

**UNIVERSITY OF THE WESTERN CAPE**

**FACULTY OF LAW**



**‘THE PROSECUTION OF SEXUAL VIOLENCE CRIMES  
UNDER ARTICLE 7 AND 8 OF THE ROME STATUTE OF  
THE INTERNATIONAL CRIMINAL COURT: A REASON  
FOR OPTIMISM?’**

**UNIVERSITY of the  
WESTERN CAPE**

**Mini-thesis submitted in partial fulfilment of the requirements for the  
award of the LLM degree in International Human Rights Protection**

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## KEY WORDS

AFRICA

ARMED CONFLICT

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INTERNATIONAL CRIMES

INTERNATIONAL CRIMINAL COURT

PROSECUTION

RAPE

ROME STATUTE

SEXUAL VIOLENCE

UGANDA

VICTIMS

WAR CRIMES



## DECLARATION

I, **TARIRO VERONICA P MASOSE**, declare that **THE PROSECUTION OF SEXUAL VIOLENCE CRIMES UNDER ARTICLE 7 AND 8 OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A REASON FOR OPTIMISM?’** is my own work and that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Signed: \_\_\_\_\_ **TARIRO VERONICA P MASOSE**

September 2017



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## DEDICATION

I dedicate this mini-thesis to my mother Betty Masose and my late father, for knowing I was special from the very moment they had me and for raising me to become greatness. I will continue to make you proud.



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## CHAPTER ONE

### 1. INTRODUCTION

#### 1.1 Background to the study

The Rome Statute gave birth to the International Criminal Court (ICC) on 17 July 1998. Its mandate is to assist the international community in the arduous task of closing the gap of impunity for the most heinous crimes, namely war crimes, crimes of aggression, genocide and crimes against humanity.<sup>1</sup> For the first time in the history of humankind, States accepted the jurisdiction of a permanent international criminal court, for the prosecution of the perpetrators of the most serious crimes committed within their territories or by nationals after the entry into force of the Rome Statute on 1 July 2002.<sup>2</sup>

The ICC is an international organization, with distinct legal capacity. It is independent of the United Nations although it does act in close association with it.<sup>3</sup> The ICC is not a substitute for national courts. The Rome Statute provides that it is still very much the duty of the State to exercise its jurisdiction over those responsible for international crimes.<sup>4</sup> The ICC can only intervene as a court of last resort where a State is unwilling or unable to carry out the investigation and prosecute the perpetrators within its own domestic courts and laws.<sup>5</sup> It may only exercise jurisdiction over crimes committed on the territory of a State party or a national of such, the only exception to this is that the United Security Council can use its powers under the UN Charter to refer situations to the Prosecutor of the ICC.<sup>6</sup> The ICC is therefore meant to compliment and support domestic criminal justice; this was reflected even in the drafting stages of the Statute whereby integration of a variety of national perspectives and judicial cultures from different countries was considered in order to ensure that the ICC did not depart from what is considered just within the domestic sphere.<sup>7</sup> It may well be argued that the Rome Statute provides an opportunity to reinvigorate and reform criminal codes which may in the long term globally strengthen the rule of law, peace and security.

<sup>1</sup> Understanding the International Criminal Court. available at [cpi.int/iccdocs/PIDS/publications/UNICCEng.pdf](https://www.iccnw.org/?mod=romeimplementation) (accessed on 8 June 2016).

<sup>2</sup> Implementation of the Rome Statute. Coalition for the International Criminal Court. available at <https://www.iccnw.org/?mod=romeimplementation>. (accessed on 8 June 2016).

<sup>3</sup> Schabas W *The International Criminal Court: A commentary on the Rome Statute* (2010) 94.

<sup>4</sup> Understanding the International Criminal Court. available at <https://www.iccnw.org/?mod=romeimplementation> (accessed on 8 June 2016).

<sup>5</sup> Dormann K & Doswald-Beck & Kolb R *Elements of War Crimes under the Rome Statute of the International Criminal Court Sources and Commentary International Committee of the Red Cross* (2003) ix.

<sup>6</sup> Werle G & Fernandez L & Vormbaum M (eds) *Africa and the International Criminal Court* (2014) 16.

<sup>7</sup> Schabas W *The international Criminal Court: A commentary on the Rome Statute* (2010) 21.



### 1.1.2 African critique

This system of complementarity and support can only work if States undertake to ratify the Rome Statute, secondly to cooperate with the court by providing all the necessary judicial assistance in its proceedings and thirdly by implementing all of the crimes under the Rome Statute into domestic legislation.<sup>8</sup> In fact, Gerhard Kemp regards the domestic implementation of the Rome Statute by African countries as pivotal to the enforcement of International Criminal Law.<sup>9</sup> However, there have been recent complications in the relationship between African States and the ICC.<sup>10</sup> Some African States want to leave as they feel the ICC is biased towards African nations and leaders. They have accused the ICC of ‘targeting Africa’ whereas the reality is that the court is playing a vital role in pursuing justice for victims in Africa and is doing so largely at the request of African countries.<sup>11</sup> The perpetrators of these sexual violence crimes are largely from Africa and are the African leaders themselves such as Jean Pierre Bemba Gombo, a former rebel leader and vice president of the Democratic Republic of Congo who was convicted of sexual violence by the ICC in March 2016.<sup>12</sup> This mini-thesis shall focus on the DRC and Uganda because these countries are experiencing on-going conflict and as a result, many of the sexual violence cases currently being investigated in the ICC are from these States.

It can be argued that although African States have ratified the Rome Statute, they now see it as an inconvenience to comply with its regulations. A glaring example of this is Kenya; it ratified the Rome Statute on 15 March 2005 which gave the ICC jurisdiction over war crimes and crimes against humanity committed by Kenyan nationals on Kenyan territory if the Kenyan courts themselves were unwilling or unable to prosecute the perpetrators of such crimes. In 2012, Uhuru Kenyatta became the first sitting president to appear before the ICC charged with five counts of crimes against humanity which included inciting ethnic violence in which women were serially raped, doused in paraffin and then set alight in order to secure victory in the 2007 to 2008 Kenya elections.<sup>13</sup> Kenyatta and his supporters began to attack the ICC in the run up to the 2013 elections accusing it of ‘meddling in its affairs’, pursuing a political prosecution and branding it as a neo-colonialist institution that is biased against

<sup>8</sup> Implementation of the Rome Statute. Coalition for the International Criminal Court. available at <https://www.iccnw.org/?mod=romeimplementation>. (accessed on 8 June 2016).

<sup>9</sup> Werle G & Fernandez L & Vormbaum M (eds) *Africa and the International Criminal Court* (2014) 62.

<sup>10</sup> Werle G & Fernandez L & Vormbaum M (eds) *Africa and the International Criminal Court* (2014) 14.

<sup>11</sup> Werle G & Fernandez L & Vormbaum M (eds) *Africa and the International Criminal Court* (2014) 17.

<sup>12</sup> The Prosecutor v Jean-Pierre Bemba ICC-01/05-01/08.

<sup>13</sup> Simons M & Gettleman J „International Court Ends Case Against Kenyan President in Election Unrest: Uhuru Kenyatta faced Allegations of Crimes Against Humanity.“ December 2014. available at <https://www.nytimes.com> (accessed on 4 August 2016).

Africa.<sup>14</sup> This led to envoys from Nairobi travelling across the African continent seeking support for the immunity of sitting presidents, which culminated in an African Union summit where it was agreed that African Heads of State would no longer face prosecution by the ICC during their term of office.<sup>15</sup> The Kenyan government refused to hand over vital evidence to the ICC and barred the ICC access to witnesses which resulted in the charges against Uhuru Kenyatta being withdrawn due to insufficient evidence.<sup>16</sup> This shows the difficult relationship between Africa and the ICC.

The relationship between the ICC and African countries has never been as tense and strained as it is today; this is disappointing because African States played a vital role in bringing the ICC to life.<sup>17</sup>

### 1.1.3 History of the ICC and why it was established

Under the regime of the 1949 Geneva Conventions and the 1977 Additional Protocols, States undertook to enact legislation necessary to provide effective penal sanctions for persons deemed to have committed grave breaches of the Geneva Conventions as defined in article 90(2)(c)(i) of the 1977 Additional Protocol I to the Geneva Conventions of 1949.<sup>18</sup> More specifically, nations incurred the obligation to search for persons alleged to have committed these grave breaches and to bring them before their own courts, regardless of their nationality.<sup>19</sup> They also have the option to hand over such persons to another High Contracting party for trial. Furthermore, States took a decision to put rules in place on penal repression of serious violations; this decision was founded on the conviction that laws which are not backed by sanctions quickly lose their credibility.<sup>20</sup> Since the founding of the United Nations and in view of the trials that took place after the Second World War, there was a need for the creation of a permanent international criminal court competent to try international crimes.

<sup>14</sup> Schabas W *An Introduction to the International Criminal Court* 4ed (2011) 56.

<sup>15</sup> Wrong M "Has Kenya destroyed the ICC?" July 15 2014. available at <https://www.foreignpolicy.com> (accessed on 4 August 2016).

<sup>16</sup> The Prosecutor v Uhuru Muigai Kenyatta ICC-01/09-02/11.

<sup>17</sup> Werle G & Fernandez L & Vormbaum M (eds) *Africa and the International Criminal Court* (2014) 17.

<sup>18</sup> Article 90(2)(c)(i) Additional Protocol I of 1977.

<sup>19</sup> Dormann K & Doswald-Beck & Kolb R *Elements of War Crimes under the Rome Statute of the International Criminal Court Sources and Commentary International Committee of the Red Cross* (2003) ix.

<sup>20</sup> Dormann K & Doswald-Beck & Kolb R *Elements of War Crimes under the Rome Statute of the International Criminal Court Sources and Commentary International Committee of the Red Cross* (2003) ix.

The tragic events that occurred in the former Yugoslavia and Rwanda, involving extreme violations of international humanitarian law, prompted a renewed effort to see the ICC established. In 1993 and 1994, two tribunals were created for specific regions in which it had become evident that rules of the Geneva Conventions had been knowingly and repeatedly contravened in these armed conflicts. In 1993 the International Tribunal for the former Yugoslavia (ICTY) was created in light of the atrocities committed against the civilian population throughout the former Yugoslavia.<sup>21</sup> The ICTY was a unique creation as it marked the first time a court had been established to prosecute individuals who perpetrated heinous crimes such as mass rape and sexual violence against women and girls in regional settlements.<sup>22</sup>

Shortly after the ICTY was created, another tribunal was established in the wake of the horrific killings during the Rwandan genocide of 1994. The shock that embodied the world after the discovery of such a systematic genocide was overwhelming, and the UN Security Council moved swiftly to bring the perpetrators to justice.<sup>23</sup> In November 1994, through Security Council Resolution 955 the ICTR tribunal became a reality. This tribunal mirrored many of the same rules established through the ICTY, but the prosecution focused specifically on Rwandans that committed the act of genocide during the terrible and short-lived civil war.<sup>24</sup> These two tribunals laid the foundation for the establishment of the ICC. In 1998 a conference was called in Rome to discuss the possibility of the ICC, despite differing opinions, opposing views and the discussion of thorny and extremely sensitive issues several compromises were made and finally the treaty passed with a vote 120 to 7 in favour of its creation.<sup>25</sup> Both the ICTY and ICTR legitimized the prosecution of international crimes thus creating a substantial and tangible body of jurisprudence, which was not present in the past.<sup>26</sup> The adoption of the ICC Statute and future establishment of the Court constituted significant progress in the international criminal law.<sup>27</sup>

<sup>21</sup> Donovan D "International Criminal Court: Success and Failures." 23 March 2012. available at <https://www.beyondintractability.org/.../international-criminal-court-overview> (accessed on 4 June 2016).

<sup>22</sup> Donovan D "International Criminal Court: Success and Failures." 23 March 2012. available at <https://www.beyondintractability.org/.../international-criminal-court-overview> (accessed on 4 June 2016).

<sup>23</sup> United Nations Security Council Resolution 955.

<sup>24</sup> Donovan D "International Criminal Court: Success and Failures." 23 March 2012. available at <https://www.beyondintractability.org/.../international-criminal-court-overview> (accessed on 4 June 2016).

<sup>25</sup> Dormann K& Doswald-Beck & Kolb R *Elements of War Crimes under the Rome Statute of the International Criminal Court* Sources and Commentary International Committee of the Red Cross (2003) x.

<sup>26</sup> Channey J 2001:122

<sup>27</sup> Mirceva S "Why the International Criminal Court is Different." January 26 2004. available at [https://www.monitor.ucepeace.org/innerpg.cfm?id\\_article=133](https://www.monitor.ucepeace.org/innerpg.cfm?id_article=133) (accessed on 10 June 2016).

#### 1.1.4 The ICC and gender crime justice

The Rome Statute is the first international convention to identify crimes against women as crimes against humanity, war crimes, and in some instances genocide. Non-governmental organizations, including members of the Coalition for the ICC were at the forefront of ensuring that the Rome Statute thoroughly safeguarded women's rights. The Rome Statute recognizes rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilizations, gender-based persecutions, trafficking of persons particularly of women and children, and sexual violence as crimes under its jurisdiction.<sup>28</sup>

#### 1.1.5 Introduction of the case law that will be discussed in this mini-thesis

This mini-thesis will focus on case law mainly from Africa because it is within this continent that the majority of civil wars and sexual violence crimes are occurring. I will deal specifically with the case of *The Prosecutor v Jean-Pierre Bemba* because it is the first and only conviction to date of sexual violence crimes by the ICC.<sup>29</sup> Chapter four of this mini-thesis will also focus on *The Prosecutor v Dominic Ongwen* and *The Prosecutor v Bosco Ntaganda* because the charges against these accused have been confirmed and they are currently awaiting trial.<sup>30</sup> *The case of the former president of Chad in The Extraordinary African Chambers in Senegal* was the first time a former head of state was held personally accountable for rape as an international crime. It is also the first universal jurisdiction case that has made it to trial in Africa.<sup>31</sup> Chapter four will also deal with the *Case of Guatemala* because it is the first time that a national court of law anywhere in the world has considered charges of sexual slavery during armed conflict.<sup>32</sup>

In *The Prosecutor v Thomas Lubanga Dyilo*, there was evidence pointing to wide spread rape and other forms of sexual violence against girl child soldiers but the ICC did not take this into account.<sup>33</sup> I will be dealing with the *Lubanga case* in order to show the inefficiency of the ICC with regards to the lack of thorough investigation into sexual violence crimes.

<sup>28</sup> "Delivering on the promise of a fair, effective and independent court: Gender and the ICC." available at <https://www.iccnw.org/?mod=gender> (accessed on 12 June 2016).

<sup>29</sup> As of August 2016.

<sup>30</sup> As of August 2016.

<sup>31</sup> As of May 2016.

<sup>32</sup> Guatemala Sepur Zarco case 2016

<sup>33</sup> Visuer Sellers P "Crimes of sexual violence and the Lubanga Case." 16/03/2012. available at <https://www.fidh.org> (accessed on 8 August 2016).

*The Prosecutor v Joseph Kony* and *The Prosecutor v The Sylvestre Mudacumura* will be discussed because although warrants of arrest have been issued, these perpetrators remain at large and this can be seen as failure by the ICC to deliver justice to victims. Lastly, I shall deal specifically with the cases of *The Prosecutor v Uhuru Kenyatta* and *The Prosecutor v William Samoei Ruto* because both these cases were closed and the charges were withdrawn due to insufficient evidence.<sup>34</sup> This may also be interpreted as failure by the ICC to give victims of sexual violence the justice they seek.

## 1.2 Problem statement

The core motivation of this mini-thesis is to explore the extent to which the ICC has been successful with regards to indictments for rape and other forms of sexual violence under Articles 7 and 8 of the Rome Statute. These two Articles recognise sexual violence as a war crime and as a crime against humanity and provide for the prosecution of perpetrators of rape and other forms of sexual violence in the context of both international and non-international armed conflicts.

Article 8 of the Rome Statute provides that the ICC has jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large scale commission of such crimes.<sup>35</sup> For the purpose of the ICC, Article 8(2)(b) 'war crimes' means, other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely all of the following acts; according to Article 8(2)(b)(xxii):

'Committing rape, sexual slavery, enforced prostitution, forced pregnancy as defined in Article 7 paragraph 2(f), enforced sterilization or any other form of sexual violence also constituting a grave breach of the Geneva Conventions.'<sup>36</sup> In accordance with Article 8(2)(e)(vi), war crimes in armed conflicts not of an international character means; committing rape, sexual slavery, enforced prostitution, forced pregnancy as defined under Article 7 paragraph 2(f) enforced sterilization and any other form of sexual violence also constituting a serious violation of Article 3 common to the Geneva Conventions.<sup>37</sup> Article 7(2)(f) defines forced pregnancy as, 'the unlawful confinement of a

<sup>34</sup> The Prosecutor v. William Samoei Ruto and Joshua Arap Sang ICC-01/09-01/11, Prosecutor v Uhuru Kenyatta ICC-01/09-02/11

<sup>35</sup> Article 8 Rome Statute 1998.

<sup>36</sup> Article 8(2)(b)(xxii) Rome Statute 1998.

<sup>37</sup> Article 8(2)(e)(vi) Rome Statute 1998.



woman forcibly made pregnant with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.’<sup>38</sup> This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.

Article 7(1)(g) of the Rome Statute provides for sexual violence as a crime against humanity:

For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity.

Despite these provisions being in place are they in reality, helping and aiding victims that have experienced sexual violence during armed conflict to find justice and thus contributing to a durable solution for war related sexual violence around the world? Or is the ICC just another court which showed potential and promise on paper but is in actual fact failing in reality? Sexual violence in the context of this mini-thesis refers to rape and other forms of sexual violence as provided for under Articles 7 and 8 of the Rome Statute.

### **1.3 Research aims and objectives**

This mini-thesis revolves around the question as to what extent the ICC has found success in its prosecution of sexual violence crimes and whether it has contributed positively to the situation in which many women and girls find themselves as victims of gender specific crimes during armed conflict.

#### **1.3.1 Research questions**

The two research questions are, whether there is a pattern with respect to these cases, for example where the ICC is so keen to get cases underway quickly that it comes at the expense of thorough investigation into the full range of crimes that took place in a given country?

Furthermore, what is the current status of the effectiveness of the ICC with respect to cases of sexual violence crimes in Africa and which impediments to its success can be identified?

The bulk of conflicts today are non-international armed conflicts mostly on the African continent and it is within these armed conflicts that we find the most atrocious cases of rape and sexual violence. Sustainable development and lasting peace are not possible without the rule of law and accountability; it can therefore be argued that it is imperative that Africa take credible ownership of the justice and accountability process in dealing with atrocity crimes

<sup>38</sup> Article 7(2)(f) Rome Statute 1998.

on the continent and provide strong support for international justice mechanisms such as the ICC.<sup>39</sup>

#### **1.4 Significance of study**

Sexual violence as a crime, in its destruction of the individual and the pervasive way in which it undermines global peace, security and development casts a long shadow on our humanity.<sup>40</sup>

Not only has rape and other forms of sexual violence been used as a weapon of war in Africa and all around the world, but now a catastrophic trend is emerging in the Middle East whereby extremist groups such as Al-Qaida and the Islamic State in Iraq are using sexual violence as a tactic of terror not only in Iraq but in Somalia, Syria, Nigeria and Mali.<sup>41</sup>

To date, there has been only one landmark judgement by the ICC on the prosecution of sexual violence crimes.<sup>42</sup> It is the verdict passed on 21 March 2016 in which Bemba Gombo has been convicted for his responsibility as commander in chief for crimes of murder, pillage and rape committed by soldiers under his effective authority and control in the Central African Republic from 2002 to 2003.<sup>43</sup> This makes Bemba not only the first person to be convicted by the ICC for crimes committed by troops under his command, but also the first person to be convicted of sexual violence crimes by the ICC.

It might well be argued that in order to provide meaningful justice for victims of crimes of sexual violence, it is important to critically review the records and cases documented within the ICC and disseminate the lessons learnt with regards to the effective investigation and prosecutions. An assessment of whether what the ICC has done to date constitutes meaningful success with regards to indictments under Articles 7 and 8 of the Rome Statute is therefore imperative.

#### **1.5 Research methodology**

The research method will include a review of academic literature. A theoretical approach to this mini-thesis will be taken in order to arrive at an answer to the research questions.

<sup>39</sup> Werle G & Fernandez L & Vormbaum M (eds) *Africa and the International Criminal Court* (2014) 17.

<sup>40</sup> United Nations Security Council 7428th Meeting. "Fight against Sexual Violence in Conflict reaches a 'New Juncture', Security Council Told." 15 April 2015. available at <https://www.un.org/press/en/2015/sc11862.doc.htm> (accessed on 12 June 2016).

<sup>41</sup> United Nations Security Council 7428<sup>th</sup> Meeting. "Fight against Sexual Violence in Conflict reaches a 'New Juncture', Security Council Told." 15 April 2015. available at <https://www.un.org/press/en/2015/sc11862.doc.htm> (accessed on 12 June 2016).

<sup>42</sup> As of 6 August 2016.

<sup>43</sup> The Prosecutor v Jean-Pierre Bemba ICC-01/05-01/08.

This research relies entirely on materials available from various sources including case law, international Statutes and treaties. Secondary sources will also be employed; these will include books, commentaries, reports, journal articles and internet articles.

## 1.6 Literature review

Asley Dallman writes that ultimately proving the success of the ICC has proved „elusive at best“ and that only the survivors most affected by the outcomes of ICC judgments can say whether the ICC has been effective or not.<sup>44</sup> In Section III of her article, she embarks on an analysis of the efficacy of the ICC in achieving justice and reframing sexual violence as an international war crime. She cites a summary of arrest warrants publicly issued by the ICC as a symbol of its potential success, but then notes that some of these indictees have not been captured, for example Al Bashir remains at large. Sylvestre Mudacumura, who has been charged with the crime of rape in the Democratic Republic of Congo (DRC) also remains at large.<sup>45</sup> A warrant of arrest has been issued by the ICC for Joseph Kony, the commander in chief of the Lord's Resistance Army (LRA) for crimes against humanity which include sexual enslavement but his location remains unknown.<sup>46</sup> She does not, however give a clear cut response as to whether the ICC has been successful or not. Her research, though shedding vital points and arguments as to both the impediments faced by the ICC and the potential it holds seems to make a list of pros and cons as it where, leaves the question as to whether there has been meaningful success open.

Gerhard Werle writes that the ICC not only fights the gap of impunity by punishing perpetrators of rape and other forms of sexual violence but it also affords the victims active participation in the judicial proceedings and the chance to apply for reparations. For many of these victims, the ICC is the only viable option to justice for the harsh realities they have suffered.<sup>47</sup>

William Schabas also writes that victim and witness participation not only during the criminal trial but in the stages of investigation is important.<sup>48</sup> In *The Prosecutor v Katanga*, fifty seven victims participated through legal representatives and nineteen received financial

<sup>44</sup> Dallman A „Prosecuting conflict related sexual violence at the International Criminal Court.“ SIPRI Insights on Peace and Security 1 May 2009. available at <https://www.books.sipri.org/files/insight/SIPRIInsight0901.pdf> (accessed on 15 June 2016).

<sup>45</sup> The Prosecutor v The Sylvestre Mudacumura ICC-01/04-01/12.

<sup>46</sup> The Prosecutor v Joseph Kony and Vincent Otti ICC-02/04-01/05.

<sup>47</sup> Werle G & Fernandez L & Vormbaum M (eds) *Africa and the International Criminal Court* (2014) 19.

<sup>48</sup> Schabas W *An Introduction to the International Criminal Court* 4ed (2011) 348.



assistance from the court.<sup>49</sup> In the *Lubanga* trial ninety-three victims were given leave to participate.<sup>50</sup> His work is vital to this mini-thesis as it shows that the ICC is upholding the measures in place such as victim participation in order to ensure the successful prosecution of sexual violence crimes. On the other hand, he acknowledges that the ICC has a long way to go in the way of efficiency because the Prosecutor had projected it would complete its first trial by 2005 yet five years down the line it was still struggling to finish the case.<sup>51</sup> It can be argued that this lack of timely completion of cases together with the lack of thorough investigation for sufficient evidence leads not only to injustice and disappointment for victims of sexual violence but to the failure of the ICC.

## 1.7 Chapter outline

Chapter one will be an introductory chapter and will provide an overview of the background to the ICC, the problem statement, the research methodology and significance of the study.

Chapter two will discuss rape and other forms of sexual violence during armed conflict in the DRC and in Uganda.

Chapter three will be on the international framework for the prosecution of sexual violence under international law.

Chapter four will critically discuss case law and consider the role of effective investigation of sexual violence crimes.

Chapter five will conclude this mini-thesis by answering the research questions, providing an opinion and possible recommendations.

<sup>49</sup>The Prosecutor v Germain Katanga ICC-01/04-01/07.

<sup>50</sup>Schabas W *An Introduction to the International Criminal Court* 4ed (2011) 348.

<sup>51</sup>Schabas W *An Introduction to the International Criminal Court* 4ed (2011) xii.

## CHAPTER TWO

### 2. INTRODUCTION

Sexual violence during armed conflict affects both men and women; however it is a crime that is predominantly committed against women.<sup>1</sup> Women are also targeted for different reasons and are affected by the experience in very different ways compared to men.<sup>2</sup> This mini-thesis will focus on rape and other forms of sexual violence during armed conflict perpetrated against women in the DRC and in Uganda. Chapter two shall explore the impact of armed conflict and sexual violence on women as well as sexual violence as a crime against humanity and as a grave breach.

#### 2.1 Sexual violence during armed conflict used as a weapon of war in the DRC and Uganda

Rape has become a rampant and unyielding weapon of war in the DRC. As the armed conflict in the country rages on, women are experiencing a conflict of their own as their bodies have become a battle ground on which sexual violence is waged.<sup>3</sup> Rape has been used as an instrument of terror on the civilian population.<sup>4</sup> It is employed as a tactic of war intended to harm, to punish and to maintain authority over civilians in territories that are occupied by rebel groups.<sup>5</sup> Women and girls of all ages are victim to such violence.

Sexual violence in the DRC has become a form of group attack. It is aimed at complete physical and psychological destruction of women with implications for the entire society.<sup>6</sup> Rape accomplishes communal degradation, because of cultural beliefs communities view the

<sup>1</sup> Shorts E & De Than C *International Criminal Law and Human Rights* (2003) 372.

<sup>2</sup> "Sexual Violence and Armed Conflict." available at <https://www.un.org/womenwatch/daw/public/w2apr98.html> (accessed on 8 August 2016).

<sup>3</sup> Brown C *Rape as a Weapon of War in the Democratic Republic of Congo* (Research Proposal, Carlifornia Polytechnic State University 2011) 3.

<sup>4</sup> Tallarico S "War Rape and the Democratic Republic of Congo: A Feminist Command for Legal Evolution, Progress towards Universal Human Rights for Women." *Michigan State Journal of Gender Law* (2008) 3.

<sup>5</sup> Tallarico S "War Rape and the Democratic Republic of Congo: A Feminist Command for Legal Evolution, Progress towards Universal Human Rights for Women." *Michigan State Journal of Gender Law* (2008) 3.

<sup>6</sup> Lincoln R "Rule of Law for Whom? Strengthening the Rule of Law as a solution to Sexual Violence in the Democratic Republic of Congo." *Berkley Journal of Gender, Law & Justice* (2011) 147.

rape of a single person as an attack on several. Furthermore, the family of a rape victim is deeply shamed by association and she brings dishonour on her husband.<sup>7</sup>

Rape as a weapon of war has taken on legal significance due to efforts by the ICTY and ICTR to prosecute it as a crime and not merely see it as a by-product but an instrument of war.<sup>8</sup> Women have historically been considered as spoils of war and it may well be argued that it has become more dangerous to be a woman than a soldier in modern conflict.<sup>9</sup> There is a culture of impunity as perpetrators are rarely punished and the Congolese government lacks the political will to stop the foreign backed rebels and DRC militia. Unfortunately peace keepers have also become the perpetrators of sexual violence crimes in the DRC. They rape the very women they are meant to be protecting. The DRC registered allegations of rape, torture and the fathering of 'peace keeper babies' against the United Nations in the year 2004.<sup>10</sup>

Since its independence from Britain in 1962, Uganda has endured a military coup, followed by a brutal military dictatorship which ended in 1979. The country has also had to contend with a brutal 20 year insurgency in the north which continues till this day, led by the Lord's Resistance Army. Throughout this internal armed conflict, women and girls have been abducted and sexually abused.<sup>11</sup> This has resulted in the internal displacement of about 1.6 million people and the rape and forced marriage of young girls to military men.<sup>12</sup>

## 2.2 Impact of armed conflict on women

Traditionally men provide reports and documentation concerning armed conflict.<sup>13</sup> This means that women are subsumed under the general categories of civilians and combatants; therefore the other distinctive ways in which women suffer during armed conflict are not

<sup>7</sup> Eirienne AK "Responding to rape as a weapon of war in the Democratic Republic of Congo: CIDA's Actions in an evaluative framework." 2009 available at <https://www.inquiriesjournal.com> (accessed on 12 August 2016).

<sup>8</sup> Buss D Rethinking "Rape as a Weapon of War" Feminist Legal Studies August 1 2009 148.

<sup>9</sup> Fiske L & Shackel R "Ending Rape in War: How Far Have We Come?" *Cosmopolitan Civil Societies: An Interdisciplinary Journal* (2004) 123.

<sup>10</sup> Harris L "Peacekeepers as Perpetrators: Sexual exploitation and Abuse of Women and Children in the Democratic Republic of the Congo." *American University Journal of Gender, Social Policy & the Law* (2006) 416.

<sup>11</sup> Hampton J *Internally Displaced People: A Global Survey* 2ed (2002) 7.

<sup>12</sup> Kezaaba R "Women and girls and the conflict in Uganda." December 6 2011 available at <http://www.genderacrossborders.com> (accessed on 29 August 2016).

<sup>13</sup> Gardam J & Jarvis M *Women, Armed Conflict and International Law* (2001) 19.

documented.<sup>14</sup> In the past, because of their role as combatants, men were primary victims of armed conflict. This is no longer the case.

Today the vast majority of armed conflict occurs within a State's borders and so actual communities have become the battlefield.<sup>15</sup> Civilians account for the bulk of casualties and this has severe ramifications for women who form the majority and experience conflict as part of the civilian population.<sup>16</sup>

Cultural and social practises within the communities of African countries do not serve the interests of women and often lead to gender injustice.<sup>17</sup> Examples of such cultural practices include female genital mutilations, early marriages and disproportionate labour in the field and in households.<sup>18</sup> In the midst of armed conflict, sexual violence escalates as ex-combatants bring it back into the communities upon their return and the rate of sexual violence perpetrated by civilians also rises.<sup>19</sup> Sexual violence against women, particularly in the DRC is grotesque and manifests as gang rape, genital mutilation and forced abortions.<sup>20</sup>

Women and children make up the vast majority of refugees.<sup>21</sup> They are also the most vulnerable groups of internally displaced persons.<sup>22</sup> In countries such as the DRC, the homestead is where most women live out their lives and carry out their responsibilities and so the loss of their home impacts them harshly. Women are forced to leave their homes in an effort to protect themselves and their children. Becoming a refugee dramatically increases the vulnerability of women to gender based violence during an armed conflict. They may be injured or killed whilst escaping war-torn regions and face tremendous physical hardships on the journey.<sup>23</sup> Furthermore, the majority of women in the DRC are poor. They face a daily struggle to feed their families and have no access to basic human rights such as education or literacy and so they have few alternatives to escape the fighting or maintain an income for

<sup>14</sup> Gardam J & Jarvis M *Women, Armed Conflict and International Law* (2001) 19.

<sup>15</sup> Durham H & Gurd T *Listening to Silences: Women And War* (2005) 21.

<sup>16</sup> Gardam J & Jarvis M *Women, Armed Conflict and International Law* (2001) 20.

<sup>17</sup> Leatherman J *Sexual Violence and Armed Conflict* (2011) 22.

<sup>18</sup> Nyangweso M *Female Genital Cutting In Industrialized Countries: Mutilation or Cultural Tradition?* (2014)

<sup>19</sup> 73.

<sup>19</sup> Lincoln R "Rule of Law for Whom? Strengthening the Rule of Law as a solution to Sexual Violence in the Democratic Republic of Congo." *Berkley Journal of Gender, Law & Justice* (2011) 145.

<sup>20</sup> Lincoln R "Rule of Law for Whom? Strengthening the Rule of Law as a solution to Sexual Violence in the Democratic Republic of Congo." *Berkley Journal of Gender, Law & Justice* (2011) 146.

<sup>21</sup> Hampton J *Internally Displaced People: A Global Survey* 2ed (2002) 7.

<sup>22</sup> Bennoune K "The Impact of Armed Conflict on Women." *Women's Rights Law Reporter* (2003) 174.

<sup>23</sup> Gardam J & Jarvis M *Women, Armed Conflict and International Law* (2001) 31.

their families.<sup>24</sup> Refugee women are frequently denied legal status in their own right in favour of issuing refugee registration cards to husbands and fathers.<sup>25</sup> Abandonment of wives by husbands is common in refugee camps due to disintegration of the family structure leaving women in a vulnerable state.<sup>26</sup> In addition to this, refugee camps are often poorly sanitised leading to diarrhoea, respiratory and infectious diseases. These camps also have limited protection from further sexual violence and little to no reproductive health services available to women.<sup>27</sup> Whilst trying to escape war some women are captured and trafficked.<sup>28</sup> It is essential that such problems are addressed when designing refugee camps.

Another severe effect of conflict is the loss of family members. Women lose their husbands and children as a result of armed conflict.<sup>29</sup> This causes trauma and immeasurable emotional, social and economic suffering for those left to put the pieces back together following the war.<sup>30</sup> Trauma is especially exacerbated in those instances where women have been forced to watch or participate in these killings. Mothers and wives of victims that have „disappeared“ experience the anguish of never knowing what happened to their family and where they are buried.<sup>31</sup> This is why the success of the ICC is important because it will ensure that those responsible for atrocities such as murder during armed conflict are held criminally liable.

Social position is also lost due to armed conflict. The majority of the population after an armed conflict is often women; this means that re-marriage which is essential to restore social position is difficult due to a shortage of marriageable men in the communities.<sup>32</sup> Consequently this leads to an increase in polygamy.<sup>33</sup>

<sup>24</sup> Leatherman J *Sexual Violence and Armed Conflict* (2011) 26.

<sup>25</sup> Gardam J & Jarvis M *Women, Armed Conflict and International Law* (2001) 31.

<sup>26</sup> Gardam J & Jarvis M *Women, Armed Conflict and International Law* (2001) 32.

<sup>27</sup> Manu B “The Impact of Sexual Violence on the life of individual women and on Family.” *Contemporary Readings in Law & Social Justice* (2009) 149.

<sup>28</sup> Manu B “The Impact of Sexual Violence on the life of individual women and on Family.” *Contemporary Readings in Law & Social Justice* (2009) 140.

<sup>29</sup> Bennoune K “The Impact of Armed Conflict on Women.” *Women’s Rights Law Reporter* (2003) 174.

<sup>30</sup> Gardam J & Jarvis M *Women, Armed Conflict and International Law* (2001) 38.

<sup>31</sup> Gardam J & Jarvis M *Women, Armed Conflict and International Law* (2001) 37.

<sup>32</sup> Gardam J & Jarvis M *Women, Armed Conflict and International Law* (2001) 38.

<sup>33</sup> Gardam J & Jarvis M *Women, Armed Conflict and International Law* (2001) 39.



Injuries causing amputations diminish the marriage prospects of women. If the women amputees are already married, their husbands may reject them in favour of able bodied women who can still carry out chores such as cooking and fetching water without difficulty.<sup>34</sup>

Women are economically disadvantaged by armed conflict. As they are forced to relocate it becomes difficult to find adequate housing or to earn an income.<sup>35</sup> Health care infrastructure is damaged during armed conflict which leads to poor health services and deaths due to pregnancy or childbirth complications.<sup>36</sup> Furthermore, reproductive health deteriorates and female mortality rises.<sup>37</sup>

### 2.2.1 Impact of sexual violence on women

Sexual violence has both a psychological and physical effect on women.<sup>38</sup> Female children may be raped along with their mothers and both may be forced to observe each other being raped. This leads to long lasting psychological trauma. In most cases, girls are ostracized because their mothers have been raped.<sup>39</sup>

Rape often damages the victim's social standing in the community. These women are blamed for the loss of their „honour“ and have to deal with a society which treats them as outcasts with no prospects of marriage or re-marriage.<sup>40</sup> If the victim is a young girl, she may be forced to marry the perpetrator to avoid stigma because losing her virginity makes her less valuable in Congolese culture.<sup>41</sup> Similarly, married women that are survivors of sexual violence are rejected by their husbands.<sup>42</sup> The psychological trauma caused by rape results in

<sup>34</sup> Gardam J & Jarvis M *Women, Armed Conflict and International Law* (2001) 39.

<sup>35</sup> Lincoln R „Rule of Law for Whom? Strengthening the Rule of Law as a solution to Sexual Violence in the Democratic Republic of Congo.“ *Berkley Journal of Gender, Law & Justice* (2011) 148.

<sup>36</sup> Urdal H “Women and Gender Inequalities in Health: The Impact of Armed Conflict on Fertility and Maternal Mortality.” *International Interactions* (2013) 490.

<sup>37</sup> Urdal H “Women and Gender Inequalities in Health: The Impact of Armed Conflict on Fertility and Maternal Mortality.” *International Interactions* (2013) 490.

<sup>38</sup> Scully P “Vulnerable Women: A Critical Reflection on Human Rights Discourse and Sexual Violence” available at <https://www.heinonline.org> (accessed on 23 November 2016) p 120.

<sup>39</sup> McKay S “The effects of Armed Conflict on Girls and Women” available at <https://www.tandfonline.com> (accessed on 23 November 2016).

<sup>40</sup> Skjelsbaek I *The Political Psychology of War Rape: Studies from Bosnia and Herzegovina* (2012) 53.

<sup>41</sup> Lincoln R “Rule of Law for Whom? Strengthening the Rule of Law as a solution to Sexual Violence in the Democratic Republic of Congo.” *Berkley Journal of Gender, Law & Justice* (2011) 147.

<sup>42</sup> Lincoln R “Rule of Law for Whom? Strengthening the Rule of Law as a solution to Sexual Violence in the Democratic Republic of Congo.” *Berkley Journal of Gender, Law & Justice* (2011) 147.

physical ailments such as problems with menstrual cycle, fistula, hair loss, weight loss and high blood pressure.<sup>43</sup>

Sexual violence also has a severe negative impact on women's reproductive health. There is the risk of contracting the HIV virus. Many survivors of sexual violence in the DRC are infected with HIV.<sup>44</sup> Some victims feel there is no point reporting the crime in conditions of chaos and societal breakdown.<sup>45</sup> Some of the women that have been raped with guns have suffered damage to their uterus and are no longer able to conceive this is exasperated by the fact that there is no immediate medical attention or gynaecologists during armed conflict.<sup>46</sup>

The LRA in Uganda launched a violent campaign in which civilians were targeted, thousands killed or abducted, and millions of people displaced, women and girls faced brutal sexual violence.<sup>47</sup> Girls were abducted for the purpose of supplying the militia with sexual services.<sup>48</sup> Many of them were forced to live in camps for those internally displaced, which had poor sanitation, limited access to clean water, food, and health facilities.<sup>49</sup> These women are often left pregnant and alone after escaping their captures. They face high levels of stigmatization from their own family and the community.<sup>50</sup>

### 2.3 International redress: Prosecuting crimes against women

Redress at a national level is the best way to provide victims of sexual violence with culturally appropriate justice.<sup>51</sup> However, after armed conflict most countries do not have the adequate legal and administrative resources to do so.<sup>52</sup> In such circumstances the international community has an important role to play.

<sup>43</sup> Gardam J & Jarvis M *Women, Armed Conflict and International Law* (2001) 46.

<sup>44</sup> Goldstoff M "Security Council Resolution 1820: An Imperfect but Necessary Resolution to Protect Civilians from Rape in War Zones." *Cardozo Journal of Law & Gender* (2010) 491.

<sup>45</sup> Oosterveld V "When Women are the Spoils of War." *UNESCO Courier* August 1 (1998) 89.

<sup>46</sup> Goldstoff M "Security Council Resolution 1820: An Imperfect but Necessary Resolution to Protect Civilians from Rape in War Zones." *Cardozo Journal of Law & Gender* (2010) 491.

<sup>47</sup> Thomson A "For Effective Justice for Women in Northern Uganda, Listen to Survivors" October 20 2014 available at <https://www.ictj.org/news/effective-justice-women-northern-uganda> (accessed on 24 November 2016).

<sup>48</sup> Manu B "The Impact of Sexual Violence on the life of individual Women and on Family." *Contemporary Readings in Law & Social Justice* 151.

<sup>49</sup> Thomson A "For Effective Justice for Women in Northern Uganda, Listen to Survivors" October 20 2014 available at <https://www.ictj.org/news/effective-justice-women-northern-uganda> (accessed on 24 November 2016).

<sup>50</sup> Thomson A "For Effective Justice for Women in Northern Uganda, Listen to Survivors" October 20 2014 available at <https://www.ictj.org/news/effective-justice-women-northern-uganda> (accessed on 24 November 2016).

<sup>51</sup> Gardam J & Jarvis M *Women, Armed Conflict and International Law* (2001) 179.

<sup>52</sup> Gardam J & Jarvis M *Women, Armed Conflict and International Law* (2001) 179.

Victims of sexual violence during armed conflict often do not speak out due to fear of stigmatisation.<sup>53</sup> Those raped and forced to become ‘wives’ to their captors are treated with suspicion and accused of being accomplices.<sup>54</sup> It is important for such women to receive acknowledgement that they are not responsible for the harm they have suffered.<sup>55</sup> Such acknowledgment may be given by way of redress. International instruments such as the United Nations Convention against Torture, refers to redress and compensation for victims.<sup>56</sup>

Monetary compensation is the most common form of reparation and is of practical importance.<sup>57</sup> At the end of war, women are left widowed, as displaced persons, with children resulting from rape and in need of on-going medical treatment due to rape. Furthermore, because of poor legal literacy, for example in the DRC, women are unable to access legal remedies. Money will enable these women to resume a normal life.

In order to determine whether harms associated with armed conflict can be addressed under international criminal law, the experiences must be regarded as sufficiently serious to constitute an international crime.<sup>58</sup> Secondly, the crimes must shock the conscious of mankind.<sup>59</sup> Gender is an important factor when considering whether resources will be devoted to prosecuting on an international level.<sup>60</sup> Gender is also relevant to the rules of evidence, treatment of witnesses and victims which must be responsive to the needs of women so as to ensure a positive process which does not cause further emotional damage or stop women from coming forward.<sup>61</sup>

### **2.3.1 Sexual violence as a crime against humanity**

The Rome Statute under Article 7(1)(g) encompasses rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other forms of sexual violence as crimes against humanity.<sup>62</sup>

<sup>53</sup> Askin K et al *International Crimes, Peace, And Human Rights: The Role of the International Criminal Court* (2000) 140.

<sup>54</sup> Buss D “Rethinking Rape as a Weapon of War” August 1 2009 156.

<sup>55</sup> Gardam J & Jarvis M *Women, Armed Conflict and International Law* (2001) 180.

<sup>56</sup> Askin K et al *International Crimes, Peace, And Human Rights: The Role of the International Criminal Court* (2000) 138.

<sup>57</sup> Askin K et al *International Crimes, Peace, And Human Rights: The Role of the International Criminal Court* (2000) 140.

<sup>58</sup> Gardam J & Jarvis M *Women, Armed Conflict and International Law* (2001) 182.

<sup>59</sup> Gardam J & Jarvis M *Women, Armed Conflict and International Law* (2001) 182.

<sup>60</sup> Article 36(8) Rome Statute 1998.

<sup>61</sup> Gardam J & Jarvis M *Women, Armed Conflict and International Law* (2001) 182.

<sup>62</sup> Boot M *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject matter Jurisdiction of the International Criminal Court* (2002) 511.



There have been several legal developments in the context of recognising sexual violence as a crime against humanity. Torture constitutes a crime against humanity.<sup>63</sup> Therefore the recognition of sexual violence as torture means that these sexual acts may also be punished as crimes against humanity.<sup>64</sup> Furthermore, rape has been implied as a crime against humanity in the Nuremburg Charter and in Control Council Law No 10.<sup>65</sup>

Both the ICTY and the ICTR have issued indictments treating rape as a crime against humanity. The ICTR in the case of *The Prosecutor Akayesu* held that rape is a crime against humanity when committed as part of a widespread attack, when committed on a civilian population and when committed on religious/ethnic grounds.<sup>66</sup> The accused was accordingly found guilty of crimes against humanity for rape.<sup>67</sup>

### 2.3.2 Sexual violence as a war crime: Grave breaches of the 1949 Geneva Conventions

The grave breach provisions of the Geneva Conventions may be interpreted to include sexual violence although this is not expressly stated.<sup>68</sup> Sexual violence qualifies as inhumane treatment which is a grave breach pursuant to Article 147 of the fourth Geneva Convention.<sup>69</sup> The ICRC is of the view that rape is a grave breach by way of wilfully causing great suffering or serious injury to the body or to one's health.<sup>70</sup> Various indictments by the International Criminal Tribunal of the Former Yugoslavia (ICTY) have prosecuted sexual violence as a grave breach by way of inhumane treatment.<sup>71</sup> Article 3 of ICTY Statute does not explicitly make reference to sexual violence as a violation of the laws and customs of war; it therefore has no express authority to prosecute it. However, since sexual violence was used as a weapon of war during the Bosnian conflict the ICTY was compelled to do so.<sup>72</sup>

<sup>63</sup> Van der Poll L "The Emerging jurisprudence on Sexual Violence Perpetrated against Women during Armed Conflict." 24 (2010) *Speculum Juris* 12.

<sup>64</sup> Gardam J & Jarvis M *Women, Armed Conflict and International Law* (2001) 197.

<sup>65</sup> Official Gazette of the Control Council for Germany No 322 20 Dec 1945.

<sup>66</sup> *The Prosecutor v Akayesu* Case No ICTR-96-4 2 September 1998 para 616.

<sup>67</sup> *The Prosecutor v Akayesu* Case No ICTR-96-4 2 September 1998 para 695.

<sup>68</sup> Van der Poll L "The Emerging jurisprudence on Sexual Violence Perpetrated against Women during Armed Conflict." 24 (2010) *Speculum Juris* 29.

<sup>69</sup> Gardam J & Jarvis M *Women, Armed Conflict and International Law* (2001) 201.

<sup>70</sup> Van der Poll L "The Emerging jurisprudence on Sexual Violence Perpetrated against Women during Armed Conflict." 24 (2010) *Speculum Juris* 29.

<sup>71</sup> Van der Poll L "The Emerging jurisprudence on Sexual Violence Perpetrated against Women during Armed Conflict." 24 (2010) *Speculum Juris* 30.

<sup>72</sup> Van der Poll L "The Emerging jurisprudence on Sexual Violence Perpetrated against Women during Armed Conflict." 24 (2010) *Speculum Juris* 30.

The extent to which sexual violence can be prosecuted as a war crime under Article 3 of the Statute of ICTY was considered in the case of *The Prosecutor Furundžija*.<sup>73</sup> The Trial Chamber confirmed that Article 3 is an all-encompassing term covering any serious violation of customary humanitarian law and international law. Furthermore, it found that „rape and other forms of sexual assaults“ fall within this definition regardless of whether they have been perpetrated in the context of an international or internal armed conflict.<sup>74</sup> Consequently Furundžija was found guilty of war crimes by outrages upon personal dignity and rape.<sup>75</sup>

In terms of Article 4 of the Statute of the ICTR, the ICTR has jurisdiction over violations of common Article 3 to the four Geneva Conventions and Additional Protocol II.<sup>76</sup> Although sexual assault was included in the ICTR Statute the tribunal was not initially determined to prosecute such activities. It did not succeed in effectively prosecuting such cases due to its initial resistance in focusing on crimes of sexual violence. Many victims will not receive redress.<sup>77</sup>

Despite protection and confidentiality measures taken by the ICTR, witnesses were subjected to political and social repercussions on returning to their communities.<sup>78</sup> The ICTR was unable to guarantee the safety of the witness as there were reports of killings and threats which deterred women from reporting rape.<sup>79</sup> It is therefore imperative that the ICC effectively prosecutes sexual violence crimes and improves on the ICTR by ensuring the participation of women, involving gender experts and guaranteeing the safety of its witnesses.<sup>80</sup>

The Rome Statute recognises sexual violence as a war crime under Article 8(2)(b)(xxii) and expressly refers to rape, sexual slavery and enforced prostitution amongst others as war crimes in both internal and international armed conflicts.<sup>81</sup> The Statute of the ICC provides that the ICC has jurisdiction on cases whereby the State is unwilling or unable to carry out investigations and prosecute the perpetrators within its own domestic courts and laws.<sup>82</sup>

<sup>73</sup> *The Prosecutor V Furundžija* Case No IT-95-17/1 29 May 1998.

<sup>74</sup> Gardam J & Jarvis M *Women, Armed Conflict and International Law* (2001) 160

<sup>75</sup> Shorts E & de Than C *International Criminal Law and Human Rights* (2003) 105.

<sup>76</sup> Gardam J & Jarvis M *Women, Armed Conflict and International Law* (2001) 214.

<sup>77</sup> Gardam J & Jarvis M *Women, Armed Conflict and International Law* (2001) 216.

<sup>78</sup> Mibenge C *Sex and International Tribunals: The Erasure of Gender from the War Narrative* (2013) 67.

<sup>79</sup> Gardam J & Jarvis M *Women, Armed Conflict and International Law* (2001) 222.

<sup>80</sup> Gardam J & Jarvis M *Women, Armed Conflict and International Law* (2001) 220.

<sup>81</sup> Article 8 of the Rome Statute 1998.

<sup>82</sup> Dorman K & Doswald-Beck L & Kolb R *Elements of War Crimes under the Rome Statute of the International Criminal Court Sources and Commentary International Committee of the Red Cross* (2003) ix.

Historically, States have rarely punished members of their armed forces for rape crimes and if such an attitude prevails at an international level, it affects international peace and security and the ICC should intervene.<sup>83</sup> However, a gender perspective has emerged at an international level regarding the prosecution of crimes committed during armed conflict.

The fact that there is a separate provision for crimes of sexual violence as war crimes under the Rome Statute constitutes due recognition that acts of a sexual nature, committed in the context of organised violence count among the most serious crimes<sup>84</sup>. Despite the enormous strides made by the Rome Statute on defining and conceptualizing sexual violence, confusion may still arise regarding the status of sexual violence as a war crime. This is because of the wording of the catch-all clause ‘any other form of sexual violence’ under Article 8(2)(b)(xxii) and Article 8(2)(e)(vi) in the Rome Statute which require that act must also constitute a ‘grave breach’ of the Geneva Conventions.<sup>85</sup> This clause brings doubt as to whether sexual violence is genuinely emancipated, since the violation of the four Geneva Conventions will always be required.<sup>86</sup> On the other hand it may well be argued that the intention of the Rome Statute with this clause is to ensure that only severe crimes of sexual violence will be punished as war crimes.<sup>87</sup>

#### **2.4 The ICC and the gender perspective on the prosecution of sexual violence during armed conflict**

When crimes committed against women during armed conflict are prosecuted by the ICC, gender perspectives should be included in the way cases are prepared and proceedings are conducted.<sup>88</sup> If this is not done, victims may suffer further trauma instead of an acknowledgement of the wrong done to them. This will dissuade women from reporting violence as well as be a barrier to victims seeking redress.<sup>89</sup> Rape victims find it difficult to recount the experiences, more so in African cultures where sexual ‘purity’ is highly

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<sup>83</sup> Boot M *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (2002) 592.

<sup>84</sup> Van der Poll L “The Emerging jurisprudence on Sexual Violence Perpetrated against Women during Armed Conflict.” 24 (2010) *Speculum Juris* 33.

<sup>85</sup> Gardam J & Jarvis M *Women, Armed Conflict and International Law* (2001) 219.

<sup>86</sup> Van der Poll L “The Emerging jurisprudence on Sexual Violence Perpetrated against Women during Armed Conflict.” 24 (2010) *Speculum Juris* 34.

<sup>87</sup> Van der Poll L “The Emerging jurisprudence on Sexual Violence Perpetrated against Women during Armed Conflict.” 24 (2010) *Speculum Juris* 34.

<sup>88</sup> Gardam J & Jarvis M *Women, Armed Conflict and International Law* (2001) 221.

<sup>89</sup> Gardam J & Jarvis M *Women, Armed Conflict and International Law* (2001) 220.

valued.<sup>90</sup> For example, in Uganda and the DRC, victims of rape face continued stigmatization.<sup>91</sup> This further stops women from seeking justice.

The Rome Statute expressly addresses the need for the participation of women and gender experts throughout the court, as a result; female judges have been appointed.<sup>92</sup> Both female victims and witnesses are allowed to participate in the proceedings. The office of the Prosecutor is required to appoint a legal adviser with expertise in sexual and gender violence with the aim that this will improve the extent to which sexual violence crimes are prosecuted.<sup>93</sup>

## 2.5 Concluding observations

In this chapter I have established that rape has been used as a weapon of war in the DRC and in Uganda, however this is not unique to these countries as women and girls in armed conflict situations all around the world are facing sexual violence.

I have also examined the various effects that armed conflict has on women such as internal displacement, loss of family members and deterioration in health due to sexually transmitted diseases or poor sanitation. Furthermore, sexual violence has a negative psychological and physical effect on women. Sexual violence as a crime against humanity is present when rape is committed as part of a widespread attack, when committed on a civilian population and when committed on religious/ethnic grounds. Sexual violence during armed conflict may be prosecuted as a war crime under Article 8(2)(b)(xxii) of the Rome Statute. Lastly, it is important to include a gender perspective when prosecuting sexual violence

What follows in the next chapter is a brief examination of the International framework for the prosecution of sexual violence crimes. I shall also consider the definition of rape and the mode of liability under international criminal law.

<sup>90</sup> Gardam J & Jarvis M *Women, Armed Conflict and International Law* (2001) 220.

<sup>91</sup> DR Congo: Consequences of stigmatization of sexual violence victims. available at <http://www.icrc.org> (accessed on 28 February 2017).

<sup>92</sup> Gardam J & Jarvis M *Women, Armed Conflict and International Law* (2001) 220.

<sup>93</sup> Gardam J & Jarvis M *Women, Armed Conflict and International Law* (2001) 221.

## CHAPTER THREE

### 3. INTRODUCTION

The justice systems in many war-torn countries have failed to address the problem of sexual violence.<sup>1</sup> The prosecution of sexual violence crimes in countries such as the DRC is hampered by widespread impunity, out dated laws and a refusal to understand the gravity and serious nature of sexual abuse.<sup>2</sup>

This chapter shall explore first, the legal definition of rape under international law as this has a bearing on the prosecution of sexual violence crimes at the ICC. Furthermore, a definition of the crime of rape is essential in order to make a distinction between rape and other forms of sexual violence which is necessary to avoid misinterpretation.<sup>3</sup> When victims come forward to testify against the accused, it is important that the act they were subjected to fits within the definition of sexual violence. The establishment of a gender neutral definition of the crime of rape has been heavily influenced by the ICTR and the ICTY case law.<sup>4</sup> The definition used by the ICC, set out in its document 'Rules of Procedure and Evidence' is a combination of the elements of rape used in the ICTR and the ICTY case law; in particular *The Prosecutor v Akayesu*, *The Prosecutor v Furundžija* and *Kunarac et al.*<sup>5</sup> I shall discuss these cases below.

The ICTR and ICTY are relevant to this discussion not only because they offer the foundation for the definition of rape but because both the ICTY and ICTR statutes have significantly contributed towards the creation of the ICC. These courts have legitimised the prosecution of international crimes thus creating a substantial and tangible body of jurisprudence which was lacking in the past.<sup>6</sup> These courts laid the foundation for the ICC.

<sup>1</sup> Kippenberg J *Soldiers who Rape, Commanders who Condone: Sexual violence and Military Reform in the Democratic Republic of Congo* (2009) 35.

<sup>2</sup> Kippenberg J *Soldiers who Rape, Commanders who Condone: Sexual violence and Military Reform in the Democratic Republic of Congo* (2009) 35.

<sup>3</sup> Dörmann K 'War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crime' *Max Planck Yearbooks of United Nations Law* 7 (2003) 391.

<sup>4</sup> Dörmann K 'War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crime' *Max Planck Yearbooks of United Nations Law* 7 (2003) 391.

<sup>5</sup> International Criminal Court Rules of Procedure and Evidence ICC-ASP/1/3, 9 Sept. 2002, Part B, Elements of Crime 119&141.

<sup>6</sup> Cheney J "International Criminal Law and the Role of Domestic Courts" *American Journal of International Law* 95/1(2001) 122.



Secondly, I shall briefly consider the mode of liability under international criminal law which allows superiors to be held responsible for crimes committed by subordinates under his/her effective control.<sup>7</sup> This will also lay a foundation for a better understanding of how charges are brought against the perpetrators in the case law that shall be discussed in chapter 4 of this mini- thesis. Lastly, what follows is an examination of the legal international framework for the prosecution of sexual violence. I shall explore some of the provisions that provide for the legal framework under international humanitarian law, human rights law and international criminal law.

### 3.1 The legal definition of rape and sexual violence as a crime

The definition of rape under international criminal law was first considered by the ICTR in *The Prosecutor v Akayesu (Akayesu)*.<sup>8</sup> In this case, Akayesu was a bourgmestre found to have known about and to have been present for instances of sexual violence that occurred under his authority. In this case, a broad approach was taken to the definition of rape, which was „a physical invasion of a sexual nature, committed under coercive circumstances.“ The proof of non-consent was not an element of the crime; instead the prosecution was required to focus on whether the rape took place under coercion.<sup>9</sup>

The standard set out in *Akayesu*, was diverted from in the case of *The Prosecutor v Furundžija (Furundžija)*. In this case, women were tortured by acts of rape whilst being detained. The ICTY in *Furundžija* stated there was no definition of rape under international criminal law and therefore took a more mechanical approach as opposed to the approach in *Akayesu* in which they gave a more detailed description of body parts and objects.<sup>10</sup> Rape was defined as,

the sexual penetration however slight; of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or the mouth of the victim by the penis of the perpetrator; by coercion or force or threat of force against the victim or a third person.<sup>11</sup>

<sup>7</sup> Martyna M “The Bemba trial before the International Criminal Court: Defining armed conflict through the Scope of A commander’s responsibility” *Military Law and Law of War Review* 54 (2015-2016) 287.

<sup>8</sup> *The Prosecutor v Akayesu* Case No ICTR 964T September 1998 para 598.

<sup>9</sup> Cole A “Prosecutor v Gacumbitsi: The New Definition for Prosecuting Rape under International Law” *ICRL* 8 (2008) 58.

<sup>10</sup> Nash S & Bantekas I *International Criminal Law* 3ed (2009) 12.

<sup>11</sup> Totten S *Plight and Fate of Women During and Following Genocide* (2012) 173.

### 3.2 Whether or not to include the element of ‘non-consent’ of the victim

Rape was defined for the third time in *Kunarac et al.* In this case, one of the accused argued that he presumed the victim’s consent because she had actively sought sex with him.<sup>12</sup> It was found that the victim had not given her consent freely because she only sought sex with the accused under the threat of death.<sup>13</sup> Here the ICTY held 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) 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.<sup>14</sup>

The court in *Kunarac et al* argued that the lack of the element of consent in *Furundžija* created a gap in the law, for instance a situation might exist where someone might not consent to the sexual act without there being any coercion, force or threat.<sup>15</sup> The definition had to be broadened so as to include cases in which the victim was drugged or incapacitated. To assume a lack of consent a priority not only eases the later procedure in court and the burden of proof, but also eases the victim’s situation of not being interrogated and questioned regarding his/her disagreement on the actions taken by the perpetrator and thereby re-living and remembering painful experiences.<sup>16</sup> This definition is at odds with previous definitions given by both the ICTR and by the ICTY itself. The main conflict is found in the element of coercion as opposed to consent. However, the court rightfully observed that the circumstances giving rise to cases charged as war crimes or crimes against humanity are universally coercive and true consent is not possible.<sup>17</sup> Were consent is induced by force or threat then it is not true consent.

In the case of *The Prosecutor v Gacumbitsi*, the accused was a mayor of the Rusumo commune during the 1994 Rwandan genocide and was found guilty of instigating rape as a

<sup>12</sup> Schomburg W & Paterson I “Genuine Consent to Sexual Violence under International Criminal Law” (2007) 127.

<sup>13</sup> Schomburg W & Paterson I “Genuine Consent to Sexual Violence under International Criminal Law” (2007) 127.

<sup>14</sup> *Kunarac et al* (IT-96-23&23/1) 2001 para 440.

<sup>15</sup> *Kunarac et al* (IT-96-23 22) 2001 para 438.

<sup>16</sup> *Kunarac et al* (IT-96-23 22) 2001 para 453.

<sup>17</sup> Cole A “Prosecutor v Gacumbitsi: The new Definition for Prosecuting Rape under International Law” *ICLR* 8 (2008) 62.

crime against humanity amongst other crimes.<sup>18</sup> The prosecution argued that non-consent should not be an element of the crime of rape and that rape should be treated similar to all other violations of international criminal law such as torture for which the prosecution is not required to establish the absence of consent.<sup>19</sup> The court held non-consent can be proven beyond reasonable doubt by establishing coercive circumstances under which meaningful consent cannot be given. Furthermore, the definition of rape under international criminal law is ordinarily in the context of armed conflict and the victims are under non-consensual attack.<sup>20</sup> It is hard to think of a case where consent would be a successful defence for a person accused of sexual violence as part of an attack against the victim's population.<sup>21</sup> It is my opinion therefore, that the element of consent should not be included in the definition of rape.

Under Article 21(3) the ICC must interpret and apply the law in a manner in line with international human rights standards. This provision provides a standard against which all the law applied by the ICC should be measured.<sup>22</sup> The International human rights law community have found that international criminal law is a way to strengthen international responses to sexual and gender based violence while enhancing the recognition of human rights of women and girls.<sup>23</sup>

Human rights law recognises that although consent has been a problematic concept in the definition of rape, it is a key factor in recognising an individual's right to exercise freedom and control over one's body. Rather than doing away with it, the concept of consent must be better articulated to ensure respect of women's rights.<sup>24</sup> In an attempt by the ICC to fulfil its obligations under Article 21(3), the court has looked to influential sources such as the European Court of Human Rights (ECtHR).<sup>25</sup> The ECtHR while dealing with the case of *M.C v Bulgaria* cited the *Kunarac et al* case with approval leading it to adopt an understanding of

<sup>18</sup> *The Prosecutor v Gacumbitsi* ICTR-2001-64-T para 6.

<sup>19</sup> Cole A "Prosecutor v Gacumbitsi: The new Definition for Prosecuting Rape under International Law" *ICRL* 8 (2008) 76.

<sup>20</sup> Cole A "Prosecutor v Gacumbitsi: The new Definition for Prosecuting Rape under International Law" *ICLR* 8 (2008) 62.

<sup>21</sup> *Kunarac et al* IT-96-23 22 2001

<sup>22</sup> Grewal K "The Protection of Sexual Autonomy under International criminal Law: The International Criminal Court and the Challenge of defining Rape" 382.

<sup>23</sup> Grewal K "The Protection of Sexual Autonomy under International criminal Law: The International Criminal Court and the Challenge of defining Rape" 382.

<sup>24</sup> Grewal K "The Protection of Sexual Autonomy under International criminal Law: The International Criminal Court and the Challenge of defining Rape" 383.

<sup>25</sup> Shepard D "The International Criminal Court and Internationally Recognised Human Rights: Understanding Article 21(3) of the Rome Statute." 10 *ICLR* 70.



rape as a violation of sexual autonomy for the purposes of human rights law.<sup>26</sup> The court also noted that there was a ‘universal trend towards regarding lack of consent as the essential element of rape and sexual abuse.’<sup>27</sup>

### 3.3 Examining the mode of liability under international law

The Rome Statute of the ICC provides for the jurisdiction over individuals for crimes such as genocide, crimes against humanity, war crimes and the crime of aggression. This paper focuses on crimes against humanity and war crimes in particular. The various modes of individual criminal responsibility, understood as the grounds upon which a person can be held criminally liable for committing a crime within the jurisdiction of the ICC, are regulated primarily by Articles 25 and 28 of the Rome Statute.<sup>28</sup>

The Statute provides for two main categories of liability: individual criminal responsibility which is regulated by Article 25 and the responsibility of commanders and other superiors which is regulated by Article 28. The mode of liability lies at the very centre of each case providing a legal theory which connects the accused to the crimes he/she is charged with.<sup>29</sup>

At present, modes of liability are among the most debated aspects of the cases in the ICC, between the Trial and Pre-Trial Chambers and also as the subject of multiple filings by the Prosecution, Defence and legal representatives of victims.<sup>30</sup> As the Statute provides only a general framework for determining individual criminal responsibility, the elements of each mode of liability are evolving through case law. The Pre-Trial and Trial Chambers have differed in their interpretations of distinct elements of the modes of liability, and these differences remain unresolved by the Appeals Chamber. Due to the growth of the ICC’s jurisprudence, these divergent interpretations between Chambers, as well as between individual judges, on the modes of liability have become an increasing source of litigation.<sup>31</sup>

Significantly, the Appeals Chamber has yet to rule on any of the elements of modes of liability and their application in a particular case. It is possible that the diverse interpretations given by Chambers to several of the elements of modes of liability may be attributed

<sup>26</sup> *M.C v Bulgaria* Eur.Ct.HR39272/98 (2003).

<sup>27</sup> *M.C v Bulgaria* Eur.Ct.HR39272/98 (2003).

<sup>28</sup> Articles 25 & 28 of the Rome Statute of the International Criminal Court 1998.

<sup>29</sup> Inder B & Orlovsky K *Mode of Liability: A review of the International Criminal Court current jurisprudence and practise* (2013) 7.

<sup>30</sup> Inder B & Orlovsky K *Mode of Liability: A review of the International Criminal Court current jurisprudence and practise* (2013) 7.

<sup>31</sup> Modes of Liability: Commission and Participation available at <https://www.iclsfoundation.org> (accessed on 1 April 2017).

in part to the absence of any substantive decision to date by the Appeals Chamber, clarifying and potentially unifying interpretations regarding the elements of participation.<sup>32</sup>

The procedural framework at the ICC requires cases to be reviewed, including charges and the mode of liability put forward by the Prosecution at multiple stages.<sup>33</sup> At the stage of issuing an arrest warrant or a summons to appear, the Pre-Trial Chamber decides, based on the evidence provided by the Prosecution, whether there are 'reasonable grounds to believe' that the charges and mode of liability were committed by the accused.<sup>34</sup> Finally, the Trial Chamber must determine, after considering all of the evidence presented at trial, whether the charges and mode of liability have been proven 'beyond reasonable doubt' for the purpose of conviction.<sup>35</sup>

There have been very few decisions regarding modes of liability which explicitly address charges for sexual violence crimes. Such cases include *The Prosecutor v Jean-Pierre Bemba Gombo* and *The Prosecutor v Kenyatta* in which charges for crimes of sexual violence have been confirmed, reached a trial judgement and resulted in conviction for the former whilst charges were dropped for the latter.<sup>36</sup>

The Rome Statute has incorporated common purpose liability, co-perpetration and indirect co-perpetration under Article 25(3)(a)–(c) and other forms of common purpose liability under Article 25(3)(d) respectively. According to Article 25, a person shall be criminally responsible and liable for punishment for a crime if he/she commits a crime, plans, and orders or solicits the crime or in any other way contributes to the commission of the crime.<sup>37</sup> I shall delve into brief explanations of these elements below.

Individual criminal responsibility under the ICC is attributed to a person when he/she was involved in the planning of the crime. Planning means that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.<sup>38</sup> The accused does not have to directly or physically commit the crime planned to be

<sup>32</sup> *The Prosecutor v Mbarushimana* ICC-01/04-01/10-514,

<sup>33</sup> Modes of Liability: Commission and Participation available at <https://www.iclsfoundation.org> (accessed on 1 April 2017).

<sup>34</sup> Article 58(1)(a) Rome Statute 1998.

<sup>35</sup> Article 66(3) Rome Statute 1998.

<sup>36</sup> *The Prosecutor v Jean-Pierre Bemba Gombo* (ICC-01/05-01/08).

<sup>37</sup> Article 25 Rome Statute 1998.

<sup>38</sup> Modes of Liability: Commission and Participation available at <https://www.iclsfoundation.org> (accessed on 1 April 2017).

found guilty of planning.<sup>39</sup> The accused does not even have to be at the crime scene, as long as it is established that the direct perpetrators were acting according to the accused's plan.<sup>40</sup>

Article 25(3)(a) criminalises three forms of 'commission': direct perpetration, co-perpetration and indirect perpetration. The jurisprudence of the ICC has also established indirect co-perpetration as a form of commission. An accused can be held directly liable for a crime if it is proven that he physically carried out all material elements of the offense with intent and knowledge.<sup>41</sup> In terms of indirect commission, the accused uses another person to physically carry out the crime. The accused controls the will of the direct perpetrator; this makes the accused an indirect perpetrator even if the direct perpetrator would not be criminally responsible for the crime.<sup>42</sup>

Co-perpetration is a form of joint liability, whereby the prosecutor must prove that two or more people shared a plan, secondly that the co-perpetrator acted with intent and knowledge, they must be aware that implementing the common plan will result in the commission of crimes and each perpetrator must have been assigned a role in the execution of the plan.<sup>43</sup>

Indirect co-perpetration is a form of co-perpetration where the essential contribution assigned to a co-perpetrator is carried out by another person who does not share the common plan or a hierarchical organization. This mode of liability encompasses all of the elements of co-perpetration and indirect commission.<sup>44</sup>

The Rome Statute criminalises the conduct of anyone who, 'for the purpose of facilitating the commission of such a crime, aids, abets, or otherwise assists in its commission or its attempted commission, including providing the means for its commission.'<sup>45</sup> It must be established that the accused acts with intent and knows and desires that his or her conduct will facilitate and assist the commission of the crime.<sup>46</sup> Article 25(3)(d) also criminalises contributing to the commission or attempted commission of a crime committed by a group of persons acting with the same common purpose. This is different from co-perpetration. The

<sup>39</sup> Modes of Liability: Commission and Participation available at <https://www.iclsfoundation.org> (accessed on 1 April 2017).

<sup>40</sup> Modes of Liability: Commission and Participation available at <https://www.iclsfoundation.org> (accessed on 1 April 2017).

<sup>41</sup> Article 25(3) (a) & 30 Rome Statute 1998.

<sup>42</sup> *Germain Katanga et al* Case No. ICC-01/04-01/07.

<sup>43</sup> Article 30 Rome Statute & Lubanga Decision on Confirmation of Charges ICC-01/04-01/06 para 349-356.

<sup>44</sup> Modes of Liability: Commission and Participation available at <https://www.iclsfoundation.org> (accessed on 1 April 2017).

<sup>45</sup> Article 25(3) (c) Rome Statute 1998.

<sup>46</sup> Ambos K *Commentary on the Rome Statute of the International Criminal Court: Observers notes* (1999) 483.

contribution must be intentional, made with the aim of furthering the criminal activity or criminal purpose of the group and in the knowledge of the intention of the group to commit the crime.<sup>47</sup>

According to Article 28, a superior shall be criminally responsible for crimes within the jurisdiction of the court committed by his subordinates as a result of his failure to exercise control properly where he knew or should have known that the crimes were being committed and he failed to take all necessary and reasonable measures within his power to prevent it.<sup>48</sup>

The first case illustrating the interpretation of Article 28 was in the context of the decision to confirm charges in *The Prosecutor v Jean-Pierre Bemba Gombo*. Bemba Gombo was originally charged with criminal responsibility as a co-perpetrator under Article 25(3)(a) of the Rome Statute.<sup>49</sup> However, the Prosecutor submitted an amended charge document of command responsibility under Article 28(a) or (b).<sup>50</sup> Bemba Gombo was set to stand trial for rape, murder and pillaging as war crimes and crimes against humanity due to his alleged responsibility as commander. He was described as the *de jure* commander in chief of a political military movement because he had the power to issue orders, to appoint and ultimately to prevent or repress the commission of crimes.<sup>51</sup> Bemba Gombo was believed to have maintained effective control over his troops throughout military action. The ICC found that for purposes of confirming charges, the accused knew his troops were committing crimes and he failed to take reasonable measures within his power to prevent the crimes. Instead, he disregarded the gravity of crimes and opted for measures not reasonably proportionate to those crimes.<sup>52</sup>

The ICC Pre-trial Chamber interprets Article 28 as a form of criminal responsibility based on a legal obligation to act. 'Effective control' lies at the very heart of the doctrine of command responsibility and is described as the material ability to prevent and punish the commission of the offences.<sup>53</sup>

<sup>47</sup> Albin E *The Rome Statute of the International Criminal Court: a commentary* (2002) 801.

<sup>48</sup> Manacoda S& Nieto A *Criminal Law between War and Peace: Justice and Cooperation in Criminal Matters in international Military Interventions* (2009) 595.

<sup>49</sup> *The Prosecutor v Jeanne Pierre Bemba Gombo* (ICC-01/05-01/08).

<sup>50</sup> *The Prosecutor v Jeanne Pierre Bemba Gombo* (ICC-01/05-01/08).

<sup>51</sup> Mariniello T *The International Criminal Court in search of its Purpose and Identity* (2015) 45.

<sup>52</sup> Mariniello T *The International Criminal Court in search of its Purpose and Identity* (2015) 45.

<sup>53</sup> Mariniello T *The International Criminal Court in search of its Purpose and Identity* (2015) 46.

### 3.4 The framework for prosecuting sexual violence crimes under international humanitarian law

Here I shall go over; The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa as well as the Geneva Conventions and their Additional Protocols because these instruments give provisions under which legal action can be brought against perpetrators of sexual violence during armed conflict.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (ACHPR) has strong provisions that safeguard and advance the protection of women's rights. Article 11 under this Protocol provides that,

States Parties must undertake to protect asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction.<sup>54</sup>

Common Article 3 to the Geneva Conventions of 1949 (GENCONV) applies to conflicts that are not of an international character. It covers traditional civil wars, internal armed conflicts that spill over into other states and internal conflicts in which third States intervene alongside the government. It establishes fundamental rules from which no derogation is permitted.<sup>55</sup>

Common Article 3(1)(a) of GENCONV provides that violence to life and person; in particular murder, mutilation, cruel treatment and torture are prohibited during internal armed conflicts. Sexual violence qualifies as cruel treatment and violence to person therefore perpetrators can be prosecuted on this basis.<sup>56</sup> Common Article 3(1)(c) prohibits outrages upon personal dignity, in particular humiliating and degrading treatment such as rape.<sup>57</sup>

In accordance with Article 27(2) of the Fourth Geneva Convention relative to the Protection of Civilian Persons in the Time of War, 'Women shall be especially protected against any attack on their honour in particular against rape, enforced prostitution, or any form of indecent assault.'<sup>58</sup> Article 75(2)(b) of Additional Protocol I, provides that outrages upon

<sup>54</sup> Article 11 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003.

<sup>55</sup> ICRC The Geneva Conventions of 1949 and their Additional Protocols available at <https://www.icrc.org> (accessed on 27 March 2017).

<sup>56</sup> Article 3 common to the Geneva Convention 1949.

<sup>57</sup> Article 3(1)(c) common to the Geneva Convention 1949.

<sup>58</sup> Article 27(2) VI Geneva Convention 1949.



personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any other form of indecent assault remain prohibited whether committed by civilians or military agents.<sup>59</sup> Furthermore, according to Article 76(1), 'Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.'<sup>60</sup> Likewise, the same protection is afforded to children under Article 77(1) of Additional Protocol I because young girls are often victims of sexual violence during armed conflict. It provides:

Children shall be the object of special respect and shall be protected against any form of indecent assault. The parties to the conflict shall provide them with the care and aid they require, whether because for their age or for any other reason.<sup>61</sup>

Article 4(2)(e) of Additional Protocol II forbids outrages upon personal dignity by way of rape, enforced prostitution and any other form of indecent assault.<sup>62</sup> Under customary law rule 93, State practice has established the prohibition of rape and other forms of sexual violence as a norm of customary international law.<sup>63</sup> In accordance with rule 94 under customary international humanitarian law, sexual slavery under the ICC Statute is a war crime in both international and internal armed conflict.<sup>64</sup>

### **3.4.1 Framework for prosecuting sexual violence crimes under human rights law**

I shall focus mostly on the United Nations Resolutions that provide for the prosecution of sexual violence crimes because these have helped to raise awareness and trigger action against sexual violence in conflict. I shall then consider provisions under The International Convention for Civil and Political Rights and the Convention on the Elimination on All forms of Discrimination Against Women.

United Nations Resolutions 1820, 1888 and 1960 confirm that sexual violence, when committed systematically and used as a weapon of war is a serious threat to international

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<sup>59</sup> Article 75(2) Additional Protocol I 1977.

<sup>60</sup> Article 76(1) Additional Protocol 1977.

<sup>61</sup> Article 77(1) Additional Protocol I 1977.

<sup>62</sup> Article 4(2) Additional Protocol II 1977.

<sup>63</sup> Vienna Convention on the Law of Treaties 1969 (1969).

<sup>64</sup> Villiger M *Customary International Law and Treaties* (1985) 298.

peace and security.<sup>65</sup> This is an affirmation that there can be no credible security approach that does not take the security of women into account.<sup>66</sup>

The United Nations Security Council first addressed the impact of armed conflict on women in Resolution 1325 (2000). This resolution recognised that the implementation of peace has different effects for women and men, hence there is a need for gender mainstreaming to ensure both genders benefit equally.<sup>67</sup> Men and women have different needs of protection during armed conflict and its resolution; it has been proven that women are targeted more by sexual violence as compared to men. The goal central to resolution 1325 is to improve the participation of women in all efforts relating to creating peace including decision making, for example women should be included in the process that results in peace agreements.<sup>68</sup>

Resolution 1820 calls for the immediate stop by all parties to armed conflict in all acts of sexual violence against civilians. It reaffirms commitment to Resolution 1325 and points out that rape and other forms of sexual violence can constitute a war crime, a crime against humanity or genocide.<sup>69</sup> Furthermore, it requests that training programmes be put in place for peace-keepers and troops that are deployed by the United Nations (UN) in order to teach them how to prevent sexual violence in both conflict and post-conflict situations.<sup>70</sup>

Resolution 1888 (2009) provides that all parties to armed conflict, 'take appropriate measures to protect civilians, including women and children, from all forms of sexual violence.' This resolution reaffirms that sexual violence when used as a weapon of war and as part of a widespread attack against the civilian population, will exacerbate conflict and hinder achievement of international peace and security.<sup>71</sup> Furthermore, it calls on the UN Secretary General to appoint a Special Representative to not only provide leadership concerning sexual violence during armed but to deploy a team of experts to situations of particular concern.<sup>72</sup> It is perceived a development in international law as it created the Office of the Special

<sup>65</sup> Bangura Z "Statement by the Special Representative of the Secretary-General on Sexual Violence in Conflict"

17 April 2013 available at <https://www.un.org> (accessed on 2 April 2017).

<sup>66</sup> Bangura Z "Statement by the Special Representative of the Secretary-General on Sexual Violence in Conflict"

17 April 2013 available at <https://www.un.org> (accessed on 2 April 2017).

<sup>67</sup> Olsson L & Gizelis T *Gender Peace and Security Implementing UN Security Council Resolution 1325* (2015)2.

<sup>68</sup> Olsson L & Gizelis T *Gender Peace and Security Implementing UN Security Council Resolution 1325* (2015) 4.

<sup>69</sup> Blanchfield L *United Nations System Efforts to Address Violence Against Women* (2011) 12.

<sup>70</sup> Blanchfield L *United Nations System Efforts to Address Violence Against Women* (2011) 12.

<sup>71</sup> UN Resolution 1888 of 2009.

<sup>72</sup> Blanchfield L *United Nations System Efforts to Address Violence Against Women* (2011) 12.

Representative of the Secretary General for Sexual Violence in Conflict. One of the priority countries identified by this office is the DRC.

On 5 October 2009 the UN adopted resolution 1889 which addresses obstacles to women's involvement in the peace process, peace building and peace keeping. Most importantly, this resolution emphasises the responsibility on States to end impunity and prosecute all perpetrators of sexual violence committed against girls and women in armed conflict.<sup>73</sup>

According to resolution 2106 (2013) gender equality, women's political, social and economic empowerment to efforts to prevent sexual violence in armed conflict and post conflict situations is central.<sup>74</sup> The resolution provides that all member States must do more to implement previous mandates and combat the impunity that exists with regard to all forms of sexual violence.<sup>75</sup>

Resolution 1960 (2010) was aimed at encouraging a more deliberate protection of women and rejecting impunity. It provided detailed reports of parties that are credibly suspected of committing or being responsible for rape or other forms of sexual violence be given to the Security Council.<sup>76</sup> The Secretary General was to monitor implementation of said commitments by the parties to the conflict through engaging with health care service providers during armed conflict and women's groups to enhance data collection and analysis of sexual violence incidents.<sup>77</sup> This would then help the Council to consider appropriate action for a specific country.

However, to date there is on-going criticism that the UN has very little capacity to enforce these resolutions and so it is arguable that the UN has failed to hold those responsible for sexual violence accountable.

The International Convention for Civil and Political Rights (ICCPR) provides that sexual violence generally violates women's rights to be free from discrimination based on sex.<sup>78</sup> In terms of Article 1 of the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW), the definition of discrimination includes gender based violence because it has the effect of nullifying the enjoyment of human rights by women on an equal

<sup>73</sup> UN Resolution 1889 of 2009.

<sup>74</sup> UN Resolution 2106 of 2013.

<sup>75</sup> UN Resolution 2106 of 2013.

<sup>76</sup> Fitzpatrick B *Tactical Rape in war and conflict: International recognition and response* (2016) 202.

<sup>77</sup> Fitzpatrick B *Tactical Rape in war and conflict: International recognition and response* (2016) 203.

<sup>78</sup> Article 2(1) & 26 of the ICCPR 1966.



basis with men.<sup>79</sup> The CEDAW Committee cited a range of obligations that must be followed by States in order to end sexual violence, such as counselling and support services for victims, medical and psychological assistance as well as ensuring that victims are treated appropriately within the justice system.<sup>80</sup> Furthermore, under Article 6 of CEDAW, slavery and forced prostitution during armed conflict constitute a basic violation of the right to liberty and security of the person.<sup>81</sup>

Although DRC and Uganda are both party to the African Charter on Human and Peoples' Rights, which guarantees the elimination of discrimination against women together with the right to be free from all inhumane treatment such as sexual violence, it may well be argued that in practice, these countries have not met their obligations.<sup>82</sup>

### **3.4.2 Framework for prosecuting sexual violence crimes under international criminal law**

This section of the mini-thesis will focus on the Rome Statute and Statutes of the ICTR and ICTY. According to Article 5(g) and 5(i) of the Statute of the International Criminal Tribunal for the former Yugoslavia, the ICTY has jurisdiction to prosecute rape and other inhumane acts as crimes against humanity when committed in armed conflicts whether international or internal in character.<sup>83</sup>

Article 4 of the Statute of the International Criminal Tribunal for Rwanda provides that the ICTR shall have jurisdiction to prosecute persons committing serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II for the protection of war victims.<sup>84</sup> In particular Article 4(e) provides a legal framework for the prosecution of those committing outrages on personal dignity such as rape, enforced prostitution and any form of indecent assault.<sup>85</sup>

<sup>79</sup> Women, Law and Development International, *Gender Violence: The Hidden War Crimes* (Washington D.C. (1998) 37.

<sup>80</sup> Committee on the Elimination of All Forms of Discrimination Against Women, "Violence Against Women," General Recommendation no. 19 (eleventh session, 1992) U.N. Document CEDAW/C/1992/L.1/Add.15.

<sup>81</sup> Article 6 Convention on the Elimination of All Forms of Discrimination Against Women 1979.

<sup>82</sup> Article 4 & 5 of the African Charter on Human and Peoples Rights (1988) 15 No. 26363.

<sup>83</sup> Article 5(g) & 5(i) of the Statute of the International Criminal Tribunal for the former Yugoslavia 1994.

<sup>84</sup> Article 4(e) of the Statute of the International Criminal Tribunal for Rwanda.

<sup>85</sup> Article 4(e) of the Statute of the International Criminal Tribunal for Rwanda.

Article 8(2)(e)(vi) of the Rome Statute provides that, „committing rape, sexual slavery...and any other form of sexual violence also constituting serious violation of article 3 common to the four Geneva Conventions if committed on a large scale shall amount to a war crime.“<sup>86</sup>

In accordance with Article 7(g) of the Rome Statute, rape, sexual slavery and other forms of sexual violence of comparable gravity constitute a crime against humanity.<sup>87</sup> In addition, Article 8(2)(b)(xxi) provides that committing outrages upon personal dignity, in particular degrading and inhumane treatment shall be prosecuted as a war crime.<sup>88</sup> Article 8(2)(b)(xxii) provides that rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence also constituting a breach of the Geneva Conventions shall be charged as war crimes when committed as part of a plan or policy or on a large scale.<sup>89</sup>

### 3.5 Concluding Observations

In this chapter I have examined part of the framework put in place for the prosecution of sexual violence crimes during armed conflict under humanitarian law, human rights law and international criminal law. I have also established that the mode of liability under international criminal law is regulated by Article 25 and 28 of the Rome Statute particularly individual criminal responsibility and the responsibility of commanders and other superiors.

It can be seen that a gender neutral definition of the crime of rape used by the ICC was heavily influenced by case law from the ICTR and the ICTY. I have also considered whether or not the element of non-consent should be included in the definition of rape.

It may well be argued that there is an adequate legal framework for the prosecution of sexual violence crimes; however the next chapter will endeavour to establish whether the ICC has been successful in prosecuting such crimes particularly under Article 7 and 8 of the Rome Statute.

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<sup>86</sup> Article 8(2)(e)(iv) Rome Statute 1988.

<sup>87</sup> Article 7(g) Rome Statute 1988.

<sup>88</sup> Article 8 (2) (b)(xxi) Rome Statute 1988.

<sup>89</sup> Article 8 (2)(xxii) Rome Statute 1988.

## CHAPTER FOUR

### 4. INTRODUCTION

In chapter three of this mini-thesis I have established that in terms of the Rome Statute, rape is defined as the perpetrator invading the body of a person by conduct resulting in (a) the penetration, however slight of any part of the body of the victim: (b) the invasion must have been committed by force, or by threat of force or coercion such as that caused by fear of violence against such person or another person.<sup>1</sup> According to Article 7(g) this definition can also be found as a crime against humanity if committed as part of a widespread or systematic attack against the civilian population.<sup>2</sup> Article 8 provides that sexual violence is considered a war crime if committed with the intention to destroy: in whole or part a national, ethnical, racial or religious group.<sup>3</sup>

As mentioned in Chapter one, this mini-thesis will focus on case law mainly from Africa because it is within this continent that the majority of civil wars and sexual violence crimes are occurring.<sup>4</sup> African leaders have argued that the OTP at the ICC has focused on African situations merely out of the desire to avoid confrontation with major powers or as a tool of western foreign policy, it is worthwhile that these leaders realise that this may be because the bulk of conflicts is currently within the African continent.

There is also an apparent reluctance by domestic courts to engage perpetrators of sexual violence during armed conflict. A glaring example of this was South Africa's failure to arrest Sudanese President Omar al-Bashir during his visit to the country in 2015.<sup>5</sup> The ICC charged President Omar al-Bashir with five counts of crimes against humanity, one of those counts being rape.<sup>6</sup> He remains at large.<sup>7</sup> South Africa is a signatory to the Rome Statute and in failing to comply with the ICC and its obligations; it proved that it was leaning on the wrong side of the impunity debate.<sup>8</sup> Both, the DRC and Uganda have not made tangible efforts to engage perpetrators of sexual violence within their domestic courts. This further demonstrates

<sup>1</sup> De Brouwer A *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (2005) 170.

<sup>2</sup> Article 7 Rome Statute 1998.

<sup>3</sup> Article 8 Rome Statute 1998.

<sup>4</sup> Omeje K & Hepner T *Conflict and Peacebuilding in the African Great Lakes Region* (2013) 44.

<sup>5</sup> Allison S „Sticking with the ICC is Africa's best shot at reform.“ 15 June 2015 available at <https://www.issafrica.org> (accessed on 10 September 2017).

<sup>6</sup> *The Prosecutor v Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09.

<sup>7</sup> *The Prosecutor v Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09.

<sup>8</sup> Allison S “Sticking with the ICC is Africa's best shot at reform.” 15 June 2015 available at <https://www.issafrica.org> (accessed on 10 September 2017).

that it is vital that the countries do not withdraw from the ICC but rather, aid in improving its efficiency.

A case from Guatemala will also be examined in this chapter for three reasons. First because this is the first time that sexual violence during armed conflict has been dealt with in the domestic courts of the country where the abuse actually occurred. Secondly, it seeks to build a standard of proof based on the testimony of survivors which is important because in cases like these, where the events occurred many years ago, little physical evidence is available. Lastly, it also serves as a reason for optimism because justice was served after decades of impunity.

International criminal law is the primary mechanism to prosecute and hold individuals accountable for sexual violence crimes.<sup>9</sup> Prosecutors at the ICC are charged with the mandate to investigate and charge perpetrators. While it is true that the ICC is currently investigating sexual abuses, it may be argued that the ICC's commitment to rigorously investigating, prosecuting and convicting sexual violence offenders is questionable.<sup>10</sup> This chapter will discuss ICC cases in which the Office of the Prosecutor (OTP), succeeded and failed to bring charges of sexual violence against women. Despite documented widespread sexual violence against women in armed conflicts around the world, the ICC has only sought a limited number of sexual slavery and rape charges.<sup>11</sup> To date the ICC has charged four men in the DRC for international criminal violations.<sup>12</sup> It has also included rape as part of indictments against several criminals from Uganda and the Central African Republic amongst other countries.

#### 4.1 Investigations by the ICC

Upon referrals by State Parties or by the UNSC, or on its own initiative and with the judges authorisation, the OTP conducts investigations by gathering and examining evidence, questioning persons under investigation and questioning victims and witnesses for the purpose of finding evidence of an accused's innocence or guilt.<sup>13</sup> The OTP must investigate

<sup>9</sup> Grover S *Prosecuting International Crimes and Human Rights Abuses Committed Against Children Leading International Court Cases* (2010) 279.

<sup>10</sup> Owen M "Fight Fire with Fire: The ICC Should Be more Aggressive in Pursuing Crimes of Sexual Violence" *Criminal Law Brief* (2009) 104.

<sup>11</sup> Stahn C *The Law and the Practice of the International Criminal Court* (2015) 807.

<sup>12</sup> Owen M "Fight Fire with Fire: The ICC Should Be more Aggressive in Pursuing Crimes of Sexual Violence" *Criminal Law Brief* (2009) 105.

<sup>13</sup> Cryer R, Friman H, Robinson D et al *An Introduction to International Criminal Law and Procedure* (2010) 2ed 445.

incriminating and exonerating circumstances equally; this requires cooperation and assistance from States, international organisations and also sending investigators to areas where the alleged crimes occurred to gather evidence. Investigators must be careful not to create any risk to the victims and witnesses.<sup>14</sup>

## 4.2 Analysis of cases and charges brought against the accused

In 2003, after numerous failed negotiation attempts and military action to bring about a settlement to the conflict in Uganda, the Ugandan government referred the LRA situation to the ICC.<sup>15</sup> The LRA has perpetrated a brutal campaign in northern Uganda, the northern areas of the DRC and the Central African Republic.<sup>16</sup> The LRA committed numerous crimes against humanity and war crimes whilst seeking to abolish the government and replace it with a government based on the biblical Ten Commandments.<sup>17</sup> Civilians have been brutalized by acts which include murder, abduction, mutilation and sexual enslavement.<sup>18</sup> Abducted civilians, including children have been forcibly recruited as soldiers, porters and sex slaves to serve the LRA and contribute to attacks against the Ugandan army and civilian communities.<sup>19</sup> Claims of ‘supernatural’ divine guidance by the leader Joseph Kony, effectively make his followers more willing to carry out his brutal orders.<sup>20</sup>

### The Prosecutor v Dominic Ongwen

The accused in this case is an alleged former Brigade Commander of the LRA. Arrest warrants were issued in 2005 for Ongwen along with four other LRA commanders, which include Joseph Kony. Only Ongwen is currently in ICC custody and faces trial. To date, all other suspects remain at large or have died.<sup>21</sup>

Initially, the OTP brought three counts of crimes against humanity and four counts of war crimes against Ongwen, none of which included sexual violence crimes. However, on 21

<sup>14</sup> ICC Situations under Investigation available at <https://www.icc-icpt.int> (accessed on 8 May 2017).

<sup>15</sup> Nichols L *The International Criminal Court and the End of Impunity in Kenya* (2015) 39.

<sup>16</sup> Traylor A “Uganda and the ICC: Difficulties in Bringing the Lord’s Resistance Army Leadership before the ICC” *Eyes on the ICC* 24.

<sup>17</sup> Traylor A “Uganda and the ICC: Difficulties in Bringing the Lord’s Resistance Army Leadership before the ICC.” *Eyes on the ICC* 24.

<sup>18</sup> Mullins C& Rothe D *Blood Power and Bedlam: Violations of International Criminal Law in Post-Colonial Africa* (2008) 126.

<sup>19</sup> Traylor A “Uganda and the ICC: Difficulties in Bringing the Lord’s Resistance Army Leadership before the ICC.” *Eyes on the ICC* 25.

<sup>20</sup> Hanlon K “Peace or Justice: Now that peace is being negotiated in Uganda, will the ICC still pursue justice?”

*Tulsa Journal of Comparative and International Law* (2007) 297.

<sup>21</sup> Moore J *Humanitarian Law in Action* (2012) 135.



December 2015, the Prosecutor charged the accused with an additional 70 counts of war crimes and crimes against humanity. These expanded charges against Ongwen include sexual and gender-based crimes committed from 2002 to 2005, forced marriage, rape, torture, sexual slavery and enslavement as well as the conscription and use of children under the age of 15 to participate actively in hostilities from 2002 to 2005 in the Sinia Brigade.<sup>22</sup> This mini-thesis focuses only on the charges of forced marriage, forced pregnancy, rape, sexual slavery and enslavement which the Prosecution will charge as crimes against humanity under Article 7 as well as the charges of forced pregnancy, rape, sexual slavery and outrages upon personal dignity which fall under Article 8 of the Rome Statute.<sup>23</sup>

The charges brought against Ongwen are as a direct perpetrator, indirect perpetrator and indirect co-perpetrator under Article 25(3)(a) of the Rome Statute, and alternatively for ordering, soliciting or inducing the crimes and for contributing in any other way to the commission or attempted commission of the crimes under Articles 25(3)(b), 25(d)(i) and (ii) respectively. He is also charged in the alternative as a commander under Article 28(a) of the Rome Statute.<sup>24</sup>

Aforementioned at paragraph 2.5 in Chapter 2 of this mini-thesis, the ICC allows for victim participation. A total number of 4,107 victims have been accepted to participate in proceedings in *The Prosecutor v Dominic Ongwen*.<sup>25</sup> They are represented by two teams of lawyers: a first group of victims is represented by two lawyers, Mr Manoba and Mr Cox, who were chosen by these victims; a second group of victims who did not choose a lawyer are represented by Ms Massidda from the Office of Public Counsel for Victims.<sup>26</sup> Through their legal representatives, the participating victims can exercise rights at trial such as attending public/non-public hearings, be notified of filed documents, question witnesses and present evidence should leave to do so be granted by the Chamber.<sup>27</sup>

The trial against Ongwen is important for three reasons: first, these charges include the largest number and widest range of charges for sexual and gender-based crimes including

<sup>22</sup> ICC case information sheet: *The Prosecutor v Dominic Ongwen* ICC-02/04-01/15 available at <https://www.ic-jcp.int> (accessed on 8 May 2017).

<sup>23</sup> Article 7&8 Rome Statute 1998.

<sup>24</sup> Decision on the confirmation of charges against Dominic Ongwen. ICC-02/04-01/15-422-Red. available at [https://www.icc-cpi.int/CourtRecords/CR2016\\_02331](https://www.icc-cpi.int/CourtRecords/CR2016_02331) (accessed on 8 May 2017).

<sup>25</sup> Situation in Uganda: *The Prosecutor v Dominic Ongwen* ICC-02/04-01/15 "Opening of the trial in the case The Prosecutor v. Dominic Ongwen" 6 December 2016 available at <https://www.icc-cpi.int> (accessed 8 May 2017).

<sup>26</sup> *The Prosecutor v Dominic Ongwen* ICC-02/04-01/15.

<sup>27</sup> Funk M Victims' Rights and Advocacy at the International Criminal Court (2015) 58.



rape, sexual slavery, forced marriage and forced pregnancy with charges of torture, enslavement and outrages upon personal dignity also underpinned by gender-based violence.<sup>28</sup> Secondly, it is also the first ICC case to reach the trial stage in the Uganda situation in relation to the 26 year conflict between the LRA and the Government of Uganda.<sup>29</sup> Moreover, this is also the first time that charges of forced pregnancy and forced marriage have been brought by the OTP in the ICC or any other international court.<sup>30</sup> These charges, combined with the characterisation of sexual and gender-based violence as other forms of criminality, such as torture and enslavement are unique features of *The Prosecutor v Dominic Ongwen*.

Ongwen's appearance before the ICC represents a long awaited step towards accountability for the grave atrocities committed by the LRA in Uganda, it is a reason for optimism and hope that impunity will be put to an end and justice will be taken seriously for the victims of LRA crimes, including the sexual violence and gender-based crimes committed against women and girls who are still suffering the consequences of those incidents.<sup>31</sup> The trial began on 6 December 2016 and is still on going.<sup>32</sup>

#### *The Prosecutor v Joseph Kony and Vincent Otti*

The ICC in *The Prosecutor v Joseph Kony and Vincent Otti*, has brought twelve counts of crimes against humanity and twenty one counts of war crimes against Joseph Kony whilst bringing eleven counts of crimes against humanity and twenty one for war crimes against Vincent Otti respectively.<sup>33</sup> These crimes against humanity and war crimes include rape, inducing rape and sexual enslavement.<sup>34</sup>

The Pre-Trial Chamber found that first, the LRA was allegedly founded and is led by Joseph Kony who is the Chairman and Commander-in-Chief and that the LRA is organised in a

<sup>28</sup> First ICC Trial in the Uganda Situation: *The Prosecutor v Dominic Ongwen* Dec 5 2016 available at <https://www.4genderjustice.org> (accessed on 8 May 2017).

<sup>29</sup> Sriram C *Transitional Justice and Peacebuilding on the Ground: Victims and Ex-combatants* (2013) 203.

<sup>30</sup> Women's Initiatives for Gender Justice statement "First ICC confirmation of charges hearing in the Uganda Situation." 20 January 2016 available at <http://4genderjustice.org/first-icc-confirmation-of-charges-hearing-inthe-uganda-situation/> (accessed on 8 May 2017).

<sup>31</sup> Women's Initiatives for Gender Justice statement "First ICC confirmation of charges hearing in the Uganda Situation." 20 January 2016 available at <http://4genderjustice.org/first-icc-confirmation-of-charges-hearing-inthe-uganda-situation/> (accessed on 8 May 2017).

<sup>32</sup> As of 8 May 2017.

<sup>33</sup> *Kony et al.* Case available at <https://www.icc-cpi.int> (accessed on 8 May 2017).

<sup>34</sup> *Kony et al.* Case available at <https://www.icc-cpi.int> (accessed on 8 May 2017).

military-type hierarchy which operates as an army.<sup>35</sup> Secondly, Joseph Kony, Vincent Otti and other senior LRA commanders are allegedly the key members of the "Control Altar". This is the section representing the core LRA leadership responsible for devising and implementing LRA strategy, including standing orders to attack and brutalise civilian populations. Thirdly, the Pre-Trial Chamber states that in his capacity as overall leader and Commander-in-Chief of the LRA, individually or together with other persons whose arrests are sought by the Prosecutor, Joseph Kony allegedly committed, ordered or induced the commission of several crimes within the jurisdiction of the ICC during the period from 1 July 2002 to 2004. Warrants for arrest in this case were issued on 8 July 2005; however the suspects are still at large.<sup>36</sup> Until the suspects are arrested and transferred to the seat of court in The Hague, this case will remain in the Pre-Trial stage because the ICC does not try individuals unless they are physically present in the courtroom.<sup>37</sup>

One of the many challenges faced by the ICC in these cases is most notably its inability to capture these alleged perpetrators and bring them before the court in order that they be brought to trial and convicted. Both the United States and African countries that are tracking the LRA leadership should be aided in their efforts of prioritising live capture of the ICC suspects as this will help the ICC in its other cases.<sup>38</sup>

It may be well argued that further impediments exist concerning the success of the ICC in its prosecution of the LRA. In terms of the issue of admissibility: the crimes that all the LRA commanders are charged with satisfy the requirements of Article 7 and 8 of the Rome Statute.<sup>39</sup> As previously mentioned at paragraph 1.1 of Chapter 1, in order for the ICC to have jurisdiction, the State concerned must be either unwilling or unable to investigate or prosecute the accused.<sup>40</sup> Such an instance may be when a country's infrastructure is ravaged by war and the court system cannot proceed, the case would then be admissible.<sup>41</sup>

<sup>35</sup> *The Prosecutor v Joseph Kony and Vincent Otti* ICC-02/04-01/05.

<sup>36</sup> ICC case Information Sheet: *The Prosecutor v Dominic Ongwen* ICC-02/04-01/15 available at <https://www.icc-cpi.int> (accessed on 8 May 2017).

<sup>37</sup> *The Prosecutor v Joseph Kony and Vincent Otti* ICC-02/04-01/05.

<sup>38</sup> First Ugandan suspect, LRA Commander Dominic Ongwen, transferred to the ICC in The Hague. 21 Jan 2015 available at <https://www.iccwomen.org> (accessed on 8 May 2017).

<sup>39</sup> Traylor A „Uganda and the ICC: Difficulties in Bringing the Lord's Resistance Army Leadership before the ICC." *Eyes on the ICC* 28.

<sup>40</sup> Article 17 Rome Statute 1998.

<sup>41</sup> Guislain P *Connecting Sub-saharan Africa: A World Bank Group Strategy For Information and Communication Technology Sector Development* (2005) 18.

The atrocities committed by the LRA have negatively affected infrastructure in Northern Uganda, however the rest of Uganda remains relatively unaffected.<sup>42</sup> The country is known for having one of the best judicial systems in Africa.<sup>43</sup> Furthermore, the LRA has no effective impact on Uganda's judicial system which is neither totally nor substantially collapsed.<sup>44</sup> In fact LRA operations are currently largely in the DRC and the CAR which further suggests that Uganda is able to prosecute the LRA.<sup>45</sup> As far as unwillingness goes, the Ugandan government was willing to offer blanket amnesty to all LRA leaders that laid down their arms in order to end the conflict.<sup>46</sup> Critics argue that the situation in Uganda may fall outside the jurisdiction of the ICC as Uganda is both willing and able to prosecute these crimes within its own court system.<sup>47</sup> Ultimately however, the ICC Pre-Trial Chamber decided that the LRA case is admissible due to the fact that the Ugandan government has been consistently unable to bring LRA leadership into custody.<sup>48</sup>

A second concern is that the issued arrest warrants by the ICC is hampering efforts to bring an end to the conflict. Since warrants were issued, the LRA has fluctuated between periods of severe violence and relative calm.<sup>49</sup> Although the warrants have put international pressure on the LRA, they have also proved to be an obstacle for peace negotiations.<sup>50</sup> The 2007 Principles Agreement which had been proposed to end the conflict was left unsigned by Kony due to failure to meet his demand of retraction of ICC arrest warrants.<sup>51</sup> It can be argued that the LRA cases place the interests of justice ahead of peace which may prove to be counterproductive.<sup>52</sup> Critics argue that the Rome Statute grants the Prosecutor the ability to

<sup>42</sup> Human Rights Watch *The Scars of Death: Children Abducted by the Lord's Resistance Army in Uganda* (1997) 53.

<sup>43</sup> Tiller J „The ICC Prosecutor and Positive Complementarity: Strengthening the rule of law.“ *International Criminal Law Review* (2013) 524.

<sup>44</sup> Human Rights Watch *The Scars of Death: Children Abducted by the Lord's Resistance Army in Uganda* (1997) 60.

<sup>45</sup> Schomerus M& Tumutegyeize K “After Operation Lightning Thunder Protecting communities and building peace.” April 2009 available at <https://www.c-r.org> (accessed on 8 May 2017).

<sup>46</sup> Refugee Law project, Whoes Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential For Conflict Resolution and Long Term Reconciliation, Working Paper No.15 (2005).

<sup>47</sup> Hanlon K “Peace or Justice: Now that peace is being negotiated in Uganda, will the ICC still pursue justice?” *Tulsa Journal of Comparative and International Law* (2007) 296.

<sup>48</sup> Warrant of Arrest for Joseph Kony issued on 8th July 2005 as amended on 27th September 2005 ICC-02/04-01/05-53 available at <https://www.icc-cpi.int> (accessed on 25 May 2017).

<sup>49</sup> House of Commons International Development Committee *Conflict and Development: Peacebuilding and Post-conflict* (2006) 203.

<sup>50</sup> Okeowo A “LRA and Ugandan Government Renew Truce” Daily Monitor Kampala July 27 2007 Global Policy Forum available at <https://www.globalpolicy.org> (accessed on 9 May 2017).

<sup>51</sup> Corrigan P “Why the ICC Must Stop Impeding Juba Process” Daily Monitor Kampala July 27 2007 Global Policy Forum available at <https://www.globalpolicy.org> (accessed on 9 May 2017).

<sup>52</sup> Allen T “War and Justice in Northern Uganda: An Assessment of the International Criminal Court's Intervention”, Crisis States Research Centre London School of Economics Independent Report (2005).

withdraw ICC investigations in the event that they do not serve „the interests of justice“ or that the domestic government proves willing and able to hold alleged criminals accountable under the principle of Complementarity. Though accountability will occur outside of an international courtroom if the ICC withdraws the indictments, it will nonetheless advance the goals of the ICC by acknowledging the rule of law and by combating impunity for LRA leadership.<sup>53</sup> In facilitating an expeditious end to the conflict and taking steps to eliminate impunity, perhaps many lives would have been saved.<sup>54</sup>

### *The Prosecutor v Sylvester Mudacumura*

The case of *The Prosecutor v Sylvester Mudacumura* is another case in which the suspect is still at large and the ICC has not been able to commence trial. The ICC has brought nine counts of war crimes against Mudacumura, some of which are: attacking civilians, murder, mutilation, cruel treatment, rape and outrages upon personal dignity. These will be prosecuted under Article 8 of the Rome Statute.<sup>55</sup>

The suspect is the alleged supreme commander of the Army for the *Forces Démocratiques pour la Libération du Rwanda*.<sup>56</sup> The Pre-Trial Chamber stated that there are reasonable grounds to believe that: an armed conflict of a certain level of intensity and of a non-international character took place over a prolonged period of time in the Kivu Provinces of the DRC, attacks were carried out in the Kivus and war crimes were allegedly committed, namely: murder, mutilation, cruel treatment, torture, outrage upon personal dignity, attack against the civilian population, pillaging, rape, and destruction of property.<sup>57</sup> On the other hand, the Chamber also finds that there are not reasonable grounds to believe that Mudacumura acted in a position of authority of a well organised organisation with clear hierarchical structure and with control over his forces and authority over recruiting, promoting, removing and disciplining them or that his orders had a direct effect on the commission of the crimes.<sup>58</sup> In accordance with the warrant of arrest, Mudacumura has

<sup>53</sup> Johnston G & Ward T *Law and Crime* (2009) 184.

<sup>54</sup> Hanlon K “Peace or Justice: Now that peace is being negotiated in Uganda, will the ICC still pursue justice?” *Tulsa Journal of Comparative and International Law* (2007) 298.

<sup>55</sup> *The Prosecutor v Sylvester Mudacumura* ICC-01/04-01/12.

<sup>56</sup> Case Information Sheet: Situation in the Democratic Republic of the Congo *The Prosecutor v Sylvester Mudacumura* ICC-01/04-01/12.

<sup>57</sup> *The Prosecutor v Sylvester Mudacumura* ICC-01/04-01/12.

<sup>58</sup> *The Prosecutor v Sylvester Mudacumura* ICC-01/04-01/12.

allegedly engaged his criminal responsibility as an indirect co-perpetrator under article under article 25(3)(b) of the Rome Statute.<sup>59</sup>

*The Prosecutor v Jean-Pierre Bemba*

Bemba Gombo was charged with two counts of crimes against humanity; murder and rape and three counts of war crimes which include murder, rape and pillaging allegedly committed during 2002 and 2003 in the CAR.<sup>60</sup>

The OTP undertook a detailed investigation of the information received from the government of the CAR, and also requested and obtained additional information from various sources. After reviewing the information received, the Prosecutor found that the conditions required by the Rome Statute for launching an investigation were satisfied.<sup>61</sup>

The Pre-Trial Chamber found that there was reasonable grounds to believe that, a non-international armed conflict took place in the CAR from 26 October 2002 to 15 March 2003, during which part of the national armed forces of Ange-Félix Patassé, the then President of the CAR allied with combatants of the Mouvement de Libération du Congo (MLC) which was led by Bemba Gombo.<sup>62</sup>

The MLC was confronted by a rebel movement led by François Bozizé, former Chief of Staff of the Central African armed forces. In the context of this conflict, the MLC forces, led by Bemba Gombo, committed crimes against the civilian population, in particular rape, murder and pillaging.<sup>63</sup> The attack against the civilian population in the CAR was widespread and systematic which qualified it to be prosecuted under Article 7(1)(a) and 7(1)(g) of the Rome Statute as crimes against humanity.<sup>64</sup> The attack against the civilian population in Bangui and Mongoumba was carried out on a large scale and targeted a significant number of civilian victims and was therefore prosecuted under Article 8(2)(c)(i), 8(2)(e)(vi) and 8(2)(e)(v) as war crimes.<sup>65</sup>

<sup>59</sup> Case Information Sheet: Situation in the Democratic Republic of the Congo *The Prosecutor v Sylvestre Mudacumura* ICC-01/04-01/12.

<sup>60</sup> Mariniello T *The International Criminal Court in Search of its Purpose and Identity* (2014) 45.

<sup>61</sup> Case Information Sheet: Situation in the Central African Republic *The Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08.

<sup>62</sup> Warrant of arrest for jean-pierre bemba gombo replacing the warrant of arrest issued on 23 MAY 2008 ICC-01/05-01/08-15 available at <https://www.icc-cpi.int> (accessed on 9 May 2017).

<sup>63</sup> *The Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08.

<sup>64</sup> *The Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08.

<sup>65</sup> Article 8 Rome Statute 1998.



Bemba Gombo was the President and Commander-in-Chief of the MLC. He effectively acted as a military commander and had effective authority and control over the MLC troops which allegedly committed the above-mentioned crimes.<sup>66</sup> Trial Chamber III concluded that the crimes against humanity of murder and rape and the war crimes of murder, rape and pillaging committed by the MLC forces in the course of the 2002 to 2003 CAR operation were a result of Bemba Gombo's failure to exercise control properly.<sup>67</sup> Bemba Gombo knew that MLC troops were committing crimes and did not take all necessary and reasonable measures within his power to prevent or repress their commission.<sup>68</sup>

Initially the OTP had only charged Bemba Gombo as criminally responsible, jointly with other persons or through other persons under Article 25(3)(a).<sup>69</sup> However, during the confirmation of charges stage, the Pre-Trial Chamber decided to adjourn the confirmation hearing in *The Prosecutor v Jean-Pierre Bemba Gombo* and requested the Prosecutor to consider submitting to it an amended document containing the charges, taking into account that the legal characterisation of the facts of the case may correspond to a mode of liability other than the individual responsibility relied on by the Prosecutor; namely criminal responsibility as a military commander or superior within the meaning of Article 28 of the Rome Statute.<sup>70</sup> Following an in depth review of the amended document containing the charges submitted by the Prosecutor, it was found that Bemba Gombo is criminally responsible for having effectively acted as a military commander within the meaning of Article 28.<sup>71</sup> He was therefore convicted under Article 28(a) of the Rome Statute; committing, as military commander.<sup>72</sup>

The trial commenced on 22 November 2010 before Trial Chamber III with the parties and participants making their opening statements. A total number 5229 victims were authorised to participate in the proceedings with three of these victims directly presenting their views and

<sup>66</sup> Case Information Sheet: Situation in the Central African Republic *The Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08.

<sup>67</sup> Case Information Sheet: Situation in the Central African Republic *The Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08.

<sup>68</sup> Case Information Sheet: Situation in the Central African Republic *The Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08.

<sup>69</sup> Falkowska M "The Bemba Trial before the International Criminal Court: Defining an armed conflict through the scope of Commander's Responsibility" *Military War and Law of War Review* (2015-2016) 294.

<sup>70</sup> Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of *The Prosecutor Against Jean-Pierre Bemba Gombo* ICC-01/05-01/08-424.

<sup>71</sup> Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of *The Prosecutor Against Jean-Pierre Bemba Gombo* ICC-01/05-01/08-424.

<sup>72</sup> Judgment pursuant to Article 74 of the Statute ICC-01/05-01/08-3343 21 March 2016 Trial Chamber III Judgment Case: *The Prosecutor v Jean-Pierre Bemba Gombo*.



concerns to the court.<sup>73</sup> The crimes under the ICC's jurisdiction cause tremendous suffering whilst women and children are particularly vulnerable; this is why the ICC pays special attention to the role of victims in the proceedings.<sup>74</sup> Along with determining the exact modality of victim participation, the ICC has the power to order protective measures for the victims.<sup>75</sup> Although reparations can be ordered for victims, realistically it may not be possible to award all victims as these atrocities were committed against thousands/millions of victims.<sup>76</sup>

On 21 March 2016, Trial Chamber III delivered its verdict and unanimously declared Bemba Gombo guilty beyond any reasonable doubt of two counts of crimes against humanity and three counts of war crimes. He is the first person to be convicted by the ICC under Article 28 of the Rome Statute.<sup>77</sup> He was sentenced to 18 years of imprisonment.<sup>78</sup> The time he has spent in detention, in accordance with an order of the ICC since 24 May 2008, will be deducted from his sentence and issues related to the procedure for victim reparations will be addressed in future in accordance with Article 75 of the Rome Statute.<sup>79</sup> This conviction offers a unique possibility of deterrence to the crime of rape. Bemba Gombo's rise to power and visibility through his government positions as both a political and military leader on the DRC made this case important in the fight against impunity.<sup>80</sup>

The following case that I shall consider; shows the importance of effective investigation of sexual violence and gender based crimes at the ICC.

#### *The Prosecutor v Thomas Lubanga Dyilo*

Thomas Lubanga Dyilo was charged with war crimes of enlisting and conscripting of children under the age of 15 years into the Patriotic Force for the Liberation of Congo (FPLC) and using them to participate actively in hostilities in the context of an armed conflict

<sup>73</sup> Case Information Sheet: Situation in the Central African Republic *The Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08.

<sup>74</sup> Sang-hyun Song H „The International Criminal Court: International Criminal Justice for Asia and the World.“ *Asia Pacific Yearbook of International Humanitarian Law* (2005) 9.

<sup>75</sup> Sang-hyun Song H „The International Criminal Court: International Criminal Justice for Asia and the World.“ *Asia Pacific Yearbook of International Humanitarian Law* (2005) 9.

<sup>76</sup> Sang-hyun Song H „The International Criminal Court: International Criminal Justice for Asia and the World.“ *Asia Pacific Yearbook of International Humanitarian Law* (2005) 9.

<sup>77</sup> Falkowska M “The Bemba Trial before the International Criminal Court: Defining an armed conflict through the scope of Commander's Responsibility” *Military War and Law of War Review* (2015-2016) 293.

<sup>78</sup> As of 21 June 2016.

<sup>79</sup> Case Information Sheet: Situation in the Central African Republic *The Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08.

<sup>80</sup> Goodell H “The Greatest Measure of Deterrence: A conviction for Jean-Pierre Bemba Gombo” *University of California* 197.

not of an international character from 1 September 2002 to 13 August 2003. This is punishable under Article 8(2)(e)(vii) of the Rome Statute.<sup>81</sup>

The Trial Chamber was satisfied beyond a reasonable doubt that first, Thomas Lubanga Dylio and his co-perpetrators agreed to, and participated in a common plan to build an army for the purpose of establishing and maintaining political and military control over Ituri. As a result of the implementation of this common plan, boys and girls under the age of 15 were conscripted and enlisted into the FPLC between 1 September 2002 and 13 August 2003.<sup>82</sup>

Secondly, it was found that FPLC used children under the age of 15 to participate actively in hostilities including during battles. Lastly, Thomas Lubanga Dylio was the Commander in Chief of the army and its political leader and as such he was informed on a continuous basis of FPLC operations. He was involved in the planning of military operations and played a critical role in providing logistical support, including providing weapons, ammunition, food, uniforms, military rations and other general supplies to the troops. Furthermore, in a speech at the Rwampara military camp, he encouraged children including those under the age of 15 years to join the army and to provide security for the population.<sup>83</sup>

The confirmation hearing was held at the seat of the Court in The Hague from 9 to 28 November 2006. On 29 January 2007, the judges of the Pre-Trial Chamber confirmed the charges against Thomas Lubanga Dylio. The Chamber heard 36 witnesses, including 3 experts called by the OTP, 24 witnesses called by the defence and 3 witnesses called by the legal representatives of the victims participating in the proceedings. The Chamber also called 4 of its own experts.<sup>84</sup> A total of 129 victims, were granted the right to participate in the trial.<sup>85</sup>

The Trial Chamber decided unanimously that Thomas Lubanga Dylio is guilty as a co-perpetrator of the war crimes of conscripting and enlisting children under the age of 15 and using them to participate actively in armed conflict. He was sentenced to 14 years

<sup>81</sup> Case Information Sheet: Situation in the Democratic Republic of the Congo *The Prosecutor v Thomas Lubanga Dyilo* ICC 01/04-01/06.

<sup>82</sup> Case Information Sheet: Situation in the Democratic Republic of the Congo *The Prosecutor v Thomas Lubanga Dyilo* ICC 01/04-01/06.

<sup>83</sup> *The Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06.

<sup>84</sup> Case Information Sheet: Situation in the Democratic Republic of the Congo *The Prosecutor v Thomas Lubanga Dyilo* ICC 01/04-01/06.

<sup>85</sup> Case Information Sheet: Situation in the Democratic Republic of the Congo *The Prosecutor v Thomas Lubanga Dyilo* ICC 01/04-01/06.

imprisonment and sent to prison facility in the DRC to serve out his sentence.<sup>86</sup> The ICC may order a convicted person to pay compensation to the victims of the crimes. Reparations may include monetary compensation, return of property, rehabilitation or symbolic measures such as apologies or memorials.<sup>87</sup>

In *The Prosecutor v Thomas Lubanga Dyilo*, it was alleged that rape and sexual slavery was committed against girl soldiers in the DRC. However, the charges do not include sexual violence despite allegations that girls were kidnapped into Thomas Lubanga Dyilo's militia to be raped and kept as sex slaves. The ICC therefore is not trying these cases due to a lack of available evidence in order to try the perpetrators.<sup>88</sup> As long as these crimes are not subject to trial by the ICC then the DRC has little incentive to pursue Thomas Lubanga Dyilo or any other perpetrators for those crimes, thus they will go entirely unaddressed at both the national and international level.<sup>89</sup> Sometimes the focus of the OTP may go wider than just the high ranking officials with the most responsibility for ICC crimes.<sup>90</sup> It could be argued that the OTP investigators do not have enough resources to allow them to pursue the kind of evidence that will trigger an examination of whether the charges should include additional crimes, in particular sexual violence crimes which are very difficult to investigate given that many victims are reluctant to discuss them.<sup>91</sup> There is a chance of prosecutorial omissions and errors in the investigation, charging and prosecution of gender based violence.<sup>92</sup> Working with intermediaries in the field is vital to international criminal investigations. Intermediaries are often the first ones in the areas where atrocities have occurred and naturally are well positioned to gather evidence.<sup>93</sup> The lack of an ICC police force and limited resources mean that intermediaries provide important information to the OTP. However, the OTP has a responsibility to verify such information.

<sup>86</sup> Case Information Sheet: Situation in the Democratic Republic of the Congo *The Prosecutor v Thomas Lubanga Dyilo* ICC 01/04-01/06.

<sup>87</sup> Decision on the review concerning reduction of sentence of Mr Germain Katanga No. ICC-01/04/01/07 para 103.

<sup>88</sup> Freedman J *Gender Violence and Politics in the Democratic Republic of Congo* (2004) Chap 4.

<sup>89</sup> Freedman J *Gender Violence and Politics in the Democratic Republic of Congo* (2007) Chap 4.

<sup>90</sup> Sacouto S & Cleary K "The Importance of effective investigation of Sexual Violence and Gender based Crimes at the International Criminal Court." *American University Journal of Gender, Social Policy & the Law* (2009) 348.

<sup>91</sup> Van Schaack B "Obstacles on the road to Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson." *Journal of Gender, Social Policy & the Law* 361.

<sup>92</sup> Bantekas I & Mylonaki E *Criminological Approaches to International Criminal Law* (2014) 134.

<sup>93</sup> Bantekas I & Mylonaki E *Criminological Approaches to International Criminal Law* (2014) 134.

### 4.3 Challenges faced by the ICC when conducting investigations

Challenges such as these have also come up in the context of *The Prosecutor v Germain Katanga*: in which the majority of judges confirmed the charges of sexual slavery against him; however Anita Usack dissented from this conclusion finding the evidence insufficient to link the accused with rape and sexual slavery.<sup>94</sup> Despite evidence that there was widespread rape by combatants and commanders in the region plus a statement from a witness that Katanga knew rapes were occurring, the judge found the evidence insufficient to establish that the suspects either knew or intended that rape would be committed by their subordinates.<sup>95</sup> This highlights that the tendency of international courts such as the ICTR and ICTY to prefer direct evidence that a superior either ordered or was present during the crime may well continue at the ICC.<sup>96</sup> Another challenge to the effective investigation of sexual violence has been the requirement that the Prosecution meet a higher evidentiary standard of proof as compared to cases not of sexual violence crimes.<sup>97</sup> Rape in the context of conflict is often tacitly tolerated even if not officially sanctioned, and so the absence of explicit orders in these cases makes it difficult for the prosecution to link the crime to the perpetrator.<sup>98</sup>

From the outset, there is physical distance between proceedings in The Hague and the locations where the crimes are alleged to have been committed. This presents a significant challenge as even locating a crime scene may prove troublesome as they are often established years after the crime was committed, plus States are uncooperative when the ICC is investigating political figures that remain in power.<sup>99</sup> Further impediments include language and cultural barriers when it comes to the gathering of information and questioning of witnesses because evidence has to be translated from local languages into English or French.<sup>100</sup> Most importantly, areas in which the most atrocious crimes took place continue to

<sup>94</sup> Jarvis M& Brammertz S *Prosecuting Conflict –Related Sexual Violence at the ICTY* (2016) 69.

<sup>95</sup> *The Prosecutor v Germain Katanga* ICC-01/04-01/07.

<sup>96</sup> Sacouto S& Cleary K “The Importance of effective investigation of Sexual Violence and Gender based Crimes at the International Criminal Court.” *American University Journal of Gender, Social Policy & the Law* (2009) 359.

<sup>97</sup> Mannix B “A quest for justice: Investigating sexual and gender based violence at the International Criminal Court.” 11.

<sup>98</sup> Sacouto S& Cleary K “The Importance of effective investigation of Sexual Violence and Gender based Crimes at the International Criminal Court.” *American University Journal of Gender, Social Policy & the Law* (2009) 353.

<sup>99</sup> Mannix B “A quest for justice: Investigating sexual and gender based violence at the International Criminal Court.” 12.

<sup>100</sup> Moffett L *Justice for Victims before the International Criminal Court* (2014) 99.

be plagued by violence, instability and uncertainty and so security risks exist.<sup>101</sup> This makes investigations by ICC personnel very dangerous, witnesses cannot be met with safely.<sup>102</sup>

There has been an increase in the number of situations that the ICC has entered into and redeployed staff has been spread very thin which has resulted in a detrimental impact on both the ICC and on the staff themselves.<sup>103</sup> As a solution to these staff shortages, the OTP has undertaken labour-saving measures such as relying on secondary sources of information in place of first hand investigations.<sup>104</sup> However, this has had the effect of discrediting the ICC with some victims. An example of this is found in the case of *The Prosecutor v William Ruto* in which victims expressed their concern that the OTP did not conduct a meaningful investigation into their experiences because they were not interviewed and they also did not know anyone in their area who had been interviewed. Furthermore, no investigation had been conducted in their region at all.<sup>105</sup>

Security concerns are problematic for both the Defence and Prosecution and this was evident in *The Prosecutor v Germain Katanga* in which some of the facts of the case were re-characterised and the mode of liability was changed from the initial indirect co-perpetrator under Article 25(3)(a) to an accessory of crimes against humanity and war crimes under Article 23(1)(d). Re-characterisation of the facts according to ICC Regulation 55 meant that the Defence would have to conduct further investigations but claimed they were given insufficient notice given the prevailing security concerns in Eastern DRC.<sup>106</sup> These issues are exasperated by the challenges unique to sexual and gender based violence during armed conflict.<sup>107</sup>

<sup>101</sup> Stahn C *The Law and Practice of the International Criminal Court* (2015) 819.

<sup>102</sup> Stahn C *The Law and Practice of the International Criminal Court* (2015) 819.

<sup>103</sup> Hamilton R "The ICC's Exit Problem." *New York University Journal of International Law and Politics* (2014) 21.

<sup>104</sup> Hamilton R "The ICC's Exit Problem." *New York University Journal of International Law and Politics* (2014) 21.

<sup>105</sup> Hamilton R "The ICC's Exit Problem." *New York University Journal of International Law and Politics* (2014) 21.

<sup>106</sup> Mannix b "a quest for justice: investigating sexual and gender based violence at the international criminal court." 12.

<sup>107</sup> Mannix b "a quest for justice: investigating sexual and gender based violence at the international criminal court." 12.



*The Prosecutor v Germain Katanga*

Trial Chamber II found Germain Katanga guilty as an accessory, within the meaning of article 25(3)(d) of the Rome Statute of one count of crimes against humanity and four counts of war crimes.<sup>108</sup>

It was established beyond reasonable doubt that Germain Katanga made a significant contribution to the commission of the crimes by the Ngiti militia, which was acting with a common purpose by assisting its members to plan the operation against Bogoro.<sup>109</sup> The Chamber found that Germain Katanga acted in the knowledge of the criminal common plan devised by the militia to target, murder and attack civilians as well as destroy and pillage property.<sup>110</sup> He contributed by virtue of his position in equipping the militia and enabling it to operate in an organised and efficient manner.<sup>111</sup>

Germain Katanga was however, acquitted of the charges of rape and sexual slavery as a crime against humanity and the war crimes of using children under the age of fifteen years to participate actively in hostilities, sexual slavery, and rape.<sup>112</sup> Even though numerous male and female witnesses testified to forced marriage of women and girls, rape by soldiers and sexual enslavement at prison camps, the Chamber found that there was no evidence beyond reasonable doubt that the crimes of rape and sexual slavery were committed.<sup>113</sup> Regarding the crime of using child soldiers, it found that there were children within the Ngiti militia and among the combatants who were in Bogoro on the day of the attack but the Chamber concluded that the evidence presented in support of the accused's guilt did not satisfy it beyond reasonable doubt of the accused's responsibility for these crimes. He was therefore sentenced to 12 years imprisonment and the time spent in detention at the ICC was deducted from his sentence.<sup>114</sup>

<sup>108</sup> Case Information Sheet: Situation in the Democratic Republic of the Congo *The Prosecutor v Germain Katanga* ICC-01/04-01/07.

<sup>109</sup> *The Prosecutor v Germain Katanga* ICC-01/04-01/07.

<sup>110</sup> *The Prosecutor v Germain Katanga* ICC-01/04-01/07.

<sup>111</sup> *The Prosecutor v Germain Katanga* ICC-01/04-01/07.

<sup>112</sup> Case Information Sheet: Situation in the Democratic Republic of the Congo *The Prosecutor v Germain Katanga* ICC-01/04-01/07.

<sup>113</sup> Gekker E "Rape, Sexual Slavery and Forced Marriage at the International Criminal Court: How Katanga Utilizes a Ten Year Old Rule but Overlooks New Jurisprudence." *Hastings Women's Law Journal* (2014) 124.

<sup>114</sup> Case Information Sheet: Situation in the Democratic Republic of the Congo *The Prosecutor v Germain Katanga* ICC-01/04-01/07.



The fact that the sexual violence charges were dropped may bring about uncertainty regarding whether fairness considerations are primarily directed towards the rights of the accused or the interests of the OTP in situations where there is tension between the two.<sup>115</sup>

The aim of the ICC is to end impunity and so it may well be argued that the rights of the victims should come first.<sup>116</sup> ICC Regulations including regulation 55 were adopted by a majority of judges rather than a negotiation and agreement of States that are party to the Rome Statute.<sup>117</sup> It was adopted in an attempt to improve judicial efficiency and fill impunity gaps if the prosecution's charges do not match the facts heard at trial.<sup>118</sup> It was also intended to avoid overburdening resulting from alternative charging and avoid acquittals where there is proof beyond a reasonable doubt that the accused has committed a crime within the jurisdiction of the ICC.<sup>119</sup> However regulation 55 has been criticized on the basis that the judges lacked authority to adopt the regulation because re-characterisation is not a routine function and cannot be reconciled with the well-defined procedures for amending charges set out by the Rome Statute.<sup>120</sup> Yet since its adoption regulation 55 has been used in multiple ICC cases, examples of this are when it was used to re-characterise the relevant conflict in *The Prosecutor v Lubanga* from non-international to international. This demonstrates that this is a powerful tool used in the ICC trials which is frequently used with potentially profound consequences.<sup>121</sup>

The ICC did not have the opportunity to separately address the independent crime of forced marriage in *The Prosecutor v Germain Katanga* case because the Rome Statute does not have jurisdiction over it.<sup>122</sup> Instead of avoiding the issue of forced marriage altogether; by finding Katanga guilty of sexual slavery, the ICC could have identified specific aspects of forced marriage that also constitute sexual slavery.<sup>123</sup> However, the lack of recognition of forced marriage as a separate crime against humanity does not diminish the seriousness of the

<sup>115</sup> Rigney S "The words don't fit you: Recharacterisation of the Charges, Trial Fairness and Katanga." *Melborne Journal of International Law* (2014) 517.

<sup>116</sup> Rigney S "The words don't fit you: Recharacterisation of the Charges, Trial Fairness and Katanga." *Melborne Journal of International Law* (2014) 517.

<sup>117</sup> Stahn C *The Law and Practice of the International Criminal Court* (2015) 903.

<sup>118</sup> Stahn C *The Law and Practice of the International Criminal Court* (2015) 903.

<sup>119</sup> Regulation 55 Rome Statute 1998.

<sup>120</sup> Steer C *Translating Guilt: Identifying Leadership for Mass Atrocity Crimes* (2017) 37.

<sup>121</sup> Steer C *Translating Guilt: Identifying Leadership for Mass Atrocity Crimes* (2017) 37.

<sup>122</sup> Gekker E "Rape, Sexual Slavery and Forced Marriage at the International Criminal Court: How Katanga Utilizes a Ten Year Old Rule but Overlooks New Jurisprudence." *Hastings Women's Law Journal* (2014) 107.

<sup>123</sup> Gekker E "Rape, Sexual Slavery and Forced Marriage at the International Criminal Court: How Katanga Utilizes a Ten Year Old Rule but Overlooks New Jurisprudence." *Hastings Women's Law Journal* (2014) 128.

prosecution and the recognition of the atrocities committed against the women and girls in Ituri and Bogoro.<sup>124</sup>

### *The Prosecutor v Bosco Ntaganda*

Bosco Ntaganda is charged with thirteen counts of war crimes and five counts of crimes against humanity which include of particular importance to this mini-thesis; the rape and sexual slavery of civilians. Bosco Ntaganda is the alleged Deputy Chief of Staff and commander of operations of the FPLC which is an organized armed group involved in two conflicts in Ituri during 2002 to 2003.<sup>125</sup> Interestingly, he is charged pursuant to different modes of liability: direct perpetration, indirect co-perpetration under Article 25(3)(a); ordering, inducing under Article 25(3)(b); any other contribution to the commission or attempted commission of crimes under Article 25(3)(d) or as a military commander for crimes committed by his subordinates under Article 28(a).<sup>126</sup> These charges against Bosco Ntaganda have been confirmed and the trial is on-going.<sup>127</sup>

### *The Prosecutor v Uhuru Kenyatta*

Uhuru Kenyatta is charged with five counts of crimes against humanity which include murder, deportation or forcible transfer of population, rape, persecution and other inhumane acts in the context of the post-election violence in Kenya during 2007 to 2008.<sup>128</sup> The confirmation of charges hearing took place from 21 September to 5 October 2011 and the charges were withdrawn due to insufficient evidence.<sup>129</sup> This case is closed unless and until the OTP submits new evidence.<sup>130</sup>

Similarly, charges in the case of *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* were also dropped by the ICC and the case was terminated.<sup>131</sup> The accused were charged with 3 crimes against humanity under Article 7(1)(a), 7(1)(d) and 7(1)(h) of the Rome

<sup>124</sup> Gekker E "Rape, Sexual Slavery and Forced Marriage at the International Criminal Court: How Katanga Utilizes a Ten Year Old Rule but Overlooks New Jurisprudence." *Hastings Women's Law Journal* (2014) 128.

<sup>125</sup> Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda para 12.

<sup>126</sup> Article 25(3)(a), 25(3)(b), 25(3)(d) & Article 28(a) of the Rome Statute 1998.

<sup>127</sup> As of 15 May 2017.

<sup>128</sup> *The Prosecutor v Uhuru Muigai Kenyatta* ICC-01/09-02/11.

<sup>129</sup> Decision on the withdrawal of charges against Mr Kenyatta No. ICC-01/09-02IU para 12.

<sup>130</sup> *The Prosecutor v Uhuru Muigai Kenyatta* ICC-01/09-02/11 available at <https://www.icc-cpi.int> (accessed on 16 May 2017).

<sup>131</sup> Situation in the Republic of Kenya: *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* ICC-01/09-01/11 available at <https://www.icc-cpi.int> (accessed on 17 May 2017).

Statute. 628 victims participated in these proceedings in which ultimately, on the basis of the evidence and arguments submitted to the Chamber, Presiding the majority judges agreed that the charges were to be vacated and the accused were to be discharged. The majority of the Chamber concluded that the Prosecution did not present sufficient evidence on which a reasonable Trial Chamber could convict the accused.<sup>132</sup>

No charges of sexual violence were mentioned in this case but it serves to show an emerging pattern with the ICC in which charges have been dropped due to lack of or weak evidence. Even though the Pre-Trial Chamber found that there was reasonable grounds to believe that first; immediately after the announcement of the results of the presidential election specifically from 30 December 2007 until 16 January 2008, an attack was carried out that allegedly targeted the civilian population, namely the Kikuyu, Kamba and Kisii ethnic groups, which were perceived as Party of National Unity (PNU) supporters.<sup>133</sup> Secondly, violence in the Uasin Gishu District allegedly ended in the death of at least 7 persons and thousands of persons were forced to seek refuge at Nandi Hills police station and in the surrounding areas.<sup>134</sup> A number of houses and business premises were also looted and burned.<sup>135</sup> Third, the Pre-Trial Chamber found there were reasonable grounds to believe that there was a plan to punish PNU supporters in the event that the 2007 presidential elections were rigged and that a network under responsible command with an established hierarchy possessed the means to carry out a widespread or systematic attack against the civilian population. Its members had access to a considerable amount of capital, guns, crude weapons and manpower.<sup>136</sup>

William Ruto provided essential contributions to the implementation of the common plan by way of organising and coordinating the commission of widespread and systematic attacks that meet the threshold of crimes against humanity.<sup>137</sup> Likewise, Joshua Arap Sang, by virtue of his influence in his capacity as a key Kass FM radio broadcaster, allegedly contributed in the implementation of the common plan by: (i) placing his radio show at the disposal of the organisation, (ii) advertising the organisation's meetings, (iii) fanning violence by spreading

<sup>132</sup> Case Information Sheet: Situation in the Republic of Kenya *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* ICC-01/09-01/11.

<sup>133</sup> Case Information Sheet: Situation in the Republic of Kenya *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* ICC-01/09-01/11.

<sup>134</sup> Nichols L *The International Criminal Court and the End of Impunity in Kenya* (2015) 50.

<sup>135</sup> Nichols L *The International Criminal Court and the End of Impunity in Kenya* (2015) 50.

<sup>136</sup> Nichols L *The International Criminal Court and the End of Impunity in Kenya* (2015) 48.

<sup>137</sup> Nichols L *The International Criminal Court and the End of Impunity in Kenya* (2015) 48.

hate messages and explicitly revealing a desire to expel the Kikuyus and (iv) broadcasting false news regarding the alleged murders of Kalenjin people in order to inflame the violent atmosphere.<sup>138</sup>

As I mentioned earlier, although no charges of sexual violence were brought against the accused in this case, it may well be argued that there seems to be a pattern with respect to ICC cases in which charges are dropped due to insufficient evidence. It is my opinion that this can be interpreted as a general failure by the ICC to bring justice to the victims of sexual violence and close the gap of impunity.

*The Extraordinary African Chambers in Senegal, the case of the former president of Chad*

Habré is a former Chad head of State who established a brutal dictatorship which, through its political police and other organisations caused the deaths of tens of thousands of individuals.<sup>139</sup>

He directly controlled the security apparatus and had primary responsibility for his government's actions.<sup>140</sup> On 13 February 2015, after a 19-month investigation, judges of the Extraordinary Chambers found sufficient evidence for Habré to face charges of crimes against humanity and torture as a member of a joint criminal enterprise and of war crimes on the basis of his command responsibility.<sup>141</sup> Specifically, they charged Habré with, sexual violence, murder, summary executions and kidnapping followed by enforced disappearance and torture, amounting to crimes against humanity and war crimes against the Hadjerai and Zaghawa ethnic groups, the people of southern Chad and political opponents.<sup>142</sup>

The case of the former president of Chad is the first universal jurisdiction case to proceed to trial in Africa.<sup>143</sup> Universal jurisdiction is a principle of international law that allows national courts to prosecute the most serious crimes even when committed abroad, by a foreigner and against foreign victims.<sup>144</sup> Universal jurisdiction is an important safety net to ensure that suspects of atrocities do not enjoy impunity in a third state when they cannot be prosecuted before the courts of the country where the crimes were allegedly committed or before an

<sup>138</sup> *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* ICC-01/09-01/11.

<sup>139</sup> *Hissène Habré v Republic of Senegal* 18 November 2010 ECW/CCJ/JUD/06/10.

<sup>140</sup> Court of Appeal of Dakar, Opinion on the Extradition Request for Hissène Habré, Decision, 25 November 2005 available at <https://www.internationalcrimesdatabase.org> (accessed on 17 May 2017).

<sup>141</sup> McCaffrey S *Understanding International Law* (2006).

<sup>142</sup> Office of the Public Prosecutor v Hissène Habré

<sup>143</sup> Human Rights Watch: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal available at <https://www.hrw.org> May 3 2016 (accessed on 17 May 2017).

<sup>144</sup> Macedo S *Universal Jurisdiction National Courts and the Prosecution of Serious Crimes Under International Law* (2004) 4.

international court.<sup>145</sup> The ICC only has jurisdiction over crimes committed after July 1, 2002, when its statute entered into effect therefore it could not prosecute Habré because the crimes of which he is accused took place between 1982 and 1990.<sup>146</sup> To strengthen the fight against impunity for the most serious crimes, it is critical for courts on all continents to use universal jurisdiction. The African Union has encouraged its member states to adopt legislation to give their national courts universal jurisdiction over war crimes, crimes against humanity and genocide and has taken steps to initiate a network of national prosecutors working on war crimes cases.<sup>147</sup>

The Extraordinary Chamber's statute gives it competence over the crimes of genocide, crimes against humanity, war crimes and torture as defined in the statute.<sup>148</sup> The definitions generally track those used in the Rome Statute.<sup>149</sup> The crimes must have taken place in Chad between 7 June 1982 and 1 December 1990, which correspond to the dates of Habré's rule.<sup>150</sup>

He was found guilty and sentenced to life in prison, a verdict which marked the end of a decade and a half long process to for the first time; convict an African head of state in an African court.<sup>151</sup>

Victims were permitted to participate in proceedings as civil parties and in addition they left their mark on the trial through their long campaign for justice as well as their dramatic testimony.

In accordance with Article 27 and 28 of the Extraordinary Chamber's statute, in the event of a conviction, it may order reparations against the accused.<sup>152</sup> This is similar to the process at the ICC where these reparations can be paid into a victim's fund, which can also receive

<sup>145</sup> Macedo S *Universal Jurisdiction National Courts and the Prosecution of Serious Crimes Under International Law* (2004) 2.

<sup>146</sup> Williams S *Hybrid and International Criminal Tribunals* (2012) 182.

<sup>147</sup> Human Rights Watch: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal available at <https://www.hrw.org> May 3 2016 (accessed on 17 May 2017).

<sup>148</sup> Articles 4,5,6&7 of the Statute of the Extraordinary African Chambers within the Senegalese judicial system for the prosecution of international crimes committed on the territory of the Republic of Chad during the period from 7 June 1982 to 1 December 1990.

<sup>149</sup> Human Rights Watch: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal available at <https://www.hrw.org> May 3 2016 (accessed on 17 May 2017).

<sup>150</sup> Articles 4,5,6&7 of the Statute of the Extraordinary African Chambers within the Senegalese judicial system for the prosecution of international crimes committed on the territory of the Republic of Chad during the period from 7 June 1982 to 1 December 1990.

<sup>151</sup> Iger J "Senegal's African Justice: The Extraordinary African Chambers and the ICC." 23 March 2017 available at <https://www.africaupclose.wilsoncentre.org> (accessed on 17 May 2017).

<sup>152</sup> Article 27 of the Statute of the Extraordinary African Chambers within the Senegalese judicial system for the prosecution of international crimes committed on the territory of the Republic of Chad during the period from 7 June 1982 to 1 December 1990.



voluntary contributions by foreign governments, international institutions, and non-governmental organizations.<sup>153</sup> Reparations from the victims' fund will be open to all victims whether individually or collectively and whether or not they participated in Habré's trial.<sup>154</sup> The Extraordinary African Chambers was dissolved after the judgment in the case of Habré.

### The Case of Guatemala Sepur Zarco

In 1999, three years after the peace accords were signed in Guatemala, the UN backed Truth Commission investigating civil war atrocities found that rape was systematic and widespread during the conflict.<sup>155</sup> According to the commission, „the rape of women, during torture or before being murdered, was a common practice aimed at destroying one of the most intimate and vulnerable aspects of the individual's dignity.“<sup>156</sup> Violence against women, such as rape, torture, and murder was often motivated by political affiliations, social participation and ideals, and often combined with other human rights abuses.<sup>157</sup> Despite the countless cases of sexual violence during the civil war, the *Sepur Zarco* case is the only one in the world where a case of wartime sexual violence was tried in the national courts of the country where the violence occurred and in a country where impunity for war crimes has long remained the norm.<sup>158</sup> Justice for conflict-related crimes, in particular for sexual violence has been elusive in the years following an end to Guatemala's civil war; these crimes have largely remained unpunished with victims facing significant barriers to access justice.<sup>159</sup>

Maya Q'eqchi communities in Guatemala have long suffered deep inequality, poverty and precarious access to land.<sup>160</sup> Before they were disappeared in 1982, the 15 husbands of the victims in the *Sepur Zarco* case were fighting for legal titles to defend the land they had lived and worked on for years. Because they were standing up for their land rights, they were despised by local large landowners, labelled as leftist insurgents and made into targets to be

<sup>153</sup> Chad Annual Human Rights Reports Submitted to Congress by the U.S. Department of State (1987)58.

<sup>154</sup> Article 28 of the Statute of the Extraordinary African Chambers within the Senegalese judicial system for the prosecution of international crimes committed on the territory of the Republic of Chad during the period from 7 June 1982 to 1 December 1990.

<sup>155</sup> Bartop P& Jacobs S *Morden Genocide: The Definitive Resource and Document Collection* (2015) 963.

<sup>156</sup> Bartop P& Jacobs S *Morden Genocide: The Definitive Resource and Document Collection* (2015) 963.

<sup>157</sup> Skjelsbaek I *The Political Psychology of War Rape: Studies from Bosnia and Herzegovina* (2012) 55.

<sup>158</sup> Hartviksen J& Abbott J "Justice for the Women of Sepur Zarco." 03/11/2016 International justice monitor available at <https://www.nacla.org> (accessed on 18 May 2017).

<sup>159</sup> Kravetz D "Promoting Domestic Accountability for conflict-Related Sexual Violence: The Cases of Guatemala, Peru and Colombia." *American University International Law Review* (2017) 714.

<sup>160</sup> Skjelsbaek I *The Political Psychology of War Rape: Studies from Bosnia and Herzegovina* (2012) 55.



silenced.<sup>161</sup> Land conflicts and unequal ownership are central to the history of Guatemala's civil war.<sup>162</sup> In 1954, a CIA-backed coup ousted the democratically elected president and reversed the fledgling agrarian reform program that aimed to expropriate idle lands from elite landowners. This coup not only triggered more than three decades of civil war, but also helped to lock in one of the most unequal land distribution patterns in Latin America.<sup>163</sup>

During one of the bloodiest years of Guatemala's civil war; Guatemalan soldiers forcibly disappeared 15 men from an eastern Maya Q'eqchi village in 1982.<sup>164</sup> The women were raped and their belongings destroyed. They were taken captive and forced to live at the Sepur Zarco military base where they were enslaved as domestic servants for the soldiers and systematically raped.<sup>165</sup> The women were forced to labour for 12 hours in an abhorrent system that lasted for several months.<sup>166</sup> Furthermore, the women's inability to give their family members a proper burial remains a source of anguish.<sup>167</sup> Two of the women stated that as a result of the repeated rapes they became pregnant and suffered abortions also as a result of the sexual violence. They also felt extreme guilt at having relations with men who were not their husbands.<sup>168</sup> All of the women, now in their 70s and 80s bear enormous physical and emotional trauma from the experience. They also faced stigma in their communities for the violence they endured and did not share what had happened to them for 30 years, they finally came forward in 2011 to seek justice.<sup>169</sup>

The *Sepur Zarco* trial marked the first time that Guatemala considered sexual violence as an international crime. This case has set further precedent for prosecuting sexual violence in the context of armed conflicts and is in stark contrast to the more internationally high profile case of sexual slavery during armed conflict in the case of Japan's 'comfort women.' This case

<sup>161</sup> Guatemala Annual Human Rights Reports Submitted to Congress by the U.S. Department of State 2816-2856

<sup>162</sup> Lovell G *Conquests and Survival in Colonial Guatemala* (2015) 4ed part 8.

<sup>163</sup> Guatemala Annual Human Rights Reports Submitted to Congress by the U.S. Department of State 2816-2856

<sup>164</sup> Kravetz D "Promoting Domestic Accountability for conflict-Related Sexual Violence: The Cases of Guatemala, Peru and Colombia." *American University International Law Review* (2017) 712.

<sup>165</sup> Guatemala: Justice for Sepur Zarco sex slavery victims, Indigenous victims of sexual slavery during Guatemala's war hope precedent-setting trial will help others get justice. available at <https://www.aljazeera.com> (accessed on 19 May 2017).

<sup>166</sup> Kravetz D "Promoting Domestic Accountability for conflict-Related Sexual Violence: The Cases of Guatemala, Peru and Colombia." *American University International Law Review* (2017) 713.

<sup>167</sup> Kravetz D "Promoting Domestic Accountability for conflict-Related Sexual Violence: The Cases of Guatemala, Peru and Colombia." *American University International Law Review* (2017) 714.

<sup>168</sup> Burt J Guatemala Trials before the National Courts of Guatemala February 22 2016 available at <https://www.ijmonitor.org> (accessed on 18 May 2017).

<sup>169</sup> Kravetz D "Promoting Domestic Accountability for conflict-Related Sexual Violence: The Cases of Guatemala, Peru and Colombia." *American University International Law Review* (2017) 718.

was rejected by a Japanese court. Former comfort women subjected to sexual slavery during World War II put Japan on trial in a mock war crimes tribunal in Tokyo in 2000, but the case never officially went to court in the country.

#### 4.4 Concluding observations

In conclusion, despite the ICC's significant resources and the considerable efforts of talented and hard-working personnel, critics note that the ICC's practical impact to date in terms of vindicating atrocity crimes by investigating, prosecuting and convicting individuals for such crimes is underwhelming.<sup>170</sup>

In this chapter I have addressed the various challenges that the ICC faces in the investigation of crimes which include that, the Prosecution must meet a higher evidentiary standard of proof as compared to cases that are not of sexual violence crimes, the long physical distance between the trial proceedings in the Hague and the location where the crimes are alleged to have been committed poses a significant challenge as even locating a crime scene may prove troublesome as they are often established years after the crime was committed. Furthermore, States are uncooperative especially when the investigation by the ICC involves a current head of State. Language and cultural barriers are also a huge problem when it comes to the gathering of information and the questioning of witnesses because evidence has to be translated from local languages into English or French. The risk of death involved when gathering evidence in violent countries also means that the ICC will find it hard to get strong and adequate evidence to bring against the perpetrators of sexual violence.

As I have indicated above, there seems to be the emergence of a pattern by the ICC in which cases have been terminated and the charges for sexual violence crimes have been dropped due to weak or a complete lack of evidence. This is evident in the cases of *The Prosecutor v Uhuru Kenyatta*, *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* and more so in *The Prosecutor v Germain Katanga* in which, even though numerous male and female witnesses testified to forced marriage of women and girls, rape by soldiers and sexual enslavement at prison camps, the Chamber found that there was no evidence beyond reasonable doubt that the crimes of rape and sexual slavery were indeed committed. In *The Prosecutor v Thomas Lubanga Dyilo* it was alleged that rape and sexual slavery was committed against girl soldiers in the DRC, however the charges do not include sexual

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<sup>170</sup> Funk M *Victims' Rights and Advocacy at the International Criminal Court* (2015) 68.

violence despite these allegations and so the ICC is not trying these cases due to a lack of available evidence.

However, it would be unfair not to celebrate the cases in which the ICC has managed to bring justice to the victims of sexual violence by prosecuting crimes under Article 7 and 8 of the Rome Statute. The ICC successfully prosecuted and convicted Bemba Gombo in the case of *The Prosecutor v Jean-Pierre Bemba Gombo*. Furthermore, in *The Prosecutor v Domnic Ongwen* the charges include the largest number and widest range of sexual and gender based crimes including rape, sexual slavery, forced marriage and forced pregnancy with charges of torture, enslavement and outrages upon personal dignity also underpinned by gender based violence. If convicted, the ICC will have the opportunity to once again meet its mandate to reduce the gap of impunity and bring justice to the women and girls that have suffered gender based violence in the DRC.

The two above mentioned ICC cases and the success stories within Africa such as in *The Case of Guatamala Sepur Zasco* and *The Extraordinary African Chambers in Senegal*, the case of the former president of Chad are very encouraging and show that there is reason for optimism.

Ultimately however, it could be argued that the ICC has overall not been successful with respect to its prosecution of cases of sexual violence crimes in Africa. To date, the ICC has only convicted one person for sexual violence crimes while the rest of the cases remain either, on-going, with charges dropped/terminated or with the suspects still at large.<sup>171</sup> *The Prosecutor v Joseph Kony and Vincent Otti* and *The Prosecutor v Sylvester Mudacumura* are cases that remain open because the suspects are at large while both *The Prosecutor v Bosco Ntaganda* and *The Prosecutor v Domnic Ongwen* cases are on-going.

The belief that human rights and humanitarian violations will be deterred simply because the ICC was established is unjustified. Mere presence of the court will not deter anyone unless the ICC proves itself effective in its prosecutions.<sup>172</sup> For those cases in which the suspects are still at large, without the possibility of apprehension there is no certainty of punishment, moreover the punishment at the ICC lacks the severity for it to be considered as deterrent. Furthermore the standard minimum sentence that can be handed down by the ICC cannot

<sup>171</sup> As of 19 May 2017.

<sup>172</sup> Pohrib A "Frustrating Noble Intentions: The clash between ICC's Deterrent Effect and the Prosecutor's Policy of Focused Investigations on Perpetrators Situated at the Highest Echelons of Responsibility." *International Community Law Review* (2013) 229.

exceed 30 years unless a life sentence is ‘justified by the extreme gravity of the crime and the individual circumstances of the convicted.’<sup>173</sup>

The following and final chapter will conclude this mini-thesis and provide recommendations on how the ICC may improve on its prosecutions as well as indicate whether the research questions have been answered.



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<sup>173</sup> Pohrib A “Frustrating Noble Intentions: The clash between ICC’s Deterrent Effect and the Prosecutor’s Policy of Focused Investigations on Perpetrators Situated at the Highest Echelons of Responsibility.” *International Community Law Review* (2013) 231.

## CHAPTER FIVE

### 5. INTRODUCTION

This mini-thesis set out to establish whether or not the ICC has fulfilled its mandate to reduce the gap of impunity, to hold perpetrators of sexual violence during armed conflict accountable for their actions and to provide justice to the women and girls that are victims to gender based violence.<sup>1</sup>

This final and concluding chapter will showcase the fact that the ICC has failed dismally in holding the perpetrators of most sexual violence crimes accountable. It is clear that there indeed is a pattern in which the ICC is so keen to get cases underway that it comes at the expense of thorough investigation into the full range of crimes that took place in these countries. What follows are recommendations of both a theoretical and practical nature. Some recommendations require political support from African States in order to ensure and improve the effectiveness of the ICC in not only delivering justice but promoting peace within the African continent. However, such support is not readily available as many states such as South Africa, Burundi and Gambia are taking the decision to withdraw from the ICC.<sup>2</sup>

#### 5.1 Conclusions

This mini-thesis has established that sexual violence is used as a tool of war in many conflict zones around the world which include the DRC, CAR and Uganda.<sup>3</sup> Women and girls in particular experience the severe effects of conflict such as internal displacement and rape. Rape often leads to the contraction of sexually transmitted diseases and HIV.<sup>4</sup> They may also experience starvation as they can no longer engage in economic activities such as cultivating and selling of crops in order to earn money.<sup>5</sup> Internally displaced women find themselves in refugee camps which do not offer any protection from further sexual violence and have poor sanitation with little to no reproductive health services offered for women.<sup>6</sup> Moreover, girls miss out on education because the school buildings are destroyed during the war and they cannot settle down into family life that would complement education as they are running

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<sup>1</sup> See 1.1 in Chapter 1.

<sup>2</sup> As of 2016.

<sup>3</sup> See 2.3 in Chapter 2.

<sup>4</sup> See Chapter 2.

<sup>5</sup> See Chapter 2.

<sup>6</sup> See 2.3 in Chapter 2.

away from rebels.<sup>7</sup> Further effects of the conflict relate to the loss of family members during the conflict which lead to trauma especially when some of the women have been forced to participate in the killing of their husbands or sons.<sup>8</sup>

Monetary compensation will allow these women to rebuild their lives after the war has ended. Many are left with babies resulting from rape, with no shelter and no food which means money is of functional importance.<sup>9</sup> In order for sexual violence to be prosecuted on an international level at the ICC; it must be classified as either torture, a crime against humanity or as a war crime.<sup>10</sup>

Rape is defined as the perpetrator invading the body of a person by conduct that results in (a) the penetration, however slight of any part of the body of the victim: (b) the invasion must have been committed by force, or by threat of force or coercion such as that caused by fear of violence against such person or another person.<sup>11</sup> This gender neutral definition of rape at the ICC has come about due to case law that has been considered in the ICTR and the ICTY.<sup>12</sup> It may be argued that international humanitarian law, international human rights law and international criminal law all provide an adequate legal framework for the prosecution of sexual violence crimes.<sup>13</sup> Furthermore, I have set out that the mode of liability under international criminal law is regulated by Articles 25 and 28 of the Rome Statute particularly individual criminal responsibility and the responsibility of commanders and other superiors.<sup>14</sup>

## 5.2 Recommendations

I will give three recommendations to help improve the efficiency of the ICC, first is increased funding to the ICC and second is the systematic prosecution of sexual violence crimes. Third is victim participation. The nature of these recommendations is both theoretical and practical.

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<sup>7</sup> See 2.3 in Chapter 2.

<sup>8</sup> See 2.3 in Chapter 2.

<sup>9</sup> See 2.4 in Chapter 2.

<sup>10</sup> See 2.4.1 & 2.4.2 in Chapter 2.

<sup>11</sup> See 3.3 in Chapter 3.

<sup>12</sup> See 3.1 in Chapter 3.

<sup>13</sup> See 3.5, 3.6 & 3.7 in Chapter 3.

<sup>14</sup> See 3.4 in Chapter 3.



### 5.2.1 Increased funding to the ICC

The following is a long term recommendation however it is not necessarily practical. Due to an increase in the number of situations that the ICC has entered into, redeployed staff has been spread very thin and this has resulted in a detrimental impact on the staff themselves.<sup>15</sup>

In 2008, Human Rights Watch reported that investigators experienced „burn out“ due to the fact that there were simply not enough of them to handle the rigorous demands of conducting investigations.<sup>16</sup> An increase in funding and resources to the ICC might enable the Prosecutor to take on new situations and thoroughly investigate them without any trade-off in its staffing.<sup>17</sup> However, it may well be argued that this is not a practical recommendation because most African States are in recession and therefore are not able to financially contribute to the ICC in order to ensure that it meets its mandate. Moreover, an example of such countries is the DRC which has not experienced any financial or economic growth in the past decade due to on-going war. It may further be argued that the ICC’s current failure to prosecute crimes of sexual violence efficiently and successfully is owed to these very same African States failure to support the court. The ICC is vital in bringing perpetrators of heinous crimes to justice and putting an end to the war, therefore the DRC and other African countries have no business withdrawing from the ICC.

### 5.2.2 Withdrawal from the ICC

Further considering the African critique discussed in this mini-thesis, States must denounce efforts to withdraw from the ICC and defend the integrity of the court.<sup>18</sup> Withdrawal from the ICC not only damages the highest level of accountability for the gravest crimes of concern to the international community such as sexual violence but also undermines the victims.<sup>19</sup>

Kenya’s President Uhuru Kenyatta has in the past been one of the most vocal voices calling for African States to stage a mass withdrawal from the ICC, needless to say that the relationship between Kenya and the ICC is strained as mentioned earlier in this mini-thesis.<sup>20</sup>

<sup>15</sup> Hamilton R “The ICC’s Exit Problem.” *New York University Journal of International Law and Politics* (2014) 21.

<sup>16</sup> Hamilton R “The ICC’s Exit Problem.” *New York University Journal of International Law and Politics* (2014) 21.

<sup>17</sup> Hamilton R “The ICC’s Exit Problem.” *New York University Journal of International Law and Politics* (2014) 21.

<sup>18</sup> See 1.1.2 Chapter 1.

<sup>19</sup> Worldwide Movement for Human Rights “ASP 15 Five Recommendations to strengthen the International Criminal Court.” 16 November 2016 available at <https://www.fidh.org> (accessed on 6 June 2017).

<sup>20</sup> The Conversation “What’s at stake as Kenya weighs withdrawal from the ICC.” November 9, 2016 available at <https://www.theconversation.com> (accessed on 31 July 2017).

Kenya's argument remains that the ICC is biased against Africans and violates the sovereignty of African countries, however withdrawal of the charges against Kenyatta left the culture of impunity intact in Kenya and it is for this very reason that African countries should not exit so as to improve the prospects of justice for victims.<sup>21</sup> Perhaps, constructive dialogue about the concerns of these African States will be more helpful than withdrawal.<sup>22</sup>

Furthermore, States should diligently contribute to positive complementarity in national jurisdictions by undertaking domestic prosecutions of international crimes as was done in *The Case of Guatamala Sepur Zasco*.<sup>23</sup>

### 5.2.3 Systematic prosecution of sexual violence crimes

There needs to be systematic prosecution of sexual violence crimes. The OTP's efforts to systematize the presentation of charges of crimes of sexual violence must be acknowledged however, they are inconsistent.<sup>24</sup> Either charges of sexual violence are not brought by the OTP because of insufficient investigation and evidence such as in *The Prosecutor v Thomas Lubanga*, *The Prosecutor v Bosco Ntaganda*, and in *The Prosecutor v Ruto and Others* or they are not confirmed by the Pre-Trial Chamber because of the lack of connection with the accused as in *The Prosecutor v Katanga*, *The Prosecutor v Muthaura and Others* or because of a restrictive interpretation of the definition of certain crimes.<sup>25</sup> It may well be argued that crimes of sexual violence should be given greater attention in all preliminary examinations and investigations by the OTP, and investigators with special expertise should be utilised.<sup>26</sup> Charges reflecting the reality of the crimes of sexual violence should be presented whenever a sufficient basis exists, and the interpretation of the qualification of crimes of sexual violence should comply with existing international jurisprudence.<sup>27</sup>

Furthermore, the OTP should be more transparent by publicly explaining the reasons for its decisions to either proceed or not to proceed with certain situations as well as explain why

<sup>21</sup> The Conversation "What's at stake as Kenya weighs withdrawal from the ICC." November 9, 2016 available at <https://www.theconversation.com> (accessed on 31 July 2017).

<sup>22</sup> Worldwide Movement for Human Rights "ASP 15 Five Recommendations to strengthen the International Criminal Court." 16 November 2016 available at <https://www.fidh.org> (accessed on 6 June 2017).

<sup>23</sup> See 4.4 in Chapter 4.

<sup>24</sup> De Brouwer A *Supranational Criminal Prosecution of Sexual Violence: The ICC and the practice of the ICTY and the ICTR* (2005) 359.

<sup>25</sup> *The Prosecutor v Thomas Lubanga Dyllo* ICC-01/04-01/06.

<sup>26</sup> Worldwide Movement for Human Rights "The ICC, 2002 - 2012: 10 years, 10 recommendations for an efficient and independent International Criminal Court." 15 June 2012 available at <https://www.fidh.org> (accessed on 10 June 2017).

<sup>27</sup> Worldwide Movement for Human Rights "The ICC, 2002 - 2012: 10 years, 10 recommendations for an efficient and independent International Criminal Court." 15 June 2012 available at <https://www.fidh.org> (accessed on 10 June 2017).

certain charges, in this case charges of sexual violence are dropped.<sup>28</sup> This can be done by submitting evaluation reports of the conditions for opening an investigation under Article 53(1).<sup>29</sup> On this basis, the victims would have a legal ground to come forward and present their views. The above recommendation is vital to improving the effectiveness of the ICC but requires political support from the member states who should be willing to cooperate with the ICC by providing required evidence or documentation concerning former head of states who need to stand trial for sexual violence crimes.

#### 5.2.4 Victim participation

The ICC should also be encouraged, in part through the financial support of French-speaking States, to maintain the French translation (working language of the ICC) of the transcripts and Court decisions, especially regarding those francophone situations.<sup>30</sup> It may also be worthwhile to deploy investigators that are well versed in both French and English to limit the loss of information through translation. This is very much a practical long term solution to ensure that justice is served.

There needs to be effective participation and representation of victims in the ICC. This system for participation must be improved by allowing for victims participation and reparations of the Registry to undertake activities in the field and inform victims of their right to participate as soon as an investigation is opened, a warrant of arrest or a summons to appear is issued. Additionally, States must allocate additional funds for the swift review of the requests for participation. This however is a theoretical recommendation and cannot easily be put into practice because in situations of on-going conflict areas such as in some regions of the DRC, victims do not feel free or safe enough to participate.

Victims participate through their legal representatives. It is therefore of prime importance that the current reform of legal aid does not render victim participation before the ICC futile.<sup>31</sup> This can be done by guaranteeing that the legal representatives at the ICC are lawyers from

<sup>28</sup> Worldwide Movement for Human Rights „The ICC, 2002 - 2012: 10 years, 10 recommendations for an efficient and independent International Criminal Court.“ 15 June 2012 available at <https://www.fidh.org> (accessed on 10 June 2017).

<sup>29</sup> Article 53(1) Rome Statute 1998.

<sup>30</sup> Funk T *Victims' Rights and Advocacy at the International Criminal Court* 2ed (2015).

<sup>31</sup> Worldwide Movement for Human Rights „The ICC, 2002 - 2012: 10 years, 10 recommendations for an efficient and independent International Criminal Court.“ 15 June 2012 available at <https://www.fidh.org> (accessed on 10 June 2017).

the situation country or have special knowledge of that country and have a permanent link with a team in the field and are independent of the Court.<sup>32</sup>

### 5.3 Research questions answered

The first research objective was to determine if there is a pattern with respect to the cases that come before the ICC.<sup>33</sup> Is the ICC so keen to get cases underway that it comes at the expense of thorough investigation into the full range of crimes that took place in a given country? The answer to this question is yes, there has been a number of sexual violence charges that have been dropped and cases of gender based violence that have been terminated due to weak evidence.<sup>34</sup> Such cases include *The Prosecutor v Uhuru Kenyatta*, *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* in which charges were withdrawn because of insufficient evidence and the cases are closed.<sup>35</sup>

Furthermore, with regards to *The Prosecutor v Germain Katanga*, even though numerous male and female witnesses testified to forced marriage of women and girls, rape by soldiers and sexual enslavement at prison camps, the Chamber found that there was no evidence beyond reasonable doubt that the crimes of rape and sexual slavery were indeed committed. Crimes of sexual violence were therefore not included in the charges against Katanga.

In *The Prosecutor v Thomas Lubanga Dyilo* it was alleged that rape and sexual slavery was committed against girl soldiers in the DRC, however the charges against Lubanga Dyilo do not include sexual violence despite such allegations and so the ICC is not trying him for sexual violence crimes due to a lack of available evidence.

The second research question is: what is the current status of the effectiveness of the ICC with respect to cases of sexual violence crimes in Africa and which impediments to its success can be identified?

To date, the ICC has not been effective in addressing and prosecuting crimes of sexual violence, this is evident from the cases that I have examined in chapter 4 of this mini-thesis. There are a number of cases in which the perpetrators of sexual violence have not been captured and brought to justice. Such cases are *The Prosecutor v Joseph Kony and Vincent*

<sup>32</sup>Worldwide Movement for Human Rights “The ICC, 2002 - 2012: 10 years, 10 recommendations for an efficient and independent International Criminal Court.” 15 June 2012 available at <https://www.fidh.org> (accessed on 10 June 2017).

<sup>33</sup> See 4.4 in Chapter 4.

<sup>34</sup> See 4.4 in Chapter 4.

<sup>35</sup> See 4.4 in Chapter 4.

*Otti and The Prosecutor v Sylvester Mudacumura*. This can be interpreted as failure by the ICC. *The Prosecutor v Bosco Ntaganda* and *The Prosecutor v Dominic Ongwen* cases are still in progress which means that no verdict or justice has been delivered yet. It may well be argued that this means that the ICC has not at all been effective with regards to prosecuting perpetrators of gender based crimes committed during armed conflict.

I have identified various impediments to the success of the ICC which include that member states may be unwilling to cooperate with the ICC especially when it seeks to try Head of States that are currently in power.<sup>36</sup> The physical distance between the proceedings in the Hague and the location where the crimes are alleged to have been committed poses a serious challenge as even locating a crime scene may prove troublesome as they are often established years after the crime was committed.<sup>37</sup> Language and cultural barriers are also posing a huge problem when it comes to the gathering of information and the questioning of witnesses because evidence has to be translated from local languages into English or French.<sup>38</sup>

Insufficient evidence is also a challenge faced by the ICC, due to on-going conflict and violence in certain areas, it is almost impossible to gather evidence because of the risks involved.<sup>39</sup>

#### **5.4 Concluding observations**

It is not only alarming but disappointing that fifteen years on since the creation of the ICC, it has not been able to improve the situation of women and girls who are victims of armed conflict across Africa. It is clear that the ICC is facing serious challenges such as being accused of only targeting the African continent and having no enforcement mechanism against the state parties who refuse to cooperate but this cannot be accepted as an excuse warranting their ineffectiveness because thousands of women and girls who have been victims of sexual violence in war torn countries are looking towards the ICC for justice.

<sup>36</sup> See 4.4 in Chapter 4.

<sup>37</sup> See 4.4 in Chapter 4.

<sup>38</sup> See 4.4 in Chapter 4.

<sup>39</sup> See 4.4 in Chapter 4.



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