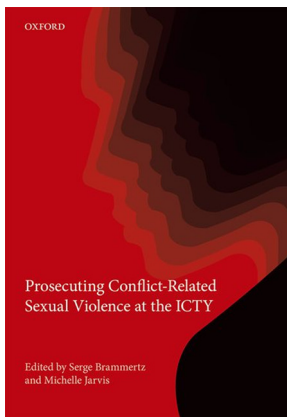


## BOOK REVIEW



# Prosecuting Conflict-Related Sexual Violence at the ICTY

**Serge Brammertz and Michelle Jarvis (eds)\***

Book review by **Silke Studzinsky**, Lawyer.

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When this book reviewer started working as an international lawyer for civil parties before the Extraordinary Chambers in the Courts of Cambodia (ECCC) in early 2008, she was surprised that investigations into sexualized violence crimes were not being conducted. This lack of action was mainly due to the misconception that while the Khmer Rouge regime was brutal, it was innocent with regard to the commission of sexualized violence crimes. Hence, the prosecution concluded that there was a lack of evidence and felt obliged to focus on the investigation of an estimated 1.7 million killings and deaths as a priority. Although many staff members of the Office of the Co-Prosecutors had a background in the International Criminal Tribunal for the former Yugoslavia (ICTY) and/or the International Criminal Tribunal for Rwanda (ICTR) and had gathered experience in the prosecution of conflict-related sexualized violence, this experience was not transferred to the ECCC. It was only through the efforts of civil parties and their lawyers that at least the policy of forced marriages was later included in investigations at the ECCC and eventually became one of the charges in the indictment. Moreover, interpreters were exclusively male, as were most of the investigators. The first training on the conduct of investigations of sexualized violence only took place after the investigations into the two main cases were concluded. This clearly shows that the course for the lack

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of investigations to sexualized violence crimes is set right at the beginning, when strategies and priorities are determined.

*Prosecuting Conflict-Related Sexual Violence at the ICTY*, edited by Serge Brammertz and Michelle Jarvis, with contributions from fourteen authors (including the editors) and counting nearly 500 pages, sheds light on almost all aspects of the challenges related to the prosecution of conflict-related sexualized violence<sup>1</sup> at the ICTY, offering responses and solutions.

Through their roles as prosecutor and deputy prosecutor of the ICTY respectively, the two editors were able to rely on their rich practical experience in the prosecution of conflict-related sexualized violence. The authors of the chapters are all former or current members of the Office of the Prosecutor (OTP), with equally rich experience with respect to the topic of the book. Each chapter looks at and analyses different aspects of the prosecution of conflict-related sexualized violence.

The book aims to compile a record of the experiences of the OTP regarding the prosecution of sexualized violence at the ICTY, documenting the experiences, achievements, challenges and practical insights of the OTP. The common aim of all the authors is to improve future investigations and prosecutions of conflict-related sexualized violence; they describe successes and shortcomings without hiding or embellishing them, they outline the developments of the past two decades, and they explain the conclusions that may be drawn from the findings obtained.

Most of the chapters of the book are based on interviews with insiders and members of the Prosecuting Sexual Violence Working Group (PSVWG).<sup>2</sup> Interviews with investigators, interpreters, prosecutors, analysts, members of senior management and members of the Witness and Victims Section enrich the book with their first-hand insight and knowledge. In addition, according to the authors, the book benefits from the inputs of external experts.

The authors acknowledge that they did not include a specific chapter on investigations in order to avoid duplication, but that the book is built on existing resources in this regard. Likewise, the book does not contain a separate section on the elements of crimes of sexualized violence because the authors do not want to repeat the work of others.<sup>3</sup>

1 The reviewer prefers the term “sexualized” over “sexual” to express that these crimes are not of a sexual nature, but of a violent one.

2 The PSVWG was founded in 2009 in order to improve the prosecution of conflict-related sexual violence. For more information, see ICTY, “Information Sheet: Prosecuting Sexual Violence Legacy Project”, Office of the Prosecutor, May 2015, available at: [www.icty.org/x/file/Outreach/sv\\_files/psv\\_legacy\\_project\\_is.pdf](http://www.icty.org/x/file/Outreach/sv_files/psv_legacy_project_is.pdf) (accessed in March 2018).

3 To name but a few, the OTP of the ICTR published a manual on best practices from lessons learned from the investigation of sexualized violence crimes: ICTR, *Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda*, 2014; see also Maria Nystedt (ed.), Christian Axboe Nielsen and Jann K. Kleffner, *A Handbook on Assisting International Criminal Investigations*, Folke Bernadotte Academy and Swedish National Defence College, 2011; United Kingdom Foreign and Commonwealth Office, *Second Edition of the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*, 2016; Women’s Initiatives for Gender Justice, *Gender in Practice: Guidelines and Methods to Address Gender Based Crime in Armed Conflict*, 2005.

The experiences described in the book rely on the specific legal and factual framework of the ICTY. Therefore, several findings only apply to the specific setting of the ICTY (for example, the possibility of amending the indictment, which is not possible for the “Document Containing the Charges” at the International Criminal Court). Any lessons drawn for the prosecution of such crimes in a different legal setting need to be adjusted to any other framework as appropriate, whether international or national.

The book consists of eleven chapters. Each chapter is followed by a very comprehensive and exhaustive summary and conclusion section with recommendations, which is akin to a checklist and is a very useful tool for practitioners. Furthermore, an inclusive table of relevant cases from international, regional and national courts and tribunals, with references to a variety of international, regional and national instruments, is provided.

In the first chapter, Michelle Jarvis describes the overarching main findings and the required hypotheses when starting investigations and prosecution. The first is that sexualized violence is committed during a conflict and is usually connected to the conflict. The second is that prosecution of sexualized violence is core for the work of any prosecution office and should not be treated differently to other crimes.

The book then looks at different aspects of the prosecution of conflict-related sexualized violence, identifies the challenges involved and offers responses and solutions for how to overcome obstacles and establish accountability for these crimes.

Following Jarvis’s introduction, the chapter by Grace Harbour puts sexualized violence into the context to which the subsequent chapters refer, examining the background of the perception of sexualized violence prior to the mandate of the ICTY and providing insight into a variety of reports that existed back then. It is important to note that reports of sexualized violence in the former Yugoslavia were among the primary concerns of many stakeholders, including the UN Security Council, eventually leading to the creation of the ICTY. Therefore, the concern with respect to such violence influenced the legal framework of the ICTY. This demonstrates that one of the reasons why the ICTY was mandated with the prosecution of sexualized violence was the existence of many reports<sup>4</sup> on the overwhelming amount of sexualized violence committed during the conflict in the former Yugoslavia.

The third chapter, by Michelle Jarvis and Kate Vigneswaran, deals with the barriers and misconceptions (a collection of the latter is based on interviews with OTP staff) which, combined with the broad discretion on the side of the OTP, negatively influence the prosecution of conflict-related sexualized violence.<sup>5</sup>

False assumptions need to be identified, addressed and overcome. The chapter shows that not only staff but also the senior management within a

4 *Prosecuting Conflict-Related Sexual Violence at the ICTY*, pp. 24–28.

5 *Ibid.*, pp. 34–42. A few examples of these assumptions and misconceptions: rape is more a sexual matter involving honour than it is a violent crime; sexualized violence is not as serious as other crimes; sexualized violence is “personally motivated” and/or “opportunistic” (this misconception poses an insurmountable problem when sexualized violence needs to be linked to senior officials); sexualized violence can only be prosecuted if it was committed in a systematic/widespread manner or committed pursuant to an order.

prosecution office need guidance and clear policies regarding how, when and why to prioritize the prosecution of conflict-related sexualized violence. In addition, as the chapter points out, courts and tribunals are subject to various types of pressure, be it political, technical or financial, and they ought to be detected and properly responded to.

Another barrier to successful prosecution of sexualized violence is the use of prosecutorial discretion, which is a demanding challenge. Thus, there is a need for setting up strategies and policies at the outset of any investigation, communicating them among all of the actors involved, and subjecting their implementation to continuous internal review and monitoring.

Jarvis and Vigneswaran also discuss in detail the phases of an investigation and trial, highlighting the stumbling blocks that the ICTY has faced over the past two decades and how they were addressed. The cutting of sexualized violence charges has occurred at several stages, for example, in the characterization of sexualized violence under “umbrella charges”, in the reduction of charges upon a chamber’s request and in the bargaining away of sexualized violence charges in guilty pleas. Being conscious and aware of the risks and having strategies in place in advance leads to a more representative and adequate prosecution of these crimes.

Chapter 4, by Michelle Jarvis and Najwar Nabti, is one of the key chapters, as it sets out in detail the institutional strategies and policies that the OTP has developed to overcome these obstacles and to successfully prosecute perpetrators of conflict-related sexualized violence on all levels. It provides for a comprehensive collection of said strategies and policies, which any prosecution office should establish and enforce in the future.

The OTP has found that a multifaceted approach is required. It is key to institutionalizing a gender policy to be applied office-wide and across teams and departments; this task should not be left to the gender adviser. Comprehensive training, awareness and knowledge of the office culture, including recruitment and gender parity, are likewise crucial for the implementation of these strategies and policies.

The fifth chapter, written by Priya Gopalan, Daniela Kravetz and Aditya Menon, discusses in detail how sexualized violence can be successfully proved beyond a reasonable doubt in the courtroom. It focuses on the victims and witnesses and their individual treatment. This chapter refers to a variety of practical examples from ICTY cases. In addition, the use of different types of evidence, such as expert, forensic and documentary, increases the success of any such prosecution.

Chapters 6 and 7, written by Laurel Baig, Michelle Jarvis, Elena Martin Salgado, Guilia Pinzauti and Barbara Goy, give an insight into how to contextualize sexualized violence. This may be done through the selection of crimes and their placement into the context of other violent crimes, such as persecution and genocide, as well as through the careful selection of the appropriate modes of liability in order to best impute the commission of sexualized violence to senior officials. These chapters further extensively discuss how to establish the foreseeability of sexualized violence crimes. This is very

useful for practitioners, who may follow the framework of foreseeability questions, which may be used as a checklist of indicators.

In Chapter 8, Laurel Baig looks into the practice of sentencing for sexualized violence crimes and offers recommendations for sentencing arguments for such crimes and any specific aggravating and mitigating factors. The ICTY's power to order the restitution of property has never been exercised. The authors recognize that the OTP should have requested such orders more vigorously and appealed rejections by chambers, and that it should also have better informed victims about their national avenues.

Chapter 9, by Saeeda Verrall, presents an overview of sexualized violence in the conflicts in the former Yugoslavia as reflected in ICTY judgments, as well as an analysis of how a more complete presentation may be achieved in future judgments.

The chapter by Serge Brammertz, Michelle Jarvis and Lada Šoljan focuses on capacity-building in national jurisdictions and the challenges related thereto. The OTP has increasingly developed a strategy for national capacity-building, but this needs to be comprehensive, structured and effective and should not just be an *ad hoc* initiative. The OTP has observed that, in national proceedings, the prosecution of sexualized violence is negatively affected by misconceptions about the nature of the crimes in question – namely, similar misconceptions and wrong assumptions encountered at the ICTY are repeated on the national level. Hence, there is room for improvement and the strengthening of capacity-building in national courts.

With regard to compensation, the OTP has realized that the existence of a comprehensive compensation framework is necessary. Such possibilities at the domestic level are limited, complicated and, often, hardly accessible for victims, especially those of sexualized violence. Even if convicted persons are ordered to pay compensation as part of national criminal proceedings, they might be unable or unwilling to pay. Therefore, an administrative framework providing compensation from the State is necessary. In Croatia, Bosnia and Herzegovina and Serbia, such laws have been adopted, but have deficiencies.

However, the reference made by the authors to the Kosovo legal framework of compensation for war victims, including sexualized violence, fails to mention the limitations of this law.<sup>6</sup> This reviewer suggests that in the future, the prosecution should hire specialized staff for matters of reparation. These staff should advise on the reparation framework of a criminal court (if applicable), possible referrals and any administrative reparation mechanisms in the respective country, and how to best serve the victims.

The authors conclude that the intersection between prosecuting and preventing sexualized violence is important. Thus, being more proactive in giving notice to commanders and military and political leaders to prevent sexualized violence could be a crucial area for the prosecution. At the same time, prosecution is but one part of the process in sexual violence trials. Ensuring

6 Republic of Kosovo, Law No. 04/L-172 on Amending and Supplementing Law No. 04/L-054 on the Status and the Rights of Martyrs, Invalids, Veterans, Members of the Kosovo Liberation Army, Sexual Violence Victims of the War, Civilian Victims and their Families, 20 March 2014.

fairness and due process also requires an effective and learned defence, as well as proper victim support at all times.

Annex A of the book contains extracts from judgments, while Annex B provides an overview of charges and outcomes in ICTY cases involving sexualized violence. These tables and extracts assist the reader in attaining an overview not only of the (legal) framework, but also of the individual cases and their specificities.

More than a decade after the establishment of the ICTY, another court began its work in Cambodia. Many of the misconceptions and wrong assumptions on the nature of sexualized violence that occurred at the ICTY were repeated there. Another ten years later, the German Higher Regional Court in Stuttgart tried two Democratic Liberation Forces of Rwanda (Forces Démocratiques de Libération du Rwanda, FDLR) leaders for the first time for international crimes under the German Code of Crimes against International Law,<sup>7</sup> but all sexualized crime charges were dismissed *inter alia*. For the first prosecution under the Code, and given the widespread sexualized violence occurring within the conflict in the Democratic Republic of the Congo, such a decision proves the sad reality of the statement given by Prosecutor Serge Brammertz in the preface of the book under review: “While recognizing that there have been important achievements over the past two decades, the fact remains that accountability for these crimes is the exception and impunity is the rule.”<sup>8</sup> These are only two examples of many that demonstrate the gap of impunity when it comes to the prosecution of conflict-related sexualized violence.

This book is not only a simple examination and analysis of official court records and judgments. It provides insight and knowledge into all levels and an analysis of all aspects that play a role in and influence successful prosecution of conflict-related sexualized violence crimes; these factors render the book outstanding and a true gem. Finally, yet importantly, the indispensable, sincerely self-critical attitude displayed by the authors while recording and analyzing the operational aspects of the OTP’s work makes this book unique and worthwhile.

This book is a must for practitioners and all those involved in the prosecution of international crimes and in particular, conflict-related sexualized violence crimes: prosecutors, investigators, interpreters, lawyers and, last but not least, judges. It will be extremely helpful for the identification of wrong assumptions and misconceptions and for the development of strategies and policies to overcome such obstacles. If all issues that the book discusses would be addressed and properly dealt with as the authors suggest, this would lead to the successful prosecution of conflict-related sexualized violence on the same level as other crimes. It is this reviewer’s hope that all those who will be involved in any future investigation of international crimes, be it on the international or national level, will read this book thoroughly and take lessons from it.

7 German Federal Parliament, Act to Introduce the Code of Crimes against International Law, 26 June 2002. The Code entered into force at the same time as the Rome Statute, on 1 July 2002. The FDLR trial was the first trial with charges pursuant to the Code.

8 *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Preface, p. x.