

# Gender and the International Criminal Court: A Critical Assessment

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The protection of women in times of armed conflict is an imperative need. Yet, despite the fact that women have always had important (albeit most often unnoticed) functions in armed conflict[1], violence and conflict are often still understood phallogcentrically (Annan, Blattman, and Mazurana 2011; Butler 1993; Carpenter 2002; Enloe 2013; Elshtain 1982; Grey and Shepherd 2012; Herrman and Pamieri 2010; Riley 2008; Sjoberg 2010; Tickner 1992; Young 2003). As a consequence thereof, women in wartime have been, if at all, studied as passive victims of violence inflicted upon them by men. In the words of Abdi (2007:183), 'the gendered consequences of war go beyond physical and psychological violence' extending to 'inverted traditions that further consolidate patriarchy and exacerbate women's social subordination'[2]. Since gender-based violence has for a long time been dismissed as a natural consequence of war, there is a need to continue to develop jurisprudence and understanding of gender within international (criminal) law. To consider experiences of both men and women allows breaking down stereotypes 'about how men and women "should" operate, and the complex ways in which conflict impacts upon them' (Durham and O'Byrne 2010:52; Bedont and Martinez 1999; Stemple 2009).

As the silence of international law may be as important as its positive statutory provisions and structures, this essay aims to advance understanding of how gender is applied and understood in international criminal law. Starting with conceptualising gender and international law (and its interrelatedness with International Relations) through the lens of

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constructivism, socially constructed gendered narratives will be investigated. The definition of gender is significantly shaped by legal as well as public institutions. This is why the Rome Statute's (1998) rather progressive definition of gender will be analysed next. Following this, the International Criminal Court's (ICCs) gender mainstreaming approach will be discussed. It will be argued that the ICC advances legal understanding of gender on the one hand and on the other still equates gender with women that are viewed in a very narrow way, particularly as victims in need of protection. Thereafter, the extent to which the Trust Fund for Victims (TFV) complies with its gender mainstreaming approach will be analysed by examining the TFV's official website and documents. Even though the TFV uses relatively gender-neutral language, it almost exclusively focuses on women. In the light of hyper-visibility of sexual violence perpetrated against women and the simultaneous silencing of male experiences of sexual violence, it will be argued that jurisprudence and gender understanding within the law need to be further developed. The study of international criminal law and gender is an area with significant gaps and silences, leaving suggestions for potential further research that will be outlined in the concluding section.

## The Gender Dimension of International Law and Politics

The power of law is essentially related to its capacity to appear to be objective and neutral and thus superior to individuals and society (Chappel 2003; Charlesworth and Chinkin 1993; Fredman 1997). This is inter alia mirrored by the ICC judges' commitment stated in the *Code of Judicial Ethics* (2005) to recall 'the principles concerning judicial independence, [and] impartiality' (Preamble; Art. 3, 4, 5). However, law is effectively not a bodiless force but is 'made by people in power (...) and is therefore strongly influenced by prevailing economic and political conditions and ideologies' (Fredman 1997:2). The recognition of law as a product of social forces enables us to evaluate the extent to which interests of certain groups in society are represented and reinforced. Arguably, these interests have for a long time been predominantly male and international law has developed based upon the paradigm of masculinity and in an environment biased against women.

Classic realist landmark contributions to International Relations Theory such as Hobbes' (1900) *Leviathan*, Morgenthau's (1948) *Politics Among Nations* or Waltz' neo-realist *Man, the State and War* (1959) remain largely silent on gender. The canonical work on International Relations arose from gender assumptions arguably leading to an inherently masculine state identity. Concurrently, legal systems throughout the centuries have been treating women as subordinate to men and only recently legal rights started to apply equally to both genders (Chappel 2003; Charlesworth 1999; Cossman 2002; Fredman 1997; Stemple 2009). Even though women have not been entirely excluded from international law, they have been narrowly defined in limited roles- 'always situated in their relationship with others – especially men or children' (Chappel 2003:6; Stemple 2009). In the words of Charlesworth (1999:381), it is 'the vocabulary of international law' that 'generally makes women invisible.' This is why, according to Charlesworth and Chinkin (1993:65), legal (*jus cogens*) norms are not 'properly universal' as 'its development has privileged the experiences of men over those of women'. Following this argument then, gendered concepts which silence half of the population can never claim universal validity (Charlesworth 1999; Charlesworth and Chinkin 1993). Only by revealing the gendered perspective upon which both international (criminal) law and politics rely is it possible to give due weight to the interests and realities of both men and women and to contribute to a broader understanding of (gendered) crimes and violence (Chappel 2003; Charlesworth 1999; Charlesworth and Chinkin 1993; Cossman 2002; Fredmann 1997; Grey and Shepherd 2012; Mouthaan 2013). This essay analyses the way gender is depicted and understood in international criminal law[3] provisions by elaborating constructed gender visibility and invisibility through the lens of constructivism.

## Conceptualisation and Underlying Assumptions of the Field

Constructivism proposes a way of understanding intersubjective concepts (such as race or gender) and their interaction with global politics and (legal) institutions (Hopf 1998). Moreover, constructivism shows how most durable institutions build upon collective understandings and reified structures that were arguably established *ex nihilo* (Adler 1997). Following different schools of thought, constructivist scholarship is not homogenous. However, most constructivists share the ontological minimal consensus that structures and actors are socially constructed and thus bring intersubjective meaning to the material world (Adler 1997; Checkel 1998; Epstein 2010, 2013a,b; Hopf 1998;

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Wendt 1992).

Realist theorists tend to devalue the role of norms assuming that 'law will inevitably be trumped by power and interest calculations' thus leaving little scope for the operation of law (Brunnée and Toope 2012:120). Unlike rationalist theories ([neo-] realism and [neo-] liberalism), constructivism insists that interests and identities are not exogenously given but constituted based on shared norms such as *jus cogens*[4] peremptory norms of international law (Slaughter, Tulumello and Wood 1998:373; Epstein 2010; Hopf 1998; Wendt 1992). Asking why states adhere to international law and norms, Koh (1997:2646) argues that the process of interaction, norm interpretation and internalisation is constitutive (cf. Slaughter et al. 1998:381). Thus, legal norms are arguably 'social norms that are essentially constituted by social practices' (Brunnée and Toope 2012:129). Thus, in contrast to its well-recognised role as an 'explicit norm-entrepreneur(.)', international criminal law may also find itself 'captured by implicit norms' (Carpenter 2005:689). This essay turns analytical attention to legal discourse analysing statutory language used to promote identification and understanding of underlying implicit gender norms related to conflict and violence.

Language is central to constructivist theorising and a medium of social construction, indeed 'the primary social institution' (Searle 1995:59-60; Brunnée and Toope 2000; Epstein 2013a,b; Slaughter et al. 1998). For Brunnée and Toope (2000:28), international (judicial) practice includes both 'material acts' and 'rhetorical commitments.' Similarly, speech can be understood as 'a symbolic invocation' which can, through performative acts, produce identities and create new orders of being (Epstein 2013a:287; Epstein 2013b; Campbell 1998; Cossman 2002; Weldes 1999).

## Humans in Western Societies are Traditionally Socialised to Believe...

... that there is an innate bond between men and violence and certain gender roles today are (subconsciously) internalised and naturalised (Carpenter 2006; Goldstein 2001; Sjoberg 2010; Tickner 1992; USIP 2013). Relying on Foucault's theorisation of power, feminist scholar Judith Butler (1993) argues that gender is constructed through relations of power. Through 'ritualized repetition of [gender] norms' (Butler 1993:preface), gender categories are socially constructed that Fotaki (2011:642) therefore regards 'arbitrary and unstable.' In Bourdieu's (2001) understanding of social structure, gender is, like all forms of collective identity, the outcome of social classification (cf. Bourdieu and Wacquant 1992; Weininger 2004). Thus, for constructivists the social world and its institutions are not given, and neither are gender roles. Elshtain (1982:341) argues that the most fundamental societal gendered assumption is that of the two 'powerful and deeply held archetypes, the Beautiful Soul and the Just Warrior' that influences the way we think about men, women, and war. *Just warriors* do not fight in war just to kill but to die for the cause. This is how, in the words of Sjoberg (2010:55), 'women are at once the object of fighting and the just purpose of war'. While men are associated with being heroic, tough, assertive and stoical, women are *beautiful souls*[5] that are vulnerable, naïve, innocent, voice-less and even unpatriotic victims in need of protection (Elshtain 1982; Enloe 2013; Fredman 1997; Kinsella 2006; Segal 2008; Sjoberg 2010; Smeulers 2015; Tickner 1992). It appears that the social construction of gender norms serves as a basis of male dominated international politics and often the vulnerable women in need of protection provide a rationale for war (Abdi 2007; Tosh 2004; Young 2003). Arguably, men's established monopoly of institutionalised power aims to maintain male supremacy and existing hierarchies (Barrow 2010; Parashar 2013; Segal 2008). From a nurture perspective, the relation between gender and war is reciprocal: 'warriors are constructed as masculine, and masculinity is constructed through war' (Vojdik 2002:266; Goldstein 2001; Jayakumar 2015; Weininger 2004). This is why men are compelled to prove their identity 'through symbolic (.) enactment of masculinity (Vojdik 2002: 266). In wartime, such enactments abound. Warriors are male. Military recruits are called 'pussy', 'fucking little girl' (Faludi 1999: 145-6) or are directly accused of 'being a women in order to toughen them up' (Jeffrey 2007: 18; Phillips 2006). Thus, a set of dualisms (the male is strong, the female weak; the male is active, the female passive etc.), depicting the world in terms of dichotomies, is socially constructed (Fredman 1997).

## Gender in the Rome Statute

The definition of gender involves the allocation of power within society and is significantly shaped by public institutions (Durham and O'Byrne 2010). This is why the UN *ad hoc* tribunals of Yugoslavia and Rwanda as well as the Rome Statute that established the permanent ICC 'provide a unique opportunity for exploring assumptions about

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women's and men' position in relation to international legal institutions' (Chappel 2003:3).

The Rome Statute of the ICC includes the first definition of gender in an international legal treaty, stating that 'gender refers to the two sexes, male and female, within the context of society' (Art. 7(3)). The ICC's definition of gender is one of the most important acknowledgements of gender within international law and the ICTR's and ICTY's practice and jurisprudence largely contributed to its development (Askin 2005; Campanaro 2001; Carpenter 2005; Glasius 2006; Grey 2014; Muthaan 2013). The ICC's definition and interpretation of gender has a direct impact on case selection and jurisprudence and was controversially debated (Oosterveld 2005). The original draft for the Rome Statute did not pay explicit attention to gender thus 'reflecting the existing state of humanitarian and international criminal law' (Glasius 2006:85). For Stemple (2009:642), the ICC made an important step towards gender inclusiveness. Other scholars, however, are more critical about the scope of the definition. Criticisms especially include that the definition wrongly 'elides the notion of gender and sex' (Charlesworth 1999:394) and thus not sufficiently recognises the social construction of gender resulting in a 'stunningly narrow conception of gender' (Cossman 2002:283; Durham and O'Byrne 2010:33). Similarly, Cossman (2002:284) argues that even though gender has been increasingly mainstreamed and instantiated, 'its meaning has become rather more rigid and fixed'. According to Oosterveld (2005:81-82), the gender definition constitutes a compromise of 'constructive ambiguity' leaving much of the interpretation of the definition to the ICC's judges.

## Ultimately, the Key Problem 'Lies in what the Vision of Gender Neutralizes, ...

...in what remains invisible within this vision' (Cossman 2002:289). While the legal and political system is always gendered on different levels of society and analysis, gender is, arguably, sometimes deliberately rendered invisible and sometimes made hyper-visible. This is what Riley (2008:1192) refers to as the 'visibility/invisibility/hyper-visibility problem'. Ultimately, 'what gets obscured and what gets highlighted are in motion or relation to each other to serve particular ends' (Riley 2008: 1193). Today, women are increasingly becoming visible in the field of international relations and international law. However, it was not until 2000 when the UN Security Council adopted the *Resolution 1325 on Women, Peace and Security*, that, for the first time, stressed the importance of women's 'equal participation and (...) to increase their role in decision-making' (Preamble). As Tryggestad (2009:541) argues, the resolution 1325 is a ground-breaking achievement that considerably acknowledges women's agency rather than the role of a victim. However, other scholars are far more critical about the impact and implementation of the resolution (Barrow 2010; Cohn, Kinsella and Gibbins 2004; USIP 2013). Cohn et al. (2004:135), for example, note that there are 'structural barriers that gender "mainstreaming" has yet to overcome.'

International law, with the ICC holding the leading role, has arguably gradually developed towards increased mainstreaming of gender taking both men and women as potential 'victims' and 'perpetrators' into consideration. Moreover, the ICC includes gender sensitive policies at the operational level and, for example, established a balance of gender at the bench (Art. 36(8)(a)(ii) of the Rome Statute). However, in most senior management positions women continue to be significantly underrepresented (Assembly of State Parties Report 2010; Chaikel 2011). Mandated to provide strategic advice on sexual and gender violence, the Office of the Prosecutor must furthermore appoint a Special Gender Adviser to the Prosecutor[6] (Article 22(9) Rome Statute, Chaikel 2011).

Notwithstanding the ICC's gender sensitive approach, when women enter into focus in international criminal law today, they are arguably still viewed in a very narrow way, mirroring Elstain's (1982) *beautiful soul*: 'often as victims, particularly as mothers, or potential mothers, in need of protection' (Charlesworth 1999:381). Thus, for example, women are often grouped together with children (Carpenter 2003, 2005, 2006; Dyvik 2014; Enloe 1993; Sivakumarana 2007). Enloe (1993:166) argues that women are often 'made visible as symbols, victims, or dependents' that are 'almost childlike in their innocence'. Therefore, she famously coined the term 'womenandchildren' to represent the infantilising of women that encourages the assumption that they are in need of (masculine) protection. Moreover, the term 'womenandchildren' functions to characterise those not fighting, arguably excluding men from the (historically feminine) status of innocent and vulnerable civilians (Carpenter 2006:26; Kinsella 2005). At the operational policy level, this is exemplified by (humanitarian) interventions in former Yugoslavia. Of all non-combatants, adult civilian men were most likely to be massacred by hostile forces. Yet, 'international agencies mandated with the "protection of civilians" evacuate women and children, but not military-aged men, from besieged

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areas' (Carpenter 2003:661). Ultimately, of the 18,000 missing persons after the wars, estimated 92 percent were men (Carpenter 2003:662).

In the same vein, United Nations Security Council Resolution 1325 begins by '[e]xpressing concern that civilians, particularly women and children, account for the vast majority of those adversely affected by armed conflict'. Yet, stating that 'women and children' account for the majority of a population is, given the fact that adult women constitute roughly half of the population, rather self-evident and thus perpetuates gender stereotypes. Similarly, in terms of qualification, nomination and election of judges, the Rome Statute (Art. 36(8)(b); 42(9); 43(6)) *inter alia* requires State Parties 'to include judges with legal expertise on specific issues, including, but not limited to, violence against women and children'. Arguably, only the detachment of women from 'womenandchildren' allows us to make both men and women visible and understand them both as active agents and potential 'victims' (Cohn et al. 2004; Stemple 2009). Yet the term continues to be frequently used.

In *The Prosecutor vs. Jean-Paul Akayesu* judgment (ICTR-96-4-T), for example, the term 'women and children' is used eight times (Paras. 128, 355, 418, 426, 433, 435, 449), commonly to specify or underline their role as victims and non-combatants (e.g. paragraph 128: 'victims were non-combatants, including women and children, even foetuses'), groups of people seeking refuge (Paras. 296: the refugees 'appeared to be farmers, old women, children, and old people', 355, 418, 433, 449) or targets of violence (Paras. 426, 435, 438). Furthermore, the term (young) 'girls and women' is used thirteen times (Paras. 421, 422, 449, 692, 696), each time in relation to incidents of rape and sexual violence.

## The Trust Fund for Victims: 'Gender Mainstreaming is a Key Requirement'

Along with the establishment of the ICC on 1 July 2002, a second independent institution, the Trust Fund for Victims (TFV), came into force under Article 79 of the Rome Statute. The TFV aims to contribute to the realisation of durable and sustainable peace through the promotion of restorative justice and reconciliation by providing assistance to 'the most vulnerable' victims of crimes falling within the ICC's jurisdiction. On its webpage, the TFV states that 'across the world, women and girls are disproportionately affected by violence and instability which occurs during, and results from, armed conflict'.

Analytical attention will turn to the extent to which the TFV complies with its mainstreaming approach by evaluating the TFV's official online presence. Overall, the language used on the TFV's website is gender-neutral. However, at second glance, the TFV focuses almost exclusively on women and thus often equates gender with women (cf. *Victims Survivor Stories* section). This is, arguably, on the one hand leading to the perpetuation of the stereotype of their passive victimhood and on the other to the exclusion of men as potential victims.

The homepage hosts a video (*Home section*) that introduces the TFV's history, aims and impacts. In combination with a soundtrack sung by women, the video *inter alia* informs its audience about the situation in the DRC: 'close to 100,000 women ages 15 to 49 have been raped across all provinces of the DRC since 2007 (...)' (7:19) leading to the conclusion that 'it is more dangerous to be a woman than to be a soldier right now (Major General Patrick Cammaert, former UN Deputy Force Commander, DRC May 2008)' (7:22). Arguably, three identifiable elements of the video question the ICC's gender mainstreaming approach. Firstly, although the film does not explicitly state that (sexual) violence is targeted only at women, where a gender is ascribed to the victim, it is invariably female. Male victims are only depicted in one instance (when it comes to victims of burn injury) and are thus rendered invisible. Secondly, the statement 'it is more dangerous to be a **woman** than to be a **soldier**' emphasises that women and soldiers dichotomously fall into different categories. Thus, female perpetrators[7] and soldiers are rendered invisible. Thirdly, showing images of and giving voice and visibility to women and children as victims of violence that have needed to be heard, leaves the question as to how violence against women relates to (structures of) conflict. Thus, the narrative of women as victims (of sexual violence) and men as perpetrators persists.

Every initiative, policy and resolution 'pursuing a one-sided mandate that includes women and excludes men perpetuates gender imbalance and only by taking both gender into consideration can gender hierarchies be understood and balanced' (Courturier 2012; Manivannan 2014; Mouthaan 2013). Thus, the language used on the

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TFV's webpage illustrates internalised beliefs about 'victims' and 'perpetrators' reflecting the omnipresent deficient understanding of gender. As discussed before, the crime of rape is often hyper-visible in international criminal law and arguably points to a different type of silence that will be elaborated in the following section.

## From Silence to Noise? Sexual Violence Taking Centre Stage

Sexual violence in conflict serves, arguably, as a method to reinforce political and gendered power hierarchies and for a long time, rape was understood as an 'inevitable by-product of war' (Bedont and Martinez 1999; Buss 2007; Dowds 2015; Jayakumar 2015). A large proportion of academic scholarship, media attention, policy statements and international law jurisprudence focuses on gender-based (sexual) violence in wartime (Barrow 2010; Chinkin 1994; Hynes 2004; Karpinski and Strasser 2005; Kirby 2012; Manivannan 2014; Segal 2008; US Commission on Civil Rights 2013; Vojdik 2002, 2014).

According to Copel (2003) and Dolan (2014), the Hague Convention (1907: Article 46) invoked female chastity and male entitlement by coding rape a 'violation of family honor and rights' thus explicitly casting rape as a moral offense rather than a crime of violence. While having the ability to prosecute those responsible for sexual assaults, the *Nuremberg* and *Tokyo* war crime tribunals remained largely silent on gender-based violence (Bedont and Martinez 1999; Campanaro 2001; Chaikel 2011; Copelon 2003; Dowds 2015; Jayakumar 2015).

This is why the Rome Statute's definitional sections on gender crimes are considered 'a historic development under international law' (Benton and Martinez 1999:69). Article 7(1)(g) includes '[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity' as a 'crime against humanity'[8]. Furthermore, Article 8(2)(b)(xxii) (war crimes) signals that, in addition, acts of sexual violence can be charged as sexual violence crimes or as the other grave breaches listed in article 8(2)(a).

The case *The Prosecutor vs. Jean-Paul Akayesu* (1999)[9] established for the first time that an accused was convicted of not only crimes against humanity and genocide (Art. 6 of the Rome Statute) but for allowing and encouraging rape as an instrument of that genocide (Askin 2005; Chaikel 2011; Chappel 2003; Mouthaan 2013:675). However, the original indictment did not include gender crimes. In fact, it was the only female judge on the ICTR, Navi Pillay, who evoked testimony of sexual violence when questioning witnesses and thus had a profound impact on the jurisprudence of gender crimes in the *Akayesu case* (Askin 2005; Bedont and Martinez 1999). As reported by Bedont and Martinez (1999), Pillay recently observed:

Who interprets the law is at least as important as who makes the law, if not more so ... I cannot stress how critical I consider it to be that women represented and gender perspective integrated at all levels of the investigation, prosecution, defense, witness protection and judiciary.

The *Akayesu case* is commonly referred to as a progressive ground-breaking 'landmark decision' (Askin 2005:1007; Mouthaan 2013; NWI 2011). For Askin (2005), 'the significance of the law developed in this case is unparalleled'. Significantly, the statutory language used in defining sexual violence is not limited to women but gender-neutral. According to Chappel (2003:11), through the *Akayesu judgement*, 'women were recognised as individuals, as members of a group as well as having a reproductive role'. Yet, for Charlesworth (1999:387), the *Akayesu case* rests on a 'limited image of women' and understanding of rape perpetuating a 'view of women as cultural objects or bodies on which and through which war can be waged'. Similarly, Jayakumar (2015) argues that 'sexual violence falls on the wrong side of law' as being constituent crime of 'war crimes, 'genocides', 'crimes against humanity' and 'torture' and thus sexual violence is seldom referred to as sexual violence. She argues that in 'not acknowledging a crime for what it is, a culture of silence is built around it'.

## 'Male Rape Remains Deeply Taboo...

... protecting traditional gender norms by fostering a culture of silence' (Courturier 2012:1-2). Gender violence has long been perceived as violence targeting solely on women and international human rights systems have, until recently, almost exclusively focused on the abuse of women and girls. However, while largely silenced and thus

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invisible to most of the world, gender-based violence (sexual) is also perpetrated against men and boys (Couturier 2012; Dolan 2014; Jayakumar 2015; Manivannan 2014; Mouthaan 2013; Natabaalo 2013; Stemple 2009; Vojdik 2014). According to Sivakumaran (2007) and Vojdik (2014), sexual violence perpetrated against men is as much about sexual domination as sexual violence perpetrated against women involving similar structures of power and domination.

However, it was not until June 2013 that the UN Security Council (*UNSCR 2106*) first recognised that sexual violence in armed conflict and post-conflict situations also affects 'men and boys' highlighting how 'gender' is often still used as an euphemism for 'women'. Even though cases of rape and sexual violation on male detainees, combatants and civilians were reported in at least 25 conflicts in which sexual violence occurred in the past two decades, 'men are largely absent from the international jurisprudence of gender violence during war' (Vojdik 2014:929; Grey and Shepherd 2012; Manivannan 2014; Sivakumaran 2007). Rendering some victims of sexual violence invisible and others compassionately hyper-visible arguably not only reifies gender hierarchies but also perpetuates norms that impose 'unhealthy expectations about masculinity on men and boys' (Stemple 2009:647; Mouthaan 2013).

Dolan (2014:6) analysed penal codes in 189 countries and found a widespread lack of protection for men who experienced sexual abuse:

- 90 percent of men in countries in conflict are in situations where the law provides no protection for male victims of sexual violence;
- 67 countries criminalise men who report abuse;
- In 28 states only men are recognised as perpetrators of sexual violence – not women.

At the same time, only 3% of 4076 nongovernmental organisations around the world that address sexual violence and rape 'mention the experience of male in their informational materials, typically as a passing reference' (Stemple 2009: 612; Manivannan 2014).

Inherently, it is difficult to precisely document sexual violence against men and presumably, sexual violence perpetrated against men is highly underreported (Dolan 2014; Grey and Shepherd 2012; Jayakumar 2015; Lewis 2010; Natabaalo 2013; Stemple 2009). Arguably, stereotypical gender assumptions impede male victims to give evidence and the absence of data may not be deemed to be equal to the absence of incidents. Thus, figures and findings vary and data about male rape is wanting. Spitzberg (1999:245), for example, finds that 3% of men worldwide have been raped in their lifetime in contrast with 13% women. At the same time, the World Health Organization asserts that worldwide, 5-10% of men were sexually abused in their childhood (Stemple 2009:607). Moreover, as reported by Dolan (2014:2), the Kampala-based Refugee Law Project found that 38.5% of male refugees from eastern DRC experienced an incident of sexual violence in their lifetime. Significantly, a study in Liberia found higher rates of exposure to sexual violence of former combatants (vs. non-combatants) for both male (32.5% vs. 7.4% of civilian males) and female (42.3% vs. 9.2% of civilian females).

Progressively, the ICTY instituted a Sexual Assault Investigation Team that not only investigated rape of women but also men. An analysis of sexual violence in Sarajevo Canton revealed that 80% of 6000 male concentration camp detainees reported that they had been raped (Stemple 2009:614; Mouthaan 2013). Yet, the ICTY has dealt only with a restricted number of crimes of sexual violence against men, including Blagoje Simić and Stevan Todorović who have both been found guilty of having committed sexual assaults on male detainees *Prosecutor v. Simid, Tadić and Zarid*, IT-95-9-T 25 paras. 728, 772; and *Prosecutor v. Todorović*, IT-95-9/1-S, paras. 39-40). Moreover, Dusko Tadić has been found guilty of sexual mutilation of male detainees (*Prosecutor vs. Prosecutor v. Tadić*, IT-94-1-A, para. 206).

## Conclusion

To be able to advance understanding of gender and law with a particular focus on sexual violence related to conflict, it is important to understand that gender is 'a social practice and identity' (Jayakumar 2015). Thus, through the lens

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of social constructivism, it can be argued that even though the ICTY, ICTR and ICC (in line with the Rome Statute) have adopted gender-neutral language, the treaties language does not necessarily translate into equal rights and procedures. Clearly, progressive international criminal law provision must now become progressive practise if it is not to quickly lose its legal and political value.

What Riley (2008) refers to as the visibility/invisibility/hyper-visibility probe of gender is evident in the *ad hoc* tribunals and the ICC's statutory language and jurisprudence. While legal understanding and consideration of gender and gender-based violence is significantly advanced and violence against women established as an issue of concern in international criminal law, male victims are still largely invisible. This is particularly evident in the TFCV's female centric approach. Broadening the scope of the term 'victim' (of sexual violence) and 'perpetrator' is a key requirement to advance jurisprudence and understanding of (sexual) violence in times of conflict. Arguably, however, judgments offer limited opportunity to make the systematic nature of violence against both men and women visible. The study of international law and gender is an area with significant gaps and silences that should be comprehensively addressed in future research.

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## Notes

[1] Significantly, the extent of female participation in war and violence worldwide has increased during the last decades.

[2] This essay equally takes account of the extent to which men are rendered vulnerable by gendered norms and institutions.

[3] In this paper, 'international criminal law' is used to refer to the law applicable to and jurisprudence emerging from the cluster of war crimes tribunals together with the ICC.

[4] For an overview of the debate on the very existence of universal peremptory norms see: Nieto-Navia 2003.

[5] Derives from Hegel's (1979:383-409) *Phenomenology of Mind*.

[6] C.A. MacKinnon was selected as such in 2008.

[7] For an analysis of female perpetrators see for example: Gardam 2005, Smeulers 2015, *Lubanga judgement*.

[8] Two other gender-specific crimes have been enumerated under crimes against humanity: the crime of persecution against any identifiable group (including gender) and the crime of "enslavement".

[9] Another essential case was the ICTY's decision in Kunarac.

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