PROMOTING ACCOUNTABILITY FOR CONFLICT-RELATED SEXUAL VIOLENCE AGAINST MEN: A COMPARATIVE LEGAL ANALYSIS OF INTERNATIONAL AND DOMESTIC LAWS RELATING TO IDP AND REFUGEE MEN IN UGANDA

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Foreword

This paper reflects an innovative collaboration between the Refugee Law Project and the International Human Rights Law Clinic, University of California, Berkeley, School of Law. It addresses an issue of growing concern to gender activists, human rights and humanitarian actors, as well as governments, namely: what legal remedies are available to male survivors of conflict-related sexual violence? Are such remedies to be found within the domestic or the international sphere? Are they best addressed as human rights violations? Through war crimes tribunals? Or through a combination of transitional justice measures? Are the same remedies available to all victims, or are refugees treated differently from IDPs or citizens?

Through careful review of existing legislation, as well as existing precedents, this paper establishes that in principle, at least, international criminal justice offers the best prospects of redress, but that this potential has been seriously underutilized in nearly all cases to date. This paper thus serves as a wake-up call to those concerned with justice for survivors of sexual violence, and, using Uganda as a case study, lays the groundwork upon which to generate a legal reform agenda internationally. An earlier draft, prepared by Clinic students from the University of California, Berkeley, School of Law under the supervision of Professor Laurel E. Fletcher in collaboration with Dr. Chris Dolan, and with further advice from Stephen Oola, was discussed at a legal round-table in Kampala in April 2013, and this version reflects key comments and suggestions that were made on that occasion.

Dr. Chris Dolan, Director, Refugee Law Project

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EXECUTIVE SUMMARY AND INTRODUCTION

International attention to conflict-related sexual violence has surged in recent years. Yet while most of the literature and legal instruments focus on strengthening accountability for crimes against women and girls, who are often seen as the main targets of abuse, men and boys are also victims of sexual violence during armed conflict and in its aftermath. The experiences of male victims [1] remain under-reported and under-studied, and demand recognition and accountability. This paper provides a comparative analysis of relevant laws and instruments regarding conflict-related sexual violence against men at the international and regional levels, with a particular focus on East Africa, and the domestic laws of Uganda. It aims to expose the gaps in Ugandan legal protections for victims, and inform an advocacy agenda that promotes legal accountability for these violations.

Scholars offer various explanations for the lack of attention to conflict-related sexual violence against men. Nevertheless, international recognition of sexual violence in conflict has assumed a gendered perspective in which women were assumed to be victims and men were assumed to be perpetrators. Such thinking has begun to change, and UN-sponsored criminal tribunals, UN agencies, and non-governmental organizations (NGOs) have begun to recognize the victimization of men and call for increased awareness of this phenomenon.

Analysis of the sexual victimization of men in conflict reveals similarities between these crimes as committed against men and as committed against women. In both instances, victims report experiencing sexual violence crimes as crimes of power, intended to degrade, humiliate, and subjugate victims. Sexual violence against men, however, takes on added dimensions in the context of conflict. Perpetrators target men, in part, to attack males as leaders and protectors, diminish their masculinity, and unravel social hierarchies.

Despite the gravity and apparent prevalence of these crimes, empirical data regarding conflict-related sexual violence against men is limited. The paucity of data may be explained, in part, by the result of lack of attention to male victims, lack of training of first responders to identify and treat male victims, fear by victims of stigma and potential criminal prosecution under anti-sodomy laws if they report their victimization, and a lack of relief available to victims

[1] We acknowledge and respect that those who have been subjected to sexual violence may choose to refer to themselves as "survivors" or "victims" or another term. In this paper, we use the term "victim" as this is the predominant definition adopted by the relevant legal instruments discussed in this analysis.

which fails to incentivize reporting. While the actual number of victims is unknown, data suggest widespread use of sexual violence against men as a tool of conflict. According to one source, conflict-related sexual violence against men has occurred in at least 25 distinct armed conflicts in the past two decades alone. Documentation from an increasing number of Ugandan Internally Displaced Persons (IDPs) reveals that sexual violence was additionally used against men during a series of decades-long conflicts in the North. Similarly, the incidence of conflict-related sexual violence against men in neighboring countries has been reported.

This analysis seeks to answer four questions. First, to what extent do international and regional laws address sexual violence against men in conflict? Second, do Ugandan domestic laws demonstrate a similar capacity? Third, can international or regional norms serve as models for domestic legal reform to increase access to justice for victims? Fourth, what potential options for redress are open to male refugee and IDP victims of conflict-related sexual violence currently residing in Uganda, and what existing obligations does Uganda have to provide access to justice for these victims?

An examination of international criminal law regarding conflict-related sexual violence against men indicates that Rome Statute for the International Criminal Court (ICC) offers the most comprehensive model for legal accountability. The Rome Statute, to which Uganda is a party, expands the class of expressly enumerated crimes of sexual violence in international law in gender-neutral terms. Additionally, the ICC has adopted legal standards to reduce traditional legal barriers to prosecuting these crimes including the recognition that rape may occur as a result of coercive circumstances. Despite this promising normative framework, its implementation regarding men is mixed. While there are a limited number of cases before ICC and the other *ad hoc* criminal tribunals that involve incidents of sexual violence against men, the record indicates that these courts and tribunals appear to treat sexual violence against men differently from sexual violence against women. A survey of such cases shows that unlike sexual violence against women, sexual violence crimes against men are generally prosecuted under non-sexual criminal classifications.

In addition to international criminal law, international human rights law offers protections of fundamental individual rights applicable to victims of sexual violence. However, international and regional human rights instruments specific to sexual violence predominately use gender-specific language, conferring explicit protection only upon women. The language of UN Security

Council resolutions overwhelmingly refer to the victimization of "women and children" in conflict. However, recent statements by the UN, such as a November 2010 report by the Secretary General on the protection of civilians in conflict, are more inclusive and recognize male victims. Perhaps most promising, the legally binding African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa specifically lists state duties to prevent "sexual and gender-based violence in all its forms," a broad statement that implies protections for men, women, and children who experience displacement-related vulnerability.

Uganda's domestic legal framework does not contain adequate protections for male victims of conflict-related sexual violence. The ICC Act of 2010, the national statute incorporating the Rome Statute into domestic law, provides limited redress for male victims of sexual violence in conflict. It appears that officials will not seek to apply the ICC Act to crimes that took place before 2010, thus limiting its utility for men who were victimized in the conflicts in Northern Uganda. The Uganda Penal Code (UPC) provisions involving crimes of sexual violence outside of armed conflict employ gender-specific language. For example, the UPC defines rape as: "the unlawful carnal knowledge of a woman or girl," and thus presumptively exclude men as victims. Also, the UPC adopts legal tests that are out of step with the ICC, for example, requiring the prosecution to prove the rape victim did not consent to intercourse. Further, the UPC includes many morality offenses, including criminalizing sodomy, which creates a disincentive for male victims to report their crimes.

International law provides a model for domestic legal reform. UPC provisions regarding crimes of sexual violence may be amended to adopt the gender-inclusive language of international criminal law such as those used by the ICC. For example, for purposes of crimes of sexual violence, victims may be defined as "persons including men, women, and children" in order to provide a maximum standard of protection. Additionally, relevant UPC provisions may be changed to incorporate the ICC's legal elements for rape. This reform would reflect the fact that rape is a crime of power and would help reduce the risk to male victims of sexual violence of facing prosecution under anti-sodomy laws.

In addition to models for domestic legal reform, international law and norms offer potential avenues for redress to victims. As a signatory to international human rights treaties, Uganda is obligated to provide male victims of sexual violence a right to a remedy for human rights violations implicated by these crimes. Arguably, remedies include adequate legal

protections to prevent, investigate, and punish sexual violence against men. Thus international law supports legal reform to increase access to justice for male victims.

Under the prevailing legal framework, in Uganda the specific legal options for justice available to victims depend on the identity of the victim, the nature of the crime, the perpetrator, and the location and time of the incident. Only victims of international crimes that take place after 2010 are eligible for redress through the International Crimes Division under the ICC Act of 2010. This excludes justice for Ugandan male victims of sexual violence of the conflict in Northern Uganda. For male refugees who were victimized in conflict outside of Uganda, there are fewer avenues for justice; criminal prosecutions in home countries are infeasible and the only recourse for these victims may be to file petitions against the state in which the incident occurred for violation of their rights under human rights treaties.

Crimes of conflict-related sexual violence have been committed against male Ugandans and refugees during their residence in Uganda. Nonetheless, domestic legal provisions fail to ensure adequate legal accountability for these violations, and deny victims justice. International and regional norms do not provide a panacea for these atrocities. However, they can offer important models for domestic legal reform through their increasing incorporation of gender-inclusive language regarding crimes of sexual violence. Additionally, international and regional legal frameworks provide opportunities for leveraging the state's international obligations to respect, protect, and ensure the fundamental rights of Ugandan men and male refugees to be free from experiencing these crimes, and having access to justice when they do.

Conflict-related sexual violence against men in Uganda is a complex and serious concern. In light of the nature of the problem, this paper is limited and presents a modest contribution to the accountability efforts of advocates and survivors. This review serves as a basis for further discussion and the development of workable strategies for advocates and survivors to continue their efforts to end impunity for perpetrators of conflict-related sexual violence against men.

I. INTERNATIONAL EVOLUTION OF SEXUAL VIOLENCE NORMS

International attention to conflict-related sexual and gender-based violence in recent decades has focused on women and their vulnerabilities to these abuses, eclipsing attention to conflict-related sexual violence against men. As a result, male victimization is under-theorized

and under-studied.[2] In recent years, researchers and nongovernmental human rights groups have begun to challenge this state of affairs and have documented conflict-related sexual violence against men in numerous contexts, including in Uganda. This section provides a brief overview of these developments as a background to the discussion of the legal norms regarding accountability for conflict-related sexual violence.

A. The Contributions of the United Nations to Addressing Sexual Violence Against Men

The first human rights instruments, drafted in the aftermath of the Second World War, did not acknowledge the specific experiences of women, despite recognition in the Universal Declaration of Human Rights of the "equal rights of men and women," and the UN Charter's prohibition on sex-based discrimination.[3] That lack of attention only began to change significantly nearly thirty years later, with the creation of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) in 1979, and the further development of the women's rights movement in the West. In the 1970s and 1980s, the women's rights movement attempted to attach human rights to women by making sexual violence their "lead issue."[4] The next two decades witnessed growing attention to women's experiences of sexual violence as activists increased awareness of female victimization. This was evidenced, for example, by NGO discourse at the Third World Women's Conference in Nairobi in 1985.[5]

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[2] Sexual violence against men has begun to become a subject of detailed analysis and attention only in the last decade. *See* 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 72 (Moser & Clark eds., 2001); Augusta DelZotto & Adam Jones, *Male-on-Male Sexual Violence in Wartime: Human Rights' Last Taboo?*, Paper presented to the Annual Convention of the International Studies Association, 23–27 (Mar. 2002); Sandesh Sivakumaran, *Male/Male Rape and the "Taint" of Homosexuality*, 27 HUMAN RIGHTS QUARTERLY 1274 (2005) [hereinafter Sivakumaran, *Male/Male Rape*]; Charli Carpenter, *Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations*, 37 SECURITY DIALOGUE 83 (2006); Sandesh Sivakumaran, *Sexual Violence Against Men in Armed Conflict*, 18(2) EUR. J. INT'L L. 253 (2007) [hereinafter Sivakumaran, *Sexual Violence Against Men in Armed Conflict*]; Wynne Russell, *Sexual violence against men and boys*, 27 FORCED MIGRATION REV. 22, 22-23 (2007), *available at* http://www.fmreview.org/FMRpdfs/FMR27/12.pdf; Dustin A. Lewis, *Unrecognized Victims: Sexual Violence Against Men in Conflict Settings under International Law*, 27(1) WIS. INT'L L.J. 1 (2009). For an early account, *see* Adam Jones, *Gender and Ethnic Conflict in ex-Yugoslavia*, 17(1) ETHNIC & RACIAL STUD. 115 (1994).

[3] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR]; U.N. Charter Preamble.

[4] Alice M. Miller, *Sexuality, Violence Against Women, and Human Rights: Women Make Demands and Ladies Get Protection*, 7(2) HEALTH & HUM. RTS. 17, 24-25 (2004).

[5] Arvonne S. Fraser, *Becoming Human: The Origins and Development of Women's Human Rights*, *in* WOMEN'S RIGHTS: A HUMAN RIGHTS QUARTERLY READER 3, 52-53 (Bert B. Lockwood ed., 2006).

The work of the UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee), the committee of independent experts responsible for overseeing CEDAW, has been central to the development of norms and practices to combat sexual violence against women. In 1989, the CEDAW Committee issued a General Comment (an authoritative interpretation of state obligations under the treaty) that required states to include the data on violence against women in their periodic reports to it.[6] The CEDAW Committee also defined gender-based violence as "a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men."[7] Similarly, in its General Recommendation 19, the CEDAW Committee noted that gender-based violence is "violence that is directed against a woman, because she is a woman, or that affects women disproportionately."[8]

Women-focused understandings of sexual violence became increasingly formalized by the United Nations in the early 1990s. In 1993, the UN General Assembly passed the Declaration on the Elimination of Violence Against Women, which committed the United Nations and its member states to the recognition and prevention of all forms of violence against women, including sexual violence.[9]

That same year, against the backdrop of the first war in Europe since the end of Second World War, in which mass rape of women was widely reported, the United Nations sponsored the World Conference on Human Rights in Vienna. The final document negotiated by states at the Conference, the Vienna Declaration and Programme of Action, recognized "gender-based violence and all forms of sexual harassment and exploitation," within the context of human rights for women, and called on the UN General Assembly to protect against those harms.[10] In 1994, the United Nations Commission on Human Rights appointed a UN Special Rapporteur on Violence Against Women, who was tasked with reporting to the Commission (subsequently the

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[6] Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-Vision of Human Rights*, *in* WOMEN'S RIGHTS: A HUMAN RIGHTS QUARTERLY READER 57, 67 (citing Committee on the Elimination of Discrimination Against Women, General Recommendation 12: Violence Against Women, U.N. Doc. A/44/38 (Mar. 6, 1989) [hereinafter General Recommendation 12]).

[7] General Recommendation 12, *supra* note 6. General recommendations, also known as general comments, are the interpretations of the treaty body of the rights and duties established by the provisions of the treaty as well as application of the treaty provision to thematic issues or its methods of work.

[8] Convention on the Elimination of All Forms of Discrimination Against Women, General Recommendations Made by the Committee on the Elimination of Discrimination against Women No. 19, General Comments No. 6, 11th Sess. (1992) [hereinafter CEDAW General Recommendations No. 19].

[9] Declaration on the Elimination of Violence Against Women, G.A. Res. 104, art. 1, U.N. GAOR, 48th Sess., 85th plen. mtg., U.N. Doc. A/48/104 (Dec. 20, 1993).

[10] World Conference on Human Rights, June 14–25, 1993, Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/23 (July 12, 1993).

Human Rights Council[11]) on an annual basis.[12] This focus on sexual violence against women is most prominently reflected in United Nations Security Council Resolution 1325, adopted in 2000, which called "on all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse… ."[13]

The United Nations now has many bodies and offices mandated to address women's vulnerabilities.[14] Some were established early and have become more robust, like the Commission on the Status of Women[15] established in 1946. Others are more recently established; for example, the United Nations Entity on Gender Equality and the Empowerment of Women (or UN Women) was created in July 2010 with a mandate to promote the advancement of women. Additionally, since 1994, the United Nations has had a Special Rapporteur on Violence Against Women, and, since 2009, a Special Representative to the Secretary General on Sexual Violence in Conflict.[16]

UN Women draws on several relatively new and gender-inclusive definitions of sexual violence that depart from a women-focused conception of sexual violence. These include the incorporation of the International Criminal Court (ICC) definition of sexual violence as an act against "one or more persons."[17] The agency has also used a World Health Organization (WHO) definition of sexual violence as "any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise *directed against a person's sexuality* using

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[11] The Human Rights Commission was the principal body of the United Nations of state representatives responsible for promoting and protecting human rights until it was replaced by the Human Rights Council in 2006.

[12] Question of integrating the rights of women into the human rights mechanisms of the United Nations and the elimination of violence against women, United Nations Commission on Human Rights, Resolution 1994/45 (Mar. 4, 1994). The Special Rapporteur was initially appointed for a three-year period, but the position has been subsequently renewed, most recently in 2011, by Resolution 16/7. Mandate of the Special Rapporteur on violence against women, its causes and consequences, United Nations Human Rights Council, Resolution 16/7, U.N. Doc. A/HRC/RES/16/7 (Apr. 8, 2011). The Rapporteur is charged with seeking information on violence against women, its causes, and consequences from various sources including governments and treaty bodies, as well as recommending measures and working with other entities to eliminate that violence.

[13] S.C. Res. 1325, U.N. Doc. S/RES/1325 (Oct. 31, 2000).

[14] *See, e.g.*, General Assembly Resolution 61/143 stressed that states need to eliminate gender-based violence to ensure the protection of "women and girls in situations of armed conflict, post conflict settings and refugee and internally displaced settings, where women are at great risk of being targeted for violence… ." G.A. Res. 61/143, ¶ 8(o), U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/143, at 5 (Jan. 30, 2007).

[15] The Commission on the Status of Women is an organ that reports to the United Nations Economic and Social Council. It is the principal global policy-making body dedicated exclusively to gender equality and the advancement of women.

[16] Ali Miller, *Fighting Over the Figure of Gender*, 31(3) Pace L. Rev. 837, 850 (2012); the Special Representative to the Secretary General on Sexual Violence in Conflict was established under UN Security Council Resolution 1888. S.C. Res. 1888, U.N. Doc. S/RES/1888 (Sept. 30, 2009).

[17] United Nations Development Fund for Women, Addressing Conflict-Related Sexual Violence: An Analytical Inventory of Peacekeeping Practice 5 (2010).

coercion, by any person regardless of their relationship to the victim, in any setting."[18] These definitions mark a gradual shift in understandings of sexual violence.

In the early 1990s, when the bloodshed in the Balkans drew new international attention to conflict-related sexual violence against women, it also resulted in documentation and subsequent accountability of conflict-related sexual violence against men.[19] The first trial of the International Criminal Tribunal for the Former Yugoslavia (ICTY) resulted in the conviction of the defendant for cruel treatment and inhumane acts, in part for his role in forcing a male detainee to perform oral sex on another detainee and then bite off one of his testicles.[20] Accountability for sexual violence against men perpetrated during the conflict in Yugoslavia continued, albeit in a limited manner, in subsequent cases.[21] The ICC has also recognized conflict-related sexual violence against men in its proceedings.

In an encouraging sign that international mechanisms are moving toward a greater recognition of sexual violence against men, the Office of the United Nations High Commissioner for Refugees (UNHCR) in 2003 stated that the agency "employs an inclusive conception of sexual and gender-based violence that recognizes that, although the majority of victims/survivors are women and children, boys and men are also targets of sexual and gender-based violence."[22] However, while the agency acknowledged the existence of sexual violence against men, it also minimized the relevance of the phenomenon to its work: "while women, men, boys and girls can be victims of gender-based violence, women and girls are the main victims."[23] Additional progress occurred in 2008, when the UN Office for the Coordination of

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[18] *See* U.N. Action Against Sexual Violence in Conflict, Analytical & Conceptual Framing of Conflict-Related Sexual Violence 1 (2011), *available at* http://www.stoprapenow.org/uploads/advocacyresources/1321456915.pdf.

[19] Sexual violence against men was documented by non-governmental organizations (NGOs), individual states, UN experts, through pleadings in cases, and through indictments and convictions of individual offenders. Sivakumaran, *Sexual Violence Against Men in Armed Conflict*, *supra* note 2, at 259.

[20] Prosecutor v. Duško Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 206 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

[21] *See, e.g.*, Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, 24, 26 (Int'l Crim. Trib. for the Former Yugoslavia November 16, 1998). Prosecutions of sexual violence by the International Criminal Tribunal for the Former Yugoslavia (ICTY) were supported by fact-finding before and after its creation. In fact, the evidence of international crimes, including those involving sexual violence, was gathered by a UN-established Commission of Experts and provided the factual basis to support the establishment of the ICTY. M. Cherif Bassiouni & Marcia McCormick, SEXUAL VIOLENCE: AN INVISIBLE WEAPON OF WAR IN THE FORMER YUGOSLAVIA 2 (1996). After the tribunal began operations, it established a Sexual Assault Investigation Team that helped to build prosecutions of crimes involving sexual violence. Eric Stener Carlson, *Sexual Assault on Men in War*, 349 LANCET 129, 129 (1997).

[22] UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, SEXUAL AND GENDER-BASED VIOLENCE AGAINST REFUGEES, RETURNEES AND INTERNALLY DISPLACED PERSONS 10 (May 2003).

[23] *Id.* at 11.

Humanitarian Affairs (OCHA) convened an expert group meeting on assessing the nature, scope, and motivation for sexual violence against men and boys in armed conflict. This was considered one of "two priority topics for research regarding gender-based violence in conflict settings."[24] Most recently, in 2011, UNHCR commissioned an operational partner, Refugee Law Project, to collaborate in developing a guidance note for staff working with male victims of sexual violence. UNHCR issued this document in mid-2012.[25] The June 2013 UN Security Council Resolution (2106) on sexual violence in armed conflict, while continuing to frame the problem of sexual violence as one which disproportionately affects women and children, for the first time acknowledged that men and boys can also be affected.[26]

B. The Contributions of Scholarship to Addressing Sexual Violence Against Men

A small number of scholars have begun to examine conflict-related sexual violence against men. Their work offers preliminary insights into how and why the international response to sexual violence has developed along particular lines, as well as the implications of this normative evolution for responding effectively to sexual violence against men. Academics such as Lara Stemple,[27] Adam Jones,[28] and Sandesh Sivakumaran[29] explain the exclusion of male victims of sexual violence from international norms as a product of history.[30] According to Stemple, the protracted recognition of sexual violence as a "women's issue" by the United Nations created a general understanding and broad framework that neglected, and in many ways continues to neglect, male victims.[31] She asserts that the conflation between gender-based violence and violence against women leaves no space for recognition that men also are

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[24] U.N. Secretary-General, *Intensification of efforts to eliminate all forms of violence against women*, ¶ 38, U.N. Doc. A/64/151 (Jul. 17, 2009).
[25] United Nations High Commissioner for Refugees, WORKING WITH MEN AND BOY SURVIVORS OF SEXUAL AND GENDER-BASED VIOLENCE IN FORCED DISPLACEMENT (2012) [hereinafter UNHCR WORKING WITH MEN AND BOY SURVIVORS].
[26] S.C. Res. 2106, U.N. Doc. S/RES/2106 (Jun. 24, 2013) *(Noting* with concern that sexual violence in armed conflict and post-conflict situations disproportionately affects women and girls …while also affecting men and boys… .).
[27] Lara Stemple is the Director of the Health and Human Rights Law Project at the University of California, Los Angeles.
[28] Adam Jones is an associate professor of Political Science at the University of British Columbia, Okanagan.
[29] Sandesh Sivakumaran is an associate professor of public international law at the University of Nottingham.
[30] Lara Stemple, *Male Rape and Human Rights*, 60 HASTINGS L. REV. 605, 625 (2009); Sivakumaran, *Male/Male Rape*, *supra* note 2, at 1278; DelZotto & Jones, *supra* note 2.
[31] Stemple, *supra* note 30, at 626-27.

subjected to gender-based violence.[32] In fact, Stemple argues that this female-specific approach violates nondiscrimination norms held to be non-derogable in international law, such as the right not to be discriminated against based on sex.[33] Paradoxically, according to legal scholar Ali Miller, "the focus on women as the sole owners of gender has not led to speedy global change for women, including reduction of [gender-based violence]."[34]

Political scientist Charli Carpenter also notes that the international community developed a "highly gendered understanding of who is to be secured."[35] Women were to be protected; men were to be punished. When mentioned in human rights instruments pertaining to sexual violence, men are discussed only in their capacity as perpetrators of abuse. For example, the UN's International Conference on Population and Development found that: "special efforts should be made to emphasize men's shared responsibility… . Special emphasis should be placed on the prevention of violence against women and children."[36] Stemple argues that this attention to the role of men as active agents of abuse would not be misplaced if there were also recognition of the vulnerability of men to being victimized.[37] In the absence of such recognition, Stemple concludes: "human rights advocacy tools for men are inadequate," which allows states and international organizations to continue to ignore the problem.[38]

Others scholars offer a different perspective on the explanatory causes for the gendered development of international norms on sexual violence. Dominik DelZotto and Adam Jones, for example, contend that framing sexual violence as a women's issue was a purposeful development by the West after the Cold War.[39] DelZotto and Jones posit that promotion of sexual violence was the result of the "Post Cold War Identities" of the United States and its allies.[40] Western powers adopted the discourse of feminist groups and NGOs to further their strategic interests, framing the West as the protector of women in order to justify military and

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[32] *Id.* at 618.
[33] *Id*. at 638; *see also* SCOR, *Rape and Sexual Assault: A Legal Study*, 2 n.4, U.N. Doc. S/1994/647/Add.2 (Dec. 28, 1994) ("The international human right not to be discriminated against, in this case on the basis of sex, does not allow derogation."). *See also* Rome Statute of the International Criminal Court art. 21(3), Jul. 17, 1998, 2187 U.N.T.S. 90 ("The interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and without distinction founded on grounds such as gender.") [hereinafter Rome Statute].
[34] Miller, *supra* note 16, at 853.
[35] Carpenter, *supra* note 2, at 85.
[36] International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, *Programme Action of the International Conference on Population and Development*, 4.29, U.N. Doc. A/CONF.171/13 (Oct. 18, 1994).
[37] Stemple, *supra* note 30, at 624.
[38] *Id.* at 636.
[39] DelZotto & Jones, *supra* note 2.
[40] *Id.*

diplomatic intervention in specific regions.[41] I.H. Jones alternately theorizes that the gendered development of these norms reflects homophobic sentiments institutionalized within and through Judaism, Christianity, and Islam.[42]

The influence of some feminist scholars has also worked to marginalize male victims within discussions of conflict-related sexual violence. One argument by many feminists is that women are the "vast majority" of victims, and that women and girls are "disproportionately affected" by sexual violence.[43] Although such claims are rarely accompanied by supporting data, the argument continues that because women form the "vast majority" of victims, finite resources should be focused on women.[44] This reasoning has obstructed both the acknowledgment of male victims and the provision of aid to such victims.[45]

Another explanation for why feminists often exclude male victims is that feminist literature is committed to "centralizing women" when discussing law, international relations, and security studies, and to looking at conflict-related sexual violence as a manifestation of discrimination against women.[46] Consequently, as noted by Grey and Shepherd, when we look at the body of scholarly literature, "we can see that the scope of that body is female and the issue of sexual violence against men is peripheral."[47]

Although research in the mid-20th century regarding the incidence of violence in conflict largely ignored the experience of women, more recent work has mirrored normative developments, thus compounding the lack of empirical data on male victims and creating a gender binary vis-à-vis the experience of men and women.[48] Studies portrayed men as aggressors and perpetrators, and women as victims and peacekeepers.[49] The male victims of sexual violence, who fell outside and thus destabilized this binary, were ignored.

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[41] *Id.*
[42] I.H. Jones, *Cultural and historical aspects of male sexual assault*, *in* MALE VICTIMS OF SEXUAL ASSAULT (Mezey & King, eds., 2000).
[43] *See, e.g.*, K. A. Gabriel, *Engendering the International Criminal Court: Crimes Based on Sexual and Gender Violence*, 1 EYES ON THE ICC 43 (2004).
[44] Rosemary Grey & Laura J. Shepherd, *"Stop Rape Now?" Masculinity, Responsibility, and Conflict-related Sexual Violence*, MEN & MASCULINITIES 1, 5 (2012).
[45] Will Storr, *The Rape of Men*, THE OBSERVER (July 16, 2011), http://www.guardian.co.uk/society/2011/jul/17/the-rape-of-men.
[46] Grey & Shepherd, *supra* note 44.
[47] *Id.* at 6.
[48] Caroline O.N. Moser & Fiona C. Clark, INTRODUCTION TO VICTIMS, PERPETRATORS OR ACTORS? GENDER, ARMED CONFLICT AND POLITICAL VIOLENCE 3 (Caroline O.N. Moser & Fiona C. Clark eds., 2001).
[49] *Id.*

As researchers overlooked sexual violence against men, NGOs neglected the experience of male victims in their advocacy efforts. In 2002, of 4076 non-governmental organizations working in the area of "war rape and other forms of political sexual violence," only 3% mentioned sexual violence against men and boys in their informational literature or programs.[50] Although NGOs and scholars have since increased their attention to sexual violence against men and boys,[51] they do, as one commentator has observed, generally include the caveat that because violence against women is more prevalent than that against men, comment and discussion is devoted to female victims.[52] Even where sexual violence against men is not dismissed as less important relative to sexual violence against women, consideration of the issue is limited to an observation that the numbers are unclear and male victims are underreported.[53] In much of the literature, male victims are initially recognized, but the analysis proceeds with a conflation of gender with women, at which point a discussion of male victims ceases, "such that male bodies are first present then absent in the scholarly literature."[54] Political scientist Dominik Zaum argues that NGOs' lack of attention to the victimization of males may be explained in part by the fact that many NGOs rely on governments and private enterprises for their funding, and their agendas must therefore mirror those of their funders.[55]

II. CONTEXTUALIZING CONFLICT-RELATED SEXUAL VIOLENCE AGAINST MEN

A. The Dynamics of Sexual Violence Against Men

A major contribution of feminism has been to gain widespread recognition that sexual violence against women should be understood as an abuse of power,[56] and that sexual violation

[50] DelZotto & Jones, *supra* note 2.
[51] *See, e.g.*, U.N. Secretary-General, *Women, Peace and Security: Study submitted by the Secretary-General pursuant to Security Council resolution 1325*, ¶ 59 (2000); U.N. SCOR, 5916th mtg. at 44, U.N. Doc. S/PV.5916 (June 19, 2008) (Ms. Stiglic, Slovenia, speaking).
[52] *See, e.g.*, Anne-Marie Goetz, *Introduction, in* WOMEN TARGETED OR AFFECTED BY ARMED CONFLICT: WHAT ROLE FOR MILITARY PEACEKEEPERS? Wilton Park, 3-4 (May 27-29, 2008).
[53] Sivakumaran, *Sexual Violence Against Men in Armed Conflict*, *supra* note 2, at 261.
[54] Grey & Shepherd, *supra* note 44.
[55] Dominik Zaum, *International non-governmental organisations and civil wars*, 11 CIVIL WARS 22 (2009).
[56] Susan Brownmiller, AGAINST OUR WILL: MEN, WOMEN AND RAPE 15 (1976); A. Nicholas Groth, MEN WHO RAPE 2 (1979); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1302–03 (1991).

"symbolizes and actualizes" the social subordination of the victim.[57] It is a "violent humiliation ritual" that reinforces male supremacy and female inferiority, and that keeps its target population smaller, quieter, and withdrawn.[58]

This analysis of sexual violence as an expression of power and dominance can be extended to the case of male victims.[59] In most societies, men represent the protection, virility, strength, and power of the family and the community.[60] Sexual violence against men is therefore not just an attack on the individual, but an attack on the community, suggesting disempowerment at the individual and collective level. This is especially true where the violence is performed in public, making the community part of the crime both as complicit accessories and victims.[61] Because masculinity and victimhood are constructed as mutually exclusive, sexual attacks against men attack and destroy a victim's sense of masculinity and therefore subordinate and demoralize him.[62] Male victims are also feminized, and, in societies where men are viewed as superior in the gender hierarchy, being reduced (in their eyes and those of their perpetrators) to *de facto* "females" through sexual cruelty also lowers their social status.[63] Some victims are selected for "deviating from expectations around masculinity" or because they are perceived as feminine.[64] Conversely, the attacker is made more masculine through his domination of the victim.[65] Additionally, the perpetrator "taints" the victim with homosexuality by sexually assaulting him or requiring him to engage in sexual acts with other male victims, further emasculating the victim.[66] Finally, sexual violence against men often aims to prevent the victim from procreating.[67]

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[57] MacKinnon, *supra* note 56, at 1302.
[58] *Id*. at 1303.
[59] Michael Scarce, MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA AND SHAME 10 (1997).
[60] Zarkov, *supra* note 2, at 71; Yovanka Perdigao, *Central Africa: Invisible Victims—Sexual Violence Against Men in the Great Lakes*, THINKAFRICAPRESS (June 28, 2012), http://allafrica.com/stories/201206290101.html.
[61] Pauline Oosterhoff et al., *Sexual Torture of Men in Croatia and Other Conflict Situations: An Open Secret*, 12 Reproductive Health Matters 68 (2004).
[62] Elizabeth Stanko & Kathy Hobdell, *Assault on Men: Masculinity and Male Victimization*, 33 BRIT. J. CRIMINOLOGY 400, 413 (1993); Lewis, *supra* note 2, at 9.
[63] Adam Jones, *Straight as a Rule: Heteronormativity, Gendercide, and the Noncombatant Male*, MEN & MASCULINITIES 451, 452 (2006); DelZotto & Jones, *supra* note 2; Chris Dolan, SOCIAL TORTURE: THE CASE OF NORTHERN UGANDA, 1986-2006 (2009).
[64] Erika Carlsen, *Rape and War in the Democratic Republic of the Congo*, PEACE REVIEW 480 (2009); Shelah Bloom, *Violence against women and girls—A compendium of Monitoring and Evaluation indicators*, USAID (Oct. 14, 2008).
[65] Lewis, *supra* note 2, at 7.
[66] Zarkov, *supra* note 2, at 79; Sivakumaran, *Male/Male Rape*, *supra* note 2.
[67] This aim is sometimes even expressed by the perpetrator during the commission of the crime. Application of the Genocide Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v.

B. Barriers to Empirical Data on Conflict-Related Sexual Violence

While there is a small body of scholarship regarding conflict-related sexual violence against men, empirical data on this phenomenon is limited. Two important factors contribute to the paucity of data. First, there are significant barriers to the reporting and documentation of these cases. Second, the issue has not received substantial attention internationally.

Social, legal, and structural barriers to the reporting and documentation of these crimes are a significant contributing factor to the lack of empirical studies of the sexual victimization of men in conflict. According to 2005 guidelines concerning sexual violence, published by the Inter-Agency Standing Committee (IASC), [68] a UN-sponsored inter-agency forum for coordination, policy development, and decision-making involving key UN and non-UN humanitarian groups: "It is important to remember that sexual violence is under-reported even in well-resourced settings worldwide, and it will be difficult if not impossible to obtain an accurate measurement of the magnitude of the problem in an emergency."[69]

In addition to the general lack of resources endemic to conflict and post-conflict situations, unique structural barriers exist to the identification and documentation of sexual violence against men in these contexts. Physicians and aid workers are often "not trained to recognize the physical sequelae" of rape and other forms of sexual violence against men or to provide psychological counseling to male victims [70] Many medical professionals and

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Serbia and Montenegro), Application of the Republic of Bosnia and Herzegovina, ¶ 44D(c) (Mar. 20, 1993), *available at* http://www.icj-cij.org/docket/files/91/7199.pdf (including the allegations by one Muslim civilian who was detained in several concentration camps and recounts: "Serb torturers would beat us, step or jump on us until they tired out. They were deliberately aiming their beatings at our testicles saying, 'You'll never make Muslim children again.'").

[68] The IASC was established in June 1992 pursuant to United Nations General Assembly Resolution 46/182 and 48/57, and is the primary mechanism for inter-agency coordination on issues of humanitarian assistance. Full members include the Food and Agriculture Organization (FAO), the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), the United Nations Development Program (UNDP), the United Nations Population Fund (UNFPA), the United Nations Human Settlements Programme (HABITAT), the United Nations High Commissioner for Refugees (UNHCR), the United Nations Children's Fund (UNICEF), the World Food Programme (WFP) and the World Health Organization (WHO). The primary objectives of the IASC are to "develop and agree on system-wide humanitarian policies ... allocate responsibilities among agencies in humanitarian programs ... develop and agree on a common ethical framework for all humanitarian activities ... advocate for common humanitarian principles to parties outside the IASC ... identify areas where gaps in mandates or lack of operational capacity exist, and resolve disputes or disagreement about and between humanitarian agencies on system-wide humanitarian issues." *About the Inter-Agency Standing Committee*, INTER-AGENCY STANDING COMMITTEE, http://www.humanitarianinfo.org/iasc/pageloader.aspx?page=content-about-default (last visited Mar. 21, 2013).

[69] *Guidelines on Gender-Based Violence Interventions in Humanitarian Settings*, INTER-AGENCY STANDING COMMITTEE, http://www.humanitarianinfo.org/iasc/pageloader.aspx?page=content-subsidi-tf_gender-gbv (2005).

[70] *See generally* Carlson, *supra* note 21.

humanitarian aid workers are unaware of the forms of sexual abuse men may experience.[71] Even where these service providers are aware, they may pay less attention to signs of this violence because men are not seen as being as susceptible to sexual violence as women.[72] Medical workers focused on male rape might exclude other forms of sexual violence against men, or focus on visible trauma and thereby miss sexual violence that leaves no physical scars.[73] Further, victims and officials alike often lack the vocabulary needed to describe these acts of sexual violence.[74] As a result, conflict-related sexual violence against men is often misclassified and therefore not documented. Consequently, any aggregation of these data or determination of their prevalence is very difficult.

In addition to misreporting, these crimes are grossly underreported.[75] Available information suggests at least four reasons victims may be hesitant to report the sexual violations that they have suffered. First, some male survivors of sexual violence may fear arrest on suspicion of being homosexual if they report the abuse in countries that enforce laws criminalizing same-sex intimacy.[76] This danger may be compounded by the difficulty some victims encounter in accurately explaining what they have experienced, which may lead to victims exposing themselves to criminal charges.[77] Second, victims may be discouraged from reporting sexual violence because they fear social and familial ostracism; there are some reports that male victims who have reported their abuse to authorities have been abandoned by wives and family members.[78] Third, a lack of access to NGO and UN aid represents a failed incentive for full reporting, as victims may see no benefits of reporting, only negative consequences.[79]

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[71] *Id.*
[72] Sivakumaran, *Sexual Violence Against Men in Armed Conflict*, *supra* note 2, at 256.
[73] Eric Carlson, *The Hidden Prevalence of Male Sexual Assault During War: Observations on Blunt Trauma to the Male Genitals*, 46 BRIT. J. CRIMINOLOGY 16, 18 (2006); Angela Burnett & Michael Peel, *The Health of Survivors of Torture and Organised Violence*, 322 BRIT MEDICAL J. 606, 608 (2001).
[74] Torbjorn Andersen, *Speaking About the Unspeakable: Sexually Abused Men Striving Toward Language*, 2 AM. J. MEN'S HEALTH 25 (2008); Sivakumaran, *Sexual Violence Against Men in Armed Conflict*, *supra* note 2, at 255-56.
[75] WORLD HEALTH ORGANIZATION, WORLD REPORT ON VIOLENCE AND HEALTH 154 (Etienne Krug, et al. eds., 2002).
[76] Storr, *supra* note 45.
[77] Sivakumaran, *Sexual Violence Against Men in Armed Conflict*, *supra* note 2, at 256.
[78] *Id.*
[79] *Id.*

Finally, the internalization of destructive stereotypes and norms also may impede accurate and full reporting of conflict-related sexual violence by men.[80] Victims underreport because they experience shame, confusion, guilt, fear, and stigma due to the imputed feminine and/or homosexual nature of being a victim of sexual violence.[81] Additionally, conceptions of masculinity discourage reporting because victims may feel the need to cope "like a man" rather than report the crime and seek assistance.[82]

C. Empirical Data on Sexual Violence Against Men Outside Uganda

Despite the lack of comprehensive data on male victims of sexual violence, sufficient information exists to conclude that sexual violence against men occurs in many conflict and post-conflict societies, spanning both time and geographical distance. In Central America, 76% of male political prisoners surveyed in one prison in El Salvador in 1986, described at least one incidence of sexual torture.[83] In Eastern Europe, a study of 6,000 survivors of detention camps in the former Yugoslavia found that 80% of men reported having been raped.[84] In Asia, 21% of Sri Lankan males who were seen at a London torture treatment center from 1997-1998 reported sexual abuse while detained by the government in Sri Lanka.[85] From 2003-2004, investigators documented sexual abuse of Iraqi detainees at Abu Ghraib Prison in Iraq by US soldiers.[86]

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[80] *Id.* at 255.
[81] Lewis, *supra* note 2, at 9; Sivakumaran, *Male/Male Rape*, *supra* note 2, at 1288.
[82] G. Mezey & M.B. King, *Treatment for Male Victims of Sexual Assault*, *in* MALE VICTIMS OF SEXUAL ASSAULT 142 (G. Mezey and M.B. King eds., 2000).
[83] Inger Agger, *Sexual torture of political prisoners: an overview*, 2(3) J. TRAUMATIC STRESS 305, 311-12 (1989). These data were compiled by prisoner interviews of fellow political prisoners about the torture to which they were subjected before being transferred to La Esperanza Prison from various detention centers. These data are compiled in a White Book issued by the El Salvador Human Rights Organization. This statistic includes all of the prisoners transferred to the prison from February to August 1986, totaling 434 prisoners. It is likely that these numbers reflect significant underreporting.
[84] Željka Mudrovčić, *Sexual and Gender-Based Violence in Post-Conflict Regions: The Bosnia and Herzegovina Case*, *in* THE IMPACT OF ARMED CONFLICT ON WOMEN AND GIRLS: A CONSULTATIVE MEETING ON MAINSTREAMING GENDER IN AREAS OF CONFLICT AND RECONSTRUCTION, UNITED NATIONS POPULATION FUND 60, 64 (2001) (reporting: "Of 6,000 concentration camp victims in the Sarajevo Canton, 5,000 were men and 80 percent of them had reportedly been raped."). These data are from the Association of Concentration Camp Torture Survivors (ACCTS) of the Canton Sarajevo, "a non-governmental organization which gathers together and supports the surviving inmates of concentration camps throughout nine municipal associations." http://www.accts.org.ba/about.html.
[85] Michael Peel, et al., *The sexual abuse of men in detention in Sri Lanka*, 355(9220) LANCET 2069, 2070 (2000). The report is based on information from 184 Sri Lankan Tamil men seeking asylum in London who were referred to the Medical Foundation for the Care of Victims of Torture in 1997–98.
[86] *See* Anthony R. Jones & George R. Fay, *AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade 68-69* (2005), http://www.globalsecurity.org/intell/library/reports/2004/intell-abu-ghraib_ar15-6.pdf.

Several reports from Human Rights Watch, Amnesty International, and Doctors Without Borders document sexual violence against men and boys in the Democratic Republic of the Congo in 2004.[87] That same year a study reported that government soldiers in Southern Sudan systematically used boys as slaves and subjected these victims to sexual abuse and gang rape.[88] Also in 2004, one NGO documented 800 cases of female rape and 140 cases of male rape in the Central African Republic.[89] In Liberia, a 2008 survey of 1666 adults found that 32.6% of male combatants experienced sexual violence while 16.5% were forced to be sexual servants.[90] A 2010 survey by the Journal of the American Medical Association found that 22% of men and 30% of women in Eastern Congo reported conflict-related sexual violence.[91] Human Rights Watch reported in 2011, that government forces systemically used sexual violence against men in Libya, including detainees in custody.[92] As of 2013, four thousand rape cases have been reported throughout the Syrian revolution, 700 of which occurred in prisons and detention centers, against both women and men.[93] In fact, male rape has been documented as a weapon of wartime or political aggression in countries including Argentina, Burundi, Cambodia, Central African Republic, Chechnya, Chile, Croatia, El Salvador, Guatemala, Greece, Iran, Iraq, Kenya,

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[87] HUMAN RIGHTS WATCH, SEEKING JUSTICE: THE PROSECUTION OF SEXUAL VIOLENCE IN THE CONGO WAR 20-21 (2005); AMNESTY INTERNATIONAL, DEMOCRATIC REPUBLIC OF CONGO: MASS RAPE—TIME FOR REMEDIES (2004), http://www.amnesty.org/en/library/info/AFR62/018/2004; DOCTORS WITHOUT BORDERS, I HAVE NO JOY, NO PEACE OF MIND: MEDICAL, PSYCHOSOCIAL, AND SOCIO-ECONOMIC CONSEQUENCES OF SEXUAL VIOLENCE IN EASTERN DRC 6, 15-16 (2004).

[88] Maria Sliwa, *Sudan Cries Rape*, WORLDNETDAILY (Mar. 2, 2004), http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=37387.

[89] *Central African Republic: Unending Misery of Rape Victims*, IRIN NEWS (August 19, 2005), http://www.irinnews.org/Report/55920/CENTRAL-AFRICAN-REPUBLIC-Unending-misery-of-rape-victims. The cases were documented by L'Organisation pour la Compassion et le Développement des Familles en Détresse.

[90] Kirsten Johnson et al., *Association of Combatant Status and Sexual Violence with Health and Mental Health Outcomes in Postconflict Liberia*, 300(6) JAMA 676, 681, 684 (2008). The study was a cross-sectional, population-based, multi-stage random cluster survey of 1,666 adults, ages 18 years or older, using structured interviews and questionnaires, conducted during a 3-week period in May 2008 in Liberia.

[91] Kirsten Johnson et al., *Association of sexual violence and human rights violations with physical and mental health in territories of the Eastern Democratic Republic of the Congo*, 304(5) JAMA 553, 557 (2010). The survey included 593 female and 405 male respondents. The study was a cross-sectional, population-based, cluster survey of 998 adults, ages 18 years or older, using structured interviews and questionnaires, conducted over a 4-week period in March 2010 in the territories of North and South Kivu provinces and the Ituri district in the DRC.

[92] HUMAN RIGHTS WATCH, WORLD REPORT 2012: LIBYA (2012).

[93] What is the United States' Role in Addressing Sexual Violence in Libya and Syria? Remarks by Patricia Haslach, Principal Deputy Assistant Secretary, Bureau of Conflict and Stabilization Operations, U.S. Department of State (February 8, 2013), http://www.state.gov/j/cso/releases/remarks/2013/203949.htm (citing al-Arabiya).

Kuwait, Liberia, New Zealand, Northern Ireland, Rwanda, South Africa, the former Soviet Union, Sri Lanka, Sudan, Turkey, the former Yugoslavia, and Zimbabwe.[94] According to the United Nations, sexual violence against men or boys has taken place in at least 25 distinct armed conflicts in just the past decade.[95] The list is even longer when sexual exploitation of boys displaced by violent conflict is included.[96]

D. Forms of Sexual Violence Against Men

The methods of sexual violence and sexual torture used against men in conflict are numerous. Included among the forms of sexual violence against men that have been reported are oral and anal penetrative rapes with a penis, another body part, or an object.[97] Sexual violence also includes genital violence and mutilation, such as forced circumcision or blunt trauma to the testicles.[98] Men are also forced to engage in sexual acts with other male victims, rape family members, watch the rape of family members, endure electric shock to the genitals, mutilate the genitals of other male victims, endure castration, or engage in forced masturbation.[99] Each new account of sexual violence against men publicizes new methods of sexual violence used against male victims in conflict.

E. Physical, Psychological, and Social Impacts on Male Survivors

Regardless of its prevalence, survivors of conflict-related sexual violence face short- and long-term side effects of sexual violence. Physically, studies show that survivors may experience severe pain, sexual dysfunction—including physical impotence, damage to their reproductive capacity, blood in their stools, abscesses, ruptures of the rectum, general pains in

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[94] Sivakumaran, *Sexual Violence Against Men in Armed Conflict*, *supra* note 2, at 257-58; Xabier Aranburu, *Sexual Violence Beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases*, 23 LEIDEN J. INT'L L. 609, 616 (2010); Tom Hennessey & Felicity Gerry, *International Human Rights Law and Sexual Violence Against Men in Conflict Zones*, HALSBURY'S LAW EXCHANGE 1, 6 (2010), *available at* http://www.halsburyslawexchange.co.uk/wp-content/uploads/2012/10/Sexual-Violence-Against-Men-in-Conflict-Zones.pdf.

[95] The Nature, Scope and Motivation for Sexual Violence Against Men and Boys in Armed Conflict, Use of Sexual Violence in Armed Conflict: Identifying Gaps in Research to Inform More Effective Interventions, UN OCHA Research Meeting (June 26, 2008).

[96] HUMAN SECURITY REPORT PROJECT, HUMAN SECURITY REPORT (2005); Russell, *supra* note 2.

[97] Lewis, *supra* note 2, at 12.

[98] *Id.* at 13.

[99] *Id.* at 14.

the rectum, sexually transmitted diseases including HIV/AIDS, and loss of consciousness.[100] Emotionally, studies indicate that victims may suffer long-term anxiety, depression, anger and vulnerability, loss of self-image, emotional distancing or desensitization, self-blame, and self-harming behaviors.[101] Additionally, psychosomatic problems evidenced by studies include headache, loss of appetite and weight, sleeplessness, palpitations, dizziness, and exhaustion.[102] Male survivors also suffer from an increased likelihood of suicide.[103]

These problems are compounded by the social consequences of victimhood. Some survivors experience social stigma, marginalization and isolation, inability to engage in particular livelihoods, and a lack of legal redress.[104] Further, victims may be abandoned by their wives and families, depriving them of crucial support systems.[105]

Children are an especially vulnerable group within the IDP community and experience even more extreme long-term effects of sexual violence. A meta-analysis of 37 studies on the impact of general childhood sexual abuse found an increase in PTSD, depression, suicidality, sexual perpetration, and poor academic performance, regardless of the victim's sex.[106]

F. Existing Data on Sexual Violence Against Men in Uganda

Some data exist indicating that sexual violence against men in Uganda is a serious and under-reported concern, although much of the information is anecdotal.[107] One report from a medical doctor who treats referrals from the Refugee Law Project documented that all of the male patients referred to her by the RLP reported some form of sexual abuse.[108] Kampala's Ntinda Family Doctors, another health provider, refers approximately fifteen refugee clients per month for operations to repair the damaged anuses of male rape survivors.[109] A study based on the 2006 Uganda Demographic Health Survey found that 11% of Ugandan men over the age of

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[100] Oosterhoff et al., *supra* note 61.
[101] *Id.*
[102] *Id.*
[103] Sivakumaran, *Sexual Violence Against Men in Armed Conflict*, *supra* note 2, at 259.
[104] UNHCR WORKING WITH MEN AND BOY SURVIVORS, *supra* note 25 .
[105] Lewis, *supra* note 2.
[106] E.O. Paolucci et al., *A Meta-Analysis of the Published Research on the Effects of Child Sexual Abuse*, 135(1) J. PSYCHOL. 17 (2001).
[107] It should be noted that some of these incidents of sexual violence may have occurred outside of Uganda. All accounts are conflict related.
[108] Storr, *supra* note 45.
[109] *DRC-Uganda: Male Sexual Abuse Survivors Living on the Margins*, IRIN AFRICA (August 2, 2011), http://www.irinnews.org/Report/93399/DRC-UGANDA-Male-sexual-abuse-survivors-living-on-the-margins.

fifteen self-identified as victims of sexual violence, although not necessarily conflict-related sexual violence.[110] One study, specifically looking at the experience of IDPs in Uganda, found that men and boys were among the victims of sexual violence in the Pabbo Camp in the Gulu District of Northern Uganda.[111] These IDPs were subjected to sexual violence by multiple parties. For example, one police officer in Adjumani town noted the sexual abuse of young male IDPs by females during the course of their work as day laborers.[112] Refugee Law Project's own video documentaries (*Gender Against Men*, 2009, and *They Slept With Me,* 2012) provide detailed footage from survivors of male rape, including refugees violated prior to their arrival in Uganda, and former IDPs in northern Uganda who were raped by Ugandan soldiers in the late 1980s and early 1990s. Clearly more research needs to be conducted to determine the prevalence of conflict-related sexual violence against men, but given the gravity of the harm, greater attention should be given to identification and documentation of such abuse. At the same time, efforts to promote accountability for victims should also be part of a comprehensive response, and it is to this dimension the paper now turns.

III. INTERNATIONAL LAW AND INSTRUMENTS PERTAINING TO SEXUAL VIOLENCE

This section focuses primarily on two categories of international law.[113] The first, international criminal law (ICL), is a body of rules that (1) proscribes international crimes; (2) creates legal obligations on states to prosecute and punish those crimes; and (3) regulates international proceedings for the prosecution of individuals accused of these crimes.[114] The

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[110] UGANDA BUREAU OF STATISTICS, UGANDA DEMOGRAPHIC AND HEALTH SURVEY 2006 290 (2006), http://www.measuredhs.com/pubs/pdf/FR194/FR194.pdf. The highest rates were reported by those living in the central and eastern regions of the country. It is important to note that the most vulnerable populations, including refugees and many internally displaced persons (IDPs), would have had limited or no access to this survey. This study included 3,851 respondents ages 15-49 years for females and 15-54 years for males. Bivariate analysis was used and results were calculated at a 95% confidence interval.

[111] UNICEF, SUFFERING IN SILENCE: A STUDY OF SEXUAL AND GENDER BASED VIOLENCE IN PABBO CAMP, GULU DISTRICT, NORTHERN UGANDA 9-10 (2005). The Gulu District Sub-Committee on Sexual and Gender Based Violence (SGBV) Group chaired by the District Community Service Department and co-chaired by UNICEF, commissioned the study. The research was conducted in Pabbo IDP camp between the 6th and 25th September 2004. A total of 100 respondents were selected and interviewed from the seven zones of the camp.

[112] *Invisibly Displaced Persons in Adjumani District* 29 (Refugee Law Project, Working Paper No. 19, 2006). Documented during an interview with a police officer, Adjumani town, 29 January 2006.

[113] Note that refugee law constitutes a separate category of legal norms and obligations; although relevant to some male victims of conflict-related sexual violence in Uganda, its application to the topic is not addressed in this paper.

[114] Lewis, *supra* note 2, at 2.

jurisprudence and statutes of the major international-sponsored criminal tribunals, including the International Criminal Court (ICC), are analyzed in relation to prosecution of sexual violence against men. The second, international human rights law (IHRL), is the international system of legal obligations, norms, and enforcement mechanisms that safeguard the fundamental rights of individuals. This section explores the extent to which these two fields generate legal norms that are gender-inclusive and may be used to improve accountability for conflict-related sexual violence against men.

A. International Criminal Law

This subsection, which reviews the relevant international jurisprudence on rape and other forms of sexual violence perpetrated in conflict and post-conflict settings, focuses on the ICC for two reasons: First, the ICC is arguably the most important international player in the field of sexual violence accountability. As a permanent court, its direct influence on international criminal law has normative and symbolic significance. Second, the Rome Statute and the ICC's Elements of Crimes reflect the latest developments in international criminal law. These instruments incorporate many of the lessons learned from the *ad hoc* criminal tribunals for Rwanda, the former Yugoslavia, and Sierra Leone. They also incorporate provisions from international humanitarian law that impose criminal liability for certain violations of the laws of war.[115]

[115] International humanitarian law (IHL) is the body of laws and customs that seek to limit the effects of armed conflict by protecting persons who are not or are no longer engaging in hostilities or by restricting the means and methods of warfare. Lewis, *supra* note 2, at 2. It applies only to situations of armed conflict and it takes precedence over other bodies of law during those situations. The Geneva Conventions comprise the four treaties and three additional protocols that establish the standards of IHL. These instruments bind parties, which are member states, but they also impose individual liability for the most severe violations of the Geneva Conventions, which are referred to as "grave breaches." The Fourth Geneva Convention provides an expanded list of crimes that constitute grave breaches: willful killing, torture or inhumane treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, etc. Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12 1949, 75 U.N.T.S. 287 ("Fourth Geneva Convention"). Since all member states of the United Nations have currently ratified the conventions, they are a widely accepted body of norms. State parties to the Geneva Conventions are legally bound to enact legislation penalizing grave breaches, as well as to prosecute or extradite alleged perpetrators. For the purposes of this paper, grave breaches are significant because they impose individual liability both as violations of the Geneva Conventions and as war crimes under Article 8 of the Rome Statute.

1. Rome Statute of the International Criminal Court

Conflict-related sexual violence has incrementally gained recognition as an international crime.[116] The International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) became the main tribunals responsible for the contemporary evolution of jurisprudence on rape and sexual violence.[117] These tribunals clarified international norms prohibiting rape and sexual violence, and developed workable definitions and clear guidelines for prosecution.[118] In doing so, they established rape and sexual violence as constituent elements of genocide, crimes against humanity, and war crimes, and set a trend for using gender-neutral language to describe the victims of sexual violence.[119]

The decisions of these *ad hoc* tribunals paved the way for prosecution of sexual violence in the ICC. The Rome Statute, an international treaty that established the ICC as a judicial body to prosecute "the most serious crimes of concern to the international community," was adopted in July 1998.[120] To date, 108 countries have become parties to the Rome Statute, including Uganda. The Rome Statute significantly expanded the class of expressly enumerated crimes of sexual violence in international law, and it did so in gender-neutral terms. It added sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other forms of sexual violence of equivalent gravity to the list of war crimes and crimes against humanity.[121] It codified the holding of *Prosecutor v. Akayesu*, a 1998 ICTR case, by acknowledging that rape committed with the intent to "destroy in whole or in part" a population could constitute

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[116] *See* Katie O'Byrne, *Beyond Consent: Conceptualizing Sexual Assault in International Criminal Law*, 11 INT'L CRIM. L. REV. 495, 497 (2011), *available at* http://dl.dropbox.com/u/33320357/Women%20in%20ICL/s12_O%27Byrne.pdf (claiming that the evolution of sexual violence crimes in international law has been interpreted as a transition from invisibility to visibility. This transition is a product of ongoing exchange between domestic laws and the procedure and jurisprudence of international courts and tribunals. "The outcome is a spectrum of recognized sexual violence crimes, which have been specified to varying degrees, and which differ in some respects depending on the forum in which they have been defined.").

[117] The Special Court for Sierra Leone referred to the Statute of the ICTY and the ICTR, in addition to the Rome Statute, when it found RUF commanders Sesay, Kallon, and Gbao guilty of rape as a crime against humanity. Prosecutor v. Issa Hassan Sesay, Moris Kallon, Augustine Gbao, Case No. SCSL-04-15-T, Judgment, ¶ 144 (Special Ct. of Sierra Leone, Mar. 2, 2009).

[118] K. Alexa Koenig et al., *The Jurisprudence of Sexual Violence*, *in* SEXUAL VIOLENCE & ACCOUNTABILITY PROJECT WORKING PAPER SERIES 2 (Human Rights Center University of California, Berkeley, 2011).

[119] *See, e.g.*, Prosecutor v. Jean-Paul Akayesu, Judgment, Case No. ICTR-96-4-T, Judgment, ¶ 688 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998) (defining rape in gender-neutral terms and explaining that the presence of coercion eliminates the need to prove lack of consent). *See also* Prosecutor v. Furundzija, Case No. It-95-17/1-T, Judgment, ¶ 185 (Dec. 10, 1998) (confirming gender-neutral definition of rape and holding that rape constitutes torture).

[120] Rome Statute, *supra* note 33, at art. 1.

[121] *Id.* at arts. 7-8.

genocide.[122] The Statute also confirmed that criminal responsibility applied to commanders and intellectual authors of crimes for actions carried out by others through the legal theories of command responsibility and joint criminal enterprise liability.[123]

Significantly, the Rome Statute acknowledged that sexual violence could be committed against both men and women. As a result, it used gender-neutral language when referring to victims of all enumerated offenses.[124] For example, a crime against humanity is defined as a widespread and systematic attack against "any civilian population" that involves any of the offenses enumerated in Article 7 of the statute. Rape, sexual slavery, enforced sterilization are listed in Article 7(1)(g) as crimes that can constitute crimes against humanity if perpetrated against any civilians, not only against women. Unlike the ICTR and ICTY, which prohibited persecution as a crime against humanity when committed on the basis of religion, politics and/or race, the Rome Statute also prohibited persecution as a crime against humanity based on gender, clarifying that "gender refers to the two sexes, male and female, within the context of society."[125] This use of gender is the first codification of the term "gender" in international law and it may allow more expansive prosecution of gender-based crimes in the future.[126]

As a court of last resort, the ICC is limited in a few key respects. First, it may only prosecute the crimes of genocide, crimes against humanity, and war crimes when particular criteria are met. The accused must be a national of a country that has ratified the Rome Statute, or the crime must have occurred within the borders of a country that has accepted the Court's jurisdiction, or the UN Security Council must refer the situation to the ICC Prosecutor.[127] The crime must have taken place after the date at which the nation under consideration ratified the

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[122] Prosecutor v. Jean-Paul Akayesu, *supra* note 119, ¶ 733.
[123] Koenig et al., *supra* note 118, at 17.
[124] Rome Statute, *supra* note 33, at arts. 7-8.
[125] Rome Statute, *supra* note 33, at art. 7(3).
[126] *See* Miller, *supra* note 16. Miller argues that even though the definition of gender in the ICC is a "tautology," it will likely allow for an expansive reading of "gender-based prosecution" as a crime against humanity. Written as such, gender-based prosecution may include attacks on persons who do not comport with social norms about what "male- and female- identified bodies are supposed to do." *Id*. at 855.
[127] Court's operations are divided into two broad categories: "situations" and "cases." Situations are "generally defined in terms of temporal, territorial, and in some cases personal parameters" and "entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such." By contrast, "cases" are defined as "specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects" and entail "proceedings that take place after the issuance of a warrant of arrest or a summons to appear." Situation in the Democratic Republic of Congo, ICC-01/04-tEN-Corr, 65 (Pre-Trial Chamber 1 of the ICC, Jan. 17, 2006).

Rome Statute. With respect to Uganda, this date is June 14, 2002.[128] Second, for the ICC to have authority over a case, national courts must be unable or unwilling to prosecute the alleged crime.[129] The third and last limitation of the ICC is that it can prosecute only crimes of "sufficient gravity."[130]

2. Definitions and elements of international crimes under the Rome Statute

The Rome Statute is complemented by a separate document, the Elements of Crimes (EoC), which sets out the legal requirements of each crime in the statute and acts as a guide to the judges of the Court.[131] Although this paper will not analyze each element that the prosecution needs to prove, a brief summary of the crimes and how they relate to sexual violence is in order.[132]

a. Genocide

Genocide is defined as any of the following acts when "committed with the intent to destroy in whole or in part, a national, ethnic, racial or religious group, as such: killing members of the group, serious bodily or mental harm, deliberately inflicting on the group conditions of life calculated to bring about its destruction, imposing measures intended to prevent births within the group, or forcibly transferring children of the group to another group."[133] Sexual violence can comprise each of those sets of acts. For example, as the ICTR established, sexual violence can be perpetrated with the intent of ultimately causing death, as when a perpetrator mutilates a

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[128] *But see* infra Section IV(A).
[129] Rome Statute, *supra* note 33, at art. 17(1)(a).
[130] *Id.* at art. 17(1)(d). Pre-Trial Chamber I, the panel of judges appointed to oversee the pre-trial proceedings in the situation of the Democratic Republic of Congo, affirmed that the gravity requirement needs to be met in every case or situation that the ICC investigates. *See* Situation in the Democratic Republic of Congo, *supra* note 127. Gravity can be established quantitatively, for example through evidence of a large number of victims, or qualitatively through evidence of the geographical or temporal intensity of the alleged crimes, their nature, method of commission, and/or impact on victims and their families. *See* Susana SáCouto & Katherine Clearey, *The Gravity Threshold of the International Criminal Court*, 5 AM. U. INT'L L. REV. 807, 809-10 (2008). In addition, the Office of the Prosecutor has made it clear that it will focus on those individuals who bear the most responsibility for crimes within the jurisdiction of the ICC.
[131] The final text of the EoC was formally adopted by the ICC Assembly of State Parties in September 2002. *See* Rome Statute, *supra* note 33, at art. 9. *See also* Elements of Crimes, art. 7(1)(g)-6, ICC-ASP/1/3 (2002).
[132] *See* Lewis, *supra* note 2, at 12 (offering a full "prosecution roadmap").
[133] Rome Statute, *supra* note 33, at art. 6.

victim's sexual body parts.[134] The EoC does not limit the acts that can constitute genocide by reference to gender-specific language, e.g. "men" or "women."[135]

b. Crimes against humanity

The international offense of crimes against humanity is defined by a variety of acts that were committed as part of a widespread and systematic attack against a civilian population.[136] Under the ICC's statute the perpetrator must have "knowledge of the attack," but no specific intent to destroy a protected group is needed, such as for genocide.[137] Unlike war crimes, crimes against humanity do not require a nexus to an armed conflict. This is important because sexual violence may increase during the unrest that presages conflict and it can continue post-conflict. The Rome Statute explicitly lists in Article 7(1)(g) acts of sexual violence that may comprise crimes against humanity if committed as part of a widespread and systematic attack on civilians:

- Rape
- Sexual slavery
- Enforced prostitution
- Forced pregnancy
- Enforced sterilization
- Any other form of sexual violence of comparable gravity.[138]

In addition, acts of sexual violence may also be prosecuted as crimes against humanity that are not of sexual nature (such as murder, torture, persecution or other acts listed in Sections 1(a)-(f) and 1(h)-(k)) if they were committed as part of those prohibited offenses. The following illustrates how an act of sexual violence may serve as a constituent element of the crime against humanity of persecution. According to the EoC, persecution as a crime against humanity has four main elements:

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[134] *See, e.g.*, Prosecutor v. Kayishema & Ruzindana, Case No. ICTR 95-1-T, Judgment, ¶¶ 446, 470, 564 (May 21, 1999). The ICTY and the ICTR used the same definition of genocide, which was originally codified in the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), Article 2. *See also* Lewis, *supra* note 2, at 12.

[135] Rome Statute, *supra* note 33, at art. 6. "Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such: (a) killing *members* of the group, (b) causing serious bodily or mental harm to *members* of the group… ." (emphasis added).

[136] An attack against a civilian population means a course of conduct involving multiple commissions of prohibited acts against a civilian population pursuant to a specific state or organizational policy. *Id.* at art. 7(2)(a).

[137] *See* Lewis, *supra* note 2, at 17.

[138] Rome Statute, *supra* note 33, at art. 7(1)(g).

> (1) the perpetrator must severely deprive, contrary to international law, one or more persons of his, her, or their fundamental rights; (2) the perpetrator must target such person or persons by reason of the identity of a group or collectivity or target the group or collectivity, as such; (3) the targeting must be based on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law; and (4) the conduct must be committed in connection with any act referred to in article 7, paragraph 1 of the Statute or any crime within the jurisdiction of the ICC.[139]

The first and fourth elements can be satisfied by proof of sexual violence. For example, in the case of *Prosecutor v. Ali Muhammad Ali Ab-Dal-Rahman*, the ICC charged the accused with persecution of the primarily Fur population of Bindisi town in Sudan by acts of rape, among other counts.[140] Even though the accused was also charged with rape as a crime against humanity, the targeting of a specific ethnic group using rape was charged directly as a crime of persecution.

Whether an act of sexual violence constitutes torture or other inhumane acts as a crime against humanity depends on the degree of pain: torture requires severe pain or suffering while other inhumane acts require great suffering or serious injury.[141] Thus, rape has been held to constitute torture,[142] while forced fellatio, forced undressing, and sexual mutilation have been held to constitute the crime against humanity of other inhumane acts.[143] Of all the acts of sexual violence enumerated in the ICC statute, forced pregnancy is the only one that is sex-specific.

c. War crimes

War crimes are serious violations of laws applicable in armed conflict that give rise to individual criminal liability. They do not have to be a part of a widespread and systematic attack against a civilian population, but may consist of isolated acts. The Rome Statute is the most recent international instrument detailing the range of war crimes of sexual violence.[144] The ICC

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[139] Elements of Crimes, *supra* note 131, at art. 7(1)(h).
[140] Prosecutor v. Ali Muhammad Ali Ab-Dal-Rahman, Case No. ICC-02/05-01/07, Warrant of Arrest for Ali Kushayb, ¶ 17 (Int'l Crim. Ct. Apr. 27, 2007).
[141] Lewis, *supra* note 2, at 18.
[142] *See* Prosecutor v. Delalic, Case No.IT-96-21-T, Judgment, ¶ 469 (Nov. 16, 1998); *see generally* Prosecutor v. Furundzija, *supra* note 119.
[143] *See* Prosecutor v. Duško Tadić, *supra* note 20, ¶¶ 729-30; Prosecutor v. Jean-Paul Akayesu, *supra* note 119, ¶ 697; *see also* Lewis, *supra* note 2, at 18.
[144] The Rome Statute incorporates two interrelated bodies of law into its war crimes section. The first consists of grave breaches of the Geneva Conventions and Additional Protocol I; the second consists of serious violations of the

definitions of war crimes of sexual nature are almost identical to those of crimes against humanity and will not be restated here.[145] Acts of sexual violence may comprise the constituent elements of war crimes, just as they can comprise the elements of genocide and crimes against humanity. Such acts may be prosecuted as a specific type of sexual violence (for example, forced sterilization), under a broader category of crime (for instance, torture or inhumane treatment), or both.[146]

Lastly, the definition of rape as both a crime against humanity and as a war crime deserves particular attention. It consists of two parts:

> 1) The perpetrator invaded the body of a *person* by conduct resulting in penetration, however slight, of any part of the body of the victim or the perpetrator with a sexual organ or of the anal or genital opening of the victim with any object or any other part of the body, and 2) The invasion was committed by force, or by the threat of force or coercion, such as that caused by fear or violence, duress, detention, psychological oppression, or abuse of power, against such person or another person, or by taking advantage of a coercive environment or the invasion was committed against a person incapable of giving genuine consent (emphasis added).[147]

This expansive definition of rape is significant for two reasons. First, it makes an explicit claim of gender-neutrality and thus criminalizes acts of sexual violence against both men and women. A footnote in the EoC states that "the word 'invasion' is intended to be broad enough to be gender-neutral."[148] Second, it emphasizes the role that coercion and abuse of power play in the perpetration of sexual acts. Both the definitions of rape and sexual violence include coercion as an element, which can be established by some degree of force, threat, or oppression.[149] Because the prosecution has to prove coercive circumstances were present, this is referred to as a "coercion test." Since lack of consent is not an element of the offense, the prosecution does not

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laws and customs of war. While the Geneva Conventions do not list rape as a grave breach, the Rome Statute does list rape and other sexual violence crimes as war crimes in Article 8(2)(b). *See* Lewis, *supra* note 2, at 19.

[145] *Id.*

[146] *Id.*

[147] Elements of Crimes, *supra* note 131, at art. 7(1)(g)-1.

[148] *Id.* at art. 7(1)(g)-1 n.15. *See also* Prosecutor v. Issa Hassan Sesay, *supra* note 117, ¶ 146 (referring to EoC footnote 15 when explaining that "both men and women can be victims of rape").

[149] The first element of the ICC's definition of sexual violence is: "the perpetrator committed an act of a sexual nature against one or more *persons* or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or *abuse of power*, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent." (emphasis added). Elements of Crimes, *supra* note 131.

have to prove that the victim did not consent, as it would in a "consent test." Lack of consent is only invoked when the victim's ability to give consent is impaired at the outset, either because of age, mental disability, or intoxication.[150]

ICC's adoption of a coercion test in the prosecution of crimes against humanity is consistent with prior cases before the ICTR and ICTY. In *Akayesu*, the ICTR defined sexual violence as "any act of sexual nature which is committed on a person under circumstances which are coercive."[151] To counter any assumption that coercion required physical force, the Trial Chamber explained that "threats, intimidation, extortion and other forms of duress that prey on fear or desperation may constitute coercion" and may be inherent in certain circumstances such as armed conflict or the presence of soldiers among refugees.[152] The Trial Chamber further clarified that the presence of coercion eliminated the need to prove lack of consent. The ICTY in *Furundzija* set its own definition of rape, retaining as a central element "coercion or force or threat of force against the victim or a third person." Further, Rule 96 of the Rules of Procedure and Evidence (RPEs) of both tribunals states that consent will not be allowed as a defense if the victim is subject to any duress.[153] Before evidence of consent is admitted at trial, the defense must prove *in camera* that the purported evidence of consent is relevant and credible.

Although international courts appear to oscillate between using coercion as an element or non-consent as an element of sexual violence crimes, an overall focus on coercion persists.[154]

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[150] O'Byrne, *supra* note 116, at 503.
[151] Prosecutor v. Jean-Paul Akayesu, *supra* note 119, ¶ 688.
[152] *Id.* ¶ 688. *See also* O'Byrne, *supra* note 116, at 501.
[153] *See* O'Byrne, *supra* note 116, at 500.
[154] The ICTY's decision in *Prosecutor v. Kunarac* diverged from the approach taken in existing jurisprudence at the ICC by including a two-pronged lack of consent element in the definition of rape: an assessment of the lack of consent of the victim and the knowledge of the perpetrator that the victim did not consent. *See* Prosecutor v. Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic, Case No. IT-96-23/1-T, Judgment, ¶ 460 (Int'l Crim. Trib. for the Former Yugoslavia, Feb 22, 2001). Yet despite this formal recognition of consent as an element, the Appeals Chamber of the ICTY focused on the coercion element inherent in conflict situations. It explained that consent could not be offered as a defense if the "victim has been subjected to or threatened with or has reason to fear violence, duress, detention or psychological oppression." *Id.* ¶ 462. The ICTR in *Gacumbitsi* affirmed the two-pronged lack of consent element established in *Kunarac* but it explained that non-consent may be demonstrated if the circumstances involved were such that "meaningful consent was not possible." Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia, June 17, 2004). The prosecution does not have to bring evidence showing use or threat of force, but rather non-consent may be inferred from evidence of the background circumstances. *Id.* ¶ 153. The element of the defendant's knowledge of non-consent can be satisfied if the prosecution proves the accused "was aware, or had reason to be aware, of the coercive circumstances that undermined the possibility of genuine consent." *Id.* ¶ 57. In this way, the *Gacumbitsi* Appeals Chamber formally affirmed the consent test, while in practice it allowed a coercion test to be applied. *See* O'Byrne, *supra* note 116, at 505. The Special Court of Sierra Leone adopted the ICC definition of rape and its focus on coercion, rather than non-consent. Prosecutor v. Issa Hassan Sesay, *supra* note 117, ¶¶ 145-47.

Even in cases in which the ICTY has held that consent is an element, non-consent could be inferred from evidence of coercive circumstances, such as an "on-going genocide campaign" or detention of the victim. This conflation of the two tests prompted the Appeals Chamber of the ICTY to conclude in its latest case that "the apparent disparity in approach is of a formal nature only."[155]

3. International Criminal Court case law

To gain a more complete understanding of how international law addresses the problem of sexual violence against men, it is necessary to look beyond the normative framework to its implementation. Although the definitions of crimes in the Rome Statute are gender-neutral and thus seem to provide equal protection to male and female victims of sexual violence, the ICC case law presents a more complex picture.

The ICC has issued a number of arrest warrants based on sexual violence against women.[156] In 2005, the Prosecutor sought charges against Joseph Kony for sexual slavery and rape as crimes against humanity and rape as a war crime.[157] In 2007, the Prosecutor filed charges against Germain Katanga and Mathieu Ngudjolo Chui for rape and sexual slavery as crimes against humanity and war crimes committed in the Democratic Republic of Congo.[158] The Prosecutor filed similar charges against Omar Hassan Ahmad Al Bashir and Ali Muhammad Ali Abd-Al-Rahman for crimes committed in Sudan, including "genocide based on rape and sexual assault" and persecution by acts of rape and outrages upon personal dignity constituting crimes against humanity.[159] Jean-Pierre Bemba faces charges for rape as a crime against humanity based on evidence of "widespread and systematic rape" committed by his forces in the

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[155] Prosecutor v. Milutinovic, Case No. IT-05-87, Judgment, ¶ 198 (Int'l Crim. Trib. for the Former Yugoslavia, Feb. 26, 2009) (affirming consent as an element while holding that some circumstances, including detention, negate the possibility of genuine consent).

[156] *But see* Lisa Gambone, *Failure to Charge: the ICC, Lubanga and Sexual Violence Crimes in the DRC*, WAR CRIMES: FOREIGN POLICY BLOG NETWORK, (Jul. 22, 2009) http://foreignpolicyblogs.com/2009/07/22/failure-to-charge-the-icc-lubanga-sexual-violence-crimes-in-the-drc/. In 2010, the Court faced criticism when prosecutors for the case of Thomas Lubanga Dyilo, the first case to go to trial at the ICC, failed to charge the defendant with sexual violence, even though there was evidence to suggest that Lubanga and his subordinates engaged in the routine rape of young girl soldiers in the DRC. *See also* Koenig et al., *supra* note 118, at 27.

[157] *See* Prosecutor v. Joseph Kony, Case No. ICC-02/04-01/05, Warrant of Arrest (Int'l Crim. Ct. Sept. 27, 2005).

[158] *See* Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Decision on Confirmation of Charges (Int'l Crim. Ct., Sept. 30, 2008).

[159] *See* Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, Second Warrant of Arrest (Int'l Crim. Ct., July 12, 2010); *see also* Prosecutor v. Ali Muhammad Ali Ab-Dal-Rahman, *supra* note 140.

Central African Republic.[160] Although these proceedings represent positive developments in the prosecution of sexual violence, they do not answer the question of whether the ICC is as willing to prosecute sexual offences of similar gravity committed against men.

The most recent ICC investigation into the 2007-2008 post-election violence in Kenya provides some important insights in that regard. On March 31, 2010, the Pre-Trial Chamber granted the Prosecutor's request to open an investigation into the episode.[161] The Pre-Trial Chamber found that there was a reasonable basis to believe that the Kenyan population had suffered several crimes against humanity, specifically murder, deportation, forcible transfer of populations, rape and other sexual violence, and other inhumane acts.[162] It based its conclusion, in part, on evidence that "numerous incidents of sexual violence against men and women had occurred."[163] The two trials are set to commence later this year.[164]

Evidence of sexual violence against men constituted at least part of the basis for these investigations. In Kenya, reports surfaced that even though "the vast majority of sexual crimes were committed against women and girls, men, too, were subjected to SGBV [sexual and gender-based violence] including forcible circumcision, sodomy, and penile amputations."[165] In the case of *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta,* Pre-Trial Chamber II found that there were reasonable grounds to believe that the defendants were criminally responsible "for at least 112 deaths, 39 reported cases of rape, at least six cases of forcible circumcision and the displacement of thousands of people."[166] The chamber pointed to

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[160] Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Decision on Confirmation of Charges (Int'l Crim. Ct., June 15, 2009). *See also* Maria McDonald, *Rape and Torture Charges in the Case against Jean-Pierre Bemba*, VRWG Bulletin 4-5 (Winter 2010) for a discussion on how victims demanded that the defendant be charged with torture as a crime against humanity independent from the rape charge.

[161] Prosecutor v. Francis Kirimi Muthaura & Uhuru Muigai Kenyatta, Case No. ICC-01/09-02/11, Case Information Sheet (Int'l Crim. Ct., Apr. 04, 2012), *available at* http://www.genderjurisprudence.org/index.php/browse-collections/icc/ICC_-_Situation,_Jdgmts,_Indmts_&_Docs/Kenya/Cases/Muthaura,_Kenyatta_&_Ali/Background_Information/detail?start=10.

[162] Prosecutor v. Francis Kirimi Muthaura & Uhuru Muigai Kenyatta, Case No. ICC-01/09-02/11, Decision Assigning the Situation in the Republic of Kenya to Pre-Trial Chamber II (Int'l Crim. Ct., Nov 6, 2009).

[163] *Id.*

[164] On March 9, 2012 the Appeals Chamber unanimously rejected appeals made by the four suspects regarding challenges to ICC jurisdiction. *See Cases and Situations: Kenya*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, http://www.coalitionfortheicc.org/?mod=Kenya.

[165] *Survivors of Sexual Attacks in Kenya Seek Justice for Post-Election Violence,* OPEN SOCIETY JUSTICE INITIATIVE, Feb. 2013, http://www.opensocietyfoundations.org/briefing-papers/briefing-survivors-sexual-attacks-kenya-seek-justice-post-election-violence.

[166] Prosecutor v. Francis Kirimi Muthaura & Uhuru Muigai Kenyatta, Case No. ICC-01/09-02/11, Case Information Sheet (Int'l Crim. Ct., Apr. 04, 2012), *available at* http://www.icc-cpi.int/iccdocs/PIDS/cis/MuthauraKenyattaAliEng.pdf.

evidence that youth groups organized by the accused had carried out acts of forced circumcision and penile amputation against ethnic Luo men presumed to be supporters of opposition presidential candidate Raila Odinga.[167]

ICC Prosecutor Luis Moreno-Ocampo moved to charge the crimes of forced circumcision and sexual mutilation as "other forms of sexual violence" under Article 7(1)(g)[168] of the Rome Statute, but judges disagreed, claiming that the crimes were not of a sexual nature.[169] The Court held that "not every act of violence which targets part of the body commonly associated with sexuality should be considered an act of sexual violence."[170] In its ruling the Court explained that the evidence did not establish the sexual nature of the acts[171] and that therefore the alleged acts should be categorized as "other inhumane acts" under Article 7(1)(k).[172] This distinction mattered to victims and local advocates, who argued that labeling forced circumcision as a form of sexual violence could raise awareness of the crime and make treatment more available.[173] It is also significant because it marks the latest example of a troubling pattern in international criminal law of the failure of courts to address the sexual nature of sexual violence crimes against men.

Despite the gender-neutral standards of international criminal law, in the limited number of cases to date, sexual violence against men appears to be treated differently from sexual violence against women. In some cases, courts report witness testimony of sexual violence against men, such as instances of sexual mutilation, but fail to include any legal consequences

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[167] Allegedly Kibaki supporters, who primarily come from the Kikuyu ethnic group and for whom male circumcision is an essential rite of passage, forcibly circumcised Luo men, who do not practice circumcision, as an act of "political and ethnic domination." *See Kenya: Rape on Rise in Post-Election Violence*, IRIN NEWS, Jan. 2, 2008, http://www.irinnews.org/Report/76068/KENYA-Rape-on-the-rise-in-post-election-violence.

[168] The residual category of "any other form of sexual violence of comparable gravity" allows for the prosecution of acts of sexual violence that are not expressly listed in the Rome Statute. *See* Lewis, *supra* note 2, at 17. For the requirements that must be fulfilled to charge this residual category, *see* Elements of Crimes, *supra* note 131.

[169] Prosecutor v. Francis Kirimi Muthaura & Uhuru Muigai Kenyatta, Case No. ICC-01/09-02/11, Confirmation of Charges, ¶¶ 264-66 (Int'l Crim. Ct., Jan. 23, 2012).

[170] *Id.* ¶ 265.

[171] Brigid Inder blames the Prosecutor for failing to provide evidence of the sexual nature of the crimes. *See* Robbie Corey Boulet, *In Kenya, Forced Male Circumcision and a Struggle for Justice*, THE ATLANTIC (Aug. 1, 2011), http://www.theatlantic.com/international/archive/2011/08/in-kenya-forced-male-circumcision-and-a-struggle-for-justice/242757/.

[172] Prosecutor v. Francis Kirimi Muthaura & Uhuru Muigai Kenyatta, *supra* note 169, ¶ 266 (finding "that the evidence placed before [the Pre-Trial Chamber] does not establish the sexual nature of the acts of forcible circumcision and penile amputation visited upon Luo men. Instead, it appears from the evidence that the acts were motivated by ethnic prejudice and intended to demonstrate cultural superiority of one tribe over the other.").

[173] *See* Boulet, *supra* note 171.

for such actions.[174] In others, male rape and sexual violence are prosecuted as persecution or "other inhumane acts," not as rape or "other forms of sexual violence of comparable gravity."[175] One justification might be that the statutes of ICTR and ICTY listed only rape as a stand-alone crime of sexual violence.[176] Accordingly, the tribunals resorted to more broadly construed categories—such as torture or other inhumane acts—to prosecute acts of sexual violence that did not constitute rape.[177] Patricia Sellers, former legal advisor to the ICTY and currently advising the ICC Prosecutor on prosecution strategies, presents another explanation, namely that the characterization of male sexual violence acts as torture or other inhumane acts "spare[s] and possibly privilege[s] male victim/survivors over women" because coercive circumstances or lack of consent do not need to be established for a charge of torture, persecution, and other inhumane acts as they do for rape.[178] A third explanation lies in the failure of prosecutors to plead forms of sexual violence against male victims, as stated by the Special Court for Sierra Leone.[179] A fourth explanation lies in the inability or unwillingness of judges to conceive of sexual violence against men as being of sexual nature, as exemplified by the comments of the ICC's Pre-Trial Chamber judges in the Kenya cases discussed above.

The ICC's decision not to charge forced circumcision as a sexual violence crime is consistent with earlier decisions by the ICTY. For example, in *Prosecutor v. Milosevic*, the ICTY prosecutor charged acts of forced fellatio, forced incest, and gang rape of men as

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[174] *See, e.g.,* Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Judgment, ¶¶ 441, 444 (Int'l Crim. Trib. for Rwanda, Apr. 28, 2005) (victim's genitals had been severed and hung on a stake); Prosecutor v. Bagosora, Case No. ICTR-98-41-T, Judgment, ¶ 2220 nn.2374, 2224 (Int'l Crim. Trib. for Rwanda, Dec. 18, 2008).

[175] *See generally, e.g.,* Prosecutor v. Duško Tadić, *supra* note 20.

[176] Statute of the ICTY, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on May 25, 1993, U.N. Doc. S/RES/827 (1993), Article 5(g). Statute of the ICTR as amended by Security Council 1998-04-30 (Res.1165 -1998), Art 3(g).

[177] Lewis, *supra* note 2, at 14.

[178] Patricia Sellers, *The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation*, 39, http://www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf.

[179] Prosecutor v. Issa Hassan Sesay, *supra* note 117, ¶ 146 (Special Ct. of Sierra Leone, Mar. 2, 2009). "RUF rebels in Bumpeh ordered a couple to have sexual intercourse in the presence of the other captured civilians and their daughter. After the enforced rape they forced the man's daughter to wash her father's penis… . The Prosecution restricted its pleadings [regarding this incident] to crimes committed against 'women and girls' thereby excluding [the] male victims." Even though the prosecutor failed to charge the acts of sexual violence against the father, the Court found that "the defect in the Indictment was cured" and the RUF rebels committed two outrages upon personal dignity. *Id.* ¶¶ 1302-06. Similarly, in another incident involving slitting of the genitalia of several male and female civilians, the Court found the accused guilty of outrages of personal dignity as war crimes, even though the prosecution "did not plead forms of sexual violence committed against male victims." *Id.* ¶¶ 1307-09. *See also* CEJIL, SUMMARIES OF JURISPRUDENCE: GENDER-BASED VIOLENCE, 363-80 (Liliana Tojo et al. eds., 2nd ed. 2012).

persecution as a crime against humanity.[180] Similarly, in *Prosecutor v. Tadic*, the defendant was accused of committing acts of systemic sexual assault and rape of male detainees. The ICTY prosecutor charged the defendant with persecution and inhumane acts as crimes against humanity, as well as torture or inhuman treatment as a war crime, but not with rape as a crime against humanity.[181] Sexual mutilation of a male prisoner that resulted in his death led to charges being filed against the defendant for murder as a crime against humanity and murder as a grave breach of the Geneva Conventions. Tadic was found guilty of cruel treatment as a war crime and inhumane acts as crimes against humanity, but the sexual nature of the offense was not reflected in the prosecution and judgment.[182] The only time that a rape of a man was charged and tried as such was in *Prosecutor v. Ranko Cesic*, where the defendant intentionally forced two Muslim brothers to perform fellatio on each other.[183] For that incident, Cesic was convicted of rape as a crime against humanity, as well as humiliating and degrading treatment as a war crime.[184] Given that international criminal tribunals have seldom explicitly acknowledged the sexual nature of sexual violence crimes committed against men, the *Cesic* case may be the exception that proves the rule.

As this brief review indicates, with its gender-neutral language and expansive definitions of rape and sexual violence, the ICC in principle enables accountability to all victims of sexual violence, including men and boys. Yet these improvements in the normative framework have yet to be matched by advances in enforcement. Incidents of sexual violence against men in Kenya are being reported and investigated by the ICC, but they have not been charged as such. When placed in a longer timeframe alongside cases from the ICTY, a problematic narrative emerges – international criminal courts and tribunals are failing fully to account for the sexual nature of sexual violence crimes against men.

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[180] Prosecutor v. Slobodan Milosevic, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal (Int'l Crim. Trib. for the Former Yugoslavia, Jun. 16, 2004) *available at* http://www.unhcr.org/refworld/docid/47fdfb590.html. Witnesses spoke of multiple, group rapes of men. On one occasion, about thirty men, many of whom were fathers and sons, were forced to strip on stage and perform fellatio on one another. During trial, witness B 1461 related how "a man was forced to show the penis he had bitten off and to swallow it." Those in the audience who did not watch what was going on stage were punished; some were raped with brooms.

[181] Prosecutor v. Duško Tadić, *supra* note 20, ¶¶ 38, 40, 44-45.

[182] *Id.* ¶¶ 726, 729-730.

[183] Prosecutor v. Ranko Cesic, Case No. IT-95-10/1-S, Sentencing Judgment, ¶¶ 13-14 (Int'l Crim. Trib. for the Former Yugoslavia, Mar. 11, 2007).

[184] *Id.* ¶¶ 35, 107 (stating that "regarding the sexual assault, the factual basis indicates that the victims were brothers, were forced at gunpoint and were watched by others… . The violation of the moral and physical integrity of the victims justified that the rape be considered particularly serious as well.").

B. International Human Rights Law

Despite its shortcomings in enforcement, international criminal law acknowledges male victims of sexual violence. In contrast, most human rights instruments pertaining to sexual violence use gender-specific language that confers protection to women and do not recognize that men too suffer acts of sexual violence, particularly in conflict and post-conflict settings. This section will review international human rights law documents that codify rights implicated in sexual violence. It will then analyze the extent to which those rights are applicable to men as well as women.

1. UN Security Council resolutions

The Security Council is the UN body responsible for promoting international peace and security. Although not all Security Council resolutions are legally binding on member states, they play an important symbolic role in international law. They serve to call international attention to an issue and to call on governments and international organizations to take action.[185] A brief examination of Security Council resolutions on the topic of sexual violence illuminates the nature of international discourse on the issue.

Resolution 1325, passed unanimously in October 2000, begins by "expressing concern that civilians, particularly women and children, account for the vast majority of those adversely affected by armed conflict."[186] Although boys are presumably included in the category of children, the parts of the resolution that prohibit sexual violence speak specifically about "women and girls." The resolution emphasizes the importance of measures designed to protect women from sexual violence and as such makes sensitization of peacekeeping personnel compulsory. It also seeks to expand the role of women in field-based operations, particularly as personnel in civilian institutions and as human rights agents.[187] The resolution calls on all parties to armed conflict "to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual violence."[188]

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[185] Hennessey & Gerry, *supra* note 94, at 15.
[186] S.C. Res. 1325, *supra* note 13.
[187] *Uganda Action Plan on UN Security Council Resolutions 1325 & 1820 and the Goma Declaration*, Ministry of Gender, Labour, and Social Development, Dec. 2008, 8, *available at* http://www.un-instraw.org/data/media/documents/GPS/UGANDANAP.pdf.
[188] S.C. Res. 1325, *supra* note 13.

The next resolutions, Resolution 1674 and Resolution 1820, for the most part reaffirmed Resolution 1325. Resolution 1674, passed in 2006, also considers wartime violence as primarily impacting women and children.[189] It condemns "sexual violence committed against civilians, in particular women and children."[190] It is notable, however, that when the Secretary-General reported on the implementation of Resolution 1674 in August 2009, he referred to sexual violence in gender-neutral language stating that the Security Council should "consider giving equal attention to all situations of concern where sexual violence is perpetrated against civilians."[191]

Resolution 1820, passed in 2008, explicitly links sexual violence to the Security Council's mandate in international peace and security.[192] It calls attention to the use of sexual violence as a "tactic of war in order to deliberately target civilians," as well as to the prevalence of sexual violence "in and around" UN camps for refugees and internally displaced persons. The resolution specifies that troops must be trained on the prohibition of sexual violence and seeks to develop a mechanism for protecting women around UN-managed camps. In addition, the resolution demands that parties take action to prevent the use of sexual violence against civilian populations.

Resolution 1960, passed in 2010, shifts toward a more comprehensive understanding of conflict-related sexual violence.[193] When in November 2010, the Secretary General delivered his second report on the protection of civilians in armed conflict, he emphasized the need to address the plight of "hundreds of thousands of civilians—women, *men* and children—confronting the horrors, pain and suffering of war on a daily basis."[194] (emphasis added) Thus the most recent statements suggest the UN is beginning to acknowledge that women are not the exclusive targets of conflict-related sexual violence.

2. Human rights instruments

With regard to accountability for conflict-related sexual violence, international human rights treaties establish the nature of state obligations to respect, protect, and fulfill the

[189] S.C. Res. 1674, U.N. Doc. S/RES/1674 (Apr. 28, 2006).
[190] S.C. Res. 1325, *supra* note 13.
[191] Hennessey & Gerry, *supra* note 94, at 15.
[192] S.C. Res. 1820, U.N. Doc. S/RES/1820 (June 19, 2008).
[193] S.C. Res. 1960, U.N. Doc. S/RES/1960 (Dec. 16, 2010).
[194] Report of the Secretary General on the Protection of Civilians in Armed Conflict, S/2010/579, 3 (Nov. 11, 2010).

fundamental rights of victims implicated by these crimes. A comprehensive review of this area lies beyond the scope of this paper. However, this section briefly highlights (1) the relevant human rights; and (2) the extent to which these rights have been interpreted to apply to men as well as to women.

Sexual violence is a violation of a whole range of human rights that apply equally to men and women. Most pertinent among them are the rights to life,[195] physical integrity,[196] non-discrimination,[197] freedom from torture and cruel, inhuman or degrading treatment,[198] health, [199] privacy,[200] and equal protection of the law.[201] Uganda has ratified the UN treaties that codify these rights and it is thus legally bound to uphold them.[202]

Human rights bodies have applied these rights to sexual violence and strengthened legal protections in this area, for example, by recognizing that rape may constitute a form of torture. The Inter-American Commission on Human Rights (IACHR) was the first human rights body to hold that an act of rape may violate the prohibition against torture.[203] In *Raquel Martí de Mejía*

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[195] *See* UDHR, *supra* note 3; International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; American Convention on Human Rights art. 4, Nov. 22, 1969, 1144 U.N.T.S. 123l [hereinafter ACHR]; European Convention of Human Rights art. 2, Sept. 3, 1953, 213 U.N.T.S. 222 [hereinafter ECHR]; African Charter on Human and People's Rights art. 4, Jun. 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 [hereinafter ACHPR].

[196] *See* ACHR, *supra* note 195, at art. 5; ECHR, *supra* note 195, at art. 88; ACHPR, *supra* note 195, at art. 16.

[197] *See* UDHR, *supra* note 3, at art. 2; ICCPR, *supra* note 195, at art. 2, 26; International Covenant on Economic, Social and Cultural Rights art. 2, Jan, 3, 1976, 993 U.N.T.S. 3 [hereinafter ICESCR]; International Convention on the Elimination of all Racial Discrimination art. 2, Jan. 4, 1969, 660 U.N.T.S. 195 [hereinafter CERD]; Convention on the Rights of the Child art. 2, Sept. 2, 1990, 2133 U.N.T.S. 161; ACHR, *supra* note 195, at art. 4; ECHR, *supra* note 195, at art. 14; ACHPR, *supra* note 195, at art. 2.

[198] *See* UDHR, *supra* note 3, at art. 5; ICCPR, *supra* note 195, at art. 7; Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment arts. 1-2, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]; ACHR, *supra* note 195, at art. 5; ECHR, *supra* note 195, at art. 3; ACHPR, *supra* note 195, at art. 5.

[199] See UDHR, *supra* note 3, at art. 25; CERD, *supra* note 197, at art. 5, ICESCR, *supra* note 197, at arts. 7(b), 12; ACHPR, *supra* note 195, at art. 4.

[200] See UDHR, *supra* note 3, at art. 12; ICCPR, *supra* note 195, at art. 17.

[201] *See* UDHR, *supra* note 3, at art. 7; ICCPR, *supra* note 195, at art. 17; CERD, *supra* note 197, at art. 5; ACHR, *supra* note 195, at art. 24; ACHPR, *supra* note 195, at art. 3.

[202] Uganda ratified ICCPR in 1995, ICESCR in 1987, CERD in 1980, CAT in 1986, ACHPR in 1986. Ratification, however, is not sufficient to enable individuals to seek judicial enforcement of rights protected by these treaties in Ugandan courts. Uganda has adopted a dualist legal system, which means that treaties are not directly enforceable until the state enacts domestic legislation to implement treaty protections. The only human rights treaty that Uganda has domesticated, at least in part, is the Convention Against Torture. For example, provisions within the Criminal Procedure Code 1950 prohibit the admissibility of evidence obtained through torture which, in effect, domesticates the state's obligations contained in Article 15 of CAT. *See Report on Uganda*, ARTICLE 5 INITIATIVE FREEDOM FROM TORTURE (2013), http://a5i.org/uganda/.

[203] The Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR) exercise jurisdiction over state signatories to the American Convention on Human Rights. A state violates the American Convention if an agent of the state commits a violation of the rights enshrined in the

v. Perú, the Commission acknowledged that the act of rape could rise to the level of torture if it constituted: "1) an intentional act through which physical and mental pain and suffering is inflicted on a person; 2) committed with a purpose; and 3) committed by a public official or by a private person acting at the instigation of the former."[204] In *Mejía*, a female principal of a school for the disabled in Peru was raped by a member of a counterinsurgency unit of the Peruvian military. The rape constituted the intentional act that caused physical and mental pain, thus fulfilling the first requirement. Because it was committed with "the aim of punishing [the victim] personally and intimidating her" and by an agent of the state, the act met the other criteria and rose to the level of torture.[205]

The European Court of Human Rights (ECtHR) followed the direction of IACHR's jurisprudence when it acknowledged rape as a form of torture and a severe form of inhuman treatment.[206] In *Aydin v. Turkey*, a 17-year-old Kurdish girl was illegally detained, beaten, stripped, blindfolded, and raped by members of the Turkish police force. In holding that her violations amounted to torture, the Court explained, "rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim."[207] Although none of these cases involve male victims of sexual violence, the language is broad enough to apply equally to men. Further, the understanding that rape constitutes torture because it is a "weapon used to punish, intimidate and humiliate" acknowledges that rape is an act that asserts power and dominance over an individual, whether or not informed by a desire

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Convention or if the state fails to provide redress to victims who have suffered such violations. *See Overview*, Organization of American States (2011), http://www.oas.org/en/iachr/mandate/what.asp.

[204] Raquel Martí de Mejía v. Perú, Case 10.970, Inter-Am. Comm'n H.R., Report 5/96, OEA/Ser.L/V/II.91, doc.7, ¶ 157 (1996). *See also* Maria Elena Loayza Tamayo v. Peru Order, Inter-Am. Ct. H.R. (Dec. 13, 2000). Members of a counter-terrorism unit of the Peruvian police repeatedly raped a female professor while detaining her for alleged communist sympathies. The IACHR found that Peru had violated the petitioner's "right to personal integrity, in violation of Article 5.1 of the Convention," but the Inter-American Court found that Peru did not violate the Convention.

[205] Raquel Martí de Mejía v. Perú, *supra* note 204. The women-specific language that the Commission uses when describing rape—the purpose of rape is "not just to humiliate the victim but also her family and community"—might have more to do with the fact that the victim in this case was a woman than with a purposeful exclusion of male victims.

[206] Sellers, *supra* note 178, at 32. The European Court of Human Rights (ECtHR) is a supranational body established by the European Convention on Human Rights and Fundamental Freedoms for the purpose of monitoring state compliance with the Convention. The ECtHR has held that state parties are responsible for crimes of sexual violence either when state agents committed the crimes or when the state failed to provide an adequate remedy at the domestic level. *See* European Court of Human Rights, http://www.echr.coe.int/echr/homepage_en/.

[207] Aydín v. Turkey, 25 Eur. Ct. H.R. 251, ¶ 83 (1988).

for sexual gratification.[208] This in turn implies a recognition that men too can be raped and abused for similar reasons that women are targeted.[209]

Accordingly, if sexual violence may be treated as a form of torture, men may seek enforcement of their rights enshrined in the UDHR, ICCPR, CAT and the regional human rights instruments, which are gender-inclusive.[210] For instance, a man who was illegally detained, tortured, and raped in Libya petitioned the UN Human Rights Committee (Human Rights Committee)[211] to seek redress under the International Covenant for Civil and Political Rights.[212] The Human Rights Committee found that Libya was in violation of a number of articles of the Covenant, including those prohibiting torture and discrimination.[213] Yet, whereas certain

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[208] Raquel Martí de Mejía v. Perú, *supra* note 204. *See also* Aydín v. Turkey, *supra* note 207 (emphasizing the abuse of power that state agents engaged in, not the gender of the victim).

[209] The ICTY referenced the IACHR's decision of *Mejía* and the ECtHR's holding in *Aydín* when it explained that "international case law ... evinces a momentum towards addressing through the legal process, the use of rape in the course of detention and interrogation as a means of torture." Prosecutor v. Furundzija, *supra* note 119. In *Furundzija*, the ICTY reiterated the standard for torture it adopted earlier in *Celebici,* namely that rape constitutes torture if it "1) causes severe pain or suffering, whether mental or physical, 2) which is inflicted intentionally; 3) and for such purposes as obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind, 4) and [is] committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity." The ICTY concluded that rape perpetrated by a state agent will almost always rise to the level of torture because "it is difficult to envisage circumstances in which rape, by or at the instigation of a public official or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination, or intimidation." *See also* Christine Strumpen-Darrie, *Rape: A Survey of Current International Jurisprudence*, *available at* http://www.wcl.american.edu/hrbrief/v7i3/rape.htm.

[210] For instance, CAT defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as … intimidating or coercing him or a third person, or for any reason based on discrimination of any kind." The term "any act" appears broad enough to include sexual violence against men. In 2007, the treaty's monitoring committee officially acknowledged that sexual violence could amount to torture under the Convention. *See* UN Committee Against Torture, C.T. and K.M. v. Sweden, No. 279/2005, Nov. 17, 2006. In a recent report to the UN General Assembly, the Special Rapporteur on Torture explained that certain forms of abuses in health care settings may amount to torture or cruel, inhuman, and degrading treatment including forced sterilization, sexual abuse in health clinics, denial of pain medications when a person's suffering is severe, and denial of medical services to persons living with HIV/AIDS or perceived to be gay or transgender. *See* Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez, A/HRC/22/53, Feb. 1, 2013, *available at* http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf/

[211] The UN Human Rights Committee is the UN body of experts tasked with monitoring state compliance with the ICCPR. It receives reports from member states and hears individual petitions concerning 112 state parties to the Optional Protocol. States that have ratified the First Optional Protocol have agreed to allow persons within their jurisdiction to submit complaints to the Committee requesting a determination on whether provisions of the ICCPR have been violated. Uganda ratified the Optional Protocol in 1995.

[212] Human Rights Committee, Communication No. 1755/2008, Jan. 7, 2008, *available at* http://sim.law.uu.nl/SIM/CaseLaw/fulltextccpr.nsf/160f6e7f0fb318e8c1256d410033e0a1/9cc1e380fd08a2d1c1257a59003193cb?OpenDocument.

[213] The Committee found that Libya violated Article 7 (prohibiting torture), alone and in conjunction with Articles 2 (no discrimination), 9 (right to liberty and security of person), and 14 (due process) of the Covenant. *Id.* ¶ 9.

human rights instruments explicitly prohibit sexual violence against women, male victims have to invoke some of the other rights protected by human rights treaties, such as the right to bodily integrity, or the right to privacy, unless their experience of sexual violence meets the criteria for torture.[214]

The main treaty that, albeit indirectly, addresses gender-based violence against women,[215] is the Convention on the Elimination of Discrimination Against Women (CEDAW).[216] The CEDAW Committee, responsible for monitoring state compliance with the CEDAW Convention, explained in its General Recommendation 19 that gender-based violence impairs women's enjoyment of their human rights and constitutes discrimination within the meaning of Article 1 of the convention.[217] It further defined gender-based violence as "violence that is directed against a woman, because she is a woman, or that affects women disproportionally."[218] The Declaration on Elimination of Violence Against Women, adopted by the UN General Assembly in 1993, employs the same language to explicitly prohibit violence against women.[219] This conflation of gender-based violence and violence against women codifies the notion that sexual violence is a phenomenon relevant only to women and girls. Since the rights in CEDAW

[214] In X & Y v. Netherlands the ECtHR held that rape abridges the right to privacy under Article 8 of the European Convention, which covers the "physical and moral integrity of a person, including his or her sexual life." X & Y v. Netherlands, Eur. Ct. H.R. 8978/80, ¶ 22 (1985), *available at* http://www.coe.int/t/dg2/equality/domesticviolencecampaign/resources/x%20and%20y%20v%20the%20netherlands_EN.asp. *See also* Sellers, *supra* note 178, at 32.

[215] One of the main criticisms of CEDAW is that it does not directly prohibit violence against women. It bans any "act or practice of discrimination against women" in Article 2(g) and calls on state parties to "suppress all forms of traffic in women and exploitation of prostitution of women" in Article 6. Convention on the Elimination of All Forms of Discrimination Against Women, 1249 U.N.T.S. 14, Dec. 18, 1979 [hereinafter CEDAW].

[216] CEDAW was adopted by the UN in 1979 and ratified by Uganda in 1985.

[217] CEDAW General Recommendations No. 19, *supra* note 8, ¶ 7(c). *See also* Sellers, *supra* note 178, at 28.

[218] CEDAW General Recommendations No. 19, *supra* note 8; *see also* Lara Stemple, *Human Rights, Sex, and Gender: Limits in Theory and Practice*, 21 PACE L. REV. 824, 827 (2012).

[219] The Declaration is the first international human rights instrument to address the issue of sexual violence. It uses gender-specific language when it defines gender-based violence as "any act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or in private life." As a declaration, it is not legally binding. *See* Declaration on Elimination of Violence Against Women, A/RES/48/104 (Dec. 20 1993), *available at* http://www.un.org/documents/ga/res/48/a48r104.htm. *See also* Women and Violence, UN Human Rights (Feb. 1996), *available at* http://www.un.org/rights/dpi1772e.htm. In April 2011, the Council of Europe agreed on a Convention on Preventing and Combating Violence against Women and Domestic Violence, but there is no such instrument protecting men from sexual violence.

are specific to women, male victims of sexual violence cannot petition the CEDAW Committee or in any way seek redress from it for the sexual abuse they have suffered.[220]

Unlike CEDAW, the other treaty that targets a particular population—the Convention on the Rights of the Child (CRC)—does not explicitly exclude male victims of sexual violence. CRC uses gender-neutral language when discussing the imperative "to protect the child from all forms of physical and mental violence … including sexual abuse."[221] It applies to all children, which includes young people of both genders as a protected category. Accordingly, when interpreting the rights in CRC, the treaty monitoring body – the Committee on the Rights of the Child (CRC Committee) – explained that "both girls and boys are at risk of all forms of violence."[222] This suggests that boy children are entitled to the same kinds of protections and rights of redress as girl children who have suffered sexual violence.

Human rights instruments recognize a category of rights to physical integrity that apply broadly to both men and women, or collectively to both genders as children. Yet the only human rights instrument that specifically codifies norms protecting against gender-based sexual violence – the Declaration on Elimination of Violence Against Women – protects exclusively women. This exclusion of men from the category of victims of sexual violence is also present in the regional human rights treaties that pertain to Uganda.

C. Regional Law Specific to Uganda

This section reviews legal norms pertaining to sexual violence in Africa and the Great Lakes Region in particular. It begins by reviewing regional instruments that are binding on Uganda and continues by briefly stating pertinent non-binding, aspirational instruments that Uganda has signed. As with human rights instruments in the European and Inter-American

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[220] For a sample of individual petitions filed with the CEDAW Committee, *see* CEDAW Committee, Cornell University Law School (2013), http://www.lawschool.cornell.edu/womenandjustice/Legal-and-Other-Resources/CEDAW-Committee.cfm.

[221] Convention on the Rights of the Child art. 19, G.A. Res. 25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989) [hereinafter CRC].

[222] Convention on the Rights of the Child, Committee on the Rights of the Child, General Comment 13, ¶ 18, *available at* http://www.crin.org/resources/infoDetail.asp?ID=24234&flag=news. "States Parties should ensure that policies and measures take into account the different risks facing girls and boys in respect of various forms of violence in various settings. States should address all forms of gender discrimination as part of a comprehensive violence-prevention strategy. This includes addressing gender-based stereotypes, power imbalances, inequalities and discrimination which support and perpetuate the use of violence and coercion in the home, in school and educational settings, in communities, in the workplace, in institutions and in society more broadly." *See id.* ¶ 65(b).

context, African instruments focus on sexual violence against women and fail to mention sexual violence against men.

1. Binding regional human rights instruments and jurisprudence

The African Charter on Human and Peoples' Rights (ACHPR), ratified by Uganda in 1986, is the primary regional human rights instrument for the African continent. Similar to the American and European Conventions on Human Rights, ACHPR enshrines the following rights using gender-neutral language that apply to both men and women: right to life,[223] right to physical integrity,[224] right to non-discrimination,[225] right to be free from slavery, torture, cruel, inhuman or degrading treatment,[226] right to health, [227] and right to equal protection of the law.[228]

In line with increased attention to sexual violence at the international level, African countries have adopted specific prohibitions of sexual violence against women, but none pertaining to sexual violence against men. For example, in 2005, a Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("the Maputo Protocol") was adopted by State Parties who agreed to "enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or in public."[229]

The African Commission and African Court on Human and Peoples' Rights are tasked with oversight and interpretation of the ACHPR.[230] While the Court does not provide for the

[223] ACHPR, *supra* note 195, at art. 4.
[224] *Id.* at art. 16.
[225] *Id.* at art. 2.
[226] *Id.* at art. 5.
[227] *Id.* at art. 4.
[228] *Id.* at art. 3.
[229] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art. 4(2)(a), Sept. 13, 2000, CAB/LEG/66.6, *available at* http://www1.umn.edu/humanrts/africa/protocol-women2003.html.
[230] The African Commission on Human and Peoples' Rights (African Commission) was created by the ACHPR, adopted in 1981 by the Assembly of Heads of State of the Organization of African Union. The Commission was criticized for its poor enforcement record; in accordance with the ACHPR, the Commission has to request the Assembly of State Parties of the AU to take specific and necessary measures for the implementation of its decisions. *See* ACHPR, *supra* note 195, at art. 54. The African Court on Human and Peoples' Rights was established by a protocol to the African Charter to "complement the protective mandate" of the African Commission. *See* Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights art. 2, Jun. 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), *available at* http://www.achpr.org/instruments/court-establishment/. The Protocol came into force in 2004 and the Court became operational in 2006. In July 2008, the Assembly of Heads of State and Government of the African Union signed a protocol on the merger of the African Court of Human and Peoples' Rights with the still non-existent African Court of Justice. As of January 2011, only three countries had ratified the Protocol and fifteen ratifications are needed for

direct right of individual petitions, the Commission does.[231] Individuals and NGOs residing in States Parties to the ACHPR are eligible to bring complaints to the attention of the Commission alleging that a State Party has violated one or more of the rights contained in the Charter.[232] A complaint filed before the Commission by the Congolese Minister of Human Rights against Burundi, Uganda, and Rwanda alleges that HIV-positive Ugandan soldiers raped women and girls in the eastern province of Congo so as to propagate an AIDS epidemic among the local population.[233] The Commission found that the raping of women and girls, which was not refuted by the respondent states, violated both the Geneva Conventions and ACHPR.[234] To date, the Commission has not heard any complaints involving sexual violence against men.

The East African Court of Justice (EACJ), created in 1999, pursuant to the Treaty for the Establishment of the East African Community,[235] is another regional, supranational court with jurisdiction to interpret state human rights obligations under the ACHPR. The treaty, to which Uganda is a party, creates a multi-lateral regional development framework. Although the treaty does not give the Court jurisdiction to hear human rights cases as such, judges have relied on the interpretative powers conferred in the treaty to adjudicate human rights claims as violations of the treaty. [236] Among other duties, Principle 6 of the treaty obligates states to uphold fundamental principles, including "the recognition, promotion and protection of human and

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the protocol to enter into force. The new court will be called the African Court of Justice and Human Rights. *See* Anna Dolidze, *African Court on Human and Peoples' Rights – Response to the Situation in Libya*, in INSIGHTS: AMERICAN SOCIETY OF INTERNATIONAL LAW (Jul. 26, 2011), available at http://www.asil.org/insights110725.cfm.

[231] The entities that can submit cases before the Court are: the African Commission, any state party, African intergovernmental organizations, and with the Court's permission, non-governmental organizations with observer status and individuals. Individuals and non-governmental organizations acquire standing only after a State Party delivers a declaration recognizing their capacity to do so. So far only five countries—Ghana, Burkina Faso, Malawi, Mali, and Tanzania—have made such declarations. *See* Protocol on the Statute of the African Court of Justice and Human Rights, July 1, 2008 *available at* http://www.au.int/en/sites/default/files/PROTOCOL_STATUTE_AFRICAN_COURT_JUSTICE_AND_HUMAN_RIGHTS.pdf. Currently, individuals in Uganda cannot petition the African Court of Human and Peoples' Rights because the government of Uganda has not submitted a declaration authorizing such action.

[232] *See* Communications Procedure, in Communications: African Commission on Human and Peoples' Rights, *available at* http://www.achpr.org/communications/. For more information on how the African Commission has applied the local remedies rule, *see* Nsongurua J. Udombana, *So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights*, 97 AM. J. INT'L L. 1 (2003).

[233] *See* 227/99 Democratic Republic of Congo/Burundi, Uganda, Rwanda, May 29, 2003, ¶ 4, *available at* http://www.achpr.org/communications/decision/227.99/.

[234] *See id. at* ¶ 86.

[235] *See EACJ Summary*, African International Courts and Tribunals, *available at* http://www.aict-ctia.org/courts_subreg/eac/eac_home.html.

[236] The Treaty contemplates that the Court will have human rights jurisdiction "at a suitable subsequent date." The Treaty gives the East African Community Council of Ministers authority to determine when the Court will have human rights jurisdiction. East African Community Treaty art. 27(2), Nov. 30, 1999, *available at* http://www.aict-ctia.org/courts_subreg/eac/EAC%20Treaty.pdf [hereinafter EACT].

peoples' rights in accordance with the provisions of the African Charter of Human and Peoples' Rights."[237] State Parties, the Secretary General of the East African Community, as well as individuals who are resident within the Community can file petitions claiming violations of human rights protected by the Treaty.[238] For example, in *Rwanda v. Plaxeda Rugumba*, the EACJ held that Rwanda breached the fundamental principles of Article 6 when it arrested and detained incommunicado a Rwandan national for five months.[239] Although research revealed no cases involving sexual violence, petitions on behalf of individuals have been filed against Uganda alleging violations of its human rights obligations under the treaty.[240]

The most recent regional treaty with implications for male survivors of conflict-related sexual violence is the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa ("Kampala Convention").[241] Adopted in 2009 in Kampala, Uganda, the Convention entered into force in December 6, 2012.[242] It is the first binding regional instrument to impose on states obligations to protect and assist IDPs.[243] In particular, the Kampala Convention creates a state duty to prevent "sexual and gender-based violence in all its forms," a broad statement that implies protections for men, women, and children.[244] The instrument also uses gender-neutral language when calling for psycho-social support for all "victims of sexual and other related abuses."[245] Although Uganda was the first country to ratify the Kampala Convention, it has yet to enact domestic implementing legislation.[246]

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[237] *Id.* at art. 6(d).
[238] The Treaty does not require exhaustion of local remedies, but it does limit the time for filing proceedings to two months after the cause of action has arisen. EACT, *supra* note 236, at art. 30(2). *See also* Attorney General of the Republic of Rwanda v. Plaxeda Rugumba, Appeal No. 1 of 2012, Judgment, ¶ 11 (Jun. 2012), available at http://www.eacj.org/judgments.php.
[239] *See id.* ¶ 39.
[240] *See* James Katabazi v. Secretary General of the East African Community, Reference No. 1 of 2007, Judgment, 20-23 (Nov. 1, 2007), *available at* http://www.eacj.org/docs/judgements/JUDGMENT_REFERENCE_NO._1_OF_2007.pdf (holding that the intervention by armed security agents of Uganda to prevent the execution of bail granted by the High Court of Uganda to the complaints violated the principle of the rule of law and … contravened the Treaty).
[241] African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, Dec. 6, 2012, *available at* http://www.unhcr.org/4ae9bede9.html [hereinafter Kampala Convention].
[242] *See Africa Unites on Human Rights: A Media Guide to the Kampala Convention*, INTERNAL DISPLACEMENT MONITORING CENTRE, *available at* http://www.internal-displacement.org/kampala-convention.
[243] *See id.*
[244] Kampala Convention, *supra* note 241, at art. 9(1)(d).
[245] *Id.* at art. 9(2)(d). However, the treaty contains gender-exclusive language, for example referring to the "reproductive and sexual health of internally displaced women."
[246] *See List of Signatories and Countries That Have Ratified the Kampala Convention*, INTERNAL DISPLACEMENT MONITORING CENTRE, *available at* http://www.internal-displacement.org/kampala-convention.

2. Non-binding regional instruments

In 2006, Uganda signed and ratified the Pact on Security, Stability, and Development of the Great Lakes Region, including the Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children.[247] In this non-binding document, signatories commit to taking steps to end sexual and gender-based violence against women and children. The protocol defines sexual violence as "any act which violates the sexual autonomy and bodily integrity of women and children under international criminal law."[248] As a signatory, Uganda has pledged to punish perpetrators of sexual violence or trafficking, as well as sexual violence in connection with genocide, war crimes, and crimes against humanity. However, the language of the Protocol restricts this pledge to sexual violence against women, thus excluding men from similar protections.

The Goma Declaration on Eradicating Sexual Violence and Ending Impunity in the Great Lakes Region was adopted in 2008, as a follow up to the regional Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children.[249] While the preamble focuses on women and children, the body of the instrument uses gender-neutral language and calls for the "prevention of SGBV [sexual and gender-based violence] and assistance to survivors," as well as the revision of discriminatory laws.[250] Notably, Uganda's Action Plan calls for the collection of "sex disaggregated data in relation to GBV [gender-based violence]"[251] and the amendment of "sections on GBV offenses in the Penal Code."[252] Further, the Plan acknowledges that rape has

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[247] Pact on Security, Stability and Development of the Great Lakes Region, art. 11, December 2006, *available at* http://www.internal-displacement.org/8025708F004BE3B1/%28httpInfoFiles%29/60ECE277A8EDA2DDC12572FB002BBDA7/$file/Great%20Lakes%20pact_en.pdf. *See also* Stephen Bwire, *Uganda: Take Gender Based Violence Out of Closet*, ALLAFRICA, Feb. 3, 2010, http://allafrica.com/stories/201002040763.html.

[248] Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children, art. 5, Nov. 30, 2006, *available at* http://www.internal-displacement.org/8025708F004BE3B1/%28httpInfoFiles%29/381B8D820A51C229C12572FB002C0C5B/$file/Final%20protocol.Sexual%20Violence%20-%20En.pdf [hereinafter Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children].

[249] Goma Declaration on Eradicating Sexual Violence and Ending Impunity in the Great Lakes Region (June 18, 2008) *available at* http://www.norway.go.ug/Global/SiteFolders/webkamp/GOMA_DECLARATION1%20%282%29.pdf [hereinafter Goma Declaration].

[250] *Id.* ¶ 1.

[251] *Uganda Action Plan*, *supra* note 187, at 28.

[252] *Id.* at 24.

been prevalent "in and around" the IDP camps in Northern Uganda and envisions protection to "all survivors of SGBV … including IDPs and refugees."[253]

In summary, while regional human rights mechanisms generally identify men and women as protected when discussing torture or assault, many specify only women or "women and children" when addressing *sexual* violence. There are some promising signs of change in several countries in Africa. Botswana[254] and South Africa,[255] for example, define rape in gender-neutral terms. In 2006, Kenya passed a Sexual Offences Act that redefined rape to consider both males and females as possible victims and perpetrators.[256] The DRC also recently expanded the crime of rape to include male victims.[257] Such broad and gender-neutral definitions of rape and sexual violence eliminate the kinds of barriers to justice for male survivors of sexual violence in Uganda that are created by the country's narrow and gender-specific provisions in its penal code.

IV. DOMESTIC LEGAL FRAMEWORK FOR PROSECUTION OF CONFLICT-RELATED SEXUAL VIOLENCE

The Ugandan domestic legal framework for the prosecution of conflict-related sexual violence involves two primary sources of law: (1) the International Criminal Court Act of 2010 (ICC Act),[258] a national statute that incorporates the substantive crimes codified in the Rome Statute;[259] and (2) relevant provisions of the Ugandan Penal Code (UPC).[260] The ICC Act also

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[253] *Id.* at 9.

[254] Botswana Penal Code (1986) § 141. "Any person who has unlawful carnal knowledge of another person, or who causes the penetration of a sexual organ or instrument, of whatever nature, into the person of another for the purposes of sexual gratification, or who causes the penetration of another person's sexual organ into his or her person, without the consent of such other person, or with such person's consent if the consent is obtained by force or means of threats or intimidation of any kind, by fear of bodily harm, or by means of false pretenses as to the nature of the act, or, in the case of a married person, by personating that person's spouse, is guilty of the offence termed rape."

[255] South African Criminal Law (Sexual Offenses) Amendment Bill 2006, Bill 50-2003 (GA) §2(1). "A person who unlawfully and intentionally commits an act which causes penetration to any extent whatsoever by the genital organs of that person into or beyond the anus or genital organs of another person, or any act which causes penetration to any extent whatsoever by the genital organs of another person into or beyond the anus or genital organs of the person committing the act, is guilty of the offence of rape."

[256] Koenig et al., *supra* note 118, at 37. *See also* Kenya Sexual Offenses Act No 3 of 2006, *available at* http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/SexualOffencesAct_No3of2006.pdf.

[257] Russell, *supra* note 2, at 23.

[258] To differentiate the international and national statutes, this paper will refer to the statute governing the International Criminal Court as the "Rome Statute" and the Ugandan national legislation, the ICC Act of 2010, as the "ICC Act."

[259] The ICC Act of 2010 is similar to national legislation adopted in the United Kingdom, Germany, and South Africa for the same purpose of enabling domestic prosecution of international crimes. Michael Otim & Marieke

established a special court, the International Crimes Division (ICD), in which these offenses can be prosecuted.[261] UPC crimes are typically prosecuted in local courts; however, charges of penal code violations may be prosecuted before the ICD, and indeed such violations were filed in conjunction with charges against former LRA commander Thomas Kwoyelo heard by the Court. One prosecutorial strategy in charging international crimes in conjunction with domestic crimes is to enable a conviction on domestic offenses if the state is unable to prove all elements of international offenses. For example, if a charge of crimes against humanity is unsuccessful because prosecutors are unable to prove the widespread and systematic nature of incidents, such as killings, the perpetrator may nonetheless be convicted of murder.[262]

This section begins with a review of the development of the national system in Uganda for prosecution of international crimes. It then identifies some criminal offenses in the Ugandan Penal Code which are relevant to accountability for conflict-related sexual violence against men. This analysis reveals three types of gaps and barriers in the domestic criminal code: (1) crime definitions that exclude men as victims of sexual violence; (2) the formulation of consent with regard to sexual violence offenses; and, (3) the criminalization of consensual sexual behavior and

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Wierda, *Uganda: Impact of the Rome Statute and the International Criminal Court*, INT'L. CTR. TRANSITIONAL JUSTICE (Mar. 26, 2013 2:45 PM), http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-ST-V-M.7-ENG.pdf.

[260] Under British colonialism, British statutory and common law was imposed on parts of East Africa in 1902, as well as several codes designed for British India. In 1962, when Uganda gained independence, much of the imported British legislation was replaced by Ugandan statutes. *Uganda*, FOREIGN LAW GUIDE (MAR. 26, 2013 2:45 PM), http://www.foreignlawguide.com/ip/flg/Uganda.htm.

[261] The ICC Act of 2010 renamed the national special court, War Crimes Division as the International Crimes Division. The War Crimes Division had been established in 2008 as a result of negotiations with the LRA. Although negotiations between the government and the LRA broke down in 2008, the War Crimes Division of the High Court was set up. At the outset, this special court lacked domestic legislation to try cases of war crimes, crimes against humanity, and genocide. The ICC Act was passed in May 2010, in advance of the ICC Assembly of States Parties meeting in Kampala in June and July 2010. *Outreach Strategy for War Crimes Division of High Court of Uganda*, 16, PUBLIC INTERNATIONAL LAW AND POLICY GROUP & VANDERBILT UNIVERSITY LAW SCHOOL INTERNATIONAL LEGAL STUDIES PROGRAM (2010), http://law.vanderbilt.edu/academics/academic-programs/international-legal-studies/program-news/download.aspx?id=6038.

[262] Sexual violence offense charges are prosecuted in local courts. These courts have broad jurisdiction over local criminal and civil matters, and Magistrate Courts are the court of first instance for most disputes, including some sexual violence cases. Brena Mahoro, *Uganda's Legal System and Legal Sector,* GLOBALEX (Mar. 27, 2013 5:50 PM) http://www.nyuglobal.org/globalex/Uganda.htm. The Magistrate Court Act (MCA) "gives Magistrate' Courts the jurisdiction to try offences under the Geneva Conventions Act." The Chief Magistrate is not allowed to try crimes for which the greatest penalty is death. Christopher Mbazira, *Prosecuting International Crimes Committed by the Lord's Resistance Army in Uganda,* in PROSECUTING INTERNATIONAL CRIMES IN AFRICA (Chacha Murungu & Japhet Biegon, eds., 2011). Magistrate courts may not adjudicate the most serious sexual violence offenses such rape (UPC §123) and aggravated defilement (UPC §129). Most appeals from local courts are heard by the High Court of Uganda, which has unlimited original jurisdiction and can hear cases in which the maximum penalty is death. Mahoro, *supra*.

its chilling effect on reporting of conflict-related sexual violence by male victims of these crimes.

A. International Criminal Court Act of 2010

1. Background to the ICC Act of 2010

In October 2005, the ICC issued arrest warrants for five senior LRA commanders including Joseph Kony and Vincent Otti.[263] In 2006, during the Juba peace talks, the complementarity provisions of the Rome Statute became a controversial topic because the LRA sought withdrawal of the international arrest warrants.[264] The parties adopted an agreement to enable national criminal proceedings rather than trials at the ICC. Accordingly, in 2008, the state established the War Crimes Division of the High Court of Uganda to prosecute serious crimes committed by the LRA during the conflict. Two years later, on the eve of hosting the ICC Review Conference, Uganda enacted the ICC Act of 2010, thereby domesticating the "obligations assumed by Uganda under the [Rome] Statute."[265]

The ICC Act also established the International Crimes Division of the High Court (ICD) to adjudicate international crimes defined in the Rome Statute as well as additional offenses.[266] The ICC Act codified the Rome Statute definitions of genocide, crimes against humanity, and war crimes.[267] The Constitutional Court reviews ICD decisions and these decisions may be appealed to the Supreme Court for final review.[268] Importantly, the ICC Act gives the ICD

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[263] Otim & Wierda, *supra* note 259, at 2.
[264] *Id.* at 4.
[265] International Criminal Court Act, pt. I, § (2)(b) (2010) [hereinafter ICC Act]. Acts Supplement No. 6, Uganda Gazette No. 39, Vol. CIII [hereinafter Acts Supplement No. 6].
[266] The High Court (International Crimes Division) Practice Directions ("ICD Practice Directions"), Legal Notice No. 10 of 2011, Legal Notices Supplement, Uganda Gazette, No. 38, Vol. CIV. *See* HUMAN RIGHTS WATCH, JUSTICE FOR SERIOUS CRIMES BEFORE NATIONAL COURTS: UGANDA'S INTERNATIONAL CRIMES DIVISION (2013), *available at* http://www.hrw.org/sites/default/files/reports/uganda0112ForUpload_0.pdf [hereinafter *Uganda's International Crimes Division*].
[267] ICC Act, *supra* note 265, at pt. II (International Crimes and Offences Against the Administration of Justice). Acts Supplement No. 6, *supra* note 265. Although the crime of aggression was listed as one of the core crimes in the Rome Statute (Art. 5), it was not defined in the instrument and the Court is not able to exercise jurisdiction over this offense. During the Review Conference of Rome Statute (held in Kampala between 31 May and 11 June 2010), the state parties adopted by consensus amendments to the Rome Statute, which include a definition of the crime of aggression and a regime establishing how the Court will exercise its jurisdiction over this crime. The Court will not be able to exercise its jurisdiction over the crime until after 1 January 2017, when a decision is to be made by States Parties to activate the jurisdiction. *See* Coalition for the International Criminal Court, *Crime of Aggression* (Mar. 27, 2013 5:55 PM) http://www.iccnow.org/?mod=aggression.
[268] *Uganda's International Crimes Division*, *supra* note 266, at 5.

jurisdiction to prosecute war crimes that were made illegal under the Ugandan Geneva Conventions Act (1964).[269]

Under specific circumstances listed in Section 18 of the ICC Act, the ICD has jurisdiction over crimes committed outside the territory of Uganda. For extraterritorial violations of sections 7 to 16 of the Act (including crimes against humanity, war crimes, and genocide), the ICD may prosecute if the perpetrator is a citizen or permanent resident of Uganda, employed by Uganda in a civilian or military capacity, has committed the offence against a citizen or permanent resident of Uganda, or is, after the commission of the offense, present in Uganda. The residency and citizenship status of the victim, therefore, are central determinants of whether or not the ICD enjoys jurisdiction.[270]

Under international law, international crimes committed in Uganda prior to Uganda's ratification of the Rome Statute in 2002 and the passage of the ICC Act in 2010 may be

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[269] Geneva Conventions Act (1964), *available at* http://www.ulii.org/ug/legislation/consolidated-act/363 [hereinafter Geneva Conventions Act]. The ICC Act excludes Rome Statute Article 8(2)(d), which provides a clarification of Article 8(2)(c), the latter which is included the ICC Act. Article 8(2)(d) states that the definition of armed conflicts not of an international character discussed in article 8(2)(c) "does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature." Similarly, the ICC Act excludes Article 8(2)(f), which provides a clarification of Article 8(2)(e), which the ICC Act adopts. Article 8(2)(f) states that the definition of armed conflict not of an international character discussed in article 8(2)(e) does not apply to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature." Article 8(2)(f) continues to explain that article 8(2)(e) "applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups." Rome Statute, *supra* note 33, at pt. 2, art. 8; ICC Act, *supra* note 265, at pt. II, arts. 7-9.

[270] Under the Uganda Citizenship and Immigration Control Act, the permanent residency and citizenship options of refugees are severely limited. Article 55 of the Act presents a list of requirements for an applicant to qualify for permanent residency, including that they have contributed to the socioeconomic or intellectual development of Uganda, have continuously lived in Uganda for ten years, and that they are not bankrupt or destitute. Uganda Citizenship and Immigration Control Act, 1999, Cap. 66 art. 55 (1999). The Refugee Act of 2006 appears to provide an opportunity for refugees to acquire citizenship under the same process as non-refugees, with article 45 stating: "The Constitution and any other law in force in Uganda regulating naturalization shall apply to the naturalization of a recognized refugee." *Id.* However, the requirements for qualification for citizenship are also quite stringent, requiring the applicant have resided in Uganda for an aggregate period of twenty years, among other requirements. *Id.* at Cap. 66 art. 16(5). For a full discussion of the citizenship possibilities for refugees, see Samuel Walker, CAN REFUGEES BECOME CITIZENS OF UGANDA? (Refugee Law Project 2008), *available at* http://www.refugeelawproject.org/briefing_papers/RLP.BP0803.pdf. However, the naturalization requirement does not include provisions regarding bankruptcy, destitution, and socioeconomic contribution like the permanent residency requirement. It should be noted, however, that while there appears to be a legal pathway for permanent residency or citizenship status for refugees, there are significant procedural barriers that may render these options untenable. *See id.*

prosecuted by the ICD without violating the principle of non-retroactivity.[271] As Article 15 of the ICCPR, to which Uganda is a state party, states:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed .... [However, n]othing in this article shall prejudice the trial and punishment of any person for any act or omission which, *at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations*. (emphasis added).[272]

The ECHR contains the same provision, and the European Court of Human Rights has held that such serious crimes can be prosecuted under international law even if at the time they were committed they were not codified under domestic law.[273] Similarly, the ICTY and the SCSL have allowed prosecution of war crimes and crimes against humanity for conduct prior to the creation of applicable statutes.[274] The theory is that international law provided the accused with notice that the conduct was illegal, such that prosecution of these offenses does not violate fundamental notions of fairness. Consistent with these principles and to promote accountability for these offenses, Article 29 of the Rome Statute states that genocide, war crimes, and crimes against humanity "shall not be subject to any statute of limitations."[275] Thus, because the ICC Act codifies crimes that existed in international law at the end of the Second World War, perpetrators of these offenses that occurred after that time but prior to enactment of the statute may nonetheless be prosecuted in domestic courts. Put differently, under international law,

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[271] The principle of non-retroactivity is a fundamental principle of law which prohibits criminalizing conduct after it has been committed. Uganda's constitution includes the following in regard to non-retroactivity: "No person shall be charged with or convicted of a criminal offence which is founded on an act or omission that did not at the time it took place constitute a criminal offence... . No penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that could have been imposed for that offence at the time when it was committed." Constitution of the Republic of Uganda 1995, arts. 28(7)-28(8). *See also* HUMAN RIGHTS WATCH, *Benchmarks for Justice for Serious Crimes in Northern Uganda* 25-27 (2007) [hereinafter *Benchmarks for Justice*].

[272] ICCPR, *supra* note 195, at art. 15.

[273] *See, e.g.*, Papon v. France, Application No. 54210/00, ECHR 2001-XII, and Touvier v. France, Commission decision of 13 January 1997, Decisions and Reports 88-B at 161, *available at* http://www.echr.coe.int/ECHR/Homepage_En/.

[274] *See, e.g.*, Prosecutor v. Norman, Special Court for Sierra Leone (SCSL), Case No. SCSL-2004-14-AR72, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) (Appeals Chamber), May 31, 2004, http://www.sc- sl.org/CDF-decisions.html (accessed September 21, 2007); and Prosecutor v. Hadzihasanovic (Trial Chamber), Decision on Joint Challenge to Jurisdiction, International Criminal Tribunal for the former Yugoslavia (ICTY), Case No. IT-01-47-PT, November 12, 2002, reversed in part by Interlocutory Appeal (Appeals Chamber), Nov. 27, 2002. *See also Benchmarks for Justice*, *supra* note 271.

[275] Rome Statute, *supra* note 33, at art. 29. Section 19(1)(a)(vii) of the ICC Act domesticates Article 29 of the Rome Statute.

Uganda has always had jurisdiction to prosecute perpetrators of international crimes; the passage of the ICC Act simply made such prosecutions practicable.[276]

It also appears there is no barrier under domestic law to ICD prosecutions of crimes against humanity, genocide, and war crimes that took place prior to 2010. When Uganda domesticated the Rome Statute, it did not limit the temporal jurisdiction (timeframe in which the incidents occurred) of the court. In fact, the ICC Act stated that its purpose was "to make *further* provision in Uganda's law for the punishment of the international crimes of genocide, crimes against humanity and war crimes" (emphasis added).[277] There may be some ambiguity regarding the particular elements of these crimes to be applied to incidents that took place prior to 2002 when the Rome Statute codified the offenses in the Elements of Crimes, but this would not bar prosecution; it rather suggests the need for further research to identify the legal elements of the charges.

The ICC Act also adopts the modes of liability from the Rome Statute offenses, meaning that indirect perpetrators may be held accountable under theories of command responsibility and joint criminal enterprise.[278] Contrary to the Rome Statute, the ICC Act does not provide for victim participation rights; the domestic statute instead adopts common law legal tradition, which separates criminal and civil legal processes.[279] Finally, although the ICD has formal jurisdiction over atrocity crimes committed by governmental or nongovernmental actors, there are questions regarding how the amnesty law may be applied, as discussed further below.

2. The Amnesty Acts

The Amnesty Act of 2000 limited the jurisdiction of the ICD as it precludes prosecution of "any Ugandan who has at any time since the 26th day of January 1986, engaged in or is

[276] There are additional theories of international law that states have duties to investigate and prosecute certain international crimes such as war crimes and genocide if the perpetrator is within the jurisdiction of state. States arguably also have the ability, but not necessarily the duty, to investigate and prosecute these crimes as well as crimes against humanity under the theory of universal jurisdiction, i.e. an international law doctrine which provides that these offenses are so egregious that any state that has jurisdiction over a perpetrator may investigate prosecute such person. *See* Cherif Bassiouni, *International Crimes:* Jus Cogens *and* Obligation Erga Omnes, 59 LAW & CONTEMP. PROBS. 63 (1997).
[277] ICC Act, *supra* note 265, at pt. I, § 2(c).
[278] *See Uganda's International Crimes Division*, *supra* note 266, at 14.
[279] Luke Moffett, *The Ugandan International Criminal Court Act 2010: What does it mean for victims?*, VICTIMS' RIGHTS WORKING GROUP, http://www.vrwg.org/home/home/post/21-the-ugandan-international-criminal-court-act-2010-what-does-it-mean-for-victims.

engaging in war or armed rebellion against the government of the Republic of Uganda."[280] The act appears to "preclude [prosecution of] all cases [against] LRA members" regardless of the severity of the crimes.[281] The effect of the Amnesty Act has recently been tested in the ICD trial against former LRA commander Thomas Kwoyelo.[282] Kwoyelo had applied for amnesty but had not received a response from authorities, and after his capture, the state charged him with numerous offenses under the Geneva Conventions Act and UPC.[283] Kwoyelo pleaded not guilty to all charges and raised objections to proceedings, claiming that his constitutional right to equal treatment under the Amnesty Act was violated. The Director of Public Prosecutions, in turn, challenged the constitutionality of the Amnesty Act.[284] The Constitutional Court upheld the Amnesty Act; it found that Kwoyelo's rights under the Act had not been fairly applied and therefore his prosecution was terminated.[285] The state appealed the decision, which appears to be under consideration by the Ugandan Supreme Court.[286]

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[280] The Act grants, "pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of punishment by the state" to "any Ugandan who has at any time since the 26th day of January, 1986 engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda" by participating in combat, collaborating with perpetrators of the war or armed rebellion, furthering the armed rebellion or assisting or aiding the conduct or prosecution of the war or armed rebellion. Amnesty Act (2000), *available at* http://www.ulii.org/ug/legislation/consolidated-act/294. *See also* The International Crimes Division, UGANDA COALITION ON THE INTERNATIONAL CRIMINAL COURT (Feb. 22, 2013 2:05 PM), http://www.ucicc.org/index.php/icd/about-icd. According to at least one scholar, Uganda's amnesty policy produced defections from foot soldiers, which were largely abducted children, but did not produce defections from LRA commanders. Payam Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, 99 AM. J. INTL. L. 403, 410 (2005); s*ee generally,* Louise Mallinder, *Uganda at a Crossroads: Narrowing the Amnesty?,* 18 (Inst. Of Criminology & Criminal Justice, Queen's Univ. Belfast, Working Paper No. 1, 2009) *available at* http://www.academia.edu/205946/Uganda_at_a_Crossroads_Narrowing_the_Amnesty.

[281] *Uganda's International Crimes Division*, *supra* note 266, at 13.

[282] Kwoyelo is a former child soldier. Alexis Okeowo, *Thomas Kwoyelo's Troubling Trial*, THE NEW YORKER (Mar. 13, 2013 1:03 PM) *available at* http://www.newyorker.com/online/blogs/newsdesk/2012/07/thomas-kwoyelos-troubling-trial.html.

[283] *Uganda's amnesty for LRA commander a 'setback' for justice*, AMNESTY INTERNATIONAL (Mar. 11, 2013 12:03 AM), *available at* http://www.amnesty.org/en/news-and-updates/uganda%E2%80%99s-amnesty-lra-commander-%E2%80%98setback%E2%80%99-justice-2011-09-23. Kwoyelo was charged with twelve counts of violations of Uganda's 1964 Geneva Conventions Act, including "willful killing, taking hostages, and extensive destruction of property." He also faced 53 alternative counts of crimes under the Ugandan Penal Code such as murder, attempted, murder, kidnapping, kidnapping with the intent to murder, robbery, and robbery using a deadly weapon. Thomas Kwoyelo alias Latoni v. Uganda (Const. Pet. No. 36 of 2011) [2011] UGCC 10 (Mar. 27, 2013 7:26 PM), *available at* http://www.ulii.org/ug/judgment/2011/10.

[284] The Constitutional court considered multiple objections to the case: (1) that Kwoyelo was being denied equal treatment under the Amnesty Act because he had not been given amnesty; (2) that Amnesty Act was unconstitutional and therefore should not bar the case against Kwoyelo; and (3) that Kwoyelo's pre-trial detention was unconstitutional. Thomas Kwoyelo alias Latoni v. Uganda, *supra* note 283.

[285] *Uganda's International Crimes Division*, *supra* note 266, at 13.

[286] Mark Kersten, *The Path Towards Prosecution: An End to Amnesty in Northern Uganda*, (Mar. 27, 2013 5:46 PM), http://justiceinconflict.org/2012/06/11/the-path-towards-prosecution-an-end-to-amnesty-in-northern-uganda/.

In May 2012, the Minister of Internal Affairs declared that Part II of the Amnesty Act (passed in January 2000) had lapsed.[287] Proposals for new amnesty bills are being considered by Ugandan authorities.[288]

B. The Ugandan Penal Code

The Penal Code of Uganda (UPC), enacted in 1950, remains the primary criminal code for the country. Within the code, laws are divided into thematic sections, which frame the context and relation of the acts to one another. When prosecutors are not able to convict perpetrators of international crimes, the ICD jurisdiction over the UPC provisions becomes particularly important because prosecutors may be able to prove the common law dimensions of the offenses.[289] For example, if prosecutors are unable to prove a defendant committed rape as a crime against humanity because they were unable to show the acts were committed as part of a widespread or systematic attack, the defendant nonetheless may be convicted of rape under the UPC.[290] With this in mind, the Ugandan Penal Code criminalizes several offenses relevant to prosecution and reporting of conflict-related sexual violence against men including, rape of women,[291] indecent assault (sexual assault),[292] and same-sex activity.[293] However, these offenses are relevant to accountability efforts in different ways. There are three categories of UPC offenses that this section will discuss: (1) offenses that criminalize sexual violence yet do not apply equally to men and women victims; (2) offenses that restrict legal recognition of sexual violence through definitions of consent; and (3) morality offenses that criminalize consensual

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[287] Barney Afako, *Undermining the LRA: Role of Uganda's Amnesty Act* (Mar. 27, 2013 5:46 PM), http://www.c-r.org/comment/undermining-lra-uganda-amnesty-act-barney-afako.

[288] A civil society petition to Parliament requested a full reinstatement of the Amnesty Act with new legislation to supplement the current provisions and a further extension of amnesty. Barney Afako, *Committee on Defense and Internal Affairs Guidance Note on Amnesty Act Amendments* (Feb. 10, 2013). One proposal includes criteria and procedures for declaring individuals ineligible for amnesty, granting the Amnesty Commission power to make reparations to victims, and to assist victims who are not citizens of Uganda. The Amnesty (Amendment) Act (2013), proposed legislation (on file with the authors).

[289] ICC Act, *supra* note 265, at pt. II, § 19 (General Principles of Criminal Law); *id.* § 19(b), "the provisions of Ugandan law and the principles of criminal law applicable to the offence under Ugandan law apply." *See generally* ICC Act, *supra*. Acts Supplement No. 6, *supra* note 265.

[290] The prosecution of sexual violence crimes may also include charges under Chapter XXIII of the UPC—Assaults. The relevant crimes are: UPC §235 Common Assault, UPC §236 Assaults causing actual bodily harm, and UPC §238 Assaults punishable with years of imprisonment.

[291] UPC § 123 Rape.

[292] UPC § 128 Indecent assault.

[293] UPC § 145 Unnatural offences.

sexual intimacy and may impede reporting and accountability for sexual violence. Each category will be reviewed to identify the problematic elements of these norms.

1. UPC and sexual violence offenses that exclude men by definition

Rape and indecent assault are important provisions for the prosecution of conflict-related sexual violence, and both provisions exclude male victims. Rape is defined by UPC § 123 which reads as follows:

> Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, commits the felony termed rape.

Thus, the elements of rape are (1) unlawful (2) carnal knowledge (3) of a female victim (4) without consent. The first element refers to the marital status of perpetrator and victim.[294] Carnal knowledge has been interpreted to mean vaginal penetration by the male organ.[295]

Indecent assault is often charged with rape, and if "carnal knowledge" is not proven beyond a reasonable doubt by the prosecution, a perpetrator may be found guilty of indecent assault.[296] The offense is criminalized in UPC § 128, which reads as follows:

> (1) Any person who unlawfully and indecently assaults any woman or girl commits a felony and is liable to imprisonment for fourteen years, with or without corporal punishment.
> (2) It shall be no defence to a charge for an indecent assault on a girl under the age of eighteen years to prove that she consented to the act of indecency.[297]

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[294] LILLIAN TIBATEMWA-EKIRIKUBINZA, CRIMINAL LAW IN UGANDA: SEXUAL ASSAULTS AND OFFENCES AGAINST MORALITY, 3 (2005).

[295] In *Uganda v. Okiring*, carnal knowledge was defined as: the "penetration of a male organ into that of the female." Case No. HCT-04-CR-SC-0080-2008, [2011] UGHC 127, *available at* http://www.ulii.org/ug/judgment/high-court/2011/127.

[296] In *Uganda v. Ekyorinkwasa Deus*, the accused was charged with rape, but the judge found him guilty of indecent assault because the prosecution had not shown beyond a reasonable doubt that sexual intercourse occurred. Case No. HCT-05-CR-SC-0074 of 2003, [2003] UGHC 20, *available at* http://www.ulii.org/ug/judgment/high-court/2003/20.

[297] The misdemeanor of indecent assault is as follows: (3) Any person who, intending to insult the modesty of any woman or girl, utters any word, makes any sound or gesture or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such woman or girl, or intrudes upon the privacy of such woman or girl, commits a misdemeanor and is liable to imprisonment for one year. UPC § 128 Indecent Assault, *supra* note 292.

Defendants have been found guilty of indecent assault when the complainant's testimony was not corroborated[298] but other elements of the crime of rape were proven beyond a reasonable doubt.[299] Similar to rape, indecent assault is gender-exclusive. Rape and indecent assault as defined in Ugandan law are problematic for the prosecution of conflict-related sexual violence against men because the sex-specific anatomical elements that make up the crime of rape ignore the violation of a male victim's bodily integrity. Code provisions perpetuate the notion that men cannot be victims of sexual violence. As a formal legal matter, the Ugandan code does not recognize male rape as a crime; this means that such acts may only be prosecuted in Ugandan courts as international crimes.

2. UPC and legal consent, coercion, and the legal capacity for consent

The element of consent, or rather proof of non-consent, is defined in the rape penal code provision as requiring that the prosecution demonstrate the perpetrator's use of "force, or means of threats or intimidation of any kind or fear of bodily harm."[300] Indecent assault, however, contains no consent provision for adults and is a strict liability crime against girls under the age of 18. Although emphasis is often placed on force, the prosecution is not required to show force to prove a lack of consent.[301] A woman may be raped without struggle as a result of threats and intimidation.[302] A victim's lack of consent may be proven by the testimony of the victim, evidence of struggle, or the state of a victim when the assault was first reported.[303] The onus of proving a lack of consent is on the prosecution because an accused's belief that a woman

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[298] Uganda v. Ekyorinkwasa Deus, *supra* note 296.

[299] In *Wepukhulu Nyunguli v. Uganda*, a rape conviction was overturned because the complainant did not state that penetration occurred or that she suffered any pain, but alleged that the accused ejaculated on her thighs. Because the penetration was not proven, the accused was convicted of indecent assault. Wepukhulu Nyunguli v. Uganda, Case No. Criminal Appeal No. 21 of 2001, [2003] UGSC 12, *available at* http://www.ulii.org/ug/judgment/supreme-court/2003/12.

[300] UPC § 123 Rape, *supra* note 291.

[301] Kayondo Robert v. Uganda, Criminal Appeal No. 18/96 Court of Appeal (Unreported). In *Kayondo Robert v. Uganda*, the appellant was convicted of raping his aunt who was a married mother of three, and pregnant at the time. The trial judge gave weight to the fact that the victim was married and allowed penetration to be proved by circumstantial evidence. There was evidence of injuries to the complainant's body, however, whether she voluntarily removed her clothing was not considered a defense because of the physical threat of violence. Penetration can be proven without medical evidence through the testimony of the victim. *See also* Uganda v. Okiring, *supra* note 295 (evidence from one witness has been enough to corroborate the victim's testimony).

[302] TIBATEMWA-EKIRIKUBINZA, *supra* note 294, at 7.

[303] *Id.* at 19. For example, in *Uganda v James Katumba*, the judge determined that the female victim's screams, which were answered by two people and the accused's subsequent flight from the scene, were evidence that the victim did not consent. Criminal Session Case No. 333/97 High Court. An absence of struggle may lead to acquittal. TIBATEMWA-EKIRIKUBINZA, *supra* note 294, at 21.

consented to intercourse is a defense to rape.[304] Although not required by law to prove sexual offenses, in practice, the Supreme Court of Uganda has stated that corroborating evidence should also be sought out and, if a judge chooses to convict without corroborating evidence, the judge must explain in the judgment.[305] The requirement of proof that the victim of sexual violence did not consent places an evidentiary burden on the prosecution and raises objections that it subjects victims to unfair psychological strain. This requirement of proof has been replaced in international law with a focus on the use of force, coercion, or an abuse of power by the perpetrator.

3. UPC and criminalizing consensual sexual behavior

The UPC contains a division with several chapters of offenses categorized as offences injurious to the public, including morality offenses.[306] These offenses are proscribed because they are thought to offend social mores.[307] The section is "synonymous with sexual misconduct," or conduct that is criminalized but may be 'victimless.'"[308] (See Appendix for examples.) The problem of these provisions from the standpoint of promoting accountability for crimes of sexual violence against men is that victims may fail to report incidents of sexual violence for fear of being prosecuted for same-sex activity. For example, the penal code criminalizes consensual sodomy under the unnatural offenses provision, UPC § 145, which reads as follows:

> **UPC § 145: Unnatural offences.**
> Any person who—
> (a) has carnal knowledge of any person against the order of nature;
> (b) has carnal knowledge of an animal; or
> (c) permits a male person to have carnal knowledge of him or her against the order of nature, commits an offence and is liable to imprisonment for life.

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[304] Kibazo v. Uganda, [1965] EA 507 Court of Appeal for Eastern Africa; TIBATEMWA-EKIRIKUBINZA, *supra* note 294, at 9.
[305] TIBATEMWA-EKIRIKUBINZA, *supra* note 294, at 26. In *Chila & Another v. Republic*, the appellants were convicted of rape from the victim's testimony, uncorroborated by other evidence and without justification by the lower court's judge. It was held on appeal that there is danger in acting on uncorroborated testimony and the conviction was quashed. *Id.*
[306] Within this division there are chapters containing offences relating to religion (Chapter XIII), offences against morality (Chapter XIV), and offences relating to marriage and domestic obligations (Chapter XV).
[307] TIBATEMWA-EKIRIKUBINZA, *supra* note 294, at 67. Some morality offenses may also violate fundamental human rights protections including the right to privacy, but such an analysis is beyond the scope of this paper. For a more complete list of morality crimes in Ugandan law, see appendix.
[308] TIBATEMWA-EKIRIKUBINZA, *supra* note 294, at 65.

It appears that the phrases "against the order of nature" and "carnal knowledge" requires anal penetration by a male organ and thus criminalizes non-procreative sexual activity.[309] While some offenses that impose criminal liability for sexual activity involving minor children may assist accountability efforts for conflict-related sexual violence,[310] the enforcement of these crimes implicates broader consideration of prosecutorial discretion and the need for courts to interpret such provisions consistent with the goals of international criminal law.[311]

V. ANALYSIS

International law supports a gender-inclusive approach to accountability for conflict-related sexual violence. With few exceptions, international instruments use broad and gender-inclusive definitions of sexual violence.[312] The statutes of international criminal courts and tribunals, including the ICC, adopt gender-inclusive definitions of sexual violence crimes and have prosecuted such offenses of sexual violence against men. While some scholars and practitioners debate whether international courts have maximally pursued accountability for male victims of sexual violence, overall, international criminal justice institutions have demonstrated that these cases may be brought and won.[313] International practice therefore provides guidance for domestic accountability efforts regarding conflict-related sexual violence against men.

This section will suggest a number of ways in which international law can be used to improve accountability for conflict-related sexual violence against men in Uganda. It will address directly the three kinds of provisions in the Ugandan Penal Code discussed above: (1) gender-exclusive offenses; (2) offenses with narrow interpretation of consent; and, (3) offenses that criminalize sodomy. Each category presents a unique set of barriers to accountability for

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[309] Women who perform sexual acts on one another are not implicated by this penal code section because of the requirement of penetration by a male organ. *Id.* at 97.

[310] *See* UPC § 129: Defilement of persons under eighteen years of age, Penal Code (Amendment) Act, 2007 UGANDA LEGAL INFORMATION INSTITUTE (Mar. 27, 2013 7:45 PM), *available at* http://www.ulii.org/content/penal-code-amendment-act-2007.

[311] For example, under common law, the complainant in a sexual offence must have her evidence corroborated by direct or indirect circumstantial evidence. TIBATEMWA-EKIRIKUBINZA, *supra* note 294, at 97. Because these crimes impose sanction without required elements of force or the mental state of intent, corroboration served to check false accusations. However, in the context of conflict-related violence, such proof may place an undue burden on victims.

[312] *See supra* Section III(A)(2) for gender-inclusive definitions in international criminal law. *But see supra* Section III(B) for gender-exclusive human rights norms.

[313] *See supra* Section III(A)(3).

conflict-related sexual violence against men. International legal standards provide widely-recognized and accepted benchmarks against which to evaluate these domestic provisions, and with which to suggest areas for reform. Although not part of this analysis, Uganda constitutional law offers advocates another avenue to challenge the gender-exclusivity of sexual violence offenses in the UPC. The Constitution guarantees fundamental human rights such as equality and freedom from discrimination, and the penal code provisions that exclude male victims could be challenged on that basis. [314]

In addition, international human rights law and principles establish legal obligations of states to protect individual rights. These norms may support advocacy efforts to argue that the Ugandan state must reform its national laws to comply with its human right obligations to provide male victims of conflict-related sexual violence an adequate remedy. Thus international law contributes in two dimensions: (1) as a normative source for domestic criminal norms and (2) as a source of legal obligations that requires the state to undertake legal reform. Finally, this section concludes with a brief introduction of potential mechanisms for redress for male victims in Uganda of conflict-related sexual violence.

A. International Law as a Normative Source for Domestic Reform

1. Using international law to promote gender-inclusivity of prosecution of sexual violence

When Uganda passed the ICC Act of 2010, it domesticated prosecution of international crimes. The Act provides that in adjudicating these cases, the ICD shall apply the Rome Statute definitions of the offenses.[315] In most instances, this results in the prosecution of offenses not previously codified in Ugandan law. However in instances in which the substantive offenses, for example rape, are defined more restrictively by the Ugandan Penal Code than by the Rome Statute and the ICC Act, this may pose an obstacle to broad, gender-inclusive, prosecutions of conflict-related sexual violence. This section focuses on the examples of rape and indecent assault in the UPC and shows how international standards might serve as a model for reform to

[314] Other fundamental rights are implicated including the prohibition of cruel, inhumane or degrading treatment, and the right to privacy. Constitution of the Republic of Uganda, *supra* note 271, at ch. 4, arts. 20, 21, 23, 24, 43, 44.
[315] ICC Act, *supra* note 265, at pt. II, § 19(4). "For the purposes of interpreting and applying article 6 to 8 of the Statute in proceedings for an offence against section 7 or section 8 or section 9—(a) the Uganda Court exercising jurisdiction in the proceedings may have regard to any elements of crimes adopted or amended in accordance with article 9 of the Statute; and (2) the provisions of Divisions I to V of the Penal Code Act do not apply." *See generally* ICC Act, *supra*. Acts Supplement No. 6, *supra* note 265.

reduce barriers to justice for male victims of sexual violence. It suggests harmonizing the UPC provisions with international law such that Ugandan courts apply the same definition of rape to the prosecution of conflict-related international crimes and to prosecutions of domestic common crimes.

International criminal law norms are gender-neutral and apply equally to men and women.[316] The Rome Statute prohibits rape, sexual slavery, enforced prostitution, enforced sterilization or any other form of sexual violence of equivalent gravity against all civilians, not just women. Of all the offenses in the Rome Statute, only forced pregnancy is gender-specific. The definitions of sexual violence offenses refer to victims generally as "persons."[317] Similarly, the statutes of *ad hoc* criminal tribunals employed gender-neutral language. As a result, international prosecutors have charged and convicted perpetrators of sexual violence against men under these provisions in international criminal law.[318] The ICC appears to be following this trend although not without some resistance; the Pre-Trial Chamber confirmed charges against two Kenyan defendants with other inhumane acts for their involvement in the forced circumcision and sexual mutilation of men but refused to charge these acts as sexual violence.[319]

Similarly, the evolution of international human rights norms and their application has tended toward gender-inclusivity, albeit with notable exceptions. UN human rights treaty monitoring bodies and regional human rights courts have held that acts of male rape constitute torture when committed by state authorities for the purposes of interrogation or punishment.[320] The definition of sexual violence promoted by the new international entity, UN Women, suggests that acts of sexual violence against men are included within the general prohibition of sexual violence.[321] However, certain human rights instruments continue to define sexual violence as an offense that excludes men as victims. For example, the new Great Lakes Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children defines

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[316] *See supra* Section III(A).
[317] *See generally, e.g.* Rome Statute, *supra* note 33, Elements of Crimes document, definition of rape as a crime against humanity and sexual violence as crimes against humanity in art. 7(1)(g)(6). Elements of Crimes, *supra* note 131, arts. 7(1)(g).
[318] The ICTY prosecuted acts of forced fellatio, forced incest and gang rape of men as the crimes against humanity of persecution and other inhumane acts, and at least once directly as the crime against humanity of rape. *See supra* Section III(A)(3). As noted earlier, ad hoc criminal tribunals have charged acts of sexual violence against men as torture or other inhumane acts, which has generated some criticism among practitioners. *See id*.
[319] *See* Prosecutor v. Francis Kirimi Muthaura & Uhuru Muigai Kenyatta, *supra* note 169, ¶ 266.
[320] *See supra* Section III(B)(2).
[321] *See supra* Section I(A).

sexual violence as "any act which violates the sexual autonomy and bodily integrity of women and children under international criminal law."[322] Thus international human rights norms are not uniform and this variation poses challenges for advocates seeking to use international norms as models for domestic reform.

When comparing the international norms to Uganda's domestic criminal offenses that are most relevant to prosecutions for conflict-related sexual violence against men, it becomes clear that the penal code diverges sharply from international trends. Notably, the primary domestic law provisions criminalizing sexual violence are gender-exclusive. Rape (UPC § 123) and indecent assault (UPC § 128) are defined as offenses against female victims.[323]

Reviewing Ugandan penal code provisions regarding sexual violence offenses in light of prevailing international definitions of victims exposes gaps regarding prosecution of conflict-related sexual violence against men. A comprehensive review of *all* potentially relevant penal code provisions is beyond the scope of this paper; however, this modest survey suggests that amendments of Ugandan penal code provisions are necessary to bring national law in line with international standards and practices. Eliminating gender-exclusive definitions of sexual violence crimes would enable the ICD to prosecute residual domestic criminal offenses to provide redress to male victims of conflict-related sexual violence. If prosecutors are unable to prove successfully all the elements of international crimes, they may nonetheless succeed in convicting perpetrators of conflict-related sexual violence against men if the domestic provisions are amended to recognize that men as well as women are victims of rape and indecent assault.

There are several approaches to considering the appropriate language for a revised penal code, each of which offers potential benefits and problems for gender inclusion and accountability. Uganda could prohibit the sexual abuse of "persons," of "men and women," of "men, women, and children" or some combination of these identifiers. Defining victims as "persons" would technically be gender-inclusive and would mirror current international criminal law definitions of crimes of sexual violence. However, as the language is neutral, prosecutors and law enforcement may interpret and implement "persons" as referring to women only, thereby maintaining the status quo. The Ugandan Parliament recently changed the gender-specific language of "male" to the gender-inclusive term "persons" in UPC § 148 in order to criminalize

[322] Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children, *supra* note 248, at art. 5.
[323] *See supra* Section IV(B).

same-sex female intimacy as well as same-sex male intimacy.[324] This suggests an institutional understanding of the gender-inclusive nature of "persons;" however, government officials may not apply a gender-neutral term to crime victims in the same way they apply a gender-neutral term to perpetrators. Put differently, prosecutors may charge both men and women as "persons" who are offenders under UPC § 148, but may not prosecute perpetrators of rape against male as well as female victims if victim is defined as "person," rather than by using gender-specific language.

Defining victims as "men and women" presents additional benefits and challenges. While this terminology would guarantee formal legal protection of male victims, it does not include children such as "boys and girls." For that reason, using "men, women, and children" or "men, women, boys, and girls" might be preferable. Additionally, employing the gender binary of "men and women" would exclude gender non-conforming victims such as transsexual, transgender, and intersex individuals. This exclusion could be particularly egregious as these individuals are especially vulnerable to harassment and violence.[325]

An alternative approach would be to define victims as "persons including men, women, and children." Using this terminology addresses all of the potential obstacles created by the previous approaches. This language explicitly includes men and children as victims, and is inclusive enough to allow for gender non-conforming victims to seek accountability.

2. Using international law to redefine sexual violence to account for abuse of power and eliminate consent as a barrier to accountability

Although the treatment of consent in sexual offenses has been a topic of controversy in international law, international legal norms are currently converging on a focus of proof of coercion or abuse of power, rather than a focus on proof of non-consent. Even though the recent Great Lakes Protocol on Sexual Violence recognizes women and not men as victims, it does adopt a definition of sexual violence consistent with the predominant international approach.[326] The Ugandan penal code adopts a different approach: prohibitions of sexual violence use the

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[324] *See* UGANDA: "ANTI-HOMOSEXUALITY" BILL MUST BE UNCONDITIONALLY REJECTED, FIDH (Mar. 28, 2013), http://www.fidh.org/Uganda-Anti-Homosexuality-Bill-12565. This change occurred in the Penal Code Amendment (Gender References) Act (2000).

[325] *See* MEGAN BASTICK, ET AL., SEXUAL VIOLENCE IN ARMED CONFLICT 18 (2007), *available at* http://www.dcaf.ch/Publications/Sexual-Violence-in-Armed-Conflict.

[326] *See* Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children, *supra* note 248.

concept of non-consent on the part of the victim to determine whether sexual violence occurred.[327] As a result, the prosecution has the burden of proving the victim's lack of consent, which imposes evidentiary and psychological burdens on victims. This subsection analyzes the extent to which international standards supply alternative norms to reduce the barrier that consent often plays to accountability for victims of conflict-related sexual violence.

Definitions of sexual violence in international criminal case law emphasize the role that coercion and abuse of power play in the perpetration of sexual acts.[328] Similarly, the ICC favors a coercion test in prosecuting crimes of sexual violence. The first element of sexual violence emphasizes the presence of a coercive factor, which can be established by some degree of force, threat, or oppression.[329] Moreover, Rule 70 of the ICC's Rules of Procedure and Evidence prohibits the inference of consent from the words, conduct, or silence of the victim in circumstances where coercion has been used, or where the victim is incapable of giving genuine consent.[330] Thus, international criminal law favors a coercion test that eliminates the requirement that the prosecution prove non-consent. The definitions of rape and sexual violence that ICC employs explicitly focus on coercion, although it is too soon to evaluate how the court will interpret and apply these norms.

Similarly, international human rights law recognizes that sexual violence is committed to assert power and dominance over an individual. The jurisprudence of ECtHR and IACHR clearly establish that rape can constitute torture where rape involves the use of power to punish and/or extract information.[331] Recent international and regional definitions of sexual violence replace the concept of consent with abuse of power or violation of the victim's autonomy as legal elements of these violations.[332]

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[327] UPC §§ 123, 128. *See also* TIBATEMWA-EKIRIKUBINZA, *supra* note 294, at 9.
[328] The ICTR in *Akayesu* defined sexual violence as "any act of sexual nature which is committed on a person under circumstances which are coercive." Prosecutor v. Jean-Paul Akayesu, *supra* note 119, ¶ 688; *see also* O'Byrne, *supra* note 116, at 501; *see also* discussion in Section III(A)(2)(c).
[329] *See* Elements of Crimes, *supra* note 131. *See also* discussion *supra* in Section III(A)(2)(c).
[330] Rules of Procedure and Evidence of the International Criminal Court, ICC-ASP/1/3. Rule 72 sets out a procedure for notification of intention or elicit evidence of consent by the defense.
[331] In the case of M.C. v. Bulgaria, the ECtHR explained that "[w]hile in practice it may sometimes be difficult to prove lack of consent in the absence of 'direct' proof of rape, such as traces of violence or direct witnesses, the authorities must nevertheless explore all the facts and decide on the basis of an assessment of all the surrounding circumstances." M.C. v. Bulgaria, App. No. 39272/98, Eur. Ct. H.R., ¶ 181 (2004). *See also* Rapporteurship on the Rights of Women, *available at* http://www.cidh.org/women/Access07/chap1.htm#_ftn69. It held that the state should have investigated the presence of coercive circumstances and not have closed the investigation when no evidence of the use of force or of physical resistance during the rape was found. M.C. v. Bulgaria, *supra*.
[332] *See generally, e.g.*, U.N. Action against Sexual Violence in Conflict, *supra* note 18.

The analogous provisions in the Ugandan Penal Code require that the prosecution prove the victim's lack of consent to rape through the victim's testimony, evidence of struggle, or the state of the victim when the crime was reported. The belief that the victim consented is a defense to rape; therefore the prosecution must also prove that the accused knew the woman had not consented. The legal standard of consent is inappropriate for conflict-related sexual violence since the circumstances of abuse may stem from threats or coercion – armed combatants ordering victims to commit sexual acts – as well as from physical force.[333] Scholars also argue that it is unfair to place the burden on victims to show lack of consent to sexual violence rather than placing the burden on the perpetrator of such offenses.[334] Moreover, the coercion standard prevalent in international law reduces the use of a consent standard in sexual violence offenses to circumstances in which meaningful consent was not possible due to age or mental capacity.[335]

Substituting coercion for consent as an element of rape and other sexual violence offenses provides greater protection and respect for the dignity of victims. International norms offer models for how domestic sexual violence offenses should be revised to remove the consent element and replace it with a legal concept of coercion and abuse of power.

3. Using international law to alleviate the chilling effect on reporting due to fear of criminal prosecution for same-sex intimacy

Many male victims of conflict-related sexual violence are hesitant to report the crimes committed against them out of a fear that they may be arrested for violating criminal prohibitions on same-sex sexual activity.[336] In Uganda, the unnatural offenses or indecent practices statute in the penal code may be enforced against male victims of sexual violence under the rationale that their sexual encounters were consensual, and therefore violate the laws criminalizing sodomy.[337] This is an application of a more general problem with prosecution of morality crimes – offenses that do not contain a required element of abuse of power, coercion, or force – which may discourage victims from reporting crimes for fear of being charged as violators. Thus the

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[333] Anne-Marie De Brouwer, SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: THE ICC AND THE PRACTICE OF THE ICTY AND THE ICTR 439 (Intersentia, Belgium, 2005). *See also* O'Byrne, *supra* note 116, at 509.
[334] *See* O'Byrne, *supra* note 116, at 510.
[335] *See id.* at 503. This understanding of consent is already recognized in Ugandan law. For example, children under the age of eighteen are considered unable to legally consent to sexual behavior. UPC §§ 129, 129A, 133, 144. Similarly, the offense of procuring the defilement of women by threats is a separate misdemeanor that can be charged with the crime of defilement. *Id.* § 132.
[336] Sivakumaran, *Sexual Violence Against Men in Armed Conflict*, *supra* note 2, at 256.
[337] Storr, *supra* note 45.

enforcement practices of police, investigators, and prosecutors must be considered in conjunction with review of the penal code with an eye toward suggested reforms. Reform of relevant criminal offenses to criminalize sexual violence rather than sexual conduct would reduce barriers to reporting conflict-related sexual violence by male victims. By applying international norms regarding coercion to relevant Ugandan Penal Code provisions, male victims of conflict-related sexual violence would not be prosecutable under the morality offenses because the circumstances of their sexual encounters would immediately vitiate consent.[338] This approach allows advocates to mitigate the fear of male victims that they may face prosecution without addressing the contentious issue of the right to privacy and its application to Uganda's criminalization of same-sex intimacy under the UPC.

One approach to reform would be to incorporate into the penal code definition of rape the legal concept of coercion codified in the ICC Elements of Crimes definitions for rape and sexual violence as war crimes or crimes against humanity. Under those definitions, rape and sexual violence are committed "by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power ... or by taking advantage of a coercive environment," or the act was committed against a person incapable of giving "genuine consent."[339] The definitions for enforced prostitution and enforced sterilization include similar language regarding consent. By the very nature of sexual violence that occurs during conflict, especially as a tool of war, victims of sexual violence cannot genuinely consent under this definition. Similarly, IDPs and refugees who are sexually assaulted by government soldiers, aid workers, or day labor employers are not in positions to consent, as the power dynamic is inherently coercive.[340] Thus, harmonizing international norms regarding coercion with the relevant Ugandan Penal Code offenses will help to reduce barriers to male victims reporting conflict-related sexual violence.

B. Using International Law as a Source of Legal Obligation by Uganda to Reform Domestic Law

International law also serves as a source of legal obligation to promote domestic reform to improve accountability for conflict-related sexual violence against men. Under international

[338] *See* discussion *supra* Section V(A)(2).
[339] Elements of Crimes, *supra* note 131, at arts. 8(2)(e)(vi)(1), 8(2)(e)(vi)(6).
[340] *See* Prosecutor v. Dragoljub Kunarac, *supra* note 154.

law, an argument may be developed that Uganda is obligated to reform its domestic laws as part of the state's duty to provide a right to a remedy for male victims of conflict-related sexual violence.[341] The right to a remedy is a long-established norm in international human rights, although the breadth of its application is still emerging. The Universal Declaration of Human Rights states: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[342] This right is subsequently reiterated in the 1966 International Covenant on Civil and Political Rights[343] as well as numerous other instruments.[344] As a signatory of each of these treaties, Uganda is bound to ensure, secure, and guarantee the fundamental rights of those under its jurisdiction, including the right to a remedy articulated in these instruments.[345] Uganda is additionally bound by the African Charter on Human and Peoples' Rights, which explicitly enumerates the right to have one's "cause heard" by "competent national organs" where the individual has been subjected to a violation of his "fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force."[346] The African Commission on Human and Peoples' Rights has held that states have a duty to take legislative and other measures to give effect to the fundamental rights of its citizens, investigate human rights violations, provide effective remedies against violations, bring perpetrators of certain violations to justice, and provide reparation to victims.[347] Although not binding, several UN General Assembly declarations also include the

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[341] *See* Human Rights Committee, General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, ¶ 7 (May 26, 2004), *available at* http://www.unhchr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f?Opendocument [hereinafter Human Rights Committee, General Comment No. 31]. The General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant states, "Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfill their legal obligations. The Committee believes that it is important to raise levels of awareness about the Covenant not only among public officials and State agents but also among the population at large."

[342] UDHR, *supra* note 3, at art. 8.

[343] ICCPR, *supra* note 195, at art. 2(3). "Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted."

[344] These instruments include CERD, *supra* note 197, ICCPR, *supra* note 195, CAT, *supra* note 198; and Convention on the Rights of the Child, *supra* note 197.

[345] ICCPR, *supra* note 195, at art. 2; CERD, at art. 2, *supra* note 197 ; CEDAW *supra* note 215, at art. 2; and the Convention on the Rights of the Child, *supra* note 197, at art. 2.

[346] ACHPR, supra note 195, at art. 7(1).

[347] Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria,

right to a remedy for victims.[348]

The legal framework for the right to a remedy is comprised of three instruments. First, the International Law Commission's Draft Articles on the Responsibility of States for Internally Wrongful Acts ("ILC Articles") provides that when a state violates the human rights of anyone on its physical territory, it is under an obligation to provide "full reparation" to the victim.[349] Full reparation requires that a state "wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[350] Prior to providing any form of reparation the state owes an obligation of cessation, wherein it must "put an end to the violation of international law" and, in doing so, uphold international rule of law and safeguard its "continuing validity and effectiveness."[351] Importantly, the state must provide victims access to authorities who are able to fairly decide their claims of a rights violation, and provide an actual remedy to the victim.[352]

The second instrument that provides a legal framework for the right to a remedy is the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International

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Communication 155/96 (30th Ordinary Session, Oct 2001), ¶¶ 44-48. The African Commission has further interpreted the right to an effective remedy in its Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa, stating: "[e]veryone has the right to an effective remedy by competent national tribunals for acts violating the rights granted by the constitution, by law or by the Charter, notwithstanding that the acts were committed by persons in an official capacity." *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa,* Principle C (a) (emphasis added), *available at* http://www.achpr.org/instruments/fair-trial/; *see also* the case of Social and Economic Rights Action Center v. Nigeria*, supra* ¶ 61, in which the Commission considered that the State had to ensure "legal remedies."

[348] These include the 1948 Universal Declaration of Human Rights (UDHR), and the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. UDHR, *supra* note 3, at art. 8; UN General Assembly, A/RES/40/34, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985), *available at* http://www.un.org/documents/ga/res/40/a40r034.htm [hereinafter Declaration of Basic Principles of Justice].

[349] United Nations International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* art 31, cmt. ¶ 3 (2001), *available at* http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [hereinafter ILC Articles].

[350] The Factory at Chorzów, (Germ. v. Pol.) Judgment, 1927 P.C.I.J. (ser. A) No. 8 (Jul. 26). This case was highly influential in framing state responsibility for international violations of rights and gives us the term "full reparation," which is the intended goal of any form of redress.

[351] ILC Articles, *supra* note 349, at art. 30, cmt. ¶ 5.

[352] The Inter-American Court and Commission has clarified that in order to comply with this obligation, a state must ensure human rights through its entire "legal, political and institutional system" and to organize "the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of legally ensuring the free and full enjoyment of human rights." Chumbivilcas (Peru), Case 10.559, Inter-Am. Comm'n H.R., Report No.1/96, ¶ V3 (Mar. 1, 1996), *available at* http://www.cidh.oas.org/annualrep/95eng/Peru10559.htm; Velásquez-Rodríguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 166 (Jul. 29, 1988).

Humanitarian Law ("Basic Principles").[353]

The third instrument providing a legal framework for the right to a remedy is the Human Rights Committee's General Comment No. 31.[354] This treaty monitoring body of the ICCPR interpreted the Covenant to require the state to create the infrastructure necessary to redress violations,[355] as well as to ensure that individuals have access to such measures of redress.[356]

Another dimension of a victim's right to a remedy is the obligation of a state to prosecute and punish perpetrators of gross human rights violations, including torture, crimes against humanity, and war crimes. These crimes include conflict-related sexual violence against men such as rape, and the duty to prosecute and punish has been recognized by the UN Security Council[357] and the General Assembly.[358] States are further obligated to prosecute and punish the commission of "other gross human rights violations," a continually evolving category of crimes codified at the international level. At least one international court, the European Court of Human Rights, has recognized the obligation of states to provide a right to remedy for the commission of rape where the domestic legal protections are insufficient, regardless of whether the act was committed by the state or private individuals.[359] The UN Human Rights Committee has further

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[353] G.A. Res.60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005), *available at* http://www2.ohchr.org/english/law/remedy.htm. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law expand the definition of victims to include "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights." This recognition of victims as those who have suffered violations of their internationally recognized human rights, despite a lack of recognition for those rights at the domestic level, is included in Principle 8 of the UN Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power. Declaration of Basic Principles of Justice, *supra* note 348.

[354] Human Rights Committee, General Comment No. 31, *supra* note 341.

[355] *Id.* ("Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfill their legal obligations.").

[356] *Id.* ¶ 15 ("Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights."). Substantively, the state's obligation of "full reparation" for the harm caused may take the form of restitution, compensation, rehabilitation, satisfaction, and/or measures of non-repetition. *See* ILC Articles, *supra* note 349, at art. 34, cmt. ¶ 2; *see also* Declaration of Basic Principles of Justice, *supra* note 348, ¶ 18; *see also* Human Rights Committee, General Comment No. 31, *supra* note 341, ¶ 16.

[357] S.C. Res. 1529, ¶ 7, U.N. Doc. S/RES/1529 (Feb. 29, 2004);
S.C. Res. 1479, ¶ 8, U.N. Doc. S/RES/1479 (May 13, 2003).

[358] Khmer Rouge Trials, G.A. Res. 57/228, 3, U.N. Doc. A/RES/57/228 (Feb. 27, 2002). The General Assembly has asked to bring those responsible of child abduction to justice. Rights of the Child, G.A. Res. 57/190, ¶ 11, U.N. Doc. A/RES/57/190 (Feb. 19, 2003).

[359] X and Y v. Netherlands, App. No. 8978/80, A091 (1985); *see also* M.C. v. Bulgaria, App. No. 39272/98, 646 Eur. Ct. H.R. ¶ 153 (2003).

stated that a climate of impunity for human rights violations (e.g. through amnesties) amounts to a breach of state obligations under the Covenant.[360] Various treaties have specifically obligated states to adopt criminal sanctions for violations of internationally recognized human rights.[361]

States also are obligated to take measures of non-repetition to ensure violations do not recur; this duty is particularly important as it may encompass an obligation by Uganda to address the violation of male victims' human rights. Guarantees of non-repetition "involve something more—for example, preventive measures to be taken by the responsible State designed to avoid repetition of the breach."[362] These measures are especially relevant with respect to human rights violations as state actions have not only egregiously harmed victims but also, in betraying the state's role as a protector, have broken ties of trust and confidence. The Basic Principles provide examples of guarantees of non-repetition, including abiding by international standards of due process, fairness, and impartiality; providing human rights education to the public and training to law enforcement officials; promoting mechanisms for preventing and monitoring social conflicts and their resolution; and reviewing and reforming laws that contribute to or allow violations of international human rights law.[363]

The international framework for the right to a remedy may provide a normative argument, if not legal basis, to assert that the Ugandan state has an obligation to ensure adequate redress for male victims of conflict-related sexual violence. Drawing on these principles,

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[360] *Concluding Observations on Uruguay,* CCPR/C/79/Add.19, ¶ 7 (May 5, 1993); *Concluding Observations on Chile,* CCPR/C/79/Add.104, ¶ 7 (Mar. 30, 1999); *Concluding Observations on Lebanon*, CCPR/C/79/Add.78, ¶ 12 (Apr. 1, 1997); *Concluding Observations on El Salvador,* CCPR/C/79/Add.34, ¶ 7 (Apr. 18, 1994); *Concluding Observations on Haiti,* A/50/40, ¶¶ 224- 241 (Oct. 3, 1995); *Concluding Observations on Peru,* CCPR/CO/70/PER, ¶ 9 (Nov. 15, 2000); *Concluding Observations on France*, CCPR/C/79/Add.80, ¶ 13 (Aug. 4, 1997); *Concluding Observations on Argentina,* CCPR/C/79/Add.46, ¶ 146 (Apr. 5, 1995); *Concluding Observations on Argentina,* CCPR/CO/70/ARG, ¶ 9 (Nov. 3, 2000); *Concluding Observations on Croatia,* CCPR/CO/71/HRV, ¶ 11 (Apr. 4, 2001); *Concluding Observations on Guatemala,* CCPR/CO/72/GTM, ¶ 12 (Aug. 27, 2001).

[361] Apartheid Convention art. 4; CAT, *supra* note 198, at arts. 4-5; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography arts. 3-5; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict art. 4; Convention on the Prevention and Punishment of the Crime of Genocide arts. 4-6; Inter-American Convention to Prevent and Punish Torture arts. 1, 6; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women art. 7; Inter-American Convention on Forced Disappearance of Persons arts. 1, 4; ILO Indigenous and Tribal Peoples Convention 1989 (No. 169) art. 18 (stipulating "[a]dequate penalties shall be established by law for unauthorized intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences."); *see also* Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity and the European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes. *See* INTERNATIONAL COMMISSION OF JURISTS, THE RIGHT TO A REMEDY AND TO REPARATION FOR GROSS HUMAN RIGHTS VIOLATIONS: A PRACTITIONERS' GUIDE 160 n.49 (2006).

[362] ILC Articles, *supra* 356, at art. 30, cmt. ¶ 12.

[363] Declaration of Basic Principles of Justice, *supra* note 348, ¶ 23.

advocates for accountability may argue that as a matter of policy Uganda should reform domestic criminal statutes to recognize and protect the right of residents, both male and female, to be protected from acts of sexual violence, whether perpetrated by the state or private actors. Further, Uganda should provide access to judicial remedies to victims of these crimes. Finally, Uganda should take necessary steps to ensure the non-repetition of these violations. A failure to act on the part of the Ugandan government potentially constitutes both a violation of its treaty obligations to provide legal redress to victims without respect to sex, as well as a violation of its treaty obligations to prosecute and punish war crimes, crimes against humanity, and gross violations of human rights such as conflict-related violence against men.

These normative arguments could be developed as part of a strategy to persuade the Ugandan government that it needs to initiate necessary reforms to improve accountability for conflict-related sexual violence against men. The extent to which these principles could be enforced as legal obligations could be tested through initiating claims on behalf of male victims and their families in international human rights fora. Thus international law may offer support for a multi-pronged effort to advocate that the Ugandan state should take action in order to comply with its obligations as a signatory to international treaties to protect, promote, and ensure the human rights of male victims of conflict-related sexual violence.

C. Options for Redress to Male Survivors of Conflict-Related Sexual Violence Living in Uganda

This section will present a brief overview of legal options available to male survivors in Uganda of conflict-related sexual violence. It will first discuss the options of victims who want to see their perpetrators criminally prosecuted. It will then discuss the options of victims who either cannot or do not wish to pursue criminal prosecution in Uganda, but who may file a human rights petition alleging state violations of their rights. A more in-depth analysis is beyond the scope of this working paper, as case-specific details involve additional layers of legal and factual complexity.

1. Victims seeking criminal prosecution in Uganda

As a Ugandan statute, the ICC Act of 2010 grants the ICD jurisdiction to hear a case when an international crime was committed inside Uganda. It also grants the ICD jurisdiction to

hear a case when the crime has occurred outside of Uganda if one or more of the following requirements are filled: (a) the perpetrator is a citizen or permanent resident of Uganda, (b) the perpetrator is employed by Uganda in a civilian or military capacity, (c) the victim was a citizen or permanent resident of Uganda, or (d) the perpetrator is present in Uganda.[364]

This subsection will focus on four main categories of victims: (1) Ugandan citizens or permanent residents (discussed in the category of "nationals" hereinafter)[365] who suffered acts of conflict-related sexual violence after June 2010;[366] (2) Ugandan nationals who suffered acts of conflict-related sexual violence before June 2010; (3) refugees who were victimized in Uganda due to their vulnerable status; and (4) refugees who are currently in Uganda but suffered acts of conflict-related sexual violence outside of Uganda.

a. Ugandan nationals who suffered sexual violence after June 2010

The ICC Act establishes the possibility of accountability for perpetrators of conflict-related sexual violence against Ugandan nationals. Prosecutors would determine whether the crimes victims suffered meet the ICC requirements for genocide, crimes against humanity, or war crimes; whether the alleged perpetrator is subject to the court's jurisdiction; and whether to proceed with charges. If the crimes victims suffered do not meet the requirements of international crimes—i.e. they were not committed as part of a genocidal campaign, were not part of a widespread and systematic attack on a civilian population, or did not take place during an armed conflict—prosecutors could file charges against alleged perpetrators pursuant to the Ugandan Penal Code, which as previously discussed is severely limited.

[364] ICC Act, *supra* note 265, at pt. II, § 18. Thus, if requirements (a), (b), or (d) dealing with the status of the perpetrator are fulfilled, the ICD has jurisdiction to hear the case regardless of the status of the victim.

[365] Since for the purposes of the ICC Act, Ugandan citizens and Ugandan permanent residents are treated the same, this paper will not explicitly differentiate between them. For purposes of brevity, this subsection will refer to both Ugandan citizens and Ugandan permanent residents as "Ugandan nationals."

[366] International crimes that occurred prior to the passage of ICC Act would be prosecuted under theories of customary international law. Offenses that took place after Uganda ratified the Rome Statute are subject to the jurisdiction of that court, consistent with the principle of complementarity. Further analysis of these potential avenues would need to be conducted to provide a comprehensive assessment of the legal challenges posed by each.

b. Ugandan nationals who suffered sexual violence before June 2010

Since the majority of crimes that were committed in Northern Uganda took place prior to the adoption of the ICC Act in 2010, most victims will fall within this category. Given the nature of the conflict, the most likely charges for sexual violence crimes would fall into the categories of crimes against humanity or, arguably, war crimes. These could be prosecuted before the ICD under principles of customary international law, although further research is required to determine the receptivity of Ugandan courts to this approach.[367] If domestic criminal prosecution of international crimes of conflict-related sexual violence that occurred prior to June 2010 is not practicable, prosecutors could nonetheless file charges under the UPC against perpetrators. There appear to be no statutes of limitations for criminal cases in Uganda, so victims are not barred from seeking an investigation years after the crime has occurred. However, prosecutors would likely be limited to filing charges under the UPC provisions that existed at the time of the violation to comply with the principle of non-retroactivity. Finally, as a practical matter, prosecutors may be reluctant to file charges for crimes that were on the books, but are decades old, because of the difficulties in obtaining evidence.

c. Refugees who suffered sexual violence in Uganda

There are a few avenues for prosecution of sexual violence crimes committed in Uganda against male refugees. First, the ICD has jurisdiction to prosecute crimes that occurred in Uganda, as long as they meet the threshold requirements of international atrocity crimes,

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[367] *See supra* Section IV(A) for a detailed discussion of this argument. Note that prosecution of sexual violence in Northern Uganda prior to 2002 might proceed under the domestic Geneva Convention Act, depending on how the conflict is characterized. Common Article 3 of the Geneva Conventions prohibits "violence to life and person" including cruel treatment, torture, and "outrages upon personal dignity." Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]. The Third Geneva Convention states that prisoners of war are entitled to "respect for their persons and their honor." Third Geneva Convention, *supra*, at art. 14, § 1. "Outrages upon personal dignity" are prohibited in Additional Protocols I and II. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 75(2), Jun. 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Additional Protocol II art. 4(2), Jun. 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II]. Additional Protocol I, in Article 75, clarifies that this prohibition includes "humiliating and degrading treatment, enforced prostitution and any form of indecent assault." Additional Protocol I, *supra*. Article 4 of Additional Protocol II explicitly prohibits rape. Additional Protocol II, *supra*. Finally, Uganda has formally incorporated Geneva provisions against "torture or inhuman treatment" and "willfully causing great suffering or serious injury to body or health" under the Geneva Conventions Act, 1964. Geneva Conventions Act, *supra* note 269. Whether incidents could be prosecuted under customary international law as war crimes if the conflict is determined to be not of an international armed conflict depends on additional factual and legal research.

regardless of whether the perpetrator is a Ugandan national. Considering the limited use of the ICD so far, this route is unlikely to succeed. Second, refugees may report the crimes they have suffered to Ugandan authorities. Refugees are subject to the protection of Uganda's laws on equal terms with citizens. Yet the current provisions of the Ugandan Penal Code that define sexual violence crimes to exclude male victims pose the same challenges to male refugee survivors as to Ugandan survivors of such crimes; prosecutors are unlikely to file charges under these provisions and judges may not interpret current law to apply to male victims.

d. Refugees residing in Uganda who suffered crimes outside Uganda

If victims who currently have refugee status in Uganda suffered crimes in Uganda, then the ICD has jurisdiction to hear their cases, subject to the temporal considerations discussed in the previous subsections. Similarly, if the perpetrator was a Ugandan national, was employed by Uganda in a civilian or military capacity, or is currently present in Uganda, the ICD has jurisdiction to hear the case, subject to the same temporal considerations. However, if the crime occurred outside of Uganda and was committed by a foreign national, then the ICD has no jurisdiction under the ICC Act, nor do other Ugandan domestic courts. However, the ICD might have jurisdiction over the offense under the Geneva Conventions Act of 1964, which specifies in section 2(2) that certain offenses committed outside of Uganda, including "torture or inhuman treatment" and "willfully causing great suffering or serious injury to body or health," can "be proceeded against, indicted, tried and punished" as if they were committed inside Uganda.[368] Nevertheless, the details of the application of this provision are unclear and warrant additional research. Ultimately, the biggest challenge to criminal prosecution in Uganda is the lack of personal jurisdiction over the perpetrator.[369] Refugees in this category may have no option to

[368] Geneva Conventions Act, *supra* note 269.

[369] If Uganda has an extradition treaty in place with the country of which the perpetrator is a national, and if there were political will to enforce that treaty, it is possible to extradite and prosecute a non-national perpetrator in Uganda. Even though in August 2005, representatives of Uganda, Rwanda, and the DRC agreed to negotiate bilateral extradition treaties aimed at individuals suspected of terrorist activity, there appear to be no extradition treaties currently in place between Uganda and the other two countries. *See Central African Extradition Treaty Set*, UPI.com, Aug. 29, 2005, http://www.upi.com/Business_News/Security-Industry/2005/08/29/Central-African-extradition-treaty-set/UPI-40231125366709/. In 2006, when several Congolese rebels were caught in Kampala, the Ugandan Minister of Internal Affairs explained that deportation depends on "individual cases" as Uganda has no extradition treaty with the DRC. *See Uganda Captures DRC Rebels in Kampala*, ReliefWeb, April 16, 2006, http://reliefweb.int/report/democratic-republic-congo/uganda-captures-drc-rebels-kampala.

press for criminal prosecutions in Uganda and would have to pursue this in their home countries, an unlikely scenario.

2. Male victims of conflict-related sexual violence seeking international finding of the violation by the State of their human rights

Victims who cannot or choose not to pursue criminal prosecution in Uganda for any of the reasons listed above, or for other practical considerations that present barriers in Uganda,[370] may bring a petition for redress of sexual violence before a number of human rights bodies.[371] As discussed in Section III(B)(2), acts of sexual violence may constitute violations of the right to life, the right to bodily integrity, and the right to be free from torture, among other rights. These rights are codified in treaties that Uganda has ratified, such as the International Covenant on Civil and Political Rights,[372] the Convention Against Torture,[373] the Convention on the Rights of

[370] Prosecutors may be unwilling to file charges for a multitude of reasons, some of them dealing with limitations in the Ugandan Penal Code, some of them dealing with political or social pressures. *See generally Uganda's International Crimes Division*, *supra* note 266.

[371] There are some non-petition advocacy opportunities that victims may pursue. NGOs with observer status with the African Commission may bring the issue of conflict-related sexual violence against men to the attention of the Commission during public sessions. *See Making the Kampala Convention Work for IDPs: Guide for Civil Society*, INTERNAL DISPLACEMENT MONITORING CENTRE, *available at* http://www.internal-displacement.org/kampala-convention. Advocates may also refer the issue of sexual violence against men to appropriate UN special rapporteurs and special representatives, as well as to some of the Africa-specific special rapporteurs set up by the African Commission, such as the ACHPR's Special Rapporteur on Refugees, Asylum Seekers, IDPs and Migrants. *See Special Mechanisms*, AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, http://www.achpr.org/mechanisms/. Victims may also appeal to the Ugandan Human Rights Commission (UHRC), which was established under Article 51 of the 1995 Constitution of Uganda to monitor Uganda's compliance with international treaties. The UHRC has a specific mandate to protect the rights of vulnerable persons, create public awareness about human rights issues, and make recommendations to parliament for effective measures of promoting human rights. *See Uganda Action Plan*, *supra* note 187, at 20.

[372] In 1995 Uganda ratified the Optional Protocol to the ICCPR, which gives the Human Rights Committee competence to examine individual complaints with regard to alleged violations of the ICCPR by states parties to the Protocol. It made the following reservation: "The Republic of Uganda does not accept the competence of the Human Rights Committee to consider a communication under the provisions of article 5 paragraph 2 from an individual if the matter in question has already been considered under another procedure of international investigation or settlement." *See* UN Treaty Collection, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en#EndDec.

[373] The Committee Against Torture (CAT Committee) is the body of ten experts that monitors implementation of CAT. *See Committee Against Torture*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, http://www2.ohchr.org/english/bodies/cat/index.htm. As a party to the treaty, Uganda is required to submit regular reports to the CAT Committee on how it is implementing its treaty obligations. Uganda has agreed to allow the CAT Committee to hear individual complaints. With a declaration under Article 21, Uganda has, however, authorized the Committee to hear complaints from other state parties that Uganda has failed its obligations under CAT. *See generally* CAT, *supra* note 198; *see also* UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en.

the Child,[374] and the African Charter of Human and Peoples' Rights.[375] As a result, victims who are Ugandan nationals might be able to file petitions before the relevant monitoring bodies, most likely the Human Rights Committee or the African Commission, claiming that their rights were violated.

Refugees also would be able to file petitions with treaty bodies if the state in which the violation occurred has agreed to allow the monitoring body to rule on individual petitions. Further, as discussed in the previous section, victims may claim violation of their right to a remedy because Uganda (or the state in which the violation took place) failed to investigate the alleged violations and provide access to a competent judicial body. Whereas in a criminal prosecution the end goal is imprisonment of the perpetrator, in a human rights petition the end goal is an acknowledgement that the state has committed a violation of its treaty obligations, a cessation of this violation, and guarantees that the violation will not occur again in the future. As discussed above, human rights remedies include restitution, compensation, rehabilitation, satisfaction, and/or measures of non-repetition. The availability of any of these remedies through an individual petition procedure requires additional research and assessment.

Lastly, victims can file a petition with the East African Court of Justice claiming that Uganda breached the fundamental principles of Article 6 of the Treaty for the Establishment of the East African Community, pertaining to rule of law and protection of human rights in accordance with the ACHPR.[376] Only victims who are residents of Uganda, Rwanda, Burundi, Kenya, and the United Republic of Tanzania have access to the East African Court. The Court has a very short statute of limitations of two months, which will present a major barrier to justice for most victims of sexual violence.[377]

In summary, the options available to victims of conflict-related sexual violence are highly dependent upon the identity of the victim and the perpetrator, the year in which the crime

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[374] The Committee on the Rights of the Child monitors the implementation of the Convention on the Rights of the Child. On December 18, 2011, the UN General Assembly approved a third optional protocol, which will allow individual children to submit complaints regarding specific violations of their rights. The Protocol opened for signature in 2012 and has not yet entered into force. *See* Monitoring Children's Rights, *available at* http://www2.ohchr.org/english/bodies/crc/.

[375] *See supra* Section III(C)(1).

[376] *See id.*

[377] However, there is no requirement that local remedies be exhausted before a petition in front of the East African Court is filed. As a result, male victims of sexual violence who cannot seek a criminal prosecution in Uganda, because crimes perpetrated against them are not recognized by the domestic penal code or do not fulfill the requirements of the international crimes subject to the ICC Act, may consider filing a petition directly with the East African Court of Justice.

occurred, and the nature of the crime. Additional considerations must be taken into account when determining the options available to victims, such as the application of the Amnesty Act (if the perpetrator has previously received amnesty) as well as the viability of domestic prosecution of international crimes that took place prior to the ICC Act under theories of customary international law. Ultimately, it is the obligation of the state to provide an adequate remedy for victims, and this paper aims to provide advocates with tools to accomplish that goal.

VII. CONCLUSION

Despite the barriers to the reporting and documentation of conflict-related sexual violence against men, existing data suggest disturbing incidents of these crimes in Uganda as well as in other countries. This paper analyzed applicable international norms and found that international criminal law offers the broadest recognition of sexual violence against men through its gender-inclusive definition of crimes. It also found the record of such prosecutions in this regard generally has been positive although it noted that more progress in application of these norms is desirable.

Turning to opportunities for domestic prosecutions of conflict-related sexual violence in Uganda, a comparative analysis of relevant international norms with Ugandan domestic criminal statutes reveals gaps that are problematic for ending impunity for the perpetrators of these crimes. Although Uganda has incorporated the Rome Statute into domestic law, ordinary criminal offenses play an important role to promote accountability, particularly if prosecutors are unable to prove all the elements of international crimes. However, the Ugandan rape laws are gender-exclusive, do not provide a workable framework for the classification of many sexual violence crimes perpetrated against men, and other penal provisions create a chilling effect on male victims to report sexual violence for fear of being prosecuted for same-sex activities. These barriers contribute to underreporting and a systemic lack of accountability for conflict-related sexual violence against men.

This paper identified the potential contribution of international law to address these gaps in the domestic legal framework. International law serves as an example for substantive and procedural norms to confront and dismantle these barriers. International criminal law definitions of sexual violence crimes are gender-neutral and could be adopted in the Ugandan Penal Code as

ordinary crimes. This would also help to harmonize international and domestic laws on sexual violence. Reform along these lines would also reduce other barriers to reporting and effective prosecutions such as the legal element of consent. Finally, international law is a source of legal obligation that advocates may use to compel Uganda to fulfill its international obligations to ensure that the rights to a remedy of male victims of sexual violence are realized.

Conflict-related sexual violence against men in Uganda is a complex and serious concern. In light of the nature of the problem, this paper is limited and presents a modest contribution to the accountability efforts of advocates and survivors. This review serves as a basis for further discussion and the development of workable strategies for advocates and survivors to continue their efforts to end impunity for perpetrators of conflict-related sexual violence against men.

VIII. APPENDIX

This chart provides examples of offenses from select chapters of the UPC relevant to the prosecution of sexual violence and illustrates the issues of gender inclusivity, consent, and criminalization of sexual activity. Chapter XIV (Offences Against Morality) is located under Division III of the code (Offences Injurious to the Public in General) and criminalizes sexual misconduct thought to violate social values. Notably, rape is categorized as a morality offense rather than among offences against the person. Offenses codified in other divisions of the UPC will also be relevant to prosecution of sexual violence but are not included here.[*]

UPC Sec./ Crime	**Elements (mental state, actions of perpetrator & circumstances)**	**Gender inclusivity**	**Consent an element?**	**Victimless crimes**	**Sexual crimes involving minors**
	Chapter XIV—offences against morality				
123 Rape	Any person who has (1) unlawful (2) carnal knowledge (3) of a woman/girl (4) without her consent	No	Yes	No	Yes
126 Abduction	When the perpetrator (1) has the intent to marry or have sexual intercourse (2) detains a person (3) without consent OR (3) takes a minor [below 18 yrs. old] out of the custody of parents/legal guardians	Yes	Yes	No	Yes

[*] Division IV: Offences against the person, includes Chapter XVIII (Murder and Manslaughter); Chapter XIX (Duties relating to the preservation of life and health); Chapter XX (Offences connected with murder and suicide); Chapter XXI (Offences endangering life or health); Chapter XXIII (Assaults); and Chapter XXIV (Offences against liberty).

UPC Sec./Crime	**Elements (mental state, actions of perpetrator & circumstances)**	**Gender inclusivity**	**Consent an element?**	**Victimless crimes**	**Sexual crimes involving minors**
127 Elopement	Any person (1) elopes or causes to elope (2) a married woman OR (1) a female (2) elopes or entices/causes (3) a married man to elope	Yes	No	Yes	No
128 Indecent Assaults (felony)	(1) unlawfully and indecently (2) assaults (3) a woman or girl	No	No	No	Yes
129 Defilement of persons under eighteen years of age	Any person who (1) performs a sexual act (2) with a person under 18 yrs. old OR (1) performs a sexual action (2) with a person under 18 yrs. old (3) under these circumstances: offender is a serial offender, victim has a disability, offender is a parent/ guardian, or offender has HIV	Yes	No	No	Yes
129A Child to Child Sex	When the offender is (1) under 12 yrs. old, Part V of the Children Act applies; (2) male and female children above 12 yrs. old (3) but below 18 yrs. old, who (4) perform sexual acts on one another are liable under Part X of the Children Act which specifies the age of criminal responsibility in Uganda as 12 yrs. old	Yes	No	?	Yes

UPC Sec./Crime	**Elements (mental state, actions of perpetrator & circumstances)**	**Gender inclusivity**	**Consent an element?**	**Victimless crimes**	**Sexual crimes involving minors**
130 Defilement of idiots or imbeciles	(1) knowing (2) woman/girl (3) is an idiot or an imbecile attempts/has (4) unlawful (5) carnal knowledge (6) under circumstances not amount to rape	No	No	No	Yes
131 Procuration	a. (1) procures (2) female under 21 yrs. old to have an (3) unlawful (4) carnal connection (5) with other person(s) b. (1) procures (2) woman/girl to become (3) "a common prostitute" c. (1) procures (2) woman/girl (3) to leave Uganda (4) with intent that she frequent a brothel d. (1) procures (2) woman or girl (3) to leave Uganda & not a Ugandan brothel (4) to go to a brothel	No	No	No	Yes
132 Procuring defilement of women by threats, etc.	(1) uses threats/ intimidation to procure (2) woman/girl to have (3) unlawful (4) carnal connection OR (1) applies/administers/ causes to be taken (2) a drug (3) with intent (4) to stupefy or overpower to have an (4) unlawful (5) carnal connection	No	No	No	Yes

UPC Sec./Crime	**Elements (mental state, actions of perpetrator & circumstances)**	**Gender inclusivity**	**Consent an element?**	**Victimless crimes**	**Sexual crimes involving minors**
133 Householder, etc. permitting defilement of a girl under the age of 18	Any person who (1) controls the premises (2) induces (3) a girl under the age of 18 (4) to be on the premises so that (5) she may be carnally known (6) by a man	No	No	No	Yes
134 Detention with sexual intent	(1) unlawfully (2) detains another person (3) for sexual intercourse; unlawfully means (1) with intent to induce him or her to remain in the place/ brothel, (2) withholds clothing, property	Yes	No	No	No
136 Person living on earnings of prostitution	(1) knowingly (2) lives on (3) the importunes for immoral purposes; OR (1) a person who lives with/habitually in the company of (2) prostitute (3) and exercised control/ direction/influence over the movements of a prostitute to show (4) aiding and abetting/ compelling his or her prostitution	Yes	No	?	No
137 Brothels	(1) keeping a place (2) of prostitution	Yes	No	?	No
138 Definition of prostitution	(1) person (2) regularly/ habitually (3) holds himself or herself out as available for sexual intercourse/sexual gratification (4) for monetary or other material gain	Yes	No	?	No

UPC Sec./Crime	**Elements (mental state, actions of perpetrator & circumstances)**	**Gender inclusivity**	**Consent an element?**	**Victimless crimes**	**Sexual crimes involving minors**
139 Prohibition of prostitution	Any person practices/ engages in prostitution commits an offence	Yes	No	?	No
140 Conspiracy to defile	Any person who (1) conspires to (2) induce (3) any woman/girl (4) by means of false pretense/ fraudulent means (5) to permit a man (6) to have (7) unlawful (8) carnal knowledge	No	No	No	Yes
144 Knowledge of age of female immaterial	Except as otherwise expressly stated, it is immaterial in the case of any of the offence committed with respect to a woman or girl under a specified age that the accused person did not know that the woman or girl was under that age, or believed that she was not under that age	No	No	?	Yes
145 Unnatural offences	Any person who (1) has carnal knowledge (2) of any person or animal (3) against the order of nature; OR (1) permits a male (2) to have carnal knowledge of him/her (3) against the order of nature	Yes	No	Yes	No

UPC Sec./Crime	**Elements (mental state, actions of perpetrator & circumstances)**	**Gender inclusivity**	**Consent an element?**	**Victimless crimes**	**Sexual crimes involving minors**
148 Indecent practices	(1) commits/procures/ attempts to procure (2) an act of gross indecency (3) with another person	Yes	No	Yes	No
149 Incest	(1) sexual relations between (2) any of the following relationships: mother & her spouse/ parents/siblings/ children, father & his spouse/parents/siblings/ children, brother/sister & their children, spouses & their parents/children, first cousins; (3) immaterial that sexual intercourse took place with consent	Yes	No	No	Maybe
	Chapter XXIV— Offences against liberty				
245 Kidnapping or abducting in order to subject person to grievous harm, slavery, etc.	Any person who (1) kidnaps or abducts (2) so that the victim is (3) in danger of being subjected to grievous harm/slavery/unnatural lust of any person (4) knowing that element #3 is likely	Yes	No	No	No
249 Buying, etc. of any person as a slave	Any person who (1) imports/exports/ removes/buys/sells/ disposes of any person (2) as a slave OR (1) accepts/receives/ detains (2) a person (3) against his will (4) as a slave	Yes	No	No	No

250 Habitual dealing in slaves	Any person who (1) habitually (2) imports/exports/ removes/buys/sells/ traffics/deals in slaves	Yes	No	No	No
UPC Sec./Crime	**Elements (mental state, actions of perpetrator & circumstances)**	**Gender inclusivity**	**Consent an element?**	**Victimless crimes**	**Sexual crimes involving minors**
251 Inducing a person to give himself or herself as a slave	Any person who (1) induces (2) another person (3) to give up himself/herself (4) as a slave	Yes	No	No	No

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