

## Interpretation of crime of “men rape” under international criminal justice



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**SUMMARY:** -1.Introduction; -2.Seeking the definition of rape in international jurisprudence through the elements of the objective and subjective existence of the offense; -3.Definition of rape at the Special Court for Sierra Leone; -4.Definition of rape by ICC; -5.Concluding remarks.

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

**Key words:** international crimes, crimes against humanity, crime of rape, ICC, SCSR, international criminal justice

### 1. Introduction

The latest military developments/actions in Syria (April 2018) remind us once again the “huge volume of overwhelming testimonies”, pictures and videos that document the so-called report: “implementation of the Resolution establishing the international, impartial and independent mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under international law committed in the Syrian Arab Republic since March 2011”<sup>1</sup>, led by the French court judge K. Marchi-Uhel, who has conducted preliminary investigations into a number of cases and cooperated with court judges that investigate war

<sup>1</sup> GA, 71th of 16 August 2017, A/71/75conflict5/Add.1.



crimes in different countries<sup>2</sup>. This investigation has stated that: “evidence of sexual crimes is overwhelming, but the cases are so many that no prosecution can be brought for all”<sup>3</sup>. Despite this finding of “impunity” by international criminal law<sup>4</sup> for serious sexual crimes<sup>5</sup> jurisprudence still know proved that: international criminal law has been vital in fostering the understanding of sexual violence against male in armed conflict<sup>6</sup> as a weapon of war that targets not only a woman but a male role in international society<sup>7</sup>.

The developments in international criminal case law, in respect of the recognition that sexual crimes fall within the scope of international war crimes against humanity and genocide crime<sup>8</sup>, have been overshadowed by the often frivolous treatment of these crimes by the international criminal justice<sup>9</sup>.

The remnants that have prevailed over these centuries for these crimes, that they were a by-product of the war<sup>10</sup>, or that in any case they are incidental and secondary to the main crimes, did not allow the provisions of the Statutes to be applied to a sufficient level<sup>11</sup>. The lack of previous international jurisprudence has found the international criminal courts in a position to be forced to make unstable interpretations or even to develop an important case-law which has often been questioned by courts themselves<sup>12</sup>. The interpretations, of course, have often led to the departure from the mechanistic perception of justice and the adoption of the aim towards full recognition of the victims' human rights<sup>13</sup>. Other times, the principle of feasibility in the prosecution has prevailed, to such an extent that it has led to several cases of impunity for perpetrators of crimes

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

<sup>3</sup> K. AMBOS, Internationales Strafrecht, C.H. Beck, 2018.

<sup>4</sup> F. MELLOH, Einheitliche Strafzumessung in den Rechtsquellen des ICC-Statuts, Dunker&Humblot, 2010.

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

<sup>6</sup> C. HENDERSON, Research handbook on international conflict and security, ed. E. Elgar Publishing, 2013, pp. 375-420.

<sup>7</sup> C. EBOE-OSUJI, International law and sexual violence in armed conflicts, ed. Brill, 2012, pp. 146ss. K. AMBOS, Treatise on international criminal law: vol. 2: The crimes and sentencing, Oxford University Press, 2014. C.S. MIBENGE, Sex and international Tribunals: The erasure of gender from the war narrative, University of Pennsylvania Press, 2013.

<sup>8</sup> A/HRC/37/65 of 1st March 2018: Human Rights Council: Joint study of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and the Special Adviser to the Secretary-General on the Prevention of Genocide. See in argument: P. BEHRENS, R. HENNAM, Elements of genocide, ed. Routledge, 2013, pp. 194ss. Y. BEIGBEDER, International Criminal Tribunals, ed. Palgrave, 2011. SÁNCHEZ REVERTE R.S., Referencia al crimen de genocidio aproximación genocidio crime, in Revista de estudios jurídicos, 2016. M.J. KELLY, The debate or genocide in Darfur, Sudan, in University of California, Davis Journal of International Law & Policy, 2012, pp. 208ss. C. LINGAAS, Imagined identities: Defining the racial group in the crime of genocide, in Genocide Studies and Prevention: An International Journal, 2016, pp. 80ss. R. MAISSON, Justice pénale internationale, ed. PUF, 2017. D.S. BETTWY, The genocide Convention and unprotected groups: Is the scope of protection expanding under customary international law?, in Notre Dame Journal of International and Comparative Law, 2011, pp. 102ss. H. BLAISE NGAMENI, La diffusion du droit international pénal dans les ordres juridiques africaines, ed. L'Harmattan, 2017. K. CALVO-GOLLER, La procédure et la jurisprudence de la Cour pénale internationale, ed. Lextenso, 2012.

<sup>9</sup> A. BABINGTON-ASHAYE, A. COMRIE, A. ADENIRAN, International criminal investigations: Law and practice, Eleven International Publishing, 2018. D. LIAKOPOULOS, Parità di armi nella giustizia penale internazionale, vol. 1, ed. Libellula University Press, 2018.

<sup>10</sup> S. PARASHAR, What wars and “war bodies” know about international relations, in Cambridge Review of International Affairs, 2013, pp. 621ss.

<sup>11</sup> K. AMBOS, Sexual offenses in international criminal law, with a special focus on the Rome Statute of the International Criminal Court (July 3, 2012), in M. BERGSMO, A. BUTENSCHØN SKRE, E.J. WOOD (eds.), Understanding and providing international sex crimes, Torkel Opsahl Academic Epublisher, Beijing, 2012, pp. 144ss.

<sup>12</sup> J. RAMJI-NOGALES, Questioning hierarchies of harm: Women, forced migration and international criminal law, in International Criminal Law Review, 2011. J. HALLEY, Rape in Berlin: Reconsidering the criminalisation of rape in the international law of armed conflict, in Melbourne Journal of International Law, 2008, pp. 80ss.

<sup>13</sup> N. PILLAY, Sexual violence: Standing by the victim, in Case Western Reserve Journal of International Law, 2009, pp. 462ss.



of sexual violence<sup>14</sup>. These failures were complemented by the inherent difficulty of dealing with these crimes as a result of the psycho-social impact of sexual violence on victims<sup>15</sup>. These difficulties are often insurmountable even at the level of domestic criminal systems, where correlations become even more complicated and inaccessible to resolving them. Even in the most recent criminal courts judiciary officers were not prepared to deal with the broadness and specificity of sexual offenses. The lack of proper staff, the lack of understanding of the law, and the general politicization of many affairs, have led to results that are highly controversial and criticized<sup>16</sup>.

## 2. Seeking the definition of rape in international jurisprudence through the elements of the objective and subjective existence of the offense

One last question that first comes to the definition of rape in international jurisprudence is: can consensus be an element of rape in the context of international crimes? Despite the progress made in the case law of the international criminal courts with regard to crimes of sexual and gender violence<sup>17</sup>, the jurisprudence of these courts reflects a constant dispute over the understanding-and hence the proof-of crimes of sexual violence in the context of armed conflicts<sup>18</sup> and mass violence<sup>19</sup>. The case law particularly reflects a doubt as to whether the victim's non-consent is required as an element in the persecution of rape<sup>20</sup>, but also how that element is interpreted. Subsequent cases of the International Criminal Tribunal for the Former Yugoslavia (ICTY)<sup>21</sup> and the International Criminal Court (ICC) of Rome<sup>22</sup> proposed non-consensus as an element of crime by requiring that the sexual act be committed without the

<sup>14</sup> B.S. BROWN, Research handbook on international criminal law, Edward Elgar Publishing, 2011, pp. 86ss. A. COLE, International criminal law and sexual violence, in C. MCGLYNN, V. MUNRO, Rethinking rape law. International and comparative perspectives, ed. Routledge, 2010, pp. 49ss.

<sup>15</sup> T. BACHAROVA, The standing of victims in the procedural design of the ICC, ed. Brill, 2017.

<sup>16</sup> J.P.L. ACEVEDO, The legitimacy of international criminal Tribunals, in Nordic Journal of Human Rights, 2017, pp. 164ss.

<sup>17</sup> A.M. DE BROUWER, The importance of understanding sexual violence in conflict for investigation and prosecution purposes, in Cornell International Law Journal, 2015.

<sup>18</sup> G. CAGGIOLI, Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law, in International Review of the Red Cross, 2014, pp. 506ss.

<sup>19</sup> M. MILANOVIĆ, Establishing the facts about mass atrocities: Accounting for the failure of the ICTY to persuade target audiences, in Georgetown Journal of International Law, 2016, pp. 1325ss. S. MOHAMED, Deviance, aspiration and the stories we tell: Reconciling mass atrocity and the criminal law, in Yale Law Journal, 2015, pp. 1630ss. M. AKSENOVA, E. VAN SLIEDREGT, S. PARMENTIER, Breaking the cycle of mass atrocities. Criminological and socio-legal approaches in international criminal law, Hart Publishing, 2018.

<sup>20</sup> N. HAYES, Creating a definition of rape in international law: The contribution of the international criminal Tribunals, in S. DARCY, J. POWDERLY, Judicial creativity at the international criminal Tribunals, Oxford University Press, 2010, pp. 130ss. R. HEFENDEHL, Grenzenlose Vorverlagerung des Strafrechts?, Berliner Wissenschafts Verlag, 2010, pp. 24ss. M. AYAT, Quelques apports des tribunaux pénaux internationaux ad hoc et notamment le TPIR, à la lutte contre les violences sexuelles subies par les femmes durant les génocides et les conflits armés, in International Criminal Law Review, 2010, pp. 789ss. P.V. SELLERS, Wartime female slavery: enslavement?, in Cornell International Law Journal, 2011, pp. 116ss. X.A. AGIRRE ARANBURU, Sexual violence beyond reasonable doubt: Using pattern evidence and analysis for international cases, in Leiden Journal of International Law, 2010, pp. 610ss. S. STOLK, Imaging scenes of mass atrocity from afar: Maps and landscapes at the International Criminal Court, in London Review of International Law, 2018.

<sup>21</sup> B. SWART, A. ZAHAR, The legacy of the international criminal Tribunal for the Former Yugoslavia, Oxford University Press, 2011, pp. 298ss.

<sup>22</sup> K. AINLEY, The International Criminal Court on trial, in Cambridge Review of International Affairs, 2011. A. TIEMESSEN, The International Criminal Court and the politics of prosecutions, in The International Journal of Human Rights, 2014.



consent of the victim and that the perpetrator was aware of the lack of consensus<sup>23</sup>. Even in the Special Court for Sierra Leone (SCSR), it has become clear that the persecution of rape<sup>24</sup>, even in the context of mass crimes<sup>25</sup>, requires proof of the victim's non-consent<sup>26</sup>. On the other hand, the Criminal Records of ICC<sup>27</sup> do not explicitly require the prosecution to prove the lack of consensus<sup>28</sup>. However, they require that the offender commit a psychological invasion of a sexual nature against the victim by force or threat of violence or coercion<sup>29</sup>, misuse of power against that person or other person, or exploiting the enforced environment, or that invasion was committed against a person incapable of give a valid consensus, a sentence that remains to be interpreted by ICC<sup>30</sup>.

Although rape was on the list of Act 10 of the Control Council<sup>31</sup> as a crime against humanity<sup>32</sup> - although no prosecution for rape was made on the cases of this law and the constitutional provisions of the ad hoc international criminal Tribunals as well as the Statute of Rome of ICC, and although implicitly refers to a number of international humanitarian law Conventions<sup>33</sup> none of these gave a definition of it, leaving rape<sup>34</sup> and other grievous crimes<sup>35</sup> without some internationally accepted definition and during a period of time to create ad hoc criminal tribunals,

<sup>23</sup> S. WHARTON, The evolution of international criminal law: prosecuting "new" crimes before the Special Court for Sierra Leone, in *International Criminal Law Review*, 2011, pp. 218ss. K.A. RODMAN, Justice is interventionist: The political sources of the judicial reach of the Special Court for Sierra Leone, in *International Criminal Law Review*, 2013, pp. 65ss. H. OLÀSOLO, International criminal law, transnational criminal organizations and transitional justice, ed. Brill/Nijhoff, 2018.

<sup>24</sup> See in particular the next cases: Brđanin case: Prosecutor v. Radoslav Brđanin ICTY (A. Ch.) 3 April 2007, Case No. IT-99-36-A.; Češić case: Prosecutor v. Ranko Češić ICTY (T. Ch.) 11 March 2004, Case No. IT-95-10/1-S; Krajišnik case: Prosecutor v. Momčilo Krajišnik ICTY (A. Ch.) 17 March 2009, Case No. IT-00-39-A. Krnojelac case: Prosecutor v. Milorad Krnojelac ICTY (T. Ch.), 13 March 2002; Case No. IT-97-25-T. Kvočka case: Prosecutor v. Kvočka et al. ICTY (A. Ch.) 28 February 2005, Case No. IT-98-30/1-A; Plavšić case: Prosecutor v. Biljana Plavšić ICTY (T. Ch.) 27 February 2003, Case No. IT-00-39&40/1-S; Stakić case: Prosecutor v. Milomir Stakić ICTY (A. Ch.) 22 March 2006, Case No. IT-97-24-A; Zelenović case: Prosecutor v. Dragan Zelenović ICTY (T. Ch. I) 4 April 2007, Case No. IT-96- 23/2-S.

<sup>25</sup> A. BOTTE-KERRISON, Responsibility for bystanders in mass crimes. Towards a duty to rescue in international criminal justice, in *International Criminal Law Review*, 2017, pp. 882ss. R. NOLLEZ-GOLDBACH, J. SAADA, La justice pénale internationale face aux crimes de masse, ed. Pedone, 2014. B. MARTINS AMORIM DUTRA, Criminal responsibility in the crimes committed by organized structures of power: Jurisprudence analysis in the light of international criminal law, in *Revista de Faculdade de Direito da UERJ*, 2012, pp. 5ss.

<sup>26</sup> C. VAN DEN WYNGAERT HON, Victims before International Criminal Courts: Some views and concerns of an ICC trial judge, in *Case Western Reserve Journal of International Law*, 2011, pp. 476ss.

<sup>27</sup> M. DEGUZMAN, The International Criminal Court's gravity jurisprudence at ten, in *Washington University Global Studies Law Review*, 2013, pp. 476ss. A. BOWERS, International Criminal Court, Wolf Legal Publishers, 2011.

<sup>28</sup> ICC Elements of Crimes, arts 7(1)(g)-1, 8(2)(b)(xxii)-1 & 8(2)(e)(vi)-1.

<sup>29</sup> S. STOLK, The victim, the International Criminal Court and the search for truth. On the interdependence and incompatibility of truths about mass atrocity, in *Journal of International Criminal Justice*, 2015, pp. 974ss.

<sup>30</sup> G.P. STEWART, The International Criminal Court, in C. GIORGETTI, The rules, practice and jurisprudence of international Courts and Tribunals, ed. Brill, 2012, pp. 194ss.

<sup>31</sup> L. FISKE, Ending rape in war: How far have we come?, in *Cosmopolitan Civil Societies: An interdisciplinary Journal*, 2013.

<sup>32</sup> Article 11 defines the crimes against humanity as: "Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic law of the country where perpetrated. See also: Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 10 December 1945, 3 Official Gazette Control Council for Germany 50-44 (1946). C. CHERNOR JALLOH, What makes a crime against humanity a crime against humanity, in *American University International Law Review*, 2013, pp. 287ss. J. WATERROW, J. SCHUMACHER, War crimes trials and investigation. A multi-disciplinary introduction, Oxford University Press, 2018.

<sup>33</sup> A. SZPAK, Legacy of the ad hoc International Criminal Tribunals in implementing international humanitarian law, in *Mediterranean Journal of Social Sciences*, 2013, pp. 530ss.

<sup>34</sup> K. KOENIG, A. LINCOLN, R. GROWTH, The jurisprudence of sexual violence-Sexual violence & accountability project, working paper series, Human Rights Center, University of California, Berkeley, May 2011, pp. 4ss. N.B. MAIER, The crime of rape under the Rome statute of the ICC: with a special emphasis on the jurisprudence of the ad hoc criminal Tribunals, in *Amsterdam Law Forum*, 2011.

<sup>35</sup> International criminal law-Sexual and gender-based crimes-ICC outlines policies to improve prosecutorial outcomes. The office of the Prosecutor of the ICC, Policy paper on sexual and gender-based crimes, in *Harvard Law Review*, 2014, pp. 796ss. F.D. NI AOLÁIN, D.F. HAYNES, N. CAHN, Gender and the forms and experiences of conflict, in F.D. NI AOLÁIN, D.F. HAYNES, N. CAHN, On the frontlines: Gender, war, and the post- conflict process, Oxford University Press, 2011, pp. 42ss. K.A.A. KHAN, C. BUISMAN, C. GOSNELL, Principles of evidence in international criminal justice, Oxford University Press, 2010, pp. 138ss.



in the early 90s<sup>36</sup>.

The absence of a commonly accepted definition of rape<sup>37</sup> in international law proved a real challenge for the ICTY<sup>38</sup> and the International Criminal Tribunal for Rwanda (ICTR) regarding the prosecution of sexual crimes<sup>39</sup>. The systematic rape of men in Rwanda and Bosnia eventually imposed the development of Court jurisprudence<sup>40</sup> allowing them to contribute to international humanitarian law<sup>41</sup> and human rights law<sup>42</sup>, particularly with regard to gender-based crimes<sup>43</sup>, a development that is clearly reflected in both the Statute of Rome of the ICT<sup>44</sup> and the Statute of the SCSL<sup>45</sup>.

<sup>36</sup> In case: Kunarac we have a description, rectius definition of rape as: “(...) the trial panel found that the actus reus of the crime of rape in international law is constituted by: 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; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The mens rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim (...)”. In particular the Tribunal has affirmed that: “(...) 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; where such penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the contents of the surrounding circumstances. The mens rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim (...)”. See also: M. CHERIF BASSIOUNI, P. MANIKAS, *The law of the International Criminal Tribunal for the Former Yugoslavia*, Transnational Publishers 1996, pp. 555ss. K.D. ASKIN, *War crimes against women: prosecution in international war crimes Tribunals*, Martinus Nijhoff Publishers, 1997, pp. 380-382. See also the case: *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Appeal Judgment, par. 207 (ICTY, July 21, 2000): “(...) the actus reus of the crime of rape in international law is constituted by: 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; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The mens rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim (...)”. P. WEINER, *The evolving jurisprudence of the crime of rape in international criminal law*, in *Boston College Law Review*, 2013, pp. 1210ss. See in the same spirit also: Case No. SCSL-04-15-T, Trial Judgment, par. 146-148. The second element of the actus reus of rape refers to the circumstances; “(...) which would render the sexual act in the first element criminal. The essence of this element is that it describes those circumstances in which the person could not be said to have voluntarily and genuinely consented to the act. The use or threat of force provides clear evidence of non consent, but it is not required (...) true consent will not be possible (...) the last part of this element refers to those situations where, even in the absence of force or coercion, a person cannot be said to genuinely have consented to the act may not, for instance, be capable of genuinely consenting if he or she is too young, under the influence of some substance, or suffering from an illness or disability (...)”. In particular Paragraph 147 of the decision refers to the Kunarac appeal judgment as describing circumstances relating to “lack of consent”. The definition derives from the ICC elements of the crime of rape, where “lack of consent” was rejected as an element adopted, in the area was generally very difficult. It is unclear what this reasoning in *Sesay* (*Prosecutor v. Sesay, Kallon & Gbao*, Case No. SCSL-04-15-A, Appeal Judgment, par. 85-92 (Oct. 26, 2009)) was intended to accomplish. According to the Court: it may be deemed proven: “(...) if the Prosecution establishes beyond reasonable doubt that the accused was aware, or had reason to be aware, of the coercive circumstances that undermined the possibility of genuine consent (...)”.

<sup>37</sup> A. GRABERT, *Dynamic interpretation in international criminal law. Striking a balance between stability and change*, ed. C.H. Beck, 2015, pp. 68-73.

<sup>38</sup> *Prosecutor v. Šainović* (Appeal Judgment) ICTY Appeals Chamber IT-05-87-A Appeals Chamber, 23 January 2014 ; *Prosecutor v. Đorđević* (Trial Judgment) ICTY Trial Chamber II IT-05-87/1-T, 23 February 2011 at (2).

<sup>39</sup> R.J. GOLDSTONE, E.A. DEHON, *Engendering accountability: Gender crimes under international criminal law*, in *New England Journal on Public Policy*, 2003, pp. 127ss.

<sup>40</sup> H.K. MORRILL, *Challenging impunity? The failure of the International Criminal Tribunal for Rwanda to prosecute Paul Kagame*, in *Brooklyn Journal of International Law*, 2012. D. BERGOFFEN, *Engendering justice: Constituting a Court, Securing a conviction, creating a human right*, in *Transitional Justice Review*, 2013, pp. 46ss.

<sup>41</sup> A.H. OLÁSULO, *Derecho internacional penal y humanitario*, ed. Tirant Lo Blanch, 2016.

<sup>42</sup> A. ZWITTER, J.K. LAMONT, H.J. HEINTZE, *Humanitarian action. Global, regional and domestic legal responses*, Cambridge University Press, 2014. G. ZYBERI, *The role of international Courts in post-conflict societies*, in I. BOEREFIJN et al. (eds) *Human rights and conflict: Essays in honour of Bas de Gaay Fortman*, ed. Brill, 2012, pp. 368ss.

<sup>43</sup> S. O’CONNELL, *Gender based crimes at the International Court*, in *Plymouth Law and Criminal Justice Review*, 2010, pp. 72ss. D. ROBINSON, E. WILMSHURST, *An introduction to international criminal law and procedure*, Cambridge University Press, 2010, pp. 184ss. G. KIRAN, *The protection of sexual autonomy under international criminal law: The International Criminal Court and the challenge of defining rape*, in *Journal of International Criminal Justice*, 2012, pp. 376ss. S. BRAMMERTZ, J. MICHELLE, *Lessons learned in prosecuting gender crimes under international law: Experiences from the ICTY*, in C. EBOE-OSUJI, *Protecting humanity: Essays in international law and policy in honour of Navanethem Pillay*, Martinus Nijhoff Publishers, 2010, pp. 97ss. R. DUBLER, KALYK M., *Crimes against humanity in the 21<sup>st</sup> century*, ed. Brill, 2018.

<sup>44</sup> K.J. HELLER, *The Rome Statute of the International Criminal Court*, in K.J. HELLER, D. DUBBER (eds.), *The handbook of comparative criminal law*, Stanford Law Books, 2011, pp. 597ss.

<sup>45</sup> T. HANSEN-YOUNG, *Defining rape: A means to achieve justice in the Special Court for Sierra Leone*, in *Chicago Journal of International Law*, 2003, pp. 483ss.



The Akayesu case is the first in international criminal justice to provide a definition of rape<sup>46</sup>. The ICTR, in its attempt to define this crime, initially concluded that there was indeed no established definition in international law and assessed the criminalization of crime in national jurisprudence in order to explore the general principles that have been shaped<sup>47</sup>. Although it found that domestic criminal codes have long Grabert defined rapes as “non-consensual sexual intercourse”<sup>48</sup>, the ICTR argued that it is necessary to provide a wider definition, aiming at taking into account the particular context of international criminal law and the peculiarities in its forms of violence recorded in Rwanda. According to the Court, “(...) variants of the act of rape may include the insertion of objects and/or the use of bodily cavities which are not inherently sexual”<sup>49</sup>. By providing a more liberal perception of rape, the Court ruled that rape is a form of assault<sup>50</sup> and that its constitutive elements “can not be isolated in a mechanistic description of objects and parts of the body”<sup>51</sup>. In fact, the ICTR made a correlation between rape and torture<sup>52</sup>, first of all finding that rape is torture and then stressing that the Convention against torture does not contain specific acts of torture, emphasizing the way this is done and the “idea” of the offense, rather than on the specific acts which constitute it, an approach which, according to the Court, is the most appropriate in international law. The Tribunal therefore defined rape as a “physical invasion of a sexual nature committed against a person under conditions of coercion”<sup>53</sup>. At the same time, the Tribunal attributed an equal definition to sexual violence in general, which includes rape, as “any act of a sexual nature committed against a person under

<sup>46</sup> B. ABEGUNDE, Re-examination of rape and its growing jurisprudence under international law, in *Journal of Politics and Law*, 2013, pp. 4ss. X.A. AGIRRE ARANBURU, Sexual violence beyond reasonable doubt: Using pattern evidence and analysis for international cases, in *Leiden Journal of International Law*, 2010, pp. 612ss.

<sup>47</sup> A. GRABERT, Dynamic interpretation in international criminal law. Striking a balance between stability and change, op. cit.

<sup>48</sup> N.B. MAIER, The crime of rape under the Rome statute of the ICC: With a special emphasis on the jurisprudence of the ad hoc criminal Tribunals, in *Amsterdam Law Forum*, 2011, pp. 148ss. A. FULFORD, The reflections of a trial judge, in *Criminal Law Forum*, 2011, pp. 216ss. A. BELTZ, Prosecuting rape in International Criminal Tribunals: The need to balance victim's rights with the due process rights of the accused, in *Journal of Civil Rights and Economic Development*, 2012. E. GEKKER, Rape, sexual slavery, and forced marriage at the international criminal Court: How Katanga utilizes a ten-year-old rule but overlooks new jurisprudence, in *Hastings Women's Law Journal*, 2014, pp. 107ss.

<sup>49</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-A, Judgment, 23 November 2001, para. 695.

<sup>50</sup> S. CERNAK, Sexual assault and rape in the military: The invisible victims of international gender crimes at the front lines, in *Michigan Journal of Gender and Law*, 2015, pp. 211ss.

<sup>51</sup> Cherif Bassiouni argues: “(...) that rape was implicitly included in both the Nuremberg and Tokyo Charters as a crime against humanity by being subsumed within the words or other inhumane acts (...) rape and sexual violence clearly constitute inhumane acts (...) rape was also implicitly included as a war crime by being subsumed within the term ill treatment (...)”. M. CHERIF BASSIOUNI, *History of international investigations and prosecution*, in M. CHERIF BASSIOUNI, *International criminal law*, Transnational Publishers, 1999. See also: *The Tokyo Judgment. The International Military Tribunal for the Far East (I.M.T.F.E.)*, 29 April 1946-12 November 1948. Edited by B. V.A. Röling and C. F. Rüter. APA - University Press Amsterdam 1977, 448. according to the Tribunal: “(...) Hirota was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result. He was content to rely on assurances which he knew were not being implemented whilst hundreds of murders, violations on women, and other atrocities were being committed daily. His inaction amounts to criminal negligence (...) from his own observations and from the reports of his staff he must have been aware of what was happening (...) that Matsui knew what was happening. He did nothing, or nothing effective to abate these horrors. He did issue orders before the capture of the City enjoining propriety of conduct upon his troops and later he issued further orders to the same purport. These orders were of no effect as it is now known, and he must have known (...) he had the power, as he had the duty, to control his troops and to protect the unfortunate citizens of Nanking. He must be held criminally responsible for his failure to discharge his duty (...)”. M. CHERIF BASSIOUNI, *Crimes against humanity in international criminal law*, Kluwer Law International 1999, pp. 348ss.

<sup>52</sup> C. TOFAN, *Torture in international criminal law*, Wolf Legal Publishers, 2011.

<sup>53</sup> The Tribunal affirmed also, that: “coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women (...)”.



conditions of compulsion”<sup>54</sup>. In particular, the latter stressed that it was not limited to bodily violation of human body and may even include acts that do not involve penetration or even physical contact. As regards rape, concluding that the use of part of the body does not necessarily have to take into account the incident of penetrating a piece of wood into a woman's and men sexual organs<sup>55</sup>.

The extended definition of rape in the *Akayesu* case differs from the traditional definition in two ways<sup>56</sup>. First, the definition given by the Tribunal includes forced oral and rectal sexual intercourse, as well as the penetration of a finger or tongue into the vagina<sup>57</sup>.

In contrast, according to the traditional approach of domestic legislation, these acts are classified as sodomy or some other forms of sexual violence<sup>58</sup>. Secondly, because this definition is sex neutral, the victim could be the man and the actor the woman. This perception differs equally from traditional law, since the latter perceives rape as a crime that only a man can commit against a woman, allowing incarceration of the woman only as an accomplice. This decision also has another pioneering premise. The Tribunal concluded that the magnitude of coercion required does not have to reach the level of physical violence, as “threats, intimidation, extortion and other forms of coercion that exploit fear and despair may be coercion, and coercion may be inherent in specific circumstances, such as armed conflict<sup>59</sup> or military presence of Interhamwe among Tutsi refugee women in the community office”<sup>60</sup>.

The Tribunal, therefore, has only widely accepted the concept of rape and sexual violence<sup>61</sup>, but has also expressed a widespread perception of coercion by emphasizing the particular nature of

<sup>54</sup> C.A. MACKINNON, Defining rape internationally: A comment on *Akayesu*, in *Columbia Journal of International Law*, 2006, pp. 944ss. R.L. HAFAJEE, Prosecuting crimes of rape and sexual violence at the ICTR: The application of joint criminal enterprise theory, in *Harvard Journal of Law and Gender*, 2006, pp. 206ss.

<sup>55</sup> G. DEREYMAEKER, L. MUNTIGH, Sexual violence and torture in international criminal law. Amnesty International. Rape and sexual violence: Human rights law and standards in the International Criminal Court, in *Journal of Human Rights Practice*, 2011, pp. 48ss.

<sup>56</sup> A.M. DE BROUWER, The importance of understanding sexual violence in conflict for investigation and prosecution purposes, in *Cornell International Law Journal*, 2015, pp. 5ss. K.A. DUCEY, Dilemmas of teaching the “greatest silence”: Rape-as- genocide in Rwanda, Darfur, and Congo, in *Genocide Studies & Prevention: International Journal*, 2010, pp. 312ss. According to Fountain: “(...) the *Akayesu* decision was considered revolutionary because it abandoned “mechanical” descriptions of rape, which generally required a certain degree of penetration and, most critically, a particular state of mind on the part of the victim (that is, of non- consent). Rather, the Trial Chamber held, rape is better determined as “physical invasion of a sexual nature, committed under circumstances that are coercive (...)”. C.J. FOUNTAIN CALEB, Sexual violence, the ad hoc Tribunals and the International criminal Court: Reconciling *Akayesu* and *Kunara*, in *ILSA Journal of International & Comparative Law*, 2013, pp. 254ss.

<sup>57</sup> P.A. BROUSSARD, Repair versus rejuvenation: The condition of vaginas as a proxy for the societal status of women, in *Seattle Journal for Social Justice*, 2011, pp. 936ss.

<sup>58</sup> D. LUPIG, Investigation and prosecution of sexual and gender-based crimes before the International Criminal Court, in *American University Journal of Gender, Social Policy & the Law*, 2009, pp. 434ss.

<sup>59</sup> J.L. LEATHERMAN, Sexual violence and armed conflict, Polity Press, 2011, pp. 10ss. R. KOLB, R. HYDE, An introduction to the international law of armed conflicts, Edward Elgar Publishing, 2008.

<sup>60</sup> M. ERIKSSON, Defining rape: Emerging obligations for States under international law?, Martinus Nijhoff Publishers, 2011, pp. 417ss.

<sup>61</sup> L. VINJAMURI, Deterrence, democracy, and the pursuit of international justice, in *Ethics International Affairs*, 2010, 194ss. A.M. DE BROUWER, C. KU, R. RÖMKENS, L. VAN DEN HERIK, Sexual violence as an international crime: Interdisciplinary approaches, ed. Intersentia, 2013, pp. 123ss.



sexual crimes in armed conflict and the need to bring closer the context in which it occurs<sup>62</sup>. Thus, the element of non-consensus is fulfilled, without the necessity of proof of violence or coercion<sup>63</sup>, since the burden falls on the perpetrator and the victim and the context in which the crimes of sexual violence were committed. This assumption leads to the further result of the elimination of the need to witness and cross-check the relevant deposits<sup>64</sup>, but also to the reluctance of victims to make detailed descriptions of the crimes against them<sup>65</sup>. As well as the analogy with the crime of torture in which the Tribunal took refuge, which does not contain the element of consensus.

Coercion is therefore the element that characterizes the rape crime in international law: in the context of genocide<sup>66</sup>, crimes against humanity<sup>67</sup> and war crimes<sup>68</sup>, when a sexual act is imposed on a person, the issue of consensus becomes redundant.

Although the *Akayesu* case was accepted as setting an important limit of protection, it was also criticized that it was too broad, not quite specific and possibly as violating the principle of legality<sup>69</sup>. Alison Cole criticized the Tribunal for its failure in this case to follow the observance of two international rules when exporting the definition, the *nullum crimen sine lege* principle<sup>70</sup>, and identifying the correct sources of international law. However, the decision was generally welcomed, as many were the ones who praised her for her creativity and her contribution to the punishment of perpetrators of sexual violence<sup>71</sup>.

The Special Expert on Violence Against Women and Men stated that the definition reinstates rape as an attack on the personal security of a woman as a person and not as a violation of the honor of the entire family or village<sup>72</sup>. As advocate General Louis Arbour noted, “the decision is truly

<sup>62</sup> P. WEINER, The evolving jurisprudence of the crime of rape in international criminal law, in Boston College Law Review, 2013, pp. 1210ss.

<sup>63</sup> X.A. ARANBURU, Sexual violence beyond reasonable doubt: Using pattern evidence and analysis for international cases, in Leiden Journal of International Law, 2010, pp. 618ss. S. GLESS, Internationales Strafrecht. Grundriss für Studium und Praxis, Helbing Lichtenhahn, 2015.

<sup>64</sup> S. NTUBE NGANE, The position of witness before the ICC, ed. Brill, 2015.

<sup>65</sup> The Tribunal defines that: “(...) the cultural sensitivities involved in public discussion of intimate matters and recalls the painful reluctance and inability of witnesses to disclose graphic anatomical details of sexual violence they endured (...)”. *Akayesu* Trial Judgment, para. 687.

<sup>66</sup> S. KIM, Collective theory of genocidal intent, ed. Springer, 2016.

<sup>67</sup> M.H. ZAKERHOSSEIN, Situation selection regime at the International Criminal Court, ed. Intersentia, 2018.

<sup>68</sup> R.J. GOLDSTONE, Prosecuting rape as a war crime, in Case Western Reserve Journal of International Law, 2002, pp. 278ss.

<sup>69</sup> A. COLE, Prosecutor v. Gacumbitsi: The new definition for prosecuting rape under international law, in International and Criminal Law Review, 2008, pp. 77ss. J. NICHOLSON, Strengthening the effectiveness of international criminal law through the principle of legality, in J. NICHOLSON, Strengthening the validity of international criminal tribunals, Brill/Nijhoff, 2018.

<sup>70</sup> G.E. BARCO, Rückwirkung und die Entwicklung der internationalen Verbrechen. Elemente einer allgemeinen Konzeption des nullum-crimen-sine lege Prinzips im Völkerstrafrecht, Duncker & Humblot, 2018.

<sup>71</sup> L. BIANCHI, The prosecution of rape and sexual violence: Lessons from prosecutions at the ICTR, in A.M. DE BROUWER, Sexual Violence as an international crime: Interdisciplinary approaches, ed. Intersentia, 2013, pp. 125ss. D. NADJ, International criminal law and sexual violence against women: The interpretation of gender in the contemporary international criminal trial, ed. Routledge, 2018.

<sup>72</sup> Economic and Social Council, Commission on Human Rights Integration of the Human Rights of Women and the Gender Perspective,





remarkable in its broadness and perspective, as well as in the detailed legal analysis of many issues that will be critical to the ICTY<sup>73</sup> and the ICTR, particularly in relation to the law of sexual violence<sup>74</sup>.

The definition of rape as set out in the *Akayesu* judgment was also adopted in the judgments *Čelebići*<sup>75</sup> (1998), *Musema*<sup>76</sup> (2000), *Niyitegeka*<sup>77</sup> (2003) and *Muhimana*<sup>78</sup> (2005). In *Musema*, which followed *Akayesu* at the ICTR, the Tribunal, by adopting the broad definition of rape, as formulated in the *Akayesu* case and then in *Čelebići*<sup>79</sup>, once again underlined that “(...) the essence of rape is not the particular details of the parts of the body and the objects involved, but rather the assault expressed in a sexual manner under coercive conditions”<sup>80</sup>. Explaining the difference in the jurisprudence of the two ad hoc tribunals<sup>81</sup>, notably as regards the adoption by the ICTY<sup>82</sup> of a mechanistic approach to rape<sup>83</sup>, concluded that the conceptual approach to rape is preferable because of the dynamic continuum of rape understanding and its integration into the principles of international law<sup>84</sup>. He rejected the tendency to focus the problem on the sexual intercourse as a prerequisite for national laws to include acts performed on objects or parts of the body which are not inherently sexual<sup>85</sup>. The ICTR, however, did not refer to which

Violence Against Women, UN Doc. E/CN.4/2001/73, 23 January 2001.

<sup>73</sup> M. SHAHADUDDEEN, *International criminal justice at the Yugoslav Tribunal*, Oxford University Press, 2012. M. SHAHADUDDEEN, *International criminal justice at the Yugoslav Tribunal-A judge's recollections*, Oxford University Press, 2012. Y. SHANY, *Assessing the effectiveness of international Courts: A goal-based approach*, in *American Journal of International Law*, 2012, pp. 225ss. Y. SHANY, *How can international criminal Courts have a greater impact upon national criminal proceedings? Lessons from the first two decades of international criminal justice in operation*, in *Israel Law Review*, 2013, pp. 4ss.

<sup>74</sup> Press release, ICTY Office of the Prosecutor, Statement by Justice Louise Arbour, ICTY Doc. CC/PIU/342-E (4 September 1998). Prosecutor v. *Musema*, Case No. ICTR-96-13-I, Judgment of 27 January 2000, para. 226.

<sup>75</sup> Case No. IT-96-21-T, ICL 95 of 20 February 2001.

<sup>76</sup> Case No. ICTR-96-13 of 16 November 2001.

<sup>77</sup> Case No. ICTR-96-14 of 9 July 2004.

<sup>78</sup> Case No. ICTR-95-1B of 21 May 2007.

<sup>79</sup> M. AKSENOVA, *Complicity in international criminal law*, Hart Publishing, 2016, pp. 189ss. C. FERNÁNDEZ-PACHECO ESTRADA, *The international criminal Court and the Čelebići test: Cumulative convictions based on the same set of facts from a comparative perspective*, in *Journal of International Criminal Justice*, 2017, pp. 692ss. A. ALIÑÁN, M. OLLÉ SESÉ, *Estudios sobre derecho penal internacional*, ed. Marcial Pons, 2018.

<sup>80</sup> A. M. DE BROUWER, *Supranational criminal prosecution of sexual violence: The ICC and the practice of the ICTY and the ICTR*, op. cit., pp. 108ss.

<sup>81</sup> L. DEREYMAEKER, G. MUNTIGH, *Sexual violence and torture in international criminal law*. Amnesty International. Rape and sexual violence: Human rights law and standards in the International Criminal Court, op. cit.

<sup>82</sup> M. JARVIS, *The practice of international criminal law. Some reflections from an ICTY Prosecutor*, in *International Criminal Law Review*, 2017, pp. 400ss.

<sup>83</sup> See also in argument the next cases: Prosecutor v. Halilovic, IT-01-48-T, judgment, 16 Nov 2005 (Halilovic trial judgment), pars 401; Prosecutor v. Krnojelac, IT-97-25-T, Judgment, 15 Mar 2002 (Krnojelac trial judgment), par 39; Prosecutor v. Plavsic, IT-00-39&40/1-S, Sentencing judgment, 27 Feb 2003; Prosecutor v. Rajic, IT-95-12-S, Sentencing judgment, 8 May 2006; Prosecutor v. Sikirica and 2 others, IT-95-8-S, Sentencing judgment, 13 Nov 2001; Prosecutor v. Bisengimana, ICTR-00-60-T, judgment and Sentence, 13 Apr 2006; Prosecutor v. Kajelijeli, ICTR-98-44A-T, Judgment and Sentence, 1 Dec 2003; Prosecutor v. Nahimana, Barayagwiza and Ngeze, ICTR-99-52-A, judgment, 28 Nov 2007; Prosecutor v. Rugambarara, ICTR-00-59-T, Sentencing judgment, 16 Nov 2007; Prosecutor v. Rukondo, ICTR-2001-70-T, judgment, 27 Feb 2009; Prosecutor v. Rutaganda, ICTR-96-3-T, judgment and Sentence, 6 Dec 1999; Prosecutor v. Milan Simic, IT-95-9/2-S, Sentencing judgment, 17 Oct 2002; Prosecutor v. Zelenovic, IT-96-23/2-S, Sentencing judgment, 4 Apr 2007.

<sup>84</sup> A. ZAKERIAN, M. ALIKHANI, *International Criminal Tribunal for the former Yugoslavia, activities and achievements*, in *Quarterly of Foreign Policy*, 2013, pp. 7ss.

<sup>85</sup> The Inter American Court has been using the sources of international criminal law to interpret the articles of the American Convention on Human Rights (ACHR) and especially in the sector of sexual violence as we can see in the next cases: Plan de Sánchez Massacre v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 105, (April 29, 2004); Myrna Mack-Chang v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 105, (Nov. 25, 2003); Prosecutor v. Moinina Fofana and Allieu Kondewa, Cases Nos. SCSL-04-14-T-128-7347, SCSL-04-14-T-128-7363, Decision on lack of jurisdiction / abuse of process: amnesty provided by the Lomé Accord, par. 36-38 (May 25, 2004); Kolk and Kislyiy v. Estonia, Apps. No. 23052/04 and No. 24018/04, Judgment, (Jan 17, 2006); Miguel Castro-Castro Prison v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 160, par. 306 (Nov. 25, 2006).



national legislation it relied on to draw this conclusion, which, moreover, tends to delimit more precisely this particular offense. In *Musema*, the Tribunal finally chose the broad definition to include other forms of sexual violence beyond the narrow concept of rape<sup>86</sup>. It is noteworthy that the two ad hoc tribunals<sup>87</sup> have not hesitated in the next few years to adopt the definition given in the above-mentioned judgments or to agree with its substance. Typical is the case of *Čelebići*, where for the first time it was attempted to give a definition of rape<sup>88</sup>. The decision provided a detailed examination of the historical development of the rape ban in international humanitarian law<sup>89</sup> but concluded that there is no Convention or other international text providing a definition of the term<sup>90</sup>. After quoting *Akayesu* and agreeing with his reasoning, he said there was no reason to deviate from the ICTR conclusion on this issue<sup>91</sup>.

The ICTY in the *Furundžija* judgment<sup>92</sup> condemned the accused for the rape crime as a common violation of article 3 of the Conventions of Geneva of 1949<sup>93</sup>, and largely deviated substantially from the defining definition of rape. Recognizing the absence of a generally accepted definition of rape in international law, the ICTY considered that it should rely on the general concepts and legal institutions common to the main legal systems of the world, avoiding too much of a legal tradition to end up a “precise definition of rape”<sup>94</sup>, and noted that due attention should be paid to national laws.

In its research, the ICTY concluded that there was a tendency in the national laws of a large number of states to broaden the definition of rape to cover acts previously classified as minor

<sup>86</sup> N.B. MAIER, The crime of rape under the Rome statute of the ICC: With a special emphasis on the jurisprudence of the ad hoc criminal Tribunals, in Amsterdam Law Forum, 2011, pp. 148ss. T. DOHERTY, Sexual violence and the role of the international Courts, in New Zealand Journal of Public and International Law, 2013, pp. 697ss. E. GEKKER, Rape, sexual slavery and forced marriage at the International Criminal Court: How Katanga utilizes a ten-year-old rule but overlooks new jurisprudence, in Hastings Women's Law Journal, 2013, pp. 108ss.

<sup>87</sup> K. MARGETTS, K.I. KAPPOS, Current developments at the ad hoc International Criminal Tribunals, in Journal of International Criminal Justice, 2012, 448ss.

<sup>88</sup> S.A. HAELEY, Prosecuting rape under the statute of the war crimes Tribunal for the former Yugoslavia, in Brooklyn Journal of International Law, 1995, pp. 338 ss. S.K. IVKOVIC, Justice by the international criminal Tribunal for the former Yugoslavia, in Stanford Journal of International Law, 2001, pp. 288ss. A. KALOSIEH, Consent to genocide? The ICTY's improper use of the consent paradigm to prosecute genocidal rape in Foča, in Women's Rights Law Reporter, 2003, pp. 122ss. N.K. KATYAL, Men who own women: A thirteenth amendment critique for forced prostitution, in Yale Law Journal, 1993, pp. 792ss.

<sup>89</sup> M. MARTÍN, I. LIROLA, Sexual crimes in international humanitarian law, Institut Català Internacional per la Pau, Barcelona, 2013. S. MOUTHAN, Sexual violence against men and international law. Criminalising the unmentionable, in International Criminal Law Review, 2013, pp. 668ss.

<sup>90</sup> Prosecution v. Delalić, Case No. ICTY-IT-96-21-T, Trial Chamber Judgment, 16 Nov. 1998, para. 478.

<sup>91</sup> S. DE SMET, The International criminal standard of proof at the ICC-Beyond reasonable doubt or beyond reason?, in STAHN, The law and practice of the International Criminal Court, Oxford University Press, 2015.

<sup>92</sup> See also: Prosecutor v. Gagovic et al., Case No. IT-96-23-I, Indictment, par. 4.8 (June 26, 1996). Prosecutor v. Gacumbitsi, Case No. ICTR 2001-64-T, Trial Chamber Judgment, par. 291-293 (June 17, 2004).

<sup>93</sup> Prosecutor v. Furundžija, Case No. ICTY- IT-95-17/1-T, Trial Judgment, para. 43, 274.

<sup>94</sup> “(...) in relation to torture by means of rape, and with reference to the prohibited purposes of torture: (...) torture by means of rape is a particularly grave form of torture (...). The violation of the moral and physical integrity of the victims makes rape a particularly serious crime. Rape is an inherently humiliating offence, and humiliation is generally taken into account when assessing the gravity of a crime (...)”. D.S. MITCHELL, The prohibition of rape in international humanitarian law as a norm of jus cogens: clarifying the doctrine, in Duke Journal of Comparative & International Law, 2005, pp. 224ss.



violations and now the stigma of rape<sup>95</sup> is attributable to an expanding category of sexual offenses, provided that certain criteria, such as forced physical penetration, are met<sup>96</sup>. He stressed, however, that there is a significant disagreement with the treatment of the States with regard to forced oral intercourse: in some states, it is classified as sexual abuse, while in other as rape. In order to resolve this conflict, the Tribunal found it necessary to resort to the general principles of international criminal law and, if no satisfactory conclusion was reached, to the general principles of international law<sup>97</sup>. By resorting to the general principle of respect for human dignity, he stressed that this principle is essentially the *raison d'être* of international humanitarian law and human rights law<sup>98</sup> and protects individuals from violations of their personal dignity<sup>99</sup>, for physical assault or for humiliation of the honor, self-esteem and the mental state of the individual<sup>100</sup>. Based on this assumption, the ICTY has concluded that undoubtedly such a serious violation, such as forced intrusion, should be described as rape<sup>101</sup>.

Before the Tribunal, the issue of breaking the *nullum crimen sine lege* principle was raised by the defense<sup>102</sup>, in particular because of the classification of forced oral intercourse with rape rather than sexual abuse, since it considered that this enlargement was very liberal and deviated from the traditional meaning of rape. This argument was rejected by the ICTY, adding that “there is no question of criminalizing acts that were not criminal when committed by the accused, since violent oral intercourse is in any case a crime, and indeed an extremely serious crime (...) in cases (...) violent oral intercourse is, as a rule, a distinct sexual abuse as it is committed in a time of war against unprotected citizens<sup>103</sup>. Thus, it is not just sexual abuse but sexual abuse as a war crime or crime against humanity (...)”<sup>104</sup>. Moving towards the wording of the definition, the

<sup>95</sup> F. MÉGRET, Practices of stigmatization, in Law and Contemporary Problems, 2014, pp. 289ss.

<sup>96</sup> A. COLE, International criminal law and sexual violence, in C. MCGLYNN, V.E. MUNRO, Rethinking rape law. International and comparative perspectives, ed. Routledge, 2010, pp. 49ss.

<sup>97</sup> L. MAY, Z. HOSKINGS, International criminal law and philosophy, Cambridge University Press, 2014, pp. 202ss.

<sup>98</sup> K. AMBOS, Castigo sin soberano? La cuestión del ius puniendi en derecho penal internacional. Una primera contribución para una teoría del derecho penal internacional consistente, in Revista Persona y Derecho, 2013, pp. 12ss. A. ASHWORTH, J. HORDER, Principles of criminal law, Oxford University Press, 2013. M. CHERIF BASSIOUNI, Crimes against humanity. Historical evolution and contemporary application, Cambridge University Press, 2011.

<sup>99</sup> N. VAN DER HAVE, The prevention of gross human rights violations under international human rights law, ed. Springer, 2018. C. JALLOH CHEVROR, A. MARONG A., Promoting accountability under international law for gross human rights violations in Africa. Essays in honour of prosecutor hasan Bubacar Jallow, ed. Brill, 2015. L.A. CAMARGOS, A responsabilidade penal internacional dos indivíduos: Estudo do caso Darfur, in Revista de Direito Brasileira, 2013, pp. 199ss.

<sup>100</sup> K. ZEEGERS, A. OVERY, International Criminal Tribunals and human rights law. Adherence and contextualization, T.M.C. Asser Press, 2016, pp. 18ss.

<sup>101</sup> “(...) the forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity. The essence of the whole corpus of international rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law (...) and debasing the honour, the self-respect or the mental well being of a person. It is consonant with this principle that such an extremely serious outrage as forced oral penetration should be classified as rape (...)”, Prosecutor v. Furundžija, Case No. ICTY- IT-95-17/1-T, Trial Judgment, para. 43, 274 para. 183.

<sup>102</sup> C. ROHAN, Z. ZYBERI, Defense perspective on international criminal justice, Cambridge University Press, 2017.

<sup>103</sup> P. KIRBY, How is rape a weapon of war?, Feminist international relations, modes of critical explanation and the study of wartime sexual violence, in European Journal of International Relations, 2012.

<sup>104</sup> M. HALLING, Push the envelope: Watch it bend: Removing the policy requirement and extending crimes against humanity, in Leiden Journal of International Law, 2010, pp. 828ss. C. ROBERTS, On the definition of crimes against humanity and other widespread or systematic



Tribunal considered that the specialty and the precision in the determination of the objective status were considered necessary to ensure procedural guarantees. The Tribunal, therefore emphasized the distinction between rape, which is described as a crime against humanity in the ICTY Statute<sup>105</sup>, and other less serious forms of sexual abuse, which could be prosecuted as “other inhuman acts”<sup>106</sup>.

It also stressed that rape should be seen as “the most serious form of sexual abuse”<sup>107</sup>. Thus, the elements of rape in international law, according to the ICTY, are considered as follows: “(i) sexual penetration, albeit mild: (a) the vagina or anal of the victim with the penis of the perpetrator or any other object used by the offender (b) the victim's mouth from the penis of the offender; (ii) coercion or violence or threat of violence against the victim or a Third Party”<sup>108</sup>.

A very important element exerted by *Furundžija*<sup>109</sup>-the composition of which consisted of the

human rights violations, in University of Pennsylvania Journal of Law and Social Change, 2017, pp. 4ss.

<sup>105</sup> R. DUBLER SC, M. KALYK, Crimes against humanity in the 21<sup>st</sup> century, ed. Brill, 2018.

<sup>106</sup> P. GRÉCIANO, Justice pénale internationale, ed. Mare & Martin, 2016.

<sup>107</sup> J.R. MCHENRY, The prosecution of rape under international law: Justice that is long overdue, in Vanderbilt Journal of Transnational Law, 2002, pp. 1310ss. N. LAVIOLETTE, Commanding rape: Sexual violence, command responsibility and the prosecution of superiors by the international criminal Tribunals for the Former Yugoslavia and Rwanda, in The Canadian Yearbook of International Law, 1998, pp. 94ss. D.A. NEBESAR, Gender-based violence as a weapon of war, in U.C. Davis Journal of International Law and Policy, 1998, pp. 148ss. I. PICCOLO, The crime of rape in international criminal law, International Courts Association, 2013.

<sup>108</sup> A.M. DE BROUWER, The importance of understanding sexual violence in conflict for investigation and prosecution purposes, in Cornell International Law Journal, 2015, pp. 5ss.

<sup>109</sup> See in particular the next cases: The ICTY Trial Chamber in case *Furundžija* drew a distinction between rape and any other forms of sexual violence on the basis of penetration: “(...) international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration (...)”. In case: *Prlić et al.* came to the same conclusion as *Furundžija*: “(...) rape is thereby prohibited, as well as all forms of sexual violence not including penetration (...)”. The ICC Trial Chamber in *Bemba* case required the invasion to amount to penetration: “(...) rape requires “invasion” of a person’s body by “conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body (...) the invasion of the body of person to constitute rape, it has to be committed under one or more of four possible circumstances: (i) by force; (ii) by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person; (iii) by taking advantage of a coercive environment; or (iv) against a person incapable of giving genuine consent (...)”. The ICTR Appeals Chamber in *Gacumbitsi* concurred and developed this approach: “(...) knowledge of non-consent may be proven, for instance, if the Prosecution establishes beyond reasonable doubt that the accused was aware, or had reason to be aware, of the coercive circumstances that undermined the possibility of genuine consent (...)”. The ECCC Appeals Chamber in *Kaing Guek Eav* (“Case 001”) (ECCC, The Prosecutor v. Kaing Guek Eav, AC, Appeal judgment, case no. 001/18-07-2007-ECCC/SC, 3 February 2012, para. 156), adopted a similar approach while limiting the purpose of control to the powers of ownership: “(...) the exercise over a person of powers attaching to ownership requires a substantial degree of control over the victim. There is no enslavement, however, where the control has an objective other than enabling the exercise of the powers attaching to ownership (...)”. The SCSL Trial Chamber in *Sesay et al.* SCSL, (The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustinus Gbao, TC I, judgment, case no. SCSL-04-15-T, 2 March 2009, para.163) concurred with the Appeal Chamber in *Kunarac et al.*, while concluding that consent might be relevant to the exercise of powers attached to the right of ownership: “(...) whether or not there was consent may be relevant from an evidentiary perspective in establishing whether or not the Accused exercised any of the powers attaching to the right of ownership (...)”. The SCSL Appeal Chamber in *Brima et al.* (SCSL, The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, TC II, judgment, case no. SCSL-2204-16-T, 20 June 2007, para. 704) overruled the Trial Chamber’s classification of forced marriage as sexual slavery, asserting the crime of forced marriage to be predominantly non-sexual in its nature: “(...) no Tribunal could reasonably have found that forced marriage was subsumed in the crime against humanity of sexual slavery. While forced marriage shares certain elements with sexual slavery such as non-consensual sex and deprivation of liberty, there are also distinguishing factors. First, forced marriage involves a perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with another person resulting in great suffering, or serious physical or mental injury on the part of the victim. Second, unlike sexual slavery, forced marriage implies a relationship of exclusivity between the “husband” and “wife,” which could lead to disciplinary consequences for breach of this exclusive arrangement. These distinctions imply that forced marriage is not predominantly a sexual crime. The Trial Chamber, therefore, erred in holding that the evidence of forced marriage is subsumed in the elements of sexual slavery (...)”. The ICC Pre-Trial Chamber in *Ongwen* (ICC, The Prosecutor v. Dominic Ongwen, PTC II, Decision on the confirmation of charges against Dominic Ongwen, case no. ICC- 02/04-01/15-422-Red, 23 March 2016, para. 88) concurred with the SCSL Appeal Chamber in *Brima et al.*, holding that forced marriage may constitute “other inhuman acts”: “(...) not explicitly include “forced marriage” as a crime within the jurisdiction of the Court. The question before the Chamber is therefore whether the conduct attributed to (the accused) (i.e. to have forced women to serve as “conjugal partners” to himself and other LRA fighters in the Sinia brigade) constitutes an other inhuman act of a character similar to the acts set out in article 7(1)(a) to (j) intentionally causing great suffering, or serious injury to body or to mental or physical health. This is largely a question of fact, but the application of the gravity threshold of article 7(1)(k) of the Statute is also a question of law, as is the question of whether the conduct described as “forced marriage” is not otherwise subsumed by the crime of sexual slavery (...)”. The ICTY Appeals Chamber in *Đorđević et al.* Case Prosecutor v. Vlastimir Đorđević et al. AJ, IT-05-87/1-A 27 January 2014 adopted a similar approach, considering that sexual violence may not require physical contact with the perpetrator where the acts constitute sexual humiliation or degradation: “(...) sexual assault requires that an act of a sexual nature take place. The Appeals Chamber notes that the act must also constitute an infringement





court judges Mumba, Cassese and May-is that when giving the definition the Tribunal did indeed attach great importance to the general rules of interpretation of international law while relying on international texts, international criminal jurisprudence and human rights law, the general principles of international law, where necessary, and the general principles of law as emerged from the study of national laws. However, although he relied on the *Akayesu*<sup>110</sup> and the *Čelebići* judgments, after finding that there was no definition of rape in international law, he did not consider them to fill the gap in international law<sup>111</sup>, relying on the absence of the principle of specialty in the conclusions of as above. Critical criticism of Catharine MacKinnon is that the Tribunal almost implies that: “without this declaration, the defendants-guards in the concentration camps accused of sexual abuse of prisoners-may not have known with sufficient precision that they were accused of committing a crime (...)”<sup>112</sup>.

However, the definition of *Furundžija* is equally important for the explicit incorporation of violence or the use of violence, along with coercion, as part of rape crime. The Tribunal concluded that all the case law investigated requires the existence of the element of violence, coercion, treat, or action without the consent of the victim<sup>113</sup>. It also placed particular emphasis on the definition given to the Prosecutor's preliminary summary, according to which rape is a violent act committed by violence or by the explicit or tacit threat of violence against the victim or a third person causes them reasonable fear of being subjected to violence, detention, coercion or psychological oppression. Thus, according to the Court's opinion, “all forms of captivity undermine consensus”<sup>114</sup>. It should be noted that, from the time when the Court relied on national criminal provisions to extract the definition of rape, it would have been more appropriate to rely more heavily on national laws criminalizing sexual acts among persons in

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of the victim's physical or moral integrity. Often the parts of the body commonly associated with sexuality are targeted or involved. Physical contact is, however, not required for an act to be qualified as sexual in nature. Forcing a person to perform or witness certain acts may be sufficient, so long as the acts humiliate and/or degrade the victim in a sexual manner (...). See also: A.T. CAYLEY, Prosecuting mass atrocities at the Extraordinary Chambers in the Courts of Cambodia (ECCC), in Washington University Global Studies Law Review, 2012, pp. 446ss. R. KILLEAN, An incomplete narrative: Prosecuting sexual violence crimes at the extraordinary Chambers in the Courts of Cambodia, in Journal of International Criminal Justice, 2015, pp. 335ss. S. SCULLY, Judging the successes and failures of the Extraordinary Chambers of the Courts of Cambodia, in Asian Pacific Law & Policy Journal, 2011, pp. 14ss. S. WILLIAMS, E. PALMER, The extraordinary Chambers in the Courts of Cambodia: Developing the law on sexual violence?, in International Criminal Law Review, 2015, pp. 454ss. L. MAY, Z. HOSKINS, The extraordinary Chambers in the Courts of Cambodia. Assessing their contribution to international criminal law, ed. Springer, 2016.

<sup>110</sup> A. BELTZ, Prosecuting rape in international criminal Tribunals: The need to balance victim's rights with the due process rights of the accused, in Journal of Civil Rights and Economic Development, 2008. C. MCCAUSLAND, From tolerance to tactic: Understanding rape in armed conflict as genocide, in Michigan State International Law Review, 2017, pp. 158ss. A. HAGAY-FREY, Sex and gender crimes in the new international law: Past, present, future, Martinus Nijhoff Publishers, 2011. Y. WEITZ, Rwandan genocide: Taking notes from the holocaust reparations movement, in Cardozo Journal of Law & Gender, 2009, pp. 370ss, according to the author: “(...) the Akayesu Court ultimately characterized rape and similar crimes of sexual violence as both genocide and as crimes against humanity. This expanded definition, along with the subsequent prosecution of rape, is a significant step forward for women's rights and has contributed to the development of international humanitarian law as a whole (...).” Cfr. S.T. DEUITCH, Putting the spotlight on “the terminator”: How the ICC prosecution of Bosco Ntaganda could reduce sexual violence during conflict, in William & Mary Journal of Women & Law, 2016, pp. 656ss. C. POWELL, You have no God: An analysis of the prosecution of genocidal rape in international criminal law, in Richmond Public Interest Law Review, 2017, pp. 26ss. S.T. DEUITCH, Putting the spotlight on “the terminator”: How the ICC prosecution of Bosco Ntaganda could reduce sexual violence during conflict, in William & Mary Journal of Women & Law, 2016, pp. 656ss.

<sup>111</sup> S. DARCY, J. POWDERLY (eds.), Judicial creativity at the international criminal Tribunals, Oxford University Press, 2010, pp. 138-

139.

<sup>112</sup> C.A. MACKINNON, Defining rape internationally: A comment on Akayesu, op. cit., pp. 940, 946.

<sup>113</sup> Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Trial Judgment, paras. 183-184.

<sup>114</sup> D. GUILFOYLE, International criminal law, Oxford University Press, 2016, 20ss.



unequal positions (such as guardians and food) instead of those criminal provisions that define consensual sexual intercourse in theoretical physiological conditions<sup>115</sup>.

By making a critical analysis of the definition of rape, as it emerges from this decision, we see that it promotes a mechanistic perception of this and clearly escapes its extended delineation in the *Akayesu* case<sup>116</sup>. However, it can not be overlooked that the definition of *Furundžija* is precise and detailed, although it focuses only on the issue of penetration, and it also highlights the issue of consensus on sexual violations and its inherent non-existence when international crimes are committed. This definition therefore includes the sexual penetration of the female vagina<sup>117</sup> or male or male anal with the penis of the perpetrator or any object used by the perpetrator as well as the sexual penetration of the mouth of a man or woman with the penis of the perpetrator<sup>118</sup>. Although at first sight, these three forms of sexual penetration can be considered as the only major forms of penetration, it nevertheless seems to exclude other forms, such as penetration of the vagina with the language or fingers of the perpetrator. However, since the Tribunal considered the main acts of penetration as humiliating and traumatic to the victim, relying on the principle of human dignity, this fundamental principle would justify widening the definition of rape to other forms<sup>119</sup>.

Therefore, while in its explanation, the ICTY laid the foundations for adopting a broad perception of the definition<sup>120</sup>, similar to that of *Akayesu*, it nevertheless appeared that it finally closed the door to adopt a conservative and largely incompatible position with the circumstances of the offenses<sup>121</sup>. Shortly thereafter, the ICTY came to reinstate the *Kunarac* case<sup>122</sup> with the broad but concise and detailed concept of rape. Once again, the Tribunal has established that there is no definition resulting from customary or conventional international law, either international human rights law or humanitarian law. It then examined the definition adopted in *Furundžija* and, while adopting it in his first part, considered that the required coercion, violence

<sup>115</sup> W. SCHOMBURG, I. PETERSON, Genuine consent to sexual violence under international criminal law, in *American Journal of International Law*, 2007, pp. 138- 139.

<sup>116</sup> B.A. OLWINE, One step forward, but two steps back: Why Gacaca in Rwanda is jeopardizing the good effect of Akayesu on women's rights, in *William & Mary Journal of Women and the Law*, 2011, pp. 640ss.

<sup>117</sup> R. GREY, Interpreting international crimes form a "female perspective" opportunities and challenges for the International Criminal Court, in *International Criminal Law Review*, 2017, pp. 328ss.

<sup>118</sup> R. GREY, L.J. SHEPHERD, Stop rape now?: Masculinity, responsibility, and conflict-related sexual violence, in *Men & Masculinities*, 2012, pp. 117ss. V.K. VOJDIK, Sexual violence against men and women in war: A masculinities approach, in *Nevada Law Journal*, 2014, pp. 925ss.

<sup>119</sup> C.F. DE CASADEVANTE ROMANI, *International law of victims*, ed. Springer, 2012.

<sup>120</sup> M. KARAGIANNAKIS, Case analysis: The definition of rape and its characterization as an act of genocide-A review of the jurisprudence of the International Criminal Tribunals for Rwanda and the Former Yugoslavia, in *Leiden Journal of International Law*, 1999, pp. 489ss, which claims that in *Furundžija* the definition of rape retained its extended form in relation to the *Akayesu*: "(...) it would seem that the broad, albeit more mechanical definition posited in the *Furundžija* Judgment does not differ in its practical application from the conceptual definition born in the *Akayesu* Judgment and followed and applied in the *Čelebići* Judgment". E. DOWDS, Conceptualizing the role of consent in the definition of rape at the International Criminal Court: A norm transfer perspective, in *International Feminist Journal of Politics*, 2018. W.A. SCHABAS, Crimes against humanity as a paradigm for international atrocity crimes, in *Middle East Critique*, 2011.

<sup>121</sup> C.J. FOUNTAIN CALEB, Sexual violence, the ad hoc Tribunals and the International Criminal Court: Reconciling *Akayesu* and *Kunarac*, in *ILSA Journal of International & Comparative Law*, 2013, pp. 4ss.

<sup>122</sup> Case No. IT-96-23 & 23/1 of 12 December 2002.

or threat of violence was very restrictive. It therefore said that *Furundžija's* definition did not refer to other factors that would make sexual penetration unconventional or non voluntary on the victim's side<sup>123</sup>. The Tribunal also criticized *Furundžija* for the fact that, while examining the national laws of many states, it found the extent to which many of them perceived the element of non-consensus, but that conclusion did not include it in the final definition. Thus, the ICTY in *Kunarac* conducted its own investigation of domestic legislation<sup>124</sup> and relevant case law in order to arrive at its own conclusions<sup>125</sup>.

The Tribunal has distinguished three categories of factors that often determine when a sexual act is rape in accordance with domestic criminal codes: i) sexual activity is accompanied by violence or threat of violence towards the victim or third person, ii) sexual activity is accompanied by violence or a variety of other special circumstances that made the victim particularly vulnerable or canceled her ability to make a conscious refusal; iii) sexual activity that takes place without the consent of the victim<sup>126</sup>. Thus, apart from point (i) “violence or threat of violence to the victim or a third person”, the Tribunal has introduced two more elements in categories (ii) and (iii). For category (ii) the court judges were convinced that by placing the victim in a position where he is unable to withstand, due to physical or mental weakness or in a surprise or misleading way, he is an element of rape crime. Similarly, in category (iii) the Tribunal took into account the absence of consensus and any circumstance where the victim does not have the possibility of reasoned refusal as another element of the crime<sup>127</sup>.

Note that this was recognized in the *Furundžija* case<sup>128</sup>, but was not included in the final definition. By proceeding with the analysis of the definition of rape, and after conducting the necessary investigation of legal systems that incorporate the principles to be adopted in the international context, the Tribunal held that “the objective reality of rape crime in international law consists of: sexual penetration, albeit of a) a vagina or anus of the victim with the penis of the perpetrator or any other object used by the offender, or b) the mouth of the victim by the penis of the offender, where this sexual penetration takes place without the consent of the victim.

<sup>123</sup> L. CARTER, M.S. ELLIS, C. CHERNOR JALLOH, *The International Criminal Court in an effective global justice system*, Edward Elgar Publishing, 2016. R. MULGREW, D. ABELS, *Research handbook on the international penal system*, Edward Elgar Publishing, 2016. SCHABAS, *International criminal law*, Edward Elgar Publishing, 2012. M. AKSENOVA, *Symbolism as a constraint on international criminal law*, in *Leiden Journal of International Law*, 2017, pp. 478ss. R. MULGREW, *Towards the development of the international penal system*, Cambridge University Press, 2013.

<sup>124</sup> R. STEGMILLER, *The pre-investigation stage of the ICC, Criteria for situation selection*, Duncker & Humblot, 2011. D. STEWART, *International criminal law in a nutshell*, in *West Academic Publishing*, 2014.

<sup>125</sup> M. CHESNEY-LIND, A.V. MERLÓ, *Global war on girls? Policing girl's sexuality and criminalizing their victimization*, in *Women and Criminal Justice*, 2015.

<sup>126</sup> C. SAFFERLING, *International criminal procedure*, Oxford University Press, 2012, pp. 97ss

<sup>127</sup> J. KNOOPS, *An introduction to the law of international criminal Tribunals. A comparative study*, ed. Brill. 2014. J. NICHOLSON, *Strengthening the validity of international criminal Tribunals*, ed. Brill. 2018. H. VAN DER WILT, C. PAULUSSEN, *Legal responses to transnational and international crimes*, Edward Elgar Publishing, 2017. G. BOAS, P. CHIFFLET, *International criminal justice*, Edward Elgar Publishing, 2017.

<sup>128</sup> C. SAFFERLING, L. BÜNGENER, H. FARTHOFFER, A. HARTWIG, Y. KOBERG, *International criminal procedure*, Oxford University Press, 2012. K. DE MEESTER, *The investigation phase in international criminal procedure: In search of common Rules*, ed. Intersentia, 2015. C. SAFFERLING, *International Criminal Procedure*, Oxford University Press, 2012, pp. 322ss.



Consent to this end must be voluntarily given as a result of the free will of the victim, assessed in the context of the surrounding circumstances. The subjective nature consists of the intention to commit sexual penetration and the knowledge that it is done without the consent of the victim (...)”<sup>129</sup>.

The definition adopted the traditional wording of the objective existence of rape. Part (a) and the first period of part (b) were taken by the *Furundžija* judgment. The definition of *Kunarac*, however, removed the phrase “coercion or violence or threat of violence”<sup>130</sup> from the previous definition and instead adopted the “lack of consensus” as an element<sup>131</sup>. In the trial, the Prosecutor claimed that lack of consensus was not an element of crime, as opposed to violence and coercion<sup>132</sup>. However, the Tribunal separated its position from the Prosecutor, stating that the basic common element of the legal systems investigated is that sexual penetration constitutes the crime of rape if it is not truly consensual or voluntary on the victim's side<sup>133</sup>.

It found that the elements of rape crime were not limited to violence, the threat of violence or coercion. The weight, according to the Tribunal, must be attributed to the violation of sexual autonomy because “the real common denominator uniting the various systems is the principle of criminalizing violations of sexual autonomy”<sup>134</sup>. Sexual autonomy is also violated whenever the person is subjected to an act to which he or she has not freely agreed or voluntarily participated<sup>135</sup>. Thus, lack of consensus is the sine qua non of rape and the element of coercion, violence or threat of violence are only some aspects that can prove the lack of consensus. The question of consensus was raised by one of the defendants, *Kunarac*, who claimed that once the thief itself had testified that intercourse was on its own initiative, he could not have known that he did not consent. As the victim was in captivity and the initiative came from the threats that he accepted, the Tribunal found that he had not consented freely<sup>136</sup>.

Moreover, since *Kunarac* was aware of the context of the war and the particular vulnerability of Muslim women and men in custody<sup>137</sup>, and of the fact that the witness had previously been raped

<sup>129</sup> Furundžija Judgment, op. cit., para. 80; Kunarac Judgment, op. cit., para. 440.

<sup>130</sup> I. MARCHUK, The fundamental concept of crime in international criminal law. A comparative law analysis, ed. Springer, 2014, pp. 117ss.

<sup>131</sup> B.S. BROWN, Research handbook on international criminal law, Edward Elgar Publishing, 2011.

<sup>132</sup> K. AMBOS, Criminal justice, in L. STAHN, N. NEDELSKY, Encyclopedia of transitional, Cambridge University Press, 2013, pp. 284ss.

<sup>133</sup> C.J. FOUNTAIN CALEB, Sexual violence, the ad hoc Tribunals and the International Criminal Court reconciling Akayesu and Kunarac, op. cit.

<sup>134</sup> I. HAENEN, Classifying acts as crimes against humanity in the Rome statute of the International Criminal Court, in German Law Journal, 2013, pp. 89ss.

<sup>135</sup> Para. 457-458: in argument of violence or threat of violence the Tribunal declares that: “(...) in practice, the absence of genuine and freely given consent or voluntary participation may be evidenced by the presence of the various factors specified in other jurisdictions-such as force, threats of force, or taking advantage of a person who is unable to resist. A clear demonstration that such factors negate true consent is found in those jurisdictions where absence of consent is an element of rape and consent is explicitly defined not to exist where factors such as use of force, the unconsciousness or inability to resist of the victim, or misrepresentation by the perpetrator”. See also T. BONACKER, C. SAFFERLING, Victims of international crimes: An interdisciplinary discourse, T.M.C. Asser Press, 2013.

<sup>136</sup> W.A. SCHABAS, S. MURPHY, Research handbook on international Courts and Tribunals, Edward Elgar Publishing, 2017.

<sup>137</sup> T.R. KARKERA, International Criminal Court's protection of women: The hands of justice at work, in American University Journal of





by several other soldiers<sup>138</sup>, the Tribunal ruled that the accused had concluded sexual intercourse with the victim, knowing in full knowledge that he did not freely consent<sup>139</sup>. In the Court of Appeal, the Court confirmed the definition of rape with some remarkable remarks. The Court of Appeal stressed that: “the conditions prevailing in most cases where there are war crimes against humanity are compelling”, concluding that under these circumstances “true consensus is not possible”<sup>140</sup>.

Based on the facts of the case, including the *de facto* detention, the systematic and repeated rape of the victims, the Court of Appeal concluded that the conditions of detention and detention itself are so compelling that there is no room for consensus. The Court of Appeal, however, confirmed the definition, which in particular requires non-consent (and not evidence of violence or coercion) as part of rape crime, while at the same time holding that consensus is impossible under inherently coercive conditions common to most international crimes. But what is the difference between *Kunarac* and *Furundžija*? The *Kunarac* Court of Appeal stated that the Court of first instance did not reject the definition of *Furundžija* but simply “tried to explain the relationship between violence and consensus (...)”<sup>141</sup>. However, a more detailed analysis of the decision does not confirm this view. The elements of rape crime in the two cases are clearly different. In fact, coercion and consensus are traditionally two distinct elements, each of which must be met independently<sup>142</sup>.

Violence, threats and coercion focus on the acts of the accused, unlike the consensus, which is related to the victim's mental state<sup>143</sup>. Given that *Kunarac* was the first case in which the Court of

Gender, Social Policy & the Law, 2004, pp. 202ss.

<sup>138</sup> A. ADAMS, The first rape prosecution before the ICC: Are the elements of crimes based on a source of international law?, in International Criminal Law Review, 2015, pp. 1100ss.

<sup>139</sup> See also in argument the next cases: *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (...) in this regard, courts have been willing to close certain proceedings to account for the concerns of witnesses. If a partial closure is requested, i.e., excluding only certain spectators, there must be a “substantial reason” for such closure, whereas a full closure to the public and press requires an “overriding interest” (...). Partial closures of the Courtroom have been justified on the grounds of a witness’ fear of retribution from perpetrators still at large (*Nieto v. Sullivan*, 879 F.2d 743 (10th Cir.), cert. Denied, 110 S. Ct 373 (1989)); to protect the dignity of an adult witness during a rape trial (*United States ex rel. Latimore v. Sielaff*, 561 F.2d 691 (7th Cir.), cert. denied 434 U.S. 1076 (1977); *Douglas v. Wainwright*, 714 F.2d 1532 (11th Cir.), cert. granted 468 U.S. 1206 (1983), vacated and remanded, 739 F.2d 531 (1984), in which protection of an adult prosecution witness from embarrassment was held to be sufficient for partial closure of a rape trial); and to protect a minor rape victim from fear of testifying before disruptive members of the defendant's family (*U.S. v. Sherlock*, 962 F.2d 1349 (9th Cir. 1989) see also *Geise v. United States*, 262 F.2d 151, 155 (9th Cir. 1958), cert. denied, 361 U.S. 842 (1959) in which the reluctance and fear of a child witness in a rape case to testify in the presence of a full Courtroom justified closure of the Courtroom to all but press, members of the bar, and close friends and relatives of the defendant). Complete closure for a limited time has been justified to protect the safety of a witness and his family ( *United States v. Hernandez*, 608 F.2d 741 (9th Cir. 1979)); to preserve confidentiality of undercover agents in narcotics cases (*United States ex. rel. Lloyd v. Vincent*, 520 F.2d 1272 (2d Cir.), cert. denied, 423 U.S. 937 (1975)). (...) Twenty-six state statutes allow for closure of trials to protect witnesses’ (...). Cfr. P. CLARK, Rape, sexual violence and transitional justice challenges. Lessons from Bosnia Herzegovina, ed. Routledge, 2018. N. BOISTER, R.J. CURRIE, Routledge handbook of transnational criminal law, ed. Routledge, 2015. A. CASSESE, F. JESSBERGER, R. CRYER, U. DÉ International criminal law, ed. Routledge, 2016. E. BIKUNDO, International criminal law using or abusing legality?, ed. Routledge, 2014. O.N.I. EBBE, Comparative justice systems. Policing, judiciary and corrections, ed. Palgrave, 2013. A. ESER, Comparative criminal law, ed. Nomos & Hart Publishing, 2017. L. GROVER, Child soldier victims of genocidal forcible transfer. Exonerating child soldiers charged with grave conflict-related international crimes, ed. Springer, 2014.

<sup>140</sup> Prosecutor v. Kunarac et al. Appeals Chamber Judgment, Case IT-96-23 and IT- 96-23/1-A, 12 June 2002, para. 129. S. BRAMMERTZ, M. JÁRVIS, Prosecuting conflict- related sexual violence at the ICTY, Oxford University Press, 2016.

<sup>141</sup> E. SCHRAMM, Internationales Strafrecht, C.H. Beck, 2018.

<sup>142</sup> I. HAENEN, Classifying acts as crimes against humanity in the Rome statute of the International Criminal Court, op. cit.

<sup>143</sup> W. SCHOMBURG, I. PETERSON, Genuine consent to sexual violence under international criminal law, in American Journal of International Law, 2007, pp. 138ss. According to Casese: “(...) according to which the two definitions are essentially the same as coercion, violence or the threat of violence to imply the essence or to mean the absence of consensus (...)”. See: A. CASSESE, International criminal law, Oxford University Press, 2013, pp. 79ss.



Appeal directly addressed the issue of the definition of rape, many other decisions, both the ICTY and the ICTR, relied on it and followed the definition it gave<sup>144</sup>. In *Kajelijeli*<sup>145</sup> and *Kamuhanda*<sup>146</sup> cases, it was accepted that rape was one of the reported acts of penetration, without the consent of the victim and knowing that this consensus was absent.

In *Muhinama*, as in *Musema*, the ICTR has tried to reconcile the conflicting definitions of rape crime<sup>147</sup>. In this case, both the prosecution and the defense welcomed the conceptual approach of rape, as was adopted in *Akayesu*. The Tribunal noted that the *Akayesu* approach and the *Kunarac* definition are not mutually exclusive, but that *Kunarac* provided: “additional details of the constituent elements of the acts considered to be rape”<sup>148</sup>. Thus, according to the Tribunal, while *Akayesu* referred extensively to “physical violation of a sexual nature”, *Kunarac* attempted to specify its parameters of what constitutes that sexual offense of sexual nature as the rape offense. Considering the issue of consensus, the ICTR in *Muhimana* case considered that: “coercion is an element that can circumvent the importance of consent as evidence for the crime of rape”<sup>149</sup> at the same time that the context of international crimes “is almost universal coercive, thereby undermining the element of consensus”<sup>150</sup>.

However, the *Muhimana* case does not provide sufficient details as to whether non-consent should be the decisive criterion for rape crime, particularly in relation to the subjective nature of the offense<sup>151</sup>. Moreover, it is difficult to see whether the pure result of the *Muhimana* decision was to reduce *Kunarac* in an interpretative guide to the broad but bold definition of *Akayesu*, or to provide an almost emotional aspect to the conceptual definition of *Akayesu*, at the same time recognizing the necessary expertise provided by *Kunarac*. In conclusion, the Tribunal did not explain how it reconciled the differentiated definitions of *Akayesu* and *Kunarac*, but also how it applied the relevant definition to the facts of the case before it.

Although *Kunarac's* appeal would normally have been a guide to all subsequent cases related to the rape crime<sup>152</sup>, however, the large number of cases of sexual violence before the ad hoc tribunals gave food to them for further discussion and investigation of the issue. This trend is reflected in the *Gacumbitsi* appeal case<sup>153</sup> before the ICTR<sup>154</sup>, where a different definition of

<sup>144</sup> Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment, 15 May 2003, paras. 344-346, Prosecutor v. Kajelijeli, Case No. ICTR-98-44-T, Judgment, 1 Dec. 2003, paras. 910-15, Prosecutor v. Kamuhanda, Case No. ICTR-95-54A-T, Judgment, 22 Jan. 2004, paras. 705-9.

<sup>145</sup> Case No. ICTR-98-4A of 23 May 2005.

<sup>146</sup> Case No. ICTR-99-54A of 19 September 2005.

<sup>147</sup> Prosecutor v. Nahimana, Trial Chamber Judgment ICTR-99-52-A of 28 November 2007.

<sup>148</sup> C.J. FOUNTAIN CALEB, Sexual violence, the ad hoc Tribunals and the International criminal Court: Reconciling Akayesu and Kunara, op. cit.

<sup>149</sup> A.L. CHOO, Evidence, Oxford University Press, 2015.

<sup>150</sup> Case No. ICTR-95-1B of 21 May 2007.

<sup>151</sup> N. HAYES, Creating a definition of rape in international law: The contribution of the international criminal Tribunals, in S. DARCY, J. POWDERLY (eds.), Judicial creativity at the international criminal Tribunals, Oxford University Press, 2010, pp. 146ss.

<sup>152</sup> See for example: Prosecutor v. Milomir Stakic, Judgment, Case No. ICTY- IT-97- 24-T, 31 Jul. 2003, para. 755, Prosecutor v. Dragon Nikolic, Sentencing Judgment, Case No. ICTY-IT-94-2, 18 Dec. 2003, para. 113.

<sup>153</sup> Case No. ICTR-01-64 of 7 July 2006.

rape was ultimately attributed<sup>155</sup>.

Gacumbitsi was found guilty of genocide<sup>156</sup> and rape for a crime against humanity<sup>157</sup>, which led the Tribunal to reconsider previous rape case law, concluding that the *Akayesu* and *Kunarac* judgments, although they have different approaches, can reconcile<sup>158</sup>. The lack of consent of the victim was proven by the fact that *Gacumbitsi* had threatened to kill the victims horribly in case they resisted and the fact that those who escaped were eventually attacked<sup>159</sup>. During the trial, the Prosecutor claimed that the lack of consensus and the relative knowledge of the accused are not elements of rape crime<sup>160</sup>. Instead, according to him, rape must be preceded in the same way as torture and enslavement<sup>161</sup>, for which the prosecution does not have to prove the lack of consensus<sup>162</sup>.

The Appeals Court rejected the prosecution's argument<sup>163</sup>. Having been consulted about whether the examination of the forced conditions *à la Akayesu* or *Furundžija* was the appropriate question or whether the lack of consensus was the appropriate legal interpretation, the *Gacumbitsi* Court of Appeal assured that the victim's lack of consent<sup>164</sup> and knowledge of the perpetrator the non-consent was indeed evidence of the crime of rape, which the prosecution has to prove beyond doubt. Furthermore, the Court of Appeal stressed that: the Prosecutor's Office can prove beyond any doubt the non-consensus by proving the existence of coercive conditions under which a substantial consensus can not be reached. As with every element of each offense, the Tribunal will take into account all relevant and admissible evidence to establish whether, in the light of the circumstances of the case, it must conclude that non-consensus has been proven beyond doubt. But it is not legally necessary for the Prosecutor to provide evidence of the victim's words or behavior or the victim's relationship with the offender. Neither does he need to suggest

<sup>154</sup> R.J. KABANO, The critical comparison of the Sierra Leone Tribunal with the international criminal Tribunal for Rwanda: The benefit of hybridity of a Court, in *Journal of Law*, 2017, pp. 7ss.

<sup>155</sup> The Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-A, ICTR, Appeal Judgment, 7 July 2006.

<sup>156</sup> M.J. KELLY, The parameters of vicarious corporate criminal liability for genocide under international law, in A. BYRNES, C. HAYASHI-MICHAELSEN, *International law in the age of globalization*, ed. Brill, 2013.

<sup>157</sup> R. BEHRENS, J. HENNAM, *Elements of genocide*, ed. Routledge, 2013, pp. 194ss. Y. BEIGBEDER, *International Criminal Tribunals*, ed. Palgrave, 2011.

<sup>158</sup> S.L. RUSSELL, BROWN, Rape as an act of genocide, in *Berkeley Journal of International Law*, 2003, pp. 362ss. P.V. SELLERS, Sexual violence and peremptory norms: The legal value of rape, in *Case Western Reserve Journal of International Law*, 2002, pp. 290ss. R.S. SÁNCHEZ REVERTE, Referencia al crimen de genocidio aproximación genocidio crime, in *Revista de Estudios Jurídicos (Segunda Época)* 2016.

<sup>159</sup> Gacumbitsi Judgment, para. 325.

<sup>160</sup> Gacumbitsi Appeal Judgment, para. 147.

<sup>161</sup> I. HAENEN, The parameters of enslavement and the act of forced marriage, in *International Criminal Law Review*, 2013, pp. 898ss.

<sup>162</sup> See also in argument: Prosecutor v. Norman, Fofana & Kondewa, Case No. SCSL-04-14-PT, Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 13 (May 24, 2005) (noting the prosecution's argument that the ad hoc Tribunals have routinely recognized acts of sexual violence as constituting crimes a

<sup>163</sup> A. TIEMESSEN, The International Criminal Court and the politics of prosecutions, in *The International Journal of Human Rights*, 2014.

<sup>164</sup> *People v. Mayberry*, 542 P.2d 1337, 1345 (Cal. 1975) (en banc) (holding that a statutory rape provision did not eviscerate the requirement of simultaneous act and wrongful intent); *State v. Smith*, 554 A.2d 713, 715–16 (Conn. 1989), holding that: “(...) for the crime of rape, the perpetrator must only intend the general physical act of sexual intercourse and not the specific act of sexual intercourse without a person’s consent (...)”; *Commonwealth v. Lopez*, 745 N.E.2d 961, 965 (Mass. 2001), that “(...) no mens rea or knowledge as to the lack of consent has ever been required” to determine that a rape has occurred (...); *State v. Reed*, 479 A.2d 1291, 1296 (Me. 1984), that: “(...) no culpable state of mind” is required when rape is compelled by force or threat (...); see also Sexual Offences Act, 2003, c. 42, par. 1(1)(c) (U.K.), which providing as an element of rape that the accused “(...) does not reasonably believe” that the victim consented (...). Also see: I. MARCHUK, *The fundamental concept of crime in international criminal law. A comparative law analysis*, ed. Springer, 2015.



evidence of violence. The Tribunal is free to conclude non-consent from the surrounding circumstances, such as the evolving genocide campaign<sup>165</sup> or the detention of the victim<sup>166</sup>. Consequently, the *Gacumbitsi* Court of Appeal held that the definition of *Kunarac*, both conceptually and *de jure*, prevailed. The conclusion of *Gacumbitsi* has sparked intense controversy and was the subject of academic and bibliographic criticism<sup>167</sup>. Schomberg argues that the unequal position of the perpetrator and the victim is an intrinsic element in cases where rape is committed during the war and ultimately leads to international crime<sup>168</sup>. Lack of consensus is not appropriate under international law once it is proved that the sexual act was committed in a context where sexual autonomy is generally absent.

### 3. Definition of rape at the Special Court for Sierra Leone

The SCSL also faced the need to define the crime of rape<sup>169</sup>. Initially, in 2007 in *Prosecutor v. Brima, Kamara & Kanu*<sup>170</sup> the SCSL essentially adopted the corresponding definition, as expressed in the *Kunarac* case. Thus, the Court, in addition to the chapeau conditions of crimes against humanity, in accordance with article 2 of the Statute, has also adopted the following elements of the crime of rape: the non-consensual penetration of the vagina or rectum of the victim with the penis of the perpetrator or any other object used by the perpetrator or mouth of the victim with the penis of the perpetrator, of sexual penetration, and the knowledge that it is done without the consent of the victim. The victim's consent must be voluntarily given as a result of the free will of the victim, assessed in the context of the surrounding circumstances. According to the Court, violence or the threat of violence is a clear demonstration of non-consensus, but violence is not a *per se* element of rape, but there are other factors that make the act of sexual penetration unconsciously or non-voluntary victim. However, in situations of armed conflict or detention, coercion is almost universal<sup>171</sup>. The constant resistance of the victim and physical violence or even the threat of such violence by the perpetrator are not preconditions for proof of coercion. The Court has held the objective nature of rape can be established by the use of indirect evidence. Accordingly, the very particular circumstances of the armed conflict, where there are indications of rape on an extensive scale, coupled with the social stigma of rape victims

<sup>165</sup> P. BEHRENS, Genocide and the question of motives, in *Journal of International Criminal Justice*, 2012. M. BERGSMO, C. WUI LING, Y. PING (a cura di), *Historical origins of international criminal law*. Vol. 1-3, TOAEP, Brussels, 2014.

<sup>166</sup> N. HOGG, Women's participation in the Rwandan genocide: Mothers or monsters?, in *International Review of Red Cross*, 2010, pp. 290ss.

<sup>167</sup> P.V. VISEUR-SELLERS, The prosecution of sexual violence in conflict: The importance of human rights as of interpretation, United Nations Office of the High Commissioner for Human Rights, 2007, pp. 23.

<sup>168</sup> W. SCHOMBERG, I. PETERSON, Genuine consent to sexual violence under international criminal law, op. cit., pp. 128. K.J. HELLER, What is an international crime?, in *Harvard International Law Journal*, 2018.

<sup>169</sup> Sesay, Case No. SCSL-04-15-T, Trial Judgment.

<sup>170</sup> AFRC Trial, Case No. SCLS-04-16-PT.

<sup>171</sup> A.A.V.V., *Jurisdicción universal. Sobre crímenes internacionales*, ed. Comares, 2013.



in particular societies, make it difficult to prove the elements of crime<sup>172</sup>. That is why it is necessary to use indirect evidence to establish the objective reality of rape. Two years later, in *Prosecutor v. Sesay, Kallon & Gbao*, the SCSL<sup>173</sup> adopted a quite different definition<sup>174</sup>. The Court, after reviewing the history of rape during wars, identified its elements as follows: 1. the accused violated the body of a person by acts that have the effect of penetrating, irrespective of gravity, any part of his body the victim or the accused with a sexual organ or the oral or rectal cavity of the victim with any object or part of the body; 2. the violation was committed with violence or threat of violence or coercion such as that caused by fear of violence, coercion, detention, psychological oppression or abuse against such person or other person or through the exploitation of the forced environment, or the violation was brought against of a person unable to give genuine consent; 3. the defendant had the added intention of causing sexual intercourse; 4. the accused had a reason to know that the victim did not consent. The Court rushed to explain how it reached the conclusions of the first two paragraphs.

Assessing the first paragraph, the Court explained the broad perception of sexual acts, noting that the first element of the objective hypothesis defines the type of violation required to establish the rape offense and covers two types of penetration, even light. The first part refers to the penetration of any part of the body, either the victim or the accused with a sexual organ, while the phrase “any part of the body” includes genital, rectal or oral penetration<sup>175</sup>.

The second part refers to penetrating the genital or anal cavity with any object or any part of the body that covers penetration with anything else, the object or part of the body, except for the genitals. The Court notes that this definition is broad enough to be sex-neutral as both men and women can be raped<sup>176</sup>. The decision attempted to clarify the role of the second paragraph, noting that the second element of the objective hypostasis refers to those circumstances that make the sexual act of the first element criminal. It describes essentially the circumstances in which a person has not voluntarily or genuinely consented to the act, whereas the use of threats or violence provides clear evidence of non-consent, but does not require its existence, since in cases where crimes are international, consent is almost universally impossible. With regard to the last part of this element, it refers essentially to the fact that even if there is no violence or coercion, it is not necessary for the person to have given his true consent in practice because he

<sup>172</sup> A. SENIER, The ICC Appeals Chamber judgment on the legal characterization of the facts in *Prosecutor v. Lubanga*, in *American Society of International Law Insights*, 2010, pp. 14ss. L. CHAPPELL, The gender injustice cascade: “transformative” reparations for victims of sexual and gender-based crimes in the Lubanga case at the international criminal Court, in *The International Journal of Human Rights*, 2017.

<sup>173</sup> S. STEPANOFF, When we wanted to talk about rape: Silencing sexual violence at the Special Court for Sierra Leone, in *International Journal of Transitional Justice*, 2007. S. DANA, The sentencing legacy of the Special Court for Sierra Leone, in *Georgia Journal of International and Comparative Law*, 2014, pp. 620ss.

<sup>174</sup> RUF Trial, Case No. SCSL-04-15-T, Trial Judgment, para. 145.

<sup>175</sup> SCSL-04-15-T, Trial judgment, 2 March 2009, para 143 (rape as a crime against humanity under article 2 of the Statute).

<sup>176</sup> C. DOLAN, Into the mainstream: Addressing sexual violence against men and boys in conflict. Briefing Paper prepared for the workshop held at the Overseas Development Institute. Refugee Law Clinic, May 2014, 1-12.



may be very young under the influence of substances or suffer from illness or disability.

An important differentiation of *Sesay*<sup>177</sup> is the analysis of the subjective nature of the crime. In fact, it requires the existence of a bilateral subjective hypostasis. Although the lack of consensus is not an element of objective fact, however, the accused must have some form of knowledge that the victim did not consent to the act. It should be noted that in the case of *Charles Taylor*<sup>178</sup>, where the accused was finally convicted of rape as a crime against humanity, the SCSL applied a slightly different definition to *Kunarac*, important elements of which, like the aforementioned decision, were finally included in the ICT for crime facts<sup>179</sup>.

#### 4. Definition of rape by ICC

The Preparatory Committee of ICC was mainly influenced by the ICTY and the ICTR case-law and the elements of crimes, a text intended to assist the Court in the interpretation and application of articles 6 (genocide), 7 (crimes against humanity) and 8 (war crimes). Of course, in ICC, the elements of rape are the same, regardless of whether rape is prosecuted as a war crime<sup>180</sup> or a crime against humanity<sup>181</sup>. Thus, rape is defined as follows: 1. the offender violated a person's body by actions that resulted in the penetration, regardless of gravity, of any part of the body of the victim or the accused with a sexual organ, or of the oral or rectal cavity victim with any object or part of the body<sup>182</sup>; 2. the violation was committed with violence or threat of violence or coercion such as that caused by fear of violence, coercion, detention, psychological

<sup>177</sup> SCSL/04/15/T of 2 March 2009. See also: G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV, S. ZAPPALÁ, International criminal procedure. Rules and principles, Oxford University Press, 2013, pp. 1576ss. R. BELLELO (ed.), International criminal justice, Ashgate Publishing, 2010, pp. 461ss. C. CHERNOR JALLOH, S. MEISNERBERG, The law reports of the Special Court of Sierra Leone, vol. III, ed. Brill & Martinus Nijhoff Publishers, 2015, pp. 366ss. E. VAN SLEDREGT, S. VASILIEV, Pluralism in international criminal law, Oxford University Press, 2014, pp. 285ss. C. CHERNOR JALLOH, The Sierra Leone Special Court and its legacy: The impact for Africa and international criminal law, Cambridge University Press, 2013, pp. 234ss. V.O.O. NMEHIELLE, Africa and the future of international criminal justice, Eleven International Publishing, 2012.

<sup>178</sup> In Charles Taylor case, the Trial Chamber of the Special Court for Sierra Leone: "(...) relied heavily on contemporary documentary evidence contained in the reports of international organisations and NGOs on, and media coverage of, the crimes committed in Sierra Leone in finding beyond reasonable doubt that the former President of Liberia was aware of the crimes committed in Sierra Leone by the RUF/AFRC forces against civilians, including rape (...)". Prosecutor v. Taylor, Trial Chamber II Judgment, Case No. SCSL-03-01-T, 18 May 2012, paras. 6815- 6886. See also: A. GRABERT, Dynamic interpretation in international criminal law. Striking a balance between stability and change, op. cit., pp. 150-158ss. M. GLASIUS, T. MEIJERS, Constructions of legitimacy: The Charles Taylor trial, in International Journal of Transitional Justice, 2012, pp. 230ss. C. CHERNOR JALLOH, A. MORGAN, International criminal justice processes in Rwanda and Sierra Leone: Lessons for Liberia, in C. CHERNOR JALLOH, E. OLUFEMI, Shielding humanity. Essays in international law in honour of judge Abdul G. Koroma, ed. Brill, 2015. S.J. ROSE, Prosecutor v. Taylor: The implications for Bashar Al-Assad, in Boston College International & Comparative Law Review, 2014, pp. 12ss. K.J. HELLER, The Taylor sentencing judgment: A critical analysis, in Journal of International Criminal Justice, 2013, pp. 838ss. R. DUBLER SC, M-. KALYK, Crimes against humanity in the 21<sup>st</sup> century, ed. Brill, 2018.

<sup>179</sup> A. SHARPE, Sexual intimacy, gender variance and criminal law, in Nordic Journal of Human Rights, 2015.

<sup>180</sup> O. SVÁČEK, Brothers and sisters in arms as victims of war crimes. Ntagada case before the ICC, in Czech Yearbook of Public & Private International Law, 2018.

<sup>181</sup> See from the ICTR the next cases: Prosecutor v. Bagosora, Kabiligi, Ntabakuze, Nsengiyumva, ICTR-98-41-T, judgment and Sentence, 18 Dec 2008; Prosecutor v. Bikindi, ICTR-01-72-T, judgment, 2 Dec 2008; Prosecutor v. Bisengimana, ICTR- 00-60-T, judgment and Sentence, 13 Apr 2006; Prosecutor v. Bizimungu (Casimir), Mugenzi, Bicomupaka and Mugiraneza, ICTR-99-50-T, Decision on Defence Motions Pursuant to Rule 98 Bis, 31 Oct 2005; Prosecutor v. Nizeyimana and Hategekimana, ICTR-00-55-I, Decision on the Prosecutor's Application for Severance and Leave to Amend the Indictment against Idelphonse Hategekimana, 25 Sept 2007; Prosecutor v. Elizaphan and Gerard Ntakirutimana, ICTR-96-10 and ICTR-96-17-T, judgment and Sentence, 21 Feb 2003; Prosecutor v. Nyiramasuhuko, Kanyabashi, Ndayambaje, Nsabimana, Ntahobali, Nteziryayo, ICTR-98-42-T, Decision on Defence Motions for Acquittal under Rule 98bis, 16 Dec 2004; Prosecutor v. Rugambarara, ICTR-00-59-T, Sentencing judgment, 16 Nov 2007; Prosecutor v. Rutaganira, ICTR-95-1C-T, judgment and Sentence, 14 Mar 2005; Prosecutor v. Seromba, ICTR-2001-66-A, judgment, 12 Mar 2008. AGNEW, Acquittals in Mugenzi & Mugiraneza v. Prosecutor contribute to the weak legacy of the International Criminal Tribunal for Rwanda, in Boston College International & Comparative Law Review, 2015, pp. 8ss.

<sup>182</sup> H. AHMAD, Context at the International Criminal Court, in Pace International Law Review, 2017, pp. 132ss.

oppression or abuse against such person or other person or through exploitation of the enforced environment<sup>183</sup>, or the violation was brought against a person unable to give genuine consent. This definition of ICT is a mixture of definitions given by the ICTY, of ICTR and Rule 96<sup>184</sup> of the ad hoc tribunals that is part of the rules and the proof process<sup>185</sup>. However, the ICTR definition avoids a clear choice between the elements of *Akayesu* and *Furundžija*, but rather seems to combine them<sup>186</sup>. It provides a gender-neutral definition<sup>187</sup>, predicting the physical penetration of any part of the victim's body as well as violence or coercion<sup>188</sup>. However, although any sexual penetration, according to the definition, may be rape, the sexual conduct of the perpetrator who does not consist penetration is not covered by the rape crime<sup>189</sup>.

The condition of coercion has been broadly defined by ICC in the *Bemba* case<sup>190</sup>, where the ICC ruled that: with regard to the term “coercion”<sup>191</sup> the Court notes that it does not only require physical violence<sup>192</sup>. On the contrary, threats, intimidation, displacement, and other forms of cruelty based on fear or despair may be coerced, while coercion may be inherent in specific circumstances, such as armed conflicts or situations of military presence<sup>193</sup>.

It remains to be seen, however, how the ICTY and ICTR will further specify in its case-law each of the elements of crime, which are to be clarified in accordance with international criminal law and which procedural rules will be applied to ensure that it will not be required to the lack of consensus of the victim. It should also be noted that this definition is quite convincing and has

<sup>183</sup> J.F. ALEXANDER, *The International Criminal Court and the prevention of atrocities: Predicting the Court's impact*, in Villanova Law Review, 2009, pp. 27ss. J. HAFETZ, *Punishing atrocities through a fair trial. International criminal law from Nuremberg to the age of global terrorism*, Cambridge University Press, 2018.

<sup>184</sup> The Rule 96 defines: in cases of sexual assault: (i) notwithstanding Rule 90 (C), no corroboration of the victim's testimony shall be required; (ii) consent shall not be allowed as a defense if the victim: (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression; or (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear; (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible; (iv) prior sexual conduct of the victim shall not be admitted in evidence or as defense. See, Rule 96 of Evidence and Procedure (UN Doc. IT/32, 1 Feb. 1994). Position adopted in case: *Prosecutor v. Tadić*, the ICTY trial Chamber explained: “(...) that the rule rejecting a corroboration requirement in sexual assault cases accords to the testimony of a victim of sexual assault the same presumption of reliability as the testimony of victims of other crimes, something long denied to victims of sexual assault by the common law (...)”. See also in argument: ROTSCH, *Criminal evidence*, ed. Nomos, 2015.

<sup>185</sup> H. SATZGER, W. SCHLUCKEBIER, G. WIDMAIER, *Strafprozessordnung (StPO)*, Carl Heymanns Verlag, 2017.

<sup>186</sup> P.V. VISEUR-SELLERS, *Gender strategy is not a luxury for international Courts*, in American University Gender, Society Policy & Law, 2009, pp. 302ss.

<sup>187</sup> See in particular the next doctrine work: A. HAGAY-FREY, *Sex and gender crimes in the new international law: Past, present, future*, Martinus Nijhoff Publishers, 2011, pp. 80ss.

<sup>188</sup> L. CHAPPELL, *The politics of gender justice at the International Criminal Court*, Oxford University Press, 2016, pp. 266ss. M. JO RATKE, B.A. SIMMONS, *Assessing the International criminal Court*, in T. SQUATRITO, O.R. YOUNG, A. FOLLESDAL, G. ULSTEIN, *The performance of international courts and Tribunals*, Cambridge University Press, 2018.

<sup>189</sup> S. MOUTHAN, *The prosecution of gender-based crimes at the ICC: Challenges and opportunities*, in International Criminal Law Review, 2011, pp. 776ss.

<sup>190</sup> ICC-01/05-01/08 of 21 March 2016. F. O'REGAN, *Prosecutor vs. Jean-Pierre Bemba Gombo: The cumulative charging principle, Gender-based violence, and expressivism*, in Georgetown Journal of International Law, 2012, pp. 1344ss.

<sup>191</sup> K. AMBOS, C. ACKERMAN, *Liber amicorum Mirjam Damaška. Beiträge zum Internationalen und Europäischen Strafrecht*, Duncker & Humblot, 2016.

<sup>192</sup> In argument see also: the United Kingdom launched an initiative on preventing sexual violence in conflict, aimed, inter alia, at strengthening international efforts and coordination, and supporting states in building their national capacity to prosecute acts of sexual violence committed during conflict. See the G8 Declaration on Preventing sexual violence in conflict, 11 April 2013. The African Solidarity Initiative, a program launched by the African Union (“AU”) in 2012 to mobilize support for post-conflict reconstruction, has also brought about consultations with the objective of formulating an AU-led strategic framework for the prevention of, and response to, sexual violence in Africa. See: The concept note on high-level consultation on preventing and responding to sexual violence in conflict, post- conflict countries and beyond, 9-11 October 2013.

<sup>193</sup> ICC, *Prosecutor v. Jean-Pierre Bemba Gombo, Decision Pursuant to article 61(7) and (b) on the Charges against Jean Pierre Bemba Gombo*, Case No. ICC-01/05- 01/08, 15 June 2009 (Bemba Confirmation Decision), para. 162.



been copied in the laws created by the Courts of Cambodia (Extraordinary Chambers in the Courts of Cambodia-ECCC)<sup>194</sup> and the special panels for serious crimes in East Timor<sup>195</sup>, which have already been issued a conviction for the rape crime in the *Cardoso* case<sup>196</sup>. I suggest that they are worth exploring, as they hold out the possibility of complementing the inevitably limited narratives which emerge through criminal proceedings and bringing us closer to making the more complex and subtle narratives of women's and men experiences “fully visible”<sup>197</sup>.

In the end, we can say that the extensive efforts of court judges in the ICTY and ICTR to identify and develop the definition of rape as an international crime<sup>198</sup> provides a classic illustration of the operation of the case-law interpretation<sup>199</sup>. *Akayesu* is the perfect archetype of jurisprudence<sup>200</sup>, while *Furundžija* and *Kunarac* propose a more cautious approach, quite detailed, based on the principle of speciality. At the same time, other decisions, such as *Musema* and *Muhimana*<sup>201</sup>, attempt to create a harmonious interpretation of existing case law. However, although these efforts have been a milestone in international criminal jurisprudence and contributed to the development of international criminal law, this issue continues to concern the courts and academics. The contradictory versions at times raises a number of concerns in the context of human rights law, and in particular the impact that different and often conflicting definitions may have on the right to equal access to justice. As Patricia Viseur Sellers points out, different definitions of rape may result in a 16-year-old men in the civil war in Sierra Leone<sup>202</sup> being less protected from gay violence than a 16- year-old men who has been sexually abused by an actor, who will be tried before the ICC<sup>203</sup>.

<sup>194</sup> S. SÁCOUTO, Victim participation at the international Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A feminist project, in *Michigan Journal of Gender & Law*, 2012, pp. 298ss. E. PALMER, S.J. WILLIAMS, A “shift in attitude”? Institutional change and sexual and gender-based crimes at the Extraordinary Chambers in the Courts of Cambodia, in *International Feminist Journal of Politics*, 2017. S. MEISENBERG, The extraordinary Chambers in the Courts in Cambodia. Assessing their contribution to international criminal law, ed. Springer, 2016. R.C. DEFALCO, Accounting for famine at the Extraordinary Chambers in the Courts of Cambodia. The crimes against humanity of extermination, inhumane acts and persecution, in *The International Journal of Transitional Justice*, 2011.

<sup>195</sup> D. SCHEFFER, The Extraordinary Chambers in the Courts of Cambodia, in M. CHERIF BASSIOUNI, *International Criminal Law*, ed. Brill, 2008, pag. 253: noting that: “(...) the ECCC (...) was never conceived of by those who negotiated its creation as an instrument of direct relief for victims, although the protection and use of victims as witnesses in the investigations and trials is addressed in detail (...) there is no express provision in the agreement, as adopted, entitling victims to participate (...)”. See also Agreement between the United Nations and the royal government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea, June 6, 2003, 2329 U.N.T.S 1-41273. The Cambodian law implementing the agreement and establishing the ECCC references a right of victims to appeal against decisions of the ECCC Trial Chamber, it does not otherwise expressly permit victims to participate in ECCC proceedings. Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Republic of Kampuchea, NS/RKM/1004/006 (Oct. 27, 004).

<sup>196</sup> The Prosecutor v. Jose Cardoso Ferreira, Case No 04/2001, 5 April 2003.

<sup>197</sup> K. AMBOS, I. STEGMILLER, Prosecuting international crimes at the International Criminal Court: Is there a coherent and comprehensive prosecution strategy?, in *Crime, Law and Social Change*, 2013.

<sup>198</sup> K.J. HELLER, What is an international crime?, in *Harvard International Law Journal*, 2018.

<sup>199</sup> M. DE GUZMAN, How serious are international crimes? The gravity problem in international criminal law, in *Columbia Journal of Transnational law*, 2012, pp. 20ss.

<sup>200</sup> K. CHIEDU MOGHALU, International humanitarian law from Nuremberg to Rome: The weighty precedents of the international criminal Tribunal for Rwanda, in *Pace International Law Review*, 2002, pp. 285ss.

<sup>201</sup> A. NOVAK, *The International Criminal Court: An Introduction*, ed. Springer, 2015.

<sup>202</sup> See from the Special Tribunal for Sierra Leone the next cases: Prosecutor v. Fofana and Kondewa, SCSL-04-14-T, Judgment, 2 Aug 2007; Prosecutor v. Sesay and 2 others, SCSL-04-15-T, judgment, TC, 2 Mar 2009; Prosecutor v. Fofana and Kondewa, SCSL-04-14-A, Judgment, 28 May 2008; Prosecutor v. Sesay and 2 others, SCSL-04-15-T, judgment, 2 Mar 2009.

<sup>203</sup> S. BARON-COHEN, *The science of evil. On empathy and the origins of cruelty*, New York, Basic Books, 2011, pp. 342ss. S. EASTON, C. PIPER, C., *Sentencing and punishment. The quest for justice*. Fourth edition, USA, Oxford University Press, 2016.





## 5. Concluding remarks

In practice, the two international criminal tribunals have acknowledged that sexual violence can constitute a bunch of other additional crimes, including war crimes of torture<sup>204</sup> and attacks on personal dignity<sup>205</sup>, the crime against humanity not only of rape but also of sexual enslavement<sup>206</sup>, persecution, and the crime of genocide<sup>207</sup>. With regard to ICC, the statute of the latter includes specific gender-based crimes, such as rape, sexual slavery, forced prostitution, pregnancy and sterilization-on the basis of both war crime<sup>208</sup> and crimes against humanity<sup>209</sup>. As regards the crimes of genocide, the elements of crimes state that although rape is not listed as a form of genocide, the latter caused by acts of “serious physical or mental harm”<sup>210</sup>, including “acts of torture, rape, sexual violence, inhuman or degrading treatment”<sup>211</sup>. However, the process of joining an act of sexual violence in the formal legal arena may be a painful process of many victims<sup>212</sup>. Not only can they experience a tremendous psychological strain because they have to go ahead and tell the violations against it<sup>213</sup>, but they may be forced to confront it with the established gender bias and rape perceptions of the system itself responsible for providing justice.

Obstacles to the process are multiple: lack of effective cooperation between health care staff and legal system, structural and resource constraints on law enforcement, lack of forensic analysis and problems of the courts themselves. Poor cooperation between investigators and prosecutors and the consequent inability to prove or attribute accusations and finally lack of sensitivity to judicial proceedings that “reconstitute” the victim's trauma<sup>214</sup>. But besides the victims, researchers and prosecutors may in turn encounter specific challenges, as they promote a case of

<sup>204</sup> See the case: Prosecutor v. Delalić, Mucic, Delic and Lanzo, Case No. ICTY-IT- 96-21-T, Trial Judgment, 16 November 1998, para. 475.

<sup>205</sup> Prosecutor v. Furundzija, Case No. ICTY-IT-95-17/1-T, Trial Judgment, 10 December 1998, para. 274.

<sup>206</sup> Prosecutor v. Kunarac Case No. ICTY-IT-96-23-T and IT-96-23/1-T, Trial Judgment, 22 February 2001, para. 436.

<sup>207</sup> Prosecutor v. Brdjanin, Case No. ICTY-96-4-T, Trial Judgment, 1 September 2004, Trial Judgment, para. 15.

<sup>208</sup> R. DUBLER SC, M. KALYK, Crimes against humanity in the 21st century. Law, practice and threats to international peace and security, ed. Brill, 2018.

<sup>209</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 113 and Prosecutor v. Ndindiyimana et al, ICTR-00-56 of 30 June 2014.

<sup>210</sup> V. OOSTERVELD, Gender-sensitive justice and the International Criminal Tribunal for Rwanda, in New England Journal of International and Comparative Law, 2005, pp. 119, 128ss. H. TROUILLE, How far has the international criminal Tribunal for Rwanda really core since Akayesu in the prosecution and investigation of sexual offenses committed against women? An analysis of Ndindiyimana et al, in International Criminal Law Review, 2013, pp. 750ss.

<sup>211</sup> International Criminal Court, Elements of Crimes, adopted on 9 September 2002, UN Doc. PCNICC/2000/1/Add.2, 2 November 2002.

<sup>212</sup> R. SCHÜNEMANN, Strafverfahrensrecht, ed. C.H. Beck, 2012, pp. 439ss. C. SCHUON, International criminal procedure: A clash of legal cultures, T.M.C. Asser Press, 2010. J. SCHUETZE-REYMANN, International criminal justice on trial. The ICTY and ICTR case referral practice to national Courts and its possible relevance for the ICC, ed. Duncker & Humblot, 2016.

<sup>213</sup> Prosecutor v. Krstić, Judgment, IT-98-33-T, 2 August 2001, para. 616. In Prlić et al., Trial Chamber III found four out of six Accused guilty of some crimes, including rape, sexual violence, and looting on the grounds that the Accused could have reasonably foreseen that such crimes would be committed as a consequence of the implementation of the joint criminal enterprise, and that they nevertheless accepted and assumed that risk, including by taking no measure to prevent the commission of further crimes. Prosecutor v. Prlić et al., Judgment, IT-04-74-T, 29 May 2013, paras. 72, 284, 437, 834, and 1014. K. GUSTAFSON, The requirement of an “express agreement” for Joint Criminal Enterprise, in Journal of International Criminal Justice, 2007, pp. 138-158.

<sup>214</sup> European Center for Constitutional and Human Rights, Sisma Mujer and Collectivo de Abogados, ICC Communication on Sexual Violence in Colombia, pag. 11.



sexual violence through the legal system. Besides the victims, researchers and prosecutors may in turn encounter specific challenges, as they promote a case of sexual violence through the legal system. The often private character of rape<sup>215</sup>, for example, rarely offers the possibility of eyewitnesses, support that can be provided to other crimes. And whether the subject is the identity of the offender or the lack of consensus on sexual intercourse, prosecutors are often called upon to fight against gender bias or misconceptions about the nature of sexual violence.

With regard to the proof of international sex crimes<sup>216</sup>, additional proofs arise: how can one collect consistent evidence of a crimes committed against countless people after many years? how can one assign responsibility to a military or political commander who may have never given a direct or immediate mandate to commit rape?

There are, however, many promising strategies for managing cases of sexual violence. These strategies have evolved, both in the domestic and international contexts. These may consist either of efforts to integrate awareness of sexual violence (as well as universal education across the range of research) or inter tactics aimed at developing expertise in the field of sexual violence crimes within the body of experts<sup>217</sup>. Innovations within an international body may have a significant impact on future developments within national or local criminal justice systems, including a context of more extensive use of gender experts, increased coordination between prosecutors and investigations and the increased protection measures of witnesses<sup>218</sup>.

Indeed, the new Prosecutor's Office paper on gender and sexual crimes provides a set of coherent and integrated goals towards more effective justice and recognition of the harm suffered by victims of sexual and gender-based violence, in the context of permanent international jurisdiction instrument. Whether the ICC will eventually become the catalyst for the eradication of sexual violence, mainly as a weapon<sup>219</sup> or war strategy<sup>220</sup>, and how soon it will be demonstrated by the progress it will make in the next period<sup>221</sup>.

<sup>215</sup> See, Appeal Chamber, Prosecutor v. Ntaganda, Judgment on the appeal of Mr Ntaganda against the "second Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9", (15 June 2017, par. 16 ). For the first time, the ICC judges have enshrined that any question submitted to them, and therefore also those relating to the interpretation of war crimes, must be resolved only on the basis of the law of the founding Charter. And secondly because in providing an interpretation of the aforementioned clause, the judges of the Chamber of Appeal seem to have given greater weight to the possibility of enhancing the object and purpose of the Statute rather than safeguarding the coherence and unity of the corpus of law and especially under international humanitarian. In this last perspective, it is important to underline the reference to the absolute prohibition of subjecting anyone to rape and sexual violence in the context of armed conflict, which appears without a shadow of doubt in line not only with the purpose of the ICC act, but above all with the evolution of international human rights law. Rigorous opinion that has found application of the nexus requirement to prevent an illegitimate expansion of the scope of war crimes rules in the Appeal Chamber, Prosecutor v. Ntaganda, Judgment on the appeal of Mr Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9", 15 June 2017, par. 68. T. RODENHÄUSER, Squaring the circle? Prosecuting sexual violence against child soldiers by their "own forces", in *Journal of International Criminal Justice*, 2016, pp. 171-186.

<sup>216</sup> M. BERGSMO, Thematic prosecution of international sex crimes some critical comments from a theoretical and comparative perspectives, ed. Torkel Opshahl Academic Epubisher, Beijing , Beijing, 2012, pp. 294ss.

<sup>217</sup> H. AHLBRECHT, K.M. BÖHMEER, Internationales Strafrecht, C.F. Müller, 2018.

<sup>218</sup> T. SQUATRITO, O.R. YOUNG, A. FOLLESDAL, G. ULSTEIN, The performance of international Courts and Tribunals, Cambridge University Press, 2018.

<sup>219</sup> P. KIRBY, How is rape a weapon of war? Feminist International Relations, modes of critical explanation and the study of wartime sexual violence, in *European Journal of International Relations*, 2012, pp. 802ss.

<sup>220</sup> D.E. BUSS, Rethinking "rape as a weapon of war, in *Feminist Legal Studies*, 2009, pp. 152ss.

<sup>221</sup> C. DAVIDSON, How to read international criminal law: Strict construction and the Rome Statute of the International Criminal



Already documented cases of sexual violence in Colombia<sup>222</sup> offer an excellent opportunity to the Prosecutor's Office to apply this new approach that has been adopted in the policy document. Besides, the ICC already has reason to believe that the Revolutionary Armed Forces of Colombia (FARC) committed crimes against the civilian population in Colombia<sup>223</sup>, which are violations of the Rome Statute<sup>224</sup>, and has already stated that it will proceed to prosecution of the international crimes committed in Colombia if the Colombian government does not manage to do so effectively. While international law provides the platform for the recognition of a set of universal rights, it is only the starting point from which the appropriate approach to justice will be diversified. Although the ICC is currently focusing on the investigation of situations in African countries and not only<sup>225</sup>, it is crucial to distinguish the details of sexual violence in different contexts in order to formulate responses that respond to the particular need of survivors and communities, and this can be achieved only if survivors are incorporated into the process of redefining how they see justice themselves, especially in ways that fit their country's political history and culture. If the ICC wants to play the role of deterring the most serious human rights violations and make progress to that end, it must integrate gender equality more prominently across the range of proceedings before the Court<sup>226</sup>.

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Court, in St. John's Law Review, 2017.

<sup>222</sup> A. COLE, International criminal law and sexual violence, in C. MCGLYNN, V.E. MUNRO (eds.), Rethinking rape law. International and comparative perspectives, ed. Routledge, 2010, pp. 49ss.

<sup>223</sup> J. BOESTEN, P. WILDING, Transformative gender justice: Setting an agenda, in Women's Studies International Forum, 2015, pp. 77ss.

<sup>224</sup> Office of the Prosecutor, Situation in Colombia: Interim Report, November 2012, pag. 8.

<sup>225</sup> F. VILJOEN, International human rights law in Africa, Oxford University Press, 2012.

<sup>226</sup> C. DAVIDSON, How to read international criminal law: Strict construction and the Rome Statute of the International Criminal Court, in Saint John's Law Review, 2017, pag. 4.

