Male victims of wartime rape and the constructions of masculinity

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Male rape victims and the wartime constructions of masculinity

**List of Abbreviations**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AP I-II</td>
<td>Additional Protocol I-II of 1977 to the GCs of 1949</td>
</tr>
<tr>
<td>EU ICS</td>
<td>European Crime and Safety Survey</td>
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<td>GCs</td>
<td>Geneva Conventions (I-IV) of 1949</td>
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<tr>
<td>IAC</td>
<td>International Armed Conflict</td>
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<td>ICC</td>
<td>International Criminal Court</td>
</tr>
<tr>
<td>ICRC</td>
<td>International Committee of the Red Cross</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<td>ICVS</td>
<td>International Crime Victims Survey</td>
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<td>IHL</td>
<td>International Humanitarian Law</td>
</tr>
<tr>
<td>LOIAC</td>
<td>Laws of International Armed Conflicts</td>
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<tr>
<td>NIAC</td>
<td>Non-International Armed Conflict</td>
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<td>ROE</td>
<td>Rules Of Engagement</td>
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<td>SC</td>
<td>(United Nations) Security Council</td>
</tr>
<tr>
<td>SCSL</td>
<td>Special Court for Sierra Leone</td>
</tr>
</tbody>
</table>
Table of Contents

List of Abbreviations .............................................................................................................. 2
Abstract ................................................................................................................................. 5
Sammanfattning (Swedish) .................................................................................................... 6

1. Introduction ..................................................................................................................... 7
  1.2 Aim .................................................................................................................................. 8
  1.3 Limitations of essay ....................................................................................................... 8
  1.4 Methods and material .................................................................................................. 9
  1.5 Disposition ................................................................................................................. 11
  1.6 Theoretical Benchmarks ............................................................................................ 11
    1.6.1 Challenges ............................................................................................................. 12

2. International Humanitarian law ...................................................................................... 14
  2.1 Internal armed conflicts .............................................................................................. 15
    2.1.1 Definition and applicable rules ............................................................................. 15
  2.2 War Crimes ................................................................................................................ 16
  2.3 Rape as a War Crime .................................................................................................. 16
    2.3.1 The nexus between the act and the armed conflict ............................................. 18
    2.3.2 Perpetrators and victims of war crimes .............................................................. 19
  2.4 Individual criminal responsibility ............................................................................. 20
  2.5 Customary law .......................................................................................................... 22
  2.6 Definition of wartime rape ........................................................................................ 23
    2.6.1 Coercion and Consent ......................................................................................... 24

3. Discussion ....................................................................................................................... 25
  3.1 Male victims of rape ................................................................................................... 25
    3.1.1 Protection and Prohibition .................................................................................... 25
    3.1.2 Definition of the act ............................................................................................. 27
  3.2 Constructions of masculinity in wartime .................................................................... 30
Male rape victims and the wartime constructions of masculinity

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.2.1</td>
<td>Judicial Decisions</td>
<td>31</td>
</tr>
<tr>
<td>3.3</td>
<td>Influences on constructions of masculinity</td>
<td>33</td>
</tr>
<tr>
<td>3.3.1</td>
<td>Rape provisions</td>
<td>33</td>
</tr>
<tr>
<td>3.3.2</td>
<td>Case law</td>
<td>36</td>
</tr>
<tr>
<td>4.</td>
<td>Conclusion</td>
<td>37</td>
</tr>
<tr>
<td>5.</td>
<td>Bibliography</td>
<td>41</td>
</tr>
</tbody>
</table>
Male rape victims and the wartime constructions of masculinity

Abstract

This essay aims to analyze the rules governing internal armed conflict from a gender perspective. It will serve as an attempt to counterbalance some of the debate on wartime rape and reintroduce a focus on the male victim. Arguably, the male rape victim is formally included within international humanitarian law’s (IHL) protection and prohibition of rape. However, international humanitarian law can be said to enforce rather than develop the wartime constructions of masculinity because of the difference in linguistic opportunity between the male and female victims of rape. The discussion has been concerned with how wartime constructions of masculinity relate to a few judicial decisions. The case law of IHL can be said to develop constructions of masculinity, since male rape victims are recognized as such. The conclusion reached within this paper is personified by the importance of semantics in reference to rape as a term and crime. As stated, the inclusion of male victims depends on the interpretation of the law and is ultimately in the purview of prosecutors and judges. The selective case law on the subject has shown a development in favor of the male victim and an acceptance of male victims of wartime rape.
Sammanfattning (Swedish)

1. Introduction

To be treated equal before the law is one of the foundations of international and most national legislation and especially in reference to criminal proceedings. The enterprise of treating all individuals equal is commendable and rests upon the presupposed notion of law being equal. That law is equal or neutral has been contested not least by feminists, who see the law as inherently male and all provisions therein founded on a masculine perspective. This could most particularly be said of International Humanitarian Law (IHL), what more masculine area of law could there be than the law of armed conflicts? Perhaps none, but what further interests me is the possible equality therein. Could a man or a woman expect to be treated equal not only before the law but by the law? The issue of rape has been debated with a particular interest from a gender perspective with a focus on women in the early nineties of last century. The main focal point I draw from their arguments is that women were not treated equal before the law since the issue of rape was not prosecuted to the extent of other crimes of war. The objections rose high concerning the wording of the rape prohibition, which generally referred to the honor of women or family sanctity. As others have posed the question of men in connection to sexual assault, not many have placed men in the victim’s position and to my knowledge, only in the last couple of years. If a man was the victim of rape in an armed conflict, would be afforded the same considerations as a woman? Or will he become a victim of war, a civilian casualty no different from those who were injured by cluster munitions,

Male rape victims and the wartime constructions of masculinity

mines or hostile fire? I will examine whether the law of armed conflicts accommodates the male victims of rape and the relation to the wartime constructions of masculinity.

1.2 Aim

The aim of this essay is to analyze war crimes provisions on rape in the context of internal armed conflicts and especially focusing on male victims and the wartime construction of masculinity.

- Are male victims included or excluded in relation to the wartime definition and criminalization of rape?
- How do judicial decisions relate to construction of masculinity in cases concerning male victims of rape?
- Could the case law and/or provisions on rape be said to enforce or develop constructed masculinities?

1.3 Limitations of essay

The purpose of this essay is primarily that of internal armed conflicts as such the regulation of international armed conflicts (IAC) will not at large be debated. The rules applicable in international armed conflict will however be mentioned in terms of mainly contemporary customary law, when the field of application includes that of Non-International Armed Conflict (NIAC). The contemporary element will largely be based on those rules and regulations that are applicable in the internal conflicts of today. However, conventions of a more historic date will be mentioned where they still are relevant or with the purpose of a brief historical background. The protection of men as civilians and combatants no longer taking part in hostilities (hereinafter civilians) will be the main focal point.

This essay does not focus on the reason for rape, rather the effect of the act, which could be said to coincide - since the desired effect of an act is most usually the purpose of committing said act. In regards to the gender perspective and thus the construction of masculinities the limitations would include that of age. The author makes no explicit reference to the question of age but wishes to reaffirm that this is another question entirely as it relates to somewhat different legal instruments, for example the Convention on the Rights of the Child. However, the author notes that human beings are all connected to the constructions of masculinity and femininity regardless of age and perhaps even more strongly during the childhood years.
Sexual assault is a term that within this essay is used to convey either an alternative terminology to rape or another incident or act of a sexually based assault. As with the terminology of war crimes, sexual assault has a general and a more specific meaning. Within this essay the terminology of both sexual assault and war crimes will predominantly be used in relation to the more narrow definition.

The case law appearing throughout this paper will largely be that from the International ad hoc Tribunals of Rwanda (ICTR) and former Yugoslavia (ICTY) and exceptionally from the Special Court of Sierra Leone (SCSL). In order to answer my second question I will concentrate on the cases containing the male victims of sexual assault. The number of referenced cases will be limited to two as the purpose of this essay is not to make a review of the ad hoc cases or find/prove a universal theory. The cases are selected because of their age or rather the time laps there between. Focus will be on the cases derived from ICTY since the ICTR has not at large in their cases debated male victims of sexual violence. I base this statement on my rough evaluation of the cases available on the ICTR’s website and it is not to say that I have conducted a thorough investigation especially since several cases are not available to the public.

1.4 Methods and material

The primary focus of this essay is in essential the rules governing hostilities, in effect international humanitarian law and as such a judicial branch of the international law spectra. The sources of international law are enumerated within article 38 of the Statute of the International Court of Justice. I will therefore initially examine the relevant conventions, namely the Geneva Conventions of 1949 (GC) and their Additional Protocols of 1977 (AP I-II). Customary law will thereafter, partly, be determined on the basis of the International Committee of the Red Cross’s customary law study as commenced in 1996 and partly through statements derived from the ad hoc tribunals of Yugoslavia, Rwanda and Sierra Leone.

The sources of international law naturally differ from those of national law, mainly because of the lack of division between the legislative and judicial entities. As seen in article 38 of the

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4 RC’s customary law study can be found at; http://www.icrc.org/customary-ihl/eng/docs/home (last visited 2011-11-30)
Male rape victims and the wartime constructions of masculinity

ICJ Statute, judicial decisions are to be employed as subsidiary and not as an actual source of law. Nevertheless, the customs of the national judicial system is not so easily abandoned; states still utilizes the judgments of the International Court of Justice. The judicial decisions will primarily serve as the empirical evidence of the factual application of the conventional and principally founded rules regarding the act of rape. Judicial decisions relating to IHL will primarily be derived from the international ad hoc tribunals as these are the main bodies which have actively exercised the judicial function in situations relating to internal armed conflict. However, regard will also be given the International Criminal Court (ICC) when relevant. As to the issue of national courts or military tribunals these will not be the primary source of judicial decisions since these court’s and tribunal’s decision to some extent could be influenced with a more uniform political agenda than their international counterpart.

Furthermore, since the issue of language in some instances poses a problem, I have chosen to focus solely on international courts and tribunals decisions, omitting also any regional or likewise judicial sentencing entity. Observance should however be made to the fact that national jurisprudence and legislation could and have served as guidelines for the international ad hoc tribunals and will in this sense, indirectly be included within the auspice of this essay.

The gender perspective which will be employed will chiefly be derived from academic research articles and other published works within the discourse of gender. This material will at large be the basis for the gendered analysis of the act of rape in the armed conflict setting. In regards to the specific material and research upon male victims and masculinity; the materials cited are not in their entirety derived from legal research or as such directly connected to internal armed conflicts. However, the author argues in the lines of Sivakumaran and the probability of the masculine norm as even more present in times of war as in peacetime. Therefore, the materials and research upon male victimization in relation to rape and masculinity in peacetime would be most relevant in regards to internal armed conflict and in regards to this essay.

Male rape victims and the wartime constructions of masculinity

1.5 Disposition

The first part of this essay will inevitably contain the introduction and more specifically the purpose, methodology and terminology used. I will further elaborate and define the gender perspective, which then will be applied throughout the entire paper.

The second part will thereafter expand upon the applicable laws in internal armed conflict and account for the criminalization of rape therein. On this subject the author has abandoned the perhaps usual “historical –paragraph” in favor of a more integrated approach. In relation to this I will further examine the definition of the act chiefly derived from judicial decisions of the ICTY and ICTR respectively.

Thirdly the examination of a limited selection of judicial decisions from the international ad hoc tribunals will be endeavored. Thereafter the author will debate whether the provisions on wartime rape enforce or develop the constructed masculinity during wartime.

1.6 Theoretical Benchmarks

The term gender is most often used to describe the socially recognized differences between men and women. There is, however, confusion as to what each reference to gender entail since the use of gender sometimes is equivalent to women and sometimes to both men and women. Gender in reference to this work, is not based on biological differences but on the cultural and social beliefs of what is masculine and what is feminine. Gender exists because the biological element does not determine the social elements. It is prudent to emphasize that socially prescribed roles relates to both men and women and they are equally affected by these roles although not with the same consequences. However, gender is a method of structuring social roles and not one specific method covering all social structures worldwide. Gender intersects with different benchmarks such as; class, race, nationality etc. and as such will invariably include different definitions of maleness or manhood as well as womanhood.

In an attempt to somewhat balance the prevailing literature and debate on rape in wartime, the gender perspective offered in this paper will focus on the male victims of rape. However, a

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7 See for example Ertürk, Yakin, Considering the role of men in gender agenda setting: conceptual and policy issues, Feminist Review. London: Nov 2004. , Iss. 78; pg. 3
9 Connell, R., W., Maskuliniteter, page 113,116
gender perspective encompasses many different aspects and theoretical backgrounds. One of
the more prominent elements is feminist theories of law which by definition focuses on
women and femininity. Feminist theories of law is not as such a homogenous group, to
mention a few; liberal, cultural, radical and post-modern feminism, where the latter is of the
most importance in relation to this essay. Post-modern feminist theorists of law have focused
on the contextual approach, the construction of femininity and masculinity because of law and
the use of language and its ability to filter our experiences. The core element of these theories
would be the first, the contextual approach rather than the universal truth. Among the post-
modern feminists is Carol Smart who has elaborated on the misconception that law only
operates in one way and as such give advantage to men and oppress women. She contends
that there are several different realities that go unnoticed by the law, not just women’s. 10

Since the focus of this essay is not feminism but rather ‘masculinism’, an analogy of the post-
modern feminist theory will serve as the basis for the gender perspective applied throughout
this essay. However, the analogy is not unfounded; firstly because of the preferred contextual
approach which can be interpreted as to include men and not only women and subsequently
relates to that of material justice rather than the more formal justice. Secondly, the subject of
gender traits i.e. masculinity and femininity is without question gender inclusive in relation to
men and masculinity. Thirdly, the issue of language as a filter and the importance thereof in
relation to both men and women would by the author also be uncontested as we are all
dependent on language in daily life as well as in legal disputes. Subsequently, these three core
elements of the feminist legal theory will be the point of departure, as well as focal point for
my discussion within the context of male rape victims.

1.6.1 Challenges

The most debated gender issue during war is perhaps the act of rape and mainly in terms of
women victims and male perpetrators. Lately, however, the debate has been influenced by the
gender perspective upon male victims of sexual abuse. These new additions has been met by
hostilities and some feminists fear the lessening of importance in regards to women victims
and the element of gendered power abuse. 11 There is also a tendency within the international

10 Charlesworth, H., Chinkin, C., The boundaries of international law – A feminist analysis,. Page 38-45, Smart,
Carol, Feminism And The Power Of Law, Taylor & Francis Routledge, 2002, 75
11 See for a summary of the objections Quênivet, N. N. R., Sexual Offenses in Armed Conflict & International
Male rape victims and the wartime constructions of masculinity

law doctrine to solely focus on women even though the terminology used is gender. The dichotomy between men and women will gain even steadier ground and so to emphasize women’s social roles will render the gender perspective a character of feminism, which form my viewpoint is neither the whole picture nor the desired effect. It is clear that the judicial realm and especially the international one is and has been dominated by men and their views, perspectives and language. It is natural to assume the role of the women and point to all the inequities and ignorance that has prevailed and justifiably do so. However, in the authors view, there’s also thereby a tendency to use and strengthen the dichotomies men and women even within the gender discipline. It is important to note Connell’s wise words in this context and that gender and thus the construction of masculinity and femininity are neither irrefutable nor constant, but a development within each context; community, culture and law. This notion of a constant development is shared by the author and will prevail within the gendered discussions below.

Masculinity is no more than femininity a uniform entity and perhaps containing even more layers and internal strife. The concept of hegemonic masculinity is vital when debating the constructions of masculinity within society, war and law. Hegemonic masculinity is basically the top of a conical environment, mainly based on the assertion of power, where the men encompassing the true hegemonic masculine features are the outmost cherished and idealistic part of the male population. The development of the Hegemonic Masculinity is closely connected to that of military development. Jones argues that since armed conflict is in itself an extreme environment, as are the military preparations beforehand, military masculinity is inherent extremist and therefor a clear base for hegemonic masculinity. The author concurs in that hegemonic masculinity is competitive, warrior and victorious masculinity.

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2. International Humanitarian law

Law of International Armed Conflict (LOIAC) or as it is most commonly known today, International humanitarian law, refers to treaties or custom that ultimately aims at solving humanitarian problems arising from armed conflict.\textsuperscript{15} IHL has developed from early codes of conduct for the honorable knight, to the “Hague Law” and “Geneva Law”. Treaties that govern situations of armed conflict and in effect the conduct of hostilities (jus in bello) and the protection of war victims. The “Hague Law”; Hague Conventions and Declarations of 1899 and 1907 has not in its entirety passed the test of time, and some such as The Hague Convention (IV) of 1907 has contemporary customary law status. The “Geneva Law”; Geneva Conventions for the protection of war victims was first adopted in 1864 under the auspice of The Red Cross and upon the initiative of H. Dunant. The Geneva Conventions or “Red Cross Conventions” were revised several times and the contemporary versions are those of 1949. The Additional Protocols of 1977 (AP I-II) supplements the Geneva Conventions 1949 and incorporates many provisions that originate from the “Hague Law”. The classical division between Hague and Geneva Law is not at large upheld in contemporary practice or doctrine and the subsequent term used is International Humanitarian Law. The terminology may however vary since for example Dinestein disapproves of the IHL term as well as the more traditional Laws of Warfare, since it does not fully relate the contents of the vastly different rules within the norm complex. Nevertheless, in this essay the terminology used will primarily be that of IHL since the theme in its essences is humanity or perhaps the lack thereof.

It is furthermore important to distinguish the \textit{jus in bello} (IHL) from the \textit{jus ad bello} (legality of the use of force), as well as the Rules of Engagement (ROE) that some countries enact.\textsuperscript{16} Noteworthy is also that there lies a distinction between International Human Rights Law and Humanitarian Law. Fundamentally, IHL is only applicable in times of armed conflict whereas International Human Rights Law will always be applicable, even if some degree of derogation


See explicitly the preamble of the St. Petersburp Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight which marked a landmark evolution in 1868.

\textsuperscript{16} Dinestein, Y., \textit{Conduct of Hostilities under the Law of International Armed Conflict}, Cambridge University Press West Nyack, NY, USA, Page 2, 4 -14
Male rape victims and the wartime constructions of masculinity

is accepted in times of war, where the “Human Rights” provisions enshrined in IHL will take over.\(^{17}\)

2.1 Internal armed conflicts

2.1.1 Definition and applicable rules

The definition of an internal armed conflict is first and foremost that it is not a conflict between two or more states. Thereby establishing the higher threshold, and as to the lower threshold; this is where the territorial sovereignty of states becomes an issue.\(^{18}\) The adapting of common article three in the Geneva Conventions established for the first time in international law rights and responsibilities for insurgents and belligerents. However, it did not clarify the definition of an internal armed conflict or the necessary criteria for the article’s application, which in effect meant that states could virtually deny the presence of armed conflicts on their territory.\(^{19}\)

The undeniable fact that the contemporary armed conflicts are internal has also given the basis for the formulation of rules specifically pertaining to internal armed conflicts. This process has been slow and it was not until 1977 that Additional Protocol II to the Geneva Conventions came to be.\(^{20}\) The protocol’s material field of application can be found in article one and its reference to the first protocol’s introductory article reaffirms the higher threshold of internal armed conflict i.e. international armed conflict. The lower threshold of the protocol limits the application to armed conflicts between the government’s armed forces and dissident armed forces or insurgents. It does not cover conflicts arising between such groups unless government forces are involved.

In regard, only to the treaty based regulations of armed conflict, there is a substantial amount which only refers to international armed conflict without its counterpart in the context of internal armed conflict. For instance the right to become prisoner of war is only afforded

19 Haye, Eve La, War Crimes in internal armed conflicts, page 41-42
Male rape victims and the wartime constructions of masculinity

combatants in international armed conflict and these provisions claim a whole convention. However, there are a formidable part of these rules that has deemed to be of customary law dignity.

2.2 War Crimes

War Crimes as a general term would include crimes against peace and humanity as well as the more narrow definition of war crimes. War crimes are in the narrow definition contradistinctive to both crimes against humanity and crimes against peace. The crucial element of war crimes in regards to internal armed conflicts is the connection; the nexus to the armed conflict. Without a nexus to the conflict in question the perpetrator should thus be tried under domestic law.

2.3 Rape as a War Crime

"War Crimes - namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to Wave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity."

War Crimes in the narrow sense were defined in article 6(b) of the Nuremberg Charter and as obvious; it did not include rape in the enumeration. The most recent international instrument to define war crimes of sexual violence, including rape, is the statute of the International Criminal Court and its article 8. In respect of non-international armed conflicts and war crimes the ICC has jurisdiction over serious violations of article three common to the Geneva

22 See ICRC’s customary law study at: http://www.icrc.org/customary-ihl/eng/docs/home (last visited at 2012-01-12)

16
Male rape victims and the wartime constructions of masculinity

Conventions and other serious violations of the laws and customs of war applicable in Non-International Armed Conflict. 27 The statute of ICC also defines internal armed conflict and said definition is consistent with that in previous treaties in regard to the higher threshold. However, the statute includes the scenario where two or more dissident groups are in conflict even if the government forces are not involved, deviating from the threshold provision in AP II. 28

The term Grave Breaches of the Geneva Conventions is not applicable in times of internal armed conflict since this term explicitly refers to those actions listed within the paragraph, protocol and conventions relevant to international armed conflict. 29 The choice of the wording “grave breaches” was intended to relieve some of the problems that might arise from using the crime terminology. The motivation was that crime was defined differently within each national legislative context and as such would create problems when interpreted and applied. However, the grave breaches terminology has in itself caused confusion and has been an issue of hard debate since the conventions does not list rape or sexual violence as a grave breach. 30 Rape has, contrary to the view supported by some feminists been prohibited for a long period of time, even though it is not always explicit, as is the case of The Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907. The closest this convention comes to prohibit rape is its 46th article on honor and rights of the family. However, as Bassiouni notes; the honor and rights of the family is considered to be a euphemism, and that this provision in the light of past linguistic use, prohibits rape and other forms of sexual assault. 31

27 ICC statute article 8(2)(c,e)
28 ICC statute article 8(2) (f)
29 Econtrario ICC statute article 8(2)(a,b) and for example art 147 Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949
30 See for a full account Dinestein, Y., Tabory, Mala, (Ed) War Crimes in International Law, Published under auspice of the Buchmann Faculty of Law, Tel Aviv University, Kluwer Law International, The Hague, ISBN:90-411-0237-x, page 156 -166
Male rape victims and the wartime constructions of masculinity

2.3.1 The nexus between the act and the armed conflict

The ICTY has elaborated on the requirements of nexus to the armed conflict in the Tadic Case, Mucic et al. Case and Kunarac Case. The court held in the Tadic Case that the act must have an obvious link to the armed conflict. However, the hostilities need not have taken place in the immediate surroundings of the alleged crime in question;

“It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.”

Moreover the court concluded that the hostilities could have ceased and that international humanitarian law would be applicable until such a time as when “a peaceful settlement is achieved”. When determining whether the alleged crime is sufficiently connected to the conflict the court relies upon, inter alia, the following factors;

- “the fact that the perpetrator is a combatant;
- the fact that the victim is a non-combatant;
- the fact that the victim is a member of the opposing party;
- the fact that the act may be said to serve the ultimate goal of a military campaign;
and;
- the fact that the crime is committed as part of or in the context of the perpetrator’s official duties.”

The nexus between the act and the armed conflict has thus been seen as primarily jurisdictional. However, the ICTY has concluded that the jurisdictional importance does not per se exclude the same prerequisite as an element of crime. Whether the armed conflict is internal or international is relevant to the jurisdiction as well as the act’s nexus to the conflict. The perpetrators knowledge thereof is a core element of the principle of individual guilt i.e.

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33 Prosecutor v. Zejnil Delalic Zdravko Mucic And Hazim Delic Esad Landzo(Mucic et al.) (Trial Chamber Judgment) Case No.: IT-96-21-T, para 196-7, reaffirmed by the Appeals Chamber Judgment in Kunarac Case No.: IT-96-23 & IT-96-23/1-A, para 57.
34 Kunarac, Appeals chamber Judgment, Case No.: IT-96-23 & IT-96-23/1-A paras 58-59.
35 As cited by the Trial Chamber in the Tadic Case, para 573.
37 Kunarac, Appeals Chamber Judgment, para 59.
38 Tadic, Appeals Chamber Judgment, para 249.
Male rape victims and the wartime constructions of masculinity

the presumption of innocence. The perpetrator can only be convicted for a crime if his *mens rea* (mental element/intentions) contains the *actus reus* (factual element) of the crime.

“The perpetrator only needs to be aware of factual circumstances on which the judge finally determines the existence of the armed conflict and the international (or internal) character thereof.”

The task of the judges is thus to determine the legal character of the factual circumstances. The ICC Elements of Crimes does accordingly not demand a legal evaluation of the circumstances by the alleged perpetrator. The perpetrator need not be aware of the factual circumstances that determine the character of the conflict, only the existence of an armed conflict.

2.3.2 Perpetrators and victims of war crimes

It is generally accepted in the legal doctrine and judicial decisions that the perpetrator of war crime can be either civilian or combatant. The ICTR elaborated upon the class of perpetrators in regards to violations of GC’s common article three and AP II. The Trial Chamber in the *Akayesu Case* reached the conclusion that the person in question should in the broadest sense be holding public authority and as such be representing the Government. The Appeals Chamber contended that the Trial Chamber had erred in their judgment and that they reached a conclusion which in essence deviated from the principles of international law laid down by the Nuremberg Tribunal. The principle in question determines that;

“Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.”

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40 *Naletilic*, Case No.: IT-98-34-A paras 109-22.
42 Haye, Eve La, *War Crimes in internal armed conflicts*, page 115 and see especially the works cited under note 67 and Akayesu Trial Chamber Judgment paras 633-4.
43 Akayesu, Trial Chamber Judgment, paras 630 – 34.
Male rape victims and the wartime constructions of masculinity

The court concluded that respect for international humanitarian law would be eroded if certain categories of persons were to be excluded from individual criminal responsibility. The widely held opinion in doctrine and judicial decisions does not necessitate the perpetrator to be connected to the armed groups of the conflict but the act should in some way be linked to the armed conflict.

The category that can be deemed victims of war crimes are both civilian and military personnel. However, an active combatant would not be said to be a victim of war since the inherent nature of war encompasses hostilities and the military goal of rendering the opponent unable to carry out military action. However, a combatant might be classified as a victim of a war crime if it indeed a war crime were committed against him or her. Those protected categories in the Geneva Conventions of 1949 and AP of 1977 are in effect those who may become victims of war crimes. This would include those not taking active part in hostilities and those who no longer do, for example a combatant who has laid down his arms. The requirement of the victims nationality being different than that of the perpetrator has somewhat lost its foundation. This is primarily due to the diverging nature of contemporary conflicts in relation to the previously prevalent conflicts between two states. According to the Appeals Chamber of ICTY the important distinction is not nationality but ethnicity.

Under these circumstances the violation of the laws and customs of war i.e. war crimes would be applicable in internal conflicts as well as those of an international character. This follows logically from the obligation placed upon belligerents and alike, to adhere to the laws and customs of war; international humanitarian law.

2.4 Individual criminal responsibility

International criminal responsibility for individuals was incorporated into the London and Tokyo Charters and was subsequently confirmed in the General Assembly by the adoption of “Affirmation of the Nuremburg principles”. However, the fundamental part of individual criminal responsibility; “the general part” as Bassiouni refers to, is not fully developed within

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47 Haye, Eve La, War Crimes in internal armed conflicts, page 117 see also Case No. SC/SL-04-15-T para 1300.
48 See for example art 1 of AP II.
49 Tadic, Appeals Chamber Judgment, para 166.
50 Haye, Eve La, War Crimes in internal armed conflicts, page 119.
51 See article 6 of the London Charter, and Affirmation of the principles of international law recognized by the Charter of the Nurnberg Tribunal; A/Res/95(I), (1946).
Male rape victims and the wartime constructions of masculinity

international criminal law nor when it comes to the more specific war crimes. That is to say that there are ample provisions on the material part of a crime but not always a reference to the mental element nor the causality or penalty. This has lately been amended, or at least attempted, within the articles of the ICC statute. IHL can entail individual criminal responsibility specifically for the grave breaches listed in article 147 of the Geneva Convention IV 1949. Additional Protocol II, governing situations of internal armed conflict, does not include a provision of individual criminal responsibility for violations committed during these conflicts. However, the act of rape is prohibited in terms of “outrages upon personal dignity” within the fourth article of AP II. The protected persons are listed in the first paragraph and include those who do not take active part in hostilities whether they have ceased taking part or never took part. In common article three there is an implicit prohibition of rape within the article’s prohibition of violence to life and person, cruel and inhumane treatment, torture and outrages upon personal dignity. Violations of common article three were first seen criminalized as war crimes in the statute of ICTR and has been confirmed by the Security Council on the basis that it was already criminalized as a crime against humanity. In the Tadic case the ICTY found it confirmed that serious violations of common article three inflicts criminal liability on the basis of customary law. In the Furundzija case the chamber concluded;

"It is indisputable that rape and other serious sexual assaults in armed conflict entail the criminal liability of the perpetrators."

As a stand- alone war crime, rape was first prohibited within the ICC Statue. Earlier acts of rape were prosecuted as war crimes under the heading of for example torture or outrages

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52 See Bassiouni, Cherif M., Crimes Against Humanity; Historical evolution and contemporary application, pages 472, 506-7.
53 Prosecutor v. Anto Furundzija, (Trial Chamber Judgment) para 166.
56 Prosecutor v. Anto Furundzija, Case No.: IT-95-171-T (trial judgment) para 169.
57 Lewis, Dustin, A., Unrecognized victims: sexual violence against men in conflict settings under international law, Wisconsin International Law Journal Vol.27 issue 1 page 46., document can be found at; http://hosted.law.wisc.edu/wilj/issues/27/1/lewis.pdf
upon personal dignity\textsuperscript{59}. Important to note is that to prosecute rape as torture or genocide, the act must in fact fulfill the criteria for either torture or genocide i.e. the rape must also include elements that correlates to the elements of the crimes torture or genocide.\textsuperscript{60}

\textbf{2.5 Customary law}

While the treaties regulating internal armed conflicts can be found minimalistic the customary law on the subject is far more wide stretched. The International Committee of the Red Cross (ICRC) has been given the mandate by member states to conduct a thorough research on the subject of customary international law of IHL in relation to both international and internal armed conflicts. So far it has concluded that 161 rules are of customary law dignity and applicable in all forms of armed conflict. Rule 93 expressly prohibits rape and all forms of sexual violence and is recognized as a rule of customary law in both IAC and NIAC.\textsuperscript{61}

The conclusion that rape is prohibited as a norm of customary international humanitarian law has been confirmed by the Appeals Chamber in the jurisdiction decision in the \textit{Tadic Case} as by the Chamber in the \textit{Akayesu Case}. The Chambers regarded both common article three and the “core provisions” (mainly those listed in article 4) of AP II to have status of customary law.\textsuperscript{62} The Geneva Conventions of 1949 and several other conventions of international humanitarian law are recognized as to having the status of international customary law, among others:

- The Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907,
- The Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, and
- The Charter of the International Military Tribunal of 8 August 1945.\textsuperscript{63}

\textsuperscript{58}\textit{Prosecutor v. Zejnil Delalic Zdravko Mucic, Hazimdelic Esad Landzoo, Case No.: IT-96-21-T} (trial judgment) para 943, See also \textit{Prosecutor v. Blagoje Simic, Miroslav Tadic and Siom Zaric, Case No. IT-95-9-T, ICTY, Trial Chamber Judgment, 17 October 2003, para. 772.

\textsuperscript{59}\textit{Prosecutor v. Anto Furundzija, Case No.: IT-95-17/1-T} (trial judgment) para 275.

\textsuperscript{60} See for example ICTY, \textit{Mucic et al. Case, Trial Chamber Judgement (para 941) and Kunarac et. al. Case, Trial Chamber Judgment, Case, para. 470, and Akayesu Case, Trial Chamber Judgment, para 122.

\textsuperscript{61} \url{http://www.icrc.org/eng/resources/documents/interview/customary-law-interview-090810.htm}, 2010-10-29

\textsuperscript{62} \textit{Tadic, jurisdiction decision, para 98 and 117 and Prosecutor v. Akayesu, Trial Chamber Judgment, para 610.

Male rape victims and the wartime constructions of masculinity

2.6 Definition of wartime rape

The act of rape has clearly been prohibited for quite some time. The issue at hand is rather the varying definitions of the act. Within the treaty law of the international humanitarian law complex there is no single specific definition of the act. However, in terms of prosecuting the violation of law; rape, there has been two very different approaches by the international tribunals for Rwanda and the former Yugoslavia, at least in theory. The elements of the crime have also on a later date been expressed in relation to the International Criminal Court and it’s Elements of Crimes;

“The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.”

The Akayesu definition – ICTR

The Akayesu definition of rape does not rely upon a description of a sexual intercourse in terms of body parts. The Chamber regards that rape is used to degrade, humiliate, intimidate etc. and that because of its similarity to torture it should not be limited by defining the mechanical or technical elements of the act. The common element between rape and torture is the violation of an individual’s dignity and should thus be phrased accordingly.

“The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”

The Furundzija definition – ICTY

The ICTY took on a different tact and described the mechanical and technical traits of rape. The Chamber considered that the following could be said to embody the objective elements of rape;

64 As seen above and See especially Article 44 of the 1863 Lieber Code which provides that all rape of persons in the invaded country is prohibited (as cited at: http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule93 (last visited 2011-11-18)) and also Meron, T., Shakespeare’s Henry the Fifth and the law of war, 86 American Journal of International Law (1992) 1 regarding violent attacks on non-combat women.
66 Prosecutor v. Akayesu, Trial Chamber Judgment, 2 September 1998, para 597
67 Prosecutor v. Akayesu, Trial Chamber Judgment, 2 September 1998, para 598
Male rape victims and the wartime constructions of masculinity

“(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.”

2.6.1 Coercion and Consent

The element of coercion and consent are the two yardsticks by which the act is defined as the crime of rape. \(^{69}\) The Trial Chamber in the Kunarac Case surveyed some national legislation on the crime of rape and reached the conclusion that most common law systems saw the sexual penetration without the victim’s free and genuine consent as rape and subsequently prohibited as much. This was admittedly found to be true for most non-common law systems as well. The court reached the conclusion that the core element of rape criminalization was the violation of an individual’s sexual autonomy. The coercive circumstances of armed conflict or the use of force can be used as evidentiary support in finding the consent inauthentic or forced according to the court. \(^{70}\)

\(^{68}\) Prosecutor v. Furundzija, Trial Chamber Judgment, 10 December 1998, para 185


\(^{70}\) Prosecutor v. Kunarac, Trial Chamber, Judgment, paras 453-460
3. Discussion

3.1 Male victims of rape

3.1.1 Protection and Prohibition

International Humanitarian Law includes two basic distinctions relevant for this essay; 1) that of international armed conflict and non-international armed conflict and 2) that of combatants and persons not or no longer taking part in the hostilities. While the first distinction depends on the state’s sovereignty the latter is by Gardam seen to be influenced by military and gender. She argues that as the military is the entity which gains from protection provisions for combatants, they do not gain anything by the corresponding provisions protecting civilians. Furthermore, she argues that women are doubly discriminated because of their inferiority as civilians in relation to the combatants and their subsidiarity to the male civilians. However, the rape provisions within APII and GC’s common article three are all in respect of those no longer or not taking part in the hostilities. This would in my mind obviously and formally include men and not only women.

Because of the by feminists often cited dichotomy between public and private and civilian and combatant, one could argue, contrary to Gardam, that these provisions actually focuses on women who are by a gender definition civilians. As it is one of the social roles ascribed to men and masculinity to engage in war or armed conflicts and not to be a civilian. However, the static presumption that all men in the “battling age” are or might be combatants is not always in their favor. As combatant in times of war or armed conflict, generally, one is far more vulnerable to violence and hostilities, since a combatant is considered a viable target. Due to the diverging nature of armed conflicts today it is possible to argue that the previous statement is not true as the main bulk of casualties in contemporary armed conflicts are civilians. In my mind it is apparent that even those proclaiming to have a gendered view

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73 See for example Hagay-Frey, Alona, Sex and gender crimes in the new international law; past, present, future, page 18-21.


75 See Mullins, Christopher, Conflict Victimization and Post-Conflict Justice 1945-2008, in The pursuit of International Criminal Justice(Bassiouni, Cherif M. ed.) cited in Bassiouni, Cherif M. Crimes against Humanity;
Male rape victims and the wartime constructions of masculinity

upon international humanitarian law more or less concludes that women are the likeliest victims in terms of civilian casualties and of wartime rape. This may be true in relation to numbers; I say may since the documentation on male victims of rape is scarce in relation to female victims. The actual number of rape victims is not known, and as such the relation between female and male victims is not known. Ergo; it would be in my opinion, unfounded to assume that women are more often victims – since the empirical data on the subject is either non-existent or does not include the male rape victims or simply fails to encompass the acts relevant to male victims, perhaps due to linguistic inadequacy.

On this subject the author wishes to note the linguistic peculiarity of rape and supports the idea of it being an element where the definition of rape is all but gender neutral. For instance, during the material research that forgo this paper, the author, as others have noticed the rather lack of material. This was especially true in regards of male rape victims in times of war – there seems to be general tendency to support the idea of women and girls being the most vulnerable to sexual assault. Thus, accordingly afford them the bulk of attention, both in statistical and doctrinal sense. However, and this is where it becomes an issue, the material increased when the search included reference points to “homosexual rape” and “sodomy” and “fellatio”. Therefore it is in line with the author’s argument and not just a matter of material discussion to observe the lack of gender-neutrality in terms of rape, since this terminology is not at large used when the victims are male. This controversy relating to the language has been given attention not least in Sivakumaran’s article on Sexual Violence Against Men in Armed Conflict. Sivakumaran summarizes some of the different reasons for the lack of knowledge and data on the subject and refers to the nonexistence of words to fully retaliate the acts and events suffered by male victims.

The handful of Security Council resolutions that has been given on the subject of sexual violence during armed conflict or on gender inclusiveness has for the most part focused on
Male rape victims and the wartime constructions of masculinity

Men has been mentioned in terms of children and their needs for protection which I as an author do not object to, since it is an understatement that children should be afforded protection from conflicts and especially so sexual violence. Nevertheless, I and Charlesworth see the same attempts at gender-neutral in the SC’s resolutions as in the doctrine and academic articles on the subject and the possible equivalence to the notion that; “gender is a female question”. This issue has been raised by Charlesworth where she objects to women being included on the basis of their femininity and their alleged peaceful quality, thereby restricting the endeavors by women to solely ordain as such.82

The term gender is, unbarked, what the society deems to be masculine and feminine traits and behavior and the two entities are each other’s neutral opposites, both in relation to status and opportunity. I argue that to even use the term gender-neutral is a contradiction in terms since the upper and lower part of a power structure can never be neutral, there is always going to be a more powerful and a less powerful entity. In my mind this can only be amended by narrowing the gap between the two entities i.e. including both which would make the preferable term gender-inclusive.

3.1.2 Definition of the act

In regards of the pure technicality of the act as defined in the Furundzija Case there is of course an explicit reference to the penetration of the vagina. Furthermore, the definition includes rape by instrumentalisation which by nature could refer to either biological sex as both victim and perpetrator.83 For the purpose of male victims this definition seems to be exhaustive when the perpetrator is male. However, in the case of a female perpetrator this definition of the act would not be fully acceptable, since she obviously does not have a penis. From a gender perspective this definition is of course more inclusive than the basic vaginal penetration by the use of a penis but, still reflects the inherent definition of women as victims and men as perpetrators. For this provision to fully encompass all possible acts of rape one should consider the possible female perpetrator both when the victim is male and female. A male victim might be forced to rape another person as seen in the last sentence of the Furundzija definition (ii) and if a woman forces a man to have; oral, anal or vaginal sex with

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83 See the Furundzija definition (i) (a) and the reference to; “…any other objects…”
her will she be seen as a rapist? Probably not, since the view on men and masculinity is to always want to have heterosexual intercourse, in fact they are deemed not to be able to control their sexuality according to the “pressure cooker” theory. The core provision of rape; penetration of the victims physical orifices is granted based on a stereotypical construction of masculine and feminine characters; thus connecting the receiving and passive victim to femininity and the aggressive and forcing perpetrator to masculinity. The only possible way to rape a man is thus to penetrate his anus or mouth – which the author finds misguiding and mainly based on the myth that men cannot ejaculate or get an erection under duress.

Nevertheless, this definition in Furundzija would be thought to exclude the possibility of a male victim who’s forced to penetrate a woman’s or a man’s orifices. This has been contested not least by the Cesic Case where the two brothers who were forced to perform fellatio on one another were considered as victims. The Special Court for Sierra Leone has also emphasized that men can be victims of sexual violence. From the author’s viewpoint it seems that the courts are more likely to accept male victims of rape and other sexual violence than the prosecutors, who at times fails to use rape and sexual assault charges when the victim is male.

However, to include these technical acts to the definition of rape could be rebutted by the concept that it is very unlikely or that the dominance of the act is inherent in the role of the penetrator and as such not applicable in the case of the penetrated. This argument coincides with the social roles prescribed within the contemporary society but in order to truly change, develop or understand the constructions of men and women there is a need to assimilate. The adaption of women as men has been proclaimed in a variety of areas but the possibility of seeing men as women is not so easily accepted, especially in terms of rape victims. This I argue is also an element of logic, it is natural to strive to the idealistic and powerful features; masculinity. It is thus illogical to strive to the lesser features i.e. femininity and victimization since these features does not convey power.

86 See Peel, M., pages 2069 f.
89 See *Prosecutor v. Mucic et al*, Trial Chamber Judgment, para 1066 and SCSL-04-15-T, para 1308( as noted above)
Male rape victims and the wartime constructions of masculinity

The definition in the Akayesu Case does not focus on the technicality or rather in the author’s view the biological technicality. Even if this seems more adapt and more ignorant towards the stereotypical roles of women and men – the definition could still be argued to be gendered. The described usage of rape as an invasion (“… intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person.”) could be viewed as inherently from a male perpetrator’s or a female victim’s point of view. The contradictive argument is that this would with all probability describe the male victim’s situation even more accurately if the perpetrator was a woman (or a man). The term invasion is considered to be gender-neutral or at least proposed to be used in such a way and the author affirms that it is far more un-stigmatized or de-gendered than penetration.

However, in regards to what meaning the wording signals, invasion or penetration is still mainly about the forcible entry into an area. I argue that it reinforces the assumption of the Challis (vagina) being penetrated by the Phallus (penis) and the receiving role of women and the forcing role of men. A more gender neutral or rather gender encompassing word would be “conquest” or “capture” or “subjugation” which would be modified by the subsequent clause and sentence. These words would regrettably still relate to the constructed masculine values of traditional heterosexuality and of sexual intercourse.

The phallocentric culture defines sexual intercourse as based on the idea of the Phallus’ pleasure of penetration. The male’s pleasure is thus clear and concise, two elements totally contradictory to women’s pleasure, which is deemed to be either consistent with the men’s pleasure or a mystery beyond understanding. That the mystery beyond understanding: women’s sexual pleasure, is a mystery follows logically because of the entity which has been defining women’s pleasure (or the lack thereof); men. Similarly, the entity that has defined men’s pleasure is also men and to men pleasure is to penetrate, which by definition would not render pleasure to the receiving partner in a for example homosexual relationship. As Smart contends that the woman’s “no” is not in reality deemed to be a no, I would argue that the male victims of rape is also subjected to this inverted linguistic discourse. The male victim is seen as an untrue victim because of the construction of masculinity which by effect should

90 Smart, Carol, Feminism And The Power Of Law, page 27-8.
91 Smart, C, Feminism And The Power Of Law, page 30-32.
Male rape victims and the wartime constructions of masculinity

render him “untouchable” and results in the misguided notion of men as non-victims of rape but a willing partner in a homosexual intercourse, even if he says no.92

The stigma of homosexuality for male rape victims have been proclaimed and offered as a major reason for the male victims’ silence. Another leading reasoning behind the underreporting is thought to be that it is still illegal in some nationals’ legislation for two men to have sexual intercourse, even on a voluntary basis. So, not only does the male victim of rape face stigmatization due to homosexual prejudices, but he might end up in prison also. Add the fact that neither the male victims nor agents of authority usually use the word rape when it is a question of a male victim and I would argue that based on a contextual approach the definition of the act is not gender-neutral. In order to reach the goal of gender-neutrality or inclusiveness, I argue that the ICC’s definition of the act of rape is only the beginning of a process.

3.2 Constructions of masculinity in wartime

To be a man is literally to not be a woman and vice versa, this unfortunate dichotomy is perhaps everlasting, but the characterization of men and women are not. Today the notion of men, male and masculine could well be said to embody the protector, aggressor and controller, ultimately an unrealistically brave hero, but that would perhaps be drawing it too far.93 More restrained, measured in western culture, would be the underlying masculine ideal in sports and corporate organizations, not unlike the organization of military or the physical fitness goal.94 Even though the normative role within society is male or maleness the actual population possessing those predetermined qualities or capabilities associated with the hegemonic masculinity (ideal male norm) are few. The men who do not fulfill these qualities will be lesser than those men who do but still be included within the hierarchy of men, normatively higher than women and profit from their group’s power dominance.95 It has been suggested that it is in fact during times of masculine insecurity that the retort to heroic

95 See Connell, R.W., Maskuliniteter. pages 117, 202-212.
Male rape victims and the wartime constructions of masculinity

Military masculinity becomes stronger. The incidents of insecurity are most often brought about by the increase of female power or general societal upheaval. Resic believes that one such incident of masculine crises is in development today and I am inclined to concur. However, the constructed masculinity in militarism and wartime has developed over the years and a tendency to incorporate the cyborg into the heroic myth of masculinity can be observed. Still, the draw of war, battle, heroism and adventure exists today, more than often in another form than government forces, such as gangs, guerillas and martial arts.96

A wartime construction of masculinity is in my mind as much political as social, the rulers of a nation do not benefit from inducing a constructed masculinity that is not to some degree parallel with the soldier. Neither do society, and because this survival instinct the society and nation hold the brave man, the man who goes down fighting as the ideal man and in effect the protector of their society and state. Wartime constructions of masculinity naturally vary but the driving forces between these constructions would in my view be the same; the survival of a nation, society and as such culture. What I deem to be wartime constructions of masculinity could in fact be said to coincide with the construction of masculinity as military. As the main goal for any armed conflict, in my perhaps limited understanding of the finer tactics of combat, would be to win or at least not loose. The natural focus of IHL legislation would thus be upon the wagers of war i.e. the combatants and because of this it is by cheer numbers a lopsided legislation.

3.2.1 Judicial Decisions

Men are raped as evident by the ICVS and EU ICS rapport97, even if this report was done without regard to armed conflict, it is apparent by the multitude of sexual violence against men in the case law of the ad hoc tribunals. Further evidence of the prevalence of male rape victims is the case of Sarajevo Canton concentration camp were 80 percent of 5000 male detainees had reportedly been raped.98

97 See Criminal Victimisation in International Perspective; Key findings from the 2004-2005 ICVS and EU ICS, Doc can be found at; http://www.unicri.it/documentation_centre/publications/icvs/_pdf_files/ICVS2004_05report.pdf See appendix 9.1 tables 1 – 8.
Male rape victims and the wartime constructions of masculinity

A clear event of male rape victims is seen in the case of Delalic (16 November 1998) before the Trial Chamber of ICTY where two men were forced to perform fellatio (oral sex) on one another. The two men were brothers and detainees and as such under the authority of the accused H.E. Landzo, who were found guilty of inhumane and cruel treatment on the basis of a fundamental attack upon their humane dignity. The indictment did not include rape charges and astonishingly the court notes that if it had been pleaded the accused would be found guilty thereof.99

In the Cesic Case (11th March 2004) the charged sexual assault was indeed very similar to that in the Delalic Case. Cesic was charged with rape as a crime against humanity for the act of forcing, at gunpoint, two brothers to engage in fellatio in front of other guards. The family relationship and the public element were reason enough to render the act particularly serious and were considered as an aggravating circumstance under the indictment of rape.100

The openly stated fact by the court in the Delalic Case; that if the prosecutor had charged the accused with rape, he would thus be convicted thereof is commendable. However, it is always easy to make a statement but rather more difficult to honor it in terms of actually applying the rape provision on male victims. One can only hypothesize about the reason behind the prosecutor’s election to not plead rape charges and in my view it would probably be due to the inadequacy of the language. When a man is subjected to sexual assault neither he nor media is likely to use the term “rape” because of its close connection to women rape victims.101 It is also clear that even psychiatrists have difficulty seeing men as wartime rape victims and combined with the victims’ own distress about having been subjected to sexual violence it is not surprising that the word rape is not used when the victim is male.102 I believe that the prosecutor goes through the same linguistic struggle as the victim and he/she also considers the possible outcome of the case. In the pragmatic sense it would be a wildcard to charge rape when the victim is male, far more likely would be to charge with torture.

Torture as a word (and crime) tends to be interpreted as more masculine than rape and as we all, both men and women are hesitant to label men as victims, whereas torture, in my view

Male rape victims and the wartime constructions of masculinity

signifies the perfect alternative. In my mind this signals the “honorable soldier who withstands torture, to protect his country” and not the “wimp who were raped, he’s most certainly homosexual, what a disgrace”. On this subject I wish to quote Hagay-Frey, who in her book mentions that;

“...we tend to view the rape of a man as a form of torture intended to break the enemy, whereas the rape of a woman is sometimes perpetrated as a form of torture and sometimes out of gender motives.”

As a gender motive I understand her to refer to the subordination of women by men through the tool; rape. She contends that rape in this sense is a gender crime and as such a violation upon one gender by the other gender. I view her considerations as interesting, but from a gender-inclusive point of view; detrimental to the male victim. However, if I would apply it as a gender crime I would indeed recognize the power struggle between the rapist and the victim to be gendered in terms of masculinity and femininity regardless of the actors’ biological sex.
I argue that the gender element should thus be considered in terms of masculinity and femininity and not necessarily in terms of women and men. However, I also consider torture to be a possible crime against women and men, and find that the argument to exclude male victims of rape from the purview of said crime would be to discriminate against men. As evident by my argumentation, I do not share the view that rape should be considered to be limited to a crime against women and neither do the Chambers of the Tribunal.

3.3 Influences on constructions of masculinity

3.3.1 Rape provisions

As seen the prohibition of rape is in most of the international instrument tied to the protection of family and/or women. It has been criticized by a number of feminists; that rape should not be regarded as a crime against a woman’s honor and that the whole notion of rape as an honor related crime stems from the masculine view of a woman’s honor i.e. her chastity. However, the APII and ICC statute is a clear step away from this traditional view of rape as the ICC’s Elements of Crime explicitly mentions that the elements of rape should be interpreted as to be

103 Compare to Scarce, M., Male on Male Rape, The hidden toll of stigma and shame, page 46-7, see also; Resic, Sanimir, From Gilgamesh To Terminator: The Warrior as Masculine Ideal – Historical and Contemporary Perspectives, page 425.
104 Hagay-Frey, Alona, Sex and Gender Crimes in the new International Law; Past, Present, Future, page 89, note 300,
Male rape victims and the wartime constructions of masculinity

inclusive of both genders. However, the more contemporary view of rape as being a crime against an individual’s integrity comes close in my mind to being one of honor. An individual with honor is also one with integrity and a violation of one’s integrity would in my mind signal a violation of one’s honor. This is not a point of agreement between Hagay-Frey and me, since she clearly refers to Kamir’s interpretation of honor and dignity. Where the latter being an inherent characteristic of every individual, whereas honor refers to the adherence to a social code. She concludes that even if the concepts were treated as synonymous the focus would be upon the injury to honor or dignity instead of the physical and mental pain of the victim. However, I would also argue that to see the act as purely a gender crime would consequently achieve the same objective; the shielding of the individual’s physical and mental pain. If one choses to see rape as a crime permitted by one gender against the other in order to reinforce the power relationship, then there is little difference to seeing it as an act of hostility in an armed conflict. However, the difference being that a military action against civilians is unlawful under the auspice of IHL and an attack against a gender by the other is, as it were, not a part of the laws of warfare.

The purpose of IHL is not to change socially perceived roles per se but it could consequently have that effect, as well as more firmly establish the contemporary development of roles. War or armed conflict can often produce a different set of gender roles from those derived in peacetime. The traditional example of this is perhaps the increased burden of the family and country’s economy on women while men were off fighting for their country. The role of women then at least temporarily changed, they were no longer confined to childbearing and the domestic sphere. Women were needed in all parts of society including traditional masculine workplaces such as automobile shops. In the aftermath of war the perceived roles will very often alter to those enshrined in society before the outbreak of hostilities and assume a status quo. In my mind this is a logical development based on the war for the nation, society, culture and in effect gender; the social constructions of masculinities and

105 Hagay-Frey, Sex and Gender Crimes in the New international Law: Past, Present, Future, page 70-1
Male rape victims and the wartime constructions of masculinity

femininities. Consequently war or armed conflict effect constructions of masculinity as most other events of the same dignity do. Whether the Laws of War can be claimed to produce the same effect is debatable. In the authors view the fact that IHL does not include rules pertaining to the rebuilding of society after conflict could be said to enforce the constructions of masculinities existent prior to the outbreak of conflict by not actively addressing the issue.

However, through judicial decisions I would say that the IHL legislation has at least laid down the foundation upon which to develop. For instance the somewhat altered view upon consent that has emerged in the case law from the ad hoc Tribunals gives reason to at least hope for further development. It is recognized that consent between two individuals belonging to different dissident groups or government forces is highly unlikely in times of armed conflict. When it comes to the issue of consent the contextual approach is in my mind the more effective method of achieving at least material justice. A difficulty with consent is that it often is pushed aside in favor of the degree of violence by which the act is committed. If for example; one considers the act of consensual intercourse as a contract between two parties, it becomes highly irregular to measure one partners objections by the amount of force or violence used by the other partner who does not object. The issue at hand is that the act of consensual intercourse has not historically evolved as a contract between two free individuals but has been based on the notion of ownership or at least the right to demand from one partner the access to physical gratification. In my view this notion is still, somehow, the fundament of the contemporary view of consensual intercourse. This will inevitably effect how rape is defined and ultimately also who are victims and perpetrators. Nevertheless, the important issue is that there has been a development and as such proves that change is possible.

However, I would argue that the existence of a conflict and the oppositeness of the victim and perpetrator should in fact alter the burden of evidence upon the perpetrator. There have been some efforts to reduce the stigma and shame that rape victims face during the trial such as Rule 96 of the ICTY’s Rules of procedure and Evidence. According to rule 96; consent cannot be used as a defense if the victim was threatened or likewise if there was a third party who’s life might be in danger. The rule also forbids the admittance of the victim’s prior sexual

Male rape victims and the wartime constructions of masculinity

color as evidence.\textsuperscript{110} This rule would and has admittedly answered some of the requests made by feminists in relation to the prosecution of rape against women and has accordingly, aided the male victims.

\subsection*{3.3.2 Case law}

As the role ascribed to men is the protector, when he fails to protect his woman or any woman tied to his area of responsibility for that matter, he fails in respect of the hegemonic masculinity.\textsuperscript{111} However, in the author’s view the man remains a man until he himself is raped and thus emasculated – there is no retribution for a feminized and emasculated man. He cannot become a man again. Observance should be granted to the correlation between feminized and emasculated – which as terms are very interdependent. The author considers the rape or sexual assault of a man as a way of feminizing him, in effect rendering him the role of women.\textsuperscript{112} This act could in its own be equivalent to emasculating him since it deprives him of the social role into which he was born and raised. However, the blunt statement by Quénivet on how biting of a man’s testicles, in the \textit{Tadic Case}, could hardly be seen as feminizing him or putting him in the slot of a woman in an imitation of a heterosexual act deserves a response.\textsuperscript{113} The act of removing a man’s testicles would in the author’s view be the ultimate way of feminizing him, since he has then been deprived of that which fundamentally sets him apart from women. This is not to say that the biological equipment solely determines the gender roles or that the argument from the author is entirely based upon biology. The establishing of gender and in this case masculinity is not only in terms of the general social roles within society but also in every singular event throughout an individual’s lifespan. Masculinity and femininity are tied to one’s biological design and especially in terms of the genitals or rather which set thereof are accorded to the individual. When we are born this teeny tiny detail sets off a number of chain reactions in the years to come, but it is not because of the biological compound in our respective bodies but due to the social characteristics that human beings perceive to be attached to the biological differences;

\begin{flushright}
\begin{itemize}
\item[110] See Rules of procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, 11 February 1994, Un Doc. IT/32/Rev.44
\item[112] So does Lewis, Dustin A., page 7-8
\end{itemize}
\end{flushright}
Male rape victims and the wartime constructions of masculinity

masculinity and femininity. Therefore, the author argues that to castrate a man is both in the biological sense to deprive him of his manhood and from a gender perspective to essentially feminize him i.e. render him the characteristics of the victim; femininity. And as to the imitation of a heterosexual intercourse, I argue that the imitation does not lie in the, admittedly non-existing, penetration but in the exertion of power and sexually degrading treatment equal to a rape of a woman (or a man).

However, I also argue that to continue to compare every act of sexual assault with the rape where the perpetrator’s a man and the victim is a woman is to enforce the constructed masculinity and subsequently femininity rather than develop them.

4. Conclusion

The simple answer to the question of gender equality within IHL is; no, gender legal equality is not present since men and women are not afforded equal protection under international humanitarian law. This is obvious in the case of women’s right to be supervised by women and the prohibition of placing explosives on kitchen utensils. Neither of these provisions has the corresponding protection or prohibition clause in favor of men. Why is it legal to put explosives on farming tools but not on kitchen equipment? Do not all civilians deserve the same legal protection from the violence of war? – Apparently not.

The burning issue in relation to this paper and gender equality before the law is the case of sexual violence against men. An issue largely ignored by national and international legislative bodies despite the attention given in several judicial decisions. The question raised in this essay is if the legal equality for men and women exists in regards of the protection of sexual violence and as such rape? To sum up the discussion regarding the male victim of rape and whether he is included in the definition of the act of rape and as such protected by the laws of war; he is. Even though the definition of rape is heterosexually normative and based on the

Male rape victims and the wartime constructions of masculinity

notion that women are victims and men are perpetrators, the development through the international ad hoc tribunals would suggest a more inclusive definition and criminalization.

The adoption of the ICC statute would confirm this development and since it aims at interpreting the terminology “invasion” gender-neutral the conclusion in this regard would be that male rape victims are formally included. As with most legal norms the vital element is their interpretation and application. It is therefore the examination of judicial decisions which would illuminate the male victim’s right to be treated as a victim of rape. As seen in the selected case law above, the evolution from the non-existing rape charges when a man is sexually assaulted to the inclusion thereof deserves tribute. However, I would like to point out that for a gender-neutral interpretation of the definition of rape as advised by the ICC’s Elements of Crimes one need not only consider the male victim but also the female perpetrator. Otherwise the neutrality would in my opinion be neutral in that sense that it would preserve the gender inequality within rape definitions. I will in conclusion say that even though the definitions of rape could be found applicable in a case of a male rape victim there is still a constant comparison with female rape victims; which could swing both ways. Female rape victims might be seen as lesser victims and male rape victims might not be seen as rape victims, but I would presume that the resistance to view men as victims will be the prevailing notion.

This view is not shared by all those who aim at a gender perspective in their articles or research etc. The contemporary proclaimers of gender within the IHL sphere are mostly referred to as feminists. This is the main issue that I struggle with – it is not strange that the power balance and the usage of rape remains an issue when the contemporary field of gendered doctrine focuses on women. The reasoning behind is natural – women are and have historically been the dominated and men the dominators and logically the focus ought to be placed on women.115 In the author’s view, it is even more logical to put equal focus on both men’s and women’s situations and see the inevitable correlation between the two dichotomies. The interesting issue of dichotomies is that one cannot exist without the other i.e. men will not be men without women and vice versa. We are all defined in relation to another entity and as such connected.116 In order for the situation to change one needs to consider the constant separateness but also the fluid border in-between. Gender is the social roles of men and

115 See also Graham, Ruth, Male Rape and the Careful Construction of the Male Victim, page 188.
116 For a more detailed debate see Jones, A., Men And Masculinities / April 2006 vol. 8 no. 4 451-469 , page 454.
Male rape victims and the wartime constructions of masculinity

women and as such unfixed, meaning essentially that the roles will change in correlation to society’s view of men; masculinity and women; femininity.

However, femininity is very often perceived to be the vulnerable victim and when an individual woman does not fit that bill there is an uncertainty as to how she should be treated. The same is evident in the instance of a man who does not match up to the gender role of men i.e. the masculine behavior and the criteria thereof are not fulfilled. A clear example is the case when a man is raped and the view of him as not being a “man” and the act more a form of sexual perversion; a crime against nature than an act of violence. Equally interesting is the incident when a woman is the perpetrator of sexual violence – she is somehow seen as something else than a woman, a monster. In order for society to accept men as victims, there is a need to redefine victims and in effect women and furthermore the notion of men. I argue that both men and women can be perpetrators of rape as well as victims and the constructions of femininity and masculinity should thus be viewed as our social sex, thereby accepting that women may have the characteristics of masculinity and men the feminine qualities.

The preferable conclusion from the author’s viewpoint is not to render the crime of rape any stronger an identity of a gender crime, but more accurately to render it a crime against autonomy and a violation against the core element of humanitarian law; the treatment of individuals with humane dignity and the protection of non-combatants. However, the author assumes the argument proclaimed by others of rape as a demonstration of power and especially so in times of armed conflict. Is it even possible to argue that it is not an issue of power? The armed conflict is in its foundation a display of power on different levels and as such the gender level should be accorded satisfactory consequence, in relation to both men and women.

In addition to my semantically based objections to a number of the so called “soft law” instruments applied to enforce gender mainstreaming and including women, at least formally there is the subject of inclusion of women in peace building. This does not only owe to

118 See Scarce, M., Male on Male Rape, The hidden toll of stigma and shame, page 199.
120 See for example, Scarce, M., pages 35-49.
Male rape victims and the wartime constructions of masculinity

abolish wartime rape but the impact of rendering women or rather femininity with peaceful attributes is rather enforcing the prevalent notion of femininity. In my mind this reinforcement of women as essentially peace builders serves as an effective method of placing the responsibility of peace principally outside the male and masculine spheres. It thus reinforces the notion of men as war wagers and violence as an admirable and desirable quality in a male. However, the attempts made on gender-mainstreaming and special gender advisers are all commendable, as are the efforts to include women in peace building. In my mind these efforts are not enough and too skewed to actually counter the prevalence of wartime rape and other sexual assault.

The attention given to women and the focus on accessible healthcare, the availability of family planning measures are all needed. But these endeavors are not only dismissive of the male victims of sexual assault but focuses on the victim rather than the perpetrator enforcing the notion that the problem lays with the victims i.e. women. In my mind there should be rape seminars to men and women focusing on the perpetrator and what rape really is – a violation of the physical autonomy. In my mind the core should be on how to avoid becoming perpetrators of rape, not how to avoid becoming victims or how to deal with victimization.

To focus on women and more accurately women victims of rape I believe that the mistake will render the advocating group the same faults that they’re protesting against, the discrimination of a minority, albeit an unproven minority; the male victims of rape.\textsuperscript{121} As the reader by now might have guessed I am not found of the term gender-neutral because it signals the dived between two separate entities and because it in my mind would be very close to an impossible endeavor to make a legislation or otherwise, gender-neutral. However, I do believe that it is possible to enact law that is gender inclusive, perhaps in a way it is purely semantic. I hope at least that I have offered some light on the issue of semantics and its importance in the case of a male rape victim who by definition would not lightly be called a rape victim. This is the issue of semantics, that by naming the law gender-neutral we are in fact establishing the already prevailing notion of gender albeit with a new coat of paint; the gender-neutral-color.

\textsuperscript{121} See for instance Kouvo, Sari and Levine, Corey, \textit{Calling a Spade a Spade: Tackling the ‘Women and Peace’ Orthodox}, Feminist Legal Studies (1 October 2008) 16:363–367, page 365
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