ENHANCING THE VISIBILITY OF SEXUAL VIOLENCE AGAINST MEN:
A CRITIQUE OF THE ICTY

Sexual violence against detained male soldiers, prisoners and non-combatants was a recurring pattern during the Yugoslav Wars. NGO reports, the Bassiouni report and also the court material from the International Court of Justice case regarding Bosnia’s application of the Genocide Convention\(^1\) substantiate that men’s sexuality was systematically targeted. A former member of the International Criminal Tribunal for the former Yugoslavia (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.\(^2\) However, a thorough analysis of the ten ICTY cases that featured sexual violence against men (Tadić, Mucić et al., Todorović, Sikirica et al. and Mejakić et al., Stakić, Simić et al., Česić, Brđanin, Krajšnik, and Martić) revealed that a proper recognition of male victims has not taken place. In fact, there were many more factors that diminished the visibility of sexual violence against men at the ICTY than factors that enhanced the recognition of male victimhood.

Only one case, Česić, concluded with a rape conviction under Article 5 (g) of the ICTY Statute for the sexual abuse of male detainees. In all other cases, the issue of sexual violence against men was inadequately addressed, reduced to a single paragraph or a footnote in the judgement, charged together with other forms of physical violence such as beatings, or referred to by the Trial Chamber as ‘other forms of mistreatment’.\(^3\) While Furundžija and Kunarac et al. stand out as exemplary cases in which the ICTY developed and enhanced the prosecution of sexual violence against women and its recognition as a war crime, an equivalent case on male victimhood of sexual violence has not been decided by the ICTY.

Sexual violence against men in the form of sexual mutilation, forced acts of fellatio between male detainees or between detainees and prison guards, and forced anal penetration with various

\(^1\) *Bosnia Herzegovina v. Yugoslavia (Serbia and Montenegro)* Application of the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ, General List No. 91, 20 March 1993, § 44D (d) (h)


objects has been prosecuted at the ICTY alongside or as other forms of physical mistreatment under a charge of torture, cruel or inhuman treatment, or the wilful causing of great suffering or serious injury. This is a problem in that it hinders men from being recognized as a targeted group for sexual violence in armed conflict.

The ICTY established in Mucić et al. that rape is a form of torture. Undoubtedly, including rape under the umbrella of the prohibition of torture has advanced its recognition as a tool of warfare. Particularly in the context of the ICTY Statute, where rape is only explicitly listed as an offence under crimes against humanity, the understanding of rape as torture has been an advantage for the Prosecution. It allows rape to be prosecuted as a grave breach of the Geneva Conventions or a violation of the laws and customs of war when the chapeau requirements for crimes against humanity are not fulfilled. However, rape and torture are distinct offences in terms of intent of the perpetrator and effects on the victim. Therefore, sexual violence should be charged and prosecuted as both rape and torture when the circumstances of the case allow.

Like sexual violence against women, sexual violence against men changes a man’s position in society. Depending on the societal and cultural context, the male victim is often perceived as no longer being a real man, because he was not able to protect himself and was put into the stereotypically submissive role of a woman (‘feminization’). In the context of male-to-male sexual violence (i.e. forced acts of fellatio or anal penetration between two men who are both victims of the offence), the victim is, as Sandesh Sivakumaran puts it, ‘tainted’ with homosexuality through which societal attitudes towards him are changed, often leading to societal isolation. All of the above are part of the plan of the perpetrator when sexually abusing a man. The perpetrator purposely targets societal expectations in regards to both femininity and masculinity in order to shatter societal structures and to break the victim through an extreme form of degradation. Thus, especially when the offence is committed in such a systematic manner as in the Yugoslav Wars, the purpose of the sexual assault goes beyond the scope of the prohibition of torture, which has been defined by the ICTY as an intentional act or omission that causes severe pain or suffering for the purpose of obtaining information or a confession, punishment, intimidation or discrimination. Even when discrimination, intimidation or
punishment is intended on part of the perpetrator, a charge on torture does not adequately address the societal long-term consequences for the male victim.

The prohibition of rape, as it was defined in *Furundžija*, does not explicitly refer to the emotions of the victim or the motive of the perpetrator. Yet, a charge of rape under Article 5 (g) of the ICTY Statute has the advantage of unequivocally stating that the offence was sexual in nature and that the sexuality of the victim was targeted without his consent. This enhances the visibility and recognition of male victimhood through sexual violence. An accurate categorization of sexual abuse would help to combat stereotypes about masculinity that make male rape such a powerful means of warfare in the first place.

Under the ICTY Statute, the Prosecution had no alternative but to charge cases of sexual mutilation or other forms of sexual violence short of sexual penetration as torture or as less severe forms of physical and psychological mistreatment. To critique the Statute of the ICTY, it is problematic that the only separate crime of a sexual nature is rape and that rape is listed only as a crime against humanity in Article 5. And yet, although the ICTY Statute clearly limits the options of recognizing male victimhood through sexual violence, the respective Trial Chambers carry a degree of responsibility for this minimal recognition. Instead of circumventing the limits of the Statute by emphasizing the sexual nature of specific acts committed against men under a charge of torture, inhumane or cruel treatment, the judicial authorities at the ICTY frequently opted to refer to those acts as other forms of violence or mistreatment. In this way, the sexual nature of many offences committed against men during the Yugoslav Wars was swept under the carpet.

In summary, while the recognition of sexual violence against women, despite the constraints of the Statute, is one of the major achievements of the *Ad Hoc* Tribunal, sexual violence against men was largely understated. To this extent, the Tribunal has not fully utilized its power to advance the understanding of gender-based violence during armed conflict.