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ABSTRACT

Chapter one addresses the role that the International Criminal Court (ICC) plays in recognizing and enforcing human rights pertaining to victims of sexual crimes, particularly of rape and sexual slavery, as well as the granting of victims' participatory rights in criminal proceedings under the application and interpretation of internationally recognized human rights.

For millennia, women, girls, men, boys and children of all genders have been victims of rape, forced pregnancy, enforced prostitution, sexual slavery and other myriad forms of sexual violence during war time and peacetime. Since then, experts, practitioners and activists have sought to use international criminal body of laws to find coercive responses to conflict-related sexual and gender based violence. Against this background, despite the fact that during the preparatory phase of the Rome Statute, the subject of sexual and gender based crimes was greatly divisive and considered of little importance, the Statute enumerates several war crimes and crimes against humanity, namely rape, sexual slavery, enforced pregnancy, enforced prostitution and enforced sterilization. Therefore, the adoption of Rome Statute and its entry into force was widely lauded as an important step to the recognition and potential prosecution of sexual and gender based crimes. In this light, one of the hallmark achievements during the preparatory phase and adoption of the Rome Statute was the enshrinement of Article 21 (3), which states that the ICC must consider '*internationally recognized human rights*' in the interpretation and application of applicable law. Therefore, this thesis addresses an insightful analysis regarding the extent to which the ICC has exploited Article 21 (3) to recognize sexual crimes and participatory rights of victims in criminal proceedings. The analysis reveals that the provision has created difficulties that overwhelm the Court with the onerous task of meaningfully interpreting this reference to "internationally recognized human rights", resulting in contradictory approaches and applications of Article 21 (3). However, paragraph 3 of said provision bears immense potential as a means of development and innovation.

The second chapter presents the challenges encountered by the Court in terms of limitations to its powers to prevent future atrocities, pertaining to (the lack of) authoritative competence to enforce its decisions and the (lack of) states' cooperation.

The final chapter outlines the conclusions drawn from the theoretical and empirical analyses of the topics elaborated in this research project.

DIE ZUSAMMENFASSUNG

Das erste Kapitel befasst sich mit der Rolle, die der Internationale Strafgerichtshof (IStGH) bei der Anerkennung und Durchsetzung der Menschenrechte von Opfern von Sexualverbrechen, insbesondere von Vergewaltigung und sexueller Sklaverei, spielt, sowie mit der Gewährung von Mitwirkungsrechten der Opfer in Strafverfahren im Rahmen der Anwendung und Auslegung der international anerkannten Menschenrechte.

Seit Jahrtausenden sind Frauen, Mädchen, Männer, Jungen und Kinder aller Geschlechter Opfer von Vergewaltigung, Zwangsschwangerschaft, Zwangsprostitution, sexueller Sklaverei und anderen unzähligen Formen sexueller Gewalt in Kriegs- und Friedenszeiten. Seitdem haben Experten, Praktiker und Aktivisten versucht, das internationale Strafrecht zu nutzen, um Zwangsmaßnahmen gegen konfliktbedingte sexuelle und geschlechtsspezifische Gewalt zu ergreifen. Vor diesem Hintergrund und trotz der Tatsache, dass in der Vorbereitungsphase des Römischen Statuts das Thema der sexuellen und geschlechtsspezifischen Verbrechen sehr umstritten war und als wenig wichtig angesehen wurde, zählt das Statut mehrere Kriegsverbrechen und Verbrechen gegen die Menschlichkeit auf, nämlich Vergewaltigung, sexuelle Sklaverei, erzwungene Schwangerschaft, Zwangsprostitution und Zwangssterilisation. Daher wurde die Verabschiedung des Römischen Statuts und sein Inkrafttreten weithin als wichtiger Schritt zur Anerkennung und potenziellen Verfolgung von sexuellen und geschlechtsspezifischen Verbrechen gelobt. Vor diesem Hintergrund war eine der wichtigsten Errungenschaften während der Vorbereitungsphase und der Verabschiedung des Römischen Statuts die Verankerung von Artikel 21 (3), der besagt, dass der IStGH bei der Auslegung und Anwendung des geltenden Rechts die "international anerkannten Menschenrechte" berücksichtigen muss. In dieser Arbeit wird daher aufschlussreich analysiert, inwieweit der IStGH Artikel 21 (3) genutzt hat, um Sexualverbrechen und die Mitwirkungsrechte der Opfer in Strafverfahren anzuerkennen. Die Analyse zeigt, dass die Bestimmung zu Schwierigkeiten geführt hat, die den Gerichtshof vor die schwierige Aufgabe stellen, diesen Verweis auf "international anerkannte Menschenrechte" sinnvoll auszulegen, was zu widersprüchlichen Ansätzen und Anwendungen von Artikel 21 (3) führt. Absatz 3 der genannten Bestimmung birgt jedoch ein immenses Potenzial für Entwicklung und Innovation.

Im zweiten Kapitel werden die Herausforderungen dargestellt, denen sich der Gerichtshof im Hinblick auf die Beschränkung seiner Befugnisse zur Verhinderung künftiger Gräueltaten gegenüberstellt, und zwar im Zusammenhang mit der (fehlenden) autoritativen Zuständigkeit für die Durchsetzung seiner Entscheidungen und der (mangelnden) Kooperation der Staaten.

Im letzten Kapitel werden die Schlussfolgerungen aus den theoretischen und empirischen Analysen der in diesem Forschungsprojekt erarbeiteten Themen dargelegt.

INTRODUCTION

The International Criminal Court was established to prosecute the most severe crimes, to ensure that these crimes, such as war crimes, crimes against humanity, genocide and crimes of aggression, do not go unpunished and to contribute to putting an end to such atrocities. The crux of the ICC's role lies in enforcing and inducing compliance with particular provisions of international law aimed at outlawing and preventing mass violence.¹

Although the ICC was not established as a human rights court *per se*, it plays a significant role in the protection and enforcement of human rights in addition to holding accountable perpetrators of the gravest crimes known to mankind. The Court's supporters claim that the culture of impunity that has allowed human rights abusers to freely commit atrocities without fear of sanction has come to an end.² The ICC has particularly contributed to combating impunity with respect to sexual and gender-based crimes against women and girls, children and recently against men and boys. Such offenses are thoroughly codified in the Rome Statute, which also mandates that the ICC's organs possess specialized knowledge regarding violence against women and children.³ The ICC reduces impunity not only by holding perpetrators accountable but also by granting victims an unprecedented role in international criminal proceedings,⁴ in addition to the opportunity for reparations. The Trust Fund for Victims⁵ is a two-pillar system, where the first pillar implements

¹ Sang-Hyun Song, "The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law" (2012) XLIX (4), UN Chronicle-Delivering Justice. <<https://www.un.org/en/chronicle/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law>> accessed 10 January 2023

² Benjamin J. Appel, "In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?" (2018) 62 (1) The Journal of Conflict Resolution. <https://www.jstor.org/stable/pdf/48597287.pdf?refreqid=excelsior%3A7bbe411a8e52cb1d5face197a0e2353b&ab_segments=&origin=>> accessed 10 January 2023

³ *Supra*, note 1.

⁴ Héctor Olásolo and Alejandro Kiss, "The role of victims in criminal proceedings before the International Criminal Court" (2010) 81 (1-2) Dans Revue Internationale De Droit Penal. <<https://www.cairn.info/revue-internationale-de-droit-penal-2010-1-page-125.htm>> accessed 10 January 2023

⁵ Article 75 & 79 of the Rome Statute. <<https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>> accessed 10 January 2023

reparations⁶ awarded by the ICC and the second pillar supports victims⁷ of the crimes and their families regardless of judicial decisions.⁸

This way, the Trust Fund contributes to enabling the empowerment and rehabilitation of survivors of atrocities and violence, their families and the communities affected by the crime of genocide, war crimes, and crimes against humanity and/or crimes of aggression.

Participation of victims in criminal proceedings is not a novel concept as many civil law countries allow victims to join proceedings as a third party, or “subsidiary prosecutor”⁹ notwithstanding the right of victims to present their views on the decision to authorize an investigation, the admissibility of a case and issues that affect their personal interests postulated for the first time in the international criminal law by the Rome Statute.¹⁰ While it is true that the recognition of the participation right of the victims is considered to be a major step forward within the international criminal justice system, simultaneously, the process established under the documents governing the ICC by which individuals apply for and receive permission to participate in proceedings has proved inefficient for the applicants, the parties, and the Court.¹¹

The ICC is not a perfect court and, unfortunately, is often considered to be susceptible to bias and political interest from powerful countries. For example, it is interesting to note that during the negotiations for the creation of the ICC, the most powerful states, United States in particular, argued against the court’s universal jurisdiction and the application of Rome Statute to non-member states as well. This ultimately led to the Rome Statute being applied only in certain circumstances, making the court less reliable than it was originally planned, and many argue that the most powerful states are capable of getting away without actually enforcing the ICC’s decisions.¹²

⁶Rule 98 (1-4) of the Rules of Procedure and Evidence. <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/FIE0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf> accessed 10 January 2023

⁷ *Ibid*, Rule 98 (5).

⁸ For a comprehensive overview read: Katharina Peschke, “The Role and Mandates of the ICC Trust Fund for Victims” in *Victims of International Crimes: An Interdisciplinary Discourse* (Asser Press 2013). <https://www.researchgate.net/publication/291242359_The_Role_and_Mandates_of_the_ICC_Trust_Fund_for_Victims> accessed 10 January 2023

⁹ Charles P. Trumbull IV, “The Victims of Victim Participation in International Criminal Proceedings” (2008) 29 (4) *Michigan Journal of International Law*. <<https://repository.law.umich.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1156&context=mjil>> accessed 10 January 2023

¹⁰ *Ibid*.

¹¹ wcl.american.edu, “Obtaining Victim Status for Purposes of Participating in Proceedings at the International Criminal Court” (2013). <https://www.wcl.american.edu/wcl-american-edu/assets/report_18_final.pdf> accessed 10 January 2023

¹² Nadia Shamsi, “The ICC: A Political Tool? How the Rome Statute is Susceptible to the Pressure of More Powerful States” (2016) 24 (1) *Willamette Journal of International Law and Dispute Resolution*. <https://www.jstor.org/stable/pdf/26210471.pdf?refreqid=excelsior%3Af5975d213bf71e89df46a2f6900c37e1&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&origin=>> accessed 10 January 2023

In contrast to domestic courts, the ICC lacks a great number of mechanisms that would allow it to enforce justice more easily. For example, it doesn't have a police force to administer arrest warrants, which puts the ICC in a peculiar position as it often finds itself needing to negotiate with states in order to hold alleged perpetrators accountable.¹³ It cannot order them to cooperate; it can only request them to do so. It is upon the states to decide whether they would like to follow through with the ICC's requests. Therefore, the road toward advancing the rule of law, enforcement of human rights and protection of individuals who suffer the most from these crimes, requires not only a legal system that strengthens the role of the ICC in condemning human rights perpetrators and addressing human rights abuses, but the effective cooperation and support of states is crucial, in addition to a stronger enforcement mechanism.

While the ICC is plagued by important limitations, it has great significance for the protection and promotion of fundamental human rights. The contribution of the ICC in enabling gender-based and sexual crimes to be prosecuted as war crimes and crimes against humanity by means of internationally recognized human rights, the extent to which the ICC has been effective in addressing human rights abuses and establishing justice, as well as the application of internationally recognized human rights so as to broaden the range of victims who participate in proceedings are key concerns that shall be addressed in order to evaluate the potential of the ICC to develop a global accountability framework for ensuring prosecution of sexual violations and promotion of victims' human rights.

To summarize, this thesis begins by examining the scope and influence of article 21 (3) to the jurisprudence of the ICC and evaluates the ICC's approach to already set precedents. Moreover, the paper considers the particular nature of sexual and gender-based crimes and the advances the ICC has made in adjudicating such crimes among recognition of participatory rights of victims in proceedings under the application of internationally recognized human rights. Finally, it assesses the efficiency of the ICC and the challenges it faces and needs to overcome in order to better enforce its decisions.

Chapters Outline

The first chapter sketches out the application and interpretation of 'internationally recognized human rights' as an innovative feature in the Rome Statute, in literature and from the practical perspective of the International Criminal Court. Further, it analyzes the role of the ICC in the sphere of international human rights by specifically concentrating on the contribution of the court in enforcing judgments against cases of sexual and gender-based crimes. Since the issues of gender-based and sexual crimes committed especially during wartimes are of a sensitive nature and require particular attention by international courts mandated to put an end to impunity, this

¹³ Steven C. Roach, "How Political is the ICC? Pressing Challenges and the Need for Diplomatic Efficacy" (2013), 19 (4) Global Governance. <<https://www.jstor.org/stable/24526391>> accessed 10 January 2023

thesis aims to elucidate in detail the contribution of the ICC in this regard and the role it plays in holding perpetrators accountable and delivering justice to victims of such crimes. Furthermore, the chapter looks into the right of victims to participate in criminal proceedings based on the Rome Statute and how application of the provisions of the Statute has been interpreted by the court in light of internationally recognized human rights. It examines different cases that have been brought to the court and the precedent that the court has set in deciding these cases. Such a topic sparked interest following the linkage between the prosecution of gender-based and sexual crimes and the victim's right to be part of the process.

The next chapter explores the challenges the International Criminal Court faces in enforcing its decisions. As we will see, lack of an effective enforcement mechanism leaves the ICC vulnerable to states in breach of the Rome Statute without any repercussion for the violation. Further, by example of case studies, the chapter illustrates the need to strengthen its enforcement mechanism in order to become a legitimate international tribunal and ensure the enforcement of human rights.

In the final chapter, a reflection upon findings and conclusions that might lead to new avenues for further research shall be presented.

Methodology

This thesis was carried out through a mixture of theoretical and practical methodology. The literature review will help us to better elucidate the theoretical underpinning of the creation of the International Criminal Court and the role it plays in the international law sphere, particularly in the development of protection against sexual and gender-based crimes and for victims of international atrocities. Through a qualitative analysis, this study will collect and draw legal postulations, approaches and opinions from legal resolutions; international treaties; international legal precedents; legal research papers; articles, government and international legal documents, NGOs and international organizations. This will enable us to better understand how the International Criminal Court implements the Rome Statute and the challenges it faces when dealing with international matters. Nonetheless, admittedly this thesis will suffer from limitations and shortfalls. The topic is very complex, entangling an array of areas of research, from war crimes, genocide, national jurisdiction, political interests and the legality of international influence. In this sense, it is nearly impossible to fully elucidate this assemblage and complexity of agency in a limited number of words.

Research Questions

This research project examines the interplay between international human rights and global justice as well as the contribution of the Court to ensuring that there is global justice in human rights

matters. The main objective of this research is to point out the role that the International Criminal Court plays in enforcing international human rights. Therefore, the research questions I aim to give answers to are:

What is the role of the ICC in recognizing gender-based and sexual crimes and the right of victims to participate in proceedings, in terms of crimes under the jurisdiction of the court?

- To what extent does the ICC apply article 21 (3) with respect to the recognition of gender-based and sexual crimes compared to the application of internal acts?
- How the application of internationally recognized human rights has been interpreted by the Court to broaden the range of victims who participate in proceedings?
- How does the ICC's approach affect/address the issue of gender-based and sexual violence?
- To what extent has the ICC been effective in addressing (or reducing) international human rights abuses/violence and establishing peace, security and justice?

How does the (non) enforcement regime/model of the ICC affect the enforcement of human rights?

- To what extent does the ICC exercise its jurisdiction?
- To what extent can an ICC ruling be enforced?
- How this model does influences countries to comply with the ruling delivered by the ICC?
- What has the jurisprudence of the court identified as vulnerabilities?

CHAPTER I

THE ROLE OF THE ICC IN ENFORCING HUMAN RIGHTS WITH PARTICULAR ATTENTION TO SEXUAL AND GENDER-BASED CRIMES AND THE PARTICIPATORY RIGHTS OF THE VICTIM

Article 21 articulates the hierarchical steps of determining the applicable law to matters that come before the ICC and in brief it requires the court to first apply the internal acts of the ICC (Statute, Elements of Crimes and the Rules of Procedure and Evidence), and secondly treaties, principles and rules of international law (including general principles of law from national laws of the world's legal systems). Further, paragraph 2 grants the court the right to apply its set precedents while paragraph 3 of the said provision determines that the above mentioned laws must be applied and interpreted in consistency with internationally recognized human rights, without discrimination to gender, age, color, race, language, belief or religion, political or other opinion, national, ethnic, wealth, birth or other status. Article 21 (3) is considered to be the greatest innovation of the Rome Statute in terms of human rights;¹⁴ therefore the understanding of its application and interpretation under the loupe of scholars and especially of the International Criminal Court demonstrates the crucial role that subparagraph 3 plays in expanding the human rights protection entailed in the Rome Statute. Thus, examination of the theoretical explanations of the core provision pertaining to human rights provides for a better analyses of the contribution that the ICC delivers toward the enforcement of human rights. The following passages elaborate on different approaches perceived from scholars in relation to the consideration of Article 21 (3), in addition to the definition of “internationally recognized human rights”. Further, it previews an insightful analysis pertaining to the raised debates in scholarly literature as to the superiority of internationally recognized human rights towards the application and interpretation of the law consistently with internationally recognized human rights. Following the approaches embraced by different scholars, the chapter

¹⁴ Emma Irving, “The other side of the Article 21 (3) coin: Human rights in the Rome Statute and the limits of Article 21 (3)” (2019) Vol 32 (4) Leiden Journal of International Law. <<https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/other-side-of-the-article-213-coin-human-rights-in-the-rome-statute-and-the-limits-of-article-213/B48B305A27B512600E635542C4A4AB61>> accessed 10 January 2023

illustrates a practical approach regarding the protection and enforcement of victims' human rights and recognition of gender-based and sexual crimes as human crimes, by means of article 21 (3).

1.1. Application of Article 21 (3) of the Rome Statute

Article 21 of the Rome Statute dictates the process through which the ICC determines the applicable law to matters that come before it. It contains mandatory language requiring the court to adhere to a three-step hierarchical process to determine the law applicable to any situation, both substantive and procedural, that comes before the Court.¹⁵ According to Article 21, "*The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards. 2. The Court may apply principles and rules of law as interpreted in its previous decisions. 3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status*".¹⁶

The drafters of the Rome Statute did not follow the precedent of Article 38 of the Statute of the International Court of Justice ("ICJ")¹⁷, which contains a list of the recognized sources of international law without a hierarchy between them¹⁸ that include: treaties, customary international law, general principles of law recognized by civilized nations, and judicial decisions and the writings of highly qualified publicists, as secondary sources of international law.¹⁹ These principal

¹⁵ Colin Flynn, "Is Article 21 of the Rome Statute an Impediment to the Development of Sentencing Principles at the International Criminal Court" (2020) 32 (1) Florida Journal of International Law. <<https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1617&context=fjil>> accessed 10 January 2023

¹⁶ *Supra*, note 5. Article 21.

¹⁷ Article 38 of the Statute of the ICJ runs as follows: "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." <<https://www.icj-cij.org/en/statute>> accessed 10 January 2023

¹⁸ Gilbert Bitti, *Article 21 of the Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC*, in *The Emerging Practice of the International Criminal Court* (Brill | Nijhof, 2009). <https://brill.com/view/book/edcoll/9789004180758/Bej.9789004166554.i-774_018.xml> accessed 10 January 2023

¹⁹ *Supra*, note 15, 57.

sources of international law are treated as equal in importance as there is nothing in the wording of the ICJ statute, or in customary international law, to give priority to either of the first three sources of international law.²⁰

Following the wording of Article 21 (1) (a), according to which “*the court shall apply [...]*” it is required that the ICC applies in the first place the Statute, Elements of Crimes and its Rules of Procedure and Evidence. There is an internal hierarchy within the first subparagraph of article 21 and the Statute prevails over the Rules of Procedure and Evidence in accordance with Article 51 (5) of the Rome Statute.²¹ Additionally, in accordance with Article 9 of the Rome Statute²², the Elements of Crimes are subordinated to the Statute; therefore in case of conflict, the Elements are overridden by the Statute itself.²³ Nonetheless, the exact relationship between the Elements of Crimes and the Statute has not been elaborated in the jurisprudence of the Court although the Pre-Trial Chambers have made reference to them.²⁴ Secondly, if the application of the above mentioned sources leaves gaps or ambiguities, the Court is required to proceed with the application of treaties and the principles and rules of international law, and, failing that, general principles of law shall be applied if the outcome would be consistent with the Statute, the international law and internationally recognized norms and standards. In this framework, the Appeals Chamber has corroborated that subparagraphs (b) and (c) of article 21 come into play if there is a *lacuna* in the written law contained in the Statute, the Elements of Crimes and the Rules; and if such *lacuna* cannot be filled by the application of the criteria of interpretation provided in articles 31 and 32 of the Vienna Convention on the Law of the Treaties and *article 21(3) of the Statute*.²⁵

²⁰ *Ibid.*

²¹ *Supra*, note 18, 290.

Article 51 (5) of the Rome Statute sets out: “*In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.*”

²² Article 9 (1) of the Rome Statute sets out: “*Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8bis. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.*”

²³ William A. Schabas, *An introduction to the International Criminal Court* (4th edn, Cambridge University Press, 2011), 207.

²⁴ *Supra*, note 18, 290.

See also: *The Prosecutor v. Lubanga Dyilo*, Pre-Trial Chamber I, Decision on the Confirmation of the Charges (7 February 2007), ICC-01/04-01/06-803-tEN, para. 205, 240, 302 357-360. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2007_02360.PDF> accessed 10 January 2023; *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Al Abd-Al-Rahman*, Pre-Trial Chamber I, Decision on the Prosecution Application under Article 58 (7) of the Statute (29 April 2007), ICC-02/05-01/07-1-Corr, para. 29, 43. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2007_02899.PDF> accessed 10 January 2023

²⁵ *The Prosecutor v. William Samoeiruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11 (23 January 2012), para. 289. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_01004.PDF> accessed 10 January 2023; *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09 (4 March 2009), para. 44. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_01517.PDF> accessed 10 January 2023; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, Decision on the confirmation of charges, ICC-01/04-01/07 (30 September 2008), para. 508. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2008_05172.PDF> accessed 10 January 2023

Article 21 (2) calls upon the ICC to apply its own case law without distinguishing the jurisprudence of the pre-trial, trial or appeals chambers of the Court.²⁶ Nonetheless it is up to the Court's discretion to rely upon its previous decisions.²⁷

Article 21 (3) which is the main subject of discussion, purports to regulate the impact of international human rights norms on the law and practice of the ICC, in providing that 'the interpretation and application of law pursuant to this Statute must be consistent with internationally recognized human rights'.²⁸ The Appeals Chamber has found "*Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights; first and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety [...]*".²⁹ Although the wording of Article 21 (3) – interpretation and application of the law shall be in line with the internationally recognized human rights – leaves little room for interpretations, it has raised debates in scholarly literature as to its superior status and the meaning of 'internationally recognized human rights'.

Zeegers describes Article 21 (3) as a provision putting in place a 'mandatory principle of consistency' rather than making human rights a separate and additional source of law to those listed in Article 21(1).³⁰ When the Court is applying Article 21 (1), it must verify whether the interpretation or application of that article or principle is consistent with human rights.³¹ If the proposed interpretation or application would not be consistent, then it must be reconsidered; if the relevant provision or principle is incapable of being interpreted and applied consistently with human rights, then the Court cannot apply it at all.³² Thereby, the provision creates a normative hierarchy in which such norms are *superior* to those contained in the Court's internal legal instruments, including the Statute.³³ Zeegers argues that a plain reading of Article 21 (3) does not allow for a different conclusion than that it elevates human rights norms to the status of *lex superior*.³⁴ In addition, if the drafters of the Statute had not intended Article 21(3) to create a superiority of internationally recognized human rights over the Statute, this could have simply

²⁶ *Supra*, note 18, p. 292.

²⁷ Rebecca Young, "Internationally Recognized Human Rights' before the International Criminal Court" (2011) 60 (1) The International and Comparative Law Quarterly. <https://www.jstor.org/stable/23017103?saml_data=eyJzYW1sVG9rZW4iOiJlNmQ2MTdjNi1mNDFiLTQzZTgtOTk3YS1iMDJkMzlhN2YyMTliLCJpbmN0aXR1dGlvbkklkcyI6WyI2ZjMyNDZjZjhmLTQzMWEtOTdjMy0xZTQxMzUyNjYwYzkiXX0#metadata_info_tab_contents> accessed 10 January 2023

²⁸ Krit Zeegers, *International Criminal Tribunals and Human Rights Law: Adherence and Contextualization*, Vol 5, (Asser Press 2016), 73. <<https://link.springer.com/book/10.1007/978-94-6265-102-9>> accessed 10 January 2023.

²⁹ *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, ICC-01/04-01/06 (OA4) (14 December 2006). <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2007_01307.PDF> accessed 10 January 2023

³⁰ *Supra*, note 28, 78.

³¹ *Supra*, note 14, 839.

³² *Ibid.*

³³ *Supra*, note 28, 73.

³⁴ *Ibid.*, 76.

been specified in the provision by exempting the Statute from the consistency requirement.³⁵ According to Pellet, if there would be a conflict between the Rome Statute or any other applicable law and human rights, the latter would "trump" norms contained in the Statute.³⁶ This view would imply that the judges of the ICC must not apply certain provisions they presume to be inconsistent with internationally recognized human rights.³⁷ Any other interpretation of the provision, according to which the Statute would be superior to human rights, would still allow the ICC to interpret and apply norms in a manner that would violate such rights, which would go against the terms of Article 21(3).³⁸ This approach is supported by the jurisprudence of the Court. For instance, the Trial Chamber I in the case of *Lubanga*³⁹ makes the interpretation and application of the law applicable under the Statute subject to internationally recognized human rights. In this light, the Chamber has drawn on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law as the source to defining 'victims'. In the same decision, reference to the Convention on the Rights of the Child has been made with regards to the best interest of the child.⁴⁰ The Appeals Chamber further explains that "*human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights.*"⁴¹ In the course of *Katanga and Ngudjolo* case,⁴² it was found that, in the light of Article 21 (3), the provisions of the Rome Statute must be applied and interpreted consistently with internationally recognized human rights standards.⁴³ Recognition of the right of a detained person to receive family visits, according to the Presidency, is in line with the international human rights law – the right to family life – and for that to be an effective right, the Court has an obligation to fund periodic visits of the detainee family members.⁴⁴ These conclusions were based on the

³⁵ *Ibid.*

³⁶ A. Pellet, "Applicable Law", in Gerhard Hafner and Christina Binder, "The Interpretation of Article 21 (3) ICC Statute, Opinion Reviewed" (2004) 9 Austrian Review of International and European Law. <<https://heinonline.org/HOL/LandingPage?handle=hein.inttyb/aurviel0009&div=9&id=&page=>> accessed 10 January 2023

³⁷ *Ibid.*

³⁸ Daniel Sheppard, "*The International Criminal Court and 'Internationally Recognized Human Rights': Understanding Article 21(3) of the Rome Statute*", in Krit Zeegers, International Criminal Tribunals and Human Rights Adherence and Contextualization (Asser Press 2016), 77.

³⁹ *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision on victim's participation, ICC-01/04-01/06 (18 January 2008), para. 35. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2008_00364.PDF> accessed 10 January 2023

⁴⁰ *Ibid.*, para. 36 – 37.

⁴¹ *The Prosecutor v. Germain Katanga*, Trial Chamber II, Decision on the Protection of Prosecution Witnesses 267 and 353, ICC-01/04-01/07 (28 May 2009), para. 14. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_09404.PDF> accessed 10 January 2023

⁴² *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, The Presidency, Decision on "Mr. Mathieu Ngudjolo's Complaint Under Regulation 221(1) of the Regulations of the Registry Against the Registrar's Decision of 18 November 2008, ICC-RoR-217-02/08 (10 March 2009. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_02787.PDF> accessed 10 January 2023

⁴³ *Ibid.*, para. 27.

⁴⁴ *Ibid.*, para. 30.

Standard Minimum Rules for the Treatment of Prisoners, the Standards of the European Committee for the Prevention of Torture,⁴⁵ in addition to the jurisprudence of the European Court of Human Rights and of other international criminal tribunals.⁴⁶

Nevertheless, several authors have contested such conclusions. Gallant argues that such rights are adopted ‘as part of the ICC Statute’, and ‘they are not stated as being superior to the ICC Statute itself’; therefore, any inconsistency between the Statute and an internationally recognized human right should not be automatically solved in favor of the right.⁴⁷ Likewise, according to Hafner and Binder, paragraph 3 requires that the Court’s “application and interpretation” of the law “must be consistent with internationally recognized human rights”, whereas it fails to establish the superiority of human rights as such.⁴⁸ Had the drafters intended to establish a super-legality of human rights, they would have phrased Article 21 differently, by requiring, for example, the compliance of the applicable law with human rights a prerequisite for its application by the Court.⁴⁹ Furthermore, the authors point out that if the superiority of human rights had been the aim, paragraph 3 would have been positioned at the beginning of Article 21 rather than added in the last paragraph.⁵⁰ Further, provisions of the Statute have explicitly referred to international human rights standards, such as exclusion of evidence – in Article 69 (7) of the Rome Statute, or principles of due process recognized by international law, in accordance with Article 17 of the Rome Statute, thus placing the internationally recognized human rights on the same footing as the Statute itself.⁵¹ The authors argue that these provisions would not be necessary if the superiority of human rights were established by Article 21(3).⁵² However, the authors conclude that the application of Article 21 (3) to the other sources of applicable law mentioned in Article 21, particularly Elements of Crimes and Rules of Procedure and Evidence, leads to a different result.⁵³ Rules that are guiding the application and interpretation of the Statute (Rules of Procedure and Evidences as well as the Elements of Crimes) would be trumped in case of an inconsistency with “internationally recognized human rights”, therefore the Court can decide not to apply an Element of Crimes or a Rule of Procedure and Evidence.⁵⁴ A similar approach is embraced by Verhoeven who claims that

⁴⁵ *Ibid*, para. 27.

⁴⁶ *Ibid*, para. 28.

⁴⁷ K. Gallant, *Individual human rights in a new international organization: the Rome Statute of the International Criminal Court*, in Krit Zeegers, *International Criminal Tribunals and Human Rights Adherence and Contextualization* (Asser Press 2016), 75.

⁴⁸ Gerhard Hafner and Christina Binder, “The Interpretation of Article 21 (3) ICC Statute, Opinion Reviewed” (2004), Vol. 9, Austrian Review of International and European Law. <https://heinonline.org/HOL/LandingPage?handle=hein.inttyb/aurviel0009&div=9&id=&page=>> accessed 10 January 2023

⁴⁹ *Ibid*.

⁵⁰ *Ibid*.

⁵¹ *Supra*, note 47, 175.

⁵² *Ibid*.

⁵³ *Ibid*.

⁵⁴ *Ibid*.

Article 21 (3) cannot imply that human rights systematically trump the Statute.⁵⁵ That would mean that if the Court finds the applicable rules to be inconsistent with internationally recognized human rights, it would have to create law, which it is not for a court, at least in civil law tradition, to do and especially not for a criminal court.⁵⁶ The author further argues that, similarly as in national law, criminal rules are always of an '*order public*' character, and they must be construed so as to avoid any inconsistency with other rules of the same character, including human rights, but if consistent interpretation proves impossible, they cannot be set aside simply because of such inconsistency.⁵⁷ The author suggests that if a conflictual interpretation between the procedural and substantive norms of the Statute and the internationally recognized human rights cannot be avoided by a conciliatory interpretation, the will of the 'international community' is suggested to be ascertained in each particular case.⁵⁸

The Court itself has showed at times limited understanding of Article 21 (3), concluding that internationally recognized human rights shall precede the text of the Statute if a lacuna in the latter is established;⁵⁹ however the vast majority of the jurisprudence of the Court affirms the normative hierarchy in which internationally recognized human rights trump the Statute.⁶⁰ The Appeals Chamber, Trial and Pre-Trial Chambers have held an unwavering position with regards to the application and interpretation of provisions of the Statute in a manner that complies with internationally recognized human rights, as postulated in Article 21 (3).⁶¹ Nonetheless, it must be

⁵⁵ J. Verhoven, *Article 21 of the Rome Statute and the Ambiguities of Applicable Law*, in Krit Zeegers, "International Criminal Tribunals and Human Rights Law Adherence and Contextualization", (Asser Press 2016), 75. <<https://link.springer.com/book/10.1007/978-94-6265-102-9>> accessed 10 January 2023

⁵⁶ J. Verhoeven, "Article 21 of the Rome Statute and the ambiguities of applicable law" (2002) 33 *Netherlands Yearbook of International Law*. <<https://www.cambridge.org/core/journals/netherlands-yearbook-of-international-law/article/abs/article-21-of-the-rome-statute-and-the-ambiguities-of-applicable-law/2B4217E3432C66378C065E3C7EB91254>> accessed 10 January 2023

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ See for instance: *The Prosecutor v. Thomas Lubanga Dyilo*, The Appeals Chamber, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo", ICC-01/04-01/06 (OA 7) (13 February 2007), in which the majority of the Appeals Chamber does not consider it necessary to address the human rights aspects of the Appellant's pre-trial detention since the conclusions has been reached based on the interpretation of the fundamental legal text of the Court, para. 107. < https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2007_01422.PDF> accessed 10 January 2023; Also in the case of *The Prosecutor v. Samoeiruto, Kosgey and Sang*, the Court held that if a gap in the Statute exists, it must be filled by resort to Article 21 (3).

⁶⁰ *Supra*, note 28, p. 80.

⁶¹ See for instance: *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo" (13 February 2007), para. 16 – 17, 110; *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision on victims' participation (18 January 2008), para. 35; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber III, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, ICC-01/05-01/08, para. 13,17. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2008_04592.PDF> accessed 10 January 2023. In the latter case, the Chamber referred to international legal instruments such as the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms etc. to interpret aspects of the fair trial.

underlined that the Court's interpretation and application of the provision still lacks a coherent understanding.

One problematic aspect of Article 21 (3) is that it fails to indicate what is meant by 'internationally recognized human rights',⁶² and the Court's jurisprudence has failed to adequately fill in this gap.⁶³ Although the incorporation of Article 21 (3) signifies a commitment to making human rights fundamental to the ICC legal framework, the lack of a methodology for identifying which rights are included remains a source of uncertainty⁶⁴ thus imposing a burden on the parties involved within the process. Participants in proceedings cannot customize their submissions or meaningfully plan ahead with a clear understanding of how a dispute may be resolved without foreknowledge of what those obligations are or even how to determine what they are.⁶⁵ On the other hand, authors have concluded that the vagueness⁶⁶ of the term gives unduly indeterminate powers to the Court.⁶⁷ In the words of Arsanjani, "*while the original intention behind this paragraph may have been to limit the court's powers in the application and interpretation of the relevant law, it could have the opposite effect and broaden the competence of the court on these matters*".⁶⁸

During the *travaux préparatoires* of the Rome Statute, the notion 'internationally recognized human rights' led to little discussion although the provision was consensually supported. Nonetheless, read within its contexts, Article 21 (3) indicates that the human rights in question, whatever their source must benefit from a degree of broad support.⁶⁹ In attempting to interpret the term, Judge Pikis noted, on a separate opinion in the *Lubanga* case that "*Internationally recognized [human rights] may be regarded those human rights acknowledged by customary international law and international treaties and conventions*".⁷⁰ In light of the obligation of the court with respect to Article 21 (3), Judge Pikis enumerated the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention for the Protection of Human

⁶² Dapo Akande, *Part A Major Problems of International Criminal Justice, II Fundamentals of International Criminal Law, Sources of International Criminal Law*, in *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009), 47. <https://www.ejiltalk.org/wp-content/uploads/2018/12/AkandeSourcesofIntCrimLaw.pdf> accessed 23 January 2023

⁶³ Daniel Sheppard, "The International Criminal Court and "Internationally Recognized Human Rights": Understanding Article 21 (3) of the Rome Statute" (2010) 10 (1) *International Criminal Law Review*. <https://brill.com/view/journals/icla/10/1/article-p43_3.xml?language=en> accessed 10 January 2023

⁶⁴ *Supra*, note 14, 840.

⁶⁵ *Supra*, note 63.

⁶⁶ *Supra*, note 63, 175.

⁶⁷ *Supra*, note 62, 47.

⁶⁸ Mahnoush H. Arsanjani, "The Rome Statute of the International Criminal Court" (1999) 93 (1) *The American Journal of International Law*. <https://www.jstor.org/stable/pdf/2997954.pdf?refreqid=excelsior%3Af596be22426ccdb9679ae161b9bee470&ab_s egments=&origin=&acceptTC=1> accessed 10 January 2023

⁶⁹ *Supra*, note 27, 199.

⁷⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Decision on the Prosecutor's "Application for Leave to Reply to 'Conclusions de la défense en réponse au mémoire d'appel du Procureur'", ICC-01/04-01/06 (12 September 2006), Separate Opinion of Judge Georgios M. Pikis, 6. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2006_03055.PDF> accessed 10 January 2023

Rights and Fundamental Freedoms, the American Convention on Human Rights and the African Charter on Human and People's Rights as the international instruments providing protection to the right to a fair trial. From this, he drew the conclusion that the incorporation of this right to international legal instruments denotes comprehensive assent to its emergence as a principle of customary international law.⁷¹ Regrettably, this review of Judge Pikis did not provide a noteworthy insight on the issue. As Sheppard reasonably notes, the brief account of Judge Pikis could lead to several interpretations as it left many questions unaddressed; the Judge regarded universal acceptance of a norm as sufficient to engage Article 21 (3), but he did not elaborate whether regional customary principles may apply or if postulation of a right in any international treaty or convention is sufficient to fall under the principles of customary international law, the minimum number of ratifications to a convention, etc.⁷² The practice of the ICC nevertheless proffers little insight – in applying Article 21 (3), the Court generally refrains from explaining either the meaning of ‘internationally recognized human rights’ or the method of identifying and incorporating concurrent sources of international instruments when addressing if a particular right falls within the scope of ‘internationally recognized human rights’ although the Court has referred to several international/universal human rights instruments.

Hafner and Binder illustrate a more precise definition of the term. *Firstly*, they argue that ‘internationally recognized human rights’ include all human rights that are “accepted and recognized by the international community of States as a whole as a norm from which the derogation is not allowed”, known as *ius cogens*.⁷³ *Secondly*, all human rights recognized as universal customary international law can be considered to be covered by the ‘internationally recognized human rights’ (*peremptory norms*).⁷⁴ *Thirdly*, treaty laws are considered to fall under the ‘internationally recognized human rights’ provided that the treaty reaches beyond regional recognition; therefore regional conventions such as the European Convention on Human Rights or the American Convention of Human rights would be excluded as the rights covered are not ‘internationally recognized’.⁷⁵ *Fourthly*, core international human rights instruments such as CERD, CCPR, CESCR, the CEDAW, the CAT, the CRC and the MWC, altogether with the Optional Protocols, as well as other universal human rights treaties published by the Office of the UN High Commissioner for Human Rights will be considered ‘internationally recognized human rights’ provided that the content of the treaty, the status of ratification and the geographical distribution of its States Parties satisfy the ‘internationally recognized human rights’.⁷⁶ In this case, universal and widely ratified human rights treaties shall be presumed as ‘internationally recognized’ and the opponent shall bear the burden to prove that the human right set out in an instrument does not meet the condition of ‘internally recognized’.⁷⁷ In any case, the examination

⁷¹ *Ibid.*

⁷² *Supra*, note 63, 48 – 49.

⁷³ *Supra*, note 48, 186.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

and classification of human rights as ‘internationally recognized’ can be determined by the Court in a step by step approach by firstly deciding whether it falls under *ius cogens*, to continue with peremptory norm or general customary international law and lastly with the universal human rights instruments.⁷⁸

As it derives from the above, the ICC has refrained from being decisive regarding the application and interpretation of Article 21 (3), nor has it adequately indicated what instruments or rights fall under the internationally recognized human rights. However, despite the fact that reference to Article 21 (3) in the practice of the Court has not been unified, the provision has showed a significant potential for its use in the future. Such different interpretation and application of paragraph 3 might derive from the fact that the protection of human rights relevant to the ICC’s practice, such as the right to a fair trial and participation of victims in proceedings are explicitly set out in the Rome Statute. Therefore, the potential of Article 21 (3) will become more evident when the Court shall have to deal with cases not explicitly mentioned by the Statute. Despite that, explanation of approaches with regard to article 21 (3) is essential to comprehend the role of this provision within the legal framework of the ICC, and by extension, the limits it might possess in enforcing human rights by the ICC.

In the following passages, we will explore the extent to which the ICC has implemented paragraph 3 of Article 21, to better comprehend its approach with regard to the interpretation of the said provision in comparison to internal acts. Further, through a comparative analysis, conclusions pertaining to the contribution of the ICC in enforcing human rights, by invoking article 21 (3) or, otherwise solely internal acts, shall be drawn. This will particularly serve to deduce the interplay between this article, the approach of the ICC and the extent to which such interplay affects the enforcement of human rights by the court.

1.2. Recognition of sexual and gender-based crimes under the loupe of the ICC. The situation in the Democratic Republic of Congo.

Gender and sexual violence crimes were generally viewed of little importance by international humanitarian law treaties. They were usually omitted from such treaties due to countless reasons such as the “*sexist belief that rape is a natural part of every war*”.⁷⁹ Further, during the early stage of drafting the Rome Statute, both governments and mainstream human rights groups were paying little attention to gender issues.⁸⁰ The Rome Statute goes a long way in acknowledging the issue of gender violence. The achievements of the women’s rights movement at the World Conference

⁷⁸ *Ibid*, 190.

⁷⁹ Barbara Bedont and Katherine Hall-Martinez, “Ending Impunity for Gender Crimes under the International Criminal Court” (1999) 6 (1) The Brown Journal of World Affairs. <https://www.jstor.org/stable/24590222?readnow=1&refreqid=excelsior%3A8a687ace4534217d34b24f08350045d4#page_scan_tab_contents> accessed 10 January 2023

⁸⁰ *Ibid*, 66.

on Human Rights, held in Vienna in 1993 (“the Vienna Conference”) and the fourth World Conference on Women, held in Beijing in 1995 (“the Beijing Conference”) gave the Women’s Initiatives for Gender Justice (formerly Women’s Caucus for Gender Justice)⁸¹ the authority for many of its proposals.⁸² At the Vienna Conference governments condemned gender-based violence and violence against women in war situations and called on governments to integrate women’s rights into the mainstream of the UN System.⁸³ At the same time, the recent conflicts in the former Yugoslavia and Rwanda and the publicized mass rapes committed during those conflicts shocked the conscience of the world and spurred the creation of two *ad hoc tribunals*.⁸⁴ The issues in war had therefore received much attention, and as a result, the vast majority of states at the Rome Diplomatic Conference supported the integration of gender provisions in the statute.⁸⁵ Acts of “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” have accordingly been included.⁸⁶ Nonetheless, commentators have been most critical of the ICC’s dismal prosecution record: in its first decade the ICC failed to secure a single conviction for sexual and gender-based crimes.⁸⁷⁸⁸

Prior to the creation of *ad-hoc tribunals*, sexual and gender-based violence had been left out in all international criminal law. The Nuremberg International Military Tribunal’s ruling omitted the phrase “rape”,⁸⁹ and other sexual crimes were specifically not mentioned in its “Charter”. These crimes could have been nonetheless prosecuted under more general provisions such as crimes against humanity, inhumane acts or the war crime of ill-treatment.⁹⁰

The Statute of the International Criminal Tribunal for Former Yugoslavia (“ICTY”) and of the International Criminal Tribunal for Rwanda (“ICTR”) recognized ‘rape’ as a crime against humanity.⁹¹ Furthermore, the ICTR Statute enumerated other acts pertaining to rape, enforced

⁸¹From 1997 until March 2003 the Women’s Caucus for Gender Justice brought together women’s human rights advocates from around the world to the negotiations towards the creation of the International Criminal Court (ICC) to firmly ingrain the principles of gender justice and accountability for crimes of sexual and gender violence in the Rome Statute. For further details access the link: <<https://4genderjustice.org/>>

⁸² *Supra*, note 79.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Supra*, note 5. Article 7 (1) (g) of the Rome Statute.

⁸⁷ Louise Chappell, “The gender injustice cascade: ‘transformative’ reparations for victims of sexual and gender-based crimes in the Lubanga case at the International Criminal Court” (2017) 21 (9) The International Journal of Human Rights. <<https://www.tandfonline.com/doi/full/10.1080/13642987.2017.1360006?needAccess=true>> accessed 10 January 2023

⁸⁸ The International Criminal Court issued the first historical conviction for crimes of sexual violence against Jean-Pierre Bemba, on 21 March 2016.

⁸⁹ Tanja Altunjan, “The International Criminal Court and Sexual Violence: Between Aspirations and Reality” (2021) 22 (5) German Law Journal. <<https://www.cambridge.org/core/services/aop-cambridge-core/content/view/6B37A67C8196A6159237A893D2A5722A/S2071832221000456a.pdf/the-international-criminal-court-and-sexual-violence-between-aspirations-and-reality.pdf>> accessed 10 January 2023

⁹⁰ *Ibid.*

⁹¹ Article 5 (Crimes against humanity) of the ICTY Statute sets out: “*The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or*

prostitution and any form of indecent assault as war crimes.⁹² Both Tribunals addressed sexual crimes and set significant precedents. The ICTY procured the first landmark case on sexual violence – *Prosecutor v. Tadić* – setting two unprecedented rulings: *first*, it was the very first international trial holding the alleged perpetrator accountable for sexual violence under crimes against humanity⁹³ and *secondly*, held the accused accountable for sexual violence against men,⁹⁴ which had not been addressed before by any other court.

Similarly, the ICTR has made contributions with regard to the definition and criminalization of rape under the crime of genocide, the first international criminal tribunal to do so. In the case of *Akayesu*⁹⁵ the Chamber recognized that “genocidal rape” during the Rwandan genocide happened to certain women because of their ethnicity – specifically to Tutsi women or Hutu women married to Tutsi men.⁹⁶ In addition, the tribunal adopted a broader and gender-neutral definition of rape, outlining it as “*a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact*”,⁹⁷ following the approach of the Convention against Torture, which “does not catalogue specific acts” focusing rather on the “conceptual framework of state-sanctioned violence”.⁹⁸ The tribunal nonetheless took a different approach in the trial of *Furundzija*. The Trial Chamber, in absence of definitions by international legal acts was challenged with addressing the elements of rape, putting aside the definition already procured in

internal in character, and directed against any civilian population: (g) rape.”
https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf accessed 10 January 2023;

Article 3 (Crimes against humanity) of the ICTR sets out: “*The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (g) rape.*”
<https://www.ohchr.org/en/instruments-mechanisms/instruments/statute-international-criminal-tribunal-prosecution-persons#:~:text=Additional%20Protocol%20II-.The%20International%20Tribunal%20for%20Rwanda%20shall%20have%20the%20power%20to,thereto%20of%2008%20June%201977> accessed 10 January 2023

⁹² *Ibid.* Article 4 (e) of the ICTR Statute sets out: “*The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to: (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.*”

⁹³ *The Prosecutor v. Duško Tadić*, Trial Chamber, Opinion and Judgement, IT-94-1-T (7 May 1997).
<https://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf> accessed 10 January 2023

⁹⁴ *The Prosecutor v. Duško Tadić*, Appeals Chamber, Judgement, IT-94-1 – A (15 July 1999).
<https://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf> accessed 10 January 2023

⁹⁵ *The Prosecutor v. Jean-Paul Akayesu*, Trial Chamber I, ICTR-96-4-T (2 September 1998), para 494.
<https://unict.irmct.org/sites/unict.irmct.org/files/case-documents/ict-96-4/trial-judgements/en/980902.pdf> accessed 10 January 2023

⁹⁶ Sherrie L. Russell-Brown, “Rape as an Act of Genocide” (2003) 21 (2) Berkeley Journal of International Law.
https://genderandsecurity.org/sites/default/files/Russell-Brown_-_Rape_as_an_Act_of_Genocide.pdf accessed 10 January 2023

⁹⁷ *Supra*, note 95, para 688.

⁹⁸ *Ibid.*, para 687, 597.

the case of Akayesu. The tribunal concluded that “*the following may be accepted as the objective elements of rape: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person*”.⁹⁹ According to the Chamber, under the provisions of the Tribunal’s Statute, rape may amount to an act of genocide, if the requisite elements are met, and may be prosecuted accordingly.¹⁰⁰ Other cases under which the tribunals have given significant contribution into the fight against sex and gender crimes include *Krstić*, in which the tribunal analyzed the link between rape and ethnic cleansing; *Mucić* in which the tribunal recognized rape as a form of torture; *Kunarac* in which the acts constituting enslavement under crimes against humanity were broadened so as to include sexual enslavement, etc.¹⁰¹ The jurisprudence of the ICTY and ICTR were indeed the foundation for the codification of crimes of sexual violence in the Rome Statute.¹⁰²

Despite these significant developments, the subject of gender sensitivity and sexual crimes during the preparations of the ICC Statute remained greatly divisive. During this time, the “Women’s Caucus for Gender Justice in the Criminal Court” was established by a group of women’s rights activists and organizations.¹⁰³ When it became clear that gender issues would receive very little attention, they began pushing for the inclusion of a gender perspective in the Statute. They were successful in recommending that the list of offences based on gender and sex be expanded. Additionally, during the negotiation process of defining sexual crimes the Women’s Caucus pushed for the use of term ‘gender’ instead of ‘sex’ as the latter is narrower and *refers to the biological differences between men and women, whereas gender includes differences between men and women because of their socially constructed roles*.¹⁰⁴ As a result, the broader term of ‘gender’ and ‘gender crimes’ instead of the terms ‘sex’ and ‘sexual crimes’ were included in many provisions of the Rome Statute, which signified a victory in the path toward consistency with the international instruments.¹⁰⁵

With regard to the ability to prosecute a variety of sexual and gender-based offenses, the establishment and consequent ratification of the Rome Statute undoubtedly constitutes a significant advancement. Prior to the adoption of gender provisions in the Statute, the impunity

⁹⁹*The Prosecutor v. Anto Furundzija*, Trial Chamber, Judgement (10 December 1998), para 185. <<https://www.icty.org/x/cases/furundzija/tjug/en/>> accessed 10 January 2023

¹⁰⁰ *Ibid.*, para 172.

¹⁰¹ United Nations, International Criminal Tribunal for former Yugoslavia. <<https://www.icty.org/en/features/crimes-sexual-violence/landmark-cases>> accessed 10 January 2023

¹⁰² Miranda Da and Sukhdev Singh, “Crimes of Sexual Violence within International Criminal Law: A Historical Outline” (2021) 14 (1) Journal Politics and Law. <<https://www.ccsenet.org/journal/index.php/jpl/article/view/0/44254>> accessed 10 January 2023

¹⁰³ Women’s Caucus for Gender Justice, “Recommendations and Commentary for December 1997 PrepCom on the Establishment of an International Criminal Court” (1997). <<https://www.legal-tools.org/doc/5y68yv/pdf>> accessed 10 January 2023

¹⁰⁴ *Supra*, note 79, 68.

¹⁰⁵ *Ibid.*

long enjoyed by perpetrators was perpetuated by the inadequate treatment of these crimes under prior legal instruments.¹⁰⁶ Thus, inclusion of gender-based crimes serves as an encouraging key to ending impunity for such crimes. The Statute identifies several particular crimes against humanity and war crimes included in the relevant articles pertaining to gender-based and sexual crimes. Furthermore, the Elements of Crimes and the Rules of Procedure and Evidence embody several provisions concerned with sexual and gender-based crimes, aimed at helping the ICC in the implementation of sanctions and punishments of sexual crimes in an effective and gender-neutral manner.¹⁰⁷

While explicit criminalization of the abovementioned offenses is important as it allows victims to seek justice against their perpetrators and expressly categorizes certain acts as crimes, the application of the Rome Statute has often proven to be difficult. Even twenty-two years after its establishment, the ICC has been successful in rendering only one final conviction for sexual crimes,¹⁰⁸ one decision overturned by a divided Appeals Chamber¹⁰⁹ and another one currently under review.¹¹⁰

In analyzing the role that the ICC has played in protecting women and children's rights, the following passages pertaining to the situation in the Democratic Republic of Congo portray a relevant case to examine as it relates to victims of sexual assault, rape, sexual slavery (in addition to other crimes) in the context of crimes against humanity and war crimes. The investigation led to three convictions: in the cases of *The Prosecutor v. Thomas Lubanga Dyilo*, *The Prosecutor v. Germain Katanga* and *The Prosecutor v. Bosco Ntaganda*.¹¹¹ Although not all of the accused were punished for sexual and gender crimes, the cases allow for the exploration of the ICC approaches throughout the process.

Firstly, prior to undertaking legal actions before the ICC, the Prosecutor assesses whether the Court has jurisdiction. Under Article 12 of the Rome Statute, the ICC has jurisdiction over crimes

¹⁰⁶ *Ibid*, 69.

¹⁰⁷ See for instance Elements of Crimes, Article 7(1)(g)-1, Article 7(1)(g)-2; Article 8(2)(b)(xxii)-1, Article 8(2)(e)(vi)-1 etc. <<https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>> accessed 10 January 2023

¹⁰⁸ *The Prosecutor v. Bosco Ntaganda*, Appeals Chamber, Judgment on the appeals of Mr. Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment', ICC-01/04-02/06 A A2 (30 March 2021). <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_03027.PDF> accessed 10 January 2023; *The Prosecutor v. Bosco Ntaganda*, Judgment, Trial Chamber VI, ICC-01/04-02/06 (8 July 2019). <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_03568.PDF> accessed 10 January 2023

¹⁰⁹ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", ICC-01/05-01/08 A (8 June 2018). <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_02984.PDF> accessed 10 January 2023

¹¹⁰ *The Prosecutor v. Dominic Ongwen*, Trial Chamber IX, Trial Judgment, ICC-02/04-01/15 (4 February 2021). <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01026.PDF> 10 January 2023

¹¹¹ *icc-cpi.int*, Situation in the Democratic Republic of the Congo, ICC-01/04. <<https://www.icc-cpi.int/drc>> accessed 10 January 2023

committed in Party States or states that have acceded to the Statute¹¹² and respectively for crimes that have occurred after the entrance into force of the Statute, or if a State has accepted the jurisdiction of the Court after this moment, the Court shall exercise its jurisdiction after the date of entrance into force of the Statute for that particular State.¹¹³ The Democratic Republic of Congo had ratified the Rome Statute in April 2002, and the alleged crimes were committed in the context of armed conflict in Eastern DRC, the Ituri region and the North South Kivu Provinces, satisfying thus both *ratione temporis* and *ratione loci*. In conformity with the principle of complementarity, a case shall be admissible before the Court just when the national legal system fails or is not willing to investigate or prosecute.¹¹⁴ The situation in the Democratic Republic of Congo was referred by its Government as a result of inadequate measures to protect the victims of sexual violence.¹¹⁵ Consequently, the case was found to be admissible under the jurisdiction of the Court.

Thomas Lubanga Dyilo, the former president of the Union des Patriotes Congolais, was brought to the ICC on charges of the war crimes of enlisting or conscripting and active participating in atrocities of children under the age of 15 years old. During the early stages of the proceedings of the *Lubanga* case, the Prosecutor did not include any charges of sexual violence despite the concerns voiced by human rights groups that Lubanga's troops had allegedly committed sexual abuses against young girls who had been recruited into the armed groups.¹¹⁶ Nonetheless, with the commencement of the trial, the prosecution stated that it had obtained evidence of sexual assault

¹¹² *Supra*, note 5. Article 12 of the Rome Statute sets out the preconditions to the exercise of jurisdiction: "A State which becomes a **Party to this Statute** thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5. 2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or **have accepted the jurisdiction** of the Court in accordance with paragraph 3: (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national. 3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, **by declaration** lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9."

¹¹³ *Ibid*, Article 11 of the Rome Statute sets out the jurisdiction *ratione temporis*.

¹¹⁴ *Ibid*, Article 17 of the Rome Statute sets out: "1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court."

¹¹⁵ Tina R. Karkera, "International Criminal Court's Protection of Women: The Hands of Justice at Work" (2011) 12 (1) American University Journal of Gender, Social Policy & the Law. <<https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1309&context=jgspl>> accessed 10 January 2023

¹¹⁶ United Nations Security Council, Special Report on the events in Ituri, Jan 2002 – Dec 2003 (S/2004.573), para 151 – 152. <<https://reliefweb.int/report/democratic-republic-congo/special-report-events-ituri-jan-2002-dec-2003-s2004573>> accessed 10 January 2023

against male children and witnesses were called to testify in this regard.¹¹⁷ The Trial Chamber allowed the joint request of the legal representatives of the victims to consider charges of sexual slavery by characterizing the facts.¹¹⁸ However, the ruling of the Trial Chamber was reversed by the Appeals Chamber arguing that the Trial Chamber erred in law when it allowed the inclusion of additional facts and circumstances that were not described in the charges.¹¹⁹ *Labanga* was convicted for the war crimes of enlisting, conscripting and using children in hostilities but was not charged with alleged acts of sexual violence due to the introduction of relevant evidences supporting the reportedly committed crimes of sexual slavery, rape and enslavement too late during the trial; therefore, the Chamber could not rule on allegations that were not included in the Decision on Confirmation of Charges.¹²⁰ It did not provide for a view whether – if the evidence had been administered earlier – sexual violence crimes would fall under the crime of ‘using children to actively participate in hostilities’.¹²¹ The Appeals Chamber did not procure an answer either.

The failure of the *Lubanga* case puts a new light on the difficulties the ICC faced and still faces in regard to sexual and gender-based violence.

First, it clearly demonstrates that a particular consideration should be given to the ability to collect evidence on such matters; otherwise the cases have the risk of failing during early stages of the proceedings. The role of the Prosecutor at this point is determinant. As was evident from this case, the Prosecutor failed to incorporate a strategy that prioritized sexual and gender-based crimes. During the trial, the Prosecutor initially stated that due to lack of time and evidence, the alleged accused could not be charged with such crimes,¹²² while later on it was argued that the crimes did not amount to being systematic so as to fall under crimes against humanity¹²³ and finally, he stated that the charges were omitted as he attempted to include the recruitment of girls for sexual purposes

¹¹⁷ *Situation in the Democratic Republic of Congo*, Trial Chamber I, ICC-01/04-01/06 (21 January 2009), 11 onward. <https://www.icc-cpi.int/sites/default/files/Transcripts/CR2009_00591.PDF> accessed 10 January 2023

¹¹⁸ *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/04-01/06 (14 July 2009), para 1, 33. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_05127.PDF> accessed 10 January 2023

¹¹⁹ *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the appeals of Mr. Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", ICC-01/04-01/06 OA 15 OA 16 (8 December 2009), para 112. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_08961.PDF> accessed 10 January 2023

¹²⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06 (14 March 2012), para 630. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_03942.PDF> accessed 10 January 2023

¹²¹ *Ibid.*

¹²² *Supra*, note 87, 1229.

¹²³ *Ibid.*

and forced marriage within the scope of ‘*active participation of child soldier*’ charges.¹²⁴ The case continued without any charges for sexual and gender-based crimes and since the Prosecutor had not demonstrated enough evidences to attribute *Labanga* to sexual violence beyond reasonable doubt, the Chamber was unable to charge the accused with these crimes.¹²⁵

Secondly, the Appeals Chambers failed to accord reparation to individual victims on the grounds that ‘reparations should be awarded based on the harm suffered as a result of the crimes in relation to which the accused was convicted’.¹²⁶ The Appeals Chamber amended the Trial Chamber’s initial reparation order, according to which indirect or direct victims could be awarded reparation, in an attempt to broaden the range of victims who can participate so as to include victims of sexual and gender-based violence too. As a consequence, the decision of the Appeals restricted the reach of reparations.

Thirdly, the case **failed to define sexual violence under the war crimes of ‘active use of children under the age of 15 in hostilities’**. The court endorsed the application of Article 21 (3) of the Rome Statute affirming that the application and interpretation of the law applicable under the Statute is subject to internationally recognized human rights.¹²⁷ In this light, it used Additional Protocol II of the Geneva Conventions and the Convention on the Rights of the Child when defining the concept of enlistment, conscription and use of children under the age of 15 to actively participate in hostilities;¹²⁸ however ***the majority of the Appeals Chambers declined to determine whether the sexual abuse of female children would amount to an active participation***, concluding that although sexual violence (in the present case rape and sexual enslavement) could be included within the scope of “using children under the age of 15 to actively participate in hostilities” as a matter of law, such allegations were not included in the Decision on the Confirmation of Charges.¹²⁹ As a result, the Appeals Chamber argued that putting the accused to trial and convincing him for crimes not included in the Confirmation of Charges would cause unfairness to him. Judge Odio Benito in her Separate and Dissenting Opinion tried to respond to this question especially by virtue of Article 21 (3) of the Rome Statute. Judge Benito elaborated that the Statute, international treaties such as the Convention on the Rights of the Child, Worst Forms of Child Labour Convention, Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, African Charter on the Rights and Welfare of

¹²⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Prosecution’s Closing Brief, ICC-01/04-01/06 (1 June 2011), para 139. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2011_10748.PDF> accessed 10 January 2023

¹²⁵ *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/06 (10 July 2012), para 60. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_07409.PDF> accessed 10 January 2023

¹²⁶ *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Decision on the admissibility of the appeals against Trial Chamber I’s “Decision establishing the principles and procedures to be applied to reparations” and directions on the further conduct of proceedings, ICC-01/04-01/06 A A2 A3 OA 21 (14 December 2012), para 69. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_10197.PDF> accessed 10 January 2023

¹²⁷ *Supra*, note 120, para 602.

¹²⁸ *Ibid*, para 602 – 630.

¹²⁹ *Ibid*, para 619-630

the Child and the international customary laws, seek to ensure the protection of children under the age of 15 from various risks which they are subject to in the context of any armed conflict, including sexual violence and forced marriages.¹³⁰ It further stated that sexual violence *constitutes an intrinsic element of the criminal conduct of “use to participate actively in the hostilities”*.¹³¹ Failure to define the legal concept of ‘enlistment, conscription and use to participate actively in the hostilities’ under war crimes is inconsistent with the mandate of the Rome Statue and internationally recognized human rights, as well as discriminatory under Article 21 (3) since the sexual violence is mainly committed against girls and women; subsequently “*it is discriminatory to exclude sexual violence which shows a clear gender differential impact from being bodyguards or porters – tasks usually assigned to boys*”.¹³² Although the approach of Judge Benito was subject to positive and negative reviews, she proclaimed her standpoint as an important contribution to gender justice.¹³³

The case of *Lubanga* is seen as a major contributing factor to gender injustices in terms of reparations¹³⁴ and **lack of proper attention to sexual and gender-based crimes**. “*The Appeals Chamber’s reparations decision extinguished any remaining hope that victims of sexual and gender-based crimes would receive any direct reparations in the Lubanga case, reflecting the trend of the entire case*”.¹³⁵ *The case presents the three historical forms of gender bias in reparations, including problems of definition/misrecognition, poor representation in Court processes, and inadequate prosecution investigations and strategies*.¹³⁶ Although the Chambers affirmed the obligation to apply and interpret the applicable law consistently to Article 21 (3), they failed, as Judge Benito argues, to adequately understand and bring sexual and gender-based crimes within the ambit of the war crime of using children to participate actively in the hostilities. Despite the mandate of the ICC to advance gender justice, the approach taken by the Court failed to achieve that goal, potentially causing more harm to the victims. The failure of the *Lubanga* case with respect to gender-based and sexual crimes demonstrates the Court’s unwillingness to exploit all the means at hand to prioritize the gender perspective of international crimes.

The Prosecutor v. Germain Katanga

Germain Katanga was the alleged commander of the Force de Résistance Patriotique en Ituri who was charged and found guilty of murder (crime against humanity/war crime) attacking a civilian

¹³⁰ Separate and Dissenting Opinion of Judge Odio Benito, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06 (14 March 2012), para 6. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_03942.PDF> accessed 10 January 2023

¹³¹ *Ibid*, para 20 – 21.

¹³² *Ibid*, para 6.

¹³³ Louise Chappell, Andrea Durbach and Judge Elizabeth Odio Benito, “Judge Odio Benito, A view of gender justice from the bench” (2014) 16 (4) International Feminist Journal of Politics. <<https://www.tandfonline.com/doi/full/10.1080/14616742.2014.959290?scroll=top&needAccess=true>> accessed 10 January 2023

¹³⁴ *Supra*, note 87, 1228.

¹³⁵ *Ibid*, 1234.

¹³⁶ *Ibid*.

population (war crime), destruction of property (war crime) and pillaging (war crime).¹³⁷ The case against *Katanga* holds special importance because it was the first case brought to the ICC that explicitly dealt with sexual crimes such as rape and sexual slavery.

The Pre-Trial Chamber held *Katanga* accountable for the war crime of sexual slavery and rape committed during the attack on the village of Bogoro on 24 February 2003. It stated that there was sufficient evidence to establish substantial grounds to believe that the crime of sexual slavery and rape was committed and fell within the scope of war crimes¹³⁸ and crimes against humanity.¹³⁹ It must be noted here that the Chamber underlined that sexual slavery may be regarded as a particular form of enslavement, following the definition provided in the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956.¹⁴⁰ In this view, “*sexual slavery can in addition encompass situations where women and girls are forced into "marriage", domestic servitude or other forced labor involving compulsory sexual activity, including rape, by their captors*”.¹⁴¹ Finally, the Chamber concluded that there was sufficient evidence proving that combatants of the FNI and FRPI, by force or threat raped women and girls during and after the February 2003 attack in or around the village of Bogoro.¹⁴² The majority of the Chamber believed that: “*when the combatants (i) abducted women from the village of Bogoro, (ii) captured and imprisoned them and kept them as their "wives", and (iii) forced and threatened them to engage in sexual intercourse, they intended to sexually enslave the women or knew that by committing such acts, sexual enslavement would occur*”.¹⁴³

During the proceedings, the Trial Chamber developed a detailed interpretation of rape and sexual slavery, magnifying the meaning of the Elements of Crimes, becoming the first ICC trial judgement to do so.¹⁴⁴ The Chamber noted that the crime of rape is established if two common material elements postulated in the Elements of Crime – whether as a war crime or a crime against humanity – are present.¹⁴⁵ Firstly, the perpetrator must have penetrated any part of the body, however slight, with a sexual organ, or penetration of the anal or genital opening with any object or any other part of the body.¹⁴⁶ Circumstances and conditions of invasion of the victim’s body,

¹³⁷ *The Prosecutor v. Germain Katanga*, Trial Chamber II, Decision on the judgment pursuant to article 74 of the Statute, ICC-01/04-01/07 (17 March 2014). https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04025.PDF accessed 10 January 2023

¹³⁸ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Pre-Trial Chamber, Decision on the confirmation of charges, ICC-01/04-01/07 (30 September 2008), para 347 – 354. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2008_05172.PDF> accessed 10 January 2023

¹³⁹ *Ibid*, para 434 – 444.

¹⁴⁰ *Ibid*, para 430.

¹⁴¹ *Ibid*.

¹⁴² *Ibid*, para 442.

¹⁴³ *Ibid*, para 435.

¹⁴⁴ Carsten Stahn, “Justice Delivered or Justice Denied? The Legacy of the Katanga Judgement” (2014) 12 (4) Journal of International Criminal Justice. <<https://academic.oup.com/jicj/article-abstract/12/4/809/2886370#no-access-message>> accessed 10 January 2023

¹⁴⁵ *Supra*, note 137, para 962.

¹⁴⁶ *Ibid*, para 964.

including the situation where the perpetrator takes advantage of the incapacity of an individual to give *genuine consent* constitute the second element.¹⁴⁷ Nonetheless, the lack of consent must be proven. The Chamber noted that the Elements of Crimes explicitly aim to punish any act of penetration that was carried out under threat or coercion, including here any penetration that came as a result of threat or violence, detention, abuse of power, psychological pressure or duress.¹⁴⁸ Moreover, the Elements of Crimes sought to punish any act of penetration that took advantage of a coercive environment.¹⁴⁹ Considering this, the Chamber held that it was sufficient for only one coercive circumstance or listed condition to be present for the penetration to be considered rape within the meaning of war crimes and crimes against humanity.¹⁵⁰

The Chamber recognized that to establish rape as a war crime under article 8(2)(e)(vi) of the Statute, they must be satisfied that the conduct occurred in the context of and was related to an armed conflict that was not of an international nature, and that consent cannot be inferred from the victim's words or behavior in cases where force or coercion was used, or where advantage was taken of a coercive environment.¹⁵¹ Furthermore, it must be shown that the conduct was a part of a widespread or systematic attack against a civilian population in order to establish that rape constitutes a crime against humanity under article 7(1)(g) of the Statute.¹⁵²

Apart from the two constituent elements mentioned above, which pertain to the objective elements, the Chamber recalled that the subjective elements in determining whether the crime of rape had occurred must be assessed. It referred to Article 30 of the Statute,¹⁵³ which pertains to the mental element in the absence of a regulation in this regard by the Elements of Crimes. Therefore, the perpetrator must have intentionally invaded the body of the victim.¹⁵⁴ “*Intent will be established where it is proven that the perpetrator acted deliberately or failed to act (1) such that penetration took place or (2) whereas he or she was aware that such a consequence would arise in the ordinary course of events*”.¹⁵⁵ Second, the perpetrator must have known that the invasion was committed by force, threat of force, coercion or by taking advantage of a coercive environment, or that the invasion took place against a person incapable of giving consent.¹⁵⁶ Third, the perpetrator must

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*, para 965.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*, para 968.

¹⁵² *Ibid.*, para 967.

¹⁵³ *Supra*, note 5. Article 30 of the Rome Statute sets out: “1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. 2. For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. 3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.”

¹⁵⁴ *Supra*, note 137, para 970.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

have respectively known that the rape was part of a widespread or systematic attack directed against a civilian population to fall under the crime against humanity,¹⁵⁷ and in order for it to constitute a war crime, factual circumstances that established the existence of an armed conflict must have been known to the perpetrator.¹⁵⁸

With respect to sexual slavery, the Chamber applied the Elements of Crimes in conjunction with war crimes and crimes against humanity as prescribed in the Rome Statute. The Chamber considered that the examples enumerated within Rule 7(1)(g)-2(1), 7(1)(g)-2(2), 8(2)(e)(vi)-2(1) and 8(2)(e)(vi)-2(2) are not exhaustive.¹⁵⁹ The first element of the crime which pertains to the right of ownership and the powers attaching to it may take different forms and in order to prove the application of powers which might be related to the right of ownership or which may ensue therefrom, the Chamber takes a case-by-case analysis taking into consideration various factors such as detention or captivity and duration, restrictions on freedom to come and go or on any freedom of choice or movement; and, more generally, any measure taken to prevent or deter any attempt at escape, use of threats, force or other means of physical or mental coercion, etc.¹⁶⁰ The second element concerns the ability of the victim to decide the conditions in which she engages in sexual activity.¹⁶¹ In this sense, even when girls and women are forced to live together and engage in acts of sexual nature may be covered by sexual slavery.¹⁶² Lastly, in order for the crime of sexual slavery to constitute a crime against humanity, it must be proven that the conduct was part of a widespread or systematic attack directed against a civilian population whereas to constitute a war crime it must have taken place in the context of and in association with an armed conflict not of an international nature.¹⁶³

The subjective element must simultaneously be met in order for the perpetrator to be held accountable. Therefore, the perpetrator must have been aware that he/she was individually or collectively exercising one of the attributes of the rights of ownership over a person and have meant to engage in the conduct in order to force the other person to engage in acts of sexual nature or have known that such a consequence would occur in the ordinary course of events.¹⁶⁴ For the conduct to fall under the crime against humanity, it must be proven that the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population whereas for it to constitute a war crime it must be proven that the

¹⁵⁷ *Ibid*, para 971.

¹⁵⁸ *Ibid*, para 972.

¹⁵⁹ *Ibid*, para 975;

Article 7 (1)(g)-2(1)(2) and Article 8(2)(b)(xxii)-2(1)(2) of the Rome Statute set out: “1. *The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.* 2. *The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.*”

¹⁶⁰ *Supra*, note 137, para 976.

¹⁶¹ *Ibid*, para 978.

¹⁶² *Ibid*.

¹⁶³ *Ibid*, para 97-980.

¹⁶⁴ *Ibid*, para 982.

perpetrator had knowledge of factual circumstances that established the existence of an armed conflict.¹⁶⁵

It is clearly evident that the Court took a different strategy, charging sexual violence and domestic abuse under war crimes and crimes against humanity. While such an approach may seem more direct and logical *prima facie*¹⁶⁶ it would potentially fail considering the fact that war crimes are traditionally committed against the opposing party rather than those within one's own military force.¹⁶⁷

Regrettably, the Trial Chamber's final decision was an odd one. Throughout the judgment, it was stated on multiple occasions that the testimonies of the victims were credible and that rape, sexual violence and other sex-related atrocities had taken place during the war. However, Katanga was acquitted of every sexual crime he was accused of.¹⁶⁸ The grounds therein stated by the Chamber pertain to insufficient evidence to find that the sexual violence was widespread and systematic, that the village was dismantled as a result of sexual violence and that the combatants had committed such sexual violence previously.¹⁶⁹ Based on such points, even though the Chamber concluded that sexual violence had occurred, it came to the conclusion that rape and sexual slavery were not a *common purpose* in accordance with Article 25(3)(d) of the Rome Statute.¹⁷⁰ Further, the Chamber took particular notice that the group must aim to further expand its criminal activity or criminal purpose and must have the intention to do so.¹⁷¹ The acquittal is thus based on the impossibility to link the defendant to the crimes of sexual violence.

Despite the second lost chance of the Court to address sexual violence, the Katanga judgment upholds salient points on substantive law.¹⁷² It was the first judgment grappling with the interpretation of rape and sexual slavery, amplifying the meaning of the Elements of Crimes, in contrast with the *Lubanga case*, in which the Prosecutor was criticized for his reluctance to charge such crimes.¹⁷³ The Chamber clarified that penetration by the perpetrator is not necessarily

¹⁶⁵ *Ibid.*, para 983-984.

¹⁶⁶ Tilman Rodenhäuser, "Squaring the Circle? Prosecuting Sexual Violence against Children Soldiers by their 'own forces'" (2016) 14 (1) Journal of International Criminal Justice. <<https://academic.oup.com/jicj/article/14/1/171/2412026>> accessed 10 January 2023

¹⁶⁷ Rosemary Grey, "Interpreting International Crimes from a 'Female Perspective': Opportunities and Challenges for the International Criminal Court" (2017) 17 (2) International Criminal Law Review. <https://brill.com/view/journals/icla/17/2/article-p325_7.xml?ebody=abstract%2Fexcerpt> accessed 10 January 2023

¹⁶⁸ *Supra*, note 135, para 1663 – 1664.

¹⁶⁹ Linnea Kortfält, "Sexual Violence and the Relevance of the Doctrine of Superior Responsibility in the Light of the Katanga Judgment at the International Criminal Court" (2015) 84 Nordic Journal of International Law. <https://brill.com/view/journals/nord/84/4/article-p533_1.xml?ebody=Abstract%2FExcerpt#access-options2> accessed 10 January 2023

¹⁷⁰ *Supra*, note 137, para 1664.

¹⁷¹ *Ibid.*

¹⁷² *Supra*, note 144, p. 820.

¹⁷³ *Ibid.*

required for it to constitute ‘rape’; it rather involves conduct resulting in penetration.¹⁷⁴ Secondly, it affirmed that the absence of the victim’s consent does not need to be proven.¹⁷⁵ The Chamber further elucidated the elements of sexual slavery, which is based on the right of ownership and the powers attached to the right of ownership.¹⁷⁶ In this sense, the latter was seen as a circumstance setting the victim in a situation of dependence which results in deprivation of any form of autonomy.¹⁷⁷ Additionally, sexual slavery involves situations where women and girls are forced to share their life with a person with whom they must engage in acts of sexual nature.¹⁷⁸

The manner of application of the law by the Chamber was nonetheless less conclusive. Rape and sexual slavery were elucidated to fall under the elements of war crimes and crimes against humanity, but the Chamber failed to bring those charges to a positive end since it was impossible to link the accused to the sexual crimes due to a lack of evidence that the sexual acts were part of the ‘common purpose’ under Article 25 (3) (d). This conclusion contradicts some findings at the Pre-Trial. Additionally, the ICC contradicted itself by finding that the sexual acts were part of the Ngiti operations, but they were not instrumental in the taking of Bogoro village.¹⁷⁹ This line of reasoning means that physical destruction (pillaging) holds greater weight in the purpose than the destruction of community structures through acts of sexual and gender-based violence.¹⁸⁰ It must be noted that this distinction raises doubts whether judges had a stricter and harsher approach to the applicable standard for sexual crimes compared to the standard for other crimes.¹⁸¹ Notably, the trial spotlights the challenge of holding the perpetrators accountable with limited witness testimony. In the *Katanga* case, high doubts were present as to whether it is sufficient to rely on a small pool of witnesses to prove complicated sexual violence charges in mass atrocity cases.¹⁸² As such, the Chambers failed to *guarantee lasting respect for and the enforcement of international justice* through the adjudication of facts.¹⁸³

Lastly, it stems from the above that the Court was limited to its internal acts to interpret the meaning of rape and sexual slavery. However, the Court made particular reference to Article 21 (3) with regard to the admissibility of the evidence tendered for the purpose of the confirmation hearing.¹⁸⁴ In the context of a fair trial, the Chamber concluded that lack of assistance by a defense counsel during the taking of the evidence (in the present case of a *procès-verbal*) does not amount to a violation of *internationally recognized human rights*; therefore the evidence shall be

¹⁷⁴ *Supra*, note 137, para 963.

¹⁷⁵ *Ibid.*, para 965.

¹⁷⁶ *Ibid.*, para 975.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*, 978.

¹⁷⁹ *Ibid.*, para 1163-1164

¹⁸⁰ *Supra*, note 144, 821.

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ *Supra*, note 5. Preamble of the Rome Statute.

¹⁸⁴ *Supra*, note 138, para 93.

admissible.¹⁸⁵ In the decision of Trial Chamber II, reference to Article 21 (3) was made with respect to the method of interpretation of the founding legal acts of the ICC highlighting that the interpretation of the applicable provisions by the Court must not run counter to internationally recognized human rights.¹⁸⁶ Although direct reference to Article 21 (3) is not always mentioned with regard to interpretation of gender-based and sexual crimes, indirect use of internationally recognized human rights norms within the framework of a criminal proceeding contribute to some extent to the positive outcome of certain cases.

The Prosecutor v. Bosco Ntaganda

The judgement of *Ntaganda* was welcomed as a crucial step towards the development of the ICC's jurisprudence on sexual and gender-based violence. It is the first victory for victims who suffered sexual acts and the long-awaited landmark conviction.

Ntaganda, who was the former deputy chief of staff and commander of operations of the Forces Patriotiques pour la Libération du Congo (FPLC) was initially charged with the war crime of enlisting, conscripting and using children under the age of fifteen to participate actively in hostilities¹⁸⁷ without any charges against sexual and gender-based crimes. However, the Office of the Prosecutor applied for the issuance of a second Warrant of Arrest under Article 58 (1) of the Rome Statute, seeking to hold him liable for crimes of rape and sexual slavery as a crime against humanity and a war crime¹⁸⁸ that had allegedly occurred in the context of military attacks against the Lendu and other non-Hema civilians in Ituri, during September 2002 to September 2003.¹⁸⁹ The Office of the Prosecutor claimed that, having the Lubanga judgment in mind, it was seeking for the Pre-Trial Chamber to expand the charges against Ntaganda¹⁹⁰ and highlighted that for many of the factual assertions in the application, it had heavily relied upon evidences and relevant factual findings of the Pre-Trial and Trial Chambers in the Ntaganda judgment.¹⁹¹ He was also charged with rape and sexual slavery of child soldiers within his own group.¹⁹² The Pre-Trial Chamber II confirmed unanimously that Ntaganda was criminally responsible as an indirect co-perpetrator for

¹⁸⁵ *Ibid*, para 98.

¹⁸⁶ *Supra*, note 137, para 50.

¹⁸⁷ *The Prosecutor v. Bosco Ntaganda*, Pre-Trial Chamber I, Warrant of Arrest, ICC-01/04-02/06 (22 August 2006). <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2007_03633.PDF> accessed 10 January 2023

¹⁸⁸ *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber II, Second Corrigendum of the Public Redacted Version of Prosecutor's Application under Article 58 filed on 14 May 2012 (ICC-01/04-611-Red), ICC-01/04 (16 May 2012). <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_06097.PDF> accessed 10 January 2023

¹⁸⁹ *Ibid*.

¹⁹⁰ Women's Initiatives for Gender Justice, "Gender Report Card on the International Criminal Court" (2012). <<https://4genderjustice.org/ftp-files/publications/Gender-Report-Card-on-the-ICC-2012.pdf>> accessed 10 January 2023

¹⁹¹ *Supra*, note 188, 6.

¹⁹² *The Prosecutor v. Bosco Ntaganda*, Trial-Chamber II, Updated Document Containing the Charges, ICC-01/04-02/06 (16 February 2015), para 100 – 108. <https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2015_01030.PDF> accessed 10 January 2023

the crime of rape and sexual violence as crimes against humanity and war crimes¹⁹³ and that the crimes had occurred in the context of an organizational policy by the UPC/FPLC.¹⁹⁴ This marks the first case in which the judges confirmed unanimously the charges pertaining to sexual and gender-based violence.¹⁹⁵ Additionally, it must be noted that the Pre-Trial Chamber II that confirmed the charges against Ntaganda was guided by Article 21 (3) and its jurisprudence in attributing the alleged crimes to the accused. In this context, the Chamber made particular reference to the set precedents of the ICC which affirm that the expression “reasonable grounds to believe” (that the accused has committed the alleged crimes) must be interpreted in accordance with *internationally recognized human rights*.¹⁹⁶ Accordingly, the Chamber reiterated the standard set by the European Convention for the Protection of Human Rights and Fundamental Freedoms that “*demands the existence of some facts or information which would satisfy an objective observer that the person concerned may have committed the offence*”.¹⁹⁷

The case of Ntaganda is a distinguished one as it provided for a unique form of the *war crime of rape* – it dealt with rape and sexual slavery committed within the group while most of other cases were dealing with civilians and adversaries as victims.¹⁹⁸ As such, the jurisdiction of the ICC over sexual violence against child soldiers belonging to the same armed group was challenged by Ntaganda’s defense team.¹⁹⁹ The defense noted that the charges against Ntaganda of rape and sexual slavery of child soldiers as war crimes were not part of the *ratione materiae* jurisdiction of the Court.²⁰⁰ In this view, article 8(2)(e)(vi) is exhaustive leaving no option for child soldiers to be victims of the war crimes of rape and sexual slavery.²⁰¹ Additionally, child soldiers who are part of the same armed group as the accused are not mentioned within the category of “*persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention or any other cause*”²⁰² nor in the category of “*all persons who do not take a direct part of who have ceased to take part in*

¹⁹³ *The Prosecutor v. Bosco Ntaganda*, Pre-Trial Chamber II, Decision on the Prosecutor's Application under Article 58, ICC-01/04-02/06 (13 July 2012), para 66. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_07506.PDF> accessed 10 January 2023

¹⁹⁴ *Ibid.*

¹⁹⁵ Women’s Initiative for Gender Justice, “Accountability for Sexual and Gender-Based Crimes at the ICC: An Analysis of Prosecutor Bensouda’s Legacy” (2021). <<https://www.fidh.org/IMG/pdf/cpiproc772ang-1.pdf>> accessed 10 January 2023

¹⁹⁶ *Supra*, note 193, para 6.

¹⁹⁷ *Ibid.*

¹⁹⁸ Muhammad Awfa, *Prosecutor v. Ntaganda and Rape of Non-Opposing Armed Forces: Addressing the Scope of War Crimes*, in Fajri Matahati Muhammadin, Rabita Madina, Tasya Marmita Irawan, Judith Gracia Adha and Brigita Gendis Kandisari, “Gadjah Mada Undergraduate Research Anthology Vol. 1: Recent Developments in International Criminal Law” (Universitas Gadjah Mada 2022), 205.

¹⁹⁹ *The Prosecutor v. Bosco Ntaganda*, Trial Chamber VI, Application on behalf of Mr. Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Document containing the charges, ICC-01/04-02/06 (1 September 2015). <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_15463.PDF> accessed 10 January 2023

²⁰⁰ *Ibid.*, para 6.

²⁰¹ *Ibid.*, para 7-8.

²⁰² *Ibid.*, para 9.

hostilities, whether or not their liberty has been restricted” – with reference to the Protocol Additional to the Geneva Convention (1949).²⁰³ Consequently, the applicable international and customary laws do not apply to violence committed against child soldiers who are members of the same armed group;²⁰⁴ therefore rape and sexual slavery are subject to national jurisdiction.²⁰⁵

The Appeals Chamber echoed the position of the Prosecutor, affirming that the crime of rape and sexual slavery committed internally may be charged as war crimes. The Chamber noted that Article 8(2)(b)(xxii)²⁰⁶ and Article 8(2)(e)(vi)²⁰⁷ do not explicitly provide that victims of rape and sexual slavery must fall under the ‘protected persons’ in terms of the Geneva Conventions (commonly referred as the Status Requirements) or ‘persons taking active part in hostilities’ as foreseen in Common Article 3,²⁰⁸ nor does the introductory provision of Article 8 (b) and (e) require such a condition – in opposition to the *chapeaux* of subsection (2) (a) and (c) of Article 8, which makes straightforward reference to the status requirements.²⁰⁹ In a nutshell, the Appeals Chamber supported the conclusions drawn by the Trial Chamber notably arguing that based on the ordinary meaning, context and drafting history of Article 8(2)(b)(xxii) and Article 8(2)(e)(vi) reference to the common Article 3 of the Geneva Conventions is not applicable.²¹⁰ The latter shall be applicable

²⁰³ *Ibid*, para 11, 21-27.

²⁰⁴ *Ibid*, para 42-43.

²⁰⁵ *Ibid*, para 13.

²⁰⁶ *Supra*, note 5. Article 8(2)(b)(xxii) of the Rome Statute sets out: Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: “Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;”.

²⁰⁷ *Ibid*. Article 8(2)(e)(vi) of the Rome Statute sets out: “Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;”.

²⁰⁸ Article 3 common in all the Geneva Conventions sets out: “1. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for. 2. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. 3. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. 4. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.” <<https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions>> accessed 15 January 2023

²⁰⁹ *The Prosecutor v. Bosco Ntaganda*, Appeals Chamber, 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”, ICC-01/04-02/06 OA5 (15 June 2017), para 46. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017_03920.PDF> accessed 15 January 2023

²¹⁰ *Ibid*, para 49 – 51.

only to the crime of “any other form(s) of sexual violence” if the conduct is of a “gravity comparable to that of a great breach of the Geneva Conventions or serious violations of Common Article 3”.²¹¹ It stems from the above that victims of rape and sexual slavery (as a war crime) need not be “*protected persons in the sense of the grave breaches or common article 3*”.²¹² Invoking Article 21 of the Rome Statute in conjunction with Article 8 (2) (b) and (c), the Chamber recalled that the ‘established framework of international law’ mentioned in the introduction of Article 8 (2) (b) and (c) must be interpreted consistently with ‘*international law and international humanitarian law in particular*’²¹³ regardless of whether any *lacuna* exists. Thus, the ‘established framework of international law’ allows the introduction of additional elements to the crimes listed in Article 8 (2) (b) and (c), taking into account that if customary or conventional international law stipulates an additional element for a given war crime, the Court will have to apply it to ensure consistency with the international law, and this is not in violation of the principle of legality postulated in Article 22 of the Rome Statute.²¹⁴ In assessing the existence of status requirements under the ‘established framework of international law’, the Chamber elaborated that the Geneva Conventions do not introduce the Status Requirement as a general rule categorically excluding members of an armed group from protection against crimes committed by members of the same armed group²¹⁵ – indeed, Common Article 3 of Geneva Conventions I and II extends protection against “*inhumane treatment irrespective of a person’s affiliation, requiring only that the persons were taking no active part in hostilities at the material time*”.²¹⁶ Further, it recalled the reliance of the Trial Chamber in the commentary of the International Committee of the Red Cross according to which Common Article 3 extends to violations committed within the same armed group.²¹⁷ Accordingly, since protection against violence for members of the same armed group is not excluded based on a general rule, there is no reason to presume the existence of such a rule specifically for rape and sexual slavery.²¹⁸ The Chamber emphasizes that it is the *nexus* requirement that should be the determining factor for the alleged war crimes of rape and sexual slavery under the Elements of Crimes – *that the conduct occurred in the context of and associated with an armed conflict regardless of its international or non-international nature* – and not the victim’s status.²¹⁹ With regard to the (*absence of*) ‘active participation of child soldiers in hostilities’, the Chamber concluded that it is premised on the existence of Status Requirement for rape and sexual slavery, and in light of the arguments above such Status Requirement does not exist.²²⁰

²¹¹ *Ibid.*

²¹² *Ibid.*, para 51.

²¹³ *Ibid.*, para 53.

²¹⁴ *Ibid.*, para 54-55.

²¹⁵ *Ibid.*, para 63.

²¹⁶ *Ibid.*, para 60.

²¹⁷ *Ibid.*, para 61.

²¹⁸ *Ibid.*, para 65.

²¹⁹ *Ibid.*, para 68.

²²⁰ *Ibid.*, para 69.

The Ntaganda judgement is additionally of utmost importance as it adds to the emerging jurisprudence and thus recognition of sexual violence against men – *as a gender-based crime*, an issue under-addressed in the international criminal law. The Trial Chamber unequivocally included rape as a gender-neutral crime. Also noteworthy is that it clarified that “‘*invasion of the body*’ includes same sex penetration, and encompasses both male and/or female perpetrators and victims”.²²¹ The same conclusion was reached by the Trial Chamber in the *Bemba* judgment,²²² and it was recalled by the Trial Chamber in the *Ntaganda* case. It further found that men had been anally penetrated by the UPC/FPLC soldiers²²³ by using sticks and ‘bits of wood’.²²⁴ These conclusions were supported by the Appeals Chamber, and it mentioned that conviction of *Ntaganda* for rape as a crime against humanity and a war crime relied upon the oral testimonies of numerous witnesses.²²⁵

In sum, the Appeals Chambers extended the application of the Rome Statute and the jurisdiction of the ICC to victims of rape and sexual slavery during armed conflicts, regardless of their relationship to the perpetrator.²²⁶ It has additionally contributed to raising the accountability level for sexual gender-based violence under international law. The Appeals Chamber had previously come to the conclusion that the Rome Statute does not exclude protection of individuals from violating acts committed by other members belonging to the same armed group;²²⁷ therefore, reaffirmation of its approach permits the prosecution of intra-party sexual violence as a war crime, thus putting an end to the accountability gap in international law.²²⁸ In addition, this decision reflects the pioneering commitment of the Prosecutor to investigate and prosecute sexual crimes in armed conflict and the inclusion of a gender-based perspective by triggering the Policy Paper on Sexual and Gender-Based Violence to all crimes within its jurisdiction.²²⁹

²²¹ *The Prosecutor v. Bosco Ntaganda*, Trial Chamber VI, Judgement, ICC-01/04-02/06 (8 July 2019), para 933. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_03568.PDF> accessed 15 January 2023

²²² *The Prosecutor v. Jean Pierre Bemba Gombo*, Trial Chamber III, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08 (21 March 2016), para 100. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_02238.PDF> accessed 15 January 2023

²²³ *Supra*, note 221, para 940.

²²⁴ *Ibid*, para 942.

²²⁵ *The Prosecutor v. Bosco Ntaganda*, The Appeals Chamber, Judgment on the appeals of Mr. Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’, ICC-01/04-02/06 A A2 (30 March 2021), para 632. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_03027.PDF> accessed 15 January 2023

²²⁶ Irene Garofalo, “Prosecuting male sexual violence at the ICC: idealism or Realism?” Center for African Justice, Peace and Human Rights. <<http://centreforaffricanjustice.org/prosecuting-male-sexual-violence-at-the-icc-idealism-or-realism/#easy-footnote-bottom-30-2007>> accessed 15 January 2023

²²⁷ *The Prosecutor v. Bosco Ntaganda*, The Appeals Chamber, 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”, ICC-01/04-02/06 OA5 (15 June 2017). <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017_03920.PDF> accessed 15 January 2023

²²⁸ *Supra*, note 89, 889.

²²⁹ Valerie Oosterveld, “The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law” (2018) 24 (3) William & Mary Journal of Race, Gender, and Social Justice. <<https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1476&context=wmjowl>> accessed 15 January 2023

As it stems from the above, the ICC plays a significant role in protecting the rights of women, children and men who have been victims of gender based and sexual crimes committed in the framework of war crimes or crimes against humanity. The praxis of the court elucidates in greater details the application of internal legal acts of the ICC among the international laws and human rights in defining and magnifying gender-based and sexual crimes. Further, exploration of the ICC's approach in this regard shines a light on the challenges faced throughout the process and the extent to which the court contributes to enforcing human rights of victims of gender-based violence, rape, sexual slavery or sexual assault in the context of crimes against humanity and war crimes.

The above case laws present the historical pathway followed by the ICC, from misrecognition of sexual violence, inadequate investigation, lack of evidence collection and reparation of victims to defining and expanding crimes of gender-based and sexual violence, particularly rape and sexual slavery; recognition of sexual violence against men – *as a gender-based crime*; broadening the range of victims benefiting from the reparation scheme so as to include victims of sexual and gender-based violence; defining the conditions that constitute the crime of rape and sexual slavery under war crimes and crimes against humanity, thus amplifying the chances of victims to get justice while holding perpetrators accountable for such atrocities.

It has been observed that the Chambers bear in mind the jurisprudence of the Court with respect to the application and interpretation of applicable laws in a manner that does not infringe on internationally recognized human rights. With respect to recognition of gender-based and sexual crimes, the Court has generally been reluctant to broaden the interpretation of elements or aspects of crimes beyond the concepts enshrined in the founding acts of the ICC, thus leading to failure of significant application of Article 21 (3) in favor of a gender-sensitive approach and without any adverse distinction founded on grounds such as gender.²³⁰ As Sheppard articulates, “*despite its paramountcy over other sources of law, Article 21 (3) has yet to receive satisfactory consideration and analyses by the Court*”.²³¹

Although the Chambers of the ICC have occasionally contradicted themselves, the court has seen a progressive approach in ensuring the protection of human rights of victims of gender-based and sexual violence, in addition to advancing accountability for such crimes. It must be noted that the ICC leaves a set of shortcomings and lessons to be learned from previous judgments of gender-based and sexual crimes, thus paving the way for the court to confront and better address these issues. The enforcement and protection of the human rights of victims of sexual crimes would have been incomplete had the ICC not provided for recognition of victims' rights to participate in proceedings. Therefore, crimes committed against individuals are intrinsically linked with the acknowledgment of the 'status of victim' and the legal opportunity of the latter to tell their story in proceedings. The following subchapter dives into the contribution of the ICC in relation to the

²³⁰ *Supra*, note 5. Article 21 (3).

²³¹ *Supra*, note 63.

granting of ‘victim’s status’ along with the participatory rights in proceedings, with a special focus on the application and interpretation of Article 21 (3) in this regard.

1.3. Obtaining the participatory right under the lens of human rights and the jurisprudence of the ICC.

The advancement and strengthening of the rights of victims have found expression in two crucial international legal acts: precisely, in the United Nation’s Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,²³² primarily concerned with the victims of domestic crimes and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.²³³ The Statute’s scheme mirrors the most advanced position existing in established international criminal justice.²³⁴ This instrument recognizes several key principles pertaining to victims: (1) participation of victims in the proceedings; (2) protection of victims and witnesses during Court proceedings; (3) the right to reparations or compensation; and (4) victim’s compensation trust fund.²³⁵

One of the most distinct features of the ICC is the recognition of a victim’s right to participate in the proceedings, giving the victims – who were once subjects of little interest to international criminal law – a foremost role in proceedings.²³⁶ The very first endeavors of the ICC concerning the participation of victims in the criminal proceedings began with the *Situation in the Democratic Republic of Congo*,²³⁷ which granted the applicants the status of victims and gave them the green light to participate in the proceedings at the investigation stage, despite the fact that the Prosecutor had not identified any person to be held accountable. The Pre-Trial Chamber made reference to the European Court of Human Rights and Article 6 (1) of the European Convention on Human Rights as well as to the Inter-American Court and Article 8 (1) of the American Convention on Human Rights as examples of systems in which victims are authorized to participate in criminal

²³² Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by General Assembly resolution 40/34 of 29 November 1985. <<https://www.ohchr.org/sites/default/files/victims.pdf>> accessed 15 January 2023

²³³ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Resolution adopted by the General Assembly on 16 December 2005. <<https://www.ohchr.org/sites/default/files/2021-08/N0549642.pdf>> accessed 15 January 2023

²³⁴ M. Cherif Bassiouni, “International Recognition of Victims’ Rights” (2006) Human Rights Law Review 6 (2). <<https://academic.oup.com/hrlr/article/6/2/203/676407>> accessed 15 January 2023

²³⁵ *Ibid.*

²³⁶ *Supra*, note 27, 190-191.

²³⁷ *Situation in the Democratic Republic of the Congo*, Pre – Trial Chamber I, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04 (17 January 2006). <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2006_01689.PDF> accessed 15 January 2023

proceedings, even before the confirmation of charges.²³⁸ The decision of the Pre-Trial Chamber, presided over by Judge Claude Jorda reflects a procedural model derived from the continental legal system whereby victims participate actively as parties in criminal trials²³⁹ as well as a corroboration of consistency with the postulation in article 21 (3).

In arguing in favor of permitting victims in proceedings, the Pre-Trial Chamber pointed out that the status of victims shall be accorded to applicants who seem to meet the definition of victims set out in Rule 85 of the Rules of Procedure and Evidence.²⁴⁰ According to the latter:

- (a) *“Victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;*
- (b) *Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.*²⁴¹

Although the Pre-Trial Chamber did not provide any further elaboration in this regard, it must be noted that this ruling applied this provision for the first time. Resorting to Article 21 (3) of the Rome Statute, Trial Chamber I²⁴² considered the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law in defining the notion of ‘victim’, noting that Principle 8 and 9 of the Basic Principles run as follows:

*“8. For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.*²⁴³

*9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.*²⁴⁴

²³⁸ *Ibid*, para 52.

²³⁹ *Supra*, note 23, 347.

²⁴⁰ *Supra*, note 237, para 66.

²⁴¹ *Supra*, note 6. Rule 85.

²⁴² *Supra*, note 39, para. 35.

²⁴³ *Supra*, note 234. Principle 8.

²⁴⁴ *Ibid*, Principle 9.

Additionally, the Trial Chamber referred to the Convention on the Rights of the Child²⁴⁵ with regard to victims who are children, establishing that the best interest of the child shall be the primary consideration. For this purpose, it found that, in aligning with Article 12 (2) of the Convention, children shall be provided the opportunity to be heard in judicial and administrative proceedings.²⁴⁶ Departing from the position held by the Trial Chamber, Judge *René Blattmann*, in a separate and dissenting opinion, challenged the decisive authority of the Basic Principles, highlighting that the definition of victim given on the particular provisions of the Basic Principles were considered during the preparatory stages of the drafting of the Rome Statute, but due to lack of support it was left out of the Statute.²⁴⁷ In his words, it is inappropriate to go beyond the scope of what was approved by the drafters of the Rome Statute and the following legislation.²⁴⁸ The Appeals Chamber nonetheless concluded that it found no error in the Trial Chamber's reckoning on the Basic Principles and Guidelines for the purpose of guidance.²⁴⁹

In light of the Pre-Trial Chamber I's line of reasoning and in reference to Rule 85 (a) of the Rules of Procedure and Evidence, *there are four criteria to be considered in granting the status of victim*: (i) the victim must be a natural person; (ii) the victim must have suffered harm; (iii) the crime from which the harm ensued must constitute a crime within the jurisdiction of the Court; and (iv) a causal link must be found between the harm a victim applicant has suffered and the crimes that the accused has been charged with.²⁵⁰

Nonetheless, the definition of victim has been the subject of divided interpretations by the Chambers with regards to the deceased individuals who have died as a result of any of the crimes falling under the jurisdiction of the Court. In this sense, the question as to whether such individuals are eligible to participate in proceedings has been brought before the court. The Pre-Trial Chamber I, in applying Rule 89 (3) of the Rules of Procedure and Evidence, concluded that the provision limits the submission of application on behalf of others solely to submissions made on behalf of children who have not reached the age of 18 and disabled persons.²⁵¹ It further pointed out that

²⁴⁵ Convention on the Rights of the Child Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, Article 12 (2) sets out:

"For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law." <<https://www.ohchr.org/sites/default/files/crc.pdf>> accessed 15 January 2023

²⁴⁶ *Supra*, note 39, para 36 – 37.

²⁴⁷ *Ibid*, para 4 - 5.

²⁴⁸ *Ibid*.

²⁴⁹ *The Prosecutor v. Thomas Lubanga Dyilo*, The Appeals Chamber, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06 OA 9 OA 10 (11 July 2008), para 33. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2008_03972.PDF> accessed 15 January 2023

²⁵⁰ *Supra*, note 239, para 79; *Situation in Uganda*, Pre-Trial Chamber II, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04 (10 August 2007), para 12. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2007_03669.PDF> accessed 15 January 2023

²⁵¹ *Situation in Darfur, Sudan*, Pre-Trial Chamber, Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07,

there is no other provision allowing applications to be made on behalf of deceased persons. In support of this approach, the Chamber added that Rule 89 (3)²⁵² requires the consent of the person in order for the application to be submitted; therefore such approval cannot be given in the case of a deceased person, and consequently the latter does not meet one of the criteria to be deemed as a victim – does not fall within the meaning of ‘natural person’.²⁵³ Regardless of Article 21 (3) demanding the application and interpretation of the law consistent to internationally recognized human rights, the Pre-Trial Chamber made reference only to the internal acts of the ICC. A different position was adopted by the Pre-Trial Chamber III, which took into account internationally recognized human rights and related jurisprudence pursuant to Article 21 (3).²⁵⁴ The Court is of the view that the rights of a deceased person, albeit he or she cannot participate in the proceedings, can be represented by his or her successor, if the latter is a victim recognized as a participant in the proceedings.²⁵⁵ Additionally, an application made on behalf of a deceased person shall satisfy three conditions: (i) the deceased was a natural person at the time of the crimes allegedly committed; (ii) the death of the deceased is caused by a crime that falls within the jurisdiction of the Court; and (iii) the written application is submitted by his or her successor.²⁵⁶ With Article 21 (3) in mind, the Court notes the jurisprudence of the Inter-American Court of Human Rights which indicated that the right of compensation for damages suffered by victims up to their death is inherited to their successors. This is an illustration, according to the Court, that the participation of deceased victims in proceedings incorporates an interpretation that accords to human rights standards, pursuant to Article 21 (3). Although the jurisprudence of the Inter-American Court refers to the right to compensation, the Court finds that it is appropriate that the successors of a deceased person exercise the rights of the latter in proceedings in order to protect claims for any future reparations.²⁵⁷

The praxis of Trial-Chamber II regarding a deceased person appears to rely upon Rule 89 (3) of the Rules of Procedure and Evidence, which provides two scenarios: “*an application for participation may be made by (i) a person acting with the consent of the victim, or (ii) a person acting on behalf of a victim, in the case of a victim who is a child or, when necessary, a victim who is disabled*”.²⁵⁸ In the case of *Katanga and Ngudjolo*,²⁵⁹ the Chamber II recognized the right of

ICC-02/05 (14 December 2007), para 36. https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2007_05255.PDF> accessed 15 January 2023

²⁵² *Supra*, note 6. Rule 89.

²⁵³ *Supra*, note 251.

²⁵⁴ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber III, Fourth Decision on Victims' Participation, ICC-01/05-01708 (12 December 2008), para 40. https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2008_07861.PDF> accessed 15 January 2023

²⁵⁵ *Ibid*, para 44.

²⁵⁶ *Ibid*, para 39.

²⁵⁷ *Ibid*, para 46.

²⁵⁸ *Supra*, note 6. Rule 89 (3).

²⁵⁹ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chambers II, Motifs de la deuxième décision relative aux demandes de participation de victimes à la procédure, ICC-01/04-01/07 (22 December 2009), para 30. https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_09244.PDF> accessed 15 January 2023; *The Prosecutor v. Germain Katanga*, Trial Chamber II, Decision on the application to resume action, submitted by a

close relatives of a deceased victim authorized to participate in proceedings to continue the action brought before the Court by the deceased victim, provided that such action was initiated by the latter (before his/her death) and within the limits of the views and concerns expressed by the victim in the initial submission. Contrary to this approach, the Trial Chamber I interpreted Rule 89 (3) broadly, providing that no link of kinship or guardianship is required to be established in order to participate in proceedings on behalf of the victim (*in the present case the victim was a child*) since within the Rules, “the person acting” is undefined and unrestricted.²⁶⁰

In the absence of a definition of the notion of ‘harm’ by either the Statute or the Rules of Procedure and Evidence, the Pre-Trial Chambers assessed that the interpretation of the term must be conducted on a *case-by-case* basis by way of resorting to Article 21 (3) of the Statute.²⁶¹ It did not go so far as to establish that a substantial impairment of the victim’s fundamental rights was a relevant form of harm – leaving out “emotional suffering”, “physical harm” and “economic loss”.²⁶² Applying a purposive interpretation of Rule 85 (b) of the Rules of Procedure and Evidence, which provides that *legal persons* must have ‘sustained direct harm’, the Trial Chamber found that people can be direct or indirect victims of a crime within the jurisdiction of the Court.²⁶³ It further ruled that, in compliance with Principle 8 of the Basic Principles, a victim may suffer from harm, either individually or collectively, in a variety of different ways such as “*physical or mental injury, emotional suffering, economic loss or substantial impairment of his or her fundamental rights*”.²⁶⁴ The victim bears the burden of making allegations of direct or indirect harm.²⁶⁵

Rule 85 (a) requires that the crime from which the victim has suffered falls within the jurisdiction of the Court. The ICC has jurisdiction over four categories of international crimes: genocide, crimes against humanity, war crimes and the crime of aggression postulated in Article 5 of the Rome Statute²⁶⁶ which are further elaborated in Articles 6 – *8bis* of the Statute. The assessment of whether the alleged crimes fall under the jurisdiction of the ICC depends on the stage of the

family member of deceased Victim a/0253/09, ICC-01/04-01/07 (10 June 2013), para 6. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2013_05652.PDF> accessed 15 January 2023

²⁶⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Annex2: Order issuing confidential and public redacted versions of Annex A to the “Decision on the applications by 7 victims to participate in the proceedings” of 10 July 2009 (ICC-01/04-01/06-2035), ICC-01/04-01/06-2065-Anx2-RSC (23 July 2009), 15. <https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2012_09619.PDF> accessed 15 January 2023

²⁶¹ *Supra*, note 235, para 81; *The Prosecutor v. Thomas Lubanga Dyilo*, Pre – Trial Chamber I, Defence submissions regarding the applications for participation in the proceedings of applicants a/0004/06 to a/0052/06, ICC-01/04-01/06 (4 September 2006), para 65. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2006_03085.PDF> accessed 15 January 2023

²⁶² *Supra*, note 4, 134.

²⁶³ *Supra*, note 39, para 91; note 257, para 64.

²⁶⁴ *Supra*, note 261, para 92; note 39, para 35.

²⁶⁵ *Supra*, note 261, para 67.

²⁶⁶ *Supra*, note 5. Article 5 of the Rome Statute sets out: “*The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.*”

proceedings to which the application for participation in criminal proceedings refers.²⁶⁷ The Trial Chamber in the case of *Lubanga* supports the point of view that during the trial stage, the right of victims to participate – read in light of Rule 85 of the Rules of Procedure and Evidence – is not limited only to the crimes contained in the charges confirmed by the Pre-Trial Chamber I, and such restriction is not found anywhere in the regulatory framework of the Court.²⁶⁸ Therefore, a victim of any crime that would qualify under the jurisdiction of the Court – regardless of the charges against the accused – can potentially participate.²⁶⁹ Following this conclusion, an applicant must therefore demonstrate, *prima facie* that the harm caused to him/her derives from a crime – for instance, as a result of a crime against humanity in the Kenya situation,²⁷⁰ committed in the territory of Kenya between 1 June 2005 and 26 November 2009.²⁷¹ Consequently, applicants who were allegedly victims of crimes committed within such a situation and satisfy therefore the *ratione temporis* and *ratione loci* criteria, in addition to *ratione material*, would qualify as ‘*situation victims*’.²⁷² Nonetheless, the Court shall examine the other criteria as mentioned above in order to attribute the right to participate in the proceedings.

Once proceedings are initiated and a *case* is established, via issuance of the charges against the accused presumed criminally responsible, the *causal link* to be proved is much narrower and limited to the harm suffered in relation to the specific crimes for which the accused is charged.²⁷³ Consequently, the victim shall be granted the right to participate in proceedings if he/she provides evidence that the harm suffered results from the crime that qualifies under the jurisdiction of the Court and was allegedly committed within the scope of the crime linked with the charges.²⁷⁴ Opposing the Trial Chamber’s conclusions mentioned above, the Appeals Chamber emphasized that, *although the ordinary meaning of Rule 85 does not per se limit the notion of victims to the victims of the crimes charged, the effect of Article 68 (3) of the Statute* is that the victim’s participation in the trial proceedings, in accordance with the procedure stipulated in Rule 89 (1) of the Rules, *is limited to those victims who are linked to the charges*’.²⁷⁵

Once the person alleged to be criminally responsible has been charged, the Trial Chamber examines in further detail the components of jurisdiction to assess whether the applicants should be granted the participatory rights during the trial. In all cases, the Chambers unanimously agree that granting victims the opportunity/right to present their views and concerns must be in a manner

²⁶⁷ Elisabeth Baumgartner, “Aspects of victim participation in the proceedings of the International Criminal Court” (2008) 90 (870) *International Review of the Red Cross*. <<https://www.corteidh.or.cr/tablas/R21692.pdf>> accessed 15 January 2023

²⁶⁸ *Supra*, note 39, para 93.

²⁶⁹ *Ibid.*

²⁷⁰ *Situation in the Republic of Kenya*, Pre-Trial Chamber II, Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya, ICC-01/09, (3 November 2010). <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_10195.PDF> accessed 15 January 2023

²⁷¹ *Ibid.*, para 19.

²⁷² *Supra*, note 267, 422.

²⁷³ *Ibid.*

²⁷⁴ *Supra*, note 4, 132.

²⁷⁵ *Supra*, note 249, para 58.

which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.²⁷⁶

The nexus between the harm suffered and crimes that the accused has been charged with, enshrined in Rule 85 (a) of the Rules of Procedure and Evidence with the words “*as a result of,*” is established if the applicants demonstrate that the harm derives directly from the commission of any crime within the jurisdiction of the ICC. The Pre-Trial Chamber applied Article 85 (a), noting that “*it is not necessary to determine in any great detail [at this stage of investigation] the precise nature of the causal link and the identity of the person(s) responsible for the crimes*”.²⁷⁷ Indeed, grounds to believe that the victim suffered harm as a result of the commission of the said crimes are sufficient in determining the nexus.²⁷⁸ In a later decision, the Pre-Trial Chamber I highlighted that the applicants must demonstrate that there is sufficient causal link between the harm suffered and the crimes on which the arrest warrant is based;²⁷⁹ that the causal link required by Rule 85 of the Rules of Procedure and Evidence with regard to the stage of the case is demonstrated once the victim, and if applicable, the immediate family or dependents of that victim, provide(s) sufficient evidence to establish that the person has suffered harm linked directly to the crimes contained in the arrest warrant or that the victim has suffered harm whilst intervening to help direct victims of the case or to prevent the latter from becoming victims because of the commission of these crimes.²⁸⁰ The same approach was taken in other cases. In the Pre-Trial phase of the *Gbagbo* case, the Single Judge recalled that the link between the alleged harm and the crimes charged at this stage [investigation] must be established on a *prima facie* basis;²⁸¹ it is sufficient if the applicant demonstrates that the alleged crimes charged by the Prosecutor could have objectively contributed to the harm suffered, and it is not necessary to demonstrate that the charged crimes are the only or substantial cause of the harm suffered.²⁸² Such an approach was confirmed by the Trial Chamber I in the same case.²⁸³

²⁷⁶ See for instance: *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Pre-Trial Chamber II, ICC-01/09-01/11 (5 August 2011), para 84. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2011_11992.PDF> accessed 15 January 2023

²⁷⁷ *Supra*, note 237, para 94.

²⁷⁸ *Ibid*, para 124, 135, 153, 167, 186.

²⁷⁹ *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber, Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06 (29 June 2006), 4. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2007_03138.PDF> accessed 15 January 2023

²⁸⁰ *Ibid*, 7.

²⁸¹ *The Prosecutor v. Laurent Gbagbo*, Pre-Trial Chamber I, Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-02/11-01/11 (4 June 2012), para 31. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_05199.PDF> accessed 15 January 2023

²⁸² *Ibid*.

²⁸³ *The Prosecutor v. Laurent Gbagbo*, Trial Chamber I, Decision on victim participation, ICC-02/11-01/11 (6 March 2015), para 36. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04330.PDF> accessed 15 January 2023

Departing from this approach, the Trial Chamber has concluded that during the trial stage the rights of both direct and indirect victims or victims authorized to participate depend on whether their personal interests are affected in compliance with Article 68 (3) of the Statute²⁸⁴ and Rule 85 of the Rules.²⁸⁵ Accordingly, the specified provisions do not restrict the participation of victims to the crimes set out in charges – such an approach is supported by the interpretation of Rule 85 (a) of the Rules which simply refer to the harm having resulted from the commission of a “crime within the jurisdiction of the Court” – therefore adding the proposed additional element – that they must be the crimes alleged against the accused – would be to introduce a limitation not found anywhere in the regulatory framework of the Court.²⁸⁶ In the *Bemba* case, the Chamber reiterated that whenever the interests of victims [harm] are not related to the confirmed charges, their applications to participate in proceedings shall be rejected.²⁸⁷

The Appeals Chamber in the Lubanga case considered that “whilst the ordinary meaning of rule 85 does not *per se*, limit the notion of victims to the victims of the crimes charged, the effect of article 68 (3) of the Statute is that the participation of victims in the trial proceedings, pursuant to the procedure set out in Rule 89 (1) of the Rules, is limited to those victims who are linked to the charges”.²⁸⁸ The Chamber seems to endorse a process which ties the harm suffered by the victim to the crimes charged to the accused, emphasizing that the harm alleged suffered by a victim must be linked to the charges – falling within the jurisdiction of the Court – as must the victim's personal interest.²⁸⁹

In addition to what is mentioned above, once the status of victim is granted, special safeguards to victims of sexual or gender-based violence are provided in the internal acts of the court. Article 68 (1) of the Rome Statute requires the Court to “*take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims (and witnesses), taking into account all relevant factors including age, gender, health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes.*”²⁹⁰ Additionally, in order to provide a higher level of protection to victims of sexual violence, including child victims, the Chambers of the Court may conduct parts of the proceedings on camera or allow the presentation of evidence by electronic or other

²⁸⁴ *Supra*, note 5. Article 68 (3) of the Rome Statute sets out: “Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.”

²⁸⁵ *Supra*, note 39, para 93.

²⁸⁶ *Ibid.*

²⁸⁷ *The Prosecutor v. Jean Pierre Bemba Gombo*, Trial Chamber III, Decision on 653 applications by victims to participate in the proceedings, ICC-01/05-01/08 (23 December 2010), para 29. <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_11344.PDF> accessed 15 January 2023

²⁸⁸ *Supra*, note 249, para 58.

²⁸⁹ *Ibid.*, para 47.

²⁹⁰ *Supra*, note 5. Article 68 (1).

special means.²⁹¹ The same language of protection is used in other provisions of the Rome Statute. The latter assigns the Prosecutor with the obligation to take appropriate measures to ensure effective investigation and prosecution of crimes within the jurisdiction of the Court and take into account the nature of the crime, particularly when sexual violence, gender violence or violence against children is involved.²⁹² The Trial Chamber is additionally required to ensure fair and expeditious trial with due regard for the protection of victims.²⁹³ In performing its duties prior to trial or during the course of a trial, the Trial Chamber may provide for the protection of the victims and/or confidential information. Although the provision does not mention victims of sexual and gender crimes in particular, it accords equal protections to victims of any crime; however, read in conjunction with other provisions of the Statute, victims of sexual and gender crimes profit from an exceptional status. Finally, the Statute allows the Court to grant victims reparations, establishing principles relating to, or in respect of, victims, including restitution, compensation and rehabilitation.²⁹⁴ The Court is commissioned to determine the scope and extent of any damage, loss and injury to, or in respect of, victims either upon request or on its own initiative.²⁹⁵ The purpose of this ‘determination’ appears to enable enforcement of victim’s rights before national courts.²⁹⁶ Under this provision, the enforcement of reparation shall take effect pursuant to their national law.²⁹⁷

As mentioned throughout this paper, the protection of human rights would be fragmentary without the right of victims to articulate their views in proceedings. Although the Rome Statute, through several provisions, grants victims an unprecedented role in proceedings, some aspects require clarification. Therefore, this subchapter delves into the contribution of the ICC in defining the term victim, personal interest of the victim, components of jurisdiction to assess whether the applicant should be granted participatory rights, the substitution of deceased victims, linkage between harm suffered and the crimes charged to the accused as well as other unclear elements. The analyses aims to highlight the extent to which the ICC invokes not only internal acts, but especially internationally recognized human rights under the application and interpretation of Article 12 (3) to define such terms and grant participatory rights

Although the positions of ICC Chambers concerning the participation of victims in international criminal proceedings have occasionally been different from one another, leading to divided approaches, in the majority of its decisions the court has significantly contributed to broadening the concept of ‘victim’ in a manner that expands the range of victims who can participate in

²⁹¹ *Ibid.*, Article 68 (2).

²⁹² *Ibid.*, Article 54 (1) (b) of the Rome Statute sets out: “Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children.”

²⁹³ *Ibid.*, Article 64 (2).

²⁹⁴ *Ibid.*, Article 75 (1).

²⁹⁵ *Ibid.*

²⁹⁶ *Supra*, note 23.

²⁹⁷ *Ibid.*, Article 75 (5), 109.

proceedings. Thus, by endorsing a process that keeps in mind the best interest of victims, the ICC has played a crucial role in protecting and enforcing victim's human rights, especially of those who have suffered gender-based and sexual violence.

CHAPTER II

CHALLENGES ON THE ROAD TO ENFORCING HUMAN RIGHTS

There are some preliminary explanations as to what terms could account for the outcome of cases brought to the ICC. For instance, the ICC's limited institutional powers, including the lack of enforcement mechanisms, hinder its ability to address criminal responsibility, therefore, if states do not cooperate with the ICC, the latter will not be able to deliver proper justice. Scholars contend that the limited jurisdiction of the Court affects the ability to prosecute crimes²⁹⁸ while others have come to the conclusion that since the ICC only steps in when the governments are unwilling or unable to prosecute, such reliance on states is critical and might play a role in why the ICC achieves the confirmation of charges in some cases and not others.²⁹⁹ Some have concluded that the state's views on the legitimacy of the ICC or the interests of a powerful state will influence the outcome of the case. The inability of the ICC to exert pressure on these states to comply demonstrates its limited capacity.³⁰⁰ As many challenges facing the ICC are common to all international courts and tribunals, unique complications have arisen in the context of [the lack of] an enforcement mechanism³⁰¹ and the non-cooperation of states.³⁰²

2.1. Lack of enforcement mechanism.

When compared to the national criminal courts, which extend their jurisdiction within a state's territory and have legal authority to impose their decisions by means of police, international criminal courts operate in other jurisdictions without any power to enforce their decisions.³⁰³ Enforcement regime issues have beset the ICC since its establishment and although there have

²⁹⁸ Thomas Hethe Clark, "The Prosecutor of the International Criminal Court, Amnesties, and the "Interests of Justice": Striking a Delicate Balance" (2005) 4 Washington University Global Studies Law Review. <https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1208&context=law_globalstudies> accessed 15 January 2023

²⁹⁹ Janine Natalya and Clark Peace, "Justice and the International Criminal Court: Limitations and Possibilities" (2011) Vol. 9 (3) Journal of International Criminal Justice. <<https://doi.org/10.1093/jicj/mqr007>> accessed 15 January 2023

³⁰⁰ Sarah J. Goodman, "The Effectiveness of the International Criminal Court: Challenges and Pathways for Prosecuting Human Rights Violations" (2020) Vol 12 (9) Inquiries Journal. <<http://www.inquiriesjournal.com/articles/1806/the-effectiveness-of-the-international-criminal-court-challenges-and-pathways-for-prosecuting-human-rights-violations>> accessed 15 January 2023

³⁰¹ Zlata Đurđević, "Legal and Political Limitations of the ICC Enforcement System: Blurring the Distinctive Features of the Criminal Court" (Faculty of Law, University of Zagreb 2016), 164. <https://www.pravo.unizg.hr/download/repository/FS_Damaska_-_Durdevic.pdf> accessed 18 January 2023

³⁰² Olympia Bekou, "Dealing with Non-cooperation at the ICC: Towards a More Holistic Approach" (2019) 19 International Law Review. <https://brill.com/view/journals/icla/19/6/article-p911_911.xml> accessed 18 January 2023

³⁰³ *Supra*, note 301, 165.

been endeavors to rectify the problem, it continues to intrude into the Court's mandate due to inadequate addressing of gaps or political troubles.³⁰⁴ As a result, the legal mechanism of the ICC regarding enforcement of investigative measures and warrants of arrest³⁰⁵ as well as enforcement of sentences relies upon the cooperation of states.³⁰⁶ While procedural cooperation (investigation, arrest and surrender of the alleged accused) is mandatory, post-trial cooperation which includes accommodation of convicted prisoners within national prison institutions is facultative even for States Parties to the Rome Statute.³⁰⁷

Since the Rome Statute is founded on national sovereignty, the enforcement mechanism lacks hierarchal interconnection between the Court and an enforcement body; states are bound to the international obligation to 'cooperate' – which is subject to exceptions and modifications – but not to 'enforce'.³⁰⁸ Such an enforcement approach does not only rupture the criminal procedural powers, but it also jeopardizes one of the Court's tasks to conduct criminal proceedings³⁰⁹ and put an end to impunity. The ICC cooperation model has been considered in the literature as suffering from a number of imperfections:³¹⁰ as a dual regime of vertical and horizontal cooperation³¹¹ or a model closer to inter-State cooperation.³¹² Sluiter³¹³ categorizes the cooperation model of the ICC as hierarchal represented with three features: *first*, State Parties are under a statutory obligation to cooperate with the ICC³¹⁴; *second*, it is entitled with authoritative powers to settle disputes with cooperation from the states³¹⁵ and *third*, the ICC is under no statutory obligation to assist State

³⁰⁴ Maryam Jamshidi, "The enforcement gap: How the International Criminal Court failed in Darfur", Opinion in Aljazeera (2013). <[The enforcement gap: How the International Criminal Court failed in Darfur | Opinions | Al Jazeera](#)> accessed 18 January 2023

³⁰⁵ *Supra*, note 301, 166.

³⁰⁶ *Supra*, note 23, 339.

³⁰⁷ *Ibid.*

³⁰⁸ *Supra*, note 301, 170.

³⁰⁹ *Ibid.*

³¹⁰ Hans-Peter Kaul and Claus Kreß, "Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises" (1999) 2 Yearbook of International Humanitarian Law. <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/96E66B454AD98841E1E9B398A93BDCCF/S138913590000404a.pdf/jurisdiction_and_cooperation_in_the_statute_of_the_international_criminal_court_principles_and_compromises1.pdf> accessed 18 January 2023

³¹¹ Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to Criminal Law and Procedure* (3rd edn, Cambridge University Press 2014), 518.

³¹² *Ibid.*

³¹³ Göran Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States*, in Zlata Đurđević, Legal and Political Limitations of the ICC Enforcement System: Blurring the Distinctive Features of the Criminal Court" (Faculty of Law, University of Zagreb 2016), 172.

³¹⁴ *Supra*, note 5. Article 86 of the Rome Statute sets out: "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court".

³¹⁵ *Ibid.* Article 87 (7) of the Rome Statute reads: "Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council"; Article 119 (1) sets out: "Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court".

Parties.³¹⁶ Although the Court bears these features, they are subject to exemptions and interpretations which defer to state sovereignty, and a horizontal intergovernmental cooperation approach is evidently both from a procedural perspective and ineffectiveness of measures for non-cooperation.³¹⁷

From a procedural perspective, the ICC is not entitled to give orders to States but can only make a request to cooperate. Under Article 87 (1), “*The Court shall have the authority to make requests to States Parties for cooperation*” through designated diplomatic channels or when appropriate through the International Criminal Police organization or other regional organizations³¹⁸ or on the grounds of an *ad hoc* agreement³¹⁹ with non-member States. The ICC relies therefore on the States to comply with the obligation to cooperate. Nonetheless, failure to comply with the request for cooperation bears consequences. The Court, after hearing arguments from the States Parties regarding their failure to cooperate³²⁰ or legality of the request for cooperation,³²¹ it makes a judicial finding and refers the matter to the Assembly of States Parties or, if the Security Council referred the matter to the Court, the latter refers the matter to the Security Council.³²² If a non-Party State fails to comply with the obligation to cooperate under the *ad hoc* agreement, the ICC is entitled to inform the Assembly of States Parties or the Security Council where the matter was referred by this body to the ICC.³²³ The ICC is not vested with powers to sanction states and in order not to impinge its limitations, the judicial findings of the ICC must not propose or suggest any recommendations as to the course of actions that the Assembly of States Parties or the Security Council may undertake in response to that finding.³²⁴ The Assembly may demand states to comply with the ICC or apply political, economic and financial pressure, which have proven to be effective.³²⁵ Additionally, the Assembly of States Parties has founded the Bureau on non-cooperation as a subsidiary authority, as well as the procedures relating to non-cooperation³²⁶ and the draft action plan on arrest strategies,³²⁷ having in consideration the increased number of cases pertaining to non-cooperation.

³¹⁶ *Supra*, note 313.

³¹⁷ *Supra*, note 301, 174.

³¹⁸ *Supra*, note 5. Article 87 (1) (a) (b).

³¹⁹ *Ibid.* Article 87 (5) (a).

³²⁰ Regulation 109 (3) of the Regulations of the Court. <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf> accessed 18 January 2023

³²¹ *Ibid.* Regulation 109 (1).

³²² *Ibid.* Regulation 109; *Supra*, note 5. Article 87 (7)

³²³ *Supra*, note 5. Article 87 (6).

³²⁴ *Supra*, note 301, p.178.

³²⁵ *Ibid.*

³²⁶ Assembly of States Parties, Procedures relating to non-cooperation, ICC-ASP/17/20, annex II. <https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP17/RES-5-ENG.pdf#page=24> accessed 18 January 2023

³²⁷ Assembly of States Parties, [Draft] Action Plan on arrest strategies submitted by the Rapporteur, ICC-ASP/14/26/Add.1, appendix. <https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP14/ICC-ASP-14-26-Add1-ENG.pdf> accessed 18 January 2023

A second alternative to foster the enforcement of the ICC decisions is through the Security Council, by applying Chapter VII of the UN Charter in cases of non-cooperation of UN member states. According to the UN Charter, the Security Council makes recommendations or takes measures from complete or partial interruption of economic relations or any means of communications and the severance of diplomatic relations³²⁸ to demonstrations, blockades or any other operations by air, sea or land forces.³²⁹ To date, the Security Council has referred the *Situation in Darfur* in Resolution 1593³³⁰ and the *Situation in Libya* in Resolution 1970³³¹. Although the Security Council required parties involved in the conflict to cooperate with the ICC, the resolutions were not satisfactory at urging states, except Sudan and Libya, to cooperate with the ICC, noting that they were under no obligation to do so.³³²

In recent years, jurisprudence of the Court pertaining to findings of non-cooperation, which has shown growth, provides an insight as to how the ICC employs its findings on non-cooperation. The non-cooperation decisions, except for the situations in Libya³³³ and Kenya,³³⁴ pertain mainly to the situation in Sudan and other States Parties' failure to hand over Al Bashir.³³⁵ By invoking Article 87 (7) of the Rome Statute, the ICC has referred the situation in Kenya to the Assembly of States Parties indicating that no other external actors, other than the Assembly, are likely to take effective actions and address the lack of cooperation of the Kenyan Government,³³⁶ while the situations in Libya and Sudan were referred to either the Assembly or the Security Council.³³⁷

Despite the high expectations from the Assembly of States Parties or the Security Council to take proper measures against states that failed to cooperate, observations indicate that the actions of the Assembly of States Parties remained a non-judicial action, limited to political and diplomatic

³²⁸ Article 41 of the UN Charter. <<https://www.un.org/en/about-us/un-charter/full-text>> accessed 18 January 2023

³²⁹ *Ibid*, Article 42.

³³⁰ United Nations Security Council, Resolution 1593 (2005) Adopted by the Security Council at its 5158th meeting, on 31 March 2005, S/RES/1593 (2005). <<https://www.securitycouncilreport.org/atf/cf/%7b65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7d/Darfur%20SRES1593.pdf>> accessed 18 January 2023

³³¹ United Nations Security Council, Resolution Adopted by the Security Council at its 6491st meeting, on 26 February 2011, S/RES/1970 (2011). <<https://www.securitycouncilreport.org/atf/cf/%7b65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7d/Libya%20S%20RES%201970.pdf>> accessed 18 January 2023

³³² Security Council Report, "In Hindsight: The Security Council and the International Criminal Court" (August 2018). <https://www.securitycouncilreport.org/monthly-forecast/2018-08/in_hindsight_the_security_council_and_the_international_criminal_court.php> accessed 18 January 2023

³³³ *The Prosecutor v. Saif Al-Islam Gaddafi*, Pre-Trial Chamber I, Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council, ICC-01/11-01/11 (10 December 2014). <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2014_09999.PDF> accessed 18 January 2023

³³⁴ *The Prosecutor v. Uhuru Muigai Kenyatta*, Trial Chamber V, Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute, ICC-01/09-02/11 (3 December 2014). <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2014_09899.PDF> accessed 18 January 2023

³³⁵ *Supra*, note 302, 919.

³³⁶ *Supra*, note 334, para 37-38.

³³⁷ Assembly of States Parties to the Rome Statute, Communications received by the Assembly or the Security Council, related to non-cooperation pursuant to the Rome Statute (section v-vi). <<https://asp.icc-cpi.int/non-cooperation>> accessed 18 January 2023

activities,³³⁸ while no action has been taken by the Security Council.³³⁹ Additionally, the Security Council failed to adequately act on 13 decisions of the ICC with regard to the non-compliance of UN member states.³⁴⁰ Apparently, the enforcement of the Court's decision relies deeply on the follow up of the Assembly and the Security Council, and the practice raises the doubt as to whether "*the jurisprudence of the ICC on non-cooperation has made any discernible difference*".³⁴¹ Therefore, relying only on judicial findings alone is not sufficient to effectively enforce the ICC's decisions.

Additionally, the Court relies upon States Parties to execute its imprisonment decisions.³⁴² States voluntarily agree to be placed in the states of enforcement list and accept the sentenced person.³⁴³ Once the Court has designated a particular state to enforce the sentence of imprisonment, the state informs the Court whether it accepts the designation or not.³⁴⁴ Unless the State opposes the designation, it becomes binding, and no changes to this determination shall be available.³⁴⁵ However, if the State rejects the designation, the Court may appoint another State to serve the imprisonment sentence.³⁴⁶ Nonetheless, the Rome Statute does not impose any direct responsibility over States to enforce the Court's sentence,³⁴⁷ except the costs for the enforcement of the sentence which shall be borne by the hosting state.³⁴⁸

As an international criminal court, the enforcement mechanism of the ICC has been subject to political negotiations and protection of States' sovereignties, putting the effectiveness of the court at the discretion of state governments.³⁴⁹ Because the ICC has no external enforcement powers and the dependency on the Assembly or the Security Agency to uphold the enforcement of its decisions has shown little impact, it is suggested by different authors that the establishment of an international police force³⁵⁰³⁵¹ or "a supranational judicial enforcement regime by empowering the national courts as ICC enforcement bodies".³⁵² The latter option has been applied by France, Georgia, Spain and Switzerland by introducing the enforcement of the ICC's decisions by national courts and avoiding the two-stage – governmental and judicial – process.³⁵³ However,

³³⁸ *Supra*, note 301, p.180.

³³⁹ *Supra*, note 302, p. 924.

³⁴⁰ *Supra*, note 332.

³⁴¹ *Supra*, note 302, 925.

³⁴² *Supra*, note 5. Article 103; *Supra*, note 6. Rule 201.

³⁴³ *Ibid.* Article 103 (1) (a); *Ibid.* Rule 200 (1) of the Rules of Procedure and Evidence.

³⁴⁴ *Ibid.* 103 (1) (c).

³⁴⁵ *Ibid.* Article 105 (1).

³⁴⁶ *Supra*, note 6. Rule 205.

³⁴⁷ Karin Calvo-Goller, "Enforcement", in "The Trial Proceedings of the International Criminal Court, ICTY and ICTR Precedents" (*Brill Nijhoff, 2006*), Chapter VI, 328.

³⁴⁸ *Supra*, note 6. Rule 208 (1).

³⁴⁹ *Supra*, note 301, 195.

³⁵⁰ *Supra*, note 304.

³⁵¹ *Supra*, note 301, 196 - 197.

³⁵² *Ibid.*

³⁵³ *Ibid.*

materialization of these suggestions have implications in terms of financial costs and with the application of the international principle of non-interference in a state's internal affairs.³⁵⁴

2.2. Lack of states' cooperation.

The International Criminal Court, which was established to investigate and prosecute the most serious crimes of concern to the international community, is equipped with legal mechanisms to uphold the rule of law, to protect and deliver justice for victims and to prevent future violations of human rights. Nonetheless, the ICC cannot act unilaterally as it generally has no executive powers and no police force of its own; it is totally dependent on full, effective and timely cooperation from States Parties.³⁵⁵ A very grave limitation on the factual side is the enormous difficulty of carrying out investigations and collecting evidence regarding mass crimes committed in regions which are thousands of kilometers away from the Court.³⁵⁶ Additionally, the Court, prior to gathering evidences, must obtain permission from the country, in respect of the state's sovereignty.³⁵⁷ Consequently, the ICC has a large dependence on the cooperation and support of countries in order to be able to commence investigations and prosecute the perpetrators.

The obligations to cooperate with the Court are listed in certain provisions of the Rome Statute. *Article 86 provides in part: 'State Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court'.*³⁵⁸ Cooperation with the ICC may include access to evidences, facilitation of the process of identifying and locating witnesses and victims as well as the whereabouts of the suspect and arrest and surrender of suspect.³⁵⁹ The Statute indicated that the national laws of States shall govern the procedure of cooperation, and failure to comply with statutory provisions pertaining to cooperation will lead to violations of the Rome Statute.³⁶⁰ However, since no proper mechanism to enforce these provisions is in place³⁶¹, the Court faces setbacks in investigating and prosecuting perpetrators due to its dependency on effective cooperation of States Parties.³⁶²

³⁵⁴ *Ibid.*

³⁵⁵ Hans-Peter Kaul, 'The International Criminal Court: Current Challenges and Perspectives' (2007) 6 Washington University Global Studies Law Review. <<https://journals.library.wustl.edu/globalstudies/article/240/galley/17079/view/>> accessed 18 January 2023

³⁵⁶ *Ibid.*

³⁵⁷ *Ibid.*

³⁵⁸ *Supra*, note 5. Article 86.

³⁵⁹ *Ibid.* Article 89, 91-93.

³⁶⁰ Bruce Broomhall, "ICC Enforcement: Cooperation of States, including the Security Council", in "International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law" (Oxford University Press, 2004), Chapter VIII, 156. <<https://academic.oup.com/book/26702>> accessed 18 January 2023

³⁶¹ Rene Blattmann and Kirsten Bowman, "Achievements and Problems of the International Criminal Court: A View from Within" (2008) 6 Journal of International Criminal Justice. <<https://ur.booksc.me/book/42496028/70911a>> accessed 18 January 2023

³⁶² *Supra*, note 355, 575.

In the absence of cooperation from a State Party or a State agreeing to provide assistance, the Court is entitled to refer the matter to or inform the Assembly of States Parties or, if the case was referred by the Security Council, to the latter.³⁶³ The Assembly on the other hand “*shall consider any question relating to non-cooperation*”.³⁶⁴ While the Security Council may authorize, by invoking Chapter VII of the UN Charter, the use of force to support the ICC, provided that the case is referred by the Security Council, the Assembly has no powers to do so; therefore it can only impose a narrow range of peaceful measures.³⁶⁵ In order for the Court to maintain the overall support of States and avoid any political polarization, the Assembly, in responding to non-cooperation findings, will consequently at times work against effective, regular and impartial enforcement.³⁶⁶

One of the most critical areas where the Court has identified shortcomings pertains to the (non) cooperation of States in implementing arrest warrants.³⁶⁷ The issue came to the fore in the case of *Prosecutor v. Omar Hassan Ahmad Al Bashir*. The first warrant for arrest was issued on 4 March 2009,³⁶⁸ followed by a second one on 12 July 2010.³⁶⁹ The ICC issued arrest requests to States which were visited by Al Bashir. However, they refused to cooperate on the grounds of lack of awareness of any impending visit by him³⁷⁰ or on grounds of violations of customary international law by virtue of his immunity *ratione personae*. The Court informed the UN Security Council and the Assembly of States Parties with regard to his visits to Kenya, Chad, Djibouti, Malawi as well as the non-cooperation of Chad, Democratic Republic of Congo and Sudan in the arrest and surrender of Al Bashir.³⁷¹ The arguments of the Sudanese Government spark interest because they indicated that “Sudan did not recognize the jurisdiction of the Court” since it was not party to the Rome Statute.³⁷² Pre-Trial Chamber II recalled that it is true that the Rome Statute can impose

³⁶³ *Supra*, note 5. Article 87 (5) & (7).

³⁶⁴ *Ibid.* Article 112 (2) (f).

³⁶⁵ *Supra*, note 360, 157.

³⁶⁶ *Ibid.*

³⁶⁷ Resolution ICC-ASP/19/33, Assembly of States Parties, Report of the Bureau on Cooperation (8 December 2020), 8. <https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/ICC-ASP-19-33-ENG-Bureau-cooperation-08dec20-1730.pdf> accessed 18 January 2023; ICC-ASP/19/Res.2, “Resolution on cooperation” (16 December 2020), 2. <https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/ICC-ASP-19-Res2-ENG.pdf> accessed 18 January 2023; Resolution ICC-ASP/19/Res.6, “Strengthening the International Criminal Court and the Assembly of States Parties” (16 December 2020), 4. <https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/ICC-ASP-19-Res6-ENG.pdf> accessed 18 January 2023

³⁶⁸ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09 (4 March 2009). <[CR2009_01514.PDF \(icc-cpi.int\)](#)> accessed 18 January 2023

³⁶⁹ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, Second Decision on the Prosecution's Application for a Warrant of Arrest, ICC-02/05-01/09 (12 July 2010). <[CR2010_04826.PDF \(icc-cpi.int\)](#)> accessed 18 January 2023

³⁷⁰ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, Annex to: Addendum to the report of the Registrar entitled “Transmission of the reply from the Republic of Kenya”, ICC-02/05-01/09-120-Anx1(29 October 2010). <[CR2010_09233.PDF \(icc-cpi.int\)](#)> accessed 18 January 2023

³⁷¹ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Timeline. <[Al Bashir | International Criminal Court \(icc-cpi.int\)](#)> accessed 18 January 2023

³⁷² *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber II, Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan, ICC-02/05-01/09 (9 March 2015), para 9 - 12. <[CR2015_02745.PDF \(icc-cpi.int\)](#)> accessed 18 January 2023

obligation only on a State Party or on a non-State Party that has given its consent. Nonetheless, the UN Security Council is empowered to alter this principle by means of a resolution adopted under Chapter VII of the UN Charter, thus introducing an obligation on UN Member States not parties to the Statute to cooperate with the Court.³⁷³ In this context, Sudan is a member of the UN – following the adoption of Resolution 1593(2005) by the Security Council in which it was determined that “*Government of Sudan [...] shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully*”.³⁷⁴ It stems from this reasoning that the provisions of the Statute pertaining to cooperation become applicable vis-à-vis Sudan.³⁷⁵ Finding that Sudan had not only failed to cooperate with the ICC but it had additionally disregarded the UN Charter, the Court referred the matter to the Security Council.³⁷⁶ The Chamber reiterated that the Council is expected to take appropriate measures to address the failure of Sudan to arrest and surrender Al Bashir; otherwise neither the Court nor the Council would achieve the ultimate goal of putting an end to impunity.³⁷⁷

Lack of cooperation of a State Party to the Rome Statute, determined in a decision of the Pre-Trial Chamber II, was upheld in the Appeals. It regards the Hashemite Kingdom of Jordan, which was found in breach of the obligation under the Statute to arrest and surrender Al Bashir when he was in the Jordanian territory on 29 March 2017, the day Jordan hosted the 28th Arab League Summit.³⁷⁸ Jordan submitted that Omar Al-Bashir enjoyed immunity *ratione personae* under international law as a sitting Head of State and that his arrest by Jordan would have violated Jordan’s obligation under customary international law concerning such immunity”.³⁷⁹ Additionally, Jordan noted that “Al Bashir enjoyed immunity from the criminal jurisdiction of Jordan during his attendance of the Arab League Summit under the 1953 Convention on the Privileges and Immunities of the Arab League acceded to by Jordan on 12 December 1953”,³⁸⁰ and, since Sudan is a non-party of the Statute (and it has not waived immunity of its officials from the jurisdiction of the Court or other States), the legal relationship between Jordan and Sudan is governed by the customary international law and treaty rules and not by the Rome Statute.³⁸¹ The

³⁷³ *Ibid.*

³⁷⁴ Security Council, S/RES/1593 (2005), Adopted by the Security Council at its 5158th meeting, on 31 March 2005, para 2. <[Microsoft Word - 0529273e.doc \(un.org\)](#)> accessed 18 January 2023

³⁷⁵ *Supra*, note 372, para 15.

³⁷⁶ *Ibid.*, para 16-17.

³⁷⁷ *Ibid.*

³⁷⁸ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber II, Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir, ICC-02/05-01/09 (11 December 2017), para 8. <[CR2017_07156.PDF \(icc-cpi.int\)](#)> accessed 18 January 2023

³⁷⁹ The Embassy of the Hashemite Kingdom of Jordan submission concerning the case of the Prosecutor v. Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09), and its decision to extend the time limit for such a submission (ICC-02/05-01/09-299 dated 2 June, 2017), ICC-02/05-01/09-301-Anx, 28-08-2018, 2. <[CR2017_04337.PDF \(icc-cpi.int\)](#)> accessed 18 January 2023

³⁸⁰ *Ibid.*

³⁸¹ *Ibid.*

Pre-Trial Chamber II found that Jordan had failed to comply with its obligations under the Statute and referred the matter to the Assembly of States Parties and the UN Security Council.³⁸²

Based on the appeal of the decision by Jordan, the Appeals Chamber held that Article 27 (2) of the Rome Statute, which stipulates that “*Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person*”, mirrors the status of customary international law.³⁸³ It came to the conclusion that Al Bashir did not enjoy immunity as Head of State under customary international law *vis-à-vis* the Court.³⁸⁴ The Chamber concluded that “*by ratifying or acceding to the Statute, States Parties have consented to the inapplicability of Head of State immunity for the purpose of proceedings before the Court. As a result, both in the State Parties’ vertical relationship with the Court and in the horizontal relationship between States Parties there is no Head of State immunity if the Court is asking for the arrest and surrender of a person.*”³⁸⁵ Therefore, in the present case where Jordan – a State Party to the Rome Statute – is required to cooperate with the ICC and Sudan – a non-State Party – is obliged to cooperate fully with the ICC under the obligations arising from Resolution 1593 (2005), the Head of State immunity is inapplicable.

After more than 10 years of multiple efforts to bring Al Bashir before justice to be held accountable for crimes against humanity, genocide and war crimes that allegedly occurred between 2003 and 2008 in Darfur, Sudan³⁸⁶, Al Bashir has not been brought before the ICC despite the widespread news that Sudan had agreed to hand him over.

Another arrest warrant issued on 27 June 2011 against Saif Al-Islam Gaddafi – the honorary chairman of the Gaddafi’s International Charity and Development Foundation and acting as the Libyan de facto Prime Minister³⁸⁷ – for alleged criminal responsibility for crimes against humanity that occurred from 15 February until at least 28 February 2011 in Libya.³⁸⁸ The arrest warrant was challenged as inadmissible by Libya on the basis that domestic courts are actively investigating Gaddafi for alleged acts of murder and persecution amounting to crimes against humanity.³⁸⁹ The Chamber rejected the challenge of inadmissibility of the case based on the failure of Libya to

³⁸² *Supra*, note 379, 21-22.

³⁸³ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, The Appeals Chamber, Judgment in the Jordan Referral re Al-Bashir Appeal, para 122. <[CR2019_02593.PDF \(icc-cpi.int\)](#)> accessed 18 January 2023

³⁸⁴ *Ibid*, para 123.

³⁸⁵ *Ibid*, para 132.

³⁸⁶ Al Bashir case: *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09. <[Al Bashir | International Criminal Court \(icc-cpi.int\)](#)> accessed 18 January 2023

³⁸⁷ Gaddafi Case, ICC-01/11-01/11. <[Gaddafi | International Criminal Court \(icc-cpi.int\)](#)> accessed 18 January 2023

³⁸⁸ *Situation in the Libyan Arab Jamahiriya*, Pre-Trial Chamber I, Decision on the “Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah AL Senussi”, ICC-01/11 (27 June 2011). <[CR2011_08499.PDF \(icc-cpi.int\)](#)> accessed 18 January 2023

³⁸⁹ *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Pre-Trial Chamber I, Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11 (1 May 2012), para 1. <[ICC Legal Tools Database | Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute \(legal-tools.org\)](#)> accessed 18 January 2023

demonstrate sufficient evidence that the national investigations covered the same alleged crimes as those before the ICC.³⁹⁰ In addition, the Court pointed out that “*a number of legal and factual issues result in the unavailability of the national judicial system for the purpose of the case against Mr. Gaddafi*,”³⁹¹ resulting to the Libya’s inability to displace Gaddafi’s custody from detention. In light of the conclusions, Libya was therefore reminded to surrender Mr. Gaddafi. Since Libya refused to comply with the request for cooperation, *Pre-Trial Chamber I referred the matter to the UN Security Council*.³⁹² The Chamber noted that while Libya is not a State Party to the Statute, it was bound to cooperate under the UN Security Council’s Resolution 1970 (2011) according to which “*Libya shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor*”³⁹³ in addition to the Security Council Resolution referring the situation to the Prosecutor.³⁹⁴ The Court emphasized that the surrender of Gaddafi was of paramount importance for the performance of functions and powers of the ICC postulated in the Rome Statute, and the failure of Libya to cooperate effectively prevented the Court from attaining its mandate, including the responsibility to protect the interest of victims and the rights of the parties.³⁹⁵ The Court nonetheless recognized the genuine efforts made by Libya to maintain a constructive dialogue.³⁹⁶ Since the referral of the matter to the UN Security Council in 2014, there has been no development and the transfer of Gaddafi is currently pending.

Similarly, the Trial Chamber III issued a warrant of arrest against Simone Gbagbo for alleged crimes against humanity in the territory of Côte d’Ivoire during the 2010-2011 post-election violence.³⁹⁷ On 19 March 2012, Côte d’Ivoire was required to arrest and surrender Gbagbo to the ICC.³⁹⁸ As a response to this request, Côte d’Ivoire submitted an admissibility challenge, showing that national courts had initiated proceedings covering similar alleged conducts to those made in the case before the ICC.³⁹⁹ Additionally, it stated that it is willing to and is capable of trying Gbagbo for those crimes⁴⁰⁰ and filed supporting documents to its claims. The Pre-Trial Chamber rejected the Admissibility Challenge of Côte d’Ivoire on the grounds that “*it has not demonstrated*

³⁹⁰ *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Pre-Trial Chamber I, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11 (31 May 2013), para 219. <[CR2013_04031.PDF \(icc-cpi.int\)](#)> accessed 18 January 2023

³⁹¹ *Ibid*, para 215.

³⁹² *Supra*, note 333.

³⁹³ *Ibid*, para 21.

³⁹⁴ *Ibid*.

³⁹⁵ *Supra*, note 333, para 29 – 32.

³⁹⁶ *Ibid*, para 33.

³⁹⁷ *The Prosecutor v. Simone Gbagbo*, Pre-Trial Chamber III, Warrant of Arrest for Simone Gbagbo, ICC -02/11-01/12 (29 February 2012), 8. <[CR2012_03549.PDF \(icc-cpi.int\)](#)> accessed 18 January 2023

³⁹⁸ *The Prosecutor v. Simone Gbagbo*, Pre Trial Chamber I, Demande d'arrestation et de remise de Simone Gbagbo, ICC-02/11-01/12 (19 mars 2012). <[ICC Legal Tools Database | Demande d'arrestation et de remise de Simone Gbagbo \(legal-tools.org\)](#)> accessed 18 January 2023

³⁹⁹ *The Prosecutor v. Simone Gbagbo*, Pre Trial Chamber I, Requete de la republique de cote d'ivoire sur la recevabilité de l'affaire le procureur c. Simone Gbagbo et demande d e sursis a execution en vertu des articles 17, 19 et 95 du Statut de Rome, ICC-02/11-01/12 (30 septembre 2013), para 23 – 38. <<https://www.legal-tools.org/doc/89790b/pdf/>> accessed 18 January 2023

⁴⁰⁰ *Ibid*, para 39 – 56.

that the case against Simone Gbagbo alleged in the proceedings before the Court is currently subject to domestic proceedings within the meaning of article 17(1)(a) of the Statute”.⁴⁰¹ Therefore Côte d'Ivoire was obliged under the Statute to proceed with the surrender of the accused to the ICC without delay.⁴⁰² The decision was brought to appeal on 17 December 2014. The Appeals Chamber echoed the Pre-Trial Chamber’s findings, concluding that Côte d'Ivoire did not demonstrate any errors of fact or law in the decision delivered by the Pre-Trial Chamber, emphasizing that the Pre-Trial was reasonable in determining that the nature of charges against Gbagbo before the domestic court differed from crimes against humanity of murder, rape and other forms of sexual violence, and other inhumane acts.⁴⁰³ Additionally, Côte d'Ivoire failed to demonstrate that the parameters of the case(s) being investigated domestically were clear.⁴⁰⁴ Consequently, the appeal was rejected and hence Côte d'Ivoire – a State Party to the Rome Statute – was likewise bound under the Statute to hand over Gbagbo to the ICC for trial. Since the issuance of the Appeals decision in 2015, the Ivorian government did not surrender the alleged perpetrator, who, in fact, was in prison at the time. Simone Gbagbo was given amnesty and released from prison in 2018.⁴⁰⁵ However, the ICC’s request that the Ivorian government surrender her was not executed, and no trial against Gbagbo commenced. Regrettably, after 9 years, the Prosecutor requested to vacate the Arrest Warrant based on the lack of reasonable prospect to prove the necessary evidentiary threshold to execute the arrest warrant.⁴⁰⁶ The request was granted by the Pre-Trial Chamber II, finding that developments at the trial and appeal stage with regard to evidences against Gbagbo did not meet the threshold under the [Article 58 (1) (a)] Rome Statute.⁴⁰⁷

The cooperation of States Parties to the Rome Statute (or non-States Parties under an *ad hoc* agreement or UN Security Council resolutions) is of utmost importance since it contributes to the operation of the ICC at all stages of proceedings, gathering of evidences and enforcement of judgements.⁴⁰⁸ Failure of cooperation from States to arrest and surrender alleged perpetrators to the ICC indicates that those states are committed to contributing to holding them responsible for

⁴⁰¹ *The Prosecutor v. Simone Gbagbo*, Pre Trial Chamber I, Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo, ICC-02/11-01/12 (11 December 2014), para 79. <[ICC Legal Tools Database | Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo \(legal-tools.org\)](https://www.legal-tools.org/doc/06088/pdf)> accessed 18 January 2023

⁴⁰² *Ibid*, para 80.

⁴⁰³ *The Prosecutor v. Simone Gbagbo*, The Appeals Chamber, Judgment on the appeal of Côte d’Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled “Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo”, ICC-02/11-01/12 OA (27 May 2015), para 98 – 101. <[CR2015_06088.PDF \(icc-cpi.int\)](https://www.legal-tools.org/doc/06088/pdf)> accessed 18 January 2023

⁴⁰⁴ *Ibid*, para 92.

⁴⁰⁵ Abraham Kouassi, “Legal Proceedings Against Simone Gbagbo: Prosecutor Requests Access to Ivorian Submissions” (2018) International Justice Monitor. <<https://www.ijmonitor.org/2018/09/legal-proceedings-against-simone-gbagbo-prosecutor-requests-access-to-ivorian-submissions/>> accessed 18 January 2023

⁴⁰⁶ *The Prosecutor v. Simone Gbagbo*, Pre-Trial Chamber II, Request to Vacate Arrest Warrant, ICC-02/11-01/12 (15 June 2021), para 6. <[CR2021_05506.PDF \(icc-cpi.int\)](https://www.legal-tools.org/doc/05506/pdf)> accessed 18 January 2023

⁴⁰⁷ *The Prosecutor v. Simone Gbagbo*, Pre-Trial Chamber II, Decision on the Prosecutor’s request to vacate the effect of the Warrant of Arrest issued against Ms. Simone Gbagbo, ICC-02/11-01/12 (19 July 2021). <[CR2021_06446.PDF \(icc-cpi.int\)](https://www.legal-tools.org/doc/06446/pdf)> accessed 18 January 2023

⁴⁰⁸ *Supra*, note 301, 165.

international crimes only on paper, thereby making it impossible for the Court to enforce its powers and mandate under the Rome Statute with regard to criminal proceedings. The arrest and surrender to the ICC of the person sought is requisite to proceedings before the ICC. Despite the unequivocal obligation, especially of States Parties to cooperate with the ICC, it is evident from the cases above that either States Parties or non-States Parties are reluctant to execute warrants of arrest thus preventing the Court from bringing them to trial. It is a more formidable challenge for the ICC if the alleged perpetrator holds a political or powerful position within the government.

Despite the notable achievements of the ICC, the Rome Statute contains weaknesses that make it vulnerable to misinterpretations and abuses. Since the ICC has no authoritative powers to enforce its decisions, it puts the effectiveness of the court at the discretion of state governments. Thus, the role of the ICC in enforcing human rights, unfortunately, relies heavily on the will of states to cooperate. The problematic issues of the Rome Statute seem to manifest in three particular directions: lack of an authoritative enforcement mechanism, lack of repercussion for States Parties that are in breach of provisions of Rome Statute, and the ambiguity of articles regarding the immunity of the accused, both when the state is or is not a member state of the Statute. Thus, by applying the case studies above, an illustration of the role and challenges the ICC faces with regard to the protection of human rights, no matter the crimes committed, is underlined. So far, the ICC is mandated to safeguard the rights of all individuals who suffer from any atrocity that falls under the jurisdiction of the Court. However, the lack of an effective enforcement mechanism hinders the performance of the ICC. Furthermore, as the examples have shown, lack of cooperation directly affects the Court's ability to hold perpetrators accountable, undermining the Court's credibility.

CHAPTER III

CONCLUSIONS

This dissertation's findings indicate that the enforcement of human rights posed too many challenges to the International Criminal Court and brought about a mixture of unintended but preventable consequences. Failure of a proper enforcement mechanism coupled with a lack of political will to cooperate with the Court resulted in counterproductive judgments with long-term consequences to international justice and the impunity of perpetrators.

As we have seen in the chapters of this paper, the ICC was founded to address the increasing number of mass crimes and large-scale atrocities in the majority of the world countries and its relevance has become undeniable. At the very least it has become a medium for denouncing human rights abuses and offering sanctions for those who have violated them. Despite the challenges it faces, it remains a place where voiceless victims can potentially be well-served when all other forums of justice have failed them. It is a way for crimes to be brought to attention on a global scale.

In interpreting and applying the law so as to provide a broader protection of human rights, the Court is bound by Article 21, and as many scholars have supported, it must especially rely heavily on paragraph 3 of the said article that pertains to the interpretation and application of laws in consistency with 'internationally recognized human rights'.

Also worth mentioning is that the practice of the ICC proffers little insight in its application of Article 21 (3), since the court generally refrains from explaining either the meaning of 'internationally recognized human rights' or the method of identifying and incorporating concurrent sources of international instruments when addressing if a particular rights falls within the scope of 'internationally recognized human rights', although the Court has referred to several international/universal human rights instruments. Despite the fact that the meaning of the notion remains elusive, Article 21 (3) is best characterized as a potential resource to evolve the norms and principles of human rights which are broadly accepted within the international community.

As the cases concerning gender-based and sexual crimes have so clearly demonstrated, a strong and well-detailed jurisprudence is crucial in assuring that proper protection from horrendous crimes is put in place. While explicit criminalization of offenses against gender-based and sexual violence is important as it allows victims to seek justice against their perpetrators and expressly categorizes certain acts as crimes, the role that the ICC plays in applying and interpreting the law in a manner that gives broader protection to victims of sexual and gender-based violence has revealed to be exceptional.

The failure of the *Lubanga* case sheds new light on the difficulties that the ICC has faced and continues to face with regard to collection of evidences when dealing with crimes of sexual and gender-based violence. Further, the ICC restricted the reach of reparations to victims of violence, narrowing the range of individuals who could be awarded reparations solely to those who suffered harm as a result of crimes for which the accused was convicted. Finally, the Court failed to define sexual violence under war crimes of ‘active use of children under the age of 15 in hostilities’. Only Judge Odio Benito in her Separate and Dissenting Opinion tried to respond to this question especially by virtue of Article 21 (3) of the Rome Statute emphasizing that failure to define the legal concept of ‘enlistment, conscription and use to participate actively in the hostilities’ under war crimes does not align with the mandate of the Rome Statute and internationally recognized human rights, in addition to showing gender discrimination under Article 21 (3).

The judgement pertaining to Katanga was a second lost chance to address sexual violence; nonetheless, it upholds significant points. It was the first judgment to grapple with the interpretation of rape and sexual slavery by amplifying the meaning of the Elements of Crimes; secondly, it affirmed the need to prove the absence of consent, and finally, it elucidated the elements of sexual slavery. However, it failed to link the accused to sexual crimes therefore failing to ensure enforcement of international justice.

The judgement of *Ntaganda* was welcomed as a crucial step towards the development of the ICC’s jurisprudence on sexual and gender-based violence. It was the first victory for victims who suffered sexual acts and the long-awaited landmark conviction. The ICC extended the application of the Statute and its jurisdiction to victims of rape and sexual slavery during armed conflicts, regardless of their relationship with the perpetrators. Further, it contributed to raising the accountability level for sexual and gender-based violence under international law by concluding that perpetrators who commit such crimes within their group shall be prosecuted accordingly. Finally, for the very first time, the Prosecutor was strongly engaged to investigate and prosecute by paying particular attention to the Policy Paper on Sexual and Gender-Based Violence.

To sum up, the role of the Court to apply and interpret the law so as to implement adequate measures to protect victims of sexual and gender-based violence is crucial. The practice has shown shortcomings that affect the long-term impact on individuals who suffer from such crimes, coupled with a poor track record of only one successful final conviction for sexual crimes to date (*The Prosecutor v. Bosco Ntaganda*). Although many cases are under investigation or pending before the Court and might still shed light on sexual and gender-based violence, the ICC nonetheless has considerable work ahead in inspiring credence for victims of sexual and gender-based crimes, in putting an end to impunity for these crimes, protecting and promoting the rights of victims globally.

With regard to the advancement and strengthening of victims’ participation in proceedings, the ICC has given the victims a central role in criminal processes. Granting the status of ‘victim’ and giving the participatory rights before the Court begins with the Situation in the Democratic

Republic of Congo. Relying upon the Rules of Procedure and Evidence and resorting to Article 21 (3), the Chambers have concluded that the status of ‘victim’ shall be granted to individuals who have suffered harm from a crime that falls under the jurisdiction of the court, provided that a link exists between the harm suffered and the crimes for which the accused has been charged.

In interpreting the categories that fall within the meaning of ‘victim’, the Court has been divided in interpreting and applying the law in conformity with Article 21 (3) of the Rome Statute. In some cases, it has relied upon the provisions of internal acts and, in other cases, has invoked Article 21 (3) and relevant international acts, such as the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, the European Convention on Human Rights, Convention on the Rights of the Child, etc. As a conclusion, the Chambers have recognized that deceased victims are eligible to obtain the status of victim and participate in proceedings, provided that the above mentioned conditions are met and that the written application to participate in proceeding is submitted by the successors with the consent of the deceased.

The notion of ‘harm’ has also been subject to interpretation as one of the conditions to be assessed when determining if an individual shall be granted the status of ‘victim’. In this sense, it has concluded, by resorting to Article 21 (3) and provisions of internal acts of the ICC that harm can be direct or indirect, individual or collective and it might be of a variety of forms such as physical, mental or emotional harm, economic loss or substantial impairment of fundamental rights. The burden of making an allegation as to whether the harm was direct or indirect falls upon the victim.

During the trial stage, attribution of participatory rights in proceedings requires that the crimes that caused harm fall within the jurisdiction of the Court, regardless of the charges against the accused. Additionally, the crime must satisfy *the ratione temporis, ratione loci* and *ratione material*. However, this does not mean that the court shall not examine other criteria pertaining to the status of the victim as mentioned above. Once proceedings are initiated and a *case* is established, via issuance of the charges against the accused presumed criminally responsible, the Court has endorsed a process which ties the harm suffered by the victim with the crimes charged to the accused, emphasizing that the harm alleged by a victim must be linked to the charges – falling within the jurisdiction of the Court – as must the victim's personal interest.

Particular caution shall be shown if participation of victims of sexual and gender-based violence is set in place, allowing, for instance, for proceedings to take place on camera or by other electronic means, keeping information confidential for granting victims’ reparations.

Lastly, while the ICC has made significant progress in defining crimes and matters that were not even considered in previous years, it still has a long road ahead for creating a standard procedure in investigating said crimes, and, ultimately, punishing them. Unfortunately, the Rome Statute has left the court vulnerable and the ICC is still being heavily criticized for lacking a proper enforcement mechanism and allowing more politically and economically powerful states to influence it. To this day, the Court has failed to take any concrete steps to reassure the international

community of its powers to punish perpetrators and prevent future atrocities, and, as it is often argued, its sense of independence continues to be compromised due to a high reliance on the voluntary cooperation of states.

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