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A Critical Analysis of the Prosecution of Sexual and Gender-Based Violence at the International Criminal Court

Oriola O. Oyewole, PhD*

"Women, their bodies, their sexuality, and their gender-specific vulnerabilities

have been used, with impunity, as weapons of war.

Human rights organisations have extensively reported that soldiers

have abused women and girls "as a part of their effort to win and

maintain control over civilians and the territory they inhabited."¹

Abstract

The prosecution of crimes of Sexual and Gender-Based Violence(SGBV) has remained a challenging issue for international criminal justice. Given that in the past, crimes of sexual violence within the context of international armed conflict were not considered substantive crimes. This is evidenced in the non-prosecution of sexual and gender-based crimes at the Nuremberg and Tokyo tribunals despite the incontrovertible utilisation of the "comfort women system" in Tokyo during World War II. However, with the emergence of the International Criminal Court(ICC), there seems to be a reasonable but piecemeal progression of the investigation and prosecution of SGBV. Although, previous studies have reported that investigating and gathering evidence for SGBV is a continuing concern within the jurisprudence of the ICC. The recently decided cases at the Court especially demonstrate a development and dynamics in the prosecution of SGBV at the ICC. By employing a doctrinal research method, I spotlight the nuances and hurdles of sexualised crimes within the ICC. The author recommends gender mainstreaming in the investigation and prosecution of sexual violence in order to fill the gap.

Keywords: sexual and gender-based violence, international criminal justice, prosecution, victims.

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¹ Susan Pritchett, "Entrenched Hegemony, Efficient Procedure, or Selective Justice?: An Inquiry into Charges for Gender-based Violence at the International Criminal Court,(2008) 17*Transnational Law and Contemporary Problems*, 265-286;*Prosecutor v Lubanga* ICC-01/04-01/06, Arrest Warrant.

1.1. Introduction

Sex and gender are at the heart of our understanding of the asymmetrical prosecution of sexual and gender-based crimes within the international criminal justice system. In recent years, there has been an increasing interest in the rationale behind exclusion and unequal positions of varying perspectives on the gradual emergence of women and girls in the international sphere.² Before this study proceeds into the central discourse, it is pertinent to discuss the relationship between sex and gender briefly. Sex is a natural phenomenon; usually, sex is determined at the foetal stage and validated at birth.³ Gender, on the other hand, is a social construction which highlights the traditional roles of girls and boys, women and men.⁴

Lucidly, sex is biological and physical features distinguishing man from woman, while gender is a product of socialisation. The traditional roles played by both gender in society are relics of socio-cultural factors. Interestingly, these traditional roles result from the biological differences between males and females.

Women are generally presumed to be "weak" and "vulnerable" because of their biological composition.⁵ Patriarchal societies entrench a binary classification of sex into superior/inferior, strong/weak, seen/unseen, loud/quiet, and dominant/submissive categories. This binary classification filters into every aspect of societal realities, including laws and international conventions.⁶ For instance, some feminists in France protested against the Declaration of the Rights of Man 1789 (as the preamble to the French Constitution 1789) because of its sexist, discriminatory and blatant marginalisation of women.⁷ They requested for the word 'man' to be replaced with 'everyone'. Some critics opine that 'man' within this context refers to

² Hilary Charlesworth and Christine Chinkin, *The boundaries of International Law: A Feminist Analysis*, (Manchester University Press 2016) 218.

³ *Ibid.*

⁴ *Ibid.*

⁵ Margaret Davies, 'Taking the inside outsex and gender in the legal subject', in N. Naffine and R. Owens (eds), *Sexing the subject of Law* (Sydney, Law Book Co. Ltd, 1997) 25.

⁶ Hilary Charlesworth and Christine Chinkin, *The boundaries of International Law: A Feminist Analysis*, First Published 2000, Manchester University Press 2016) 218.

⁷ Olympe de Gouges, Declaration of the Rights of Woman and of the Female Citizen. available at <<https://pages.uoregon.edu/dluebke/301ModernEurope/GougesRightsofWomen.pdf>> last accessed 5 July 2023

mankind.⁸The Declaration of Man is believed to subsume women under men. The discussion is beyond the scope of this study.

Marginality and gender inequality could be argued to pervade international law, particularly international criminal law and international humanitarian law, and it is against this backdrop that the thesis of this study emerges. Previous research suggests that investigating and gathering evidence for SGBV during armed conflict has been a clog in the wheel of the ICC's operations.⁹ Therefore, there is a continued concern that the challenges to prosecuting SGBV successfully at ICC may put the victims of this category of crime at a disadvantage for their inability to access justice. One implication is that it may adversely impact victims' perception of the Court, given that the ICC has been hailed as the "victims' Court"¹⁰ because of its innovative victim participation regime and reparations programme. Set against this background, this paper intends to critically analyse the development of the prosecution of SGBV by using a few of its decided cases.

In this paper, I argue that victims, especially victims of SGBV, should be actively included in the investigations/pre-trial stage. Plausibly, women and men can be affected by sexual violence; women and girls may be disproportionately affected during the war because of the interplay of social, political and cultural factors. Many a time, the perpetrators of SGBV are foot soldiers or combatants.¹¹ Since the ICC's mandate is the punishment of the masterminds of serious crimes,¹² the commander or leader should be held responsible for the subordinates' command responsibility. With this theory, if the commander is guilty, national jurisdictions should try the foot soldiers (subordinates). This is known as positive complementarity.

⁸Christine Delphy, *The Invention of French Feminism: An Essential Move*, (1995) 84 *Yale French Studies*, 191-195; Andrew Deutz, 'Gender and International Human Rights', (1993) 17(2) *Fletcher Forum of World Affairs*, 33-51.

⁹ C M De Vos, 'Investigating from Afar: The ICC's Evidence Problem' (2013) 26(4) *Leiden Journal of International Law*, 1010-1015.

¹⁰ Human Rights Centre, University of California, 'The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court' (2015) available at https://www.law.berkeley.edu/wp-content/uploads/2015/04/VP_report_2015_final_full2.pdf > last accessed 9 June 2023.

¹¹Charlotte Lindsey, *Women facing war*, (ICRC 2001) 52; Susan Pritchett, "Entrenched Hegemony, Efficient Procedure, or Selective Justice?: An Inquiry into Charges for Gender-based Violence at the International Criminal Court," (2008) 17 *Transnational Law and Contemporary Problems*, 265-286,

¹²The Rome Statute 1998, Preamble.

The research data in this paper is drawn from transcripts of two decided cases of the ICC. The *Lubanga* case and *Katanga* case.¹³ By exploring the qualitative analysis of these transcripts, I attempt to explore how the crimes of SGBV were treated in these cases, as well as the parties' attitudes towards the crime and the victims of SGBV. This paper also uses a doctrinal research method.

This paper first gives a brief overview of the prosecution of SGBV in the international criminal justice system and the definition of sexual violence. The second section will examine the provisions of the Rome Statute and the Rules of Evidence and Procedure (RPE) on SGBV. The third section reviews the prosecution of SGBV in the *Lubanga* and *Katanga* cases.

1.2. Contextual Background of Crimes of SGBV in the International Criminal Justice System

Given that women are subject to discrimination in peacetime, they become more prone to marginalisation, poverty and are disproportionately affected by hostilities.¹⁴ In Lindsey's words:

"Women may be particularly vulnerable if they are held up as "symbolic" bearers of cultural and ethnic identity and the producers of the future generation of the community. In such situations, women may be vulnerable to attack or threats from their own community for not conforming to this role e.g. by not wearing a veil...or conversely they may be targeted by the enemy in order to destroy or subvert this role. Present-day conflict shows that women are increasingly becoming the target of fighting."¹⁵

According to the United Nations Secretary-General, sexual violence spans 'through 'sexual exploitation', and it includes any actual or attempted abuse of a position of vulnerability, differential power, or trust for sexual purposes, including but not limited to profiting monetarily, socially, politically from the sexual exploitation of another.'¹⁶ In the

¹³*Prosecutor v Thomas Dyilo Lubanga, Decision on Sentence Pursuant to Article 76 of the Statute*, 10 July 2012, ICC-01/04-01/06-2901; *Prosecutor v Pierre Bemba Gombo*, ICC-01/05-01/08, 4 May 2016; *Prosecutor v Germain Katanga, Judgment pursuant to Article 74 of the Statute*, 7 March 2014, ICC-01/04-01/07-3436-tENG.

¹⁴ Charlotte Lindsey, *Women Facing War* (ICRC 2001) 28.

¹⁵*Ibid* (n 29).

¹⁶United Nations, *Secretary' Bulletin,; Special Measures for Protection of Sexual Exploitation and Sexual Abuse*, United Nations Document, ST/SGB/2003/13, 9 October 2003, 1

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same vein, "sexual abuse" means the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.¹⁷

Basile and Saltzman vividly defines sexual violence as:

"completed or attempted penetration of the genital opening or anus by the penis, a hand, a finger, or any other object, or penetration of the mouth by the penis or other object. Sexual violence also includes non-penetrative abusive sexual contact (e.g., intentional touching of the groin), as well as non-contact sexual abuse (e.g., voyeurism, exposure to pornography). Sexual violence occurs when the victim does not consent to the sexual activity, or when the victim is unable to consent (e.g., due to age, illness) or refuse (e.g., due to physical violence or threats)."¹⁸

Notably, the first definition (from the excerpts) overlooks the fact that a female may be a perpetrator of sexual violence, given that the only sexual organ mentioned is the male organ, 'penis'. Therefore, the first definition fails to acknowledge the other dimension of sexual violence acts and perpetrators. Both gender, women and men, can be victims and perpetrators of sexual violence.

For purposes of this study, this author shall adopt the definition of the previously mentioned United Nations Document ST/SGB/2003/1. Also, the term "sexual violence" refers to a wide range of activities that would ordinarily be classified as sexual abuse, sexual assault, and other sexual crimes, such as voyeurism and sexual harassment.¹⁹ Sexual violence is not restricted to physically forced penetration, nor are its perpetrators limited to strangers. Actually, perpetrators of sexual abuse are more likely to be people the victim knows.²⁰

¹⁷Ibid (n 1)

¹⁸ Kathleen C. Basil and Linda E. Saltzman, *Sexual Violence Surveillance: Uniform Definitions and Recommended Data Elements* (National Center for Injury Prevention and Control, Center for Disease Control and Prevention, Atlanta Georgia 2002)1,

¹⁹*Ibid*

²⁰ Mary P. Koss, Christine A. Gidycz, & Nadine Wisniewski, 'The scope of rape: Incidence and prevalence of sexual aggression and victimization in a national sample of higher education students', (1987) 55(2), *Journal of Consulting and Clinical Psychology*, 162–170.

In addition, sexual violence may be described as a violent act of a sexual nature, carried out without consent or the capacity to consent.²¹ It is not an act of lust but rather the premeditated exercise of control over another individual. Sexual violence is frequently used to denigrate people or groups deliberately. Social inequality and oppressive patriarchal power systems are the root causes of sexual violence. It is a political crime committed in order to achieve political or military objectives.²² Rape, sexual assault, forced pregnancy, forced sterilization, forced abortion, forced prostitution, forced prostitution, sexual slavery, forced circumcision, genital mutilation, or forced nudity are all instances of sexual crimes.²³

Within the context of international humanitarian law, a generally accepted definition of sexual violence is lacking. In fact, the four Geneva Conventions and the additional protocols do not provide an unambiguous definition of sexual violence. Similarly, the Nuremberg Charter does not define sexual violence, likewise the statutes of the International Criminal Tribunal for former Yugoslavia and the International Criminal Tribunal for Rwanda. Nonetheless, the Rome Statute uses the term 'sexual violence' to refer to rape, sexual slavery, forced pregnancy, enforced prostitution and enforced sterilisation. It recognises crimes of sexual nature as criminal acts which can constitute war crimes and/or crimes against humanity.²⁴ A cursory look at the various international legal frameworks related to international criminal law and international humanitarian law demonstrates that the Rome Statute was apparently the first international legal framework to make a distinction between the different forms of sexual violence, this, in itself, espouses an inclusive approach to recognising victims of SGBV regardless of the dimension of their sexualised violence. Lupig notes that the Rome Statute mirrors the 'significant historical advances made in the investigation and prosecution of sexual and gender-based crimes before the international criminal courts.'²⁵

²¹ European Centre for Constitutional and Human Rights, 'Sexual Violence' available at <https://www.ecchr.eu/en/glossary/sexual-violence/#:~:text=Sexual%20violence%20is%20defined%20as%20a%20last%20accessed%206%20July%202023>

²²*Ibid*

²³*Ibid*.

²⁴The Rome Statute 1998, Article 7(1)(g), Article 8(2)(b)(xxii)

²⁵Diane Lupig, "Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court." (2009) 17(2)*American University Journal of Gender, Social Policy & the Law*, 431-496

In the past, Sexual violence and SGBV were not classified as substantive crimes in international law.²⁶ Nevertheless, evidence suggests that sexual violence sometimes, is inevitable during armed conflict²⁷ Sexual violence was not considered a crime but as spoils of war.²⁸ Hence, it became difficult to prosecute sexual violence.. Sexual violence increased as combatants used it as 'weapons of war'; women and girls were subdued, raped and made sexual slaves by footsoldiers, combatants and commanders.²⁹ As mentioned earlier, the subcategories of sexual violence include rape, sexual slavery, enforced prostitution and forced pregnancy.³⁰ It has been reported that these were common occurrences in national jurisdictions like Rwanda, Sudan, Uganda, Former Yugoslavia, the Democratic Republic of Congo(DRC), and East and West Timor.³¹

Notably, some previous criminal tribunals did not recognise SGBV as a punishable crime because their statutes did not empower them with such jurisdictions. For instance, the Tokyo tribunal failed to recognise the "Comfort Women System" and its consequences on women who were sexually exploited by the soldiers in Japan during World War II.³² Interestingly, the ad-hoc tribunals, ICTY and ICTR, were equipped to try rape and sexual assault. One of the most significant judgments of the ICTR was the *Akayesu* case,³³ where the Court held that Mr Akayesu knew how armed local militia committed sexual violence against some civilians

²⁶ Kerry Crawford, 'From spoils to weapons: framing wartime sexual violence' (2013) 21(3) *Conflict and violence*, 505-517

²⁷ Asma Abdel Halim, "Attack with a Friendly Weapon, in Meredith Turshen & Clotide Twagiramariya (eds) *What do women do in War – Time: Gender and Conflict in Africa* (Zed Books 1998) 92-96; The United Nations Response to Trafficking in Women and Girls, Division for Advancement of Women, Department of Economic and Social Affairs, United Nations Document EGM/TRAF/2002/WP.2 (2002), <<http://www.un.org/womenwatch/daw/egm/trafficking2002/reports/WP-DAW.PDF> last accessed January 12, 2023.

²⁸ Kerry Crawford, 'From spoils to weapons: framing wartime sexual violence' (2013) 21(3) *Conflict and violence*, 505-517; Janie Leatherman, 'Sexual Violence and Armed Conflict: Complex Dynamics of Re-Victimisation' (2007) 12(1) *International Journal of Peace Studies*, 52-71.; Katy Glassborow, *Apartheid Legacy Haunts ICC Appeal Judge*, According to Justice Goldstone, Judge Pillay's most significant contribution was her classification of rape as a crime against humanity under international law. Rape was previously considered one of the spoils of war, but under Pillay's supervision, the ICTR determined that rape constituted genocide when it was intended to exterminate a specific community

²⁹ Human Rights Watch, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (1996) 52-62.

³⁰ The Rome Statute 1998, Article 7(1)(g), Article 8(2)(b)(xxii).

³¹ Valerie Oostervald, 'Sexual Slavery and the International Criminal Court: Advancing International Law' (2002) 25(3) *Michigan Journal of International Law*, 606.

³² Luke Moffett, "The Role of Victims in the International Criminal Tribunals of the Second World War" (2012) 12(1) *International Criminal Law Review*, 245-270.

³³ Prosecutor v Akayesu, ICTR-96-4-T, International Criminal Tribunal for Rwanda, Trial Chamber 2, September 1998, paras 471-690.; other cases at the ICTY include the Prosecutor v Zejnil Delalic (Celebici case), Judgment ICTY, IT-96-21-A, February 2001, para 410-416 ; The Prosecutor v Furundžija, *the Judgment of the Trial Chamber*,

who sought refuge at the communal bureau but failed to prevent these acts although he was duty bound to prevent them.³⁴ Hence, the Court established for that rape was a crime of genocide and constituted a crime against humanity. .³⁵

The Court also delivered an expansive interpretation of rape and sexual violence in international law. It states:

"...any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact ... coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal."³⁶

The ICTY defined the crime of rape:

"comprises the following elements: "the sexual penetration, however slight, either of the vagina or anus of the victim by the penis of the perpetrator, or any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator, where such penetration is effected by coercion or force or threat of force against the victim or a third person."³⁷

Given the ICTR's approach to defining sexual violence acts and imputing liability of the foot soldiers on the commander, Mr Akayesu, through the doctrine of command responsibility, one would think that this landmark decision would suffice for the subsequent courts. Albeit, the interpretation of sexual and gender-based violence at the International Criminal Court (ICC) appears to be piecemeal.

The following section will address the investigation and prosecution of SGBV at the ICC.

1.3. The Prosecution of Sexual and Gender-Based Violence at the ICC

The Office of the Prosecutor (OTP) is vested with the power to select situations and cases to be heard by the Court. It is also noteworthy that the Prosecutor has broad discretion in

³⁴*Ibid.* para 687-688

³⁵*Ibid.*

³⁶*Ibid.* Para 688

³⁷The Prosecutor v *Anto Furundžija, the Judgment of the Trial Chamber*, IT-95-17-110 December 1998; The ICTY in this case also found that rape may constitute torture.

determining situations and cases based on the 'interests' of justice.³⁸ According to Articles 17 and 53, the Prosecutor can exercise his discretion by the criteria of 'gravity' and 'interests of justice.'³⁹ Schabas notes that despite the requirements set out by articles 17 and 53, it seems the Prosecutor of the ICC complies with the 'wishes' of the State Parties and concerning the availability of an individual to be prosecuted.⁴⁰ Be that as it may, several factors, including political considerations, are considered in selecting situations. It appears the Court has been unable to effectively access the 'gravity' and 'interests of justice' standards that govern the Prosecutor's exercise of power. One plausible explanation is the uncertainty that appears to plague the understanding of these phrases.

Moreover, the Pre-Trial Chamber is empowered to review the initiation of investigations.⁴¹ The Prosecutor has broad discretion in determining the scope of investigations which raises the question of what role victims should be allowed to play during such inquiries, particularly when their personal interests are at stake. Let us remain cognisant that the Prosecutor is generally interested in the situations, cases, and investigations. In most domestic jurisdictions, victims can request an investigation into how prosecutors use discretion.⁴² In contrast, victims do not have the right to request for review of the Prosecutor's decisions. Victims' roles are limited to making general submissions when the Prosecutor requests that investigations be opened on his motion or submitting opinions and concerns once the Chamber has initiated review proceedings.⁴³ The Prosecutor has discretionary powers to decide which investigations to be opened or closed. Additionally, the Prosecutor has the power to decide the scope of investigations. Arguably, the victims' role during an investigation is moderated to forestall overburdening the Court's operations at this phase and ensure compliance with the Prosecutor's fairness, impartiality and independence.

³⁸ The Rome Statute 1998, Articles 53(1) and 53(2)

³⁹ The Rome Statute 1998, Articles 17 and 53.

⁴⁰ Williams Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' 2008) 6(4) *Journal of International Criminal Justice*, 731-761.

⁴¹ The Rome Statute 1998, Article 53(2)©, Article 53(3) and Article 53(4).

⁴² Redress and Institute for Security Studies, 'Victim Participation in Criminal Law Proceedings :Survey of Domestic Practices for Application to International Crimes Prosecutions' (2017) available at <https://redress.org/wp-content/uploads/2017/11/Englishvictim-rights-report.pdf>> last accessed 11 July 2023, 60-65.

⁴³ Ibid; Kenya; Ivory Coast Situations; Comoros Situations.

The Appeal Chamber's finding reflects that victims have no general right to participate in the 'investigation phase' of the proceedings,⁴⁴ which may imply that victims cannot seek clarification or answers from the Prosecutor. Similarly, one major flaw with this finding is that it fails to recognise that the prosecution's decisions relating to investigations affect victims' concerns and interests. It could be argued that decisions undermine victims' ability to secure justice for the harm they have endured and their right to know the truth about what happened.

Article 42 establishes the Prosecutor and the OTP as an independent body of the Court. It further emphasises that the OTP shall not seek or act on external orders.⁴⁵ Article 15 empowers the Prosecutor to launch an inquiry independently after receiving information from any source, without the need for a referral from the State or Security Council. Furthermore, the OTP has the authority to independently decide how to conduct investigations and the method of presentation during the trial. The Prosecutor is also at liberty to organise the internal structure of his office.⁴⁶

Having said that, the Prosecutor, as an independent organ of the Court, has the discretionary ability to halt an investigation or prosecution in 'the interests' of justice, provided he considers the gravity of the crime and the interests of justice.⁴⁷ In this case, the Prosecutor must decide whether to initiate or continue an investigation and prosecution based on 'the interests of justice'. The Prosecutor must weigh the offence's gravity against the victims' interests. The intensity of a crime can be defined by how egregious the violation of human rights is, whereas the losses experienced by victims must establish the interests of victims.

The wordings of Article 53 goes as follows:

"(1)The Prosecutor, shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to

⁴⁴*Situation in the Democratic Republic of Congo*, Pre-Trial Phase Appeal Chambers Decision, Judgment on Victim Participation in the Investigation stage of the Proceedings in the Appeal of the OPCD against the Decision of the Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial, 19 December 2008.

⁴⁵Rome Statute 1998, Article 42.

⁴⁶Article 53(1) (c), Rome Statute 1998.

⁴⁷ Article 53(1)(c), Rome Statute 1998.

proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether :

- (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
- (b) The case is or would be admissible under article 17; and
- (c) taking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of the justice."⁴⁸

Article 53(1)(a) stipulates that the available information for the prosecution gives a reasonable basis. The interpretation of a reasonable basis can be relative. Article 53(1) (c) provides that upon investigation, the Prosecutor may decide that there is no sufficient basis to commence prosecution because it would not be in the interests of justice. It is worthy of mention that if the Prosecutor decides not to proceed with the investigation because of the sub-paragraph (c) provision, he must notify the Pre-Trial Chambers.

In addition, the victims also have the right to submit applications to participate in the proceedings. If the Pre-Trial Chamber is satisfied, it will grant them (victim-applicants) the status of victims. This status permits them to participate in the proceedings. However, the rules governing victim application to participate in proceedings have been inefficient for the applicants, parties, and the Court.⁴⁹

Interestingly, scholars like Stahn, Robinson, and Schabas have argued that 'justice' as part of the phrase 'interests of justice' cannot be restricted or limited to retributive justice.⁵⁰ Hence, justice within this context poses a broader meaning than retributive justice. In contrast, Ohlin

⁴⁸Article 53 (1) (c)

⁴⁹Susana SaCouto and Katherine Cleary Thompson, 'Regulation 55 and the Rights of the Accused at the International Criminal Court,' (2014) 21(1) *Human Rights Brief*, 1

⁵⁰ Carsten Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guideline for the International Criminal Court ,(2005) *Journal of Criminal Justice*, 3695-720, 698; Daryl Robinson, 'Serving the Interests of Justice :Amnesties , Truth Commissions and the International Criminal Court(2003) 14 *European Journal of International Law*, 481-505, 488; Williams Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court,(2008), 6 *Journal of International Criminal Justice*, 731.

and Gallavin propose a narrow sense of the concept.⁵¹ From their perspective, the concept should exclusively include procedural considerations and the criteria which are listed in Article 53(1)(c)-the gravity of the crime and the interests of victims- and Article 2(c)-the gravity of the crime, the interests of victims, the age or infirmity of the accused, and their role in the alleged crime. Therefore, investigations or prosecutions could only be discontinued for the above-listed purposes, excluding security considerations, peace, and other alternative forms of justice.⁵² Clark suggests that the narrow scope of 'interests of justice' points out justice's important role in preserving peace and the significance of retribution in the traditional criminal justice system.⁵³ Hence, the interests of justice here are not broader than criminal justice.

Arguably, a broader definition of justice reflects the multidimensional aspects of the criminal justice, given that the criminal justice system is traditionally retributive and offender-centred, incorporating victims into a predominantly offender-centred system requires a shift from the status-quo, which in turn creates more space for a holistic approach to justice. Interests of justice should also encompass both restorative justice and transitional justice. This approach includes victims' interests, and the gap may be closed.

With these participatory rights left to the discretion of the Chamber, the Chamber seeks the views of victims at that stage on the decision of the Prosecutor not to initiate an investigation or proceed with an investigation. It is thought that seeking their views is needed where the decision of the Prosecutor not to proceed with an investigation is based on the presence of substantial reasons to believe that an investigation would not serve the interests of justice, regardless of the gravity of the crime and interest of victims, as enunciated in Article 53.

According to Article 54(1)(a), in order to establish the truth, the Prosecutor shall extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and in doing so, investigate incriminating and

⁵¹Jens Ohlin, 'Peace, Security and Prosecutorial Discretion' in Carstan Stahn and Goran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (2009), 187-208; Chris Gallavin, 'Article 53 of the Rome Statute of the International Criminal Court: In the Interests of Justice?' *King's College Law Journal*, (2003) 14 193- 197.

⁵²*Ibid.*

⁵³Janine Clark, 'Peace Justice and the International Criminal Court Limitations and Possibilities' (2011) 9 *Journal of International Criminal Justice*, 521-541.

exonerating circumstances. Furthermore, Article 54(1)(b) puts the Prosecutor under an obligation to take 'appropriate measures to ensure effective investigation and prosecution of crimes within the jurisdiction; he has to respect the interests and personal circumstances of the victims and witnesses-such as age, gender as defined in article 7(3), and health, and take into account the nature of the crime. The Prosecutor is also implored to consider the nature of the crime, especially where it involves sexual violence, gender violence and violence against children. One may infer that these last crime categories place a higher threshold for the Prosecutor to conduct effective investigations. So, while conducting effective investigations and prosecutions, the Prosecutor should respect the victims' and witnesses' interests and personal circumstances. Due to the sensitive nature of sexual violence, due diligence and discretion would encourage victims to come forward.

Having said that, Article 68(3) makes provision for victims' participation in proceedings. However, this legal regime may be described as generic because it provides the most general requirement for victim participation. Besides the ambiguity of this legal regime, it is reasoned that the preliminary examination and investigation stage could fit into '*stages of the proceedings*.' Nevertheless, whether the investigation stage is appropriate is left to the discretion of the Pre-trial Chamber. Plausibly, victims of situations fulfil some criteria in Article 68(3) – the 'personal interests' criteria. However, this '*personal interests*' clause does not guarantee that their views and concerns will be considered if the investigation stage is not construed as an '*appropriate stage*'. This is a vague umbrella provision that is not fully applicable, but there are more specific provisions that are directly applicable. For the proper application of this umbrella provision, it must be balanced against the accused fair trial rights. The accused rights within this context presuppose trial proceedings rather than an investigation stage. One could argue that this umbrella provision excludes the investigation phase within this context. From another perspective, one could contend that article 68(3) is contained under Part 6 of the Rome Statute, with the subheading 'Trial'; hence proceedings under this part excludes preliminary examinations and investigations because Part 5 covers investigations, as such Article 68(3) may not be construed as an 'umbrella' provision. A cursory assessment of Rule 89 and 93 of the ICC Rules of Evidence and Procedure expressly provides for participation of victims at the ICC.

From the first assertion, it is possible; therefore, to assert that Article 68(3) makes victimhood dependent on the presence or identification of an accused or suspect, which connotes that before recognising victims' rights within the context of the Court, an accused must be responsible for the commission of the crime on investigation or trial, this position resonates with the definition of victims in Rule 85. Notwithstanding, some international legal frameworks, especially the United Nations Declaration on Basic Principles of Justice for Victims of Crimes and Abuse of Power (1985) recognises victimhood in investigations and trials where the suspect remains unidentified. According to this legal framework, "a person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted..."⁵⁴

The above definition deviates from the traditional definition of a victim as defined by the Rome Statute and other statutory provisions. Even victimology gives a holistic definition of a victim. This definition does not attempt to connect the victim and the perpetrator, unlike what is applicable in other legal frameworks. It pays attention to the victim, and the harm suffered, excluding the context of trial while highlighting the recognition of victims. Rule 85 overlooks that a person may still be considered a victim, irrespective of the fact that a suspect has not been identified.

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse (herein referred to as 1985 Declaration) and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (herein referred to as 2005 Basic Principles) may be described as the key instruments which accentuate victims' rights into limelight. These instruments set out victims' rights in the international criminal justice system. As such, they are essential because they serve as the springboard for recognising victims and victims' rights in the criminal justice system. A significant drawback of these instruments is that they are not legally binding, but largely hortatory in nature. However, they have contributed to developing victims' rights.

⁵⁴ The United Nations Declaration on Basic Principles and Guidelines on Victims of Crime and Abuse, 1985, Annex 2; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law 2005, sub v.9.

SaCouto and Cleary hold the view that the 1985 UN Declaration initiates a significant milestone in recognising victimhood, victims' entitlement to access to mechanisms of justice.⁵⁵The 1985 Basic Principles define victims as

"Victims" means persons who, individually or collectively, have suffered harm, including physical or

mental injury, emotional suffering, economic loss or substantial impairment of their fundamental

rights, through acts or omissions that are in violation of criminal laws operative within Member States,

including those laws proscribing criminal abuse of power."

"A person may be considered a victim, under this Declaration, regardless of whether the perpetrator

is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between

"Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court".⁵⁶

This definition states that there must be nexus between the harm suffered by the person and the crime committed. There is a clear distinction between the definition of victims in the 1985 declaration and the definition in the ICC rules. Whereas the 1985 declaration delivers a broader interpretation of 'victims', the ICC Rules gives a restrictive definition of 'victims'. A notable distinction is that persons may be considered victims of crime even if the perpetrator has not been identified, apprehended or prosecuted. At the same time, the ICC Rules enunciate the presumption of innocence and a link between the crimes committed by the perpetrator and the harm suffered by the victims. It begs the question of the victim circumventing the presumption of innocence for the accused. Zappala notes that declaring an

⁵⁵Susana SaCouto and Katherine Cleary, 'Victims Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia (2012) 18(2) *Michigan Journal of Gender and Law* 297-359.

⁵⁶ ICC Rules of Evidence and Procedure, Rule 85.

individual as a 'victim' in legal proceedings, where the guilt of the accused has not been proven, robs the accused of a presumption of innocence. This prejudices the situation surrounding the identity and culpability of the perpetrator.⁵⁷ Nonetheless, this may not be an issue where the commission of the crimes is not in dispute and the identity of the perpetrator has been revealed

The provisions of Rule 85 on victims enunciate the concept of victimhood as a legal category,⁵⁸ also known as juridified victimhood.⁵⁹ This concept gives such victims recognised status. This recognition filters which victims proceed to the procedural level and determines which ones are conferred with the right to participate. Without the sanction by law, the voices of victims may likely not be silenced and restricted access to the platform. Thus, it could be argued that the recognition of victims by law predetermines the selection of a few, an idea propounded by Kendall and Nouwen- 'pyramid of victimhood'. This label polarises victims into two categories, the victims of harm and the recognised victims.⁶⁰ It is worthy of mention that victims of harm do not automatically qualify for recognition by the Court.

1.3.1 The Provision of The Rome Statute on Sexual and Gender-Based Violence

The Rome Statute and the establishment of the ICC play an essential role in codifying sexual violence as war crimes, crimes against humanity, and the prosecution of sexual violence. Rape and sexual slavery have been classified as war crimes and crimes against humanity.⁶¹

Equally important is the Prosecutor's role in drafting the document containing the charges. These documents are issued once the Prosecutor chooses whether or not to investigate. The Prosecutor must decide which charges to file, which raises the issue of victims' interests in charges and charge reduction. The Chamber critically examined this question. According to the Appeal Court (AC)'s findings, "the harm alleged by victims and the concept of personal interests under article 68(3) of the Statute must be linked with the charges confirmed against the accused"⁶² for trial processes. The decision established a link

⁵⁷ Salvatore Zappala 'The Rights of Victims v. the Rights of the Accused(2010)8(1) *Journal of International Criminal Justice*.137-138

⁵⁸ Sara Kendall and Sarah Nouwen, Representational Practices at the International Criminal Court :The Gap Between Juridified and Abstract Victimhood (2014)76 *Law and Contemporary Problems*, 238-244.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ The Rome Statute 1998, Articles 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi) and 7(1)(g).

⁶² ICC-01/04-01/06-1432, 11 July 2008, p.4, para.2.

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between the victims' personal interests, the damage, and the charges. The allegations lay the groundwork for the victims' and their interests.

Given that the Prosecutor is responsible for preparing the charging document, failure to include one or two alleged crimes in the charging document by intention or omission may potentially establish an impunity gap. The AC held that a person is regarded as a victim if they can demonstrate that they suffered an injury due to the offence charged in the case. The definition of victim is included in the charging document.⁶³ A person is not eligible to be a victim if the injury he suffered is not included in the charges. As a result, this emphasises the significance of charging document and their connection to victims.

The Prosecutor is generally interested in determining truth,⁶⁴ from the investigation stage to the pre-trial, the main trial, and sentencing. Determining this truth begins with investigations into the drafting of the charges. Plausibly, the selectivity of offences is reflected in the charging documents. In this process, the charging document may reveal the partial truth if this is left unchallenged.

According to Aptel, the specific targets to be examined and prosecuted make up one component of prosecutorial discretion. Many culprits are believed to commit crimes during armed conflict, but the ICC must try the most accountable.⁶⁵ As a result, the ICC is obligated to sift through a vast number of perpetrators in order to apprehend the masterminds.⁶⁶ Consequently the scope of suspects for criminal trials is constrained. One probable consequence of the selection is reducing the number of possibly affected victims. Most foot soldiers are liable for sexualised violence. However, they are not prosecuted at the ICC because its scope is restricted to high-ranking officers. Lower-ranking commanders' absence may marginalise some victims unless they are arraigned in their home country. For example, the ICC Prosecutor believed that Lubanga was the most culpable for crimes committed in the Democratic Republic of the Congo. As a result, the main reason for his arrest and arraignment was the presence of other masterminds. Kambale concluded that some

⁶³*Prosecutor v Lubanga*, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, Trial Chamber, ICC-01/04-01/06-1432. 11 July 2008.

⁶⁴Rome Statute 1998, Article 69.

⁶⁵The Rome Statute 1998, Article 1.

⁶⁶Cecile Aptel, "Prosecutorial Discretion at the ICC and Victims' Right to Remedy(2012) 10(5) *Journal of International Criminal Justice*,3.

other high-ranking instigators had evaded indictment.⁶⁷ These high-ranking instigators were identified but not indicted. He further claimed that the RCD-ML (Rassemblement Congolais pour la Démocratie—Mouvement de Libération), of whom Lubanga was only a minister, was responsible for the most heinous crimes in Ituri.

Furthermore, another component is the selection of particular factual claims to be mentioned in the charges. Limiting factual allegations is typically done to restrict the number of scenarios or instances to be tried to a few 'illustrative incidents'.⁶⁸ In the case of *Prosecutor v. Katanga*, the Prosecutor confined the allegations to acts committed on 24 February 2003 during the attack on the village of Bogoro (DRC).⁶⁹ Several attacks occurred in different districts during that time period. Similarly, at the start of the investigation in the Lubanga's case, the Prosecutor stated that he would 'investigate grave crimes allegedly committed on the territory of the DRC since 1 July 2002.' He cited reports from States, international organisations, and non-governmental organisations on 'thousands of deaths by mass murder and summary execution in the DRC since 2002.' The Prosecutor observed 'a pattern of rape, torture, forced displacement, and illegal use of soldiers'.⁷⁰ Unfortunately, the Prosecutor did not look into these allegations. The charges were so narrow that they overlooked the massive scale of armed conflict and some of its consequences. The limitations to these illustrative events are frequently linked to the challenges inherent in evidence gathering. Combs and Del Ponte draw our attention to the difficulties in gathering evidence for a large-scale crime.⁷¹ Challenges of this nature may constrain the powers of the Prosecutor to expand the content or events in the charges. Moreover, another component is the choice to limit the legal description of the offence. A limited legal characterisation may result in narrow charges inadvertently. This may limit the charges to a one-count or two-count charge, ignoring the other alleged offences.⁷² In the *Lubanga's* case, for example, the Prosecutor framed a two-count charge of recruiting children under 15 and actively using children under 15 to

⁶⁷Pascal Kambale, 'The ICC and Lubanga :Missed Opportunities ' SSRC Forums: African Futures, 16 March 2012, available at <http://forums.ssrc.org/african-futures/2012/03/16/african-futures-icc-missed-opportunities/> last accessed 16 March 2023..

⁶⁸Aptel, note 66.

⁶⁹*Situation in the Democratic Republic of Congo, The Prosecutor Germain Katanga and Ngudjolo Chui*,

⁷⁰ 'The Office of the Prosecutor of the International Criminal Court opens its first investigation': Press release issued by the Court on 23 June 2004, ICC-OTP-200-40624-59.

⁷¹ Armoury Combs, *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Convictions* (Cambridge University Press, 2010) ; Carla Del Ponte, *Investigation and Prosecution of Large – Scale Crimes at the International Level* (2006) 4 *Journal of International Criminal Justice*, 552.

⁷²*Ibid*, Aptel, note 66.

participate in hostilities.⁷³ By implication, this two-count charge in the *Lubanga*'s case marginalised other crimes such as SGBV and cruel treatment. Kambale stated that the OTP could only come up with one count of charge—conscription and enrolment of juvenile soldiers, after two years of inquiry, among other major crimes committed in Ituri.⁷⁴

Furthermore, some human rights organisations, NGOs, and victims' associations across the country questioned the Prosecutor's motives for not considering other serious crimes committed in Ituri, which fell under the Court's jurisdiction. They opined that the Prosecutor's failure in this aspect might affect the ICC's credibility.⁷⁵ Public trust in the ICC's prosecution of crimes increases its legitimacy. A departure from the mandate may call the legitimacy of the Court into doubt.

These factors, taken together, suggest that victims have limited access to justice due to the Prosecutor's broad discretionary powers. Unfortunately, the ICC cannot try all perpetrators because doing so may impede the Court's efficiency. However, it is inferred that these determinant components provide access to justice for a select few victims.

1.3.2 The Prosecution of Sexual and Gender-Based Violence in *Prosecutor v Thomas Dyilo Lubanga*

Prosecutor v. Thomas Dyilo Lubanga (herein referred to as the *Lubanga*'s case) was the first case tried at the ICC. Tensions occurred in 1999 due to a dispute over land allotment in Ituri, a province of the Democratic Republic of the Congo (DRC). This conflict was also linked to the seizure of natural resources in Ituri, which persisted until 2002, when tensions erupted into new violence, an internal armed conflict. However, Uganda and Rwanda's intervention

⁷³ *Prosecutor v. Lubanga*, Decision on the confirmation of charges, ICC-01/04-01/06-803-tEN, Pre-Trial Chamber I, 7 February 2007.

⁷⁴ Pascal Kambale, 'The ICC and Lubanga Missed Opportunities' SSRC Forums: African Futures, 16 March 2012, available at <http://forums.ssrc.org/african-futures/2012/03/16/african-futures-icc-missed-opportunities/> last accessed 16 March 2023.

⁷⁵ Statement by women's rights and human rights NGOs of the DRC on the prosecutions by the ICC, September 16, 2006

presented a more international dimension.⁷⁶ Furthermore, on 15 September 2000, Thomas Lubanga Dyilo signed the Union des Patriotes Congolais (UPC) Statutes. As a result, several members of the party's leadership and its armed military wing, the Forces Patriotiques pour la Liberation du Congo (FLPC), were assassinated. UPC took over Bunia in August 2002.⁷⁷ Sequel to this development, alleged war crimes and crimes against humanity were committed under the coordination of Thomas Lubanga, a commander and political leader.

Following his previous investigation into crimes allegedly committed in the Ituri District since 1 July 2002, the prosecution applied for the issuance of a warrant of arrest for Thomas Lubanga Dyilo on 13 January 2006. On 10 February 2006, the Pre-Trial Chamber (PTC) issued a warrant of arrest for Mr Lubanga, considering that he was criminally responsible for war crimes of enlistment and conscription of child soldiers. This decision was made on reasonable grounds.⁷⁸ As such, the threshold was lower than the requirement for the confirmation of charges hearing.

Article 61(1) provides that: 'within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber of the ICC shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial.'⁷⁹ The confirmation of charges is the stage at which the Pre-trial decides if there are 'substantial grounds' for the case to be referred to the main trial. It is like a screening stage for the situation to proceed to trial. The Prosecutor and Defence are parties to the Pre-trial hearing and have the right to submit evidence and call witnesses. The victims are permitted to participate in this stage.⁸⁰ However, the role and status of victims in the proceedings of the PTC have been controversial. Victim applicants may apply, provided there is a nexus between the harm suffered and the charges.⁸¹ The victims will participate through their legal representatives in the confirmation proceedings.

⁷⁶*The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, Pre-Trial Chamber I, Decision on Confirmation of Charges, 29 January 2007 para 156-160, available at <http://www.icc-cpi.int>.

⁷⁷*Ibid.*

⁷⁸*Prosecutor v Lubanga*, Decision on the Prosecutor's Application for a Warrant of Arrest, ICC-01/04-01/06-8, 10 February 2006.

⁷⁹Rome Statute 1998, Article 61(1).

⁸⁰*Ibid.*, Article 68(3).

⁸¹ICC Rules of Evidence and Procedure, Rule 85

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The Confirmation hearing was held from 9 to 28 November 2006. On 29 January 2007, the judges of the Pre-Trial Chamber confirmed the charges of conscription and enlistment of child soldiers against the accused, Mr Lubanga. It is observed that the charging document contained a one-count charge of enlisting and conscripting children under the age of 15 years to participate actively in hostilities. Therefore, narrowing the scope of the charges confirmed by the PTC. As such, it excluded charges of sexual slavery and sexual violence suffered by the victims. One reasonable implication of this is that victims of Sexual and Gender-Based Violence and cruel and inhuman treatment were factored out from the trial because the harm they suffered could not be linked to the charges brought against the accused (Lubanga).

As a result of this lacuna in the charges, the Women's Initiatives for Gender Justice brought the attention of the ICC Prosecutor to the allegations of a pattern of rape, other forms of sexual violence, torture and forced displacement.⁸² The Women Initiatives pointed out that the only crimes included in the warrant of arrest issued against Lubanga were crimes relating to the conscription and use of child soldiers, Article 8(2)(b)(xxvi) and 8(2)(e)(vii).⁸³ Also, the Women's initiatives urged the Prosecutor to exercise its discretion in a 'transparent' and 'principled' way in order to have just and fair proceedings, not only from the accused perspective but also from the lens of victims, local and international communities.⁸⁴

There are documents by international organisations, NGOs and the media that evidence rape and other forms of sexualised violence were perpetrated during the conflict in eastern DRC.⁸⁵ It is possible that the Prosecution had to streamline the allegations into a one-count charge in order to reduce the pressure of investigation and manage the expectations of the international community. It could also be that the *Lubanga* case being the ICC's first meant the Prosecution had to prioritise alleged crimes that were not pending trial at the Congo national court.⁸⁶ This

⁸² Brigid Inder, Women Initiatives for Gender Justice, accessible at https://www.icc-cpi.int/RelatedRecords/CR2007_01671.PDF last accessed 14 September 2022.

⁸³ ICC-01/04-01-01/06-2, "Warrant of Arrest" 10 February 2006, p3-4.; Address by Prosecutor Luiz Moreno Ocampo, Third Session of the Assembly of States to the Rome Statute of the International Criminal Court, The Hague, 6 September 2004 <http://www.icc-cpi.int/press/pressreleases/133.html>.

⁸⁴ *Ibid* 1.

⁸⁵ Situation in the Democratic Republic of the Congo, *The Prosecutor v Thomas Lubanga Dyilo*, Request Submitted Pursuant to Rule 103(1) of the Rules of Procedure and Evidence for Leave to Participate as Amicus Curiae in the Article 61 Confirmation Proceedings (With Confidential Annex 2), Pre-Trial Chamber, ICC-01/04-01/06, 7 September 2006.

⁸⁶ Before the issuance of arrest warrant for Thomas Dyilo Lubanga, the Democratic Republic of Congo authorities arrested Lubanga and charged him with genocide, and crimes against humanity amongst others. He was detained in the DRC; Lubanga Arrest Warrant, para.33.

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contrary to the far-fetched speculation that the Court's hesitation to include these in the charges implies that the effects of the harm caused by the perpetrators of sexual violence are insignificant.

In addition, there were public documents which outlined the crimes of sexual violence committed by UPC/FPLC Lubanga was the President in September 2000 and Commander-in-Chief of the FPLC from September 2002 to 2003. Amnesty International and Human Rights Watch report gender-based crimes committed by the UPC.⁸⁷ In addition, the United Nations has described DRC as the "Rape Capital of the World."⁸⁸ The prevalence of sexual violence in the war-torn area of eastern Congo is solidified by impunity. The United Nations further stressed that: 'if women continue to suffer sexual violence, it is not because the law is inadequate to protect them, but because it is inadequately enforced.'⁸⁹

The team received reports of 18 cases of rape, some of the victims being as young as 11, committed by UPC soldiers after the ceasefire was signed on 17 May 2003. Most of the victims were abducted while out to look for food and water and were taken to military places or private houses and sexually abused. UPC soldiers also committed large-scale rape in the 15 different areas of the town, sometimes abusing girls as young as 12.⁹⁰

After the abuses committed in Mambasa, similar abuses were also systematically carried out in the villages south of the town and between Komanda and Eringeti, with the involvement of UPC. The number of rape cases - mainly young girls or women between 12 and 25 years old - also rose to an alarming level.⁹¹

⁸⁷Amnesty International, "Democratic Republic of Congo-Mass Rape Time for Remedies" AFR 62/018/2004, 26 October 2004 <http://web.amnesty.org/library/index/ENGAFR6200182004> ; Human Rights Watch, "Seeking Justice: The Prosecution of Sexual Violence in the Congo War" March 2005, <http://hrw.org/reports/2005/drc0305/drc0305text.pdf>, at 19-20.

⁸⁸Margot Wallstrom, United Nations Special Representative on Sexual Violence in Conflict, "UN Official calls DR Congo 'rape capital of the world'" accessible at <http://news.bbc.co.uk/2/hi/8650112.stm> > Last accessed 4 June 2023.

⁸⁹*Ibid.*

⁹⁰United Nations Security Council, Letter dated 16 July 2004 from the Secretary-General addressed to the President of the Security Council, covering a "Special report on the events in Ituri, January 2002-December 2003", UN Doc S/2004/573, 16 July 2004 < <http://documents->

⁹¹United Nations Security Council, Letter dated 16 July 2004 from the Secretary-General addressed to the President of the Security Council, covering a "Special report on the events in Ituri, January 2002-December 2003", UN Doc S/2004/573, 16 July 2004 < <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/430/63/img/N0443063.pdf?OpenElement> >, at para. 108.

At the commencement of the investigation, the then Prosecutor, Moreno Ocampo, reported that additional investigations would be carried out to identify other crimes committed by the accused, Lubanga Dyilo. In his words:

"We will present evidence in Court to show how Thomas Lubanga Dyilo designed policies to force the enlistment and conscription of children under 15 years. We will show pictures of Thomas Lubanga Dyilo inspecting the camps where children were trained. We will present evidence to show how Thomas Lubanga used the children to take part in hostilities. This is the first case, not the last. The investigation is ongoing, we will continue to investigate more crimes committed by Thomas Lubanga Dyilo and we will also investigate other crimes committed by other groups. This is important, it's a sequence. We will investigate crimes committed by other militias and other persons— this is the first case, not the last. We are totally committed to staying in Congo – to make sure justice is done."⁹²

It appears the then Prosecutor intended to pursue other alleged crimes against Lubanga; however, the other crimes were not investigated. It is contended that Lubanga was in custody awaiting trial in a Congolese court for charges of genocide and crimes against humanity before the Prosecutor secured an arrest warrant for him on the alleged crime of conscripting and enlisting children under the age of 15 years and using them to participate actively in hostilities (a crime which was absent in his charges before the domestic jurisdiction).⁹³ Perhaps the Prosecutor considered the other alleged crimes against Lubanga would be investigated and prosecuted in the affected national jurisdiction. However, the oversight of sexual and gender-based violence could be attributed to the existing challenges in gathering evidence on sexual-related crimes during armed conflict and the novelty of the criminal trial at the ICC- *Prosecutor v Thomas Lubanga*, being the first ICC case.

⁹² Statement by Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court, Press Conference in relation with the surrender to the Court of Mr Thomas Lubanga Dyilo The Hague, 18 March 2006 available at <[Microsoft Word - LMO_20060318_En.doc \(icc-cpi.int\)](#)> Last accessed 29 May 2023.

⁹³ Decision on the Prosecutor's Application for a Warrant of Arrest, *Prosecutor v. Lubanga* (ICC-01/04-01/06-8), Pre-Trial Chamber I, 10 February 2006; Williams Schabas, *Prosecutorial Discretion v Judicial Activism* (2008) 6 *Journal of International Criminal Justice* 781.

The Women Initiatives assert from their interviews and documentation that the militias committed both gender, rape, sexual enslavement, and other forms of sexual violence were integral to induction into the militia.⁹⁴

The legal representatives for victims jointly requested the Trial Chamber to modify the legal characterisation of facts to include sexual slavery and inhumane and cruel treatment in the charging document pursuant to Regulation 55.⁹⁵ Subsequently, the majority of the judges adopted Regulation 55 of the Regulations of the Court to re-characterise the facts of the charging document, an act which may be considered usurping the powers of the prosecution, as it is deemed that modification of the charges is within the exclusive purview of the prosecution. This regulation was triggered to include rape, sexual slavery and inhumane treatment as part of the charges.⁹⁶ The trial Chamber alluded to this initiative, with Judge Fulford dissenting.⁹⁷ Unfortunately, the Appeals Chamber reversed the decision of the Trial Chamber because the judges had exceeded their judicial powers; hence, re-characterising the facts to reflect sexual violence and inhumane treatment was jettisoned.⁹⁸

However, during the trial, 21 out of 25 witnesses mentioned the participation of female troops within the UPC. A considerable number of prosecution witnesses also testified regarding gender-based abuse, specifically the rape and sexual servitude of girl soldiers within the UPC. Radhika Coomaraswamy, the UN Under-Secretary-General for Children and Armed Conflict, testified as an expert witness.⁹⁹ She described the various duties female soldiers were compelled to take in armed battles, including warfare, reconnaissance, and portering, as well as being forced into marriages and sexual enslavement. Child soldiers were

⁹⁴ Women's Initiatives for Gender Justice, Legal Filings, accessible at <http://www.iccwomen.org/publications/articles/docs/LegalFilings-web-2-10.pdf> Last accessed 6 June 2023.

⁹⁵ Regulations of the Court 2004.

⁹⁶ *Prosecutor v Thomas Lubanga*, Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court. Trial Chamber I, ICC-01/04-01/06-2049, 14 July 2009.

⁹⁷ *Prosecutor v Thomas Lubanga*, Second Corrigendum to "Minority opinion on the "Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court" of 17 July 2009, Trial Chamber I, ICC-01/04-01/06-2069-Anx1 31 July 2009 accessible at https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2009_05411.PDF.

⁹⁸ *Prosecutor v Thomas Lubanga*, Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court. Trial Chamber I, ICC-01/04-01/06-2049, 14 July 2009.

⁹⁹ *Prosecutor v Thomas Lubanga Dyilo*, Submission by the Registrar of correspondence received from the United Nations in relation to the expert testimony of Ms Radhika Coomaraswamy, Trial Chamber 1, ICC-01/04-01/06-2030, 7 July 2009.

assigned various non-combat and combat-related assignments, such as procuring other civilian girls and young women for their commander's sexual pleasure and becoming his sexual property. Boy soldiers were compelled to rape and were occasionally raped. These narratives demonstrate how sexual violence was a component of their conscription and active conflict participation.¹⁰⁰ Nevertheless, none of these new charges were incorporated into the existing charges, mainly because of technicalities and reversal by the Appeal Chamber.

Moreover, that was not the end; in March 2012, the issue of sexual violence reared its head during the judgment and sentencing phase. The Trial Chamber found Lubanga guilty of counts of enlistment, conscription and use of child soldiers to participate actively in hostilities. The majority ruled that girl child soldiers were subjected to cruelty and rape; however, no charges were filed in this regard.¹⁰¹ One implication of the absence of sexual violence charges was that it did not impact the judgment nor the sentencing, consequently annihilating victims of sexual violence from obtaining satisfaction and closure.

Furthermore, in its sentencing decision, on July 2012, the Bench opined: "It strongly deprecates the attitude of the former Prosecutor in relation to the issue of sexual violence".¹⁰² The excerpts highlight the significant role of the Prosecutor in drafting the charges and how the investigation and the document containing the charges may have a domino effect on the accessibility of justice for some categories of victims. Sometimes the fate of some victims may lie in the hands of the Prosecutor as the gatekeeper of the ICC. Overall, the *Lubanga* case was not a failure because it enhanced the prosecution of crimes within the ICC jurisprudence.

The following section will critically analyse the prosecution of sexualised violence in the *Prosecutor v Germain Katanga*.

1.3.3. The Prosecution of Sexual and Gender-Based Violence in the *Prosecutor v Katanga*

On 19 April 2004, by referral, the DRC government requested the ICC to determine if it could investigate the situation in the DRC and ascertain one or more culpable persons

¹⁰⁰*Ibid.*

¹⁰¹*Prosecutor v Thomas Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, Trial Chamber, ICC-01/04-01/06-2842, 05 April 2021.

¹⁰²*Prosecutor v Thomas Lubanga*, Decision on Sentence Pursuant to Article 76 of the Statute, Trial Chamber, ICC-01/04-01/06-2901, 13 July 2012.

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accused of crimes which fall within the jurisdiction of the Court.¹⁰³ On 23 June 2004, the ICC Prosecutor commenced an official investigation into the alleged crimes committed in the Ituri district.

The investigations revealed sufficient evidence to establish the joint military operations carried out by the *Front for Patriotic Resistance in Ituri* (FRPI) and *Front des Nationalistes et Integrationnistes* (FNI) members during an attack on the village of Bogoro in February 2003.¹⁰⁴ The members of these militias specifically targeted civilians of the Hema ethnicity. The combatants committed pillaging, the murder of civilians, sexual slavery, rape, and using children under the age of fifteen to participate actively in the hostilities.¹⁰⁵ The criminal acts were classified as war crimes and crimes against humanity.

On 25 June 2007, the Prosecution requested arrest warrants for Katanga and Ngudjolo.¹⁰⁶ In response to the request, the Chamber issued unsealed arrest warrants against Katanga and Ngudjolo on 18 October 2007 and 7 February 2008, respectively. On 10 March 2008, the PTC 1 joined the two cases because the suspects, Katanga and Ngudjolo, allegedly shared responsibility for crimes committed during the joint attack on the Bogoro, and the available evidence linked the suspects together.¹⁰⁷ It is also noted that the joinder of the case would not be prejudicial to the interests of the victims and witnesses.¹⁰⁸

Germain Katanga and Ngudjolo Chui were alleged to be the former leaders of the *Forces de Resistance Patriotique Ituri* (FRPI) and *Front des Nationalistes et Integrationnistes* (FNI), respectively. They were charged for the alleged commission of war crimes and crimes against

¹⁰³ Coalition from the International Criminal Court, Katanga and Ngudjolo Chui cases, accessible at <http://iccnow.org/?mod=drctimelinekatanga&idudctp=109&order=titledesc> last accessed 02 February 2022; International Justice Monitor, Germaine Katanga and Mathieu Ngudjolo Chui, accessible at <https://www.ijmonitor.org/germaine-katanga-and-mathieu-ngudjolo-chui-background/> last accessed 02 February 2020.

¹⁰⁴ *Ibid* 104.

¹⁰⁵ *Ibid* 104.

¹⁰⁶ ICC-01/04-348-US-Exp and ICC-01/04-350-US-EXP; *The Prosecutor v. Germain Katanga*, Case Information Sheet, ICC-01/04-01/07-257, accessible at <https://www.icc-cpi.int/iccdocs/pids/publications/KatangaEng.pdf> last accessed at 02 February 2020.

¹⁰⁷ ICC-01/04-01/07-257; International Justice Monitor, *Germaine Katanga and Mathieu Ngudjolo Chui*, accessible at <https://www.ijmonitor.org/germaine-katanga-and-mathieu-ngudjolo-chui-background/> last accessed 02 February 2020.

¹⁰⁸ International Justice Monitor, *Germaine Katanga and Mathieu Ngudjolo Chui*, accessible at <https://www.ijmonitor.org/germaine-katanga-and-mathieu-ngudjolo-chui-background/> last accessed 02 February 2022.

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humanity during an attack in the village of Bogoro, in the Ituri district of eastern DRC, on 24 February 2003.¹⁰⁹ The crimes span from January to March 2003. However, the major crime under investigation was confined to 24 February 2003.

On 26 September 2008, PTC 1 issued the decision on the confirmation of charges. It found unanimously that "there was sufficient evidence to establish substantial grounds to believe that, during the attack on Bogoro of 24 February 2003, Katanga and Ngudjolo, as principal indirect co-perpetrators, jointly committed through other persons, within the meaning of Article 25(3)(a) of the Statute," the following crimes(amongst others) with intent:

- 1.the war crime of using children under the age of fifteen years to participate actively in hostilities as set out in Article 8(2)(b)(xxvi).¹¹⁰
- 2.the war crime of sexual slavery under article 8(2)(xxii) of the Statute;
- 3.the crime against humanity of sexual slavery under article 7(1)(g) of the Statute;
4. The war crime of rape under article 8(2)(b)(xxii);
- 5.the crime against humanity of rape under article 7(1)(g).¹¹¹

It is observed that the charges reveal different crimes committed within one single event on a day. The charges were considered comprehensive as opposed to the narrow charges in *Lubanga* case. However, these charges were limited to a single day and event rather than a more extended period. The ICC prosecutor decided to reduce the scope of his investigation to the Ituri region due to the gravity of crimes committed during the Ituri conflict.¹¹²

The Legal Representatives for Victims(LRV) also adduced evidence to prove that the Lendu and the Ngiti attackers massacred the civilian population in the events at Bogoro on 24 February 2004 without distinguishing between the UPC combatants and civilians.¹¹³ Corroborated evidence reports that nearly 200 people were killed on 24 February

¹⁰⁹ Decision on the Confirmation of Charges in the Case of the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.

¹¹⁰ Situation in the Democratic Republic of the Congo, in the case of the *Prosecutor v. Mathieu Ngudjolo*, Judgment Pursuant to article 74 of the Statute, ICC-01/04-02/12-3-tENG 12-04-2013 1/198 FB T, 18 December 2012, p.7 para 7-9; Decision on the Confirmation of Charges, para 574-579.

¹¹¹ Decision on the Confirmation of Charges Situation in the Democratic Republic of the Congo, in the case of the *Prosecutor v. Mathieu Ngudjolo*, Judgment Pursuant to article 74 of the Statute, ICC-01/04-02/12-3-tENG 12-04-2013 1/198 FB T, 18 December 2012, p.7 para 7-9; Decision on the Confirmation of Charges, para 574-579. in the case of the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, para.576 and 580.

¹¹² International Justice Monitor, Background to the Germain Katanga and Mathieu Ngudjolo Chui Trials, accessible at <https://www.ijmonitor.org/germain-katanga-and-mathieu-ngudjolo-chui-background/> Last accessed 02/February 2022.

¹¹³ *Ibid* 113, paras 213-154.

2004, which indicated that the attack aimed to eliminate civilians and not military objectives. The LRV reminded the Chambers that it heard specific corroborating testimonies which emphasised several cases of women being raped and taken into sexual slavery.¹¹⁴

However, Judge Anita Usacka, in her dissenting opinion, held that there was insufficient evidence to establish the defendants' culpability. She stressed that it was not established that the defendants jointly committed through other people, within the meaning of Article 25(3)(a) of the Statute, the charges of rape and sexual slavery, both as war crimes and crimes against humanity within the meaning of articles 8(2)(b)(xxii) and 7(1)(g) of the Statute, based on Article 61(7)(c)(i).¹¹⁵ She requested the Prosecutor to provide further evidence in respect of these charges.¹¹⁶ For this reason, it was demonstrated that SGBV requires a higher evidentiary burden.

The International Centre for Transitional Justice (ICTJ) noted that the ICC prosecutor could have charged the accused persons with fewer crimes committed during several events over a long period.¹¹⁷ The charges contained multiple attacks in one day, 24 February 2004. To this end, hostilities within the same period were excluded from the charges.

On 21 November 2012, Trial Chamber severed the cases. It gave notice of its intention to the parties and participants that Katanga's mode of liability as an indirect co-perpetrator and principal under Article 25(3)(a) may be subject to legal re-characterisation pursuant to Regulation 55 in order to assess his responsibility as an accessory (Article 25(3)(d)). Subsequently, Trial Chamber II acquitted Ngudjolo of all charges because the Prosecutor could not provide sufficient evidence to prove his case beyond a reasonable doubt. The Chamber commented on the inadequacies of the Prosecutor in evidence gathering and the flawed testimonies of the three principal witnesses of the Prosecutor.¹¹⁸ Accordingly, the TC changed Katanga's mode of liability from a principal perpetrator to an accomplice (accessory). Although, the counts of these charges, to some extent, are

¹¹⁴Closing Brief of the common legal representatives of the main group of victims, paras 195-209 and 259; Oral Closing Statement of the common legal representatives of the main group of victims, T.337, PP.89-91.

¹¹⁵ Judge Anita Usacka, Dissenting Opinion.

¹¹⁶*Ibid.*

¹¹⁷ Michele Laborde-Barnagere, Guy Mushiata and Meritxell Regue, ICTJ briefing, Case against Germain Katanga and Mathieu Ngudjolo <<https://www.ictj.org/sites/default/files/ICTJ-Briefing-DRC-Katanga-2014.PDF>.

¹¹⁸*Ibid.*

comprehensive. However, the content was limited to a single-day event, neglecting the other multiple attacks during that period.

Jon Heller and Jacobs criticised the deficiencies of the Prosecutor's investigations.¹¹⁹ They argued that the Prosecutor could not prove any of the allegations in the charges.

The OTP charged Katanga for the alleged commission of seven counts of war crimes (using children under the age of fifteen to take an active part in hostilities, directing an attack against civilians, wilful killing, destruction of property, pillaging, sexual slavery and rape) and three counts of crimes against humanity (murder, rape and sexual slavery). The alleged mode of responsibility was the indirect perpetrator.¹²⁰

The Chamber assessed the components of rape as a war crime and a crime against humanity. In its view, the Chamber alluded to the ICC's Elements of Crimes. It referred to Article 8(2)(e)(vi) of the Statute and Article 7(1)(g) of the Statute, which defines rape as a war crime and crimes against humanity, respectively. These provisions include two common material elements:

“1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.”¹²¹

¹¹⁹ Kevin Jon Heller, “Another Terrible Day for the OTP” *Opinio Juris*, <http://opiniojuris.org/2014/03/08/another-terrible-day-otp/>; Dov Jacobs, *The ICC Katanga Judgement: A Commentary: Investigation, Interpretation and the Crimes* 10 March 2014, available at <<https://dovjacobs.com/2014/03/10/the-icc-katanga-judgment-a-commentary-part-1-investigation-interpretation-and-the-crimes/>> last accessed 14 October 2022

¹²⁰ *Prosecutor v. Katanga*, Judgment pursuant to article 74 of the Statute, Trial Chamber II, No. ICC-01/04-01/07, 7 March 2014

¹²¹ *The Prosecutor v. Germain Katanga*, Judgment pursuant to article 74 of the Statute, Trial Chamber II, No. ICC-01/04-01/07, 7 March 2014 Accessible at <<https://www.legal-tools.org/doc/f74b4f/pdf/>> p.962; Summary of Trial Chamber II's Judgment of 7 March 2014, pursuant to article 74 of the Statute in the case of *The Prosecutor v. Germain Katanga*, paras 35-36.

The Chamber reasoned in its interpretation that the first ingredient could be proven without the presence of the culprit, which indicates that the perpetrator does not need to be present to have engaged in the penetration himself. This stance includes if 'the perpetrator is himself 'penetrated' or 'brings about the penetration'.¹²²

Concerning the second element, the Chamber elaborated on the circumstances that will deem the invasion of the victim's body unlawful, and such events include taking advantage of the victim's inability to consent due to age. It pointed to the exception of a specific case in which the perpetrator took advantage of a person's failure to deliver genuine information and determined that the component does not need to be established. Rather, the Chamber decided that it is sufficient to demonstrate one of the violent circumstances listed in the second element, noting that this interpretation is supported by Article 7 of the Statute.¹²³

Additionally, the Chamber highlighted that in order to establish rape as a crime against humanity under Article 7(1)(g) of the Statute, the act must be part of a widespread or systematic assault on a civilian population. It was also stressed that in order to establish rape as a war crime under Article 8(2)(e)(vi) of the Statute, rape must have occurred in the context of and be related to a non-international armed conflict.¹²⁴ The Chamber stated that when the elements of a crime allude to distinct mental elements, the knowledge and purpose criteria under Article 30 of the Statute must be considered. As a result, the Chamber proposed that for rape to be classified as both a war crime and a crime against humanity, the perpetrator 'intentionally took possession of the victim's body' through deliberate action or failure to act: '(1) resulting in penetration; or (2) while he was aware that penetration would occur in the ordinary course of events. Furthermore, the perpetrator must have known that the conduct was performed by 'force, threat of force, coercion' or 'by taking advantage of the victim's inability to give genuine consent'.¹²⁵

In conclusion, the Chamber found that, in addition to the knowledge and intent requirements under Article 30, the Elements of Crimes demand awareness of the conduct to establish rape as a crime against humanity. This means that the perpetrator must have been aware of, or have planned to be part of, a widespread or systematic attack on a civilian population. To establish

¹²²*Ibid.*

¹²³*Ibid.*

¹²⁴*Ibid.*

¹²⁵*Ibid.*

rape as a war crime, the perpetrator must have been aware of the factual circumstances constituting the presence of an armed conflict.

Regarding sexual slavery as war crimes and crimes against humanity, the Chamber identified the two common material elements required to prove sexual slavery as a war crime under Article 8(2)(e)(vi) of the Statute and as a crime against humanity under Article 7(1)(g) of the Statute. These are the material elements:

“1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.

2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.”¹²⁶

Concerning the first factor, the Chamber stated that the person must have used "power attaching to the right of ownership as the possibility of using, enjoying, and disposing of a person as one's property, by placing the person in a situation of dependence that leads to a complete deprivation of autonomy." The Chamber stated that the ownership powers mentioned in the first part are not exhaustive.¹²⁷

The Chamber believes that the objective element of the crime of sexual slavery is the use, enjoyment, and disposal of a person regarded as property by placing them in a state of dependence that deprives them of any autonomy. The Chamber will have to conduct a case-by-case analysis to establish the exercise of powers associated with the right of ownership, taking into account various factors such as detention or captivity, restrictions on freedom of movement, any measure taken to prevent or deter any attempt at escape, the use of threats, force, the exaction of forced labour, the exertion of psychological pressure, the victim's vulnerability, and the socio-economic conditions in which the power is exercised. The Chamber considered that the perpetrator must have been aware that they were exercising one

¹²⁶*Ibid.*

¹²⁷ ICC-01/04-01.07-3436, para 975.

of the ownership rights over a person and intended to engage in the conduct to force the person concerned to engage in sexual actions. To establish sexual slavery as a crime against humanity, the perpetrator must be aware of factual conditions proving the existence of an armed conflict.¹²⁸

Concerning subjective element, the Chamber believes that the perpetrator must have been aware of exerting one of the aspects of ownership rights over a person and forcing the person to engage in one or more sexual acts. To commit a crime against humanity, the criminal must be aware of facts establishing the existence of an armed conflict.¹²⁹

Following the closing statements from the parties and participants, on 7 March 2014, a majority of the Trial Chamber found Katanga guilty. However, it convicted him as an accessory to one count of a crime against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property and pillaging) on 24 February 2003 during the attack on the village of Bogoro, in the Ituri district of the DRC.¹³⁰ The Pre-Trial Chamber concluded that members of the Patriotic Resistance Force (PRF) engaged in acts of rape and sexual enslavement.¹³¹ The Pre-Trial Chamber found that Mr Katanga's combatants abducted women (forced to become combatants' wives), sexually exploited them, and physically assaulted them. At the Trial Chamber, on all four charges brought against Mr Katanga, an accessory to murder, attacking a civilian population, destroying property, and pillaging, he was found guilty as an accomplice to war crimes. In addition, the Court decided that he was responsible for the crime against humanity as an accessory to the murder.

Regarding rape, the Trial Chamber found that combatants raped the victims during or immediately after the conflict between the two factions. In addition, the Chamber noticed that the combatants who kidnapped some of the witnesses¹³² handed them over to one of the Ngiti

¹²⁸No. ICC-01/04-01/07, paras 975-980.

¹²⁹ Situation in the Democratic Republic of the Congo in the case of the *Prosecutor v. Germain Katanga*, Judgment pursuant to article 74 of the Statute, Trial Chamber II, ICC-01/04-01/07-3436-tENG, 07 March 2014 accessible at <https://www.legal-tools.org/doc/f74b4f/pdf/> Paras 981-984.

¹³⁰*Prosecutor v. Germain Katanga*, Judgment pursuant to article 74 of the Statute, Trial Chamber II, ICC-01/04-01/07-3436-tENG, 07 March 2014.

¹³¹*Prosecutor v Germain Katanga*, Decision on the confirmation of charges, paras. 347 and 354.

¹³²Witnesses P-249, P-353 and P-132

commanders in Bogoro. Furthermore, the Chamber concluded that the presence, threat and use of firearms heightened the victims' coercive environment, increasing the death threats they received.¹³³ The sexual slavery of Witnesses¹³⁴ by Ngiti combatants who had attacked Bogoro or by males residing in military camps occurred in the context of and was related to the armed conflict, according to article 8(2)(e)(vi) of the Statute.

The three women were sexually enslaved in military camps, and their kidnapping was directly tied to the battle.¹³⁵

However, he was not found guilty of the charges of rape and sexual enslavement committed by the PRF troops.¹³⁶ The acquittal was because the crimes could not be linked to him, nor could it be proven that the crimes were standard practice among the combatants.¹³⁷ As a result, the Chamber cleared Katanga of the SGBV charges. Despite his acquittal on sexual-related crimes, this case is particularly noteworthy since it was the first instance in which offences of sexual violence, such as rape and sexual slavery, were charged successfully, in contrast to the *Bemba* case,¹³⁸ whose acquittal overturned the sexual violence charges and victory for victims of SGBV. Nonetheless, the *Bemba* case illustrates the possibility of command responsibility for sexualised violence. This connotes a significant step towards recognising victims of Sexual and Gender-Based Violence(SGBV) at the ICC.

The convicted person, Mr Katanga, was sentenced to 12 years imprisonment, with a deduction of the time spent in detention at the ICC between 18 September 2007 and 23 May 2014, from his sentence.¹³⁹

¹³³*Prosecutor v. Germaine Katanga*, Judgment pursuant to article 74 of the Statute., ICC-01/04-01/07-3436-tENG 20-04-201, Trial Chamber II 7 March 2014 accessible <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04025.PDF> paras 986-993.

¹³⁴Witnesses P-132, P-249, and P-353

¹³⁵*Ibid.*

¹³⁶Summary of Trial Chamber II's Judgment of 7 March 2014, pursuant to article 74 of the Statute in the case of *The Prosecutor v. Germaine Katanga*, accessible at < https://www.icc-cpi.int/sites/default/files/itemsDocuments/986/14_0259_ENG_summary_judgment.pdf> p.30.

¹³⁷*Ibid.*

¹³⁸*Prosecutor v Jean-Pierre Bemba*, ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute, March 2016; *Bemba* case was the first case to incorporate sexual and gender-based violence in the charging document, and a conviction for sexual violence on the basis of command responsibility, however, the conviction was overturned on appeal. ICC-01/05-01/13; In the *Bemba* Case, the Trial Chamber found that Article 28's intention was to create a distinct mode of liability¹³⁸This creates a form of sui generis responsibility for the superior.

¹³⁹Summary of Trial Chamber II's Judgment of 7 March 2014, pursuant to article 74 of the Statute in the case of *The Prosecutor v. Germaine Katanga*, accessible at < https://www.icc-cpi.int/sites/default/files/itemsDocuments/986/14_0259_ENG_summary_judgment.pdf> p.30.

It is worthy of mention that Judge Wyngaert dissented.¹⁴⁰ Judge Fatoumata Diarra and Bruno Cotte concurred with the dissenting opinion of Judge Wyngaert.¹⁴¹ Judge Wyngaert reiterated that changes in the legal characterisation of the facts and circumstances in charges of Katanga violated the defendant's right to a fair trial. His mode of liability was changed from indirect co-perpetrator to accomplice. The PTC confirmed Katanga as an accomplice; She added that the majority exceeded their judicial powers by taking over the role of the Prosecution in the amendment of charges. If the Prosecution could not prove the accused case beyond a reasonable doubt, the accused should be released based on the presumption of innocence.¹⁴²

Plausibly, the acquittal of the defendant of the charges of rape and sexual slavery could invariably mean injustice to the victims of SGBV; however, it does not inadvertently mean injustice to the defendant but might create an impunity gap given that the acquittal translates to the preclusion of victims of sexual violence from individual reparations. Nevertheless, it is not a bar to accessing collective reparations and Trust Fund for Victims.¹⁴³ It is contended that the role of individual reparations cannot be displaced. Since the situation demonstrated a higher threshold to investigate and prosecute SGBV crimes, particularly within the context of armed conflict, because such crimes are usually committed on a large scale, it requires a nexus between the defendants and those acts or the subordinates of the defendants and the acts. From the transcripts, particularly at the confirmation of charges, it can be seen that the majority of the Chamber confirmed the charges of sexual violence while the minority dissented. The minority believed that the evidence linking the charges of rape and sexual slavery to the accused, Mr Katanga was insufficient.

1.3.4 Command Responsibility

One may wonder how the term 'command responsibility' impacted victims before the ICC. The role of command responsibility in criminal trials cannot be relegated because it is intricately linked to individual criminal responsibility.. Command responsibility is a form of

¹⁴⁰ Separate Opinion of Judge Christine Van den Wyngaert.

¹⁴¹ Concurring opinion of judges Fatoutmata Diarra and Bruno Cotte, ICC-01/04-01/07-3436-AnxII-tENG, 13-03-2014.

¹⁴² *Ibid.*

¹⁴³ *Prosecutor v. Lubanga* (Order for Reparations, Judgment on the Appeals Against the “Decision Establishing the Principles and Procedures to be Applied to Reparations” of 7 August 2012 with Amended Order for Reparations and Public Annexes 1 and 2. ICC-01/04-01/06-3129, March 3, 2015.

culpability, not a criminal offence, it includes the type of participation¹⁴⁴ Culpability is intimately related to command responsibility, and this culpability reflects the content of the sentencing as well as the judgement.¹⁴⁵ For instance, the command structure dictates the presence of foot soldiers and subordinates in armed conflict who carry out the orders of their leaders. In such a circumstance, some crimes committed may be imputed to the commander. It may be argued that Lubanga could have been criminally liable for some sexual slavery, rape and other forms of sexual violence, provided he had control over the FLPC and had reasonable knowledge of sexual violence. Also, in the Bemba Case, the Trial Chamber found that Article 28 intended to create a distinct mode of liability, which created a form of sui generis responsibility for the superior.¹⁴⁶

1.4. Conclusion

This paper has examined the prosecution of sexual violence at the ICC with particular reference to the first decided case at the Court, *Prosecutor v Lubanga* and the case of *Prosecutor v Katanga*. It is worthy of mention that there has been a reasonable progression in investigation and prosecution of SGBV. The stereotypes and hurdles involved in sexual crimes in most domestic jurisdictions inadvertently filter into international criminal justice. Given the large-scale violence in which sexualised violence is committed and the shame associated with this category of crimes, addressing sexual violence will entail an intersectional approach.

¹⁴⁴ Darryl Robinson, *Justice in Extreme Cases: Criminal law Theory meets International Criminal Law* (Cambridge University Press 2020) 194-223; Arnold Roberta, "Article 28", in *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* Otto Triffterrer (eds) (2008) 795-844.

¹⁴⁵ *Ibid*

¹⁴⁶ *Prosecutor v Jean-Pierre Bemba Bemba*, Trial Judgment Pursuant to Article 74 of the Statute ICC-01/05-01/08-3343, Trial Chamber III, 21 March 2016, para.173.

A revision of the method of sexualised violence evidence gathering might provide a holistic perspective. Combs brings our attention to ICC's evidence gathering.¹⁴⁷ He contends that international courts do encounter difficulties with evidence gathering. Del Ponte also holds the same view.¹⁴⁸ Be that as it may, the narrow charges of the *Lubanga* case overlooked the large scale of the armed conflict. It seems that the limited charges represented unheard truth. The narrow charges precluded the resolution of the concerns raised about sexual violence.

One of the rationale behind the exclusion of sexualised crimes from the charges in *Lubanga* case was technicalities encountered by the Prosecutor in the process of amending the charges, the interpretation of Regulation 55 by the Appeal Chamber espoused another perspective which prevented the Court from making a remarking decision on SGBV.

In addition, this paper has also shown that prosecutorial discretion and charges affect the pendulum of justice, the determination of truth and, consequently, victims. It is argued that the charges shape the determination of truth and substantive justice. For instance, in the *Lubanga* case, it is contended that the charges drafted by the Prosecutor were very narrow. The accused was charged with one count- the conscription and enlistment of children under 15 years as child soldiers. Consequently, victims of SGBV were left with unmet expectations, which demonstrates one of the complexities of criminal trials.

In the *Katanga* case, the Chamber determined that there was evidence beyond a reasonable doubt that rape and sexual enslavement had occurred.¹⁴⁹ However, the Chamber found that the evidence submitted supporting the accused's guilt did not prove the accused's guilt beyond a reasonable doubt.¹⁵⁰ This juncture raised the hot debate on accused rights against victims' rights. In such situations of imbalance, the judgment will be entered in favour of the accused.¹⁵¹

Furthermore, this study has shown that victims of sexual and gender-based violence did not obtain justice in *Katanga* case because it was challenging for the Court to pinpoint the direct

¹⁴⁷ Armoury Combs, Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Convictions (2012) 12(2), *International Criminal Law Review*, 301-303

¹⁴⁸ C. Del Ponte, Investigation and Prosecution of Large –Scale Crimes at the International Level (2006) 4 *Journal of International Criminal Justice*, 552.

¹⁴⁹ *Prosecutor v Germain Katanga*, Trial Judgment

¹⁵⁰ *Prosecutor v Germain Katanga*.

¹⁵¹ Rome Statute 1998, Article 66.

perpetrators of sexual slavery and rape. This paper reasons that generally, the commanders of the subordinate and foot soldiers should have been held responsible vis-à-vis the command responsibility theory. This theory is provided for in Article 28 of the Rome Statute. According to the 'should have known' test, the commander should have been held criminally responsible because he had effective control.

1.5 Recommendations

The findings suggest that prosecutorial discretion (via scope of the documents containing the charges) may inadvertently influence some victims' access to justice. Hence, further research is recommended to establish the extent of the Prosecutor's discretion.

It is proposed that the best way to make criminal trials victim-centred or, at least, victim-oriented is a thorough assessment of victims' needs on a case-by-case basis. This could be done through campaigns and outreach within the conflict zone, especially at the pre-trial and trial stages. Moreover, positive complementarity with the domestic jurisdiction is needed. Therefore, domestic courts should discharge their obligations under the Rome Statute and other treaties. Domestic jurisdictions may also want to utilise non-judicial transitional justice mechanisms, such as Truth and Reconciliation Commissions (TRCs).

In addition, though the Rome Statute provides for gender-based violence, gender mainstreaming should be included in other aspects of the Court's operations, such as the ICC policy on sexual and gender-based violence, preliminary examination stage, the investigations, pre-trial and trial stages.

It is also noted that sexual violence against men and boys was hardly put into consideration in these two cases; male sexualised violence is an area that requires attention. The latest development of the *Dominic Ongwen* case underscores the prosecution of male sexual violence.

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