

April 2018

The Consideration of Male Victims of Sexual Violence as a Subset of the Particular Social Group “Homosexual” in Adjudicating Asylum Claims

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Recommended Citation

Christiana Desrosiers, *The Consideration of Male Victims of Sexual Violence as a Subset of the Particular Social Group “Homosexual” in Adjudicating Asylum Claims*, 30 Pace Int'l L. Rev. 279 (2018)

DOI: <https://doi.org/10.58948/2331-3536.1376>

Available at: <https://digitalcommons.pace.edu/pilr/vol30/iss2/2>

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THE CONSIDERATION OF MALE VICTIMS OF SEXUAL VIOLENCE AS A SUBSET OF THE PARTICULAR SOCIAL GROUP “HOMOSEXUAL” IN ADJUDICATING ASYLUM CLAIMS

Christiana Desrosiers*

ABSTRACT

This Article analyzes the difficulties African male victims of sexual violence experience when seeking asylum in homophobic host countries and the lack of attention they receive from international and national governments and organizations. It concludes by recommending that male victims of sexual violence be able to seek asylum in host countries due to lack of medical care that they receive in their countries on account of imputed homosexual status.

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* JD Candidate, May 2018, the Elisabeth Haub School of Law at Pace University. I would like to give special thanks to Professor Mark R. von Sternberg, who, for the past year and a half, shared his expansive knowledge in the area of asylum claims and provided me with continuous guidance and support. I would also like to thank the Editors and Associates of Pace International Law Review for their dedicated work on this Article.

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INTRODUCTION

In any given society, there are a number of reactions that one may witness when males are victims of sexual violence—laughter, apathy, outrage, or accusations of the victim being homosexual. However, if the gender of the victim were a female, one is more likely to observe sympathy or outrage. Regardless of his sexual orientation, the world pays little attention to the possibility of a male being raped by another male. Typically, the sexual violence is considered abuse or torture.¹ Male on male rape, also known as male sexual violence, is prevalent in many parts of the world, particularly in countries where there has been a history of war or political conflict, such as “Chile, Greece, Croatia, Sri Lanka, El Salvador, Iran, Kuwait, the former Soviet Union, the Democratic Republic of the Congo [“DRC”], the former Yugoslavia,”² and more recently Egypt³ and Afghanistan.⁴ The

¹ Sandesh Sivakumaran, *Sexual Violence Against Men in Armed Conflict*, 18 EUR. J. INT’L. L. 253, 256 (2007), <http://ejil.oxfordjournals.org/content/18/2/253.full.pdf+html>.

² Lara Stemple, *Male Rape and Human Rights*, 60 HASTINGS L. J. 605, 612-13 (2009), http://scienceblogs.de/geograffitico/wp-content/blogs.dir/70/files/2012/07/i-e76e350f9e3d50b6ce07403e0a3d35fe-Stemple_60-HLJ-605.pdf.

³ Loulla-Mae Eleftheriou-Smith, *Egypt: Rape and sexual violence perpetrated by security forces ‘surges’ under el-Sisi’s regime in campaign to ‘eliminate public protest,’* INDEPENDENT (May 19, 2015 8:31 AM), <http://www.independent.co.uk/news/world/middle-east/egypt-rape-and-sexual-violence-perpetrated-by-security-forces-surges-under-el-sisis-regime-in-10260040.html> (noting “[p]olitical prisoners are believed to suffer the most serious sexual assault during detention, particularly men who are thought to be withholding information”); *Egyptian detainees ‘tortured and raped,’* AL JAZERRA (Apr. 1, 2014), <http://www.aljazeera.com/humanrights/2014/04/egyptian-detainees-tortured-raped-201441165823978172.html> (discussing how a male student held in detention was raped by security forces); see also Patrick Kingsley, *Egypt’s secret prison ‘disappeared’ face torture in Azouli military jail,* THE GUARDIAN (June 22, 2014), <https://www.theguardian.com/world/2014/jun/22/disappeared-egyptians-torture-secret-military-prison> (discussing a male threatened with rape).

amount of men who have been raped during times of conflict ranges between 21% and 80%.⁵ In the eastern region of the DRC, 23.6% of males have reported being victims of sexual violence.⁶ However, these figures only reflect the number of men who have been able to come forward and speak about the rape they suffered. Typically, when men are raped by other men, in many parts of the world, the men are accused of being either homosexual or weak, or both.⁷ In the DRC, for instance, rape victims are often abandoned by their families and rejected by their communities.⁸ Furthermore, they are ignored by international institutions, nongovernmental organizations, their own country's legal institutions, and the legal institutions of their host country if they are refugees.⁹

The DRC is a country wrought with strife, where one can see how the international community and the African community both share common views of male sexual violence. Furthermore, there is a plethora of articles available with regard to male rape victims of the DRC and the discrimination they face in both their communities and the international arena. For these reasons, the DRC will serve as a microcosm of male rape worldwide. The views expressed in this Article are not reserved solely for the DRC,

⁴ Joseph Goldstein, *U.S. Soldiers Told to Ignore Sexual Abuse of Boys by Afghan Allies*, N.Y. TIMES (Sept. 20, 2015), https://www.nytimes.com/2015/09/21/world/asia/us-soldiers-told-to-ignore-afghan-allies-abuse-of-boys.html?_r=0.

⁵ Stemple, *supra* note 2, at 613-14.

⁶ 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 JAMA NETWORK 553, 553 (Aug. 4, 2010), <http://jamanetwork.com/journals/jama/fullarticle/186342>.

⁷ See Sivakumaran, *supra* note 1, at 272.

⁸ Will Storr, *The rape of men: the darkest secret of war*, THE GUARDIAN (July 16, 2011, 7:05 PM), <https://www.theguardian.com/society/2011/jul/17/the-rape-of-men>.

⁹ *Id.*; see also Miya Cain, *Hope in the Shadows: Male Victims of Sexual Assault in the Democratic Republic of the Congo*, HUMANITY IN ACTION, <https://www.humanityinaction.org/knowledgebase/657-hope-in-the-shadows-male-victims-of-sexual-assault-in-the-democratic-republic-of-the-congo> (last visited Mar. 11, 2018).

but for all countries where male sexual violence¹⁰ is an issue. Although men are also raped by other men while in prison, the focus of this Article will be on male sexual violence occurring during conflict and post-conflict, and the challenges the men face in countries where they are refugees. The aid male victims receive is less than that of females, and the sexual violence that men endure during times of unrest is largely undocumented, in contrast to male sexual violence that occurs in the prison context, which is more often reported.

Part I will discuss gendered violence and its exclusion of males, and compare rape of both males and females. Part I will also discuss rape laws in the DRC and Uganda and analyze their effects on male victims of sexual violence. Further, Part I will analyze the definitions of rape in the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda, demonstrating through the testimony of male rape victims how the experiences they suffered were discussed in the tribunals. Part I will also briefly glance at international organizations to see if any laws have yet acknowledged the plight of men during times of conflict. Following will be a brief presentation of homosexuality laws in the DRC and Uganda, analyzing how they prevent male rape victims from seeking aid out of fear of persecution on account of homosexuality.

Part II will argue for the ability of male rape victims to seek asylum based on imputed homosexuality and lack of medical care. It will look at the definition of refugee under the 1951 Convention Relating to the Status of Refugees (“The 1951 Convention”),¹¹ the 1967 Protocol Relating to the Status of Refugees (“The 1967 Protocol”),¹² Uganda’s Refugee Act 2006,¹³ and the United States’

¹⁰ “Rape” and “sexual violence” will be used interchangeably throughout this paper.

¹¹ Convention Relating to the Status of Refugees, Apr. 22, 1954, 189 U.N.T.S. 150 [hereinafter *The 1951 Convention*].

¹² Protocol Relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267 [hereinafter *The 1967 Protocol*].

Immigration and Nationality Act (“INA”).¹⁴ United States (“U.S.”) supporting case law will be used to argue that male rape victims should constitute a particular social group on account of imputed homosexual status and inability to access medical aid.

Further, to aid in this endeavor, this Article will compare the case law of the U.S. on victims seeking asylum and that of the United Kingdom (“U.K.”) on claimants seeking non-refoulement due to lack of medical treatment. The Article will also review U.S. history and case law to portray how homosexuality and its subset, imputed homosexuality, became a particular social group. Lastly, it will analyze U.S. case law to support the conclusion that the particular social group of homosexuality should be expanded to include male rape victims who are unable to seek medical care due to imputed homosexual status.

In conclusion, this Article will argue that male victims of sexual violence who are unable to seek medical aid due to fear of imputed homosexual status should constitute a particular social group and be able to seek asylum.

PART I

A. *How the Term “Gendered Violence” Excludes Males*

In recent years, there has been a lot of attention devoted to gendered sexual violence, particularly in times of conflict or post-conflict. But what does “gendered” mean? Gender is “either the male or female division of a species, especially as differentiated by social and cultural roles and behavior.”¹⁵ When “gender” or “gendered” is used, it almost always refers to women and, by

¹³ Uganda: The Refugees Act 2006, May 24, 2006, act 21, <http://www.refworld.org/docid/4b7baba52.html> [hereinafter Refugees Act 2006].

¹⁴ Immigration and Nationality Act of 1965, H.R. 2580, 89th Cong. (1965) [hereinafter INA].

¹⁵ *Gender*, DICTIONARY.COM, <http://www.dictionary.com/browse/gender?s=t> (last visited Dec. 16, 2016).

consequence, children.¹⁶ This is so because whenever someone is raped, the victim is typically a woman; and if not a woman, then a “child,” where one is left wondering what the sex¹⁷ of the child is.¹⁸ When the term “child” or “children” is used, it is more often than not used as to not assign gender to the young person, by essentially creating a third gender. In this “third gendered” state, a young person is considered to be innocent and his or her sex is deemed irrelevant. Nonetheless, when the term “child” or “children” is used in the third gendered sense, in the subconscious of society, one automatically assumes that the victim is a female,¹⁹ and rightfully so. Most of the time when a child is raped, it is a young girl.²⁰ In everyday parlance or on the news, one may observe that when one learns that a child has been raped, the news either remains silent on the sex of the victim, thereby causing the viewer to imply that the victim is a girl; or, if the victim is a boy, the news will blatantly state that it is a boy.²¹

¹⁶ MARTA LATEK, EUROPEAN PARLIAMENTARY RESEARCH SERVICE, SEXUAL VIOLENCE IN THE DEMOCRATIC REPUBLIC OF CONGO 1 (2014), <http://www.europarl.europa.eu/EPRS/EPRS-AaG-542155-Sexual-violence-in-DRC-FINAL.pdf> (noting the majority of victims as women and children).

¹⁷ This author will use the terms “sex” and “gender” interchangeably, although their meanings are different. In this Article, “sex,” like “gender,” will refer to the biological make-up of the person as well as what he or she appears to be.

¹⁸ LATEK, *supra* note 16.

¹⁹ ROLAND C. SUMMIT, THE CHILD ABUSE ACCOMMODATION SYNDROME 5-6 (Abuse Watch 1983), <https://www.abusewatch.net/Child%20Sexual%20Abuse%20Accommodation%20Syndrome.pdf>.

²⁰ See *Facts and figures: Ending violence against women*, U.N. WOMEN, <http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures> (last updated Aug. 2017).

²¹ This is based on the conversations that the author has had with others over the years and her own personal observations. Lately, however, this is starting to change, particularly with news outlets. When a child has been sexually abused, news outlets state the sex of the child. See, e.g., Richard Wilson, *Prosecutor: Child sex victim testifies to years of abuse in Xenia*, DAYTON DAILY NEWS (Mar. 12, 2018, 4:45 PM), <https://www.daytondailynews.com/news/prosecutor-child-sex-victim-testifies-years-abuse-xenia/uiLIQIce2UO9Z2Y6z2FjLP/> (“The mother told police she was sleeping on the couch and her *daughter* was sleeping in her bed when the defendant got in bed with her *daughter* . . .”) (emphasis added).

In sum, rape is commonly associated with being a female's problem, never affecting any other part of the population. Society often overlooks males as victims of gendered violence. Rape is a gendered act, but the term "gender" or "child" should not be used to focus on the issues plaguing females, but also those pertaining to males.

B. Similarities and Differences Between the Sexes

In the DRC, males and females who have been raped face many social stigmas for having been victimized. A female will generally be disowned by her family, both her own and her in-laws.²² They will accuse her and her children of prostitution, despite knowing that there are mass rapes being committed in a particular area.²³ Similarly, a male, like a female, will also be disowned by both his family (wife, children, and relatives) and his in-laws upon disclosing that he was raped by a man.²⁴ Typically, the family will accuse him of being homosexual or call him a

²² See generally *DRC: Rape as a Weapon of War* (Viceland television broadcast May 10, 2016), https://www.viceland.com/en_us/video/drc-rape-as-a-weapon-of-war/571a790731aefdc664a4e166; see Pete Jones, *Congo: We Did Whatever We Wanted, Says Soldier Who Raped 53 Women*, THE GUARDIAN (Apr. 11, 2013), <https://www.theguardian.com/world/2013/apr/11/congo-rapes-g8-soldier>; see also Michele Lent Hirsch & Lauren Wolfe, *Conflict Profile: Democratic Republic of Congo*, WOMEN'S MEDIA CTR. (WMC) (Feb. 8, 2012), <http://www.womenundersiegeproject.org/conflicts/profile/democratic-republic-of-congo>; Fiona Lloyd-Davies, *Why Eastern DR Congo is 'Rape Capital of the World'*, CNN (Nov. 25, 2011), <http://www.cnn.com/2011/11/24/world/africa/democratic-congo-rape/index.html>.

²³ See generally *DRC: Rape as a Weapon of War*, *supra* note 22.

²⁴ Storr, *supra* note 8.

“bush wife.”²⁵ To add to the mental, emotional, and psychological anguish, if either gender has been raped repeatedly, the medical injuries are unimaginable. Some die as a result of their untreated injuries.²⁶

Although the consequences of being raped for male and female victims are very similar, what makes them different is the lack of acknowledgement of male victims of sexual violence by nongovernmental organizations, international governments, and the laws of their own country. While there is little aid available to females after they have been raped, there is even less for males.

C. Rape Laws in the DRC

In the DRC, rape, as defined in the Criminal Code,²⁷ is the “forcible sexual penetration of a female, and indecent assault, defined as sexual assault without penetration.”²⁸ The Criminal

²⁵ “Bush wife” is a term used for a woman who was kidnapped by a member of a rebel group, forcibly married to the rebel, performed domestic chores, and was forced to have sexual relations with the member. See Jina Moore, *In Africa, justice for ‘bush wives,’* CHRISTIAN SCI. MONITOR (Jun. 10, 2008), <http://www.csmonitor.com/World/Africa/2008/0610/p06s01-woaf.html> (defining bush wife); see also Jeffrey Gettleman, *Symbol of Unhealed Congo: Male Rape Victims*, N.Y. TIMES (Aug. 4, 2009), <http://www.nytimes.com/2009/08/05/world/africa/05congo.html>.

²⁶ Heather Murdock, *Rape in Congo Devastates Male Victims*, VOA NEWS (Nov. 17, 2011, 7:00 PM), <https://www.voanews.com/a/rape-in-congo-devastates-male-victims-134117048/148375.html> (noting men dying from physical trauma); see generally Juliane Kippenberg, *Seeking Justice: The Prosecution of Sexual Violence in the Congo War*, 17(1)(A) HUM. RTS. WATCH 1, 11, 18 (2005), <https://www.hrw.org/sites/default/files/reports/drc0305.pdf> (noting women dying from untreated rape injuries).

²⁷ The Criminal Code applies to both civil and military persons. Kippenberg, *supra* note 26, at 28.

²⁸ CODE PÉNAL [C.PÉN.] arts. 167-170 (Dem. Rep. Congo) (2004), <http://www.leganet.cd/Legislation/JO/2004/JO.30.11.2004.pdf> (The translation provided in the text was found at Kippenberg, *supra* note 26, at 28. The Congolese Criminal Code definition of rape, however, does not use the term “female;” it is gender neutral. The interpretation provided may reflect the societal view that rape is viewed as an attack against women only.)

Code further states that for having committed rape, a perpetrator can serve a prison sentence of five to twenty years, regardless of the age of the victim.²⁹ However, if the victim is killed during the commission of the act, the perpetrator can be sentenced to death or life imprisonment.³⁰

The Criminal Code does not specify which acts are considered rape. Although the definition is gender neutral, in practice, it is women who are seen as victims of rape in Congolese society, not males. By not defining rape, the definition promulgates the general societal view that sexual violence is only committed when a penis enters the vagina. By failing to acknowledge one half of the population and the sexual violence that they have experienced, it ignores a score of rape victims and inhibits them from speaking out about the crime they suffered, resulting in many males refusing to seek legal recourse.

Since the passage of the Pretoria Accord in 2002,³¹ there have been a few victims³² of sexual violence who have tried to seek justice for the crimes committed against them. Nonetheless, these few victims were largely unsuccessful due to the state of the Congolese government, which, at the time, was transitioning to a new government.³³ Among the problems faced were:

[D]eficiencies in the law [to
adequately address the brutal rape

²⁹ *Id.* art. 170.

³⁰ *Id.* art. 171.

³¹ Peace Agreement between the Government of the Democratic Republic of the Congo and the Republic of Rwanda on the Withdrawal of the Rwandan Troops from the Territory of the Democratic Republic of the Congo and the Dismantling of the ex-FAR and Interahamwe Forces in the Democratic Republic of the Congo, Dem. Rep. Congo-Rwanda, July 30, 2002, S/2002/914, https://peacemaker.un.org/sites/peacemaker.un.org/files/CD%20RW_020730_PeaceAgreementRwandaDRC.pdf.

³² See generally Kippenberg, *supra* note 26. The victims focused on in this source are female. Although the text is gender neutral, the law at that time didn't recognize male rape victims; therefore, they had no legal recourse.

³³ *Id.* at 7-8.

female victims encountered], the unwillingness of military and other officials to treat sexual violence as a serious offense, [the] lack of protection for the victims, and [the] various logistical and financial impediments linked to the dilapidated state of the judicial system.³⁴

In 2006, the Congolese government amended the Criminal Code's definition of rape to reflect what was transpiring against both sexes.³⁵ The legislature looked to international humanitarian law as a guide on how to conform their laws.³⁶ Under the new amendment, the definition was expanded to include males as rape victims.³⁷ It also responded to the question that was left unanswered by the previous law—which acts constitute sexual violence. The new amendment states:

[Whoever] shall have committed rape, either by aid of violence or grave threats or by coercion against a person, directly or through a third person, or by surprise, psychological pressure, or at the occasion of a coercive environment, or by abusing a person who due to illness, alteration of faculties or any other

³⁴ *Id.* at 2.

³⁵ JOURNAL OFFICIEL DE LA REPUBLIQUE DEMOCRATIQUE DU CONGO CODE PÉNAL [C.PÉN.] [OFFICIAL JOURNAL OF THE DEMOCRATIC REPUBLIC OF CONGO] [PENAL CODE] Aug. 1, 2006 (Dem. Rep. Congo) (Christiana Desrosiers trans.), <http://www.droit-afrique.com/upload/doc/rdc/RDC-Code-1940-penal-modif-2006.pdf>.

³⁶ *Democratic Republic of the Congo: Practice Relating to Rule 93. Rape and Other Forms of Sexual Violence*, INT'L COMM. RED CROSS, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_cd_rule93 (last visited Dec. 17, 2016) [hereinafter INT'L COMM. RED CROSS].

³⁷ *Id.*

accidental reason has lost the use of his/her senses, or who has been deprived of them by artifice:

a) any man, whatever his age, who has inserted his sexual organ, however slight, into that of a woman, or any woman, whatever her age, who has forced a man to insert, if only superficially, his sexual organ into hers;

b) any man who has penetrated, however slight, the anus, mouth or any other orifice of the body of a woman or a man with a sexual organ, with any other part of the body, or with any object whatsoever;

c) any person who has inserted, however slight, any other part of the body or any object whatsoever into the vagina;

d) any person who has forced a man or a woman to penetrate, however slight, his anus, mouth or any orifice of the body with a sexual organ, with any other part of the body, or with any object whatsoever. Whoever is found guilty of rape shall be punished with a penalty of penal servitude between five and twenty years and a fine of not less than 100,000 Congolese francs.³⁸

Though the law has been amended for over a decade, there

³⁸ CODE PÉNAL [C.PÉN] art. 170 (Dem. Rep. Congo) (modified 2006), translated in INT'L COMM. RED CROSS, *supra* note 36.

has yet to occur a massive prosecution of perpetrators—both since the wars of 1996 and 1998³⁹ and the amendment to the Criminal Code. In the eastern part of the DRC, men, women, and children continue to be systematically raped by military forces and rebel groups.⁴⁰ Many of the victims refuse to come forward about the sexual violence they suffered due to societal stigma and the threats against them by the perpetrators.⁴¹

The victims also know that even if they do notify the authorities, nothing may come of it. If the perpetrator is arrested, it can be years before a trial takes place.⁴² Moreover, “[b]ecause of poor security in prisons, and corruption among judicial and prison staff, many of those arrested for rape have escaped from prison; [and] some have returned to threaten the victims who denounced them.”⁴³ Further, the members of the groups who are perpetrating sexual violence in the eastern part of the DRC protect their commanders from being prosecuted.⁴⁴ This makes it increasingly difficult to reach out to victims in those regions and to bring the perpetrators to justice.⁴⁵

In addition, the government has integrated rebel leaders and war criminals into the national army, giving some of them senior positions.⁴⁶ While in these positions, they have continued to commit acts of violence against the populace.⁴⁷ Recently, however, civilians have started turning to themselves to bring victims justice. They have formed their own police unit to find the

³⁹ *Democratic Republic of Congo: Ending Impunity for Sexual Violence*, HUM. RTS. WATCH (June 10, 2014, 1:01 AM), <https://www.hrw.org/news/2014/06/10/democratic-republic-congo-ending-impunity-sexual-violence> [hereinafter *Ending Impunity for Sexual Violence*].

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

rapists of women and children victims.⁴⁸ Once rape has been committed in the community, men and women join forces to find the person(s) responsible; once found, they turn the person(s) to the authorities to be prosecuted.⁴⁹ This group, however, protects *only* women and children.⁵⁰

Further, since 2012, Congolese authorities, with the help of Open Society Justice Initiative and the Open Society Initiative for Southern Africa, have formed mobile courts that travel around the DRC to hear the stories of female victims of sexual violence and help them acquire justice.⁵¹ These mobile courts have convicted many perpetrators.⁵² What is notable about this achievement is that many leaders of the military, rebel groups, and the national police force are being convicted of war crimes and crimes against humanity.⁵³ In 2015, military commanders signed a declaration to eliminate rape in war.⁵⁴ This pledge is to be taken by all military

⁴⁸ Merveille Kavira Luneghe, *Civilian Police Group Tries to Curb Sexual Violence in Democratic Republic of Congo*, SEATTLE GLOBALIST (Aug. 16, 2016), <http://www.seattleglobalist.com/2016/08/16/civilian-police-fights-sexual-violence-democratic-republic-of-congo/55110>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *See generally Justice in DRC: Mobile Courts Combat Rape and Impunity in Eastern Congo*, OPEN SOC'Y FOUNDS., <https://www.opensocietyfoundations.org/sites/default/files/justice-drc-20130114.pdf> (last visited Apr. 29, 2018).

⁵² *Id.*

⁵³ Press Release, Zainab Hawa Bangura, Special Representative of the Secretary-General for Sexual Violence in Conflict, Recent Convictions of Military and Police Officials in DRC Send Clear Message That Impunity for Sexual Violence in Conflict Will Not Be Tolerated (Dec. 16, 2014), <http://www.un.org/sexualviolenceinconflict/press-release/recent-convictions-of-military-and-police-officials-in-drc-send-clear-message-that-impunity-for-sexual-violence-in-conflict-will-not-be-tolerated/>; *see generally* U.N. Secretary General, *Democratic Republic of the Congo*, U.N. Doc. S/2018/250 (Apr. 16, 2018), <http://www.un.org/sexualviolenceinconflict/countries/democratic-republic-of-the-congo/>.

⁵⁴ Press Release, Zainab Hawa Bangura, Special Representative of the Secretary-General for Sexual Violence in Conflict, DRC: Military Pledge Marks Milestone on Road to Ending Conflict-Related Sexual Violence (Mar. 31, 2015), <http://www.un.org/sexualviolenceinconflict/press-release/drc-military-pledge->

commanders.⁵⁵ It requires them to prevent acts of sexual violence from occurring, and punish those who have committed them.⁵⁶

But what about acts of sexual violence that occur post-conflict? In times of peace, most of the perpetrators are civilians who were once part of the military or rebel groups.⁵⁷ This declaration only provides justice to those who will be the future victims of those serving in the military.⁵⁸ Furthermore, because a lot of those in the military were also rebel leaders and war criminals who committed these acts themselves, what incentives do they have to hold their subordinates accountable for committing crimes against humanity and war crimes, when they committed or are committing those very same crimes themselves? This declaration is a step in the right direction, but victims are still unable to acquire justice due to a wholly inadequate judicial system. Meanwhile, mass acts of sexual violence continue to be committed against males and females. For instance, in the case of one female victim, while she was testifying as to the abuse she suffered, the military judge made her reveal her identity to “confront her oppressor in open court.”⁵⁹ This is against the rules, as the identity of the victims is to remain concealed.⁶⁰ The judge disregarded the potential safety risks of the victim. This example shows the level of difficulty in female victims acquiring justice.

With all of the advancements in Congolese law, adult males still have not been able to come forward to speak about the sexual

marks-milestone-on-road-to-ending-conflict-related-sexual-violence/
[hereinafter DRC: Military Pledge Marks Milestone on Road to Ending
Conflict-Related Sexual Violence].

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Pain, Stigma and Little Justice for Victims of Sexual Violence in Democratic Republic of the Congo*, (PBS television broadcast July 15, 2015, 7:36 PM), <http://www.pbs.org/newshour/bb/pain-stigma-little-justice-victims-sexual-violence-democratic-republic-congo/> [hereinafter *Pain, Stigma and Little Justice*].

⁵⁸ DRC: Military Pledge Marks Milestone on Road to Ending Conflict-Related Sexual Violence, *supra* note 54.

⁵⁹ *Pain, Stigma and Little Justice*, *supra* note 57.

⁶⁰ *Id.*

violence they faced due to the perception of what it means to be a male in their society. Male rape victims are often suicidal; their sexuality is called into question by others upon revealing the acts that happened to them; or they are turned away by the government, medical professionals, or are ostracized by society.⁶¹ The government and society still have a lot of work to do in order to address the sexual violence being committed against males.

D. Rape Laws in Uganda

In Uganda, the law is very straightforward with respect to who the victims of rape are. There, rape is committed by an individual against a female.⁶² If a female is raped by an individual, regardless of her age, the individual is “liable to suffer death.”⁶³ Moreover, it is gender neutral as to the sex of the perpetrator. In any event, the rape laws of Uganda are important, as many male rape victims of the DRC are currently seeking refuge in northern Uganda.⁶⁴ Due to its societal views and recent laws addressing homosexuality, many men are reluctant to come forward and speak about the sexual violence they suffered.⁶⁵

E. Definition of Rape in the ICC, ICTY, and ICTR

Although the Rome Statute of the International Criminal Court (“ICC”) does not define rape, it is listed as a crime against humanity and a war crime.⁶⁶ Nevertheless, rape was defined in

⁶¹ Cain, *supra* note 9.

⁶² Uganda Penal Code Act § 123 (1950), http://www.wipo.int/wipolex/en/text.jsp?file_id=170005.

⁶³ *Id.* § 124.

⁶⁴ Grace Natabaalo, *Male Rape Survivors Fight Stigma in Uganda*, AL JAZEERA (Apr. 12, 2013), <http://www.aljazeera.com/indepth/features/2013/04/2013411111517944475.html>.

⁶⁵ *Id.* (“Men also choose not to speak out for fear of being branded homosexuals, and victims cannot get proper support because they are accused of being gay.”).

⁶⁶ Rome Statute, U.N. Doc. A/CONF.183/9, arts. 7(1)(g), 8(2)(b)(xxii) (entered into force July 1, 2002), <https://www.icc-cpi.int/nr/rdonlyres/add16852-ae9-4757-abe7-9cdc7cf02886/283503/romestatuteng1.pdf>.

two tribunals—the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”).

i. ICTY

The ICTY had prosecuted those who committed wartime sexual violence as a war crime, crime against humanity, and genocide. *Tadić* was the first-ever trial for sexual violence against men,⁶⁷ and *Furundžija*⁶⁸ defined rape as:

(i) [T]he sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator;

(ii) by coercion or force or threat of force against the victim or a third person.⁶⁹

This definition of rape is important, as it can apply to both male and female victims of sexual violence. Although *Furundžija* was decided three years after *Tadić*, the Court was careful not to rule rape as an act that only affects females, but males too.

In *Tadić*, two of the witnesses recalled having to mutilate

⁶⁷ Prosecutor v. DU [KO TADI] a/k/a/ “DULE,” Case No. IT-94-1-T, Opinion and Judgment (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997), <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf>.

⁶⁸ Prosecutor v. Anton Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 185 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>.

⁶⁹ *Id.* ¶ 185.

the genitals of a man named Fikret Harambai.⁷⁰ The two witnesses (Witness G and H) and Fikret Harambai were forced to enter a pit.⁷¹ Fikret was naked and was recently beaten by the guards without cause.⁷² Upon entering the pit, Witness H was ordered to lick Fikret's buttocks and G was ordered to suck on Fikret's penis and bite his genitals.⁷³ The guards were nearby telling G to bite harder.⁷⁴ They were then ordered to get out of the pit, and Fikret was forced to lie on a table with G between his legs.⁷⁵ H was threatened to cover Fikret's mouth to prevent him from screaming, unless he wanted his eyes gouged out.⁷⁶ While Fikret was lying on the table with his mouth covered, G was ordered to hit and bite Fikret's genitals.⁷⁷ G bit off one of Fikret's genitals, spat it out, and was told by the guards to leave. Neither G nor H saw Fikret again.⁷⁸

Similarly, in *Milošević*,⁷⁹ Ms. Melika Malesevic, who was once a detainee in a camp for nine months, became a member of the Alliance of Detainees of Bosnia and Herzegovina.⁸⁰ The purpose of the Alliance was to gather information about what was happening to detainees in the various camps.⁸¹ The Alliance received information from former detainees.⁸² Below is the testimony of Mrs. Malesevic, recounting the instance of male sexual abuse in Celopek camp located in Zvornik, Bosnia, as told to her by one of the witnesses:

⁷⁰ Prosecutor v. DU [KO TADI] a/k/a/ "DULE," Case No. IT-94-1-T, ¶ 206.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Prosecutor v. DU [KO TADI] a/k/a/ "DULE," Case No. IT-94-1-T, ¶ 206.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See generally Transcript of Record, Prosecutor v. Milošević, Case No. IT-02-54 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 10, 2003), http://www.icty.org/x/cases/slobodan_milosevic/trans/en/030310ED.htm.

⁸⁰ *Id.* at 17415.

⁸¹ *Id.*

⁸² *Id.*

We have quite a number of witnesses, but I would mention the example of one witness who speaks of a serial rape of men, sexual abuse of men. He describes that it was horrific. There were about 170 detainees there. There were uniformed men who called out eight of the detainees, fathers and sons. Our witness was not with his father, so they took his uncle. And they forced them to climb onto the stage and to strip. Then they forced them to do sexual abuse of various kinds. Afterwards, the detainees were forced to bite off each other's penises, and all this was under the control of men in uniform on the stage. And when they found that three detainees did not fulfil [sic] their assignment, they were sentenced to death.⁸³

The ICTY was the first international court to bring sexual

⁸³ *Id.* at 17433-34.

violence against males to the forefront of its trials.⁸⁴ However, during the trials at the ICTY, male sexual violence was not viewed as sexual abuse, but was categorized as torture or abuse.⁸⁵

ii. ICTR

The ICTR first declared that rape could be an act of genocide in the case of *Akayesu*.⁸⁶ Rape was defined as a “physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”⁸⁷ Further:

Sexual violence, which includes

⁸⁴ *Landmark Cases: Duško Tadić: first-ever trial for sexual violence against men*, INT’L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/features/crimes-sexual-violence/landmark-cases> (last visited Apr. 29, 2018); see also Amrita Kapur & Kelli Muddell, *When No One Calls It Rape: Addressing Sexual Violence Against Men and Boys*, INT’L CTR. TRANSITIONAL JUST. (Dec. 8, 2016), <https://www.ictj.org/publication/sexual-violence-men-boys> (“International and hybrid tribunals have similarly failed when it comes to the characterization of sexual violence as such when committed against men. The International Criminal Tribunal for Rwanda, the International Criminal Court, and the Special Court for Sierra Leone each failed in varying ways to explicitly recognize the sexual dimension of various forms of violence committed against men, instead opting to characterize such acts exclusively as torture or cruel or inhumane treatment. Only the International Criminal Tribunal for the former Yugoslavia has made nominally greater progress in identifying forced fellatio between two brothers as rape and hearing evidence of other acts of a sexual nature committed against men.”); Wynne Russell, *Sexual Violence Against Men and Boys*, 27 FORCED MIGRATION REV. 22, <http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/FMRpdfs/FMR27/12.pdf> (last visited Apr. 29, 2018).

⁸⁵ Renata Čuk, *Sexual Violence Against Men in Armed Conflicts*, MIROVNA AKADEMIJA (Nov. 22, 2011), http://mirovna-akademija.org/rma/index.php?option=com_content&view=article&id=247:sexual-violence&catid=34:gender&Itemid=134&lang=en.

⁸⁶ *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, ¶¶ 727-733 (Sept. 2, 1998), <http://unictr.unmict.org/sites/unictr.org/files/case-documents/ict96-4/trial-judgements/en/980902.pdf>.

⁸⁷ *Id.* ¶ 598.

rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive. This act must be committed: a) as part of a wide spread or systematic attack; b) on a civilian population; c) on certain catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds.⁸⁸

In *Akayesu*, the ICTR declared that rape was genocide because it found that Tutsi women were targeted for sexual abuse and mutilation.⁸⁹ Although the Court used the testimony of women to come to its conclusion, it can easily be applied to male rape victims of conflict and post-conflict. Male victims of sexual violence have expressed disinterest in procreating with their spouses, leading to the decline of marriages within an ethnic group and the birth of children.⁹⁰ Of course, however, this will not always be the case. A court would need to find whether it was the perpetrators' intent to prevent males from procreating, thereby preventing the birth of more people of a particular group. If intent can be established, a court would find genocidal intent.

F. *Reception of Male Rape Victims by Nongovernmental International Organizations*

Since the definition and stories of rape in the ICTY and the ICTR, there have not been many changes in the attention given to male victims of sexual violence. An organization from Makerere University School of Law in Uganda, the Refugee Law Project,

⁸⁸ *Id.*

⁸⁹ *Id.* ¶ 731-34.

⁹⁰ Storr, *supra* note 8 (noting man who is unable to have sex with wife); Allan Ngari, *Stigma, shame and destroyed livelihoods are the repercussions of sexual violence against boys and men in conflict situations*, INST. SEC. STUD. (June 20, 2016), <https://issafrica.org/iss-today/male-victims-of-sexual-violence-wars-silent-sufferers> (“Victims are likely to develop an aversion to healthy sexual relations with their spouses . . .”).

conducts many programs addressing sexual violence to its refugee and migrant population.⁹¹ Through this program, male rape victims have been able to confront their traumas.

Those who work for the Refugee Law Project notice first-hand how the international community, the United Nations, and African governments fail to acknowledge male rape victims. In fact, the United Nations and many of the non-profit organizations (“NGOs”) turn males away when they seek help because they only believe that females are in need and, therefore, are trained to help women.⁹² A counselor of the Refugee Law Project has stated that male rape victims are “despised” by the United Nations and the NGOs.⁹³ Out of 4,076 international NGOs that address rape during conflict, only three percent acknowledge male rape victims, “typically as a passing reference.”⁹⁴ The director of the Refugee Law Project, Chris Dolan, stated that one of his donors, Dutch Oxfam, threatened to discontinue funding if seventy percent of the victims aided were not female.⁹⁵ He also mentioned the attempt by international organizations to prevent him from screening a movie he created about male rape.⁹⁶

The fear that many organizations have is that if society were to start acknowledging male rape, it would turn attention away from female victims, thereby allocating more resources to a notion they never considered to be a possibility.⁹⁷ However, this is

⁹¹ See generally Storr, *supra* note 8; REFUGEE LAW PROJECT, MALE SURVIVORS OF SEXUAL VIOLENCE IN KAMPALA DEMAND FOR BETTER SERVICES, 8 (2014), http://www.refugeelawproject.org/files/others/Male_Survivors_of_Sexual_Violence_in_Kampala_Demand_for_Better_Services.pdf [hereinafter REFUGEE LAW PROJECT].

⁹² Storr, *supra* note 8.

⁹³ See *id.*; see also Katie Nguyen, *Powerful myths silence male victims of rape in war*, REUTERS (May 15, 2014), <http://news.trust.org/item/20140515154437-het27>.

⁹⁴ Stemple, *supra* note 2, at 612.

⁹⁵ Storr, *supra* note 8.

⁹⁶ *Id.*

⁹⁷ *Id.*

an inaccurate assumption. The number of male rape victims is small in comparison to the number of female rape victims.⁹⁸ The allocation of resources to help both genders during conflict or post-conflict will help society understand that sexual violence affects both genders, not just one.

G. LGBT Rights in the DRC

In previous years, homosexuality was hardly discussed in African society. Today, however, the discussion has become more prominent due to the LGBT movement in Western countries.⁹⁹ This has resulted in a negative reaction to homosexuality in African communities.¹⁰⁰ Many African societies believe that homosexuality is a concept promulgated by the West.¹⁰¹ This notion was further disseminated when U.S. President Barack Obama traveled to Kenya to have a joint conference with President Uhuru Kenyatta and spoke of LGBT rights in Kenya.¹⁰²

In December of 2013, following Uganda's Anti-Homosexuality Bill, Parti Travailleiste Congolais Member of Parliament Steve Mbikayi introduced a bill that criminalizes homosexuality and transgender.¹⁰³ The bill stated that those who have been convicted of homosexuality shall go to prison for three to five years and be fined, whereas those who are transgender shall

⁹⁸ Johnson et al., *supra* note 6 (noting statistics of males raped in eastern DRC compared to females).

⁹⁹ Jana Ašenbrennerová, *Abuse of Congo's LGBT Community Puts US Supreme Court Ruling in Perspective (PHOTOS)*, PRI (July 2, 2015, 7:00 PM), <https://www.pri.org/stories/2015-07-02/abuse-congos-lgbt-community-puts-us-supreme-court-ruling-perspective-photos>.

¹⁰⁰ See Lucy Westcott, *Kenyan Leaders Respond to Obama's Support for LGBT Rights*, NEWSWEEK (Jul. 27, 2015, 6:01 PM), <http://www.newsweek.com/kenyan-leaders-respond-obamas-support-lgbt-rights-357563>.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Natasha Barsotti, *Congolese MP seeks to drum up support for anti-gay bill*, XTRA (Mar. 12, 2014, 2:42 PM), <https://www.dailyxtra.com/congolese-mp-seeks-to-drum-up-support-for-anti-gay-bill-59029>.

go to prison for three to twelve years and be fined.¹⁰⁴ However, further research about the bill suggests that it was never passed, as there are no articles that mention it after its introduction by Mbikayi to Parliament.

Although homosexuality is not illegal in the DRC, societal views vary.¹⁰⁵ Some homosexuals are well-received by society, whereas others are arrested, raped, and stigmatized.¹⁰⁶ Notably, in the DRC Constitution, marriage between opposite sexes is permitted, but not marriage between same-sex couples.¹⁰⁷

LGBT activists and homosexuals have reported the abuse that they suffer at the hands of government officials and members of their society.¹⁰⁸ Homosexuals, after having their sexual orientation disclosed by a member of society or having disclosed it themselves, are immediately rejected by their families, forced to quit their studies (as they no longer have the financial support to pay for their books), forced to live on the streets, and as a result, resort to a life of prostitution.¹⁰⁹ For homosexuals, the price of disclosing their sexual orientation may result in jail or being sentenced to punitive rape.¹¹⁰ An LGBT activist, who worked for a nongovernmental organization for the promotion of human rights of LGBT individuals, reported having been jailed for four days for

¹⁰⁴ *Id.*

¹⁰⁵ AFP, *Case Study: Being a gay woman in DRC and facing fears of 'punitive' rape*, THEJOURNAL.IE (May 24, 2014), <http://www.thejournal.ie/gay-rights-congo-1478144-May2014/>; see Andrew Potts, *Congolese MP pushing to outlaw homosexuals and transgender people*, GAY STAR NEWS (Mar. 12, 2014), <http://www.gaystarnews.com/article/congolese-mp-pushing-outlaw-homosexuals-and-transgender-people120314/#gs.MOemDE4>.

¹⁰⁶ AFP, *supra* note 105.

¹⁰⁷ CONSTITUTION DE LA RÉPUBLIQUE DÉMOCRATIQUE DU CONGO [CONST. OF THE DEM. REP. OF THE CONGO] Feb. 18, 2006, art. 40 (Congo), <http://www.wipo.int/edocs/lexdocs/laws/fr/cd/cd001fr.pdf> [hereinafter Const. of Congo].

¹⁰⁸ Ašenbrennerová, *supra* note 99.

¹⁰⁹ See *id.*; AFP, *supra* note 105.

¹¹⁰ See AFP, *supra* note 105.

“promoting homosexuality.”¹¹¹ While in jail, he was beaten and tortured by the police, then beaten and raped by inmates while a police officer watched.¹¹² Upon his release from jail, he had to seek medical treatment.¹¹³

These articles only reflect what happens to homosexuals in the DRC—but what about male victims of sexual violence? The men are treated the same way that homosexual men are because they are perceived to be homosexual. They hide the violence they endured, often out of fear of being rejected by their families and punished by their society.¹¹⁴ Luckily for the LBGT activist above, he was able to seek medical treatment for his injuries. In the Congo, however, sex is seen as something that is consensual between the two parties, unless it goes against the Criminal Code. So a male who has been a victim of sexual violence will refuse to go to the hospital for his injuries out of fear of being mocked or refused treatment because the sex is deemed consensual.

H. LGBT Rights in Uganda

Homosexuality has been illegal in Uganda since the 1950s.¹¹⁵ If one is found guilty of homosexual acts, he or she is to be sentenced to life imprisonment or seven years’ imprisonment.¹¹⁶ In 2009, the Anti-Homosexuality Bill was introduced to Uganda’s

¹¹¹ *Congo: LGBT activists arrested, beaten, released*, ERASING 76 CRIMES (May 22, 2013), <https://76crimes.com/2013/05/22/congo-lgbt-activists-arrested-beaten-released-update/>.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Storr, *supra* note 8.

¹¹⁵ See Uganda Penal Code Act §§ 145, 148 (1950), http://www.wipo.int/wipolex/en/text.jsp?file_id=170005.

¹¹⁶ See *id.* (The determining factor for the length of a prison sentence in this case is whether homosexual acts are “unnatural offences” or “indecent practices.” If the acts are “unnatural,” then one is subject to life imprisonment. However, if the acts are considered “indecent,” then the sentence is seven years’ imprisonment. Also, if the homosexual acts are an attempt to commit “unnatural offences,” there is a seven-year prison sentence.)

Parliament by Member of Parliament David Bahati.¹¹⁷ It made consensual homosexual activities punishable by death.¹¹⁸ The bill aims to imprison those who promote homosexuality, or fail to report anyone who may be homosexual, or those who support the human rights of homosexuals.¹¹⁹ This bill was passed in response to the arrival of Evangelical Christian Americans preaching about the “consequences” of homosexuality in the African culture, such as the decline of the family structure, moral corruption of personal values, and rape of children.¹²⁰ And in a conservative society where family values are held in high regard, many Ugandans deem homosexuality to be an attack on their way of life.

In early 2010, President Museveni stated that he would rethink the bill prior to it being voted upon in Parliament, as a result of the outcry by international donor governments.¹²¹ In 2013, the law was passed, but required the signature of President Museveni in order to take effect.¹²² In February of 2014, President Museveni signed the law.¹²³ The death penalty was removed to

¹¹⁷ *Uganda: ‘Anti-Homosexuality’ Bill Threatens Liberties and Human Rights Defenders*, HUM. RTS. WATCH (Oct. 15, 2009, 2:00 PM), <https://www.hrw.org/news/2009/10/15/uganda-anti-homosexuality-bill-threatens-liberties-and-human-rights-defenders>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See Jeffrey Gettleman, *Americans’ Role Seen in Uganda Anti-Gay Push*, N.Y. TIMES (Jan. 3, 2010), <http://www.nytimes.com/2010/01/04/world/africa/04uganda.html>.

¹²¹ Xan Rice, *Uganda Rows Back on Draconian Anti-Gay Law After Western Outrage*, THE GUARDIAN (Jan. 13, 2010, 7:10 PM), <https://www.theguardian.com/world/2010/jan/14/uganda-backpedals-on-gay-law>.

¹²² Associated Press in Kampala, *Uganda Passes Draconian Anti-Gay Law*, THE GUARDIAN (Dec. 20, 2013), <https://www.theguardian.com/world/2013/dec/20/uganda-anti-gay-law-life-imprisonment>.

¹²³ Amy Fallon, *Uganda politicians celebrate passing of anti-gay laws*, THE GUARDIAN (Feb. 24, 2014, 14:23 EST), <https://www.theguardian.com/world/2014/feb/24/uganda-president-signs-anti-gay-laws>.

make the law appear less harsh.¹²⁴ However, the law imposes life imprisonment for “aggravated homosexuality.”¹²⁵ It further prevents homosexuals from acquiring housing and possibly HIV treatment, as seeking HIV counseling may be seen as “promoting homosexuality.”¹²⁶

In August of 2014, the law was deemed unconstitutional by Uganda’s Constitutional Court.¹²⁷ It reasoned that the law was passed without the requisite quorum and was therefore illegal.¹²⁸ Those in Parliament who were against the ruling of the Court began drafting a new bill that would conform to the Court’s reasoning.¹²⁹ The new draft focused more on the “promotion” of homosexuality.¹³⁰ A gay rights activist noted that it could affect heterosexuals and homosexuals.¹³¹ He illustrated that a news station reporting a story on homosexuality can be seen as promoting it.¹³² “[It] also outlaws ‘funding for purposes of promoting unnatural sexual practices’ and ‘exhibiting unnatural sexual practices,’ and deems consent invalid as a defence.”¹³³

In November of 2015, Uganda passed the new Anti-Homosexuality Bill, which bans nongovernmental organizations

¹²⁴ Gregory Warner, *Uganda Passes Anti-Gay Bill That Includes Life in Prison*, (NPR radio broadcast Dec. 20, 2013, 4:01 PM EST), <http://www.npr.org/sections/parallels/2013/12/20/255825383/uganda-passes-anti-gay-bill-that-includes-life-in-prison>.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Uganda court annuls anti-homosexuality law*, BBC NEWS (Aug. 1, 2014), <http://www.bbc.com/news/world-africa-28605400>.

¹²⁸ *Id.*

¹²⁹ Chris Johnston, *Uganda Drafts New Anti-Gay Laws*, THE GUARDIAN (Nov. 8, 2014, 8:43 AM EST), <https://www.theguardian.com/world/2014/nov/08/uganda-drafts-anti-gay-laws-prison-promotion-homosexuality>.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

from providing help to LGBTI members.¹³⁴ It further prevents foreign nongovernmental organizations from commenting or becoming involved in the nation's political affairs.¹³⁵

Since the passage of both bills, and the striking of one, there has been an increase in violence against the LGBT community.¹³⁶ In May of 2014, 162 cases were reported, compared to eight in 2013 and nineteen in 2012.¹³⁷ Between May of 2014 and December 31, 2015, there have been 264 reports of human rights abuses against LGBT Ugandans.¹³⁸

I. Connection Between Anti-Homosexuality Laws and the Prevention of Medical Treatment

Like females, male rape victims suffer irreparable damage as a result of the violence they experienced. Males have reported being gang raped by men who have formed a queue, waiting patiently to rape them; having to perform oral sex to a queue of soldiers; being forced to penetrate holes in banana trees that run with acidic sap; sitting with their genitals over a fire; having objects inserted into their recta, such as screwdrivers and sticks; their penises being beaten with sticks; or being forced to drag rocks from their penises.¹³⁹ Others have stated that they have seen victims die days after being raped as a result of their injuries.¹⁴⁰

These reports come from the victims that the Refugee Law

¹³⁴ Joe Morgan, *Uganda passes new anti-gay law: Gay Rights Activism Could Lead to Four to Eight Years in Prison*, GAY STAR NEWS (Nov. 26, 2015), <http://www.gaystarnews.com/article/uganda-passes-new-anti-gay-law/#gs.wN=gHvQ>.

¹³⁵ *Id.*

¹³⁶ Michael K. Lavers, *Report: Anti-LGBT persecution increased under Uganda law*, WASH. BLADE (Apr. 22, 2016, 4:00 AM), <http://www.washingtonblade.com/2016/04/22/report-anti-lgbt-persecution-increased-under-uganda-law/>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Storr, *supra* note 8.

¹⁴⁰ *Id.*

Project has helped over the years. The Refugee Law Project, which is the leading organization in the fight for justice of male victims of sexual violence, helps male victims from various countries in Africa, such as Burundi, Ethiopia, and Eritrea; but the majority of male victims that it aids are from the DRC.¹⁴¹ Male victims currently residing in Uganda are not likely to tell a physician the problems that are truly plaguing them.¹⁴² They would usually state that there is a problem with their stomach or their back, out of fear of being turned away from the doctor if they were to state that they have rectal pain.¹⁴³ If they do share with the doctor their ailments, the doctor will be rude to them, lack the skills necessary to handle male rape victims, or both.¹⁴⁴ Frequently, these males bleed profusely from their anus and must constantly wear a pad.¹⁴⁵ Furthermore, they can only eat soft foods, such as bananas and porridge, because passing bowels can exacerbate the rectal trauma.¹⁴⁶ These foods are too expensive for the males to afford, thereby worsening their injuries.¹⁴⁷ Those who work for the organization state that they can tell when their client was a victim of rape because he would generally sit on one buttock.¹⁴⁸

Despite how difficult it was for the males to admit that they were victims, they were willing to seek aid with the Refugee Law Project as they knew that they would not be judged.¹⁴⁹ However, with the passage of the Anti-Homosexuality Bill, it is nearly impossible for Ugandan males to seek aid. Under the bill, going to a doctor or a nongovernmental organization, such as the Refugee Law Project, can be seen as the promotion of homosexuality.¹⁵⁰ It

¹⁴¹ Natabaalo, *supra* note 64.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ REFUGEE LAW PROJECT, *supra* note 91, at 5-6.

¹⁴⁵ Natabaalo, *supra* note 64.

¹⁴⁶ Storr, *supra* note 8.

¹⁴⁷ *Id.*; REFUGEE LAW PROJECT, *supra* note 91, at 6.

¹⁴⁸ *See generally* Storr, *supra* note 8.

¹⁴⁹ *Home*, REFUGEE LAW PROJECT, <https://www.refugeelawproject.org> (last visited Apr. 29, 2018).

¹⁵⁰ REFUGEE LAW PROJECT, *supra* note 91, at 7.

prevents those who are homosexuals, rape victims, or both from seeking aid for their injuries.¹⁵¹ The Refugee Law Project released a report which stated that “[t]he Anti-homosexuality Bill . . . has posed a threat to the members of the group who have proposed suspending community activities for fear of being viewed and labeled as homosexuals.”¹⁵² The report continued to state that “[t]he Anti-homosexuality Bill ha[s] not only reinforced homophobia[,] but also heightened xenophobia.”¹⁵³ Moreover, the majority of males seeking aid from the Refugee Law Project are not homosexuals, but heterosexuals. The lack of effective medical treatment and anti-homosexual sentiment can result in the deaths of men—both from the attacks by those who are homophobic, and from their injuries resulting from sexual violence.¹⁵⁴

PART II

The 1951 Convention and the 1967 Protocol are the leading treaties on refugee law.¹⁵⁵ They were passed in response to the refugee crisis in Europe (and elsewhere) after World War II.¹⁵⁶ The 1951 Convention and the 1967 Protocol have been ratified by many countries, which, in turn, have reformed their own immigration laws to be used as a supplement to them.¹⁵⁷ Under the 1951 Convention,

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*; see also Thom Senzee, *Uganda: Program for Male Rape Victims Threatened by Antigay Law*, THE ADVOC. (July 29, 2014, 11:49 AM), <http://www.advocate.com/world/2014/07/29/uganda-program-male-rape-victims-threatened-antigay-law>.

¹⁵⁴ Storr, *supra* note 8.

¹⁵⁵ See generally Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT'L L. 1 (1997).

¹⁵⁶ Paul Weis, *The Refugee Convention, 1951, The Travaux Préparatoires Analysed with a Commentary* 5, UNHCR, <http://www.unhcr.org/en-us/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html,%20and%20refer%20to%20bottom%20of%20page's%20introduction> (last visited Apr. 29, 2018).

¹⁵⁷ *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, UNHCR (Apr.

as amended by the 1967 Protocol, a refugee is defined as:

Any person who . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership [in] a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.¹⁵⁸

The amendment removed the limitation of acquiring refugee status, which required that only those who became refugees as a result of the events occurring before January 1, 1951 could be considered refugees.¹⁵⁹

A. *Ugandan Refugee Law*

In 1960, Uganda passed the Control of Alien Refugees Act.¹⁶⁰ It defined refugee as any person whom the Ministry of Internal Affairs declared to be a refugee, with various exceptions.¹⁶¹ It further states that refugees may be offered employment opportunities and are to be paid for such work at “the appropriate rate of wages prevailing in Uganda for the performance of similar work,”

2015), <http://www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>.

¹⁵⁸ The 1967 Protocol, *supra* note 12, art. I, § (2).

¹⁵⁹ *Id.*; Weis, *supra* note 156, at 5.

¹⁶⁰ Uganda: Control of Alien Refugees Act, Cap.64 of 1960, July 13, 1960, <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=544e48d84> [hereinafter Refugee Act of 1960].

¹⁶¹ *Id.* § 3(1).

with exceptions.¹⁶² Importantly, it prevents refugees from attaining Ugandan citizenship.¹⁶³

Under the Ugandan Citizenship and Immigration Control Act of 1990, which was not amended by the Refugee Act of 2006, in order to attain citizenship, one must have resided in the country for a number of years.¹⁶⁴ This law states that the residence requirement is not met if one was a refugee,¹⁶⁵ as the clock would not start until one has ceased being a refugee. This effectively leaves refugees in a state of limbo. They are neither permitted to become residents nor citizens.

Uganda passed the Refugees Act 2006 to conform its refugee law to be in accordance with the 1951 Convention Relating to the Status of Refugees, as amended by the 1967 Protocol.¹⁶⁶ This law adopted the refugee definition of the 1951 Convention and the 1967 Protocol, expanded it, and broadened the rights of refugees.¹⁶⁷ A person is a refugee if:

(a) [O]wing to a well-founded fear of being persecuted for reasons of race, sex, religion, nationality, membership of a particular social group or political opinion, that person is outside the country of his or her nationality and is unable, or owing to that fear, is unwilling to return to or avail himself or herself of the protection of that country;

(b) not having a nationality and being

¹⁶² *Id.* § 15.

¹⁶³ *Id.* § 18(2).

¹⁶⁴ Uganda Citizenship and Immigration Control Act, Cap. 66 of 1990, Aug. 21, 2009, § 16, <https://www.ulii.org/ug/legislation/consolidated-act/66>.

¹⁶⁵ *Id.* § 25.

¹⁶⁶ Refugees Act 2006, *supra* note 13.

¹⁶⁷ *Id.* § 4.

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outside the country of his or her former habitual residence owing to a well-founded fear of being persecuted for reasons of race, sex, religion, membership of a particular social group or political opinion, that person is unwilling or unable to return to the country of his or her former habitual residence;

(c) owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either a part or the whole of his or her country of origin or nationality, that person is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin or nationality;

(d) owing to a well-founded fear of persecution for failing to conform to gender discriminating practices, that person is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside the country of origin or nationality;

(e) that person is considered a refugee under any treaty obligation to which Uganda is a party, or any law in force at the commencement of this Act; or

(f) that person is a member of a class of persons declared to be refugees

under section 25 of this Act.¹⁶⁸

This definition contrasts with the refugee definition in the 1951 Convention and the 1967 Protocol because it lists “gender discriminating practices”¹⁶⁹ as a separate criterion for consideration as a refugee, whereas in the U.S., under the 1951 Convention and the 1967 Protocol, gender discrimination is interpreted to be a category under “membership of a particular social group.”¹⁷⁰ Furthermore, this definition also includes aspects of the Organization of African Unity (“OAU”) Convention,¹⁷¹ which is broader than the 1951 Convention and the 1967 Protocol, and has no nexus between serious harm and protected ground. The OAU Convention fails to define who may be a member of a particular social group, but states that it applies to all refugees regardless of “race, religion, nationality, membership of a particular social group, or political opinions.”¹⁷² Nevertheless, like Uganda’s Penal Code,¹⁷³ gender discrimination in the Refugees Act 2006 refers only to females, not males.¹⁷⁴

Moreover, the Refugees Act 2006 lists country conflict as a basis to seek refugee status.¹⁷⁵ It further provides that refugees cannot be extradited, expelled, or returned to a country from which they came or their origin, when there is a possibility they may face

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* § 4(d); *id.* § 2 (“[G]ender discriminating practices include strict and forced adherence to a dress code, obligatory pre-arranged marriages, physically harmful facial or genital mutilation, rape, domestic violence and other gender related negative activities.”).

¹⁷⁰ Matter of A-R-C-G-, 26 I. & N. Dec. 388, 389 (B.I.A. 2014) (noting that married women in Guatemala constituted membership in a particular social group); Matter of Kasinga, 21 I. & N. Dec. 357 (BIA 1996) (noting that Togolese women fleeing from female genital mutilation constituted membership in a particular social group).

¹⁷¹ Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S 45 [hereinafter OAU Convention].

¹⁷² *Id.* art. 4.

¹⁷³ See, e.g., Uganda: Penal Code Act, Cap. 120 of 1950, June 15, 1950, § 132, <http://www.wipo.int/wipolex/en/details.jsp?id=5241>.

¹⁷⁴ Refugees Act 2006, *supra* note 13.

¹⁷⁵ *Id.* § 4(c).

persecution on any of the protected grounds for seeking asylum status or where there will be a threat to their life or liberty.¹⁷⁶ In such a circumstance, the Minister must ensure that the person will be sent to another country of his or her choice.¹⁷⁷

B. U.S. Refugee Laws

The interpretation of U.S. immigration law has undergone significant change since the 1960s.¹⁷⁸ Although an extensive report can be provided on the myriad changes of the law, the focus of this section will be current immigration law and its expansion of the element “membership of a particular social group” in the recent case *Matter of A-R-C-G*.¹⁷⁹ The INA defines a refugee as:

[A]ny person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is [1] unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of [2] persecution or a well-founded fear of persecution on account of [3] race, religion, nationality, membership in a particular social group, or political opinion¹⁸⁰

Under the U.S. definition, persecution refers to either past

¹⁷⁶ *Id.* § 42(1)(a)-(b).

¹⁷⁷ *Id.* § 42(2).

¹⁷⁸ See generally Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984).

¹⁷⁹ *Matter of A-R-C-G*-, 26 I. & N. Dec. 388 (B.I.A. 2014).

¹⁸⁰ INA, *supra* note 14, § 101(a)(42)(A).

persecution, or a well-founded fear of future persecution.¹⁸¹ And, more recently, membership in a particular social group has expanded to include homosexuals and gendered violence.¹⁸² The focus of this Article will be on the two aforementioned elements—persecution and membership in a particular social group.

i. Persecution

Sexual violence is a form of persecution.¹⁸³ However, the U.S. government regards it as an issue that mainly plagues females.¹⁸⁴ The Department of State's Memorandum on Gender Related Asylum Claims portrays females as the sole victims, and provides the various techniques asylum officers may employ when adjudicating the asylum claims of females.¹⁸⁵

ii. Membership in a particular social group

The Board of Immigration Appeals (“BIA”) stated in *Matter of Acosta*,¹⁸⁶ that one can be persecuted on account of the social group that one is a part of based upon a common characteristic the group shares.¹⁸⁷ This characteristic must be immutable or so fundamental to the individual's identity or conscience that the person should not be required to change it.¹⁸⁸ Over time, the holding in

¹⁸¹ *Id.*; Establishing Asylum Eligibility, 8 C.F.R. § 208.13(b)(1)-(2) (2018).

¹⁸² *Matter of Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996); *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990).

¹⁸³ Memorandum from U.S. Dep't of State, on Considerations for Asylum Officers: Adjudicating Asylum Claims from Women, pt. II, § a (May 26, 1995) (on file with the U.S. Department of State), <http://www.state.gov/s/l/65633.htm> [hereinafter State Department Memo].

¹⁸⁴ See generally U.S. AGENCY FOR INT'L DEV., THE UNITED STATES NATIONAL ACTION PLAN ON WOMEN, PEACE, AND SECURITY (June 2016), <https://www.usaid.gov/sites/default/files/documents/1868/National%20Action%20Plan%20on%20Women%2C%20Peace%2C%20and%20Security.pdf>.

¹⁸⁵ See State Department Memo, *supra* note 183.

¹⁸⁶ *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) *overruled in part* by *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

Matter of Acosta was interpreted to include gender-based asylum claims,¹⁸⁹ and *Matter of Kasinga* was interpreted as such.¹⁹⁰ Prior to *Matter of Kasinga*, a woman could not receive asylum on the basis of gender-related acts. Recently, in the case *Matter of A-R-C-G-*, *Matter of Acosta*'s interpretation was extended to gender-based asylum claims in domestic violence settings.¹⁹¹ However, prior to *Matter of A-R-C-G-*, it was very difficult for females to seek asylum status based solely on gender in domestic violence settings.

For instance, in *Gomez v. INS*,¹⁹² the Second Circuit held that “[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group.”¹⁹³ The Third Circuit, on the other hand, took a contrary position in *Fatin v. INS*.¹⁹⁴ It stated that gender could be a basis for seeking asylum under “membership of a particular social group.”¹⁹⁵ However, in *Fatin*, the woman’s claim was dismissed because she could not prove that she would be persecuted solely for being a woman.¹⁹⁶ She reasoned that because she was part of a group of women who failed to conform to society’s gender-related

¹⁸⁹ *Membership in a Particular Social Group*, USCIS, <https://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-62325/0-0-0-64099/0-0-0-64242/0-0-0-64298.html> (last visited Apr. 29, 2018) (noting that “[g]ender is clearly [] an immutable trait, is listed as such in *Matter of Acosta*, and is incorporated in this rule.”); DOMESTIC VIOLENCE-BASED ASYLUM CLAIMS: CGRS PRACTICE ADVISORY 3 (Ctr. Gender & Refugees Stud. 2014), [https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Domestic%20Violence-Based%20Asylum%20Claims%20\(Sept%2012,%202014\).pdf](https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Domestic%20Violence-Based%20Asylum%20Claims%20(Sept%2012,%202014).pdf) [hereinafter DOMESTIC VIOLENCE-BASED ASYLUM CLAIMS] (noting that the reasoning of *Matter of Acosta* was used to adjudicate *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996), wherein the Court granted asylum to a Togolese woman fleeing from female genital mutilation).

¹⁹⁰ *Matter of Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996); DOMESTIC VIOLENCE-BASED ASYLUM CLAIMS, *supra* note 189, at 2.

¹⁹¹ *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 389 (B.I.A. 2014).

¹⁹² *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991).

¹⁹³ *Id.* at 664.

¹⁹⁴ *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993).

¹⁹⁵ *Id.* at 1240.

¹⁹⁶ *Id.* at 1241.

beliefs of women, she was at risk of persecution.¹⁹⁷ However, she had not proved that she was at risk of persecution, because she stated that she “would try to avoid” as much as possible those parts of the strictures of Islam to which she objected.¹⁹⁸ But the Court did find that the woman’s feminist beliefs were “so fundamental to [her] identity” that she should not be forced to alter them.¹⁹⁹

In *Matter of A-R-C-G-*, the BIA found that married women in Guatemala, who could not escape their domestic violence relationship, constitute a particular social group.²⁰⁰ The BIA reasoned “that an applicant seeking asylum based on his or her membership in a ‘particular social group’ must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.”²⁰¹ Element (1) derives from *Matter Acosta*; element (2) clarifies that “not every ‘immutable characteristic’ is sufficiently precise to define a particular social group;”²⁰² and element (3) states that the group must be perceived to be a group by its society.²⁰³

In *Matter of A-R-C-G-*, the BIA found that element (1) was met by relying upon *Matter of Acosta*: gender is an immutable characteristic as it is something that cannot be changed.²⁰⁴ Element (2) was also met, as the BIA found that using terms such as “married” and “women” were words with “commonly accepted

¹⁹⁷ *Id.* at 1241-42.

¹⁹⁸ *Id.* at 1241.

¹⁹⁹ *Id.* (citing *Matter of Acosta*, 19 I. & N. Dec. 211, 234 (B.I.A. 1985)).

²⁰⁰ *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 388-89 (B.I.A. 2014).

²⁰¹ *Id.* at 392 (citing *Matter of Acosta*, 19 I. & N. Dec. at 233-34; *Matter of W-G-R-*, 26 I. & N. Dec. 208, 214 (B.I.A. 2014); *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 239 (B.I.A. 2014)).

²⁰² *Id.* (citing *Matter of M-E-V-G-*, 26 I. & N. Dec. at 239).

²⁰³ *Id.* (citing to *Matter of W-G-R-*, 26 I. & N. Dec. at 216).

²⁰⁴ *Id.* (citing *Matter of Acosta*, 19 I. & N. Dec. at 233; *Matter of W-G-R-*, 26 I. & N. Dec. at 213).

definitions in Guatemalan society.”²⁰⁵ Finally, element (3) was satisfied by looking at the social status of married women in a domestic violence relationship in Guatemala.²⁰⁶

In applying the same reasoning of *Matter of A-R-C-G-* to male victims of sexual violence, one would find that male victims of sexual violence are victims of post-rape developments due to the imposition of homosexual status upon heterosexual males, and, therefore, should also constitute a particular social group. In 1990, the BIA accepted, in principle, the notion of attributed membership in a social group.²⁰⁷ Element (1) is met under the *Matter of Acosta* standard as male is a gender. Moreover, it is an immutable characteristic that one should not be required to change. Element (2) is similarly met as male in DRC and Ugandan societies takes on a traditional definition. The male is known for safe guarding his family, being its protector.²⁰⁸ Furthermore, he is known as the financial supporter, whereas the females take on domestic roles, such as child bearing and cooking.²⁰⁹ In essence, being a male is commonly accepted in DRC and Ugandan societies as being the dominant one.²¹⁰ Element (3) can be ascertained by looking at the social status of male victims of sexual violence in the DRC and Uganda and the status of homosexuality attributed to them as a result of the abuse they endured.

A court would likely find that this particular group of males, on account of post-rape developments, has been denied medical

²⁰⁵ *Matter of A-R-C-G-*, 26 I. & N. Dec. at 388, 393 (B.I.A. 2014) (citing *Matter of M-E-V-G-*, 26 I. & N. Dec. at 239; *Matter of W-G-R-*, 26 I. & N. Dec. at 214).

²⁰⁶ *Id.* at 394.

²⁰⁷ See *Pozos v. Gonzales*, 141 F. App'x 629 (9th Cir. 2005); see also *Amanfi v. Ashcroft*, 328 F.3d 719, 730 (3d Cir. 2003) (noting that imputed homosexuality constitutes membership of a particular social group).

²⁰⁸ See generally DESIREE LWAMBO, “BEFORE THE WAR, I WAS A MAN”: MEN AND MASCULINITIES IN EASTERN DR CONGO (2011), http://learn.tearfund.org/~media/files/tilz/topics/gender/heal_africa_masculinity_report_zwanck_sept_2011.pdf.

²⁰⁹ See *id.*

²¹⁰ See *id.*

treatment from both internal and external organizations due to stringent anti-homosexuality laws, harsh anti-homosexuality sentiment in daily life, and lack of awareness of male victims of sexual violence. They are unable to seek medical treatment because a doctor may refuse to treat their anus and decry them as homosexuals.²¹¹ Homosexuals and presumed homosexuals are brutally beaten, raped, and tortured, by both members of the community and the police.²¹² The government continues to turn a blind eye on these crimes.²¹³

C. *Asylum for Medical Reasons*

As previously stated, whether in the DRC or Uganda, it is very difficult for males to seek medical aid out of fear of being perceived as homosexual. Nongovernmental organizations are neither equipped, trained, nor interested in helping male victims of sexual violence.²¹⁴ As a result, some males are forced to suffer in silence and have died due to a lack of medical treatment.²¹⁵ As such, male victims of sexual violence should be able to seek asylum due to a lack of medical treatment.

In the U.S., there is not much case law that can be used to support the notion that male victims of sexual violence should be allowed to seek asylum in the U.S. on account of medical treatment. In fact, seeking asylum on account of lack of access to medical treatment does not exist under U.S. law. However, one case in particular, *Karouni v. Gonzales*, can arguably signify asylum

²¹¹ WOMEN'S REFUGEE COMM'N, MEAN STREETS: IDENTIFYING AND RESPONDING TO URBAN REFUGEES' RISKS OF GENDER-BASED VIOLENCE 126-28 (2016), <https://www.womensrefugeecommission.org/gbv/resources/1272-mean-streets>.

²¹² See, e.g., Peter Walker, *Gay men 'tortured and sodomised' by police in Uganda to 'prove they are gay,'* INDEPENDENT (Nov. 3, 2016, 4:58 PM), <https://www.independent.co.uk/news/world/africa/uganda-gay-men-tortured-police-sodomised-beaten-a7395856.html>.

²¹³ See *id.*

²¹⁴ Storr, *supra* note 8.

²¹⁵ Murdock, *supra* note 26.

status due to lack of medical treatment.²¹⁶ The applicant, Karouni, was a homosexual male from a prominent Shiite Lebanese family.²¹⁷ He was from Tyre, Lebanon, which was controlled by the Hezbollah.²¹⁸ The Hezbollah instituted Sharia law, which condones the killing of homosexuals.²¹⁹

One day, the town's newspaper reported the recent arrests by the Lebanese police of several young males for engaging in homosexual acts.²²⁰ Karouni's cousin, Khalil, was discovered by the family as being homosexual and was ostracized.²²¹ A few months later, the Hezbollah came to Khalil's house and shot him in the anus.²²² Khalil survived the attack, but was killed two years later by the Hezbollah.²²³ Karouni also reported that two armed men in militia garb appeared at his home and questioned him about the names of other homosexuals.²²⁴ The men left his apartment after a neighbor intervened.²²⁵ Karouni's partner was arrested and beaten by Amal militiamen, never to be seen again.²²⁶ Upon the arrest of one of Karouni's friends on charges of homosexuality, who, upon being beaten, revealed the sexual orientation of his friends to the Hezbollah, Karouni's friends were all arrested, beaten, and/or killed due to being homosexual.²²⁷

Karouni also had a letter from a Lebanese doctor stating, "[his] homosexuality is no secret among certain circles in Lebanon."²²⁸ Moreover, Karouni was fearful of being persecuted in

²¹⁶ Karouni v. Gonzales, 399 F.3d 1163 (9th Cir. 2005).

²¹⁷ *Id.* at 1169.

²¹⁸ *Id.* at 1166.

²¹⁹ *Id.* at 1166-67.

²²⁰ *Id.* at 1167.

²²¹ *Id.* at 1168.

²²² Karouni v. Gonzales, 399 F.3d 1163, 1168 (9th Cir. 2005).

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Karouni v. Gonzales, 399 F.3d 1163, 1169 (9th Cir. 2005).

Lebanon because he has AIDS.²²⁹ As an AIDS carrier, Karouni was unable to seek treatment because doing so would confirm suspicions of his homosexuality.²³⁰ Furthermore, in Lebanon, AIDS symbolized punishment from God and that one is homosexual.²³¹

Although the Court ultimately granted Karouni asylum, due to the various grievous reasons for which he could be persecuted by the Hezbollah—if all of the mitigating factors were not there (such as his encounters with the militiamen), and only his inability to seek medical treatment were left—the Court would likely find that he has presented a persuasive argument to be granted asylum. Preventing an AIDS carrier from seeking treatment for an incurable disease is preventing him from engaging in a basic human right—life, by subjecting him to a horrible death. This would support the notion that he should be able to seek medical treatment on account of his lack of access to medical treatment. However, this argument would be much stronger if his medical circumstances were direr, *i.e.* if he had an advanced stage of AIDS and rectal pain (be it from rape, sexual intercourse, or a medical condition), and societal norms prevented him from accessing medical treatment. As with male Congolese refugees in Uganda, this would demonstrate that not only could Karouni not go to the doctor and get treated because he is an AIDS carrier, but also because seeking treatment for his rectum may cause others to assume that the pain resulted from homosexual activities.

In 1997, in the United Kingdom, the European Court of Human Rights allowed for a claimant's status to be granted due to lack of medical treatment. In *D. v. The United Kingdom*,²³² a man from St. Kitts, who was previously held in an English prison on drug-related charges, was dying of AIDS and was to be deported

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *D. v. United Kingdom*, 30240/96, Eur. Ct. H.R. (1997), <http://hudoc.echr.coe.int/eng?i=001-58035>.

after having served his sentence.²³³ He challenged his removal by arguing that prevention of attaining medical treatment by deportation would be in violation of Article 3 of the European Convention on Human Rights,²³⁴ which prohibits torture, inhumane, or degrading treatment or punishment.²³⁵ The Court agreed. It said that for him to be subjected to deportation without any family to care for him, no moral or social support, no probability of there being a bed for him at a hospital in his home country, in conjunction with the fact that he is in the latter stages of an incurable and terminal illness, would be effectively subjecting him to an inhumane death.²³⁶

D. v. The United Kingdom is an exceptional case, as many of the cases following it have resulted in the removal of a claimant on the basis of medical treatment.²³⁷ In *N. v. The United Kingdom*,²³⁸ the United Kingdom was once again faced with the decision of deporting an asylum seeker on the basis of medical treatment. N was a woman from Uganda who had been raped by members of the National Resistance Movement due to her affiliation with the Lord's Resistance Army.²³⁹ She learned that she had HIV when she was admitted to the hospital after falling ill.²⁴⁰ Initially, N was very ill, but with the help of medical treatment, she was able to slow the progression of the disease.²⁴¹ However, without the medical

²³³ *Id.* ¶ 7.

²³⁴ *Id.* ¶¶ 39-40; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Dec. 3, 1953), http://www.echr.coe.int/Documents/Convention_ENG.pdf [hereinafter European Convention on Human Rights].

²³⁵ European Convention on Human Rights, *supra* note 234, art. 3.

²³⁶ *D. v. The United Kingdom*, ¶¶ 51-53.

²³⁷ *See, e.g., Wasilewski v. Poland*, 32734/96, Eur. Ct. H.R. (1999), (holding that the Convention does not guarantee the right to any particular standard of medical service or the right to access to medical treatment in any particular country).

²³⁸ *N. v. The United Kingdom*, 26565/05, Eur. Ct. H.R. 227 (2008), http://www.echr.coe.int/Documents/Reports_Recueil_2008-III.pdf.

²³⁹ *Id.* ¶ 10.

²⁴⁰ *Id.* ¶ 9.

²⁴¹ *Id.* ¶ 11.

treatment, she would only have less than a year to live.²⁴² The Court held that although Ugandan medical treatment for HIV is expensive, unlike the plaintiff in *D. v. The United Kingdom*, she did have relatives in Uganda who would be able to care for her, and she was not near death.²⁴³ She would be near death only in the event she returned to Uganda. The Court reasoned that “[a]liens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical . . . assistance . . . provided by the expelling State.”²⁴⁴ It continued to reason that the reduction in “life expectancy . . . if [one] were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3.”²⁴⁵ It further provided that only in exceptional cases will it be possible that those who are suffering from severe medical illness be prevented from returning to a country where the medical treatment is inferior to that of the Contracting State.²⁴⁶ *D. v. United Kingdom* is an example of such an exception—where the plaintiff was near death and it was not guaranteed that he would receive medical treatment in his country.²⁴⁷

In a recent case, *GS (India) & Ors v. The Secretary of State for the Home Department*,²⁴⁸ the United Kingdom Court of Appeal once again upheld the reasoning in *D. v. The United Kingdom*, whose standards are hard to attain. Here, there were six defendants, each of whom was suffering from either an advanced stage of HIV or kidney failure.²⁴⁹ Their illnesses were not life-threatening.²⁵⁰ They were

²⁴² *Id.* ¶ 12.

²⁴³ *Id.* ¶ 50.

²⁴⁴ *N. v. The United Kingdom*, 26565/05, Eur. Ct. H.R. ¶ 42 (2008), (citing *D. v. The United Kingdom*).

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *GS (India) & Ors v. The Secretary of State for the Home Department* [2015] EWCA (Civ) 40, (appeals taken from Eng. & Wales) <http://www.refworld.org/docid/54e347174.html>.

²⁴⁹ *Id.* ¶ 1.

²⁵⁰ *Id.*

only to be deemed such once the medical treatment was discontinued. The Court held that each of the defendants' illnesses were not grave enough to prevent removal proceedings, as they did not meet the standard set out in *D. v. The United Kingdom*.²⁵¹

It is important to note that the English cases above are not asylum cases, but non-refoulement cases. Moreover, the issue in these cases is different from that in the American cases in that the law appears to emphasize protection rather than persecution when adjudicating claims under Article 3 of the European Convention on Human Rights, which prohibits torture, inhumane, or degrading treatment.²⁵² On the other hand, the American cases focus more on discrimination, which fits into the 1951 Convention and the 1967 Protocol definition of refugee. The English standard is indicative of a growing role where protection plays into refugee analysis.

D. Asylum on the Basis of Homosexuality

Homosexuality has only been a valid basis for seeking asylum relief in the United States since 1994, while in Uganda, it is still not a valid basis.²⁵³ In 1965, U.S. immigration laws were amended to exclude the "sexually deviant" from entering the U.S.²⁵⁴ In 1987, at the height of the HIV/AIDS epidemic, President Reagan banned those who were HIV-positive from entering the country, by placing HIV on the "dangerous, contagious diseases for excluding persons from the United States" list.²⁵⁵ This law further affected

²⁵¹ *Id.* ¶ 84.

²⁵² European Convention on Human Rights, *supra* note 234, art. 3.

²⁵³ In fact, LGBT Ugandans are seeking asylum in Western countries in order to escape persecution. *See Gays and Lesbians Seeking Asylum in U.S. May Find a Hard Road*, NPR (Feb. 26, 2014, 3:37 AM), <https://www.npr.org/sections/parallels/2014/02/26/282568084/gays-and-lesbians-seeking-asylum-in-u-s-may-find-a-hard-road>; *see also* LGBT, POL. ASYLUM USA, <http://www.politicalasylumusa.com/application-for-asylum/gay-lgbt/> (last visited Apr. 5, 2018).

²⁵⁴ LGBT Immigration Highlights, OUT 4 IMMIGR., <http://www.out4immigration.org/history.html> (last visited Apr. 5, 2016) [hereinafter *LGBT Immigration Highlights*].

²⁵⁵ *Id.*

homosexuals, as HIV was, at the time, prominent in the homosexual community.²⁵⁶ In 1990, the immigration laws were once again amended and removed the homosexuality ban.²⁵⁷ Later that year, in *Matter of Toboso-Alfonso*, the BIA ruled that homosexuals were a “particular social group.”²⁵⁸ In 1993, the HIV-ban became law and was listed in the National Institutes of Health Revitalization Act of 1993, which bars entry into the U.S. of persons who are HIV-positive.²⁵⁹ In 2009, this ban was lifted.²⁶⁰

The applicant in *Matter of Toboso-Alfonso* was from Cuba, and recounted to the Court that every two to three months for thirteen years he was called into the police bureau and held in confinement for several days because of his sexual orientation.²⁶¹ He was also forced to work in a labor camp for sixty days for having missed work.²⁶² He stated that this punishment would not have occurred if the person had been heterosexual.²⁶³ He further stated that upon going to work, there was an anti-homosexuality rally, where the hosts declared that all homosexuals in Cuba must leave and go to the U.S.²⁶⁴ Upon returning home, he found a notice tacked on his door informing him that he had to go to the U.S. or be imprisoned for four years.²⁶⁵ When the protestors in the neighborhood began attacking him, the police expedited his voyage to the U.S.²⁶⁶ The BIA found

²⁵⁶ See Jen Christensen, *AIDS in the 80s: The rise of a new civil rights movement*, CNN (June 1, 2016, 5:37 PM), <https://www.cnn.com/2016/04/14/health/aids-atlanta-emory-university-the-80s/index.html>.

²⁵⁷ *LGBT Immigration Highlights*, *supra* note 256.

²⁵⁸ *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 819-20 (B.I.A. 1990).

²⁵⁹ *LGBT Immigration Highlights*, *supra* note 256.

²⁶⁰ Julia Preston, *Obama Lifts a Ban on Entry Into U.S. by H.I.V.-Positive People*, N.Y. TIMES (Oct. 30, 2009), <http://www.nytimes.com/2009/10/31/us/politics/31travel.html>.

²⁶¹ *Matter of Toboso-Alfonso*, 20 I. & N. Dec. at 820-21.

²⁶² *Id.* at 821.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

that the treatment that he received in Cuba on account of his sexual orientation, not his sexual acts, permitted homosexuals to be a “particular social group.”²⁶⁷ On June 19, 1994, the Attorney General designated *Matter of Toboso-Alfonso* “as precedent in all proceedings involving the same issue or issues,” based on immutable characteristics.²⁶⁸

Over the years, appellate courts continued to accept homosexuality as a “particular social group;” but in a later case, *Kimumwe v. Gonzales*,²⁶⁹ the Eighth Circuit distinguished between one who is targeted for engaging in sexual misconduct,²⁷⁰ and one who is persecuted for being homosexual. In *Kimumwe v. Gonzales*, the sexual misconduct was rape, and the applicant was a Zimbabwean national who engaged in forcible homosexual acts with another male while attending college in Zimbabwe.²⁷¹ He was sent to jail for sodomy and sexual assault but was released due to a lack of evidence.²⁷² The Court found that this was not persecution because he was jailed on account of his sexual misconduct.²⁷³ The Court similarly found that by Kimumwe having “lured” another student to engage in homosexual activities in secondary school and being expelled, his punishment was not as a result of his homosexual status, but because it was illegal to engage in sexual activities while in school.²⁷⁴

Although Kimumwe further provided that he was once harassed by the local authorities who chased him and insulted him and was beaten by villagers, harassment does not rise to the level of persecution.²⁷⁵ The Court reasoned that persecution is a very strong

²⁶⁷ *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 822 (B.I.A. 1990).

²⁶⁸ Memorandum from Janet Reno, Attorney General, United States, to Mary Maguire Dunne, Acting Chair, Board of Immigration Appeals 1 (June 16, 1994) (on file with the Department of Justice).

²⁶⁹ *Kimumwe v. Gonzales*, 431 F.3d 319 (8th Cir. 2005).

²⁷⁰ *Id.* at 322 (noting the sexual misconduct was rape).

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Kimumwe v. Gonzales*, 431 F.3d 319, 322 (8th Cir. 2005).

word, and “[a]ctions by private parties are not attributable to the government, absent a showing that the harm is inflicted by persons that the government is unwilling or unable to control.”²⁷⁶ Furthermore, although the country has espoused anti-homosexual sentiment, to rise to the level of persecution, one must be subject to the “infliction or threat of death, torture, or injury to one’s person or freedom.”²⁷⁷ Contrary to that of *Kimumwe v. Gonzales*, the Court in *Karouni v. Gonzales* saw no difference between one who is persecuted on account of his sexual orientation as opposed to one who is persecuted for engaging in homosexual acts.²⁷⁸

Although the majority of male victims of sexual violence are not homosexual, but are perceived to be homosexual by their persecutors, they satisfy the refugee definition requiring persecution on account of membership in a particular social group. In *Amanfi v. Ashcroft*, the Ghanaian applicant engaged in homosexual acts in order to safeguard himself from being used in a human sacrifice.²⁷⁹ After being caught engaging in homosexual acts, he was further detained while already in the custody of “machos men.”²⁸⁰ He was beaten for a number of months (because he was perceived to be homosexual) until he was able to escape to his cousin’s home.²⁸¹ With her help, he was able to secure passage to the U.S. to go to Canada.²⁸² The Court found that his imputed status of being homosexual, although he did not identify as such, was reason enough to be found that his perception of being in the group made him a part of the group.²⁸³ The Court followed this reasoning in *Pozos v. Gonzales*,²⁸⁴ where a Mexican applicant was repeatedly beaten, tortured, and raped by a high-ranking government official on account

²⁷⁶ *Id.* at 322-23. It is important to note that the anti-homosexual sentiment in Zimbabwe does not rise to the level of anti-homosexual sentiment in Uganda.

²⁷⁷ *Id.* at 323 (citing *Salkeld v. Gonzales*, 420 F.3d 804, 808-09 (8th Cir. 2005)).

²⁷⁸ *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005).

²⁷⁹ *Amanfi v. Ashcroft*, 328 F.3d 719, 723 (3d Cir. 2003).

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.* at 730.

²⁸⁴ *Pozos v. Gonzales*, 141 F. App’x 629 (9th Cir. 2005).

of his perceived homosexuality.²⁸⁵ In fact, Pozos was not homosexual, and was diagnosed with sexual aversion disorder.²⁸⁶ The Court stated that there is “no . . . question that one can be eligible for asylum as a result of persecution he suffers on account of imputed homosexuality.”²⁸⁷

CONCLUSION

The exception carved out in *D. v. The United Kingdom*, and further explained in *N. v. The United Kingdom*, can be applied in the case of males seeking asylum due to lack of appropriate medical care—not solely as a reason for males to remain in the United States, but to arrive, as well. In *N. v. The United Kingdom*, the Court noted that not only must the claimant be on his deathbed, but expelling him from the country to a country with inferior medical treatment will result in inhumane treatment. If the U.S. were to apply the ruling of the above cases to male victims of sexual violence who are currently in the U.S. seeking asylum, it would find that some male victims die sooner or later as a result of their injuries not being cared for at their native country’s hospital.²⁸⁸ This can be a result of either the hospital staffs’ lack of experience with male victims of sexual violence, or society’s hostile perception of male rape victims being homosexual, or both. However, in adopting this approach, the U.S. would have to equally consider the protection standard and the discrimination standard when adjudicating asylum claims. In contrast, the U.S. could find that although the male has yet to face persecution on account of his imputed homosexual status as a result of his sexual violence injuries, his inability and/or inhibition of access to a medical facility and the anti-homosexual sentiment that is found in his home country or previous country of residence is reason for a court to likely find that he should be granted asylum.

This does not mean to allow male victims of sexual violence to arrive in the U.S. solely for medical treatment, but to expand the

²⁸⁵ *Id.* at 632.

²⁸⁶ *Id.* at 633 (Kozinski, J., dissenting).

²⁸⁷ *Id.* at 631, n.1.

²⁸⁸ *See generally* Murdock, *supra* note 26 (noting five men dying after having been brutally raped).

definition of homosexual to include those who are prevented from receiving medical treatment on account of imputed homosexual status arising from post-rape developments in societies. Furthermore, the U.S. can play a major role in this endeavor by supporting males who are in countries with strict anti-homosexuality laws, such as Uganda. The U.S. can help inform and direct nongovernmental medical organizations, such as Doctors Without Borders, to be aware of male victims of sexual violence in order to adequately provide them medical treatment. Although Doctors Without Borders does treat male victims of sexual violence, it can do more community outreach by partnering with organizations in the field, such as Refugee Law Project, to have greater access to this underrepresented population of male rape victims.²⁸⁹

Lastly, it is not unknown that blacks, regardless of their ethnic background, have more difficulty in entering the U.S. and remaining in the U.S. than those of other ethnic groups.²⁹⁰ African males, in particular, are stigmatized as instigators and perpetrators of war and violence plaguing their countries, but this is almost never the case.²⁹¹ Often they are victims. Very few members in a given society, whether they are male or female, will believe that a male has been raped, and once they do discover that the male has been raped, he is presumed homosexual.²⁹² What the laws are of a country or what the cultural beliefs are of a society dictate what transgressions a

²⁸⁹ *Sexual Violence*, DOCTORS WITHOUT BORDERS, <https://www.doctorswithoutborders.org/issue/sexual-violence> (last updated Oct. 5, 2015).

²⁹⁰ JULIANA MORGAN-TROSTLE & KEXIN ZHENG, BLACK ALLIANCE FOR JUST IMMIGRATION, *THE STATE OF BLACK IMMIGRANTS PART II: BLACK IMMIGRANTS IN THE MASS CRIMINALIZATION SYSTEM 20* (2016), https://gallery.mailchimp.com/f93cc152bdf285410bda78bb1/files/SOBI_Deportation_FINAL.pdf; Esther Yu Hsi Lee, *Think Progress, The Mass Deportation of Black Immigrants That You Haven't Heard About*, THINK PROGRESS (July 26, 2016, 1:16 PM), <https://thinkprogress.org/the-mass-deportation-of-black-immigrants-that-you-havent-heard-about-4c291b0c5205>.

²⁹¹ This is based on conversations the author has had with others about the perception of African males.

²⁹² Storr, *supra* note 8.

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male may face in a particular society.²⁹³ For these reasons, the U.S. should grant these individuals asylum due to the necessity of their situation.

²⁹³ See Staff of the Global Legal Research Directorate, *Laws of Homosexuality in African Nations*, LIBRARY OF CONGRESS (Feb. 2014), <https://www.loc.gov/law/help/criminal-laws-on-homosexuality/homosexuality-laws-in-african-nations.pdf>; see also *Mapping Anti-Gay Laws in Africa*, AMNESTY INT'L UK (July 22, 2015, 6:53 PM), <https://www.amnesty.org.uk/lgbti-lgbt-gay-human-rights-law-africa-uganda-kenya-nigeria-cameroon>.