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<b>Citation</b>	Dustin Lewis, Unrecognized Victims: Sexual Violence Against Men in Conflict Settings Under International Law, 27 Wis. Int'l L.J. 1 (2009).
<b>Published Version</b>	<a href="http://hosted.law.wisc.edu/wordpress/wilj/volume-27/">http://hosted.law.wisc.edu/wordpress/wilj/volume-27/</a>
<b>Accessed</b>	November 24, 2017 4:21:30 AM EST
<b>Citable Link</b>	<a href="http://nrs.harvard.edu/urn-3:HUL.InstRepos:9823975">http://nrs.harvard.edu/urn-3:HUL.InstRepos:9823975</a>
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## UNRECOGNIZED VICTIMS: SEXUAL VIOLENCE AGAINST MEN IN CONFLICT SETTINGS UNDER INTERNATIONAL LAW

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### INTRODUCTION

Sexual violence against men as a constituent element of genocide, crimes against humanity, and war crimes often goes under noticed, under prosecuted, and, ultimately, under punished.<sup>2</sup> To date, this issue has received relatively short shrift in international conventions,<sup>3</sup> the jurisprudence of international tribunals,<sup>4</sup> and the writings of learned publicists.<sup>5</sup> The lack of recognition, enforcement, and analysis stems from—

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<sup>2</sup> While armed conflict is not a necessary condition for genocide or crimes against humanity (though it is for war crimes), throughout this article I examine sexual violence against men in the specific context of armed conflict. I do so, firstly, because there is substantial overlap in the causes and consequences of sexual violence against men in each of these three international crimes, and, secondly, because the current literature does not identify many, if any, relevant distinctions between and among such violence when perpetrated as a constituent element of genocide, of crimes against humanity, and of war crimes. Moreover, as a practical matter, genocide and crimes against humanity (or the impending threat of either) have historically been accompanied by armed conflict. For the specific contextual elements of each set of crimes, *see infra* Sections III.A (genocide), III.B (crimes against humanity), and III.C (war crimes), respectively.

<sup>3</sup> *See infra* Sections II.B–C.

<sup>4</sup> *See infra* Sections III.A–C.

<sup>5</sup> Sandesh Sivakumaran is an exception. His groundbreaking recent work introduces many of the issues I expound upon here. *See* Sandesh Sivakumaran, *Sexual Violence Against Men in Armed Conflict*, 18 EUR. J. INT'L L. 253 (2007) [hereinafter Sivakumaran, *Sexual Violence*]; Sandesh Sivakumaran, *Male/Male Rape and the 'Taint' of Homosexuality*, 27 HUM. RTS. QTY. 1274 (2005) [hereinafter Sivakumaran, *Male/Male Rape*]. Hilmi Zawati also sketches some of these issues. Hilmi M. Zawati, *Impunity or Immunity: Wartime Male Rape and Sexual Torture as a Crime Against Humanity*, 17 TORTURE 27, 27–47 (2007).

among other things—false assumptions about the frequency and the nature of these crimes.<sup>6</sup>

This article argues that to reduce and prevent sexual violence against men in conflict settings<sup>7</sup> international law should be interpreted, applied, and enforced in ways that delegitimize the prejudicial and discriminatory conceptions of gender, sex, and (homo)sexuality that fuel such violence in the first place. A primary way to do so is to use a definition of sexual violence that includes violence targeting an individual's imputed, perceived, or actual sexuality.

Section I elucidates phenomena pertaining to sexual violence against men in armed conflict, including its causes and consequences. In doing so, Section I isolates the destructive conceptions of gender, sex, and (homo)sexuality that may provide motivation to the perpetrators, and the particular stigma that can attach to male victims. Section II assesses international law pertaining to sexual violence in conflict settings. It demonstrates that international instruments and customary international law have developed in ways that often exclude, whether explicitly or implicitly, men as a class of victims of sexual violence in armed conflict. Nonetheless, Section III details how prosecutors can use capaciously worded conventional and jurisprudential standards to pursue perpetrators of sexual violence against men in conflict settings, as constituent elements of genocide, crimes against humanity, and war crimes. The article concludes by suggesting that, to further enhance the protection international law provides to all victims of sexual violence, policy-makers should incorporate men explicitly into international instruments pertaining to sexual violence, and promote a *jus cogens* norm that encompasses all forms of sexual violence against women and men.

Four component parts of this article merit definition at the outset (1) *sexual violence* (2) *against men* (3) *in conflict settings* (4) *under in-*

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<sup>6</sup> See *infra* Sections I.A–B. This is not to suggest that women do not also remain intolerably exposed to sexual violence in armed conflict. See generally Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288, 305–47 (2003) [hereinafter Askin, *Prosecuting Wartime Rape*]; ANNE-MARIE L.M. DE BROUWER, *SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: THE ICC AND THE PRACTICE OF THE ICTY AND THE ICTR* (2005). Rather, the narrower point is that, as will be shown, international law does not fully or adequately recognize that men, too, are vulnerable to sexual violence in armed conflict.

<sup>7</sup> I use the terms “war” (and similarly “wartime”), “armed conflict,” “conflict situations,” and “conflict settings” interchangeably. I nonetheless recognize that “war” has a specific legal meaning that can be distinguished, in part, by whether a State has expressly declared a war, from the other largely synonymous terms I use. See L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 1–2, 44, 54–55 (2d ed. 2000).

*ternational law.* This article uses the following definition of sexual violence: any violence, whether physical and/or mental, carried out through sexual means or by targeting sexuality.<sup>8</sup> Drawn from a United Nations' report, this definition is appropriately broad. It embraces "both physical and psychological attacks directed at a person's sexual characteristics,"<sup>9</sup> while also encompassing "all serious abuses of a sexual nature inflicted upon the physical or moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity."<sup>10</sup> As will become apparent, an adequate definition of sexual violence against men must include targeting (homo)sexuality, whether imputed, perceived, or actual, in order to recognize and delegitimize a principal motivation that may fuel such violence.

With respect to men, this article encompasses both boys and adult men.<sup>11</sup> Focus is placed on men because, while both men and women suffer sexual violence in situations in which genocide, crimes against humanity, and war crimes take place, the issue has been substantially less addressed with respect to men than it has with women.<sup>12</sup> This disparity

<sup>8</sup> U.N. Commission on Human Rights, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict: Final Report submitted by Gay J. McDougall, Special Rapporteur*, ¶ 21, U.N. Doc. E/CN.4/Sub.2/1998/13 (June 22, 1998) (citing M. Cherif Bassiouni et al., *Sexual Violence: An Invisible Weapon of War in the Former Yugoslavia*, Occasional Paper No. 1, at 3 (Int'l Human Rights Law Institute, DePaul Univ. College of Law 1996)) [hereinafter *Final Report*].

<sup>9</sup> *Id.* ¶ 21 (citing HUMAN RIGHTS WATCH/AFRICA, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH 62 (1996)). I use "sexual violence" instead of "sexualized violence" because the former is more recognized in common usage than the latter. Nonetheless, "sexualized violence" may provide a more accurate description of this class of crimes. As some commentators note, the term "crimes of sexualized violence" may be broader and unite under a single heading the two violations a victim of sexual violence suffers: the infringement of his sexual autonomy and the invasion of his physical or mental integrity. See, e.g., Wolfgang Schomburg & Ines Peterson, *Genuine Consent to Sexual Violence Under International Criminal Law*, 101 AM. J. INT'L L. 121, 126–27 (2007) (internal citations omitted) [hereinafter Schomburg et al.].

<sup>10</sup> David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 DUKE J. COMP. & INT'L L. 219, 225–26 (2005) (citing Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 186 (Dec. 10, 1998)). For a non-exhaustive list of the types of sexual violence perpetrated against men, see *infra* Section I.B.

<sup>11</sup> As discussed below, international conventions sometimes provide boys more protection against sexual violence than adult men by extending enhanced explicit protection to women and to children (and therefore to both girls and boys). Nonetheless, this enhanced conventional protection is found often only in the preambulatory portion of the instrument and may not extend to the operative portion. See *infra* note 94.

<sup>12</sup> I do not mean to suggest that transgendered or intersex persons do not also suffer sexual violence in armed conflict and in peacetime. One peacetime example of such violence comes from South Korea, where two men raped a male-to-female transgender person. There, the nation's highest

in attention may flow from the proportionally greater number of women sexually violated in conflict settings. Yet, regardless of the ratio and the aggregate numbers,<sup>13</sup> sexual violence against men in such settings is a documented fact<sup>14</sup> and remains inadequately scrutinized. As will be shown, effectively addressing sexual violence against women and men in armed conflict is not an either/or proposition, but it is a necessity for both.<sup>15</sup>

As for conflict settings, this article incorporates both international and non-international armed conflicts.<sup>16</sup> International armed conflicts may exist “whenever there is resort to armed force between two or more States.”<sup>17</sup> Non-international armed conflicts may be defined as:

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court held that under municipal law rape is proscribed only when perpetrated against chromosomal females, and therefore the two men were guilty not of rape but of a lesser form of sexual assault. *In Korea, Male to Female Transsexuals Cannot be Raped . . . Or So Government Says*, REUTERS NEWSWIRE, June 15, 1996, in MICHAEL SCARCE, MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA AND SHAME 79–80 (1997). In this regard, it is of interest to note that the overwhelming majority of international instruments that address gender- or sex-related bias recognize explicitly and exclusively two sexes (men and women; male and female). These instruments thereby fail to heed forceful criticism by biologists that this men-women (or “sexual dimorphism”) conception of sex difference does not accurately encompass the full range of chromosomal disparities. See generally ANNE FAUSTO-STERLING, SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY (2000).

<sup>13</sup> Which, for reasons addressed below, are currently difficult to obtain and are of questionable validity. See *infra* notes 48–53 and corresponding text.

<sup>14</sup> See *infra* Section I.B.

<sup>15</sup> As a matter of semantics, it is important to note that, in human rights law especially, a misconception often causes confusion by conflating the terms “sex” and “gender.” These terms are not interchangeable; generally, and at the risk of cascading into reductionism, sex refers to biological categories of male and female, while gender refers to socially constructed notions of masculinity (or maleness) and femininity (or femaleness). See generally FAUSTO-STERLING, *supra* note 12. Yet in many human rights instruments, “gender-based violence” appears to denote only and always violence perpetrated against women, thereby merging “gender” with “sex.” In this way, “gender-based violence,” as currently conceived and applied in many human rights instruments, describes only female victimization and implicitly excludes (even the possibility of) male victimization.

<sup>16</sup> I exclude post-conflict situations from my analysis. As such, I do not address the issue of sexual violence committed by U.N. peacekeepers and aid workers, especially, though not exclusively, against children. For a recent report on the prominence of sexual violence committed by U.N. peacekeepers against children, see CORINNA CSÁKY, SAVE THE CHILDREN UK, NO ONE TO TURN TO: THE UNDER-REPORTING OF CHILD SEXUAL EXPLOITATION AND ABUSE BY AID WORKERS AND PEACEKEEPERS (2008), available at [http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/27\\_05\\_08\\_savethechildren.pdf](http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/27_05_08_savethechildren.pdf).

<sup>17</sup> INT’L COMM. OF THE RED CROSS (ICRC), OPINION PAPER: HOW IS THE TERM “ARMED CONFLICT” DEFINED IN INTERNATIONAL HUMANITARIAN LAW? 5 (2008) [hereinafter ICRC, *Opinion Paper*], available at [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/\\$file/Opinion-paper-armed-conflict.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/$file/Opinion-paper-armed-conflict.pdf). This definition is predicated on Common Article 2 of the 1949 Geneva Conventions and the ICRC’s authoritative commentary thereto. See Jean S. Pictet, *Commentary on the Geneva Conventions of 12 August 1848, Volume I:*

[P]rotracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organization.<sup>18</sup>

Non-international armed conflicts can be distinguished from internal disturbances, tensions, and isolated or sporadic acts of violence, which do not rise to the level of an armed conflict.<sup>19</sup>

As for its legal parameters, this article focuses primarily on two overlapping subcategories of public international law: international criminal law (ICL) and international humanitarian law (IHL). ICL can be thought of as a body of rules (1) that proscribes international crimes, (2) that imposes upon states the obligation to prosecute and punish some of these crimes, and (3) that regulates international proceedings for prosecuting individuals accused of these crimes.<sup>20</sup> IHL can be formulated as the laws and customs that seek to limit the effects of armed conflict for humanitarian reasons, by protecting persons who are not or who are no longer participating directly in hostilities and by restricting the means and methods of warfare.<sup>21</sup> The article also examines briefly relevant municipal law and international human rights law—the latter conceived

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*Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* 32 (1952).

<sup>18</sup> ICRC, *Opinion Paper*, *supra* note 17, at 5.

<sup>19</sup> See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 1(2), June 8, 1997, 1125 U.N.T.S. 609 [hereinafter Protocol II].

<sup>20</sup> ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 15 (2003).

<sup>21</sup> This definition is drawn from the INT'L COMM. OF THE RED CROSS, *WHAT IS INTERNATIONAL HUMANITARIAN LAW?* (2004), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/\\$File/What\\_is\\_IHL.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/$File/What_is_IHL.pdf). The primary international conventions composing IHL are as follows: Convention (II) with Respect to the Laws and Customs of War on Land, with Annex, July 29, 1899, 1 Bevans 247, 187 Consol. T.S. 429; Convention (IV) Respecting the Laws and Customs of War on Land, with Annex, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter 1907 Hague Convention]; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol II, *supra* note 19. See *infra* Section I.I.C.

broadly as the international system of norms, legal standards, and enforcement mechanisms that safeguards individuals' fundamental rights against abuse by states. In comparing relevant municipal law to IHL, the article finds a disturbing paradox: male victims of same-sex sexual violence who live in countries where male-male sexual behavior is proscribed as a criminal violation enjoy greater legal protection in wartime than in peacetime. In addition, the article highlights how international human rights law often excludes men as a category of potential victims of sexual violence in wartime.<sup>22</sup>

## I. PHENOMENA OF SEXUAL VIOLENCE AGAINST MEN IN ARMED CONFLICT

This Section outlines the causes, the scale and types of abuses, and the consequences of sexual violence against men in armed conflict. In doing so, it finds, among other things, that destructive conceptions of gender, sex, and (homo)sexuality can provide motivation to commit sexual violence against men in such settings. Based on this finding, the Section argues that one way to prevent and reduce sexual violence against men is to use a definition of sexual violence that includes violence targeting an individual's imputed, perceived, or actual sexuality.

### A. CAUSES AND UNDER-REPORTING

Political scientists, psychologists, and sociologists have isolated some factors that help explain what facilitates and causes sexual violence in armed conflict. In such settings, sexual violence may occur for reasons of personal gratification,<sup>23</sup> as a by-product of supposedly necessary military training,<sup>24</sup> or in a more instrumental capacity—for example, as a reward offered to soldiers for participating in conflict in the first place.<sup>25</sup> Some scholars and clinicians posit that sexual violence—regardless of

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<sup>22</sup> For recent examinations of the relationship between international humanitarian law and international human rights law, see RENE PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW (2002); Hans-Peter Gasser, *International Humanitarian Law and Human Rights Law in Non-International Armed Conflict: Joint Venture or Mutual Exclusion?*, 45 GER. Y.B. INT'L L. 149–62 (2002).

<sup>23</sup> Elisabeth Jean Wood, *Variation in Sexual Violence During War*, 34 POLITICS & SOC'Y 307, 321–23 (2006).

<sup>24</sup> *Id.* at 326–27.

<sup>25</sup> *Id.* at 325–28.

the sex or gender of the victim or of the setting—may be motivated significantly less by sexual gratification than by an attempt to exert power and dominance over the victim and potentially the victim’s community.<sup>26</sup>

Sexual violence in conflict settings, in particular, may flow from the “gendered” nature of war.<sup>27</sup> According to scholar Elisabeth Jean Wood:

The gendered formation of soldiers . . . rests on particular ideas about manhood: leaders persuade soldiers that to be a real man is to assert a militaristic masculinity. One result of such practices is that soldiers then represent the domination of the enemy in a gendered way, leading to the use of specifically *sexual* violence against enemy women and, occasionally, against enemy men who are dominated through male rape and castration.<sup>28</sup>

The question arises as to what extent, if any, male-male<sup>29</sup> sexual violence in armed conflict implicates the sexual orientation of the victim and the perpetrator.<sup>30</sup>

In examining male-male sexual violence in conflict settings, it becomes crucial to recognize that the perpetrator may gain power and dominance through a complex psychosocial process in which homosexual and/or feminine attributes are imputed to the male victim—attributes that may obtain a larger, even more damaging significance in wartime. Interestingly, if not unexpectedly, such attributes are ironically often not imputed to the perpetrator himself.<sup>31</sup> Given these considerations, it

<sup>26</sup> A. NICHOLAS GROTH, *MEN WHO RAPE: THE PSYCHOLOGY OF THE OFFENDER* 2 (1979); SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 3 (1975); SCARCE, *supra* note 12, at 10.

<sup>27</sup> JOSHUA S. GOLDSTEIN, *WAR AND GENDER: HOW GENDER SHAPES THE WAR SYSTEM AND VICE VERSA* 356–60 (2001).

<sup>28</sup> Wood, *supra* note 23, at 326 (emphasis in original) (citing GOLDSTEIN, *supra* note 27, at 356–60).

<sup>29</sup> Women can, of course, also commit sexual violence against men in armed conflict. *See, e.g., infra* notes 61 and 70 and corresponding text.

<sup>30</sup> I use the terms “victim” and “survivor” interchangeably; it is important to note, however, that not all victims of sexual violence survive.

<sup>31</sup> This asymmetry tracks cultural norms in which only one participant (the receptive partner) in (both consensual and coerced) male-male insertive anal sex is viewed as feminine and/or homosexual while the other participant (the insertive partner) is viewed not as feminine or homosexual, but as masculine. As scholar Brad Epps explicates in a discussion of social and political constructions of, among other things, gender and sexuality during the Cuban Revolution:

Designating less a libidinal relationship between individuals of the same gender than a particular role, position, or style of behavior, homosexuality, male homosexuality that is, primarily designates those men who exhibit “feminine” traits or otherwise show that they assume so-called passive or receptive positions in sexual intercourse. The *maricon*, very much more than the “active,” “insertive,” “masculine-acting” *bu-garron* is here the subject in question. The latter indeed is a figure who, as Roger



would be inaccurate to say there is no “gay” or “homosexual” component to male-male sexual violence. To the contrary, it is in part precisely *because* of the potential negative effect of imputing a “gay” identity or “homosexual” behavior to the victims that male-male sexual violence can be so psychologically and emotionally damaging—in addition, of course, to the physical harm, which occurs regardless of the perpetrator’s motivation.

Due to destructive stereotypes of femininity and masculinity, as well as to equally destructive prevailing social norms that denigrate homosexuality, homosexual and feminine attributes can be, and often are, conceived as weakness.<sup>32</sup> In turn, this perceived weakness (evident during peacetime, but all the more so during wartime) can lead not only to dishonor, but ultimately to death.<sup>33</sup> In these ways, the emasculating effect of sexual violence against men may therefore be exacerbated in wartime. Moreover, the male victim perceives an incompatibility with his masculinity and his victimization; likewise, he may also perceive his inability to protect himself and his broader community as a confidence-shattering personal failing.<sup>34</sup>

The issue of sexual gratification in male-male sexual violence may also be significant, due to some victims’ physical response during the abuse. For example, some male victims of sexual violence, regardless of their sexual orientation, may experience a sexual response (such as an erection or ejaculation) during the assault.<sup>35</sup> If the victim equates a sexual response with pleasure, he may experience sexual-orientation confusion, and perceive himself to be homosexual, thereby aggravating the

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Lancaster puts it, is not, or not necessarily, “labeled” or “stigmatized” as homosexual, and who may even find his masculinity reinforced by penetrating other men. This is a crucial point, pointing to a difference between homosexuality as generally understood and experienced in, on the one hand, North America and Western Europe and, on the other hand, Latin America and the Middle East.

Brad Epps, *Proper Conduct: Reinaldo Arenas, Fidel Castro, and the Politics of Homosexuality*, 6 J. HIST. SEXUALITY, 232–33 (1995) (internal citations omitted).

<sup>32</sup> Male victims of sexual violence may be “tainted” with homosexuality and thereby “emasculated.” See generally Sivakumaran, *Male/Male Rape*, *supra* note 5. See also GOLDSTEIN, *supra* note 27, at 356–60.

<sup>33</sup> GOLDSTEIN, *supra* note 27, at 356–60.

<sup>34</sup> Sivakumaran, *Sexual Violence*, *supra* note 5, at 255 (asserting “it may be argued that [the perceived incompatibility between the victim’s masculinity and victimization] would apply *a fortiori* in an armed conflict, where men tend to self-identify with masculine stereotypes more strongly”). For more on the various consequences of sexual violence against men in conflict settings, see *infra* Section I.C.

<sup>35</sup> Jayne Walker, John Archer & Michelle Davies, *Effects of Rape on Men: A Descriptive Analysis*, 34 ARCHIVES OF SEXUAL BEHAVIOR 69, 76 (2005) [hereinafter Walker et al., *Effects of Rape*].

effects of the abuse if he conceives of homosexual behaviors as an indicator of weakness.<sup>36</sup>

The aforementioned destructive stereotypes and norms also impede accurate and full reporting by men of sexual violence in conflict settings, thereby precluding an accurate assessment of the depth and severity of the problem. In short, underreporting results from the shame, confusion, guilt, fear, and stigma that flow from imputing a homosexual and/or feminine identity onto a man in combat.<sup>37</sup> Other factors that lead to non or partial recognition include: a tendency for men to associate their victimization as incompatible with their masculinity<sup>38</sup> and a lack of vocabulary to describe their sexual violence.<sup>39</sup> Regarding the latter, for example, castration may be classified not as castration as such, but only as “abuse” or “torture,” thereby eliding the more specific violation.<sup>40</sup> As a consequence, some men who experience sexual violence do not have words at their disposal to express their trauma precisely.<sup>41</sup>

In the same vein, front-line points of contact for male victims of sexual violence in conflict settings—including doctors, counselors, and humanitarian workers—may not expect abuse or recognize signs of it.<sup>42</sup> Those who are aware of the problem may focus on male rape to the exclusion of other forms of sexual violence.<sup>43</sup> Moreover, as discussed below, if the male survivor does not accurately explain what happened, he may expose himself to criminal charges, *even as a victim of sexual violence*<sup>44</sup>—a highly troubling situation that has a tremendous potential to

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<sup>36</sup> *Id.* at 76; M. Peel, A. Mahtani, G. Hinshelwood & D. Forrest, *The Sexual Abuse of Men in Detention in Sri Lanka*, 355 *THE LANCET* 2069–70 (2000).

<sup>37</sup> Sivakumaran, *Sexual Violence*, *supra* note 5, at 255.

<sup>38</sup> Elizabeth A. Stanko & Kathy Hobdell, *Assault on Men: Masculinity and Male Victimization*, 33 *BRIT. J. CRIMINOLOGY* 400, 403–04 (1993).

<sup>39</sup> Sivakumaran, *Sexual Violence*, *supra* note 5, at 255–56.

<sup>40</sup> Eric Stener Carlson, *Sexual Assault on Men in War*, 349 *THE LANCET* 129 (1997). Recognizing and prosecuting sexual violence as both the general category of crime (e.g., “torture”) and the particular type of crime (e.g., “mutilation”) would reflect the totality of the offense. See Sivakumaran, *Sexual Violence*, *supra* note 5, at 256.

<sup>41</sup> See generally *Torbjørn Herlof Andersen*, Speaking About the Unspeakable: Sexually Abused Men Striving Toward Language, 2 *AM. J. MEN'S HEALTH* 25 (2008). See also Sivakumaran, *Sexual Violence*, *supra* note 5, at 255 (noting that “[e]ven if male survivors did wish to talk about the abuse they suffered, they may find that, as victims also of masculine stereotypes, they do not have the right words to express themselves”) (internal citations omitted).

<sup>42</sup> Pauline Oosterhoff, Prisca Zwanikken & Evert Ketting, *Sexual Torture of Men in Croatia and Other Conflict Situations: An Open Secret*, 12 *REPRODUCTIVE HEALTH MATTERS* 68, 68 (2004).

<sup>43</sup> Eric Stener Carlson, *The Hidden Prevalence of Male Sexual Assault During War: Observations on Blunt Trauma to the Male Genitals*, 46 *BRIT. J. CRIMINOLOGY* 16, 18 (2006).

<sup>44</sup> See *infra* Section II.A.

dissuade male victims from reporting their abuse in the first place.<sup>45</sup> Interestingly, however, one commentator notes that while reporting challenges can be compounded during war, the general social disruption caused by war can, alternatively, lead to an increase in reporting of sexual violence.<sup>46</sup>

For the foregoing reasons, it becomes clear that, to reduce and prevent sexual violence against men in conflict settings, a sufficient definition of sexual violence must include, among other things, violence targeting an individual's (imputed, perceived, or actual) sexuality. Such a definition would recognize and delegitimize the root causes of this type of violence, namely the aforementioned harmful stereotypes and norms pertaining to gender, sex, and (homo)sexuality.

### **B. BREADTH AND TYPES OF ABUSES**

This subsection details the breadth and types of abuses pertaining to sexual violence against men in armed conflict. While exact numbers are hard to come by, the breadth and types of abuses encompass violations such as anal rape, genital mutilation, and enforced masturbation, and span from ancient times to the modern day.

The breadth of sexual abuses suffered by men in armed conflict seems practically and frighteningly unlimited. As scholar Sandesh Sivakumaran aptly summarizes:

[Sexual violence against men in armed conflict] is not limited to any particular part of the world. It is not confined to state forces, armed opposition groups, or private contractors . . . The range of sexual violence committed against men in armed conflict crosses the full gamut of possibilities; all permutations and combinations are present.<sup>47</sup>

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<sup>45</sup> Sivakumaran, *Sexual Violence*, *supra* note 5, at 256 n.11 (drawing a parallel with “female victims who have been unable to prove they have been raped being subjected to charges of adultery”).

<sup>46</sup> Wood, *supra* note 23, at 318–19.

<sup>47</sup> Sivakumaran, *Sexual Violence*, *supra* note 5, at 257–58 (stating that sexual violence against men in conflict situations has occurred in Ancient Persia; the Crusades; Ancient Greek, Chinese, Amalekite, Egyptian, and Norse armies; conflicts in El Salvador, Chile, Guatemala, Argentina, Greece, Northern Ireland, Chechnya, Turkey, former Yugoslavia, Sri Lanka, Iraq-Kuwait, Coalition-Iraq, Sino-Japanese War, Liberia, Sierra Leone, Kenya, Sudan, the Central African Republic, Burundi, Uganda, Rwanda, the Democratic Republic of the Congo, Zimbabwe, and South Africa (internal citations omitted)).

Nonetheless, as with sexual violence against women,<sup>48</sup> exact numbers regarding the incidence of sexual violence against men in armed conflict are difficult to ascertain, in part due to underreporting and non-recognition.<sup>49</sup> However, in one assessment, of the 5,000 male inmates at a concentration camp in Sarajevo Canton, 80 percent reported being raped.<sup>50</sup>

The peacetime municipal context, while by no means a perfect analogy, may shed some light on the prevalence of sexual violence against men in conflict settings. The Center for Disease Control and Prevention and the National Institute of Justice found that in the United States (U.S.), men comprise 15 percent of victims of sexual assaults, that 92,700 adult men are forcibly raped each year, and that approximately 3 percent (or, at the time of the study, roughly 2.78 million men) had experienced attempted or completed rape in their lifetime.<sup>51</sup> Police data from England and Wales tends to indicate that males constitute 7.5 percent of all reported rape victims.<sup>52</sup> According to one analysis of 120 prevalence studies, 3 percent of men and 13 percent of women have been raped in their lifetime.<sup>53</sup>

No exhaustive list of the types of sexual abuses men can suffer in conflict settings exists. Nor is such a list necessarily desirable, for, as

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<sup>48</sup> For instance, it has been estimated that in the former Yugoslavia, 20,000 women were raped between 1991 and 1995, while in Rwanda, 250,000 to 500,000 women were raped in a four-month period in 1994. For the former Yugoslavia, see WOMEN AID INTERNATIONAL, WARBURTON MISSION II REPORT, EUROPEAN COMMUNITY INVESTIGATIVE MISSION INTO THE TREATMENT OF MUSLIM WOMEN IN THE FORMER YUGOSLAVIA - REPORT TO THE EUROPEAN COMMUNITY FOREIGN MINISTERS, para. 14 (Feb. 3, 1993), <http://www.womenaid.org/press/info/humanrights/warburtonfull.htm> (last visited Mar. 30, 2009). For Rwanda, see U.N. Commission on Human Rights, *Report on the Situation of Human Rights in Rwanda Submitted by René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, Under Paragraph 20 of Resolution S-3/1 of 25 May 1994*, ¶ 16, U.N. Doc. E/CN.4.1996/68 (Jan. 29, 1996).

<sup>49</sup> See *supra* Sections I.A–B.

<sup>50</sup> Željka Mudrovčić, *Sexual and Gender-Based Violence in Post-Conflict Regions: The Bosnia-Herzegovina Case* (2001), in UNITED NATIONS POPULATION FUND, *THE IMPACT OF ARMED CONFLICT ON WOMEN AND GIRLS: A UNFPA STRATEGY FOR GENDER MAINSTREAMING IN AREAS OF CONFLICT AND RECONSTRUCTION* 64 (2002), available at [http://www.unfpa.org/upload/lib\\_pub\\_file/46\\_filename\\_armedconflict\\_women.pdf](http://www.unfpa.org/upload/lib_pub_file/46_filename_armedconflict_women.pdf).

<sup>51</sup> PATRICIA TJADEN & NANCY THOENNES, NATIONAL INSTITUTE OF JUSTICE & CENTERS FOR DISEASE CONTROL AND PREVENTION: PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 3–4 (1998).

<sup>52</sup> Catherine Armitage, *In a Lonely Place*, 12 STUDENT BMJ 200 (2004) (internal citations omitted).

<sup>53</sup> Brian H. Spitzberg, *An Analysis of Empirical Estimates of Sexual Aggression Victimization and Perpetration*, 14 VIOLENCE & VICTIMS 241, 241 (1999).

Nigel S. Rodley observes with respect to torture,<sup>54</sup> “a juridical definition cannot depend upon a catalogue of horrific practices; for it to do so would simply provide a challenge to the ingenuity of the torturers, not a viable legal prohibition.”<sup>55</sup> Nonetheless, various forms of sexual violence against men in conflict settings have been documented. Included among these are oral and anal penetrative rapes with a penis, another body part, or an object.<sup>56</sup> The “Taguba Report,” for instance, details allegations of a detainee being sodomized with a chemical light and a broomstick.<sup>57</sup>

Another form of sexual violence against men is genital violence and mutilation. An example of this type of violation was relayed explicitly in a judgment of the International Criminal Tribunal for the Former Yugoslavia:

The fourth and last body of evidence relating to this paragraph of the Indictment concerns Fikret Harambasic and chronologically follows immediately after the attacks on the above three victims. After G and Witness H had been forced to pull Jasmin Hrnica's body about the hangar floor they were ordered to jump down into the inspection pit, then Fikret Harambasic, who was naked and bloody from beating, was made to jump into the pit with them and Witness H was ordered to lick his naked bottom and G to suck his penis and then to bite his testicles. Meanwhile a group of men in uniform stood around the inspection pit watching and shouting to bite harder. All three were then made to get out of the pit onto the hangar floor and Witness H was threatened with a knife that both his eyes would be cut out if he did not hold Fikret Harambasic's mouth closed to prevent him from screaming; G was then made to lie between the naked Fikret Harambasic's legs and, while the latter struggled, hit and bite his genitals. G then bit off one of Fikret Harambasic's testicles and spat it out and was told he was free to leave. Witness H was ordered to drag Fikret Harambasic to a nearby table, where he then stood beside him and was then ordered to return to his room, which he did. Fikret Harambasic has not been seen or heard of since.<sup>58</sup>

<sup>54</sup> As the ICTY held, sexual violence can constitute torture. *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-A & IT-96-23/1-A, Appeal Judgment, ¶¶149–50 (June 12, 2002) [hereinafter *Kunarac et al.*, Appeal Judgment].

<sup>55</sup> NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 105 (1998) quoted in *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Judgment, ¶ 469 (Nov. 16, 1998) [hereinafter *Delalić et al.*, Judgment].

<sup>56</sup> For a discussion of the definition of rape in international law, see *infra* Section III.B.1.

<sup>57</sup> MAJOR GENERAL ANTONIO M. TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE, paras. 8(e), (g) [hereinafter TAGUBA REPORT], available at <http://www.fas.org/irp/agency/dod/taguba.pdf>.

<sup>58</sup> *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 206 (May 7, 1997) [hereinafter *Tadić*, Opinion and Judgment].

There are many other examples of genital violence and mutilation, including allegations made in pleadings by the Republic of Bosnia and Herzegovina before the International Court of Justice that:

They were hitting me, as well as others, in the testicles, using metal hampers, metal bars, kicking with the boots. My testicles were swollen, the size of large oranges . . . Serb torturers would beat us, step or jump on us until they tired out. They were deliberately aiming their beatings at our testicles saying “you’ll never make Muslim children again.”<sup>59</sup>

And, in the same application:

I saw how Muslims were forced to bite each other’s testicles off, their mouth filled with testicles and blood, ripped blood vessels sticking out of their mouths. Daily Serb torturers forced Muslim prisoners to [explicative] each other, to perform oral sex on each other, forcing these bestialities especially among family members, between a father and son.<sup>60</sup>

Another alleged instance involving genital violence and mutilation—this time, reportedly resulting in death—comes from the Democratic Republic of Congo, where:

In early 2003, under threat of being shot, [a 13-year-old girl] was made to participate in an attack on Langu, a Lendu village north of Bunia, in the course of which she was ordered to tie the testicles of a Lendu prisoner with a wire. The prisoner died as a result of the maltreatment.<sup>61</sup>

These examples demonstrate not only the heinous nature and devastating effects of genital violence and mutilation against men in conflict settings, but also the range of both the perpetrators and the circumstances under which such violence is committed.

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<sup>59</sup> See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Oral Proceedings of Bosnia and Herzegovina (CR 2006/06), 51, available at <http://www.icj-cij.org/docket/files/91/10596.pdf> (asserting that “[s]exual violence against men was perpetrated essentially in the detention camps. There is much testimony describing sexual violence of all kinds practised against men, sometimes father and son, sometimes two brothers. As noted in the Reply, ‘[s]exual assaults against men took mainly two forms: one is coerced sexual activity with other men, the other is aggression against their virility’”) (internal citations omitted).

<sup>60</sup> Application of the Genocide Convention, *supra* note 59, ¶ 44D(h).

<sup>61</sup> Katy Glassborow, *Call for Lubanga Charges to Cover Rape*, INST. WAR & PEACE REPORTING, May 12, 2008, [http://www.iwpr.net/?p=acr&s=f&o=344590&apc\\_state=henh](http://www.iwpr.net/?p=acr&s=f&o=344590&apc_state=henh) (last visited Mar. 30, 2009).

Enforced sterilization (including castration) is another related form of sexual violence suffered by men in armed conflict.<sup>62</sup> As is enforced masturbation, which allegedly took place in the conflict in Sri Lanka,<sup>63</sup> as well as enforced fellatio,<sup>64</sup> which was found to have taken place in the former Yugoslavia. Instances of enforced rape or sexual contact (including with a family member or the dead) are also known to have been committed against men in armed conflict,<sup>65</sup> as are instances of enforced viewing of sexual acts (including sexual acts that involve a family member or the dead).<sup>66</sup>

Violations of certain cultural norms can also act as sexual violations in wartime. During the conflict in Sierra Leone, for example, “rebels broke other taboos . . . forcing male family members to rape female family members or to watch them dance naked or be raped by others.”<sup>67</sup> Violations of such cultural norms carry increased shame for the victim precisely because these violations combine physical abuse with psychological torment.

Generally speaking, at least some of the specific acts of sexual violence listed above may also constitute murder and other broader categories of crime (such as torture, inhumane and degrading treatment, etc.).<sup>68</sup> They may take place in custodial situations (such as detention centers) and in non-custodial situations (such as during raids).<sup>69</sup> They

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<sup>62</sup> Application of the Genocide Convention, *supra* note 59, ¶¶ 44D(c), (h); *Tadić*, Opinion and Judgment, Case No. IT-94-1, ¶ 206; Glassborow, *supra* note 61.

<sup>63</sup> Peel et al., *supra* note 36, at 2069.

<sup>64</sup> Application of the Genocide Convention, *supra* note 59, ¶ 44D(h); *Tadić*, Opinion and Judgment, Case No. IT-94-1, ¶ 206.

<sup>65</sup> Application of the Genocide Convention, *supra* note 59, ¶ 44D(h).

<sup>66</sup> *Id.* Another example is how the sexual violence committed during the “rape of Nanking” was not limited to women but was also committed against men, “including rape, the forcing of men to have intercourse with family members or the dead, and the forcing of celibate men to have intercourse.” Wood, *supra* note 23, at 311. Forced marriage may also constitute a form of sexual violence against men (as it can against women). See, e.g., Prosecutor v. Brima et al., Case No. SCSL-2004-16-PT, Decision on Prosecution Request for Leave to Amend the Indictment (May 6, 2004).

<sup>67</sup> Wood, *supra* note 23, at 314 (citing FINAL REPORT OF TRUTH & RECONCILIATION COMMISSION OF SIERRA LEONE, vol. 3B, ch.3, paras. 292–96 (2005); Human Rights Watch, “We’ll Kill You if You Cry”: Sexual Violence in the Sierra Leone Conflict 35–42 (Jan. 16, 2003)). See also Application of the Genocide Convention, *supra* note 59, ¶¶ 44D(c), (h); *Tadić*, Opinion and Judgment, Case No. IT-94-1-T, ¶ 206.

<sup>68</sup> See *infra* Sections III.A (genocide), III.B (crimes against humanity), and III.C (war crimes), discussing broader categories of crime under which certain types of sexual violence may also be charged.

<sup>69</sup> Some commentators assert that more sexual violence takes place in custodial situations than in non-custodial situations. Oosterhoff et al., *supra* note 42, at 69 (citing to AMNESTY INTERNATIONAL, A GLIMPSE OF HELL: REPORTS ON TORTURE WORLDWIDE (2002)) (asserting

may be perpetrated by men, women, or both.<sup>70</sup> Finally, they may result in severe physical trauma.<sup>71</sup>

### C. CONSEQUENCES

Male survivors of sexual violence committed during conflict situations may face various short- and long-term consequences.<sup>72</sup> Physically, they may experience severe pain, sexual dysfunction—including physical impotence, damage to their reproductive capacity, blood in their stools, abscesses, ruptures of the rectum, general pains in the rectum, sexually transmitted diseases including HIV/AIDS, other genital infections, and loss of consciousness.<sup>73</sup> As with women who suffer sexual violence, men who have been sexually violated also suffer more general health consequences, such as ongoing aches and general malaise.<sup>74</sup>

Emotionally, male victims of sexual violence may suffer long-term trauma such as anxiety, depression, increased feelings of anger and vulnerability, loss of self-image, emotional distancing or desensitization,

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that “[l]ike other forms of torture, sexual torture usually takes place during the first week of captivity, most often at night and often when guards are drunk”).

<sup>70</sup> Wood, *supra* note 23, at 325 (noting that “women sometimes participate in sexual violence as in Rwanda, where women sometimes incited men to rape, and in Iraq, Guantánamo, and Afghanistan, where U.S. servicewomen played key roles in the sexual humiliation of prisoners”). See, e.g., TAGUBA REPORT, *supra* note 57; Glassborow, *supra* note 61.

<sup>71</sup> One institution, the World Health Organization, has stated that “[m]ale victims of sexual assault are more likely to suffer significant physical trauma than [are] female victims.” WORLD HEALTH ORG., REPRODUCTIVE HEALTH DURING CONFLICT AND DISPLACEMENT, ch. 17 (2000) (citing AMERICAN MED. ASS’N, STRATEGIES FOR THE TREATMENT AND PREVENTION OF SEXUAL ASSAULT 23 (1995)), available at [http://who.int/reproductive-health/publications/conflict\\_and\\_displacement/RH\\_conflict\\_chapter17.en.html](http://who.int/reproductive-health/publications/conflict_and_displacement/RH_conflict_chapter17.en.html) (last visited Mar. 30, 2009). The accuracy of that claim is disputable, but the fact that men may suffer tremendous physical trauma from sexual violence is borne out by a review of the relevant medical literature. See *infra* Section I.C.

<sup>72</sup> Women survivors of sexual violence in conflict settings of course also suffer short- and long-term consequences. Indeed, many of the consequences of rape are not sex-specific. Some that are sex-specific include miscarriage due to rape and birth of children from rape; the latter violation may result in particular harmful consequences in patriarchal societies where the ethnicity of the child is that of the father-rapist. Conceivably, the same effect could be obtained in a matriarchal society, where a man could be forced to impregnate a woman. Yet depending on prevailing cultural norms, women may be more likely than men to suffer social ostracization, especially in cultures that assign special value to female virginity. DE BROUWER, *supra* note 6, at 55 (citing HUMAN RIGHTS WATCH/AFRICA, *supra* note 9).

<sup>73</sup> Oosterhoff et al., *supra* note 42, at 71 (citing Harry van Tienhoven, *Sexual Violence: A Method of Torture Also Used Against Male Victims*, 10 NORDISK SEXOLOGY 243–49 (1992)).

<sup>74</sup> DE BROUWER, *supra* note 6, at 55 (internal citations omitted).



self-blame, and self-harming behaviors (including suicide).<sup>75</sup> Psychosomatic problems may occur as well, including headache, loss of appetite and weight, sleeplessness, palpitations, dizziness, and exhaustion.<sup>76</sup> Multiple rapes, gang rapes, sexual mutilation, and rapes with objects<sup>77</sup> may aggravate these physical and emotional consequences.<sup>78</sup>

Psychosocially, depending on prevailing cultural norms, male victims of sexual violence in conflict settings may additionally face isolation, abandonment by family members (including wife and children), shame, and stigmatization.<sup>79</sup> Related consequences that may occur include marital problems, social withdrawal, loss of interest in work, inexplicable outbursts of anger, and alcohol and drug abuse.<sup>80</sup>

#### D. COMPARING SEXUAL VIOLENCE IN PEACETIME AND WARTIME

Despite similarities with sexual violence perpetrated during peacetime, sexual violence committed during wartime entails certain distinctions. One such difference is the scale of the potential abuse. In conflict settings, custodial situations and mass displacement can facilitate abuse on a larger scale.<sup>81</sup> Another distinction is the potentially enhanced effect of group emasculation, which can be devastating not only to the individual victim, but also to his community.<sup>82</sup> Perhaps chief among the differences is the so-called “international” element of international crimes.<sup>83</sup> To constitute a crime under international criminal law, sexual violence must have a sufficient nexus to a genocide, to a widespread or systematic attack against a civilian population (for crimes against humanity), or to an armed conflict (for war crimes).<sup>84</sup>

A related issue is whether an irrebutable presumption of non-consent exists for certain individuals in conflict settings. The *ad hoc*

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<sup>75</sup> Oosterhoff et al., *supra* note 42, at 71. See generally Walker et al., *Effects of Rape*, *supra* note 35, at 69.

<sup>76</sup> Oosterhoff et al., *supra* note 42, at 71.

<sup>77</sup> All of which occurred against women in the Rwandan genocide, among other conflicts. See generally HUMAN RIGHTS WATCH/AFRICA, *supra* note 9.

<sup>78</sup> DE BROUWER, *supra* note 6, at 55 (internal citations omitted).

<sup>79</sup> See *supra* notes 31–32 and corresponding text (discussing the homosexual and feminine stigma often associated with sexual violence against men).

<sup>80</sup> Oosterhoff et al., *supra* note 42, at 71.

<sup>81</sup> See *supra* note 48 (discussing the scale of rape in the former Yugoslavia and Rwandan conflicts).

<sup>82</sup> See *supra* notes 32–34 and corresponding text.

<sup>83</sup> Schomburg et al., *supra* note 9, at 128 (internal citations omitted).

<sup>84</sup> For an explanation of each of these factors, see *infra* Sections III.A (genocide), III.B (crimes against humanity), and III.C (war crimes), respectively.

Tribunals have recently demonstrated a tendency to assume that, due to their severity, the situations in which international crimes occur vitiate even the theoretical possibility for consensual sexual activity between people from adverse parties; this is so especially for sexual activity between a combatant and a non-combatant from adverse parties.<sup>85</sup> The emerging presumption of non-consent in international criminal law has met some criticism. According to law professor Karen Engle, in international criminal law, the combination of a definition of rape that presumes lack of consent with an irrebuttable presumption that all rape constitutes severe pain and suffering may, among other things, diminish the sexual agency of men and women in conflict settings.<sup>86</sup> This presumption would appear to apply equally to same- and different-sex relations.

## II. DEVELOPMENTS IN INTERNATIONAL LAW

This section details developments in international law relating to sexual violence in armed conflict. To assess the general trajectory of law in this field, the section compares IHL to the law in some domestic contexts and then analyzes relevant instruments, custom, and principles. In regard to the former, the section finds that, due to the criminalization of male-male sexual behavior in some countries, victims of male-male sexual violence in those countries enjoy, perversely, greater legal protection in wartime than they do in peacetime. The section also finds that while international human rights law may inadequately protect men from sexual violence, international humanitarian law provides significantly more protection. The section then traces the trajectory of IHL and ICL, noting how the definition of rape and other forms of sexual violence have developed since the mid-nineteenth century, and culminates in a discussion of a postulated *jus cogens* norm prohibiting rape in armed conflict.

### A. MUNICIPAL LAW

This subsection demonstrates the relatively greater legal protection international humanitarian law affords men from some countries in armed conflict compared to the legal protection extended to them in peacetime. In short, in some national jurisdictions, male victims of sex-

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<sup>85</sup> See Schomburg et al., *supra* note 9, at 131.

<sup>86</sup> Karen Engle, *Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AM. J. INT'L L. 778, 805 (2005). Cf. Schomburg et al., *supra* note 9.

ual violence in non-conflict settings may face criminal prosecution.<sup>87</sup> These prosecutions may take place in countries in which male-male sexual behavior is proscribed as a criminal violation. At last count, eighty-six countries and six provinces or territorial units criminalize consensual adult same-sex sex; of these, seven have legal provisions with the death penalty as potential punishment for such acts.<sup>88</sup> As Sivakumaran observes:

If male survivors wished to report the abuse and were able to find the words with which to do so, they face the danger of consent being assumed if they are unable to prove the rape. This may lead to a finding of the victim engaging in consensual homosexual activity, which may in turn be a criminal offense under the law of the relevant state.<sup>89</sup>

In this regard, it is important to note that during situations of armed conflict, international humanitarian law applies as *lex specialis* and thereby displaces municipal laws that provide less protection to persons not (or at least no longer) taking direct part in hostilities.<sup>90</sup> As a result, international humanitarian law provides far greater protection to men who are sexually violated than does municipal law in countries in which all male-male sex is prohibited. This is, in part, because international humanitarian law does not discriminate negatively on the basis of sex.<sup>91</sup> According to the U.N. Committee of Experts:

Violent crimes of a homosexual nature are not explicitly mentioned in international humanitarian law . . . That international humanitarian law, insofar as it provides protection against rape and other sexual assaults, is applicable to men as well is beyond any doubt as the international human right not to be discriminated against (in this case on the basis of sex) does not allow derogation.<sup>92</sup>

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<sup>87</sup> See, e.g., Thanassis Cambanis, *In Rape Case, a French Youth Takes on Dubai*, N.Y. TIMES, Nov. 1, 2007, at Section A, Foreign Desk 1.

<sup>88</sup> DANIEL OTTOSSON, INT'L LESBIAN & GAY ASS'N, STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF LAWS PROHIBITING SAME SEX ACTIVITY BETWEEN CONSENTING ADULTS 4 (2008), available at [http://www.ilga.org/statehomophobia/ILGA\\_State\\_Sponsored\\_Homophobia\\_2008.pdf](http://www.ilga.org/statehomophobia/ILGA_State_Sponsored_Homophobia_2008.pdf).

<sup>89</sup> Sivakumaran, *Sexual Violence*, *supra* note 5, at 256 & n.11 (drawing a parallel with "female victims who have been unable to prove they have been raped being subjected to charges of adultery").

<sup>90</sup> Human rights law may also apply in conjunction with international humanitarian law during conflict situations. See *supra* note 22 and corresponding text.

<sup>91</sup> However, certain provisions of Geneva Convention IV, *supra* note 21, provide enhanced protection specifically for women, including pregnant women. See, e.g., arts. 38(5), 132.

<sup>92</sup> U.N. Comm'n of Experts, *Annex II: Rape and Sexual Assault: A Legal Study, Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, n.4, U.N. Doc. S/1994/674/Add.2 (Vol. I) (Dec. 28, 1994) [hereinafter *Rape and Sexual Assault*].

As a troubling but revealing result, men residing in countries that prohibit (even consensual) male-male sexual behavior are afforded greater protection against male-male sexual violence in wartime than in peacetime.<sup>93</sup>

## B. INTERNATIONAL HUMAN RIGHTS LAW

International human rights law provides inadequate legal protection for adult male victims of sexual violence in part because international human rights instruments define sexual violence in ways that often exclude men from the class of potential victims.<sup>94</sup> Rather, these instruments presume women (and children) to be the only victims of sexual violence. Part of the problem lies in a conflation of the terms “sex” and “gender,”<sup>95</sup> whereby “gender-based violence” becomes synonymous with “sexual violence against women.”<sup>96</sup> Due to the exclusion of men from the class of potential victims of sexual violence in these instruments, male victims of sexual violence must look to sex-neutral instruments for recourse. Yet, neither the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)<sup>97</sup> nor the International Covenant on Civil and Political Rights (ICCPR)<sup>98</sup> contain an express sexual provision for any of the types of abuse those instruments prohibit. As such, male victims of sexual violence in armed conflict may have little effective recourse to extant international human

<sup>93</sup> Even relatively liberal societies may have only recently recognized in their criminal laws that men can be raped. For instance, in the United Kingdom, it was only in 1994 that the criminal statutes reflected this possibility. Criminal Justice and Public Order Act, 1994, c. 33, § 142, (Eng.).

<sup>94</sup> However, such instruments do not always exclude boys. Most of the instruments that, for instance, include “women and children” in the preambulatory text (thereby implicitly including both female and male children) in the class of potential victims, switch to “women and girls” when addressing sexual violence in the operative part of the instrument. An example is S.C. Res. 1325 at 1, U.N. Doc. S/RES/1325 (Oct. 31, 2000). S.C. Res. 1820, U.N. Doc. S/RES/1820 (June 19, 2008) expressly recognizes at different points “women and children” and “women and girls”, but not also men, as victims of sexual violence in armed conflict. *Cf.* the sex-neutral approach of the Convention on the Rights of the Child, G.A. Res. 44/25, Annex, art. 19(1), U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49/Annex (Nov. 20, 1989).

<sup>95</sup> *See supra* note 15.

<sup>96</sup> For instance, the Convention on the Elimination of All Forms of Discrimination Against Women defines gender-based violence as “violence that is directed against a woman because she is a woman or that affects women disproportionately.” U.N. Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 19: Violence Against Women*, ¶ 6 (11th Sess., 1992). *See also supra* note 15.

<sup>97</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. TREATY DOC. No. 100-20, 1465 U.N.T.S. 113, 116 (1988).

<sup>98</sup> International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

rights instruments. They have significantly better recourse through international criminal and humanitarian instruments.

### C. INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL CRIMINAL LAW

This subsection traces the trajectory from the mid-nineteenth century to the present of international legal protections against sexual violence in conflict settings. Broadly speaking, in international humanitarian law, rape used to be conceived and defined in women-specific terms, as a crime against property, as a crime of troop discipline, and as a crime against family honor. Now, rape is treated as a crime against the individual; indeed, as detailed below, international law has developed to the point at which rape now consists of a dual violation (1) of an individual's physical or mental integrity and (2) of an individual's sexual autonomy. Moreover, the number of sexual acts that are codified as international crimes has increased to include non-penetrative sexual acts, such as forced nudity. Finally, while often women-specific, international instruments are in many cases nonetheless worded capaciously enough to implicitly include men as a category of victims.

#### 1. MILITARY CODES

Since at least the fourteenth century, some military codes outlawed (implicitly male-female) rape and made violators subject to capital punishment.<sup>99</sup> Nonetheless, until recently, rape during conflict was conceived of as an inevitable, if unlawful, consequence of war. The Lieber Code of 1863,<sup>100</sup> which was the first codification of customary international laws of land warfare, provided explicit protection against sexual violence. The Lieber Code prohibits rape in two provisions: Article 37 and Article 44. Article 37 gives women special protection by linking

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<sup>99</sup> Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 425 (1993) (observing that "[r]ape by soldiers has of course been prohibited by the law of war for centuries, and violators have been subjected to capital punishment under national military codes, such as those of Richard II (1385) and Henry V (1419)").

<sup>100</sup> Francis Lieber, "Instructions for the Government of Armies of the United States in the Field," Apr. 24, 1863, *reprinted in* FRANCIS LIEBER, *LIEBER'S CODE AND THE LAW OF WAR* 45 (1983) [hereinafter *Lieber Code*].

them to family relations.<sup>101</sup> Article 44 classifies rape as a crime of troop discipline, yet at the same time appears to recognize the violent character of rape.<sup>102</sup>

It is important to note that at the time of the Lieber Code, rape existed in a conceptual world different from today. Nonetheless, the extent and effect of that difference is contestable. Scholar David S. Mitchell contends that in 1863, rape was “closely associated with crimes of property rather than crimes against the person. Hence the phrase ‘rape and pillage.’”<sup>103</sup> Mitchell further asserts that “at this stage [in 1863] rape remains a property crime perpetuated against man’s honor[,] and . . . it was rare to find rape reported as a crime against the person.”<sup>104</sup> Nonetheless, Article 44 of the Lieber Code employs sex-neutral terminology, at least implicitly prohibiting rape, not only against women, but also against men.

## 2. INTERNATIONAL INSTRUMENTS

Departing somewhat from the Lieber Code, but building upon international documents promulgated in the interim,<sup>105</sup> the 1899 and 1907 Hague Regulations do not characterize rape as a violent crime. Rather, in Article 46 of the 1907 Regulations, rape is conceived as violating “family honor and rights.”<sup>106</sup> Explicitly prohibited in the Lieber Code of

<sup>101</sup> *Id.* art. 37, which provides in pertinent part that “[t]he United States acknowledge and protect, in hostile countries occupied by them, religion and morality . . . the persons of the inhabitants, especially those of women; and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished.”

<sup>102</sup> *Id.* art. 44, which states that:

All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking place by the main force, all rape, wounding, maiming, or killing such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.

*See also* Catherine N. Niarchos, *Women, War and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia*, 17 HUM. RTS. Q. 649, 672 n.140 (1995).

<sup>103</sup> Mitchell, *supra* note 10, at 236 n.58 (citing KELLY D. ASKIN, *WAR CRIMES AGAINST WOMEN: PROSECUTIONS IN INTERNATIONAL WAR CRIMES TRIBUNALS* 51 (1997)).

<sup>104</sup> *Id.*

<sup>105</sup> Included among them was the OXFORD MANUAL OF THE LAWS OF WAR ON LAND, Sept. 9, 1880, reprinted in *A MANUAL ON INTERNATIONAL HUMANITARIAN LAW AND ARMS CONTROL AGREEMENTS* 291, 296 (M. Cherif Bassiouni ed., 2000). *See generally* ASKIN, *supra* note 103, at 35–40.

<sup>106</sup> Article 46 of the 1907 Hague Convention, *supra* note 21, reads, “[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.”

1863, rape was no longer prohibited as such in the Hague Regulations of 1907. Though Article 46 of the 1907 Regulations can be read broadly to encompass wartime rape against women, it was seldom interpreted in this way.<sup>107</sup> Mitchell asserts that “[s]trikingly in this period, the status of women is not addressed directly—wartime rape is limited to a crime of troop discipline as an illegal but inevitable occurrence during armed conflict—and women are perceived as private objects rather than public subjects of law.”<sup>108</sup> Article 46 thereby uses historically contingent language and conceptions of legal subjecthood, but it also provides at least some express prohibition against rape.

The London Charter of 1945 and the Tokyo Charter of 1946, respectively, do not mention rape or sexual assault, but both do implicitly refer to rape and sexual assault under the term “ill treatment.”<sup>109</sup> Rape was not prosecuted in Nuremberg,<sup>110</sup> but it was listed in the Tokyo Tribunal’s indictment as “inhuman treatment,” “ill treatment,” and “failure to respect family honour and rights.”<sup>111</sup> In this way, the Tokyo Tribunal set a precedent for the international prosecution of rape as a war crime.<sup>112</sup> Nevertheless, the few prosecutions of rape in the Tokyo Tribunal are viewed by some as ancillary to the prosecution of other war crimes.<sup>113</sup>

The four occupying powers in Germany adopted Control Council Law No. 10 in December 1945.<sup>114</sup> The law was established to try war criminals whose cases were not adjudicated by the Nuremberg Tribunal and whose crimes had a specific locale.<sup>115</sup> Control Council Law No. 10 expressly lists rape as an offense under crimes against humanity.<sup>116</sup> While no one was prosecuted under its auspices, Control Council Law No. 10 established at least three principles relevant to sexual violence in international criminal law (1) that rape on a wide scale could be prose-

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<sup>107</sup> Mitchell, *supra* note 10, at 237 (internal citations omitted).

<sup>108</sup> *Id.*

<sup>109</sup> Charter of the International Military Tribunal art. 6(b), Aug. 8, 1945, 59 Stat. 1546, 1547, 82 U.N.T.S. 279. Charter for the International Military Tribunal for the Far East arts. 5(b)-(c), Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevens 20 (1968). M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 348 (1999).

<sup>110</sup> Though enforced prostitution was prosecuted in national courts outside Germany. Meron, *supra* note 99, at 425–26 & 426 n.13.

<sup>111</sup> ASKIN, *supra* note 103, at 180.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> William A. Schabas, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 7 (2007).

<sup>115</sup> Mitchell, *supra* note 10, at 238 n.67.

<sup>116</sup> Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity art. II(1)(c), Dec. 20, 1945.

cuted as a war crime;<sup>117</sup> (2) that crimes of sexual violence committed during peacetime could constitute crimes against humanity;<sup>118</sup> and (3) that responsibility for such crimes could not be limited to military personnel and, consequently, liability could attach to persons occupying other key positions.<sup>119</sup>

Geneva Convention IV of 1949, which relates to the protection of civilian persons during times of armed conflict, prohibits rape, enforced prostitution, and indecent assault explicitly under Article 27.<sup>120</sup> Nonetheless, the scope of Article 27 is expressly limited to women victims,<sup>121</sup> and has a tendency to resurrect harmful stereotypes, including that a raped woman is “disgraced” and that rape is a crime against honor.<sup>122</sup> Nonetheless, Article 27 provides a basis to charge rape.

Rape and sexual assault are omitted, however, from Article 147 of Geneva Convention IV, which lists grave breaches.<sup>123</sup> This may be due to the fact that in Geneva Convention IV rape is attached not to the category of rights protecting a person’s physical integrity (Article 32), but to the provision offering protection for “family rights” (Article 27).<sup>124</sup> Though rape could be interpreted as falling within Article 147’s prohibition on the grave breach of inhuman treatment, explicit recognition of rape as a grave breach is absent from the Convention.

Recognition of rape as a grave breach would carry significant consequences because grave breaches may give rise to universal jurisdiction, which would provide a basis for the investigation and prosecution of sexual violence regardless of where and by whom such violence was allegedly committed.<sup>125</sup> Classifying rape as a grave breach would also serve as a tacit recognition of the gravity of the crime.<sup>126</sup> In this regard, Catherine N. Niarchos, former Director General for Human Rights the OSCE Mission to Bosnia and Herzegovina, finds that the failure to specify rape as a grave breach indicates that the treaty drafters thought viola-

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<sup>117</sup> Niarchos, *supra* note 102, at 677–78 and n.175.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Geneva Convention IV, *supra* note 21, art. 27.

<sup>121</sup> *Id.*

<sup>122</sup> Mitchell, *supra* note 10, at 238 n.69 (citing Niarchos, *supra* note 102, at 674).

<sup>123</sup> Geneva Convention IV, *supra* note 21, art. 147.

<sup>124</sup> Mitchell, *supra* note 10, at 238 n.69 (internal citations omitted).

<sup>125</sup> Marc Weller, *Undoing the Global Constitution: UN Security Council Action on the International Criminal Court*, 78 INT’L AFFAIRS 693, 699 (2002) (asserting that it is “uncontroversial that grave breaches of the conventions are also covered by genuine universality in customary law”).

<sup>126</sup> Niarchos, *supra* note 102, at 675.



tions such as forcing a person to serve in the forces of a hostile power merited more attention than rape.<sup>127</sup>

The 1977 Additional Protocols to the 1949 Geneva Convention further enhanced protection against sexual violence in conflict settings.<sup>128</sup> Article 75 of Protocol I employs sex-neutral language in prohibiting “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault.”<sup>129</sup> Article 76 of Protocol I explicitly prohibits rape against women,<sup>130</sup> while Article 4 of Protocol II prohibits rape without regard to sex.<sup>131</sup>

Some argue that the Article 76 of Protocol I and Article 4 of Protocol II suffer fundamental flaws because, in distinguishing sexual assaults from crimes of violence, the Protocols do not adequately reflect that sexual violence is in fact a *violent* crime.<sup>132</sup> Tracking similar logic, Mitchell notes that both Article 76 of Protocol I and Article 4 of Protocol II also reify the gendered stereotype that women need to be “the object of special respect.”<sup>133</sup> Whether these distinctions, in and of themselves, precluded effective prosecution of sexual violence against women remains unclear. In this regard, it is important to note that the Protocols have not been universally ratified.<sup>134</sup>

To date, 108 countries have become party to the Rome Statute,<sup>135</sup> which created the International Criminal Court (ICC). The Rome Statute significantly expands the class of expressly enumerated crimes of sexual violence in international law, and does so in sex-neutral terms. The Rome Statute explicitly classifies “rape, sexual slavery, forced pregnancy, enforced sterilization, or any other form of sexual violence of compa-

<sup>127</sup> *Id.* at 674–75.

<sup>128</sup> Protocol I, *supra* note 19, arts. 75, 76 and Protocol II, *supra* note 21, art. 4.

<sup>129</sup> Protocol I, *supra* note 19, protects individuals not taking direct part in hostilities in international armed conflicts.

<sup>130</sup> Protocol I, *supra* note 19, art. 76 states that: *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 . . . (emphasis added).

<sup>131</sup> Protocol II, *supra* note 21, art. 4(1), provides protection to individuals not taking direct part in hostilities in non-international armed conflict.

<sup>132</sup> Niarchos, *supra* note 102, at 674–75.

<sup>133</sup> Mitchell, *supra* note 10, at 239.

<sup>134</sup> Niarchos, *supra* note 102, at 676 (internal citations omitted).

<sup>135</sup> Rome Statute of the International Criminal Court, *adopted by* the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court on July 17, 1998, 2187 U.N.T.S. 90, U.N. Doc. A/CONF.183/9 [hereinafter Rome Statute]; COAL. FOR THE INT’L CRIMINAL COURT, FACTSHEET: STATES PARTIES TO THE ROME STATUTE ACCORDING TO THE UN GENERAL ASSEMBLY REGIONAL GROUPS (2008), [http://www.iccnw.org/documents/RatificationsbyUNGroup\\_18\\_July\\_08.pdf](http://www.iccnw.org/documents/RatificationsbyUNGroup_18_July_08.pdf).

rable gravity<sup>136</sup> as, depending on the situational predicate, crimes against humanity and/or war crimes.<sup>137</sup>

#### D. JUS COGENS

In a 2005 law journal article, scholar David S. Mitchell concludes that “[u]ndeniably, the prohibition of rape as a crime in international humanitarian law possesses the character of *jus cogens*.”<sup>138</sup> Mitchell’s conclusion turns on the assertion that “a general norm prohibiting rape satisfies the basic sources of international law—treaty, custom, and general principles—as well as the objective indicia put forth by the [International Law Commission].”<sup>139</sup> A question emerges as to whether the *jus cogens* norm prohibiting rape in armed conflict that Mitchell postulates applies both to women and men, an issue Mitchell does not expressly address.

Of the large number of normative multilateral agreements and resolutions that prohibit rape, most, if not all, do so in sex—or, more accurately, women—specific terms.<sup>140</sup> Moreover, Mitchell’s assertions that “the municipal law of every nation in the world outlaws rape as part of general custom and rape is frequently condemned in practice of most nations as an obligatory rule of higher international standing,”<sup>141</sup> may not hold, at least not to the same extent, for men. In some countries,<sup>142</sup> both the male rapist and his male victim are considered to have committed the unlawful act of homosexual sex, which constitutes a crime in many national jurisdictions.<sup>143</sup> In these countries, non-consent on the part of the male rape victim does not vitiate the illegality of having engaged, however against his will, in male-male sex or sexual violence. Lastly, while international courts, regional tribunals, and the UN Security Council

<sup>136</sup> Rome Statute, *supra* note 135, art. 7(1)(g). See *infra* Section III.B.

<sup>137</sup> Rome Statute, *supra* note 135, arts. 8(2)(b)(xxii), 8(2)(e)(vi). See *infra* Section III.C.

<sup>138</sup> Mitchell, *supra* note 10, at 256.

<sup>139</sup> *Id.*

<sup>140</sup> See, e.g., Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (“Convention of Belém do Pará”), U.N. Doc. OEA/Ser.P AG/doc.3115/94 rev.2 (June 9, 1994); U.N. Declaration on the Elimination of Violence Against Women art. 4(c), G.A. Res. 104, U.N. GAOR, 48th Sess., Supp. No. 49, U.N. Doc. A/RES/48/104 (1993) (declaring that states should “[e]xercise due diligence to prevent, investigate and . . . punish acts of violence against women, whether those acts are perpetrated by the State or by private persons”). Though, as noted, the Rome Statute employs sex-neutral language. See *supra* notes 136–37 and corresponding text.

<sup>141</sup> Mitchell, *supra* note 10, at 256.

<sup>142</sup> See *supra* notes 88–89 and corresponding text.

<sup>143</sup> See *supra* Section II.A.

have recognized and applied the prohibition against rape as a *jus cogens* norm,<sup>144</sup> most of these instances involved cases of women or girls being raped.

Nonetheless, the argument that a *jus cogens* norm against rape in armed conflict encompasses rape not only of women but also of men draws support from reference to the general principle of international law of non-discrimination.<sup>145</sup> As mentioned earlier, the UN Committee of Experts held that it is beyond doubt that the protection international humanitarian law provides against sexual violence extends to men.<sup>146</sup> The argument also draws support from the jurisprudence of the *ad hoc* Tribunals that has found sexual violence against men clearly and indisputably constituting severe violations of international humanitarian law.<sup>147</sup> It draws further support from the ICC's statute's sex-neutral approach to sexual violence. As such, it appears that no meaningful distinction can be drawn between men and women with regard to the postulated *jus cogens* character of the prohibition of rape in armed conflict.<sup>148</sup>

However, such a character may not yet extend to all the other forms of sexual violence that are criminalized under international law. Much of Mitchell's analysis of international conventions depends on numerous conventions' explicit (and perhaps exclusive) prohibition of rape as such. To provide further protection to victims of sexual violence, as a matter of *de lege ferenda* the postulated *jus cogens* norm prohibiting rape should be broadened to cover all other forms of sexual violence that international law criminalizes. Lastly, to help ensure its effectiveness, the postulated *jus cogens* norm should use a definition of sexual violence

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<sup>144</sup> Mitchell, *supra* note 10, at 256.

<sup>145</sup> See generally IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 546–49 (7th ed. 2008).

<sup>146</sup> *Rape and Sexual Assault*, *supra* note 92.

<sup>147</sup> See, e.g., *Tadić*, Opinion and Judgment, Case No. IT-94-1-T.

<sup>148</sup> A *jus cogens* norm prohibiting the rape of men in armed conflict may have consequences for refugee and asylum law, at least to the extent certain countries provide asylum based on a violation of a *jus cogens* norm. This may be especially significant when considered in light of the phenomenon of "rape plus," whereby the perpetrator, while sexually violating the victim, also intentionally infects him with HIV. See *infra* note 166 and corresponding text. In the U.S., for instance, the application of a *jus cogens* norm against rape during armed conflict, and especially against "rape plus," may override "medical inadmissibility" provisions that prohibit asylum, immigration, or temporary visits based on a person's seropositive HIV status. See generally Margaret A. Somerville & Sarah Wilson, *Crossing Boundaries: Travel, Immigration, Human Rights and AIDS*, 43 MCGILL L.J. 781–834 (1998). For an overview of refugee law relevant to sexuality, see Kristen L. Walker, *Evolving Human Rights Norms Around Sexuality*, 6 ILSA J. INT'L & COMP. L. 343, 348–59 (2000).

that includes violence targeting an individual's imputed, perceived, or actual sexuality.

### III. CONVENTIONAL STANDARDS AND CASE LAW: A PROSECUTION ROADMAP

This section outlines what charges have been brought and can be brought against perpetrators of sexual violence in conflict settings. The section aims to provide a prosecution roadmap sketch, by making reference to sex-neutral language employed in relevant instruments and jurisprudence, regarding what needs to be proven to prosecute various sexual abuses that occur as constituent elements of genocide, crimes against humanity, and war crimes. The section is divided by category of crime; for each (genocide, crimes against humanity, and war crimes) conventional standards and relevant case law are summarized. While almost all of the extant jurisprudence involves instances of sexual violence against women, unless otherwise noted, the following adumbrated standards should logically apply with equal force to acts of sexual violence against men.

#### A. GENOCIDE IN RELATION TO SEXUAL VIOLENCE

Genocide is defined in international law as any of the acts enumerated in the 1948 Genocide Convention when "committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."<sup>149</sup> Sexual violence is not listed as a constituent element of genocide in the 1948 Genocide Convention. Nonetheless, as discussed below, the *ad hoc* Tribunals have prosecuted rape and other forms of sexual violence as constituent elements of genocide.

The major substantive provisions of the Genocide Convention are considered part of customary international law.<sup>150</sup> Indeed, the prohibition of the crime of genocide has obtained the status of a *jus cogens*

<sup>149</sup> Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277. The sketch of jurisprudential holdings in Section III draws heavily on the excellent analysis in DE BROUWER, *supra* note 6.

<sup>150</sup> See Reservations to the Convention on the Prevention and the Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28); Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 495 (Sept. 2, 1998) [hereinafter *Akayesu*, Judgment]; Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence, ¶¶ 45-46 (Dec. 6, 1999) [hereinafter *Rutaganda*, Judgment and Sentence]; Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment and Sentence, ¶¶ 150-51 (Jan. 27, 2000) [hereinafter *Musema*, Judgment and Sentence]; Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶¶ 540-41 (Aug. 2, 2001) [hereinafter *Krstić*, Judgment].

norm.<sup>151</sup> Pursuant to Articles I and IV of the Convention, states undertake to prevent and punish genocide, whether committed in peacetime or in wartime, and whether committed by rulers, public officials, or private individuals.<sup>152</sup>

The ICTY, the ICTR, and the ICC all incorporated verbatim the Convention's definition of genocide into their respective statutes.<sup>153</sup> Therefore, the *ad hoc* Tribunals and the ICC may prosecute persons who committed genocide or any of the participatory forms of genocide. The ICC's Elements of Crimes<sup>154</sup> also reflect that sexual violence can comprise each of the sets of acts and omissions that constitute genocide. The section is subdivided into each of the five sets of acts and omissions prohibited in the Genocide Convention, followed by the *mens rea* standard, which applies to all five sets of acts and omissions.

### 1. KILLING MEMBERS OF THE GROUP

Sexual violence can serve as the constituent element for purposes of paragraph (a) of the Genocide Convention, which prohibits "killings members of the group."<sup>155</sup> In *Prosecutor v. Akayesu*, an ICTR Trial Chamber held that sexual violence is often perpetrated with the intent of ultimately causing the victim's death.<sup>156</sup> Death can result, for example, in cases in which a perpetrator makes a person bleed profusely, by inserting

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<sup>151</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, 1993 I.C.J. 325, 440 (separate opinion of Judge *ad hoc* Lauterpacht); *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)*, para. 152, U.N. Doc. S/1994/1405 (Annex) (Dec. 9, 1994).

<sup>152</sup> Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 A (III) (Dec. 9, 1948).

<sup>153</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, *adopted by* S.C. Res. 827, U.N. Doc. S/Res/827 (May 25, 1993) [hereinafter ICTY Statute]; Statute of the International Tribunal for Rwanda, *adopted by* S.C. Res. 955, U.N. Doc. S/Res/955 (Nov. 8, 1994) [hereinafter ICTR Statute]; Rome Statute, *supra* note 135, art. 6.

<sup>154</sup> Elements of Crimes, International Criminal Court (ICC) Doc. ICC-ASP/1/3 (part II-B), arts. 6(a)-6(e) (Sept. 9, 2002), *available at* [http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element\\_of\\_Crimes\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf) [hereinafter Elements of Crimes]. Art. 9(1) of the Rome Statute, *supra* note 135, provides that the "Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8." Art. 9(3) of the Rome Statute, *supra* note 135, moreover, states that "[t]he Elements of Crimes and amendments thereto shall be consistent with this Statute."

<sup>155</sup> *See generally* DE BROUWER, *supra* note 6, at 48-51. A difference arises here between men and women, based on women's unique capacity to bear children.

<sup>156</sup> *Akayesu*, Judgment, Case No. ICTR 96-4-T, ¶ 733.

sticks into the victim's vagina<sup>157</sup> (or, by analogy, into the victim's anus), or by mutilating the victim's breasts<sup>158</sup> or other sexual(ized) body parts.

## 2. SERIOUS BODILY OR MENTAL HARM

Rape and other forms of sexual violence can also fall under paragraph (b)'s prohibition on "serious bodily or mental harm." As the ICTR held in *Akayesu*, "rape and sexual violence certainly constitute infliction of serious bodily or mental harm on the victims and are even . . . one of the worst ways of inflict[ing] harm on the victim as he or she suffers both bodily and mental harm."<sup>159</sup> Subsequent cases also prosecuted sexual violence as genocide under paragraph (b).<sup>160</sup> Likewise, the ICC's Elements of Crimes state in sex-neutral terms that the "serious bodily or mental harm" provision in the crime of genocide "may include, but is not necessarily restricted to, acts of . . . rape, sexual violence or other inhumane and degrading treatment."<sup>161</sup> According to one judgment, to rise to the level of seriousness under paragraph (b), an act or omission need not inflict permanent or irreparable harm, but it must go "beyond temporary unhappiness, embarrassment or humiliation. It must be a harm that results in grave and long-term disadvantage to a person's ability to lead a normal and constructive life."<sup>162</sup> The destruction or partial destruction of the group is not required under paragraph (b).<sup>163</sup>

<sup>157</sup> Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-T, Judgment, ¶¶ 215, 261 (June 17, 2004) [hereinafter *Gacumbitsi*, Judgment].

<sup>158</sup> See, e.g., Prosecutor v. Kayishema & Ruzindana, Case No. ICTR 95-1-T, Judgment, ¶¶ 446, 470, 564 (May 21, 1999) [hereinafter *Kayishema & Ruzindana*].

<sup>159</sup> *Akayesu*, Judgment, Case No. ICTR 96-4-T, ¶ 731.

<sup>160</sup> See, e.g., *Gacumbitsi*, Judgment, Case No. ICTR-2001-64-T, ¶¶ 200–04, 215, 291–93; Prosecutor v. Muhimana, Case No. ICTR-95-1-I, Judgment and Sentence, ¶¶ 273–74, 291, 302, 513–19 (Apr. 28, 2005) [hereinafter *Muhimana*, Judgment and Sentence].

<sup>161</sup> Elements of Crimes, *supra* note 154, art. 6(b)-1 n.3.

<sup>162</sup> *Krstić*, Judgment, Case No. IT-98-33-T, ¶ 513 (referencing *Akayesu*, Judgment, Case No. ICTR 96-4-T, ¶ 502). The ICTR's jurisprudence has held that an assessment of the following characteristics may determine whether an act or omission constituted "serious bodily or mental harm": for example, whether the harm "seriously injures the health, causes disfigurement or causes any injury to the external, internal organs or senses," *Kayishema & Ruzindana*, Judgment, Case No. ICTR 95-1-T, ¶109, or whether it constitutes "some type of impairment of mental faculties, or harm that causes serious injury to the mental state of the victim," *Gacumbitsi*, Judgment, Case No. ICTR-2001-64-T, ¶ 291 (citing Report of International Law Commission, ¶ 14 under art. 17 Draft Code of Crimes against the Peace and Security of Mankind (1996)).

<sup>163</sup> DE BROUWER, *supra* note 6, at 56.

### 3. DELIBERATELY INFLECTING ON THE GROUP CONDITIONS OF LIFE CALCULATED TO BRING ABOUT ITS DESTRUCTION

In the *ad hoc* Tribunals, no charge for rape or sexual violence has yet been brought under paragraph (c)'s prohibition on "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part."<sup>164</sup> Nonetheless, in *Prosecutor v. Kayeshima and Ruzindana*, an ICTR Trial Chamber held that rape can constitute one such "condition of life" for the sake of paragraph (c).<sup>165</sup> Intentionally infecting someone with HIV/AIDS through sexual violence, a frequent occurrence in the Rwandan genocide and in other conflicts,<sup>166</sup> which is sometimes called "rape plus,"<sup>167</sup> appears to fall under this provision as well.

### 4. IMPOSING MEASURES INTENDED TO PREVENT BIRTHS WITHIN THE GROUP

As with paragraph (c), no sexual violence-based prosecutions have been brought in the *ad hoc* Tribunals under paragraph (d), which prohibits "imposing measures intended to prevent births within the group."<sup>168</sup> However, the ICTR articulated circumstances under which such charges could be prosecuted. The *Akayesu* Trial Chamber held that "measures intended to prevent births in the group" may include "sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages."<sup>169</sup> The Trial Chamber also noted that such measures can be physical or mental; one example of the latter is when someone who has been raped refuses subsequently to procreate.<sup>170</sup> The prosecutor need not prove births were actually prevented within the

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<sup>164</sup> *Id.* at 56–58.

<sup>165</sup> *Kayishema & Ruzindana*, Judgment, Case No. ICTR 95-1-T, ¶ 116.

<sup>166</sup> For instance, "in Kosovo, the OSCE reported one interviewee recounting that, 'he saw two male detainees being raped by two policemen who declared that they had AIDS.'" Sivakumaran, *Sexual Violence*, *supra* note 5, at 264 n.82 (citing ORGANIZATION FOR SECURITY & CO-OPERATION IN EUROPE (OSCE), KOSOVO/KOSOVA: AS SEEN, AS TOLD ch. 7 (1999)).

<sup>167</sup> Sivakumaran, *Sexual Violence*, *supra* note 5, at 264 (citations omitted).

<sup>168</sup> Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 152, art. 2(d).

<sup>169</sup> *Akayesu*, Judgment, Case No. ICTR 96-4-T, ¶ 507.

<sup>170</sup> *Id.* ¶ 508. See also *Kayishema & Ruzindana*, Judgment, Case No. ICTR-95-1-T, ¶ 117; *Rutaganda*, Judgment and Sentence, Case No. ICTR-96-3-T, ¶ 53.

group, but rather, the measures were imposed intentionally to prevent births within the group.<sup>171</sup>

#### 5. FORCIBLY TRANSFERRING CHILDREN OF THE GROUP TO ANOTHER GROUP

The Trial Chamber in *Akayesu* elucidated how sexual violence could fall within the prohibition embodied in paragraph (e), namely, “forcibly transferring children of the group to another group.”<sup>172</sup> The Chamber held that:

as in the case of measures intended to prevent births [paragraph (d)], the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.<sup>173</sup>

Therefore, acts of sexual violence that serve as such threats or trauma may fall within this provision. Building upon *Akayesu*, the ICC’s Elements of Crimes state that:

the term “forcibly” is not restricted to physical force, but may include 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.<sup>174</sup>

To incur liability under paragraph (e), the perpetrator must have had the intent to forcibly transfer the children from one group to another. The Elements of Crimes clarify that, in the ICC, a perpetrator needed to know, or should have known, that the person or persons were under the age of eighteen.<sup>175</sup>

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<sup>171</sup> DE BROUWER, *supra* note 6, at 59; Elements of Crimes, *supra* note 154, art. 6(d)-4.

<sup>172</sup> See generally DE BROUWER, *supra* note 6, at 59–60. While “children” is not defined in the either of the Tribunals’ statutes or in the Genocide Convention, the Elements of Crime provide that in conformity with the Convention on the Rights of the Child, “[t]he person or persons were under the age of 18 years.” Elements of Crimes, *supra* note 154, art. 6(e)-5. However, paragraph (e) may not apply to older children, because older children are less likely to lose their identity, which was purportedly the aim of the provision. See WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 176 (2000). Transfer of adults may be prosecuted as crimes against humanity (e.g., Rome Statute, *supra* note 135, art. 8(2)(b)(viii)) or as war crimes (e.g., Rome Statute, *supra* note 135, art. 8(2)(a)(vii)).

<sup>173</sup> *Akayesu*, Judgment, Case No. ICTR 96-4-T, ¶ 509.

<sup>174</sup> Elements of Crimes, *supra* note 154, art. 6(e)-1 n. 5.

<sup>175</sup> *Id.* art. 6(e)-6.



## 6. MENS REA

The *mens rea* standard for genocide consists of three parts (1) the degree of intent, (2) the destruction of the group, as such, and (3) the “in whole or in part” aspect.<sup>176</sup> The intent requirement makes genocide purportedly the “crime of crimes.”<sup>177</sup> To fulfill the “destruction of the group, as such” requirement of the crime of genocide, a perpetrator must commit the act “against a specifically targeted group.”<sup>178</sup> This requirement helps distinguish genocide from crimes against humanity, especially the crime against humanity of persecution. Persecution is a crime against humanity in which the perpetrator selects his victims based on their membership in a specific community.<sup>179</sup> In the crime of genocide, the perpetrator must intend to destroy the group, per se. The *Akayesu* Trial Chamber defined the different types of groups recognized by the Genocide Convention. The Chamber defined a national group as “a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties;”<sup>180</sup> an ethnic group as “a group whose members share a common language or culture;”<sup>181</sup> a racial group as “based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors;”<sup>182</sup> and a religious group as “one whose members share the same religion, denomination or mode of worship.”<sup>183</sup> These distinctions are not airtight, as commentators remark, for instance, with respect to false distinctions drawn between Tutsi and Hutu as disparate ethnic groups.<sup>184</sup> Some legal scholars propose that gender (or sex) be added to the list of protected groups.<sup>185</sup>

With regard to the third component of genocide (“in whole or in part”), as long as the acts were committed with the specific intent to destroy the group, the acts need not lead to the whole, or even the partial, annihilation of the group. However, an ICTY Trial Chamber defined “in

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<sup>176</sup> See generally DE BROUWER, SUPRANATIONAL PROSECUTION, *supra* note 6, at 60–75.

<sup>177</sup> Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment and Sentence, ¶ 16 (Sept. 4, 1998).

<sup>178</sup> *Akayesu*, Judgment, Case No. ICTR 96-4-T, ¶ 499.

<sup>179</sup> See *infra* Section III.B.8.

<sup>180</sup> *Akayesu*, Judgment, Case No. ICTR 96-4-T, ¶ 512 (referencing Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6)).

<sup>181</sup> *Id.* ¶ 513.

<sup>182</sup> *Id.* ¶ 514.

<sup>183</sup> *Id.* ¶ 515.

<sup>184</sup> DE BROUWER, *supra* note 6, at 73–74.

<sup>185</sup> *Id.* at 75.

part” to encompass a “substantial” part, with substantial meaning “a large minority of the group in question or the most representative members of the targeted community.”<sup>186</sup> The Chamber thereby set a non-trivial standard for the portion of the group that must be annihilated in order to reach the genocide threshold.

## **B. CRIMES AGAINST HUMANITY IN RELATION TO SEXUAL VIOLENCE**

As adjudicated in the *ad hoc* Tribunals and as recognized explicitly in the Rome Statute, sexual violence can comprise various crimes against humanity. Crimes against humanity can be distinguished from genocide because they do not require that the perpetrator intended to annihilate a protected group, as such. In addition, crimes against humanity can be distinguished from war crimes because crimes against humanity do not strictly require a nexus to an armed conflict, but rather require a nexus to a widespread or systematic attack against a civilian population.

This subsection is divided into each of the various crimes against humanity for which sexual violence can act as the constituent element. It is helpful to note that rape was the only crime of sexual violence listed explicitly as stand-alone constituent element in the ICTR’s and ICTY’s respective statutes; therefore, in prosecuting sexual violence those Tribunals sometimes resorted to more broadly construed categories of crimes against humanity (including torture, enslavement, and other inhumane acts of a similar character). For its part, as will be shown, the Rome Statute explicitly lists acts of sexual violence that comprise crimes against humanity (and war crimes, depending on the situational predicate): rape, sexual slavery, enforced prostitution, enforced sterilization, forced pregnancy, and any other form of sexual violence of comparable gravity.

### 1. RAPE

Different chambers within the Tribunals have defined raped differently. The ICTR Trial Chamber in *Akayesu*, the first such court to define rape in international criminal law, invoked a conceptual approach, defining rape as “a physical invasion of a sexual nature, [which is] com-

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<sup>186</sup> Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶ 82 (Dec. 14, 1999).

mitted on a person under circumstances which are coercive.”<sup>187</sup> The Trial Chamber stressed 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 . . . .<sup>188</sup>

An effect of using the term “invasion” instead of “penetration” is that rape could encompass acts such as forced masturbation and sexual mutilation, neither of which involved physical penetration.

Some chambers in the ICTY have adopted a more mechanical definition of rape, first in *Prosecutor v. Furundžija* and later in *Prosecutor v. Kunarac, Kovač and Vuković*. In *Furundžija*, rape is defined as:

(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>189</sup>

In *Kunarac, Kovač and Vuković*, the act of rape is again defined using a more mechanical approach (in contrast to *Akayesu*'s more conceptual approach), but in these cases includes the element of non-consent:

[rape is] 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

<sup>187</sup> *Akayesu*, Judgment, Case No. ICTR 96-4-T, ¶ 598. Later in its decision, the Trial Chamber defined sexual violence as follows: “The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.” *Id.* ¶ 688.

<sup>188</sup> *Id.* The definition of rape delimited in *Akayesu* was upheld in four cases: *Delalić et al.*, Judgment, Case No. IT-96-21-T, ¶¶ 478-79; *Musema*, Judgment and Sentence, Case No. ICTR-96-13-T, ¶¶ 220, 226; *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, Judgment and Sentence, ¶ 456 (May 16, 2003) (accused acquitted of the charge of rape as a crime against humanity due to insufficient evidence) [hereinafter *Niyitegeka*, Judgment and Sentence]; and *Muhimana*, Judgment and Sentence, Case No. ICTR-95-1-I, ¶¶ 535-51.

<sup>189</sup> *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, ¶ 185 (Dec. 10, 1998) [hereinafter *Furundžija*, Judgment].

of the perpetrator; where such sexual penetration occurs without the consent of the victim.<sup>190</sup>

The Trial Chamber in *Kunarac, Kovač and Vuković* clarified that consent must be given voluntarily as a result of the victim's free will.<sup>191</sup> Some commentators assail the notion that consent can ever be a factor in a situation that is inherently coercive,<sup>192</sup> while at least one scholar criticizes the *Kunarac, Kovač and Vuković* Appeals Chamber for purportedly diminishing sexual autonomy, especially for women, in conflict situations.<sup>193</sup>

Recently, the joint Appeals Chamber of the *ad hoc* Tribunals defined rape by combining the consent element of the *Kunarac* decision with the coercive circumstances element of the *Akayesu* decision.<sup>194</sup> Accordingly, prosecutors must prove lack of consent, but they can prove it by an assessment of circumstantial evidence alone.<sup>195</sup> The ICC incorporates the element of force, threat of force, coercion, or a coercive environment for the crime against humanity of rape; however, it does not require lack of consent.<sup>196</sup>

As for the *mens rea* standard for rape as a crime against humanity, in the ICC the prosecutor must prove the accused intended to invade 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.<sup>197</sup> The Prosecutor must also prove that the accused knew through the surrounding circumstances that the invasion was committed by force, or by threat of force or coercion, or by taking advantage of a coercive environment, or that the invasion was committed

<sup>190</sup> Prosecutor v. Kunarac et al., Case No. IT-96-23 & 23/1-T, Judgment, ¶ 460 (Feb. 22, 2001), [hereinafter *Kunarac et al.*, Judgment].

<sup>191</sup> *Id.* The definition of rape used in *Kunarac et al.*, Judgment, was affirmed in *Kunarac et al.*, Appeal Judgment, Case No. IT-96-23 & 23/1-A, ¶¶ 127-28; Prosecutor v. Kvočka et al., Case No. IT-98-30/1-T, Judgment, ¶¶ 177-79 (Nov. 2, 2001); Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment and Sentence, ¶¶ 344-46 (May 15, 2003); Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment and Sentence, ¶¶ 912-15 (Dec. 1, 2003); Prosecutor v. Kamuhanda, Case No. ICTR-95-54A-T, Judgment and Sentence, ¶¶ 707-10 (Jan. 22, 2004).

<sup>192</sup> See, e.g., DE BROUWER, *supra* note 6, at 119.

<sup>193</sup> Engle, *supra* note 86, at 780.

<sup>194</sup> Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-A, Appeal Judgment ¶ 153-55 (July 7, 2006).

<sup>195</sup> *Id.* at 155. See Alison Cole, *Prosecutor v. Gacumbitsi: The New Definition for Prosecuting Rape Under International Law*, 8 INT'L CRIM. L. REV. 55, 71-73 (2008).

<sup>196</sup> Elements of Crimes, *supra* note 154, art. 7(1)(g)-1.

<sup>197</sup> Rome Statute, *supra* note 135, art. 30 (requirement of proving intent and knowledge for all ICC offenses).

against a person incapable of giving genuine consent.<sup>198</sup> It is unnecessary for the prosecutor to prove the perpetrator's knowledge of the victim's non-consent.<sup>199</sup>

## 2. TORTURE

According to the ICC's Elements of Crimes, acts of sexual violence can constitute the crime against humanity of torture if those acts fulfill three cumulative criteria.<sup>200</sup> First, the perpetrator must inflict severe pain or mental suffering upon one or more persons.<sup>201</sup> While no specific criteria upon which to assess the degree of pain or suffering exists, the Appeals Chamber in *Kunarac, Kovač and Vuković* upheld the finding that sexual violence can amount to torture because of its inherent severity.<sup>202</sup> The second criterion listed in the Elements of Crimes is that the tortured person or persons must have been in the custody or under the control of the perpetrator.<sup>203</sup> "Custody" here includes any form of detention in which a person's liberty is deprived; it encompasses, among other situations, arrest by security forces, crowd control by security forces, and enforced disappearances.<sup>204</sup> Situations where the victim had nowhere else to go, even if he was not detained, would fall within this crime.<sup>205</sup> The third criterion is that "such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions."<sup>206</sup> "Lawful" means controlling international law or domestic law. However, sexual violence can never qualify as a lawful sanction because international law prohibits it.<sup>207</sup> In contrast to the war crime of torture,<sup>208</sup> the crime against humanity of torture does not require the perpetrator to have committed the act for a prohibited purpose.<sup>209</sup>

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<sup>198</sup> *Id.*

<sup>199</sup> DE BROUWER, *supra* note 6, at 135.

<sup>200</sup> Elements of Crimes, *supra* note 154, art. 7(1)(f).

<sup>201</sup> *Id.* art. 7(1)(f)-1.

<sup>202</sup> *Kunarac et al.*, Appeal Judgment, Case No. IT-96-23 & 23/1-A, ¶¶ 149–50.

<sup>203</sup> Elements of Crimes, *supra* note 154, art. 7(1)(f)-2.

<sup>204</sup> DE BROUWER, *supra* note 6, at 100.

<sup>205</sup> *Id.*

<sup>206</sup> Elements of Crimes, *supra* note 154, art. 7(1)(f)-3.

<sup>207</sup> DE BROUWER, *supra* note 6, at 100–01.

<sup>208</sup> *See infra* Section III.C.1.

<sup>209</sup> DE BROUWER, *supra* note 6, at 95–100.

## 3. SEXUAL SLAVERY AND ENSLAVEMENT

Unlike the *ad hoc* Tribunals' statutes, the ICC's statute expressly lists sexual slavery as a crime against humanity.<sup>210</sup> In accordance with the ICC's largely sex-neutral Elements of Crimes, the *actus reus* of the crime consists of two parts. The first is that the:

[P]erpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.<sup>211</sup>

The "such as" here, however, does not denote an exclusive list; this is clarified in a footnote in the Elements of Crimes, which note that a commercial benefit is not a requirement.<sup>212</sup> The second part is that the "perpetrator caused such person or persons to engage in one or more acts of a sexual nature."<sup>213</sup> This clause distinguishes sexual slavery as a crime against humanity from enslavement as a crime against humanity. The *mens rea* required for sexual slavery as a crime against humanity is that the perpetrator intended to exercise "any or all powers attaching to the right of ownership over one or more persons" and intended to cause "such person or persons to engage in one or more acts of a sexual nature."<sup>214</sup>

While the ICC's statute provides an explicit basis to prosecute the crime against humanity of sexual slavery,<sup>215</sup> no such basis existed in either of the *ad hoc* Tribunals' statutes. The ICTY nonetheless utilized the more broadly construed crime against humanity of enslavement to prosecute allegations of sexual slavery. In *Kunarac, Kovač and Vuković*, the Trial Chamber defined the crime against humanity of enslavement as "the exercise of any or all powers attaching to the right of ownership over a person. The *mens rea* of the violation consists in the intentional exercise of such powers."<sup>216</sup> The Trial Chamber found that some of the

<sup>210</sup> Rome Statute, *supra* note 135, art. 7(1)(g).

<sup>211</sup> Elements of Crimes, *supra* note 154, art. 7(1)(g)-2-1.

<sup>212</sup> *Id.* art. 7(1)(c)-1 n.11, provides that "[i]t is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children."

<sup>213</sup> *Id.* art. 7(1)(g)-2-2.

<sup>214</sup> Rome Statute, *supra* note 135, art. 30 (intent for purposes of all ICC offenses).

<sup>215</sup> *Id.* art. 7(2)(c).

<sup>216</sup> *Kunarac et al.*, Judgment, Case No. IT-96-23 & 23/1-T, ¶ 540.

accused held women in slavery-like situations with a primary aim of raping them.<sup>217</sup> The Trial Chamber's decision, which the Appeals Chamber substantially upheld, clarified that sexual slavery can constitute the crime against humanity of enslavement.<sup>218</sup> As noted above, whereas the ICTY and ICTR have applied broad conceptions of enslavement to prosecute sexual slavery as a crime against humanity, the ICC's statute now provides an explicit basis for sexual slavery as a stand-alone crime against humanity.<sup>219</sup>

#### 4. ENFORCED PROSTITUTION AND FORCED PREGNANCY

According to the ICC's Elements of Crimes, the *actus reus* of enforced prostitution as a crime against humanity consists of two elements. The first is that the:

[P]erpetrator caused one or more persons to engage in one or more aspects 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>220</sup>

The second is that the "perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature."<sup>221</sup> The Elements of Crimes, therefore, distinguishes the crime against humanity of sexual slavery from the crime against humanity of enforced prostitution by requiring a pecuniary element for that the latter but not for the former.<sup>222</sup> Of the acts of sexual violence enumerated in the ICC's statute, forced pregnancy is the only one that is sex-specific, since only women can be victims of the crime because only women are capable of becoming pregnant.

#### 5. ENFORCED STERILIZATION

With respect to the ICC's statute, the crime against humanity of enforced sterilization consists of two parts. The first is that the "perpe-

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<sup>217</sup> *Id.* ¶¶ 741-42.

<sup>218</sup> *Kunarac et al.*, Appeal Judgment, Case No. IT-96-23 & 23/1-A, ¶¶ 106-24.

<sup>219</sup> Rome Statute, *supra* note 135, art. 7(1)(g).

<sup>220</sup> Elements of Crimes, *supra* note 154, art. 7(1)(g)-3-1.

<sup>221</sup> *Id.* art. 7(1)(g)-3-2.

<sup>222</sup> DE BROUWER, *supra* note 6, at 141.

trator deprived one or more persons of [his, her, or their] biological productive capacity.”<sup>223</sup> The second is that the “conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with [his, her, or] their genuine consent.”<sup>224</sup> Sterilization need not be permanent to satisfy this definition.<sup>225</sup> Enforced sterilization includes surgical removal of the reproductive organs and any other means or measures—such as cutting off the genitals or violence that destroys the reproductive system—that have the effect of depriving a person of his or her biological reproductive capacity.<sup>226</sup> Enforced sterilization may also amount to the crime of genocide if the requisite intent is present; in particular, it may fall under paragraph (c) or (d), as discussed above.<sup>227</sup>

#### 6. ANY OTHER FORM OF SEXUAL VIOLENCE OF COMPARABLE GRAVITY

The residual category of “any other form of sexual violence of comparable gravity” allows for the prosecution of crimes against humanity for acts of sexual violence that are not expressly listed in the ICC’s statute.<sup>228</sup> Three requirements must be fulfilled to charge this residual category.<sup>229</sup> The first is that the:

[P]erpetrator 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 persons, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.<sup>230</sup>

This requirement encompasses both acts of a sexual nature committed against another person or persons and acts causing a person or persons to engage in an act of a sexual nature by (threat of) force or coercion.

The second requirement is that the act reaches a certain gravity threshold. According to the Rome Statute, the threshold must be comparable to rape, sexual slavery, enforced prostitution, forced pregnancy, or

<sup>223</sup> Elements of Crimes, *supra* note 154, art. 7(1)(g)-5-1.

<sup>224</sup> *Id.* art. 7(1)(g)-5-2.

<sup>225</sup> DE BROUWER, *supra* note 6, at 146–47.

<sup>226</sup> *Id.*

<sup>227</sup> See *supra* Sections III.A.3–4.

<sup>228</sup> Rome Statute, *supra* note 135, art. 7(1)(g).

<sup>229</sup> See generally DE BROUWER, *supra* note 6, at 148–51.

<sup>230</sup> Elements of Crimes, *supra* note 154, art. 7(1)(g)-6.



enforced sterilization.<sup>231</sup> Some commentators read the ICC's statute thereby to potentially exclude forced nudity and sexual mutilation from "any other form of sexual violence of comparable gravity" as a crime against humanity.<sup>232</sup> As a corrective measure, these commentators suggest that the ICC interpret the restriction broadly by utilizing the jurisprudence of the ICTY and ICTR, which upheld a more capacious definition of sexual violence as international crimes.<sup>233</sup> The third requirement is that the "perpetrator was aware of the factual circumstances that established the gravity of the conduct."<sup>234</sup>

#### 7. OTHER INHUMANE ACTS OF A SIMILAR CHARACTER

The ICTY and the ICTR have held that certain acts of sexual violence can fall within the even broader category of "other inhumane acts."<sup>235</sup> Given the savings-clause character of this provision in the ICC statute,<sup>236</sup> it may be argued that crimes of sexual violence should be prosecuted as the crime against humanity of "other inhumane acts" only if those acts do not fall within the more specifically listed crimes against humanity relating to sexual violence discussed above.

Whether an act consists of torture or other inhumane acts depends on the degree of pain or suffering: torture requires severe pain or suffering, while other inhuman acts require great suffering or serious injury.<sup>237</sup> Types of sexual violence that have been held to fall within the "other inhumane acts" provision include forced fellatio, forced sexual mutilation, forced undressing, and forcing women to perform naked in public.<sup>238</sup>

#### 8. PERSECUTION

Sexual violence may serve as a constituent element of the crime against humanity of persecution provided the other necessary components of the crime of persecution are fulfilled. According to the ICC's

<sup>231</sup> Rome Statute, *supra* note 135, art. 7(1)(g).

<sup>232</sup> DE BROUWER, *supra* note 6, at 148–49.

<sup>233</sup> See, e.g., *Akayesu*, Judgment, Case No. ICTR 96-4-T, ¶ 697.

<sup>234</sup> Elements of Crimes, *supra* note 154, art. 7(1)(g)-6.

<sup>235</sup> See, e.g., *Akayesu*, Judgment, Case No. ICTR 96-4-T, ¶ 697.

<sup>236</sup> Rome Statute, *supra* note 135, art. 7(1)(k).

<sup>237</sup> DE BROUWER, *supra* note 6, at 163.

<sup>238</sup> *Tadić*, Opinion and Judgment, Case No. IT-94-1-T, ¶¶ 729-30; *Akayesu*, Judgment, Case No. ICTR 96-4-T, ¶ 697; *Niyitegeka*, Judgment and Sentence, Case No. ICTR-96-14-T, ¶¶ 459–67.

Elements of Crimes, to amount to the crime against humanity of persecution (1) the perpetrator must severely deprive, contrary to international law, one or more persons of his, her, or their fundamental rights; (2) the perpetrator must target such person or persons by reason of the identity of a group or collectivity or target the group or collectivity, as such; (3) the targeting must be based on political, racial, national, ethnic, cultural, religious, gender,<sup>239</sup> or other grounds that are universally recognized as impermissible under international law; and (4) the conduct must be committed in connection with any act referred to in article 7, paragraph 1 of the Statute or any crime within the jurisdiction of the ICC.<sup>240</sup> A question arises as to whether, under the Rome Statute, sexual orientation may be invoked as a discriminatory ground for purposes of prosecuting persecution as a crime against humanity. Although it was mentioned in the ICTY *Tadić* Appeals Chamber judgment,<sup>241</sup> “sexual preference” has not yet been recognized conventionally as a prohibited ground of discrimination for purposes of the crime against humanity of persecution.<sup>242</sup>

As to the situational predicate, to constitute a crime against humanity, an act of sexual violence must form part of a widespread or systematic attack against a civilian population.<sup>243</sup> Under the ICC’s statute, the perpetrator must have “knowledge of the attack.”<sup>244</sup> Because no specific parameters delineate when an attack has reached the widespread or systematic threshold, a factual determination of each attack is necessary. The ICC thereby requires that the attack involved multiple commissions of prohibited acts against a civilian population, and that the attack’s course of conduct occurred pursuant to a specific state or organizational policy.<sup>245</sup>

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<sup>239</sup> “Gender” as explicitly defined in Rome Statute, *supra* note 135, art. 7(3).

<sup>240</sup> Elements of Crimes, *supra* note 154, art. 7(1)(h). See also DE BROUWER, *supra* note 6, at 152–62.

<sup>241</sup> Prosecutor v. Tadić, Case No. IT-94-1-A, Appeal Judgment, ¶ 285 (July 15, 1999) [hereinafter *Tadić*, Appeal Judgment].

<sup>242</sup> Based on the text of art. 7(3) of the Rome Statute, *supra* note 135, sexual preference would not fall under the “gender” heading for the crime of persecution (stating that “gender,” as a protected category against persecution, “refers to the two sexes, male and female, within the context of society,” and that “[t]he term ‘gender’ does not indicate any meaning different from the above.”). See also DE BROUWER, *supra* note 6, at 159.

<sup>243</sup> Rome Statute, *supra* note 135, art. 7(1).

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* art. 7(2)(a).

### C. WAR CRIMES IN RELATION TO SEXUAL VIOLENCE

As with genocide and crimes against humanity, acts of sexual violence may comprise the constituent elements of war crimes. Such acts can be prosecuted as the specific type of sexual violence (for instance, as forced sterilization), under a broader category of crime (for instance, as torture or inhumane treatment), or both. The ICC's statute is the most recently established international instrument detailing the definition and scope of the war crimes of sexual violence.<sup>246</sup> The Rome Statute's list and accompanying definitions of the war crimes of sexual violence are almost identical to its list and definitions of sexual violence that constitute crimes against humanity that were just sketched—namely, rape, sexual slavery, enforced prostitution, enforced sterilization, forced pregnancy, and any other form of sexual violence that meets a certain threshold.

Therefore, this section focuses on highlighting distinctions between the two (crimes against humanity and war crimes). It looks in particular at the two crimes' respective situational predicates. In short, crimes against humanity require a systematic or widespread attack directed at a civilian population,<sup>247</sup> while war crimes occur during situations of armed conflict. According to its statute, the ICC has jurisdiction over war crimes "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes."<sup>248</sup> While distinctions can be drawn between international armed conflict and non-international armed conflict, the substantive provisions expressly prohibiting various forms of sexual violence are similar to each type of conflict. The primary distinction is that for international armed conflicts, grave breaches of the Geneva Conventions may also be prosecuted, while for non-international armed conflicts, violations of Common Article 3 may also be prosecuted.<sup>249</sup>

For international armed conflicts, the ICC's statute incorporates two interrelated bodies of law into its war crimes section. The first consists of grave breaches of the 1949 Geneva Conventions and Additional Protocol I.<sup>250</sup> The second consists of serious violations of the laws and

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<sup>246</sup> *Id.* arts. 8(2)(b)(xxii), 8(2)(e)(vi).

<sup>247</sup> Rome Statute, *supra* note 135, art. 7(1).

<sup>248</sup> Rome Statute, *supra* note 135, art. 8(1).

<sup>249</sup> *Id.* arts. 8(2)(a), 8(2)(b)(xxii), 8(2)(c), and 8(2)(c)(vi).

<sup>250</sup> Rome Statute, *supra* note 135, art. 8(2)(a).

customs of war.<sup>251</sup> The latter can be ascertained by reference to customary international humanitarian law, in particular to the 1899 and 1907 Hague Convention and Regulations, the four 1949 Geneva Conventions, and the two 1977 Additional Protocols thereto.<sup>252</sup> Serious violations of the laws and customs of war constitute the second ground on which war crimes can be prosecuted for armed conflicts of a non-international character.<sup>253</sup>

### 1. GRAVE BREACHES (INTERNATIONAL ARMED CONFLICT)

Because they are considered to be the most serious violations of international humanitarian law, grave breaches of the 1949 Geneva Conventions impose universal jurisdiction on states that are party to the Conventions.<sup>254</sup> For violations falling short of the grave breach standards, states must “take measures necessary for the suppression” of such acts.<sup>255</sup>

In the ICC’s statute, grave breaches consist of any of the enumerated acts when committed against a protected person.<sup>256</sup> In accordance with the ICTY *Tadić* Appeal Judgment, a protected person may be of the same nationality as the perpetrator so long as he is of the adverse party.<sup>257</sup> While the 1949 Geneva Conventions fails to list rape in particular as a grave breach, the ICTY has charged and prosecuted crimes of sexual violence, as such, as grave breaches.<sup>258</sup> Two grave breaches, in particular, are relevant to the discussion of sexual violence. The first is torture or inhuman treatment, including biological experiments. The second is willfully causing great suffering, or serious injury to body or health.

Torture, as a grave breach, requires the infliction of severe pain or suffering, whether mental or physical, for a prohibited purpose.<sup>259</sup> However, the official-capacity requirement, which is found in the Con-

<sup>251</sup> *Id.* art. 8(2)(b).

<sup>252</sup> *See supra* notes 19 and 21.

<sup>253</sup> The other is serious violations of Article 3 common to the four 1949 Geneva Conventions, not, as with international armed conflicts, grave breaches of the Geneva Conventions.

<sup>254</sup> Geneva Convention I, *supra* note 21, arts. 49–50; Geneva Convention II, *supra* note 21, arts. 50–51; Geneva Convention III, *supra* note 21, arts. 129–130; Geneva Convention IV, *supra* note 21, arts. 146–147.

<sup>255</sup> Geneva Convention I, *supra* note 21, art. 49; Geneva Convention II, *supra* note 21, art. 50; Geneva Convention III, *supra* note 21, art. 129; Geneva Convention IV, *supra* note 21, art. 146.

<sup>256</sup> Rome Statute, *supra* note 135, art. 8(2)(a).

<sup>257</sup> *Tadić*, Appeal Judgment, Case No. IT-94-1-A, ¶ 166.

<sup>258</sup> *Furundžija*, Judgment, Case No. IT-95-17/1-T, ¶ 172; Prosecutor v. Haradinaj et al., Case No. IT-04-84-I, Indictment (Mar. 4, 2005) [hereinafter *Haradinaj et al.*, Indictment].

<sup>259</sup> *Delalić et al.*, Judgment, Case No. IT-96-21-T, ¶¶ 442, 470–72.

vention Against Torture,<sup>260</sup> is absent for war crimes in the ICC. This is due to the different natures of public international law, which is predicated largely on acts attributable to the state, and international criminal law, which is predicated on attributing acts not to a state but to individuals.<sup>261</sup> Although rape and other forms of sexual violence are not listed expressly as grave breaches in the Geneva Conventions or in the *ad hoc* Tribunals' respective statutes, both Tribunals held that sexual violence can constitute a grave breach of torture and inhuman treatment,<sup>262</sup> as the ICTY did for the grave breach of willfully causing great suffering, or serious injury to body or health.<sup>263</sup> Indeed, despite not having listed rape as a grave breach in either the ICTY's authorizing instrument or the Geneva Conventions, the ICTY directly charged rape as a grave breach in at least one case.<sup>264</sup>

## 2. OTHER SERIOUS VIOLATIONS OF THE LAWS AND CUSTOMS APPLICABLE IN INTERNATIONAL ARMED CONFLICT

In addition to grave breaches, the other relevant war crimes with respect to sexual violence in international armed conflicts are categorized as other serious violations of the laws and customs applicable in such conflicts. This category includes both broadly construed categories of crime (outrages upon personal dignity, in particular humiliating and degrading treatment)<sup>265</sup> and expressly listed types of sexual violence (rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or "any other form of sexual violence also constituting a grave breach of the Geneva Conventions").<sup>266</sup> The material elements for most of the latter war crimes are largely consistent with those same acts when committed as crimes against humanity, which have been discussed above and which will therefore not be repeated here.<sup>267</sup>

According to the ICC's statute, the serious violation of the laws and customs of war applicable in international armed conflict of outrages

<sup>260</sup> Convention Against Torture, *supra* note 97, art. 1.

<sup>261</sup> DE BROUWER, *supra* note 6, at 183 n.36.

<sup>262</sup> *Akayesu*, Judgment, Case No. ICTR 96-4-T, ¶ 597; *Furundžija*, Judgment, Case No. IT-95-17/1-T, ¶¶ 163, 171.

<sup>263</sup> Prosecutor v. Delalić et al., Case No. IT-96-21-A, Appeal Judgment, ¶ 427 (Feb. 20, 2001); *Tadić*, Appeal Judgment, Case No. IT-94-1-A, ¶ 171.

<sup>264</sup> *Haradinaj et al.*, Indictment, Case No. IT-04-84-I.

<sup>265</sup> Rome Statute, *supra* note 135, art. 8(2)(b)(xxi).

<sup>266</sup> *Id.* art. 8(2)(b)(xxii).

<sup>267</sup> See *supra* Section III.B.

upon personal dignity (including humiliating and degrading treatment) consists of two elements. First, the perpetrator must have humiliated, degraded, or otherwise violated the dignity of one or more persons.<sup>268</sup> Second, the severity of the humiliation, degradation, or other violation must have been of such a degree as to be generally recognized as an outrage upon personal dignity.<sup>269</sup> To clarify the second element, the Elements of Crimes state that “persons” can include dead persons, that the victim need not be personally aware of the existence of the humiliation, degradation, or other violation, and that the element takes into account the relevant aspects of the victim’s cultural background.<sup>270</sup> These elements are identical to the non-international armed conflict violation of Common Article 3 of outrages upon personal dignity.<sup>271</sup>

According to the ICC’s Elements of Crimes, to constitute a grave breach or another serious violation of the law and customs of war in an international armed conflict, sexual violence must fulfill two cumulative criteria. First, the conduct must have taken place in the context of and have been associated with an international armed conflict.<sup>272</sup> Second, “the perpetrator was aware of factual circumstances that established the existence of an armed conflict.”<sup>273</sup> No definition of international armed conflict is provided in the ICC’s statute or in its Elements of Crimes, though the latter does indicate that military occupations fall within international armed conflict.<sup>274</sup>

### 3. SERIOUS VIOLATIONS OF COMMON ARTICLE 3 (NON-INTERNATIONAL ARMED CONFLICTS)

Article 3, which is common to all four Geneva Conventions of 1949, provides an absolute minimum level of protection for individuals not taking active part in hostilities.<sup>275</sup> The ICTY has prosecuted rape and other forms of sexual violence as violations of Common Article 3’s pro-

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<sup>268</sup> Rome Statute, *supra* note 135, art. 8(2)(b)(xxi); Elements of Crimes, *supra* note 154, art. 8(2)(b)(xxi).

<sup>269</sup> Rome Statute, *supra* note 135, art. 8(2)(b)(xxi); Elements of Crimes, *supra* note 154, art. 8(2)(b)(xxi).

<sup>270</sup> Elements of Crimes, *supra* note 154, art. 8(2)(b)(xxi) n.49.

<sup>271</sup> Rome Statute, *supra* note 135, art. 8(2)(c)(ii); Elements of Crimes, *supra* note 154, art. 8(2)(c)(ii).

<sup>272</sup> Elements of Crimes, *supra* note 154, art. 8(2)(e)(vi)-6.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* art. 8(2)(a)(i)(4) n.34.

<sup>275</sup> Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, para. 218 (June 27).

hibitions on cruel treatment, torture, and outrages upon personal dignity, including humiliating and degrading treatment.<sup>276</sup> The ICC's statute also prohibits these acts.<sup>277</sup> The ICTY held that rape, forced fellatio, threats of sexual mutilation, forced public nudity, and sexual exploitation can amount to outrages upon personal dignity.<sup>278</sup>

#### 4. OTHER SERIOUS VIOLATIONS OF THE LAWS AND CUSTOMS OF WAR APPLICABLE IN NON-INTERNATIONAL ARMED CONFLICT

As in cases involving international armed conflict, in cases involving non-international armed conflict a residual category of prohibited conduct exists. This category consists of other serious violations of the laws and customs of war. The ICC's statute expressly includes within this category "rape, sexual slavery, enforced prostitution, forced pregnancy . . . enforced sterilization, and any other form of sexual violence also constituting a serious violation" of Common Article 3.<sup>279</sup> The material and mental elements of these crimes are the same in non-international armed conflicts as they are in international armed conflicts, which were discussed above.<sup>280</sup> While the ICC's statute for the first time expressly prohibits rape as a stand-alone war crime, rape was nonetheless prosecuted as such in the *ad hoc* Tribunals as well.<sup>281</sup>

As to the situational predicate, according to the ICC's statute, to constitute a serious violation of Common Article 3 or another serious violation of the law and customs of war in a non-international armed conflict, sexual violence must fulfill two cumulative criteria. The first is that the conduct must have taken place in the context of and was associated with a non-international armed conflict.<sup>282</sup> The second criterion is that "the perpetrator was aware of factual circumstances that established the existence of an armed conflict."<sup>283</sup>

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<sup>276</sup> *Kunarac et al.*, Judgment, Case No. IT-96-23 & 23/1-T, ¶¶ 400, 405–06.

<sup>277</sup> Rome Statute, *supra* note 135, art. 8(2)(c).

<sup>278</sup> DE BROUWER, *supra* note 6, at 214.

<sup>279</sup> Rome Statute, *supra* note 135, art. 8(2)(e)(vi).

<sup>280</sup> See *supra* Sections III.B.1, III.B.3–6, and III.C.2.

<sup>281</sup> See, e.g., *Kunarac et al.*, Appeal Judgment, Case No. IT-96-23 & 23/1-A.

<sup>282</sup> DE BROUWER, *supra* note 6, at 220.

<sup>283</sup> *Id.*

## CONCLUSION

Despite recent advances, international law currently fails to deter and punish adequately crimes of sexual violence against men in armed conflict.<sup>284</sup> This failure stems in part from the broader geopolitical system in which international law operates. International criminal law, in particular, is but one option policy-makers at the international level may employ to deter and punish those responsible for some of the worst atrocities. Guided by normative values that promote individual criminal responsibility, international criminal law operates in a highly politicized global environment in which policy-makers may choose to implement international criminal law enforcement mechanisms in some situations but not in other, seemingly analogous situations.<sup>285</sup> This decision may turn, in part, on the strategic interests of individual states, especially states with disproportionately more power to influence the decision whether to implement such mechanisms.<sup>286</sup>

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<sup>284</sup> This is not to suggest that international criminal law adequately protects women from sexual violence. It does not. As Kelly Dawn Askin states, in appropriately sex-neutral terms:

Despite its insidious prevalence during armed conflict, even the most notorious or egregious cases of sexual violence are typically committed with absolute impunity . . . an overwhelming majority of perpetrators or facilitators of sexual violence are not held accountable for their crimes and few survivors ever receive justice or any other form of accountability or reparation, must less medical, psychological, or financial redress.

Askin, *The Quest for Post-Conflict Gender Justice*, 41 COLUM. J. TRANSNAT'L L. 509, 520 (2003).

<sup>285</sup> As one commentator observes:

The subject of international criminal law is benighted by strong elements of paradox. On the face of things, the Rule of Law has been strengthened by a proliferation of international criminal tribunals . . . But the picture includes negative elements. In some situations, the creation of a Tribunal has appeared to substitute for more effective preventive action by the international community . . . Moreover, in the case of the ICTY the creation of the Tribunal was associated with a specialized political campaign to destabilize the multi-ethnic State of Yugoslavia, with the ultimate aim of bringing about 'regime change' in Serbia.

BROWNLIE, *supra* note 145, at 575.

<sup>286</sup> Some commentators contend that the U.S. intervenes in some humanitarian situations (such as the former Yugoslavia) but not in others in order to protect and promote a certain political ideology that is predicated, at least in part, on patriarchal notions of guardianship. Augusta del Zotto & Adam Jones, *Male-on-Male Sexual Violence in Wartime: Human Rights' Last Taboo?*, paper presented to the Annual Convention of the International Studies Association (ISA), New Orleans, Louisiana (March 23-27, 2002), available at <http://adamjones.freeservers.com/malerape.htm> (last visited May 22, 2008). Del Zotto and Jones state:

[T]he regime of humanitarian assistance forms a complex network reflecting well-defined strategic interests. In terms of war and sexual violence, the nexus leads to a



Even though its enforcement mechanisms may not be invoked frequently, international criminal law provides an important normative and legal framework to deter and punish those most responsible for the worst atrocities. Indeed, much of the *ad hoc* Tribunals' sexual-violence jurisprudence attests to the way international criminal law may develop to better, if not perfectly, address the perpetrators of the most egregious crimes perpetrated during armed conflict. Rape is now recognized in international criminal law as a severe violation of an individual's physical and mental integrity and his or her sexual autonomy. This evolution crystallized only after numerous charges of sexual violence against women—and, to a lesser extent, men—were successfully prosecuted.<sup>287</sup> Yet, much remains to be done, especially with regard to sexual violence against men in conflict settings.

To provide men enhanced protection against sexual violence in armed conflict, treaty drafters, jurists, prosecutors, and scholars should be cognizant of at least three interrelated issues. First, they should recognize how existing international law may reify and reinforce certain stereotypes and norms that may both fuel such violence in the first place and lead to its underreporting. As demonstrated previously, international instruments tend to conceptualize sexual violence as something perpetrated primarily against women and children. These conceptions flow from harmful stereotypes of femininity and masculinity and from pernicious cultural norms regarding sexuality, especially same-sex sexual behavior.<sup>288</sup> The initial step in providing enhanced protection must therefore be to, at a minimum, explicitly recognize that men also suffer sexual violence in conflict settings.

Second, to delegitimize the harmful stereotypes and norms that fuel such violence,<sup>289</sup> treaty drafters should use the definition of sexual violence laid out earlier, in which sexual violence includes attacks directed at an individual's perceived, imputed, or actual sexuality.<sup>290</sup> Criminalizing attacks targeting an individual's sexuality would work toward

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highly-gendered provision of services conforming to the re-emerging paternal political identity. The U.S. constructs a role as a protective father-figure, rescuing women in distress from hostile, sexually aggressive forces.

*Id.* See also BROWNIE, *supra* note 145, at 575 (concluding that “[p]olitical considerations, power, and patronage will continue to determine who is to be tried for international crimes and who [is] not”).

<sup>287</sup> See *supra* Sections III.

<sup>288</sup> See *supra* Sections I.A.

<sup>289</sup> *Ibid.*

<sup>290</sup> See *supra* Introduction and Section I.A.

delegitimizing the destructive stereotypes attending heterosexuality and homosexuality in wartime,<sup>291</sup> stereotypes that provide some of the motivation for men (and women) to commit sexual violence against men. Such explicit recognition in international instruments would also put potential perpetrators on notice that sexual violence against men is just as serious a crime as it is against women. Moreover, such recognition would provide male victims with a vocabulary to articulate their experiences. And, as a related effect, explicit recognition would help ensure that more humanitarian-aid workers and doctors in the field may recognize and thereby better treat such violence.

Third and last, the postulated *jus cogens* norm prohibiting rape<sup>292</sup> should encompass all forms of sexual violence committed against both sexes in armed conflict and should use a definition of sexual violence that includes targeting an individual's perceived, imputed, or actual sexuality. Such an expansion would reflect the seriousness of these additional forms of sexual violence, as well as their range. A norm with a *jus cogens* character may also provide a universal jurisdiction regime against perpetrators of all forms of sexual violence in conflict settings. Additionally, broadening sexual violence as a *jus cogens* norm would call attention to an area of international law that has, to date, been neglected by international actors. Lastly, such a broadening could provide male victims of sexual violence in armed conflict a mechanism to obtain asylum or refugee status.<sup>293</sup>

These changes are necessary so that men may be rightfully recognized, alongside women and children, as victims of sexual violence in armed conflict. Unless and until such recognition is obtained, an entire category of victims will remain unnoticed while their perpetrators remain unpunished.

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<sup>291</sup> See generally Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential for International Criminal Law*, 43 STAN. J. INT'L. L. 39 (2007).

<sup>292</sup> See *supra* Section II.D.

<sup>293</sup> See *supra* note 148 and accompanying text.