

The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia

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Abstract¹

Recent efforts to develop and implement progressive models of transitional justice have been significantly influenced by major developments in the law concerning sexual violence in armed conflict. In particular, the International Criminal Tribunal for the former Yugoslavia has pioneered accountability for sexual violence against women in armed conflict. This article takes the ICTY as a case study of how gender can structure the accountability mechanisms of transitional justice. The article analyses how legal norms and practices instantiate and reiterate, rather than transform, existing hierarchical gender relations. It considers the existing models of sexual violence as a criminal harm under international law, and then examines gendered patterns of legal practice in ICTY prosecutions. To address this engendering of transitional justice, the article produces a new model of the harm of sexual violence in conflict, suggests the development of a new international offence of sexual violence and generates different strategies for international prosecutions of sexual violence.

Introduction

Contemporary debates in transitional justice increasingly recognise the importance of addressing issues of gender in conflict and its aftermath. This growing recognition of gender issues has been significantly influenced by major developments in the international legal regulation of sexual violence in armed conflict.² This article explores the complex relationship between gender and the legal accountability mechanisms of international transitional justice. It examines how gender structures these legal mechanisms, focusing upon the rapidly developing area of the prosecution of sexual violence in armed conflict.

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² Christine Bell and Catherine O'Rourke, 'Does Feminism Need A Theory of Transitional Justice?' *The International Journal of Transitional Justice* 1(1) (2007): 23–44.

The article analyses how these international legal rules and practices can instantiate and reiterate, rather than transform, existing hierarchical norms of gender. It first examines the model of sexual violence as a criminal harm under international law, and then analyses gendered patterns of legal practice in international criminal prosecutions. It concludes by outlining the necessity for new models of the harms and crimes of sexual violence in conflict in order to engender international legal mechanisms and secure justice for crimes of this nature.

This analysis uses the International Criminal Tribunal for the former Yugoslavia (ICTY) as a case study of how the legal mechanisms of transitional justice form and reproduce gendered social relations. The ICTY has been chosen because of its important contributions to the prosecution of sexual violence in armed conflict, both in terms of its extensive doctrinal development and its unprecedented number of prosecutions in this area.³ Accountability for sexual violence in the Yugoslavian conflict is now seen as a 'core achievement' of the ICTY.⁴ However, a close examination of these prosecutions reveals the complex way in which these rules and practices of international post-conflict justice are themselves gendered, and can serve to reinforce and entrench gendered hierarchies.

The Legal Field: Analysing Legal Practices and Norms

My analysis of the relationship between gender and the legal mechanisms of transitional justice requires understanding how law functions not as 'an aggregate of isolated elements, [but as] a configuration or a network of relationships.'⁵ This approach argues that international criminal justice does not simply comprise rules that define crimes (the positive law of the field), or trial proceedings (practices that adjudicate the legal claim). Focusing on either of these elements in isolation provides only a partial analysis rather than enabling an understanding of how these norms and practices together form the field of international criminal justice. In contrast, my approach understands legal norms and practices as structured forms of social action. It follows Bourdieu's description of the juridical field as 'an area of structured, socially patterned activity or "practice," in this case disciplinarily and professionally defined.'⁶ This article seeks to analyse international criminal justice as a field of both legal rules that articulate certain models of persons and social relations, and legal practices that represent particular forms of adjudicating conflict.

³ ICTY sexual violence cases as of August 2007 include: *Tadic* (IT-94-1); *Nikolic* (IT-94-2); *Dosen, Kolundzija and Sikirica* (IT-95-8); *Todorovic* (IT-95-9/1); *Simic* (IT-95-9/2); *Cesic* (IT-95-10/1); *Rajic* (IT-95-12); *Cerkez and Kordic* (IT-95-14/2); *Bralo* (IT-95-17); *Furundzija* (IT-95-17/1); *Delalic, Delic, Mucic, and Landzo* (IT-96-21); *Kovac, Kunarac, and Vukovic* (IT-96-23, IT-96-23/1); *Stakic* (IT-97-24); *Kos, Kvočka, Prcac, Radic, and Žigic* (IT-98-30/1); *Brdanin* (IT-99-36); *Plavsic* (IT-00-39 & 40/1); *Banovic* (IT-02-65/1).

⁴ ICTY, 'Bringing Justice to the Former Yugoslavia: The Tribunal's Core Achievements,' <http://www.un.org/icty/glance-e/index.htm> (accessed 14 February 2007).

⁵ Fritz Ringer, *Fields of Knowledge* (Cambridge: Cambridge University Press, 1992), 5.

⁶ Richard Terdiman, 'Translator's Introduction,' *Hastings Law Journal* 38 (1986–1987): 805.

Sexual Violence as a Crime under International Humanitarian Law: Gender and the Legal Harms of Sexual Violence

An analysis of the international rules defining sexual violence offences is important for two reasons. First, substantive law defines which conduct is criminal and which is not (for example, the criminal act); who is a victim of that harm (such as the element of consent); and who perpetrates it (such as the element of criminal intention). How criminal law itself constructs the wrong is crucial to understanding the relationship between gender and the international prohibition upon sexual violence in armed conflict.⁷ These legal norms represent models of persons and their relations to others. As Roger Cotterrell points out, 'law constitutes in regulatory terms what it treats as the social, but it has to *presuppose* an overall conception of the social in which its regulatory norms can make sense.'⁸ In this sense, the regulatory norms of legal rules articulate particular conceptions of persons and social relations. This model of law permits us to trace the relationship between gender and legal norms, because it describes how those norms articulate particular conceptions of gendered persons and their relationship to other persons. Using this model, we can see how the regulatory norms of the international legal rules governing sexual violence in armed conflict represent certain ideas of gender identity and relations.

Second, the ICTY uses these rules to define the harm of sexual violence in conflict. It applies the rules of customary international law, those 'informal unwritten rules which are binding upon States,'⁹ to determine whether the conduct constitutes an offence under international law.¹⁰ The development of the substantive rules in this area by the ICTY is often regarded as its most significant legacy.¹¹

To analyse the engendering of the harm of sexual violence, then, first requires identifying those legal rules, using the interpretative methods of conventional legal analysis to identify the positive law that defines sexual violence offences. The first step therefore is to identify sexual violence offences captured under customary law.

Sexual Violence Offences

While customary international law prohibits rape and other forms of sexual violence in armed conflict,¹² there is no distinct offence of sexual violence in international

⁷ Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Oxford: Hart, 1998).

⁸ Roger Cotterrell, 'Law in Social Theory and Social Theory in the Study of Law,' in *The Blackwell Companion to Law and Society*, ed. Austin Sarat (Oxford: Blackwell, 2004), 25 [emphasis original].

⁹ Michael Byers, *Custom, Power, and the Power of Rules* (Cambridge: Cambridge University Press, 1999), xi. The existence of a rule of customary international law requires two elements: State practice and a belief that such a practice is required, prohibited or allowed as a matter of law. Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, The Rules*, vol 1 (Cambridge: Cambridge University Press, 2005), xxxi–xxxii.

¹⁰ These norms apply to all members of the international system. See, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc. S/25704 & Add. 1 (1993), para 35.

¹¹ Kelly Askin, 'Reflections on Some of the Most Significant Achievements of the ICTY,' *New England Law Review* 37(4) (2002–2003): 903–914.

¹² Henckaerts and Doswald-Beck, *supra* n 9.

law. Rather, if the requisite elements are met, then sexual violence can be prosecuted as a criminal violation of international humanitarian law: namely, as a war crime, genocide or as a crime against humanity. Sexual violence may be charged as a constituent element of humanitarian crimes, including:

(1) *War crimes:*

- *Grave breaches of the Geneva Conventions:* including wilful killing,¹³ torture,¹⁴ or inhuman treatment,¹⁵ and wilfully causing great suffering or serious injury to body or health,¹⁶ when committed in an international conflict against protected persons;
- *Serious violations of humanitarian law:* A breach of a customary rule that protects important values, involves grave consequences for the victim, and gives rise to individual criminal responsibility.¹⁷ These include violations of Common Article 3 of the Geneva Conventions, such as violence to life and person (in particular, murder,¹⁸ mutilation,¹⁹ cruel treatment and torture²⁰), and outrages upon personal dignity (in particular humiliating and degrading treatment),²¹ whether committed in international or non-international conflict. Article 27 of the Fourth Geneva Convention; Article 76(1) of its Additional Protocol I; and Article 4(2)(3) of the Additional Protocol II prohibit 'rape, enforced prostitution and any form of indecent assault.'²²

(2) *Genocide:*

- *The intent to destroy, in whole or in part, a national, ethnical, racial or religious group:* including killing or causing serious bodily or mental harm to members of the group,²³ deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,²⁴

¹³ This charge has been considered, but the causal relationship between the sexual violence and the victim's death was not established: *Tadic*, Trial Judgement, 1997, para 241.

¹⁴ *Kunarac*, Appeals Judgement, 2002, paras 150–151.

¹⁵ *Delalic*, Trial Judgement, 1998, para 1066.

¹⁶ *Tadic*, Trial Judgement, para 243; and *Delalic*, paras 1038–1040.

¹⁷ *Tadic*, Appeals Judgement, 1995, para 94.

¹⁸ Charges have not yet been considered, but it is arguable that certain acts of sexual assault would constitute intentional killing where the intention is to kill through *sexualised* violence. See, Anne-Marie Brouwer, *Supranational Criminal Prosecution of Sexual Violence* (Antwerp: Intersentia, 2005), 50.

¹⁹ Charges of mutilation have not yet been considered.

²⁰ *Furundzija*, Trial Judgement, 1998.

²¹ *Kunarac*, Appeals Judgement.

²² *Kvocka*, Trial Judgement, 2001, para 234, n 409. While the ICTY accepted a charge of rape under Additional Protocol II in *Kunarac*, there is still considerable debate as to the customary status of the Additional Protocols. See, Patricia Visueur Sellers, 'Sexual Violence and Peremptory Norms: The Legal Value of Rape,' *Case Western Reserve Journal of International Law* 34 (2002): 287–303.

²³ *Prosecutor v. Akayesu*, (ICTR-96-4), Trial Chamber Judgement, 1996, paras 688, 731–733.

²⁴ *Prosecutor v. Kayishema and Ruzindana*, (ICTR-95-1), Trial Chamber Judgement, 1999, paras 108–9, 115–116.

²⁵ *Akayesu*, paras 507–8.

imposing measures intended to prevent births within the group,²⁵ and forcibly transferring children of the group to another group.

(3) *Crimes against humanity:*

- *systematic or widespread attacks upon civilian populations:* including, murder, extermination, enslavement,²⁶ deportation, imprisonment,²⁷ torture,²⁸ rape,²⁹ persecutions on political, racial and religious grounds,³⁰ and other inhumane acts.³¹

Definition of Sexual Violence

Sexual violence offences constitute a category of acts prohibited under humanitarian law. However, sexual violence, including rape, was not defined until the decisions of the ICTY and the International Criminal Tribunal for Rwanda (ICTR). The leading case, *Akayesu*, defines sexual violence, which includes rape, as:

any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.³²

This category of prohibited acts ranges from forced nudity to the ‘gender related crimes’ recognised by the International Criminal Court (ICC) Statute, such as rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilisation.³³

Rape as a crime against humanity is the only offence of sexual violence that is specified in the Statutes of the ICTY (Article 5(g)) and the ICTR (Article 3(g)). However, the ICTY and ICTR Statutes do not set out the elements of the offence. The first definition of rape was given by *Akayesu*:

the central elements of the crime of rape cannot be captured in a mechanical description of objects or body parts ... the essence of rape is the aggression that is expressed in a sexual manner under conditions of coercion.³⁴

This conceptual approach was subsequently followed in *Delalic* (ICTY) and *Musema* (ICTR).³⁵ However, the ICTY’s later decision in *Furundzija* considered it necessary ‘to arrive at an accurate definition of rape based on the criminal law principle of specificity’ by drawing upon ‘principles of criminal law common to the

²⁶ *Kunarac*, Appeals Judgement.

²⁷ Neither charge has yet been considered.

²⁸ *Kunarac*, Appeals Judgement.

²⁹ *Ibid.*

³⁰ *Kvočka*, para 186.

³¹ *Akayesu*, para 688.

³² *Ibid.* See also, *Delalic*, para 478; *Kvočka*, para 180.

³³ *Kvočka*, para 180.

³⁴ *Akayesu*, paras 597–598.

³⁵ *Prosecutor v. Musema*, (ICTR-96-13), Appeal Chamber Judgement, 2000, para 156.

³⁶ *Furundzija*, para 178.

major legal systems of the world.³⁶ *Furundzija* developed a ‘mechanical’ definition of rape as penetration by coercion or force,³⁷ which was followed in *Kunarac*:

The *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (i) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (ii) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim ... The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.³⁸

Later ICTR decisions followed this distinction between conceptual and mechanical definitions, and affirmed the mechanical approach of *Kunarac*.³⁹ However, the recent ICTR Trial Chamber decision in *Muhimana* held that these definitions are ‘not incompatible or substantially different,’ as the *Kunarac* definition provides ‘additional details on the constituent elements of acts considered to be rape’ under *Akayesu*.⁴⁰

Rape is a ‘forced or coerced [act] of sexual penetration,’ in which sexual penetration marks the distinction between rape and other sexual violence offences.⁴¹ In *Kunarac*, the ICTY Appeals Chamber rearticulated the element of coercion or force in terms of absence of consent. The ICTR Appeals Chamber provided a recent extensive consideration of consent in *Gacumbitsi*,⁴² and affirmed non-consent and knowledge thereof as elements of rape.

The Gender of Sexual Violence

Sexual violence is ostensibly a gender-neutral term that refers to violence of a sexual nature against either women or men.⁴³ Most commentators argue that gender-neutral provisions are important because they recognise male and female sexual assault.⁴⁴ Moreover, this gender-neutrality reflects the predominant liberal framework of formal legal equality in public international law.

While this model appears to be gender-neutral, it nevertheless relies on notions of gendered bodies and actions. Particular gendered understandings of bodies and sexuality give content to the harm of sexual violence. The *sexual* distinguishes violence

³⁷ *Ibid*, para 185.

³⁸ *Kunarac*, Trial Chamber Judgement, 2001, para 460.

³⁹ *Prosecutor v. Kajelijeli* (ICTR-98-44), Trial Chamber Judgement, 2003, paras 910–915; *Prosecutor v. Semanza*, (ICTR-97–20), Trial Chamber Judgement, 2003, paras 344–345; *Prosecutor v. Kamuhanda* (ICTR-95-54), Trial Chamber Judgement, 2004, paras 705–710.

⁴⁰ *Prosecutor v. Muhimana* (ICTR-95-1B-T), Trial Chamber Judgement, 2005, paras 549–551.

⁴¹ *Kvočka*, para 182. This definition was most recently followed in *Brdanin*, Trial Chamber Judgement, 2004, paras 330–1.

⁴² *Prosecutor v. Gacumbitsi*, Appeals Chamber Judgement, 2006, para 153.

⁴³ Brouwer, *supra* n 18 at 26.

⁴⁴ Patricia Viseur Sellers, ‘Individual(’s) Liability for Collective Sexual Violence,’ in *Gender and Human Rights*, ed. Karen Knop (Oxford: Oxford University Press, 2004). There has been considerable debate concerning the shift from gender-specific to gender-neutral definitions of sexual assault in national common law jurisdictions, but little discussion of this issue at an international level.

⁴⁵ See also, *Akayesu*, para 686.

(such as assault, an unlawful application of force to another) from sexual violence (such as sexual assault, a non-consensual sexual act). For example, there is no intrinsic reason to understand either a person's mouth or an object such as a bottle as sexual; and yet the use of a bottle to simulate fellatio can be a sexual crime, and not simply an assault.⁴⁵ As Ann Cahill points out, 'those objects or orifices not always perceived as sexual *become sexualised* in the context of the assault.'⁴⁶ This model of sexual violence defines the criminality of the act in terms of its sexual nature, and its *sexual* nature derives from the sexual meaning given to the interaction of particular acts and bodies. For example, the *Kunarac* definition of the criminal conduct or *actus reus* of 'sexual penetration' identifies parts of the body that carry sexual meaning, such as the penis, vagina, anus or mouth.

However, the notion of the 'sexual' in crimes of sexual violence is always already gendered. Judith Butler points out that 'the sexual' is a particular representation of acts and bodies. It represents this act (but not that) as sexual; this body part (but not that) as sexed; this body as female, but that as male. As such, it relies upon 'regulatory ideals' or norms that delineate certain acts as sexual, certain body parts as sexual organs, and certain bodies as male and female. These norms give meaning to the otherwise abstract notion of 'sexual violence' because they structure the imaginary content of those harms in relation to masculine and feminine bodies. For example, the *Akayesu* definition of sexual violence includes acts that do not involve physical contact, such as forced nudity. However, the sexual nature of nudity depends upon the forced exposure of particular bodies. In certain social contexts, forcing a female victim to remove her shirt is sexual, whereas forcing a male victim to do the same is not. In Butler's terms, the 'regulatory norms of "sex" work ... to materialise sexual difference in the service of the consolidation of the heterosexual imperative.'⁴⁷ Because these 'regulatory ideas' constitute bodies as masculine or feminine, they also structure sexuality in terms of a heterosexual norm, since sexual desire for the *opposite* sex defines ideas of masculine and feminine sexuality.⁴⁸

'Sexual violence' materialises ideas of masculinity and femininity (ideas of what it is to be a man or a woman) through its repetition of norms of sexual practices (which sexual acts are appropriate to men or women) that in turn rely upon notions of 'biological' difference (what it 'means' to have a male or female body). If the notion of 'sexual violence' relies upon certain models of sexual acts, organs and bodies, those models in turn draw upon ideas of masculine and feminine acts, organs and bodies. Their constitution structures sexuality as a heterosexual relationship between 'the two sexes, male and female' (Article 7(3), ICC Statute). While sexual violence is commonly understood as referring to violence against

⁴⁶ Ann Cahill, *Rethinking Rape* (Ithaca and London: Cornell University Press, 2001), 139 [emphasis original].

⁴⁷ Judith Butler, *Bodies That Matter* (London and New York: Routledge, 1993), 2.

⁴⁸ Judith Butler, *The Psychic Life of Power: Theories of Subjection* (Stanford: Stanford University Press, 1997).

⁴⁹ Patricia Wencelblat, 'Boys Will Be Boys? An Analysis of Male-on-Male Heterosexual Violence,'

men or women, the 'sexual' nature of the offence relies upon ideas of masculinity and femininity which signify bodies and acts as sexual in specific ways.

This engendering of sexual violence upon a model of the 'two sexes' becomes most obvious in relation to the only sexual offence specified under humanitarian law, namely, rape as a crime against humanity. As in many national jurisdictions, international criminal law defines rape in terms of two elements: the conduct of penetration and the intent of the perpetrator.⁴⁹ In this model, penetration becomes the paradigmatic sexual act, and the perpetrator's intent defines the illegality of the sexual act. This model has been criticised for its mirroring of masculine models of sexuality,⁵⁰ as it defines the harm by the sexual intent of the perpetrator rather than the experience of the victim, and understands the sexual act in terms of an active masculine body that penetrates a passive feminine body.

Commentators suggest that a more appropriate model of sexual violence is a violation of the right to sexual autonomy, such as in *Kunarac*.⁵¹ However, as I argue elsewhere,⁵² this model of rape characterises the harm as a breach of the 'liberal ideal' of 'sexual autonomy' because it negates the exercise of the free will of the person over her physical body.⁵³ For this reason, lack of consent becomes central to the offence, because it is the indicator of the denial of the right to 'exercise the right of consent over that property which is most personally held: the body.'⁵⁴ There are four key problems with this necessary reliance upon a notion of consent as the marker of sexual autonomy. First, there is a lack of doctrinal clarity regarding whether consent is an element of the offence, an affirmative defence, or an evidential issue.⁵⁵ Second, consent is not the most appropriate means of determining sexual violence in the coercive context of armed conflict.⁵⁶ Third, if consent is not assumed, then it may be argued that all relationships in that conflict may be characterised as non-consensual.⁵⁷ Finally, and perhaps most importantly, as the prosecution argued in *Gacumbitsi*, rape should be viewed in the same way as other violations of international criminal law, such as torture or enslavement, where it is not required to establish lack of consent to the harm.⁵⁸

These debates concerning consent do not address the more problematic issue of the nature of the harm itself, namely, whether the harm is the coercive or the sexual aspect of the assault. For these reasons, it is necessary to shift from the existing

Columbia Journal of Law and Social Problems 37 (2004–5): 37–66.

⁵⁰ See, Brouwer, *supra* n 18 for an overview of these arguments.

⁵¹ Kristen Boon, 'Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent,' *Columbia Human Rights Review* 32 (2001): 625–675.

⁵² Kirsten Campbell, 'The Trauma of Justice,' *Social and Legal Studies* 13(3) (2004): 329–305.

⁵³ Lacey, *supra* n 7 at 104.

⁵⁴ Cahill, *supra* n 46 at 170.

⁵⁵ The ICTR Appeals Chamber recently rejected the affirmative defence argument, and held that non-consent is an element of the offence. *Gacumbitsi*, para 153.

⁵⁶ Brouwer, *supra* n 18. See also, *Muhimana*, para 546.

⁵⁷ Karen Engle, 'Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina,' *The American Journal of International Law* 99(4) (2005): 778–816.

⁵⁸ *Gacumbitsi*, para 149. Note that this argument was rejected.

models of sexual violence that turn on consent in various forms to develop a new model that engages with the specificity of the harm, comparable to other harms under humanitarian law. The failure to address sexual violence as a specific harm reflects its traditionally neglected status in international law.⁵⁹ Bassiouni notes that 'there are significant gaps in protection from sexual violence, in the normative scheme for its prohibition and in the punishment of offenders.'⁶⁰ A crucial gap is that sexual violence in its own right is not accorded the status of an international crime. Rather, it is only when sexual violence has a nexus to armed conflict, the intended destruction of a national, ethnic, racial or religious group, or an attack upon a civilian population, that the conduct becomes an international crime. Accordingly, sexual violence is a subsidiary act, which is recognised as an international crime only when framed by other forms of illegality.⁶¹ This model characterises the conduct as significant only where it is understood in terms of a crime against a victim's community or nation,⁶² which solidifies those very boundaries of ethnicity, community and nation that are so often themselves at stake in armed conflicts.

The challenge is to provide an adequate model of sexual violence as a specific offence under humanitarian law. As Fionnuala Ní Aoláin points out, that model needs to capture the complex harms of sexual violence, both in terms of the harm that the perpetrator intends to inflict, and the experience of the harm by the victim.⁶³ This challenge requires reconsidering both the sexual and the violent nature of the harms. While in some domestic jurisdictions there has been considerable emphasis upon understanding sexual assault as a violent act, in the context of *sexualised* practices of armed conflict it is clear that perpetrators intend, and victims' experience, these practices as sexual.

If it is necessary to have a category of legal harms that recognises the specificity of sexual violence, then it is also necessary to address the limitations of the current model of such harms. The dominant approach to this issue of harm defines 'sexual violence' as acts of a sexual nature, and 'gender violence' as 'violence that is targeted at women or men because of their sex and/or socially constructed roles.'⁶⁴ This distinction between sexual and gender violence follows United Nations policies in distinguishing between biological sex and socially constructed gender.⁶⁵ However, this distinction is particularly difficult to sustain in relation to sexual violence that

⁵⁹ Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000).

⁶⁰ M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (New York: Transnational, 1996), 560.

⁶¹ Judith Gardam and Michelle Jarvis, *Women, Conflict, and International Law* (The Hague, Boston, and London: Kluwer, 2001).

⁶² Doris Buss, 'Women at the Borders: Rape and Nationalism in International Law,' *Feminist Legal Studies* 6(2) (1998): 171–203.

⁶³ Fionnuala Ní Aoláin, 'Rethinking the Concept of Harm and Legal Categorizations of Sexual Violence During War,' *Theoretical Inquiries in Law* (2000) 1(2): 307–340.

⁶⁴ Brouwer, *supra* n 18 at 27.

⁶⁵ Valerie Oosterveld, 'The Definition of 'Gender' in the Rome Statute of the International Criminal Court: A Step Backwards?' *Harvard Human Rights Journal* 18 (2005): 55–84.

harms women's bodies. The characterisation of these crimes typically involves a conceptual slippage between sexual violence and gendered harms.⁶⁶ This difficulty suggests that it is necessary to develop a new model of the gendered nature of the harm that the law seeks to prohibit. In particular, it is necessary to develop a new understanding of the sexual nature of the harm that can address the complex relationship between sexual and gender violence.

The Trials of Sexual Violence: Gender and Legal Practice

The field of law consists not only of the norms that define the harms of sexual violence in armed conflict, but also the practices that adjudicate the claim of harm. Bourdieu points out that:

[e]ntry into the juridical field implies the tacit acceptance of the field's fundamental law [that] conflicts can only be resolved juridically – that is, according to the rules and conventions of the field itself.⁶⁷

These rules and conventions are forms of social action particular to that field, the practices of the legal trial such as investigation, trial, judgement and sentencing of crimes. What then is the relationship between legal practices and the regulation and reiteration of norms of masculinity and femininity? Are there gendered patterns of legal practice?

In answering these questions, I focus upon two sets of related practices of the legal adjudication of sexual violence. The first set of practices concern the formation of sexual violence in armed conflict as a juridical problem. These practices involve 'the juridical construction of the issue [that] institutes the controversy as a lawsuit, as a juridical problem that can become the object of a juridically regulated debate.'⁶⁸ These practices construct the legal wrong or claim that the court adjudicates. I examine how legal practices construct sexual violence in armed conflict as a juridical issue by analysing counts in indictments in ICTY sexual violence cases. I focus upon counts because these are the legal practices that articulate the legal wrong, and create the case that the court adjudicates. The second set of legal practices that I examine is the legal trial, that is, the case that the court adjudicates. This analysis considers practices of naming and witnessing harms in trial proceedings by focusing upon the role of victims and perpetrators. The aim of this analysis of counts and cases is to identify the gendered patterns of these legal practices. It is not to provide statistical correlations within international

⁶⁶ See, for example, the very problematic discussion of the finding that cutting a pregnant women open from her breasts to her vagina was not a physical invasion of a sexual nature, while acknowledging that the act interfered with the sexual organs. *Muhimana*, para 557.

⁶⁷ Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field,' *Hastings Law Journal* 38 (1986–1987): 831.

⁶⁸ *Ibid*, 831–832 [emphasis original].

⁶⁹ For a discussion of the limitations of this approach see, Jack Goldsmith and Adrian Vermeule, 'Empirical Methodology and Legal Scholarship,' *The University of Chicago Law Review* 69(1) (2002): 153–167.

criminal justice,⁶⁹ but rather to describe and interpret the relationship between gender norms and legal practices. This contextual analysis seeks to identify how regular patterns of specific forms of social practice, namely, legal proceedings, produce and reproduce gender.

The ICTY does not undertake analysis of legal proceedings in the area of sexual violence.⁷⁰ ICTY staff suggest that there are two key reasons for this. First, there are the difficulties of providing such monitoring, including tracking cases, the amendment of indictments, the consolidation or separation of cases, the withdrawal of charges and the hearing of these offences in closed sessions. Second, changes in the charging strategy of the Office of the Prosecutor (OTP) in response to decisions of the Chambers (and broader policy shifts such as the ICTY completion strategy) exacerbate this difficulty. However, it is possible to address these difficulties by using interpretative social research methods to analyse ICTY sexual violence prosecutions. This approach provides two strategies that can identify important patterns and relations of gendered legal practice.

The first strategy is to identify cases that include sexual violence conduct prohibited under international law. This strategy uses the current legal definition of sexual violence, which delineates the legal harm under adjudication, to identify sexual violence cases. It uses this legal definition to select those cases in which indictments specify sexual violence (such as rape as a crime against humanity), or where it forms the factual basis of the criminal conduct (such as the forced sexual mutilation of another prisoner, charged as torture or inhuman treatment under Article 2 of the ICTY Statute). It excludes those cases where the indictment does not charge sexual violence, but is subsequently put forward in testimony as evidence of an offence, since that evidence does not constitute the legal claim that the court adjudicates. This approach addresses the problem of amendment of indictment, withdrawal of charges, case consolidation and so on, by analysing the final form of the indictment presented at trial. That final indictment articulates the legal wrong that the court adjudicates. It also addresses closed session and redacted indictments by only analysing completed indictments that go to trial, that is, to adjudication. It treats closed sessions as related to evidentiary matters only, and redacted charges on indictments as incomplete where they have not yet been considered at trial.

The second strategy is to use completed sexual violence prosecutions as a 'case study' of legal practices of international criminal justice. In the sociological context, case-study methodology conceives the object of study as a set of bounded,

⁷⁰ ICTY staff in interviews with author and Dr Sari Wastell (The Hague, 2006–2007). Eighty interviews were conducted with ICTY staff during field work undertaken over two years in the Hague and the former Yugoslavia as part of the research project, 'The Codification of Trauma in Humanitarian Law,' funded by the Wenner Gren Foundation. Further references to 'ICTY interviews' refer to this research.

⁷¹ Clyde Mitchell, 'Case and Situation Analysis,' in *Qualitative Research*, ed. Alan Bryman and Robert Burgess (London: Sage, 1999).

related and limited social practices.⁷¹ The ‘case’ or object to be studied in this instance is the set of completed ICTY sexual violence trials, which are understood as a related and bounded set of social practices. The approach complements the earlier description of law as a structured and socially patterned activity, and legal practices and norms as specific forms of social practice. It does not reduce cases to a reflection of a specific prosecutorial (or defence) strategy at a particular time. Rather, this approach provides a global picture of sexual violence offences by treating completed legal proceedings as a set or ‘case’ of related and structured legal practices. Case study research utilises different methodological approaches in order to examine the case in detail.⁷² To examine this case of completed legal proceedings in detail, the study draws on documentary analysis, ethnographic fieldwork and in-depth interviews.⁷³

The Victims of Sexual Violence: Cases and Counts

There have been 17 cases of sexual violence out of a total of 35 completed cases heard by the ICTY. Their first striking aspect is that the indictments specify the gender of the victim in all but three cases:

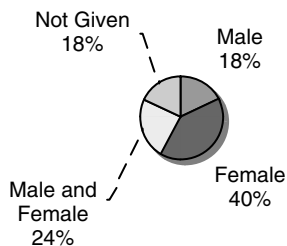


Fig. 1 Sexual violence cases by sex of victim

Seven cases include counts of sexual violence solely against female victims, three against male victims and four involving both male and female victims. The second notable aspect is that over 40 percent (7 out of 17) of the total number of these cases include charges in which men are the victims of sexual violence.

If we consider counts rather than cases, then a slightly different pattern emerges, which can be seen in Figure 2 below. Of a total of 476 counts, 108 involve sexual violence, that is, approximately 20 percent of all counts. Of these sexual violence counts, 64 involve offences against women; 31 against men; 5 against both men and women; with 8 unspecified:

⁷² Roger Gomm et al., *Case Study Method* (London: Sage, 2000); Robert Yin, *Case Study Research* (London: Sage, 2003).

⁷³ See, ICTY interviews, *supra* n 70.

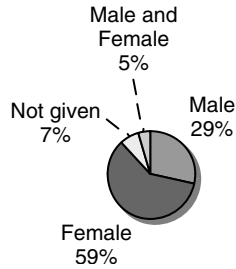


Fig. 2 Sexual violence counts by sex of victim

The majority of the counts involving sexual violence against women were brought in the case of *Kunarac*. As can be seen in Figure 3 below, if the *Kunarac* offences are excluded, then there is an equal distribution of male and female sexual violence offences in other cases. A similar pattern holds for all cases involving explicit rape charges, in which 19 (83 percent) involve offences against women, and four (17 percent) offences against men. With *Kunarac* excluded, again there is a roughly equal distribution, with four rape charges involving male and three charges female victims:

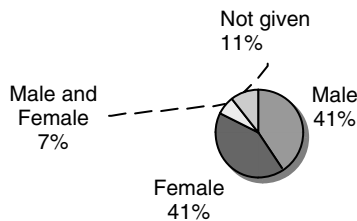


Fig. 3 Sexual violence counts by sex of victim (excluding *Kunarac*).

The high number of cases and counts involving sexual violence against male victims is unexpected for two reasons. First, prosecutions of these cases are in clear contrast to the general lack of visibility of male sexual assault in the Yugoslavian conflict; both in terms of media coverage and in comparison to the institutional and legal focus upon sexual violence against women.⁷⁴ Second, the high proportion of counts of male sexual assault are surprising given the generally agreed predominance of sexual violence against female victims in the conflict. Estimated numbers of female victims of sexual violence in Yugoslavia range from 12,000 to 50,000.⁷⁵ Exact numbers of female victims were difficult to establish for two rea-

⁷⁴ Eric Steiner Carlson, 'The Hidden Prevalence of Male Sexual Assault During War,' *British Journal of Criminology* 46 (2006): 16–25; and Nidzara Ahmetasevic, *The Last Taboo*, 'Balkans Investigative Reporting Network,' 19 August 2006, <http://www.bim.ba/en/8/10/852/>.

⁷⁵ The number of victims has been highly contested and the precise figures are unknown - see, Catherine Niarchos, 'Women, War and Rape,' *Human Rights Quarterly*, 17(4) (1995): 649–690. The commonly accepted estimate of victims is 20,000, first given in the EC *Investigative Mission into the Treatment of Muslim Women in the former Yugoslavia* (1993), para 14, and confirmed by Cherif Bassiouni in *Sexual Violence: An Invisible Weapon of War in the Former Yugoslavia* (International Human Rights Law Institute, De Paul University College of Law, 1996), note 9.

sons. First, these investigations faced not only the general challenges encountered when researching sexual violence, but the additional difficulty of doing so in the midst of an armed conflict.⁷⁶ Second, as claims and counter-claims of sexual violence became part of the Yugoslavian conflict,⁷⁷ these estimates themselves became the subject of ‘wars of interpretation.’⁷⁸ Similar difficulties arose in investigating incidents of sexual violence against men and there are no comparable estimates for male sexual assault.⁷⁹ It is important to emphasise that while the actual levels of male sexual assault may never be known, it was undoubtedly a feature of this conflict. The issue here is not whether it is possible to provide exact numbers of victims or to establish that only women were victims of sexual violence. Rather, it is to identify the ‘gender dimension of conflict.’⁸⁰ It is now well established that there are significant differences in the patterns and scale of male and female sexual assault in the conflict. For example, the Bassiouni Report notes incidences of male sexual violence, but it does not suggest that these are comparable to the widespread and systematic rape of women, or that they occur across all categories of sexual assault.⁸¹ The high number of male sexual violence prosecutions by the ICTY does not reflect these differential patterns and scales of sexual assault.

The first gendered pattern of legal practices in these legal proceedings concerns the overrepresentation of prosecuted incidences of sexual violence against men, where that overrepresentation is defined in terms of comparable incidences of female sexual assault in the conflict. If it is agreed that incidences of male sexual assault form a comparably small proportion of total sexual assaults, then it is reasonable to expect that the proportion of male and female victims before the ICTY would reflect this. However, approximately 40 percent of the cases, and 30 percent of the counts involve sexual violence in which men are victims. If the *Kunarac* case is excluded, then there is an equal distribution of male and female sexual violence offences in other cases. These proportions do not reflect the generally agreed differential scale of gendered assaults.

The high number of counts of male sexual assault counts may be explained by the disproportionate number of male witnesses appearing before the Tribunal. Eighty percent of Tribunal witnesses are male, and 20 percent are female.⁸²

⁷⁶ See, Tadeusz Mazowiecki, *Situation of Human Rights in the Territory of the former Yugoslavia*, E/CN.4/1993/50 (1993) [hereafter ‘Mazowiecki Report’], and Cherif Bassiouni, *Final Report of the Commission of Experts*, UN Doc. S/1994/674 (1994) [hereafter ‘Bassiouni Report’].

⁷⁷ Vesna Nikolic-Ristanović, *Women, Violence and War: Wartime Victimization of Refugees in the Balkans*, trans. Borislav Radovic (Budapest: Central European University Press, 2000).

⁷⁸ Vesna Kesić, ‘Muslim Women, Croatian Women, Serbian Women, Albanian Women...’ in *Balkan as Metaphor*, ed. Dušan Bjelic and Obrad Savic (Cambridge, MA and London: Massachusetts Institute of Technology Press, 2003), 317.

⁷⁹ Pauline Oosterhoff et al., ‘Sexual Torture of Men in Croatia and Other Conflict Situations: An Open Secret,’ *Reproductive Health Matters* 12(23) (2004): 68–77.

⁸⁰ Sandesh Sivakumaran, ‘Sexual Violence against Men in Armed Conflict,’ *The European Journal of International Law* 18(2) (2007): 260.

⁸¹ Similarly, the Mazowiecki Report describes estimates as indicative of the scale of sexual violence. Mazowiecki, supra n 76 at para 30.

⁸² Michelle Jarvis, ‘An Emerging Gender Perspective on International Crimes,’ in *International Criminal Law Developments in the Case Law of the ICTY*, ed. Gideon Boas and William Schabas (Leiden and Boston: Nijhoff, 2003).

Moreover, as the figures include women testifying to sexual violence, the imbalance of women testifying to non-gender related crimes is even more significant. While female witnesses are significantly underrepresented in proceedings before the ICTY, Tribunal staff emphasise the persuasiveness and usefulness of female witnesses testifying to events other than sexual violence, not least of which because women are often survivors of those events.⁸³ Just as having both women and men testify to sexual violence shows different aspects of gendered harms, having women testify to their experience of armed violence reveals a different understanding of conflict itself.

Those gendered patterns in witnessing war can also be seen in the naming of the harms of war. Rosalind Petchesky points out that ‘acts of sexual violence against men, women, and transgenders are named and experienced differently, which is what it means to say they are gendered.’⁸⁴ The charging of sexual violence presents it as the legal issue that the court adjudicates, and its naming as a particular category of criminal offence determines the nature of the harm that the court recognises. To charge sexual violence as genocide is to categorise it as a different kind of harm from charging the conduct as a crime against humanity; the former characterises the assault as an element of the destruction of an ethnic group, while the latter frames it as part of a systematic attack on a civilian population.

As can be seen in Figure 4 overpage, sexual violence offences involving male victims roughly evenly divide between grave breaches of the Geneva Convention, war crimes and crimes against humanity (including four counts of rape). Sexual violence offences against women are predominantly charged as war crimes (with nine counts of rape) or crimes against humanity (with ten counts of rape), with a smaller number of charges of grave breaches. In the small number of genocide cases, sexual violence was explicitly charged against women (four counts), men and women (two counts) or unspecified (two counts). These genocide cases all involve women held in camps and detention centres; including the *Brdanin* case where although two counts involve both male and female victims, the indicted criminal conduct predominantly involves the rape of female victims.

In the charging of these offences, explicit charges of rape as a violation of the laws and customs of war, or rape as a crime against humanity, comprise a third of total sexual violence offences against women. As Figure 5 shows, the multiple charges of rape in *Kunarac* explains, in part, the higher number of counts of war crimes and crimes against humanity involving female victims of sexual violence, as does the fact that rape can be charged as an explicit and constituent element of these offences.

Those gendered patterns of legal practices in which women appear to predominantly testify to sexual violence have profound implications for the speaking positions of men and women before the Tribunal, since it creates a pattern in which men appear to testify to conflict and women testify to rape. If men primarily narrate war,

⁸³ ICTY Interviews (The Hague, 2006–2007), supra n 70.

⁸⁴ Rosalind Petchesky, ‘Rights of the Body and Perversions of War,’ *International Social Science Journal* 57(184) (2005): 312.

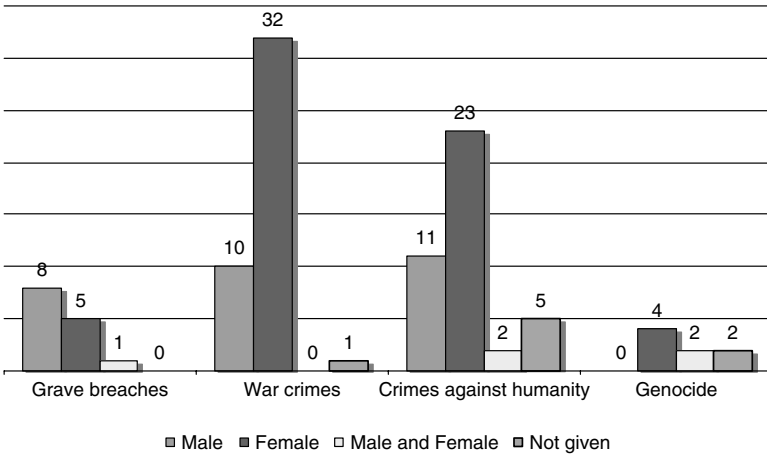


Fig. 4 Sexual violence offences by sex of victim

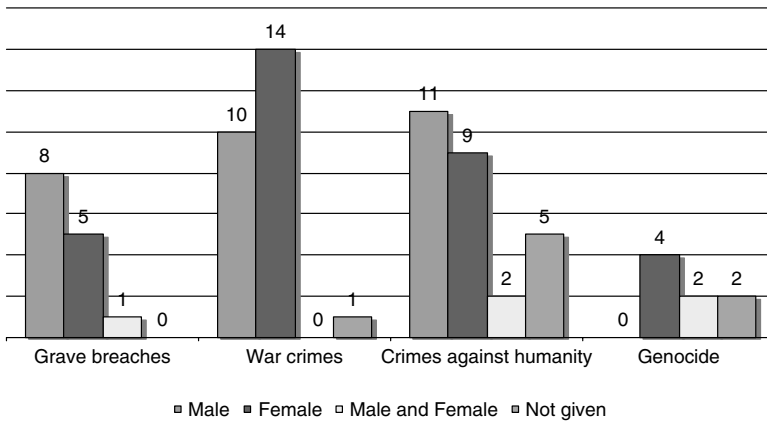


Fig. 5 Sexual violence offences by sex of victim (excluding *Kunarac*).

then they appear to function as actors within the conflict. If women only narrate rape, then they appear as passive victims of *sexual* violence. Such narrative framing reproduces traditional models of active masculinity and passive femininity. It produces the problem of the *legal representation* of women’s agency, which becomes particularly important in this context of the engendering of naming and witnessing harms of conflict.

While there is an overrepresentation of counts of sexual violence against male compared to female victims, and a differential distribution of the categories of

offences being charged between genders, there is an underrepresentation of cases in which sexual violence against male victims forms the sole basis of the charges. For example, there is no case comparable to that of *Kunarac* or *Furundzija* for male victims of sexual violence. This is surprising given the high numbers of counts of sexual violence against men. While *Kunarac* was explicitly selected and publicised by the ICTY as a landmark case in the prosecution of sexual violence against women, there has not been an equivalent in the prosecution of male sexual violence, nor have the charges of male sexual violence been characterised as such.

In this gendered pattern of cases, women are visible victims of sexual violence, while men remain the invisible victims. Ruth Graham notes that in the heterosexual making of gendered bodies, ‘the male body is *by definition* the penetrator/not penetrated, and the female body is also *by definition* the penetrated (by the reception of penetration).’⁸⁵ These patterns of legal practice reiterate these norms of heterosexual sexuality – those dominant ideas of who does what to whom, which figure masculinity as active and femininity as passive.⁸⁶ In these models of sexuality,

penetration of the female body remains less ‘shocking’ than that of the male body, because the definition of the male corporeal boundary is contradicted by such a penetration, in a way that the boundaries of the female body are not.⁸⁷

In this respect, it is notable that the four counts of male rape involve fellatio rather than anal penetration. The sexually assaulted man made ‘passive’ through feminising sexual assault appears more problematic than the heterosexual rape of a woman, and for this reason is not made visible. This invisibility in turn reinforces gendered framings of conflict, in which men are active agents of conflict and women are passive civilians subject to sexual violence.

Perpetrators and Patterns of Sexual Violence

If prosecutions are analysed in terms of perpetrators rather than victims, then the gendered pattern of perpetrators and their mode of participation in offences is again evident. There is only one ICTY case involving a female perpetrator, Biljana Plavsic, the former President of Republika Srpska, in which sexual violence against non-Serb persons was charged as genocide and as persecution, a crime against humanity.⁸⁸ It has been suggested that the failure to indict other women reflects an assumption that women are only victims rather than agents of conflict.⁸⁹ However, the legal issue for the Tribunal is not participation in conflict, but participation in, and responsibility for, illegal acts. The failure to indict other women

⁸⁵ Ruth Graham, ‘Male Rape and the Careful Construction of the Male Victim,’ *Social and Legal Studies* 15(2) (2006): 197–8 [emphasis original].

⁸⁶ The two conventional defence strategies in domestic rape trials that draw upon these notions of femininity – that the victim had consented to the sexual relationship (*Kunarac*) or was an unreliable witness due to trauma (*Furundzija*) – appear only in the cases of female sexual assault.

⁸⁷ Graham, *supra* n 85.

⁸⁸ *Prosecutor v. Plavsic* (IT-00-39), Sentencing Judgement, 2003.

⁸⁹ Engle, *supra* n 57.

in fact reflects the gendered patterns of conflict and power within the Yugoslavian war and politics, where (like many other states) women were significantly under-represented in the military and political institutions involved in the conflict.⁹⁰

Plavsic was not a physical participant in the criminal conduct, but was charged as a member of a joint criminal enterprise and for her superior responsibility. This indirect mode of participation is typical of 'higher level' Tribunal cases, including those involving sexual violence charges. However, the majority of sexual violence offences against women involve actual physical perpetration. In contrast, male sexual violence offences typically do not involve the perpetrator physically assaulting another man, but rather the perpetrator forcing male detainees to sexually assault each other (most usually fellatio).

These cases reveal that sexual violence takes different forms – and has different functions – in armed violence. The cases tried before the ICTY generally fall into two categories of sexual violence. The first category consists of the so-called 'camp cases,' where sexual violence against both males and females occurs in detention camps or centres. The second category consists of so-called 'ethnic cleansing cases,' where sexual violence occurs during the forced removal of a group from an area. To date, the latter category has only included charges of sexual violence against women.

The Final Report of the United Nations Commission of Experts (the Bassiouni Report) identifies five key patterns of sexual violence in the Yugoslavian conflict, which range from sexual violence as a strategy of ethnic cleansing to the opportunistic detention of women.⁹¹ It is possible to find examples of each of these patterns of sexual violence against women in ICTY cases. However, patterns of sexual violence against men are not similarly represented, and the failure to prosecute a single case of male sexual violence comparable to *Kunarac* reinforces the invisibility of male sexual assault.

A New Framework for Sexual Violence in Transitional Justice Prosecutions

These gendered legal norms and practices suggest that it is necessary to develop a new legal conception of the harms of sexual violence in armed conflict. First, we need to understand 'sexual violence' as a category that describes a wide range of acts, ranging from forced nudity to sexual penetration. This category should be understood as a continuum of coercive sexual acts in conflict. This approach permits the legal model of the harm of sexual violence to capture its different forms and patterns.⁹²

Second, it is necessary to develop a new understanding of the gendered and sexual nature of the harms of sexual violence. Sexual violence is 'the form of violence

⁹⁰ Olivera Pavlovic, 'The Participation of Women in Politics – Analysis of the 2000 Local and General Elections in Bosnia and Herzegovina,' *South-East Europe Review* 3 (2001): 125–140.

⁹¹ Bassiouni Report, supra n 76 at annex IX, sec C.

⁹² Cheryl Benard, 'Rape as Terror: The Case of Bosnia,' *The Journal of Terrorism and Political Violence* 6(1) (1994): 29–43; Ruth Seifert, 'The Second Front: The Logic of Sexual Violence in Wars,' *Women's Studies International Forum* 19 (1996): 35–43.

which most clearly communicates masculinisation and feminisation.⁹³ That is, sexual violence is a performative act that instantiates these gender norms. Understanding sexual violence as performative suggests that it is an action that through its performance or enactment constitutes norms of masculinity and femininity through violence. It *produces* sexual difference through its repetition of those norms by force upon the body. Sexual violence in armed conflict constitutes sexual (biological) difference through gender (social) difference, thereby reproducing ‘the ideal types of “masculinity” and “femininity” as they are constituted in a patriarchal society in the state of war.’⁹⁴ For example, if the primary role of the female body in a society is to reproduce nation or ethnicity,⁹⁵ then ethnically targeted rape attempts to reduce women to their reproductive roles, attempting to symbolically and physically transform ‘the individual body into the social body’ in order to destroy it.⁹⁶

These acts constitute bodies and their sexual difference along axes of identity, ethnicity and power, in contexts of conflict in which those persons were often not previously ascribed those identities, and in which those identities are at stake in the conflict itself. Sexual violence in armed conflict works to constitute these identities, making individuals into the social categories of the perpetrator – for example, a ‘Muslim man.’ This reduction to social identities as defined by the violence of the perpetrator, and in particular to one’s *sex* in the case of sexual violence, is an integral part of the harm.

In this model, masculinity and femininity are norms that are constituted in relation to each other. For example, male sexual assault often involves the feminisation of its victims (‘you are not a man’), and female sexual assault the reduction of women to their non-masculine role of femininity (‘you are a woman’). Moreover, these relational terms are filled with imaginary content in relation to specific social contexts – in this society, this is what it is to be a man, and this is what it is to be a woman – and the content of these is itself subject to contestation in conflict. To identify the specific harms of sexual violence in particular conflicts it is therefore necessary to identify how notions of sexual difference are given meaning in that social context.⁹⁷

From this new model of sexual violence in conflict we can develop two important strategies to address the engendering of the legal mechanisms of transitional justice. The first strategy involves the recognition by the international community of sexual violence in armed conflict as an offence in its own right. The definition of this offence could usefully build upon the customary international rule that

⁹³ Inger Skjelsbaek, ‘Sexual Violence and War: Mapping Out a Complex Relationship,’ *European Journal of International Relations* 7(2) (2001): 227.

⁹⁴ Nikolic-Ristanovic, *supra* n 77 at 79.

⁹⁵ Kesic, *supra* n 78.

⁹⁶ Maria Olujić, ‘Embodiment of Terror: Gendered Violence in Peacetime and Wartime in Croatia and Bosnia–Herzegovina,’ *Medical Anthropology Quarterly* 12(1) (1998): 43. This is of course not the only form or function of sexual violence in war. See, Benard, *supra* n 92.

⁹⁷ Darius Rejali, ‘After Feminist Analyses of Bosnian Violence,’ in *The Women and War Reader*, ed. Lois Ann Lorenzen and Jennifer Turpin (New York and London: New York University Press, 1998).

prohibits rape and other forms of sexual violence in armed conflict.⁹⁸ Nevertheless, this rule cannot simply be used to define an international crime of sexual violence because of technical issues regarding the different customary norms in international or non-international conflicts; the problem of sufficient specificity; and the prohibition upon sexual violence as genocide and crimes against humanity, which do not require a nexus to conflict.

To develop this model of the prohibited harm as a specified criminal offence, we first need to consider it as a *category* of prohibited acts, namely, acts of a sexual nature, committed in coercive circumstances. This approach has a number of advantages. First, it draws on the existing legal model of sexual violence as a category of sexual acts, including rape, committed in coercive circumstances. Second, understanding sexual violence as a continuum of acts does not distinguish between rape and other offences, and hence does not privilege a penetrative conception of the criminal act. Third, this model can articulate the different forms of the harm of sexual violence in conflict. Fourth, and perhaps most importantly, the emphasis upon the coercive circumstances of the act shifts the focus of proceedings from the consent of the complainant to the context and conduct of the defendant.⁹⁹

There are two possible ways to articulate these harms: as a number of different offences or as a single differentiated offence. The ICC Statute is an example of using a strategy of a number of different offences. However, such an approach does not significantly overcome the weaknesses of the ICTY model discussed earlier, such as the hierarchy of international crimes and so on. The second strategy uses a differentiated offence, that is, a definition that refers specifically to the different ways in which the wrong can be perpetrated. This strategy is preferable because it articulates the harm of sexual violence as a distinct offence, while specifying the different ways in which it can be perpetrated – such as a nexus to armed conflict, an attack upon a civilian population, or the destruction of a protected group – and that give the conduct its character as an international crime.¹⁰⁰ Using a differentiated offence addresses the limitations of the specific applicability of existing humanitarian rules (international or non-international, protected or non-protected person, systematic or non-systematic). It also permits the development of new modes of perpetration that can better symbolise the different forms of sexual violence in conflict.

Together with this differentiated offence of sexual violence, the second strategy is to utilise a model of representative prosecution. This strategy would ensure that legal proceedings reflect the patterns of sexual violence in a particular armed conflict so that counts and cases reflect specific patterns of illegality. The decision to prosecute should consider not only the prosecution of those who are most responsible for the worst crimes, but also that these cases should represent the different forms of that illegality. If sexual violence assumes different patterns in conflict, then cases chosen to represent the illegal forms of conflict should reflect those patterns.

⁹⁸ Henckaerts and Doswald-Beck, *supra* n 9.

⁹⁹ Victor Tadros, 'Rape without Consent,' *Oxford Journal of Legal Studies* 26(3) (2006): 515–543.

¹⁰⁰ *Ibid.*

Moreover, it entails that the charges and cases should reflect the different patterns of sexual violence against men and women in a particular conflict. The effective implementation of this strategy would require:

- (1) investigation and identification of patterns of sexual violence in the particular conflict;
- (2) proportionate charging of female and male sexual violence offences to reflect those patterns;
- (3) prosecution of a case that arises solely from charges of male sexual violence if appropriate to that conflict;¹⁰¹
- (4) proportionate numbers of male and female victim-witnesses; and
- (5) regular review and analysis of cases in terms of sexual violence offences to make visible and to address gendered patterns of prosecution and trial.

Two objections to this strategy of representative prosecutions might be raised. First, how would this strategy deal with the difficulty of fully characterising the totality of a conflict, which often involves a very complex set of social actors and practices, prior to the significant and sustained investigative and judicial work of legal trials? However, the effective prosecution of international offences necessarily requires an understanding of the context of conflict in which the criminal incident takes place. As Mohamed Othman, the former Chief of Prosecutions for the ICTR, notes:

[t]he body politic of any given situation ... is crucial to investigations and to the formulation of a prosecution and investigation strategy. These crimes are best investigated and prosecuted, if the socio-political, and other dimensions (e.g. historical, cultural, etc.) of a conflict or a crisis are appreciated.¹⁰²

Moreover, it is possible to address this challenge by developing appropriate pre-trial investigative policies, and drawing on appropriate scholarly and legal expertise (such as historians, anthropologists and military experts).

The second possible objection concerns whether it is possible to retain the penal function of a judicial body – to punish all that break the law – with a policy of selective prosecution.¹⁰³ However all international criminal institutions necessarily have a policy of selective prosecution.¹⁰⁴ For example, considerations of representation concerning gaps in jurisprudence, regions of the conflict and particular ‘situations’ of conflict have shaped prosecution policy in the ICTY.¹⁰⁵ The issue is not whether there *should* be selective prosecution; as selection is an integral part

¹⁰¹ This would also shift current understandings and prosecutions of male sexual violence in conflict.

¹⁰² ‘Briefing Note: ICC-OTP Questions,’ 3 February 2003, www.icc-cpi.int/library/organs/otp/Othman.pdf.

¹⁰³ Michael Humphrey, ‘International Intervention, Justice and National Reconciliation: The Role of the ICTY and ICTR in Bosnia and Rwanda,’ *Journal of Human Rights* 2(4) (2003): 495–506.

¹⁰⁴ Carla Del Ponte, ‘Investigation and Prosecution of Large-scale Crimes at the International Level: The Experience of the ICTY,’ *Journal of International Criminal Justice* 4(3) (2006): 539–558.

¹⁰⁵ ICTY interview (The Hague, 2006–2007).

of international legal enforcement mechanisms, and this approach merely amplifies those necessary exercises of prosecutorial discretion and strategy.¹⁰⁶ Rather, the issue concerns the appropriate criteria of selection of prosecutions. An explicit policy of representative prosecution accepts that an appropriate ground of selection is that cases should represent patterns of illegality in conflict, including patterns of illegality of sexual violence. The development of this policy at an international level could then serve as a model for both criminal and non-legal transitional justice mechanisms at a national level, which have often been extensively criticised for the failure to address issues of gender and sexual violence.¹⁰⁷

This analysis of international legal rules and proceedings reveals the gender of international transitional justice. It shows how 'gender' structures these mechanisms of post-conflict justice, such that these norms and practices are not gender-neutral but instead reiterate existing hierarchical models of gender. For this reason, it is necessary to develop strategies to address this engendering of transitional justice. The first task is to develop a new understanding of sexual violence in armed conflict as a continuum of acts that constitute gender norms through force. From that new model, it then becomes possible to develop two strategies to undo the existing gendered construction of these accountability mechanisms. The first strategy is the international recognition of a differentiated international crime of sexual violence. The second is that international criminal proceedings should apply a policy of representative prosecutions, which could function as a model for national criminal and non-legal transitional justice mechanisms.

These strategies will produce new understandings of the harms of war, and hence, of the legal norms and practices that are needed to provide justice for its victims. For this reason, these strategies of transforming rather than reiterating the gender of post-conflict legal accountability will challenge existing models of legal accountability in transitional justice. To transform the gender of these transitional justice mechanisms will thus contribute to the transformation of the very notion of transitional justice itself.

¹⁰⁶ See the special issue on prosecutorial discretion, *Journal of International Criminal Justice*, 3(1) (2005).

¹⁰⁷ Bell and O'Rourke, *supra* n 2.