

Recognising Male Victims of Sexual Violence in War: A Pathway to Gender Equality

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The conference paper assignment presented a unique challenge at this level and a taste of the academic's life. The process obviously allowed me to learn a topic in much greater detail, but also showed how much editing down was required to fit the time limit of the presentation. Tangential thoughts had to be sidetracked and arguments narrowed, at times to an uncomfortable degree. Thankfully, once the panel had presented, the opportunity to respond to questions allowed for ideas encountered and previously thrown aside to re-emerge. I was surprised, as going into the conference this question phase was the most daunting prospect for me but, come the time, I felt comfortable and my usually barren memory kicked into gear. Indeed, being able to share gathered knowledge in response to really engaged questions from my peers was the most rewarding aspect of the experience. The delivery of my paper certainly could have been improved, and this too was a source of learning. Seeing my classmates perform and observing some of their techniques for timing (even down to how the paper is printed) and getting over the nerves will be helpful in future. Listening to others' work, and being able to comment and ask questions of them, was of course the most rewarding part of the process. I think we were a pretty close group by the end of our two terms together, but this day truly fused us together.

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The recognition of male victims of sexual-violence, particularly in the context of war, is extraordinarily recent. In this paper I examine how the International Criminal Tribunal for the Former Yugoslavia (henceforth ICTY) has approached male victims of wartime sexual violence and this will lead to questions of the delayed recognition of such victims and how such recognition may be beneficial to gender equality. I begin with a brief introduction of the ICTY itself and the definition of sexual violence that it adopted. This is followed by a quantitative and qualitative empirical look at the ICTY's jurisprudence. I argue that this jurisprudence reflects the particular stream of feminist thought which configures sexual violence as a 'weapon of war' that is tactically deployed in wartime against women to disempower the 'enemy'. Ultimately, I suggest that while the ICTY may have contributed to and been complicit in the propagation of such a model (and its inherent gender normativity), its treatment of male victims nevertheless allows for a more complete academic interrogation of sexual violence during war.

To give a brief background to the ICTY, it was called into existence for the purpose of examining war crimes committed in relation to a specific set of events, those being the conflicts resulting from the break up of the former Yugoslavia, commencing in 1991 and primarily concerning the Croatian war of independence from 1991 to 1995, the War in Bosnia and Herzegovina from 1992 to 1995 and the Kosovo war of 1998-1999. It is important to note that the Tribunal came into existence whilst these conflicts raged on. In 1992, reports of atrocities, including mass rape, began to emerge (Zawati 2014: 89). On 6 October 1992, the UN Security Council commissioned a group of experts, headed by Cherif Bassiouni, to investigate possible violations of the laws of war. Based on its interim report, the Security Council called for the establishment of the Tribunal on 22 February 1993 (*Security Council Resolution 808*, 22 February 1993). On 25 May 1993, the Security Council adopted the Statute of the Tribunal setting out its mandate (*Security Council Resolution 827*, 25 May 1993). Namely, to investigate and try individuals responsible for

grave breaches of international humanitarian law, including: Grave Breaches of the Geneva Convention, Violations of the Laws or Customs of War, Genocide and Crimes Against Humanity (Bassiouni, 1994). For the very first time, rape was included as a Crime Against Humanity (*Statute of the International Criminal Tribunal for the Former Yugoslavia* 1993, Art.5(g)). This brought the promise of an end to impunity both for those committing rape directly and for their superiors. Whilst rape was not defined in the Statute, and sexual violence more broadly was not included, this was relatively quickly rectified in the Tribunal's jurisprudence. Importantly the definitions arrived at were gender neutral. For example, in the case of *Prosecutor v Kvočka et al.* (2001, para. 180) the Tribunal adopted the Rwandan Tribunal's definition in the case of *Akayesu* of sexual assault as:

any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. (*Prosecutor v. Akayesu* 1998, paras. 598 and 601)

In the Rwandan case forced public nudity was found to constitute sexual violence. In part these neutral definitions resulted from the Tribunal examining different jurisdictional approaches to sexual violence. But, the fact that the final Bassiouni report, submitted in October of 1994, included incidences of sexual violence directed at men and itself used gender-neutral definitions no doubt had an impact (see, for example, Bassiouni 1994, paras. 230, 235, 241, 242, 245, 247, 250). Nevertheless, when the Tribunal came to consider sexual violence perpetrated against men it did so in a manner that only re-inscribed gender norms.ⁱ

In assessing the ICTY's treatment of male victims of sexual violence I noticed conflicting accounts in the literature of their prevalence. Kimi Lynn King and Megan Greening (2007: 1057) note that, “[a]lthough there are markedly fewer cases of male sexual violence, the rates of conviction (although not sentences) are, in fact, slightly higher.” Whereas Kirsten Campbell, in her assessment of 35 completed cases in 2007, found an overrepresentation of prosecution of sexual

violence against men (Campbell 2007: 422-426). I sought clarification in the cases themselves (at the time of writing 62 cases had been completed, 4 remained at both the trial and appeal stages). The results are presented in the annexed tables. Where sexual violence was not identified as such in indictments or judgements, but I believed the facts fit the Tribunal's definition, I included it as being present.

Among other observations, I found that female victims of sexual violence are explicitly mentioned in 20 of the 36 casesⁱⁱ which included charges relating to sexual violence at the indictment stage. Male victims are explicitly mentioned in 10 of 36 cases. Also, female victims appear in the majority of judgements dealing with sexual violence: 28 of 39. Male victims appear in at least 17. And, cases dealing with female victims only are far more frequent than cases dealing only with males. That said, male victims were included in many of the cases before the Tribunal. I acknowledge that such tables leave many questions begging. For example, they don't show how sexual violence was approached by the Prosecutor in terms of charges and plea agreements and how this may have been gender-biased. Focussing on final indictments, they also don't account for tactical shifts over time within individual cases. So, I now want to look at examples of how male victims of sexual violence appear in the cases themselves.

Firstly, when the Tribunal considered male victims, the sexual nature of the violence was often obscured. Arguably this was because only rape, as opposed to other forms of sexual violence, is treated as a Crime Against Humanity. Therefore, sexual violence committed against both women and men, which did not meet the definition of rape, had to be prosecuted as torture or cruel or inhuman treatment. However, in the case of male victims, the sexual nature of the torture or inhuman treatment is often not described as such. For example, in the case of *Prosecutor v Simić et al.* (2003; see also *Simić et al. Fifth Amended Indictment* 2002) the indictment makes no mention of sexual violence and the Trial Chamber makes no reference to the sexual nature of the violence when describing daily beatings, including to the genitals, as well as the following incident:

Several times, Kemal Mehinović had to spread his legs so that they could beat him in the crotch, and they told him that the Muslims should not propagate. (Ibid., para. 697)

As Valerie Oosterveld (2014: 113) argues, this lack of calling sexual violence what it is, acts to obscure its presence. When reading through the cases, beatings of detainees are so frequent, and so horrific, that I found myself questioning why we distinguish between non-sexual violence and sexual violence at all. However, one can discern differences in the approaches taken to male and female victims. This is perhaps most evident relation to male victims of rape. Incidents meeting the definition of rape of men most often come under the rubric of ‘torture’ or ‘cruel or inhuman treatment’ even though the Statute includes rape as a crime against humanity (DelZotto and Jones 2002). For example, in *Tadić and Borovnica Second Amended Indictment*, the very first case dealing with sexual violence, despite the indictment mentioning that both women and men were raped in the camps, the individual charges relating to male victims who were forced to fellate one another were framed as torture, whereas the charges relating to female victims came under rape. The Trial Chamber infamously called the Prosecutor up on this in the case of *Mucić et al.* Then the judges noted that an incident of forced fellatio ‘could constitute rape for which liability could have been found if pleaded in the appropriate manner’ (*Prosecutor v Mucić et al.* 2001, para. 1066). There are rare exceptions, in *Češić*, in which the indictment pre-dated that of *Mucić*, and where the defendant pled guilty to a charge of rape involving forced fellatio (*Češić Indictment* 1995, para. 33; *Mucić et al. Indictment* 1996).

Strikingly, the few incidences I have come across in which guards directly raped detainees, one involving a guard forcing his penis into the mouth of a male detainee (*Prosecutor v Naletilić and Martinović* 2003, para. 464) and others involving objects being forced into male detainees anuses (*Prosecutor v Simić et al.* 2003, paras. 728 and 772) are not charged or even described as

rape and only appear as evidence supporting other crimes.ⁱⁱⁱ Indeed, in the case of *Martić*, evidence of direct male rape only appears in a footnote (*Prosecutor v Martić* 2007: 108, footnote 899). In the exceptional case of *Sikirica*, such an incident was charged as rape (*Sikirica et al. Second Amended Indictment* 2001, para. 46), but by plea agreement, the charge was dropped (*Prosecutor v Sikirica et al.* 2001, paras. 13-15). Even more striking is the Tribunal's consideration in *Brđanin* of an incident in which guards attempted to force a male detainee to rape a female detainee (see also Oosterveld 2014). The Trial chamber found, 'that the threat of rape constituted a sexual assault vis-a-vis the female detainee' (*Prosecutor v Brđanin* 2004, para. 516). The male victim here is simply made to disappear.

The question we must pose is why these disappearances came about. Arguably one reason is that the strain of feminism which pushed for wartime rape and sexual violence to be addressed by the court was one that relied upon a gendered notion of rape. This feminism posited rape as an instrument of power wielded by men to subjugate women. Indeed, in making the case for international prosecutions of rape and gender based violence in the former Yugoslavia, Kathleen Pratt and Laurel Fletcher defined 'gender-based violence' as 'physical violations directed at women on account of their gender' (1994: 78, footnote 4). This conception of sexual-violence finds its source in Susan Brownmiller's 1975 work *Against Our Will: Men, Women and Rape*, in which she discussed the logic of wartime rape in the following manner:

Defense of women has long been a hallmark of masculine pride, as possession of women has been a hallmark of masculine success. Rape by a conquering soldier destroys all remaining illusions of power and property for men of the defeated side. (Brownmiller 1975: 31)

This logic refuses to accept male victims. Indeed, as others have argued in more recent literature, male victims if acknowledged at all were mentioned in asides, or worse, footnoted, much

like the male rape in the case of *Martić* (see Carpenter 2006: 93-94; Lewis 2014: 207). For example, Catherine MacKinnon, writing on the camps in 1993 notes: 'The camps can be outdoor enclosures of barbed wire or buildings where people are held, beaten, and killed and where women, and sometimes men, are raped' (MacKinnon 1994: 9). But she goes on to affirm that, 'rape *is* a daily act by men against women; it is *always* an act of domination by men over women' (ibid., 10). The problem with such an inflexible account is that it inevitably relies upon the binaries it seeks to subvert. The only way men can possibly fit the narrative is if they are rendered feminine.

As we have seen, this logic can be observed in ICTY jurisprudence. Arguably this is because it fits legal requirements such as intent and, in the case of superiors, foreseeability. A weapon does not just go off on its own. In any case, the Tribunal was more comfortable dealing with instances of male rape where the perpetrator was not directly involved in the rape itself, and thus maintained his masculinity while feminising the male victims. Where an attempt is made to force a man to rape a woman, the man's victimhood must be disregarded in order for his masculinity to be maintained. More recent literature, which brings attention to male victims often draws on alternative feminisms, which call into question the very binaries upon which the rape as a "weapon of war" logic rest (see, for example, Skjelsbaek 2012; Baaz and Stern 2013; Campbell, 2007). Perhaps these may have gained track too late to profoundly influence the ICTY. Or they may not have sought to do so anyway, given their tendency to be suspicious of such institutions. That said, I believe the very presence of male victims in the Tribunal's jurisprudence has played a part in recent reassessments of the nature of sex, gender and indeed power itself.

I do not mean to take too much away from the ICTY nor to completely dismiss the contribution feminist activism made to it. It *has* made immensely important inroads into the prosecution of sexual violence during war. It has to a large extent eradicated the guarantee of impunity for perpetrators of sexual violence during war, both at the international and national level. Unfortunately, with respect to sexual violence, it would seem that the Tribunal fell prey to the

powerful critique of courts as only capable of reproducing the discourses they have been fed or have always fed upon – or, in other words, of judges speaking in codified and ritualised ways so as to reproduce societal norms, including gender norms (Butler, 2010: 148). There is hope, as Gilles Deleuze (1996) made clear, jurisprudence, even when faced with the same factual scenarios, evolves. In the sadly likely event that such crimes are prosecuted again, one hopes contemporary explorations of sexual violence play their part in such an evolution.

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Appendix: Quantitative Evaluation of ICTY Cases

Cases with trial judgments (including on appeal):

| | Indictment | Trial: |
|---|------------|--------|
| No Sexual Violence | 30 | 19 |
| Sexual Violence Present (whether identified as such or not) | 28 | 39 |
| Total | 59 | 59 |

Sex of victims of the Completed Cases involving sexual violence:

| Victims: | Indictment | Trial |
|--|---------------------------------|-----------|
| Both Female and Male *(presumed) | 5 *(2 'in particular women') | 9 *(1) |
| Female Only | 4 | 18 |
| Male Only *(not treated as sexual violence) | 2 | 5 *(2) |
| Sex/Gender Unspecified | 8 | 2 |
| Female and Implied/presumed Male | 1 | |
| Female and Unclear | 5 | |
| Male/presumed male and Unclear | 1 | 2 |
| Total: | 28 | 39 |

Cases without Trials/ [Cases at Trial Stage]:

| | Indictment |
|--|------------|
| No Sexual Violence | 3 |
| Sexual Violence Identified as Sexual Violence | 4 [4] |
| Sexual Violence present not identified as sexual violence | |
| Uncertain if Sexual Violence | 1 |

Sex of victims in indictments in incomplete and no trial cases involving sexual violence:

| Victims: | Indictment |
|------------------------|---|
| Both Female and Male | 2 |
| Female Only | 1 |
| Male Only | |
| Sex/Gender Unspecified | 5 (note however in <i>Milosevic</i> evidence was led at trial about male victim ¹) |

¹ Evidence of Mr Sulejman Tihic: T29968, December 2 2003.

ⁱ Unfortunately this paper is too constrained to consider the extensive debate surrounding the ICTY's reversion to a mechanical, as opposed to conceptual, definition of rape and how this renewed focus on body parts as opposed to survivors' experiences has also proved gender and hetero-normative: see for example MacKinnon (2006: 945-946), Campbell (2007: 416-419), Hayes (2010: 129-156). See also Zawati (2014: 71-75), where he takes issue with the inconsistency of the rulings and appears to favour the more mechanical definition as more "accurate".

ⁱⁱ 36 is reached from adding the 28 cases with judgements involving sexual violence to the 8 cases involving sexual violence at either the trial stage or those that did not go to trial.

ⁱⁱⁱ For charges see: *Naletilić and Martinović Second Amended Indictment* (2001).