UiO : Faculty of Law
University of Oslo

"A Critical Approach toward International Criminal Law Jurisprudence on Protection of Women against Sexual Violence."

Candidate number: 7025

Number of words: 17950

PIL Thesis

Deadline for submission: August 08 2022

Content List

Introduction

List of abbreviations

ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
IMTFE	International Military Tribunal for the Far East
IHL	International Humanitarian Law
IMT	International Military Tribunal
UN	United Nations
ICRC	International Committee of the Red Cross
CIDAW	Convention on Elimination of All Forms of Discrimination against Women
GCs	1949 Geneva Conventions
IACs	International Armed Conflicts
NIACs	Non-International Armed Conflicts
IIIM	International and impartial mechanism
The Rules	The Rules of Procedure and Evidence
NGO	Non-governmental Organization
INGO	International Non-governmental Organization

INTRODUCTION

There's been a drastic growth in sexual violence against women in societies, either industrial or developing, in the current century. Feminists and women-rights activists such as; Marlene LeGates and Catherinne MacKinnon strongly believe that sexual violence is used as one of the most effective and applicable strategies for controlling women and making them thoroughly isolated, particularly within armed conflicts.[1]

Women as a majority of civilians are required to be protected against violence before, in, and after armed conflicts. While international humanitarian law (IHL) deals with the protection of women against violence during wars, international criminal law (ICL) mostly encompasses the mechanisms to protect victims of gender-based crimes afterward. However, although sexual violence has brought women catastrophic damages and vulnerable injuries aftermath of wars, ICL has not yet thoroughly, comprehensively, and applicably protected women against sexual violence during armed conflicts through international criminal courts jurisprudence. One reason can be that ICL is suffering from bias and the patriarchal structure itself. Moreover, the lack of a precise and explicit definition of elements of gender-based crimes in caselaw, poor women's access to justice, serious challenges and barriers to secure the women's right to a fair trial in sexual crimes proceedings and less focus on preventive measures have adversely impacted on the performance of international tribunals to protect women against sexual violence. Also, inefficient state's cooperation with international courts/tribunals has exacerbated the crisis.

This research discusses whether the ICL protective mechanisms for female victims of conflict-related sexual crimes have been enough effective and the potential need for reforms. Thus, the first chapter introduces the ICL protective mechanisms against sexual violence and international criminal tribunals' approaches toward gender-based crimes. The second chapter evaluates the effectiveness of ICL jurisprudence and courts' performance in the protection of women against sexual violence with a critical approach. It also discusses the challenges with which the international courts/tribunals have faced to protect the victims of sexual violence after armed

[1] Marlene LeGates (2001), *In Their Time, A History of Feminism in Western Society*, Routledge, p. 131; See also, Catherine, Mackinnone (1989), *Toward Feminist Theory of the State*, New York, Harvard University Press. P. 70.

conflicts. The research also emphasizes on the necessity of evolution via ICL in the case of sexual crimes against women and comes with remarks and suggestions for more effective protection.

In this regard, the caselaw has been the most momentous resource used. This is because a critical approach toward the preceptive mechanisms for female victims of sexual violence in armed conflicts mainly requires a thorough and meticulous examination of the judgments against the perpetrators of sexual crimes issued by international criminal courts. Thus, due attention shall be given to the caselaw in order to assess the protection.

This is why the research mainly focuses on the judicial precedents of *ad hoc* Tribunals and the International Criminal Court (ICC) regarding conflict-related sexual crimes with a comparative and critical approach in order to realize the challenges and figure out the solutions. Likewise, the international criminal courts' statutes and rules of procedures have been reviewed.

In addition, the resolutions and declarations issued by UN Security Council and General Assembly with regard to the protection of women against sexual violence in international and civil wars as well as the reports published by non-governmental organizations provided a wealth of information.

I. ICL AND PROTECTION OF WOMEN AGAINST SEXUAL VIOLENCE

"Armed conflicts" always come with serious violations of women's rights and sexual violence which make women the most vulnerable civilians who experience agonies and affliction far worse than even death. Although "gender-based violence" is not limited to "sexual violence" and the term includes a wide range of brutal and degrading acts against women with the purpose of their humiliation and debilitation, this paper deals with "sexual violence", mostly "rape" as the most detrimental and common form of sexual violence.

ICL has made significant achievements to protect female victims of sexual violence in armed conflicts in recent decades. In fact, it provides victims with protection against sexual violence within two stages:

1. Recognition and criminalization of sexual violence against women in armed conflicts within the framework of the statutes of international criminal courts/tribunals;
2. Trials and punishments of perpetrators, participants, and accomplices of sexual crimes.

In this regard, the first chapter will discuss mainly, the protective mechanisms via ICL with due attention to the international criminal tribunal's performance. While these protective measures are indisputably necessary, any effort to critique and evaluate them provides an opportunity for more effective protection. In other words, taking a feministic and critical approach toward the ICL protective mechanisms in favor of female victims of sexual violence is a definite prerequisite to making any progress or development. Therefore, in the first chapter, the protective mechanisms and measures are briefly described and in the second chapter, they will be critically assessed to pave the way for any possible remarks, reforms, or suggestions.

1.1. SEXUAL VIOLENCE AGAINST WOMEN AS A WAR STRATEGY

Armed conflicts mostly occur in societies where women have always suffered from sexual violence due to gender inequality and patriarchal cultural beliefs. In such cultures, when women are victimized by sexual violence, they're forced not to reveal it or speak up. The fear or threat results from the fact that victimization is considered as a disgrace for the family or clan and keeps them subordinated.[1]

[1] Owen D. Jones, (1999), "Sex, Culture, and the Biology of Rape: Toward Explanation and Prevention", California Law Journal, Vol. 87, p. 35.

In feminist literature, it is argued that sexual violence especially rape causes domination of men over women who live under a permeant fear of being a victim and this will result in lifelong obedience, submissiveness, and subordination.[1] In other words, some feminists believe that rape cannot be considered a biological issue arising from male aggression, but it's the main outcome of a system in which the male population exercises control over females.[2] This is why sexual violence is directly related to militarism in war situations and multiple rapes are done by troops and soldiers as a military means to dominate, isolate and disable women as a huge part of the civilian population.

As a result, it can be argued that sexual violence within armed conflicts is supposed to be not only a war crime but also a militia weapon and war strategy. Thus, rape and other forms of violence have been among the most destructive weapons in recent war experiences of the international community.

Last but not least, although "gender-based violence" is not limited to "sexual violence" and the term includes a wide range of brutal and degrading acts against women with the purpose of their humiliation and debilitation, this thesis deals with either form of sexual violence which have been criminalized under the category of "sexual crimes". As "rape" is supposed to be among the most detrimental and common forms of sexual crimes in armed conflicts, it will be within the thesis's main focus.

1.2. INTERNATIONAL CRIMINAL TRIBUNALS' APPROACHES TOWARD SEXUAL CRIMES AND PROTECTION OF VICTIMS

Protection of women against sexual violence in armed conflicts can be considered within three categories:

1- To prevent women from any forms of sexual violence before armed conflicts;
2- To support women against sexual violence during an armed conflict; and
3- To protect female victims of sexual violence after armed conflicts.

The first category mainly includes preventive measures by governmental bodies or civil society before an armed conflict is launched. The second one encompasses a set of protections described within the 1949 Geneva Conventions and the Additional Protocols and other core

[1] Brownmiller, Susan, 1975, *Against Our Will: Men, Women and Rape*, Simon and Schuster publication, pp. 49 -51.
[2] *Ibid*, p. 55.

documents in the field of international humanitarian law (IHL) to combat sexual violence against civilians within armed conflicts. The third category focuses chiefly on protecting and advocating for the victims of sexual violence via opening a lawsuit in international criminal courts/tribunals as well as prosecuting and punishing the perpetrators and responsible individuals.

Thus, when an armed conflict ceases, the protective mechanisms are mostly defined within the framework of the international criminal justice system to provide the women who have been victimized by sexual crimes with an opportunity to comply with their violated rights under ICL rules and international human rights law as well. In other words, ICL protections for female victims of sexual violence mostly fall within courts/tribunals proceedings in order to recognize and interpret any forms of sexual violence which have been criminalized via their statutes and also to prosecute and trial the perpetrators of such crimes.

For this reason, a review of the statutes, interpretations, decisions, and judgments by international criminal courts/tribunals in terms of sexual crimes against women is necessarily required to evaluate and criticize the protective system of ICL. Therefore, in the following parts, the approach of the most prominent international criminal courts/tribunals toward sexual crimes and the protection of the victims will be briefly examined in the context of their statutes and judicial proceedings.

1.2.1. INTERNATIONAL CRIMINAL TRIBUNAL FOR FORMER YUGOSLAVIA

The gendered nature of the jurisprudence of international criminal courts has been widely discussed in feminist literature. In recent years feminists have sought to challenge the existing definition of sexual crimes through the statutes and precedents of international institutions including the UN *Ad hoc* Tribunals for Yugoslavia and Rwanda and the International Criminal Court (ICC). Through their efforts, they have drawn the intention of the international community to different aspects of women's rights already ignored in ICL and IHL.[1]

Thus, this part explores the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) to show whether it has thoroughly recognized and properly dealt with the violence against women in wars. ICTY, in spite of the limited jurisdiction established by its statute, considered "rape" as a crime against humanity and condemned "sexual crimes" against women because of a threat to international peace and security on the basis of laws and customs

[1] Laetitia Ruiz (2016), *Gender Jurisprudence for Gender Crimes*? International Crimes Database, pp. 1-3.

of war. According to Article 5 of the ICTY statute, "The Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: …(g) rape."

Although sexual violence in the wake of the crisis in the Former Yugoslavia occurred intensely and widely, the only form of sexual violence criminalized as a crime against humanity was merely rape. Aside from this, the rape elements have not been specified and defined within the Tribunal's statute.

Moreover, ICTY case law has mainly focused on the elements of rape but no other forms of sexual violence. ICTY Trial Chamber, *for instance,* stated in the judgment on five Serbians that the elements of the crime of rape were not defined in the statute, case law, and treaty law.[1] Also, in *Forundzija* case, the Trial Chamber via exploring various sources of international law, concluded that it's impossible to find out the elements of rape within customary international law or treaty law; thus as the last resort, the common principles of criminal law in domestic legal systems shall be taken into account.[2] Finally, the Trial Chamber defined rape based on national criminal laws and adopted that it can be committed against a victim of either sex."[3]

1.2.2. INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

Article 3 of the statute of the International Criminal Tribunal for Rwanda (ICTR) has specified rape as one of the crimes against humanity. ICTR's approach toward the definition and elements of sexual crimes is supposed to be different from ICTY because the Trial Chamber, in *Akayesu* case, defined rape "as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive, however, sexual violence which includes rape is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive."[4]

The Trial Chamber made three significant findings: first, that sexual violence was an integral part of the genocide in Rwanda; second, that rape and other forms of sexual violence were

[1] Prosecutor *v.* Miroslav Kvocka, Milojica Kos, Mlado Radic, Zoran Zigic and Dragoljub Prcac, Judgment, Trial Ch. ICTY, Case. No. CC/P.I.S./631e, 2001.
[2] Prosecutor *v.* Furundzija, Judgment, Trial Ch. ICTY, Case. No. IT-95-17/1-T, 1998, paras. 175-179.
[3] *Ibid*, para. 180, *See also*; Art. 201 of the Austrian Penal Code, French Code Pénal Arts. 222-23.
[4] Prosecutor *v.* Akayesu, Judgement, Trial Ch. ICTR, Case No. IT- 96-4-I, 1998, para. 598.

independent crimes constituting crimes against humanity and third, that rape should be defined in a broad and progressive manner.[1]

Accordingly, the Tribunal believed that sexual violence is not limited to physical invasion of the human body and may include acts that do not involve penetration or even physical contact. For this reason, the Chamber affirmed that "the incident described by one of the witnesses in which the accused ordered the *Interahamwe*[2] to undress a student and force her to do gymnastics naked in the public courtyard in front of a crowd, constitutes sexual violence."[3]

The Chamber also, in *Musema* case, affirmed the definition of rape and sexual violence set forth in *Akayesu*, and further stated that "variations on the acts of rape may include acts which involve the insertions of objects and/or the use of bodily orifices not considered to be intrinsically sexual."[4]

In conclusion, via ICTR's approach, more acts could constitute sexual violence to fall within The Tribunal's jurisdiction in order to prosecute the responsible persons and provide women with more protection.

Furthermore, ICTR, despite its broad jurisdiction set forth under the statute, dealt with sexual crimes with a considerable delay in comparison to ICTY. In ICTR jurisprudence, the initial judgment convicted the accused of rape as a crime against humanity issued under *Akayesu* case in 1998. While the Prosecutor charged him with genocide, crimes against humanity, and violation of Article 3 of 1949 Geneva Conventions and stressed out on the commission of sexual violence such as rape, sexual abuse, and coercive disrobe of women, he went on trial for rape with a considerable delay. The reason is supposed to be that sexual crimes were less significant to the prosecution board than other crimes against humanity, though the prosecutor's office announced the postponement was due to the lack of evidence as well as the fear and reluctance of victims for information exposure. Finally, pursuant to the testimony by a Tutsi woman on the rape against the girls under the age of 10 in city hall and public spaces by Hutu armed forces, The Tribunal seriously noticed the sexual violence against women, and the indictment was amended afterward on June 17, 1998.

---

[1] Chappel, Louise (2003), "Women, Gender and International Institutions: Exploring New Opportunities at the International Criminal Court", International Policy & Privacy Journal (Published Online: 2017), Vol. 22, Issue, p. 10.

[2] A Hutu paramilitary organization led by led by Robert Kajuga, were the main perpetrators of the Rwandan genocide in 1994.

[3] Prosecutor *v.* Akayesu, *op. cit*, para. 688.

[4] Prosecutor *v.* Musema, Judgement, Trial. Ch. ICTR, Case. No. 96-13-T, 2000, para. 221.

1.2.3. SPECIAL COURT FOR SIERRA LEONE

Special Court for Sierra Leone in light of Article 2 of the statute has enumerated crimes against humanity including any form of sexual violence bringing the court with more comprehensive jurisdiction over sexual crimes than the two above-mentioned ad hoc tribunals.

The Special Court has made a precious precedent on the crime against humanity of forced marriage in the Armed Forces Revolutionary Council Case (AFRC). In the AFRC trial judgment, a majority of the judges held that forced marriage is subsumed by the crime of sexual slavery,[1] but the Appeals Chamber subsequently concluded that this is an overly simplistic and incorrect understanding of the crime. According to the Appeals Chamber, forced marriage should be defined not by the sexual and nonsexual acts that are indicators of the crime, but as forced conjugal association resulting in severe suffering or physical, mental, or psychological injury to the victim. Another interlinked notion is that seemingly gender-neutral crimes, such as the war crime of cruel treatment or the crime against humanity of other inhumane acts may contain gendered elements.

The Appeals Chamber has commented, in AFRC appeals judgment, that acts of gender-based violence can be used to prove such crimes.[2]

In contrast, the Trial Chamber judgment in Civil Defense Forces Case (CDFC) was virtually silent on crimes committed against women and girls during the internal war in Sierra Leone, 2 although the Appeal Chamber took efforts to partially redress this silence. This is why some are in the belief that its jurisprudence potentially failed to significantly contribute to gender-sensitive transitional justice.[3]

1.2.4. INTERNATIONAL CRIMINAL COURT

The statute of ICC approaches sexual violence more extensively and explicitly in comparison to the above-mentioned tribunals and introduces the elements of sexual crimes clearly. Therefore, the Court faced fewer conceptual and practical challenges to establish the elements of such crimes.

Drawing on their experience with the two ad hoc tribunals, feminist activists have been persistent in their efforts to have a gender perspective incorporated into the ICC statute. One organization, the Women's Caucus for Gender Justice (WCGJ) has been particularly active in

[1] Prosecutor *v.* Armed Forces Council Leaders, Judgement, Trial. Ch. SCSL, 20 June 2006.
[2] Valerie Osterveld, "Lessons from the Special Court for Sierra Leone on the Prosecution of Gender-Based Crimes", Journal of Gender, Social Policy & the Law, Vol 17, Issue 2, p. 490
[3] *Ibid*, p. 492.

this regard. Created in 1997, it includes over 300 women's organizations and 500 individuals and has the mandate to ensure that the International Criminal Court will be able to effectively investigate and prosecute crimes of sexual and gender violence. In order to achieve its objectives, the WCGJ played an active role at the 1998 Rome Conference.[1] Moreover, while concluding the Rome Statute of ICC in 1998, the states sought to eradicate the problems faced by ad hoc tribunals regarding sexual violence.

Accordingly, ICC statute didn't merely focus on rape but considered any act of sexual nature that occurred by coercion or threat of force or reluctance as sexual violence which falls within the Court's jurisdiction. In addition, not only has it criminalized various forms of sexual violence including, rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization, and other instances under the headings of "war crimes" or "crimes against humanity", but also it has described the constituent elements of these crimes. In order for the Court to face fewer problems in recognition and adaptation of these elements via the judicial procedures and trials.

Furthermore, ICC jurisprudence has made remarkable interpretations of sexual crimes against women showing the judge's efforts to provide victims with more protection. For instance, first, the Court acknowledged that in order to establish "non-consent or coercion of victim" regarding the crime of rape or other forms of sexual violence, the specific circumstances or war status in which the women have been victimized must be considered. This is because women as well as the prosecutor might not mostly be able to provide sufficient evidence before the Court to prove the victim's reluctance or use of force against them.[2]

Second, a key achievement in ICC jurisprudence relates to the judgments on compulsory compensation and reparation for the benefit of female victims of sexual crimes. The first case in which ICC accepted compensations and reparations for victims of sexual violence was in *Katanga* trial judgment. *German Katanga* was sentenced to 12 years imprisonment due to aiding and abetting war crimes and crimes against humanity in 2014. According to the Court's decision, reparations were made for around 297 number of women through pecuniary, the supplement of housing, and educational and medical facilities.[3] ICC also decided on victim

[1] Louise Chappell, *op cit*, p. 14.

[2] Lee, Roy. S. (2001), *International Criminal Court, Elements of Crimes and Rules of and Evidence*, Transnational Publisher USA, p. 57.

[3] Prosecutor *v.* Germain Katanga, Judgment, Trial. Ch. ICC, Case No. ICC-01/04-01/07, 2014, paras. 1-8.

reparations on 7 August 2012 against *Thomas Lubanga Dyilo*[1] who was sentenced to 14 years imprisonment on the charge of crimes against humanity and use of children under 15 in armed conflicts by the Court Trial Chamber on 10 July 2012.[2]

ICC Rules of Procedure and Evidence provide victims of sexual violence with more protection via facilitating their presence as witnesses before the Court and the opportunity to make direct communication with Prosecutor's Office.

[1] Prosecutor *v.* Thomas Lubanga Dyilo, Decision on Victim Reparations, Trial Ch. ICC, Case No. ICC-01/04- 01/06, 2012.

[2] Prosecutor *v.* Thomas Lubanga Dyilo, Judgment, Trial Ch. ICC, Case No. ICC-01/04-01/06, 10 July 2012.

II. A CRITICAL ANALYSIS OF ICL PROTECTIVE MECHANISMS FOR VICTIMS OF SEXUAL VIOLENCE

Sexual violence is one of the most powerful strategies to exercise control and dominance over women in armed conflicts. In fact, it seems to be the most destructive & vulnerable war tactic which could debilitate, diminish and subjugate women as a huge part of civilians. Likewise, in most conflicting societies, there's a general cultural belief that when the mothers, wives, sisters, or daughters are victimized by rape or other forms of sexual violence, they have been dominated and possessed by enemy soldiers or troops. Thus, it will cause their husbands, brothers, or fathers to feel despised as it proves to them that they have not been enough strong to protect their belonging women. And it may also cause a serious threat to the population leading to forced displacement.

Although international or national legal systems should have taken the most efficient protective mechanisms against sexual crimes, it's been quite of a challenge whether international law has provided victims with the most effective protection. In fact, taking international treaties & customary laws into account, it's always been questioned whether international law conventions including; the Hague Conventions, Convention on Elimination of All Forms of Discrimination against Women (CIDAW) & 1949 Geneva Conventions (GCs) would have been able to protect the female victims of sexual violence efficiently. In this regard, the Leiber Code declared rape a capital offense. The Hague Conventions have stressed that the prohibition of rape is applied during wars as well as peacetime. The 1949 Third Geneva Convention (GC) demonstrated that "women shall be treated with all consideration due to their sex".[1] The Forth GC also spelled out more clearly than its predecessors that "women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution or any form of indecent assault".[2] CIDAW also proclaims that all forms of traffic in women and exploitation of the prostitution of women shall be suppressed.[3]

Nevertheless, these documents only declare the prohibition of rape and other forms of indecent assault. In other words, they lack a specific approach to establish a protective legal system within which;

1- "the sexual violence" and its various forms are defined;

[1] Geneva Convention III, Art. 3
[2] Geneva Convention IV, Art. 27
[3] CIDAW, Art. 6

2- the state parties are classified with regard to their political, economic, security & financial capabilities in order to implement protective mechanisms.

3- each group of states follows specific plans and layouts to prevent sexual violence based on their economic & national legislative systems as well as their own abilities and susceptibilities.

This is why international law has received a lot of criticism for the insufficient protection of women against sexual violence in recent years. ICL is also expected to provide female victims of sexual violence with considerable support within international courts' jurisprudence and judicial proceedings in post-conflict societies.[1]

After armed conflicts, the most efficient protective mechanism for victims of sexual violence falls within the international criminal justice system. The reason could be argued that the national judicial systems are out of action aftermath of an armed conflict and conflicting states mostly seem not to be able enough to take even preliminary measures in order to bring either the perpetrators or the victims before the national courts. Moreover, after an armed conflict, there is a huge range of victims who shall be protected the most through judicial proceedings. Thus, ICL is mainly focused on victims of sexual crimes and takes efforts to provide them with the most applicable assistance and support within international courts and tribunals.

International criminal tribunals as the most important mechanism for protection of women against sexual violence after armed conflicts have frequently coped with numerous problems and predicaments from the commencement of investigations up until the trial completion and case closure. Accordingly, *e.g.* women's poor access to international criminal justice, victims' refusal to appear before the international courts due to the threats or fear of disgrace or dishonor, failure to comply with principles of a fair trial in respect of sexual crimes, the difficulties of female victims of sexual violence to present the evidence, particularly to prove their non-consent to the sexual act, avoidance of witnesses to appear before the international criminal courts due to unsafety and insecurity reasons, the poor collaboration of states with international criminal tribunals during trials have adversely impacted on preparing female victims of sexual violence with effective support.

Thus, this chapter discusses the challenges and inefficiencies of international criminal courts jurisprudence with regard to the protection of female victims of sexual violence and the potentiality for any reform or improvement. Therefore, the first part will deal with the women's

[1] Catherine, Mackinnone, *Op cit*, p. 93.

poor access to international criminal justice after armed conflicts and the second part will discuss the international criminal courts' challenges within sexual crimes proceedings.

2.1. WOMEN'S POOR ACCESS TO INTERNATIONAL CRIMINAL JUSTICE IN POST-CONFLICT SOCIETIES

Women have been faced with some drastic difficulties in filing lawsuits against perpetrators of sexual crimes in recent years. The reason could be mostly argued that a constant fear has always been refraining them from appearing before either national or international courts after an armed conflict. In other words, there are three main reasons for females' poor access to international criminal justice after armed conflicts. First & foremost, women are perennially coping with serious problems & obstacles in opening lawsuits on sexual crimes in criminal courts due to cultural barriers and patriarchal beliefs. Secondly, the states' failure in providing victims with proper and prompt access to international justice exacerbates the situation. Thirdly, some feminists have been talking, in recent years, about the patriarchal and biased structure of legal systems which has adversely impacted female victims' access to international criminal justice.[1] Therefore, the following parts will discuss the aforementioned reasons.

2.1.1. CHALLENGES IN FILING LAWSUITS AGAINST PERPETRATORS OF SEXUAL CRIMES IN INTERNATIONAL CRIMINAL COURTS

Women are frequently victimized by sexual violence and harassment during armed conflicts. As well, the end of war does not mean the end of violations against women.[2] For instance, according to the estimates, 200,000 women were supposedly raped in the Democratic Republic of Congo.[3] UN agencies estimate that up to 60,000 women were raped during the war in the Former Yugoslavia (1992-1995), more than 60,000 within the civil war in Sierra Leone (1991-2002), and at least 200,000 in the Democratic Republic of Congo since 1998.[4] It is also said that approximately 6000 women have been raped since the civil war in Syria began in 2011 and beyond 600,000 women have fled due to fear of sexual assault.

[1] *Ibid*, p. 74-75.
[2] Women's Human Rights, Human Rights Watch, World Report, 2002.
[3] Conflict-related Sexual Violence: Report of the UN Secretary-General, No. S/2021/312, 30 March 2021, para. 12.
[4] Conflict-related Sexual Violence: Report of the UN Secretary-General, No. S/2022/272, 29 March 2022, paras. 8-10.

These numbers likely do not paint the whole picture, as they're only the rape estimates and the victims are often reluctant to report the violence due to the fear of stigmatization and disgrace.[1] Nevertheless, in the post-conflict period, women confront numerous barriers to opening a file against perpetrators of sexual crimes in international criminal courts and going through judicial procedures.

One of the main obstacles is the fear to speak up against sexual violence and let others know that they have been the victims. So, the fear makes them somehow reluctant to bring the accused before either the national or international courts. In fact, such fear arises from patriarchal cultural beliefs. Armed conflicts mostly occur within societies where women are suffering from gender discrimination and patriarchy. In such societies, when a woman is victimized by any form of sexual violence, not only men are not often sued and punished due to their sexual abuses and misdemeanors, but also, there's a general sense that females are the ones who have caused the men to do the guilt because of their indecent behavior or improper appearance in the public. In other words, victimization by rape or other forms of sexual violence is supposed to be a disgrace and dishonor for the woman and her family or whole tribe. Therefore, female victims are subjugated to men due to the fear caused by patriarchal cultures and gender inequalities, and they are forced not to reveal the violence.[2]

For instance, according to the State Commission in Bosnia and Herzegovina, approximately 25,000 victims had been registered. Women had also been victims of massive deportation and detention in most of the 200 registered camps in the occupied territories. Those camps were the scene of large-scale rapes, forced prostitution, and other abuses.[3] However, in spite of massive sexual violence against women in the above-mentioned conflict zones, victims were mostly afraid to break their silence. In Bosnia & Herzegovina women have been living for years in perpetrators' neighborhoods after the war and suffering from severe pain and disease but they'd rather keep silent. The reason could be argued that cultural taboos and discriminatory beliefs as well as the fear of talking about being victimized by rape have prevented them from taking any legal measures against perpetrators. Also, the lack of

[1] Henry, Nicola (2016), "Theorizing Wartime Rape: Deconstructing Gender, Sexuality, and violence", Gender & Society, Vol. 30, No. 1, pp. 44-50.
[2] Stuart Mill, John (2012), *The Subjection of Women*, Dover Publications, Originally published at 1869 by J.P. Lippincott & Co, pp. 29-31; *See also*; Owen D. Jones (1999), ``Sex, Culture & the Biology of Rape: Toward Explanation and Prevention``, California Law Journal, Vol. 87, p. 84-86.
[3] Special Report on "Concluding comments of the Committee on the Elimination of Discrimination against Women: Bosnia and Herzegovina", Committee on the Elimination of Discrimination against Women, Thirteenth session, No. 38 (A/49/38), 17 January-4 February 1994, para. 2.

efficient access to justice, poor knowledge of how to sue the accused, and unstable political and catastrophic judicial situation of the country after armed conflict have exacerbated the victims' status.

Moreover, in Rwanda, between 250,000 to 500,000 women have been raped during the three months of the genocide in 1994. [1] Although ICTR was established in 1994, the initial judgment on the conviction of *Akayesu* for rape as a crime against humanity was issued in 1998.[2] He was accused of 15 counts of genocide, crimes against humanity including rape, and the breach of Common Article 3 of GCs within the Prosecutor's indictment. Rape has also been recognized as a crime against humanity by virtue of Article 3 (g) of the ICTR Statute. However, the Tribunal dealt with sexual crimes with considerable delay. The Prosecutor acknowledged that the delay was due to a lack of enough proof of sexual crimes. Because women were afraid and felt embarrassed to reveal what's been going on to them during the armed conflict by soldiers and military troops.

In addition, female victims avoid opening a lawsuit against the ones who are responsible for sexual crimes due to the volatile political & unstable economic situation in the territory of conflicting parties after a war. They lack efficient support from either the state sector or civil society. The reason could be argued that the judicial systems and security forces are mostly unable to protect women after armed conflicts in most societies, particularly within third world countries where a majority of wars are going on. On the other hand, civil society is yet powerless to provide victims with a platform or opportunity to unmask what has been going on against them during armed conflicts.

As a consequence, regarding the fact that sexual violence against women is supposed to be one of the most destructive war weapons and vulnerable war strategies, opening a lawsuit on sexual crimes should be taken as fast and easy as possible. However, women's problems and predicaments to unmask the violence and break their silence cause that such crimes will not proceed before the international courts at the earliest opportunity.

Nowadays, during the pandemic, humanitarian workers in conflict zones across the world are reporting new cases of rape and gang rape daily. According to the Secretary-General's latest report on sexual violence in armed conflicts, chronic underreporting of crimes and

[1] Concluding comments of the Committee on the Elimination of Discrimination against Women: Bosnia and Herzegovina; Special Report, CIDAW Committee, No. 38 (A/49/38), 17 January – 4 February 1994, para. 734.
[2] Prosecutor *v.* Akayesu, *Op cit,* paras. 6-10.

limited access to care have only been compounded by the movement restrictions, lockdowns, and cuts in service.[1] "The pandemic amplified gender-based inequality, which is a root cause and driver of sexual violence in times of conflict and peace. It exacerbated the disproportionate socioeconomic and care burden borne by women and led to a global spike in gender-based violence at a time when avenues for seeking redress were narrower than ever, as shelters closed and clinics were repurposed in response to COVID-19. Lockdowns, curfews, quarantines, the fear of contracting or transmitting the virus, and limited access to first responders compounded the existing structural, institutional, and sociocultural barriers to the reporting of sexual violence, which is already a chronically underreported crime.[2]

The pandemic further complicated the pursuit of justice and redress, as lockdowns affected reporting mechanisms, the work of investigators, judges, prosecutors, and lawyers, and the overall effective functioning of justice and accountability systems."

2.1.2. FAILURE OF STATES IN FACILITATING VICTIMS' ACCESS TO INTERNATIONAL CRIMINAL JUSTICE

After or within an armed conflict, one of the thorniest problems with which women are coping is the poor performance or insufficient effort of states to provide the victims with quick and proper access to either national or international courts.

With regard to national courts, conflicting parties mostly cannot make an effective contribution to the victims of sexual violence in order to bring their cases before such courts because their national legal frameworks and judicial systems have often collapsed due to post-war effects.

Another reason is argued that perpetrators of sexual crimes are mainly among the states' senior politicians and high-ranking military commanders. Thus, not only the conflicting parties are reluctant to help victims in order to break their silence against their high authorities before the courts, but also, they often make an effort to hinder judicial proceedings.

In the case of international criminal courts, in particular, ICC, it may exercise jurisdiction when national courts fail to do so or to obtain either the accused or necessary evidence.[3] A majority of conflicting parties invoke the principle of complementarity to avoid filing

[1] Conflict-related Sexual Violence: Report of Secretary General, *op cit*, paras. 1-2.
[2] *Ibid*, para. 9.
[3] Rome Statute, Art. 17 (a &b)

lawsuits against perpetrators of sexual crimes in ICC and to prove that the court is inadmissible even if they are unwilling or unable genuinely to carry out the investigations or prosecutions.

In addition, the responsibility for addressing crimes of gender-based nature lies mainly with the state parties. This is why ICC relies on the political will of state parties to bring domestic law in line with all aspects of the statute, including its provisions on sexual crimes.[1]

In consequence, conflicting states are adequately reluctant or unable to provide women with proper and prompt access to national or international justice, and the principle of complementarity in international criminal courts jurisprudence has been invocated by them to refrain from bringing the sexual violence cases before such courts.

Furthermore, the states are expected to take some preventive measures in order to provide women with efficient protection against sexual violence during armed conflicts including building up safe houses and sanctuaries for women and children keeping them safe from military troops. Such constructions can also provide the ICRC forces, UN Peacekeeping Forces, Fact-finding Commissions, the members of Human Rights Watch, and Amnesty International with the opportunity to attain a wealth of information on victims of sexual violence and to help them to go through the competent courts. However, there are approximately a few states providing their citizens with such secure shelters as "Institution for Protection of Sexual Violence Victims", "Charley Griswell Center" and "The Center for Rape Crisis" in the UK. As well, there are some NGOs in Iraq including "The Iraqi-German Association WADI" and "The Organization for Women's Freedom in Iraq" which put some efforts to supply women with sanitary and medical assistance.

Therefore, although the states somehow ignored the importance and necessity of safe houses for women, they need to take the required measures to build up appropriate infrastructures. They are likewise needed to make more efficient collaboration with international entities such as ICRC, UN, and NGOs to give them access for the purpose of identifying the victims and facilitating their access to international justice.

[1] Chappell, Louise (2011), "The Role of ICC in Transitional Gender Justice: Capacity and Limitations", in Buckey-Zistel S; Stanley R (ed.), *Gender in transitional justice*, edn. Original, Palgrave Macmillan New York, pp. 37 – 58.

2.1.3. THE BIAS AND PATRIARCHAL STRUCTURE OF ICL

The study of ICL and gender-based violence seems to be very complicated. It is argued that a gender bias has always been present within ICL, leading to a legal framework that was inadequate to properly protect women against sexual violence.[1]

Some are in the belief that international law has developed based upon the paradigm of masculinity and in an environment biased against women.[2] Because a majority of states are surrounded by patriarchal societies which are based on male-dominated power structures. Likewise, men are the main decision-makers in most spheres.[3]

In some areas of International law, this gender bias might have adversely impacted either establishment or implementation of the protective mechanisms for female victims of sexual violence. For example, within IHL, although common Article 3 of the GCs prohibits "violence to life and person" and "outrages upon personal dignity", it has not explicitly noted rape and all other forms of sexual violence. While Article (75) of Additional Protocol I declares that prohibition of "outrages upon personal dignity" includes "humiliating and degrading treatment, enforced prostitution and any form of indecent assault" and in addition, Article (27) of GC IV articulates that women shall be especially protected against rape, enforced prostitution or any form of indecent assault, IHL has not yet established a protective legal framework within GCs to combat sexual violence against women during armed conflicts. There are just a few provisions declaring the prohibition of rape and sexual assault against civilians. Therefore, the gender bias and patriarchal paradigms caused a lack of a systematic protective framework within IHL, and considering sexual violence as a severe destructive war strategy, IHL needs to create an efficient protective legal system within GCs and other relevant treaties and put every effort on their effective implementation by the state parties.

In order to discuss whether ICL has been also suffering from gender bias and a masculine structure, the ICC gender mainstreaming approach shall be reviewed. No one can deny that; the Rome Statute has made remarkable novelties in international law with the principle of complementarity and inclusion of the longest list of conflict-related sexual violence crimes compared to the *ad hoc* tribunals such as ICTY and ICTR. In addition, the Rome Statute includes the first definition of "gender" via an international legal treaty, stating that gender

[1] *Ibid*, p. 41, *See also*; Goetz, Anne Marie, & Jenkins, Rob (2005), *Reinventing Accountability*, Palgrave Macmillan, p. 163.
[2] *Ibid,* p. 47.
[3] MacKinnon, Catrinne, *Op. cit*, p. 79.

refers to the two sexes, male and female, in the context of society.[1] Although this definition looks to be utterly controversial, it's notably impacted either the case proceedings or the Court's jurisprudence.[2]

Nevertheless, it's argued that the ICL has yet a biased and patriarchal structure leading to its failure of providing the victims of sexual violence with tremendous and proper protection, although the Rome Statute is supposed to be gender-neutral with no distinction between male and female victims. The reason might be the fact that legal systems have been treating women as subordinates to men throughout the centuries and legal rights have recently started to apply equally to both genders.[3]

In other words, even though ICC has taken a gender-neutral approach through either its Statute or procedure, it would not assure equal rights and efficient protection through its jurisprudence.

As a consequence, the gender bias within the context of international law has caused a patriarchal and masculine power framework that prevents ICL from bringing the victims with efficient protection

2.2. INTERNATIONAL CRIMINAL COURTS CHALLENGES WITHIN SEXUAL CRIMES PROCEEDINGS

International criminal courts are supposed to be the most important protective mechanism in ICL for female victims of sexual violence after armed conflicts. However, since the Nuremberg trials after World War II, despite significant strides in international law, a considerable rate of sexual crimes have been going unpunished because of flawed investigations and serious challenges during judicial proceedings.

When it comes to conflict-related sexual violence, either more criticisms are received. The reason could be argued that in spite of the severe and widespread sexual violence during armed conflicts, this issue has not yet been dealt with comprehensively and properly.

While ICC as the most essential permanent international criminal tribunal has sought to act more promptly and appropriately in terms of sexual crimes in order to overcome the challenges

[1] Rome Statute, Art. 7(3)
[2] Oosterveld, Valerie (2005), "The Definition of 'Gender' in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?", Harvard Human Rights Journal, Vol. 18, pp. 55-84.
[3] Chappel, Louise (2003), "Women, Gender and International Institutions: Exploring New Opportunities at the International Criminal Court", *Op cit*, pp. 4-23.

of the former *ad hoc* tribunals, it's still grappling with some serious issues and difficulties in respect of the female victims of sexual crimes.

In other words, ICC, compared to ICTY and ICTR, has undoubtfully made extraordinary evolutions and remarkable upheavals through the proceedings of conflict-related sexual crimes, nonetheless, its performance has been criticized in recent years due to the following problems and predicaments:

1- Failure to comply with the right of female victims of sexual crimes to a fair trial;

2- non-participation of female victims of sexual violence in the trial process and passivity of victims;

3- Lack of states' collaborations within investigations and proceedings leading to impunity for international crimes

Therefore, the three subsequent parts will deal with the above-mentioned challenges with a critical approach in order to present effective solutions and remarks.

2.2.1. FAILURE TO COMPLY WITH THE RIGHT TO FAIR TRIAL

No one can deny that ICL aims to ensure a fair and impartial trial. Since World War II, it's been a matter of issue for International courts and tribunals to comply with the principles of a fair trial. The effective implementation of these principles seems to get more complicated in terms of the proceedings of sexual crimes.

Article 14 (1) of the International Covenant on Civil and Political Rights and Article 6 (1) of the European Convention on Human Rights point out the concepts of "fair and public hearing".

Therewith, according to Article 60 of the African Charter on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights "shall draw inspiration from other international instruments for the protection of human and peoples' rights". This provision enables the Commission to be inspired, inter alia, by the provisions of Article 14 of the International Covenant on Civil and Political Rights when interpreting the trial guarantees laid down in Article 7 of the Charter."[1]

[1] *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors & Lawyers* (2003), Professional Training Series No. 9; Office of the High commissioner for Human rights, p. 254.

Moreover, the right to a fair and public hearing has been referred to in Article 21 (2) of the ICTY Statute. In addition, Article 20 (2) of the ICTR Statute states that an accused is entitled to a fair and public hearing in the determination of charges against him or her. Article 20 (1) of the ICTY Statute and Article 19 (1) of the ICTR Statute also affirm that a fair and expeditious trial shall be ensured by all Tribunals Chambers.

In accordance with the above-mentioned provisions, the right to "a fair and public hearing" means that the trial shall be held within a reasonable time and heard by an independent and impartial decision-maker. Upon this right, the accused is entitled to be informed of all charges against him or her and to be transferred to the International Tribunal as soon as the indictment is confirmed and he is taken into custody.

In other words, the right to a fair trial requires the accused to:

- be presumed innocent until he is proven guilty;

- meet the equality of arms,[1] particularly with regard to the burden of proof;

- have enough time to prepare the case and evidence;

- be informed as early as possible of what he is accused of;

- be able to call the witnesses;

- question the main witness against the accused and call other witnesses;

- attend the trial, to remain silent;

- access all the relevant information; and

- have an interpreter, if the accused needs one.[2]

In this regard, one of the most complicated and disputable issues in international criminal courts and tribunals jurisprudence is how to efficiently comply with the principles of a fair trial, especially within sexual crimes proceedings. The reason can be argued that in such proceedings, the equality of arms, in particular, the ability of female victims to present sufficient proof before

[1] "Equality of arms" is the concept created by the European Court of Human Rights in the context of the right to a fair trial. It is defined as there must be a fair balance between the opportunities to the parties involved in litigation.

[2] Nicolas A.J. Croquet (2011), "The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights' Jurisdiction?", Human Rights Law Review, Vol. 11, Published by Oxford University Press, pp. 92-93.

the court and to prove the substantial element of "non-consent" to sexual crimes, has been challenged so far. As well, women have been dealing with serious difficulties regarding the effective protection and appearance of witnesses on the victim's side, and the efficient compensation and reparation for female victims are questioned. Therefore, the right to a fair trial has not yet been secured properly within sexual crimes proceedings for the female victims of such crimes.

For example, although the principles of a fair trial were not entirely disregarded during the trials of ICTY and ICTR, and both Tribunals took some efforts to ensure the right to a fair trial, no one can deny that there were serious challenges and predicaments to comply with those principles in sexual crimes cases. While ICC, noting the former *ad hoc* tribunals' experience, made considerable attempts to end the problems and eliminate inefficiencies, there are still some barriers to the effective securing of the right to a fair and public hearing for female victims of sexual crimes.

Thus, according to the jurisprudence of ICC and *ad hoc* Tribunals, the right to a fair trial has mostly been disregarded or violated within the proceedings of sexual crimes in the following cases:

1- Failure to ensure the victim's equal opportunity and ability to the perpetrator in order to prepare the evidence and to prove her non-consent in terms of the rape or sexual assaults;

2- Lack of sufficient protection for the witnesses on the victim's side and difficulties in their appearance before the courts;

3- Barriers to making compensations and reparation rewards for victims of conflict-related sexual violence.

As a consequence, securing the right to a fair trial, especially in respect of sexual crimes, is one of the most debatable and challenging issues in the context of ICL. In fact, it doesn't matter whether the accused is not tried in a competent court or tried unfairly. Therefore, it is highly important to discuss the main breaches of the right to a fair trial and to come up with applicable solutions and remarks. The following parts, taking a critical approach, will deal with the three above-mentioned violations of the right to a fair trial within sexual crimes proceedings in the precedents of ICC and *ad hoc* Tribunals including ICTY and ICTR.

A. FAILURE TO ENSURE THE VICTIM'S EQUAL OPPORTUNITY TO PROVE NON-CONSENT

The equality of arms as a jurisprudential principle issued by the European Court of Human Rights is a part of the right to a fair trial. The principle is supposed to be very challenging and complicated with regard to proving the elements of sexual crimes against female victims particularly the element of "non-consent".

According to the criminal procedures in national judicial forums, the burden of proof is up to the victims due to the presumption of innocence of the accused. In addition, both parties of litigation shall have the equal opportunity and possibility to provide the evidence in order to either prove or deny the elements of crimes.

When it comes to the issue of conflict-related sexual crimes, with due attention to the international criminal courts and tribunals jurisprudence in recent years, it's been a very controversial issue why the court's focus is often on the female victim so that she is expected to prove her "non-consent and coercion to the sexual act or intercourse"? This caused the principle of equality of arms to be highly challenged in case the female victims have to demonstrate the element of "non-consent" in rape or other forms of sexual assault.

In order to figure out the answer, both the national and international courts' approaches will be discussed.

In national judicial forums, in rape cases, the courts try to realize whether the woman has consented to the sexual act and if there is any evidence including the witnesses for her claim of rape. However, in order to determine the lack of consent, the national courts often consider the accused's belief but not the victim's. For example, "The United Kingdom Sexual Offenses Act 2003" sets out the offenses requiring the prosecution to prove the absence of consent in sections 1-4 including; rape, assault by penetration, sexual assault, and causing a person to engage in sexual activity. "In relation to these offenses, a person (A) is guilty of an offense if (s)he:

- Acts intentionally;
- (B) does not consent to the act;
- And (A) does not reasonably believe that (B) consents."[1]

Thus, it is up to the accused's belief that the victim has consented to the sexual contact, whereas it shall be determined based upon the woman's belief not the man's.

[1] Sexual Offences Act (2003), UK, Sections. 1-4.

Furthermore, the aforementioned Act led to a wealth of different interpretations of "non-consent" by either trial or appeal chambers. For example, the Appeal Court upheld the conviction of the accused of rape in a case where the woman consented to the sexual act and intercourse provided that the man uses protection including a condom. The Appeal Court argued that the woman's consent has been conditional on using a condom and in lack of such condition, there's no consent in virtue of Sections 1 (B) (4) and (1) (C) of the Sexual Offences Act.[1] The Court affirmed that "sex without a condom would be a sexual offense in the UK if the other partner had only agreed on the condition a condom was used." However, the Court denied the rape claim in a similar *Lawrance* case. Jason Lawrance was found guilty of raping a woman twice despite her consent to sex because he had lied about having had a vasectomy. Although the prosecutor's team was in the belief that the woman's consent was obtained by deception and it was not true consent, the judges stated that lying about fertility is not rape.

The Court of Appeal declared that " the ruling provides clarity on the important issue of whether one person's consent to a sexual act can be negated by another person's dishonesty. Nevertheless, his lie about his fertility was not capable in law of negating consent".
The Court referred to Section 74 of the Sexual Offenses Act which specifies that "a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice. Thus, in terms of section 74 of the 2003 Act, the complainant [the woman] was not deprived by the appellant's [Lawrance's] lie of the freedom to choose whether to have the sexual intercourse which occurred."[2]

Therefore, national courts have been facing difficulties in their interpretations of elements of sexual crimes which have led to different and sometimes contradictory commentaries. As far as mentioned, in some cases, the courts' findings on the element of "non-consent" is only based on whether the accused believes that the woman consents. In addition, in national proceedings, the victim is often expected to prepare all relevant evidence to prove her lack of consent. These issues may challenge the right of a rape victim to a fair trial in national courts.

International criminal courts and tribunals have also been challenged in terms of their interpretations of the elements of the sexual crimes particularly the element of "non-consent"

[1] Julian Assange *v.* Swedish Prosecution Authority, UK Appeal Court, Case No. C0/1925/2011, 2 November 2011, paras. 79, 86-87 & 93-95.
[2] Regina *v.* Jason Lawrance, UK Appeal Court, Case No. 201903220B2, 23 July 2020, paras. 8-10, 16-17 & 42-43.

as well as the burden of proof and the equal opportunity and capability of victims in comparison to perpetrators in order to present the evidence before the international courts.

While the international criminal tribunals, with due attention to the national courts' precedents, took vital steps to avoid conflicting interpretations in terms of "female victim's lack of consent", there are still some predicaments and complexities; *e.g.* it's a very controversial issue whether to include the element of "non-consent of the victim" as a part of the necessary legal elements of a sexual crime including *mens rea* and if so, how to either interpret or establish it. Moreover, whether the victim is expected to prove her non-consent in the sexual crimes or the lack of consent can be deduced from a war situation.

The *Ad hoc* Tribunals including ICTY and ICTR believed that the victim's non-consent is not necessarily inferred from "severe pain and physical or mental harm" indicating the resistance against the use of force or any threat or fear to the use of force, but the exceptional war situation shall be taken into account. The reason can be argued that either consent or coercion in a state of war is quite different from a peaceful ordinary status. Accordingly, sexual acts may be considered a kind of sexual violence within armed conflicts.

For example, in *Akayesu's* judgment, the first definition of the legal elements of rape as a crime against humanity was presented at an international judicial forum. In this regard, the elements of rape were "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive".[1] In contrast, the *Akayesu* judgment restrains from any prerequisites that the victim physically or verbally expressed her non-consent to the perpetrator regarding the sexual act. Thus, the Trial Chamber believed that the surroundings in conflict areas evidenced "circumstances which are coercive".

Furthermore, ICTY Trial Chamber in the *Furundzija* case held that "any form of captivity vitiated consent."[2] Therefore, like *Akayesu's* judgment, it abstained the non-consent of the victim as a prerequisite to the commission of rape.[3]

Moreover, in the *Gacumbitsi* case, the ICTR Trial Chamber affirmed that "the facts which were used to prove the victims' lack of consent demonstrated that the women and girls were raped under precise circumstances, namely that: 1) prior to the rapes the Accused

[1] Prosecutor *v.* Akayesu, *Op cit*, para. 593 & 598.
[2] Prosecutor *v.* Frundzija, Judgment, Trial Ch. ICTY, Case. No. IT-95-17/1, 2001, para. 271.
[3] Anne-Marie L.M. de (2006), "Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR", School of Human Rights Research Series, University of Tilburg, Volume 20, p. 121.

admonished the *Interhamwe* to kill, in an atrocious manner, any females who resisted the sexual attacks; and 2) the heretofore rape victims were attempting to flee from their attackers when raped." The Trial Chamber realized these circumstances adequately established the victims' lack of consent to the rapes.[1]

In order to find out "the coercive circumstances" leading to the absence of consent, ICTR Appeal Chamber in the *Gacumbitsi* case upheld that "the Prosecution can prove non-consent beyond a reasonable doubt by proving the existence of coercive circumstances under which meaningful consent is not possible. As with every element of any offense, the Trial Chamber will consider all the relevant and admissible evidence in determining whether, under the circumstances of the case, it is appropriate to conclude that non-consent is proven beyond a reasonable doubt. Likewise, the Trial Chamber is free to infer non-consent from the background circumstances, such as an on-going genocide campaign or the detention of the victim."[2]

However, in the *Kunarac* case, the ICTY Trial Chamber articulated that "the *actus reus* of rape 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 penetration occurs without the consent of the victim. Consent for this purpose must be given voluntarily, as a result of the victim's free will, assessed in the contents of the surrounding circumstances."[3]

The Trial Chamber in *Kunarac's* judgment also held that "sexual autonomy is violated whenever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant. In addition, the absence of genuine and freely given consent or voluntary participation may be evidenced by the presence of various factors including force, threats of force, or taking advantage of a person who is unable to resist."[4]

Thus, while the Trial Chamber believed that this understanding of the element of non-consent does not differ substantially from *Furundzija's* definition, in fact, *Kunarac's* judgment mandated two requirements in the case of rape including, the victim's consent that is given

[1] Prosecutor *v.* Gacumbitsi, Judgment, Trial Ch. ICTR, Case No. ICTR-2001-64-A, 7 July 2006, para. 325.
[2] *Ibid*, para 153
[3] Prosecutor *v.* Dragoljub Kunarac, Radomir Kovac & Zoran Vukovic, Judgment, Trial Ch. ICTY, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 460.
[4] *Ibid*, paras. 457-458.

voluntarily as a result of the victim's free will, and the perpetrator's knowledge that penetration occurs without consent. In other words, it seems that *Kunarac's* definition, in contrast to *Akayesu* or *Frundzija's* judgments retained the prerequisite of the absence of consent and put the burden of proof for lack of consent on the female victim's shoulders, although the judges recited that the detention centers where the victims were held amounted to "circumstances that were so coercive as to negate any possibility of consent".[1]

Finally, the rape is defined within Article 8 (2)(b) (xxii) of the Rome Statute and Elements of Crimes Annex which articulates that "the invasion to the body of a person can be committed by force, the threat of force, or via taking advantage of a coercive environment, or the person invaded is incapable of giving genuine consent." Therefore, whereas the phrase "genuine consent" is subject to judicial interpretation, the situations whereby the consent is impossible due to the coercive circumstances or incapability of the person, the elements of the rape are established.

In conclusion, given that there's a common belief that the consent of the victims of sexual violence in armed conflicts must be assessed within the surrounding circumstances and it is almost impossible to obtain the genuine consent due to the war status, the international criminal courts and tribunals are expected to provide the victims with the most efficient protection via their interpretations of non-consent and to exempt them from proving their absence of consent. Because the coercive circumstances caused by armed conflicts adequately establish the lack of consent, whilst a majority of victims are incapable and unable to prove it.

In other respects, the victims' right to a fair trial and equal opportunity to prepare the proof of coercion and other elements of the crime would be quashed.

B. TESTIMONIES IN SEXUAL CRIMES PROCEEDINGS

A fair trial enables litigants (plaintiffs and defendants) to call their witnesses and question them. Thus, a fair trial requires equal opportunities for the victim and the accused in order to bring their witnesses before the court and protect them effectively. However, in recent years, international criminal courts have received a lot of criticism in terms of the safety of witnesses as there are numerous reports of torture, detention, threat, harassment, and even assassination of the witnesses. This is because international crimes especially conflict-related sexual violence

[1] *Ibid*, para. 464.

are committed by high-ranking politicians and military commanders of national armies. Therefore, the appearance of witnesses before international criminal courts for the purpose of giving testimonies against the above perpetrators might result in serious difficulties which hinder their assistance.

While *Ad hoc* Tribunals and ICC put some efforts to safeguard the witnesses, there are still notable challenges and barriers which will be further discussed.

1. *AD HOC* TRIBUNALS & PROTECTION OF WITNESSES

The *ad hoc* Tribunals including ICTY and ICTR sought to take steps for the purpose of better support and sufficient protection of witnesses as follows:

First and foremost, Rules 69 of both ICTY and ICTR Rules of Procedure and Evidence refers to the necessity of "non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal". This policy aims at better compliance with the right to a fair trial as it reduces the risks and potential vulnerabilities threatening the witnesses and encourages them to appear before the Tribunals.

In addition, Rule 75 (b) contains some protective measures for victims and witnesses such as; holding in-camera proceedings, ordering closed sessions, expunging the name and private information from public records, using image or voice-altering devices or closed-circuit televisions, assignment of anonymity, non-disclosure of identifying records to the public and facilitating the testimony of vulnerable victims or witnesses through one-way circuit televisions.

Furthermore, Rule 96 of ICTY and ICTR Rules exempts victims who give testimonies in sexual assault cases from any corroboration. Pursuant to the aforementioned Rule, the victim's testimony is not required to be confirmed. Likewise, "the consent shall not be allowed as a defense by the accused while the victim has been threatened with duress, torture, detention, psychological oppression or any form of violence."[1]

Last but not least, *Ad hoc* Tribunals established two sections under different names but with the same competencies and qualifications namely, "Victims and Witnesses Section" according to Rule 34 of ICTY Rules and "Victims and Witnesses Support Unit" within ICTR Rules. These

[1] ICTY Rules of Procedure & Evicdence, Rule 96 (ii) (a)

sections are responsible for the physical and psychological rehabilitation of victims and witnesses and for providing them with consultations and necessary information, especially in case of conflict-related sexual violence. Thus, either Section sought to grant specific support to the victims of sexual violence and their witnesses because they are in definite need of such protection. In other words, the establishment of these units seems to be an inventive as well as a feministic act by the Tribunals as Rule 34 (B) of ICTR Rules declares that "a gender-sensitive approach to protective measures for victims and witnesses should be adopted and due consideration given, in the appointment of staff within this Unit, to the employment of qualified women."

Nevertheless, the above-mentioned supportive measures by ICTY and ICTR for the victims and witnesses in cases of sexual violence during armed conflicts have been widely criticized in recent years. There are some reports indicating that witnesses have been subjected to torture, harassment, and assassination. The terror of two witnesses supposed to give testimonies before ICTR, caused the other witnesses to feel unsafe and refuse their appearance in the hearings.

On the other hand, the Rwandan government, due to some political disputes and tensions with the ICTR Office of Prosecutor and judges, imposed severe restrictions on the persons entering the country with the purpose of giving testimonies before the Tribunal. This incident resulted in the postponement of several hearing sessions.

Moreover, neither the "Victims and Witnesses Section" nor "Support Unit", was not able to provide witnesses with adequate support as they lack a comprehensive layout and specific plan of action; in addition to the fact that there was no clear definition of "witness" and the ones who were entitled to safety supports.

2. ICC & PROTECTION OF WITNESSES

In accordance with the Rome Statute, the Court ensures "to protect the safety, dignity, privacy, physical and psychological well-being of victims and witnesses."[1] More importantly, the Statute notes that in order to provide efficient protection, "the nature of the crime, in particular, where the crime involves sexual or gender violence shall be regarded and the Prosecutor shall take the protective measures, especially during the investigation and prosecution of these crimes."[2] It

[1] Rome Statute, Article 68 (1)
[2] *Ibid*, Article 68 (1)

shows that the Court has realized the vulnerability of the victims and witnesses in such crimes. Thus, undoubtfully, they are in definite need of specific attention and more protection.

In addition, in the case of victims of sexual violence and their witnesses, the proceedings can be conducted in camera and the evidence may be presented by electronic or other special means under the Court's permission.[1]

Moreover, ICC Rules of Procedure and Evidence give the Chambers the opportunity "to order measures for the purpose of protection and safeguard of victims and witnesses upon the request by their owns or their legal representatives or under the motion of the Prosecutor or the defense or by its own motion after having consulted with the Victims and Witnesses Unit."[2] This Rule enables the Court to provide widespread protection whenever necessary even if the protective measure has been referred into within neither the Statute nor the Rules.

The Court has also set up a "Victims and Witnesses Unit" within the Registry which is responsible for any appropriate assistance including "counseling, protective measures and security arrangments for witnesses, victims and anyone at risk on account of testimony given by witnesses."[3] In virtue of Rule 16 (1) (b) of ICC Rules of Procedure and Evidence, the Unit shall make appropriate assistance to witnesses and victims in order to obtain legal advice and organize their legal representation, and provide their legal representatives with adequate support, assistance and information.

However, despite all the above-mentioned supports, nowadays, one of the main ICC challenges relates to how to ensure the safety of witnesses and anyone at risk on account of testimonies given by them. In fact, it seems that ICC has not yet been able to win the trust of the international community in respect of "witnesses protection".

For example, in *Kenyatta* and *William Ruto* cases, the lack of adequate evidence in order to prove the guilt of the accused persons led to the closure of proceedings because the witnesses have been retrieving their testimonies due to threats, and fear, bribery motions, allurement, and social isolations.[4] During Kenyan Crisis in 2007-8 and post-election clashes, more than

[1] Rome Statute, Article 68 (2)
[2] ICC Rules of Procedure and Evidence, Rule 87 (1)
[3] Rome Statute, Article 43 (6)
[4] Prosecutor *v*. Uhuru Muigai Kenyatta, Decision on the Withdrawal of Charges against Mr. Kenyatta, Trial Ch. V (B), ICC, Case No. ICC-07/09-02/11, 13 March 2015, paras. 4, 9-10; *See also,* Prosecutor *v.* William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arab Sang, Decision on the Prosecutor's

thousands of civilians have been killed and around five hundred thousand have fled their country. *Uhuru Kenyatta*, the incumbent president of Kenya, and his deputy, *William Ruto*, were being persecuted since 2011 by ICC Prosecutor, for their roles in crimes against humanity including murder, deportation, or forcible transfer of population and persecution allegedly committed during the post-election violence in 2007-8.

ICC Pre-trial Chamber affirmed their charges and the proceedings were launched.[1] Around 30 witnesses testified, however, a majority retrieved their testimonies because of the threats received or enticement. While the Prosecutor insisted on considering their initial and prior recorded testimonies, the Trial Chamber, in the *Kenyatta* case, ruled on a "no case to answer" motion upon which the defense was seeking a dismissal of the case due to lack of evidence. Thus, from the judges' point of view, the Prosecutor did not present sufficient evidence by which the Chamber could reasonably convict the accused.[2] Finally, the Appeals Chamber upheld the denial of the admissibility of the evidence and reversed an earlier decision[3] that would have permitted the approval of the testimonies recorded priorly. [4] In this regard, Judge *Chile Eboe-Osuji* from Trial Chamber stated that "it cannot be discounted that the weaknesses in the prosecution might be explained by the demonstrated incidence of tainting of the trial process by way of witness interference and political meddling that was reasonably likely to intimidate witnesses."[5]

As a consequence, either the failure or success of a case in international criminal courts relies upon the capability of the court to protect and safeguard the witnesses.

Request for Protective Measures for Witness 452, Trial Ch. V (A), ICC, Case No. ICC-01/09-01/11, 13 May 2014, para. 25.

[1] Prosecutor *v.* Francis Kirimi Muthaura & Uhuru Muigai Kenyatta & Mohammed Hussein Ali, Decision on the Confirmation of Charges Pursuant to Article 61 (7) (a) and (b) of the Rome Statute, Pre-Trial Ch. II, ICC, Case No. ICC-01/09-02/11, 23 January 2012.

[2] Prosecutor *v.* Francis Kirimi Muthaura & Uhuru Muigai Kenyatta, Decision on Withdrawal of Charges against Mr. Muthaura, Trial Ch. V, ICC, Case No. ICC-01/09-02/11, 18 March 2013, paras. 7 & 11; *See also;* Prosecutor *v.* William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arab Sang, *Op cit*, paras. 25-27.

[3] Prosecutor *v.* Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Judgement, Appeals Ch. ICC, Case No. ICC-01/09-02/11 O A, 30 August 2011, paras. 121-122.

[4] Prosecutor *v.* William Samoei Ruto & Joshua Arab Sang, Judgment, The Appeals Chamber, ICC, Case No. ICC-01/09-01/11 OA, 12 February 2016, paras. 91-92 & 94-95; *See also,* Prosecutor *v.* Uhuru Muigai Kenyatta, The Appeals Ch. ICC, Case No. ICC-01/09-01/11 OA 5, 19 August 2015, paras. 90-91.

[5] Prosecutor *v.* Uhuru Muigai Kenyatta, Separate Further Opinion of Judge Eboe-Osuji, ICC-01/09-02/11-830-Anx3-Corr, 18 October 2013, paras. 12 & 37.

Furthermore, ICC has been coping with serious problems regarding testimonies given by the staff of conflict-related international organizations; such as ICRC and UN Peace Keeping Forces. ICC Prosecutor, via her report on the performance and collaboration of ICRC with the Court, declared that in order to obtain the evidence, especially the sufficient proof of sexual crimes, more cooperation by ICRC forces is definitely needed. She argued that ICRC personnel have been witnessing the commission of crimes during their missions on different battlefields. Thus, their appearance before the Court can extremely help to proceed with the trials more rapidly, however, in most cases, they refuse to reveal what they have viewed.

In contrast, the reason behind the policy of ICRC on giving testimonies before international criminal courts have explained by ICTY in *Simic* Case ruling that "ICRC's right to absolute confidentiality must be respected in all cases".[1] In addition to the principle of confidentiality, presenting the information or evidence by ICRC employees before international tribunals might adversely impact the mutual relations between ICRC and the conflicting parties or third states. For example, in some cases, the conflicting states sought to hinder the entry of ICRC personnel to their territories or they ceased their financial support or suspended the legal obligations toward ICRC. Nevertheless, the ICTY Prosecutor in the *Simic* case believed that "the decision to either uphold or reject ICRC confidentiality should be made by the Tribunal, on a case-by-case basis and the ICRC's interest would be adequately saved by a balancing test in which the Tribunal would weigh the importance of the evidence in question against the confidentiality interest of ICRC."[2]

Therefore, it likely seems to make a balance between the ICRC's confidentiality interest and its most efficient cooperation with international criminal tribunals. In other words, it can be permitted the discretion to release information or documents or bring the staff as witnesses before the courts in exceptional cases such as conflict-related sexual crimes in which the victims mostly lack enough evidence.

C. COMPENSATIONS & REPARATIONS TO VICTIMS

"Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power" adopted by the UN General Assembly in 1985, is the first international declaration on the fundamental rights of the victims of crimes. It consists of two parts; part A, on "Victims of Crimes" which

[1] Prosecutor *v.* Simic and Others, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of Witness, IT 95-9. PT, Trial Ch. ICTY, 27 July 1999, para. 55.
[2] *Ibid*, para. 4.

contains three subdivided sections including "Access to justice and fair treatment", "Restitution" and "Compensation", and Part B, on "Victims of abuse of power." The Declaration points out that a fair trial requires the international courts to detect the most effective mechanisms for the purpose of awarding compensation to the victims of crimes.[1]

Furthermore, the Resolution on "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of IHL" adopted by the UN General Assembly in 2005, honors the victims' right to benefit from remedies and recognizes the commitment of the international community to decrease the victims' agonies and pains.[2]

Likewise, in virtue of Article 8 of "The Universal Declaration of Human Rights", everyone is entitled to an effective remedy by the competent national courts for the crimes violating her/his basic rights. Accordingly, Article 2 (3) (a & b) of "The International Covenant on Civil and Political Rights" states that "the Parties undertake to ensure that any person whose rights or freedoms are violated shall enjoy an effective remedy and any person claiming such a remedy shall have her/his right thereto determined by component judicial, administrative or legislative authorities."

In addition, Articles 8 & 25 of "The American Convention on Human Rights" as well as Article 7 (1) of "The African Charter on Human and People's Rights and Article 13 of "The European Convention on Human Rights" recognize and honor the right to an effective reparation and compensation for the victims of gross violations of human rights.

In accordance with the above-mentioned provisions, the right to an effective remedy includes either the compensation and restitution for victims or the prosecution and punishment of the individuals who are responsible for serious breaches of human rights. It also refers to the efficient and prompt restitution in favor of the victims in proportion to their injuries or loss or damages.[3]

---

[1] "Basic Principles of Justice for Victims of Crime and Abuse of Power", UN General Assembly Declartion, A/RES/40/34, 29 November 1985, Paras. 1-5.

[2] "Basic Principles and Guidelined on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", General Assembly Resolution, GA/60/147, 16 December 2005, para. 1-3 & part. II & III.

[3] Treatment of Victims, Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International

However, in recent years, international criminal courts have been dealing with the issue of making an effective and immediate remedy, especially for victims of sexual violence in armed conflicts. It is said that the first conviction on compensation for victims of sexual violence[1] was made by "The War Crimes Chamber in the Court of Bosnia and Herzegovina".[2] While Serbian leaders sought to preclude the Court from issuance of reparation orders, the Chamber took some efforts to encourage the victims of rape to request and open files for remedies and compensations which led to the disclosure of the victims' identities imperiling their safety and health.

In this regard, the following parts will discuss the steps taken by *Ad hoc* Tribunals and ICC regarding how to secure the right to an effective remedy for female victims of sexual violence in wars.

1. *AD HOC* TRIBUNALS

Although a considerable number of rapes were reported during the war in either Former Yugoslavia or Rowanda, ICTY and ICTR did not address the issue of remedies and reliefs for the victims. This might be because of the fact that neither the Statutes of both Tribunals nor their Rules of Procedure and Evidence had not dealt with the right to reparations, while the Tribunals shall undertake that their acts will not endanger or ignore the right of victims to reparations according to the Security Council Resolutions on the establishment of both *Ad hoc* Tribunals.[3]

In light of Article 24 (1 & 3) of ICTY Statute and Article 23 (1 & 3) of ICTR Statute, "the penalty imposed by the Trial Chambers shall be limited to imprisonment. In addition, the Chamber may order the property or proceeds to be returned to their rightful owners." Therefore, the right of victims to an effective remedy has not been mentioned within the Statutes.

Humanitarian Law; (1999) *UN Handbook on Justice for Victims, UN Office of Drugs Contrl and Crimes Prevention,* Principle. 10.

[1] Edham, Angela J (2008) "Crimes of Sexual Violence in the War Crimes Chamber of the State Court of Bosnia and Herzegovina: Successes and Challenges", *American University Washington College of Law Journals & Law Reviews,* Vol 16, pp. 21-28.

[2] The War Crimes Chamber in the Court of Bosnia and Herzegovina has operated from March 9, 2005 to continue the work of ICTY.

[3] Resolution 808 on "Establishment of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia", UN Security Council, S/RES/80, 22 February 1993, Para. 8; Resolution 955 on "Establishment of an International Tribunal for Rwanda and adoption of the Statute of the Tribunal", UN Security Council, S/RES/955, 8 November 1998.

Nonetheless, the Trial Chambers may refer the cases on reparations or compensations to the national courts[1] such as The War Crimes Chamber in the Court of Bosnia and Herzegovina.

Transmitting to or bringing the case on compensations before national courts may be beneficial for the victims because such courts have generally the capability to proceed with the victim's requests more promptly due to their more convenient and swift access to the facts, evidence, and any relevant information. However, victims have been facing with serious barriers within their access to national justice forums in post-conflict societies. For example, the orders on reparations and compensations issued by Former Yugoslavia's national courts in favor of victims of sexual violence were not effectively executed as the national judicial system lacked the adequate power to figure out the implementing mechanisms to secure the right to effective remedy after the war.

This is why the ICTY Prosecutor took a notable step to facilitate the process of remedies and reliefs for victims, in particular, victims of sexual violence through "the Prosecutor's address to the Security Council in 2000".[2] The Prosecutor highly recommended that the ICTY Statute and the Rules shall be amended for the purpose of providing the victims with effective remedies after the armed conflict. He also stated that the ICTY judges are not interested in assigning the role of compensating victims to the Tribunal itself, preferring to establish a "Claims commission". The motion of creating a commission or a victims unit was supposed to work out, nevertheless, in the judges' views, any amendment within the Tribunal Statute or the Rules would be demanding and quite long-lasting. Thus, none of the Prosecutor's suggestions took into action.

2. ICC

The Statute of ICC took remarkable steps in order to protect the victims of sexual violence and secure the right to an effective remedy.

First and foremost, ICC Rules provide a broad definition of "victim". In light of Rule 85, a "victim" is the one who has suffered harm due to the commission of the crimes within the scope of the Court jurisdiction. It also includes organizations or legal entities sustaining direct harm to their property which is dedicated to religion, education, art or science or charitable purposes,

[1] Rule 106 (A & B) of ICTY Rules

[2] "The Prosecutor's Address to the Security Council", *Carla Del Ponte*; *Prosecutor of the International Criminal Tribunals for former Yugoslavis and Rwanda*, JL/P.I.S./542-e, 24 November 2000.

and to their historic monuments, hospitals and other places and objects for humanitarian purposes."

In addition, Rule 97 articulates that the reparations will be granted on either an individualized or collective basis and the victim's rights shall be preserved under any circumstances. What seems to be a key inititive by the Court Statute is the appointment of experts, upon the request of either the victim or the convicted person, in order to assess the scope and extent of any damage, loss, and injury to the victims. Thus, the reparations can proceed more rapidly and precisely in favor of victims.

Rome Statute also provides different methods for reparations including monetary compensation, return of the property, rehabilitation, or symbolic measures such as apologies or memorials. In fact, the Court beleives that reparation shall not be restricted to financial restitution or pecuniary. The reason could be argued that, for example, in case of sexual crimes, if the victims are merely received monetary compensations, they will never be granted an effective remedy due to severe mental harm and physical injuries. Thus, other reliefs are required as they have been presented via the ICC Statute and the Rules.

Moreover, Rome Statute has established various sections within the Court body to facilitate the reparation or restitution process including "the Registrar", "Victims and Witnesses Unit" and "Trust Fund".

In accordance with Rule 16 (2) of ICC Rules, the Registrar is responsible for making the victims, witnesses, and others who are at risk on account of given testimonies aware of their rights and informing them of the capabilities and functions of the Victims and Witnesses Unit.

The Unit, pursuant to Rule 17 (2) (a), is in charge of providing the adequate protection for the victims and witnesses, implementing the long and short term safety plans, making medical and psychological assistance and giving the necessary information on the key issues including trauma, sexual violence, security and confidentiality to the Court and the State Parties.

Moreover, according to Rule 98 (2), in case the direct reparation to the victim is impossible or a collective award for reparations looks more appropriate, "the Court may order that an award for reparations against a convicted person be deposited with the Trust Fund." This mechanism speeds the reparation process up and facilitates the swift execution of the Court orders.

Therefore, ICC, for the first time, ruled in making the compensations in favor of the victims of war crimes within the *Katanga* case.[1] The Trial Chamber sentenced Germain Katanga to 12 years of imprisonment on 23 May 2014 and found him guilty, as an accessory, of one count of crimes against humanity and four counts of war crimes including murder, attacking a civilian population, destruction of property and pillaging in the territory of Democratic Republic of Congo. On 24 March 2017, The Trial Chamber II, issued an order awarding individual and collective reparations to the victims of crimes committed by *Katanga* in 2003. 297 victims have been granted a symbolic compensation of USD 250 per person as well as collective reparations in the form of support for housing, income-generating activities, education aid, and psychological support. Due to Katanga's penury, the Trust Fund for Victims was requested to use its resources for reparations.

The second case was that of Thomas Lubanga Dylio sentenced to 14 years of imprisonment on 10 July 2012 due to war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities in the Democratic Republic Congo. The reparation proceedings for victims launched on 7 August 2012.[2] Finally, on 18 July 2019, the Appeal Chamber upheld a USD 10,000,000 collective reparations award for 425 victims[3] ordered by the Trial Chamber on 21 December 2017.[4]

The third recent Order by the Court on reparation awards was issued in the *Ahmad Al Faqi Al Mahdi* case on 17 August 2017. [5] He was found guilty as a co-perpetrator of consisting in intentionally directing attacks against religious and historic buildings in *Timbuktu*, Mali, during June and July 2012. While the accused, pursuant to the reparations order, was liable for 2.7 million euros for individual and collective reparations for the community of *Timbuktu*, the Court Trial Chamber VIII, due to his indigence, requested the Trust Fund to submit a draft implementation plan in order to complete the compensations. Although the Appeal Chamber confirmed the Order on 8 March 2018, it amended the reparations on two points. First, it

[1] Prosecutor *v.* Germain Katanga, Judgment, Trial. Ch. ICC, Case No. ICC-01/04-01/04-01/07, 7 March 2014, paras. 1-8.
[2] Prosecutor *v.* Thomas Lubanga Dyilo, Decision on Victim Reparations, Trial Ch. ICC, Case No. ICC-01/04-01/06, 07 august 2012.
[3] Prosecutor *v.* Thomas Lubanga Dyilo, Judgment on the appeals against Trial Chamber II's "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable", Appeal Ch. ICC, Case No. ICC-01/04-01/06 A7 A8, 18 July 2019.
[4] Prosecutor *v.* Thomas Lubanga Dyilo, Corrected version of the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable", Trial Ch. II ICC, Case No. ICC-01/04-01/06, 21 December 2017.
[5] Prosecutor *v.* Ahmad Al Faqi Al Mahdi, Reparations Order, Trial Ch. ICC, Case No. ICC-01/12-01/15, 27 August 2017.

concluded that "the victims should have the chance to appeal the decision taken by the Trust Fund before the Trial chamber on their eligibility for individual reparations. Second, the Trial Chamber found applicants who do not wish that their identities be disclosed to Mr. Al Mahdi may nevertheless be considered for individual reparations, in that case, their identities will be disclosed to the Trust Fund."[1]

However, considering all afore-mentioned methods and mechanisms to protect the rights of the victims on an effective remedy via Rome Statute, and precedents, there are still some difficulties and challenges which impact adversely on the Court performance, especially in respect of reparation awards for sexual crimes victims. For example, the large volume of damages, losses, and injuries resulting from international crimes, the huge number of victims and innumerate claims on compensation and applications for reparations have caused serious problems for the Court Chambers in recent years.

Furthermore, the mechanisms and methods for making the reparations within the Statute and the Rules, seem to be somewhat vague and general. While the process of doing the assessments of reparation awards, and making the proportionality between the crime and the amount of harm, loss or injury shall be illustrated explicitly through the relevant provisions.

Moreover, a considerable number of victims are unaware of their rights to effective remedies and reliefs. Thus, they refuse to apply for reparations awards before the Court.

Also, the lack of adequate funds and financial resources in addition to insufficient experts and professionals for reparation assessments have affected the speed and quality of implementation of reparations plans.

2.2.2. NON-PARTICIPATION OF VICTIMS IN SEXUAL CRIMES PROCEEDINGS

No one can deny the importance of victims' participation during proceedings in international criminal courts, particularly within the investigation and trial of sexual crimes. In fact, ignoring the active participation of victims of sexual crimes and their roles in judicial proceedings will lead to the widespread violation of their fundamental rights.

In Nuremberg Military Tribunal and the International Military Tribunal for the Far East[2] (IMTFE), the victims were absent from nearly all trials. In other words, no right was secured

[1] Prosecutor *v.* Ahmad Al Faqi Al Mahdi, Decision on Public Redacted Judgement on the Apppeal of the Victims against the "Reparations Order", Appeal Ch. ICC, Case No. ICC-01/12-01/15 A, 8 March 2018, paras. 26-30 & 44-48.

[2] Also known as the Tokyo Trial or the Tokyo War Crimes Tribunal

for the victims upon which they can attend the investigations or appear before the Tribunals.[1] The notion of "victim" was not defined in neither of these Tribunals Statutes. Likewise, the victims' participation in both Nuremberg or Tokyo trials in order to give testimonies as the witnesses were quite infrequent and there were rare cases in which a victim has testified before either of the Tribunals.

In ICTY and ICTR, the methods enabling the victims to actively attend the trials, were not included within their Statutes and Rules.

For example, pursuant to ICTY Statute and the Rules, the Prosecutor's Office was the exclusive authority accountable for the prosecution of the defendants based on the information received from the states, UN subsidiaries or agencies, and transnational and non-governmental organizations (NGOs). Thus, it was not precedented that the victims might communicate directly with the Prosecutor to submit or obtain the information leading to the launch of the investigations. There was also no obligation for the Office of the Prosecutor to inform the victims of the progress of inspections or of the reasons upon which the accused was acquitted.

Moreover, while the victims were able to present before the Tribunals as witnesses, they were not allowed to access the evidence and testimonies within proceedings or to express their own views regarding the question raised by the judges. In contrast, the victims were expected to respond clearly and directly to the inquiries. Thus, it prevented them from providing the Tribunals with more relevant information or talking about their personal perspectives and problems.

Lastly, in ICTY and ICTR jurisprudence, the victims lack the opportunity to apply for reparation awards because both Tribunals undertook to refer the compensation cases to the national courts according to the Statute and the Rules.[2] However, the judges took some steps in order to improve the status and living conditions of the victims.

For the first time in the history of international criminal trials, the victims have been given the right, by the ICC Statute and the Rules, to participate actively and effectively in judicial proceedings and to have their own views, challenges and concerns expressed.

[1] Zappala, Salvatore (2003), *Human Rights in International Criminal Proceedings*, Oxford University Press, pp. 45-46
[2] Rule 106 (A & B) of ICTY Rules of Procedure and Evidence

In this regard, Rule 16 (1) (d) of the ICC Rules emphasizes that the Court Registrar is in charge of "taking gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings."

For this purpose, the victims, in virtue of Article 68 (3) of the Rome Statute, are permitted to present their perspectives and difficulties when their personal interests are affected at all stages of the proceedings via written applications submitted to the Registrar. Afterward, their applications will be sent to the Chambers under Rule 89 (1) of the ICC Rules. It's up to the Chamber to determine the appropriate form of participation.

The victims can also contact the Office of the Prosecutor and correspond with her directly for the purpose of obtaining information regarding the progress of the investigations or trials and transmitting the documents and evidence. In addition, the victims are able to request for awarding reparations. In case of indigence of the accused or when it's impossible to make individual awards directly to each victim, under Rule 98 of the ICC Rules, the Trust Fund undertakes to facilitate the process.

Thus, some are truly in the belief that in spite of former international criminal tribunals not allowing the victims to have an active role during the trials, the ICC tried to expand the scope of victims' active participation.[1]

2.2.3. LACK OF STATES' COOPERATION WITH INTERNATIONAL CRIMINAL COURTS IN CASE OF SEXUAL CRIMES

When it comes to the issue of states' cooperation with international criminal courts, it is undeniable that in absence of effective and reciprocal collaboration between them, the perpetrators of the cruelest atrocities may stay unpunished. For example, Libya eschewed referring *Saif Al-Islam Gaddafi* case to the ICC Prosecutor, despite the arrest warrant issued against the accused and the request for cooperation by the Prosecutor. The *Libyan* authorities also protested against the admissibility of the case before ICC in 2012. Finally, the Court Pre-Trial Chamber I rejected the objection to the admissibility of the case arguing that "the case is inadmissible where it is being investigated or prosecuted by a State which has jurisdiction over it unless the state is unwilling or unable genuinely to carry out the investigation or

[1] Zegveld, L. (2010) "Victims' Reparation Claim and International Criminal Court, In compatible Value", Journal of American International Law, Vol. 8, p. 95.

prosecution."[1] Nevertheless, the accused is not still in Court custody due to the non-corporation of the Libyan government and this is why the case has remained in the Pre-Trial stage, pending his transfer to the seat of the Court in the Hague.

Another prominent case is that of *Omar Al Bashir* who is under prosecution by the ICC over charges of genocide, crimes against humanity, and war crimes committed in Darfur, Sudan. In spite of two warrants of arrest issued by the Court, the suspect is still at large. UN Security Council via the Resolution (1953) referring the Sudan Case to ICC, recalled the State Parties to undertake to ensure the effective collaboration with the Court in all proceeding stages including the investigations, execution of arrest warrants, hearings, and implementation of the punishments.[2] However, when the accused traveled to Saudi Arabia, the government refused to detain him declaring that Saudi is not a member state of the Rome Statute. *Al Bashir* also visited South Africa in 2015 and traveled to *Uganda*, but both states restrained his extradition to the Court. Thus, the Prosecutor reported their non-compliance under Article 87 (7) of the Rome Statute to the UN General Assembly and Security Council.[3]

In addition, in *Kenyatta* case, the Kenyan government's refusal of collaboration with ICC in order to provide the necessary evidence and adequate protection for witnesses led to closure of the proceedings. Thereafter, the Trial Chamber V, upon the Prosecutor's request, referred the case to the Assembly of Member States' of the Court for further reviews on the violation of Kenya's obligations under the Rome Statute.[4]

States's cooperation with international criminal courts falls within three main categories as follows:

I. In ltigations and opening the files before the courts and tribunals;
II. Within inspections and investigations, detention of the accused, proceedings; access to the evidence and presence of witnesses;

[1] Prosecutor *v.* Saif Al Islam Gaddafi, Decision on the 'Admissibility Challenge by *Dr. Saif Al-Islam Gaddafi* pursuant to Articles 17 (1) (c), 19 and 20 (3) of the Rome Statute', Pre-Trial Ch. ICC, Case No. ICC-01/11-01/11, 05 April 2019, paras. 28-30.
[2] Resolution 1953 on "Referring the Situation in Darfur, Sudan, to the Prosecutor of ICC (2005)", UN Security Council, No. SC/8351.
[3] Prosecutor *v.* Omar Hassan Ahmad Al Bashir, The Warrant of Arrest, Pre-Trial Ch. I. ICC, Case No. ICC-02/05-01/09-1, 04 March 2009.
[4] Prosecutor *v.* Uhuru Muigai Kenyatta, Second Decision on Prosecution's Application for a finding of non-compliance under Article 87 (7) of the Statute, Trial Ch. V, ICC, Case No. ICC -01/09-02/11-1.37, 19 September 2016.

III. In order to execute the punishments.

With regard to the first category, the states are mostly reluctant to accept the courts' jurisdiction over their nationals especially when the accused is of high political or military positions enjoying a kind of immunity. As well, the issue of states' collaboration gets more complicated in case of the complementarity jurisdiction of ICC. Because the member states sought to resort the principle of complimentarity to refrain the launch of proceedings before the Court.

Moreover, the state parties, in most of the cases, abstain from collaboration with international criminal courts within the investigation process and the proceedings. As such courts lack the adequate facilities and finance in order to implement the imprisonment and other sort of punishments, they are in serious need of states's contribution. However, the ICC Prosecutor's Annual Report in 2014 indicates high rates of suspending or prolonging the investigation process because of the elimination of evidence, threatening or death of the witnesses by the member state officials which has led to closure of the relevant cases.[1] The crisis exacerbates in case of sexual crimes as the extension of proceedings due to non-collaboration of the Parties may intensify different mental and physical traumas to the victims, as well.

[1] Twentieth Report of the Prosecutor of the ICC to the UN Security Council pursuant to Paragraph 8 of UN Security Council Resolution 1953, The Office of Prosecutor, 31 March 2005, Para. 3-18.

CONCLUSION AND OUTCOMES

The first chapter addressed the available protection within ICL for the female victims of sexual violence and the second chapter discussed the existing challenges, barriers, and difficulties with which these victims face within the investigations and proceedings in international criminal courts and tribunals.

The conclusion part will deal with the main outcomes of the research and come up with remarks and suggestions to resolve the problems and remove the obstacles. In fact, a critical approach toward the ICL protective measures for female victims of sexual violence requires not only to go beyond a mere descriptive attitude but also to put forward the appropriate solutions and applicable mechanisms for consideration.

In order to figure out the effective solutions which can highly assist the female victims of sexual violence and surmount the aforementioned problems and predicaments, the following mechanisms are recommended:

1. Establishment of "*Ad hoc* Tribunals for conflict-related sexual crimes"

2. Foundation of "Special Department for War Crimes as a Potential Model"

3. Implementation of International and Impartial Mechanism (IIIM) to assist with the investigation and prosecution of perpetrators of international crimes

4. To strengthen "Civil Society" in order to provide efficient protection for female victims of sexual violence

1. *AD HOC* TRIBUNALS FOR CONFLICT-RELATED SEXUAL CRIMES

The establishment of *Ad hoc* Tribunals for conflict-related sexual crimes can make an effective contribution to the female victims of sexual violence. Some are in the belief that the *Ad hoc* Tribunals such as those set up for the Former Yugoslavia and Rwanda made a major impact on the implementation of IHL by "affirming the customary nature of certain principles, reducing the gaps in the rules applicable to International Armed Conflicts (IACs) and Non-International Armed Conflicts (NIACs) and by adapting more traditional provisions of IHL to modern

realities through a more flexible interpretation."[1] Moreover, as these tribunals concentrate on the crimes committed in a specific geographic area, their access to the evidence seems to be much more swift and convenient. This is why some argue that *Ad hoc* Tribunals focusing merely on sexual crimes can operate better than even a permeant court such as ICC.

In contrast, the others hold the opinion that the ICC has broad jurisdiction over all sorts of sexual violence in armed conflicts.[2] Thus, the establishment of *Ad hoc* tribunals for sexual crimes, parallel to a permanent court like ICC, can be out of use and even disadvantageous due to the issues arising from competence priorities, long-lasting formation process, and the necessary funds.

As a result, an independent claim is also included. If specific chambers of ICC are allocated to the proceedings of sexual crimes, it might pave the way for the victims of such crimes to approach a higher level on the justice ladder. Although the high number of cases, shortage of experts, and lack of adequate finance make it extremely difficult to set up the particular chambers with due attention to sexual violence in ICC, it seems to be much more efficient than establishing new *Ad hoc* tribunals.

2. SPECIAL DEPARTMENT FOR WAR CRIMES AS A POTENTIAL MODEL

The establishment of the "Special Department for War Crimes as a Potential Model" in the territory of member states of the ICC can facilitate the extradition process of the ones who are responsible for international crimes. Human Rights Watch, via its Report in 2006, has emphasized that this model enables the states to make some district prosecutors' offices and recruit specialized investigators for each to work exclusively on war crime cases. [3] The ICRC also encourages the states to end impunity through national legislation and establishments at the domestic level.

[1] "*Ad hoc* Tribunals Overview", International Committee of Red Cross, 29 October 2013; *See also*, Malek Ahmadi Pegah, "Human Rights in International Armed Conflicts, Colombia University School of Arts & Science, May 2018, p. 29.
[2] Cassese, Antonio (2005), *International Law*, Oxford University Press, Second Edition, p. 113.
[3] Report on "A Chance for Justice? War Crime Prosecutions in Bosnia's Serb Republic, Human Rights Watch, March 2006, pp. 5-9.

3. INTERNATIONAL AND IMPARTIAL MECHANISM (IIIM) TO ASSIST WITH THE PROSECUTION OF PERPETRATORS OF INTERNATIONAL CRIMES

The "International and impartial mechanism (IIIM)" outlined by the UN General Assembly Resolution[1] can assist the international criminal tribunals and the states with prosecutions and investigation of serious international crimes. For this purpose, "the General Assembly mandated the IIIM to:

- Collect, consolidate and preserve information or evidence of violations of international humanitarian law and human rights violations and abuses;

- Analyze this collected evidence and prepare files in order to facilitate and expedite fair and independent criminal proceedings;

- Share information and evidence collected and analytical work produced with national, regional, and international courts." [2]

Moreover, the General Assembly "calls upon all states, conflict parties as well as civil society to cooperate fully with IIIM and "the Commission of Inquiry" to effectively fulfill their respective mandates and, in particular, to provide them with any information and documentation they may process, as well as any other forms of assistance pertaining to their respective mandates."[3]

4. CIVIL SOCIETY AND EFFICIENT PROTECTION FOR FEMALE VICTIMS OF SEXUAL VIOLENCE

Lastly, civil society seems to be one of the most effective mechanisms which can effectively cooperate with international criminal tribunals and courts in order to ensure the fundamental rights of women who have been victimized by sexual violence in armed conflicts. For example, International non-governmental organizations (INGOs) such as Human Rights Watch, Amnesty International, ActionAid, Care International and etc. can contribute to the victims of sexual violence in various ways as follows:

[1] Establishment of an International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in Syria since March 2011, General Assembly Resolution, No. A/RES/71248, 21 December 2016.
[2] *Ibid*, para. 4
[3] *Ibid*, para. 6

- Assisting women with more convenient access to international justice;
- Facilitating the process of bringing the files before the courts for victims of sexual violence;
- Providing the courts with information on the crimes and the number and identity of victims;
- Contributing to the courts to secure the principles of a fair trial in the proceedings;
- Assisting the states to make more efficient cooperation with international criminal courts;
- Boosting the effective communication with international bodies such as UN subordinates and agencies, Commission on the Status of Women, Red Cross, and, particularly ICC;
- Reporting the cases of serious violations of women's rights and conflict-related sexual violence in an international scope; and,
- Collaborating with ICRC in the provision of food and medical staff as well as safeguarding healthcare for female victims of sexual violence in post-conflict societies.

In summary, civil society can cooperate with both states and international criminal courts in order to facilitate the female victims' access to international justice, compliance with fair trial principles in judicial proceedings, and the mutual collaboration of states and international criminal courts which will be discussed further in detail within the following parts.

4.1. CIVIL SOCIETY AND ACCESS TO JUSTICE FOR FEMALE VICTIMS OF SEXUAL VIOLENCE

Civil society can make access to justice for the female victims of sexual violence much easier via:

- identifying the victims of sexual violence through visiting the war zones;
- providing the victims with relevant information on how to open a file in a competent court;
- constant communication with ICC Prosecutor's Office in order to present the information on the number and status of victims as well as their identification with due attention to their safety and the principle of confidentiality;

- facilitating the appearance of witnesses before international criminal courts especially ICC via sharing their identification, number, and nationality with the Prosecutor's Office with serious consideration to confidentiality;
- Enabling the women to contact the competent national organizations which are lawfully in charge of providing medical, legal, social, or financial assistance.

As the conflict parties, in most of the cases, are reluctant to share the necessary information regarding the crimes, victims, and the accused with the international criminal courts, civil society can, to some extent, feel the void. The reason may be argued that INGOs attain a wealth of information via their consistent presence in conflict areas and active participation in humanitarian aid missions. For example, Human Rights Watch has taken numerous interviews with women who have been suffering from sexual violence in the ongoing conflicts in Africa or the war in Bosnia. Thus, INGOs can make an effective contribution to the ICC Prosecutor's Office leading to the launch of an investigation. As well, they are able to assist the victims in bringing their cases before ICC by making them aware of their rights and providing them with legal advice/consultations.

4.2. OUTSTANDING IMPACTS OF CIVIL SOCIETY ON THE PROCEEDINGS OF SEXUAL CRIMES IN INTERNATIONAL CRIMINAL COURTS

Civil society can significantly impact the performance and efficiency of international criminal courts with regard to sexual crimes. For example, within the Review Conference of the Rome Statute held in 2010 in Uganda, some amendments were made because they have been consistently insisted on and followed up by either international or national NGOs, *e.g.*, the extension of the Court's jurisdiction over war crimes provided for in Article 8.

Furthermore, INGOs have the ability to highlight the criticisms and challenges regarding the international criminal courts' compliance with the right to a fair trial in sexual crimes proceedings. This is because the INGOs reports and statements are published worldwide and both the states and international tribunals care about how the world will judge their acts and attitudes. For instance, the INGOs periodic or annual reports on the performance of ICC are highly important for the Court's Prosecutor and judges. In recent years, Human Rights Watch has criticized about the adverse impacts of political interference on the ICC Prosecutor's investigations leading to the closure of some proceedings such as the *Kenyatta* case. Therefore, the issue is seriously on the Court's agenda.

Civil society also meets the potentiality to offer applicable solutions. In this regard, Human Rights Watch has suggested the ICC Prosecutor to change her policy on the segregated and in-phase investigations. For instance, in the *Gbagbo* case, the arrest warrant against *Laurent Gbagbo*, the Ivorian national and former president of Côte d'Ivoire was initially issued on 23 November 2011. Although another warrant was issued against *Charles Ble Goude*, the second accused person for the charges of crimes against humanity, at almost the same time on 21 December 2011, their cases were joined on 11 March 2015. On the other hand, *Simon Gbagbo*, the other accused person, was summoned to the Court on the latest February 2012. Thus, such incoherence within the investigation process and prosecution of the individuals who were responsible for the common charges in a case caused delays, disorder, chaos, and parallel work between national and international courts.

In conclusion, the reports and statements by either NGOs or INGOs can pave the way for the international criminal courts to approach a higher level on the justice ladder, particularly in respect of the victims of sexual crimes in armed conflicts.

Bibliography

Books:

1. Brownmiller, Susan, (1975), ***Against Our Will: Men, Women and Rape***, Simon and Schuster publication.
2. Fangrad, Alana, (2013), ***Wartime Rape and Sexual Violence***, Author House publication.
3. Garcia- Godos, Jemima, Andreas Lid, Knut, (2010), ***Transitional Justice and Victim's Rights before the End of Conflict: the Unusual Case of Colombia***, Cambridge University Press.
4. ***Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors & Lawyers*** (2003), Professional Training Series No. 9; Office of the High commissioner for Human rights.
5. Laetitia Ruiz (2016), ***Gender Jurisprudence for Gender Crimes***?, International Crimes Database.
6. Lee, Roy. S. (2001), ***International Criminal Court, Elements of Crimes and Rules of and Evidence***, Transnational Publisher; First Published, USA.
7. Mackinnon, Catharine, (1989), ***Toward Feminist Theory of the State,*** Harvard University Press.
8. Patricia Mahoney, (2001), ***Violence against Women by Intimate Relationship Partners,*** Sourcebook on Violence against Women.
9. Stuart Mill, John (2012), ***The Subjection of Women, Dover Publications,*** Originally published at 1869 by J.P. Lippincott & Co.
10. Weaver, Gina Marie, 2010, *Ideologies of Forgetting: Rape in the Vietnam War,* State University of New York Press.
11. Zappala, Salvatore, (2003), ***Human Rights in International Criminal Proceedings***, Oxford University Press.

Articles:

1. Alexander, Jane, (2003), "**A Scoping study of Transitional Justice and Poverty Reduction**", *Report for the Department for International Development (DFID).*
2. Anne-Marie L.M. de (2006), "**Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR"**, *School of Human Rights Research Series, University of Tilburg*, Volume 20.
3. Buck, Alexy, Pleasence, Pascoe, Balmer, Nigel, (2007), "**Education Implications from the English and Welsh Civil and Social Justice Survey**", *Annex to the PLEAS Task Force Report*.
4. Cassese, Antonio, (1999), "**The Statute of the International Criminal Court: Some Preliminary Reflections**", *European Journal of International Law*, Vol. 10.
5. Chappell, Louise (2020), **"Re-writing sex and gender in international criminal law",** in *The Elgar Companion to the International Criminal Court*, Edward Elgar Publishing.
6. Chappell, Louise (2011), "**The Role of ICC in Transitional Gender Justice: Capacity and Limitations",** in Buckey-Zistel S; Stanley R (ed.), *Gender in transitional justice*, edn. Original, Palgrave Macmillan, New York.
7. Chappel, Louise (2003), "**Women, Gender and International Institutions: Exploring New Opportunities at the International Criminal Court**", International Policy & Privacy Journal (Published Online: 2017), Vol. 22, Issue.
8. Charlesworth, Hilary, Chinkin, Chiristian, (1993), "**The gender of Jus Cogens**", *Human Rights Quarterly*, vol. 15.
9. Ciampa, Nancy. C, (1997), "**United States Asylum Law: The Failure of The United States to Accommodate Women's Gender-Based Asylum**

Claims", *ILSA Journal of International & Comparative Law*, Vol. 2, Issue. 493.

10. Dermant, John, (2004), "**Civil Society and prevention of sexual violence**", *European Journal of International Law*, Vol. 93, Issue. 118.
11. Duncan, Sheila, (1997), "**The Mirror Tells its Tale: Constructions of Gender in Criminal Law**", *Sourcebook on Feminist Jurisprudence* (edited by Hilair Barnett), Cavendish Publishing.
12. Fountain, Caleb, (2015), "**Sexual Violence, the Ad Hoc Tribunals and the International Criminal Court: Reconciling Akayesu and Kunarac**", *ILSA Journal of International & Comparative Law*, Vol. 2, Issue. 19.
13. Gurvinder Kalra and Dinesh Bhugra, (2013), "**Sexual violence against women: Understanding cross-cultural intersections**", *Indian Journal of Psychiatry*, Vol. 55, Issue. 3.
14. Henry, Nicola (2016), **"Theorizing Wartime Rape: Deconstructing Gender, Sexuality, and Violence"**, Gender & Society, Vol. 30.
15. Henzelin, M., Heiskanen, V., Guenael, M., (2006), "**Reparations to Victims before the International Criminal Court, Lessons from International Mass Claims Processes**", *Criminal Law Forum*, Vol. 17.
16. Lai, Sarah. Y, Ralph, Regan, (1995), "**Female sexual autonomy and Human Rights**", *Harvard Human Rights Journal*, Vol 8.
17. Malamuth, N. and Heilmann, M.F, (1998), "**Evolutionary Psychology and Sexual Aggression**", *Handbook of Evolutionary Psychology*.
18. Meron, Theodor, (2015), "**Customary Humanitarian Law Today: From the Academy to the Courtroom**", *The Oxford Handbook of International Law in Armed Conflict (*edited by Andrew Clapham and Paola Gaeta*)*, Oxford University Press.
19. Nicolas A.J. Croquet (2011), **"The International Criminal Court and the Treatment of Defense Rights: A Mirror of the European Court of**

Human Rights' Jurisdiction?", Human Rights Law Review, Vol. 11, Published by Oxford University Press.

20. Oosterveld, Valerie (2005), **"The Definition of 'Gender' in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?"**, Harvard Human Rights Journal, Vol. 18.
21. Owen D. Jones, (1999), "**Sex, Culture, and the Biology of Rape: Toward Explanation and Prevention**", *California Law Journal*, Vol. 87.
22. Russell, Yvette, (2013), "**Thinking Sexual Difference through the Law of Rape**", *Law and Critique Journal*, Vol. 24, No. 3.
23. Stahn, Carsten, Volker, Nerlich, (2008), "**The International Criminal Court and Co-operation: Introductory Note**", *Leiden Journal of International Law*, vol. 21.
24. Valerie Osterveld, **"Lessons from the Special Court for Sierra Leone on the Prosecution of Gender-Based Crimes",** Journal of Gender, Social Policy & the Law, Vol 17, Issue 2.
25. Yodanis, Carrie, (2004), "**Gender Inequality, Violence against Women, and Fear A Cross- National Test of the Feminist Theory of Violence against Women**", *Journal of Interpersonal Violence*, Vol. 19, No. 6.
26. Zegveld, L, (2010), "**Victims' Reparation Claim and International Criminal Court, Incompatible Value**", *Journal of American International Law*, Vol. 8.

Caselaw:

1. The Prosecutor *v.* Ahmad Al Faqi Al Mahdi, Reparations Order, Case No. ICC-01/12-01/15, Trial Ch. ICC, 27 August 2017.
2. The Prosecutor *v.* Ahmad Al Faqi Al Mahdi, Judgement, Case No. ICC-01/12-01/15, Trial Ch. ICC, 27 September 2016.

3. The Prosecutor *v.* Akayesu, Judgement, Case No. IT- 96- 4- I, Trial Ch. ICTR, 2 September 1998.
4. The Prosecutor v. Armed Forces Council Leaders, Judgement, Trial. Ch. SCSL, 20 June 2006.
5. The Prosecutor *v.* Bosco Ntaganda, Decision on the confirmation of charges against Bosco Ntaganda, Case No. ICC-01/04-02/06, Trial Ch. ICC, 9 June 2014.
6. The Prosecutor *v.* Celebici, Judgement, Case No. ICTR -96-21-A, Trial Ch. of ICTR, 20 Feb 2001.
7. The Prosecutor v. Francis Kirimi Muthaura & Uhuru Muigai Kenyatta & Mohammed Hussein Ali, Decision on the Confirmation of Charges Pursuant to Article 61 (7) (a) and (b) of the Rome Statute, Pre-Trial Ch. II, ICC, Case No. ICC-01/09-02/11, 23 January 2012.
8. The Prosecutor v. Francis Kirimi Muthaura & Uhuru Muigai Kenyatta, Decision on Withdrawal of Charges against Mr. Muthaura, Trial Ch. V, ICC, Case No. ICC-01/09-02/11, 18 March 2013.
9. The Prosecutor *v.* Furundzija, Judgment, Case. No. IT-95-17/1-T, Trial Ch. of ICTY, 10 December 1998.
10. The Prosecutor v. Gacumbitsi, Judgment, Trial Ch. ICTR, Case No. ICTR-2001-64-A, 7 July 2006.
11. The Prosecutor v. Germain Katanga, Judgement, Case No. ICC-01/04-01/07, Trial Ch. ICC, 7 March 2014.
12. Julian Assange v. Swedish Prosecution Authority, UK Appeal Court, Case No. C0/1925/2011, 2 November 2011.
13. The Prosecutor *v.* Kvocka, Milojica Kos, Mlacoradi, Zoran Zigi, Dragoljub Prca, Judgement, Case No. IT-98-30/1-T, Trial Ch. Of ICTY, 2 Nov 2001.
14. The Prosecutor *v.* Kunarac, Kovac and Vokuvic, Judgement, Case No. IT-96-23& IT-96-23/1-A, Trial Ch. Of ICTY, 12 June 2002.

15. The Prosecutor *v.* Laurent Gbagbo and Charles Blé Goudé, The warrant of Arrest, Case No. ICC-02/11-01/15, Pre-Trial Ch. ICC, 23 November 2011.
16. The Prosecutor *v.* Laurent Gbagbo and Charles Blé Goudé, The warrant of Arrest, Case No. ICC-02/11-01/15, Pre-Trial Ch. ICC, 21 December 2011 (The Blé Goudé case and Gbagbo case were joined on 11 March 2015.).
17. The Prosecutor *v.* Muammar Mohammed Abuminyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Judgment, Case No. ICC-01/11-01/11- 565, Appeals Ch. ICC, 24 July 2014.
18. Regina v. Jason Lawrance, UK Appeal Court, Case No. 201903220B2, 23 July 2020.
19. The Prosecutor *v.* Omar Hassan Ahmad Al Bashir, The warrant of arrest, Case No. ICC-02/05-01/09, Pre-Trial Ch. ICC, 2008.
20. The Prosecutor *v.* Saif Al-Islam Gaddafi, The warrant of arrest, Case No. ICC-01/11-01/11, Pre-Trial Ch. ICC, 27 June 2011.
21. The Prosecutor v. Simic and Others, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of Witness, IT 95-9. PT, Trial Ch. ICTY, 27 July 1999.
22. The Prosecutor *v.* Simone Gbagbo, The warrant of Arrest, Case No. ICC-02/11-01/12, Pre-Trial Ch. ICC, 29 February 2012.
23. The Prosecutor *v.* Uhuru Muigai Kenyatta, Second decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute, Case No. ICC-01/09-02/11-1037, Trial Ch. V (b) ICC, 19 September 2016.
24. The Prosecutor *v.* Uhuru Muigai Kenyatta, Judgment (on the Prosecutor's appeal against Trial Chamber V(B)'s Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute), Case No. ICC-01/09-02/11-1032, Appeal Ch. ICC, 19 August 2015.
25. The Prosecutor *v.* Thomas Lubanga Dyilo, Judgrmrnt Case No. ICC-01/04-01/06, Trial Ch. ICC, 10 July 2012.

26. The Prosecutor *v.* William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Judgement, Case No. ICC-01/09-01/11, Trial. Ch. ICC, 23 January 2012.

Documents:

1. American Convention on Human Rights, Organization of American States (OAS), 22 November 1969.
2. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly Resolution, GA/60/147, 16 December 2005.
3. Conflict-related Sexual Violence: Report of the UN Secretary General, No. S/2022/272, 29 March 2022.
4. Convention on the Elimination of All Forms of Discrimination against Women United Nation General Assembly, 1979.
5. Conflict-related Sexual Violence: Report of Secretary General, No. S/2021/312, 30 March 2021.
6. Declaration on the Protection of Women and Children in Emergency and Armed Conflict, General Assembly Declaration, A/RES/3318, 14 December 1974.
7. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN General Assembly Declaration, A/RES/40/34, 29 November 1985.
8. Declaration on the Elimination of violence against women, UN General Assembly, 20 Dec 1993.
9. Establishment of an International, Impartial and Independent Mechanism to assist in the investigation and prosecution of those responsible for the most serious crimes under international law committed in Syria since March 2011,

10. General Assembly Resolution, No. A/RES/71/248, 21 December 2016.
11. European Convention on Human Rights (ECHR), drafted by Council of Europe, 4 November 1950.
12. Guidelines for the Prevention of Crime, United Nation Economic, Social and Cultural Council (ECOSOC) Resolution, No. 2002/13, 24 July 2002.
13. Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, United Nation High Commissioner of Refugees, No. HCR/GIP/02/01, 7 May 2002.
14. ICTY Judges' Report on Victims Compensation and Participation, The Hague, No. JL/P.I.S./528-e, 14 September 2000.
15. Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem Do Para), 6 September 1994.
16. International Covenant on Civil and Political Rights, General Assembly Resolution, 2200A/ XXI, 16 December 1966
17. Landmark resolution on Women, Peace and Security, Security Council, No. S/RES/1325, 31 October 2000.
18. Political Solution to the Syrian Crisis, Security Council Resolution, No. S/RES/2254, 18 December 2015.
19. Report of A Chance for Justice? War Crime Prosecutions in Bosnia's Serb Republic, Human Rights Watch, March 2006.
20. Report on In-depth Study on all Forms of Violence against Women, Secretary-General of the United Nations, 9 October 2006.
21. Report on Elimination and Prevention of All Forms of Violence against Women and Girls in War, The fifty-seventh Session of the Commission on the Status of Women, No. 2013/ CSW57, 15 March 2013.
22. Report on Abuse of Girl Soldiers, Human Rights Watch, 21 June 2007.

23. Report on sexual violence in war and conflict, United Nations Secretary General, 17 April 2013
24. Rules of Procedure and Evidence, International Criminal Court, ICC-ASP/1/3, 9 September 2002.
25. Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda, U.N. Doc. ITR/3/REV.1, 1995.
26. Rules of Procedure and Evidence, International Criminal Tribunal for the former Yugoslavia, Adopted on 11 February 1994, Amended 22 July 2009.
27. Secretary-General's remarks to Security Council open debate on Women, Peace and Security, 13 October 2015.
28. Special Report on violence against women, including its causes and consequences, United Nations Commission on Human Rights Resolution, No. 1994/45, 4 March 1994.
29. Resolution 808 on Establishment of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, Security Council, S/RES/808, 22 February 1993.
30. Resolution 955 on the establishment of an International Tribunal for Rwanda and adoption of the Statute of the Tribunal, United Nations Security Council, S/RES/955/, 8 November 1998.
31. The Universal Declaration of Human Rights, General Assembly resolution, GA/217/A, 10 December 1948.
32. Treatment of Victims, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; *UN Handbook on Justice for Victims*, United Nations Office of Drugs Control and Crimes Prevention, 1999.

33. Twentieth Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to paragraph 8 of UN Security Council Resolution 1593, The Office of Prosecutor, 31 March 2005.
34. Women's Human Rights, Human Rights Watch, World Report, 2002.
35. World Report on Violence and Health, World Health Organization, 3 October 2002.