Engendering International Humanitarian Law
Introduction

Gender violence in conflict has for a while been perceived as violence targeting women and girls. Men and boys are as much the subject of gender based violence – with the perpetrators being men and women alike. While the former has gathered much attention – starting first as being perceived as “by-products” of conflict, to being recognised for what it really is, namely, actual conflict-strategy – the latter has been spoken of very, very rarely. This is in part possibly because men do not speak out as much, and sometimes those that speak out are forced to keep silent in the face of threats of emasculation. Even as women are acknowledged targets, legislation and policy have been vague at best while addressing gender based violence. This has, in turn, made efforts addressing the crime next to futile. No legislation explicitly talks about sexual violence in the terms that it needs to be spoken about with. Either packing them as offences under the umbrella of “war crimes” or “crimes against humanity” or “torture” and “genocide”, these offences are not given the attention that they need to be given under the ambit of international human rights and international humanitarian law.

The prosecution of crimes committed in war is a precondition for peace: and this is especially so in the context of crimes like sexual violence where prosecution serves three purposes: (a) closure for the survivor (b) removal of fear of repercussions which would otherwise amount to a state of disturbed peace and (c) the creation of an enabling environment for a sustainable future built on foundations of peace. There is copious material through written judgments and statutory provisions that speaks tremendously of how sexual violence falls on the wrong side of law as being a constituent crime of ‘war crimes’, ‘genocide’, ‘crimes against humanity’ and ‘torture’. However, there has seldom been instances of referring to sexual violence as sexual violence – a drawback that has effectively resulted in imperfect prosecutions and even the ignorance of certain crimes.

This paper will examine the phenomenon of sexual violence as it presents itself in a conflict setting, and then move onto studying the law and judicial pronouncements concerning gender-based violence in conflict. Following this, the paper will attempt to make the case for more visibility for the crimes under the law by factoring in gender mainstreamed legislative provisions.

Sexual Violence in War

Wars do not have clearly defined “end” points, and one cannot necessarily find comfortable distinctions between relief and development. In every war, alongside cataclysmic statistical tolls of civilian deaths, a major hurdle is the large-scale perpetration of sexual violence against women. It is oftentimes heard that war turns a woman’s body into a battleground, and that when women are subjected to sexual violence, the institution of the family is broken. However, the same is just as true for men, too – male survivors of sexual violence and rape suffer just as much if not more – and it is barely a justifiable argument to evaluate which of the two suffers more. The fact, though, is that sexual violence is a strategic weapon in war, directed for use against men and women alike. Sexual violence is calculated, brutal and absolutely bereft of humanity. Using sexual violence as a modus operandi in warfare is intricately woven with the hegemonic desire for power. Sexual violence in conflict is a preferred method to reinforce gendered and political hierarchies.

1 World Disasters Report, 1996.
Sexual violence in conflict isn’t about lust, but rather about wielding power and dominance. It is about asserting domination and power. Sexual violence imposes dominance and emasculates the enemy, or feminises the enemy. The purpose of using sexual violence is to break the victims who are supposed to be significant members of society and to erode the sanctity attached to their identity. These are planned and anticipated results. Labelling it as a crime of torture or a war crime or even cruel treatment, these crimes are not specifically addressed as an issue needing attention – but rather, as just being a part and parcel of war. These crimes, in the few instances of prosecution have been convicted only as torture, war crimes, crimes against humanity, or as examples of “great suffering or serious injury to body or health,” “cruel treatment,” and “inhumane acts”, and not as sexual violence or gender crimes proper.

What does the Law say?

Rape and sexual violence against women have been considered crimes under international law – although this was not something that happened at first. The International Criminal Tribunal for the former Yugoslavia (ICTY) recognized sexual violence as a distinct crime of war, a crime against humanity, and a human rights violation constituting part of a widespread or systematic attack on a civilian population based upon ethnic, national, racial, political, or religious grounds. The International Criminal Tribunal for Rwanda (ICTR) recognized that rape could constitute genocide, as it can destroy the group it is used against, in Prosecutor v. Jean-Paul Akayesu. These were the first instances looking at rape and sexual violence through the international criminal lens. In both tribunals prosecuting rape and sexual violence was restricted to instances involving women. Nevertheless, both laid down considerably significant pointers in that Akayesu defined sexual violence as “any act of a sexual nature which is committed on a person under circumstances which are coercive”; and the ICTR affirmed that “sexual violence is not limited to physical invasion of the human body, but may include acts which do not involve penetration or even physical contact.” In Prosecutor v. Dusko Tadic, the ICTY convicted the defendant of sexual violence against men among other abuses – including ordering

---

3 Don Couturier, "The Rape of Men: Eschewing Myths of Sexual Violence in War" http://web.uvic.ca/~onpol/1_Don.pdf
4 Article 27, Geneva Convention Relative to the Protection of Civilian Persons in Times of War, 1947; Article 3 of the Geneva Conventions of 1949; Article 3 of the ICTY Statute and Article 4 of the ICTR Statute; Article 1, Torture Convention; Crimes against Humanity as under Article 7 ICC, Article 5 ICTY and Article 3 ICTR
6 Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 688 (Sept. 2, 1998)
7 Ibid
8 Ibid
10 Prosecutor v. Dusko Tadic, Trial Chamber Judgment, May 7, 1997, at [206]
two male detainees to perform oral sex on a third male detainee. Later, in Prosecutor v. Delalic, the tribunal convicted four defendants for the acts of those in subordinate positions to them — and these acts included the placement of burning fuse cords around the genitals of male detainees and forcing two detainees to perform oral sex on each other. In Prosecutor v. Cesic, the tribunal convicted a Serbian commander for many crimes of which one included the forcing of two Muslim brothers to perform oral sex on each other, sometimes in front of other prisoners.

Though there hasn’t been any prosecution specifically angling on male rape and sexual violence as individual crimes beyond the scope of torture or war crimes, many international aid workers have documented instances of male rape and sexual violence, noting that they were in effect, “open secrets”. A report filed by the UN Commission of Experts that handled the investigation of sexual violence during the disintegration of Yugoslavia and the conflicts that ensured actually documented sexual violence against men, with accounts of castration, sodomy and terrible forms of genital mutilation. The only instance of judicial prosecution of male rape and sexual violence was by the Special Court for Sierra Leone. The tribunal prosecuted sexual violence against men during the conflict by the Revolutionary United Front (RUF). In Prosecutor v. Sesay et al, the Tribunal recognised that male rape and sexual violence committed by RUF troops against men and boys in captivity as part of their reign of terror. Besides these provisions and hallmarks in jurisprudence, the Rome Statute of the International Criminal Court, 2000 criminalizes rape and other forms of sexual violence in armed conflict, defining sexual violence as a crime of war and crime against humanity. The statutory language used defining sexual violence appears to be specific and gender-neutral.

Engendering legal rhetoric or keeping it gender blind?

Acknowledging the crime for what it is lets the victim room to avail the kind of medical, psychological and humanitarian assistance that will help him recover and rehabilitate his mind and body without hesitation to label his trauma. In not acknowledging the crime for what it is, a culture of silence is built around it. Rape and sexual violence remain tools of choice in conflict settings because of the absolute lack of dialogue around it.

11 Delalic et al., n. 22
12 Prosecutor v. Cesic, Sentencing Judgment, IT-95-10/1-S, paras. 13-14
15 Ibid
16 Ibid
18 Report of the Secretary- General pursuant to Security Resolution 1820 (2208), S/2009/362, paras. 3 and 6.
The premise of this contention is that there should be a gender blind approach to wording legislation, followed by an appropriate measure of engendered interpretation where appropriate. Looking at male rape and sexual violence through a masculine approach will remove the invisibility shrouding the issue. The invisibility is attributable not to the fact that feminism has outdone masculine narratives in securing attention for the cause of rape and sexual violence of women, but rather, that masculine approaches have been more inclined towards defining men as dominant, powerful and stoic, even. Male victims are often forced into silence under the threat of being ascribed a stigma of being weak or emasculated.

The first step is to recognise and acknowledge clearly that the crime exists. Denial does no good – for the crime continues to thrive in the hotbed of impunity that is fuelled by silence. Acknowledging the crime allows room for dialogue and verbal exchange that encourages understanding, enough to obliterate stigma, or at least work towards it. Secondly, gender mainstreaming of law and policy addressing sexual violence should be encouraged. Instead of obliterating the gender quotient altogether, making a legal instrument more logically attuned to the impact a crime may have on victims based on their gender makes more sense. By broadening the scope of gender, a wider social construct is extended to masculinity as there is no perception of what men should be or should not. Expanding the scope of the term “victims” of sexual violence leads to greater understanding of sexual violence. Analysing men as separate from the sexual violence rhetoric is detrimental to male victims and their interests. Sexual violence targeting men and women are mutually reinforcing. They function from a standpoint on gender that attributes a certain privilege or empowers the dominating masculinity.

To be able to do this, it is important to understand that masculinity is a social practice and not an identity. By perceiving it as an identity, there are attributes that are expected to be fulfilled in order to continue keeping that identity. Manliness must be validated by other men, in its reality as actual or potential violence, and certified by recognition of membership of the group of ‘real men’.” This leads to the creation of an expectation that must be adhered to especially during conflict in an armed militia, there is a rite of passage of sorts where those in combat are expected to assert their masculinities in a manner that would suitably weaken and break the enemy. The assertion of their masculinities invariably takes shape in the form of violence, for that becomes the most symbolic representation and rendition of domination. The construction of masculinity is attributed to how much of a “warrior” a soldier is, and how much “fight” he has in him. In many ways, this masculinity is “constructed through war”. The construction of masculinity is not only for the men who fight in war, but also for the women involved. By masculinising the perpetrator, troops in conflicts have sought to emasculate the enemy by feminising them. This is, of course, symbolic – as it is only about trying to assert dominance over the other by breaking the other. This equation effectively renders sexual violence and rape as a war weapon, a strategy of sorts that works to disempower the enemy and break the enemy through feminisation. The body of the target – whether male or female is a representative symbol of the collective, or the embodiment of the group at large. Through rape or sexual violence, this collective is “conquered”, or sought to be conquered.

---

21 Pierre Bourdieu, Masculine Domination (1998) p. 52
22 Joshua Goldstein, War and Gender (2001) pp. 264-272
Conclusion
Working towards giving male rape and sexual violence visibility and attention under law and policy requires a lot of shifts in the current state of understanding. The sexualised violation of men, like women, is not restricted only to armed conflict. Sexual violence by and large exists in a peacetime-wartime continuum, and is amplified in numbers during armed conflict owing to the fact that it becomes a question of victory in battle. The idea is to retain and assert dominance over the enemy – and the hegemony becomes a matter of greater significance in a conflict than in peacetime as the goal is to break the enemy. Rape and sexual violence in conflict – against men or women, may be spoken about in bursts and spurts, and even subject to much discussion. But until legislative and policy measures are installed in place with a view to specifically address these crimes for what they are, prosecuting them with the right language and the right kind of understanding of the nature of the crime as it subsists in the context of conflict, there will not be much change in the impact on the social landscape. Although it is agreeable that how much legal regulation of a crime can effectively stop the crime is still a debatable issue, deterrence is still a factor in keeping crime in check, and appropriate prosecution is a very valuable tool for closure.

23 Ibid