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Towards an Intersectional Understanding of Conflict-Related Sexual Violence: Gender, Sexuality, and Ethnicity at the ICTY

Abstract

In the past 25 years, the International Criminal Tribunal for the former Yugoslavia (ICTY) has contributed significantly to a more sophisticated understanding of conflict-related sexual violence (CRSV) in international criminal law. The ICTY's jurisprudence has broken new ground in relation to the prosecution of CRSV, but also has brought to light the multifaceted challenges associated with the prosecution of such crimes at an international level.

Whilst cases heard by the ICTY have addressed both CRSV committed against women and men, there exist significant differences in the ways in which the ICTY has approached the experiences of male victims of sexual violence during the Yugoslav Wars. We therefore analyse the extent to and ways in which the ICTY has fostered the understanding of CRSV as *gender-based* violence that is embedded into the socio-cultural dynamics of the community within which the violence occurs.

Keywords: conflict-related sexual violence (CRSV); gender-based violence; socio-cultural dynamics; sexual violence against men; intersectionality; Former Yugoslavia.

1 Introduction

According to Saeeda Verrall, former member of the ICTY Office of the Prosecutor (OTP), the creation of a historical record of the Yugoslav Wars is not the primary

1 function of the ICTY.¹ However, the ICTY's case-law provides a significant record of
2 the atrocities and extreme violence that took place in the Former Yugoslavia in 1990s.
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4 Thanks to the work of the ICTY, this record is now also reflective of the mass scale of
5 conflict-related sexual violence (CRSV) that occurred during that conflict. The ICTY's
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7 closure in December 2017 invited celebrations of its legacy in advancing the prosecution
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9 of sexual violence crimes in international law. At the same time, the end of ICTY's
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11 operations provided a unique and timely opportunity to critically reflect on the impact of
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13 the Tribunal's jurisprudence in advancing 'gender justice' in international criminal law
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15 (ICL).
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21 Within the discipline of gender studies, Kimberlé Crenshaw's concept of
22 'intersectionality' continues to dominate the discourse even thirty years after its coining.²
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24 The concept considers how different identity categories a person claims for himself or
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26 herself or is assigned to, such as gender identity, sexual orientation, race, ethnicity, and
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28 religious affiliation, intersect with one another and create unique experiences of harm,
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30 violence, and access to justice and support services. Particularly in the context of the
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32 study and reform of the criminal justice system, intersectionality aims to be more than
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34 an analytical tool for the purpose of mere knowledge production. Instead,
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36 intersectionality scholars and advocates aim to create an impact on social forces and
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38 dynamics by not only addressing the effects of discrimination, but also its causes and
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54 ¹ S. Verrall, 'The Picture of Sexual Violence in the Former Yugoslavia Conflicts as Reflected in ICTY
55 Judgments' in S. Brammertz, M. Jarvis (eds.), *Prosecuting Conflict-Related Sexual Violence at the ICTY*
56 (Oxford University Press, 2016) p. 230.

57 ² K. W. Crenshaw, 'Demarginalizing the intersection of race and sex: A black feminist critique of
58 antidiscrimination doctrine, feminist theory and antiracist politics', 1 *University of Chicago Legal Forum*
59 (1989) Article 8.
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1 underlying practices. Thus, as a critical practice, intersectionality critiques social
2 injustices, imagines alternatives, and proposes strategies for change.³
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4 Due to the prominence and usefulness of the concept in identifying and understanding
5 the nuances of gender-based violence, our analysis aims to contribute to the thus far small
6 amount of research and scholarly commentary on the incorporation of intersectionality
7 as a practice and an analytical framework into the field of international criminal justice.
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9 As Gözde Turan put forward, if international justice is the recognition of harm, justice
10 systems have to account for the wide spectrum of harm that is experienced during armed
11 conflict by a great number of people based on their overlapping identities as a product of
12 their social context.⁴ Echoing Turan, we suggest that an intersectional analysis of
13 international crimes, particularly those involving CRSV, is a necessary tool to fully
14 understand and appropriately investigate, charge and prosecute conflict-related gender-
15 based violence. Crucially, an intersectional approach towards investigating and
16 prosecuting crimes committed during armed conflict would allow for the disruption of
17 traditional gender conceptions relating to CRSV. Furthermore, such an approach would
18 enable the courts to produce a more nuanced understanding of CRSV and challenge the
19 assumption of homogeneity of CRSV victims which is commonly reproduced in
20 judgments of international criminal courts and tribunals.⁵ Particularly in light of the
21 symbolic nature of international courts and tribunals and the historic documentation of
22 armed conflicts they create,⁶ ICL has an opportunity of establishing a historical record
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51 ³ *Ibid.*, p. 149; *See also* C. A. MacKinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist
52 Jurisprudence', 8(4) *Signs: Journal of Women in Culture and Society* (1983); P. H. Collins,
53 'Intersectionality's definitional dilemmas', 41 *Annual Review of Sociology* (2015) p. 17; G. Turan,
54 'Manhood Deprived and (Re)constructed during Conflicts and International Prosecutions: The Curious
55 Case of the Prosecutor v. Uhuru Muigai Kenyatta et al.', 24(1) *Feminist Legal Studies* (2016), p. 34.

56 ⁴ Turan, *supra* note 3, p. 34.

57 ⁵ *Ibid.*, p. 44.

58 ⁶ D. Buss, 'Performing Legal Order: Some Feminist Thoughts on International Criminal Law', 11
59 *International Criminal Law Review* (2011) p. 413.
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1 that is reflective of the experiences of all people impacted by the conflict. This ‘produced
2 truth’ has to link the crimes committed to their causes in order to create a foundation for
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4 future conflict prevention.⁷ For this purpose, an intersectional analysis and investigation
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6 of the crimes committed during armed conflict is imperative.
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9 In the following sections of this article, we analyse the legacy of the ICTY in relation to
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11 the prosecution of CRSV through an intersectional lens. We start our analysis with a
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13 discussion of the landmarks established by the ICTY jurisprudence on CRSV. As part of
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15 this discussion we provide a commentary on the successful prosecutions of substantive
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17 crimes and the advancement of the jurisprudence on modes of liability for CRSV through
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19 the category of joint criminal enterprise III (JCE III). Secondly, we move to explore the
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21 ways in which the ICTY’s jurisprudence on CRSV could have been expanded to create
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23 a more gender-based understanding of CRSV that took place during the Yugoslav
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25 conflict. We focus on two aspects of the ICTY’s jurisprudence: firstly, we examine the
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27 way in which cases involving sexual violence against men have been prosecuted and we
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29 interrogate the gender aspect of these decisions; secondly, we turn to the question of
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31 intersectionality in the CRSV judgments of the ICTY and consider whether the existing
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33 jurisprudence reflects the multidimensional and diverse nature of harms sustained by the
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35 victims of sexual violence in the former Yugoslavia.
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43 Recognizing the multiple challenges faced by the ICTY as well as the practical and
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45 procedural limitations of any international judicial investigative body, it cannot be
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47 emphasised enough that, especially in the context of the prosecution of CRSV, the ICTY
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49 has made significant progress and paved the way for international judicial bodies that
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51 followed. To further advance international criminal justice, the legacy of the tribunal
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59 ⁷ On the term ‘produced truth’ see D. Buss, ‘Knowing Women: Translating Patriarchy in International
60 Criminal Law?’, 23(1) *Social & Legal Studies* (2014) p. 73.
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1 shall - in the framework of our analysis - not only constitute all of the ICTY's
2 accomplishments, but also all the challenges that persist after over twenty years of
3 prosecuting CRSV in ICL. Thus, where we point to gaps and shortcomings, it is with the
4 intention of providing insight into the ways in which the prosecution of CRSV in
5 international criminal law can be improved by incorporating more consistently an
6 intersectional inquiry into the causes and effects of CRSV.
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17 **2 Conflict-Related Sexual Violence: Socio-Cultural and Intersectional** 18 19 **Perspectives** 20 21 22 23

24 At the time when the ICTY was created in 1993, relatively little had been written about
25 CRSV. Although the international humanitarian law framework prohibiting sexual
26 violence was created in 1949 (Geneva Conventions) and 1977 (Additional Protocols to
27 the four Geneva Conventions), perceptions and treatment of CRSV in the early 1990s
28 were still susceptible to myths regarding its nature, purpose and patterns of occurrence
29 in armed conflicts. Whilst sexual abuse of women (as well as men) had been well
30 documented, CRSV was viewed by many as a seemingly inseparable and omnipresent
31 element of armed conflicts or even as “socially acceptable behaviour well within the
32 rules of warfare”.⁸ However, the outbreak of the war in the Former Yugoslavia (and soon
33 thereafter, the Rwandan Genocide) demonstrated a mass scale of sexual violence in
34 modern armed conflicts (or, following Mary Kaldor, ‘new wars’)⁹ and exposed the
35 multiple contexts in which CRSV takes place. Furthermore, as the scholarship on CRSV
36 has been expanding since early 1990s, some progress was made towards a deeper and
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58 ⁸ K. D. Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals* (Martinus
59 Nijhoff Publishers, Leiden, 1997) p. 21.

60 ⁹ M. Kaldor, *New and Old Wars* (Polity Press, Cambridge, 2012).
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1 more nuanced understanding of CRSV, its causes and uses. This was made possible not
2 only thanks to feminist scholars and civil society organisations who relentlessly
3 advocated for greater accountability for CRSV, but also through the work of international
4 criminal tribunals, particularly the ICTY, that established long-overdue accountability
5 for rape and other forms of sexual violence in international law. Furthermore, a
6 heightened visibility of CRSV in cases before ad hoc tribunals has opened up avenues
7 for further interrogation of the phenomenon of CRSV, its role in new wars, as well as the
8 impact it has on victims, especially from an intersectional perspective.
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10 It is now generally acknowledged that CRSV, in particular rape, constitutes a deliberate
11 strategy of war which, through relying on very particular sociological, cultural and
12 psychological aspects of the outcome of the act, purports to attack and weaken the
13 targeted community. It is understood that CRSV often serves other military purposes,
14 such as ethnic cleansing or even genocide. As emphasised in the United Nations Security
15 Council Resolution (UNSCR) 1820, sexual violence is a tool of war, contributing to the
16 international destabilization, humiliation, and degradation of a population or an ethnic
17 group.¹⁰
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19 Sexual violence continues to be used in new wars which are predominantly waged in the
20 name of ethnic, religious or tribal identity and belonging. Furthermore, as Chinkin and
21 Kaldor attest, new wars are characterised by high levels of extreme violence towards
22 civilians which is used to instill fear in order to exercise control and to ‘expel or kill those
23 who disagree or have a different identity’.¹¹ This too was the key characteristic of the
24 conflict in the former Yugoslavia. However, the conflict also had a significant gender
25 dimension, evidenced not least in the systematic pattern of the use of sexual violence
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58 ¹⁰ United Nations Security Council, *Resolution 1820* (UN Doc. S/RES/1820), Preamble.

59 ¹¹ C. Chinkin, and M. Kaldor, ‘Gender and New Wars’ 67(1) *Journal of International Affairs* (2013), pp.
60 167, 173.
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against members of particular ethnic and religious groups in an attempt to spread terror, displace, persecute, but also to ethically cleanse certain territories. Bosnian Muslim women in particular were targeted due to both their gender and ethnicity. Although sexual violence had been used as a tactic in many wars prior to the Yugoslav conflict, Slavenka Drakulić observed that ‘(w)hat seems to be unprecedented about the rapes of Muslim women in Bosnia (and, to a lesser extent, Croatian women too) is that there is a clear political purpose behind the practice. The rapes in Bosnia are not only a standard tactic of war, they are an organised and systematic attempt to cleanse (to move, resettle, exile) the Muslim population from certain territories’.¹²

As illustrated by modern armed conflicts, the way in which CRSV occurs across conflicts is not uniform. It manifests itself through various patterns, occurs in many different contexts, and is committed by a multitude of perpetrators. Furthermore, as demonstrated by Wood, the variation in the use of sexual violence depends on the culture and organisation within individual armed groups which in turn influences the ‘repertoire of violence’ of the particular group.¹³ During the conflicts in Rwanda and in the Former Yugoslavia, sexual violence was an integral part of genocide whereby women of particular ethnicity (Tutsi/ Bosnian Muslim women) were targeted, raped and, particularly in the Rwandan context, killed. Both conflicts exposed the intersectional nature of CRSV, particularly in relation to ethnicity, as women were targeted both due to their gender and their ethnicity.¹⁴ The conflict in the former Yugoslavia also exposed other characteristics and multiple contexts of CRSV, including the diversity of

¹² S. Drakulić, ‘Women Hide Behind a Wall of Silence: Mass Rape in Bosnia’, 1 March 1993, 8 *The Nation*, pp. 267-268.

¹³ E. J. Wood, ‘Conflict-related sexual violence and the policy implications of recent research’ 96 (894) *International Review of the Red Cross* (2014), pp. 457, 461, 466-470.

¹⁴ See D. Buss, ‘The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law’ 25(1) *Windsor Yearbook of Access to Justice* (2007), p. 3.

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perpetrators of CRSV, who can be state actors, military or non-state actors such as gangs
and rebel groups as well as peacekeeping forces. The public nature of sexual violence
committed during the Yugoslav conflict has also come to light in the CRSV cases heard
before the ICTY. In that context, women were frequently raped by soldiers, policemen
and other state agents, many of whom were known to the victims from before the war.
Furthermore, the use of rape camps (such as those in the Bosnian town of Foča) and the
widespread perpetration of sexual violence on forcibly detained women emphasised the
role of CRSV in the context of detention and enslavement.¹⁵ The latter was later
prosecuted in the landmark judgment in *Kunarac*, which advanced the modern
understanding of enslavement as well as the role of sexual violence in perpetration of
this crime. Crucially, the Trial Chamber in *Kunarac* placed the notion of the exercise of
powers attaching to the rights of ownership over another person at the centre of defining
enslavement. Furthermore, as the case dealt exclusively with charges of sexual violence,
the Trial Chamber broadened the acts that constitute enslavement as a crime against
humanity to include sexual enslavement. In doing so, the Trial Chamber made the link
between crimes involving sexual violence and customary international law, emphasising
that sexual servitude of women in Foča constituted enslavement.

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The significance of gender as a factor shaping the reality of new wars as well as the
strategic use of CRSV are further illustrated by the impact that CRSV has on the victims,
both male and female. The consequences of CRSV do not only span across time (short-
mid- and long- term) but also affect various aspects of the victim's life, including

¹⁵ *Prosecutor v. Mucić et al. (Čelebići Case)*, Judgment of 16 November 1998, IT-96-21-T, <www.icty.org/case/mucic/4#tjug> accessed 19 April 2018; *Prosecutor v. Kvočka et al.*, Judgment of 2 November 2001, IT-98-30/1-T <www.icty.org/case/kvočka/4> accessed 19 April 2018; *Prosecutor v. Kunarac*, Appeals Chamber Judgment of 12 June 2002, IT-96-23/IT-96-23/1-A, <www.icty.org/case/kunarac/4#acjug> accessed 19 April 2018.

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physical, mental, economic, social as well as cultural implications. Whilst such
consequences concern both male and female victims, the particularly detrimental and
gender-specific position of women and girls in armed conflict was recognized at the
international level during The Fourth World Conference on Women in 1995, where it
was noted that ‘while entire communities suffer the consequences of armed conflict and
terrorism, women and girls are particularly affected because of their status in society and
their sex’.¹⁶ Women’s experiences of armed conflict are underscored by their gender
roles within a particular social context, but they are by far not uniform. Whilst there exist
some common aspects, women’s actual experiences depend on a range of factors, such
as age, race, class, nationality, employment, socio-economic status and, finally, their
combatant or civilian status.¹⁷ During conflict, women’s traditional gender roles (for
example as wives, mothers and carers) become especially important from a social and
political perspective and gain strategic significance. They are not only seen as paramount
to ensuring the survival of a particular social, ethnic or religious group, but also in
securing the maintenance and continuity of their traditions and customs. However, that
also means that targeting women, often by acts of sexual violence, becomes a politically
and strategically important aspect of ethnic conflicts, as illustrated by the conflicts in
Rwanda and in the former Yugoslavia.

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In contrast, men are stereotyped as able to protect themselves from an attack and are not,
unlike women, thought of as targets of sexual abuse. When a man has been sexually
assaulted during armed conflict, his masculinity is often questioned (by himself and/or
others) because he was not able to protect himself like a *real* man and instead put into
the stereotypically submissive role of a woman. Just as in the case of female victims of

¹⁶ United Nations, *Report of the Fourth World Conference on Women*, (UN Doc. A/CONF. 177/20), para. 135.

¹⁷ C. Chinkin, ‘Gender and Armed Conflict’ in A. Clapham and P. Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press, Oxford, 2014), pp. 677-678.

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CRSV, a man's experience of CRSV is also largely informed by his identities, how his community interacts with these identities, and what expectations exist towards him as a man. In most conflict environments, men are subjected to sexual acts performed by other men. Those other men are either unarmed victims (non-combatants or prisoners) of the same act, or combatants who are ordered by their superior to sexually violate unarmed detainees or civilians. Depending on the command structure and given or perceived agency of the individual combatant to reject orders, the lines between victimhood and perpetration can become blurred. In many cases the male-to-male rape is not only an attack on the gender role of the male victim within society, but also an attack on his sexuality. Particularly where masculinity is closely associated with heterosexuality, male-to-male rape exposes male victims to further stigmatization and societal isolation, especially when same sex intimacy is ostracized or even illegal.¹⁸

In the context of the Yugoslav Wars, in a society where homosexuality was a taboo at the time, the perceived sexuality of male victims of rape likely played a significant role.¹⁹

Pierre Salignon, who worked for Médecins Sans Frontières with refugees in Croatia, explained that the sexual abusers of men were intelligent torturers, because they chose a means of inflicting violence upon their victims that would not kill them but break them through an extreme form of degradation.²⁰ Also, OSCE staff found strong indicators in the Yugoslav Wars that sexual violence against men was used to break down the

¹⁸ D. A. Lewis, 'Unrecognized Victims: Sexual Violence Against Men in Conflict Settings Under International Law', 27(1) *Wisconsin International Law Journal* (2009) p. 8; P. Oosterhoff, P. Zwanikken and E. Ketting, 'Sexual Torture of Men in Croatia and Other Conflict Situations: An Open Secret', 12(23) *Reproductive Health Matters* (2004) p. 68; S. Sivakumaran, 'Male/Male Rape and the "Taint" of Homosexuality', 27(4) *Human Rights Quarterly* (2005) p. 1290.

¹⁹ Sivakumaran, *supra* note 18, p. 1299.

²⁰ J. Borneman, *Subversions of International Order. Studies in the Political Anthropology of Culture* (State University of New York Press, Albany, 1998) p. 292.

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physical, psychological and sexual identity of victims.²¹ In fact, interviews with Bosnian Muslim male victims of sexual violence revealed that rape was the most difficult trauma to deal with because they associated the experience of rape by male with homosexuality.²² In the case of both female and male victims of CRSV, the effect of sexual violence as a means to psychologically break the victim is facilitated and reinforced through the same tropes and societal expectations relating to masculinity, femininity, and sexuality.

3 ICTY's Legacy in Prosecuting CRSV

When assessing the ICTY's legacy in relation to establishing accountability for CRSV, it is worth emphasising the context in which the ICTY achieved its landmark jurisprudence. Whilst it is now relatively common to prosecute CRSV at an international level, at the time of the ICTY's inception there were no precedents of such judicial practice. For instance, neither the International Military Tribunal at Nuremberg or at Tokyo entered convictions for crimes involving sexual violence perpetrated during World War II. The indictments for sexual violence perpetrated in Bosnia and Herzegovina were filed in the early days of the ICTY's operations against the backdrop of this 'historical legacy' of gross invisibility of sexual violence in ICL. The practical implications of this meant that whilst it was possible to charge rape as a crime against humanity under Article 5(g) of the ICTY Statute, charging other forms of sexual violence appeared to be less straight forward. There was a lack of substantive provisions

²¹ OSCE, *Kosovo/Kosova. As seen, as told. An analysis of the human rights findings of the OSCE Kosovo Verification Mission from October 1998 to June 1999*, <www.osce.org/odihr/17772?download=true> accessed 19 April 2018, p. 95.

²² M. B. Olujić, 'Embodiment of Terror: Gendered Violence in Peacetime and Wartime in Croatia and Bosnia-Herzegovina', 12(1) *Medical Anthropology Quarterly* (1998) p. 33.

1 concerning such crimes in the ICTY Statute (e.g. forced pregnancy, sexual slavery) as
2 well as a notable absence of appropriate definitions of such offences in ICL.
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7 3.1 *Changing Perceptions of CRSV*

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10 Despite these significant obstacles, the ICTY achieved what appeared impossible to
11 many: it brought accountability for CRSV to the realm of international law and
12 substantively developed the law in respect of international crimes involving sexual
13 violence. Although some questioned the legality and legitimacy of the ICTY, its
14 jurisprudence set major milestones by holding perpetrators of international crimes
15 criminally accountable and also by developing a comprehensive conceptual and
16 procedural framework of ICL.²³ Much has been written about the landmarks set by the
17 ICTY in individual cases, highlighting prosecutions of rape as torture (*Mucić et al.*),
18 sexual enslavement and rape as crimes against humanity (*Kunarac*), first successful
19 prosecution of sexual violence against men (*Tadić*) or recognition that acts of sexual
20 nature may amount to persecution (*Brđanin*).²⁴ The Appeals Chamber judgment in
21 *Kunarac* was particularly progressive not only in advancing the concept of coercive
22 circumstances as a basis for negating the possibility of ‘true consent’ in cases involving
23 sexual violence²⁵ but also determined the relationship of gender crimes (particularly
24 CRSV) to customary law. Furthermore, the ICTY case-law subverted many traditional
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48 ²³ The legality and legitimacy of the ICTY were contested by the defendant in *Prosecutor v. Tadić*.
49 However, these arguments were dismissed by the ICTY Appeals Chamber in its decision on jurisdiction,
50 see *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2
51 October 1995, IT-94-1 <www.icty.org/x/cases/tadic/acdec/en/51002.htm> accessed 19 April 2018.

52 ²⁴ D. Buss, ‘Prosecuting Mass Rape: Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran
53 Vukovic’, 10(1) *Feminist Legal Studies* (2000) p. 90; A. de Brouwer, *Supranational Criminal Prosecution
54 of Sexual Violence. The ICC and the Practice of the ICTY and the ICTR* (Intersentia, Cambridge, 2005);
55 A. de Brouwer, C. Ku, R. Römkens and L. van den Herik, *Sexual Violence as an International Crime:
56 Interdisciplinary Approaches* (Intersentia, Cambridge, 2013); S. Brammertz and M. Jarvis (eds),
57 *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford University Press, 2016).

58 ²⁵ *Prosecutor v. Kunarac*, Appeals Chamber Judgment of 12 June 2002, IT-96-23/IT-96-23/1-A,
59 <www.icty.org/case/kunarac/4#acjug> accessed 19 April 2018, para. 129-132.
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misconceptions about CRSV, especially that it is an incidental by-product of conflict, by demonstrating that sexual violence was occurring in multiple contexts (detention, interrogation, ethnic cleansing campaigns) and committed by multiple perpetrators.²⁶

The Tribunal established that CRSV is used for strategic purposes and, as such, successfully connected acts of sexual violence to relevant modes of liability, including individual and superior criminal responsibility. In 2014, the ICTY Appeals Chamber made a groundbreaking statement by confirming that crimes involving CRSV are on a par with other (non-sexual) crimes within the jurisdiction of the Tribunal. Importantly, the Appeals Chamber emphasized:

(...) that personal motive does not preclude a perpetrator from also having the requisite specific intent. (...) the same applies to sexual crimes, which in this regard must not be treated differently from other violent acts simply because of their sexual component. Thus, a perpetrator may be motivated by sexual desire but at the same time also possess the intent to discriminate against his or her victim on political, racial, or religious grounds.²⁷

Through its extensive jurisprudence, the ICTY demonstrated that punishing CRSV is dependent not only on substantive provisions criminalising acts of sexual nature. More crucially, it requires the appropriate characterisation and contextualisation of CRSV as well as linking the alleged acts to the accused through the appropriate mode of liability.

Reflecting on the ICTY OTP's experience Baig et al. note that cases involving (often

²⁶ For instance, the Trial Chamber in *Prosecutor v. Karadžić et al.* confirmed that 'the systematic rape of women... is in some cases intended to transmit a new ethnic identity to the child': *Prosecutor v. Karadžić et al.*, Transcript of Hearing from 2 July 1996, IT-95-18-R61, IT-95-5-R61, <www.icty.org/x/cases/karadzic/trans/en/960702it.htm> accessed 19 April 1988, para. 94.

²⁷ *Prosecutor v. Dordević*, Appeals Chamber Judgment of 27 January 2014, IT-05-87/1-A <www.icty.org/case/djordjevic/4> accessed 19 April 2018, para. 887.

1 low-level) direct physical perpetrators of CRSV were least complicated to prosecute.²⁸
2 Such cases were also most successful and showed a minimal need for contextualisation
3 of the crime. In contrast, prosecuting CRSV is much more difficult when acts require
4 linking to mid- and senior-level figures. Thus, the ICTY's record in successfully utilising
5 the doctrine of JCE in cases involving CRSV is a significant part of its legacy.
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14 **3.2 JCE III and Prosecution of CRSV**

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16 In order to charge and prosecute high-level commanders and leaders for gender-based
17 crimes, the link needs to be established between the acts of sexual violence and the
18 accused. It needs to be shown that the accused either committed or instigated the acts
19 themselves (individual criminal responsibility) or that the accused exercised superior
20 responsibility over the direct perpetrator of the alleged offence (superior responsibility
21 doctrine). In the context of the latter, it needs to be demonstrated that the perpetrator (i.e.
22 subordinate) was under the effective control of the accused and that the accused knew,
23 or should have known, that his subordinates were committing or were about to commit
24 international crimes yet failed to take all necessary and reasonable measures to prevent
25 or repress the commission of such crimes.
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43 JCE can be used in relation to any of the crimes under the ICTY Statute, and there is no
44 reason to treat it any differently in cases involving sexual violence. In order to prosecute
45 any crime using JCE liability, it needs to be shown that there exists a link between the
46 high-level accused person and the committed crimes, even though the accused may have
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58 ²⁸ L. Baig, M. Jarvis, E. Martin Salgado and G. Pinzauti, 'Contextualizing Sexual Violence: Selection of
59 Crimes' in S. Brammertz and M. Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY*
60 (Oxford University Press, 2016) p. 174.
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been physically removed from them. The ICTY Appeals Chamber in *Tadić* confirmed that JCE is a part of customary ICL and outlined three forms of JCE:

- a) JCE I, where all participants in the common design possess the same criminal intent to commit a crime;
- b) JCE II (so called ‘concentration camp’ cases) is a variant of JCE I which requires that a criminal plan involves ill-treatment taking place in an institutionalised setting, e.g. detention camp;
- c) JCE III, where the criminal act falls outside the ‘common purpose’ but is nonetheless a foreseeable consequence of the common plan’s implementation.²⁹

The ICTY has successfully relied on JCE in the prosecution of cases involving sexual violence.³⁰ The mode of liability applied in such cases was generally involving JCE III (i.e. where sexual violence was a natural and foreseeable consequence of the implementation of the common plan), but JCE I liability was nonetheless successfully invoked in *Stakić*.³¹ In *Prosecutor v. Kvočka et al.*, the ICTY Trial Chamber convicted the accused of committing acts of persecution (involving rape and sexual assault) in the

²⁹ *Prosecutor v. Tadić*, Appeals Chamber Judgment of 15 July 1999, IT-94-1-A, <www.icty.org/cases/party/787/4> accessed 19 April 2018, para.220.

³⁰ For example: *Prosecutor v. Kvočka et al.*, Trial Judgment of 2 November 2001, IT-98-30/1 <www.icty.org/case/kvočka/4> accessed 19 April 2018; *Prosecutor v. Krstić*, Appeals Judgment of 19 April 2004, IT-98-33-A <www.icty.org/case/krstic/4> accessed 19 April 2018; *Prosecutor v. Šainović et al.*, Appeals Judgment of 23 January 2014, IT-05-87-A <www.icty.org/case/milutinovic/4> accessed 19 April 2018.

M. Jarvis, E. M. Salgado, ‘Future Challenges to Prosecuting Sexual Violence Under International Law: Insights from ICTY Practice’ in A. de Brouwer, C. Ku, R. Römken and L. van den Herik, *supra* note 24, pp. 111-117.

³¹ *Prosecutor v. Stakić*, Trial Judgment of 31 July 2003, IT-97-24-T <www.icty.org/cases/party/782/4> accessed 19 April 2018, paras. 234-236, 240-241, 244, 757, 791-806, 826; *Prosecutor v. Stakić*, Appeal Judgment of 22 March 2006, IT-97-24-A, <www.icty.org/cases/party/782/4> accessed 19 April 2018, paras.73, 84-85, 92-98, 104; The ICTY Trial Chamber also used JCE I in *Prosecutor v. Krajišnik*, convicting Krajišnik of persecution based on, amongst other things, sexual violence. However, the ICTY Appeals Chamber overturned Trial Chamber’s finding due to insufficient detail. Therefore, the final decision in *Krajišnik* did not include sexual violence crimes. *Prosecutor v. Krajišnik* Trial Judgment of 27 September 2006, IT-00-39-T <www.icty.org/cases/party/709/4> accessed 19 April 2018, paras. 4, 1126, 1145, 1182.

1 Omarska camp in Prijedor. Considering the question of foreseeability of acts of sexual
2 violence in the detention camp in Omarska by the defendants, the Trial Chamber
3 concluded that in light of the circumstances and conditions imposed upon detainees in
4 the Omarska camp, it was foreseeable that acts of sexual violence might be committed
5 (even though they did not form a part of the common plan agreed by the accused):
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14 Any crimes that were natural or foreseeable consequences of the joint criminal
15 enterprise of the Omarska camp, including sexual violence, can be attributable to
16 participants in the criminal enterprise if committed during the time he participated
17 in the enterprise. In Omarska camp, approximately 36 women were held in
18 detention, guarded by men with weapons who were often drunk, violent, and
19 physically and mentally abusive and who were allowed to act with virtual
20 impunity. Indeed, it would be unrealistic and contrary to all rational logic to
21 expect that none of the women held in Omarska, placed in circumstances
22 rendering them especially vulnerable, would be subjected to rape or other forms
23 of sexual violence.³²
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34 Similarly, in *Krstić*, the ICTY Trial Chamber reasoned that sexual violence was not an
35 agreed part of the defendants' common purpose to forcibly transfer Bosnian Muslims
36 from Srebrenica, but rather amounted to a natural and foreseeable consequence of such
37 plan. The ICTY correctly noted that factors such as 'the lack of shelter, the density of the
38 crowds, the vulnerable condition of the refugees, the presence of many regular and
39 irregular military and paramilitary units in the area and the sheer lack of sufficient
40 members of the UN to provide protection' were indicative of the foreseeability of sexual
41 violence.³³
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56 ³² *Prosecutor v. Kvočka et al.*, Trial Judgment of 2 November 2003, IT-98-30/1-T,
57 <www.icty.org/cases/party/721/4> accessed 19 April 2018, para. 327.

58 ³³ *Prosecutor v. Krstić*, Trial Judgment of 2 August 2001, IT-98-33-T <www.icty.org/case/krstic/4>
59 accessed 19 April 2018, para.616; conviction of Krstić in relation to acts of sexual violence on the basis
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2 In *Šainović et al.*, the ICTY Appeals Chamber reversed the first instance finding that
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4 while acts of murder and destruction or damage to religious property were sufficiently
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6 foreseeable consequences of the ethnic cleansing campaign in Kosovo in 1999, sexual
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8 assaults were not (amounting to a JCE).³⁴ The Appeals Chamber, similarly to *Krstić* and
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10 *Kvočka*, relied on various facts (such as reports of sexual violence taking place) as well
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12 as circumstantial factors suggesting that it was foreseeable to the accused that sexual
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14 violence might be committed in relation to Kosovar Albanian women. In addition, the
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16 Appeals Chamber provided an important clarification on the standard for JCE III
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18 liability, confirming that it is one of possibility, not probability. Therefore, it corrected
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20 the error of the Trial Chamber in applying the higher degree of foreseeability than
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22 required for crimes falling outside the scope of common purpose (i.e. JCE III).³⁵
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31 **4 Broadening the Understanding of Gender-Based Violence to Include the** 32 33 **Experiences of Men** 34 35 36 37 38

39 Despite significant advances in international criminal prosecutions of CRSV, it has in
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41 many contexts been treated as a ‘women’s issue’.³⁶ It is widely recognized that women
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46 of JCE III was upheld on appeal: *Prosecutor v. Krstić*, Appeals Judgment of 19 April 2004, IT-98-33-A
47 <www.icty.org/case/krstic/4> accessed 19 April 2018, paras. 150-151.

48 ³⁴ *Prosecutor v. Milutinović et al.*, Trial Judgment of 26 February 2009, vol.III, IT-05-87-T
49 <www.icty.org/case/milutinovic/4> accessed 19 April 2018, paras. 470-473 (finding, in respect of
50 Šainović, that murder and destruction of damage to religious property was reasonably foreseeable but that
51 sexual assault was not), paras.1134-1136 (finding, in respect of Lukić, that murder and destruction of
52 damage to religious property was reasonably foreseeable but that sexual assault was not); overturned on
53 appeal: *Prosecutor v. Šainović et al.*, Appeals Judgment of 23 January 2014, IT-05-87-A
54 <www.icty.org/case/milutinovic/4> accessed 19 April 2018, paras.1581-1582 (re: Šainović), 1591-1592
55 (re: Lukić).

56 ³⁵ *Prosecutor v. Šainović et al.*, Appeals Judgment of 23 January 2014, IT-05-87-A
57 <www.icty.org/case/milutinovic/4> accessed 19 April 2018, para.1061.

58 ³⁶ A. Kapur and K. Muddell, ‘When No One Calls It Rape. Addressing Sexual Violence Against Men and
59 Boys in Transitional Contexts’ International Center for Transitional Justice, 12 July 2016,
60 <www.ictj.org/publication/sexual-violence-men-boys> accessed 19 April 2018.
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1 and girls have been disproportionately affected by any form of sexual violence in many
2 if not most of the armed conflicts of the twentieth and twenty-first century. Sexual
3 violence against men has also been documented in recent and ancient armed conflicts.
4 While far fewer men than women and girls become victims of sexual violence, sexual
5 violence against all members of society, independent of their sex or gender identity, has
6 to be understood in the context of dominating narratives relating gender, sex, and
7 sexuality. All forms of sexual violence therefore have to be discussed in conjunction with
8 and not in separation of each other.³⁷

9 Owing to feminist activism and scholarship in the outgoing twentieth century, CRSV
10 against women is today acknowledged as more than a ‘meaningless explosion of inner
11 rage’.³⁸ Instead, it is seen as an expression of power of one conflict party over another
12 that targets gender roles and dynamics.³⁹ To this end, CRSV is often correctly referred
13 to as *gender-based violence*. The conflated use of the terms *gender-based violence* and
14 *violence against women* is, however, problematic as it is indicative of a misconception
15 about the extent to which gender-based violence occurs during armed conflict, whom it
16 targets, how, and for what reason. Gender roles and societal expectations about
17 masculinity and femininity shape the manner in which power and strength are expressed
18 during war.⁴⁰ In situations where women are characterized as submissive, weak and in
19 need of protection, and men as assertive, strong and responsible for providing protection,

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³⁷ J. S. Goldstein, *War and Gender: How Gender shapes the War System and vice versa* (Cambridge University Press, 2001) p. 265; Sivakumaran, *supra* note 18, p. 1274.

³⁸ A. DelZotto and A. Jones, ‘Male-on-Male Sexual Violence in Wartime: Human Rights’ Last Taboo?’ (Annual Convention of the International Studies Association, New Orleans, March 2002); M. Eriksson, *Defining Rape: Emerging Obligations for States under International Law?* (Martinus Nijhoff Publishers, Leiden, 2011) p. 287.

³⁹ V. K. Vojdik, ‘Sexual violence against men and women in war: a masculinities approach’ 14(3) *Nevada Law Journal* (2014) p. 926; N. B. Maier, ‘The Crime of Rape under the Rome Statute of the ICC with a special emphasis on the jurisprudence of the Ad Hoc Criminal Tribunals’, 3(2) *Amsterdam Law Forum* (2011) p. 150.

⁴⁰ Olujic, *supra* note 22, p. 33.

1 expectations about femininity and masculinity can easily be targeted during war in order
2 to shatter societal structures, affecting all gender identities.⁴¹
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4 The historical record about the occurrence of gender-based violence remains incomplete
5 and the intersecting and overlapping root causes and motives unaccounted for in many
6 conflict environments. If one considers the binary and often harmful societal conceptions
7 about masculinity and femininity that intersect with socio-cultural perceptions around
8 sexuality, ethnicity and nationality as a framework within which CRSV occurs, the
9 exclusion of male victims from the mainstream narrative around CRSV leads to a
10 perpetuation of masculinist and heteronormative gender ideologies that negatively
11 impact both male and female victims of rape.⁴² When CRSV is used synonymously with
12 violence against women and girls, the experiences of other groups of victims, particularly
13 those of men and trans communities, remain unrecognized and victims without effective
14 support services. Male-identified victims face general unavailability of support resources
15 and all victims are expected to make meaning of, heal, and ultimately move on in the
16 same socio-cultural environment that facilitated their experience of sexual abuse in the
17 first place.
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43 **4.1 *Sexual Violence Against Men During the Yugoslav Wars***

44 While far less discussed and investigated by international relief organizations, news
45 outlets and academic scholarship on CRSV, sexual violence against men was a recurring
46 pattern of the Yugoslav Wars. NGO reports, the Bassiouni report and the court material
47 from the International Court of Justice case regarding Bosnia's application of the
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56 ⁴¹ Del Zotto and Jones, *supra* note 38; Vojdik, *supra* note 39, p. 948.

57 ⁴² See also Kapur and Muddell, *supra* note 36, p. 4.; E. A. Philo Gorris, 'Invisible victims? Where are male
58 victims of conflict-related sexual violence in international law and policy?' 22(4) *European Journal of*
59 *Women's Studies* (2015), p. 415.
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Genocide Convention substantiate that men's sexuality was systematically targeted.⁴³
Agnes Inderhaug, a former member of the ICTY sexual assault investigation team, came
to realize that sexual violence against men was not only widespread, but an integral part
of the war-making itself.⁴⁴ It was estimated that 80 percent of the approximately 5,000
inmates in a concentration camp in Sarajevo had been raped.⁴⁵ While the exact number
of male rape victims in the break-up of the former Yugoslavia will never be known, their
invisibility is a product of masculinity tropes that governed to a significant extent the
nature of the war making itself. In her book *The Body of War - Media, Ethnicity, and
Gender in the Break-up of Yugoslavia*, Dubravka Žarkov gives one of the most detailed
accounts of the construction and intersection of gender, sexuality, ethnicity and
nationality during the Yugoslav Wars in relation to the national and international reports
of mass rapes as part of the conflict. According to her, the invisibility of male rape
victims during and after the armed conflict is immediately linked to the role of gender
and sexuality in their creation of ethnic differences during the Yugoslav War. Before the
war, cultural practices and norms, particularly norms relating to gender and sexuality,
were shared across ethnicities. Those norms equalized masculinity with heterosexuality
and power.⁴⁶ During the war, to preserve Croat, Serb or Bosnian Muslim power and
nationhood, it was important for the ethnic Self to maintain its unquestioned masculinity

45 OSCE, supra note 21, pp. 96 *et seq.*; Amnesty International, *Bosnia-Herzegovina: Rape and Sexual Assault by Armed Forces*, 21 January 1993, EUR 63/001/1993, <https://www.amnesty.org/en/documents/eur63/001/1993/en/>, accessed 19 April 2019, p. 5; United Nations Security Council, *Final Report of the United Nations Commission of Experts established pursuant to Security Council Resolution 780*, 27 May 1994, UN Doc. S/1994/674, www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf, accessed 19 April 2018, para. 235. *Bosnia Herzegovina v Yugoslavia (Serbia and Montenegro)*, 20 March 1993, International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ, General List No. 91.

44 E. Carlson, 'Sexual Assault on Men in War', 349 *The Lancet* (1997), p. 129; E. Carlson, 'The hidden prevalence of male sexual assault during war: Observations on blunt trauma to male genitals' 46(1) *British Journal of Criminology* (2006) p. 16.

45 Kapur and Muddell, supra note 36, p. 8.

46 D. Žarkov, *The Body of War – Media, Ethnicity, and Gender in the Break-up of Yugoslavia* (Duke University Press, Durham, 2007) pp. 156, 169f.

1 while that of the ethnically Other had to be challenged. Reports of sexual violence against
2 male members of the ethnic Self would have hampered this image; reports of sexually
3 abused male members of the ethnic Other, however, supported a portrayal of the Other
4 as less pristine and powerful.⁴⁷ The link between ethnicity, gender, sexuality, and power
5 was, according to Žarkov, not only a dominant feature in the local reporting of sexual
6 violence against men, but also reflected in the perpetration of sexual violence. She
7 suggests that prison guards assaulted ethnically different prisoners with foreign objects
8 in public, but did not rape them in public as this would have caused there to be witnesses.
9 Male victims of rape (here meant as the non-consensual physical perpetration of sexual
10 organs of or by the male perpetrator) did, presumably, have less chance to survive.⁴⁸
11 Therefore, there may have been fewer witnesses to testify in front of fact-finding
12 commissions and, ultimately, the ICTY.
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14 And yet, the writing and publishing of the above-mentioned NGO reports either
15 overlapped with the drafting and establishment of the ICTY Statute or occurred shortly
16 afterwards. For this reason, it is not entirely clear how much knowledge the drafters of
17 the ICTY Statute had about the extent to which males were sexually abused during the
18 Yugoslav Wars. However, Del Zotto and Jones claim that the issue of male victimhood
19 of sexual violence was, despite sufficient evidence, ignored in the preparatory sessions
20 of the ICTY in which the topic of dealing with witnesses of sexual violence was
21 discussed.⁴⁹ Žarkov has questioned the readiness and ability of key international figures
22 who were involved in the establishment of the ICTY to abandon and move beyond
23 popular conceptions of masculinity and wartime rape. To substantiate this concern,
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⁴⁷ The Croatian media, for example, created a narrative in which homosexuality was a natural characteristic of Serb and Muslim men, but not of Croat men. In this narrative, Muslim men were framed as feminized victims of sexual violence while Serb men were demonized and pathologized as perpetrators of sexual violence against men. See: Žarkov, *supra* note 46, p. 169.

⁴⁸ Žarkov, *supra* note 46, p. 166.

⁴⁹ DelZotto and Jones, *supra* note 41.

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Žarkov cited the Dutch legal experts Melanie Tijssen and Timeke Cleiren. Cleiren was a member of the U.N. Commission of Experts collecting data on rape and sexual assaults during the Yugoslav Wars and later gave expert testimony before the ICTY. Cleiren and Tijssen held that attitudes about gender only factor into cases of sexual violence against women and that all victims of sexual violence, independent of their multiple and overlapping identities, make meaning of their abuse in the same way. Further, they were of the opinion that sexual violence against men is a homosexual act if it involves the physical penetration of the male body.⁵⁰ In challenging Cleiren and Tijssen, Žarkov explained that a sexual act is neither heterosexual nor homosexual in nature. Instead, dominant notions of masculinity and norms of heterosexuality within a particular cultural and political context determine which sexual acts will later be described as either heterosexual or homosexual:

The acts of violence are informed by the same set of discourses and practices - produced through intersections of gender, sexuality and ethnicity - that informs the representation of these acts. [...] the cultural meanings of violence predefine the violent act as well as their representations, while political context makes some victims, while obscuring the others.⁵¹

Referring to the research on identity-based power dynamics in the context of male-to-male sexual violence and the sexual torture of political prisoners (i.e. Abu Ghraib during the 2003 Iraq War), Žarkov declares that the tortured and sexually violated male body during the Yugoslav Wars was the site of multiple identity-based power relations. CRSV against men was a manifestation of a struggle over social dominance and not a

⁵⁰ T. Cleiren, M. Tijssen, 'Rape and Other Forms of Sexual Assault in the Armed Conflict in the Former Yugoslavia', 3 *Nemesis Essays* 111-131 (1996); Žarkov, *supra* note 46, p. 160.

⁵¹ Žarkov, *supra* note 46, p. 160.

1 manifestation of subconscious homosexual desires.⁵² Cleiren's and Tijssen's
2 conceptualisation of gender, sexuality and sexual violence were therefore substantially
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4 flawed. Yet, at least Cleiren's views were shared with Judges of the ICTY who were not
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6 only tasked with advancing the law on sexual violence, but who also dealt with cases of
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8 sexual violence against men. The prosecution of CRSV against men at the ICTY has to
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10 be understood and analysed in this context. At least in the early stages of the ICTY,
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12 sexual violence against men during armed conflict was still widely unrecognized in
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14 academic scholarship and not on the agendas of international relief organizations. Thus,
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16 the ICTY cases that are discussed below are embedded in a time when local and
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18 international narratives around masculinity and victimhood of CRSV still dominated the
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20 discourse on gender-based violence to the exclusion of the experiences of male victims.
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22 Moreover, as Verrall stated, the ICTY 'inherited a legacy of historical silence and under-
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24 investigation in relation to sexual violence crimes'.⁵³ In light of this, it has to be
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26 highlighted that the ICTY was the first international criminal investigative body that
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28 dealt with sexual violence against men. Breaking the silence and attempting to prosecute
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30 sexual violence against women *and* men was therefore already a major step towards
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32 broadening the scope and understanding of CRSV as gender-based violence.
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4.2 *ICTY Cases on Sexual Violence Against Men*

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44 For the purpose of this article, ten ICTY cases that featured sexual violence against men
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46 have been examined carefully to find out the extent to which the tribunal dealt with,
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48 recognized, and contributed to the visibility of male victims of CRSV.⁵⁴ The analysis of
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55 ⁵² Žarkov, *supra* note 46, p. 164.

56 ⁵³ Verrall, *supra* note 1, p. 333.

57 ⁵⁴ The examined cases are: *Prosecutor v. Tadić*, IT-94-1 <www.icty.org/case/tadic/4> accessed 19 April
58 2018; *Prosecutor v. Mucić et al.*, IT-96-21 <www.icty.org/case/mucic/4> accessed 19 April 2018;
59 *Prosecutor v. Todorović*, IT-95-9/1 <www.icty.org/case/todorovic/4m> accessed 19 April 2018;
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1 these cases suggests that there has been a lack of consistency in charging and prosecuting
2 sexual violence against men. In “*Prosecuting Conflict-Related Sexual Violence at the*
3 *ICTY*”, one of the most insightful and ground-breaking books on the topic of
4 international prosecution of CRSV, Michelle Jarvis and Kate Vigneswaran, former staff
5 members of the ICTY Office of the Prosecutor, concede that charges have in fact not
6 been consistent across cases. They also refer to the alleged ICTY’s bias towards
7 prioritising cases involving sexual violence against men over cases of sexual violence
8 against women. A similar point has been made by Campbell who criticized the tribunal
9 for having more counts on sexual violence relating to male than to female victims.⁵⁵
10 However, it is not necessarily only a matter of tallying counts when assessing whether
11 or not there has been a gender-imbalance in the way in which the tribunal has prosecuted
12 CRSV. It is equally relevant to consider whether or not opportunities to charge acts of
13 sexual violence against men as sexual offences have been used by the tribunal to increase
14 the visibility of and advance the jurisprudence on male victimhood altogether.

15 While the prosecution of sexual violence against women has been significantly advanced
16 by the ICTY through several landmark cases, similar progress for the prosecution of
17 CRSV against men remained absent from the tribunal’s track record. In eight out of ten
18 analysed cases – *Stakić* and *Knezević* being the exceptions – sexual violence against men
19 included forced acts of fellatio between male detainees.⁵⁶ In five of those eight cases, the

20 *Prosecutor v. Sikirica et al.*, IT-95-8 <www.icty.org/case/sikirica/4> accessed 19 April 2018; *Prosecutor*
21 *v. Mejakić et al.*, IT-02-65 <www.icty.org/cases/party/734/4> accessed 19 April 2018; *Prosecutor v.*
22 *Stakić*, IT-97-24 <www.icty.org/cases/party/782/4> accessed 19 April 2018; *Prosecutor v. Simić et al.*, IT-
23 95-9, <www.icty.org/case/milan_simic/4> accessed 19 April 2018; *Prosecutor v. Česić*, IT-95-10,
24 <www.icty.org/case/cesic/4> accessed 19 April 2018; *Prosecutor v. Brđanin*, IT-99-36,
25 <www.icty.org/case/brdanin/4> accessed 19 April 2018; *Prosecutor v. Krajišnik*, IT-00-39,
26 <www.icty.org/case/krajisnik/4> accessed 19 April 2018; *Prosecutor v. Martić*, IT-95-11,
27 <www.icty.org/case/martic/4> accessed 19 April 2018.

28 ⁵⁵ K. Campbell, ‘The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal
29 Tribunal for the Former Yugoslavia’ 1(3) *International Journal of Transitional Justice* (2007) p. 23.

30 ⁵⁶ In *Stakić* and *Knezević*, the available information only reveals that men were forced to perform sexually
31 humiliating acts.

1 forced acts of fellatio were explicitly mentioned already in the indictment.⁵⁷ However,
2 the charging in those cases was inconsistent and related to different offences such as
3 torture, inhumane treatment, cruel treatment, humiliation and degradation, other
4 inhumane acts and persecution. Only in three cases, *Todorović, Sikirica et al.* and *Češić*,
5 the forced acts of fellatio were charged under article 5 (g) of the ICTY Statute as rape.
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7 As the crime of rape is listed as a separate offence only under article 5 of the ICTY
8 Statute, it was a major advancement for the prosecution of sexual violence that such
9 offences were charged and successfully prosecuted in numerous ICTY cases as cruel
10 treatment, torture, persecution, and genocide.⁵⁸ However, the scope of the crimes under
11 which forced acts of fellatio were charged is confusing as those crimes differ from one
12 another in the level of severity and the motive and intent of the perpetrator.
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15 Another frequent problem in terms of charging sexual violence against men was that the
16 indictments did not properly separate acts of violence that target the sexuality of the
17 victim from other acts of violence. For instance, in *Tadić* and *Čelebići*, acts of sexual
18 violence against men were charged together with beatings and other forms of
19 mistreatment as torture, inhumane or cruel treatment. This practice complicates the
20 comprehension of charges and their relation to sexual violence. Commenting on the
21 rationale behind the OTP's decision to package sexual violence under these so-called
22 'umbrella charges', Jarvis and Vigneswaran explained that, in addition to considering the
23 practicality of charging incidents under separate counts, the prosecution often favoured
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51 19 April 2018; *Prosecutor v. Mucić et al.*, Indictment of 19 March 1996, IT-96-21,
52 <www.icty.org/case/mucic/4> accessed 19 April 2018; *Prosecutor v. Sikirica et al.* Indictment (Second
53 Amended) of 3 January 2001, IT-95-8-PT <www.icty.org/case/sikirica/4> accessed 19 April 2018;
54 *Prosecutor v. Todorović* Indictment (Second Amended) of 19 November 1998, IT-95-9/1,
55 <www.icty.org/case/todorovic/4m> accessed 19 April 2018; *Prosecutor v. Češić* Indictment (Third
56 Amended) of 26 November 2002, IT-95-10-I <www.icty.org/case/cesic/4> accessed 19 April 2018.

57 ⁵⁸ M. Jarvis and K. Vigneswaran 'Challenges to Successful Outcomes in Sexual Violence Cases' in S.
58 Brammertz and M. Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford
59 University Press, 2016) p. 58.
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1 umbrella charges because they allowed for sexual violence crimes to be more easily
2 linked to senior leadership figures, especially when they were presented as part of a
3 campaign of crimes in prison camp setting.⁵⁹ Conceding that while there are clear
4 advantages to umbrella charges, Jarvis and Vigneswaran also admit that these charges
5 contain the risk of obscuring the gendered nature of the violent campaign.⁶⁰ In fact, such
6 umbrella charges and their subsequent adjudication significantly contributed to the
7 invisibility of sexual violence against men at the ICTY. They led to a presentation of
8 sexual violence against men as a criminal offense that is not different in terms of its intent
9 or impact from other forms of physical mistreatment.
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11 Similarly, at the trial stage, evidence of sexual violence against men was summarized as
12 ‘other acts of violence’ or ‘mistreatment of prisoners’,⁶¹ thereby concealing the sexual
13 nature of the offences. Moreover, in *Tadić* and *Brđanin* several males who had been
14 forced to engage in sexual acts were not referred to as victims during the trial
15 proceedings. In *Tadić*, the forced sexual acts involved three male detainees. Only one of
16 them was referred to as a victim while the other two were referred to as ‘*the other*
17 *detainees involved*’.⁶² In *Brđanin* an elderly man was ordered to rape a female detainee
18 at Omarska Camp. The Trial Chamber later found that the threat of rape constituted a
19 sexual assault only vis-à-vis the female but not the male detainee.⁶³
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21 Despite all those factors that diminished the visibility of sexual violence against men at
22 the pre-trial or trial stage, two cases, *Česić* and *Čelebići*, stand out positively. In *Čelebići*,

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51 ⁵⁹ Jarvis and Vigneswaran, *supra* note 56, p. 59.

52 ⁶⁰ *Ibid.*

53 ⁶¹ *Prosecutor v. Tadić*, Opinion and Judgement of 7 May 1997, IT-94-1-I <www.icty.org/case/tadic/4>
54 accessed 19 April 2018, paras. 726, 730; *Prosecutor v. Martić* Trial Judgement of 12 June 2007, IT-95-
55 11-T <www.icty.org/case/martic/4> accessed 19 April 2018, para. 413.

56 ⁶² *Prosecutor v. Tadić*, Sentencing Judgement of 14 July 1997, IT-94-1-T <www.icty.org/case/tadic/4>
57 accessed 19 April 2018, para. 22.

58 ⁶³ *Prosecutor v. Brđanin*, Trial Judgement of 1 September 2004, IT-99-36-T
59 <www.icty.org/case/brdanin/4> accessed 19 April 2018, para. 516.
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1 Esad Landžo was charged for forcing two brothers to perform fellatio on each other.
2 After they had been forced to perform those oral sexual acts, Landžo placed a burning
3 fuse cord around their genitals.⁶⁴ The placing of a burning fuse cord around the genitals
4 of two male detainees was charged together with severe beatings of two other detainees
5 as wilfully causing great suffering or serious injury to body or health and cruel treatment.
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7 The forced acts of fellatio were charged together with other '*incidents of inhumane acts*
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of two male detainees was charged together with severe beatings of two other detainees as wilfully causing great suffering or serious injury to body or health and cruel treatment. The forced acts of fellatio were charged together with other '*incidents of inhumane acts committed in Čelebići camp*' as inhumane and cruel treatment.⁶⁵ The Trial Chamber later pointed out the missed opportunity in the indictment to highlight the sexual nature of the acts of violence against the two brothers, remarking that the forced acts of fellatio could also have amounted to rape if the prosecution had argued so appropriately.⁶⁶

4.3 *Broadening of the Definition of Rape: the Česić Case*

Despite the rather bleak picture of prosecutions of CRSV against men, the Česić case made more significant advances in progressing the Tribunal's jurisprudence on CRSV against men. Ranko Česić forced two brothers at gunpoint to hit each other and to perform fellatio on each other under the watch of other guards. The final indictment charged Česić with 'rape, which includes other forms of sexual assault' for the forced oral sexual acts.⁶⁷ When the prosecution submitted the final indictment against Česić, the ICTY had already defined rape in *Furundžija* as

⁶⁴ *Prosecutor v. Mucić et al.*, Trial Judgement of 16 November 1998, IT-96-21-T <www.icty.org/case/mucic/4> accessed 19 April 2018, paras. 1038, 1062-1066.

⁶⁵ *Prosecutor v. Mucić et al.*, Indictment of 19 March 1996, IT-96-21 <www.icty.org/case/mucic/4> accessed 19 April 2018, para. 34.

⁶⁶ *Prosecutor v. Mucić et al.*, Trial Judgement of 16 November 1998, IT-96-21-T <www.icty.org/case/mucic/4> accessed 19 April 2018, para. 1066.

⁶⁷ *Prosecutor v. Česić*, Sentencing Judgement of 11 March 2004, IT-95-10, <www.icty.org/case/cesic/4> accessed 19 April 2018, para. 14; *Prosecutor v. Česić*, Indictment (Third Amended) of 26 November 2002, IT-95-10 <www.icty.org/case/cesic/4> accessed 19 April 2018, para. 15.

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- (i) the sexual penetration, however slight:
 - a. of the vagina or the 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
 - (ii) by coercion or force or threat of force against the victim or a third person.⁶⁸

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When Česić pleaded guilty to all counts of the final indictment, the plea agreement in the charge relating to rape set forth that proof is required that ‘... (a) the Accused caused the victim(s) to be sexually penetrated without their consent [and that] (b) the Accused intended that a sexual penetration occur; (...)’.⁶⁹ In point (a), the prosecution slightly - but essentially - amended the first element of the definition of rape to include causing someone else to rape. Recognizing that Česić’s lack of physical involvement in the sexual act is outside of the scope of the ICTY definition of rape in *Furundžija*, the wording of the plea agreement allowed the prosecution to circumvent this fact. In finding Česić guilty under Article 5 (g) of the ICTY Statute, the Trial Chamber established that an act of a sexual nature can constitute rape even if the perpetrator is not part of the sexual act itself. This was particularly significant in that *Česić* was the first case in ICL in which sexual violence against men had successfully been prosecuted as rape.

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The forced acts of fellatio between two male detainees described in *Česić* were by far no exception but a common element of ICTY cases in which CRSV against men were part of the criminal investigation. In most of these cases, the defendants did not themselves physically assault other men, but forced male detainees to perform sexual acts on each other. The exclusion of this particular form of CRSV against men during the Yugoslav

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⁶⁸ *Prosecutor v. Furundžija*, Trial Judgement of 10 December 1998, IT-95-17/IT <www.icty.org/case/furundzija/4> accessed 19 April 2018, para. 185.

⁶⁹ *Prosecutor v. Česić*, Plea Agreement 28 October 2003, IT-95-10/1-PT <www.icty.org/case/cesic/4> accessed 19 April 2018, para. 5.

1 Wars from the ICTY definition of rape renders the definition *de facto* not gender neutral.

2 The *Česić* Plea Agreement picked up on this dilemma and amended the concept of
3 physical penetration to the benefit of male victims of sexual violence. Unfortunately,
4 however, it was not utilized in any other case before the ICTY.
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9 In summary, while acknowledging the procedural and statutory difficulties of
10 prosecuting CRSV against men and celebrating the progress made in *Česić*, the pervasive
11 mischaracterization by judges and prosecutors of CRSV against men as another form
12 physical violence was the most salient challenge in increasing the visibility and
13 broadening the understanding of gender-based violence at the ICTY.⁷⁰ It is also worth
14 mentioning that in the context of different modes of liability, the ICTY seems to have
15 adapted a highly sophisticated approach to establishing liability of commanders for
16 CRSV, while at the same time perpetuating tropes about masculinity and CRSV as a
17 form of predictable male behaviour during war. The ICTY established that where women
18 were held in detention by armed, drunk, physically and mentally abusive men, sexual
19 violence against these women was deemed foreseeable.⁷¹ Given the relative invisibility
20 of sexual violence against men, though prevalent in most conflict environments and
21 certainly widespread during the Yugoslav Wars, a similar argument to establish the
22 liability of a commander for the sexual abuse of men has not been made. In either case,
23 the highly gendered language used in *Kvočka* (cited in section 3.2.) makes several
24 assumptions about *typical* violent male behaviour during war and is a flat attribution of
25 the commission of sexual violence crimes to all male guards under the influence of
26 alcohol. This assumption, though strategically useful for holding commanders
27 accountable, challenges efforts of abandoning the perception of sexual violence as a
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58 ⁷⁰ Kapur and Muddell, *supra* note 36, pp.17, 22.

59 ⁷¹ *Prosecutor v. Kvočka et al.*, Trial Judgment of 2 November 2001, IT-98-30/1
60 <www.icty.org/case/kvočka/4> accessed 19 April 2018, para. 327.
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1 natural side-effect of war. It perpetuates a narrative in which sexual violence is caused
2 by the natural sexual drive of male combatants that is facilitated by the overall chaos and
3 moral decline during armed conflict. Further, while constructing sexual violence in a
4 binary framework of male perpetrators versus female victims, the ‘foreseeability of
5 sexual violence’ argument made in *Kvočka* does not account for male victims of sexual
6 violence. It feeds a narrowed view and understanding of gender-based violence that does
7 not appreciate and fully account for the socio-cultural interconnectedness of CRSV
8 against women *and* men.
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22 **5 Intersectionality in the ICTY Judgments on CRSV**

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27 Intersectionality is a concept and a framework for the critical inquiry of injustices that
28 produce societal tensions and conflict. It encourages a better understanding of how
29 groups of society are, based on their overlapping identities, more vulnerable to
30 experiencing marginalization and violence. Thus far, no criminal court or tribunal has
31 demonstrated an intersectional approach in prosecuting cases involving CRSV. Holding
32 the ICTY to such a standard would be dismissive in light of the tremendous challenges
33 the tribunal encountered in pioneering prosecutions of CRSV, and the novelty of
34 intersectionality as a concept at the time. However, given the legacy of ICTY in relation
35 to changing perceptions of CRSV (not least in the ICL field), our article seeks to examine
36 the extent to which the ICTY has addressed and challenged harmful societal dynamics
37 and considered identity-based differences in experiencing harm, therefore making a step
38 towards advancing a more intersectional analysis of CRSV.
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58 **5.1 Addressing Societal Relations in Context of CRSV**

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1 Referring to the work of Nayanika Mookherjee, Dubravka Žarkov wrote that

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4 a woman's experience of rape cannot be abstracted from her experience of the
5 world in which she learns what it means to be raped. (...) Agency and
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9 victimization do not only stand side by side, but actually constitute each other.⁷²
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14 As we argued in section 2.1, a man's experience of rape is equally a product of societal
15 and communal values and norms relating to gender, harm, and violence. Especially in
16 non-international conflicts, the experience of both victim and perpetrator are framed by
17 the same social and cultural knowledge. The stigma attached to a person surviving rape
18 is therefore known to (and likely intended by) the perpetrator. Žarkov established that
19 the representation and interpretation of sexual violence by various national communities
20 through different media outlets were instruments for enacting identity and mobilising
21 ethnicity during the Yugoslav Wars. In this dynamic, these enacted and mobilised
22 ethnicities turned into an interpretive frame within which sexual violence was understood
23 and the conflict justified.⁷³ In this light it becomes clear that identity-based power
24 dynamics on the intersection of gender and ethnicity were major socio-cultural forces
25 that created a climate within which sexual violence became a powerful tool for waging
26 war.
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45 The relation between socio-cultural dynamics and the extent to and ways in which
46 gender-based violence occurs during armed conflict were in no way unique to the
47 Yugoslav Wars. Feminists who have advocated for the prosecution of wartime rape
48 throughout the past thirty years have emphasised the importance of situating wartime
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59 ⁷² Žarkov, *supra* note 46, p. 179.

60 ⁷³ Buss, *supra* note 6, p. 420.
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1 rape within the broader socio-political context of structural inequality that contributed to
2 violence and existed before the outbreak of war. Accordingly, in ‘peacetime’ and in
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4 ‘wartime’ violence and inequality are the result of complex identity dynamics and gender
5 relations within society. Gender and ethnicity can thereby not be treated as entirely
6 separate identity categories. Therefore, interpreting CRSV uniformly as either ethnicised
7 violence or gender-based violence does not reflect the complex realities of many conflict
8 environments, including the Former Yugoslavia. Thus, prosecutions of international
9 crimes committed during armed conflict, particularly CRSV, is a highly legalistic
10 response to a large scale violence in which socio-cultural dynamics and endemic
11 inequality remain invisible and therefore unrepaired.⁷⁴ For Turan, the exclusion of
12 diverse social realities from the investigations in international criminal justice constitutes
13 a danger of narrating a single truth that suppresses alternative and subordinate voices. As
14 a consequence, this single ontology of past and present gives rise to a future that is built
15 upon the same socio-cultural dynamics that turned out to be the foundation for the
16 outbreak of large-scale violence in the first place.⁷⁵ At the ICTY and in other
17 international criminal courts, there appears to be limited appetite for judicial engagement
18 with root causes of CRSV. The Trial Chamber in *Čelebići* considered it futile to elaborate
19 on root causes of violations, noting that the Chamber

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‘does not seek to identify causal factors, nor through history explain why the
conflict with which we are concerned occurred. It would indeed do no justice to
the victims of this conflict to attempt to explain their suffering by proffering
historical ‘root causes’ which somehow inexorably led to the violence which
engulfed them’.⁷⁶

⁷⁴ *Ibid.*, p. 413.

⁷⁵ Turan, *supra* note 3, p. 35.

⁷⁶ *Prosecutor v. Mucić et al.*, Trial Judgement of 16 November 1998, IT-96-21-T
<www.icty.org/case/mucic/4> accessed 19 April 2018, para.89.

1 From the perspective of advancing jurisprudence on CRSV in ICL, it is concerning that
2 the ICTY has dismissed the need to ‘look beyond’ the crimes of CRSV. The Tribunal
3 has thereby foregone an opportunity to reflect on the gendered nature of sexual violence
4 and its socio-cultural impact. The continuum of such violence between ‘peacetime’ and
5 ‘wartime’ has therefore remained unaddressed.
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11 Despite the court’s reluctance to engage with root causes of CRSV, the socio-cultural
12 dimension of CRSV was at times made visible after all, particularly in witness statements
13 which occasionally were also directly quoted in the judgments. For instance, testimony
14 of Mrs Čećez, one of the CRSV victims in Čelebići, highlighted the severe and personal
15 impact of rape (“he trampled on my pride and I will never be able to be the woman that
16 I was”) whilst also indicating the long-term and strategic nature of CRSV
17 (“Psychologically and physically I was completely worn out. They kill you
18 psychologically.”).⁷⁷ Whilst stigma and shame of rape victims received some visibility
19 in cases involving sexual violence against women, their gravity generally did not affect
20 the sentencing of the convicted perpetrators. In the context of CRSV against men, the
21 tribunal has not commented specifically on the stigma or shame attached to male victims
22 of sexual violence. Only in *Češić* the Trial Chamber highlighted that the forced acts of
23 fellatio were a particularly serious violation of the moral and physical integrity of the
24 two brothers, which was considered in determining a sentence.⁷⁸ However, the Trial
25 Chamber did not elaborate further on this point. It is therefore not clear whether the
26 particularly severe violation of the brothers’ integrity relates to the stigma and shame
27 attached to their experience, to the fact that they are both men, to the fact that they are
28 siblings, or to a combination of all these circumstances. In either case, the judgments
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58 ⁷⁷ *Ibid.*, para.938.

59 ⁷⁸ *Prosecutor v. Češić*, Sentencing Judgement of 11 March 2004, IT-95-10/1 <www.icty.org/case/cesic/4>
60 accessed 19 April 2018, paras. 35, 53.
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1 concerning CRSV have never condemned the societal and structural forces that shame
2 and stigmatize survivors of such crimes. Thus, while acts of CRSV have been prosecuted
3 and punished at the ICTY, little attention has been given to advancing the understanding
4 of root causes of gender-based violence. In doing so, the ICTY has left a gap for the ICC
5 and other international criminal investigative bodies that aim to be as impactful as the
6 ICTY has been in many other aspects of ICL.
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17 5.2 *CRSV as a Gendered Harm*

18 During and after the Yugoslav Wars, uncountable reports have been produced about the
19 mass rapes of primarily Bosnian Muslim women. At the time of the establishment of the
20 tribunal, feminists advocated for rape not to be solely understood as an attack on an entire
21 ethnic community (as “the dishonouring of the nation”⁷⁹), but also as a crime committed
22 against a woman as a *woman*.⁸⁰ However, most media news stories that addressed their
23 experiences framed these women into the discourse of Muslim traditions of male
24 protection of women. They reduced Muslim women to blind followers of the cultural
25 norms of chastity, passivity, and submissiveness that made their rape even more tragic
26 because now they were left with a life of stigma, shame, and abandonment.⁸¹ Also in the
27 ICTY’s case-law, one can observe examples of such approaches. For instance, the Trial
28 Chamber in *Krstić* heavily focused on emphasizing the patriarchal nature of Bosnian
29 Muslim society and established a direct link between this characteristic and the impact
30 of killings of men in Srebrenica on surviving Bosnian-Muslim women. The Trial
31 Chamber asserted that ‘the elimination of virtually all the men has made it almost
32 impossible for Bosnian Muslim women who survived the take-over of Srebrenica to
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58 ⁷⁹ Buss, *Performing Legal Order*, *supra* note 6, p. 413.

59 ⁸⁰ *Ibid.*, p. 418.

60 ⁸¹ Žarkov, *supra* note 46, p. 144.
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successfully re-establish their lives'. Furthermore, the Trial Chamber emphasised 'the catastrophic impact that the disappearance of two or three generations of men would have on the survival of traditionally patriarchal society'.⁸² Such an approach, whilst emphasizing women as secondary victims of the Srebrenica genocide, created a uniform picture of Bosnian Muslim society, in which women were portrayed not only as a homogenous group, but also as individuals lacking agency whose identity is defined through men and by ethnic and religious characteristics.

Another critique of the ICTY's jurisprudence on CRSV, especially rape, relates to the manner in which the judgments portrayed such crimes as primarily ethnicity-related rather than conceptualising them also as acts of gender-based violence against women. By focusing predominantly on ethnicity as a factor for vulnerability, the ICTY failed to acknowledge the overlapping identity categories that made different groups of society more vulnerable to becoming targets of CRSV. Furthermore, cases such as *Krstić* that focused solely on the collective harm experienced by a group of people based on their ethnic belonging left out the recognition of women's individual experiences of violence and conflict from the Tribunal's judgments. Also, in cases involving sexual violence against men, the ICTY did in most cases refer to the ethnicity of the victim, but it did not refer to the acts of sexual violence as a form of gender-based violence that target the male victim's sexuality and role as a man within society. In contrast, while exclusively focusing on ethnicity in many cases involving Bosnian Muslim victims, the ICTY did not engage the category of ethnicity when considering the multiple rapes of Mrs Čećez, a Bosnian Serb woman, in *Čelebići*. This was despite the fact that the judgment

⁸² *Prosecutor v. Krstić*, Trial Judgment of 2 August 2001, IT-98-33-T <www.icty.org/case/krstic/4> accessed 19 April 2018, paras. 91, 595.

1 acknowledges that crimes prosecuted in that case were driven by ‘feelings of revenge
2 against people of Serb ethnicity’.⁸³
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4 Whilst trying to emphasize the gender-specific impact of the Srebrenica genocide in
5 *Krstić*, the Trial Chamber missed an opportunity to further conceptualise gendered harms
6 and deepen the analysis of the impact as well as root causes of such harms suffered by
7 (not only Bosnian Muslim) women during the conflict in the Former Yugoslavia.
8 Questioning the way in which the Tribunal arrived at such conclusion, Buss also notes
9 that ‘courts are also sources of official knowledge about what happened to women and
10 men during that conflict, and hence what harms need to be addressed as part of the
11 ‘transition’ from conflict to ‘peace’’.⁸⁴ As such, the approach of the ICTY (as well as
12 other courts) also informs other transitional justice processes. It is therefore crucial that
13 such records adequately and fully reflect the spectrum, impact, and causes of gendered
14 harms.
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34 The demand for a more complex analysis of the root causes of CRSV and a more nuanced
35 portrayal of CRSV in international criminal judgments puts feminist jurisprudence, as Ní
36 Aoláin and Turan indicate, into a position where it has to decide what its focus shall be.
37 Should greater focus be placed upon the individual lived experiences of the victim, or
38 the actuality of the criminal practices, unencumbered by social context, which could
39 potentially result in a far too generalized understanding of harm?⁸⁵ The ICTY has opted
40 not to side with either one of these strategies, leaving it up to future international criminal
41 investigations to strike a balance between the creation of a narrative that enables the
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56 ⁸³ *Prosecutor v. Mucić et al.*, Trial Judgement of 16 November 1998, IT-96-21-T
57 <www.icty.org/case/mucic/4> accessed 19 April 2018, para.1269.

58 ⁸⁴ Buss, *supra* note 7, pp. 74-75.

59 ⁸⁵ Turan, *supra* note 3, p. 33. F. N. Aoláin, ‘Sex-based violence and the Holocaust: A re-evaluation of
60 harms and rights in international law’ 12(1) *Yale Journal of Law & Feminism* (2000) p. 61.
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1 prosecution of violent campaigns, and the recording of nuances in which harm was
2 perpetrated and experienced differently by a seemingly homogeneous but factually
3 diverse group of people.
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9 **6 Conclusions**

10 A lot has changed in ICL since the ICTY came into being in 1993, both in the field of
11 international criminal law as well as in general international law and international policy-
12 making. Whilst much remains to be done in the field of accountability for CRSV, the
13 debates have shifted from whether to prosecute CRSV to ‘how’ best to achieve justice
14 for its victims.⁸⁶ The courts and tribunals which came into being after the ICTY (e.g.
15 Extraordinary Chambers in the Courts of Cambodia, Special Court for Sierra Leone, the
16 ICC) all contained substantive provisions on CRSV and prosecuted CRSV crimes. At an
17 international level, we have observed the increased commitment to prosecuting and
18 combatting CRSV which resulted in substantive as well as institutional developments.
19 These include (but are not limited to): the appointment of the Special Representative of
20 the Secretary-General on Sexual Violence in Conflict (2008), adoption of the UNSCR
21 1325 (2000) and Women, Peace and Security Agenda at the UN Security Council, the
22 launch of the International Protocol on the Documentation and Investigation of Sexual
23 Violence in Conflict; the Global Summit to End Sexual Violence in Conflict (London,
24 10-13 June 2014).⁸⁷
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53 ⁸⁶ M. Milanović, ‘The impact of the ICTY on the former Yugoslavia: an anticipatory postmortem’ 110(2)
54 *American Journal of International Law* (2016) pp. 233-259.

55 ⁸⁷ Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict was
56 established by UNSCR 1888 (2009); United Nations Security Council, *Resolution 1325* (UN Doc.
57 S/RES/1325); UK Foreign & Commonwealth Office, *International Protocol on the Documentation and*
58 *Investigation of Sexual Violence in Conflict*, 11 June 2014,
59 <[www.gov.uk/government/publications/international-protocol-on-the-documentation-and-investigation-](http://www.gov.uk/government/publications/international-protocol-on-the-documentation-and-investigation-of-sexual-violence-in-conflict)
60 [of-sexual-violence-in-conflict](http://www.gov.uk/government/publications/international-protocol-on-the-documentation-and-investigation-of-sexual-violence-in-conflict)> accessed 19 April 2018.
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2 Although there exists a degree of scepticism regarding the Tribunal's work, the ICTY
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4 has achieved an impressive landmark in advancing prosecutions of CRSV. Both on a
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6 substantive and procedural level, the ICTY set a solid jurisprudential foundation for
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8 international as well as domestic criminal justice institutions – not least the International
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10 Criminal Court - that can (and should) seek justice for the victims of CRSV. However,
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12 as we demonstrated in this article, the ICTY's jurisprudence also produced certain
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14 silences, especially with regard to the manner in which CRSV is interpreted and
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16 portrayed in the judgments. We suggest that a turn towards a more intersectional analysis
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18 of CRSV in the judgments of the ICTY could have further advanced the understanding
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20 of CRSV and gone an extra mile in subverting myths concerning such acts. That said,
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22 the true legacy of the ICTY's jurisprudence, especially its critical elements, lies in its
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24 future contributions to prosecutions of CRSV. It is now the task of the remaining
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26 international and domestic criminal courts to not only learn lessons from the ICTY but
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28 also build upon them to continue delivering justice for the victims of CRSV.
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