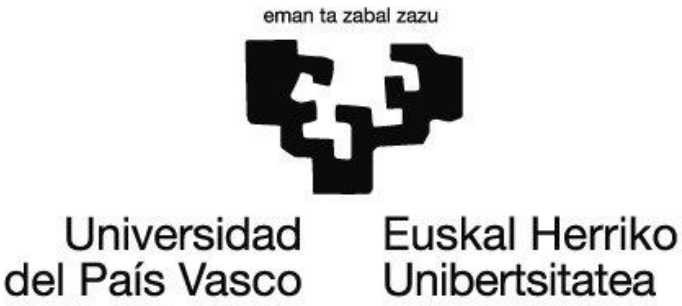

Sexual and gender-based crimes

in the International Criminal Court

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1. Introduction

During the history of century XX there were progressive ameliorations in the fight against sexual and gender-based crimes in the international law.

This evolving process reached its apex in the enactment of the Rome Statute. The latter created the International Criminal Court (ICC) and established central milestones. The Statute was the inaugural instrument in international law to present a broad roster of sexual and gender-based crimes and regard them as war crimes (in both international and non-international armed conflicts). It extended beyond the crime of rape the list of sexual and gender-based crimes constituting crimes against humanity, so as to encompass “sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity”, and persecution based on gender. It established valuable progress in the rights and prerogatives of the victims "lato sensu", and of the victims of sexual and gender crimes "stricto sensu", guaranteeing them protection, participation and reparation.[1]

The Statute system was conceived to constitute a step forward in eradicating the impunity that affects gender crimes. The Rome Statute entailed a significant advance in the combat against sexual and gender-based crimes, from a theoretical viewpoint.

The present doctoral thesis provides an extensive background of the aforementioned evolution of the handling of these crimes. It also explains the process that led to the creation of the ICC, and highlights the innovations brought by the Rome Statute in relation to sexual and gender-based crimes and their victims.

The backdrop contextualizes and permits the understanding of the expectations behind the functioning of the International Criminal Court related to the investigation and the prosecution of sexual and gender-based crimes under the Court´s jurisdiction. Certainly, it was presumed that the International Criminal Court, in discharging its mandate, would live up to the provisions of the Rome Statute.[2]

It was anticipated that the Court would efficiently investigate, charge and prosecute sexual and gender-based crimes. By avoiding failures, and rightly delineating, investigating and prosecuting violence against women in situations of armed conflict, the ICC would end the impunity of the perpetrators of such crimes and contribute to their prevention.

However, the necessary impulse to face the gender and sexual violence foreseen in the Rome Statute does not seem to have been transferred in its entirety to the practice of the ICC.[3]

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[1] International Criminal Court, the Office of the Prosecutor. Policy Paper on Sexual and Gender-Based Crimes, pp. 5,9 (9 June 2014); Bedont, B., & Martinez, K. H. (1999), pp. 65-85; The Trust Fund for Victims website, Rome Statute, Art. 7 (1) (g),

[2] Kambale, P. K. (2015). In De Vos, C., Kendall, S., & Stahn, C., (eds.), pp. 171-197

[3] Green, L. (2011), pp. 529–541

In view of that, this work carries out a juridical review of the practice in the ICC-the first three ICC cases involving sexual and gender-based crimes in which final judgements have been rendered (The Prosecutor v. Thomas Lubanga Dyilo, the Prosecutor v Germain Katanga, the Prosecutor v. Jean-Pierre Bemba Gombo) are analysed. The examination consists in an in-depth study of the approach of the International Criminal Court towards sexual and gender-based crimes in each of the cases.

The main objective of the doctoral thesis is to determine how the International Criminal Court has been handling the sexual and gender-based crimes in its cases. The thesis also examines the perspective of the victims by verifying if and how the ICC is providing adequate assistance to the victims of sexual and gender-based crimes.

The work is organized in the following manner.

Chapter 2 addresses the historical evolution of sexual and gender-based crimes in the International Criminal Law scenario, covering the antecedents, from the trial of Peter von Hagenbach until the trial of the Rwandan genocide.

Chapter 3 deals with the Rome Statute and the International Criminal Court, presenting the antecedents and the construction process (inclusive of the efforts of the United Nations to create an International Criminal Court, and the insertion of gender-related issues in the Rome Statute). This chapter expands on the ICC`s jurisdiction, admissibility, applicable law and procedure, as well as the beginning of its functioning.

Chapter 4 discusses the sexual and gender-based crimes in the Rome Statute, disposing about the relevance of the Statute for these crimes, and analysing their extent and definition (covering the Statute`s provisions on sexual and gender-based crimes and the respective elements of crimes).

The theme of Chapter 5 is the victims of sexual and gender-based crimes in the Rome Statute. It examines several aspects, such as the innovations in the rights granted to victims, the specific provisions directed at protecting victims of sexual and gender-based crimes, and the issue of how to balance protection of the rights of the victims and witnesses, protection of rights of the accused and promotion of an impartial and just trial.

In Chapter 6, the situation in the Democratic Republic of the Congo is presented. The case the Prosecutor v. Thomas Lubanga Dyilo is analysed with emphasis on the handling of sexual and gender-based crimes, and the rather restrict charging of crimes against Lubanga, which led to the absence of charges for alleged sexual and gender-based crimes.

The subject of Chapter 7 is the case the Prosecutor v. Germain Katanga. After offering a background and overview of the case, the charging and prosecution of sexual and gender-based crimes are examined as well as the fact that the Trial

Chamber II (contrarily to the Pre-Trial I´s understanding) considered that the accused could not be held responsible for these crimes.

Chapter 8 deals with the situation in the Central African Republic. Then, it discusses the case the Prosecutor v. Jean-Pierre Bemba Gombo, highlighting Bemba´s conviction grounded on sexual and gender-based crimes, which was subsequently reversed by the Appeals Chamber. It is analysed the impact of such outcome for the victims, and how it affects the prosecution of sexual and gender-based crimes in the International Criminal Law scenario. It is verified the repercussion on the Court´s credibility and its role in fighting the impunity of the perpetrators of sexual and gender-based crimes and promoting a deterrent effect**.**

In the Discussion and Conclusions, the main findings are gathered, offering a portrait of the evolution of the International Criminal Court in the handling of sexual and gender-based crimes.

The correct steps adopted by the Court up to now are stressed, and the issues where there is room for improvement are pointed out. Finally, we make recommendations to the ICC regarding its approach to sexual and gender-based crimes.

Hence, we aim to contribute to the effective prosecution and punishment of the sexual and gender-based crimes under the International Criminal Court´s jurisdiction.

2. Historical evolution of sexual and gender-based crimes in the International Criminal Law scenario

2.1. Antecedents- from the trial of Peter von Hagenbach until the trial of the Rwandan genocide

2.1.1. Trial of Peter von Hagenbach in Breisach, 1474

The 1474 trial of Peter von Hagenbach in Breisach, Germany, is regarded as a momentous and conceptual backbone of international criminal law's ancient history. Indeed, the history of international war crimes trials was initiated with the prosecution of Peter von Hagenbach for crimes (including rape and murder) perpetrated while working for the Duke of Burgundy as governor in Alsatian territories from 1469 to 1474.[4]

According to Bassiouni, Hagenbach was a Dutch "condottiere" (a mercenary soldier), which corresponds to a contemporary mercenary leader. The Duke of Burgundy (who was French and had got the city of Breisach after rendering services to the Holy Roman Empire) hired Hagenbach to form an army to occupy Breisach and collect heavy exactions from the population. In view of the population´s insurgency, the Duke ordered Hagenbach to raid, plunder, rape, and burn the city and, as expected at the time, Hagenbach complied with his superior's orders. It was propagated all over the empire that the attack on Breisach was an overwhelming aggression. This gave rise to a general agreement that the attack amounted to "crime against the laws of God and Man".[5]

At the time, the Holy Roman Empire was formed by twenty-six member states. The leaders of these states (personally or using representatives) acted as international judges to try Hagenbach for offences carried out in Germany in obedience to the orders of a French ruler. In a practical sense and having the modern standards as a parameter, this "ad hoc" tribunal constituted "the first international criminal tribunal".[6]

At the trial, the accused´s intention was to exhibit the written orders he had received from the Duke of Burgundy. Nevertheless, the judges did not consent it (permitting the presentation of such evidence would entail that people occupying a subordinate position as Hagenbach should not comply with the orders of their superiors in case they are clearly "against the laws of God and Man"). Moreover, the court's rejection of Hagenbach´s defense of superior orders protected the Duke from responsibility. Hagenbach was condemned for rape and murder among other crimes against the "laws of God and Man", losing his knighthood, and being convicted to death.

This trial is the first brick in the complex construction of the sexual and gender-based crimes as constituting offences addressed by the international criminal law. Supporting this idea, Gordon explains that the majority of legal scholars

[4] Gordon, G. S. (2013). In Heller, K. J., & Simpson, G. pp. 13-49; Scharf, M. P., & Schabas, W. A. (2002), p. 39
[5] Bassiouni, M. C. (2010), pp. 270-323
[6] *Ibidem*

consider the prosecution of Hagenbach as a landmark: while some exalt it for the manifest charge of rape as a war crime, others value it on the grounds of devising an incipient version of crimes against humanity, and all of them agree that it is the earliest recorded case in history in which the defence of superior orders was rejected.[7]

2.1.2. Lieber Code, 1863

During the American Civil War (1861-1865), the US Government was urged to recognise that the sectional conflict had trespassed the regulation of municipal law, and, in order to regulate the laws of warfare, President Lincoln promulgated the US Army General Order No.100 (Lieber Code) on 24 April 1863. This first undertaking to codify the laws of war was prepared by Francis Lieber, a professor at Columbia College in New York.[8]

In spite of been binding solely on the forces of the United States, the Lieber Code expressly stated the principle of military necessity ("military necessity does not admit of cruelty") and comprised a significant extent of the customs and laws of war adopted at the time. It had an important influence in the subsequent codifications and regulations of the laws of war and prompted the enactment of the Hague conventions on land warfare of 1899 and 1907.[9]

The Lieber Code´s relevance for the sexual ad gender-based crimes history lays on the fact that, in accordance with the principle of military necessity, it prohibits rape against persons in the invaded country "under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offence".[10]

Along the same lines, it states that rape committed by an American soldier in a hostile country against its inhabitants is

> "not only punishable as at home, but in all cases in which death is not inflicted the severer punishment shall be preferred."[11]

Moreover, in its Article 19, the Code instructs commanders to

> "whenever admissible, inform the enemy of their intention to bombard a place, so that the non-combatants, and especially the women and children, may be removed before the bombardment commences."[12]

[7] Bassiouni, M. C. (2010), pp. 270-323; Gordon, G. S. (2013). In Heller, K. J., & Simpson. G. (eds.), pp. 13-49; Scharf, M., & Schabas, W. A. (2002) p. 39
[8] McCoubrey, H., & White, N. D. (1992), p. 217; Schindler, D., & Toman, J. (eds.) (1988), p. 3
[9] Schindler, D., & Toman, J. (eds.) (1988), p. 3; Kwakwa, E. K. (1992), p. 34; United States. General Order No.100, Instructions for the Government of Armies of the United States in the Field (Lieber Code), Art. 16. (24 April 1863)
[10] Lieber Code, Art. 44
[11] Lieber Code, Art. 47
[12] Lieber Code, Art. 19

Therefore, the Lieber Code expressly prohibits rape against persons in the invaded country**,** prescribing severe punishments, and envisages special protection to women and children as to shield them from US bombardments.

2.1.3. Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (the Hague, 29 July 1899) and the Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (the Hague, 18 October 1907): the Martens Clause and the principle of humanity

The First Hague Peace Conference of 1899 failed to achieve its main goal of limiting or decreasing the armaments, but engendered the adoption of three Conventions, including the Hague Convention (II) with Respect to the Laws and Customs of War on Land and the annexed Regulations, and other acts referred to in the Final Protocol.[13]

Even though the St. Petersburg Declaration (1868) had already mentioned the "laws of humanity" in its preamble, it was in the preamble of above-mentioned Convention that the Martens Clause appeared for the first time:[14]

> "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience."[15]

Since then, this clause has integrated the laws of armed conflict.[16]

The Convention (II) with Respect to the Laws and Customs of War on Land and the annexed Regulations were subsequently revised at the Second International Peace Conference in 1907. The two versions of the Convention and the Regulations are very similar and the preamble of the 1907 Hague Convention (IV) also refers to the "laws of humanity". These unarticulated humanistic values served as the foundation for the normative prescriptions of both conventions and the words "laws of humanity" constitute the only precedent references in the international law panorama to the term "crimes against humanity", which was used for the first time in the Charter of the International Military Tribunal (1945).[17]

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[13] Schindler, D., & Toman, J. (eds.) (1998), p. 49

[14] Bassiouni, M. C. (1992), p. 167, footnote 68; Ticehurst, R. (1997), pp. 125-134; Saint Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles of under 400 Grams Weight (11 December 1868).

[15] Convention (II) with Respect to the Laws and Customs of War on Land its annex: Regulations concerning the Laws and Customs of War on Land, Preamble (29 July 1899).

[16] Ticehurst, R. (1997), pp. 125-134.

[17] Bassiouni, M. C. (1992) pp. 165-167; Schindler, D., & Toman, J. (eds.) (1998), pp. 49-56;

Moreover, Article 46 of the 1907 Hague Convention (IV) states that “[f]amily honour and rights … must be respected”, which has been interpreted as englobing rape.[18]

Although the Hague Conventions regulated “war crimes” in a strict sense, such crimes came about from the broader signification of the violation of “laws of humanity” and, as a result, such words were designed to enclose protection against undefined violations that would be subsequently determined by future normative advances in positive international law.[19]

The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, set up in its Article 1 paragraph 2 a later version of the Martens Clause by adopting the term "principles of humanity", which is a synonymous with the expression “laws of humanity” of the preamble of the 1899 Hague Convention (II).[20]

E. Kwakwa affirms that the principle of humanity complements (and sometimes is used interchangeably with) the principle of military necessity in the sense that it forbids measures of violence that are unnecessary to reach a definite military advantage.[21]

Therefore, the 1899 Hague Convention (II) by instating the principle of humanity built-in the Martens Clause (which intended to provide protection against violations yet unspecified but that in the course of time would be regulated by the international law positive rules) contributed to the development of the of armed conflict laws and, ultimately, to the future banishment of sexual and gender-based crimes by the international community.[22]

In fact, the principle of humanity, reinstating the principle of military necessity, proposed that combatants should keep at large of avoidable harm and suffering,[23] that is the essence of the criminalisation of sexual and gender-based offences in the international armed conflict scenario.

2.1.4. The Paris Preliminary Peace Conference

During World War I, the governments of France, Great Britain and Russia (28 May 1915) released a joint declaration denouncing the massacres of the Armenian population in Turkey as constituting “crimes against civilization and humanity” for which all the members of the Turkish government would be held

Convention (IV) with Respect to the Laws and Customs of War on Land its annex: Regulations concerning the Laws and Customs of War on Land, Preamble (18 October 1907).

[18] Meron, T. (1993), pp. 424-428.

[19] Bassiouni, M. C. (1992), p. 166

[20] Ticehurst, R. (1997), pp. 125-134; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art. 1 (2) (8 June 1977).

[21] Kwakwa, E. K. (1992), pp. 36-37

[22] *Ibidem*; Bassiouni, M. C. (1992), p. 166

[23] Kwakwa, E. K. (1992), p. 37

accountable in conjunction with the agents involved in the massacres. After the end of the war, the Allies started to plan how to implement that commitment.[24]

With the aim of establishing the conditions of peace to be offered to Germany and its allies, the five Great Powers (the United States of America, the British Empire, France, Italy, and Japan) summoned the Preliminary Peace Conference, held in Paris on 18 January 1919.[25]

In the Conference´s second plenary session (25 January 1919), the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (the "Commission of Fifteen") was set up to examine and report on the violations of international law incurred by Germany and its allies during the war.[26]

Nevertheless, the Commission of Fifteen was not able to arrive at conclusions satisfactory to all of its members on all subjects under consideration, and, on 29 March 1919, presented a Report that also contained the Dissenting Reports of the American and Japanese members.[27]

In this 29 March 1919 Report, the Commission concluded that the “clear dictates of humanity” had been abused by the enemy powers by the use of “barbarous or illegitimate methods” inclusive of “the violation of … the laws of humanity”. The Report further stated:[28]

> “all persons belonging to enemy countries … who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal liability.”[29]

The Commission divided its work in three sub-commissions (sub-commission I on Criminal-Acts, sub-commission II on Responsibility for the War, sub-commission II on Responsibility for the Violation of the Laws and Customs of War) and arrived at a list of war crimes.[30]

Annex I of the Report included a summary table enumerating the offences that the enemy countries had incurred during the war. The crimes of rape and abduction of girls and women for the purpose of enforced prostitution were among the infringements of the non-exhaustive list of the Annex I.[31]

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[24] Armenian Memorandum presented by the Greek delegation to the Commission of Fifteen of March 14, 1919, reprinted in Schwelb, E. (1946), pp. 178-226; Bassiouni, M. C. (1992), pp. 168-169; Matas, D. (1989), pp. 86-104.
[25] Finch, G. A. (1919), pp. 159-186.
[26] Matas, D. (1989), pp. 86-104.
[27] *Ibidem*
[28] 29 March 1919 Report reprinted in Schwelb, E. (1946), pp. 178-226; 29 March 1919 Report cited in Maogoto, J. (2009). In Doria, J., Gasser, H., & Bassiouni, M. C. (eds.), pp. 3-22.
[29] *Ibidem; Ibidem*
[30] United Nations, War Crimes Commission (1948 b), pp. 32-34.
[31] Brownmiller, S. (1975), pp. 40, 44; Carnegie Endowment for International Peace, Division of International Law (1949), pp. 17-18; Sandoz, Y. (2008). In Bassiouni, M. C., pp. 293-321.

Therefore, the Commission expressly considered rape and abduction of girls and women for the purpose of enforced prostitution as grave breaches and stated that the perpetrators were subject to be criminally prosecuted.[32]

Nonetheless, since the US and Japan members were against the concept of international criminal responsibility for breaches of the "laws of humanity", this basis for international criminal responsibility was no adopted.[33]

2.1.5. The Treaty of Versailles (28 June 1919)

The Treaty of Versailles (which sealed peace between the Allied and Associated Powers and Germany) fixed the punishability of war criminals, ordering the German government to[34]

> "hand over to the Allied and Associated Powers … all persons accused of having committed an act in violation of the laws and customs of war"[35]

to be brought before military tribunals (Article 228), and allowing the Allies to set up national war crimes tribunals (Article 227). Additionally, the treaty stated that an international tribunal would be constituted for the purpose of trying the Kaiser Wilhelm II (Article 227).[36]

In spite of these provisions, Article 228 was ineffective since Germany refused to extradite its nationals and the Netherlands firmly refused to extradite Kaiser Wilhelm II to the Allies. Moreover, very few people were prosecuted by Germany (only 12 people were tried before the Supreme Court of the Reich in Leipzig, and half of them were acquitted).[37]

Although Max Ramdahr was charged with Mistreatment of Belgian Children (and found not guilty), none of the defendants were charged with rape or abduction of girls and women for the purpose of enforced prostitution.[38]

2.1.6. Charter of the International Military Tribunal annexed to the London Agreement (London, 8 August 1945), Allied Control Council Law No. 10 Punishment of Persons Guilty of War Crimes, Crimes against Peace and Against Humanity (20 December 1945) and the Charter of the International Military Tribunal for the Far East (Tokyo, 19 January 1946)

The atrocity and amplitude of crimes committed during the World War II were unparalleled. When the war ceased, the Allied leaders concluded that the

[32] Sandoz, Y. (1999). In Bassiouni, M. C. (ed.), p. 409
[33] Bassiouni, M. C. (1994 b), pp. 784-805
[34] Bassiouni, M. C. (1980), pp. 8-9.
[35] The Treaty of peace between the Allied and Associated Powers and Germany (the treaty of Versailles) (28 June 1919). Versailles.
[36] Bassiouni, M. C. (1980), p. 9
[37] Bassiouni, M. C. (1980), p. 9; Parks, M. W. H. (1973), pp. 1-104; Sunga, L. S. (1997), p. 280
[38] *Ibidem*

responsible for such horrendous and despicable crimes should be held liable for them.[39]

In this context, the Charter of the International Military Tribunal (also known as the London Charter) complementing the Agreement for the prosecution and punishment of the major war criminals of the European Axis (London, 8 August 1945) stated that

> "there shall be established an International Military Tribunal … for the just and prompt trial and punishment of the major war criminals of the European Axis"[40]

who committed crimes against peace, war crimes or crimes against humanity[41].

For the first time in positive international criminal law, the precise terms "crimes against humanity" were used. The London Charter also provided the first definition of this international criminal category. According to its Article 6 (c), "crimes against humanity" comprised:[42]

> "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."[43]

The London Charter established the model and set up the legal basis for the subsequent formulations of "crimes against humanity" in the Article 5 (c) of the Tokyo Charter and Article II (c) of the Allied Control Council Law No.10.[44]

According to Bassiouni, rape is subsumed within the expression "other humane acts" and, as a result, is considered as a crime against humanity in the London and Tokyo Charters. However, Article II 1 (c) of the Allied Control Council Law No.10 goes beyond the reference to "other humane acts" and explicitly lists rape as a crime against humanity. It is relevant to stress that, unlike the Nuremberg and Tokyo Charts, which are international instruments, the Allied Control Council Law No.10 is a national instrument, applied solely territorially (it was intended to serve as the legal basis for criminal trials conducted by the Allies' in Germany).[45]

Moreover, the term "ill treatment" that appears in the definition of war crimes in both the London Charter (Article 6(b)) and the Allied Control Council Law No.10 (Article II (b)) encapsulates rape, so this kind of sexual crime would also be

[39] Mettraux, G. (2011), pp. 5-16
[40] United Nations. Charter of the International Military Tribunal Art. 1
[41] United Nations. Charter of the International Military Tribunal, Art. 6
[42] Bassiouni, M. C. (1992), pp. 1-2
[43] United Nations. Charter of the International Military Tribunal, Art. 6 (c)
[44] Bassiouni, M. C. (1992), p. 1; Control Council Law No.10, Art. II 1 (c); United Nations. Charter of the International Military Tribunal for the Far East, Art. 5 (c)
[45] Bassiouni, M. C. (1992), pp. 35-36; von Knierrem, A. (1959). The Nuremberg Trials. Chicago: Henry Regnery Co. cited in Bassiouni, M. C. (1992) pp. 35-36

rendered as a war crime on these grounds (the Tokyo Charter simply refers to Conventional War Crimesas “violations of the laws or customs of war” in its Article 5 (b) and does not make use of the expression “ill treatment”).[46]

2.1.7. The Nuremberg Trial

The Nuremberg Tribunal was constituted as to implementthe London Charter´s provision of the establishment of an International Military Tribunal for the prosecution and penalisation of major war criminals of the European Axis who incurred in crimes against peace, war crimes or crimes against humanity during the World War II.[47]

The trial took place in Nuremberg between 20 November 1945 (indictment) and 1 October 1946 (final day of the Tribunal´s judgment). Charges were brought against 24 defendants under four counts: Common Plan or Conspiracy, Crimes against Peace, War Crimes and Crimes against Humanity.[48]

The judges of the International Military Tribunal demonstrated to be conscious that barbarous crimes had been committed against women and children during the World War II. For instance, in count three - War Crimes (Charter, Article 6, especially 6 (b)) of the indictment, the Tribunal addressed Murder and Ill-treatment of civilian populations of or in occupied territory and on the high seas, and among the particulars set out by way of example included the following:[49]

> “Methods used for the work of extermination in concentration camps were:
>
> Bad treatment, pseudo-scientific experiments (sterilization of women at Auschwitz and at Ravensbrück, study of the evolution of cancer of the womb at Auschwitz …)”[50]
>
> “In the Stalingrad region … [o]ne hundred and thirty-nine women had their arms painfully bent backward and held by wires. From some their breasts had been cut off and their ears, fingers, and toes had been amputated.”[51]

Further, while addressing Slave Labor Policy, the Tribunal referred to Heinrich Himmler´s (who, among other duties, was the Reich Commissioner for the "strengthening of Germanism") affirmation:[52]

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[46] Bassiouni, M. C. (1992), p. 348; Control Council Law No.10, Art. II (b); Tompkins, T. L. (1999), pp. 845-890; United Nations. Charter of the International Military Tribunal, Art. 6 (b)
[47] Sunga, L. S. (1997), p. 281
[48] International Military Tribunal - Nuremberg (1947), pp. 27-92; Mettraux, G. (2011). In Schabas, W. A., & Bernaz, N. (eds.), pp. 5-16
[49] International Military Tribunal - Nuremberg (1947), p. 43
[50] International Military Tribunal - Nuremberg (1947), pp. 45-46
[51] International Military Tribunal - Nuremberg (1947), p. 49
[52] International Military Tribunal - Nuremberg (1947), p. 242

> "Whether ten thousand Russian females fall down from exhaustion while digging an anti-tank ditch interests me only insofar as the anti-tank ditch for Germany is finished…"[53]

The Germans had clearly adopted a general sado-sexual humiliation upon the Jews. Brownmiller ponderates that rape had a relevant and logical role in fulfilling the Germans´ final goal of humiliating and annihilating people they considered inferior and establishing their superior race.[54]

Apart from the recurring rape, the German and Japanese set up military brothels in which conquered women were forced into prostitution. In this context, the same author states:[55]

> "Concentration-camp rape and institutionalized camp brothels in which women were held against their will for the pleasure of the soldiery were a most sinister aspect of the abuse of women in World War II, since acceptance of continuous rape without protest was held out as a possible chance for survival."[56]

And adds:

> "Jewish women alone did not suffer rape as the German Army advanced into Russia. All women were prey. From evidence presented to the Nuremberg tribunal the pattern becomes clear."[57]

Indeed, reports of sexual violence and "the routine use of rape as a terror weapon of terror" were submitted to the Tribunal. The French prosecutor, although sparing the heinous details, sustained that rape had been employed "as a method of military retaliation or reprisal". The Soviet prosecution, by its turn, endeavoured to present the rape of Russian women as a component of the Nazi´s terror and genocide crusade.[58]

Despite allegations of rape being included in affidavits and presented as evidence, there was no express mention of rape in the indictment and none of the defendants was expressly tried or condemned for committing sexual crimes in the Nuremberg Trials (nor were there the defendants prosecuted or convicted for gender-based crimes).[59]

Still is Askin who explains:

> "Whether it was out of shyness, prudishness, reserve, ignorance, revulsion, confusion, or intentional omission, the lack of both

[53] International Military Tribunal - Nuremberg (1947), p. 244
[54] Brownmiller, S. (1975), pp. 49, 52
[55] Brownmiller, S. (1975), p. 76
[56] Brownmiller, S. (1975), p. 63
[57] Brownmiller, S. (1975), p. 54
[58] Brownmiller, S. (1975), pp. 53, 56, 69; Askin, K. D. (1997), p. 97
[59] International Military Tribunal - Nuremberg (1947), pp. 27-95; Lupig, D. (2009), pp. 433-491; Meron, T. (1993), pp. 424-428; Tompkins, T. L. (1999), pp. 845-890

> public documentation and official prosecution gave impetus to the notion that sexual assaults were less important crimes. Indeed, the comprehensive, 732-page Index to the forty-two volume set reporting the proceedings of the Nuremberg Trial does not even bother to include "rape", "prostitution", or "women" among their headings or subheadings. In contrast, "looting" warrants three and one half pages in the Index alone."[60]

It is necessary to highlight, though, that the Nuremberg Tribunal, in its judgment, under the head War Crimes and Crimes against Humanity, Murder and Ill-treatment of Civilian Population, affirmed:

> "Article 6 (b) of the Charter provides that "ill-treatment ... of civilian population of or in occupied territory ... killing of hostages ... wanton destruction of cities, towns, or villages" shall be a war crime. In the main, these provisions are merely declaratory of the existing laws of war as expressed by the Hague Convention, Article 46, which stated: "Family honour and rights, the lives of persons and private property, as well as religious convictions and practice must be respected.""[61]

Meron considered rape to be subsumed by "family honour and rights", thus, it can be argued that rape was covered when the Nuremberg Tribunal dealt with the commitment of the war crime ill-treatment and the crime against humanity of inhumane treatment.[62]

In conclusion, the Nuremberg Tribunal merely considered the sexual violence that had taken place during the armed conflict as contingent to the war crimes or crimes against humanity, not dispensing specific attention to the sexual and gender-based offences perpetrated during the World War II.

2.1.8. Trial of General Tomoyuki Yamashita by the U.S. Military Commission, 8 October- 7 December 1945

The trial of General Tomoyuki Yamashita, even though not being part of the major war crimes trial of the Japanese, is relevant for humanitarian law.[63]

Between 9 October 1944 and 2 September 1945, Yamashita served as Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands and was prosecuted by the United States Military Commission (composed by American officers who did not have legal training) in Manila between 8 October and 7 December, 1945.[64]

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[60] Askin, K. D. (1997), p. 98
[61] International Military Tribunal - Nuremberg (1947), p. 232
[62] Meron, T. (1993), pp. 424-428; Tompkins, T. L. (1999), pp. 845-890
[63] Askin, K. D. (1997), p. 192
[64] Bassiouni, M. C. (1992), p. 378; United Nations, War Crimes Commission. (1948 a), pp. 1-3 3

The Prosecution stated that

> "the accused knew or must have known of, and permitted, the widespread crimes committed in the Philippines by troops under his command (which included murder, plunder, devastation, rape, lack of provision for prisoners of war and shooting of guerrillas without trial), and/or that he did not take the steps required of him by international law to find out the state of discipline maintained by his men and the conditions prevailing in the prisoner-of-war and civilian internee camps under his command."[65]

The judgment of the Commission was historical:

> "This is the first time in history of the modern world that a commander has been held criminally liable for acts committed by his troops. It is the first time in modern history that any man has been held criminally liable for acts which … do not involve criminal intent or even gross negligence."[66]

The Commission found Yamashita guilty on all the accounts including rape and sentenced him to death by hanging. In spite of an appeal for clemency, and the filing of petitions before the Supreme Court of the Philippine Islands and the Supreme Court of the United States, the findings of the Military Commission were maintained and Yamashita was hanged on 23 February 1946.[67]

2.1.9. The International Military Tribunal for the Far East (Tokyo Tribunal)

The International Military Tribunal in Tokyo was set up by the Tokyo Charter for the trial and punishment of the major war criminals in the Far East for incurring in Crimes against Peace, Conventional War Crimes (restricted to "violations of the laws or customs of war" without mentioning rape), and Crimes against Humanity (including "other inhumane acts") during World War II.[68]

After the Trial at Nuremberg, the Tokyo Trial constituted the other important post-war trial supported by the Allies. The trial took place from 29 April 1946 to 10 November 1948. 11 prosecutors of different nations brought charges against 28 defendants (who were an exemplificative sample of Japanese leaders involved at distinct levels of Japan´s military expansion between 1932 and 1945) and 25 were convicted on 10 counts.[69]

Although at Tokyo the crimes against peace were preponderant (in the indictment the first 36 counts of a total of 56 charged this type of crimes, while conventional

[65] United Nations, War Crimes Commission. (1948 a), p. 1
[66] United Nations, War Crimes Commission. (1948 a), p. 37
[67] United Nations, War Crimes Commission. (1948 a), pp. 2, 35-37, 75
[68] United Nations. Charter of the International Military Tribunal for the Far East Arts. 1, 5 (a) (b) (c)
[69] Boister, N. (2011). In Schabas, W. A., & Bernaz, N. (eds.), pp. 17-32

war crimes were merely charged in counts 53-55), charges of rape were brought against Japanese defendants as war crimes, especially in relation to the "Rape of Nanking" (a systematic mass rape that was remarkably continuous).[70]

In fact, in Nanking, from December 1937 to February 1938,[71]

> "[t]here were many cases of rape. Death was a frequent penalty for the slightest resistance on the part of a victim or the members of her family who sought to protect her. Even girls of tender years and old women were raped in large numbers throughout the city, and many cases of abnormal and sadistic behavior in connection with these rapings occurred. Many women were killed after the act and their bodies mutilated.
>
> Approximately 20,000 cases of rape occurred within the city during the first month of the occupation."[72]

2.2.9.i. Trial of Foreign Minister Koki Hirota, General Iwane Matsui and Admiral Soemu Toyoda

Koki Hirota, Foreign Minister in the First Konoye Cabinet from June 1937 until May 1938, received reports of the atrocities in Nanking immediately after the entry of the Japanese forces into the city. He took up the subject with the War Ministry who assured him that atrocities would cease. Nonetheless, after such assurances, for at least one month, there were further reports of atrocities.[73]

In view of that, the Tribunal understood that Koki Hirota was negligent in his duty when he failed to insist before the Cabinet that it was necessary to adopt urgent measures to stop the atrocities (as well as take any other action available to him to achieve such termination). Hirota was satisfied to wait on assurances, which he was aware that were not being put into action, while several murders, rapes of women, among other atrocities were perpetrated every day. To Hirota, the extension of liability was especially important because he exerted influence (instead of formal authority) over the military. Finding that his inaction constituted criminal negligence, the Tribunal sentenced him to death by hanging.[74]

Iwane Matsui assumed the position of Commander-in-Chief of the Central China Area Army, that encompassed the shanghai Expeditionary Force and the Tenth Amy. He deployed these troops and led the invasion of Nanking on 13 December 1937.[75]

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[70] *Ibidem*; Brownmiller, S. (1975), pp. 57-62
[71] International Military Tribunal for the Far East. Judgment of 4 November 1948, p. 49,791
[72] International Military Tribunal for the Far East. Judgment of 4 November 1948, pp. 49,604-49,606
[73] International Military Tribunal for the Far East. Judgment of 4 November 1948, pp. 49,604-49,606, 49,788, 49,791
[74] International Military Tribunal for the Far East. Judgment of 4 November 1948, pp. 49, 200, 49, 513, 49,789, 49,791, 49,855; Lippman, M. (2001), pp. 1-93.
[75] International Military Tribunal for the Far East. Judgment of 4 November 1948, p. 49,814

> "Then followed a long succession of most horrible atrocities committed by the Japanese Army upon the helpless citizens. Wholesale massacres, individual murders, rape, looting and arson were committed by Japanese soldiers. (...) In this period of six or seven weeks thousands of women were raped, upwards of 100,000 people were killed and untold property was stolen and burned."[76]

The Tokyo Tribunal found that Matsui was guilty. It understood that he commanded the Army that had carried out such despicable acts, and, being aware of them, failed to discharge his duty to tame the troops and protect the defenseless townspeople of Nanking. He was convicted to death by hanging.[77]

Hirota and Matsui were executed on 23 December 1948 amidst the other defendants also sentenced to the Capital Punishment.[78]

The Military Tribunal in Tokyo prosecuted Admiral Soemu Toyoda in a trial that began on 29 October 1948. Inter other counts, Toyoda was charged with

> "willfully and unlawfully disregarding and failing to discharge his duties by ordering, directing, inciting, causing, permitting, ratifying and failing to prevent Japanese Naval personnel of units and organizations under his command, control and supervision to abuse, mistreat, torture, rape, kill and commit other atrocities;"[79]

However, Toyoda was acquitted on 6 September 1949 because the tribunal understood that General Yamashita had the command, control, and responsibility for the naval troops in Manila, instead of Toyoda.[80]

Despite the explicit charges of rape, none of the women who had been victims of this crime was summoned to provide the Tokyo Tribunal with evidence. In addition, the Tokyo Tribunal did not receive evidence regarding the sexual enslavement of thousands of Korean, Chinese, Indonesian, Filipina, Dutch, Burmese and Japanese "comfort women" in military brothels by the Japanese.[81]

All and all, even though the prosecution of rapes of civilian women and nurses before the Tokyo Tribunal was successful, rape was regarded as auxiliary to the other war crimes, forming part of the broader charges of command responsibility for the commitment of atrocities in Nanking In spite of that, the trial was a big step towards the protection of women against rape during wartime since, as stated by

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[76] I International Military Tribunal for the Far East. Judgment of 4 November 1948, p. 49,815
[77] International Military Tribunal for the Far East. Judgment of 4 November 1948, pp. 49,816, 49,856
[78] Boister, N. (2011). In Schabas, W. A., & Bernaz, N. (eds.), pp. 17-32.
[79] Parks, Major W. H. (1973), pp. 69-70
[80] Parks, Major W. H. (1973), p. 23, footnote 66, p. 69
[81] Brownmiller, S. (1975), p. 58; Niarchos, C. N. (1995), pp. 649-690, Tompkins, T. L. (1999), pp. 845-890

Brownmiller “[h]ad it not been for the Tokyo war-crimes tribunal, who would have believed the full dimensions of the Rape of Nanking?”[82]

2.1.10. Trial of Takashi Sakai by the Chinese War Crimes Military Tribunal of the Ministry of National Defence, 29 August 1946

It is important to stress that, apart from the Tokyo Tribunal, several military tribunals established by the Allied also tried cases of rape.[83]

For instance, Takashi Sakai (a military commander during the war of 1939-1945 and one of the leaders of the Japanese aggression against China) was prosecuted before the Chinese War Crimes Military Tribunal of the Ministry of National Defense in Nanking.[84]

As Regimental Commander of 29 Infantry Brigade in China, between November 1941 and March 1943, in Kwantung and Hainan, he incited or allowed his subordinates to incur in numerous atrocities acts, such as massacring over one hundred civilians by shooting and bayoneting, drowning women after severely beating them, torturing a pregnant woman, and raping and mutilating two women and then feeding their bodies to dogs.[85]

Sakai was found guilty of the crime against peace of "participating in the war of aggression", as well as the war crimes and crimes against humanity

> "of inciting or permitting his subordinates to murder prisoners of war, wounded soldiers and non-combatants; to rape, plunder and deport civilians; to indulge in cruel punishment and torture; and to cause destruction of property."[86]

For these crimes he was convicted to death.[87]

2.1.11. Affirmation and formulation of the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal

The United Nations General Assembly did not present any express reference to sexual crimes in the 1946 Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal. In the following year, the General Assembly assigned to the International Law Commission the responsibility of formulating the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal. The

[82] Brownmiller, S. (1975), pp. 61-62, Lupig, D. (2009), pp. 433-491; Tompkins, T. L. (1999), pp. 845-890
[83] Lupig, D. (2009), pp. 433-491
[84] United Nations, War Crimes Commission (1949 a), Trial of Takashi Sakai, p. 1
[85] United Nations, War Crimes Commission (1949 a), Trial of Takashi Sakai, pp. 1-2
[86] United Nations, War Crimes Commission (1949 a), Trial of Takashi Sakai, p. 2
[87] *Ibidem*

referred Commission also failed to include sexual offences in its Formulation of the Nuremberg Principles.[88]

2.1.12. Batavia Military Tribunal, 1948

A Netherlands court with seat in Batavia (known nowadays as Jakarta) was established in 1948 to prosecute the abduction of Dutch girls and women for the purpose of enforced prostitution carried out by the Japanese during World War II in the Dutch Indonesia (enforced prostitution was regarded as a war crime by both municipal law and the war crimes list established by the 1919 "Commission of Fifteen").[89]

The Batavia Military Tribunal prosecuted Washio Awochi, a Japanese hotel-keeper, and found him guilty of the “war crime of enforced prostitution” for compelling Dutch girls (as young as 12 and 14 years old) and women to practice prostitution from 1943-1945 in the premises of a club-restaurant that he ran in Batavia. Awochi was sentenced to 10 years imprisonment.[90]

According to Lupig, this was “[t]he first known international criminal law prosecution for “forced prostitution””, albeit the trial was conducted in secrecy and quietude.[91]

It is relevant to note that several other Chinese, Indian, and Indonesian women as well as thousands of women from distinct Asian countries were also seized and forced into prostitution in the Dutch Indonesia at that time. Nevertheless, the Batavia Military Tribunal only prosecuted crimes committed against Dutch women.[92]

2.1.13. Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948

In Article 2 of the Convention, genocide is defined as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group:

> “(a) Killing members of the group;

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[88] Boot, M. revised by Hall, C. K. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 206-216; Lupig, D. (2009), pp. 433-491; United Nations, General Assembly. Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal (11 December 1946); United Nations, General Assembly. Formulation of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal (21 November 1947); United Nations, International Law Commission. Report of the International Law Commission to the General Assembly. Report of the International Law Commission covering its second session, 5 June - 29 July 1950. Formulation of the Nürnberg Principles, pp. 374-378.

[89] Askin, K. D. (1997) p. 85; Demleitner, N. V. (1994), pp. 163-197; United Nations, War Crimes Commission (1949), Case No. 76, Trial of Washio Awochi, pp. 122-125

[90] United Nations, War Crimes Commission (1949), Case No. 76, Trial of Washio Awochi, pp. 122-123

[91] Askin, K. D. (1997), p.87; Lupig, D. (2009), pp. 433-491

[92] Askin, K. D. (1997), p.87

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group."[93]

Gender is not included in one of the singled out protected groups, and, consequently, genocide grounded in gender cannot be sheltered under the traditional genocide definition.[94]

Rape and other sexual assaults, in turn, can amount to genocidal acts despite not being expressly listed in the Genocide Convention. However, so that rape and other sexual crimes can be considered genocidal acts, there must be proof of the "dolus specialis" to "destroy, in whole or in part, a national, ethnical, racial or religious group".[95]

Consequently, it is imperative to analyse if, in the concrete case, there was intention to cause the destruction, in whole or in part, of one of the groups outlined by Article 2 since rape and other acts of sexual violence cannot be regarded as genocidal only because they were perpetrated concomitantly or in the same context of a genocide.[96]

2.1.14. The Four Geneva Conventions of 12 August 1949; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977)

In 12 August 1949, four Conventions were adopted in Geneva as to give an answer to the pressing lack of international instruments to safeguard the civilians during war.[97]

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[93] United Nations, General Assembly. Convention on the Prevention and Punishment of the Crime of Genocide, Art. 2. Resolution 260 A (III) (9 December 1948).
[94] Askin, K. D. (1997), pp. 225-226
[95] Askin, K. D. (1997), pp. 225-226
[95] Nowrojee, B. (1996), p. 34; Russell-Brown, S. L. (2003), pp. 350-374; United Nations, General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, Art. 2, Preamble
[96] Nowrojee, B. (1996), p. 34
[97] Askin, K. D. (1997), p. 244; Ferencz, B. B. (1980), pp. 66-67; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (Geneva Convention II); Geneva Convention

The four Geneva Conventions constitute the structure of the humanitarian law (per times also denominated as the law of armed conflict). Notwithstanding the fact that rape is considered a war crime, the Geneva Conventions and successive Protocols do not particularly include it among the war crimes.[98]

The Fourth Geneva Convention, in its Article 27, disposing about the status and treatment of protected persons in both the territories of the parties to the conflict and occupied territories, provides:

> "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."[99]

This prohibition of rape and enforced prostitution constituted the most relevant progress in humanitarian law in relation to the forbiddance of violence against women during war. Nevertheless, none of the four Geneva Conventions and the subsequent Protocols lists rape among their grave breaches and war crimes.[100]

It is important to state that the International Committee of the Red Cross (that had a prominent role in the formulation of the Conventions) has regarded, within the framework of the reach of a grave breach of international humanitarian law, that the grave breach of "willfully causing great suffering or serious injury to body or health" includes rape and any other attack on a woman's dignity. Further, the United States Department of State has acknowledged that it regards rape as a war crime or a grave breach under customary international law and the Geneva Conventions.[101]

On 8 June 1977, two Additional Protocolsto the Geneva Conventions of 12 August 1949 were adopted at Geneva.[102]

In its Article 76, Protocol I addresses the issue of protection of women stating that

> "[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault."[103]

Relative to the Treatment of Prisoners of War (Geneva Convention III); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV)

[98] Russell-Brown, S. L. (2003), pp. 350-374; United Nations, Security Council. Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), para. 37

[99] Geneva Convention IV, Art. 27

[100] Askin, K. D. (1997), p. 245; Russell-Brown, S. L. (2003), pp. 350-374; Geneva Convention I, Art. 50; Geneva Convention II, Art. 51

[101] Gardam, J. G. (1998), pp. 449-462; International Committee of the Red Cross. Update on *Aide-Mémoire* on rape committed during the armed conflict in ex-Yugoslavia, 3 December 1992, cited in Meron, T. (1993), p. 426; Letter from Robert A. Bradtke, Acting Assistant Secretary legal for Legislative Affairs, to Senator Arlen Specter, 27 January 1993, cited in Meron, T. (1993), p. 427

[102] Protocol I; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)

[103] Protocol I, Art. 76

Buy its turn, Protocol II Additional, disposing about internal armed conflicts, in its Article 4, paragraph 2 (e) establishes that

> "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault"[104]

"are and shall remain prohibited at any time and in any place whatsoever".[105]

As a consequence, although the Fourth Geneva Convention and Additional Protocols undoubtedly forbid rape, they did not follow the Allied Control Council Law No. 10 antecedent, and left rape out of the grave breaches that are under universal jurisdiction.[106]

2.1.15. United Nations General Assembly, Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Resolution 3318 (XXIX) of 14 December 1974

Much as this instrument was designed to defend women and children in cases of emergency and armed conflict, it fails to address rape in wartime.[107]

There is no explicit mention to rape or other sexual crimes although the declaration expresses in the preamble

> "its deep concern over the sufferings of women and children belonging to the civilian population who … are too often the victims of inhuman acts and consequently suffer serious harm".[108]

The instrument also states in its paragraph 4 that

> "[a]ll the necessary steps shall be taken to ensure the prohibition of measures such as … degrading treatment and violence, particularly against that part of the civilian population that consists of women and children"[109]

and in paragraph 5 that "[a]ll forms of repression and cruel and inhuman treatment of women and children … shall be considered criminal."[110]

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[104] Protocol II, Art. 4 (2) (e)
[105] Protocol II, Art. 4 (2)
[106] Meron, T. (1993), pp. 424-428
[107] Askin, K. D. (1997), p. 250
[108] United Nations, General Assembly. Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Preamble
[109] United Nations, General Assembly. Declaration on the Protection of Women and Children in Emergency and Armed Conflict, para. 4
[110] United Nations, General Assembly. Declaration on the Protection of Women and Children in Emergency and Armed Conflict, para. 5

Consequently, the cruel and inhuman treatment of women is rendered a criminal act. Nonetheless, the fact that these provisions to shelter women and children in wartime were inserted in a declaration (which is a non-binding instrument) is another demonstration of the historical hesitation to penalise those who incur in gender-based war crimes.[111]

2.1.16. Statute of the International Criminal Tribunal for the Former Yugoslavia, 25 May 1993, and the International Criminal Tribunal for the Former Yugoslavia

Over forty years after the Nuremburg and Tokyo trials took place, two other "ad hoc" international war crimes tribunal were established: the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), both of which tried sexual and gender-based crimes.[112]

Since 1991 there were conflicts in the area of the former Yugoslavia. There were accounts attesting the propagated transgression of international humanitarian law and disregard of fundamental human rights in this conflict, notably in the Republic of Bosnia and Herzegovina. In fact, reports, such as the 1993 “European Community Investigative Mission into the Treatment of Muslim Women in the former Yugoslavia” Report on Rape in Bosnia-Herzegovina (also known as the “Warburton Mission Report” as the mission was led by Dame Anne Warburton), portraited systematic or widespread sexual violence against women in the conflict in Yugoslavia.[113]

The Commission on Human Rights asserted in aforementioned report that rape of Muslim women was being carried out on a wide scale and in such a manner as to constitute part of a consciously adopted policy, sufficient to amount to a relevant component of war strategy. And also affirmed that[114]

> “[i]ndications are that at least some of the rapes have been committed in particularly sadistic ways, so as to inflict maximum humiliation on the victims, on their family, and on the whole community. In many cases there seems little doubt that the intention is deliberately to make women pregnant and then to detain them until pregnancy is far enough advanced to make termination impossible, as an additional form of humiliation and constant reminder of the abuse done to them.”[115]

The wars of the former Yugoslavia and Rwanda inaugurate a new type of war action in which sexual aggression assumes a central position as a weapon of war which produces cruelty and lethality, within a form of mortal damage that is concomitantly material and moral. Indeed, gender specific war crimes in the

[111] Askin, K. D. (1997), p. 250
[112] Lupig, D. (2009), pp. 433-491; Scharf, M. P., & Day, M. (2011). In Schabas, W. A., & Bernaz, B. (eds.), pp. 51-66
[113] Askin, K. D. (1997) p. 261; Pocar, F. (2008), pp. 1-6
[114] European Community Investigative Mission into the Treatment of Muslim Women in the Former Yugoslavia: Report to the EC Foreign Ministries (The Warburton Mission II Report- 1993), para. 13.
[115] The Warburton Mission II Report (1993), para.15

Balkan conflict abounded. The military tactics included an “ethnic cleansing” policy whose elements involve rape, forced impregnation, and forced maternity, apart from torture, humiliation, murder, genocide, and forced displacement “inter alia”.[116]

The destruction of the undesired group in the “ethnic cleansing” goes beyond the physical annihilation. It can comprehend, for instance, sexual abuse in order to cause emotional degradation, humiliation, and submission, constituting a demonstration of the power of the invading forces. Another example is the rape of women as to forcibly impregnate them with a diverse ethnic gene or perpetrated with the clear intention of demoralising and terrorising communities, prompting people to run away to escape. Rape was so inherent the Yugoslav conflict that there were rape facilities and soldiers who refused to perpetrate it could be either castrated or killed. Muslim women represented the largest part of victims. Thousands of Muslim women who were forcedly impregnated, after giving birth to unwanted babies (palpable reminders of the horror and the violence suffered) no rarely abandoned them.[117]

Apart from enduring the consequences of the violation of their physical integrity (rape can be used to purposely infect women with HIV or cause women from the undesirable community to be unable to have children), women who survive rape experiment terror and suffer different psychological reactions. Nonetheless, the psychological impact of rape and the social stigma attached to this crime can be especially severe for Muslim women victims of rape since they are often socially marginalised and rejected by their former communities.[118]

Likewise, Muslim and Croatian women, Serbian women were reproductively abused by means of sexual mutilation, forced sterilization, forced impregnation and forced maternity.[119]

Forced sexual slavery took place during the Yugoslavian conflict and women who were forced into sexual slavery were kept in brothels where they suffered both rape and forced prostitution, having, thus, the same fate as the called “comfort women” during World War II. Men were also victims of sexual abuse.[120]

According to the 1994 Final Report of the Commission of Experts pursuant to Security Council Resolution 780 (1992), through the database designed by the Commission

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[116] Askin, K. D. (1997), pp. 261-262; Segato, R. L. (2014), p. 101

[117] Amnesty International (1993), p. 5 ; Askin, K. D. (1997), pp. 263, 273; Branson, L. *Balkan “Rape Babies” face Dark Future*, Straits Times (Singapore), July 5, 1993, p. 12, quoted in Kohn, E. A. (1994), p. 202, footnote 13; Kohn, E. A. (1994), pp. 199-221; The Warburton Mission II Report (1993), para. 20

[118] Brownmiller, S. (1975), pp. 361, 385; The Warburton Mission II Report (1993), para. 8; United Nations. Outreach Programme on the Rwanda Genocide and the United Nations. Background Information on Sexual Violence used as a Tool of War. Department of Public Information (March 2014).

[119] Askin, K. D. (1997), pp. 273, 282-283

[120] Askin, K. D. (1997), pp. 291-292; United Nations, Security Council. The Final Report of the Commission of Experts pursuant to Security Council Resolution 780 (1992), pp. 58-59, para. 247

> "to provide a comprehensive record of all reported grave breaches of the Geneva Conventions and other violations of international humanitarian law"[121]

during the conflict in the former Yugoslavia, it was possible to identify 5 patterns of rape and sexual assault during the Yugoslavian conflict, without taking into account the ethnic background of the perpetrators or the victims.[122]

This Yugoslavian situation threated the international peace and security. The Security Council of the United Nations was determined to halt these infringements of international humanitarian law ("mass killings, massive, organized and systematic detention and rape of women, and "ethnic cleansing"") and to take effective actions to bring to justice those responsible for such misdeeds.[123]

Thus, in its Resolution 827 (dated 25 May 1993), the Security Council decided to set up an international tribunal to prosecute persons responsible for serious violations of international humanitarian law perpetrated in the territory of the former Yugoslavia. This Resolution also incorporated the Security Council of the United Nations´ first condemnation of rape in wartime.[124]

In the Prosecutor v. Furundžija, Case No. IT-95-17/1-A, in the Appeals Chamber Judgment, the International Criminal Tribunal for the former Yugoslavia Appeals Chamber refers to the systematic rape and detention of women in the former Yugoslavia and subsequently affirms that

> "[t]he general question of bringing to justice the perpetrators of these crimes was, therefore, one of the reasons that the Security Council established the Tribunal."[125]

The International Criminal Tribunal for the Former Yugoslavia's Statute is annexed to Resolution 827 and has given jurisdiction to the Tribunal over crimes against humanity, war crimes, and genocide. In its Article 5, (g), the Statute specifically provides that rape can be prosecuted as crime against humanity by the ICTY. Moreover, several of the provisions of the Statute related to the Tribunal's jurisdiction to try war criminals of the Balkan conflict confer protection against gender abuses.[126]

The ICTY has its seat in the Hague (the Netherlands). It has prosecuted more than 160 persons, including prominent police, military and political leaders. The

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[121] United Nations, Security Council. Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council, p. 1

[122] The Final Report of the Commission of Experts pursuant to Security Council Resolution 780 (1992), pp. 58-59, paras. 245-249

[123] United Nations, Security Council. Statute of the International Criminal Tribunal for the Former Yugoslavia (1993), Preamble

[124] Lupig, D. (2009), pp. 433-491; United Nations, Security Council. Statute of the International Criminal Tribunal for the Former Yugoslavia (1993), para. 2

[125] ICTY. The Prosecutor v. Furundžija, Case No. IT-95-17/1-A. The Appeals Chamber, Judgment, p. 62, para. 201 (21 July 2000)

[126] Askin, K. D. (1997), p. 300; Chinkin, C. (1994), pp. 326-341; United Nations, Security Council. Statute of the International Criminal Tribunal for the Former Yugoslavia (1993), Arts. 2-5

indictments concern crimes committed between 1991 and 2001 against members of distinct ethnicities in Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Kosovo, and Serbia.[127]

The Tribunal contributed to the progress of international justice in the gender-based crimes field by permitting sexual violence to be the tried "as a war crime, a crime against humanity and genocide". Certainly, since 1995 the ICTY has charged and prosecuted over seventy people with sexual violence crimes (inclusive of rape and sexual assault). As of the beginning of 2011, almost a third was found guilty.[128]

> "Sexual violence takes on various forms in the judgments. These include: rape, torture, enslavement, and persecution as crimes against humanity; and rape, torture, outrages upon personal dignity, and inhuman treatment as war crimes. Rape and/or other sexual violence amounted to torture in several cases."[129]

The most relevant judgments involving sexual offences are the following:

2.1.16.i. Case The Prosecutor v. Duško Tadić a.k.a. "Dule" (IT-94-1), related to crimes committed in "Prijedor"

Apart from being the first international war crimes trial since Nuremberg and Tokyo, the Duško Tadić case was both the first international war crimes trial involving charges of sexual violence and the first-ever international trial for sexual violence against men.[130]

In the Omarska Camp, uniformed men, among them Tadić, compelled one of the detainees to suck the penis and bite off the testicles of another detainee. In May 1997, the Trial Chamber found Tadić guilty of cruel treatment (violation of the laws and customs of war) and inhumane acts (crime against humanity) for his participation in this and other crimes.[131]

On appeal, Duško Tadić was also found guilty of grave breaches of the 1949 Geneva Conventions (inhumane treatment and willfully causing great suffering or serious injury to the body or health), being convicted to 20 years imprisonment in January 2000.[132]

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[127] ICTY website, About the International Criminal Tribunal for the former Yugoslavia
[128] ICTY website, Landmark Cases
[129] United Nations. Department of Peacemaking Operations (2010), p. 30, para. 76
[130] ICTY website, Landmark Cases
[131] ICTY. The Prosecutor v. Duško Tadić a.k.a. "Dule", Case No. IT-94-1. Trial Chamber, Opinion and Judgment, pp. 73, 285 (7 May 1997).
[132] ICTY. The Prosecutor v. Duško Tadić a.k.a. "Dule", Case No. IT-94-1. The Appeals Chamber, Judgment, pp. 144-145 (15 July 1999); ICTY website, Landmark Cases

2.1.16.ii. Case the Prosecutor v. Zejnil Delalić, Zdravko Mucić also known as "Pavo", Hazim Delić, and Esad Landžo also known as "Zenga", (IT-96-21), in relation to offences perpetrated in the "Čelebići Camp" (IT-96-21)

The Trial Chamber dealt with a number of sexual violence charges during the trial. Hazim Delić and Esad Landžo were charged with individual criminal responsibility, as direct participants in certain offences, including acts of torture, murder and rape (rape was charged as torture or cruel treatment). Delić, the deputy camp commander, was charged as well in his capacity as a superior with command responsibility. Zejnil Delalić and Zdravko Mucić were charged as superiors with responsibility for crimes perpetrated by their subordinates, including those carried out by the other two accused.[133]

Among other crimes, Hazim Delić was found guilty of torture by way of the horrific rapes of two women who were detained in the camp, being convicted to 18 years imprisonment. The trial was a landmark in international justice: for the first time a judgment of an international criminal tribunal regarded rape as a form of torture and, consequently, a grave breach (punishable under Article 2 (b) (torture) of the Statute of the Tribunal) and a violation of the laws or customs of war (punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3 (1) (a) (torture) of the Geneva Conventions; or alternatively punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3 (1) (a) (cruel treatment) of the Geneva Conventions).[134]

Additionally, the Trial Chamber understood that the sexual violence endured by the two women was permeated by discrimination, being employed on them because of their gender. In fact, the judges stressed that it had been recognized that[135]

> "violence directed against a woman because she is a woman, including acts that inflict physical, mental or sexual harm or suffering, represent a form of discrimination that seriously inhibits the ability of women to enjoy human rights and freedoms"[136]

and affirmed:

> "it is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment,

[133] ICTY. The Prosecutor v. Zejnil Delalić, et al., Case No. IT-96-21-T. Trial Chamber, Judgment, p. 3, para. 5, footnote 7 (16 November 1998); ICTY website, Landmark Cases
[134] ICTY. The Prosecutor v. Zejnil Delalić, et al., Case No. IT-96-21-T. Trial Chamber, Judgment, pp. 431, 443-446, 464-469, paras. 1262, 1285, 24-25 (16 November 1998); ICTY, Case information sheet- Mucic et al.; ICTY website, Landmark Cases
[135] ICTY. The Prosecutor v. Zejnil Delalić, et al., Case No. IT-96-21-T. Trial Chamber, Judgment, pp. 171, 177, paras. 471, 490 (16 November 1998)
[136] ICTY. The Prosecutor v. Zejnil Delalić, et al., Case No. IT-96-21-T. Trial Chamber, Judgment, p. 171, para. 493 (16 November 1998)

> coercion, discrimination or intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict."[137]

As Landžo was a camp guard, it is notable that the ICTY held him responsible for criminal acts he had incurred in, such as obliging two brothers to commit fellatio on each other in full view of other detainees, and then putting a burning fuse around their genitals. Landžo was convicted to 15 years imprisonment.[138]

The camp commander Zdravko Mucić was convicted of these and other crimes carried out by his subordinates and punished with 9 years imprisonment. The offences were considered grave breaches and violations of the laws and customs of war. Zejnil Delalić was found not guilty for lack of evidence.[139]

2.1.16.iii. Case the Prosecutor v. Anto Furundžija (IT-95-17/1) regarding the crimes carried out in the Lašva Valley

This was the first ICTY case totally focused on charges of sexual violence- the commitment of multiple rapes of a Bosnian Muslim woman during interrogations led by Furundžija, at time the commander of a special unit of the Croatian Defence Council.[140]

The Tribunal stated that while Furundžija proceeded with the interrogation of a Muslim woman,

> "a subordinate soldier threatened her by rubbing his knife on her inner thighs and saying that he would cut out her private parts.
>
> • In another room the victim and her friend, a Croatian soldier, were interrogated and beaten on their feet with a baton. The woman was then repeatedly raped before a group of soldiers. The Croatian soldier was forced to watch the sexual attacks against his friend."[141]

However, the accused

> "did nothing to stop or curtail these actions in his presence, and the continued interrogation substantially contributed to the criminal acts committed upon the woman and her friend." [142]

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[137] ICTY. The Prosecutor v. Zejnil Delalić, et al., Case No. IT-96-21-T. Trial Chamber, Judgment, pp. 178, 179, para. 495 (16 November 1998)
[138] ICTY. The Prosecutor v. Zejnil Delalić, et al., Case No. IT-96-21-T. Trial Chamber, Judgment, pp. 363, 449, paras. 1062, 1285 (16 November 1998)
[139] ICTY. The Prosecutor v. Zejnil Delalić, et al., Case No. IT-96-21-T. Trial Chamber, Judgment, pp. 440-443, para. 1285 (16 November 1998)
[140] ICTY website, Landmark Cases
[141] ICTY website, Landmark Cases; ICTY. The Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T. Trial Chamber, Judgment, pp. 17, 33, 35-36, 101, paras. 40-41, 82, 87, 266 (10 December 1998)
[142] ICTY website, Landmark Cases

Thus, Anto Furundžija was sentenced to 10 years imprisonment for committing torture ("violations of the laws or customs of war") and outrages upon personal dignity, inclusive of rape (constituting "violations of the laws or customs of war").[143]

> "In the Tribunal's Statute, the only explicit reference to rape is as one of the crimes constituting crimes against humanity. The Trial Chamber widened that scope and stated that rape may also be prosecuted as a grave breach of the Geneva Conventions and as a violation of the laws and customs of war."[144]

In this case the ICTY's judges confirmed the finding that rape can amount to genocide, following the 1998 landmark precedent set by the ICTR Akayesu case judgment, which established that rape may constitute genocide.[145]

2.1.16.iv. Case the Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković (IT-96-23 & 23/1) concerning the offences perpetrated in Foča

On 26 June 1996 Dragoljub Kunarac was indicted along Radomir Kovač and Zoran Vuković for taking part in the subjugation of Muslim women in Foča to a merciless scheme of gang rape (including oral, anal and vaginal rape and use of ejaculation to degrade victims), enslavement and torture by Bosnian Serb soldiers, members of paramilitary groups and policemen after Bosnian Serb forces occupied the city in April 1992. In the conduction of the attack against civilians, rape was deployed as a strategic "tool" to expel the Muslims from the Foča region.[146]

This was the second ICTY case exclusively with charges of sexual violence and its judgment constituted

> "another significant contribution to international criminal law. The judgement broadened the acts that constitute enslavement as a crime against humanity to include sexual enslavement and determined the relationship of gender crimes to customary law."[147]

The three criminals were Bosnian Serb army officers who had an important role in the organization and maintenance of the despicable rape camps scheme in

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[143] ICTY. The Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T. Trial Chamber, Judgment, p. 112 (10 December 1998); ICTY website, Case information sheet- Furundzija

[144] United Nations, Security Council. Statute of the International Criminal Tribunal for the Former Yugoslavia (1993), Art. 5 (g); ICTY website, Landmark Cases

[145] ICTY. The Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T. Trial Chamber, Judgment, pp. 62, 68, paras. 160, 172 (10 December 1998); ICTY website, Landmark Cases

[146] Jones, J. R.W.D. (1998), p. 347; ICTY. The Prosecutor v. Dragoljub Kunarac, et al., Case No. IT-96-23-T and IT-96-23/1-T. The Appeals Chamber, Judgment, p. 2, paras. 1-2 (12 June 2002); ICTY website, Landmark Cases

[147] ICTY website, Landmark Cases; ICTY. The Prosecutor v. Dragoljub Kunarac, et al., Case No. IT-96-23-T and IT-96-23/1-T. The Appeals Chamber, Judgment, pp. 36, 38, paras. 117, 124 (12 June 2002)

Foča. In fact, as demonstrated by the evidence, the members of the Bosnian Serb armed forces used rape as an instrument of terror, which was employed against whomsoever and whenever they wanted.[148]

In addition, the accused persons were involved in the enslavement of several women in apartments and hotels run as brothels for Serb soldiers. Women were treated like properties, been forced to perform household chores, and to comply with all the demands of their abusers. Moreover, they were unable to move with freedom and were bought and sold like goods.[149]

The judges' finding that the nature of the enslavement was sexual was important because previously international law had linked enslavement to compulsory labour and servitude. The reach of the crime was increased as to include sexual slavery.[150]

> "All three accused were also found guilty of rape as a crime against humanity. This was the first such conviction in the ICTY's history, closely following on the historical precedent set by the ICTR's judgement in the Akayesu case in 1998."[151]

Kunarac, Kovač and Vuković were penalized with, respectively, 28, 20, and 12 years imprisonment.[152]

2.1.16.v. Case the Prosecutor v. Radislav Krstić (IT-98-33) related to the crimes carried out in Srebrenica

While the Kunarac et al. judgment established that rape was employed as a "tool of war", the case of Radislav Krstić demonstrated the connection between rape and ethnic cleansing, which was intimately linked to genocide in the panorama of the crimes committed in Srebrenica in July 1995.[153]

In July 1995, Krstić commanded an operation in Srebrenica that culminated in the killing of over seven thousand Bosnian Muslim boys and men, regarded by the judges as genocide.[154]

As a result, around 20-30,000 of the Muslim residents (mainly women, children and the elderly) escaped to Potočari, a nearby village. Several thousands looked for protection inside the UN military camp, but Serb soldiers invaded the

[148] ICTY. The Prosecutor v. Dragoljub Kunarac, et al. Case No. IT-96-23-T and IT-96-23/1-T. The Appeals Chamber, Judgment, pp. 2-6, paras. 1-22 (12 June 2002); ICTY website, Case information sheet- Kunarac; ICTY website, Landmark Cases
[149] ICTY. The Prosecutor v. Dragoljub Kunarac, et al. The Appeals Chamber, Judgment, pp. 4, 93, paras. 12-13, 287 (12 June 2002); ICTY website, Landmark Cases
[150] ICTY. The Prosecutor v. Dragoljub Kunarac, et al. The Appeals Chamber, Judgment, p. 36, para. 119 (12 June 2002); ICTY website, Landmark Cases
[151] ICTY website, Landmark Cases; ICTY. The Prosecutor v. Dragoljub Kunarac, et al. The Appeals Chamber, Judgment, pp. 2-3, para. 5 (12 June 2002)
[152] ICTY. The Prosecutor v. Dragoljub Kunarac, et al. The Appeals Chamber, Judgment, pp. 125-127 (12 June 2002); ICTY website, Landmark Cases; ICTY website, The Cases
[153] ICTY website, Landmark Cases
[154] ICTY. The Prosecutor v. Radislav Krstić, Case No. IT-98-33. Trial Chamber, Judgment, pp. 25, 219-229, 252, paras. 79, 619-645, 720 (2 August 2001); ICTY website, Landmark Cases

compound and attacked people, threatening, beating, raping and killing them. Subsequently, Muslim women, children and the elderly were forcibly transferred from Potočari.[155]

Krstić was held responsible for the crime of forcibly transferring women, children and the elderly, including the incidental murders, beatings, abuses and rapes that took place in Potočari. Such crimes were regarded as "natural and foreseeable consequences of the ethnic cleansing campaign."[156]

It was observed by the Judges that "although "ethnic cleansing" was not a legal term, it had been used in various legal analyses before." The Trial Chamber also stressed that it presents many similarities with genocide.[157]

However, the rapes carried out in Potočari did not integrate the conviction of Krstić for the crime of aiding and abetting genocide because the crimes in Potočari were regarded as constituting a prologue to the consecutive genocide.[158]

The Appeals Chamber confirmed the sexual violence convictions amid other crimes, and Krstić was convicted to 35 years imprisonment.[159]

2.1.17. Other instruments protecting women

Around the same time of the establishment of the ICTY in 1993, further international declarations largely augmented the awareness and boosted the amelioration of women´s situation in the world. These declarations reckoned that crimes of sexual violence (comprising rape, sexual slavery, and forced pregnancy) should be handled as war crimes and crimes against humanity.[160]

Indeed, the United Nations World Conference on Human Rights, addressing the equal status and human rights of women in the Vienna Declaration and Programme of Action (25 June 1993)**,** asserts:

> "Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response."[161]

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[155] ICTY. The Prosecutor v. Radislav Krstić, Case No. IT-98-33. Trial Chamber, Judgment, pp. 12-14, 215-216, paras. 37, 41-47, 608 (2 August 2001)
[156] ICTY. The Prosecutor v. Radislav Krstić, Case No. IT-98-33. Trial Chamber, Judgment, pp. 218-219, paras. 616-617 (2 August 2001)
[157] ICTY website, Landmark Cases; ICTY. The Prosecutor v. Radislav Krstić, Case No. IT-98-33. Trial Chamber, Judgment, pp. 196-197, 217, paras. 561-562, 578, 612 (2 August 2001)
[158] ICTY website, Landmark Cases
[159] *Ibidem*; ICTY website, The Cases; ICTY. The Prosecutor v. Radislav Krstić, Case No. IT-98-33. The Appeals Chamber, Judgment, p.7, para. 117 (19 April 2004)
[160] Askin, K. D. (1997) p. 257; Lupig, D. (2009), pp. 433-491
[161] United Nations. Vienna Declaration and Programme of Action, II, B, 3, para. 38 (12 July 1993)

Whereas the Fourth World Conference on Women, held in Beijing, China, in September 1995, states:

> "Massive violations of human rights, especially in the form of … rape, including systematic rape of women in war situations ...are abhorrent practices that are strongly condemned and must be stopped immediately, while perpetrators of such crimes must be punished."[162]

Also, as a result of the Cairo Population Conference, which took place in Egypt in 1994, a Programme of Action of the United Nations International Conference on Population & Development was adopted. The Programme tackled in its chapter IV issues of gender equality, equity and empowerment of women, and its article 4.4 preamble and (c) preconizes that

> "[c]ountries should act to empower women and should take steps to eliminate inequalities between men and women as soon as possible by … eliminating all practices that discriminate against women; assisting women to establish and realize their rights, including those that relate to reproductive and sexual health;"[163]

2.1.18. Statute of the International Criminal Tribunal for Rwanda, 8 November 1994, and the International Criminal Tribunal for Rwanda

After assigning the elaboration of reports about the situation in Rwanda, which concluded "that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda", the Security Council of the United Nations established the International Criminal Tribunal for Rwanda (ICTR) in its Resolution 955 of 8 November 1994.[164]

Certainly, the Rwandan civil war and genocide started just after the murder of Hutu President Juvenal Habyarimana on 6 April 1994, and when it was over on 19 July 1994, a minimum of 800.000 people had been killed. The extremist Hutu militia (in association with the Rwandan Army Forces and others) started an extermination policy against both the whole Tutsi ethnic minority and the moderate Hutu.[165]

The estimative is that over this period the number of rapes was between 250.000 and 500.000. As it has been affirmed in the United Nations Commission on Human Rights' Report on the situation of human rights in Rwanda, "rape was the rule and its absence the exception." The purpose to completely annihilate the Tutsi was further demonstrated by the killing of even newborn babies and

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[162] United Nations. Report of the Fourth World Conference on Women, Beijing Declaration and Platform for Action, p. 56, para. 131 (1995)

[163] Programme of Action of the United Nations. International Conference on Population and Development, Art. 4.4, Preamble and para. (c), pp. 25-27 (5-13 September 1994).

[164] Jones, J. R.W.D. (1998), p. 4; United Nations, Security Council. Resolution 955 (1994) Establishing the International Criminal Tribunal for Rwanda (with Annexed Statute), Preamble

[165] Byron, H.E. J. C. M. D. (2010). In Bassiouni, M. C. (ed.), p. 146; Scharf, M. P. (2008); Sunga, L. S. (1997), p. 294

pregnant women (comprehending those of Hutu ethnicity) whose foetuses were fathered by Tutsi.[166]

In order to penalise those who held responsibility for the Rwandan genocide, the United Nations set up the International Criminal Tribunal for Rwanda[167]

> "for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994."[168]

Article 2 of the Statute of the International Criminal Tribunal for Rwanda (annex to Resolution 955 of 8 November 1994) provided a definition of genocide. It stated:

> "Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group."[169]

In the Prosecutor v. Akayesu case, when the Trial Chamber dealt with causing serious bodily or mental harm to members of the group, it underscored that

> "rape and sexual violence … constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group,

[166] Haffajee, R. L. (2006). pp. 201-222; Othman, M. C. (2005), p. 28; United Nations Economic and Social Council. Commission on Human Rights. Report on the situation of human rights in Rwanda submitted by Mr. René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of the resolution S 3-1 of 25 May 1994, p. 7, para. 16; United Nations. Outreach Programme on the Rwanda Genocide and the United Nations. The Justice and Reconciliation Process in Rwanda. Department of Public Information (March 2014)
[167] Scharf, M. P. (2008), p. 1
[168] United Nations, Security Council. Resolution 955 of 8 November 1994, Art. 1
[169] United Nations, Security Council. Statute of the International Criminal Tribunal for Rwanda (1994), Art. 2

> targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflict harm on the victim as he or she suffers both bodily and mental harm. ... These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole."[170]

In what concerns "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", in the Prosecutor v. Kayishema and Ruzindana case, the judges determined that actions which did not instantly caused death were subsumed under this head of charges and asserted that[171]

> "the conditions of life envisaged include rape, the starving of a group of people, reducing required medical services below a minimum, and withholding sufficient living accommodation for a reasonable period, provided the above would lead to the destruction of the group in whole or in part."[172]

Further, in paragraphs 507-508 of the Prosecutor v. Akayesu case, the judges held that

> "the measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.
>
> … measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate."[173]

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[170] ICTR. The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T. Chamber I, Judgment, para. 731 (2 September 1998).
[171] United Nations, Security Council. Statute of the International Criminal Tribunal for Rwanda (1994), Art. 2 (c)
[172] ICTR. The Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T. Trial Chamber II, Judgment, para. 116 (21 May 1999); van den Herik, L. J. (2005), p. 142
[173] ICTR. The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4. Chamber I, Judgment, paras. 507-508 (2 September 1998).

Likewise, Article 5 (g) of the ICTY statute, the ICTR Statute established in its Articles 3 (g) that the Tribunal has jurisdiction to "prosecute persons responsible for" the crime of rape (as a crime against humanity)

> "when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds".[174]

The relevance of identifying rape as an act of genocide lays on the fact that, by giving express recognition to the particular hardship inflicted on women, it prompts the crime of rape to occupy a more important role in international humanitarian law, instead of remaining relegated to its margins, as it happened, for example, in the Nuremberg and Tokyo Charters.[175]

Additionally, in its Article 4 (e), the Statute gives jurisdiction to the ICTR

> "to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977".[176]

Both Tribunals, employing constructive interaction, worked towards the establishment of a definition of rape that was internationally accepted. In the Prosecutor v. Akayesu case, the ICTR judges decanted themselves towards a conceptual definition (instead of a technical one).[177]

Indeed, the Trial Chamber asserted that

> "[w]hile rape has been defined in certain national courts as a non-consensual intercourse, variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual."[178]

By the same token, it defined "rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[179]

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[174] United Nations, Security Council. Statute of the International Criminal Tribunal for Rwanda (1994), Art. 3 (g)
[175] van den Herik, L. J. (2005), pp. 145-146
[176] United Nations, Security Council. Statute of the International Criminal Tribunal for Rwanda (1994), Art. 4
[177] van den Herik, L. J. (2005), p. 192
[178] ICTR. The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4. Chamber I, Judgment, para. 596 (2 September 1998).
[179] ICTR. The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4. Chamber I, Judgment, para. 598 (2 September 1998).

The judges went farther and differentiated rape from sexual violence, affirming that

> "[s]exual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive."[180]

Consequently, the latter is wider than the former and subsumes all acts of sexual nature carried out under circumstances that are coercive.[181]

Finally, in the case the Prosecutor v. Semanza, the ICTR applied the wider definition of torture set up in the ICTY "Čelebići" case, and held that instigating rape for a discriminatory purpose is legally considered torture and, thus, can be rendered a genocidal act.[182]

It is important to note that rape and enforced prostitution were not defined as war crimes and that there were no express references to other sexual violence offences in the ICTY and ICTR Statutes.[183]

In spite of that, the inclusion of rape in the list of acts that could amount to a crime against humanity in the Statutes of both "ad hoc" Tribunals and to install the juridical debate on the rape definition under international is a valuable achievement because, as seen, rape was out of the mainstream of international humanitarian law for a long period.[184]

2.1.19. Conclusion

As seen throughout the chapter, the prosecution of sexual and gender-based crimes had virtually no place in the international scenario up to the previous century.

Except for very few pinpointed actions (specifically, the 1474 Peter von Hagenbach's conviction for rape among other crimes, the 1863 Lieber Code rape forbiddance, and the introduction of the Martens Clause and the respect to the "laws of humanity" by the 1899 Convention (II) with Respect to the Laws and Customs of War on Land), the main legal developments in relation to the criminalisation and punishment of the sexual and gender-based crimes in the International Criminal Law scenario only started in the 20th century. Thus, it constitutes a relatively new subject.

Along the last century, such crimes progressively started to occupy a more prominent role in International Criminal Law. The enacted international

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[180] *Ibidem*

[181] van den Herik, L. J. (2005), p. 192

[182] ICTR. The Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-T. Trial Chamber III, Judgment and Sentence, pp. 147, 152-153, paras. 485, 506 (15 May 2003); United Nations, Security Council. Statute of the International Criminal Tribunal for Rwanda, Art. 3 (f); van den Herik, L. J. (2005), pp. 190-191

[183] Boot, M. revised by Hall, C. K. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 206-216; Lupig, D. (2009), pp. 433-491

[184] van den Herik, L. J. (2005), pp.191-193

documents (such as the Four Geneva Conventions of 12 August 1949 and Additional Protocols) reflected the increase in the attention dispensed by the International Community towards sexual and gender-based crimes, contributing to the protection of women.

This process led to the incorporation of sexual and gender-based crimes among the offenses over which the “ad hoc” International Tribunals have jurisdiction. The statutes of the ICTY and the ICTR rendered the crime of rape as a crime against humanity. Furthermore, the cases of these tribunals were of great importance for the prosecution of sexual and gender-based crimes in the international scenario.

This legal and historical background has to be taken into account in the analysis of the creation of the International Criminal Court.

3. The Rome Statute and the International Criminal Court

3.1. Antecedents and the construction process of the International Criminal Court

3.1.1. The Breisach "ad hoc" tribunal, 1474

As discussed in Chapter 2, the first international criminal tribunal was the "ad hoc" tribunal that prosecuted Peter von Hagenbach in Breisach in 1474.[185]

In spite of that, almost 400 years passed before the concept of a permanent international criminal court was formally considered.[186]

3.1.2. The Geneva Red Cross Convention, 22 August 1864

In accordance with Hall, "it is not widely known that the first serious such proposal" to establish a permanent international criminal court was made by Gustave Moynier (one of the founders and President of the International Committee of the Red Cross) in 1872. The proposal followed his disappointment with the failure of the adversary powers in the 1870-1871 Franco- Prussian War to respect the provisions of the Geneva "Convention for the Amelioration of the Condition of the Wounded in Armies in the Field" of 22 August 1864.[187]

In fact, in Moynier's 1870 commentary on the 1864 Geneva Convention, he deemed that an international criminal court was not necessary to enforce the Convention and believed that public criticism of infringements would suffice to States parties to impose penalties for criminal offences in their national legislations. However, the Franco-Prussian War proved him wrong.[188]

In view of that, on 3 January 1872 at a meeting of the International Committee of the Red Cross (ICRC), Moynier submitted a proposal for the creation of a permanent international criminal tribunal, by treaty. His proposal was published on 11 April of the same year under the title "Note on the creation of a specific international judicial institution to prevent and punish violations of the Geneva Convention" and stated:[189]

> "Therefore I would like [to propose] a tribunal to which contentious cases could be submitted. The tribunal would conduct an investigation of each case, would hear as required the pleadings of the plaintiff and the accused, would condemn the guilty according to future international law concerning infractions of the Geneva Convention."[190]

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[185] Bassiouni, M. C. (2010), p. 298; Scharf, M. P., & Schabas, W. A. (2002), p. 39
[186] Hall, C. K. (1998), pp. 57-74
[187] *Ibidem;* Shabtai, R. (2000). In Schmitt, M. N. (ed.), pp. 387-420
[188] Moynier, G. (1870), pp. 58-59*;* Hall, C. K. (1998), pp. 57-74
[189] Moynier, G. (1872), pp. 122-131; Hall, C. K., (1998), pp. 57-74
[190] Moynier, G. (1872), pp. 122-131; Hutchinson, J. F. (1996), p. 131

The 1872 Note included a Draft convention for the establishment of an international judicial body suitable for the prevention and punishment of violations of the Geneva Convention containing 10 articles.[191]

In accordance with the laid in Article 1 of the Draft convention,

> "the tribunal would have been … a permanent institution, which would be activated automatically in the case of any war between the parties."[192]

Moynier (acknowledging that the Geneva Convention terms did not convey the necessary strength to back up the establishment of criminal responsibility) proposed in Article 5, paragraph 2 to define criminal offences and penalties in a different instrument. Nevertheless, he did not try to establish the violations and respective punishments himself.[193]
Moynier´s proposition of an international criminal jurisdiction was a major shift. Despite the concept of a permanent international court to settle inter-State disputes had been addressed before 1872 by a few politicians, legal experts, and writers (often briefly and to regard it unfeasible), Moynier´s proposal seems to be "the first serious such proposal" "to establish a permanent international court" which would have jurisdiction over humanitarian law infringements. The model that inspired him was of the arbitral tribunal established by the Washington Treaty in the Alabama case. However, in the Draft convention, the duties of the 5 adjudicators (denominated "arbitres") were more closely related to those performed by judges than those carried out by arbitrators.[194]

Additionally, Moynier´s proposal presented daring innovations, such as the possibility of compensation to victims, although exclusively in the cases in which the accuser State enclosed a request for damages and interest in its complaint. These are advanced concepts which are still ahead of the views of several contemporary governments.[195]

Nonetheless, the proposal was not well received by governments and those responsible for the several aid societies. Moreover, many well-known experts in international law sent him letters criticising several elements of the proposal. Some sustained that the idea to set up an international criminal court would be less effective than other methods, whereas others disapproved the precise concept of an international criminal court, favouring other means.[196]

At a meeting of the "Institut de droit international", in Cambridge, in 1895, there was a discussion about the creation of an international tribunal to address

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[191] Moynier, G. (1872), pp. 122-131; Hall, C. K. (1998), pp. 57-74
[192] Moynier, G. (1872), pp. 122-131; Hall, C. K. (1998), pp. 57-74
[193] Moynier, G. (1872), pp. 122-131; Hall, C. K. (1998), pp. 57-74
[194] Hall, C. K. (1998), pp. 57-74, 65; Gabriel, E. W. P. (2000). In Carrillo Salcedo, J. A. (ed.), pp. 29-88; Moynier, G. (1872), pp. 122-131
[195] Moynier, G. (1872), pp. 122-131; Hall, C. K. (1998), pp. 57-74
[196] Hall, C. K., (1998), pp. 57-74; Hutchinson, J. F. (1996), p. 131; Shabtai, R. (2000). In Schmitt, M. N. (ed.), pp. 387-420.

offences of the laws of war, but it was not followed up. Except for this discussion, Moynier´s initiative was mostly forgotten.[197]

> "One can only speculate on the impact that an international criminal court with jurisdiction over the the Geneva Convention of 1864 and the 1907 Hague Conventions would have had on the behaviour of troops in the Russo-Japanese war, the Balkan Wars and the First World War, and the development of humanitarian law in civil wars and other national armed conflicts." [198]

3.1.3. Convention for the Pacific Settlement of International Disputes (First Hague, I), 29 July 1899, and Convention Relative to the Establishment of an International Prize Court (Second Hague, XII), 18 October 1907

The Hague Peace Conferences of 1899 and 1907, establishing several rules regarding the mechanisms and methods of warfare, set up consistent ways for the pacific settlement of disputes to permit the parties to overcome the threat of war, in case and when war arises.[199]

In this context, the Hague Convention (XII) relative to the Creation of an International Prize Court (1907) stated:

> "Animated by the desire to settle in an equitable manner the differences which sometimes arise in the course of a naval war in connection with the decisions of national prize courts; Considering that … it is desirable that in certain cases an appeal should be provided under conditions conciliating, as far as possible, the public and private interests involved in matters of prize; Whereas, moreover, the institution of an International Court, whose jurisdiction and procedure would be carefully defined, has seemed to be the best method of attaining this object."[200]

The aforementioned Convention proposed the creation of an International Prize Court with jurisdiction to decide appeals brought against national prize courts´ judgments. Nonetheless, the debates at the Hague demonstrated that there were serious disagreements in relation to the rules of law that would have been applied by the Court, what ultimately led to the non-implementation of this proposal.[201]

Certainly, as to reach an agreement regarding such rules, a Naval Conference was held in London in 1908 and 1909, producing the Declaration of London, which was never ratified. Subsequently, the proposal was modified by the 1910 Additional Protocol to the Convention Relative to the Creation of an International

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[197] Ferencz, B. B. (1980), p. 6; Hall, C. K., (1998), pp. 57-74
[198] Hall, C. K., (1998), pp. 57-74
[199] Sunga, L. S. (1997), p. 33
[200] Hague Convention (XII) relative to the Creation of an International Prize Court, Preamble (18 October 1907).
[201] Schindler, D., & Toman, J. (ed.) (1998), pp. 825-836

Prize Court because some of the States considered that there were difficulties of a constitutional nature which prevented the acceptance of the 1907 Convention, as it stood. Nevertheless, these efforts were fruitless, and, failing the ratification of the 1907 convention and the 1910 protocol, the proposal for an International Prize Court was not put into action.[202]

In spite of that, the proposal was important. It consisted in the first provision for a genuinely international court, distinct of a court of arbitration, with superior jurisdiction over the courts of the signatory States. Further, the Convention allowed individuals to have access to the court, in a period in which, in accordance with the dominant doctrine, solely States enjoyed rights and had duties under international law. Finally, said Convention conveyed the feasibility of the establishment of other courts with broader authority.[203]

3.1.4. Treaty of Peace with Germany (Treaty of Versailles), 28 June 1919

The drafters of the 1919 Treaty of Versailles were behind the following urge for formulating an international justice system.[204]

As stated in the previous chapter, the Treaty of Versailles determined in its Article 227 the creation of an "ad hoc" international criminal court to try Germany's Kaiser Wilhelm II for the commencement of the war.The Treaty further provided in its Articles 228 and 229 for the trial of German military personnel accused of having committed acts against the laws and customs of war before Allied Military Tribunals or before the Military Courts of one of the Allies.[205]

Although these two articles constituted the Treaty of Versailles' main provisions, they were not put into action because geopolitical considerations prevailed in the period after World War I. In relation to the prosecution of the Kaiser under Article 227, the Allies blamed the government of the Netherlands for refusing to extradite him, fact interpreted by some as a form to avoid establishing a tribunal in accordance with Article 227. The Allies were not prepared to set up the precedent of trying a Head of State for a novel international crime, as demonstrated by the words employed by them when drafting Article 227:[206]

> "The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties."[207]

Therefore, the drafters did not refer to a known international crime, and instead preferred to regard the crime of aggression as being a "political" crime. In view of that, the Netherlands had a valid legal ground to repel the Allies' eventual formal

[202] Additional Protocol to the Convention Relative to the Creation of an International Prize Court, Preamble (19 September 1910); Schindler, D., & Toman, J. (1998), pp. 825-836
[203] Brown, H. B. (1908), pp. 476- 489; Hague Convention (XII), Arts. 3 (1); 4 (2), 22
[204] Coalition for the International Criminal Court, History of the ICC
[205] The treaty of Versailles, Art. 227; Bassiouni, M. C. (1997), pp. 11-62
[206] Bassiouni, M. C. (2012), p. 546; Maogoto, J. (2009). In Doria, J., Gasser, H.-P., & Bassiouni M. C. (eds.), pp. 15-16
[207] The treaty of Versailles, Art. 227

submission for the surrender of the Kaiser' for prosecution, request that was made. It is possible that Article 227 was deemed to fail, representing more a response to both the European masses (which regarded the Kaiser as despicable) and to the French and Belgian Governments (that yearned to see Germany humiliated for beginning the war).[208]

In relation to the prosecutions contemplated by Article 228, the energy of the Allies to create joint or even separate military tribunals had subsided by 1921, and it was necessary to refrain of further humiliate Germany as not to cause the already instable Weimar Republic to become even more fragile. Thus, instead of establishing an Allied Tribunal in the terms of Article 228, the Allies requested Germany to undertake the trial of a constrained number of war criminals before its Supreme Court, in Leipizig.[209]

The Leipzig trials represented the prevalence of international and domestic politics of the Allies in detriment of justice. The commitment disposed in Treaty of Versailles to prosecute and penalize offenders in case Germany failed to do it was not implemented.[210]

It was a common ground that the League of Nations, created "to promote international co-operation and to achieve international peace and security" (its Covenant was included in the Treaty of Versailles), would establish a new order of universal peace with a deterrent effect over future wars. Nevertheless, the Allies missed the chance to establish an internationalized system of justice free of political considerations that would have worked to guarantee impartial justice.[211]

The weakness of the international criminal justice processes subsequent to World War I, apart from generating a feeling of impunity, failed to deter the military leaders who started World War II.[212]

In spite of its tenuous results, the Treaty of Versailles acknowledged "a priori" that war crimes and crimes against the peace should be penalized, and that international tribunals should be established for the trial of these criminal offences. Certainly, however serious were the divergences of viewpoint among the members of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, the Commission stated, amidst its conclusion, that it was[213]

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[208] Bassiouni, M. C. (2012), pp. 546-547; Maogoto, J. (2009). In Doria, J., Gasser, H.-P., & Bassiouni M. C. (eds.), p.16

[209] Bassiouni, M. C. (1994 a), p. 1194 quoting the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Reports Presented to the Preliminary Conference of Paris, Pamphlet 32 (1919), reprinted in 14 American Journal of International Law 95 (1920); Bassiouni, M. C. (2012), pp. 546-547; Maogoto, J. (2009). In Doria, J., Gasser, H.-P., & Bassiouni M. C. (eds.), pp.16-17

[210] Bassiouni, M. C. (1992), p. 202; Bassiouni, M. C. (2012), p. 548; Maogoto, J. (2009). In Doria, J., Gasser, H.-P., & Bassiouni M. C. (eds.), p. 20

[211] Bassiouni, M. C. (2012), p. 548; Maogoto, J. (2009). In Doria, J., Gasser, H.-P., & Bassiouni M. C. (eds.), pp. 20-21; The treaty of Versailles, Preamble, Arts. 1-26;

[212] Bassiouni, M. C. (2012), pp. 548-549

[213] United Nations, International Law Commission. Report on the Question of International Criminal Jurisdiction by Ricardo J. Alfaro, para. 12 (3 March 1950).

"desirable that for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law."[214]

3.1.5. The Geneva Conventions for the Prevention and Punishment of Terrorism and for the Creation of an International Criminal Court, 16 November 1937

After the murder of the King Alexander of Yugoslavia and Mr. Barthou, at Marseilles on 9 November 1934, the French Government sent a letter to the Secretary-General of the League of Nations stressing the necessity to enact an international convention against terrorism and suggesting the creation of an international court to prosecute perpetrators of terrorism acts that would be disposed in the Convention.[215]
3.1.2
The Council of the League followed up the subject and the International Conference on the Repression of Terrorism was held in Geneva, on 16 November 1937. At the Conference, following the adoption of the Convention for the Prevention and Punishment of Terrorism, the Convention for the Creation of an International Criminal Court envisaged the establishment of an international criminal court to prosecute the accused of committing the crimes enlisted in the Terrorism Convention.[216]

This was the first time in which States agreed on the creation of international criminal tribunal invested with a permanent character (although it only would sit when seized of proceedings for a crime within its jurisdiction), and that the possibility and practicality of jurisdiction over crimes of an international nature and liable to perturb international peace were officially acknowledged.[217]

Nevertheless, due to a lack of a sufficient number of ratifications and accessions, none of these Conventions has ever entered into force (the Terrorism Convention received merely twenty ratifications, while the Criminal Court Convention ten).[218]

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[214] United Nations, General Assembly, International Law Commission. Historical Survey of the Question of International Criminal Jurisdiction - Memorandum submitted by the Secretary-General, p. 49 (1949).
[215] United Nations, General Assembly, International Law Commission. Historical Survey of the Question of International Criminal Jurisdiction - Memorandum submitted by the Secretary-General, p. 16 (1949).
[216] United Nations, General Assembly, International Law Commission. Historical Survey of the Question of International Criminal Jurisdiction - Memorandum submitted by the Secretary-General, pp. 16-17 (1949).
[217] Convention for the Creation of an International Criminal Court, Art. 3. Part I (2) of the Final Act of the International Conference on the Repression of Terrorism (16 November 1937); United Nations, International Law Commission. Report on the Question of International Criminal Jurisdiction, by Ricardo J. Alfaro, para. 26 (3 March 1950)
[218] Marston, G. (2003), pp. 293-313

3.1.6. The Nuremberg International Military Tribunal and the International Military Tribunal for the Far East

After the barbaric criminal offences and atrocities perpetrated by the Germans and their allies during World War II, jurists and political leaders realised that if they re-incurred in the failure to uphold the law (as it had happened in the post-World War I period), it would ultimately jeopardise their capacity to advance and invigorate the future international law.[219]

On 8 August 1945, the Governments of Great Britain, the United States, France, and the Soviet Union concluded the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis in London, which provided for the establishment of an International Military Tribunal for the prosecution of war criminals whose crimes did not have particular geographical location (namely, crimes against the peace, war crimes and crimes against humanity). A Charter of the International Military Tribunal annexed to the Agreement (The Nuremberg Charter) disposed about the Tribunal's constitution, general principles, jurisdiction and functions.[220]

At last official action left behind the purely theoretical sphere and substantiated its objectives when this established Tribunal, with sit in Nuremberg, Germany, prosecuted the major criminals of World War II, convicting nineteen of the accused (there condemnations varied from death to prison terms ranging from ten years to life) and absolving three of them.[221]

Following the Special Proclamation by the Supreme Commander for the Allied Powers ordering and providing that it should be established an International Military Tribunal for the Far East (in order to prosecute persons charged with offences which encompassed Crimes against Peace), the Charter set up the Tribunal and detailed its constitution, jurisdiction, general principles and functions.[222]

The Tribunal had its seat in Tokyo, and convicted twenty-five accused (seven of the defendants were sentenced to death by hanging, sixteen others were sentenced to life imprisonment, a further accused was convicted to a twenty-year sentence and the last one was punished with seven years imprisonment). Therefore, the prosecutions before the Tokyo Tribunal represented the affirmation of the model set up by the Nuremberg Tribunal of trying war criminals. In this sense, the Nuremberg and Tokyo Tribunals set up the path for the future establishment of the International Criminal Court. For the first time ever, two international tribunals invested with criminal jurisdiction and formed by judges from different countries prosecuted persons accused of perpetrating crimes against peace and the humanity. Furthermore, the trials consisted in judicial

[219] Finch, G. A. (1943), pp. 81-88; Finch, G. A. (1947), pp. 20-37
[220] United Nations. Charter of the International Military Tribunal, Arts. 1-2
[221] United Nations, International Law Commission. Report on the Question of International Criminal Jurisdiction, by Ricardo J. Alfaro, paras. 37-38 (3 March 1950)
[222] United Nations. Charter of the International Military Tribunal for the Far East, Arts. 1-2, 5

proceedings in which the accused (who had the assistance of counsel and all the guarantees needed to prove their innocence) were given a just judgment.[223]

3.2. The efforts of the United Nations to create an International Criminal Court

The Charter of the United Nations (signed on 26 June 1945, in San Francisco, upon the conclusion of the United Nations Conference on International Organization) disposed that the General Assembly should begin studies and make recommendations related to

> "promoting international cooperation in the political field and encouraging the progressive development of international law and its codification."[224]

As to put this provision into action, the United Nations General Assembly, in its Resolution 94 (I) of 11 December 1946, constituted a Committee composed of seventeen members of the United Nations and directed it to study, "inter alia", the approaches whereby the General Assembly should boost the progressive development of international law and its eventual codification.[225]

This Committee on the Progressive Development of International Law and its Codification (also known as the "Committee of Seventeen") held meetings from 12 May to 17 June 1947 in New York. On 13 May 1947, France's representative on the Committee, Henri Donnedieu de Vabres (who also served as a judge in the International Military Tribunal at Nuremberg) proposed the creation of permanent international criminal court and subsequently submitted a Memorandum to the Committee containing a draft proposal for the establishment of an international criminal court:[226]

> "The repression, pursuant to the principles of the Nürnberg judgment, of international crimes against peace and humanity, which the General Assembly of the United Nations confirmed by its resolution of 11 December1946, can only be ensured by the establishment of an international criminal court.

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[223] International Military Tribunal for the Far East, judgment of 12 November 1948. In Pritchard, J., & Zaide, S. M. (eds.), pp. 49, 854-858; United Nations. Charter of the International Military Tribunal for the Far East, Art.1; United Nations, International Law Commission. Report on the Question of International Criminal Jurisdiction, by Ricardo J. Alfaro, para. 42 (3 March 1950)

[224] Charter of the United Nations and Statute of the International Court of Justice, Art. 13 (1) (a) (26 June 1945)

[225] United Nations, General Assembly. Resolution 94 (I). Progressive Development of International Law and its Codification (11 December 1946).

[226] Amnesty International (1997), p. 5; Draft Proposal for the Establishment of an International Court of Criminal Jurisdiction. Memorandum submitted to the Committee on the Progressive Development of International Law and its Codification by the delegate of France. (15 May 1947). In United Nations, General Assembly, International Law Commission. *Historical Survey of the Question of International Criminal Jurisdiction (Memorandum by the Secretary-General)*, Appendix 11, p. 119 (1949).; Dhokalia, R. P. (1970), p. 153; Hall, C. K. (1998), pp. 57-74

> This would avoid any future recurrence of the criticism often levelled against the International Military Tribunal for the trial of major war criminals, that it was an ad hoc court which only imperfectly represented the international community."[227]

Further, in its Resolution 174 (II) of 21 November 1947, the United Nations General Assembly resolved to establish the International Law Commission (its subsidiary organ formed by persons of indisputable competence in the international law field and representing the world's leading forms of civilization and main legal systems, all of them elected by the General Assembly), whose purpose was to advance both the progressive development of international law and its codification, and that would actuate in accordance with the terms of the Statute annexed to such Resolution.[228]

The proposal of creating an international criminal cort was resumed in 1948. However, in spite of these efforts, the United Nations General Assembly abstained itself of creating an international criminal court in the enactment of the Convention on the Prevention and Punishment of the Crime of Genocide (Resolution 260 (III), A, 9 December 1948), solely stating that persons accused of genocide shall be prosecuted by a competent domestic tribunal[229]

> "or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."[230]

Thus, the reluctancy of carrying out prosecutions in international courts once more prevailed, and the drafters of this Convention committed to the suppression of genocide without concomitantly establishing an international jurisdiction. The General Assembly purportedly limited its efforts towards the establishment of international criminal court and merely called the International Law Commission to analyse the opportuneness and feasibility of creating an organ of international justice to try persons accused of genocide and other criminal acts.[231]

Certainly, the General Assembly invited the International Law Commission

> "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions;"[232]

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[227] Draft Proposal for the Establishment of an International Court of Criminal Jurisdiction. Memorandum submitted to the Committee on the Progressive Development of International Law and its Codification by the delegate of France (15 May 1947).

[228] United Nations, General Assembly. Resolution 174 (II). Establishment of an International Law Commission (21 November 1947); Wood, M. (2009), p. 1.

[229] Amnesty International (1997), p. 5; Schabas, W. A. (2000), p. 345; United Nations, General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, Art. 6

[230] United Nations, General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, Art.6

[231] Schabas, W. A. (2000), p. 345; Schindler, D., & Toman, J. (eds.) (1998), p. 231

[232] United Nations, General Assembly. Resolution 260 (III) B. Study by the International Law Commission of the Question of an International Criminal Tribunal (9 December 1948)

and requested it "to pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice" when implementing such task.[233]

In spite of its downside, the Convention represented a universal awareness that genocide could not remain unpunished anymore and that an impartial judicial enforcement system was necessary in order to adequately enforce the law.[234]

In view of the General Assembly's invitation, at its first session, held in 1949, the International Law Commission assigned two joint Special Rapporteurs to submit working papers on the matter: Ricardo J. Alfaro of Panama, who supported the establishment of an International Judicial Organ (he found that such an organ was possible, and, even more than desirable, desired), and A.E.F. Sandström of Sweden, who favoured a Criminal Chamber of the International Court of Justice. Although Judge Sandström was expected to defend the establishment of an international criminal court, his report represented the common position of the international community that it was not appropriate the moment to set up an international criminal court.[235]

The reality was that the member-states countries were not prepared for the establishment of an international criminal court, but, at the same time, none of them wanted to be the blamed for aborting the idea. Further, to go against the concept of an international criminal court would jeopardize the credibility of the Allied powers after the Tokyo and Nuremberg trials.[236]

At its second session, in 1950, the International Law Commission analysed the "possibility" of[237]

> "the establishment of an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions" [238]

and, paying regard to the two opposite reports on the subject, decided that such court was "desirable" and "possible". Amidst concerns of national sovereignty and ripeness, the Commission upheld Alfaro's reported findings, but did not follow

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[233] *Ibidem*

[234] International Criminal Court, the Office of the Prosecutor, Fatou Bensouda. 65th Anniversary of the Genocide Convention: The Contribution of the Office of the Prosecutor of the International Criminal Court, the World in the Age of Genocide, p. 2.

[235] Bassiouni, M. C. (1987*)*, p. 4; Report of the Sixth Committee to the General Assembly (1950), reprinted in Ferencz, B.B. (1980). pp. 306-311; United Nations (1972), p. 22; United Nations, International Law Commission. Report on the Question of International Criminal Jurisdiction, by Ricardo J. Alfaro, paras. 128-131 (3 March 1950); United Nations, International Law Commission. Report on the Question of International Criminal Jurisdiction by Emil Sandström, paras. 39, 40 (30 March 1950); United Nations, International Law Commission. Report of the International Law Commission on its Second Session, 5 June to 29 July 1950 (July 1950).

[236] Bassiouni, M. C. (1987), pp. 4-5

[237] United Nations, International Law Commission. Report of the International Law Commission on its Second Session, 5 June to 29 July 1950, para. 137 (July 1950)

[238] United Nations, International Law Commission. Report of the International Law Commission on its Second Session, 5 June to 29 July 1950, para. 140 (July 1950)

Sandström's opinion (it did not recommend "establishing a criminal chamber of the International Court of Justice").[239]

Therefore, the debate on the sensibility, legality and convenience of an International Criminal Court continued, disguising the fact that the moment of establishing this court had not come yet. A Special Committee for the Development of a Draft Statute for an International Criminal Court, formed by seventeen states, was constituted by the General Assembly in its Resolution 489 (V), adopted on 12 December 1950. In August 1951 this Special Committee presented a report containing a Draft Statute for an International Criminal Court so that Governments could make comments. However, only a few Member-States made observations on the draft and the recurrent criticisms in relation to national sovereignty and readiness led to the appointment of a Second Special Committee (resolution 687 (VII) of 5 December 1952) which, having the States' suggestions and comments as foundation, would re-examine the draft to enable the constitution of the court.[240]

In 1953 the Second Special Committee's Revised Draft Statute for an International Criminal Court completed the alterations to the 1951 Draft Statute, and presented the respective report to the General Assembly in its first 1954 session. Nonetheless, the General Assembly understood that the appreciation of the 1953 Revised Draft Statute was conditioned to the conclusion by the International Law Commission of the Draft Code of Offences against the Peace and Security of Mankind containing the international crimes over which the eventual International Criminal Court would have jurisdiction, what followed shortly, still in the same year.[241]

Nevertheless, another problem prevented the continuity of the project of the formation of an international criminal court. Although dealing with aggression, the 1953 Draft Code of Offences could not define this crime since another Special Committee had been assigned to meet in 1956 in order to arrive at a definition of aggression and report to the General Assembly. In fact, in its Resolution 897 (IX), adopted on 4 December 1954, the General Assembly resolved to suspend the consideration of the Draft Code of Offences and wait for the submission of the new Special Committee's report on the definition of the crime of aggression. Ultimately, this resulted in the impossibility of the analysis of the 1953 Revised

[239] United Nations, International Law Commission. Report of the International Law Commission on its Second Session, 5 June to 29 July 1950, paras. 137-140, 145 (July 1950); United Nations (1972), p. 22

[240] Bassiouni, M. C. (1987) pp. 5-7; Faculty of Law, The National University of Singapore (1997), pp. 227-277; Report of the International Law Commission on its Second Session, 5 June to 29 July 1950 (July 1950); Revised Draft Statute for an International Criminal Court (Annex to the Report of the Committee on International Criminal Jurisdiction, 20 August 1953), 9 GAOR Supp. No. 12, UN Doc. A/2645 (1954), cited in Bassiouni, M. C. (1987), p. 7; United Nations (1972), p. 23; United Nations, General Assembly. Resolution 489 (V). International Criminal Jurisdiction (12 December 1950); United Nations, General Assembly. Resolution 687 (VII). International Criminal Jurisdiction (5 December 1952)

[241] Bassiouni, M. C. (1987) p. 7; Report of the 1953 Committee on International Criminal Jurisdiction 27 July-20 August 1953, 9 GAOR Supp. No. 12. UN Doc. A/2645 (1954). In Ferencz, B.B. (1980), pp. 429-459; Report of the International Law Commission covering the work of its sixth session, 9 GAOR Supp. No. 9. UN Doc. A/2693 (1954). In Ferencz, B.B. (1980) pp. 460-464; United Nations (1972), p. 23

Draft Statute by the General Assembly until the issue of the pendent aggression definition was resolved.[242]

The debates were lengthy, and in 1974 the last of the four Special Committees on the Question of Defining Aggression arrived at a definition of aggression, which was adopted by consensus by the General Assembly in its resolution 3314 (XXIX) of the same year.[243]

In spite of that, it was not until 1978 that the General Assembly decided to reconsider the 1954 Draft Code of Offences, not making any mention to the 1953 Revised Draft Statute for the Court, though. The actions in this respect were further delayed until 1981 when the International Law Commission, upon the General Assembly's invitation, finally resumed "its work with a view to elaborating the draft Code of Offences against the Peace and Security of Mankind", producing seven reports until 1989. In December of 1989, the General Assembly asked the International Law Commission to[244]

> "address the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons alleged to have committed crimes which may be covered under such a code, including persons engaged in illicit trafficking in narcotic drugs across national frontiers".[245]

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[242] Bassiouni, M. C. (1987), p. 8; Report of the International Law Commission covering the work of its sixth session, 9 GAOR Supp. No. 9. UN Doc. A/2693 (1954). In Ferencz, B.B. (1980) pp. 460-464; Report of the Sixth Committee, paras. 22-23, 9 GAOR, agenda item 49, Annexes (1954). In Ferencz, B.B. (1980) pp. 465-467; United Nations, General Assembly. Resolution 897 (IX). Draft Code of Offences against the Peace and Security of Mankind (4 December 1954).

[243] Bassiouni, M. C. (1987), p. 8; Resolution 3314 (XXIX) annexing the Definition of Aggression, 14 December 1974; Wilmshurst, E. (2008), p. 2

[244] Allain, J., & Jones, J. R. W.D. (1997), pp. 100-117; Bassiouni, M. C. (1987), p. 9; United Nations, General Assembly. Resolution 36/106. Draft Code of Offences against the Peace and Security of Mankind, para. 1 (10 December 1981); United Nations, International Law Commission. Draft Code of Offences against the Peace and Security of Mankind, First report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur. A/CN.4/364 (18 March 1983); United Nations, International Law Commission. Second report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur. A/CN.4/377 (incorporating document A/CN.4/377 and Corr.1) (1 February 1984); United Nations, International Law Commission. Third report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur. A/CN.4/387 (incorporating document A/CN.4/387/Corr.l.) (8 April 1985); United Nations, International Law Commission. Fourth report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur. A/CN.4/398 (Incorporating documents A/CN.4/398/Corr.l-3) (11 March1986); United Nations, International Law Commission. Fifth report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur. A/CN.4/404 (Incorporating document A/CN.4/404/Corr.l.) (17 March 1987); United Nations, International Law Commission. Sixth report on the draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur. A/CN.4/411(Incorporating documents documents A/CN.4/411/Corr. 1 and 2) (19 February 1988); United Nations, International Law Commission. Seventh report on the draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur. A/CN.4/419 and Add.l (Incorporating document A/CN.4/419/Corr.l) (24 February 1989).

[245] United Nations, General Assembly. Resolution 44/39, para. 1 (4 December 1989).

The General Assembly's request followed extensive actions by non-governmental organizations (in particular the International Association for Penal Law and the World Federalist Movement) and reiterated efforts of independent experts to show the possibility of implementing this court. Moreover, two political initiatives contributed to the reassessment of the issue. There were[246]

> "initiatives by President Mikhail Gorbachev of the USSR in 1987 calling for an international criminal court to try cases of terrorism"[247]

and in 1989 the Prime Minister of Trinidad and Tobago, A.N.R. Robinson, called for the establishment of an international criminal court with jurisdiction to try persons and entities engaged in, "inter alia", the international drugs trafficking.[248]

At its 42nd session (that took place between 1 May and 20 July 1990), the International Law Commission set up a Working Group to consider General Assembly´s 1989 request on the issue of creating an international criminal court or other international criminal trial mechanism with jurisdiction over persons accused of committing determined crimes.[249]

On 28 November 1990, the General Assembly reiterated its posture, and, after stating that the International Law Commission continued its work on the elaboration of the draft Code of Offences, invited the Commission to

> "consider further and analyse the issues raised in its report concerning the question of an international criminal jurisdiction, including the possibility of establishing an international criminal court or other international criminal trial mechanism."[250]

At its 43th session (1991), the Commission, arguing that the General Assembly had not yet decided if it was on favour of establishing an international criminal court or another trial mechanism, solely tackled the issue of the jurisdiction of an international criminal court and the requirements for the institution of criminal proceedings.[251]

At its 44th session, held on 20 March 1992, the International Law Commission addressed the question of the potential creation of an international criminal jurisdiction, inclusive considering certain objections to the establishment of such

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[246] Amnesty International (1997), p. 6, footnote 17; Quigley, J (1988), pp. 788-797; Schloenhardt, A. (2005); pp. 93-122; United Nations, General Assembly. Letter dated 21 Aug 1989 from the Permanent Representative of Trinidad and Tobago to the UN Secretary-General

[247] Amnesty International (1997), p. 6

[248] Amnesty International (1997), p. 6, footnote 17; Quigley, J (1988), pp. 788-797; Schloenhardt, A. (2005); pp. 93-122; United Nations, General Assembly. Letter dated 21 Aug 1989 from the Permanent Representative of Trinidad and Tobago to the UN Secretary-General

[249] Report of the International Law Commission on the work of its forty-second session (1 May-20 July 1990), pp. 8, 19-25, paras. 12, 93-157 (1990).

[250] United Nations, General Assembly. Report of the International Law Commission on the work of its forty-second session, para. 3. (28 November 1990).

[251] Report of the International Law Commission on the work of its forty-third session (29 April-19 July 1991), p. 80, paras. 67-68 (1981).

jurisdiction, and provided two versions of a possible draft provision (regarding the jurisdiction of the court, criminal proceedings, the law that should be applied by the court, proceedings related to compensation for injury, the handing over of an accused person to the court, as well as the double-hearing principle).[252]

Up to this point, the goal of the International Law Commission`s session, regarding the establishment of an international criminal court, was to launch a thorough debate in relation to relevant aspects of the creation of such a court, so that the discussion of these issues could provide the foundation for draft a statute.[253]

On 28 November 1992, the General Assembly explicitly requested the International Law Commission to

> "continue its work on this question by undertaking the project for the elaboration of a draft statute for an international criminal court as a matter of priority as from its next session."[254]

As a result, the eleventh report on the Draft Code of Crimes Against the Peace and the Security of Mankind offered a Draft Statute for an International Criminal Court to the International Law Commission, at the latter´s 45th session, held on 25 March, 1993.[255]

Still in 1993, the "ad hoc" International Criminal Tribunal for the former Yugoslavia was established. In December of that year, the General Assembly, after considering the International Law Commission's report on the work of its 45th session and expressing its appreciation for the progress achieved in the elaboration of the Draft Statute for an International Criminal Court, requested the Commission to "continue its work as a matter of priority on this question with a view to elaborating a draft statute, if possible at its forty-sixth session in 1994."[256]

The International Law Commission did elaborate a draft statute by July 1994 (46th session), and

> "decided to recommend to the General Assembly that it convene an international conference of plenipotentiaries to study the draft statute and to conclude a convention on the establishment of an international criminal court."[257]

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[252] Tenth report on the draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur, p. 52, paras. 1-4 (20 March 1992).
[253] Eleventh report on the draft code of Crimes Against the Peace and the Security of Mankind, by Mr Dodou Thiam, Special Rapporteur, p. 113, para. 1 (25 March 1993).
[254] Report of the International Law Commission on the work of its forty-fourth session, GA Res. 47/33, GAOR Forty-seventh session, Supp. No. 49, para. 6 (1992).
[255] Eleventh report on the draft code of Crimes Against the Peace and the Security of Mankind, p. 113, para. 2
[256] United Nations, General Assembly. Report of the International Law Commission on the work of its forty-fifth session, para. 6 (9 December 1993).
[257] United Nations, International Law Commission. Report of the International Law Commission on the work of its forty-sixth session, para. 17 (2 May -22 July 1994).

Although the International Criminal Tribunal for Rwanda had been set up recently, the Commission´s recommendation was defeated in the Sixth Committee of the General Assembly. The General Assembly, in its resolution 49/53 of 9 December 1994, decided to[258]

> "establish an ad hoc committee, open to all States Members of the United Nations or members of specialized agencies, to review the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, in the light of that review, to consider arrangements for the convening of an international conference of plenipotentiaries"[259]

Following the General Assembly´s decision, this ""Ad hoc" Committee on the Establishment of an International Criminal Court" met from 3 to 13 April and from 14 to 25 August 1995. It reviewed the issues that had arisen out of the 1994 draft statute and made arrangements for assembling an international conference.[260]

In the resolution 50/46 of 11 December 1995, the General Assembly took the decision of establishing

> "a preparatory committee ... to discuss further the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, taking into account the different views expressed during the meetings, to draft texts, with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries."[261]

The Preparatory Committee on the Establishment of an International Criminal Court met from 25 March to 12 April and from 12 to 30 August 1996. It deeply analysed the problems related to the draft statute and started to work on a broadly acceptable consolidated text of an international criminal court convention.[262]

In 1996 the General Assembly decided in its resolution 51/207 that the Preparatory Committee would meet in 1997 and 1998. The task would be to finish "the drafting of a widely acceptable consolidated text of a convention for an international criminal court". Moreover, the Assembly decided that a diplomatic conference of plenipotentiaries would be held in 1998.[263]

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[258] Amnesty International (1997), p. 6
[259] United Nations, General Assembly. Establishment of an International Criminal Court, para. 2 (9 December 1994)
[260] United Nations, General Assembly. Establishment of an International Criminal Court, para. 3 (9 December 1994)
[261] United Nations, General Assembly. Establishment of an International Criminal Court, para. 2. (11 December 1995).
[262] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (1998).
[263] United Nations, General Assembly. Establishment of an International Criminal Court, paras. 4-5 (17 December 1996).

In accordance with the General Assembly's decision, the Preparatory Committee held three meetings in 1997 (from 11 to 21 February, from 4 to 15 August and from 1 to 12 December). It worked and elaborated "a widely acceptable consolidated text of a convention for an international criminal court".[264]

In its resolution 52/160 of 15 December 1997, the General Assembly accepted the offer of the Government of Italy to be the host country of the "United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court". The Conference would be held at Rome between 15 June and 17 July 1998.[265]

The Preparatory Committee met from 16 March to 3 April 1998. It completed the elaboration of the draft Statute of an International Criminal Court.[266]

The Conference took place in Rome from 15 June to 17 July 1998. The Preparatory Committee's draft Statute was presented. The Conference entrusted the Committee of the Whole with considering the draft Convention on the Establishment of an International Criminal Court adopted by the Preparatory Committee, and assigned the[267]

> "the Drafting Committee, without reopening substantive discussion on any matter, with coordinating and refining the drafting of all texts referred to it without altering their substance, formulating drafts and giving advice on drafting as requested".[268]

On 17 July 1998, the Rome Statute of the International Criminal Court was adopted by the Conference (120 states voted in favour, 7 against, while 21 abstained). It was opened for signature on 17 July 1998 until 17 October 1998 at the Ministry of Foreign Affairs of Italy. Afterwards, it remained opened up to 31 December 2000, but at United Nations Headquarters in New York.[269]

The Rome Statute entered into force on 1 July 2002, following the terms of its Art. 125 (2), as it will be discussed below.

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[264] *Ibidem*; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (1998)

[265] United Nations, General Assembly. Establishment of an International Criminal Court, paras. 1, 3 (15 December 1997).

[266] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (1998).

[267] Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, paras. 21-22 (17 July 1998).

[268] Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, para. 21 (17 July 1998).

[269] United Nations, Rome Statute of the International Criminal Court, Art. 125, para. 1 (17 July 1998).

3.3. The inclusion of gender-related issues in the Rome Statute

3.3.1. Introduction

The use and definition of the term “gender” in the Rome Statute of the International Criminal Court was an achievement. It constituted the first instance in which such term appeared defined in an international criminal law treaty.[270] Nevertheless, the inclusion of “gender” in the Statute did not come easily.

In fact, although the final version of the Rome Statute refers to “gender” nine times, the 1994 Draft Statute for an International Criminal Court by the International Law Commission did not include the word “gender”. The final text was adopted due to an intense lobbying effort by non- governmental organizations (in special the Women's Caucus for Gender Justice in the International Criminal Court) and the fact that many delegations recognized that the Statute had to be gender-sensitive if the International Criminal Court was to effectively prosecute genocide, crimes against humanity, and war crimes.[271]

It was a good time to lobby for an "engendered" statute for an international criminal tribunal: the issue of sexual violence in war had being object of plenty of attention by the time of the Rome Diplomatic Conference, and, resultantly, the majority of states at the Rome Diplomatic Conference was on favour of including gender provisions in the Statute.[272]

Nevertheless, there was a well-organized minority opposition (constituted by collusion between some anti-choice groups, mainly from the USA and Canada, and some delegations of states where religion is used as a basis to discriminate the treatment dispensed to women, including the Vatican and an Islamic States group) that aimed to obstruct the Court's ability to appropriately handle sexual and gender crimes.[273]

As a consequence of this antagonism, the negotiations on the inclusion of the term “gender” were tough and very belligerent. Moreover, the debate around the term “gender” triggered the alarm of conservative delegations in relation to the potential raise of issues connected to sexuality. Contrarily, other terms such as “political,” “racial,” “national,” “ethnic,” “cultural,” “religious,” “age,” “wealth,” and “birth” were smoothly included in the enlisted forbidden basis of persecution and discrimination.[274]

The provision defining “gender” resulted “oddly worded and circular” and was permeated by the “constructive ambiguity” employed by the delegates, as discussed below.[275]

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[270] Oosterveld, V. (2005), pp. 55-84
[271] Oosterveld, V. (2005), pp. 55-84; Rome Statute, Arts. 7(1)(b), 7(3), 21, 42(9), 54(1)(b), 68(1); Report of the International Law Commission on the work of its forty-sixth session (2 May -22 July 1994).
[272] Bedont, B., & Martinez, K. H. (1999), pp. 65-85
[273] *Ibidem*
[274] Oosterveld, V. (2005), pp. 55-84; Rome Statute, Arts. 7(1) (h), 21(3)
[275] Oosterveld, V. (2005), pp. 55-84

3.3.2. The discussions regarding the inclusion of the term "gender"

In 1996 the term "gender" was used for the first time: many States recommended to include a remark on gender balance in the International Law Commission's article regarding the qualifications and election of judges.[276]

At the February 1997 Preparatory Committee meeting, the Committee stated that "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural or religious [or gender]" constituted grounds for incurring in crimes against humanity.[277]

Nevertheless, the fact that the term "gender" was included in brackets signalised that the text had not been accepted consensually (as it is the use in international negotiations).[278]

Another five references to "gender" were included in the draft International Criminal Court Statute in the Preparatory Committee negotiations, which took place in August 1997. Two appeared in Art. 26, 2, [(iii)], [(d) bis]:[279]

> "The Prosecutor shall take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in so doing, respect the interests and personal circumstances of victims and witnesses, including age, gender and health, and take into account the nature of the crime, in particular, but not limited to, where it involves sexual or gender violence or violence against children;]"[280]

Another two were added in Art. 43(2):

> "[The Prosecutor shall, in ensuring the effective investigation and prosecution of crimes, respect and take appropriate measures to protect the privacy, physical and psychological well-being, dignity and security of victims and witnesses, having regard to all relevant factors, including age, gender and health, and the nature

[276] *Ibidem*; United Nations, General Assembly. Report of the Preparatory Committee on the Establishment of the International Criminal Court, Vol. I (Proceedings of the Preparatory Committee During March-April and August, 1996); United Nations, General Assembly, Report of the Preparatory Committee on the Establishment of the International Criminal Court, Vol. II (Compilation of Proposals) (1996).
[277] United Nations, General Assembly. Decisions Taken by the Preparatory Committee at Its Session Held from 11 to 21 February 1997, GAOR, Preparatory Comm. on the Establishment of an Int'l Crim. Court, 51st mtg., Annex 1, pp. 4, 5, n.7 (1997).
[278] Oosterveld, V. (2005), pp. 55-84
[279] *Ibidem*; United Nations, General Assembly. Decisions Taken by the Preparatory Committee at Its Session Held from 4 to 15 August 1997, GAOR, Preparatory Comm. on the Establishment of an Int'l Crim. Court, Annex 2, Arts. 26, 2, [(iii)], [(d) bis], 43 (2) (3) (1997).
[280] United Nations, General Assembly. Decisions Taken by the Preparatory Committee at Its Session Held from 4 to 15 August 1997, GAOR, Preparatory Comm. on the Establishment of an Int'l Crim. Court, Annex 2, Art. 26, 2, [(iii)], [(d) bis];(1997).

> of the crime, in particular, whether the crime involves sexual or gender violence …]"[281]

The final mention to gender appeared in art. 43(3):

> "The Court shall take such measures as are necessary to ensure the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, at all stages of the process, including, but not limited to, victims and witnesses of sexual and gender violence."[282]

Although at this point no State contested (at least in public) the use of the term "gender" in such provisions, the first two provisions were bracketed due to the debated of the delegates on whether or not the mention of the role of the Prosecutor in protecting victims and witnesses should be separately mentioned in the text. Article 43 (3), on the other hand, was broadly accepted and was not bracketed.[283]

At the December 1997 round of negotiations, it was proposed the inclusion of a provision establishing that the application and interpretation of general sources of law by the International Criminal Court must be consistent with, "inter alia", norms of nondiscrimination founded on gender.[284]

This idea, which received increasing support, was incorporated in an unbracketed article of the March 1998 draft statute, despite the fact that, in corridor discussions, determined conservative states still questioned why this article did not refer instead to non-discrimination on the grounds of sex.[285]

Also, in these 1998 negotiations, the Preparatory Committee included provisions, which were bracketed, urging the Prosecutor to

> "appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children"[286]

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[281] United Nations, General Assembly. Decisions Taken by the Preparatory Committee at Its Session Held from 4 to 15 August 1997, GAOR, Preparatory Comm. on the Establishment of an Int'l Crim. Court, Annex 2, Art. 43 (2) (1997).
[282] United Nations, General Assembly. Decisions Taken by the Preparatory Committee at Its Session Held from 4 to 15 August 1997, GAOR, Preparatory Comm. on the Establishment of an Int'l Crim. Court, Annex 2, Art. 43 (3) (1997).
[283] Oosterveld, V. (2005), pp. 55-84
[284] *Ibidem*; United Nations, General Assembly. Decisions Taken by the Preparatory Committee at Its Session Held 1 to 12 December 1997, GAOR, Preparatory Comm. on the Establishment of an Int'l Crim. Court, Annex 2, p. 14, n.11 (1997).
[285] Oosterveld, V. (2005), pp. 55-84; United Nations. Report of the Preparatory Committee on the Establishment of an International Criminal Court (Draft Statute and Draft Final Act), Art. 20 (3) (14 April 1998).
[286] United Nations. Report of the Preparatory Committee on the Establishment of an International Criminal Court (Draft Statute and Draft Final Act), Art. 43 (9) (14 April 1998).

and stating that the Office of the Prosecutor should "include staff with expertise in trauma, including trauma related to crimes of sexual violence."[287]

Revisiting the question of the qualifications of judges, the delegates added a draft text in brackets providing that both "gender balance" and[288]

> "[t]he need, within the membership of the Court, for expertise on issues related to sexual and gender violence, violence against children and other similar matters" [289]

should be considered in the election of the International Criminal Court's judges.[290]

It was further agreed that in the employment the staff of the Court, the Registrar and the Prosecutor should use the same criteria.[291]

In the Rome Diplomatic Conference (15 June-17 July 1998), it seemed that a partial agreement on the use of the term "gender" in the Statute had been reached: two provisions containing such term were consensually agreed and four others were bracketed and, thus, subject to discussion.[292]

Negotiations at the Diplomatic Conference started calmlywith the adoption of the provision that urged the appointment by the prosecutor of[293]

> "advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children."[294]

Nevertheless, soon it emerged resistance to the use of "gender" in the negotiations on the judicial qualifications. Concomitantly, conservative nongovernmental organizations circulated lobby papers supporting the removal of both "gender balance" and the requirement of judges' qualifications.[295]

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[287] United Nations. Report of the Preparatory Committee on the Establishment of an International Criminal Court (Draft Statute and Draft Final Act), Art. 43 (10) (14 April 1998).
[288] Oosterveld, V. (2005), pp. 55-84; United Nations, General Assembly. Report of the Preparatory Committee on the Establishment of the International Criminal Court, Vol. II (Compilation of Proposals), pp. 11, 14
[289] United Nations. Report of the Preparatory Committee on the Establishment of an International Criminal Court (Draft Statute and Draft Final Act), Art. 37 (8) (e) (14 April 1998).
[290] United Nations. Report of the Preparatory Committee on the Establishment of an International Criminal Court (Draft Statute and Draft Final Act), Art. 37 (8) (d) (e) (14 April 1998).
[291] United Nations. Report of the Preparatory Committee on the Establishment of an International Criminal Court (Draft Statute and Draft Final Act), Art. 45 (2) (14 April 1998).
[292] Oosterveld, V. (2005), pp. 55-84; United Nations. Report of the Preparatory Committee on the Establishment of an International Criminal Court (Draft Statute and Draft Final Act), Arts. 20 (3), 37 (8) (e), 43 (9), 54 (4) (e), 68 (2) (3) (14 April 1998).
[293] Oosterveld, V. (2005), pp. 55-84
[294] United Nations. Report of the Preparatory Committee on the Establishment of an International Criminal Court (Draft Statute and Draft Final Act), Art. 43 (9) (14 April 1998).
[295] Oosterveld, V. (2005), pp. 55-84; Summary Record of the 14th Meeting, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Crim. Court, Comm. of the Whole, 14th mtg., Agenda Item 11, para. 46 (1998); Summary Record of the 15th Meeting, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Crim. Court, Comm.

States that played an important role on the defense of the gender issues, (as, for instance, Australia, Canada, New Zealand, and Samoa) faced procedural obstacles in the negotiations. Certainly, since in the Rome Treaty Conference the statute's provisions were adopted by consensus, whenever group of opponents did not agree with the wording favored by the majority, the efforts to approve provisions addressing gender issues were fruitless.[296]

As a result of an extended process of negotiation, the delegates decided to put an end to the impasse by deleting the term “gender” from the part regarding judicial expertise. Although a number of States wanted to follow the precedent established by the 1995 Beijing Declaration and Platform for Action and preserve the reference to “gender” in “gender balance”, the delegates conceded to replace such reference by “female and male” (in this specific point, the meaning concerned biological sex, therefore it made sense to make such alteration it for the sake of terminological clarity, in spite of the Beijing Platform for Action’s usage of “gender balance”).[297]

Negotiations on whether some judges should be specialised on questions concerning sexual and gender violence had a similar outcome, and the final text adopted only mentioned expertise “on specific issues, including, but not limited to, violence against women or children.” Nonetheless, the fact that the list which described the judicial qualifications is merely illustrative (instead of exhaustive), and the partial overlap between expertise on violence against women or children and expertise on gender issues, tempered the defeat of the supporters of the maintenance of the reference to “gender” on judicial qualifications.[298]

Following the exclusion of two references to “gender” in order to sort out the impasse on the judicial qualifications, several countries felt that the remaining references to “gender” had to be ultimately adopted.[299]

The discussion regarding whether or not the term should be removed from the provision concerning persecution was postponed (after the inclusion of a footnote stating that “gender” “referred to male or female”) and opened space for the debate on the applicable law provision, the instance in which a solution for the question was found.[300]

Apart from defining the law that the Court should apply, such provision finished with a “no adverse distinction” clause. The initial draft set out that[301]

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of the Whole, 15th mtg., Agenda Item 11, para. 11 (1998)

[296] Bedont, B., & Martinez, K. H. (1999), pp. 65-85

[297] Oosterveld, V. (2005), pp. 55-84; Rittich, K., Charlesworth, H., Cossman, B., Obiora, L., & Romany, C. (1999), pp. 206-209; United Nations. Report of the Fourth World Conference on Women, Beijing Declaration and Platform for Action, p. 58, para. 142 (b) (1995).

[298] Oosterveld, V. (2005), pp. 55-84; Rome Statute, Art. 36 (8)

[299] Oosterveld, V. (2005), pp. 55-84

[300] *Ibidem*; Rome Statute, Art. 21 (3) (correspondent to Art. 20(3) of the draft statute); United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. Crimes Within the Jurisdiction of the Court, Art. 5, p. 2, n.2. (1998).

[301] Oosterveld, V. (2005), pp. 55-84

> "[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, which include the prohibition on any adverse distinction founded on gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status, or on any other similar criteria."[302]

Even though the text of this paragraph had been agreed during the Preparatory Committee's March 1998 meeting, many States started to defend the idea that the term "gender" should be either removed from the enlisted grounds or that the clause should stop at "internationally recognized human rights" (fact that demonstrates that the Catholic and Islamic delegations were so committed to oppose gender issues, that they were even willing to jeopardize basic rights, such as clearly protecting people from religious discrimination).[303]

A polarized debate aroused and numerous countries advocated for, or opposed to, the maintenance of the term "gender."[304]

The opposition argued that the use of "gender" ("gender" encompasses the distinctions between men and women due to their socially constructed roles, whereas "sex" is limited to their biological differences) could denote rights broader than those then recognised in several countries, and could lead to the approval of rights founded on sexual orientation. Indeed, some Arab states justificative was that term "gender" covered sexual orientation, but their position on this topic served as well as a justification for undermining several provisions throughout the statute that were promoting women's rights.[305]

Additionally, some delegations argued that "gender" could not be properly translated into the six official UN languages, and conservative non-governmental organizations hand out lobby papers containing similar, although further detailed, arguments.[306]

It became patent that the discussion on the term "gender" had come to a deadlock, so the Chair of the Working Group on Applicable Law asked if the use of the same solution adopted at the 1995 World Conference on Women might possibly bring together the different opinions. In that case, in the "Statement by the President of the Conference on the Commonly Understood Meaning of the Term "Gender" (Annex IV to the Beijing Platform for Action, that was included in

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[302] United Nations. Report of the Preparatory Committee on the Establishment of an International Criminal Court (Draft Statute and Draft Final Act), Art. 20 (3) (14 April 1998).

[303] Bedont, B., & Martinez, K. H. (1999), pp. 65-85; Steains, C. (1999). In Lee, R. S. K. (ed.), pp. 357-390

[304] Oosterveld, V. (1998). Member of the Canadian Delegation to the 1998 U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, Notes from Working Group on Applicable Law, July 11, 13, 1998 (on file with author)), cited in Oosterveld, V. (2005), pp. 55-84

[305] Bedont, B., & Martinez, K. H. (1999), pp. 65-85; Steains, C. (1999). In Lee, R. S. K. (ed.), pp. 357-390; Oosterveld, V. (2005), pp. 55-84

[306] Oosterveld, V. (1998). Member of the Canadian Delegation to the 1998 U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, Notes from Working Group on Applicable Law, July 11, 13, 1998 (on file with author)), cited in Oosterveld, V. (2005), pp. 55-84

the conference report), the President noted that the word "gender" was “used and understood in its ordinary, generally accepted usage” in many United Nations forums and conferences and reaffirmed that “gender” should be interpreted and understood in the same manner in the Platform for Action.[307]

Numerous delegations regarded this solution acceptable, however those against the use of the term “gender” argued that the Beijing solution was equivocal because it did not provide a definition for “gender” and this lack of definition would infringe criminal law’s requirement of certainty.[308]

Since in bilateral and corridor discussions the delegations that were against the inclusion of the term “gender” insisted that adopting a suitable definition was the only form in which such term could be maintained, negotiations changed towards drafting a definition that could be approved by all States.[309]

Those which opposed the use of the term “gender” demanded the maintenance of “two sexes” and agreed on including a reference to “society”, proposing:[310]

> “For the purposes of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, [and their roles] within society [in the con- text of society]. The term does not imply the existence of more than two sexes.”[311]

Those that wished to retain “gender” responded that the last sentence should at least reproduce the Beijing approach and state: “The term does not imply any new meaning or connotation of the term different from accepted prior usage.”[312]

Finally, references to “in the context of their society” or “in the context of society and the traditional family unit” were suggested by those against “gender”. Nevertheless, such expressions were rejected and rendered very restrictive by those on favour of the term “gender”, whereas “in the context of society” was welcomed by both sides and considered to be sufficiently flexible and precise.[313]

Subsequently, those against “gender” expressed that they demanded something else, and the product was the employment in the last sentence of the words that had already been proposed, but written in a redundant form: “The term ‘gender’ does not indicate any meaning different from the above.”[314]

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[307] Oosterveld, V. (2005), pp. 55-84*;* United Nations. Report of the Fourth World Conference on Women, Beijing Declaration and Platform for Action, p. 218, paras. 2-3 (1995).
[308] Oosterveld, V. (1998). Member of the Canadian Delegation to the 1998 U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, Notes from Working Group on Applicable Law, July 11, 13, 1998 (on file with author)), cited in Oosterveld, V. (2005), pp. 55-84
[309] Oosterveld, V. (2005), pp. 55-84
[310] *Ibidem*
[311] Oosterveld, V. (1998). Member of the Canadian Delegation to the 1998 U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, Notes from Working Group on Applicable Law, July 11, 13, 1998 (on file with author)), cited in Oosterveld, V. (2005), pp. 55-84
[312] *Ibidem*
[313] *Ibidem*
[314] Oosterveld, V. (2005), pp. 55-84; Rome Statute, Art. 7 (3)

The provision ultimately adopted was:

> "it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above."[315]

Even though it constituted an uncommon solution, this sentence comforted both those delegations against “gender” (from their perspective, the definition reaffirmed the “two sexes, male and female”) and those supportive (they perceived the definition as harmless since it reaffirmed the important reference to “context of society, which covers the sociological distinctions between men and women).[316]

Moreover, such definition allowed the adoption of the terms "gender" and "gender crimes" elsewhere in the Statute. In fact, these terms were used as substitutes to "sex" and "sexual violence”, respectively, which are more restrict. It was an important victory since it continued the well-established practice of using this wider concept, “gender”, in international instruments. Additionally, the second sentence suggests that the concept can not be enlarged beyond its current understanding as established in the first sentence. The definition's acceptance facilitated the inclusion of many other provisions. Undoubtedly, following further discussion on how the definition should be incorporated into the Rome Statute, the delegates included the words “as defined in article 7(3)” after each time that the term “gender” appeared in the Statute.[317]

For instance, the adopted non-discrimination provision states:

> “The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.”[318]

Such clause was essential to guarantee the fair treatment of individuals involved in the International Criminal Court process by registrars, investigators, prosecutors, and chambers of the Court.[319]

Although the level of combativeness of the negotiations on “gender” at the Rome Diplomatic Conference surprised many, it had precedents. The Holy See, conservative organizations, and determined Arab states had previously made clear their opinion on the term “gender” in other international fora as, for instance, during the discussions of the 1995 Beijing Declaration and Platform for Action. Certainly, after the 1995 Beijing Declaration and Platform for Action was adopted,

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[315] Rome Statute, Art. 7 (3)
[316] Bedont, B., & Martinez, K. H. (1999), pp. 65-85; Oosterveld, V. (2005), pp. 55-84
[317] *Ibidem; Ibidem*
[318] Rome Statute, Art. 21 (3)
[319] Bedont, B., & Martinez, K. H. (1999), pp. 65-85

the Holy See stated that it understood that the term “gender” was based “in biological sexual identity, male or female” and therefore excluded[320]

> “dubious interpretations based on world views which assert that sexual identity can be adapted indefinitely to suit new and different purposes.”[321]

Unfortunately, the obstacles in the negotiations concerning the gender provisions in the Rome Statute reflect the continuous struggle to advance women's rights.[322]

3.4. The International Criminal Court

The Rome Statute is mainly known as the treaty that set up the International Criminal Court. Nevertheless, more than half of the Statute disposes about the creation of a system of international criminal justice.[323]

As seen above, the Statute is the product of several laboriously achieved compromises, and constitutes a long and intricate document. Although its provisions derived from different legal traditions of the main legal systems of the world, they were formulated as to form a rounded one piece.[324]

In fact, apart from its preamble, the Rome Statute contains 128 articles that are interdependent and divided in 13 parts, disposing about the establishment of the Court; the Court’s jurisdiction, admissibility and applicable law; general principles of criminal law (eleven in total); composition and administration of the Court; investigation, prosecution and trial stages; the penalties; the possibility of appeal and apply for revision; international cooperation and judicial assistance; enforcement; the regulation of the Assembly of States Parties; financing issues; and final clauses.[325]

Many of the general principles of law, fundamental legal provisions, and rules of procedure regulating the Court’s judicial functions were included for the first time in an international treaty.[326]

Furthermore, the fundamental criminal laws and procedures established in the Statute amounted to “the first true international criminal justice system in codified treaty form”.[327]

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[320] Oosterveld, V. (2005), pp. 55-84; United Nations. Report of the Fourth World Conference on Women, Beijing Declaration and Platform for Action, p. 162, para. 12 (1996).
[321] United Nations. Report of the Fourth World Conference on Women, Beijing Declaration and Platform for Action, p. 162, para. 12 (1995).
[322] Bedont, B., & Martinez, K. H. (1999), pp. 65-85
[323] Lee, R. S. K. (1999). In Lee, R. S. K. (ed.). pp. 1-40
[324] *Ibidem*; Politi, M. (2001). In Politi, M., & Nesi, G. (eds.), pp. 7-16
[325] Rome Statute, Arts. 1-128
[326] Lee, R. S. K. (1999). In Lee, R. S. K. (ed.). pp. 1-40
[327] *Ibidem*

Therefore, the Rome Statute, which is “part legislation and part constitution”, goes beyond the establishment of the International Criminal Court, and sets up the basis of “a system of international criminal law”.[328]

The International Criminal Court is a “treaty-based tribunal". It means that it was established (and is also determined) by the Rome Statute, adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998. States ratify or accede to this document, and, under it, they have determined prerogatives and are committed to carry out certain obligations.[329]

The objective of the States when they instituted the International Criminal Court was to eradicate the impunity for the perpetrators of the most serious offences of international concern, thus, contributing to prevent these crimes, and to maintain international peace and security, in accordance with the purposes and principles of the Charter of the United Nations.[330]

An overview of the Court will be succinctly provided.

3.4.1. Status, characteristics and inherent powers

The International Criminal Court is a permanent body, with power to exercise its jurisdiction over persons for the most serious crimes of international concern, namely, the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.[331]

The International Criminal Court has its seat at the Hague in the Netherlands and is an independent judicial institution with international legal personality. In fact, the Court is not a constituting part of the United Nations (contrarily to the International Criminal Tribunals for Yugoslavia and Rwanda that were established by and consist in organs of the Security Council of the United Nations). It was rather brought into relationship with the United Nations through a Relationship Agreement approved by the United Nations Resolution 58/318 (following the preconised by art. 2 of the Rome Statute).[332]

This United Nations - International Criminal Court Relationship Agreement established the institutional relation, cooperation and judicial assistance between them. Moreover, it confirmed the special role that the Security Council plays in

[328] *Ibidem;* Washburn, J. (1999), pp. 361-377
[329] Scheffer, D. (2011). In Schabas, W. A., & Bernaz, N. (eds.), pp. 67-84
[330] Charter of the United Nations and Statute of the International Court of Justice, Art. 1, para.1; United Nations, Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome, 15 June-17 July 1998)
[331] Rome Statute, Arts. 1, 5 (a) (b) (c) (d)
[332] Dag Hammarskjöld Library, UN Documentation: International Law, International Criminal Court; Rome Statute, Arts. 1, 2, 3 (1), 4 (1); Scheffer, D. (2011). In Schabas, W. A., & Bernaz, N. (eds.), pp. 67-84; United Nations, General Assembly. Cooperation between the United Nations and the International Criminal Court (2004); United Nations, General Assembly. Negotiated Relationship Agreement between the United Nations and the International Criminal Court (2004)

the operations of the Court. In spite of that, the International Criminal Court's independence is one of the main features of such institution.[333]

3.4.2. Jurisdiction, admissibility and applicable law

3.4.2.(i). Fundamentals of the International Criminal Court's jurisdiction

The International Criminal Court's was established with the agreement of the States that are subject to its jurisdiction (unlike the four precedent international criminal tribunals). These States have accorded that crimes perpetrated in their territory or by their nationals can be tried by the Court.[334]

3.4.2.(ii). Personal ("ratione personae") jurisdiction

As previously stated, the subjects of the International Criminal Court's jurisdiction are the individuals responsible for the most serious crimes of international concern.[335]

For the first time in history it was set up a court with jurisdiction over persons all over the world, regardless of their colour, race, nationality, place of residence, or social position. No one has immunity before the International Criminal Court because of his/her status, and, consequently, Presidents, Members of Parliament, government officials and leaders of rebel movements can be prosecuted. It is necessary to stress that the Court does not try persons who were under the age of 18 at the time in which a crime under the ICC's jurisdiction was allegedly perpetrated.[336]

Furthermore, under determined circumstances, a person in authority can be regarded responsible for the crimes perpetrated by those working under his order or command.[337]

3.4.2.(iii). Subject matter jurisdiction

Article 5 "Crimes within the jurisdiction of the Court" of the Statute enlists the most serious crimes of international concern, expressly, crime of genocide, crimes against humanity, war crimes, and the crime of aggression, establishing the International Criminal Court's material jurisdiction.[338]

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[333] Scheffer, D. (2011). In Schabas, W. A., & Bernaz, N. (eds.), pp. 67-84; United Nations, General Assembly. Cooperation between the United Nations and the International Criminal Court (2004); United Nations, General Assembly. Negotiated Relationship Agreement between the United Nations and the International Criminal Court (2004)

[334] Schabas, W. A. (2011), pp. 63-64

[335] Rome Statute, Art. 1

[336] International Criminal Court (2010). Booklet, Victims before the International Criminal Court, A Guide for the Participation of Victims in the Proceedings of the Court, p. 6; Pikis, G. M. (2010), pp. 1, 21; Rome Statute, Art. 21 (3)

[337] International Criminal Court (2010). Booklet, Victims before the International Criminal Court, A Guide for the Participation of Victims in the Proceedings of the Court, p. 6

[338] Pikis, G. M. (2010), p. 50; Rome Statute, Arts. 1, 5 (a) (b) (c) (d)

Sexual and gender-based crimes appear expressly under the head of crimes against humanity and war crimes, and implicitly under the head genocide.[339]

3.4.2.(iv). Territorial ("ratione loci") jurisdiction

Article 12 of the Rome statute, disposing about the preconditions to the exercise of jurisdiction, establishes the Court´s competence by stating the instances in which it has the right to take the case.[340]

In accordance with such article, the International Criminal Court is empowered to exercise jurisdiction if the State on the territory of which the act or omission happened or the State of nationality of the person suspect either is party to the Statute or has acquiesced to the jurisdiction of the Court.[341]

In a nutshell, the Court has jurisdiction over crimes that were perpetrated within the territory of a State party (extended to crimes carried out on a sea vessel or aircraft registered in the country) or by nationals of a State party.[342]

3.4.2.(v). Temporal ("ratione temporis") jurisdiction

Contrarily to the four precedent "ad hoc" international criminal tribunals, the International Criminal Court does not have a retroactive effect.[343]

The Court can assume jurisdiction solely over facts ulterior the entry into force of the Rome Statute (that took place on 1 July 2002, in accordance with the terms set up by article 126 paragraph 1 of the Statute).[344]

However,

> "[i]f a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration"[345]

accepting the jurisdiction of the ICC in relation to the criminal offence at stake.[346]

3.4.2.(vi). Admissibility

The jurisdiction conferred to International Criminal Court by the international community is narrower and more limited than the jurisdiction that the individual nations have over the same crimes.[347]

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[339] Rome Statute, Arts. 6 (b) (c) (d), 7 (g) (f), 8 (2) (b), (xxii), (e), (vi)
[340] Rome Statute, Art. 12 (2) (a) (b), (3)
[341] Rome Statute, Art. 12
[342] Pikis, G. M. (2010), p. 50
[343] Rome Statute, Art. 1
[344] Rome Statute, Arts. 11 (1), 24 (1), 126 (1)
[345] Rome Statute, Art. 11 (2)
[346] Rome Statute, Arts. 11 (2), 12 (3), 126 (2)
[347] Schabas, W. A. (2011), p. 64

Surely, the International Criminal Court´s jurisdiction is complementary to national criminal jurisdictions. States retain the incumbency of trying persons who allegedly committed war crimes before their national courts. The Court´s jurisdiction is ancillary to the jurisdiction of countries, which, for the circumstances of the crime, can prosecute it.[348]

Therefore, the International Criminal Court is only vested with jurisdiction to investigate or conduct a prosecution where the States are unwilling, or are genuinely unable to do so.[349]

3.4.2.(vii). Applicable law

The International Criminal Court determines the law that should be applied to case following a "cascading priority of sources".[350]

Article 21 of the Rome Statute determines that

> "The Court shall apply:
>
> (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
>
> (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
>
> (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime."[351]

Furthermore, the Court can use "principles and rules of law as interpreted" in its preceding decisions.[352]

3.4.3. Structure and Organization

The Rome Statute presents several organizational rules that mould the work of the Court. The International Criminal Court's organizational design permits a division and allocation of different powers and duties, hence allowing that the functioning of the Court obeys the established procedural provisions.[353]

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[348] Pikis, G. M. (2010), pp. 1, 54; Rome Statute, Art. 1
[349] Rome Statute, Art. 17 (1) (a), (2), (3); Song, H. E. J. S.-H. (2010). In Bassiouni, M. C., pp. 142-143
[350] Scheffer, D. (2011). In Schabas, W. A., & Bernaz, N. (eds.), pp. 67-84
[351] Rome Statute, Art. 21 (1) (a) (b) (c)
[352] Rome Statute, Art. 21 (2)
[353] Roben, V. (2003). In von Bogdandy, A., & Wolfrum, R. (eds.), pp. 513-552

The structure of the International Criminal Court is multipart: it encompasses administrative, prosecutorial and judicial authorities.[354]

The organs of the Court are the Presidency (which commands the Court); an Appeals Division, a Trial Division and a Pre-Trial Division (that guarantee that the trial is fair); the Office of the Prosecutor (in charge of proceeding with investigations and prosecutions); and the Registry (whose mission is to support the Court).[355]

As of 5 July 2019, there are 800 staff members (from around 100 States). The court has 6 official languages (Arabic, Chinese, English, French, Russian and Spanish) and 2 working languages (English and French).[356]

3.4.3.(i). Judicial sector

The Assembly of States Parties (composed by all the countries that have ratified or acceded to the Rome Statute, is in charge of the International Criminal Court's management oversight and constitutes its legislative body) elects 18 judges, by majority of votes, for nine-year terms (in the beginning of the Court some judges had shorter terms). As a rule, the judges should not be re-elected.[357]

The judges are individuals of high moral character, impartiality and integrity. All the judges must have a different nationality, be citizens of a State party, and present experience in criminal law or international law. Additionally, they should be independent to carry out their functions.[358]

The Rome Statute expressly determined that, when selecting the judges, the nations parties should take into consideration the need for a fair representation of female and male judges within the membership of the Court ("inter alia"). It also established that the States Parties should[359]

> "take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children."[360]

The Presidency is formed by the President, together with the First and Second Vice-Presidents. The three of them are chosen "by an absolute majority of the 18 judges of the Court for a maximum of two, three-year terms." [361]

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[354] Pikis, G. M. (2010), p. 27

[355] International Criminal Court, Understanding the International Criminal Court, p.8; Pikis, G. M. (2010), p. 27; Rome Statute, Art. 34 (a), (b), (c), (d)

[356] International Criminal Court website, The Court Today (2018); Rome Statute, Art. 50 (1) (2)

[357] International Criminal Court, ICC at a glance; Rome Statute, Arts. 1, 6 (a) (b), (9) (a) (b), 36 (9) (a), 125 (2); Scheffer, D. (2011). In Schabas, W. A., & Bernaz, N. (eds.), pp. 67-84

[358] Bassiouni M. C. (1999). In Bassiouni M. C. (ed.), pp. 29-65; Rome Statute, Arts. 36 (3) (a) (b) (i) (ii), (7), 40 (1); Scheffer, D. (2011). In Schabas, W. A., & Bernaz, N. (eds.), pp. 67-84

[359] Rome Statute, Art. 36 (8) (a) (iii)

[360] Rome Statute, Art. 36 (8) (b)

[361] International Criminal Court, Understanding the International Criminal Court, p. 9; Rome Statute, Art. 38 (1) (3)

The Presidency is in charge of

> "the administration of the Court, with the exception of the Office of the Prosecutor. It represents the Court to the outside world and helps with the organization of the work of the judges., and ensure that the sentences rendered by the Court are enforced. The Presidency is also responsible for carrying out other tasks, such as ensuring the enforcement of sentences imposed by the Court."[362]

> "The 18 judges, including the three judges of the Presidency, are assigned to the Court´s three judicial divisions: the Pre-Trial Division (composed of seven judges), the Trial Division (composed of six judges), the Trial Division (composed of five judges)."[363]

The judicial functions of the Court are implemented in each division by Chambers. Therefore, the judges are assigned in the following Chambers: Pre-Trial Chambers (each formed by one or three judges), the Trial Chambers (each of them constituted of three judges) and the Appeals Chamber (which is composed of all the five judges of the Appeals Division).[364]

The Pre-Trial Chamber has authority to deal with pre-trial questions, including the authorization of investigations (and contingent issues), the arrest and detention of the person summoned before the Court, drawing out evidence and disclosure to the counterparty before the confirmation hearing, and holding the confirmation of charges hearing. Further, it has power to authorize the adoption of measures with views of protecting the victims, witnesses and members of their families, in accordance with the Rome Statute and the Rules of Procedure and Evidence.[365]

The Trial Chamber has competence to try the individuals committed to trial after the confirmation of charges, and, in case of conviction, is responsible for dealing with the subsequent matters, as, for example, imposing sentence on a person rendered guilty, awarding reparations that are owned to victims, holding a re-trial of a case in situations in which the Appeal Chamber directs so, and revising conviction or sentence in cases in which such matter is remitted to it by the Appeals Chamber.[366]

The Appeals Chamber, which is the second and last tier of the International Criminal Court, presents appellate jurisdiction. Certain decisions of the Pre-Trial and Trial Chambers (that constitute the first instance courts) are appealable before the Appeals Chamber, following the proceedings set up by the Statute, the Rules of Procedure and Evidence and the Regulations of the Court.[367]

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[362] International Criminal Court, Understanding the International Criminal Court, p. 9
[363] *Ibidem*; Rome Statute, Art. 39 (1) (3) (4)
[364] Rome Statute, Art. 39 (2) (a) (b) (i) (ii) (iii); International Criminal Court, Understanding the International Criminal Court, p.9
[365] Pikis, G. M. (2010), p. 91; Rome Statute, Arts. 15 (3) (4) (5), 18 (2) (4) (6) (7), 19 (6), 53 (1) (2) (3) (a), 54 (2) (b), 56 (1) (2) (b) (3), 57, 58, 59 (5) (6), 60, 61, 68;
[366] Pikis, G. M. (2010), p. 91; Rome Statute, Arts. 75-78, 83 (2) (b), 84 (2) (a)
[367] Pikis, G. M. (2010), p. 92; Rome Statute, Arts. 82-85

3.4.3.(ii). Prosecutorial sector

The Office of the Prosecutor should "act independently as a separate organ of the Court". In fact, the judicial and prosecutorial sectors of the Court work separately within the institution, each one having its own functions.[368]

> "The Office of the Prosecutor is an independent organ of the Court. Its mandate is to receive and analyse information on situations or alleged crimes within the jurisdiction of the ICC, to analyse situations referred to it in order to determine whether there is a reasonable basis to initiate an investigation into a crime of genocide, crimes against humanity, war crimes or the crime of aggression, and to bring the perpetrators of these crimes before the Court."[369]

"As an independent and impartial body, the Prosecutor was granted the power to investigate and prosecute *ex officio.*" Thus, his/ her central task has an executive character. His/her position under the International Criminal Court's procedure lays on three features: independence to carry out an investigation, judicial control of his/her important decisions, and obligation to act with objectivity.[370]

In the terms of Article 42, paragraph 4 of the Statute,

> "[t]he Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled. Unless a shorter term is decided upon at the time of their election, the Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for re-election."[371]

3.4.3.(iii). Administrative sector

By providing administrative and operational support, the Registry assists the Court to conduct impartial, fair, and public trial. The Registry is in charge of the non-judicial elements concerning the Court´s administration and servicing, without prejudice to the Prosecutor´s functions and powers over the Office of the Prosecutor. Therefore, the administrative structure of the International Criminal Court is dual. Certainly, as head of the Office of the Prosecutor, the Prosecutor has total authority over this office´s management and administration, inclusive of staff, facilities and further resources.[372]

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[368] Pikis, G. M. (2010), p. 27; Rome Statute, Art. 42 (1)
[369] International Criminal Court, Understanding the International Criminal Court, p. 10; Rome Statute, Art. 42 (1)
[370] Roben, V. (2003). In von Bogdandy, A., & Wolfrum, R. (eds.), pp. 513-552; Rome Statute, Art. 54
[371] Rome Statute, Art. 42 (4)
[372] International Criminal Court, Understanding the International Criminal Court, p.11; Rome Statute, Arts. 42 (2), 43 (1); Pikis, G. M. (2010), p. 27

The Registrar, by his turn, is the main administrative officer of the International Criminal Court, heads the Registry, and carries out his duties under the authority of the President of the Court. He is elected by an absolute majority of the judges (taking into consideration any recommendation by the Assembly of States Parties) for a term of five years, and is eligible for reelection once. Should the need arise, and paying regard to the recommendation of the Registrar, the judges will choose a Deputy Registrar in the same way, for a five-year term of or a briefer term as decided by an absolute majority of the judges, as disposed by Article 43, paragraph 5 of the Statute.[373]

In accordance with article 43, paragraph 6 of the Rome Statute, and with the goal of providing

> "protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses,"[374]

the Registrar has established a Victims and Witnesses Unit (VWU) within the Registry.[375]

The VWU should incorporate in its staff people with specific knowledge in trauma (inclusive of trauma connected to sexual violence crimes) and gender and cultural diversity, among other types of expertise.[376]

The Court has established as well the Trust Fund for Victims, and the Victims Participation and Reparation Section. The Victims Participation and Reparation Section was set up within the Registry in order to help victims with their applications for participation in the proceedings and/or for reparations. It is also the Section´s duty to assist victims in the obtainment of legal advice and organization of their legal representation.[377]

3.4.4. Investigation and procedure

When designing the International Criminal Court's procedure, the international community endorsed several relevant decisions taken by of the UN Security Council in the establishment of the former Yugoslavia and Rwanda "ad hoc" Tribunals.[378]

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[373] Rome Statute, Art. 43 (2) (4) (5)
[374] Rome Statute, Art. 43 (6)
[375] *Ibidem*
[376] Rome Statute, Arts. 43 (6), 79; Rules of Procedure and Evidence of the International Criminal Court, Rule 19 (e)
[377] International Criminal Court (2010). Booklet, Victims before the International Criminal Court, A Guide for the Participation of Victims in the Proceedings of the Court, p. 28; Rome Statute, Arts. 75 (1), (2), (3), 79; Rules of Procedure and Evidence of the International Criminal Court, Rule 98; Trindade, A. A. C. (2011), p. 202
[378] Roben, V. (2003). In von Bogdandy, A., & Wolfrum, R. (eds.), pp. 513-552

The International Criminal Court directs its investigations and trials in accordance with the rules established in the Rome Statute, the Elements of Crimes and the Rules of Procedure and Evidence. The Regulations of the Court and the Regulations of the Registry complement the list of basic documents of the Court.[379]

3.4.4.(i). The International Criminal Court's procedure

The International Criminal Court's proceedings cover four main stages: Preliminary Examination Stage, Pre-Trial Stage, Trial Stage, and Appeal Stage.[380]

3.4.4.(i).(a). Preliminary Examination stage

Article 13 of the Rome Statute establishes three mechanisms to trigger the jurisdiction of the International Criminal Court. The first one is when a State Party refers to the Prosecutor a situation in which one or more of the crimes under the Court's jurisdiction seem to have been perpetrated. The second consists in a referral to the Prosecutor by the United Nations Security Council of the same kind of situation. The last possibility is the initiation of investigations "proprio motu" by the Prosecutor grounded on information regarding crimes that are under the ICC´s jurisdiction.[381]

After receiving a referral of a situation from either a State Party or the Security Council, the Prosecutor will analyse the available information and begin an investigation, except if he concludes that there are no justifiable grounds to proceed.[382]

In the "proprio motu" investigations, the Prosecutor will consider the seriousness of the information received, and may seek additional information from several trustful sources. Upon considering that there is a reasonable basis to start an investigation, the Prosecutor will present to the Pre-Trial Chamber[383]

> "a request for authorization of an investigation, together with any supporting material collected."[384]

Therefore, the central objective during this preliminary examination stage is to decide whether the Prosecutor will investigate a determined situation in which

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[379] Rome Statute, Art. 1; Elements of Crimes of the International Criminal Court; Rules of Procedure and Evidence of the International Criminal Court; International Criminal Court. Regulations of the International Criminal Court; International Criminal Court. Regulations of the Registry; Pikis, G. M. (2010), p. 91; Scheffer, D. (2011). In Schabas, W. A., & Bernaz, N. (eds.), pp. 67-84

[380] International Criminal Court (2010). Booklet, Victims before the International Criminal Court, A Guide for the Participation of Victims in the Proceedings of the Court, p. 6; Rome Statute, Arts. 13, 14, 15 (1) (2) (6), 53-85

[381] Pikis, G. M. (2010), p. 91

[381] Rome Statute, Arts. 13 (a) (b) (c), 14 (1), 15 (1)

[382] Pikis, G. M. (2010), p. 91

[382] Rome Statute, Arts. 13 (a) (b) (c), 14 (1), 53 (1)

[383] Rome Statute, Art. 15 (2) (3)

[384] Rome Statute, Art. 15 (3)

criminal offences within the jurisdiction of the International Criminal Court may have been perpetrated, and then conduct the investigation of the situation as to establish which crimes have actually been committed and who should be held responsible for them.[385]

3.4.4.(i).(b). Pre-Trial stage

In the course of the investigation, the situation is assigned to one of the Pre-Trial Chambers, which is responsible for the proceedings' judicial aspects.[386]

At any moment of the investigation, the Prosecutor can apply for an issuance of a warrant of arrest by the Pre-Trial Chamber. After examining "the application and the evidence or other information submitted by the Prosecutor," the Pre-Trial Chamber will issue a warrant of arrest if it considers that there are justifiable basis to believe that the person has incurred in "a crime within the jurisdiction of the Court", and that "the arrest of the person seems necessary", in the terms laid in Article 58 (1) (b) of the Rome Statute.[387]

The surrender of a person to the International Criminal Court or his/her appearance before it constitutes the beginning of the judicial process regarding the offences that the individual is believed to have perpetrated.[388]

Within a reasonable time following the surrender or voluntary appearance of the accused before the Court, the Pre-Trial Chamber will hold a hearing to confirm the charges put forward by the Prosecutor. If the charges are sustained in the confirmation hearing, they will constitute the foundation of the trial. [389]

3.4.4.(i).(c). Trial stage

Subsequently to the confirmation of charges, the Presidency will constitute a Trial Chamber to conduct the ulterior proceedings. The Trial Chamber is responsible for dealing with the case should ensure the fairness and celerity of the trial. Moreover, this organ should guarantee both the respect to the accused individual's rights and the protection of victims and witnesses.[390]

The charged person is presumed to be innocent until the Prosecutor proves, beyond reasonable doubt, his/her guilt. Among the accused's right is the prerogative to conduct the defense either in person or through legal assistance of his/her choice.[391]

In cases in which the victims' personal interests are affected, the Court can permit, in determined stages of the proceedings, the presentation of the victims'

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[385] International Criminal Court (2010). Booklet, Victims before the International Criminal Court, A Guide for the Participation of Victims in the Proceedings of the Court, p. 6; Rome Statute, Arts. 53-56
[386] International Criminal Court's website, How the Court works; Rome Statute, Art. 57
[387] Rome Statute, Art. 58 (1) (a) (b) (i) (ii) (iii)
[388] Pikis, G. M. (2010), p. 122; Rome Statute, Art. 60
[389] Rome Statute, Art. 61 (1); International Criminal Court's website, How the Court works
[390] Rome Statute, Arts. 61 (11); 64 (2)
[391] Rome Statute, Arts. 66, 67 (1) (d)

views and concerns by their legal representatives (as long as it is not prejudicial to or inconsistent with the accused person's rights, and a fair and impartial trial).[392]

After the proceedings are concluded, the Trial Chamber renders a decision of acquittal or conviction. In the cases in which the accused is convicted, the Trial Chamber will ponder which is the appropriate penalty and issue a sentence. In accordance with the Rome Statute, the penalties to be imposed are imprisonment for a determined number of years (the period of imprisonment cannot exceed 30 years, though), or a term of life imprisonment ("when justified by the extreme gravity of the crime and the individual circumstances of the convicted person").[393]

Additionally, the Trial Chamber can order reparations to victims, including restitution, rehabilitation and compensation.[394]

3.4.4.(i).(d). Appeal stage

During the Pre-Trial and Trial stages, the accused, the Prosecutor or a concerned State can appeal decisions rendered by the Pre-Trial and Trial Chambers, in the terms of the Rome Statute.[395]

Subsequently to the Trial Chamber's decision, the convicted person or the Prosecutor can appeal against the decision of acquittal or conviction or against the sentence. Legal representatives of victims, the convicted individuals or bona fide owners of adversely-affected property are entitled to appeal orders of reparations issued by the Trial Chambers.[396]

Moreover, a conviction or sentence could be revised by the Appeals Chamber, if, for example, new evidence emerges or it is found out that decisive evidence was actually was false, forged or falsified. The Appeals Chamber is responsible of deciding all appeals, issuing the final judgment.[397]

3.5. The entering into force of the Rome Statute

The Rome Statute established in its Article 126, paragraph 1, that it would

> "enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations."[398]

[392] Rome Statute, Art. 68 (3)
[393] International Criminal Court's website, How the Court works; Rome Statute, Arts. 74, 76 (1), 77 (1) (a) (b)
[394] Rome Statute, Art. 75 (2)
[395] International Criminal Court's website, How the Court works; Rome Statute, Art. 82
[396] Rome Statute, Arts. 81, 84 (2)
[397] International Criminal Court's website, How the Court works; Rome Statute, Art 84 (2)
[398] Rome Statute, Art. 126 (1)

Signing started on the adoption of the Rome Statute on 17 July 1998. The first State to ratify the Rome Statute was Senegal on 2 February 2009, while Trinidad and Tobago was the following one, in April of the same year.[399]

The speed of ratification was faster than it had been expected, and by 31 December 2001, forty-eight ratifications had been obtained. On 11 April 2002 there was a special treaty ratification event, in which 10 States submitted in conjunction their ratifications to the Secretary General of the United Nations, increasing the total number of ratifications to 66 (in a special arrangement, the UN Treaty Office rendered all of the nations that ratified simultaneously on that day as being among the first 60). For this reason, and in accordance with Article125 (2) of the Rome Statute, the latter entered into force on 1 July 2002.[400]

Also, on 17 July 1998, the Preparatory Commission for the Establishment of an International Criminal Court was created, and all States were invited to participate.[401]

> "The Preparatory Commission (PrepCom) was charged with completing the establishment and smooth functioning of the Court by negotiating complementary documents, including the Rules of Procedure and Evidence, the Elements of Crimes, the Relationship Agreement between the Court and the United Nations, the Financial Regulations, the Agreement on the Privileges and Immunities of the Court."[402]

As of 5 July 2019,

> "123 countries are parties to the Rome Statute (effective as of 27 October 2017). Of these, 33 are from Africa, 19 from the Asia Pacific, 18 from Eastern Europe, 28 from Latin America and the Caribbean, as well as 25 from Western Europe and North America."[403]

3.6. The beginning of the International Criminal Court's functioning

Subsequently to the entry into force of the Rome Statute and the 10th and last session of the Preparatory Commission (1-12 July 2002), the Assembly of States Parties´ held its first meeting between 3-10 September 2002, and, without further substantive discussion, adopted the documents that had been consensually

[399] Schabas, W. A. (2011), p. 24; Sekuloski, B. (2013), pp. 144-167
[400] Coalition for the International Criminal Court, History of the ICC; The Electronic Newsletter of the Women's Caucus for Gender Justice (2002); Schabas, W. A. (2011), p. 24; Song, H. E. J. S.-H. (2010). In Bassiouni, M. C. (ed.) (2010 b), pp. 142-143; Verweij, H. (2001), pp. 737-749.
[401] Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, paras. 1-2, 6-14
[402] Coalition for the International Criminal Court, History of the ICC; Agreement on the Privileges and Immunities of the Court (2002); Elements of Crimes of the International Criminal Court (2002); Negotiated Relationship Agreement between the United Nations and the International Criminal Court (2004); Rules of Procedure of the Assembly of States Parties (2002); Financial Regulations and Rules (2002); Rules of Procedure and Evidence of the International Criminal Court (2002)
[403] International Criminal Court website, The Court Today (2018)

approved by the Preparatory Commission two years before. Also at this session were made arrangements for the election of the 18 judges and the prosecutor positions.[404]

In November 2002 the nomination of candidates to the elections was closed, and even though there were more than 40 candidates for the judge positions, there were no candidates to the prosecutor position. In the first week of February 2003, the Assembly of States concluded the election of the 18 judges. 7 of the total number of judges were women (thus, more than one third of the total number of judges), an achievement unparalleled in the history of international courts and tribunals. On 11 March 2013 the inaugural meeting of judges of the International Criminal Court took place. In April 2003 the first Prosecutor to the International Criminal Court was elected.[405]

On 18 April 2003 the Republic of Côte d'Ivoire issued a declaration under article 12-3 of the Rome Statute accepting the International Criminal Court's jurisdiction over the authors and accomplices of acts committed in its territory subsequently to the events of 19 September 2002 (nevertheless, only on 14 December 2010 that State wrote a letter reconfirming the acceptance of the Court's jurisdiction, and, on 03 October 2011, the Pre-Trial Chamber authorised the opening of an investigation into the situation in the Republic of Côte d'Ivoire, in the terms of article 15 of the Rome Statute).[406]

Upon receiving many communications from both persons and non-governmental organisations, in July 2003 the Prosecutor announced that he would carefully follow the situation in the Democratic Republic of the Congo and indicated that such situation would be one of the first concerns of his Office. Two months later, the Prosecutor informed the Assembly of States Parties that he would be prepared to open a "proprio motu" investigation subject to the authorisation from a Pre-Trial Chamber, but pointed out that a referral and cooperation from Democratic Republic of the Congo would facilitate his Office's work.[407]

In April 2004 the Prosecutor

> "received a letter signed by the President of the Democratic Republic of Congo (DRC) referring to him the situation of crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC since the entry into force of the Rome Statute, on 1 July 2002."[408]

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[404] Dörmann, K., & Maresca, L. (2004); pp. 217-232; Schabas, W. A. (2011), p. 24; The Electronic Newsletter of the Women's Caucus for Gender Justice (2002)

[405] International Criminal Court, Assembly of States Parties. Report, First Session, Official Records. (3-10 September 2002); Schabas, W. A. (2011), p. 24; United Nations, Secretary-General's Statement to the Inaugural Meeting of Judges of the International Criminal Court (11 March 2003)

[406] International Criminal Court website, Situations under investigation

[407] ICC website, Press Release, Prosecutor receives referral of the situation in the Democratic Republic of Congo (19 April 2004)

[408] *Ibidem*

Two months later, the Prosecutor installed an investigation on the situation of the Democratic Republic of Congo. This was the first investigation opened at the International Criminal Court. [409]

In December 2003 the President of Uganda referred the situation regarding the Lord's Resistance Army to the Prosecutor. This was the first referral of a situation to the Prosecutor of the International Criminal Court. Subsequently, the Prosecutor's decision to start an investigation on the situation was taken in July 2004.[410]

3.7. Ongoing preliminary examinations, situations and cases

As of 5 July 2019, the Office of the Prosecutor is conducting 10 preliminary examinations. In fact, the Office of the Prosecutor has been monitoring the situations of Afghanistan, Colombia, Guinea, Iraq/UK, Nigeria, Palestine, the Philippines, Bangladesh/Myanmar, Ukraine and Venezuela.[411]

Apart from the investigations on the Democratic Republic of Congo, Uganda, and Republic of Côte d'Ivoire situations, there are ongoing investigations on other 8 situations: situation in the Central African Republic (referral on 7 January 2005, decision to open investigation on 22 May 2007), situation in Darfur, Sudan (not a State Party to the Rome Statute, referral by the United Nations Security Council on 31 March 2005, decision to open investigation on 6 June 2005), situation in the Republic of Kenya (Pre-Trial Chamber II authorised the Prosecutor to open an investigation on 31 March 2010), situation in Libya (not a State Party to the Rome Statute, referral by the United Nations Security Council on 26 February 2011, decision to open investigation on 3 March 2011), situation in the Republic of Mali (referral on 13 July 2012, decision to open investigation on 16 January 2013), situation in the Central African Republic II (referral on 30 May 2014, decision to open investigation on 24 September 2014), situation in Burundi (the Prosecutor of the ICC authorised to open "proprio motu" investigation on 25 October 2017) and situation in Georgia (the Prosecutor of the ICC authorised to open "proprio motu" investigation on 27 January 2016).[412]

As of 5 July 2019, a total of 27 cases (in the foregoing 11 situations) have been brought before the International Criminal Court. This work will focus on three cases involving sexual and gender-based crimes in which the International Criminal Court has rendered its final judgment: the Prosecutor v. Thomas Lubanga Dyilo, the Prosecutor v. Germain Katanga, and the Prosecutor v. Jean-Pierre Bemba Gombo.[413]

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[409] International Criminal Court website, Situations under investigation; International Criminal Court website, Democratic Republic of the Congo, Situation in the Democratic Republic of the Congo, ICC-01/04; International Criminal Court website, Press Release, The Office of the Prosecutor of the International Criminal Court opens its first investigation.

[410] ICC website, Press release, President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC (29 January 2005); International Criminal Court website, Situations under investigation

[411] International Criminal Court website, Preliminary examinations

[412] International Criminal Court website, Situations under investigation

[413] *Ibidem;* International Criminal Court website, The Court Today (2018)

4. Sexual and gender-based crimes in the Rome Statute

4.1. The relevance of the Rome Statute for the sexual and gender-based crimes

As previously mentioned in Chapter 2, during the last few decades, the international community has adopted various effective measures in order to respond to surging demands to recognise sexual and gender-based crimes as grave crimes at both national and international levels.[414]

The apex of these efforts was when States participating of the Rome Conference agreed to include in the Rome Statute specific provisions regarding several forms of sexual and gender-based crimes, uplifting these crimes and at last including them amidst "the most serious crimes of concern to the international community", (namely, "war crimes", "crimes against humanity", and "genocide").[415]

In fact, the drafters of the Rome Statute attached great importance to the relevance of gender in the commission of criminal offences under the Statute. As a result, the Rome Statute was the inaugural instrument in international law to present a broad roster of sexual and gender-based crimes and regard them as war crimes (in both international and non-international armed conflicts).[416]

Although both the statute of the ICTY and the statute of the ICTR included the crime of rape amidst the "crimes against humanity", the Rome Statute was an important development since it went further and extended the list of sexual and gender-based crimes which constitute crimes against humanity. Surely, the Rome Statute presents a more detailed provision: apart from rape, other kinds of sexual violence (sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity) and persecution on the grounds of gender were enlisted under the head crimes against humanity.[417]

In addition, the commission of sexual and gender-based crimes with intent to destroy, either in whole or in part, a national, ethnic, racial, or religious group can amount to genocidal acts, albeit there is no explicit mention to sexual and gender-based crimes in Article 6 of the Rome Statute (which defines the crime of genocide).[418]

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[414] International Criminal Court, the Office of the Prosecutor. Policy Paper on Sexual and Gender-Based Crimes, p. 9 (9 June 2014).
[415] *Ibidem*; Rome Statute, Article 5 (a) (b) (c)
[416] International Criminal Court, the Office of the Prosecutor. Policy Paper on Sexual and Gender-Based Crimes, pp. 9-11 (9 June 2014).
[417] International Criminal Court, the Office of the Prosecutor. Policy Paper on Sexual and Gender-Based Crimes p. 9 (9 June 2014); Rome Statute, Art. 5 (g) (h); Schabas, W. A. (2010, p. 185; United Nations, Security Council. Statute of the International Criminal Tribunal for the Former Yugoslavia (1993), Art. 5 (g); United Nations, Security Council. Statute of the International Criminal Tribunal for Rwanda (1994), Art. 3 (g).
[418] Rome Statute, Art. 6; International Criminal Court, the Office of the Prosecutor. Policy Paper on Sexual and Gender-Based Crimes, p. 9 (9 June 2014).

Furthermore, since the jurisdiction of the International Criminal Court is complementary to the States, the Rome Statute indirectly lays the responsibility on the States of investigating and prosecuting such crimes. Certainly, as an outgrowth of the Rome Statute, and in order to diminish the impunity gap, the States are bound to adhere to the effective investigation and prosecution of the most serious international crimes, amongst which are sexual and gender-based crimes.[419]

Sexual and gender-based crimes can be committed in a variety of contexts, which go beyond those covered by the Rome Statute (fact which demands all relevant actors to commit, adopt a united line of action and dedicate efforts).[420]

Nevertheless, the advent and the entry into force of the Statute went a long way in the fight against and accountability for such crimes. Indeed, in conformity with the Rome Statute, the sexual and gender-based crimes perpetrated in the situation of armed conflict or mass violence are prosecutable by the International Criminal Court as crimes against humanity, war crimes, and genocide.[421]

It is necessary to clarify, though, that Rome Statute is a landmark not only for establishing the jurisdiction of the International Criminal Court over sexual and gender-based crimes, but also for setting up procedures to guarantee that such crimes and their victims receive adequate treatment, as it will be discussed later in this chapter and chapter 5.[422]

Therefore, from the terms of the Rome Statute, it should result the utmost rejection and condemnation of the perpetration of sexual and gender-based crimes in international and non-international armed conflicts, and, as an outreach of the values underlying the Statute, in any situation.

4.2. The extent of sexual and gender-based crimes under the Rome Statute

4.2.1. Article 6- Genocide

Even though the “ad hoc” International Criminal Tribunals had established relevant precedents for prosecuting gender-based violence as genocide, the Rome Statute enlisted neither rape nor sexual violence as particular elements of the crime of genocide.[423]

The drafters of the Rome Statute achieved a remarkable reinvigoration when defining crimes against humanity and war crimes. Nonetheless, they did not strive to update the genocide definition, and rather limited themselves to reproduce the terms of Article 2 of the 1948 Convention on the Prevention and Punishment of

[419] Rome Statute, Article 1; International Criminal Court, the Office of the Prosecutor. Policy Paper on Sexual and Gender-Based Crimes, p. 7 (9 June 2014).
[420] International Criminal Court, the Office of the Prosecutor. Policy Paper on Sexual and Gender-Based Crimes, p. 11 (9 June 2014).
[421] *Ibidem*
[422] Copelon, R. (2000), pp. 217-240
[423] von Joeden-Forgey, E. (2010). In Bloxham, D., & Moses, A. D. (eds.), pp. 61–80.

the Crime of Genocide. Certainly, the only country which proposed to amend the definition of genocide (so as to expand it by the inclusion of social and political groupings) was Cuba.[424]

As a result, Article 6 of the Rome Statute does not include gender, rape or any other form of sexual violence among the basis for the crime of genocide.

This article preconizes that the acts which can amount to genocide (if carried out with the aim of "destroying, in whole or in part, a national, ethnical, racial or religious group") are: "killing members of the group"; "causing serious bodily or mental harm to members of the group"; "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part"; "imposing measures intended to prevent births within the group; and "forcibly transferring children of the group to another group".[425]

Following the path set up by the ICTY and the ICTR, the ICC has understood that rape can be regarded as a genocidal act for it can be used to achieve the purposes enlisted in subparagraphs (b), (c), and (d) of Article 6 of the Rome Statute (namely, cause serious bodily or mental harm to members of the group, to purposefully inflict on the group conditions of life calculated to bring about its physical destruction in whole or in part, and as a measure intended to prevent births within the group). Consequently, the International Criminal Court has been prosecuting the crime of rape under such subparagraphs, as it will be seen in detail within the analysis of the cases tried before the Court.[426]

4.2.2. Article 7- Crimes against humanity

Article 7 of the Rome Statute enlists the crimes against humanity. In this context, such article disposes that, for the scope of the Statute, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, as well as persecution against any identifiable group or collectivity on gender grounds constitute 'crime against humanity' when carried out as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.[427]

This relevant list of sexual and gender-based crimes vividly consubstantiates the objective of the drafters of the Statute of extending the reach of the crimes against humanity. Indeed, apart from rape, Article 7 (1) (g) expressly brings four other types of sexual violence (sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization) and finishes with a generic formula "or any other form of

[424] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the Whole, Summary Record of the 3rd Meeting, para. 100 (15 June -17 July 1998); United Nations, General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, Art. 2; Schabas, W. A. (2010 a). In Bloxham, D., & Moses, A. D. (eds.), pp. 123-142.
[425] Rome Statute, Art. 6; United Nations, General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, Art. 2
[426] von Joeden-Forgey, E. (2010). In Bloxham, D., & Moses, A. D. (eds.), pp. 61–80.
[427] *Ibidem*; Fisher, S.K. (1996), pp. 91-133; Rome Statute, Art. 7 (1) (g) (h)

sexual violence of comparable gravity", thus, leaving margin to interpretation for the judges of the International Criminal Court.[428]

Additionally, Article 7 (1) (h) establishes that it is a crime against humanity the persecution against any identifiable group or collectivity on gender (as defined in paragraph 3) grounds in connection with any act referred to in paragraph 1or any crime within the jurisdiction of the Court.[429]

As explained in chapter 3 (3.3), after intense negotiations on the gender issue, the Rome Statute drafters finally agreed to state in paragraph 3 of Article 7 that for the ends of the Statute

> "it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does indicate any meaning different from the above."[430]

Finally, it is important to highlight that in accordance with the preamble of Article 7, for the purpose of the Rome Statute, the acts enlisted in the subsequent subparagraphs (inclusive of subparagraphs (g) and (h) which address sexual and gender-based crimes) are considered to be subsumed under the head 'crime against humanity' (and, consequently, subject to the jurisdiction of the International Criminal Court) only when carried out as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.[431] Such requirements will be further expanded on later in this same chapter.

4.2.3. Article 8- War crimes

During the drafting of the Rome Statute, the delegates conducted coordinated discussions regarding the crimes against humanity provisions related to rape and other forms of sexual violence and the war crimes provisions on the same subject. In fact, the negotiations of the crimes against humanity and war crimes provisions on sexual and gender-based crimes were aligned and their wording only assumed a final shape in the Bureau draft that was presented to the Conference in the morning of 17 July 1998 (the same day of the adoption of the Statute). Therefore, Articles 7 and 8 are pretty much alike when addressing sexual and gender-based crimes.[432]

Accordingly, rape, sexual slavery, enforced prostitution, forced pregnancy (the unlawful confinement of a woman forcibly made pregnant, with the goal of affecting the ethnic composition of any population or carrying out other grave violations of international law) and enforced sterilization are also clearly regarded as war crimes.[433]

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[428] Schabas, W. A. (2011), pp. 107-121
[429] Rome Statute, Art. 7 (1) (h), (3)
[430] Rome Statute, Art. 7 (3)
[431] Rome Statute, Art. 7
[432] Rome Statute, Arts. 7, (2) (f), 8 (2) (b) (xxii), (e) (vi); Schabas, W. A. (2010), pp. 170, 250; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, pp. 2-3, 6, 8. (15 June -17 July 1998)
[433] Rome Statute, Arts. 7 (2) (f), 8 (2) (b) (xxii), (e) (vi)

However, the Statute did not circumscribe the classification of such crimes as “war crimes” to when committed during an international armed conflict, but rather expanded the “label” “war crimes” to cover these crimes also when perpetrated in armed conflicts not of an international character (following the precedent set up by the common Article 3 of the Geneva Conventions of 1949 which extended general coverage to conflicts not of an international character).[434]

Undoubtedly, the crimes of rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization appear as species of the genus “other serious violations of the laws and customs” within the establishment of the meaning and boundaries of war crimes by Article 8 for the purpose of the Rome Statute. Such article states that “other serious violations of the laws and customs” can amount to war crimes not only in international armed conflict but also armed conflicts not of an international character, within the established framework of international law.[435]

After expressly establishing that rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization are subsumed under the head “other serious violations of the laws and customs” (and, ultimately, under the category war crimes), the Rome Statute adopted a generic formula “and any other form of sexual violence”. This generic formula slightly differs since the part covering international armed conflicts refers to “or any other form of sexual violence also constituting a grave breach of the Geneva Conventions”, while the part disposing about armed conflicts not of an international character reads

> “or any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions.”[436]

Article 7 (1) (g), by its turn, after casting the aforementioned sexual and gender-based crimes as crimes against humanity, ends adding "or any other form of sexual violence of comparable gravity". Therefore, in crimes against humanity the measure of the comprehensiveness of "and any other form of sexual violence" is given by "comparable gravity", while under the head war crimes the "any other form of sexual violence” would have also to amount to a grave breach or a serious violation of Article 3 common to the Geneva Conventions. In the subsequent Elements of Crimes, the Preparatory Commission rectified this distortion by disposing that sexual violence should be of “a gravity comparable to that of a grave breach of the Geneva Conventions" or "of a serious violation of article 3 common to the four Geneva Convention”.[437]

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[434] Geneva Conventions I, II, III, and IV, Art. 3; American Red Cross, International Humanitarian Law. Summary of the Geneva Conventions of 1949 and their Additional Protocols (April 2011).
[435] Rome Statute, Art. 8 (2) (b) (xxii), (e) (vi)
[436] Rome Statute, Art. 8 (2) (e) (vi)
[437] Rome Statute, Art. 7 (1) (g); Elements of Crimes of the International Criminal Court, Art. 8 (2) (b) (xxii)-6 (2), (e) (vi)-6 (2); Schabas, W. A. (2010), p. 250

4.3. Defining sexual and gender-based crimes- analysis of the sexual and gender violence provisions in the Statute and of the elements of crimes

4.3.1. Rape

4.3.1. (i). Introduction

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court created the Preparatory Commission for the International Criminal Court with the task to elaborate proposals of functional measures to effectively install the Court and to set in motion its activities. Included in the mandate of the Preparatory Commission was to prepare draft texts of the Rules of Procedure and Evidence and the Elements of Crimes and finalise them prior to 30 June 2000.[438]

These two documents are subsidiary and assist the Court in the interpretation and application of the Rome Statute. The Pre-trial Chamber I of the International Criminal Court has debated whether the Elements of Crimes has a "binding" nature and the Majority considered[439]

> "that the Elements of Crimes and the Rules must be applied unless the competent Chamber finds an irreconcilable contradiction between these documents on the one hand, and the Statute on the other hand. If such irreconcilable contradiction is found, the provisions contained in the Statute must prevail".[440]

The Rules of Procedure specified a number of procedural and evidentiary issues, whereas the Elements of Crimes developed and refined the definitions of the crimes enlisted in Articles 6, 7, and 8 of the Rome Statute.[441]

Positively, the Rome Statute, when drawing the boundaries of the jurisdiction of the International Criminal Court, organized the international crimes into four major categories, specifically, the crime of genocide, crimes against humanity, war crimes and the crime of aggression, and divided the first three into various sub-categories (e.g. rape, sexual slavery, enforced prostitution, forced pregnancy). The Preparatory Commission was assigned with the function of further defining and describing the sub-categories. As a result, in spite of the fact that the Rome Statute presents wide and flexible definitions of the international crimes, these

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[438] Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex 1, paras. 5 (b), 6

[439] Elements of Crimes of the International Criminal Court, General introduction (1); Eriksson, M. (2011), pp. 405-406

[440] International Criminal Court. The Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir"). Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, para. 128. (4 March 2009); Schabas, W. A. (2010), p. 265

[441] Schabas, W. A. (2011), pp. 1-22

are limited by the Rules of Procedure and Evidence and the Elements of Crimes.[442]

Articles 7 and 8 of the Rome Statute enlist rape, respectively, as a crime against humanity and as a war crime, but do not define it. In accordance with the top-down approach adopted by the Statute drafters, it is the Elements of Crimes which provides a definition of rape, establishing the reach of this offence and outlining it with rather significant minuteness.[443]

4.3.1. (ii). Background to the rape definition in the Elements of Crimes

The term "rape" is largely used in municipal law systems, but each State adopts its own concept and, consequently, the definitions vary significantly. This crime has been substantially reshaped along the years as a result of the evolving notions of the nature and seriousness of sexual violence. Indeed, the traditional concept of rape has been reformed in civil and common law legislations as a consequence of the developing comprehension of both the nature of the crime and the way in which the victim experiences it.[444]

Further, before the adoption of the Rome Statute, international humanitarian and human rights law lacked an established definition of rape. The Elements of Crimes consisted in the first document to provide a definition of the elements of the international crime of rape.[445]

To weave the definition of the sexual and gender-based crimes brought in Article 8 (2) (b) (XXI) was a time-consuming task. The formulation of the sexual offences was defying, being in the middle of the most contentious provisions of the Elements of Crimes in virtue of the drafters´ distinct legal, cultural and philosophical traditions. Surely, the work of defining rape was a lengthy process conducted by delegates of the Preparatory Commission who derived from different legal models and had divergent points of views.[446]

What is more, it presented a challenge to the Commission for the then available case law on the question was both scarce and heterogeneous. Significantly, the "ad hoc" International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) had distinct understandings regarding which were the elements of rape. The divergence of interpretations of

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[442] Eriksson, M. (2011), pp. 405-406; McGoldrick, D. (2004). In McGoldrick, D., Rowe, P., & Donnelly, E. (eds.), p. 464

[443] Elements of Crimes of the International Criminal Court, Arts. 7 (1) (g)-1; 8 (2) (b) (xxii)-1, (e) (vi)-1; Rome Statute, Arts. 7 (1) (g), (2) (b) (xxii), (e) (vi); Schabas, W. A. (2010) p. 171

[444] ECHR, Case M.C. v. Bulgaria (2003), paras. 126-128 (4 December 2003); Schabas, W. A. (2010), p. 171

[445] Boot, M. revised by Hall, C. K. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 206-216; Elements of Crimes of the International Criminal Court, Arts. 7 (1) (g)-1; 8 (2) (b) (xxii)-1, (e) (vi)-1; Eriksson, M. (2011), pp. 405-406

[446] Boon, K. (2001), pp. 625-775; Eriksson, M. (2011), p. 428; Steains, C. (1999). In Lee, R. S. K. (ed.), pp. 357-390; Schabas, W. A. (2011), pp. 122-155; Dörmann, K. (2001), pp. 461-487.

the two “ad hoc” tribunals was particularly accentuated with regards to rape as a crime against humanity.[447]

The ambit of rape in the Rome Statute was determined while the jurisprudence of the ICTY and ITCR was still evolving. In fact, the codification of the concept of rape in the Elements of Crimes took place, from a chronological point of view, in the midst of the development of the “ad hoc” tribunals´ jurisprudence.[448]

The Commission used three legal approaches as chief foundation sources when delimitating the crime of rape: the Prosecutor v. Akayesu case (tried before the International Criminal Tribunal for Rwanda), the Prosecutor v. Anto Furundžija case (prosecuted by the International Criminal Tribunal for the former Yugoslavia) and the common law definition of rape (found in a number of national laws).[449]

4.3.1.(ii).(a). The Prosecutor v. Akayesu case of the International Criminal Tribunal for Rwanda

In the judgment of the Prosecutor v. Akayesu case, the International Criminal Tribunal for Rwanda, after acknowledging that there was no commonly accepted definition of rape in international law, provided a conceptual definition of the term.[450]

The Tribunal, taking a broad approach affirmed that[451]

> “rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts”[452]

and subsequently defined this crime as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.” It constituted a significant departure from the classic attainment to the lack of consent of the victim to sexual intercourse and parts of the body of the criminal and the victim.[453]

4.3.1.(ii).(b). The Prosecutor v. Anto Furundžija of the International Criminal Tribunal for the Former Yugoslavia

Three months later, in the Prosecutor v. Anto Furundžija case (already analysed in Chapter 2, 2.2.16.iii. Case the Prosecutor v. Anto Furundžija (IT-95-17/1)

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[447] Dörmann, K. (2001), p. 479; Dörmann, K. (2003 a). In Bogdandy, A., & Wolfrum, R. (eds.), pp. 341-407; Maire, N. B. (2011), pp. 146-159; Schabas, W. A. (2011), pp. 122-155

[448] ECHR, Case M.C. v. Bulgaria (2003), paras. 126-128; Eriksson, M. (2011), p. 430

[449] Boon, K. (2001), pp. 625-775; de Brouwer, A.-M. L.M. (2005), p. 130; Eriksson, M. (2011), p. 424

[450] Chenault, S. (2008), pp. 221-237; ICTR. The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4. Chamber I, Judgment, paras. 685-695 (2 September 1998)

[451] Schabas, W. A. (2010), p. 171

[452] ICTR. The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4. Chamber I, Judgment, para. 688 (2 September 1998).

[453] Chenault, S. (2008), pp. 221-237; ICTR. The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4. Chamber I, Judgment, para. 688 (2 September 1998)

regarding the crimes carried out in the Lašva Valley), the International Criminal Tribunal for the former Yugoslavia also provided a rape definition in its judgment. Nevertheless, the ICTY was worried about an eventual violation of the "nullum crimen sine lege" principle and stuck to a more positivistic concept. In fact, upon concluding the examination of national laws on rape, the Trial Chamber determined the objective elements of rape to be:[454]

> "(i) the 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."[455]

Even though it went back to the mechanical model (anteriorly criticised by the ICTR in the Akayesu case), the ICTY regarded its concept of rape as being more ample and embodying the principle of protecting human dignity, for it expressly encompassed forcible oral sex, that is not covered in the definition of rape in certain national jurisdictions. Further, the view of rape incorporated in Furundžija case was grounded on force and provided a concrete concept, thus, favouring legal security.[456]

The two aforementioned judgments were rendered shortly after the adoption of the Rome Statute. They offer an interesting view not only of the relationship between the ICTY and the ICTR, but also of the strain between the need to guarantee the observance to the "nullum crimen sine lege" principle, on the one hand, and the adoption of malleable definitions (which can encompass the whole spectrum of situations that have brought about the cases under the jurisdiction of the "ad hoc" tribunals), on the other hand.[457]

These cases served as a basis to the Preparatory Commission because eventual future cases tried by the International Criminal Court would presumably present some closeness to them. Moreover, both the ICTR and the ICTY had conducted research on the concept of rape in the international law field. France suggested to insert commentaries in the Elements of Crimes that would make more comprehensive references to the case law of the ICTR and ICTY, aligning the interpretations of the criminal offences defined in the Elements of Crimes with the jurisprudence of such "ad hoc" tribunals.[458]

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[454] ICTY. The Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T. Trial Chamber, Judgment, pp. 68-73, paras. 174-186 (10 December 1998); Schabas, W. A. (2010), p. 171

[455] ICTY. The Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T. Trial Chamber, Judgment, p. 73, para. 185 (10 December 1998)

[456] Boas, G., Bischoff, J. L., & Reid, N. (2010), p. 86; Eriksson, M. (2011), p. 390; ICTY. The Prosecutor v. Anto Furundžija, Trial Chamber, Case No. IT-95-17/1-T. Judgment, pp. 72-73, para. 184 (10 December 1998)

[457] Schabas, W. A. (2010) pp. 84-85; Schabas, W. A. (2011), pp. 122-155

[458] de Brouwer, A.-M. L. M. (2005), p. 130; Eriksson, M. (2011), p. 430; Preparatory Commission for the International Criminal Court, Working Group on Elements of Crimes. Proposal submitted

In relation to the common law definition of rape, it has been historically conceived as "the carnal knowledge of a woman by force and against her will". Even though contemporarily it has been largely recognized that men can also be victims of rape (as discussed below), such definition, whose elements comprehend sexual intercourse, the use of force, and the lack of consent, is present in several municipal laws and also reverberated on the negotiations.[459]

It is important to stress that, apart from these fundamental models followed by the Preparatory Commission, other sources have also impacted the negotiations on the rape definition. Surely, the Special Rapporteur of the Working Group on Contemporary Forms of Slavery, on Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict, and the ICTY Čelebići case (in which rape was regarded as a form of torture) were invoked during the discussions. The ICTY Kunarac case, which progressively discussed the issue of sexual autonomy and adopted an approach based on non-consent, was not taken into consideration since its judgments had not been rendered yet. Likewise, the ICTR Musema judgment still had not been issued.[460]

4.3.1.(ii).(c). The negotiations within the Preparatory Commission

The mechanical definition of rape provided in the Furundžija case by the Trial Chamber of the ICTY was the beginning point for the discussions on the concept of rape.[461]

Indeed, in the Proposal submitted by the United States of America, Draft elements of crimes, Addendum, (PCNICC/1999/DP.4/Add.1), when addressing the crime against humanity of rape, it was suggested to adopt the following elements:

> "1. That the accused intended to attack one or more persons through acts of a sexual nature.

by France, Comments on the proposal submitted by the United States of America concerning article 6, Crime of genocide (18 February 1999)

[459] Boon, K. (2001), pp. 625-775; Co. Lit. 123 b.2 Inst. 180 quoted in Commonwealth v. John Burke, 105 Mass. 376, October 1870, Bristol County; Eriksson, M. (2011), p. 424; ICTR. The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4. Chamber I, Judgment, para. 686 (2 September 1998); Sivakumaran, S. (2007), pp. 253-276; Spitzberg, B. H. (1999), pp. 241-260; Stemple, L. (2008), pp. 605-647

[460] Boon, K. (2001), pp. 625-775; de Brouwer, A.-M. L. M. (2005), p. 130- body text and footnote 203; Eriksson, M. (2011), pp. 390, 424; ICTR. The Prosecutor v. Musema, ICTR-96-13-A, Trial Chamber, Judgment (27 January 2000); ICTY. The Prosecutor v. Dragoljub Kunarac, et al., Case No. IT-96-23-T and IT-96-23/1-T. Trial Chamber, Judgment (22 February 2001); ICTY. The Prosecutor v. Zejnil Delalić, et al., Case No. IT-96-21-T. Trial Chamber, Judgment (16 November 1998); La Haye, E. (2001). In Lee, R. S. K. & Friman, H. (eds.), pp. 184-189; Rückert, W., & Witschel, G. (2001). In Fischer, H., Kress, C., Lüder, S. R. (eds.), pp. 59-93; United Nations, Report of the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict (1998)

[461] de Brouwer, A.-M. L. M. (2005), p. 130

> 2. That the accused penetrated any part of the body of another person with the accused´s sexual organ, or penetrated the anal or genital opening of another person with any object or other part of the accused´s body.
>
> 3. That the penetration was committed by force.
>
> 4. That the assault was part of, and the accused knew it was part of, a widespread or systematic attack against a civilian population."[462]

This proposed definition of rape was also mechanical, albeit encompassing more acts than the definition of the Furundžija case.[463]

In the Proposal submitted by Costa Rica, Hungary and Switzerland on certain provisions of Article 8, paragraph 2(b), of the Rome Statute of the International Criminal Court: (viii), (x), (xiii), (xiv), (xv), (xvi), (xxi), (xxii) (xxvi) (dated 19 July 1999), the crime of rape was defined in these terms:

> "1. The conduct took place in the context of and was associated with an international armed conflict.
>
> 2. The perpetrator committed an act of 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;
>
> 1. The perpetrator committed this act by coercion or force or threat of force against the victim or a third person."[464]

This definition covered the same acts enlisted in the definition of rape adopted in the Furundžija case judgment, and, consequently, was narrower than the one proposed by the US.[465]

Colombia commented on the proposal by the delegations of Costa Rica, Hungary and Switzerland concerning article 8, paragraph 2 (b) of the Rome Statute (PCNICC/1999/WGEC/DP.8), and advocated for a more ample definition of rape:

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[462] Preparatory Commission for the International Criminal Court, Working Group on Elements of Crimes, Proposal submitted by the United States of America. Draft elements of crimes, Addendum, p. 5 (4 February 1999).
[463] de Brouwer, A.-M. L. M. (2005), pp. 130-131, footnote 205
[464] Preparatory Commission for the International Criminal Court, Working Group on Elements of Crimes. Proposal submitted by Costa Rica, Hungary and Switzerland on certain provisions of Article 8, paragraph 2(b), of the Rome Statute of the International Criminal Court: (viii), (x), (xiii), (xiv), (xv), (xvi), (xxi), (xxii) (xxvi), p. 4. (19 July 1999)
[465] de Brouwer, A.-M. L. M. (2005), pp. 130-131

> "3.3.1. Rape
>
> (a) The conduct takes place in the context of and is associated with an international armed conflict.
>
> (b) The agent has sexual access to the victim.
>
> (c) The agent commits the act through violence or the use of coercion or force or intimidation or the threat of force against the victim or a third person.
>
> Commentary
>
> (a) The expression "penetration" and paragraph 2 (a) and (b) are eliminated, since the expression "to have sexual access to" indicates clearly what the act consists of, without the need for specification which could lower the threshold of protection.
>
> (b) In paragraph (c) the word "intimidation" is added so as to include cases in which psychological pressure is exerted on the victim to obtain his or her consent to sexual relations. Also included, with a view to complete protection, is the expression "violence", a generic term which indicates what the act consists of." [466]

Nevertheless, this Colombia´s proposal supporting a far-reaching concept of rape was not actively embraced in the subsequent negotiations.[467]

In fact, determined States were reluctant to accept a broad definition of rape for they were afraid of the potential influence on their municipal legislation (as, for instance, criminalisation of sexual comportment inside marriage). Eleven Middle Eastern nations suggested the exclusion of certain offences that could be rendered as crimes against humanity in case they were at odds with religious or familiar cultural rules. Certainly, it was suggested to include a proviso in Article 7 (1) (g): Forced pregnancy stating

> "[t]hese acts do not include acts related to natural marital sexual relations or the bearing of children in different national laws in accordance with religious principles or cultural norms."[468]

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[466] Preparatory Commission for the International Criminal Court, Working Group on Elements of Crimes. Proposal submitted by Colombia, Comments on the proposal by the delegations of Costa Rica, Hungary and Switzerland concerning article 8, paragraph 2 (b) of the Rome Statute, p. 3. (29 July 1999).

[467] de Brouwer, A.-M. L. M. (2005), pp. 130-131, footnote 205

[468] Preparatory Commission for the International Criminal Court, Working Group on Elements of Crimes. Proposal concerning the Elements of Crimes Against Humanity submitted by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic, and the United Arab Emirates concerning the elements of crimes against humanity, Art. 7 (1) (g) (4). (3 December 1999)

Likewise, in regard to rape and any other form of sexual violence of comparable gravity, such countries proposed to include

> "[n]othing in these elements shall affect natural and legal marital sexual relations in accordance with religious principles or cultural norms in different national laws"[469]

so that these sexual crimes would be subordinate to cultural rules and religious norms in national legislations. If such proposals were accepted, rape between husband and wife (conduct not regarded an offence in determined States) and forced pregnancy within the marriage would have rested excluded, among other behaviours.[470]

It is noteworthy that it was especially hard to achieve a consensus regarding the non-consent issue. Several States required more advanced requirements of proof (as, for example, physical or verbal opposition). Some countries supported the express inclusion of non-consent definition because frequently it is used as the main element to assess to culpableness of unlawful sexual conduct between adults. Conversely, other delegates were against such approach, arguing that the non-consent cannot be regarded as an element of rape in an armed conflict situation, or yet that lack of consent is actually inbuilt in the elements force or threat of force.[471]

During the Rome Conference it preponderated the perspective that there was an important aspect weighing against a definition of rape grounded on non-consent: the underlying idea that women could consent in spite of coercive circumstances (substantiated in the armed conflicts). It was regarded that a model of rape definition based on the lack of consent would result humiliating for the victims in so far as attention would be directed to their behavior anteriorly to the rape.[472]

Ultimately, the Preparatory Commission formulated a definition of rape merging invasion and penetration, and force and coercive circumstances, hence, reflecting the elements of the case law of the ICTY and the ICTR, as it will be subsequently seen.[473]

Even though there was not a clear option for any of the legal models used as basis, it is mainly understood that the elements of the "actus reus" adopted in the Elements of Crimes were closer to the ones favored by the ICTY in the Furundžija case. Nevertheless, there are some authors who support that the definition of rape that the Preparatory Commission came up with tends more towards the Akayesu case prosecuted by the ICTR.[474]

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[469] Preparatory Commission for the International Criminal Court, Working Group on Elements of Crimes. Proposal concerning the Elements of Crimes Against Humanity submitted by Bahrain, et al., Elements of Crimes, Annex III, Art. 7 (1) (g) (1) (4), Art. 7 (1) (g) (6) (3)
[470] Eriksson, M. (2011), pp. 428-429
[471] Boon, K. (2001), pp. 625-775; Eriksson, M. (2011), p. 429
[472] Eriksson, M. (2011), p. 391; Halley, J. (2008), pp. 1-120
[473] Eriksson, M. (2011), pp. 424, 430
[474] Boon, K. (2001), pp. 625-775; de Brouwer, A.-M. L. M. (2005), p. 130; Eriksson, M. (2011), p. 424; Rückert, W., & Witschel, G. (2001). In Fischer, H., Kress, C., Lüder, S. R. (eds.), pp. 59-93

4.3.1.(iii). Definition of rape

4.3.1.(iii).(a). Introduction

In the Elements of Crimes, rape does not present a univocal definition. Surely, the elements of the crime against humanity of rape and the war crime of rape do not coincide altogether.[475]

What sets apart the definition of rape as a crime against humanity and as a war crime are the context elements. Indeed, the contextual elements vary because they reflect the specificities of each of the two broader categories of international crimes in which the crime of rape is inserted. Nonetheless, there are elements held in common:[476]

> "1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
>
> 2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent."[477]

In fact, the elements of the "actus reus" of the crime of rape are the same regardless if rape is charged as a war crime, a crime against humanity or even as a genocidal act.[478]

4.3.1.(iii).(b). "Actus reus"

4.3.1.(iii).(b)-1. Element 1

> "The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body."[479]

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[475] Elements of Crimes of the International Criminal Court, Arts. 7 (1) (g)-1, 8 (2) (b) (xxii)-1, (e) (vi)-1

[476] Amnesty International (2011), p. 11; Elements of Crimes of the International Criminal Court, General Introduction, (7) (c), Art. 7, Introduction (2); Eriksson, M. (2011), p. 424

[477] Elements of Crimes of the International Criminal Court, Arts. 7 (1) (g)-1 (1) (2), 8 (2) (b) (xxii)-1 (1) (2)

[478] Boas, G., Bischoff, J. L., & Reid, N. (2010) p. 280

[479] Elements of Crimes of the International Criminal Court, Arts. 7 (1) (g)-1 (1), 8 (2) (b) (xxii)-1 (1)

The first element starts focusing on the invasion of the body of a person, likewise the definition of rape in the Akayesu case. The fact that Preparatory Commission initially refers to "invasion" echoes the pursuit of making usage of broad and genderless terminology. The goal was to reach female perpetrators of rape and those cases in which the victim is compelled to penetrate the perpetrator. Undoubtedly, the Elements of Crimes clearly established that the concept of "invasion" was built with an extensive significance so as to be gender-neutral.[480]

Nevertheless, the "invasion" must result in penetration, even if slight. This requirement followed the compromise reached in the Preparatory Commission: although twenty-four States clearly favoured the inclusion of "invasion" (term regarded more neutral), an expressive minority, composed by States such as France, the Netherlands, and the United States, supported the use of "penetration". They considered "invasion" too imprecise and argued that it could give rise to incompatibility with their municipal laws.[481]

As a result, the concept of "invasion" was coupled with "penetration" despite the fact that the latter limits the former (not all invasions necessarily involve penetration, but all penetrations configure invasions). In the Akayesu case, the Trial Chamber of the ITCR employed "invasion" in its definition of rape exactly so as to cover sexual acts which do not comprise penetration. This exemplifies that, instead of being a state-of-art work, the rape definition of the Elements of Crimes per times perspires incoordination. Indeed, following the precedent set up in the Rome Statute, the Preparatory Commission combined the common law and civil law systems when elaborating the definitions and the rules on procedure, repercussion of the distinct legal traditions of the States involved in the task.[482]

The body parts that subject to penetration are left open by virtue of the use of the term "any part of the body". Surely, the first element initially contemplates the penetration of "any part of the body of the victim or of the perpetrator with a sexual organ". The option for a malleable concept (which presumably includes the "standard" vaginal, anal or oral penetration with the penis) leaves room for a wider interpretation, which could encompass the penetration of the ears, eyes or nose of the person with the sexual organ. The last part of the first element, by its turn, refers to cases in which the anus or vagina of the victim is penetrated with either an object or "any other part of the body", term which could be understood, in such situation, as covering the tongue, fingers, or hands of the perpetrator.[483]

All and all, the first element of the "actus reus" of rape is primarily grounded on the mechanical definition of rape of the Furundžija case: even though it starts concentrating on the "invasion" (in the Akayesu case fashion), this invasion necessarily entails the penetration of any part of the body of the victim or of the offender with a sexual organ, or of the anal or genital opening of the victim with

[480] Dörmann, K. (2003), p. 327; Elements of Crimes of the International Criminal Court, Art. 8 (2) (b) (xxii)-1, Element 1, footnote 50; Eriksson, M. (2011), p. 425
[481] Boon, K. (2001), pp. 625-775; de Brouwer, A.-M. L. M. (2005), p. 131; Eriksson, M. (2011), p. 425
[482] de Brouwer, A.-M. L. M. (2005), p. 131; Eriksson, M. (2011), pp. 424-36, 430
[483] de Brouwer, A.-M. L. M. (2005), p. 133; Elements of Crimes of the International Criminal Court, Arts. 7 (1) (g)-1, 8 (2) (b) (xxii)-1; Eriksson, M. (2011), p. 425

either an object or any other part of the body (resembling the more restricted definition of rape of the Furundžija case, which is also adopted by several national laws on rape). Therefore, the act of touching a person in a sexual way which does not involve penetration (as, for example, sexual mutilation or forced masturbation) is not subsumed in the rape definition established by the Elements of Crime.[484]

4.3.1. (iii).(b)-2. Element 2

> "The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent."[485]

The second element of the "actus reus" disposes the context in which the invasion (resulting in penetration, albeit slight) of a sexual nature can be regarded as rape.[486]

In fact, it is the context that undermines the individuals' sexual autonomy ("the right to choose freely whether and when to be sexually intimate with another person"), and, thus, renders the sexual activity unlawful.[487]

Regarding this subject, the ICTY stated in the Kunarac case that

> "serious violations of sexual autonomy are to be penalised. Sexual autonomy is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant.
>
> 458. In practice, the absence of genuine and freely given consent or voluntary participation may be evidenced by the presence of the various factors specified in other jurisdictions – such as force, threats of force, or taking advantage of a person who is unable to resist. A clear demonstration that such factors negate true consent is found in those jurisdictions where absence of consent is an element of rape and consent is explicitly defined not to exist where factors such as use of force, the unconsciousness or inability to resist of the victim, or misrepresentation by the perpetrator."[488]

[484] de Brouwer, A.-M. L. M. (2005), p. 131; Eriksson, M. (2011), p.425
[485] Elements of Crimes of the International Criminal Court, Arts. 7 (1) (g)-1 (2), 8 (2) (b) (xxii)-1 (2)
[486] Eriksson, M. (2011), pp. 425-426; Manenti, M. R. (2013-2014), p. 171
[487] Amnesty International (2011), p. 17; Schulhofer, S. J. (1998), p. 99
[488] ICTY. The Prosecutor v. Dragoljub Kunarac, et al., Case No. IT-96-23-T and IT-96-23/1-T. Trial Chamber, Judgment, paras. 457-458 (22 February 2001)

Along the samelines, the Beijing Declaration and Platform for Action affirmed that[489]

> "[t]he human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behaviour and its consequences."[490]

Although it has been sustained that the sexual autonomy of the individual consists in an element of physical and mental integrity, sexual autonomy is actually safeguarded "per se", not being necessary to demonstrate damage to the person´s physical or mental integrity.[491]

Element 2 established four conditions that compromise the exercise of sexual autonomy (thus, causing the sexual acts to constitute criminal offences):[492]

> "(1) Situations where the perpetrator uses force or threatened to use force;
> (2) The perpetrator used coercion, or where he or she creates fear of violence, applies duress (including detention), psychological oppression, or abuses his or her power;
> (3) Coercive environments, from which a perpetrator takes advantage of a victim; or
> (4) Other conditions, including age, where various forms of natural incapacity or reduced capacity exist which affect the individual's ability to give genuine consent."[493]

Once more, it is patent that the Preparatory Commission fused the Furundžija case, the Akayesu case and national legislations when establishing the first three conditions (force or threat of force, coercion, by taking advantage of a coercive environment), and aggregating to it a group of persons who cannot give genuine consent.[494]

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[489] Amnesty International (2011), pp. 13, 18
[490] United Nations. Report of the Fourth World Conference on Women, Beijing Declaration and Platform for Action, p. 36, para. 95 (1995)
[491] Amnesty International (2011), pp. 13, 18
[492] Amnesty International (2011), p. 17
[493] Amnesty International (2011), p. 18
[494] de Brouwer, A.-M. L. M. (2005), pp. 130, 134; Eriksson, M. (2011), p. 426; La Haye, E. (2001). In Lee, R. S. K. & Friman, H. (eds.), pp. 184-189; Rückert, W., & Witschel, G. (2001). In Fischer, H., Kress, C., Lüder, S. R. (eds.), pp. 59-93

1-) The invasion was committed by force, or by threat of force or coercion

These circumstances resemble the approach of the ICTY in the Furundžija case which, when fixing the elements of its mechanical concept of rape, included "coercion or force or threat of force against the victim or a third person."[495]

Expanding on the issue, the ICTY stated that its definition of rape seemed to embrace

> "all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity."[496]

Also, in Austria, Brazil, China, Korea, Norway and Spain, the definitions of rape demand force, threat of force or violence. Specifically, in Spain the crime of sexual aggression demands "violence or intimidation", whereas in Brazil for the configuration of rape it is necessary "violence or serious threat".[497]

The Elements of Crimes provides an illustrative list of "force", "threat of force" and "coercion". Certainly, the drafters made use of the expression "such as" followed by the elements "fear of violence, duress, detention, psychological oppression, and abuse of power", which exemplify forms in which force, threat of force and coercion can materialise.[498]

It is indisputable that the employment of force, or its threat, or coercion inhibits the exercise of sexual autonomy.[499]

In accordance with the Appeal Chamber in the ICTY Kunarac case, "[f]orce or threat of force provides clear evidence of non-consent" (the consent issue will be analysed later on).[500]

Force should be regarded as "force" in the ordinary use of the term, rather than as "excessive", "life-threatening", or "overwhelming" physical force (although jurisprudence in domestic jurisdictions have frequently described it).[501]

Furthermore, albeit deeply rooted in "physical power or strength", the concept of force goes beyond the physical aspect. Indeed, force is ordinarily defined as

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[495] ICTY. The Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T. Trial Chamber, Judgment, p. 73, para. 185 (ii) (10 December 1998); Eriksson, M. (2011), p. 426
[496] ICTY. The Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T. Trial Chamber, Judgment, p. 73, para. 186 (10 December 1998)
[497] Brazilian Criminal Code, Art. 213; Spanish Criminal Code, Art. 178; ICTY. The Prosecutor v. Dragoljub Kunarac, et al., Case No. IT-96-23-T and IT-96-23/1-T. Trial Chamber, Judgment, para. 444 (22 February 2001)
[498] Eriksson, M. (2011), p. 426
[499] Amnesty International (2011), p. 17; ICTY. The Prosecutor v. Dragoljub Kunarac, et al. The Appeals Chamber, Judgment, p. 38, para. 126 (12 June 2002)
[500] *Ibidem; Ibidem*
[501] Amnesty International (2011), p. 18; Schulhofer, S. J. (1998), p. 4;

> "1. physical power or strength possessed by a living being …
>
> 2. strength or power exerted upon an object; physical coercion; violence …
>
> 4. power to influence, affect, or control; efficacious power …
>
> 6. persuasive power; power to convince …
>
> 7. mental or moral strength"[502]

The drafters of the Elements of Crimes intended force to have such a broad reach. Certainly, they inserted footnotes in the definitions of other crimes (namely, the crime of genocide by forcibly transferring children and the crime against humanity of forcible transfer of population) clarifying that "[t]he term "forcibly" is not restricted to physical force"[503]and can encompass

> "threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment."[504]

In the same path, the Appeals Chamber of the Kunarac case, referring to and citing the California Penal Code 1999, Title 9, Section 261(a)(6), noted:

> "that in some domestic jurisdictions, neither the use of a weapon nor the physical overpowering of a victim is necessary to demonstrate force. A threat to retaliate "in the future against the victim or any other person" is a sufficient *indicium* of force so long as "there is a reasonable possibility that the perpetrator will execute the threat"."[505]

Also, Sellers sustains that the employment of the term "such as" "would allow for situations of economic or cultural constraints to be viable, comparable factors".[506]

In accordance with such line of thinking, the scope of force would be flexible (rather than limited to the physical sphere). Also, this not thorough list of examples enlightens the conceptualization of coercion, clarifying that it is plausible the occurrence of coercion without the employment of physical force.

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[502] Dictionary.com website, Force, retrieved from http://dictionary.reference.com/browse/force (5 July 2019)
[503] Amnesty International (2011), pp. 18-19; Elements of Crimes of the International Criminal Court, Art. 6 (e), Element 1, footnote 5, Art. 7 (1) (d), Element 1, footnote 12
[504] Elements of Crimes of the International Criminal Court, Art. 6 (e), Element 1, footnote 5, Art. 7 (1) (d), Element 1, footnote 12
[505] ICTY. The Prosecutor v. Dragoljub Kunarac, et al. The Appeals Chamber, Judgment, pp. 39-40, para. 130 (12 June 2002)
[506] Sellers, P. V. (2008), p. 26, footnote 134

Undoubtedly, the utilisation of psychological power on the victim suffices. Consequently, force is not an intrinsic part of coercion.[507]

Regarding the amount of psychological coercion exercised on the victim, the threshold is not so easily defined (unlike the physical coercion, which allows visual perception and rests unambiguous). Indeed, the psychological coercion lies on what the individual perceives to be dangerous, and not obligatorily by what actually constitutes a danger.[508]

Therefore, the extension of the psychological power inflicted on the victim which consubstantiates coercion cannot be measured by objective parametres. The psychological coercion should be analised in each concrete case, paying regard to the peculiarities of the victim and his/her subjective perception. The employment of coercion in the form of "psychological oppression" will be detailed below.

In the Elements of Crimes, "force, or by threat of force or coercion" appear as methods of committing the crimes of rape, enforced prostitution and sexual violence. Consequently, force and threat of force should not be considered as the required elements of such crimes: coercion is enough for their configuration.[509]

The recognition of coercion as an indispensable element of rape, enforced prostitution and sexual violence is a relevant advancement for it admits the inequality that exists between perpetrators and victims.[510]

The South African Law Commission stated that

> "[a] shift from 'absence of consent' to 'coercion' represents a shift in the focus of the utmost importance from the subjective state of mind of the victim to the imbalance of power between the parties on the occasion in question. This perspective also allows one to understand that coercion constitutes more than physical force or threat thereof, but may also include various other forms of exercise of power over another person: emotional, psychological, economical, social or organizational power. One may also add here the exercise of power resulting from age difference between the perpetrator and victim."[511]

Coercion in the form of fear of violence, duress, detention, psychological oppression, and abuse of power will be subsequently analysed. Nonetheless, it is necessary to keep in mind that these are merely examples of ways in which coercion can be deployed in the perpetration of sexual criminal offences.

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[507] de Brouwer, A.-M. L. M. (2005), p. 134; Eriksson, M. (2011), p. 426; Manenti, M. R. (2013-2014), pp. 171-172

[508] The Neurotypical site, Psychological Coercion, Revised from Dr. Margaret Singer, Professor Emeritus at the University of California, Berkeley

[509] Elements of Crimes of the International Criminal Court, Arts. 7 (1) (g)-1, 3, 6; 8 (2) (b) (xxii)-1, 3, 6; Amnesty International (2011), p. 18

[510] Amnesty International (2011), p. 19

[511] South African Law Reform Commission. Discussion Paper 85 (Project 107) Part A: Sexual Offences: the Substantive Law, p. 114, para. 3.4.7.3.14 (12 August 1999).

Certainly, as mentioned above, such elements (which are also examples of force and threat of force) are merely illustrative rather than exhaustive.[512]

a) Fear of violence

The core of fear of violence resides in "threatened violence." In fact,[513]

> "[f]ear of violence is a more subtle, but equally compelling, form of coercion as victims may silently and without complaint acquiesce in order to avoid further risk to their safety."[514]

The European Court of Human Rights in the M.C. v. Bulgaria case affirmed that "rapists often employ subtle coercion or bullying when this is sufficient to overcome their victims."[515]

In fact, fear of violence is frequently a reaction of the victim to the perpetrator's actions. The victims, afraid of the possible escalation of threats or their conversion to the actual use of force, are coerced to subject themselves to sexual acts fast and silently in an attempt to halt the perpetrator to pass from a coercive conduct to violence.[516]

The fear of violence excludes any possibility that, in the course of the sexual conducts, the victim is exercising sexual autonomy in the condition of an even participant. The decision of whether the victim´s fear of violence was "reasonable" should be free of assumptions and stereotypes.[517]

b) Duress

In national criminal law, duress is normally regarded

> "as a defence to conduct or circumstances that threatened the life or safety of the defendant or of another. Duress, however, should never be a defence to a crime under international law, but only a possible ground for mitigation of punishment."[518]

Duress as a form of perpetrating crimes of sexual violence has an ample concept, and encloses extortion. In the Akayesu, the Trial Chamber asserted that

> "threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion."[519]

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[512] Amnesty International (2011), p. 19
[513] *Ibidem*
[514] *Ibidem*
[515] ECHR, Case M.C. v. Bulgaria (2003), para. 146
[516] Amnesty International (2011), p. 20
[517] Amnesty International (2011), p. 20, footnote 41
[518] *Ibidem*
[519] *Ibidem;* ICTR. The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4. Chamber I, Judgment, para. 688 (2 September 1998).

Duress also encompasses to make “threats which a person in his [or her] situation would be unable to resist.”[520]

c) Detention

Detention has an intrinsically coercive nature, and, consequently, sexual acts between inmates, or detainees and persons in authority responsible for the enforcement of the detention are deemed to be sexual crimes.[521]

Certainly, detention constitutes an innately coercive environment, independently of whether or not the authority who perpetrated the sexual acts was the one in charge of the placement of the victim into detention. In the cases in which detention is lawful, the authorities assigned with the initiation and supervision of the detention bear a duty of protect the individuals in their custody and must not abuse them. In the situations in which the detention is rather unlawful, the perpetration of sexual acts with a detainee lends support to coercion.[522]

In the ICTY Kunarac case, the Appeals Chamber stated that cases of

> “sexual acts with prisoners and persons in custody of public authority” give rise to a “need to presume non-consent.”[523]

In the context of detention, it is common same-sex violence. When sexual crimes are perpetrated by inmates,[524]

> “both the perpetrator and the victim are detained, and the perpetrator takes advantage of the coercive environment caused by the detention”.[525]

It is noteworthy that prisoners can develop “de facto” authority in the place of detention and incur in abuse of power.[526]

d) Psychological oppression

In the ICTY Furundžija case, the Trial Chamber, noting that the Prosecutor´s statement that rape is a forcible act had been unchallenged by the Defence, repeated the terms of the Prosecution's Pre-trial Brief which affirmed that rape is

> “accomplished by force or threats of force against the victim or a third person, such threats being express or implied and must place the victim in reasonable fear that he, she or a third person

[520] Amnesty International (2011), p. 20; Schulhofer, S. J. (1998), p. 126
[521] Amnesty International (2011), p. 20
[522] Amnesty International (2011), p. 21; Kaisner, D., & Stannow, L. (2010); Kaisner, D., & Stannow, L. (2010 a)
[523] ICTY. The Prosecutor v. Dragoljub Kunarac, et al. The Appeals Chamber, Judgment, p. 40, para. 131 (12 June 2002)
[524] Amnesty International (2011), pp. 21-22
[525] Amnesty International (2011), p. 21
[526] Amnesty International (2011), p. 22

> will be subjected to violence, detention, duress or psychological oppression."[527]

This same Chamber asserted that "force is given a broad interpretation and includes rendering the victim helpless."[528]

In the ICTY Kunarac case,

> "the Trial Chamber accepted that the definition of rape in various jurisdictions covered situations in which the victim was rendered "incapable of resisting.""[529]

Subsequently, the Appeals Chamber in this case affirmed that a conceivable, credible threat of reprisal in the future against the victim or a third person is adequate indication of force by stating:

> "A threat to retaliate "in the future against the victim or any other person" is a sufficient indicium of force so long as "there is a reasonable possibility that the perpetrator will execute the threat"."[530]

Upon defining rape (as well as enforced prostitution and sexual violence), the Elements of Crime recognised that psychological oppression can be a manifestation of force, threat of force or coercion and be deployed in the perpetration of sexual crimes.[531]

The perpetrator can employ psychological pressure more effortlessly in situations

> "where there is a preexisting relationship or psychological bonds between the victim and the perpetrator, such as that between family members and children, teachers and students, doctors and patients, religious leaders and adherents, employer and employee and peacekeepers and members of protected populations: while sexual contact between people who maintain such relationships should not be seen in themselves as inherently coercive". [532]

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[527] ICTY. The Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T. Trial Chamber, Judgment, p. 68, para. 174 (10 December 1998); ICTY. The Prosecutor v. Anto Furundžija, Prosecution's Pre-trial Brief, p. 15

[528] ICTY. The Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T. Trial Chamber, Judgment, pp. 70-71, para. 180 (10 December 1998)

[529] Amnesty International (2011), p. 22; ICTY. The Prosecutor v. Dragoljub Kunarac, et al., Case No. IT-96-23-T and IT-96-23/1-T. Trial Chamber, Judgment, paras. 446-452 (22 February 2001)

[530] ICTY. The Prosecutor v. Dragoljub Kunarac, et al. Case No. IT-96-23-T and IT-96-23/1-T. The Appeals Chamber, Judgment, pp. 39-40, para. 130 (12 June 2002)

[531] Amnesty International (2011), p. 22

[532] *Ibidem*

When such relationships exist, the International Criminal Court should pay more attention to whether the purposed perpetrators employed psychological oppression.[533]

The victim´s shaming or humiliation not rarely integrates the psychological oppression. The embarrassment/ disgrace of the victim plays a rather important role when the occurrence of sexual violence is made widely known, or if the perpetrator menaces to publicise the acts of sexual violence as a way to blackmail the victim and guarantee his/her submission.[534]

In several communities, individuals subjected to sexual violence can suffer double victimisation. Indeed, first the victims endure the sexual violence inflicted by the perpetrators, and subsequently they are considered as an infamy to the "honour" of the family or community. In its harshest form, the re-victimisation can be violent and even mortal, however even the potential ostracism and rejection from the community can amount to psychological oppression.[535]

The spotlight is on the judgments on the chastity of the woman or girl victimized- "[m]any victims... pointed out that the public perception of rape was preventing them from rebuilding their lives and integrating with the society."[536]

A victim interviewed by the Amnesty International exposed the stigmatisation built-in the crime of rape by saying:

> "I do not have any rights. Wherever I go people perceive me – I am sorry to use this word – as a whore. But did I choose this life?"[537]

In the case of Karen Tayag Vertido v. the Philippines, the Committee on the Elimination of Discrimination against Women included in its recommendations to the respondent State to reduce to a minimum the secondary victimisation of the complainant/survivor.[538]

e) Abuse of power

Even though abuse of power and coercion in detention can overlay, the former constitutes a broader element and includes situations in which the perpetrator holds a position of power (political, military or another type) in relation to the victim.[539]

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[533] *Ibidem*
[534] Amnesty International (2011), p. 23
[535] Amnesty International (2011), p. 23
[536] Amnesty International (2009), p. 23, footnote 60, p. 59
[537] Amnesty International interview with Selma, FBiH, 28 March 2009, quoted in Amnesty International (2009), p. 59
[538] United Nations, Committee on the Elimination of Discrimination against Women. Case Karen Tayag Vertido v. Philippines, Communication No. 18/2008, para. 8.9 (b) (ii) (1 September 2010).
[539] Amnesty International (2011), p. 23

Instances of such an abuse of power encompass

> "coercion through promises that the victim will receive better treatment and assurances that third parties will be protected from harm in exchange for yielding to the perpetrator."[540]

In the ICTY Delalić case,

> "the Trial Chamber noted that the involvement of a state agent or public official was inherently coercive, especially in the context of armed conflict" [541]

In fact, the Chamber affirmed that

> "it is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict."[542]

Even in cases in which the accused is not invested with official authority or power, abuse of power can play an important role. In the ICTR Musema case, the Trial Chamber acknowledged (albeit collaterally to the main issue under judgment) that coercive power is employed beyond official state or military organisations by way of other relations of power and control that are brought before the Court and are progressively frequent in situations of armed conflict.[543]

There were allegations of abuse of power in the peacekeeper or humanitarian aid context. Indeed, allegedly United Nations aid workers, despite having the duty to protect and aid the populations, were involved in sexual abuse and exploitation.[544]

Such abuse of power causes special concern because of the "de facto" fiduciary relationship that exists between the parties and the potential immunity of peacekeepers against prosecution.[545]

In fact, the United Nations Charter established that

> "[r]epresentatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization."[546]

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[540] *Ibidem*
[541] Amnesty International (2011), p. 24
[542] ICTY. The Prosecutor v. Zejnil Delalić, et al., Case No. IT-96-21-T. Trial Chamber, Judgment, p. 178, para. 495 (16 November 1998)
[543] ICTR. The Prosecutor v. Musema, paras. 880-881; Amnesty International (2011), p. 24
[544] Amnesty International (2011), p. 24
[545] *Ibidem*
[546] Charter of the United Nations, Art. 105, para. 2

Subsequently, the Convention on the Privileges and Immunities of the United Nations determined that

> "[o]fficials of the United Nations shall: Be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity."[547]

However, the same Convention, upon recognising that privileges and immunities are not granted to officials for their personal benefit, but rather in the interests of the United Nations, stated:[548]

> "The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations."[549]

The allegations prompted responses from the United Nations in the form of investigations, reports, and codes and bulletins containing rules of conduct that should be observed by United Nations´ workers.[550]

In the 2003 Secretary-General's Bulletin on Special measures for protection from sexual exploitation and sexual abuse, sexual exploitation was defined as

> "any actual or attempted abuse of a position of vulnerability, differential power, or trust for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another,"[551]

whereas sexual abuse was regarded as an

> "actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions."[552]

These approaches are comprehensive and consider that, within context of peacekeeping operations, any type of sexual exploitation constitutes a grave misconduct, independently of the victim´s purported consent.[553]

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[547] United Nations, General Assembly. Convention on the Privileges and Immunities of the United Nations, Art. V, section 18 (a) (13 February 1946)
[548] United Nations, General Assembly. Convention on the Privileges and Immunities of the United Nations, Art. V, section 20
[549] *Ibidem*
[550] United Nations, General Assembly, Office of Internal Oversight Services. Report of the Office of Internal Oversight Services on its Investigations into Allegations of Sexual Exploitation and Abuse in the Ituri Region (Bunia) in the United Nations Organization Mission in the Democratic Republic of the Congo, pp. 7-8, para. 19 (5 April 2007); United Nations, Secretariat. Secretary-General's Bulletin. Special measures for protection from sexual exploitation and sexual abuse, section 1 (9 October 2003); Amnesty International (2011), pp. 24-25
[551] United Nations, Secretariat, Secretary-General's Bulletin. Special measures for protection from sexual exploitation and sexual abuse, section 1
[552] *Ibidem*
[553] Amnesty International (2011), p. 25

Refraining from sexual activity became part of the professional responsibility and duty of care of the aid workers (in the same form that criminal law in determined national jurisdictions, like the United States and Germany, considers a criminal offence the occurrence of sex between a detention or prison officer and detainee or prisoner).[554]

These rules were established to avoid rape and sexual violence, and, in their preventive scope, finished inhibiting abuse of power. Indeed, these rules avoid aid workers abusing individuals that lack power. Moreover, the workers are prevented of unfairly benefitting people who would be ready to perform sexual acts so as to be recompensed with easier access to services, money, goods or benefits. Therefore, the aid workers must adhere to their duty of care and justice in the distribution of aid, protection, or another form of assistance.[555]

As it happens in detention, there is a professional relationship between aid workers and protected populations that demands respect in order to prevent any staining by abuse of power. Also like in detention, the limits are reasonable and proportionate constrictions imposed on a professional conduct, and do not consist in restrictions to the own expression of sexuality.[556]

It is noteworthy that the five types of coercion exposed above are also enlisted in the Elements of Crimes as examples of force and threat of force, thus, applying to the latter “mutatis mutandis”.

f) Final remarks

The fact that the invasion can be “committed by force, or by threat of force or coercion” “against such person or another person” reveals that within the concept of coercion are included those situations in which the threat involves a third person and the victim of rape is pressed to accede in face of such threat.[557]

Undoubtedly, the term “another person” amplifies the reach of rape so as to encompass those circumstances in which a person submits to the performance of sexual conducts in order to avoid the victimisation of somebody else.[558]

In addition, the victim´s resistance to force is not relevant to the perpetration of the crime. In fact, Rule 70 of the International Criminal Court Rules of Procedure and Evidence establishes that[559]

> “[c]onsent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence.”[560]

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[554] ICTY. The Prosecutor v. Dragoljub Kunarac, et al. The Appeals Chamber, Judgment, p. 40, para. 131 (12 June 2002); German Criminal Code (13 November 1998), Chapter 13, Sections 174 a and 174 b; United States. Case New Jersey v. Martin, 235 N.J. Super. 47 (1989), 561 A.2d 631; Amnesty International (2011), pp. 21, 25

[555] Amnesty International (2011), pp. 25-26

[556] Amnesty International (2011), p. 26

[557] Eriksson, M. (2011), p. 426

[558] de Brouwer, A.-M. L. M. (2005), pp. 134-135;

[559] Amnesty International (2011), p. 18

[560] Rules of Procedure and Evidence of the International Criminal Court, Rule 70

2-) The invasion was committed by taking advantage of a coercive environment

This term brings to mind the requirement of the Akayesu case "under circumstances which are coercive". In relation to this requirement, the ICTR affirmed that

> "coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal."[561]

Along the same lines, the Special Rapporteur on Sexual Slavery, among other authorities, has affirmed that the existence of an armed conflict "per se" corresponds to an inherently coercive environment as a result of the extensive latent violence.[562]

Therefore, the insertion of "by taking advantage of a coercive environment" in the rape definition (and in the enforced prostitution and sexual violence concepts) of the Elements of Crimes represents the acknowledgement that in cases of armed conflicts or widespread violence, the perpetrator can carry out rape (as well as the other two crimes) without needing to make a straightforward use of force or threat of force.[563]

Further, the Elements of Crimes, by inserting the term "taking advantage of a coercive environment", acknowledged that the armed conflict effects have a rather ample reach, going further than the battlefield, and lingers to nearly all elements of civilian population´s lives.[564]

The distinctive trace of taking advantage of a coercive environment (in relation to other types of coercion) resides in the fact that the perpetrator is not in a direct manner responsible for giving rise to the coercive situation.[565]

Certainly, the existence of the coercive environment is not attached to the actions of the perpetrator, but the latter makes use of the already existing coercive environment and takes advantage of it (as, for instance, when one detainee, taking advantage of the innately coercive environment of the detention, rapes another).[566]

The 1992 Commission of Experts in the former Yugoslavia identified one pattern in which civilians had permission to enter the premises of detention camps and

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[561] ICTR. The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4. Chamber I, Judgment, para. 688 (2 September 1998)
[562] United Nations, Report of the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict, para. 25; Amnesty International (2011), p. 26
[563] Eriksson, M. (2011), p. 426; Tonkin, H. (2004), pp. 243-263
[564] Amnesty International (2011), p. 26
[565] *Ibidem*
[566] *Ibidem*

chose women to take away and rape, and then take such women back to the camp or kill them. In these circumstances, the civilians, albeit not responsible for detaining the women, were clearly taking advantage of the coercive environment in the detention camps. Contrarily to the case of detention (in which guards have determined duties in relation to the detainees), civilians who entered the camp did not have any obligations concerning the detainees, but even so could abuse them.[567]

Aid workers can exercise coercion by means of either abuse of power or taking advantage of the coercive environment surrounding the population (which has not arisen as a direct consequence of the presence of such workers in the place).[568]

In fact, all sort of individuals (from non-combatants and other displaced persons to criminals and members of gangs or quasi-independent groups not related to the armed conflict) can "take advantage of the situation of disorder, confusion and lawlessness to commit rape and other sexual crimes".[569]

Both the International Criminal Court (which has "power to exercise its jurisdiction over persons for the most serious crimes of international concern") and the States (that have the duty "to exercise its criminal jurisdiction over those responsible for international crimes") should take into consideration all these possibilities when prosecuting sexual and gender-based criminal offences, so as to provide justice to as many as possible victims.[570]

3-) The invasion was committed against a person incapable of giving genuine consent

The goal of such provision is to protect a determined group of individuals that do not have the ability to take conscious decisions regarding sexual acts, and against whom rape can be perpetrated without the employment of force or coercion.[571]

There are two keystone terms that must be assessed: "incapable" and "genuine consent".

- Incapable

The Elements of Crimes explicitly explains that

> "a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity."[572]

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[567] Amnesty International (2011), pp. 26-27; United Nations. Final Report of the UN Commission of Experts, established pursuant to Security Council Resolution 780 (1992) Annex VIII, part 1 of 10, Prison Camps, preliminary remarks (27 May 1994).
[568] Amnesty International (2011), p. 27
[569] *Ibidem*
[570] *Ibidem;* Rome Statute, Preamble, Art. 1
[571] de Brouwer, A.-M. L. M. (2005), p. 134; Eriksson, M. (2011), p. 426; La Haye, E. (2001). In Lee, R. S. K. & Friman, H. (eds.), pp. 184-189
[572] Elements of Crimes of the International Criminal Court, Art. 7 (1) (g)-1, Element 2, footnote 16

de Brouwer clarifies that such circumstances refer

> "to persons who are legally incapable of giving consent, as is commonly used in national jurisdictions."[573]

This circumstance relates to a category of people who would be unable to consent to sexual relations, specifically children, old people, disabled people and persons under the influence of drugs and alcohol.[574]

Indeed, there are people who are not capable of securing their sexual autonomy as a result of being impaired by natural incapacity (for instance, mental incapacity to comprehend the nature of the act), induced incapacity (for instance, reduced capacity resultant from the ingestion of drugs and/or alcohol; deception) or age associated incapacity (for instance, children´s capability to give free and cognisant agreement to sexual conduct).[575]

a.i) Age-related incapacity

Many children, especially girls, are targeted for rape and other forms of sexual violence. Indeed, the commission of sexual crimes against girls and boys is often reported in armed conflict and contexts in which crimes against humanity and genocide are being perpetrated (and also in peacetime).[576]

Children are defenceless preys, being more easily forced, threatened and coerced than grownups human beings.[577]

Professor Paulo Sergio Pinheiro, entrusted by the UN Secretary-General to elaborate a global report on violence against children, stated:

> "Studies suggest that young children are at greatest risk of physical violence, while sexual violence predominantly affects those who have reached puberty or adolescence. Boys are at greater risk of physical violence than girls, while girls face greater risk of sexual violence, neglect and forced prostitution."[578]

The United Nations International Children´s Emergency Fund (UNICEF) prepared a follow-up report to the one elaborated by Professor Pinheiro and noted:[579]

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[573] de Brouwer, A.-M. L. M. (2005), p. 134
[574] *Ibidem*; Eriksson, M. (2011), p. 426; La Haye, E. (2001). In Lee, R. S. K. & Friman, H. (eds.), pp. 184-189
[575] Amnesty International (2011), pp. 27-28, footnote 78
[576] Amnesty International (2011), p. 32
[577] Amnesty International (2011), p. 31; United Nations, General Assembly. Convention on the Rights of Child, Art. 34 (20 November 1989).
[578] Krug, E. G., Dahlberg, L. L., Mercy, J. A., Zwi, A. B., & Lozano, R. (eds.) (2002). *World Report on Violence and Health,* p. 5; United Nations, General Assembly. Promotion and protection of the rights of children, Report of the independent expert for the United Nations study on violence against children, para. 30. UN Doc A/61/299 (29 August 2006)
[579] Amnesty International (2011), p. 32

> "Given vulnerabilities associated with their age, physicality and lack of negotiating power, it is likely that adolescent girls are among the highest of all risk groups for sexual violence perpetrated against them by members of their community. However, for many girls around the world, sexual aggression by boys and men is normative, and therefore not perceived by girls (or boys) as criminal unless it crosses the bounds into more conformist definitions of rape. [...] Average estimates of coerced first sex among adolescent girls around the world range from 10 percent to 30 percent, but in some settings, such as Korea, Cameroon and Peru, the number is closer to 40 percent."[580]

Article 34 of the Convention on the Rights of the Child requires States to "protect the child from all forms of sexual exploitation and sexual abuse" and prevent:[581]

> "(a) The inducement or coercion of a child to engage in any unlawful sexual activity;
>
> (b) The exploitative use of children in prostitution or other unlawful sexual practices;
>
> (c) The exploitative use of children in pornographic performances and materials."[582]

With this aim of protecting children, several national jurisdictions establish that to carry out sexual activities with a person under a certain age automatically constitutes a crime. An example are statutory rape laws whose purpose is to protect children and adolescents under a certain age from sexual intercourse.[583]

Certainly, the legislators presume that in function of his/her young age, a person lacks capacity to exercise sexual autonomy and take conscious decisions regarding engaging in sexual acts. Therefore, the age-related incapacity is presumed in function of a statutory age limit.

For instance, in Spain whoever perpetrates acts of a sexual nature with a person under the age of 16 years incurs at least in sexual abuse of a minor and shall be punished with imprisonment from 2 to 6 years. It is noteworthy that the age limit for sexual consent was elevated from 13 to 16 years in the modification of the Spanish Criminal Code of 28 April 2015. The new redaction of the Spanish Criminal Code came into force on 1 July 2015. [584]

When the offence is committed by using violence or intimidation, the responsible will be punished for the crime of sexual assault of a minor with 5 to 10 years in

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[580] UNICEF (2008). *From invisible to indivisible: promoting and protecting the right of the girl child to be free from violence*, p. 47
[581] United Nations, General Assembly. Convention on the Rights of Child, Art. 34
[582] United Nations, General Assembly. Convention on the Rights of Child, Art. 34 (a) (b) (c)
[583] Jailbait, C. C. (2004), p. 28.
[584] Spanish Criminal Code (BOE n. 281, 24 November 195), Art. 183, para. 1

prison. The same penalties will be imposed when someone, by violence or intimidation, compels a person younger than sixteen years to engage in sexual acts with a third party or commit them upon himself/herself.[585]

In the sexual abuse of a minor or sexual assault of a minor, if the attack consists of vaginal, anal, or oral sexual access, or introduction of bodily members or objects by either the vagina or the anus, the responsible will be punished with 8 to 12 years in prison, and, in case of use of violence or intimidation, with 12 to 15 years in prison.[586]

The following constitute aggravating circumstances:

> "a) When the low intellectual or physical development of the victim, or the fact of presenting a mental disorder, has placed the victim in a situation of utter helplessness and, in any case, when the victim is younger than 4 years old.
> …
> d) Where, for the execution of the crime, the responsible has taken advantage of a relationship of superiority or kinship, for being ascendant, or sibling, by nature or adoption, of the victim."[587]

Furthermore, a person who, by deception or abuse of a recognised position of trust, authority or influence over the victim, performs acts of a sexual nature with a person over 16 and under 18 years is perpetrating the crime of sexual abuse.[588]

Whoever, for sexual purposes, compels a victim under 16 years to engage in behavior of a sexual nature, or make him/her witness acts of sexual character, even if the author does not participate of such acts, shall be punished with imprisonment from 6 months to 2 years. If a victim under 16 years is made to witness sexual abuses, even if the author does not participate of such abuses, a prison sentence of 1 to 3 years shall be imposed.[589]

It is noteworthy that the free consent of the minor under 16 years shall exclude criminal responsibility for the aforementioned crimes, when the author is a person close to the minor by age and degree of development or maturity.[590]

Therefore, in accordance with the determinations of the Spanish law, any sexual conduct with a person under 16 years old is deemed sexual abuse of minor. If such sexual conduct is achieved by the use of violence or intimidation, the conduct is classified as sexual assault of minor. If the attack consists of vaginal, anal, or oral sexual access, or introduction of bodily members or objects by either the vagina or the anus, higher penalties apply.

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[585] Spanish Criminal Code, Art. 183, para. 2
[586] Spanish Criminal Code, Art. 183, para. 3
[587] Spanish Criminal Code, Art. 183, para. 4 (a) (d)
[588] Spanish Criminal Code, Art. 182, para. 1
[589] Spanish Criminal Code, Art.183 bis
[590] Spanish Criminal Code, Art.183 quater

In these criminal offences, it is an aggravating circumstance the fact that the sexual aggression is committed against a person younger than 4 years old, or if the low intellectual or physical development of the victim, or the fact of presenting a mental disorder, has placed the victim in a situation of utter helplessness.

Sexual acts with a person between 16 and 18 years old amount to sexual abuse if they were performed as a consequence of the employment of deception or by the abuse of a recognised position of trust, authority or influence over the teenager.

All and all, the Spanish Criminal Law confers ample protection against sexual crimes to persons younger than 16 years old, and especially to children under 4 years old. Adolescents between 16 and 18 years old are also object of special protection against sexual crimes, albeit such protection is conditioned to either the use of deception or the abuse of a recognised position of trust, authority or influence by the perpetrator.

In Brazil, it is a crime ("rape of a vulnerable person") to have sexual intercourse or practice another sexual act with a person under 14 years old.[591]

Further, it is a crime of corruption of minors to induce a person under the age of 14 years to satisfy somebody else´s lust.[592]

It is also a criminal offence to practice, in the presence of a person under the age of 14 years, or to induce him/her to presence, sexual intercourse or another libidinous act, so as to satisfy one´s own lust or a third person´s.[593]

It is a crime ("favoring prostitution or other form of sexual exploitation of children or adolescents or vulnerable") to submit, induce or attract to prostitution or another form of sexual exploitation a person under the age of 18 years (or that, for mental illness or disability, does not have the necessary understanding to the practice of the act), facilitate it, impede it or make it difficult to abandon it.[594]

The critic made towards such approach is that if the age limit chosen is too high or too low, the statutory rape provisions will inevitably fail to provide the victims with justice.[595]

If the age limit is set on the high side,

> "it denies adolescents the right to make their own choices relating to sexual activity, as it makes them liable to criminal prosecution for exercising their human rights."[596]

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[591] Brazilian Criminal Code (Decree-Law n. 2848, 7 December 1940), Art. 217-A, preamble and para. 1, included by Law nº 12.015/2009
[592] Brazilian Criminal Code, Art. 218, included by Law nº 12.015/2009
[593] Brazilian Criminal Code, Art. 218-A, included by Law nº 12.015/2009
[594] Brazilian Criminal Code, Art. 218-B, included by Law nº 12.015/2009;
Brazilian Children and Adolescents Statute (Law n. 8.069, 13 July 1990), Art. 244-A, included by Law nº 9.975/2000
[595] Amnesty International (2011), p. 31
[596] Ibidem

In fact, Article 5 of the Convention on the Rights of Child refers to "the exercise by the child of the rights recognized" in the Convention, which has been interpreted seen as permitting adolescents and young people to make choices with regards to sexual education and sexual acts under the age of 18.[597]

On the other hand, where the age cap is lower than appropriate, it leaves adolescents, specifically adolescent girls, out of the range of[598]

> "protection of the criminal law. Once girls are over the age stipulated in the statutory rape provision, they are frequently assumed to have agreed to sexual contact, irrespective of whether the evidence indicates that they were forced, threatened, or otherwise coerced."[599]

Therefore, there is a thin line between safeguarding and punishing adolescent sexuality, and the statutory age limit should focus on the protection of children and adolescents.[600]

In spite of determining an age threshold (up to 15 years) when setting up the war crime of conscripting or enlisting children into the national armed forces or using them to participate actively in hostilities, the drafters of the Rome Statute did not provide a statutory age limit concerning the sexual crimes.[601]

Ulteriorly, the Preparatory Commission, while elaborating the Elements of Crimes, did not include either an age threshold which it is assumed that the child is unable consent to sexual acts.[602]

It has been sustained that the concept of rape inserted in the Elements of Crimes, by focusing on coercion, force and threat of force, and including age-related incapability of giving genuine consent, can be correctly utilised in the evidence regarding how children that are victimised experience such crime, and how perpetrators make use of coercion and power differentials so as to carry out this criminal offence. The core is on the actions of the perpetrator and how such actions impacted the victim´s behaviour, thus it would be possible to scrutinise if such actions were markedly coercive because of the victim´s young age. As a result, the inclusion of an age threshold could be regarded as dispensable.[603]

However, the International Criminal Court could adopt a statutory age limit to the sexual crimes, so that the mere fact of practicing sexual acts with someone below an established age "per se" would amount to a criminal offence.

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[597] *Ibidem*, footnote 87; United Nations, General Assembly. Convention on the Rights of Child, Art. 5
[598] Amnesty International (2011), pp. 31-32
[599] *Ibidem*
[600] Jailbait, C. C. (2004), p. 27
[601] Rome Statute, Art. 8 (2) (b) (xxvi); Amnesty International (2011), p. 31
[602] Amnesty International (2011), p. 31
[603] Amnesty International (2011), pp. 31-33

This measure would enhance the protection of children and adolescent against sexual violence “lato sensu”. Moreover, there would be no need to analyse the employment of power differentials by the perpetrator to commit these sexual crimes.[604]

Further, it would be dispensable to show how the children/adolescents were impacted by the perpetrator´s behaviour and experienced the crimes.[605]

Certainly, by assuming that a sexual contact with a children or adolescent under a certain age limit is an invasion “against a person incapable of giving genuine consent”, the children/adolescents would be spared of delving in the suffering imposed on them by the perpetrator. As a result, their psychological well-being, dignity and privacy would be preserved, in consonance with article 68 (1) of the Rome Statute which states:

> “[t]he Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children.”[606]

Therefore, the presupposition that any sexual conduct carried out with children/adolescents below a determined age consists in a sexual crime committed “against a person incapable of giving genuine consent” would benefit the prosecution of sexual crimes enlisted in the Rome Statute perpetrated against children and adolescents. Indeed, it would be enough for the configuration of the sexual crime that sexual acts were carried out with a person younger than the statutory age limit.

The International Criminal Court, when setting up the age limit for that ends, should pay attention and opt for an age threshold that will protect children and adolescents, and, concomitantly, will not cause detriment to adolescents` sexuality.[607]

Conceivably, the Court could establish the age of 15 years as the statutory age limit, mirroring the war crime of “conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities” (such age would also be a mid-term between the Spanish and Brazilian statutory age limits).[608]

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[604] Amnesty International (2011), pp. 31-32
[605] *Ibidem*
[606] Rome Statute, Art. 68 (1)
[607] Jailbait, C. C. (2004), p. 27
[608] Rome Statute, Art. 8 (2) (b) (xxvi) (e) (vii); Amnesty International (2011), p. 31

a.ii) Natural incapacity and induced incapacity

National legislations also seek to confer special protection against sexual crimes to people affected by natural or induced incapacity. As in the age-related incapacity, the Spanish and Brazilian criminal laws on the subject will be analysed for the sake of exemplifying the approach adopted by the domestic laws.

In accordance with the Spanish Criminal Code, those persons deprived of sense or whose mental illness is abused of, as well as those committed by nullifying the determination of the victim by the use of medicines, drugs or any other natural or synthetic substance that brings about such effect, are particularly protected against the crime of non-consented sexual abuse (and even more so when the non-consented sexual abuse consists of vaginal, anal, or oral sexual access, or introduction of bodily members or objects by either the vagina or the anus).[609]

Further, the fact that the victim is especially vulnerable in virtue of his/her age, illness, disability or situation constitutes aggravating circumstances.[610]

Moreover, in the crimes of sexual abuse of minor and sexual assault of a minor, it constitutes an aggravating circumstance if the low intellectual or physical development of the victim, or the fact of presenting a mental disorder has placed the victim in a situation of utter helplessness.[611]

Consequently, persons under 16 years who present low intellectual or physical development, or mental disorder (which has placed the victim in a situation of utter helplessness) and are victims of these criminal offences (namely, sexual abuse of minor and sexual assault of minor) are object of reinforced protection by the Spanish law, in virtue of both their age and some mental, intellectual, or physical underdevelopment.

In Brazil, it also constitutes the crime “rape of a vulnerable person” to have sexual intercourse, or practice of another sexual act with a person that, for mental illness or disability, does not have the necessary understanding to practice the act, or, for any other reason, cannot offer resistance.[612]

As stated above, it is a crime (“favoring prostitution or other form of sexual exploitation of children or adolescents or vulnerable”) to submit, induce or attract to prostitution or another form of sexual exploitation a person under the age of 18 years, or that, for mental illness or disability, does not have the necessary understanding to the practice of the act, facilitate it, impede it or make it difficult to abandon it.[613]

The reference included in the Elements of Crimes to “natural, age-related, or induced capacity” implies that a person’s capacity to exercise discernment and

[609] Spanish Criminal Code, Art. 181 (1) (2) (4)
[610] Spanish Criminal Code, Arts 178; 179; 180 (1), (3ª) (4ª); 181 (4) (5)
[611] Spanish Criminal Code, Art. 183 (1) (2) (3) 4 (a)
[612] Brazilian Criminal Code, Art. 217-A (1) included by Law nº 12.015/2009
[613] Brazilian Criminal Code, Art. 218-B, included by Law nº 12.015/2009

reasoning, so as to make decisions about their own interests and desires, should be regarded as primordial.[614]

This understanding is consonant with the affirmation of the European Court of Human Rights that

> "the development of law and practice in that area reflects the evolution of societies towards effective equality and respect for each individual's sexual autonomy."[615]

The International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities recognises that for persons with disabilities their individual autonomy and independence (including their liberty to choose) is relevant. Further, the convention establishes among its principles the[616]

> "respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons."[617]

Therefore, the International Criminal Court should determine, in view of the facts of the concrete case under judgment, wether the person had capacity to decide, with freedom and genuineness, to participate of sexual acts. In doing so, the Court should take into consideration factors as the individual's abilities of perception, understanding, and communication. Also, the International Criminal Court should verify the existence of particular developmental, mental health or noncognitive problems (in special drugs or alcohol-induced) and if such problems had caused the person incapable of genuinely exercising sexual autonomy.[618]

b) Genuine consent

> "The term "genuine consent" is a term used in the Elements of Crimes definitions of rape, enforced prostitution, and enforced sterilisation; also in Rule 70 of the Rules of Procedure and Evidence. In order to be consistent with international human rights law, all references to the term 'consent' or 'genuine consent' used in the Court's practice should be interpreted and applied in the light of the treatment of consent in human rights law which calls for free consent, free of force, coercion, discrimination and violence."[619]

The groups of people mentioned above are regarded as unable to give genuine consent and, as consequence, the non-consent is assumed.[620]

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[614] Amnesty International (2011), p. 15
[615] ECHR, Case M.C. v. Bulgaria (2003), para. 165
[616] United Nations, General Assembly. International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Annex I, Preamble, para. (n) (2006).
[617] United Nations, General Assembly. International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Art. 3 (a) (2006).
[618] Amnesty International (2011), p. 28
[619] Amnesty International (2011), p. 15
[620] de Brouwer, A.-M. L. M. (2005), p. 134

It is noteworthy that the Elements of the Crime did not render non-consent as a keystone element of rape, merely regarding it as an addition to the central components force and coercion.[621]

Therefore, in accordance with the rape definition inserted in this supplementary agreement to the Rome Statute, consent is not taken into account when force, threat of force, coercion, or coercive environment is present in the situation, or if the person was not capable of giving genuine consent.[622]

Certainly, non-consent, in its conventional usage, clearly does not integrate the essential elements of the definition of the crime rape imprinted in the Elements of Crimes.[623]

Apart from these persons "incapable of giving genuine consent", there is no mention to the non-consent of further groups of individuals, being left solely the lack of consent that is inherent to the elements "force" or "coercion". This comes as an aftereffect of the definition of rape provided by the Elements of Crimes being centered in the coercive environment, rather than the victims´ non-consent.[624]

Indeed, the Elements of the Crime did not render non-consent as a keystone element of rape, merely regarding it as an addition to the central components force and coercion.[625]

As a consequence, in accordance with the rape definition inserted in this supplementary agreement to the Rome Statute, consent is not taken into account when force, threat of force, coercion, or coercive environment is present in the situation, or if the person was not capable of giving genuine consent. Certainly, non-consent, in its conventional usage, clearly does not integrate the essential elements of the definition of the crime rape imprinted in the Elements of Crimes.[626]

b.i) "Mens rea" and consent as a defense of mistake of fact

The question of consent, especially in cases of sexual violence, was further expanded in the Rules of Procedure and Evidence. Rule 70 brings principles of evidence in cases of sexual violence versing about consent and establishes that "[i]n cases of sexual violence, the Court shall be guided by and, where

[621] de Brouwer, A.-M. L. M. (2005), pp. 130,134; Eriksson, M. (2011), p. 426; La Haye, E. (2001). In Lee, R. S. K. & Friman, H. (eds.), pp. 184-189; Rückert, W., & Witschel, G. (2001). In Fischer, H., Kress, C., Lüder, S. R. (eds.), pp. 59-93

[622] *Ibidem; Ibidem; Ibidem; Ibidem*

[623] Eriksson, M. (2011), p. 426

[624] de Brouwer, A.-M. L. M. (2005), p. 134; Eriksson, M. (2011), p. 426; La Haye, E. (2001). In Lee, R. S. K. & Friman, H. (eds.), pp. 184-189; Rückert, W., & Witschel, G. (2001). In Fischer, H., Kress, C., Lüder, S. R. (eds.), pp. 59-93

[625] *Ibidem; Ibidem; Ibidem*; Eriksson, M. (2011), p. 426

[626] de Brouwer, A.-M. L. M. (2005), p. 134; Eriksson, M. (2011), p. 426; La Haye, E. (2001). In Lee, R. S. K. & Friman, H. (eds.), pp. 184-189; Rückert, W., & Witschel, G. (2001). In Fischer, H., Kress, C., Lüder, S. R. (eds.), pp. 59-93; Eriksson, M. (2011), p. 426

appropriate, apply" them. As a result, the judges are not bound to the application of the principles on consent, and their use is only a faculty. The aforementioned principles are:[627]

> "(a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
> (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
>
> (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;
>
> (d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness."[628]

In this instrument for the application of the Rome Statute of the International Criminal Court, consent is clearly regarded as a possibility of defence and the "onus probandi" lies on the Defence.[629]

The possibility of consent being a form of defence arises from the "mens rea" of the crime of rape.

Article 30 of the Rome Statute disposes:

> "1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
>
> 2. For the purposes of this article, a person has intent where:
>
> (a) In relation to conduct, that person means to engage in the conduct;
>
> (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
>
> 3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the

[627] Eriksson, M. (2011), p. 426; Rules of Procedure and Evidence of the International Criminal Court, Rule 70
[628] Rules of Procedure and Evidence of the International Criminal Court, Rule 70
[629] Eriksson, M. (2011), p. 426

> ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly."[630]

The mental element brought by this article of the Statute applies to all the criminal offences under the ICC jurisdiction. Specifically, in regard to the crime of rape, "the material elements are committed with intent and knowledge" entails that the perpetrator intended to invade the victim´s body, resulting in penetration, and knew that the invasion was perpetrated [631]

> "by force, or by threat of force or coercion, … or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent." [632]

Thus, even though the definition of rape of the International Criminal Court did not expressly include the non-consent of the victim among the elements which constitute the crime of rape, the "mens rea" requirement that the material element is committed with "intent and knowledge" (specific mental state) enables a defense of mistake of fact ("[w]here an offence requires a particular mental state, such as knowledge or purpose, an honest and reasonable belief that precludes a defendant from forming or maintaining that mental state will preclude conviction").[633]

There is a procedural mechanism so as to determine if the question of consent is important: after the Defence files a submission requesting to produce evidence regarding the victim´s non-consent, the Court will hold an "in camera" procedure. Rule 72 (2) states that

> "[i]n deciding whether the evidence…is relevant or admissible, a Chamber shall hear in camera the views of the Prosecutor, the defence, the witness and the victim or his or her legal representative, if any, and shall take into account whether that evidence has a sufficient degree of probative value to an issue in the case and the prejudice that such evidence may cause."[634]

According to such provision, the use of consent as a defence is expressly ruled out in certain circumstances, issue that caused controversy among the delegates during the negotiations of the agreement. Those opposing such rule defended that it would needlessly pose as a barrier to the presentation of evidence in respect of consent. This view was backed by the argument that it is not possible to render as coercive all sexual activity that is carried out in the periods of civil unrest or armed conflict, in particular when the circumstances permit civilians to continue with their regular routines. It was also argued that the fact that there is a spread sense of coercion in a determined area does not necessarily mean that it has affected the victim in question. A mid-term was found and the defence of

[630] Rome Statute, Art. 30
[631] Eriksson, M. (2011), pp. 427-428
[632] Elements of Crimes of the International Criminal Court, Article 7 (1) (g)-1 (2)
[633] Cavallaro, R. (1996), pp. 815-860; Weiner, P. (2013), pp. 1207-1237
[634] Rules of Procedure and Evidence of the International Criminal Court, Rule 72 (2)

consent is permitted by the Court, however first it ought to go through a test which evaluates its relevance.[635]

- Final remarks

Simply put, the basis of element 2 is that, from both a logical and legal point of view, so that sexual acts are legal, both parties engaging in the sexual activity ought to be unforced and uncoerced.[636]

Nevertheless, if the person was incapable of giving genuine consent (in other words, was affected by natural, induced or age-related incapacity), the employment of force and coercion does not play a role in the configuration of the crime, and the invasion of element 1 as a matter of course amounts to the crime of rape (subject to being present the context elements).

4.3.1.(iii).(c). Further considerations

The detailed definition of rape inserted in the Elements of Crime, which is centred on force and coercion, has been target of praise and criticism. The concept of rape of the Elements of Crimes is precise and clear, but gives rise to the discussion if, since they sought for accuracy, the delegates finally decided upon a rather narrow definition of the offence.[637]

As stated above, this definition managed to be a little broader than the elected by the ICTY in the Furundžija case (and subsequently in the ICTY the Prosecutor v. Kunarac case): the penetration of the vagina or anus can also be carried out with fingers, hands and tongue (instead of exclusively with "the penis of the perpetrator or any other object"), and an orifice other than vaginal, anal or oral ones can be penetrated with the sexual organ. However, as also aforementioned, such approach to rape is more restrict than the model adopted in the Akayesu case: the latter comprises situations of sexual violence that do not include penetration with the penis (e.g., forced masturbation, forced nudity, or sexual mutilation). Consequently, albeit mechanical, the definition of the Elements of Crimes sets apart rape and inferior degrees of sexual violence.[638]

Moreover, conversely to the Akayesu case judgment (which, for the configuration of rape, demands the physical invasion of a sexual nature committed against a person to be carried out "under circumstances which are coercive", and, thus, requires the awareness of the perpetrator and of the victim of the purposely forcible environment), the sexual acts that, according to the of Elements of Crimes, amount to rape are objectified (as a result of the mechanical vein in the delimitation of the crime). Hence, the victim´s subjective perception and the

[635] Eriksson, M. (2011), p. 427
[636] Amnesty International (2011), p. 14
[637] Boon, K. (2001), pp. 625-775; de Brouwer, A.-M. L. M. (2005), p. 136; Eriksson, M. (2011), pp. 391, 425, 429
[638] de Brouwer, A.-M. L. M. (2005), p. 133; Eriksson, M. (2011), p. 425; ICTY. The Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T. Trial Chamber, Judgment, p. 73, para. 185 (10 December 1998); ICTY. The Prosecutor v. Dragoljub Kunarac, et al., Case No. IT-96-23-T and IT-96-23/1-T. Trial Chamber, Judgment, para. 460 (22 February 2001)

perpetrator´s intentions in relation to the sexual acts do not play a role in the configuration of rape in the terms it is delineated in the Elements of Crimes.[639]

It is relevant to stress that rape, as understood in the Rome Statute and the Elements of Crimes, has departed from the traditional conception of a crime which attempts against morality and honour. Undoubtedly, the Preparatory Commission aimed to reflect the objective of safeguarding sexual autonomy when drafting the concept of rape of the Elements of Crimes. The employment of force, or threat of force or coercion by the criminal renders it impossible for the victims to make use of their entitlement to physical and mental integrity, and, as an extension, of their sexual autonomy. This new format[640]

> "signals a new paradigm for the international criminalization of sexual crimes - one based on broader principles of human dignity, autonomy, and consent."[641]

Finally, it is also important to highlight that the language used in the definition by the drafters is deliberately gender-blind, upholding that both men and women can suffer sexual violence. The employment of the words "person", "victim" and "perpetrator" (and the lack of gender-specific pronouns such as "he" and "she") goes to show the gender-neutrality spread throughout the definition of rape. In spite of the fact that women account for the largest part of the victims of sexual violence, the perpetration of sexual violence against men is more frequent than commonly thought. In fact, 3% of men worldwide have been raped in their lifetime in comparison with 13% of women. Sexual violence against men (including male to male rape and woman to male rape) has taken place in several conflicts and has been addressed in the "ad hoc" tribunals cases and the Special Court of Sierra Leone. For instance, sexual violence reached new levels during the civil war in the former Yugoslavia, so much so that the ICTY formed a Sexual Assault Investigation Team and, "inter alia", assigned it with, the task of investigating the rape of men during the conflict. The Team reported that men were compelled to rape and sexually assault other men, were victims of sexual mutilations (such as castrations, circumcisions, among others), and were also obliged to perform oral sex and other sexual acts on both guards and one another.[642]

4.3.1.(iii).(d). The crime against humanity of rape

As explained above, the singularities of the definition of rape as a crime against humanity and of the concept of such crime as a war crime are found in the contextual elements set up by the Elements of Crimes. Such approach was also exploited by the drafters of the Elements of Crimes when defining the other sexual

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[639] *Ibidem; Ibidem*

[640] Amnesty International (2011), p. 11; Eriksson, M. (2011), pp. 425, 429; United Nations, Entity for Gender Equality and Empowerment of Women. Convention on the Elimination of All Forms of Discrimination against Women, General Recommendations made by the Committee on the Elimination of All Forms of Discrimination against Women, General Recommendation No. 19, para. 7 (g) (1992).

[641] Boon, K. (2001), p. 631

[642] Bassiouni, M. C., & McCormick, M. (1996), pp. 17-18; Carlson, E. S. (1997), p. 129; Eriksson, M. (2011), p. 424; Schabas, W. A. (2011), pp. 122-155; Sivakumaran, S. (2007), pp. 253-276; Spitzberg, B. H. (1999), pp. 241-260; Stemple, L. (2008), pp. 605-647; Taylor, L. (2003), p. 42

and gender-based crimes enlisted in the Rome Statute (specifically, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and sexual violence).[643]

When the subject matter at issue is the context, the Elements of Crimes reverberates Articles 7 and 8 of the Rome Statute.

Article 7 (1) of the Rome Statute (drawing inspiration from the preamble of Article 3 of the ICTR Statute) disposes that

> "[f]or the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[644]

Accompanying this vein, the drafters of the Elements of Crimes established in Elements of Article 7 (1) (g)-1 Crime against humanity of rape, the following circumstantial elements:

> "3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
>
> 4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population."[645]

Certainly, the Introduction (2) to Article 7 of the Elements to Crimes elucidates that "[t]he last two elements for each crime against humanity describe the context in which the conduct must take place."[646]

Therefore, pursuant the Elements of Crimes, for the configuration of rape as a crime against humanity, it is not enough that the perpetrator invaded the body of a person by conduct resulting in penetration, however slight, and that such invasion was committed by force, or by threat of force or coercion, or against a person incapable of giving genuine consent. It is imperative that the conduct was carried out "as part of a widespread or systematic attack directed against a civilian population" and that the perpetrator was conscious that his conduct[647]

> "was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population."[648]

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[643] Elements of Crimes of the International Criminal Court, Art. 7, Introduction (2); Amnesty International (2011), p. 11; Manenti, M. R., (2013- 2014), p. 172
[644] Rome Statute, Art. 7 (1)
[645] Elements of Crimes of the International Criminal Court, Art. 7 (1) (g)-1
[646] Elements of Crimes of the International Criminal Court, Art. 7, Introduction (2)
[647] Elements of Crimes of the International Criminal Court, Article 7 (1) (g)-1 (1) (2) (3)
[648] Elements of Crimes of the International Criminal Court, Article 7 (1) (g)-1 (4)

4.3.1. (iii).(d)-1. Element 3

> "The conduct was committed as part of a widespread or systematic attack directed against a civilian population."[649]

In short, the invasion resulting in penetration must integrate an attack which is either widespread or systematic and, in any case, directed against a civilian population. It is necessary to study and define the amplitude of each of these elements.

1) Attack

Article 7 (2) (a) of the Rome Statute disposes that for the ends of paragraph 1:

> "'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack".[650]

As a result, pursuant to symmetry, Elements of Crimes states that, in these context elements, the term "attack directed against a civilian population"

> "is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that "policy to commit such attack" requires that the State or organization actively promote or encourage such an attack against a civilian population."[651]

Such provisions were inspired in the ICTR law cases. In fact, in the Akayesu case, the Trial Chamber of the ICTR stated that

> "[t]he concept of attack' maybe defined as a unlawful act of the kind enumerated in Article 3(a) to (I) of the Statute, like murder, extermination, enslavement etc. An attack may also be non violent in nature, like imposing a system of apartheid … or exerting pressure on the population to act in a particular manner."[652]

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[649] Elements of Crimes of the International Criminal Court, Art. 7 (1) (g)-1, Element 3
[650] Rome Statute, Art. 7 (2) (a)
[651] Elements of Crimes of the International Criminal Court, Art. 7, Introduction (3)
[652] ICTR. The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4. Chamber I, Judgment, para. 581 (2 September 1998).

In this exert, the Trial Chamber is referring to Article 3 of Statute of the International Criminal Tribunal for Rwanda, that enlists the crimes against humanity (among which is rape).[653]

In the Kayishema and Ruzindana case, the same "ad hoc" tribunal affirmed that

> "[t]he attack is the event in which the enumerated crimes must form part. Indeed, within a single attack, there may exist a combination of the enumerated crimes, for example murder, rape and deportation."[654]

Besides, the Elements of Crimes establishes that the multiplicity of such unlawful acts does not have to be committed within a military context.

2) Widespread or systematic

Further, such course of conduct has to be perpetrated as an integrating

> "part of a wide spread or systematic attack and not just a random act of violence. The act can be part of a widespread or systematic attack and need not be a part of both."[655]

It is necessary to highlight that the conduct has to be widespread or, alternatively, systematic, the two terms being purposefully linked by the disjunctive 'or' (rather than by the conjunctive 'and'). Surely, in consonance with Customary International Law as well as the practice of the International Law Commission and the ICTY, the attack has to be either widespread or systematic.[656]

A widespread attack encompasses

> "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims."[657]

Therefore, two elements can inform the element widespread: the broad scale of action or the quantity of victims, ruling out isolated inhumane acts carried out as a private enterprise and also those directed against a unique victim.[658]

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[653] United Nations, Security Council. Statute of the International Criminal Tribunal for Rwanda (1994), Art. 3 (g)

[654] ICTR. The Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T. Trial Chamber II, Judgment, para. 122 (21 May 1999);

[655] ICTR. The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4. Chamber I, Judgment, para. 579 (2 September 1998).

[656] ICTR. The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4. Chamber I, Judgment, para. 579, footnote 144 (2 September 1998); ICTR. The Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T. Trial Chamber II, Judgment, para. 123, footnote 63 (21 May 1999); Hwang, P. (1998), pp. 457-504.

[657] ICTR. The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4. Chamber I, Judgment, para. 580 (2 September 1998).

[658] United Nations, International Law Commission. Report of the Work of the International Law Commission on the work of its forty-eighth session (6 May to 26 July 1996), Art. 18, commentary-para. 4 (1996); Hwang, P. (1998), pp. 457-504.

The concept of systematic, by its turn, can be regarded as

> "thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a state. There must however be some kind of preconceived plan or policy."[659]

Consequently, to be rendered systematic, the attack ought to integrate a more ample strategy or policy.[660]

In a nutshell, an attack is considered widespread when it can be regarded as massive or if it is aimed at multiplicity of victims, whereas a systematic attack is that committed in accordance with a premeditated state/ organizational policy or planning.[661]

The requirement of a "widespread or systematic" attack poses a barrier for the trial as a crime against of a "random act", driven solely by private causes, which constitutes an ordinary criminal offence (and, as such, should be prosecuted in national jurisdiction). As a result, rest excluded those conducts "carried out for purely personal motives and those outside of a broader policy or plan", allowing the International Criminal Court to focus on crimes of international concern.[662]

Nevertheless, it is unnecessary to prove that the person charged has personally perpetrated multiple crimes since the accused can be rendered criminally liable for only one inhumane act (e.g., rape), provided that the crime was carried out as an integrating part of the larger attack. This understanding is congruent with Article 7, paragraph 1 of the Rome Statute which disposes that a crime against humanity means "any of the following acts when committed as part of a widespread or systematic attack."[663]

Indeed, since the context is an attack (that is "a course of conduct involving the multiple commission of acts" which were enlisted by the Rome Statute as criminal

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[659] ICTR. The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4. Chamber I, Judgment, para. 580 (2 September 1998); United Nations, International Law Commission. Report of the Work of the International Law Commission on the work of its forty-eighth session (6 May to 26 July 1996), Art. 18, commentary- para. 3

[660] The Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T. Trial Chamber II, Judgment, para. 122 (21 May 1999)

[661] The Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T. Trial Chamber II, Judgment, para. 123 (21 May 1999); ICTR. The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4. Chamber I, Judgment, para. 579 (2 September 1998); Hwang, P. (1998), pp. 457-504.

[662] The Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T. Trial Chamber II, Judgment, paras. 122.123 (21 May 1999); United Nations, International Law Commission. Report of the Work of the International Law Commission on the work of its forty-eighth session (6 May to 26 July 1996), Draft Code of Crimes Against the Peace and Security of Mankind, Art. 1; Hwang, P. (1998), pp. 457-504.

[663] ICTY. The Prosecutor v. Duško Tadić a.k.a. "Dule", Case No. IT-94-1. Trial Chamber, Opinion and Judgment, pp. 236, 237 (7 May 1997); Robinson, D. (1999), pp. 43-57; Rome Statute, Art. 7 (1)

offences under the jurisdiction of the International Criminal Court), obligatorily the sexual offence will have taken place amidst a series of crimes.[664]

Nevertheless, for the attack (multiple commission of acts of violence enumerated in Article 7 (1) of the Rome Statute) to take place, it is not necessary the perpetrator to act repeatedly by him/herself. Certainly, the other crimes might be carried out by persons other than the perpetrator of the sexual crime, and do not have to present a sexual/gender-based character.[665]

3) Directed against a civilian population

After determining that in order to amount to a crime against humanity, an act ought to be directed against the civilian population, the Chamber I in the Akayesu case clarified that:[666]

> "[m]embers of the civilian population are people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed hors de combat by sickness, wounds, detention or any other cause. Where there are certain individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character."[667]

It is relevant to highlight that the requisite that the attack has to be directed against a civilian population", "per se" indicates that there is guidance, commandment regarding the specific target, circumstance that implicates in the attack taking place within a preconceived and structured planning.[668]

In spite of that, the Rome Statute determines in Article 7 (2) (a) that the attack directed against any civilian population must be carried out "pursuant to or in furtherance of a State or organizational policy to commit such attack",[669] reiterating the idea that there must be some sort of "planning, pattern, coordinated activity, or scheme."[670]

Certainly, the categorical mention to "policy" was the catalyst which enabled the achievement of a compromise in the Rome Conference. Although some observers, afraid that such term could pose as an obstacle to prosecution, would have been more content if it was not expressly included in the Statue, the element "policy" has been backed by several authorities since the Nuremberg Charter and the Nuremberg Tribunal´s pronouncements.[671]

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[664] Rome Statute, Art. 7 (2) (a)
[665] Werle, G., & Bung, J. (2010), p. 2
[666] ICTR. The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4. Chamber I, Judgment, para. 582 (2 September 1998)
[667] *Ibidem*
[668] Robinson, D. (1999), pp. 43-57
[669] Rome Statute, Art. 2 (a)
[670] Hwang, P. (1998), pp. 457-504.
[671] Robinson, D. (1999), pp. 43-57

Likewise, the Elements of Crimes asserted that the “attack directed against a civilian population” must be carried out

> "pursuant to or in furtherance of a State or organizational policy to commit such attack ... It is understood that “policy to commit such attack” requires that the State or organization actively promote or encourage such an attack against a civilian population."[672]

Since the attack must be perpetrated in accordance with or in furtherance of a State or organizational policy/plan, it would seem that it will ever be systematic, being solely left open the question on whether or not the attack is widespread.

Finally, it is noteworthy that in addition to state officials and representatives, organizations (including terrorist ones and those organizations of separatist and insurrectional movements) can also be behind the plan or policy that gives rise to the widespread or systematic attack.[673]

The Elements of Crimes asserts that

> “[a] policy which has a civilian population as the object of the attack would be implemented by State or organizational action”[674]

and adds that, in unusual circumstances, such a policy can be achieved by means of a purposeful inertia in face of the awareness that the lack of action will stimulate the attack. Therefore, the mere absence of governmental or organizational action is not enough to rule out the existence of such a policy.[675]

From the explained above, "[t]he conduct was committed as part of a widespread or systematic attack directed against a civilian population", signifies, for the purpose of the definitions provided in the Elements of Crimes, that the unlawful act (enumerated in Article 7 (1) (a) to (k) of the Rome Statute) was perpetrated as part of a course of procedure encompassing the multiple commission of such acts. Additionally, aforementioned course of procedure must be either widespread (when it can be rendered substantial, of a vast scale or if it is aimed at a multiplicity of victims), or systematic (carried out pursuant to or in advancement of a State or organizational policy/plan) and anyhow directed against civilians (meaning people that are not taking any active role in the hostilities).

Therefore, elements 1 and 2 of the definition of rape set up in the Elements of Crimes must have been perpetrated in this context so that the unlawful act can be regarded as a crime against humanity of rape, and be under the jurisdiction of the International Criminal Court.

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[672] Elements of Crimes of the International Criminal Court, Art. 7, Introduction (3)
[673] Arsanjani, M. H. (1999), pp. 22-43
[674] Elements of Crimes of the International Criminal Court, Art. 7, Introduction (3), footnote 6
[675] *Ibidem*

4.3.1.(iii).(d)-2. Element 4

> "The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population."[676]

In paragraph 2 of the introduction to Article 7 of the Elements of the Crimes, after establishing that the last two elements for each crime against humanity actually describe the context in which the conduct must be perpetrated, the drafters clarified that

> "the requisite … knowledge of a widespread or systematic attack against a civilian population … should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack."[677]

Further, the Elements of the Crimes explains that the existence of the factors knowledge and intent can be drawn from important facts and circumstances.[678]

4.3.1.(iii).(e). War crime of rape

As explained above, regarding the demarcation of rape as a war crime and as a crime against humanity in the Elements of Crimes, the first two elements present literally the same wording, purely being different the last elements, which dispose about the context of the crime.[679]

Moreover, since war crimes are actually bi-folded (they can take place in either an international armed conflict or an armed conflict not of an international character), the Preparatory Commission elaborated two sets of elements of crimes for the war crime of rape: one for rape related to an international armed conflict, (Article 8 (2) (b) (xxii)-1); and another for rape associated with an armed conflict not of an international character (Article 8 (2) (e) (vi)-1). Once more, the distinction lies on the contextual elements.

Certainly, Article 8 (2) (b) (xxii)-1 enlisted the following as context elements:

> "3. The conduct took place in the context of and was associated with an international armed conflict.

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[676] Elements of Crimes of the International Criminal Court, Art. 7 (1) (g)-1, Element 4
[677] Elements of Crimes of the International Criminal Court, Art. 7, Introduction (2)
[678] Elements of Crimes of the International Criminal Court, General Introduction (3)
[679] Elements of Crimes of the International Criminal Court, General Introduction, (7) (c), Arts. 7, Introduction (2), (1) (g)-1; 8 (2) (b) (xxii)-1, (e) (vi)-1; Amnesty International (2011), p.11

> 4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict",[680]

whilst Article 8 (2) (e) (vi)-1 enumerated these elements:

> "3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
>
> 4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict."[681]

4.3.1.(iii).(e)-1. Element 3

To amount to a war crime, the conduct has to be carried out within the context of and be connected with an armed conflict, which can present either an international or a municipal character.

In the ICTY Tadić case, the Trial Chamber stated that "armed conflict" exists

> "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State."[682]

In a footnote inserted to element 4 of the war crime of willful killing, the drafters clarified that:[683]

> "[t]he term "international armed conflict" includes military occupation. This footnote also applies to the corresponding element in each crime under article 8 (2) (a)."[684]

This is as far as the Element of Crimes went to set up the boundaries of an international armed conflict, so it is necessary to recourse to Common article 2 of the four Geneva Conventions which states:[685]

> "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."[686]

The nexus that ought to exist between the conduct of the perpetrator and the armed conflict is relevant insofar as it sets up the distinction between war crimes and common criminal practice. Further, it clarifies that determined war crimes can

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[680] Elements of Crimes of the International Criminal Court, Art. 8 (2) (b) (xxii)-1 (3), (4)
[681] Elements of Crimes of the International Criminal Court, Art. 8 (2) (e) (vi)-1 (3), (4)
[682] ICTY. The Prosecutor v. Duško Tadić a.k.a. "Dule", Case No. IT-94-1. Trial Chamber, Opinion and Judgment, pp. 24, 25 (7 May 1997)
[683] Elements of Crimes of the International Criminal Court, Art. 8 (2) (a) (i)
[684] Elements of Crimes of the International Criminal Court, Art. 8 (2) (a) (i)-4, footnote 34
[685] Dörmann, K. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 300-322
[686] Geneva Conventions I, II, III, and IV, Art. 2

be carried out following the termination of the conflict (as for instance, a conduct that amounts to a grave breach of the Geneva Conventions of 12 August 1949 is committed subsequently to a general halt of military activity).[687]

The term "associated with" was intended to mirror the case law of the "ad hoc" International Criminal Tribunals which rendered necessary the establishment of a sufficient connection between the crimes and the armed conflict. Indeed, criminal acts which are not related to an armed conflict are not regarded war crimes.[688]

In the Kunarac case, the Appeals chamber affirmed that

> "[w]hat ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established … that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict."[689]

4.3.1.(iii).(e)-2. Element 4

The delegates in charge of defining the elements of crimes were not ready to accept an exclusively objective requirement, and thus included a mental requirement- "the awareness of the factual circumstances that established the existence of an armed conflict."[690]

Regarding such requirement, the own Elements of Crimes made it clear that the awareness "is implicit in the terms "took place in the context of and was associated with"".[691]

In the introduction to Article 8 War crimes, the drafting States affirmed that

> "[w]ith respect to the last two elements listed for each crime:

[687] Dörmann, K. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 300-322
[688] *Ibidem*
[689] ICTY. The Prosecutor v. Dragoljub Kunarac, et al. The Appeals Chamber, Judgment, p. 17, para. 58 (12 June 2002)
[690] Elements of Crimes of the International Criminal Court, Art. 8 (2) (b) (xxii)-1, (e) (vi)-1; Dörmann, K. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 300-322
[691] Elements of Crimes of the International Criminal Court, Art. 8, Introduction (c)

> (a) There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or noninternational;
>
> (b) In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or noninternational;
>
> (c) There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms "took place in the context of and was associated with"."[692]

Article 8, in its subparagraphs (a) and (b) states that the perpetrator is required neither to carry out a legal evaluation in relation to the existence of an armed conflict or its character (international or not) nor to be aware of the facts that defined the character of the conflict as international or municipal. In fact, legal evaluation and knowledge of the character assumed by the armed conflict are spared, not constituting requirements for the configuration of the crime.[693]

However, some sort of knowledge is demanded (a threshold lower than the one inserted in Article 30 of the Rome Statute, which, addressing the mental element issue, demands the material elements to be carried out with intent and knowledge): the perpetrator has to be conscious of factual junctures that brought about the armed conflict.[694]

Ostensibly, the perpetrator ought to be merely aware that his unlawful acts and an armed conflict are intertwined. Indeed, the criminal is only required to be conscious that the rape was connected with the armed conflict.[695]

Such interpretation is coherent with Article 8 (1) of the Rome Statute which affirms that

> "[t]he Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes."[696]

This provision means that the International Criminal Court has jurisdiction over war crimes particularly when carried out in a systematic (as part of a plan or policy) or widespread (as part of a large-scale commission of such crimes). Thus, the perpetrator must realize that the rape is inset in the hostilities, being a "piece in the puzzle".

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[692] Elements of Crimes of the International Criminal Court, Art. 8, Introduction (a) (b) (c)
[693] *Ibidem*
[694] Rome Statute, Art. 30 (1); Dörmann, K. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 300-322; Dörmann, K. (2000), pp. 771-796.
[695] *Ibidem*
[696] Rome Statute, Art. 8 (1)

All and all, so that rape can be tried before the International Criminal Court as a war crime, it must be perpetrated in the context of and be associated with an (international or domestic) armed conflict, and the perpetrator must be aware of the factual circumstances that established the existence of such armed conflict.

4.3.1.(iii).(f). Summary

In short, the crime of rape in the Rome Statute, means the following:

4.3.1.(iii).(f)-1. Crime against humanity of rape

Element 1

> "The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body."

Requirements

1-) Invasion resulting in penetration of the body of a person.

2-) If the victim is suffering the invasion/penetration, there are 2 possibilities:

a-) invasion of any part of the victim´s body with a sexual organ; or
b-) invasion of the anal or genital opening of the victim with either an object or any other part of the body.

3-) If the victim is compelled to carry out the invasion, the victim is forced to insert its sexual organ in any part of a person´s body.

Element 2

> "The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent."

Requirements

The invasion must be committed pursuant to one of the following:

1-) Force;

2-) Threat of force;

3-) Coercion;

4-) By taking advantage of a coercive environment;

5-) Or yet be perpetrated against an individual incapable of giving genuine consent.

Element 3

> "The conduct was committed as part of a widespread or systematic attack directed against a civilian population."

Requirements

1-) The invasion was carried out as part of an attack;

2-) The attack must be widespread or systematic;

3-) The attack must be directed against a civilian population (independently if it is systematic or widespread).

Element 4

> "The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population."

Requirements

1-) The perpetrator´s knowledge that the invasion was part of the attack described in element 3; or

2-) The perpetrator´s aspiration that the invasion would constitute an integrating part of the attack.

4.3.1. (iii).(f)-2. War crime of rape

Elements 1 and 2

Identical to elements 1 and 2 of the crime against humanity of rape

Element 3

> "The conduct took place in the context of and was associated with an international armed conflict/ an armed conflict not of an international character."

Requirements

1-) The invasion was perpetrated in the context of an international armed conflict, or an armed conflict not of an international character;

2-) The invasion was associated with such armed conflict.

Element 4

> "The perpetrator was aware of factual circumstances that established the existence of an armed conflict."

Requirement

1-) The perpetrator´s awareness of factual circumstances that gave cause to the existence of the armed conflict.

4.3.1.(iii).(g). Subsequent evolution of the definition of the crime of rape

The rape definition of the Elements of Crimes did not consist in the ultimate definition of such crime in the international law scenario since a posterior judgment of the ITCY in the Kunarac case came up with yet another definition of rape, grounded on the non-consent issue.[697]

Indeed, in its judgment, the Appeal Chamber of the Kunarac case understood necessary, for the configuration of its mechanical definition of rape, that

> "such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim."[698]

The Appeal Chamber also explained that, when the Trial Chamber of the Kunarac case regarded the non-consent as the "conditio sine qua non" for the configuration of rape, it had intended to clarify the relation between force and consent, rather than contradict the findings of the Tribunal in the Furundžija Trial Judgment. The fact that Trial Chamber of the Furundžija case had considered the element force as the defining feature of rape actually meant that force (or its threat) implies one of two possibilities:[699]

- the use of physical violence finishes nullifying the feasibility of a potential resistance, or

- the circumstances are so coercive that renders consent impossible.[700]

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[697] de Brouwer, A.-M. L. M. (2005), p. 135

[698] ICTY. The Prosecutor v. Dragoljub Kunarac, et al., Case No. IT-96-23-T and IT-96-23/1-T. Trial Chamber, Judgment, para. 460 (22 February 2001)

[699] ICTY. The Prosecutor v. Dragoljub Kunarac, et al., Case No. IT-96-23-T and IT-96-23/1-T. Trial Chamber, Judgment, para. 458 (22 February 2001)

[700] ICTY. The Prosecutor v. Dragoljub Kunarac, et al., Case No. IT-96-23-T and IT-96-23/1-T. Trial Chamber, Judgment, para. 185 (22 February 2001); ICTY. The Prosecutor v. Dragoljub Kunarac, et al. The Appeals Chamber, Judgment, p. 39, footnote 158 (12 June 2002)

As a consequence, force or threat of force clearly indicates the inexistence of consent. Nevertheless, force does not amount to an element "per se" of rape because there are "factors other than force which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim."[701]

The Appeal Chamber of such case further stated that there are such coercive circumstances which annihilate any chance of consent, causing it to be unattainable. Therefore, both force and coercive circumstances can make consent to sexual activity impossible, and the non-consent is the "registered mark" of rape in accordance with the findings of this Chamber in such case.[702]

The Kunarac case had an important influence on the ulterior case law of the ICTR, the European Court of Human Rights, as well as of the own ICTY.[703]

The different definitions of rape adopted in the case law of the International Criminal Tribunals have given raise to discussions among academics in relation to the benefits of the distinct models, based on the elements force (like the ICTY Furundžija case), coercion (as the ICTR Akayesu case) or non-consent (e.g. the ICTY Kunarac case).[704]

Some authors judge that is not appropriate to give emphasis to the element force when defining the crime of rape for such approach does not pay proper regard to the person´s autonomy. Certainly, the Preparatory Commission´s model of rape inserted in the Elements of Crimes (grounded on force and coercion) can be considered as coming behind the ICTY´s approach in what concerns the extension of the protection dispensed towards sexual autonomy (for the latter clearly focused on the element non-consent in the Kunarac case).[705]

Nevertheless, other authors consider that a concept of rape whose focus is on consent is not suitable in circumstances of genocide, crimes against humanity, and war crimes, rendering the application of the "non-consent standard" unsatisfactory in the supranational criminal law scenario. Further, the not inclusion of "non-consent" among the cornerstone elements of rape can be considered beneficial for the victims: it avoids the degrading need of delving in their previous lives so as to establish if there was consent in spite of the circumstances.[706]

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[701] ICTY. The Prosecutor v. Dragoljub Kunarac, et al., Case No. IT-96-23-T and IT-96-23/1-T. Trial Chamber, Judgment, para. 458 (22 February 2001); ICTY. The Prosecutor v. Dragoljub Kunarac, et al. The Appeals Chamber, Judgment, para. 129 (12 June 2002)

[702] ICTY. The Prosecutor v. Dragoljub Kunarac, et al. The Appeals Chamber, Judgment, paras. 132-133 (12 June 2002)

[703] de Brouwer, A.-M. L. M. (2005), p. 136; Eriksson, M. (2011), pp. 390, 424

[704] Eriksson, M. (2011), pp. 391, 429

[705] Cryer, R., Friman, H., Robinson, D., & Wilmshurst, E. (2014), p. 210; Eriksson, M. (2011), pp. 425, 429

[706] de Brouwer, A.-M. L. M. (2005), pp.120-123, 136; Eriksson, M. (2011), p. 391, 429; Halley, J. (2008), pp. 1-120; Kalosieh, A. (2003), pp. 121- 136; Schomburg, W., & Peterson, I. (2007); pp. 121-140; United Nations, Report of the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict, para. 25

Undoubtedly, the adequacy of a concept of rape grounded on non-consent has been especially challenged. For instance, Gay McDougall, UN Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict, understood that[707]

> "the manifestly coercive circumstances that exist in all armed conflict situations establish a presumption of non-consent and negates the need for the prosecution to establish a lack of consent as an element of the crime."[708]

de Brouwer (2005), has vehemently positioned against the introduction of "non-consent standard"[709] in the elements of crimes of rape sustaining that in the situation of genocide, crimes against humanity and armed conflict, every case of rape (if not all) will have been perpetrated under force, threat of force, coercion or coercive circumstances, and, thus, it is tautological to inquire if there was consent.[710] She advocates that "removing consent as an element of the crime of rape or as a defence if coercive circumstances have been proved."[711]

In conclusion, there is room for more than one definition of rape in the supranational law panorama. The approach adopted in practice by International Criminal Court and the way it has been addressing such crime will be analised in the study of its preliminary investigations, situations and cases.[712]

4.3.2. Sexual Slavery

4.3.2.(i). Introduction

The crime of sexual slavery relates to enslavement through recurrent rape or sexual abuse to compel the victim to dispense sexual services. Its concept had not been included in treaties of international humanitarian law or distinct international conventions before the Rome Statute even though the crime of slavery "lato sensu" had been addressed in several international conventions. Surely, the crime of sexual slavery had no precedents in being expressly recognised as an independent crime in the international criminal law scenario, and was codified for the first time ever in the Statute.[713]

The ICTR and the ICTY Statutes do not differentiate sexual slavery as an independent crime, exclusively enumerating the crime of enslavement. In the

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[707] Eriksson, M. (2011), p. 391
[708] United Nations, Report of the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict, para. 25
[709] Eriksson, M. (2011), p. 391
[710] de Brouwer, A.-M. L. M. (2005), p. 120
[711] de Brouwer, A.-M. L. M. (2005), p. 121
[712] de Brouwer, A.-M. L. M. (2005), p. 135
[713] Bedont, B. (1999). In Lattanzi, F., & Schabas, W. A. (eds.), pp. 183-210; Cottier, M. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 431-454; de Brouwer, A.-M. L. M. (2005), p. 137; United Nations, Report of the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict, para. 28 and Annex, para.12 (1998); United Nations, Economic and Social Council. Contemporary Forms of Slavery, Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict, Update to the final report submitted by Ms. Gay J. McDougall, Special Rapporteur, paras. 9, 51 (6 June 1998)

ICTY Kunarac case (the first in which the “ad hoc” tribunal had to deal with the crime of enslavement as a crime against humanity) two of the defendants were accused of committing "rape" and "enslavement" as crimes against humanity. In the indictment these accused were charged for enslaving women and young girls and subjecting them to reiterated rape and other forms of sexual violence (inclusive of sexual entertainment and forced nudity), during weeks or even months.[714]

Regarding the crime of slavery, the Trial Chamber of this case established that

> “the actus reus of the violation is the exercise of any or all of the powers attaching to the right of ownership over a person. The *mens rea* of the violation consists in the intentional exercise of such powers.”[715]

In spite of the fact that the main objective of the perpetrators was to obtain sexual servitude from the victims (the women and girls being forced to perform domestic chores was rather collateral), in its findings the Trial Chamber did not always associate the crimes of sexual violence to the enslavement. Further, when the Chamber did relate them, it merely considers the sexual violence crimes as one of the determinants of enslavement:[716]

> “[u]nder this definition, indications of enslavement include elements of control and ownership; the restriction or control of an individual’s autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim’s position of vulnerability; detention or captivity, psychological oppression or socio-economic condition.”[717]

Gay J. McDougall, Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights on Systematic rape, sexual slavery and slavery-like practices during armed conflict stated in her report that

> ““slavery” should be understood to be the status or condition of a person over whom any or all of the powers attaching to the right

[714] Argibay, C. M. (2003), pp. 375-389; de Brouwer, A.-M. L.M. (2005), p. 89; United Nations, Security Council. Statute of the International Criminal Tribunal for the Former Yugoslavia (1993), Art. 5 (c); United Nations, Security Council. Statute of the International Criminal Tribunal for Rwanda (1994), Art. 3 (c)

[715] ICTY. The Prosecutor v. Dragoljub Kunarac, et al., Case No. IT-96-23-T and IT-96-23/1-T. Trial Chamber, Judgment, para. 540 (22 February 2001)

[716] de Brouwer, A.-M. L.M. (2001), pp. 221-236; de Brouwer, A.-M. L. M. (2005), p. 92

[717] ICTY. The Prosecutor v. Dragoljub Kunarac, et al., Case No. IT-96-23-T and IT-96-23/1-T, Trial Chamber, Judgment, para. 542 (22 February 2001)

> of ownership are exercised, including sexual access through rape or other forms of sexual violence."[718]

and reinforced that "[i]n all respects and in all circumstances, sexual slavery is slavery and its prohibition is a *jus cogens* norm."[719]

Certainly, as in the ICTY Kunarac case, the focal point of such report is to acknowledge that the infraction of sexual freedom through rape or other types of sexual violence consists in a power attaching to the right of ownership of a person.[720]

However, the Special Rapporteur also made clear that, for the ends of the report, the term "sexual" was used "as an adjective to describe a form of slavery, not to denote a separate crime."[721]

In spite of such approach, the report considered that the reach of sexual slavery was rather ample, as demonstrated by the following extracts:

> "practices such as the detention of women in "rape camps" or "comfort stations"; forced, temporary "marriages" to soldiers; and other practices involving the treatment of women as chattel, are both in fact and in law forms of slavery and, as such, violations of the peremptory norm prohibiting slavery"[722]

and

> "[s]exual slavery also encompasses situations where women and girls are forced into "marriage", domestic servitude or other forced labour that ultimately involves forced sexual activity, including rape by their captors."[723]

As a consequence of how sexual slavery had been addressed in these previous instances, during the drafting of the Statute the question if sexual slavery should figurate as a crime independent of enslavement was rather controversial.[724]

Ultimately, the drafters reached a few conclusions: that sexual slavery is a prevailing contemporary criminal offence that should be explicitly recognised; that forbiddance of sexual slavery was firmly entrenched in the then existing law; that the gender-sensitivity the Rome Statute would be boosted by the enlistment of

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[718] United Nations, Report of the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict, para. 27 (1998)
[719] United Nations, Report of the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict, para. 30 (1998)
[720] Argibay, C. M. (2003), pp. 375-389
[721] United Nations, Report of the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict, para. 30 (1998)
[722] United Nations, Report of the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict, para. 8 (1998)
[723] *Ibidem*
[724] Dörmann, K. (2001), p. 480; Oosterveld, V. (2004), pp. 605-651; Oosterveld, V. (2011). In Sadat, L. N. (ed.), pp. 78-101

such crime; and that sexual slavery presents a conceptual distinction from determined other kinds of enslavement or slavery-like practices.[725]

As a result, the Rome Statute enumerated amidst its criminal offences not only enslavement but also sexual slavery, thus acknowledging the sexual character informing the latter. In fact, to include the crime of sexual slavery as a separate crime (rather than allowing it to be merely treated as a form of enslavement) shows the recognition of the criminal sexual nature intrinsic to the sexual slavery.[726]

Additionally, it was disputed the issue of how differentiate sexual slavery from enforced prostitution. The criminalisation of sexual slavery in contrast to enforced prostitution was relevant for it flashes on the strong coercive aspect involving the situations in which a person is obliged to dispense sexual services. "Enforced prostitution" has been regarded as insinuating some degree of voluntariness that is inexistent when women are subjugated to conditions akin to slaves. It casts a shadow on the profuse violence, control and coercion that are typical to sexual slavery, as it will be further discussed below.[727]

In face of that, Article 7 (1) (g), Article 8 (2) (b) (xxii), and Article 8 (2) (e) (vi) expressly included the crime of sexual slavery among the sexual and gender-based crimes.

In the Elements of Crimes, the Preparatory Commission reached an agreement on the elements of crimes of sexual slavery after protracted debates on the slavery question.[728]

Hence, first it is necessary to proceed to an analysis the reach of the crime of slavery.

4.3.2.(i).(a). Slavery and enslavement

In accordance with the 1926 Slavery Convention, slavery is

> "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."[729]

Article 7(a) of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery states:

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[725] Oosterveld, V. (2004), pp. 605-651; Oosterveld, V. (2011). In Sadat, L. N. (ed.), pp. 78-101
[726] Bedont, B. (1999). In Lattanzi, F., & Schabas, W. A. (eds.), pp. 183-210; de Brouwer, A.-M. L. M. (2005), p. 137
[727] Bedont, B. (1999). In Lattanzi, F., & Schabas, W. A. (eds.), pp. 183-210; Dörmann, K. (2001), p. 48; Oosterveld, V. (2004), pp. 605-651; Oosterveld, V. (2011). In Sadat, L. N. (ed.), pp. 78-101; Women´s Caucus for Gender Justice for an ICC. Recommendations and Commentary for December 1997 PrepCom on the Establishment of an International Criminal Court, paras. WC5.6-6 to WC5.6-11 (1997).
[728] Oosterveld, V. (2004), pp. 605-651; Oosterveld, V. (2011). In Sadat, L. N. (ed.), pp. 78-101
[729] League of Nations. Slavery Convention, Art. 1 (1) (1926).

> "´Slavery´ means, as defined in the Slavery Convention of 1926, the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, and ´slave´ means a person in such condition or status."[730]

In the Kunarac case, the ICTY, leveraged by the 1926 Slavery Convention, established the following concept (also shared by the ICTR):[731]

> "enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person."[732]

The Rome Statute, albeit inspired by these definitions, preferred to set up an amplified definition of enslavement:[733]

> "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children."[734]

The first obvious difference between the two concepts of slavery and the definition of enslavement found in the Rome Statute is the absence of "the status or condition" in the latter. This topic will be developed below.

Besides, the introduction of "trafficking in persons" was a novelty. "Trafficking in persons" was defined in the 2001 United Nations Palermo Protocol and the same concept was inserted in the 2005 Council of Europe Convention:[735]

> "'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."[736]

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[730] United Nations. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Art. 7 (a) (1956).
[731] Bassiouni, M. C. (2011), p. 378
[732] ICTY. The Prosecutor v. Dragoljub Kunarac, et al., Case No. IT-96-23-T and IT-96-23/1-T. Trial Chamber, Judgment, para. 539 (22 February 2001)
[733] Bedont, B. (1999). In Lattanzi, F., & Schabas, W. A. (eds.), pp. 183-210
[734] Rome Statute, Art. 7 (2) (c)
[735] Allain, J. (2007), p. 17, para. 33; Bedont, B. (1999). In Lattanzi, F., & Schabas, W. A. (eds.), pp. 183-210
[736] Council of Europe. Convention on Action against Trafficking in Human Beings, Art. 4 (a) (2005); United Nations. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially

Therefore, the term “slavery” (one of the forms in which enslavement is manifested) is included in the definition of “trafficking in persons”. In spite of that, “slavery” should be prosecuted before the International Criminal Court under the head of the crime of enslavement.[737]

Furthermore, it is significant the express remark “in particular women and children". In fact, women and girls are especially susceptible to trafficking for the ends of sexual exploitation, and for forced labour or services as well.[738]

The common element in these exerts of the 1926 Slavery Convention, the 1956 Supplementary Convention and the Rome Statute is “the powers attaching to the right of ownership”.[739]

4.3.2.(i).(b). Ownership v. the powers attaching to the right of ownership

The concept of ownership is socially constructed, being usually regarded as one´s “priorital right over something”. It could be said that ownership is a conjunct of rights, the legal ability to, for example, buy, sell, or possess a person and, upon challenge, to have such a right vindicated in a court of law.[740]

In relation to slavery, ownership implies the right to possess and use a slave, to compel and obtain profit from the slave’s labour, as well as to buy, sell, or destroy a slave, although even under Roman Law it was criminal to kill slaves or to use them as gladiators without the magistrate´s permission.[741]

However, ownership is not the fundamental element informing the crime of slavery in the international law scenario. Instead, the heart of such criminal offence lies on “the exercise of any or all of the powers attaching to the right of ownership.”[742]

In fact, the concept of slavery is not centred on the legal right of ownership, but rather related to the powers attached to the right of ownership. To exercise the right of ownership over a person is essentially distinct to exercise the powers attached to the right of ownership. The distinction between these two elements sets apart slavery *“*de jure” and slavery “de facto”.[743]

Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, Art. 3 (a) (2000)

[737] Allain, J. (2007), p. 17, para. 33

[738] Argibay, C. M. (2003), pp. 375-389; Bedont, B. (1999). In Lattanzi, F., & Schabas, W. A. (eds.), pp. 183-210; United Nations, General Assembly. Trafficking in women and girls (19 December 2006).

[739] Allain, J. (2007), p. 3, para. 3

[740] Allain, J. (2007), pp. 3, 10-11, paras. 3, 15

[741] Allain, J. (2007), p. 11, para. 16; Johnston, D. (1999), p. 42

[742] Allain, J. (2007), p. 3, para. 3; Attachment, Amicus Curiae on Observations Related to Sexual Slavery Submitted by Queen’s University Belfast Human Rights Centre, pp. 1-24 (2009).

[743] Allain, J. (2007), pp. 11, 21, paras. 17, 45

Both the 1926 Slavery Convention and the Article 7(a) of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery refer to

> "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised"[744]

when defining slavery.

The expression "status or condition" separate slavery "de jure" and slavery "de facto": slavery as "status" is a legal recognition of slavery, whilst slavery as "condition" consists in slavery in fact, based on social custom, not endorsed by law.[745]

The drafters of the Rome Statute, when setting up the definition of enslavement, removed the phrase "status or condition", abiding for "the exercise of any or all of the powers attaching to the right of ownership".[746]

This entails that one would hold the powers of ownership except for the fact that the right of ownership is not recognized in law. Surely, the "owner" exercises powers attached to the right of ownership over his/her illegal "chattel" (the slave "de facto"), albeit does not exercise any legal rights of ownership. He/she is not entitled to bring a claim before a court of law, but can exercise the powers attached to the right of ownership (as, for instance, possession): it is equivalent to a right of ownership aside from the fact that it is illegal to own an individual.[747]

As a consequence, within the definition of slavery, the question is not if a person "owns" another from a legal perspective, but rather if a person can exercise a power of ownership, as, for example, being able to transfer an individual without his/her consent.[748]

In a 1953 Report, the United Nations Secretary-General, after addressing the Roman Law nature of the concept of slavery inserted in the 1926 Slavery Convention, considered the which are the characteristics of the various powers attaching to the right of ownership:[749]

> "1. the individual of servile status may be made the object of a purchase;
>
> 2. the master may use the individual of servile status, and in particular his capacity to work, in an absolute manner, without

[744] Slavery Convention, Art. 1; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Art. 7 (a)
[745] Allain, J. (2007), p. 12, para. 21; Slavery Convention, Art. 1
[746] Allain, J. (2007), pp.12-13, para. 22; Rome Statute, Art. 7 (2) (c)
[747] Allain, J. (2007), pp. 12-13, 21, paras. 22,55
[748] Attachment, Amicus Curiae on Observations Related to Sexual Slavery Submitted by Queen's University Belfast Human Rights Centre, pp. 1-24 (2009).
[749] Allain, J. (2007), p. 13, para. 24

> any restriction other than that which might be expressly provided by law;
>
> 3. the products of labour of the individual of servile status become the property of the master without any compensation commensurate to the value of the labour;
>
> 4. the ownership of the individual of servile status can be transferred to another person;
>
> 5. the servile status is permanent, that is to say, it cannot be terminated by the will of the individual subject to it;
>
> 6. the servile status is transmitted ipso facto to descendants of the individual having such status."[750]

When these six characteristics of "the powers attaching to the right of ownership" are analysed under the prism of the global definition of slavery ("the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised") what stems are elements which, separately or conjunctly considered, amount to slavery in law.[751]

Moreover, such characteristics of power attaching to the right of ownership established in the Memorandum of the United Nations Secretary-General provide authoritative consistence to the definition of enslavement found in the Rome Statute.[752]

Therefore, the inclusion of "the exercise of any or all of the powers attaching to the right of ownership" (without mentioning status or condition) in the Rome Statute indicates that enslavement of a person does not imply possessing a legal right of ownership over such person, but rather the powers connected to such rights except for the fact that ownership is illegal. In consonance with contemporary law (that does not shelter the legal right of ownership over a person, thus, not foreseeing a remedy for a claim based on such grounds), the Statute attained to "the powers attached to the right of ownership", which corresponds to slavery "de facto", as opposed to "the legal right of ownership", which amounts to slavery "de jure".[753]

So, the crime of sexual slavery, being a kind of slavery, would be inherently connected to "the exercise of any or all of the powers attaching to the right of ownership".

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[750] United Nations, Economic and Social Council. Slavery, the Slave Trade, and other forms of Servitude (Report of the Secretary-General), p. 28 (1953).
[751] Allain, J. (2007), p. 11, para. 17
[752] Attachment, Amicus Curiae on Observations Related to Sexual Slavery Submitted by Queen's University Belfast Human Rights Centre, pp. 1-24 (2009).
[753] Allain, J. (2007), p. 11-13, paras. 17, 22

4.3.2.(ii). "Actus reus"

4.3.2.(ii).(a). Introduction

As explained above, the negotiations of the sexual and gender-based crimes as crimes against humanity and war crimes progressed together during the enactment of the Rome Statute. Following the parallelism of such discussions, the Preparatory Commission inserted identical "actus reus" (elements 1 and 2) in the elements of crimes of the sexual and gender-based crimes when defining them under the heads crimes against humanity and war crimes in the Elements of Crimes.

The crime of sexual slavery is no exception to the approach applied by the Commission throughout the definitions of the cluster of criminal offences object of the present study, and, thus, elements 1 and 2 found in Article 7 (1) (g)-2 Crime against humanity of sexual slavery also appear in Article 8 (2) (b) (xxii)-2 War crime of sexual slavery and Article 8 (2) (e) (vi)-2 War crime of sexual slavery.

4.3.2.(ii).(b). Element 1

> "The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty."[754]

By inserting such wording in the first element, the Preparatory Commission clearly preferred to start focusing on the element slavery instead of the sexual aspect.[755]

The Preparatory Commission came up with this element when defining the crime against humanity of sexual slavery in the Elements of Crimes. Certainly, when establishing the elements of crimes of such sexual offence, the delegates of the Commission resolved to insert the first part of the concept of enslavement provided by the Rome Statute "the exercise of any or all of the powers attaching to the right of ownership over a person" for they acknowledged that sexual slavery is a form of slavery.[756]

Subsequently, the exact terms of this element 1 were reproduced by the delegates of the Commission when setting up the elements of crimes of the crime against humanity of enslavement.[757]

Element 1 expands on the definition of enslavement brought by the Rome Statute ("the exercise of any or all of the powers attaching to the right of

[754] Elements of Crimes of the International Criminal Court, Arts. 7 (1) (g)-2 (1); 8 (2) (b) (xxii)-2 (1), (e) (vi)-2 (1)
[755] Attachment, Amicus Curiae on Observations Related to Sexual Slavery Submitted by Queen's University Belfast Human Rights Centre, pp. 1-24 (2009).
[756] de Brouwer, A.-M. L. M. (2005), p. 87; Rome Statute, Art. 7 (2) (c);
[757] de Brouwer, A.-M. L. M. (2005), p. 87

ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children"). In fact, some States considered the concept of enslavement in the Statute rather vague, so the United States proposed to provide examples of forms of exercising the powers attaching to the right of ownership over a person.[758]

The expression "such as", indicating flexibility, was included, being succeeded by examples of conducts that amount to "powers attaching to the right of ownership": buying, selling, lending or bartering such person/ persons, or even inflicting on them a similar deprivation of freedom.[759]

The insertion of the "purchasing, selling, lending or bartering such a person" corroborates the idea that "slavery", as "enslavement" is to be regarded as being embodied in not only slavery "de jure" but also slavery "de facto". Therefore, in relation to enslavement, the Elements of the Crimes accompanied the evolution of the constitutive elements of slavery in international law, specifically exercising "any or all of the powers attaching to the right of ownership".[760]

Beyond supplying examples of "the powers attaching to the right of ownership", element 1 adds the phrase "or by imposing on them a similar deprivation of liberty". The conjunction "or" at the beginning of such phrase should be interpreted as a continuation of the examples "such as by purchasing, selling, lending or bartering such a person or persons", forming part of the sequence of instances of "the powers attaching to the right of ownership". Therefore, a "similar deprivation of liberty" is very much alike to the purchasing of an individual, the selling of an individual, or the lending or bartering of an individual. Since these are illustrations of "the powers attaching to the right of ownership", "similar deprivation of liberty" does not present any meaning if separate from these powers (and indicates that the roster of powers is non-exhaustive).[761]

However, there were a few concerns regarding the wording of element 1. Firstly, the substitution of the word "includes" in the definition of enslavement figuring in the Rome Statute by the term "such as" could give rise to doubts regarding an eventual attempt by the drafters of the Elements of Crimes to restrict the reach of the exercise of any or all of the powers attaching to the right of ownership over a person. In fact, "includes" could be regarded as covering a broad reach, while "such as" followed by concrete examples could be understood as a limit to the conducts that amount to enslavement, instead of a way of conferring extensibility to the definition. Moreover, the alternative "or by imposing on them a similar deprivation of liberty" was criticised for being rather narrow.[762]

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[758] Allain, J. (2013), p. 275; de Brouwer, A.-M. L. M. (2005), p. 138; La Haye, E. (2001). In Lee, R. S. K. & Friman, H. (eds.), pp. 184-18; Rome Statute, Art. 7 (2) (c)
[759] Allain, J. (2013), p. 275
[760] Allain, J. (2007), p. 18, para. 35
[761] Ambos, K. (2014), p. 99; Attachment, Amicus Curiae on Observations Related to Sexual Slavery Submitted by Queen's University Belfast Human Rights Centre, pp. 1-24 (2009); Special Court of Sierra Leone (SCSL). The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu, Case No. SCSL-04-16-T. Trial Chamber II, Judgment, pp. 218-219, para. 709 (20 June 2007)
[762] Dörmann, K. (2003), p. 328; Hall, C. K. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 237-255

Also, many drafters were worried that “buying, selling, lending or bartering” appeared to be based on some sort of commercial advantage. This was rather troublesome since sexual slavery can be, and in most instances is, not connected to any commercial benefit (as was the case of the comfort women during Second World War).[763]

In face of these issues, and in the interest of repelling the idea that the crime of sexual slavery required a commercial or pecuniary exchange, the concerned drafters insisted in inserting in the elements of crimes of sexual slavery a footnote originally conceived for the crime of enslavement, clarifying the boundaries of the expression “by imposing on them a similar deprivation of liberty”:[764]

> “It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.”[765]

In accordance with the 1930 Convention concerning Forced or Compulsory Labour,

> “*forced or compulsory labour* shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”[766]

The term “servile status”, pursuant the disposing of the aforementioned footnote, should be conceived as in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. Such convention establishes that "a person of servile status" means a person in the condition or status resulting from any of the following institutions or practices: debt bondage, serfdom, forced marriage and child exploitation.[767]

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[763] de Brouwer, A.-M. L. M. (2005), p. 87; Elements of Crimes of the International Criminal Court, Arts. 7 (1) (c), Element 1, Footnote 11; 8 (2) (b) (xxii), Element 1, footnote 53, (e) (vi), Element 1, footnote 66

[764] de Brouwer, A.-M. L. M. (2005), p. 87; Elements of Crimes of the International Criminal Court, Arts. 7 (1) (c), Element 1, Footnote 11; 8 (2) (b) (xxii), Element 1, Footnote 53, (e) (vi), Element 1, Footnote 66; Hall, C. K. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 237-255

[765] Elements of Crimes of the International Criminal Court, Arts. 7 (1) (c), Element 1, Footnote 11; 8 (2) (b) (xxii), Element 1, Footnote 53, (e) (vi), Element 1, Footnote 66

[766] International Labour Organisation. Forced Labour Convention, Convention concerning Forced or Compulsory Labour, Art. 2 (1) (28 June 1930)

[767] Elements of Crimes of the International Criminal Court, Arts. 7 (1) (c), Element 1, Footnote 11; 8 (2) (b) (xxii), Element 1, Footnote 53, (e) (vi), Element 1, footnote 66; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Arts. 1 (a) (b) (c) (d), 7 (b)

As before mentioned, “trafficking in persons” was defined in Article 3(a) of the United Nations’ (2000) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

The goal of the drafters to provide such instances of “a similar deprivation of liberty” was to enable sexual violence offences to be tried as the crimes against humanity of enslavement or sexual slavery regardless of proof that the perpetrator obtained a pecuniary advantage. Certainly, various of the examples do not necessarily entail a commercial advantage (debt bondage, forced marriage, child exploitation), and the result is that the term “similar”, which appears in the expression “by imposing on them a similar deprivation of liberty”, rests detached from the concept of commercial benefit. Furthermore, debt bondage eliminates the need to demonstrate that the victims were confined in a determined place.[768]

This approach of the drafters of the Elements of Crimes is in accordance with the Special Rapporteur understanding that

> “based on customary law interpretations of the crime of slavery, and thus sexual slavery, there are no requirements of any payment or exchange; of any physical restraint, detention or confinement for any set or particular length of time; nor is there a requirement of legal disenfranchisement. Nonetheless, these and other factors may be taken into account in determining whether a "status or condition" of slavery exists. While the most commonly recognized form of slavery involves the coerced performance of physical labour or service of some kind, again, this is merely a factor to be considered in determining whether a "status or condition" exists, which transforms an act, such as rape, into sexual slavery. It is the status or condition of being enslaved which differentiates sexual slavery from other crimes of sexual violence, such as rape.”[769]

Additionally, the Kunarac case asserts:

> “indications of enslavement include elements of control and ownership; the restriction or control of an individual’s autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim’s position of

[768] de Brouwer, A.-M. L. M. (2005), pp. 89, 138; de Brouwer, A.-M. L.M. (2011). In Jones, J., Grear, A., Fenton, R. A., and Stevenson, K. (eds.), pp. 201-212; Elements of Crimes of the International Criminal Court, Art. 8 (2) (b) (xxii), Element 1, footnote 53, (e) (vi), Element 1, footnote 66

[769] United Nations, Economic and Social Council. Contemporary Forms of Slavery, Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict, Update to the final report submitted by Ms. Gay J. McDougall, Special Rapporteur, para. 50

> vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking."[770]

Consequently, the Preparatory Commission intended the phrase "by imposing on them a similar deprivation of liberty" to have a broad interpretation, subsuming forced labour, servile status, and trafficking in persons, in particular women and children. In fact, the elements of crimes of the sexual slavery crime were purposefully constructed so as to prevent a rather narrow interpretation of such offence.[771]

In conclusion, this element, based on the crime of enslavement, is focused on ownership (chattel slavery) and deprivation of liberty.[772]

4.3.2.(ii).(c). Element 2

> "The perpetrator caused such person or persons to engage in one or more acts of a sexual nature."[773]

Element 2 addresses the sexual aspect of the crime by stating that the perpetrator causes the victim(s) to engage in at least one act of a sexual nature. It differentiates sexual slavery from the enslavement as a crime against humanity, and openly condemns the sexual aspect of the crime of sexual slavery.[774]

It is noteworthy that the perpetrator must only cause a determined person to perform one or more sexual acts, being dispensable proof that the victim was coerced by the perpetrator. Undoubtedly, it is not necessary to demonstrate the victim´s lack of resistance or consent, although it can be obliquely important in the establishment that the perpetrator exercised power attaching to the right of ownership.[775]

Proceeding to an interpretation of element 1 (which regards the powers attaching to the right of ownership as forms of deprivation of liberty), it is possible to infer that when the perpetrator is causing the person/persons to engage in sexual act/acts, he is further depriving such person/persons of liberty.

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[770] ICTY. The Prosecutor v. Dragoljub Kunarac, et al., Case No. IT-96-23-T and IT-96-23/1-T. Trial Chamber, Judgment, para. 542 (22 February 2001)
[771] Cottier, M. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 431-454; de Brouwer, A.-M. L. M. (2005), p. 87; Henckaerts, J.-M., & Doswald-Beck, L. (2009), pp. 327-330.
[772] Cottier, M. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 431-454; Ambos, K. (2014), p.99
[773] Elements of Crimes of the International Criminal Court, Arts. 7 (1) (g)-2 (2); 8 (2) (b) (xxii)-2 (2), (e) (vi)-2 (2)
[774] de Brouwer, A.-M. L. M. (2005), p. 141
[775] Boot, M. revised by Hall, C. K. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 206-216; Cottier, M. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 431-454

Control and deprivation of a person´s autonomy, as, for instance, to restrict the freedom of movement or command the sexual access, can be rendered as constitutive elements of slavery.[776]

Certainly, the persons solely engage in acts of a sexual nature because the perpetrator, exercising powers attaching to the right of ownership over such persons, cause them to do so. The victims are stripped from their self-determination with regards to sexual conducts, they lose control over their sexuality.

When the Preparatory Commission referred to "at least one act of a sexual nature", it established that the perpetrator can be tried under the head of "sexual slavery" even if he caused the victim(s) to engage in solely one punctual act of a sexual nature. Thus, the sexual conduct has to be neither reiterated nor protracted in time.[777]

In this regard, the Kunarac case, addressing the crime of enslavement, preconises that albeit the duration of the suspected exercise of powers attaching to the right of ownership is an element that may be considered when establishing if a person was enslaved, the duration does not constitute an element of the crime.[778]

It is important to stress that, in spite of the fact that coercion and long duration are not essential for the configuration of the crime of sexual slavery, sexual control normally implies some other token of enslavement, e.g. control over movement, repetition, duration or coercion.[779]

Further, the choice of the expression "act of a sexual nature" denotes that the drafters envisaged the definition of "sexual slavery" to cover sexual acts "lato sensu", thus, permitting an ample range of sexual acts to be subsumed and prosecuted, for the benefit of the victims. Certainly, the sexual acts do not compulsorily cover rape, but beyond any doubt worsen the aggression against the self-determination of the victim(s).[780]

As a consequence, in the "actus reus" of the crime of sexual slavery, the Preparatory Commission tied together element 1 ("the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty") and the requirement that the perpetrator must prompt "such person or persons to engage in one or more acts of a sexual nature".[781]

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[776] *Ibidem*
[777] Argibay, C. M. (2003), pp. 375-389
[778] ICTY. The Prosecutor v. Dragoljub Kunarac, et al., Case No. IT-96-23-T and IT-96-23/1-T., Trial Chamber, Judgment, para. 542 (22 February 2001); ICTY. The Prosecutor v. Dragoljub Kunarac, et al. The Appeals Chamber, Judgment, p. 37, para.121 (12 June 2002)
[779] Argibay, C. M. (2003), pp. 375-389
[780] Lupig, D. (2009), pp. 433-491
[781] ICRC, Updated version of the Study on customary international humanitarian law, Rule 94

In sum, this crime entails restriction of the victim´s autonomy, freedom of mobility, and ability to decide questions regarding his/her sexual activity. The endurance of serial rapes allied to the impossibility of escaping (and, thus, no foreseeable halt of the violence) makes it tremendously barbaric.[782]

Moreover, the own Elements of Crimes establishes in a footnote to the crime against humanity of sexual slavery that:

> "Given the complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as a part of a common criminal purpose."[783]

Therefore, in view of the intricate facet of the crime of sexual slavery, its perpetration could draw in a bundle of individuals as a constituent of a criminal purpose held in common by them.[784]

4.3.2.(iii). "Mens rea"

4.3.2.(iii).(a). Introduction

Following the same pattern of the crime of rape (and of the other sexual and gender-based crimes), the contextual elements incorporated in the crime against humanity of sexual slavery and those included in the war crime of sexual slavery embody the distinction between the two forms assumed by sexual slavery.[785]

4.3.2.(iii).(b). Crime against humanity of sexual slavery

4.3.2.(iii).(b)-1. Elements 3 and 4

> "3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
>
> 4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population."[786]

Here, the drafters simply repeated the context elements inserted in the crime against humanity of rape. Thus, the same observations inserted in 4.3.1. (iii).(e)-1. Element 3 and 4.3.1.(iii).(e)-2. Element 4 are applicable to the crime of sexual slavery.

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[782] Bassiouni, M. C. (1991), pp. 445-571; Boot, M. revised by Hall, C. K. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 206-216; de Brouwer, A.-M. L. M. (2005), p. 140; Ray, A. E. (1997), pp. 793-840

[783] Elements of Crimes of the International Criminal Court, Art. 8(2)(b)(xxii), footnote 52, (e)(vi), footnote 65

[784] Ambos, K. (2014), p. 99; Elements of Crimes of the International Criminal Court, Art. 7 (1) (g)-2, footnote 17

[785] Elements of Crimes of the International Criminal Court, Arts. 7 (1) (g)-2, 8 (2) (b) (xxii)-2, (e) (vi)-2

[786] Elements of Crimes of the International Criminal Court, 7 (1) (g)-2 (3) (4)

Pursuant to the Elements of Crimes, the criminal offence of sexual slavery occurs when the perpetrator, exercising any or all of the powers attaching to the right of ownership over one or more persons, causes such person or persons to engage in one or more acts of a sexual nature.

The exercise of powers attaching to the right of ownership which ultimately leads to the victim(s) unwantedly engage in sexual act(s) amounts to a crime against humanity if:

1) it constitutes part of a widespread or systematic attack directed against a civilian population; and

2) the perpetrator knew that the conduct was part of or intended the conduct to be part of such attack.

In short, the exercise of powers attaching to the right of ownership that causes the forcedly engagement of the victim(s) in sexual act(s) must integrate a widespread (with a large number of victims or covering a sweeping geographical area) or systematic (carried out following a plan/ policy) attack (commission of multiple acts enlisted in article 7 (1) of the Rome Statute) directed against civilians. Also, the perpetrator must be aware that his conduct was part of this attack, or at least intend his conduct to integrate the attack, in accordance with or in furtherance of a State or organizational policy to perpetrate such attack.[787]

4.3.2.(iii).(c). War crime of sexual slavery

The contextual elements regarding armed conflicts of international character are:

> "3. The conduct took place in the context of and was associated with an international armed conflict.
>
> 4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict."[788]

While the contextual elements related to a domestic armed conflict are:

> "3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
>
> 4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict."[789]

The exercise of powers attaching to the right of ownership which culminate in the victim(s) unwillingly engaging in sexual act(s) constitutes a war crime if:

- The conduct was carried out in the context of and had association with a national or international armed conflict;

[787] Elements of Crimes of the International Criminal Court, Art. 7, Introduction, (2) (3)
[788] Elements of Crimes of the International Criminal Court, Art. 8 (2) (b) (xxii)-2 (3) (4)
[789] Elements of Crimes of the International Criminal Court, Art. 8 (2) (e) (vi)-2 (3), (4)

- and the perpetrator was conscious of circumstances of fact which led to the establishment of the armed conflict.

Therefore, the exercise of powers attaching to the right of ownership that brings about the involuntary engagement of the victim(s) in sexual act(s) must be related to a domestic or supranational armed conflict. In fact, there must be a satisfying link between the conduct of the criminal and the armed conflict. Moreover, the perpetrator must know about facts which culminated in the conflict.[790]

Certainly, in accordance with the terms of the introduction to the war crimes inserted in the Elements of Crimes:

> "With respect to the last two elements listed for each crime:
>
> (a) There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or noninternational;
>
> (b) In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or noninternational;
>
> (c) There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms "took place in the context of and was associated with."[791]

4.3.2.(iv). Final remarks

In those cases, in which the control of one´s sexuality is an element of enslavement, the crime of sexual slavery should be separately charged. In fact, there should be charges for sexual slavery and enslavement since they encompass different elements and protect diverse interests. Sexual slavery acknowledges the particular nature of this type of enslavement and guarantees that it will receive a correspondent adequate handling.[792]

Additionally, the protective measures and redress that are appropriate to the victims of sexual slavery may result distinct than those applicable to victims of other kinds of slavery.[793]

In an updated report subsequent to the Elements of Crimes, the Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict endorsed the following the definition of slavery:

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[790] Elements of Crimes of the International Criminal Court, Art. 8 (2) (b) (xxii)-2, (e) (vi)-2
[791] Elements of Crimes of the International Criminal Court, Art. 8, Introduction
[792] Argibay, C. M. (2003), pp. 375-389
[793] *Ibidem*

> "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including sexual access through rape or other forms of sexual violence. Slavery, when combined with sexual violence, constitutes sexual slavery."[794]

Later on, it will be analysed how the International Criminal Tribunal has dealt practically with the crime of sexual slavery and its close relation with enslavement.

Finally, it is noteworthy that sexual slavery can englobe one or more conducts that configure rape or another sexual offence.[795]

Undoubtedly, the UN Special Rapporteur stated in her final report on Contemporary forms of Slavery that "[s]exual slavery also encompasses most, if not all forms of forced prostitution".[796]

4.3.3. Enforced Prostitution

4.3.3.(i). Introduction

The stamp "prostitute" applies to individuals who sell sex, and to women that infringe social rules that oppose extra-marital sex or who otherwise contravenes what is considered an adequate female sexual behaviour. In fact, throughout history, the concept of "prostitute" has been linked to the female gender.[797]

In several countries, the practice of prostitution (exchanging sex for money or another value) remains criminalised. Further, for centuries there has been account of prostitution (voluntary and forced) during war.[798]

The term "enforced prostitution" had already been employed in international humanitarian law and conventions against slavery before being included amidst the sexual crimes of the Rome Statute.[799]

As previously stated, the 1919 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties inserted "rape" and "abduction of girls and women for the purpose of enforced prostitution" when enumerating war crimes that had been perpetrated by Germany and its allied countries during World War I.

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[794] United Nations, Economic and Social Council. Contemporary Forms of Slavery, Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict, Update to the final report submitted by Ms. Gay J. McDougall, Special Rapporteur, para. 47
[795] Cottier, M. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 431-454
[796] United Nations, Report of the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict, para. 31
[797] Argibay, C. M. (2003), pp. 375-389
[798] *Ibidem*; Askin, K. D., (1997), p. 71
[799] Oosterveld, V. (2011). In Sadat, L. N. (ed.), pp. 78-101

However, the term "enforced prostitution" presented a problematic nature, as illustrated by the 1933 Trafficking Convention in which the term "immoral purposes" refers to not only voluntary prostitution but also coerced prostitution.[800]

In the course of World War II, thousands of women were confined in brothels by the Japanese and Germans. Around 200.000 women, mostly Korean between 14 and 18 years old, were captured by Japanese forces and used as “comfort women”, being compelled to serve around 60-70 men per day. The Japanese run a system of comfort women in organised and supervised brothels established for the soldiers. The comfort women stations were set up in China, the Philippines, Korea and the Dutch East Indies, countries where Japanese military bases were present, being regulated by the military. In fact, in accordance with official documents issued by Japanese authorities, the scope of such brothels or “comfort stations” was[801]

> “to prevent anti-Japanese sentiments from fermenting as a result of rapes and other unlawful acts by Japanese military personnel against local residents in the areas occupied by the then Japanese military, the need to prevent loss of troop strength by venereal and other diseases, and the need to prevent espionage.”[802]

In spite of that, the crime of enforced prostitution was not brought before the Nuremberg Tribunal, solely appearing in a few judgments in domestic courts (none in Japan, Germany, or Italy).[803]

The impunity experienced by the Japanese military in relation to sexual slavery during World War II is one of the several examples of the States´ failure to investigate and try perpetrators of crimes of sexual violence.[804]

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[800] Argibay, C. M. (2003), pp. 375-389; League of Nations. International Convention for the Suppression of the Traffic in Women of Full Age, Art. 1 (1933)

[801] Demleitner, N. V. (1994), pp. 163-197; Eriksson, M. (2011), p. 131; Goldstein, A. T. (1993), p. 11; Meron, T. (1992), pp. 1-45; Meron, T. (1993), pp. 424-428; United Nations, Economic and Social Council, Commission on Human Rights. Note Verbale dated 26 March 1996 from the Permanent Mission of Japan to the United Nations Office at Geneva Addressed to the Centre for Human Rights, p. 14. (27 March 1996); United Nations, Economic and Social Council, Commission on Human Rights. Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45, para. 288 (22 November 1994); United Nations, Economic and Social Council, Commission on Human Rights. Addendum-Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, in Accordance with Commission on Human Rights Resolution 1994/45- Report on the Mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime, pp. 6, 9 (4 January 1996); Wood, E. J. (2006), pp. 307-341

[802] Note Verbale dated 26 March 1996 from the Permanent Mission of Japan to the United Nations Office at Geneva Addressed to the Centre for Human Rights, p. 14

[803] Demleitner, N. V. (1994), pp. 163-197; Goldstein, A. T. (1993), p. 11; Meron, T. (1992), pp. 1-45; Meron, T. (1993), pp. 424-428

[804] Eriksson, M. (2011), pp. 130-131; United Nations, Economic and Social Council, Commission on Human Rights. Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, submitted in accordance with Commission on Human Rights Resolution 2000/45-

As stated in Chapter 2 (2.2.12 Batavia Military Tribunal, 1948), a Netherlands court in Batavia (Indonesia) prosecuted 12 Japanese army officers for the abduction of 35 Dutch girls and women “for the purpose of enforced prostitution" (a war crime in municipal law and in the compilation of war crimes set up by the 1919 Commission). The court found Washio Awochi (a hotel-keeper) guilty of the “war crime of enforced prostitution”, holding him directly liable for the women´s exploitation. Lupig highlighted the relevance of the Batavia Military Tribunal`s trial by asserting that it was “[t]he first known international criminal law prosecution for “forced prostitution””. Nevertheless, the judgment was focused on the women´s incarceration, ill-trieatment, and destitution of freedom instead of their abduction or deportation with the aim of forcing them to engage in prostitution.[805]

Moreover, such prosecution was an exception to the general impunity. As a rule, the enforced prostitution of the comfort women was mainly ignored and remained unacknowledged until the establishment of the Women’s International War Crimes Tribunal on Japan's Military Sexual Slavery, held in Tokyo, between 8 and 12 December 2000.[806]

Additionally, previously to the Rome Statute, most instruments that brought sexual violence crimes regarded them as attacks on honour, instead of criminal offences against the victims´ personal autonomy.[807]

In fact, Article 27 of the Fourth Geneva Convention (1949) affirmed that women should be guarded from "any attack on their honor, in particular, rape, enforced prostitution, or any form of sexual assault."[808]

Such approach to sexual violence as consisting in an attack against the honour of a woman is founded on the stereotype that women are ashamed of being victims of crimes of sexual violence and deny the significant harm (physical and emotional) endured as a consequence of such offences.[809]

The 1977 Additional Protocols to the Geneva Conventions persisted in the line of subsuming crimes of sexual violence under categories related to female honour and dignity. Indeed, Additional Protocol I affirmed that women should be “the object of special respect” and should be guarded “in particular against rape, forced prostitution and any other form of indecent assault.”[810]

Violence against women perpetrated and/or condoned by the State during times of armed conflict (1997-2000), p. 5. (23 January 2001)

[805] de Brouwer, A.-M. L. M. (2005), p. 139; Demleitner, N. V. (1994), pp. 163-197; Lupig, D. (2009), pp. 433-491; Piccicallo, P. R. (1979), p. 180; United Nations, War Crimes Commission (1949). Case No. 76, Trial of Washio Awochi, pp. 122-124

[806] Eriksson, M. (2011), pp. 346-349; Tokyo Tribunal 2000 & Public Hearing on Crimes Against women; Women´s Caucus for Gender Justice (2001). RE: Judgment of the Women´s International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery, in the matter of the Prosecutors and the Peoples of the Asia-Pacific Region vs. Emperor Hirohito et al., & the Government of Japan

[807] Boot, M. revised by Hall, C. K. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 206-216

[808] Geneva Convention IV, Art. 27

[809] *Ibidem*; Bedont, B., & Martinez, K. H. (1999), pp. 65-85

[810] Bedont, B., & Martinez, K. H. (1999), pp. 65-85; Protocol I, Art. 76 (1); Protocol II

Additional Protocol II compiles together "outrages upon personal dignity, in particular, humiliating and degrading treatment" and "rape, enforced prostitution and any form of indecent assault".[811]

In 1983, Jean Fernand-Laurent, Special Rapporteur on the suppression of the traffic in persons and the exploitation of the prostitution of others, regarded "traffic in persons" as "the exploitation of the prostitution of women and children" and considered it as a violation of human rights. Such definition regarded the term "traffic" as being immaterial, while the expression "exploitation of prostitution" embodies the forced character of the practice. Even though the Special Rapporteur recommended the combat against procurement as the short-term objective, the main goal was to decrease prostitution.[812]

The Nairobi Forward-Looking Strategies elaborated at the 1985 International Women's Conference conceived forced prostitution as "a form of slavery imposed on women by procurers." These strategies considered that forced prostitution arises from[813]

> "economic degradation that alienates women's labour through processes of rapid urbanization and migration resulting in underemployment and unemployment. It also stems from women's dependence on men. Social and political pressures produce refugees and missing persons. Often these include vulnerable groups of women who are victimized by procurers. Sex tourism, forced prostitution and pornography reduce women to mere sex objects and marketable commodities."[814]

Article 4 (e) of the ICTR Statute, when establishing the competence of the "ad hoc" Tribunal, enumerated "[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault" as Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II.[815]

In the 1996 Draft Code of Crimes against the Peace and Security of Mankind, the crimes "[r]ape, enforced prostitution and other forms of sexual abuse" were inserted in Article 18 (j), which compiled the crimes against humanity. It was the first instrument in which enforced prostitution and other forms of sexual

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811 Bedont, B., & Martinez, K. H. (1999), pp. 65-85; Protocol II, Art. 4 (2) (e)

812 Demleitner, N. V. (1994), pp. 163-197; United Nations, Economic and Social Council. Activities for the Advancement of Women: Equality, Development and Peace, Report of Mr. Jean Fernand-Laurent, Special Rapporteur on the suppression of the traffic in persons and the exploitation of the prostitution of others, p. 4, para. 8 (17 March 1983); United Nations, Department of International Economic and Social Affairs. Activities for the Advancement of Women: Equality, Development and Peace, pp. 5, 7, 17, 19 (1985)

813 United Nations. Report of The World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, p. 70, para. 290. (15 to 26 July 1985)

814 *Ibidem*

815 United Nations, Security Council. Statute of the International Criminal Tribunal for Rwanda (1994), Art. 4 (e)

abuse were unambiguously enlisted as a crime against humanity, along with rape.[816]

During the negotiation of the Rome Statute, there were corridor discussions on whether the term “enforced prostitution” was actually outdated and should be substituted by “sexual slavery”.[817]

As mentioned above, there was a problem with the term "enforced prostitution”, which has been described as embodying the male point of view (the perspective of the procurers, brothel owners and managers, and those who benefit from the system by the rape of women).[818]

The expression “enforced prostitution” implied some degree of willingness, tarnishing the victims’ reputation, concealing the real cruelty of the crime. The survivors were regarded depraved, “used goods”.[819]

Indeed, after the end of the war, the “comfort women” who had been confined to brothels by the Japanese were not welcomed back to their communities as individuals who had been subjected to an awful crime, but rather experienced ineffable shame and loneliness.[820]

Many survivors of the comfort system instituted by the Japanese who testified before the Tokyo 2000 Tribunal (a people´s tribunal constituted by Asian women and organisations of human rights with moral authority and which issued a judgment on 4 December 2001 holding guilty all the ten defendants who had been indicted) affirmed that being “branded” as prostitutes evilly escalated their suffering.[821]

The States decided to include both terms “enforced prostitution” and “sexual slavery” in the Rome Statute. Such decision was praised. The crime sexual slavery covers the sexual facet of the crime of slavery and also highlights the coercive element present when women are compelled to provide sexual services. At the same time, the crime of enforced prostitution was preserved and inserted in the Rome Statute so as to cover the cases short of slavery-like conditions, which are not subsumed in the concept of slavery.[822]

It has been affirmed that the classification of sexual slavery as a crime under international law (by its insertion in the Rome Statute) consists in a belated

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[816] Boot, M. revised by Hall, C. K. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 206-216; United Nations, International Law Commission. Report of the Work of the International Law Commission on the work of its forty-eighth session (6 May to 26 July 1996), Draft Code of Crimes against the Peace and Security of Mankind, Art. 18 (j)

[817] Oosterveld, V. (2004), pp. 605-651; Oosterveld, V. (2011). In Sadat, L. N. (ed.), pp. 78-101

[818] Argibay, C. M. (2003), pp. 375-389

[819] *Ibidem*

[820] *Ibidem*

[821] Argibay, C. M. (2003), pp. 375-389; de Brouwer, A.-M. L. M. (2005), p. 139; Eriksson, M. (2011), pp. 346-349; Tokyo Tribunal 2000 & Public Hearing on Crimes Against women; Judgment of the Women´s International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery

[822] Bedont, B., & Martinez, K. H. (1999), pp. 65-85; Oosterveld, V. (2004), pp. 605-651; Oosterveld, V. (2011). In Sadat, L. N. (ed.), pp. 78-101

change of the name of the conduct formerly known as crime of forced prostitution. Classifying the crime endured by comfort women as “sexual slavery" diminished the prejudice against the survivors and eventual future victims of such sexual offence.[823]

In reality, the inclusion of the crime of sexual slavery in the Statute corrected the underlying prejudice carried by the word prostitution.

When outlining the elements of crimes of the crime of enforced prostitution, the Preparatory Commission had the opportunity to establish the difference between this crime and sexual slavery. The negotiations of the elements of crimes of enforced prostitution gave rise to the discussion of two intertwined points. The first was if a person who is not subject to enslavement may be compelled to perform sexual acts. The second issue at hand was if there was a requirement of an interchange of a benefit (monetary or of another type) for the sexual acts, what could amount to a benefit, and whom must take advantage of the benefit.[824]

The understating of the majority of the drafters was that the idea underlying prostitution is that either the perpetrator or another person bears the expectative or obtains a monetary or another kind of benefit as a retribution for or in relation to the sexual acts.[825]

Nevertheless, they also decided that “advantage” should be regarded in a rather intricate acceptation. It could enclose advantage of sexual access to either the perpetrator or a person somehow connected to the latter, material advantage (as, for instance, exchanging objects or services for sex) in benefit of the perpetrator or someone else, or psychological advantage obtained by the perpetrator or some other person over the victim or an individual connected to the victim. Some delegates asserted that the own victims could be the persons expecting the advantage for they could aspire to be spared of torture or murder in exchange for sex.[826]

4.3.3.(ii). Elements of Crimes

The Preparatory Commission applied here the same formula used in the other sexual and gender-based crimes: elements 1 and 2 (“actus reus”) are common to “enforced prostitution” as a crime against humanity and as a war crime, and solely elements 3 and 4 (“mens rea”) vary.

[823] Argibay, C. M. (2003), pp. 375-389
[824] Oosterveld, V. (2004), pp. 605-651; Oosterveld, V. (2011). In Sadat, L. N. (ed.), pp. 78-101
[825] La Haye, E. (2001). In Lee, R. S. K. & Friman, H. (eds.), pp. 184-189; Oosterveld, V. (2011). In Sadat, L. N. (ed.), pp. 78-101
[826] La Haye, E. (2001). In Lee, R. S. K. & Friman, H. (eds.), pp. 184-189; Oosterveld, V. (2004), pp. 605-651; Oosterveld, V. (2011). In Sadat, L. N. (ed.), pp. 78-101

4.3.3.(ii).(a). *"Actus reus"*

4.3.3.(ii).(a)-1. Element 1

> *"*The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent."[827]

1st part

> "The perpetrator caused one or more persons to engage in one or more acts of a sexual nature"

The first part of element 1 bears a very close resemblance to the wording of element 2 of the crime of sexual slavery- "[t]he perpetrator caused such person or persons to engage in one or more acts of a sexual nature."[828]

Therefore, here as well the perpetrator must prompt the victim or victims to engage in one or more acts of a sexual nature. Like in the crime of sexual slavery, the interpretation of "acts of a sexual nature" should be broad as to include a large spectrum of sexual acts.

2nd part

> "by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent."

Still in element 2, the Preparatory Commission determined the manner in which the perpetrator must cause one or more persons to engage in one or more acts of a sexual nature.

The extract above is mainly a replica of the provision found in element 2 of the crime of rape:

> "[t]he invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a

[827] Elements of Crimes of the International Criminal Court, Arts. 7 (1) (g), Element 3; 8 (2) (b) (xxii)-3, Element 1, (e) (vi)-3, Element 1
[828] Elements of Crimes of the International Criminal Court, Arts. 7 (1) (g)-2, Element 2; 8 (2) (b) (xxii)-2, Element 2, (e) (vi)-2 Element 2

> coercive environment, or the invasion was committed against a person incapable of giving genuine consent."[829]

Certainly, likewise in the definition of rape, there are four conditions that compromise the exercise of sexual autonomy:[830]

1) Force or threat of force;

2) Coercion;

3) Taking advantage of a coercive environment;

4) Taking advantage of such person's or persons' incapacity to give genuine consent.

Force, threat of force and coercion are exemplified by the same 5 elements used in the crime of rape, namely "fear of violence, duress, detention, psychological oppression or abuse of power".

Furthermore, also like in the crime of rape, when the perpetrator causes one or more persons to engage in one or more acts of a sexual nature by making use of force, threat of force, or coercion, the damage or menace can be directed either against the own victim or a third person.

Other forms in which the perpetrator can cause one or more persons to engage in one or more acts of a sexual nature is by taking advantage of a coercive environment, or taking advantage of such person's or persons' incapacity to give genuine consent.

"Taking advantage of a coercive environment" means that the perpetrator can make use of a pre-existent situation marked by coerciveness (which arose independently of the perpetrator) to cause one or more persons to engage in one or more acts of a sexual nature.

The wording of the crime of enforced prostitution "taking advantage of such person's or persons' incapacity to give genuine consent" slightly differs from the expression inserted in the crime of rape "the invasion was committed against a person incapable of giving genuine consent".

Despite this difference, the expression inserted in the crime of enforced prostitution should be interpreted in the light of the explanation provided by the own Elements of Crimes when addressing the crime of rape:

> "a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity."[831]

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[829] Elements of Crimes of the International Criminal Court, Arts. 7 (1) (g)-1, Element 2; 8 (2) (b) (xxii)-1, Element 2

[830] Amnesty International (2011), p. 18

[831] Elements of Crimes of the International Criminal Court, Art. 7 (1) (g)-1, Element 1, footnote 16

Thus, for the configuration of the crime of enforced prostitution in the form of taking advantage of such person's or persons' incapacity to give genuine consent, the person should be affected by natural incapacity (e.g. mental incapacity to comprehend the nature of the act), induced incapacity (e.g. reduced capacity resultant from the ingestion of drugs and/or alcohol; deception) or age-related incapacity (e.g. children´s capability to give free and cognisant agreement to sexual conduct).[832]

As a consequence, the comments made when the analysis of element 2 of the crime of rape (Chapter 4, 4.3.1. (iii).(b)-2. Element 2) apply here "mutatis mutandi".

4.3.3.(ii).(a)-2. Element 2

> "The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature"

The crimes of enforced prostitution and sexual slavery have in common the fact that the perpetrator causes an individual or individuals to engage in one or more acts of a sexual nature.

In element 2 of the crime of enforced prostitution is found the fundamental distinctive feature of the two crimes: while the crime of enforced prostitution comprehends the perpetrator or another person obtaining or hoping to attain advantage (pecuniary or of another type) in reciprocation for sexual acts, the crime of sexual slavery is not concerned with the matter of advantage. Instead, the gravitational point of the crime of sexual slavery consists in exercising the powers attaching to the right of ownership.[833]

In view of that, the situation of the World War II "comfort women" was erroneously classified as "enforced prostitution". Indeed, these women were subject to sexual slavery since their hole was to provide sex and perpetrators did not expect to reap benefits.[834]

Even though enforced prostitution is generally centred in pecuniary advantage, the own text of the Elements of Crimes recognises that the advantage has a broad reach: the benefit expected/obtained goes beyond the monetary dimension and can possibly assume a different nature. As mentioned above, the advantage can encompass a material benefit distinct than money, or even have a psychological character.[835]

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[832] Amnesty International (2011), pp. 27-28, footnote 78

[833] Oosterveld, V. (2004), pp. 605-651; Oosterveld, V. (2011). In Sadat, L. N. (ed.), pp. 78-101; Priddy, A. (2014). In Casey-Maslen, S. (ed.), p. 271–296

[834] de Brouwer, A.-M. L. M. (2005), p. 142

[835] de Brouwer, A.-M. L.M. (2011). In Jones, J., Grear, A., Fenton, R. A., and Stevenson, K. (eds.), pp. 201-212; Oosterveld, V. (2004), pp. 605-651; Oosterveld, V. (2011). In Sadat, L. N. (ed.), pp. 78-101

4.3.3.(ii).(b). "Mens rea"

4.3.3.(ii).(b)-1. Crime against humanity of enforced prostitution[836]

Element 3

> "The conduct was committed as part of a widespread or systematic attack directed against a civilian population"

Therefore, the conduct of the perpetrator consistent in causing one or more persons to engage in one or more acts of a sexual nature (by force, or by threat of force or coercion, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent) so as to obtain pecuniary or other advantage in exchange for or in connection with the sexual acts must be committed as part of a widespread (of a large scale or with a high number of victims) or systematic (in accordance with a premeditated state/ organizational policy or planning) attack (course of conduct encompassing the multiple commission of acts enlisted in Article 7 (1) of the Rome Statute) directed against a civilian population (specific targeting civilians).

Element 4

> "The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population"

Furthermore, the perpetrator must know that he caused individual(s) to engage in sexual act(s), with views to obtaining pecuniary or other type of advantage, as part of (or at least intended it to be part) a widespread or systematic attack directed against a civilian population.

4.3.3.(ii).(b)-2. War crime of enforced prostitution[837]

Article 8 (2) (b) (xxii)-3 War crime of enforced prostitution

> "3. The conduct took place in the context of and was associated with an international armed conflict.
>
> 4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict."

Article 8 (2) (e) (vi)-3 War crime of enforced prostitution

> "3. The conduct took place in the context of and was associated with an armed conflict not of an international character.

[836] Elements of Crimes of the International Criminal Court, Art. 7 (1) (g)-3
[837] Elements of Crimes of the International Criminal Court, Art. 8 (2) (b) (xxii)-3

4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict."

The perpetrator´s inducement to the sexual activity aimed at harvesting benefits must be appropriately related to an (either international or national) armed conflict.

Also, the perpetrator ought to be conscious of factual circumstances that brought into being the armed conflict.

4.3.3.(iii). Final remarks

In situations of genocide, crimes against humanity and armed conflicts, women are often captured with the plain goal of being forced to provide sex, and the captors do not envisage to attain (financial or otherwise) benefits.

Therefore, most of the cases in which perpetrator causes an individual or individuals to engage in one or more acts of a sexual nature would be prosecuted as sexual slavery before the International Criminal Court.[838]

In spite of that, by preserving the crime of enforced prostitution in the Rome Statute, the drafters allowed that sexual violence not fitting into the requirements of the crime of sexual slavery can still be prosecuted under the head enforced prostitution by the International Criminal Court. Thus, their option of including both crimes in the Statute amplifies the protection of victims against sexual crimes during armed conflicts.[839]

Indeed, the crime of enforced prostitution can be related to sexual slavery or another type of sexual abuse.[840]

4.3.4. Crime of forced pregnancy

4.3.4.(i). Introduction

The Rome Statute was the first international treaty to specifically list the crime of forced pregnancy (although forced pregnancy had been acknowledged as a fundamental humanitarian and human rights violation in the Vienna Conference's Programme of Action, the Beijing Conference's Platform for Action, and also in numerous resolutions of UN Commission on Human Rights).[841]

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[838] de Brouwer, A.-M. L.M. (2011). In Jones, J., Grear, A., Fenton, R. A., and Stevenson, K. (eds.), pp. 201-212

[839] Priddy, A. (2014). In Casey-Maslen, S. (ed.), p. 271–296

[840] Cottier, M. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 431-454

[841] Bedont, B., & Martinez, K. H. (1999), pp. 65-85; United Nations, Economic and Social Council, Commission on Human Rights. The Elimination of Violence against Women (8 March 1995); United Nations, Economic and Social Council, Commission on Human Rights. The Elimination of Violence against Women (19 April 1996); United Nations, Economic and Social Council, Commission on Human Rights, The Elimination of Violence against Women (11 April 1997); United Nations, Economic and Social Council, Commission on Human Rights. Rights of the Child, para. 13 (a) (18 April 1997); United Nations, Economic and Social Council, Commission on Human Rights. The Elimination of Violence against Women, para. 4 (17 April 1998); United

Furthermore, before the advent of the Statute, forced pregnancy (in the same manner as the other sexual-related crimes) was rendered as an infraction against honour. The Rome Statute constituted a turning point and established a new platform (whose pillars are the principles of human dignity, autonomy and consent) for the international criminalisation of sexual offences. Indeed, after its enactment, the sexual and gender-based crimes, among which is included forced pregnancy, started to be regarded from the perspective of the harm done to the bodily integrity of the victim.[842]

However, as aforementioned, such achievements did not come easily: the inclusion of the sexual based-crimes in the Rome Statute was achieved by joint efforts of the civil society (particularly the Women´s Coalition for Gender Justice) to beat the resistance of determined delegations to agree to provisions safeguarding women´s rights.[843]

During the Rome negotiations, the discussions concerning the crime of forced pregnancy were very tough. It also constituted one of the most emotional topics debated during the confection of the Statute. In fact,[844]

> "[w]hile some negotiation took place on the other gender crimes, such as enslavement and gender-based prosecution, none of them was the subject of such intense opposition as forced pregnancy." [845]

Some delegates sustained that the inclusion of such criminal offence was dispensable for it would be covered by the crimes of rape and unlawful confinement. Contrarily, other delegates argued that such approach finished denying the criminal nature intrinsic to forced pregnancy, and, consequently, it should be regarded as a separate crime.[846]

The crime of forced pregnancy infringes the fundamental human right to bodily integrity, and only can be inflicted against women, thus, being gender-based. Certainly, this crime causes paramount physical harm on the victims by occupying a woman's body and compelling her to carry her rapist's baby. Moreover, there is an enormous psychological impact since the victim has to decide whether to keep the baby (whose father is her rapist, often from a distinct

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Nations, Economic and Social Council, Commission on Human Rights. Rights of the Child, para. 13 (a) (22 April 1998); United Nations. Report of the Fourth World Conference on Women, Beijing Declaration and Platform for Action, pp. 49, 56-57, paras. 114, 132, 135 (1995); United Nations. Vienna Declaration and Programme of Action, paras. 18 and 38

[842] Boon, K. (2001), pp. 625-775;

[843] Bedont, B., & Martinez, K. H. (1999), pp. 65-85; Boot, M. revised by Hall, C. K. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 255-263

[844] *Ibidem; Ibidem;* Jessie, S. S. E. (2006), pp. 311-337; Bedont, B. (1999). In Lattanzi, F., & Schabas, W. A. (eds.), pp. 183-210; Steains, C. (1999). In Lee, R. S. K. (ed.), pp. 357-390; de Brouwer, A.-M. L. M. (2005), p. 143-144

[845] Bedont, B., & Martinez, K. H. (1999), pp. 65-85

[846] de Brouwer, A.-M. L. M. (2005), p. 144; Steains, C. (1999). In Lee, R. S. K. (ed.), pp. 357-390

ethnicity) or not (meaning to have an abortion or give up the baby for adoption after he/she is born).[847]

In case she opts for keeping the baby, in several societies (particularly in patriarchal ones), the woman and the baby will not be accepted, what can cause her to reject the child as well. The Vatican and other delegations were worried about the second option in which the woman raped and made pregnant wants to have an abortion and the State where she resides (or has sought refuge) does not allow it.[848]

In fact, the main issue at stake was that many delegations (inclusive of the Vatican and Ireland whose policies prohibit all abortions) were concerned that if crime of forced pregnancy was included in the Rome Statute, States would be required to permit the victims of such crime to have access to abortion. Apart from the Vatican and Ireland, other countries that made statements opposing or expressing concern in relation to the insertion of the crime of forced pregnancy were: Bahrain, Colombia, Costa Rica, Ecuador, Egypt, Iran, Iraq, Kuwait, Libya, Malta, Nicaragua, Oman, Paraguay, Philippines, Poland, Russia, Saudi Arabia, San Marino, United Arab Emirates and Venezuela.[849]

The reasoning behind the apprehension was that if it was a crime to maintain a raped woman pregnant, States would have to provide these women with access to abortion, otherwise they would be contributing to maintain these women pregnant, thus, incurring in the crime. Therefore, the resistance to the inclusion of the crime of forced pregnancy (likewise the insertion of the term gender) reflected the persistent refusal of certain States to accept women's rights. Certainly, the hostile states sought to undermine the insertion of the crime of forced pregnancy because of misleading associations with the question of the legalisation of abortion.[850]

In a proposal submitted by the Holy See during the last PrepCom meeting (March-April 1998), the Vatican suggested to substitute “enforced pregnancy” for “forcible impregnation”. However, in view of the then recent atrocities perpetrated in Bosnia (women were raped and kept confined to captivity up to the point in which they could no longer abort a child that the Serbian criminals considered to be of Serbian ethnicity, like the rapist), most of the delegations did not agree to use the expression “forcible impregnation” (that was seem as referring to make forcibly a woman pregnant) in detriment of “enforced pregnancy” (which was considered to embrace maintaining the woman pregnant).[851]

Indeed, the scope of those who wanted to include the crime in the Statute was not to make a criminal offence to deny services of abortion (which is regarded an

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[847] Bedont, B., & Martinez, K. H. (1999), pp. 65-85; de Brouwer, A.-M. L. M. (2005), p. 144; Jessie, S. S. E. (2006), pp. 311-337

[848] de Brouwer, A.-M. L. M. (2005), p. 144

[849] Bedont, B., & Martinez, K. H. (1999), pp. 65-85; de Brouwer, A.-M. L. M. (2005), p. 144; Steains, C. (1999). In Lee, R. S. K. (ed.), pp. 357-390

[850] *Ibidem; Ibidem; Ibidem*

[851] de Brouwer, A.-M. L. M. (2005), p. 144; Preparatory Committee on the Establishment of an International Criminal Court, 16 March- 3 April 1998. Proposal Submitted by the Holy See. (1 April 1998); Steains, C. (1999). In Lee, R. S. K. (ed.), pp. 357-390

omission under criminal law), but rather to criminalise the acts of making and maintaining a woman pregnant (that is a commission under criminal law).[852]

In view of that, negotiations continued with the aim of elaborating a concept of forced pregnancy which would set up the boundaries of the crime.[853]

So as to minimise the concerns of the Vatican and other States, the delegates arrived at a compromise and inserted it in the last sentence of the concept of forced pregnancy included in the Rome Statute:[854]

> "'Forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy."[855]

It is noteworthy that the Holy See tried to limit the definition of forced pregnancy to acts perpetrated with the goal of promoting an ethnic cleansing. However, such proposal did not find support because it would implicate in the exclusion of several other facets of the crime (i.e., in World War II, Jewish women were forcibly made and kept pregnant for medical experiments purposes). Following protracted debates, the parties reached an agreement to include "carrying out other grave violations of international law" as an alternative goal for the perpetration of such crime.[856]

4.3.4.(i).(a). The Rome Statute´s definition

After enlisting the crime of forced pregnancy as a crime against humanity and a war crime, the Rome Statute defined forced pregnancy as[857]

> "the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy."[858]

The concept will be analysed per parts.

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[852] Bedont, B., & Martinez, K. H. (1999), pp. 65-85
[853] *Ibidem*
[854] *Ibidem*
[855] Rome Statute, Art. 7 (2) (f)
[856] Bedont, B., & Martinez, K. H. (1999), pp. 65-85
[857] Rome Statute, Arts. 7 (1) (g), 8 (2) (b) (xxii)
[858] Rome Statute, Art. 7 (2) (f)

4.3.4.(i).(a)-1. Unlawful confinement

The expression “unlawful confinement” should be regarded as any form of seizure of an individual´s physical liberty which attempts against international law and standards.[859]

Oppositely to the crime of imprisonment or other severe deprivation of physical liberty, which demands the deprivation of liberty to be severe, in the crime under analysis there is no such requirement of severity in the deprivation of the victim´s liberty.[860]

A conduct which constitutes forced pregnancy can also configure the crime of unlawful confinement.[861]

4.3.4.(i).(a)-2. Forcibly made pregnant

“Forcibly made pregnant” refers to a pregnancy which resulted from the use of force, or to a pregnancy in which the element force was otherwise involved and played a hole in the impregnation.[862]

As already mentioned, the Elements of Crimes adopted a broad approach when delimiting “forcibly” and stated that this term is not constricted to physical force, but can cover threat of force or coercion, or by taking advantage of a coercive environment.[863]

In the same manner as the crime of rape, the crime of forced pregnancy is informed by coercion “lato sensu”. The use of violence is not obligatory.[864]

As aforementioned in the crime of rape, any type of force, threat of force, or coercion against the own victim or a third person forbids consent. Moreover, any type of physical detention wipes out consent.[865]

For the configuration of the crime, it is not necessary that the woman was forcibly impregnated by the person responsible for holding her in captivity. The act of forcibly making the victim pregnant can also be comprised by the crimes of rape or “any other form of sexual violence of comparable gravity”.[866]

It is noteworthy that among the sexual and gender-based crimes, the crime of forced pregnancy is the only one which can be perpetrated exclusively against women. Surely, the other sexual offences were redacted by the drafters in a

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[859] Boot, M. revised by Hall, C. K. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 255-263
[860] *Ibidem,* Rome Statute, Art. 7 (1) (e)
[861] Rome Statute, Art. 8 (a) (vii)-2;
Cottier, M. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 431-454
[862] Boot, M. revised by Hall, C. K. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 255-263
[863] Elements of Crimes of the International Criminal Court, Art. 7 (1) (d) footnote 12
[864] Boot, M. revised by Hall, C. K. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 255-263
[865] *Ibidem*; Elements of Crimes of the International Criminal Court, Arts. 7 (1) (g)-1, Element 2; 8 (2) (b) (xxii)-1, Element 2
[866] Boot, M. revised by Hall, C. K. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 255-263; Rome Statute, Art. 7 (1) (g)

gender-neutral form, hence, both the perpetrators and the victims can be of whatever sex and gender.[867]

4.3.4.(i).(a)-3. With the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law

For the occurrence the crime of forced pregnancy is not enough to carry out the unlawful confinement of a woman forcibly made pregnant. It is indispensable that the perpetrator unlawfully confines such a woman with a specific objective: either to affect the ethnic composition of a determined population or to carry out other grave violations of international law.[868]

As aforementioned, the intend of "carrying out other grave violations of international law" as an alternative goal for the perpetration of such crime was included to cover a broad spectrum of situations that do not fit into the aim of affecting the ethnic composition of a determined population. Undoubtedly, the second intend can be considered to cover the crime of genocide (forced pregnancy can cause “serious bodily or mental harm to members of the group”, and can be regarded as purposefully imposing “on the group conditions of life calculated to bring about its physical destruction in whole or in part”), torture (listed as both a crime against humanity and war crime) and enforced disappearances (which is a war crime).[869]

4.3.4.(i).(a)-4. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy

This sentence was inserted to guarantee that the concept of forced pregnancy included in the Rome Statute would not have any impact on the national laws concerning pregnancy.[870]

The goal was to easy the States which were reticent in relation to the inclusion of the crime in the Statute and make it clear that such States would not be forced to permit abortion.

In fact, the phrase clarified that national laws that forbid abortion do no constitute the crime of forced pregnancy of the Rome Statute, as long as they are not intended to affect the ethnic composition of any population or commit other grave violations of international law.[871]

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[867] Cottier, M. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 431-454
[868] Boot, M. revised by Hall, C. K. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 255-263
[869] *Ibidem*, Bedont, B., & Martinez, K. H. (1999), pp. 65-85; Rome Statute, Arts. 6 (b) (c); 7 (1) (f) (i), (2) (e); 8 (2) (a) (ii), (c) (i); Salzman, T. A. (1998), pp. 348–378
[870] Boot, M. revised by Hall, C. K. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 255-263
[871] *Ibidem*

4.3.4.(ii).“Actus reus”[872]

4.3.4.(ii).(a). Element 1

> “The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law”

The “actus reus” of the crime of forced pregnancy is composed by solely one element, which is actually a restatement of the definition provided by the Rome Statute.[873]

Hence, the requirements of the Statute and of the Elements of Crimes coincide:

> “the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.”[874]

4.3.4.(iii). *“*Mens rea”

4.3.4.(iii).(a). Crime against humanity of forced pregnancy

In the crime against humanity of forced pregnancy the contextual elements (which are the same as the contextual elements of the other crimes against humanity) appear in elements 2 and 3:

> “2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
>
> 3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.”[875]

Thus, in accordance with Art. 7 (1) (g)-4 of the Elements of Crimes, the conduct of unlawfully confining a woman who was forcibly made pregnant (with the aim of affecting a population´s ethnic composition or perpetrating distinct serious infringements of international law) must be carried out “as part of a widespread or systematic attack directed against a civilian population.”[876]

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[872] Elements of Crimes of the International Criminal Court, Arts. 7 (1) (g)-4, Element 1, 8 (2) (b) (xxii)-4, Element 1

[873] Boot, M. revised by Hall, C. K. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 255-263; Rome Statute, Art. 7 (2) (f)

[874] Rome Statute, Art. 7 (2) (f)

[875] Elements of Crimes of the International Criminal Court, Art. 7 (1) (g)-4

[876] Ibidem

Surely, such confinement must be part of an operation or campaign, meaning the multiple commission of acts (referred to in paragraph 1 of article 7 of the Rome Statute) on a large scale or with a high quantity of victims (widespread), or in a thoroughly organised manner and consonant to a steady pattern (systematic), carried out in detriment of civilians, in accordance with or boosting a State or organizational plan or policy. Additionally, the perpetrator´s knowledge (regarding the direct linkage between the confinement and the attack) or intention is required.[877]

4.3.4.(iii).(b). War crime of forced pregnancy

4.3.4.(iii).(b)-1. Article 8 (2) (b) (xxii)-4 War crime of forced pregnancy

"2. The conduct took place in the context of and was associated with an international armed conflict.

3. The perpetrator was aware of factual circumstances that established the existence of an armed conflict."[878]

4.3.4.(iii).(b)-2. Article 8 (2) (e) (vi)-4 War crime of forced pregnancy

"2. The conduct took place in the context of and was associated with an armed conflict not of an international character.

3. The perpetrator was aware of factual circumstances that established the existence of an armed conflict."[879]

The act of confining one or more women forcibly made pregnant, with the scope of affecting the ethnic composition of any population or committing other grave violations of international law, ought to be interwoven to an armed conflict (international, Article 8 (2) (b) (xxii)-4, or local, Article 8 (2) (e) (vi)-4) and be related to the conflict.

Consequently, the exercise of powers attaching to the right of ownership that brings about the involuntary engagement of the victim(s) in sexual act(s) must be related to a domestic or supranational armed conflict. In fact, there must be a satisfying link between the conduct of the criminal and the conflic. Moreover, the latter must know about facts which lead to the establishment of the conflict in question.[880]

[877] Boot, M. revised by Hall, C. K. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 255-263; Dixon, R., revised by Hall, C. K. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 168-183
[878] Elements of Crimes of the International Criminal Court, Art. 8 (2) (b) (xxii)-4
[879] Elements of Crimes of the International Criminal Court, Art. 8 (2) (e) (vi)-4
[880] Elements of Crimes of the International Criminal Court, Art. 8 (2) (b) (xxii)-2, (e) (vi)-2

4.3.5. Enforced sterilization

4.3.5.(i). Introduction

The criminal offence “enforced sterilization” was firstly codified by the Rome Statute. Posteriorly, it appeared enlisted as both a crime against humanity and war crime (along the crimes of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence of comparable gravity) in Regulation no. 2000/15 of the United Nations Transitional Administration in East Timor.[881]

The inclusion of the crime of enforced sterilization in the Rome Statute was prompted by cases of mass sterilization and medical experimentations conducted during World War II. The performance of sterilization and medical experimentations in concentration camps was related in the “Medical Case” (U.S.A. vs. Karl Brandt, et al.) of the Nuremberg Trials. Also contributed reports of acts of sexual violence conducted during conflicts and that gave cause to serious reproductive damage (inclusive of sterilization).[882]

Indeed, enforced sterilization can result from sexual violence and, for this reason, figures among the crimes of sexual violence in the Rome Statute. For instance, sterilization can come about as a consequence of sexual mutilation or damage, as the employment of a weapon or another object to rape, trough violent and/or multiple rapes, or castration. Furthermore, sexually transmitted diseases and forced or botched abortions are among causes of sterilization. Several “comfort women” lost their ability of reproduce as a consequence of the sexual slavery they were submitted to during World War II.[883]

Nevertheless, sterilization may stem from medical procedures which affect reproductive capacity which do not obligatorily involve sexual violence. In fact, in 1993 Germany adopted a sterilization law that allowed forcible sterilization of any person who suffered from so-called “genetically determined” illnesses (which covered schizophrenia, manic-depressive insanity, feeblemindedness, deafness, genetic blindness, genetic epilepsy and “severe alcoholism”). In the following year, 181 Genetic Health Courts and Appellate Genetic Health Courts were set up, giving effectivity to such law. Together with the Nuremberg Laws and the euthanasia operation, the sterilization law constituted one the core programs of the Nazi regime policy of wiping out "inferior" populations (negative racial hygiene) and promoting positive racial hygiene.[884]

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[881] Oosterveld, V. (2011). In Sadat, L. N. (ed.), pp. 78-101; United Nations, Transitional Administration in East Timor. Regulation No. 2000/15, On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, Section 5.1 (g), Section 6.1 (b) (xxii), Section 6.1 (e) (vi) (6 June 2000).

[882] Nuremberg Military Tribunal. NMT 1 (U.S.A. v. Karl Brandt et al.), Rudolf Emil H. Brandt`s Affidavit concerning the sterilization experiments (19 April 1946); Oosterveld, V. (2011). In Sadat, L. N. (ed.), pp. 78-101

[883] Askin, K. D. (2005), pp. 146-147; Oosterveld, V. (2011). In Sadat, L. N. (ed.), pp. 78-101

[884] Oosterveld, V. (2011). In Sadat, L. N. (ed.), pp. 78-101; Proctor, R. N. (1994), pp. 35-37.; Proctor, R. N. (1992), pp. 20-21

Furthermore, the Medical Case (U.S.A. vs. Karl Brandt, et al., "the Doctors' Trial") reported that during World War II medical experiments involving x-rays, drugs and surgery were conducted on concentration camps prisoners so as to find out manners of obtaining expeditious, outreach sterilization. In fact, in this case, 23 Nazi doctors and administrators were tried under the accusation of organising and participating in war crimes and crimes against humanity, specifically conducting medical experiments and medical procedures on both prisoners and civilians. Sterilization experiments were amidst the medical experiments and medical procedures charged.[885]

Certainly, between March 1941 and January 1945 sterilization experiments were carried out in concentration camp inmates with a view of developing methods of fast and extensive sterilization (the typical tubal ligature was considered very slow and costly to be employed on a large scale). Sterilization experiments using drugs (such as caladium sequinum, or the injection of an irritating compound), x-rays, and surgery were prepared and/or performed at Auschwitz Ravensbrueck, and in other places. The physicians who performed such experiments sought to develop a new area of medical science which would provide the Nazi with scientific means to plan and carry out racial cleansing, and annihilate Jews, Russians, Poles, Gypsies, etc. A total of 8 defendants were charged for conducting sterilization experiments. The charges against 2 of them (Mrugowsky and Oberheuser) were withdrawn. Out of the 6 remaining defendants, 3 were acquitted (K. Brandt, Pokorny and Poppendick) and 3 (Brack, R. Brandt and Gebhardt) were found guilty of conducting sterilization experiments. Therefore, these experiments, aimed at enabling the Nazi to sterilize millions of people and ultimately destroy them, presented a eugenics character. They were not "sexual" in the common usage of the word.[886]

In fact, some of the forms of causing enforced sterilization do not present a sexual vein (differently than the crimes of rape, enforced prostitution, sexual slavery and enforced pregnancy). For this reason, it has been argued that the crime of enforced sterilization should have not been listed with the other sexual criminal offences in the Rome Statute. Supporting this argument is the fact that even though sexual violence frequently damages the victim´s reproductive system, causing sterilization, it is difficult to prove that the perpetrator of the sexual violence conduct actually intended the victim to become sterile.[887]

It is also important to highlight that enforced sterilization performed without consent can amount to genocide insofar it is carried out with a view to destroy a certain group in whole or in part. Surely, non-consensual sterilization can be a form of "imposing measures intended to prevent births within the group", subsuming to article 6 (e) of the Rome Statute.[888]

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[885] Harvard Law School Library, Nuremberg Trials Project. Nuremberg Military Tribunals, Case 1, U.S.A. v. Karl Brandt et al.: The Doctor´s Trial.
[886] *Ibidem*; Schabas, W. A. (2010), p. 174
[887] Oosterveld, V. (2011). In Sadat, L. N. (ed.), pp. 78-101; Schabas, W. A. (2010), p. 174
[888] Boot, M. (2002), p. 516; Mason, J. K. (1998), p. 68; Rome Statute, Art. 6 (e)

4.3.5.(ii). "Actus reus"[889]

4.3.5.(ii).(a). Element 1

> "The perpetrator deprived one or more persons of biological reproductive capacity"

This element surrounded by controversy and there was a delegation that wanted to remove mandatory measures destined to apply to all inhabitants.[890]

The forbidden conduct is to deprive a human being of producing descendants.[891]

According to Mason (1998), what is protected is the right to choose whether or not to procreate (a particular feature of the right of a person to control his/her own body), or, as an alternative, the right to withhold the ability to procreate.[892]

The drafters of the Elements of Crimes added in a footnote to this element that the deprivation "is not intended to include birth-control measures which have a non-permanent effect in practice". Therefore, in accordance with the wording of the Elements of Crimes, the crime of enforced sterilization demands the intention of stripping a person from his/her reproductive capacity for good.[893]

Consequently, the induced inability of procreating any further should be everlasting, and "a priori" birth-control pills that once no longer ingested cease being effectively should not regarded as a method of enforced sterilization.[894]

However, this is a thorny issue. It has been argued that it is questionable if such exception (birth-control measures with a non-permanent effect) is congruent with international law. In fact, the imposition of temporary birth-control measures directed to avoid births within a certain group (and the consequent decrease of birthday rate) can be deployed as a means of genocide.[895]

4.3.5.(ii).(b). Element 2

> "The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent"

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[889] Elements of Crimes of the International Criminal Court, Arts. 7 (1) (g)-5; 8 (2) (b) (xxii)-5, (e) (vi)-5

[890] Cottier, M. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 431-454

[891] Boot, M., revised by Hall, C. K. (2008). Article 7 Crimes Against Humanity, para. 1(g). In Triffterer, O., & Ambos, K. (eds.), pp. 206-216

[892] Mason, J. K. (1998), pp. 85, 87

[893] Cottier, M. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 431-454; Elements of Crimes of the International Criminal Court, Arts. 7 (1) (g)-5, Element 1, Footnote 19; 8 (2) (b) (xxii)-5, Element 1, Footnote 54; (e) (vi)-5, Element 1, Footnote 67

[894] Cottier, M. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 431-454

[895] Boot, M., revised by Hall, C. K. (2008). Article 7 Crimes Against Humanity, para. 1(g). In Triffterer, O., & Ambos, K. (eds.), pp. 206-216

Element 2 of the crime disposes that sterilization constitutes a crime within the jurisdiction of the International Criminal Court if not legitimised by therapeutic reasons, or if carried out without the victim´s genuine consent.[896]

"Genuine consent" is an essential element of the definition of the crime of enforced sterilization. Indeed, a therapeutic sterilization may still constitute enforced sterilization in case it is performed without the person´s genuine consent.[897]

This consent-based approach is somewhat surprising, since the term "enforced" employed by the Rome Statute when enlisting this crime could be regarded to be implying that the sterilization ought to be forcible, as, for example, when it is carried out against the victim´s will.[898] Indeed, it could be expected that the drafters would restate the formula applied in the crime of rape, whose conditions are mainly centred on coercion ("by force, or by threat of force or coercion … or by taking advantage of a coercive environment, or … against a person incapable of giving genuine consent").[899]

However, as aforesaid in the analysis of the crime of rape, so as to be in agreement with international human rights law, the term "genuine consent" should be interpreted as being free, unhindered of force, coercion, discrimination and violence.[900]

Therefore, so as to legitimize the sterilization, the person´s consent must be voluntary, unconstrained.[901]

Furthermore, a person can only give true consent if he/she forms an understanding based on veracious, accurate information. Consent given by a person who was not properly informed, is not valid. Lack of informed consent is sufficient to render the sterilization criminal. It is imperative that the person is adequately informed when consenting.[902]

In this sense, in a footnote to element 2, the redactors of the Elements of Crimes explained that the expression "genuine consent" "does not include consent obtained through deception". Thus, rest excluded, for example, cases of deception in relation to the durability of the sterilization or the possibility of reversing it.[903]

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[896] Cottier, M. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 431-454
[897] *Ibidem*
[898] *Ibidem*
[899] Elements of Crimes of the International Criminal Court, Arts. 7 (1) (g)-1, Element 2; 8 (2) (b) (xxii)-1, Element 2
[900] Amnesty International (2011), p. 15
[901] Cottier, M. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 431-454
[902] Cottier, M. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 431-454; Leon Acevedo, J. P. P. (2015); Mason, J. K. (1998), p. 89
[903] Cottier, M. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 431-454; Elements of Crimes of the International Criminal Court, Arts. 7 (1) (g)-5, Element 2, footnote 20; Article 8 (2) (b) (xxii)-5, Element 2, footnote 55, (e) (vi)-5, Element 2, footnote 68

In the crime of rape, a footnote established that

> "[i]t is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age related incapacity"[904]

and that such provision applies also to the crimes of enforced prostitution, enforced sterilization, and sexual violence.[905]

Consequently, if there is a case in which someone was sterilized purportedly agreeing to it, but such person is affected by natural, induced or age-related incapacity, then the International Criminal Court judges will have to analyse if the person´s condition prevented him/her of manifesting genuine consent.

It is important to stress that a sterilization carried out for medical care reasons may still constitute enforced sterilization in case it is forcible (takes place against the person´s capable, voluntary, and knowledgeable will).[906]

In sum, adult holds jurisdiction over his/her body as a result of individual´s autonomy, and, thus, can make a free, unrestrained, and rational choice to submit himself/herself to sterilization. If the sterilization carried out in dissonance with this premise (in other words, without the person´s genuine consent), it is enforced.[907]

Finally, it is noteworthy that this concept of enforced sterilization is not limited to medical operations, but also includes a calculated use of chemical to achieve it.[908]

4.3.5.(iii). "Mens rea"

The "mens rea" of the crime of enforced sterilization obeys the same logic of the other sexual and gender-based crimes: the distinct contextual elements consist in the differentiation factor between enforced sterilization as a crime against humanity and as a war crime.

4.3.5.(iii).(a). Crime against humanity of enforced sterilization[909]

> "3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

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[904] Elements of Crimes of the International Criminal Court, Arts. 7 (1) (g)-1, Element 2, footnoote 16; 8 (2) (b) (xxii)-1, Element 2, footnoote 51; (e) (vi)-1, Element 2, footnoote 64
[905] *Ibidem*
[906] Cottier, M. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 431-454
[907] Mason, J. K. (1998), p. 87
[908] Cryer, R., Friman, H., Robinson, D., & Wilmshurst, E. (2014), pp. 258; La Haye, E. (2001). In Lee, R. S. K. & Friman, H. (eds.), pp. 184-189
[909] Elements of Crimes of the International Criminal Court, Art. 7 (1) (g)-5

4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population."

Therefore, the perpetrator must know/ intend that he/she is depriving a person of his/her biological reproductive capacity (absent medical reasons and the person´s genuine consent) as part of a widespread (against a large number of victims or extended over an ample geographic area) or systematic (of an organized nature) attack directed against civilians.

4.3.5.(iii).(b). War Crime of enforced sterilization[910]

4.3.5.(iii).(b)-1. Article 8 (2) (b) (xxii)-5 War Crime of enforced sterilization

"3. The conduct took place in the context of and was associated with an international armed conflict.

4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict."[911]

4.3.5.(iii).(b)-2. Article 8 (2) (e) (vi)-5 War Crime of enforced sterilization

"3. The conduct took place in the context of and was associated with an armed conflict not of an international character.

4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict."[912]

In the war crime of enforced sterilization, the deprivation of a person´s biological reproductive capacity (not present medical reasons and the person´s genuine consent) must present a bond with an armed conflict. It is indifferent the character (international or not) of the armed conflict.

4.3.6. Or any other form of sexual violence

4.3.6.(i). Introduction

Sexual violence is wider than rape, presenting a far-ranging concept. It includes any type of violence implemented by sexual means or which attempts against one´s sexuality.[913]

To reflect this amplitude, in the Rome Statute the listing of sexual and gender-based crimes finishes with a basket clause which condemns "any other form of

[910] Elements of Crimes of the International Criminal Court, Art. 8 (1) (g)-5
[911] Elements of Crimes of the International Criminal Court, Art. 8 (2) (b) (xxii)-5
[912] Elements of Crimes of the International Criminal Court, Art. 8 (2) (e) (vi)-5
[913] Boot, M., revised by Hall, C. K. (2008). Article 7 Crimes Against Humanity, para. 1(g). In Triffterer, O., & Ambos, K. (eds.), pp. 206-216

sexual violence". However, the wording of this last part slightly differs in the "crime against humanity" and the "war crimes".[914]

Indeed, after enlisting the 5 initial sexual informed offences (rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization), the drafters of the Rome Statute adopted different wordings when redacting the last offence composing Article 7 (1) (g), Article 8 (2) (b) (xxii), and Article 8 (2) (e) (xxii), as it will be subsequently analysed.

4.3.6.(i).(a). Crimes against Humanity

The last crime enumerated in Article 7 (1) (g) is "or any other form of sexual violence of comparable gravity".[915]

It is a residual class which unequivocally emphasises the sexual violence element.[916]

It was another relevant advancement introduced by the Rome Statute. Certainly, in the ICTY and ICTR statutes, apart from rape, the crimes of sexual violence were tried as "other humane acts", defaulting any reference to the sexual aspect.[917]

This criminal type captures other forms of sexual violence which, although not expressly itemised in the sexual and gender-based crimes group, also worry the international community (as, for example, forced nudity, forced undressing, sexual mutilation, forced abortion, forced marriage, forced impregnation not followed by forcible confinement, and forced sexual intercourse or distinct sexual acts with family members).[918]

The insertion of the vestigial basket clause in the Rome Statute was somewhat agreeable. Nonetheless, the inclusion the term "comparable gravity" was not so pacific.[919]

"Comparable gravity" was adopted so as to easy the concerns of delegates of the Rome Conference that if such expression was absent, the basket clause could be considered rather vague and, thus, come short of meeting the principle of legality.[920]

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[914] Oosterveld, V. (2011). In Sadat, L. N. (ed.), pp. 78-101
[915] Rome Statute, Art. 7 (1) (g)
[916] de Brouwer, A.-M. L. M. (2005), p. 147
[917] *Ibidem*; United Nations, Security Council. Statute of the International Criminal Tribunal for the Former Yugoslavia (1993), Art. 5 (i); United Nations, Security Council. Statute of the International Criminal Tribunal for Rwanda (1994), Article 3 (i)
[918] ICTR. The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4. Chamber I, Judgment, para. 697 (2 September 1998); ICTY. The Prosecutor v. Miroslav Kvočka, et al., Case No. IT-98-30/1. Trial Chamber, Judgment, para. 180, footnote 343 (2 November 2001); Oosterveld, V. (2011). In Sadat, L. N. (ed.), pp. 78-101
[919] Oosterveld, V. (2011). In Sadat, L. N. (ed.), pp. 78-101
[920] *Ibidem*

In spite of that, there were doubts in relation to this requisite, if it demanded penetration. Non-Governmental Organizations were uneasy with the possibility that the International Criminal Court could regard the phrasing "of comparable gravity" as signifying that sexual violence would have to resemble the crime of rape.[921]

However, the expression "comparable gravity" should not be interpreted as ruling out acts which do not implicate penetration or physical contact.[922]

Certainly, in the Akayesu case the ITCR found that

> "[s]exual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or physical contact."[923]

This issue was resolved in the elaboration of the Elements of Crimes, as it will be seen further below.

4.3.6.(i).(b). War crimes

Article 8 (2) (b) (xxii) final criminal offence is "or any other form of sexual violence also constituting a grave breach of the Geneva Conventions".[924]

Grave breaches constitute notably grave infringements of international humanitarian law. Article 8 paragraph 2 (a) of the Rome Statute assimilated the list of grave breaches that appear in the four 1949 Geneva Conventions (Art. 50 Geneva Convention I, Art. 51 Geneva Convention II, Art. 130 Geneva Convention III, and Art. 147 Geneva Convention IV). The drafters of the Statute decided to simply repeat the concept of grave breaches inserted in the four 1949 Geneva Conventions, namely:[925]

> "(i) Willful killing;
>
> (ii) Torture or inhuman treatment, including biological experiments;
>
> (iii) Willfully causing great suffering, or serious injury to body or health;
>
> (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

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[921] *Ibidem*
[922] Boot, M., revised by Hall, C. K. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 206-216
[923] ICTR. The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4. Chamber I, Judgment, paras. 598, 688 (2 September 1998).
[924] Rome Statute, Art. 8 (2) (b) (xxii)
[925] Dörmann, K. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 300-322
[925] Elements of Crimes of the International Criminal Court, Art. 7 (1) (g)-6

> (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
>
> (vi) Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
>
> (vii) Unlawful deportation or transfer or unlawful confinement;
>
> (viii) Taking of hostages."[926]

"A priori" it would seem that the wording "or any other form of sexual violence also constituting a grave breach of the Geneva Conventions" would grant two interpretations. It could either purport that "any other form of sexual violence" is under the jurisdiction of the International Criminal Court exclusively if it qualifies as a grave breach of the Geneva Conventions too, or convey that the specific "other form of sexual violence" must be considered as a grave breach "per se" by the relevant international law (conceivably covering those conducts not yet classified as grave breaches at the time that the Rome Statute was adopted).[927]

Nonetheless, none of these lines was adopted by the Preparatory Commission when elaborating the Elements of Crimes, as it will be discussed later on.

Article 8 (2) (e) addresses "other serious violations of the laws and customs applicable in armed conflicts not of an international character" and closes its subparagraph (vi) with the phrasing

> "and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions."[928]

Article 3 Common to the four Geneva Conventions handles conflicts not of an international character and states in paragraph 1:

> "the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted

[926] Rome Statute, Art. 8 (2) (a)
[927] Cottier, M. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 431-454; Rome Statute, Article 8 (2) (b) (xxii)
[928] Rome Statute, Art. 8 (2) (e) (vi)

> court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[929]

The insertion of violations of article 3 Common to the four Geneva Conventions in the Rome Statute was challenged by a handful of States (China, India, Indonesia, Pakistan, and Turkey). This was unexpected bearing in mind that the International Court of Justice had stated that Common Article 3 serves as a minimum benchmark in cases of civil conflicts:[930]

> "Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non- international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts" [931]

Also, Article 4 of the ICTR Statute had explicitly criminalized serious violations of Common Article 3 of the Geneva Conventions:[932]

> "The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977."[933]

Furthermore, previously to the Rome Conference, the Appeals Chamber of both the ICTY and the ICTR had expressly corroborated that, in accordance with current customary international law provisions, violations of Common Article 3, even in cases of internal armed conflicts, implicate in the individual responsibility of the person incurring in the infringements:[934]

> "customary international law imposes criminal liability for serious violations of common Article 3 … for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife."[935]

> "It is today clear that the norms of Common Article 3 have acquired the status of customary law in that most States, by their domestic penal codes, have criminalized acts which if committed during internal armed conflict, would constitute violations of Common Article 3. It was also held by the ICTY Trial Chamber in

[929] Geneva Conventions I, II, III, IV, Art. 3
[930] Zimmermann, A. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 475-502
[931] International Court of Justice. Nicaragua v. United States of America, Merits Judgment, p. 114, para. 219 (27 June 1986).
[932] Zimmermann, A. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 475-502
[933] United Nations, Security Council. Statute of the International Criminal Tribunal for Rwanda (1994), Art. 4
[934] Zimmermann, A. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 475-502
[935] ICTY. The Prosecutor v. Duško Tadić a.k.a. "Dule", Case No. IT-94-1. Trial Chamber, Opinion and Judgment, pp. 46-49 (7 May 1997)

> the Tadic judgment 155 that Article 3 of the ICTY Statute (Customs of War), being the body of customary international humanitarian law not covered by Articles 2, 4, and 5 of the ICTY Statute, included the regime of protection established under Common Article 3 applicable to armed conflicts not of an international character. This was in line with the view of the ICTY Appeals Chamber stipulating that Common Article 3 beyond doubt formed part of customary international law, and further that there exists a corpus of general principles and norms on internal armed conflict embracing Common Article 3 but having a much greater scope."[936]

Theoretically, the wording of Article 8 (2) (e) (vi) "and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions" could signify that "any other form of sexual violence" is under the jurisdiction of the International Criminal Court solely in case it constitutes as a serious violation of article 3 Common to the four Geneva Conventions too. Alternatively, it could mean that the determined "other form of sexual violence" must be regarded as a serious violation of article 3 Common to the four Geneva Conventions.[937]

In spite of the different terminology employed in the last criminal figure inserted in Article 8 (2) (b) (xxii), Article 8 (2) (e) (vi) and Article 7 (1) (g), they stand on a common basis. Surely, the goal of the delegates of the Rome Conference was to include a far-reaching group of relevant sexual informed crimes so as to avoid that an eventual sexual crime could not be prosecuted for a deficiency in subsuming it into one of the sexual criminal offences brought by the Rome Statute. Indeed, the drafters of the Rome Statute, recognising the gravity of sexual crimes, aimed to demonstrate to the world that sexual violence is among the most serious offences of concern of the international community and, hence, ought not to continue without punishment.[938]

Once again, the concept of sexual violence found in the ICTY and ICTR cases inspired the drafters of the Elements of Crimes of the International Criminal Court. In such case law, sexual violence can take place even in the absence of penetration or physical contact. In fact, both "ad hoc" tribunals have considered forced nudity to amount to sexual violence.[939]

In the ICTY Furundžija case, the Trial Chamber stated that:

> "international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. It would seem that the prohibition embraces all serious abuses of a sexual

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[936] ICTR. The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4. Chamber I, Judgment, para. 608 (2 September 1998).
[937] Rome Statute, Art. 8 (2) (e) (vi);
Cottier, M. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 431-454
[938] Cottier, M. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 431-454; de Brouwer, A.-M. L. M. (2005), p. 147
[939] de Brouwer, A.-M. L. M. (2005), p. 149

> nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity. As both these categories of acts are criminalised in international law, the distinction between them is one that is primarily material for the purposes of sentencing."[940]

The ICTR defined the crime of sexual violence in the Akayesu case:

> "The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or physical contact."[941]

In the Kvocka case, the ICTY tribunal referred to and held up such concept:

> "[t]he Akayesu Trial Chamber defined sexual violence as "any act of a sexual nature which is committed on a person under circumstances which are coercive." Thus, sexual violence is broader than rape and includes such crimes as sexual slavery or molestation. Moreover, the Akayesu Trial Chamber emphasized that sexual violence need not necessarily involve physical contact and cited forced public nudity as an example."[942]

Therefore, sexual violence in the case law of the International Criminal Tribunals was considered a wide-ranged concept that covers all types of sexual violence, inclusive of rape.[943]

The 1998 Slavery report also adopted such approach:

> "[r]ape falls within the broader category of "sexual violence", which this report defines as any violence, physical or psychological, carried out through sexual means or by targeting sexuality. Sexual violence covers both physical and psychological attacks directed at a person's sexual characteristics, such as forcing a person to strip naked in public, mutilating a person's genitals, or slicing off a woman's breasts."[944]

In the Rome Statute and the supplementary Elements of Crimes, the crime of sexual violence retained this feature. Indeed, it was designed to offer a wide

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[940] ICTY. The Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T. Trial Chamber, Judgment, p. 73, para. 186 (10 December 1998)
[941] ICTR. The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4. Chamber I, Judgment, paras. 598, 688 (2 September 1998).
[942] ICTY. The Prosecutor v. Miroslav Kvočka, et al., Case No. IT-98-30/1. Trial Chamber, Judgment, para. 180 (2 November 2001)
[943] de Brouwer, A.-M. L. M. (2005), p. 150
[944] United Nations, Report of the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict, PP. 7-8, para. 21

protection to victims against acts of sexual violence. It encompasses conducts such as forced nudity, mutilation of parts of the human body which present a sexual aspect (for instance, the breasts of a woman or a person´s genitals), sexual molestations, and forced abortion, which, failing to qualify as the specific sexual crimes aforementioned, find shelter in the broad scope of the sexual violence provision.[945]

Conducts which theoretically could be qualified as amounting to the crime of sexual violence, but, concomitantly, constitute a specific criminal type inserted in the Rome Statute, should be tried with basis on the particular sexual crime.[946]

Indeed, only types of sexual violence which cannot be subsumed under one of the 5 specialized sexual crimes should be prosecuted as the crime of sexual violence, for the latter is residual.[947]

4.3.6.(ii). Elements of Crimes

4.3.6.(ii).(a). Crime against humanity of sexual violence[948]

4.3.6.(ii).(a)-1. "Actus reus"

Element 1

> "The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent."

This inaugural element establishes that the crime of sexual violence can assume two forms. The first consists in committing an act of a sexual nature against one or more persons. The second involves causing such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion.[949]

The examples of coercion (fear of violence, duress, detention, psychological oppression or abuse of power, against such person or a third party, or by taking advantage of a coercive environment, or by taking advantage of such person's incapacity to give genuine consent) laid down here are a restatement of those inserted in the crimes against humanity of rape and enforced prostitution.[950]

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[945] de Brouwer, A.-M. L. M. (2005), p. 150
[946] *Ibidem*
[947] Cottier, M. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 431-454
[948] Elements of Crimes of the International Criminal Court, Art. 7 (1) (g)-6
[949] de Brouwer, A.-M. L. M. (2005), p. 148
[950] *Ibidem*; Oosterveld, V. (2011). In Sadat, L. N. (ed.), pp. 78-101

In fact, the ample concept of coercion inserted in the crime of rape was reapplied here. As a result, non-consent does not amount to a constitutive element of sexual violence.[951]

Moreover, from the expression "psychological oppression" rests explicit that sexual violence encloses not only physical but also psychological attempts against someone´s sexuality.[952]

Element 2

> "Such conduct was of a gravity comparable to the other offences in article 7, paragraph 1 (g), of the Statute"

As already stressed out, in the making of the Rome Statute were raised concerns with regards to the phrasing "comparable gravity", if it required penetration as the crime of rape.[953]

The negotiations on the elements of crimes made it explicit that the conduct must be "of a gravity comparable to the other offences in article 7, paragraph 1 (g), of the Statute", and not only rape, in consonance with the findings of the "ad hoc" tribunals that sexual violence covers a large variety of conducts, ranging from the invasion of sexual organs to humiliating acts that dispense physical contact.[954]

Undoubtedly, element 2 demands seriousness of the conduct (either carry out an act of a sexual nature against a person or cause somebody to participate of an act of a sexual nature by force, or by threat of force or coercion) to be equivalent to the crimes of rape, sexual slavery, forced pregnancy, enforced sterilization, or enforced prostitution.[955]

As a result, the expression "comparable gravity" should not be taken as ruling out conducts which do not imply penetration or physical contact.[956]

Element 3

> "The perpetrator was aware of the factual circumstances that established the gravity of the conduct"

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[951] Boot, M., revised by Hall, C. K. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 206-216; de Brouwer, A.-M. L. M. (2005), p. 148

[952] United Nations, Report of the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict, para. 21;
Boot, M., revised by Hall, C. K. (2008). Article 7 Crimes Against Humanity, para. 1(g). In Triffterer, O., & Ambos, K. (eds.), pp. 206-216

[953] de Brouwer, A.-M. L. M. (2005), p. 148; Rome Statute, Art. 7 (1) (g)

[954] Oosterveld, V. (2011). In Sadat, L. N. (ed.), pp. 78-101

[955] de Brouwer, A.-M. L. M. (2005), p. 148

[956] Boot, M., revised by Hall, C. K. (2008). Article 7 Crimes Against Humanity, para. 1(g). In Triffterer, O., & Ambos, K. (eds.), pp. 206-216

The third element does not demand the perpetrator to proceed to a legal analysis of the seriousness of the act. Certainly, the perpetrator must only be conscious of the facts that informed the gravity of his act.[957]

4.3.6.(ii).(a)-2. "Mens Rea"

Element 4

> "The conduct was committed as part of a widespread or systematic attack directed against a civilian population."

Once more, the conduct (to perpetrate an act of a sexual nature against a person or cause somebody to participate of an act of a sexual nature by force, or by threat of force or coercion) must be part of course of action targeting civilians. Such course of action must produce several victims, be carried out within a wide geographic region (widespread), or be conducted in accordance with a policy/strategy (systematic).

Element 5

> "The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population."

The perpetrator ought to know that his act was part (or at least intended it to be part) of the attack described in element 4.

4.3.6.(ii).(b). War crime of sexual violence

4.3.6.(ii).(b)-1. International armed conflicts[958]

"Actus reus"

Element 1

> "The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent."

Element 1 is a reproduction of element 1 of the crime against humanity of sexual violence, and, hence, brings the same two modes of incurring in the crime of sexual violence: committing an act of a sexual nature against one or more person, or causing such person or persons to engage in an act of a sexual nature.

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[957] *Ibidem*, p. 215, para. 53

[958] Elements of Crimes of the International Criminal Court, Art. 8 (2) (b) (xxii)-6

Further, so as to be qualified as sexual violence within the provisions of the Rome Statute (oppositely to a simple sexual act), the conduct must be informed by coercion, in the terms laid in the war crimes of rape and enforced prostitution.[959]

Element 2

> "The conduct was of a gravity comparable to that of a grave breach of the Geneva Conventions"

This element is the interpretation provided by the International Criminal Court Preparatory Commission of the phrasing of Article 8 paragraph 2 (b) (xxii) of the Rome Statute "also constituting a grave breach of the Geneva Conventions".[960]

The term "also constituting" generated an intense discussion due to its lack of precision. The International Criminal Court Preparatory Commission, influenced by the Women´s Caucus´ lobby, decided to regard the statement "also constituting a grave breach of the Geneva Conventions" of the Rome Statute as meaning "of a gravity comparable to that of a grave breach of the Geneva Conventions".[961]

Nevertheless, such understating is not in consonance with the wording of the concept inserted in the Rome Statute and, thus, is not binding on the International Criminal Court judges, in the terms of Article 9, paragraph 3, of the Rome Statute.[962]

Having said that, it is noteworthy that the interpretation given to the phrasing of Article 8 paragraph 2 (b) (xxii) agrees with the main goal behind it, specifically, the willingness to establish a threshold and ban "less relevant" types of sexual violence (those not be important enough to be among the most serious crimes of concern to the international community), whose prosecution before the International Criminal Court would be misplaced.[963]

All and all, in the terms of the Element 2, so that it can be subsumed in the terms of the Rome Statute, "any other form of sexual violence" must reach the required minimum limit of gravity comparable to a grave breach of the Geneva Conventions, as, for example, torture or inhuman treatment, including biological experiments, wilfully causing great suffering, or serious injury to body or health, or, tenably, one of the 5 particular types of sexual crimes enumerated in Article 8 paragraph 2 (b) (xxii), since the latter are considered "per se" grave breaches. In fact, nowadays it is largely acknowledged that rape and other types of sexual violence perpetrated during armed conflict constitute war crimes and grave breaches.[964]

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[959] Cottier, M. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 431-454
[960] *Ibidem*
[961] *Ibidem*
[962] *Ibidem*
[963] *Ibidem*
[964] *Ibidem*

Element 3

> "The perpetrator was aware of the factual circumstances that established the gravity of the conduct"

The perpetrator has to be conscious of the factual (but not legal) circumstances that prompted the seriousness of the conduct.

"Mens rea"

Element 4

> "The conduct took place in the context of and was associated with an international armed conflict"

There must be established a sufficient nexus between the act of sexual violence and the international armed conflict.[965]

Element 5

> "The perpetrator was aware of factual circumstances that established the existence of an armed conflict"

Also, it is demanded form the perpetrator some type of knowledge about the factual circumstances that gave rise to the international armed conflict.[966]

4.3.6.(ii).(b)-2. Armed conflict not of an international character

"Actus reus"

Element 1

> "The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent"

The terms of element 1 of the war crime of sexual violence in armed conflict not of an international character (Article 8 (2) (b) (xxii)-6) are precisely the same as those inserted in element 1 of the war crime of sexual violence in armed conflict of an international character (Article 8 (2) (b) (xxii)-6). Therefore, the observations made there apply here.[967]

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[965] Dörmann, K. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 300-322
[966] *Ibidem*
[967] Zimmermann, A. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 475-502

Element 2

> "The conduct was of a gravity comparable to that of a serious violation of article 3 common to the four Geneva Conventions"

Article 8 (2) (e) (vi) of the Rome Statute stated, in relation to armed conflicts not of an international character, that

> "any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions"[968]

is subject to the jurisdiction of the International Criminal Court.

It means that sexual acts beyond rape, forced pregnancy, sexual slavery, enforced prostitution and enforced sterilization perpetrated in internal armed conflict solely could be prosecuted before the ICC in case they also amount to a serious violation of article 3 common to the four Geneva Conventions. This interpretation is availed by the employment of the word "also" and by the fact that a comma separates the first 5 criminal figure and "any other form of sexual violence", entailing that "also constituting a serious violation of article 3 common to the four Geneva Conventions" is to be regarded as a threshold that must be met.[969]

Moreover, the term "also" corroborates the widely accepted understanding that the crimes of rape, forced pregnancy, sexual slavery, enforced prostitution and enforced sterilization consist in serious violations of common Article 3 "per se".[970]

Notwithstanding that, when determining the constitutive elements of this crime, the Preparatory Commission resolved to follow the same path it headed to set up the boundaries of Article 8 (2) (b) (xxii) of the Rome Statute. Indeed, The Preparatory Commission, interpreting "also constituting a serious violation of article 3 common to the four Geneva Conventions", adopted the wording

> "of a gravity comparable to that of a serious violation of article 3 common to the four Geneva Conventions."[971]

As a consequence, symmetrically to the situation found in the war crime of sexual violence in armed conflict of an international character, here the wording of element 2 does not coincide with the definition inserted in Article 8 (2) (e) (vi) of the Rome Statute and, hence, is not binding on the judges of the International Criminal Court (Article 9, paragraph 3, Rome Statute).[972] It will be possible to see eventual effects of this issue in the study of the practice of the International Criminal Court.

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[968] Rome Statute, Art. 8 (2) (e) (vi)
[969] Zimmermann, A. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 475-502
[970] *Ibidem*
[971] Rome Statute, Art. 8 (2) (e) (vi); Elements of Crimes of the International Criminal Court, Art. 8 (2) (b) (xxii)-6, Element 2, (e) (vi)-6, Element 2
[972] Cottier, M. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 431-454

Element 3

> "The perpetrator was aware of the factual circumstances that established the gravity of the conduct"

This element coincides with element 3 of Article 8 (2) (b) (xxii)-6, Elements of Crimes. The perpetrator is required to be conscious of factual circumstances that arouse the gravity of his conduct. Awareness of legal circumstances is not demanded.

"Mens rea"

Element 4

> "The conduct took place in the context of and was associated with an armed conflict not of an international character"

Element 5

> "The perpetrator was aware of factual circumstances that established the existence of an armed conflict"

Except for the requirement that the armed conflict must be not of an international character, Elements 4 and 5 of the war crime of sexual violence in armed conflict not of an international character are an identical to Elements 4 and 5 of the war crime of sexual violence in armed conflict of an international character (Article 8 (2) (b) (xxii)-6).[973]

Therefore, the act of sexual violence must be wedded to the armed conflict not of an international character.[974]

Moreover, it is demanded form the perpetrator some kind of knowledge about the factual circumstances which triggered the establishment of the armed conflict not of an international character.

4.4. Conclusion

The establishment of the International Criminal Court coronated the evolving process of the internationally criminalizing sexual and gender-based crimes. The drafters of the Rome Statute attached great importance to the relevance of gender in the commission of criminal offences under the Statute.[975]

[973] Zimmermann, A. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 475-502
[974] Dörmann, K. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 300-322
[975] ICTR. The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4. Chamber I, Judgment, para. 598 (2 September 1998).

As a result, the Rome Statute was the inaugural instrument in international law to present a broad roster of sexual and gender-based crimes and regard them as war crimes (in both international and non-international armed conflicts).[976]

Moreover, the Rome Statute, apart from including the crime of rape among which constitute crimes against humanity (as the two “ad hoc” International Criminal Tribunals), extended the list of sexual and gender-based crimes that constitute crimes against humanity. In fact, it established that the following crimes are to be prosecuted under the head crimes against humanity: sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, and persecution on the grounds of gender.[977]

Also, the commission of sexual and gender-based crimes with intent to destroy, either in whole or in part, a national, ethnic, racial, or religious group can amount to genocidal acts.[978]

From a broad point of view, the Rome Statute considerably expanded the range of situations in which one can be regarded responsible for committing sexual and gender-based crimes.

[976] International Criminal Court, the Office of the Prosecutor. Policy Paper on Sexual and Gender-Based Crimes, pp. 9-11 (9 June 2014).
[977] International Criminal Court, the Office of the Prosecutor. Policy Paper on Sexual and Gender-Based Crimes, pp. 5, 9 (9 June 2014); Rome Statute, Art. 5 (g) (h)
[978] International Criminal Court, the Office of the Prosecutor. Policy Paper on Sexual and Gender-Based Crimes, pp. 5, 9 (9 June 2014); Rome Statute, Art. 6

5. The victims of sexual and gender-based crimes in the Rome Statute

5.1. Antecedents

In spite of the increase of legal instruments protecting human rights and the startling number of persons victimised in the subsequent 50 years to the World War II (there were roughly 70-170 million mortal victims- a number twice as high as the number of casualties during the two World Wars- caused by around 250 international and non-international conflicts), the first International Criminal Tribunals, instead of opting for a victim-oriented approach, decided to follow the usual neglect to which war victims traditionally have been submitted, and, in general, did not pay much regard to victims.[979]

At the Nuremberg Trials, the procedure was based on written sources, and, solely sporadically, victims figured as witnesses.[980]

Indeed, the role played by victims and survivors of the Nazi regime and their rights were understated during the Nuremberg Trials proceedings. This can be somehow surprising bearing in mind that one of the central goals of the Nuremberg Trials was to promote justice and vindicate millions of victims of the Nazism. The American and British prosecutors did not call any survivors to provide evidence. Even though French and Russian prosecutors called survivors to testify, the role of the evidence provided by the latter was incidental. Certainly, the trials were predominantly directed by the Americans, thus, following their prosecution case and method.[981]

Furthermore, apart from the fact that the American and British prosecutors mistakenly did not call any survivor to testify, another factor contributed for the exclusion of the victims and survivors from the trial: the 1945 Charter of the International Military Tribunal, which established the Nuremberg Military International Tribunal, did not include the words “victims” and “survivors”. This entails that, in the constitution of the Tribunal, it was not foreseen that survivors would give testimony or that they would play a part in the proceedings, and, logically, it was not envisaged that survivors would have right to be protected and supported before, during and after testifying. Moreover, before and during the trials there was no discussion about the possibility of giving or awarding some type of reparation to victims and survivors.[982]

The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda made more use of witness testimony, and were attuned to the concept that victims should, at least, not be subject to further victimisation by the system of international criminal justice.[983]

The 1993 ICTY Statute included innovative and forward-looking measures to help and guard victims, which constituted a significant advancement for the rights and

[979] Bassiouni, M. C. (2006), pp. 203-279; Mégret, F. (2012); pp. 23-27
[980] Mégret, F. (2012), pp. 23-27
[981] Garkawe, S. (2006), p. 86
[982] *Ibidem*
[983] Mégret, F. (2012), pp. 23-27

interests of the victims in the international scenario. The ICTY was invested with competence to create specific procedural rules or measures to protect victims and witnesses. A Victims and Witnesses Section was constituted to provide support to victims and help them when dealing with the Tribunal.[984]

Indeed, Rule 34 (A) determined that

> "[t]here shall be set up under the authority of the Registrar a Victims and Witnesses Section consisting of qualified staff to:
>
> (i) recommend protective measures for victims and witnesses in accordance with Article 22 of the Statute; and
>
> (ii) provide counselling and support for them, in particular in cases of rape and sexual assault."[985]

Subparagraph (ii) demonstrates that victims regarded "vulnerable", in particular women and children, were object of distinguished consideration in the rules of the ICTY.[986]

Another example of the special treatment dispensed towards women and children is Rule 96 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia. This Rule, disposing about evidence in cases of sexual assault, provides that "no corroboration of the victim's testimony" is demanded. It also establishes that[987]

> "consent shall not be allowed as a defence if the victim
>
> (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
> (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;" [988]

and that "prior sexual conduct of the victim shall not be admitted in evidence."[989]

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[984] Garkawe, S. (2006), pp. 86-87; ICTY. Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, Rule 34, (A) (i) (ii) (11 February 1994);
United Nations, Security Council. Statute of the International Criminal Tribunal for the Former Yugoslavia (1993), Arts. 15, 20 (1), 22;

[985] ICTY. Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, Rule 34, (A) (i) (ii)

[986] Garkawe, S. (2006), pp. 86-87; International Criminal Tribunal for the former Yugoslavia´s Statute, Art. 22; ICTY. Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, Rules 69, 74, 75, 90 (B), 96, 98 (B), 105, 106

[987] ICTY. Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, Rule 96 (i)

[988] ICTY. Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, Rule 96 (ii) (a) (b)

[989] ICTY. Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, Rule 96 (iv)

The main feature of the ICTY in relation to victims was that for the first time in history an international criminal court made an effort towards facilitating the reparation or compensation of victims. However, there were few provisions on reparation. Moreover, the existent ones were insufficient and only went so far as to provide that victims could appear before national courts with an international condemnatory judgment holding guilty the person(s) who incurred in criminal offence(s) against them, but this seldom happened. Another downside was that victims were not considered as parties to the ICTY proceedings. The 1994 Statute of the ICTR and its Rules of Procedure and Evidence contained similar measures to those inserted in the ICTY Statute.[990]

All and all, even though the "ad hoc" International Criminal Tribunals´ provisions which related to victims contained measures of protection and reparation (the latter circumscribed to restitution and compensation), they failed to outline victims´ participation in proceedings (the role of the victims was seen as a mere instrument to make progress the cases) and a well-grounded possibility of claiming reparations.[991]

As a result, the "ad hoc" International Criminal Tribunals came short of granting more significant and palpable justice.[992]

The victims' dissatisfaction with these Tribunals was one of the catalyst elements for including further victim-oriented provisions in the constitution of the International Criminal Court.[993]

Certainly, fostered by the unsatisfactory answers of the "ad hoc" International Criminal Tribunals to the victims´ needs, the movement to establish the International Criminal Court almost from its origin adopted a different perspective of the victims´ role and status.[994]

In the first place, the International Criminal Court was not to be constituted by the Security Council and pursued other sources of legitimacy.[995]

The States Parties to the Rome Statute established the International Criminal Court "as an independent permanent institution in relationship with the United Nations system." A relationship agreement between the ICC and the United

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[990] Garkawe, S. (2006), pp. 86-87; ICTR. Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, Rules 34 (A) (i) (ii), 39 (ii), 40 (iii), 65 (B), 69, 75 (13 May 1995); Mégret, F. (2012), pp. 23-27; United Nations, Security Council. Statute of the International l Criminal Tribunal for Rwanda, Arts. 14, 19 (1), 21

[991] Donat-Cattin, D. (1999). In Lattanzi, F., & Schabas, W. A. (eds.), pp. 251-277; Moffett, L. (2014 a), p.1; Nitti, G., & Bourguiba, L. (2012). Victim´s access to the International Criminal Court: Much remains to be done. In Michelon, C., Clunie, G., McCorkindale, C., & Psaras, H. (eds.), pp. 287-302

[992] Moffett, L. (2014 a), p.1

[993] *Ibidem*

[994] Nitti, G., & Bourguiba, L. (2012). In Michelon, C., Clunie, G., McCorkindale, C., & Psaras, H. (eds.), pp. 287-302

[995] *Ibidem*

Nations was approved by the Assembly of States Parties and concluded by the President of the Court in 2004.[996]

Moreover, civil society groups (in particular Redress and Human Rights Watch) had an important role in the setting up of the International Criminal Court. These groups were more prone to consider international criminal justice as a way of providing justice to victims instead of only, for instance, a channel to achieve both international peace and security.[997]

Further, associations of victims were frustrated and disappointed with the international criminal tribunals that had been created until then and by several legal developments related to the human right to reparation, fact that impacted the debates in the 1990s. The pressure exerted by these agents and circumstances rebounded in the Rome Conference.[998]

Indeed, the insertion of the victim-oriented norms in the Rome Statute resulted from arduous work from such groups and associations.

The 1994 Draft Statute of the International Criminal Court of the International Law Commission had merely 3 articles destined to the safeguard of victims:[999]

Article 26 (2) (a) disposed that, in the investigation of alleged crimes, the Prosecutor could request the presence of and question suspects, victims and witnesses.[1000]

Article 38 stated that it is among the functions of the Trial Chamber to

> "ensure that a trial is fair and expeditious and is conducted in accordance with this Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses."[1001]

Article 43, on protection of the accused, victims and witnesses stated that the Court was responsible for taking the necessary measures so as to protect the accused, victims and witnesses, and, to achieve such goal, could conduct closed proceedings and permit the presentation of evidence by electronic or other special means.[1002]

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[996] Rome Statute, Arts. 1-2, United Nations, General Assembly. Negotiated Relationship Agreement between the United Nations and the International Criminal Court, Preamble
[997] Mégret, F. (2012), pp. 23-27
[998] *Ibidem*
[999] Vázquez Pedreño, J. (2014), pp. 248-249
[1000] United Nations, International Law Commission. Report of the International Law Commission on the work of its forty-sixth session, Draft Statute for an International Criminal Court with commentaries 1994, Art. 26 (2) (a)
[1001] United Nations, International Law Commission. Report of the International Law Commission on the work of its forty-sixth session, Draft Statute for an International Criminal Court with commentaries 1994, Art. 38 (2)
[1002] United Nations, International Law Commission. Report of the International Law Commission on the work of its forty-sixth session, Draft Statute for an International Criminal Court with commentaries 1994, Art. 43

It was rather an incipient start. However, the movement pro-victims was empowered by two factors. First, the negotiations of the contents of the Rome Statute coincided with an advance in the conception of the relevance of victims in both international human rights law and international humanitarian law. Second, at the same time, there was a strengthening of the restorative justice in criminal justice.[1003]

Stimulated by these circumstances, the movement pro-victims gained strength and influenced the debates. Fiona McKay, representing REDRESS, in behalf of the Victims´ Rights Working Group at the Rome Conference of the International Criminal Court, affirmed in a 1998 statement that:

> "It is this theme of how the ICC can do justice in the eyes of victims that I wish to take up.
>
> The establishment of an international criminal court, able to bring to justice those responsible for the most heinous crimes, is itself an important symbol for survivors of those crimes.
>
> But punishing criminals is not enough. There will be no justice without justice for victims. And in order to do justice for victims, the ICC must be empowered to address their rights and needs. There is increasing recognition at both international and national levels of the need to ensure that criminal justice does take account of victims' rights:
>
> • At the international level, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power calls for a greater responsiveness of judicial processes to the needs of victims, and for victims to be treated with compassion and respect for their dignity.
> …
> Victims have a wide range of needs which must be met if the process of healing and reconciliation is to take place. They need to have the opportunity to speak the truth about what happened to them, however painful that might be. They also need to hear the truth: to receive answers, and official acknowledgement concerning the violations. They need to be protected from further harm. They need to be involved in the judicial process. And they need compensation, restitution and rehabilitation. All these needs, now largely recognized in international law, have been translated into rights.
>
> It should be recognized that victimisation affects not only the individual victim but families, communities and whole societies."[1004]

[1003] Schabas, W. A. (2011), p. 172

[1004] Victims Rights Working Group, advocating for the rights of victims at the International Criminal Court. Rome Conference for the establishment of an International Criminal Court, Speech by Fiona Mckay on behalf of the Victims Rights Working Group (16 June 1998).

In the same statement, McKay also focused on how the International Criminal Court could adequately and effectively attend to the needs and rights of victims:

> "[f]irst, it is essential that the Court be able to guarantee protection for victims and other witnesses in the proceedings. This means a strong and effective victims and witnesses unit with adequate powers and resources.
>
> Second, women - who are a majority of victims and are often victims of sexual or gender violence - must have appropriate structures and personnel with gender expertise to ensure proper respect and treatment. Recognition of crimes against women is itself a crucial aspect of justice and the healing process.
>
> Third, child victims will also require specialised treatment and mechanisms.
>
> Fourth, it is important that victims are involved in the judicial process as more than mere bystanders. Adequate provision must be made for their effective participation in the proceedings.
>
> Fifth, the Court must be able to ensure the right of victims and their families to reparation. Reparation is defined in the draft UN Principles and Guidelines on the right to reparation for violations of human rights and humanitarian law. It includes not only compensation but also restitution, rehabilitation, satisfaction and guarantees of non-repetition.
>
> Finally, if the Court proves able to effectively bring to justice those responsible for the crimes within its jurisdiction, that will do most of all to make victims feel that justice has been done."[1005]

Therefore, the engagement of non-governmental organizations was crucial for the insertion of measures containing victims´ rights.[1006]

As a result of their lobby, an unparalleled role was conceded to the victims in the creation of the International Criminal Court through the enactment of the Rome Statute.[1007]

Regarding the special treatment dispensed towards victims of sexual or gender violence and the insertion of specific measures to protect and support them in the Rome Statute, it is necessary to bear in mind that there were other elements which contributed to them being leveraged to a group entitled to receive extra protection and assistance from the Court.

[1005] *Ibidem*

[1006] Nitti, G., & Bourguiba, L. (2012). In Michelon, C., Clunie, G., McCorkindale, C., & Psaras, H. (eds.), pp. 287-302

[1007] Mégret, F. (2012), pp. 23-27

Indeed, the feminist movement, especially after World War II, emphasised that criminal law not only does not protect victims but also re-victimises them (re-victimisation or secondary victimisation refers to the victimisation that takes place not as a direct consequence of the crime but by how institutions and individuals respond to the victim, in this case, by the International Criminal Court), being gender violence the most remarkable example. Furthermore, it highlighted that the first victimologists were prone to blame the women victims of violent crimes, especially in cases of crimes of a sexual nature.[1008]

Although it is not possible to affirm that there is a proper feminist victimology, under this concept three principles have been established: rejection of gender-centrism; patriarchy as an element explaining the criminalisation and victimisation of women; and it was reached the conclusion that usually women victims form a minority without power, in qualitative terms, and they suffer effective discrimination by control agents.[1009]

Therefore, there was a tendency in Criminology to pay attention to the implication of the gender category in the commission of crimes, and the unfairness with which women were treated in particular in crimes of violence of a sexual character.[1010]

In this framework, the international community adopted numerous substantial steps so as to respond to the increasing demand to acknowledge sexual and gender-based crimes as grave crimes nationally and internationally.[1011]

A great attainment in this process was the enlistment of sexual (rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and sexual violence, which encompass physical and non-physical acts with a sexual factor) and gender-based crimes (those perpetrated against persons, either male or female, in view of their sex and/or socially fabricated gender roles, which can cover non-sexual attacks on male and female due to their gender) in the Rome Statute, and the particular protection and support dispensed to victims of sexual and gender-based violence (within the groundbreaking protection and assistance to victims in general).[1012]

Certainly, cognisant of the vulnerability and specific needs of the victims of sexual and gender-based crimes, the Rome Statute and subsequent related legal instruments have further established an even more attentive system of protection and assistance to this category of victims, as it will be seen below.

[1008] Varona Martínez, G. (2012), pp. 8, 19, 25; United Nations Office on Drugs and Crime (1999), p. 9; Wolfgang, M. E., & Singer, S. I. (1978), pp. 379-394

[1009] Varona Martínez, G. (2012), pp. 7-8

[1010] *Ibidem*

[1011] International Criminal Court, the Office of the Prosecutor. Policy Paper on Sexual and Gender-Based Crimes, pp. 5, 9 (9 June 2014).

[1012] Rome Statute, Arts. 7 (1) (g), 8 (2) (b) (xxii), (e) (vi); International Criminal Court, the Office of the Prosecutor. Policy Paper on Sexual and Gender-Based Crimes, p. 3 (9 June 2014).

5.2. Rome Statute and the International Criminal Court: innovations in the rights granted to victims

5.2.1. Introduction

The Rome Statute adopted a solid victim constituent.[1013]

Undoubtedly, during the negotiations of the Statute, it was a priority to ensure the observance of the fundamental values of the International Criminal Court, namely, the promotion of greater peace and security by means of liability for crimes, and the respect for victims' rights and dignity. This was a central and decisive issue for it entailed the acknowledgement of the States involved in the elaboration of the Statute that the International Criminal Court besides its retributive role, had also a restorative one.[1014]

Although the traditional conceptions associated with due process and criminal justice were not abandoned, the drafters of the Statute decided to deploy a victimological approach, elevating victims' accounts to an eminent position in the international criminal justice process.[1015]

As a consequence, the Rome Statute is permeated by a victim-oriented spirit, bringing several provisions on the protection and support of the victims, and has been regarded as turning point in Victimology.[1016]

Surely, the Statue was pioneer in the history of international criminal justice, and, for the first time ever, conceded to victims the chance to bring their views and considerations to the Court. Thus, the victim-based provisions inserted in the Statute grant victims with the possibility to have a say in the proceedings of the International Criminal Court.[1017]

In the preamble it is disposed that the States Parties to the Statute were

> "[m]indful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity."[1018]

The reference to the suffering experienced by millions of innocent human beings is an attempt to guarantee that the alarming number of victims and their suffering persists on the focus of the collective human conscience. In fact, the idea of

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[1013] Moffett, L. (2014), p. 86

[1014] International Criminal Court, Office of Public Counsel for Victims. Representing Victims before the International Criminal Court, A Manual for legal representatives appearing before the Court, p. 26

[1015] Benhassine, S. (2015), pp. 11-12; Groenhuijsen, M. S., & Pemberton, A. (2011). In Letschert, R., Havemen, R., de Brouwer, A.-M. L. M., & Pemberton, A. (eds.), pp. 9-34

[1016] Groenhuijsen, M. S. (2005). In Snyman, R., & Davis, L. (eds.), pp. 333-351

[1017] International Criminal Court, The Office of Public Counsel for Victims. Helping victims make their voice heard, pp. 3, 11; International Criminal Court. Victims Participation and Reparations Section´s booklet, Victims before the International Criminal Court, A guide for the participation of victims in the proceedings of the Court, p. 12; International Criminal Court website, Victims

[1018] Rome Statute, Preamble

justice was reviewed so that, beyond referring to individuals or categories of victims, it would be delivered in behalf of humankind.[1019]

The preamble is followed by an array of rights conceded to victims along the Rome Statute, which constituted one of its great novelties.[1020]

Comparing with the procedural rules of the two "ad hoc" International Criminal Tribunals, the main improvements of the Rome Statute are the enlargement of the protection conferred to victims, the extension of the victims´ participation in the proceedings, and the ameliorated provisions regarding reparation.[1021]

Certainly, the Rome Statute confers a more ample procedural role to victims by means of acknowledgment, participation, safeguarding, and aid measures, opposed to prior International Criminal Tribunals.[1022]

5.2.2. The definition of victim for the International Criminal Court

The Rome Statute did not elaborate a concept of victim. Such task was undertaken by the drafters of the Rules of Procedure and Evidence of the Rome Statute. Inspired by the definition of victims of the 1985 UN Declaration on Justice for Victims, the Preparatory Commission established in Rule 85 the following definition:[1023]

> "For the purposes of the Statute and the Rules of Procedure and Evidence:
>
> (a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
>
> (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes."[1024]

Therefore, in accordance with Rule 85, not only natural people can be regarded as victims but also organisations or institutions. In fact, Rule 85 (b) wording "[v]ictims may include organizations or institutions" implies that organisations and

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[1019] Triffterer, O. (2008), preamble. In Triffterer, O., & Ambos, K. (eds.), p. 7
[1020] International Criminal Court. Victims Participation and Reparations Section´s booklet, p. 12
[1021] Garkawe, S. (2003), pp. 345-367
[1022] Moffett, L. (2014), p. 86
[1023] de la Cuesta Arzamendi, J. L. (2018), pp. 229-248; de Brouwer, A.-M. L. M. (2005), p. 25, footnote 96; Fernandez de Gurmendi, S. A. (2001). In Lee, R. S. K. & Friman, H. (eds.), pp. 427-433; International Criminal Court. Situation in the Democratic Republic of the Congo, Nº. ICC-01/04. Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6, para. 66 (17 January 2006); United Nations, General Assembly. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (29 November 1985)
[1024] Rules of Procedure and Evidence of the International Criminal Court, Rule 85

institutions maybe be rendered victims, and it is a task of the International Criminal Court, in view of the peculiarities of the case, to determine if certain organizations and institutions should be considered victims.[1025]

It is important to stress that a victim can be a person that endures harm as a consequence of a criminal offence directed at someone else as, for instance, a relative of a person who has been murdered. Indeed, upon recognising that the notion of "family" can have numerous cultural variations, the Court understood that it is necessary[1026]

> "to have regard to the applicable social and familial structures. In this context, the Court should take into account the widely accepted presumption that an individual is succeeded by his or her spouse and children."[1027]

The notion of "harm" was not defined by the Rome Statute or the Rules of Procedure and Evidence. In spite of that, the Court has understood that it relates to "hurt, injury and damage". The harm does not have to be direct, but it is necessary that it is personal to the victim. Harm can be material, physical, and psychological.[1028]

The causal relation between the criminal offence and the harm for the ends of reparations is to be established by the Court in face of the particularities of the case.[1029]

Still with regard to the concept of victim employed by the International Criminal Court, in a decision on Victims' Participation in the Prosecutor v. Lubanga case, the Trial Chamber I, applying what the Rome Statute disposes in its Article 21 (3) ("The application and interpretation of law … must be consistent with internationally recognized human rights"), and taking into account the decision of the Appeals Chamber that[1030]

> "makes the interpretation as well as the application of the law applicable under the Statute subject to internationally recognised human rights",[1031]

[1025]de la Cuesta Arzamendi, J. L. (2018), pp. 229-248; de Brouwer, A.-M. L. M. (2005), p. 25; Fernandez de Gurmendi, S. A. (2001). In Lee, R. S. K. & Friman, H. (eds.), pp. 427-433

[1026] International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Order for Reparations (amended), p. 2, para. 7 (3 March 2015); International Criminal Court. Victims Participation and Reparations Section´s booklet, p. 9

[1027] International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Order for Reparations (amended), p. 2, para. 7 (3 March 2015)

[1028] International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Order for Reparations (amended), p. 3, para. 10 (3 March 2015)

[1029] International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Order for Reparations (amended), p. 3, para. 11 (3 March 2015)

[1030] Rome Statute, Art. 21 (3)

[1031] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, p. 18, para. 36 (14 December 2006).

provided a definition of victims with basis on principles 8 and 9 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[1032]

In consonance with these principles:

> "victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.
>
> 9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim."[1033]

It is noteworthy that the definition of victim contained in the Rules of Procedure and Evidence of the Rome Statute is broader than the adopted by the ICTR and ICTY- "[a] person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed."[1034]

Indeed, the ICTR and ICTY´s concept is limited, whereas the International Criminal Court´s definition determines that all those that have been harmed by the perpetration of any crime under the jurisdiction of the Court may qualify as victims, hence encompassing immediate family members or dependants of the person who suffered direct harm from the criminal offence.[1035]

Further, the International Criminal Court´s definition regards a person as a victim since the moment that he/she reports the crime, while in accordance with the wording of the ICTR and ICTY´s concept someone only becomes a victim after the guilt of the accused has been determined.[1036]

[1032] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision on Victims' Participation, para. 35 (18 January 2008).
[1033] *Ibidem*; United Nations, General Assembly. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Principles 8 and 9 (16 December 2005).
[1034] ICTR. Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, Rule 2 (A); ICTY. Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, Rule 2 (A)
[1035] de Brouwer, A.-M. L. M. (2005), p. 25
[1036] *Ibidem*

5.3. Protection and support to victims and witnesses in the proceedings

In the International Criminal Court system, the prominence of the protection and support of victims and witnesses stands out. Undoubtedly, having in mind the vulnerability of victims and witnesses, the Rome Statute, its Rules of Procedure and Evidence, the Regulations of the Court, Regulations of the Office of the Prosecutor and the Regulations of the Registry brought norms designed to safeguard and assist them.[1037]

The goal of the Court is to protect and support victims and witnesses, shielding them from the risks they are susceptible to. Certainly, the evidence of witnesses exposes the offenders, helping to hold the latter accountable for the suffering caused to victims. Therefore, the silence of victims and witnesses and even their disappearance would be of assistance to criminals and their coadjutors.[1038]

Together with the objective of preserving the victims and witnesses` safety and guarding them from retaliation and intimidation, the International Criminal Court aims to minimise other inconveniences to victims.[1039]

In fact, the establishment of measures of protection is also intended to prevent intrusion in the privacy and dignity of victims and witnesses and to decrease trauma connected with the process of giving testimony, issues that would most certainly arise in cases of sexual and gender-based violence.[1040]

The last rationale behind the safeguard measures is that without victims and witnesses, in general, the trial would not even take place. Therefore, victims are needed so as to determine the truth. In fact, the various Chambers of the International Criminal Court have remarkably recognised that the participation of victims helps them to undercover the truth.[1041]

In view of the essentiality of the victims and witnesses, on the one hand, and their exposure to potential dangers, on the other hand, the International Criminal Court system (in addition to establishing practical measures to support and guard them in the course of the Court´s proceedings) assigned bodies to specifically deal with and care for victims and witnesses, namely the Victims and Witnesses Unit (VWU), the Victims Participation and Reparations Section (VPRS), the Office of Public Counsel for Victims (OPCV) and the Trust Fund for Victims (TFV).

[1037] International Criminal Court. Regulations of the Registry, Regulations 95-96; Pikis, G. M. (2010), p. 277

[1038] *Ibidem; Ibidem*

[1039] Council of Europe, Committee of Ministers. Recommendation No. R (85) 11 of the Committee of Ministers to Member States on the Position of the Victim in the Framework of Criminal Law and Procedure (28 June 1985); de Brouwer, A.-M. L. M. (2005), pp. 231-232; United Nations, General Assembly. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Annex, Art. 6 (d)

[1040] *Ibidem; Ibidem; Ibidem*

[1041] de Brouwer, A.-M. L. M. (2005), pp. 231-232; International Criminal Court website, Victims

The Victims and Witnesses Unit and the Victims Participation and Reparations Section were set up within the Registry, whereas the Office of Public Counsel for victims was created as an independent body.[1042]

The Trust Fund for Victims was established by decision of the Assembly of States Parties for the benefit of victims and their families. The role of the Trust Fund will be addressed in the analysis of reparations to victims.[1043]

The Victims and Witnesses Unit was set up by the Registrar in accordance with Article 43 (6) of the Statute. Its objective is

> "to provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses."[1044]

Thus, the VWU`s function is bi-folded: it is in charge of providing both protection measures and services of assistance.[1045]

The Unit is responsible for providing victims, witnesses, and others who are in danger due to the witnesses´ testimony (as, for example, family members) with pertinent protective and security measures (for instance, witness anonymity). The protection envisaged is rather wide and the Unit is bound to formulate long-term and short-term plans for protecting them.[1046]

Also, Article 68 (4) determines that the Victims and Witness Unit of the Registry has to

> "advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6."[1047]

When victims testify as witnesses, the VWU offers administrative and logistical support so as to expedite their appearance before the International Criminal Court.[1048]

Further, it must take gender-sensitive measures in order to facilitate the testimony of victims of sexual violence crimes at all stages of the proceeding.[1049]

[1042] Rome Statute, Art. 43 (6); International Criminal Court. Regulations of the Court, Regulation 81 (1)
[1043] Rome Statute, Art. 79 (1)
[1044] Rome Statute, Art. 43 (6)
[1045] Tolbert, D. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 981-991
[1046] Rome Statute, Art. 68 (4); Rules of Procedure and Evidence of the International Criminal Court, Rule 17 (2) (a) (i)
[1047] Rome Statute, Art. 68 (4)
[1048] Rules of Procedure and Evidence of the International Criminal Court, Rule 17 (1), (2) (b) (i) (ii); International Criminal Court. Victims Participation and Reparations Section´s booklet, pp. 10-11
[1049] Rules of Procedure and Evidence of the International Criminal Court, Rule 17 (2) (b) (iii)

The Unit includes staff with expertise in trauma, inclusive of trauma connected to crimes of sexual violence. Certainly, its staff must be trained in relation to victims' and witnesses' security, integrity and dignity, inclusive of matters concerning gender and cultural sensitivity. The Unit has to make available to the Court and the parties training in questions of trauma, sexual violence, security and confidentiality.[1050]

It is also the Unit´s duty to help victims, witnesses, and other persons at risk to obtain medical, psychological and other adequate assistance.[1051]

The Victims Participation and Reparations Section (VPRS) was created in accordance with the established in Regulation 86 (9) of the Regulations of the Court, being set up within the Registry in order to help victims and groups of victims, and make streamlined their access to the Court. It serves as point of entry for victims` applications to participate in the Court´s proceedings and is in charge of processing these applications.[1052]

The VPRS informs victims of their rights connected with participation and reparations in the International Criminal Court, permitting them to submit applications to the Court in case they want to do it. The Section also helps victims in obtaining legal advice and organising their legal representations.[1053]

The Office of Public Counsel for Victims (OPCV) was established in consonance with Regulation 81 of the Regulations of the Court. It was an important advance in reinforcing the victims` legal representation in proceedings before the Court.[1054]

The OPCV functions in its substantive work as a totally independent office, only falling within the remit of the Registry for purposes of administration. Counsel and assistants within the Office act with independence. Its central aim is to provide general support and assistance to the victims and their legal representative.[1055]

In fact, the functions of the OPCV consist in providing general support and assistance to the victims and their legal representative, inclusive of legal research and advice, and, upon the instruction or with the permission of the Chamber, advising on and helping with the particularised factual circumstances of the case. Hence, it enhances the competency of external legal representatives by providing

[1050] Rome Statute, Art. 43 (6); Rules of Procedure and Evidence of the International Criminal Court, Rules 17 (2) (a) (vi); 18 (d)
[1051] Rome Statute, Art. 68 (4); Rules of Procedure and Evidence of the International Criminal Court, Rule 17, (2) (a) (iii)
[1052] International Criminal Court. Regulations of the Court, Regulation 86 (9); McKay, F. (2008), pp. 2-5
[1053] International Criminal Court. Victims Participation and Reparations Section´s booklet, p. 10
[1054] de Brouwer, A.-M., & Heikkilä, M. (2013). In Sluiter, G., Friman, H., Linton, S., Zappala, S., & Vasiliev, S. (eds.), pp. 1299-1374, footnote 79; International Criminal Court. Regulations of the Court, Regulation 81; International Criminal Court, The Office of Public Counsel for Victims. Helping victims make their voice heard, p. 3
[1055] International Criminal Court. Regulations of the Court, Regulation 81 (1) (2) (4)

legal research and advice, thus, strengthening the capacity of the victims` legal representation.[1056]

Further, the Office can represent a victim or victims in the proceedings, upon the instruction of the Chamber or with its leave, in those cases in which it is in the interests of justice.[1057]

When appointed as legal representative, the OPCV´s mandate is not different from that of external legal representatives. Consequently, in fulfilling their duties, members of the Office have the same rights and prerogatives of external legal representatives of victims. They are also bound by the same obligations, inclusive of those inserted in the Code of Professional Conduct for Counsel before the International Criminal Court.[1058]

It is necessary to highlight that the OPCV´s members do not receive directions from anyone related to the handling of the representation of victims. Such independence is indispensable to perform its role of aiding the victims´ legal representatives and/ or helping and representing the victims. In fact, the independence enables the Office to carry out its work without being subordinate to any type of pressure and protects the privileged relation existent between victims and their legal representatives.[1059]

The Victims and Witnesses Unit (VWU), the Victims Participation and Reparations Section, and the Office of Public Counsel for Victims (OPCV) form part of the structure within the International Criminal Court designed to assist and support victims. Their work of is parallel. Certainly, these three bodies co-operate to guarantee that they support each other in an effective manner. The VWU, VPRS and OPCV´s functions are coordinated and directed at helping victims to have their rights wholly recognised, specifically, to be adequately represented, well-advised, and updated of the status of the proceedings.[1060]

The net of protection to victims and witnesses includes as well provisions establishing measures intended to protect and support them. Undoubtedly, beyond setting up the aforementioned bodies, the Rome Statute and related legal instruments contain further norms to assist and safeguard victims and witnesses.

Article 68 paragraph 1 of the Rome Statute is the mainstay of the protection of the victims and witnesses and establishes that:

> "The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard

[1056] *Ibidem*, Regulation 81 (4) (a); International Criminal Court, The Office of Public Counsel for Victims. Helping victims make their voice heard, p. 3
[1057] International Criminal Court. Regulations of the Court, Regulations 80 (1), 81 (4) (b) (e)
[1058] International Criminal Court. Code of Professional Conduct for counsel (2 December 2005); International Criminal Court, The Office of Public Counsel for Victims. Helping victims make their voice heard, pp. 3-4
[1059] International Criminal Court. Victims Participation and Reparations Section´s booklet, p. 18
[1060] International Criminal Court, The Office of Public Counsel for Victims. Helping victims make their voice heard, p. 4

> to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."[1061]

Rule 86 of the Rules of Procedure and Evidence of the Rome Statute, by its turn, contains a general principle relative to victims:

> "[a] Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence."[1062]

In accordance with these norms, the International Criminal Court is bound to adopt the necessary measures to shield the safety, physical and psychological well-being, honour and privateness of all victims, and, specifically, of victims of sexual and gender-based crimes, children, elderly persons, and persons with disabilities.

The safety, physical and psychological well-being, privacy and, particularly, dignity of the victim or witness encompasses the whole amplitude of the inalienable human rights established in international and national legal instruments.[1063]

By establishing this high threshold so as to safeguard victims and witnesses, the Rome Statute gave rise to a paradigm for the continuous development of law not only in international criminal justice but actually in all operating criminal justice systems.[1064]

The second part of Article 68 (1) and the last part of Rule 86 require the Court to pay regard to determined groups of victims and witnesses that are in circumstances of serious danger due to the nature of the crimes (specially, albeit not exclusively, in the cases in which the crime involves sexual or gender violence or violence against children), and/or their status, which covers their gender, age, and health condition, "inter alia". [1065]

The final part of the Article 68 (1) is related to pre-trial proceedings, phase in which it is essential the adoption of all available protection measures so as to

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[1061] Rome Statute, Art. 68 (1)
[1062] Rules of Procedure and Evidence of the International Criminal Court, Rule 86
[1063] Donat-Cattin, D. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 1275-1300; Rome Statute, Art. 68 (1)
[1064] *Ibidem; Ibidem*
[1065] *Ibidem; Ibidem*

guarantee the observance to the supra-mentioned prerogatives to which victims and witnesses are entitled to. In fact, at this stage of the proceedings the Prosecutor has to be able to impart to the victims and witnesses the extension of their rights and the important actions that the Court will take.[1066]

Along the same lines, Article 54 of the Statute affirmed that

> "[t]he Prosecutor shall:
> …
> (b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children;"[1067]

Consequently, the Prosecutor should take into consideration these practical questions so as to conduct an adequate and effective investigation and prosecution. In fact, in the consecution of his/her objective of holding guilty the perpetrators of the most heinous crimes, the Prosecutor has to be attentive to the victims and witnesses` needs, thus, avoiding to further traumatising them.[1068]

In this sense, when selecting persons to be questioned in relation to an investigation, the Office, apart from assessing the reliability of the person, and has to consider his/her safety and well-being, paying regard to all elements important to the risks of re-traumatisation.[1069]

Also, the Office has to gather all information possible on the degree of risk which a questioning can pose for that person and for others (including those persons that intermediated the contact between the Office and the person who will be questioned). Grounded on the establishment of the level of risk, the Office can consider options to questioning and the prospect of additional security measures, in examination with the Victims and Witnesses Unit, as adequate.[1070]

These dispositions reaffirm the protection to victims and witnesses and extend it to other persons (usually their relatives) who have their security endangered.

Article 68 (5) of the Statute establishes that

> "[w]here the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a

[1066] *Ibidem; Ibidem*
[1067] Rome Statute, Art. 54 (b)
[1068] Rome Statute, Art. 54 (1) (c)
[1068] Rome Statute, Art. 54 (3) (f); Bergsmo, M., & Kruger, P. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 1077-1087
[1069] International Criminal Court. Regulations of the Office of the Prosecutor, Regulation 36 (1)
[1070] International Criminal Court. Regulations of the Office of the Prosecutor, Regulation 36 (2)

> witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."[1071]

During the pre-trial phase, the Prosecutor can present summaries of the evidence, keeping the disclosure of the evidence for the trial phase. This contributes to protect the physical and psychological well-being of witnesses, who are remarkably vulnerable when they are also victims, particularly if they have suffered sexual violence crimes.[1072]

Undoubtedly, the Prosecutor is required to fully observe the rights established by the Rome Statute so as to protect persons. He/she is bound to take adequate measures "to ensure the confidentiality of information, the protection of any person or the preservation of evidence."[1073]

Therefore, the Prosecutor should be careful in the investigations so as not to infringe the prerogatives of any person, victims and witnesses included.[1074]

The Rome Statute in its Article 57 (3) (c) determines that the Pre-Trial Chamber can "[w]here necessary, provide for the protection and privacy of victims and witnesses", while Regulation 48 (2) of the Regulations of the Court determines that[1075]

> "[t]he Pre-Trial Chamber shall take such measures as are necessary… under article 68, paragraph 5, to protect the safety of witnesses and victims and members of their families."[1076]

In the same direction, Rule 107 of the Rules of Procedure and Evidence affirms that the Pre-Trial Chamber may request a review of the Prosecutor´s decision of not investigating or prosecuting and/or request the Prosecutor to transmit the information or documents in his/her possession, or summaries, "to protect the safety of witnesses and victims and members of their families."[1077]

The Trial Chamber is responsible as well for guaranteeing the protection of the witnesses and victims. Surely, the Trial Chamber must ensure that[1078]

[1071] Rome Statute, Art. 68 (5)
[1072] Donat-Cattin, D. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 1275-1300
[1073] Rome Statute, Art. 54 (1) (c) (3) (f)
[1074] Rome Statute, Art. 54 (1) (c); Bergsmo, M., & Kruger, P. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 1077-1087
[1075] Rome Statute, Art. 57 (3) (c)
[1076] International Criminal Court. Regulations of the Court, Regulation 48 (2)
[1077] Rules of Procedure and Evidence of the International Criminal Court, Rule 107 (1) (2) (3)
[1078] Rome Statute, Art. 64 (6) (e)

> "a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses."[1079]

Pursuant to Article 68 (2) of the Statute,

> "[as] an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness."[1080]

On the same subject, Rule 88 (1) establishes that

> "a Chamber may, taking into account the views of the victim or witness, order special measures such as, but not limited to, measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to article 68, paragraphs 1 and 2"[1081]

and in its paragraph 2 asserts that

> "a Chamber may hold a hearing on a motion or a request under sub-rule 1, if necessary in camera or ex parte, to determine whether to order any such special measure, including but not limited to an order that a counsel, a legal representative, a psychologist or a family member be permitted to attend during the testimony of the victim or the witness."[1082]

Still in this regard, Rule 87 (1) asserts that

> "a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2."[1083]

However, whenever possible, before ordering the protective measures disposed in Rule 87 (1) and Rule 88 (1), the Chamber should seek to obtain the agreement of the person who is the addressee of the protective measure.[1084]

[1079] Rome Statute, Art. 64 (2); Rules of Procedure and Evidence of the International Criminal Court, Rules 101 (1), 132 (2)
[1080] Rome Statute, Art. 64 (2)
[1081] Rules of Procedure and Evidence of the International Criminal Court, Rule 88 (1)
[1082] Rules of Procedure and Evidence of the International Criminal Court, Rule 88 (2)
[1083] Rules of Procedure and Evidence of the International Criminal Court, Rule 87 (1), the Rules of Procedure and Evidence
[1084] Rules of Procedure and Evidence of the International Criminal Court, Rules 87 (1), 88 (1), 107 (3)

Furthermore, taking into account that infringements of the privacy of a witness or victim can give rise to the endangerment of his/her safety, a Chamber has to be vigilant in controlling the form of questioning a witness or victim in order to prevent any intimidation or harassment, being especially attentive to avoid attacks against victims of sexual violence crimes.[1085]

It stems from these norms that the sexual/gender-based character of crimes exerts a further weight on the level of protection and support dispensed by the Court towards the victims. In fact, when providing for special measures of protection and assistance to victims, the Rome Statute and related legal texts paid specific attention to the most vulnerable groups of victims, among which the victims of gender-based and sexual crimes are enlisted. The topic of the specific protection and aid to victims of sexual and gender-based crimes will be expanded below.[1086]

Also, Regulation 21 (8) determines that

> "[a]t the request of a participant or the Registry, or proprio motu, …, the Chamber may, in the interests of justice, order that any information likely to present a risk to the security or safety of victims, witnesses or other persons, or likely to be prejudicial to national security interests, shall not be published in any broadcast, audio- or video-recording or transcript of a public hearing."[1087]

Regulation 100 of the Regulations of the Registry disposes as well about the protection and security of the victims, determining that

> "[w]here the Registry is in direct communication with victims, it shall ensure that it does not endanger their safety, physical and psychological well-being, dignity and privacy. …
>
> 2. Where a victim who communicates with the Court fears that his or her application is putting him or her or a third person at risk, or where the assessment undertaken under regulation 99, subregulations 1 and 2, concludes that such a risk might exist, the Registry may take measures under regulations 92 to 96 and/or advise the relevant Chamber on appropriate protective measures and/or security arrangements in order to protect the safety and the physical and psychological well-being of the victim or third person."[1088]

[1085] Rules of Procedure and Evidence of the International Criminal Court, Rule 88 (5)
[1086] International Criminal Court, Office of Public Counsel for Victims. Representing Victims before the International Criminal Court
[1087] International Criminal Court. Regulations of the Court, Regulation 21 (8)
[1088] International Criminal Court. Regulations of the Registry, Regulation 100

Regulation 43 (3) of the Regulations of the Registry establishes that

> "[a] request for non-publication of information may be made more than 30 minutes after the information is mentioned during the hearing if it presents a risk to the security or safety of victims, witnesses or other persons at risk, or is prejudicial to national security interests."[1089]

Regulation 42 of the Regulations of the Court tackles the question of application and variation of protective measures, establishing that

> "[p]rotective measures once ordered in any proceedings in respect of a victim or witness shall continue to have full force and effect in relation to any other proceedings before the Court and shall continue after proceedings have been concluded, subject to revision by a Chamber."[1090]

Regulation 41 permits the Victims and Witnesses Unit to

> "draw any matter to the attention of a Chamber where protective measures under rule 87 or special measures under rule 88 require its consideration."[1091]

On the subject of the Court´s requests to States Parties for cooperation, Article 87 (4) of the Rome Statute establishes that

> "the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under this Part shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families."[1092]

Also, in the terms of the Statute`s Article 93 (1) (j), the States Parties have to comply with requests by the Court to provide protection to victims and witnesses when assisting the Court with investigations or prosecutions.[1093]

Moreover, the Registrar on behalf of the Court can negotiate with the States (confidential) agreements on relocation and provision of assistance services on the territory of a State where are located traumatized or threatened victims, witnesses and others who are in peril in view of the testimony of witnesses. [1094]

[1089] International Criminal Court. Regulations of the Registry, Regulation 43 (3)
[1090] International Criminal Court. Regulations of the Court, Regulation 42 (1)
[1091] International Criminal Court. Regulations of the Court, Regulation 41
[1092] Rome Statute, Art. 87 (4)
[1093] Rome Statute, Art. 93 (1) (j)
[1094] Rules of Procedure and Evidence of the International Criminal Court, Rule 16 (5)

Further, Article 57 (3) (e) disposes that

> "[w]here a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned"[1095]

the Pre-Trial Chamber

> "can seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims."[1096]

These numerous provisions go to show that the protection to the security of victims and witnesses, as well as to their privacy and integrity, is of paramount relevance to the International Criminal Court. Certainly, the system of the Court innovated the approach of international criminal tribunals towards victims and witnesses by adopting several measures in order to guarantee the safety, physical and psychological well-being, dignity and privacy of victims, witnesses and their families.

5.3.1. Specific provisions directed at protecting victims of sexual and gender-based crimes

The victims of sexual or gender violence (natural persons who have suffered harm as a consequence of the perpetration of sexual or gender-based be crimes within the jurisdiction of the Court, namely, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of similar seriousness) are regarded vulnerable persons (those persons at a higher risk of psychological harm due to the process of appearing before the Court and/or who suffer psychosocial or physical difficulties that alter their capacity to so appear), thus, requiring particular safeguard in the Court`s proceedings.[1097]

As a result, the International Criminal Court scheme brings specific provisions aimed at safeguarding the rights and interests of victims and witnesses of such crimes and at guaranteeing the effectiveness of the investigation and prosecution of sexual and gender-based crimes.[1098]

Article 68 (1) of the Statute bounds the Court to adopt adequate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, paying regard to all relevant elements, including age, gender (meaning both sexes, males and females, within the context of society), and health, and the character of the crime, in special, albeit not limited to, in the case of crimes encompassing sexual or gender violence or violence against

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[1095] Rome Statute, Art. 57 (3) (e)
[1096] *Ibidem*
[1097] International Criminal Court. Regulations of the Registry, Regulation 94 bis (2) (b), Rules of Procedure and Evidence of the International Criminal Court, Rule 85 (a)
[1098] International Criminal Court, the Office of the Prosecutor. Policy Paper on Sexual and Gender-Based Crimes, p. 9 (9 June 2014).

children. Still pursuant Article 68 (1), as well as Article 54 (1) (b), the Prosecutor has to take the same measures, especially when investigating and prosecuting crimes that involve sexual or gender violence or violence against children.[1099]

The general principle inserted in Rule 86 determines that the Chambers (when making a direction or order) and other organs of the Court (in the performance of their duties) have to take into consideration the needs of all victims and witnesses pursuant to Article 68, particularly of victims of sexual or gender violence, children, elderly, and persons with disabilities.[1100]

Paragraph 2 of Article 68 establishes in its initial part that

> "[a]s an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means."[1101]

Here the Chambers have discretion to conduct any part of the proceedings in camera, or permit the presentation of evidence by electronic or diverse special means.

In the final part of the paragraph, it is stated that:

> "In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness." [1102]

The expression "such measures shall be implemented" (in contrast to "the Court may, to protect victims and witnesses or an accused, conduct" of the first part of the paragraph) means that when these measures (in camera hearings and other exceptions to the principle of public hearings) are requested by a victim of sexual violence or minors, the Court is obliged to accede to them.[1103]

Rule 88 (1), complementing the disposed in Article 68, paragraphs 1 and 2, provides that upon the motion of the Prosecutor or the defence, or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as adequate, a Chamber can, taking into consideration the victim or witness` views, order special measures as, for example, measures to facilitate the testimony of a traumatised victim or witness, a child, an elderly person or a victim of sexual violence. Whenever possible, before ordering the measure, the Chamber should

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[1099] Rome Statute, Arts. 54 (1) (b), 68 (1)
[1100] Rules of Procedure and Evidence of the International Criminal Court, Rule 86
[1101] Rome Statute, Art. 68 (2)
[1102] Rome Statute, Art. 68 (2)
[1103] Rome Statute, Art. s 67 (1), 68 (2); Donat-Cattin, D. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 1275-1300

endeavor to get the consent of the person who will be benefited by the special measure.[1104]

The wording of Rule 88 (1) is pretty similar to that of Rule 87 (1). However, the latter determines "lato sensu", that a Chamber can order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2, while the former establishes "stricto sensu" that a Chamber can order special measures as, for instance, measures to facilitate the testimony of a traumatised victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to Article 68, paragraphs 1 and 2.[1105]

The inclusion of the specific norm (Rule 88 (1)) subsequently the general one (Rule 87 (1)) clearly demonstrates that the International Criminal Court is obliged to be extremely attentive to the protection and participation of victims of sexual and gender-based violence, children, disabled and elderly persons in the proceedings.

Rule 88 (2) determines that a Chamber can hold a hearing on a motion or a request in the terms of under sub-rule 1, if necessary "in camera" or "ex parte", to establish whether to order any such special measure, including (albeit not limited to) an order that a counsel, a legal representative, a psychologist or a family member be allowed to attend in the testimony of the victim or the witness.[1106]

Certainly, the fact that the person is a victim of sexual or gender violence is one of the criteria taken into consideration by the International Criminal Court when determining whether a witness, a victim that appears before the Court, or a person at risk is eligible to bring an accompanying support person with him/her to the Court.[1107]

Also, pursuant Rule 88 (5), taking into account that violations of the privacy of a witness or victim can give rise to a risk to his/her security, a Chamber should be cautious in directing the way of questioning a witness or victim in order to avoid any demoralisation or harassment, paying particular regard to attacks directed against victims of crimes of sexual violence.[1108]

In fact, the judges should exercise a strict control of narrative testimony and of forbearance of aggressive examination of victims-witnesses since it is a relevant procedural mechanism to reduce the danger of re-traumatisation, to which the victims of sexual and gender-based violence are so susceptible to.[1109]

Rule 16 enlists the responsibilities of the Registrar relating to victims and witnesses and establishes that the Registrar is bound to adopt gender-sensitive

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[1104] Rules of Procedure and Evidence of the International Criminal Court, Rule 88 (1)
[1105] Rules of Procedure and Evidence of the International Criminal Court; Rules 87 (1), 88 (1)
[1106] Rules of Procedure and Evidence of the International Criminal Court, Rule 88 (2)
[1107] International Criminal Court. Regulations of the Registry, Regulation 91 (2) (g)
[1108] Rules of Procedure and Evidence of the International Criminal Court, Rule 88 (5)
[1109] Donat-Cattin, D. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 1275-1300

measures to expedite the participation of victims of sexual violence at all the stages of the proceedings.[1110]

In conformity with Regulation 89 (b) of the Regulations of the Registry, the Registry is bound to assist witnesses and victims that appear before the Court (and, where adequate, the dependants of these persons as well as accompanying support persons) by providing psychological assistance, as adequate, especially for victims of sexual violence, children, the disabled, and elderly persons.[1111]

The Rules of Evidence and Procedure built on Article 69 (4) of the Statute and introduced provisions concerning the questions of corroboration, consent and past behaviour.[1112]

Rule 63 (4) establishes that corroboration is not required so as to prove any crime within the jurisdiction of the Court, especially, crimes of sexual violence.[1113]

Rule 70 sets up the principles of evidence in cases of sexual violence. Consent cannot be inferred on account of any words or conduct of a victim where force, threat of force or coercion, or taking advantage of a coercive environment, impaired the victim's capability of giving voluntary and genuine consent.[1114]

Likewise, consent cannot be inferred on account of any words or conduct of a victim where the victim is unable to give genuine consent, or by virtue of the silence of, or lack of resistance by, the victim. This includes, for instance, the situations in which the victim engages in an act of a sexual nature because of fear of violence, duress, detention, psychological oppression or abuse of power.[1115]

Moreover, credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by virtue of the sexual nature of the former or subsequent conduct of a victim or witness.[1116]

Also, Rule 71 establishes that, in view of the definition and character of the crimes within the jurisdiction of the Court, and subject to article 69, paragraph 4, a Chamber cannot admit evidence of the anterior or subsequent sexual conduct of a victim or witness.[1117]

[1110] Rules of Procedure and Evidence of the International Criminal Court, Rule 16 (1) (d)
[1111] International Criminal Court. Regulations of the Registry, Regulation 89 (b)
[1112] International Criminal Court, the Office of the Prosecutor. Policy Paper on Sexual and Gender-Based Crimes, p. 36 (9 June 2014).
[1113] Rules of Procedure and Evidence of the International Criminal Court, Rule 63 (4)
[1114] Rules of Procedure and Evidence of the International Criminal Court, Rule 70 (a)
[1115] Elements of Crimes of the International Criminal Court, Arts. 7 (1) (g)-1 and (g)-6; 8 (2) (b) (xxii)-1 and (xxii)-6, 8 (2) (e) (vi)-1 and (e) (vi)-6, Element 2; International Criminal Court, the Office of the Prosecutor. Policy Paper on Sexual and Gender-Based Crimes, p. 36 (9 June 2014); Rules of Procedure and Evidence of the International Criminal Court, Rule 70 (b) (c)
[1116] Rules of Procedure and Evidence of the International Criminal Court, Rule 70 (d)
[1117] Rules of Procedure and Evidence of the International Criminal Court, Rule 71

These provisions constitute a relevant exclusion of any effort to undermine or discredit victims or witnesses of sexual violence with basis on their prior or current sexual conduct.[1118]

Rule 72 demands notification to the Court in case the Defense intends to present evidence of the victim´s consent, inclusive by means of the questioning of a victim or witness, or evidence of the victim or witness` words, conduct, silence or lack of resistance.[1119]

The drafters of the Rome Statute, aware that the evidence and/or testimony in cases of sexual and gender-based crimes not rarely finish being punctured by pre-conceptions and patriarchal/ chauvinistic notions, established in Article 69 (4) that[1120]

> "[t]he Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness." [1121]

The well-being (both physical and psychological) of individuals who are questioned by the Office of the Prosecutor and are regarded vulnerable (especially victims of gender and sexual crimes, children, and persons with disabilities) should be analysed by a psychology, psycho-social or another expert in an in-person interview before the questioning takes place. This assessment should establish if the person's condition at that determined moment permits him/her to be questioned without risk of experiencing re-traumatisation.[1122]

The Office should consult with experts, and, where adequate, propose their testimony on different issues, as, for example, the socio-political, psychological and medical elements of sexual and gender-based crimes. These experts can also assist in the identification of patterns of sexual and gender-based crimes, the nature of injuries and their congruency with victim testimony, as well as the personal and social sequelae of such crimes.[1123]

The Office of the Prosecutor maintains contact with witnesses post-testimony so as to keep them informed of developments in the case, inclusive of sentence, and any appeal. It also pays attention to questions related to the victims` safety and physical and psychological well-being in their interaction with the Office.[1124]

[1118] Rules of Procedure and Evidence of the International Criminal Court, Rules 70 (d), 71; International Criminal Court, the Office of the Prosecutor. Policy Paper on Sexual and Gender-Based Crimes, p. 36 (9 June 2014).
[1119] Rules of Procedure and Evidence of the International Criminal Court, Rule 71; International Criminal Court, the Office of the Prosecutor. Policy Paper on Sexual and Gender-Based Crimes, p. 36 (9 June 2014).
[1120] International Criminal Court, the Office of the Prosecutor. Policy Paper on Sexual and Gender-Based Crimes, p. 36 (9 June 2014).
[1121] Rome Statute, Art. 69 (4)
[1122] International Criminal Court. Regulations of the Office of the Prosecutor, Regulation 34 (1) (2)
[1123] International Criminal Court, the Office of the Prosecutor. Policy Paper on Sexual and Gender-Based Crimes, pp. 36-37 (9 June 2014).
[1124] *Ibidem;* Rome Statute, Arts. 43 (6), 68 (1) (4); Rules of Procedure and Evidence of the International Criminal Court, Rule 50 (1)

These provisions on special measures aimed at protecting victims of sexual and gender-based violence are complemented by rules related to the structure of the Organs of the Court, and by the availability of pertinent expertise.[1125]

In fact, a relevant achievement of the Women's Caucus during the negotiations of the Rome Statute was to guarantee that women would integrate the staff of all organs of the Court, as well as to ensure that women and men with particular expertise in sexual and gender violence would be part of the staff of the Court at all levels. As a result of their lobbying, the Statute was the first to explicitly adopt principles of female representation and gender expertise.[1126]

Indeed, in its function, the International Criminal Court has to employ a gender perspective that demands a comprehension of the variation in power, needs, roles and status between men and women, and the effect of gender on people's opportunities and relations.[1127]

Also, the Court has to proceed to a "gender analysis" which attempts to the

> "underlying differences and inequalities between women and men, and girls and boys, and the power relationships and other dynamics which determine and shape gender roles in a society, and give rise to assumptions and stereotypes. In the context of the work of the Office, this involves a consideration of whether, and in what ways, crimes, including sexual and gender-based crimes, are related to gender norms and inequalities."[1128]

The inclusion of women in the staff of the Court was essential not only because of the recognition of the gender equity as an objective "per se" but also because women are usually more motivated than men to guarantee the effectiveness of the investigation and punishment of sexual and gender-based crimes. Besides, unlike men, women tend to have a conciliatory moral reasoning, which is more aligned with the restorative justice pursued by the International Criminal Court. In fact, the female relational line of thinking is linked to the ideas of justice, responsibility and maintainment of relations, opposite to a criminal law system traditionally dominated by the male perspective.[1129]

The Rome Statute demands the States Parties to take into account, when selecting judges, the requirement for an equitable representation of female and male judges, as well as the necessity of incorporating judges with legal expertise

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[1125] International Criminal Court, the Office of the Prosecutor. Policy Paper on Sexual and Gender-Based Crimes, p. 9 (9 June 2014).
[1126] Bedont, B., & Martinez, K. H. (1999), pp. 65-85
[1127] International Criminal Court, the Office of the Prosecutor. Policy Paper on Sexual and Gender-Based Crimes, p. 3 (9 June 2014).
[1128] International Criminal Court, the Office of the Prosecutor. Policy Paper on Sexual and Gender-Based Crimes, p. 4 (9 June 2014).
[1129] Bedont, B., & Martinez, K. H. (1999), pp. 65-85;
Gilligan, C. (1982). *In a Different Voice: Psychological Theory and Women´s Development*, Cambridge, Massachusetts: Harvard University Press cited in Varona Martínez, G. (2012), p.7

on determined issues, including (albeit not limited to) violence against women or children.[1130]

Similarly, pursuant Article 44 (2) of the Statute, it must be paid due regard to just representation of female and male staff members in the other organs of the Court.[1131]

The Staff Regulations of the International Criminal Court established that

> "[a]ll vacancies to be filled, and requirements to be met by candidates to such vacancies, shall be notified to all States Parties."[1132]

and, where adequate, so as to attain a better parity in gender or geographical representation, these notifications can include favored consideration of candidates of determined nationalities or gender.[1133]

Moreover, in the appointment, transfer or promotion of the staff it should be taken into consideration the necessity of fair representation of female and male staff members, "inter alia" requirements.[1134]

Therefore, there must be a balanced, fair representation of men and women in the staff of International Criminal Court.[1135]

Further, in accordance with Article 42 (9) of the Statute preconises that the Prosecutor ought to appoint advisers who have legal expertise on particular issues, including, although not restricted to, sexual and gender violence and violence against children.[1136]

Also in this regard, Regulation 6 of Regulations of the Office of the Prosecutor addresses expert advice on sexual and gender violence, violence against children and other issues and establishes that

> "[i]n accordance with article 42, paragraph 9:
>
> (a) expertise related to sexual and gender violence and violence against children shall be provided by the Gender and Children Unit of the Office; and
>
> (b) a Special Gender Advisor and advisors on other matters shall provide additional expertise to the Prosecutor and ExCom."[1137]

[1130] Rome Statute, Art. 36 (8) (a) (iii), (b)
[1131] Rome Statute, Art. 44 (2)
[1132] International Criminal Court. Staff Regulations of the International Criminal Court, p.14 (12 September 2003).
[1133] *Ibidem*
[1134] *Ibidem*
[1135] Wen-qi, Z., & Chana, S. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 941-948
[1136] Rome Statute, Art. 42 (9)
[1137] International Criminal Court. Regulations of the Office of the Prosecutor, Regulation 6 (a) (b)

The Gender and Children Unit is composed by staff with legal and other expertise on sexual and gender violence and violence against children. The Unit is in charge of providing advice to the Prosecutor, the Executive Committee (constituted by the Prosecutor and the Heads of the three Divisions of the Office)[1138] and the Divisions (the Jurisdiction, Complementarity and Cooperation Division, the Investigation Division, the Prosecution Division) in all issues regarding sexual and gender violence and violence against children, and is required to provide assistance in preliminary examinations and evaluations, investigations and prosecutions which involve these types of violence.[1139]

Also, when planning investigative activities, the joint team (that is constituted following a decision to proceed with an investigation in a situation so as to conduct the investigation) has to attempt, particularly by consulting with the Gender and Children Unit, to guarantee the well-being of victims and witnesses and to prevent that they suffer re-traumatisation.[1140]

Moreover, the joint team, after identifying a provisional case hypothesis, should select incidents that reflect the gravest crimes and the principal kinds of victimisation, including sexual and gender-based violence and violence against children, and which are the most delineative of the dimension and effects of the crimes.[1141]

The staff of the Victims and Witnesses Unit is also required to have expertise in trauma, including trauma connected with crimes of sexual violence.[1142]

These are crucial steps forward and play an important role in decreasing the perils of re-victimisation, which is inherent to the criminal law proceedings.[1143]

In fact, these measures are in consonance with the objective inserted in the Rome Statute of avoiding that the victims` interaction with the Court could give rise to secondary victimisation (it occurs, for example, when the relevant court is oblivious to the victims` necessities or negates their victimisation).[1144]

5.3.1.(i). Final Remarks

By instituting specific norms aimed at protecting and supporting victims of sexual and gender-based crimes, the International Criminal Court scheme is pursuing to promote procedural justice to these vulnerable victims (which includes to make sure that victims receive a fair, respectful, and dignified treatment during the proceedings and have access to reparations).[1145]

[1138] International Criminal Court. Regulations of the Office of the Prosecutor, Regulation 12
[1139] International Criminal Court. Regulations of the Office of the Prosecutor, Regulations 4, 5
[1140] International Criminal Court. Regulations of the Office of the Prosecutor, Regulations 32 (1), 35 (3)
[1141] International Criminal Court. Regulations of the Office of the Prosecutor, Regulation 34 (1) (2)
[1142] Rome Statute, Art. 43 (6)
[1143] Varona Martínez, G. (2012), pp. 19, 25; Wolfgang, M. E., & Singer, S. I. (1978), pp. 379-394
[1144] Moffett, L. (2014 a), p. 3; United Nations. Handbook on Justice for Victims, pp. 9-10
[1145] Wemmers, J.-A. M. (1996), pp. 101-102; Moffett, L. (2014 a), p. 3

Certainly, the Rome Statute innovated by codifying a mandate for the International Criminal Court to make use of particular investigative, procedural, and evidentiary measures which are fundamental to guarantee gender justice.[1146]

Such innovation is extremely important because, as highlighted by de la Cuesta, vulnerable victims sholud be individually evaluated and receive adequate protection, since the acknowledgment of the condition of vunerable victim entails particular obligations to the public institutions.[1147]

If the International Criminal Court is performing its mandate in accordance with these parameters will be seen in the analysis of the Court´s practice.

5.4. Protection of the rights of the victims and witnesses, protection of rights of the accused and promotion of an impartial and just trial?

Notwithstanding the large protection and assistance conferred to the victims and witnesses, it must not be forgotten that the Rome Statute provides protection for the accused person too.

Indeed, Article 66 (1) of the Rome Statute adopted the general principle of criminal law of presumption of innocence disposing that:

> "Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law."[1148]

In consonance with this approach, in its Article 67, the Statute established the accused person´s rights, which must be utterly observed by the Court. Amidst other guarantees, the accused is entitled to a public hearing, which must be fair and conducted with impartiality.[1149]

Certainly, the Court must respect the rights of the accused so as to reach international legitimacy:[1150]

> "it is precisely at those times when moral outrage is at its highest that the burden on adjudicating bodies is heaviest both to satisfy society's collective need for condemnation and punishment of war criminals and simultaneously to assiduously protect the rights of those accused of war crimes. In order for a war crimes tribunal to possess legitimacy, it must ensure that rights of the accused are protected by the principles of due process and fundamental fairness."[1151]

[1146] Bedont, B., & Martinez, K. H. (1999), pp. 65-85
[1147] de la Cuesta Arzamendi, J. L. (2018), pp. 229-248
[1148] Rome Statute, Art. 66 (1)
[1149] Rome Statute, Art. 67 (1) (c)
[1150] Corrie, K. (2007), pp. 1-2
[1151] Baum, L. M. (2001), pp.197-230

Hence, the International Criminal Court, on the one hand, protects, supports and grants rights to the victims and witnesses, and, on the other hand, guarantees rights to the accused.[1152]

The Rome Statute aims to observe the legitimate prerogative of victims' without compromising a fair trial for the accused. Surely, the Court has to ensure that the victims and witnesses` rights are not prejudicial to or inconsistent with the accused´s rights.[1153]

Article 64 (2) of the Statute demonstrates it by affirming that

> "[t]he Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses."[1154]

Also, Article 68 of the Rome Statute, which, as seen, is one of the cornerstones on protection of the victims and witnesses, establishes in the first part of paragraph 1 that the Court and the Prosecutor are bound to adopt the necessary measures

> "to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including ... gender …, and the nature of the crime, in particular, … where the crime involves sexual or gender violence …"[1155]

and finishes the paragraph affirming that

> "[t]hese measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."[1156]

The same article, in para. 3, puts forward the participation of victims in the proceedings upon approval of the Court. This participation must occur

> "in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."[1157]

The Court must attain an equilibrium of the rights at stake for the purpose of conducting a just and unbiased trial. In fact, the maintenance of the balance between the victims and witnesses` entitlements and the accused´s prerogatives is of vital importance since it allows the International Criminal Court to conduct a fair and impartial trial and, ultimately, achieve justice.

[1152] Schabas, W. A. (2010), p. 823
[1153] *Ibidem*
[1154] Rome Statute, Art. 64 (2)
[1155] Rome Statute, Art. 68 (1)
[1156] *Ibidem*
[1157] Rome Statute, Art. 68 (3)

Thus, the Court pursues to equilibrate the accused´s rights and the efficiency of the proceedings with significant participation of the victims.[1158]

In its practice, the Court must analyse the concrete circumstances and counterweight the interests at stake when the rights of the accused and the rights of the victims and witnesses seem to be at odds.

Article 67 (1) (e) stipulates that the accused has the right to examine, or have examined

> "the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her."[1159]

In spite of that, in the terms of Article 68 (2) of the Statute, so as to protect victims and witnesses, it can be made an exception to the principle of public hearings (inserted in Article 67),

> "and the Chambers of the Court may … conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness."[1160]

In the same direction, Rule 112 allows the Prosecutor to audio- or video-record the questioning of witnesses

> "in particular where the use of such procedures could assist in reducing any subsequent traumatization of a victim of sexual or gender violence, a child or a person with disabilities in providing their evidence."[1161]

Therefore, in certain circumstances (namely, so as to avoid traumatisation of a victim of sexual or gender violence, a child or a person with disabilities in providing their evidence), it can made an exception to the principle of public hearings and a part of the proceedings can be conducted in camera or evidence can be provided by electronic or other special means. In these circumstances, the examination of witnesses on behalf of the accused might differ of the conditions of examination of witnesses against him/her.

[1158] Corrie, K. (2007), pp. 1-2
[1159] Rome Statute, Art. 67 (1) (e)
[1160] Rome Statute, Art. 68 (2)
[1161] Rules of Procedure and Evidence of the International Criminal Court, Rule 112 (4)

As already explained, this exception is part of the framework conceived by the Statute to provide a higher level of protection to victims and witnesses of crime involving sexual or gender violence.[1162]

5.5. Participation of victims and witnesses in the proceedings

In the international criminal justice system, the International Criminal Court was pioneer in permitting victims to participate in the proceedings.[1163]

As anteriorly explained, the failure of the ICTR and the ICTY in getting closer to the communities which were most harmed by the perpetration of the crimes in addition to a wide movement in favour of the implementation of restorative justice (in opposition to a rigid retributive justice) contributed for the drafters of the Rome Statute to include provisions on the victims` participation in the proceedings.[1164]

Whilst the ICTR and the ICTY did not provide for any type of victims´ participation in the proceedings beyond serving as witnesses to be called to testify before the Court, the International Criminal Court established a rather wide scheme allowing victims to voluntarily participate of the proceedings. [1165]

Indeed, the International Criminal Court, being framed by victim-centred instruments that empowered victims by providing them with the possibility of having a say in the proceedings, has assumed a role of real leadership in the victims´ rights area.[1166]

The Rome Statute in its Article 68 (3) asserted that

> "[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."[1167]

This provision does not convey that victims may start proceedings (they do not acquire the status or condition of a party to the proceedings before the International Criminal Court), but it does constitute a significant advance for now

[1162] Rome Statute, Arts. 43 (6), 68 (1) (2); Rules of Procedure and Evidence of the International Criminal Court, Rules 16 (1) (d), 17 (2) (a) (iv), (b) (iii), 63 (4), 70, 71, 72 (1), 86, 88 (1) (5), 112 (4)
[1163] International Criminal Court, The Office of Public Counsel for Victims. Helping victims make their voice heard, p. 3
[1164] Donat-Cattin, D. (2008). In Triffterer, O., & Ambos, K. (eds.), pp. 1275-1300; Haslam, E. (2004). In McGoldrick, D., Rowe, P., & Donnelly, E. (eds.), pp. 315-336
[1165] Baumgartner, E. (2008), pp. 409-440; Corrie, K. (2007), pp. 1-2; Donat-Cattin, D. (1999). In Lattanzi, F., & Schabas, W. A. (eds.), pp. 251-277; International Criminal Court. Victims Participation and Reparations Section´s booklet, p. 10
[1166] Funk, T. M. (2010), p. 225
[1167] Rome Statute, Art. 68 (3)

they are entitled to participate in criminal proceedings by presenting their views and concerns severally from the Prosecution and the Defence.[1168]

It is important to highlight that, at the same time that the Rome Statute created a place for victims to participate, it established limitations. Certainly, even though victims can take part in the proceedings, their involvement is not thorough and unlimited.[1169]

As seen, Article 68 (3) establishes that victims whose "personal interests" are affected can submit "their views and concerns" to be considered by the Court at proceedings stages deemed appropriate by the latter.

The first thing that stands out in such provision is the fact that the victims` participation can take place when their personal interests are affected.

In the Situation in the Democratic Republic of the Congo, the Pre-Trial Chamber I issued a "Decision on the Applications for Participation in the Proceedings" on 17 January 2006, in which it affirmed that

> "the "personal interests" criterion expressly set out in article 68 (3) constitutes an additional criterion to be met by victims, over and above the victim status accorded to them."[1170]

Personal interests are those that individuate the person of the victim when compared to anybody else. The interests involved must be different from those of the other victims or of the public in general (the latter has a permanent interest that individuals who perpetrated crimes under the jurisdiction of the International Criminal Court should be tried before it, regardless of who they are, or the position they occupy).[1171]

Surely, when the victims participate of the proceedings, it is in pursuance of their own interests and concerns, autonomous from the parties.[1172]

In the mentioned decision, the Pre-Trial Chamber I also affirmed that "the Statute grants victims an independent voice and role in proceedings before the Court"[1173] and asserted that victims are not to be regarded as inevitably being the ally of the prosecution for their roles and goals are markedly distinct.[1174]

[1168] International Criminal Court, Office of Public Counsel for Victims. Representing Victims before the International Criminal Court, p. 27; International Criminal Court`s Trust Fund for Victims` website; McKay, F. (2008), pp. 2-5; Vázquez Pedreño, J. (2014), pp. 262, 278-280
[1169] Schabas, W. A. (2011), pp. 342-368
[1170] ICC. Situation in the Democratic Republic of the Congo. Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6, para. 62
[1171] Pikis, G. M. (2010), p. 291
[1172] International Criminal Court. Victims Participation and Reparations Section´s booklet, p. 10; McKay, F. (2008), pp. 2-5
[1173] ICC. Situation in the Democratic Republic of the Congo. Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6, para. 51
[1174] *Ibidem*

Also, the Court has affirmed that

> "[t]he principal criterion for victim participation is that the personal interests of the applicant must have been affected. This requirement is met whenever a victim applies for a participation following the issuance of a warrant of arrest. The personal interests of a victim are affected in respect of proceedings relating to the very crime in which that victim was allegedly involved."[1175]

Hence, in accordance with the understanding of the International Criminal Court, so that victims can participate, their interests must be affected by the proceedings.[1176]

In the same direction, in the Prosecutor v. Lubanga Dyilo case, a Decision of the Appeals Chamber related to Victims´ Participation Application expressed that:

> "pursuant to article 68 (3) of the Statute, victims will first have to demonstrate that their personal interests are affected by the trial in order to be permitted to present their views and concerns at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."[1177]

It is of note that, even though in the supra decision the Appeals Chamber expressed that the victims have to show that their personal interests are impacted by the trial, in the terms of Article 68 (3) of the Statute, victims can participate "at stages of the proceedings", which should be interpreted as encompassing the pre-trial phase. This issue will be further addressed in the "forms of participation" below.[1178]

Therefore, the first boundary is that the victims´ personal interests must be impacted by the proceedings.

The second boundary consists in the conditioning of the victims´ participation to the Court´s approval. In fact, victims can have a voice in the proceedings only if the Court considers convenient their participation at a determined stage.[1179]

Exceptionally, the rule that the participation of the victims is subject the Court´s authorisation does not apply to restitution. In the terms of Article 75 (1) of the Statute, when a person is condemned by the International Criminal Court, victims of the crimes perpetrated by him/her can request the Court to award restitution

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[1175] ICC. Situation in Uganda, Pre-Trial Chamber II (Single Judge), Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, pp. 8-9, paras. 9-10 (10 August 2007)
[1176] Pikis, G. M. (2010), p.291
[1177] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber. Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, p. 21, para. 61 (11 July 2008).
[1178] Rome Statute, Art. 68 (3)
[1179] *Ibidem*

(without excluding the possibility of the Court awarding restitution "proprio motu").[1180]

The third boundary found in Article 68 (3) is that victims who are allowed by the Court to present views and observations at a determined stage of the proceedings must do it "in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".[1181]

The importance of finding a mid-term between the rights of the victims, on one side, and the rights of the accused, on the other, so as to conduct a just and unprejudiced trial was addressed above when dealing with the protection of the victims. In short, the Court can permit victims to take part of the proceeding, but their participation should interfere neither with the accused´s prerogatives nor with the fairness and neutrality of the trial.

Shortly, the participation of the victims in the proceedings is built upon the following requisites:

- The victims` personal interests must be affected by the proceedings;
- As a rule, the participation of the victims in the proceedings depends on the Court´s previous approval:
- The Court has to ensure that the involvement of the victims in the proceedings occurs in a way which is not detrimental to or incompatible with the rights of the accused and a fair and unbiased trial.

Therefore, so that a victim can participate at a certain phase of the proceedings, the Chamber will establish if the applicant victim's interests are in particular affected by these proceedings and if participation in the manner requested is adequate and compatible with the defence´s rights to a fair and expeditious trial.[1182]

5.5.1. Application process

In the Situation in the Democratic Republic of the Congo, the Pre-Trial Chamber I issued a Decision on the Applications for Participation in the Proceedings on 10 January 2006, in which it asserted that

> "the status of victim will be accorded to applicants who seem to meet the definition of victims set out in rule 85 of the Rules of Procedure and Evidence in relation to the situation in question."[1183]

[1180] Rome Statute, Art. 75 (1)
[1181] Rome Statute, Art. 68 (3)
[1182] Redress Trust (2012), p. 41
[1183] ICC. Situation in the Democratic Republic of the Congo. Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6

Furthermore, it has been established by the Appeals Chamber in its judgment of 11 July 2008 in the Lubanga Dyilo case that:

> "whilst the ordinary meaning of rule 85 does not per se, limit the notion of victims to the victims of the crimes charged, the effect of article 68 (3) of the Statute is that the participation of victims in the trial proceedings, pursuant to the procedure set out in rule 89 (1) of the Rules, is limited to those victims who are linked to the charges."[1184]

As a result, so that victims can apply for participation in the proceedings of the Court, apart from subsuming to the concept inserted in Rule 85, they must be connected to the charges in the terms of Rule 89 (1). The latter establishes that

> "[i]n order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber. Subject to the provisions of sub-rule 2, the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements."[1185]

Accordingly, the victims that want to participate of the proceedings have to file a written application (there is an application form for individuals and an application form for organisations on the website of the ICC) to the Registrar.[1186]

In the case of individual victims, the application can be made by someone acting with the consent of the victim. Also, when the victim is a child or in if the victim presents an incapacitating disability, the application can be filed by a person acting on behalf of the victim.[1187]

If the victims are organisations or institutions, solely rightfully authorised representatives of the organisations or institutions can proceed with the application.[1188]

[1184] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Appeals Chamber´s Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, p. 21, para. 58

[1185] Rules of Procedure and Evidence of the International Criminal Court, Rule 89 (1)

[1186] *Ibidem*; International Criminal Court. Regulations of the Court, Regulation 86; International Criminal Court. Application Form for Individuals, Request for Participation in Proceedings and Reparations at the ICC For Individual Victims; International Criminal Court. Application Form for Organisations, Request for Participation in Proceedings and Reparations at the ICC For Victims that are Organisations or Institutions

[1187] Rules of Procedure and Evidence of the International Criminal Court, Rule 89 (3)

[1188] International Criminal Court (2010). Booklet, Victims before the International Criminal Court, A Guide for the Participation of Victims in the Proceedings of the Court, p.9

In any case, the filing of the application to participate of the proceedings is gratuitous.[1189]

Regarding the timing of the application, Regulation 86 (3) determines that

> "[v]ictims applying for participation in the trial and/or appeal proceedings shall, to the extent possible, make their application to the Registrar before the start of the stage of the proceedings in which they want to participate."[1190]

Thus, victims should apply for participation in the trial and/or appeal proceedings prior to the commencement of the stage of the proceedings in which they want to engage in.

The Victims Participation and Reparations Section, which is the part within the Registrar responsible for processing the application, remits the application to the pertinent Chamber.[1191]

In the sequence, the VPRS

> "shall review the application and assess whether the disclosure to the Prosecutor, the defence and/or other participants of any information contained in such application, may jeopardise the safety and security of the victim concerned or any third person.
>
> 2. Such review shall take into account the factors set out in article 68, paragraph 1, any request for non-disclosure made by the victim, consultations held with the legal representative(s) of the victim, where appropriate, and inter alia, the level of security in the area where the victim lives and the feasibility of implementing local measures for their protection and security and/or protective measures where necessary.
>
> 3. The Registry shall inform the Chamber of the results of the assessment and may make recommendations regarding the disclosure of all or part of the information provided by the victim.
>
> 4. If a victim requests that all or part of the information he or she has provided to the Registry not to be disclosed to the Prosecutor, the defence, or other participants, the Registry shall inform the victim that such requests may be granted or rejected by the Chamber. The Registry shall communicate the victim's request, together with the result of the assessment made

[1189] International Criminal Court (2010). Booklet, Victims before the International Criminal Court, A Guide for the Participation of Victims in the Proceedings of the Court, p. 20
[1190] International Criminal Court. Regulations of the Court, Regulation 86 (3)
[1191] Rome Statute, Art. 68 (1); Rules of Procedure and Evidence of the International Criminal Court, Rule 89 (1); Vázquez Pedreño, J. (2014), p. 259

> pursuant to sub-regulations 1 and 2, to the Chamber and to the legal representative of the victim."[1192]

In fact, the VPRS must review the application and verify if the disclosure of the application´s information harbours any potential harm to the safety, physical and psychological well-being, dignity and privacy of the victims and other participants.[1193]

Other factors that weigh on the VPRS assessment are any request for non-disclosure made by the victim (such request may be granted or rejected by the relevant Chamber), eventual consultations held with the legal representative(s) of the victim, and "inter alia", the level of security in the place in which the victim lives and the possibility of putting into effect local measures for their protection and security and/or protective measures should the need arise.[1194]

The VPRS informs the Chamber of the results of the assessment and can make recommendations on the partial or whole disclosure of the information provided by the victim.[1195]

In case it is established that the disclosure of the information contained in the application does not endanger victims or any third person, the VPRS will forward a copy of the application to the Prosecutor and the defence so that they have the opportunity to reply within a time period determined by the Chamber.[1196]

The Chamber is responsible for ruling whether or not the application is going to be accepted. Indeed, Rule 89 (2) establishes that

> "[t]he Chamber, on its own initiative or on the application of the Prosecutor or the defence, may reject the application if it considers that the person is not a victim or that the criteria set forth in article 68, paragraph 3, are not otherwise fulfilled. A victim whose application has been rejected may file a new application later in the proceedings."[1197]

Therefore, the Chamber, "proprio motu" or prompted by the Prosecutor or the defence, can reject the victim´s application in case it understands that the person is not a victim or that the threshold of Article 68 (3) of the Statute is not otherwise met.

[1192] International Criminal Court. Regulations of the Registry, Regulation 99 (1) (2) (3) (4)
[1193] International Criminal Court. Regulations of the Registry, Regulation 99 (1); Rome Statute, Art. 68 (1)
[1194] International Criminal Court. Regulations of the Registry, Regulation 99 (2) (4)
[1195] International Criminal Court. Regulations of the Registry, Regulation 99 (3)
[1196] International Criminal Court. Regulations of the Registry, Regulation 99 (1); Rules of Procedure and Evidence of the International Criminal Court, Rule 89 (1)
[1197] Rules of Procedure and Evidence of the International Criminal Court, Rule 89 (1)

Apart from verifying if the applicant subsumes to the concept of victim established in Rule 85, the Chamber has also to ensure that applicant is actually connected with the charges.[1198]

Indeed, in accordance with the Pre-Trial Chamber I´s Decision on the Applications for Participation in the Proceedings of 17 January 2006 in the Situation in the Democratic Republic of the Congo, before taking a decision, the Chamber should conduct

> "a general assessment, pertaining to the scope of the application filed with the Court which relates to the whole of the proceedings before it."[1199]

It is important to highlight that this general assessment

> "does not rule out the possibility of a more specific assessment of victims' personal interests based on the applications filed by victims in accordance with the modalities of the participation of victims in the proceedings." [1200]

It is of note that

> "the analysis of whether victims' personal interests are affected under article 68(3) of the Statute is to be conducted in relation to stages of the proceedings, and not in relation to each specific procedural activity or piece of evidence dealt with at a given stage of the proceedings."[1201]

Consequently, the applicants must be victims in the terms of Rule 85 and be linked with the charges, thus, having their personal interests impacted by the proceedings "lato sensu". Furthermore, the Chamber should also evaluate the pertinence of applicants´ participation in the specific stage of the proceedings they are willing to take part in. In fact, so that the application is accepted and participation granted, the personal interests of the victims must be straightforwardly influenced by that determined stage of the proceedings.

[1198] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Appeals Chamber´s Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, p. 21, para. 58

[1199] ICC. Situation in the Democratic Republic of the Congo. Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6, para. 64; International Criminal Court. Regulations of the Registry, Regulation 109 (1)

[1200] ICC. Situation in the Democratic Republic of the Congo. Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6, para. 64

[1201] ICC. Situation in Darfur, Sudan, No. ICC-02/05. Pre-Trial Chamber I, Decision on the Requests for Leave to Appeal the Decision on the Application for Participation of Victims in the Proceedings in the Situation, p. 6 (7 February 2008).

There have been cases in which over 2000 applications of participation have been submitted to the Court.[1202] The processing of this high volume of applications has faced capacity restraints. Also, there have been critics regarding provision of the victims` participation in the proceedings based on the argument that it constitutes a burden on the Court and can potentially causes delays to the proceedings.[1203]

Moreover, it is relevant to stress that, in general, the identity of the victims will not be made public, except if they consent to it.[1204]

Indeed,

> "victims have to fill-in a written application which will be considered by the Court. From this very moment, the identities of victims are protected in the proceedings by a pseudonym attributed to them by the Court (for example: a/0001/18) and their names consequently do not appear in the public domain."[1205]

Finally, the rejection of the application does not prevent the victim of making a new one subsequently in the proceedings.

Where there is acceptance of the application, the Chamber has to particularise the proceedings and point out the form in which participation is regarded appropriate, which can encompass making opening and closing statements, submitting observations, and making representations to the Court.[1206]

When approving an application, the Chamber has to determine the adequate manner for the participation to take place, always ensuring that it

> "is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."[1207]

Regarding the participation victims of sexual violence, Rule 16 establishes that the Registrar is bound to adopt gender-sensitive measures to expedite the participation of these victims at all the stages of the proceedings.[1208]

5.5.2. Timing of victims` participation

The International Criminal Court´s system has neither precisely established a moment from which victims could request the Court to participate of the

[1202] ICC. Situation in the Republic of Kenya, The Prosecutor v. William Samoei Ruto and Joseph Arap Sang. Trial Chamber V, Application by Kituo Cha Sheria for Leave to Submit Observations pursuant to Rule 103 of the Rules of Procedure and Evidence, p. 6, para. 12 (30 October 2012).
[1203] Stahn, C. (2012), pp. 251-282.
[1204] International Criminal Court. Victims Participation and Reparations Section´s booklet, p. 17
[1205] International Criminal Court website, Victims
[1206] Rome Statute, Arts. 15 (3), 19 (3); Rules of Procedure and Evidence of the International Criminal Court, Rule 89 (1)
[1207] Rome Statute, Art. 68 (3)
[1208] Rules of Procedure and Evidence of the International Criminal Court, Rule 16 (1 (d)

proceedings nor systematically defined the manners of victims' participation in the proceedings.[1209]

In fact, Article 68 (3) of the Rome Statute did not circumscribe the participation of victims to any determined stage of proceedings when it asserted that the Court shall permit the views and concerns of victims (whose personal interests are affected)

> "to be presented and considered at stages of the proceedings determined to be appropriate by the Court" and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."[1210]

The convenience of the timing of the victims` participation has been established by the Judges on a case by case basis, paying regard to the accused`s rights, the need to guarantee the effectiveness and expeditiousness of the proceedings, and the victims` interests.[1211]

There was controversy about the victims´ participation in the investigation and pre-trial stage.

However, from a systematic analysis of the Rome Statute and the Rules of Procedure and Evidence, it is coherent to interpret the term "proceedings" appearing in Article 68 (3) of the Rome Statute as encompassing the investigation stage.[1212]

For example, Article 15 (3) of the Rome Statute and Rule 50 of the Rules of Procedure and Evidence dispose that victims can make representations to the Pre-Trial Chamber when the Prosecutor requests the latter authorization to proceed with an investigation. In such circumstances, it is likely that victims will be on favor of the Prosecutor´s request.[1213]

Also, after "taking into account the gravity of the crime and the interests of victims", if the Prosecutor understands that an investigation or prosecution "would not serve the interests of justice", the Court has to notify victims in relation to the Prosecutor`s decision so that they can apply for participation in the proceedings.[1214]

In these circumstances, victims probably will be against the Prosecutor´s decision. The presence of victims before the Pre-Trial Chamber should serve the purpose of guaranteeing that the Prosecutor genuinely takes into consideration

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[1209] International Criminal Court, Office of Public Counsel for Victims. Representing Victims before the International Criminal Court, pp. 29, 84; Redress Trust (2012); Schabas, W. A. (2010), pp. 827- 830; Vázquez Pedreño, J. (2014), p. 258

[1210] Rome Statute, Art. 68 (3)

[1211] Redress Trust (2012), p. 41

[1212] International Criminal Court, Office of Public Counsel for Victims. Representing Victims before the International Criminal Court, pp. 27-28

[1213] Rome Statute, Art. 15 (3); Schabas, W. A. (2011) p. 330

[1214] Rome Statute, Art. 53 (1) (c), (2) (c); Rules of Procedure and Evidence of the International Criminal Court, Rule 92 (2)

all the circumstances, including the seriousness of the crime, the victims` interests, and the age or infirmity of the purportedly perpetrator.[1215]

Similarly, when issues of admissibility of a case or jurisdiction of the Court arise, victims are entitled to be informed of the questions and challenges at stake and may submit observations in this regard, even in those cases which have started following the reference of a situation to the Prosecutor by the States parties or the Security Council.[1216]

These and other provisionsdemonstrate that the drafters of the Rome Statute envisaged the participation of victims in the proceedings since the investigation stage, subject to the Court´s permission.[1217]

Additionally, the International Criminal Court understood that the "stage of proceedings" of Article 68 (3) includes the investigation phase.

In its Decision on Applications for Participation in the Proceedings the situation in the Democratic Republic of the Congo, Pre-Trial Chamber I considered that

> "the personal interests of victims are affected in general at the investigation stage, since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered."[1218]

Still in the referred situation, the same Chamber considered that

> "pursuant to article 68 (3) of the Statute, … victims may present their views and concerns at the investigation stage of the situation in the Democratic Republic of the Congo once the Chamber grants them victim status;"[1219]

Also, in the Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, the Single Judge (Pre-Trial Chamber I) emphasised that the Chamber had repeatedly stated that:

> "(ii) the pre-trial stage of a case is a stage of the proceedings in relation to which the analysis of whether victims' personal interests are affected under article 68(3) of the Statute is to be conducted;

[1215] Rome Statute, Art. 53 (1) (c), (2) (c); Schabas, W. A. (2011), pp. 342-368
[1216] Rome Statute, Arts. 13 (a) (b),15 (3),19 (3); Rules of Procedure and Evidence of the International Criminal Court, Rule 59 (1) (b); Schabas, W. A. (2011), pp. pp. 342-368
[1217] Rome Statute, Arts. 15 (3);19 (3); 53 (1) (c), (2) (c); 56 (1) (a) (b), (3) (a); 57 (3) (c); Rules of Procedure and Evidence of the International Criminal Court, Rules 59 (1) (b); 87, 88, 92 (2); 93, 119 (3)
[1218] ICC. Situation in the Democratic Republic of the Congo. Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6, para. 63
[1219] ICC. Situation in the Democratic Republic of the Congo, No. ICC-01/04. Pre-Trial Chamber I, Decision on the Application by Applicants a/0001/06 to a/0003/06 for Leave to Respond to the Observations of the Prosecutor and Ad Hoc Counsel for the Defence, p. 3 (7 July 2006).

> (iii) the interests of victims are affected at this stage of the proceedings since this is an essential stage of the proceedings which aims to determine whether there is sufficient evidence providing substantial grounds to believe that the suspects are responsible for the crimes included in the Prosecution Charging Document, and consequently:
>
> 1. this is an appropriate stage of the proceedings for victim participation in all cases before the Court;
> … and
>
> 3. a procedural status of victim exists at the pre-trial stage of any case before the Court;"[1220]

Therefore, from the procedure outlook, victims can take part in the proceedings of the International Criminal Court throughout the investigation, pre-trial, trial and appeals stages.[1221]

Moreover, pursuant to Regulation 86 (3) determines that the victims that wish to participate of the trial and/or appeal proceedings should apply for participation before the beginning of such stages of the proceedings, to the extent possible.[1222]

5.5.3. Modalities of victims` participation

The Rome Statute did not provide a hampered script in relation to the form of the victims` participation.[1223]

Instead, Article 68 (3) determines that it is also down to the Court to ensure that the participation of victims occurs

> "in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."[1224]

Therefore, the drafters of the Statute opted for conferring to the Chambers the role of managing the participation of the victims in accordance with the specificities of stage of the proceedings.[1225]

Following this path, Rule 89 (1) determined that "[t]he Chamber shall […] specify the proceedings and manner in which participation is considered appropriate." A

[1220] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Single Judge (Pre-Trial Chamber I), Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, pp. 20-21, para. 45 (13 May 2008).
[1221] Donat-Cattin, D. (1999). In Lattanzi, F., & Schabas, W. A. (eds.), pp. 251-277; Schabas, W. A. (2011) pp. 329-330
[1222] International Criminal Court. Regulations of the Court, Regulation 86 (3)
[1223] Baumgartner, E. (2008), pp. 409-440
[1224] Rome Statute, Art. 68 (3)
[1225] Baumgartner, E. (2008), pp. 409-440; Donat-Cattin, D. (1999). In Lattanzi, F., & Schabas, W. A. (eds.), pp. 251-277; Stahn, C., Olásolo, H., & Gibson, K. (2006), pp. 219-238;

more detained analysis of the Rome Statute and of the Rules of Procedure and Evidence permits to delineate the parameters of the victims` participation.[1226]
In accordance with the general scheme set up by Article 68 (3), the Court shall permit the victims´ views and concerns to be presented and considered in the course of the proceedings.[1227]

Moreover, subject to the International Criminal Court`s permission, victims are allowed to make representations and submit observations.[1228]

It is necessary to highlight that voluntariness is the core difference between the groundbreaking victims´ participation envisaged by the International Criminal Court system and simply being called to testify as a witnesses by the Prosecution or the Defense to provide evidence regarding the culpability or not of the accused person.[1229]

Surely, the participation of the victims is voluntary, being up to them to decide which observations, views and concerns they want to communicate to the Court.[1230]

In the terms of Rule 91(2),

> "[a] legal representative of a victim shall be entitled to attend and participate in the proceedings … This shall include participation in hearings unless, in the circumstances of the case, the Chamber concerned is of the view that the representative's intervention should be confined to written observations or submissions."[1231]

At the Pre-trial stage of its first cases, the International Criminal Court allowed victims to attend hearings, make opening and closing remarks and other oral submissions in the confirmation of charges hearing, question witnesses at the confirmation hearing, have access to filings and distinct documents, as well as make written submissions on questions of law and fact.[1232]

[1226] Rome Statute, Art. s 15(3), 19(3), 68(1) and (2), 68(3), 75(3), 87(4), 93(1)(j) of the Rome Statute; Rules of Procedure and Evidence of the International Criminal Court, Rules 16, 69, 70-73, 87, 88, 89 (1), 90, 91, 94, 95, 97-99, 101, 132 (2), 136, 139, 143, 144 (1) (2), 145, 191, 217, 221; International Criminal Court. Regulations of the Court, Regulations 21 (8), 24 (2), 28 (1) (2), 31 (1) (2), 54, 79 (2) (3), 86 (1) (2), 86, 88, 117(c); International Criminal Court. Regulations of the Registry, Regulations 64 (4), 66 (4), 99 (2) (4); 109(3); International Criminal Court, Office of Public Counsel for Victims. Representing Victims before the International Criminal Court, p. 29
[1227] Rome Statute, Art. 68 (3); Rules of Procedure and Evidence of the International Criminal Court, Rule 89 (1)
[1228] Rome Statute, Art. s 15 (3), 19 (3)
[1229] International Criminal Court. Victims Participation and Reparations Section´s booklet, p. 10; McKay, F. (2008), pp. 2-5
[1230] International Criminal Court. Victims Participation and Reparations Section´s booklet, p. 10
[1231] Rule 91(2), Rules of Procedure
[1232] Corrie, K. (2013), pp. 1-9; ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Single Judge (Pre-Trial Chamber I), Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case; ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Single Judge (Pre-Trial Chamber I), Decision on Limitations of Set of Procedural Rights for Non-

At trial stage, the victims are entitled to attend and participate in hearings, present written observations or submissions, question a witness, an expert or the defendant, make opening and closing statements, file a response to any document, have access to evidence and filings, make comments regarding the evidence put forward by the defence and the Prosecution, present evidence related to the guilt or innocence of the defendant, testify (both on their own motion and as witnesses for one of the parties), make not under oath statements, and suggest to the Chamber other witnesses who could be called to testify.[1233]

Furthermore, in the terms of Rule 87 (1),

> "[u]pon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, …, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure".[1234]

Therefore, the victims have the prerogative to request the relevant Chamber to adopt protective measures to safeguard himself/herself, a witness or another person at risk on account of testimony given by a witness.

Moreover, pursuant to Rule 88 (1)

> "upon the request of a witness or a victim or his or her legal representative, if any, … a Chamber may, taking into account the views of the victim or witness, order special measures such as, but not limited to, measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to article 68, paragraphs 1 and 2."[1235]

As a consequence, the victims have the right to request a Chamber to order special measures, as, for example, measures to facilitate the testimony of a victim of sexual violence.

Anonymous Victims (30 May 2008); Rules of Procedure and Evidence of the International Criminal Court, Rules 91 (2); 92 (3) (4) (5) (a)

[1233] Corrie, K. (2013), pp. 1-9; International Criminal Court. Regulations of the Court, Regulation 24 (2); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision on Victims' Participation, paras. 108, 111; International Criminal Court. Victims Participation and Reparations Section´s booklet, p. 13; Rome Statute, Art. 68 (3); Rules of Procedure and Evidence of the International Criminal Court, Rule 89 (1), 91-93;

[1234] Rules of Procedure and Evidence of the International Criminal Court, Rule 87 (1)

[1235] Rules of Procedure and Evidence of the International Criminal Court, Rule 88 (1)

Once a defendant is found guilty, the Chamber can, upon request or "proprio motu" in exceptional situations, establish the scope and proportions of any damage, loss and injury to, or apropos of, victims.[1236]

Surely, victims can request reparation for the harm they have endured, independently of the Court´s approval.[1237]

The competent Chamber is empowered to

> "make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation."[1238]

Where adequate, the Chamber can order the award for reparations to be made by means of the Trust Fund.[1239]

The topic of reparation will be further addressed below.

If the Judges on their own motion grant reparation to the victims, the latter can appeal their order of reparations. Apart from this decision, victims are not entitled to appeal. Notwithstanding that, when the Prosecution or the defence appeals a decision of the Chamber, victims can be allowed to present their views and concerns regarding it.[1240]

So as to enable the victims` participation in the proceedings, Rule 92 establishes a wide scheme of notification to the victims and their legal representatives.

Certainly, the Court is bound to notify the victims of the course of proceedings, important decisions (such as the Court´s decision to hold a confirmation hearing), materials, etc. This obligation imposed on the Court (more specifically, the Registrar and the Prosecutor) is reiterated in the framework of particular rights conferred to victims in the proceedings of the International Criminal Court.[1241]

5.5.4. Final remarks

This extensive participation of victims in the proceedings before the International Criminal Court, in addition to be a novelty, is extremely relevant.

Undoubtedly, apart from helping the International Criminal Court to unveil the truth and to hold accountable the perpetrators of the crimes (retributive justice),

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[1236] Rome Statute, Art. 75 (3)
[1237] *Ibidem*; Rules of Procedure and Evidence of the International Criminal Court, Rules 94 (1), 95 2 (a) (b); International Criminal Court. Regulations of the Court, Regulation 88
[1238] Rome Statute, Art. 75 (2)
[1239] *Ibidem*
[1240] Corrie, K. (2013), pp. 1-9
[1241] Rome Statute, Arts. 15 (3), 19 (3) Rules of Procedure and Evidence of the International Criminal Court, Rule s 16 (1) (a) (b), (2)(b); 49 (1) (2); 50 (1) (3) (4) (5) (6); 92; 95 (1); 142 (1); 144 (1) (2); 217; 221 (1); International Criminal Court. Regulations of the Court, Regulations 31(1) (2), 87 (1) (2); International Criminal Court, Office of Public Counsel for Victims. Representing Victims before the International Criminal Court, p. 29

the victims´ participation is an essential element of the restorative justice. Certainly, it permits victims (who are the persons most impacted by the crimes at stake) to express what has occurred to them, their families, and their communities. The participation of victims is also a form of acknowledging the suffering they have gone through. Also, by participating of the Court´s proceedings, the victims are experiencing justice. Further, their taking part in the proceedings can promote heal and rehabilitation and constitutes the basis for the achievement of reconciliation in impacted communities.[1242]

Surely,

> "[v]ictims' participation empowers them, recognises their suffering and enables them to contribute to the establishment of the historical record, the truth as it were of what occurred. Victims play an important role as active participants in the quest for justice and should be valued in that way by the justice process. Moreover their participation in the justice process contributes to closing the impunity gap and is one step in the process of healing for individuals and societies."[1243]

In the same direction,

> "[p]articipation is significant not only to protecting the rights of the victim at various stages of the proceeding, but also to advancing the process of healing from trauma and degradation. The active involvement, enhanced respect and protection afforded by participation and representation is particularly significant for victims of sexual and gender violence whose perceptions and needs are – in all cultures of the world – frequently ignored, presumed, or misunderstood."[1244]

In spite of the general praise of the Rome Statute for its provisions on the participation of victims in the Court`s proceedings, critics have also been made on this regard.

It has been sustained that strengthening the role of the victims in criminal proceedings is actually harmful to the defence´s rights. Further, it has been pointed that the scheme of victims` involvement is elaborated and costly, entailing procedural difficulties, such as the possibility of delays, among other inefficiencies.[1245]

[1242] Corrie, K. (2013), pp. 1-9; McKay, F. (1999), p. 15; Pena, M. (2010), pp. 498-516; War Crimes Research Office. Victim Participation Before the International Criminal Court, p. 9. (November 2007); Women's Caucus for Gender Justice (1997). Recommendations and Commentary for August 1997 PrepCom on the Establishment of an International Criminal Court, p. 33

[1243] International Criminal Court, Assembly of States Parties. Revised Strategy in Relation to Victims. ICC-ASP/11/38 (5 November 2012).

[1244] Women's Caucus for Gender Justice, Recommendations and Commentary for August 1997 PrepCom on the Establishment of an International Criminal Court

[1245] Schabas, W. A. (2011 a) pp. 493–509; Redress Trust (2012), p. 41

The reality of the participation of victims of sexual and gender-based violence in the investigations, situations and cases before the International Criminal Court will be analysed in the next chapter.

5.6. Legal representatives of the victims

The last part of Article 68 (3) determines that the victims´

> "views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence."[1246]

By its turn, Rule 90 of the Rules of Procedure and Evidence on legal representatives of victims provides that

> "1. A victim shall be free to choose a legal representative.
>
> 2. Where there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives.
> …
>
> 3. If the victims are unable to choose a common legal representative or representatives within a time limit that the Chamber may decide, the Chamber may request the Registrar to choose one or more common legal representatives.
>
> 4. The Chamber and the Registry shall take all reasonable steps to ensure that in the selection of common legal representatives, the distinct interests of the victims, particularly as provided in article 68, paragraph 1, are represented and that any conflict of interest is avoided.
>
> 5. A victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance."[1247]

Taking into consideration the intricacy of the International Criminal Court`s proceedings, victims have the prerogative to choose a legal representative so as to enable their efficient participation.[1248]

[1246] Rome Statute, Art. 68 (3)
[1247] Rules of Procedure and Evidence of the International Criminal Court, Rule 90 (1)
[1248] International Criminal Court, Office of Public Counsel for Victims. Representing Victims before the International Criminal Court, p. 27

Surely, victims do not to have to appear personally before the Court so as to participate of stages of the proceedings. In the majority of cases, the presentation of the victims´ views and concerns on issues that affect their personal interests occurs through their legal representatives.[1249]

However, given the potentially high number of victims who might wish to participate in the proceedings before the Court, and, so as to ensure the effectiveness of the proceedings, the Chamber may request the victims or specific groups of victims to elect a common legal representative or representatives.[1250]

If the victims are not able to agree on a common legal representative or representatives within a determined period of time, the Chamber can request Registrar to select one or more common legal representatives.[1251]

Certainly, in accordance with Regulation 80 (1) (2) and 81 (3), in those cases in which the interests of justice so demand, subsequently to consultation with the Registrar, a Chamber can appoint a legal representative of victims, that can be from the Office of Public Counsel for victims and should meet the same criteria required from the legal representatives of victims.[1252]

In the selection of common legal representatives, it must be ensured by the Chamber and the Registry that the different interests of the victims (such as age, gender, health, and the nature of the crime, particularly where the crime involves sexual or gender violence or violence against children) are represented and that potential conflicts of interest are prevented.[1253]

Also, if a victim or a group of victims cannot afford to pay for a common legal representative selected by the International Criminal Court, he/she/they can receive assistance from the Registry, including, as adequate, financial aid.[1254]

It is required from the victims` legal representative

> "established competence in international or criminal law and procedure, as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings. A counsel for the defence shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court."[1255]

[1249] International Criminal Court website, Victims; International Criminal Court`s Trust Fund for Victims´ website,

[1250] Rules of Procedure and Evidence of the International Criminal Court, Rule 90 (1) (2); International Criminal Court. Regulations of the Court, Regulations 79, 80 (1) (2), 81 (3); International Criminal Court, The Office of Public Counsel for Victims. Helping victims make their voice heard, p. 3

[1251] Rules of Procedure and Evidence of the International Criminal Court, Rule 90 (3)

[1252] International Criminal Court. Regulations of the Court, Regulations 80 (1) (2), 81 (3)

[1253] Rules of Procedure and Evidence of the International Criminal Court, Rule 90 (4)

[1254]Rules of Procedure and Evidence of the International Criminal Court, Rule 90 (5)

[1255] Rules of Procedure and Evidence of the International Criminal Court, Rule 22 (1)

To subsume to the "necessary relevant experience whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings", the legal representative must have been acting in this capacity for a minimum period of 10 years, in the terms of Regulation 67 (1).[1256]

Also, he/she should not have been found guilty of a grave criminal or disciplinary offence which conflicts with the nature of the office of counsel before the International Criminal Court.[1257]

The victims` legal representative is required to be fluent in English or French, which are the working languages of the International Criminal Court, in accordance with Article 50 (2) of the Rome Statute.[1258]

Rule 91 disposes about the participation of legal representatives in the Court proceedings. In its Sub-rule 2 it establishes that

> "[a] legal representative of a victim shall be entitled to attend and participate in the proceedings … [t]his shall include participation in hearings unless, in the circumstances of the case, the Chamber concerned is of the view that the representative's intervention should be confined to written observations or submissions. The Prosecutor and the defence shall be allowed to reply to any oral or written observation by the legal representative for victims."[1259]

Therefore, the victims´ counsel can take part in the proceedings, file submissions and attend the hearings on behalf of the victims. Also, in the terms set up in sub-rules 3 and 4 of Rule 91, they can question witnesses.[1260]

5.7. Reparations

5.7.1. Introduction

Several global and regional human rights treaties and distinct instruments attest that the right to a remedy pertains to international law.[1261]

[1256] International Criminal Court. Regulations of the Court, Regulation 67 (1)
[1256] Rules of Procedure and Evidence of the International Criminal Court, Rule 90 (3)
[1257] International Criminal Court. Regulations of the Court, Regulation 67 (2)
[1258] Rome Statute, Art. 50 (2); Rules of Procedure and Evidence of the International Criminal Court, Rule 22 (1)
[1259] Rules of Procedure and Evidence of the International Criminal Court, Rule 91 (2)
[1260] Rules of Procedure and Evidence of the International Criminal Court, Rule 91 (2) (3) (4)
[1261] United Nations, General Assembly. International Covenant on Civil and Political Rights, Arts. 2 (3), 9 (5), 14 (6), 17 (16 December 1966); United Nations, General Assembly. Convention on Elimination of Racial Discrimination, Art. 6. (21 December 1965); United Nations, General Assembly. Convention on Elimination of all Forms of Discrimination against Women, Art. 2 (c). (18 December 1979); United Nations, General Assembly. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 14 (10 December 1984); United Nations, General Assembly. Convention on the Rights of Child, Art. 16; American Convention on Human Rights, Arts. 1(1), 8, 10, 11 (3), 25 (22 November 1969); European Convention on Human Rights, Art. 8 (4 November 1950); African (Banjul) Charter on Human and Peoples` Rights, Arts. 5, 7, 21, 26 (27 June 1981); United Nations, General Assembly. Universal Declaration of Human

The Universal Declaration of Human Rights, in its Article 8 affirms that

> "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[1262]

Nevertheless, customarily, the harm endured by victims during an armed conflict was not considered as entitling them to some form of reparation. In the best scenario, their suffering was taken into consideration when war indemnities were paid to the Government of their country of origin, situation in which the State would be purportedly acting on behalf of its citizens.[1263]

It was not only until 1991, after the end of the Golf War, that it was set up a compensation scheme for victims of a war by the faulty State.[1264]

In fact, subsequently to the Golf War, the United Nations Security Council determined in its Resolution 687 that Iraq was liable under international law for any direct loss, damage, or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait, and decided to create a fund to pay compensation to claims arising from such determination and to establish a commission to administer the fund.[1265]

In its Resolution 692, the Security Council, implementing its decision of Resolution 687, set up the Fund and the United Nations Compensation Commission to handle the requests for compensation made by foreign Governments, nationals and corporations in view of the direct loss, damage or injury they suffered as a consequence of Iraq´s unlawful invasion and occupation of Kuwait.[1266]

On the reparations issue, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda had a quite limited margin, only being able to order property and proceeds seized by means of

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Rights, Arts. 8, 12 (10 December 1948); American Declaration of Rights and Duties of the Man, Arts. VV, XVII (2 May 1948); International Labour Organisation. Convention n. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, Arts. 15 (2), 16 (4), 16 (5) (27 Jun 1989); European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 13 (20 March 1952); European Union. Council Framework Decision of 15 March 2001 on the standing victims in criminal proceedings, 2001/220/JHA, Official Journal of the European Communities. L 82/1 (22 March 2001); European Union. Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, Official Journal of the European Communities. L 261/15 (6 August 2004); Shelton, D. (2005). In De Feyter, K., Parmentier, S., Bossuyt, M., & Lemmens, P. (eds.), pp. 11-34.

[1262] Universal Declaration of Human Rights, Art. 8

[1263] International Criminal Court, Office of Public Counsel for Victims. Representing Victims before the International Criminal Court, p. 30

[1264] *Ibidem*

[1265] United Nations, Security Council. Resolution 687, paras. 16, 18. S/RES/687(1991) (3 April 1991)

[1266] United Nations, Security Council. Resolution 692, para. 3. (20 May 1991); International Criminal Court, Office of Public Counsel for Victims. Representing Victims before the International Criminal Court, p. 30

criminal conduct (including through duress) to be returned to their rightful owners.[1267]

Surely, in the terms of Article 24(3) of the ICTY Statute and Article 23(3) of the ICTR Statute

> "[i]n addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners."[1268]

The Rome Statute and the Rules of Procedure and Evidence introduced a system of reparations which mirrors a growing acknowledgment in the international criminal law field that it is necessary to go beyond the concept of punitive justice towards a more inclusive solution, which stimulates participation and recognises the importance of providing victims with effective remedies.[1269]

As a result, the International Criminal Court is not solely worried about trying and punishing those who incur in the international crimes enlisted in the Rome Statute, but also aims to provide justice to victims of such crimes.[1270]

In fact, the Court seeks to balance retributive justice (put criminals on trial and render them accountable for the crimes they have incurred into) and restorative justice (assist the victims in patching and rebuilding their lives).[1271]

This is a key advancement bearing in mind that the Criminology and Victimology have recurrently exposed, from the perspective of the necessary reparation and asistence to the victims, the insufficiencies of the tradicional systems of civil responsibility. On the one hand, because such systems demand the unappealable sentence, and, on the other hand, in the frequent cases of indigence of the convicted person, in spite of a favourable outcome, the victim experiences a complete insatisfaction.[1272]

So as to promote restorative justice, the Rome Statute and the Rules of Procedure and Evidence provided for reparations, which fulfil two central goals of the Rome Statute: they oblige the convicted persons to repair the harm which their crimes gave rise to the victims, and they allow the Court to guarantee that the perpetrators respond for their acts.[1273]

[1267] United Nations, Security Council. Statute of the International Criminal Tribunal for the Former Yugoslavia (1993), Art. 24 (3); United Nations, Security Council. Statute of the International Criminal Tribunal for Rwanda (1994), Art. 23 (3); International Criminal Court, Office of Public Counsel for Victims. Representing Victims before the International Criminal Court, p. 27

[1268] United Nations, Security Council. Statute of the International Criminal Tribunal for the Former Yugoslavia (1993), Art. 24 (3); United Nations, Security Council. Statute of the International Criminal Tribunal for Rwanda (1994), Art. 23 (3).

[1269] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Order for Reparations (amended), p. 1, para. 1

[1270] Moffett, L., (2014), p. 86

[1271] International Criminal Court website, Victims

[1272] de la Cuesta Arzamendi, J. L. (2018), pp. 229-248

[1273] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Order for Reparations (amended), p. 1, para. 2

The Rome Statute´s system of reparations is a key characteristic. Indeed, to a certain degree, the Court´s success is dependent on the success of its reparation scheme. The trials will only be significant to the communities in case there is outreach which is proactive, attentive to the cultural context, and mindful of peoples' thoughts on the Court and its trials.[1274]

It is interesting that, in spite of the Rome Statute´s advance, the Special Tribunal for East-Timor and the Special Tribunal for Sierra Leone are not empowered to issue reparations awards, even though their statutes were considerably influenced by the Rome Statute .[1275]

5.7.2. The International Criminal Court reparations scheme

The drafters of the Rome Statute innovated and stated in Article 75 that:

> "1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
>
> 2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.
>
> Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.
>
> 3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States."[1276]

Therefore, in its Article 75, the Statute foresaw the possibility of awarding reparations to victims of the international crimes so as to compensate/ alleviate their suffering. Undoubtedly, in those cases in which an accused is found guilty, the Court can issue an order of reparations either upon the victims` request or on its own motion in extraordinary circumstances.

[1274] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Order for Reparations (amended), p. 1, para. 3; International Criminal Court, Assembly of States Parties. Report of the Bureau on the impact of the Rome Statute system on victims and affected communities, p. 10, para. 27 (22 November 2010).

[1275] International Criminal Court, Office of Public Counsel for Victims. Representing Victims before the International Criminal Court, p. 27

[1276] Rome Statute, Art. 75 (1) (2) (3)

This article clearly permits victims´ participation at the reparation phase, thus, placing them in the middle of the proceedings.[1277]

It is important to clarify that there were more ambitious proposals for victims` compensation, but they were ruled out during the negotiations. The idea of international compensation is appealing, but there are several practical difficulties. Generally, defendants are successful in claiming indigence and finish being represented by tribunal-funded counsel even though they are widely believed to have proceeded to the looting of the countries they used to rule.[1278]

In the International Criminal Court system, victims are entitled to apply for reparations even if they did not apply for participation at the Pre-trial or Trial stages of the proceedings or were not admitted.[1279]

Undoubtedly, all victims should be treated justly and equally in relation to reparations, regardless of whether or not they participated in the trial proceedings which led to the conviction sentence.[1280]

Also, the Court can act on its own initiative when the victims do not make a specific request for reparations. This concept that the International Criminal Court could on its own motion award reparations to victims was a thorny issue. The argument of the delegations favouring this idea was that victims in underdeveloped countries were hardly in a position to exercise this prerogative by themselves.[1281]

When the Court awards reparations on its own initiative, it should inform the defendant and the victims as extensively as possible. The Court ought to give publicity, as broadly as possible, to the reparation proceedings, and, when necessary, seek the cooperation of States Parties so that the maximum number of victims can make their request.[1282]

Pursuant to Rule 97,

> "[t]aking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both."[1283]

Thus, reparation is to be awarded with basis on the harm endured as a consequence of the perpetration of the crimes under the Court´s jurisdiction.

[1277] Funk, T. M. (2010), p. 225
[1278] Schabas, W. A. (2011), pp. 342-368
[1279] Corrie, K. (2013), pp. 1-9
[1280] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Order for Reparations (amended), p. 1, para. 3
[1281] Schabas, W. A. (2011), pp. 342-368
[1282] Rome Statute, Arts. 75 (3) (4), 86, 87 (1), 88, 93 (1) (l); International Criminal Court, Office of Public Counsel for Victims. Representing Victims before the International Criminal Court, p. 30
[1283] Rules of Procedure and Evidence of the International Criminal Court, Rule 97 (1)
ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Order for Reparations (amended), p. 3, para. 11

Further, as established in Article 75, paragraph 2 of the Rome Statute, the Court can direct the convicted person to make adequate reparations to, or in relation to, victims. Where pertinent, the ICC can determine "the award for reparations to be made through the Trust Fund".[1284]

It is relevant to stress that when the Court grants individual awards for reparations, the latter should be "made directly against a convicted person."[1285]

> "The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim." [1286]

In this situation,

> "[t]he award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible." [1287]

Also, "where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate", the ICC can determine that the award for reparations is to "be made through the Trust Fund".[1288]

In all cases, the Court is bound to observe the rights of the victims and of the convicted person.[1289]

At the request of victims or their legal representatives, or at the request of the person who was found guilty, or on the Court´s "propro motu" initiative, the latter

> "may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations."[1290]

In addition, the Court can invite, as adequate, victims or their legal representatives, the person who was convicted as well as interested persons and interested States to make observations regarding the experts` reports.[1291]

As determined in Article 68 of the Statute and in the general principle of Rule 86 of the Rules of Procedure and Evidence, in all issues concerning reparations the Court should pay regard to the needs of all the victims (particularly, children,

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[1284] Rome Statute, Art. 75 (2)
[1285] Rules of Procedure and Evidence of the International Criminal Court, Rule 98 (1)
[1286] Rules of Procedure and Evidence of the International Criminal Court, Rule 98 (2)
[1287] Rules of Procedure and Evidence of the International Criminal Court, Rule 98 (2)
[1288] Rules of Procedure and Evidence of the International Criminal Court, Rule 98 (3)
[1289] Rules of Procedure and Evidence of the International Criminal Court, Rule 97 (3)
[1290] Rules of Procedure and Evidence of the International Criminal Court, Rule 97 (2)
[1291] *Ibidem*

elderly persons, persons with disabilities, and victims of sexual or gender violence).[1292]

In the reparation proceedings, the applicant should sufficiently prove the causal nexus between the criminal offence and the harm endured, in accordance with the specific circumstances of the case. Due to the essentially distinct nature of reparations proceedings, the required standard of proof is not as high as that for trial (in the latter the prosecution, so as to secure a conviction, must proof the relevant facts "beyond a reasonable doubt", in the terms of Article 66 (3)). In establishing the adequate standard of proof in reparation proceedings, several factors particular to the case should be taken into account, inclusive of the difficulty victims can have in gathering evidence to support their claim in view of either the destruction or unavailability of evidence.[1293]

The victims of the crimes, along with their family members and communities that are also entitled to reparations, have the prerogative to participate during the reparations process.[1294]

Surely, reparations are completely voluntary and the recipient must provide an informed consent before any award of reparations. The Court should consult with victims on questions regarding the beneficiaries´ identity and their priorities.[1295]

The victims should get appropriate support so as to make their participation in reparations valuable and effective.[1296]

It is noteworthy that the order for reparations do not affect the victims´ rights to reparations in other cases, brought before the Court or before regional, national, or other international bodies. Similarly, decisions by other national or international bodies do not impact the victims` rights to receive reparations in accordance with Article 75 of the Rome Statute. Nevertheless, despite those broad propositions, the Court can take into consideration any awards or benefits established pro the victims from other bodies so as to ensure that reparations are not applied unjustly or in discriminatory way.[1297]

[1292] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Order for Reparations (amended), p. 3, para. 14

[1293] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Order for Reparations (amended), p. 5, para 22; Rome Statute, Art. 66 (3)

[1294] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Order for Reparations (amended), p. 7, paras. 29, 31

[1295] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Order for Reparations (amended), p. 7, paras. 30-32; UNICEF. The Paris Principles, Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, Principle 3.8 (February 2007)

[1296] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Order for Reparations (amended), p. 7, para.29, 31

[1297] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Order for Reparations (amended), pp. 1-3, paras. 4, 9; Rome Statute, Art. 75 (6)

5.7.3. Types of reparations

As already stated, individual and collective reparations are not incompatible and can be awarded concomitantly.[1298]

Also, individual reparations should be awarded in a manner so as to avoid generating tensions and discrepancies within the correspondent communities. Collective reparations should respond to the harm that the victims endured individually and collectively.[1299]

In accordance with Article 75 of the Rome Statute, reparation comprises restitution, compensation and rehabilitation. These institutes were addressed by the 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. Certainly, upon recalling articles 68 and 75 of the Rome Statute, this document asserted that:

> "19. *Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.
>
> 20. *Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:
>
> (*a*) Physical or mental harm;
>
> (*b*) Lost opportunities, including employment, education and social benefits;
>
> (*c*) Material damages and loss of earnings, including loss of earning potential;
>
> (*d*) Moral damage;
>
> (*e*) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

[1298] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Order for Reparations (amended), p. 7, para. 33
[1299] *Ibidem*

21. *Rehabilitation* should include medical and psychological care as well as legal and social services."[1300]

Therefore, in the pursuance of restitution, the International Criminal Court should seek to restore the victim to the original situation before the perpetration of the crimes under the jurisdiction of the Court, whenever possible.

Restitution is aimed at restoring the life of an individual. It encompasses return to the person´s family, home and prior employment, provide education on a continuous basis, and the return of either lost or stolen property.[1301]

Restitution can be suitable as well for legal institutions, as, for instance, schools or other bodies.[1302]

A few elements should concur for the award of compensation. Firstly, the economic harm should be sufficiently quantifiable. Secondly, this kind of award has to be adequate and proportionate in face of the seriousness of the crime and the circumstances surrounding the case. Thirdly, funds must be available, hence, making the award of compensation feasible.[1303]

The award of compensation must be grounded on a gender-inclusive approach and must refrain from replicating former structural disparities and discriminatory measures.[1304]

Compensation demands a wide application, to cover all sorts of injury, damage, and loss. Indeed, compensation applies to material damages as well as to other suffering and harms of a psychological and physical character. It encompasses alterations to the victims` projects of life and social interactions, and modifications in the idiosyncrasy of their families and communities.[1305]

[1300] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, paras. 19-21

[1301] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 19; United Nations Office on Drugs and Crime, UNICEF. Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, Model Law and Related Commentary, para. 37; United Nations, Economic and Social Council. Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, para. 37 (22 July 2005); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Appeals Chamber, Order for Reparations (amended), p. 8, para. 35

[1302] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Appeals Chamber, Order for Reparations (amended), p. 8, para. 36

[1303] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 20; ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Order for Reparations (amended), p. 8, para. 37

[1304] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Order for Reparations (amended), p. 8, para. 38

[1305] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Order for Reparations (amended), p. 8, para. 39; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 20; Extraordinary Chambers in the Courts of Cambodia. Internal Rules, Rule 23 bis (l) (b); Inter-American Court of

Even though it is not viable to quantify some types of damage in monetary terms, compensation is a kind of financial relief directed at responding, in a proportionate and adequate way, to the harm that has been caused to the victims.[1306]

Examples of harm endured by victims:

- Physical harm, inclusive of causing a person to lose the ability to reproduce;[1307]

- Moral and non-material harm causing physical, mental and emotional hardship;[1308]

- Material damage, covering the income lost; the loss of chance to work; loss of, or harm to, possessions; not paid wages or salaries; other ways of inhibiting a person's ability to work; and reduction of savings;[1309]

- Loss of opportunities (covering those concerning education, employment, and social benefits); status lost; and the hampering of the legal rights of a person (even though the Court must not maintain customary or existing prejudice practices, for example on the grounds of gender, in trying to address to respond to these questions);[1310]

Human Rights. Case "Las Dos Erres" Massacre v. Guatemala. Judgment, (Preliminary Objection, Merits, Reparations, and Costs) para. 226 (24 November 2009)

[1306] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 20; ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Order for Reparations (amended), p. 8, para. 40

[1307] Inter-American Court of Human Rights. Case Velásquez Rodríguez v. Honduras. Judgment (Merits), paras. 156, 175, 187 (29 July 2998); European Court of Human Rights. Case X and Y v. the Netherlands (Application n. 8978/80). Judgment, para. 22 (26 March 1985); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Order for Reparations (amended), p. 8, para. 40 (3)

[1308] Inter-American Court of Human Rights. Case Garrido and Baigorria v. Argentina. Judgment (Reparations and Costs), para. 49 (27 August 1998); Inter-American Court of Human Rights. Case plan de Sánchez Massacre v. Guatemala. Judgment (Merits), paras. 80-89, 117 (29 April 2004); Inter-American Court of Human Rights. Case the "Juvenile Reeducation Institute" v. Paraguay. Judgment (Preliminary Objections, Merits, Reparations and Costs), para. 295 (2 September 2004); European Court of Human Rights. Case Selmouni v. France Application (Application n. 25803/94). Judgment, paras. 92, 98, 105 (28 July 1999); European Court of Human Rights. Case Aksoy v. Turkey (Application no. 21987/93). Judgment, para. 113 (18 December 1996); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial I, Decision on Applications for Participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the case of The Prosecutor v. Thomas Lubanga Dyilo, para. 11 (21 October 2006); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Fourth Decision on Victims' Participation, paras. 51 (21 January 2008); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Appeals Chamber, Order for Reparations (amended), p. 9, para. 40 (b)

[1309] Inter-American Court of Human Rights. Case El Amparo v. Venezuela. Judgment, paras. 28-30 (14 September 1996);
ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Appeals Chamber, Order for Reparations (amended), p. 9, para. 40 (c)

[1310] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Appeals Chamber, Order for Reparations (amended), p. 9, para. 40 (d); European Court of Human Rights. Case Campbell v. the United Kingdom (Application no. 13590/88). Judgment, para. 26 (25 March

- Costs of legal or other pertinent experts, and expenses associate with medical services, as well as social and psychological assistance.[1311]

The victim` rights to rehabilitation should be implemented by the Court on the grounds of the principles concerning non-discrimination, and it should encompass a gender-inclusive approach covering men and women of all ages.[1312]

Rehabilitation should encompass medical services and healthcare, psychiatric, psychological, and social assistance to help victims who suffer from grief and trauma; as well as any pertinent social and legal services.[1313]

Victims are entitled to receive appropriate, adequate and expeditious reparations.[1314]

The awards have to be proportionate to the damage, harm, injury, loss caused to the victims, as determined by the Court.[1315]

Reparations should intend reconcile the victims with their families and the impacted communities.[1316]

Always that possible, reparations should mirror local culture and conventional practices except if such practices are inequitable, exclusive or prevent victims of having igualitarian access to their rights.[1317]

1992); European Court of Human Rights. Case T.P., & K.M. v. the United Kingdom (Application no. 28945/95). Judgment, para. 115 (10 May 2001); European Court of Human Rights. Case Thlimmenos v. Greece (Application no. 34369/97). Judgment, para. 70 (6 April 2000); Inter-American Court of Human Rights. Case Loayza Tamayo v. Peru, Judgment, paras. 147-148 (17 September 1997); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Appeals Chamber, Order for Reparations (amended), p. 9, para. 40 (d)

[1311] Inter-American Court of Human Rights. Case Loayza Tamayo v. Peru, Judgment, paras. 129 (d) (17 September 1997); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Appeals Chamber, Order for Reparations (amended), p. 9, para. 40 (e); Inter-American Court of Human Rights. Case Barrios Altos v. Peru. Judgment, para. 42 (14 March 2001).

[1312] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 25; ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Appeals Chamber, Order for Reparations (amended), p. 9, para. 41

[1313] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Appeals Chamber, Order for Reparations (amended), p. 9, para. 42; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 21;

[1314] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Appeals Chamber, Order for Reparations (amended), p. 10, para. 44; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para.15;

[1315] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Appeals Chamber, Order for Reparations (amended), p. 10, para. 45

[1316] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Appeals Chamber, Order for Reparations (amended), p. 10, para. 46

[1317] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Appeals Chamber, Order for Reparations (amended), p. 10, para. 47

Reparations need to support self-sufficing programmes so as to permit victims, their families and communities to obtain advantages from these measures during a long period of time. If victims are entitled to pensions or other kinds of economic benefits, whenever possible, they should be paid by periodical instalments instead of by means of a lump payment.[1318]

Also, the UN General Assembly, recognising that victims have right to benefit from remedies and reparation, adopted the 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. The latter established that, pursuant to domestic law and international law, and paying regard to individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as adequate and proportional to the seriousness of the violation and the particularities of each case, be provided with integral and efficient reparation, which, in addition to restitution, compensation, rehabilitation, includes also satisfaction and guarantees of non-repetition.[1319]

In the terms of paragraph 22 of the Basic Principles and Guidelines, satisfaction should include, where adequate:

> "(a) Effective measures aimed at the cessation of continuing violations;
>
> (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
>
> (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
>
> (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
>
> (e) Public apology, including acknowledgement of the facts and acceptance of responsibility;

[1318] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Appeals Chamber, Order for Reparations (amended), p. 10, para. 48

[1319] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para.18

(f) Judicial and administrative sanctions against persons liable for the violations;

(g) Commemorations and tributes to the victims;

(h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels." [1320]

Guarantees of non-repetition, by its turn, should cover, where adequate, any or all of the subsequent measures, which will also lead to prevention:

"(a) Ensuring effective civilian control of military and security forces;

(b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;

(c) Strengthening the independence of the judiciary;

(d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;

(e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;

(f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;

(g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;

(h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law."[1321]

[1320] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 22

[1321] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 23

In tune with the concept of satisfaction and guarantees of non-repetition introduced by the 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims, the International Criminal Court has stated that reparations are not circumscribed to restitution, compensation and rehabilitation. Certainly, the Court has affirmed that other kinds of reparations with a preventative or transformative value, as well as symbolic measures (like, for example, memorials or apologies), can also be adequate.[1322]

Finally, the Court should actively engage the victims and their communities in the outreach activities, which encompass, primarily, programmes targeting vulnerable groups such as women and ethnic minorities, and, in second place, communication between the International Criminal Court and the impacted persons and their communities. The outreach activities are primordial to guarantee that reparations have ample and real meaning.[1323]

As it will be discussed above, in the cases the Prosecutor v. Thomas Lubanga Dyilo, the Prosecutor v. Germain Katanga, the ICC, after finding the accused guilty and issuing the respective sentences, ordered reparations which have been implemented.[1324]

5.8. The Trust Fund for Victims

Pursuant to Article 79 of the Statute, the Trust Fund for Victims (TFV) was created in 2004 by decision of the Assembly of States Parties[1325]

> "for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims."[1326]

The Trust Fund is separate from the Court, being managed by Board of Directors composed by five persons that serve in voluntary capacity.[1327]

[1322] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Appeals Chamber, Order for Reparations (amended), p. 10, para. 48; International Criminal Court website, Reparation/Compensation stage

[1323] International Criminal Court, Assembly of States Parties. Report of the Bureau on the impact of the Rome Statute system on victims and affected communities, p. 10, paras. 26-32

[1324] Rome Statute, Art. 75 (3); Rules of Procedure and Evidence of the International Criminal Court, Rule 103; The Prosecutor v. Lubanga case, Appeals Chamber, Order for reparations (amended), (3 March 2015); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Redaction of Filing on Reparations and Draft Implementation Plan (3 November 2005); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Order instructing the Trust Fund for Victims to supplement the draft implementation plan (9 February 2016); ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Order granting leave to file representations pursuant to article 75(3) of the Statute (1 April 2015).

[1325] International Criminal Court. Establishment of a Fund for the Benefit of Victims of Crimes Within the Jurisdiction of the Court, and of the Families of Such Victims (9 September 2002); International Criminal Court website, Trust Fund for Victims; Rome Statute, Art. 79 (1)

[1326] Rome Statute, Art. 79 (3)

[1327] *Ibidem*; International Criminal Court. Procedure for the nomination and election of members of the Board of Directors of the Trust Fund for the benefit of victims (9 September 2002); International Criminal Court website, Trust Fund for Victims

The Trust Fund´s goal is

> "to support and implement programmes that address harms resulting from genocide, crimes of humanity and war crimes. To achieve this mission, the TFV has a two-fold mandate: (i) to implement Court-Ordered reparations and (ii) to provide physical, psychological, and material support to victims and their families."[1328]

Indeed, independently from reparations (which can solely be granted after the conviction of a defendant), the Trust Fund was assigned with the task of using[1329]

> "[o]ther resources of the Trust Fund ... to benefit victims of crimes as defined in rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families, who have suffered physical, psychological and/or material harm as a result of these crimes."[1330]

The term "other resources" means resources different than those obtained by means of fines, forfeitures and awards for reparations (namely, voluntary contributions and resources that the Assembly of States Parties allocates to the Trust Fund).[1331]

The Trust Fund´s assistance mandate is essential for repairing the harm endured by victims. Its assistance (physical assistance, psychological assistance and material support) is provided[1332]

> "1) in a timelier manner than the judicial process may allowed, and 2) to a more extensive range of victims who are affected by the broader situations before the Court, regardless of whether the harm they suffered stems from particular crimes charged in a specific case. In particular, earmarked funding constitutes an important component of the TFV's resources under the assistance mandate, especially for supporting victims of sexual and gender-based violence".[1333]

The expedite character of the assistance mandate of the TVF is of paramount importance to victims of sexual and gender violence since the latter are often in a remarkably vulnerable situation and urgently require psycho-social support and medical care, thus, demanding a high-priority and fast answer.[1334]

[1328] International Criminal Court. How the Court works; International Criminal Court website, Trust Fund for Victims

[1329] Rome Statute, Art. 75 (2); Rules of Procedure and Evidence of the International Criminal Court, Rule 98; The Trust Fund for Victims website

[1330] Regulations of the Trust Fund for Victims, Regulation 48

[1331] Regulations of the Trust Fund for Victims, Regulations 21 (a) (d), 47; Rules of Procedure and Evidence of the International Criminal Court, Rule 98 (5)

[1332] The Trust Fund for Victims website, Assistance Mandate

[1333] *Ibidem*

[1334] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Appeals Chamber, Order for Reparations (amended), p. 4, para. 19

In fact, if these victims` needs are not quickly satisfied (which would be the case if victims were only aided and supported after the condemnation of a defendant by the Court), their health conditions would deteriorate and some of them would not even be able to survive, as, for instance, those victims infected by the HIV/AIDS as a consequence of the perpetration of sexual and gender-based crimes.[1335]

In the Uganda and Democratic Republic of Congo situations, the Pre-Trial Chamber permitted the Trust Fund to provide the most vulnerable and marginalised victims (who are within the victim concept inserted in Rule 85) with interim relief since the investigation stage, by means of provision of rehabilitation (both physical and psychological) and material assistance.[1336]

In these situations, the victims of sexual and gender-based violence have benefitted of physical rehabilitation (care and rehabilitation of victims that have endured physical injury, as for example, the provision of fistula repair, HIV tests and treatment, post-exposure-prophylaxis, as well as reproductive health services and other specialised medical care), psychological rehabilitation (provision of cost-effective psychological, social and other health benefits as a form of help in the recovery of victims, and educate local populations about the victims` needs, reducing the stigmatisation of victims) and material support (enhancement of the victims` economic status as a way to aid in their recovery).[1337]

By answering to harm, the Trust Fund for Victims assists victims to reobtain dignity and hope and rebuild their lives.[1338]

Ultimately, by helping victims

> "to return to a dignified and contributory life within their communities, the TFV contributes to realizing sustainable and long-lasting peace by promoting restorative justice and reconciliation."[1339]

5.9. Conclusion

The enactment of the Rome Statute brought groundbreaking protection and assistance to victims in general. Also, observed certain conditions, victims were

[1335] de Brouwer, A.-M. L. M. (2005), pp. 418-424; Novak, A. (2015), p. 98
[1336] de Brouwer, A.-M. L. M. (2005), pp. 418-425; Novak, A. (2015), p. 98; Regulations of the Trust Fund for Victims, Regulation 50 (a) (i) (ii) (iii); International Criminal Court website, Victims; The Trust Fund for Victims website, Programmes; The Trust Fund for Victims website, Assistance Mandate; The Trust Fund for Victims, Programme Progress Report November 2009
[1337] de Brouwer, A.-M. L. M. (2005), pp. 418- 424; International Criminal Court website, Victims; The Trust Fund for Victims website, Assistance Mandate; Novak, A. (2015), p. 98
[1338] The Trust Fund for Victims website, Press Release, New TFV Board of Directors: Prioritizing Victim Survivors in International Justice (26 April 2016).
[1339] International Criminal Court. How the Court works; International Criminal Court website, Trust Fund for Victims

allowed to participate at all stages of the proceedings. Further, the drafters of the Rome Statute envisaged that the Court would offer a complementary restorative answer to victims in the International Criminal Law scenario, in which, traditionally, victims have had a secondary role.[1340]

It is remarkable that specific norms (particular investigative, procedural, and evidentiary measures) were inserted in the Statute and its related legal instruments with a view to specifically protect and support victims of sexual and gender-based crime. The International Criminal Court scheme sought to promote procedural justice to these especially vulnerable victims (which includes to make sure that victims receive a fair, respectful, and dignified treatment during the proceedings and have access to reparations) and provide them with a meaningful role in the International Criminal Justice process.[1341]

In view of these key advancements introduced by the Rome Statute, it could be theoretically suggested that international criminal justice is at last in a position to permit all victims, particularly victims of sexual and gender-based violence, to have access to retributive, restorative, practical and procedural aspects of justice.[1342]

In the following chapter, when analysing the practice of the International Criminal Court in its first three cases involving sexual and gender-based crimes in which final judgments have been rendered, it will be possible to verify whether the Court`s handling of such crimes and the level of protection and support conferred to the victims stand to the high safeguard and assistance levels envisaged by its founding and sustaining legal instruments.

Also, by scrutinising how the ICC has been developing the victims` participation regime, in particular in relation to victims of sexual and gender-based crimes, it will be possible to see if the Court has been taking in consideration the victims' interests.[1343]

Indeed, it will be possible to verify if the International Criminal Court is being able to, along with the traditional punitive answer to crimes, appropriately and effectively implement a restorative response focused on the victims rather than in the convicted person, and, thus, if the victims of sexual and gender-based crimes are being able to effectively access justice.[1344]

[1340] *Ibidem*; Varona Martínez, G. (2012 a), pp. 201-245
[1341] Bedont, B., & Martinez, K. H. (1999), pp. 65-85; Benhassine, S. (2015), p. 47; Moffett, L. (2014 a), p. 3; Wemmers, J.-A. M. (1996), pp. 101-102
[1342] Bedont, B., & Martinez, K. H. (1999), pp. 65-85; Benhassine, S. (2015), pp. 11-12, 47-48; Garbett, C. (2017), pp. 198-220
[1343] Moffett, L. (2015), pp. 255-289
[1344] Benhassine, S. (2015), pp. 47-48; Garbett, C. (2017), pp. 198-220

6. Case the Prosecutor v. Thomas Lubanga Dyilo

6.1. Situation in the Democratic Republic of the Congo

In April 2002, the Democratic Republic of the Congo ratified the Rome Statute.[1345]

In July 2003, the Office of the Prosecutor started analysing the situation in the Democratic Republic of the Congo (initially focusing on crimes perpetrated in the Ituri region). Two months later, the Prosecutor informed the States Parties that he was willing to request the Pre-Trial Chamber an authorisation to use his powers laid down in Article 15 paragraph 1 of the Rome Statute and establish a formal investigation, but added that a referral from the Democratic Republic of the Congo in the terms of Article 14, paragraph 1 of the Rome Statute would help his work.[1346]

Subsequently, in November 2003, the Government of the Democratic Republic of the Congo sent a letter welcoming the involvement of the International Criminal Court and, on 3 March 2004, sent a referral letter of the situation in the Democratic Republic of the Congo (ICC-01/04) to the Court. The later was received by the Prosecutor in April and, as a result, investigations were initiated by the ICC on 21 June 2004.[1347]

On 5 July 2004, the Presidency of the International Criminal Court issued a decision assigning the situation in the Democratic Republic of Congo to Pre-Trial Chamber I.[1348]

The core of the situation consists in the alleged perpetration of war crimes and crimes against humanity within the circumstances of armed conflict in the Democratic Republic of the Congo (with a regional focus on Eastern part of the country, in the Ituri region as well as the North and South Kivu Provinces). In fact, the Second Congo War took place in the Democratic Republic of the Congo between1998-2003 and during this period the Hema, Lendu, Ngiti and Bira ethnicities disputed the control of gold mines. However, the investigation was on the events that happened from 1 July 2002 onwards (the date of entrance into force of the Rome Statute and, thus, from which the ICC has jurisdiction over war crimes, crimes against humanity, genocide and aggression).[1349]

[1345] International Criminal Court website, Democratic Republic of the Congo, Situation in the Democratic Republic of the Congo, ICC-01/04

[1346] Rome Statute, Art. 14 (1), 15 (1); ICC website, Press Release, The Office of the Prosecutor of the International Criminal Court opens its first investigation (23 June 2004).

[1347] International Criminal Court website, Democratic Republic of the Congo, Situation in the Democratic Republic of the Congo, ICC-01/04; International Criminal Court website, Case Information Sheet, Situation in the Democratic Republic of the Congo, The Prosecutor v. Thomas Lubanga Dyilo; International Criminal Court website, Democratic Republic of the Congo, Lubanga case, The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06; ICC website, Press Release, 23 June 2004

[1348] International Criminal Court, Presidency. Decision assigning the situation in the Democratic Republic of Congo to Pre-Trial Chamber I (5 July 2004).

[1349] International Criminal Court website, Democratic Republic of the Congo, Situation in the Democratic Republic of the Congo, ICC-01/04; Galain Palermo, P. (2014). In Ambos, K., Malarino, E., & Steiner, C. (eds.), pp. 389-430

This was the inaugural investigation of the Office of the Prosecutor and triggered the instatement of 6 cases (namely, the Prosecutor v. Thomas Lubanga Dyilo, the Prosecutor v. Bosco Ntaganda, the Prosecutor v. Germain Katanga, the Prosecutor v. Callixte Mbarushimana, the Prosecutor v. Sylvestre Mudacumura, and the Prosecutor v. Mathieu Ngudojolo Chui) involving charges of war crimes and crimes against humanity that encompassed crimes of rape and sexual slavery, among other crimes.[1350]

The cases the Prosecutor v. Thomas Lubanga Dyilo, the Prosecutor v. Germain Katanga and the Prosecutor v. Bosco Ntaganda will be subsequently analysed since they offer a portrait the evolution of the International criminal Court in regarding to the handling of sexual and gender-based crimes.

6.2. Background and overview of the case

The Prosecutor vs. Thomas Lubanga Dyilo (Case No.: ICC-01/04-01/06) was the first case of the International Criminal Court.[1351]

The background of the case is the following: the *Union des Patriotes Congolais* (UPC) was formed on 15 September 2000. Thomas Lubanga Dyilo, a founding member of the UPC, was its President since the beginning. The UPC goal was to establish Hema dominance and control in Ituri through the use of military means and violence. In September 2002, Lubanga founded the *Force Patriotique pour la Libération du Congo* (FPLC) to be a military wing of the UPC. So as to achieve the objectives of the UPC, Lubanga (together with other UPC leaders and FPLC Commanders) outlined a strategy to attack the non-Hema militias, mainly the Lendu militia that ulteriorly appeared as the Lendu-controlled Front Nationaliste Integrationniste (FNI), and to make use of violence against Lendu civilians as well a civilian members of other ethnic groups connected with the Lendu in Ituri. Also, in September 2002, the UPC/ FPLC took power in Ituri and started large-scale military operations in Ituri, chiefly against the Lendu militia forces, Lendu civilians, and, following its creation in December 2002, against the FNI. As a consequence, an armed conflict of a non-international character took place in the Ituri region from September 2002 to 13 August 2003. In the course of the conflict, the UPC/FPLC allegedly carried out several of the crimes that were enlisted in the Rome Statute.[1352]

[1350] International Criminal Court website, Democratic Republic of the Congo, Situation in the Democratic Republic of the Congo, ICC-01/04,

[1351] International Criminal Court, The Office of the Prosecutor. Report on the activities performed during the first three years (June 2003 – June 2006), p. 2 (12 September 2006); International Criminal Court website, Case Information Sheet, Situation in the Democratic Republic of the Congo, The Prosecutor v. Thomas Lubanga Dyilo

[1352] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Document Containing the Charges, Article 61(3) (a), pp. 3-7, paras. 4-5, 12-14, 19 (28 August 2006); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Judgment pursuant to Article 74 of the Statute, pp. 24, 591, paras. 25, 27, 1359 (14 March 2012).

In fact, in the establishment of the investigation of the Situation of the Democratic Republic of the Congo, the OTP affirmed that

> "States, international organizations and non-governmental organizations have reported thousands of deaths by mass murder and summary execution in the DRC since 2002. The reports allege a pattern of rape, torture, forced displacement and the illegal use of child soldiers."[1353]

Bearing in mind that the Prosecutor vs. Thomas Lubanga Dyilo was the International Criminal Court´s first case/trial/verdict, there was a lot of expectation in relation to how the Court would conduct the case.[1354]

Particularly, in view of the relevance given by the Rome Statute and subsequent documents regarding sexual and gender-based crimes, there was expectancy that the International Criminal Court would investigate these crimes and that they could be included among the charges made against Lubanga. Indeed, the Rome Statute furnished the International Criminal Court with the most progressive structure in history of sexual/ gender-based violence in international criminal law, and, thus, the Court has both the mandate and chance to prosecute sexual and gender-based crimes in those cases in which there is evidence these crimes have been perpetrated.[1355]

Likewise at the outset of the investigation, in several posterior occasions the Prosecutor and the OTP reaffirmed that the Situation in the Democratic Republic of the Congo comprised allegations of a multiplicity of large-scale crimes under the Rome Statute, inclusive of rape and other crimes of sexual violence, torture, conscription and use of child soldiers, forced displacement, deaths by mass murder and summary execution.[1356]

It was well reported that during the operations of the UPC militia group, the perpetration of the crime of rape and other types of sexual-oriented crimes was widespread. Various sources (as, for instance, a letter from the Secretary-General of the United Nations to the President of the Security Council dated 16 July 2004, United States Department of State country reports for the DRC for the years 2003 and 2004, and reports by Amnesty International, Human Rights Watch, as well as the Women's Initiatives for Gender Justice) publicly exposed the occurrence of these crimes. The OTP was aware of the availability of plenty of information, witnesses and documentation connected with sexual and gender-

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[1353] ICC website, Press Release, 23 June 2004

[1354] ICC website, Case Information Sheet, Situation in the Democratic Republic of the Congo, The Prosecutor v. Thomas Lubanga Dyilo (15 December 2017)

[1355] Inder, B. (2008), p. 3

[1356] ICC (2004). Address by Prosecutor Luis Moreno Ocampo, Third Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court; United Nations, General Assembly. Report of the International Criminal Court, p. 10, para. 37 (1 August 2005); International Criminal Court, Assembly of States Parties. Fourth session, 28 November to 3 December 2005, Report on the activities of the Court, p. 9, para. 53. ICC-ASP/4/16 (16 September 2005); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Request for leave to participate as *amicus curiae* in the Article 61 Confirmation of Charges proceedings, p. 9, para. 11 (7 September 2006).

based crimes carried out by the UPC/ FPLC during the 2002/ 2003 armed conflict in Ituri.[1357]

However, on 12 January 2006, the Office of the Prosecutor submitted a sealed application for an arrest warrant against Lubanga and charged him uniquely with the crimes of conscripting, enlisting, and using children under fifteen years old to participate actively in hostilities.[1358]

Accordingly, when the Pre-Trial Chamber I issued a Warrant of Arrest for Thomas Lubanga Dyilo on 10 February 2006, it was solely stated that there were

> "reasonable grounds to believe that Mr Thomas Lubanga Dyilo is criminally responsible under article 25 (3) (a) of the Statute for:
>
> (i) the war crime of enlisting children under the age of fifteen punishable under article 8 (2) (b) (xxvi) or article 8 (2) (e) (vii) of the Statute;
>
> (ii) the war crime of conscription of children under the age of fifteen punishable under article 8 (2) (b) (xxvi) or article 8 (2) (e) (vii) of the Statute; and
>
> (iii) the war crime of using children under the age of fifteen to participate actively in hostilities punishable under article 8 (2) (b) (xxvi) or article 8 (2) (e) (vii) of the Statute".[1359]

Certainly, no other crimes were included in the basis for the issuance of the Warrant of Arrest.

It is noteworthy that before the issuance of the Warrant of Arrest, the Prosecution had informed the Pre-Trial Chamber that it was investigating further allegations of crimes and that it would be in a position to make its final determination in relation to a possible amendment of the charges by the end of the first semester of 2006. Certainly, the Prosecution explained that it was carrying out investigations in the case connected with allegations of intentional direction of

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[1357] United Nations, Security Council. Letter dated 16 July 2004 from the Secretary-General addressed to the President of the Security Council, covering a "Special report on the events in Ituri, January 2002-December 2003" (16 July 2004); United States of America, Department of State, Bureau of Democracy, Human Rights, and Labor. Democratic Republic of the Congo, Country Reports on Human Rights Practices, 2003 (25 February 2004); United States of America, Department of State, Bureau of Democracy, Human Rights, and Labor. Democratic Republic of the Congo, Country Reports on Human Rights Practices, 2004 (28 February 2005). Amnesty International (2003), pp- 3-4; Amnesty International (2004 a); Human Rights Watch (2005); Letter from Women's Initiatives for Gender Justice to the Prosecutor Luis Moreno Ocampo (15 August 2006); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Request for leave to participate as *amicus curiae* in the Article 61 Confirmation of Charges proceedings, pp. 12, 16, paras. 20 (4), 27; Letter from Women's Initiatives for Gender Justice to the Prosecutor Luis Moreno Ocampo (15 August 2006); Inder, B. (2008), pp. 15, 22

[1358] International Criminal Court, The Office of the Prosecutor. Report on the activities performed during the first three years, p.12

[1359] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Warrant of Arrest, p. 4 (10 February 2006)

attacks against the civilian population, murders perpetrated during and after these attacks, the pillaging of towns and places, and ordering the displacement of the civilian population "inter alia" (no explicit reference was made in relation to an investigation into sexual and gender-based crimes in the case), and that, within a few months, it would determine if the evidence and information on other crimes constituted a basis steady enough and could justify to consider Lubanga criminally responsible for their commission.[1360]

On 28 June 2006, the Prosecutor filed a document containing information on further investigation and stated that investigations that were being undertaken in relation to possible additional charges had been suspended, and that the charges against Lubanga would not be amended in the course of the proceedings. The Prosecutor explained that[1361]

> "it can reasonably be anticipated that the current limited possibilities to further investigate into crimes allegedly committed by Thomas LUBANGA DYILO will make it impossible to complement the collection of evidence to the extent necessary to amend the charges within the time frames as legally determined by Articles 61(4) and 61(9) of the Statute.
>
> 9. In addition, the pace of the present proceedings, based on the current charges against Thomas LUBANGA DYILO has been heavily affected by the ongoing efforts of the Court to provide for adequate protection of victims and witnesses. In the Prosecutor's view, amending the charges would unavoidably add to these difficulties, likely to result in further significant delays that conflict with Thomas LUBANGA DYILO's right to be tried without undue delay."[1362]

Therefore, in spite of its knowledge of the occurrence of further crimes (including sexual and gender-based crimes), the OTP made limited charges in the Lubanga case arguing that:

1-) due to then limited possibilities to investigate more into crimes which were allegedly perpetrated by Lubanga, it was not possible to complement the gathering of evidence to the extent required to amend the charges respecting the time frames established in Articles 61(4) and 61(9) of the Rome Statute;

[1360] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Request for leave to participate as *amicus curiae* in the Article 61 Confirmation of Charges proceedings, p. 11, para. 19; ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Prosecutor's Information on Further Investigation, pp. 2-3, paras. 2-3 (28 June 2006); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Prosecution's Submission of Further Information and Materials, paras. 8-15 (25 January 2006), cited in The Prosecutor v. Thomas Lubanga Dyilo, Pre-Trial Chamber I, Prosecutor's Information on Further Investigation, p. 1 (28 June 2006)

[1361] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Prosecutor's Information on Further Investigation, p. 4, para. 7

[1362] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Prosecutor's Information on Further Investigation, p. 5, paras. 8-9

2-) the amendment of the charges would contribute to further delay the pace of the proceedings (which had already been heavily affected by the ICC´s efforts to provide for proper protection of victims and witnesses), fact that would cause more relevant delays and that would be in conflict with the defendant´s rights to be tried without undue delay.[1363]

In face of the Prosecutor´s decision to temporarily halt the investigation connected to other potential charges against Lubanga and to refrain from amending the charges up to the close of the pre-confirmation proceedings (without discarding an amendment at a posterior stage, though), the legal representative of 6 victims who had been granted participation in the proceedings (VPRS 1 to 6) tried to convince the Pre-Trial Chamber I to make use of its prerogatives of "propio motu" reviewing such a decision, in the terms of Article 53 (3) (b) of the Statute.[1364]

Such request of the victims´ legal representative came as an unfolding of the victims´ prerogative to participate in the proceedings, as established in Article 68 (3) of the Statute and Rule 92 (2). These provisions conferred participatory rights to victims at this procedural stage so as to guarantee that the situation proceedings are not discharged improperly and without the victims´ concerns to have been taken into account.[1365]

The legal representative of the victims argued that the Prosecutor´s resolution should be regarded as an unstated decision of not to prosecute based on Article 53 (2) (c) of the Rome Statute (specifically, that the Prosecutor´s decision of not prosecuting the crimes that were under further investigation was based on his understanding that it would not be "in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime"), circumstance that would allow its revision by the Pre Trial Chamber in the terms of Article 53 (3) (b). Nevertheless, the Pre-trial Chamber I found that the Prosecutor´s decision of suspending the investigation did not subsume in the decision of not investigating or prosecuting in the terms laid in Article 53 (1) (c) and (2) (c) and, thus, dismissed the request alleging that it had no legal basis and was not appropriate.[1366]

As a result, in the Document Containing the Charges of 28 August 2006, it was stated that Lubanga had committed:

[1363] *Ibidem*

[1364] Rome Statute, Arts. 53 (1) (c), (2) (c), (3) (b); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Prosecutor's Information on Further Investigation, pp. 4-5, paras. 7,10; Vasiliev, S. (2009). In Stahn, C., & Sluiter, G. (eds.), pp. 635-690

[1365] ICC. Situation in the Democratic Republic of Congo. Pre-Trial Chamber I, Prosecution's Reply on the Applications for Participation 01/041/dp to 01/04-6/dp, pp. 4-8, paras. 14-17, 21. ICC-01/04-84-Conf (15 August 2005); Vasiliev, S. (2009). In Stahn, C., & Sluiter, G. (eds.), pp. 635-690

[1366] Rome Statute, Art. 53 (1) (c), (2) (c), (3) (b); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Prosecutor's Information on Further Investigation, pp. 4-5, paras. 7,10; Vasiliev, S. (2009). In Stahn, C., & Sluiter, G. (eds.), pp. 635-690

> "Count 1: CONSCRIPTING CHILDREN INTO ARMED GROUPS, a WAR CRIME, punishable under Articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute.
>
> Count 2: ENLISTING CHILDREN INTO ARMED GROUPS, a WAR CRIME, punishable under Articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute.
>
> Count 3: USING CHILDREN TO PARTICIPATE ACTIVELY IN HOSTILITIES, a WAR CRIME, punishable under Articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute."[1367]

The Confirmation Hearing took place from 9 to 28 November 2006. In accordance with the Rome Statute, the OTP is bound to centre its efforts on the most concerning crimes and the persons who bear the greatest responsibility. Several people in the Democratic Republic of Congo considered it unsettling the circumstance that the only crimes that the OTP appointed as being amidst the most serious perpetrated in the Ituri province were the supra mentioned ones. In fact, in accordance with assessments conducted in Ituri by the International Center for Transitional Justice (ICTJ), there was a degree of frustration amidst the Lendu community in view of the fact that Lubanga was not charged with what population members considered as being the relevant crimes carried out by the UPC (rape, torture, murder, looting and destruction of property). Surely, soon the media and human rights organizations expressed their indignation. It was expected that the OTP would include in the charges the whole (or, at least, a larger) range of the criminality perpetrated by the UPC/FPLC during the armed conflict so as to demand accountability for the most serious incidents and the principal forms of victimisation.[1368]

On 29 January 2007, the Pre-Trial Chamber I in the Decision on the confirmation of charges, upheld that there was "sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo" was responsible, in the condition of a co-perpetrator,[1369]

> "for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(b)(xxvi)

[1367] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Document Containing the Charges, Article 61(3) (a), p. 24

[1368] Rome Statute, Preamble and Arts. 1, 5; ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, p.34, para. 84 (7 August 2012); International Criminal Court, The Office of the Prosecutor. Report on the activities performed during the first three years, pp.7-8; International Criminal Court website, Case Information Sheet, Situation in the Democratic Republic of the Congo, The Prosecutor v. Thomas Lubanga Dyilo; Kambale, P. K. (2015). In De Vos, C., Kendall, S., & Stahn, C., (eds.), pp. 171-197

[1369] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Decision on the confirmation of charges, p. 156 (29 January 2007).

> and 25(3)(a) of the Statute from early September 2002 to 2 June 2003;" [1370]

and

> "for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(e)(vii) and 25(3)(a) of the Statute from 2 June 2003 to 13 August 2003." [1371]

Since the Prosecution´s original Document containing the charges did not reflect the charges that were confirmed against Lubanga by the Pre-Trial Chamber, on 9 December 2008, the Trial Chamber I ordered the Prosecution to file an amended document containing the charges in the way that they had been confirmed by the Pre-Trial Chamber I. In view of that, on 23 December 2008, the Prosecution submitted the Amended Document Containing the Charges, Article 61(3)(a).[1372]

On 22 May 2009, a joint application was filed by the legal representatives of the victims for the implementation of the procedure under regulation 55 of the regulations of the Court. In the application, they requested the Trial Chamber I to trigger the procedure for legal re-characterisation of the facts as sexual slavery (Articles 7(l)(g) or 8(2)(b)(xxii) or 8(2)(e)(vi) of the Rome Statute) and inhuman and/or cruel treatment (Articles 8(2)(a)(ii) or 8(2)(c)(i) of the Rome Statute).[1373]

The victims` legal representatives argued that

> "the personal interests of the victims they represent are affected by the application of the said regulation. Indeed, almost all of those victims are former child soldiers who were forcibly recruited into the UPC/FPLC when they were under the age of 15 years and were subsequently sent to training camps where they underwent military training.
>
> During that training, all of those victims suffered inhuman and/or cruel treatment. Furthermore, the young girls were subjected to

[1370] *Ibidem*

[1371] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Decision on the confirmation of charges, p. 157 (29 January 2007).

[1372] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Order for the prosecution to file an amended document containing the charges, p. 8, para. 14 (9 December 2008); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Amended Document Containing the Charges, Article 61(3)(a) (23 December 2008); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, p. 4, para. 3. (8 December 2009).

[1373] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court, pp. 22-23, paras. 41-42 (22 May 2009).

> various acts of sexual violence and were sexually enslaved. It follows that all of those victims have a direct and personal interest in seeing that the acts of sexual violence and inhuman and cruel treatment suffered by the UPC/FPLC recruits following their recruitment receive an appropriate legal characterisation under regulation 55 of the Regulations of the Court."[1374]

In view of this request, on 14 July 2009, the Chamber issued a Decision giving notice to the parties and participants that it appeared to the majority of the Chamber that the legal characterisation of facts might be subject to change (Judge Adrian Fulford dissented).[1375]

Indeed, Regulation 55 (on the Authority of the Chamber to modify the legal characterisation of facts) of the Regulations of the ICC establishes that

> "1. In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.
>
> 2. If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change.
>
> 3. For the purposes of sub-regulation 2, the Chamber shall, in particular, ensure that the accused shall:
>
> (a) Have adequate time and facilities for the effective preparation of his or her defence in accordance with article 67, paragraph 1 (b); and
>
> (b) If necessary, be given the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Statute in accordance with article 67, paragraph 1 (e)."[1376]

[1374] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court, p. 5, para. 11 (22 May 2009).
[1375] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, p. 16, para. 35 (14 July 2009)
[1376] International Criminal Court, Regulations of the Court, Regulation 55 (1) (2) (3)

The majority of the Trial Chamber I understood that

> “Regulation 55 sets out the powers of the Chamber in relation to two distinct stages. One stage is defined in Regulation 55(1) by referring expressly to Article 74 of the Statute which sets out the "Requirements for the decision", that is, the requirements for the Trial Chamber's final judgment. Pursuant to Article 74(2) of the Statute, that decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. In harmony with Article 74, Regulation 55(1) confers on the Chamber, in that final stage, the power to change the legal characterisation of facts with one express limitation: "without exceeding the facts and circumstances described in the charges and any amendments to the charges".
>
> 28. On the other hand. Regulation 55(2) defines a distinct stage in which this subregulation operates. In contrast to Regulation 55(1), the former applies "at any time during the trial". The power to change the legal characterisation of facts at this stage also has limitations, namely those specified in Regulation 55(2) and (3). However, the latter sub-regulations do not require that the modification is done "without exceeding the facts and circumstances described in the charges and any amendments to the charges."[1377]

Therefore, the majority of the Trial Chamber I was of the view that the limitations set up in Regulation 55(1) (specifically, "without exceeding the facts and circumstances described in the charges and any amendments to the charges”) applied only to the Chamber´s final judgment, and not to the procedural moment at stake. Certainly, the Chamber stated that

> “the limitations provided in Regulation 55(1) to the "the facts and circumstances described in the charges" are not applicable to the present procedural situation, which is governed by Regulation 55(2) and (3).”[1378]

The Trial Chamber I was convinced by the victims´ legal representatives´ submissions and by the evidence heard during the trial that a change of the legal characterisation of facts was possible and, in accordance, issued the Decision giving notice to the parties and participants.[1379]

[1377] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, p. 14, paras. 27-28

[1378] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, p. 16, para. 32

[1379] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision giving notice to the parties and participants that the legal characterisation of the facts

The fact that the Chamber understood that it would be possible to re-characterise the facts and circumstances described in the charges and amendments at that stage of the procedure meant, in practice, a chance of including of charges of sexual-slavery, and inhuman and/or cruel treatment in the case. [1380]

However, on 11 and 12 August 2009, respectively, the Defence and the Prosecution filed Applications for Leave to Appeal of the Decision giving notice to the parties and participants that it appeared to the majority of the Chamber that the legal characterisation of facts might be subject to change.[1381]

On 27 August 2009, it was issued by Trial Chamber I the Clarification and further guidance to parties and participants in relation to the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court".[1382]

On 3 September 2009, the Trial Chamber I granted leave to appeal in relation to two questions:

> "Question 1
>
> Whether the Majority erred in their interpretation of Regulation 55, namely that it contains two distinct procedures for changing the legal characterisation of the facts, applicable at different stages of the trial (with each respectively subject to separate conditions), and whether under Regulation 55(2) and (3) a Trial Chamber may change the legal characterisation of the charges based on facts and circumstances that, although not contained in the charges and any amendments thereto, build a procedural unity with the latter and are established by the evidence at trial.

may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, p. 16, paras. 33-35

[1380] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, p. 16, para. 32

[1381] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Defence Application for Leave to Appeal the Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court rendered on 14 July 2009 (11 August 2009); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Prosecution's Application for Leave to Appeal the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court" (12 August 2009)

[1382] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Clarification and further guidance to parties and participants in relation to the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court". (27 August 2009).

Question 2

> Whether the Majority of the Chamber erred in determining that the legal characterisation of the facts may be subject to change, viz. to include crimes under Articles 7(l)(g), 8(2)(b)(xxvi) [sic\, 8(2)(e)(vi), 8(2)(a)(ii) and 8(2)(c)(i) of the Statute."[1383]

The Defence and the Prosecution filed their documents in support of the appeal, on 10 and 14 September 2009, respectively.[1384]

On 14 September 2009, victims a/0001/06, a/0002/06, a/0003/06, a/0049/06, a/0007/08, a/0149/08, a/0155/07, a/0156/07, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0149/07, a/0162/07, a/0610/08, a/0611/08 and a/0249/09 filed an application for participation in relation to the appeals of the Defence and the Prosecution. In the following day, victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 filed a similar application, and, on 18 September 2009, victims a/0051/06, a/0078/06, a/0232/06, a/0233/06 and a/0246/06 also filed an application with views to take part in the appeals.[1385]

On 20 October 2009, the Appeals Chamber decided to grant these 27 victims

> "the right to participate in the present appeals for the purpose of presenting their views and concerns respecting their personal interests in the issues raised on appeal."[1386]

[1383] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision on the prosecution and the defence applications for leave to appeal the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", p. 22, para. 41 (3 September 2009).

[1384] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Defence Appeal against the Decision of 14 July 2009 *entitled Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court* (10 September 2009);
ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Prosecution's Document in Support of Appeal against the 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court' and urgent request for suspensive effect (14 September 2009).

[1385] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Application for Participation by the Legal Representatives in the Appeals Proceedings relating to the Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court (14 September 2009); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Application by the OPCV as the Legal Representative of Victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 to participate in the Interlocutory Appeals Lodged by the Prosecution and the Defence Against the Decision of 14 July 2009 (15 September 2009); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Application for Participation from the Legal Representative of Victims a/0051/06, a/0078/06, a/0232/06 et a/0246/08 in the Defence and Prosecution Appeals against the *Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court* rendered on 14 July 2009 (18 September 2009).

[1386] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Decision on the participation of victims in the appeals, pp. 3-4 (21 October 2009).

Finally, on 8 December 2009, the Appeals Chamber understood that

> "Regulation 55 (2) and (3) of the Regulations of the Court may not be used to exceed the facts and circumstances described in the charges or any amendment thereto."[1387]

Regarding Question 1, the Appeals Chamber stated that it appeared to be a bi-folded question, specifically, if Regulation 55 encompasses two different procedures, and if Regulation 55 (2) and (3) allows the[1388]

> "change of the legal characterisation of the charges based on facts and circumstances that, although not contained in the charges and any amendments thereto, build a procedural unity with the latter and are established by the evidence at trial."[1389]

However, the Appeals Chamber considered that the first question was elemental part of the second question and, thus, analysed both together.[1390]

Regarding this issue, the Appeals Chamber recalled that the Trial Chamber, grounded on its understanding that Regulation 55 encompasses two different procedures which are applicable at distinct stages of the procedure, found that[1391]

> "the provision would allow it to change the legal characterisation "based on facts and circumstances that, although not contained in the charges and any amendments thereto, build a procedural unity with the latter and are established by the evidence at trial.""[1392]

The Appeals Chamber decided that the Trial Chamber I´s interpretation of the provision was incorrect since

> "Regulation 55 (2) and (3) may not be used to exceed the facts and circumstances described in the charges or any amendment thereto".[1393]

[1387] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009, p. 3, para. 1
ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009, p. 15, para. 38
[1389] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009, p. 22, para. 41
[1390] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009, p. 15, para. 38
[1391] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009, p. 32, para. 88
[1392] *Ibidem*
[1393] *Ibidem*

In relation to Question 2, the Appeals Chamber´s main argument was that the Trial Chamber I had grounded its finding that the legal characterisation of the facts might be subject to modification on an erroneous interpretation of Regulation 55. Additionally, the Appeals Chamber noted that the Trial Chamber I had not taken into consideration the questions that would derive from the second issue. The explanations of the Trial Chamber's concerning the facts and circumstances that it would consider for the legal re-characterisation were very incipient.[1394]

As a consequence, the efforts of the Trial Chamber I to enlarge the rather narrow charges and include charges of sexual slavery and inhuman treatment and/or cruel treatment were to no avail.

6.3. Lack of charges of sexual and gender-based crimes against Lubanga

It could be argued that the Prosecutor failed to set out important charges before the Confirmation Hearing and before the beginning of the trial, in the terms of Article 61 paragraphs 4 and 9 of the Statute.[1395]

In fact, it has been sustained that the Prosecution opted for a narrow approach when it charged Lubanga uniquely with the crimes of enlisting and conscripting children under the age of fifteen and using them to participate actively in hostilities.[1396]

The restrict indictment issued by the Prosecutor against Lubanga was very limiting for various victims who endured the larger repercussions of the crimes of conscripting, enlisting and using child soldiers, as, for example, women that were raped by these child soldiers as well as villagers mutilated by them.[1397]

Several human rights organisations affirmed in a joint letter sent to the Prosecutor on 31 July 2006 that “the failure to include additional charges in the case against Mr. Lubanga could undercut the credibility of the ICC in the DRC.”[1398]

Specifically, when dealing with sexual and gender-based crimes, the OTP could have used two approaches:

[1394] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009, p. 39, 40, para. 109

[1395] Rome Statute, Art. 61 (4) (9); O’Connell, S. (2010), pp. 69-80

[1396] Ferstman, C. (2011). In Schabas, W. A., & Bernaz, N. (eds.), pp. 407-419; ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Request for leave to participate as *amicus curiae* in the Article 61 Confirmation of Charges proceedings, p.11, para. 18; Letter from Women’s Initiatives for Gender Justice to the Prosecutor Luis Moreno Ocampo (15 August 2006); Joint Letter from Avocats Sans Frontières et al. to Chief Prosecutor of the International Criminal Court (31 July 2006)

[1397] Ferstman, C. (2011). In Schabas, W. A., & Bernaz, N. (eds.), pp. 407-419

[1398] Joint Letter from Avocats Sans Frontières et al. to the Chief Prosecutor of the International Criminal Court (31 July 2006)

1-) the fact that members of UPC/ FPLC- including the conscripted and enlisted child soldiers who were being used to participate actively in the hostilities- committed rape as a form of propagating violence during the armed conflict;

2-) the circumstance that girls soldiers were victims of sexual violence, being subject to rape and sexual slavery by the UPC/ FPLC.

Certainly, it seems that there was "substantial and available evidence" of the widespread practice of sexual and gender-based crimes in the Lubanga case.[1399]

Regarding the use of rape as a weapon of war by the UPC/ FPLC, the Document Containing the Charges clearly stated that the child recruits had been permission by a commander to rape the Lendu women.

Certainly, when describing individual cases (specifically, "Using REDACTED and other children under the age of fifteen years to actively participate in the FPLC attack on Lipri in February and March 2003"), the OTP affirmed that

> "[i]n February 2003, FPLC commander PITCHEN ordered REDACTED to accompany him to fight in Lipri, REDACTED. In compliance with the order, REDACTED followed commander PITCHEN and fought with him in Lipri. Prior to leaving for Lipri, PITCHEN told REDACTED to kill the Lendu fighters, and to plunder their houses. PITCHEN also told the recruits that they were allowed to rape the Lendu women."[1400]

The Prosecution relied on this information in the Document Containing the Charges, and, therefore, was fully aware that child soldiers who were being used to participate actively in hostilities by the FPLC had been given permission to commit the crime of rape against Lendu women.

Thus, the OTP had a strong indication that members of the FPLC inclusive of child soldiers perpetrated rape against Lendu women during the attack on Lipri. It surfaces that the own child victims could have shed a light (and furnished the OTP with evidence during the investigation stage) on the question so as to establish if rapes were in fact carried out by the UPC/FPLC during the armed conflict.

Moreover, apart from "readily-available public material documenting crimes of sexual violence that were committed specifically by the UPC/FPLC," it seems it would have not been too burdensome for the OTP to gather specific evidence which is demanded at trial.[1401]

[1399] Letter from Women's Initiatives for Gender Justice to the Prosecutor Luis Moreno Ocampo (15 August 2006)

[1400] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Document Containing the Charges, Article 61(3) (a), p. 17, para. 55

[1401] Letter from Women's Initiatives for Gender Justice to the Prosecutor Luis Moreno Ocampo, p. 3 (15 August 2006); United Nations, Security Council; Letter dated 16 July 2004 from the Secretary-General addressed to the President of the Security Council; United States of America, Country Reports on Human Rights Practices, 2003, Democratic Republic of the Congo, dated 25 February 2004; United States of America, Country Reports on Human Rights Practices, 2004,

On 15 August 2006, the Women's Initiatives for Gender Justice (a women's human rights organization which advocates for gender justice through the International Criminal Court and is committed to ensure that violence of a sexual character and gender-based crimes are a priority in the ICC´s investigations and prosecutions) sent a letter to the Prosecutor and "submitted a report to the Prosecutor detailing gender-based crimes committed in eastern DRC", which included[1402]

> "over fifty-five (55) individual interviews with women victims/survivors of rape and other forms of sexualized violence since 1 July 2002. Of these, thirty-one (31) interviewees are victims/survivors specifically of acts of rape and sexual slavery committed by the UPC. This report is the result of two field missions conducted in May and July 2006 by the Women's Initiatives in collaboration with local activists in eastern DRC." [1403]

In mentioned letter, the Women's Initiatives for Gender Justice stressed that the perpetration of sexual and gender-based crimes had been widespread and that victims/survivors and witnesses of such crimes were disposed to come forward.[1404]

It seems logical that if the victims/survivors of rape and sexual slavery had already come forward, they would have been willing to provide the OTP with information on the sexual crimes they suffered so as to base charges of such crimes against Lubanga and testify before the International Criminal Court. In fact, the Court had more means to protect and assist them than the Women's Initiatives for Gender Justice and local activists in eastern DRC had when preparing their report.

Therefore, the OTP could possibly have obtained evidence from those 31 victims/survivors of acts of rape and sexual slavery carried out by the UPC, whose policies and practices were under the authority and ultimate control of its President, Thomas Lubanga Dyilo.[1405]

Democratic Republic of the Congo, dated 28 February 2005; Amnesty International (2003), pp. 3-4; Amnesty International (2004 a); Human Rights Watch (2005); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Request for leave to participate as *amicus curiae* in the Article 61 Confirmation of Charges proceedings, p. 12, para. 20 (4)

[1402] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Request for leave to participate as *amicus curiae* in the Article 61 Confirmation of Charges proceedings, p. 15, paras. 26, 27; Letter from Women's Initiatives for Gender Justice to the Prosecutor Luis Moreno Ocampo (15 August 2006)

[1403] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Request for leave to participate as *amicus curiae* in the Article 61 Confirmation of Charges proceedings, p.16, para. 2

[1404] Letter from Women's Initiatives for Gender Justice to the Prosecutor Luis Moreno Ocampo, p. 4 (15 August 2006); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Warrant of Arrest, p. 4

[1405] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Warrant of Arrest, p. 4 (10 February 2006)

As a result, the OTP could have ascertained with both the presumed perpetrators of rapes (children who were victims of enlistment, conscription, and use by the UPC/FPLC militia) and with alleged victims (women interviewed in the Women's Initiatives for Gender Justice`s report) whether rapes were committed by the UPC/FPLC the course of the attacks in the Ituri region.

Certainly, despite the Prosecution´s allegations that it was not possible to complement the gathering of evidence to the level demanded to amend the charges within the time frames established in Articles 61(4) and 61(9) of Statute, apparently the obtainment of the necessary evidence on the perpetration of rape by the UPC/FPLC so as to charge Lubanga with sexual crimes would be neither very cumbersome nor too time consuming.

On what concerns the sexual abuse of girls soldiers, it is well known that the crimes of enlisting and conscripting children into armed forces is entwined with the crimes of sexual slavery.[1406]

Indeed, sexual slavery is one of the major consequences of the forced recruitment of girls into armed forces, or even its main objective, as several witnesses testified before the Court. Such concept is also defended by several international texts and by international organizations, inclusive of the United Nations and the African Union.[1407]

Girls who are recruited into armed militias perform various roles in these groups, as, for instance, combatant, sexual slave, domestic help, cook, porter, body guard. The diversity of roles is recognised by numerous international documents.[1408]

For example, the 1997 Cape Town Principles defines "child soldier" as

> "any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members. The definition includes girls recruited for sexual purposes and for

[1406] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Observations from the Legal Representatives of the Victims in response to the documents filed by the Prosecution and the Defence in support of their appeals against the Decision of Trial Chamber I of 14 July 2009, p. 11-12, para. 30 (23 October 2009); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009, p. 23, para. 59

[1407] *Ibidem*; ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009, p. 23, paras. 59-60

[1408] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court, p. 12, paragraph 26; UNICEF. Cape Town Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa (30 April 1997); UNICEF. The Paris Principles, Principle 2.1

> forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms."[1409]

Along the same lines, the 2007 Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups establishes that "a child associated with an armed force or armed group" refers to

> "any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities."[1410]

Moreover, the United Nations provided in its Operational Guide to the Integrated Disarmament, Demobilization and Reintegration Standards that

> "[n]o distinction should be made between combatants and noncombatants when eligibility criteria are determined, as these roles are blurred in armed forces and groups, where children, and girls in particular, perform numerous combat support and non-combat roles that are essential to the functioning of the armed force or group."[1411]

In addition, in her Written Submissions regarding the application of Rule 103 of the Rules of Procedure and Evidence, the United Nations Special Representative of the Secretary-General on Children and Armed Conflict (Radhika Coomaraswamy) asserted that

> "[t]he Court should deliberately include any sexual acts perpetrated, in particular against girls, within its understanding of the "using" crime. […] during war, the use of girl children in particular includes sexual violence"[1412]

and, after quoting the 2004 African Union's Solemn Declaration on Gender Equality (where it had been agreed to "[l]aunch, within the next one year, a campaign for systematic prohibition of the recruitment of child soldiers and abuse of girl children as wives and sex slaves"), she stated that this Declaration "reiterated its disdain of the illicit sexual abuse conduct inflicted upon girl children when they are child soldiers."[1413]

[1409] UNICEF. Cape Town Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa

[1410] UNICEF. The Paris Principles, Principle 2.1

[1411] United Nations. Operational Guide to the Integrated Disarmament, Demobilization and Reintegration Standards, p. 230 (2014).

[1412] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict Submitted in application of Rule 103 of the Rules of Procedure and Evidence, para. 23. ICC-01/04-01/06-1229-AnxA (17 March 2008).

[1413] African Union's Solemn Declaration on Gender Equality (6-8 July 2004); The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Written Submissions of the

Further, the United Nations expressly recognised that the recruitment of girls into armed groups is mainly motivated by sexual purposes by stating:[1414]

> "[r]ecruitment often takes different forms for boys and girls: boys are used in combat and other military activities, whereas girls are more frequently used for sexual slavery and forced labour."[1415]

The Secretary-General on Children and Armed Conflict affirmed in a 2000 Report that

> "[t]here is still little awareness of the extreme suffering that armed conflict inflicts on girls or the many roles girls are often forced to play during conflict and long after. Girls are often abducted for sexual and other purposes by armed groups and forces. They face a variety of threats, including rape and forced prostitution. The work of the Special Rapporteur on systematic rape, sexual slavery and slavery like practices during armed conflict and that of the Special Rapporteur on violence against women have drawn attention to the human rights violations, including sexual slavery, which are perpetrated against women and girls in times of armed conflict."[1416]

It was also observed that the practice of exploiting girls as sexual slaves or "wives" is similar to the practice of serfdom, which is forbidden by Article 1 (b) of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.[1417]

Consequently, by the time of the investigation of facts connected with the Lubanga case by the OTP, there were plenty of international instruments defending the idea that the recruitment or use of girls by an armed force is motivated by, and implicates the sexual abuse of these girls.[1418]

United Nations Special Representative of the Secretary-General on Children and Armed Conflict Conflict Submitted in application of Rule 103 of the Rules of Procedure and Evidence, para. 23

[1414] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court, p.15, para. 31

[1415] United Nations, High Commissioner for Refugees. Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons. Guidelines for Prevention and Response, p. 73 (May 2003)

[1416] United Nations, General Assembly, Security Council. Children and armed conflict, Report of the Secretary-General, p. 13, para. 34 (19 July 2000).

[1417] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Observations from the Legal Representatives of the Victims in response to the documents filed by the Prosecution and the Defence in support of their appeals against the Decision of Trial Chamber I of 14 July 2009, pp. 11-12, para. 30; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Art. 1 (b).

[1418] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Observations from the Legal Representatives of the Victims in response to the documents filed by the Prosecution and the Defence in support of their appeals against the Decision of Trial Chamber I of 14 July 2009, p. 12, para. 31;

The Trial Chamber clarified in the Judgment pursuant Article 74 of the Statute dated 14 March 2012 that a total of 129 individual victims (34 female and 95 male) were authorised by the ICC to participate in the proceedings.[1419]

Whilst all the victims asserted that they had suffered harm as a consequence of the enlistment or conscription of children under the age of 15, or of being used to participate actively in the hostilities, many also affirmed they had suffered harm as a consequence of other crimes, as, for example, torture or other forms of ill treatment and sexual violence, which were not the included in the charges against Lubanga.[1420]

Precisely, out of the 129 victims, "30 victims (18 female and 12 male) referred to acts of sexual violence which they either suffered or witnessed." [1421]

Therefore, there were 30 victims who were granted participation in the proceedings either suffered or witnessed of sexual violence. The personal interests of these victims had already been affected by the proceedings and, accordingly, they had no reason to refuse to cooperate with the OTP to gather evidence to charge Lubanga with sexual and gender-related crimes, quite the opposite.[1422]

For instance, child victim a/0050/06, who was granted participation in the proceedings and was enlisted as a witness for the Prosecution, affirmed that had suffered several acts of sexual violence by the UPC. This child victim (that was trusted by the Prosecution to the point of enlisting him/her as its witness) most certainly would have provided the Prosecution with evidence on acts of sexual violence he/she endured as a UPC/FPLC recruit and contributed to enable the charging of Lubanga with sexual/ gender crimes.[1423]

ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009, p. 23, para. 60

[1419] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Judgment pursuant to Article 74 of the Statute, pp.19-20, paras. 15-16

[1420] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Judgment pursuant to Article 74 of the Statute, pp. 19-20, paragraph 16

[1421] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Judgment pursuant to Article 74 of the Statute, p. 20, footnote 54

[1422] Rome Statute, Art. 68 (3)

[1423] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision on the supplementary information relevant to the applications of 21 victims. ICC-01/04-01/06-2063 (21 July 2009); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court; ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Application by the OPCV as the Legal Representative of Victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 to participate in the Interlocutory Appeals Lodged by the Prosecution and the Defence Against the Decision of 14 July 2009, p. 9, paras. 25-26; ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009, pp. 12-13, para. 30.

Further, the supposition that victims participating in the proceedings could have furnished the Prosecution with such evidence is supported by the fact that, in face of the absence of charges of sexual and gender-based crimes against Lubanga, the representatives of the victims (channelling the latter´s insatisfaction with the limited charges and willingness to see Lubanga held accountable for sexual criminal offences) applied for the legal re-characterisation of the facts as sexual slavery and inhuman and/or cruel treatment.[1424]

As laid in Article 61 (9) of the Rome Statute, even after the confirmation of the charges, but still in the Pre-trial stage, the Prosecutor could have amended the charges. He could have explored the fact that the impact of the crimes of enlistment, conscription and use of child soldiers can be even more cruel on girls since in these circumstances they usually also finish being oppressed by sexual and gender-based crimes, and, accordingly, charged Lubanga with these crimes.[1425]

However, the Prosecution did not include

> "the use of girl soldiers as sexual slaves together with the resulting unwanted pregnancies … in the facts and circumstances described in the charges as confirmed in the Decision on the Confirmation of Charges"[1426]

and the Trial Chamber I ensured that its Judgment did not exceed the facts and circumstances described in the charges.[1427]

Certainly, Trial Chamber I affirmed in its 14 March 2012 verdict that

> "[i]t is to be noted that although the prosecution referred to sexual violence in its opening and closing submissions, it has not requested any relevant amendment to the charges. During the trial the legal representatives of victims requested the Chamber to include this conduct in its consideration of the charges, and their joint request led to Decisions on the issue by the Trial Chamber and the Appeals Chamber (viz. whether it was permissible the change the legal characterisation of the facts to include crimes associated with sexual violence). Not only did the prosecution fail to apply to include rape and sexual enslavement at the relevant procedural stages, in essence it opposed this step. It submitted that it would cause unfairness to the accused if he was tried and convicted on this basis.

[1424] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court
[1425] Charlesworth, H. (1999), pp. 385-394; Askin, K. D. (2003), pp. 288-349; Cahn, N. R. (2004), pp. 1-66
[1426] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Judgment pursuant to Article 74 of the Statute, p. 27, para. 36
[1427] *Ibidem*

> 630. In accordance with the jurisprudence of the Appeals Chamber, the Trial Chamber's Article 74 Decision shall not exceed the facts and circumstances (i.e. the factual allegations) described in the charges and any amendments to them. The Trial Chamber has earlier pointed out that "[f]actual allegations potentially supporting sexual slavery are simply not referred to at any stage in the Decision on the Confirmation of Charges". Regardless of whether sexual violence may properly be included within the scope of "using [children under the age of 15] to participate actively in hostilities" as a matter of law, because facts relating to sexual violence were not included in the Decision on the Confirmation of Charges, it would be impermissible for the Chamber to base its Decision pursuant to Article 74(2) on the evidence introduced during the trial that is relevant to this issue."[1428]

Undoubtedly, in its Application for Leave to Appeal the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", the Prosecution sustained that the understanding of the majority of Trial Chamber I that it was authorised by Regulation 55(2) and (3) to add or change charges that go beyond the facts and circumstances described in the Document Containing the Charges had adverse consequences:

> "[t]his issue significantly affects the fairness of the proceeding. It determines that the Accused may be tried and convicted on criminal charges based on facts that were not presented in the charging document or considered by the Pre-Trial Chamber at the confirmation hearing. The principle that a judgment may not extend beyond the factual parameters of the charges is a fundamental aspect of the fairness of the legal process. The Statute reflects this, with Article 74(2) clearly stating that "[t]he Trial Chamber's decision [….] shall not exceed the facts and circumstances described in the charges and any amendments to the charges" – a provision which has been described as "important, though perfectly classic". Regardless of whether the Majority decision is ultimately judged to be correct or incorrect, the issue affects the rights and obligations of the Prosecution, the Defence, the victims, and the witnesses alike.
>
> 23. The parties and all other participants have been preparing for trial, and the trial is half-way completed, based on the facts set out in the charges the Prosecution filed three years ago and the Pre-Trial Chamber confirmed. But with the Majority's Decision, the parties and participants may not yet know the factual

[1428] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Judgment pursuant to Article 74 of the Statute, pp. 286-288, paras. 629-631, and footnote 58

> parameters of the case. Such uncertainty impacts on their ability to effectively prepare for the rest of the trial."[1429]

In spite of that, later in proceedings, the Prosecution sustained that the UPC/FPCL both sexually abused of girls soldiers and instigated child soldiers to commit rape during the hostilities, under the penalty of severe punishment. Certainly, the Prosecution included the sexual violence issue in both its opening and closing submissions.[1430]

In its Closing Brief, the Prosecution, when addressing the use of girl child soldiers in the UPC/FPLC, stated that 10 witnesses had affirmed that girls soldiers had several distinct tasks, such as serving as bodyguards, doing household chores, keeping the commanders´ property while they went into war, carrying their bags, and participating of combat. Six of these witnesses specifically testified that the girls soldiers were also used to provide sexual services to UPC/FPLC commanders, raped, abused and taken by the commanders as "wives". One witness had served as bodyguard to a determined commander and confirmed that she had been taken as one of his wives.[1431]

Therefore, during the trial proceedings, the Prosecution recognised that there was extensive evidence demonstrating that girls soldiers were sexually abused.

Along the same lines, the Prosecution affirmed that

> "[i]t was at these camps that the children first experienced the full reality and harshness of military life. They were ill fed, beaten, whipped, imprisoned, and young girls were raped. They were encouraged to drink alcohol and take drugs, and were regularly intoxicated."[1432]

Still in the same document the Prosecution acknowledged that the child soldiers were commanded to commit rape when participating of combats by saying that:

> "[d]uring battles, they were incited to pillage and to steal money from the population and sometimes to rape. If they refused, they were killed or beaten."[1433]

[1429] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Prosecution's Application for Leave to Appeal the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", pp. 8-9, paras. 22-23

[1430] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Judgment pursuant to Article 74 of the Statute, pp. 286-288, paras. 629-631, and footnote 58

[1431] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Prosecution's Closing Brief, pp. 95-97, paras. 227-234. (1 June 2011); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Witness DRC-OPT-WWWW-0008, pp. 20-22, 78-79 (27 February 2009)

[1432] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Prosecution's Closing Brief, p. 11, para. 18

[1433] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Prosecution's Closing Brief, p. 87, para. 211

Moreover, in its closing statement, the Prosecution in an attempt to draw the dimensions of the cruelty exerted by the UPC/FPLC said that

> "[t]hose children were trained in about 20 camps around Ituri, a territory bigger than the Netherlands. They were used to fight in conflicts. They were used to kill, rape, and pillage throughout the 12-month period of these charges."[1434]

Therefore, the Prosecution unquestionably recognised that the UPC/FPLC members perpetrated sexual crimes against girls soldiers and ordered child soldiers to carry our rapes when participating of the armed conflicts.

In view of the amount of evidence on sexual and gender violence which was produced during the trial, it is hard to conceive that if the Prosecution had strived, it would not have been able to collect enough information up to the beginning of the trial so as to amend the charges and prosecute Lubanga for sexual and gender-based crimes.

All and all, it seems hardly justifiable that the Prosecutor did not charge Lubanga with sexual and gender-based crimes. This lack of charges could be regarded as a failure.

Certainly, victims, several ONG and institutions on favour of women´s rights were disappointed with the lack of charges and impossibility of rendering Lubanga responsible for the sexual crimes perpetrated during the armed conflict in Ituri province.[1435]

Such was the level of dissatisfaction that, in the Launch of the Gender Report Card on the International Criminal Court 2011, the Prosecutor (after affirming that, in the course of the trial of the Lubanga case, the OTP had "explained the gender dimension of the crime of enlisting and conscripting children under the age of 15 years") asserted that

> "[t]he office took note of the reactions of civil society and their preference for these aspects to be explicitly charged."[1436]

It was expected that the practice of the ICC would give priority to sexual and gender-based crimes, in view of new parameters established by Rome Statute in relation to these criminal offences. The feeling was that the International Criminal Court had not honoured the Rome Statute and its provisions on gender and sexual-natured crimes.[1437]

[1434] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Office of the Prosecutors Closing Statements (Open Session), p. 4 (25 August 2011)
[1435] Statement by the Women's Initiatives for Gender Justice on the Arrest of Germain Katanga; Pia-Comella, J. (2013). Talking points for panel presentation, Prosecuting gender-based crimes before the ICC, p.3.
[1436] ICC, the Office of the Prosecutor, Fatou Bensouda. Launch of the Gender Report Card on the International Criminal Court 2011, p.3. (13 December 2011)
[1437] Kambale, P. K. (2015). In De Vos, C., Kendall, S., & Stahn, C., (eds.), pp. 171-197;

Being the ICC´s inaugural case, the efficiency of the Court was under scrutiny and its credibility was tarnished to some extent. Undoubtedly, it was deemed that there was a gap between the International Criminal Court´s aspirations and its actual accomplishments, circumstance that was detrimental to its legitimacy.[1438]

6.4. The factors that drew the OTP to solely charge Lubanga with the crimes of enlistment, conscription and use of child soldiers

As supra mentioned, in the Prosecutor's Information on Further Investigation dated 28 June 2006, it was stated that it was not possible to complement the gathering of evidence to the extent required to amend the charges respecting the time frames established in Articles 61(4) and 61(9) of the Rome Statute in face of limited possibilities to investigate more into crimes which were allegedly perpetrated by Lubanga. The Prosecutor argued as well that the amendment of the charges would contribute to further delay the pace of the proceedings, circumstance that would cause more relevant delays and be in conflict with the accused´s rights to be tried without undue delay.[1439]

When the Prosecutor put forward these arguments to justify the fact that the Prosecution would not be making more charges against Lubanga, he seemed to admit that the decision to try Lubanga on the charges of "conscripting or enlisting children under the age of fifteen years" into the FPLC and using them to "participate actively in hostilities" was not specially grounded on the seriousness of such crimes but instead on which crimes the investigators were able to rapidly collect evidence so as to guarantee a warrant arrest against the accused.[1440]

Also, the OTP asserted that one of the challenges it faced was how to carry out investigations into situations of continuous violence

> "where even travelling to the areas in question may be impossible, or where the territory suffers from a collapse of functioning institutions,"[1441]

thus, entailing remarkable logistical difficulties. In order to address such challenge, the Office adopted two critical measures- to decrease the length and the amplitude of the investigation, and, accordingly, requested a warrant arrest against Lubanga after 18 months of investigations.[1442]

Green, L. (2011). First-Class Crimes, Second-Class Justice: Cumulative Charges for Gender-Based Crimes at the International Criminal Court. *International Criminal Law Review, 11* (3), pp. 529-541; O'Connell, S. (2010), pp. 69-80

[1438] Kambale, P. K. (2015). In De Vos, C., Kendall, S., & Stahn, C., (eds.), pp. 171-197; Damaska, M. R. (2009), pp. 19-35.

[1439] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Prosecutor's Information on Further Investigation, p.5, paras. 8-9

[1440] Kambale, P. K. (2015). In De Vos, C., Kendall, S., & Stahn, C., (eds.), pp. 171-197; ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Prosecutor's Information on Further Investigation, p. 4, para. 7

[1441] International Criminal Court, The Office of the Prosecutor. Report on the activities performed during the first three years, p. 7

[1442] International Criminal Court, The Office of the Prosecutor. Report on the activities performed during the first three years, pp. 2, 7

In this regard, it is necessary to highlight that the impending release of Lubanga (who had been under arrest in the Democratic Republic of the Congo since March 2005) weighed on the Prosecutor´s decision to concentrate on the crimes of conscripting, enlisting, and using children under fifteen years old to actively participate in hostilities.[1443]

The OTP explained that

> "[i]n the situation in the DRC, the Office initially investigated a wide range of crimes allegedly committed, seeking to represent the broad range of criminality. The Office subsequently decided in its first case to focus on the crime of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities. The decision to focus on this crime was triggered by the possible imminent release of Thomas Lubanga Dyilo, who had been under arrest in the DRC for approximately one year before he was transferred to the Court. Therefore, after careful consideration of the evidence gathered, including linkage of the accused to the crime and in accordance with the requirement to prove charges beyond a reasonable doubt, the Office decided to limit the charges to those mentioned above."[1444]

Certainly, the possible imminent release of Lubanga acted as a catalyst element in the decision regarding the timing and the scope of charges. Since March 2005, Lubanga and leaders of other militias had been under arrest in the Democratic Republic of the Congo in answer to the murder of UN peacekeepers on 25 February 2005. The Human Rights Watch criticised the military proceedings of the DRC mainly because there were no charges against them. Lubanga´s detention was renewed every month by the military prosecutor. In accordance with DRC law, following 12 successive months of detention (specifically, on 19 March 2006, in Lubanga´s case), a military judge must confirm the detention. Even though there was no information regarding the intentions of the competent military judge, it was plausible that Lubanga could be released on 19 March 2006 for there was no information linking the latter with the attack against the UN peacekeepers. Consequently,[1445]

> "after careful consideration of the evidence gathered, including linkage of the accused to the crime and in accordance with the requirement to prove charges beyond a reasonable doubt," [1446]

[1443] International Criminal Court, The Office of the Prosecutor. Report on the activities performed during the first three years, pp.2-3
[1444] International Criminal Court, The Office of the Prosecutor. Report on the activities performed during the first three years, p. 8
[1445] International Criminal Court, The Office of the Prosecutor. Report on the activities performed during the first three years, pp. 12-13
[1446] International Criminal Court, The Office of the Prosecutor. Report on the activities performed during the first three years, p. 8

the OTP resolved to request for an arrest warrant against Lubanga with basis on the crimes of enlisting and conscripting children under the age of fifteen years and using them to participate actively in hostilities.[1447]

It does not rest clear, though, if the OTP´s renounce to the persecution of further crimes that were under investigation was down to the fact that such crimes did not reach the material threshold to be prosecuted or if it was merely a decision of criminal politics in view of the circumstance that these crimes did not meet the interest of justice threshold.[1448]

Based on the Prosecutor's Information on Further Investigation dated 28 June 2006, it could be said that both factors played an important role in the decision.

Thus, it could be sustained that the Prosecution´s renounce was to some extent incongruent with the then prosecutor Luis Moreno Ocampo´s assertion:[1449]

> "As the Prosecutor of the ICC, I was given a clear judicial mandate. My duty is to apply the law without political considerations."[1450]

So that the renounce could be based on Article 17 of the Rome Statute, mentioned crimes should have been tried by the Democratic Republic of Congo´s justice.[1451]

Another issue was that the OTP´s independent investigations were regarded as secondary part in the gathering of evidence. On the one hand, it is a further evidence that the OTP employed a[1452]

> "prosecutorial strategy that prioritised political expedience over thorough investigation … frustrating a fuller accounting of the full scope of the DRC conflict."[1453]

On the other hand, it indicates the hardships of working in situations of conflict and the scarcity of resources to carry out investigation on the ground by the Prosecution.[1454]

[1447] International Criminal Court, The Office of the Prosecutor. Report on the activities performed during the first three years, pp. 8, 12-13
[1448] Galain Palermo, P. (2014). In Ambos, K., Malarino, E., & Steiner, C. (eds.), pp. 389-430
[1449] *Ibidem*
[1450] Moreno-Ocampo, L. M. (2009). Building a Future on Peace and Justice: The International Criminal Court. In Ambos, K., Large, J., & Wierda, M. (eds.). *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development- The Nuremberg Declaration on Peace and Justice*, pp. 9-13. Berlin, Heidelberg: Springer.
[1451] Rome Statute, Art.17; Galain Palermo, P. (2014). In Ambos, K., Malarino, E., & Steiner, C. (eds.), pp. 389-430, footnote 4
[1452] Stuart, H. V. (2008), pp. 409-417; O'Connell, S. (2010), pp. 69-80
[1453] Kambale, P. K. (2015). In De Vos, C., Kendall, S., & Stahn, C., (eds.), pp. 171-197
[1454] International Criminal Court, The Office of the Prosecutor. Report on the activities performed during the first three years, p.7; O'Connell, S. (2010), pp. 69-80

Surely, being Lubanga the first case of the ICC, the OTP

> "had to learn how to: approach the possible witnesses without exposing them; identify safe sites for interviews; secure discreet transportation for investigators and witnesses; provide for the contingency of moving witnesses to safe locations without attracting attention; and even check the relationships of drivers and hotel owners with the suspects. In addition, the Office had to communicate effectively with witnesses in different languages, some of which have no corresponding words for the legal terminology required for the interview. In Northern Uganda there are four local languages, … in Ituri district of the DRC there are three … Because there are few qualified professional translators, finding persons with the appropriate skills and background required exceptional efforts. Conditions on the ground for investigators are usually quite difficult, with poor facilities; in some cases 90% of the Office's investigators returned from their missions with illnesses."[1455]

Additionally, the OTP failed to set up contacts and bring about closeness with women and other local groups in order to permit the follow up of evidence. The establishment of networks is of primordial relevance for the OTP. Surely, when compared to a domestic prosecuting authority, the investigative process of the OTP is more arduous since the latter does not dispose of unburdened access to witnesses and evidence and depends on the co-operation of States.[1456]

In what concerns sexual and gender-based crimes, it must be born in mind that the specificities and particularities of this type of crimes constitute a disadvantage for their inclusion in the charges.[1457]

In this sense, Askin affirmed that

> "[s]ex crimes are undoubtedly some of the most difficult to investigate and prosecute. Because there is reluctance from all sides, the tendency to ignore sex- and gender-based crimes. The crimes are intensely personal, the injuries often less visible, and the details provoke discomfort and aversion. But the alternative is silence, impunity and grave injustice."[1458]

The drafters of the Rome Statute, aware that the investigation and prosecution of sexual violence and gender violence crimes is burdened by the very nature of these crimes, established in Article 54 (1) (b) that the Prosecutor should take that

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[1455] International Criminal Court, The Office of the Prosecutor. Report on the activities performed during the first three years, p. 7

[1456] International Criminal Court, The Office of the Prosecutor. Report on the activities performed during the first three years, p. 5; O'Connell, S. (2010), pp. 69-80; ICC, OTP, Fatou Bensouda, Launch of the Gender Report Card on the International Criminal Court 2011, p.4

[1457] Instituto de Estudios sobre Conflictos y Acción Humanitária (2012). Fatou Bensouda y su visión de los crímenes de violencia sexual.

[1458] Askin, K. D., (2003)

into account and adopt pertinent measures to guarantee the effective investigation and prosecution of such crimes.[1459]

Also, so as to avoid that the demand of a more specific approach and in depth knowledge could constitute a barrier for the investigation and prosecution of sexual and gender-based crimes, the Rome Statute equipped the International Criminal Court and the OPT with the necessary human and procedural tools to be able to investigate and prosecute sexual and gender-based crimes.[1460]

In the terms of Article 42 (9) of the Statute, the Prosecutor is bound to appoint advisers with legal expertise on sexual and gender violence. However, at the time of the investigation of the Lubanga case, the Prosecutor had not appointed a Gender Legal Adviser yet. Undoubtedly, only on 26 November 2008 Professor Catharine MacKinnon was appointed as Special Adviser on Gender Issues to the Prosecutor of the International Criminal Court. The deficiency of gender expertise in handling the investigations into gender-based crimes was an element that hampered the charging to sexual and gender-based crimes in the Lubanga case.[1461]

The elements exposed above had a deterrent effect in the inclusion of further charges against Lubanga “lato sensu” and prevented the incorporation of sexual and gender-based crimes among the charges “stricto sensu”.

As previously stressed, the Prosecution´s unilateral decision of not pursuing to charge Lubanga with sexual and gender-based crimes caused the repudiation of the victims and of large part of the international community involved in gender issues.[1462]

6.5. The approach of the Trial Chamber I and the Appeals Chamber in relation to sexual and gender-based crimes in the Lubanga Case

As previously indicated, the former Prosecutor failed to include sexual violence or sexual slavery in the original charges and did not request their inclusion at posterior stages of the proceedings either. Additionally, he forcibly objected the inclusion of charges of rape and sexual slavery during the trial by submitting that it would be unfair to the defendant if he was convicted on such grounds.[1463]

Notwithstanding that, Luis Moreno Ocampo

> “advanced extensive submissions as regards sexual violence in his opening and closing submissions at trial, and in his

[1459] Rome Statute, Art. 54 (1) (b)
[1460] Rome Statute, Art. 42 (9), 54 (1) (b), 68 (1) (2)
[1461] Rome Statute, Art.42 (9); ICC, OTP, Fatou Bensouda, Launch of the Gender Report Card on the International Criminal Court 2011, pp. 2-3; O’Connell, S. (2010), pp. 69-80
[1462] Galain Palermo, P. (2014). In Ambos, K., Malarino, E., & Steiner, C. (eds.), pp. 389-430, footnote 4
[1463] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute, p. 24, para .60 (10 July 2012)

> arguments on sentence he contended that sexual violence is an aggravating factor that should be reflected by the Chamber."[1464]

Therefore, despite his previous posture towards the sexual violence issue throughout the proceedings, he submitted that sexual violence ought to be taken into account for the purposes of sentencing. Such attitude was strongly deprecated by the Trial Chamber I.[1465]

In this sense, the Prosecution submitted that

> "although the Chamber did not base its Article 74(2) decision on evidence relating to sexual violence and rape, the evidence of the witnesses on this issue was credible and reliable and it may "assist as regards sentence".
>
> On this basis, the prosecution submits that the sexual violence and rape to which some girl soldiers were subjected demonstrates that the crimes of conscription, enlistment and use of children were committed with marked cruelty, and they were directed at victims who were particularly defenceless, within the meaning of Rule 145(2)(b)(iii) of the Rules.
>
> 62. The prosecution argues that the evidence supports the conclusion that sexual violence was routinely inflicted upon female child soldiers by the UPC/FPLC trainers and commanders, and that the evidence of sexual violence and rape should be treated as an aggravating factor for the purposes of sentencing. It is submitted that this would not be prejudicial to the convicted person as the defence was on notice of this evidence and the accused cross-examined witnesses on this material during the trial."[1466]

The Trial Chamber I found itself in a thorny situation in face of the abundant evidence that rape and sexual enslavement had been perpetrated.

As already stated, the Chamber could not judge Lubanga for these crimes in its verdict of 14 March 2012. Indeed, the boundaries of the judgment were circumscribed to the facts and circumstances outlined in the charges, and sexual and gender-based crimes were not incorporated therein.[1467]

As a response to the sexual violence issue, Trial Chamber I affirmed that in due course it would "consider whether these matters ought to be taken into account for the purposes of sentencing and reparations."[1468]

[1464] *Ibidem*
[1465] *Ibidem*
[1466] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute, pp. 24-25, paras. 61-62 (10 July 2012)
[1467] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Judgment pursuant to Article 74 of the Statute, p. 27, para. 26
[1468] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Judgment pursuant to Article 74 of the Statute, p. 288, para. 631

Subsequently, in its sentence issued on 10 July 2012, the Trial Chamber I affirmed that

> "[t]he prosecution's failure to charge Mr Lubanga with rape and other forms of sexual violence as separate crimes within the jurisdiction of the Court is not determinative of the question of whether that activity is a relevant factor in the determination of the sentence. The Chamber is entitled to consider sexual violence under Rule 145(l)(c) of the Rules as part of: (i) the harm suffered by the victims; (ii) the nature of the unlawful behaviour; and (iii) the circumstances of manner in which the crime was committed; additionally, this can be considered under Rule 145(2)(b)(iv) as showing the crime was committed with particular cruelty.
>
> 68. For the reasons set out above in the section establishing the procedure to be adopted at this stage, the Chamber is entitled to consider sexual violence in determining the sentence that is to be passed, notwithstanding the fact that it did not form part of the Confirmation Decision. Given the procedural safeguards, there will be no consequential unfairness if the Chamber decides that sexual violence is a relevant factor.
>
> 69. However, that said, it remains necessary for the Chamber to be satisfied beyond reasonable doubt that: (i) child soldiers under 15 were subjected to sexual violence; and (ii) this can be attributed to Mr Lubanga in a manner that reflects his culpability, pursuant to Rule 145(1)(a) of the Rules." [1469]

Consequently, so that the sexual and gender-based crimes could be included as an aggravating factor and, hence, be taken into account for the purposes of sentencing, the Prosecution had to prove it beyond reasonable doubt. Such requirement is down to the circumstance that aggravating factors entail an increase in the defendant´s penalty.[1470]

It is important to mention that in a Dissenting Opinion issued by judge Anita Ušacka in the Appeal of Thomas Lubanga Dyilo against his conviction, she affirmed that

> "Article 66 (3) of the Statute provides that "[…] to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt" (emphasis added). This evidentiary standard is the highest one within the Court's legal framework, and I understand it to mean that "conviction should not occur unless all reasonable hypotheses based on the evidence presented indicate guilt". This standard applies not only to the

[1469] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute, pp. 26-27, paras. 67-69
[1470] Dondé Matute, J. (2014). In Ambos, K., Malarino, E., & Steiner, C. (eds.), pp. 305-327

> ultimate question of guilt, but also to the fact-finding stage, specifically to the facts necessary to establish the elements of the crimes charged."[1471]

And continued saying

> "as expressly stated in article 66 (2) of the Statute, this means that it is for the Prosecutor to prove before the Court that the accused is guilty to the standard of beyond reasonable doubt. A logical consequence of this onus is that it is for the Prosecutor to adduce sufficient evidence underpinning her case that she is convinced will have a chance of successfully proving the guilt of the accused."[1472]

Likewise, in the Prosecutor v. Mathieu Ngudjolo case, the Trial Chamber II clarified that

> "the fact that an allegation is not, in its view, proven beyond reasonable doubt does not necessarily mean that the Chamber questions the very existence of the alleged fact. It simply means that it considers that there is insufficient reliable evidence to make a finding on the veracity of the alleged fact in light of the standard of proof. Accordingly, finding an accused person not guilty does not necessarily mean that the Chamber considers him or her to be innocent. Such a finding merely demonstrates that the evidence presented in support of the accused's guilt has not satisfied the Chamber "beyond reasonable doubt"."[1473]

Thus, the requirement "beyond reasonable doubt" is straight related to the evidence presented and if it allows to make a finding on the verity of an alleged fact in view of the standard of proof.

After mentioning the testimonies of 4 witnesses, the Trial Chamber I affirmed that

> "[o]n the basis of the totality of the evidence introduced during the trial on this issue, the Majority is unable to conclude that sexual violence against the children who were recruited was sufficiently widespread that it could be characterised as occurring in the ordinary course of the implementation of the common plan for which Mr Lubanga is responsible. Moreover, nothing suggests that Mr Lubanga ordered or encouraged sexual violence, that he was aware of it or that it could otherwise be attributed to him in a way that reflects his culpability."[1474]

[1471] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Dissenting Opinion of Judge Anita Ušacka, p.13, para. 27 (1 December 2014)
[1472] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Dissenting Opinion of Judge Anita Ušacka, p. 14, para. 27 (1 December 2014)
[1473] ICC. The Prosecutor v. Mathieu Ngudjolo, Case No. ICC- 01/04-02/12. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 17, para. 36. (18 December 2012)
[1474] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute, p. 28, para. 74

Regarding the contextual criteria “the ordinary course of the crime”, the Majority of the Chamber´s view in the verdict was that

> “the “awareness that a consequence will occur in the ordinary course of events” means that the participants anticipate, based on their knowledge of how events ordinarily develop, that the consequence will occur in the future.”[1475]

Therefore, it demands that during the planning of the crime or its execution, it was predictable the commitment of the aggravating factor from a “*ex ante*” perspective- in accordance with the perspective of an ordinary person in the position of author- independently if the concrete subject took it or not into account. As a consequence, the sexual violence would be communicable when its occurrence was expected, attending to the facts.[1476]

The Majority of the Chamber was not convinced that sexual violence carried out against the child recruits was enough widespread to such an extent that would permit to characterise it as taking place in the ordinary course of the operation of the common plan for which Lubanga was held responsible.[1477]

Further, the Majority of the Chamber understood that there was no element suggesting that the defendant had ordered or boosted sexual violence, that he was conscious of it, or that it could in any other way be attributed to him in a manner that emulates his culpability.[1478]

Consequently, in the view of the Majority, it was not established beyond reasonable doubt the connection between Lubanga and sexual violence in the context of the charges.

Once more, such outcome arose as consequence of the Prosecutor´s recklessness in relation to sexual violence in the Lubanga case.

In fact, in the sentence, the Chamber affirmed that

> “[a]lthough the former Prosecutor was entitled to introduce evidence on this issue during the sentencing hearing, he failed to take this step or to refer to any relevant evidence that had been given during the trial. As a result, in the view of the Majority, the link between Mr Lubanga and sexual violence, in the context of the charges, has not been established beyond reasonable doubt. Therefore, this factor cannot properly form part of the assessment of his culpability for the purposes of sentence.

[1475] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Judgment pursuant to Article 74 of the Statute, p. 436, para. 1012

[1476] Modolell Gonzaléz, J. L. (2014). Problemas Específicos de la *Decision on Sentence*: Circunstancias Agravantes y Atenuantes, Concurso y Cálculo de Pena. Ambos, K., Malarino, E., & Steiner, C. (eds.), pp. 331-333

[1477] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute, p. 28, paras. 74-75

[1478] *Ibidem*

> 76. In a separate Decision, the Chamber will assess whether this factor is relevant to the issue of reparations."[1479]

As a result, even though sexual violence took place in the context of the crimes of which Lubanga was convicted, there was not an adequate ground to hold him responsible for it, and, thus, sexual violence could not be rendered as an aggravating circumstance for the purposes of sentencing.[1480]

In the Lubanga Sentencing Judgment on Appeals of 1 December 2014, the Appeals Chamber affirmed that this TCI understanding actually encompassed "a broad range of possibilities from objective foreseeability to intent".[1481]

In addition to sexual violence, the Prosecution argued that the factors "Commission of the Crime when the Victims are Particularly Defenceless" and "Discriminatory motive" should also be considered as aggravating circumstances by the Trial Chamber I.

Regarding the Commission of the Crime when the Victims are Particularly Defenceless, the Trial Chamber I stated that

> "[t]he VOl group of victims suggests that in joining with others to form a rebel army that included children under the age of 15, Mr Lubanga knew the crime involved individuals who were particularly vulnerable; whose education would be interrupted; who might be injured or killed during fighting; and who were at risk of abuse, including sexual abuse. The victims submit that these factors should be taken into account as an aggravating circumstance by the Court.
>
> 78. As already indicated, the factors that are relevant for determining the gravity of the crime cannot additionally be taken into account as aggravating circumstances. Therefore, the age of the children does not both define the gravity of the crime and act as an aggravating factor. Accordingly, the age of the children does not constitute an aggravating factor as regard these offences."[1482]

As the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia recalled in its Judgment on Sentencing Appeal (8 March 2006) in the

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[1479] *Ibidem*

[1480] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute, pp. 26-28, paras. 66, 74-75

[1481] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute", p. 38, para. 90 (1 December 2014)

[1482] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute, p. 29, paras. 77-78

Prosecutor v. Nikolic case and the Trial Chamber I reaffirmed in its Decision Sentence of 10 July 2012,[1483]

> "any factors that are to be taken into account when assessing the gravity of the crime will not additionally be taken into account as aggravating circumstances, and vice versa."[1484]

Since the Trial Chamber I found that the age of the children defines the gravity of the crime, it could not constitute an aggravating factor. If it was treated as an aggravating circumstance, it would violate the "ne bis in ídem" material (double counting) principle. Certainly, the children´s age should not be "double-counted" for the ends of the sentence.[1485]

In what concerns gender as a Discriminatory motive, the Chamber affirmed:

> "[t]he prosecution contends that the evidence demonstrates that the female recruits were subjected to sexual violence, rape and "conjugal subservience" on the basis of their gender. It is suggested this constitutes gender-based harm within the meaning of Rule 145(2)(b)(v) and, as a result, it is an aggravating factor. V02 group of victims submits that the crimes for which Mr Lubanga was convicted were committed in a deliberately discriminatory manner, given the commanders sexually abused female soldiers.
> …
> 81. In the judgment of the Majority, the Court has not been provided with any evidence that Mr Lubanga deliberately discriminated against women in committing these offences, in the sense suggested by the prosecution or the victims. In any event, "motive involving discrimination" pursuant to Rule 145(2)(b)(v) has not been treated as an aggravating factor."[1486]

As a result, the Trial Chamber I did not find that Lubanga deliberately discriminated against women, and, in consonance, did not accept that gender as a discriminatory motive should be treated as an aggravating circumstance.

[1483] ICTY. The Prosecutor v. Momir Nikolic, Case No. IT-02-60/1-A. The Appeals Chamber, Judgment on Sentencing Appeal, p., 22, para. 58 (8 March 2006)

[1484]ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute, p.14, para. 35

[1485] ICTY. The Prosecutor v. Momir Nikolic. The Appeals Chamber, Judgment on Sentencing Appeal, p. 22, para. 58; ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute, p. 51, para. 23; ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute, p. 51, para. 23; Dondé Matute, J. (2014). In Ambos, K., Malarino, E., & Steiner, C. (eds.), pp. 305-327

[1486] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute, pp. 29-30, paras. 79, 81

In relation to the Dissenting Opinion of Judge Odio Benito, it is necessary to highlight that she did agree with the Majority of the Chamber that no aggravating circumstances should be considered.[1487]

Nonetheless, she understood that, in accordance with Rule 145(l)(c) of the Rules of Procedure and Evidence, the harm caused to the victims and their families, especially as a consequence of the harsh punishments and sexual violence endured by the victims of such crimes, should be taken into account in the determination of the sentence against Lubanga since it relates to the seriousness of the crimes of enlistment, conscription and use of children under the age of 15 to participate actively in the hostilities, and specifically the damage inflicted on child victims and their families as a consequence of such crimes.[1488]

In fact, Judge Odio Benito strongly disagreed

> "with the Majority of the Chamber that disregards the damage caused to the victims and their families, particularly as a result of the harsh punishments and sexual violence suffered by the victims of these crimes pursuant to Rule 145(l)(c) of the Rules of Procedure and Evidence ("Rules")."[1489]

She sustained her viewpoint explicating that

> "the Chamber received ample evidence during the trial related to the conditions in which boys and girls were recruited and the harms they suffered as a result of their involvement with the UPC. The evidence received as regards the punishments and harsh conditions of children in the recruitment camps and the sexual violence they suffered (mainly but not exclusively the girls) at their young age should be taken into consideration when determining the sentence against the convicted person as it touches upon the gravity of the crimes of enlistment, conscription and use of children under the age of 15 to participate actively in the hostilities, and particularly the damage caused to the child victims and their families as a result of these crimes.
>
> 7. The evidence presented during the trial demonstrates beyond reasonable doubt that children "were subject to a range of punishments during the training with the UPC/FPLC, particularly given there is no evidence to suggest they were excluded from this treatment". As regards sexual violence, although the

[1487] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Dissenting Opinion of Judge Odio Benito in Public Decision on Sentence pursuant to Article 76 of the Statute, p. 41, para. 1. (10 July 2012)
[1488] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Dissenting Opinion of Judge Odio Benito in Public Decision on Sentence pursuant to Article 76 of the Statute, pp. 41-42, paras. 2, 6 (10 July 2012)
[1489] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Dissenting Opinion of Judge Odio Benito in Public Decision on Sentence pursuant to Article 76 of the Statute, p. 41, para. 2 (10 July 2012)

Chamber concluded that it would not make findings of fact on whether the responsibility is to be attributed to Mr Lubanga, it concluded that it would hear submissions as to whether the issue could assist as regards sentence and reparations.

8. Pursuant to Rule 145(l)(c) of the Rules, the Chamber has the authority and the obligation to consider the damaging effects that the recruitment, particularly the harsh treatment and sexual violence had upon very young children, as an exacerbating factor in the determination of the sentence. Although cruel treatment and sexual violence are not included in the facts and circumstances of the charges described in the Confirmation of Charges decision, as set out in the Majority Decision, given the procedural safeguards implemented by the Chamber, the convicted person has had adequate notice, time and facilities for the preparation of his defence during the sentence hearing. There is thus no unfairness towards the defence should the Chamber consider the issue in the determination of the sentence.

C. The expert witnesses´ evidence on the harm caused to victims and their families

9. The evidence that the Chamber heard from expert witness Elisabeth Schauer, who testified on post-traumatic stress disorder and other harmful effects that child recruitment has on its victims is fundamental to determine the damage that the crimes for which Mr Lubanga has been convicted cause on the lives of the young victims and their families. Although, as noted by the Majority Decision, the crimes subject matter of this case occurred during a rather limited time period, the effects of the crimes on the victims and their families are long-lasting, sometimes for a lifetime and often will pass from one generation to another. As noted by the expert witness Ms Schauer, the post-traumatic stress disorder may affect victims for their entire lives, following their exposure to traumatic events (including having experienced or witnessed killing or mutilation, severe physical or sexual assault, sexual abuse and rape) whilst serving as child soldiers.

…

13. Whilst considering the gravity of the crimes of enlistment, conscription and use of children under the age of 15 to participate actively in the hostilities, it is essential to keep in mind the differential gender effects and damages that these crimes have upon their victims, depending on whether they are boys or girls. Along these lines, Ms Schauer stated that sexual violence, including torture, rape, mass rape, sexual slavery, enforced prostitution, forced sterilization, forced termination of pregnancies, giving birth without assistance and being mutilated are some of the key gender-based experiences of both women and girls during armed conflicts. She also stated that in some

armed conflicts, abducted girls where almost universally raped. Similarly, Ms Coomaraswamy stated that rape happens to girls on a regular basis and they also suffer from forced marriage and other forms of sexual violence, including force nudity and sexual harassment. She stated that for girls, recruitment is a "particularly horrendous experience".

…

E. The harm caused to victims and their families has been proven beyond reasonable doubt as a factor pursuant to Rule 145(l)(c) of the Rules

19. In light of the abundant evidence rehearsed above, it is my opinion that the damage caused to these children is a factor that shall be considered by the Chamber in the determination of the sentence against Mr Lubanga Dyilo, pursuant to Rule 145(1)(c) of the Rules. The children who were victims of the crimes for which Mr Lubanga has been convicted were subjected to acts of extreme violence, including harsh punishments and sexual violence, all of which caused serious damage which may continue to date and may extend into the future, even affecting future generations. Given the nature of these crimes, the harm caused extends to the victims' family, including the parents who lost their children or lost any possibility to have a relationship with their children in the future. Children born as a result of the sexual violence suffered by girls who were recruited are also deeply affected by these crimes and this is what was defined by expert Ms Schauer as the "transgenerational effects", which in her words "cripple individuals and families even into next generations".

20. The fact that the victims were all of a young age (under the age of 15) must also be considered by the Chamber. Moreover, because of their age, many of the victims may never be able to be fully repaired for the harm they suffered and still continue to suffer. Their childhood was deeply affected by these crimes that have scarred their lives and those of their families forever. Consequently, I deem that these are exacerbating factors pursuant to Rule 145(l)(c) of the Rules, all of which may be attributed to Mr Lubanga since he was found guilty beyond reasonable doubt of the crimes that caused such harms to the child victims and their families.

21. Although, as noted by the Majority of the Chamber, Mr Lubanga may not have "deliberately discriminated against women in committing these offences", the crimes for which he was convicted resulted in the discrimination of women, particularly girls under the age of 15 who were subject to sexual violence (and consequently to unwanted pregnancies, abortions, HIV and other sexually transmitted diseases) as a result of their recruitment within the UPC. Although this may not have been the

> deliberate intention of the convicted person, the sexual violence suffered by children under the age of 15 as a result of the crimes for which he was found to be a co-perpetrator, impaired and most likely nullified, perhaps for the rest of their lives, the enjoyment of other human rights and fundamental freedoms of its victims (including inter alia, their right to education, their right to health, including sexual and reproductive health, and their right to a family life).
>
> 22. Consequently, I dissent with the Majority of the Chamber that disregarded factors such as "punishment" and "sexual violence" in the determination of the sentence against Mr Lubanga Dyilo, as these acts resulted in serious and often irreparable harm to the victims and their families."[1490]

Therefore, in her dissenting opinion, Judge Odio Benito (contrarily to the majority of the Chamber) defended that both sexual violence and punishment should be considered in the elaboration of the sentence against Lubanga because these acts caused grave and frequently irreparable damage to the victims and their families.

6.6. Reparations

The reparations proceedings began on 7 August 2012 when the Trial Chamber I issued the Decision establishing the principles and procedures to be applied to reparations.[1491]

In this decision, the Trial Chamber affirmed that, in the terms of Article 21(l)(a) of the Rome Statute, when deciding on reparations the Court is bound to apply the Statute, the Elements of Crimes and the Rules. It added that the Court would consider as well the Regulations of the Court, the Regulations of the Registry and the Regulations of the Trust Fund for Victims.[1492]

The Chamber recalled the provisions inserted in these instruments connected with reparations and which provide guidelines as to how they should be established.[1493]

Certainly, the Chamber affirmed that when implementing the reparations, the Court must attain to the preconised in Article 21(3) of the Rome Statute,

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[1490] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Dissenting Opinion of Judge Odio Benito in Public Decision on Sentence pursuant to Article 76 of the Statute, pp. 42-46, 49, 50, paras. 6-9, 13, 19-22 (10 July 2012)

[1491] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, p. 66, para. 182; International Criminal Court website, Lubanga Case, The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06,

[1492] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, p. 66, para. 184, and footnote 371

[1493] Rome Statute, Arts. 21 (1) (a) (b) (c), (3); 36 (8) (b); 42 (9); 43 (6); 54 (1) (b); 68 (1) (2); Rules of Procedure and Evidence of the International Criminal Court, Rules 16-17,70-72, 86, 88 (1) (5)

specifically that reparations are to be granted to victims without detrimental differentiation on the basis of gender, age, race, colour, language, religion or belief, political or other opinion, sexual orientation, national, ethnic or social origin, wealth, birth or other status.[1494]

The Trial Chamber I stated that, when establishing the guiding principles to apply to the reparations of the Lubanga case, it used as sources of inspiration international instruments, determined relevant human rights reports, the jurisprudence of the regional human rights courts and the national as well as international mechanisms and practices which have been developed in this area.[1495]

The Chamber reaffirmed the disposition of Article 68 of the Rome Statute and Rule 86 of the Rules, and asserted that in all issues concerning reparations, it would take in consideration the needs of all the victims, and, in particular, children, the elderly, persons with disabilities and the victims of sexual or gender violence.[1496]

The Trial Chamber I also sustained that

> "[r]eparations need to address any underlying injustices and in their implementation the Court should avoid replicating discriminatory practices or structures that predated the commission of the crimes. Equally, the Court should avoid further stigmatisation of the victims and discrimination by their families and communities.
>
> 193. Reparations should secure, whenever possible, reconciliation between the convicted person, the victims of the crimes and the affected communities."[1497]

When addressing the beneficiaries of reparations, the Chamber recognised that

> "priority may need to be given to certain victims who are in a particularly vulnerable situation or who require urgent assistance. These may include, inter alia, the victims of sexual or gender-based violence, individuals who require immediate medical care (especially when plastic surgery or treatment for HIV is necessary), as well as severely traumatized children, for instance following the loss of family members. The Court may adopt,

[1494] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, pp. 66, 69, paras. 184, 191; Rome Statute, Art. 21 (3)
[1495] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, pp. 66-67, para. 185-186
[1496] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, p. 68, para. 189
[1497] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, p. 68-69, paras. 192-193

> therefore, measures that constitute affirmative action in order to guarantee equal, effective and safe access to reparations for particularly vulnerable victims."[1498]

The Trial Chamber I also asserted that

> "[a] gender-inclusive approach should guide the design of the principles and procedures to be applied to reparations, ensuring that they are accessible to all victims in their implementation. Accordingly, gender parity in all aspects of reparations is an important goal of the Court."[1499]

The Trial Chamber I clarified that, if reparations are to have ample and real significance, it is essential to guarantee the implementation of outreach activities which encompass, first off gender-inclusive and ethnic-inclusive programmes, and also communication between the International Criminal Court and the affected persons and their communities.[1500]

When addressing the victims of sexual violence, the Trial Chamber stated that the Court should devise and implement reparations awards which are adequate for the victims of sexual and gender-based violence. The Court must reflect the circumstance that the results of such crimes are convoluted and their unfolding reaches distinct levels. Their impact can live on a protracted long period of time, they affect women and girls, men and boys, jointly with their families and communities. To tackle the harms resulting from sexual and gender violence, it is necessary to deploy a specialist, unified and multidisciplinary approach.[1501]

The Trial Chamber established that the Court shall implement gender-sensitive measures in order to surpass the difficulties endured by women and girls when they seek to access justice in such context. In accordance, the Court is bound to take measures to guarantee that women and girls can participate integrally in the reparation programmes.[1502]

Consequently, the approach adopted by the Court should permit women and girls in the affected communities to participate in parity and meaningfully in the outline and implementation of the reparation orders.[1503]

[1498] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, p. 70, para. 200
[1499] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, p. 71, para. 202
[1500] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, p. 72, para. 205
[1501] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, p. 72, para. 207
[1502] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, p. 72, para. 208
[1503] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, p. 73, para. 209

Further, the reparations decisions regarding children should characterised by a gender-inclusive attitude.[1504]

Likewise, a gender-inclusive approach must be deployed by the Court when rehabilitating former child soldiers and re-establishing them into society.[1505]

Additionally, the International Criminal Court has to ensure that the award of reparations is made on non-discriminatory and gender-inclusive grounds.[1506]

Even though Article 75 of the Statute enumerates restitution, compensation and rehabilitation as types of reparations, such list is not closed. Other kinds of reparations, as, for example, those that present a symbolic, preventative or transformative value, can also be adequate. A gender-sensitive approach should be employed when establishing the form of applying reparations.[1507]

Furthermore, awards should not replicate former structural inequalities or reinforce discriminatory practices, including disparities based on gender.[1508]

Compensation (a type of economic relief directed at addressing, in a proportionate and adequate manner, the harm that has been caused, as for example, physical harm of causing a person to be unable to bear children, and medical services, psychological and social assistance for boys and girls with HIV and Aids) is to be approached on a gender-inclusive basis. Certainly, the measures put in place for awarding compensation should take into consideration the gender and age-specific effect that the criminal offences of enlisting and conscripting children under the age of 15 and using them to participate actively in the hostilities may have on victims, their families, and communities.[1509]

The right of victims to rehabilitation should be implemented by the International Criminal Court on the grounds of the principles related to non-discrimination, including a gender-inclusive method that covers males and females of all ages.[1510]

Reparations can encompass measures to tackle the shame felt by some ex child soldiers, and to avoid any future victimisation, especially in the cases in that they

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[1504] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, p. 73, para.211
[1505] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, p. 74, para.216
[1506] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, p. 75, para. 218
[1507] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, pp. 75-76, para. 222
[1508] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, p. 76, para. 227
[1509] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, p. 76-78, paras. 227, 230, 231
[1510] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, p. 79, para. 232

endured sexual violence, torture and inhumane and degrading treatment subsequently to their recruitment.[1511]

In all circumstances, the reparations should be awarded on a non-discriminatory grounds, and they have to be established and applied following a gender-inclusive approach.[1512]

The Trial Chamber I stated that reparations should be directed at reconciling the victims of the crimes with their families and all the communities impacted by the crimes. The Chamber, clarified that in cases of sexual violence, reconciliation with the perpetrator can be an inadequate measure as data indicates that numerous survivors of sexual violence want neither a direct apology from the perpetrator nor any contact with him/her.[1513]

The Chamber endorsed the proposal of the Registry that there should be a multidisciplinary team of experts in order to provide assistance to the Court in the elaboration and implementation of a reparations plan. The team ought to encompass Democratic Republic of the Congo representatives, international representatives, as well as specialists in child and gender issues.[1514]

The Trial Chamber I, in accordance with Rule 97(2) of the Rules, delegated to the TFV the function of choosing and appointing adequate multidisciplinary experts, including experts in the areas of child soldiers, gender issues and violence against girls and boys.[1515]

However, 3 appeals were filed against the Trial Chamber I´s Decision establishing the principles and procedures to be applied to reparations of 7 August 2012. Certainly, on 24 August 2012, an appeal was filed jointly by the Legal Representatives of Victims V02 and the Office of Public Counsel for victims on behalf of the victims they represent; on 3 September 2012, an appeal was filed by the Legal Representatives of Victims V01 on behalf of the victims they represent; and on 6 September 2012, an appeal was filed by Thomas Lubanga Dyilo.[1516]

[1511] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, p. 81, para. 240

[1512]ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, p. 81, para. 243

[1513] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, p. 81, para. 244 and footnote 431

[1514] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, pp. 86-87, paras. 263, 264

[1515] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, p. 87, para. 265

[1516] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Appeal against Trial Chamber I's Decision establishing the principles and procedures to be applied to reparations of 7 August 2012 (24 August 2012); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Appeal against Trial Chamber I's Decision establishing the principles and procedures to be applied to reparation of 7 August 2012 (3 September 2012); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Appeal of the Defence for Mr Thomas Lubanga against Trial Chamber I's Decision establishing the principles and procedures to be applied to reparation

As a consequence, the Appeals Chamber amended referred Decision by majority.[1517]

The Trial Chamber I had stipulated that

> "[t]he Court should formulate and implement reparations awards that are appropriate for the victims of sexual and gender-based violence."[1518]

The Defence disputed this finding of the Trial Chamber I. It sustained that the Prosecutor restricted the reach of the case to enlistment, conscription and use of child soldiers under the age of 15 years to participate actively in hostilities, and that the Trial Chamber rejected the Prosecutor´s argument that the perpetration of such crimes would mandatorily lead to the perpetration of sexual violence. Moreover, the Defence contended that Articles 8 (2) (e) (vi) and (vii) of the Rome Statute and the Elements of Crimes do not associate the perpetration of sexual violence to the condition of child soldiers.[1519]

The Legal Representatives of Victims V01 argued that the TCI´s stipulation meant that persons that suffered gender-based violence can be considered victims in the reparations proceedings, but not that all of them can benefit from reparations. These victims are entitled to receive reparations solely if it is established a causal link between the harm they endured and the criminal offences for which Lubanga was condemned.[1520]

The OPCV and the Legal Representatives of Victims V02 submitted that gender-based crimes and inhumane treatment are intrinsic elements of the crimes of enlistment, recruitment and use of children in hostilities. As a result, applicants solely had to demonstrate that their harm derived from the crimes for which Lubanga was condemned so as to be awarded reparations.[1521]

The Trust Fund assured that since the damage coming from sexual violence is innately related to the fundamental facts of the charges, the criteria of rule 85 of

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rendered on 7 August 2012 (6 September 2012); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, pp. 6,10-11, paras. 18-20 (3 March 2015)

[1517] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, p. 6, para. 1

[1518] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, p. 72, para. 207

[1519] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, pp. 75-76, para. 193.

[1520] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, p. 76, para. 194

[1521] *Ibidem*

the Rules of Procedure and Evidence are fulfilled independently of the issue of sexualised violence being particularly charged or not.[1522]

However, the Appeals Chamber understood that sexual and gender-based violence could not be "defined as a *harm* resulting from the crimes for which Mr Lubanga was convicted" and, therefore, the individuals who suffered this type of violence could not be considered victims (in the terms of rule 85 (a) of the Rules of Procedure and Evidence,"natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court").[1523]

The Appeals Chamber considered that the Trial Chamber's understanding that the sexual violence acts could not be imputed to Lubanga led to the conclusion that the Trial Chamber did not determine that harm from sexual and gender-based violence arose from the crimes for which Lubanga was condemned, within the terms of rule 85 (a) of the Rules of Procedure and Evidence.[1524]

Regarding reparations, even though the Trial Chamber I had stipulated that reparations awards which "are appropriate for the victims of sexual and gender-based violence" should be formulated and implemented by the Court, the Appeals Chamber overruled such decision. It stated that, since the Trial Chamber I "did not establish that harm from sexual and gender-based violence resulted from the crimes for which Mr Lubanga was convicted," it should have explained how it still rendered that he "should be liable for reparations in respect of the harm of sexual and gender-based violence." The TCI failed to do it. Consequently, the Appeals Chamber understood that Lubanga could not be held responsible for reparations related to this harm, and amended the Impugned Decision in this regard.[1525]

The Appeals Chamber clarified that its finding on Lubanga's liability for reparations in relation to the harm arising from sexual and gender-based violence did not prevent these victims from benefitting from assistance activities undertaken by the Trust Fund. [1526]

[1522] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, p. 76, para. 195

[1523] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, p. 76, para. 196; Rules of Procedure and Evidence of the International Criminal Court, Rule 85 (a)

[1524] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, p. 77, para. 198

[1525] *Ibidem*

[1526] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, p. 77, para. 199

Actually, in the amended Order for Reparations dated 3 March 2015, the Appeals Chamber established that

> "[i]t is appropriate for the Board of Directors of the Trust Fund to consider, in its discretion, the possibility of including victims of sexual and gender-based violence in the assistance activities undertaken according to its mandate under regulation 50 (a) of the Regulations of the Trust Fund. It is also appropriate for the draft implementation plan to include a referral process to other competent NGOs in the affected areas that offer services to victims of sexual and gender-based violence."[1527]

Therefore, the Appeals Chamber established that sexual and gender-based violence could not be conceived as a harm arising from the crimes for which Lubanga was condemned, but allowed the inclusion of victims that suffered damage as a consequence of sexual and gender-based violence in the TFV's assistance mandate, at its discretion.

On 3 November 2015, the Trust Fund for Victims submitted its Filing on Reparations and Draft Implementation Plan, to which was annexed the Draft Implementation Plan for collective reparations to victims.[1528]

The TFV proposed to develop reparation programmes, apart from the programmes under the assistance mandate, directed at the reintegration of former child soldiers into their communities, particularly by means of vocational training and accelerated literacy courses. The TFV also proposed to develop a training to boost the resolution of disputes and conflicts between the victims, their families and their communities, apart from a gender-sensitive training. The TFV planned as well to install a programme of targeted psychological assistance and treatment intended to foster community ties and to contribute to healing and acceptance.[1529]

On 9 February 2016, the Trial Chamber II understood that, even though the TFV's proposals were in line with the types of reparations ordered by the Appeals Chamber, the later had presented solely a summary description of the prospective programmes and how they would be developed and managed, and this information was not enough to grant an approval of the implementation of the Proposed Plan.[1530]

[1527] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Order for Reparations (amended), p. 14, para. 64

[1528] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Filing on Reparations and Draft Implementation Plan (3 November 2015); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Annex A to Filing on Reparations and Draft Implementation Plan (3 November 2015)

[1529] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Filing on Reparations and Draft Implementation Plan, p. 34, paras. 68-69

[1530] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Order instructing the Trust Fund for Victims to supplement the draft implementation plan, p. 9, para. 20.

Accordingly, the Chamber instructed the TFV to submit, up to 7 May2016, a proposal of a set of collective reparation programmes in accordance with the Appeals Chamber´s order. The Trial Chamber II stated that the programmes must be aimed at direct and indirect victims of the crimes of which Lubanga had been convicted and must give specific attention to the gender-specific results of the crimes, as the TFV had indicated. The Chamber also agreed that such programmes must be conceived so as to include as many victims as possible.[1531]

After been granted an extension, on 7 June 2016, the Trust Fund for Victims submitted the Additional Programme Information Filing. It sustained that the strict procedural approach adopted by the Trial Chamber in relation to victims' eligibility and harm (a "legal procedure prior to programme approval or implementation, with eligibility determinations to be made by the Trial Chamber, requiring the compilation of individual victim dossiers, including both detailed victimization information and a harm assessment at the individual level, as well as informed consent by each victim to agree to have his or her identity revealed and challenged by the convicted person") in its Order of 9 February 2016 meant that a considerably lower number of victims would be eligible to benefit from reparations than the original number estimated by the TFV when it submitted the Draft Implementation Plan (in accordance with the latter, the eligibility screening would consist in an administrative procedure undertaken during the programme implementation).[1532]

In fact, stakeholder factors as the potential quantity of 3,000 victims (direct and indirect), and their screening and enrolment play a determinant role in the feasibility of implementing the collective reparations programme designed by TVF in accordance with the findings and information obtained from a very detailed and consistent contextual assessment.[1533]

Further, the TFV argued that such approach of the Trial Chamber would cause the exclusion of particular vulnerable victims, as, for example, female victims or victims that are still stigmatised nowadays as a consequence of the harm they endured.[1534]

A €1 million complement had been offered by the Trust Fund Board of Directors in the 3 November 2015 Draft Implementation Plan. Nevertheless, the TVF clarified that this sum would be invalidated if the Trial Chamber´s approach was actually implemented causing the number of eligible victims to be drastically reduced when compared with the number previously estimated in the Draft Plan. Certainly, if this situation did concretise, the Board of Directors might feel impelled to modify downward the 1 million complement that funds reparations in proportion

[1531] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Order instructing the Trust Fund for Victims to supplement the draft implementation plan, p. 9, para. 21
[1532] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Additional Programme Information Filing, p. 6, paras. 15, 17 (7 June 2016)
[1533] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Additional Programme Information Filing, pp. 5-6, paras. 12-13 (7 June 2016)
[1534] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Additional Programme Information Filing, pp. 6-7, paras. 17 (7 June 2016)

with the diminution in the standard of programming demanded for a significant lower number of victims.[1535]

The viewpoint of the Board of Directors was that to carry out the collective reparation programme in accordance with Chamber's approach would do more harm than good, because it would potentially benefit a disproportionally limited number of victims able to benefit from reparations and it would promote re-traumatisation, fear, and a sense of unfairness in the victim population, circumstances that would force the Board of Directors to review the proposed draft plan and the total amount of the financial complement.[1536]

The fundamental modification in the method of the victim identification process and its expected outcome brought as consequence a level of uncertainty, both legal and procedural, which impeded the Trust Fund of proposing any viable further details of the design, planning and implementation of the programme.[1537]

As a consequence, the TFV affirmed that the victim eligibility process of the Trial Chamber straight affected the Trust Fund's programming and undermined the feasibility of the Draft Implementation Plan dated 3 November 2015, and, thus, called for it to be substantially revised.[1538]

Certainly, the Trust Fund submitted that the Draft Implementation Plan already contained all the essential components needed to tackle programmatic uncertainties, while concomitantly being able to address the distinct redress needs of the victims. Consonantly, the Trust Fund requested the Trial Chamber to give up on its procedural approach and to permit the Draft Implementation Plan to be fully implemented, inclusive of the screening mechanism established therein.[1539]

Also, the Trust Fund stressed that the differences between its reparations mandate and its assistance mandate must be kept in mind so that the inherent advantages of both mandates do not terminate damaged.[1540]

Subsequently, on 15 July 2016, the Trial Chamber II, by majority, issued a Request Concerning the Feasibility of Applying Symbolic Collective Reparations. The majority of the Chamber, agreeing with TFV´s statement that symbolic interventions and programs directed at the promotion of reconciliation and non-repetition constitute a central element of reparations awards, endorsed the

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[1535] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Additional Programme Information Filing, pp. 6-8, paras. 16, 19 (7 June 2016)
[1536] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Additional Programme Information Filing, pp. 7-8, para. 19 (7 June 2016)
[1537] *Ibidem*, p. 10, para. 26
ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Additional Programme Information Filing, p. 10, para. 26 (7 June 2016)
[1538] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Additional Programme Information Filing, p. 8, para. 17 (7 June 2016)
[1539] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Additional Programme Information Filing, p. 14, para. 42 (7 June 2016)
[1540] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Additional Programme Information Filing, p. 21, para. 71 (7 June 2016)

OPCV´s viewpoint that symbolic activities, which are aimed at affected communities, could be implemented at the same time as other projects for victims, and have the benefit of not demanding prior identification of beneficiaries.[1541]

In view of that, the Chamber requested the TFV to verify the practicability of advancing an actual project directed at providing responsive symbolic reparations (in the shape of a commemoration and/or constructing a statue for child soldiers that have suffered due to the events, "inter alia") and requested precise information on the approximated costs of this project, the time frame for its finalisation, and any detailed proposal(s) related to the issue.[1542]

In accordance with the Request of 15 July 2016, the Trust Fund submitted a Filing regarding symbolic collective reparations projects on 19 September 2016. The Trust Fund proposed a carefully planned and particularised project framework for symbolic collective reparations involving two main elements:[1543]

> "a. The development and construction of symbolic structures, in the form of commemoration centres that will host interactive symbolic activities, in three communities; and
>
> b. The development and implementation of mobile memorialization initiatives in five additional communities that will promote awareness raising of the crimes and resulting harms, reintegration, reconciliation, and memorialization."[1544]

The central goal of these projects is that

> "the reintegration and rehabilitation of former child soldiers in the Lubanga case are enabled by the awareness and acknowledgement of the affected communities that the enlistment, conscription and use of child soldiers under the age of 15 are crimes, causing enduring harm to the former child

[1541] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Additional Programme Information Filing, p. 19, para. 65 (7 June 2016); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Request Concerning the Feasibility of Applying Symbolic Collective Reparations, p. 6, para. 11 (15 July 2016); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Consolidated response to the submissions filed on 31 March and 7 June 2016 by the Trust Fund for Victims, p.12, para. 37 (1 July 2016)

[1542] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Request Concerning the Feasibility of Applying Symbolic Collective Reparations, p. 7, para. 12

[1543] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Filing regarding symbolic collective reparations projects with Confidential Annex: Draft Request for Proposals, p. 26, para. 61 (19 September 2016)

[1544] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Filing regarding symbolic collective reparations projects with Confidential Annex: Draft Request for Proposals, p. 26, para. 63 (19 September 2016)

> soldiers and their families and consequently continuing to disturb the wellbeing of the communities."[1545]

Additionally, it is envisaged that such projects will contribute to significantly reduce the stigma attributed to former child soldiers in their communities, thus, positively affecting their capability of reintegration and rehabilitation. In fact, former child soldiers were feared by their own families and communities. They were the target of a strong negative perception, been seen as incapable of readjusting to civilian life and carrying a stigmatizing reputation (are regarded as thieves, violent, "sullied" girls, etc). Further, social stigma and lower social status are a frequent consequence especially endured by girls and young women when returning to their communities as ex child soldiers.[1546]

Also, it is expected that the that the affected communities' awareness and acknowledgement of the pertinent crimes and resulting damages grants a propitious environment to establish and carry pout service-based collective reparations awards to both direct and indirect victims in the Lubanga case.[1547]

Finally, it is foreseen that the goals and the results achieved of such collective symbolic reparations project can inform other stakeholders and be appreciated by them, as an initial expression of the joint reparative justice mandates of the International Criminal Court and the Trust Fund.[1548]

In the consecution of the projects, women and girls should be justly represented and be involved in all elements of planning and implementation.[1549]

On 21 October 2016, the TC II issued an "order approving the proposed plan of the Trust Fund for Victims (the "TFV") in relation to symbolic collective reparation" for the victims in the Lubanga case. The Trial Chamber II specifically agreed with the TFV´s submission that implementing symbolic reparations[1550]

> "paves the way for the social acceptance of reparations awards in the affected communities, and it creates a safe environment for victims to come forward and voluntarily participate in the

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[1545] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Filing regarding symbolic collective reparations projects with Confidential Annex: Draft Request for Proposals, pp. 25-26, para. 61 (19 September 2016)

[1546] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Filing regarding symbolic collective reparations projects with Confidential Annex: Draft Request for Proposals, pp. 11-13, 26, paras. 18, 23, 62 (19 September 2016)

[1547] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Filing regarding symbolic collective reparations projects with Confidential Annex: Draft Request for Proposals, p. 26, para. 62 (19 September 2016)

[1548] *Ibidem*

[1549] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Filing regarding symbolic collective reparations projects with Confidential Annex: Draft Request for Proposals, p. 18, paras. 36, 39 (19 September 2016)

[1550] International Criminal Court website, Case Information Sheet, Situation in the Democratic Republic of the Congo, The Prosecutor v. Thomas Lubanga Dyilo; ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations, p. 7, para. 12 (21 October 2016)

> service- based collective awards without undue fear for their safety or reputation."[1551]

On 15 December 2017, Trial Chamber II established that Lubanga's liability for collective reparations amounted to USD 10,000,000 in relation to 425 victims it found eligible for reparations and other victims who can be eventually identified. However, in face of his indigence, the TC II[1552]

> "invited the Board of Directors of the Trust Fund for Victims to examine the possibility of earmarking an additional amount for the implementation of collective reparations and/or continuing its efforts to raise additional funds. The Chamber also instructed the Trust Fund to make contact with the Government of the DRC to explore how the Government might contribute to the reparations process."[1553]

The legal representatives of the V01 group of victims and of Mr Thomas Lubanga Dyilo appealed against Trial Chamber II´s "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable" issued in December 2017. On 18 July 2019, the Appeals Chamber confirmed TC II´s decision, only amending it so that[1554]

> "the victims whom Trial Chamber II found ineligible to receive reparations, and who consider that their failure to sufficiently substantiate their allegations, including by supporting documentation, resulted from insufficient notice of the requirements for eligibility, may seek a new assessment of their eligibility by the Trust Fund for Victims, together with other victims who may come forward in the course of the implementation stage."[1555]

[1551] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations, p. 7, para. 12 (21 October 2016)

[1552] International Criminal Court website, Case Information Sheet, Situation in the Democratic Republic of the Congo, The Prosecutor v. Thomas Lubanga Dyilo; ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable', p. 4 (18 July 2019); ICC website, Press Release, Lubanga case: Appeals Chamber confirms Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable' (18 July 2019)

[1553] International Criminal Court website, Case Information Sheet, Situation in the Democratic Republic of the Congo, The Prosecutor v. Thomas Lubanga Dyilo

[1554] *Ibidem*; ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable', p. 4 (18 July 2019); ICC website, Press Release, Lubanga case: Appeals Chamber confirms Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable' (18 July 2019)

[1555] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable', p. 4

6.7. Conclusion

In this landmark case (the first in which the ICC has not only dealt sexual and gender-based crimes but also entered a conviction), the Court faltered in what concerns the investigation and prosecution of sexual and gender-based crimes. It was permeated by flaws of the Prosecution in relation to the charging of sexual and gender-based crimes. It is no wonder it tarnished the reputation of the ICC and put at stake its ability to translate into practical actions the victimological forefront provisions of the Rome Statute, and bring justice to victims. Moreover, the case meant a blow for victims and those who advocate for the prosecution of sexual and gender-based crimes in the international scenario.

7. Case the Prosecutor v. Gemain Katanga

7.1. Background and overview of the case

Likewise the Lubanga case, the background of the Katanga case (Case No.: ICC-01/04-01/07) is also the armed conflict of a non-international character which took place in the Ituri region between 2002 and 2003.[1556]

Such conflict involved armed groups that had hierarchical organisaton and the capability of planning and carrying out military operations. Among these groups were the Union des Patriotes Congolais (UPC) / Force Patriotique pour la Libération du Congo (FPLC), whose president was Thomas Lubanga Dyilo, the Force de resistance pratiotique en Ituri (FRPI), whose highest ranking commander was Germain Katanga, the Front des nationalistes et intégrationnistes (FNI), the Part pour l´unité et la sauvegarde de l´intégrité du Congo (PUSIC) as well as the Uganda People's Defence Force (UPDF).[1557]

Between January 2003 and at least March 2003, the FNI and FRPI perpetrated an attack directed against the civilian population of determined parts of the territory of Ituri, mainly of Hema ethnicity. In this context, and moved by a common purpose, the FNI and FRPI committed an indiscriminate attack against the village of Bogoro that began on or around 24 February 2003. There have been critics that the scope of the charges was actually narrow as it covered solely this specific massacre.[1558]

In fact, during the attack against the village and in its aftermath, members of the FNI and FRPI carried out various crimes against civilians (principally of Hema ethnicity), specifically,[1559]

> "i) the murder of about 200 civilians, ii) causing serious bodily harm to civilians, iii) arresting, threatening with weapons and imprisoning civilians in a room filled with corpses, iv) pillaging, v) the sexual enslavement of several women and girls and vi) the active participation of children under the age of fifteen years in hostilities, were part of the common plan, or, were, at the very least, a probable and accepted consequence of the implementation of said common plan."[1560]

[1556] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Document Containing the Charges, Article 61(3) (a), pp. 3-7, paras.4-5, 12-14, 19; ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Warrant of Arrest for Germain Katanga, p. 3 (2 July 2007)

[1557] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Warrant of Arrest for Germain Katanga, p. 3 (2 July 2007)

[1558] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Warrant of Arrest for Germain Katanga, pp. 3-4; van den Berg, S., & Sengenya, C. (2019)

[1559] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Warrant of Arrest for Germain Katanga, p. 4 (2 July 2007)

[1560] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Warrant of Arrest for Germain Katanga, p. 5 (2 July 2007)

The Pre-Trial Chamber I, considering that, together with other senior FNI and FRPI military commanders, Germain Katanga devised a common plan for the Bogoro attack and ordered his subordinates to carry it out, regarded that Katanga´s contribution was of paramount importance for the attack´s implementation and, thus, that he was[1561]

> "criminally responsible under article 25(3)(a) or, in the alternative, under article 25(3)(b of the Statute, for:
>
> i) murder as a crime against humanity, punishable under article 7(1)(a) of the Statute;
>
> ii) wilful killing as a war crime, punishable under article 8(2)(a)(i) or article 8(2)(c)(i) of the Statute;
>
> iii) inhumane acts as a crime against humanity, punishable under article 7(1)(k) of the Statute;
>
> iv) inhuman treatment as a war crime, punishable under article 8(2)(a)(ii) or cruel treatment as a war crime, punishable under article 8(2)(c) (i) of the Statute;
>
> v) the war crime of using children under the age of fifteen years to participate actively in hostilities, punishable under article 8(2)(b)(xxvi) or article 8(2)(e)(vii) of the Statute;
>
> vi) sexual slavery as a crime against humanity, punishable under article 7(1)(g) of the Statute;
>
> vii) sexual slavery as a war crime, punishable under article 8(2)(b)(xxii) or article 8(2)(e)(vi) of the Statute;
>
> viii) the war crime of intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities, punishable under article 8(2)(b)(i) or article 8(2)(e)(i) of the Statute;
>
> ix) pillaging a town or place, even when taken by assault as a war crime, punishable under article 8(2)(b)(xvi) or article 8(2)(e)(v) of the Statute."[1562]

In face of that, on 2 July 2007, the Pre-Trial Chamber I issued the warrant of arrest for Katanga.[1563]

[1561] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Warrant of Arrest for Germain Katanga, pp. 5-6 (2 July 2007)
[1562] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Warrant of Arrest for Germain Katanga, p. 6 (2 July 2007)
[1563] *Ibidem*

In the Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, the PTC I found, among other things, that there were

> "reasonable grounds to believe that in the aftermath of the joint indiscriminate attack by the FRPI and the FNI upon the village of Bogoro on or about 24 February 2003, members of the FRPI and the FNI abducted women and girls to be used as their "wives" and serve as sexual slaves for them and other commanders."[1564]

The crimes purportedly perpetrated by Mathieu Ngudjolo Chui (allegedly FNI/ Lendu militia of BeduEzekere leader) arose from the same background facts of the Katanga case- the "joint attack of the village of Bogoro by the FNI and FRP 1 on 24 February 2003." As a consequence, on 10 March 2008, the Pre-Trial Chamber I rendered a decision joining the cases against Germain Katanga and Mathieu Ngudjolo Chui so as to prevent replication of the proceedings before the International Criminal Court. On 9 June 2008, the Appeals Chamber issued a judgment confirming the Pre-Trial Chamber I´s decision on joinder.[1565]

It is noteworthy that the Registrar did not admit Witnesses 132, 163, 238 and 287 (on whom the Prosecution had intention to rely for the confirmation of the charges) into the Court's Witness Protection Programme. The Prosecution, diverging from the approach of the Victims and Witnesses Unit, considered that these witnesses demanded protection before their identity could be disclosed to the Defence and, hence, carried out preventive relocation of witnesses.[1566]

The Single Judge requested the Prosecution to expand on the type of protection offered to these witnesses by the Office of the Prosecutor before their statements could be accepted as evidence at the confirmation hearing.[1567]

On 16 April 2008, the Prosecution filed its Submission of Information on the Preventive Relocation of Witnesses 132,163, 238 and 287, in which the OTP informed the particularities of the preventive relocation measures that were being

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[1564] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, p. 20, para. 48. ICC-01/04-01/07 (6 July 2007)

[1565] ICC. The Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/07. Pre-Trial Chamber I, Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui, p. 3 (10 March 2008); ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07 OA 6. The Appeals Chamber, Judgment on the Appeal Against the Decision on Joinder rendered on 10 March 2008 by the Pre-Trial Chamber in the Germain Katanga and Mathieu Ngudjolo Chui Cases, pp. 3-4, para. 1 (9 June 2008)

[1566] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Prosecution's Submission of Information on the Preventive Relocation of Witnesses 132,163, 238 and 287, pp.3-4, paras. 3-4 (16 April 2008); ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, p. 26, paras. 53-55 (25 April 2008)

[1567] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Prosecution's Submission of Information on the Preventive Relocation of Witnesses 132,163, 238 and 287, p.4, para. 4

adopted for these witnesses so that the Prosecution could "be in a position to fulfil its disclosure Obligations." In the following day, Prosecution filed another document, its Submission of Information regarding the Preventive Relocation of Witness 132.[1568]

The Single Judge understood that

> "in implementing the practice of preventive relocation, as defined by the Prosecution, the latter is not only exceeding its mandate under the Statute and the Rules but it is also misusing its mandate in order to de facto shift the power to decide on the relocation of a given witness from the Registry to the Prosecution.
>
> 33. Furthermore, the implementation of such a practice also constitutes an ineffective use of the limited resources of the Court. The tasks carried out by [REDACTED] during the preventive relocations are similar to those carried out by the members of the VWU during the actual relocations."[1569]

After examining the Prosecution's unauthorised preventive relocations of Witnesses 132 and 287 (who provided the OTP with evidence on sexual offences), the Single Judge decided that the adequate remedy was to exclude the statements, interview notes and interview transcripts of these witnesses for the ends of the confirmation hearing.[1570]

As a consequence, in its Submission of the Document Containing the Charges and List of Evidence on 21 April 2008, the Prosecution did not include the charge of sexual slavery although sexual enslavement of several women and girls was one of the basis of the Warrant of Arrest for Katanga and the Warrant of Arrest for Ngudjolo. In fact, since the Prosecution could not rely on the evidence provided by Witnesses 132 and 287, the OTP found that, regarding the crime of sexual slavery, it was not in a position to meet the threshold of proof demanded at the trial stage.[1571]

[1568] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Prosecution's Submission of Information on the Preventive Relocation of Witnesses 132,163, 238 and 287, 1, p. 3; ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Prosecution's Submission of Information regarding the Preventive Relocation of Witness 132 (17 April 2008)

[1569] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, 1, p. 20, paras. 32-33

[1570] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, 1, p. 22, para. 39

[1571] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Warrant of Arrest for Germain Katanga, p. 6; ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Prosecution's Submission of the Document Containing the Charges and List of Evidence, p. 5. (21 April 2008);

Nonetheless, the Prosecution clarified that it would be

> "seeking leave to appeal the 18 April Decision regarding the exclusion of evidence in support of the allegation of sexual slavery and the decision-making process and the implementation of protective measures. Should the appeal be granted, the Prosecution will be in a position to reintroduce the charges of sexual slavery and add the charges of rape and outrage upon personal dignity."[1572]

Also, the Prosecution clearly stated that it maintained

> "the factual underpinnings of these sexual offences, which the Prosecution intends to level against both persons charged in the Document Containing the Charges. These allegations serve as notice to the Defence that the Prosecution will pursue such charges at the Confirmation Hearing if relevant aspects of the 18 April Decision are reversed. For that reason the Prosecution will seek leave to appeal the 18 April Decision."[1573]

In the Annex 1 to the Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute dated 21 April 2008, with respect to sexual offences, the Prosecution affirmed that

> "[s]ome women, who were captured at Bogoro and spared because they hid their ethnicity, were raped and forcibly taken to military camps. Once there, they were sometimes given as a "wife" to their captors or kept in the camp's prison, which was a hole dug in the ground. The women detained in these prisons were repeatedly raped by soldiers and commanders alike and also by soldiers who were punished and sent to prison. The fate reserved to captured women was widely known."[1574]

On 19 May 2008, the Registrar issued a Report informing the Pre-Trial Chamber I that Witnesses 132 and 287 had been accepted into the ICCPP and, accordingly, had been relocated within the extent of the programme.[1575]

ICC. The Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/07. Pre-Trial Chamber I, Warrant of arrest Mathieu Ngudjolo Chui, p. 6 (6 July 2007)

[1572] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Prosecution's Submission of the Document Containing the Charges and List of Evidence, p. 3

[1573] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Prosecution's Submission of the Document Containing the Charges and List of Evidence, p. 6

[1574] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute, p. 28, para. 89 (21 April 2008)

[1575] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Registrar´s Report on the Protective Measures Afforded to Witnesses 132, 238 and 287 (19 May 2008)

In fact, the Registrar stated that the VWU had solid grounds not to accept Witnesses 132 and 287 in the ICCPP, arguing that this should be the last instance measure in the appropriate protection of witnesses of the Court. Nevertheless, the Registry ultimately understood that these two witnesses should be accepted into the ICCPP.[1576]

> "due to the fact that the witnesses had been preventively relocated by the Prosecution and taking into account the unknown result of the current legal proceedings before the Court."[1577]

In the Decision on Leave to Appeal, the Single Judge further expanded on its prior decision of not accepting the evidence provided by Witnesses 132 and 287 and said that:

> "in the Decision, the Single Judge found that the type of protection provided for Witnesses 132 and 287 was only their unlawful relocation by the Prosecution; that therefore they were to be considered at the time the Decision was issued as being unprotected; and that as Witnesses 132 and 287 were unprotected even redacted or summary versions of their evidence could not be admitted for the purpose of the confirmation hearing in order to ensure their protection since the content of their statements would inevitably disclose their identities."[1578]

On 27 May 2008 the Prosecution filed an Urgent Application for the Admission of the Evidence of Witnesses 132 and 287.[1579]

Subsequently, in the Decision on Prosecution's Urgent Application for the Admission of the Evidence of Witnesses 132 and 287, the Single Judge found that, since the VWU had admitted these witnesses in the ICCPP, the concerns regarding security, which had led to the exclusion of evidence provided Witnesses 132 and 287, did not exist anymore. Certainly, because the previous security concerns no longer constituted an obstacle to including the statements, interview notes and interview transcripts of Witnesses 132 and 287 in the

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[1576] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Defence Application for Leave to Appeal the Single Judge's Decision on the "Decision on Prosecution's Urgent Application for the Admission of the Evidence of Witnesses 132 and 287", p.8, footnote 21 (3 June 2008); ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Registrar´s Report on the Protective Measures Afforded to Witnesses 132, 238 and 287, paras. 3 and 4

[1577] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Registrar´s Report on the Protective Measures Afforded to Witnesses 132, 238 and 287, paras. 3 and 4

[1578] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Decision on the Requests for Leave to Appeal the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67 (2) of the Statute and Rules 77 of the Rules, p. 10 (20 May 2008)

[1579] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Prosecution's Urgent Application for the Admission of the Evidence of Witnesses 132 and 287 (28 May 2008)

Prosecution's Amended List Evidence, the Single Judge decided that such evidence would be acceptable for the ends of the confirmation hearing.[1580]

It is relevant to note that, in the Confirmation of Charges, the Pre-Trial Chamber I decided that

> "the preventive relocations of Witnesses 28, 132, 287 and 250 by the Prosecution do not affect the probative value accorded to their statements."[1581]

The Amended Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute (26 June 2008), explicitly included sexual slavery, rape and outrages upon personal dignity among the 13 counts.[1582]

Surely, "Sexual Slavery following the Bogoro attack" was included as constituting a crime against humanity and a war crime in counts 6 and 7, respectively:

> "On or about 24 February 2003, Germain KATANGA and Mathieu NGUDJOLO, committed, jointly with others, or each ordered the commission of crimes against humanity which in fact occurred, namely, the sexual enslavement of civilian female residents or civilian women present at Bogoro village, in the Bahema Sud collectivité, Irumu territory, Ituri district, including W-132 and VV-249."[1583]

The crime of "Rape following the attack on Bogoro village" was inserted also as a crime against humanity (count 8) and as a war crime (count 9):

> "On or about 24 February 2003, Germain KATANGA and Mathieu NGUDJOLO, committed, jointly with others, or each ordered the commission of war crimes which in fact occurred, namely, the rape of civilian female residents or civilian women present at Bogoro village, in the Bahema Sud collectivité, Irumu territory, Ituri district, including W-132 and W-249."[1584]

The crime of "Outrages upon personal dignity at Bogoro" was included as a war crime (count 10):

[1580] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Prosecution's Urgent Application for the Admission of the Evidence of Witnesses 132 and 287, p. 8 (28 May 2008); ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Decision on the confirmation of charges, p. 54, para. 169 (30 September 2008)

[1581] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Decision on the confirmation of charges, p. 209

[1582] *Ibidem*, p. 112, para. 345 and footnote 449

[1583] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Amended Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute, p. 32 (26 June 2008)

[1584] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Amended Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute, p. 33 (26 June 2008)

> "outrages upon personal dignity of civilian female residents or civilian women present at Bogoro village, in the Bahema Sud collectivité, Irumu District, including W-287."[1585]

Therefore, in the amendment to the charges, Germain Katanga and Mathieu Ngudjolo Chui were further charged by the Prosecution with the crimes of rape and sexual slavery as both crimes against humanity and war crimes (in the terms of Article 7(l)(g), Article 8(2)(e)(vi) or Article 8(2)(b)(xxii), and Article 25(3)(a) or (b) of the Rome Statute), as well as the war crime of outrages upon personal dignity (Article 8(2)(b)(xxi) or Article 8(2)(c)(ii), and Article 25(3)(a) or (b) of the Statute).

As expressed by the Prosecutor, the charge of sexual slavery was actually reinstated for it had been withdrawn by the Prosecution before the confirmation of charges hearing due to the Single Judge´s decision to exclude the evidence presented by Witnesses P-132 and P-287 who had been relocated by the Prosecution. The new charges submitted were the charge of rape and the charge outrages upon personal dignity. By including these two charges, the OTP enlarged the prosecution of the sexual and gender-based crimes in the case.[1586]

It constituted an important advance in relation to the Lubanga case since, as seen in the previous chapter, in that case there was no charge for sexual and gender-based crimes in spite of the existence of evidence of the commitment of this kind of crimes.

In its Decision on the confirmation of charges, the Pre-Trial Chamber I unanimously confirmed that

> "on the basis of the evidence admitted for the purposes of the confirmation hearing, that there is sufficient evidence to establish substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui"[1587]

were responsible, under article 25(3)(a) of the Statute, for the following charges:

- murder constituting a crime against humanity within the meaning of article 7(1)(a) of the Statute;

- wilful killing as a war crime within the meaning of article 8(2)(a)(i) of the Statute;

[1585] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Amended Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute, p. 33 (26 June 2008)

[1586] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Prosecution's Submission of the Document Containing the Charges and List of Evidence, 7, p. 3; Women´s Initiative for Gender Justice. Partial Conviction of Katanga by ICC, Acquittals for Sexual Violence and Use of Child Soldiers, The Prosecutor vs. Germain Katanga (7 March 2014).

[1587] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Decision on the confirmation of charges, pp. 209-211

- using children to participate actively in hostilities, as a war crime within the meaning of article 8(2)(b)(xxvi) of the Statute;

- intentionally directing attacks against the civilian population of Bogoro village, constituting a war crime within the meaning of article 8(2)(b)(i) of the Statute;

- pillaging constituting a war crime within the meaning of article 8(2)(b)(xvi) of the Statute;

- charge of destruction of property constituting a war crime within the meaning of article 8(2)(b)(xiii) of the Statute.[1588]

The PTC I also unanimously declined to confirm the charge of inhuman treatment as a war crime (within the meaning of article 8(2)(a)(ii)) on the basis of article 61(7)(b) of the Rome Statute) as well as the charge of outrages upon personal dignity as a war crime (within the meaning of article 8(2)(b)(xxxi) of the Statute), on the basis of article 61(7)(b) of the Rome Statute).[1589]

In relation to these two charges, the Pre-Trial Chamber I affirmed that there was enough evidence to establish substantial basis to believe that FNI/FRPI members carried out war crimes of outrages upon personal dignity and of inhuman treatment. Nonetheless, in the Chamber´s view, the Prosecution did not present evidence demonstrating that the perpetration of these crimes was intended by the accused as a constituting part of the common plan to destruct the Bogoro village. For this reason, the PTC I did not confirm the charges.[1590]

Regarding the crimes of a sexual nature, the Chamber took into account that

> "Witness 249 is a Hema civilian woman [REDACTED]. She was abducted, undressed, and raped by an Ngiti combatant at the village of Bogoro. Following death threats, she became the 'wife' of an Ngiti combatant, and was repeatedly raped. She had a child as a result of these rapes during her captivity.
>
> b. Witness 132 is a Hema civilian woman [REDACTED]. She fled the village of Bogoro during the attack and was still in hiding when she was abducted by the combatants. She was repeatedly raped at the site of her abduction and while in captivity. She had a child as a result of these rapes during her captivity"[1591]

and found that there was a substantial basis indicating that the criminal offences of rape and sexual slavery (as crimes against humanity and war crimes,

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[1588] *Ibidem*

[1589] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Decision on the confirmation of charges, p. 211

[1590] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Decision on the confirmation of charges, pp. 204, 211

[1591] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Decision on the confirmation of charges, p. 114, para. 353

respectively, under article 7(1)(g) and article 8(2)(e)(vi) or 8(2)(b)(xxii)) were perpetrated by FNI/FRPI members against civilian women in the following of the 24 February 2003 attack on the village of Bogoro.[1592]

Indeed, the Pre-Trial Chamber I stated that in its view

> "the evidence is sufficient to establish substantial grounds to believe that, following the 24 February 2003 attack on the village of Bogoro, FNI/FRPI combatants committed rape and sexual enslavement of civilian women.
>
> 348. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that civilian women were abducted from the village of Bogoro after the attack, imprisoned, and forced into becoming the 'wives' of FNI/FRPI combatants, required to cook for and obey the orders of FNI or FPRI combatants.
>
> 349. The Chamber also finds that there is sufficient evidence to establish substantial grounds to believe that these civilian women were forced to engage in acts of a sexual nature,
> …
> 351. The Chamber also finds that there is sufficient evidence to establish substantial grounds to believe that these rapes resulted in the invasion of the body of these civilian women by the penetration of the perpetrator's sexual organ or other body parts.
>
> 352. The evidence admitted for the purposes of the confirmation hearing also gives substantial grounds to believe that these invasions were committed by force, threat or fear of violence or death, and/or detention.
> …
> 354. In conclusion, the Chamber finds that there are substantial grounds to believe that the war crimes of rape and sexual slavery, as denned in article 8(2)(b)(xxii) of the Statute, were committed by FNI/FRPI members in the aftermath of the 24 February 2003 attack on the village of Bogoro."[1593]

The Pre-Trial Chamber I clarified that

> "551. In relation to the crimes of rape and sexual slavery, the majority of the Chamber, Judge Anita Usacka dissenting, also finds that although the evidence tendered by the Prosecution is not sufficient to establish substantial grounds to believe that the

[1592] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Decision on the confirmation of charges, pp. 113-115, 145-149, paras. 347, 350, 354, 434-444

[1593] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Decision on the confirmation of charges, pp. 113- 115, paras. 347-349, 351, 352, 354

agreement or common plan specifically instructed the soldiers to rape or sexually enslave the civilian women there, the majority of the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that, in the ordinary course of events, the implementation of the common plan would inevitably result in the rape or sexual enslavement of civilian women there."[1594]

The majority of the Chamber also understood that there was

> "sufficient evidence to establish substantial grounds to believe that from the Aveba meeting in early 2003 to the day of the attack on 24 February 2003, Germain Katanga and Mathieu Ngudjolo Chui knew that, as a consequence of the common plan, rape and sexual slavery of women and girls would occur in the ordinary course of the events.
>
> 568. Accordingly, in the view of the majority of the Chamber, this conclusion, in relation to the crimes against humanity of rape and sexual slavery of women and girls, is also substantiated by the fact that:
>
> (i) rape and sexual slavery against of women and girls constituted a common practice in the region of Ituri throughout the protracted armed conflict;
>
> (ii) such common practice was widely acknowledged amongst the soldiers and the commanders;
>
> (iii) in previous and subsequent attacks against the civilian population, the militias led and used by the suspects to perpetrate attacks repeatedly committed rape and sexual slavery against women and girls living in Ituri;
>
> (iv) the soldiers and child soldiers were trained (and grew up) in camps in which women and girls were constantly raped and kept in conditions to ease sexual slavery;
>
> (v) Germain Katanga, Mathieu Ngudjolo Chui and their commanders visited the camps under their control, frequently received reports of the activities of the camps by the camps commanders under their command, and were in permanent contact with the combatants during the attacks, including the attack on Bogoro;
>
> (vi) the fate reserved to captured women and girls was widely known amongst combatants; and

[1594] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Decision on the confirmation of charges, p. 192, para. 551

> (vii) the suspects and the combatants were aware, for example, which camps and which commanders more frequently engaged in this practice.
>
> 569. Therefore, the majority of the Chamber, Judge Anita Usacka dissenting, finds that there is sufficient evidence to establish substantial grounds to believe that when they planned, ordered and monitored the attack on Bogoro and on other villages inhabited mainly by Hema population, the suspects knew that rape and sexual slavery would be committed in the ordinary course of the events."[1595]

Except for Judge Anita Usacka, the majority of the Chamber found that the evidence submitted was consistent enough, enabling the establishment of substantial basis to believe that on 24 February 2003, the accused jointly committed through other persons (within the meaning of article 25(3)(a) of the Statute) the crimes of sexual slavery and rape (as war crimes under article 8(2)(b)(xxii) of the Rome Statute, and as crimes against humanity under article 7(l)(g) of the Statute) "with knowledge that the following crimes would occur in the ordinary course of events (*dolus directus* of the second degree)".[1596]

The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui case was the first instance in which sexual crimes were charged at the International Criminal Court.[1597]

In spite of this development, it is noteworthy that the sexual crimes were the only category of offences that brought about divergence among the judges.

As aforementioned, in her Partly Dissenting Opinion, Judge Anita Usacka found that the evidence presented by the Prosecution was not enough in order to determine the suspects' criminal responsibility for the war crimes and crimes against humanity of rape and sexual slavery.

She asserted that

> "the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that the objective elements of the war crimes and crimes against humanity of rape and sexual slavery, as described in counts 6, 7,8, and 9, were committed.
>
> 14. While I agree with this conclusion, I am not "thoroughly satisfied" that the Prosecution's allegations are sufficiently strong

[1595] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Decision on the confirmation of charges, pp. 202-204, paras. 567-569

[1596] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Decision on the confirmation of charges, pp. 205-206, paras. 576, 580

[1597] ICC Women website, Partial Conviction of Katanga by ICC, Acquittals for Sexual Violence and Use of Child Soldiers, The Prosecutor vs. Germain Katanga; Opinio Juris website, Sane, J., Mathieu Ngudjolo Chui: reflections on the ICC's first acquittal

> to establish substantial grounds to believe that the suspects were criminally responsible for the commission of those crimes. In particular, I do not find that the evidence presented is sufficient to establish substantial grounds to believe that the suspects intended for rape and sexual slavery to be committed during the attack on Bogoro village, or even in the aftermath of the Bogoro attack, or to establish the suspects' knowledge that rape and sexual slavery would be committed by the combatants in the ordinary course of events."[1598]

The judge openly appreciated

> "the difficulty the Prosecution must face in acquiring evidence which would directly link a suspect to these types of crimes when criminal responsibility is alleged under article 25(3)(a) of the Statute on the basis of the existence of a common plan. I also appreciate that the Prosecution has a substantial burden under article 30 of the Statute in presenting evidence that the suspects either intended for rapes and sexual slavery to occur when it is not alleged that they were the direct perpetrators, or were aware that rapes and sexual slavery would occur in the ordinary course of events, when the basis for criminal responsibility is that they jointly committed the crimes through other persons, within the meaning of article 25(3)(a) of the Statute."[1599]

In spite of that, she asserted that

> "[o]n the basis of the evidence presented, I am not "thoroughly satisfied" that there are substantial grounds to believe that the suspects intended for rape and sexual slavery to be included in the common plan to attack Bogoro village on 24 February 2003. In my view, the evidence presented is insufficient to directly or closely link Germain Katanga and Mathieu Ngudjolo Chui to these crimes."[1600]

The trial commenced on 24 November 2009. The parties and participants submitted their closing statements from 15 to 23 May 2012.[1601]

[1598] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Decision on the confirmation of charges, Partly Dissenting Opinion of Judge Anita Ušacka, p. 218, paras. 13-14 (30 September 2008)

[1599] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Decision on the confirmation of charges, Partly Dissenting Opinion of Judge Anita Ušacka, pp. 223-224, para.28 (30 September 2008)

[1600] *Ibidem*

[1601] ICC website, Case information sheet, Situation in the Democratic Republic of the Congo, The Prosecutor v. Germain Katanga (20 March 2018)

As previously stated, the case against Germain Katanga was joined to the case against Mathieu Ngudjolo Chui. Nonetheless, on 21 November 2012, the Trial Chamber II decided to severe the charges against the two defendants.[1602]

The Majority of Trial Chamber II decided to trigger regulation 55 of the Regulations of the Court and notified the parties and participants that the mode of liability under which Germain Katanga stood charged was subject to legal recharacterisation on the grounds of article 25(3)(d) of the Rome Statute.[1603]

The triggering of the recharacterisation under regulation 55 of the Regulations of the Court came as an unfold of Germain Katanga's own testimony in which "he spontaneously presented various accounts, explanations and comments to the Chamber … that they might later be used to incriminate him."[1604]

Katanga did not have his statement taken at the investigative stage. He

> "chose to testify as a witness under oath at the end of the trial, having heard all of the *viva voce* evidence. As a result, the uniqueness of his statement at the final stage of the hearings did not put the Chamber in a position to compare the account he gave at that time with previous statements."[1605]

The Majority of Trial Chamber II (Judge Van den Wyngaert dissenting on this regard), after analysing the evidence, understood that

> "Germain Katanga's mode of participation could be considered from a different perspective from that underlying the Confirmation Decision and it was therefore appropriate to implement regulation 55 of the Regulations of the Court while ensuring that the Defence is able to exercise its rights effectively, in accordance with regulation 55(2) and 55(3)."[1606]

The Chamber stated that it was

> "prohibited from exceeding the facts and the circumstances described in the charges, but it may give them a different legal characterisation if it considers it necessary to assess them

[1602] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Trial Chamber II, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons (21 November 2012)
[1603] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Trial Chamber II, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, p. 29 (21 November 2012)
[1604] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Trial Chamber II, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, pp. 11, 25 (21 November 2012)
[1605] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 38, para. 64 (7 March 2014)
[1606] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Trial Chamber II, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, p. 6, para. 6

> differently, in accordance with regulation 55 of the Regulations of the Court."[1607]

Following, it explained that

> "the triggering of regulation 55 in respect solely of Germain Katanga necessarily now leads the Chamber to order unanimously, pursuant to article 64(5) of the Statute, that the charges against Mathieu Ngudjolo be severed."[1608]

In fact, the triggering of regulation 55 in respect of Germain Katanga had

> "the potential consequence of prolonging the proceedings against him. The Chamber therefore considers that no purpose would be served by deferring the decision on Mathieu Ngudjolo until a ruling is made in respect of Germain Katanga, and in respect of Mathieu Ngudjolo, in the wording of rule 136(1), it is necessary "to avoid serious prejudice to" him, which requires that the proceedings against him be brought to an end promptly.
>
> 62. Consequently, separate treatment of Mathieu Ngudjolo's case, which also meets the dual requirement of fairness and expeditiousness established by article 64 of the Statute, necessarily leads the Chamber to order the severance of the charges against him and to rule separately on their merits without the need for him to make submissions on the recharacterisation being considered for his co-Accused." [1609]

It is important to stress that, unlike the recharacterisation, the severance of the two cases was ordered unanimously by Trial Chamber II.[1610]

Regarding Katanga, the Majority of Trial Chamber II found that it was

> "possible to enable the Accused to prepare an efficient and effective defence under regulation 55(3), without prolonging the proceedings such as to entail an undue delay."[1611]

[1607] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Trial Chamber II, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, p.8, para. 10
[1608] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Trial Chamber II, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, p. 27, para. 59
[1609] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Trial Chamber II, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, pp. 27-28, paras. 61-62
[1610] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Trial Chamber II, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, p.27, para. 59
[1611] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Trial Chamber II, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, p. 22, para. 44

Therefore, as an outcome of Katanga´s testimony, the Majority of the Chamber found that it was possible to confer a distinct legal characterisation of the facts and the circumstances expounded in the charges without going beyond their limits, though. Nonetheless, so as to avoid undue delay in the proceedings to Ngudjolo, the Chamber, by unanimity, severed the proceedings of the trials against Germain Katanga and Mathieu Ngudjolo Chui.

It is also noteworthy that the Majority of Trial Chamber II ruled that the victims who had been allowed to participate in the initial proceedings were granted permission to remain participating in the two severed proceedings.[1612]

On 18 December 2012, the Trial Chamber II pronounced the verdict in the case against Mathieu Ngudjolo Chui and acquitted him of all charges, including the sexual offences.[1613]

The Chamber noted that there was

> "a wealth of evidence to show that during and after the 24 February 2003 attack, inhabitants of Bogoro were killed, women were raped and some were kept in captivity by the attackers, property was pillaged and, lastly, buildings were attacked and destroyed."[1614]

The attack was carried out by the Lendu and Ngiti militias (comprising the FRPI and the Lendu militia of BeduEzekere) against the UPC forces and the predominantly Hema civilian population of Bogoro on 24 February 2003, and took place in the background of an on-going armed conflict opposing these groups against each other.[1615]

In accordance with the Prosecution, Germain Katanga had the control of the FRPI and Mathieu Ngudjolo of the Lendu militia of BeduEzekere.[1616]

Nevertheless, when analysing the evidence related to Ngudjolo's authority over the Lendu combatants from Bedu-Ezekere, the Chamber stated that it could not

> "discount the possibility that, at the time of the events under consideration, he was one of the military commanders who held a senior position among the Lendu combatants from Bedu-Ezekere groupement, but emphasises that it is not in a position to establish this fact beyond reasonable doubt.

[1612] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Trial Chamber II, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, p. 28, para. 64
[1613] ICC. The Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/12. Trial Chamber II, Judgment pursuant to article 74 of the Statute,
[1614] ICC. The Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/12. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 125-126, para. 338
[1615] ICC. The Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/12. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 29, para. 73
[1616] ICC. The Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/12. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 31, para. 77

> 502. Furthermore, the Chamber underscores that, in any event, its analysis has not provided it with credible evidence to find that Mathieu Ngudjolo had issued military orders or instructions, taken steps to enforce such orders or instructions, initiated disciplinary proceedings or ordered sanctions of this kind.
>
> 503. Consequently, the Chamber cannot, on the basis of all the evidence in the case record, find beyond reasonable doubt that the Accused was the leader of the Lendu combatants who took part in the 24 February 2003 attack on Bogoro."[1617]

In fact, Mathieu Ngudjolo´s "rank of colonel was only mentioned during the signing of the 18 March 2003 Agreement to end Hostilities." The Chamber found no proof that he was already a senior military leader previously to this appointment and, specifically, before the attack of 24 February 2003.[1618]

Regarding the participation of child soldiers from Bedu-Ezekere group in the attack on Bogoro of 24 February 2003, in particular, the Trial Chamber II noted that

> "children under the age of 15 years, including some bearing bladed weapons, from Bedu-Ezekere groupement were present at the 24 February 2003 attack on Bogoro. However, it also notes that there is insufficient evidence to establish, for example, that military training had been given to the children under the age of 15 years on the Accused's orders, that he used them as personal bodyguards or for any other purpose prior to, during or following the attack. Consequently, the Chamber is unable to establish beyond reasonable doubt a link between the Accused and the children who were in Bogoro on 24 February 2003."[1619]

As a consequence, the Chamber found Mathieu Ngudjolo not guilty and acquitted him of all charges, including the ones of war crimes and crimes against humanity of rape and sexual slavery.[1620]

This judgment was the second rendered by the International Criminal Court and its first acquittal (previously it had condemned Lubanga on 15 March 2012). The lack of authority of Mathieu Ngudjolo grounded the Chamber´s decision, and, thus, the latter did not have to make any findings regarding the alleged crimes.[1621]

[1617] ICC. The Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/12. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 189, paras. 501-503
[1618] ICC. The Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/12. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 188, para. 500
[1619] ICC. The Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/12. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 196, para. 516
[1620] ICC. The Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/12. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 197
[1621] Opinio Juris website, Sane, J., Mathieu Ngudjolo Chui: reflections on the ICC's first acquittal,

7.2. Judgment

On 7 March 2014, the Trial Chamber II rendered its judgment on the Prosecution v. Germain Katanga case.[1622]

In the part of the decision where the Chamber analysed the crimes committed during the attack on Bogoro on 24 February 2003, when addressing the crimes of rape and sexual slavery as crimes against humanity and war crimes, the Chamber stated that

> "[i]n the *Decision on the confirmation of charges*, the Pre-Trial Chamber found that there was sufficient evidence to establish substantial grounds to believe that during and after the attack on the village of Bogoro on 24 February 2003, members of the FNI and the FRPI committed acts of rape and sexual slavery constituting war crimes under article 8(2)(b)(xxii) of the Statute and crimes against humanity under article 7(1)(g) of the Statute. According to the Pre-Trial Chamber, combatants of those two movements raped civilians during and after the attack, and some of the women who had been subjected to these acts were also abducted, imprisoned and forced to become the wives of the combatants, to engage in acts of a sexual nature, to carry out household chores for them and, generally, to obey them." [1623]

The Prosecution argued that

> "evidence on record established beyond reasonable doubt that during and after the attack on Bogoro, Witnesses P-132, P249 and P-353 and other young women were raped by Lendu and Ngiti combatants. … they were abducted by the combatants and taken to their camps, where they were sexually enslaved. There they were forcibly married to commanders and combatants and raped repeatedly, physically abused, deprived of liberty and forced to do household chores. The Prosecution submitted that the women were severely affected both physically and mentally by this experience and that they were rejected by their community. According to the Prosecution, they endured this fate because they had convinced their abductors that they were not Hema. Lastly, according to the Prosecution, these acts were not isolated incidents but common practice among the Lendu combatants during the conflict raging in Ituri at the material time."[1624]

[1622] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute,

[1623] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 359, para. 958

[1624] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 359-360, para. 959

Surely, during the trial proceedings, the Prosecution presented evidence that during and subsequently to the attack on Bogoro, Witnesses P-132, P-249 and P-353 as well as other young women were raped by Lendu and Ngiti combatants. They were also abducted by the attackers and taken to their camps to be sexually enslaved. Once in the camps, these women were forcibly married to commanders and combatants, being raped frequently, enduring physical abuse and deprivation of liberty, and being obligated to carry out domestic tasks, such as sweeping and washing. As a consequence of this experience, they were extremely affected not only physically but also mentally, and, upon returning to their community, faced rejection. These women were subject to such hardships (instead of being killed) because they had persuaded their abductors into believing that they were not of Hema ethnicity.[1625]

The Defence rebutted by saying that the evidence produced established neither that the crime of rape had been carried out by combatants under Katanga's orders, immediately prior, during and/or in the aftermath of the 24 February 2003 attack on Bogoro nor that women abducted from Bogoro had been subjected to sexual slavery by the combatants.

The Defence also submitted that the Prosecution had failed to prove, in relation to the crimes against humanity, that rape and sexual enslavement were commonly practiced by the FRPI combatants. Moreover, the Defence sustained that, regarding war crimes the Prosecution had not proved either that the acts were linked to an international armed conflict.[1626]

In its findings of fact and legal characterisation on the crimes of rape and sexual slavery, the Trial Chamber II determined that, in relation to the charges that such crimes were perpetrated during and after the 24 February 2003 attack on Bogoro, and particularly by Ngiti combatants from Walendu-Bindi "collectivité," its decisions would be mainly based on the "viva voce" evidence of Witnesses P-132, P-249 and P-353, who testified as direct victims of these crimes.[1627]

The TC II also added:

> "the evidence of other witnesses may also be relevant, especially in confirming or corroborating the abduction of certain women during the attack, their captivity and their allocation to Ngiti combatants. The Chamber must, however, underscore that

[1625] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Office of the Prosecutor, *Corrigendum du mémoire final - ICC-01/04-01/07-3251-Conf,* pp. 40-45, paras. 76-89 (3 July 2012); ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Office of the Prosecutor, Closing Statements, T. 336, pp. 7-8, 50-59 (15 May 2012); ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Common Legal Representative of the main group of Victims, Second Corrigendum *Conclusions Finales*, pp. 7-8, 74-77, paras. 6-9, 194-201 (16 March 2012); ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 359, para. 959

[1626] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 360, para. 960

[1627] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 368, para. 986

> under rule 63(4) of the Rules of Procedure and Evidence there is no legal requirement that corroboration is required to prove crimes of sexual violence."[1628]

Certainly, as noted by the Chamber,

> "the initial investigative documents in its possession date back to mid-2006 and therefore post-date by three years the *sub judice* facts. Yet, the taking of testimonies that are as close as possible to the date of the events is of critical importance. It is equally desirable, where practicable, to make as many factual findings as possible − in particular, forensic findings which are often crucial to the identification of victims − expeditiously and at the *loci in quo*. In the case at bar, the absence of such evidence made it necessary to rely primarily on the statements of witness and reports of MONUC investigators."[1629]

Moreover, the Trial Chamber II affirmed that

> "[h]aving regard to the specific nature of evidence peculiar to the crimes of rape and sexual slavery, the Chamber will apply a specific modus operandi to the analysis of their commission. First, it will undertake a factual scrutiny and provide a legal characterisation of the three *sub judice* testimonies. It will then present its conclusions of law on the commission of the two types of crimes as a crime against humanity (article 7(1)(g) of the Statute) and a war crime (article 8(2)(e)(vi) of the Statute."[1630]

Therefore, in relation to the crimes of rape and sexual slavery, because a long time had passed since the allegedly commission of these crimes and there was no forensic examination available, the Trial Chamber II had to rely chiefly on the victims´ testimonies. In this context, and taking into account the particularities of the evidence of sexual and gender based crimes, the Chamber decided to proceed to a close examination of the facts and then provide a legal characterisation of the "sub judice" testimonies of Witnesses P-132, P-249 and P-353 so as to be able to reach conclusions regarding the perpetration of crimes of rape and sexual slavery during the offensive against Bogoro and in its aftermath.

It is relevant to stress that the Trial Chamber II also proceeded to an analysis of the credibility of specific witnesses, including Witnesses P-132 and P-353, which encompassed a detailed examination of the conditions under which they testified and the content of their testimonies.[1631]

[1628] *Ibidem*

[1629] *Ibidem*

[1630] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 368-369, paras. 986-987; Elements of Crimes of the International Criminal Court, Arts. 7(1)(g)-2, footnote 17; 8(2)(e)(vi)-2, footnote 65

[1631] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 52. para. 111

Indeed, the Chamber stated that

> "since the Prosecution's case with regard to Germain Katanga is for the most part based upon the testimony of two key witnesses, P-219 and P-28, whose credibility is vigorously impugned, the Chamber is of the view that the conditions under which they testified and the substance of their testimony should be thoroughly analysed. It adopted the same approach for Witnesses P-12, P-132, P-161, P-250, P-279, P-280, P-317 and P-353, who were also called to testify by the Prosecution."[1632]

As a result, the Chamber made an extensive assessment of the statements of P-132 and P-353, who provided their testimonies as direct victims of the crimes of rape and sexual slavery.[1633]

- Witness P-132

Witness P-132's affirmed in her testimony that she was in her family house in Bogoro on 24 February 2003 and awoke to gunfire at about 5 a.m. She saw that the city was been attacked and then ran away in direction of the valley, towards Waka mountain, and hid in the grass near the river. While trying to escape, P-132 was hit by gunfire and saw that several people had been killed.[1634]

Witness P-132 narrated that she was found hiding in the bush by 6 combatants (who carried knives, guns and spears) and convinced them that she was not part of the Hema ethnic group. Subsequently, she was sexually abused by three of her attackers, who in turn penetrated her vagina. The witness endured considerable pain and trauma as a result of these actions.[1635]

P-132 was forced to follow her attackers to a Ngiti camp in Walendu-Bindi. There, after being questioned about why she was in Bogoro, she was sent to prison and obligated to perform domestic tasks. The witness said that, while in the camp, she was forced by some members of the militia to have sexual intercourse in the bush and also that other members entered the prison and raped the female prisoners.[1636]

P-132 also stated that the head of the camp determined where she would live and ordered her to "marry" to one of the men in the camp. She affirmed as well

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[1632] *Ibidem*

[1633] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 52, 368, paras. 111, 986

[1634] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 81, paras. 199, 200

[1635] Elements of Crimes of the International Criminal Court, Arts. 7(1)(g)-2, footnote 17; 8(2)(e)(vi)-2, footnote 65; ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 369-370, para. 989

[1636] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 81-82, paras. 200-201

that she saw Germain Katanga three times in the camp where she was imprisoned.[1637]

In its analysis, the Chamber observed that during her meetings with the investigators of the Office of the Prosecutor, P-132 gave different accounts of what she had experienced following the attack on Bogoro.[1638]

In fact, the witness indicated two distinct places of birth and modified the name of the camp where she was held as a prisoner. She also changed the place and preliminary information she had given regarding the people with whom she had been held. Moreover, P-132 affirmed that she had admitted to her captors that she was of Hema ethnicity, but later stated that she had concealed her ethnicity from them.[1639]

The Chamber noted that in spite of such contradictions, the version that P-132 provided before the Court coincides with her last statement at the Office of the Prosecutor. Additionally, she recognised by herself the inconsistency and explained that she was scared of telling the truth to the investigators.[1640]

When addressing the Prosecution´s investigations, the Trial Chamber II expressly recognised that witnesses can be overtaken by fear when recollecting the events. Certainly, it affirmed that

> "59. The investigation in the case of The Prosecutor v. Germain Katanga, is along with those in the cases of The Prosecutor v. Thomas Lubanga and The Prosecutor v. Mathieu Ngudjolo, one of the first investigations conducted by the Office of the Prosecutor. The Chamber is mindful that the investigation had to be carried out in a region with a high degree of insecurity. It therefore acknowledges the difficulties which the Office of the Prosecutor may have encountered in finding witnesses with a sufficiently precise recollection of the events and ready to testify without fear, as well as gathering − absent infrastructure, archives or public information – reliable documentary evidence which can be used to determine the truth."[1641]

Moreover, the Chamber recalled that

> "victims of sexual violence are particularly vulnerable witnesses. Of note is that the Court's Victims and Witnesses Unit underscored that P-132 was still highly traumatised by her

[1637] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 81, para. 202
[1638] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 82, para. 203
[1639] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 82-83, para. 203
[1640] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 83, para. 203
[1641] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 36, para. 59

> experience and that it required "[TRANSLATION] considerable effort" for her to testify before the Court. Moreover, a member of that Unit's staff remained by her side throughout her testimony. The Chamber is alive to the fact, as recalled by the witness, that women who are victims of such acts run a very high risk of being rejected by their own community when they decide to tell the truth about their ordeal. It is therefore understandable that P-132 wished to know which guarantees and protective measures the Court could provide her before telling the truth to the Prosecution's investigators."[1642]

The Chamber noted that, during the trial, P-132 stuck to the account of events that she had gradually narrated to the OTP investigators and did not importantly contradict herself when providing evidence. According to the Chamber, this consistency is worth of emphasis because, in spite of the specific care in the conduction of the proceedings, on several moments during her testimony in court, P-132 emotionally broke down in tears and had to stop, causing adjournment.[1643]

Therefore, notwithstanding the undeniable difficulties that P-132 faced in remembering those tragic circumstances and, what is more, describing them, the Chamber regarded that the coherence of her testimony supports her credibility.[1644]

Further, the TC II noted that

> "on the subject of P-132, several witnesses stated that they had heard an account which corresponds in many respects to the witness's testimony before the Chamber."[1645]

With respect to the circumstances of Witness P-132´s abduction, there was discrepancy between her account of the events and P-353´s testimony. In fact, in accordance with Witness P-353, she, P-132 and two other young women were hiding in a house when they were apprehended. On a photograph presented to her in court, P-353 recognised P-132 as being one of the four persons who survived the massacre of the inhabitants of the house in which, in consonance with P-353, they had been hiding. P-353 also confirmed that the woman in the photograph was one those whose first name she had formerly furnished. P-132, by her turn, affirmed that she had been captured by combatants in the bush, where she was hiding after running away from her family home. P-353 then said that P-132 had been captured with her and conducted to the Institute before being separate into distinct groups and parting ways.[1646]

[1642] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 82, para. 201

[1643] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 83-84, para. 205

[1644] *Ibidem*

[1645] *Ibidem*

[1646] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 84, para. 206

The Defence argued that P-132 had not been forcibly married but rather maintained a consensual relationship with one of the men in the camp. In spite of the fact that the Defence several times attempted to make her agree to this version of the events, P-132 sustained her account.[1647]

In relation to P-132's personal experience, the Chamber noted that

> "several details she provided were corroborated by testimonies of various other witnesses,"[1648]

inclusive of her assertion that she was abducted by combatants on patrol, that she had denied that she was Hema when enquired about her ethnicity, and the name of the camp where she was held as a prisoner.[1649]

Moreover, P-132 testified that she was hit by gunfire being wounded in a determined part of her body when fleeing. The bullet wound could be seen on photographs that were accepted into the record. Also, another witness affirmed that a woman who was the namesake of P-132 and whom he had taken to the camp presented a bullet wound exactly on the same part of the body as P-132 mentioned. In view of that, the Chamber established that "on 24 February 2003, P-132 sustained a bullet wound in Bogoro."[1650]

The Trial Chamber II asserted that Witness P-132 gave a somewhat thorough narrative of both her flight and the period that she was hiding, recalling what she had heard, and offering clarification when solicited. The Chamber also observed numerous coincidences in P-132 and P-249's testimonies regarding what the former heard and saw during the 24 February 2003 attack. As a result, even though P-353's testimony could cast some doubt in relation to P-132's version of the events surrounding her capture, the Chamber understood that it could not wholly affect P-132's testimony.[1651]

In fact, the Chamber attributed the divergences between the testimonies of P-353 and P-132, and the uncertainties which arise from the incongruent points, to the situation of vulnerability of the witnesses at the time of the events and also when giving testimonies before the Court. In this context, the Chamber, after finding that none of the testimonies should be given precedence over the other in n relation to the circumstances of P-132's capture, decided to rely exclusively on the parts that it regarded that were consistent and trustworthy.[1652]

[1647] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 84, para. 207
[1648] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 369, para. 988
[1649] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 85, para. 208
[1650] *Ibidem*
[1651] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 85, para. 209
[1652] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 86, para. 211

The Chamber understood that, based on either P-132's statement or P-353´s, it was established that P-132 was in Bogoro during the attack on 24 February 2003 and, thus, was in a position to see what was occurring there. It was further established that she was captured in Bogoro (although the precise circumstances of her capture and the route she took were not aligned with P-353's testimony). In accordance with P-132´s testimony and that of Witness D02-148, she was abducted in Bogoro and then forcedly taken to a Ngiti camp where she was sexually enslaved.[1653]

In connection to the crime of rape, Trial Chamber II considered that it could

> "rely on those parts of Witness P-132's testimony concerning the sexual violence which she claimed to have suffered in Bogoro, despite apparent contradictions identified in her previous statements and discrepancies discerned between her statements and certain aspects of P-353's account. The Chamber will not hold against the witness her somewhat unclear in-court testimony, which may be explained by her difficulty in describing such intimate scenes to the Chamber. However, the Chamber will highlight the detailed nature of the information provided by P-132 about what she allegedly saw and heard from her hiding-place in the Waka plain and note that several details she provided were corroborated by testimonies of various other witnesses."[1654]

Thus, in spite of the existence of some discrepancies among Witness P-132's testimony and determined parts of Witness P-353's testimony, the Chamber admitted the former´s account on the sexual violence she had suffered. In fact, the Trial Chamber II decided to disregard the fact that Witness P-132's "*sub judice*" testimony presented some cloudiness for considering that it was caused by the witness´ embarrassment to describe highly intimate scenes. Also, the Chamber took into account the circumstance that Witness P-132 provided a very detailed account of what she had seen and heard while hiding in the Waka plain and noted that numerous particularities she provided were corroborated by other witnesses` testimonies (D02-148 and Witness P-249).

Although it was very difficult for the Witness P-132 to describe before the Court the precise circumstances of her suffering, she seemed to be conscious that she could not resist the attackers under the penalty of being killed. Surely, the Trial Chamber II noted that the witness had heard that other persons who were trying to escape were being murdered, and that, convinced that death was imminent, she was in a situation of total submission at that point.[1655]

[1653] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 85-86, para. 210, 212

[1654] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 369, para. 988

[1655] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 369-370, para. 989

- Witness P-353

In relation to Witness P-353, she affirmed that the attack on Bogoro began in the morning and that she took refuge in her house with other fleeing neighbours. The combatants, after breaking down the front door, entered in the house and start shooting and killing the people who were hiding there.[1656]

Witness P-353 and three other young women who were hiding with her denied being Hema to the attackers, so the latter asked them to leave the house. Two attackers started to argue regarding to whom P-353 would be assigned. She was taken by the combatants to a Ngiti camp in Walendu-Bindi. After arriving at the camp, P-353 was forced to have sexual intercourse with two men, and thereafter on a daily basis during many months.[1657]

Witness P-353 also affirmed that, around three months after she had been taken to the camp, she heard someone arriving by car, to whom the combatants shouted "[TRANSLATION] President".[1658]

The Trial Chamber II observed that

> "333. P-353 replied frankly and candidly to the questions put to her by the Prosecution and the Defence. When overwhelmed by emotion at certain questions, she would inform the parties and participants. The Chamber considered her testimony to be very coherent and noted that she testified clearly, despite the extreme gravity of the crimes of which she claims to have been a victim."[1659]

The analysis made by the Defence of Witness P-353's testimony casted doubt on various points, namely:

> "the witness did not recognise the CECA 20 church in Bogoro from a photograph shown to her; she claimed to have attended school in 2002 at a time when her school had been moved to Bunia; she confused the Bogoro Institute with the Muzora Institute and, lastly, P-353 claimed that Ugandan soldiers were protecting Bogoro in 2003, although they had already left the village."[1660]

[1656] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 125, paras. 329-330
[1657] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 125, para. 331
[1658] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 125-126, para. 332
[1659] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 126, para. 333
[1660] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 126, para. 335

The Chamber noted that some of contextual information furnished by Witness P-353 was not correct. However, among other arguments, the Chamber affirmed that these were

> "distant events and P-353 was under the age of 18 on 24 February 2003 which, in the Chamber's view, explains why she was unable to identify precisely which armed group was defending Bogoro at the material time."[1661]

In conclusion, the Trial Chamber II recalled that

> "P-353 is a vulnerable witness who did her utmost to try to forget the events she experienced in Bogoro on 24 February 2003 and their tragic consequences. In particular, she stated that out of shame she systematically avoided any conversation on the attack; she wished never to return to the village; her father had asked her never to bring up what had happened; and she put great effort into erasing these painful events from her memory. Given the circumstances, the Chamber considers that the inaccuracies noted in P-353's evidence only reflect her difficulty in recalling in court events that she had endeavoured to forget in order to survive in a particularly harsh social environment, which is hostile to women who have been raped."[1662]

The Chamber, considering Witness P-353´s testimony consistent and her replies precise, rendered that was credible and reliable.[1663]

- The Crime of Rape

In its findings of fact and legal characterisation regarding the crime of rape, the Trial Chamber II found that, based on Witness P-132's testimony, during the attack on Bogoro on 24 February 2003, 3 combatants forced her to have sexual intercourse with them.[1664]

Indeed, the Trial Chamber II was satisfied that Witness P-132 was sexually abused (forced to vaginal penetration) by 3 attackers and that[1665]

> "such penetrations could only have taken place with violence and coercion, since in any event the perpetrators told the witness that she had become "[TRANSLATION] their wife". In the view of the Chamber, such acts of a sexual nature committed by attackers

[1661] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 126, para. 334
[1662] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 127-128, para. 338
[1663] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 128, para. 339
[1664] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 369-371, paras. 989, 991
[1665] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp.369-370, para. 989

> during an armed offensive against civilians are necessarily coercive. In that instance, the coercion was all the more significant in that the crimes were committed collectively against a single victim."[1666]

In accordance with the Chamber, the witness "was aware of the risks which non-compliance entailed, she had no choice but to suffer in silence." In fact, the Chamber noted that

> "the witness had heard that other persons who had taken flight were being killed and was convinced that death was looming, she was in a state of complete submission at that moment."[1667]

In sum, the Chamber considered that

> "although P-132's testimony about the events is at times inconsistent due to, and this must be repeated, her difficulty in reviving such painful memories, it can be relied on to establish that the three persons who attacked her in Bogoro intentionally committed the crime of rape. In fact, it can be inferred from the circumstances of the events that the aforementioned subjective elements are established, as the men had the intention of engaging in sexual intercourse with the woman and were fully aware of the coercive environment in which she found herself."[1668]

- Witness P-249

The Chamber noted that, during the attack on Bogoro village, Witness P-249 was found hiding in the bush by 6 armed combatants, who chased and dragged her through the bush. She was forced to have sexual intercourse with them. Certainly, she was undressed, assaulted, threatened with death by those men. They twice forcibly penetrated her vagina. Then, the group of combatants took the witness to a place where she was held against her will. There the witness was again hit and raped, although she asked her attackers to kill her instead of treating her in that way.[1669]

The Chamber also noted that Witness P-249 was extremely vulnerable and had strong grounds to be afraid of being killed.[1670]

[1666] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 370, para. 990
[1667] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp.369-370, para. 989
[1668] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p.371, para. 992
[1669] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 371-372, para. 993
[1670] *Ibidem*

The Defence pointed out some differences between P-249's statement to the Office of the Prosecutor and her testimony before the court. Nevertheless, the Chamber noted that

> "the Witness met with the investigators twice and that although her second account does differ from the first, it is to a great extent identical to her in court testimony. The Chamber is of the view, furthermore, particularly in the light of the witness's own explanations, that the contradictions were due to her initial reluctance to reveal personal information and the place where she lived, to recount her ordeal and to provide details about the number, names and conduct of her attackers. In the view of the Chamber, these inconsistencies − essentially arising from the witness's sense of shame at having to reveal what she had endured and her security concerns − do not therefore undermine her credibility. Furthermore, although the witness stated that the events had taken place the "[TRANSLATION] day after" the attack, the Chamber has no doubt that the assault did take place on 24 February 2003. In fact, P-249's testimony shows that she considered the attack to have begun on the night of 23 to 24 February 2003 and that what she calls the "[TRANSLATION] day after" actually denotes the day of the 24th."[1671]

In face of that, the Chamber found that Witness P-249 was forced by combatants to engage in sexual intercourse during the attack on Bogoro on 24 February 2003. In the Chamber´s view, the body of evidence was sufficient to establish the first two objective elements of the crime of rape.[1672]

Further, P-249's attackers perpetrated acts of violence (physical and psychological) against her and humiliated her, circumstances which allowed the Chamber to find that the mental elements demanded by article 30 of the Rome Statute were also established. Additionally, the attackers could not have been oblivious to her verbal objections.[1673]

Accordingly, the Chamber considered that

> "in Bogoro on 24 February 2003, six combatants intentionally invaded P-249's body in the knowledge of the force, threats and duress they were exerting on their victim as well of the prevailing coercive environment."[1674]

[1671] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 372, para. 994

[1672] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 372, para. 995; Elements of Crimes of the International Criminal Court, Arts. 7(1)(g)-2, footnote 17; 8(2)(e)(vi)-2, footnote 65

[1673] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 372-373, para. 996

[1674] *Ibidem*

In relation to Witness P-353, the TC II affirmed that

> "[a]fter witnessing the very violent murders in Bogoro of those with whom she had been hiding, P-353 was forced to go with the perpetrators and transport for them property they had just stolen. The combatants then declared that she was thenceforth "[TRANSLATION] their wife". Abused physically and spared for the sole reason that she was not Hema, the witness subsequently found herself alone, deprived of liberty in the combatants' camp, several hours' walk from her village. Two of them, who were part of the group that she had had to go along with to the camp, in turn engaged in sexual intercourse with her on the evening of her arrival. In the light of her in-court testimony, the Chamber considers that both men forced her to engage in sexual intercourse. P-353 did state, it should be recalled, that the first of them declared that she had become "[TRANSLATION] his wife", further stating that after threatening and undressing her, he forcibly penetrated her vagina."[1675]

The Chamber stated that Witness P-353 feared for her life and had no option left but to obey her attackers. The Chamber understood that she was assaulted both physically and verbally by the combatants during the attack on Bogoro, and, upon arrival at the camp, was forced to engage in sexual intercourse with them by means of threat and coercion.[1676]

Indeed, the Trial Chamber II asserted that

> "P-353, who was under 18 years of age at the material time, was forced by two combatants in the camp in Walendu-Bindi collectivité to engage in sexual intercourse with them from 24 February 2003."[1677]

In consonance, the Chamber found that

> "two combatants, who were members of that Walendu-Bindi militia camp, intentionally raped P-353 on 24 February 2003: they were aware of the circumstances in which she found herself but nevertheless deliberately engaged in sexual intercourse with her."[1678]

"In the light of the foregoing and the Chamber's findings following its assessment of the contextual elements of crimes against humanity and war crimes," [1679] the Chamber understood that the evidence established

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[1675] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 373-374, para. 997
[1676] *Ibidem*
[1677] *Ibidem*
[1678] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 374, para. 998
[1679] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 374, para. 999

> "beyond reasonable doubt that during the attack on Bogoro on 24 February 2003, combatants from the military camps of the Ngiti militia of Walendu-Bindi intentionally committed against P-132, P-249 and P-353, crimes of rape constituting crimes against humanity and war crimes under articles 8(2)(e)(vi) and 7(1)(g) of the Statute."[1680]

- Sexual Slavery

In its findings of fact and legal characterisation, when addressing the crime of sexual slavery, the TCII noted that the term "wife", which was employed by the attackers to refer to the witnesses they had raped by way of predetermining their fate, had a very particular meaning in the circumstances under scrutiny. In fact, Witnesses P-132, P-249 and P-353, who had testified before the Court as victims of sexual violence, used the term "wife", that is especially important to the examination of the crime of sexual slavery.[1681]

In the Chamber´s view, in the particular context of the events that took place immediately after of the attack on Bogoro, the affirmation that a women had been "taken as a wife" by a combatant or that she was to "become his wife" was an unequivocal reference to coercive circumstances which almost certainly entailed the engagement in acts of a sexual character.

- Witness P-132

Witness P-132 affirmed that

> "[TRANSLATION] You know full well that when someone takes you for his wife, he can have sexual intercourse whenever and however he wishes. He told me that I had become his wife. I could not refuse."[1682]

She also asserted that when being raped by the attackers for the first time in the bush, she instantly thought that she had become their wife.[1683]

In accordance with the Trial Chamber II´s understanding, the circumstance that the combatants explicitly considered the women who they had abducted in Bogoro and forcibly taken to their military camps as "their wives" demonstrates

[1680] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 374, para. 999
[1681] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 374-375, para. 1000
[1682] *Ibidem*; ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Witness P -132, T. 140, p. 21
[1683] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Witness P -132, T. 139, p. 20; ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 375, para. 1000

that “they all harboured the intention to treat the victims as if they owned them and obtain sexual favours from them.”[1684]

The Chamber recalled that, in her testimony, Witness P-132 affirmed that, after being raped by the combatants and taken to their military camp, she spent many days in a hole dug in the ground, until the commander of the camp decided her fate and forced her to live behind his house. She was then forced to perform domestic chores, inclusive of helping the combatants’ wives in their daily tasks.[1685]

The Chamber also recalled that P-132 regarded herself a hostage and wanted to flee the camp, but was scared to disobey the orders of her commander.[1686]

Certainly, P-132 narrated that

> “on the orders of the “[TRANSLATION] superior”, she was compelled to marry a militia member living at the camp, live with him and follow him when he was reassigned to other Ngiti camps. The witness claimed that she feared him and that she had thought about how she might escape but was unable to do so.”[1687]

The testimony of Witnesses P-132´s on being captured by the combatants in Bogoro in the aftermath of the attack and subsequently being taken by them as a hostage to a camp where she was forced to “marry” a combatant was corroborated by the testimonies of D02-148, P-28 and P-233.[1688]

It is noteworthy that the Defence to Katanga argued that Witness P-132 had consented to marry to [REDACTED]. Surely, the Defence stated that she had maintained a consensual relationship with a combatant in the camp and subsequently married him, argument which was supported by the testimony of D02-148.[1689]

In spite of the Defence´s efforts to make P-132 accept this version, she sustained that she had never agreed to a relationship and that it could not be regarded as marriage in those circumstances. Indeed, the witness explained in a logical manner that there was no room for her not to acquiesce to the “marriage”.[1690]

[1684] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 375, para. 1001

[1685] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 375-376, para. 1002

[1686] *Ibidem*

[1687] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 376, para. 1004

[1688] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 376-377, paras. 1003-1004

[1689] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 377, para. 1005; ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Common Legal Representative of the main group of Victims, Second Corrigendum *Conclusions Finales*, p. 7, para. 7

[1690] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Trial Chamber II, Second Corrigendum to Defence Closing Brief, p. 266, para. 980 (29

The Trial Chamber II noted that P-132 was deeply moved when confronted with the arguments of the Defence calling into question the consensual character of the union. The Witness was also upset when it was presented a photograph of the person who, in accordance with the Defence, was her husband.[1691]

The Chamber did not exclude

> "the possibility that he was the man to whom she may have been married and that her emotional response to the photograph could be explained by the trauma she suffered, since it can indeed be disturbing or painful to have to recall such experiences. Combatants at the camp where she was held captive wielded powers over her resulting from a veritable right of ownership, and the circumstances in which the union took place did not leave her the necessary discretion to enter into such an arrangement, even though D02-148, who was at the camp, thought that he discerned emotional ties between her and the man."[1692]

Therefore, apart from all the suffering experienced by Witness P-132 due to the rapes and sexual enslavement, when giving her testimony before the Court, she was confronted with the Defence´s argument that she had willingly taken part in the "marriage", as if her consent was not vitiated, as if the circumstances allowed her to make her self-determination prevail. In the Defense´s argument it is implied that, to some extent, she concurred to the violent acts that followed the "marriage"- the frequent rapes, the physical abuse, the forced household chores.

Certainly, upon giving an emotional and very detailed testimony of all her anguish and suffering in the hands of the combatants, Witness P-132 had to withstand the underlying notion that, instead of being a victim of sexual slavery, she had actually freely agreed to the circumstances she had to endure.[1693]

This situation can produce an important negative psychological impact, especially on someone who was already patently vulnerable. The negative effects can have an in-depth reach independently of both the witness´ immediate ability to rebut the Defence´s argument and the Court´s findings.[1694]

June 2012); ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Witness P-132, T. 143, pp. 34-37, 53-59 and 60-63; ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 377, para. 1005; ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Common Legal Representative of the main group of Victims, Second Corrigendum *Conclusions Finales*, p. 7, para. 7

[1691] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 377, para. 1005

[1692] *Ibidem*

[1693] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Common Legal Representative of the main group of Victims, Second Corrigendum *Conclusions Finales*, p. 7, para. 6

[1694] *Ibidem*

Hence, the possibility of the occurrence of re-victimisation of victims of sexual and gender-based crimes- as a consequence of they providing their testimonies before the Court- is a downside which should not be downplayed.

In fact, as the Witnesses and Victims Unit noted, Witness P-132 (likewise Witness P-353) was particular vulnerable and, due to the severe trauma she experienced, attempted to forget what had happened to her. Not rarely victims of sexual/ gender-based crimes seek to dismiss from their mind the circumstances of the crimes they endured, what can lead to omissions in their accounts of the facts or even to what might be regarded as inconsistencies.[1695]

Moreover, when testifying about such events, these witnesses are flooded by turbulent emotions (such as rage, sadness, and shame) upon awakening their tragic memories. This circumstance can also impair their accountability of the facts.

However, the unintentional gaps caused by the seriousness of the psychological trauma can make it harder to prove the occurrence of sexual/ gender-based crimes.

The TC II recalled that once Witness P-132 realised that the circumstances had become favourable and that the conditions were appropriate, she ran away from the military camp where she had been living with the militia member, and went to a different region.[1696]

With regards the second material element, the Chamber noted that Witness P-132 was raped many times by militia members during the attack on Bogoro, at the military camp where she was taken and, more broadly, while in captivity. Indeed, the TCII noted that during her incarceration, P-132 was often assaulted, on occasions by various combatants in turn, and these events caused her grave mental and physical harm. During that time, apart from being raped on a regular basis by the combatant who had taken her as his wife, Witness P-132 was also raped by men who, under threat, took her into the bush. After fleeing, she gave birth to a child who was conceived while she was held captive in the camp.[1697]

In the view of the Chamber, such facts established that

> "combatants from the camp where P-132 was kept wielded powers over her attaching to the right of ownership: the witness, who was held at the camp, was extremely vulnerable. She did not have freedom of movement, nor was she able to decide where she lived, and she in fact belonged to the camp combatants. The Chamber further considers that it has sufficient material to satisfy it that the man who became her "husband" was given P-132 and exercised powers over her attaching to the right

[1695] *Ibidem*
[1696] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 377, para. 1005
[1697] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 378, para. 1006

> of ownership. It can thus be established from the available evidence that this state of enslavement lasted over a year and a half. Furthermore, in the light of the evidence placed before it, the Chamber is satisfied that P-132 was constantly compelled to performed sexual acts whilst in captivity."[1698]

The TC II understood that, in face of all the evidence presented, it was possible to establish that the militia members that raped P-132 purposefully compelled her to have sexual intercourse with them. They were conscious that she, who had been living as a captive in their military camp for an extensive period, did not have freedom of movement. This was particular applicable for those who raped P-132 whilst she was incarcerated and for the combatant who took her as his wife. He could not have been oblivious to the fact that he exercised such power over P-132 that she was actually completely subjugated to his control. For example, when P-132 opposed his advances, he told her that she would become his wife anyway, and, allegedly, as a result the camp commander ordered so.[1699]

Therefore, the Chamber found that it had been demonstrated that these militia members intentionally perpetrated the crime of sexual slavery against P-132 and that the mental elements demanded in article 30 of the Rome Statute had been satisfied.[1700]

- Witness P-249

The Chamber noted that, during the 24 February 2003 offensive against Bogoro, six Ngiti combatants physically assaulted and raped Witness P-249. She was then taken to a camp, where she was raped again by her attackers. There P-249 was told by the commander that because she refused to tell him where the Hema were, she would either be killed or become their wife, meaning that she would have to do as they wanted. As a consequence, she was "[TRANSLATION] consigned" to one of his bodyguards. While held in captivity, she was obliged to live with and serve the combatants from this group, and, particularly, be available to the commander´s bodyguard. Being threatened with death, P-249 was under the control of the militia members, who denied her any freedom of movement since they kept her under constant surveillance. Afraid of retaliation, she also forcibly carried out several household tasks for them despite the fact that she presented a leg wound. P-249 affirmed that she only managed to escape due to a lapse in the vigilance of the combatants.[1701]

[1698] The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Witness P-132, T. 139, pp. 13-14, 18-21, 39, 46-53, T. 140, pp. 18, 20-21, 23, T. 141, pp. 37-40 and 43, T. 142, pp. 41-42; ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 378, para. 1007

[1699] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Witness P-132, T. 140, pp. 18 and 21; ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 378-379, para. 1008

[1700] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 379, para. 1008

[1701] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 379-380, para. 1009

Even though P-249 affirmed that she has met a commander named Yuda on the day of the Bogoro attack and subsequently had lived alongside him, she was not able to identify him in a photograph showed by the Defence in court. As a consequence, the Chamber was not satisfied that the commander to whom she referred was in fact that Yuda. However, the Chamber understood that the situation that P-249 considered him to be Yuda did not interfere on the credibility or reliability of her testimony in relation to the events that she narrated and allegedly experienced.[1702]

The Chamber further noted that the Witness P-249 was raped by many Ngiti combatants, on several occasions, beginning on 24 February 2003 and subsequently every night during the period she was at the military camp in Bogoro, especially by the bodyguard of the commander. She asserted that men looked for her at night with the exclusive objective of having sexual intercourse with her, without even talking to her.[1703]

Consequently, the Chamber regarded that this evidence established that not only the commander's bodyguard but also many other military members collectively exercised prerogatives over Witness P-249 attaching to the right of ownership. It was also established that P-249 was seen by the combatants as a woman who was available for their sexual gratification and, hence, she was forced to engage in acts of a sexual character with various men, inclusive of the bodyguard.[1704]

The Trial Chamber II rendered doubtless the fact that the bodyguard wished to maintain sexual intercourse with Witness P-249, and so did the other men at the Bogoro camp, and they knew that she was denied any freedom of movement and autonomy. The Chamber was satisfied that all of them were aware that they collectively disposed of powers attaching to the right of ownership. As a result, the TCII found that Witness P-249 was intentionally sexually enslaved by the combatants at the Bogoro camp.[1705]

- Witness P-353

The Chamber noted that, after murdering people who had been hiding in a house during the Bogoro attack, the combatants ordered P-353 as well as two other women (whom they believed not to be Hema) to leave the house and assigned the 3 to themselves. Two combatants disagreed in relation to who should keep P-353 and then decided to share her as a wife. After being beaten and abducted in Bogoro, P-353 was obliged to follow those men and transport the property they had just stolen. During the way to the camp, P-353 thought that she was going to be killed by the combatants. The Chamber recalled that upon her arrival at the

[1702] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 380, para. 1010
[1703] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 380-381, para. 1011
[1704] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 381, para. 1012
[1705] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p.381, para. 1013

camp in Walendu-Bindi “collectivité”, P-353 was forced to have sexual intercourse with two of her attackers.[1706]

Following, P-353 found herself alone at the camp for around three months, being confined to a house and scared to go out in case they discovered she was actually Hema and killed her. Her “husbands” made sure she could not flee. Certainly, one of them controlled her daily life to such an extent that he actually wished that the single activity P-353 performed was to have sexual intercourse with him. The Chamber noted that P-353 did not see a way to escape, because she was convinced that the combatants would recapture and kill her. Ultimately, after obtaining permission from her “[TRANSLATION] husband” to temporarily leave the camp, she managed to escape captivity assisted by a woman.[1707]

The Chamber understood that the status of “[TRANSLATION] wife” imposed on Witness P-353 entailed that her two “husbands” could obtain sexual favours from her. As she affirmed, her only task was to have sexual intercourse with the two of them.[1708]

Even though Witness P-353 affirmed that she was not threatened by her “husbands” the Chamber noted that she had stated that she was forced to second-guess what were their expectations every time they came to her, and it recalled that, on 24 February 2003, she was raped under threat. The Chamber also noted here that she was raped on a regular basis during a period of approximately three months, first by two combatants and later by only one of them.[1709]

In the Chamber’s view, the testimony of P-353 “per se” allowed to establish that, after she was incarcerated on 24 February 2003, the two combatants who had made her their wife exercised over her prerogatives attaching to the right of ownership. In consonance, the Chamber also found that starting on 24 February 2003 and constantly thereafter, the two men (who belonged to the group that had obliged the witness to go to their military camp subsequently to the attack on Bogoro) forced P-353 to have sexual intercourse with them.[1710]

They could have not been unaware that while at the camp P-353, whom they had abducted in Bogoro and were holding captive, was dispossessed of all freedom of movement. They purposefully compelled her to engage in acts of a sexual character. In this regard, the first man that raped her at the camp explicitly said that she his wife henceforth, and, to guarantee she understood precisely what

[1706] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp.381-382, para. 1014
[1707] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 382, para. 1015
[1708] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 382, para. 1016
[1709] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 382-383, para. 1016
[1710] *Ibidem*

being a “wife” entailed, he said that he wanted her body, and, pushing her onto the bed, raped her while she cried.[1711]

Consequently, the Chamber rendered it was established that two combatants, who were based at a Ngiti military camp in Walendu-Bindi “collectivité”, perpetrated the crime of the sexual enslavement against Witness P-353 for an interval of around three months as of 24 February 2003.[1712]

Moreover, the Chamber found that the evidence arising from the testimonies of P-353, P-132, P-268, and P-233 permitted to confirm that (apart from P-132, P-353, and P-249) other women were also sexually enslaved by Ngiti combatants in the aftermath of the 24 February 2003 attack on Bogoro.[1713]

In what concerns the perpetrators of these acts, in the opinion of the Chamber it was established that the crimes of rape and sexual slavery committed against Witnesses P-132, P-249 and P-353 were carried out by Ngiti combatants.[1714]

In face of the aforesaid, the Chamber found that the evidence established beyond reasonable doubt that crimes of sexual slavery as both a war crime (Article 8(2)(e)(vi) of the Rome Statute) and a crime against humanity (Article 7(1)(g) of the Statute) were intentionally committed following the attack on Bogoro on 24 February 2003, by combatants stationed at camps belonging to the Ngiti militia of Walendu-Bindi and by others in these camps.[1715]

- Contextual Elements

Following, the Trial Chamber II examined the contextual elements of the crimes. In connection with the crimes against humanity, the TC II recalled that Article 7 (1) of the Rome Statute determined the contextual elements of crimes against humanity by disposing that

> “[f]or the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack,”[1716]

whereas Article 7(2)(a) of the Statute defined an attack directed against a civilian population as being

[1711] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 383, para. 1018
[1712] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 383, para. 1019
[1713] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 384, paras. 1020-1021
[1714] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 384-385, para. 1022
[1715] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 385, para. 1023
[1716] Rome Statute, Art. 7(1)

> "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."[1717]

The Chamber considered appropriate to recapitulate the three phases of reasoning that the application of Article 7 of the Statute involves.[1718]

The first stage of reasoning consists in verifying the existence of an attack. So that it can be concluded that an attack took place, it is necessary, in the terms of Article 7 (2) (a) the fulfilment of following elements:

> "(1) establishment of the existence of an operation or course of conduct involving, notably, the multiple commission of acts referred to in article 7(1) aforecited; (2) that the operation or course of conduct be directed against a civilian population; and (3) that it be proved that the operation or course of conduct took place pursuant to or in furtherance of a State or organisational policy."[1719]

The second phase refers to characterisation of the attack, specifically the evaluation of whether or not it was widespread or systematic. The Chamber clarified that, in general, the term "widespread" relates to the large-scale character of the attack, whilst the term "systematic" is entwined with the organised character of the violent acts.[1720]

In fact, the Chamber stated that

> "[t]he attack must be widespread or systematic, implying that the acts of violence are not spontaneous or isolated. An established line of authority holds that the adjective "widespread" adverts to the large-scale nature of the attack and to the number of targeted persons, whereas the adjective "systematic" reflects the organised nature of the acts of violence and the improbability of their random occurrence. It has also been consistently held that the "systematic" character of the attack refers to the existence of "patterns of crimes" reflected in the nonaccidental repetition of similar criminal conduct on a regular basis."[1721]

[1717] Rome Statute, Art. 7 (2) (a)

[1718] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 414, para. 1096

[1719] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 414-415, para. 1097

[1720] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 415, para. 1098

[1721] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 426, para. 1123

The goal of the last stage is to ascertain, in first place, if there is nexus between the widespread or systematic attack and the act of violence, and, in second place, if the perpetrator of the act had knowledge of the nexus.[1722]

In relation to the nexus, the Trial Chamber II recalled that

> "the individual act must be committed as part of a widespread or systematic attack. In determining whether an act within the ambit of article 7(1) of the Statute forms part of a widespread or systematic attack, the bench must, with due regard for the nature of the act at issue, the aims it pursues and the consequences it occasions, inquire as to whether it is part of the widespread or systematic attack, considered as a whole, and in respect of the various components of the attack (i.e. not only the policy but also, where relevant, the pattern of crimes, the type of victims, etc.). Isolated acts that clearly differ in their nature, aims and consequences from other acts that form part of an attack, fall out with article 7(1) of the Statute."[1723]

Indeed, the requirement of nexus entails that a direct link must exist "between the course of conduct or operation and the policy."[1724]

Further, as preconised in Article 7 (2) (a), the attack must be directed against civilians, in accordance with or in furtherance of a State or organizational policy to perpetrate this attack.

Therefore, the main target of the attack must be the civilian population. Certainly, the victimisation of civilians must be the central objective of the offensive action. Thus, if the civilian population is just collaterally afflicted, it is not a case of an attack as defined by Article 7 of the Statute.[1725]

In what concerns the requirement that the attack must be carried out in accordance with or in furtherance of a State or organizational policy to commit such attack, the view of TC II was that

> ""policy", within the meaning of article 7(2)(a) of the Statute, refers essentially to the fact that a State or organisation intends to carry out an attack against a civilian population, whether through action or deliberate failure to take action."[1726]

[1722] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 427, para. 1124
[1723] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 415, para. 1099
[1724] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 422, para. 1116
[1725] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 417, para. 1104
[1726] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 419, para. 1108

The Chamber also explained that even though the adjectives "policy" ("the State or organisation meant to commit an attack against a civilian population") and "systematic" ("*pattern* of repeated conduct or the recurring or continuous perpetration of interlinked, non-random acts of violence") are not to be considered as synonymous,[1727]

> "the demonstration of, first, the existence of a policy and, second, of the systematic character of the attack do ultimately form part of the same requirement: the requirement to establish that the individual act is the link in a chain and that it is connected to a system or plan."[1728]

Therefore, so as to subsume to Article 7 of the Statute, the act of violence must be a connected to a larger system or plan conceived by the State or an organisation.

In its findings of fact and legal characterisation, the TC II established that the contextual elements of crimes against humanity were met.

- Existence of the attack

In relation to the existence of the attack, the Chamber considered that:

The assault against the Bogoro village on 24 February 2003 involved the commission of multiple acts within the terms of Article 7(1) of the Rome Statute[1729]

The main object of such assault was the civilian population (more specifically, the individuals of Hema ethnicity) occupying the area. Certainly, the Ngiti combatants of Walendu-Bindi "collectivité" (who advocated an anti-Hema ideology) harboured the specific design to eliminate from Bogoro[1730]

> "not only UPC troops but also the predominantly Hema civilian population of the village and whom the Ngiti combatants considered synonymous with the UPC."[1731]

Therefore, "the civilian population was the principal target and not solely the UPC troops or a group of randomly selected individuals."[1732]

[1727] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 420, paras. 1111-1113
[1728] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 420, para. 1112
[1729] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 432, para. 1134-1135
[1730] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 435, para. 1143
[1731] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 434-435, para. 1142
[1732] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 433, para. 1138

The Walendu-Bindi "collectivité" *(*whose Ngiti combatants were organised within a single militia*)* formed an organisation in accordance with the meaning set out in Article 7(2) of the Statute.[1733]

The assault was carried out pursuant to or in furtherance of the Walendu-Bindi "collectivité" organisation policy, specifically to wipe out from Bogoro the civilians of Hema ethnic group. Undoubtedly the Chamber considered that

> "preparations within the collectivité preceding the attack and the ultimate modus operandi of the attack demonstrate that the Bogoro operation ensued from the design harboured specifically by the Ngiti militia to target the predominantly Hema civilian population of Bogoro."[1734]

In the Chamber´s words:

> "in the light of the foregoing, it appears that the Ngiti militia of Walendu-Bindi collectivité fully intended to direct an attack against Bogoro's civilian population and mete out acts of violence to the village's Hema inhabitants. Accordingly, the Chamber finds that the attack which took place in that village was executed pursuant to an organisational policy to attack it with a view to not only wiping out the UPC troops there but also, and first and foremost, the Hema civilians who were present, this design forming part of a wider operation to reconquer Ituri."[1735]

As a consequence, present all the elements exposed above, the Chamber concluded that it rested demonstrated that on 24 February 2003 an attack was directed against the Bogoro village's civilian population in accordance with the terms established in Article 7(2)(a) of the Rome Statute.[1736]

- The attack on Bogoro was systematic

The Chamber found that the attack on Bogoro was systematic by affirming that

> "[f]rom the sequence of attack and, specifically, from how the troops deployed, attacked the village and committed the crimes; the number of Hema civilians targeted; the pursuit of the Hema population who had survived the assault during the battle and thereafter; and lastly the destruction and pillaging of property, it

[1733] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 434, paras. 1139-1141
[1734] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 437, para. 1150
[1735] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 439, para. 1155
[1736] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 439, para. 1156

> is apparent that the attack was carried out in a coordinated and organised fashion."[1737]

In this respect, the TC II also stated that it had established that

> "the Lendu and Ngiti combatants pursued anyone who crossed their path, making no distinction between ordinary villagers and UPC soldiers. It recalls that from the start of the attack, during the capture of the military camp and even after the fighting had ended, the attackers pursued the villagers, wounding or killing them by machete and firearms. Men, women, elderly people, children and, at times, babies were attacked in their homes, whilst in flight or seeking refuge at the Institute or in the bush, even though they took no part in the fighting. … The attackers also captured several civilians and sexually assaulted women who had concealed that they were Hema in order to escape certain death."[1738]

- Nexus between the crimes perpetrated and the attack

In relation to the crime of murder as a crime against humanity (Article 7(1)(a) of the Statute), the Chamber considered it was established that murders were committed by the group of Ngiti combatants of Walendu-Bindi "collectivité" as part of the attack against the predominantly Hema civilian population. This crime was the principal means of execution of the attack and was elemental to it. The victims died in consonance with the plan conceived by the Ngiti combatants of Walendu-Bindi to annihilate the Hema civilians of Bogoro.[1739]

In what concerns the acts of sexual violence perpetrated against women who pretended not to be Hema so as to escape certain death, the Chamber recalled that it must be established a nexus between the attack and the violent act (being expendable to demonstrate that each act was carried out pursuant to or in furtherance of the policy).[1740]

The Chamber considered that

> "the acts of sexual violence during the operation to wipe out Bogoro's civilian population were committed with a same objective and objectively formed part of that operation. By no means could they constitute isolated acts."[1741]

[1737] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 439-440, para. 1158
[1738] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 440-441, para. 1160
[1739] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 441-442, para. 1164
[1740] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 442, para. 1165
[1741] *Ibidem*

Finally, the Chamber rendered that the perpetrators of the acts were combatants of the militia of Walendu-Bindi “collectivité”, and they carried out the murders, rapes and sexual slavery knowing about the attack and being aware that their acts integrated it.[1742]

Therefore, both the requisite of nexus between the act of violence and the attack and the requisite of knowledge of the perpetrator were satisfied.

In light of the exposed above, the Trial Chamber II concluded that the murders and rapes perpetrated in Bogoro on 24 February 2003 and the sexual enslavement which arose from day were part of the systematic attack targeting the predominantly Hema civilian population of Bogoro and that was executed in line with a policy of the Walendu-Bindi Ngiti militia.[1743]

Consequently, the Chamber regarded that the crimes of rape and sexual slavery as crimes against humanity were committed during the systematic attack undertaken by Ngiti combatants of the Walendu-Bindi “collectivité” organisation against the predominantly Hema civilian population of Bogoro on 24 February 2003 and in its aftermath.

- War Crimes

The Trial Chamber II stated that, in the case at bar, the Pre-Trial Chamber I had found in its Decision on the confirmation of charges, that there was substantial evidence indicating that between August 2002 and May 2003, in the territory of Ituri an armed conflict took place between several local organised armed groups, such as the UPC/FPLC, the FNI, the FRPI and PUSIC, among others. Taking into account that Uganda was directly involved in this armed conflict by means of the UPDF and that it was one of the principal suppliers of weapons and ammunition for the armed groups, the Pre-Trial Chamber regarded that the conflict presented an international character.[1744]

However, the arguments sustained by the parties and participants in their closing briefs, especially in face of the judgment rendered by the ICC in the Lubanga case, put in doubt characterisation on the Pre-Trial Chamber of the conflict as presenting an international nature.[1745]

In view of that, the Trial Chamber II notified the parties and participants of a possibility of changing the legal characterisation of the facts in consonance with

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[1742] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 442, para. 1166

[1743] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 442, para. 1167

[1744] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 442-443, para. 1168; ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Decision on the confirmation of charges, paras. 239-240

[1745] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 443, para. 1169; ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Decision on the confirmation of charges, paras. 239-240

regulation 55 of the Regulations of the Court. The Chamber invited them to expose in the closing statements their views on the compatibility of the application of regulation 55 with the accused´s right to a fair trial, as well as to furnish their opinion about a possible recharacterisation of the armed conflict as being of non-international nature.[1746]

In its observations, the Defence affirmed that the Prosecution had the burden of proving that the crimes had been perpetrated in an international or non-international armed conflict, and, for this reason, the Defence should not recall witnesses or tender new evidence, under the penalty of reversing the burden of proof.[1747]

On 7 May 2012 decision, the Chamber issued a decision confirming that it would entertain these observations made by the Defence in its Article 74 judgment, but that it would not inquire the latter anymore about its views on the need to present further evidence.[1748]

In the Judgment, the Trial Chamber II found that law of non-international armed conflict was the applicable one to the hostilities that occurred in Ituri between armed groups, inclusive of the Ngiti militia and the UPC, during the material time, and particularly between January and May 2003. It also found that the attack on Bogoro constituted an elementary part of the armed conflict.[1749]

Moreover, the Chamber understood that, in the case at stake, the recharacterisation of the nature of the armed conflict as determined by the Pre-Trial Chamber in its "Decision on the confirmation of charges" did not infringe Katanga´s rights. The Chamber underscored that the novel characterisation of the armed conflict did not entail a substantial modification of the legal elements of the alleged crimes. In addition, it observed that the facts and circumstances at issue were the same. [1750]

The TC II determined that the crimes of murder, attack against a civilian population, acts of pillaging and destruction (Article 8 (2) (c) (i) (2) (e)(i) (2)(e)(V) (2)(e)(xii)) were deeply connected to the ongoing armed conflict and that the perpetrators (some of whom were Ngiti militia members), in undertaking these

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[1746] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 443, para. 1170; ; ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Decision on the confirmation of charges, paras. 239-240

[1747] *Ibidem, Ibidem*

[1748] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 443, para. 1171; ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, *Décision sur la mise en oeuvre de l'ordonnance relative aux modalités de présentation des conclusions orales*, para. 6 (7 May 2012)

[1749] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 465-466, para. 1129

[1750] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 466, para. 1130; ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, *Décision sur la mise en oeuvre de l'ordonnance relative aux modalités de présentation des conclusions orales*, para. 6.

acts, were conscious of the factual circumstances which established the existence of such conflict.[1751]

Surely, the Chamber noted that, in the particular context of the case, due to the extension of the conflict and its impact in the Ituri region, it is hard to conceive that someone "could be oblivious to the factual circumstances establishing the existence of an armed conflict."[1752]

In what concerns the crime of rape (Article 8(2)(e)(vi) of the Statute), the Chamber observed that were militia members who carried out the rapes against the victims, and, furthermore, that the crimes occurred during the attack or just thereafter. The Chamber noted as well that the combatants who had abducted Witnesses P- 249, P-353 and P-132 were the ones who brought them to one of the Ngiti commanders in Bogoro. Moreover, the Chamber rendered that the existence, use and threat of weapons increased the coercive character of the environment surrounding the victims, and, thus, aggravated the death threats which they received. The Chamber´s opinion was that the crimes of rape were linked to the ongoing hostilities, and that the combatants, who had assumed an active role in that armed conflict by perpetrating the crimes of the rapes, had knowledge of the circumstances of fact that established the existence of the conflict.[1753]

With respect to the crime of sexual slavery (Article 8(2) (e) (vi) of the Rome Statute), the Chamber considered that Witnesses P-132, P-249 and P-353 were sexual enslaved by Ngiti combatants who had attacked Bogoro or by men who were living in military camps and that, likewise the crimes of rape, these acts occurred in the context of and was associated with the armed conflict. It also noted that the capture of the 3 victims was intimately related to the fighting and that their sexual enslavement took place in military camps. As a consequence, the Chamber understood that the criminal acts were entwined with the hostilities, and the perpetrators of those acts (who in incurring in such acts took on an active part in the armed conflict) were conscious of the factual circumstances that set out the existence of the conflict.[1754]

- Germain Katanga´s criminal responsibility

Criminal responsibility within the meaning of Article 25(3)(a) (indirect commission)

As aforementioned, on 26 September 2008, the Pre-Trial Chamber I rendered the Decision on the confirmation of charges in which it found by unanimity that there was enough evidence to establish substantial basis to believe that, during the attack against the Bogoro village on 24 February 2003, Germain Katanga and

[1751] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 466, paras. 1231-1232
[1752] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 466, para. 1231
[1753] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 467, para. 1233
[1754] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 467, para. 1234

Mathieu Ngudjolo jointly perpetrated through other persons, within the terms of Article 25(3)(a) of the Rome Statute, the subsequent crimes with intent:[1755]

- the war crime of wilful killing (Article 8(2)(a)(i) of the Statute);

- the crime against humanity of murder (Article 7(1)(a) of the Statute);

- the war crime of directing an attack against a civilian population as such or against individual civilians not taking direct part in hostilities (Article 8(2)(b)(i) of the Statute); and

- the war crime of destruction of property (Article 8(2)(b)(xiii) of the Statute).[1756]

Germain Katanga also stood accused of having perpetrated jointly with Mathieu Ngudjolo through other persons, within the terms of Article 25(3)(a) of the Statute, the war crime of pillaging (Article 8(2)(b)(xvi) of the Statute), knowing that the offence would occur in the regular course of events.[1757]

Moreover, Germain Katanga stood accused of having perpetrated jointly with Mathieu Ngudjolo, within the terms of Article 25(3)(a) of the Statute, the war crime of using children under the age of fifteen years to participate actively in hostilities (Article 8(2)(b)(xxvi) of the Statute).[1758]

Nonetheless, solely a majority of the Pre-Trial Chamber (Judge Anita Ušacka rendered an Dissenting Opinion) understood that there was enough evidence to establish substantial grounds to believe that, during the Bogoro attack of 24 February 2003, Germain Katanga jointly perpetrated with Mathieu Ngudjolo through other persons, within the terms of Article 25(3)(a) of the Statute, the subsequent crimes, with the knowledge that they would take place in the ordinary course of events: [1759]

- the war crime of sexual slavery (Article 8(2)(b)(xxii) of the Statute);

- the crime against humanity of sexual slavery (Article 7(1)(g) of the Statute);

- the war crime of rape (Article 8(2)(b)(xxii) of the Statute); and

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[1755] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Decision on the confirmation of charges, pp. 209-211, ICC-01/04-01/07

[1756] *Ibidem*

[1757] *Ibidem*; ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 16, para. 8

[1758] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Decision on the confirmation of charges, pp. 209-211, ICC-01/04-01/07; ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 16, para. 9

[1759] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Decision on the confirmation of charges, pp. 209-211, ICC-01/04-01/07; ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 16, para. 10

- the crime against humanity of rape (Article 7(1)(g) of the Statute).[1760]

As a consequence, Germain Katanga was initially charged with basis on Article 25(3)(a) of the Statute that disposes about indirect commission by stating that

> "[i]n accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;"[1761]

In this respect, the Trial Chamber II concluded in its Judgment pursuant to Article 74 that, so as to subsume in the criminal responsibility as an indirect perpetrator (within the meaning of Article 25(3)(a) of the Rome Statute), the person must:

> "- exert control over the crime whose material elements were brought about by one or more persons, which, in the case at bar, will be met where the commission of the crime is secured through the exertion of control over an apparatus of power;
>
> - meet the mental elements prescribed by article 30 of the Statute and the mental elements specific to the crime at issue; and
>
> - be aware of the factual circumstances which allow the person to exert control over the crime."[1762]

Even though it was established that Germain Katanga was in fact at the top of the Walendu-Bindi "collectivité" organisation, the lack of a systematised and effective commandment chain led to some conclusions.[1763]

Firstly, it was not established that in February 2003, the Ngiti militia consisted in an organised mechanism of power. Secondly, it was not established that Germain Katanga, at that period, held control over the militia to a degree to exercise control over the crimes for the ends of Article 25(3)(a) of the Rome Statute. As a result, it was not necessary, the Chamber to continue inquiring whether the other constitutive elements of commission were present.[1764]

[1760] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, pp. 16-17, para. 10 (7 March 2014); ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Decision on the confirmation of charges, pp. 209-211

[1761] Rome Statute, Art. 25 (3) (a)

[1762] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 543, para. 1416

[1763] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, pp. 543-544, paras. 1417-1419

[1764] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 544-545, paras. 1420-1421

As a result, the Chamber found that the Prosecution had not demonstrated that Germain Katanga perpetrated the alleged crimes, within the terms of Article 25(3)(a) of the Statute.[1765]

- Recharacterisation

In its decision of 21 November 2012, the Trial Chamber II, by majority, decided to put into action regulation 55 of the Regulations of the Court, and gave notice to the parties and participants to the proceedings that the mode of liability under which the Germain Katanga initially stood charged (Article 25(3)(a) of the Rome Statute) could be subject to legal recharacterised on the grounds of Article 25(3)(d) of the Statute. On 27 March 2013, the Appeals Chamber confirmed this decision by majority.[1766]

In the Judgment pursuant to Article 74, the TC II understood that the proposed recharacterisation could be effected without outreaching the facts and circumstances delineated in the charges and that, in face of all of the circumstances of the case, implementation of regulation 55 did not cause unfairness of the proceedings against Germain Katanga, being upheld the minimum guarantees enlisted in Article 67(1) of the Rome Statute.[1767]

The Trial Chamber II affirmed that the factual allegations that supported the recharacterisation were essentially those laid in the *Decision on the confirmation of charges* and which founded the Pre-Trial Chamber's conclusions of law with respect to Germain Katanga on the grounds of Article 25(3)(a) of the Rome Statute.[1768]

Taking into account the circumstances and details determined in the ´Decision on the confirmation of charges´ and the distinguishing measures adopted during the Pre-trial proceedings and as from the implementation of regulation 55, the Chamber regarded that Germain Katanga was properly informed in detail of the character, cause and content of the charges.[1769]

Moreover, the Chamber considered that it had overseen the fair and expeditious conduct of the trial in the case at bar, paying due regard for Katanga´s rights.[1770]

[1765] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 545, para. 1421

[1766] *Ibidem*; ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07 OA 13. The Appeals Chamber, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons". ICC-01/04-01/07-3363 (27 March 2013); ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Trial Chamber II, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, p. 11

[1767] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 545, para. 1421

[1768] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 573, para. 1484,

[1769] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 589, para. 1527

[1770] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 614, para. 1592

Hence, the Trial Chamber concluded that the proposed recharacterisation was totally congruent with the dispositions of regulation 55 (1) of the Regulations of the Court and Articles 67(1) and 74(2) of the Statute.[1771]

- Criminal responsibility within the meaning of Article 25(3)(d) (accessoryship)

As a result of such finding, the Trial Court II had to address the issue of responsibility within the meaning of Article 25(3)(d) (accessoryship). Certainly, the Chamber had to consider whether Germain Katanga had incurred in criminal responsibility in the terms of Article 25(3)(d) of the Rome Statute.[1772]

Article 25(3)(d) of the Statute sets out that

> "[i]n accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (ii) Be made in the knowledge of the intention of the group to commit the crime;"[1773]

As the Chamber had already noted in its 15 May 2013 Decision, implementation in the case at stake of Article 25(3)(d)(ii) required that:[1774]

> "- a crime within the jurisdiction of the Court was committed;
>
> - the persons who committed the crime belonged to a group acting with a common purpose;
>
> - the accused made a significant contribution to the commission of the crime;
>
> - the contribution was intentional; and

[1771] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 573, para. 1484
[1772] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 616, para.1596
[1773] Rome Statute, Art. 25(3)(d)
[1774] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Trial Chamber II,i Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court), para. 16 (15 May 2013)

> - the accused's contribution was made in the knowledge of the intention of the group to commit the crime."[1775]

Surely, so that a person can be held criminally responsible for a crime within the jurisdiction of the International Criminal Court on the basis of Article 25(3)(d)(ii) of the Rome Statute, these 5 constituting elements (the first three being objective elements and the last two subjective ones) must be ascertained beyond reasonable doubt.[1776]

As a consequence, the Chamber passed to verify the presence of these constitutive elements in the instant case.

In what concerns the requisite "a crime within the jurisdiction of the Court was committed," the Chamber clarified that it must satisfy itself that it has been proven beyond reasonable doubt that the offences confirmed by the Pre-Trial Chamber were indeed perpetrated. In consonance, it must be determined both the objective and subjective elements particular to the crimes and their contextual elements.[1777]

In what regards the element "the persons who committed the crime belonged to a group acting with a common purpose", the Chamber asserted that

> "it is a *sine qua non* of the application of article 25(3)(d) of the Statute that the existence of a group of persons driven by and acting with a common purpose be established. Further, the persons who committed the crime must belong to the group, whether they form all or part of it."[1778]

Further, the Chamber decided that, so as to define the coordinated action of the group acting with a common purpose, it would refer to the jurisprudence of the "ad hoc" tribunals on joint criminal enterprise, a mode of liability which also leans on the idea of "common purpose". The Chamber considered that it might take into account the jurisprudence on that, especially in order to adequately ascertain the meaning of the expression "common purpose".[1779]

In accordance with the Chamber's view,

> "that definition of the criminal purpose of the group presupposes specification of the criminal goal pursued; its scope, by pinpointing its temporal and geographic purview; the type, origins

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[1775] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 625, para. 1620
[1776] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, pp. 624, 625, paras. 1617, 1621
[1777] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 626, para. 1622
[1778] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 626, para. 1624
[1779] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, pp. 626-627, para. 1625

> or characteristics of the victims pursued; and the identity of the members of group, although each person need not be identified by name. To its mind, the group of persons acting with a common purpose may be evinced without necessarily establishing the existence of an organisation incorporated into a military, political or administrative structure. Proof that the common purpose was previously arranged or formulated is not required. It may materialise extemporaneously and be inferred from the subsequent concerted action of the group of persons."[1780]

In relation to the criminality of such purpose, the Chamber considered that the purpose must be to perpetrate the crime or must encompass its execution.[1781]

To the Chamber's mind, the participants in the common purpose must have the same intent. Indeed, they must want to cause the result that consists in the crime or be aware that the crime will happen in the ordinary course of events. The shared intent can be determined by, "inter alia", collective decisions of the group and consequent action, or its omissions.[1782]

In addition, the Chamber affirmed that

> "since article 25(3)(d) of the Statute provides for individual responsibility as an accessory to a crime which ensued from the concerted action of a group of persons, it must be established that the persons who committed the crime, in any of the manners enumerated in article 25(3)(a), belonged to the group."[1783]

The Chamber noted that the existence of a "common plan" (as defined by various benches of the ICC and considered as an objective element of joint commission within the terms of Article 25(3) (a) of the Rome Statute) can determine pursuance of a common purpose (without needing to specifically prove the existence of this "common plan" among the members of the group).[1784]

Moreover, so as to be satisfied that the perpetrator's acts were covered by the common purpose, it is necessary to demonstrate that the crime was part of the common purpose. Certainly, crimes arising from opportunistic acts by members of the group and that are foreign the common purpose do not integrate the group´s coordinated action.

> "Only those crimes which the group harboured the intention to commit (the common purpose being to commit the crime or encompassing its execution), and falling within the ordinary

[1780] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 627, para. 1626
[1781] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, pp. 627-628, para. 1627
[1782] *Ibidem*
[1783] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 628, para. 1628
[1784] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 628, para. 1629

course of events, can therefore be attributed to the said group and incur the accused's liability under article 25(3)(d)."[1785]

The requisite "the accused made a significant contribution to the commission of the crime" entails that it must be proven beyond reasonable doubt the accused`s significant contribution (a contribution that can influence the perpetration of the crime) with respect to each crime.[1786]

For that ends, it is necessary to analyse the conduct of a person in the context in which he or she acted or failed to act so as to determine whether or not the conduct had a bear in the perpetration of the crime and, if that is the case, to which extension. The influence can be linked to the material elements of the crimes (as for instance, to furnish weapons to the direct perpetrators of the crimes of murder) or to subjective elements (as for example, encouragement).

In fact, the Chamber considered that proximity to the crime is not an important criterion, being rendered criminally responsible those persons who, while physically, structurally or causally distant from the physical perpetrators of the crimes, indirectly perpetrated them or facilitated their perpetration by deploying the position they enjoyed, notwithstanding its remoteness.[1787]

In connection with the requirement that "the contribution was intentional", the Chamber asserted that Article 25(3)(d), particularly at paragraphs (i) and (ii), sets out a distinct mental element than the provided by Article 30 of the Statute, and, thus, is an exception to the general rule.[1788]

Even though the mental element of Article 30 does not apply in the instant case, the Chamber can make use of such article so as to construct the boundaries the terms "intention" and "knowledge" inserted in Article 25(3)(d).[1789]

The Chamber affirmed too that the contribution must be "intentional" so as to subsume in the mode of liability laid down in Article 25(3)(d). However, the requirement of intentionality should not overlap with paragraph (i) or paragraph (ii) of the Article 25 (3) (d). As a result, this requirement applies solely to the conduct that amounts to the contribution and not to the activity, purpose or criminal intention, which are referred to at paragraphs (i) and (ii) of the Article 25 (3) (d), respectively.[1790]

[1785] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, pp. 628-629, para. 1630

[1786] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 629, para. 1632

[1787] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, pp. 630-631, paras. 1633-1636; ICC. The Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10. Pre-Trial Chamber I, Decision on the confirmation of charges, paras. 284-285 (16 December 2011); ICTY. The Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-A. The Appeals Chamber, Judgment (17 March 2009)

[1788] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 631, para. 1637

[1789] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 631, para. 1637

[1790] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, pp. 631-632, para. 1638

In the Chamber´s view, it must be demonstrated that the accused had the intention to engage in the conduct that amounts to a contribution as well as that he or she knew that his/her conduct contributed to the activities of the group of persons acting in consonance with a common purpose.[1791]

Finally, as regards the last element "the accused's contribution was made in the knowledge of the intention of the group to commit the crime", the Chamber highlighted that the Rome Statute offers an alternative in Article 25(3)(d), since the contribution must either (i)"be made with the aim of furthering the criminal activity or criminal purpose of the group" or (ii) "be made in the knowledge of the intention of the group to commit the crime". In the case at bar, the Chamber opted for the latter (Article 25(3)(d)(ii)).[1792]

The Chamber also underlined its understanding that the group of persons acting with a common purpose must have had the intention to carry out the crime, in agreement with the meaning of Article 30(2)(b) of the Rome Statute. Surely, Article 30(2) disposes:

> "For the purpose of this article, a person has the intent where:
>
> (a) In relation to conduct, that person means to engage in the conduct;
>
> (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events."[1793]

In the Chamber´s view, and in consonance with Article 30 (2) (b), in what refers to the consequence that constitutes the offence, the group must mean to bring about such consequence or know that the offence will take place in the ordinary unfolding of events.[1794]

The Chamber opinion was that, in line with Article 30(3) of the Statute, the requirement of the accused's knowledge means that he or she must be aware of the existence of the intention of the group to undertake the crime by the time of his/her engagement in the conduct which amounted to the contribution.[1795]

[1791] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 632, para. 1639; ICC. The Prosecutor v. Callixte Mbarushimana*,* Case No. ICC-01/04-01/10. Pre-Trial Chamber I, Decision on the confirmation of charges, para. 288.

[1792] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 632, para. 1640

[1793] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 632, para. 1641; Rome Statute, Art. 30 (2) (a) (b)

[1794] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 632, para. 1641

[1795] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, pp. 632-633, para. 1641

It should be called attention to the fact that it must be established the accused's knowledge for each specific crime. Indeed, knowledge of a general criminal intention will not be enough to prove, within the terms of article 25(3)(d)(ii), that the accused knew of the group's intention to carry out each of the crimes integrating the common purpose. Moreover, so as to subsume in liability as an accessory, the accused's knowledge must be ascertained from the important facts and circumstances, and be linked to the group's intention (as defined in Article 30(2)(b) of the Rome Statute) to perpetrate the specific offences.[1796]

In its conclusions of fact and legal characterisation, the Trial Chamber II passed to determine the presence in the instant case of each of the aforementioned 5 elements that are essential to the characterisation of criminal responsibility within the meaning of Article 25(3)(d) (accessoryship).

In relation to the element "crimes within the jurisdiction of the Court were committed", the TC II recalled

> "its finding that, on 24 February 2003, Ngiti combatants from Walendu-Bindi collectivité committed the crimes of murder as a crime against humanity and as a war crime; attack against civilians as a war crime; pillaging and destruction as war crimes; and lastly, rape and, as of 24 February 2003, sexual slavery as war crimes and as crimes against humanity."[1797]

Therefore, it was established that those crimes were perpetrated, including rape and sexual slavery (as war crimes and crimes against humanity).

Concerning the element "the persons who committed the crimes belonged to a group acting with a common purpose", the Chamber asserted that it would verify in first place if it was established that the Ngiti militia of Walendu-Bindi "collectivité" formed a group of persons acting with a common purpose at the material period. Secondly, it would determine if each of the charged crimes integrated the common purpose. Finally, the Chamber would address the question of whether the evidence submitted before it allowed the establishment that the physical perpetrators of the crimes were members of the militia.[1798]

The Chamber recalled then its finding that the Ngiti combatants and commanders of Walendu-Bindi "collectivité" were part of a militia that amounted to an organisation within the terms of Article 7(2)3 of the Rome Statute and to an armed group as conceived in the law of armed conflict.[1799]

[1796] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 633, para. 1642

[1797] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, pp. 639-640, para. 1652

[1798]ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 640, para. 1653

[1799] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, pp. 232, 235-236, 238, 242-243, 245-246, 252-253, 434, 640, paras. 628, 635, 640, 651, 661-663, 679, 681,1141, 1654

In fact, the Trial Chamber II found that

> "the Ngiti combatants and commanders of Walendu-Bindi collectivité were part of a militia, which constituted an organisation within the meaning of article 7(2) of the Statute and an armed group within the meaning of the law of armed conflict. This militia harboured its own design, which, although part of a wider design to reconquer territory, was to attack the village of Bogoro so as to wipe out from that place not only the UPC troops but also, and, first and foremost, the Hema civilians."[1800]

Consequently, the common purpose, the goal of the Ngiti militia was to reconquer Bogoro by eliminating the UPC troops and, mainly, the Hema civilian population that was living there at the beginning of 2003.[1801]

Following, the TC II determined whether each of the charged crime formed part of the common purpose of the Ngiti militia.[1802]

In this regard, the Chamber recapitulated how the 24 February 2003 attack on Bogoro proceeded and understood that it was

> "established that the Ngiti attackers did not confine themselves to seizing control of Bogoro by attacking the UPC, but that they also considered it necessary during combat and after overrunning Bogoro, to pursue and kill the population, destroy its houses and steal its property. In the aftermath of the assault, the village of Bogoro was cleared of its predominantly Hema population.
>
> 1657. In the Chamber's view, the manner in which Bogoro was attacked and that Hema civilians, who had no part in combat, were pursued and killed, confirms the existence of a common purpose of a criminal nature vis-à-vis the population of the village."[1803]

In face of that, the Chamber considered it was established that the crime of murder (as a crime against humanity and as a war crime) and the crime of attack against civilians (as a war crime) integrated the common purpose of the Ngiti militia. Moreover, the "modus operandi" of the Ngiti group both before the 24 February 2003 attack on Bogoro and thereafter corroborated that they meant to perpetrate these crimes.[1804]

[1800] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 640, para. 1654
[1801] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, pp. 640-641, paras. 1654, 1655
[1802] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, pp. 640-641, paras. 1653, 1655
[1803] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 641, para. 1656-1657
[1804] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, pp. 641-642, para. 1656

Further, the Chamber observed that on 24 February 2003, acts of destruction of houses (demolishing and/or setting ablaze) took place throughout the Bogoro village all day long (even after it had been dominated the attackers) and that there was an extensive pillage of the civilians´ belongings (such as roofing sheets of houses, livestock and other animals).[1805]

The Chamber also noted that, in Ituri, the destruction of houses (frequently by setting them ablaze) and the seizing of enemy property were common practices, especially among Ngiti combatants.[1806]

Thus, the Chamber found that the crimes of destruction of the property and pillage conducted by the Nigti combatants during the attack on Bogoro constituted "an integral part of the operation, which consisted of wiping out Bogoro by attacking its Hema civilian population."[1807]

In fact, the Chamber asserted that

> "the Ngiti combatants of Walendu-Bindi collectivité harboured the intention to pillage the property and livestock, and more specifically, that they knew that such acts of pillaging would occur on 24 February 2003 in the ordinary course of events. Accordingly, the Chamber is of the view that the crime of pillaging as a war crime was part of the common purpose. Similarly, the crime of destruction of property as a war crime was also part of the common purpose, which was specific to the militia, namely to eliminate from Bogoro the predominantly Hema civilian population."[1808]

In addition, the Trial Chamber II recalled that, on the day of the aforementioned attack, the Ngiti combatants raped women who claimed not to be Hema (in order to be spared death) and sexually enslaved them.[1809]

[1805] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 642, para. 1659-160

[1806] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, 642-643, para. 1661

[1807] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 642, para. 1660

[1808] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 643, para. 1662

[1809] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, pp. 319, 329, 369-370, 373-374, 379-382, 643, paras. 853, 876, 989, 997, 1009, 1014, 1663; ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Trial Chamber II, Second Corrigendum to Defence Closing Brief, paras. 996-1001; ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Trial Chamber II, Defence Closing Statements, pp. 64-68 (21 May 2012)

Nevertheless, the Chamber understood that there was no evidence that allowed

> "it to find that the acts of rape and enslavement were committed on a wide scale and repeatedly on 24 February 2003."[1810]

It is important to highlight that, after establishing that the attack on Bogoro was systematic, the Trial Chamber II when analysing the existence of the nexus between the act and the attack, found

> "that the acts of sexual violence during the operation to wipe out Bogoro's civilian population were committed with a same objective and objectively formed part of that operation. By no means could they constitute isolated acts.
>
> 1166. Furthermore, the perpetrators of the acts were members of the militia of Walendu-Bindi collectivité, and they committed the murders, rapes and sexual slavery in the knowledge of that attack and that their acts formed part of it."[1811]

It concluded that

> "the murders and rapes committed in Bogoro on 24 February 2003 and the enslavement which ensued that day formed part of a systematic attack principally directed against the village's predominantly Hema civilian population that was launched pursuant to a policy of the Walendu-Bindi Ngiti militia."[1812]

Therefore, the TC II first affirmed that the acts of sexual violence during the attack to destruct Bogoro's civilian population were perpetrated with the same objective and objectively constituted part of that operation, not being isolated acts. From this affirmation, one could infer that the acts of sexual violence were part of the common purpose for they were carried out with the same aim of the attack and were not to be regarded as isolated acts.

However, in this part of the judgment the Chamber asserted that the acts of rape and enslavement were not committed on a wide scale and repeatedly on the date of the attack.

It seems that, although the Trial Chamber II had found that the attack on Bogoro was systematic and that the acts of sexual violence were part of the operation to wipe out Bogoro's civilian population, it decided to apply the requirement of

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[1810] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 643, paras. 1663

[1811] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 442, paras. 1165-1166

[1812] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 442, para.1167; ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Trial Chamber II, Second Corrigendum to Defence Closing Brief, paras. 996-1001; ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Trial Chamber II, Defence Closing Statements, pp. 64-68

widespread as a threshold to being a part of the common purpose to attack Bogoro.

Surely, as aforementioned, the requirement that the attack is widespread refers to the wide scale character of the attack as well as the number of persons who were targeted.[1813]

In this part of its reasoning, the Chamber argued that the acts of rape and sexual slavery were perpetrated in a small scale and not repeatedly. As a consequence, the Chamber found that such acts could not be regarded as part of the common purpose of the Ngiti militia to wipe out Bogoro of its predominantly Hema population.

Also, in support of its finding, the Chamber affirmed that the destruction of the Bogoro village did not necessarily entail the perpetration of these acts.[1814]

In fact, the TC II found that the perpetration of crimes of rape and sexual slavery was not indispensable in the consecution of the Ngiti militia´s goal of wiping out Bogoro and its Hema population and observed that, unlike the other offences that integrate the common purpose, it was not proved that the Ngiti militia members of Walendu-Bindi "collectivité" had perpetrated the crimes of rape or sexual slavery before the battle of Bogoro.[1815]

The absence of proof that the Ngiti militia had previously incurred in the perpetration of the crimes of rape and sexual slavery meant that such crimes could not be considered part of the militia´s "modus operandi" to carry out attacks.

The Chamber also noted that

> "the lives of those women who were raped, abducted and enslaved were specifically "spared" and they evaded certain death by claiming to be other than of Hema ethnicity."[1816]

[1813] Rome Statute, Art. 7(1)(a); Elements of Crimes of the International Criminal Court, Art. 7 (1) (g)-1; ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 420, paras. 1111, 1113

[1814] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, pp. 319, 329, 369-370, 373-374, 379-382, 643, paras. 853, 876, 989, 997, 1009, 1014, 1663; ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Trial Chamber II, Second Corrigendum to Defence Closing Brief, paras. 996-1001; ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Trial Chamber II, Defence Closing Statements, pp. 64-68

[1815] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 643, para. 1663; ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Trial Chamber II, Second Corrigendum to Defence Closing Brief, paras. 996-1001; ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Trial Chamber II, Defence Closing Statements, pp. 64-68

[1816] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, pp. 319, 329, 369-370, 373-374, 379-382, 643-644, paras. 853, 876, 989, 997, 1009, 1014, 1663

In view of that, the Chamber considered that the perpetration of rape and sexual slavery was incidental, not being part of the group´s common purpose.

Certainly, the Trial Chamber affirmed that even though the acts of rape and sexual enslavement amounted to an integral component of the Ngiti militia's goal of attacking the Hemas who were living in the village of Bogoro, the evidence presented did not support the finding that the criminal purpose pursued on 24 February 2003 obligatorily included the perpetration of the crimes of rape and sexual slavery.[1817]

In spite of the allegations that to carry out the crimes of rape and sexual slavery was not indispensable in the consecution of the Ngiti militia´s goal and that it was not proved that the Ngiti militia members of Walendu-Bindi "collectivité" normally used rape and sexual slavery as a war weapon, it seems that the Trial Chamber II did contradict itself in relation to the crimes of rape and sexual slavery. The affirmation that they were not committed in a large scale and repeatedly did not suffice to exclude them from the common purpose. As the own Chamber stated, by no means they could be regarded as isolated acts, but, instead, formed part of that operation.

Nonetheless, since these crimes were not essential for achieving the goal of wipe out the Hemas from Bogoro, they could have been considered as being in the ordinary course of events, which would make Katanga's liable for them within the terms of Article 25(3)(d).[1818]

However, based on the arguments above, the Chamber stated that it could not find that rape and sexual slavery were part of the common purpose of the Ngiti militia when it attacked the predominantly Hema civilian population of Bogoro on 24 February 2003. Therefore, the TC II´s view was aligned with the dissenting opinion rendered by Judge Anita Ušacka in the Decision on the confirmation of charges.[1819]

The Trial Chamber II understood that the crimes of rape and sexual slavery were perpetrated during the attack on Bogoro and in its aftermath. Nevertheless, in the Chamber´s view, these crimes were not an integrating part of the criminal purpose of the Ngiti militia of Walendu-Bindi "collectivité" that led to the attack on Bogoro.

In this respect, the Chamber asserted that

> "[t]o be satisfied that the perpetrator's acts were encompassed by the common purpose, it will also be necessary to show that the crime at hand formed part of the common purpose. Crimes

[1817] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 644, para. 1664
[1818] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, pp. 628-629, para. 1630
[1819] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 644, para. 1664; ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Decision on the confirmation of charges, pp. 209-211

> ensuing solely from opportunistic acts by members of the group and which fall out with the common purpose cannot be attributed to the group's concerted action. Only those crimes which the group harboured the intention to commit (the common purpose being to commit the crime or encompassing its execution), and falling within the ordinary course of events, can therefore be attributed to the said group and incur the accused's liability under article 25(3)(d)."[1820]

Consequently, Germain Katanga could not be considered criminally responsible for the crimes of rape and sexual slavery within the terms of Article 25(3)(d)(ii) of the Rome Statute.

In fact, those crimes, albeit perpetrated during the 24 February 2003 attack on Bogoro and in its aftermath, were considered by the Chamber as not being part of the common purpose of the Ngiti militia of Walendu-Bindi "collectivité" and, hence, the accused could not be held responsible for them.

In face of the commitment of the crimes of rape and sexual slavery, on the one hand, and the impossibility of regarding such crimes as being part of the Ngiti militia's common purpose, on the other hand, the Trial Chamber II decided to include some of these acts in the crime of attack against civilians as a war crime (Article 8 (2)(e)(I) of the Statute).[1821]

Undoubtedly, when addressing the crimes committed during the attack on Bogoro on 24 February 2003, in the conclusions on the crime of attack against civilians as a crime war, the TC II affirmed that

> "although the UPC combatants had retreated, the Lendu and Ngiti combatants continued to pursue the population of Bogoro who were still hiding in the bush, killed some of them and sexually assaulted two women."[1822]

Thus, the Chamber decided to insert the pursuit and rapes of Witness P-132 and Witness P-249 among the acts constituting the war crime of attack against civilians.

[1820] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, pp. 628-629, para. 1630

[1821] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, pp. 319, 329, 369-370, 373-374, 379-382, 643, paras. 853, 876, 989, 997, 1009, 1014, 1663; ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Trial Chamber II, Second Corrigendum to Defence Closing Brief, paras. 996-1001; ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Trial Chamber II, Defence Closing Statements, pp. 64-68

[1822] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, pp. 309-310, 329, paras. 829, 876

The Trial Chamber found

> "beyond reasonable doubt that Ngiti combatants directly targeted the predominantly Hema civilian population of Bogoro on 24 February 2003.
>
> 879. In the light of the above and its findings on the contextual elements of war crimes, the Chamber is therefore satisfied beyond reasonable doubt that the civilian population and civilians not taking direct part in hostilities were attacked intentionally in Bogoro on 24 February 2003 and that the crime defined in article 8(2)(e)(i) was committed by Ngiti combatants."[1823]

Therefore, to circumvent the situation, it treated the crime of rape (sexual assault of two women) as being subsumed in the war crime of attack against civilians.

In conclusion, in spite of the fact that the Trial Chamber II did find that there was a common purpose (namely, to wipe out from the Bogoro village the UPC military elements as well as the Hema civilian population), it understood that solely the crimes of murder (as a crime against humanity and as a war crime), attack against civilians (as a war crime), pillaging and destruction (as war crimes) were part of this common purpose.[1824]

Certainly, the TC II established that the crimes of murder (as a crime against humanity and as a war crime), attack against civilians (as a war crime), pillaging and destruction (as war crimes) were committed by members of the Ngiti militia of Walendu-Bindi "collectivité", when they, moved by a common purpose, attacked Bogoro on 24 February 2003.[1825]

In this respect, the Chamber stated that there was

> "perfect concordance between: (1) the attack, that is, the operation against Bogoro; (2) the group's common purpose, which in this instance was to wipe out from that area the UPC military elements and the Hema civilians there; and (3) the commission of the crimes by the Ngiti combatants."[1826]

Germain Katanga was found criminally responsible for these crimes, within the terms of Article 25 3 (d) (II) of the Rome Statute, for he was aware of the intention

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[1823] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, pp. 329, paras. 878, 879

[1824] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 647, para. 1672; CC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Trial Chamber II, Second Corrigendum to Defence Closing Brief, paras. 996-1001; ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Trial Chamber II, Defence Closing Statements, pp. 64-68

[1825] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, pp. 644-645, paras. 1665, 1669

[1826] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 647, para. 1672

of the Ngiti militia to commit such crimes and intentionally made a significant contribution to their perpetration.[1827]

In this respect, the Chamber affirmed that

> "Germain Katanga's contribution proved to be of particular relevance to the commission of the crimes which form part of the common purpose, since that contribution had considerable influence on their *occurrence* and the *manner* of their commission. His involvement allowed the militia to avail itself of logistical means which it did not possess and which, however, were of paramount importance in attacking Bogoro. His involvement, therefore, had a truly significant part in bringing about the crimes. Germain Katanga's contribution secured the military superiority of the Ngiti combatants over their adversary, the UPC, and allowed them to see through their purpose of eliminating from Bogoro the predominantly Hema civilian population."[1828]

The Chamber regarded that, in the context of the case, Katanga´s influence (his activities in totality and the numerous forms that his contribution assumed) clearly had an important weigh in the commission of the crimes of murder (as a war crime and as a crime against humanity) attack against civilians, pillaging and destruction of property (as war crimes) during the massacre in Bogoro.[1829]

Further, there was no doubt that the accused meant to make his contribution. The Chamber recalled that in his "viva voce" *e*vidence, Germain Katanga

> "explained that his contribution to the design to attack Bogoro was made with awareness and that he had a part in its conception in Beni in November 2002 and thereafter during subsequent trips to the area.
>
> 1683. Germain Katanga further testified that had he not been forced to remain in Aveba during the assault on Bogoro, he would, moreover, have taken part in the attack. … Hence the Accused acted deliberately and was fully aware that his conduct contributed to the activities of the Ngiti militia."[1830]

In relation to the question if the accused knew of the intention of the group to perpetrate the crimes that formed the common purpose, the Chamber asserted that Katanga

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[1827] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 625, para. 1620, 1621
[1828] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 650, para. 1679
[1829] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 651, para. 1681
[1830] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 651, para. 1682-1683

> "knew of the anti-Hema ideology which, in February 2003, drove and mobilised the Ngiti commanders and combatants of Walendu-Bindi…. the Accused's testimony shows in no uncertain terms that he wholeheartedly espoused that ideology."[1831]

The Chamber concluded that

> "… Germain Katanga, in his capacity as President of the Ngiti militia of Walendu-Bindi collectivité, knew that a military attack against Bogoro was being prepared and that the weapons supplies were intended for that battle. He also knew that the methods of warfare generally deployed in Ituri, and in Walendu-Bindi specifically, by all of the armed groups entailed acts of violence against the civilian population. More specifically, he knew that Ngiti combatants from Walendu-Bindi had already violently attacked the civilian population and were driven by an ideology inimical to the Hema and that certain commanders of that militia had already fought in Nyakunde in September 2002. Accordingly, the Chamber must find that Germain Katanga knew that the attack on Bogoro would proceed as it did and that the Ngiti militia would commit the crimes of murder, attack against civilians, destruction of property and pillaging."[1832]

The Chamber considered that its findings established beyond reasonable doubt that Katanga made an intentional contribution to the crimes of murder (as both war crime and crime against humanity), attack against civilians, destruction of property and pillaging (as war crimes), and that such contribution was significant and made in the knowledge of the group´s intention to perpetrate such crimes.[1833]

It is noteworthy that, in the case at bench, the Defence raised the question of cumulative convictions for the crimes of rape and sexual slavery arguing that two convictions could not be entered in relation to each one of these crimes. The Defence contended that if it was established Katanga´s responsibility for the crimes of rape and sexual slavery, he should only be convicted with respect to these crimes as constituting crimes against humanity and not with respect to the same crimes if they amount to war crimes too.[1834]

The Chamber recalled its finding that the crimes of rape and sexual slavery did not integrate the common purpose and, thus, Katanga could not be rendered guilty of any of the four correlating charges.[1835]

[1831] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, pp. 654-655, para. 1688
[1832] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 655, para. 1689
[1833] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 655, para. 1691
[1834] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 656, para. 1692
[1835] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 656, para. 1693

Although none of the parties raised the issue of whether it was possible to enter cumulative convictions for the crimes of murder amounting to crimes against humanity and war crimes (for which the Chamber understood that all the constituting elements of Article 25(3)(d) of the Statue were established), the Chamber addressed the question and asserted that it would allow cumulative convictions solely when the conduct at issue notably infringes two different provisions of the Rome Statute, each requiring proof of a "materially distinct" element not demanded by the other. An element will be regarded different if it demands proof of a fact not demanded by the others.[1836]

The TC II noted that the crime of murder as a crime against humanity contains a different material element than the crime of murder as a war crime. The former demands

> "the existence of a widespread or systematic attack against a civilian population, and the demonstration of a nexus between the perpetrator's conduct and the attack, in respect of both the objective and the subjective elements."[1837]

Conversely, the war crime of murder requires

> "demonstration that the person killed was "*hors de combat*" or was not actively participating in hostilities and establishment that the conduct in question was connected to an armed conflict."[1838]

Therefore, the Chamber ruled that multiple convictions could be entered for the crimes of murder amounting to crimes against humanity (Article 7(1)(a)) and war crimes (Article 8(2)(c)(i)).[1839]

- Disposition

In the disposition, the Chamber, in accordance with regulation 55 of the Regulations of the Court, unanimously modified the legal characterisation of the facts, establishing that the armed conflict linked to the charges was not of an international character between August 2002 and May 2003.[1840]

It was the first time in which the International Criminal Court modified the legal characterisation of the facts in accordance with regulation 55 of the Regulations of the Court (as seen in the previous chapter, in the Lubanga case the Trial Chamber I did not allow the legal re-characterisation of the facts as sexual

[1836] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 657, paras. 1693, 1695
[1837] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 657, para. 1695
[1838] *Ibidem*
[1839] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 657, para. 1696
[1840] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 658

slavery and inhuman and/or cruel treatment so as to include charges of sexual and gender-based crimes).[1841]

The Chamber, in accordance with regulation 55 of the Regulations of the Court (and except for the crime of using children under the age of 15 years to participate actively in hostilities), modified, by majority, the legal characterisation of the mode of liability firstly applied to Germain Katanga under Article 25(3)(a) of the Rome Statute (indirect co-perpetration) in order to apply instead Article 25(3)(d) of the Statute (accessoryship by means of a contribution made "in any other way to the commission of a crime by a group of persons acting with a common purpose").[1842]

The Chamber, by majority, rejected the Defence´s application for a permanent stay of proceedings.[1843]

The Chamber found, by majority, Germain Katanga guilty, within the terms of Article 25(3)(d) of the Rome Statute, as an accessory to the following crimes perpetrated on 24 February 2003:

- Murder as a crime against humanity (Article 7(1)(a) of the Rome Statute);

- Murder as a war crime (Article 8(2)(c)(i) of the Rome Statute);

- Attack against a civilian population as such or against individual civilians not taking direct part in hostilities, as a war crime (Article 8(2)(e)(i) of the Rome Statute);

- Destruction of enemy property as a war crime (Article 8(2)(e)(xii) of the Rome Statute); and

- Pillaging as a war crime (Article 8(2)(e)(v) of the Rome Statute).[1844]

The Chamber unanimously found German Katanga not guilty, within the terms of Article 25(3)(d) of the Rome Statute, as an accessory to the crimes of rape and sexual slavery as crimes against humanity (Article 7(1)(g) of the Rome Statute) and as war crimes (Article 8(2)(e)(vi) of the Rome Statute), thus, acquitting him of those charges.[1845]

The Chamber unanimously found Germain Katanga not guilty, within the terms of Article 25(3)(a) of the Rome Statute, of the crime of using children under the

[1841] ICC Women website, Partial Conviction of Katanga by ICC, Acquittals for Sexual Violence and Use of Child Soldiers, The Prosecutor vs. Germain Katanga
[1842] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 658; Rome Statute, Art. 25 (3) (d)
[1843] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 658
[1844] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, pp. 658-659
[1845] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 659

age of 15 years to participate actively in hostilities as a war crime (Article 8(2)(e)(vii) of the Rome Statute), hence, acquitting him of that charge.[1846]

Therefore, German Katanga was partially convicted, solely being rendered guilty as an accessory to one count of one crime against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property and pillaging).[1847]

On 23 May 2014, Germain Katanga was sentenced, by the majority of Trial Chamber II, to a total of 12 years' imprisonment. The time he had already spent in detention at the International Criminal Court (from 18 September 2007 to 23 May 2014) was deducted from the12 years. Judge Christine Van den Wyngaert issued a dissenting opinion.[1848]

7.3. Post judgment

On 25 June 2014, both the Defence and the Prosecutor withdrew their appeal on the Judgment. They also indicated that they did not have the intention of appealing the Chamber's Sentencing decision.[1849]

On 13 November 2015, the Appeals Chamber decided, in accordance with the review conducted under Article 110 (3) of the Statute, to reduce the original sentence of Germain Katanga by 3 years and 8 months.[1850]

In fact, a Panel of three judges of the Appeals Chamber was appointed for the review (under Article 110 (3) of the Statute) concerning reduction of sentence in face of the fact that Germain Katanga had served two thirds of his sentence (8 years). The Panel found that the following factors were present:

> "(i) an early and continuing willingness by Mr Katanga to cooperate with the Court in its investigations and prosecutions (article 110 (4) (a) of the Statute); (ii) a genuine dissociation from his crimes demonstrated by Mr Katanga's conduct while in detention (rule 223 (a) of the Rules of Procedure and Evidence); (iii) the prospect of resocialisation and successful resettlement of Mr Katanga (rule 223 (b) of the Rules of Procedure and Evidence); (iv) the prospect that Mr Katanga's early release

[1846] *Ibidem*

[1847] ICC website, The Prosecutor v. Germain Katanga, ICC-01/04-01/07

[1848] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Trial Chamber II, Decision on Sentence pursuant to article 76 of the Statute, pp. 58, 65-67, paras. 147, 168, 170, 171 (23 May 2014)

[1849] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. The Appeals Chamber, Defence Notice of Discontinuance of Appeal against the '*Judgment rendu en application de l'article 74 du Statut'* rendered by Trial Chamber II on 7 April 2014 (25 June 2014); ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. The Appeals Chamber, Notice of Discontinuance of the Prosecution's Appeal against the Article 74 Judgment of Conviction of Trial Chamber II date 7 March 2014 in relation to Germain Katanga (25 June 2014)

[1850] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Three judges of the Appeals Chamber appointed for the review concerning reduction of sentence, Decision on the review concerning reduction of sentence of Mr Germain Katanga (13 November 2015)

> would give rise to some level of social instability in the DRC, though not to the level of "significant" (rule 223 (c) of the Rules of Procedure and Evidence); and (v) the individual circumstance of an increase in familial responsibilities due to recent deaths in Mr Katanga's family (rule 223 (e) of the Rules of Procedure and Evidence."[1851]

As a consequence of these positive factors, the Panel decided to reduce the original sentence of Mr Germain Katanga by 3 years and 8 months.[1852]

On 19 December 2015 Katanga was transferred to a prison facility in the Democratic Republic of the Congo to serve the final part of his imprisonment sentence.[1853]

The reparations proceedings began on 7 August 2012. On 24 March 2017 the Trial Chamber II, by unanimity, handed down an "Order for Reparations pursuant to Article 75 of the Statute" against Germain Katanga. Certainly, the Chamber found that out of the 341 Applicants, 297 had shown to the standard of proof of a balance of probabilities that they are victims of the crimes for which Germain Katanga was condemned. Accordingly, the Chamber awarded reparations in the case to the 297 victims.[1854]

The Chamber assessed that the total monetary value of the extent of the harm suffered by them to be USD 3.752.620, and set the reparations award for which Germain Katanga is liable at USD 1 million. However, the Chamber found that he was indigent for the purposes of reparations at the time of the award. In view of that, the Chamber directed the Presidency (with the Registrar´s assistance) to monitor Germain Katanga's financial situation on a regular basis in the terms of regulation 117 of the Regulations of the Court.[1855]

Moreover, the Chamber awarded individual reparations, consisting in compensation in the form of a symbolic award of USD 250, as well as collective reparations aimed at benefitting each victim, embodied in support for housing, support for an income-generating activity, support for education as well as psychological support.[1856]

[1851] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Three judges of the Appeals Chamber appointed for the review concerning reduction of sentence, Decision on the review concerning reduction of sentence of Mr Germain Katanga, p. 41, para.111

[1852] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Three judges of the Appeals Chamber appointed for the review concerning reduction of sentence, Decision on the review concerning reduction of sentence of Mr Germain Katanga, pp. 42-43, paras. 113-116

[1853] International Criminal Court website, Democratic Republic of the Congo, Situation in the Democratic Republic of the Congo, ICC-01/04

[1854] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Trial Chamber II, Order for Reparations pursuant to Article 75 of the Statute, p. 118 (24 March 2017); International Criminal Court website, Democratic Republic of the Congo, Situation in the Democratic Republic of the Congo, ICC-01/04

[1855] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Trial Chamber II, Order for Reparations pursuant to Article 75 of the Statute, pp. 118-119 (24 March 2017)

[1856] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Trial Chamber II, Order for Reparations pursuant to Article 75 of the Statute, p. 118 (24 March 2017)

The TC II also directed the Trust Fund for Victims to elaborate, with basis on the Chamber's rulings on the kinds and modalities of reparations, a draft implementation plan to be submitted by 27 June 2017, establishing a programme containing the projects the TFV intends to carry out. It also directed the Legal Representative and the Defence to submit observations with respect to the Draft Plan up to 28 July 2017.[1857]

The Trial Chamber II further directed the Defence to contact the TFV in order to discuss the contribution of Germain Katanga, in case he so wished, to the types of reparations, and directed the TFV to contact the Government of the DRC in relation to how it could collaborate so as to give effect to and implement the reparations.[1858]

Additionally, the Chamber, considering Katanga's financial situation, directed the Board of Directors of the TFV to inform the Bench if it is minded to use its "other resources" so as to fund and implement individual and collective reparations, as well as to estimate it in the Draft Plan of the monetary amount.[1859]

The Chamber invited the TFV to take into account, as part of its assistance mandate, wherever appropriate, the harm endured by the Applicants as a consequence of violence of a sexual character or as a consequence of transgenerational psychological trauma, and the harm suffered by the former child soldiers, that the Chamber had not been in a position to examine in the case.[1860]

The TC II directed the Registrar to take all the necessary measures in order to give appropriate publicity to its order for reparations. Germain Katanga, the Legal Representative of Victims and the Office of Public Counsel appealed against such Reparations Order, but the latter was mostly upheld by the Appeals Chamber ("is reversed to the extent that it rejected the applications for reparation of applicants a/25094/16, a/25096/16, a/25097/16, a/25098/16 and a/25099/16. The Trial Chamber is directed to carry out a new assessment of these applications, providing sufficient reasons for its eventual conclusion thereon").[1861]

It is noteworthy that the Trial Chamber specifically advised the TFV that, in the implementation of its assistance mandate, it should bear in mind the harm endured by the Applicants as a consequence of violence of a sexual character or

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[1857] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Trial Chamber II, Order for Reparations pursuant to Article 75 of the Statute, pp. 118-119 (24 March 2017)
[1858] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Trial Chamber II, Order for Reparations pursuant to Article 75 of the Statute, p. 119 (24 March 2017)
[1859] *Ibidem*
[1860] *Ibidem*
[1861] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Trial Chamber II, Order for Reparations pursuant to Article 75 of the Statute, p. 120 (24 March 2017);
ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. The Appelas Chamber, Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute", p. 4 (8 March 2018); ICC website, Press Release, Katanga case: Reparations Order largely confirmed, ICC-CPI-20180308-PR1364 (8 March 2018)

as a consequence of transgenerational psychological trauma, as well as the harm suffered by the former child soldiers.[1862]

It must be stressed that, due to Katanga´s acquittal for the crimes of rape and sexual slavery, this invitation of the TC II to the TFV was related to its assistance mandate. It demonstrates the Chamber´s concern with the harm brought about by sexual violence.

What is more, the Chamber stated that the TFV should take into consideration such harm not only with respect to the 297 victims but also in relation to the other applicants who were not considered victims of the crimes of which Katanga was convicted. The TFV´s attempt to decrease the suffering caused by violent acts of sexual nature should be broad, embracing as high a number of persons as possible, inclusive those not admitted as victims for the ends of reparations.

On 18 May 2017, the he Board of Directors of the Trust Fund for Victims decided to provide USD 1 million for the collective and individual reparations awarded to victims in the case, thus, covering all the costs of the TC II Order for Reparations of 24 March 2017. The Netherlands contributed to such amount with a donation of 200.000 euros, which included earmarked funding that should be allocated to the payment of individual awards.[1863]

Certainly, in face of the Trial Chamber II´s finding that Germain Katanga was indigent for purposes of reparations, it requested the Board to contemplate the possibility of making use of the "other resources of the Trust Fund" to complement the payment of individual and collective awards, in the terms of regulation 56 of the TFV Regulations. It was the first time in the ICC´s history that the Board of Directors of the TVF received such a request from a Trial Chamber, including in relation to the payment of individual awards ordered in accordance with rule 98 (2) of the Rules of Procedure and Evidence.[1864]

The Trial Chamber awarded individual reparations to the 297 victims in the form of a symbolic compensation of $250 per person (amounting to USD 74,250) as well as four collective awards (which combined amount to USD 925,750) in the form of education assistance, housing assistance, income-generating activities, and psychological rehabilitation.[1865]

[1862] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Trial Chamber II, Order for Reparations pursuant to Article 75 of the Statute, p. 119

[1863] ICC website, Press Release, Trust Fund for Victims decides to provide $1 million for the reparations awarded to victims in the Katanga case, welcomes earmarked donations of €200,000 from the Netherlands (18 May 2017)

[1864] ICC website, Press Release, Trust Fund for Victims decides to provide $1 million for the reparations awarded to victims in the Katanga case, welcomes earmarked donations of €200,000 from the Netherlands; ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Trial Chamber II, Order for Reparations pursuant to Article 75 of the Statute, pp. 118-119

[1865] ICC website, Press Release, Trust Fund for Victims decides to provide $1 million for the reparations awarded to victims in the Katanga case, welcomes earmarked donations of €200,000 from the Netherlands (18 May 2017)

It demonstrates that the ICC is committed to its goal of providing justice to victims, not only through the trial and eventual conviction of the accused persons, but also in a concrete, tangible way. In fact, the ICC is seeking to promote and find means to materialise its restorative justice and make it meaningful, by providing monetary compensation, albeit symbolic, to each victim individually as well as financing programmes that will revert in the benefit of victims, promoting their healing, rehabilitation and reintegration.

> "The Rome Statute's innovative inclusion of the potential to award reparations to victims following a criminal conviction underscores the victim-centred approach of the entire Rome Statute system. ... Reparations therefore are a critical part of the reparative justice afforded to victims under the Rome Statute.
>
> In light of Mr Katanga's indigence and while recalling that he nonetheless remains liable for the reparations ordered against him, it is our sincerest hope that the Trust Fund's complement of $1,000,000 USD to the payment of the awards for reparations will ensure that the victims in the Katanga case receive the real tangible benefits of these awards and that they are received in a timely manner."[1866]

On 25 July 2017 the TVF presented a draft plan for reparations in the case.

In the explanation of the intake process of such plan, it was stated that

> “The Trust Fund and the implementing partner will endeavour to ensure that the composition of participants are gender inclusive, and that participants are sensitive to gender specific issues during the intake process. Participants will also identify various channels for women and girls’ access to registration and services of their preference that ensure confidentiality as needed and avoid stigmatization.”[1867]

Regarding the individual compensation award, the Trust Fund affirmed that it was

> “aware of potential gender and power dynamics that may affect victims. Accordingly, the Trust Fund will take steps to ensure that the individual compensation award is received by the victim regardless of their gender and age, unless the individual wishes to proceed differently. The Trust Fund will furthermore ensure that the modes of distribution permit female victims to not only

[1866] *Ibidem*

[1867] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Trial Chamber II, Draft implementation plan relevant to Trial Chamber II’s order for reparations of 24 March 2017, p. 35, para. 114 (25 July 2017)

> have the same access, but also retain control over, the benefits that are preferable to them."[1868]

Further, as stated, the plan encompassed, housing assistance, education assistance, income-generating activities, and psychological rehabilitation.

In connection with housing assistance, the TVF requested to its prospective implementing partners the inclusion (among other items) in their project proposals of ability to assist with any necessary legal registration inclusive of any certificates that the victims need, inclusive of guaranteeing that women victims keep ownership, if they wish so.[1869]

In relation to income-generating activities, the TVF requested its prospective implementing partners to include (amidst other elements) in their project proposals of additional income generating activities grounded on a market survey of the ongoing economic activities where the victims are established, inclusive of particular activities for women victims.[1870]

When addressing psychological rehabilitation, the TFV proposed the specific activities of individual trauma-based counselling sessions as well as group counselling sessions. In relation to prospective implementing partners, the Trust Fund requested them to include in their project proposals, among others requirements, the CV of the project proposed counsellor evincing expertise to provide trauma-related counselling, including in terms of gender-sensitive methods to guarantee that female victims will participate of both individual and group counselling.[1871]

Moreover, even though the TVF affirmed that

> "[m]isunderstandings and disinformation about the exact scope of reparations awards to victims, as well as about the implementation of the awards, may cause jealousy and stigmatisation towards victims, jeopardise the integrity of the reparations programme, and cause damage to the reputation of the Court and the Trust Fund."[1872]

[1868] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Trial Chamber II, Draft implementation plan relevant to Trial Chamber II's order for reparations of 24 March 2017, pp. 35-36, para. 115 (25 July 2017)
[1869] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Trial Chamber II, Draft implementation plan relevant to Trial Chamber II's order for reparations of 24 March 2017, p. 39, para. 125 (25 July 2017)
[1870] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Trial Chamber II, Draft implementation plan relevant to Trial Chamber II's order for reparations of 24 March 2017, p. 41, para. 129 (25 July 2017)
[1871] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Trial Chamber II, Draft implementation plan relevant to Trial Chamber II's order for reparations of 24 March 2017, p. 41, para. 130-131 (25 July 2017)
[1872] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Trial Chamber II, Draft implementation plan relevant to Trial Chamber II's order for reparations of 24 March 2017, p. 37, para. 122 (25 July 2017)

and, consequently, constituted a risk informing the draft implementation plan, the TVF also reckoned that its proposed implementation of the reparations order would successfully decrease the risks of jealousy and stigmatisation for victims.[1873]

In what concerns monitoring and evaluation, the Trust Fund for Victims affirmed that, during the implementation of the programme, its headquarters staff and field programme managers would, among other assigned tasks,

> "[a]nalyze performance monitoring indicator data to identify gender gaps (the extent to which females and males are participating in and benefiting from the reparations programme and specific projects)."[1874]

As a result, the TVF was attuned to gender issues and the question of stigmatisation in the elaboration of the draft implementation plan. Indeed, it deliberately adopted measures destined to protect women victims and diminish the gap between them and men.

7.4. Importance of the Prosecutor v. Germain Katanga case for the prosecution of the sexual and gender-based cases

The case the Prosecutor v. Germain Katanga consisted in a step forward in the prosecution of sexual and gender-based crimes before the International Criminal Court.

Certainly, for the first time in the history of the ICC accused persons (while Germain Katanga was still being jointly prosecuted with Mathieu Ngudjolo Chui, ICC-01/04-01/07) were charged with sexual and gender-based crimes, namely, the crimes of rape and sexual slavery, as both war crimes and crimes against humanity. It was an improvement in relation to the Lubanga case, since in that case the Prosecution did not present charges for sexual and gender-based crimes (as seen in the previous chapter).

In this regard, it is relevant to highlight that even though in the beginning the Prosecution intended to charge Katanga with the crime of sexual slavery, in the Amendment of the Charges it reinstated this crime (that had been withdrawn as previously explained) and also included the charges of the crimes of rape and outrage upon personal dignity.

The charge of the crime of outrage upon personal dignity had a gender informed nature, but, as seen, was not confirmed by the Pre-Trial Chamber I. It stems that, in relation to the charging sexual and gender-based, the Prosecution adopted an

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[1873] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Trial Chamber II, Draft implementation plan relevant to Trial Chamber II's order for reparations of 24 March 2017, p. 38, para. 123 (25 July 2017)

[1874] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Trial Chamber II, Draft implementation plan relevant to Trial Chamber II's order for reparations of 24 March 2017, p. 44, para. 141 (25 July 2017)

approach which was broader than its initial one (which does not mean that it could not have been even more inclusive, as it will be discussed below).

As aforementioned, in the severed case against Mathieu Ngudjolo Chui, the Trial Chamber II did not have to entertain whether or not the crimes had been committed because its view was that the accused lacked of authority, and, accordingly, acquitted him of all charges, inclusive of the crimes of rape and sexual slavery.[1875]

However, in the severed case against Germain Katanga, the TC II did analyse if the crimes of rape and sexual slavery had been perpetrated. It was the first time in which the Court had to examine evidence presented in relation to the crimes of rape and sexual slavery so as to establish whether the perpetration of such crimes had occurred.

The Chamber seemed sensitive to the specificities that the sexual and gender-based crimes entail.

Certainly, the Trial Chamber II asserted that

> "[h]aving regard to the specific nature of evidence peculiar to the crimes of rape and sexual slavery, the Chamber will apply a specific modus operandi to the analysis of their commission. First, it will undertake a factual scrutiny and provide a legal characterisation of the three *sub judice* testimonies. It will then present its conclusions of law on the commission of the two types of crimes as a crime against humanity (article 7(1)(g) of the Statute) and a war crime (article 8(2)(e)(vi) of the Statute)."[1876]

Hence, the Chamber´s approach reflected the view that the gathering and analysis of evidence of gender-based violence can be conducted under different circumstances than the gathering and examine of other types of evidence, and that such difference should be taken into consideration when appropriate.[1877]

Further, the Chamber recalled that

> "victims of sexual violence are particularly vulnerable witnesses. ... The Chamber is alive to the fact, as recalled by the witness, that women who are victims of such acts run a very high risk of being rejected by their own community when they decide to tell the truth about their ordeal. It is therefore understandable that P-132 wished to know which guarantees and protective measures

[1875] Opinio Juris website, Sane, J., Mathieu Ngudjolo Chui: reflections on the ICC's first acquittal
[1876] Elements of Crimes of the International Criminal Court, Arts. 7 (1) (g)-2, footnote 17; 8 (2) (e) (vi)-2, footnote 65; ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, pp. 368-369, paras. 986-987
[1877] Oosterveld, V. (2009), pp. 407-430

> the Court could provide her before telling the truth to the Prosecution's investigators."[1878]

It is especially difficult for victims of sexual and gender-based crimes to come forward and give their testimonies. These victims fear to suffer rejection from their community upon exposing the acts of violence carried out against them. Further, in some circumstances, it is the very existence of the indictment and the subsequent imprisonment of the accused person that generate favourable conditions, providing the necessary safety for witnesses (who previously were not disposed to provide evidence) to finally come forward and testify. Thus, the feeling of insecurity and uncertainty can lead victims to provide misleading information in the beginning of the Prosecutor´s investigations.[1879]

As a result, it is important for the prosecution of sexual and gender-related crimes before the ICC that Trial Chamber II was attuned to special vulnerability of the witnesses who were victims of sexual violence and took it into account (not only in the conduction of the trial proceedings but also when analysing and giving credibility to those witnesses´ testimonies).

Surely, the TC II adopted an extra careful attitude in relation to the testimonies of this type of witnesses who were victims of sexual and gender-based offences so as to alleviate the difficulty they find in recalling their ordeal and also in an attempt to avoid revictimisation.

Furthermore, the Chamber understood that the extreme vulnerability of these victims and their pursuit in forgetting the violence they suffered must be considered in the analysis of the evidence provided by them.

Thus, the TC II regarded the sexual crimes as been extremely serious and considered that their gravity could impact one´s testimony, fact that should be taken into consideration when assessing its credibility and reliability.

The Chamber also acknowledged that apart from the psychological and physical impact caused by sexual and gender-based crimes, the victims of these offences also face other challenges, such as stigmatisation and marginalisation by their communities.

In spite of said progresses, some critics can be made regarding the conduction of the case.

Firstly, there was a divergence between the Prosecution and the Registry (specifically the Victims and Witnesses Unit) regarding relocation of Witnesses 132 and 287 (who provided the OTP with evidence on sexual offences).[1880]

[1878] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 82, para. 201

[1879] SCSL. The Prosecutor v. Moinina Fofana and Allieu Kondewa, Case No. SCSL-04-14-A, The Appeals Chamber, Judgment (Partially Dissenting Opinion of Honourable Justice Renate Winters), para. 79 (28 May 2008)

[1880] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Warrant of Arrest for Germain Katanga, p. 6; ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Prosecution's

Surely, the Registrar did not admitted Witnesses 132, 163, 238 and 287 (on whom the Prosecution had intention to rely for the confirmation of the charges) into the Court's Witness Protection Programme. The Prosecution, diverging from this approach of the Victims and Witnesses Unit, considered that these witnesses demanded protection before their identity could be disclosed to the defence and, hence, carried out preventive relocation of witnesses.[1881]

As a consequence of the Prosecution's unauthorised preventive relocations of Witnesses 132 and 287, the Single Judge, after criticising the Prosecution for carrying out preventive relocation of witnesses, decided that the adequate remedy was to exclude the statements, interview notes and interview transcripts of these witnesses for the ends of the confirmation hearing.[1882]

Indeed, the Single Judge did not accept the evidence provided by Witnesses 132 and 287 for regarding that these witnesses were actually unprotected at the time of the confirmation hearing since the only safeguard they had received was their unlawful relocation by the Prosecution. Surely, the inclusion of their statements would necessarily implicate the disclosure of their identities.[1883]

On 19 May 2008, the Registrar issued a Report informing the Pre-Trial Chamber I that Witnesses 132 and 287 had been accepted into the ICCPP and, accordingly, had been relocated within the extent of the programme.[1884]

Once there were no more security concerns in relation to Witnesses 132 and 287, the Single Judge accepted the statements, interview notes and interview transcripts of these witnesses for the ends of the confirmation hearing.[1885]

Submission of the Document Containing the Charges and List of Evidence, 7, p. 5; ICC. The Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/07. Pre-Trial Chamber I, Warrant of arrest Mathieu Ngudjolo Chui, 7, p. 6

[1881] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Prosecution's Submission of Information on the Preventive Relocation of Witnesses 132,163, 238 and 287, 1, pp. 3-4; ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, 1, p. 26, paras. 53-55

[1882] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, 1, p. 22, para. 39

[1883] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Decision on the Requests for Leave to Appeal the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67 (2) of the Statute and Rules 77 of the Rules, p. 10

[1884] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Registrar´s Report on the Protective Measures Afforded to Witnesses 132, 238 and 287

[1885] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Prosecution's Urgent Application for the Admission of the Evidence of Witnesses 132 and 287, p. 8; ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Decision on Prosecution's Urgent Application for the Admission of the Evidence of Witnesses 132 and 287; ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Decision on the confirmation of charges, p. 54, para. 169

The Amended Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute (26 June 2008), included rape, sexual slavery, and outrage upon personal dignity among the 13 counts.[1886]

Therefore, there was not a unified course of action between the Prosecution and the VWU regarding the type of protection that should be granted to Witnesses who were victims of sexual and gender-based offences. Further, the Prosecution decided to promote a preventive relocation on its own, exceeding its mandate under the Rome Statute and the Rules. What is more, it misused its mandate, shifting the power to decide on the relocation of witnesses from the Registry to the Prosecution.

It is also noteworthy that in spite of the VWU affirmation that it had solid grounds not to accept Witnesses 132 and 287 in the ICCPP, it seems that these Witnesses should have been included in this Protection Programme since the beginning.

Indeed, the Single Judge refused to accept the evidence furnished by these Witnesses in the presentation of charges against the accused by the Prosecution for considering that the preventive relocation promoted by the Prosecution (the unique protection measure that they had received) was insufficient to guarantee their security, and that the inclusion of their statements would entail the disclosure of their identities.

However, once the Registry accepted Witnesses 132 and 287 into the ICCPP, the Single Judge understood that there were not concerns regarding their security anymore, and, accordingly, admitted the inclusion of the evidence provided by them.

In view of the circumstance that the inclusion Witnesses 132 and 287 in the ICC Protection Programme led the Single Judge to regard that they were safe and, hence, accept their statements, interview notes and interview transcripts for the ends of the confirmation hearing, it stems that this protection was essential for the prosecution of the sexual and gender-based crimes, and the VWU should have granted it from the start, avoiding delay in the proceedings.[1887]

The Prosecution should, on the one hand, respect the VWU´s mandate and, on the other hand, obey the boundaries of its own mandate (even if its goal is purportedly to protect the witnesses of sexual and gender-based crimes, as it happened when it unduly promoted the preventive relocation of Witnesses 132 and 287).

[1886] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Decision on the confirmation of charges, p. 112, para. 345, footnote 449

[1887] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Prosecution's Urgent Application for the Admission of the Evidence of Witnesses 132 and 287, p. 8; ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Decision on Prosecution's Urgent Application for the Admission of the Evidence of Witnesses 132 and 287; ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Decision on the confirmation of charges, p. 54, para. 169

The VWU, by its turn, should promptly furnish the necessary protection to witnesses who were victims of sexual and gender-based offences in those situations that so require, as in the present case in which the witnesses´ protection was needed so as to enable the inclusion of evidence and consequent charging of sexual and gender-based crimes.

In conclusion, there should be a concerted action between the Prosecution and the VWU regarding the protection that should be granted to witnesses who were victims of sexual and gender-based offences.

Another critic is that, although there is explicit mention to the occurrence of forced marriage, the Prosecutor decided to charge the sexual and gender-based violence suffered by the victims in the camps exclusively as sexual slavery.

In fact, Oosterveld when addressing the case at stake affirmed that

> "the Prosecutor has chosen to charge only the sexual slavery aspect of forced marriage and not the other aspects. In the confirmation of charges hearing, he successfully used evidence of forced marriage to prove that there is sufficient evidence to establish substantial grounds to believe that civilian women were subjected to the crime against humanity of sexual slavery."[1888]

Forced marriage is a kind of gender-based crime that involves sexual elements (for instance, frequent rape) as well as various non-sexual elements (for instance, forced child-bearing and cooking). It demands an understanding of gender in its full complexity, without simplistic reducing it to sex.[1889]

Nevertheless, in the present case, the Prosecution decided to charge facts that amounted to forced marriage exclusively as sexual slavery. Such choice denotes that the Prosecution gave too much emphasis to the sexual elements of the crime and not enough relevance to the harm caused by the non-sexual elements.[1890]

Indeed, by prosecuting the acts of sexual and gender-based violence at stake solely under the head of sexual slavery, the Prosecution gave prominence to the sexual facet, which is undeniably serious. However, other grave aspects, such as forced pregnancy and compulsory household labour, were relegated to second plan (despite their seriousness).[1891]

[1888] Oosterveld, V. (2009), pp. 407-430

[1889] *Ibidem*

[1890] *Ibidem*

[1891] *Ibidem*; SCSL. The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu, Case No. SCSL-04-16-T. Trial Chamber II, Jugdement, Separate Concurring Opinion of the Hon. Justice Julia Sebutinde Appended to Judgment Pursuant to Rule 88 (C)**,** p. 580, para. 16

Oosterveld affirmed that the Pre-Trial Chamber I used

> "evidence of non-sexual acts such as abduction, imprisonment and forced cooking as proof of the exercise of powers attaching to the right of ownership."[1892]

Certainly, gender-specific activities were presented as a form of proof of the sexual crimes instead of considering it a separate proof of the harm suffered by the victims.[1893]

Furthermore, the fact that Witness P-132 bore a child as a result of the frequent rapes she was subjected to was also included among the evidence that the Ngiti combatants intentionally carried out the crime of sexual slavery.[1894]

Therefore, the charging of sexual and gender-based crimes in the case was limited. It could have been wider so as to recognise not only the sexual element (that is built in the crime of sexual slavery) but also non-sexual elements that are gender-related and should be equally considered in the analysis of the violence endured by the victims.

Undoubtedly, the Prosecution could have adopted a broader approach when addressing the violence perpetrated by the Ngiti combatants from Walendu-Bindi against Witnesses P- 132, P-249 and P-353 in the camps.

For instance, the Prosecution could have charged the acts of violence suffered by Witnesses P-132, P-249 and P-353 in the camps not only as the crime of sexual slavery but also as the crime of forced marriage under the head "any other form of sexual violence" (Articles 7 (1) (g) and 8 (e) (vi) of the Rome Statute).

In addition, the circumstance that Witness P-132 bore a child as a result of the often rapes she suffered eventually could have been be charged as the crime of forced pregnancy (Articles 7 (1) (g) and 8 (e) (vi) of the Rome Statute).

In this regard, the same author asserted that

> "[p]erhaps in future cases the Prosecutor could instead charge all of the acts relating to forced marriage, and not only the sexual acts, in order to better capture the entire harm."[1895]

And, so as to achieve this goal, suggests that

> "[t]his could be done through the charge of inhumane acts as a crime against humanity, as was done in the Special Court, or by

[1892] Oosterveld, V. (2009), pp. 407-430
[1893] *Ibidem*; SCSL, The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu, Case No. SCSL-04-16-T. Trial Chamber II, Jugdement, Separate Concurring Opinion of the Hon. Justice Julia Sebutinde Appended to Judgment Pursuant to Rule 88 (C)**,** p. 580, para. 16
[1894] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, p. 378, para. 1006
[1895] Oosterveld, V. (2009), pp. 407-430

> coupling charges of the crimes against humanity of enslavement and sexual slavery. Another option, where warranted, is to charge forced marriage as the crime against humanity of gender-based persecution."[1896]

Moreover, it must be stressed the issue of secondary victimisation that, although deeply related to sexual and gender-based crimes, must be born in mind. Indeed, apart from all the suffering experienced by Witness P-132 as a decurrence of the rapes and sexual enslavement, and the expected (although undesirable) suffering arising from the recollection of these acts during her testimony, in this instance she was confronted with the Defense´s assertion that she had willingly accepted the "marriage", as if her consent was not impaired, as if her, a hostage in a situation of confinement, was actually allowed to make her will prevail.

Undoubtedly, the argument raised by the Defense that the union of P-132 and her "husband" was consensual signifies that she had freely agreed to a sequence of violent crimes that followed their "marriage"- the repeated rapes, the physical abuse, the obligatory performance of domestic tasks.

Such situation can produce a relevant negative psychological impact, especially on someone who was already notably vulnerable. The negative effects can have an in-depth reach independently of both the witness´ instantaneous ability to rebut the Defence´s argument and the Court´s ruling. Thus, the occurrence of secondary victimisation of witnesses who were victims of sexual and gender-based when testifying before the Court, although predictable, is a negative aspect that should not be minimised.[1897]

Further, there were critics with respect to the Trial Chamber II´s finding that the crimes of murder, attack against civilians, pillaging and destruction were part of the Ngiti militia´s common purpose, but that the crimes of rape and sexual slavery did not fall within this common purpose.

On this subject, it has been noted that

> "[f]rom the early stages of this case, there were indications that some of the judges considered the evidence linking the charges of rape and sexual slavery to Mr Katanga to be insufficient. In the confirmation of charges decision, the sexual violence charges were the only crimes confirmed by a majority of judges and not by the full bench. This was an early and important indication that the evidence underpinning Mr Katanga's role in the commission of rape and sexual slavery would need to be reinforced at trial."[1898]

[1896] *Ibidem*

[1897] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Common Legal Representative of the main group of Victims, Second Corrigendum *Conclusions Finales*, p. 7, para. 6

[1898] ICC Women website, Partial Conviction of Katanga by ICC, Acquittals for Sexual Violence and Use of Child Soldiers, The Prosecutor vs. Germain Katanga

It has been argued that

> "it is possible that a higher standard of evidence was expected in relation to sexual violence, including requiring a more deliberate intention to commit these crimes in the Bogoro attack, which they did not require in convicting Mr Katanga for the crimes of directing an attack against a civilian population, pillaging, murder and destruction of property."[1899]

It could be asserted that the crimes of directing an attack against a civilian population, pillaging, murder and destruction of property are more apparent than the crimes of rape and sexual slavery. The occurrence of former is supported by material evidence whilst the last two crimes do not present material evidence. Indeed, so as to prove of the crimes of rape and sexual slavery before the Court, it is necessary to resort to the testimonies of victims, who many times are not willing to testify or do not clearly recollect the facts due to the time lapse between the perpetration of the crimes and the trial as well as their endeavours to forget the violence they suffered.

Undoubtedly, absent forensic evidence, the proof of the crimes of rape and sexual slavery depends almost exclusively on the victims´ testimonies, so actually this type of crimes is harder to prove.

The arguments of the Trial Chamber II to support its finding that the crimes of rape and sexual slavery were not part of the Ngiti militia of the Walendu-Bindi "collectivité" ´s common purpose are the subsequent ones:

- The crimes of rape and sexual slavery did not occur repeatedly and/or in a broad scale;

- The achievement of the goal of destructing the Hemas living in Bogoro village did not necessarily entail the perpetration of these acts of sexual violence;

- It did not rest proved that the Ngiti militia of Walendu-Bindi "collectivité" had incurred in such acts in its previous attacks, fact that indicated that rape and sexual enslavement were not part of its criminal strategy when undertaking an attack.

In spite of these arguments, it does not seem correct the Chamber´s understanding that such crimes did not form part of the militia´s common purpose.

As mentioned before, the Chamber should have stuck to its initial finding that the acts of sexual violence during the operation to destruct Bogoro's civilian population were not isolated acts, but had been perpetrated with a same objective and objectively constituted part of that operation. It should not have adopted widespread as a threshold to determine whether rape was a constitutive part of the common purpose to attack Bogoro or not.

[1899] *Ibidem*

Indeed, the Trial Chamber II should have regarded that, in the ordinary course of events, the implementation of the common purpose would bring about crimes of rape and sexual slavery (as did the majority of the Pre-Trial I). In such case, irrespectively of not being perpetrated in a large scale or against a high number of victims, these crimes would be considered as part of the Ngiti militia´s common purpose. Accordingly, Katanga would have been found guilty as an accessory of the crimes of rape and sexual slavery.[1900]

In conclusion, even though there was some room for improvement in the handling of sexual and gender-based crimes, and despite the acquittal of Germain Katanga in relation to the charges of rape and sexual slavery, the case was an advance in the prosecution of sexual and gender-based crimes before the International Criminal Court.

[1900] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Decision on the confirmation of charges, pp. 202-206, paras. 567-569, 580

8. Case the Prosecutor v. Jean-Pierre Bemba Gombo

8.1. Situation in the Central African Republic (ICC-01/05)

On 3 October 2001 the Rome Statute was ratified by the Central African Republic (CAR). On 22 December 2004, "[t]he CAR Government referred the situation to the Office of the Prosecutor".[1901]

> "In June 2005, the Government of the Central African Republic provided the Prosecutor with documents concerning the crimes committed in its territory in 2002 - 2003, and the records of judicial proceedings held in Bangui in relation to these crimes.
>
> The Prosecutor undertook a detailed analysis of the information received from the Government of the Central African Republic, and also requested and obtained additional information from various sources. After reviewing the information received, the Prosecutor found that the conditions required by the Rome Statute for launching an investigation were satisfied."[1902]

In view of that, on 10 May 2007, the Government of the Central African Republic, Pre-Trial Chamber III and the President of the Court were informed of the Prosecutor´s decision to launch an investigation. Twelve days later, it was made public the information regarding the opening of referred investigation.[1903]

The focus of the investigation was alleged war crimes and crimes against humanity carried out in the context of an armed conflict between the Government of Central African Republic and rebel forces from 1 July 2002 onwards. It is relevant to point out that there have been critics to the circumstance that, although Bemba was a politician and militia leader from DRC, he was not charged for crimes carried out by this subordinated in Congo. Surely, he was prosecuted and judged exclusively for crimes perpetrated in bordering Central African Republic, where his troops were operating for a restricted period.[1904]

It is important to highlight that the renewed wave of violence that started in the country in 2012 gave rise to the Situation in the Central African Republic II (ICC-01/14) before the Court.[1905]

The violence peaked in 2002/2003. In fact, some of the worst allegations connected to the crimes of killing, looting and rape took place during intense combat in October/November 2002 and February/March 2003. Subsequently to

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[1901] ICC, the Office of the Prosecutor. Background, Situation in the Central African Republic (22 May 2007)
[1902] *Ibidem*; ICC website, Case Information Sheet, Situation in the Central African Republic, The Prosecutor v. Jean-Pierre Bemba Gombo ICC-01/05-01/08 (March 2019)
[1903] ICC, the Office of the Prosecutor. Background, Situation in the Central African Republic (22 May 2007)
[1904] ICC website, Central African Republic, Situation in the Central African Republic, ICC-01/05; van den Berg, S., & Sengenya, C. (2019)
[1905] ICC website, Central African Republic, Situation in the Central African Republic, ICC-01/05; ICC website, Central African Republic, Situation in the Central African Republic, ICC-01/14

the attacks against civilians, there was a failed coup attempt. Then came out a pattern of extensive rape as well as the perpetration of sexual violence by armed individuals. Sexual violence figured as a main feature of the conflict.[1906]

In the launching of the investigation into the situation in the Central African Republic (May 2007), the following press release was issued by the OTP:[1907]

> "[b]ased on a preliminary analysis of alleged crimes, the peak of violence and criminality occurred in 2002 and 2003. Civilians were killed and raped; and homes and stores were looted. The alleged crimes occurred in the context of an armed conflict between the government and rebel forces. This is the first time the Prosecutor is opening an investigation in which allegations of sexual crimes far outnumber alleged killings. (…) Hundreds of rape victims have come forward to tell their stories, recounting crimes acted out with particular cruelty. Reports detailing their accounts were ultimately provided to the Prosecutor's Office. Victims described being raped in public; being attacked by multiple perpetrators; being raped in the presence of family members; and being abused in other ways if they resisted their attackers. Many of the victims were subsequently shunned by their families and communities."[1908]

Indeed, the then Prosecutor Luis Moreno-Ocampo affirmed that, in the context of supra mentioned armed conflict, preliminary analysis indicated that civilians were murdered, homes and stores were looted, and comprehensive and substantiated allegations of sexual crimes considerably exceeded alleged murders.[1909]

The Prosecutor explicitly stated that

> “[t]he information we have now suggests that the rape of civilians was committed in numbers that cannot be ignored under international law."[1910]

He also pointed out that there were public and multiple rapes and abuse which caused victims to be rejected by their families and communities and added that “[t]hese victims are calling for justice.”[1911]

Therefore, the distinctive characteristic of the Situation in the Central African Republic consists in the high reported number of victims of rape (at least 600 victims during a 5-month period).[1912]

[1906] ICC, the Office of the Prosecutor. Background, Situation in the Central African Republic; ICC website, Central African Republic, Situation in the Central African Republic, ICC-01/05
[1907] ICC website, Central African Republic, Situation in the Central African Republic, ICC-01/05
[1908] ICC website, Statement, Prosecutor opens investigation in the Central African Republic (22 May 2007)
[1909] *Ibidem*
[1910] The Prosecutor of the International Criminal Court quoted in ICC website, Statement, Prosecutor opens investigation in the Central African Republic (22 May 2007)
[1911] *Ibidem*
[1912] ICC, the Office of the Prosecutor, Background, Situation in the Central African Republic

In accordance with credible reports, rape had been perpetrated against civilians, including young girls, elderly women, and men. Aggravating circumstances of cruelty were present, as, for example, the fact that rapes were carried out in front of third persons, that relatives were forced to engage, as well as the circumstance that rapes were conducted by multiple perpetrators. The social impact seemed devastating since several victims were stigmatised, and contracted the HIV virus.[1913]

The Office of the Prosecutor stated that

> "[t]his is the first time the Prosecutor is opening an investigation in which allegations of sexual crimes far outnumber alleged killings."[1914]

The investigation brought about the case against Jean-Pierre Bemba Gombo (Case No. ICC-01/05-01/08) which involved the charges of 3 war crimes (namely, murder, rape and pillaging) and 2 crimes against humanity (specifically, murder and rape).[1915]

Besides this main case, another case- the Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido (ICC-01/05-01/13)- was installed in relation to charges for offences against the administration of justice purportedly carried out in respect of the Prosecutor v. Jean-Pierre Bemba Gombo case.[1916]

8.2. Background and overview of the case

> "An armed conflict not of an international character took place in the Central African Republic (CAR) from 26 October 2002 to 15 March 2003, during which part of the national armed forces of Ange-Félix Patassé, the then President of the CAR, allied with combatants of the Mouvement de Libération du Congo (MLC) led by Jean-Pierre Bemba Gombo, was confronted by a rebel movement led by François Bozizé, former Chief-of-Staff of the Central African armed forces."[1917]

In 2002, at the request and in support of Ange-Félix Patassé, Jean-Pierre Bemba deployed a MLC contingent of three battalions (in a total of approximately 1.500 men) to CAR in order to oppose forces faithful to François Bozizé. During the

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[1913] *Ibidem*
[1914] ICC website, Statement, Prosecutor opens investigation in the Central African Republic9
[1915] ICC website, Central African Republic, Situation in the Central African Republic, ICC-01/05,
[1916] *Ibidem*; ICC website, Case Information Sheet, Situation in the Central African Republic, The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido (September 2018)
[1917] ICC website, The Prosecutor v. Jean-Pierre Bemba Gombo, Alleged crimes (non-exhaustive list)

conflict, a contingent of MLC troops purportedly carried out the crimes of murder, rape and pillaging.[1918]

Jean-Pierre Bemba was the President and Commander-in-Chief of the Mouvement de Libération du Congo. He occupied the position of military commander, disposing of effective authority and control over the MLC troops that allegedly incurred in these crimes.[1919]

On 9 May 2008 the Prosecutor filed before the Pre-Trial Chamber III (PTC III) the "Application for Warrant of Arrest under Article 58" for Jean-Pierre Bemba Gombo.[1920]

However, on 21 May 2008, the PTC III rendered a decision in which it requested to the Prosecutor further information and supporting material on several aspects of his application, particularly on the counts of other forms of sexual violence and murder (both being regarded as crimes against humanity and war crimes).[1921]

On 23 May 2008 the Pre-Trial Chamber III issued a Warrant of Arrest stating that there were reasonable grounds to believe that Bemba was criminally responsible, jointly with another person or through other persons in the terms of article 25(3) of the Rome Statute, for:[1922]

> "(i) rape as a crime against humanity, punishable under article 7(1)(g) of the Statute;
>
> (ii) rape as a war crime, punishable under article 8(2)(e)(vi) of the Statute;
>
> (iii) torture as a crime against humanity, punishable under article 7(1)(f) of the Statute;

[1918] ICC website, The Prosecutor v. Jean-Pierre Bemba Gombo, Bemba Case, The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08; ICC website, Case Information Sheet, Situation in the Central African Republic, The Prosecutor v. Jean-Pierre Bemba Gombo (March 2019)

[1919] ICC website, The Prosecutor v. Jean-Pierre Bemba Gombo, Alleged crimes (non-exhaustive list)

[1920] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Application for Warrant of Arrest Under Article 58 (9 May 2008)
ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Warrant of Arrest for Jean-Pierre Bemba Gombo Replacing the Warrant of Arrest Issued on 23 May 2008, p. 3, para. 1.(10 June 2008)

[1921] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Warrant of Arrest for Jean-Pierre Bemba Gombo Replacing the Warrant of Arrest Issued on 23 May 2008, pp.3, 5, paras. 3-4, 7
ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Prosecutor's Application for Request for Provisional Arrest under Article 92 (23 May 2008)

[1922] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Application for Warrant of Arrest Under Article 58, para. 22; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Warrant of Arrest for Jean-Pierre Bemba Gombo Replacing the Warrant of Arrest Issued on 23 May 2008, p. 4, para. 5

(iv) torture as a war crime, punishable under article 8(2)(c)(i) of the Statute;

(v) committing outrages upon personal dignity, in particular humiliating and degrading treatment, as a war crime, punishable under article 8(2)(c)(ii) of the Statute;

(vi) pillaging a town or place as a war crime, punishable under article 8(2)(e)(v) of the Statute."[1923]

In the same Warrant of Arrest, the PTC III also stated that it would consider the additional evidence and information presented by the Prosecutor in a subsequent decision.[1924]

On 27 May 2008, the Prosecutor, in consonance with the PTC III´s Decision of 21 May 2008, submitted additional supporting material in its *Informations supplémentaires soumises par le Procureur.*[1925]

On 10 June 2008, the Chamber issued the "Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo". In this decision, after analysing all the supporting material supplied by the Prosecutor, the Chamber rendered necessary to issue another warrant of arrest to replace that of 23 May 2008.[1926]

Therefore, the Warrant of Arrest of 23 May 2008 was substituted by the "Warrant of Arrest for Jean-Pierre Bemba Gombo replacing the Warrant of Arrest issued on 23 May 2008", dated 10 June 2008, and which related to the very circumstances that occurred in the Central African Republic during the same time period (specifically, from 25 October 2002 to 15 March 2003). Such Warrant of Arrest, besides containing the crimes included in the Warrant of Arrest of 23 May

[1923] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Application for Warrant of Arrest Under Article 58, para. 22; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Warrant of Arrest for Jean-Pierre Bemba Gombo Replacing the Warrant of Arrest Issued on 23 May 2008, p. 4, para. 5

[1924] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Application for Warrant of Arrest Under Article 58, para. 7; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Warrant of Arrest for Jean-Pierre Bemba Gombo Replacing the Warrant of Arrest Issued on 23 May 2008, p. 4, para. 6

[1925] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, *Informations supplémentaires soumises par le Procureur* (27 May 2008); ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Warrant of Arrest for Jean-Pierre Bemba Gombo Replacing the Warrant of Arrest Issued on 23 May 2008, p. 5, para. 8

[1926] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Warrant of Arrest for Jean-Pierre Bemba Gombo Replacing the Warrant of Arrest Issued on 23 May 2008, p. 5, para. 9; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean Pierre Bemba Gombo. ICC-01/05-01/08-14-tENG (10 June 2008)

2008, also set up two counts of murder, typified as both crimes against humanity and war crimes.[1927]

Certainly, the Pre-Trial Chamber III rendered that there was considerable basis to conceive that Jean-Pierre Bemba was criminally responsible, jointly with another person or through other persons, in accordance with article 25(3)(a) of the Statute, for:[1928]

> "(i) rape as a crime against humanity, punishable under article 7(1)(g) of the Statute;
>
> (ii) rape as a war crime, punishable under article 8(2)(e)(vi) of the Statute;
>
> (iii) torture as a crime against humanity, punishable under article 7(1)(f) of the Statute;
>
> (iv) torture as a war crime, punishable under article 8(2)(c)(i) of the Statute;
>
> (v) committing outrages upon personal dignity, in particular humiliating and degrading treatment, as a war crime, punishable under article 8(2)(c)(ii) of the Statute;
>
> (vi) murder as a crime against humanity, punishable under article 7(1)(a) of the Statute;
>
> (vii) murder as a war crime, punishable under article 8(2)(c)(i) of the Statute;
>
> (viii) pillaging a town or place as a war crime, punishable under article 8(2)(e)(v) of the Statute."[1929]

As a consequence, Bemba was charged with the crime of rape under the heads of war crime and crime against humanity.

The Confirmation of charges hearing took place between 12-15 January 2009.[1930]

[1927] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Warrant of Arrest for Jean-Pierre Bemba Gombo Replacing the Warrant of Arrest Issued on 23 May 2008, p. 5, para. 10

[1928] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Warrant of Arrest for Jean-Pierre Bemba Gombo Replacing the Warrant of Arrest Issued on 23 May 2008,

[1929] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Warrant of Arrest for Jean-Pierre Bemba Gombo Replacing the Warrant of Arrest Issued on 23 May 2008, pp. 8-9, para. 24

[1930] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 7, para.12 (15 June 2009)

On 3 March 2009, the PTC III issued the Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute. In this decision, the Chamber´s view was that the evidence presented seemed to establish a distinct crime within the jurisdiction of the Court, in consonance with article 61(7) (c) (ii) of the Rome Statute.[1931]

In considering the Evidence and the Arguments of the Parties and Participants, the Chamber observed that, in paragraph 57 of the Amended Document Containing the Charges dated 17 October 2008, the Prosecutor did not rule out "any other applicable mode of liability" apart from article 25 of the Rome Statute.[1932]

Moreover, the PTC III enlisted several points, inclusive of the Prosecutor´s closing statements at the Hearing, the Defence´s arguments, and witnesses´ statements corroborated by NGO reports, that seem to indicate a distinct mode of liability as established in article 28 of the Rome Statute.[1933]

Based on these elements (and without any forethought in relation to the possible application of the mode of participation inserted by the Prosecutor in the Amended Document Containing the Charges, namely article 25(3)(a) of the Rome Statute), the Chamber considered that the legal characterisation of the facts of the case could correspond to a different form of liability under article 28 of the Rome Statute.[1934]

In view of that, and so as to be in a position to issue a decision regarding the merits as to whether or not Bemba should be committed to trial, the Chamber rendered it was necessary for the Prosecution to hand in some written elaboration on this specific type of participation based on the evidence that had already been disclosed. The Chamber clarified that any further evidence presented by the Prosecutor would not be considered.[1935]

[1931] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 8, para .15 (15 June 2009); ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute (3 March 2009)

[1932] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, p. 16, para. 41

[1933] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, pp. 16-17, paras. 42-45; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Prosecutor´s closing statements at the Hearing, p. 36, lines 14-19 and pp. 23-25; p. 37, lines 7-10 and 12-20; p. 38, lines 16-23; p. 39, lines 11-19; p. 41, lines 1-10; p. 43, lines 23-25 to p. 44, lines 1-8; p. 56, lines 1-6, p. 77, lines 2-8; p. 78, lines 5-7 (15 January 2009)

[1934] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, p. 17, para. 46

[1935] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, p. 18, para. 48

Hence, the PTC III decided to adjourn the hearing and requested the Prosecutor to consider amending the charges since the evidence presented seemed to establish a distinct crime (mode of liability), specifically the form of liability under article 28 of the Rome Statute, in the context and within the terms of article 61(7)(c) (ii) of the Rome Statute.[1936]

On 19 March 2009 the Presidency took the decision of merging Pre-Trial Chamber III with Pre-Trial Chamber II, and assigned the situation in the Central African Republic to Pre-Trial Chamber II.[1937]

On 30 March 2009, in accordance with the Pre-Trial Chamber III´s request when it adjourned the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, the Prosecutor submitted an amended document which contained the charges, an amended list of evidence and an amended related in-depth analysis chart of the evidence.[1938]

Nevertheless, the Prosecutor continued sustaining that Bemba was primarily responsible for the charges of murder, rape, torture, and pillaging pursuant to article 25(3)(a) of the Rome Statute, meaning as a co-perpetrator. The Prosecutor stated that, alternatively, Bemba was criminally responsible by reason of his superior-subordinate relationship with MLC troops (pursuant to article 28 (a), or in the alternative article 28(b), of the Rome Statute).

Indeed, the Prosecution asserted that

> "[p]rimarily, BEMBA is individually criminally responsible pursuant to Article 25(3)(a) of the Rome Statute, for the crimes against humanity and war crimes referred to in Articles 7 and 8 of the Statute, as described in this Amended DCC, which he committed jointly with Patassé through MLC troops. Alternatively, BEMBA is criminally responsible by virtue of his superior-subordinate relationship with MLC troops pursuant to Article 28 (a), or in the alternative Article 28(b), of the Statute, for crimes against humanity and war crimes, as described in this Amended DCC and enumerated in Counts 1 to 8, which were committed by MLC troops under his effective command, or authority, and

[1936] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, p. 19, para. 49

[1937] International Criminal Court, Presidency. Decision on the constitution of Pre-trial Chambers and on the assignment of the Central African Republic situation.TCC-Pres-01-09 (19 March 2009); ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 8, para. 16

[1938] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 8, para. 17; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Prosecution's Submission of Amended Document Containing the Charges, Amended List of Evidence and Amended In-Depth Analysis Chart of Incriminatory Evidence, and its related Annexes (30 March 2009)

> control as a result of his failure to exercise control properly over these forces."[1939]

Therefore, the Prosecutor charged Mr Jean-Pierre Bemba as being criminally responsible as a co-perpetrator/indirect perpetrator, within the meaning of article 25(3)(a) of the Rome Statute, or, in the alternative, as a military commander or individual effectually acting as a military commander or superior in the terms article 28(a) or (b) of the Rome Statute, for the crimes of murder, rape, torture and pillaging (as war crimes and crimes against humanity).[1940]

Regarding the crime of rape, the Prosecutor affirmed that

> "… [f]rom approximately 26 October 2002 to 15 March 2003, the MLC troops perpetrated mass rapes, mass looting and killings against the CAR civilian population in specific locations as they advanced in, and retreated out of the CAR. These locations include but are not limited to Bangui - PK 12, Boy-Rabé, Fou (also written as Fouh) - Mongoumba, Bossangoa, Damara, Bossembélé, Sibut, Bozoum and Bossemptele.
>
> 39. In the locations identified in paragraph 38, the MLC troops looted, raped, and killed CAR civilians. Civilian properties were systematically looted, and civilians were forced to cook and clean for the MLC troops against their will and with no payment. Men, women and children were raped by multiple MLC perpetrators in their homes, raped in front of family members, forced to watch rapes of family members, and raped in public locations including streets, fields and farms. Many of the women victims of rapes and gang-rapes contracted HIV, and became pregnant as a result of these rapes. Civilians that were killed included those who tried to prevent or resist rapes, attacks or lootings.
>
> … One CAR official conservatively estimates the number of victims to be about one thousand (1,000), a majority of which were rape victims. Of these, about two hundred and fifty (250) dare reported cases of looting. The MLC troops also killed civilians who resisted or attempted to prevent the attacks."[1941]

[1939] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Prosecution's Submission of Amended Document Containing the Charges, Amended List of Evidence and Amended In-Depth Analysis Chart of Incriminatory Evidence, and its related Annexes, p.16, para. 57

[1940] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 114, para. 341

[1941] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Prosecution's Submission of Amended Document Containing the Charges, Amended List of Evidence and Amended In-Depth Analysis Chart of Incriminatory Evidence, and its related Annexes, pp. 12-13, paras. 38-40

And added that

> "[o]nce the MLC troops established control over former rebel held territories, they systematically targeted the civilian population by conducting house to house searches, and raping, looting and killing civilians. Lootings, rapes and murders occurred as MLC troops sought to punish perceived rebel sympathizers. Women were raped on the pretext that they were rebel sympathizers. Men were also raped as a deliberate tactic to humiliate civilian men, and demonstrate their powerlessness to protect their families. Many of the women and girls who were raped feared being shot by combatants.
>
> 42. These crimes were used as a tool, or one of the means necessary to maintain Patassé's Presidency. By subjecting the CAR civilian population to cruel, inhuman and humiliating attacks, the MLC troops instilled a general climate of fear in the CAR population, with the hope of effectively destabilizing the opposing army.
>
> 43. At all times relevant to this Amended DCC, BEMBA knew that his conduct was part of, or intended for his conduct to be part of a widespread or systematic attack on the CAR civilian population."[1942]

This charging consisted in a landmark for the international criminal law. For first time in its history, sexual violence perpetrated against men was expressly charged as rape, instead of being prosecuted as the crimes of torture or cruel treatment (as in the ICTY the Prosecutor v. Zejnil Delalić, Zdravko Mucić also known as "Pavo", Hazim Delić, and Esad Landžo also known as "Zenga" case) or even under the heads of the crime of humiliating and degrading treatment and the crime other forms of sexual assault (as in the ICTY the Prosecutor v. Češić case).[1943]

It is noteworthy that there were 5.708 individual applications for participation and 5.229 victims were allowed to participate in the case, an unprecedented number in the history of the ICC. So as to guarantee the effectiveness and expeditiousness of the trial proceedings, two legal representatives represented all participating victims. Furthermore, the Amnesty International was granted leave to submit "amicus curiae" observations in accordance to rule 103 of the Rules of Procedure and Evidence.[1944]

[1942] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Prosecution's Submission of Amended Document Containing the Charges, Amended List of Evidence and Amended In-Depth Analysis Chart of Incriminatory Evidence, and its related Annexes, p. 13, paras. 41-43

[1943] ICTY. The Prosecutor v. Zejnil Delalić, et al., Case No. IT-96-21-T. Trial Chamber, Judgment, p. 3 (16 November 1998); ICTY. The Prosecutor v. Ranko Češić, Case No. IT-95-10/1-PT. Third Amended Indictment, Counts 7-8, Sexual Assault (26 Nov 2002); Hayes, N. (2016)

[1944] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber II, Judgment pursuant to Article 74 of the Statute, pp.16-17, paras. 18-20 (21 March 2016); ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial

In relation to the scope of the victims´ participation, they were

> "authorised to participate at hearings and status conferences, to make opening and closing statements, to file written submissions, to introduce evidence, to question witnesses subject to a discrete written application decided upon in advance by the Chamber, and to have access to confidential documents in the record."[1945]

Moreover,

> "the Chamber authorised the Legal Representative to call two victims to give evidence as witnesses during the trial and invited three further victims to present their views and concerns in person."[1946]

Nevertheless, there was a divergence among the Judges regarding the quantity of victims who should be allowed to give evidence as witnesses or to present their views and concerns in person, as well as the requirements for such purposes. Undoubtedly, the presiding Judge partly dissented from the Majority Decision in relation to the demands for the presentation by victims of evidence and the refusal to permit some of the victims to provide evidence and to present their views and concerns.[1947]

The presiding Judge´s partial disagreement with the decision of the Majority of the Chamber concerned, particularly,

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Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, pp. 4, 5, 9, paras. 7, 19, 21 (22 February 2012); ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Decision on common legal representation of victims for the purpose of trial. ICC-01/05-01/08-1005 (12 November 2010); ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Fourth Decision on Victims' Participation, pp. 36-37. ICC-01/05-01/08-320 (12 December 2008); ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Application for leave to submit amicus curiae observations under rule 103 of the Rules of Procedure and Evidence (6 April 2009); ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 9, para. 19

[1945] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, paras. 38-40 (12 July 2010); ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Decision on Directions for the Conduct of the Proceedings, paras. 17-20 (19 November 2010); ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p.19, para. 24

[1946] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p.19, para. 24

[1947] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, p.3

> “(i) the adoption, in paragraph 23 of the Decision, of the strict condition according to which the testimony of a victim "needs to be considered to make a genuine contribution to the ascertainment of the truth"; (ii) the adoption, in paragraph 24 of the Decision, of the strict criteria quoted from a decision of Trial Chamber II, which requires the victim's testimony to "bring to light substantial new information that is relevant to issues which the Chamber must consider in its assessment of the charges" ; and (iii) the subsequent assessment of the proposed victims' applications and the decision not to allow some of them to testify or present their views and concerns before the Chamber.”[1948]

Certainly, the requirements established by the Majority of the Judges for the presentation of evidence by victims were considered too restrict by the presiding Judge Steiner.[1949]

She was contrary to the demands of the Majority that the presentation of evidence by an individual victim should be "useful" for the Trial Chamber, "make a genuine contribution to the ascertainment of the truth" or

> "bring to light substantial new information that is relevant to issues which the Chamber must consider in its assessment of the charges."[1950]

In regard to the assessment of the proposed victims' applications and the decision not to permit some of them to testify or present their views and concerns before the Chamber, in its Order dated 21 November 2011, the TC III established the procedure to be observed by the 2 legal representatives of victims in case they wanted to seek leave to provide evidence or for individual victims to submit their views and concerns before the Chamber.[1951]

[1948] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, p. 6, para. 10

[1949] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims (22 February 2012); ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, p. 6, para. 11; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp.19-20, footnote 80

[1950] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, pp. 7-8, paras. 10,13

[1951] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, p.3, para. 1; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Order regarding applications by victims to present their views and concerns or to present evidence, para. 3. ICC-01/05-01/08-1935 (21 November 2011)

The Legal Representatives of the victims initially made an application for 17 victims to testify and/or to present their views and concerns. It was calculated that it would take approximately 345 hours of court time (equivalent to roughly 77 sitting days, or 15 and a half weeks) to hear the testimony and/or views and concerns of the 17 victims enlisted by the Legal Representatives.[1952]

The TCIII stressed that even though victims´ participation should be significant, such participation must not be detrimental to or conflict with the accused´s rights and a just and impartial trial (particularly the right of accused to be tried without unjustifiable delay).[1953]

Based on such argument, the Chamber understood that hearing the 17 victims put forward by the Legal Representatives would considerably increase the duration of the trial and might cause undue delay prohibited by Article 67(l)(c) of the Statute. Accordingly, it instructed the legal representatives to reduce their lists to a maximum of 8 victims in total.[1954]

In fact, the TC III stated that

> "… the Legal Representatives are instructed to work together to narrow the list of 17 victims included in the Applications into a short list of no more than eight individuals (together, "Relevant Victims"). The Relevant Victims should be those who, in the Legal Representatives' view, are (i) best-placed to assist the Chamber in the determination of the truth in this case; (ii) able to present evidence and/or views and concerns that affect the personal interests of the greatest number of participating victims; (iii) best-placed to present testimony that will not be cumulative

[1952] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Second order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims, p. 6, para. 10 (21 December 2011); ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Application by the Legal Representative of Victims for leave to call victims to appear as witnesses and present their views and concerns to the Chamber, para. 2 (9 December 2011); ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, *Rectificatif à la justification relative à "Requête afin d'autorisation de présentation d'éléments de preuves et subsidiairement de présentation de vues et préoccupations par les victims*", para. 8 (12 December 2011)

[1953] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Second order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims, p. 5, para. 9 (21 December 2011); ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, pp. 3-4, para. 2

[1954] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Second order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims, pp. 6, 7, paras. 11, 12; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, pp. 3-4, para. 2

> of that which has already been presented in this case; and (iv) willing for their identity to be disclosed to the parties in the event that they are permitted to testify and/or present their views and concerns.
>
> 13. After receiving the additional information described below and after hearing from the parties, the Chamber will make a final determination on which of the Relevant Victims, if any, should be permitted to testify and/or present their views and concerns."[1955]

As a result, the Legal Representatives of the victims, complying with the Chamber's Second Order, cut down the number of victims proposed to be called to a total of 8 victims. Furthermore, the questioning time was estimated to last 32 hours (as opposed to the 138 hours that had been estimated to conduct the questioning of 17 victims). Following, the victims´ Legal Representatives collected and presented written statements for 7 out of the 8 victims they proposed to call. For that ends, the victims were contacted in their individual locations and gave specific accounts of the events and the damage they had suffered.[1956]

Consequently, it seemed that the Court had

> "led the legal representatives to believe and to have a legitimate expectation that, by following all the specific instructions given by the Chamber in the Second Order, the victims would be authorised to testify and to present their views and concerns in person."[1957]

Nonetheless, of the already narrowed down list of victims submitted by the victims´ legal representatives, solely 2 victims were permitted to give evidence and 3 other victims were granted authorisation to present their views and

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[1955] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Second order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims, p. 7, paras. 12, 13

[1956] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Second order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims, p. 6, para. 10; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, *Complément de la requête afin d'autorisation de présentation d'éléments de preuves et subsidiairement de présentation de vues et préoccupations par les victimes du 6 décembre 2012* (23 January 2012); ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, *Requête de la Représentante légale de victims concernant des informations supplémentaires à sa requête du 6 décembre 2011 afin d'autoriser des victimes à témoigner et à faire valoir leurs vues et préoccupations devant la Chambre* (23 January 2012); ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, p. 4, paras. 3-5

[1957] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, p. 4, para. 6

concerns, in accordance with the decision of the Majority of the Trial Chamber III.[1958]

In fact, only 2 victims (a/0866/10 and a/1317/10) were allowed to give evidence (meaning to give evidence under oath from the witness box so as contribute to the evidence in the trial) and appeared before the Trial Chamber III. These witnesses presented their testimonies without protective measures and were questioned by the Legal Representatives, the Prosecution, the Defence, and the TCIII.[1959]

Three victims (a/0542/08, a/0394/08 and a/0511/) were granted permission to present their views and concerns before the Chamber ("the equivalent of presenting submissions, and although any views and concerns of the victims may assist the Chamber in its approach to the evidence in the case, these statements by victims … will not form part of the trial evidence").[1960]

However, the presiding Judge Steiner considered that "the participatory rights of the victims are arbitrarily limited to two victims allowed to give testimony" and stated that[1961]

> "the use of these criteria which are unduly and unfairly curtailing the victims' rights to present evidence. These criteria have no legal basis and cannot be deduced from the statutory framework pursuant to its literal, systematic or teleological interpretation. In my view, the adoption of these criteria by the Majority reflects a utilitarian approach to victims' rights rather than an attempt to ensure that the rights granted under the statutory provisions are exercised effectively and only within the limits specifically set out in these provisions.
>
> 15. It should be sufficient, in my view, to recall that the Appeals Chamber has detailed the requirements that are necessary in order to allow victims to present evidence, notably and most importantly for the purposes of my partly dissenting opinion: the demonstration of the personal interests that are affected by the

[1958] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, p. 5, para. 9

[1959] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 20, para. 27; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, p. 11, para. 19, quoting ICC-01/04-01/06-2032-Anx, para. 25

[1960] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, p. 11, para. 19, quoting ICC-01/04-01/06-2032-Anx, para. 25.

[1961] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, p. 7, paras. 13, 16

> specific proceedings; a determination of the appropriateness of the victim's specific participation; and the consistency with the rights of the accused and the requirements of a fair trial."[1962]

The same Judge asserted that

> "the strict limitations imposed by the Majority to the presentation of evidence by victims and the 'case-by-case' analysis of the victims' right to present their views and concerns reflect a utilitarian approach towards the role of victims before the Court, which has no legal basis and appears to unreasonably restrict the rights recognised for victims by the drafters of the Statute."[1963]

Furthermore, although the dissenting Judge recognised that, in view of the elevate number of victims participating of the proceedings, it was necessary to restrict the number of victims authorised to present their views and concerns in order to ensure expeditiousness of the trial, she could not understand how to allow 7 victims (out of a total of 2287 whose participation in the proceeding had already been authorised by TC III) to present their views and concerns in person would jeopardise the expeditiousness of the proceedings.[1964]

In addition, referring to precedents of the other Trial Chambers of the ICC, the Judge recalled that Trial Chamber I had authorised 3 victims out of 129 participating victims to present evidence, whereas Trial Chamber II had initially authorised 4 victims out of 370 participating victims to present evidence.[1965]

Hence, to allow only 2 out of 2287 victims who had been granted participation in the proceedings up to that point to present evidence seems quite disproportionate.

Also, this Judge did not understand how permitting 7 victims to express their views and concerns in person would jeopardise the rapidity of the proceedings if

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[1962] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, p. 7, paras. 14-15

[1963] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, p.6, paragraph 11

[1964] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, pp. 9-10, para. 21

[1965] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, p. 10, para. 22

177 hearing days had already been spent in the presentation of the Prosecution's evidence.[1966]

In face of that, the presiding Judge considered that the Majority of the Trial Chamber III

> "without any factual elements on which to base its assessment of the effect of the victims' participation on the expeditiousness of the trial, denied a number of victims their statutory rights to present their views and concerns which, depending on the modalities of participation that could be set by the Chamber at a later stage, could have been fully consistent with and not prejudicial to the rights of the accused."[1967]

Indeed, she affirmed that, although the Majority refers largely to these requirements and to the importance of the avoiding "undue" delays in the proceedings, in none of their findings they presented a justification or a factual elements basis so as to support them.[1968]

Judge Steiner sustained that the Majority´s demands were unjustly limiting rights of the victims to present evidence. She would have assessed the applications of the victims to present evidence in accordance with the requirements previously established by the Appeals Chamber in the Lubanga case (namely, "demonstration of the personal interests that are affected by the specific proceedings; a determination of the appropriateness of the victim's specific participation; and the consistency with the rights of the accused and the requirements of a fair trial") and after would have established whether the evidence was important and carried probative value.[1969]

Finally, the Judge also disagreed with the Majority in relation to their decision to hear via video-link technology the 3 victims who were authorised to present their views and concerns. She would have preferred to call[1970]

[1966] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, pp.9-10, para. 21; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Second order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims, p. 6, para. 10

[1967] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, p. 10, para.23

[1968] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, pp. 7-8, paras. 13,16

[1969] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, pp. 7-8, paras. 15-16

[1970] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp. 20-21, para. 28; ICC. The

> "the victims to present their views and concerns by way of their appearance in person in the courtroom in The Hague, rather than by way of video-link."[1971]

The Decision Pursuant to Article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo was issued on 15 June 2009. The Chamber expressly stated that Bemba's criminal responsibility under article 28 of the Statute would only be examined in case there was not enough evidence establishing substantial grounds to believe that the he was criminally responsible as an indirect perpetrator (within the terms of article 25(3)(a) of the Rome Statute) for the crimes enumerated in the Amended DCC.[1972]

However, once the PTC II understood that, in face of the threshold of proof demanded at the Pre-Trial stage, Bemba's criminal responsibility for the crimes at bar could not be determined under article 25(3)(a) of the Rome Statute, it proceed to the analysis of his criminal responsibility within the meaning of article 28 of the Statute.[1973]

In fact, the PTC II understood that there was no foundation to prosecute Bemba for the crimes of murder, rape and pillage as an indirect perpetrator within the meaning of article 25 (3) of the Rome Statute. Hence, it rejected the Prosecutor´s main argument in respect of Bemba´s mode of criminal responsibility. In view of that, it proceeded to the analysis of the accused´s criminal liability on the basis of article 28 of the Statute.

Therefore, if the PTC III had not adjourned the hearing and requested the Prosecutor to consider amending the charges so as to establish that Bemba was criminally liable by reason of his superior-subordinate relationship with MLC troops (in the terms of article 28 of the Rome Statute), the Chamber would not have confirmed the charges of murder, rape and pillaging against Bemba. In fact, the Prosecutor v. Jean-Pierre Bemba case would not have made to the trial phase, and, thus, the latter would not be judged for the mentioned crimes due to a fail of the Prosecution to include the adequate mode of liability in the charge.[1974]

In view of the Disclosed Evidence, the Chamber was satisfied that there was enough evidence to establish substantial basis to believe that an extensive

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Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Decision on the presentation of views and concerns by victims a/0542/08, a/0394/08 and a/0511/0, pp. 5, 6, 8, footnote 14, paras. 7, 13(a). ICC-01/0501/08-2220 (24 May 2012)

[1971] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Decision on the presentation of views and concerns by victims a/0542/08, a/0394/08 and a/0511/07, pp. 5, 6, 8, footnote 14, paras. 7, 13(a)

[1972] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, pp. 114, 115, 139, paras. 341, 342, 402

[1973] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 139, para. 403

[1974] Heller, K. J. (22 March 2016)

number of Central African Republic civilians were victims of crimes specified in the Amended Document Containing the Charges, including murder and that a majority were victims of rapes during a five-month period. Nevertheless, the Chamber rejected the Prosecutor´s cumulative charging approach and did not confirm count 3 of torture as a crime against humanity (pursuant to article 7(1)(f) of the Rome Statute).[1975]

When entertaining the existence of the attack (within the concept of crimes of against humanity), the PTC III observed that the Defence did not challenge the fact that civilians of the Central African Republic were victims of several crimes, particularly rapes, that took place during the conflict.[1976]

Along the same lines, the PTC III observed that the Defence did not disclose evidence so as to deny the widespread or systematic nature of the attack, but even referred to "300, 400, 2000 rapes". In fact, as stressed by one the legal representatives of the victims, the Defence´s strategy was instead concentrated on showing Bemba´s lack of knowledge of the widespread or systematic attack targeting CAR civil population.[1977]

Regarding the act of rape as a crime against humanity (count I), In the Amended Document Containing the Charges, the Prosecutor sustained that

> "[f]rom on or about 26 October 2002 to 15 March 2003, Jean-Pierre Bemba committed, jointly with another, Ange-Félix Pattasé, crimes against humanity through acts of rape upon civilian men, women and children in the Central African Republic, in violation of Articles 7(1)(g) and 25(3)(a) or 28(a) or 28(b) of the Rome Statute."[1978]

In its Decision on the Charges, the Pre-Trial Chamber II considered that there was

> "sufficient evidence to establish substantial grounds to believe that acts of rape constituting crimes against humanity directed

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[1975] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, pp. 25, 37, paras. 72, 108

[1976] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Transcript, p. 49, lines 16-17 (13 January 2009); ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 31, para. 92

[1977] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Transcript, p. 49, lines 16-17, p. 91, lines 11-14, p. 103, lines 8-9 (13 January 2009); ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 42, para. 118; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, *Liste des elements de preuve de la Défense*. ICC-01/05-01/08-319-Conf-AnxA (18 December 2008)

[1978] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Public Redacted Version of the Amended Document Containing the Charges filed on 30 March 2009, pp. 33-34 (30 March 2009)

> against CAR civilians were committed by MLC soldiers as part of the widespread attack against the CAR civilian population from on or about 26 October 2002 to 15 March 2003, with the knowledge of the attack by MLC soldiers."[1979]

In fact, the Chamber asserted that

> "[h]aving reviewed the Disclosed Evidence, and in particular, the statements of direct witnesses 23, 29, 42, 68, 80, 81, 87 and 22, the Chamber finds that they consistently describe the multiple acts of rape they directly suffered from and detail the invasion of their body by the sexual organ of MLC soldiers, resulting in vaginal or anal penetration. The evidence shows that direct witnesses were raped by several MLC perpetrators in turn, that their clothes were ripped off by force, that they were pushed to the ground, immobilised by MLC soldiers standing on or holding them, raped at gunpoint, in public or in front of or near their family members. The element of force, threat of force or coercion was thus a prevailing factor."[1980]

After concluding that the perpetrators of the acts of rape were MLC soldiers, the Pre-Trial Chamber II established its view on some questions raised by the Defence. At the Hearing, the Defence, alluding to the statement of witness 9, argued that victims of rape had maintained sexual relations with soldiers on a voluntary basis, hence disputing the force requirement.[1981]

The Defence challenged the Prosecutor's Amended Document Containing the Charges by sustaining that

> "alleged rapes of unidentified victims 1 to 35 (the "Unidentified Victims 1 to 35") as reported by witness 47 occurred at dates either not specified or contradictory. In the same line, the Defence underlined inconsistencies in witness 22's statement as to the alleged date of her rape by MLC soldiers."[1982]

[1979] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 57, para. 160

[1980] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 58, para. 165

[1981] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 58, paras. 166-167; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Transcript, p. 54, lines 12-20 (14 January 2009)

[1982] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 59, para.167; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, *Conclusions de la Defense en Reponse a L'acte D'accusation Amende Du 30 Mars 2009*, pp. 5-8, paras. 15,18, 24-29, 32 (24 April 2009); ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Transcript, p. 51, lines 7-12.

In connection with the Defence´s first challenge, the Pre-Trial Chamber II rendered it ungrounded the argument that CAR women had voluntarily engaged into sexual relations with soldiers. The Chamber reaffirmed that, in view of the corroborating evidence, the statement of witness 9 had enough probative value to be taken into consideration in its findings. Nevertheless, in relation to the witness's affirmation that a number of CAR women had willingly maintained sexual relations with soldiers on the ground, the Chamber observed that the own witness had explained that this applied to a small number of women and that several CAR civilian women had been victims of rape from on or about 26 October 2002 to 15 March 2003. Witness 9 also furnished information that, as a result of the rapes, many women became pregnant. The Chamber noted that the victims had freely told the witness what had happened to them. Further, the Chamber observed that, in relation to other witnesses presented by the Prosecutor, that were purportedly raped, the Defence had not raised this challenge and neither had it showed that they willingly had engaged in sexual relations with MLC soldiers.[1983]

The PTC II dismissed without addressing the challenge regarding the lack of specificity of the dates of the purported rapes of Unidentified Victims 1 to 35 for it was based on the statement witness 47, to which the Chamber attached a rather low probative value since this witness was anonymous and his statement was not corroborated. Certainly, the Chamber did not rely on such statement so as to confirm the charge of rape as a crime against humanity and, thus, did not enter in the merit of the challenge.[1984]

As a consequence, the Pre-Trial Chamber III understood that the challenges raised by the Defence did not bear a weigh on the facts.[1985]

The PTC II drew attention to some events and the related evidence.

In relation to witness 23, on 8 November 2002, he was in his house in PK 12, when 8 MLC soldiers entered with guns and accused him of giving protection to rebels. The witness denied protecting rebels and suddenly heard a gunshot. The witness was threatened with death by an MLC soldier, who told him "Ok, you will live but we will have to fuck your anus". In view of that, witness 23 was ordered to adopt the position of a horse and then was raped successively by three MLC soldiers in the garden of his house in front of his three wives and children. Such

[1983] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, pp. 59-60, para. 168

[1984] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, pp. 39, 56, 60, paras. 114, 158, 169

[1985] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 60, para. 170

evidence demonstrates that the rapes of witness 23 were perpetrated by threat of force and by coercion.[1986]

The same witness furnished information that, in the same place and the same date, MLC soldiers also raped at least two of his daughters in front of him. Such information was backed up by witness 80`s statement. The Chamber observed that the acts endured by witness 23 took place in front of his three wives and children and that their fearful reactions (the kids were crying and one of the wives broke down due to the shootings). In view of that, the Chamber understood that its findings in relation to the force element and the perpetrators´ identity also applied to the rapes of the two daughters of witness 23.[1987]

On 5 March 2003, Witness 29 was in her father's house in Mongoumba when 3 MLC soldiers entered the house and, in succession, vaginally raped her. Indeed, witness 29 was told by them to lie down on the floor, but she did not obey. Subsequently, the first soldier who raped her tore her clothes and shoved her to the ground. The witness cried during the attacks. While she was being raped by the third MLC soldier, gunfires were heard and the soldiers fled.[1988]

The ten years-old daughter of witness 42 was successively raped by two MLC soldiers in Begoa (PK 12). The rape took place in a small shelter located behind the house of the witness. A group of MLC soldiers invaded his house and, after obligating him, his wife and children to lie face down on the floor, took his daughter by force outside the house. Following, the witness saw that his daughter's dress was stained with blood. Afterwards, the girl confided in her mother who, in turn, told witness 42 that their daughter had been raped by the soldiers.[1989]

On 27 October 2002, two MLC soldiers vaginally raped witness 68 close to Miskine high school in Fouh. The witness accounted that during the rape, a third MLC soldier stood on her arms with his feet, forcing her to the ground. She explained that, while fleeing from home with her sister-in-law, they ran into group of MLC soldiers. Witness 68 reported as well that her sister-in-law was also raped in the same occasion. Indeed, upon stumbling across the group of MLC soldiers,

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[1986] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, pp. 60-61, para. 171

[1987] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 61, para.172

[1988] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 61, para. 173

[1989] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, pp. 61-62, para. 174; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Prosecution's Submission of Amended Document Containing the Charges, Amended List of Evidence and Amended In-Depth Analysis Chart of Incriminatory Evidence, and its related Annexes, p. 35

three of them took her sister-in-law. She heard the sister-in-law screaming while being raped.[1990]

Three MLC soldiers vaginally raped witness 80 in the presence her family. They entered the house with guns, hence exerting coercion on the witness, and intimidated and slapped her in the face when she resisted rape. Witness 80's husband (witness 23) attempted to intervene but the soldiers bet him and threatened him with rape.[1991]

Four MLC soldiers vaginally raped witness 81 in her house at PK 12 in front of her husband, her offspring, her mother and her brother. The first attacker ("Leopard") beat her on the thigh using a gun and obliged her to get naked before he raped her. The witness told them that she had recently given birth, and, thus, expressed total lack of consent. Subsequently, she was successively raped by 3 other soldiers, what caused her to bleed. Whereas the witness was being raped, the soldiers also lashed her brother 50 times by using a rope.[1992]

The Pre-Trial Chamber II observed that the witness did not furnish information on the date of these acts but mentioned an event, particularly Jean-Pierre Bemba Gombo´s visit to Begoa school in PK 12, from which the date of the rape can be deducted. PTC II also noted that, throughout the witness´ statement, on many occasions she did not provide information regarding time periods or dates. The Chamber further observed that the witness was young when such events happened. The Chamber took into account other corroborating evidence which contained important information in relation to the date at stake. The Chamber noted that witness 23 and witness 80 are neighbours, and relied on the statement of witness 23 (who provided an indication on the date of witness 80´s rape) so as to draw the conclusion that both witnesses were raped in the same day, specifically 8 November 2002.[1993]

On 30 October 2002, witness 87 was vaginally raped by 3 MLC soldiers outside her house, located in BoyRabe. Although the witness did not clarify in her statement whether or not she was threatened with death by the assailants who entered her house, the Chamber found there was enough evidence to determine that the MLC soldiers entered the witness´ house with their guns, and threatened her. The first MLC soldier undressed the witness, then she was forced on the ground (and was kept without freedom of movements during all the acts carried

[1990] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 62, paras. 175-176
[1991] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, pp. 62-63, paras. 177-178
[1992] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 63, para. 179
[1993] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, pp. 63-64, para.180

out by the 3 soldiers) and raped. While raping the witness, the MLC soldiers kept their arms close to the witness.[1994]

Three MLC soldiers successively vaginally raped witness 22 while she was in her uncle's house close to PK 12. The witness affirmed that the attack took place on 26 October 2002. The witness accounted that the soldiers pushed her into the bedroom and, deploying a knife, threatened her. They ordered her to undress but she did not comply. Then the soldiers shoved her on to the bed cut her tights with the knife. The first assailant pointed his gun at the throat of the witness whereas raping her. After the first rape, the witness wanted to leave but was not allowed. The other two MLC soldiers raped witness 22 and the gun remained directed at her throat.[1995]

The Chamber addressed specific challenge raised by the Defence in relation to the exact date of the rape of witness 22. She stated the rape occurred on 26 October 2002 in PK12. However, in accordance with the Defence, MLC troops solely arrived at PK12 on 30 October 2002.[1996]

The PTC II considered that imprecision in dates could occur by reason of the horrid events the witnesses underwent and the time that had passed between the rapes and they giving their testimonies (nearly six years). In view of that, the Chamber opted for assessing the trustworthiness of the witnesses' statements on the whole and pay special regard to the account of the acts of rape and the information provided by the witnesses that permitted the Chamber to identify with certitude the aggressors.[1997]

The Chamber was convinced of the reliability of the information furnished by witness 22. It stated that she had provided accurate and conclusive information showing that she had been raped. She was also capable to differentiate the distinct parties in the conflict and clearly recognised that the attackers were MLC soldiers. The Chamber considered that, independently of the precise date of the events, the acts of rape endured by witness 22 were imputed to MLC soldiers. With basis on the evidence, the Chamber concluded that rape of witness 22 took place at the end of October 2002 in the context of the attack targeting CAR civilian population from on or about 26 October 2002 until 15 March 2003. Therefore, the Chamber rejected the Defence´s challenge of the in this respect.[1998]

[1994] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 64, para. 181

[1995] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, pp. 64-65, para. 182

[1996] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 65, para. 183

[1997] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 65, para.184

[1998] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, para. 185

Additionally to direct evidence, the Chamber acknowledged that indirect evidence (as, for example, hearsay evidence and numerous NGO and UN reports) holds backing up nature and shows the extensive number of acts of rape perpetrated in the same locations specified by direct witnesses during the same time period, precisely from on or about 26 October 2002 until 15 March 2003.[1999]

The PTC II found, in relation to the MLC soldiers' requisite “mens rea”, that the intent and knowledge of these soldiers to rape the aforementioned CAR civilians can be drawn from the factual circumstances. The seven direct witnesses that were raped persistently identified the MLC soldiers as being the direct perpetrators. The Chamber understood that the MLC soldiers threatened to rape the civilian population, employed force, inclusive of arms against unarmed civilians, and, hence, intended to rape CAR civilians.[2000]

Regarding the requirement of nexus, the Chamber´s view was that the acts of rape were carried out as part of the widespread attack targeting the CAR population from on or about 26 October 2002 until 15 March 2003. Rapes were committed when the civilians objected the MLC soldiers looting their goods. MLC soldiers used the repeated practice of rape as a weapon to terrorise the population. The evidence demonstrated that rapes were perpetrated as MLC troops were advancing into or withdrawing from CAR territory. Further, the Disclosed Evidence indicated the occurrence of rapes in the localities (as Boy-Rabe, Fouh, Mongoumba and PK 12) that were being attacked by MLC soldiers at the relevant time period.[2001]

Thus, the Chamber found that there was enough evidence to establish substantial basis to believe that during the widespread attack targeting the CAR population from approximately 26 October 2002 to 15 March 2003 acts of rape amounting to crime against humanity (in the terms of article 7(1)(g) of the Rome Statute) were carried by MLC soldiers.

Upon reviewing the whole of the Disclosed Evidence, the Pre-Trial Chamber II also found that there was enough evidence to establish substantial basis to believe that an armed conflict not of an international character took place between, on the one hand, Mr Bozizé´s organized armed group, and, on the other hand, troops supporting Mr Patassé, inclusive of the “Unité de Sécurité Présidentielle” (the "USP") and the FACA (a group composed by 500 predominantly Chadian mercenaries, 100 Libyan troops, as well roughly 1,500

[1999] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 66, para. 186; Amnesty International (2004 a). Central African Republic, Five months of war against women, pp. 6-14; *Fédération internationale des ligues des droits de l'Homme* (FIDH) report (2003); FIDH report (2006); Reliefweb, UN Resident and Humanitarian Coordinator for the Central African Republic, Central African Republic, Weekly Humanitarian Update (17 December 2002).

[2000] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 66, para. 187

[2001] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, pp. 66-67, para. 188

MLC soldiers) in the period from on or about 26 October 2002 to 15 March 2003 on the Central African Republic`s territory.[2002]

Moreover, the Chamber found that there was enough evidence to establish substantial basis to believe that during such armed conflict acts of murder, rape and pillaging amounting to war crimes (in the terms of article 8(2)(c)(i), 8(2)(e)(vi) and 8(2)(e)(v) of the Rome Statute) were perpetrated by MLC soldiers. Nonetheless, the Chamber did not confirm count 4 of torture and count 5 of outrage upon personal dignity as war crimes as established in article 8(2)(c)(i) and (ii) of the Rome Statute.[2003]

Certainly, after exposing the reasons that supported its findings in relation to the existence of an armed conflict not of an international character and the awareness of the perpetrators of the existence such conflict, the PTC II started to analyse the specific elements constituting war crimes. In what concerns the specific elements of rape as a war crime (count 2), the Chamber, based on the aforementioned evidence provided by the victims, understood that[2004]

> "civilian women and men were raped from on or about 26 October 2002 to 15 March 2003 by MLC soldiers on the CAR territory. More specifically, the evidence shows that as MLC soldiers moved in battle throughout the CAR territory civilians were raped by force, or by threat of force or coercion."[2005]

The Chamber recollected that in respect of article 8(2)(e)(vi) of the Rome Statute, the Elements of Crimes demand in respect of the "actus reus" that

> "(1) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;
>
> (2) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent."[2006]

[2002] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, pp. 74-75, para. 212

[2003] *Ibidem*

[2004] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, pp. 83-92, 97, paras. 240-264, para. 286

[2005] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 9, para. 286

[2006] Elements of Crimes of the International Criminal Court, Art. 8 (2) (e) (vi)-1, Elements 1, 2

In relation to “mens rea”, regarding the mental element established in article 30 of the Statute, the Chamber was convinced that the MLC soldiers acted with both intent and knowledge when they raped CAR civilians.[2007]

As to the nexus requirement, the PTC II was convinced that these acts of rape occurred in the context of and were associated with the armed conflict not of an international character in the CAR which lasted from on or about 26 October 2002 up to 15 March 2003. The evidence demonstrated that the rapes took place at the same time as MLC soldiers were advancing in battle through the territory of the CAR.[2008]

As mentioned above, the Pre-Trial Chamber II understood that Jean-Pierre Bemba´s criminal responsibility was based on Article 28 of the Rome Statute (and not Article 25 (3) as firstly sustained for the Prosecution).

Indeed, the Chamber stated that so that a person can be held criminally responsible for crimes against humanity and war crimes, it does not suffice that the objective elements are present. In this regard, the Rome Statute does not allow attribution of criminal responsibility on the grounds of strict liability. Instead, it also demands the presence of a determined state of guilty mind (“actus non facit reum nisi mens rea”) usually called “mens rea”, which comprises the subjective elements. In the case at bench, besides the objective elements, three cumulative subjective elements must be met so as to permit to make a finding on Jean-Pierre Bemba´s criminal responsibility as a co-perpetrator within the ambit of the evidentiary standard demanded at the pre-trial stage as established in article 61(7) of the Rome Statute. Particularly, Bemba must

> “(a) fulfil the subjective elements of the crimes charged, namely intent and knowledge as required under article 30 of the Statute;
>
> (b) be aware and accept that implementing the common plan will result in the fulfilment of the material elements of the crimes; and
>
> (c) be aware of the factual circumstances enabling him to control the crimes jointly with the other co-perpetrator.”[2009]

The Chamber´s view was that Jean-Pierre Bemba did not have intent and knowledge in the terms of article 30 of the Statute. Surely, after analysing the 9 elements introduced by the Prosecutor so as to sustain the suspect´s intent and knowledge, the Chamber concluded that there was not enough evidence to establish substantial grounds to believe that, when Jean-Pierre Bemba sent the MLC troops from on or about 26 October 2002 to the CAR and kept them there

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[2007] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, pp. 66, 98, paras. 187, 287

[2008] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 98, para. 288

[2009] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 118, para. 351

up to their withdrawal on 15 March 2003, he was aware that the crimes against humanity and war crimes perpetrated by the MLC soldiers would occur in the ordinary course of events.[2010]

In accordance with the Pre-Trial Chamber II, the fact that Jean-Pierre Bemba continued to implement the alleged common plan did not allow to infer that he harboured intent. Surely, the Chamber sustained that it was not possible to infer that, by maintaining his troops in the Central African Republic, the suspect was aware that it was an almost certain consequence that these crimes would be perpetrated in the ordinary course of events. The maximum that can be inferred from the Disclosed Evidence is that he may have foreseen the risk of occurrence of these crimes as a simple possibility and accepted it in order to achieve his mains goal, namely to help Mr Patassé to keep power. In the Chamber's view, this does amount to "dolus directus" in the second degree (that "does not require that the suspect has the actual intent or will to bring about the material elements of the crime, but that he or she is aware that those elements will be the almost inevitable outcome of his acts or omissions") which is the demanded standard for article 30 of the Rome Statute.[2011]

In view of the absence of the first of the 3 cumulative subjective elements, the Chamber did not deem necessary to consider the other two, and, disregarding Bemba´s criminal responsibility in terms of article 25 (3) of the Rome Statute, passed to analyse Bemba´s alternative purportedly criminal responsibility under article 28 of the Statute.[2012]

In the light of the Disclosed Evidence, the Pre-Trial Chamber II found that the accused met the requirements to incur in the type of responsibility preconised in Article 28 (a) of the Statute, specifically that he[2013]

1) "was effectively acting as a military commander" and had "effective command and control" over the MLC troops that perpetrated the crimes;

2) "knew or, owing to the circumstances at the time, should have known that" the MLC troops "were committing or about to commit such crime";

3) "failed to take all necessary and reasonable measures within" his "power to prevent or repress" the commission of the crimes by the MLC troops.[2014]

[2010] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, pp. 138-139, paras. 400-401

[2011] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, pp. 121, 138-139, paras. 359, 400-401

[2012] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, pp. 128, 139, paras. 374, 403

[2013] Rome Statute, Art. 28 (a) (i) (ii); ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, pp. 141-142, para. 407

[2014] *Ibidem*; *Ibidem*

In fact, the Chamber considered that there was "sufficient evidence to establish substantial grounds to believe" that Bemba,[2015]

> "at all times relevant to the charges, effectively acted as a military commander and had effective authority and control over the MLC troops who committed the crimes against humanity of murder and rape and the war crimes of murder, rape and pillaging in the CAR from on or about 26 October 2002 to 15 March 2003;"[2016]

> "knew that the MLC troops were committing or were about to commit the crimes against humanity of murder and rape and the war crimes of murder, rape and pillaging in the CAR from on or about 26 October 2002 to 15 March 2003;"[2017]

and

> "failed to take all necessary and reasonable measures within his power to prevent or repress the commission by the MLC troops of the crimes against humanity of murder and rape and the war crimes of murder, rape and pillaging in the CAR from on or about 26 October 2002 to 15 March 2003."[2018]

As a result, the Pre-Trial Chamber II confirmed the charges against Jean-Pierre Bemba on the basis of command responsibility (in the terms of article 28(a) of the Rome Statute) for the crimes of murder (as crimes against humanity- article 7(1)(a) of the Statute, and as war crimes- article 8(2)(c)(i) of the Statute), rape (as crimes against humanity- article 7(1)(g) of the Statute, and as war crimes- article 8(2)(e)(vi) of the Statute), and pillaging (as war crimes- article 8(2)(e)(v) of the Statute), perpetrated by MLC troops in the CAR from on or about 26 October 2002 until 15 March 2003.[2019]

However, for the reasons aforementioned, the Pre-Trial Chamber II did not to confirm that Jean-Pierre Bemba Gombo was criminally responsible in the terms of article 28 (a) of the Rome Statute for the charges of

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[2015] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 159, para. 444

[2016] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 160, para. 446

[2017] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 160, para. 478

[2018] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 178, para. 490

[2019] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 159, para. 444; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p.12, para. 7

> "(i) torture constituting a crime against humanity (count 3) within the meaning of article 7(1) (f) of the Statute;
>
> (ii) torture constituting a war crime (count 4) within the meaning of article 8(2)(c)(i) of the Statute;
>
> (iii) outrages upon personal dignity constituting a war crime (count 5) within the meaning of article 8(2)(c)(ii) of the Statute."[2020]

8.3. Trial Chamber III´s Judgment pursuant to Article 74 of the Statute dated 21 March 2016

In its judgment, the Trial Chamber addressed both rape as a war crime and rape as a crime against humanity in the same section in view of the fact that only the contextual elements are different.[2021]

Regarding the material elements ("actus reus"), the Chamber after recalling that the first element "invasion of the body of a person" must result in[2022]

> "penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body,"[2023]

stressed that such invasion was constructed sufficiently wise so as to be gender-neutral. Thus, it covers same-sex penetration, and includes both male and/or female offenders and victims.[2024]

The TC III observed that "the definition of rape encompasses acts of "invasion" of any part of a victim's body, including the victim's mouth, by a sexual organ." In fact, "as supported by the jurisprudence" of the ICTY, oral penetration by a sexual organ can constitute rape and consists in a fundamental attack against human dignity that can be as abusive and horrid as vaginal or anal penetration.[2025]

[2020] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 185 (e)

[2021] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 52, para. 98

[2022] Elements of Crimes of the International Criminal Court, Arts. 7(1)(g)-1, Element 1; 8 (2) (e) (vi)-1, Element 1; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 53, para. 99

[2023] Elements of Crimes of the International Criminal Court, Arts. 7(1)(g)-1, Element 1; 8 (2) (e) (vi)-1, Element 1; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 52, para. 98

[2024] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 53, para. 100; Elements of Crimes of the International Criminal Court, Arts. 7 (1) (g)-1, Element 1, footnote 15; 8 (2) (b) (xxii)-1, Element 1, footnote 50, (e) (vi)-1, Element 1, footnote 63

[2025] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 53, para. 101; ICTY. The

The second material element of rape refers to the circumstances and conditions that confer a criminal nature to the invasion of the body of the victim or of the offender. For the invasion of the body of a person to amount to rape, it has to be perpetrated under at least one of four possible situations:[2026]

> "by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent."[2027]

Addressing the circumstance "by taking advantage of a coercive environment", the TC III asserted that it adopted the same line of the ICTR in the Trial Judgment of the Akayesu case in relation to "coercive circumstances", specifically that[2028]

> "coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal."[2029]

Thus, the Chamber did not rule out

> "the possibility that, in addition to the military presence of hostile forces among the civilian population, there are other coercive environments of which a perpetrator may take advantage to commit rape. Further, the Chamber considers that several factors may contribute to create a coercive environment. It may include, for instance, the number of people involved in the commission of the crime, or whether the rape is committed during or immediately following a combat situation, or is committed together with other crimes. In addition, the Chamber emphasises that, in relation to the requirement of the existence of a "coercive

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Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T. Trial Chamber, Judgment, pp. 72-73, paras. 183-185 (10 December 1998); ICTY. The Prosecutor v. Zejnil Delalić, et al., Case No. IT-96-21-T. Trial Chamber, Judgment, p. 364, para. 1066 (16 November 1998)

[2026] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp. 53-54, para. 102

[2027] Elements of Crimes of the International Criminal Court, Arts. 7 (1) (g)-1, Element 2; 8 (2) (e) (vi)-1, Element 2

[2028] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 54, para. 103; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, pp. 57-58, para. 162

[2029] ICTR. The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4. Chamber I, Judgment, para. 688 (2 September 1998).

> environment", it must be proven that the perpetrator's conduct involved "taking advantage" of such a coercive environment."[2030]

Furthermore, the Trial Chamber observed that the lack of consent of the victim is not one of the legal elements of the crime of rape in the terms of the Rome Statute.[2031]

In connection with the mental elements ("mens rea"), the requirements are the standard ones, established in Article 30 of the Statute. In relation to "intent",

> "it must be proven that the perpetrator intentionally committed the act of rape. Intent will be established where it is proven that the perpetrator meant to engage in the conduct in order for the penetration to take place.
>
> 112. As to the requirement of "knowledge", it must be proven that the perpetrator was aware that the act was committed by force, by the threat of force or coercion, by taking advantage of a coercive environment, or against a person incapable of giving genuine consent."[2032]

In the Confirmation Decision, the Pre-Trial Chamber understood

> "that there was sufficient evidence to establish substantial grounds to believe that MLC soldiers committed the crime against humanity of rape as part of a widespread attack directed against the civilian population in the CAR from on or about 26 October 2002 to 15 March 2003", [2033]

as well as

> "that there was sufficient evidence to establish substantial grounds to believe that, … MLC soldiers committed the war crime of rape in the context of, and in association with, an armed conflict not of an international character."[2034]

Following the PCT´s findings in the Confirmation Decision, the Trial Chamber III analysed the alleged underlying acts of rape that fell within the boundaries of the charges and of which the Defence had had appropriate notice.[2035]

[2030] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp. 54-55, para. 104
[2031] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p.55, para. 105
[2032] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 56, paras. 110-112
[2033] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 316, para. 631
[2034] *Ibidem*
[2035] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 316, para. 631

The TC III considered that it could not enter findings related the alleged second and third rape incidents about which witness P47 had testified. Therefore, the Chamber did not take such alleged acts into consideration when deciding on the charges of rape.[2036]

Nevertheless, the Chamber understood that

> "perpetrator(s), by force, invaded the bodies of the following victims by penetrating their vaginas and/or anuses, and/or other bodily openings with their penises:
>
> a. P68 and P68's sister-in-law in Bangui at the end of October 2002;
>
> b. two unidentified girls aged 12 and 13 years in Bangui on or around 30 October 2002;
>
> c. P87 in Bangui on or around 30 October 2002;
>
> d. eight unidentified women at the Port Beach naval base in Bangui at the end of October or beginning of November 2002;
>
> e. P23, P80, P81, P82, and two of P23's other daughters in PK12 in early November 2002;
>
> f. P69 and his wife in PK12 at the end of November 2002;
>
> g. P22 in PK12 on or around 6 or 7 November 2002;
>
> h. P79 and her daughter in PK12 several days after the MLC arrived in PK12;
>
> i. P42's daughter in PK12 around the end of November 2002;
>
> j. a woman in the bush outside of PK22 in November 2002;
>
> k. P29 in Mongoumba on 5 March 2003; and
>
> l. V1 in Mongoumba on 5 March 2003."[2037]

a. P68 and P68's sister-in-law in Bangui at the end of October 2002;

The Chamber found that, at the end of October 2002, two MLC soldiers, by force, invaded P68's body and penetrated her vagina with their penises, in a compound in the Bondoro neighbourhood of Bangui. P68 explained she suffered psychological and medical consequences of these acts, which encompassed

[2036] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp. 235, 316-317, paras. 484, 632
[2037] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp. 317-318, para. 633

depression, a fear of armed soldiers, stomach and vaginal ailments, as well as HIV.[2038]

The Chamber also understood that, at the end of October 2002, in a compound in the Bondoro neighbourhood of Bangui, three MLC soldiers, by force, penetrated the body of P68's sister-in-law with a sexual organ or penetrated her anal or genital opening with any object or any other part of the body. After that, she presented health problems.[2039]

b. two unidentified girls aged 12 and 13 years in Bangui on or around 30 October 2002;

Witness P119 testified regarding the rape of two not identified girls aged 12 and 13 years in Bangui on or approximately 30 October 2002. She stated that CAR soldiers arrived at her compound saying that they had been sent by "Papa Bemba". Subsequently, P119 listening to girls shouting and, following the noise, saw several soldiers who were aligned in 2 columns by a canal waiting to have sex with two girls. She hid behind plants and saw the soldiers penetrate two girls with their penises. P119 affirmed that she pushed a big stone on one perpetrator, what made him scream and caused the soldiers to escape. The girls were crying and had blood in their vaginas, and told her their ages (12 and 13 years old).[2040]

The Defence resisted P119 account saying that it was unconvincing that P119 had helped the two girls in the canal without finding out their names or suffering harm. P119 sustained that she did not have the opportunity to ask their names in view of the circumstances at the time. The Chamber, considering that the circumstances were chaotic and traumatic at the time, accepted her explanation and regarded that the fact that P119 did not ask the names of the victims did not jeopardize the trustworthiness of her account.[2041]

In relation to P119's testimony that she had pushed a large stone on one soldier, the Defence demonstrated incredulity that she had managed then to escape from harm. The Chamber, although recalling that P119 was hidden from view during the facts, understood that the portion of the testimony in which she purportedly threw a large stone onto a soldier could have been exaggerated.[2042]

Apart from that, the Chamber regarded that her testimony was otherwise generally trustworthy.[2043]

As a result, the Chamber found that, on or around 30 October 2002, two soldiers, by force, used their penises to penetrate the vaginas of two unidentified girls,

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[2038] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp. 225-227, para. 462-464
[2039] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 227, paras. 465-466
[2040] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp. 227-228, para. 467
[2041] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 228, para. 468
[2042] *Ibidem*
[2043] *Ibidem*

thus, invading the latter´s bodies, in a canal close to P119's compound in the Boy-Rabé neighbourhood of Bangui.[2044]

c. P87 in Bangui on or around 30 October 2002;

On or around 30 October 2002, 3 different groups of armed CAR soldiers came to P87´s house. While the first 2 groups only stole goods from the house, the soldiers of the last group raped her. One soldier who carried a gun, threw her on the floor, took off her underwear and penetrated her vagina with his penis. 2 other soldiers subsequently also penetrated her vagina with their penises, and one of them inclusive pointed the barrel of his rifle at the witness.

P87 endured medical and psychological consequences, which includes pelvic pain, skin disorders, and depression.[2045]

In what concerns the submissions of the Defence sustaining that P87 had omitted any reference of rape in an antecedent report to the family lawyer, the Chamber observed that she testified that, due to feelings of shame, she had decided not to tell her neighbours about the rapes immediately after the facts. Also out of shame, she did not include information regarding the rapes she suffered in a complaint submitted with the CAR "*Procureur general"* and in her ICC victim application. The Chamber accepted her explanation, and rendered that such omissions did not affect the reliability of P87´s testimony. In view of the above, the Chamber found that, on or around 30 October 2002, three soldiers, by force, invaded P87's body by penetrating her vagina with their penises.[2046]

d. eight unidentified women at the Port Beach naval base in Bangui at the end of October or beginning of November 2002;

P47, who worked as a mechanic for a river transport company that ferried MLC troops to the CAR, affirmed that, after the MLC were in control of Bangui, he witnessed two or three incidents of rape at the naval base at Port Beach.[2047]

The first incident took place between 15.00 and 19.00, at the end of October or beginning of November 2002. Twenty-two MLC soldiers brought eight women to the deck of a ferry. After beating, kicking and undressing these women, the soldiers, in turns, penetrated the women's vaginas with their penises whilst holding weapons. After these facts, P47 talked to the women, who were from the regions of Boy-Rabé and PK12 in CAR.[2048]

The Defence challenged the credibility of P47's account alleging, "inter alia", that there were incongruences in his testimony. The Chamber recalling that it had

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[2044] *Ibidem*

[2045] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp. 229-230, paras. 471-472

[2046] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp. 230-231, para. 473

[2047] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 233, para. 480

[2048] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp. 233-234, para. 481

already dismissed the general allegations of the Defence in relation to P47´s reliability, also recognised that evidence provided by P47 was at times confusing on determined minor issues.[2049]

In connection with the first incident, the Defence stated that there was an inconsistency regarding the time of day it occurred (P47 first affirmed the facts had taken place at 17.30 and in an ulterior statement that they took place at 19.00). The Chamber regarded that the inconsistency identified by the Defence in connection with the timing of the first incident did not undermine the credibility of P47´s testimony. The TC III exposed several reasons to support its finding among which P47's demeanour in his testimony about this incident, his coherent description of the facts, the traumatic nature of the circumstances, the relatively limited character of the incongruence. Hence, the Chamber understood that at the end of October/ beginning of November 2002, on a ferry docked at the Port Beach naval base in Bangui, soldiers, invaded the bodies of eight women, who were from Boy-Rabé and PK12, by penetrating their vaginas with their penises, by deploying force.[2050]

Nonetheless, the Chamber did not rely on P47´s testimony in relation to two other alleged incidents of rape. The Chamber asserted that his testimony was confusing and incongruent regarding the quantity of perpetrators and victims, if a woman was killed by the MLC soldiers during the second incident, and even if the third incident did take place. Since there was not any other evidence in relation to the second and third incidents, the Chamber was unable to enter any finding in relation to them.[2051]

e. P23, P80, P81, P82, and two of P23's other daughters in PK12 in early November 2002;

In early November 2002, eight soldiers armed with guns entered P23's compound and threatened his family. Three of these soldiers started to assault P80, who was P23`s wife, in front of their children. Whilst holding P80 at gunpoint, the three soldiers invaded her body by penetrating her vagina with their penises. After the events, P80 presented physical injuries to her vagina, back, eyes, kidneys, and pelvis, and suffered social stigmatisation since people pointed and derided her.[2052]

In the same day, one soldier got hold of P82 (who was P23's granddaughter and was aged between 10 and 13 years old). She was taken outside where soldiers hit her with batons, and then at least two of soldiers penetrated her vagina with

[2049] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 234, para. 482
[2050] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, 234-235, para. 483
[2051] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 235, para. 484
[2052] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp. 238-239, para. 488

their penises in turns. As a result, P82 presented physical injuries to her vagina, endured pain, and rested socially excluded by other girls of the same age.[2053]

The Chamber observed that there were inconsistencies regarding P82's precise age, the time the facts took place, and the number of perpetrators. Nonetheless, in light of the witness´ demeanour, the time that had passed between the facts and her testimony, her young age at the time of the facts, the traumatic character of the events and the fact that her narrative was corroborated by her relatives and a neighbour, the Chamber did not find that such inconsistencies invalidated her testimony, which it regarded to be overall credible. Therefore, the Chamber found that, at the beginning of November 2002, in P23's compound in PK12, a minimum of two soldiers, by force, invaded P82's body and penetrated her vagina with their penises.[2054]

P23's daughter, P81, was also raped by a group of soldiers armed with Kalashnikovs on the same day, in a distinct house in the same compound. Four soldiers vaginally penetrated the witness while another soldier did not do it because she was bleeding. As a result, P81 had abdominal pains, difficulties conceiving, and suffered social stigma.[2055]

The Chamber rendered that the inconsistences in P81's testimony, (as for instance, in relation to her age at the time of the facts) were down to the length of time between the facts and the account, the traumatic nature of the events, and her difficulties in narrating these personal scenes in court. Thus, for the TC III the incongruences did not undermine P81's reliability. In light of the above, the Chamber found that in the same date and place, four soldiers, by force, invaded P81's body and penetrated her vagina with their penises.[2056]

Moreover, in accordance with P23 testimony, two of his other daughters, aged 14 and 16 years old, were also raped by vaginal penetration during the attack on the family's compound. In spite of the lack of certain details in P23´S testimony in relation to the rape of these 2 daughters, it was supported by P80, P81, and P82. Also, it agreed with the general circumstances of the attack on the family compound. As a result, the Chamber rendered his testimony reliable and found that in the same date and place, one or more perpetrators, by force, invaded the bodies of two of P23's daughters, aged 14 and 16 years, and penetrated their vaginas with their penises.[2057]

Also, in the same day in the compound, three armed soldiers forcefully penetrated P23's anus with their penises in front of his relatives and neighbour. After these facts, P23 could not walk due to the injuries to his anus and suffered

[2053] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 239, para. 489
[2054] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp. 239-240, para. 490
[2055] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 240, paras. 491-492
[2056] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 240, para. 492
[2057] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 240, para. 493

psychological damage. Community people did not respect him. Thus, the Chamber found that three perpetrators, by force, invaded P23's body and penetrated his anus with their penises.[2058]

f. P69 and his wife in PK12 at the end of November 2002;

In accordance with P69´s narrative, 6 armed soldiers entered his compound. At least four of them raped his wife by penetrating her vagina and anus with their penises. When P69 protested, two soldiers held him at gunpoint and raped him by penetrating his anus and mouth with their penises. After, P69 presented severe damage to his anus, and his wife had a surgery.[2059]

The Chamber observed that the evidence submitted by the Prosecution presented inconsistences in relation several issues, including if P69´s wife was inside or outside the house at the time of the facts, the number of soldiers who purportedly raped her and P69´s narrative of his own purported rape.[2060]

P69 clarified that there might have been mistakes on these points in the record of his previous statements. He testified that he was illiterate and as a result did not realise such these inconsistencies so as to correct them. Upon being challenged, P69 consistently sustained the account he had provided to TC III. In view of the time that had passed between the events and testimony, the traumatic nature of the events, P69's manner, his explanations for incongruences, and the spontaneity of his responses, the Chamber regarded that P69's testimony was reliable. Therefore, the Chamber found that at the end of November 2002, in P69's compound in PK12, perpetrators, by force, invaded the body of P69's wife and penetrated her vagina and anus with their penises; and two perpetrators, by force, invaded the body of P69 and penetrated his anus and mouth with their penises.[2061]

g. P22 in PK12 on or around 6 or 7 November 2002;

P22 lived in her uncle´s house in PK12. On or around 6 or 7 November 2002, a group of more than 20 CAR soldiers broke into the house, and 6 of them came to the room where she was and asked her to give them money. Subsequently, she was held at gunpoint, pushed onto bed and, after opening her legs with their boots, 3 soldiers penetrated her with their penises in turns. As a result, P22 had suicidal thoughts, was reluctant to maintain any sexual relationship, and presented symptoms of post-traumatic stress disorder. Thus, the Chamber found that, in the aforementioned date and place, three perpetrators, by force, invaded the body of P22 and penetrated her vagina with their penises.[2062]

[2058] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 240, para. 494
[2059] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 243, para. 498
[2060] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 243, para. 499
[2061] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp. 243-244, paras. 500-501
[2062] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp. 247-248, paras. 508-509

h. P79 and her daughter in PK12 several days after the MLC arrived in PK12;

Some days after the MLC had arrived in PK12, five armed soldiers invaded P79's house while she was sleeping. Whereas one soldier held her at gunpoint, two others took turns in forcibly penetrating her vagina with their penises. Afterwards, P79 presented both physical and psychological symptoms, inclusive of gastric problems, high blood pressure, hypertension, and nightmares. In the same circumstances, in another room, a soldier penetrated P79's 11-year-old daughter´s vagina with his penis in front of other children. The children tried to shout, but the soldiers threated to shoot them. Immediately after the rapes, P79 saw that her daughter had blood in the vagina.[2063]

The Chamber considered if it should accord weigh to the "procès verbal*"* which purported related to P79 and her daughter. P79 denied that these documents were authentic and affirmed that neither she nor her daughter had reported the violence they alleged suffered to the authorities appearing in the documents. P79 clarified that revealing the purported rape of her daughter, who was a Muslim girl, would keep her from finding a husband. Moreover, when comparing her signature with her previous statement, P79 denied that she had signed the "procès verbal d'audition de victime". Further, the letter head of the "procès verbal de constat*"* purported connected to P79's daughter did not present any determinate date, and these documents did not contain signatures or other information identifying P79 or her daughter. As a consequence, the Chamber did not give any weight to such documents when analysing the testimony of P79. [2064]

Accordingly, the Chamber found that, several days after the MLC arrived in PK12, she was raped by two perpetrators, who, by force, invaded her body by penetrating her vagina with their penises. The Chamber also found that P79's daughter was raped by a perpetrator, who, by force, invaded her body by penetrating her vagina. [2065]

i. P42's daughter in PK12 around the end of November 2002;

On a determinate date, at the end of November, the soldiers came to P42's house, and, his son asked them to pay for supplies they were taking from his business. As a consequence of this demonstration of resistance, the soldiers beat P42´s son, and then took him away to the military headquarters. More soldiers arrived at the house and, after accusing P42 of being a "rebel", forced him and his relatives to lie down facing the ground. The soldiers took P42's 10-year-old daughter to a shelter situated behind the house, where P42 could hear her crying out. The girl was vaginally penetrated by 2 soldiers- one did so with his finger

[2063] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp. 248-249, paras. 510-511
[2064] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp. 249-250, para. 512
[2065] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 250, para. 513

while the other employed his penis. Later, P42's wife told him that the girl was bleeding from her vagina and that her dress was stained with blood.[2066]

As a result, the Chamber found that, around the end of November 2002, at P42's compound in PK12, two perpetrators, by force, invaded the body of P42's daughter and penetrated her vagina.[2067]

j. a woman in the bush outside of PK22 in November 2002;

In November 2002, a woman identified by P75 encountered a group of four MLC soldiers and a woman in the bush outside PK22. After asking for money to the latter, the attackers threw her on the floor, beat her, and threatened her using arms. One soldier wiped his penis on the woman´s face, obliging her to lick it, whilst the other men were pulling her hair. When the woman resisted, they tore her clothes, pulled her legs apart, and three soldiers penetrated her vagina and one soldier penetrated her anus. After these facts, the woman was ashamed and presented several medical problems, inclusive of pelvic pain.[2068]

As a consequence, the TC III found that, in November 2002, in the bush outside PK22, three perpetrators, by force, invaded the body of a woman and penetrated her mouth, vagina, and anus with their penises.[2069]

k. P29 in Mongoumba on 5 March 2003;

On 5 March 2003, P29 was getting ready to run away, but she was forced to go back into the house by three soldiers. After kicking her to the ground, and pushing her legs apart, in spite of P29´s cries, the 3 men penetrated her vagina with their penises, in turns. Following the events, P29 felt sad constantly and found out that she had contracted HIV/AIDS.[2070]

In view of that, the Chamber found that, on 5 March 2003, in P29´s house in Mongoumba, three perpetrators, by force, invaded P29's body and penetrated her vagina with their penises.[2071]

[2066] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp. 251-252, paras. 515-516
[2067] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 252, para. 517
[2068] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp. 254-255, para. 522
[2069] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 255, para. 523
[2070] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp. 267-268, para. 545
[2071] *Ibidem*

l. V1 in Mongoumba on 5 March 2003

In the same date, a group of approximately 20 armed soldiers entered in the local hospital in Mongoumba and there intercepted Ms Pulchérie Makiandakama (V1) and other persons, who were hiding under beds.[2072]

Since V1 spoke Lingala, the soldiers took her from the hospital with them so as to serve as their interpreter. Following, the soldiers took V1 to a camp, close to the river bank, where 2 soldiers removed her trousers and underwear, and beat her onto the floor when she tried to resist. Then, the 2 men “slept with” and “raped" the witness in turns, in front of other soldiers.[2073]

V1 had to follow the soldiers back to Mongoumba, where they kept looting. Subsequently, the soldiers and V1 went back to the camp with the looted goods. There, V1 was thrown on the floor and stripped naked, and then 4 armed soldiers raped her in turns until she lost her conscious. When she recovered the conscious, she saw that the soldiers were continuing to attack her. A total of 12 men invaded her body by penetrating her mouth, vagina and anus with their penises. V1 was bleeding from her vagina and subsequently experienced pain in both her vagina and lungs, and also presented psychological issues. She affirmed she felt like as if she was no longer treated as a human being and was being called “Banyamulengué wife” in her community. This stigmatisation led her to lose her job, and, hence, be unable to support her children.[2074]

The Defence sustained that V1’s account was not reliable in view of its scale, and stressed numerous purportedly inconsistencies/omissions with her statement to the Legal Representative and victim application. The TCIII observed that V1’s victim application was written in French even though she does not understand this language. Further, V1 testified that the mentioned application was not re-read to her in Sango (the language commonly spoken in the Central African Republic). In relation to her previous statement to the Legal Representative, V1 admitted that she may have forgotten to mention some particularities. The Chamber asserted that in view of the time passed between the facts and testimony, the traumatic events, the V1´s explanations in relation to purported incongruences and omissions, her demeanour and consistent account under oath, the Chamber understood that such incongruences and omissions did not invalidate her testimony, which it regarded to be generally credible.[2075]

The Chamber observed that V1 did not clarify the meaning of her affirmation that the 2 soldiers had “slept with” her and “raped” her in the first incident. Nevertheless, the Chamber understood that her testimony that the 2 men had stripped off her clothes, including her underwear, and her testimony in relation to the second episode of rape, indicated that V1 employed the terms “slept with”

[2072] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p.268, para. 546
[2073] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp. 268-269, paras. 547-548
[2074] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp. 269-270, paras. 549-551
[2075] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p.271, para. 552

and “raped” in a manner that covered the penetration of her body by the soldiers with their penises. Consequently, the Chamber found that, on 5 March 2003, at a camp on the riverbank in Mongoumba, two perpetrators, by force, invaded V1’s body and penetrated her with their penises. Concerning the second incident, the Chamber found that, in the same date and place, 12 perpetrators, by force, invaded V1’s body and penetrated her vagina, anus and mouth with their penises.[2076]

Concerning the identity of the perpetrators of the rapes described above (as well as the charged murders and looting), the TC III found beyond reasonable doubt that they were MLC soldiers. The Chamber based its finding on several elements such as the soldiers´ uniform, the language they spoke to each other and the victims (Lingala, which is the language commonly spoken in the DRC or French), the circumstance that the victims and witnesses identified the attackers as “Banyamulengués” or MLC, the fact that their actions agreed with evidence of the “modus operandi” of MLC, the movements of the troop and exclusive presence of the MLC in the relevant places at the time of the crimes. Moreover, P119 affirmed that soldiers who arrived at her house in PK12 told her that “Papa Bemba” had sent them.[2077]

The Chamber observed that P29 had affirmed in her testimony that the foreign dialect spoken by the men who attacked her was probably not Lingala. However, the Chamber observed that she could neither identify nor understand the language the attackers spoke, that they communicate with her by using hand gestures, and that the other elements exposed above were also applicable to such perpetrators. As a consequence, the Chamber considered that there were enough elements which permitted to identify the perpetrators of rape against P29.[2078]

In view of these mentioned factors, considered together, the Chamber found beyond reasonable doubt that the perpetrators of the aforementioned rapes were MLC soldiers.[2079]

Further, the TC III, taking into account its finding beyond reasonable doubt that the contextual elements of both war crimes and crimes against humanity were satisfied, found[2080]

> “beyond reasonable doubt that the perpetrators knowingly and intentionally invaded the bodies of the victims by forcefully

[2076] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p.271, para. 553
[2077] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp. 227-228, 314-315, 318-319, paras. 467, 626-628, 634-636
[2078] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 318, para. 635
[2079] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 318, para. 636
[2080] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp. 319, 324-340, paras. 637, 649-692

penetrating their vaginas and/or anuses, and/or other bodily openings with their penises."[2081]

Therefore, the Chamber found beyond reasonable doubt that MLC soldiers perpetrated the war crime of rape and the crime against humanity of rape in the Central African Republic from on or about 26 October 2002 to 15 March 2003.[2082]

Moreover, the Chamber found beyond reasonable doubt that MLC soldiers perpetrated the war crime of murder and the crime against humanity of murder as well as the war crime of pillaging a town or place in the Central African Republic from on or about 26 October 2002 to 15 March 2003.[2083]

Regarding the command responsibility established in Article 28(a) of the Statute, the TC III disposed that the necessary elements were the following:

1-) The crimes within the jurisdiction of the Court must have been perpetrated by forces;

2-) The accused must have been either a military commander or someone effectively acting as a military commander;

3-) The accused must have had effective command and control, or effective authority and control, over the forces who perpetrated the crimes;

4-) Knowledge that the forces were perpetrating or about to perpetrate these crimes;

5-) The commander failed to take all necessary and reasonable measures that were within his power, which encompasses

a) Failure to prevent the perpetration of crimes;

b) Failure to repress the perpetration of crimes or submit the question to the competent authorities for investigation and prosecution;

6-) The crimes perpetrated by the forces must have resulted from the failure of the accused to exercise control properly over them.[2084]

The Trial Chamber found that such elements were present in the case at bench. In fact, the crimes of rape, murder and pillaging were perpetrated by forces (MLC troops). Bemba effectively acted as a military commander and had effective authority and control over the contingent of MLC troops in the Central African

[2081] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 319, para. 637
[2082] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 319, para. 638
[2083] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp. 49-52, 56-62, 313-316, 319-324, paras. 87-94, 113-125, 622-630, 639-648
[2084] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp. 79-97, paras. 170-213

Republic during the 2002-2003 CAR Operation. Further, the TC III found that he had knowledge that the forces were perpetrating or about to perpetrate these crimes. Surely, in view of the overall evidence, as well as the notoriety of the crimes, the accused's position, his regular contact with MLC officials in the CAR, the available communication channels, general sources of information regarding crimes committed by MLC soldiers (inclusive of media, NGO, and intelligence reports of the MLC), and Bemba's direct knowledge of claims of murder, rape, and pillaging by MLC soldiers at determined times during the 2002-2003 CAR Operation, the Chamber found beyond reasonable doubt that, during the 2002-2003 CAR Operation, Bemba knew that the MLC forces under his effective authority and control were perpetrating or about to perpetrate the crimes of rape, murder (as both crimes against humanity and war crimes) and pillaging (war crime).[2085]

Also, the TC III regarded that, although the accused had a broad range of available measures at his disposal, he took measures which plainly fell short of "all necessary and reasonable measures" within his material ability to prevent and repress the perpetration of crimes by his subordinates in the course of the 2002-2003 CAR Operation. Indeed, in spite of the existence of consistent internal (within the MLC organization) and external information (reported in the media) about crimes of murder, rape, and pillaging carried out by MLC soldiers during the 2002-2003 CAR Operation, Bemba took only minimal and inadequate measures (his reactions were restricted to general, public warnings to his troops not to mistreat the civilians, the establishment of two investigative commissions, the trial of seven low-ranking soldiers for pillaging of goods of rather limited value, and the Sibut Mission, that was not an investigation) to theoretically tackle all allegations of crimes. His real goal, in accordance with TC III´s finding, was to protect the MLC image and not to deter the commitment of these crimes.[2086]

What is more, the crimes were perpetrated as a consequence of Bemba failing to exercise control properly over the MLC troops. The Chamber found that, if the accused had taken appropriate measures, the crimes would have been avoided or would not have been perpetrated in the same circumstances. The Chamber, thus, found beyond reasonable doubt that the crimes of rape, murder (as both crimes against humanity and war crimes) and pillaging (war crime) carried out by the MLC forces during the 2002-2003 CAR Operation were a result of Bemba's failure to exercise control adequately.[2087]

Since the TC III´s found that the required elements of command responsibility of Article 28 (a) were present in the case at bench, it considered that Bemba could be held responsible for the charged crimes on such grounds.

[2085] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp. 345, 349-350, para. 705, 717

[2086] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp. 350-356, paras. 719-734

[2087] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p.359, para. 741

Surely, the Trial Chamber found

> "beyond reasonable doubt that Mr Bemba is criminally responsible under Article 28(a) for the crimes against humanity of murder and rape, and the war crimes of murder, rape, and pillaging committed by his forces in the course of the 2002-2003 CAR Operation."[2088]

In the disposition, "pursuant to Article 74(2)of the Statute," the TC III considered that Bemba was guilty, "under Article 28(a) of the Statute, as a person effectively acting as a military commander," of the crimes of murder (as crime against humanity and as war crime), rape (as crime against humanity and war crime), and pillaging (as war crime).[2089]

Judge Sylvia Steiner and Judge Kuniko Ozaki append separate opinions to the Judgment on minor questions concerning the reasoning, but not the outcome.[2090]

On 21 June 2016 the Trial Chamber III issued Decision on Sentence pursuant to Article 76 of the Statute. The Chamber affirmed that so as to sufficiently and adequately acknowledge the harm caused to the victims and achieve the goals of sentencing, the sentence imposed must be proportionate to the seriousness of the crimes, and the individual circumstances and culpability of the person found guilty. In this assessment, the Chamber regarded that, in the case at bench, the crimes of rape, murder, and pillaging were of serious gravity. The Chamber found that 2 aggravating circumstances were applicable to the crimes of rape, namely that it was perpetrated against especially defenceless victims, and that it was perpetrated with special cruelty. The Chamber also understood that Bemba Gombo´s culpable conduct was of serious gravity, and that there were not any mitigating circumstances in the case. In view of these and other factors analysed by the Chamber, Bemba Gombo was sentenced to 18 years of imprisonment.[2091]

This finding was a milestone in the history of the international persecution of sexual and gender-based crimes. Undoubtedly, 14 years after the beginning of the works of the International Criminal Court, for the first time an accused was tried and condemned by the Court for the perpetration of rape (and sexual and gender-based crimes "lato sensu").

[2088] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 359, para. 742

[2089] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 364, para. 752

[2090] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 364, para. 753; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Separate Opinion of Judge Sylvia Steiner (21 March 2016); ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Separate Opinion of Judge Kuniko Ozaki (21 March 2016)

[2091] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Decision on Sentence pursuant to Article 76 of the Statute, pp. 43, 44, 45, paras. 91, 93, 94. ICC-01/05-01/08-3399 (21 June 2016)

Moreover, it was the first time that the ICC convicted a defendant based on the command responsibility for the actions of his/her troops.[2092]

The Chamber, recalling the disposition of the Elements of Crimes, reaffirmed that the concept of invasion inserted in the Rome Statute was intended to be sufficiently ample so as to be genderless. Therefore, it encompasses same-sex penetration, and is applicable to both male and/or female offenders and victims. Furthermore, it covers acts of invasion culminating in penetration of any part of the body of the victim (including the mouth) by a sexual organ, or of the victim´s anal or genital opening with any object or any other part of the body.[2093]

As a result, it allowed for the penetration of a man´s anus to be tried as the crime of rape. In fact, although in different circumstances, 3 male witnesses (PK12, P23 and P69) testified that MLC soldiers had invaded their bodies by penetrating their anuses with their penises. The soldiers who attacked P69 also penetrated his mouth with their penises.

These acts were tried as rapes. This was a paramount development for never before in the international scenario sexual violence perpetrated against men had been prosecuted as rape “per se”.

Indeed, in the “Zenga” case, the ICTY held Landzo responsible for criminal acts he had incurred in, inclusive of obliging two brothers to commit fellatio on each other in front of other detainees. This act was regarded by the Trial Chamber as constituting the offences of inhuman treatment and cruel treatment (Articles 2 and 3 of the ICTY Statute). Nonetheless, the own Trial Chamber observed that such act could amount to rape for which culpability could have found if it had been pleaded in the adequate way.[2094]

In the Prosecutor v. Češić case, the same tribunal considered the event in which Češić, deploying a gun, forced 2 Muslim detainees who were brothers to beat each other and mutually perform sexual acts in front of other people, as violation of the laws or customs of war (recognised by Article 3 of the ICTY Statute and Article 3 (1) (c)-humiliating and degrading treatment- of the Geneva Conventions) and the crime against humanity inserted in Article 5 (g), which enlisted rape, but in the modality other forms of sexual assault.[2095]

[2092] The Guardian (2018). Jean-Pierre Bemba 's war crimes conviction overturned. In the Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber, Annex E to the Mr. Bemba’s claim for compensation and damages. ICC-01/05-01/08-3673-AnxE (19 March 2019)

[2093] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 53, paras. 99-101; Elements of Crimes of the International Criminal Court, Arts. 7 (1) (g)-1, Element 1, footnote 15; 8 (2) (b) (xxii)-1, Element 1, footnote 50, (e)(vi)-1, Element 1, footnote 63; ICTY. The Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T. Trial Chamber, Judgment, pp. 72-73, paras. 183-185 (10 December 1998); ICTY. The Prosecutor v. Zejnil Delalic et al. (Celebici Case). Trial Chamber, Judgment, p. 364, para. 1066

[2094] ICTY. The Prosecutor v. Zejnil Delalic et al. (Celebici Case). Trial Chamber, Judgment, pp. 3, 363-364, footnote 7, paras. 1062-1066

[2095] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, pp. 60-61, para. 171; ICC. The Prosecutor v.

Therefore, in the Bemba case, the ICC had the merit of including under the counts of the war crime of rape and the crime against humanity of rape the invasion culminating in penetration of a man´s body (anus and mouth) by the offender´s penis. The ICC finally put in practice the theory that the crime of rape enlisted in the Rome Statute was constructed so as to be gender-neutral. This is a step forward in the persecution of sexual crime. It places both women and men as putative victims of rape, instead of making a difference of terminology for the same act (penetration of one´s anus or mouth) in accordance with the gender of the victim. Thus, women and men were made equal as victims of rape even though women constitute the greatest majority of rape victims.

Although rape is horrific and condemnable in all its forms, the fact that men are included as victims should entail a lower degree of stigmatisation and discrimination against women victims of rape. This reaffirmation of the gender-neutral character of the crime of rape should have a positive impact on how women victims of rape are socially perceived. In fact, it might contribute for the social awareness that, independently of their gender, victims of sexual violence should be treated as victims, with due respect, instead of having doubts casted about their consent to the performance of the sexual acts and having their sexual past brought into discussion before the court. Hence, the Trial Chamber III´s Judgment pursuant to Article 74 of the Statute in the Bemba case constitutes a hallmark in the prosecution of sexual crimes in the international criminal scenario.

In addition, this was the first ICC case in which an accused was convicted on basis of a sexual crime. Surely, as discussed in the ulterior two chapters, in the Lubanga case there were no charges of sexual crimes while in the Katanga case, there were charges of the crimes of rape and sexual slavery, but the accused was not found guilty of them. Certainly, in the latter, the Trial Chamber II recognised that such crimes were perpetrated during and of the 24 February 2003 attack on Bogoro and in its aftermath. However, the Chamber found that crimes of rape and sexual slavery were not part of the common purpose of the Ngiti militia of Walendu-Bindi “collectivité” and, accordingly, the accused could not be held responsible for them. The TC II decided to include the pursuit and rapes of 2 witnesses amidst the acts constituting the war crime of attack against civilians.[2096]

Hence, the Trial Chamber III´s judgment finding Bemba guilty of the crimes of rape could pave the way for future convictions for the perpetration of sexual and gender-based crimes.

Further, the Trial Chamber III (following the steps of Trial Chamber II in the Katanga case) appeared to be attuned to the specificities of sexual and gender-based crimes, demonstrating to be attentive to the special characteristics of

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Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 240, 243, paras. 494, 498; ICTY. The Prosecutor v. Ranko Češić. Third Amended Indictment, Counts 7-8, Sexual Assault; Hayes, N. (2016)

[2096] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Judgment pursuant to article 74 of the Statute, pp. 309-310, 329, paras. 829, 876

witnesses who were victims of rape. Undoubtedly, the Chamber recognised that the traumatic nature of the circumstances these witnesses describe, their eventual young age, and the time elapsed between the events and the testimony are factors that bear weight on their accounts and can lead to omissions/gaps or apparent contradictions. Nevertheless, the Chamber adequately addressed the dimension and extent of the omissions and contradictions and if such elements could undermine the credibility and reliability of the testimony on a case by case basis. The Chamber also paid due regard to the difficulty the witness might have in recalling the obnoxious events and the violence they suffered and that it can affect their testimonies.

It is also noteworthy that, as sustained by dissenting Judge Steiner, it seems that the Majority of Trial Chamber III unfairly and without a steady basis limited the victims' participatory rights in the case. Indeed, when the victims' Legal Representative posed for 7 victims to give evidence and present their views and concerns (out of a total of 2287 victims whose participation in the proceeding had already been authorised by the Chamber), the Majority of TC III decided to restrict their participation by only allowing 2 victims to give evidence and 3 other victims to present their views and concerns before the Court. One of the arguments used by the majority of the Chamber was that the proceedings would be unduly delayed if the 7 victims had been granted participation. Nevertheless, as Judge Steiner highlighted, in view of the number of victims in the case, to allow 7 victims to testify or present their views and concerns before the Court does not seem exaggerate, on the contrary. Also, bearing in mind the time that had been spent in the submission of evidence, it is very unlikely that permitting 2 more victims to submit evidence or present their views and concerns before the Court would negatively impact the pace of the proceedings.[2097]

All and all, the fact that Bemba was convicted for the war crime and crime against humanity of rape gave rise to a rather positive prospect of the international persecution of sexual and gender-based crimes.

The ICC appeared to be up to its mandate of enforcing international justice and not permitting the gravest crimes of concern to the international community go unpunished.

This case could serve as a precedent for posterior convictions based on sexual and gender-based crime. Moreover, in consonance with the Court´s goal to contribute to the prevention to such crimes, Bemba´s conviction could have a deterrent effect on the rapes "stricto sensu" and sexual and gender-based crimes "lato sensu". Certainly, potential perpetrators would be aware that they could indeed be held responsible if they incur in these crimes.

[2097] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, pp. 5-10, paras. 9-23; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, p. 11, para. 19, quoting ICC-01/04-01/06-2032-Anx, para. 25; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 20, para. 27

From the victims´ viewpoint, Bemba´s conviction of rape by TC III meant that the sexual violence they suffered would be vindicated.

By delivering such judgment, the Trial Chamber III seemed to be serving the interests of justice and giving an appropriate and satisfying answer to victims.

The ICC seemed to have proved wrong the perceived mistrust from victims, NGOs and the general international criminal community in relation to its ability and efforts to charge and condemn those responsible for sexual crimes in the terms of the Rome Statute.

Moreover, sexual and gender-based crimes appeared to acquire a higher status, being included among the crimes which can in fact grant a conviction by the International Criminal Court.

This was a turning point decision for the previous cases involving sexual violence were permeated by gaps that led to lack of charges (in the Lubanga case) and of condemnation (in the Katanga case) of the accused charged of sexual criminal offences.

However, Trial Chamber III´s verdict and sentence were subject to appeals. The Defence to Bemba appealed both whilst the Prosecutor appealed the sentence.[2098]

From 9 to 12 January 2018 and on 16 January, the Appeals Chamber held hearings in the case in order to hear the submissions and observations of the Prosecution, Defence and participants on the appeals.[2099]

8.4. The Appeals Chamber´s Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute"

On 8 June 2018, the Appeals Chamber issued its "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's Judgment pursuant to Article 74 of the Statute".[2100]

By Majority (Judge Monageng and Judge Hofmański dissented), the Appeals Chamber decided to reverse the Trial Chamber III´s Judgment.[2101]

[2098] ICC. Media Advisory, Bemba case: Appeals Chamber to issue appeals judgments on verdict and sentence on 8 June 2018. ICC-CPI-20180518-MA225 (18 May 2018)
[2099] ICC website, Bemba Case, The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08; ICC website, Case Information Sheet, Situation in the Central African Republic, The Prosecutor v. Jean-Pierre Bemba Gombo (March 2019)
[2100] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute" (8 June 2018)
[2101] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p. 4, para. 1

Surely, even though the Trial Chamber III´s conviction was unanimous, the Appeals Chamber judgment reversing the TC´s judgment was issued by Majority, namely Presiding Judge Christine Van den Wyngaert, Judge Chile Eboe-Osuji and Judge Howard Morrison. Judge Monageng and Judge Hofmański appended a dissenting opinion to the Majority´s judgment in relation to both the "reasons and the outcome." Further, Judge Van den Wyngaert and Judge Morrison appended a "joint separate opinion to this judgment", and, subsequently, Judge Eboe-Osuji appended a "separate opinion to this judgment".[2102]

It is noteworthy that the Majority "adopted a number of modifications to the standard of appellate review for alleged errors of fact."[2103]

Surely, in relation to the "standard of review", the Majority recalled that, in accordance with article 83 (2) of the Rome Statute, the Appeals Chamber can[2104]

> "intervene only if it "finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error"."[2105]

in the Lubanga case the Appeals Chamber established the following:

> "Having regard to the similarity between the Court's legal framework and those under which the *ad hoc* tribunals operate, the Appeals Chamber considers it appropriate to apply the same standard. Accordingly, when a factual error is alleged, the Appeals Chamber will determine whether a reasonable Trial Chamber could have been satisfied beyond reasonable doubt as to the finding in question."[2106]

[2102] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", pp. 5, 80; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, p. 4, para. 4 (8 June 2018); ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Separate Opinion of Judge Van den Wyngaert and Judge Morrison (8 June 2018); ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Concurring Separate Opinion of Judge Eboe-Osuji (14 June 2018)

[2103] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, p. 4, para. 4

[2104] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p.12, para. 35

[2105] Rome Statute, Art. 83 (2)

[2106] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute", p. 13, para. 27

Nonetheless, the Majority of the Appeals Chamber in the Bemba case stated that

> "[i]t has previously been stated that when a factual error is alleged, the Appeals Chamber's task is to determine whether a reasonable trial chamber could have been satisfied beyond reasonable doubt as to the finding in question, thereby applying a margin of deference to the factual findings of the trial chamber. However, the Appeals Chamber considers that the idea of a margin of deference to the factual findings of the trial chamber must be approached with extreme caution."[2107]

And continued saying that

> "when assessing the reasonableness of a factual finding, the Appeals Chamber will have regard not only to the evidence relied upon, but also to the trial chamber's reasoning in analysing it. In particular if the supporting evidence is, on its face, weak, or if there is significant contradictory evidence, deficiencies in the trial chamber's reasoning as to why it found that evidence persuasive may lead the Appeals Chamber to conclude that the finding in question was such that no reasonable trier of fact could have reached. Nevertheless, the emphasis of the Appeals Chamber's assessment is on the substance: whether the evidence was such as to allow a reasonable trial chamber to reach the finding it did beyond reasonable doubt.
>
> 45. Ultimately, the Appeals Chamber must be satisfied that factual findings that are made beyond reasonable doubt are clear and unassailable, both in terms of evidence and rationale… However, when a reasonable and objective person can articulate serious doubts about the accuracy of a given finding, and is able to support this view with specific arguments, this is a strong indication that the trial chamber may not have respected the standard of proof and, accordingly, that an error of fact may have been made.
>
> 46. When the trial chamber is not convinced of guilt beyond reasonable doubt it must refrain from entering a finding. Accordingly, when the Appeals Chamber is able to identify findings that can reasonably be called into doubt, it must overturn them. This is not a matter of the Appeals Chamber substituting its own factual findings for those of the trial chamber. It is merely an application of the standard of proof."[2108]

[2107] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p.13, para. 38

[2108] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p.15, paras. 44-46

Therefore, the Majority of the Appeals Chamber decided to deviate from the "regular" standard of review in relation to factual errors (consisting in "to determine whether a reasonable trial chamber could have been satisfied beyond reasonable doubt as to the finding in question").[2109]

Instead, the Majority understood that when the

> "Appeals Chamber is able to identify findings that can reasonably be called into doubt, it must overturn them."[2110]

In relation to the merits, the Majority of the Appeals Chamber declared that the some of the crimes were not within the facts and circumstances described in the charges and that the Trial Chamber III, thus, could not render a verdict regarding them. Such crimes were the subsequent ones:[2111]

> "i. The murder of P69's sister in PK12 the day after the MLC's arrival in PK12;
>
> ii. Pillaging of the belongings of P69's sister in PK12 the day after the MLC arrived;
>
> iii. Pillaging of the belongings of P69 in PK12 the day after the MLC arrived;
>
> iv. Pillaging of the belongings of P110 in PK12 the day after the MLC arrived;
>
> v. Pillaging of the belongings of P79 and her brother in PK12 several days after the MLC's arrival;
>
> vi. The rape of P79 and her daughter in PK12 several days after the MLC arrived in PK12;
>
> vii. Pillaging of the property of V2 in Sibut in the days after the MLC's arrival.
>
> viii. Pillaging of the belongings of P108 in PK12 during the MLC's presence;

[2109] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute", p. 13, para. 27; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p.13, para. 38

[2110] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p. 15, para. 46

[2111]ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p. 4, para. 2

ix. The rape of two unidentified girls aged 12 and 13 years in Bangui on or around 30 October 2002;

x. Pillaging of the belongings of P119 in Bangui after 30 October 2002;

xi. Pillaging of the belongings of P112 in PK12 in November 2002;

xii. The rape of a woman in the bush outside of PK22 in November 2002;

xiii. Pillaging of the belongings of a woman in the bush outside PK22 in November 2002;

xiv. The rape of P69 and his wife in PK12 at the end of November 2002;

xv. Pillaging of the belongings of P73 in PK12 at the end of November 2002;

xvi. The rape of V1 in Mongoumba on 5 March 2003;

xvii. Pillaging of the property of V1, a church, nuns, priests, an unidentified "Muslim" man and his neighbour, the gendarmerie, and mayor in Mongoumba on 5 March 2003; and

xviii. The murder of an unidentified "Muslim" man on 5 March 2003 in Mongoumba witnessed by V1."[2112]

Undoubtedly, the Majority of the Appeals Chamber recalled that these crimes of murder, rape and pillage were added by the Prosecutor (by way of disclosure and inclusion in auxiliary documents) after the confirmation of the charges against Bemba and the seisure of Trial Chamber III of the case. Even though the Majority of the AC considered that this approach seemed to be coherent with TC III's understanding that the Pre-Trial Chamber had not intended to restrict the criminal acts reached by this case to those expressly included in the Amended Document Containing the Charges, it regarded that such the criminal acts could not be considered part of the facts and circumstances described in the charges pursuant to article 74 (2) of the Statute.[2113]

[2112] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", pp. 42-43, para. 116

[2113] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p. 41, paras. 115-116

Indeed, the majority of the Appeals Chamber considered that

> "[s]imply listing the categories of crimes with which a person is to be charged or stating, in broad general terms, the temporal and geographical parameters of the charge is not sufficient to comply with the requirements of regulation 52 (b) of the Regulations of the Court and does not allow for a meaningful application of article 74 (2) of the Statute."[2114]

The Majority of the Appeals Chamber observed that "the Amended Document Containing the Charges" and the "Confirmation Decision" presented identified criminal acts, which amount to a more detailed factual allegations in relation to the crimes for which Bemba was to be prosecuted. The Majority concluded that the facts and circumstances connected to the crimes were described at the level of "individual criminal acts". As a result, only the[2115]

> "the criminal acts that were mentioned in the Amended Document Containing the Charges and mentioned with approval in the Confirmation Decision were within the scope of this case."[2116]

The "individual criminal acts" included subsequently to the Confirmation Decision "were outside the scope of the charges". Indeed, in accordance with the Majority,[2117]

> "adding any additional criminal acts of murder, rape and pillage would have required an amendment to the charges, which, however, did not occur in the case at hand." [2118]

The Majority of the Appeals Chamber´s argument was that, in this particular case, the Prosecutor had devised the charges with a degree of detail which was enough for the ends of that provision solely in relation of the criminal acts specified in the Amended Document Containing the Charges. Consequently, the addition of any

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[2114] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p. 39, para. 110

[2115] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", pp. 39-41, paras. 111-115

[2116] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p. 39, para. 113

[2117] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", pp. 39-41, paras. 111-115

[2118] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", pp. 41-42, para. 115

further criminal acts of murder, rape and pillage would have demanded an amendment to the charges, which was not made.[2119]

The Majority affirmed that, in view of the manner in which the charges were pleaded by the Prosecutor in the case,

> "an amendment to the charges… was the only course of action that would have allowed additional criminal acts to enter the scope of the trial." [2120]

As such amendment did not take place, the Appeals Chamber found, by Majority, that the "individual criminal acts" included in the case subsequently to the Confirmation Decision could not be considered as being subsumed in the facts and circumstances outlined in the charges. [2121]

Certainly, the Majority affirmed that

> "the criminal acts that were added after the Confirmation Decision had been issued did not form part of the "facts and circumstances described in the charges" – to the extent that the document containing the charges was not amended to reflect them – and Mr Bemba could therefore not be convicted of them. The same applies to the criminal acts put forward by the Victims."[2122]

As a result, Bemba could not be found guilty of such crimes.[2123]

Therefore, concerning the conviction of Bemba, "the only criminal acts that the Trial Chamber found to be established beyond reasonable doubt" to be included in the "scope of the charges" were these: [2124]

> "i. The rape of P87 in Bangui on or around 30 October 2002;

[2119] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", pp. 41-43, paras. 115-116

[2120] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", pp. 41-42, para. 115

[2121] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", pp. 41-43, paras. 115-116

[2122] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", pp. 41-42, para. 115

[2123] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", pp. 41-43, paras. 115- 116

[2124] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", pp. 43-44, para. 118

> ii. Pillaging of the property of P87 and her family in Bangui on or around 30 October 2002;
>
> iii. The murder of P87's "brother" in Bangui at the end of October 2002;
>
> iv. The rape of P68 and P68's sister-in-law in Bangui at the end of October 2002;
>
> v. The rape of P23, P80, P81, P82, and two of P23's other daughters in PK12 in early November 2002;
>
> vi. Pillaging of the property of P23, P80, P81, and P82 in Bangui in early November 2002;
>
> vii. The rape of P22 in PK12 on or around 6 or 7 November 2002;
>
> viii. Pillaging of the property of P22 and her uncle in PK12 on or around 6 or 7 November 2002;
>
> ix. The rape of P42's daughter in PK12 around the end of November 2002;
>
> x. Pillaging of the property of P42 and his family in PK12 at the end of November 2002; and
>
> xi. The rape of P29 in Mongoumba on 5 March 2003."[2125]

Thus, Bemba was found guilty of one murder, the rape of 20 persons and 5 acts of pillaging.[2126]

The Appeals Chamber analised exclusively these crimes when examining the argument of the Defence that

> "the Trial Chamber erred when it found that he was responsible as a commander pursuant to article 28 (a) of the Statute for crimes that MLC troops had committed during the 2002-2003 CAR Operation."[2127]

The Defence raised numerous arguments against the finding of TC III, and its overall argument is that no reasonable trial chamber could have concluded that Bemba[2128]

[2125] *Ibidem*
[2126] *Ibidem*
[2127] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p. 44, para. 120
[2128] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p.66, para. 166

> "failed to take all necessary and reasonable measures within his power to prevent or repress the commission of crimes by his subordinates during the 2002-2003 CAR Operation, or to submit the matter to the competent authorities."[2129]

The Majority applied its novel, modified standard of appellate review in regard to factual errors. Indeed, the Majority rendered that whenever "the Appeals Chamber is able to identify findings that can reasonably be called into doubt," it can "interfere with the factual findings of the first-instance chamber" so as to avoid a miscarriage of justice.[2130]

Even though the application of this standard entails a lower degree of deference to the Trial Chamber, the Majority stated that "[w]hen a factual error is alleged, the Appeals Chamber will not assess the evidence de novo."[2131]

The Majority identified the subsequent serious errors in TC III´s analysis of whether or not Bemba took all necessary and reasonable measures to prevent or repress the perpetration of crimes by his subordinates or to submit the matter to the competent authorities for investigation and prosecution:

> "(i) the Trial Chamber erred by failing to properly appreciate the limitations that Mr Bemba would have faced in investigating and prosecuting crimes as a remote commander sending troops to a foreign country;
>
> (ii) the Trial Chamber erred by failing to address Mr Bemba's argument that he sent a letter to the CAR authorities before concluding that Mr Bemba had not referred allegations of crimes to the CAR authorities for investigation;
>
> (iii) the Trial Chamber erred in considering that the motivations that it attributed to Mr Bemba were indicative of a lack of genuineness in adopting measures to prevent and repress the commission of crimes;
>
> (iv) the Trial Chamber erred in attributing to Mr Bemba any limitations it found in the mandate, execution and/or results of the measures taken;
>
> (v) the Trial Chamber erred in finding that Mr Bemba failed to empower other MLC officials to fully and adequately investigate and prosecute crimes;

[2129] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 356, para. 734

[2130] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", pp. 13, 15, paras. 40, 46

[2131] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p. 14, para. 42; SáCouto, S. (2018)

> (vi) the Trial Chamber erred in failing to give any indication of the approximate number of the crimes committed and to assess the impact of this on the determination of whether Mr Bemba took all necessary and reasonable measures;
>
> and (vii) the Trial Chamber erred by taking into account the redeployment of MLC troops, for example to avoid contact with the civilian population as a measure available to Mr Bemba."[2132]

The Majority of the Appeals Chamber then assessed the cumulative material impact of such errors. It concluded that such errors resulted in an unreasonable analysis by TC III of whether Bemba failed to adopt all necessary and reasonable measures in the circumstances that existed at the time.[2133]

As a consequence, the Majority found that the Trial Chamber's errors materially affected the latter's conclusion on Bemba´s failure to take all necessary and reasonable measures in answer to MLC crimes in the Central African Republic. Absent one of the elements of command responsibility under article 28 (a) of the Statute, Bemba cannot be considered criminally responsible pursuant to such article for the crimes perpetrated by MLC troops in the course of the 2002-2003 CAR Operation.[2134]

In fact, the Majority of the Appeals Chamber understood that TC III's finding that Bemba was guilty of the aforementioned crimes (of one murder, the rape of 20 persons and 5 acts of pillaging) was unreasonable for it presented serious errors.[2135]

In sum, the Majority considered that the Trial Chamber III erred when convicted for the criminal acts aforementioned enumerated because such criminal acts were not part of the "facts and circumstances described in the charges" in accordance with article 74 (2) of the Statute. Moreover, In regard to the other criminal acts, its view was that TC III erred when finding that Bemba had failed to adopt all necessary and reasonable measures that were in his power to prevent or repress the crimes perpetrated by MLC soldiers, or to take the issue to the competent authorities for investigation and prosecution.[2136]

[2132] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p. 77, para. 189
[2133] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", pp. 77, 78, paras. 189, 193
[2134] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p. 79, para. 194
[2135] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", pp. 44, 66, paras. 118, 166
[2136] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p. 79, para. 196

In these circumstances, the Majority regarded "it appropriate to reverse the conviction of Mr Bemba". It declared that the aforementioned list of "criminal acts" were "outside the scope of this case and that the proceedings in that regard are discontinued".[2137]

In what concerns the remaining criminal acts of which Bemba was found guilty, the Majority of the AC reversed Bemba´s conviction and entered an acquittal. Indeed, it considered that the error identified in the finding of Trial Chamber III related to necessary and reasonable measures totally expunged Bemba´s criminal responsibility for such crimes.[2138]

The Majority of the Appeals Chamber observed that upon an acquittal, the acquitted person should be released from detention right away. Nevertheless, Bemba was found guilty of offences against the administration of justice (in the terms of article 70 (1) (a) and (c) of the Rome Statute) by the ICC in the Prosecutor v. Jean-Pierre Bemba Gombo et al. case, which is related to the Prosecutor v. Jean-Pierre Bemba Gombo case. As a consequence of this other case, Bemba was not immediately released.[2139]

However, on 12 June 2018, Trial Chamber VII of the ICC (that is in charge of the Prosecutor v. Jean-Pierre Bemba Gombo et al case) issued a decision in which it ordered Bemba´s interim release (with determined conditions, including that he must abstain from making public statements on the case, "not change his address without prior notice to the Court", "[n]ot contact any witnesses in this case," strictly observe all orders in the case, and "surrender himself immediately to the relevant authorities" if the TC VII so determines) whilst it is pending a final decision on his sentence. Following arrangements, 3 days later, he was released in Belgium.[2140]

8.5. Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański

In the Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, they affirmed that they would have confirmed Bemba´s conviction by Trial Chamber III in the Judgment pursuant to Article 74 of the Statute.[2141]

[2137] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p. 79, para. 197

[2138] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p. 79, para. 198

[2139] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p. 80, paras. 199-200; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13; ICC website, Bemba et al. case: Mr Bemba on interim release in Belgium pending final decision on sentence (15 June 2018)

[2140] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo et al., Case No. ICC-01/05-01/13. Trial Chamber VII, Decision on Mr Bemba`s Application for Release (12 June 2018)

[2141] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, p. 3, para. 1

These 2 Judges disagreed with both the Majority´s decision to discontinue the proceedings in relation to some of the criminal acts and to reverse Bemba´s conviction with respect to the remnant of the criminal acts. Surely, they disagreed with the Majority´s conclusions related to the scope of the charges and with its analysis if Bemba failed to take all necessary and reasonable measures to prevent, repress or punish the perpetration of crimes by his subordinates.[2142]

In relation to change by the Majority of the established standard of appellate review for alleged factual findings, the Dissenting Judges affirmed that the Majority did

> "not provide any reason for departing from the established standard of appellate review for alleged factual findings, which has been applied in all judgments on final appeals before the Court, including the Bemba et al. Appeal Judgment of 8 March 2018. They do not give reasons for this departure, despite the standard of review being a fundamental question for the appellate process with significant implications for the parties and participants."[2143]

In connection with the scope of the charge, Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański asserted that it is possible for the facts and circumstances to be described in the charges at a wide plane for the ends of article 74 (2) of the Statute in the initial stages of a case. Their understating is that the Pre-Trial Chamber´s task is to establish if there is a case to be tried ("whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged") instead of confirming or delineating all the factual allegations grounding the charges for the ends of the trial.[2144]

They regarded that the Pre-Trial Chamber can confirm the crimes charged in an ample manner subject to the nature of the charges. In this respect, the minority of the Judges affirmed that the discretion of the Prosecutor in the approach of formulating the charges depends on the particular circumstances of each case. They observed that in cases in which command responsibility is alleged for mass crimes perpetrated by the accused's subordinates, the focal point of the case will usually be the accused person's ability and failure to exercise control properly. Surely, in such cases (among which the one at hand is included)[2145]

> "the detail of the individual criminal acts alleged will usually be less material to the description of the charges under article 74 (2)

[2142] *Ibidem*

[2143] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, p. 4, para. 5

[2144] Rome Statute, Art. 61 (7); ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, p. 12, para. 21

[2145] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, pp. 12, 14, paras. 21, 27

> of the Statute than in cases, for example, where the accused is alleged to have directly perpetrated those acts."[2146]

Certainly, it should be taken into account that Bemba was charged with command responsibility pursuant to article 28 (a) of the Rome Statute and was purported to have been far from the actual perpetration of crimes by MLC troops.[2147]

These Judges also affirmed that, in the case at stake, the document containing the charges established the scope of the charges by means of temporal parameters, geographical parameters and other factual parameters. Nevertheless, unlike the Majority's suggestion that "a territory of more than 600,000 square kilometres" was encompassed by reference to the territory of the CAR, they understood that the temporal and geographical scope of the charges was narrowed down by reference to the description of the circumstance that MLC advanced through and withdrew from the CAR during such period of time. Therefore, the charges encompassed a relatively limited area, precisely, numerous particular localities and two axes between other particular localities. Further, whilst the document containing the charges enumerated a series of examples of particularised criminal acts, it clearly stated that the charges "include, but are not limited to" such acts.[2148]

Their view was that, in the present case, the charges were formulated in a broad manner, not being circumscribed to the particular individual criminal acts appearing in the Amended Document Containing the Charges and in the Confirmation Decision. The totality of criminal acts was within the scope of the charges in the measure that they were acts of murder, rape or pillaging perpetrated by MLC troops from approximately 26 October 2002 until 15 March 2003, during the movement of the forces through the CAR territory.[2149]

Therefore, the Dissenting Judges regarded the description of the facts and circumstances inserted in the charges to be appropriate from the viewpoint of article 74 (2) of the Rome Statute in the circumstances of the case.[2150]

[2146] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, p. 14, para. 27

[2147] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, pp. 15-16, para. 32

[2148] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p. 36, para. 103; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Corrected Revised Second Amended Document Containing the Charges, pp. 32-34 (13 October 2010); ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, pp. 14-16, paras. 29-32

[2149] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, pp. 15-16, 18, paras. 32, 37

[2150] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, pp. 15-16, para. 32

Indeed, in light of the foregoing arguments, the Dissenting Judges disagreed with the Majority that the charges in the present case were formulated too widely to constitute a meaningful description of the charges pursuant to the terms of article 74 (2) of the Rome Statute. Such article concerns the congruence between the charges and the conviction, instead of the degree of detail of the charges. The Prosecutor has discretion when formulating the charges, thus, she can choose to formulate them at a broader level. The exercise of this prerogative by the Prosecutor does not impact the Pre-Trial Chamber´s task of confirming the crimes charged and committing the person for trial.[2151]

In sum, the scope of the charges was determined by means of temporal, geographical and other factual parameters, being more particularised with the description of the advance through and retraction from the CAR of the MLC forces. In view of that, and taking into consideration the mode of criminal responsibility charged, Bemba´s remote position to the crimes charged and the quantity of criminal acts purported, the Dissenting Judges found that the facts and circumstances were adequately described in the charges.[2152]

Undoubtedly, in face of the ample formulation of the charges, the Dissenting Judges understood that the conviction did not exceed the facts and circumstances described in the charges, pursuant to article 74 (2) of the Rome Statute. Consequently, they would have concluded that Bemba failed to demonstrate that the Trial Chamber committed a legal error.[2153]

Accordingly, the aforementioned Judges would have found that Bemba's conviction did not surpass the facts and circumstances described in the charges, and, therefore, would not have discontinued the proceedings connected the criminal acts which the Majority found that to exceeded the facts and circumstances portrayed in the charges.[2154]

The Dissenting Judges also disagreed with the finding of the Majority that Bemba did not fail to take all necessary and reasonable measures within his power to prevent or repress the perpetration of crimes.

Surely, they reviewed the Trial Chamber's findings in light of the arguments raised by the Defence on appeal, but did not find any error in the Trial Chamber's findings or any unreasonableness in the general conclusions. As a consequence, they would have rejected the Defence's arguments and confirmed Trial Chamber III´s findings and conclusions.[2155]

[2151] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, pp. 18-19, para. 39

[2152] *Ibidem*

[2153] *Ibidem*

[2154] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, p. 12, para. 22

[2155] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, p. 20, para. 43

The Dissenting Judges affirmed that the Majority reached its conclusion after conducting an unacceptable and deeply flawed assessment. In relation to the measures adopted by Bemba, the Majority found that the Trial Chamber III:

> "(i) paid insufficient attention to the fact that the MLC troops were operating in a foreign country with the attendant difficulties on Mr Bemba's ability to take measures; (ii) treated Mr Bemba's motivations as determinative of the adequacy or otherwise of the measures; and (iii) failed to establish that Mr Bemba purposively limited the mandates of the commissions and inquiries."[2156]

In accordance with the understanding of the Dissenting Judges, the first error identified by the Majority was grounded

> "on an erroneous assessment of a limited part of the evidentiary record and the uncritical acceptance of Mr Bemba's unsubstantiated argument, which does not point to any attempts to investigate that were in fact made and proved impossible."[2157]

The second error signalised was not raised by the Defence and seems to mirror the subjective view of the Majority in relation to the Trial Chamber's reasoning.[2158]

In relation to the third error, the Dissenting Judges considered

> "the Majority's position to misconstrue the nature of criminal liability under article 28 of the Statute. Notably, in faulting the Trial Chamber for failing to make findings as to whether the shortcomings in the measures that Mr Bemba took could be attributed to him and whether he purposively limited the mandates of the commissions and inquiries that he set up, the Majority seems to lose sight of the focus of article 28 of the Statute, namely holding a commander responsible for his failures and not for his actions."[2159]

The Majority appeared to accept Bemba's rather weak arguments without further looking into it merits in face of the evidentiary assessment and findings of the Trial Chamber. Surely, it neither analysed the availability of measures within Bemba´s reach nor did it review the appropriateness of the Trial Chamber III´s conclusions in light of the submitted evidence.[2160]

[2156] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, p. 20, para. 44

[2157] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, p. 20, para. 45

[2158] *Ibidem*

[2159] *Ibidem*

[2160] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, pp. 38-39, para. 110

Instead, the Majority pinpointed some doubts regarding minor factual findings of the Trial Chamber, and, following, concluded that the latter´s overall finding was unreasonable.[2161]

The Dissenting Judges could not agree with the Majority´s approach and consecutive conclusion that Bemba did not fail[2162]

> "to take all necessary and reasonable measures within his power to prevent or repress the commission of crimes by his subordinates … or to submit the matter to the competent authorities."[2163]

Hence, they would have dismissed Bemba's arguments and confirmed the Trial Chamber III's finding.[2164]

8.6. Analysis of the decision of the Majority of the Appeals Chamber (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute" dated 8 June 2018) and its potential consequences

Jean-Pierre Bemba Gombo was convicted by the Trial Chamber III in its Judgment pursuant to Article 74 of the Statute dated 21 March 2016, being subsequently sentenced to 18 years imprisonment. On 8 June 2018, Bemba was acquitted by the Majority of the Appeals Chamber in its Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute".

The decision of the Majority of the Appeals Chamber to reform Trial Chamber III´s conviction brings about important consequences.

In broad terms, in the 17 years that the International Criminal Court has been in operation, Bemba was one of the four people (together with Thomas Lubanga Dyilo, Germain Katanga and Ahmad Al Faqi Al Mahdi) unappealable convicted by the Court, and the one with the highest ranking amidst them.[2165]

As affirmed by McKay,

> [t]his was the first ICC case with a major focus on the use of rape as a weapon of war and testing the notion of command responsibility".[2166]

[2161] *Ibidem*
[2162] *Ibidem*
[2163] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 356, para. 734
[2164] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, pp. 38-39, para. 110
[2165] van den Berg, S., & Mwarabu, A. (2018); ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06; ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07; ICC. The Prosecutor v. Ahmad Al Faqi Al Mahdi, Case No. ICC-01/12-01/15
[2166] McKay, F. quoted by van den Berg, S., & Mwarabu, A. (2018), p. 4

As previously stated, the fact that Bemba was found guilty of the crime of rape under the heads of war crime and crime against humanity by Trial Chamber III signalised the gravity of this type of crime and the commitment of the ICC to fight sexual violence and to put an end to its impunity.

There was hope that this conviction would be a catalysis element for a shift in the culture of sexual and gender-based crimes in the international panorama both in terms of preventing future crimes and facilitating their criminal prosecution.

Also, the victims felt that their pursuit of justice was satisfied and that reparations would arise from the conviction so as to alleviate their suffering.

Bemba´s conviction was all an achievement in the combat of sexual and gender-based crimes.

Consequently, the reversion of the verdict by the Majority of the Appeals Chamber was a major setback.

The positive message that the plight of victims of sexual violence had been finally been heard and justice had been delivered by the ICC faded.

Fatou Bensouda, the ICC's Prosecutor, in her pronouncement made clear her "disappointment over this decision and its impact, first and foremost, on the victims".[2167]

Bemba´s acquittal means that lack of accountability for this type of crime- in spite of the evidence proving its perpetration- persists.

Surely, as the Prosecutor affirmed, the

> "judgement indeed confirms that Mr Bemba's troops committed grave crimes, which resulted in great suffering in the CAR. The carnage and suffering caused by those crimes were very real."[2168]

Further, it meant a huge disappointment for the victims, who (not without reason) may wonder if impunity of sexual and gender-based crimes is the order of the day in the ICC cases.[2169]

It is noteworthy that the Office of the Prosecutor had been working on the case for over 10 years and destined vast resources to its prosecution.[2170]

For these reasons, the seriousness and credibility of the Court has, once more, been tarnished.

[2167] ICC website, Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba (13 June 2018)
[2168] *Ibidem*
[2169] *Ibidem*
[2170] McKay, F. quoted by van den Berg, S., & Mwarabu, A. (2018)

With regards to the legal arguments over which the Majority of the Appeals Chamber grounded its reformation of Trial Chamber III´s judgment, besides the challenges posed by the Dissenting Judges in their well-founded opinion, there have been further critics.[2171]

Sá Couto detailed the impact of the Appeals Chamber's decision, especially on cases encompassing charges of sexual and gender-based violence. For that, she analysed the following elements and its repercussions:[2172]

1) the circumstance that the Appeals Chamber used and applied a modified standard for appellate review;

2) the approach of the Appeals Chamber to the Pre-Trial Chamber´s role;

3) the Appeals Chamber´s interpretation of "all necessary and reasonable measures" that a commander is demanded to take so as to prevent liability pursuant Article 28 of the Rome Statute.[2173]

In what concerns the standard for appellate review, the Appeals Chamber abandoned the one used up to this point by the own ICC and "ad hoc" International Criminal Tribunals for the former Yugoslavia and Rwanda.[2174]

Indeed, instead of verifying "whether a reasonable Trial Chamber could have been satisfied beyond a reasonable doubt as to the finding in question," which confers a "margin of deference" to the Trial Chamber´s evaluation of the evidence, the Appeals Chamber decided to adopt a new standard.[2175]

In accordance with this novel standard, the Appeals Chamber can

> "interfere with the factual findings of the first-instance chamber whenever the failure to interfere may occasion a miscarriage of justice"[2176]

[2171] ICC website, Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba
[2172] SáCouto, S. (2018)
[2173] *Ibidem*
[2174] *Ibidem*
[2175] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute", para. 27; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p. 13, para. 38; SáCouto, S. (2018)
[2176] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p. 13, para. 40

in the occasions in which it is "able to identify findings that can reasonably be called into doubt."[2177]

Although the application of this standard entails a lower degree of deference to the Trial Chamber (despite the fact that it "spent nearly four years hearing the case, including 77 witnesses and 773 pieces of evidence"), the Majority stated that "[w]hen a factual error is alleged, the Appeals Chamber will not assess the evidence de novo."[2178]

This decision entails a contradiction- even though, pursuant to the new standard of review, the Majority is entitled to review the record itself (instead of relying on the assessment of Trial Chamber, as in the typical standard of review), it did not assess again all evidence in the record.[2179]

Thus, the Majority was relying on restricted evidence, and arguably important evidence was left out, when it disregarded the Trial Chamber III's assessment of Bemba's command responsibility, and acquitted him of all charges.[2180]

This approach is unsatisfactory, in particular for cases encompassing crimes of sexual violence, that often demand a comprehensive analysis of context in order to gather how this violence is actually carried out in the context of conflict or mass violence.[2181]

Indeed, as the Katanga case exemplifies, in practice, not unfrequently the impunity of the accused steams from the lack of a comprehensive analysis of the context, which is essential to promote the understanding how sexual violence is actually perpetrated in the situation of conflict or mass violence.[2182]

In mentioned case, the Trial Chamber should have maintained the contextual analysis of the Pre-Trial Chamber, which led to the conclusion that although sexual violence initially seemed unintended, it was actually entwined with the perpetration of the crimes which the TC rendered to be within the common purpose of the Ngiti militia. Hence, the crimes of rape and sexual slavery charged should have been considered within the common purpose of the Ngiti militia and, thus, attributed to Katanga.[2183]

It is important to stress that the risk of impunity of crimes of sexual violence "lato sensu" due to a limited analysis of the evidence increases if the review standard allows the Appeals Chamber to interfere with the Trial Chamber´s findings when

[2177] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p. 15, para. 46
[2178] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p. 14, para. 42; SáCouto, S. (2018)
[2179] SáCouto, S. (2018)
[2180] *Ibidem*
[2181] *Ibidem*
[2182] *Ibidem*
[2183] *Ibidem*

such findings can be called into question, but their review is rather restricted to select pieces of the evidence presented before the TC. [2184]

The choice of the Majority of the Appeals Chamber to depart "from the traditional model of appellate review of factual errors" and apply a new standard in which it can interfere with the Trial Chamber´s factual findings whenever it identifies findings which can reasonably be called into question seems unwise.[2185]

Firstly, the Trial Chamber appears to be better prepared to analyse the evidence which was submitted before it along the trial proceedings.

Secondly, the Majority of the Appeals Chamber decided not to review all the evidence again and, consequently, limited its assessment to some parts of evidence. As a result, the Majority´s findings are solely based on part of the evidence, approach inconsistent with the goal of rendering a fair decision.

Thirdly, the application of the Majority´s new standard of review surges the possibilities that sexual and gender-based crimes go unpunished for such crimes often require a through holistic analysis of the elements of evidence so as to clarify the circumstances and context in which they were committed.

Therefore, the shift from the ICC precedent jurisprudence and its substitution with novel, uncertain and untried standards is regrettable. It seems to be at odds with the pursuit of the Court to render a fair and just judgment. [2186]

Furthermore, it is very unfortunate that the change of standard review occurred in the gravest case of sexual and gender-based violence decided by the ICC. All the more so at a time when there is a critical urge to send an unequivocal warn globally that these despicable crimes must not remain without punishment.[2187]

The judgment of the Majority of the Appeals Chamber constitutes the last instance and there is no possibility of reversing Bemba´s acquittal. The Appeals Chamber should be aware of its equivocal new standard of review and its negative consequences for all the cases, particularly for those involving sexual and gender-based crimes. In future cases, the AC should maintain

> "the cautious approach to appellate review that it has always adopted since the commencement of its work, adhering to its own precedents and standards."[2188]

In this regard, Bensouda also expressed "I hope that there will be, in future, a return to those standards of appellate review."[2189]

[2184] *Ibidem*
[2185] ICC website, Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba
[2186] *Ibidem*
[2187] *Ibidem*
[2188] *Ibidem*
[2189] *Ibidem*

Certainly, since the Appeals Chamber is the highest appellate judicial body in the ICC´s legal framework, and its decisions are final, it is crucially relevant that it continues to adopt its usual wary approach to the standard of appellate review.[2190]

In what concerns the approach of the Appeals Chamber to the Pre-Trial Chamber´s role, it is necessary to stress that the ICC presents a unique feature with respect with to the Pre-Trial Chamber´s role in the confirmation of charges process. The PTC is required to find "substantial grounds to believe" that the accused perpetrated the alleged crimes. The Court has reiterated that such standard is rather low and aimed to prevent wrongful and patently baseless charges from passing to the trial stage.[2191]

Nevertheless, in the Bemba case, the Majority of the Appeals Chamber chose a considerably higher standard. Apart from demanding the Pre-Trial Chamber to be satisfied the charges are not evidently unfounded, the Majority also required it to confirm every individual act underlying the charges.[2192]

In accordance with the Majority´s understanding, the PTC must confirm all individual acts even when, as in the present case, the accused is given notice of any additional acts underlying the charges during the (frequently extensive) period of time between confirmation and the beginning of trial. In the Majority´s view, so that the additional individual acts could be considered part of the charges, the Prosecution must have amended the charges.[2193]

This is prejudicial for cases that involve sexual and gender-based crimes. Due to numerous reasons (inclusive because, not rarely, sexual violence is erroneously regarded as incidental and secondary rather than as a constitutive part of the broader conflict or it is seen as merely adjuvant to other crimes), investigators often do not consider the investigation of sexual and gender-based crimes a priority from the outset. In fact, as the jurisprudence of the "ad hoc" tribunals indicates, evidence of crimes involving sexual violence frequently is brought out tardy in the investigation of atrocity crimes, and sometimes even in the course of the trial.[2194]

The Appeal Chamber´s rule to bar the Trial Chamber from considering acts of which the accused was given proper notice but which were not particularly confirmed by the Pre-Trial Chamber could give rise to undesirable effects. It would prolong the already lengthy process of confirmation (which is contrary to the right of the accused to be tried without delay by the Court) and probably would negatively affect the cases involving sexual violence crimes.[2195]

[2190] *Ibidem*
[2191] *Ibidem*
[2192] *Ibidem*
[2193] *Ibidem;* ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p. 41, para. 115
[2194] ICC website, Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba
[2195] *Ibidem*

Moreover, the Majority of the Appeals Chamber deviated from the antecedent jurisprudence of the Appeals Chamber, "as well as international practice, in relation to the manner in which the Prosecution ought to charge cases" that encompass mass criminality.[2196]

> "The level of detail that the Prosecution may now be required to include in the charges may render it difficult to prosecute future cases entailing extensive campaigns of victimisation, especially where the accused is not a direct perpetrator, but a commander remote from the scene of the alleged crimes but who may bear criminal responsibility as the superior having effective control over the perpetrators, his subordinates."[2197]

Surely, the decision of the Majority of the Appeals Chamber of the ICC will be taken into consideration by other UN war crimes tribunals that have to deal with similar disputes in relation to legal definitions of the command responsibilities of generals and senior politicians who are in charge of troops that perpetrate mass rapes, murders, and other crimes.[2198]

Finally, the approach of the Majority to command responsibility preconised in article 28 of the Rome Statute, allied to the Court´s previous approach to other liability modes, fuels the likelihood of impunity for crimes of sexual violence.[2199]

The restrictive interpretation of the Appeals Chamber of indirect co-perpetration (Article 25(3)(a) of the Statute) probably will configure an especially high threshold for the prosecution of cases involving charges of sexual and gender-based crimes. It will be hard to demonstrate that individuals accused of these crimes "unquestionably… conceived the crime, oversaw its preparation at different hierarchical levels, and controlled its performance and execution," as demanded by the Court in the Katanga case. Surely, sexual violence, even in those cases in which it is widespread, frequently occurs because it is tolerated and allowed instead of being expressly ordered or planned.[2200]

If the interpretation of the Appeals Chamber of what configures "all necessary and reasonable measures" of Article 28(a) continues to be applied, the liability modes under which a perpetrator can be held criminally responsible for sexual and gender-based crimes will be even more narrowed down.[2201]

[2196] *Ibidem*
[2197] *Ibidem*
[2198] The Guardian (2018). Jean-Pierre Bemba 's war crimes conviction overturned. In the Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber, Annex E to the Mr. Bemba's claim for compensation and damages. ICC-01/05-01/08-3673-AnxE (19 March 2019)
[2199] ICC website, Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba
[2200] *Ibidem;* ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 542, para. 1412; ICC website, Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba
[2201] ICC website, Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba

In the Bemba case, the Majority of the Appeals Chamber reached the conclusion that the Trial Chamber made several errors that

> "resulted in an unreasonable assessment of whether Mr Bemba failed to take all necessary and reasonable measures in the circumstances existing at the time."[2202]

Amidst these errors was the failure of the TC to analyse the measures Bemba should have adopted by reference to the particular crimes that were actually perpetrated, which the Majority suggests (with no citation to any specific authority) should have been restricted to the crimes it regarded had been established beyond reasonable doubt, specifically one murder, 20 acts of rape, and 5 acts of pillaging.[2203]

Even though the Majority highlighted that the scope of the obligation to adopt the measures was dependant on the number of such crimes (that in the case at stake was relatively low), it did not mention the sufficiency of such efforts in relation to the specific nature of such crimes. Certainly, in view of the fact that acts of rapes constituted the far majority of the crimes that were established beyond reasonable doubt, it is alarming that the Appeals Chamber barely mentioned the circumstance that 2 of the principal mechanisms established by Bemba in order to investigate allegations of crimes perpetrated by his troops in CAR did little to pursue rape reports (the Mondonga Inquiry) and were restricted to pillaging allegations (Zongo Commission).[2204]

In fact, even though there is evidence in the record that Bemba was copied on a case file containing detailed information in relation to acts of pillaging and rape purportedly carried out by his troops in the CAR, the Appeals Chamber did not assess the adequacy or quality of such investigation in relation to the allegations of sexual violence.[2205]

This approach entails that the analysis of "all reasonable and necessary measures" does not need to consider if and how such investigative measures appropriately address the specific kind of crimes perpetrated.[2206]

Even an incipient consideration of the concept that a measure must be adopted independently of its competence and quality to halt and prevent future crimes seems rather flawed. Even more so when, pursuant to the disposition of Article 28 of the Rome Statute, in order to evade command responsibility the accused person must adopt "all reasonable and necessary measures", which entails that the measures which must be adopted are not any measures, but must meet a standard- logically, they must be satisfactory and sufficient to serve the purpose established by the drafters of the Rome Statute, namely prevent or repress the

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[2202] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p. 78, para. 193

[2203] ICC website, Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba

[2204] *Ibidem*

[2205] *Ibidem*

[2206] *Ibidem*

crimes. Therefore, when assessing the measures adopted by the person holding command responsibility, the Appeal Chamber should consider if these measures were adequate bearing in mind the nature of the crimes at stake as well as if they were enough so as to stop or avoid the crimes.

Again, the Majority´s approach seems inadequate. Also, it is unfavourable for cases encompassing sexual violence since war crimes investigations have frequently presented insufficiencies in regard to sexual violence crimes, even when they are appropriate with respect to other crimes.[2207]

In conclusion, it seems that the Majority´s judgment is incorrect. Bemba should not have been acquitted. Instead, the Trial Chamber III´s judgment should have maintained, in conformity with the understanding of the Dissenting Judges in their opinion.

In sum, the main issues in relation to the judgment of Majority of the Appeals Chamber are the following:

1-) The usual standard of appellate review ("when a factual error is alleged, the Appeals Chamber will determine whether a reasonable Trial Chamber could have been satisfied beyond reasonable doubt as to the finding in question") should have been maintained;[2208]

The higher-level deference to the Trial Chamber and its findings seems to be more appropriate for the achievement of a just decision. Indeed, the evidence produced by the partied is submitted before the Trial Chamber, and due to this first-hand, direct contact evidence, the TC is in a better position to assess it than the Appeals Chamber;

2-) Since the Majority decided to apply a new standard of appellate review, it should then have analysed all the evidence, and not solely a part to make its findings;

3-) The individual criminal acts posteriorly added by the Prosecution and of which Bemba received proper notice did not require specific confirmation;

Such acts were within the scope of the charges, and, instead of discontinuing the proceedings in relation to them, the Appeals Chamber should have maintained the Trial Chamber´s finding that Bemba was criminally responsible for them;

4-) The Majority of the Appeals Chamber´s understanding that Bemba did not fail "to take all reasonable and necessary measures within his or her power to prevent

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[2207] *Ibidem*

[2208] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute", p. 13, para. 27; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p.13, para. 38

or repress their commission or to submit the matter to the competent authorities for investigation and prosecution" was incorrect.

Actually, the measures he adopted were limited in their mandate, execution and/or outcomes. Accordingly, Bemba´s conviction should have been ratified by the Appeals Chamber.[2209]

The implications of the Majority´s decision could be quite extensive both for the ICC and other courts addressing related crimes, inclusive of the Special Criminal Court (SCC), the court that was set up in Central African Republic and that has jurisdiction over the same kind of violations which appeared in the Bemba case.[2210]

8.7. The impact of the Majority´s decision on the Prosecutor v. Jean-Pierre Bemba Gombo et al. case

After Bemba´s acquittal by the Majority of the Appeals Chamber, the Prosecution filed a Detailed Notice of Additional Sentencing Submissions in the case the Prosecutor v. Jean-Pierre Bemba Gombo et al. (ICC-01/05-01/13). In such submissions, it was stated that[2211]

> "Mr Bemba's acquittal evidences the "damage caused" by the conduct of the convicted persons and an "aggravating circumstance" pursuant to rule 145. As a 'new fact' particularly one which comprises the realisation of the very objective of the common criminal plan in which Messrs Bemba, Kilolo and Mangenda participated, it is incumbent on the Prosecution to raise this matter before their re-sentencing. Similarly, the Trial Chamber is required to give the matter consideration in their determination.
>
> 2. This unprecedented case concerns the convicted persons' execution of a sophisticated and concerted plan to obtain Mr Bemba's acquittal through unlawful means—means which imperilled this Court's ability fairly to adjudicate the serious crimes of international concern with which he was charged. Messrs Bemba, Kilolo, Mangenda, Babala and Arido were convicted by this Trial Chamber for, inter alia, corruptly influencing 14 Defence witnesses in the Main Case ("Corrupted Witnesses").
> …
> 4. However, that an impact on the outcome of a case is not required as a matter of law to harm the administration of justice does not mean there was no impact in this instance. There was.

[2209] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 350, para. 720
[2210] ICC website, Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba
[2211] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo et al., Case No. ICC-01/05-01/13. Trial Chamber VII, Prosecution Detailed Notice of Additional Sentencing Submissions (2 July 2018)

> … Mr Bemba's acquittal was, at least to a discernible extent, resulting from, and predicated on, evidence affected by a pervasive campaign of witness tampering, which eventually but not unforeseeably, the Bemba AJ. Here, the toxic effects of the corrupt and tainted evidence adduced by Messrs Bemba, Kilolo and Mangenda at trial affected not only the immediate proceedings in which it was tendered, but inevitably, subsequent proceedings. In short, the convicted persons' concerted and unlawful efforts may have ultimately succeeded, not at trial as originally intended, but at the appellate stage.
>
> 5. Although the convicted persons could not have known that the Appeals Chamber would depart from the Court's established appellate standard of review for factual errors or that the Appeals Chamber's understanding of the scope of the charges would play a substantial role on quashing Mr Bemba's conviction, this is of no moment. They intended and foresaw Mr Bemba's acquittal by means of their illicit actions. Thus, in so far as the Bemba AJ disturbed the Bemba TJ to any extent on the basis of evidence adduced through, or the acts and conduct of, corrupted or tainted Defence witnesses, Mr Bemba's acquittal comprises "the damage caused" or an "aggravating circumstance[ ]" within the contemplation of rule 145."[2212]

In fact, the Prosecution sustained that Bemba´s acquittal was partially based on the limited evaluation carried out by the Majority of an evidentiary record which the convicted persons had intentionally and criminally tainted and scripted. In particular, the Majority understood that when Trial Chamber III convicted Bemba, it had inadequately dismissed determined arguments, and inappropriately assessed and weighed determined evidence submitted by the Bemba Defence concerning the effective control Bemba exerted over MLC troops and the extent of measures within his power to tackle crimes purportedly committed by MLC. The Majority found that the analysis of the Trial Chamber III regarding the commissions and inquiries allegedly set up by Bemba was faulty, hence, implicitly accepting the false narrative provided by the corrupted Defence witnesses who were "tainted or corruptly influenced by the convicted persons". Therefore, the evidence put forward by these witnesses (which was partially cited in the Bemba Appeals Judgment) undoubtedly influenced the Majority's assessment of the trial record and bore an important role in its decision to overturn Bemba´s conviction.[2213]

[2212] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo et al., Case No. ICC-01/05-01/13. Trial Chamber VII, Prosecution Detailed Notice of Additional Sentencing Submissions, pp. 3-4, paras. 1,2,4,5

[2213] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo et al., Case No. ICC-01/05-01/13. Trial Chamber VII, Prosecution Detailed Notice of Additional Sentencing Submissions, pp. 5,6, paras. 7, 8

The Prosecutor affirmed that

> "[a]s this Trial Chamber has found beyond reasonable doubt, the conduct of the convicted persons directly resulted in a scripted trial record encompassing at least the Corrupted Witnesses. Moreover, the unreliable testimonies of other non-credible witnesses are also related and linked to the convicted persons' actions. Once the record of a case is polluted with corrupt evidence and false testimony, there is no way of controlling the reach of their toxic effect. Here, that effect reached the appellate stage and affected at least a significant part of the Majority's assessment and conclusions. As demonstrated above, the factual narrative testified to by several Main Case tainted and Corrupted Witnesses permeated the Majority's analysis:
>
> ● consistent with D-54's, D-15's, D-13's and D-25's illicitly coached testimony, the Majority found that Mr Bemba, as a remote commander, had limited effective control;
>
> ● relying on D-48's tainted testimony and consistent with D-19's unreliable and D-54's coached narratives, the Majority found that the Trial Chamber had not properly assessed the measures that Mr Bemba took, or said he took, to address the crimes."[2214]

Additionally,

> "even if the convicted persons would not have known precisely how a Chamber of this Court might assess the scripted and tainted narrative presented by the tainted and Corrupted Witnesses (absent the benefit of observing their testimony directly, or in its application of an unconventional standard of appellate review), the fact is that they deliberately manipulated such evidence in order to be relied on by a Chamber of this Court with the intention to affect the outcome of the Main Case. Having failed before Trial Chamber III, the result achieved before the Appeals Chamber was not only foreseeable, but necessarily comprised the very objective of the witness corruption scheme."[2215]

Hence, the acquittal of Bemba for part of the charges resulted from the crimes of the convicted persons. It is, at least partially, a clearly identifiable "damage" originated from the course and scope of the criminal offences of Bemba, Kilolo, and Mangenda pursuant to rule 145(1)(c) or an aggravating factor in the terms of

[2214] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo et al., Case No. ICC-01/05-01/13. Trial Chamber VII, Prosecution Detailed Notice of Additional Sentencing Submissions, p. 19, para. 44
[2215] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo et al., Case No. ICC-01/05-01/13. Trial Chamber VII, Prosecution Detailed Notice of Additional Sentencing Submissions, p. 20, para. 46

rule 145(2)(b)(iv), and important for establishing the seriousness of the crimes of which they were found guilty and their respective sentences.[2216]

Indeed, it is patent that the corrupted and false evidence had a corrosive effect on the proper administration of justice, being necessary an adequate punishment with its associate effective determent. Bemba, Mr Kilolo and Mr Mangenda deserve the punishment of five-year imprisonment and a substantial fine, as requested by the Prosecution.[2217]

8.8. The Majority of the Appeals Chamber´s Judgment and the victims

The judgment rendered by Trial Chamber III against Bemba for having command responsibility for the crimes of rape (as both war crime and crime against humanity) carried out by MLC troops during the 2002/2003 CAR operation felt like a long-awaited victory against sexual and gender-based violence and its impunity.

Finally, the ICC had charged, prosecuted and condemned an accused for the perpetration of the crime of rape. It seemed that the historical efforts poured into promoting accountability, justice and reparation to victims of sexual violence and deterring these crimes had paid off.

The Bemba case was the first case of the International Criminal Court whose main focus was the perpetration of sexual crimes, specifically rapes.[2218]

5.229 victims were granted participation, an unprecedented number in the history of the ICC. In fact,[2219]

> "[h]undreds of rape victims have come forward to tell their stories, recounting crimes acted out with particular cruelty. Reports

[2216] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo et al., Case No. ICC-01/05-01/13. Trial Chamber VII, Prosecution Detailed Notice of Additional Sentencing Submissions, p. 20, para. 47
[2217] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo et al., Case No. ICC-01/05-01/13. Trial Chamber VII, Prosecution Detailed Notice of Additional Sentencing Submissions, pp. 20-21, para. 48
[2218] ICC website, Central African Republic, Situation in the Central African Republic, ICC-01/05,
[2219] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp.16-17, paras. 18-20; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, pp. 4, 5, 9, paras. 7, 19, 21; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Decision on common legal representation of victims for the purpose of trial; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Fourth Decision on Victims' Participation, pp. 36-37; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Application for leave to submit amicus curiae observations under rule 103 of the Rules of Procedure and Evidence; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 9, para. 19

> detailing their accounts were ultimately provided to the Prosecutor's Office."[2220]

In this regard, Fatou Bensouda affirmed that

> "[m]any Prosecution witnesses expressed their satisfaction and stressed the value of being able to tell their account to the world, of being listened to and having their victimisation recognised."[2221]

Furthermore, the Trial Chamber III found in its judgment that 2 aggravating circumstances were applicable to the crimes of rape, namely that it was perpetrated against especially defenceless victims (including a 10 year-old girl who was successively raped by 2 MLC soldiers), and that it was perpetrated with particular cruelty (victims were gang raped, raped in public, raped in the presence of relatives, and were abused in other manner if they resisted their attackers). In this respect, it is certain that victims suffered physical and psychological harm, inclusive contracting HIV, and were "subsequently shunned by their families and communities."[2222]

In fact,

> "[s]ome victims contracted HIV after being gang-raped by MLC soldiers. Others were rejected by their families and ostracised by their communities, and many have been left to fend for themselves, without access to basic antiretroviral drugs, psychological or economic support."[2223]

Bemba's conviction for the crime of rape appeared to indicate a change in the prosecution of sexual violence in the ICC. The victims could feel that their efforts to come forward and tell their story in spite of the all the suffering and shame involved was worth, that their accounts had gone to great lengths- they had assisted to hold Bemba criminally responsible for sexual crimes.

Thus, there were high expectations that the Trial Chamber III´s judgment would pave the way for further convictions of sexual and gender-based crimes in both the ICC and the international scenario.

Certainly, TC III´s decision was a reason of hope for victims of sexual violence and of concern to the perpetrators of sexual and gender-based crimes.

[2220] ICC website, Central African Republic, Situation in the Central African Republic, ICC-01/05,
[2221] ICC website, Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba
[2222] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Decision on Sentence pursuant to Article 76 of the Statute, pp. 43-45, paras. 91, 93, 94; ICC website, Central African Republic, Situation in the Central African Republic, ICC-01/05
[2223] Skilbeck, R. quoted in The Guardian (2018). Jean-Pierre Bemba 's war crimes conviction overturned. In the Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber, Annex E to the Mr. Bemba's claim for compensation and damages. ICC-01/05-01/08-3673-AnxE (19 March 2019)

However, the reversion of the Trial Chamber´s III conviction was a huge setback for the thousands of victims who participated in the proceedings of the case, and for victims of sexual violence in general. Indeed, [2224]

> "[t]he Bemba decision has left … the victims and survivors of mass atrocities … confused, discouraged, and disillusioned."[2225]

As Skilbeck affirmed,

> "[t]his is a devastating outcome for the more than five thousand victims who participated in the trial and had waited 15 years to see justice done and to receive some form of redress for their suffering."[2226]

In her pronouncement, the ICC Prosecutor made clear her "disappointment over this decision and its impact, first and foremost, on the victims".[2227]

The concept that the plight of sexual violence victims had been heard was replaced by the immensely discouraging message that, even though we are in the second decade of century XXI, sexual and gender-based crimes still go unpunished even in cases in which such crimes are prosecuted (and proved) before a serious court like, the International Criminal Court.

The Prosecutor further affirmed that

> "[t]he *Bemba* case will always represent an important recognition of the crimes of rape, murder and pillaging suffered by victims in CAR at the hands of *Mouvement de Libération du Congo* troops that were effectively under the authority and control of Mr Bemba who had knowledge of the crimes during the 2002 to 2003 CAR conflict. The *Bemba* Appeals Judgment confirms this."[2228]

Undoubtedly, Bemba´s acquittal means that lack of accountability for this type of crime- in spite of the evidence proving its perpetration- persists. It is very unfortunate that after prosecuting Lubanga, Katanga and Bemba, the ICC still has to secure and maintain a conviction for sexual and gender-based crimes.

The general feeling is that, in spite of the Prosecution´s dedication and efforts in trying sexual and gender-based crimes (when comparing the Lubanga, Katanga and Bemba cases, it is evident the progress of the Prosecution´s work in trying sexual and gender-based crimes stands- even though there is room for

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[2224] Amnesty International (2018); McKay, F. quoted by van den Berg, S., & Mwarabu, A. (2018)
[2225] Poutou, N. C. F., & Hayali, L. B. (2018).
[2226] Skilbeck, R., quoted in The Guardian (2018). Jean-Pierre Bemba 's war crimes conviction overturned. In the Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber, Annex E to the Mr. Bemba's claim for compensation and damages. ICC-01/05-01/08-3673-AnxE (19 March 2019)
[2227] ICC website, Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba
[2228] *Ibidem*

improvement), the ICC came short of living up to the very core of its establishment and functioning:[2229]

> "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured."[2230]

Even though

> "[t]he long journey for justice in the *Bemba* case is a testament to the unwavering courage and determination of the victims of CAR to fight against impunity,"[2231]

in view of the Majority of the Appeals Chamber´s acquittal, the ICC seems not to have delivered justice in the case (likewise in the Lubanga and Katanga cases).

In regard to the victims, it was affirmed that

> "5229 survivors of Bemba's atrocities participated in the ICC proceedings – for these brave individuals, as well as thousands of other victims in CAR, the pursuit of truth, justice and reparations will continue."[2232]

It has been said that

> "[t]he Office of the Prosecutor of the ICC and judicial authorities in CAR must learn from this decision and redouble their efforts to investigate and prosecute alleged perpetrators of crimes under international law, with full respect for their rights to a fair trial."[2233]

Notwithstanding that, the victims of sexual violence can only feel that they were left forsaken by the ICC. Surely, as SáSouto stated,

> "[i]f the ICC could not hold Bemba responsible for the sexual violence crimes committed in CAR, how will the SCC hold other perpetrators accountable for sexual violence crimes?"[2234]

[2229] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, p. 19, para. 49;
ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Prosecution's Submission of Amended Document Containing the Charges, Amended List of Evidence and Amended In-Depth Analysis Chart of Incriminatory Evidence, and its related Annexes, p.16, para. 57

[2230] Rome Statute, Preamble

[2231] ICC website, Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba

[2232] Amnesty International (2018)

[2233] *Ibidem*

[2234] ICC website, Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba

It is necessary to highlight, though, the Prosecutor´s assertion:

> "[i]n spite of Bemba´s acquittal and its consequent effect of stopping the reparations proceedings, the Trust Fund for Victims at the ICC can, in its assistance mandate, supply a "reparative response" to the victims. In fact, on 8 June 2018, the Board of Directors of the TFV decided to expedite the launch of its programme of assistance mandate in the CAR. Such programme will take into account the harms endured by victims in the *Bemba* case as well as harms arising from further sexual and gender-based violence that proceeded from the situation."[2235]

Therefore, the Trust Fund for Victims will adopt reparative measures to alleviate the suffering of victims, including damage caused by the furtherance of sexual and gender-based violence derived from the situation.

In what concerns the ICC as a Court, the reversal of Bemba´s conviction seriously undermined the overall confidence in its prosecution of cases, and damaged the victims and public´s trust, particularly in relation to sexual and gender-based crimes.

It does not suffice the ICC´s theoretical commitment to

> "continue with renewed determination its fight against impunity for perpetrators of the most serious crimes."[2236]

Warranting a final and irreversible conviction for sexual and gender-based crimes is the only way for the ICC to recover its respectability as a Court which can achieve its purpose in relation to such crimes.

When that happens, victims of sexual violence will harbour hope that they can trust the ICC to hold accountable those responsible for the crimes they endured. Also, the pursued deterrent effect against sexual and gender-based crimes will be achieved.

[2235] *Ibidem*
[2236] *Ibidem*

9. Discussion and Conclusions

As seen throughout the present work, the prosecution of sexual and gender-based crimes had virtually no place in the international scenario up to the previous century.

Except for very few pinpointed actions (specifically, the 1474 Peter von Hagenbach's conviction for rape among other crimes, the 1863 Lieber Code rape forbiddance, and the introduction of the Martens Clause and the respect to the "laws of humanity' by the 1899 Convention (II) with Respect to the Laws and Customs of War on Land), the main legal developments in relation to the criminalisation and punishment of the sexual and gender-based crimes in the International Criminal Law scenario only started in the 20th century. Thus, it constitutes a relatively new subject.

Along the last century such crimes progressively started to occupy a more prominent role in International Criminal Law. The enacted international documents (such as the Four Geneva Conventions of 12 August 1949 and Additional Protocols) reflected the increase in the attention dispensed by the International Community towards sexual and gender-based crimes, contributing to the protection of women.

This process led to the incorporation of sexual and gender-based crimes among the offenses over which the "ad hoc" International Criminal Tribunals have jurisdiction. The statute of the ICTY and the statute of the ICTR classified the crime of rape as a crime against humanity. Furthermore, the cases of these tribunals were of great importance for the prosecution of sexual and gender-based crimes in the international scenario. For instance, the ICTY case the Prosecutor v. Duško Tadić (which "was the first international war crimes trial involving charges of sexual violence" and included "[i]ncidents of sexual violence against men"), and the ICTR case the Prosecutor v. Akayesu (which established that rape may constitute genocide, and differentiated this type of offence from sexual violence) were landmarks.[2237]

The establishment of the International Criminal Court coronated the evolving process of the internationally criminalizing sexual and gender-based crimes. The drafters of the Rome Statute attached great importance to the relevance of gender in the commission of criminal offences under the Statute. As a result, the Rome Statute was the inaugural instrument in international law to present a broad roster of sexual and gender-based crimes and regard them as war crimes (in both international and non-international armed conflicts).[2238]

[2237] ICTR. The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4. Chamber I, Judgment, para. 598 (2 September 1998); ICTY. The Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T. Trial Chamber, Judgment, pp. 62, 63, 67, paras. 160, 171 (10 December 1998); ICTY website, Landmark Cases; United Nations, Security Council. Statute of the International Criminal Tribunal for the Former Yugoslavia (1993), Art. 5 (g); United Nations, Security Council. Statute of the International Criminal Tribunal for Rwanda, Art. 3 (g)

[2238] ICTR. The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4. Chamber I, Judgment, para. 598 (2 September 1998); International Criminal Court, the Office of the Prosecutor. Policy Paper on Sexual and Gender-Based Crimes (9 June 2014)

Moreover, the Rome Statute extended the list of sexual and gender-based crimes which constitute crimes against humanity, so as to include sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, and persecution on the grounds of gender. Also, the commission of sexual and gender-based crimes with intent to destroy, either in whole or in part, a national, ethnic, racial, or religious group can amount to genocidal acts.[2239]

It should be remarked that the drafters of the Rome Statute lost an important opportunity to grant further protection to victims against sexual and gender-based crimes when they did not include gender, rape or any other form of sexual violence among the basis for the crime of genocide in the definition of genocide provided in Article 6 of the Rome Statute. For the ends of prosecution of genocide, the sexual and gender-based crimes can only be regarded as genocidal acts subsumed in the acts of causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, and imposing measures intended to prevent births within the group.

From a broad point of view, the Rome Statute considerably expanded the range of situations in which one can be regarded responsible for committing sexual and gender-based crimes. It generated hope that the prosecution of the International Criminal Court´s cases would embody the culmination of condemnation of those responsible for perpetration of sexual and gender-based crimes, having a deterrent effect as well. There was expectation from the victims and the international criminal community that the ICC´s judgments would bring accountability for such crimes and promote justice.

The enactment of the Rome Statute brought groundbreaking protection and assistance to victims in general. Also, observed certain conditions, victims were allowed to participate at all stages of the proceedings. Further, the drafters of the Rome Statute envisaged that the Court would offer a complementary restorative answer to victims in the International Criminal Law scenario, in which, traditionally, victims have had a secondary role.[2240]

It is remarkable that specific norms (particular investigative, procedural, and evidentiary measures) were inserted in the Statute and its related legal instruments with a view to specifically protect and support victims of sexual and gender-based crime. The International Criminal Court scheme sought to promote procedural justice to these especially vulnerable victims (which includes to make sure that victims receive a fair, respectful, and dignified treatment during the proceedings and have access to reparations) and provide them with a meaningful role in the International Criminal Justice process.[2241]

[2239] International Criminal Court, the Office of the Prosecutor. Policy Paper on Sexual and Gender-Based Crimes (9 June 2014); Rome Statute, Art. 5 (g) (h), 6

[2240] International Criminal Court, the Office of the Prosecutor. Policy Paper on Sexual and Gender-Based Crimes (9 June 2014); Rome Statute, Arts. 5 (g) (h), 6, 7 (1) (g), 8 (2) (b) (xxii), and 8 (2) (e) (vi); Varona Martínez, G. (2012 a)

[2241] Benhassine, S. (2015), p. 47; Bedont, B., & Martinez, K. H. (1999), pp. 65-85; Moffett, L. (2014 a), p 3; Wemmers, J.-A. M. (1996), pp. 101-102

In view of the innovations introduced by Rome Statute, it could be theoretically suggested that international criminal justice is at last in a position to permit all victims, particularly victims of sexual and gender-based violence, to have access to retributive, restorative, practical and procedural aspects of justice.[2242]

9.1. In the light of the ICC cases

So as to ascertain if these theoretical expectations have been held up by the practice of the International Criminal Court, we analysed the three ICC cases which are relevant from the perspective sexual and gender-based crimes in which final judgments have been rendered by the Court, namely, the Prosecutor v. Thomas Lubanga Dyilo, the Prosecutor v. Germain Katanga, and the Prosecutor v. Jean-Pierre Bemba Gombo.

9.1.1. Case the Prosecutor v. Lubanga

In the first case, the Office of the Prosecutor only charged Lubanga with the crimes of enlistment, conscription and use of child soldiers. Even though more crimes- including rape and sexual slavery- were allegedly perpetrated by Lubanga, they were not among the charges.

This was the ICC´s first case to be prosecuted. One of the problems faced by the Office of the Prosecutor was how to carry out investigations into situations of continuous violence, that entailed remarkable logistical difficulties. So as to address this challenge, the Office adopted critical measures. It decided to decrease the length and the amplitude of the investigation, and to request a warrant arrest against Lubanga after 18 months of investigations.[2243]

In this regard, it is necessary to highlight that the impending release of Lubanga (who had been under arrest in the Democratic Republic of the Congo since March 2005) weighed on the Prosecutor´s decision to concentrate on the crimes of conscripting, enlisting, and using children under fifteen years old to actively participate in hostilities.[2244]

It is also noteworthy that, at the time of the investigation of the Lubanga case, the Prosecutor had not appointed a Gender Legal Adviser yet. The deficiency of gender expertise in handling the investigations into gender-based crimes was an element that hampered the charging to sexual and gender-based crimes in the Lubanga case.[2245]

[2242] Benhassine, S. (2015), pp. 11-12
[2243] International Criminal Court, The Office of the Prosecutor. Report on the activities performed during the first three years (June 2003 – June 2006), pp. 2, 7
[2244] International Criminal Court, The Office of the Prosecutor. Report on the activities performed during the first three years (June 2003 – June 2006), pp. 2-3
[2245] Rome Statute, Art.42 (9); ICC, OTP, Fatou Bensouda, Launch of the Gender Report Card on the International Criminal Court 2011, pp. 2-3; O'Connell, S. (2010), pp. 69-80

The Prosecutor's Information on Further Investigation of 28 June 2006 stated that it was not possible to complement the gathering of evidence to the extent required to amend the charges respecting the time frames set up in Articles 61(4) and 61(9) of the Rome Statute in face of limited possibilities to investigate more into crimes which were allegedly perpetrated by Lubanga. It was argued that the amendment of the charges would contribute to further delay the pace of the proceedings, causing significant delays, which would be at odds the accused´s rights to be tried without undue delay.[2246]

These arguments go to show that the Prosecutor´s decision to solely try Lubanga on the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities was not specially grounded on the gravity of these offences, but rather on which crimes the investigators were able to quickly collect evidence so as to guarantee a warrant arrest against Lubanga.[2247]

The Prosecutor´s preference for a practical approach is rather clear in what concerns the lack of charges for sexual and gender-based crimes in the case. He failed to include sexual violence or sexual slavery in the original charges and did not request their addition at posterior stages of the proceedings either. Additionally, he forcibly objected their inclusion during the trial by submitting that it would be unfair to the defendant if he was convicted on such grounds.[2248]

However, this course of action does not seem justifiable. Surely, when dealing with sexual and gender-based crimes, the OTP could have used two approaches:

1-) the fact that members of UPC/ FPLC- including the conscripted and enlisted child soldiers who were being used to participate actively in the hostilities- committed rape as a form of propagating violence during the armed conflict;

2-) the circumstance that girls soldiers were victims of sexual violence, being subject to rape and sexual slavery by the UPC/ FPLC.

Regarding the use of rape as a weapon of war by the UPC/ FPLC, the Document Containing the Charges clearly stated that the child recruits had been permission by a commander to rape Lendu women.[2249]

Thus, the OTP had a strong indication that members of the FPLC inclusive of child soldiers perpetrated rape against Lendu women during the attack on Lipri. It surfaces that the own child victims could have shed a light (and furnished the OTP with evidence during the investigation stage) on the question so as to

[2246] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Prosecutor's Information on Further Investigation, p. 5, paras. 8-9
[2247] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Prosecutor's Information on Further Investigation, p. 4, para. 7; Kambale, P. K. (2015). In De Vos, C., Kendall, S., & Stahn, C., (eds.), pp. 171-197
[2248] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute, p. 24, para. 60
[2249] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Document Containing the Charges, Article 61(3) (a), p. 17, para. 55

establish if rapes were in fact carried out by the UPC/FPLC during the armed conflict.

Additionally, on 15 August 2006, the Women's Initiatives for Gender Justice sent a letter to the Prosecutor and "submitted a report to the Prosecutor detailing gender-based crimes committed in eastern DRC", which included a list of 31 victims/survivors of acts of rape and sexual slavery committed by the UPC who were disposed to come forward.[2250]

As a result, the OTP could have ascertained with both the presumed perpetrators of rapes (children who were victims of enlistment, conscription, and use by the UPC/FPLC militia) and with alleged victims (women interviewed in the Women's Initiatives for Gender Justice`s report) whether rapes were committed by the UPC/FPLC during the course of the attacks in the Ituri region.

In what concerns the sexual abuse of girls soldiers, it is well known that the crimes of enlisting and conscripting children into armed forces is entwined with the crimes of sexual slavery.[2251]

Consequently, there was "substantial and available evidence" of the widespread practice of sexual and gender-based crimes in the Lubanga case.[2252]

Despite the Prosecution´s allegations that it was not possible to complement the gathering of evidence to the level demanded to amend the charges within the time frames of the Statute, apparently the obtainment of the necessary evidence on the perpetration of rape by the UPC/FPLC so as to charge Lubanga with sexual crimes would be neither very cumbersome nor too time consuming.

The Prosecution´s unilateral decision of not pursuing to charge Lubanga with sexual and gender-based crimes caused the repudiation of the victims and of large part of the international community involved in gender issues.[2253]

In spite of his previous posture towards the sexual violence issue throughout the proceedings, the Prosecutor submitted that sexual violence ought to be taken into

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[2250] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Request for leave to participate as *amicus curiae* in the Article 61 Confirmation of Charges proceedings, p.16, para. 27; Letter from Women's Initiatives for Gender Justice to the Prosecutor Luis Moreno Ocampo (15 August 2006)

[2251] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Observations from the Legal Representatives of the Victims in response to the documents filed by the Prosecution and the Defence in support of their appeals against the Decision of Trial Chamber I of 14 July 2009, p. 11-12, para. 30;
ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Cour, p.23, para. 59

[2252] Letter from Women's Initiatives for Gender Justice to the Prosecutor Luis Moreno Ocampo (15 August 2006)

[2253] Galain Palermo, P. (2014). In Ambos, K., Malarino, E., & Steiner, C. (eds.), pp. 389-430, footnote 4

account for the purposes of sentencing. Such attitude was strongly deprecated by the Trial Chamber I.[2254]

In the view of the Majority of TC I, it was not established beyond reasonable doubt the connection between Lubanga and sexual violence in the context of the charges. This outcome arose as consequence of the Prosecutor´s recklessness in relation to sexual violence in the Lubanga case: he failed to introduce evidence on this issue during the sentencing hearing, and to refer to relevant evidence given during the trial.[2255]

Even though sexual violence took place in the context of the crimes of which Lubanga was convicted, as a result of the lack of demonstration of a link between the accused and sexual violence, the Majority understood that there was not an adequate ground to hold Lubanga responsible for it. Thus, sexual violence could not be rendered as an aggravating circumstance for the purposes of sentencing.[2256]

Nevertheless, in her dissenting opinion, Judge Odio Benito (contrarily to the Majority of the Chamber) defended that sexual violence and punishment should be considered as aggravating circumstances in the elaboration of the sentence against Lubanga because these acts caused grave and frequently irreparable damage to the victims and their families, and even affected future generations.[2257]

Regarding reparations, even though the Trial Chamber I had stipulated that reparations awards which "are appropriate for the victims of sexual and gender-based violence" should be formulated and implemented by the Court, the Appeals Chamber overruled such decision. It stated that, since the Trial Chamber I "did not establish that harm from sexual and gender-based violence resulted from the crimes for which Mr Lubanga was convicted," it should have explained how it still rendered that he "should be liable for reparations in respect of the harm of sexual and gender-based violence." The TCI failed to do it. For this reason, the Appeals Chamber understood that Lubanga could not be held responsible for reparations related to this harm, and amended the Impugned Decision in this regard.[2258]

The Appeals Chamber clarified that its finding on Lubanga's liability for reparations in relation to the harm arising from sexual and gender-based violence

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[2254] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute, p. 24, para. 60

[2255] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute, p. 28, paras. 75-76

[2256] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute, pp. 26, 28, paras. 66, 74-75

[2257] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Dissenting Opinion of Judge Odio Benito in Public Decision on Sentence pursuant to Article 76 of the Statute, pp. 42-46, 49, 50, paras. 6-9, 13, 19-22

[2258] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, p. 72, para. 207; ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, p. 77, para. 198

did not prevent these victims from benefitting from assistance activities undertaken by the Trust Fund. Consequently, the Appeals Chamber allowed the inclusion of victims that suffered damage as a consequence of sexual and gender-based violence in the TFV's assistance mandate.[2259]

Further, the TFV and the Trial Chamber determined that the former´s programmes must be aimed at direct and indirect victims of the crimes of which Lubanga had been convicted and must give specific attention to the gender-specific results of the crimes, and would include a gender-sensitive training.[2260]

Therefore, in relation to the Lubanga case, it is possible to conclude that:

- The OTP incorrectly opted for a practical approach when handling the crimes charged in the Lubanga case, obstructing the prosecution of sexual and gender-based crimes;

- The Prosecutor should have appointed a Gender Legal Adviser since the beginning of the investigation of the case;

- The OTP should have ascertained with both the presumed perpetrators of rapes (children who were victims of enlistment, conscription, and use by the UPC/FPLC militia) and with alleged victims (women interviewed in the Women's Initiatives for Gender Justice`s report) whether rapes were committed by the UPC/FPLC in the course of the attacks in the Ituri region;

- Upon collecting this easily available evidence on the commitment of rape and sexual slavery, the Prosecutor should have requested the inclusion of these crimes among the offences charged at a posterior stage of the proceedings;

- The Prosecutor should not have objected the inclusion of charges of sexual slavery and inhuman and/or cruel treatment when the issue of the recharacterization of the facts arose;[2261]

[2259] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, p. 77, para. 199

[2260] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Filing on Reparations and Draft Implementation Plan, p. 34, paras. 68-69;
ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Order instructing the Trust Fund for Victims to supplement the draft implementation plan, p. 9, para. 21

[2261] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute, p. 24, para. 60; ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Prosecution's Application for Leave to Appeal the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", pp. 8-9, paras. 22-23; ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Prosecution's Further Observations Regarding the Legal Representatives' Joint Request Made Pursuant to Regulation 55. ICC-01/0401/06-1966 (12 June 2009).

- When submitting that sexual violence ought to be taken into account for the purposes of sentencing, the Prosecutor should have introduced evidence on this issue during the sentencing hearing, or referred to relevant evidence that had been given during the trial, in order to establish beyond reasonable doubt the existence of a link between the accused and sexual violence, in the context of the charges;

- The Trial Chamber I, the Appeals Chamber and the TVF were adequately aware of the need to pay due regard to gender specificities and to include victims suffered damage as a consequence of sexual and gender-based violence in the programmes conducted under the TFV's assistance mandate.

This first case was permeated by flaws of the Prosecution in relation to the charging of sexual and gender-based crimes. It is no wonder it tarnished the reputation of the ICC and put at stake its ability to translate into practical actions the victimological forefront provisions of the Rome Statute, and bring justice to victims. Moreover, the case meant a blow for victims and those who advocate for the prosecution of sexual and gender-based crimes in the international criminal scenario.

9.1.2. Case the Prosecutor v. Katanga

The case the Prosecutor v. Katanga consisted in first time in the history of the ICC in which accused persons (while Germain Katanga was still being jointly prosecuted with Mathieu Ngudjolo Chui, ICC-01/04-01/07) were charged with sexual and gender-based crimes, specifically, the crimes of rape and sexual slavery, as both war crimes and crimes against humanity. It was an improvement in relation to the Lubanga case, since in the latter the Prosecution did not present charges.

In the severed case against Mathieu Ngudjolo Chui, the Trial Chamber II did not have to entertain whether or not the crimes had been committed because its view was that the accused lacked of authority, and, accordingly, acquitted him of all charges, inclusive of the crimes of rape and sexual slavery.[2262]

However, in the severed case against Germain Katanga, the TC II did analyse if the crimes of rape and sexual slavery had been perpetrated. It was the first time in which the Court examined evidence presented in relation to the crimes of rape and sexual slavery so as to establish whether the perpetration of such crimes had occurred.

Trial Chamber II was attuned to special vulnerability of the witnesses who were victims of sexual violence, and took it into account (not only in the conduction of the trial proceedings but also when analysing and giving credibility to those witnesses´ testimonies). Its approach was oriented to alleviate the difficulty the

[2262] Opinio Juris website, Sane, J., Mathieu Ngudjolo Chui: reflections on the ICC's first acquittal,

victims find in recalling their ordeal and, hence, avoid revictimization for the prosecution of sexual and gender-related crimes. The Chamber also acknowledged that, apart from the psychological and physical impact caused by sexual and gender-based crimes, the victims of these offences face other challenges, such as stigmatisation and marginalisation by their communities.[2263]

In spite of said progresses, some critics can be made regarding the conduction of the case.

Firstly, the lack of a unified course of action between the Prosecution and the VWU regarding the type of protection that should be granted to witnesses who were victims of sexual and gender-based offences caused delay in the proceedings.[2264]

Another critic is that the charging of sexual and gender-based crimes in the case was limited. Although there is explicit mention to the occurrence of forced marriage and forced pregnancy, the Prosecutor decided to charge the sexual and gender-based violence suffered by the victims in the camps exclusively as sexual slavery. Gender-specific activities were presented as a form of proof of the sexual crimes instead of considering it a separate proof of the harm suffered by the victims.[2265]

The Prosecution´s choice to charge facts that amounted to forced marriage and forced pregnancy as sexual slavery denotes that it gave too much emphasis to the sexual elements of the crime and not enough relevance to the harm caused by the non-sexual (for instance, forced child-bearing and cooking). Other grave aspects, such as forced pregnancy and compulsory household labour, were relegated to second plan, being presented as a form of proof of the sexual crimes instead of considering it a separate proof of the harm endured by the victims [2266]

There were critics with respect to the Trial Chamber II´s finding that the crimes of murder, attack against civilians, pillaging and destruction were part of the Ngiti militia´s common purpose, but that the crimes of rape and sexual slavery did not fall within this common purpose.

The Chamber ultimately decided for this approach, despite its initial affirmation that acts of sexual violence during the operation to destruct Bogoro's civilian

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[2263] Oosterveld, V. (2009), pp. 407-430

[2264] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Warrant of Arrest for Germain Katanga, p. 6; ICC. The Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/07. Pre-Trial Chamber I, Warrant of arrest Mathieu Ngudjolo Chui, 7, p. 6; ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Prosecution's Submission of the Document Containing the Charges and List of Evidence, 7, p. 5, para. 5

[2265] Oosterveld, V. (2009), pp. 407-430; SCSL, The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu, Case No. SCSL-04-16-T. Trial Chamber II, Jugdement, Separate Concurring Opinion of the Hon. Justice Julia Sebutinde Appended to Judgment Pursuant to Rule 88 (C)**,** p. 580, para. 16

[2266] Oosterveld, V. (2009), pp. 407-430; SCSL, The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu, Case No. SCSL-04-16-T. Trial Chamber II, Jugdement, Separate Concurring Opinion of the Hon. Justice Julia Sebutinde Appended to Judgment Pursuant to Rule 88 (C)**,** p. 580, para. 16

population were not isolated acts, but had been perpetrated with a same objective and objectively constituted part of that operation. This first understanding was in accordance with the Majority of the Pre-Trial I´s finding that, in the ordinary course of events, the implementation of the common purpose would bring about crimes of rape and sexual slavery. If the TC II had maintained its primary conclusion regarding the nature of the crimes of rape and sexual slavery, they would be considered as part of the Ngiti militia´s common purpose, and, accordingly, Katanga would have been found guilty as an accessory of these crimes.[2267]

The TC II adopted a restrictive interpretation of indirect co-perpetration (Article 25 (3)(a)), demanding proof that the accused undoubtedly devised the crime, supervised its preparation at distinct hierarchical levels, and was in charge of its performance and execution. This approach configures an especially high threshold for the prosecution of cases involving charges of sexual and gender-based crimes. Sexual violence, even in those cases in which it is widespread, frequently occurs because it is tolerated and allowed instead of being expressly ordered or planned.[2268]

Regarding reparations to victims, the Chamber specifically invited the TFV to take into account, as part of its assistance mandate, wherever appropriate, the harm endured by the applicants (and not only with respect to the 297 persons who were admitted by the Court as victims of Katanga's crimes) as a consequence of violence of a sexual character.[2269]

The Trial Chamber II awarded individual reparations to the 297 victims in the form of a symbolic compensation of $250 per person (amounting to USD 74,250) as well as four collective awards (which combined amount to USD 925,750) in the form of education assistance, housing assistance, income-generating activities, and psychological rehabilitation.[2270]

The ICC sought to promote and find means to materialise its restorative justice mandate, by providing monetary compensation (which, albeit symbolic, is concrete, tangible) to each victim individually, as well as financing programmes that will revert in the benefit of victims, by promoting their healing, rehabilitation and reintegration.

[2267] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Decision on the confirmation of charges, pp. 202-206, paras. 567-569, 580; ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 442, para. 1165-1166

[2268] ICC website, Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba; ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 542-541, para. 1412

[2269] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Trial Chamber II, Order for Reparations pursuant to Article 75 of the Statute, p. 119

[2270] ICC website, Press Release, Trust Fund for Victims decides to provide $1 million for the reparations awarded to victims in the Katanga case, welcomes earmarked donations of €200,000 from the Netherlands

The TVF´s draft plan for reparations stated that it was “aware of potential gender and power dynamics that may affect victims” and that gender specific issues would be addressed.[2271]

As a consequence, it is possible to conclude that:

- There should be a concerted action between the Prosecution and the VWU regarding the protection granted to witnesses who were victims of sexual and gender-based criminal offences, not only so as to adequately protect them but also in order to avoid undue delays in the proceedings;

- The charging of sexual and gender-based crimes should have been wider;[2272]

- The crime of forced marriage should have been explicitly recognized and charged:

  - under the head “any other form of sexual violence” (Articles 7 (1) (g) and 8 (e) (vi) of the Rome Statute);
  - under the head “other inhumane acts” (Article 7 (1) (k));
  - under the head “persecution on gender grounds” (Article 7 (1) (h));
  - by coupling the charge of sexual slavery with the charge of enslavement (Article 7 (1) (c));

- The crime of forced pregnancy (Articles 7 (1) (g) and 8 (e) (vi) of the Rome Statute) should have been expressly recognized and charged (in view of the circumstance that Witness P-132 bore a child as a result of the often rapes she suffered), thus, acknowledging the gravity of non-sexual elements that are gender-related and should be equally considered in the analysis of the violence endured by the victims;[2273]

- Trial Chamber II should have adopted a more flexible concept of the boundaries of indirect co-perpetration (Article 25 (3)(a) of the Statute) so as to allow the sexual crimes (that often are perpetrated because they are tolerated and allowed instead of being expressly ordered or planned) to be subsumed in this type of liability;[2274]

- TC II should have continued applying its initial broader approach and considered that (likewise the crimes of murder, attack against civilians, pillaging and destruction) the crimes of rape and sexual slavery did fall within the common purpose of the Ngiti militia and, hence, that Katanga could be held accountable for them;

[2271] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Trial Chamber II, Draft implementation plan relevant to Trial Chamber II’s order for reparations of 24 March 2017, p. 35, paras. 114-115

[2272] Oosterveld, V. (2009), pp. 407-430

[2273] *Ibidem*

[2274] *Ibidem;* ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 542, para. 1412; ICC website, Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba

- Despite the points above, the fact that Katanga was charged with rape and sexual slavery meant an advance in the prosecution o of sexual and gender-based crime before the International Criminal Court;

- Trial Chamber II appropriately handled the gathering and analysis of evidence of sexual and gender-based violence by recognising that its intrinsic sensitivities and particularities should be taken into consideration when appropriate, hence, avoiding revictimization;

- The Chamber was correct when established that the course of action of the TFV, in its assistential role, should be broad so as to attempt to decrease the suffering caused by violent acts of sexual nature, encompassing as high a number of persons as possible, inclusive those not admitted as victims by the Court for the ends of reparations;

- The ICC demonstrated its commitment to effectively provide restorative justice by granting individual monetary awards to victims.

9.1.3. Case the Prosecutor v. Bemba

In the Prosecutor v. Bemba case, initially Jean-Pierre Bemba was charged for being criminally responsible, jointly with another person or through other persons, in accordance with Article 25 (3) (a) of the Rome Statute, for the crimes of rape (as a crime against humanity and a war crime), torture (as a crime against humanity and a war crime), committing outrages upon personal dignity, in particular humiliating and degrading treatment (as a war crime), murder (as a crime against humanity and a war crime), and pillaging a town or place (as a war crime).[2275]

Nevertheless, the Pre-Trial Chamber III regarded that there were several points that indicated that the legal characterisation of the facts of the case could correspond to a different form of liability under Article 28 of the Rome Statute. Therefore, it requested the Prosecutor to consider amending the charges, in the context and within the terms of Article 61 (7) (c) (ii) of the Rome Statute.[2276]

In spite of that, the Prosecutor charged Bemba as being criminally responsible for aforementioned crimes as a co-perpetrator/ indirect perpetrator, within the meaning of Article 25 (3) (a) of the Rome Statute, or, in the alternative, as a military commander or individual effectually acting as a military commander or superior in the terms Article 28(a) or (b) of the Rome Statute.[2277]

[2275] ICC.The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Prosecution´s Amended Document Containing the Charges, para. 57, ICC-01/05-01/04-264-Conf-AnxA (17 October 2008); ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, p. 16, para. 41

[2276] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, p. 17, paras. 46, 49

[2277] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, Case No. ICC-01/05-01/08. Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges

The Pre-Trial Chamber II stated that Bemba's criminal responsibility under Article 28 of the Statute would only be examined in case there was not enough evidence establishing substantial grounds to believe that the he was criminally responsible as an indirect perpetrator (within the terms of Article 25 (3) (a) of the Rome Statute) for the crimes enumerated in the Amended Document Containing the Charges.[2278]

In the same Decision, PTC II understood that there was no foundation to prosecute Bemba for the crimes of murder, rape, and pillage as an indirect perpetrator within the meaning of Article 25 (3) of the Rome Statute (it declined to confirm the counts of torture and committing outrages upon personal dignity). Hence, it rejected the Prosecutor´s main argument in respect of Bemba´s mode of criminal responsibility. In view of that, it proceeded to the analysis of the accused´s criminal liability on the basis of Article 28 of the Statute.[2279]

Concerning the victims´ participation, there was a divergence among the Judges regarding the quantity of victims who should be allowed to give evidence as witnesses or to present their views and concerns in person, as well as the requirements for such purposes.[2280]

The Majority of Trial Chamber III established that the presentation of evidence by an individual victim should be "useful" for the Trial Chamber, "make a genuine contribution to the ascertainment of the truth" or

> "bring to light substantial new information that is relevant to issues which the Chamber must consider in its assessment of the charges".[2281]

Also, the Legal Representatives of the victims initially made an application for 17 victims to testify and/or to present their views and concerns, but the Trial Chamber III understood that hearing these 17 victims would considerably increase the duration of the trial and might cause undue delay, prohibited by Article 67(l)(c) of the Statute. Accordingly, it instructed the Legal Representatives to reduce their list to a maximum of 8 victims in total. Following, the victims´ Legal Representatives collected and presented written statements for 7 victims. Nonetheless, the Majority of the Trial Chamber III (the presiding Judge

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of Prosecutor against Jean-Pierre Bemba Gombo, p. 114, para. 341. ICC-01/05-01/08-424 (15 June 2009).

[2278] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, pp. 114, 115, 139, paras. 341, 342, 402

[2279] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 25, 37, 74-75, 139, 185, paras. 72, 108, 212, 403

[2280] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, p.3

[2281] *Ibidem* pp. 7-8, paras. 13,16

dissenting) solely allowed 2 victims to give evidence in person and 3 other victims to present their views and concerns via video-link.[2282]

The presiding Judge opposed the decisions taken by the Majority of TC III. Firstly, Judge Steiner was against they adding the supra mentioned requirements so as to permit the victims to present evidence. She affirmed that the demand of these further elements had no legal basis, and should not be part of the threshold for victims to be allowed to present evidence.[2283]

Secondly, the Judge could not agree with the Majority´s approach that permitting 7 victims (out of a total of 2287 whose participation in the proceeding had already been authorised by TC III) to give evidence and present their views and concerns would cause an unjustifiable delay in the proceedings. Especially because the Legal Representatives of the victims had curtailed their list of victims from 17 to 7, following the TC III´s request to decrease the number of victims proposed to be called to a total of 8 victims.[2284]

Thirdly, Judge Steiner disagreed with the Majority in relation to their decision to hear via video-link technology the 3 victims who were authorised to present their

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[2282] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Second order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims, pp. 6, 7, paras. 11, 12; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, pp. 3-5, paras. 2,9; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Application by the Legal Representative of Victims for leave to call victims to appear as witnesses and present their views and concerns to the Chamber, para. 2; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, *Rectificatif à la justification relative à "Requête afin d'autorisation de présentation d'éléments de preuves et subsidiairement de présentation de vues et préoccupations par les victims*", para. 8*;* ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, *Complément de la requête afin d'autorisation de présentation d'éléments de preuves et subsidiairement de présentation de vues et préoccupations par les victimes du 6 décembre 2012*; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, *Requête de la Représentante légale de victims concernant des informations supplémentaires à sa requête du 6 décembre 2011 afin d'autoriser des victimes à témoigner et à faire valoir leurs vues et préoccupations devant la Chambre*

[2283] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, p. 7, paras. 14-15

[2284] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, pp. 4, 7-10, paras. 3-6, 15-16, 21-22; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Second order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims, p. 6, para. 10; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, *Complément de la requête afin d'autorisation de présentation d'éléments de preuves et subsidiairement de présentation de vues et préoccupations par les victimes du 6 décembre 2012*; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, *Requête de la Représentante légale de victims concernant des informations supplémentaires à sa requête du 6 décembre 2011 afin d'autoriser des victimes à témoigner et à faire valoir leurs vues et préoccupations devant la Chambre*

views and concerns. She would have preferred to call the victims to appear in person in the courtroom.[2285]

In its Judgment, Trial Chamber III found beyond reasonable doubt that MLC soldiers perpetrated the crimes of rape (crime against humanity and war crime), murder (crime against humanity and war crime), and pillaging a town or place (war crime) in the Central African Republic from on or about 26 October 2002 to 15 March 2003.[2286]

In relation to the crime of rape, it is noteworthy that the Chamber, recalling the disposition of the Elements of Crimes, reaffirmed that the concept of invasion inserted in the Rome Statute was intended to be sufficiently ample so as to be genderless. It encompasses same-sex penetration, and is applicable to both male and/or female offenders and victims.[2287]

> "Bemba Judgement represents the first time in the history of international criminal law that sexual violence perpetrated against men has been charged as the crime of rape (as opposed to crimes of torture, outrages upon personal dignity or cruel treatment) or that the defendant has been convicted of rape based on the testimony of male victims."[2288]

Certainly, up to this point, sexual violence perpetrated against men had never been prosecuted as rape international criminal law scenario. Instead, it had been been tried as the crimes of torture or cruel treatment (as in the ICTY the Prosecutor v. Zejnil Delalić et al. case) or even under the heads of the crime of humiliating and degrading treatment and the crime other forms of sexual assault (as in the ICTY the Prosecutor v. Češić case).[2289]

The Trial Chamber III (following the steps of Trial Chamber II in the Katanga case) appeared to be attuned to the specificities of sexual and gender-based crimes, demonstrating to be attentive to the special characteristics of witnesses who were victims of rape. The Chamber recognised that the traumatic nature of the circumstances these witnesses describe, their eventual young age, and the time

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[2285] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp. 20-21, para. 28; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Decision on the presentation of views and concerns by victims a/0542/08, a/0394/08 and a/0511/07, pp. 5, 6, 8, footnote 14, paras. 7, 13(a)

[2286] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp. 49-52, 56-62, 313-316, 319-324, paras. 87-94, 113-125, 622-630, 639-648

[2287] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 53, paras. 99-101; Elements of Crimes of the International Criminal Court, Arts. 7(1)(g)-1, para. 1, footnote 15; 8(2)(b)(xxii)-1, footnote 50; 8(2)(e)(vi)-1, para. 1

[2288] Hayes, N. (2016)

[2289] *Ibidem*; ICTY, The Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T. Trial Chamber, Judgment, pp. 72-72, paras. 183-185 (10 December 1998); ICTY. The Prosecutor v. Zejnil Delalić, et al., Case No. IT-96-21-T. Trial Chamber, Judgment, p. 3, footnote 7, p. 364, para. 1066 (16 November 1998); TY. The Prosecutor v. Ranko Češić. Third Amended Indictment, Counts 7-8, Sexual Assault

elapsed between the events and the testimony are factors that bear weight on their accounts and can lead to omissions/gaps or apparent contradictions. The TC III addressed the dimension and extent of the omissions and contradictions and if such elements could undermine the credibility and reliability of the testimony on a case by case basis. It also acknowledged the difficulty the witnesses might have in recalling the events and the violence they suffered and that it can affect their testimonies.

The TC III found that the constitutive requirements of command responsibility established in Article 28 (a) of the Statute were present. As a result, it considered that Bemba could be held criminally responsible in the terms of this article for the crimes against humanity of murder and rape, and the war crimes of murder, rape, and pillaging perpetrated by his forces throughout the 2002-2003 CAR Operation.[2290]

This was the ICC´s first time conviction for a sexual gender-based crime. Additionally, the Bemba case was its first conviction grounded on command responsibility.[2291]

In the sentence, the Chamber also found that 2 aggravating circumstances were applicable to the crimes of rape, namely that it was perpetrated against especially defenceless victims, and that it was carried out with significant cruelty. The Chamber understood that Bemba´s culpable conduct was of serious gravity, and that there were not any mitigating circumstances in the case. Accordingly, Bemba was sentenced to 18 years of imprisonment.[2292]

However, the Trial Chamber III´s verdict and sentence were subject to appeals, and, by Majority, the Appeals Chamber decided to reverse the Trial Chamber III´s Judgment.[2293]

In regard to the merits, the Majority declared that the crimes included in the case after the Confirmation Decision

> "were not within the facts and circumstances described in the charges and that the Trial Chamber, therefore, could not enter a verdict thereon."[2294]

[2290] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 359, para. 742

[2291] The Guardian (2018). Jean-Pierre Bemba 's war crimes conviction overturned. In the Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber, Annex E to the Mr. Bemba's claim for compensation and damages (19 March 2019)

[2292] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Decision on Sentence pursuant to Article 76 of the Statute, pp. 43, 44, 45, para. 91, 93, 94 (21 June 2016)

[2293] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p. 4, para. 1; ICC. Media Advisory, Bemba case: Appeals Chamber to issue appeals judgments on verdict and sentence on 8 June 2018 (18 May 2018)

[2294] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p.4, para. 2

In fact, the Majority considered that only

> "the criminal acts that were mentioned in the Amended Document Containing the Charges and mentioned with approval in the Confirmation Decision were within the scope of this case"[2295]

According to the Majority´s understanding, the Prosecution should have proceeded to a new amendment of the charges so as to include the criminal acts added after the Confirmation Decision into the "scope of the case". There was no such amendment. Consequently, these "individual criminal acts" were not part of the case and Bemba could not be found guilty of them.[2296]

Furthermore, the Majority adopted a series of modifications to "the standard of review for factual errors". It decided not to follow the "conventional standard of review" (that consists in establishing if a "whether a reasonable trial chamber could have been satisfied beyond reasonable doubt as to the finding in question") and understood instead that when the Appeals Chamber can identify findings which can reasonably be called into doubt, it must reverse them, so as to avoid a miscarriage of justice.[2297]

Even though the application of this standard entails a lower degree of deference to the Trial Chamber, the Majority stated that "[w]hen a factual error is alleged, the Appeals Chamber will not assess the evidence de novo".[2298]

The Majority of the Appeal Chamber found that the Trial Chamber incurred in errors that materially affected the latter's conclusion on Bemba´s failure to take all necessary and reasonable measures in answer to MLC crimes in the Central African Republic. Absent one of the elements of command responsibility under Article 28 (a) of the Statute, Bemba could not be considered criminally responsible pursuant to such article for the crimes perpetrated by MLC troops in the course of the 2002-2003 CAR Operation.[2299]

[2295] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p. 39, para. 112

[2296] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", pp. 4, 39, 41-42, paras. 2, 111-112, 115, 116

[2297] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", pp.11, 13, 15, paras. 34, 38, 44-46; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, pp. 4, 6, paras. 4, 9

[2298] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p. 14, para. 42; SáCouto, S. (2018)

[2299] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p. 79, para. 194

In these circumstances, the Majority declared that the criminal acts which were not confirmed in the Confirmation Decision were outside the reach of the case and that the related proceedings were discontinued.[2300]

In what concerns the remaining criminal acts of which Bemba was found guilty, the Majority of the AC reversed Bemba´s conviction and entered an acquittal. The Majority considered that the errors it identified in the findings of Trial Chamber III, related to necessary and reasonable measures to prevent, repress or punish the perpetration of crimes by his subordinates, ruled out Bemba´s criminal responsibility for such crimes.[2301]

However, the Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański stated that they would have confirmed Bemba´s conviction by Trial Chamber III.[2302]

These two Judges disagreed with the Majority´s conclusions related to the scope of the charges and with its analysis if Bemba had failed to take all necessary and reasonable measures to prevent, repress or punish the perpetration of crimes by his subordinates.[2303]

In accordance with the Dissenting Judges, the description of the facts and circumstances inserted in the charges were appropriate from the viewpoint of article 74 (2) of the Rome Statute in the circumstances of the case. Hence, the Majority should not have regarded that the criminal acts included in the case subsequently to the Confirmation Decision were outside the scope of the case.

Additionally, the Majority did not adduce any reason to change the standard of appellate review for errors of fact, and, thus, should have applied the usual standard (used by the ICTY and ICTR and the own ICC in all its final appeals before the Court), which would lead to the confirmation that Bemba failed to take all necessary and reasonable measures to prevent, repress or punish the perpetration of crimes by his subordinates.[2304]

The option of the Majority of the Appeals Chamber to use and apply the modified standard for appellate review of factual errors entails a contradiction- even though the Majority is entitled to review the record itself (instead of relying on the assessment of Trial Chamber, as in the typical standard of review), it did not assess again all evidence in the record. Therefore, the Majority was relying on restricted evidence when it disregarded the Trial Chamber III's assessment of Bemba's command responsibility, and acquitted him of all charges. This approach

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[2300] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p. 79, para. 197

[2301] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p. 79, para.198

[2302] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, p. 3, para. 1

[2303] *Ibidem*

[2304] SáCouto, S. (2018)

is unsatisfactory, in particular for crimes of sexual violence (that often demand a comprehensive analysis of context in order to gather how this violence is actually carried out in the context of conflict or mass violence).[2305]

The Majority of the Appeals Chamber´s demand that the Pre-Trial Chamber confirms all individual acts (even when the accused is given notice of any additional acts underlying the charges during the period of time between confirmation and the beginning of trial) consists in a higher standard for the prosecution of crimes. In accordance with Article 61, paragraph 7 of the Rome Statute, the PTC is to confirm the charges when it finds "substantial grounds to believe" that the accused perpetrated the alleged crimes. This regular standard applied by the ICC is purposefully low and aimed to prevent wrongful and patently baseless charges from passing to the trial stage. The further demand could prolong the already lengthy process of confirmation (which is contrary to the right of the accused "[t]o be tried without undue delay") and probably would negatively affect the cases involving sexual violence crimes because evidence of these crimes frequently is brought out tardy in the investigation of atrocity crimes (sometimes even in the course of the trial). Moreover, the degree of particularities that the Prosecutor can be demanded to include in the charges might toughen the prosecution of[2306]

> "future cases entailing extensive campaigns of victimisation, especially where the accused is not a direct perpetrator, but a commander remote from the scene of the alleged crimes but who may bear criminal responsibility as the superior having effective control over the perpetrators, his subordinates."[2307]

When assessing the "all reasonable and necessary measures" adopted by Bemba as the person holding command responsibility in the terms of Article 28 (a) (ii) of the Rome Statute, the Majority of the Appeals Chamber considered neither if such measures were aimed at crimes of sexual character (bearing in mind that the vast majority of the crimes confirmed by the Pre-Trial Chamber consisted of rapes) nor if they were enough so as to stop or avoid the crimes perpetrated by his subordinates. Certainly, the Appeals Chamber did not verify the appropriateness or quality of Bemba´s measures.[2308]

The fact that the proceedings of the case were discontinued in relation to the crimes that the Majority understood not to be within the scope of the case and that Bemba was acquitted of the remaining crimes meant that the reparations proceedings were discontinued. However, the TFV, in its assistance mandate, launched a programme of assistance mandate in the CAR, which takes into account[2309]

[2305] *Ibidem*
[2306] ICC website, Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba; Rome Statute, Arts. 61 (7), 67 (c)
[2307] ICC website, Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba
[2308] *Ibidem;* Rome Statute, Art. 28 (a) (ii)
[2309] ICC website, Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba

> "the harms suffered by victims in the *Bemba* case as well as harms suffered from additional sexual and gender-based violence arising out of the situation."[2310]

As a consequence, it is possible to conclude that:

- The Prosecution should have included the correct mode of liability in the charge (command responsibility in terms of Article 28 of the Rome Statute) from the beginning. The case would not have gone to the trial stage if the PTC III had not adjourned the hearing and requested the Prosecutor to consider amending the charges so as to establish that Bemba was criminally liable by reason of his superior-subordinate relationship with MLC troops;[2311]

- There is room for improvement in relation to distinct aspects of victims´ participation in the Court´s proceedings. Reason assisted Judge Steiner when she disagreed of the Majority in relation to the requirements of victims´ participation and stated that no further requirements for their participation should be imposed; when she affirmed that to allow 7 victims- put forward by the 2 legal representatives of over 2000 victims who were participating then in the proceedings- to give evidence and present their views and concerns would not cause unjustifiable delay in the proceedings; when she affirmed that, likewise the 2 victims who were granted permission to give evidence on the case were called to appear in person in the courtroom, the 3 victims authorised to present their views and concerns should have appeared in person instead of been heard via video-link technology;

- The Trial Chamber III adequately interpreted the provision of the Rome Statute and the Elements of Crimes when it decided that the crime of rape was gender neutral and had been widely constructed so as to encompass vaginal, anal and oral penetration, hence, allowing the penetration of men´s anus and mouth by the attackers´ penises to be tried under the head of the crime of rape;

- By solidifying its course of action in relation to the specificities of sexual and gender-based crimes (namely, likewise in the Katanga case, recognising the impact that the traumatic nature of the circumstances, the witnesses´ eventual young age, and the time elapsed between the events and the testimony are factors which bear weight on their accounts), the ICC seems to be in the right direction in handling the testimonies of witnesses victims of sexual and gender-based crimes and assessing their importance in the case. In spite of that, the ICC should continue aware of the possibility of secondary victimisation due to both the opportunity that

[2310] *Ibidem*
[2311] Heller, K. J. (22 March 2016)

Defence has to question these victims about their willingness to participate in the acts accounted and the underlying pain which may arise when they recollect the violence suffered;

- The Majority of the Appeals Chamber should have confirmed the Trial Chamber III´s Judgment against Bemba. All the criminal acts should have been considered as part of the scope of the charges against the accused for there is no founded reason to require each act to be specifically confirmed by the PTC, as supported by the Dissenting Judges. As a result, the proceedings should not have discontinued in relation to the offences introduced in the case after the PTC´s confirmation of charges;

- The Majority should have applied the ICC´s "standard of review for factual errors", that would substantiate that Bemba failed to take all necessary and reasonable measures to prevent, repress or punish the perpetration of crimes by his subordinates. Consequently, Bemba´s command responsibility would be configured and he would not have been acquitted of the offences expressly reported in the charges;[2312]

- The Majority of the Appeals Chamber, when analysing if Bemba had adopted "all necessary and reasonable measures" in the terms of Article 28 (a) (ii) of the Rome Statute, should have paid attention if the measures were appropriate taking into account the nature of the crimes, and if they were enough so as to stop or avoid the latter;[2313]

- In spite of the discontinuation of the proceedings and Bemba´s acquittal, the TFV correctly launched a programme of assistance mandate in the CAR, so as to address not only the harm endured by victims but also the damage caused by additional sexual and gender-based violence that derived from the situation.[2314]

Bemba´s conviction was an important achievement in the combat of sexual and gender-based crimes and there was hope that this conviction would be a catalysis element for a shift in the culture of sexual and gender-based crimes in the international panorama (including the persecution of rape and sexual violence perpetrated against men) both in terms of preventing future crimes and facilitating their criminal prosecution. Also, the victims felt that their pursuit of justice was satisfied and that reparations would arise from the conviction so as to alleviate their suffering. Consequently, the incorrect Bemba´s acquittal by the Majority of the Appeals Chamber deleteriously tarnished the ICC´s reputation.

[2312] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, pp. 11-12, para. 34
[2313] SáCouto, S. (2018)
[2314] ICC website, Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba

9.2. Recommendations to the International Criminal Court concerning sexual and gender-based crimes and its prosecution

In an era in which the tolerance to sexual and gender-based crimes is getting lower and lower, as shown, for instance, by the movement #*MeToo (*that has had a global reach due to the social media spread and press coverage, making well-known the widespread existence of sexual assault and harassment against women), the International Criminal Court is in the spotlight.[2315]

The Court´s next steps regarding the investigation, prosecution and judgment of sexual and gender-based crimes are crucial if it wants to affirm itself as a beacon against the impunity of this sort of crimes.

It is noteworthy that, on 8 July 2019, Trial Chamber VI rendered judgment in the case the Prosecutor v. Bosco Ntaganda (ICC-01/04-02/06). The Chamber found the accused guilty on 18 counts, inclusive of being an indirect perpetrator of the crimes of rape and sexual slavery, as both war crimes and crimes against humanity. Likewise the background of the Lubanga and Katanga cases, the crimes for which Ntaganda was convicted were perpetrated in the armed conflict of a non-international character which occurred in the Ituri region between 2002 and 2003.[2316]

The conviction is another important victory in the fight against impunity of sexual and gender-based crimes. Ntaganda was convicted as an indirect perpetrator for the crimes of rape and sexual slavery committed by UPC/FPLC soldiers, and which encompassed the rape of men and of young persons, successive rape, as well as the use of extreme violence and death threats. However, as of 9 July 2019, the decision on the sentence is pending, and the parties can appeal the verdict, meaning that the accused´s conviction is not final and might still be overturned by the Appeals Chamber.[2317]

So that the ICC can steadily establish its decisive position in the prosecution and fight against sexual and gender-based crimes in the international law scenario, we recommend the following:

- Article 6 of the Rome Statute should be amended and include gender, rape or any other form of sexual violence among the basis for the crime of genocide;

- The Prosecution and the Victims and Witnesses Unit should have a concerted action regarding the protection that should be granted to witnesses who were victims of sexual and gender-based crimes;

[2315] Wikipedia https://en.wikipedia.org/wiki/Me_Too_movement (5 July 2019)
[2316] ICC. The Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06. Trial Chamber IV, Judgment, pp. 2-3, paras. 2-3 (8 July 2019); ICC website, Press Release, ICC Trial Chamber VI declares Bosco Ntaganda guilty of war crimes and crimes against humanity (8 July 2019).
[2317] ICC. The Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06. Trial Chamber IV, Judgment, pp. 2-3, paras. 2-3 (8 July 2019); ICC website, Press Release, ICC Trial Chamber VI declares Bosco Ntaganda guilty of war crimes and crimes against humanity, (8 July 2019).

- The charging of sexual and gender-based crimes should be as wide as possible, encompassing all forms of gender-based and sexual violence suffered by the victims in the concrete case;

- Non-sexual elements that are gender-related should be equally considered in the charging of these crimes;

- The Prosecution should verify the correct mode of liability ahead of filing the charge before the ICC, and, in case of doubt, include another type of liability as an alternative in order to ensure that the case will pass to the trial phase;

- The Court should go back to the regular standard regarding the Pre-Trial Chamber (the latter should confirm the charges upon finding "substantial grounds to believe" that the accused committed the alleged crimes, following the established in the Rome Statute) and not to demand each criminal act to be specifically confirmed;[2318]

- The ICC should appropriately handle the participation of victims in the proceedings by:

  1) not requiring unnecessary, non-legal demands for their participation;
  2) properly assessing which is a reasonable number of victims to give evidence and present their views and concerns;
  3) favouring their appearance in person whenever possible.

  By adopting such approach, the ICC will be promoting a satisfactory victims´participation which fosters healing, as envisaged by the drafters of the Rome Statute.

- When hearing and analysing the testimonies of witnesses who were victims of sexual and gender-based violence, the Court should continue to take into consideration particularities entwined with these crimes (such as the vulnerability of these victims, which can lead them to tell lies in the beginning until they feel safe enough to tell share true story, and the fact that they may be overcome with emotion and fear due to the traumatic character of the events recollected). Furthermore, the ICC should keep in mind that the victims´ eventual young age at the time of the occurrence and the time elapsed may lead to unintentional gaps and/or omissions;

- The ICC should continue aware of the possibility of secondary victimisation of victims of sexual and gender-based violence and take all available measures to avoid it;

[2318] Rome Statute, Art. 61 (7)

- The Court should make use of an extensive interpretation of the boundaries of indirect co-perpetration (Article 25 (3)(a) of the Rome Statute), so sexual and gender-based crimes are subsumed into this kind of criminal responsability;[2319]

- In verifying if the person holding command responsibility adopted "all necessary and reasonable measures" (Article 28 (a) (ii) of the Rome Statute), the ICC should analyse if the measures were adequate taking into account the character of the crimes, and if they were enough so as to halt or prevent the crimes;[2320]

- The Appeals Chambers should stick to the commonly applied "standard of review in relation to factual errors" and establish if "a reasonable trial chamber could have been satisfied beyond reasonable doubt" in relation to the Trial Chamber´s factual findings;[2321]

- The Court should maintain its policy regarding the reparation and compensation towards victims, in general, and victims of sexual and gender-based crimes, in particular.

If the International Criminal Court follows this course of action, it will be closer to achieve its core objective- that the gravest crimes relevant to the international community do not remain unpunished and that their effective prosecution is assured.[2322]

[2319] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 542-541, para. 1412
[2320] SáCouto, S. (2018)
[2321] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute", p. 13, para. 27; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p.13, para. 38
[2322] Rome Statute, Preamble

Bibliography

Books, Journals, Reports, Thesis and Legislations

A

Additional Protocol to the Convention Relative to the Creation of an International Prize Court, Preamble (19 September 1910). The Hague.

African (Banjul) Charter on Human and Peoples' Rights, adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

African Union's Solemn Declaration on Gender Equality (6-8 July 2004). Retrieved from https://www.mrfcj.org/pdf/Solemn_Declaration_on_Gender_Equality_in_Africa.pdf (5 July 2019)

Allain, Jean (2007). *The Definition of 'Slavery' in General International Law and the Crime of Enslavement within the Rome Statute*. Retrieved from https://www.icc-cpi.int/NR/rdonlyres/069658BB-FDBD-4EDD-8414-543ECB1FA9DC/0/ICCOTP20070426Allain_en.pdf (5 July 2019)

Allain, Jean (2013). *Slavery in International Law: of Human Exploitation and Trafficking*. Leiden: Martinus Nijhoff Publishers.

Allain, Jean, & Jones, John R. W.D. (1997). *A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind*, pp. 100-117. Retrieved from https://academic.oup.com/ejil/article/8/1/100/651416 (5 July 2019)

Ambos, Kai (2014). *Treatise on International Criminal Law, Volume II: The Crimes and Sentencing*. Oxford: Oxford University Press.

American Convention on Human Rights (22 November 1969).

American Declaration of Rights and Duties of the Man (2 May 1948).

American Red Cross, *International Humanitarian Law. Summary of the Geneva Conventions of 1949 and their Additional Protocols* (April 2011). Retrieved from https://www.redcross.org/content/dam/redcross/atg/PDF_s/International_Services/International_Humanitarian_Law/IHL_SummaryGenevaConv.pdf (5 July 2019)

Amnesty International (1993). *Bosnia-Herzegovina, Rape and sexual abuse by armed forces*. AI Index EUR: 63/01/93.

Retrieved from
https://www.amnesty.org/download/Documents/188000/eur630011993en.pdf (5 July 2019)

Amnesty International (1997). *The International Criminal Court: Making the right choices*. AI Index: IOR 40/01/97.
Retrieved from
http://www.iccnow.org/documents/ALMakingRightChoises97PartI.pdf (5 July 2019)

Amnesty International (2003). Democratic Republic of Congo: Ituri - How many more have to die? AI Index: APR 62/030/2003.
Retrieved from
https://www.amnesty.org/en/documents/afr62/030/2003/en/ (5 July 2019)

Amnesty International (2004). *Central African Republic, Five months of war against women*. AI Index: AFR 19/001/2004.
Retrieved from
https://www.amnesty.org/download/Documents/88000/afr190012004en.pdf (5 July 2019)

Amnesty International (2004 a). *Democratic Republic of Congo: Mass Rape - Time for Remedies*. AI Index: APR 62/018/2004
Retrieved from
https://www.amnesty.org/en/documents/afr62/018/2004/en/ (5 July 2019)

Amnesty International (2009). *Whose Justice? the women of Bosnia and Herzegovina are still waiting*. AI Index: EUR 63/006/2009
Retrieved from
http://www.refworld.org/pdfid/4ac365d22.pdf (5 July 2019)

Amnesty International (2011). *Rape and sexual violence: Human rights law and standards in the International Criminal Court.* AI Index: IOR 53/001/2011
Retrieved from
https://www.amnesty.org/download/Documents/32000/ior530012011en.pdf (5 July 2019)

Amnesty International (2018). *CAR: Acquittal of Bemba a Blow to Victims*.
Retrieved from
https://www.amnesty.org/en/press-releases/2018/06/car-acquittal-of-bemba-a-blow-to-victims/ (5 July 2019)

Annas, George J., & Grodin, Michael A. (eds.) (1992).*The Nazi Doctors and Nuremberg Code: Human Rights in Human Experimentation*. Oxford: Oxford University Press.

Argibay, Carmen M. (2003). *Sexual Slavery and the Comfort Women of World War II*, pp. 375-389.
Retrieved from

https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1242&context=bjil (5 July 2019)

Arsanjani, Mahnoush H. (1999). *The Rome Statute of the International Criminal Court*, pp. 22-43.
Retrieved from
https://www.cambridge.org/core/journals/american-journal-of-international-law/article/rome-statute-of-the-international-criminal-court/EA248C86B481B50F9F7C7B277FB50292 (5 July 2019)

Askin, Kelly D. (1997). *War crimes against women: Prosecution in international war crimes tribunals*. The Hague: Martinus Nijhoff.

Askin, Kelly D. (2003). *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, pp. 288-349.
Retrieved from
https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1240&context=bjil (5 July 2019)

Askin, Kelly D. (2005). *The Jurisprudence of International War Crimes Tribunals: Securing Gender Justice for Some Survivors*. Leiden: Martinus Nijhoff.

B

Bassiouni, M. Cherif (1980). *International criminal law: A draft international criminal code*. Alphen aan den Rijn, Netherlands: Sijhoff & Noordhoff.

Bassiouni, M. Cherif (1987*). A Draft International Criminal Code and Draft Statute for an International Criminal Tribuna*l. Dordrecht, Boston, Lancaster: Martinus Nihjoff Publisher.

Bassiouni, M. Cherif (1991). *Enslavement as an International Crime*, pp. 445-571.
Retrieved from
https://www.legal-tools.org/doc/6ac14a/pdf/ (5 July 2019)

Bassiouni, M. Cherif (1992). *Crimes against humanity in international criminal law*. The Hague: Kluwer Law International.

Bassiouni, M. Cherif (1994). *Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal,* pp. 1191-1211.
Retrieved from
https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1434&context=ilj (5 July 2019)

Bassiouni, M. Cherif (1994). *The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992*), pp. 784-805.
Retrieved from

https://www.cambridge.org/core/journals/american-journal-of-international-law/article/united-nations-commission-of-experts-established-pursuant-to-security-council-resolution-780-1992/B21BAE7C6BEDE9A6CE05FFFBF309C4D9 (5 July 2019)

Bassiouni, M. Cherif (1997). *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, pp. 11-62. Retrieved from https://heinonline.org/HOL/LandingPage?handle=hein.journals/hhrj10&div=3&id=&page= (5 July 2019)

Bassiouni M. Cherif (1999). "International Criminal Justice in Historical Perspective". In Bassiouni M. C. (ed.). *International Criminal Law*: *Enforcement*, 2nd ed. Vol. III. Ardsley: Transnational Publishers, pp. 29-65.

Bassiouni, M. Cherif (2006). *International Recognition on Victims` Rights*, pp. 203-279. Retrieved from https://www.icc-cpi.int/RelatedRecords/CR2010_03413.PDF(5 July 2019)

Bassiouni, M. Cherif (2010). *Perspectives on International Criminal Justice*, pp. 270-323. Retrieved from https://www.legal-tools.org/doc/29427e/pdf/ (5 July 2019)

Bassiouni, M. Cherif (2011). *Crimes Against Humanity: Historical Evolution and Contemporary Application*. Cambridge: Cambridge University Press.

Bassiouni, M. Cherif (2012). *Introduction to International Criminal Law*, 2nd revised ed., International Criminal Law, Series 1. Leiden: Martinus Nijhoff Publishers.

Bassiouni, M. Cherif, & McCormick, Marcia (1996). *Sexual Violence: An Invisible Weapon of War in the former Yugoslavia*. Chicago, IL: International Human Rights Law Institute, De Paul University.

Baum, Lynne M. (2001). *Pursuing Justice in a Climate of Moral Outrage: An Evaluation of the Rights of the Accused in the Rome Statute of the International Criminal Court*, pp.197-230. Retrieved from http://hosted.law.wisc.edu/wordpress/wilj/files/2017/11/V.-19-I.2-Lynne-Baum.pdf (5 July 2019)

Baumgartner, Elisabeth (2008). *Aspects of victim participation in the proceedings of the International Criminal Court*, pp. 409-440. Retrieved from https://www.icrc.org/en/international-review/article/aspects-victim-participation-proceedings-international-criminal-court (5 July 2019)

Bedont, Barbara (1999). “Gender-specific Provisions in the Statute of the International Criminal Court”. In Lattanzi, Flavia, & Schabas, William A. (eds.). *Essays on the Rome Statute of the International Criminal Court*, Vol. 1. Ripa di Fagnano Alto, Italy: il Sirente, pp. 183-210.

Bedont, Barbara, & Martinez, Katherine H. (1999). *Ending Impunity for Gender Crimes under the International Criminal Court*, pp. 65-85.
Retrieved from
http://iccwomen.org/publications/articles/docs/Ending_Impunity_for_Gender_Crimes_under_the_International_Criminal_Court.doc. (5 July 2019)

Benhassine, Sonia (2015). *Is ‘justice’ ever possible for victims of gender-based violence during armed conflict? A critical reflection of the position of women within international criminal justice*, pp. 11-12. Postgraduate Human Rights Centre, Working Paper No. 10, Queen´s University Belfast.
Retrieved from
https://www.qub.ac.uk/schools/SchoolofLaw/Research/HumanRights/postgraduates/working-papers/ (17 June 2017)

Bergsmo, Morten, & Kruger, Pieter (2008). “Article 54 Duties and Powers of the Prosecutor with respect to investigations”. In Triffterer, Otto, & Ambos, Kai (eds.). *Commentary on the Rome Statute of the International Criminal Court: Observer's note, article by article*, 2nd ed. München: Beck, pp. 1077-1087.

Boas, Gideon, Bischoff, James L., & Reid, Natalie L. (2010). *International Criminal Law Practitioner Library - Volume II: Elements of Crimes Under International Law.* Cambridge: Cambridge University Press.

Boister, Neil (2011). “The Tokyo Trial”. In Schabas, William A., & Bernaz, Nadia (2011). *Routledge handbook of international criminal law*. London: Routledge, Taylor & Francis Group, pp. 17-32.

Boon, Kristen (2001). *Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent*, pp. 625-775.
Retrieved from
http://genderandsecurity.org/projects-resources/research/rape-and-forced-pregnancy-under-icc-statute-human-dignity-autonomy-and (5 July 2019)

Boot, Machteld (2002). *Genocide, Crimes against Humanity and War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, School of Human Rights Research, Vol. 12. Antwerpen, Oxford, New York: Intersentia.

Boot, Machteld, revised by Hall, Christopher K. (2008). “Article 7 Crimes Against Humanity, para. 1 (g)”. In Triffterer, Otto, & Ambos, Kai (eds.). *Commentary on the Rome Statute of the International Criminal Court: Observer's note, article by article*, 2nd ed. München: Beck, pp. 206-216.

Boot, Machteld, revised by Hall, Christopher K. (2008). “Article 7 Crimes Against Humanity, para. 2 (f)”. In Triffterer, Otto, & Ambos, Kai (eds.). *Commentary on*

the Rome Statute of the International Criminal Court: Observer's note, article by article, 2nd ed. München: Beck, pp. 255-263.

Brown, Henry B. (1908). *The Proposed International Prize Court*, pp. 476- 489. Retrieved from https://www.jstor.org/stable/2186326?origin=crossref&seq=1#metadata_info_tab_contents (5 July 2019)

Brownmiller, Susan (1975). *Against our will: Men, women and rape*. New York: Simon and Schuster.

Byron, H.E. Judge Charles Michael Dennis (2010). Statements of the Presidents of the ICJ and of the International Criminal Tribunals. In Bassiouni, M. Cherif (ed.). *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice*, Vol. 1. Antwerp, Oxford, Portland: Intersentia, pp. 146-148.

C

Cahn, Naomi R. (2004). *Beyond Retribution and Impunity: Responding to War Crimes of Sexual Violence*, pp. 1-66. Retrieved from http://scholarship.law.gwu.edu/faculty_publications/332 (5 July 2019)

Carlson, Eric S. (1997). *Sexual Assault on Men in War*, p. 129. Retrieved from https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(96)10013-1/fulltext (5 July 2019)

Carnegie Endowment for International Peace, Division of International Law (1949). *Violation of the Laws and Customs of War. Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris 1919*, Annex I, Pamphlet No. 32. Oxford: At the Clarendon Press, pp. 17-18. Retrieved from https://archive.org/details/violationoflawsc00pariuoft/page/n1 (5 July 2019)

Cavallaro, Rosanna (1996). *A Big Mistake: Eroding the Defense of Mistake of Fact About Consent in Rape*, pp. 815-860. Retrieved from https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6878&context=jclc (5 July 2019)

Charlesworth, Hilary (1999). *Feminist Methods in International Law*, pp. 379-394. Retrieved from https://www.jstor.org/stable/2997996?seq=1#page_scan_tab_contents (5 July 2019)

Charter of the United Nations and Statute of the International Court of Justice (26 June 1945). San Francisco.

Chenault, Suzanne (2008). *And since Akayesu? The Development of ICTR Jurisprudence on Gender Crimes: A Comparison of Akayesu and Muhimana*, pp. 221-237.
Retrieved from
https://www.womenslinkworldwide.org/files/gjo_analysis_caseProsecutorvJean PaulAkayesu_en.pdf (5 July 2019)

Chinkin, Christine (1994). *Rape and Sexual Abuse of Women in International Law Symposium: The Yugoslav Crisis: New International Law Issues*, pp. 326-341.
Retrieved from
http://www.ejil.org/pdfs/5/1/1246.pdf (5 July 2019)

Coalition for the International Criminal Court, History of the ICC
Retrieved from
http://iccnow.org/?mod=icchistory (5 July 2019)

Commonwealth v. John Burke, 105 Mass. 376. (October 1870) Bristol County.
Retrieved from
http://masscases.com/cases/sjc/105/105mass376.html (5 July 2019)

Control Council Law No.10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity (20 December 1945). Berlin.

Convention (II) with Respect to the Laws and Customs of War on Land its annex: Regulations concerning the Laws and Customs of War on Land, Preamble (29 July 1899). The Hague.

Convention (IV) with Respect to the Laws and Customs of War on Land its annex: Regulations concerning the Laws and Customs of War on Land, Preamble (18 October 1907). The Hague.

Copelon, Rhonda (2000). *Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law*, pp. 217-240.
Retrieved from
https://www.researchgate.net/publication/288845091_Gender_Crimes_as_War_Crimes_Integrating_Crimes_against_Women_into_International_Criminal_Law (5 July 2019)

Corrie, Karen (2007). *Questions & Answers on Victims' Participation and Defendants' Due Process Rights: Compatible Regimes at the International Criminal Cour*t, pp. 1-2.
Retrieved from
https://docs.wixstatic.com/ugd/e13974_07c85a1f09e346438623c0d385ae405d.pdf (5 July 2019)

Corrie, Karen (2013). *Victims' Participation at the ICC: Purpose, Early Developments and Lessons,* pp. 1-9.

Retrieved from
https://docs.wixstatic.com/ugd/e13974_984a3cb61bd7441cb5ee85546fe22571.pdf (5 July 2019)

Cottier, Michael (2008). “Article 8 War Crimes, para. 2(b) (xxii)”. In Triffterer, Otto, & Ambos, Kai (eds.). *Commentary on the Rome Statute of the International Criminal Court: Observer's note, article by article*, 2nd ed. München: Beck, pp. 431-454.

Council of Europe, Committee of Ministers. Recommendation No. R (85) 11 of the Committee of Ministers to Member States on the Position of the Victim in the Framework of Criminal Law and Procedure (28 June 1985).

Council of Europe. Convention on Action against Trafficking in Human Beings (16 May 2005).

Cryer, Robert, Friman, Håkan, Robinson, Darryl, & Wilmshurst, Elizabeth (2014). *An Introduction to International Criminal Law and Procedur*e, 3rd ed. Cambridge: Cambridge University Press.

D

Dag Hammarskjöld Library, UN Documentation: International Law, International Criminal Court.
Retrieved from
http://research.un.org/en/docs/law/courts (5 July 2019)

Damaska, Mirjan R. (2009). *The International Criminal Court Between Aspiration and Achievement*, pp. 19-35.
Retrieved from
https://digitalcommons.law.yale.edu/fss_papers/1572 (5 July 2019)

de Brouwer, Anne-Marie L.M. (2001). *Case Law: The International Criminal Tribunal* for the former Yugoslavia: Kunarac, Kovac and Vukovic case (“Foča”), pp. 221-236.
Retrieved from
https://brill.com/abstract/journals/tilr/9/2/article-p221_5.xml (5 July 2019)

de Brouwer, Anne-Marie L.M. (2005). *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*. Cambridge: Intersentia.

de Brouwer, Anne-Marie L.M. (2011). “Prosecution of Sexual Violence”. In Jones, Jackie, Grear, Anna, Fenton, Rachel A., and Stevenson, Kim (eds.). *Gender, Sexualities and Law*. Oxon, New York: Routledge, pp. 201-212.

de Brouwer, Anne-Marie, & Heikkilä, Mikaela (2013). “Victims Issues: Participation, Protection, Reparation and Assistance”. In Sluiter, Göran, Friman, Håkan, Linton, Suzannah, Zappala, Salvatore, & Vasiliev, Sergey (eds.).

International Criminal Procedure: Principles and Rules. Oxford: Oxford University Press, pp. 1299-1374.

de la Cuesta Arzamendi, José Luis (2018). "La normativa internacional como respuesta a los procesos de victimización". In Varona Martinez, Gemma (ed.). *Victimología: en busca de un enfoque integrador para repensar la intervención con víctimas*. Cizur Menor: Thomson Reuters Aranzadi, pp. 229-248.

Demleitner, Nora V. (1994). *Forced Prostitution: Naming an International Offense*, pp. 163-197.
Retrieved from
https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1164&context=wlufac (5 July 2019)

Dhokalia, Ramaa P. (1970). *The Codification of Public International Law*. Manchester: Manchester University Press.

Dixon, Rodney, revised by Hall, Christopher K. (2008). "Article 7 Crimes Against Humanity, para. 1 "Chapeau"". In Triffterer, Otto, & Ambos, Kai (eds.). *Commentary on the Rome Statute of the International Criminal Court: Observer's note, article by article*, 2nd ed. München: Beck, pp. 168-183.

Donat-Cattin, Donat (1999). "The role of victims in ICC proceedings". In Lattanzi, Flavia, & Schabas, William A. (eds.). *Essays on the Rome Statute of the International Criminal Court*, Vol. 1. Ripa di Fagnano Alto, Italy: il Sirente, pp. 251-278.

Donat-Cattin, Donat (2008). "Article 68 Protection of victims and witnesses and their participation in the proceedings". In Triffterer, Otto, & Ambos, Kai (eds.). *Commentary on the Rome Statute of the International Criminal Court: Observer's note, article by article*, 2nd ed. München: Beck, pp. 1275-1300.

Dondé Matute, Javier. (2014). "Sentencia de Imposición de Pena en el Caso Thomas Lubanga. Aspectos Generaels". In Ambos, Kai, Malarino, Ezequiel, & Steiner, Christian (eds.). *Análisis de la primera sentencia de la Corte Penal Internacional: el caso Lubanga*. Berlín, Bogotá: Konrad Adenauer Stiftung, pp. 305-327.

Dörmann, Knut (2000). *Preparatory Commission for the International Criminal Court: The Elements of War Crimes*, pp. 771-796.
Retrieved from
https://www.icrc.org/en/doc/resources/documents/article/other/57jqqd.htm (5 July 2019)

Dörmann, Knut (2001). *Preparatory Commission for the International Criminal Court: The Elements of War Crimes Part II: Other serious violations of the laws and customs applicable in internationaland non-international armed conflicts*, pp. 461-487.
Retrieved from
https://www.icrc.org/eng/assets/files/other/461-488_dormann.pdf (5 July 2019)

Dörmann, Knut (2003). *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*. Cambridge: International Committee of the Red Cross/ Cambridge University Press.
Retrieved from
https://www.icrc.org/en/doc/resources/documents/publication/p0-521-81852-4.htm (5 July 2019)

Dörmann, Knut (2003 a). "War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crime". In von Bogdandy, Armin, & Wolfrum, Rüdiger (eds.). *Max Planck Yearbook of United Nations Law*, Vol 7. Leiden/ Boston: Martinus Nijhoff Publishers, pp. 341-407.

Dörmann, Knut (2008). "Article 8 War crimes, para. 2 (a)". In Triffterer, Otto, & Ambos, Kai (eds.), *Commentary on the Rome Statute of the International Criminal Court: Observer's note, article by article*, 2nd ed. München: Beck, pp. 300-322.

Dörmann, Knut, & Maresca, Louis (2004). *The International Committee of the Red Cross and its Contribution to the Development of International Humanitarian Law in Specialized Instruments*, pp. 217-232.
Retrieved from
https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1521&context=cjil (5 July 2019)

E

The Electronic Newsletter of the Women's Caucus for Gender Justice (2002), Vol. III (2, June).
Retrieved from
http://www.iccwomen.org/wigjdraft1/Archives/oldWCGJ/resources/newsletter702.html
(5 July 2019)

Eriksson, Maria (2011). *Defining Rape: Emerging Obligations for States Under International Law?* Leiden: Martinus Nijhoff Publishers.

European Community Investigative Mission into the Treatment of Muslim Women in the Former Yugoslavia: Report to the EC Foreign Ministries (The Warburton Mission II Report). E/CN.4/1993/92, S/25240 Annex I (3 February 1993).

European Convention for the Protection of Human Rights and Fundamental Freedoms (20 March 1952).

European Union. Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, Official Journal of the European Communities. L 261/15 (6 August 2004).

European Union. Council Framework Decision of 15 March 2001 on the standing victims in criminal proceedings, 2001/220/JHA, Official Journal of the European Communities. L 82/1 (22 March 2001).

European Court of Human Rights. Case Aksoy v. Turkey (Application no. 21987/93). Judgment (18 December 1996).

European Court of Human Rights. Case Campbell v. the United Kingdom (Application no. 13590/88). Judgment (25 March 1992).

European Court of Human Rights. Case M.C. v. Bulgaria (Application No. 39272/98). Judgment (4 December 2003).

European Court of Human Rights. Case Selmouni v. France Application (Application n. 25803/94). Judgment (28 July 1999).

European Court of Human Rights. Case Thlimmenos v. Greece (Application no. 34369/97). Judgment (6 April 2000).

European Court of Human Rights. Case T.P., & K.M. v. the United Kingdom (Application no. 28945/95). Judgment (10 May 2001).

European Court of Human Rights. Case X and Y v. the Netherlands (Application n. 8978/80). Judgment (26 March 1985).

F

Faculty of Law, The National University of Singapore (1997). *The International Criminal Court*, pp. 227-277.
Retrieved from
https://heinonline.org/HOL/LandingPage?handle=hein.journals/singa1&div=1&src=home (5 July 2019)

Fédération internationale des ligues des droits de l'Homme report (2003). *Crimes de Guerre en République Centrafricaine Quand les éléphants se battent, c'est l'herbe qui souffre*
Retrieved from
https://www.fidh.org/IMG/article_PDF/article_a1091.pdf (5 July 2019)

Fédération internationale des ligues des droits de l'Homme report (2006), *République centrafricaine, Oubliées, stigmatisées: la double peine des victimes de crimes internationaux.*
Retrieved from
https://www.fidh.org/IMG/pdf/RCA457-2006.pdf (5 July 2019)

Ferencz, Benjamin B. (1980). An International Criminal Court, a step toward world peace: a documentary history and analysis. London: Oceana.

Fernandez de Gurmendi, Silvia A. (2001). “Definition of Victims and General Principle”. In Lee, Roy S. K. & Friman, Hakan. (eds.). *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*. Ardsley: Transnational Publishers, pp. 427-433.

Ferstman, Carla (2011). “International Criminal law and victims´ rights”. In Schabas, William A., & Bernaz, Nadia (eds.). *Routledge handbook of international criminal law*. London: Routledge, Taylor & Francis Group, pp. 407-419.

Finch, George A. (1919). *The Peace Conference of Paris, 1919*, pp. 159-186. Retrieved from https://www.cambridge.org/core/journals/american-journal-of-international-law/article/peace-conference-of-paris-1919/C0837A233F235071DFBE9FC46762179A (5 July 2019)

Finch, George A. (1943). *Retribution for War Crimes,* pp. 81-88. Retrieved from https://www.cambridge.org/core/journals/american-journal-of-international-law/article/retribution-for-war-crimes/956025C02BEF2524398DEFB6FD0ECF44 (5 July 2019)

Finch, George A. (1947). *The Nuremberg Trial and International Law,* pp. 20-37. Retrieved from https://www.jstor.org/stable/i312053 (5 July 2019)

Fisher, Siobhán K. (1996). *Occupation of the Womb: Forced Impregnation as Genocide*, pp. 91-133. Retrieved from https://scholarship.law.duke.edu/dlj/vol46/iss1/4 (5 July 2009)

Funk, T. Markus (2010). *Victims`rights and advocacy at the International Criminal Court*. Oxford: Oxford University Press.

G

Gabriel, Eulalia. W. P. (2000). “La Propuesta de Tribunal Penal Internacional de Gustave Moynier, un Proyecto Antiguo Recentemente Rescatado (1872-1998)”. In Carrillo Salcedo, Juan A. (ed.), *La Criminalización de la Barbarie: la Corte Penal Internacional*. Madrid: Impreso Consejo General de Poder Judicial, pp. 29-88.

Galain Palermo, Pablo (2014) “Modalidades de Reparación y Adecuación al Tipo de Víctima”. In Ambos, Kai, Malarino, Ezequiel, & Steiner, Christian (eds.). *Análisis de la primera sentencia de la Corte Penal Internacional: el caso Lubanga*. Berlín, Bogotá: Konrad Adenauer Stiftung. pp. 389-430.

Garbett, Claire (2017). *The International Criminal Court and restorative justice: victims, participation and the processes of justice,* pp. 198-220.

Retrieved from
https://www.tandfonline.com/doi/pdf/10.1080/20504721.2017.1339953?needAccess=true (5 July 2019)

Gardam, Judith G. (1998). *Women, human rights and international humanitarian law*, pp. 449-462.
Retrieved from
https://www.icrc.org/en/doc/resources/documents/article/other/57jpg4.htm (5 July 2009)

Garkawe, Sam (2003). *Victims and the International Criminal Court: Three Major Issues*, pp. 345-367.
Retrieved from
https://brill.com/abstract/journals/icla/3/4/article-p345_2.xml (5 July 2019)

Garkawe, Sam (2006). "The Role and Rights of Victims at the Nuremberg Military International Tribunal". In Heginbogin, Herbert R., Safferling, Christoph J. M., & Hippel, Walter R. (eds.). *The Nuremberg Trials: International Criminal Law Since 1945 / Die Nürnberger Prozesse: Völkerstrafrecht seit 1945*. Saur München: De Gruyter, pp. 86-87.

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. 6 U.S.T. 3114, 75 U.N.T.S. 31 (12 August 1949).

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea. 6 U.S.T. 3217, 75 U.N.T.S. 85 (12 August 1949).

Geneva Convention Relative to the Treatment of Prisoners of War. 6 U.S.T. 3316, 75 U.N.T.S. 135 (12 August 1949).

Geneva Convention Relative to the Protection of Civilian Persons in Time of War. 6 U.T.S. 3516, 75 U.N.T.S. 287 (12 August 1949).

Goldstein, Anne. T. (1993). *Recognizing Forced Impregnation as a War Crime Under International Law: A Special Report of the International Program*. New York, New York: Center for Reproductive Law and Policy.

Gordon, Gregory S. (2013). "The Trial of Peter Von Hagenbach: Reconciling History, Historiography, and International Criminal Law". In Heller, Kevin J., & Simpson, Gerry. *The Hidden Histories of War Crimes Trials*. Oxford: Oxford University Press, pp. 13-49.

Green, Laurie (2011). *First-Class Crimes, Second-Class Justice: Cumulative Charges for Gender-Based Crimes at the International Criminal Court*, pp. 529-541.
Retrieved from

https://www.researchgate.net/publication/233600669_First-Class_Crimes_Second-Class_Justice_Cumulative_Charges_for_Gender-Based_Crimes_at_the_International_Criminal_Court (5 July 2019)

Groenhuijsen, Marc S. (2005). *International Protocols on Victims' Rights and some Reflections on Significant Recent Developments in Victimology*, pp. 333-351.
Retrieved from
https://pure.uvt.nl/ws/portalfiles/portal/709308/INTPROT_.PDF (5 July 2019)

Groenhuijsen, Marc S., & Pemberton, Antony (2011). “Genocide, Crimes against Humanity and War Crimes, A Victimological Perspective on International Criminal Justice”. In Letschert, Rianne, Havemen, Roelof, de Brouwer, Anne-Marie L. M., & Pemberton, Antony (eds.). *Victimological approaches to international crimes: Africa*. Oxford, Portland, Wien, Mortsel: Intersentia, pp. 9-34.

The Guardian (2018). Jean-Pierre Bemba 's war crimes conviction overturned. In the Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber, Annex E to the Mr. Bemba´s claim for compensation and damages. ICC-01/05-01/08-3673-AnxE (19 March 2019)
Retrieved from
https://www.icc-cpi.int/RelatedRecords/CR2019_01343.PDF (5 July 2019))

The Guardian (2018). Jean-Pierre Bemba 's war crimes conviction overturned.
Retrieved from
https://www.theguardian.com/global-development/2018/jun/08/former-congo-leader-jean-pierre-bemba-wins-war-crimes-appeal-international-criminal-court (5 July 2019)

H

Haffajee, Rebecca L. (2006). *Prosecuting Crimes of Rape and Sexual Violence at the ICTR: the application of Joint Criminal Enterprise Theory,* pp. 201-222.
Retrieved from
https://pdfs.semanticscholar.org/65b3/e13e70452bd135177cd33ae7ef45a5fde0e1.pdf (5 July 2019)

Hague Convention (XII) relative to the Creation of an International Prize Court (18 October 1907). The Hague.

Hall, Christopher K. (1998). *The first proposal for a permanent international criminal court*, pp. 57-74.
Retrieved from
https://www.icrc.org/en/doc/resources/documents/article/other/57jp4m.htm (5 July 2019)

Hall, Christopher K. (2008). “Article 7 Crimes Against Humanity, para. 2 (c)”. In Triffterer, Otto, & Ambos, Kai (eds.). *Commentary on the Rome Statute of the*

International Criminal Court: Observer's note, article by article, 2nd ed. München: Beck, pp. 237-255.

Halley, Janet. (2008). *Rape at Rome: Feminist Interventions in the Criminalization of Sex Related Violence in Positive International Criminal Law*, pp. 1-120.
Retrieved from
https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1117&context=mjil (5 July 2019)

Harvard Law School Library, Nuremberg Trials Project. *Nuremberg* Military Tribunals, Case 1, U.S.A. v. Karl Brandt et al.: The Doctor´s Trial.
Retrieved from
http://nuremberg.law.harvard.edu/nmt_1_intro (5 July 2019)

Haslam, Emily (2004). "Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?" In McGoldrick, Dominic, Rowe, Peter, & Donnelly, Eric. (eds.). *The Permanent International Criminal Court: Legal and Policy Issues, Studies in International Law*. Oxford: Hart Publishing, pp. 315-336.

Hayes, Niamh (2016). The Bemba Trial Judgment – A Memorable Day for the Prosecution of Sexual Violence by the ICC.
Retrieved from
http://humanrightsdoctorate.blogspot.com/2016/03/hayes-bemba-trial-judgement-memorable.html (5 July 2019)

Heller, Kevin J. (2016). Why Bemba's Conviction Was Not a "Very Good Day" for the OTP (Updated).
Retrieved from
http://opiniojuris.org/2016/03/22/a-few-thoughts-on-bembas-conviction/ (5 July 2019)

Henckaerts, Jean-Marie, & Doswald-Beck, Louise (2009). Customary International Humanitarian Law, Volume I: Rules. International Committee of the Red Cross. Cambridge: Cambridge University Press, pp. 327-330.
Retrieved from
https://www.refworld.org/pdfid/5305e3de4.pdf (5 July 2019)

Human Rights Watch (2005). *Seeking Justice: The Prosecution of Sexual Violence in the Congo War*, pp. 1-53.
Retrieved from
https://www.hrw.org/sites/default/files/reports/drc0305.pdf (5 July 2019)

Hutchinson, John F. (1996). *Champions of charity: war and the rise of the Red Cross*. Boulder, Colorado: Westview Press.
Retrieved from
https://www.icrc.org/en/doc/resources/documents/article/other/57jnd4.htm (5 July 2019)

Hwang, Phylilis (1998). *Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court*, pp. 457-504.

Retrieved from
https://ir.lawnet.fordham.edu/ilj/vol22/iss2/5/ (5 July 2019)

I

Inder, Brigid (2008). *Making a Statement, a Review of Charges and Prosecutions for Gender-based crimes before the International Criminal Court*, pp. 1-37.
Retrieved from
http://www.iccwomen.org/publications/articles/docs/MakingAStatement-WebFinal.pdf (5 July 2019)

Instituto de Estudios sobre Conflictos y Acción Humanitária (2012). Fatou Bensouda y su visión de los crímenes de violencia sexual.
Retrieved from
http://www.iecah.org/web/index.php?option=com_content&view=article&id=1801:fatou-bensouda-y-su-vision-de-los-crimenes-de-violencia-sexual&catid=37:entrevistas&Itemid=88 (5 July 2019)

Inter-American Court of Human Rights. Case Barrios Altos v. Peru. Judgment (14 March 2001).

Inter-American Court of Human Rights. Case El Amparo v. Venezuela. Judgment (14 September 1996).

Inter-American Court of Human Rights. Case Garrido and Baigorria v. Argentina. Judgment (Reparations and Costs) (27 August 1998).

Inter-American Court of Human Rights. Case “Las Dos Erres” Massacre v. Guatemala. Judgment, (Preliminary Objection, Merits, Reparations, and Costs) (24 November 2009).

Inter-American Court of Human Rights. Case Loayza Tamayo v. Peru, Judgment (17 September 1997).

Inter-American Court of Human Rights. Case plan de Sánchez Massacre v. Guatemala. Judgment (Merits) (29 April 2004).

Inter-American Court of Human Rights. Case the “Juvenile Reeducation Institute” v. Paraguay. Judgment (Preliminary Objections, Merits, Reparations and Costs) (2 September 2004).

Inter-American Court of Human Rights. Case Velásquez Rodríguez v. Honduras. Judgment (Merits) (29 July 2998).

International Court of Justice. Nicaragua v. United States of America, Merits Judgment (27 June 1986).

International Criminal Court (2004). *Address by Prosecutor Luis Moreno Ocampo, Third Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court*.
Retrieved from
https://www.icc-cpi.int/NR/rdonlyres/1E4656AC-32D9-483D-9D2A-DE74F2FD8415/0/LMO_20040906_En.pdf (5 July 2019)

International Criminal Court. Agreement on the Privileges and Immunities of the Court. ICC-ASP/1/3 (Part. II-E) (2002).

International Criminal Court. Application Form for Organisations, Request for Participation in Proceedings and Reparations at the ICC For Victims that are Organisations or Institutions.
Retrieved from
https://www.icc-cpi.int/itemsDocuments/appForms-yn/ynAppFormOrg_ENG.pdf (5 July 2019)

International Criminal Court, Assembly of States Parties. Fourth session, 28 November to 3 December 2005, Report on the activities of the Court. ICC-ASP/4/16 (16 September 2005).

International Criminal Court, Assembly of States Parties. Report, First Session, Official Records. ICC-ASP/1/3 and Corr.1 (3-10 September 2002).
Retrieved from
https://documents-dds-ny.un.org/doc/UNDOC/GEN/N02/603/35/PDF/N0260335.pdf?OpenElement (5 July 2019)

International Criminal Court, Assembly of States Parties. Report of the Bureau on the impact of the Rome Statute system on victims and affected communities. ICC-ASP/9/2 (22 November 2010).

International Criminal Court, Assembly of States Parties. Revised Strategy in Relation to Victims. ICC-ASP/11/38 (5 November 2012).

International Criminal Court (2010). Booklet, Victims before the International Criminal Court, A Guide for the Participation of Victims in the Proceedings of the Court.
Retrieved from
https://www.icc-cpi.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSBookletEnglish.pdf (5 July 2019)

International Criminal Court. Code of Professional Conduct for counsel. Resolution ICC-ASP/4/Res.1. ICC-ASP/4/Res.1 (2 December 2005).

International Criminal Court. Elements of Crimes of the International Criminal Court. ICC-ASP/1/3 (part II-B) (2002).

International Criminal Court. Establishment of a Fund for the Benefit of Victims of Crimes Within the Jurisdiction of the Court, and of the Families of Such Victims, Resolution ICC-ASP /1/Res.6. ICC-ASP/1/Res.6 (9 September 2002).

International Criminal Court. Financial Regulations and Rules. ICC-ASP/1/3 (Part. II-D) (2002).

International Criminal Court. How the Court works.
Retrieved from
https://www.icc-cpi.int/about/how-the-court-works (5 July 2019)

International Criminal Court. ICC at a glance. ICC-PIDS-FS-01-004/13_Eng
Retrieved from
https://www.icc-cpi.int/iccdocs/PIDS/publications/ICCAtAGlanceEng.pdf (5 July 2019)

ICC. Media Advisory, Bemba case: Appeals Chamber to issue appeals judgments on verdict and sentence on 8 June 2018. ICC-CPI-20180518-MA225 (18 May 2018)
Retrieved from
https://www.icc-cpi.int/Pages/item.aspx?name=ma225 (5 July 2019)

International Criminal Court, Office of Public Counsel for Victims. Representing Victims before the International Criminal Court, A Manual for legal representatives appearing before the Court.
Retrieved from
https://www.icc-cpi.int/iccdocs/PIDS/tmp/Representing%20Victims%20before%20ICC.PDF (5 July 2019)

International Criminal Court. Preliminary examinations.
Retrieved from
https://www.icc-cpi.int/pages/pe.aspx (5 July 2019)

International Criminal Court, Presidency. Decision assigning the situation in the Democratic Republic of Congo to Pre-Trial Chamber I. ICC-01/04-01/06-10 (5 July 2004).
Retrieved from
https://www.icc-cpi.int/CourtRecords/CR2006_02088.PDF (5 July 2019)

International Criminal Court, Presidency. Decision on the constitution of Pre-trial Chambers and on the assignment of the Central African Republic situation.TCC-Pres-01-09 (19 March 2009).

International Criminal Court. Procedure for the nomination and election of members of the Board of Directors of the Trust Fund for the benefit of victims, Resolution ICC-ASP/1/Res.7. ICC-ASP/1/Res.7 (9 September 2002).

International Criminal Court. Regulations of the Court. ICC-BD/01-01-04 (2004).

International Criminal Court. Regulations of the Office of the Prosecutor. ICC-BD/05-01-09 (23 April 2009).

International Criminal Court. Regulations of the Registry. ICC-BD/03-01-06-Rev.1 (6 March 2006).

International Criminal Court. Regulations of the Trust Fund for Victims. Resolution ICC-ASP/4/Res.3. ICC-ASP/4/Res.3 (3 December 2005).

International Criminal Court. Rules of Procedure and Evidence of the International Criminal Court. ICC-ASP/1/3 (part II-A) (2002).

International Criminal Court. Rules of Procedure of the Assembly of States Parties. ICC-ASP/1/3 (Part. II-C) (2002).

International Criminal Court. Situation in Darfur, Sudan, No. ICC-02/05. Pre-Trial Chamber I, Decision on the Requests for Leave to Appeal the Decision on the Application for Participation of Victims in the Proceedings in the Situation. ICC-02/05-121 (7 February 2008).

International Criminal Court. Situation in the Democratic Republic of the Congo, No. ICC-01/04. Pre-Trial Chamber I, Decision on the Application by Applicants a/0001/06 to a/0003/06 for Leave to Respond to the Observations of the Prosecutor and Ad Hoc Counsel for the Defence. ICC-01/04-164-tENG (7 July 2006).

International Criminal Court. Situation in the Democratic Republic of the Congo, Nº. ICC-01/04. Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6. ICC-01/04-101-tEN-Corr (17 January 2006).

International Criminal Court. Situation in the Democratic Republic of Congo. Pre-Trial Chamber I, Prosecution's Reply on the Applications for Participation 01/041/dp to 01/04-6/dp. ICC-01/04-84-Conf (15 August 2005).

International Criminal Court. Situation in the Republic of Kenya, The Prosecutor v. William Samoei Ruto and Joseph Arap Sang. Trial Chamber V, Application by Kituo Cha Sheria for Leave to Submit Observations pursuant to Rule 103 of the Rules of Procedure and Evidence. ICC-01/09-01/11 (30 October 2012).

International Criminal Court. Situation in Uganda, Pre-Trial Chamber II (Single Judge), Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06. ICC-02/04-101 (10 August 2007).

International Criminal Court. Situations under investigation.
Retrieved from
https://www.icc-cpi.int/pages/situation.aspx (5 July 2019)

International Criminal Court. Staff Regulations of the International Criminal Court. Resolution ICC-ASP/2/Res.2. ICC-ASP/2/Res.2 (12 September 2003).

International Criminal Court. The Court Today. ICC-PIDS-TCT-01-092/18_Eng (21 September 2018).
Retrieved from
https://www.icc-cpi.int/iccdocs/PIDS/publications/TheCourtTodayEng.pdf (5 July 2019)

International Criminal Court, the Office of the Prosecutor. Background, Situation in the Central African Republic. ICC-OTP-BN-20070522-220-A_EN (22 May 2007). The Hague.
Retrieved from
https://reliefweb.int/sites/reliefweb.int/files/resources/87FA905689B4FD92C12572E300302CF0-Fulll_Report.pdf (5 July 2019)

International Criminal Court, the Office of the Prosecutor, Fatou Bensouda. 65th Anniversary of the Genocide Convention: The Contribution of the Office of the Prosecutor of the International Criminal Court, the World in the Age of Genocide (12 December 2013). New York.
Retrieved from
https://www.icc-cpi.int/iccdocs/otp/OTP-Genocide-Poland-event-NY.pdf (5 July 2019)

International Criminal Court, the Office of the Prosecutor, Fatou Bensouda. Launch of the Gender Report Card on the International Criminal Court 2011 (13 December 2011).
Retrieved from
https://www.icc-cpi.int/NR/rdonlyres/BCB9AB3F-4684-4EC3-A677-73E8E443148C/284154/111213StatementFB.pdf (5 July 2019)

International Criminal Court, the Office of the Prosecutor. Policy Paper on Sexual and Gender-Based Crimes (9 June 2014).
Retrieved from
https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf (5 July 2019)

International Criminal Court, the Office of the Prosecutor. Report on the activities performed during the first three years (June 2003 – June 2006). (12 September 2006). The Hague.
Retrieved from
https://www.icc-cpi.int/nr/rdonlyres/d76a5d89-fb64-47a9-9821-725747378ab2/143680/otp_3yearreport20060914_english.pdf (5 July 2019)

International Criminal Court, the Office of Public Counsel for Victims. Helping victims make their voice heard. 5 years of activities.
Retrieved from
https://www.icc-cpi.int/NR/rdonlyres/01A26724-F32B-4BE4-8B02-A65D6151E4AD/282846/LRBookletEng.pdf (5 July 2019)

International Criminal Court. The Prosecutor v. Ahmad Al Faqi Al Mahdi, Case No. ICC-01/12-01/15.

International Criminal Court. The Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06. Trial Chamber IV, Judgment. ICC-01/04-02/06-2359 (8 July 2019).

International Criminal Court. The Prosecutor v. *Callixte Mbarushimana,* Case No. ICC-01/04-01/10. Pre-Trial Chamber I, Decision on the confirmation of charges. ICC-01/04-01/10-465-Red (16 December 2011).

International Criminal Court. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga. ICC-01/04-01/07 (6 July 2007).

International Criminal Court. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Warrant of Arrest for Germain Katanga. ICC-01/04-01/07-1-tENG (2 July 2007).

International Criminal Court. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. The Appeals Chamber, Defence Notice of Discontinuance of Appeal against the '*Judgment rendu en application de l'article 74 du Statut'* rendered by Trial Chamber II on 7 April 2014. ICC-01/04-01/07-3497 and annex (25 June 2014).

International Criminal Court. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07 OA 13. The Appeals Chamber, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons". ICC-01/04-01/07-3363 (27 March 2013).

International Criminal Court. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. The Appelas Chamber, Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute", p. 4. ICC-01/04-01/07-3778-Red 09-03-2018 (8 March 2018).

International Criminal Court. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. The Appeals Chamber, Notice of Discontinuance of the Prosecution's Appeal against the Article 74 Judgment of Conviction of Trial Chamber II date 7 March 2014 in relation to Germain Katanga. ICC-01/04-01/07-3498 (25 June 2014).

International Criminal Court. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Three judges of the Appeals Chamber appointed for the review concerning reduction of sentence, Decision on the review concerning reduction of sentence of Mr Germain Katanga. ICC-01/04-01/07-3615 (13 November 2015)

International Criminal Court. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Common Legal Representative of the main group of Victims, Second Corrigendum *Conclusions Finales*. ICC-01/04-01/07-3253-Corr2-Red (16 March 2012).

International Criminal Court. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Trial Chamber II, Decision on Sentence pursuant to article 76 of the Statute. ICC-01/04-01/07-3484-tENG (23 May 2014).

International Criminal Court. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, *Décision sur la mise en oeuvre de l'ordonnance relative aux modalités de présentation des conclusions orales*. ICC-01/04-01/07-3285 (7 May 2012).

International Criminal Court. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Trial Chamber II, Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court). ICC-01/04-01/07-3371-tENG (15 May 2013).

International Criminal Court. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Trial Chamber II, Draft implementation plan relevant to Trial Chamber II's order for reparations of 24 March 2017. ICC-01/04-01/07-3728 (25 July 2007).

International Criminal Court. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute. ICC-01/04-01/07-3436-tENG (7 March 2014).

International Criminal Court. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Office of the Prosecutor, Closing Statements, T. 336. ICC-01/04-01/07-T-336-FRA CT WT 15-05-2012 1/80 NB T (15 May 2012).

International Criminal Court. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Trial Chamber II, Order for Reparations pursuant to Article 75 of the Statute. ICC-01/04-01/07-3728-tENG (24 March 2017).

International Criminal Court. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Order granting leave to file representations pursuant to article 75(3) of the Statute. ICC-01/04-01/07-3533-tENG (1 April 2015).

International Criminal Court. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Witness P-132, T. 139, T. 140, T. 141, T. 142, T. 143.

International Criminal Court. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Single Judge (Pre-Trial Chamber I), Decision on Limitations of Set of Procedural Rights for Non-Anonymous Victims. ICC-01/04-01/07-537 (30 May 2008).

International Criminal Court. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Single Judge (Pre-Trial Chamber I), Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case. ICC-01/04-01/07-717 (13 May 2008).

International Criminal Court. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Amended Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute. ICC-01/04-01/07-649-Anxl A (26 June 2008).

International Criminal Court. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules. ICC-01/04-01/07-428-CORR (25 April 2008).

International Criminal Court. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Decision on the confirmation of charges, Partly Dissenting Opinion of Judge Anita Ušacka. ICC-01/04-01/07 (30 September 2008).

International Criminal Court. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Decision on the Requests for Leave to Appeal the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67 (2) of the Statute and Rules 77 of the Rules. ICC-01/04-01/07-484 (20 May 2008).

International Criminal Court. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Defence Application for Leave to Appeal the Single Judge's Decision on the "Decision on Prosecution's Urgent Application for the Admission of the Evidence of Witnesses 132 and 287". ICC-01/04-01/07-545 (3 June 2008).

International Criminal Court. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute. ICC-01/04-01/07 (21 April 2008).

International Criminal Court. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Prosecution's Submission of Information on the Preventive Relocation of Witnesses 132,163, 238 and 287. ICC-01/04-01/07 (16 April 2008).

International Criminal Court. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Prosecution's Submission of Information regarding the Preventive Relocation of Witness 132. ICC-01 /04-01 /07-404-Con f-Ex (17 April 2008).

International Criminal Court. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Prosecution's

Submission of the Document Containing the Charges and List of Evidence. ICC-01/04-01/07-422 (21 April 2008).

International Criminal Court. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Prosecution's Urgent Application for the Admission of the Evidence of Witnesses 132 and 287. ICC-01/04-01/07-423 (28 May 2008).

International Criminal Court. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Registrar´s Report on the Protective Measures Afforded to Witnesses 132, 238 and 287. ICC-01/04-01/07-482-Conf-Exp (19 May 2008)

International Criminal Court. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Trial Chamber II, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons. ICC-01/04-01/07 (21 November 2012).

International Criminal Court. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Trial Chamber II, Defence Closing Statements. *ICC*-01/04-01/07-T-338-Red-ENG WT (21 May 2012).

International Criminal Court. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Trial Chamber II, Office of the Prosecutor, *Corrigendum du mémoire final - ICC-01/04-01/07-3251-Conf*. ICC-01/04-01/07-3251-Corr-Red (3 July 2012).

International Criminal Court. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Trial Chamber II, Second Corrigendum to Defence Closing Brief. ICC-01/04-01/07-3266-Corr2-Red (29 June 2012).

International Criminal Court. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07 OA 6. The Appeals Chamber, Judgment on the Appeal Against the Decision on Joinder rendered on 10 March 2008 by the Pre-Trial Chamber in the Germain Katanga and Mathieu Ngudjolo Chui Cases. ICC-01/04-01/07-57 (9 June 2008).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Application for leave to submit amicus curiae observations under rule 103 of the Rules of Procedure and Evidence. ICC-01/05-01/08-399 (6 April 2009).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, *Conclusions de la Defense en Reponse a L'acte D'accusation Amende Du 30 Mars 2009*. ICC-01/05-01/08-413 (24 April 2009).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Application for Warrant of Arrest Under Article 58. ICC-01/05-13-US-Exp (9 May 2008).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute. ICC-01/05-01/08-38 (3 March 2009).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean Pierre Bemba Gombo. ICC-01/05-01/08-14-tENG (10 June 2008).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo. ICC-01/05-01/08-424 (15 June 2009).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Fourth Decision on Victims' Participation. ICC-01/05-01/08-320 (12 December 2008).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, *Informations supplémentaires soumises par le Procureur*. ICC-01/05-01/16-US-Exp (27 May 2008).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, *Liste des elements de preuve de la Défense*. ICC-01/05-01/08-319-Conf-AnxA (18 December 2008).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Prosecution´s Amended Document Containing the Charges. ICC-01/05-01/04-264-Conf-AnxA (17 October 2008).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Prosecution's Submission of Amended Document Containing the Charges, Amended List of Evidence and Amended In-Depth Analysis Chart of Incriminatory Evidence, and its related Annexes. ICC-01/05-01/08-395 (30 March 2009).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Prosecutor´s Application for Request for Provisional Arrest under Article 92. ICC-01/05-15-US-Exp (23 May 2008).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Prosecutor´s closing statements at the Hearing. ICC-01/05-01/08-T-12-Conf-ENG ET (15 January 2009).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Public Redacted Version of the Amended Document Containing the Charges filed on 30 March 2009. ICC-01/05-01/08-395-Anx3 (30 March 2009).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Transcript. ICC-01/05-01/08-T-10 ENG ET WT (13 January 2009);

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Transcript. ICC-01/05-01/08-T-11 ENG ET WT (14 January 2009).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Warrant of Arrest for Jean-Pierre Bemba Gombo Replacing the Warrant of Arrest Issued on 23 May 2008. ICC-01/05-01/08-15-tENG (10 June 2008).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Application by the Legal Representative of Victims for leave to call victims to appear as witnesses and present their views and concerns to the Chamber. ICC-01/05-01/081990-tENG (9 December 2011).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, *Complément de la requête afin d'autorisation de présentation d'éléments de preuves et subsidiairement de présentation de vues et préoccupations par les victimes du 6 décembre 2012*. ICC-01/0501/08-2058-Conf and confidential ex parte annexes (23 January 2012).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Corrected Revised Second Amended Document Containing the Charges. ICC-01/05-01/08-950 (13 October 2010).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings. ICC-01/05-01/08-807-Corr (12 July 2010).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Decision on common legal representation of victims for the purpose of trial. ICC-01/05-01/08-1005 (12 November 2010).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Decision on Directions for the Conduct of the Proceedings. ICC-01/05-01/08-1023 (19 November 2010).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Decision on Sentence pursuant to Article 76 of the Statute. ICC-01/05-01/08-3399 (21 June 2016).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Decision on the presentation of views and concerns by victims a/0542/08, a/0394/08 and a/0511/0. ICC-01/0501/08-2220 (24 May 2012).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims. ICC-01/05-01/08-2138 (22 February 2012).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber II, Judgment pursuant to Article 74 of the Statute. ICC-01/05-01/08-3343 (21 March 2016).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Order regarding applications by victims to present their views and concerns or to present evidence. ICC-01/05-01/08-1935 (21 November 2011).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims. ICC-01/05-01/08-2140 (22 February 2012).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, *Rectificatif à la justification relative à "Requête afin d'autorisation de présentation d'éléments de preuves et subsidiairement de présentation de vues et préoccupations par les victims*". ICC-01 /05-01/08-1989-Conf-Corr (12 December 2011).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, *Requête de la Représentante légale de victims concernant des informations supplémentaires à sa requête du 6 décembre 2011 afin d'autoriser des victimes à témoigner et à faire valoir leurs vues et préoccupations devant la Chambre.* ICC-01/05-0l/08-2061-Conf and confidential ex parte annexes (23 January 2012).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Second order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims. TCC-01/05-01/08-2027 (21 December 2011).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Separate Opinion of Judge Kuniko Ozaki. ICC-01/05-01/08-3343-AnxII (21 March 2016).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Separate Opinion of Judge Sylvia Steiner. ICC-01/05-01/08-3343-AnxI (21 March 2016).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Concurring Separate Opinion of Judge Eboe-Osuji. ICC-01/05-01/08-3636-Anx3 (14 June 2018).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański. ICC-01/05-01/08-3636-Anx1-Red (8 June 2018).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute". ICC-01/05-01/08 A (8 June 2018).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Separate Opinion of Judge Van den Wyngaert and Judge Morrison. ICC-01/05-01/08-3636-Anx2 (8 June 2018).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No. ICC-01/05-01/13. Trial Chamber VII, Decision on Mr Bemba`s Application for Release. ICC-01/05-01/13-2291 (12 June 2018).

International Criminal Court. The Prosecutor v. Jean-Pierre Bemba Gombo et al., Case No. ICC-01/05-01/13. Trial Chamber VII, Prosecution Detailed Notice of Additional Sentencing Submissions. ICC-01/05-01/13-2296 (2 July 2018).

International Criminal Court. The Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/07. Pre-Trial Chamber I, Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui. ICC-01/04-01/07-307 (10 March 2008).

International Criminal Court. The Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/07. Pre-Trial Chamber I, Warrant of arrest Mathieu Ngudjolo Chui. ICC-01/04-01/07-260-tENG (6 July 2007).

International Criminal Court. The Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/12. Trial Chamber II, Judgment pursuant to article 74 of the Statute. ICC-01/04-02/12-3-tENG (18 December 2012).

International Criminal Court. The Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir"). Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir. ICC-02/05-01/09-3 (4 March 2009).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial I, Decision on Applications for Participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the case of The Prosecutor v. Thomas Lubanga Dyilo. ICC-01/04-01/06-601-tem (21 October 2006).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Decision on the confirmation of charges. ICC-01/04-01/06-803-tEN (29 January 2007).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Document Containing the Charges, Article 61(3) (a). ICC-01/04-01/06-356-Anx2 (28 August 2006).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Prosecutor's Information on Further Investigation. ICC-01/04-01/06-170 (28 June 2006).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Request for leave to participate as *amicus curiae* in the Article 61 Confirmation of Charges proceedings. ICC-01/04-01/06-403 (7 September 2006).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Warrant of Arrest. ICC-01/04-01/06-2-tEN (10 February 2006).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Annex A to Filing on Reparations and Draft Implementation Plan. ICC-01/04-01/06-3177-AnxA (3 November 2015).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Appeal against Trial Chamber I's Decision establishing the principles and procedures to be applied to reparations of 7 August 2012. ICC-01/04-01/06-2909-tENG (24 August 2012).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Appeal against Trial Chamber I's Decision establishing the principles and procedures to be applied to reparation of 7 August 2012. ICC-01/04-01/06-2914-tENG (3 September 2012).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Appeal of the Defence for Mr Thomas Lubanga against Trial Chamber I's Decision establishing the principles and procedures to be applied to reparation rendered on 7 August 2012. ICC-01/04-01/06-2917-tENG (6 September 2012).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Application by the OPCV as the Legal Representative of Victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 to

participate in the Interlocutory Appeals Lodged by the Prosecution and the Defence Against the Decision of 14 July 2009. ICC-01/04-01/06-2122-tENG (15 September 2009).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Application for Participation by the Legal Representatives in the Appeals Proceedings relating to the Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court. ICC-01/04-01/06-2121-tENG (14 September 2009).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Application for Participation from the Legal Representative of Victims a/0051/06, a/0078/06, a/0232/06 et a/0246/08 in the Defence and Prosecution Appeals against the *Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court* rendered on 14 July 2009. ICC-01/04-01/06-2134 (18 September 2009).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Decision on the participation of victims in the appeals. ICC-01/04-01/06-2168 (21 October 2009).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Dissenting Opinion of Judge Anita Ušacka. ICC-01/04-01/06-3121-Anx2 (1 December 2014).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Filing on Reparations and Draft Implementation Plan. ICC-01/04-01/06-3177-Red (3 November 2015).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006. ICC01/04-01/06-772 (14 December 2006).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2. ICC-01/04-01/06-3129 (3 March 2015).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'. ICC-01/04-01/06-3466-Red (18 July 2019).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court. ICC-01/04-01/06 OA 15 OA 16 (8 December 2009).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the “Decision on Sentence pursuant to Article 76 of the Statute”. ICC-01/04-01/06-3122 (1 December 2014).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber. Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008. ICC-01/04-01/06 OA 9 OA 1 (11 July 2008).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Observations from the Legal Representatives of the Victims in response to the documents filed by the Prosecution and the Defence in support of their appeals against the Decision of Trial Chamber I of 14 July 2009. ICC-01/04-01/06-2173-tENG, (23 October 2009).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Order for Reparations (amended). ICC-01/04-01/06-3129-AnxA (3 March 2015).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Prosecution's Document in Support of Appeal against the 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court' and urgent request for suspensive effect. ICC-01/0401/06-2120 (14 September 2009).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Amended Document Containing the Charges, Article 61(3)(a). ICC-01/04-01/06-1573 (23 December 2008).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Clarification and further guidance to parties and participants in relation to the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court". ICC-01/04-01/06-2093 (27 August 2009).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations. ICC-01/04-01/06-2904 (7 August 2012).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court. ICC-01/04-01/06-2049 (14 July 2009).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute. ICC-01/04-01/06-2901 (10 July 2012).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision on the prosecution and the defence applications for leave to appeal the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court". ICC-01/04-01/06-2107 (3 September 2009).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision on the supplementary information relevant to the applications of 21 victims. ICC-01/04-01/06-2063 (21 July 2009).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision on Victims' Participation. ICC-01/04-01/06-1119 (18 January 2008).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Defence Appeal against the Decision of 14 July 2009 entitled *Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court*. ICC-01/04-01/06-2112-tENG (10 September 2009).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Defence Application for Leave to Appeal the Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court rendered on 14 July 2009. ICC-01/04-01/06-2073 -tENG (11 August 2009).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Dissenting Opinion of Judge Odio Benito in Public Decision on Sentence pursuant to Article 76 of the Statute. ICC-01/04-01/06-2901 (10 July 2012).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Fourth Decision on Victims' Participation. ICC-01/04-01/06-1119 (21 January 2008).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court. ICC-01/04-01/06-189 (22 May 2009).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Judgment pursuant to Article 74 of the Statute. ICC-01/04-01/06-2842 (14 March 2012).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Office of the Prosecutors Closing Statements (Open Session) (25 August 2011).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Order for the prosecution to file an amended document containing the charges. ICC-01/04-01/06-1548 (9 December 2008).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Prosecution's Application for Leave to Appeal the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court". ICC-01/04-01/06-2074 (12 August 2009).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Prosecution's Closing Brief. ICC-1/04-01/06-2748-Red (1 June 2011);

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Prosecution's Further Observations Regarding the Legal Representatives' Joint Request Made Pursuant to Regulation 55. ICC-01/0401/06-1966 (12 June 2009).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Witness DRC-OPT-WWWW-0008. ICC-01/04-01/06-T-138-ENG (27 February 2009).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict Submitted in application of Rule 103 of the Rules of Procedure and Evidence. ICC-01/04-01/06-1229-AnxA (17 March 2008).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Additional Programme Information Filing. ICC-01/04-01/06-3209 (7 June 2016).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Consolidated response to the submissions

filed on 31 March and 7 June 2016 by the Trust Fund for Victims. ICC-01/04-01/06-3212-tENG (1 July 2016).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Filing regarding symbolic collective reparations projects with Confidential Annex: Draft Request for Proposals. ICC-01/04-01/06-3223-Conf ICC (19 September 2016).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations. ICC-01/04-01/06-3251 (21 October 2016).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Order instructing the Trust Fund for Victims to supplement the draft implementation plan. ICC-01/04-01/06-3198-tENG (9 February 2016).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Redaction of Filing on Reparations and Draft Implementation Plan. ICC-01/04-01/06-3177-Red (03 November 2015), and its two annexes ("Annex A", ICC-01/04-01/06-3177-AnxA, and "Annex I", ICC-01/04-01/06-3177-Conf-Exp-AnxI).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Request Concerning the Feasibility of Applying Symbolic Collective Reparations. ICC-01/04-01/06-3219 (15 July 2016).

International Criminal Court. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Transcript. ICC-01/04-0l/06-T-368-Red-ENG WT (13 October 2016).

International Criminal Court. Understanding the International Criminal Court.
Retrieved from
https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf (5 July 2019)

International Criminal Court. Victims Participation and Reparations Section´s booklet, Victims before the International Criminal Court, A guide for the participation of victims in the proceedings of the Court.
Retrieved from
https://www.icc-cpi.int/about/victims/Documents/VPRS_Victim-s_booklet.pdf (5 July 2019)

International Criminal Court website, Bemba et al. case: Mr Bemba on interim release in Belgium pending final decision on sentence. ICC-CPI-20180615-PR1394 (15 June 2018).
Retrieved from
https://www.icc-cpi.int/Pages/item.aspx?name=PR1394 (5 July 2019)

International Criminal Court website, Central African Republic, Situation in the Central African Republic, ICC-01/05.
Retrieved from
https://www.icc-cpi.int/car (5 July 2019)

International Criminal Court website, Central African Republic, Situation in the Central African Republic, ICC-01/14.
Retrieved from
https://www.icc-cpi.int/carII (5 July 2019)

International Criminal Court website, Case Information Sheet, Situation in the Central African Republic, The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, ICC-01/05-01/13. ICC-PIDS-CIS-CAR-02-014/18_Eng, Updated: September 2018
Retrieved from
https://www.icc-cpi.int/CaseInformationSheets/Bemba-et-alEng.pdf (5 July 2019)

International Criminal Court website, Case Information Sheet, Situation in the Central African Republic, The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08. ICC-PIDS-CIS-CAR-01-020/18_Eng, Updated: March 2019
Retrieved from
https://www.icc-cpi.int/CaseInformationSheets/BembaEng.pdf (5 July 2019)

International Criminal Court website, Case information sheet, Situation in the Democratic Republic of the Congo, The Prosecutor v. Germain Katanga, ICC-01/04-01/07, ICC-PIDS-CIS-DRC-03-014/17_Eng, Updated: 20 March 2018
Retrieved from
https://www.icc-cpi.int/CaseInformationSheets/KatangaEng.pdf (5 July 2019)

International Criminal Court website, Case Information Sheet, Situation in the Democratic Republic of the Congo, The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06. ICC-PIDS-CIS-DRC-01-016/17_Eng, Updated: 15 December 2017
Retrieved from
https://www.icc-cpi.int/CaseInformationSheets/LubangaEng.pdf (5 July 2019)

International Criminal Court website, Democratic Republic of the Congo, Lubanga case, The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06
Retrieved from
https://www.icc-cpi.int/drc/lubanga#1 (5 July 2019)

International Criminal Court website, Democratic Republic of the Congo, Situation in the Democratic Republic of the Congo, ICC-01/04
Retrieved from
https://www.icc-cpi.int/drc (5 July 2019)

International Criminal Court website, Katanga Case, The Prosecutor v. Germain Katanga, ICC-01/04-01/07
Retrieved from

https://www.icc-cpi.int/drc/katanga (5 July 2019)

International Criminal Court website, Lubanga Case, The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06
Retrieved from
https://www.icc-cpi.int/drc/lubanga (5 July 2019)

International Criminal Court website. Press Release, ICC Trial Chamber VI declares Bosco Ntaganda guilty of war crimes and crimes against humanity, ICC-CPI-20190708-PR1466 (8 July 2019).
Retrieved from
https://www.icc-cpi.int/Pages/item.aspx?name=pr1466 (9 July 2019)

International Criminal Court website, Press Release, Katanga case: Reparations Order largely confirmed, ICC-CPI-20180308-PR1364 (8 March 2018)
Retrieved from
https://www.icc-cpi.int/Pages/item.aspx?name=pr1364 (5 July 2019)

International Criminal Court website, Press Release, Lubanga case: Appeals Chamber confirms Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable' (18 July 2019).
Retrieved from
https://www.icc-cpi.int/Pages/item.aspx?name=PR1473 (18 July 2019).

International Criminal Court website. Press release, President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC. ICC-20040129-44 (29 January 2005).
Retrieved from
https://www.icc-cpi.int/Pages/item.aspx?name=president+of+uganda+refers+situation+concerning+the+lord_s+resistance+army+_lra_+to+the+icc (5 July 2019)

International Criminal Court website. Press Release, Prosecutor receives referral of the situation in the Democratic Republic of Congo. ICC-OTP-20040419-50 (19 April 2004)
Retrieved from
https://www.icc-cpi.int/Pages/item.aspx?name=prosecutor+receives+referral+of+the+situation+in+the+democratic+republic+of+congo (5 July 2019)

International Criminal Court website, Press Release, The Office of the Prosecutor of the International Criminal Court opens its first investigation. ICC-OTP-20040623-59 (23 June 2004).
Retrieved from
https://www.icc-cpi.int/pages/item.aspx?name=the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation (5 July 2019)

International Criminal Court website, Press Release, Trust Fund for Victims decides to provide $1 million for the reparations awarded to victims in the Katanga case, welcomes earmarked donations of €200,000 from the Netherlands (18 May 2017)
Retrieved from
https://www.icc-cpi.int/Pages/item.aspx?name=pr1305 (5 July 2019)

International Criminal Court website, Reparation/Compensation stage
Retrieved from
https://www.icc-cpi.int/Pages/ReparationCompensation.aspx (5 July 2019)

International Criminal Court website, Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba (13 June 2018).
Retrieved from
https://www.icc-cpi.int/Pages/item.aspx?name=180613-OTP-stat (5 July 2019)

International Criminal Court website, Statement, Prosecutor opens investigation in the Central African Republic (22 May 2007).
Retrieved from
https://www.icc-cpi.int/Pages/item.aspx?name=prosecutor+opens+investigation+in+the+central+african+republic (5 July 2019)

International Criminal Court website, The Court Today (13 June 2018)
Retrieved from
https://www.icc-cpi.int/resource-library/Documents/TheCourtTodayEng.pdf

International Criminal Court website, The Prosecutor v. Jean-Pierre Bemba Gombo, Alleged crimes (non-exhaustive list)
Retrieved from
https://www.icc-cpi.int/car/bemba/pages/alleged-crimes.aspx (5 July 2019)

International Criminal Court website, The Prosecutor v. Jean-Pierre Bemba Gombo, Bemba Case, The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08
Retrieved from
https://www.icc-cpi.int/car/bemba (5 July 2019)

International Criminal Court website, Trust Fund for Victims
Retrieved from
https://www.icc-cpi.int/tfv (5 July 2019)

International Criminal Court website, Victims
Retrieved from
https://www.icc-cpi.int/about/victims?ln=en (5 July 2019)

International Criminal Tribunal for Rwanda. Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (13 May 1995).

International Criminal Tribunal for Rwanda. The Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T. Trial Chamber II, Judgment (21 May 1999).

International Criminal Tribunal for Rwanda. The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T. Chamber I, Judgment (2 September 1998).

International Criminal Tribunal for Rwanda. The Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-T. Trial Chamber III, Judgment and Sentence (15 May 2003).

International Criminal Tribunal for Rwanda. The Prosecutor v. Musema, ICTR-96-13-A, Trial Chamber, Judgment (27 January 2000).

International Criminal Tribunal for the former Yugoslavia. Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (11 February 1994).

International Criminal Tribunal for the former Yugoslavia. The Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T. Trial Chamber, Judgment (10 December 1998).

International Criminal Tribunal for the former Yugoslavia. The Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vukovik, Case No. IT-96-23-T and IT-96-23/1-T. The Appeals Chamber, Judgment (12 June 2002).

International Criminal Tribunal for the former Yugoslavia. The Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vukovik, Case No. IT-96-23-T and IT-96-23/1-T. Trial Chamber, Judgment (22 February 2001).

International Criminal Tribunal for the former Yugoslavia. The Prosecutor v. Duško Tadić a.k.a. “Dule”, Case No. IT-94-1. The Appeals Chamber, Judgment (15 July 1999).

International Criminal Tribunal for the former Yugoslavia. The Prosecutor v. Duško Tadić a.k.a. “Dule”, Case No. IT-94-1. Trial Chamber, Opinion and Judgment (7 May 1997).

International Criminal Tribunal for the former Yugoslavia. The Prosecutor v. Furundžija, Case No. IT-95-17/1-A. The Appeals Chamber, Judgment (21 July 2000).

International Criminal Tribunal for the former Yugoslavia. The Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radic, Zoran Žigic, Dragoljub Prcac, Case No. IT-98-30/1. Trial Chamber, Judgment (2 November 2001).

International Criminal Tribunal for the former Yugoslavia. The Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-A. The Appeals Chamber, Judgment (17 March 2009).

International Criminal Tribunal for the former Yugoslavia. The Prosecutor v. Momir Nikolic, Case No. IT-02-60/1-A. The Appeals Chamber, Judgment on Sentencing Appeal (8 March 2006).

International Criminal Tribunal for the former Yugoslavia. The Prosecutor v. Radislav Krstić, Case No. IT-98-33. The Appeals Chamber, Judgment (19 April 2004).

International Criminal Tribunal for the former Yugoslavia. The Prosecutor v. Radislav Krstić, Case No. IT-98-33. Trial Chamber, Judgment (2 August 2001).

International Criminal Tribunal for the former Yugoslavia. The Prosecutor v. Ranko Češić, Case No. IT-95-10/1-PT. Third Amended Indictment, Counts 7-8, Sexual Assault (26 Nov 2002)

International Criminal Tribunal for the former Yugoslavia. The Prosecutor v. Zejnil Delalić, Zdravko Mucic (Aka "Pavo"), Hazim Delic and Esad Landžo (Aka "Zenga"), (Celebici Case), Case No. IT-96-21-T. Trial Chamber, Judgment (16 November 1998).

International Criminal Tribunal for the former Yugoslavia website, About the International Criminal Tribunal for the former Yugoslavia
Retrieved from
http://www.icty.org/en/about (5 July 2019)

International Criminal Tribunal for the former Yugoslavia website, Case information sheet- Mucic et al.
Retrieved from
http://www.icty.org/x/cases/mucic/cis/en/cis_mucic_al_en.pdf (5 July 2019)

International Criminal Tribunal for the former Yugoslavia website, Case information sheet- Furundzija
Retrieved from
http://www.icty.org/x/cases/furundzija/cis/en/cis_furundzija.pdf (5 July 2019)

International Criminal Tribunal for the former Yugoslavia website, Case information sheet- Kunarac.
Retrieved from
http://www.icty.org/x/cases/kunarac/cis/en/cis_kunarac_al_en.pdf (5 July 2019)

International Criminal Tribunal for the former Yugoslavia website, The Cases.
Retrieved from
http://www.icty.org/action/cases/4 (5 July 2019)

International Criminal Tribunal for the former Yugoslavia website, Landmark Cases.
Retrieved from
http://www.icty.org/sid/10314 (5 July 2019)

International Labour Organisation. Convention n. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (27 June 1989).

International Labour Organisation. Forced Labour Convention, Convention concerning Forced or Compulsory Labour. CO-29 (28 June 1930). Geneva.

International Military Tribunal for the Far East. Judgment of 4 November 1948. Retrieved from
https://werle.rewi.hu-berlin.de/tokio.pdf (5 July 2019)

International Military Tribunal - Nuremberg (1947). Trial of the Major War Criminals before the Military Tribunal - Nuremberg, 14 November 1945-1 October 1946, Vol. I. Nuremberg, Germany.
Retrieved from
https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf (5 July 2019)

J

Jailbait, Carolyn C. (2004). *The Politics of Statutory Rape Laws in the United States, Statutory Rape Laws in Historical Context*. Albany, NY: State University of New York Press.

Jessie, Soh S. E. (2006). *Forced Pregnancy: Codification in the Rome Statute and its Prospect as Implicit Genocide*, pp. 311-337.
Retrieved from
https://genderandsecurity.org/sites/default/files/Eng_-_Forced_Pregnancy.pdf (5 July 2019)

Johnston, David (1999). *Roman Law in Context, Key Themes in Ancient History*. Cambridge: Cambridge University Press.

Joint Letter from Avocats Sans Frontières et al. to the Chief Prosecutor of the International Criminal Court, D.R. Congo: ICC Charges Raise Concern (31 July 2006).
Retrieved from
https://www.hrw.org/news/2006/07/31/dr-congo-icc-charges-raise-concern (5 July 2019)

Jones, John R.W.D. (1998). *The Practice of the International Criminal Tribunals for the former Yugoslavia and Rwanda*. Irvington-on-Hudson, New York: Transnational Publishers.

K

Kaisner, David, & Stannow, Lovisa (2010). *The rape of American Prisoners*.
Retrieved from
https://www.nybooks.com/articles/2010/03/11/the-rape-of-american-prisoners/ (5 July 2019)

Kaisner, David, & Stannow, Lovisa (2010 a). *The Way to Stop Prisoner Rape*. Retrieved from https://www.nybooks.com/articles/2010/03/25/the-way-to-stop-prison-rape/ (5 July 2019)

Kalosieh, Adrienne (2003). *Consent to Genocide? The ICTY's Improper Use of the Consent Paradigm to Prosecute Genocidal Rape in Foca*, pp. 121- 136. Retrieved from https://heinonline.org/HOL/LandingPage?handle=hein.journals/worts24&div=1&src=home (5 July 2019)

Kambale, Pascal Kalume (2015). "A story of missed opportunities". In De Vos, Christian, Kendall, Sara, & Stahn, Carsten (eds.). *Contested Justice: The Politics and Practice of International Criminal Court Intervention*. Cambridge: Cambridge University Press, pp. 171-197.

Kohn, Elizabeth A. (1994). *Rape as a Weapon of War: Women's Human Rights during the Dissolution of Yugoslavia*, pp. 199-221. Retrieved from http://digitalcommons.law.ggu.edu/ggulrev/vol24/iss1/7(5 July 2019)

Krug, Etienne G., Dahlberg, Linda L., Mercy, James A., Zwi, Anthony B., & Lozano, Rafael (eds.) (2002). *World Report on Violence and Health*. Geneva: World Health Organization. Retrieved from http://apps.who.int/iris/bitstream/handle/10665/42495/9241545615_eng.pdf;sequence=1 (5 July 2019)

Kwakwa, Edward K. (1992). *The International law of armed conflict: Personal and material fields of application*. Dordrecht: Kluwer Academic.

L

La Haye, Eve (2001). Article 8(2)(b)(xxii)—Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, Enforced Sterilization, and Sexual Violence. In Lee, Roy S. K. & Friman, Hakan. (eds.). *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*. Ardsley: Transnational Publishers, pp. 184-189.

League of Nations. Convention for the Creation of an International Criminal Court. Part I (2) of the Final Act of the International Conference on the Repression of Terrorism, League of Nations Doc. C.548.M.385.1937.V. (16 November 1937). Retrieved from http://legal.un.org/ilc/documentation/english/a_cn4_7_rev1.pdf (5 July 2019)

League of Nations. International Convention for the Suppression of the Traffic in Women of Full Age (1933).

League of Nations. Slavery Convention (25 September 1926). Geneva.

Lee, Roy S. K. (1999). “The Rome Conference and its Contribution to International Law”. In Lee, Roy S. K. (ed.). *The International Criminal Court: The Making of the Rome Statute- Issues, Negotiations, Results*. The Hague, Boston: Kluwer Law International, pp. 1-40.

Leon Acevedo, Juan P. P. (2015). *Investigating Alleged Widespread and/or Systematic Forced Sterilizations in Peru*.
Retrieved from
http://ohrh.law.ox.ac.uk/investigating-alleged-widespread-andor-systematic-forced-sterilizations-in-peru/ (5 July 2019)

Letter from Women’s Initiatives for Gender Justice to the Prosecutor Luis Moreno Ocampo (15 August 2006).
Retrieved from
http://www.iccwomen.org/news/docs/Prosecutor_Letter_August_2006_Redacted.pdf (5 July 2019)

Lippman, Matthew (2001). *Humanitarian Law: The Uncertain Contours of Command Responsibility*, pp. 1-93.
Retrieved from
https://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=1000&context=tjcil

Lupig, Diane. (2009). *Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court*, pp. 433-491.
Retrieved from
http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1030&context=jgspl (5 July 2019)

M

Maire, Nicole B. (2011). *The Crime of Rape under the Rome Statute of the ICC: with a special emphasis on the jurisprudence of the Ad Hoc Criminal Tribunals*, pp. 146-159.
Retrieved from
http://amsterdamlawforum.org/article/viewFile/209/397 (5 July 2019)

Manenti, Martina R. (2013-2014). *Wartime Sexual Violence as an International Crime*. Facoltà di Giurisprudenza Corso di Laurea in Giurisprudenza, Università degli Studi di Milano, Milan.
Retrieved from
https://www.penalecontemporaneo.it/d/4012-wartime-sexual-violence-as-an-international-crime-tesi-di-laurea (5 July 2019)

Maogoto, Jackson (2009). “Early Efforts to Establish an International Criminal Court”. In Doria, José, Gasser, Hans-Peter, & Bassiouni, M. Cherif (eds.) (2009). *The legal regime of the International Criminal Court: Essays in honour of*

Professor Igor Blishchenko: In memoriam Professor Igor Pavlovich Blishchenko (1930-2000). Leiden: Martinus Nijhoff, pp. 3-22.

Marston, Geoffrey (2003). *Early Attempts to Suppress Terrorism: The Terrorism and International Criminal Court Conventions of 1937*, pp. 293-313.
Retrieved from
https://academic.oup.com/bybil/article-abstract/73/1/293/310673 (5 July 2019)

Mason, John K. (1998). *Medico- Legal Aspects of Reproduction and Parenthood*, 2nd ed. Oxon, New York: Routledge.

Matas, David (1989). *Prosecuting Crimes Against Humanity: The Lessons of Wolrd War I*, pp. 86-104.
Retrieved from
https://pdfs.semanticscholar.org/fdad/abb27ef9a697a4ab23ca526f1d32eecba5b4.pdf (5 July 2019)

McCoubrey, Hilaire, & White, Nigel D. (1992). *International law and armed conflict*. Aldershot: Dartmouth.

McGoldrick, Dominic (2004). "The Legal and Political Significance of a Permanent International Criminal Court". In McGoldrick, Dominic, Rowe, Peter, & Donnelly, Eric. (eds.). *The Permanent International Criminal Court: Legal and Policy Issues, Studies in International Law*. Oxford: Hart Publishing. pp. 453-478.

McKay, Fiona (1999). *Universal Jurisdiction in Europe: Criminal Prosecutions in Europe since 1990 for War Crimes, Crimes Against Humanity, Torture and Genocide,* pp. 1-47.
Retrieved from
https://redress.org/wp-content/uploads/2018/01/G.-June-1999-Universal-Jurisdiction-in-Europe.pdf (5 July 2019)

McKay, Fiona (2008). *Victim Participation in Proceedings before the International Criminal Court*, pp. 2-5.
Retrieved from
https://digitalcommons.wcl.american.edu/hrbrief/vol15/iss3/1/ (5 July 2019)

Mégret, Frédéric (2012). *Victims before the International Criminal Court: A New Model of Criminal Justice?,* pp. 23-27.
Retrieved from
http://justice.gc.ca/eng/rp-pr/cj-jp/victim/rd5-rr5/p6.html (5 July 2019)

Meron, Theodor (1992*). Shakespeare's Henry the Fifth and the Law of War*, pp. 1-45.
Retrieved from
https://www.jstor.org/stable/2203137?seq=1#page_scan_tab_contents (5 July 2019)

Meron, Theodor (1993). *Rape as a Crime Under International Humanitarian Law*, pp. 424-428.

Retrieved from
https://www.jstor.org/stable/2203650?seq=1#page_scan_tab_contents (5 July 2019)

Mettraux, Guénaël *(2011).* "Trial at Nuremberg". In Schabas, William A., & Bernaz, Nadia (2011). *Routledge handbook of international criminal law*. London: Routledge, Taylor & Francis Group, pp. 5-16.

Michalczyk, Jonh J. (1994). Medicine, Ethics and the Third Reich: Historical and Contemporary Issues. Kansas City, MO: Sheed & Ward.

Moffett, Luke (2014). *Justice for Victims before the International Criminal Court*. Oxon, NewYork: Routledge.

Moffett, Luke (2014 a). *Realising Justice for Victims before the International Criminal Court*, pp. 1-11.
Retrieved from
http://www.internationalcrimesdatabase.org/upload/documents/20140916T170017-ICD%20Brief%20-%20Moffett.pdf (5 July 2019)

Moreno-Ocampo, L. M. (2009). "Building a Future on Peace and Justice: The International Criminal Court". In Ambos, Kai, Large, Judith, & Wierda, Marieke (eds.). *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development- The Nuremberg Declaration on Peace and Justice*. Berlin, Heidelberg: Springer, pp. 9-13.

Moynier, Gustave (1870). *Étude sur la Convention de Genève pour l'amélioration du sort des militaires blessés dans les armées en champagne (1864 et 1868)*.
Retrieved from
https://fr.wikisource.org/wiki/Étude_sur_la_convention_de_Genève_pour_l%27amélioration_du_sort_des_militaires_blessés_dans_les_armées_en_campagne_(1864_et_1868) (5 July 2019)

Moynier, Gustave (1872). *Note sur la création d'une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève*", pp. 122-131.
Retrieved from
http://www.legalanthology.ch/wp-content/uploads/2013/12/Moynier-Note-sur-la-creation-dune-institution.pdf (5 July 2019)

N

The Neurotypical site, Psychological Coercion, Revised from Dr. Margaret Singer.
Retrieved from
http://www.theneurotypical.com/psychological_coercion.html (5 July 2019)

Niarchos, Catherine N. (1995). *Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia*, pp. 649-690.
Retrieved from

https://www.jstor.org/stable/762485?seq=1#page_scan_tab_contents (5 July 2019)

Nitti, Gilbert, & Bourguiba, Leïla (2012). “Victim´s access to the International Criminal Court: Much remains to be done”. In Michelon, Cláudio, Clunie, Gregor, McCorkindale, Christopher, & Psaras, Haris (eds.). *The Public in Law: Representations of the Political in Legal Discourse*, Edinburgh/Glasgow Law and Society Series. Surrey/ Burlington: Ashgate, pp. 287-302.

Novak, Andrew (2015). *The International Criminal Court: An Introduction*. New York, Dordrecht, London: Springer.

Nowrojee, Binaifer (1996). *Shattered lives: Sexual violence during the Rwandan genocide and its aftermath*, pp. 1-73.
Retrieved from
https://www.hrw.org/sites/default/files/reports/1996_Rwanda_%20Shattered%20Lives.pdf (5 July 2019)

Nuremberg Military Tribunal. NMT 1 (U.S.A. v. Karl Brandt et al.), Rudolf Emil H. Brandt`s Affidavit concerning the sterilization experiments (19 April 1946).
Retrieved from
http://nuremberg.law.harvard.edu/documents/93-affidavit-concerning-the-sterilization?q=Karl+Brandt+#p.1 (5 July 2019)

O

O’Connell, Sophie (2010). *Gender Based Crimes at the International Criminal Court*, pp. 69-80.
Retrieved from
http://www.plymouthlawreview.org/vol3/Oconnell.pdf (5 July 2019)

Oosterveld, Valerie (2004). *Sexual Slavery and the International Criminal Court: Advancing International Law*, pp. 605-651.
Retrieved from
https://repository.law.umich.edu/mjil/vol25/iss3/2/ (5 July 2019)

Oosterveld, Valerie (2005). *The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, pp. 55-84.
Retrieved from
http://wikigender.org/wp-content/uploads/files/Definition_of_gender_in_the_Rome_Statute.pdf (5 July 2019)

Oosterveld, Valerie (2009). *Obstacles on the Road to Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson*, pp. 407-430.
Retrieved from
https://repository.law.umich.edu/mjil/vol25/iss3/2/ (5 July 2019)

Oosterveld, Valerie (2011). “Gender-Based Crimes Against Humanity”. In Sadat, Leila N. (ed.) *Forging a Convention for Crimes against Humanity*. Cambridge: Cambridge University Press, pp. 78-101.

Opinio Juris website, Sane, Jelia. Mathieu Ngudjolo Chui: reflections on the ICC’s first acquittal.
Retrieved from
http://opiniojuris.org/2012/12/24/mathieu-ngudjolo-chui-reflections-on-the-iccs-first-acquittal/ (5 July 2019)

Othman, Mohamed C. (2005). *Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor*. New York: Springer.

P

Parks, Major William H. (1973). *Command Responsibility for War Crimes*, pp. 1-104.
Retrieved from
https://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/27508F~1.pdf (5 July 2019)

Pena, Mariana (2010). *Victim Participation in the International Criminal Court: Achievements Made and Challenges Lying Ahead*, pp. 498-516.
Retrieved from
https://nsuworks.nova.edu/cgi/viewcontent.cgi?article=1778&context=ilsajournal (5 July 2019)

Pia-Comella, Jelena (2013). *Talking points for panel presentation, Prosecuting gender-based crimes before the ICC*, pp. 1-6.
Retrieved from
http://archive.iccnow.org/documents/CSWpanelMarch62013.pdf (5 July 2019)

Piccicallo, Philip R. (1979). The Japanese on Trial: Allied War Crimes Operations in the East, 1945–1951. Austin: University of Texas Press.

Pikis, Georghios M. (2010). *The Rome statute for the International Criminal Court: analysis of the statute, the rules of procedure and evidence, the regulations of the court and supplementary instruments*. Leiden: Brill/ Nijhoff.

Pocar, Fausto (2008). *Statute of the International Criminal Tribunal for the former Yugoslavia*, pp. 1-6.
Retrieved from
http://legal.un.org/avl/pdf/ha/icty/icty_e.pdf (5 July 2019)

Politi, Mauro (2001). “The Rome Statute of the ICC. Rays of Light and Some Shadows”. In Politi, Mauro, & Nesi, Giuseppe (ed.) *The Rome Statute of the International Criminal Court: a challenge to impunity*, Aldershot, Dartmouth: Ashgate, pp. 7-16.

Poutou, Nadia C. F., & Hayali, Lucie B. (2018). A Belief Shattered: The International Criminal Court´s Bemba Acquittal.
Retrieved from
https://www.justsecurity.org/58386/belief-shattered-international-criminal-courts-bemba-acquittal/ (5 July 2019)

Preparatory Commission for the International Criminal Court, Working Group on Elements of Crimes. Proposal concerning the Elements of Crimes Against Humanity submitted by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic, and the United Arab Emirates concerning the elements of crimes against humanity. PCNICC/1999/WGEC/DP.39 (3 December 1999).

Preparatory Commission for the International Criminal Court, Working Group on Elements of Crimes. Proposal submitted by Colombia, Comments on the proposal by the delegations of Costa Rica, Hungary and Switzerland concerning article 8, paragraph 2 (b) of the Rome Statute (PCNICC/1999/WGEC/DP.8). PCNICC/1999/WGEC/DP.16 (29 July 1999).

Preparatory Commission for the International Criminal Court, Working Group on Elements of Crimes. Proposal submitted by Costa Rica, Hungary and Switzerland on certain provisions of Article 8, paragraph 2(b), of the Rome Statute of the International Criminal Court: (viii), (x), (xiii), (xiv), (xv), (xvi), (xxi), (xxii) (xxvi). PCNICC/1999/WGEC/DP.8 (19 July 1999).

Preparatory Commission for the International Criminal Court, Working Group on Elements of Crimes. Proposal submitted by France, Comments on the proposal submitted by the United States of America concerning article 6, Crime of genocide (PCNICC/1999/DP.4). PCNICC/1999/WGEC/DP.1 (18 February 1999).

Preparatory Commission for the International Criminal Court, Working Group on Elements of Crimes, Proposal submitted by the United States of America. Draft elements of crimes, Addendum. PCNICC/1999/DP.4/Add.1 (4 February 1999).

Preparatory Committee on the Establishment of an International Criminal Court, 16 March- 3 April 1998. Proposal Submitted by the Holy See. A/AC.249/1998/DP.13 (1 April 1998).
Retrieved from
https://www.legal-tools.org/doc/f8ff69/pdf/ (5 July 2019)

Priddy, Alice (2014). “Sexual Violence against Men and Boys in Armed Conflict”. In Casey-Maslen, Stuart (ed.). *The War Report: Armed Conflict in 2013, Part III Important themes in armed conflicts in 2013*. Oxford: Oxford University Press, pp. 271-296.

Pritchard, John, & Zaide, Sonia M. (eds.) (1981). *The Tokyo War Crimes Trial*, Vol. 22, pp. 49, 854-858.
Retrieved from
https://werle.rewi.hu-berlin.de/tokio.pdf (5 July 2019)

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977).

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977).

Q

Quigley, John (1988). *Perestroika and International Law,* pp. 788-797.
Retrieved from
https://www.jstor.org/stable/2203513 (5 July 2019)

R

Ray*,* Amy E. (1997). The *Shame* of It: *Gender-Based Terrorism* in the *Former Yugoslavia* and the *Failure* of *International Human Rights Law* to *Comprehend* the *Injuries*, pp. 793-840.
Retrieved from
https://digitalcommons.wcl.american.edu/aulr/vol46/iss3/4/ (5 July 2019)

Redress Trust (2011). Justice for Victims: The ICC's Reparations Mandate.
Retrieved from
https://www.refworld.org/pdfid/4def341618.pdf (5 July 2019)

Redress Trust (2012). The Participation of Victims in the International Criminal Court, Review of the Practice and Consideration of Options for the Future.
Retrieved from
http://www.vrwg.org/REDRESS%20Doc/121030participation_reportEN.pdf (5 July 2019)

Reliefweb, UN Resident and Humanitarian Coordinator for the Central African Republic, Central African Republic, Weekly Humanitarian Update (17 December 2002).
Retrieved from
https://reliefweb.int/report/central-african-republic/central-african-republic-weekly-humanitarian-update-17-dec-02 (5 July 2019)

Rittich, Kerry, Charlesworth, Hilary, Cossman, Brenda, Obiora, Leslye, & Romany, Celina (1999). *The Gender of International Law*, pp. 206-209.
Retrieved from
https://www.jstor.org/stable/25659291?seq=1#page_scan_tab_contents (5 July 2019)

Roben, Volker (2003). *The Procedure of the ICC: Status and Function of the Prosecutor*, pp. 513-552.
Retrieved from

http://www.mpil.de/files/pdf3/mpunyb_roeben_7.pdf (5 July 2019)

Robinson, Darryl (1999). *Defining "Crimes Against Humanity" at the Rome Conference*, pp. 43-57.
Retrieved from
https://www.cambridge.org/core/journals/american-journal-of-international-law/article/defining-crimes-against-humanity-at-the-rome-conference/0E12725E3A128056F3B7694C3DC4727A
(5 July 2019)

Rückert, Wiebke, & Witschel, Georg (2001). Genocide and Crimes Against Humanity in the Elements of Crimes. In Fischer, Horst, Kress, Claus, & Lüder, Sascha R. (eds.). *International and National Prosecution of Crimes under International Law: Current Developments*. Berlin: Berlin Verlag, pp. 59-93.

Russell-Brown, Sherrie L. (2003). *Rape as an Act of Genocide*, pp. 350-374.
Retrieved from
https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1241&context=bjil (5 July 2019)

S

SáCouto, Susana (2018) *The Impact of the Appeals Chamber Decision in Bemba: Impunity for Sexual and Gender-Based Crimes?, Commentary from Jean-Pierre Bemba Gombo at the International Criminal Court*.
Retrieved from
https://www.ijmonitor.org/2018/06/the-impact-of-the-appeals-chamber-decision-in-bemba-impunity-for-sexual-and-gender-based-crimes/ (5 July 2019)

Saint Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles of under 400 Grams Weight (11 December 1868). Saint Petersburg.

Salzman, Todd A. (1998). *Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural, and Ethical Responses to Rape Victims in the former Yugoslavia*, pp. 348–378.
Retrieved from
https://www.researchgate.net/publication/236727644_Rape_Camps_as_a_Means_of_Ethnic_Cleansing_Religious_Cultural_and_Ethical_Responses_to_Rape_Victims_in_the_Former_Yugoslavia (5 July 2019)

Sandoz, Yves (1999). “Penal aspects of International Humanitaran Law”. In Bassiouni, M. Cherif (ed.), *International Criminal Law*: *Crimes*, vol. I, 2nd ed. Ardsley: Transnational Publishers, pp. 293-321.

Schabas, William A. (2000). *Genocide in International Law: The Crimes of Crimes*. Cambridge: Cambridge University Press.

Schabas, William A. (2010).*T*he International Criminal Court: a commentary on the Rome Statute. Oxford: Oxford University Press.

Schabas, William A. (2010 a). “The Law and Genocide”. In Bloxham, Donald, & Moses, A. Dirk (eds.) (2010). *Oxford Handbook of Genocide Studies*. Oxford: Oxford University Press, pp. 123-142.
Schabas, William A. (2011). *An Introduction to the International Criminal Court*, 4th ed. Cambridge: Cambridge University Press.

Schabas, William A. (2011 a). *The International Criminal Court at ten*, pp. 493-509.
Retrieved from
https://link.springer.com/article/10.1007/s10609-011-9154-0 (5 July 2019)

Scharf, Michael P. (2008). *Statute of the International Criminal Tribunal for Rwanda,* pp. 1-6*.*
Retrieved from
http://legal.un.org/avl/pdf/ha/ictr/ictr_e.pdf (5 July 2019)

Scharf, Michael P., & Day, Margaux. (2011). “The Ad Hoc International Criminal Tribunals: Launching a New Era of Accountability”. In Schabas, William A., & Bernaz, Nadia (2011). *Routledge handbook of international criminal law*. London: Routledge, Taylor & Francis Group, pp. 51-66.

Scharf, Michael P., & Schabas, William A. (2002). *Slobodan Milosevic on trial: A companion*. New York, NY: Continuum.

Scheffer, David (2011). “The International Criminal Court”. In Schabas, William A., & Bernaz, Nadia (eds.). *Routledge handbook of international criminal law*. London: Routledge, Taylor & Francis Group, pp. 67-84.

Schindler, Dietrich, & Toman, Jiri (eds.) (1988). *The laws of armed conflicts: A collection of conventions, resolutions and other documents*. Leiden: Sijthoff.

Schloenhardt, Andreas (2005). *Transnational Organised Crime and the International Criminal Court Developments and Debates*, pp. 93-122.
Retrieved from
http://www6.austlii.edu.au/au/journals/UQLawJl/2005/4.pdf (5 July 2019)

Schomburg, Wolfgang, & Peterson, Ines (2007). *Genuine Consent to Sexual Violence Under International Criminal Law*, pp. 121-140.
Retrieved from
https://www.jstor.org/stable/4149827?seq=1#page_scan_tab_contents (5 July 2019)

Schulhofer, Stephen J. (1998). *Unwanted Sex: the culture of intimidation and the failure of law*. Cambridge, *Massachusetts:* Harvard University Press.

Schwelb, Egon (1946). *Crimes against humanity*, pp. 178-226.
Retrieved from
https://archive.org/details/britishyearbooko031843mbp/page/n9 (5 July 2019)

Segato, Rita L. (2014). *Las nuevas formas de la guerra y el cuerpo de las mujeres*, 1a. ed. Puebla: Pez en el árbol.
Retrieved from
http://www.feministas.org/IMG/pdf/libro_ritalaurasegato.pdf (5 July 2019)

Sekuloski, Branko (2013). *International Criminal Court*, pp. 144-167.
Retrieved from
https://eujournal.org/index.php/esj/article/view/1889 (5 July 2019)

Sellers, Patricia V. (2008). *The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as a Means of Interpretation*, pp. 1-41.
Retrieved from
https://www.ohchr.org/Documents/Issues/Women/WRGS/Paper_Prosecution_of_Sexual_Violence.pdf (5 July 2019)

Shabtai, Rosenne (2000). *Antecedents of the Rome Statute of the International Criminal Court Revisited,* pp. 387-420.
Retrieved from
https://archive.org/details/internationallaw75schm/page/n7 (5 July 2019)

Shelton, Dinah (2005). "The UN Principles and Guidelines on Reparations: Context and Contents". In De Feyter, Koen, Parmentier, Stephan, Bossuyt, Marc, & Lemmens, Paul (eds.). *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, Oxford, Holmes Beach, Zurich, Mortsel: Intersentia, pp. 11-34.

Sivakumaran, Sandesh (2007). *Sexual Violence against Men in Armed Conflict*, pp. 253-276.
Retrieved from
http://ejil.org/pdfs/18/2/224.pdf (5 July 2019)

Song, H. E. Judge Sang-hyun (2010). The International Criminal Court. In Bassiouni, M. Cherif (ed.). *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice*, Vol. 1. Antwerp, Oxford, Portland: Intersentia, pp. 142-143.

South African Law Reform Commission. Discussion Paper 85 (Project 107) Part A: Sexual Offences: the Substantive Law (12 August 1999).
Retrieved from
http://www.justice.gov.za/salrc/dpapers/dp85.pdf (5 July 2019)

Special Court of Sierra Leone. The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu, Case No. SCSL-04-16-T. Trial Chamber II, Judgment (20 June 2007).

Special Court of Sierra Leone. The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu, Case No. SCSL-04-16-T. Trial Chamber II, Judgment, Separate Concurring Opinion of the Hon. Justice Julia Sebutinde Appended to Judgment Pursuant to Rule 88 (C) (20 June 2007).

Special Court of Sierra Leone. The Prosecutor v. Moinina *Fofana* and Allieu Kondewa, Case No. SCSL-04-14-A, The Appeals Chamber, Judgment (Partially Dissenting Opinion of Honourable Justice Renate Winters) (28 May 2008).

Spitzberg, Brian H. (1999). *An Analysis of Empirical Estimates of Sexual Aggression Victimization and Perpetration*, pp. 241-260.
Retrieved from
https://www.questia.com/library/journal/1P3-1459293611/an-analysis-of-empirical-estimates-of-sexual-aggression (5 July 2019)

Stahn, Carsten (2012). *Between "faith" and "facts": by what standards should we assess international criminal justice?,* pp. 251-282.
Retrieved from
https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/editorial-between-faith-and-facts-by-what-standards-should-we-assess-international-criminal-justice/E076D11F3DE65F10006C63243AABE45D (5 July 2019)

Stahn, Carsten, Olásolo, Héctor, & Gibson, Kate (2006). *Participation of victims in pre-trial proceedings of the ICC*, pp. 219-238.
Retrieved from
https://www.researchgate.net/publication/301892750_Participation_of_Victims_in_PreTrial_Proceedings_of_the_ICC/download (5 July 2019)

Statement by the Women's Initiatives for Gender Justice on the Arrest of Germain Katanga.
Retrieved from
http://iccwomen.org/documents/ArrestKatanga_Statement_2007.pdf (5 July 2019)

Steains, Cate (1999). "Gender Issues". In Lee, Roy S. K. (ed.). *The International Criminal Court: The Making of the Rome Statute- Issues, Negotiations, Results*. The Hague, Boston: Kluwer Law International, pp. 366-370.

Stemple, Lara (2008). *Male Rape and Human Rights*, pp. 605-647.
Retrieved from
http://scienceblogs.de/geograffitico/wp-content/blogs.dir/70/files/2012/07/i-e76e350f9e3d50b6ce07403e0a3d35fe-Stemple_60-HLJ-605.pdf (5 July 2019)

Stuart, Heikelina V. (2008). *The ICC in trouble*, pp. 409-417.
Retrieved from
https://academic.oup.com/jicj/article-abstract/6/3/409/917692?redirectedFrom=fulltext (5 July 2019)

Sunga, Lyal S. (1997). *The emerging system of international criminal law: Developments in codification and implementation*. The Hague: Kluwer law international.

T

Taylor, Louise (2003). *We'll Kill You If You Cry: Sexual Violence in the Sierra Leone Conflict*, pp. 1-75.
Retrieved from
http://www.hrw.org/reports/2003/sierraleone/sierleon0103.pdf (5 July 2019)

Ticehurst, Rupert (1997). *The Martens Clause and the Laws of Armed Conflict*, pp. 125-134.
Retrieved from
https://www.icrc.org/en/doc/resources/documents/article/other/57jnhy.htm (5 July 2019)

Tolbert, David (2008). "Article 43 The Registry". In Triffterer, Otto, & Ambos, Kai (eds.). *Commentary on the Rome Statute of the International Criminal Court: Observer's note, article by article*, 2nd ed. München: Beck, pp. 981-991.

Tompkins, Tamara L. (1999). *Prosecuting Rape as a War Crime: Speaking the Unspeakable*, pp. 845-890.
Retrieved from
https://scholarship.law.nd.edu/ndlr/vol70/iss4/3/ (5 July 2019)

Tonkin, Hannah (2004). *Rape in the International Arena: The Evolution of Autonomy and Consent*, pp. 243-263.
Retrieved from
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2773245 (5 July 2019)

The Treaty of peace between the Allied and Associated Powers and Germany (the treaty of Versailles) (28 June 1919). Versailles.

Triffterer, Otto (2008). In Triffterer, Otto, & Ambos, Kai. (eds.), *Commentary on the Rome Statute of the International Criminal Court: Observer's note, article by article*, 2nd ed. München: Beck, pp. 1-14.

Trindade, Antônio A. C. (2011). *The Access of Individuals to International Justice*. New York: Oxford University Press.

The Trust Fund for Victims website
Retrieved from
http://www.trustfundforvictims.org/ (5 July 2019)

The Trust Fund for Victims website, Assistance mandate
Retrieved from
https://www.trustfundforvictims.org/en/about/two-mandates-tfv/assistance (5 July 2019)

The Trust Fund for Victims website, Press Release, New TFV Board of Directors: Prioritizing Victim Survivors in International Justice, ICC-TFV-20160426-PR1210 (26 April 2016)
Retrieved from

https://www.icc-cpi.int//Pages/item.aspx?name=pr1210 (5 July 2019)

The Trust Fund for Victims website, Programmes
Retrieved from
https://www.trustfundforvictims.org/en/what-we-do/assistance-programmes;

The Trust Fund for Victims, Programme Progress Report November 2009
Retrieved from
http://www.trustfundforvictims.org/sites/default/files/imce/TFV%20Programme%20Report%20November%202009.pdf (5 July 2019)

U

United Nations. Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement") (8 August 1945). London.

United Nations. Charter of the International Military Tribunal for the Far East (19 January 1946). Tokyo.

United Nations, Committee on the Elimination of Discrimination against Women. Case Karen Tayag Vertido v. Philippines, Communication No. 18/2008. UN Doc. CEDAW/C/46/D/18/2008 (1 September 2010).
Retrieved from
www2.ohchr.org/english/law/docs/cedaw.c.46.d18.2008_en.doc (5 July 2019)

United Nations, Department of International Economic and Social Affairs. Activities for the Advancement of Women: Equality, Development and Peace. UN Doc. ST/ESA/174 (1985).

United Nations. Department of Peacemaking Operations. Review of the Sexual Violence Elements of the Judgments of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in the Light of Security Council Resolution 1820.
Retrieved from
http://www.icty.org/x/file/Outreach/sv_files/DPKO_report_sexual_violence.pdf (5 July 2019)

United Nations. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome, 15 June-17 July 1998).
Retrieved from
http://legal.un.org/diplomaticconferences/1998_icc/ (5 July 2019)

United Nations. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. Crimes Within the Jurisdiction of the Court. UN Doc. A/CONF.183/C.1/L.44 (1998).

United Nations. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. UN Doc. A/CONF.183/C.1/L.76/Add.2 (15 June -17 July 1998).

United Nations, Economic and Social Council. Activities for the Advancement of Women: Equality, Development and Peace, Report of Mr. Jean Fernand-Laurent, Special Rapporteur on the suppression of the traffic in persons and the exploitation of the prostitution of others. UN Doc. E/1983/7 (17 March 1983).

United Nations. Slavery, the Slave Trade, and other forms of Servitude (Report of the Secretary-General), p. 28. UN Doc. E/2357 (27 January 1953). United Nations. Slavery, the Slave Trade, and other forms of Servitude (Report of the Secretary-General), p. 28. UN Doc. E/2357 (27 January 1953).

United Nations, Economic and Social Council, Commission on Human Rights. Addendum- Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, in Accordance with Commission on Human Rights Resolution 1994/45- Report on the Mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime. UN Doc. E/CN.4/1996/53.Add.1 (4 January 1996).

United Nations, Economic and Social Council, Commission on Human Rights. Note Verbale dated 26 March 1996 from the Permanent Mission of Japan to the United Nations Office at Geneva Addressed to the Centre for Human Rights. UN Doc. E/CN.4/1996/137 (27 March 1996).

United Nations, Economic and Social Council, Commission on Human Rights. Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45. UN Doc. E/CN.4//1995/42 (22 November 1994).

United Nations, Economic and Social Council, Commission on Human Rights. Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, submitted in accordance with Commission on Human Rights Resolution 2000/45- Violence against women perpetrated and/or condoned by the State during times of armed conflict (1997-2000). UN Doc. E/CN.4/2001/73 (23 January 2001).

United Nations, Economic and Social Council. Commission on Human Rights. Report on the situation of human rights in Rwanda submitted by Mr. René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of the resolution S 3-1 of 25 May 1994. E/CN.4/1996/7 (28 June 1995).
Retrieved from
http://hrlibrary.umn.edu/commission/country52/7-rwa.htm (5 July 2019)

United Nations, Economic and Social Council, Commission on Human Rights. Rights of the Child. Res. 1997/78 (18 April 1997).

United Nations, Economic and Social Council, Commission on Human Rights. Rights of the Child. Res. 1998/76 (22 April 1998).

United Nations, Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities. Contemporary Forms of Slavery, Systematic rape, sexual slavery and slavery-like practices during armed conflict, Final report submitted by Ms. Gay J. McDougall, Special Rapporteur (Report of the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict). UN Doc. E/CN.4/Sub.2/1998/13 (22 June 1998).

United Nations, Economic and Social Council, Commission on Human Rights. The Elimination of Violence against Women. Res. 1995/85 (8 March 1995).

United Nations, Economic and Social Council, Commission on Human Rights. The Elimination of Violence against Women. Res. 1996/49 (19 April 1996).

United Nations, Economic and Social Council, Commission on Human Rights, The Elimination of Violence against Women. Res. 1997/44 (11 April 1997).

United Nations, Economic and Social Council, Commission on Human Rights. The Elimination of Violence against Women. Res.1998/52 (17 April 1998).

United Nations, Economic and Social Council. Contemporary Forms of Slavery, Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict, Update to the final report submitted by Ms. Gay J. McDougall, Special Rapporteur. UN Doc. E/CN.4/Sub.2/2000/21 (6 June 1998).

United Nations. Slavery, the Slave Trade, and other forms of Servitude (Report of the Secretary-General), p. 28. UN Doc. E/2357 (27 January 1953).

United Nations, Economic and Social Council. Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime. Resolution 2005/20 (22 July 2005).

United Nations. Slavery, the Slave Trade, and other forms of Servitude (Report of the Secretary-General), p. 28. UN Doc. E/2357 (27 January 1953).

United Nations, Economic and Social Council. Slavery, the Slave Trade and other forms of Servitude (Report of the Secretary-General). UN Doc E/2357 (27 January 1953).

United Nations, Entity for Gender Equality and Empowerment of Women. Convention on the Elimination of All Forms of Discrimination against Women, General Recommendations made by the Committee on the Elimination of All Forms of Discrimination against Women. 11th session (1992).

United Nations. Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. UN Doc. A/CONF.183/10 (17 July 1998).

United Nations. Final Report of the UN Commission of Experts, established pursuant to Security Council Resolution 780 (1992). UN Doc S/1994/674/Add.2 (27 May 1994).

United Nations, General Assembly. Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal. Resolution 95 (I), A/RES/1/95 (11 December 1946).

United Nations, General Assembly. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. Resolution 60/147 (16 December 2005).

United Nations, General Assembly. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Resolution 39/46 (10 December 1984).

United Nations, General Assembly. Convention on Elimination of all Forms of Discrimination against Women- Resolution 34/180 (18 December 1979).

United Nations, General Assembly. Convention on Elimination of Racial Discrimination. Resolution 2106 (XX) (21 December 1965).

United Nations, General Assembly. Convention on the Prevention and Punishment of the Crime of Genocide. Resolution 260 A (III), A/RES/3/260 (9 December 1948).

United Nations, General Assembly. Convention on the Privileges and Immunities of the United Nations (13 February 1946).

United Nations, General Assembly. Convention on the Rights of Child. UNGA Resolution 44/25 (20 November 1989).

United Nations, General Assembly. Cooperation between the United Nations and the International Criminal Court. Resolution 58/318, A/RES/58/318 (20 September 2004).

United Nations, General Assembly. Decisions Taken by the Preparatory Committee at Its Session Held from 11 to 21 February 1997. GAOR, Preparatory Comm. on the Establishment of an Int'l Crim. Court, 51st mtg., Annex 1. UN Doc. A/AC.249/1997/L.5 (1997).

United Nations, General Assembly. Decisions Taken by the Preparatory Committee at Its Session Held from 4 to 15 August 1997. GAOR, Preparatory Comm. on the Establishment of an Int'l Crim. Court, Annex 2. UN Doc. A/AC.249/1997/L.8/Rev.1 (1997).

United Nations, General Assembly. Decisions Taken by the Preparatory Committee at Its Session Held 1 to 12 December 1997. GAOR, Preparatory Comm. on the Establishment of an Int'l Crim. Court, Annex 2. UN Doc. A/AC.249/1997/L.9/Rev.1 (1997).

United Nations, General Assembly. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. UN Doc. A/RES/40/34 and Annex (29 November 1985).

United Nations General Assembly. Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Preamble*. Resolution 3318 (XXIX),* A/RES/29/3318 (14 December 1974).

United Nations, General Assembly. Establishment of an International Criminal Court. Resolution 49/53, A/RES/49/53 (9 December 1994).

United Nations, General Assembly. Establishment of an International Criminal Court. Resolution 50/46, A/RES/50/46 (11 December 1995).

United Nations, General Assembly. Establishment of an International Criminal Court. Resolution 51/207, A/RES/51/207 (17 December 1996).

United Nations, General Assembly. Establishment of an International Criminal Court. Resolution 52/160, A/RES/52/160 (15 December 1997).

United Nations, General Assembly. Formulation of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal. Resolution 177 (II), A/RES/177 (II) (21 November 1947).

United Nations, General Assembly. International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities. UN Doc. A/RES/61/106 (2006).

United Nations, General Assembly. International Covenant on Civil and Political Rights. Resolution 2200A (XXI) (16 December 1966).

United Nations, General Assembly, International Law Commission. *Historical Survey of the Question of International Criminal Jurisdiction (Memorandum by the Secretary-General)*. UN Doc. A/CN.4/7/Rev.1 (1949).
Retrieved from
http://legal.un.org/ilc/documentation/english/a_cn4_7_rev1.pdf (5 July 2019)

United Nations, General Assembly. Letter dated 21 Aug 1989 from the Permanent Representative of Trinidad and Tobago to the UN Secretary-General. UN Doc A/44/195 (1989)/ UNGA Res. 44/39 (1989).

United Nations, General Assembly. Negotiated Relationship Agreement between the United Nations and the International Criminal Court. UN Doc. A/58/874 (2004)/ Doc. A/58/874/Add.1 (2004).

United Nations, General Assembly, Office of Internal Oversight Services. Report of the Office of Internal Oversight Services on its Investigations into Allegations of Sexual Exploitation and Abuse in the Ituri Region (Bunia) in the United Nations Organization Mission in the Democratic Republic of the Congo. UN Doc. A/61/841 (5 April 2007).

United Nations, General Assembly. Promotion and protection of the rights of children, Report of the independent expert for the United Nations study on violence against children. UN Doc A/61/299 (29 August 2006).

United Nations, General Assembly. Report of the International Criminal Court. UN Doc. A/60/177 (1 August 2005).

United Nations, General Assembly. Report of the International Law Commission on the work of its forty-second session (1 May-20 July 1990). GAOR Forty-fifth session, Supp. No. 10. UN Doc. A/45/10 (1990).

United Nations, General Assembly. Report of the International Law Commission on the work of its forty-second session. UN Doc. A/RES/45/41 (28 November 1990).

United Nations, General Assembly. Report of the International Law Commission on the work of its forty-fifth session. Resolution 48/31, A/RES/48/31 (9 December 1993).

United Nations, General Assembly. Report of the Preparatory Committee on the Establishment of the International Criminal Court, Vol. I (Proceedings of the Preparatory Committee During March-April and August, 1996). 51 GAOR., Supp. No. 22. UN Doc. A/51/22 (1996).

United Nations, General Assembly. Report of the Preparatory Committee on the Establishment of the International Criminal Court, Vol. II (Compilation of Proposals). 51 GAOR, Supp. No. 22. UN Doc. A/51/22 (1996).

United Nations, General Assembly. Resolution 36/106. Draft Code of Offences against the Peace and Security of Mankind. A/RES/36/106 (10 December 1981).

United Nations, General Assembly. Resolution 44/39. International criminal responsibility of individuals and entities engaged in illicit trafficking in narcotic drugs across national frontiers and other transnational criminal activities: establishment of an international criminal court with jurisdiction over such crimes. A/RES/44/39 (4 December 1989).

United Nations, General Assembly. Resolution 94 (I). Progressive Development of International Law and its Codification (11 December 1946).

United Nations, General Assembly. Resolution 174 (II). Establishment of an International Law Commission. (21 November 1947).

United Nations, General Assembly. Resolution 260 (III) B. Study by the

International Law Commission of the Question of an International Criminal Tribunal (9 December 1948).

United Nations, General Assembly. Resolution 489 (V). International Criminal Jurisdiction (12 December 1950).

United Nations, General Assembly. Resolution 687 (VII). International Criminal Jurisdiction (5 December 1952).

United Nations, General Assembly. Resolution 897 (IX). Draft Code of Offences against the Peace and Security of Mankind (4 December 1954).

United Nations, General Assembly. Resolution 3314 (XXIX) annexing the Definition of Aggression (14 December 1974).

United Nations, General Assembly, Security Council. Children and armed conflict, Report of the Secretary-General. A/55/163 - S/2000/712 (19 July 2000).
United Nations, General Assembly. Trafficking in women and girls. A/RES/61/144 (19 December 2006).

United Nations, General Assembly. Universal Declaration of Human Rights. Res. 217 A (III) (10 December 1948).

United Nations, High Commissioner for Refugees. Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons. Guidelines for Prevention and Response. (May 2003).
Retrieved from
http://www.unhcr.org/3f696bcc4.pdf (5 July 2019)

United Nations, International Children´s Emergency Fund. The Paris Principles, Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (February 2007).

United Nations, International Children´s Emergency Fund. Cape Town Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa (30 April 1997).

United Nations, International Children´s Emergency Fund (2008). *From invisible to indivisible: promoting and protecting the right of the girl child to be free from violence*.
Retrieved from
https://unicef.at/fileadmin/media/Infos_und_Medien/Info-Material/Maedchen_und_Frauen/From_Invisible_To_Indivisible_-_Rights_of_Girl_Child.pdf (5 July 2019)

United Nations, International Law Commission. Draft Code of Offences against the Peace and Security of Mankind, First report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur. A/CN.4/364 (18 March 1983).

United Nations, International Law Commission. Eleventh report on the draft code of Crimes Against the Peace and the Security of Mankind, by Mr Dodou Thiam, Special Rapporteur. UN Doc. A/CN.4/449 (25 March 1993).

United Nations, International Law Commission. Fifth report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur. A/CN.4/404 (Incorporating document A/CN.4/404/Corr.l.) (17 March 1987).

United Nations, International Law Commission. Fourth report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur. A/CN.4/398 (Incorporating documents A/CN.4/398/Corr.l-3) (11 March1986).

United Nations, International Law Commission. Report of the Work of the International Law Commission on the work of its forty-eighthforty-eighth session (6 May to 26 July 1996). UN GAOR, 51st session, 10 Supp. 10. UN Doc A/51/10 (1996).

United Nations, International Law Commission. Report of the International Law Commission on its Second Session, 5 June to 29 July 1950, Official Records of the General Assembly, Fifth session, para. 140. Supplement No.12, Doc. A/1316 (July 1950).
Retrieved from
http://legal.un.org/docs/?path=../ilc/documentation/english/reports/a_cn4_34.pdf &lang=E (5 July 2019)

United Nations, International Law Commission. Report of the International Law Commission on the work of its forty-eighth session (6 May to 26 July 1996). Report of the Work of the International Law Commission on the work of its forty-eighth session (6 May to 26 July 1996), UN GAOR 51st Sess., Supp. No. 10. UN Doc. A/51/10 (1996).

United Nations, International Law Commission. Report of the International Law Commission on the work of its forty-fourth session, GA Res. 47/33. 47 GAOR, Supp. No. 49. UN Doc. A/47/49 (1992).

United Nations, International Law Commission. Report of the International Law Commission on the work of its forty-second session (1 May-20 July 1990). 45 GAOR, Supp. No. 10. UN Doc. A/45/10 (1990).

United Nations, International Law Commission. Report of the International Law Commission on the work of its forty-sixth session (2 May -22 July 1994). 49 GAOR, Supp. No. 10. UN Doc. A/49/10 (1994).

United Nations, International Law Commission. Report of the International Law Commission on the work of its forty-third session (29 April-19 July 1991). 46 GAOR, Supp. No. 10. UN Doc. A/46/10 (1981).

United Nations, International Law Commission. Report of the International Law Commission to the General Assembly. Report of the International Law Commission covering its second session, 5 June - 29 July 1950. Formulation of the Nürnberg Principles. Doc. A/1316 (July 1950).
Retrieved from
http://legal.un.org/ilc/documentation/english/reports/a_cn4_34.pdf (5 July 2019)

United Nations, International Law Commission. Report on the Question of International Criminal Jurisdiction by Emil Sandström, Special Rapporteur. UN Doc. A/CN 4/20 (30 March 1950).

United Nations, International Law Commission. Report on the Question of International Criminal Jurisdiction by Ricardo J. Alfaro, Special Rapporteur. A/CN.4/15 and Corr.1 (3 March 1950).

United Nations, International Law Commission. Second report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur. A/CN.4/377 (incorporating document A/CN.4/377 and Corr.1) (1 February 1984).

United Nations, International Law Commission. Seventh report on the draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur. A/CN.4/419 and Add.l (Incorporating document A/CN.4/419/Corr.l) (24 February 1989).

United Nations, International Law Commission. Sixth report on the draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur. A/CN.4/411(Incorporating documents documents A/CN.4/411/Corr. 1 and 2) (19 February 1988).

United Nations, International Law Commission. Tenth report on the draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur. UN Doc. A/CN.4/442 (20 March 1992).

United Nations, International Law Commission. Third report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur. A/CN.4/387 (incorporating document A/CN.4/387/Corr.l.) (8 April 1985).

United Nations Office on Drugs and Crime (1999). Handbook on Justice for Victims. New York: United Nations Office on Drugs and Crime.
Retrieved from
https://www.refworld.org/docid/479eeb1a2.html (5 July 2019)

United Nations Office on Drugs and Crime, UNICEF. Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, Model Law and Related Commentary
Retrieved from
https://www.unodc.org/documents/justice-and-prison-reform/Justice_in_matters...pdf (5 July 2019)

United Nations. Operational Guide to the Integrated Disarmament, Demobilization and Reintegration Standards, p. 230 (2014).
Retrieved from
http://unddr.org/uploads/documents/Operational%20Guide.pdf

United Nations. Outreach Programme on the Rwanda Genocide and the United Nations. Background Information on Sexual Violence used as a Tool of War. Department of Public Information (March 2014).
Retrieved from
http://www.un.org/en/preventgenocide/rwanda/pdf/Backgrounder%20Justice%202014.pdf (5 July 2019)

United Nations. Outreach Programme on the Rwanda Genocide and the United Nations. The Justice and Reconciliation Process in Rwanda. Department of Public Information (March 2014).
Retrieved from
https://www.un.org/en/preventgenocide/rwanda/assets/pdf/Backgrounder%20Justice%202014.pdf (5 July 2019)

United Nations. Programme of Action of the United Nations. International Conference on Population and Development (5-13 September 1994). Cairo.

United Nations. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime. Adopted by Resolution A/RES/55/25 (15 November 2000).

United Nations. Report of the Fourth World Conference on Women, Beijing Declaration and Platform for Action. UN Doc. A/CONF.177/20 (1995); A/CONF.177/20/Add.11 (1995); A/CONF.177/20/Rev.1 (1996) (4-15 September 1995). Beijing.
Retrieved from
http://unipd-centrodirittiumani.it/public/docs/BeijingDeclarationAndPlatformForAction.pdf (5 July 2019)

United Nations. Report of the Preparatory Committee on the Establishment of an International Criminal Court (Draft Statute and Draft Final Act). A/CONF.183/2/Add.1 (14 April 1998).

United Nations. Report of the World Conference to Review and Appraise the Developments of the United Nations Decade of Women: Equality, Development and PeaceReport of The World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, p. 70. UN Doc. A/CONF.116/28/Rev.1 (UN Doc. A/CONF.116/28/Rev.1 (15 to 26 July 1985). Nairobi, Kenya.1985). Nairobi, Kenya.

United Nations. Rome Statute of the International Criminal Court. UN Doc. A/CONF.183/9 (17 July 1998).

United Nations, Secretariat. Secretary-General's Bulletin. Special measures for protection from sexual exploitation and sexual abuse. UN Doc. ST/SGB/2003/13 (9 October 2003)
Retrieved from
https://oios.un.org/resources/2015/01/ST-SGB-2003-13.pdf (5 July 2019)

United Nations. Secretary-General's Statement to the Inaugural Meeting of Judges of the International Criminal Court (11 March 2003).
Retrieved from
https://www.un.org/sg/en/content/sg/statement/2003-03-11/secretary-generals-statement-inaugural-meeting-judges-international (5 July 2019)

United Nations, Security Council. Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council. S64/1994/674 (27 May 1994).

United Nations, Security Council. Letter dated 16 July 2004 from the Secretary-General addressed to the President of the Security Council, covering a "Special report on the events in Ituri, January 2002-December 2003". UN Doc. S/2004/573 (16 July 2004).

United Nations, Security Council. Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993). UN Doc. S/25704 (3 May 1993).

United Nations, Security Council. Resolution 687. S/RES/687(1991) (3 April 1991).

United Nations, Security Council. Resolution 692. S/RES/692 (1991) (20 May 1991).

United Nations, Security Council. Resolution 955 (1994) Establishing the International Criminal Tribunal for Rwanda (with Annexed Statute). UN Doc. S/RES/955 (1994) (8 November 1994).

United Nations, Security Council. Statute of the International Criminal Tribunal for the Former Yugoslavia. Resolution 827 (1993), S/RES/827 (1993) (25 May 1993).

United Nations, Security Council. The Final Report of the Commission of Experts pursuant to Security Council Resolution 780 (1992). S64/1994/674 (27 May 1994).

United Nations. Summary Record of the 14th Meeting, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Crim. Court, Comm. of the Whole, 14th mtg. UN Doc. A/CONF.183/C.1/SR.14 (1998).

United Nations. Summary Record of the 15th Meeting, U.N. Diplomatic

Conference of Plenipotentiaries on the Establishment of an Int'l Crim. Court, Comm. of the Whole, 15th mtg. UN Doc. A/CONF.183/ C.1/SR.15 (1998).

United Nations. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to SlaverySupplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (7 September 1956). Geneva.

United Nations (1972). The work of the International Law Commission, 2nd ed. New York: United Nations.

United Nations, Transitional Administration in East Timor. Regulation No. 2000/15, On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences. UN Doc UNTAET/REG/2000/15 (6 June 2000).

United Nations, Vienna Declaration and Programme of Action. UN Doc. A/CONF.157/24 (12 July 1993). Vienna.

United Nations, War Crimes Commission (1948). Case No. 21, Trial of General Tomoyuki Yamashita. United States Military Commission, Manila (8 October-7 December 1945) and the Supreme Court of the United States (judgment delivered on 4 February 1946). *Law Reports of Trials of War Criminals*, Vol. IV. London: H. M. Stationery Office.
Retrieved from
https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-4.pdf (5 July 2019)

United Nations, War Crimes Commission (1948). *History of the United Nations War Crimes Commission and the Development of the Laws of War*. London: H. M. Stationery Office.
Retrieved from
http://www.unwcc.org/wp-content/uploads/2017/04/UNWCC-history.pdf (5 July 2019)

United Nations, War Crimes Commission (1949). Case No. 76, Trial of Washio Awochi, The Netherlands Temporary Court-Martial at Batavia (Judgment delivered on 25 October 1946), *Law Reports of Trials of War Criminals*, vol. XIII. London, H. M. Stationery Office.
Retrieved from
https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-13.pdf (5 July 2019)

United Nations, War Crimes Commission (1949 a). Trial of Takashi Sakai, Chinese War Crimes Military Tribunal of the Ministry of National Defence, Nanking (Judgment delivered on 29 August 1946), *Law Reports of Trials of War Criminals*, pp. 1-7, Vol. XIV. London: H. M. Stationery Office.
Retrieved from
https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-14.pdf (5 July 2019)

United States. Case New Jersey v. Martin, 235 N.J. Super. 47 (1989), 561 A.2d 631.
Retrieved from

https://law.justia.com/cases/new-jersey/appellate-division-published/1989/235-n-j-super-47-0.html (5 July 2019)

United States. General Order No.100, Instructions for the Government of Armies of the United States in the Field (Lieber Code) (24 April 1863).

United States of America, Department of State, Bureau of Democracy, Human Rights, and Labor. Democratic Republic of the Congo, Country Reports on Human Rights Practices, 2003 (25 February 2004).
Retrieved from
https://www.refworld.org/publisher,USDOS,ANNUALREPORT,COD,403f57af10,0.html (5 July 2019)

United States of America, Department of State, Bureau of Democracy, Human Rights, and Labor. Democratic Republic of the Congo, Country Reports on Human Rights Practices, 2004 (28 February 2005).
Retrieved from
https://www.refworld.org/publisher,USDOS,ANNUALREPORT,COD,4226d96917,0.html (5 July 2019)

V

Vasiliev, Sergey (2009). “Article 68 (3) and personal interests in the ermerging practice of the ICC”. In Stahn, Carsten, & Sluiter, Göran (eds.). *The Emerging Practice of the International Criminal Court*. Leiden, Boston: Martinus Nijhoff Publishers, pp. 635-690.

van den Berg, Stephanie, & Mwarabu, Amedee (2018). Congolese ex-Vice President Bemba acquitted of war crimes on appeal. Reuters, in The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber, Annex E to the Mr. Bemba´s claim for compensation and damages. ICC-01/05-01/08-3673-AnxE (19 March 2019)
Retrieved from
https://www.icc-cpi.int/RelatedRecords/CR2019_01343.PDF (5 July 2019)

van den Berg, Stephanie, & Sengenya, Claude (2019). Ntaganda´s Conviction, a Sweeping Win for the ICC Prosecutor, Justiceinfo.net website.
Retrieved from
https://www.justiceinfo.net/en/tribunals/icc/41897-ntaganda-s-conviction-a-sweeping-win-for-the-icc-prosecutor.html (9 July 2019)

van den Herik, Larissa J. (2005). *The contribution of the Rwanda Tribunal to the development of international law*. The Hague: Martinus Nijhoff.

Varona Martínez, Gemma (2012). *Asistencia a las Víctimas de Experiencias Traumáticas, Mediación y justicia restaurativa*, pp. 1-51.
Retrieved from
https://studylib.es/doc/7749375/asistencia-a-las-víctimas-de-experiencias-traumáticas (5 July 2019)

Varona Martínez, Gemma (2012 a). *Justicia Restaurativa en Supuestos de Victimación Terrorista: Hacia un Sistema de Garantías Mediante el Estudio Criminológico de Casos Comparado*, pp. 201-245.
Retrieved from
http://www.ehu.eus/documents/1736829/2177136/Varona+Eguzkilore+26-21.pdf (5 July 2019)

Vázquez Pedreño, José (2014). *Las víctimas de crímenes internacionales, en particular los grupos especialmente vulnerables ante la Justicia Penal Internacional*. Universidad de Murcia, Murcia.
Retrieved from
http://hdl.handle.net/10201/39916 (5 July 2019)

Verweij, Harry (2001). *The International Criminal Court: Alive, Soon Kicking!*, pp. 737-749.
Retrieved from
https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1832&context=ilj (5 July 2019)

Victims Rights Working Group, advocating for the rights of victims at the International Criminal Court. Rome Conference for the establishment of an International Criminal Court, Speech by Fiona Mckay on behalf of the Victims Rights Working Group (16 June 1998).
Retrieved from
http://www.vrwg.org/VRWG_DOC/1998_Flyer_speech.pdf (5 July 2019)

Victims' Rights Working Group (2000). Victims' Rights in the International Criminal Court.
Retrieved from
http://iccnow.org/documents/VRWG%20flyer2000.pdf (5 July 2019)

von Joeden-Forgey, Elisa (2010). "Gender and Genocide". In Bloxham, Donald, & Moses, A. Dirk (eds.) (2010). *Oxford Handbook of Genocide Studies*. Oxford: Oxford University Press, pp. 61–80.

W

War Crimes Research Office. Victim Participation Before the International Criminal Court. International Criminal Court, Legal Analysis and Education Project (November 2007).
Retrieved from
https://www.wcl.american.edu/impact/initiatives-programs/warcrimes/our-projects/icc-legal-analysis-and-education-project/reports/report-1-victim-participation-before-the-international-criminal-court/ (5 July 2019)

Washburn, John (1999). *The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century*, pp. 361-377.
Retrieved from

https://digitalcommons.pace.edu/pilr/vol11/iss2/4 (5 July 2019)

Weiner, Philip (2013). The Evolving Jurisprudence of the Crime of Rape in International Criminal Law, pp. 1207-1237.
Retrieved from
http://lawdigitalcommons.bc.edu/bclr/vol54/iss3/14 (5 July 2019)

Wemmers, Jo-Anne M. (1996). *Victims in the Criminal Justice System*. WODC-Ministry of Justice. Amsterdam/ New York: Kugler.
Retrieved from
https://www.wodc.nl/binaries/ov-1996-05-full-tekst_tcm28-78069.pdf (5 July 2019)

Wen-qi, Zhu, & Chana, Sureta. (2008). Article 36 Qualifications, nomination and election of judges. In Triffterer, Otto, & Ambos, Kai (eds.). *Commentary on the Rome Statute of the International Criminal Court: Observer's note, article by article*, 2nd ed. München: Beck, pp. 941-948.

Werle, Gerard, & Bung, Jochen (2010). *Summary (Crimes against Humanity), International Criminal Justice*. Humboldt- Universität zu Berlin.
Retrieved from
http://werle.rewi.hu-berlin.de/04_Crimes%20against%20Humanity-Summary.pdf (5 July 2019)

Wilmshurst, Elizabeth (2008). *Definition of Aggression*, pp. 1-4.
Retrieved from
http://legal.un.org/avl/pdf/ha/da/da_e.pdf (5 July 2019)

Wolfgang, Marvin E., & Singer, Simon I. (1978). *Victim Categories of Crime*, pp. 379-394.
Retrieved from
https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6081&context=jclc (5 July 2019)

Women's Caucus for Gender Justice. Tokyo Tribunal 2000 & Public Hearing on Crimes Against women.
Retrieved from
http://iccwomen.org/wigjdraft1/Archives/oldWCGJ/tokyo/index.html (5 July 2019)

Women's Caucus for Gender Justice (1997). Recommendations and Commentary for August 1997 PrepCom on the Establishment of an International Criminal Court. United Nations Headquarter.
Retrieved from
http://iccnow.org/documents/WomensCRecomm.pdf (5 July 2019)

Women´s Caucus for Gender Justice (2001). RE: Judgment of the Women´s International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery, in the matter of the Prosecutors and the Peoples of the Asia-Pacific Region vs. Emperor Hirohito et al., & the Government of Japan.
Retrieved from

http://iccwomen.org/wigjdraft1/Archives/oldWCGJ/tokyo/judgmentannounce.html (5 July 2019)

Women´s Initiative for Gender Justice. Partial Conviction of Katanga by ICC, Acquittals for Sexual Violence and Use of Child Soldiers, The Prosecutor vs. Germain Katanga (7 March 2014).
Retrieved from
http://www.iccwomen.org/images/Katanga-Judgment-Statement-corr.pdf (5 July 2019)

Wood, Elisabeth J. (2006). *Variation in Sexual Violence during War*, pp. 307-341.
Retrieved from
http://home.iscte-iul.pt/~apad/MSV/text%20violencia/sexo%20e%20guerra.pdf (5 July 2019)

Wood, Michael (2009). *Statute of the International Law Commission*, pp. 1-6.
Retrieved from
http://legal.un.org/avl/pdf/ha/silc/silc_e.pdf (5 July 2019)

Z

Zimmermann, Andreas (2008). “Article 8 War Crimes, para. 2 (c)”. In Triffterer, Otto, & Ambos, Kai (eds.). *Commentary on the Rome Statute of the International Criminal Court: Observer's note, article by article*, 2nd ed. München: Beck. pp. 475-502.

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Sexual and gender-based crimes in the International Criminal Court

Los crímenes sexuales y de género en la Corte Penal Internacional

Resumen

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Sumario

Introducción

Durante la historia del siglo XX hubo mejoras progresivas en la lucha contra los crímenes sexuales y de género en el derecho internacional.

Esta evolución alcanzó su punto álgido en la promulgación del Estatuto de Roma, que creó la Corte Penal Internacional (CPI) y estableció hitos centrales.

El Estatuto fue el primer instrumento del derecho internacional en incorporar una amplia lista de crímenes sexuales y de género y considerarlos crímenes de guerra en conflictos armados internacionales y no internacionales. Extendió más allá del crimen de violación la lista de crímenes sexuales y de género que constituyen crímenes contra la humanidad en conflictos armados internacionales y no internacionales, para abarcar la esclavitud sexual, la prostitución forzada, el embarazo forzado, la esterilización forzada y otras formas de violencia sexual y persecución basada en el género. Estableció un valioso progreso en los derechos y prerrogativas de las víctimas "lato sensu" y de las víctimas de crímenes sexuales y de género "stricto sensu", garantizándoles protección, participación y reparación.

El sistema del Estatuto de Roma fue concebido para constituir un paso adelante en la erradicación de la impunidad que afecta los crímenes de género. Por lo tanto, el Estatuto supuso un avance significativo en la lucha contra los crímenes sexuales y de género, desde un punto de vista teórico.

La presente tesis doctoral proporciona una base amplia de los antecedentes de la mencionada evolución del manejo de crímenes sexuales y de género. También destaca el proceso que conduce a la creación de la Corte Penal Internacional y las innovaciones introducidas por el Estatuto de Roma en relación con los crímenes sexuales y de género y sus víctimas.

El historial contextualiza y permite comprender las expectativas detrás del funcionamiento de la Corte Penal Internacional relacionadas con la investigación y el enjuiciamiento de crímenes sexuales y de género bajo la jurisdicción de la Corte.

Ciertamente, se esperaba que la Corte Penal Internacional al cumplir su mandato, estaría a la altura de las disposiciones del Estatuto de Roma.[1]

Se anticipó que la Corte investigara, acusara y enjuiciara eficientemente los crímenes sexuales y de género en situaciones de conflicto armado. De hacerlo correctamente, la CPI pondría fin a la impunidad de los autores de tales crímenes y contribuiría a su prevención.

Sin embargo, el impulso necesario para abordar la violencia de género y sexual prevista en el Estatuto de Roma no parece haberse transferido en su totalidad a la práctica de la CPI.[2]

Para determinar eso, el presente trabajo lleva a cabo una revisión jurídica de la práctica en la CPI donde los primeros tres casos de la Corte relacionados con crímenes sexuales y de género en los que se han dictado sentencias finales (El Fiscal v. Thomas Lubanga Dyilo, el El fiscal v Germain Katanga, el fiscal v. Jean-Pierre Bemba Gombo) han sido analizados.

El examen ha consistido en un estudio en profundidad del enfoque de la Corte Penal Internacional respecto de los crímenes sexuales y de género en cada uno de los casos.

El objetivo principal de la tesis doctoral es verificar cómo la Corte Penal Internacional ha manejado los crímenes sexuales y de género en sus casos.

La tesis también examina la perspectiva de las víctimas al verificar si la CPI brinda asistencia adecuada a las víctimas de crímenes sexuales y de género y de cual forma.

El trabajo se organiza de la siguiente manera.

El Capítulo 2 aborda la evolución histórica de los crímenes sexuales y de género en el escenario del Derecho Penal Internacional, cubriendo los antecedentes, desde el juicio de Peter von Hagenbach hasta el juicio por el genocidio de Ruanda.

El Capítulo 3 trata sobre el Estatuto de Roma y la Corte Penal Internacional, presentando los antecedentes y el proceso de construcción (incluidos los esfuerzos de las Naciones Unidas para crear una Corte Penal Internacional y la inserción de cuestiones relacionadas con el género en el Estatuto de Roma).

[1] Kambale, P. K. (2015). In De Vos, C., Kendall, S., & Stahn, C., (eds.), pp. 171-197
[2] Green, L. (2011), pp. 529–541

Este capítulo aborda la la jurisdicción, la admisibilidad, la ley y el procedimiento aplicables de la CPI, así como el comienzo de su funcionamiento.

El Capítulo 4 discute los crímenes sexuales y de género en el Estatuto de Roma, aclarando la relevancia del Estatuto para estos crímenes y analizando su extensión y definición (cubriendo las disposiciones del Estatuto sobre crímenes sexuales y de género y los respectivos elementos de los crímenes).

El tema del Capítulo 5 son las víctimas de crímenes sexuales y de género en el Estatuto de Roma. Ese capítulo examina varios aspectos, como las innovaciones en los derechos otorgados a las víctimas, las disposiciones específicas dirigidas a proteger a las víctimas de crímenes sexuales y de género, y la cuestión de cómo equilibrar la protección de los derechos de las víctimas y testigos, la protección de derechos del acusado y promoción de un juicio imparcial y justo.

En el Capítulo 6, se presenta la situación en la República Democrática del Congo y el caso del Fiscal v. Thomas Lubanga Dyilo es analizado con énfasis en el manejo de los crímenes sexuales y de género, y la restricción de los cargos criminales contra Lubanga, lo que llevó a la ausencia de cargos por presuntos crímenes sexuales y de género.

El tema del Capítulo 7 es el caso del Fiscal v. Germain Katanga. Después de ofrecer un antecedente y una visión general del caso, se examinan los cargos y el enjuiciamiento de crímenes sexuales y de género, así como el hecho de que la Sala de Primera Instancia II (en contra de lo que entendió la Sala de Cuestiones Preliminares I) consideró que el acusado no podría ser responsabilizado por estos crímenes.

El Capítulo 8 aborda la situación en la República Centroafricana, y luego discute el caso del Fiscal v. Jean-Pierre Bemba Gombo, destacando la condena de Bemba basada en crímenes sexuales y de género que posteriormente fue revocada por la Sala de Apelaciones. Se analiza el impacto de dicho resultado para las víctimas y cómo afecta el enjuiciamiento de los crímenes sexuales y de género en el escenario del derecho penal internacional. Se verifica la repercusión en la credibilidad de la Corte y su papel en la lucha contra la impunidad de los autores de crímenes sexuales y de género y en la promoción de un efecto disuasorio.

En el debate y las conclusiones, se reúnen los principales hallazgos que ofrecen un retrato de la evolución de la Corte Penal Internacional en el manejo de los crímenes sexuales y de género. Se enfatizan los pasos correctos adoptados por la Corte hasta ahora y se señalan los temas donde hay margen de mejora.

En resumen, en esta tesis se ha establecido el progreso realizado por la CPI y se han determinado los desafíos que aún enfrenta en relación con tales crímenes.

Al final, con base en las conclusiones tras el análisis de los casos de la Corte Penal Internacional, se han hecho recomendaciones que podrán contribuir al

enjuiciamiento y castigo efectivo de los crímenes sexuales y de género bajo la jurisdicción de la Corte.

Discusión

Como se ve a lo largo del presente trabajo, el enjuiciamiento de crímenes sexuales y de género prácticamente no tenía lugar en el escenario internacional hasta el siglo anterior.

Excepto por muy pocas acciones señaladas (específicamente, la condena de Peter von Hagenbach de 1474 por violación entre otros crímenes, la prohibición de violación del Código Lieber de 1863, y la introducción de la Cláusula Martens y el respeto a las "leyes de la humanidad" por la Convención de 1899 (II) con respecto a las leyes y costumbres de la guerra en la tierra), los principales desarrollos legales en relación con la criminalización y el castigo de los crímenes sexuales y de género en el escenario del Derecho Penal Internacional solo comenzaron en el siglo XX. Por lo tanto, constituye un tema relativamente nuevo. A lo largo del siglo pasado, tales crímenes comenzaron progresivamente a ocupar un papel más destacado en el Derecho Penal Internacional. Los documentos internacionales promulgados (como los Cuatro Convenios de Ginebra del 12 de agosto de 1949 y los Protocolos Adicionales) reflejan el aumento de la atención prestada por la Comunidad Internacional a los crímenes sexuales y de género, contribuyendo a la protección de las mujeres.

Este proceso condujo a la incorporación de crímenes sexuales y de género entre los crímenes sobre los cuales los Tribunales Penales Internacionales "ad hoc" tienen jurisdicción. Los estatutos del Tribunal Penal Internacional para la ex Yugoslavia (TPIY) y el Tribunal Penal Internacional para Ruanda (TPIR) convirtieron el crimen de violación en un crimen contra la humanidad. Además, los casos de estos Tribunales fueron de gran importancia para el enjuiciamiento de crímenes sexuales y de género en el escenario internacional. Por ejemplo, el caso TPIY el Fiscal v. Duško Tadić (que fue el primer juicio internacional por crímenes de guerra con cargos de violencia sexual y el primer juicio por violencia sexual contra hombres), y el caso TPIR el Fiscal v. Akayesu (que estableció que la violación puede constituir genocidio y diferenció este tipo de crimen de violencia sexual) fueron hitos en el combate a este tipo de crímenes.[3]

El establecimiento de la Corte Penal Internacional coronó el proceso en evolución de la criminalización internacional de los crímenes sexuales y de género. Los redactores del Estatuto de Roma atribuyeron gran importancia a la relevancia del género en la comisión de crímenes penales dispuestos en Estatuto. Como resultado, el Estatuto de Roma es el primer instrumento del derecho internacional que incorpora una amplia lista de crímenes sexuales y de

[3] ICTR. The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4. Chamber I, Judgment, para. 598 (2 September 1998); ICTY. The Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T. Trial Chamber, Judgment, pp. 62, 63, 67, paras. 160, 171 (10 December 1998); ICTY website, Landmark Cases; United Nations, Security Council. Statute of the International Criminal Tribunal for the Former Yugoslavia (1993), Art. 5 (g); United Nations, Security Council. Statute of the International Criminal Tribunal for Rwanda, Art. 3 (g)

género y los considera crímenes de guerra, en el contexto de conflictos armados internacionales y no internacionales.[4]

Además, el Estatuto de Roma amplió la lista de crímenes sexuales y de género que constituyen crímenes contra la humanidad, para incluir la esclavitud sexual, la prostitución forzada, el embarazo forzado, la esterilización forzada o cualquier otra forma de violencia sexual de gravedad comparable y persecución por motivos de género. También, la comisión de crímenes sexuales y de género con la intención de destruir, total o parcialmente, un grupo nacional, étnico, racial o religioso puede constituir actos genocidas.[5]

Cabe señalar que los redactores del Estatuto de Roma perdieron una oportunidad importante de otorgar mayor protección a las víctimas contra los crímenes sexuales y de género cuando no incluyeron el género, la violación o cualquier otra forma de violencia sexual entre las bases del crimen de genocidio en la definición de genocidio prevista en el artículo 6 del Estatuto de Roma. Para los fines del enjuiciamiento del genocidio, los crímenes sexuales y de género solo pueden considerarse como actos genocidas subsumidos en los actos de causar lesión grave a la integridad física o mental de los miembros del grupo; someter intencionalmente el grupo a condiciones de existencia que hayan de acarrear su destrucción física, total o parcial, y adoptar medidas destinadas a impedir nacimientos en el seno del grupo.

Desde un punto de vista amplio, el Estatuto de Roma alargó considerablemente la gama de situaciones en las que uno puede ser considerado responsable de cometer crímenes sexuales y de género. Tal hecho generó la esperanza de que el enjuiciamiento de los casos de la Corte Penal Internacional representaría la culminación de la condena de los responsables de la comisión de esos crímenes, y que también tuvieran un efecto disuasorio. De hecho, las víctimas y la comunidad criminal internacional esperaban que los juicios de la CPI darían cuenta de tales crímenes y promoverían la justicia.

La promulgación del Estatuto de Roma trajo protección y asistencia innovadoras a las víctimas en general. Además, observadas ciertas condiciones, a las víctimas se les permitió participar en todas las etapas del proceso. Los redactores del Estatuto de Roma previeron que la Corte ofrecería una respuesta restaurativa complementaria a las víctimas en el escenario del Derecho Penal Internacional, en el que, tradicionalmente, las víctimas han tenido un papel secundario.[6]

Es notable que en el Estatuto y en sus instrumentos legales relacionados se hayan insertado normas específicas (en particular medidas investigativas, procesales y probatorias) con el fin de proteger y apoyar específicamente a las

[4] ICTR. The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4. Chamber I, Judgment, para. 598 (2 September 1998); International Criminal Court, the Office of the Prosecutor. Policy Paper on Sexual and Gender-Based Crimes (9 June 2014)

[5] International Criminal Court, the Office of the Prosecutor. Policy Paper on Sexual and Gender-Based Crimes (9 June 2014); Estatuto de Roma, Art. 5 (g) (h), 6

[6] International Criminal Court, the Office of the Prosecutor. Policy Paper on Sexual and Gender-Based Crimes (9 June 2014); Estatuto de Roma, Arts. 5 (g) (h), 6, 7 (1) (g), 8 (2) (b) (xxii), and 8 (2) (e) (vi); Varona Martínez, G. (2012 a)

víctimas de crímenes sexuales y de género. El esquema de la Corte Penal Internacional buscó promover la justicia procesal para estas víctimas especialmente vulnerables (lo que incluye asegurarse de que las víctimas reciban un trato justo, respetuoso y digno durante el proceso y tengan acceso a las reparaciones) y proporcionarles un papel significativo en el proceso de Justicia Penal internacional.[7]

En vista de las innovaciones introducidas por el Estatuto de Roma, se podría sugerir teóricamente que la Justicia Penal Internacional estaría finalmente en condiciones de permitir que todas las víctimas, particularmente las víctimas de violencia sexual y de género, tengan acceso a los aspectos retributivos, restaurativos, prácticos y procesales de la justicia.[8]

Conclusiones la luz de los casos de la CPI

Para determinar si estas expectativas teóricas han sido mantenidas por la práctica de la Corte Penal Internacional, analizamos los tres casos de la CPI que son relevantes desde la perspectiva de los crímenes sexuales y de género en los que la Corte ha dictado sentencias finales, a saber, el Fiscal v. Thomas Lubanga Dyilo, el Fiscal v. Germain Katanga y el Fiscal v. Jean-Pierre Bemba Gombo.

- Caso el Fiscal v. Lubanga

En el primer caso, la Fiscalía solo acusó a Lubanga de los crímenes de reclutamiento, alistamiento, y uso de niños soldados. Aunque Lubanga presuntamente cometió más crímenes, incluyendo violación y esclavitud sexual, esos crímenes no figuraban entre los cargos.

Este fue el primer caso de la CPI en ser procesado. Uno de los problemas que enfrentaba la Fiscalía era cómo llevar a cabo investigaciones sobre situaciones de violencia continua, que conllevaban dificultades logísticas notables. Para abordar este desafío, la Oficina adoptó medidas críticas. Decidió disminuir la duración y la amplitud de la investigación, y solicitar una orden de arresto contra Lubanga después de 18 meses de investigaciones.[9]

A este respecto, es necesario destacar que la inminente liberación de Lubanga (que había estado bajo arresto en la República Democrática del Congo desde marzo de 2005) influyó en la decisión del Fiscal de concentrarse en los crímenes de reclutamiento, alistamiento y uso de niños menores de 15 años para participar activamente en hostilidades.[10]

[7] Benhassine, S. (2015), p. 47; Bedont, B., & Martinez, K. H. (1999), pp. 65-85; Moffett, L. (2014), p 3; Wemmers, J.-A. M. (1996), pp. 101-102
[8] Benhassine, S. (2015), pp. 11-12
[9] International Criminal Court, The Office of the Prosecutor. Report on the activities performed during the first three years (June 2003 – June 2006), pp. 2, 7
[10] International Criminal Court, The Office of the Prosecutor. Report on the activities performed during the first three years (June 2003 – June 2006), pp. 2-3

También en esta dirección, la información del Fiscal sobre la investigación adicional del 28 de junio de 2006 declaró que no era posible complementar la recopilación de pruebas en la medida necesaria para modificar los cargos respectando a los plazos establecidos en los artículos 61 (4) y 61 (9) del Estatuto de Roma por causa de las posibilidades limitadas de investigar más sobre los crímenes presuntamente perpetrados por Lubanga. Se argumentó que la modificación de los cargos contribuiría a retrasar aún más el ritmo de los procedimientos, causando demoras significativas, lo que estaría en desacuerdo con los derechos del acusado a ser juzgado sin demora indebida.[11]

Estos argumentos demuestran que la decisión del Fiscal de juzgar únicamente a Lubanga por los cargos de reclutar y alistar niños menores de quince años en el *Force Patriotique pour la Libération du Congo* (FPLC) y usarlos para participar activamente en hostilidades no se basó especialmente en la gravedad de estos crímenes, sino más bien sobre qué crímenes los investigadores pudieron recopilar rápidamente evidencia para garantizar una orden de arresto contra Lubanga.[12]

La preferencia del Fiscal por un enfoque práctico es bastante clara en lo que respecta a la falta de cargos por crímenes sexuales y de género en el caso. No incluyó la violencia sexual o la esclavitud sexual en los cargos originales y tampoco solicitó su incorporación en las etapas posteriores del proceso. Además, objetó su inclusión durante el juicio al afirmar que sería injusto para el acusado si fuera condenado por tales motivos.[13]

Sin embargo, este curso de acción no parece justificable. Seguramente, cuando se trata de crímenes sexuales y de género, la Fiscalía podría haber utilizado dos enfoques:

1-) el hecho de que miembros de la *Union des Patriotes Congolais*/ *Force Patriotique pour la Libération du Congo* (UPC / FPLC)- incluidos los niños soldados reclutados y alistados que estaban siendo utilizados para participar activamente en las hostilidades- cometieron violaciones como forma de propagación de la violencia durante el conflicto armado.

Con respecto al uso de la violación como arma de guerra por parte de la UPC / FPLC, el Documento que contiene los cargos claramente establece que los niños reclutados habían recibido permiso de un comandante para violar a mujeres Lendu.[14]

Por lo tanto, la Fiscalía tenía una fuerte indicación de que los miembros de la FPLC, incluidos los niños soldados, perpetraron violaciones contra mujeres

[11] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Prosecutor's Information on Further Investigation, p. 5, paras. 8-9
[12] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Prosecutor's Information on Further Investigation, p. 4, para. 7; Kambale, P. K. (2015). In De Vos, C., Kendall, S., & Stahn, C., (eds.), pp. 171-197
[13] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute, p. 24, para. 60
[14] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Document Containing the Charges, Article 61(3) (a), p. 17, para. 55

Lendu durante el ataque en Lipri. Resulta que los propios niños víctimas podrían haber arrojado una luz (y haber proporcionado pruebas a la Fiscalía durante la etapa de investigación) sobre la cuestión para determinar si las UPC / FPLC realmente llevaron a cabo violaciones durante el conflicto armado.

Además, el 15 de agosto de 2006, la organización *Women's Initiatives for Gender Justice* (Iniciativa de Mujeres para Justicia de Género) envió una carta al Fiscal y presentó "un informe al Fiscal que detalla los crímenes de género cometidos en el este de la RDC", que incluía una lista de 31 víctimas / sobrevivientes de actos de violación y esclavitud sexual cometidas por la UPC que estaban dispuestas a presentarse. [15]

Como resultado, la Fiscalía podría haber determinado tanto con los presuntos autores de violaciones (niños que fueron víctimas de reclutamiento, alistamiento y uso por parte de la milicia UPC / FPLC) como con presuntas víctimas (mujeres entrevistadas en el informe de la *Women's Initiatives for Gender Justice*) si la UPC / FPLC cometió violaciones en el curso de los ataques en la región de Ituri.

2-) la circunstancia de que las niñas soldados fueron víctimas de violencia sexual, siendo objeto de violación y esclavitud sexual por la UPC / FPLC.

En lo que respecta al abuso sexual de niñas soldados, es bien sabido que los crímenes de reclutar y alistar niños en las fuerzas armadas están relacionados con los crímenes de esclavitud sexual.[16]

En consecuencia, hubo "evidencia sustancial y disponible" de la práctica generalizada de los crímenes sexuales y de género en el caso Lubanga.[17]

A pesar de las alegaciones de la Fiscalía de que no era posible complementar la recopilación de pruebas al nivel exigido para enmendar los cargos dentro de los plazos del Estatuto, aparentemente la obtención de las pruebas necesarias sobre la perpetración de violación por parte de la UPC / FPLC para acusar a Lubanga de crímenes sexuales no sería muy trabajosa ni demasiado lenta.[18]

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[15] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Pre-Trial Chamber I, Request for leave to participate as *amicus curiae* in the Article 61 Confirmation of Charges proceedings, p.16, para. 27; Letter from Women's Initiatives for Gender Justice to the Prosecutor Luis Moreno Ocampo (15 August 2006)

[16] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Observations from the Legal Representatives of the Victims in response to the documents filed by the Prosecution and the Defence in support of their appeals against the Decision of Trial Chamber I of 14 July 2009, p. 11-12, para. 30;
ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Cour, p.23, para. 59

[17] Letter from Women's Initiatives for Gender Justice to the Prosecutor Luis Moreno Ocampo (15 August 2006)

[18] Letter from Women's Initiatives for Gender Justice to the Prosecutor Luis Moreno Ocampo (15 August 2006)

La decisión unilateral de la Fiscalía de no perseguir el cargo a Lubanga de crímenes sexuales y de género causó el repudio de las víctimas y de gran parte de la comunidad internacional involucrada en cuestiones de género.[19]

A pesar de su postura anterior hacia el tema de la violencia sexual durante todos los procedimientos, el Fiscal afirmó que la violencia sexual debería tenerse en cuenta a los fines de la sentencia. Tal actitud fue fuertemente desaprobada por la Sala de Primera Instancia (SPI) I.[20]

En opinión de la mayoría de Sala de Primera Instancia I, no se estableció más allá de toda duda razonable la conexión entre Lubanga y la violencia sexual en el contexto de los cargos. Tal resultado surgió como consecuencia de la imprudencia del Fiscal en relación con la violencia sexual en el caso de Lubanga: no presentó evidencia sobre este tema durante la audiencia de sentencia y no se refirió a la evidencia relevante presentada durante el juicio.[21]

A pesar de que la violencia sexual tuvo lugar en el contexto de los crímenes por los cuales Lubanga fue condenado, como resultado de la falta de demostración de un vínculo entre el acusado y violencia sexual, la mayoría entendió que no era adecuado responsabilizarle a Lubanga por ella. Por lo tanto, la violencia sexual no puede representarse como una circunstancia agravante para los fines de la sentencia.[22]

Sin embargo, en su opinión disidente, la jueza Odio Benito (contrariamente a la mayoría de la Sala) defendió que la violencia sexual y el castigo deben considerarse circunstancias agravantes en la elaboración de la sentencia contra Lubanga porque estos actos causaron daños graves y con frecuencia irreparables a las víctimas y sus familias, e incluso afectarán a las generaciones futuras.[23]

Con respecto a la reparación, aunque la Sala de Primera Instancia I había estipulado que la indemnización otorgada a título de reparación adequada para las víctimas de violencia sexual y de género deberia ser formulada e implementada por la Corte, la Sala de Apelaciones revocó dicha decisión. Declaró que, una vez que la SPI había determinado que Lubanga no podía ser considerado responsable de actos de violencia sexual, la Sala debería haber explicado cómo todavía se hacía responsable de las reparaciones en relación con el daño causado por la violencia sexual y de género. La Sala no lo hizo. Por lo tanto, la Sala de Apelaciones entendió que Lubanga no podía ser considerado

[19] Galain Palermo, P. (2014). In Ambos, K., Malarino, E., & Steiner, C. (eds.), pp. 389-430, footnote 4
[20] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute, p. 24, para. 60
[21] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute, p. 28, paras. 75-76
[22] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute, pp. 26, 28, paras. 66, 74-75
[23] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Dissenting Opinion of Judge Odio Benito in Public Decision on Sentence pursuant to Article 76 of the Statute, pp. 42-46, 49, 50, paras. 6-9, 13, 19-22

responsable de las reparaciones relacionadas con este daño, y modificó la Decisión impugnada en este respecto.[24]

La Sala de Apelaciones aclaró que su hallazgo sobre la responsabilidad de Lubanga por las reparaciones en relación con el daño derivado de la violencia sexual y de género no impediría que estas víctimas se beneficiaran de las actividades de asistencia realizadas por el Fondo Fiduciario para las Víctimas. En consecuencia, la Sala de Apelaciones permitió la inclusión de víctimas que sufrieron daños como consecuencia de la violencia sexual y de género en el mandato de asistencia del Fondo Fiduciario.[25]

Además, el Fondo Fiduciario y la Sala de Primera Instancia determinaron que los programas de los primeros deben estar dirigidos a víctimas directas e indirectas de los crímenes de los cuales Lubanga ha sido condenado y deben prestar atención específica a los resultados específicos de género de los crímenes e incluir una formación sensible al género.[26]

Por lo tanto, en relación con el caso Lubanga, es posible concluir que:

- La Fiscalía optó incorrectamente por un enfoque práctico al manejar los crímenes denunciados en los cargos en el caso Lubanga, obstruyendo el enjuiciamiento de crímenes sexuales y de género;

- El Fiscal debería haber designado un Asesor Jurídico Especialista en Género desde el comienzo de la investigación del caso;

- La Fiscalía debería haberse verificado tanto con los presuntos autores de violaciones (niños que fueron víctimas de reclutamiento, alistamiento y uso por parte de la milicia UPC / FPLC) como con presuntas víctimas (mujeres entrevistadas en el informe de la *Women's Initiatives for Gender Justice*) si la UPC / FPLC cometió violaciones durante los ataques en la región de Ituri;

- Al reunir esta evidencia que estaba fácilmente disponible sobre la perpetración de violación y esclavitud sexual, el Fiscal debería haber solicitado la inclusión de estos crímenes entre los crímenes denunciados en los cargos en una etapa posterior del proceso;

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[24] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, p. 72, para. 207; ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, p. 77, para. 198

[25] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, p. 77, para. 199

[26] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Filing on Reparations and Draft Implementation Plan, p. 34, paras. 68-69;
ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber II, Order instructing the Trust Fund for Victims to supplement the draft implementation plan, p. 9, para. 21

- El Fiscal no debería haber objetado la inclusión de los cargos de esclavitud sexual y trato inhumano y / o cruel cuando surgió la cuestión de la recaracterización de los hechos;[27]

- Una vez que el Fiscal defendió que la violencia sexual debería tenerse en cuenta a los fines de la sentencia, él debería haber presentado pruebas sobre este tema durante la audiencia de sentencia, o referirse a las pruebas pertinentes que se habían presentado durante el juicio, para establecer más allá duda razonable de la existencia de un vínculo entre el acusado y la violencia sexual, en el contexto de los cargos;

- La Sala de Primera Instancia I, la Sala de Apelaciones y la Fondo Fiduciário para las Víctimas fueran conscientes de la necesidad de prestar la debida atención a las especificidades de género e incluir a las víctimas que sufrieron daños como consecuencia de la violencia sexual y de género en los programas realizados bajo el mandato de asistencia del Fondo.

Este primer caso estuvo permeado por fallas de la Fiscalía en relación con la acusación de crímenes sexuales y de género. No es de extrañar que empañara la reputación de la CPI y pusiera en juego su capacidad para traducir en acciones prácticas las disposiciones de vanguardia victimológica del Estatuto de Roma, así como llevar justicia a las víctimas. Además, el caso significó un duro golpe para las víctimas y los que abogan por el enjuiciamiento de los crímenes sexuales y de género en el escenario penal internacional.

- Caso el Fiscal v. Katanga

El caso que el Fiscal v. Katanga fue primera vez en la historia de la CPI en el que acusados (mientras Germain Katanga todavía estaba siendo procesado conjuntamente con Mathieu Ngudjolo Chui, ICC-01 / 04-01 / 07) fueron acusados de crímenes sexuales y de género, específicamente, los crímenes de violación y esclavitud sexual, como crímenes de guerra y crímenes contra la humanidad. Fue una mejora en relación con el caso Lubanga, ya que en este último la Fiscalía no presentó cargos de crímenes sexuales y de género.

En el caso contra Mathieu Ngudjolo Chui (que fue separado por la Corte del caso contra Katanga), la Sala de Primera Instancia II no tuvo que considerar si los crímenes se habían cometido o no porque consideraba que el acusado carecía de autoridad y, en consecuencia, lo absolvió de todos los cargos, incluidos los crímenes de violación y esclavitud sexual.[28]

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[27] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute, p. 24, para. 60; ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Prosecution's Application for Leave to Appeal the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", pp. 8-9, paras. 22-23; ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. Trial Chamber I, Prosecution's Further Observations Regarding the Legal Representatives' Joint Request Made Pursuant to Regulation 55. ICC-01/0401/06-1966 (12 June 2009).

[28] Opinio Juris website, Sane, J., Mathieu Ngudjolo Chui: reflections on the ICC's first acquittal,

Sin embargo, en el caso contra Germain Katanga, la SPI II analizó si los crímenes de violación y esclavitud sexual habían sido perpetrados. Fue la primera vez en que la Corte examinó las pruebas presentadas en relación con los crímenes de violación y esclavitud sexual para determinar si se habían cometido dichos crímenes.

La SPI II estaba en sintonía con la vulnerabilidad especial de los testigos que fueron víctimas de violencia sexual, y la tuvo en cuenta (no solo en la conducción de los procedimientos del juicio, sino también al analizar y dar credibilidad a los testimonios de esos testigos). Su enfoque estaba orientado a aliviar la dificultad que las víctimas encuentran al recordar su terrible experiencia y, por lo tanto, evitar la revictimización para el enjuiciamiento de crímenes sexuales y de género. La Sala también reconoció que, además del impacto psicológico y físico causado por los crímenes sexuales y de género, las víctimas de estos crímenes enfrentan otros desafíos, como la estigmatización y la marginación por parte de sus comunidades.[29]

A pesar de dichos progresos, se pueden hacer algunas críticas con respecto a la conducción del caso.

En primer lugar, la falta de un curso de acción unificado entre la Fiscalía y el Dependencia de Víctimas y Testigos (DVT) con respecto al tipo de protección que debería otorgarse a los testigos que fueron víctimas de crímenes sexuales y de género causó demoras en el proceso.[30]

Otra crítica es que la acusación de crímenes sexuales y de género en el caso fue limitada. Aunque hay mención explícita a la ocurrencia de matrimonio forzado y embarazo forzado, el Fiscal decidió acusar la violencia sexual y de género sufrida por las víctimas exclusivamente como esclavitud sexual. Las actividades específicas de género se presentaron como una forma de prueba de los crímenes sexuales en lugar de ser considerada como una prueba separada del daño sufrido por las víctimas.[31]

La elección de la Fiscalía de acusar hechos que equivalían a matrimonio forzado y embarazo forzado exclusivamente como esclavitud sexual denota que se dio demasiado énfasis a los elementos sexuales del crimen y no se dio suficiente relevancia al daño causado por los aspectos no sexuales (como, por ejemplo, forzar la maternidad y a cocinar). Otros aspectos graves, como el embarazo forzado y el trabajo doméstico obligatorio, se relegaron al segundo plan, y se

[29] Oosterveld, V. (2009), pp. 407-430

[30] ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Warrant of Arrest for Germain Katanga, p. 6; ICC. The Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/07. Pre-Trial Chamber I, Warrant of arrest Mathieu Ngudjolo Chui, 7, p. 6; ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07. Pre-Trial Chamber I, Prosecution's Submission of the Document Containing the Charges and List of Evidence, 7, p. 5, para. 5

[31] Oosterveld, V. (2009), pp. 407-430; SCSL, The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu, Case No. SCSL-04-16-T. Trial Chamber II, Jugdement, Separate Concurring Opinion of the Hon. Justice Julia Sebutinde Appended to Judgment Pursuant to Rule 88 (C), p. 580, para. 16

presentaron como una forma de prueba de los crímenes sexuales en lugar de considerarlo una prueba separada del daño sufrido por las víctimas.[32]

Hubo críticas con respecto a la conclusión de la Sala de Primera Instancia II de que los crímenes de asesinato, ataque contra la población civil, saqueo y destrucción eran parte del propósito común de la milicia Ngiti, pero que los crímenes de violación y esclavitud sexual no estaban incluidos este propósito común.

La SPI II finalmente decidió adoptar este enfoque, a pesar de su afirmación inicial de que los actos de violencia sexual durante la operación para destruir a la población civil de Bogoro no eran actos aislados, sino que habían sido perpetrados con el mismo objetivo y formaban parte objetiva de esa operación. Esta primera comprensión estuvo de acuerdo con el entendimiento de la mayoría de la Sala de Cuestiones Preliminares (SCP) I de que, en el curso normal de los acontecimientos, la implementación del propósito común implicaría en la perpetración de los crímenes de violación y esclavitud sexual. Si la SPI II hubiera mantenido su conclusión inicial con respecto a la naturaleza de los crímenes de violación y esclavitud sexual, estos serían considerados parte del propósito común de la milicia Ngiti y, en consecuencia, Katanga tendría responsabilidad accesoria por estos crímenes.[33]

La Sala de Primera Instancia II adoptó una interpretación restrictiva de la coautoría indirecta (Artículo 25 (3) (a)), exigiendo pruebas de que el acusado indudablemente ideó el crimen, supervisó su preparación en distintos niveles jerárquicos y estuvo a cargo de su desempeño y ejecución. Este enfoque configura un umbral especialmente alto para el enjuiciamiento de casos relacionados con cargos de crímenes sexuales y de género. La violencia sexual, incluso en aquellos casos en los que es generalizada, ocurre con frecuencia porque se tolera y se permite en lugar de ser expresamente ordenada o planificada. [34]

Con respecto a las reparaciones a las víctimas, la Sala invitó específicamente al Fondo Fiduciario de las Víctimas a tener en cuenta como parte de su mandato de asistencia el daño sufrido por los solicitantes (y no solo con respecto a las 297 personas que fueron admitidas por la Corte como víctimas de los crímenes de Katanga) como consecuencia de la violencia de carácter sexual. [35]

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[32] Oosterveld, V. (2009), pp. 407-430; SCSL, The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu, Case No. SCSL-04-16-T. Trial Chamber II, Jugdement, Separate Concurring Opinion of the Hon. Justice Julia Sebutinde Appended to Judgment Pursuant to Rule 88 (C), p. 580, para. 16

[33] ICC. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC 01/04-01/07. Pre-Trial Chamber I, Decision on the confirmation of charges, pp. 202-206, paras. 567-569, 580; The ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, p. 442, para. 1165-1166

[34] ICC website, Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba; The ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 542-541, para. 1412

[35] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Trial Chamber II, Order for Reparations pursuant to Article 75 of the Statute, p. 119

La Sala de Primera Instancia II otorgó reparaciones individuales a las 297 víctimas en forma de una compensación simbólica de $250 por persona (que asciende a USD 74,250), así como cuatro premios colectivos (que combinados ascienden a USD 925,750) en forma de asistencia educativa, asistencia para la vivienda, actividades generadoras de ingresos y rehabilitación psicológica. [36]

La CPI buscó promover y encontrar medios para materializar su mandato de justicia restaurativa, proporcionando una compensación monetaria (que, aunque simbólica, es concreta, tangible) a cada víctima individualmente, así como programas de financiamiento que revertirán en beneficio de las víctimas, promoviendo su curación, rehabilitación y reintegración.

El borrador del plan de reparaciones de Fondo Fiduciario esto declaró que era "consciente de las posibles dinámicas de género y poder que pueden afectar a las víctimas" y que se abordarían cuestiones específicas de género.[37]
Como consecuencia, es posible concluir que:

- Debería haber una acción concertada entre la Fiscalía y la Dependencia de Víctimas y Testigos con respecto a la protección otorgada a los testigos que fueron víctimas de crímenes sexuales y de género, no solo para protegerlos adecuadamente sino también para evitar demoras indebidas en los procedimientos;

- La acusación de crímenes sexuales y de género debería haber sido más amplia;[38]

- El crimen de matrimonio forzado debería haber sido reconocido y denunciados en los cargos de una de las siguientes maneras:

    - bajo el encabezado "cualquier otra forma de violencia sexual" (artículos 7 (1) (g) y 8 (e) (vi) del Estatuto de Roma);

    - bajo el encabezado "otros actos inhumanos" (Artículo 7 (1) (k));

    - bajo el encabezado "persecución por motivos de género" (Artículo 7 (1) (h));

    - combinando el cargo de esclavitud sexual con el cargo de esclavitud (Artículo 7 (1) (c)).

- El crimen de embarazo forzado (artículos 7 (1) (g) y 8 (e) (vi) del Estatuto de Roma) debería haber sido expresamente reconocido y denunciado en los cargos (en vista de la circunstancia de que el testigo P-132 dio a luz a un niño como

[36] ICC website, Press Release, Trust Fund for Victims decides to provide $1 million for the reparations awarded to victims in the Katanga case, welcomes earmarked donations of €200,000 from the Netherlands
[37] ICC. The Prosecutor v. Germain Katanga, Case No. ICC 01/04-01/07. Trial Chamber II, Draft implementation plan relevant to Trial Chamber II's order for reparations of 24 March 2017, p. 35, paras. 114-115
[38] Oosterveld, V. (2009), pp. 407-430

resultado de las frecuentes violaciones que sufrió) de modo a reconocer la gravedad de los elementos no sexuales que están relacionados con el género y que deben considerarse igualmente en el análisis de la violencia que sufren las víctimas;[39]

- La Sala de Primera Instancia II debería haber adoptado un concepto más flexible de los límites de la coautoría indirecta (Artículo 25 (3) (a) del Estatuto) para permitir que los crímenes sexuales (que a menudo se cometen porque son tolerados y permitidos en lugar de ser expresamente ordenado o planeado) sean incluidos en este tipo de responsabilidad;

- TC II debería haber seguido aplicando su enfoque inicial más amplio y considerar que (del mismo modo los crímenes de asesinato, ataque contra civiles, saqueo y destrucción) los crímenes de violación y esclavitud sexual estaban dentro del propósito común de la milicia Ngiti y, por lo tanto, que Katanga podría ser considerado responsable de ellos;

- A pesar de los puntos anteriores, el hecho de que Katanga fue acusado de violación y esclavitud sexual significó un avance en el enjuiciamiento de crímenes sexuales y de género ante la Corte Penal Internacional;

- La Sala de Primera Instancia II manejó adecuadamente la recopilación y el análisis de pruebas de violencia sexual y de género al reconocer que sus sensibilidades y particularidades intrínsecas deben tenerse en cuenta, evitando así la revictimización;

- La Sala tenía razón cuando estableció que el curso de acción del Fondo Fiduciario para las Víctimas, en su función de asistencia, debe ser amplio para intentar disminuir el sufrimiento causado por actos violentos de naturaleza sexual y abarcar la mayor cantidad posible de personas, incluidos los no admitidos como víctimas por la Corte por el fin de las reparaciones;

- La CPI demostró su compromiso de efectivamente proporcionar justicia restaurativa al otorgar premios monetarios individuales a las víctimas.

- Caso el Fiscal v. Bemba

En el caso Fiscal v. Bemba, inicialmente Jean-Pierre Bemba fue acusado de ser penalmente responsable, conjuntamente con otra persona o por conducta de otras personas, de conformidad con el Artículo 25 (3) (a) del Estatuto de Roma, por los crímenes de violación (como crimen contra la humanidad y crimen de guerra), tortura (como crimen contra la humanidad y crimen de guerra), atentados contra la dignidad personal, en particular trato humillante y degradante (como crimen de guerra), asesinato (como crimen contra humanidad y un crimen de guerra) y saqueo de una ciudad o lugar (como un crimen de guerra).[40]

[39] *Ibidem*

[40] ICC.The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Prosecution´s Amended Document Containing the Charges, para. 57, ICC-01/05-01/04-264-Conf-AnxA (17 October 2008); ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, p. 16, para. 41

No obstante, la Sala de Cuestiones Preliminares III consideró que había varios puntos en el caso que indicaban que la caracterización legal de los hechos del caso podría corresponder a una forma diferente de responsabilidad bajo el Artículo 28 del Estatuto de Roma, y solicitó al Fiscal que considerase enmendar los cargos, en el contexto y dentro de los términos del Artículo 61 (7) (c) (ii) del Estatuto de Roma. [41]

A pesar de eso, el Fiscal acusó a Bemba de ser penalmente responsable de los crímenes mencionados como co-perpetrador/ perpetrador indirecto, en los términos del Artículo 25 (3) (a) del Estatuto de Roma, o, como alternativa, como un jefe militar o individuo que efectivamente actúa como jefe militar o superior en los términos del Artículo 28 (a) o (b) del Estatuto de Roma.[42]

La Sala de Cuestiones Preliminares II declaró que la responsabilidad penal de Bemba en virtud del Artículo 28 del Estatuto solo se examinaría en caso de que no hubiera suficientes pruebas estableciendo motivos sustanciales para creer que Bemba era penalmente responsable como autor indirecto (dentro de los términos del artículo 25 (3) (a) del Estatuto de Roma) por los crímenes enumerados en el Documento Modificado que Contiene los Cargos.[43]

En la misma Decisión, la Sala entendió que no había fundamento para procesar a Bemba por los crímenes de asesinato, violación y saqueo como perpetrador indirecto en el sentido del Artículo 25 (3) del Estatuto de Roma (se negó a confirmar los cargos de tortura y atentados contra la dignidad personal). Por lo tanto, rechazó el argumento principal del Fiscal con respecto al tipo de responsabilidad penal de Bemba. En vista de ello, se procedió al análisis de la responsabilidad penal del acusado en los términos del artículo 28 del Estatuto.[44]

Con respecto a la participación de las víctimas, hubo una divergencia entre los jueces con respecto a la cantidad de víctimas a las que se les debería permitir presentar pruebas como testigos o presentar sus puntos de vista y preocupaciones en persona, así como los requisitos para tales fines.[45]

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[41] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber III, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, p. 17, paras. 46, 49

[42] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 114, para. 341. ICC-01/05-01/08-424 (15 June 2009).

[43] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, pp. 114, 115, 139, paras. 341, 342, 402

[44] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber II, Decision Pursuant to article 61 (7) (a) and (b) of the Rome Statute on the Charges of Prosecutor against Jean-Pierre Bemba Gombo, p. 25, 37, 74-75, 139, 185, paras. 72, 108, 212, 403

[45] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, p.3

La mayoría de la Sala de Primera Instancia III estableció que la presentación de pruebas por parte de una víctima individual debe ser "útil" para la Sala de Primera Instancia, "hacer una contribución genuina a la determinación de la verdad" o "sacar a la luz información sustancial nueva que sea relevante para cuestiones que la Sala debe considerar en su evaluación de los cargos ".[46]

Además, los Representantes Legales de las Víctimas inicialmente presentaron una solicitud para que 17 víctimas testificaran y / o presentaran sus opiniones y observaciones, pero la SPI III entendió que escuchar a estas 17 víctimas aumentaría considerablemente la duración del juicio y podría causar indebido retraso, lo que está prohibido por el artículo 67 (l) (c) del Estatuto. En consecuencia, instruyó a los Representantes Legales a reducir sus listas a un máximo de 8 víctimas en total. A continuación, los Representantes Legales de las víctimas recolectaron y presentaron declaraciones escritas de 7 víctimas. No obstante, la mayoría de la Sala de Primera Instancia III (la jueza presidente disidente) únicamente permitió que 2 víctimas presentaran pruebas en persona y otras 3 víctimas presentaran sus opiniones y observaciones a través de grabación de vídeo.[47]

La jueza Steiner se opuso a las decisiones tomadas por la mayoría. En primer lugar, ella estaba en contra de que se agregaran los requisitos mencionados anteriormente para permitir a las víctimas presentar pruebas. Afirmó que la demanda de estos elementos adicionales no tenía base legal, y no debería ser parte del umbral para que las víctimas puedan presentar pruebas.[48]

En segundo lugar, la jueza presidente no pudo estar de acuerdo con el enfoque de la mayoría de que permitir 7 víctimas (de un total de 2287 cuya participación

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[46] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, pp. 7-8, paras. 13,16

[47] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Second order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims, pp. 6, 7, paras. 11, 12; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, pp. 3-5, paras. 2,9; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Application by the Legal Representative of Victims for leave to call victims to appear as witnesses and present their views and concerns to the Chamber, para. 2; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, *Rectificatif à la justification relative à "Requête afin d'autorisation de présentation d'éléments de preuves et subsidiairement de présentation de vues et préoccupations par les victims*", para. 8*;* ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, *Complément de la requête afin d'autorisation de présentation d'éléments de preuves et subsidiairement de présentation de vues et préoccupations par les victimes du 6 décembre 2012*; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, *Requête de la Représentante légale de victims concernant des informations supplémentaires à sa requête du 6 décembre 2011 afin d'autoriser des victimes à témoigner et à faire valoir leurs vues et préoccupations devant la Chambre*

[48] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, p. 7, paras. 14-15

en el proceso ya había sido autorizada por la Sala de Primera Instancia III) para presentar pruebas y presentar sus opiniones y observaciones causaría un retraso injustificable en los procedimientos. Especialmente porque los Representantes Legales de las víctimas habían reducido su lista de víctimas de 17 a 7, luego de la solicitud de la SPI III de disminuir el número de víctimas propuestas para ser llamadas a un total de 8 víctimas.[49]

En tercer lugar, la jueza no estuvo de acuerdo con la mayoría en relación con su decisión de escuchar a través de la tecnología de grabación de video a las 3 víctimas que estaban autorizadas a presentar sus opiniones y observaciones. Ella hubiera preferido llamar a las víctimas para que se presentaran en persona.[50]

En su Sentencia, la Sala de Primera Instancia III declaró que estaba convencida más allá de toda duda razonable que los soldados del MLC perpetraron los crímenes de violación (crimen contra la humanidad y crimen de guerra), asesinato (crimen contra la humanidad y crimen de guerra) y el saqueo de una ciudad o lugar (crimen de guerra) en la República Centroafricana desde el 26 de octubre de 2002 hasta el 15 de marzo de 2003.[51]

Es de destacar que, en relación al crimen de violación, la Sala, recordando la disposición de los Elementos de los Crímenes, reafirmó que el concepto de invasión insertado en el Estatuto de Roma tenía la intención de ser lo suficientemente amplio para reflejar una neutralidad de género. Por lo tanto, tal concepto abarca la penetración del mismo sexo y es aplicable a criminales y víctimas, independientemente del género de estos. Como consecuencia, por primera vez en la historia del Derecho Penal Internacional, la violencia sexual perpetrada contra los hombres fue expresamente cargada como violación, en lugar de ser procesada como crímenes de tortura o trato cruel (como en el caso del TPIY el Fiscal v. Zejnil Delalić et al.) o incluso bajo los encabezados del

[49] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, pp. 4, 7-10, paras. 3-6, 15-16, 21-22; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Second order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims, p. 6, para. 10; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, *Complément de la requête afin d'autorisation de présentation d'éléments de preuves et subsidiairement de présentation de vues et préoccupations par les victimes du 6 décembre 2012*; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, *Requête de la Représentante légale de victims concernant des informations supplémentaires à sa requête du 6 décembre 2011 afin d'autoriser des victimes à témoigner et à faire valoir leurs vues et préoccupations devant la Chambre*

[50] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp. 20-21, para. 28; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Decision on the presentation of views and concerns by victims a/0542/08, a/0394/08 and a/0511/07, pp. 5, 6, 8, footnote 14, paras. 7, 13(a)

[51] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, pp. 49-52, 56-62, 313-316, 319-324, paras. 87-94, 113-125, 622-630, 639-648

crimen de trato humillante y degradante y el crimen de otras formas de agresión sexual (como en el caso del TPIY el Fiscal v. Češić).[52]

La Sala de Primera Instancia III (siguiendo los pasos de la Sala de Primera Instancia II en el caso Katanga) parecía estar en sintonía con las especificidades de los crímenes sexuales y de género, demostrando estar atentos a las características especiales de los testigos que fueron víctimas de violación. La Sala reconoció que la naturaleza traumática de las circunstancias que describen estos testigos, su eventual corta edad y el tiempo transcurrido entre los eventos y el testimonio son factores que tienen peso en sus cuentas y pueden conducir a omisiones / brechas o aparentes contradicciones. La SPI III abordó la dimensión y el alcance de las omisiones y contradicciones y si dichos elementos podrían socavar la credibilidad y confiabilidad del testimonio caso por caso. También reconoció la dificultad que los testigos podrían tener para recordar los eventos y la violencia que sufrieron y que pueden afectar sus testimonios.

La Sala determinó que estaban presentes los requisitos constitutivos de responsabilidad de los jefes militares establecidos en el Artículo 28 (a) del Estatuto y, por lo tanto, consideró que Bemba podría ser penalmente responsable en virtud de este artículo por los crímenes contra la humanidad de asesinato y violación y los crímenes de guerra de asesinato, violación y saqueo perpetrados por sus fuerzas a lo largo de la Operación en la República Centroafricana en 2002-2003.[53]

Esta fue la primera condena de la CPI por un crimen sexual y de género. Además, el caso Bemba fue su primera condena basada en la responsabilidad de los jefes militares.[54]

En la sentencia, la Sala también determinó que 2 circunstancias agravantes eran aplicables a los crímenes de violación, a saber, que se cometió contra víctimas especialmente indefensas y que se perpetró con una crueldad significativa. La SPI III entendió que la conducta culpable de Bemba fue especialmente grave, y que no hubo circunstancias atenuantes en el caso. En consecuencia, Bemba fue sentenciado a 18 años de prisión.[55]

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[52] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 53, paras. 99-101; Elements of Crimes of the International Criminal Court, Arts. 7(1)(g)-1, para. 1, footnote 15; 8(2)(b)(xxii)-1, footnote 50; 8(2)(e)(vi)-1, para. 1; ICTY, The Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T. Trial Chamber, Judgment, pp. 72-72, paras. 183-185 (10 December 1998); ICTY. The Prosecutor v. Zejnil Delalić, et al., Case No. IT-96-21-T. Trial Chamber, Judgment, p. 3, footnote 7, p. 364, para. 1066 (16 November 1998); TY. The Prosecutor v. Ranko Češić. Third Amended Indictment, Counts 7-8, Sexual Assault; Hayes, N. (2016)

[53] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Judgment pursuant to Article 74 of the Statute, p. 359, para. 742

[54] The Guardian (2018). Jean-Pierre Bemba 's war crimes conviction overturned. In the Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Pre-Trial Chamber, Annex E to the Mr. Bemba's claim for compensation and damages (19 March 2019)

[55] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. Trial Chamber III, Decision on Sentence pursuant to Article 76 of the Statute, pp. 43, 44, 45, para. 91, 93, 94 (21 June 2016)

Sin embargo, el veredicto y la sentencia de la Sala de Primera Instancia III fueron objeto de apelaciones y, por mayoría, la Sala de Apelaciones decidió revocar la Sentencia de la Sala de Primera Instancia III. [56]

En cuanto a los méritos, la mayoría de la Sala de Apelaciones declaró que algunos de los crímenes no estaban dentro de los hechos y circunstancias descritos en los cargos y que la Sala de Primera Instancia III, por lo tanto, no podía emitir un veredicto sobre ellos. Consideró que solo los actos criminales individuales que aparecieron en el Documento Modificado que Contiene los Cargos y que fueron confirmados en la Decisión de Confirmación estaban dentro del alcance de este caso. Dictó que la Fiscalía debería haber procedido a una nueva enmienda de los cargos para incluir los actos criminales agregados después de la Decisión de Confirmación del caso. En consecuencia, Bemba no pudo ser declarado culpable de estos actos criminales posteriormente añadidos.[57]

Además, la mayoría adoptó una serie de modificaciones al estándar de revisión de apelaciones por errores de hecho. Decidió desviarse del estándar de revisión "regular" en relación con los errores de hecho (que consiste en establecer si una sala de primera instancia razonable podría haberse satisfecho más allá de toda duda razonable en relación con el hallazgo en juego) y entendió en su lugar que cuando la Sala de Apelaciones pueda identificar hallazgos que razonablemente pueden ponerse en duda, debe revertirlos para evitar un error judicial.[58]

Aunque la aplicación de esta norma implica un menor grado de deferencia a la Sala de Primera Instancia, la mayoría de la Sala de Apelaciones declaró que "[cuando] se alegue un error de hecho, la Sala de Apelaciones no evaluará las pruebas de novo".[59]

La mayoría de la Sala de Apelaciones determinó que la Sala de Primera Instancia incurrió en errores que afectaron materialmente su conclusión sobre la falla de Bemba de tomar todas las medidas necesarias y razonables en respuesta a los crímenes del MLC en la República Centroafricana. En ausencia de uno de los elementos de responsabilidad de jefe militar según el Artículo 28 (a) del Estatuto, Bemba no podría ser considerado penalmente responsable de conformidad con

[56] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p.4, para. 1; ICC. Media Advisory, Bemba case: Appeals Chamber to issue appeals judgments on verdict and sentence on 8 June 2018 (18 May 2018)

[57] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", pp. 4, 39, 41-42, paras. 2, 111-112, 115, 116

[58] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p.15, paras. 44-46; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, p. 4, para. 4

[59] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p. 14, para. 42; SáCouto, S. (2018)

dicho artículo por los crímenes perpetrados por las tropas del MLC en el transcurso de la Operación en la República Centroafricana en 2002-2003.[60]

En estas circunstancias, mayoría de la Sala de Apelaciones declaró que los actos delictivos que no fueron confirmados en la Decisión de Confirmación estaban fuera del alcance del caso y los procedimientos relacionados con los mismos fueron descontinuados.[61]

En lo que respecta a los actos criminales restantes de los cuales Bemba fue declarado culpable, la mayoría de los miembros de la Sala revocó la condena de Bemba y lo absolvió. La mayoría consideró que los errores identificados en los hallazgos de la Sala de Primera Instancia III, relacionados con las medidas necesarias y razonables para prevenir, reprimir o sancionar la perpetración de crímenes por parte de sus subordinados, descartaron la responsabilidad penal de Bemba por tales crímenes.[62]

Sin embargo, en su opinión disidente, el juez Sanji Mmasenono Monageng y el juez Piotr Hofmański declararon que habrían confirmado la condena de Bemba por la Sala de Primera Instancia III.[63]

Estos dos jueces no estuvieron de acuerdo con las conclusiones de la mayoría relacionadas con el alcance de los cargos y con su análisis si Bemba había fallado en tomar todas las medidas necesarias y razonables para prevenir, reprimir o castigar la perpetración de crímenes por parte de sus subordinados.[64]

De acuerdo con los jueces disidentes, la descripción de los hechos y circunstancias insertadas en los cargos fue apropiada desde el punto de vista del artículo 74 (2) del Estatuto de Roma en las circunstancias del caso. Por lo tanto, la mayoría no debería haber considerado que los actos criminales incluidos en el caso posteriormente a la Decisión de Confirmación estaban fuera del alcance del caso.

Además, la mayoría no alegó ninguna razón para cambiar el estándar de revisión de apelaciones de errores de hecho, y, por lo tanto, debería haber aplicado el estándar habitual (utilizado por el TPIY y el TPIR y la propia CPI en todas sus apelaciones finales ante la Corte), lo que llevaría a la confirmación de que Bemba "[n]o hubiere adoptado todas las medidas necesarias y razonables a su alcance para prevenir o reprimir" la comisión de los crímenes asesinato, violación y

[60] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p. 79, para. 194
[61] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p. 79, para. 197
[62] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p. 79, para.198
[63] ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, p. 3, para. 1
[64] *Ibidem*

saqueo “o para poner el asunto en conocimiento de las autoridades competentes a los efectos de su investigación y enjuiciamiento.”[65]

La opción de la mayoría de la Sala de Apelaciones de usar y aplicar un estándar modificado para la revisión de apelaciones de errores de hecho conlleva una contradicción. A pesar de que la mayoría tiene derecho a revisar el registro en sí (en lugar de confiar en la evaluación de la Sala de Primera Instancia, como en el estándar típico de revisión), no evaluó nuevamente todas las pruebas en el registro. Por lo tanto, la mayoría se basó en evidencia restringida cuando ignoró la evaluación de la Sala de Primera Instancia III de la responsabilidad de jefe militar de Bemba y lo absolvió de todos los cargos. Este enfoque es insatisfactorio, en particular para los crímenes de violencia sexual (que a menudo exigen un análisis exhaustivo del contexto para recopilar cómo se lleva a cabo esta violencia en el contexto de conflicto o violencia masiva).[66]

La demanda de la mayoría de la Sala de Apelaciones de que la Sala de Cuestiones Preliminares confirme todos los actos individuales (incluso cuando el acusado recibe notificación de cualquier acto adicional subyacente a los cargos durante el período de tiempo entre la confirmación y el comienzo del juicio) consiste en umbral más alto de exigencia para la persecución de los crímenes. De acuerdo con el estándar regular aplicado por la CPI, la SCP debe confirmar los cargos cuando encuentra "motivos sustanciales para creer" que el acusado cometió los presuntos crímenes. Este nivel de exigencia es intencionalmente bajo y tiene como objetivo evitar que cargos ilícitos y sin fundamento pasen a la etapa de juicio. La demanda adicional podría prolongar el ya largo proceso de confirmación (que es contrario al derecho del acusado a ser juzgado sin demora por la Corte) y probablemente afectaría negativamente los casos que involucran crímenes de violencia sexual porque la evidencia de estos crímenes con frecuencia se presenta tardíamente en la investigación (a veces incluso en el curso del juicio). Además, el nivel de detalle que se le puede exigir al Fiscal que incluya en los cargos podría endurecer la acusación en futuros casos que involucren amplias campañas de victimización, particularmente cuando la persona acusada es un comandante lejos de la escena de los supuestos crímenes, pero quién puede ser considerado penalmente responsable de ser el superior con control efectivo sobre los perpetradores directos, sus subordinados.[67]

Al evaluar "todas las medidas razonables y necesarias" adoptadas por Bemba como la persona que tiene la responsabilidad de jefe militar en los términos del Artículo 28 (a) (ii) del Estatuto de Roma, la mayoría de la Sala de Apelaciones no consideró si tales medidas estaban destinadas a crímenes de carácter sexual (teniendo en cuenta que la gran mayoría de los crímenes confirmados por la Sala de Cuestiones Preliminares consistieron en violaciones) ni si fueron suficientes para prevenir o reprimir los crímenes perpetrados por sus subordinados.

[65] SáCouto, S. (2018), Estatuto de Roma, Art. 28 (a) (ii)
[66] *Ibidem*
[67] ICC website, Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba

Ciertamente, la Sala de Apelaciones no verificó la adecuación o calidad de las medidas de Bemba.[68]

El hecho de que los procedimientos del caso se interrumpieran en relación con los crímenes que la mayoría entendío que no estaban dentro del alcance del caso y que Bemba fuera absuelto de los crímenes restantes significó que los procedimientos de reparación se suspendieron. Sin embargo, el Fondo Fiduciario, en su mandato de asistencia, lanzó un programa de mandato de asistencia en la República Centroafricana, que tiene en cuenta tanto el daño sufrido por las víctimas en el caso como el daño originado por la violencia sexual y de género adicional que surgió de la situación.[69]

Como consecuencia, es posible concluir que:

- La Fiscalía debería haber incluido el tipo correcto de responsabilidad en el cargo (responsabilidad de jefe militar en los términos del Artículo 28 (a) del Estatuto de Roma) desde el principio. El caso no habría pasado a la etapa de juicio si la Sala de Cuestiones Preliminares III no hubiera aplazado la audiencia y pedido al Fiscal que considerara enmendar los cargos para establecer que Bemba era penalmente responsable por su relación superior-subordinada con las tropas del MLC;[70]

- Hay margen de mejora en relación con distintos aspectos de la participación de las víctimas en los procedimientos de la Corte. La razón asistió a la jueza Steiner cuando ella no estaba de acuerdo con la mayoría en relación con los requisitos de participación de las víctimas y declaró que no deberían imponerse requisitos adicionales para su participación; cuando afirmó que permitir que 7 víctimas (de entre la más de 2000 víctimas que participaban en el proceso) presentaran pruebas y presentaran sus opiniones y observaciones no causaría una demora injustificable en los procedimientos; cuando afirmó que las 3 víctimas autorizadas para presentar sus opiniones y observaciones deberían haber aparecido en persona en lugar de ser escuchadas por tecnología de grabación de video;

- La Sala de Primera Instancia III interpretó adecuadamente las disposiciones del Estatuto de Roma y de los Elementos de los Crímenes cuando decidió que el crimen de violación era de “gender-neutral” y había sido ampliamente construido para abarcar la penetración vaginal, anal y oral, permitiendo así la penetración. del ano y la boca de los hombres por los penes de los criminales, de manera que tales actos puedan ser juzgados bajo la cabeza del crimen de violación;

- Al solidificar su curso de acción en relación con las especificidades de los crímenes sexuales y de género (reconociendo el impacto que la naturaleza traumática de las circunstancias y que la eventual edad de los testigos y el tiempo transcurrido entre los eventos y el testimonio son factores que tienen peso en sus testimonios), la CPI parece estar en la dirección correcta al manejar los testimonios de testigos víctimas de crímenes sexuales y de género. A pesar de

[68] *Ibidem*
[69] *Ibidem*
[70] Heller, K. J. (22 March 2016)

eso, la CPI debe seguir consciente de la posibilidad de una victimización secundaria debido tanto a la oportunidad que Defensa tiene de cuestionar a estas víctimas sobre su disposición a participar en los actos como sobre el dolor subyacente que puede surgir cuando recuerdan la violencia sufrida;

- La mayoría de la Sala de Apelaciones debería haber confirmado la Sentencia de la Sala de Primera Instancia III contra Bemba. Todos los actos criminales deberían haberse considerado como parte del alcance de los cargos contra el acusado porque no hay razón fundada para exigir que cada acto sea confirmado específicamente por la Sala de Cuestiones Preliminares, como lo respaldan los jueces disidentes. Como resultado, el proceso no debería haberse interrumpido en relación con los crímenes introducidos en el caso después de la confirmación de los cargos por parte de la SCP;

- La mayoría debería haber aplicado el habitual “estándar de revisión para errores de hecho” de la CPI, lo que confirmaría que Bemba no tomó todas las medidas necesarias y razonables para prevenir, reprimir o castigar la perpetración de crímenes por parte de sus subordinados. En consecuencia, la responsabilidad de jefe militar de Bemba estaría configurada y él no habría sido absuelto de los crímenes expresamente denunciados en los cargos;

- La mayoría de la Sala de Apelaciones, al analizar si Bemba había adoptado "todas las medidas necesarias y razonables" en los términos del Artículo 28 (a) (ii) del Estatuto de Roma, debería haber prestado atención si las medidas eran apropiadas teniendo en cuenta la naturaleza de los crímenes y si fueron suficientes para detenerlos o evitarlos;[71]

- A pesar de la interrupción de los procedimientos y la absolución de Bemba, el Fondo Fiduciario para las Víctimas lanzó correctamente un programa de mandato de asistencia en República Centroafricana, para abordar no solo el daño sufrido por las víctimas sino también el daño causado por la violencia sexual y de género adicional derivada de la situación. [72]

La condena de Bemba fue un logro importante en el combate de los crímenes sexuales y de género y se esperaba que esta condena fuera un elemento de catálisis para un cambio en la cultura de los crímenes sexuales y de género en el panorama internacional (incluyendo la persecución por violación y violencia sexual perpetrada contra hombres) tanto en términos de prevención de crímenes futuros como de facilitar su enjuiciamiento penal. Además, las víctimas sintieron que su búsqueda de justicia estaba satisfecha y que las reparaciones surgirían de la condena para aliviar su sufrimiento. En consecuencia, la absolución incorrecta de Bemba por parte de la mayoría de la Sala de Apelaciones empañó de manera nociva la reputación de la CPI.

[71] SáCouto, S. (2018)
[72] ICC website, Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba

Recomendaciones a la Corte Penal Internacional sobre crímenes sexuales y de género y su enjuiciamiento

En una era en la que la tolerancia a los crímenes sexuales y de género es cada vez menor, como lo demuestra, por ejemplo, el movimiento #MeToo (que ha tenido un alcance mundial debido a la difusión en las redes sociales y la cobertura de la prensa, lo que está bien -conocida la existencia generalizada de asalto sexual y acoso contra las mujeres), la Corte Penal Internacional está en el centro de las atenciones.[73]

Los próximos pasos de la Corte con respecto a la investigación, el enjuiciamiento y el juicio de crímenes sexuales y de género son cruciales si quiere afirmarse como un faro contra la impunidad de este tipo de crímenes.

Cabe destacar que, el 8 de julio de 2019, la Sala de Primera Instancia VI dictó sentencia en el caso el Fiscal v. Bosco Ntaganda (ICC-01 / 04-02 / 06). La Sala encontró al acusado culpable por 18 cargos, incluido ser autor indirecto de los crímenes de violación y esclavitud sexual, como crímenes de guerra y crímenes contra la humanidad. Asi como los antecedentes de los casos de Lubanga y Katanga, los crímenes por los cuales Ntaganda fue condenado fueron perpetrados en el conflicto armado de carácter no internacional que ocurrió en la región de Ituri entre 2002 y 2003.[74]

La condena es otra victoria importante en la lucha contra la impunidad de los crímenes sexuales y de género. Ntaganda fue condenado como autor indirecto por los crímenes de violación y esclavitud sexual cometidos por soldados de la UPC / FPLC, y que abarcaban la violación de hombres y jóvenes, violaciones sucesivas, así como el uso de violencia extrema y amenazas de muerte. Sin embargo, en la fecha del 9 de julio de 2019, la decisión sobre la sentencia está pendiente, y las partes pueden apelar el veredicto, lo que significa que la condena del acusado no es definitiva y aún puede ser revocada por la Sala de Apelaciones.[75]

Para que la CPI pueda establecer firmemente su posición decisiva en el enjuiciamiento y la lucha contra los crímenes sexuales y de género en el escenario del derecho internacional, recomendamos lo siguiente:

- El artículo 6 del Estatuto de Roma debería modificarse e incluir género, violación o cualquier otra forma de violencia sexual entre las bases del crimen de genocidio;

[73] Wikipedia https://en.wikipedia.org/wiki/Me_Too_movement (5 July 2019)
[74] ICC. The Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06. Trial Chamber IV, Judgment, pp. 2-3, paras. 2-3 (8 July 2019); ICC website, Press Release, ICC Trial Chamber VI declares Bosco Ntaganda guilty of war crimes and crimes against humanity (8 July 2019).
[75] ICC. The Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06. Trial Chamber IV, Judgment, pp. 2-3, paras. 2-3 (8 July 2019); ICC website, Press Release, ICC Trial Chamber VI declares Bosco Ntaganda guilty of war crimes and crimes against humanity, (8 July 2019).

- La Fiscalía y la Dependencia de Víctimas y Testigos deberían tener una acción concertada con respecto a la protección que debería otorgarse a los testigos que fueron víctimas de crímenes sexuales y de género;

- La acusación de crímenes sexuales y de género debe ser lo más amplia posible, abarcando todas las formas de violencia sexual y de género sufrida por las víctimas en el caso concreto;

- Los elementos no sexuales relacionados con el género deben considerarse igualmente en la acusación de estos crímenes;

- La Fiscalía debe verificar el modo correcto de responsabilidad antes de presentar el cargo ante la CPI y, en caso de duda, incluir otro tipo de responsabilidad como alternativa para garantizar que el caso pase a la fase de juicio;

- La Corte debe volver a su norma habitual con respecto a la Sala de Cuestiones Preliminares (esta última debe confirmar los cargos al encontrar "motivos sustanciales para creer" que el acusado cometió los presuntos crímenes, siguiendo lo preconizado en el Estatuto de Roma) y no exigir que se confirme específicamente cada acto criminal;

- La CPI debe manejar adecuadamente la participación de las víctimas en los procedimientos y:

1) no añadir demandas innecesarias e ilegales para su participación;

2) evaluar adecuadamente cuál es un número razonable de víctimas para dar evidencia y presentar sus opiniones y observaciones;

3) favorecer su aparición en persona siempre que sea posible.

Al adoptar dicho enfoque, la CPI promoverá una participación satisfactoria de las víctimas y que fomente la curación, según lo previsto por los redactores del Estatuto de Roma.

- Al escuchar y analizar los testimonios de testigos que fueron víctimas de violencia sexual y de género, la Corte debe seguir teniendo en cuenta las particularidades relacionadas con estos crímenes (como la vulnerabilidad de estas víctimas, que puede llevar a decir mentiras en el comienzo hasta que se sientan lo suficientemente seguras para contar su verdadera historia, y el hecho de que pueden ser superados por la emoción y el miedo debido al carácter traumático de los eventos que se recuerdan), así como también la eventual juventud de las víctimas en el momento ocurrencia y el tiempo transcurrido pueden conducir a lagunas y / u omisiones involuntarias;

- La CPI debe seguir consciente de la posibilidad de revictimización de las víctimas de violencia sexual y de género y tomar todas las medidas disponibles para evitarla;

- La Corte debería adoptar una interpretación amplia de los límites de la co-perpetración indirecta (Artículo 25 (3) (a) del Estatuto de Roma), que abarque los crímenes sexuales y de género en este tipo de responsabilidad penal;[76]

- Al verificar si la persona que tiene la responsabilidad de jefe militar tomó "todas las medidas necesarias y razonables" (Artículo 28 (a) (ii) del Estatuto de Roma), la CPI debe analizar si las medidas fueron adecuadas teniendo en cuenta el carácter de los crímenes, y si fueran suficientes para detener o prevenir los crímenes;[77]

- Las Salas de Apelaciones deben atenerse al estándar comúnmente aplicado de revisión de apelaciones de errores de hecho y establecer si "una Sala de Primera Instancia razonable podría haberse satisfecho más allá de toda duda razonable" en relación con las conclusiones de hecho de la Sala de Primera Instancia;[78]

- La Corte debe mantener su política con respecto a la reparación y compensación a las víctimas, en general, y a las víctimas de crímenes sexuales y de género, en particular.

Si la Corte Penal Internacional sigue este curso de acción, estará más cerca de lograr su objetivo central: que los crímenes más graves para la comunidad internacional no queden impunes y que su enjuiciamiento efectivo esté asegurado.[79]

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[76] The ICC. The Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07. Trial Chamber II, Judgment pursuant to article 74 of the Statute, pp. 542-541, para. 1412

[77] SáCouto, S. (2018)

[78] ICC. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06. The Appeals Chamber, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute", p. 13, para. 27; ICC. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08. The Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", p.13, para. 38

[79] Estatuto de Roma, Preambulo

Convención (IV) sobre las leyes y costumbres de la Guerra Terrestre y su anexo: Reglamento sobre las leyes y costumbres de la guerra terrestre (La Haya, 18 de octubre de 1907): la Cláusula Martens y el principio de humanidad

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2.1.12. Tribunal Militar de Batavia, 1948

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2.1.14. Los cuatro Convenios de Ginebra del 12 de agosto de 1949; Protocolo Adicional a los Convenios de Ginebra del 12 de agosto de 1949, y relativo a la Protección de las Víctimas de los Conflictos Armados Internacionales (Protocolo I) (8 de junio de 1977); Protocolo Adicional a los Convenios de Ginebra del 12 de agosto de 1949, y relativo a la Protección de las Víctimas de Conflictos Armados No Internacionales (Protocolo II) (8 de junio de 1977)

2.1.15. Asamblea General de las Naciones Unidas, Declaración sobre la Protección de las Mujeres y los Niños en Situaciones de Emergencia y Conflictos Armados, Resolución 3318 (XXIX) de 14 de diciembre de 1974

2.1.16. Estatuto del Tribunal Penal Internacional para la ex Yugoslavia, 25 de mayo de 1993, y el Tribunal Penal Internacional para la ex Yugoslavia

2.1.16.i. Caso el Fiscal v. Duško Tadić también conocido como "Dule" (IT-94-1), relacionado con crímenes cometidos en "Prijedor"

2.1.16.ii. Caso el Fiscal c. Zejnil Delalić, Zdravko Mucić también conocido como "Pavo", Hazim Delić y Esad Landžo también conocido como "Zenga", (IT-96-21), en relación con los crímenes perpetrados en el "Campamento Čelebići" (IT-96-21)