

GENDER JURISPRUDENCE FOR GENDER CRIMES?

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ABSTRACT

The gendered nature of international criminal courts/tribunals and international criminal and humanitarian law has been widely discussed in feminist literature. However, the idea that international criminal law and the practice of international criminal courts and tribunals could be gendered in a way that does not recognize the harms inflicted upon men has rarely been explored. This paper explores international humanitarian law (IHL), international criminal law (ICL) and the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and aims at showing that the international legal order – which normally privileges the male experience of conflict – does not always recognize the harms inflicted upon men. As a result, this paper argues that the jurisprudence of the ICTY communicates a certain idea of gender which may, ultimately, further entrench the norms which lead to the silencing of male sexual victimization.

I. INTRODUCTION

The main idea directing this paper is not new. Indeed, reflecting on the possibility that international humanitarian law (IHL), international criminal law (ICL) and the practice of international criminal courts and tribunals is gendered has been widely discussed in feminist literature for several decades.¹ This body of feminist literature has centered around gender-based crimes committed against women and their lack of recognition in international law along with devising reforms to effect change in the law applied by international criminal courts/tribunals and their practice in prosecuting these crimes. However, examining the pervasiveness of gender norms in these domains in a way that silences or misrecognizes the harm suffered by men in conflict situations has been explored to a much lesser extent and this article intends to shed some light on this issue.

Men's experiences of armed conflict can take several forms, most of them significantly shaped by gender. These experiences can include – but are not limited to – selected killings

¹ See for instance H. Charlesworth et al., 'Feminist Approaches to International Law', *American Journal of International Law*, 1991, Vol. 85, pp. 613-645; H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press: Manchester, 2000); H. Durham and T. Gurd (eds), *Listening to the Silences: Women and War* (Martinus Nijhoff publishers, Leiden and Boston, 2005), [Durham and Gurd].

and forced conscription² and sexual violence³ against both civilians and military personnel. Sexual violence against men can take many forms⁴ but this paper focuses on rape (male rape). Despite being an unexceptional and ubiquitous feature of armed conflict, since times immemorial⁵ to the most recent conflicts,⁶ the issue of male rape (and sexual violence against men) has remained at the periphery of discourses on sexual violence during armed conflict.⁷ It is argued here that this tendency to leave the rape of men in conflict situations on the margins is reflected in IHL, ICL and the practice of international criminal courts and tribunals because male rape subverts gendered constructions of masculinity and therefore does not fit within the hegemonic heteronormative framework.⁸

II. THE PLACE OF MALE RAPE VICTIMS IN INTERNATIONAL HUMANITARIAN LAW

Examining the place of male rape victims in IHL comes down to, borrowing Durham and Gurd's phrase, "listening to the silences"⁹ rather than analyzing explicit provisions mentioning these victims. The following analysis of a selected number of IHL instruments aims to show

² C. Carpenter, 'Recognizing Gender-Based Violence Against Civilian Men and Boys in Armed Conflict Situations', *Security Dialogue*, 2006, Vol. 37, pp. 83-103.

³ See for instance Ibid, pp. 83-103; S. Sivakumaran, 'Sexual Violence Against Men in Armed Conflicts', *European Journal of International Law*, 2007, Vol. 18, pp. 253-276, [Sivakumaran, 2007]

⁴ Other forms of sexual violence include (the following list is in no way exhaustive) "castration and other forms of enforced sterilization; other forms of mutilation; genital violence (for example beatings of the genitals or the administration of electric shock to the genital area); enforced nudity; enforced masturbation and other forms of sexual humiliation; and enforced incest or enforced rape of female or male others." UN OCHA, 'Discussion Paper 2 – The Nature, Scope and Motivation for Sexual Violence Against Men and Boys in Conflict', Use of Sexual Violence in Armed Conflict: Identifying gaps in Research to inform More Effective Interventions, UN OCHA Research Meeting, 26 June 2008, [OCHA Discussion Paper 2](#).

⁵ See for example, J.S. Goldstein, *War and Gender. How Gender Shapes the War System and Vice Versa* (Cambridge University Press, Cambridge, 2001), p. 359; I.H. Jones, 'Cultural and historical aspects of male sexual assault', in G.C. Mezey and M.B. King (eds), *Male Victims of Sexual Assault* (2nd edition) (Oxford University Press, Oxford, 2000), pp. 113-124, p. 118; A. DelZotto and A. Jones, 'Male-on-Male Sexual Violence in Wartime: Human Right's Law Taboo?', Paper presented to the Annual Convention of the International Studies Association, New Orleans, 23-27 March 2002, <http://adamjones.freesevers.com/malerape.htm>; S. Sivakumaran, 'Lost in translation: UN responses to sexual violence against men and boys in situations of armed conflict', *International Review of the Red Cross*, 2010, Vol. 82, pp. 259-277, p. 264, [Sivakumaran, 2010].

⁶ See for example the latest report (at the time of writing) of the Commission of Inquiry on Syria. UN Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UNHRCOR, 30th Sess, UN Doc. A/HRC/20/48, 13 August 2015, para. 95, [A/HRC/20/48](#). See also for Libya: UN Human Rights Council, Report of the International Commission of Inquiry on Libya, UNHRCOR, 19th Sess, UN Doc. A/HRC/19/68, 8 March 2012, paras. 65-70, [A/HRC/19/68](#).

⁷ S. Sivakumaran, 'Male/Male Rape and the "Taint" of Homosexuality', *Human Rights Quarterly*, 2005, Vol. 27, pp. 1274-1306, p. 1279, [Sivakuamaran, 2005]

⁸ See for example J. Butler, *Bodies That Matter: On the Discursive Limits of "Sex"* (Routledge, New York and London, 1993), p. 50; R. Graham, 'Male Rape and the Careful Construction of the Male Victim', *Social & Legal Studies*, 2006, Vol. 15, pp. 187-208, p. 197.

⁹ Durham and Gurd, above note 1.

that male rape victims are rarely explicitly considered as potential victims. This state of affairs stands in stark contrast to the now widely accepted view that international law privileges the experience of men while eliding that of women.¹⁰

Core IHL instruments

Before the Second World War, IHL conventions used euphemistic, also qualified as “Victorian”,¹¹ language to prohibit the use of rape during armed conflict. For instance, the 1899 Hague Convention II and the 1907 Hague Convention IV both provide for the protection of family honour and rights.¹² The 1929 Geneva Convention also provided that “[p]risoners of war have the right to have their person and their honour respected. Women shall have to be treated with all regard due to their sex”.¹³ This “genteel phrasing”¹⁴ framing the prohibition of rape as affording women the regard due to their sex has been interpreted by several international legal scholars as protecting women from rape only insofar as men’s honour and property rights are concerned, rather than as offering women protection from rape as an act of violence specifically directed at the victims themselves.¹⁵ It, however, is unclear whether the provisions relating to the respect of the prisoners’ person and honour and the protection of family honour and rights intended to include male rape. Considering that a specific clause was added for women (in the 1929 Geneva Convention), it is unlikely that the drafters targeted, among others, male rape.

Of the four Geneva Conventions (GCs) adopted following World War II, only the fourth one (GC IV) contains an explicit prohibition of rape¹⁶ in Article 27, which reads:

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.¹⁷

¹⁰ See for example, Charlesworth et al., above note 1, pp. 614-615.

¹¹ P. Viseur Sellers, ‘The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation’, UN OHCHR, 2008, p. 7, footnote 13, [UNOHCHR Viseur Sellers](#).

¹² *Convention With respect to the Laws and Customs of War on Land*, The Hague, 29 July 1899, 32 Stat. 1803, T.S. No. 403 (entry into force 4 September 1900), Article 46. The language in the 1907 only differs slightly, providing that “[f]amily honour and rights... must be respected.” *Convention Respecting the Laws and Customs of War on Land*, The Hague, 18 October 1907, 36 Stat. 2277, T.S. No. 539 (entry into force 26 January 1910), Article XLVI.

¹³ Geneva Convention Relating to Prisoners of War, Geneva, 27 July 1929, Article 3.

¹⁴ Viseur Sellers, above note 11, p. 7.

¹⁵ K.D. Askin, ‘Prosecuting Wartime Rape and other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles,’ *Berkeley Journal of International Law*, 2003, Vol. 23, pp. 288-349, p. 296.

¹⁶ The third Geneva Convention contains a provision, in Article 14, which provides that “[p]risoners of war are entitled in all circumstances to respect for their persons and their honour.” *Geneva Convention (III) relative to the Treatment of Prisoners of War* (Geneva Convention III), Geneva, 12 August 1949, 75 UNTS 135 (entry into force 21 October 1950), Article 14(1).

Women appear to be the main object of Article 27 and are explicitly mentioned as potential rape victims. Men, on the other hand, do not seem to be included in this provision. A stronger point for the exclusion of men is made in the 1958 commentary of this article:

A woman should have an acknowledged right to special protection, the special regard owed to women being, of course, in addition to the safeguards laid down in paragraph 1, which they enjoy equally with men.¹⁸

A brief analysis of this commentary indicates that the prohibition of rape was drafted with the specific protection of women in mind. Of course, this does not necessarily lead to the outright exclusion of men from this provision, but the author submits that it indicates that men were not considered as the primary targets of Article 27, whereas women quite explicitly were. In other words, the visibility of one group (women) compared with the silence of another (men) can be interpreted as an indication of the drafters' assumptions as to who is victim of rape in armed conflict. However, it can also be argued that common Article 3 to the GCs provides protection from rape to all civilians in times of conflict – but it does not do so explicitly, i.e. by mentioning 'rape'. Another nuancing point is the clause of non-discrimination based on sex contained in that same article which implies that the obligation to treat persons not taking an active part in hostilities must be treated humanely without any distinction based on, among others, sex encompasses both women and men.¹⁹

Similarly containing a clause of non-discrimination based on sex,²⁰ the first Additional Protocol to the Geneva Conventions (AP I) uses language similar to that of Article 27 GC IV, this time under the very specific and explicit heading of "Protection of women":

Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.²¹

As with Article 27 GC IV, AP I does not explicitly mention men as targets for rape which, again, does not necessarily outright excludes them from the group of potential victims but at least does not make them visible members of that group either. Interestingly, however, the

¹⁷ *Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War* (Geneva Convention IV), Geneva, 12 August 1949, 75 UNTS 287 (entry into force 21 October 1950, Article 27).

¹⁸ Commentary of Article 27 of Geneva Convention IV, 1958, [1958 commentary](#).

¹⁹ Common Article 3 to the Geneva Conventions of 1949.

²⁰ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, Geneva, 8 June 1977, 1125 UNTS 3 (entry into force 7 December 1978), Article 75(1) [AP I]. The second Additional Protocol to the Geneva Conventions also contains a similar non-discrimination clause. See *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, Geneva, 8 June 1977, 1125 UNTS 609 (entry into force 7 December 1978), Article 2(1) [AP II].

²¹ AP I, above note 20, Article 76(1).

second Additional Protocol to the Geneva Conventions (AP II) uses a different language in its provision on the prohibition of rape. Rather than targeting specifically women, AP II refers to the prohibition of rape against “persons”.²² This difference in language between the two documents adopted on the very same day is noteworthy. The language used in AP II would indicate the possible existence of male rape victims. Nonetheless, it is worth asking whether this gender-neutral terminology indicates a shift in thinking about rape victims mainly as women. This questioning is particularly important considering that, as just mentioned, both protocols were drafted at the same time. It is therefore likely that they mainly refer not only to the same acts but also to similar victims, namely women.

Feminist analyses of IHL put forward the understanding that as a regime, IHL not only privileges men but privileges the recognition of the harm inflicted upon men.²³ They usually illustrate this standpoint with the public/private dichotomy through which acts usually committed against men, such as torture, are criminalized, while acts usually committed against women, such as rape, remain in the private sphere.²⁴ From a feminist perspective, the victim of codified international crimes, here under IHL, is virtually always male.²⁵ IHL is overwhelmingly based on men’s experiences of conflict.²⁶ What the above analysis shows, however, is that IHL provides an, at best, incomplete account of men’s experiences of conflict because it does not – at least explicitly - consider men as potential rape victims.

Non-binding instruments

Documents adopted later in the twentieth century show a similar bias towards considering solely women as potential rape victims in conflict situations, although a trend towards inclusion can be observed. Staying at the international level, the resolutions adopted by the United Nations Security Council (UNSC) regarding Women, peace and security are of particular interest, along with the Declaration of Commitment to End Sexual Violence in Conflict endorsed by a majority of UN member states.²⁷

²² AP II, above note 20, Article 4(2)(e).

²³ See for example Charlesworth et al., above note 10, pp. 614-615.

²⁴ Ibid, p. 625.

²⁵ V. Nesiiah, ‘Missionary Zeal for a Secular Mission: Bringing Gender to Transitional justice and Redemption to Feminism’, in S. Kouvo and Z. Pearson (eds), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (Hart publishing: Oxford and Portland, 2011), pp. 137-157, p. 142.

²⁶ J. Gardam and H. Charlesworth, ‘Protection of Women in Armed Conflict’, *Human Rights Quarterly*, 2000, Vol. 22, pp. 148-166, p. 160.

²⁷ Office of the Special Representative of the Secretary-General for Sexual Violence in Conflict, ‘122 countries endorse historic ‘Declaration of Commitment to End Sexual Violence in Conflict’’, Press Release, 2 October 2013, [UNSRV Press Release](#). The full text of the declaration can be found at Foreign and

The unanimous adoption of the UNSC's first resolution on Women, peace and security in 2000 marked a turning point in the recognition of sexual violence during armed conflict.²⁸ However, it was in 2013 that the UNSC adopted a Women, peace and security resolution which, for the first time, explicitly mentioned men (and boys) as victims of sexual violence during armed conflict.²⁹ This inclusion consists of only one explicit reference while the rest of the resolution mentions only "women and girls" and makes a point of "[n]oting with concern that sexual violence in armed conflict and post-conflict situations disproportionately affects women and girls".³⁰ Until then, UNSC resolutions only explicitly mentioned women and girls and sometimes used gender-neutral terms such as "civilians" and "civilian populations".³¹

UNSC Resolution 1820 provides a fertile ground for analysis. In the concept paper circulated by the United States before the UNSC debate, three themes are identified for discussion, including that of "[u]nderstanding the problem" of sexual violence in conflict situations.³² Yet, Resolution 1820 does not provide a comprehensive understanding of sexual violence during armed conflict because it focuses on women and girls. No specific and explicit mention of men and boys is made, which is puzzling when taking into account that their experiences would undoubtedly contribute to better understanding the problem of sexual violence. The gender-neutral wording sometimes used in Resolution 1820 and other Women, peace and security resolutions has been interpreted by some commentators to indicate an understanding "that sexual violence may be committed against anyone but that, in practice, women and girls have been, and remain, particularly susceptible",³³ while admitting that some parts of the Resolution use "exclusory" language.³⁴

Commonwealth Office, *Declaration of Commitment to End Sexual Violence in Conflict*, 24 September 2013, [Declaration of Commitment](#) [Declaration of Commitment].

²⁸ UNSC, Resolution 1325(2000), 31 October 2000, UN Doc. S/Res/1325, [UNSC Res 1325](#), [UNSC Res 1325].

²⁹ UNSC, Resolution 2106(2013), 24 June 2013, UN Doc. S/Res/2106(2013), [UNSC Res 2106](#), [UNSC Res 2106].

³⁰ *Ibid.*

³¹ UNSC Res 1325, above note 28; UNSC, Resolution 1820(2008), 19 June 2008, UN Doc. S/Res/1820, [UNSC Res 1820](#); UNSC, Resolution 1888(2009), 30 September 2009, UN Doc. S/Res/1888, [UNSC Res 1888](#).

³² Annex to the letter dated 4 June 2008 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, 4 June 2008, UN Doc. S/2008/364, p. 3, [S/2008/364](#).

³³ Sivakumaran 2010, above note 5, p. 267.

³⁴ *Ibid.*, p. 267.

The use of gender-neutral language is therefore brought into question, just like regarding Article 4(2)(e) of AP II. As such, Resolution 2106, adopted in 2013, represents a significant step forward in the recognition of sexual violence (therefore including male rape) directed against men in conflict situations.

The Declaration of Commitment to End Sexual Violence in Conflict, presented to the UN General Assembly on 24 September 2013,³⁵ has to date been endorsed by more than two thirds of UN member states.³⁶ It uses language in stark contrast with UNSC Resolutions on Women, peace and security, referring to an “individual” and “victims”.³⁷ Men are explicitly recognized as sexual violence victims, without UNSC Resolution 2106’s caveat that women and girls are nevertheless “disproportionately” affected by it.³⁸ More importantly, it contains the following sentence:

Our efforts must also serve to shift the stigma of shame from the victims of these crimes to those who commit, command and condone them.³⁹

This sentence may seem innocuous but it could indicate the increased recognition, not just of male rape (and other acts of sexual violence against men) but of the masculinity gender norms which ascribe shame and stigma to male rape victims. As progressive as the Declaration is, there is still quite a way to go, as evidenced by the presence of some women-specific commitments and the absence of men-specific ones, a surprising fact considering that many facets of male sexual victimization still remain un- or under-explored, especially regarding monitoring and documentation.⁴⁰

³⁵ ‘Global Support to End Sexual Violence in Conflict’, 20 September 2013, [Global support](#).

³⁶ ‘137 countries, 70% of the United Nations have committed to end sexual violence in conflict’, 29 November 2013, [70% of UN committed](#).

³⁷ Declaration of Commitment, above note 27, p.1,

³⁸ Ibid, p. 2,

³⁹ Ibid.

⁴⁰ The Declaration contains a commitment to “[e]ncourage, support and protect the efforts of civil society organizations, including women’s groups and human rights defenders, to improve the monitoring and documentation of cases of sexual violence in conflict”. Ibid, p. 3. On the other hand, monitoring and documentation of male sexual violence is scarce and many scholars have lamented the cruel lack of data on the issue, coined the “information gap” in V. Oosterveld, ‘Sexual Violence Directed Against Men and Boys in Armed Conflict or Mass Atrocity: Addressing a Gendered Harm in International Criminal Tribunals’, *Journal of international Law & International Relations*, 2014 Vol. 10, pp. 107-128, pp. 108-109. To this day, only two population-based surveys including sexual violence against men have been conducted. See K. Johnson et al., ‘Association of Combatant Status and Sexual Violence With Health and Mental Health Outcomes in Postconflict Liberia’, *Journal of the American Medical Association*, 2008, Vol. 300, pp. 676-690, [Johnson, 2008]; K. Johnson et al., ‘Association of Sexual Violence and Human Rights Violations With Physical and Mental Health in Territories of the Eastern Republic of the Congo’, *Journal of the American Medical Association*, 2010, Vol. 304, pp. 553-562, [Johnson, 2010].

The roots of IHL as a gendered regime

What the invisibility or sometimes seemingly reluctant inclusion of male rape victims in binding and non-binding IHL instruments demonstrates is that the drafters of these documents did not – and sometimes still do not – consider men as potential rape victims as readily as they did/do women. Specifically apparent in core IHL instruments is the view that rape is a crime whose primary targets appear to be women.

The author argues here that the assumption or understanding that rape is perpetrated exclusively or mainly against women stems from constructions of masculinity.⁴¹ Central to the construction of masculinity are two intertwined concepts, power and heterosexuality. “[T]he ability to exert power over others, especially through the use of force”⁴² means that masculinity creates expectations of strength, toughness, independence, aggressiveness, dominance, and the ability to protect oneself and others in men.⁴³ Power is linked to heterosexuality in the way that the latter is generally “culturally hegemonic”⁴⁴ and viewed as sexual relations taking place between men and women according to a hierarchy of power that privileges men. Men are thereby given one role in rape, that of the perpetrator.⁴⁵

The penetration of the constructed impenetrable male body⁴⁶ subverts gender norms of masculinity and this deviation from the heteronormative masculine standard leads to a loss of the victim’s masculine identity or at least to the victim being ‘less’ masculine⁴⁷ or not a

⁴¹ It would be more accurate to discuss ‘masculinities’ as masculinity can take a variety of forms according to specific cultures and several masculinities exist within each gender system. Nevertheless, it is argued that some common traits can be identified, especially in the case of norms regulating rape, thereby allowing for a certain degree of generalization. See for instance B. Hamber, ‘Masculinity and Transitional Justice: An Exploratory Essay’, *International Journal of Transitional Justice*, 2007, Vol. 1, pp. 375-390, p. 379.

⁴² R. Coomaraswamy, *Preliminary Report of the United Nations Special Rapporteur on Violence against Women, Its Causes and Consequences*, 22 November 1994, UN Doc. E.CN.4/1995/42, para. 64, [E.CN.4/1995/42](#).

⁴³ See for instance J.A. Turchik and K.M. Edwards, ‘Myths About Male Rape: A Literature Review’, *Psychology of Men and Masculinities*, 2012, Vol. 13, pp. 211-226, p. 213; D. Zarkov, ‘The Body of the Other Man – Sexual Violence and Construction of Masculinity, Sexuality and Ethnicity in the Croatian Media’, in C.O.N. Moser and F.C. Clark (eds), *Victims, Perpetrators or Actors? Gender, Armed Conflict and Political Violence* (Zed Books, London and New York, 2001), pp. 69-82, p. 77, [Zarkov, 2001]; D. Zarkov, ‘War rapes in Bosnia: On Masculinity, Femininity and Power of the Rape Victim Identity’, *Tijdschrift voor Criminologie*, 1997, Vol. 39, pp. 140-151, p. 143, [Zarkov, 1997].

⁴⁴ A. Jones, ‘Straight as a Rule: Heteronormativity, Gendercide, and the Noncombatant Male’, *Men and Masculinities*, 2006, Vol. 8, pp. 451-469, p. 451.

⁴⁵ Sivakumaran, 2007, above note 3, p. 270.

⁴⁶ Judith Butler interprets Plato’s *Timaeus* to demonstrate gender norms at play in the act of sexual penetration and concludes that “he... will never be entered by her or, in fact, by anything. For he is the impenetrable penetrator, and she, the invariably penetrated.” Butler, above note 8, p. 50; see also Graham, above note 8, p. 197.

⁴⁷ See Sivakumaran, 2007, above note 3, p. 270.

'proper'⁴⁸ or 'real'⁴⁹ man. This loss of identity leads men to be ascribed the gendered identity of a woman because in the "gendered power-play of masculinized dominance and feminized subordination",⁵⁰ the victim assumed the role of the passive female. Victims' testimonies confirm the existence of this feminization process.⁵¹

In addition to feminization, victims also undergo a process of 'homosexualization'.⁵² Zarkov observed this process in her study of articles published in the Croatia media during the conflict in the former Yugoslavia. The media "systematically questioned" "the masculinity and heterosexuality" of Muslim male rape victims.⁵³

The inconceivability of male rape victims leads to the issue being silenced, from victims themselves and also on the part of the wider community. Documentation indicates that victims usually cannot find the words to express their ordeal⁵⁴ and feel shame⁵⁵ while the wider community, when it does not cast aspersions of female or homosexual identity, ostracizes victims⁵⁶ or silences this specific experience of conflict, as is argued here in the field of international law.⁵⁷

⁴⁸ Zarkov, 2001, above note 43, p. 77.

⁴⁹ M. Davies, et al., 'Examining the Relationship Between Male Rape Myth Acceptance, Female Rape Myth Acceptance, Victim Blame, Homophobia, Gender Roles, and Ambivalent Sexism', *Journal of Interpersonal Violence*, 2012, Vol. 27, pp. 2807-2823, pp. 2808-2809.

⁵⁰ L. Stemple, 'Male Rape and Human Rights', *Hastings Law Journal*, 2009, Vol. 60, pp. 605-647, p. 628.

⁵¹ See for example J. Gettleman, 'Symbol of Unhealed Congo: Male Rape Victims', *The New York Times*, 4 August 2009, [Symbol of unhealed Congo](#); A victim testified that "[t]hey made me as if I were a woman" in Refugee Law Project, 'They Slept with Men', Video, 10 December 2011, at 3:35, [They slept with me](#).

⁵² Sivakumaran, 2005, above note 7.

⁵³ Zarkov, 2001, above note 43, p. 77.

⁵⁴ See for instance, M. Peel, et al., 'The sexual abuse of men in detention in Sri Lanka', 355 *The Lancet*, 2000, Vol. 355, pp. 2069-2070, p. 2069.

⁵⁵ See for example, Johnson, 2008, above note 40 p. 688; Carlson, 'The Hidden prevalence of Male Sexual Assault During War: Observations on Blunt Trauma to the Male Genitals', 46 *British Journal of Criminology*, 2006, Vol. 46, pp. 16-25, pp. 22-23; Sivakumaran, 2005, above note 7, p. 1288.

⁵⁶ See for example, 'DRC-Uganda: Male sexual abuse survivors living on the margins', *IRIN*, 2 August 2011, [Survivors on the margins](#); Johnson, 2008, above note 40, p. 688; Carlson, above note 55, pp. 22-23.

⁵⁷ This silence is also reflected in other fields, such as academia or politics. See for example S. Mouthaan, "Sexual Violence against Men and International Law: Criminalising the Unmentionable", 13 *International Criminal Law Review*, 2013, Vo. 13, pp. 665-695, p. 667; Zarkov, 1997, above note 43, p. 145.

III. ICL AND THE PROSECUTION OF MALE RAPE IN SUPRANATIONAL JURISDICTIONS

Being based, in part, on IHL, ICL has been influenced by its content and its underlying assumptions and gender biases. The question becomes whether the ambiguity of a male victim of sexual violence has been reproduced in ICL as it is conceived in IHL.

Substantive and procedural ICL

From a substantive point of view, ICL has emancipated itself to a great extent from IHL. Indeed, all the definitions of rape adopted by the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC) have been elaborated in a gender-neutral language.⁵⁸ The ICTY and ICTR have used various definitions over the years which all share a gender-neutral language. The gender-neutrality of the definition was expressed in two ways, that is the manner in which the rape victim was referred to and the body parts whose penetration were deemed to constitute acts of rape. Regarding the designation of the victim, the definitions used the words “person”⁵⁹ and/or “victim”.⁶⁰ Regarding the enumerated body parts, the tribunals took two very diverging approach. The *Akayesu* Trial Chamber purposely avoided listing body parts and instead defined rape as “a physical invasion of a sexual nature” because it reasoned that “rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts.”⁶¹ On the other hand, the *Furundžija* Trial Chamber changed the definition of rape to a more ‘mechanical’ one, identifying the following as one of elements of rape: the sexual penetration, however slight: of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or of the mouth of the victim by the penis of the perpetrator.⁶² Even though these definitions consist of immensely diverging elements, they both allow for men to be rape victims.

⁵⁸ Debates about the definition of rape in ICL have centered on the issue of consent, which is not the focus of this section. See C. MacKinnon, ‘Defining Rape Internationally: A Comment on *Akayesu*’, *Columbia Journal of Transnational Law*, 2005-2006, Vol. 44, pp. 940-958; Viseur Sellers, above note 11, p. 18.

⁵⁹ For instance in *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 598, [ICTR-96-4-T](#), [Akayesu Trial Judgment]; *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Trial Judgment, 16 November 1998, paras. 478-479, [IT-96-21-T](#).

⁶⁰ For instance in *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1, Trial Judgment, 10 December 1998, para. 185, [IT-95-17/1](#), [Furundžija Trial Judgment]; *Prosecutor v. Dragoljub Kunarac et al.*, Case Nos. IT-96-23 and IT-96-23/1, Trial Judgment, 22 February 2001, para. 460, [IT-96-23/IT-96-23/1](#).

⁶¹ Akayesu Trial Judgment, above note 59, para. 597.

⁶² Furundžija Trial Judgment, above note 60, para. 185.

The ICC learned from the different definitions elaborated by the ICTY and ICTR. The ICC Elements of Crimes (EoC) define rape using similar language regarding the rape victim by referring to a “person” and the “victim”.⁶³ Combining the two main different definitions from the ICTR and the ICTY, the ICC EoC state that rape is composed of the following element: “[t]he perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.”⁶⁴ In addition to this already gender-neutral language, a footnote to the word “invaded” reads: “[t]he concept of “invasion” is intended to be broad enough to be gender-neutral.”⁶⁵ That the drafters of the Rome Statute felt the need to add this footnote to a definition which is already framed in gender-neutral terms can only be lauded and may reflect the acknowledgment men are raped in times of conflict.

These definitions, although showing great promise, also demonstrate that male rape victims’ experience of rape was not entirely taken into account. All the definitions presented here center around the perpetrator using his/her body (or an object) to rape the victim – in the case of the ICC rather as the one penetrating or as the one being penetrated. Yet, a common method of committing rape against men in conflict settings is what some scholars have coined “forced rape”⁶⁶ or “enforced rape”,⁶⁷ namely when the perpetrator forces a victim to rape a fellow victim. Following a strict interpretation of the above-mentioned definitions, it remains uncertain whether both victims could be found victims of rape.⁶⁸

It is important to note that feminist activism strongly influenced the elaboration of rape definitions, in particular during the Rome Statute negotiations.⁶⁹ In this context, feminist activists attempted, with some success, to modify the understanding of rape from one based

⁶³ ICC Elements of Crimes, arts. 7(1)(g), 8(2)(b)(xxii)-I and 8(2)(e)(xi), [ICC Elements of Crimes], [ICC EoC](#).

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Carpenter, above note 2, p. 95.

⁶⁷ Sivakumaran, ‘Prosecuting Sexual Violence Against Men and Boys’, in A-M de Brouwer et al. (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia, Antwerp, 2013), pp. 79-97, p. 80. [Sivakumaran, 2013].

⁶⁸ Some scholars believe that the wording includes this form of rape. See Ibid, p. 85.

⁶⁹ See for example, Bedont, B. and Hall-Martinez, K, ‘Ending Impunity for Gender Crimes under the International Criminal Court’, *Brown Journal of World Affairs*, 1999, Vol. 6, pp. 65-85; J. Halley, ‘Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Law’, *Michigan Journal of International Law*, 2008, Vol. 30, pp. 1-123.

on a male- or patriarchal-oriented understanding to one representative of the female experience, by removing for instance references to 'honour' and making it into a crime of a violent nature.⁷⁰ This feminist intervention in ICL, but also at the national level, has led MacKinnon to conclude that "when what usually happens to women [rape] [...] happens to men, which it sometimes does, women's experience is the template for it."⁷¹ While the different definitions of rape discussed previously appear to support a strong gender-neutral perspective, the question becomes whether the same can be said from a procedural point of view.

From a procedural point of view, particularly relevant here is Rule 96 of the ICTY and ICTR Rules of Procedure and Evidence (RPE), namely the evidentiary rules applying specifically in cases of sexual assault which impose strict limits on the corroboration requirement, the use of a consent defence and the use of the victim's prior sexual conduct.⁷² The inclusion of this rule into the RPE of both *ad hoc* tribunals was nothing short of revolutionary and the present analysis does not intend to question its rightful place in these documents. Nevertheless, it seeks to question whether gender norms and stereotypes underlie it. Its inclusion was the direct result of feminist activism⁷³ and sought to ensure that obstacles encountered by female rape victims at the domestic level would not arise before the tribunals. As a result, this rule was based on domestic 'rape shield laws' destined to improve women's experience of the criminal justice process. Again, this rule reflects women's experience of rape trials. As previously stated, this rule has an undeniable place in the tribunals' RPE but it raises the question whether male victims' experience of rape trials is the same as women's and

⁷⁰ See for example, C. MacKinnon, 'On Torture', in *Are Women Human? And Other International Dialogues* (Belknap Press of Harvard University Press, Cambridge, MA and London, 2006), pp. 17-27.

⁷¹ *Ibid.*, p. 21.

⁷² ICTY, Rules of Procedure and Evidence, Rule 96, [ICTY RPE](#); ICTR, Rules of Procedure and Evidence, Rule 96, [ICTR RPE](#). Rule 96 reads as follow:

"In cases of sexual assault:

- (i) no corroboration of the victim's testimony shall be required;
- (ii) consent shall not be allowed as a defence if the victim
 - (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
 - (b) reasonable believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
- (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;
- (iv) prior sexual conduct of the victim shall not be admitted in evidence."

⁷³ Most of the Rule 96 wording is taken verbatim from J. Green et al., 'Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique,' *Hastings Women's Law Journal*, 1994, Vol. 5, pp. 171-241, pp. 200-203.

whether this rule adequately reflects this experience. The ICC's RPE lead to a similar questioning as the rules applying in cases of sexual violence echo the ICTY and ICTR's Rule 96.⁷⁴

Jurisprudence

The jurisprudence of international criminal courts and tribunals in prosecuting male rape has been, to say the least, inconsistent. The ICTR has not prosecuted, or even recognized, a single case of male rape in spite of testimonies pointing to its occurrence during the genocide.⁷⁵ There seemed to have been no willingness on the part of the ICTR to investigate male rape (and male sexual victimization in general).⁷⁶

The jurisprudence of the Special Court for Sierra Leone (SCSL) does not offer a brighter picture. In the *RUF* case, the Prosecution put forth one instance when "RUF rebels in Bumpreh ordered a couple to have sexual intercourse in the presence of the other captured civilians and their daughter. After the enforced rape they forced the man's daughter to wash her father's penis."⁷⁷ Whereas, it is difficult to say whether this type of rape could consider the husband as a rape victim in light of the definition of rape used by the SCSL,⁷⁸ the Trial Chamber qualified the act as "enforced rape," seemingly leaning towards recognizing both victims as rape victims. However, in its indictment, the Prosecution "restricted its pleadings on sexual violence... to crimes committed against "women and girls," thereby excluding male victims of sexual violence."⁷⁹ The defect in the indictment was deemed cured by the Trial Chamber and the accused found guilty of outrages upon personal dignity, as charged in the Indictment⁸⁰ for acts which constitute rape. In the *AFRC* and *Taylor* cases, the Prosecution also restricted the charges to sexual violence against women and girls even though

⁷⁴ ICC Rules of Procedure and Evidence, Rules 70, 71 and 72, [ICC RPE](#).

⁷⁵ D.E. Buss, 'Rethinking 'Rape as a Weapon of War'', *Feminist Legal Studies*, 2009, Vol. 17, pp. 145-163, p. 159.

⁷⁶ Only two instances of other forms of sexual violence against men were recognized (but not always attached to legal consequences) in the ICTR case law. See *Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, Trial Judgment, 16 May 2003, paras. 303 and 417, [ICTR-96-14-T](#); *Prosecutor v. Mikaeli Muhimana*, Case No. ICTR-95-1B, Trial Judgment, 28 April 2005, paras. 441-444, [ICTR-95-1B](#); *Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Trial Judgment, 18 December 2008, para. 1908, [ICTR-98-41-T](#).

⁷⁷ *Prosecutor v. Issa Hassan Sesay et al.*, Case No. SCSL-04-15-T, Judgment, 2 March 2009, para. 1302, [SCSL-04-15-T](#); [Sesay Judgment].

⁷⁸ The SCSL used a definition of rape close to that adopted by the *Kunarac* Trial Chamber. See *Prosecutor v. Alex Tamba Brima et al.*, Case No. SCSL-04-16-T, Judgment, 20 June 2007, para. 693, [SCSL-04-16-T](#), [Brima Judgment].

⁷⁹ Sesay Judgment, above note 77, para. 1303.

⁸⁰ *Ibid*, para. 1306.

unspecified acts of sexual violence against men were acknowledged. In the *Taylor* case, the initial indictment contained unspecific allegations of sexual violence against men⁸¹ but they were then removed and the Second amended indictment only contains charges of sexual violence, including rape, against women and girls.⁸² The *AFRC* Further Amended Consolidated Indictment alleges sexual violence against men⁸³ but restricts the charges to sexual violence, including rape, against women and girls.⁸⁴ In both cases, the Trial Chambers were unable to make legal findings regarding sexual violence against men due to the indictment defects.⁸⁵ Overall, the SCSL Prosecution seemed unwilling to bring charges of male rape (or male sexual violence) and instead focused exclusively on rape (and sexual violence) directed against women and girls.

The ICTY is, to date, the only international criminal tribunal to have completed prosecutions for acts constituting male rape. The report of the UN Commission of Experts for the former Yugoslavia foreshadowed this state of affairs by reporting several instances of male rape in detention facilities⁸⁶ and invoking the principle of non-discrimination based on sex enshrined in IHL to point out that men were indeed victims of rape even though, paraphrasing the Commission's final report, IHL does not mention them as potential victims.⁸⁷

The first case before the ICTY appeared to herald a new era in the prosecution of male rape. The Second Amended Indictment against Duško Tadić contained the following passage: "Both female and male prisoners were beaten, tortured, raped, sexually assaulted, and humiliated."⁸⁸ Yet, for "forc[ing] two other prisoners, 'G' and 'H,' to commit oral sexual acts",⁸⁹

⁸¹ *Prosecutor v. Charles Taylor*, Case No. SCSL-03-91-T, Indictment, 7 March 2003, para. 30, [SCSL-03-91-T](#).

⁸² *Prosecutor v. Charles Taylor*, Case No. SCSL-03-91-T, Second Amended Indictment, 29 May 2007, para. 14, [SCSL-03-91-T-2](#).

⁸³ *Prosecutor v. Alex Tamba Brima et al.*, Case No. SCSL-04-16-PT, Further Amended Consolidated Indictment, 18 February 2005, para. 39, [SCSL-04-16-PT](#).

⁸⁴ *Ibid.*, para. 51.

⁸⁵ *Prosecutor v. Charles Taylor*, Case No. SCSL-03-91-T, Trial Judgment, 18 May 2012, paras. 124-134, [SCSL-03-91-T](#); *Brima Judgment*, above note 78, paras. 968-969.

⁸⁶ See for example, UNSC, *Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, UN Doc. S/1994/674/Add.2 Vol. V, Annex IX 'Rape and Sexual Assault', 24 December 1994, paras. 20.

⁸⁷ UNSC, *Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, UN Doc. S/1994/674, 24 May 1994, para. 103 and accompanying note 18, p. 75, [S/1994/674](#). Specifically, note 18 reads as follows: "Violent crimes of a homosexual nature are not explicitly mentioned in international humanitarian law, but protection against rape and other sexual assaults is also applicable to men on the basis of equality and non-discrimination."

⁸⁸ *Prosecutor v. Duško Tadić*, Case No. IT-94-1-I, Second Amended Indictment, 14 December 1995, para. 2.6, [IT-94-1-I](#).

⁸⁹ *Ibid.*, para. 6.

Tadić was charged with torture or inhuman treatment, willfully causing great suffering or serious injury to body or health, cruel treatment and inhumane acts.⁹⁰ This case could have been the opportunity for the ICTY to label an act of rape (here, forced fellatio) as rape but instead the Prosecutor chose to label it as a more general category of crime.

This first case more or less set the tone for the prosecution of future cases of male rape before the ICTY. The *Čelebići Camp* case is a good example of this tendency. In this instance, rape as torture was charged in the case of the rape of female victims.⁹¹ However, for “forcing persons to commit fellatio with each other”, the accused were charged with inhuman treatment and cruel treatment without mention of the label ‘rape’.⁹² The Trial Chamber noticed the inconsistency of the labeling practice and made it known in its judgment:

The Trial Chamber notes that the aforementioned act [forced fellatio] could constitute rape for which liability could have been found if pleaded in the appropriate manner.⁹³

This remark, by the Trial Chamber in the *Čelebići Camp* case, did not spur a revision of indictments containing charges for acts constituting rape to re-label them as rape. Indeed, forced fellatio and the insertion of objects in the anus were routinely charged as torture, inhuman acts, cruel treatment or persecution rather than rape, such as in the *Milošević* case where rape (forced fellatio and incest), was charged as persecution,⁹⁴ or the *Martić* case in which “forced mutual oral sex among detainees or with prison guards” was charged as persecution, torture and cruel treatment without the label ‘rape’ anywhere in sight.⁹⁵ In *Simić*, an “incident involved ramming a police truncheon in the anus of a detainee” while some other incidents “involved forcing male prisoners to perform oral sex on each other and on Stevan Todorović, sometimes in front of other prisoners.”⁹⁶ These incidents fulfil the elements of rape and yet, they were charged as torture.⁹⁷

⁹⁰ Ibid.

⁹¹ *Prosecutor v. Mucić et al.*, Case No. IT-96-21, Indictment, 19 March 1996, paras. 24-25 and 29, [IT-96-21](#).

⁹² Ibid, para. 34.

⁹³ *Prosecutor v. Mucić et al.*, Case No. IT-96-21, Trial Judgment, 16 November 1998, para. 1066, [IT-96-21-T](#).

⁹⁴ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Open court testimony from Witness B 1461 in Prosecution case, as reproduced in Viseur Sellers, above note 11, p. 40, footnote 13.

⁹⁵ *Prosecutor v. Milan Martić*, Case No. IT-95-11, Trial Judgment, 12 June 2007, paras. 288 (and accompanying footnote 899), 413-415, 454-455, 480, and 518, [IT-95-11](#).

⁹⁶ *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9-T, Trial judgment, 17 October 2003, para. 728, [IT-95-9-T](#).

⁹⁷ Ibid, para. 772.

There seems to have been two exceptions to this tendency. In the *Todorović* case, forcing two detainees to perform fellatio on each other was charged as rape, humiliating and degrading treatment, and torture or inhuman treatment.⁹⁸ Ranko Češić was similarly charged with, among others, rape, for forcing two brothers to perform fellatio on each other.⁹⁹ While these indictments appear groundbreaking with regards to the prosecution of male rape, a closer look at the indictments tempers hyperbolic statements. Forced fellatio was charged under Article 5(g) of the ICTY Statute – the provision for rape – but both indictments specify that this article is interpreted as including other forms of sexual assault. Therefore, both accused were not charged with rape specifically, but rather with sexual assault. On one hand, the mischaracterization of acts of rape as sexual assault constitutes another lost opportunity for the ICTY to prosecute male rape adequately. On the other hand, the fact that the charges themselves reflect the sexual nature of the crimes constitutes a significant step forward in the recognition of men as victims of sexual violence.

Todorović entered into a plea agreement with the Prosecution, which saw him convicted of the crime of persecution while all other counts were withdrawn. Todorović agreed that the facts charged as sexual assault were true but he was therefore not found guilty of them specifically.¹⁰⁰ Češić also entered into a plea agreement with the Prosecution but, unlike Todorović, pled guilty to all counts of the indictment, therefore to forced fellatio as sexual assault.¹⁰¹

Other instances of acts constituting rape have been identified by the ICTY Trial Chambers but were only included in factual findings and therefore no legal consequences were attached to these findings. This is the case in the *Naletilić and Martinović* case when a soldier “took out his penis, forced it into Nenad Harmandžić’s mouth and asked him whether he liked it.”¹⁰²

⁹⁸ *Prosecutor v. Todorović*, Case No. IT-95-9/1, Second Amended Indictment, 19 November 1998, paras. 44-46, [IT-95-9/1-2](#).

⁹⁹ *Prosecutor v. Ranko Češić*, Case No. IT-95-10/1, Third Amended Indictment, 26 November 2002, para. 15, [IT-95-10/1-3](#).

¹⁰⁰ *Prosecutor v. Todorović*, Case No. IT-95-9/1-S, Sentencing Judgment, 31 July 2001, paras. 9 and 17, [IT-95-9/1-S](#).

¹⁰¹ *Prosecutor v. Ranko Češić*, Case No. IT-95-10/1, Sentencing Judgment, 11 March 2004, paras. 13-14, 33 and 35-36, [IT-95-10/1-SJ](#).

¹⁰² *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34, Trial Judgment, 31 March 2003, para. 464, [IT-98-34](#).

Taken as a whole, the record of the ICTY with regard to the prosecution of male rape is disappointing. In all the cases, the Tribunal has refused to assign the correct legal characterization to the acts in question (rape). In many of these, the Tribunals instead chose broader categories of crime (torture or inhuman treatment) while in a few, the charges reflected the sexual nature of the crimes.¹⁰³ This vagueness translates the ability for the Tribunal to grapple with the violent nature of male rape but not with its sexual nature. As a result, the Tribunal's record erases the sexual nature of the crime and focuses on its violent aspect. This observation is in itself noteworthy. For decades feminist activists have fought to ensure the recognition of rape as an act of torture in order to surface the hitherto hidden violent nature of it,¹⁰⁴ while scholars conducting research on the international criminal prosecution of male rape advocate for the recognition of the sexual aspect of it by correctly labeling it as rape rather than solely as torture.¹⁰⁵

On March 21st, 2016, The ICC became the first international court or tribunal to have ever prosecuted and convicted an individual – Jean-Pierre Bemba Gombo – for male rape under the specific charge of rape.¹⁰⁶ In the confirmation of charges, the Pre-Trial Chamber explicitly stated that “civilian women and *men* were raped”.¹⁰⁷ The language used by the Court here indicates significant progress in labelling the crime of rape. Rather than avoid the word ‘rape’, the Pre-Trial Chamber reports that “Witness 23 was ordered to lie down in the position of a horse and was raped”.¹⁰⁸ Of even more significance, Witness 23 testified during the trial.¹⁰⁹ This testimony constitutes the first time in the history of international criminal law that a male rape victim gave his testimony to support specifically a rape charge.

¹⁰³ These criticisms have been levelled at the ICTY with regards the prosecution of rape and other forms of sexual violence against women, but in this context commentators identified stereotypes and bias against women as the cause. See for instance K.D. Askin, ‘Treatment of Sexual Violence in Armed Conflicts: A Historical Perspective and the Way Forward’, in A-M de Brouwer et al. (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia, Antwerp, 2013), pp. 19-55, p. 52.

¹⁰⁴ See for example MacKinnon, above note 70, pp. 17-27. Recently, some divergent opinions have emerged. See for example, C. McGlynn, ‘Rape as ‘Torture’? Catharine MacKinnon and Questions of Feminist Strategy’, *Feminist Legal Studies*, 2008, Vol. 16, pp. 71-85.

¹⁰⁵ See for instance Sivakumaran, 2013, above note 67, pp. 92-93; Oosterveld, above note 40, pp. 107-128.

¹⁰⁶ *Prosecutor v. Jean-Pierre Bemba*, Case No. ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute, 21 March 2016, para. 633, [ICC-01/05-01/08](#).

¹⁰⁷ *Prosecutor v. Jean-Pierre Bemba*, Case No. ICC-01/05-01/08, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 286, [ICC-01/05-01/08-PT](#).

¹⁰⁸ *ibid*, para. 171.

¹⁰⁹ *Prosecutor v. Jean-Pierre Bemba*, Case No. ICC-01/05-01/08, Trial Transcript, ICC-01/05-01/08-T-50-Red-ENG, 21 January 2011, p. 32, pp. 32, 34-38, [T-50-Red-ENG](#).

However, the picture becomes more mixed once attention is turned to male sexual victimization in general. The first ICC case, *Lubanga*, did not include any reference to sexual violence (against women or men as a matter of fact) even though evidence suggests that persons close to Lubanga committed sexual violence against men (and women).¹¹⁰ The request to amend the charges to include charges of sexual violence was denied.¹¹¹ Throughout the trial, the Prosecution nevertheless mentioned sexual violence and particularly emphasized sexual violence against girls. The only reference to sexual violence committed against boys in the judgment was in a footnote.¹¹² Judge Odio Benito nevertheless included sexual violence directed against boys and discussed the plight of “victims” rather than that of girl victims of sexual violence in her dissenting opinion.¹¹³ In the *Muthaura and Kenyatta* case, the suspects were charged with rape and other forms of sexual violence in the case of forced circumcision and sexual mutilation.¹¹⁴ In itself, the Amended Document Containing the Charges was therefore quite progressive. However, the Pre-Trial Chamber confirmed the charge of rape but declined to confirm that of other forms of sexual violence.¹¹⁵ The Judges reasoned that “not every act which targets part of the body commonly associated with sexuality should be considered an act of sexual violence.”¹¹⁶ That a man would not consider the mutilation of his penis as an act of a sexual nature is hard to fathom.

With the election of Fatou Bensouda as Prosecutor, adequate labelling for crimes of sexual violence against men do not seem to be out of reach. Bosco Ntaganda was originally not charged with any sexual violence crimes in 2006.¹¹⁷ However, the Office of the Prosecutor

¹¹⁰ Sivakumaran 2013, above note 67, p. 96.

¹¹¹ *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Appeals Judgement, 8 December 2009, p. 3, [ICC-01/04-01/06-A](#).

¹¹² *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Judgment, 14 March 2012, footnote 1811, [ICC-01/04-01/06](#). Footnote 1811 reads “Ms Coomaraswamy suggested that the use for sexual exploitation of boys and girls by armed forced or groups constitutes an “essential support function””,

¹¹³ *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Separate and Dissenting Opinion of Judge Odio Benito, 14 March 2012, para. 16, [ICC-01/04-01/06](#). Para. 16 contains the following: “By failing to deliberately include within the legal concept of “use to participate actively in hostilities” the sexual violence and other ill-treatment suffered by girls and boys, the Majority of the Chamber is making this critical aspect of the crime invisible. Invisibility of sexual violence in the legal concept leads to discrimination against the victims of enlistment”.

¹¹⁴ *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 254, [ICC-01/09-02/11](#).

¹¹⁵ *Ibid*, para. 154.

¹¹⁶ *Ibid*, para. 265.

¹¹⁷ *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Warrant of Arrest, 22 August 2006, [ICC-01/04-02/06](#).

filed new charges against him, especially charges of sexual violence and in particular, charges of sexual violence against men which were confirmed in 2014.¹¹⁸ These charges include rape as a crime against humanity and as a war crime for forcing male prisoners to rape female detainees and for the rape of three men by Ntaganda's soldiers.¹¹⁹

The Office of the Prosecutor has also elaborated the ICC's Policy Paper on Sexual and Gender Based Crimes.¹²⁰ The document is promising in its language. It discusses men and boys as similarly potential victims of sexual violence (and other gender-based crimes) as women and girls – a first in an international criminal law document and commits, for instance, to include men in future indictments and strategies¹²¹ and to account for the gendered meaning of crimes.¹²²

IV. CONCLUSION

The recognition of male rape as one of men's experiences of conflict has run into significant obstacles stemming from gender norms governing masculinity. IHL still elides this phenomenon and the jurisprudence of international criminal courts and tribunals still struggles to capture the harm that male rape inflicts on victims. This paper attempted to show the possible influence of IHL's perception of men's experience of conflict (being killed or tortured) on the work of international criminal courts and tribunals (that men suffer from torture rather than rape). Looking at the prosecution of sexual violence (against men and women) at the ICTY, Campbell contends that "women are visible victims of sexual violence, while men remain the invisible victims."¹²³ She concludes that "men appear to testify to conflict and women testify to rape."¹²⁴ Recent encouraging developments indicate a new trend for the prosecution of male rape at the ICC. Hopefully, new cases will follow in the footsteps of the *Bemba* case.

¹¹⁸ *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 9 June 2014, [ICC-01/04-02/06-PT](#).

¹¹⁹ *Ibid*, paras. 50-52.

¹²⁰ ICC Office of the Prosecutor, Policy paper on Sexual and gender-Based Crimes, June 2014, [ICC-Policy-Paper](#).

¹²¹ *Ibid*, paras. 16, 20, 27-28.

¹²² *Ibid*, para. 20.

¹²³ K. Campbell, 'The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia', 1 *International Journal of Transitional Justice*, 2007, Vol. 1, pp. 411-432, p. 427.

¹²⁴ *Ibid*, p. 425.