
Using Social Science to Frame International Crimes

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I. Introduction

In 2008, the United Nations Security Council passed Resolution 1820 asking the Secretary General to submit a report that provides “information on situations of armed conflict in which sexual violence has been widely or systematically employed against civilians,” and “information on his plans for facilitating the collection of timely, objective, accurate and reliable information on the use of sexual violence in situations of armed conflict.”¹ In 2009, in his one-year report on Resolution 1820, United Nations Secretary General Ban Ki-Moon noted the importance of analyzing sexual violence in armed conflict, saying that, “to ascertain prevalence, population-based surveys would need to be conducted”² but noting that “these are difficult to undertake in conflict settings.”³

Building from these calls by the UN, we hope to add to this discussion on Libya and Syria by providing insights into how survey research might be used to frame sexualized violence⁴ as an international crime. The growing interest in social science to aid prosecutions underscores a desire to protect

¹ SC Res 1820, UN Doc S/1820/2008 (June 19, 2008).

² Report of the Secretary General Pursuant to Security Council Resolution 1820, UN Doc. S/2009/362 (Aug. 20, 2009), para 4.

³ *Ibid.*

⁴ Under international law, sexual violence and rape are distinct; we use the word sexualized violence rather than rape, sexual violence, or gender-based violence in order to encompass different types of violence of a sexual nature, and to clarify that men are also violated. See K Alexa Koenig, Ryan S Lincoln & Lauren E Groth, “Contextualizing Sexual Violence Committed During the War on Terror: a Historical Overview of International Accountability”, 45 USF L Rev 911 (2010).

witnesses from recounting painful experiences,⁵ to avoid misrepresentations and misunderstandings during testimonies,⁶ and to bolster claims that the violence meets the threshold of international crimes.⁷ The hope is that better data and analysis from survey research may help end impunity for sexualized violence.⁸

In the context of armed conflict, rape and other forms of sexualized violence are now seen as crimes in and of themselves, as well as elements of genocide, crimes against humanity and torture.⁹ Although the jurisprudence has made it easier to convict individuals accused of international crimes, investigators need as much information as possible in order to determine whether a person or an entity (e.g., a state) can be held accountable under international law.¹⁰

⁵ Peggy Kuo, "Prosecuting Crimes of Sexual Violence in an International Tribunal", 34 Case W Res J Int'l L 305, 316 (2002) (describing the challenge of encouraging survivors of sexual violence to participate in the ICTY).

⁶ Scholars continue to offer worrisome critiques about incentives to misrepresent facts in court, the misunderstandings between judges and lawyers who are trained in western law and survivors with different approaches to narrating their experiences. See Nancy A Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (2010).

⁷ The International Criminal Court (ICC) refers to this threshold as the "gravity" of the crime, and has the authority to determine whether the violence meets this threshold. Specifically Article 17 of the Rome Statute, which governs the ICC, provides that the Court may exercise jurisdiction only if (1) national jurisdictions are 'unwilling or unable' to; (2) the crime is of sufficient gravity; and (3) the person has not already been tried for the conduct on which the complaint is based (*ne bis in idem*). Rome Statute of the International Criminal Court, adopted July 17, 1998, 2187 UNTS 90, 37 ILM 1002 (entered into force July 1, 2002), art 17 [Rome Statute].

⁸ Xabier Agirre Aranburu, "Sexual Violence beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases", 23 Leiden J Int'l L 609, 611 (2010) (explaining how lawyers must use evidence to develop fact patterns).

⁹ Rome Statutes, arts 7,8. The specific intention to destroy an identified group either "in whole or in part" distinguishes the crime of genocide from a crime against humanity. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, UNTS 277, art 2; Rome Statute, art 6. Crimes against humanity include murder, extermination, rape, persecution and all other inhumane acts of a similar character, such as willfully causing great suffering, or serious injury to body or to mental or physical health, committed "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." Rome Statute, art 7.

Violence that constitutes crimes against humanity tend to be at a larger scale than "war crimes," which refers to serious breaches of international humanitarian law committed against civilians or enemy combatants during an international or domestic armed conflict, for which the perpetrators may be held criminally liable on an individual basis. Rome Statute, art. 8.

¹⁰ Under the statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the defendant must either intend to plan or intend to commit the crime or be "aware of the substantial likelihood that a criminal act or omission would occur as a consequence of his conduct." The Statute of the International Criminal Tribunal for the Former Yugoslavia, May 25, 1993, 32 ILM 1192 (1993), art 6(1). The Statute of the International Criminal Tribunal for Rwanda, Nov. 8, 1994, 33 ILM 1598 (1994), art 7(1). The ICTY also expanded theories of liability so that individuals who did not directly perpetrate crimes could be held liable. They did this mainly through the legal doctrine of Joint Criminal Enterprise, which enables an individual to be held responsible for all crimes committed pursuant to the existence of a common plan or design which involves the commission of a crime provided for in the Statute if the defendant participates with others in the common design. This theory has been heavily critiqued for expanding the scope of liability too far, enabling guilt by association. For a summary of these critiques, see Allison Marston Danner & Jenny S. Martinez, "Guilty Associations: Joint Criminal Enterprise, Command Responsibility,

Here, we ask what kind of information a survey of survivors can provide, and how might the information gleaned from a survey be used to further successful prosecutions in international criminal courts? We suggest that survey research and subsequent statistical analyses may be particularly useful to address concerns about the prevalence of the violence.¹¹ Obviously, it will be more difficult to use this information to show who or what might be liable.¹² Moreover, given the different ways that judges, advocates and social scientists utilize personal accounts, it will be even more difficult to convince judges that such information is useful to them.

This conference paper is geared towards advocates and policy makers who may be interested in using social science and, thus, does not delve deeply into legal doctrine or methods. Other scholars have provided useful insights into ways to think about methods, legal definitions and everyday challenges in international courts when trying to end impunity for sexualized violence.¹³ Rather, we provide various examples of how survey research on victims¹⁴ as well as statistical analysis have been used to describe as well as frame mass violence as international crimes. We focus on different types of scholarship, including public health, criminology and demography in order to highlight different approaches to data collection and analysis.¹⁵

and the Development of International Criminal Law", 93 Cal L Rev 75 (2005); Jens David Ohlin, "Three conceptual problems with the doctrine of Joint Criminal Enterprise", 5 J Int'l Crim Just 69 (2007); Steven Powles, "Joint Criminal Enterprise-Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity", 2 J Int'l Crim Just 606 (2004).

¹¹ The Rome Statute suggests that violence is part of a plan or policy or committed on a "large-scale basis," "widespread or systematic." Rome Statute, arts. 7, 8. See also Leila Sadat, "Unpacking the Complexities of International Criminal Tribunal Jurisdiction", Wash U St Louis Legal Stud Res Paper Ser No 10-03-13, 14 (2010) (arguing that the ICC looks for "scale – that is, the magnitude or widespread nature of the crimes").

¹² At the ICC, perpetrators can be held liable if there was a) deliberate inducement, or the leaders deliberately create the opportunity for violence, b) implicit causation, or the violence was a natural and foreseeable result from actions triggered by the leaders and c) command responsibility if the leaders knowingly failed to prevent or repress crimes committed by their subordinates. Rome Statute, art. 28.

¹³ See especially Aranburu, *supra* note 8. Jana Asher, David Banks & Fritz Scheuren, *Statistical Methods for Human Rights* (2008); Patrick Ball, "Making the Case: The Role of Statistics in Human Rights Reporting", 18 Statistical J UN 163 (2001); Robert Justin Goldstein, "The Limitations of Using Quantitative Data in Studying Human Rights Abuses", 8 Hum Rts Q 607 (1986).

¹⁴ The growing research on perpetrators is very important as it provides clues into how they understand the use of sexualized violence, and why it may be present in some conflicts but not others. See especially, Dara Kay Cohen, "Explaining Sexual Violence During Civil War: Evidence from the Sierra Leone War (1991-2002)", Ann Conv Am Pol Sci Ass'n, Chicago, IL (August 2007), available at http://www.poli562c.moonfruit.com/download/i/mark_dl/u/4008218952/4537427941/Reading%203.4.pdf (last visited Feb 15, 2013). For an early and influential account on rape during war, see Susan Brownmiller, *Against Our Will: Men, Women, and Rape* 30–113 (1993).

¹⁵ In addition to studies of sexualized violence, we discuss mortality as courts have recognized that the numbers of killed or missing are important in establishing whether or not a genocide occurred. *Prosecutor v Krstić*, Judgment, ICTY Appeals Chamber, at para. 12, Case No. IT-98-33, (2004). Genocidal intent can be proven by evidence of deliberate or systematic targeting of individuals based on membership to a specific group. See Herbert F. Spitzer & William Seltzer, "Obtaining Evidence for the International Criminal Court Using Data and Statistical Analysis," in *Statistical Methods for Human Rights* 195-225, 219 (Jana Asher, David Banks, Fritz Sheuren, eds 2008).

Our hope is that these examples might inform ongoing efforts to gather more information about sexualized violence in Syria and Libya, especially for those with an eye towards future prosecutions.

The paper begins with an overview of what we know about sexualized violence in Syria and Libya. This section reveals the limitations of existing information, and how difficult it will be to overcome these limitations. In particular, we address the challenges that advocacy organizations face in gathering and analyzing it. Next, we examine three ways to think about how survey research might be used, drawing on examples of survey studies used to evaluate the causes and consequences sexualized violence as well as mortality. We focus specifically on public health scholarship as this field continues to offer important insights into how surveys might assess the causes of violence. Following, we present several examples of how social scientists might analyze the data with statistical methods in order to frame the violence as an international crime. Finally, we discuss the potential challenge of using statistical analysis in international prosecutions. The discussion reveals an ongoing need to increase dialogue between advocates, scholars and jurists about what kinds of information can and should be used to ensure accountability for sexualized violence in Libya and Syria.

II. The Limited Information: Sexualized Violence in Syria and Libya

Existing information reveals that all sides in Syria and Libya are using sexualized violence, and victims are both men and women. In 2013, the International Rescue Committee conducted a survey of female refugees from Syria, reporting that many claimed to have left their villages due to the sexualized violence.¹⁶ Their report notes “many women and girls relayed accounts of being attacked in public or in their homes.”¹⁷ While conducting research on the conflict in early 2014, gay refugees in Syria reported being entrapped and tortured by Islamist groups that are taking over various parts of the country.¹⁸ The New York-based Women Under Siege collected 81 stories of sexual assault reported in 2012 and 2013, mostly in home raids and residential sweeps. In a report of their findings, the organization indicated that 90% of women victims experienced rape and 42% experienced gang rape, and described these attacks as a widespread and systematic tool of war.¹⁹

This information is particularly limited by the nature of the organization’s reporting method. They do not systematically gather information and do not verify the accounts. Rather, they are self-reported acts of violence.

The information reported early on in Libya is even more problematic.

¹⁶Alexandra Brosnan and Megan Finckly, *Syria: A Regional Crisis: The IRC Commission on Syria Refugees 4* (2013).

¹⁷*Ibid*, at 6.

¹⁸ Personal Communication, Beirut, Lebanon, December 30, 2013.

¹⁹ Lauren Wolfe, “The Ultimate Assault: Charting Syria’s Use of Rape to Terrorize its People”, July 11, 2012, <http://www.womenundersiegeproject.org/blog/entry/the-ultimate-assault-charting-syrias-use-of-rape-to-terrorize-its-people>.

Seham Sergewa, a Libyan psychologist claimed to have sent out 70,000 questionnaires, receiving 60,000 responses, despite the lack of a functional postal system, with 259 reports of rape.²⁰ A more credible report came from Physicians for Social Responsibility. The organization conducted an investigation into sexualized violence in Libya by administering fifty-four interviews over a one-week period. They describe interviews with six civilians, including two medical professionals who report the use of rape as a military tactic and honor killings in response.²¹ This information was corroborated by the United Nations investigation, which also found that men leave villages in order to protect family members from rape.²²

While useful, this information is limited for a variety of reasons. In her study on the presence or absence of sexualized violence during armed conflict, political scientist Elizabeth Wood summarizes part of this dilemma, saying:

The frequency and type of incidents reported are shaped by oft-noted factors such as the willingness of victims to talk, the resources available, whether forensic authorities record signs of sexual violence, and the regional and partisan bias of the organization. In addition, the description of sexual violence as ‘widespread’ and ‘systematic’ may reflect an organization’s attempt to draw resources to document sexual violence (whatever its actual level) rather than the frequency of incidents, or may reflect legal rather than social science concepts. And in settings where political violence is ongoing, organizations may feel it prudent to state that all sides engage in sexual violence, whatever their beliefs and data about asymmetric patterns.²³

Other scholars have similarly pointed out that data on sexualized violence is particularly difficult to gather given the sensitivity of the topic, the difficulty in determining which acts should be categorized as sexualized violence, and how to integrate gender issues, such as whether to only count female victims. In particular, Hoover-Green and Cohen argue that advocacy organizations that gather data on sexualized violence struggle from “dueling incentives” over short-term needs for funding and long-term needs for credibility.²⁴ As a result, advocacy organizations may make claims that are not credible, particularly claims that overstate the violence. Those claims may dominate popular discourse about the nature and prevalence of the violence. Xabier Aranburu, a senior analyst with the International Criminal Court, has expressed concern over this dilemma and points out that advocacy organizations may try to claim that rape is “weapon of war” or of

²⁰Karim Faheem, “Claims of Rape Unsettle and Divide Libyans”, *New York Times*, June 19, 2011, <http://www.nytimes.com/2011/06/20/world/africa/20rape.html>. The article reports that the Sergewa claimed to have used family and NGO networks to distribute the surveys.

²¹Physicians for Human Rights, *Witness to War Crimes: Evidence from Misrata, Libya* (2011), https://s3.amazonaws.com/PHR_Reports/Libya-WitnessToWarCrimes-Aug2011.pdf

²²U.N. Human Rights Council, Report of the International Commission of Inquiry to Investigate All Alleged violations of international human rights law in the Libyan Arab Jamahiriya, para 216, U.N. Doc. A/HRC/17/44 (1 Jun. 2011), available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.44_AUV.pdf.

²³Elisabeth Jean Wood, “Armed Groups and Sexual Violence: When Is Wartime Rape Rare?”, 37 *Pol & Soc’y* 131, 133–34 (2009).

²⁴Dara Kay Cohen & Amelia Hoover Green, “Dueling Incentives: Sexual Violence in Liberia and the Politics of Human Rights Advocacy”, 49 *J Peace Research* 445 (2012).

some strategic design when, in reality, it may be more opportunistic.²⁵

Given these dilemmas, any study conducted with an eye towards judicial accountability must understand these different professional communities, and how their different approaches to gathering and analyzing information affects their ability to frame sexualized violence as an international crime.

III. Public Health: Assessing The Nature and Prevalence of Violence

Public health scholars have been at the forefront of efforts to improve data collection and analysis on sexualized violence. Here, we discuss several public health studies, selected to highlight the different methodological approaches that scholars have taken, as a way to highlight the kind of information that surveys of sexualized violence survivors can help provide.

A variety of survey studies address sexualized violence in armed conflict as part of broader inquiries into women's health. Many involve interviews with women well after the violence has ceased, when it is easier to access survivors. For example, in 2007 the Centers for Disease Control conducted a survey study on women's reproductive health in Liberia, asking questions about the conflict and post conflict period.²⁶ This report used a sophisticated sampling methodology, drawing on available data about urban/rural living in order to generalize the findings of the study to the overall population. The researchers ended up interviewing 907 households, with 58.9% reporting at least one sexual violation during the conflict.²⁷ They asked questions related to the nature of sexualized violence, such as if the women were subjected to improper sexual comments or forced to have sex in exchange for goods or services. The researchers found that women were ten times more likely to have reported a sexual violation during the recent conflict period (1999-2003), than the post conflict period of the previous year. They suggest that sexualized violence was much more likely during the armed conflict than in times of peace.

Other public health studies relied on surveys with questions related to what survivors wanted as a response to the violence, in addition to what they experienced. In 2001, just after the brutal war ended, researchers in Sierra Leone conducted a population-based survey of internally displaced women within three refugee camps and one town. They interviewed 991 women who were heads of families and who provided information on 9,166 household members. In this study, 9% of respondents reported sexual abuse, and reported that 8% of female household members and 0.1 % of men had experienced war-related sexual violence.²⁸ The researchers also asked

²⁵ Aranburu, *supra note 8*, at 613-15 (2010) (pointing out an ongoing debate as to whether sexualized violence is strategic or opportunistic).

²⁶ Basia Tomczyk et al, *Women's Reproductive Health in Liberia: The Lofa Country Reproductive Survey January-February 2007* (2007), http://www.africare.org/our-work/where-we-work/liberia/Resources/5Liberia_ResourceDoc.pdf.

²⁷ *Ibid*, at xv.

²⁸ Lynn Amowitz, Chen Reis, Kristina Hare Lyons, et al., "Prevalence of War-Related Sexualized Violence and Other Human Rights Abuses Among Internally Displaced Persons in Sierra Leone", 287 *J Am Med Ass'n* 513 (2002). Rape was reported by nearly 90% of the respondents

questions about the consequences of the sexual assault and what women thought helped and would help them. Interestingly, they found that few thought punishment would be beneficial.²⁹

Another survey conducted in East Timor broadened the inquiry to address the nature of the violence, including questions related to statements by perpetrators. Their questions focused on the prevalence of sexualized violence, but they also wanted to learn more about the context, asking whether the violence was accompanied by “improper sexual comment.”³⁰ Of the 288 women, ages 18-49, who participated in this study, 24% reported a violent episode from someone outside the family during the 1999 conflict; of these 24%, 92% reported being threatened with a weapon, and 96% included improper sexual comments.³¹

While it is useful to know how many women reported improper sexual comments, knowing more about these comments may provide insights into the motivations for sexualized violence during armed conflict, which may be important to determine whether the violence rises to the level of international crime, and which one. A report authored by Physicians for Human Rights and the Harvard Human Rights Initiative investigated sexualized violence in Chad and Darfur and offers a particularly instructive model for a survey designed to address sexualized violence in Syria or Libya.³² In order to ensure that survivors would not be concerned about the stigma associated with sexualized violence, the researchers claimed that they were careful to avoid asking questions directly related to sexual violence and, instead, focused on questions about why they left Darfur and what struggles they face now.³³ At a refugee camp in Chad, researchers interviewed 88 women willing to talk to them (therefore the data can not be generalized to all of the women in the camp) and conducted physical and psychological evaluations of women who reported sexual or physical assault.³⁴

Notably, this report provides insights into the prevalence of rape in the refugee camps, not only in Darfur. The report also provides detailed qualitative information that could be very useful for those interested in framing sexualized violence as different international crimes. For example, it notes that at least one Darfuri women claimed that she was called ‘slave’ by

who claimed war-related sexualized violence, and 30% reported gang rape (the average number of perpetrators was 3.2). *Id.* at 516.

²⁹ *Ibid.*, at 517.

³⁰ Michelle Hynes, Jeanne Ward, Kathryn Robertson, and Mary Crouse, A Determination of the Prevalence of Gender-based Violence Among Conflict-affected Populations in East Timor 59 (2003), http://www.rhrc.org/resources/East%20Timor_gbv_en.pdf.

³¹ See also Michelle Hynes, Jeanne Ward, Kathryn Robertson, and Mary Crouse, “A Determination of the Prevalence of Gender-Based Violence Among Conflict-Affected Populations in East Timor”, 28 *Disasters* 294 (2004), http://www.rhrc.org/resources/East%20Timor_gbv_en.pdf.

³² Physicians for Human Rights, *Nowhere to Turn: Failure to Protect, Support and Assure Justice for Darfuri Women* (2009), https://s3.amazonaws.com/PHR_Reports/nowhere-to-turn.pdf.

³³ *Ibid.*, at 2; Public Presentation at *Symposium: Missing Peace, United States Institute for Peace, Washington D.C.* (Feb.14, 2013).

³⁴ Physicians for Human Rights, *supra* note 31, at 2.

her assailants.³⁵ This is an important finding that reveals how learning about the specific statements made during an act of sexualized violence might provide important insights into whether or to what extent sexualized violence is motivated or exacerbated by discrimination on the basis of nationality, sex, or other group features.³⁶

These examples offer initial insights into how to think about using a survey to frame sexualized violence in Libya and Syria as international crimes. Several of these surveys, particularly those that took place after the conflict ended, attempted to sample women in a way that would enable estimates of sexualized violence throughout the country. However, due to the difficulty of conducting research where violence is ongoing, most of these studies are limited to who was available and willing to speak. It is much easier to generate a representative sample after the violence has ceased. Moreover, except for the report on Darfur and Chad, most of the published information from these surveys focuses on the who, what, when and where of the violence. This makes it difficult to gain insights into other contextual factors, such as what the perpetrators said or the survivors' feelings of fear or duress. These feelings will be important in order to bolster claims that they could not meaningfully consent to sexual acts, and how perpetrators used sexualized violence in their campaigns.³⁷

In addition, these studies focus on sexualized violence against women.³⁸

³⁵ *Ibid*, at 18.

³⁶ While comments about nationality or ethnicity may give rise to claims of genocide, comments about gender may give rise to claims of torture. In its holding on the violence committed at the Čelebići camp, the Trial Chamber at the International Criminal Tribunal for the Former Yugoslavia found that "the violence suffered by Ms. Čekez in the form of rape, was inflicted upon her by Delić because she is a woman...this represents a form of discrimination which constitutes a prohibited purpose for the offence of torture." *Prosecutor v Mucić et al*, Judgment, ICTY Trial Chamber, at para 941, Case No IT- 96-21 (November 16, 1998).

³⁷ Consent has remained an important question in the international jurisprudence on sexualized violence. In the ICTY case of *Kunarać*, the issue of consent became central to the trial due to the fact that the defendants were being tried for running "rape camps" in which women were routinely violated. The ICTY Trial Chamber wanted an explicit and affirmative inquiry into the consent of the victim and defined consent in the following way: "Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the contents of the surrounding circumstances." *Prosecutor v Dragoljub Kunarać, Radomir Kovač and Zoran Vuković*, Judgment, ICTY Trial Chamber, at para 460, Case No IT-96-23/1- T (Feb. 22, 2001). In *Gacumbitsi*, the ICTR Appeals Chamber reexamined the issue of consent and where the burden of proof lies. The Appeals Chamber affirmed that both the victim's non-consent and the accused's knowledge of lack-of-consent are elements that must be proved by the prosecution. The Appeals Chamber did, however, elaborate that non-consent may be proven if circumstances can be demonstrated "under which meaningful consent is not possible." According to this standard, the prosecution does not need to produce evidence of the victim's conduct or evidence indicating use or threat of force; non-consent may be inferred from examining relevant and admissible evidence of the background circumstances, such as detention or violence in the context of an ongoing campaign of genocide. *Prosecutor v Gacumbitsi*, Judgment, ICTR Trial Chamber, at paras 147, 153, Case No 2001-64-T (June 17, 2004).

³⁸ There is some interesting survey research on sexualized violence against men as part of the International Men and Gender Equality Studies project. The South African-based Sonke Gender Justice Network and the Brazilian non-governmental organisation Promundo conducted the survey in and near Goma in Congo's North Kivu province. Sonke Gender Justice Network, Promundo, Gender Relations, Sexual Violence and the Effects of Conflict on the Men and Women of East Kivu: Preliminary Results from the International Men and Gender Equality Survey (2012). A total of 708 men and 754 women aged between 18 and 59 took part in

Given ongoing reports of violence against men, it is important to study violence perpetrated against both genders and the similarities and differences in these acts.³⁹ For those looking to frame sexualized violence against men or women as an international crime, this data might support the argument that the violence was discriminatory in nature, bolstering claims of genocide or torture. Moreover, they may shed light on how sexualized violence against men in armed conflict differs from or is similar to sexualized violence against women.

In sum, while most of these studies were conducted with an eye towards public health outcomes, researchers collecting information for legal ends can draw some important lessons from them. Many survivors have fled Syria and interviewing individuals in refugee camps may prove fruitful. At the same time, it may be difficult to interview a sample that can be generalizable to the population. In Libya, where women continue to face repercussions for discussing violence perpetrated against them, it will be very difficult to encourage them to participate in a study on sexualized violence. Presenting the research as one about the conflict more generally, as was done in Darfur and Chad, may help. A survey designed with an eye towards prosecutions might encourage narratives in which survivors share more about the context of the violence. They might ask different questions related to issues of consent, focusing on feelings of fear or duress, and statements made by perpetrators in order to gain more insights into the motivation for sexualized violence.

IV. Beyond Prevalence: Examining Intent

While survey research on sexual violence in Libya and Syria might help assess what survivors have experienced, it will be much more difficult to use this kind of information to show that a person or group can or should be held liable under international criminal law. To elaborate on this point, we present a distinct example of how scholars tried to use survey research to frame mass violence as genocide. The survey is the Atrocities Documentation Survey (ADS), which was sponsored by the United States State Department in 2004. In addition to using the data to describe the violence, social scientists trained in criminology and sociology tried to explain, at least partially, *why* it occurred. Their analysis offers a useful example of how to think more broadly about how information from a survey, if it could be gathered, might be used to frame sexual violence in Libya and Syria as international crimes.

In the ADS survey, researchers tried to sample survivors in order to

individual interviews and focus group discussions in June 2012. The study has striking findings that 9% of men and 22% of women report direct sexualized abuse during the conflict, with 16% of men and 26% of women reporting having been forced to watch a rape. *Id.* at 8. This survey is fascinating and disturbing from the perspective of combating sexualized violence. For example, nearly two-thirds of male respondents agreed with the statement that a woman who does not dress decently is asking to be raped. *Id.* at 9.

³⁹ See Sarah Solangon & Preeti Patel, "Sexual Violence Against Men in Countries Affected by Armed Conflict", 12 *Conflict, Sec & Dev* 417, 425 (2012) (arguing that the narrow focus on women in studies of sexualized violence in armed conflict reifies the stereotype that men are perpetrators and women are victims). See also R. Charli Carpenter, "Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations", 37 *Sec Dialogue* 83 (2006).

generalize to the entire population of individuals who fled their homes. They interviewed 1,136 refugees in nineteen camps throughout Chad from July 12 through August 18, 2004.⁴⁰ Interviewers randomly selected a sector within a refugee camp and then, from a fixed point within the sector, chose every 10th dwelling unit for interviewing.⁴¹ Interviews took place in private, with only the refugee, a translator, and the interviewer present.⁴² The teams used a semi-structured interviewing approach to encourage the refugees to provide narratives about their experience as a whole; the report only drew on descriptions of eyewitness accounts of violence, not hearsay.⁴³ The questions from the survey focus on the context in which the violence took place, and provide information of ongoing killings, sexualized violence and displacement.⁴⁴

What was novel about this survey was not only the sampling method, designed to enable the scientists to generalize to the broader population of survivors, and the detailed information it provided, but how social scientists later analyzed it. Two sociologists at Northwestern University, including one of this article's authors, decided to use the information to explain *why* the violence occurred. In particular, they wanted to address the Sudanese government's claims that the violence was occurring due to efforts to gain natural resources and/or fight rebel groups in the communities. The social scientists examined different causes of the violence by constructing statistical models to account for the killings and displacement. In particular, they tried to statistically examine the government's role in the violence. They found that the presence of government officials and rebel forces greatly increased the amount of violence that individuals experienced, as well as the chance that individuals would hear racial epithets.⁴⁵

With an eye towards accountability for genocide, they argue that this finding supports the claim that the government has helped foment racially-motivated violence. In order to bolster this claim, they measured the relationship between individual reports of violence, what they call victimization severity, and variables such as age, gender, ethnic group of victim, social group of attackers, news about rebels in the area, and other

⁴⁰ United States State Department, *Documenting Atrocities in Darfur*, State Publication 11182. Released by the Bureau of Democracy, Human Rights, and Labor and the Bureau of Intelligence and Research, September 2004. A summary can be found at <http://2001-2009.state.gov/g/drl/rls/36028.htm>. An internal evaluation by the State Department asserted that the survey captured the entire scope of Darfuri refugees in Chad. Jonathan Howard, "Survey Methodology and the Darfur Genocide," in *Genocide in Darfur: Investigating the Atrocities in the Sudan* 59-74, 73 (Samuel Totten & Erik Markusen, eds, 2013).

⁴¹ All adults were listed within the dwelling unit, and one adult was randomly selected. Howard, in *Genocide in*

Darfur: Investigating the Atrocities in the Sudan, *supra* note 39, at 65.

⁴² *Ibid*, at 66

⁴³ *Ibid*, at 69.

⁴⁴ *Ibid*.

⁴⁵ John Hagan & Wenona Rymond-Richmond, "Collective Dynamics of Genocidal Victimization in Darfur", 73 *Am Soc. Rev* 875 (2008). To underscore that the violence is not caused by competition for scarce resources, they included the interaction effects of settlement density and joint attacks. They found that settlement density is not a good predictor of hearing racial epithets, which might be expected if competition for scarce resources was the mediating factor that encouraged racialized violence. *Ibid*, at 888.

potential explanations of the violence.⁴⁶ They found that factoring in racial motivation takes away the significance of population density, undermining the government's claim that the violence is occurring over scarce resources in densely populated areas.⁴⁷ They also found that the levels of victimization increase when there is both bombing and racial intent. The survey data also included accounts of how perpetrators used racial epithets when engaging in acts of sexualized violence. The analysis revealed that sexualized violence was reported less often when government or Janjaweed forces conducted the attacks separately and when attackers used no racial epithets during attacks.⁴⁸ The social scientists argue that, given these findings, sexualized violence is part of the genocide.⁴⁹

In their analysis, the sociologists blended social science and advocacy, arguing that their findings support the claim that genocide is occurring in Darfur.⁵⁰ The social scientists published a book and numerous articles from their research, but struggled to gain attention from policy makers and prosecutors.⁵¹ Their approach offers an instructive example of how survey research, and statistical analysis of the information gathered, can be used to frame mass violence as different international crimes. In particular, by applying techniques from criminology and sociology, their efforts reveal how one might think of designing questions that could later be turned into quantifiable variables that can help explain why the violence occurred.

V. Proving Intent: The Challenge of Using Statistics in Court

Even if advocates or social scientists were able to conduct a survey, and

⁴⁶ *Ibid.*, at 875-881. The Sudanese government has proposed a variety of explanations for the violence, mainly that they are fighting rebel groups being hidden by the Darfuris who have been victimized. The models show a variety of factors that are statistically significant in relation to the overall victimization, such as gender (women are more likely to be attacked) and the presence of both the Janjaweed and the government army during attacks. *Id.* at 890.

⁴⁷ *Ibid.*

⁴⁸ John Hagan, Wenona Rymond-Richmond and Alberto Palloni, "Racial Targeting of Sexual Violence in Darfur", 99 *Am J Pub Health* 1386, 1390 (2009).

⁴⁹ Hagan & Rymond-Richmond, *supra* note 44, at 891.

⁵⁰ *Ibid.*

⁵¹ John Hagan & Wenona Rymond-Richmond, *Darfur and the Crime of Genocide* (2008). Meanwhile, in 2009, the ICC indicted Sudanese president Al-Bashir for war crimes and crimes against humanity and, in 2010, for genocide. Situation in Darfur, Sudan, in the Case of *The Prosecutor v Omar Hassan Ahmad Al Bashir: Warrant of Arrest for Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09 (4 Mar. 2009), available at <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>; Situation in Darfur, Sudan, in the Case of *Prosecutor v Omar Hassan Ahmad Al Bashir, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09 (12 July 2010), available at <http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf>. Although there is increasingly a consensus among western scholars, policy makers and advocates that the violence in Darfur amounts to genocide, some scholars suggest that indicting Al-Bashir has divided the African Union and undermined the legitimacy of the ICC. See Kurt Mills, "Bashir is Dividing Us": *Africa and the International Criminal Court*, 34 *HUM. RTS. Q.* 404, 423-26 (2012). In particular, the indictment for genocide was strongly condemned. African Union, Communiqué: The Chairperson of the Commission Expresses Deep Concern About the New Decision of the ICC Pre-Trial Chamber 1 on Sudan and Its Impact on the Ongoing Peace Processes in Sudan, 16 July 2010, available at http://reliefweb.int/sites/reliefweb.int/files/resources/2E3A31D7D68FA9154925776C000322ED-Full_Report.pdf.

later analyze it to help illuminate why the violence occurred, they may still struggle to use their findings in court. There are the various dilemmas using statistical analysis because of different ideas of causality, the legal definition of widespread and systematic, and a variety of other differences between advocacy, social science, and the law.⁵² It remains difficult to assess the nature of sexualized violence in armed conflict given that much of what we know suggests that there is great variation across national contexts.⁵³

Most criminal trials, whether domestic or international, draw on testimonial, documentary and physical evidence to help prove a case. Survey research may be useful to complement testimonial evidence, as it is difficult, if not impossible to use all survivors of mass violence to be witnesses. At the same time, it may be difficult for courts to accept the findings of a statistical analysis. Moreover, it's not clear that they should. Critics of the use of statistics in international criminal law note that statistics may help provide insights into the causes of violence more generally, but they cannot provide insights into the direct causes of a specific act.⁵⁴ As a demographer who worked for the ICTY noted, "a demographer is usually not able, based on demographic data, to say anything about who the perpetrators were and why they committed the atrocities. He/she can only attempt at making reliable estimates of the number and distribution of the victims."⁵⁵

This observation is crucial in thinking about how courts may interpret statistical analyses of survey data. While the ADS analysis was never challenged in court of law, other analyses have been. At the ICTY, judges looked favorably upon demographic estimates on the mass killings during the 1991-1995 war.⁵⁶ However, when social scientists tried to aid the prosecution with a statistical analysis of what may have accounted for violence in Kosovo in 1999, problems arose. In the case of *Milutinović et. al.* six Serb defendants were put on trial for genocide against Kosovo Albanians during the conflict, and the judgment specifically addressed the shortcomings of the prosecution's use of statistical analysis.⁵⁷ A demographer presented an analysis of killings and refugee flows in Kosovo during 1999, when NATO intervened as the Serb and Kosovo Liberation Army (KLA) clashed. A research organization published a report based on analysis of the numbers of killed or missing from lists collected by the ICTY

⁵² For example, in international criminal law, "widespread" refers to the large-scale nature of the attack and the number of targeted persons, while the phrase "systematic" refers to the organized nature of the acts of violence and the improbability of their random occurrence." *Prosecutor v Blaškić*, Judgment, ICTY Appeals Chamber, para 101, Case No. IT-95-14-A (2004) para 101, reprinted in Spirer and Seltzer, in *Statistical Methods for Human Rights*, *supra* note 15, at 200.

⁵³ Wood, *supra* note 22.

⁵⁴ Samuel R. Lucas, "The Road to Hell...:The Statistics Proposal as the Final Solution to the Sovereign's Human Rights Question", 30 *Wis Int'l LJ* 259, 283 (2012).

⁵⁵ Helbe Brunborg, "Needs for Demographic and Statistical Expertise at the International Criminal Court", Expert consultation process on general issues relevant for the Office of the Prosecutor, at 5, available at www.iccpi.int/iccdocs/asp_docs/library/organs/otp/brunborg.pdf (last visited 16 December 2009).

⁵⁶ *Ibid.* There were several cases on this violence, most notably the first conviction in the ICTY. *Prosecutor v Krstić*. Judgment, ICTY Trial Chamber, *supra* note 15.

⁵⁷ *Prosecutor v Milutinović et al.* Judgment, ICTY Trial Chamber, at para. 21-29, Case No IT-05-87-T (July 2009). The analysis was also used in the case against Milosević but, due to his death, this case was never concluded.

and three organizations.⁵⁸ After estimating the total number of killed and displaced, they noted two peaks in the otherwise linear increase in number over time. The report concluded that, “when viewed in isolation local refugee movement and killings may look like a local response to a local cause, seen in the aggregate, statistical analysis reveals a pattern implying a common cause.”⁵⁹

With this foundation, the team looked for a common cause that would be “consistent with or contradicted by the statistical evidence.”⁶⁰ The research team created a statistical model to analyze whether there was any relationship between the patterns of killings and migration and three hypothetical causes: the conditions created by reported NATO bombings, KLA attacks, or Yugoslav army attacks.⁶¹ In their analysis, they found a statistically significant relationship between refugee flows and Yugoslav army attacks.⁶² They concluded that their analysis was consistent with the prosecution’s claim that there was a planned, systematic attack on the Kosovar Albanians.⁶³

Although the defendants were convicted of the crime of genocide, the judgment states that the analysis was “of little value” because it did not provide adequate alternative explanations as to why the violence occurred:

The Ojdanić Defence submits four additional explanations: movement may have resulted from KLA-issued orders for Kosovo Albanian civilians to leave their villages; refugees may have fled the areas of combat between the KLA and the Yugoslav forces; people may have moved in anticipation of NATO bombing; and the patterns may have resulted from NATO and KLA working together in Kosovo. The Chamber notes that the exclusion of the first two hypotheses by Ball—even if based upon correct data and methodology—is of little value because it still leaves a number of potentially plausible options unexplored.⁶⁴

In the end, the Trial Chamber “potentially” commends Ball for his “alternative, innovative” approach, and suggests that its theoretical and

⁵⁸ The organizations are the American Bar Association Central and East European Law Initiative and its partners,

Human Rights Watch and the Organization for Security and Cooperation in Europe.

⁵⁹ Patrick Ball, Wendy Betts, Fritz Scheuren, Jana Dudukovich & Jana Asher, Killings and Refugee Flow In Kosovo March-June 1999 8 (Report to the International Criminal Tribunal for the Former Yugoslavia (Jan. 3, 2002), app. 1.

⁶⁰ *Ibid.*

⁶¹ This hypothesis was that “[a]ir attacks by the North Atlantic Treaty Organization (NATO) created local conditions that led to Kosovars being killed and leaving their homes. The NATO influence could either have been direct, because people were killed in airstrikes and others fled, or indirect, because local Yugoslav authorities responded to the airstrikes by killing Kosovars and forcing them from their homes.” The other hypothesis was that “[a]ction by the Kosovo Liberation Army (KLA) motivated Kosovars to leave their homes, either directly because the KLA ordered people to leave, or indirectly because Kosovars fled fighting between KLA and Yugoslav forces. *Id.* at 7.

⁶² *Ibid.*, at 10.

⁶³ This hypothesis was that “[a] systematic campaign by Yugoslav forces drove Kosovar Albanians from their homes. Killings were used either to motivate the departures, or the killings were a result of the campaign. *Id.* at 7.

⁶⁴ *Prosecutor v Milutinović et. al.*, Judgment, ICTY Trial Chamber, *supra* note 56, at para 28.

scientific value lies within the academic community.⁶⁵

This assessment of the statistical analysis provided important lessons on how statistical analysis might be viewed in international criminal tribunals.⁶⁶ Each step of a statistical analysis requires assumptions that can be readily challenged by an attorney or judge. Statistics are used to show probability, and it is impossible to statistically examine all the alternative hypotheses for why mass violence occurred. Moreover, when it comes to survey research, statistical analysis will face additional challenges based on the quality of the underlying data, which, as explained in earlier, requires careful attention to the sampling and the questions. Any survey designed with an eye toward future prosecution must be planned, analyzed and presented with awareness that statistical analyses may not be well received in court.

VI. Conclusions: Improving the Information, and Facing the Inherent Limitations

International criminal law is increasingly addressing sexualized violence as a collective crime rather than “collateral damage.”⁶⁷ Survey research can aid this endeavor by providing information about whether the violence may constitute international crimes, who may be liable and, ultimately, held accountable for it. At the same time, the challenge that social scientists faced at the ICTY is indicative of an ongoing dilemma related to the use of statistical analysis in international criminal law.⁶⁸ The conclusions in *Milutinović* have as much to do with the inherent limitations of the data and its analysis as they do with the inherent limitations of international criminal courts to address issues as devastating and complex as sexualized violence in armed conflict. It would be impossible to statistically examine all possible explanations for violence, just as it would be impossible to cross-examine every survivor. Even if survey research helps confirm that sexualized violence is widespread, it will still be difficult to show *why* it is occurring. It may be harder yet to convince international judges that a statistical analysis can or should complement, let alone substitute, testimonies, documents or physical evidence that may be difficult to gather.

Given these dilemmas, various scholars have suggested that survey research and statistical analysis might be most useful at the stage of investigation, where courts may be looking at whether or not to indict a

⁶⁵ *Prosecutor v Milutinović et. al.*, Judgment, ICTY Trial Chamber, *supra* note 56, at para 29.

⁶⁶ See Amelia Hoover-Green, (Learning the Hard Way at the ICTY: Statistical Evidence of Human Rights Violations in an Adversarial Information Environment,” in *Collective Violence And International Criminal Justice: An Interdisciplinary Approach* 325-350 (Alette Smeulers, ed. 2010).

⁶⁷ Janie L Leatherman, *Sexualized Violence and Armed Conflict* 138 (2012) (discussing new developments in international law that address sexualized violence as part of genocide, crimes against humanity and also a way for soldiers to assert their masculinity in situations in which they feel helpless).

⁶⁸ Spierer and Seltzer, in discussing how statistical analysis might be used by the ICC, note that such information may be useful in 1) assisting in the investigative process, 2) producing statistical or demographic estimates to be offered into evidence, either in the form of descriptive statistics, causal analysis, or other types of analysis. Spierer & Seltzer in *Statistical Methods for Human Rights*, *supra* note 15, at 198.

perpetrator of violence.⁶⁹ The International Criminal Court has made it clear that, at the investigation stage, one does not need to “exclude all hypotheses inconsistent with the requisite statutory elements of the alleged crime.”⁷⁰ Statistical analysis that draws on survey research may be most useful in establishing that there are “reasonable grounds”⁷¹ to charge perpetrators rather than prove beyond a reasonable doubt that their explanation for the violence is accurate. At the same time, investigators may be even less knowledgeable about statistical methods and have their own concerns and biases that shape the facts they incorporate into their reports.

Finally, it is important to emphasize that criminal liability modeled on individual actions in a domestic context may be inherently problematic due to the nature of mass violence, particularly sexualized violence, in armed conflict.⁷² Survey research and statistical analysis may be used to further accountability efforts in international criminal courts, but may also help inform policy makers about other mechanisms that may be better equipped to address the collective nature of the violence. While gathering more information on sexualized violence may provide greater understanding of how survivors experience the violence, it will not be able to uncover the many structural factors that contribute to it, such as masculinity, the nature of war, and historical, cultural, and economic inequities, among others.⁷³ Studying survivors may do little to shed light on these larger issues, which, in the end, must be addressed in order to stop, prevent, or redress sexualized violence.

In the meantime, social scientists, policy makers and advocates must increase their understanding of each other and how each approaches the collection and analysis of information. Mutual understanding can help strengthen efforts to stop, prevent or redress the violence, either through international prosecution or some other means.

⁶⁹ See John Hagan, Richard Brooks & Todd Haugh, “Reasonable Grounds Evidence Involving Sexual Violence in Darfur”, 35 *Law & Soc Inquiry* 881 (2010).

⁷⁰ *Prosecutor v Al Bashir*, Case No. ICC 02/05-01/09, Judgment on Prosecutor’s Appeal (February 3, 2010), rev’d *Prosecutor v Al Bashir*, Case No. ICC-02/05-01/09, Decision on Prosecutor’s Application for a Warrant of Arrest, para 12 (March 4, 2009).

⁷¹ *Id.*, at para 30, 42 (establishing that an indictment can go forward where there are “reasonable grounds to conclude” that the crime took place).

⁷² Mark Drumbl, “Collective Responsibility and Post-Conflict Justice,” in *Accountability for Collective Wrongdoing*, 23-60 (Tracy Isaacs, Richard Vernon, eds, 2011).

⁷³ As Leatherman suggests, sexualized violence is better understood as a function of global and local economies far more than collateral damage of military strategies. Leatherman, *supra* note 66, at 138.