

## How Can the Methodology of Feminist Judgment Writing Improve Gender-Sensitivity in International Criminal Law?

Kathryn Gooding\*

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### ABSTRACT

*The Feminist Judgments Project has been utilised in a number of jurisdictions, including the UK, US, Canada and Australia, to critique real-life judicial judgments and to re-write these problematic judgments using feminist judging methodologies. This paper seeks to demonstrate the utility of the application of feminist judging methodologies to judgments and decisions from international criminal law mechanisms, with a specific focus on sexual and gender-based crimes, as a means to improve gender-sensitivity in international criminal judicial decision-making. Through an analysis of feminist judgments and feminist dissenting opinions from the UK, US and International Criminal Court, the main hallmarks of feminist judging are identified. The author uses the hallmarks of feminist judging to create her own Feminist Judgment based on a decision from the Prosecutor v Ongwen case before the International Criminal Court, to display the indeterminacy of judicial decision-making in international criminal law and to demonstrate how greater gender-sensitivity can be achieved at the International Criminal Court through feminist judicial reasoning.*

### INTRODUCTION

The field of international criminal law has been consistently criticised for its lack of gender-sensitivity. Suzan M. Pritchett argues that international law is a gendered system, which has failed to reflect the experiences or needs of women.<sup>1</sup>

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\* LLB (LSE) '18, LLM (Leiden University) '18, Public Law Paralegal at Irwin Mitchell 2019. Areas of interest: international criminal law and socio-legal studies.

<sup>1</sup> Suzan M Pritchett, 'Entrenched Hegemony, Efficient Procedure, or Selective Justice? An Inquiry into Charges for Gender-based Violence at the International Criminal Court' (2008) 17 *Transnational Law and Contemporary Problems* 265.

Whilst it must be conceded that the attitude of the international bench has improved towards women, and that sexual and gender-based crimes are receiving unprecedented attention, particularly in the International Criminal Court,<sup>2</sup> significant problems remain. The gendered elements of international crimes are systematically overlooked, and the impacts of sexual and gender-based crimes on men, and the corresponding implications for women, are ignored. Many of these problems stem from the lack of diversity and consequential lack of differing perspectives on the international criminal bench. Hilary Charlesworth and Christine Chinkin argue that there has been a notable lack of women in the development of international law, which has produced a narrow and inadequate jurisprudence, perpetuating the unequal position of women around the world.<sup>3</sup> On nine of the twelve international courts, women made up 20 percent or less of the bench in mid-2015.<sup>4</sup> In the international criminal field, the bench has been defined by a lack of gender diversity. At the time of writing, male judges outnumber female judges on the current bench of the International Criminal Court (ICC) by two to one.<sup>5</sup> In 2016, all 14 permanent judges of the International Criminal Tribunal for the former Yugoslavia (ICTY) were men.<sup>6</sup>

This lack of gender diversity is highly concerning because there is evidence to suggest that women and men may approach certain legal issues differently. Rosemary Hunter argues that, on the basis of an assessment of English and Welsh judges, non-traditional judges reach different decisions. She claims that female judges can alter the outcomes of cases by bringing a “gendered sensibility”<sup>7</sup> to the process of decision-making. One reason for this phenomenon may be that all

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<sup>2</sup> See for example ICC Office of the Prosecutor, ‘Policy Paper on Sexual and Gender-Based Crimes’ (June 2014).

<sup>3</sup> Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000) 1.

<sup>4</sup> Nienke Grossman, ‘Achieving Sex-Representative International Court Benches’ (2016) 110 *American Journal of International Law* 82.

<sup>5</sup> International Criminal Court, ‘Who’s Who’ <<https://www.icc-cpi.int/bios-2>> accessed 24 January 2019.

<sup>6</sup> Joseph Powderly and Jacob Chylinski, ‘The Women Judges: Leading the Line in the Development of International Law’ in William A Schabas and Shannonbrooke Murphy (eds), *Research Handbook on International Courts and Tribunals* (Elgar Publishing 2017) 143-180.

<sup>7</sup> Rosemary Hunter, ‘More than Just a Different Face? Judicial Diversity and Decision-Making’ (2015) 68 *Current Legal Problems* 119.

judges bring their life experience to the process of judging.<sup>8</sup> Female judges have markedly different experiences to male judges, in particular with their experiences of giving birth to and raising children, sexism, and discrimination. These alternative experiences could lead to judgments more accurately reflecting the reality and diversity of human experience, not simply the male life experience.

It is submitted that a means to improve gender-sensitivity in international criminal law would be for judges of the international criminal bench to utilise feminist methodologies of judging in their reasoning and in determining case outcomes. Berger, Crawford and Stanchi argue that feminism strives to embrace justice for all and associates itself with movements for the representation of historically marginalised groups.<sup>9</sup> By prioritising the views and interests of historically marginalised groups, feminist theories allow us to challenge the concepts and rules of the international legal order, which are built on “sexed and gendered hierarchies of difference”.<sup>10</sup> This is not to say that by having greater gender diversity on the international bench, there would be an explicit move towards feminist judging. However, greater diversity on the bench is indicative of broader perspectives brought to international judging, as can be seen with the impact that women have on the domestic judging process.

Many feminist judgment projects have arisen around the world, whereby original decisions from different jurisdictions are re-written using feminist methodologies of judging. The first feminist judgments project was originally set up by a group of Canadian legal academics, who published six judgments. These judgments were rewritten opinions of the Canadian Supreme Court, which re-interpreted the Canadian Charter of Rights and Freedoms using feminist reasoning.<sup>11</sup> The feminist judgments project was then taken up in 2010 by English feminist scholars, who re-wrote judgments that were problematic from a feminist

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<sup>8</sup> *ibid.*

<sup>9</sup> Linda L Berger, Bridget J Crawford and Kathryn M Stanchi, ‘Feminist Judging Matters: How Feminist Theory and Methods Affect the Process of Judging’ [2018] *Scholarly Works* 1100.

<sup>10</sup> Charlesworth and Chinkin (n 3) 44-45.

<sup>11</sup> Rosemary Hunter, ‘The Power of Feminist Judgments?’ (2012) 20 *Fem. Leg. Stud.* 135.

perspective.<sup>12</sup> There have also been similar projects in Australia<sup>13</sup> and Ireland,<sup>14</sup> and an international feminist judgments project is also underway.<sup>15</sup>

Feminist judgment projects are a demonstration that, at the time these cases were decided, the cases could have been reasoned and decided differently. Therefore, they are an alternative means of feminist legal critique.<sup>16</sup> Feminist judgments projects consider alternative ways in which judgments could have been approached and decided in a fairer way, prioritising overlooked viewpoints and contextualising legal issues. Feminist judgment projects are based on the notion that the law can be considered to be indeterminate, therefore it is possible to make choices between varying interpretations of the law.<sup>17</sup> This means there is scope for feminist perspectives to enter the process of judging to impact judicial reasoning and outcomes to reach a fairer result. This is because a feminist judge is more likely to consider the specific contextual facts of a case, and to consider how the decision will individually impact historically disadvantaged groups, including women.<sup>18</sup>

At the moment, there has been very little application of the feminist judgment project to the international criminal law field. The aim of this paper is to show how the feminist judgment project can be applied to the international criminal law field, and how the utilisation of feminist judging methodologies would directly lead to reasoning and case outcomes that prioritise gender-sensitivity. Bringing in alternative perspectives, in this case feminist perspectives, will show the impact that greater diversity in perspectives on the international criminal bench would have on both reasoning and outcomes of cases. In order to

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<sup>12</sup> Rosemary Hunter, Clare McGlynn, Erika Rackley (eds), *Feminist Judgments: from Theory to Practice* (Hart Publishing, 2010).

<sup>13</sup> Heather Douglas, Francesca Bartlett, Trish Luker and Rosemary Hunter (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing 2014).

<sup>14</sup> Máiréad Enright, Julie McCandless, Aoife O'Donoghue (eds), *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Hart Publishing, 2017)

<sup>15</sup> Loveday Hodson, Troy Lavers (eds), *Feminist Judgments in International Law* (Hart Publishing 2019).

<sup>16</sup> Rosemary Hunter, 'Analysing Judgments from a Feminist Perspective' (2015) 15 *Legal Information Management* 8.

<sup>17</sup> Rosemary Hunter, Clare McGlynn, Erika Rackley, 'Feminist Judgments: An Introduction' in R Hunter, C McGlynn and E Rackley (eds), *Feminist Judgments: from Theory to Practice* (Hart Publishing, 2010) 5.

<sup>18</sup> Berger, Crawford and Stanchi (n 9).

highlight this, the author will create an international criminal feminist judgment, which will consist of a 'Feminist Re-Writing' of the *Decision on the Legal Representative Request for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives*,<sup>19</sup> in the case of *The Prosecutor v Dominic Ongwen*. This international criminal feminist judgment will use feminist reasoning to highlight the plight of male victims of sexual violence in conflict, and to demonstrate how feminist methodologies can lead to alternative reasoning and case outcomes which prioritise gender-sensitivity in a previously overlooked area of international criminal law. I will take a post-modern feminist perspective to my international criminal feminist judgment. Post-modern feminist theory focuses on the operation of the law in the life of the individual and argues that the law does not simply oppress women and advantage men.<sup>20</sup> Post-modern feminism is also concerned with how the law constitutes identities, such as 'masculinity' and 'femininity'.<sup>21</sup> It prioritises the plurality of different experiences of women and men, and the importance of context in analyses.

The construction of an international criminal 'Feminist Re-Writing' necessitates an initial discussion of the features of the feminist mode of reasoning through an analysis of feminist features exhibited in domestic judgments. There will then be an examination of how this mode of reasoning can be applied to international criminal law, specifically utilising the case study of sexual and gender-based crimes against men and boys in conflict. These analyses will then be utilised to re-write the *Decision on the Legal Representative Request for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives* in the case of *The Prosecutor v Dominic Ongwen* from a feminist perspective.<sup>22</sup>

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<sup>19</sup> *Prosecutor v Ongwen* (Decision on the Legal Representative Request for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives) ICC-02/04-01/15-1210 (26 March 2018).

<sup>20</sup> Charlesworth and Chinkin (n 3) 44-45.

<sup>21</sup> *ibid.*

<sup>22</sup> *Prosecutor v Ongwen* (Decision on the Legal Representative Request for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives) ICC-02/04-01/15-1210 (26 March 2018).

## I. RE-WRITING A JUDGEMENT FROM A FEMINIST PERSPECTIVE - METHODOLOGY

The objective of those writing feminist judgments is to re-write judgments whilst observing the same rules and constraints that the original judges were bound by. This means that those writing feminist judgments must be bound by the same legal rules, the same facts, and the same rules regarding reasoning and judgment-writing that were applied in the original case.<sup>23</sup> Therefore, in writing the Feminist Re-Writing of the *Ongwen* Decision, I will adhere to the constraints of international criminal law, as well as the constraints created by the original decision itself. This means that in writing the Feminist Re-Writing of the *Ongwen* Decision, I must abide by certain international criminal procedural principles. As I am re-writing an International Criminal Court decision, I am bound to apply principles found within the Rome Statute to the judgment-writing, particularly Article 22. This is the *nullum crimen sine lege* principle, which specifies that there cannot be the retroactive application of the law to the conduct in question, and that the definition of a crime must be strictly construed and cannot be extended by analogy.<sup>24</sup> An example of this substantive legality approach is evident in Judge Cassese's Separate and Dissenting Opinion in *Prosecutor v Erdemović*.<sup>25</sup> Judge Cassese argued that a policy-oriented approach in criminal law runs afoul of the *nullum crimen sine lege* principle, and that the majority should have come to their conclusion through recourse to the existing rules of international law.<sup>26</sup> The *nullum crimen sine lege* approach therefore restricts judicial creativity and activism, obliging judges to apply *lex lata*. Furthermore, the Rome Statute guarantees the fair trial rights of the accused through Article 64, and Article 21(3) emphasises that the application and interpretation of the legal sources of the ICC must be consistent with internationally recognised human rights, meaning that all applications of law must be consistent with the rights of the accused to a fair trial.<sup>27</sup> This shows that feminist judgment writing cannot radically reshape the law; it must adhere to the constraints of the law to reach a realistic outcome.

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<sup>23</sup> Hunter, McGlynn and Rackley (n 17) 13.

<sup>24</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF.183/9 (Rome Statute) art 22.

<sup>25</sup> *Prosecutor v Erdemović* (Judgment) (Separate and Dissenting Opinion of Judge Cassese) IT-96-22-A (7 October 1997) para 49.

<sup>26</sup> *ibid*.

<sup>27</sup> Rome Statute (n 25) arts 64 and 21(3).

In order to identify the features of feminist judgment writing that will be applied to create the Feminist Re-Writing of the *Ongwen* Decision, I will analyse a number of case studies, made up of ‘real life’ feminist judgments and feminist judgments written by feminist scholars as a critique. These features of feminist judgment writing will then be used in the Feminist Re-Writing of the *Ongwen* Decision to critique the original decision from a feminist perspective. These case studies all raise feminist issues and have different focuses, all of which are relevant to the Feminist Re-Writing of the *Ongwen* Decision, even if the facts of the cases vary drastically to the facts of the *Ongwen* decision.

### ***Sheffield City Council v E* – Feminist Judgment**

Nicola Barker and Marie Fox created a feminist re-writing of this English marriage law judgment. The main issue before the Court was the question of which issues had to be understood before a person could be said to have the capacity to enter a marriage.<sup>28</sup> In the original decision, Munby J decided that the appropriate test for capacity was whether a person understood the “duties and responsibilities that normally attach to marriage”,<sup>29</sup> not whether a person had made a good choice of spouse. This approach was completely rejected by Nicola Barker and Marie Fox in their feminist judgment. They believed that the identity of the partner is central to the form the marriage takes in real life, and so the appropriate test for capacity to marry should be whether E understands the nature of the marriage she intends to enter, and that domestic violence and sexual abuse may be a possible consequence of marrying S, in light of his history of sexual violence.<sup>30</sup>

An important feature of the feminist judgment is that it emphasises the false dichotomy that is portrayed in the original decision between autonomy and agency on the one hand, and vulnerability and victimhood on the other hand.<sup>31</sup> In liberal legal theory, individuals may only be one or the other, and it often results in a position where autonomy is viewed as masculine, and vulnerability as

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<sup>28</sup> *Sheffield City Council v E* [2004] EWHC 2808 (Fam) para 19.

<sup>29</sup> *ibid* para 68.

<sup>30</sup> Nicola Barker and Marie Fox, ‘Sheffield City Council v E and another’ in Rosemary Hunter, Clare McGlynn, Erika Rackley (eds), *Feminist Judgments: from Theory to Practice* (Hart Publishing 2010) 351-362.

<sup>31</sup> Hunter, McGlynn and Rackley (n 17) 22.

feminine.<sup>32</sup> The feminist judgment in this case dispels this myth, and shows that individuals can occupy the positions of both autonomy and vulnerability simultaneously, meaning that a person can be both an agent and a victim.

### ***R v A (No. 2)* – Feminist Judgment**

This was an English criminal evidence case concerning a challenge under the Human Rights Act 1998 to the rape shield enacted in section 41 of the Youth Justice and Criminal Evidence Act 1999.<sup>33</sup> Section 41 concerns the admissibility of sexual history evidence, which prevents the introduction of evidence or questioning about a complainant's sexual behaviour, unless the court permits it in certain circumstances.<sup>34</sup> However, the question of leave raises questions of relevance of sexual history evidence. This case was decided by a panel of male judges, whose analysis of the concept of 'relevance' was drawn from their own male perspectives.<sup>35</sup> The judges came to the conclusion that the straightforward application of section 41 meant that 'relevant' evidence could not be submitted and that breached the defendant's right to a fair trial. Therefore, they pursued an alternative interpretation of section 41 to allow the wider admission of evidence on the issue of consent to sexual relations.<sup>36</sup> The feminist judgment by Clare McGlynn takes a completely different approach to the relevance of sexual history evidence, prioritising the autonomy of the complainant to make a decision to consent to sexual relations. She emphasises the fact that "the choice to engage in sexual activity is always made afresh within the specific circumstances existing at the time."<sup>37</sup>

An important feature of this feminist judgment is a scepticism of human rights discourse as a means of protection of vulnerable people and women. As rights increase in number, they have a tendency to clash with each other, and often in liberal legalism, the rights of the accused to a fair trial take precedence.<sup>38</sup>

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<sup>32</sup> *ibid.*

<sup>33</sup> Louise Ellison, 'Commentary on *R v A (No 2)*' in R Hunter, C McGlynn and E Rackley (eds), *Feminist Judgments: from Theory to Practice* (Hart Publishing 2010) 205.

<sup>34</sup> *ibid.* 206.

<sup>35</sup> *ibid.*

<sup>36</sup> *R v A (No 2)* [2001] UKHL 25 [46].

<sup>37</sup> Clare McGlynn, 'Regina v A (No 2)' in R Hunter, C McGlynn and E Rackley (eds), *Feminist Judgments: from Theory to Practice* (Hart Publishing 2010) 211-227.

<sup>38</sup> Hunter, McGlynn and Rackley (n 17) 23.

Therefore, in the original decision, the House of Lords held that section 41, which was designed to protect complainants in sexual assault trials from demeaning questioning about their sexual history, was incompatible with a defendant's right to a fair trial under Article 6 of the European Convention of Human Rights. However, the feminist judgment rejects this finding and shows how the relevant provisions do not conflict with a defendant's right to a fair trial, and that seemingly conflicting rights can be accommodated with each other.<sup>39</sup> In her feminist judgment, Clare McGlynn concludes that Article 6 right to a fair trial is not engaged because she argues that "all substantially relevant sexual history evidence is capable of being accommodated within Section 41's gateways for the submission of sexual history evidence."<sup>40</sup> McGlynn argues that judges must take into account the right to respect for the private life of the complainant, enshrined in Article 8 of the European Convention on Human Rights, which prevents unnecessarily intrusive questions.<sup>41</sup> She argues that a balance must be struck between the various interests at play, and that the defendant still has the ability to submit substantially relevant sexual history evidence through Section 41.<sup>42</sup> It is simply that the balancing of the rights means that the defendant does not have the right to have all evidence admitted.

### **Judge Sotomayor's Dissenting Opinion in *Utah v Strieff***

This is an example of a real-life American judgment reflecting feminist theory. In this case, Strieff challenged the admissibility of evidence obtained by police after he was illegally detained.<sup>43</sup> The Utah Supreme Court agreed with Strieff, however the US Supreme Court majority reversed that decision.<sup>44</sup> Judge Sotomayor dissented and came to the conclusion that police should not be allowed to carry out "unreasonable searches and seizures with impunity".<sup>45</sup> She argued that the majority opinion essentially provided the police permission to carry out illegal stops, so long as the police later found an outstanding warrant for that individual, so to be able to justify earlier searches carried out.<sup>46</sup>

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<sup>39</sup> McGlynn (n 37) 211-227.

<sup>40</sup> *ibid* 224-226.

<sup>41</sup> *ibid*.

<sup>42</sup> *ibid*.

<sup>43</sup> *Utah v Strieff* 136 S. Ct. 2056 (2016) [2060].

<sup>44</sup> *ibid*.

<sup>45</sup> *ibid*. (Sotomayor, J., dissenting) paras 2065-2066

<sup>46</sup> *ibid* paras 2067-2068.

Judge Sotomayor's dissent bears a number of feminist features in both her reasoning and ultimate decision. She wrote from her 'professional experiences', by including a number of contextual facts related to race, to explain how "people of colour are disproportionate victims of this type of scrutiny"<sup>47</sup> and to explain the dangers that they face in their encounters with police. She employed feminist practical reasoning to reveal the implications of the majority's decision, prioritising the individual lived experiences of victims of illegal searches, and emphasising the importance of the autonomy of individuals to be free from illegal searches, as illegal searches "risk treating members of our communities as second-class citizens".<sup>48</sup> She also moved away from traditional legal authorities and cited law review articles and scholarly books to support her conclusions regarding the dangers that people of colour face when confronted with police, and to explain the difficulties in gaining housing and jobs that those with arrest records face.<sup>49</sup>

## Conclusion

From these varied case studies, it is possible to see that feminist methodologies prioritise the voiceless, or those who suffer "socially constructed prejudices based on pre-existing power structures".<sup>50</sup> Feminist reasoning and judging is therefore defined by giving due regard to marginalised voices and experiences, emphasising intersectional experiences of gender, providing social and legal context to issues, drawing upon wider materials such as social science research, and reasoning with reference to actual lived experiences of individuals.<sup>51</sup> The case studies also show that feminist judging is marked by a scepticism of rights discourse, and it attempts to undermine the false and gendered dichotomy of agency and victimhood. These themes and features of feminist judging will all be utilised in the Feminist Re-Writing of the *Ongwen* Decision, to explore how to better represent the experiences of excluded or marginalised voices, and how greater gender-sensitivity can be gained in international criminal judging through the utilisation of feminist methodologies of judging.

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<sup>47</sup> Berger, Crawford and Stanchi (n 9).

<sup>48</sup> *ibid.*

<sup>49</sup> *ibid.*

<sup>50</sup> Enright, McCandless and O'Donoghue (n 14) 52.

<sup>51</sup> Rosemary Hunter, 'An Account of Feminist Judging' in R Hunter, C McGlynn and E Rackley (eds), *Feminist Judgments: from Theory to Practice* (Hart Publishing 2010) 30-43.

## II. THE APPLICATION OF FEMINIST JUDGING METHODOLOGIES TO INTERNATIONAL CRIMINAL LAW: CASE STUDY OF MALE VICTIMS OF SEXUAL VIOLENCE IN CONFLICT

### Introduction

In order to explore the utility of applying feminist methodologies to international criminal judgments, I will use a case study that explores the issue of sexual violence against men and boys in conflict through a feminist lens. This will show how feminist methodologies to judging can have varied application to various areas within international criminal law that do not solely focus on implications for women. In the following section, I will determine the extent to which sexual violence against men and boys has been historically neglected by international criminal courts and tribunals. Through a feminist re-writing of a problematic ICC decision, arising out of *the Prosecutor v Dominic Ongwen*, specifically the *Decision on the Legal Representative Request for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives*,<sup>52</sup> I will explore how feminist judging methodologies can be utilised to ameliorate the attitude of the international legal community towards male victims of sexual violence, and show more generally, how feminist judging methodologies can be used to prioritise historically side-lined issues and perspectives, and lead to fairer outcomes. This analysis will demonstrate how feminist judging is a useful lens through which one can grapple with issues that do not contain conventional feminist concerns. This examination necessitates an initial discussion about male victims of sexual violence, how this can be considered to be a feminist issue, and the problems with international criminal law's attitudes towards sexual and gender-based violence, particularly against men and boys.

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<sup>52</sup> *Prosecutor v Ongwen* (Decision on the Legal Representative Request for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives) ICC-02/04-01/15-1210 (26 March 2018).

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**Overview: Sexual Violence against Men and Boys in Conflict-Settings**

Sexual violence against men and boys has been prevalent throughout history, and has been reported in at least 25 conflict or repressive situations in the last three decades: in Argentina, Central African Republic, Democratic Republic of the Congo, Greece, and Northern Ireland,<sup>53</sup> to name but a few. Kampala-based Refugee Law Project found that through assessing male refugee populations from eastern Democratic Republic of the Congo, the NGO found that more than one in three men had experienced sexual violence in their lifetime.<sup>54</sup> Despite the high numbers of men and boys affected by sexual violence, particularly in conflict settings, their plight has been consistently overlooked by the international criminal legal system, investigators and healthcare professionals.<sup>55</sup>

There are many compounding reasons why male victims of sexual violence have been overlooked. A significant reason is that there is a substantial lack of reporting by male victims to the competent authorities due to stigma, shame and perceived loss of masculinity integral to social standing within a community.<sup>56</sup> A study carried out by Refugee Law Project found that 67 countries criminalise men who report abuse due to the criminalisation of same-sex acts.<sup>57</sup> Therefore, victims who report to the police are at risk of being arrested.<sup>58</sup> Furthermore, the victims may not view their victimisation as sexual because it might be that they have an assumption that men cannot be raped due to their cultural or societal background. This aligns with many of the reasons why male sexual violence is overlooked by investigators, medical and humanitarian personnel. These personnel may also

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<sup>53</sup> Sandesh Sivakumaran, 'Sexual Violence Against Men in Armed Conflict' (2007) 18 EJIL 253.

<sup>54</sup> Refugee Law Project, 'Into the Mainstream: Addressing Sexual Violence Against Men and Boys in Conflict' (14 May 2014) <[https://reliefweb.int/sites/reliefweb.int/files/resources/Into\\_The\\_Mainstream-Addressing\\_Sexual\\_Violence\\_against\\_Men\\_and\\_Boys\\_in\\_Conflict.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/Into_The_Mainstream-Addressing_Sexual_Violence_against_Men_and_Boys_in_Conflict.pdf)> accessed 11 May 2019.

<sup>55</sup> Sandesh Sivakumaran, 'Prosecuting Sexual Violence Against Men and Boys' in A M de Brouwer, C Ku, R Römkens and L van den Herik (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia, 2013).

<sup>56</sup> *ibid.*

<sup>57</sup> Refugee Law Project (n 54).

<sup>58</sup> Heleen Touquet and Ellen Gorris, 'Out of the Shadows? The Inclusion of Men and Boys in Conceptualisations of Wartime Sexual Violence' (2016) 24 *Reproductive Health Matters* 36.

assume that men will not be targeted with sexual violence, they may not be trained to recognise signs of male sexual violence, and they may assume that only rape constitutes sexual violence, rather than recognising that other acts, such as castration and forced sexual acts, can also constitute sexual violence.<sup>59</sup> This reinforces the view that only women and girls can be victims of sexual violence, leading to it being denoted on the international level as something committed 'against women and girls', as Sivakumaran explains is the prevalent term used in United Nations Resolutions.<sup>60</sup> Sexual violence against men and boys during conflict occurs for many of the same reasons as sexual violence committed against women and girls. Rape is a crime of domination and control, often used to humiliate, degrade, disempower and terrorise a civilian population. For example, in Bosnia, rape was an instrument of ethnic cleansing, used to terrorise a population from a certain ethnic group in order to force the population to abandon its territory.<sup>61</sup> However, sexual violence against men and boys also occurs for reasons that are different to female sexual violence. Masculinity and victimhood are seemingly inconsistent, as the concept of hegemonic masculinity positions the heterosexual male at the top of the gender hierarchy.<sup>62</sup> Deviating from this norm is to emasculate the victim, as male victims of sexual violence embody subordinate masculinities, who are seen as 'abnormal' due to the sexual violence casting aspersions of homosexuality.<sup>63</sup> Therefore, sexual violence against male victims functions to masculinise and empower the perpetrator, and to feminise and conquer the victim, and by extension, the community.<sup>64</sup>

## **Feminist Implications**

It is paramount to recognise that feminist reasoning can be applied to scenarios that are not strictly concerning women, as demonstrated by the focus on male victims of sexual violence in the present discussion. Nancy E. Dowd

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<sup>59</sup> *ibid.*

<sup>60</sup> Sandesh Sivakumaran, 'Lost in Translation: UN Responses to Sexual Violence Against Men and Boys in Situations of Armed Conflict' (2010) 92 *International Review of the Red Cross* 259.

<sup>61</sup> Joshua Goldstein, *War and Gender* (CUP 2004), 362.

<sup>62</sup> Raewyn W Connell, *Masculinities* (2<sup>nd</sup> edn, University of California Press 2005).

<sup>63</sup> Aliraza Javaid, 'The Unknown Victims: Hegemonic Masculinity, Masculinities, and Male Sexual Victimization' (2016) 22 *Sociological Research Online* 1.

<sup>64</sup> Valore K Vojdik, 'Sexual Violence Against Men and Women in War: A Masculinities Approach' (2014) 14 *Nevada Law Journal* 923.

explains that examining men is a feminist issue, and that instead of focusing exclusively on women's equality, it is also necessary to acknowledge when men and boys are also disadvantaged by constructions of hegemonic masculinity.<sup>65</sup> Examining men through a feminist lens does not mean that women will be considered less in academic discourse. It simply provides for a more realistic understanding of gender subordination, which can also include the subordination of men. If this approach is utilised on the international criminal level, the utility of which will be exemplified in the upcoming feminist re-writing of the *Ongwen* Decision, there will be far greater gender-sensitivity amongst judges and decision-makers who will ultimately be able to examine the true cost of war on both men and women.

Discourses of gender dictate the very distinction between combatant and victim. A traditional construction of war is of a male soldier, and his masculinity is defined in relation to his ability to function as a combatant, and as a "protector".<sup>66</sup> This construction depends on an "other", constructed as feminine, and as denoting victimhood.<sup>67</sup> Women are consistently portrayed as being in need of protection and of being incapable of overcoming the binary of protector/protected, to become protectors themselves.<sup>68</sup> However, sexual violence against men undermines these binaries. It is a means of feminising the enemy, and at the same time constructs the armed perpetrators as masculine. This means that male victims of sexual violence are portrayed as female, and thus victims. Moreover, treating sexual violence as something that happens frequently to anyone during war, whether to women, men or children, would create a more accurate representation of war, and would undermine the construction of "women as rape victims", which denotes victimhood and weakness.<sup>69</sup> This would undermine the traditional binary of masculine/combatant and feminine/victim. Therefore, the plight of male victims of sexual violence during war is in fact a feminist issue, and one which exemplifies the flexibility of feminist discourses to

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<sup>65</sup> Nancy E Dowd, 'Masculinities and Feminist Legal Theory' (2008) 23 Wis. J. L. Gender & Soc'y 201.

<sup>66</sup> Helen M Kinsella, 'Securing the Civilian: Sex and Gender in the Laws of War' in Michael Barnett and Raymond Duvall (eds), *Power in Global Governance* (CUP 2005), 249-272.

<sup>67</sup> Goldstein (n 61) 251.

<sup>68</sup> Kinsella (n 66).

<sup>69</sup> Lara Stemple, 'Male Rape and Human Rights' (2008) 60 Hastings Law Journal 605.

take into account gender perspectives which have been historically overlooked on the international level.

### **International Criminal Law and Sexual Violence against Men and Boys**

The issue of the historic neglect of male victims of sexual violence in international criminal law must be contextualised, to understand that initially sexual violence was rarely dealt with on the international level, and that the law of armed conflict and international criminal law were slow to address the issue of sexual violence against women. It is necessary to show that inroads have been made to improve gender-inclusivity at the international criminal level, however, much remains to be done. Suzan M. Pritchett argues that international law itself is a gendered system, which has “failed to reflect the experiences or needs of women.”<sup>70</sup> She argues that these entrenched attitudes have meant that violence against women was consistently overlooked, as sexual violence was considered to be something that occurred against women in the domestic sphere.<sup>71</sup> This meant that in early international criminal prosecutions, wartime sexual violence against women was hardly accounted for. The Charter for the Nuremberg International Military Tribunal failed to include any form of sexual violence as a crime within the jurisdiction of the Tribunal.<sup>72</sup> Rape was included as a Crime Against Humanity under Control Council Law No. 10.<sup>73</sup> However, other sexual and gender-based crimes were hardly touched upon during the trials.<sup>74</sup>

The formation of the ICTY and ICTR were huge turning-points in the recognition of female victims of sexual violence. In *Akayesu*, the ICTR defined rape as a weapon of war that can constitute an act of genocide, and found that the rape of Tutsi women was systematic and accompanied by a specific intent to

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<sup>70</sup> Suzan M Pritchett, ‘Entrenched Hegemony, Efficient Procedure, or Selective Justice? An Inquiry into Charges for Gender-based Violence at the International Criminal Court’ (2008) 17 *Transnational Law and Contemporary Problems* 265.

<sup>71</sup> *ibid.*

<sup>72</sup> Charter of the International Military Tribunal (adopted 08 August 1945, entered into force 08 August 1945) 82 UNTS 279.

<sup>73</sup> Control Council Law No. 10 (20 December 1945), art II(1)(c).

<sup>74</sup> Kelly Askin, ‘Treatment of Sexual Violence in Armed Conflicts: A Historical Perspective and the Way Forward’ in Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens, Larissa van den Herik (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia 2013).

kill those women.<sup>75</sup> The ICTY and ICTR were the first to prosecute wartime rape as a crime against humanity.<sup>76</sup>

Despite these inroads, and the explicit move towards greater gender-sensitivity on the international criminal level, the international criminal tribunals consistently overlooked the plight of male victims of sexual violence. This attitude has led to two main issues, whereby sexual violence is often not charged in any form in the indictment, even if there is evidence provided that sexual violence did occur against men and boys. Furthermore, even where sexual violence has been prosecuted, it has often not been characterised as *sexual* violence. Touquet and Gorris argue that these challenges remain due to the implicit gender-stereotypes among judges, prosecutors and investigators, of women being the sole victims of sexual and gender-based violence, and of rape being the only form of sexual violence.<sup>77</sup> This perpetuates the invisibility of male victims of sexual violence, and demonstrates the continued ignorance of the international criminal courts towards the modalities and actors involved in sexual violence perpetrated against both men and women in war.

The *RUF* case before the Special Court for Sierra Leone demonstrates the case where sexual violence against men and boys is not represented in any form in the indictment even though evidence of sexual violence against men and boys emerges. The indictment refers to the “widespread sexual violence committed against civilian women and girls [which] included brutal rapes, often by multiple rapists and forced ‘marriages’”.<sup>78</sup> However, evidence of sexual violence against men and boys arose in the trial.<sup>79</sup> This was a deeply problematic formulation, as limiting the charges to civilian women and girls meant that witness testimony on sexual violence against men and boys could not form the basis of any conviction.<sup>80</sup>

In other cases, when male sexual violence has been prosecuted, it has often not been characterised as sexual violence. It has more often been characterised as

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<sup>75</sup> *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) at 732.

<sup>76</sup> *Vojdik* (n 64).

<sup>77</sup> Touquet and Gorris (n 58).

<sup>78</sup> *Prosecutor v Sesay, Kallon and Gbao* (Indictment) SCSL-04-15-T (13 May 2004) para 54.

<sup>79</sup> Valerie Oosterveld, ‘Sexual Violence Directed Against Men and Boys in Armed Conflict or Mass Atrocity: Addressing a Gendered Harm in International Criminal Tribunals’ (2014) 10 *Journal of International Law and International Relations* 107.

<sup>80</sup> Sivakumaran (n 55).

torture and inhuman treatment at the ICTY and ICTR. Part of the reason for this is that the Statutes of the ICTY and ICTR only made explicit reference to rape,<sup>81</sup> and did not make explicit reference to any other form of sexual violence, such as sexual slavery or a residual category of “any other form of sexual violence”. Therefore, ICTY and ICTR Prosecutors were forced to fit evidence of sexual violence under other categories, that being the crime against humanity or war crime of torture, the crime against humanity of inhumane treatment, or the war crime of cruel treatment. In *Tadić*, ‘oral sexual acts’ and sexual mutilation were charged in the indictment as torture or inhuman treatment, and wilfully causing great suffering, among others.<sup>82</sup> In *Simić et al.*, the ICTY Trial Chamber characterised as torture the assault of a detainee with a police truncheon and forcing male detainees to perform oral sex on each other and on the perpetrators.<sup>83</sup>

However, this has been an issue at the ICC even though the Rome Statute explicitly lists other acts of sexual violence as crimes against humanity or war crimes.<sup>84</sup> In the *Kenyatta* case, the forced circumcision of men and penile amputation, even though they were prosecuted by the Office of the Prosecutor as ‘other forms of sexual violence’ as part of the crimes against humanity charge,<sup>85</sup> were not considered to be forms of sexual violence by Pre-Trial Chamber II in the confirmation of the charges. Pre-Trial Chamber II stated that they were not acts of a sexual nature, and should instead be prosecuted as the crime against humanity of ‘other inhumane acts’.<sup>86</sup> The Pre-Trial Chamber reached this decision “in light of the serious injury to body that the forcible circumcision causes and in view of its character.”<sup>87</sup> The Pre-Trial Chamber’s analysis shows that it viewed

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<sup>81</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted 25 May 1993 UN SC res. 827) (ICTY Statute) art 5(g); Statute of the International Criminal Tribunal for Rwanda (adopted 08 November 1994 UN SC res. 955) (ICTR Statute) art 3(g).

<sup>82</sup> *Prosecutor v Tadić* (Indictment) IT-94-1-I (14 December 1995) at counts 8-11.

<sup>83</sup> *Prosecutor v Simić* (Judgment) IT-95-9-T (17 October 2003) at para 728 and 772.

<sup>84</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF.183/9 (Rome Statute) art 7(1)(g), art 8(2)(b)(xxii) and art 8(2)(e)(vi).

<sup>85</sup> *Prosecutor v Kenyatta* (Decision on Prosecutor’s Application for Summonses to Appear) ICC-01/09-02/11 (8 March 2011) at para 27.

<sup>86</sup> *ibid.*

<sup>87</sup> *ibid.*

penile amputation as not sufficiently sexual, and as more of a physical injury, overlooking the fact that violence to sexual organs causes great physical injury.

It is highly problematic that sexual violence is not being prosecuted as such, and acts are not being recognised for their sexual nature. Eriksson argues that rape must be understood as a sexual manifestation of aggression, because this allows the courts a greater appreciation of the other methods used to subjugate an enemy group in armed conflict.<sup>88</sup> By not recognising sexual violence as such, this overlooks the methods used by groups to cause terror and to dominate a population. Also, if male sexual violence is not labelled as such, it perpetuates the idea that sexual violence is a crime that only affects women and girls,<sup>89</sup> conflating femininity with weakness and victimhood. This undermines the emotional and physical damage suffered by the men and boys,<sup>90</sup> and renders male victims invisible.

The ICC has made a number of improvements, indicating that it may be pursuing a gender-inclusive approach. In 2014, the Office of the Prosecutor of the ICC released a policy paper on sexual and gender-based crimes. The policy paper refers to “victims” in gender-neutral terms and defines sexual and gender-based violence in broad terms, including “non-sexual attacks on women, girls, men and boys because of their gender”, to ensure that the term represents the full spectrum of violence that any person may experience.<sup>91</sup> Also, the ICC case law is signalling a gender-inclusive approach. In *Bemba*, the accused was convicted of murder, rape and pillage under command responsibility.<sup>92</sup> This was the first ICC case that explicitly charged and convicted an accused of crimes of sexual violence against men and boys, as well as women and girls.<sup>93</sup> Despite this move towards greater gender-sensitivity within the ICC, many issues remain. The latest problematic development within the ICC concerns the *Ongwen* case before the Trial Chamber. The issues arising from this case will be analysed, and re-

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<sup>88</sup> Maria Eriksson, *Defining Rape: Emerging Obligations for States Under International Law?* (Martinus Nijhoff Publishers 2011), 58.

<sup>89</sup> Oosterveld (n 79).

<sup>90</sup> Vojdik (n 64).

<sup>91</sup> ICC Office of the Prosecutor, ‘Policy Paper on Sexual and Gender-Based Crimes’ (June 2014), 3-5.

<sup>92</sup> *Prosecutor v Bemba* (Judgment) ICC-01/05-01/08 (21 March 2016) at 752.

<sup>93</sup> Janine Natalya Clark, ‘The First Rape Conviction at the ICC: An Analysis of the *Bemba* Judgment’ (2016) 14 *Journal of International Criminal Justice* 667.

interpreted utilising feminist judging methodologies in order to construct a Feminist Re-Writing of a Decision taken from *Ongwen* that prioritises gender-sensitivity.

**III. DECISION ON THE LEGAL REPRESENTATIVE  
REQUEST FOR RECONSIDERATION OF THE DECISION  
ON WITNESSES TO BE CALLED BY THE VICTIMS  
REPRESENTATIVES IN THE CASE OF *THE PROSECUTOR V  
DOMINIC ONGWEN***

**Background**

Dominic Ongwen was a leader of the Lord's Resistance Army, an insurgent group that has been fighting against the Government of Uganda since 1987.<sup>94</sup> The LRA has been involved in a campaign of extreme violence against civilians and Ugandan soldiers, which has included acts of murder, sexual violence, mutilation, and the abduction of children.<sup>95</sup>

The International Criminal Court issued a warrant for his arrest, and the arrest of other LRA leaders, including Joseph Kony, who remains at large. Ongwen was charged with crimes against humanity under Article 7 of the Rome Statute, and war crimes under Article 8 of the Rome Statute, for direct and indirect perpetration of acts of murder, torture, cruel treatment, enslavement, pillaging, persecution, conscription and use of child soldiers.<sup>96</sup> He was also charged with a number of sexual and gender-based crimes as crimes against humanity and war crimes, including forced marriage, torture, rape, sexual slavery, enslavement and outrages upon personal dignity.<sup>97</sup> These charges also included charges for direct and indirect co-perpetration. However, significantly, the sexual and gender-based crimes were stated in the Decision on the Confirmation of Charges as only in relation to women and girls.<sup>98</sup> The charges of direct perpetration of sexual and

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<sup>94</sup> Windell Nortje, 'Victim or Villain: Exploring the Possible Bases of a Defence in the *Ongwen* Case at the International Criminal Court' (2017) 17 *International Criminal Law Review* 186.

<sup>95</sup> *ibid.*

<sup>96</sup> *Prosecutor v Ongwen* (Decision on the Confirmation of Charges against Dominic Ongwen) ICC-02/04-01/15-422-Red (23 March 2016).

<sup>97</sup> *ibid* paras 86-141.

<sup>98</sup> *ibid* para 102.

gender-based crimes related to eight identified women and girls.<sup>99</sup> The charges of indirect perpetration only concerned evidence of the abduction of women and girls with a view to them becoming ‘wives’, where the women were forced to serve as domestic servants, as forced exclusive conjugal partners, and as sexual slaves.<sup>100</sup> This is very problematic from a feminist perspective, as formulation of the sexual and gender-based crimes in this way, as limited solely to acts committed against women and girls in this specific context, means that witness testimony concerning different sexual and gender-based crimes committed in a different context against men and boys cannot form the basis of a conviction. This also created problems when evidence of sexual violence against men and boys came to light, and the Legal Representatives of Victims (LRVs) sought to submit witness testimony to this effect.

### **Procedural History**

The LRVs sought leave to present factual witnesses on a number of issues before Judgment, including the infliction of sexual violence on men and boys in the context of attacks on IDP camps and in the context of the abduction and abuse of child soldiers,<sup>101</sup> despite the fact that the charges for sexual and gender-based crimes in the indictment only concerned acts committed against women and girls in the context of their abduction and their subsequent use as ‘wives’. The LRVs argued that it was important for the Chamber to hear this evidence, in order to emphasise that the sexual violence committed by the LRA was not limited to women and girls, and that a significant number of men and boys were victims of rape, were forced to carry out rapes, or were forced to sexually abuse the bodies of those killed.<sup>102</sup> The LRVs argued that hearing this evidence would assist the Chamber in creating a holistic and accurate understanding of the type of violence utilised by the LRA,<sup>103</sup> and that it was necessary to hear the evidence due to the need for the ICC to recognise this type of harm, in light of the under-reporting,

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<sup>99</sup> *ibid* para 102-135.

<sup>100</sup> *ibid* para 136-140.

<sup>101</sup> *Prosecutor v Ongwen* (Victims’ request for leave to present evidence and to present victims’ views and concerns in person) ICC-02/04-01/15-1166 (2 February 2018) paras 16 and 21.

<sup>102</sup> *ibid*.

<sup>103</sup> *ibid* para 17.

stigma and shame attached to sexual violence against men and boys, particularly in Uganda.<sup>104</sup>

The Trial Chamber determined that the proposed topic of the infliction of sexual violence on men and boys “exceeded the facts and circumstances described in the charges confirmed by the Pre-Trial Chamber.”<sup>105</sup> The Chamber emphasised that the charges for sexual and gender-based crimes concerned solely crimes against women and girls.<sup>106</sup> As the acts described in the proposed testimony by the factual witnesses would concern sexual violence against men and boys, the Chamber determined that the evidence would be beyond the scope of the charges, and rejected the request by the LRVs to call these factual witnesses.<sup>107</sup>

The LRVs submitted a request for reconsideration of the Decision of the Trial Chamber to exclude the testimony of witnesses regarding sexual violence against men and boys,<sup>108</sup> and this led to the Trial Chamber ‘Decision on the Legal Representative Request for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives’, which is the subject of the Feminist Re-Writing and discussion of gender-sensitivity at the ICC.

## **The Original Decision**

### *Relevance of Evidence of Sexual and Gender-Based Violence to the Confirmed Charges*

From a feminist perspective, the Chamber’s Decision was highly problematic. The Chamber provided a superficial discussion as to how there was not an error of reasoning in the original Decision. The Chamber restated the finding that presenting evidence on sexual violence against men and boys would “exceed the facts and circumstances of the sexual and gender-based crimes in this

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<sup>104</sup> *ibid* para 20.

<sup>105</sup> *Prosecutor v Ongwen* (Decision on the Legal Representatives for Victims Requests to present Evidence and Views and Concerns and related requests) ICC-02/04-01/15-1199-Red (6 March 2018) para 57.

<sup>106</sup> *ibid*.

<sup>107</sup> *ibid* para 57-59.

<sup>108</sup> *Prosecutor v Ongwen* (Request for reconsideration of the “Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests”) ICC-02/04-01/15-1203 (12 March 2018).

case”,<sup>109</sup> as the sexual and gender-crimes charges confirmed by the Pre-Trial Chamber were restricted to sexual and gender-based crimes committed against women and girls in the context of their abduction to become ‘wives’. As the Prosecution did not bring forward charges of sexual and gender-based crimes that could encompass the evidence of sexual violence against men and boys, it was important that the Chamber nevertheless encompassed the evidence of male sexual violence in other confirmed charges, such as the charges of conscription of child soldiers, as the LRVs submitted that sexual violence against men and boys was used as a means in which to forcibly recruit child soldiers.<sup>110</sup> This approach would have ensured that the lived experiences of men and boys affected by sexual violence were reflected on the Chamber record. However, the Chamber failed to do this.

In rejecting the evidence of male sexual violence, the Court has contributed to the continued invisibility of male victims of sexual violence, who already suffer from high levels of stigma, shame, fears of emasculation, and fears of being branded as homosexual, particularly in Uganda due to the presence of laws that criminalise same-sex acts. The Court had an opportunity to shed light on these issues through encompassing the evidence in non-sexual and gender-based crimes charges, such as in the charges of torture as a crime against humanity. Significantly, there is also evidence to suggest that sexual violence was utilised as a means in which to recruit child soldiers, whereby sexual violence was used as a means to terrify child soldiers into submission.<sup>111</sup> Furthermore, there is evidence to suggest that sexual violence was used as a means to establish control over abductees.<sup>112</sup> The Chamber had the opportunity to consider the gendered implications of these other crimes, such as the crime of conscription of child soldiers and the crime of enslavement, which posed an opportunity to understand the different modalities of sexual violence, as an instrument to terrify for varying purposes. The Chamber’s disregard for the importance of hearing evidence of male sexual violence evidences the Chamber’s lack of gender-sensitivity, and its reinforcement of the invisibility of male sexual violence survivors.

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<sup>109</sup> *Prosecutor v Ongwen* (Decision on the Legal Representative Request for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives) ICC-02/04-01/15-1210 (26 March 2018) paras 8-10.

<sup>110</sup> *Prosecutor v Ongwen* (n 108) para 18.

<sup>111</sup> *ibid* para 18.

<sup>112</sup> *ibid* para 18.

*Establishment of the Truth*

The Chamber noted that the LRV was concerned that the exclusion of the evidence would undermine the establishment of the truth in the proceedings.<sup>113</sup> In response to this concern, the Chamber merely asserted that not granting leave to call the witnesses is “not a determination on the truthfulness of the allegations.”<sup>114</sup> This overlooks the fact that the Chamber Decisions and Judgments are an important record of the events and acts committed by Ongwen. By omitting male victims of sexual violence from the official record of acts committed by the LRA, the Chamber is contributing to the continued neglect of attention to male victims of sexual violence in international criminal law, ignoring their suffering during the atrocities committed by the LRA. This also reinforces the perception that only women and girls are victims of such crimes. This again contributes to the invisibility of male victims of sexual violence and overlooks the importance of their testimony in establishing the facts.

*Fair Trial Concerns*

The Chamber also emphasised that the rights of victims to participate in Court proceedings, pursuant to Article 68(3) of the Rome Statute, need to be balanced with the Article 67 rights of the accused, without attempting to reconcile both sets of rights.<sup>115</sup> It simply allows the superiority of the rights of the accused in this case, without exploring how the manifestation of the rights of the male victims to participate in this case would undermine the rights of the accused, and how both sets of rights could be reconciled in these circumstances, to allow for the representation of the interests and experiences of male victims of sexual violence in the proceedings before the Chamber.

## **Conclusion**

In this Decision, the Chamber displayed a lack of gender-inclusivity, as it did not recognise the gendered implications of sexual violence and other crimes, which has contributed to the invisibility of male victims of sexual violence. The next section contains the Feminist Re-Writing of the ‘Decision on the Legal

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<sup>113</sup> *Prosecutor v Ongwen* (n 109) para 12.

<sup>114</sup> *ibid* para 12.

<sup>115</sup> *ibid* para 12.

Representative for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives'. The Feminist Re-Writing will seek to confront the issues highlighted above and improve the reasoning and outcomes using feminist judging methodologies.

Original: English

No.: ICC-02/04-01/15

Date:

26 March 2018

## TRIAL CHAMBER IX

Before: Judge Kathryn Gooding

### SITUATION IN UGANDA IN THE CASE OF *THE PROSECUTOR v. DOMINIC ONGWEN*

Decision on the Legal Representative Request for Reconsideration of the  
Decision on Witnesses to be Called by the Victims Representatives

**Trial Chamber IX** ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 64(2), 67(1), 68(3), 69(3) of the Rome Statute ('Statute'), issues the following 'Decision on the Legal Representative Request for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives'.<sup>116</sup>

#### I. Procedural history and submissions

1. On 2 February 2018, the CLRV and LRV<sup>117</sup> filed their final lists of witnesses and requests for leave to present evidence.
2. On 6 March 2018, the Chamber issued its Decision on the CLRV and LRV requests, allowing the CLRV to call three witnesses and the LRV to call four witnesses.<sup>118</sup> The Chamber rejected the remainder of the

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<sup>116</sup> *Prosecutor v Ongwen* (Decision on the Legal Representative Request for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives) ICC-02/04-01/15-1210 (26 March 2018).

<sup>117</sup> *Prosecutor v Ongwen* (Victims' requests for leave to present evidence and to present victims' views and concerns in person) ICC-02/04-01/15-1166 (2 February 2018).

<sup>118</sup> *Prosecutor v Ongwen* (Decision on the Legal Representatives for Victims Request to Present Evidence and Views and Concerns and related requests) ICC-02/04-01/15-1199-Red (6 March 2018).

requests, including the LRV requests to present factual witnesses on the issues of sexual violence inflicted against men and boys (“Decision”).<sup>119</sup>

3. On 12 March 2018, the LRV filed a request for reconsideration (“Request”).<sup>120</sup> The LRV recommends that the Chamber re-examines its decision not to call the witnesses who seek to provide testimony about the infliction of sexual violence against men and boys by the Lord’s Resistance Army (“Anticipated Testimony”).<sup>121</sup>
4. The LRV recognises that the power of the Chamber to reconsider its own decisions is exceptional.<sup>122</sup> However, it argues that reconsideration is justified, as the Chamber committed an error of reasoning<sup>123</sup> in rejecting the request to call the three witnesses, which causes an injustice.<sup>124</sup>

## II. Analysis

5. Reconsideration of a Decision is an exceptional measure, which can only be done if a clear error of reasoning has been demonstrated or where it is necessary to prevent an injustice.<sup>125</sup>
6. The LRV submits that the Chamber erred in finding that the testimony on the subject of sexual violence against men and boys is beyond the scope of the charges. The LRV argues that because Charges 50 to 68 of the indictment concern sexual violence specifically against women and girls, it is true that the acts in the Anticipated Testimony are not within the scope of these charges. However, the LRV submits that the topics

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<sup>119</sup> *ibid.*

<sup>120</sup> *Prosecutor v Ongwen* (Request for reconsideration of the “Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests”) ICC-02/04-01/15-1203 (12 March 2018).

<sup>121</sup> *ibid* para 42.

<sup>122</sup> *ibid* paras 38-41.

<sup>123</sup> *ibid* paras 10-26.

<sup>124</sup> *ibid* paras 27-37.

<sup>125</sup> *Prosecutor v Ongwen* (Decision on the Defence Request for Partial Reconsideration of the Decision under Rule 68(2)(b) of the Rules of Procedure and Evidence) ICC-02/04-01/15-711 (23 February 2017) para 4.

of the Anticipated Testimony are covered by the other charges in the indictment.<sup>126</sup>

*Prosecutorial Strategy*

7. The Chamber considers that it is unfortunate that the Prosecutor did not reflect evidence of sexual violence against men and boys in charges 50 to 68 relating to sexual and gender-based violence against women and girls. As the Anticipated Testimony is not part of the facts and circumstances described in the charges for sexual and gender-based crimes against women and girls, the Anticipated Testimony would be beyond the scope of these charges. It notes the difficulties in investigating sexual violence perpetrated against men and boys stemming from the lack of visibility and under-reporting of this violence, in light of the stigma, fears of emasculation and criminalisation of same-sex acts in Uganda. Accordingly, it is paramount that the Prosecutor considers the various gendered implications of crimes against both men and women during the investigatory stages, to ensure that sexual violence against men and boys is recognised for its sexual nature in the confirmation of the charges, and that the plight of men and boys is not overlooked.

*Relevance of Evidence of Sexual and Gender-Based Violence to the Confirmed Charges*

8. In this Decision, as the charges have already been confirmed, the Chamber will analyse how evidence of sexual violence against men and boys may support the facts and circumstances described in the other charges brought by the Prosecutor. The Chamber considers that rapes committed during the attack in Abok IDP Camp by LRA fighters against civilian men both in the camp, and once abducted by the fighters, would come within a number of the charges:
  - Charges 42-45: Torture, cruel treatment and inhumane acts as war crimes and crimes against humanity under Articles 7(1)(f), 7(1)(k) and 8(2)(c)(i) of the Statute;

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<sup>126</sup> *Prosecutor v Ongwen* (n 120) paras 11-26.

- Charge 49: Enslavement as a crime against humanity under Article 7(1)(c) of the Statute;
  - Charge 69: The conscription of children into an armed group as a war crime under Article 8(2)(e)(vii) of the Statute.
9. It has been well established that rape constitutes an act of torture. The *Kumarac et al.* ICTY Appeals Chamber held as follows:
- Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture.*<sup>127</sup>
10. The *Mucić et al.* ICTY Appeals Chamber held as follows:
- 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. [...] Accordingly, whenever rape and other forms of sexual violence meet the aforementioned criteria, then they shall constitute torture.*<sup>128</sup>
11. The sexual violence was perpetrated for the purpose of punishment, intimidation and humiliation. It was also linked to the widespread and systematic attack against the civilian population in Abok IDP Camp, as well as the wider armed conflict. The Chamber finds that the evidence is not sufficient to prove the elements of the crimes on its own, however the evidence is sufficiently relevant to the elements of the charges to be able to be considered to be within the scope of the charges of torture, cruel treatment and inhumane acts as crimes against humanity and war crimes.
12. The Chamber notes that sexual violence was a means in which child soldiers were recruited, whereby they were terrorised by the LRA into

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<sup>127</sup> *Prosecutor v Kumarac et al.* (Appeal Judgment) IT-96-23/1-A (12 June 2002) paras 149-151.

<sup>128</sup> *Prosecutor v Mucić et al.* (Judgment) IT-96-21-T (16 November 1998) paras 495-496.

submission.<sup>129</sup> This is similarly the case for adult abductees who were enslaved by the LRA, whereby sexual violence was a means of intimidation through which the LRA established control over abductees.<sup>130</sup>

13. Whilst the Chamber considers that it would have been preferable for the sexual nature of the crimes to be recognised and reflected by appropriate sexual and gender-based crimes charges within the indictment, it is paramount that the experiences of the men and boys affected are nevertheless represented within Trial proceedings, and the opportunity arises for the accused to answer the allegations. The Chamber concludes that the Chamber erred in finding that the Anticipated Testimony would be beyond the scope of the charges of the indictment.

#### *Establishment of the Truth*

14. The Chamber notes the LRV's concerns regarding injustice stemming from the lack of establishing the truth regarding the allegations contained in the Anticipated Testimony. The Chamber recognises the lack of jurisprudence and explicit recognition of sexual violence against men and boys in wider society. It recalls studies that show that the majority of international attention is focused on female victims of sexual violence.<sup>131</sup> Men and boys in Uganda are particularly discouraged from disclosing sexual violence perpetrated against them due to societal assumptions that men cannot be raped,<sup>132</sup> as it is the antithesis of being 'masculine' and autonomous. Studies show that to be raped is to be feminised, and so emasculated, denoting connotations of victimhood

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<sup>129</sup> Jocelyn Kelly, Lindsay Branham & Michele Decker, 'Abducted Children and Youth in Lord's Resistance Army in Northeastern Democratic Republic of the Congo: Mechanisms of Indoctrination and Control' (2016) 10 *Conflict and Health* 11.

<sup>130</sup> Graham Carrington and Elena Naughton, 'Unredressed Legacy: Possible Policy Options and Approaches to Fulfilling Reparation in Uganda' (*International Center for Transitional Justice*, December 2012).

<sup>131</sup> Sandesh Sivakumaran, 'Lost in Translation: UN Responses to Sexual Violence Against Men and Boys in Situations of Armed Conflict' (2010) 92 *International Review of the Red Cross* 259.

<sup>132</sup> Refugee Law Project, 'Into the Mainstream: Addressing Sexual Violence Against Men and Boys in Conflict' (14 May 2014).

and weakness to both the victim and wider community.<sup>133</sup> Sexual violence against men and boys is also highly stigmatised in Uganda leading to very few reports made by male victims of sexual violence, due to fears of being branded as homosexual, and the corresponding fear of being prosecuted for sodomy under Ugandan law.<sup>134</sup>

15. The Chamber considers that allowing men and boys to testify would show that they can be both victims and agents. It would empower the victim, create a more accurate record of the alleged atrocities, and engender greater prominence of the issue of male victims of sexual violence. The Chamber emphasises that it would more accurately establish the truth in this case.

#### Fair Trial Concerns

16. The Chamber notes that Article 68(3) and Article 69(2) read together grants victims leave to present evidence where the personal interests of the victims are affected, where the presentation of evidence is consistent with the rights of the accused under Article 67(1), where the hearing of evidence is appropriate and affects the issues in the case, and the hearing of evidence is necessary for the determination of the truth.<sup>135</sup> Therefore, it is important to reconcile the rights of participation of the victims and the rights of the accused to a fair trial.
17. In response to the LRV's requests for leave to call witnesses, the Defence submitted that the LRV failed to submit a list of evidence.<sup>136</sup> The Defence alleges that this failure violates the accused's right to have adequate time and facilities for the preparation of his defence and to examine the witnesses against him, pursuant to Article 67(1)(b) and (e).<sup>137</sup>

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<sup>133</sup> *ibid.*

<sup>134</sup> *ibid.*

<sup>135</sup> *Prosecutor v Ongwen* (n 118) para 15.

<sup>136</sup> *Prosecutor v Ongwen* (n 120) para 11.

<sup>137</sup> *ibid* para 11.

18. The Chamber indicates that the rights of participation of the victims and the rights of the accused to a fair trial can be reconciled, where the Defence is given the opportunity to examine the witnesses who testify and where the Defence has adequate opportunity to prepare its defence, pursuant to Article 67(1)(b) and (e). This necessitates the disclosure of evidence the LRV intends to use and the identities of the witnesses sufficiently in advance.<sup>138</sup> Accordingly, the rights of the accused to a fair trial do not preclude the testimony of male victims of sexual violence, so long as disclosure is carried out sufficiently in advance.
  
19. In respect of the exceptionality of reconsideration, the Chamber finds that the omission of evidence and the lack of opportunity to testify would harm already vulnerable male victims, and would misrepresent the events that occurred. It is paramount that the Trial Judgment reflects as accurately as possible the harms perpetrated against the victims. Accordingly, the Chamber considers that these factors justify the exceptionality of the measure of reconsideration.
  
20. Accordingly, the Chamber considers that there are exceptional circumstances justifying the reconsideration of the Decision and consequently accepts the Request.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**ACCEPTS** the Request.

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<sup>138</sup> *ibid* para 20.

#### IV. COMMENTARY ON THE FEMINIST RE-WRITING

This section serves as a commentary to the ‘Feminist Re-Writing’ of the *Decision on the Legal Representative Request for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives*. In this commentary, there will be a discussion of the explanations for the various decisions within the case as well as the feminist justification for these decisions. There will also be an explanation of the feminist methodology used for the reasoning, which will utilise the features of feminist reasoning extracted from the feminist judgments in Section 2, ‘Re-Writing a Judgment from a Feminist Perspective – Methodology’.

##### Prosecutorial Strategy

Paragraph seven of the ‘Feminist Re-Writing’ articulates how it is unfortunate that the Prosecutor failed to reflect the evidence of sexual violence against men and boys in the charges, as the sexual and gender-based crimes charges are only in relation to acts committed against women and girls.<sup>139</sup> This paragraph acts as a plea for greater gender-sensitivity at the investigatory stage. Prosecutors must recognise the modalities of sexual violence, particularly as against men and boys. Consequently, they must take into account how much longer it will take to investigate this evidence, as it will take a significant amount of time to establish a relationship of trust with the victim, to allow them to open up about their experiences of sexual violence.<sup>140</sup> Furthermore, this evidence frequently remains hidden out of fear on the part of the victim of being ostracised from their communities or of being accused of consensual homosexual activity, and of being prosecuted as such.<sup>141</sup> Therefore, paragraph seven serves as a call to the Prosecution to seek out excluded voices and experiences, in this case of male

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<sup>139</sup> *Prosecutor v Ongwen* (Decision on the Confirmation of Charges against Dominic Ongwen) ICC-02/04-01/15-422-Red (23 March 2016), paras 86-141.

<sup>140</sup> Tom Maliti, ‘Manoba and Cox: There is a Conspiracy of Silence About Male Victims of Sex Crimes’ (*International Justice Monitor*, 14 September 2018) <<https://www.ijmonitor.org/2018/09/manoba-and-cox-there-is-a-conspiracy-of-silence-about-male-victims-of-sex-crimes/>> accessed 12 May 2019.

<sup>141</sup> Refugee Law Project, ‘Into the Mainstream: Addressing Sexual Violence Against Men and Boys in Conflict’ (14 May 2014) <[https://reliefweb.int/sites/reliefweb.int/files/resources/Into\\_The\\_Mainstream-Addressing\\_Sexual\\_Violence\\_against\\_Men\\_and\\_Boys\\_in\\_Conflict.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/Into_The_Mainstream-Addressing_Sexual_Violence_against_Men_and_Boys_in_Conflict.pdf)> accessed 11 May 2019.

victims of sexual violence. This is feminist reasoning similar to that utilised by Judge Sotomayor in her Dissenting Opinion in *Utab v Strieff*, in which she prioritises the often-overlooked experiences of victims of illegal searches and how illegal searches perpetuate racial divides in society.<sup>142</sup> However, this paragraph also warns that this will entail a longer investigatory period, as it is more difficult to bring this type of evidence to light.

### **Relevance of Evidence of Sexual and Gender-Based Violence to the Confirmed Charges**

Paragraphs eight to thirteen of the ‘Feminist Re-Writing’ reach an alternative conclusion to that of the Original Decision, in that the Feminist Re-Writing finds that evidence of sexual violence against men and boys can be encapsulated by the other charges, such as torture, enslavement, and conscription and use of child soldiers, and thus the evidence is not beyond the scope of the charges. Paragraph thirteen notes that it would have been preferable that appropriate sexual and gender-based crimes charges were confirmed, so that the sexual violence against men and boys could be recognised for its sexual nature. As elaborated upon previously, if sexual violence against men and boys is not labelled as such, it perpetuates the idea that only women and girls can be victims of sexual violence.<sup>143</sup> This therefore conflates femininity with weakness and victimhood. It is necessary to dispel these myths and to understand more fully the specific harms suffered by male victims of sexual violence. In this case, as the sexual and gender-based crimes charges only concern sexual violence committed against women and girls in the context of their abduction to be ‘wives’ of the LRA, it is true that the evidence of sexual violence against men and boys would be beyond the scope of the charges. This is why paragraphs eight to thirteen exemplify how sexual violence against men and boys can be encompassed by alternative non-sexual or gender-based crimes charges, as it is more important that sexual violence against men and boys is represented in the framework than not at all.

This approach utilises the feminist methodology utilised by Judge Sotomayor in *Utab v Strieff*, where she emphasises the individual lived experiences

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<sup>142</sup> *Utab v Strieff* 136 S. Ct. 2056 (2016).

<sup>143</sup> Valerie Oosterveld, ‘Sexual Violence Directed Against Men and Boys in Armed Conflict or Mass Atrocity: Addressing a Gendered Harm in International Criminal Tribunals’ (2014) 10 *Journal of International Law and International Relations* 107.

of people of colour who are disproportionately affected by abuses of police power.<sup>144</sup> In the Feminist Re-Writing, the aim was to utilise similar reasoning of prioritising the lived experience of male child soldiers, victims of the IDP attacks or abductees from the IDP camps, which was marked by sexual violence in conjunction with the other confirmed charges, such as torture, and the conscription and use of child soldiers.

### Establishment of the Truth

Paragraphs fourteen and fifteen explore the argument of the LRV that preventing male victims of sexual violence from appearing as witnesses would be an injustice. The Feminist Re-Writing explores the importance of admitting such testimony in light of the need to establish the truth in the course of the proceedings and to provide an accurate portrayal of the events. The Feminist Re-Writing in these two paragraphs utilises a number of feminist methodological devices, such as the use of facts and information derived from law review articles to contextualise the discussion and provide a more informed discussion, which was also carried out by Judge Sotomayor in *Utab v Strieff*.<sup>145</sup> The use of facts and discussion to contextualise serves to provide a deeper understanding of the type of harm sexual violence inflicts against men and boys and why it is important to shed light on sexual violence against men and boys in the context of the lack of attention given to the issue in international criminal law. Furthermore, these paragraphs seek to dispel the false dichotomy between autonomy and victimhood, enunciated upon in the feminist re-writing of *Sheffield City Council v E*.<sup>146</sup> The false dichotomy dictates that victimhood is denoted as something essentially feminine, and autonomy as something essentially masculine. The dichotomy also means that individuals can only occupy one of these positions at any time. By listening to their testimony in the Chamber proceedings, male sexual violence survivors would be acknowledged to be victims of sexual violence, as their testimony would reflect the violence inflicted against them by the LRA. However, they would simultaneously be provided with the autonomy to recount their own experiences to the Court, which would allow male sexual violence survivors to control the

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<sup>144</sup> *Utab v Strieff* (n 142).

<sup>145</sup> *Utab v Strieff* (n 142).

<sup>146</sup> Rosemary Hunter, Clare McGlynn, Erika Rackley, 'Feminist Judgments: An Introduction' in Rosemary Hunter, Clare McGlynn, Erika Rackley (eds), *Feminist Judgments: from Theory to Practice* (Hart Publishing 2010) 22.

narrative and establish a reliable Court record that accurately reflects all of the abuses committed by the LRA. This would allow male victims of sexual violence to actively participate in the Chamber proceedings and contribute to the establishment of the truth. This would therefore allow the male victims of sexual violence to occupy both positions of victimhood and autonomy simultaneously, and contribute towards undermining the false dichotomy between victimhood and autonomy.

### **Fair Trial Concerns**

Paragraphs seventeen and eighteen display a scepticism of utilising the human rights framework as a means to protect vulnerable and overlooked individuals, such as male victims of sexual violence. This scepticism was explored in the feminist re-writing of *R v A (No. 2)*, in which it was argued that the human rights framework often denoted a prioritisation of the rights of the accused to a fair trial over alternative rights,<sup>147</sup> such as the rights of participation for victims in criminal proceedings. The feminist approach taken in the Feminist Re-Writing seeks to show how varying rights can be accommodated in a way that does not undermine the rights of vulnerable individuals in international criminal proceedings, nor does it undermine the rights of the accused to a fair trial. The Feminist Re-Writing aims to show how the right of the male victims to participation in the proceedings can be balanced with the rights of the accused to a fair trial, and that one right need not take precedence over the other.

### **Conclusion**

By placing male victims of sexual violence at the centre of the Chamber proceedings through the application of feminist methodologies, the Feminist Re-Writing seeks to show how a different perspective can directly lead to alternative reasoning and alternative Decision outcomes that balance the rights of the accused to a fair trial with the right of victims to participation in the proceedings. This approach prioritises the previously overlooked accounts and perspectives of male victims of sexual violence, and allows for their effective representation and participation in proceedings that concern them. The Feminist Re-Writing aims to show how the International Criminal Court could vastly increase its gender-sensitivity if it utilised this approach, as it would ensure the representation of

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<sup>147</sup> *ibid* 23.

gender issues concerning male victims of sexual violence that have been historically overlooked in international criminal discourse.

## CONCLUSION

The Feminist Re-Writing of the *Ongwen* Decision demonstrates the difference that feminist methodologies of judging can have on Decisions and Judgments that concern various areas of international criminal law. The Feminist Re-Writing exemplifies a number of prominent feminist features of judging extrapolated from domestic law feminist judgments: the use of reasoning that undermined the false dichotomy between agency and autonomy, and victimhood and vulnerability; the use of reasoning that evidenced a scepticism of human rights discourse as a means of protection for vulnerable people, as well as reasoning that attempted to reconcile supposedly conflicting rights; the inclusion of contextual facts and alternative sources, such as law review articles and scholarly books; a focus on the overlooked gendered dimensions of international crimes; and an emphasis on prioritising excluded voices and experiences, in this case of male victims of sexual violence in conflict.

Utilising these feminist features of judging directly led to alternative reasoning and case outcomes when compared to the original *Ongwen* Decision, as the Feminist Re-Writing actually reasoned in favour of the Legal Representatives of the Victims, to grant them leave to present a number of witnesses. This is the completely opposite result to that determined in the original *Ongwen* Decision. The example of the case study of male victims of sexual and gender-based violence was intended to be a tool to exemplify the flexibility of feminist methodologies to various areas of international criminal law, demonstrating the fact that feminist methodologies can be utilised in thematic areas that do not necessarily concern women.

Using these features, the Feminist Re-Writing was able to improve gender-sensitivity in judging, as it was able to emphasise the overlooked gender dimensions of international crimes. For example, the Feminist Re-Writing was bound by the fact that the Prosecutor had not brought any specific sexual and gender-based crimes charges that related to men and boys, therefore the reasoning found a way to look at the gendered elements of non-sexual and gender-based crimes, such as the crimes of conscription of child soldiers and enslavement, so

that the evidence of male victims could still be presented in the course of the proceedings.

This was important in the context of gender-sensitivity, because allowing the male victims to present their evidence was a significant step in providing them the opportunity to dispel the myth that only women and girls are victims of sexual violence in conflict, and to recognise more accurately the modalities of wartime sexual violence as a crime that affects both men and boys, women and girls. It is hoped that the calls for greater gender diversity on the international bench will directly lead to greater diversity in perspectives in judging. This then leaves the possibility for feminist perspectives to be represented in international criminal judging. This would be a significant step forward in establishing greater gender justice for both men and women through improved gender-sensitivity in judging in the international criminal system.