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# Gender Stereotypes and Armed Conflict - A Study of the Repercussions for International Justice

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# Sammanfattning

Väpnade konflikter är komplexa och mångfacetterade – män och kvinnors roller och nivå av inblandning varier avsevärt. Med detta i åtanke är det nödvändigt för internationell rätt och dess utövare att erbjuda ett reellt skydd, där ansvarsutkrävande och upprättelse erbjuds på lika villkor för alla oavsett kön. Risken är annars att vissa grupper osynliggörs. Sammanfattningsvis krävs det en nyanserad förståelse för könsroller både före, under och efter konflikter, för att internationell rätt ska bli ett effektivt instrument i det internationella arbetet för jämställdhet.

I feministisk litteratur återspeglas internationell humanitär rätt som föråldrad, som ett regelverk som förstärker existerande könsroller och patriarkala strukturer. Två av de mest framträdande könsstereotyper som lyfts fram i litteraturen är den ”aktiva” manliga förövaren och det ”passiva” kvinnliga offret. Dessa stereotyper baseras på redan existerande könsroller och förutfattade meningar om hur män och kvinnor ”borde” agera i konflikter. Utgångspunkten är att det ligger i kvinnors natur att vara passiva, fredsälskande och vårdgivande, och att inte ta del i stridigheter. Den andra utgångspunkten är att män är aktiva, våldsamma och dominanta, således inte offer för sexuellt våld.

I den här uppsatsen vill jag utreda om ovan nämnda könsstereotyper står i vägen för internationell rättvisa. Uppsatsen avser att dekonstruerar de mest uppenbara manliga och kvinnliga könsrollerna, och analyserar huruvida dessa förstärks av lagstiftare, jurister och akademiker. Avslutningsvis utreder uppsatsen huruvida könsstereotyper leder till hinder för internationella åtaganden att under konflikt erbjuda lika skydd för män och kvinnor. Två grupper kommer speciellt att belysas, nämligen kvinnliga kombattanter och manliga våldtäktsoffer. Uppsatsen redogör för hur dessa grupper på grund av könsstereotyper har hamnat efter i relation till ansvarsutkrävande, upprättelse och rehabilitering.

# Summary

Sites of armed conflicts are complex environments in which experiences of men and women differ considerably. Consequently, it is necessary to maintain a nuanced understanding of the interactions between gender and armed conflict in order to provide protection, accountability and redress for women and men equally. An understanding of the gendered components of armed conflict allows international law to be an authoritative instrument in addressing systematic gender inequalities.

Scholars argue that the laws governing armed conflict are archaic and reinforce gender stereotypes and patriarchal structures. Two of the most controversial gender stereotypes concern the “active” male perpetrator and the “passive” female victim. These stereotypes build on pre-existing gender roles that lead to assumptions about men and women’s roles in armed conflict. Namely, women are passive, peace loving and subordinate - they do not take part in combat. Men are active, violent and dominant - they are not victims of sexual violence.

The purpose of this paper is to explore whether these gender stereotypes obstruct international justice. It maps prevalent male and female gender stereotypes and examine whether the international law community, i.e. treaty drafters, jurists and scholars, reinforce these gender stereotypes. Finally, it examines the effects of these gender stereotypes on the international commitments to equally protect women and men during armed conflicts. More specifically, it looks at two groups that allegedly have been placed at the periphery of international law due to prevailing gender stereotypes. Specifically, it looks at female combatants and male victims of sexual violence and their access to justice, redress and rehabilitation.

# Abbreviations

AP	Additional Protocols
GC	Geneva Conventions
HRC	Human Rights Council
ICC	International Criminal Court
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
OHCHR	The UN Office of the High Commissioner for Human Rights
SCSL	The Special Court for Sierra Leone
SRSG	Office of the United Nations Special Representative of the Secretary-General on Sexual Violence in Conflict
SV	Sexual Violence
UN	United Nations
UNSCR	United Nations Security Council Resolutions

# 1. Introduction

## 1.1 Context

Sites of armed conflicts are complex environments in which experiences of men and women differ considerably. Consequently, it is necessary to maintain a nuanced understanding of the interactions between gender and armed conflict in order to provide protection, accountability and redress for women and men equally. An understanding of the gendered components allows international law to be an authoritative instrument in addressing systematic gender inequalities.

## 1.2 Purpose and Research Questions

The purpose of this paper is to explore the relationship between gender roles and the laws and practices governing armed conflict. By examining the discourse amongst international law scholars and the practices of international courts and tribunals, this paper aims to map stereotypes concerning men and women's roles in armed conflict. It will also seek to determine whether or not these gender stereotypes are an impediment to gender equality and victims' equal access to protection, accountability and redress.

As such, this paper attempts to answer the following questions: does the international law community, i.e. treaty drafters, jurists and scholars, reinforce gender stereotypes? If so, does this have negative repercussions for the international commitments to equally protect women and men during armed conflict?

## 1.3 Limitations

While there are several gender stereotypes in the context of armed conflict, I have limited myself to two of the most prevalent stereotypes. For the purpose of this paper, "gender stereotypes" will refer to common preconceptions about characteristics men and women "should" possess. I will not go into details concerning definitions of gender and sex – for more

information on this please view my contributions to the United Nations Office of the High Commissioner for Human Rights (OHCHR) guidance note on gender integration.<sup>1</sup>

Due to the limited word count, I have chosen to focus on a few specific legal provisions in international law that are problematized in literature. International human rights law instruments have purposely been excluded. There are numerous cases from the international courts and tribunals and so I have selected a few illustrative cases. Other pertinent topics related to gender and armed conflict, such as the definition of rape in the Rome Statute, have been left out but should suggestively be subject to further research.

I have not discussed the benefits of specific legal protection for women in armed conflict. The increased criminalisation of wartime rape has been pivotal for the recognition of violence against women and the pursuit of women's emancipation. The debate is rather about sensitizing the discourse to portraying women in a sexualised and dominated form. Such stereotypes turn women into sites of power and expose them to political and societal pressure.

## **1.4 Methodology**

In order to answer the research questions, I have applied a feminist legal theory. I have employed the theory since it analyses and challenges traditional legal theory and practice. By questioning legal categories and concepts rather than accepting them as given, the feminist legal theory enables a deeper analysis that scratches under the surface of traditional legal thinking.<sup>2</sup> It enables us to study the constructions and implications of the law from different perspectives. The methodology will be applied when examining the literature, the legal framework and the case law. Irrespective of the connotations that the word "feminist" might have, the theory should not be simplified as to only present a "women's perspective." I have intentionally chosen to apply a gender perspective that includes the perspectives of both men and women. The reason being that the essence of the feminist legal theory is to deconstruct gender stereotypes and draw attention to such categories of victims that are side-lined and marginalized by the existing jurisprudence – irrespectively of sex.

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<sup>1</sup> Sara Parikh Drar, *Systematizing Gender Integration in the Work of Commissions of Inquiry and Fact Finding Missions*, 2016, United Nations Office of the High Commissioner for Human Rights, p. 5 and 6.

<sup>2</sup> For more information on feminist legal theory, please visit [https://www.law.cornell.edu/wex/feminist\\_jurisprudence](https://www.law.cornell.edu/wex/feminist_jurisprudence).



## 1.5 Current State of Research

When reviewing the available research on topics related to gender and the laws of war, it is evident that a substantive number of feminist scholars continue to question the passive role attributed to women in international law. Scholars such as Nicole Henry (*The Fixation on Wartime Rape: Feminist Critique and International Criminal Law*, 2014) and Kiran Kaur Grewal (*International Criminal Law as a Site for Enhancing Women's Rights? Challenges, Possibilities, Strategies*, 2015) emphasise the potential drawbacks of offering special protection to women during armed conflict and fixating on women's sexuality. In recent years, a considerable amount of research has also focused on the "new" topic of male gender stereotypes of perceived masculinity, including scholars such as Sandesh Sivakumaran (*Prosecuting Sexual Violence Against Men and Boys*, 2013) and Laetitia Ruiz (*Gender Jurisprudence for Gender Crimes?*, 2016).

The research by these scholars is extensive but focuses on either male or female aspects of gender stereotypes. For the sake of maintaining a nuanced and holistic picture of gender biases in international law, I will therefore combine the research of these scholars in my analysis.

## 1.6 Literature

The feminist legal theory has been crucial when choosing the literature for this paper – in order to answer the research questions I have prioritized authors that apply a critical approach to the law. In addition to the literature mentioned in section 1.5, I have based much of the research on the work of Dustin A. Lewis (*Unrecognized Victims: Sexual Violence against Men in Conflict Settings under International Law*, 2009), Helen Durham and Katie O'Byrne (*The Dialogue of Difference: Gender Perspectives on International Humanitarian Law*, 2010) and Helen M. Kinsella (*Securing the Civilian: Sex and Gender in the Laws of War*, 2014). I have also included research on women in combat by Lucinda Peach (*Women at War: The Ethics of Women in Combat*, 1993) and Nicole Hogg (*Women's Participation in the Rwandan Genocide: Mothers or Monsters?*, 2010).

In order to get an overview of the practices of international courts and tribunals I have analysed several cases from the International Criminal Court (ICC), the International Criminal

Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL). I have also included the latest guidance material on the topic of gender and conflict published by the ICC and the OHCHR.

## **1.7 Structure of the Paper**

This paper will focus on a number of gendered themes in armed conflict. The introduction presents the research questions, the methodology and the literature. The second chapter provides a brief overview of the on-going discussions amongst scholars on the topic of gender and armed conflict. Chapter three applies a gender perspective to the Geneva Conventions (GCs) and the Rome Statute, focusing on provisions on the protection of women and sexual violence (SV). Chapter four introduces two gender stereotypes that run as a red thread throughout the paper: women are “too good to fight” and men are “never victims of rape.” These assumptions lead to the placement of two categories of people at the periphery of international law: female combatants and male victims of SV. The chapter includes the perspectives of prominent scholars on these two groups, and a few illustrative examples. The fifth chapter will examine the repercussions of these gender stereotypes on international justice, specifically on impunity for male SV and lack of assistance for demobilized female combatants. The final chapter provides an analysis and a conclusion.

## 2. Gender Perspectives within International Law

Literature on gender and armed conflict has for decades discussed whether or not international law is gendered.<sup>3</sup> It has been argued that the laws governing armed conflict reinforce gender stereotypes. Two of the most controversial stereotypes concern the “active” male perpetrator and the “passive” female victim. These stereotypes build on pre-existing gender roles and lead to assumptions about men and women’s roles in armed conflict. Women are passive and nurture loving and they do not take part in combat. Men are active, violent and dominant, and not victims of SV.

Scholars argue that the law institutes differences between the sexes, which reinforces the dissimilarities in their structural relations and obstruct international justice.<sup>4</sup> By placing women and men in fixed and unchangeable categories, some scholars claim that we run the risk of excluding the experience of those persons who do not fit into these categories. The opposing argument is that we should be careful of generalisations about the law causing passive victimisation – victims are diverse and not merely determined by the “coordinated power of law.”<sup>5</sup>

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<sup>3</sup> Laetitia Ruiz, *Gender Jurisprudence for Gender Crimes?* International Crimes Database, 20 June 2016, p. 2.

<sup>4</sup> See chapter three and four.

<sup>5</sup> Nicole Henry, *The Fixation on Wartime Rape: Feminist Critique and International Criminal Law*, Social and Legal Studies, Vol. 23(1) 93–111, 2014, p. 104.

# 3. A Gender Perspective on International law and Armed Conflict

## 3.1 The Geneva Conventions and its Protocols

The GCs and its protocols make up the core of International humanitarian law (IHL) and regulate the conduct of armed conflict. The GCs offer protection “without any adverse distinction founded on sex.”<sup>6</sup> The majority of the provisions in the GCs are general and gender neutral, i.e. they apply equally to men and women without distinction. However, certain provisions apply exclusively to women and offer them specific protection.<sup>7</sup> The wording on combatants are phrased in a gender-neutral way, indirectly acknowledging that there might be both male and female combatants during an armed conflict.<sup>8</sup> However, special protection is granted women in general and female prisoners of war in particular, whom must “be treated with all consideration due to their sex.”<sup>9</sup>

Whether or not the GCs reinforce gender stereotypes and patriarchal structures have been discussed at length.<sup>10</sup> Scholars argue that the depiction of women in the GCs is archaic.<sup>11</sup> Almost half of the 42 specific provisions relating to women within the GCs and their 1977 Additional Protocols (APs) deal with women in their roles as expectant or nursing mothers.<sup>12</sup>

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<sup>6</sup> GC I, art. 12; GC II, art. 12; GC III, art. 16; GC IV, art. 27; AP (AP) I, art. 75; AP II, art. 4.

<sup>7</sup> International Committee of the Red Cross (ICRC), *General and specific protection of women under international humanitarian law*, 2 March 2004, available at <https://www.icrc.org/en/document/general-specific-protection-women>.

<sup>8</sup> See art. 43(2) and 51(3) of AP I for international armed conflicts and Common art. 3 of the GC and art. 13(3) of AP II for non-international armed conflicts.

<sup>9</sup> With regard to women prisoners see GC III, art. 14 personal, and with regards to safety in general see art. GC I and II.

<sup>10</sup> Charlotte Lindsey, *The Impact of Armed Conflict on Women*, in Helen Durham and Tracey Gurd (eds), *Listening to the Silences: Women and War*, Koninklijke Brill, Leiden, 2005, p. 33.

<sup>11</sup> Ruiz 2016 p. 4.

<sup>12</sup> Helen Durham and Katie O’Byrne, *The dialogue of difference: gender perspectives on international humanitarian law*, International Review of the Red Cross, vol. 92 no. 877, March 2010, p. 34. See for example GC IV, arts. 14; 15, AP I, art. 76, AP I, art. 70(1), GC IV, art. 14, GC IV, art. 16, GC IV, art. 50, AP I, art. 8(a), AP I, art. 76(2) and AP I, art. 76(3).

Rape amounts to a grave breach of the GCs and its protocols, but it is not explicitly listed as a war crime.<sup>13</sup> Two out of the three articles that deal with rape specifically refer to women and female “honour.”<sup>14</sup> Under the very specific and explicit heading of “Protection of Women”, GC IV states that: “Women must be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any other form of indecent assault.”<sup>15</sup> The more recent provisions from 1977 are gender-neutral and refer to “outrages upon personal dignity.”<sup>16</sup>

The “gendered” nature of IHL is argued by some scholars to have downgraded women to the status of victims and accorded them legitimacy only in their role as mothers.<sup>17</sup> The exclusion of men from provisions on SV in IHL is argued by some scholars to render male victims of wartime rape invisible and to incline the international community towards believing that men are unlikely victims of SV in armed conflict.<sup>18</sup> It has also been argued that gender as a justification for discriminating between classes of victims is not compatible with IHL.<sup>19</sup>

### 3.2 The Rome Statute

The Rome Statute is complementary to national criminal jurisdictions and the ICC charges the gravest crimes within the international community.<sup>20</sup> Its provisions apply equally to women and men. Rape and other forms of SV are mentioned without reference to gender, and can be prosecuted as war crimes, crimes of genocide and crimes against humanity.<sup>21</sup> The statute mentions specific SV crimes, including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other forms of SV.<sup>22</sup> Jurisprudence from international criminal tribunals have shown that rape can be charged and successfully prosecuted as a war crime, a crime against humanity, as well as genocide.<sup>23</sup>

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<sup>13</sup> International Committee of the Red Cross, Rule 156. Definition of War Crimes, available at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter44\\_rule156](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter44_rule156).

<sup>14</sup> GC IV, art. 27, AP I, art. 76 and AP II, art. 4(2). Durham and O’Byrne 2010 p. 35.

<sup>15</sup> Art 27 in GC IV is from 1949. See also AP I, art. 76.

<sup>16</sup> GC Common art. 3, II from 1977 arts. 4(2)(e) AP, AP I, arts.75(2)(a)(b). Durham and O’Byrne 2010 p. 47.

<sup>17</sup> Durham and O’Byrne 2010 p. 34. See also Judith Gardam and Michelle Jarvis, *Women, Armed Conflict and International Law*, Kluwer Law International, 2001 and Helen Durham, *Women, armed conflict and international law*, International Review of the Red Cross, vol. 84, no. 847, September 2002, p. 655.

<sup>18</sup> Ruiz 2016 p. 4.

<sup>19</sup> Durham and O’Byrne 2010 p. 49.

<sup>20</sup> The Rome Statute entered into force on 1 July 2002.

<sup>21</sup> See arts. 6, 7 and 8 in the Rome Statute.

<sup>22</sup> The Rome Statute, arts 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi).

<sup>23</sup> Durham and O’Byrne 2010 p. 36.

In contrast to the GCs, the Rome Statute recognises various forms of SV as war crimes. This development indicates a change in the attitude towards SV and a greater recognition of wartime rape.<sup>24</sup> International criminal law (ICL) has evolved from IHL by not specifically limiting the wording to women in provisions on SV.<sup>25</sup> However, the specific types of SV mentioned indicate that the drafters still consider women as the primary target of wartime rape.<sup>26</sup> The most common types of male rape are not included, such as forced masturbation and forced circumcision.<sup>27</sup> Furthermore, the international courts and tribunals continue to use definitions of rape elaborated by the ICC Elements of Crimes, which focus on “penetration” and “invasion.”<sup>28</sup> “Enforced” rape, which is a common practice of SV against men, is therefore not covered by the definition.<sup>29</sup>

### 3.3 Non-binding International Instruments

The United Nations Security Council resolutions (UNSCR) focuses a great deal on the increased protection for female victims of SV during armed conflict, while failing to give recognition to male victims.<sup>30</sup> The drafters focus on the protection of women and girls as a part of a “vulnerable group” while disregarding that men and boys constitute a significant percentage of SV victims in armed conflict.<sup>31</sup> There are two UNSCR that differ. UNSCR 1325 (2000) indicates a significant shift in the position of the Council on women in armed conflict, the focus being on women’s participation and self-agency. UNSCR 2106 (2013) uses a more gender-neutral language in terms of SV, and for the first time in history, men and boys are mentioned amongst the affected SV victims in UNSCR.

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<sup>24</sup> International Committee of the Red Cross, Rule 156. Definition of War Crimes, available at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter44\\_rule156](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter44_rule156).

<sup>25</sup> Ruiz 2016 p. 10.

<sup>26</sup> Ruiz 2016 p. 8.

<sup>27</sup> For a list of the common types of male SV see Office of the United Nations Special Representative of the Secretary-General on Sexual Violence in Conflict (SRSG), *Report on Sexual Violence against Men and Boys in Conflict*, 25-26 July 2013, New York, p. 11. Available at <http://ifls.osgoode.yorku.ca/wp-content/uploads/2014/01/Report-of-Workshop-on-Sexual-Violence-against-Men-and-Boys-Final.pdf>. Sandesh Sivakumaran, *Prosecuting Sexual Violence Against Men and Boys*, in A-M de Brouwer et al. (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches*, Intersentia, Antwerp, 2013, p. 80.

<sup>28</sup> ICC Elements of Crimes, International Criminal Court, 2011, p. 8. Available at <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.

<sup>29</sup> “Enforced” rape is when the perpetrator forces a victim to rape a fellow victim. For specific cases involving “enforced” rape see chapter 5.1.

<sup>30</sup> UNSCR 1960 (2010), 1888 (2009) and 1820 (2008). For a thorough gender analysis of the resolutions see Ruiz and Dianne Otto, *Power and Danger Feminist Engagement with International Law Through the UN Security Council*, Australian Feminist Law Journal, Vol. 32, 2010, p. 97-121.

<sup>31</sup> Durham and O’Byrne 2010 p. 49 and Dustin A. Lewis, *Unrecognized Victims: Sexual Violence against Men in Conflict Settings under International Law*, Wisconsin International Law Journal, 29 August 2009, p. 19.

# 4. Prominent Gender Stereotypes in Armed Conflict

## 4.1 Women are “too Good to Fight”

IHL is dictated by the principle of distinction, i.e. the State’s obligation to distinguish between combatants and civilians at all times during armed conflicts.<sup>32</sup> Presumptions are not uncommon in relation to determining the civilian status of a person during an armed conflict. Men are assumed to be combatants, while women are automatically considered civilians. Statements by the international community at times include simplifications such as “innocent women, children, refugees and other vulnerable groups.”<sup>33</sup> Kinsella argues that such presumptions have been prominent in numerous conflicts, including in Srebrenica, Chechnya and the Israeli- Palestinian conflict.<sup>34</sup> The automated association with women as civilians, i.e. “the protected”, portrays women in a passive manner, and by default women become the customary victims of armed conflict.<sup>35</sup>

Attempts to recognize women as active and committed participants/combatants is often disapproved and side-lined as irrelevant.<sup>36</sup> Some scholars suggest that we need to reevaluate the participation of women in armed conflict.<sup>37</sup> In countries such as Colombia, female combatants made up about 40 percent of the FARC militia,<sup>38</sup> and as illustrated below, Rwandan women played an active role in the genocide 1994.

Women are assumed to lack the capacity to fight, biologically as well as physically. However, the deciding factor is perhaps rather that women are considered “too good to fight.” Social constructs often dictate that women are inherently good, innocent and incapable of

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<sup>32</sup> Kinsella p. 6.

<sup>33</sup> Security Council Press Release, SC/6847, 19 April 2000.

<sup>34</sup> Helen M. Kinsell, *Securing the Civilian: Sex and Gender in the Laws of War*, Consortium on Gender, Security and Human Rights, Working Paper No. 201/2014, p.14.

<sup>35</sup> Kinsella 2014 p. 6.

<sup>36</sup> Kinsella 2014 p. 5.

<sup>37</sup> Nicole Hogg, *Women’s participation in the Rwandan genocide: mothers or monsters?* International Review of the Red Cross, Vol. 92 No. 877, March 2010, p.71 and 78.

<sup>38</sup> Megan Alpert, *To Be a Guerrilla, and a Woman, in Colombia*, The Atlantic, 28 September 2016, available at <http://www.theatlantic.com/international/archive/2016/09/farc-deal-female-fighters/501644/>. For more information about former Colombian combatants see chapter 5.2.

committing atrocities, i.e. that it goes against their nature (morally and ethically).<sup>39</sup> The legal theorist Peach writes:

The ethic of care is tainted by ideological assumptions that women are different than men, more oriented towards peace and non-violence, and should thus not participate in the immoral activities of a largely sexist and patriarchal institution which functions to destroy rather than preserve life.<sup>40</sup>

Durham and O'Byrne argues that the notion of women being "too good to fight" shapes the general thinking of societies, leading to the denial and non-acceptance of women participating in combat and/or committing serious crimes.<sup>41</sup> Otto Pollak's "chivalry theory" ascertained this exact phenomenon: witnesses, investigators, prosecutors and judges are affected by their own gender biases and less likely to perceive women as criminals. Consequently, women commit more crimes than official statistics imply.<sup>42</sup>

A noteworthy example of the "too good to fight" stereotype is the role of women in the Rwandan genocide. According to Hogg, women's participation in the genocide goes far beyond official statistics.<sup>43</sup> Hogg reports that 46 percent of the 71 detained women she met in Rwanda had been involved in killing with their own hands or as a member of a group.<sup>44</sup> The former Rwandan minister Pauline Nyiramasuhuko was the first woman convicted of genocide by the ICTR.<sup>45</sup> Nyiramasuhuko's femininity was a prominent feature for debate and it was used both for and against her. Her supporters focused on her womanliness and status as a mother in order to gain sympathy throughout the trial.<sup>46</sup>

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<sup>39</sup> Durham and O'Byrne 2010 p. 42.

<sup>40</sup> Lucinda Peach, *Women at War: The Ethics of Women in Combat*, Hamline Journal of Public Law and Policy, vol. 15, p. 199.

<sup>41</sup> Durham and O'Byrne 2010 p. 42. See also Carrie Sperling, *Mother of atrocities: Pauline Nyiramasuhuko's role in the Rwandan genocide*, in Fordham Urban Law Journal, vol. 33, no. 1, 2006, p. 637.

<sup>42</sup> Otto Pollock, *The criminality of women*. Philadelphia: University of Pennsylvania Press, 1950. See also Hogg 2010 p. 81.

<sup>43</sup> Hogg 2010 p. 71.

<sup>44</sup> Hogg 2010 p. 78. See also Nicole Hogg, *I never poured blood: Women Accused of Genocide in Rwanda*, MA thesis, Faculty of Law, McGill University, Toronto, Canada, November 2001.

<sup>45</sup> *Nyiramasuhuko et al. (Butare)*, ICTR-98-42, Judgment, 14 December 2015.

<sup>46</sup> Sperling 2006, p. 637.



## 4.2 Men as “Never Victims of Rape”

The perceived biological and emotional differences between men and women have become part of the construction of women’s identity as inherently vulnerable.<sup>47</sup> Concepts of gender, women and SV have according to Grewal become intertwined and reinforced patriarchal structures and stereotypes that brand women as vulnerable and in need of protection.<sup>48</sup> According to Kinsella, this increased protection puts them at risk of being treated as “always already” victims, subject to either “the benevolence or malevolence of their benefactors.”<sup>49</sup>

According to some scholars, this view has not only manifested in the law discourse itself, but in the practice of international courts and tribunal. Women are defined and identified by their sexual victimisation and perceived as “already raped.”<sup>50</sup> Buckley-Zistel and Zolkos states:

[T]he fixation on wartime rape, reduces women to targets of one particular crime and constructs them as perpetual victims, fixing their social positions and political identities in the newly emerging society as passive, inferior, vulnerable, and in need of (male) protection.<sup>51</sup>

Some court cases reflect an almost presumptive attitude to women as potential rape victims during conflict. During the *CDF* case before the SCSL, the dissenting Judge Itoe stated that the fact that women had been captured and detained “on the other side” was enough to suggest that they had been subjected to SV.<sup>52</sup> Judge Itoe’s view reflects a common notion that women’s experiences of war are inherently associated with sexuality and vulnerability.<sup>53</sup> Henry reaffirms this by stating:

Wartime rape has very much become a ‘passion’ of international criminal law, a crime that incites much outrage and indignation. This is no doubt an important marketing strategy of international criminal

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<sup>47</sup> Kiran Kaur Grewal, *International Criminal Law as a Site for Enhancing Women’s Rights? Challenges, Possibilities, Strategies*, Feminist Legal Studies, DOI 10.1007/s10691-015-9286-4, 26 June 2015, p. 155.

<sup>48</sup> Grewal 2015 p. 157 and Henry 2014 p. 103.

<sup>49</sup> Kinsella 2014 p. 4.

<sup>50</sup> Henry 2014 p. 103 and Sharon Marcus, *Fighting bodies, fighting words: A theory and politics of rape prevention*, Butler J and Scott J (eds) *Feminists Theorize the Political*, New York, Routledge, 1992, pp. 385–403.

<sup>51</sup> Buckley-Zistel, Susanne and Zolkos, Magdalena, *Introduction: Gender in transitional justice*. In: Buckley-Zistel S and Stanley R (eds) *Gender and Transitional Justice*, Hampshire and New York, Palgrave MacMillan, 2011, p. 10.

<sup>52</sup> Grewal 2015 p. 154. See also *Prosecutor v. Fofana and Kondew*, Case No. SCSL-04-14-T, 31 August 2007.

<sup>53</sup> Grewal 2015 p. 155.

law's image of itself as an enlightened, progressive moral force that has the power to vindicate victims, prosecute villains and end impunity for these egregious crimes.<sup>54</sup>

The fixation on SV as the universal experience of women's oppression leads to "mainstream" violations being overlooked.<sup>55</sup> Several cases in for example Yugoslavia and Sierra Leone depict scenarios where the gendered impact of armed conflict on women mainly included crimes such as women being forced to carry out domestic chores while confined to their homes.<sup>56</sup> The focus on SV has become the expression of the construction of women within the law, and "the relative dismissal of women's experiences during war."<sup>57</sup>

Ruiz argues that while stereotyped notions of women's vulnerability pins them down as the perpetual victim, gender norms governing masculinity obstruct the recognition of male SV as an experience of conflict.<sup>58</sup> SV involves "a complex psychosocial process" in which "homosexual and/or feminine attributes" are assigned to the male victim.<sup>59</sup> It debases and humiliates the victim, leaving him at the bottom of the societal power structure.<sup>60</sup> The association with weakness makes it a powerful instrument during wartime, a fact that may exacerbate its use.<sup>61</sup>

According to Lewis, international law reinforces certain gender stereotypes, which result in the underreporting of SV against men and boys:

[I]nternational instruments tend to conceptualize sexual violence as something perpetrated primarily against women and children. These conceptions flow from harmful stereotypes of femininity and masculinity and from pernicious cultural norms regarding sexuality, especially same-sex sexual behaviour. The initial step in providing enhanced protection must therefore be to, at a minimum, explicitly recognize that men also suffer sexual violence in conflict settings.<sup>62</sup>

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<sup>54</sup> Henry 2014 p. 106.

<sup>55</sup> Grewal 2015 p. 154.

<sup>56</sup> Grewal 2015 p. 157.

<sup>57</sup> Kinsella 2014 p. 4.

<sup>58</sup> Ruiz 2016 p. 19.

<sup>59</sup> Lewis 2009 p. 7.

<sup>60</sup> Durham and O'Byrne 2010 p. 48.

<sup>61</sup> Lewis 2009 p. 8-9.

<sup>62</sup> Lewis 2009 p. 48.

According to Sivakumaran there is a need for a more nuanced view of the roles of men and women in armed conflict, one that questions the stereotype of women solely being victims and men being perpetrators.<sup>63</sup> The stereotype of men as “never victims of rape” is a typically gendered narrative of war.<sup>64</sup>

There is a widespread assumption that females constitute the majority of wartime rape victims, which according to some scholars is incorrect.<sup>65</sup> While it is impossible to determine the exact numbers, reports clearly indicate the widespread use of male wartime rape in for example Sarajevo, Mali and Syria.<sup>66</sup>

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<sup>63</sup> Sandesh Sivakumaran, *Sexual Violence Against Men in Armed Conflict*, European Journal of International Law, vol. 18, 2007, p. 260.

<sup>64</sup> Kinsella 2014 p. 4 and Dubravka Zarkov, *The Body of the Other Man: Sexual Violence and the Construction of Masculinity, Sexuality and Ethnicity in Croatian Media*, in *Victims, Perpetrators or Actors? Gender, Armed Conflict, and Political Violence*, edited by Caroline Moser and Fiona Clark, London: Zed Books, 2011, p. 69–82.

<sup>65</sup> Lewis 2009 p. 3 and Henry 2014 p. 98.

<sup>66</sup> Durham and O’Byrne 2010 p. 48. See also the reports of UN Commission of Inquiry on Syria, A/HRC/S-17/2/Add.1 and UN Fact-finding Mission to Mali, A/HRC/22/33.

# 5. The Repercussions of Gender Stereotypes in International Justice

## 5.1 Impunity for Sexual Crimes

Ruiz states that SV against men has been at the “periphery of discourses on sexual violence during armed conflict.” This is allegedly reflected in the practices of the international criminal courts and tribunals.<sup>67</sup> Prosecutors tend to exclude male victims of SV by restricting its pleadings to crimes committed against “women and girls.” In addition, the SV against men is often dealt with within broader categories of crime, usually torture and inhuman treatment, instead of the provisions dealing exclusively with SV.<sup>68</sup> Scholars such as Oosterveld and Sivakumaran advocate for the recognition of the sexual component to SV against men by using correct headings such as rape.<sup>69</sup>

At the ICTY, sexual violence have routinely been charged as more general categories of crime.<sup>70</sup> In *Tadić*, *Čelebići Camp*, *Simić* and *Martić*, forced fellatio and the insertion of objects in the anus were charged as torture, inhuman acts and cruel treatment.<sup>71</sup> Similarly, SV against male victims were charged as outrages upon personal dignity in the *RUF* case at the SCSL.<sup>72</sup> In the *RUF* case male and female victims had been forced to have sex or commit sexual acts to family members (“enforced” rape). However, in its indictment the prosecution excluded the male victims from charges of rape by using the wording “women and girls.”<sup>73</sup>

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<sup>67</sup> Ruiz 2016 p. 2, 3 and 14. See also Lewis 2009 p. 1.

<sup>68</sup> Grewal 2015 p. 155.

<sup>69</sup> Ruiz 2016 p. 17, See also Sandesh Sivakumaran, *Prosecuting Sexual Violence Against Men and Boys*, in A-M de Brouwer et al. (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches*, Intersentia, Antwerp, 2013 and Valerie Oosterveld, *Sexual Violence Directed Against Men and Boys in Armed Conflict or Mass Atrocity: Addressing a Gendered Harm in International Criminal Tribunals*, *Journal of international Law & International Relations*, 2014 Vol. 10, p. 107-128.

<sup>70</sup> Ruiz 2016 p. 15 and Henry 2014 p. 99.

<sup>71</sup> Forced fellatios entail the forcing of two men to commit oral sexual acts. See *Prosecutor v. Duško Tadić*, Case No. IT-94-1-I, Second Amended Indictment, 14 December 1995, para. 2.6, IT-94-1-I, *Prosecutor v. Mucić et al.*, Case No. IT-96-21, Trial Judgment, 16 November 1998, para. 1066, IT-96-21-T, *Prosecutor v. Milan Martić*, Case No. IT-95-11, Trial Judgment, 12 June 2007, paras. 288 (footnote 899), 413-415, 454-455, 480, and 518, IT-95-11 and *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9-T, Trial judgment, 17 October 2003, para. 728.

<sup>72</sup> *Prosecutor v. Issa Hassan Sesay et al.*, Case No. SCSL-04-15-T, Judgment, 2 March 2009, para. 1302-1306.

<sup>73</sup> *Prosecutor v. Issa Hassan Sesay et al.*, Case No. SCSL-04-15-T, Judgment, 2 March 2009, para. 1302.

In the *Muthaura and Kenyatta* case, the Pre-Trial Chamber at the ICC did not characterise the forced circumcisions and penile amputations of Luo men as SV, arguing that “not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence.”<sup>74</sup> In 2012 the prosecutor submitted a written application for formal notice to the Trial Chamber, requesting legal re-characterization, stating that the Pre-Trial Chamber erred in failing to characterize forced circumcision and penile amputation as “other forms of sexual violence.” A less narrow definition was considered warranted, as the Pre-Trial Chamber “relied on an outdated conceptualization of sexual violence; namely, that such acts are purely about sex and not about the complex power dynamics at play.”<sup>75</sup>

Notably, some developments have taken place in terms of accountability for male SV. In 2004, forced fellatio was charged in the *Češić* case under article 5(g) of the ICTY Statute, which is the provision for rape.<sup>76</sup> However, the indictment specifies that the article includes other forms of sexual assault – thus the accused was charged with sexual assault rather than rape.<sup>77</sup> A more significant development is the judgment in the *Bemba* case at the ICC in 2016, where male SV for the first time was charged and convicted under the specific charges of rape.<sup>78</sup> Another development is the ICC Policy Paper on Sexual and Gender Based Crimes from 2014, where men and boys were discussed on an equal base with women and girls as potential victims of SV.<sup>79</sup>

## 5.2 Lack of Assistance in Post-conflict Settings

In post-conflict settings, very few legal and social networks are assisting male victims of SV and psychosocial services for male victims are more or less non-existent.<sup>80</sup> Victims of SV

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<sup>74</sup> *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 265.

<sup>75</sup> Grewal 2015 p. 154.

<sup>76</sup> *Prosecutor v. Češić*. Case No. IT-95-10/1, Sentencing Judgement, 11 March 2004, para. 33, 52–53, 103.

<sup>77</sup> Ruiz 2016 p. 16 and Durham and O’Byrne 2010 p. 50.

<sup>78</sup> Ruiz 2016 p. 17, *Prosecutor v. Jean-Pierre Bemba*, Case No. ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute, 21 March 2016, para. 633.

<sup>79</sup> ICC Office of the Prosecutor, *Policy paper on Sexual and gender-Based Crimes*, June 2014, <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>

<sup>80</sup> R. Charli Carpenter, *Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations*, in Security Dialogue, vol. 37, 2006, no. 1, pp. 83–103 and IRIN, *Male Sexual Abuse Survivors Living on the Margins*, 2 August 2011, available at <http://www.irinnews.org/report/93399/drc-uganda-male-sexual-abuse-survivors-living-margins>.

face gender-specific challenges, which needs to be considered when developing rehabilitation and reintegration programs. Male victims of SV may experience physical impotence/damages to the reproductive organs/rectum, as well as confusion about their sexuality that might lead to social withdrawal, increased feelings of anger and alcohol and drug abuse. The failure/unwillingness to address the specific needs of male victims of SV might have devastating effects for the rehabilitation and reintegration of victims in society.<sup>81</sup>

Due to the social stigma of homosexuality, men are dissuaded to speak about incidents of sexual abuse and might face prosecution if they do.<sup>82</sup> Several countries have a gendered definition of rape, and consensual male–male sex is criminalized.<sup>83</sup> Victims are deterred from reporting a violation in fear of prosecution, incarceration or the death penalty.<sup>84</sup> According to Lewis, eighty-six countries criminalize consensual sexual intercourse between consensual adult. Seven has the death penalty as a potential punishment.<sup>85</sup> For these reasons, SV against men and boys might be far more widespread than statistics indicate.<sup>86</sup>

According to Durham and O’Byrne, specific types of stigmatization connected to male SV such as homosexuality, feminization and emasculation, render the crime a largely invisible offence.<sup>87</sup> Stemple writes:

Male rape will only be curtailed when the perception of men broadens beyond one that sees men as a monolithic perpetrator class, and instead recognizes that men and boys can and should also be a group entitled to rights claiming... It is possible to take sex and gender into account without setting up false divisions that pit all men against all women, villains against damsels in distress.<sup>88</sup>

Likewise, a narrow definition of who constitutes a combatant might lead to the needs of former female combatants being overlooked. Demobilized female combatants risk exclusion from transitional justice programs, which hinders their successful reintegration back into

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<sup>81</sup> World Health Organization (WHO), *Reproductive Health During Conflict and Displacement, A Guide for Program Managers*, 2000, p. 111-2. Available at [http://apps.who.int/iris/bitstream/10665/66784/1/WHO\\_RHR\\_00.13.pdf](http://apps.who.int/iris/bitstream/10665/66784/1/WHO_RHR_00.13.pdf) and 2009 p.15-16.

<sup>82</sup> WHO 2000, p. 112.

<sup>83</sup> Parikh Drar p. 20.

<sup>84</sup> Durham and O’Byrne 2010 p. 48-49.

<sup>85</sup> Lewis 2009 p. 18.

<sup>86</sup> WHO 2000 p 112.

<sup>87</sup> Durham and O’Byrne 2010 p. 48-49.

<sup>88</sup> Lara Stemple, *Male Rape And Human Rights*, in *Hastings Law Journal*, vol. 60, 2009, p. 634

society.<sup>89</sup> Reportedly, returned female combatants experience immense social pressure after the conflict has seized. The pressure both stems from the struggle to reintegrate into their communities and the gendered expectations of post-conflict societies.<sup>90</sup> Barth's study depicts a challenging scenario where returned female combatants struggle to conform to traditional gender roles and to join family life. They might have cut ties with their families to join the fighting or returned with a disability that makes them less likely to start a family.<sup>91</sup> Barth explains:

Female ex-fighters experience a lot of tension in their lives, finding themselves considered somewhere between, on the one hand, heroines, and on the other, unclean women. They have led lives that do not comply with rules for how respectable women ought to live, and they have to negotiate their identity against this background.<sup>92</sup>

In Colombia only about 20 percent of the former female combatants entered the government's formal reintegration program. Historically, Colombia's reintegration programs have been male-dominated and shaped by traditional gender roles. They have not been adapted to the specific needs of former female combatants. Women were for example encouraged to reintegrate into more domestic careers, such as cooking and tailoring. Consequently, many women chose to demobilize and reintegrate informally. They also sought to avoid the social stigma having "contradicted the idealized role of a peaceful, loving mother." Without government support the women were at a higher risk of retaliation, while also losing opportunities to receive job training and financial and psychological support provided by the Colombian Reintegration Agency (ACR).<sup>93</sup>

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<sup>89</sup> Kinsella 2014 p. 5.

<sup>90</sup> Durham and O'Byrne 2010 p. 43.

<sup>91</sup> Elise Fredrikke Barth, *Peace as Disappointment: The Reintegration of Female Soldiers in Post-Conflict Societies: A Comparative Study from Africa*, International Peace Research Institute (PRIO), Oslo, August 2002.

<sup>92</sup> Barth 2002 note 26.

<sup>93</sup> Alpert 2016.

## 6. Analysis

The question posed in the beginning of this paper was whether or not the international law community reinforce gender stereotypes, and if so, whether this affects the international commitments to equally protect women and men during armed conflicts.<sup>94</sup> The arguments presented above indicate that treaty drafters, jurists and scholars fortify gender stereotypes, which impedes victims' access to justice, redress and rehabilitation. This conclusion was based on the analysis of two gender stereotypes - namely that women do not participate in combat and that men are not subject to wartime SV.<sup>95</sup>

### 6.1 The Multifaceted Involvement of Women in Armed Conflicted

The language used in the GCs is not always gender-neutral and at times they reinforce patriarchal structures by portraying women as passive and vulnerable. A woman in need of protection rather than an active agent in society, a woman whose main contribution to society is as a mother and caregiver. Provisions granting women special protection "due to their sex" and excluding male victims of SV are somewhat problematic. International law does not accept the use of gender as a justification for discriminating between groups of victims.<sup>96</sup> With the exception of UNSCR 1325 (2000), resolutions also tend to reinforce female gender stereotypes.<sup>97</sup>

In the international law discourse on armed conflict, women tend to be portrayed as passive victims rather than active parties.<sup>98</sup> The phenomenon is not beneficial for either women or men. It undermines women's self- agency and their contribution to society and vilifies men. It is a simplistic view that does not reflect the situation on the ground. Women's involvement in armed conflict is multifaceted. Similarly to men, women play different roles in the shared experience of war. The fact that women commit crimes and atrocities should not be surprising.<sup>99</sup> Without fully investigating women's partaking in these crimes it is impossible to understand women's diverse experiences of armed conflict. Acknowledging their involvement

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<sup>94</sup> See chapter 1.2.

<sup>95</sup> See chapter four.

<sup>96</sup> See chapter 3.1.

<sup>97</sup> See chapter 3.3.

<sup>98</sup> See chapter 3.1 and 4.1.

<sup>99</sup> See chapter 4.1 and the section on women's participation in the Rwandan genocide.



is necessary to provide women who have participated in combat with effective reintegration programs. If the experiences of former female combatants are disregarded, their needs might be side-lined and overlooked.

## **6.2 Female Sexual Victimization**

The prevailing gender stereotypes of women have led to simplifications of women's experience during conflict and women are simply defined by their sexual victimisation. The fixation on SV as the universal experience of women's oppression is not beneficial to the pursuit of justice and accountability. It reduces women to passive, sexed "subjects" of law. This is done at the expense of "mainstream" crimes, which receive very little attention.<sup>100</sup> Armed conflicts are complex and situation-specific and there is a broad range of crimes perpetuated against women and men in wars worldwide.

## **6.3 Silencing Male Victims of Sexual Violence**

The legal discourse in international law has centred on gender-based crimes committed against women and their lack of recognition. However, other gendered aspects need to be considered, such as the silencing of SV against men in conflict situations.<sup>101</sup> This stands in contrast to the widely accepted view that international law privileges the experience of men while marginalizing that of women. Arguably, the "male narrative" of armed conflict does not always benefit men.

The international law community has failed to acknowledge the diversity of SV victims. The legal framework indicates that men are unlikely victims of SV in armed conflict – the GCs specifically mentions women as victims of wartime rape<sup>102</sup> and the Rome Statute fails to include male categories of SV.<sup>103</sup> The preconceived notion that women are the primary targets of wartime rape is reflected amongst the international community, particularly in the UNSCR and international courts and tribunals.<sup>104</sup> The prosecution is unwilling to bring forward charges of male rape and practices remain sporadic and inconsistent. It has in several cases failed to acknowledge the sexual components of these crimes and to assign the appropriate

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<sup>100</sup> See chapter 4.2.

<sup>101</sup> See chapter 4.2.

<sup>102</sup> See chapter 3.1.

<sup>103</sup> See chapter 3.2.

<sup>104</sup> See chapter 3.3 and 5.2.

legal characterization. However, the *Bemba* case has set a new precedent that hopefully indicates the courts willingness to rectify the silence and impunity that has followed male SV throughout history.

The international law community needs to recognize that SV against men is as serious as when perpetrated against women – it is used extensively in order to emasculate and “weaken” men during armed conflict. Recognition would send a signal to potential perpetrators, as well as professionals in the frontline that are tasked with reporting and prosecuting such crimes. It would also facilitate the inclusion of the specific physical, emotional and legal needs for male victims during transitional justice and rehabilitation efforts. As Lewis correctly highlights “effectively addressing sexual violence against women and men in armed conflict is not an either/or proposition, but it is a necessity for both.”<sup>105</sup>

## 6.4 Conclusion

The international law community’s reinforcement of certain gender stereotypes has a negative affect on the international commitments to equally protect women and men during armed conflict. As discussed in chapter five, gender stereotypes shape our perceptions of victims and assumptions of who the victim is of a particular crime. This obstructs the access to justice for certain “silenced” groups. Specifically, it impedes the successful reintegration of former female combatants, as well as accountability and inclusive rehabilitation programs for male SV survivors.<sup>106</sup>

In other words, to achieve substantive gender justice it is pivotal to reject preconceived notions of women and men that derive from sexist assumptions. The quest towards the protection of men and women is not mutually exclusive – understanding both male and female gender stereotypes is necessary to get a holistic picture. As long as stereotypes remain, victims will continue to be denied equal recognition and protection.

Suggestively, the international community could address the controversies above by taking a few assertive measures. Firstly, all types of violations should be thoroughly investigated, prosecuted and correctly categorized. Secondly, fixed notions of who constitutes a victim

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<sup>105</sup> Lewis 2009 p. 4.

<sup>106</sup> See chapter 5.1-2.

should to be deconstructed and replaced by a nuanced view. Thirdly, victims should not be reduced to powerless individuals, but recognised as diverse agents with distinct needs. Finally, the interaction between gender and IHL should be explored in more depth in order to get a more complete picture. By employing these steps, the journey towards worldwide justice for all persons is greatly enhanced.

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