

To what extent is a gender bias in international law responsible for the failure to adequately address victims of sexual violence in conflict?

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## Abstract

This thesis looks into the international legal framework criminalizing conflict-related sexual violence. It establishes that a gender bias causes sexual violence towards men and women to be overlooked. It argues that this gender bias was historically always present in international criminal law, leading to a legal framework that was grossly inadequate to properly address sexual violence.

In the last decades, attention for sexual violence was on the rise and the historically faulty framework improved through the case law of the ICTY and ICTR. Based on this case law, the Rome Statute included the longest list of conflict-related sexual violence crimes ever in international law. On the surface, this framework is gender-neutral and makes no distinction between male and female victims. This thesis argues, however, that the gender bias did not leave international law entirely. On the contrary, it is still very much present in the application of the framework. This means that, even though on paper, the framework improved tremendously, international law still fails to address victims of sexual violence properly. This gender bias is demonstrated through specific examples of ICC case law that failed to take the gender dimension into account.

## List of abbreviations

<b>ICC</b>	International Criminal Court
<b>ICTR</b>	International Criminal Tribunal for Rwanda
<b>ICTY</b>	International Criminal Tribunal for Yugoslavia
<b>IHL</b>	International Humanitarian Law
<b>IMT</b>	International Military Tribunal
<b>UN</b>	United Nations

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## Introduction

### Situating the problem

Sexual violence takes place in almost any conflict, although to varying degrees. In some conflicts, sexual violence reportedly barely took place (as in Sri Lanka and Palestine, for example), yet in others it was widespread (as in Yugoslavia or Rwanda).<sup>1</sup> The sexual violence can also vary greatly in form. In some conflicts, sexual slavery is the most common form; in others, it is torture in detention. It can be committed in group or by individuals. It can be ethnic or target victims indiscriminately. It can be public or private.<sup>2</sup> All of these factors differ a lot between different conflicts.

One thing that is for sure, is that both women and men can be victims of sexual violence in conflict. Sexual violence against women is well documented, as the issue was high on the agenda in the past few years. In the 1937 Nanking Massacre for example, it is estimated that Japanese soldiers raped, sexually tortured and murdered around 20,000 women. In 1945, according to estimates 120,000 to 900,000 were supposedly raped in the greater Berlin area. 200,000 women were estimated to have been raped in Bangladesh in 1971. In Kuwait, it is said 5000 women were raped under Iraqi occupation.<sup>3</sup> These are only a few examples of recent conflicts. These numbers are also limited to rape and do not cover other forms of sexual violence. These numbers likely do not paint the entire picture, as victims are often reluctant to report due to shame, fear and stigmatization.<sup>4</sup>

Women are more victimized than men, yet men are also a big victim group.<sup>5</sup> Finding accurate numbers on sexual violence against men is however not an easy task, as most research focuses on women as victims.<sup>6</sup> Additionally reporting is made more difficult by the fact that men are more reluctant than women to report sexual violence.<sup>7</sup> Physicians and aid workers are often not trained to see the symptoms in victims, which further complicates reporting.<sup>8</sup> Yet sexual violence against men was documented in conflicts all over the world at different times throughout history, from Greece, to Chili, Iran, Kuwait and the former Yugoslavia.<sup>9</sup>

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<sup>1</sup> Elisabeth Jean Wood, 'Variation in Sexual Violence during War' (2006) 34 *Politics & Society* 307, 307.

<sup>2</sup> Wood (2006) (n 1) 308.

<sup>3</sup> Ruth Seifert, 'The Second Front. The Logic of Sexual Violence in Wars' (1996) 19 *Women's Studies International Forum* 35, 37.

<sup>4</sup> Wood (2006) (n 1) 318.

<sup>5</sup> Lara Stemple, 'Male Rape and Human Rights' (2008) 60 *Hastings Law Journal* 605, 606.

<sup>6</sup> Stemple (n 5) 612.

<sup>7</sup> Wood (2006) (n 1) 318.

<sup>8</sup> Stemple (n 5) 612.

<sup>9</sup> Sandesh Sivakumaran, 'Lost in Translation: UN Responses to Sexual Violence against men and boys in situations of armed conflict' (2010) 92 *International Review of the Red Cross* 259, 264; Stemple (n 5) 612.

The conflict in the former Yugoslavia eventually led to thorough reporting on sexual violence against men, showing how widespread this form of sexual violence can be. Men were often sexually mutilated, castrated or forced to perform sexual acts on other guards or fellow prisoners.<sup>10</sup> One study reported that of 6000 concentration camp inmates interviewed, 80% reported having been raped.<sup>11</sup> Attention for sexual violence against men is now on the rise. Yet reporting remains scarce. When sexual violence against men is mentioned at all in reports, it is often just a reference in passing.<sup>12</sup>

This means sexual violence against both men and women is frequent. However, for years both types of sexual violence went unrecognized and were barely addressed in international law. If there were prohibitions against sexual violence, these were barely enforced. Only recently, sexual violence against women gained attention and became an issue high on the agenda within international criminal and humanitarian law, causing laws to change. Yet some say it is still a crime within international law that goes unrecognized. However, sexual violence against men did not gain the same amount of attention. As the attention for conflict-related sexual violence against women increased, sexual violence against others went ignored.

This means there is criticism on the way international law addresses sexual violence towards women as well as men. This thesis will provide a possible explanation for this lack of justice. It will investigate whether a gender bias within international law can explain the gaps within the law and its application for conflict-related sexual violence.

## Research question and methodology

The research question this thesis will try to answer is the following: *'To what extent is a gender bias in international law responsible for the failure to adequately address victims of sexual violence in conflict?'*

The term 'gender' used in this thesis will follow the common understanding in international law of the term, referring to the culturally expected behaviours of men and women based on roles, attitudes and values ascribed to them on the basis of their sex.<sup>13</sup> Sex is understood in this thesis as the biological and

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<sup>10</sup> Stemple (n 5) 613.

<sup>11</sup> *Ibid.*

<sup>12</sup> Sivakumaran (2010) (n 9) 260.

<sup>13</sup> Helen Durham and Katie O'Byrne, 'The Dialogue of Difference: Gender Perspectives on International Humanitarian Law' (2010) 92 *International Review of the Red Cross* 31, 32; *Addressing the Needs of Women Affected by Armed Conflict. An ICRC Guidance Document* (ICRC, 2004) 7.

natural differences between male and female bodies.<sup>14</sup> It is realized, however, that not all legal scholars agree with this definition.<sup>15</sup> The term conflict used will refer to international armed conflict and non-international armed conflict. No distinction will be made.

To establish a gender bias, a thorough analysis will be made of feminist legal scholarship. The criticisms of the women's human rights movement will be analysed, but also more recent literature scrutinizing why men are excluded from the framework will be included. Constructions of masculinity and femininity in the law are an important part of the legal theory. These constructions play an important role in (wartime) sexual violence and can therefore help explain a gender bias. The framework criminalizing conflict-related sexual violence will then be analysed to establish whether or not a gender bias affects how the framework was shaped and affects its application still.

The scope of this research will be limited to the framework currently used by the ICC to prosecute and convict conflict-related sexual violence. This framework is established through analysis of international criminal and international humanitarian law. The evolution of the framework will however be compared to the ICTY and the ICTR. When case law of these tribunals influenced the application of the current definition or helped shape the current definition, this case law will be included. For reasons of length, it was decided not to go into the case law of the Special Court for Sierra Leone or other ad hoc international criminal courts.

This thesis will look into the crimes of rape, enforced sterilization and other forms of sexual violence, as these are known to happen to women as well as men.<sup>16</sup> This facilitates the analysis of the gender-neutrality of the legal definitions used by the ICC. It also facilitates comparison of application, if any distinction is made.

Lastly, this research acknowledges that conflict-related sexual violence is more layered than the mere binary distinction of men and women and that many other factors, such as race, sexual orientation, gender

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<sup>14</sup> Durham (n 13) 32; Caterina E. A. Ward, *Wartime Sexual Violence at the International Level: A Legal Perspective* (Brill Nijhoff, 2018) 54.

<sup>15</sup> Diane Otto, 'Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law' in Anne Orford (ed), *International Law and its Others* (Cambridge University Press 2006) 318, 319.

<sup>16</sup> Sandesh Sivakumaran, 'Sexual Violence Against Men in Armed Conflict' (2007) 18 *The European Journal of International Law* 253, 261-267.



identity and so on influence sexual violence. However, these topics merit a thesis on their own. Therefore, they might be mentioned in passing, but they will not be discussed in-depth.

The first chapter will discuss how conflict-related sexual violence was ignored throughout history, towards men as well as women. The second chapter will establish a gender bias in international law in general, before discussing this gender bias in international humanitarian and international criminal law. The third chapter will establish the current framework criminalizing conflict-related sexual violence and see whether the framework itself contains a bias on the one hand and whether the definitions and mechanisms criminalizing sexual violence are applied in a biased way on the other hand. The last chapter will assess the overall application of the framework, before going over to the conclusion.

## 1. The slow recognition within international law of conflict-related sexual violence

This chapter will look into the historic omission of conflict-related sexual violence in international law. It will establish how only in the past few decades, the topic was addressed seriously and received proper redress. It will also establish how this early focus was only on women as victims, which influences the view of international law on conflict-related sexual violence until today. The discourse of these early days still influences sexual violence criminalization today.

### 1.1 Ancient Times until the Second World War

It took quite some time before conflict-related sexual violence gained visibility and was taken seriously as a violation of international humanitarian law. The lack of recognition did not mean sexual violence was not prohibited. In Ancient Times, rape of a woman was considered a property crime. Women were considered to be the property of their father, husband, slave master or guardian.<sup>17</sup> Raping a woman was therefore a violation of man's property.<sup>18</sup> During the Middle Ages, this largely stayed the same. Scholars at the time believed that, as long as the war itself was justified, atrocities could be committed.<sup>19</sup> This idea did not change until the first regulations of wartime prohibitions emerged around the 15<sup>th</sup> century.<sup>20</sup> Some military codes created around that time contained prohibitions of rape.<sup>21</sup> However, these prohibitions did not change much in practice.<sup>22</sup>

Of an influential nature was the 1863 US Lieber Code, one of the earliest codifications of customary law on armed conflict, which punished rape with capital punishment.<sup>23</sup> This Code went on to inspire many war codes to follow.<sup>24</sup> The 1907 Hague Conventions could also be seen to prohibit wartime rape, stating that '*family honour and rights [...] must be respected.*' This did require a broad interpretation of the

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<sup>17</sup> Kelly Dawn Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals* (Martinus Nijhoff, 1997) 20.

<sup>18</sup> Askin (1997) (n 17) 21; Karen Engle, 'Feminism and its (dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina' (2005) 99 *American Journal of International Law* 778, 779.

<sup>19</sup> Askin (1997) (n 17) 24.

<sup>20</sup> *Ibid.*

<sup>21</sup> Theodore Meron, 'Rape as a Crime under International Humanitarian Law' (1993) 87 *American Journal of International Law* 424, 425.

<sup>22</sup> Askin (1997) (n 17) 27.

<sup>23</sup> Kelly Dawn Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law' (2003) 21 *Berkeley Journal of International Law* 288, 299; Meron (n 21) 425.

<sup>24</sup> Askin (2006) (n 23) 299.

Conventions, equating family honour with that of the woman.<sup>25</sup> The original Geneva Conventions did not mention sexual violence, but the 1949 Geneva Conventions do.<sup>26</sup> Article 27 of the Convention IV relative to the Protection of Civilian Persons in Time of War states that '*Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.*'<sup>27</sup> The classification of rape under this Convention means protection is not extended to female combatants.<sup>28</sup> Its explicit mention of women as victims excludes the application of this prohibition for male victims.<sup>29</sup> In 1977, two additional protocols were added to the Geneva Conventions, one focussing on international armed conflict (Protocol I) and the other focussing on non-international armed conflict (Protocol II).<sup>30</sup> Both of these documents make mention of sexual violence, but once more only against women. Article 76(1) of the Protocol I states '*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.*'<sup>31</sup> This prohibition only protects women.<sup>32</sup> Article 4(2)(e) of Protocol II to the Geneva Conventions prohibits '*outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.*'<sup>33</sup> This definition could be applied without distinction on the basis of sex.<sup>34</sup> The acts listed in the Geneva Conventions as 'grave breaches' of international law, considered the most appalling violations of international humanitarian law, do not contain an express mention of sexual violence.<sup>35</sup> The crimes listed in these articles come with express criminal liability and universal jurisdiction, meaning they could be prosecuted at any time and no matter who committed the crimes.<sup>36</sup> The fact that they do not explicitly mentioned sexual violence constitutes a barrier to prosecuting it.<sup>37</sup>

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<sup>25</sup> Askin (2006) (n 23) 300; Shana Eaton, 'Sierra Leone: The Proving Ground for Prosecuting Rape as a War Crime' (2004) 35 *Georgetown Journal of International Law* 873, 883.

<sup>26</sup> Askin (2006) (n 23) 288.

<sup>27</sup> Askin (2006) (n 23) 304; Eaton (n 25) 884.

<sup>28</sup> Eileen Servidio, 'Rape and Other Sexual Violence Against Women and Girls in Armed Conflict: A Legal Look at the Issues' in David Wingeate Pike (ed), *Crimes Against Women* (Nova Science Publishing 2011) 54.

<sup>29</sup> Dustin Lewis, 'Unrecognized Victims: Sexual Violence Against Men in Conflicting Settings Under International Law' (2009) 27 *Conflict & Sexual Violence Against Men* 1, 23.

<sup>30</sup> Askin (2006) (n 23) 303.

<sup>31</sup> *Ibid*, 304.

<sup>32</sup> Lewis (n 29) 24.

<sup>33</sup> Askin (2006) (n 23) 304.

<sup>34</sup> Lewis (n 29) 24.

<sup>35</sup> Askin (2006) (n 23) 309.

<sup>36</sup> Askin (2006) (n 23) 310; Ward (n 14) 35.

<sup>37</sup> Ward (n 14) 35.

International prosecution of sexual violence was scarce, because the dominant idea was that sexual violence was an inevitable by-product of armed conflict.<sup>38</sup> In addition, wartime sexual violence was not seen as a public matter, but as a private issue. These acts were supposedly committed by 'undisciplined' or 'needy' soldiers and were therefore considered the responsibility of national criminal justice systems.<sup>39</sup> Moreover, rape was treated as a moral issue, by national laws as well as international laws.<sup>40</sup> The abovementioned Hague Conventions and Geneva Conventions, for example, speak of a violation of honour or dignity with regards to sexual violence. Even the Additional Protocols added in 1977 still define sexual violence as a violation of the victim's honour and personal dignity, instead of recognizing them as a crime of violence.<sup>41</sup> This negates the seriousness of rape as a violation of one's mental, physical and sexual integrity. The focus on honour and dignity also reinforces the stigma and shame felt by victims for having been raped.<sup>42</sup> These factors explain why sexual violence was not taken seriously and was barely prosecuted.<sup>43</sup>

## 1.2 The crimes committed during the Second World War

After the Second World War, tribunals were created in order to bring the perpetrators of war crimes to justice. The main focus of these trials was to punish the ones responsible for waging the war and committing crimes against peace.<sup>44</sup> Therefore, little justice was provided for sexual violence victims. At the Nuremberg trials, sexual violence was not prosecuted, even though evidence was gathered that proved sexual violence crimes were committed.<sup>45</sup> This evidence was submitted to the IMT, but it was not considered. The IMT indictment nor the final judgments made mention of sexual violence.<sup>46</sup> However, according to Askin, there was a legal basis for prosecuting sexual violence through the US Lieber Code and Hague Conventions.<sup>47</sup> If there had been a willingness to prosecute sexual violence, the indictment could

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<sup>38</sup> Justin Wagner, 'The Systematic Use of Rape as a Tool of War in Darfur: A Blueprint for International War Crimes Prosecutions' (2005) 37 *Georgetown Journal of International Law* 193, 210.

<sup>39</sup> Meron (n 21) 425.

<sup>40</sup> *Ibid.*

<sup>41</sup> Askin (2006) (n 23) 304.

<sup>42</sup> Eaton (n 25) 885.

<sup>43</sup> Meron (n 21) 425.

<sup>44</sup> Askin (2006) (n 23) 301.

<sup>45</sup> *Ibid.*

<sup>46</sup> Rosemary Grey, 'Conflicting Interpretations of 'Sexual Violence' in the International Criminal Court' (2014) 29 *Australian Feminist Studies* 273, 274; Richard J. Goldstone Hon., 'Prosecuting Rape as a War Crime' (2002) 34 *Case Western Reserve Journal of International Law* 277, 278.

<sup>47</sup> Askin (1997) (n 17) 138.

have been interpreted to include sexual violence under 'abduction of civilian population [...] into slavery and for other purposes' and/or under 'devastation unjustified by military necessity'.<sup>48</sup>

The first time rape was prosecuted as a war crime was at the Tokyo Tribunal.<sup>49</sup> The indictment mentioned rape as a violation of recognized customs and conventions of war and several defendants of the Nanjing invasion, during which a high number of rapes were committed, were charged with the war crime of rape.<sup>50</sup> Even though the Tokyo Charter did not explicitly mention rape, the indictment included rape as a war crime under 'inhumane treatment', 'ill-treatment' and 'failure to respect family honour and rights'.<sup>51</sup> It was however prosecuted as a secondary crime.<sup>52</sup> The Tokyo Tribunal also failed to prosecute what happened to the comfort women who were kidnapped and forced into prostitution to serve Japanese soldiers.<sup>53</sup>

### 1.3 1990's onwards

It was not until the 1990's that conflict-related sexual violence gained more attention. When details came out about the crimes committed against civilians in the conflict in Yugoslavia, a Commission of Experts was created to investigate the crimes committed.<sup>54</sup> The Final Report extensively covered the sexual violence crimes committed during the conflict.<sup>55</sup> When subsequently the ICTY was created, the Security Council explicitly condemned the sexual violence and stated its commitment to holding the perpetrators accountable.<sup>56</sup> Shortly after, the genocide in Rwanda took place. The UN appointed a Special Rapporteur for Rwanda and the ICTR was established.<sup>57</sup> Both tribunals codify rape as a crime against humanity in their respective statutes.<sup>58</sup>

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<sup>48</sup> Askin (1997) (n 17) 138.

<sup>49</sup> Nicola Henry, 'The Fixation on Wartime Rape: Feminist Critique and International Criminal Law' (2014) 23 *Social & Legal Studies* 93, 96; Ward (n 14) 27.

<sup>50</sup> Askin (1997) (n 17) 180; Nicola Henry, 'Memory of an Injustice: The "Comfort Women" and the Legacy of the Tokyo Trial' (2013) 37 *Asian Studies Review* 362, 367.

<sup>51</sup> Askin (1997) (n 17) 202.

<sup>52</sup> Askin (2006) (n 23) 302; Eaton (n 25) 884.

<sup>53</sup> Grey (n 46) 273; Henry (2013) (n 50) 367.

<sup>54</sup> Askin (1997) (n 17) 306.

<sup>55</sup> *Ibid.*

<sup>56</sup> UNSC Res 808 (22 February 1993); UNSC Res 827 (25 May 1993) S/RES/827; Goldstone (n 46) 278; Michelle Jarvis and Elena Martín Salgado, 'Future Challenges to Prosecuting Sexual Violence under International Law: Insights from ICTY Practice' in in Anne-Marie de Brouwer, Charlotte Ku, Renée G. Römkens, Larissa van den Herik (eds), *Sexual Violence as an International Crimes: interdisciplinary approaches* (Intersentia, 2012) 101.

<sup>57</sup> Askin (2006) (n 23) 306.

<sup>58</sup> Judith Gail Gardam and Michelle J. Jarvis, *Women, Armed Conflict and International Law* (Kluwer International Law 2001) 13.

It was not only the nature of the majority of the sexual violence committed in these conflicts – the fact that it was planned, systematic and a means to achieve the destruction of an ethnic group – that led to prosecution of the violence.<sup>59</sup> It was also largely due to the women’s human rights movement.<sup>60</sup> This movement was not only focussed on women in international humanitarian law, but it was a larger movement at the end of the 20<sup>th</sup> century trying to put women’s rights on the agenda. They wanted to have women’s rights recognized as universal rights and as indivisible.<sup>61</sup> Their two main goals were the promotion of the mainstreaming of women’s human rights and to have gender-specific forms of rights violations recognized as human rights violations.<sup>62</sup> This culminated in the 1995 Beijing World Conference, one in the series of many conferences that addressed women’s issues. In its final action plan, violence against women is one of the critical areas of concern.<sup>63</sup>

It was in this context that the stories of women in Rwanda and Yugoslavia became known. This caused a mobilization from feminists from all kind of backgrounds (such as Bosnian and Croatian women’s groups as well as internationalist legal feminist elites) to obtain justice and put sexual violence on the agenda of the ICTY and ICTR.<sup>64</sup> Jennifer Green and Rhonda Copelon for example created a working group in order to establish their demands on the inclusion of gender-related crimes in the ICTY and ICTR Statutes, with mixed success.<sup>65</sup> Nevertheless, the gender aspect was largely taken into account through specific rules of procedure, the appointment of a Legal Advisor for Gender-related Crimes by the Office of the Prosecutor for both the ICTY and ICTR and a Victims and Witnesses Unit was created to provide victims with counselling and support.<sup>66</sup> The prosecution of sexual violence however did not come about easy. The first few years after the creation of the ICTR, sexual violence was largely overlooked due to a number of reasons. First, there was a lack of experience and no gender policy was elaborated to deal with this type of crime.<sup>67</sup> Second, rape was largely overlooked in those first years, with the OTP considering it a lesser

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<sup>59</sup> Wagner (n 38) 215.

<sup>60</sup> Gardam and Jarvis (n 58) 13; Diane Otto, ‘International Human Rights Law: Towards Rethinking Sex/Gender Dualism and Asymmetry’ (2012) 620 University of Melbourne Legal Studies Research Paper 1, 8.

<sup>61</sup> Otto (n 15) 344.

<sup>62</sup> *Ibid*, 345-347.

<sup>63</sup> Charlotte Bunch, ‘Opening Doors for Feminism: UN World Conferences on Women’ (2012) 24 *Journal of Women’s History* 213, 218.

<sup>64</sup> Rana Jaleel, ‘Weapons of Sex, Weapons of War’ (2013) 27 *Cultural Studies* 115, 119.

<sup>65</sup> Janet Halley, ‘Rape at Rome: Feminist Interventions in the Criminalization of Sex-related Violence in Positive International Criminal Law’ (2008) 30 *Michigan Journal of International Law* 1, 49 and 70.

<sup>66</sup> Engle (n 18) 781.

<sup>67</sup> Hilmi M. Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunal* (Oxford University Press 2014) 111.

crime and the victims being treated as secondary casualties.<sup>68</sup> The indictment of the *Akayesu* case, for example, originally did not include any mention of sexual violence. It was not until the only female judge on the bench, Judge Navanethem Pillay, asked some witnesses whether they had been raped or had heard of rapes taking place and they answered affirmatively, that the Prosecutor opened an investigation into these crimes and eventually changed the indictment.<sup>69</sup> The pressure exercised by human rights groups also contributed to the prosecution of sexual violence at the ICTR.<sup>70</sup> The *Akayesu* case would eventually be instrumental in the development of international humanitarian law regarding sexual violence (see *infra*).<sup>71</sup>

Feminist groups learned from their mixed successes at the ICTY and ICTR. When a permanent international criminal court was to be created, they knew their position and the legal reforms they wanted to achieve.<sup>72</sup> The different feminist groups united as the Women's Caucus for Gender Justice during the Rome Conference. They had a broad agenda that covered every aspect of trial proceedings, ranging from the actual Rome Statute to the rules of procedure and how sexual violence had to be prosecuted.<sup>73</sup> Their activism managed to drastically change the original draft of the Rome Statute, which was based on the existing international law and barely included sexual violence.<sup>74</sup> Most of their concerns were addressed, despite opposition from some states.<sup>75</sup> Their work managed to secure the inclusion of a long list of sexual violence and gender-specific crimes in the final version of the Rome Statute, as will be discussed in the next part.<sup>76</sup> The Women's Caucus for Gender Justice eventually shut down its activities when the Rome Statute was completed, but currently operates in the form of the Women's Initiatives for Gender Justice to make sure the gender perspective is taken into account during ICC proceedings.

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<sup>68</sup> Zawati (n 67) 111.

<sup>69</sup> Rhonda Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law' (2000) 46 McGill Law Journal 217, 225; Valerie Oosterveld, 'Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons learned for the International Criminal Court' (2005) 12 New England Journal of International and Comparative Law 119, 122.

<sup>70</sup> Zawati (n 67) 111.

<sup>71</sup> Eaton (n 25) 888; Suzan M. Pritchett, 'Entrenched Hegemony, Efficient Procedure, or Selected Justice: An Inquiry into Charges for Gender-Based Violence at the International Criminal Court' (2008) 17 Transnational and Contemporary Problems 265, 275.

<sup>72</sup> Halley (n 65) 70.

<sup>73</sup> *Ibid*, 75.

<sup>74</sup> Cenap Çakmak, 'The Rome Statute of the International Criminal Court (2002): The Impact of the Coalition of Women's Groups' in David Wingeate Pike (ed.), *Crimes Against Women* (Nova Science Publishers 2011) 42; Dieneke De Vos, "'Schizophrenia' in the Rome Statute? The concept of gender in the work of the International Criminal Court' (Paper delivered at GenderFEST, European University Institute) (unpublished) 6.

<sup>75</sup> Çakmak (n 74) 46.

<sup>76</sup> *Ibid*, 47.

The progress made in the 90's regarding international sex crimes led the interpretation of the grave breaches in the Geneva Conventions to change. Nowadays, it is accepted that sexual violence can fall under 'inhuman treatment', 'torture', 'wilfully causing great suffering' and 'serious injury to body health'.<sup>77</sup> An express mention of sexual violence as a grave breach is however still lacking. One can ask though whether it makes a difference in practice, as for example most of the ICTY charges were not brought as 'grave breaches', since their scope is limited to international armed conflict.<sup>78</sup> Nevertheless, the classification of a crime as 'grave breach' comes with a symbolic value.

This chapter established how historically, sexual violence was ignored as a crime during conflict, not only against women but even more so against men. If there were any laws prohibiting wartime sexual violence, they only focused on women as victims. Moreover, these laws were not suitable to properly address sexual violence, as their main focus was on honour and dignity, instead of recognizing it for the violence it is. The women's human rights movement fought to have forms of conflict-related sexual violence recognized as crimes in their own right and sought to have perpetrators of the crimes brought to justice. It has to be kept in mind though that the women's human rights movement only fought for sexual violence against women to be recognized. Men as victims were not considered and largely overlooked. The consequences of this discourse will be discussed in the next chapter.

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<sup>77</sup> Ward (n 14) 35; Meron (n 21) 426.

<sup>78</sup> Askin (2006) (n 23) 311.



## 2. Establishing a gender bias and gender stereotypes

This next chapter will look at why, according to legal scholarship, conflict-related sexual violence went overlooked historically. First, the critiques of the women's human rights movement on international law's bias against women will be discussed. It will offer an overview of their main arguments as to why international law ignores issues that are considered women's issues. Then, this chapter will establish a bias towards women and men in international law in general, before turning to the impact this bias has on the framework criminalizing conflict-related sexual violence. In order to understand the bias in the framework, constructs of masculinity and femininity and how they play a role in conflict-related sexual violence will be determined. Lastly, different types of conflict-related sexual violence will be listed, mentioning the gendered aspects of each type.

### 2.1 Biases against women

According to the women's human rights movement, international law is biased towards women. International law was created by men and therefore reflects a male viewpoint. Hence, it continues to ensure male dominance.<sup>79</sup> The law respects and reinforces predominantly male interests, catering only one group in society.<sup>80</sup> This is because the main subjects of international law are male dominated power structures: states and international organizations.<sup>81</sup> The law is, according to them, gendered. This is, amongst other reasons, because states are patriarchal structures and international organizations copied these structures, leading women to be largely invisible in these structures and to be excluded from decision making.<sup>82</sup> The inequalities in society in general are also present in the decision making process and hence the law itself. Law is based on experience, but not on that of women, as they are not involved in the making of it. Additionally, the law only tends to guarantee rights based on society's approval of them.<sup>83</sup>

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<sup>79</sup> Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *The American Journal of International Law* 613, 621.

<sup>80</sup> Shazia Qureshi, 'Feminist Analysis of Human Rights Law' (2012) 19 *Journal of Political Studies* 41, 43.

<sup>81</sup> Charlesworth (1991) (n 79) 621.

<sup>82</sup> *Ibid*; Hilary Charlesworth, 'The Hidden Gender of International Law' (2002) 16 *Temple International and Comparative Law Journal* 93, 94.

<sup>83</sup> Catharine A. MacKinnon, 'Reflections on Sex Equality under Law' (1991) 100 *Yale Law Journal* 1281, 1325.

Another reason is the standard in international law. Law privileges a male view of the universe and the law, highlighting only a limited aspect of human experience.<sup>84</sup> This causes concerns typically viewed as female not to be addressed. Men are, according to Charlesworth, not the victims of sex discrimination, domestic violence and sexual degradation for violence.<sup>85</sup> Therefore, these issues tend to go ignored and the law does not respond to them.<sup>86</sup>

This general bias in international law also affected international human rights law, according to the women's human rights movement.<sup>87</sup> International human rights law inherited some of the biases from the general framework of international law.<sup>88</sup> Human rights law, like international law generally, was created by men, hence human rights is based on their experience and what they find acceptable. As not all of humanity was there for the creation of human rights law, human rights do not cover all of human suffering and wrongdoing. Not only in international law in general is the standard gendered, it also is in human rights law: the human rights standard is a male one. Human rights are based on men's experience and do not address the issues women face.<sup>89</sup> The women's human rights movement rejects the idea that the law is neutral, apolitical and unbiased.<sup>90</sup> Women's humanity is, according to some, simply denied.<sup>91</sup> Human rights are based on a male model of what it means to be human.<sup>92</sup> Additionally, when women's issues are addressed, they are put into a different category.<sup>93</sup> This could be used as an excuse for human rights bodies to ignore or minimize women's perspectives, as they are reassured women's rights are addressed elsewhere.<sup>94</sup>

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<sup>84</sup> Charlesworth (2002) (n 82) 96.

<sup>85</sup> Charlesworth (1991) (n 79) 623.

<sup>86</sup> Qureshi (n 80) 43.

<sup>87</sup> Karen Engle, 'International Human Rights and Feminism: When Discourses Meet' (1992) 13 *Michigan Journal of International Law* 517, 522; Qureshi (n 80) 43.

<sup>88</sup> Qureshi (n 80) 43.

<sup>89</sup> Hilary Charlesworth, 'What are "Women's International Human Rights"?' in Rebecca J. Cook (ed), *Human Rights of Women. National and International Perspectives* (University of Pennsylvania Press, 1994) 59.

<sup>90</sup> Qureshi (n 80) 43.

<sup>91</sup> Engle (1992) (n 87) 521; Gardam and Jarvis (n 58) 86; Catharine A. MacKinnon, 'Crimes of War, Crimes of Peace' in Stephen Shute and Susan Hurley (eds), *On Human Rights: The Oxford Amnesty Lectures 1993* (BasicBooks 1993) 86.

<sup>92</sup> Qureshi (n 80) 43.

<sup>93</sup> Kirsten Anderson, 'Violence against Women: State Responsibilities in International Human Rights Law to Address Harmful Masculinities' (2008) 26 *Netherlands Quarterly of Human Rights* 173, 174; Charlesworth (1991) (n 79) 625.

<sup>94</sup> Charlesworth (1991) (n 79) 632.

According to MacKinnon, this bias causes practices of conflict-related sexual violence to be allowed as an excess of passion or the spoils of victory in war.<sup>95</sup> They are considered the liberties of their perpetrators. Even when these crimes are formally recognized as a crime, they are not properly recognized as human rights violations of their victims.<sup>96</sup> Women and low-status groups do not have equal access to the law.<sup>97</sup>

## 2.2 Subjectivities of the masculine and the feminine

Diane Otto later built on this and stated that the bias in international law in reality goes much further. International law is not only biased towards women, it is also biased towards men. She states international law is based on a male – female dualism, consisting of opposing representations of men and women. According to her, there are three female subjectivities in international law.<sup>98</sup> First, there is the figure of wife and mother who needs protection in times of war and peace. Second, there is the subjectivity of the woman who is formally equal in the law. Third and last, there is the ‘victim’ subject, produced by colonial narratives of gender, as well as by notions of women’s sexual vulnerability. Each of these female subjectivities is contrasted by the male representations they sustain.<sup>99</sup> The image of the protected wife/mother comes with the image of a protector, namely the head of the household or, in times of war, the combatant. The formally equal woman is produced by a masculine standard of equality that she has to measure up to and the ‘victim’ subject is created by the opposing image of the masculine bearer of civilization, coming to save her.<sup>100</sup>

According to Otto, these dualisms can be traced back from the earliest international law documents until now.<sup>101</sup> The Universal Declaration of Human Rights, for example, is not as universal as its title suggests. Several provisions of the Declaration use gendered language and only refer to male pronouns, despite the efforts of the Commission on the Status of Women (CSW), a commission charged with ensuring women’s inclusion in the Declaration, to obtain more inclusive language.<sup>102</sup> Instead of having women’s rights

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<sup>95</sup> Catharine A. MacKinnon, ‘Rape, Genocide and Women’s Human Rights’ (1994) 17 *Harvard Women’s Law Journal* 5, 7.

<sup>96</sup> MacKinnon (1994) (n 95) 7.

<sup>97</sup> Louise Chappell, *The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy* (Oxford Scholarship Online, 2015) 89.

<sup>98</sup> Otto (n 15) 320; Darren Rosenblum, ‘Unsex CEDAW, or What’s wrong with Women’s Rights’ (2011) 20 *Columbia Journal of Gender & Law* 98, 137.

<sup>99</sup> Otto (n 15) 320.

<sup>100</sup> *Ibid*, 320.

<sup>101</sup> *Ibid*, 321.

<sup>102</sup> *Ibid*, 331.

included in the universal rights, their rights are treated by separate instruments that are considered less important.<sup>103</sup> Even the Convention on the Elimination of Discrimination against Women is affected by this bias. Some authors have suggested that the Convention is considered a lesser human rights instrument, as, for example, states are allowed to make reservations that undermine the very essence of the Convention.<sup>104</sup> It is, in fact, the most heavily reserved of international human rights conventions.<sup>105</sup> By excluding men from the framework, it undermines its own goals and reproduces the hierarchical binaries it tries to fight.<sup>106</sup> Furthermore, the content of the Convention itself reaffirms the subjectivities of international law, even though the concept of substantial equality it promotes is some improvement.<sup>107</sup> It buys into the formal equality yardstick that accepts the male standard as a higher standard to live up to, instead of questioning this standard.<sup>108</sup> Man is by the CEDAW reaffirmed as the measure of all things; consequently his power and authority are reaffirmed too.<sup>109</sup> Additionally, CEDAW contains the three subjectivities of women as defined by Otto, re-establishing these subjectivities and the male subjectivities they sustain, but also excludes women not fitting into these subjectivities from the framework.<sup>110</sup>

Others have also called these male representations masculinities. A masculinity is considered to be a *'performance, a set of stage directions, a 'script' that men learn to perform. Socialising agents like the family, school and the mass media inculcate and validate gender-appropriate behaviour and the boy learns the male role through observation, initiation (even indoctrination) and feedback.'*<sup>111</sup> They are generally not considered to be a fixed state, idea or identity.<sup>112</sup> Rather, they depend on the socio-cultural context in which they are embedded, because they are constructed by the factors a particular group deems 'manly'.<sup>113</sup> This means the meaning of what is manly can vary from one society, culture, social class, ethnic group and generation to another. Since law is based on experience, the law reflects these ideas of masculinity in the way described by Otto. It might seem conflicting that the law only captures three

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<sup>103</sup> Judith Gardam, 'Women and the Law of Armed Conflict: Why the Silence?' (1997) 46 *The International and Comparative Law Quarterly* 55, 56.

<sup>104</sup> Gardam (n 103) 56; Rebecca J. Cook, 'Reservations to the Convention on the Elimination of All Forms of Discrimination' (1989-90) 30 *Virginia Journal of International Law* 643, 648.

<sup>105</sup> Cook (n 104) 644.

<sup>106</sup> Rosenblum (n 98) 137.

<sup>107</sup> Otto (n 15) 341.

<sup>108</sup> Rosenblum (n 98) 137.

<sup>109</sup> Charlesworth (1991) (n 79) 632.

<sup>110</sup> Rosenblum (n 98) 137.

<sup>111</sup> Anderson (n 93) 177.

<sup>112</sup> *Ibid*, 177.

<sup>113</sup> *Ibid*, 177; John Beynon, *Masculinities and culture* (Open University Press, 2002) 1; Raewyn W. Connell, *Masculinities* (Polity 2005) 67.

representations of what it means to be male as the concept of masculinity varies between different cultures. However, it is possible that the law reflects the common denominators of what it means for the men who made the law, despite being from different cultures, to be masculine.

A consequence of the definition of masculinities, is that it automatically defines what it not is, namely feminine. These concepts are mutually exclusive, what is considered masculine cannot be considered feminine.<sup>114</sup> This also means the conceptions of femininity and masculinity are interdependent: changing one would automatically change the other.<sup>115</sup> Additionally, the conceptions of masculinity and femininity come with a hierarchical order. What is considered masculine is at the top of the hierarchy and is considered to hold the power; what is at the bottom is feminine and considered subordinate.<sup>116</sup> However, there is a hierarchy between masculinities too, depending on the value society accords different masculinities. The dominant form of masculinity within a certain community or region was baptized 'hegemonic masculinities'.<sup>117</sup> Other forms of masculinities, such as homosexual masculinities, are considered to be subordinate to the hegemonic masculinities in a certain group, causing a hierarchy between different forms of masculinities.<sup>118</sup> Men representing hegemonic masculinities do not necessarily gain their position through direct violence, rather they gain their position through a successful claim at authority, consensual negotiations and or power achievement.<sup>119</sup> Hegemonic masculinities police masculine behaviour and warns them not to deviate from the prescribed norm.<sup>120</sup> When men adopt subordinate masculinities or society thrusts these masculinities upon them, they deviate from the hegemonic standard and they are likely to be persecuted for it. This is one explanation for why homosexual men or men considered to be homosexual, are especially targeted in some societies.<sup>121</sup>

Based on this, the critiques uttered by the women's human rights movement seemed to be correct in asserting that women are at the bottom of the hierarchy and subordinated by men. This is harmful for

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<sup>114</sup> Anderson (n 93) 177; Connell (n 113) 69.

<sup>115</sup> Otto (n 15) 320.

<sup>116</sup> Anderson (n 93) 177-178; Charlesworth (1991) (n 79) 632; Catharine MacKinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' (1983) 8 *Signs* 635, 635.

<sup>117</sup> Anderson (n 93) 177; Connell (n 113) 77.

<sup>118</sup> Anderson (n 93) 177; Michael Kaufman, 'The White Ribbon Campaign: Involving Men and Boys in Ending Global Violence Against Women' in Bob Pease and Keith Pringle (eds), *A Man's World? Changing Men's Practices in a Globalized World* (Zed Books, 2001) 38.

<sup>119</sup> Beynon (n 113) 16; Connell (n 113) 77.

<sup>120</sup> Anderson (n 93) 177.

<sup>121</sup> Adam Jones 'Straight as a Rule: Heteronormativity, Gendercide, and the Noncombatant Male' (2006) 8 *Men and Masculinities* 451, 453.

women because issues considered to be women's issues are overlooked. It is even claimed that the silences of the law when it comes to sexual violence enable male dominance<sup>122</sup> However, the women's human rights movement did not see how these power structures also created ideas of masculine identity that were harmful for men. This becomes particularly clear when looking at the effects these concepts of masculinity and femininity have on sexual violence in international criminal law.

## 2.3 Bias within international humanitarian and criminal law

### 2.3.1 Subjectivities of men and women

In international humanitarian and criminal law, as in international law in general, biases against women were identified by feminist legal scholars. International criminal law has a history of impunity for sexual violence. As demonstrated in the previous chapter, it largely failed to address sexual violence properly, marginalizing it even when it was acknowledged.<sup>123</sup> This is, according to some scholars, due to how international law was made. It was created by Western, Christian states and therefore international humanitarian law largely incorporates their views on women at the time of its creation.<sup>124</sup> Others say the main goal of international humanitarian law was to establish organized rules for combatants on how to wage war, causing women's interests to be ignored when it came to holding soldiers accountable for their behaviour.<sup>125</sup> International humanitarian law pretends to be neutral, for example through its 'no adverse distinction' principle, one of its central principles. This principle means adverse distinction on the basis of sex and other criteria is not allowed.<sup>126</sup> However, according to Gardam and Jarvis, this ignores that this standard – as in human rights law in general – is a male standard.<sup>127</sup>

This means already one set of dual subjectivities defined by Otto, namely the formally equal woman and the masculine standard the woman has to live up to, in general international law is also present in international humanitarian law. The subjectivity of women portrayed as mothers or wives that needs protection in conflict, can also easily be traced.<sup>128</sup> Gardam and Jarvis claim international humanitarian law in general is based on women's perceived physical and psychological weakness, implying that they need

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<sup>122</sup> Ward (n 14) 144.

<sup>123</sup> Chappell (n 97) 90.

<sup>124</sup> Gardam and Jarvis (n 58) 107.

<sup>125</sup> Chappell (n 97) 90.

<sup>126</sup> Valerie Oosterveld, 'Feminist Debates on Civilian Women and International Humanitarian Law' (2009) 27 Windsor Year Book of Access to Justice 385, 389.

<sup>127</sup> Gardam and Jarvis (n 58) 97; Oosterveld (n 126) 389.

<sup>128</sup> Otto (n 15) 320.

protection. IHL seems especially concerned with women as mothers, as nineteen of the forty-two provisions of the Geneva Conventions and their additional protocols deal with concerns related to motherhood.<sup>129</sup> This way IHL contributes to the opposing male subjectivity: the man as combatant, as protector of the woman in need.<sup>130</sup> The organization of IHL provisions captures this distinction by covering all matters related to combatants in the general provisions and addressing matters related to needs considered to be women's needs in special provisions, as if women are not part of the general group.<sup>131</sup>

Furthermore, international humanitarian law reproduces the inequality of men and women in its provisions. The special provisions that concern themselves with women during wartime are lower in the IHL hierarchy than the other provisions.<sup>132</sup> An example of this are the earlier mentioned grave breaches of the Geneva Conventions. At the time the Geneva Conventions were drafted, the violence women underwent in conflict was not considered serious enough to include it in the grave breaches.<sup>133</sup> Their suffering was left to be taken off by other provisions, carrying less weight. As a contrast, the crimes that are considered grave breaches are acts that are most likely to be perpetrated against men.<sup>134</sup>

### 2.3.2 Dynamics of sexual violence

To get an answer on where these subjectivities in the law regarding conflict-related sexual violence come from, the dynamics of sexual violence have to be understood. Sexual violence, like any kind of violence, comes down to power dynamics in war as well as in peacetime. The power dynamic theory is based on the hierarchy of power within society, where men dominate women.<sup>135</sup> As the ones on the top are afraid of losing their power, they rape the ones at the bottom to exert their dominance.<sup>136</sup> Roles of masculinity are intrinsically linked with domination.<sup>137</sup> As women are unequal to men in society, it is easy to recognize these dynamics in the case of rape by men of women (male/female rape). As women are at the bottom of the hierarchy, men rape them as an act of dominance.<sup>138</sup> Violence against women is expressly linked to

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<sup>129</sup> Gardam and Jarvis (n 58) 96.

<sup>130</sup> Otto (n 15) 320.

<sup>131</sup> Gardam and Jarvis (n 58) 98.

<sup>132</sup> *Ibid*, 100.

<sup>133</sup> *Ibid*, 100.

<sup>134</sup> *Ibid*, 100.

<sup>135</sup> Sandesh Sivakumaran, 'Male/Male Rape and the "Taint" of Homosexuality' (2005) 27 *Human Rights Quarterly* 1274, 1281.

<sup>136</sup> Sivakumaran (2005) (n 135) 1281; James D. Willets, 'Conceptualizing Private Violence against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective' (1997) 60 *Albanian Law Review* 989, 1006.

<sup>137</sup> Anderson (n 93) 179.

<sup>138</sup> MacKinnon (1991) (n 83) 1301; Sivakumaran (2005) (n 107) 1281.

patriarchal ideologies, as studies showed that when perpetrators subscribe to patriarchal ideas of domination and control, this causes a higher prevalence of violence.<sup>139</sup> This is also the view adopted by feminist legal scholars who claim women are targeted because they are women, because of being part of a group defined by its gender.<sup>140</sup> Sexual violence is a means of re-establishing that women are at the bottom of the power ranks and occupy a degraded position.<sup>141</sup> Because of this dominance aspect, it is labelled a form of sex discrimination.<sup>142</sup> This view does not only come from feminist legal scholarship, but the Committee on the Elimination of Discrimination against Women adopted this stance too in multiple of its recommendations.<sup>143</sup> This means any type of sexual violence against women is gendered and sexualized.<sup>144</sup>

However this view of the power dynamics at play is too narrow. These power dynamics do not only apply to situations of sexual violence towards women by men, as it is traditionally seen, they can also explain other forms of rape, like rape by a woman of a woman (female/female rape), rape by a woman of a man (female/male rape) and rape by a man of another man (male/male rape).<sup>145</sup>

When it comes to male/male rape, within these dynamics of power and dominance, men target other men because rape of a man by another feminizes him. In patriarchal societies a passive, feminine status is ascribed to the receiving partner in sexual relations and a masculine status to the active party, therefore male/male rape confirms the heterosexual, hegemonic masculinity of the rapist.<sup>146</sup> This puts the male victim in the same position a woman occupies in society: the lower half of the hierarchy.<sup>147</sup> The violence is

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<sup>139</sup> Anderson (n 93) 179.

<sup>140</sup> Chappell (n 97) 90; MacKinnon (1991) (n 83) 1301.

<sup>141</sup> MacKinnon (1991) (n 83) 1302.

<sup>142</sup> *Ibid*, 1299.

<sup>143</sup> UN Committee for the Elimination of All Forms of Discrimination against Women, 'General Recommendation No 19' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (29 July 1994) UN Doc HRI/GEN/1/Rev.1; UN Committee for the Elimination of All Forms of Discrimination against Women, 'General Recommendation No 30' (1 November 2013) CEDAW/C/GC/30; UN Committee for the Elimination of All Forms of Discrimination against Women, 'General Recommendation No 32' (14 November 2014) CEDAW/C/GC/32; Rarna Kapur, 'The Tragedy of Victimization Rhetoric: Resurrecting the Native Subject in International/Post-Colonial Feminist Legal Politics' (2002) 15 *Harvard Human Rights Journal* 1, 4.

<sup>144</sup> Doris Buss, 'Performing Legal Order: Some Feminist Thoughts on International Criminal Law' (2011) 11 *International Criminal Law Review* 409, 413.

<sup>145</sup> Sivakumaran (2005) (n 135) 1275 and 1282.

<sup>146</sup> Jones (n 121) 459.

<sup>147</sup> Sivakumaran (2005) (n 135) 1282; Catharine A. MacKinnon, 'Joseph Oncale, Petitioner, vs. Sundowner Offshore Services, Inc., John Lyons, Danny Pippen, and Brandon Johnson, Respondents' (1997) 8 *UCLA Women's Law Journal* 9, 19.



used to lower his social status.<sup>148</sup> It is also said a male victim is ‘emasculated’, implying that his masculinity and strength has been taken away and he is instead weak and effeminate.<sup>149</sup> He becomes the feminized male ‘other’.<sup>150</sup> Additionally, the strategy of feminization is a powerful tool in constructing and maintaining the hierarchies of masculinities mentioned in the previous part of this chapter.<sup>151</sup> As a consequence, no matter the actual gender of victim or perpetrator, the characteristic of masculinity is always accorded to the perpetrator and that of femininity to the victim.<sup>152</sup> This means men too are targeted for their gender in a similar way women are.

Another reason male sexual violence causes men to be considered emasculated is the ‘taint’ of homosexuality attached to it.<sup>153</sup> As mentioned earlier, a man is only masculine when he is heterosexual; homosexuality does not fit the construct of hegemonic masculinity. The homosexual male is viewed as less masculine and more effeminate or even to lack masculinity altogether.<sup>154</sup> Since men are socialized with the concepts of masculinity, they are also taught very early on in life that the homosexual man is an inferior form of masculinity.<sup>155</sup> Consequently, considering the male victim of rape as homosexual leads to his emasculation and the reduction of his social status.<sup>156</sup> Male sexual violence is used precisely to ‘taint’ him with this homosexuality label and a subordinate masculinity is thrust upon him, he is no longer a hegemonic male.<sup>157</sup> The taint of homosexuality also leads male/male rape to be viewed worse than female/male rape, where the homosexuality aspect is not present.<sup>158</sup> This ‘taint’ of homosexuality has been said to cause the international community to turn a blind eye on sexual violence.

This ‘taint’ does not only come from society’s aversion of homosexuality, it also comes from the physical reaction, in the form of an erection or ejaculation, men sometimes experience during rape.<sup>159</sup> Especially in cases of ‘enforced rape’ – when one man is forced to rape another – this is a concern.<sup>160</sup> Additionally, when

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<sup>148</sup> Sivakumaran (2007) (n 16) 271.

<sup>149</sup> MacKinnon (1997) (n 147) 20; Sivakumaran (2005) (n 165) 1283.

<sup>150</sup> Jones (n 121) 453.

<sup>151</sup> Charlotte Hooper, *Manly states: Masculinity, international relations, and gender politics* (Columbia University Press, 2001) 71; Jones (n 121) 452.

<sup>152</sup> Sivakumaran (2007) (n 16) 271.

<sup>153</sup> Sivakumaran (2005) (n 135) 1285.

<sup>154</sup> Connell (n 113) 143.

<sup>155</sup> Jones (n 121) 453.

<sup>156</sup> Sivakumaran (2007) (n 16) 272.

<sup>157</sup> Lewis (n 29) 7; Sivakumaran (2007) (n 16) 272.

<sup>158</sup> Sivakumaran (2005) (n 135) 1290.

<sup>159</sup> Lewis (n 29) 8.

<sup>160</sup> Sivakumaran (2007) (n 16) 272.

a man rapes another man to establish his power and dominance, the rapist is not seen as homosexual. When a man is forced to rape another man, this does not apply. Both victims are seen to lose their heterosexual status and are considered homosexualized, because the power is with the offender.<sup>161</sup> There is a general misconception that heterosexual men do not rape other heterosexual men, a misconception that also affects the victim's view of the facts.<sup>162</sup> They question both their masculinity and sexuality.<sup>163</sup> This can explain why men not only stay silent on their abuse, but also actively deny it.<sup>164</sup> The shame, guilt, fear and stigma contributes to underreporting of male sexual violence.<sup>165</sup>

Most of the mechanisms described above are applicable in war as well as in peacetime. However, in conflict another factor contributes to these masculinities, namely militarism. Within militaries there is a narrow concept of hegemonic masculinities, created by an environment of competition, physical hardness, conformity and a sense of elite membership.<sup>166</sup> This kind of environment could explain conflict-related violence performed by militaries. They use violence with the goal of sustaining hegemonic masculinity.<sup>167</sup>

### 2.3.3 Consequences

These ideas about conflict-related sexual violence, towards men as well as women, lead to subjectivities in the discourse related to the matter and subjectivities in the law. The women's human rights movement, unintentionally, contributed to this narrative. Their narrative focused on how sexual violence against women went overlooked because it happened to women. Because men, as the dominant group, created and applied the law, women's issues were ignored. The women's human rights movement fought to have forms of sexual violence towards women eradicated. This strong reaction from the women's movement can almost be seen as an overcorrection for earlier lacking of women's inclusion in human rights.<sup>168</sup> This created a discourse solely focused on women as victim, leading to gender and women being used almost interchangeably.<sup>169</sup> Often when gender violence is being discussed, only violence against women is meant. This does not mean the women's human rights movement did not make significant advances in getting

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<sup>161</sup> Sivakumaran (2007) (n 16) 272.

<sup>162</sup> WHO, 'Guidelines for medico-legal care for victims of sexual violence' (World Health Organization, 2003) 16; Sivakumaran (2007) (n 16) 272.

<sup>163</sup> Lewis (n 29) 9; Stemple (n 5) 633; WHO (n 162) 16.

<sup>164</sup> Sivakumaran (2007) (n 16) 273.

<sup>165</sup> Lewis (n 29) 9.

<sup>166</sup> Jones (n 121) 454.

<sup>167</sup> *Ibid*, 457.

<sup>168</sup> Stemple (n 5) 628.

<sup>169</sup> *Ibid*, 619.

certain issues on the agenda, because they did.<sup>170</sup> However, through solely focusing on women as victims of violence, they fed into a discourse of women as weak and women as victims. Women were once more portrayed as victims.<sup>171</sup> Sexual violence towards women was represented as the worst harm that could happen to women. It even led MacKinnon to draw parallels between violence against women and a non-international armed conflict waged by non-state actors, as if violence against women was a form of terrorism performed by men.<sup>172</sup>

This is also harmful for men in that it excludes men's analogous gendered injuries, including when they suffer sexual violence in conflict.<sup>173</sup> As women are always seen as the victims of men, this leaves no room for men to be seen as victims too. Men are only seen as the perpetrator class, preventing them from being seen as a group having rights claims as sexual violence victims.<sup>174</sup> The existing concepts of masculinities also prohibit this. Men are supposed to be strong, powerful and able to exert power over others.<sup>175</sup> These outdated assumptions about men and women in rape rhetoric is detrimental to women as well as men.<sup>176</sup> It has led to not only sexual violence against women going without proper redress, because it is violence that happens to women, it also causes sexual violence against men to go overlooked in the law. Any group considered to have a subordinate status – meaning not only women but also, for example, feminized/homosexualized men – does not enjoy full protection of international law.<sup>177</sup>

The gendered discourse of the women's human rights movement only reinforced the gender dichotomy and the subjectivities of men and women within international law.<sup>178</sup> Therefore, even though the women's human rights movement has been able to make significant advances in the criminalization of violence against women, they have not been able to eradicate gender stereotypes within international law.<sup>179</sup> Yet addressing male sexual violence could be crucial in addressing these stereotypes, since the same mechanisms are at play in male/female and male/male sexual violence. There is an equation of femininity and weakness and an implication that putting a man in a woman's position is demeaning. This makes it all

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<sup>170</sup> Kapur (n 143) 5.

<sup>171</sup> *Ibid*, 15.

<sup>172</sup> Catharine A. MacKinnon, 'Women's September 11<sup>th</sup>: Rethinking the International Law of Conflict' (2006) 47 *Harvard International Law Journal* 1.

<sup>173</sup> Otto (n 15) 345.

<sup>174</sup> Stemple (n 5) 634.

<sup>175</sup> Sivakumaran (2005) (n 135) 1289.

<sup>176</sup> Stemple (n 5) 635.

<sup>177</sup> Chappell (n 97) 91.

<sup>178</sup> Otto (n 15) 345.

<sup>179</sup> Sivakumaran (2005) (n 135) 1278.

the more relevant for the women's movement to address this problem and they could only benefit from it.<sup>180</sup> Turning around the equation of femininity with weakness can lead to different concepts of gender in society and tackle inequality. In order to challenge these universalized assumptions about women's subject position and their realities, it can help to recognize and centre the peripheral subject, like the male victim.<sup>181</sup> Changing the international community's view on sexual violence does require including men in the conversation on masculinities and denouncing violence against women. This can help to challenge traditional views of power and violence.<sup>182</sup> Some efforts were made to include men in the fight against violence towards women, but sexual violence against men still goes largely underreported.<sup>183</sup>

## 2.4 The complex reality of gender and conflict-related sexual violence

As later in this thesis it will be argued that international criminal law's misunderstanding of sexual violence and its gendered aspects precludes it from providing adequate protection of victims, it is important to understand the different layers of conflict-related sexual violence. Conflict-related sexual violence can be committed for many different purposes and varying goals. Different types of sexual violence can also be committed because of different gendered reasons. Distinguishing between different types of conflict-related sexual violence can help explain the gender dynamics behind them and understand the violence better. Wartime sexual violence also comes with a toll on the community and leads to different socio-political effects, as will be highlighted throughout this chapter.

A first type of wartime rape, is tactical rape.<sup>184</sup> This is sexual violence used as a tactic of war to terrorize civilians and facilitate taking over a certain territory. It is argued that sexual violence can be used towards men and women to disrupt communities. When used towards women, sexual violence is a mechanism of establishing the masculine impotence in a community, as they are not able to protect their women.<sup>185</sup> When men are the victim of sexual violence, this effect is even stronger. Men are supposed to be the

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<sup>180</sup> Sivakumaran (2005) (n 135) 1283.

<sup>181</sup> Kapur (n 143) 29; Sivakumaran (2005) (n 135) 1279.

<sup>182</sup> Anderson (n 93) 181.

<sup>183</sup> United Nations, 'The Role of Men and Boys in Achieving Gender Equality' (7 October 2003) EGM/Men-Boys-GE/2003/BP.1; Anderson (n 93) 175; Kaufman (n 118) 38.

<sup>184</sup> Robynn Collins, 'Defining Rape in Conflict-Affected Areas' in David Wingeate Pike (ed), *Crimes Against Women* (Nova Science Publishing 2011) 75; Elisabeth Jean Wood, 'Rape as a Practice of War: Toward a Typology of Political Violence' (2018) 46 *Politics and Society* 513, 515.

<sup>185</sup> UN Commission on Human Rights, 'Report of the Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomaraswamy, submitted in accordance with Commission resolution 1997/44' (26 January 1998) UN Doc E/CN.4/1998/54, §12; Sivakumaran (2007) (n 16) 268.

virility, strength and power of the family, able to protect not only themselves but also others.<sup>186</sup> Hence, when sexual violence is used towards men in a community, this does not only symbolize their personal disempowerment, but that of the entire community.<sup>187</sup>

Furthermore, sexual violence is often committed in public, as to show the community that they lost their virtue and their protectors are not able to perform their task. The public nature of the violence enhances the shame felt by female victims and makes the disempowerment of male victims complete.<sup>188</sup> The entire community is immediately informed that their protection is lost.<sup>189</sup> The power of the perpetrator is established.<sup>190</sup> If their protectors cannot protect their women, nor themselves, how could the rest of the community do it? The sexual violence could bring a community to flee the territory; this could even have been the goal of the sexual violence in the first place.<sup>191</sup>

Additionally, in ethnic conflicts, sexual violence can be used to degrade the victim's ethnicity. This is rape as a strategy, often premeditated, planned in advance and carried out with a specific goal in mind.<sup>192</sup> In these cases, sexual violence against men and women is used as a way to symbolically destroy the national, racial, religious or ethnic culture. The symbolic construction of the female body tends to be that of the community, such as the figure of 'Marianne' symbolizing France or the Statue of Liberty representing the United States.<sup>193</sup> Sexual violence towards men can represent the symbolic emasculation of the entire national, racial, religious or ethnic group.<sup>194</sup> For offender and victims, it stigmatizes the victim's ethnicity as a lesser ethnicity.<sup>195</sup>

The two forms of sexual violence mentioned above are forms of sexual violence as a policy by higher ranking officials of the government or armed organisations. Sexual violence can however also be

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<sup>186</sup> UN Commission on Human Rights, 'Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45' (31 January 2002) UN Doc. E/CN.4/1995/42, §64.

<sup>187</sup> Rosemary Grey, *Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court. Practice, Progress and Potential* (Cambridge University Press, 2019) 196; Sivakumaran (2007) (n 16) 268.

<sup>188</sup> Sivakumaran (2007) (n 16) 268.

<sup>189</sup> *Ibid*, 268.

<sup>190</sup> Pauline Oosterhoff, Prisca Zwanikken and Evert Ketting, 'Sexual Torture of Men in Croatia and Other Conflict Situations: An Open Secret' (2004) 12 *Reproductive Health Matters* 68, 74.

<sup>191</sup> Askin (n 17) 263; Sivakumaran (2007) (n 16) 274.

<sup>192</sup> Collins (n 184) 74.

<sup>193</sup> Doris Buss, 'The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law' (2007) 25 *Windsor Yearbook on Access to Justice* 3, 10; Seifert (n 3) 39; Sivakumaran (2007) (n 16) 274.

<sup>194</sup> Sivakumaran (2007) (n 16) 274.

<sup>195</sup> *Ibid*, 274.

committed by combatants without their superiors directly ordering it. This form of sexual violence has been given many different labels, such as collateral, sporadic or opportunistic.<sup>196</sup> Wood was the first to label it a practice of war. This is sexual violence committed by combatants low in rank and tolerated by the commanders or others higher in rank.<sup>197</sup> The rapes are not expressly ordered, nor are they expressly prohibited. The reasons why they are tolerated can vary. Sometimes, an effective prohibition can be too costly, whilst in other cases sexual violence can be seen as a 'compensation' for the combatants, for example when pay is low.<sup>198</sup> Whether or not sexual violence as a practice occurs depends on the one hand on unit social dynamics that generate participation through pressure to conform or coercion and a preference for rape among at least some of the combatants on the other hand.<sup>199</sup> This type of sexual violence is what effectively amounts to sexual violence as a form of discrimination, as it depends on the combatants' idea of gender hierarchy and their ideas on masculinities and femininities.<sup>200</sup>

There has been criticism on the discourse of conflict-related sexual violence. Wood claims there is a tendency of analysts to consider any type of sexual violence frequently committed by an armed organization as a strategy of war or some form of organizational policy.<sup>201</sup> Buss criticizes how ethnicity became the main focal point of conflict-related sexual violence.<sup>202</sup> The ethnic dimension of the Rwandan and Yugoslav conflicts were overplayed, preventing the integration of a gender analysis in the Tribunals' decision making.<sup>203</sup> Conflict-related sexual violence was merely understood to be part of a larger attack on a community; the gendered aspects were largely overlooked.<sup>204</sup> This constructs conflict-related sexual violence as something aberrant and ignores the fact that it can also happen as a practice of war.<sup>205</sup> Distinguishing between different types of sexual violence and understanding their gendered motives could help international humanitarian and international criminal law go into the underlying inequalities and try to address them, which is something IHL has not done enough according to some feminists.<sup>206</sup>

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<sup>196</sup> Collins (n 184) 76; Ward (n 14) 55.

<sup>197</sup> Ward (n 14) 56; Wood (n 184) 515.

<sup>198</sup> Elisabeth Jean Wood, 'Conflict-related sexual violence and the policy implications of recent research' (2014) 96 *International Review of the Red Cross* 457, 473; Maria Eriksson Baaz and Maria Stern, 'Why Do Soldiers Rape? Masculinity, Violence and Sexuality in the Armed Forces in the Congo (DRC)' (2009) 53 *International Studies Quarterly* 495, 501.

<sup>199</sup> Wood (n 184) 523.

<sup>200</sup> *Ibid*, 524.

<sup>201</sup> *Ibid*, 516.

<sup>202</sup> Buss (n 193) 22

<sup>203</sup> *Ibid*, 22.

<sup>204</sup> *Ibid*, 22; Buss (n 144) 413.

<sup>205</sup> Fionnuala Ní Aoláin, 'Gendered Harms and their Interface with International Criminal Law' (2014) 16 *International Feminist Journal of Politics* 622, 626.

<sup>206</sup> Durham (n 13) 36; Oosterveld (2009) (n 126) 402.

### 3 The evolution of the international framework for conflict-related sexual violence

The previous chapter established how constructs of gender influence sexual violence. According to legal scholars, the gender dynamics of conflict-related sexual violence influenced the blindness of the law, not only when it comes to sexual violence against women, but also against men. This chapter provides an overview of the international law criminalizing rape, enforced sterilization and other forms of sexual violence, whilst also assessing if there is any bias in this framework or its application. As explained in the introduction, it was decided to focus on rape, enforced sterilization and other forms of sexual violence, as these are acts known to happen to men as well as to women.

As established in the first chapter, conflict related sexual violence gained a lot of attention in the 1990's and was specifically considered at the ICTY and ICTR. Before that, the legislation regarding conflict-related sexual violence was insufficient. It focused on women's honour and personal's dignity, instead of acknowledging the violence it entailed. It was also not part of the most serious crimes within international criminal law. This chapter will therefore first look at the evolution in the criminalization of sexual violence crimes, before looking at how these definitions evolved and how they were included in the Rome Statute. It will look at the gender neutrality of the definitions, but also look at whether or not the definitions are applied in a gender neutral way.

#### 3.1 Sexual violence in the ICTY and ICTR Statutes

Both the ICTY and ICTR copied the grave breaches as they are mentioned in the Geneva Conventions, meaning it did not explicitly include sexual violence as a grave breach.<sup>207</sup> However, the interpretation of the grave breaches did change and is now considered to include sexual violence crimes under the notions 'inhuman treatment', 'torture', 'wilfully causing great suffering' and 'serious injury to body health'.<sup>208</sup> The definition of genocide and the acts constituting genocide contained in both statutes are copied from the 1948 Genocide Convention and make no explicit mention of sexual violence crimes either.<sup>209</sup> The interpretation of the acts constituting genocide did evolve to include sexual violence crimes, as will be

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<sup>207</sup> Askin (1997) (n 17) 298.

<sup>208</sup> Ward (n 14) 35; Meron (n 21) 426.

<sup>209</sup> UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993; UN Security Council, Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), 8 November 1994; Askin (1997) (n 17) 299.

discussed in this chapter. Both the ICTY and the ICTR contained rape as a crime against humanity in their statute.<sup>210</sup> The ICTR additionally criminalized rape, enforced prosecution and any form of indecent assault as a war crime in its statute.<sup>211</sup> In phrasing it that way, the statute linked sexual violence with decency, instead of recognizing the seriousness of sexual violence acts. This does not mean other forms of sexual violence, like enforced sterilization, were not prosecuted, but they were interpreted to fall under other acts like, for example, torture. This however precluded these acts from the sexual violence label and did not recognize them for what they were, repeating the phrasing of earlier instruments criminalizing conflict-related sexual violence.

The ICTY managed to obtain a relatively high number of convictions for different types of sexual violence committed against men, like forced sexual acts and sexual mutilation.<sup>212</sup> It is said this is in part due to the UN Commission of Experts report that made mention of crimes of sexual violence committed against men during the conflict.<sup>213</sup> No woman was convicted by the ICTY for sexual violence crimes.

The ICTR did not manage to secure many convictions for conflict-related sexual violence against men. Only one case included a conviction for sexual violence against men.<sup>214</sup> In other cases, it was mentioned in passing, but not considered in depth.<sup>215</sup> One would be tempted to think sexual violence towards men only limitedly took place during the conflict in Rwanda, but the opposite is true. There are stories of men being forced to commit sexual acts by men as well as female perpetrators.<sup>216</sup> Yet somehow, these incidents did not make it to the court room of the ICTR. There were also barely any convictions of women for rape, even though in Rwanda, women were actively involved in the conflict. They were planners, instigators and perpetrators as much as men were, although seemingly in lesser numbers, but only one woman was convicted by the ICTR.<sup>217</sup> The Rwandan national courts seemed to be more successful in prosecuting these female perpetrators, including for rape and other sexual violence.<sup>218</sup>

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<sup>210</sup> Grey (n 46) 273.

<sup>211</sup> *Ibid*, 273.

<sup>212</sup> Sandesh Sivakumaran, 'Prosecuting Sexual Violence Against Men and Boys' in Anne-Marie De Brouwer, Charlotte Ku, Renée G. Römkens, Larissa van den Herik (eds), *Sexual Violence as an International Crimes: interdisciplinary approaches* (Intersentia, 2012) 88.

<sup>213</sup> UNSC, 'Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)' (27 May 1994) S/1994/674.

<sup>214</sup> *Prosecutor v Niyitegeka* (Judgment) ICTR-96-14-T, T Ch I (16 May 2003); Sivakumaran (n 212) 88.

<sup>215</sup> *Prosecutor v Muhimana* (Judgment) ICTR- 95-1B-T, T Ch III (28 April 2005); *Prosecutor v Bagsora* (Judgment) ICTR-98-41-T, T Ch I (18 December 2008); Sivakumaran (n 212) 88.

<sup>216</sup> Usta Kaitesi, *Genocidal Gender and Sexual Violence* (Intersentia, 2014) 22.

<sup>217</sup> Kaitesi (n 216) 166; Ward (n 14) 145.

<sup>218</sup> Kaitesi (n 216) 166.



### 3.2 The definition of rape

Until the 1990's, there was no international definition of rape. Despite various international humanitarian law instruments mentioning rape as a crime (see *supra*), none of them defines it. It is not until the ICTY and ICTR render judgements regarding sexual violence, that rape is internationally defined. This however does not mean this definition came about easily. This chapter will provide an overview of the evolution of the definition of rape in international criminal law. It will look at the ICTY and ICTR cases that shaped the ICC definition of rape and the cases that will influenced the application of the definition by the ICC. The ICC is the definition that will be used in future cases concerning rape, but it was clearly based on existing legal definitions.<sup>219</sup>

The first definition of rape was formulated in the *Akayesu* judgement. The ICTR trial chamber defined rape as '*a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.*'<sup>220</sup> It then went on to explain that coercive circumstances '*need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women.*'<sup>221</sup> The Tribunal chose a conceptual approach of the definition, similar to the approach used in the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment.<sup>222</sup> It considered that only making a technical list of all the acts associated with the stigma of rape would not be enough to define the crime.<sup>223</sup> The definition was broad enough to include male as well as female victims, as it makes no mention of gender. It can therefore be applied to male and female victims, as well as for male and female perpetrators.<sup>224</sup>

This definition was not maintained in subsequent case law. The ICTY at first adhered to this definition in the *Delalić* and *Čelebići* cases, but coined another definition of rape in the case of *Prosecutor v*

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<sup>219</sup> Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence* (Intersentia 2005) 130.

<sup>220</sup> *Prosecutor v. Akayesu* (Judgment) ICTR-96-4-T, T Ch I (2 September 1998) §598; Phillip Weiner, 'The Evolving Jurisprudence of the Crime of Rape in International Criminal Law' (2013) 54 Boston Law Review 1207, 1209.

<sup>221</sup> *Prosecutor v Akayesu* (n 220) §688; Weiner (n 220) 1209.

<sup>222</sup> *Prosecutor v Akayesu* (n 220) §597-598; Alice Cole, '*Prosecutor v Gacumbitsi*: The New Definition for Prosecuting Rape Under International Law' (2005) 8 International Criminal Law Review 55, 57.

<sup>223</sup> Cole (n 222) 58.

<sup>224</sup> Weiner (n 220) 1210.

*Furundžija*.<sup>225</sup> After having compared different legal systems, it formulated a definition based on the principles they have in common, consisting of the following elements:

*(i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person.*<sup>226</sup>

This definition is formulated more narrow than the earlier mentioned *Akayesu* definition. For example, it cannot apply to penetration by tongue or fingers. It also excludes women as perpetrators unless they would use an object to penetrate the victim.<sup>227</sup> Additionally, the question arises whether this definition applies to situations where a victim is made to penetrate a third person. This matters, because men can be – and have been in the past – the penetrating victim.<sup>228</sup> However, if the legal definition does not foresee this option, these men could not get justice. At first glance, the *Furundžija* could be considered not to cover these acts, but the Trial Chamber stated the definition did cover forced oral penetration.<sup>229</sup>

It is suggested they departed from the *Akayesu* definition because of the principle of specificity in criminal law.<sup>230</sup> Others connect it with the criticism on the *Akayesu* definition that it supposedly went beyond the general principles of international law.<sup>231</sup> They claim that, since there was no definition of rape in international criminal law, the common principles between countries' rape laws are considered the consensus in international law, but that *Akayesu* took its definition further than the accepted consensus.<sup>232</sup> Whatever the reason, the Trial Chamber decided to divert from the *Akayesu* approach of the definition.<sup>233</sup>

Shortly after the *Furundžija* case, the Preparatory Commission, mandated to create the Elements of Crimes mentioned in article 9 of the Rome Statute, finalised its definition of rape.<sup>234</sup> For the creation of the

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<sup>225</sup> Prosecutor v Anto Furundžija (Judgment) IT-95-17/1-T, T Ch (10 December 1998); Cole (n 222) 58; De Brouwer (n 200) 108; Knut Dörman, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Cambridge, 2003) 334.

<sup>226</sup> Prosecutor v Furundžija (n 225) §185; Weiner (n 220) 1211; Eithne Dowds, 'Conceptualizing the role of consent in the definition of rape at the international criminal court: a norm transfer perspective' (2018) 20 *International Feminist Journal of Politics* 624, 629.

<sup>227</sup> Weiner (n 220) 1211.

<sup>228</sup> Sivakumaran (2007) (n 16) 264.

<sup>229</sup> Furundžija (n 225) §183; Weiner (n 220) 1211.

<sup>230</sup> Cole (n 222) 59; Chile Eboe-Osuji, *International Law and Sexual Violence in Armed Conflicts* (Martinus Nijhoff, 2012) 147.

<sup>231</sup> Eboe-Osuji (n 230) 147.

<sup>232</sup> *Ibid*, 147.

<sup>233</sup> Cole (n 222) 59.

<sup>234</sup> Dörman (n 225) 2-3; Dowds (n 226) 629.

definitions in the Elements of Crimes, the Preparatory Commission based itself on the existing case law at the time. Therefore the definition is a mixture of the *Akayesu* and *Furundžija* case law, navigating the broadness of the *Akayesu* definition and the narrowness of the *Furundžija* definition.<sup>235</sup> The definition laid down by the Elements of Crimes goes as follows:

1. *The 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.*

2. *The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.*<sup>236</sup>

The definition is the same for the war crime of rape and the crime against humanity of rape, only the contextual elements differ (see *infra*).<sup>237</sup> Footnote 50 specifies that the definition is meant to be gender-neutral. The definition does not use gendered language to describe victim or perpetrator, which does imply it is gender-neutral. Additionally, the ICC Trial Chamber convicted Bemba of command responsibility for rape of a male victim.<sup>238</sup> Even though the decision was overruled on appeal and Bemba was acquitted on all charges, this does affirm the possible gender-neutral application of the definition.<sup>239</sup> Footnote 51 accompanying the definition clarifies that incapacity refers to people unable to give genuine consent due to natural, induced or age-related incapacity.<sup>240</sup>

The acts covered by this definition are broader than the *Furundžija* definition, as it also covers penetration by fingers or tongue.<sup>241</sup> It is however more narrow than the *Akayesu* definition, which could have also applied to sexual violence acts not including penetration, like forced masturbation or sexual mutilation.<sup>242</sup> These could now however be tried through the 'other forms of sexual violence'. De Brouwer argues this label is more suitable and prevents the legal definition of rape from becoming a hollow concept, unable

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<sup>235</sup> Dörman (n 225) 327; Weiner (n 220) 1217.

<sup>236</sup> Art. 7 (1) (g)-1, art. 8 (2) (b) (xxii)-1 and art. 8 (2) (e) (vi)-1 Elements of Crimes.

<sup>237</sup> Weiner (n 220) 1217.

<sup>238</sup> Prosecutor v Bemba (Judgment) ICC-01/05-01/08-3343, T Ch III (21 March 2016).

<sup>239</sup> Prosecutor v Bemba (Judgment) ICC-01/05-01/08-363-Red, App Ch (8 June 2018).

<sup>240</sup> Footnote 51 of the Elements of Crimes; Weiner (n 220) 1218.

<sup>241</sup> De Brouwer (n 219) 132.

<sup>242</sup> *Ibid*, 133.

to capture the reality of the victims.<sup>243</sup> Denying that it is sexual violence denies the gendered realities behind these acts and effectively denies the victim's experience.

The definition also seems to be applicable to forced sexual acts, even though the wording of the definition is rather unclear in that regard, stating 'The perpetrator invaded the body of a person by conduct resulting in penetration [...] of any part of the body of the victim or of the perpetrator with a sexual organ'. This seems to indicate the drafters' intention to include forced sexual acts and make the definition applicable to instances where the victim is forced to penetrate the perpetrator or a third person. However, because of the vague phrasing, it is not clear which exact situations are meant.<sup>244</sup>

The ICTY did not follow this definition and formulated yet another one in the case of *Prosecutor v. Kunarac, Kovac and Vokovic*.<sup>245</sup> Once more, the Tribunal based its definition on a comparison of different national legal systems.<sup>246</sup> It opened up the debate about consent in the legal definition of rape in international criminal law by removing the 'coercion or force or threat of force' requirement and replacing it by 'lack of consent'. It claimed only mentioning the former is too narrow, since it does not mention factors that do not involve some form of coercion or force.<sup>247</sup> The goal of the trial chamber was to put more emphasis on sexual autonomy and somehow include how rape is a violation of that autonomy.<sup>248</sup> It therefore defined consent as being '*consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances.*'<sup>249</sup>

Some criticized the decision for applying 'peacetime law in a wartime trial', since the Tribunal surveyed national legal principles to establish an international criminal law definition.<sup>250</sup> It seems however that these fears are unfounded and that the Tribunal did take into account the special nature of conflict, as the appeal chamber later specified that, when it comes to crimes against humanity and war crimes, the circumstances

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<sup>243</sup> De Brouwer (n 219) 133.

<sup>244</sup> *Ibid*, 132.

<sup>245</sup> *Prosecutor v Kunarac, Kovač and Vuković* (Judgment) IT-96-23-T & IT-96-23/1-T, T Ch (22 February 2001).

<sup>246</sup> Dowds (n 226) 630.

<sup>247</sup> Ilias Bantekas, *International Criminal Law* (Hart Publishing, 2010) 162.

<sup>248</sup> *Prosecutor v Kunarac* (n 245) §457; Dowds (n 226) 630.

<sup>249</sup> *Prosecutor v Kunarac* (n 245) §460; Dowds (n 226) 630.

<sup>250</sup> Dowds (n 226) 631; De Brouwer (n 219) 120.

are usually coercive, making real consent basically impossible.<sup>251</sup> Future case law confirmed this view and accepted the coercive and oppressive circumstances of the crimes as evidence of the lack of consent.<sup>252</sup>

Later judgements did try to reconcile the existing definitions, with different rates of success. First there was the *Muhimana* case, in which the ICTR judged that the *Akayesu* and *Kunarac* definitions are not incompatible.<sup>253</sup> It said *Akayesu* laid down the conceptual definition and *Kunarac* further detailed the elements.<sup>254</sup> However, it did not go into the details of how this would work in practice and how it would reconcile some seemingly conflicting elements.<sup>255</sup> The ICTR in the *Gacumbitsi* case tried to remedy this, by stating that consent is part of the definition, but that consent does not have to be proven when there are coercive circumstances.<sup>256</sup> The accused can raise consent by the victim as a defence, unless the victim '*has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression*' or if they reasonably believed this would happen to a third person.<sup>257</sup>

This change in case law caused uncertainty as to how the ICC would apply the definition of rape when it came to consent.<sup>258</sup> The Court decided not to include it, but rather focus on the existence of coercive circumstances instead.<sup>259</sup> The Trial Chamber stated in the *Katanga* and *Bemba* cases that '*lack of consent is not a legal element of the crime of rape in the Statute.*'<sup>260</sup> It also stated that proof of non-consent was not required when 'force', 'threat of force or coercion' or 'taking advantage of a coercive environment' was proven.<sup>261</sup> Both Mr. Bemba and Mr. Katanga were eventually acquitted for the sexual violence charges, but this stance is still indicative of the approach adopted by the ICC for future sexual violence cases. The legal reasoning seems to be in line with the *Gacumbitsi* case. Dowds however is not sure that consent completely vanished from the ICC application of the definition of rape. During the *Bemba* trial, the judges asked witnesses whether or not they consented to the sexual acts they testified about. The judges also deducted a lack of consent from certain circumstances.<sup>262</sup> However, according to Dowds, this happens

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<sup>251</sup> Dowds (n 226) 630.

<sup>252</sup> *Ibid*, 631.

<sup>253</sup> Prosecutor v Muhimana (n 215); Weiner (n 220) 1215.

<sup>254</sup> Prosecutor v Muhimana (n 215) §550; Weiner (n 220) 1215; Cole (n 222) 63.

<sup>255</sup> Weiner (n 220) 1216.

<sup>256</sup> Gacumbitsi v Prosecutor (Judgement) ICTR-2001-64-A, App Ch (7 July 2006); Cole (n 223) 72.

<sup>257</sup> Rule 96(ii) ICTR Rules of Procedure and Evidence; Cole (n 222) 73.

<sup>258</sup> Irene Piccolo (ed), *Rape and International Criminal Law* (International Courts Association 2013) 31.

<sup>259</sup> Ward (n 14) 99

<sup>260</sup> Dowds (n 226) 631.

<sup>261</sup> Prosecutor v. Bemba (Judgment) (n 238) §§105-106.

<sup>262</sup> Dowds (n 226) 634.

without a clear legal standard for the application of consent, possibly affecting the legality principle and causing legal uncertainty.<sup>263</sup>

The discussions on whether or not to include consent in the definition of rape might seem like a mere probatory one. One could argue that the exclusion of consent in the definition avoids questions about the victims behaviour or state of mind at the time of the rape.<sup>264</sup> Some worried that the focus on consent during the international criminal trials would make way for a defence based on 'reasonable mistake of fact' and shift the focus to the behaviour of the victim.<sup>265</sup> This as opposed to discussions about use of force or coercion, which is behaviour posed by the accused.<sup>266</sup> Excluding consent from the elements of rape would also recognize the acts as violations of the victim's sexual autonomy.<sup>267</sup> Therefore, it is claimed this definition is more victim-friendly.<sup>268</sup>

Other feminist legal scholars however disagree, stating that the focus on coercive circumstances denies women's sexual agency.<sup>269</sup> Not including consent immediately precludes the possibility that women consent to any type of sexual relations in conflict. It is a measure meant to protect women, but only has the adverse the effect of reinforcing certain stereotypes against women. It reinforces the image of the female victim in need of protection, highlights women's vulnerability and leads to protective approaches, as the ones international law often employed in the past when it came to women's sexuality.<sup>270</sup> Early 20<sup>th</sup> century, for example, international law regulated practices of women being trafficked for prostitution from a rather moralistic stand point, implying that women could not validly consent to sex work.<sup>271</sup> The later adopted CEDAW voiced this protective approach in its article 6, that encourages States Parties to adopt appropriate measures to suppress exploitation of prostitution of women.<sup>272</sup> The Rome Statute, in excluding the possibility that women validly consent to sexual relations and hence denying women's sexual agency, risks echoing these protective approaches.

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<sup>263</sup> Dowds (n 226) 634.

<sup>264</sup> De Brouwer (n 219) 136.

<sup>265</sup> Weiner (n 220) 1214.

<sup>266</sup> *Ibid*, 1215.

<sup>267</sup> Chappell (n 97) 101.

<sup>268</sup> De Brouwer (n 219) 136.

<sup>269</sup> Dowds (n 226) 631; Engle (n 18) 803.

<sup>270</sup> Otto (n 15) 345.

<sup>271</sup> *Ibid*, 325.

<sup>272</sup> *Ibid*, 341.

### 3.3 Enforced sterilization

Currently, the Elements of Crimes of the ICC define enforced sterilization in the following way:

*The perpetrator deprived one or more persons of biological reproductive capacity. The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.*<sup>273</sup>

Footnote 19 explains that deprivation is not intended to include birth-control measures that have a non-permanent effect in practice. Footnote 20 clarifies that genuine consent does not include consent obtained through deception.

This is one of the crimes added to the list of sexual violence crimes with the creation of the Rome Statute. It was added in large part due to the efforts of the Women's Caucus for Gender Justice. The crime is meant to criminalize any measures intended to prevent the victim from procreating. It can cover, for example, cutting off genitals. Before this was recognized as a crime in its own right, this was prosecuted as different types of crimes. In the *Tadić* case brought for the ICTY, the instance of a man forced to bite of the testicle of another was considered cruel treatment as a violation of the laws or customs of war, inhumane acts as a crime against humanity and inhumane treatment as a grave breach of the Geneva Conventions and willfully causing great suffering or serious injury to body or health as a grave breach of the Geneva Conventions.<sup>274</sup> The placement of a burning fuse cord around the genital area of two detainees in the *Delalić* case (another ICTY case) was considered willfully causing great suffering or serious injury to body or health as a grave breach of the Geneva Conventions.<sup>275</sup> At the ICTR, a case of castration in the *Nchamihigo* case was considered crime against humanity (other inhumane acts).<sup>276</sup> These types of acts, when having the effect of sterilizing someone, could now be tried as a crime of their own. The crime could also encompass cases where, as a consequence of violently being raped, a woman's reproductive system is destroyed.<sup>277</sup>

Even though the definition of this new crime is formulated in a gender neutral way, its application by the Court is not, if the charges are brought at all. In the *Katanga* case, one witness provided evidence of men's and women's genitals being cut off, yet, even though these charges could have been brought as enforced

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<sup>273</sup> Art. 7 (1) (g)-5, art. 8 (2) (b) (xxii)-5 and 8 (2) (e) (vi)-5 Elements of Crimes.

<sup>274</sup> Prosecutor v Tadić (Judgment) IT-94-1-A, T Ch (14 July 1997) and App Ch (15 July 1999).

<sup>275</sup> Prosecutor v Delalić et al. (Judgment) IT-96-21, T Ch (16 November 1998) and App Ch (20 February 2001).

<sup>276</sup> Prosecutor v Nchamihigo (Judgment and sentence) ICTR-01-63-T, T Ch III (12 November 2008).

<sup>277</sup> De Brouwer (n 219) 147.

sterilization or ‘any other form of sexual violence’ (see *infra*), they were not brought at all.<sup>278</sup> In the *Kenyatta* cases, charges were brought by the prosecutor for acts of penile amputation and forced circumcision of Luo men during the post-election violence in Kenya in 2007-2008.<sup>279</sup> The charges for both of these acts were brought as ‘other forms of sexual violence’. However, the facts of penile amputation could have perfectly fallen under the definition of ‘enforced sterilization’. It is not clear why the charges were not brought under this qualification.

### 3.4 Other forms of sexual violence

Another new sexual violence crime is the residual category meant for any other form of sexual violence reaching a certain level of gravity.<sup>280</sup> More specifically, it is defined by the Elements of Crime as follows:

*‘The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.’<sup>281</sup>*

For the act to be a crime against humanity, it has to be of a gravity comparable to the other offences in article 7, paragraph 1 (g), of the Statute.<sup>282</sup> For the act to be a war crime, the standard of comparison is not the gravity of the other sexual violence, rather it is compared to the grave breaches of the Geneva Conventions.<sup>283</sup> Additionally, the perpetrator had to be aware of the factual circumstances that established the gravity of the conduct.<sup>284</sup>

Before this was recognized as a crime against humanity, the conducts covered by this definition were tried as ‘other inhumane acts’, since they did not fit any other category.<sup>285</sup> This however precluded these acts from the label of sexual violence. It was the Women’s Caucus of Gender Justice that pushed to have this crime included as a crime of its own.<sup>286</sup> The Caucus realized it was possible to prosecute this crime and the

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<sup>278</sup> Grey (2019) (n 187) 152.

<sup>279</sup> De Vos (n 74) 13.

<sup>280</sup> Art. 7.1 (g) Rome Statute.

<sup>281</sup> Article 7 (1) (g)-6, 1 Elements of Crimes.

<sup>282</sup> Article 7 (1) (g)-6, 2 Elements of Crimes.

<sup>283</sup> Article 8 (2) (b) (xxii)-6 and 8 (2) (e) (vi)-6 Elements of Crimes.

<sup>284</sup> Article 7 (1) (g)-6 (3), art. 8 (2) (b) (xxii)-6 and art. 8 (2) (e) (vi)-6 Elements of Crimes.

<sup>285</sup> De Brouwer (n 219) 147.

<sup>286</sup> Grey (n 46) 276.



crime of enforced sterilization through other international crimes, such as torture or genocide, yet they wanted an explicit recognition of these crimes in the hopes of combatting under-investigation and under-prosecution. That way, they could be understood as crimes in themselves.<sup>287</sup>

Two types of acts are targeted by this definition. On the one hand, it includes sexual acts committed by the perpetrator. On the other hand, it also applies to situations where the victim is forced to perform sexual acts. The circumstances constituting coercion are the same as for the crime of rape.<sup>288</sup> Some have criticized this definition because it does not define what makes an act sexual, it only defines what makes an act violent.<sup>289</sup> The ICC Policy Paper on Sexual and Gender-Based Crimes does not provide much guidance either, as it only states *'an act of a sexual nature is not limited to physical violence, and may not involve any physical contact—for example, forced nudity. Sexual crimes, therefore, cover both physical and non-physical acts with a sexual element.'*<sup>290</sup> In legal literature, it is largely considered to encompass forced nudity (possibly accompanied by threats or mockery), acts of sexual mutilation and genital violence that do not lead to enforced sterilization, enforced masturbation or any other degrading acts.<sup>291</sup>

There is some concern in legal writing about the gravity requirement restricting the crime too much. When compared with the other crimes of article 7.1 (g), it could be considered that penetration is necessary in order to reach the threshold of gravity.<sup>292</sup> That is why the Women's Caucus for Gender Justice proposed 'any crime against humanity' as the yardstick against which to measure the gravity.<sup>293</sup> This might bring it more in line with the case law on 'other inhumane acts' concerning sexual violence acts. In the *Niyitegeka* case (ICTR), for example, sexual mutilation after killing two civilians was prosecuted as 'other inhumane acts'.<sup>294</sup> The Tribunal found it serious enough compared with other acts listed as crimes against humanity because it 'would cause mental suffering to civilians, in particular, Tutsi civilians, and constitute a serious attack on the human dignity of the Tutsi community as a whole.'<sup>295</sup> If the gravity requirement would be interpreted too narrowly, these conducts might not fall in the ambit of 'other forms of sexual violence'.<sup>296</sup>

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<sup>287</sup> Grey (n 46) 275.

<sup>288</sup> De Brouwer (n 219) 148.

<sup>289</sup> Grey (n 46) 276.

<sup>290</sup> The Office of the Prosecutor, 'Policy Paper on Sexual and Gender-Based Crimes' (International Criminal Court, 2014) 3; Grey (n 46) 276.

<sup>291</sup> De Brouwer (n 219) 149; Oosterveld (2005b) (n 69) 124; Sivakumaran (2007) (n 16) 263.

<sup>292</sup> De Brouwer (n 219) 148; Grey (n 46) 276.

<sup>293</sup> De Brouwer (n 219) 149; Grey (n 46) 276.

<sup>294</sup> Prosecutor v Niyitegeka (n 214).

<sup>295</sup> *Ibid.*, §465.

<sup>296</sup> De Brouwer (n 219) 151.

They could then be prosecuted as ‘other inhumane acts’, but this would take away the legal connection with sexual violence.

What some scholars feared, turned out to be true. In the *Kenyatta* cases, the Pre-Trial Chamber denied charges of forced circumcision and penile amputation were acts of sexual violence and requalified the facts to ‘other inhumane acts’.<sup>297</sup> It did not explain why it decided to requalify, but merely stated that these acts cannot be considered sexual in nature.<sup>298</sup> In doing so, the Pre-Trial Chamber ignored the dynamics of conflict-related sexual violence and the constructs of masculinity underlying these acts.<sup>299</sup> Amputating a man’s penis effectively amounts to the destruction of his masculinity and goes to the heart of his gender identity.<sup>300</sup> It is also hard to conceive how violence resulting in sexual dysfunction can be considered not sexual.<sup>301</sup>

The Pre-Trial Chamber also ignored the specific context of the Kenya conflict, as male circumcision was a common trade in one ethnic group. Thereby, by enforcing the ethnic symbol of one group on the other group, they established their dominance as ethnic group.<sup>302</sup> This was sexual violence as a tool of establishing the perpetrators’ power. The victims’ legal representative criticized this view as outdated, viewing it as merely about sex and ignoring the complex power dynamics at play.<sup>303</sup> Even when the victims’ legal representative contended that the victims did consider this violence to be sexual, the Court dismissed their input.<sup>304</sup>

Fatou Bensouda, in 2012 elected as the new Prosecutor for the ICC, did have a better understanding of the dynamics behind the acts committed in the *Kenyatta* case and renewed her Office’s efforts to have them recognized as the sexual violence acts that they are. These attempts eventually amounted to nothing

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<sup>297</sup> De Vos (n 74) 13.

<sup>298</sup> Prosecutor v. Francis Kirimimuthaura, Uhuru Muigaienyatta and Mohammed Hussein Ali (Decision on the Prosecutor's Application for Summonses to Appear) ICC-01/09-02/11, Pre-Tr Ch II (8 March 2011) §27.

<sup>299</sup> De Vos (n 74) 14; Grey (n 46) 280.

<sup>300</sup> Grey (n 46) 280 and 282.

<sup>301</sup> *Ibid*, 282.

<sup>302</sup> De Vos (n 74) 14.

<sup>303</sup> Prosecutor v. Francis Kirimimuthaura, Uhuru Muigaienyatta and Mohammed Hussein Ali (Victim’s Observations on the Prosecution’s application for notice to be given under Regulation 55(2) with respect to certain crimes charged) ICC-01/09-02/11, T Ch V (24 July 2012) 12-13.

<sup>304</sup> Prosecutor v. Francis Kirimimuthaura, Uhuru Muigaienyatta and Mohammed Hussein Ali (Decision on the Prosecutor's Application for Summonses to Appear) ICC-01/09-02/11, Pre-Tr Ch II (23 January 2012) §264-266; Grey (n 46) 282.

as the defense's reaction to the sexual violence label effectively barred the prosecution from using this term altogether.<sup>305</sup>

Possibly if the definition had contained a description of what makes violence sexual, it would have been considered as such by the Court. However, as the charges in the *Kenyatta* cases were eventually dropped, the Court did not have the opportunity to explain what makes sexual violence sexual.<sup>306</sup> In the *Katanga* case, a case of forced nudity was brought by the Prosecution under charges of outrages on personal dignity, rather than under 'any other form of sexual violence'.<sup>307</sup>

The comparable gravity test also caused difficulty in prosecuting sexual violence crimes. In the *Bemba* case, the Prosecutor submitted evidence of civilians being forced to strip naked by MLC soldiers in Congo. The specific purpose of this violence was to humiliate them. Evidence was also submitted of a man being forced to undress by a female soldier before she raped him. Another incident concerned a woman being forced to undress herself by soldiers. The intention of the soldiers was to rape her, but they changed their mind when they noticed she had scabies.<sup>308</sup>

The Pre-Trial Chamber declined to charge any of these charges brought as 'any other form of sexual violence', claiming that the acts of forced nudity did not pass the 'comparable gravity' test.<sup>309</sup> It additionally deemed the charges under this qualification redundant. The Chamber stated the acts could potentially be charged under 'outrages on personal dignity'.<sup>310</sup> This seems to go against previous ICTR case law, like the *Akayesu* case, that had established forced nudity could be considered a crime against humanity.<sup>311</sup> Furthermore, it seems to go against the intention of the drafters, that had specifically included 'any other form of sexual violence' on the basis of the *Akayesu* case and other cases that mentioned evidence of these kind of acts.<sup>312</sup>

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<sup>305</sup> Grey (n 46) 282.

<sup>306</sup> Grey (2019) (n 187) 210.

<sup>307</sup> *Ibid*, 150.

<sup>308</sup> Prosecutor v Bemba (Prosecutor's Application for Warrant of Arrest under Article 58) ICC-01/05-01/08-26, Pre Tr Ch III (9 May 2008); Amnesty International, 'Central African Republic: Five Months of War Against Women' (Report, 2004) < <https://www.amnesty.org/download/Documents/88000/afr190012004en.pdf> > 5 and 9; Grey (n 46) 277.

<sup>309</sup> Prosecutor v Bemba (Decision on the Prosecutor's Application for a Warrant of Arrest) ICC-01/05-01/08-14, Pre T Ch III (10 June 2008) §40; Grey (n 46) 277.

<sup>310</sup> Prosecutor v Bemba (Decision on the Prosecutor's Application for a Warrant of Arrest) (n 260) §63; Grey (n 46) 277.

<sup>311</sup> Prosecutor v Akayesu (n 220) § 688; Chappell (n 97) 118; Oosterveld (2005b) (n 69) 124.

<sup>312</sup> Oosterveld (2005b) (n 69) 124.

### 3.5 Contextual elements of crimes against humanity and war crimes

All of the abovementioned crimes, namely rape, enforced sterilization and other forms of sexual violence, are both criminalized as war crimes and crimes against humanity. Only the contextual elements for both types of crimes differ. For an act to be a crime against humanity, it has to be committed '*as part of a widespread or systematic attack directed against a civilian population*' and the perpetrator '*knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.*'<sup>313</sup>

This definition also stems from earlier ICTY and ICTR case law, as does its application. A widespread attack is an action carried out collectively with considerable seriousness at a massive, frequent and large scale and towards a multiplicity of victims.<sup>314</sup> Therefore, proving a widespread attack generally requires proof that several offences took place.<sup>315</sup> Proving a systematic attack on the other hand is more difficult. Systematic refers to the '*organized nature of the acts of violence and the improbability of their random occurrence*'.<sup>316</sup> In *Blaškić*, the ICTY even listed four requirements for an attack to be systematic: the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community; the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another; the preparation and use of significant public or private resources, whether military or other; and the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.<sup>317</sup> Unlike for the crime of genocide, no intention to destroy the group in whole or in part is required. This makes it easier to prosecute crimes against humanity than the crime of genocide, because the burden of proof is easier. The plan also does not have to be expressly declared, proof of the plan can be inferred from circumstances.<sup>318</sup> It suffices that it is created by an organized non-state entity, it is not required that it is organized by a government.<sup>319</sup>

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<sup>313</sup> Art. 7.1 Rome Statute; Art. 7 (1) (g)-1 §§3-4 Elements of Crimes.

<sup>314</sup> Prosecutor v Akayesu (n 220) §580; Prosecutor v Blaškić (Judgment) IT-95-14-T, T Ch (3 March 2000) §206; De Brouwer (n 219) 166.

<sup>315</sup> Bantekas (n 247) 197.

<sup>316</sup> Prosecutor v Kunarac (n 245) §429; De Brouwer (n 219) 167.

<sup>317</sup> Prosecutor v Blaškić (n 314) §203; Bantekas (n 247) 196.

<sup>318</sup> Bantekas (n 247) 197.

<sup>319</sup> *Ibid*, 196.

For sexual violence to constitute a war crime, it has to be committed ‘as part of a plan or policy or as part of a large-scale commission of such crimes.’<sup>320</sup> This means war crimes have to be committed in a systematic way or on a large scale.<sup>321</sup> War crimes can be committed in international armed conflict or in a non-international armed conflict. The Rome Statute codified rape, enforced sterilization and other forms of sexual violence as a war crime for both types of conflict.<sup>322</sup>

It is argued that these requirements preclude effective redress for all types of sexual violence in conflict.<sup>323</sup> As seen in chapter 2.4, conflict-related sexual violence can take on many forms, of which one constitutes rape as a practice of war. This is sexual violence committed by combatants, tolerated by their commanders. These types of sexual violence, the ones that are not committed as part of an overall, organized plan, do not seem to be covered by the requirements of article 7 and 8 Rome Statute.<sup>324</sup> These articles even seem to imply that the sexual violence must rise to a certain level of severity for it to be considered a war crime.<sup>325</sup> Some have argued that articles 7 and 8 do not require the act itself to be widespread or systematic, it only has to be part of a systematic and widespread attack.<sup>326</sup> It has also been claimed that the *Blaskic* definition mentioned above allows for a single act to be considered a crime against humanity, as long as the attack has a political or ideological purpose.<sup>327</sup>

This last interpretation does however not seem to be the one adopted by the ICC. For example in the *Lubanga* case, charges of sexual violence were dismissed because they were not ‘sufficiently widespread’, nor could it be linked to a common plan developed by Lubanga.<sup>328</sup> In the *Katanga* case, the requirement of article 7 was used by the Trial Chamber to acquit Katanga of the sexual violence charges brought against him.<sup>329</sup> It considered that the acts of rape and sexual enslavement were not part of the common purpose of the group, as opposed to the other crimes of humanity in the same case, like pillage and murder.<sup>330</sup> The Chamber did not provide an explanation as to why it considered certain as part of the plan and others not.

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<sup>320</sup> Art. 8.1 Rome Statute.

<sup>321</sup> De Brouwer (n 219) 177.

<sup>322</sup> Art 8.2 (b)(xxii) and art 8.2 (e)(vi) Rome Statute.

<sup>323</sup> Alona Hagay-Frey, *Sex and Gender Crimes in the New International Law: Past, Present, Future* (Brill, 2011) 116; Ward (n 14) 98.

<sup>324</sup> Hagay-Frey (n 323) 116; Ward (n 14) 98.

<sup>325</sup> Hagay-Frey (n 323) 116.

<sup>326</sup> De Brouwer (n 219) 167; Hagay-Frey (n 323) 116.

<sup>327</sup> Hagay-Frey (n 323) 116.

<sup>328</sup> Ward (n 14) 100.

<sup>329</sup> Grey (2019) (n 187) 159.

<sup>330</sup> Prosecutor v Katanga (Judgment) ICC-01/04-01/07-3436, T Ch II (7 March 2014); Ward (n 14) 103.

In the Bemba case, the Trial Chamber convicted Bemba for command responsibility because of the rapes committed by his soldiers.

This led certain scholars to question the usefulness of this requirement, given its limited possibilities in providing justice for all types of sexual violence.<sup>331</sup> Cassese for example suggested the requirement be eliminated altogether and replaced by the mere requirement of the policy being accepted or tolerated by the responsible state or organization for the acts to be considered crimes against humanity.<sup>332</sup> This could certainly ensure that instances of rape as a practice as defined earlier could fall under the definition. It could also improve prosecution of sexual violence. As it is generally hard to prove sexual violence, additionally having to prove a political rationale for these crimes only complicates prosecution more.<sup>333</sup>

Moreover, prosecution of sexual violence as a crime against humanity is also complicated by the *mens rea* requirement. As Hagay-Frey puts it, '*Even if it were proven that a reasonable person would have known that the rape was part of the widespread or systematic attack, this would be insufficient – it must be shown that the perpetrator knew or intended that the conduct would be part of the widespread or systematic attack.*'<sup>334</sup> Hence, a conviction for negligence seems implausible.<sup>335</sup>

This is exactly what some feminist legal scholars feared. They were afraid sexual violence would only be recognized if it was seen as an attack on a certain ethnic, racial or religious community. If it would only be recognized as such, the gendered nature of the crime would be ignored.<sup>336</sup> Seeing rape as intrinsically linked with attacks on groups substantially limits the understanding of gender-based and sexual violence and prevents the prosecution of sexual violence crimes that are considered a practice of war, as defined in chapter 2.

### 3.6 Sexual violence as a form of genocide

Genocide was defined for the first time by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The definition of genocide contained in the Rome Statute is the same as the one listed

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<sup>331</sup> Hagay-Frey (n 323) 118.

<sup>332</sup> Antonio Cassese, 'Crimes against Humanity' in Antonio Cassese (ed), *The Rome Statute for an International Criminal Court. A Commentary* (Oxford University Press, 2002) 376; Ward (n 14) 118.

<sup>333</sup> Ward (n 14) 118.

<sup>334</sup> Hagay-Frey (n 323) 120.

<sup>335</sup> Hagay-Frey (n 323) 120; Ward (n 14)

<sup>336</sup> Buss (n 144) 413.

in the Genocide Convention and the ICTR and ICTY Statutes.<sup>337</sup> Since the creation of the Convention, the crime evolved to being customary international law and even became a *jus cogens* norm, meaning no derogation is possible.<sup>338</sup> The prohibition of genocide also binds states that have not ratified any treaty containing the prohibition.<sup>339</sup> The acts constituent of genocide could also be considered as war crimes or crimes against humanity, but what causes these acts to be genocide, is the intent with which they were performed. Genocide requires a *dolus specialis* of wanting to destroy in whole or in part anyone from a national, ethnical, racial or religious group.<sup>340</sup> This, according to the *Akayesu* judgment, can be proved by *'the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups.'*<sup>341</sup> The intention to commit these acts has to be formed prior to their execution.<sup>342</sup> The acts constituting genocide are elaborated in this exhaustive list:

- (a) *Killing members of the group;*
- (b) *Causing serious bodily or mental harm to members of the group;*
- (c) *Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
- (d) *Imposing measures intended to prevent births within the group;*
- (e) *Forcibly transferring children of the group to another group.*<sup>343</sup>

When the Convention was created, sexual violence was not included as a constituent act of genocide.<sup>344</sup> This gap was eventually remedied fifty years later by the ICTR case law. In the *Akayesu* case, the Trial Chamber stated that sexual violence can fall under *'causing serious bodily or mental harm to members of the group'* and therefore be a constituent act of genocide.<sup>345</sup> This was the first time rape was recognized as a constituent act of genocide by an international tribunal.<sup>346</sup> It was already clear though that this provision was not limited to what is generally thought of as causing bodily or mental harm, like torture.<sup>347</sup>

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<sup>337</sup> Art. II Genocide Convention; Art. 6 Rome Statute.

<sup>338</sup> Bantekas (n 247) 204; De Brouwer (n 219) 42.

<sup>339</sup> Bantekas (n 247) 204.

<sup>340</sup> Art. II Genocide Convention; Art. 6 Rome Statute; Bantekas (n 247) 205.

<sup>341</sup> Prosecutor v Akayesu (n 220) §523; Ward (n 14) 70.

<sup>342</sup> Bantekas (n 247) 210.

<sup>343</sup> Art. II Genocide Convention; Art. 6 Rome Statute; Bantekas (n 247) 206.

<sup>344</sup> De Brouwer (n 219) 43.

<sup>345</sup> Prosecutor v Akayesu (n 220) §497; Bantekas (n 247) 216; De Brouwer (n 219) 44.

<sup>346</sup> Ward (n 14) 70.

<sup>347</sup> Bantekas (n 247) 216.

The act of ‘causing bodily or mental harm’ is not the only one that include sexual violence crimes. ‘Imposing measures intended to prevent births within the group’ includes acts of enforced sterilization when they are committed with the intent of destroying the group in whole or in part.<sup>348</sup> However, this constitutive act of genocide has also been interpreted to include rape, for example through forced impregnation.<sup>349</sup> In patriarchal societies, the membership of the group is often passed through the father’s line. Therefore, by raping women and forcibly impregnating them, births within the group are prevented. On top of that, rape can cause mental and physical trauma, leading the victim to not be able to procreate anymore.<sup>350</sup>

In the *Kayishema and Ruzindana* case, the Trial Chamber also held that rape could be considered to fall under ‘(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part’.<sup>351</sup> The ICC Elements of Crimes eventually decided to follow the *Akayesu* line of reasoning and consider rape and sexual violence as a constituent act of genocide falling under ‘causing serious bodily or mental harm’.<sup>352</sup> This clarified the position of rape as a form of genocide and solidified the case law as international law.<sup>353</sup>

However, sexual violence is still not included in the actual definition, despite efforts of the Women’s Caucus at the Rome Conference to have it included in the Rome Statute.<sup>354</sup> Nor are any other sexual violence acts, such as forced impregnation, sexual slavery or enforced prostitution.<sup>355</sup> Gender is also not recognized as a persecuted group, even though women are, according to de Brouwer, sometimes targeted only because they are women.<sup>356</sup> This however seems to ignore the reality that men too can be and are victims of sexual violence as a form of genocide. This form of sexual violence would not fall under the persecuted group of ‘gender’, if this group was added to the list, generally seen as only meaning ‘women’.<sup>357</sup> Using ‘gender’ as a category of persecution would also risk reproducing essentialist ideas about women and feeding into dualism in international law.<sup>358</sup>

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<sup>348</sup> De Brouwer (n 219) 147.

<sup>349</sup> Prosecutor v Akayesu (n 220) §507; Bantekas (n 247) 216.

<sup>350</sup> Prosecutor v Akayesu (n 220) §508; Bantekas (n 247) 216.

<sup>351</sup> Prosecutor v Kayishema and Ruzindana (judgement) ICTR-95-1, T Ch II (21 May 1999); De Brouwer (n 219) 46.

<sup>352</sup> Footnote 3 Elements of Crimes.

<sup>353</sup> De Brouwer (n 200) 80.

<sup>354</sup> Chappell (n 97) 100.

<sup>355</sup> De Brouwer (n 219) 80.

<sup>356</sup> De Brouwer (n 219) 83.

<sup>357</sup> Ward (n 14) 55.

<sup>358</sup> Otto (n 15) 345.



Sexual violence against men was not yet specifically recognized as amounting to genocide.<sup>359</sup> However, certain acts constituent of genocide could be interpreted to include sexual violence against men. Since rape falls under ‘causing serious bodily or mental harm to members of the group’ and the definition of rape is gender-neutral, there is no reason to assume it could not include rape against men.<sup>360</sup> Other forms of sexual violence could also be considered to reach the threshold of severity for it to fall under serious bodily or mental harm, as for women.<sup>361</sup> Enforced sterilization and genital violence could be interpreted to fall under ‘measures intended to prevent births within the group’, as it could prevent men from a certain group to procreate.<sup>362</sup>

Ever since the *Akayesu* case, there have barely been any convictions for sexual violence as genocide. However, it has to be kept in mind that genocide is generally hard to prosecute due to a multitude of factors, such as its narrow focus on state-planned genocides and a high threshold for determining genocidal intent.<sup>363</sup> This makes it harder to prosecute any crime as an act constituent of genocide, not just sexual violence.

### 3.7 Command responsibility

Under the Rome Statute, perpetrators can not only be held individually accountable, they can also be held accountable under the command responsibility doctrine. Article 28 (a) of the Rome Statute defines the responsibility as follows:

*A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:*

- (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and*

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<sup>359</sup> Sivakumaran (n 212) 85.

<sup>360</sup> Lewis (n 29) 27; Sivakumaran (n 212) 86.

<sup>361</sup> Sivakumaran (n 212) 86.

<sup>362</sup> Sivakumaran (n 212) 86.

<sup>363</sup> Doris Buss, ‘Making Sense of Genocide, Making Sense of Law: International Criminal Prosecutions of Large-Scale Sexual violence’ in Amy Randall (ed) *Genocide and Gender in the Twentieth Century: A Comparative Survey* (Bloomsbury Publishing, 2015).

- (ii) *That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.*

This comes down to criminalizing commanders' passive conduct, to holding commanders responsible for their inability to act and stop crimes from happening.<sup>364</sup> However, it proved to be particularly difficult so far to ensure a conviction on the basis of command responsibility. One case where it went wrong, was the *Bemba* case. As mentioned earlier, the charges of other forms of sexual violence were not retained by the Pre-Trial Chamber, but Bemba was subsequently convicted by the Trial Chamber for the remaining charge of rape as a war crime through the command responsibility doctrine. In doing so, the judgment cemented this doctrine in its application for rape cases, something previous tribunals struggled with.<sup>365</sup> The conviction was later overturned on appeal in a highly contested judgment. The appeal judges were especially criticized for not taking into account the consequences of their judgement for the prosecution of sexual violence. The judgement acquitted Bemba on two main grounds. First, the Appeals Chamber found that the conviction exceeded the charges determined by the Pre-Trial Chamber, which goes against art. 74 (2) of the Rome Statute.<sup>366</sup> That way, the majority established that eighteen acts of murder, rape and pillage were not part of the 'facts and circumstances described in the charges' and that Mr Bemba could not have been rightfully convicted for these facts.<sup>367</sup> Critics like SáCouto state that this interpretation of art. 74 (2) Rome Statute is particularly for sexual violence, as it is often not the main investigative priority, causing the (entire scope of) the charges to only come to light at a later stage.<sup>368</sup>

The second ground of acquittal in the Bemba case concerned the command responsibility he was found guilty of. The Appeals Chamber believed Bemba did take all necessary and reasonable measures to prevent, repress or punish the crimes committed by the MLC soldiers, claiming the Trial Chamber did not

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<sup>364</sup> Bader Mohammed Alsharidi, 'The Consistency of Implementing Command Responsibility in International Criminal Law: An Analysis of the Nature of This Doctrine in the Ad Hoc and Special Tribunals' Case Law and at the International Criminal Court in Bemba (2016-2017) 12 *Eyes on the ICC* 73, 93.

<sup>365</sup> Clay Anthony, 'In the Case of the Prosecutor v. Jean-Pierre Bemba Gombo: Cementing Sexual Violence and Command Responsibility within International Criminal Law' (2017) 25 *Tulane Journal of International and Comparative Law* 403, 421.

<sup>366</sup> Prosecutor v Bemba (n 239) §116.

<sup>367</sup> Art 74 (2) Rome Statute; Joseph Powderly, 'Introductory Note to Prosecutor v. Jean-Pierre Bemba Gombo: Judgement on the Appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgement Pursuant to Article 74 of the Statute" (Int'l Crim. Ct.)' (2018) 57 *International Legal Materials* 1031, 1033.

<sup>368</sup> Susana SáCouto, 'The Impact of the Appeals Chamber Decision in Bemba: Impunity for Sexual and Gender-Based Crimes?' (*International Justice Monitor*, 22 June 2018) <<https://www.ijmonitor.org/2018/06/the-impact-of-the-appeals-chamber-decision-in-bemba-impunity-for-sexual-and-gender-based-crimes/>> accessed 24 March 2019.

sufficiently take into account Bemba's geographical remoteness of his troops.<sup>369</sup> Yet critics say the Appeals Chamber did not scrutinize the measures Bemba adopted to stop the sexual violence committed by his soldiers. If it would have done so, it would have noticed that none of the measures he adopted were intended to stop the sexual violence committed by his troops.<sup>370</sup>

The same thing happened in the *Ngudjolo* case. Even though it was admitted that there was a 'wealth of evidence' for the sexual violence charges, it was, according to the Court, not established that Ngudjolo was the leader of the group committing the attacks.<sup>371</sup> The acquittal was confirmed by the Appeals Chamber, despite the Prosecution's argument that the standard imposed establishes an impossible threshold of proof.<sup>372</sup>

### 3.8 Limits to the framework

This framework is limited by the territorial jurisdiction of the International Criminal Court. It is important to keep in mind that this framework is not able to provide justice for all conflict-related sexual violence. The ICC is bound by its Statute and cannot just take up any case it so desires, since the Court does not have universal jurisdiction. Instead, it can only exercise jurisdiction over the territory of State Parties, regardless of the nationality of the offender.<sup>373</sup> States can however also accept the Court's jurisdiction on an ad hoc basis when they are not themselves a Party-State.<sup>374</sup> The state wanting to do this has to lodge a declaration through which it accepts the jurisdiction of the Court for a certain crime.<sup>375</sup> Additionally, the Security Council can decide to refer cases on the basis of article 13(b) Rome Statute and Chapter VII of the Charter of the United Nations.<sup>376</sup> This is why, for example, no case has yet been started at the ICC against the ISIS leaders responsible for the sexual violence against and sexual slavery of the Yazidis, despite overwhelming

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<sup>369</sup> Prosecutor v Bemba (n 239) §§171 and 176; Grey (2019) (n 187) 200.

<sup>370</sup> Grey (2019) (n 187) 203; Miles Jackson, 'Geographical Remoteness in Bemba' (*EJIL: Talk!*, 30 July 2018) <<https://www.ejiltalk.org/geographical-remoteness-in-bemba/>> accessed 24 March 2019; SáCouto (n 368).

<sup>371</sup> Prosecutor v Ngudjolo (Judgment) ICC-01/04-02/12-3, T Ch II (18 December 2012) §§338 and 503; Grey (2019) (n) 156.

<sup>372</sup> Prosecutor v Ngudjolo (Judgment) ICC-01/04-02/12-271, App Ch (7 April 2015); Grey (2019) (n 187) 156.

<sup>373</sup> Art. 12(2)(a) Rome Statute; William A. Schabas, *An Introduction to the International Criminal Court* (5<sup>th</sup> edn, Cambridge University Press 2017) 66.

<sup>374</sup> Art. 12(3) Rome Statute; Schabas (n 373) 69.

<sup>375</sup> Art. 12(3) Rome Statute; Schabas (n 373) 69.

<sup>376</sup> Schabas (n 373) 66.

evidence.<sup>377</sup> Iraq nor Syria ratified the Rome Statute.<sup>378</sup> So far, there was also no political will within the Security Council to refer the case.<sup>379</sup> This means certain cases of sexual violence will still go without justice for the victims.

The complementarity principle further limits the admissibility of cases. According to this principle, the national justice system is the primary responsible for prosecuting war crimes. Only when the national justice system is unwilling or unable to genuinely proceed with a case, the ICC can take up the case.<sup>380</sup> It is argued that this principle can have detrimental effects for gender justice, as domestic legal systems can be gender-biased and impede access to justice for sexual violence victims.<sup>381</sup> This topic is however beyond the scope of this thesis.

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<sup>377</sup> Samar El-Masri, 'Prosecuting ISIS for the sexual slavery of the Yazidi women and girls' (2018) 22 *The International Journal for Human Rights* 1047, 1052.

<sup>378</sup> Sara De Vido, 'Protecting Yazidi cultural heritage through women: An international feminist law analysis' (2018) 33 *Journal of Cultural Heritage* 264, 274.

<sup>379</sup> De Vido (n 184) 274.

<sup>380</sup> Schabas (n 175) 170.

<sup>381</sup> Louise Chappell, Rosemary Grey and Emily Waller, 'The Gender Justice Shadow of Complementarity: Lessons from the International Criminal Court's Preliminary Examinations in Guinea and Colombia' (2013) 7 *The International Journal of Transitional Justice* 455.

## 4 An improved Framework, but a biased application

### 4.1 A lack of understanding of conflict-related sexual violence

When the Rome Statute was created, it contained an extensive list of sexual crimes, the most extensive in international criminal law up until that point.<sup>382</sup> The Statute now criminalizes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and the broad category of other forms of sexual violence.<sup>383</sup> On paper, the framework improved substantially. In reality, however, the Court struggles to ensure convictions for conflict-related sexual violence. At the time of writing, there were no final convictions for conflict-related sexual violence. In the course of proceedings, many of the charges fell off and did not make it to the final trial.<sup>384</sup> This is normal to some extent, given that the burden of proof becomes harder as the trial progresses, but numbers show that sexual violence charges are particularly vulnerable to this phenomenon compared to other types of crimes.<sup>385</sup> This seems to be emblematic of a larger problem. The previous chapter highlights how specific crimes and their mode of liability cause problems for gender justice at the ICC. This chapter will discuss more general problems in the ICC's understanding of gender and conflict-related sexual violence.

Generally, the Court does not seem to have a good understanding of gender and gender-based crimes. The definition in the Rome Statute in this regard does not help much. This definition reads: *'For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.'*<sup>386</sup> This definition received a lot of criticism from feminist legal scholars, claiming that the definition conflates the terms sex and gender, thereby denying that gender is a social construct.<sup>387</sup> Others however argued that the reference to 'within the context of society' specifically refers to the construction of gender.<sup>388</sup> Copelon added to that her doubts about one of the highest international courts resolving a case in favour of discrimination.<sup>389</sup> However, the current definition does divert from the one generally used in UN

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<sup>382</sup> De Brouwer (n 219) 177; Valerie Oosterveld, 'The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law' (2018) 24 *William & Mary Journal of Race, Gender, and Social Justice* 443, 443.

<sup>383</sup> Art. 7 (1)(g) Rome Statute.

<sup>384</sup> Chappell (n 97) 104.

<sup>385</sup> *Ibid*, 108.

<sup>386</sup> Art. 7.3 Rome Statute.

<sup>387</sup> Valerie Oosterveld, 'The Definition of Gender in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?' (2005) 18 *Harvard Human Rights Journal* 55, 71.

<sup>388</sup> Copelon (n 69) 237; Oosterveld (2005) (n 387) 71.

<sup>389</sup> Copelon (n 69) 237; Oosterveld (2005) (n 387) 71.

documents.<sup>390</sup> The discussions within feminist legal scholarship only seem to indicate how unclear the definition really is.

To understand why the wording of the definition is so vague, one has to understand how it emerged. The concept of gender was a highly contested issue at the negotiations of the Rome Statute (and even now still).<sup>391</sup> Negotiations between parties in favour of the references to gender in the Rome Statute and the parties against were difficult. As a compromise, the final definition is an example of 'constructive ambiguity'.<sup>392</sup> Whilst this language might have been necessary in order to keep the term gender in the Statute, the indefinite language does complicate its application.<sup>393</sup> It was kept vague on purpose, leaving the actual application to the Court.<sup>394</sup>

Whatever the definition's meaning might be, it does matter. The definition of gender in the Rome Statute is crucial in guiding the Court's understanding of gender and therefore also influences the Court's view on gender crimes. In the Rome Statute alone, the word gender is mentioned nine times.<sup>395</sup> This number is even higher for the Rules of Procedure guiding the Court's work. If the Court is not able to dive into the social constructions of gender and recognize the consequences of these constructions, it could lead to insensitive decisions towards sexual violence victims.<sup>396</sup> It is said that a limited understanding by the Prosecutor of its gender mandate during the first ten years of the ICC's existence, contributed to the poor success rate of sexual violence charges.<sup>397</sup> As demonstrated above, a society's views on and constructions of masculinity and femininity play an important role in the dynamics of sexual violence.

So far, the Court did not directly address the interpretation of the definition gender in its work. It seems however that the Court is still struggling to fully understand gender in its work. The prosecutions made some errors in this regard, for example when it left out charges of sexual violence altogether or when it brought charges of sexual violence under outrages of 'personal dignity'. The Court however does not always take into account the gendered consequences of its decisions either. There are numerous

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<sup>390</sup> De Vos (n 74) 6; Oosterveld (2005) (n 387) 71.

<sup>391</sup> De Vos (n 74) 6; Oosterveld (2005a) (n 387) 59.

<sup>392</sup> De Vos (n 74) 6; Oosterveld (2005a) (n 387) 64; Valerie Oosterveld, 'Constructive Ambiguity and the Meaning of Gender for the International Criminal Court' (2014) 16 *International Feminist Journal of Politics* 563.

<sup>393</sup> Oosterveld (2014) (n 392) 564.

<sup>394</sup> De Vos (n 74) 6; Oosterveld (2014) (n 392) 564.

<sup>395</sup> De Vos (n 74) 6; Ward (n 14) 134.

<sup>396</sup> Oosterveld (2005a) (n 387) 72.

<sup>397</sup> De Vos (n 74) 8.

examples. In the *Kenyatta* case, it requalified the charges of sexual violence against men to ‘other inhumane acts’, as mentioned earlier. The consequences of the *Bemba* ruling on appeal also set a higher standard for prosecuting sexual violence, a standard that is already pretty high.

Sometimes charges of sexual violence were also simply not brought, as for example in the *Lubanga* case. The Prosecutor did not include any sexual violence charges in his application for an arrest warrant, even though there was ample evidence of sexual violence committed against abducted girls and of child soldiers being encouraged to commit sexual violence crimes.<sup>398</sup> These charges were also not brought in the Document Containing the Charges, as the Prosecutor claimed there was not enough time to expand the charges.<sup>399</sup> At a later stage, he claimed the crimes did not meet the threshold of being ‘systematic’.<sup>400</sup> Even as the Women’s Initiatives for Gender Justice and other organizations provided evidence of sexual violence, the charges were not altered to include these crimes.<sup>401</sup> When they kept meeting resistance from the Prosecutor, the Women’s Initiatives for Gender Justice tried to intervene through the Court’s amicus curiae provisions, but their request was denied on technical grounds.<sup>402</sup> At some point throughout the trial, the Office of the Prosecutor stated their overall prosecution strategy was to provide lesser examples of crimes in order to make justice more efficient and shorter.<sup>403</sup> It seems however that they failed to see the discriminatory effect of this policy towards sexual violence victims.<sup>404</sup> This type of omissions only seem to show that sexual violence crimes are treated as lesser crimes.

The *Ntaganda* case initially seemed to go the same direction. The original charges made no mention of sexual and gender-based violence, however they were later expanded to include charges of sexual violence towards men and women.<sup>405</sup> The case also marked the first time sexual violence within an armed group was prosecuted, a form of sexual violence usually overlooked.<sup>406</sup> Moreover, it was the first time all of the

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<sup>398</sup> Chappell (n 97) 111; Grey (2019) (n 187) 129; Pritchett (n 71) 287.

<sup>399</sup> Grey (2019) (n 187) 130-131; Pritchett (n 71) 287.

<sup>400</sup> Chappell (n 97) 111.

<sup>401</sup> Chappell (n 97) 111; Grey (2019) (n 187) 131.

<sup>402</sup> Chappell (n 97) 112; Grey (2019) (n 187) 131; Pritchett (n 71) 288.

<sup>403</sup> Luis Moreno-Ocampo, ‘A Word from the Prosecutor’ (November 2006) 10 International Criminal Court Newsletter <[https://www.icc-cpi.int/NR/rdonlyres/2AD04DD6-6E18-4B9B-9477-4DFCD8D607A4/278462/ICCNL10200611\\_En.pdf](https://www.icc-cpi.int/NR/rdonlyres/2AD04DD6-6E18-4B9B-9477-4DFCD8D607A4/278462/ICCNL10200611_En.pdf)>; Pritchett (n 71) 292.

<sup>404</sup> Pritchett (n 71) 292.

<sup>405</sup> Grey (2019) (n 187) 142-145.

<sup>406</sup> *Ibid*, 146.

sexual violence charges brought by the Prosecutor were confirmed by the Court.<sup>407</sup> The charges were maintained throughout the Trial, but at the time of writing, the judgement was not yet delivered.

Additionally, when charges of sexual violence were brought, they mostly concerned rape.<sup>408</sup> The full tool box of sexual violence crimes available to the prosecutor is not being used. Therefore, even though the Rome Statute included the longest list ever of sexual violence crimes in international criminal law, these crimes are not being prosecuted and sexual violence crimes are still not considered important enough to ensure justice for the victims.<sup>409</sup> It seems like only rape is being taken seriously enough when it comes to prosecution and even then justice is not provided.

However, even when other charges were brought by the Prosecutor, the Court sometimes dismissed them. In the *Bemba* case for example, the Prosecution brought seven charges of gender-based crimes, but only rape as a war crime and rape as a crime against humanity were retained by the Pre-Trial Chamber.<sup>410</sup> One of the charges dismissed was torture constituting a crime against humanity for making the civilian population watch acts of rape and other forms of sexual violence. This caused, according to the Prosecutor, severe mental pain or suffering. The Prosecution explained that the troops '*used torture through acts of sexual violence for the purpose of punishing and intimidating the civilian population for allegedly sympathizing with Bozizé's rebels, as well as for the purpose of discriminating against their victims.*'<sup>411</sup> This is precisely the goal of sexual violence in public, as explained in Chapter 2. Yet the Court failed to see the larger picture and dismissed the charges, displaying a misunderstanding of conflict-related sexual violence.

A positive note is that sexual violence that did not fit the concept of men as perpetrators and women as victims was considered several times by the ICC, like in the *Bemba* and *Ntaganda* cases. The case mentioned male victims of sexual violence and female perpetrators. However, as much as this might be seen as a step forward in the recognition of other forms of sexual violence than male/female, the overall *Bemba* case can hardly be considered an advancement for the prosecution of sexual violence crimes, as demonstrated in the previous chapter. It also does not outweigh the general misrecognition of sexual violence towards men by ignoring the sexual aspect of the forced circumcisions and penile amputations in

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<sup>407</sup> Ward (n 14) 108.

<sup>408</sup> Chappell (n 97) 108.

<sup>409</sup> *Ibid.*, 109.

<sup>410</sup> Grey (n 187) 195.

<sup>411</sup> Prosecutor v Bemba (Decision on the Charges) ICC-01/05-01/08-424, Pre-T Ch II (15 June 2009) §297.



the *Kenyatta* cases. This is part of a larger tendency to classify sexual violence against men under general crimes rather than the specific. If genital mutilation and enforced sterilization of women deserves the label of sexual violence, why do the same facts committed against men not merit the same understanding? What does it take for acts of violence towards men to be considered sexual violence? Is it only rape? This type of thinking ultimately only contributes to the narrative of women as victims and men not being able to be considered as such. It reinforces the stereotype that women are raped but men cannot be.<sup>412</sup>

#### 4.2 The ICC Policy Paper

In 2014, the office of the prosecutor of the ICC published a policy paper, outlining how the office would address sexual and gender-based crimes with the aim of tackling some of the problems mentioned above.<sup>413</sup> It was created after Fatou Bensouda took over the office of Prosecutor and was meant to strengthen the efforts of the OTP regarding sexual and gender-based crimes. Her predecessor, Louis Moreno-Ocampo, received quite some criticism from feminist legal scholars and women's rights groups for how he and his office addressed sexual and gender based violence crimes.<sup>414</sup> Indeed, some of the issues identified in this and the previous chapter can be ascribed to him.

The policy paper is meant to tackle some of the problems identified in this and the previous chapter that plagued the ICC in its prosecution of sexual and gender-based crimes.<sup>415</sup> Its goal is to close the impunity gap, through applying a gender analysis and taking into account the power relationships and other dynamics that shape gender roles.<sup>416</sup> The paper also aims to address the historic conflation of the terms women and gender.<sup>417</sup> The paper's definition of gender-based crimes forms part of this engagement, defining them as followed: *'those [crimes] committed against persons, whether male or female, because of their sex and/or socially constructed gender roles. Gender-based crimes are not always manifested as a form of sexual violence. These crimes may include non-sexual attacks on women and girls, and men and boys, because of their gender, such as persecution on the grounds of gender.'*<sup>418</sup> It also specifically states that it will work on gender analysis, which will examine *'the underlying differences and inequalities between women and men, and girls and boys, and the power relationships and other dynamics which*

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<sup>412</sup> Sivakumaran (n 212) 93.

<sup>413</sup> ICC Policy Paper (n 290).

<sup>414</sup> Chappell (n 97) 110; De Vos (n 74) 8; Grey (n 46) 277.

<sup>415</sup> Chappell (n 97) 125.

<sup>416</sup> ICC Policy Paper (n 290) 5.

<sup>417</sup> Oosterveld (n 382) 444.

<sup>418</sup> ICC Policy Paper (n 290) 12.

*determine and shape gender roles in a society, and give rise to assumptions and stereotypes. In the context of the work of the Office, this involves a consideration of whether, and in what ways, crimes, including sexual and gender-based crimes, are related to gender norms and inequalities.*<sup>419</sup>

This seems promising for the understanding and prosecution of sexual violence crimes. Yet the willingness to understand gender-based crimes seems to end there. Throughout the rest of the policy, a rather one-sided understanding of gender is adopted. It does not mention the historic silence on sexual violence against men, nor does it make mention of certain forms of sexual violence committed against men. It makes no mention of men being forced to commit sexual acts against other men, women or children.<sup>420</sup> This is however a commonly used tool of sexual violence against men. When the Policy Paper discusses the crime of torture, it merely states these crimes can have a sexual and/or gender element.<sup>421</sup> However, these crimes are known to have a gendered effect. The Yugoslavia Tribunal mentioned several instances of sexual torture against men and convinced several perpetrators for these crimes.<sup>422</sup> Additionally, the focus of the sexual violence mentioned lies on the sexual; the gendered consequences are barely mentioned.<sup>423</sup> This line of reasoning seems to equate sexual violence with sexual gratification. It is this line of reasoning that precluded the acts of forced circumcision and penile amputation to be considered as 'other inhumane acts' by the Pre-Trial Chamber in the Kenyatta cases. However, as this thesis established in Chapter 2, sexual violence is more about power and dominance than it is about sexual gratification. The sexual becomes a means, a tool of establishing power and dominance.

The tendency to exclude men as victims does not only take place at the ICC; it largely persists in international law in general. The Security Council, for example, adopts resolutions concerning conflict-related sexual violence, but for years they only mentioned it being committed against women and children.<sup>424</sup> In some instances, it did not even mention children, but only specifically spoke of girls, excluding boys as victims.<sup>425</sup> The UN's landmark resolution on women and conflict, Security Council Resolution 1325, only speaks of violence against women and girls.<sup>426</sup> Its successors largely did the same.

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<sup>419</sup> *Ibid*, 3.

<sup>420</sup> De Vos (n 74) 10.

<sup>421</sup> ICC Policy Paper (n 290) 13.

<sup>422</sup> De Vos (n 74) 10.

<sup>423</sup> *Ibid*.

<sup>424</sup> Chris Dolan, 'Victims Who are Men' in Fionnuala Ní Aoláin, Naomi Cahn, Dina Francesca Haynes and Nahla Valji (eds), *The Oxford Handbook of Gender and Conflict* (Oxford University Press, 2017) 86.

<sup>425</sup> Dolan (n 424) 86.

<sup>426</sup> UNSC Res 1325 on women, peace and security (31 October 2000) S/RES/1325.

When the UN Security Council recognized that sexual violence could be used as a tactic in conflict, it only did so for sexual violence against women.<sup>427</sup> This only changed in 2013, with UNSCR 2106.<sup>428</sup> The Resolution reads: *'Noting with concern that sexual violence in armed conflict and post-conflict situations disproportionately affects women and girls, as well as groups that are particularly vulnerable or may be specifically targeted, while also affecting men and boys'*.<sup>429</sup> The main focus of the Resolution was however sexual violence committed against women and girls.

Therefore, even if there are some cases where sexual violence against men is addressed, the progress stays limited. As long as the understanding of gender does not improve, sexual violence against men will go misunderstood and probably not properly addressed. This affects conflict-related sexual violence against women too. Women are still seen as the principle victims and, as a consequence, sexual violence committed against them is still a marginal topic.<sup>430</sup> This shows in the case law of the ICC. This means the criticism of the women's human rights movement is, despite the progress made over the years, still very current.

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<sup>427</sup> UNSC Res 1820 on acts of sexual violence against civilians in armed conflicts (19 June 2008) S/RES/1820.

<sup>428</sup> Dolan (n 424) 86.

<sup>429</sup> UNSC Res 2106 on sexual violence in armed conflict (24 June 2013) S/RES/2106.

<sup>430</sup> Solange Mouthaan, 'Sexual Violence against Men and International Law – Criminalising the Unmentionable' (2013) 13 International Criminal Law Review 665, 689.

## Conclusion

This thesis argued that a gender bias is responsible for some of the faults in addressing conflict-related sexual violence in international law. It has shown that in the past few years, the legal framework regarding conflict-related sexual violence made significant advances. On paper, the bias was removed from the framework. Gender-neutral definitions were instated. However, these advances were not enough to change the general view on conflict-related sexual violence. The bias identified by this thesis through (feminist) legal scholarship still persists and has nestled itself in the application of the framework.

This gender bias affects both men and women, due to the constructions of men and women in society. The bias affects women because sexual violence is considered to be a women's issue. When something is considered a women's issue, it goes generally ignored by the law or is considered an issue of lesser importance. This explains why sexual violence historically went without proper remedy and is still not taken seriously, as was demonstrated by this thesis. Several instances were identified where sexual violence was not a priority for the ICC prosecutor (e.g. the *Lubanga* case) or was not taken into account sufficiently by the Court (e.g. the *Bemba* case). The misunderstanding of conflict-related sexual violence also led to forms of sexual violence that are not considered widespread or part of a common purpose to be dismissed (as in the *Lubanga* and *Katanga* cases). This general misunderstanding is, evidently, not only applicable to sexual violence against women, but also to sexual violence against men. It comes however from the general idea that only women are victims and it is therefore considered less important.

Conflict-related sexual violence against men, on the other hand, was ignored because men are not seen as victims. This does not fit the construction of masculinity in society. Men are supposed to be strong and able to protect not only themselves, but also the ones around them. Men as victims – lowered in the social hierarchy and having received a sub-ordinated status – do not fit the construct of masculinity. This explains why sexual violence against men goes overlooked. This bias is also present in international law: it reflects the construct of men as strong combatants and women as weak victims. This bias is not only present in the law, but can also be found in the discourse of the women's human rights movement or the Security Council's Resolutions concerning sexual violence. A heavy focus on women as victims was developed, which left violence against men overlooked. Because of this bias, even though sexual violence against men can be prosecuted under the current framework, justice for male victims of sexual violence remains limited. The *Kenyatta* cases clearly showed that there are still problems in the understanding of conflict-

related sexual violence against men. Even when there is clear evidence of sexual violence committed against men, it is not considered as such, thereby denying men's suffering and contributing to the general narrative of men not being seen victims.

A better understanding of the constructed roles of men and women in society could help the ICC to better understand sexual violence. This could ultimately help to provide justice for male and female sexual violence victims. The definition of gender in the Rome Statute does not help much in this regard and the ICC has not addressed the aspect of gender itself. The Policy Paper adopted by the Office of the Prosecutor could be a positive step forward. Its effects however still remain to be seen. Until that time, proper address for victims of sexual violence is still lacking.

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