

Criticism, interpretation and suggestions for the male sexual crimes under the jurisprudence of international criminal justice

Crítica, interpretación y sugerencias para los delitos sexuales masculinos bajo la jurisprudencia de la justicia penal internacional

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ABSTRACT: The present work has attempted to analyze sexual crimes and especially the crime of male rape. The international jurisprudence of international criminal Tribunals and the International Criminal Court has tried to qualify rape either as a crime of genocide in the form of serious bodily and physical injuries, even if not necessarily permanent (lett. b) art. 6 of the Rome Statute; or as a crime against humanity where there are elements of context and above all material elements that emerge from the definitions given by the ad hoc Tribunals and the elements of crimes; or even as a war crime in case it is implemented as a part of a political plan or design, or as part of series of similar crimes committed on a large scale. This behavior is rebuilt in a residual way compared to that of sexual violence, according to a gender specific relationship to *speciem*. The indication of the level of gravity of the crime is necessary for the relevance of sexual violence and rape as crimes against humanity that we will see in the next years from the panorama of international criminal law.

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KEYWORDS: Unconstitutionality action; international treaties; general rules; constitutional supremacy; contradiction.

RESUMEN: Actualmente en el medio jurídico mexicano no existe un tratamiento específico relativo al procedimiento que deben seguir las sentencias dictadas en la acción de inconstitucionalidad por la Suprema Corte de Justicia de la Nación declarativas de una contradicción entre un tratado internacional y el texto de la Constitución Política de los Estados Unidos Mexicanos. La ruta crítica del presente texto es la siguiente: analizar los tratados internacionales y la acción de inconstitucionalidad; los medios de impugnación y los escenarios; la problemática de la acción de inconstitucionalidad frente a los tratados internacionales; y finalmente el futuro de la acción de inconstitucionalidad y los tratados internacionales.

PALABRAS CLAVE: acción de inconstitucionalidad; tratados internacionales; normas generales; supremacía constitucional; contradicción.

I. INTRODUCTION

The latest military developments/actions in Syria (April 2018) remind us once again the “huge volume of overwhelming testimonies”, pictures and videos that document the so-called report: “implementation of the Resolution establishing the international, impartial and independent mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under international law committed in the Syrian Arab Republic since March 2011”¹, led by the French court judge K. Marchi-Uhel, who has conducted preliminary investigations into a number of cases and cooperated with court judges that investigate war crimes in different countries². This investigation has stated that: “evidence of sexual crimes is overwhelming, but the cases are so many that no prosecution can be brought for all”³. Despite this finding of “impunity” by international criminal law⁴ for serious sexual crimes⁵ jurisprudence still know proved that: international criminal law has been vital in fostering the understanding of sexual violence against male in armed conflict as a weapon of war that targets not only a woman but a male role in international society⁶.

¹ GA, 71th of 16 August 2017, A/71/755/Add.1.

² ACQUAVIVA, G., “War crimes at the ICTY: Jurisdictional and substantive issues”, in BELLELLI (a cura di), *International criminal justice. Law and practice from the Rome Statute to its review*, Ashgate Publishing, 2010, pp. 299ss.

³ K. AMBOS, *Internationales Strafrecht*, C.H. Beck, 2018.

⁴ F. MELLOH, *Einheitliche Strafzumessung in den Rechtsquellen des ICC-Statuts*, Dunker&Humblot, 2010.

⁵ ABTAHI, H., KOH, S.A., “The emerging enforcement practice of the International Criminal Court”, in *Cornell International Law Journal*, 2012, pp. 1 ss. MOUTHAN, S., “Sexual violence against men and international law criminalising the unmentionable”, in *International Criminal Law Review*, 2013, pp. 667 ss.

⁶ EBOE-OSUJI, C., *International law and sexual violence in armed conflicts*, ed. Brill, 2012, pp. 146 ss. AMBOS, K., *Treatise on international criminal law*, vol. 2, *The crimes and sentencing*, Oxford University Press, 2014. MIBENGE, C.S.,

The developments in international criminal case law, in respect of the recognition that sexual crimes fall within the scope of international war crimes against humanity and genocide crime⁷, have been overshadowed by the often frivolous treatment of these crimes by the international criminal justice⁸.

The remnants that have prevailed over these centuries for these crimes, that they were a by-product of the war⁹, or that in any case they are incidental and secondary to the main crimes, did not allow the provisions of the Statutes to be applied to a sufficient level¹⁰. The lack of previous international jurisprudence has

Sex and international Tribunals: The erasure of gender from the war narrative, University of Pennsylvania Press, 2013.

⁷ A/HRC/37/65 of 1st March 2018: Human Rights Council: Joint study of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and the Special Adviser to the Secretary-General on the Prevention of Genocide. See in argument: BEHRENS, P., HENNAM, R., *Elements of genocide*, ed. Routledge, 2013, pp. 194 ss. DUBLER, R., KALYK, M., *Crimes against humanity in the 21st century*, ed. Brill, 2018. BEIGBEDER, Y., *International Criminal Tribunals*, ed. Palgrave, 2011. SÁNCHEZ REVERTE, R.S., “Referencia al crimen de genocidio aproximación genocidio crime”, in *Revista de Estudios Jurídicos*, 2016. KELLY, M.J., The debate on genocide in Darfur, Sudan, in University of California, Davis Journal of International Law & Policy, 2012, pp. 208ss. LINGAAS, C., “Imagined identities: Defining the racial group in the crime of genocide”, in *Genocide Studies and Prevention: An International Journal*, 2016, pp. 80ss. MAISSON, R., *Justice pénale internationale*, ed. PUF, 2017. BETTWEY, D.S., “The genocide Convention and unprotected groups: Is the scope of protection expanding under customary international law?”, in *Notre Dame Journal of International and Comparative Law*, 2011, pp. 102ss. BLAISE NGAMENI, H., *La diffusion du droit international pénal dans les ordres juridiques africains*, ed. L’Harmattan, 2017. CALVO-GOLLER, K., *La procédure et la jurisprudence de la Cour pénale internationale*, ed. Lextenso, 2012.

⁸ BABINGTON-ASHAYE, A., COMRIE, A., ADENIRAN, A., *International criminal investigations: Law and practice*, Eleven International Publishing, 2018. LIAKOPOULOS, D., *Parità di armi nella giustizia penale internazionale*, vol. 1, ed. Libellula University Press, 2018.

⁹ PARASHAR, D., “What wars and ‘war bodies’ know about international relations”, in *Cambridge Review of International Affairs*, 2013, pp. 621ss.

¹⁰ AMBOS, K., “Sexual offenses in international criminal law, with a special focus on the Rome Statute of the International Criminal Court” (July 3, 2012),

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found the international criminal courts in a position to be forced to make unstable interpretations or even to develop an important case-law which has often been questioned by courts themselves¹¹. The interpretations, of course, have often led to the departure from the mechanistic perception of justice and the adoption of the aim towards full recognition of the victims' human rights¹². Other times, the principle of feasibility in the prosecution has prevailed, to such an extent that it has led to several cases of impunity for perpetrators of crimes of sexual violence¹³. These failures were complemented by the inherent difficulty of dealing with these crimes as a result of the psycho-social impact of sexual violence on victims¹⁴. These difficulties are often insurmountable even at the level of domestic criminal systems, where correlations become even more complicated and inaccessible to resolving them. Even

in BERGSMO, M., BUTENSCHØN SKRE, A., WOOD, E.J. (eds.), *Understanding and proving international sex crimes*, Torkel Opsahl Academic Epublisher, Beijing, 2012, pp. 144ss.

¹¹ RAMJI-NOGALES, J., "Questioning hierarchies of harm: Women, forced migration and international criminal law", in *International Criminal Law Review*, 2011. HALLEY, J., "Rape in Berlin: Reconsidering the criminalisation of rape in the international law of armed conflict", in *Melbourne Journal of International Law*, 2008, pp. 80ss.

¹² PILLAY, N., "Sexual violence: Standing by the victim", in *Case Western Reserve Journal of International Law*, 2009, pp. 462ss. SVARC, D., "The contribution of International Court of Justice to the promotion and protection of human rights", in KOOMEN, J., "Language work at international criminal courts", in *International Feminist Journal of Politics*, 2014. RATKE, M. JO, SIMMONS, B.A., "Assessing the International criminal Court", in SQUATRITO, T., YOUNG, O.R., FOLLESDAL, A., ULSTEIN, G., *The performance of international courts and Tribunals*, Cambridge University Press, 2018.

¹³ BROWN, B.S., *Research handbook on international criminal law*, Edward Elgar Publishing, 2011, pp. 86ss. COLE, A., "International criminal law and sexual violence", in MCGLYNN, C., MUNRO, V., *Rethinking rape law. International and comparative perspectives*, ed. Routledge, 2010, pp. 49ss. NADJ, D., *International criminal law and sexual violence against women: The interpretation of gender in the contemporary international criminal trial*, ed. Routledge, 2018.

¹⁴ BACHAROVA, T., *The standing of victims in the procedural design of the ICC*, ed. Brill, 2017.

in the most recent criminal courts judiciary officers were not prepared to deal with the broadness and specificity of sexual offenses. The lack of proper staff, the lack of understanding of the law, and the general politicization of many affairs, have led to results that are highly controversial and criticized¹⁵.

II. CRITICISM IN THE IMPLEMENTATION OF JOINT CRIMINAL OPERATION AS A MEANS OF INCRIMINATING THE SUPPORTERS OF THE CRIMES OF SEXUAL VIOLENCE

Although the joint criminal enterprise offers satisfactory opportunities to prosecutors in relation to the establishment of categories of crimes of sexual violence, its growing use has been criticized. Indeed, in some cases, the Tribunals have made an even wider understanding of the joint criminal enterprise¹⁶. The Special Court for Sierra Leone (SCSR), for example, has made this expanded interpretation, largely due to the fact that the cases before him concerned many defendants, many geographical areas and many accusations. The RUF case¹⁷ is a prime example of the widening of the concept of a joint criminal enterprise in relation to that originally devised in the *Tadić* case. It replaced “the necessary intention to promote the purpose of the joint criminal enterprise” with negligence¹⁸. In addition, the Tribunal in RUF case ruled that it is not necessary for the actions of the participants in the joint

¹⁵ ACEVEDO, J.P.L., “The legitimacy of international criminal Tribunals”, in *Nordic Journal of Human Rights*, 2017, pp. 164ss.

¹⁶ Prosecutor v. Prlić et al., judgment, Case No. ICTY- IT-04-74-T, 29 May 2013, paras. op. cit.

¹⁷ After the AFCR case: SCSL-04-16-T of 20 June 2007 of SCSL. See EASTERDAY, “Obscuring Joint Criminal Enterprise liability: The conviction of Augustin Gbao by the Special Court of Sierra Leone”, in *Berkeley Journal of International Law*, 2009, pp. 11ss.

¹⁸ NOLLKAEMPER, A., VAN DER WILT, H. (eds.), *System criminality in international law*, Cambridge University Press, 2009.

criminal enterprise to cause the commission of a particular crime. It is sufficient for the accused to participate in the promotion of the common purpose.

The SCSL has further expanded the concept of a joint criminal enterprise in the AFRC case¹⁹, considering that the purpose of the criminal enterprise does not necessarily have to be criminal, since the means of its realization are criminal. In particular, the Court of Appeal stated that although the purpose of obtaining and exercising political power and control in the territory of Sierra Leone may not be criminal under the Statute, the acts in question as a means of achieving that purpose are criminal under the Statute²⁰.

Thus, critics focus on the basis of two arguments. First, they assert that this form of responsibility makes individuals responsible for conduct that is far from the actions of the accused and therefore the principle of individual criminal guilt, by introducing a form of collective responsibility and guilt. It also fails to apply traditional criminal theories of punishment, including punishment, general and specific prevention. The second argument is based on the lack of an adequate basis in customary international law. If court judges convict as easily criminals on the basis of a joint criminal enterprise, this could lead to the decriminalization of international criminal law and its historical background in general, judging in particular a guilty of a crime which he did not necessarily commit²¹.

In support of this argument, it is often highlighted that the joint criminal society emerged for the first time at the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the

¹⁹ S. MEISENBERG, *Das Vermächtnis des Sondergerichtshofs für Sierra Leone*, in *Humanitäres Völkerrecht*, 2013, pp. 166ss.

²⁰ *Prosecutor v. Brima, Kamara and Kanu (AFRC)*, SCSL Appeals Chamber, 22 February 2008, para. 80. S.J. ROSE, "Troubled indictments at the Special Court for Sierra Leone: The pleading of joint criminal enterprise and sex-based crimes", in *Journal of International Criminal Justice*, 2009, pp. 361-363.

²¹ MALEKIAN, F., *Jurisprudence of international criminal justice*, Cambridge Scholars Press, 2014, pp. 156ss.

Tadić case²² of appeal and not in the case law of the Second World War courts and the case law of the domestic courts. However, it is equally true that international criminal law is a constantly evolving field in which efforts are being made to bring together the different main legal systems and to justify the most harsh international crimes, with all the difficulties that this implies²³.

It is indeed true that international crimes occur during chaotic situations: wars, massive violations, extensive collapse of structures and public order. Proof of the individual responsibility of an accused when such conditions prevail is a really difficult matter. For example, David Cohen argues that the crimes committed by Germans and Japanese during World War II, as opposed to common crimes perpetrated by a single perpetrator or group of people, were the result of systematic action by massive and complex organizations²⁴. Thus, the widespread interpretation of the joint criminal enterprise, which has been resorted to by courts for the prosecution and punishment of sexual offenses, is perceived as exemplary of justice in terms of human rights, i.e. by targeting the victim and by using some of the most important interpretative methods of human rights law²⁵. Indeed, in accordance with the principle of effectiveness, human rights courts often interpret the

²² Prosecutor v. Duško Tadić, Case No. ICTY- IT-94-1-A, Appeals Judgment, July 15 1999, para. 195–229.

²³ EASTON, S., PIPER, C., *Sentencing and punishment. The quest for justice*. Fourth edition, USA, Oxford University Press, 2016.

²⁴ COHEN, D., “Beyond Nuremberg: Individual responsibility for war crimes”, in HESSE, C., POST, R. (eds.), *Human rights in political transitions: Gettysburg to Bosnia*, ed. Zone, 1999, pp. 53ss. PLESCH, D., SÁCOUTO, S., LASCO, C., “The relevance of the UN war crimes Commission to the prosecution of sexual and gender-based crimes today”, in *Criminal Law Forum*, 2014, pp. 350ss. GOY, B., “Individual criminal responsibility before the International Criminal Court: A Comparison with the ad hoc Tribunals”, in *International Criminal Law Review*, 2012, pp. 34ss. CAMARGOS, L.A., “A responsabilidade penal internacional dos indivíduos: Estudo do caso Darfur”, in *Revista de Direito Brasileira*, 2013, pp. 199ss.

²⁵ O’BYRNE, K., “Beyond consent: Conceptualising sexual assault in international criminal law”, in *International Criminal Law Review*, 2011, pp. 498ss.

rights guaranteed by the Conventions in a way that responds to changing circumstances or ensures that it is practical and effective. A former president of the European Court of Human Rights has pointed out that: “the object and purpose of human rights conventions can often lead to a wider interpretation of individual rights”²⁶. Ad hoc criminal tribunals have, for example, used the teleological aim of protecting human dignity in order to broaden the definition of rape crime, and, as discussed above, have made a broad interpretation of even the Convention against torture²⁷.

However, when an International Criminal Court (ICC) is set up, it must strictly observe the general principles of criminal law, and in this case the principle of fault. This is dictated by both the need to safeguard the fundamental rights of the accused²⁸ and the need to safeguard the prestige and credibility of international criminal justice and the legalization of international criminal law as an impartial and effective justice system²⁹.

As court judge Hunt has commented on the broader interpretations of international criminal justice judgments, decisions that give little meaning to “the rights of the accused will leave a mark on the reputation of this Tribunal”³⁰. That is why it is proposed to limit the theory of joint criminal enterprise. It should be

²⁶ ORAKHELASHVILI, A., “Restrictive interpretation of human rights treaties in the recent jurisprudence of the European Court of Human Rights”, in *European Journal of International Law*, 2003, pp. 529, 534.

²⁷ AMBOS, K., “El uso transnacional de prueba obtenida por medio de tortura”, in AMBOS, K., MALARINO, E., ELSNER G., (eds.), *Sistema interamericano de protección de los derechos humanos y derecho penal internacional*, Georg-August-University-Göttingen, Institute de Ciencias Criminales, Department de Derecho Penal Etranjero e Internacional, vol. I, 2010, pp. 449ss.

²⁸ VAN ROOSMALE M. *et al.*, (eds), *Fundamental rights and principles*, Liber amicorum Pieter van Dijk, ed. Intersentia 2013, 49-71.

²⁹ SCHABAS, W.A., “Interpreting the Statutes of the ad hoc Tribunals”, in CHAND VOHRAH L., *et al.*, *Man’s Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese*, ed. Brill, 2003, pp. 846, 865.

³⁰ Prosecutor v. Milošević, Case. No. ICTY-IT-02-54-AR73.4, dissenting opinion of judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statements, ICTY Appeals Chamber, 21 Oct. 2003, para. 22.

noted that article 25(3)(d) of the ICTY and International Criminal Tribunal for Rwanda (ICTR) Statute does not cover the third category of the joint criminal enterprise, as it requires knowing the intention of the group, thus excluding any possible deception, without this implying it can not use the conclusions of the corresponding interpretation of the case law of the ad hoc tribunals³¹.

III. INEFFECTIVE INVESTIGATIONS AND OMISSIONS IN THE PROSECUTION OF CRIMES OF SEXUAL VIOLENCE BEFORE THE INTERNATIONAL CRIMINAL TRIBUNALS

Although the recognition of sexual offenses by the post-war international military courts was very limited, women's and men experiences in wartime began to receive increasing attention in 1990s³². In this, helped the contribution of feminists to ensure that rape and other sexual abuse in time of war were effectively prosecuted before ad hoc criminal tribunals³³.

However, notwithstanding the remarkable steps in this direction, especially during the last few years, it has also become apparent that in many cases of crimes of sexual violence, inadequate investigations and prosecutions were carried out, despite the really reliable and sufficient evidence, which still resulted and the complete absence of these offenses by procedures³⁴. It was mainly

³¹ VAN SLIEDREGT, R., *The criminal responsibility of individuals for violations of international humanitarian law*, TMC Asser Press, 2003, pp. 108ss.

³² WARD, C.E.A., *Wartime sexual violence at the international level: A legal perspective*, ed. Brill, 2018.

³³ BUSS, D.E., *The curious visibility of wartime rape: Gender and ethnicity in international criminal law*, in Windsor Y.B. Access Justice, 2007, pp. 4ss.

³⁴ SÁCOUTO, S., "Victim participation at the international criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A feminist Project", in *Michigan Journal of Gender and Law*, 2012, pp. 305ss. IRVIN-ERIKSON, D., "Prosecuting sexual violence at the cambodian war crimes Tribunal: challenges, limitations and implication", in *Human Rights Quarterly*, 2018. PIKIS, G.M., *The Rome statute, the Rules of procedure and evidence, the regulations*

observed the tendency on the part of judges to demand the satisfaction of a high level of evidence in these cases in relation to other cases. One of the most prominent examples is provided by the case files before the ICTR. In many cases, the ICTR has proved inadequate as a result of the lack of basic tools such as the lack of female researchers and researchers with relevant experience, lack of political will by the investigators of crimes of sexual violence, the misconception of a portion of staff of the Tribunal that there is no need to collect evidence of rape as there was a belief that men would never come to talk about them³⁵.

One of the most typical examples of the lack of sufficiently substantiated indictments is the *Akayesu* case. The trial began in January 1997 on the basis of the crimes he was charged with in his arrest: direct responsibility for genocide³⁶, participation in genocide, genocide, humanity's murder and murder, and war crime murder³⁷. Shortly after the trial began, a witness was summoned to testify for the murders of her family members. In her testimony,

of the Court and supplementary instruments, ed. Martinus Nijhoff Publishers, 2010. PRITCHETT, S., "Entrenched hegemony, efficient procedure, or selective justice?: An inquiry into charges for gender-based violence at the International Criminal Court", in *Transnational Law & Contemporary Problems*, 2008, pp. 265. SÁCOUTO, S., CLEARY, K., "The importance of effective investigation of sexual and gender-based crimes at the International Criminal Court", in *American University Journal of Gender, Social Policy and Law*, 2009, pp. 399ss.

³⁵ OOSTERVELD, V., "Gender-sensitive justice and the International Criminal Tribunal for Rwanda: Lessons learned for the International Criminal Court", in *New England Journal of International and Comparative Law*, 2005, pp. 122ss.

³⁶ LAMBOURNE, W., "Justice after genocide: Impunity and the Extraordinary Chambers in the Courts of Cambodia", in *Genocide Studies and Prevention: An International Journal*, 2014, pp. 31ss.

³⁷ POWELL, C., "You have no God: An analysis of the prosecution of genocidal rape in international criminal law", in *Richmond Public Interest Law Review*, 2017. ELLIS, M.S., "Breaking the silence: Rape as an international crime", in *Case Western Reserve Journal of International Law*, 2007, pp. 229ss. HELLER, K.J., "What is an international crime?", in *Harvard International Law Journal*, 2018. DUBLER, R., KALYK, M., *Crimes against humanity in the 21st century*, ed. Brill, 2018.

she reported the rape of her six-year-old daughter³⁸, whom she had never been told by the Prosecutor's Office to testify, as she added, had heard that other girls had been raped at *Akayesu's* office. There was another witness testimony, which was routed to rape of girls committed by the community police and Interhamwe at the community bureau, in the presence of the accused. In view of the above, the Tribunal was forced to postpone the case for May 1997³⁹. In the context of these developments, the Prosecutor has been forced to amend the indictment to include three new categories: rape and other inhumane acts as a crime against humanity and war crimes of personal dignity, and in particular rape, degrading treatment and abuse lewdness⁴⁰.

In the footsteps of *Akayesu*, a number of amended indictments have been brought before the ICTR, so as to include rape and other forms of sexual violence⁴¹. Considering only the number of accusations of crimes of sexual violence, one might have the optimistic view that rape victims eventually gained effective access to justice⁴². Indeed, more than half of the indictments issued by the ICTR in the period 1995-2002 included accusations of sexual violence⁴³. However, a detailed analysis of the trend in the prosecu-

³⁸ VAN SCHAACK, B., "Engendering genocide: Akayesu and the affirmation of genocidal rape", in HURWITZ D.R., *et al.* (eds.), *Human rights advocacy stories*, Foundation Press, 2008, pp. 193ss.

³⁹ DE BROUWER, A.M., "The problem of witness interference before international criminal Tribunals", in *International Criminal Law Review*, 2015, pp. 702ss.

⁴⁰ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, art. 1.41, para. 23.

⁴¹ SÁCOUTO, S., CLEARY, K., "The women's Protocol to the African Charter and sexual violence in the context of armed conflict or other mass atrocity", in *Washington and Lee Journal of Civil Rights and Social Justice*, 2009, pp. 173, 180.

⁴² RUFFER, G., "Testimony of sexual violence in the Democratic Republic of Congo and the injustice of rape: Moral outrage, epistemic injustice, and the failures of bearing witness", in *Oregon Review of International Law*, 2013, pp. 247ss.

⁴³ Coalition for Women's Human Rights in Conflict Situations, *Analysis of Trends in Sexual Violence Prosecutions in the Indictments by the ICTR*, from November 1995 to November 2002.

tion of sexual violence before the ICTR, from November 1995 to November 2002, shows that the number of indictments involving sex crimes was shot between 1996 and 2001⁴⁴, and then declined dramatically towards the end of 2002⁴⁵. The reason is, according to the report, that deposits are the “Gordis Link” to the work of the Prosecutor, both because of the need for sufficient decision-making and because of the difficulty of finding out peas⁴⁶. According to the report, the difficulty of rejecting witnesses is due to the questioning of NGOs and men victims in relation to the Court’s real capacity to proceed with the prosecution of sexual violence⁴⁷.

Even after *Akayesu*, tribunal judges continued to keep a “silent fish” on the issue of investigating sexual violence complaints or “evidence of sexual violence was held in obscurity by the Prosecutor’s office, in the context of a specific strategy defined by

⁴⁴ MAYSTRE, M., RANGEL, N., “Analytical and comparative digest of the ICTY, ICTR and SCSL jurisprudence on international sex crimes”, in BERGSMO, M., BUTENSCHØN SKRE, A., WOOD E.J., (eds.), “Understanding and proving international sex crimes”, *op. cit.*, pp. 512ss.

⁴⁵ BERGSMO, M., BUTENSCHØN SKRE, A., WOOD, E.J., *Understanding and proving international sex crimes*, Beijing 2012, 146ss. GREWAL, K., “The protection of sexual autonomy under international criminal law: The International Criminal Court and the challenge of defining rape”, in *Journal of International Criminal Justice*, 2012, pp. 375ss. HAENEN, I., “Classifying acts as crimes against humanity” in the *Rome Statute of the International Criminal Court*, *German Law Journal*, 2013, pp. 798ss. MOUTHAN, S., “The prosecution of gender-based crimes at the ICC: Challenges and opportunities”, in *International Criminal Law Review*, 2011, pp. 779ss. GERAS, N., *Crimes against humanity. Birth of a concept*, Manchester University Press, 2011. GROVER, L., *Interpreting crimes in the Rome statute of the International Criminal Court*, Oxford University Press, 2016. JIA, B.B., “The differing concepts of war crimes and crimes against humanity in international criminal law”, in GOODWIN-GILL, G. *et al.*, “The reality of international law. Essays” in *Honour of Ian Brownlie*, Oxford University Press, 2012.

⁴⁶ DE RUITER, D., *Sexual offenses in international criminal law*, *International Court Association*, The Hague, 2011.

⁴⁷ WAKE, M.N., SMITH, E. (eds.), *General defences in criminal law. Domestic and comparative perspectives*, ed. Routledge, 2016, pp. 255-272.

the Prosecutor”⁴⁸. In the case of *Serushago*⁴⁹, for example, rape cases were withdrawn from the indictment to be replaced by other accusations which gave “men victims and (...) the impression that crimes of sexual violence are not treated with the same quality of seriousness and importance as other crimes (...)”⁵⁰.

One of the most typical cases is the *Cyangugu* case⁵¹. In this case, two class witnesses filed before the Court for acts of sexual violence that were not included in the indictment and for which they also stated that they had not been summoned to testify. In the face of this development, the coalition for men human rights in conflict situations took the initiative to seek an *amicus curiae* hearing before the Court, so that the Prosecutor could amend the indictment and include charges of sexual violence⁵².

⁴⁸ HAGAY-FREY, A., *Sex and gender crimes in the new international law*, ed. Brill, 2011.

⁴⁹ ICTR 98-39-S of 5 February 1999.

⁵⁰ LAKE, M., “Ending impunity for sexual and gender-based crimes: The International Criminal Court and complementarity in the Democratic Republic of Congo”, in *African Conflict & Peacebuilding Review*, 2014, pp. 6ss. KRINGS, B.L., “The principles of ‘complementarity’ and universal jurisdiction in international criminal law: Antagonism or perfect match?”, in *Goettingen Journal of International Law*, 2012, pp. 752ss. NEWTON, M.A., “The complementarity conundrum: Are we watching evolution or evisceration?”, in *Santa Clara Journal of International Law*, 2010, pp. 137ss. LATTANZI, F., “Concurrent jurisdiction between primacy and complementarity”, in BELLELLI, R. (a cura di), *International criminal justice. Law and practice from the Rome Statute to its review*, Ashgate Publishing, 2010, pp. 198ss. CHIBUEZE, “The International Criminal Court: Bottlenecks to individual criminal liability in the Rome Statute”, in *Annual Survey of International & Comparative Law*, 2006, pp. 191ss. TURONE, “Powers and duties of the Prosecutor”, in CASSESE, A., GAETA, P., JONES, G.R.W.D. (a cura di), *The Rome Statute of the International Criminal Court: a Commentary*, Vol. II, New York, 2002, pp. 1179ss.

⁵¹ Prosecutor v. André Imanishimwe, Emmanuel Bagambiki and Samuel Ntagerura, Case No. ICTR-99-46-T, Judgment and Sentence (case: Cynagugu), 24 February 2004.

⁵² Brief for Coalition for Women’s Human Rights in Conflict Situations as Amicus Curiae Respecting the Need to Include Sexual Violence Charges in the Indictment at para. II A, Prosecutor v. André Imanishimwe, Emmanuel Bagambiki and Samuel Ntagerura, Case No. ICTR-99-46-T.

The Prosecutor, stating his opposition, argued that it was at the discretion of the Public Prosecutor's Office concerning the accusations for which he was prosecuted and that he would in any case intend to introduce these categories but at a later stage⁵³. The Tribunal not only denied the NGO's proposal, but ruled out the introduction of evidence of crimes of sexual violence⁵⁴, stating that allowing such evidence could have the effect of prejudicing the rights of the accuse. Also in *Semanza* case⁵⁵, four men filed before the Tribunal that they had been rushed and although the Tribunal actually found rape to have taken place, the ICTR ruled that the accused is not guilty of rape as a crime against humanity, considering that the indictment was unclear as to the date, place and timing of the crimes.

In *Kajelijeli* case⁵⁶, the Tribunal also released the accused from all accusations of rape and sexual violence because of insufficient evidence to prove the relevant charges. For the rape category as a crime against humanity⁵⁷, the Tribunal found that the prosecution had failed to show beyond doubt that the accused was individually responsible for planning, instigating, ordering, committing, encouraging or instigating planning, preparation or execution of rape⁵⁸.

⁵³ Prosecutor v. André Imanishimwe, Emmanuel Bagambiki and Samuel Ntagerura, Case No. ICTR-99-46-T, Decision on the Application to File an Amicus Curiae Brief According to Rule 74 of the Rules of Procedure and Evidence Filed on Behalf of the NGO Coalition for Women's Human Rights in Conflict Situations, para. 9. SLUITER, G., FRIMAN, H., LINTON, S., VASILIEV, S., ZAPPALÁ, S., *Criminal procedure: Principles and Rules*, Oxford University Press, 2013, pp. 871-872.

⁵⁴ MAROCHKIN, S.Y., NELAEVA, G.A., "Rape and sexual violence as torture and genocide in the decisions of international Tribunals: Trans-judicial networks and the development of international criminal law", in *Human Rights Review*, 2014, pp. 474ss.

⁵⁵ ICTR-97-20 of 20 May 2000.

⁵⁶ ICTR-98-44A of 23 May 2005.

⁵⁷ L. SADAT, Crimes against humanity in the modern age, in *American Journal of International Law*, 2013, pp. 335ss.

⁵⁸ Prosecutor v. Kajelijeli, para. 923.

Regarding the superior's responsibility, the Tribunal found that the Interahamwe members committed the majority of the rape when *Kajelijeli* was not present, while the Tribunal did not show the evidence that the accused had ordered the rape⁵⁹. The ICTY has many more cases of Prosecutor's mistakes. In the *Lukić* case, during the investigation of the accused⁶⁰, many men complained that they had been sexually abused by him⁶¹.

⁵⁹ *Lukić & Lukić*, Case No. ICTY-IT-98-32/1-PT, Decision on Prosecution Motion Seeking Leave To Amend the Second Amended Indictment and on Prosecution Motion To Include U.N. Security Council Resolution 1820 (2008) as Additional Supporting Material to Proposed Third Amended Indictment as Well as on Milan Lukić's Request for Reconsideration on Certification of the Pre-Trial Judges Order of 19 June 2008, paras. 12, 60. See also: UNSC, Resolution 2106 (2013), 24 June 2013, UN Doc. S/Res/2106(2013), UNSC Res 2106, [UNSC Res 2106] on sexual violence in armed conflict. BARROW, UN "Security Council Resolution 1325 and 1820: Constructing gender in armed conflict and international humanitarian law", in *International Review of the Red Cross*, 2010, pp. 224ss. PLESCHÉ, D., SÁCOUTO, S., LASCO, C., "The relevance of the United Nations war crimes Commission to the prosecution of sexual and gender-based crimes today", in *Criminal Law Forum*, 2014, pp. 352ss.

⁶⁰ See also art. 19(3) from ICC: "In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court." Note that article 15(3) refers to "representations" by victims, while article 19 refers to "observations". The Statute does not define either term or distinguish one from the other. See also: Rule 50 (providing the procedure for article 15) and Rule 59 (providing the procedure for article 19) both speak of a victim's right to provide "representations" and both require such representations to be submitted in writing. Compare International Criminal Court, Rules of Procedure and Evidence, ICC-ASP/I/3 (2002), R. 50(3) with ICC Rules, R. 59(3). This may indicate that although these articles use different terminology, they both contemplate only written submissions on behalf of victims at these early stages of the proceedings. Cfr. KILLEAN, R., *Victims, atrocity and international criminal justice. Lessons from Cambodia*, ed. Routledge, 2018.

⁶¹ *Prosecutor v. Lukić & Lukić*, Case No. ICTY- IT-98-32/1-T, Initial Indictment (Jan. 25, 2000).

At the time, the Prosecutor, Carla del Ponte, did not include any charges of sexual abuse in the indictment⁶², basing her decision on the fact that she was compelled, due to a timetable set by the Tribunal, to complete the cases as soon as possible⁶³. He believed that crimes of sexual violence would lead to delaying the trial⁶⁴. The Prosecutor who took office immediately after Del Ponte's term of office, trying to correct this omission, filed a request to amend the indictment to include accusations of sexual abuse⁶⁵.

Although there was evidence of "very serious crimes"⁶⁶, the Tribunal rejected the request on the grounds that the inclusion of new categories would lead to undue delay in the proceedings, while pointing out that there is no question of judicial error in the present circumstances⁶⁷. A similar issue arose in another case before the SCSL this time in the *CDF* case⁶⁸. As discussed above,

⁶² NADJ, D., *International criminal law and sexual. Violence against women. The interpretation of gender in the contemporary international criminal trial*, ed. Routledge, 2018.

⁶³ Lukić & Lukić, Case No. ICTY- IT-98-32/1-PT, Decision on Prosecution Motion Seeking Leave To Amend the Second Amended Indictment and on Prosecution Motion To Include U.N. Security Council Resolution 1820 (2008) as Additional Supporting Material to Proposed Third Amended Indictment as Well as on Milan Lukić's Request for Reconsideration on Certification of the Pre-Trial Judges Order of 19 June 2008, paras. 12, p.60.

⁶⁴ CASSESE, A., JESSBERGER, F., CRYER, R., DÉ, U., *INTERNATIONAL CRIMINAL LAW*, ed. Routledge, 2016.

⁶⁵ STOLK, S., "The victim, the International Criminal Court and the search for truth. On the interdependence and incompatibility of truths about mass atrocity", in *Journal of International Criminal Justice*, 2015, pp. 974ss

⁶⁶ Prosecutor v. Lukić & Lukić, Case No. IT-98-32/1-PT, Prosecution Motion Seeking Leave To Amend the Second Amended Indictment, paras. 16, 37.

⁶⁷ DARCY, S., POWDERLY, J., *Judicial creativity at the international criminal Tribunals*, Oxford University Press, 2010, pp. 130ss.

⁶⁸ Prosecutor v. Sam Hinga Norman, Moinina Fofana and Allieu Kondewa, Case No. SCSL-04-14- T, 4 February 2004. See in particular: S. SÁCOUTO, Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project, in *Michigan Journal of Gender and Law*, 2012, pp. 305-306.

the Statute of the Special Court, like the Rome Statute, includes a bunch of gender-based crimes as crimes against humanity and war crimes⁶⁹, while explicitly requiring “due attention” to be given to the employment of prosecutors and researchers with experience in grievous crimes⁷⁰. However, the Prosecutor’s Office omitted any charges in respect of these crimes in the original indictment against the three CDF leaders⁷¹. Although the supplementary investigation carried out by the Prosecutor, proving evidence of the submission of men to various forms of sexual violence⁷², the Tribunal has argued that the addition of new categories would lead to an unjustified delay in the trial and would undermine the right of accused in a fair and swift trial⁷³. It should be noted that the Tribunal took this decision, after of course admitting that: “(...) it is fully aware of the importance of gender-based crimes in international criminal justice⁷⁴, given the high proportion of victims of

⁶⁹ See the Statute for the Special Tribunal for Sierra Leone, art. 2-3, 16 Jan. 16 2002, 2178 UNTS 145. GBERIE, L., “Africa and international criminal justice lessons from the special Court of Sierra Leone”, in *African Security Review*, 2010. WHARTON, S., “The evolution of international criminal law: Prosecuting ‘new’ crimes before the Special Court for Sierra Leone”, in *International Criminal Law Review*, 2011, pp. 220ss. NKANSAH, L., “International Criminal Court in the trenches of Africa”, in *Africa Journal of International Criminal Justice*, 2014. CLARKE, K.M., KNOTNERU, A.S., DE VOLDER, E., *Africa and the ICC*, Cambridge University Press, 2016

⁷⁰ BELTZ, A., “Prosecuting rape in International Criminal Tribunals: The need to balance victim’s rights with the due process rights of the accused”, in *Journal of Civil Rights and Economic Development*, 2008.

⁷¹ Prosecutor v. Norman, Case No. SCSL-03-14-I, Indictment, para. 22-29.

⁷² Prosecutor v. Norman, Case No. SCSL-04-14-PT, Decision on Prosecution Request for Leave to Amend the Indictment, 10 May 2004, para. 10.

⁷³ Prosecutor v. Norman, Case No. SCSL-04-14-PT, Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 2005, para. 3.

⁷⁴ ROTHE, D., MEEMIK, J., INGADÖTTIR, T., *The realities of international criminal justice*, ed. Brill. 2013.

sexually abused men and other forms of sex abuse, during internal and international armed conflicts (...)”⁷⁵.

The Prosecutor then attempted to admit evidence of sexual violence in relation to the crime against humanity of inhuman acts and war crimes of infringing life, health and physical or mental well-being which had been included in the original indictment⁷⁶. The Tribunal also made a disappointing decision: it rejected the request by point in Africa out that the indictment did not report incidents involving sexual violence in support of the relevant categories and that the subsequent addition of such evidence would violate the rights of the accused⁷⁷.

A special Panel for serious crimes in East Timor was formed, although providing a very small contribution to the prosecution of crimes of sexual violence⁷⁸, mainly because most perpetrators could government also systematically refused to cooperate with the United Nations for this purpose, on the pretext that it intends to bring the perpetrators accountable to the national human rights Court in Jakarta. However, they provide some typical examples of wrong practices and priorities on the part of the prosecution, resulting in ineffective prosecution and punishment of perpetrators of such crimes. During the investigations mainly for assassination

⁷⁵ Prosecutor v. Norman, Case No. SCSL-04-14-PT, Decision on Prosecution Request for Leave to Amend the Indictment, para. 82.

⁷⁶ Prosecutor v. Norman, Case No. SCSL-04-14-PT, Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 2005, para. 3.

⁷⁷ See the dissenting opinion of judge Boutet: Prosecutor v. Norman et al, dissenting opinion of Justice Pierre Boutet on Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, SCSL-04-14-PT, 24 May 2005. see also: STAGGS KELSALL, M.S., STEPANOFF, S., “When we wanted to talk about rape: Silencing sexual violence at the Special Court for Sierra Leone”, in *International Journal of Transitional Justice*, 2007, pp. 355ss.

⁷⁸ LE ROUX, J., MUHIRE, Y., “The status of acts of sexual violence in international criminal law”, in *South African Journal of Criminal Justice*, 2009. OOSTERVELD, V., “Constructive ambiguity and the meaning of “gender” for the International Criminal Court”, in *International Feminist Journal of Politics*, 2014.

cases, and especially thanks to the work of women's advocates for special panels⁷⁹, there was a wealth of evidence of crimes of sexual violence, which included: rape, forced prostitution, forced marriages⁸⁰ and the sexual enslavement.

However, only in the *Cardoso* case rape was prosecuted as part of a broader framework of political violence, terrorism and oppression⁸¹, noting that the accusations against *Cardoso* were attributed to her by a female Prosecutor who led the survey of gender-specific crimes in special panels. Testimonies and other evidence of rape and concentration of men in detention centers where Indonesian police officers were systematically harasses, sexual slavery of men associated with the independence movement⁸², it is remarkable that they did not lead to trials for the punishment of perpetrators.

The indictments that were issued but not fruitful confirm these crimes and indicate that men were targeted because of their beliefs and their action on independence, making this fact not by accident but a weapon directed as political intimidation and oppression⁸³. Apart from the difficulty in identifying the pepe-

⁷⁹ PUSCHKE, J., Grund und Grenzen des Gefährdungsstrafrechts am beispiel der Vorbereitungsdelikte, in HEFENDEHL, R., *Grenzenlose Vorverlagerung des Strafrechts?*, Berliner Wissenschafts-Verlag, 2010, pp. 10ss.

⁸⁰ PALMER, E., "An evolutionary analysis of gender-based war crimes and the continued tolerance of 'forced marriage' ", in *Northwestern Journal of International Human Rights*, 2009, pp. 135ss. RAPP, S.J., "The compact model in international criminal justice: The Special Court for Sierra Leone", in *Drake Law Review*, 2008, pp. 14ss.

⁸¹ Special Panels for Serious Crimes in East Timor (SPSV), Prosecutor v. Jose Cardoso, Case No. 04/2001, Judgment, 5 April 2003.

⁸² COHEN, D., "Prosecuting sexual violence from Tokyo to the ICC", in BERGSMO, M., BUTENSCHØN SKRE, A., WOOD, E.J., "Understanding and proving international sex crimes", *op. cit.*, pp. 44-63.

⁸³ GILBERT, J., "Justice not revenge: The International Criminal Court and the grounds to exclude criminal responsibility-defences or negation of criminality?", in *The International Journal of Human Rights*, 2006. MARTINS AMORIUM DUTRA, B., "Criminal responsibility in the crimes committed by organized structures of power: Jurisprudence analysis in the light of international criminal law", in *Revista de Faculdade de Dioreito da UERJ*, 2012, pp. 5ss.

trators, supported by the East Timor government's reluctance to prosecute, the limited number of indictments that included crimes of sexual violence is also due to a lack of understanding of the concept of gender-based crimes by prosecutors who conducted the investigations⁸⁴.

In one of these cases, the public Prosecutor appeared to accept the defendant's allegation that the 12-year-old male who confessed that he was raped, because, according to the Prosecutor, before leaving, he paid for his "services" the price of \$2. Thus, the Prosecutor appeared, among other things, to ignore the fact that the male was of an age in which genuine consensus on a sexual act is not possible. It therefore seems that the tribunals are reluctant to amend the indictment to include persecution of sexual offenses or to include additional evidence because of the concerns raised about the defendant's right to a fair trial, accompanied by the need for effectiveness⁸⁵. However, in some cases the ICTR has allowed the Prosecutor to amend the complaint in a number of cases, especially when the relevant Prosecutor's proposal is well documented at an earlier stage of the trial⁸⁶. It is characteristic that the total number of indictments issued for gender-based crimes was only 8 out of 95, of which only one case, that of *Cardoso*, was at the stage of the hearing.

⁸⁴ MOULTON, E., "Myth and reality: interpreting the dynamics of crime trends: lies damn lies and (criminal) statistics", in *Police Practice and Research*, 2013.

⁸⁵ See article 19 (1) of ICTR: the trials Chamber shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused with due regard for the protection of victims and witnesses.

⁸⁶ Ndindabazihi Trial Judgment, Nizeyimana and Kategekimana, Decision Hategekimana, ICTR-2000-55C-T of 19 June 2012.

IV. LEGAL AND JUDICIAL VACUUM IN VIOLENCE AGAINST MEN

As has been noted, there is not a human rights text relating to sexual violence against men, while sexual violence against women and men oftentimes referred to UN decisions, contracts and other sources of human rights law. "(...) The international instruments containing the most comprehensive and substantive definitions of sexual violence exclude men from the very first page, incorporating and reflecting the assumption that sexual violence is a phenomenon associated only with men and girls (...)">⁸⁷. Moreover, despite the wealth of information available, male victims are almost totally ignored by the important decisions adopted by the Security Council on sexual violence in armed conflict.

With regard to the statutes of international criminal tribunals, the fact that only the Statute of the SCSL and the ICC contains explicit reference to various forms of sexual violence other than rape, such as sexual slavery, forced prostitution and "any other form of sexual violence", is a serious legal issue⁸⁸. This has often forced international criminal courts to classify sexual violence against men (for example, blows in the genitals), torture, forced labor, other inhumane acts, cruel and inhuman treatment as persecution etc., courts have made remarkable progress in their case-law on these crimes, and although in Rwanda, Former Yugoslavia and Sierra Leone, sexual violence against men was recorded and acknowledged. Moreover, by 2010, there was no case in any criminal Court focusing exclusively on male sexual violence.

In a total of 80 indictments for sexual violence, only 18 of them had corresponding accusations for male victims, and in

⁸⁷ Simić Trial Judgment, paras. 697, 698, 771. See also: SIVAKUMARAN, Lost in translation: UN responses to sexual violence against men and boys in situations of armed conflict, in *International Review of the Red Cross*, 2010, pp. 259, 264ss.

⁸⁸ NIGGLI, M.A., HEIMGARTNER, S., *Internationales Strafrecht*, Helbing Lichtenhahn, 2015.

three cases that could only focus on sexual violence against men, they did not even lead to charges of sexual violence⁸⁹. As noted, however, the ICT Statute already has an extremely expanded list of crimes of sexual violence, including forced sterilization, which crime elements define as “deprivation of biological reproductive capacity”⁹⁰. Indeed, under this broad definition could be the most frequent incidents of sexual violence against men such as genital mutilation, sexual torture, and the ICTY will be able to issue a conviction for the crime against humanity referred to in article 7(1)(g)⁹¹. It should be noted that the ICC has taken some first steps in this direction by coping with a Court document in Kenya case on sexual violence⁹² against men in the form of forced circumcision and the rape of a man in *Bemba* case⁹³. More specifically, in *Bemba* case, the Prosecutor’s Office included in their accusations rape committed against both women and men, and called not only women victims but also two men in positions of

⁸⁹ Prosecutor v. Mejkacic, Case No. IT-95-4, Initial Indictment 13 February 1995, para. 29.1, Prosecutor v. Mucic, Case No. IT-96-21-T, Judgment, 16 November 1998, para. 1275, Prosecutor v. Naletilic & Martinovic, Case No. IT-98-34-T, Judgment, 31 March 2003, para. 450.

⁹⁰ SIVAKUMARAN, S., “Sexual violence against men in armed conflict”, in *European Journal of International Law*, 2007, pp. 274ss.

⁹¹ Prosecutor v. Muthaura & Kenyatta, Case No. 01/09-02/11, Victim’s Observations on the “Prosecution’s application for notice to be given under Regulation 55 (2) with respect to certain crimes charged, 24 July 2014, para. 14, Prosecutor v. Bemba, Case No. 01/05-01/08, Decision Pursuant to article 61 (7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 171.

⁹² HELWIG-BÖTE, M., *Political bickering over the International Criminal Court: The Case of Kenya*, January 2014, Stiftung Wissenschaft Politik. MUELLER, S.D., “Kenya and the International Criminal Court (ICC): Politics, the election and the law”, in *Journal of Eastern African Studies*, 2014, pp. 5ss. MUKUM MBAKU, J., *International justice: The International Criminal Court and Africa*, January 2014, Foresight Africa: Top Priorities for the Continent in 2014, The Brookings Africa Growth Initiative.

⁹³ Prosecutor v. Bemba, Public Redacted Version of the Amended Document containing the charges filed on 30 March 2009, Case No. ICC-01/05-01/08-395- Anx3, 30 March 2009.

authority who were victims of rape in order to testify at the trial. In Kenyatta case, the Prosecutor's Office included in the allegations acts of forced circumcision and mutilation of the penis of men regarded as supporters of the opposing political party⁹⁴.

The case-law progress that may be made in the context of ICTR may also be based on previous case-law of ad hoc criminal tribunals⁹⁵. The ICTR has given such a broad definition of sexual violence, including even acts that do not constitute physical contact⁹⁶. The ICTR has also recognized that rape and sexual violence can be committed against men and women, although no one in Rwanda has been accused of sexual abuse of men. In conclusion, all the above obstacles, resulting from the socio-cultural context of the victims, the lack of understanding, knowledge and recognition of sexual violence against men, the ICC has an excellent opportunity to overcome them, learning from the mistakes of the past. In the recent conflict in Syria, there are extensive reports of incidents of sexual violence against men, particularly in the context of detention. It is an excellent opportunity for the Tribunal, if the Security Council mentions the case before it, since Syria has not signed the Rome Statute, to be accused of these crimes⁹⁷.

⁹⁴ Prosecutor v. Kenyatta, Public Redacted Version of the Corrigendum of the Second Updated Document Containing the Charges, ICC-01/09-02/11-732-AnxA- Corr-Red, 10 May 2013, p. 34.

⁹⁵ BRADY, H., "The power of precedents: using the case law of the ad hoc international criminal Tribunals and hybrid Courts in adjudicating sexual violence and gender-based crimes at the ICC", in *Australian Journal of Human Rights*, 2012.

⁹⁶ ZAWATI, H. M., "Impunity or immunity: Wartime male rape wants sexual torture as a crime against humanity", in *Torture*, 2007, pp. 34ss. NADYA SADAT, L., "Elements and innovations in a new global treaty on crimes against humanity", in LATIER, M., SANDS, P., *The grey zone: Civilian protection between human rights and the laws of war*, Hart Publishing, 2018.

⁹⁷ Women's Initiatives for Gender Justice, Statement of Women's Initiatives for Gender Justice, Appeals Withdrawn by Prosecution and Defence, The Prosecutor vs. Germain Katanga, 26 June 2014. WOLFE, L., "Blind spot: Why do convictions for the world's worst crimes neglect survivors of rape?", in *Foreign Policy*, 12 March 2014.

V. THE NEW POLICY DOCUMENT OF ICC PROSECUTOR'S OFFICE: ADDRESSING THE GAPS IN INTERNATIONAL CRIMINAL JUSTICE

In the wake of the judgment in *Prosecutor v. Katanga*, whose verdict is the most recent example of the Prosecutors Office failure to secure conviction for sexual or gender-based crimes⁹⁸, the ICC Prosecutor's Office has released a policy paper on sexual and gender-related crimes, which confirms the commitment the latter to prosecute these crimes⁹⁹. This document, as will be demonstrated by the following analysis, recognizing the challenges faced by international criminal justice with regard to these crimes, sets out objectives and policies to overcome these deficiencies and to develop the approach of the Court in relation to sex and crimes related to it, in the application of international criminal law.

The policy document, which is the result of a two-year internal and external consultation process¹⁰⁰, is an important public commitment by the Prosecutor that its Office will address holistically the investigation and prosecution of gender-based crimes¹⁰¹. The perspectives for tackling gender and sexual violence will include gender mainstreaming across the Office's range of competences, from the analysis of criminal standards to administrative structures, particularly within the context of "gender-specific dynamics in a specific context". This will result in maximizing dissuasive

⁹⁸ LEÓN ACEVEDO, J.P., "The Katanga reparation order at the International Criminal Court developing the emerging reparation, practice of the Court", in *NORDIC JOURNAL OF HUMAN RIGHTS*, 2018.

⁹⁹ International Criminal Court, The Office of the Prosecutor, Policy on Sexual and Gender- Base Crimes, June 2014.

¹⁰⁰ BENSOUA, F., *The Investigation and prosecution of sexual and gender-based crimes: reflections from the Office of the Prosecutor*, The Hague Academy of International Law Advanced Course on International Criminal Law-Special Focus: Gender Justice, Keynote Speech, 24 August 2015, pp. 4ss.

¹⁰¹ F. BENSOUA, "Reflections from the International Criminal Court Prosecutor", in *Case Western Journal of International Law*, 2012, pp. 506ss.

effect, challenging the gender-based hierarchy, and justifying the experiences lived people who have been victims.

In its preamble, it goes on to define gender-based crimes by defining them as “those committed against persons, whether men or women, because of their gender and/or socially-constructed gender roles. Gender-related crimes are not always manifests as a form of sexual violence. They may include non-sexual attacks on women and girls, men and boys because of their sex (...)”¹⁰². Below, it does not refer to the gender dimension adopted by the policy document. Apart from the importance of the distinction between the social and biological sex proposed by the document, these reports are of particular importance, including men, as an important step in the fight against the impunity of sexual violence, as violence against men has traditionally ignored and is therefore largely unpunished.

The document begins by reaffirming once again that it “pays particular attention” to sexual and gender violence. It adds not that the Prosecutor’s Office believes that all crimes of the ICC’s jurisdiction¹⁰³ are likely to be gendered. In this context, commit these crimes by persecuting them whenever they can be taught sufficient evidence to allow it. Thus, whenever it judges that “there is sufficient evidence to support (...) the charges” for sexual and gender-based crimes, the Prosecutor’s office assures that it will be prosecuted¹⁰⁴. It will prosecute sexual and gender-based crimes “as crimes per se” as well as “other crimes of ICC jurisdiction, for example by persecuting rape as torture, persecution and genocide

¹⁰² WACHALA, K., “The tools to combat the war on women’s bodies: Rape and sexual violence against women in armed conflict”, in *The International Journal of Human Rights*, 2012.

¹⁰³ YANG, L., “International Criminal Court: A judicial guarantee for international peace and security”, in BERGSMO, M., YOUNG, L., *State sovereignty and international criminal law*, Torkel Opshal Academic Epublisher, 2012, pp. 98ss. YASUAKI, O., *International law in a transcivilizational world*, Cambridge University Press, 2017.

¹⁰⁴ DE BROUWER A.M., *et al.* (eds.), *Sexual violence as an international crime: Interdisciplinary approaches*, *op. cit.*, pp. 132ss.

(...) it stresses the importance of article 21(3) of the Statute because it requires the application of the Statute and its interpretation to be in accordance with internationally recognized human rights, without any discrimination on grounds of *inter alia* gender or other circumstances (...)”¹⁰⁵.

An important recognition of the new policy paper is the adoption of a new approach to evidence. As discussed above, accusations of sexual violence before international criminal trials have often failed, not because of problems related, for example, to the evidence of international crimes or to the choice of the appropriate form of liability of the accused.

It is undisputedly true that researchers and prosecutors face particular challenges when dealing with victims and witnesses of sexual violence¹⁰⁶, but these can be addressed through appropriate training and specialization. The ICTR review committee’s conclusion on sexual violence is that low levels of convictions for sexual violence crimes in ICTR are due not to the lack of evidence-as rape victims and witnesses were available-but more to lack of understanding, specialization and training with regard to obtaining the necessary evidence to support its decision¹⁰⁷. Experience from other criminal courts has shown that the fundamental issue is the ability to recognize sexual violence, the determination and approximation of victims with respect and discretion, the way in which interview and the taking evidence are based, the foundation and substantiation of the case and the choice of the most appropriate form of liability, as well as the presentation of the case to court judges, who will fully judge the criminal responsibility.

¹⁰⁵ BOSLY, H.D., VANDERMEERSCH, D., *Génocide, crimes contre l’humanité et crimes de guerre face à la justice*, ed. Bruylant, 2012.

¹⁰⁶ United Kingdom: Foreign and Commonwealth Office, International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, June 2014.

¹⁰⁷ BIANCHI, L., “The prosecution of rape and sexual violence: Lessons from prosecution at the ICTR”, in DE BROUWER A.M., *et al.* (eds.), *Sexual violence as an international crime: Interdisciplinary approaches, op cit.* pp. 122ss.

The new political document seems to have incorporated these fundamental issues. Some of the most important areas of reform, as defined by the policy document, relate to the overall strategy of investigation and prosecution, which has the potential to positively influence the Prosecutor's work, even in non-sexual cases. An example is the abandonment of the focused research strategy for the sake of more in-depth openness "(...) so that more evidence from different sources can be collected (...)". This emphasis on the different and new sources of evidence reflects the challenge of the Prosecutor's Office regarding the extent to which this should be based so much on witness testimonies. In the speech of Prosecutor Fatou Bensouda in the presentation of the policy document, he said that the Prosecutor's Office: "(...) has decided to change the strategy not only by looking at witness statements but also by documenting evidence such as hospital records and using forensic strategies investigations as a new way of collecting the evidence we need (...)")¹⁰⁸.

The policy paper states that: the office is aware that victims of sexual and gender violence may face additional risks of discrimination, social stigma, exclusion from their families and the community, bodily harm, or other retaliation, In order to minimize their exposure and potential recurrence, the Office will strengthen its efforts to collect other forms of evidence, where available, including empirical surveys and reports, and other reliable data provided by States, UN, transnational and non-governmental organizations, and other trusted sources. However, this reference is of particular value for another reason. Recognition by Prosecutor's Office of the likelihood that the victim will experience the trauma again during his testimony¹⁰⁹ signals the Office's greatest turn in

¹⁰⁸ NIAMH, H., "La lutte continue: Investigating and prosecuting sexual violence at the ICC", in STAHN, *The law and practice of the International Criminal Court*, Oxford University Press, 2015, pp. 831ss.

¹⁰⁹ G. VERMEULEN, E. DEWREE, E., *Offender reintegration and rehabilitation as a component of international criminal justice? Execution of sentences at the level of international tribunals and courts: Moving beyond the mere protection of procedural rights and minimal fundamental interests?*, ed. Maklu, 2014.

paying particular attention to the individual “personal circumstances” of the victims¹¹⁰. It adopts a model centered on the victim, sensitized to the needs of the latter¹¹¹. It therefore recognizes that one instrumental focus of the victims jeopardizes the provision of justice to victims of sexual and gender- based crimes and undermines the possible remedial value of persecution¹¹². Evidence of difficulties will also be addressed through increased use of gradual prosecutions, investigations of which will start from the lowest to the highest level, and the cultivation of costly and trustworthy witnesses.

However, the policy document recognizes another factor that has been dealt with by international criminal justice and has even contributed to the forfeiture or inability to justify the charges. These are forms of responsibility. In the policy document, Prosecutor’s Office declares itself ready to reinforce the possibility of issuing convictions against the administrative and military superiors and to accuse the basis both of article 25 of the ICC Statute and of article 28¹¹³. In the case of gender and sex offenses,

¹¹⁰ Y. McDERMOTT, W. SCHABAS, *Ashgate research companion to international criminal law. Critical perspectives*, ed. Routledge, 2016.

¹¹¹ The Office of the Prosecutor of the ICC, Policy Paper on Sexual and Gender Based Crimes: ICC Outlines Policies to Improve Prosecutorial Outcomes, Recent Policy Paper, in *Harvard Law Review*, 2014, pp. 799ss.

¹¹² S. MOUTHAN, “Victim participation at the ICC for victims of gender-based crimes: A conflict of interest?”, in *CARDOZO JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW*, 2013, pp. 619ss.

¹¹³ Superior responsibility is thus distinct from for example “ordering” under article 25 which requires the superior to have actively contributed to the crime in question as we can see in *Prosecutor v. Bemba*, ICC PT Ch. II, Decision Pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean- Pierre Bemba Gombo, ICC-01/05-01/08, 15 June 2009, par. 405). The superior is responsible for: “(...) there will be practical consequences, not only in relation to the stigma attached to a guilty verdict under the doctrine, but also in respect of for example sentencing considerations, evidentiary demands and possibly even the interpretation of the elements of the doctrine. Superior responsibility is a Mode of Participation and the superior in this manner is convicted as a participant in the “principal crime”. Superior responsibility shares common feature with other Modes of Participation in that

they are accessory to the principal crimes committed by other perpetrator/s. The difference is however that in respect of the other Modes of Participation there needs to be a positive act or, at least, a certain level of contribution to the commission of the principal crime (...) superior responsibility is rather characterized by inaction/non-action of the superior. Despite this fact, there have been strong proponents for an interpretation of that superior responsibility should be interpreted as a Mode of Participation (...). Orić Prosecution Appeal Brief, 18 October 2006, par. 162) the criminal responsibility of the superior is limited to his or her own failure to act with regard to, or in relation to, the “principal crime”. In accordance with this interpretation, the superior is convicted: “(...) not for the “principal crime”, but merely for his or her own failure to act or. This interpretation does evaluate the level of responsibility, not only to the gravity of the superior’s own failure, but also to the gravity of the “principal crime”. The Trial Chamber did however stress the connection to the gravity of the principal crime in the following: “(...) the imposition of responsibility upon a commander for breach of his duty is to be weighed against the crimes of his subordinates; a commander is responsible not as though he had committed the crime himself, but his responsibility is considered in proportion to the gravity of the offences committed” (Prosecutor v. Halilović, ICTY T. Ch., 16 November 2005, par. 54) (...) the connection between the responsibility of the superior and the gravity of the “principal crime” is further developed in the Hadžihasanović Appeal Judgment (Prosecutor v. Hadžihasanović (Case No. IT-01-47-A), ICTY A. Ch, Judgment, 22 April 2008, parr. 312-318). According to Fenrick: “(...) the concept “person effectively acting as military commander” may accordingly also include persons who have assumed de facto control over armed forces, armed police units or paramilitary units (FENRICK, W., article 28, in TRIFFTER, O. (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Nomos Verlagsgesellschaft, 1999, pp. 518-520) (...) a person may be accountable under the doctrine of superior responsibility based on “de facto command” finds support in the case law of both the ad hoc Tribunals and the ICC. Representative of this opinion is the following quote from the Čelebići T.Ch.: “Formal designation as a commander should not be considered to be a necessary prerequisite for command responsibility to attach, as such responsibility may be imposed by virtue of a person’s de facto , as well as de jure, position as a commander” (Prosecutor v. Mucic et al., ICTY T. Ch., 16 November 1998, par. 370) (...). The same pronouncement is encapsulated in the following quote from the ICC: “With respect to a “person effectively acting as a military commander”, the Chamber considers that this term is meant to cover a distinct as well as a broader category of commanders. This category refers to those who are not elected by law to carry out a military commander’s role, yet they perform it de facto by exercising effective control over a group of persons through

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a chain of command”. Prosecutor v. Bemba, ICC PT Ch. II, 15 June 2009, par. 409. “(...) “authority and control” is a somewhat broader concept than “effective command and control” according to Fenrick: “(...) the definition and the distinction between these terms was addressed by the ICC in the Bemba case, where it was concluded that: “article 28(a) of the Statute refers to the terms “effective command and control” or “effective authority and control” as applicable alternatives in situations of military commanders *strictu sensu* and military-like commanders. In this regard, the Chamber considers that the additional words “command” and “authority” under the two expressions has no substantial effect on the required level or standard of “control” (...) in this context, the Chamber underlines that the term “effective command” certainly reveals or reflects “effective authority”. Indeed, in the English language the word “command” is defined as “authority, especially over armed forces”, and the expression “authority” refers to the “power or right to give orders and enforce obedience” (...).” Prosecutor v. Bemba, ICC PT Ch. II, Decision Pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, par. 412–413. According to Ambos: “(...) further stresses that “it should be clear now (...) that the “should have known” standard must be understood as negligence and that it, therefore, requires neither awareness nor considers sufficient the imputation of knowledge on the basis of purely objective facts (...) a specific comment as to this point with regard to the Bemba confirmation decision. He thus points out that both of these standards ought to constitute a negligence standard and that it would be beneficial for the ICC to apply a restrictive interpretation of the “should have known”-standard in order to bring it closer in line with the “reason to know” standard (...) the Appeals Chamber recalls that the ICTR Appeals Chamber has on a previous occasion rejected criminal negligence as a basis of liability in the context of command responsibility, and that it stated that “it would be both unnecessary and unfair to hold an accused responsible under a head of responsibility which has not clearly been defined in international criminal law (...)”. The Appeals Chamber expressly endorses this view”. Prosecutor v. Blaškić, ICTY A Ch., 29 July 2004, par. 63. In the Orić case: “(...) the Trial Chamber furthermore formulated a normative yardstick in order to measure whether the superior has fulfilled his or her duty to prevent: “first, as a superior cannot be asked for more than what is in his or her power, the kind and extent of measures to be taken ultimately depend on the degree of effective control over the conduct of subordinates at the time a superior is expected to act; second, in order to be efficient, a superior must undertake all measures which are necessary and reasonable to prevent subordinates from planning, preparing or executing the prospective crime; third, the more grievous and/or imminent the potential crimes of subordinates appear to be, the more attentive and quicker

the Office will specifically ensure that it will make more extensive use of the provisions on seniority liability, in accordance with article 28,“(...) in order to encourage military commanders and civilian officers to effectively deal with the commission of these crimes by their forces or subordinates”¹¹⁴. The Prosecutor’s Office also makes clear that it will pay particular attention to the possible use of evidence models to substantiate the accused’s knowledge

the superior is expected to react; and fourth, since a superior is duty bound only to undertake what appears appropriate under the given conditions, he or she is not obliged to do the impossible (...)”. Prosecutor v. Orić, ICTY T Ch, Judgment, 30 June 2006, par. 329: “(...) the Čelebići, Musema, Bagilishema cases expressed similar views”. “[I]t is (...) the Trial Chamber’s conclusion that a superior, whether military or civilian, may be held liable under the principle of superior responsibility on the basis of his de facto position of authority (...) the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences (...)”. Prosecutor v. Mucic et al., ICTY T Ch., Judgment, 16 November 1998, par. 377–378: “(...) it is also significant to note that a civilian superior may be charged with superior responsibility only where he has effective control, be it de jure or merely de facto, over the persons committing violations of international humanitarian law (...)”. Prosecutor v. Musema, ICTR T Ch., Judgment, 27 January 2000, par. 141: “(...) the effective control test applies to all superiors, whether de jure or de facto, military or civilian”. Prosecutor v. Bagilishema, ICTR A Ch., Judgment, 3 July 2002, par. 50. Also see: AMBOS, K., “Individual criminal responsibility”, in TRIFFTERER, O. (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by article*, 2nd ed., C.H. Beck/Hart/Nomos, 2008, pp. 795–843. AMBOS, “Critical Issues in the Bemba decision”, in *Leiden Journal of International Law*, 2009, pp. 715–726. NYBONDAS, M.L., *Command responsibility and its applicability to civilian leaders*, ed. TMC Asser Press, 2010. MCDERMOTT, Y., SCHABAS, W., *Ashgate research companion to international criminal law. Critical perspectives*, op. cit., ARCHIBUGI, D., PEASE, A., *Crime and global justice: The dynamics of international punishment*, ed. Polity, 2018. DONDE MATUTE, J., “Responsabilidad penal internacional: Los nuevos escenarios dogmáticos”, in *Anuario Mexicano de Derecho Internacional*, 2018.

¹¹⁴ HOYLE, L., “Command responsibility-A legal obligation to deter sexual violence in the military”, in *Boston College International & Comparative Law Review*, 2014, pp. 354ss.

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or awareness of crimes of sexual and gender-based violence, in accordance with article 30 (mental element)¹¹⁵.

¹¹⁵ See in particular: Prosecutor v. Katanga and Ngudjolo Chui, ICC PT. Ch., Decision on the Confirmation of Charges, ICC-01/04-01/07-717, 30 September 2008, para. 529; Prosecutor v. Bemba Gombo, ICC PT. Ch., Decision on the Confirmation of Charges, ICC-01/05-01/08-424, 15 June 2009, para. 356: “(...) article 30 of the ICC Statute would not accommodate any standard of mens rea below the threshold of knowledge of result in terms of practical certainty (...) in this sense: Prosecutor v. Bemba, ICC PT. Ch., Decision Pursuant to article 61(7)(a) and of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, paras. 359ss; Prosecutor v. Lubanga, ICC T. Ch., Judgment pursuant to article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, para. 1011; Prosecutor v. Lubanga, ICC A. Ch., Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-A-5, 1 December 2014, paras. 441; Prosecutor v. Lubanga, ICC PT. Ch., Decision on the Confirmation of Charges, ICC-01/04-01/06-803-t, 29 January 2007, paras. 352; Prosecutor v. Katanga and Ngudjolo Chui, ICCPT. Ch., Decision on the Confirmation of Charges, ICC-01/04-01/07-717, 30 September 2008, para. 251 fn. 329: “(...) the Pre-Trial Chamber added the following specification: [t]he Chamber considers that in the latter type of situation, two kinds of scenarios are distinguishable (...) if the risk of bringing about the objective elements of the crime is substantial (that is, there is a likelihood that it “will occur in the ordinary course of events”), the fact that the suspect accepts the idea of bringing about the objective elements of the crime can be inferred from: i. the awareness by the suspect of the substantial likelihood that his or her actions or omissions would result in the realization of the objective elements of the crime; and ii. the decision by the suspect to carry out his or her actions or omissions despite such awareness (...) ICC argued that: (w)ith respect to *dolus eventualis* as the third form of *dolus*, recklessness or any lower form of culpability, the Chamber is of the view that such concepts are not captured by article 30 of the Statute. This conclusion is supported by the express language of the phrase “will occur in the ordinary course of events”, which does not accommodate a lower standard than the one required by *dolus directus* in the second degree (oblique intention) (...)”; Prosecutor v. Bemba, ICC PT. Ch., Decision Pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, para. 360), that: “(...) the Pre-Trial Chamber concluded therefore that “the suspect could not be said to have intended to commit any of the crimes charged, unless the evidence shows that he was at least aware that, in the ordinary course of events, the occurrence of such crimes was a

virtually certain consequence of the implementation of the common plan (...)” (Prosecutor v. Bemba, ICC PT. Ch., Decision Pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, para. 368; Prosecutor v. Lubanga, ICC T.Ch., Judgment pursuant to article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, para. 1012, according to the ultimate judgment: “(...) due to the cumulative reference to “intent and knowledge” in article 30(1) ICC Statute, the requirement of knowledge in relation to result should apply even to an agent who clearly wanted to bring about the result pursuant to the first alternative of article 30(2)(b) ICC Statute. Finnin illustrates the practical outcome of this by inviting the reader to consider the case of an accused who plants an improvised explosive device (or ‘IED’, which have a notoriously low success rate), which he or she intends to initiate remotely when civilians come within range. It is the perpetrator’s conscious object to kill those civilians; however, unless it could be shown that he or she knew (at the time the device was initiated) that the device would explode successfully and thereby result in the death of those civilians, the perpetrator would not satisfy this gradation of intent (...). This obviously represents an unexpected and undesired consequence of the conjunctive “intent and knowledge” wording of article 30 (...).” Also see: BADAR, M.E., “Dolus eventualis and the Rome Statute without it?”, in *New Criminal Law Review*, 2009, pp. 436ss. BADAR, M.E., *The concept of mens rea in international criminal law. The Case for a unified approach*, Hart Publishing, 2013. BADAR, M.E., HIGGINS, N., “General principles of law in the early jurisprudence of the ICC”, in MARINIELLO, T. (ed.), *The International Criminal Court in search of its purpose and identity*, ed. Routledge, 2014. BADAR, M.E., PORRO, S., “Rethinking the mental elements in the jurisprudence of the ICC”, in STAHN, C. (ed.), *The law and practice of the International Criminal Court*, Oxford University Press, 2015. GIL, A.G., “Mens rea in co-perpetration and indirect perpetration according to article 30 of the Rome Statute. Arguments against punishment for excesses committed by the agent or the co-perpetrator”, in *International Criminal Law Review*, 2014, pp. 85ss. HELLER, K.J., “The Rome Statute of the International Criminal Court”, in HELLER, K.J., DUBER, D. (eds.), *The Handbook of comparative criminal law*, Stanford Law Books, Stanford, 2011, pp. 594ss. PORRO, S., *Risk and mental element: An analysis of national and international law on core crimes*, ed. Nomos, 2014. WERLE, G., JESSBERGER, F., *Principles of international criminal law*, 3rd ed., Oxford University Press, 2014, pp. 795ss. FINNIN, S., “Mental elements under article 30 of the Rome statute of the International Criminal Court. A comparative analysis”, in *International & Comparative Law Quarterly*, 2012, pp. 328ss. PIRAGOFF, D., ROBINSON, D., “Mental element”, in AMBOS, K., TRIFFTERER, O., *The Rome statute of the In-*

The Prosecutor also stated that he would “attribute different forms of liability in an auxiliary manner where appropriate”. In the policy document, the Prosecutor’s Office also states that it is ready to deliver charges based on the range of forms of participation allowed by the Rome Statute¹¹⁶. When also choosing to bring charges, Prosecutor’s Office will do so cumulatively and additionally to reflect the seriousness and multi-dimensionality of these crimes¹¹⁷.

Regarding the latter, it is worthwhile to make some remarks. The ICTY has assessed the value of cumulative accusations for the same criminal behavior. As has been pointed out, the logic of this practice is that, before all the evidence is presented, it is not possible to determine with certainty which of the accusations will ultimately prove. The Tribunal is in a position to assess which accusations will be held, based on the adequacy of the evidence¹¹⁸.

As has also been pointed out by the ICTY Court of Appeal, “multiple convictions serve to record the full guilt of a particular defendant or provide a full picture of his criminal behavior”¹¹⁹.

ternational Criminal Court, ed. Nomos, Hart Publishing, C.H. Beck, 2016, pp. 114ss. JANJAC, K., *The mental element in the Rome statute of the International Criminal Court*, Wolf Legal Publishers, 2013. CLARK, R.S., “The mental element in international criminal law: The Rome Statute of the International Criminal Court and the elements of offences”, in *Criminal Law Forum*, 2001, pp. 296ss. CRYER, R., FRIMAN, H., ROBINSON, D., WILMSHURST, E., *An introduction to international criminal law and procedure*, Cambridge University Press, 2010.

¹¹⁶ DAVIDSON, C., “How to read international criminal law: Strict construction and the Rome Statute of the International Criminal Court”, in *St. John’s Law Review*, 2017.

¹¹⁷ Comments on the OTP draft policy paper on sexual and gender based crimes, ed. Redress, pp. 4ss.

¹¹⁸ Čelebići Appeal Judgment, Case No. IT-96-21-A, 20 February 2001, para. 400, Kupreškić et al. Appeal Judgment, Case No. IT-95-16-A, 23 October 2001, para. 385; Kunarac et al. Appeal Judgment, Case No. IT-96-23&IT-96-23/1-A, 12 June 2002, para. 167; Naletilić & Martinović Appeal Judgment, Case No. IT-98-34-A, 3 May 2006, para. 103; Galić Appeal Judgment, Case No. IT-98-29-A, 30 November 2006, para. 161.

¹¹⁹ Naletilić & Martinović Appeal judgment, Case No. IT-98-34-A, 3 May 2006, para. 585 quoting Kunarac et al. Appeal judgment, para. 169 (citing the

However, when commenting on the draft policy paper, criticized this by pointing to the possible unfair treatment of the accused in cases of decisions on cumulative charges for criminal behavior. In particular, it referred to the principle that the total penalty should reflect all the culpable conduct, also indicating Rule 55 of ICC¹²⁰. Noting that witness testimony is often necessary to prove responsibility and subjective status, the document also highlights the policies it adopts to protect witnesses. The document strengthens the commitment of the Prosecutor's Office to comply with its statutory obligations, in particular to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses¹²¹. It states that it will "take into account the particular vulnerability of each of the witnesses and any additional care with regard to safety, personal, and/or family or social impact"¹²², and will "take all possible measures to prevent (...) harassment, intimidation and re-offense (...) "¹²³.

The policy document also reflects the intention to make changes in relation to its staff. During Moreno Ocampo's term of office, the Prosecutor's Office's investigation department was understaffed, with alternate teams of a "growing new staff" who conducted the investigations without a continuous presence in the field¹²⁴. This fact, which has been compounded by persistent problems with culture management and the inadequacy of domestic staff,

Partial dissenting opinion of judge Shahabuddeen in the Jelisić Appeal judgment, para. 34). Brima et al., Appeal judgment, Case No. SCSL-2004-16-A, 22 February 2008, para. 215.

¹²⁰ In pag. 4-5 referred that Regulation 55 of the ICC Regulations of the Court does not obviate the need for cumulative charging as such a provision does not require trial Chambers to re-characterize facts but only provides them with a possibility to do so.

¹²¹ Statute of Rome, art. 68, par. 1.

¹²² OTP Policy Paper, para. 87.

¹²³ MCDERMOTT, Y., SCHABAS, W., "Ashgate research companion to international criminal law. Critical perspectives", *op. cit.*

¹²⁴ DE VOS, C.M., "Investigation from Afar: The ICC's evidence problem", in *Leiden Journal of International Law*, 2013, pp. 1009ss.

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has led to the loss of a large number of experienced researchers and prosecutors.

Prosecutor F. Bensouda acknowledged abuse of the rotation practice of researchers. The Strategic Plan for the period 2012-2015 recognizes the need to increase the staff in the research department as well as greater researchers' experience, stating in particular: the new approach to investigations requires the office to assess whether the existing mix of experience, specialization, language, gender and nationality is in line with the new conditions¹²⁵.

The policy paper emphasizes the need for improved capabilities and operational expertise in sexual and gender violence as well as the value of continuing specialist training on issues such as the impact of trauma on vulnerable witnesses and methodologies for collecting and analyzing relevant information¹²⁶. It should be noted, however, that tackling sexual and gender violence requires not only proper education and appropriate skills, but also the right "identities"¹²⁷. The dynamics of gender, for example, often varies in importance and in many cases upgraded, where the two persons share the same gender identity¹²⁸.

VI. PROSPECTS AND SUGGESTIONS

Surely, the drafting of the publication of policy document of the Prosecutor's Office for sexual and gender crime is a remarkable progress. It represents a type of proclamation that there is a fundamental change in research and prosecution strategies, that were so

¹²⁵ ICC OTP, Strategic Plan 2012-2015, paras. 20-24. TRIFFTERER, AMBOS, *The Rome statute of the International Criminal Court. A commentary*, ed. C.H. Beck, Nomos, Oxford University Press, 2016.

¹²⁶ OTP Policy Paper, paras. 21, 28, 37, 57, 115, 117-119.

¹²⁷ Refugee Law Project, Comments on the ICC Draft Policy on Sexual and Gender Based Violence, Refugee Law Project, 23 February 2014, pag. 11.

¹²⁸ BIANCHI, L., "The prosecution of rape and sexual violence: Lessons from the prosecutions at the ICTR", *op. cit.*, pp. 123-149.

erroneous in the past and left huge gaps in international criminal justice¹²⁹.

However, the significance of this document will only become meaningful if the policies described are properly and adequately implemented by increasing ICTY and ICTR cases concerning these crimes and the resulting improvement in domestic criminal case law. Some positive results from the strategic goals of the office have already emerged since the newly elected Prosecutor Fatou Bensouda took office. Issuing an arrest warrant against Sylvestre Mudacumura¹³⁰ and confirming the charges against Ntaganda are some of the most typical examples. However, it remains to be seen to what extent the Prosecutor will be able to overcome the practical difficulties so that the constitutional obligation of priority on sexual and gender-based crimes can now be implemented.

On the Prosecutor's side, the policy document is expected to ensure effective investigation and prosecution of those specific crimes and maximize access to justice for victims through ICC. According to the Prosecutor, "it is expected that the policy will also serve as a guide for national authorities in exercising their primary jurisdiction to make the perpetrators responsible for these crimes (...) the message to perpetrators and potential perpetrators must be clear: sexual and gender-based crimes in the conflict will neither be tolerated nor neglected by the Tribunal"¹³¹.

The question that arises is: can human rights be the tool to overcome the challenges of international criminal justice?

¹²⁹ MARINIELLO, T., *The International Criminal Court in search of its purpose and identity*, ed. Routledge, 2014.

¹³⁰ Prosecutor v. Sylvestre Mudacumura, Case No. ICC-01/04-01/12, Prosecution application for a warrant of arrest, 13 June 2012 and Warrant of arrest issued by Pre-Trial Chamber II, 13 July 2012. (see in particular the paragraphs in relation on sexual crimes).

¹³¹ Press Release, ICC, The Prosecutor of the International Criminal Court, Fatou Bensouda, Publishes Comprehensive Policy Paper on Sexual and Gender-Based Crimes, June 5, 2014.

Article 21(3) has been described as “one of the most important provisions of the Rome Statute”¹³². The obligation under article 21(3) is widespread and requires all the institutions of the Tribunal to demonstrate the understanding of human rights violations constituting crimes contained in the Statute of ICC and how international human rights law can provide information and enlighten the applicable criminal law. The CEDAW Commission has already recognized since 1992 that “gendered violence is a form of discrimination that certainly affects the ability of women to enjoy rights and freedoms on the basis of equality with men”¹³³. Regional human rights instruments have also pointed out that gender violence is “one of the most extreme and widespread forms of discrimination, greatly altering and abolishing the implementation of women’s and men rights”¹³⁴.

This finding may indeed affect the way in which courts analyze complaints of sexual and gender-based violence. Firstly, it requires courts to recognize that sexual and gender violence occurring during periods of armed conflict are often part of a wider “image” of discrimination¹³⁵. It requires the courts to recognize, for example, that rape, forced nakedness, sexual torture and other acts of a similar nature are often used to facilitate the commission of other crimes because of the gender-related nature of many of them are treated in societies¹³⁶.

¹³² TRIFFTERER, O., *Commentary on the Rome Statute of the International Criminal Court*, Observers’ Notes. Article by article, Hart Publishing, 2008, pp. 712ss.

¹³³ CEDAW Committee General Recommendation 19 on violence against women, UN Doc HRI/GEN/1/Rev7 (1992) para 1.

¹³⁴ Jessica Lenahan (Gonzales) v. United States, Inter-American Commission of Human Rights, Inter American Commission of Human Rights (21 July 2011), Case 12.626, Report 80/11, para 110.

¹³⁵ GRABERT, A., “Dynamic interpretation in international criminal law. Striking a balance between stability and change”, *op. cit.*

¹³⁶ SÁCOUTO, S., “Gaps in the gender-based violence jurisprudence of international and hybrid criminal Courts: Can human rights help?”, in NGWENA, C., DUROJAYE, E. (eds.), *Strengthening the protection of sexual and reproductive*

The fact that international criminal justice has to deal with sexual and gender-based crimes as a form of discrimination as perceived by human rights law has already been codified in the Rome Statute of the Tribunal, in article 21(3)¹³⁷. At the same time, it is duty of the Court to ensure that the interpretation and application of the Rome Statute is compatible with international human rights law and free of stereotypes of a distinct nature. As several commentators have noted, “while it is reasonable that human rights law can not be used to define international crimes such as persecution, this law can certainly be used to help interpret, where the absence of international criminal case law is evident”¹³⁸.

Persistent challenges can be addressed to a certain extent by the application of the fundamental principle of non-discrimination, encouraging international courts to develop an improved understanding of when, why and how sexual violence takes place during armed conflicts, helping them better interpreted, what forms of criminal responsibility can and should be used to prosecute these crimes, what is the best way to deal with these crime systems, helping them reach equal justice.

VII. CONCLUDING REMARKS

In practice, the two international criminal tribunals have acknowledged that sexual violence can constitute a bunch of other additional crimes, including war crimes of torture¹³⁹ and attacks

health and rights in the African region through human rights, Pretoria University Law Press, 2014, pp. 319ss.

¹³⁷ VAGIAS, M., *The territorial jurisdiction of the International Criminal Court*, Cambridge University Press, 2014, pp. 202ss.

¹³⁸ BROWN, B.S., GRENFELL, L., “The international crime of gender-based persecution and the Taliban”, in *Melbourne Journal of International Law*, 2003, pp. 360-361.

¹³⁹ See the case: Prosecutor v. Delalić, Mucuc, Delic and Lanzo, Case No.IC-TY-IT- 96-21-T, Trial Judgment, 16 November 1998, para. 475.

on personal dignity¹⁴⁰, the crime against humanity not only of rape but also of sexual enslavement¹⁴¹, persecution, and the crime of genocide¹⁴². With regard to ICC, the statute of the latter includes specific gender-based crimes, such as rape, sexual slavery, forced prostitution, pregnancy and sterilization-on the basis of both war crime¹⁴³ and crimes against humanity¹⁴⁴. As regards the crimes of genocide, the elements of crimes state that although rape is not listed as a form of genocide, the latter caused by acts of “serious physical or mental harm”¹⁴⁵, including “acts of torture, rape, sexual violence, inhuman or degrading treatment”¹⁴⁶. However, the process of joining an act of sexual violence in the formal legal arena may be a painful process of many victims¹⁴⁷. Not only can they experience a tremendous psychological strain because they

¹⁴⁰ Prosecutor v. Furundzija, Case No. ICTY-IT-95-17/1-T, Trial Judgment, 10 December 1998, para. 274.

¹⁴¹ Prosecutor v. Kunarac Case No. ICTY-IT-96-23-T and IT-96-23/1-T, Trial Judgment, 22 February 2001, para. 436.

¹⁴² Prosecutor v. Brdjanin, Cse No ICTY-96-4-T, Trial Judgment, 1 September 2004, Trial Judgment, para. 15.

¹⁴³ DUBLER, R., KALYK, SC, M, *Crimes against humanity in the 21st century. Law, practice and threats to international peace and security*, ed. Brill, 2018.

¹⁴⁴ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 113 and Prosecutor v. Ndindilyimana et al, ICTR-00-56 of 30 June 2014.

¹⁴⁵ OOSTERVELD, V., “Gender-sensitive justice and the International Criminal Tribunal for Rwanda”, in *New England Journal of International and Comparative Law*, 2005, pp. 119, 128ss. TROUILLE, H., “How far has the international criminal Tribunal for Rwanda really core since Akayesu in the prosecution and investigation of sexual offenses committed against women? An analysis of Ndindilyimana” in *International Criminal Law Review*, 2013, pp. 750ss.

¹⁴⁶ International Criminal Court, Elements of Crimes, adopted on 9 September 2002, UN Doc. PCNICC/2000/1/Add.2, 2 November 2002.

¹⁴⁷ SCHÜNEMANN, R., *Strafverfahrensrecht*, ed. C.H. Beck, 2012, pp. 439ss. SCHUON, C., *International criminal procedure: A clash of legal cultures*, T.M.C. Asser Press, 2010. SCHUETZE-REYMANN, J., *International criminal justice on trial. The ICTY and ICTR case referral practice to national Courts and its possible relevance for the ICC*, ed. Duncker & Humblot, 2016.

have to go ahead and tell the violations against it¹⁴⁸, but they may be forced to confront it with the established gender bias and rape perceptions of the system itself responsible for providing justice.

Obstacles to the process are multiple: lack of effective cooperation between health care staff and legal system, structural and resource constraints on law enforcement, lack of forensic analysis and problems of the courts themselves. Poor cooperation between investigators and prosecutors and the consequent inability to prove or attribute accusations and finally lack of sensitivity to judicial proceedings that “reconstitute” the victim’s trauma¹⁴⁹. But besides the victims, researchers and prosecutors may in turn encounter specific challenges, as they promote a case of sexual violence through the legal system. Besides the victims, researchers and prosecutors may in turn encounter specific challenges, as they promote a case of sexual violence through the legal system. The often private character of rape¹⁵⁰, for example, rarely offers the

¹⁴⁸ Prosecutor v. Krstić, Judgment, IT-98-33-T, 2 August 2001, para. 616. In Prlić et al., Trial Chamber III found four out of six Accused guilty of some crimes, including rape, sexual violence, and looting on the grounds that the Accused could have reasonably foreseen that such crimes would be committed as a consequence of the implementation of the joint criminal enterprise, and that they nevertheless accepted and assumed that risk, including by taking no measure to prevent the commission of further crimes. Prosecutor v. Prlić et al., Judgment, IT-04-74-T, 29 May 2013, paras. 72, 284, 437, 834, and 1014. K. GUSTAFSON, The requirement of an “express agreement” for Joint Criminal Enterprise, in *Journal of International Criminal Justice*, 2007, pp. 138-158.

¹⁴⁹ European Center for Constitutional and Human Rights, *Sisma Mujer and Collectivo de Abogados*, ICC Communication on Sexual Violence in Colombia, pag. 11.

¹⁵⁰ See, Appeal Chamber, Prosecutor v. Ntaganda, Judgment on the appeal of Mr Ntaganda against the “second Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9” (15 June 2017, par. 16). For the first time, the ICC judges have enshrined that any question submitted to them, and therefore also those relating to the interpretation of war crimes, must be resolved only on the basis of the law of the founding Charter. And secondly because in providing an interpretation of the aforementioned clause, the judges of the Chamber of Appeal seem to have given greater weight to the possibility of enhancing the object and purpose of the Statute rather than safeguarding

possibility of eyewitnesses, support that can be provided to other crimes. And whether the subject is the identity of the offender or the lack of consensus on sexual intercourse, prosecutors are often called upon to fight against gender bias or misconceptions about the nature of sexual violence.

With regard to the proof of international sex crimes¹⁵¹, additional proofs arise: how can one collect consistent evidence of a crimes committed against countless people after many years? how can one assign responsibility to a military or political commander who may have never given a direct or immediate mandate to commit rape?

There are, however, many promising strategies for managing cases of sexual violence. These strategies have evolved, both in the domestic and international contexts. These may consist either of efforts to integrate awareness of sexual violence (as well as universal education across the range of research) or inter tactics aimed at developing expertise in the field of sexual violence crimes within the body of experts¹⁵². Innovations within an international body may have a significant impact on future developments within

the coherence and unity of the corpus of law and especially under international humanitarian. In this last perspective, it is important to underline the reference to the absolute prohibition of subjecting anyone to rape and sexual violence in the context of armed conflict, which appears without a shadow of doubt in line not only with the purpose of the ICC act, but above all with the evolution of international human rights law. Rigorous opinion that has found application of the nexus requirement to prevent an illegitimate expansion of the scope of war crimes rules in the Appeal Chamber, Prosecutor v. Ntaganda, Judgment on the appeal of Mr Ntaganda against the “Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9”, 15 June 2017, par. 68. RODENHÄUSER, “Squaring the circle? Prosecuting sexual violence against child soldiers by their ‘own forces’”, in *Journal of International Criminal Justice*, 2016, pp. 171-186.

¹⁵¹ BERGSMO, M., *Thematic prosecution of international sex crimes some critical comments from a theoretical and comparative perspectives*, ed. Torkel Opshahl Academic Publisher, Beijing, 2012, pp. 294ss.

¹⁵² AHLBRECHT, H., BÖHMEER, H. M., *Internationales Strafrecht*, C.F. Müller, 2018.

national or local criminal justice systems, including a context of more extensive use of gender experts, increased coordination between prosecutors and investigations and the increased protection measures of witnesses¹⁵³.

Indeed, the new Prosecutor's Office paper on gender and sexual crimes provides a set of coherent and integrated goals towards more effective justice and recognition of the harm suffered by victims of sexual and gender-based violence, in the context of permanent international jurisdiction instrument. Whether the ICC will eventually become the catalyst for the eradication of sexual violence, mainly as a weapon¹⁵⁴ or war strategy¹⁵⁵, and how soon it will be demonstrated by the progress it will make in the next period.

Already documented cases of sexual violence in Colombia¹⁵⁶ offer an excellent opportunity to the Prosecutor's Office to apply this new approach that has been adopted in the policy document. Besides, the ICC already has reason to believe that the Revolutionary Armed Forces of Colombia (FARC) committed crimes against the civilian population in Colombia¹⁵⁷, which are violations of

¹⁵³ SQUATRITO, T., YOUNG, O.R., FOLLESDAL, A., ULSTEIN, G., *The performance of international Courts and Tribunals*, Cambridge University Press, 2018.

¹⁵⁴ KIRBY, P., "How is rape a weapon of war? Feminist International Relations, modes of critical explanation and the study of wartime sexual violence", in *European Journal of International Relations*, 2012, pp. 802ss. ARRABAL WARD, C.E., *Wartime sexual violence at the international level a legal perspective*, ed. Brill, 2018. WATERROW, J., SCHUMACHER, J., *War crimes trials and investigation. A multi-disciplinary introduction*, Oxford University Press, 2018.

¹⁵⁵ BUSS, D.E., Rethinking "rape as a weapon of war", in *Feminist Legal Studies*, 2009, pp. 152ss.

¹⁵⁶ COLE, A., *International criminal law and sexual violence*, in MCGYNN, C., MUNRO V.E., (eds.), *Rethinking rape law. International and comparative perspectives*, ed. Routledge, 2010, pp. 49ss.

¹⁵⁷ BOESTEN, J., "Analyzing rape regimes at the interface of war and peace in Peru", in *The International Journal of Transitional Justice*, 2010, pp. 112ss. BOESTEN, J., WILDING, P., "Transformative gender justice: Setting an agenda", in *Women's Studies International Forum*, 2015, pp. 77ss.

the Rome Statute¹⁵⁸, and has already stated that it will proceed to prosecution of the international crimes committed in Colombia if the Colombian government does not manage to do so effectively. While international law provides the platform for the recognition of a set of universal rights, it is only the starting point from which the appropriate approach to justice will be diversified. Although the ICC is currently focusing on the investigation of situations in African countries and not only¹⁵⁹, it is crucial to distinguish the details of sexual violence in different contexts in order to formulate responses that respond to the particular need of survivors and communities, and this can be achieved only if survivors are incorporated into the process of redefining how they see justice themselves, especially in ways that fit their country's political history and culture. If the ICC wants to play the role of deterring the most serious human rights violations and make progress to that end, it must integrate gender equality more prominently across the range of proceedings before the Court¹⁶⁰.

¹⁵⁸ Office of the Prosecutor, Situation in Colombia: Interim Report, November 2012, p. 8.

¹⁵⁹ VILJOEN, F., *International human rights law in Africa*, Oxford University Press, 2012.

¹⁶⁰ DAVIDSON, C., "How to read international criminal law: Strict construction and the Rome Statute of the International Criminal Court", in *Saint John's Law Review*, 2017, p. 4.

