INTERPRETATION OF CRIME OF “MEN RAPE” UNDER INTERNATIONAL CRIMINAL JUSTICE

INTERPRETACIÓN DEL CRIMEN DE “VIOLACION MASCULINA” BAJO LA JUSTICIA PENAL INTERNACIONAL

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

KEYWORDS: International crimes, crimes against humanity, crime of rape, ICC, SCSR, international criminal justice

RESUMEN: El presente trabajo ha intentado analizar los delitos sexuales y especialmente el delito de violación masculina. La jurisprudencia internacional de los Tribunales penales internacionales y la Corte Penal Internacional han tratado de calificar la violación como un crimen de genocidio en forma de lesiones corporales y físicas graves, incluso si no son necesariamente permanentes (lett. B) art. 6 del Estatuto de Roma; o como un crimen contra la humanidad donde hay elementos de contexto y, sobre todo, elementos materiales que surgen de las definiciones dadas por los Tribunales especiales y los elementos de crímenes; o incluso como un crimen de guerra en caso de que se implemente como parte de un plan o diseño político, o como parte de una serie de delitos similares cometidos a gran escala. Este comportamiento se reconstruye de manera residual en comparación con el de la violencia sexual, de acuerdo con una relación específica de género con el tema. La indicación del nivel de gravedad del crimen es necesaria para la relevancia de la violencia sexual y la violación

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como crímenes de lesa humanidad que veremos en los próximos años desde el panorama del derecho penal internacional.

PALABRAS CLAVE: Crímenes internacionales, crímenes de lesa humanidad, delitos de violación, CPI, SCSR, justicia penal internacional

1. Introduction

The latest military developments/actions in Syria (April 2018) remind us once again the “huge volume of overwhelming testimonies”, pictures and videos that document the so-called report: “implementation of the Resolution establishing the international, impartial and independent mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under international law committed in the Syrian Arab Republic since March 2011”\(^2\), led by the French court judge K. Marchi-Uhel, who has conducted preliminary investigations into a number of cases and cooperated with court judges that investigate war crimes in different countries\(^3\). This investigation has stated that: “evidence of sexual crimes is overwhelming, but the cases are so many that no prosecution can be brought for all”\(^4\). Despite this finding of “impunity” by international criminal law\(^5\) for serious sexual crimes\(^6\) jurisprudence still know proved that: international criminal law has been vital in fostering the understanding of sexual violence against male in armed conflict\(^7\) as a weapon of war that targets not only a woman but a male role in international society\(^8\).

The developments in international criminal case law, in respect of the recognition that sexual crimes fall within the scope of international war crimes against humanity and genocide

\(^7\)S. MOUTHAAH, Sexual violence against men and international law criminalising the unmentionable, in International Criminal Law Review, 2013, pp. 667ss.
\(^{10}\)K. AMBOS, Treatise on international criminal law: vol. 2: The crimes and sentencing, Oxford University Press, 2014.
\(^{11}\)C.S. MIBENGE, Sex and international Tribunals: The erasure of gender from the war narrative, University of Pennsylvania Press, 2013.
crime\textsuperscript{9}, have been overshadowed by the often frivolous treatment of these crimes by the international criminal justice\textsuperscript{10}.

The remnants that have prevailed over these centuries for these crimes, that they were a by-product of the war\textsuperscript{11}, or that in any case they are incidental and secondary to the main crimes, did not allow the provisions of the Statutes to be applied to a sufficient level\textsuperscript{12}. The lack of previous international jurisprudence has found the international criminal courts in a position to be forced to make unstable interpretations or even to develop an important case-law which has often been questioned by courts themselves\textsuperscript{13}. The interpretations, of course, have often led to the departure from the mechanistic perception of justice and the adoption of the aim towards full recognition of the victims' human rights\textsuperscript{14}. Other times, the principle of feasibility in the prosecution has prevailed, to such an extent that it has led to several cases of impunity for perpetrators of crimes of sexual violence\textsuperscript{15}. These failures were complemented by the inherent difficulty of dealing with these crimes as a result of the


\textsuperscript{11}S. PARASHAR, What wars and “war bodies” know about international relations, in Cambridge Review of International Affairs, 2013, pp. 621ss.

\textsuperscript{12}K. AMBOS, Sexual offenses in international criminal law, with a special focus on the Rome Statute of the International Criminal Court (July 3, 2012), in M. BERGSMO, A. BUTENSCHÖN SKRE, E.J. WOOD (eds.), Understanding and providing international sex crimes, Torkel Opsahl Academic Epublisher, Beijing, 2012, pp. 144ss.


\textsuperscript{14}N. PILLAY, Sexual violence: Standing by the victim, in Case Western Reserve Journal of International Law, 2009, pp. 462ss.

psycho-social impact of sexual violence on victims\textsuperscript{16}. These difficulties are often insurmountable even at the level of domestic criminal systems, where correlations become even more complicated and inaccessible to resolving them. Even in the most recent criminal courts judiciary officers were not prepared to deal with the broadness and specificity of sexual offenses. The lack of proper staff, the lack of understanding of the law, and the general politicization of many affairs, have led to results that are highly controversial and criticized\textsuperscript{17}.

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

One last question that first comes to the definition of rape in international jurisprudence is: can consensus be an element of rape in the context of international crimes? Despite the progress made in the case law of the international criminal courts with regard to crimes of sexual and gender violence\textsuperscript{18}, the jurisprudence of these courts reflects a constant dispute over the understanding-and hence the proof-of crimes of sexual violence in the context of armed conflicts\textsuperscript{19} and mass violence\textsuperscript{20}. The case law particularly reflects a doubt as to whether the victim's non-consent is required as an element in the persecution of rape\textsuperscript{21}, but also how that element is interpreted. Subsequent cases of the International Criminal

\textsuperscript{19}G. CAGGIOLI, Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law, in International Review of the Red Cross, 2014, pp. 506ss.
Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Court (ICC) of Rome proposed non-consensus as an element of crime by requiring that the sexual act be committed without the consent of the victim and that the perpetrator was aware of the lack of consensus. Even in the Special Court for Sierra Leone (SCSR), it has become clear that the persecution of rape, even in the context of mass crimes, requires proof of the victim's non-consent. On the other hand, the Criminal Records of ICC do not explicitly require the prosecution to prove the lack of consensus. However, they require that the offender commit a psychical invasion of a sexual nature against the victim by force or threat of violence or coercion, misuse of power against that person or other person, or exploiting the enforced environment, or that invasion was committed against a person incapable of give a valid consensus, a sentence that remains to be interpreted by ICC.

26K. A. RODMAN, Justice is interventionist: The political sources of the judicial reach of the Special Court for Sierra Leone, in International Criminal Law Review, 2011, pp. 218ss.
31B. MARTINS AMORIUM DUTRA, Criminal responsibility in the crimes committed by organized structures of power: Jurisprudence analysis in the light of international criminal law, in Revista de Faculdade de Direito da UERJ, 2012, pp. 5ss.
Although rape was on the list of Act 10 of the Control Council\textsuperscript{32} as a crime against humanity\textsuperscript{33}—although no prosecution for rape was made on the cases of this law and the constitutional provisions of the ad hoc international criminal Tribunals as well as the Statute of Rome of ICC, and although implicitly refers to a number of international humanitarian law Conventions\textsuperscript{34} none of these gave a definition of it, leaving rape\textsuperscript{35} and other grievous crimes\textsuperscript{36} without some internationally accepted definition and during a period of time to create ad hoc criminal tribunals, in the early 90s\textsuperscript{37}.

\textsuperscript{32}L. FISKE, Ending rape in war: How far have we come?, in Cosmopolitan Civil Societies: An interdisciplinary Journal, 2013.
\textsuperscript{33}Article 11 defines the crimes against humanity as: “Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic law of the country where perpetrated. See also: Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 10 December 1945, 3 Official Gazette Control Council for Germany 50-44 (1946). C. CHERNOR JALLOH, What makes a crime against humanity a crime against humanity, in American University International Law Review, 2013, pp. 287ss. J. WATERROW, J. SCHUMACHER, War crimes trials and investigation. A multi-disciplinary introduction, Oxford University Press, 2018.
\textsuperscript{34}A. SZPAK, Legacy of the ad hoc International Criminal Tribunals in implementing international humanitarian law, in Mediterranean Journal of Social Sciences, 2013, pp. 530ss.
\textsuperscript{37}In case: Kunarac we have a description, rectius definition of rape as: “(...)the trial panel found that the actus reus of the crime of rape in international law is constituted by: sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The men area is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim (...”)”. In particular the Tribunal has affirmed that: “(...)the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the 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 (...”). See also: M. CHERIF BASSIOUNI, P. MANIKAS, The law of the International Criminal Tribunal for the Former Yugoslavia, Transnational Publishers 1996, pp. 555ss. K.D. ASKIN, War crimes against women: prosecution in international war crimes Tribunals, Martinus Nijhoff Publishers, 1997, pp. 380-382. See also the case: Prosecutor v. Furundžija, Case No. IT-95-171/A, Appeal Judgment, par. 207 (ICTY, July 21, 2000): “(...) the actus reus of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose
The absence of a commonly accepted definition of rape\(^{38}\) in international law proved a real challenge for the ICTY\(^ {39}\) and the International Criminal Tribunal for Rwanda (ICTR) regarding the prosecution of sexual crimes\(^ {40}\). The systematic rape of men in Rwanda and Bosnia eventually imposed the development of Court jurisprudence\(^ {41}\) allowing them to contribute to international humanitarian law\(^ {42}\) and human rights law\(^ {43}\), particularly with regard to gender-based crimes\(^ {44}\), a development that is clearly reflected in both the Statute of Rome of the ICT\(^ {45}\) and the Statute of the SCSL\(^ {46}\).

must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The men’s rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim (…)”. P. WEINER. The evolving jurisprudence of the crime of rape in international criminal law, in Boston College Law Review, 2013, pp. 1210ss. See in the same spirit also: Case No. SCSL-04-15-T, Trial Judgment, parr. 146–148. The second element of the actus reus of rape refers to the circumstances; “(…) which would render the sexual act in the first element criminal. The essence of this element is that it describes those circumstances in which the person could not be said to have voluntarily and genuinely consented to the act. The use or threat of force provides clear evidence of non consent, but it is not required (…) true consent will not be possible (…) the last part of this element refers to those situations where, even in the absence of force or coercion, a person cannot be said to genuinely have consented to the son may not, for instance, be capable of genuinely consenting if he or she is too young, under the influence of some substance, or suffering from an illness or disability (…)”. In particular Paragraph 147 of the decision refers to the Kunarac appeal judgment as describing circumstances relating to “lack of consent”. The definition derives from the ICC elements of the crime of rape, where “lack of consent” was rejected as an element adopted, in the area was generally very difficult. It is unclear what this reasoning in Sesay (Prosecutor v. Sesay, Kallon & Gbao, Case No. SCSL-04-15-A, Appeal Judgment, parr. 85–92 (Oct. 26, 2009)) was intended to accomplish. According to the Court: it may be deemed proven: “(…) if the Prosecution establishes beyond reasonable doubt that the accused was aware, or had reason to be aware, of the coercive circumstances that undermined the possibility of genuine consent (…)").


The Akayesu case is the first in international criminal justice to provide a definition of rape. The ICTR, in its attempt to define this crime, initially concluded that there was indeed no established definition in international law and assessed the criminalization of crime in national jurisprudence in order to explore the general principles that have been shaped. Although it found that domestic criminal codes have long Grabert defined rapes as “non-consensual sexual intercourse”, the ICTR argued that it is necessary to provide a wider definition, aiming at taking into account the particular context of international criminal law and the peculiarities in its forms of violence recorded in Rwanda. According to the Court, “(...) variants of the act of rape may include the insertion of objects and/or the use of bodily cavities which are not inherently sexual”. By providing a more liberal perception of rape, the Court ruled that rape is a form of assault and that its constitutive elements “can not be isolated in a mechanistic description of objects and parts of the body”. In fact, the
ICTR made a correlation between rape and torture\textsuperscript{53}, first of all finding that rape is torture and then stressing that the Convention against torture does not contain specific acts of torture, emphasizing the way this is done and the “idea” of the offense, rather than on the specific acts which constitute it, an approach which, according to the Court, is the most appropriate in international law. The Tribunal therefore defined rape as a “physical invasion of a sexual nature committed against a person under conditions of coercion”\textsuperscript{54}. At the same time, the Tribunal attributed an equal definition to sexual violence in general, which includes rape, as “any act of a sexual nature committed against a person under conditions of compulsion”\textsuperscript{55}. In particular, the latter stressed that it was not limited to bodily violation of human body and may even include acts that do not involve penetration or even physical contact. As regards rape, concluding that the use of part of the body does not necessarily have to take into account the incident of penetrating a piece of wood into a woman's and men sexual organs\textsuperscript{56}.

The extended definition of rape in the \textit{Akayesu} case differs from the traditional definition in two ways\textsuperscript{57}. First, the definition given by the Tribunal includes forced oral and rectal sexual intercourse, as well as the penetration of a finger or tongue into the vagina\textsuperscript{58}.

\textsuperscript{53}C. TOFAN, Torture in international criminal law, Wolf Legal Publishers, 2011.

\textsuperscript{54}The Tribunal affirmed also, that: “coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women (…)”.


\textsuperscript{57}A.M. DE BROUWER, The importance of understanding sexual violence in conflict for investigation and prosecution purposes, in Cornell International Law Journal, 2015, pp. 5ss. K.A. DUCEY, Dilemmas of teaching the “greatest silence”: Rape-as- genocide in Rwanda, Darfur, and Congo, in Genocide Studies & Prevention: International Journal, 2010, pp. 312ss. According to Fountain: “(…) the Akayesu decision was considered revolutionary because it abandoned “mechanical” descriptions of rape, which generally required a certain degree of penetration and, most critically, a particular state of mind on the part of the victim (that is, of non-consent). Rather, the Trial Chamber held, rape is better determined as "physical invasion of a sexual nature, committed under circumstances that are coercive (…)". C.J. FOUNTAIN CALEB, Sexual violence, the ad hoc Tribunals and the International criminal Court: Reconciling \textit{Akayesu} and \textit{Kunara}, in ILSA Journal of International & Comparative Law, 2013, pp. 254ss.

\textsuperscript{58}P.A. BROUSSARD, Repair versus rejuvenation: The condition of vaginas as a proxy for the societal status of women, in Seattle Journal for Social Justice, 2011, pp. 936ss.
In contrast, according to the traditional approach of domestic legislation, these acts are classified as sodomy or some other forms of sexual violence. Secondly, because this definition is sex neutral, the victim could be the man and the actor the woman. This perception differs equally from traditional law, since the latter perceives rape as a crime that only a man can commit against a woman, allowing incarceration of the woman only as an accomplice. This decision also has another pioneering premise. The Tribunal concluded that the magnitude of coercion required does not have to reach the level of physical violence, as “threats, intimidation, extortion and other forms of coercion that exploit fear and despair may be coercion, and coercion may be inherent in specific circumstances, such as armed conflict or military presence of Interhamwe among Tutsi refugee women in the community office”.

The Tribunal, therefore, has only widely accepted the concept of rape and sexual violence, but has also expressed a widespread perception of coercion by emphasizing the particular nature of sexual crimes in armed conflict and the need to bring closer the context in which it occurs. Thus, the element of non-consensus is fulfilled, without the necessity of proof of violence or coercion, since the burden falls on the perpetrator and the victim and the context in which the crimes of sexual violence were committed. This assumption leads to the further result of the elimination of the need to witness and cross-check the relevant deposits, but also to the reluctance of victims to make detailed descriptions of the crimes against them. As well as the analogy with the crime of torture in which the Tribunal took refuge, which does not contain the element of consensus.

66 The Tribunal defines that: “(...) the cultural sensitivities involved in public discussion of intimate matters and recalls the painful reluctance and inability of witnesses to disclose graphic anatomical details of sexual violence they endured (...)”. Akayesu Trial Judgment, para. 687.
Coercion is therefore the element that characterizes the rape crime in international law: in the context of genocide⁶⁷, crimes against humanity⁶⁸ and war crimes⁶⁹, when a sexual act is imposed on a person, the issue of consensus becomes redundant. Although the Akayesu case was accepted as setting an important limit of protection, it was also criticized that it was too broad, not quite specific and possibly as violating the principle of legality⁷⁰. Alison Cole criticized the Tribunal for its failure in this case to follow the observance of two international rules when exporting the definition, the nullum crimen sine lege principle⁷¹, and identifying the correct sources of international law. However, the decision was generally welcomed, as many were the ones who praised her for her creativity and her contribution to the punishment of perpetrators of sexual violence⁷².

The Special Expert on Violence Against Women and Men stated that the definition reinstates rape as an attack on the personal security of a woman as a person and not as a violation of the honor of the entire family or village⁷³. As advocate General Louis Arbour noted, “the decision is truly remarkable in its broadness and perspective, as well as in the detailed legal analysis of many issues that will be critical to the ICTY⁷⁴ and the ICTR, particularly in relation to the law of sexual violence”⁷⁵.

The definition of rape as set out in the Akayesu judgment was also adopted in the judgments

⁶⁹R.J. GOLDSTONE, Prosecuting rape as a war crime, in Case Western Reserve Journal of International Law, 2002, pp. 278ss.
⁷¹J. NICHOLSON, Strengthening the effectiveness of international criminal law through the principle of legality, in J. NICHOLSON, Strengthening the validity of international criminal tribunals, Brill/Nijhoff, 2018.
⁷⁹Y. SHANY, How can international criminal Courts have a greater impact upon national criminal proceedings? Lessons from the first two decades of international criminal justice in operation, in Israel Law Review, 2013, pp. 4ss.
Čelebići76 (1998), Musema77 (2000), Niyitegeka78 (2003) and Muhimana79 (2005). In Musema, which followed Akayesu at the ICTR, the Tribunal, by adopting the broad definition of rape, as formulated in the Akayesu case and then in Čelebići80, once again underlined that “(...) the essence of rape is not the particular details of the parts of the body and the objects involved, but rather the assault expressed in a sexual manner under coercive conditions”81. Explaining the difference in the jurisprudence of the two ad hoc tribunals82, notably as regards the adoption by the ICTY83 of a mechanistic approach to rape84, concluded that the conceptual approach to rape is preferable because of the dynamic continuum of rape understanding and its integration into the principles of international law85. He rejected the tendency to focus the problem on the sexual intercourse as a prerequisite for national laws to include acts performed on objects or parts of the body which are not inherently sexual86. The ICTR, however, did not refer to which national

76Case No. IT-96-21-T, ICL 95 of 20 February 2001.
78Case No. ICTR-96-14 of 9 July 2004.
85A. ZAKERIAN, M. ALIKHANI, International Criminal Tribunal for the former Yugoslavia, activities and achievements, in Quarterly of Foreign Policy, 2013, pp. 7ss.
86The Inter American Court has been using the sources of international criminal law to interpret the articles of the American Convention on Human Rights (ACHR) and especially in the sector of sexual violence as we can see in the next cases: Plan de Sánchez Massacre v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 105, (April 29, 2004); Myrna Mack-Chang v. Guatemala. Inter-Am. Ct. H.R. (ser. C) No. 105, (Nov. 25, 2003); Prosecutor v. Moinina Fofana and Allieu Kondewa, Cases Nos. SCSL-04- 14-T-128-7347, SCSL-04-14-T-128-7363,
legislation it relied on to draw this conclusion, which, moreover, tends to delimit more precisely this particular offense. In Musema, the Tribunal finally chose the broad definition to include other forms of sexual violence beyond the narrow concept of rape. It is noteworthy that the two ad hoc tribunals have not hesitated in the next few years to adopt the definition given in the above-mentioned judgments or to agree with its substance. Typical is the case of Čelebići, where for the first time it was attempted to give a definition of rape. The decision provided a detailed examination of the historical development of the rape ban in international humanitarian law but concluded that there is no Convention or other international text providing a definition of the term. After quoting Akayesu and agreeing with his reasoning, he said there was no reason to deviate from the ICTR conclusion on this issue.

The ICTY in the Furundžija judgment condemned the accused for the rape crime as a common violation of article 3 of the Conventions of Geneva of 1949, and largely deviated substantially from the defining definition of rape. Recognizing the absence of a generally accepted definition of rape in international law, the ICTY considered that it should rely on the general concepts and legal institutions common to the main legal systems of the world,


Prosecutor v. Furundžija, Case No. ICTY- IT-95-17/1-T, Trial Judgment, para. 43, 274.
avoiding too much of a legal tradition to end up a “precise definition of rape”\(^{95}\), and noted that due attention should be paid to national laws.

In its research, the ICTY concluded that there was a tendency in the national laws of a large number of states to broaden the definition of rape to cover acts previously classified as minor violations and now the stigma of rape\(^{96}\) is attributable to an expanding category of sexual offenses, provided that certain criteria, such as forced physical penetration, are met\(^{97}\). He stressed, however, that there is a significant disagreement with the treatment of the States with regard to forced oral intercourse: in some states, it is classified as sexual abuse, while in other as rape. In order to resolve this conflict, the Tribunal found it necessary to resort to the general principles of international criminal law and, if no satisfactory conclusion was reached, to the general principles of international law\(^{98}\). By resorting to the general principle of respect for human dignity, he stressed that this principle is essentially the *raison d’être* of international humanitarian law and human rights law\(^{99}\) and protects individuals from violations of their personal dignity\(^{100}\), for physical assault or for humiliation of the honor, self-esteem and the mental state of the individual\(^{101}\). Based on this assumption, the ICTY has concluded that undoubtedly such a serious violation, such as forced intrusion, should be described as rape\(^{102}\).

\(^{95}\)“(...) in relation to torture by means of rape, and with reference to the prohibited purposes of torture: (...) torture by means of rape is a particularly grave form of torture (...). The violation of the moral and physical integrity of the victims makes rape a particularly serious crime. Rape is an inherently humiliating offence, and humiliation is generally taken into account when assessing the gravity of a crime (...).” D.S. MITCHELL, The prohibition of rape in international humanitarian law as a norm of jus cogens: clarifying the doctrine, in Duke Journal of Comparative & International Law, 2005, pp. 224ss.


\(^{102}\)”(...) the forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity. The essence of the whole corpus of international rights law lies in the
Before the Tribunal, the issue of breaking the *nullum crimen sine lege* principle was raised by the defense\(^{103}\), in particular because of the classification of forced oral intercourse with rape rather than sexual abuse, since it considered that this enlargement was very liberal and deviated from the traditional meaning of rape. This argument was rejected by the ICTY, adding that “there is no question of criminalizing acts that were not criminal when committed by the accused, since violent oral intercourse is in any case a crime, and indeed an extremely serious crime (...) in cases (...) violent oral intercourse is, as a rule, a distinct sexual abuse as it is committed in a time of war against unprotected citizens\(^{104}\). Thus, it is not just sexual abuse but sexual abuse as a war crime or crime against humanity (...)”\(^{105}\). Moving towards the wording of the definition, the Tribunal considered that the specialty and the precision in the determination of the objective status were considered necessary to ensure procedural guarantees. The Tribunal, therefore emphasized the distinction between rape, which is described as a crime against humanity in the ICTY Statute\(^{106}\), and other less serious forms of sexual abuse, which could be prosecuted as “other inhuman acts”\(^{107}\).

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

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\(^{104}\) P. KIRBY, How is rape a weapon of war?, Feminist international relations, modes of critical explanation and the study of wartime sexual violence, in European Journal of International Relations, 2012.


\(^{107}\) P. GRÉCIANO, Justice pénale internationale, ed. Mare & Martin, 2016.

A very important element exerted by Furundžija—the composition of which consisted of

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110See in particular the next cases: The ICTY Trial Chamber in case Furundžija drew a distinction between rape and any other forms of sexual violence on the basis of penetration: “(...) international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration (…)”. In case: Prlić et al. came to the same conclusion as Furundžija: “(...) rape is thereby prohibited, as well as all forms of sexual violence not including penetration (…)”. The ICC Trial Chamber in Bemba case required the invasion to amount to penetration: “(...) rape requires “invasion” of a person’s body by “conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body (...) the invasion of the body of person to constitute rape, it has to be committed under one or more of four possible circumstances: (i) by force; (ii) by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person; (iii) by taking advantage of a coercive environment; or (iv) against a person incapable of giving genuine consent (…)”. The ICTR Appeals Chamber in Gacumbitsi concurred and developed this approach: “(...) knowledge of non-consent may be proven, for instance, if the Prosecution establishes beyond reasonable doubt that the accused was aware, or had reason to be aware, of the coercive circumstances that undermined the possibility of genuine consent (…)”. The ECCC Appeals Chamber in Kaing Guek Eav (“Case 001”) (ECCC, The Prosecutor v. Kaing Guek Eav, AC, Appeal judgment, case no. 001/18-07-2007-ECCC/SC, 3 February 2012, para. 156), adopted a similar approach while limiting the purpose of control to the powers of ownership: “(...) the exercise over a person of powers attaching to ownership requires a substantial degree of control over the victim. There is no enslavement, however, where the control has an objective other than enabling the exercise of the powers attaching to ownership (…)”. The SCSL Trial Chamber in Sesay et al. SCSL, (The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustin Gbao, TC I, judgment, case no. SCSL-04-15-T, 2 March 2009, para.163) concurred with the Appeal Chamber in Kunarac et al., while concluding that consent might be relevant to the exercise of powers attached to the right of ownership: “(...) whether or not there was consent may be relevant from an evidentiary perspective in establishing whether or not the Accused exercised any of the powers attaching to the right of ownership (…)”. The SCSL Appeal Chamber in Brima et al. (SCSL, The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, TC II, judgment, case no. SCSL-2204-16-T, 20 June 2007, para. 704) overruled the Trial Chamber’s classification of forced marriage as sexual slavery, asserting the crime of forced marriage to be predominantly non-sexual in its nature: “(...) no Tribunal could reasonably have found that forced marriage was subsumed in the crime against humanity of sexual slavery. While forced marriage shares certain elements wipalmerth sexual slavery such as non-consensual sex and deprivation of liberty, there are also distinguishing factors. First, forced marriage involves a perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with another person resulting in great suffering, or serious physical or mental injury on the part of the victim. Second, unlike sexual slavery, forced marriage implies a relationship of exclusivity between the “husband” and “wife,” which could lead to disciplinary consequences for breach of this exclusive arrangement. These distinctions imply that forced marriage is not predominantly a sexual crime. The Trial Chamber, therefore, erred in holding that the evidence of forced marriage is subsumed in the elements of sexual slavery (…)”. The ICC Pre- Trial Chamber in Ongwen (ICC, The Prosecutor v. Dominic Ongwen, PTC II, Decision on the confirmation of charges against Dominic Ongwen, case no. ICC- 02/04-01/15-422-Red, 23 March 2016, para. 88) concurred with the SCSL Appeal Chamber in Brima et al, holding that forced marriage may constitute “other inhumane acts”: “(...) not explicitly include “forced marriage” as a crime within the jurisdiction of the Court. The question before the Chamber is therefore whether the conduct attributed to (the accused) (i.e. to have forced women to serve as “conjugual partners” to himself and other LRA fighters in the Sinia brigade) constitutes an other inhumane act of a character similar to the acts set out in article 7(1)(a) to (j) intentionally causing great suffering, or serious injury to body or to mental or physical health. This is largely a question of fact, but the application of the gravity threshold of article 7(1)(k) of the Statute is also a question of law, as is the question of whether the conduct described as “forced marriage” is not otherwise subsumed by the crime of sexual slavery (…)”. The ICTY Appeals Chamber in Đorđević et al. Case Prosecutor v. Vlastimir Đorđević et al. AJ, IT-05-87/1-A 27 January 2014 adopted a similar approach, considering that sexual violence may not
the court judges Mumba, Cassese and May-is that when giving the definition the Tribunal did indeed attach great importance to the general rules of interpretation of international law while relying on international texts, international criminal jurisprudence and human rights law, the general principles of international law, where necessary, and the general principles of law as emerged from the study of national laws. However, although he relied on the Akayesu\textsuperscript{111} and the Čelebići judgments, after finding that there was no definition of rape in international law, he did not consider them to fill the gap in international law\textsuperscript{112}, relying on the absence of the principle of specialty in the conclusions of as above. Critical criticism of Catharine MacKinnon is that the Tribunal almost implies that: “without this declaration, the defendants-guards in the concentration camps accused of sexual abuse of prisoners-may not have known with sufficient precision that they were accused of committing a crime (...)”\textsuperscript{113}. However, the definition of Furundžija is equally important for the explicit incorporation of require physical contact with the perpetrator where the acts constitute sexual humiliation or degradation: “(...) sexual assault requires that an act of a sexual nature take place. The Appeals Chamber notes that the act must also constitute an infringement of the victim’s physical or moral integrity. Often the parts of the body commonly associated with sexuality are targeted or involved. Physical contact is, however, not required for an act to be qualified as sexual in nature. Forcing a person to perform or witness certain acts may be sufficient, so long as the acts humiliate and/or degrade the victim in a sexual manner (...).” See also: A.T. CAYLEY, Prosecuting mass atrocities at the Extraordinary Chambers in the Courts of Cambodia (ECCC), in Washington University Global Studies Law Review, 2012, pp. 446ss. R. KILLEAN, An incomplete narrative: Prosecuting sexual violence crimes at the Extraordinary Chambers in the Courts of Cambodia, in Journal of International Criminal Justice, 2015, pp. 335ss. S. SCULLY, Judging the successes and failures of the Extraordinary Chambers of the Courts of Cambodia, in Asian Pacific Law & Policy Journal, 2011, pp. 14ss. S. WILLIAMS, E. PALMER, The extraordinary Chambers in the Courts of Cambodia: Developing the law on sexual violence?, in International Criminal Law Review, 2015, pp. 454ss. L. MAY, Z. HOSKINS, The extraordinary Chambers in the Courts of Cambodia. Assessing their contribution to international criminal law, ed. Springer, 2016.


\textsuperscript{112} S. DARCY, J. POWDERLY (eds.), Judicial creativity at the international criminal Tribunals, Oxford University Press, 2010, pp. 138-139.

\textsuperscript{113} C.A. MACKINNON, Defining rape internationally: A comment on Akayesu, op. cit., pp. 940, 946.
violence or the use of violence, along with coercion, as part of rape crime. The Tribunal concluded that all the case law investigated requires the existence of the element of violence, coercion, treat, or action without the consent of the victim. It also placed particular emphasis on the definition given to the Prosecutor's preliminary summary, according to which rape is a violent act committed by violence or by the explicit or tacit threat of violence against the victim or a third person causes them reasonable fear of being subjected to violence, detention, coercion or psychological oppression. Thus, according to the Court's opinion, “all forms of captivity undermine consensus”. It should be noted that, from the time when the Court relied on national criminal provisions to extract the definition of rape, it would have been more appropriate to rely more heavily on national laws criminalizing sexual acts among persons in unequal positions (such as guardians and food) instead of those criminal provisions that define consensual sexual intercourse in theoretical physiological conditions.

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

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114Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Trial Judgment, paras. 183-184.
117B.A. OLWINE, One step forward, but two steps back: Why Gacaca in Rwanda is jeopardizing the good effect of Akayesu on women’s rights, in William & Mary Journal of Women and the Law, 2011, pp. 640ss.
humiliating and traumatic to the victim, relying on the principle of human dignity, this fundamental principle would justify widening the definition of rape to other forms\textsuperscript{120}. Therefore, while in its explanation, the ICTY laid the foundations for adopting a broad perception of the definition\textsuperscript{121}, similar to that of Akayesu, it nevertheless appeared that it finally closed the door to adopt a conservative and largely incompatible position with the circumstances of the offenses\textsuperscript{122}. Shortly thereafter, the ICTY came to reinstate the Kunarac case\textsuperscript{123} with the broad but concise and detailed concept of rape. Once again, the Tribunal has established that there is no definition resulting from customary or conventional international law, either international human rights law or humanitarian law. It then examined the definition adopted in Furundžija and, while adopting it in his first part, considered that the required coercion, violence or threat of violence was very restrictive. It therefore said that Furundžija's definition did not refer to other factors that would make sexual penetration unconventional or non-voluntary on the victim's side\textsuperscript{124}. The Tribunal also criticized Furundžija for the fact that, while examining the national laws of many states, it found the extent to which many of them perceived the element of non-consensus, but that conclusion did not include it in the final definition. Thus, the ICTY in Kunarac conducted its own investigation of domestic legislation\textsuperscript{125} and relevant case law in order to arrive at its own conclusions\textsuperscript{126}.

\textsuperscript{120}C.F. DE CASADEVANTE ROMANI, International law of victims, ed. Springer, 2012.
\textsuperscript{121}M. KARAGIANNAKIS, Case analysis: The definition of rape and its characterization as an act of genocide-A review of the jurisprudence of the International Criminal Tribunals for Rwanda and the Former Yugoslavia, in Leiden Journal of International Law, 1999, pp. 489ss, which claims that in Furundžija the definition of rape retained its extended form in relation to the Akayesu: "(...) it would seem that the broad, albeit more mechanical definition posited in the Furundžija Judgment does not differ in its practical application from the conceptual definition born in the Akayesu Judgment and followed and applied in the Čelebići Judgment". E. DOWDS, Conceptualizing the role of consent in the definition of rape at the International Criminal Court: A norm transfer perspective, in International Feminist Journal of Politics, 2018. W.A. SCHABAS, Crimes against humanity as a paradigm for international atrocity crimes, in Middle East Critique, 2011.
\textsuperscript{122}C.J. FOUNTAIN CALEB, Sexual violence, the ad hoc Tribunals and the International Criminal Court: Reconciling Akayesu and Kunarac, in ILSA Journal of International & Comparative Law, 2013, pp. 4ss.
\textsuperscript{123}Case No. IT-96-23 & 23/1 of 12 December 2002.
\textsuperscript{126}M. CHESNEY-LIND, A.V. MERLÓ, Global war on girls? Policing girl's sexuality and criminalizing their
The Tribunal has distinguished three categories of factors that often determine when a sexual act is rape in accordance with domestic criminal codes: i) sexual activity is accompanied by violence or threat of violence towards the victim or third person, ii) sexual activity is accompanied by violence or a variety of other special circumstances that made the victim particularly vulnerable or canceled her ability to make a conscious refusal; iii) sexual activity that takes place without the consent of the victim. Thus, apart from point (i) “violence or threat of violence to the victim or a third person”, the Tribunal has introduced two more elements in categories (ii) and (iii). For category (ii) the court judges were convinced that by placing the victim in a position where he is unable to withstand, due to physical or mental weakness or in a surprise or misleading way, he is an element of rape crime. Similarly, in category (iii) the Tribunal took into account the absence of consensus and any circumstance where the victim does not have the possibility of reasoned refusal as another element of the crime.

Note that this was recognized in the Furundžija case, but was not included in the final definition. By proceeding with the analysis of the definition of rape, and after conducting the necessary investigation of legal systems that incorporate the principles to be adopted in the international context, the Tribunal held that “the objective reality of rape crime in international law consists of: sexual penetration, albeit of a) a vagina or anus of the victim with the penis of the perpetrator or any other object used by the offender, or b) the mouth of the victim by the penis of the offender, where this sexual penetration takes place without the consent of the victim. Consent to this end must be voluntarily given as a result of the free will of the victim, assessed in the context of the surrounding circumstances. The subjective nature consists of the intention to commit sexual penetration and the knowledge that it is done without the consent of the victim (...).”

The definition adopted the traditional wording of the objective existence of rape. Part (a) and

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

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

Moreover, since Kunarac was aware of the context of the war and the particular

134 C.J. FOUNTAIN CALEB, Sexual violence, the ad hoc Tribunals and the International Criminal Court reconciling Akayesu and Kunarac, op. cit.
135 I. HAENEN, Classifying acts as crimes against humanity in the Rome statute of the International Criminal Court, in German Law Journal, 2013, pp. 89ss.
136 Para. 457-458: in argument of violence or treat of violence the Tribunal declares that: “(...) in practice, the absence of genuine and freely given consent or voluntary participation may be evidenced by the presence of the various factors specified in other jurisdictions—such as force, threats of force, or taking advantage of a person who is unable to resist. A clear demonstration that such factors negate true consent is found in those jurisdictions where absence of consent is an element of rape and consent is explicitly defined not to exist where factors such as use of force, the unconsciousness or inability to resist of the victim, or misrepresentation by the perpetrator”. See also T. BONACKER, C. SAFFERLING, Victims of international crimes: An interdisciplinary discourse, T.M.C. Asser Press, 2013.
vulnerability of Muslim women and men in custody\textsuperscript{138}, and of the fact that the witness had previously been raped by several other soldiers\textsuperscript{139}, the Tribunal ruled that the accused had concluded sexual intercourse with the victim, knowing in full knowledge that he did not freely consent\textsuperscript{140}. In the Court of Appeal, the Court confirmed the definition of rape with some remarkable remarks. The Court of Appeal stressed that: “the conditions prevailing in most cases where there are war crimes against humanity are compelling”, concluding that under these circumstances “true consensus is not possible”\textsuperscript{141}.

Based on the facts of the case, including the de facto detention, the systematic and repeated rape of the victims, the Court of Appeal concluded that the conditions of detention and detention itself are so compelling that there is no room for consensus. The Court of Appeal, however, confirmed the definition, which in particular requires non-consent (and not evidence of violence or coercion) as part of rape crime, while at the same time holding that consensus is impossible under inherently coercive conditions common to most international

\textsuperscript{139}A. ADAMS, The first rape prosecution before the ICC: Are the elements of crimes based on a source of international law?, in International Criminal Law Review, 2015, pp. 1100ss.
\textsuperscript{140}See also in argument the next cases: Florida Star v. BJF, 491 U.S. 524 (1989) (...) in this regard, courts have been willing to close certain proceedings to account for the concerns of witnesses. If a partial closure is requested, i.e., excluding only certain spectators, there must be a “substantial reason” for such closure, whereas a full closure to the public and press requires an “overriding interest” (...)”. Partial closures of the Courtroom have been justified on the grounds of a witness’ fear of retribution from perpetrators still at large (Nieto v. Sullivan, 879 F.2d 743 (10th Cir.), cert. Denied, 110 S. Ct 373 (1989)); to protect the dignity of an adult witness during a rape trial (United States ex rel. Latimore v. Sielaff, 561 F.2d 691 (7th Cir.), cert. denied 434 U.S. 1076 (1977); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir.), cert. granted 468 U.S. 1206 (1983), vacated and remanded, 739 F.2d 531 (1984), in which protection of an adult prosecution witness from embarrassment was held to be sufficient for partial closure of a rape trial); and to protect a minor rape victim from fear of testifying before disruptive members of the defendant's family (U.S. v. Sherlock, 962 F.2d 1349 (9th Cir. 1989) see also Geise v. United States, 262 F.2d 151, 155 (9th Cir. 1958), cert. denied, 361 U.S. 842 (1959) in which the reluctance and fear of a child witness in a rape case to testify in the presence of a full Courtroom justified closure of the Courtroom to all but press, members of the bar, and close friends and relatives of the defendant). Complete closure for a limited time has been justified to protect the safety of a witness and his family (United States v. Hernandez, 608 F.2d 741 (9th Cir. 1979)); to preserve confidentiality of undercover agents in narcotics cases (United States ex. rel. Lloyd v. Vincent, 520 F.2d 1272 (2d Cir.), cert. denied, 423 U.S. 937 (1975)). (...) Twenty-six state statutes allow for closure of trials to protect witnesses’ (...)”. Cfr. P. CLARK, Rape, sexual violence and transitional justice challenges. Lessons from Bosnia Herzegovina, ed. Routledge, 2018. N. BOISTER, R.J. CURRIE, Routledge handbook of transnational criminal law, ed. Routledge, 2015. A. CASSESE, F. JESSBERGER, R. CRYER, U. DÉ International criminal law, ed. Routledge, 2016. E. BIKUNDO, International criminal law using or abusing legality?, ed. Routledge, 2014. O.N.I. EBBE, Comparative justice systems. Policing, judiciary and corrections, ed. Palgrave, 2013. A. ESER, Comparative criminal law, ed. Nomos & Hart Publishing, 2017. L. GROVER, Child soldier victims of genocidal forcible transfer. Exonerating child soldiers charged with grave conflict-related international crimes, ed. Springer, 2014.

crimes. But what is the difference between Kunarac and Furundžija? The Kunarac Court of Appeal stated that the Court of first instance did not reject the definition of Furundžija but simply “tried to explain the relationship between violence and consensus (...)”\textsuperscript{142}. However, a more detailed analysis of the decision does not confirm this view. The elements of rape crime in the two cases are clearly different. In fact, coercion and consensus are traditionally two distinct elements, each of which must be met independently\textsuperscript{143}. Violence, threats and coercion focus on the acts of the accused, unlike the consensus, which is related to the victim's mental state\textsuperscript{144}. Given that Kunarac was the first case in which the Court of Appeal directly addressed the issue of the definition of rape, many other decisions, both the ICTY and the ICTR, relied on it and followed the definition it gave\textsuperscript{145}. In Kajelijeli\textsuperscript{146} and Kamuhanda\textsuperscript{147} cases, it was accepted that rape was one of the reported acts of penetration, without the consent of the victim and knowing that this consensus was absent.

In Muhinama, as in Musema, the ICTR has tried to reconcile the conflicting definitions of rape crime\textsuperscript{148}. In this case, both the prosecution and the defense welcomed the conceptual approach of rape, as was adopted in Akayesu. The Tribunal noted that the Akayesu approach and the Kunarac definition are not mutually exclusive, but that Kunarac provided: “additional details of the constituent elements of the acts considered to be rape”\textsuperscript{149}. Thus, according to the Tribunal, while Akayesu referred extensively to “physical violation of a sexual nature”, Kunarac attempted to specify its parameters of what constitutes that sexual offense of sexual nature as the rape offense. Considering the issue of consensus, the ICTR in Muhimana case considered that: “coercion is an element that can circumvent the importance

\textsuperscript{143}I. HAENEN, Classifying acts as crimes against humanity in the Rome statute of the International Criminal Court, op. cit.
\textsuperscript{144}W. SCHOMBURG, I. PETERSON, Genuine consent to sexual violence under international criminal law, in American Journal of International Law, 2007, pp. 138ss. According to Cassese: “(...) according to which the two definitions are essentially the same as coercion, violence or the threat of violence to imply the essence or to mean the absence of consensus (...).” See: A. CASSESE, International criminal law, Oxford University Press, 2013, pp. 79ss.
\textsuperscript{146}Case No. ICTR-98-4A od 23 May 2005.
\textsuperscript{147}Case No. ICTR-99-54A of 19 September 2005.
\textsuperscript{149}C.J. FOUNTAIN CALEB, Sexual violence, the ad hoc Tribunals and the International criminal Court: Reconciling Akayesu and Kunara, op. cit.
of consent as evidence for the crime of rape”\textsuperscript{150} at the same time that the context of international crimes “is almost universal coercive, thereby undermining the element of consensus”\textsuperscript{151}.

However, the 	extit{Muhimana} case does not provide sufficient details as to whether non-consent should be the decisive criterion for rape crime, particularly in relation to the subjective nature of the offense\textsuperscript{152}. Moreover, it is difficult to see whether the pure result of the 	extit{Muhimana} decision was to reduce Kunarac in an interpretative guide to the broad but bold definition of 	extit{Akayesu}, or to provide an almost emotional aspect to the conceptual definition of 	extit{Akayesu}, at the same time recognizing the necessary expertise provided by Kunarac. In conclusion, the Tribunal did not explain how it reconciled the differentiated definitions of 	extit{Akayesu} and Kunarac, but also how it applied the relevant definition to the facts of the case before it.

Although Kunarac’s appeal would normally have been a guide to all subsequent cases related to the rape crime\textsuperscript{153}, however, the large number of cases of sexual violence before the ad hoc tribunals gave food to them for further discussion and investigation of the issue. This trend is reflected in the 	extit{Gacumbitsi} appeal case\textsuperscript{154} before the ICTR\textsuperscript{155}, where a different definition of rape was ultimately attributed\textsuperscript{156}.

Gacumbitsi was found guilty of genocide\textsuperscript{157} and rape for a crime against humanity\textsuperscript{158}, which led the Tribunal to reconsider previous rape case law, concluding that the 	extit{Akayesu} and Kunarac judgments, although they have different approaches, can reconcile\textsuperscript{159}. The lack of consent of the victim was proven by the fact that Gacumbitsi had threatened to kill the

\textsuperscript{150}A.L. CHOO, Evidence, Oxford University Press, 2015.
\textsuperscript{151}Case No. ICTR-95-1B of 21 May 2007.
\textsuperscript{152}N. HAYES, Creating a definition of rape in international law: The contribution of the international criminal Tribunals, in S. DARCY, J. POWDERLY (eds.), Judicial creativity at the international criminal Tribunals, Oxford University Press, 2010, pp. 146ss.
\textsuperscript{154}Case No. ICTR-01-64 of 7 July 2006.
\textsuperscript{155}R.J. KABANO, The critical comparison of the Sierra Leone Tribunal with the international criminal Tribunal for Rwanda: The benefit of hybridity of a Court, in Journal of Law, 2017, pp. 7ss.
\textsuperscript{156}The Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-A, ICTR, Appeal Judgment, 7 July 2006.
victims horribly in case they resisted and the fact that those who escaped were eventually attacked. During the trial, the Prosecutor claimed that the lack of consensus and the relative knowledge of the accused are not elements of rape crime. Instead, according to him, rape must be preceded in the same way as torture and enslavement, for which the prosecution does not have to prove the lack of consensus.

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

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160 Gacumbitsi Judgment, para. 325.
161 Gacumbitsi Appeal Judgment, para. 147.
163 See also in argument: Prosecutor v. Norman, Fofana & Kondewa, Case No. SCSL-04-14-PT, Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 13 (May 24, 2005) (noting the prosecution's argument that the ad hoc Tribunals have routinely recognized acts of sexual violence as constituting crimes a
165 People v. Mayberry, 542 P.2d 1337, 1345 (Cal. 1975) (en banc) (holding that a statutory rape provision did not eviscerate the requirement of simultaneous act and wrongful intent); State v. Smith, 554 A.2d 713, 715–16 (Conn. 1989), holding that: “(...) for the crime of rape, the perpetrator must only intend the general physical act of sexual intercourse and not the specific act of sexual intercourse without a person's consent (...);” Commonwealth v. Lopez, 745 N.E.2d 961, 965 (Mass. 2001), that “(...) no mens rea or knowledge as to the lack of consent has ever been required” to determine that a rape has occurred (...); State v. Reed, 479 A.2d 1291, 1296 (Me. 1984), that: “(...) no culpable state of mind” is required when rape is compelled by force or threat (...); see also Sexual Offences Act, 2003, c. 42, par. 1(1)(c) (U.K.), which providing as an element of rape that the accused “(...) does not reasonably believe” that the victim consented (...).” Also see: I. MARCHUK, The fundamental concept of crime in international criminal law. A comparative law analysis, ed. Springer, 2015.
the evolving genocide campaign\textsuperscript{166} or the detention of the victim\textsuperscript{167}. Consequently, the Gacumbitsi Court of Appeal held that the definition of Kunarac, both conceptually and \textit{de jure}, prevailed. The conclusion of Gacumbitsi has sparked intense controversy and was the subject of academic and bibliographic criticism\textsuperscript{168}. Schomberg argues that the unequal position of the perpetrator and the victim is an intrinsic element in cases where rape is committed during the war and ultimately leads to international crime\textsuperscript{169}. Lack of consensus is not appropriate under international law once it is proved that the sexual act was committed in a context where sexual autonomy is generally absent.

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

The SCSL also faced the need to define the crime of rape\textsuperscript{170}. Initially, in 2007 in \textit{Prosecutor v. Brima, Kamara & Kanu}\textsuperscript{171} the SCSL essentially adopted the corresponding definition, as expressed in the \textit{Kunarac} case. Thus, the Court, in addition to the chapeau conditions of crimes against humanity, in accordance with article 2 of the Statute, has also adopted the following elements of the crime of rape: the non-consensual penetration of the vagina or rectum of the victim with the penis of the perpetrator or any other object used by the perpetrator or mouth of the victim with the penis of the perpetrator, of sexual penetration, and the knowledge that it is done without the consent of the victim. The victim's consent must be voluntarily given as a result of the free will of the victim, assessed in the context of the surrounding circumstances. According to the Court, violence or the threat of violence is a clear demonstration of non-consensus, but violence is not a \textit{per se} element of rape, but there are other factors that make the act of sexual penetration unconsciously or non-voluntary victim. However, in situations of armed conflict or detention, coercion is almost universal\textsuperscript{172}. The constant resistance of the victim and physical violence or even the treat of


\textsuperscript{167}N. HOGG, Women’s participation in the Rwandan genocide: Mothers or monsters?, in International Review of Red Cross, 2010, pp. 290ss.


\textsuperscript{170}Sesay, Case No. SCSL-04-15-T, Trial Judgment.

\textsuperscript{171}AFRC Trial, Case No. SCLS-04-16-PT.

\textsuperscript{172}A.A.V.V., Jurisdiccion universal. Sobre crimenes internacionales, ed. Comares, 2013.
such violence by the perpetrator are not preconditions for proof of coercion. The Court has held the objective nature of rape can be established by the use of indirect evidence. Accordingly, the very particular circumstances of the armed conflict, where there are indications of rape on an extensive scale, coupled with the social stigma of rape victims in particular societies, make it difficult to prove the elements of crime\textsuperscript{173}. That is why it is necessary to use indirect evidence to establish the objective reality of rape. Two years later, in Prosecutor v. Sesay, Kallon & Gbao, the SCSL\textsuperscript{174} adopted a quite different definition\textsuperscript{175}. The Court, after reviewing the history of rape during wars, identified its elements as follows: 1. the accused violated the body of a person by acts that have the effect of penetrating, irrespective of gravity, any part of his body the victim or the accused with a sexual organ or the oral or rectal cavity of the victim with any object or part of the body; 2. the violation was committed with violence or threat of violence or coercion such as that caused by fear of violence, coercion, detention, psychological oppression or abuse against such person or other person or through the exploitation of the forced environment, or the violation was brought against of a person unable to give genuine consent; 3. the defendant had the added intention of causing sexual intercourse; 4. the accused had a reason to know that the victim did not consent. The Court rushed to explain how it reached the conclusions of the first two paragraphs.

Assessing the first paragraph, the Court explained the broad perception of sexual acts, noting that the first element of the objective hypothesis defines the type of violation required to establish the rape offense and covers two types of penetration, even light. The first part refers to the penetration of any part of the body, either the victim or the accused with a sexual organ, while the phrase “any part of the body” includes genital, rectal or oral penetration\textsuperscript{176}.

The second part refers to penetrating the genital or anal cavity with any object or any part of the body that covers penetration with anything else, the object or part of the body, except for


\textsuperscript{175}RUF Trial, Case No. SCSL-04-15-T, Trial Judgment, para. 145.

\textsuperscript{176}SCSL-04-15-T, Trial judgment, 2 March 2009, para 143 (rape as a crime against humanity under article 2 of the Statute).
the genitals. The Court notes that this definition is broad enough to be sex-neutral as both men and women can be raped\textsuperscript{177}. The decision attempted to clarify the role of the second paragraph, noting that the second element of the objective hypostasis refers to those circumstances that make the sexual act of the first element criminal. It describes essentially the circumstances in which a person has not voluntarily or genuinely consented to the act, whereas the use of threats or violence provides clear evidence of non-consent, but does not require its existence, since in cases where crimes are international, consent is almost universally impossible. With regard to the last part of this element, it refers essentially to the fact that even if there is no violence or coercion, it is not necessary for the person to have given his true consent in practice because he may be very young under the influence of substances or suffer from illness or disability.

An important differentiation of Sesay\textsuperscript{178} is the analysis of the subjective nature of the crime. In fact, it requires the existence of a bilateral subjective hypostasis. Although the lack of consensus is not an element of objective fact, however, the accused must have some form of knowledge that the victim did not consent to the act. It should be noted that in the case of Charles Taylor\textsuperscript{179}, where the accused was finally convicted of rape as a crime against

\textsuperscript{177}C. DOLAN, Into the mainstream: Addressing sexual violence against men and boys in conflict. Briefing Paper prepared for the workshop held at the Overseas Development Institute. Refugee Law Clinic, May 2014, 1-12.


humanity, the SCSL applied a slightly different definition to Kunarac, important elements of which, like the aforementioned decision, were finally included in the ICT for crime facts\textsuperscript{180}.

### 4. Definition of rape by ICC

The Preparatory Committee of ICC was mainly influenced by the ICTY and the ICTR case-law and the elements of crimes, a text intended to assist the Court in the interpretation and application of articles 6 (genocide), 7 (crimes against humanity) and 8 (war crimes). Of course, in ICC, the elements of rape are the same, regardless of whether rape is prosecuted as a war crime\textsuperscript{181} or a crime against humanity\textsuperscript{182}. Thus, rape is defined as follows: 1. the offender violated a person's body by actions that resulted in the penetration, regardless of gravity, of any part of the body of the victim or the accused with a sexual organ, or of the oral or rectal cavity victim with any object or part of the body\textsuperscript{183}; 2. the violation was committed with violence or threat of violence or coercion such as that caused by fear of violence, coercion, detention, psychological oppression or abuse against such person or other person or through exploitation of the enforced environment\textsuperscript{184}, or the violation was brought against a person unable to give genuine consent. This definition of ICT is a mixture of definitions given by the ICTY, of ICTR and Rule 96\textsuperscript{185} of the ad hoc tribunals that is part

\textsuperscript{180}A. SHARPE, Sexual intimacy, gender variance and criminal law, in Nordic Journal of Human Rights, 2015.


\textsuperscript{185}The Rule 96 defines: in cases of sexual assault: (i) notwithstanding Rule 90 (C), no corroboration of the victim's testimony shall be required; (ii) consent shall not be allowed as a defense if the victim: (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological
of the rules and the proof process. However, the ICTR definition avoids a clear choice between the elements of Akayesu and Furundžija, but rather seems to combine them. It provides a gender-neutral definition, predicting the physical penetration of any part of the victim's body as well as violence or coercion. However, although any sexual penetration, according to the definition, may be rape, the sexual conduct of the perpetrator who does not consist penetration is not covered by the rape crime.

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

oppression; or (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear; (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible; (iv) prior sexual conduct of the victim shall not be admitted in evidence or as defense. See, Rule 96 of Evidence and Procedure (UN Doc. IT/32, 1 Feb. 1994). Position adopted in case: Prosecutor v. Tadić, the ICTY trial Chamber explained: “(...) that the rule rejecting a corroboration requirement in sexual assault cases accords to the testimony of a victim of sexual assault the same presumption of reliability as the testimony of victims of other crimes, something long denied to victims of sexual assault by the common law (...).” See also in argument: ROTSCHE, Criminal evidence, ed. Nomos, 2015.

186 H. SATZGER, W. SCHLUCKEBIER, G. WIDMAIER, Strafprozessordnung (StPO), Carl Heymanns Verlag, 2017.
187 P.V. VISEUR-SELLERS, Gender strategy is not a luxury for international Courts, in American University Gender, Society Policy & Law, 2009, pp. 302ss.
188 See in particular the next doctrine work: A. HAGAY-FREY, Sex and gender crimes in the new international law; Past, present, future, Martinus Nijhoff Publishers, 2011, pp. 80ss.
193 In argument see also: the United Kingdom launched an initiative on preventing sexual violence in conflict, aimed, inter alia, at strengthening international efforts and coordination, and supporting states in building their national capacity to prosecute acts of sexual violence committed during conflict. See the G8 Declaration on Preventing sexual violence in conflict, 11 April 2013. The African Solidarity Initiative, a program launched by the African Union (“AU”) in 2012 to mobilize support for post-conflict reconstruction, has also brought about consultations with the objective of formulating an AU-led strategic framework for the prevention of, and response to, sexual violence in Africa. See: The concept note on high-level consultation on preventing and responding to sexual violence in conflict, post-conflict countries and beyond, 9-11 October 2013.
194 ICC, Prosecutor v. Jean-Pierre Bemba Gombo, Decision Pursuant to article 61(7) and (b) on the Charges against Jean Pierre Bemba Gombo, Case No. ICC-01/05-01/08, 15 June 2009 (Bemba Confirmation
It remains to be seen, however, how the ICTY and ICTR will further specify in its case-law each of the elements of crime, which are to be clarified in accordance with international criminal law and which procedural rules will be applied to ensure that it will not be required to the lack of consensus of the victim. It should also be noted that this definition is quite convincing and has been copied in the laws created by the Courts of Cambodia (Extraordinary Chambers in the Courts of Cambodia-ECCC)\(^{195}\) and the special panels for serious crimes in East Timor\(^{196}\), which have already been issued a conviction for the rape crime in the *Cardoso* case\(^{197}\). I suggest that they are worth exploring, as they hold out the possibility of complementing the inevitably limited narratives which emerge through criminal proceedings and bringing us closer to making the more complex and subtle narratives of women's and men experiences “fully visible”\(^{198}\).

In the end, we can say that the extensive efforts of court judges in the ICTY and ICTR to identify and develop the definition of rape as an international crime\(^{199}\) provides a classic illustration of the operation of the case-law interpretation\(^{200}\). *Akayesu* is the perfect archetype of jurisprudence\(^{201}\), while *Furundžija* and *Kunarac* propose a more cautious

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196D. SCHEFFER, The Extraordinary Chambers in the Courts of Cambodia, in M. CHERIF BASSIOUNI, International Criminal Law, ed. Brill, 2008, pag. 253: noting that: “(...) the ECCC (...) was never conceived of by those who negotiated its creation as an instrument of direct relief for victims, although the protection and use of victims as witnesses in the investigations and trials is addressed in detail (...) there is no express provision in the agreement, as adopted, entitling victims to participate (...)”.


200M. DE GUZMAN, How serious are international crimes? The gravity problem in international criminal law, in Columbia Journal of Transnational law, 2012, pp. 20ss.

approach, quite detailed, based on the principle of speciality. At the same time, other decisions, such as Musema and Muhimana\textsuperscript{202}, attempt to create a harmonious interpretation of existing case law. However, although these efforts have been a milestone in international criminal jurisprudence and contributed to the development of international criminal law, this issue continues to concern the courts and academics. The contradictory versions at times raises a number of concerns in the context of human rights law, and in particular the impact that different and often conflicting definitions may have on the right to equal access to justice. As Patricia Viseur Sellers points out, different definitions of rape may result in a 16-year-old man in the civil war in Sierra Leone\textsuperscript{203} being less protected from gay violence than a 16-year-old man who has been sexually abused by an actor, who will be tried before the ICC\textsuperscript{204}.

5. Concluding remarks

In practice, the two international criminal tribunals have acknowledged that sexual violence can constitute a bunch of other additional crimes, including war crimes of torture\textsuperscript{205} and attacks on personal dignity\textsuperscript{206}, the crime against humanity not only of rape but also of sexual enslavement\textsuperscript{207}, persecution, and the crime of genocide\textsuperscript{208}. With regard to ICC, the statute of the latter includes specific gender-based crimes, such as rape, sexual slavery, forced prostitution, pregnancy and sterilization-on the basis of both war crime\textsuperscript{209} and crimes against humanity\textsuperscript{210}. As regards the crimes of genocide, the elements of crimes state that although rape is not listed as a form of genocide, the latter caused by acts of “serious physical or

\textsuperscript{205}See the case: Prosecutor v. Delalić, Mucuc, Delic and Lanzo, Case No.ICTY-IT-96-21-T, Trial Judgment, 16 November 1998, para. 475.
\textsuperscript{206}Prosecutor v. Furundzija, Case No. ICTY-IT-95-1711-T, Trial Judgment, 10 December 1998, para. 274.
\textsuperscript{210}Prosecutor v. Brdjanin, Cse No ICTY-96-4-T, Trial Judgment, 1 September 2004, Trial Judgment, para. 15.
mental harm”\textsuperscript{211}, including “acts of torture, rape, sexual violence, inhuman or degrading treatment”\textsuperscript{212}. However, the process of joining an act of sexual violence in the formal legal arena may be a painful process of many victims\textsuperscript{213}. Not only can they experience a tremendous psychological strain because they have to go ahead and tell the violations against it\textsuperscript{214}, but they may be forced to confront it with the established gender bias and rape perceptions of the system itself responsible for providing justice.

Obstacles to the process are multiple: lack of effective cooperation between health care staff and legal system, structural and resource constraints on law enforcement, lack of forensic analysis and problems of the courts themselves. Poor cooperation between investigators and prosecutors and the consequent inability to prove or attribute accusations and finally lack of sensitivity to judicial proceedings that “reconstitute” the victim's trauma\textsuperscript{215}. But besides the victims, researchers and prosecutors may in turn encounter specific challenges, as they promote a case of sexual violence through the legal system. Besides the victims, researchers and prosecutors may in turn encounter specific challenges, as they promote a case of sexual violence through the legal system. The often private character of rape\textsuperscript{216}, for example, rarely

\textsuperscript{211}V. OOSTERVELD, Gender-sensitive justice and the International Criminal Tribunal for Rwanda, in New England Journal of International and Comparative Law, 2005, pp. 119, 128ss. H. TROUILLE, How far has the international criminal Tribunal for Rwanda really core since Akayesu in the prosecution and investigation of sexual offenses committed against women? An analysis of Nkindiyimana et al, in International Criminal Law Review, 2013, pp. 750ss.
\textsuperscript{214}Prosecutor v. Krstić, Judgment, IT-98-33-T, 2 August 2001, para. 616. In Prlić et al., Trial Chamber III found four out of six Accused guilty of some crimes, including rape, sexual violence, and looting on the grounds that the Accused could have reasonably foreseen that such crimes would be committed as a consequence of the implementation of the joint criminal enterprise, and that they nevertheless accepted and assumed that risk, including by taking no measure to prevent the commission of further crimes. Prosecutor v. Prlić et al., Judgment, IT-04-74-T, 29 May 2013, paras. 72, 284, 437, 834, and 1014. K. GUSTAFSON, The requirement of an “express agreement” for Joint Criminal Enterprise, in Journal of International Criminal Justice, 2007, pp. 138-158.
\textsuperscript{215}European Center for Constitutional and Human Rights, Sisma Mujer and Collectivo de Abogados, ICC Communication on Sexual Violence in Colombia, pag. 11.
\textsuperscript{216}See, Appeal Chamber, Prosecutor v. Ntaganda, Judgment on the appeal of Mr Ntaganda against the “second Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9”, (15 June 2017, par. 16 ). For the first time, the ICC judges have enshrined that any question submitted to them, and therefore also those relating to the interpretation of war crimes, must be resolved only on the basis of the law of the founding Charter. And secondly because in providing an interpretation of the aforementioned clause, the judges of the Chamber of Appeal seem to have given greater weight to the possibility of enhancing the object and purpose of the Statute rather than safeguarding the coherence and unity of the corpus of law and especially under international humanitarian. In this last perspective, it is important to underline the reference to the
offers the possibility of eyewitnesses, support that can be provided to other crimes. And whether the subject is the identity of the offender or the lack of consensus on sexual intercourse, prosecutors are often called upon to fight against gender bias or misconceptions about the nature of sexual violence.

With regard to the proof of international sex crimes\(^2\), additional proofs arise: how can one collect consistent evidence of a crimes committed against countless people after many years? how can one assign responsibility to a military or political commander who may have never given a direct or immediate mandate to commit rape?

There are, however, many promising strategies for managing cases of sexual violence. These strategies have evolved, both in the domestic and international contexts. These may consist either of efforts to integrate awareness of sexual violence (as well as universal education across the range of research) or inter tactics aimed at developing expertise in the field of sexual violence crimes within the body of experts\(^2\). Innovations within an international body may have a significant impact on future developments within national or local criminal justice systems, including a context of more extensive use of gender experts, increased coordination between prosecutors and investigations and the increased protection measures of witnesses\(^2\).

Indeed, the new Prosecutor's Office paper on gender and sexual crimes provides a set of coherent and integrated goals towards more effective justice and recognition of the harm suffered by victims of sexual and gender-based violence, in the context of permanent international jurisdiction instrument. Whether the ICC will eventually become the catalyst for the eradication of sexual violence, mainly as a weapon\(^2\) or war strategy\(^2\), and how

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\(^2\)M. BERGSMO, Thematic prosecution of international sex crimes some critical comments from a theoretical and comparative perspectives, ed. Torkel Opshahl Academic Epublisher, Beijing, Beijing, 2012, pp. 294ss.


\(^2\)D.E. BUSS, Rethinking “rape as a weapon of war, in Feminist Legal Studies, 2009, pp. 152ss.
soon it will be demonstrated by the progress it will make in the next period\textsuperscript{222}.

Already documented cases of sexual violence in Colombia\textsuperscript{223} offer an excellent opportunity to the Prosecutor's Office to apply this new approach that has been adopted in the policy document. Besides, the ICC already has reason to believe that the Revolutionary Armed Forces of Colombia (FARC) committed crimes against the civilian population in Colombia\textsuperscript{224}, which are violations of the Rome Statute\textsuperscript{225}, and has already stated that it will proceed to prosecution of the international crimes committed in Colombia if the Colombian government does not manage to do so effectively. While international law provides the platform for the recognition of a set of universal rights, it is only the starting point from which the appropriate approach to justice will be diversified. Although the ICC is currently focusing on the investigation of situations in African countries and not only\textsuperscript{226}, it is crucial to distinguish the details of sexual violence in different contexts in order to formulate responses that respond to the particular need of survivors and communities, and this can achieved only if survivors are incorporated into the process of redefining how they see justice themselves, especially in ways that fit their country's political history and culture. If the ICC wants to play the role of deterring the most serious human rights violations and make progress to that end, it must integrate gender equality more prominently across the range of proceedings before the Court\textsuperscript{227}.

\textsuperscript{224}J. BOESTEN, P. WILDING, Transformative gender justice: Setting an agenda, in Women’s Studies International Forum, 2015, pp. 77ss.
\textsuperscript{225}Office of the Prosecutor, Situation in Colombia: Interim Report, November 2012, pag. 8.