The New Crimes of Rape and Sexual Slavery Against Child Soldiers at the ICC: A Feminist Perspective of the Expressivist Potential

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ABSTRACT

This thesis explores the capacity of international criminal law (ICL) to express norms in the context of sex crimes prosecutions from a feminist perspective. Two key elements are considered: norm expression and the creation of a wartime narrative. Ultimately, this thesis seeks to analyze the expressive strengths and shortcomings of ICL in relation to the prosecution of the crimes of rape and sexual slavery against child soldiers. Those "new crimes" are currently prosecuted in the case of *The Prosecutor v. Bosco Ntaganda* at the International Criminal Court (ICC). The first chapter explores the feminist literature on this matter and how ICL has distorted the wartime narrative away from women's standpoint, expressed norms that have reinforced victimhood, and denied women's agency. Chapter 2 examines two case-studies, the ICC child soldiers case of *Thomas Lubanga* and the "bush wives" cases from the Special Court for Sierra Leone, that both share similarities with the "new crimes" of rape and sexual slavery against child soldiers. Specifically, I trace the expressive strengths and weaknesses in those cases and conclude that, while holding the perpetrator accountable might be a strength, reifying gendered stereotypes clearly shape our understanding of those crimes and the experiences of women. In the final chapter, I illustrate how the expressive function of international criminal law is likely to fall short of its purpose in the case of "new crimes" by creating a hierarchy of harms and reifying gendered stereotypes. In summary, although the expressive function of ICL have been considered the most persuasive justification of ICL, the norms and the wartime narrative expressed with the "new crimes" of rape and sexual slavery against child soldiers are expected to remain imperfect and limited.

RÉSUMÉ

Le présent mémoire explore la capacité du droit pénal international (DPI) d'exprimer des normes dans le contexte de procès pour violence sexuelle. Tout en adoptant une perspective féministe, ce mémoire reposera sur deux concepts clefs, soit l'expression de normes et la création d'un narratif de guerre. Plus particulièrement, il sera ici question d'exposer les forces et les lacunes de cette fonction expressive du DPI qui pourrait trouver écho dans la poursuite des « nouveaux crimes » de violences sexuelles à l'encontre d'enfant soldats dans le cadre de l'affaire *Le Procureur c Bosco Ntaganda* devant la Cour Pénale Internationale (CPI). Le premier Chapitre explore la littérature féministe concernant les poursuites de violences sexuelles, puis la manière par laquelle le DPI déforme le narratif de guerre dans une perspective de genre et exprime des normes qui renforcent la victimisation et suppriment l'agentivité des victimes. Le deuxième Chapitre examine deux cas d'espèce où l'on retrouve des éléments communs avec les « nouveaux crimes », soit l'affaire *Thomas Lubanga* au sujet d'enfant soldats devant la CPI, ainsi que les cas de mariage forcé débattus devant le Tribunal Spécial pour la Sierra Leone. Plus précisément, je retrace les lacunes expressives en lien avec ces cas et conclus qu'ils ont contribué à réifier des stéréotypes de genre qui ont clairement modelé notre compréhension des expériences des femmes survivantes. Le troisième Chapitre illustre comment la fonction expressive du DPI est susceptible de faillir à sa tâche dans le cas des « nouveaux crimes » en créant une hiérarchie des souffrances et en réifiant des stéréotypes de genre. Au final, malgré que la fonction expressive du DPI soit la justification la plus convaincante, les normes exprimées et le narratif de guerre que créeront les « nouveaux crimes » est susceptible de demeurer au mieux limités et à parfaire.

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LIST OF ABBREVIATIONS

Additional Protocol I (API) and Additional Protocol II (APII)

Armed Forces Revolutionary Council case (the 'AFRC case')

Civil Defense Forces case (the 'CDF' case)

Document Containing the Charges (DCC)

Geneva Convention (GC)

International criminal law (ICL)

International Criminal Court (ICC)

International humanitarian law (IHL)

International Military Tribunal of Nuremburg (IMT)

International Criminal Tribunal for Ex-Yugoslavia (ICTY)

International Criminal Tribunal for Rwanda (ICTR)

Legal Representative of the Former Child Soldiers (LRV)

Office of the Prosecutor (OTP)

Pre-Trial Chamber II (Pre-Trial Chamber)

Rome Statute (the Statute)

Special Court for Sierra Leone (SCSL)

The Prosecutor v Sesay, Kallon and Gbao / The Revolution Union Front (The 'RUF' case)

UN Convention on the Rights of the Child

Updated Document containing the Charges (UDCC)

United Nations (UN)

Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo (UPC/FPLC)

Introduction

Significant progress has been achieved in international criminal law (ICL) over the past twenty years with regard to the prosecution of gender-based crimes.[1] Indeed, successful trials at the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL) revealed the potential international tribunals had to offer when it comes to punishing perpetrators of sexual violence that occurred during armed conflict. For instance, key decisions were rendered by the ICTR in the case of *Akayesu*[2], by the ICTY in the cases of *Kunarac*[3], *Delalić*[4] and *Furundžija*[5] and by the SCSL in the case of *Sesay, Kallon and Gbao* (RUF)[6]. These developments were made possible by the work of feminist scholars, jurists and activists.[7] Such efforts led the incorporation of specific

[1] Note that different terms will be used across this thesis: sex crimes, sexual violence or gender-based violence equally refers to violence with a gender dimension, such as rape, forced pregnancy, sexual slavery ect.
Men also have suffered sexual violence during armed conflict. However, women have unquestionably been victim and survivors of sexual violence on a larger scale.

[2] *Prosecutor v Jean-Paul Akayesu*, ICTR-96-4, Judgement (2 September 1998), (International Criminal Tribunal for Rwanda, Trial Chamber). [*Akayesu* Trial Judgment] Rape was considered as a weapon of war and a crime of genocide sexual for the first time by the Tribunal.

[3] *Prosecutor v Dragoljub Kunarac and al*. (Foca Camp Case), IT-96-23-T& IT-96-23/1-T, Judgement (22 February 2001) (International Criminal Tribunal for the former Yugoslavia, Trial Chamber). [*Kunarac* Trial Judgment] Rape was considered as a crime against humanity, the *actus reus* and *means rea* of the crime were defined, the court established a presumption of lack of consent, ect.

[4] *Prosecutor v Zejnil Delalić and al.* (Celebici Camp Case), IT-96-21-A, Trial Judgement (16 November 1998) (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), paras 943 and 965. [*Ćelebici* Trial Judgment] The Court recognized that rape can constitutes a grave breach or serious violation of Common Article 3.

[5] ICTY, *Prosecutor v Anto Furundžija*, IT-95-17/1-T, Judgment (10 December 1998) (International Criminal Tribunal for the former Yugoslavia, Trial Chamber). [*Furundžija* Trial Judgement]

[6] *Prosecutor v Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, SCSL-04-15-T, Judgment (25 February 2009) (The Special Court for Sierra Leone). [RUF Trial Judgment] The Court found that the crime of forced marriage could be considered as a crime against humanity.

[7] Doris Buss, "Performing Legal Order: Some Feminist Thoughts on International Criminal Law" (2011) 11 Intl Crim Law Rev 409, at 409. [Buss 2011] See also Barbara Bedont and Katherine Hall-Martinez, "Ending Impunity for Gender Crimes Under the International Criminal Court" (1999) 6 Brown J World Affair 65, at p.66-69, [Bedont & Hall-Martinez] and Janet Halley, *Split Decisions: How and Why to Take a Break From Feminism* (Princeton: Princeton University Press, 2006) at 21 [Halley 2006]

and explicit gender-based crimes in the Rome Statute (the Statute)[8], consequently spreading the jurisdiction of the International Criminal Court (ICC) over a panoply of sex crimes, both as war crimes and crimes against humanity, committed in international and non-international armed conflict[9]. The legal and political recognition of the harms women have suffered during wartime was concretized by the decisions emanating from these International Tribunals and the further acknowledgement by the member States during the creation of the ICC.[10]

This international recognition of sexual and gender-based violence reflects the transformation of perception that has evolved in the last decades. The concept of rape and other sexual violence as a weapon of war is a symbol of this transformation. This concept evokes the "planned and targeted"[11], systemic and pervasive nature of sexual violence[12]. However, sexual violence committed against members of one's own armed group during armed conflicts remains overlooked by international tribunals.

The ICC Office of the Prosecutor (the 'OTP') has shown interest in prosecuting gender-based violence since its first case. In the case of Thomas Lubanga, who was charged in 2006 with conscription, enlistment and use of children under the age of fifteen into his armed group, the *Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo* (UPC/FPLC), Chief Prosecutor Luis Moreno-Ocampo raised the

[8] *Rome Statute of the International Criminal Court*, 17 July 1998, A/CONF.183/9 (entered in force on 1 July 2002) [Rome Statute].
[9] *Ibid*. As crime against humanity in Section 7(1)(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; and as war crime in Section 8(2)(b)(xxii) and 8(2)(e)(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
[10] Buss 2011, *Supra* note 7, at 414.
[11] Doris Buss, "Rethinking 'Rape as a Weapon of War'" (2009) 17 Fem Leg Stud 145, at 146 [Buss 2009].
[12] *Ibid*, at 149.

question of sexual violence at the beginning and at the end of the trial. However, the Chamber refused to rule upon sexual violence that might have occurred, since the Prosecutor had not formally requested the addition of sexual violence charges in accordance with article 8(2)(e)(vii) of the Statute.[13] The OTP did not repeat this mistake in the case of Bosco Ntaganda, the UPC/FPLC Deputy Chief of Staff in charge of the military operations. The charges of rape and sexual slavery against women, as well as against child soldiers in the UPC/FPLC under article 8(2)(e)(vi) were confirmed by the Pre-Trial Chamber II on June 9, 2014.[14] Thus, the crimes of rape and sexual slavery against child soldiers can be considered as "new crimes", since for the first time, sexual violence against members of an armed group was prosecuted as a Rome Statute's listed crime, with a specific type of victim, girl child soldiers. This expansive interpretation of the war crimes of rape and sexual slavery against child soldiers will be used as a case study for this thesis, considering the novelty of this approach to sexual violence in ICL.

This thesis is of interest and original because it not only tracks how sexual violence came to be included in the interpretations of war crimes and crimes against humanity, but also examines how gender violence is translated into our systems of legal knowledge. As Doris Buss has pointed out, the production of knowledge does not only occur at the trial stage, but also takes place in "the trial process itself (and earlier), as rules of evidence, investigative processes, court procedures, judicial customs, and individual actors structure how the accounts of what happened unfold and [give] meaning"[15]. The study of

[13] *The Prosecutor v Lubanga*, ICC-01/04-01/06- 2842-AnxA, Trial Judgment (14 March 2012), para. 36 (International Criminal Court). Available at: http:// www.icc-cpi.int/iccdocs/doc/doc1379838.pdf., para 629-630. [*Lubanga* Trial Judgment]

[14] *The Prosecutor v Bosco Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b)of the Rome Statute on the Charges, ICC-01/04-02/06, PTC II (9 June 2014), para 74-75. [*Ntaganda* Decision confirming the charges]

[15] Doris Buss, "Knowing Women: Translating Patriarchy in International Criminal Law" (2014) 23 :1 Soc & Leg Stud 73, at 75. [Buss 2014]

the knowledge production of women's experiences of war by ICL is not only an important academic contribution, but also contributes to feminist activism in ICL.[16] Analyzing how the process of defining and categorizing crimes and how this process plays a role in the invisibilisation of certain harms and types of victims contributes to the understanding of the way gender violence is conceived and dealt with at the international level. It can also contribute to the struggle for gender equality by offering a richer conception of the symbolic and practical effects of prosecuting gender based violence as an international crime.[17]

International criminal law is an interesting site for feminist activism that should not be neglected, but the framework that it provides is nonetheless limited. This thesis argues that the prosecution of sexual violence crimes inevitably narrows the experience of girls and women, and reduces the complex systemic and systematic problem of violence against them to an acquittal or a conviction, often abstracting from the political and socio-economic context that gave rise to the conflict and the violence.[18] As a result, international prosecutions do not fully reflect girls' and women's experiences of wartime, instead eclipsing their agency, and thus, not truly contributing to the elimination of gender discrimination and violence.[19] It has been argued that the over-criminalization of wartime sexual violence and granting an exceptional character to some sexual violence over others can be detrimental to the inclusion of all women narratives in the larger picture of the wartime violence.[20] These limitations should not be overlooked, not only when

[16] *Ibid* at 76.
[17] Buss 2009, *Supra* note 11, at 155.
[18] Buss 2011, *Supra* note 7, at 416.
[19] Nicola Henry, "The Fixation on Wartime Rape: Feminist Critique and International Law" (2014) 23:1 Soc & Leg Stud 93, at 102 [*Henry* 2014] citing Halley 2006, *supra* note 7, at 340-347.
[20] For e.g. *Ibid* Henry 2014, at 100.

assessing the results, but also when creating new crimes or expanding the scope of already existing ones. To this end, this thesis will critically discuss the expressive value of prosecuting the war crimes of rape and sexual slavery against child soldiers – crimes that are prosecuted for the first in the case of *The Prosecutor v Bosco Ntaganda* before the International Criminal Court – and the way it shapes norms and our knowledge and understanding of the sexual and gender violence women face throughout armed conflict. Indeed, the concept of knowledge production and wartime narrative that are key concepts for this thesis are closely connected with the expressive rationale of criminal law, and by extension of ICL. This expressive rationale serves to express norms that are accepted and valued by the community that implements the law and that should be respected by members of this community. This function of criminal law is increasingly dominant among the rationales for the criminal prosecution of international crimes.

If those concepts have been explored by feminist scholars previously with regard to the jurisprudence of the TPIY, TPIR and SCSL, the original contribution here is the focus on the specific expressive value of the new crimes of sexual violence against child soldiers charged within the framework of the ICC. The feminist faith in the expressive role of ICL has led to a feminist push to recognize more sex crimes, and has culminated most recently in the elaboration of the “new crimes”. The importance of expressive function in relation to the prosecution of sex crimes will therefore be further examined.

In order to carry out this inquiry, the literature on the prosecution of sex crimes and feminist propositions on ICL will be discussed, as well as the body of jurisprudence mainly from the ICTY, ICTR and SCSL. By doing so, the legal research methodology relied upon throughout this thesis is predominantly a doctrinal method. Nonetheless, this research

method closely interacts with interdisciplinary method by integrating a sociological perspective as well as a critical assessment of the law, through feminist theories.

This thesis brings forward a much-needed analysis of the limits and progress of women's rights through the prosecution of sexual violence by the ICC, with an acute acknowledgment of its ironic position between the enhanced visibility of women within international legal discourse and the remaining heterosexist power structure in which it evolves.[21] In the next chapters, the increased role of women's rights discourse in shaping ICL will be highlighted and critiqued at the same time, in order to demonstrate the limits of the framework currently developed with ICL. That being said, a complete desertion of the ICL field is not desirable either. It will be demonstrated how women have been invisible from the wartime narrative for decades, and that without feminist efforts to reshape international criminal law, sexual violence would still be considered as "a collateral damage of war". At the same time, as Grewal underlines it, feminists are partly to blame for the reinforcement of the patriarchal structures and this strengthens the case to reflect on how to conceive ICL and to put it into practice in feminist terms. The expressive rationale of ICL is thus an interesting sphere to consider ICL "in practice" and to observe unexpected consequences of the prosecution of sexual violence.

This thesis demonstrates that while the "new crimes" might be considered a further step toward ending impunity against sexual violence, the norms communicated through

[21] Kiran Kaur Grewal, "International Criminal Law as a site for enhancing women's rights?: Challenges, Possibilities, Strategies" (2015) 23 Fem Leg Stud 149, at 159. [Grewal 2015] This thesis is based on the central premise that, as put forward by Kiran Kaur Grewal, "[i]t is ironic that while women have never been more visible within international legal and political discourse, patriarchal, heterosexist and racist power structures remain far from dismantled and may even have been reinforced through our engagement with ICL."

those crimes reify gender stereotypes and patriarchal structures, and the narrative they express remains, at best, imperfect.

To that effect, Chapter 1 begins with an overview of the legal feminist literature on the subject of prosecution of wartime sexual violence. Next, I review the four main justifications behind criminal law, which are the retributive function, the deterrent function, the expressive function and the restorative function. I describe how the expressive function is increasingly favoured by scholars because of the normative goal that is worth pursuing through ICL in order to further gender equality. The expressive limitations with the prosecution of sexual violence in the context of domestic criminal law and, more importantly, in the context of international criminal law, are also analysed. Two elements constitute the focus of the research: norm expression and the expression of a wartime narrative. Finally, those two key elements will be my barometer to evaluate the new crimes in subsequent chapters.

Chapter 2 discusses two case studies that will provide us the necessary background and insights to the evaluate the “new crimes”. First, I discuss the limitations of the *Lubanga* case, the first child soldier case prosecuted by the ICC, which established the definition of child soldiers and direct participation in hostilities. Second, I discuss the “bush wives” cases in the Sierra Leone. Those cases are similar in many ways to the *Ntaganda* case. I will focus on the lessons that could be learned from those cases and the feminist debate that raged around it.

Chapter 3 examines the “new crimes” of rape and sexual slavery against child soldiers. After a review of the jurisdictional challenges raised in the *Ntaganda* case over the “new crimes”, I will analyze the expressive potential of those crimes in light of the

feminist theories and the capacity to express norms and narrative. I will argue that the "new crimes" express certain norms against sexual violence and address situations of violence that were until recently ignored, however, the wartime narrative remains imperfectly expressed.

In conclusion, although this thesis is not advocating for the desertion of the field of ICL, it serves as a warning to moderate expectations placed in the expressive function in relation to the prosecution of the "new crimes".

Chapter One: Feminist Justifications for Prosecuting Sexual Violence in International and Domestic Legal Literature

A prevailing view among scholars is that ICL's most important rationale in relation to sexual violence lies in its expressive function. This chapter critically engages this literature to set the stage for Chapter 3's evaluation of the expressive potential of two new international crimes of gender violence – rape and sexual slavery against child soldiers. Part I-A of this Chapter explores three of the four justifications behind international criminal law and the reasons why they do not exactly serve feminist aspirations in relation to ICL. This will lead to Part I-B, which outlines the feminist arguments that promote the expressive function as the ICL rationale that justifies giving priority to sex crimes prosecution. Part II and III of this Chapter explore the debate about whether giving priority to the prosecution of sexual violence will serve an expressive function that can have a genuine impact on women's rights and bolster a positive change within affected communities. Those two Parts are supported by the main claim of this thesis: that although law *is* a relevant place to enforce norms and transform society, when it comes to sexual violence, it cannot be considered as a sufficient site to remedy gender inequalities deeply entrenched within societies and bring significant normative changes. Those last two Parts will critically assess the expressive value of criminal trial in cases where sexual violence is engaged, both tempering the enthusiasm for this expressive rationale of ICL.

Many feminist scholars argued that the prosecution of sex crimes should be given particular attention based on the normative value attributed to criminal law. Indeed, they saw criminal trial as a meaningful way to express norms prohibiting sexual violence and

therefore viewed the expressive rationale to truly be the most relevant justification of ICL.[22] The focus on repressing crimes of sexual and gender-based violence is reflected in the ICC's *Policy Paper on Sexual Violence and Gender-Based Crimes* issued by the OTP in June 2014 as well as in the Strategic Plan of 2012-2015 and the Strategic Plan of 2016-2018, which emphasized the importance of ending impunity that still prevails around sexual violence and the importance of integrating a gender perspective in all of OTP's spheres of actions.[23]

Other feminists have criticized the prosecution of sex crimes, arguing that the institutional framework of ICL is limited in its capacity to communicate gender-related norms and to properly reflect history, by the way in which it flattens the experience of women in wartime and reduce them to victimhood. Part II of this chapter will challenge how international criminal trial builds historical records that are in fact judicial truth – rather than historical – riddled with blind spots, portraying inaccurately or at least not entirely women's experiences. Part III of this chapter will demonstrate how international trials have reduced women to victimhood, by restricting the roles they have played during armed conflicts to the one of victims.

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[22] Buss 2011, *supra* note 7. See also Margaret M. de Guzman, "An Expressive Rationale for the Thematic Prosecutions of Sex Crime" in Morten Bergsmo, ed, *Thematic Prosecution of International Sex Crimes* (Torkel Opsahl Academic EPublisher, 2012) 11, at 13, 35-36. [deGuzman 2012]; Alona Hagay-Frey, *Sex and Gender Crimes in the New International Law: Past, present, future* (Leiden: Martinus Nijhoff Publishers, 2011) [Hagay-Frey 2011].
Also, feminist authors have held this line of argument in the dawn of the jurisprudence on the crime of forced marriage issued by the Special Court for Sierra Leone that will be explored in the next chapter. See Rachel Slater "Gender Violence or Violence Against Women? The Treatment of Forced Marriage in the Special Court for Sierra Leone" (2012) 13 Melbourne J Intl L 732 [Slater 2012]; Amy Palmer "An Evolutionary analysis of gender-based war, crimes and the continued tolerance of 'forced marriage'" (2009) 7:1 Northwestern Journal of International Human Rights [Palmer 2009]

[23] *Policy Paper on Sexual and Gender Based Crimes*, International Criminal Court Office of the Prosecutor (ICC OTP), June 2014, online: ICC-CPI <https://www.icc-cpi.int/iccdocs/otp/otp-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>; ICC OTP Strategic Plan of 2013, online ICC-CPI <https://www.icc-cpi.int/iccdocs/otp/OTP-Strategic-Plan-2013.pdf>; ICC OTP Strategic Plan of 2016-2018, online: ICC –CPI <https://www.icc-cpi.int/iccdocs/otp/Plan-strategique-2016-2018.pdf>

The arguments canvassed in those last two sections are inspired by a postmodern feminist theory, which offers to debunk categories and the construction of gender, reveals the multiple layers of oppression suffered by women, questions the victimology language and argues for a more nuanced approach to women's agency.[24] Postmodern feminists have criticized Western feminists for having often :

> (a) fixated on rape as the universal experience of women and have fail[ing] to acknowledge or capture the diversity of victims or the intersections of marginalization; (b) isolate[ing] women's sexuality as the basis of oppression, which serves to reinforce the sexed body as an inevitable target of sexual violence; (c) reduc[ing] women to passive, vulnerable objects of the law, whose identities have become defined rather than challenged by this subjection; and (d) ced[ing] power and legitimacy to law as a source of knowledge and truth and the grantor and protector of women's equality, rights and liberty […].[25]

This approach will be echoed in this thesis that focuses on the value of the creation of new sex crimes.

I. The Philosophical Justifications of International Criminal Justice

International criminal law, like in domestic criminal law more broadly, is supported by four generally accepted philosophical justifications. These are the retributive aspect, the deterrence effect, the restorative dimension and the expressive rationale. Among these, ICL is considered to be most effective at fulfilling its expressive function, however

[24] Carine Mardorossian, "Toward a new feminist theory of rape" (2002) 27 : 3 Signs 743, at 745. [Mardorossian 2002] "Postmodern feminist theory in particular has been instrumental in challenging existing paradigms about the category of (women's) "experience" that too often constitutes the unproblematized basis of a positivist feminist politics."
[25] Henry, 2014*, supra* note 19, at 97. [citations omitted]

imperfectly it does so.[26] What is more, several feminist scholars have argued that the prosecution of gender-based violence should be given priority in the context of international criminal trials, especially in light of the expressive potential of the law.[27] For this reason, it is important to consider this argument in evaluating the prosecution of new sex crimes in international law. Although section I-B of this chapter focus on the expressive rationale of ICL, a quick overview of the three other justifications, as well as the reason why those justifications falls short of fulfilling their goals in the domestic context, but particularly in the international one, will be useful for this thesis.

A. The Other Justifications Behind ICL

Retribution and deterrence are fundamental principles that constitute the basis of most western criminal justice systems as well as of ICL. Indeed, the ICC's primary goals are to fight impunity and prevent the perpetration of crimes, goals that are directly linked with these justifications, together with the restorative dimension of criminal law that is also at the heart of the ICC. ICL, as a space for dealing with highly broken societies, also functions in some ways as a transitional justice mechanism.

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[26] Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press: New York, 2007) at 149. [Drumbl, 2007 A] "I conclude that, although these modalities [sentencing modalities] go some way to meet retributive and deterrent goals, they fall short of operationalizing these goals in any meaningful sense. Extant modalities experience greater, albeit still limited, success in attaining expressive goals."

[27] Margaret M. deGuzman, "Giving Priority to Sex Crime Prosecutions at International Courts: The Philosophical Foundations of a Feminist Agenda" (2011) 11 Intl Crim Law Rev 515, at 516. [deGuzman 2011]; see also footnote 1 for a more comprehensive reference.

i. The Retributive Function

The retributive aspect of criminal law is closely linked to the deservingness of the individual who has committed an offence. It is measured according to the seriousness of the offence and the suffering of the victim. However, the small number of accused and convicted perpetrators at the international level seriously impede the fulfillment of the retributive goal of criminal law. Scholars explain the lack of retributive efficiency through the notion of "selectivity", which is the inevitable selection of the individuals that will be indicted and eventually prosecuted, limited to high commanders and heads of state. Considering the large scale on which crimes are committed during an armed conflict, the number of perpetrators on the lower level of the military hierarchy that are not targeted by ICL, the relative lack of resources to investigate and tried individuals seriously hamper the retributive function of ICL.[28]

Further, the concept of "selectivity" implies that the discretion of the prosecutorial team of international tribunals over the selection of the accused "[…] tends to be exercised in favour of those cases where there is a better chance of securing a conviction."[29] Certainly, securing a conviction is the operational aspect of the retributive goal of criminal law. The result, however, is that punishment is distributed based on factors that may not track desert precisely.

The selective enforcement of ICL is especially pronounced in the context of sexual violence. It is well documented that prosecutorial and investigative teams have ignored sex crimes, and that those crimes therefore have remained unpunished following many

[28] *Drumbl* 2007 A*, supra* note 26, at 151. Diane Marie Amann, "Group Mentality, Expressivism and Genocide" (2002) 2.2 Int Crim Law Rev 93*,* at 116. [Amann 2002]
[29] Drumbl 2007 A*, supra* note 26, at 151.

conflicts, as it will be demonstrated further in this chapter in section I-B.[30] Among many reasons, the difficulty of securing convictions on sexual charges appears ironically to deter prosecutors from pursuing those crimes, both in domestic and international criminal law. Further, the fact that the discretionary power of the prosecution is often influenced by the gravity of the crime operates against the prosecution of gender violence. Indeed, crimes such as murder have been considered more serious than rape in domestic criminal law where sentences are usually higher for cases of intentional murder than for rape.[31] Although the number of perpetrators found guilty and punished for war crimes and crimes against humanity is considerably low, the number of convictions for crimes of sexual nature is even lower, especially when those numbers are contrasted with the history of sexual violence within armed conflicts.[32]

ii. The Deterrence Function

The deterrent effect is based on the persuasive impact of the punishment associated with a crime that deters others from committing it.[33] Several scholars have voiced doubts about the genuine deterrent effect of international criminal law, again, considering the very few convictions at the international level and the capacity of law enforcement.[34] There is not much available information pertaining the dissuasive effect that ICL has on potential

[30] Rhonda Copelon, "Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law" (1994) 5:2 Hastings Women's L J, at 243. [Copelon 1994] For more details, see section 1.2.2. Giving Priority to Prosecution of Sex Crimes; (a) The Historical Lack of Enforcement of Gender-Based Offences.
[31] deGuzman 2011, *supra* note 27, at 522.
[32] Hagay-Frey 2011, *supra* note 22, at 59.
[33] deGuzman 2012, *supra* note 22, at 24. See also Amann 2002, *supra* note 28, at 115.
[34] deGuzman 2012, *supra* note 22, at 25. See also Robert Sloane, "The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law" (2006) Columbia Public L & Legal Theory Working Papers, at 72-73. [Sloane 2006]

perpetrators. Despite that fact, it is widely acknowledged that deterrence is not the most convincing rationale of international criminal law, and that the selection of the accused encountered in the retributive goal likewise challenges the ICL's ambition to deter.[35] Indeed, the number of high commanders and heads of state indicted by international tribunals has remained very small and the likelihood of being prosecuted is so low that the deterrent effect cannot be perceived as a realistic justification for decreasing the perpetration of massive violent crimes.[36] Moreover, the deterrent effect theory is based on postulates that actually fit a western perception of crimes, which does not necessarily translate in the context of widespread ethnic, political or religious tensions among a state or a region, doubled with established colonial structures and/or economic instabilities in which foment violence.[37] As Sloane expresses it, the rational-actor model involving the calculus of cost-benefit of committing a crime is deficient in ICL, in light of the few convictions by international tribunals, the large-scale of the violence, and relative lack of coercive order as well as the figurative nature of the international community.[38]

Not only is the deterrence effect subject to debate on the international level, but it also raises debate on the domestic level. The causes of crime are complex, and there are a number of reasons why criminal law often fails to deter a person from committing a crime. Not everyone knows the legal rules, and even when they are known, many "social,

[35] Drumbl 2007 A*, supra* note 26, at 169. See also Sloane 2006, *supra* note 34, at 71. "It may well be quixotic to expect ICL to exert a significant deterrent effect on war criminals and *génocidaires* merely through its potential to increase the perceived costs of international crime." And see Mirjan Damaska, "What Is the Point of International Criminal Justice" (2008) 83 Chicago-Kent Kent L Rev 329, at 344-345. [*Damaska* 2008]
[36] Drumbl 2007 A*, supra* note 26, at 170.
[37] Drumbl 2007 A*, supra* note 26, at 171-172. Drumbl gives as example the lack of deterrent effect for a terrorist kamikaze or situation of chaos and genocidal propaganda, etc. He also points out two realities of the wartime field: gratification by violence and the survival instinct.
[38] Sloane 2006, *supra* note 34, at 70.

situational, or chemical influences"[39] can explain the failure of criminal law to deter such behaviours. In addition, the perspective for potential offenders of being caught might be small or very distant, so that the cost-benefit calculation weighs more on the side of committing the offence. A combination of many of these factors might also be the reason why the deterrent effect of criminal law raises skepticism among scholars.[40]

Considering the above, some scholars have argued that efforts at deterring should be directed toward the crimes generating the heaviest degree of harm, which some have argued are sex crimes.[41] The greatness of the suffering could be widely debated, and will be later in this paper.[42] Nevertheless, sexual gratification or propaganda directed at annihilating the "other" in the context of war, for instance, can be stronger than the faint thought of being indicted by an international tribunal.[43]

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[39] Paul H. Robinson, "Does Criminal Law Deter?" in *Distributive Principles of Criminal Law: Who Should be Punished How Much* (Oxford University Press 2008), at 22. [Robinson 2008]
"Potential offenders commonly do not know the legal rules, either directly or indirectly, even those rules that have been explicitly formulated to produce a behavioral effect. Even if they know the legal rules, potential offenders commonly cannot or will not use such knowledge to guide their conduct in their own best interests, such failure stemming from a variety of social, situational, or chemical influences. And even if they know the rules and do rationally calculate what is in their best interests, the cost-benefit analysis that potential offenders perceive—which is the only cost-benefit analysis that matters— commonly leads to a conclusion suggesting violation rather than compliance, either because the perceived likelihood of punishment is so small, or because it is so distant as to be highly discounted, or for a variety of other or combination of reasons. Even if none of these three hurdles is fatal to law's behavioral influence, their cumulative effect commonly is."
[40] *Ibid*.
[41] deGuzman 2012, *supra* note 22, at 27.
[42] With this question comes the impact of focusing to specifically on sexual violence, in a way that reduces all other suffering. This question is well illustrated by Janet Halley in *Rape in Berlin*, with regards to the story of this anonymous women who have been raped during the fall of the Third Reich and the arrival of the Russian army, and the rape of German women by Russian militiamen.
[43] Note that the recent conviction for rape of Jean-Pierre Bemba was for his commander responsibility, the first rape conviction at the ICC. *The Prosecution v Jean-Pierre Bemba*, ICC-01/05-01/08-3343, Judgment rendu en application de l'Article 74 du Statut, (21 mars 2016) [*Bemba* Trial Judgment]; Janine Natalya Clark, "The First Rape Conviction at the ICC: An Analysis of the *Bemba* Judgment" (2016) 14:3 J Int Crim Justice 667. [Clark, 2016] However, the Appeal Court of the ICC acquitted M. Bemba of all charges, on the basis that the Trial Chamber wrongly assess the scope of the duty of a commander to "take all reasonable measures" to prevent or repress the commission of crimes to be committed under his command or to defer the matter to an investigation or prosecution, since M. Bemba was convicted pursuant to Article 28 of the Statute. *The Prosecutor v Jean-Pierre Bemba*, ICC-01/05-01/08-3636-Red, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute" (8 juin 2018), Appeals Chamber, paras 2-11. [*Bemba* Appeals Judgement]

In sum, the deterrent effect of criminal law in the international context might not be as significant as on the domestic level, where it has also been questioned. The complexity of an armed conflict, the social context and the personal disposition of the individual in this conflict can have an impact on the capacity of ICL to deter individuals from committing international crimes, and much less to commit crimes of sexual nature.

iii. The Restorative Function

The restorative goal of ICL focuses on creating a historical record including all types of suffering and ensuring the truth is revealed in order to favour a climate of reconciliation.[44] In addition, many scholars have argued that the possibility of testifying at an international trial allows the victims to heal, alleviating the pain endured during the armed conflict and creating a historical narrative inclusive of all, including the women who have experienced violence.[45] Although many have posited that restoration is central to ICL, others claim that ICL's healing properties are exaggerated. That being said, success in achieving the restorative goal of ICL is difficult to assess. However, scholars who had experiences and studied transitional justice in relation to the ITCY and ICTR have come to a similar conclusion, that ICL have fallen short from restorative aspirations. This may be due to the fact that healing is a private matter, based on individual decisions, while criminal trials

[44] deGuzman 2012, *supra* note 22, at 31. DeGuzman explains that "Restorative justice goals provide several reasons to give priority to sex crime prosecutions over crimes involving killing. First, about societal restoration, it is important for all major types of criminality in a given conflict to be represented in the prosecutions. Such representation is necessary for the truth of what happened to emerge and for a complete historical record to be created. Representative prosecutions will often require sex crimes to be selected for prosecution over crimes involving killing"

[45] Julie Mertus, "Shouting from the Bottom of the Well, The Impact of International Trials for Wartime Rape on Women's Agency (2004) 6:1 Intl Feminist J of Politics 110, at 115. [Mertus 2004]

focus on individual punishment and not on collective reconciliation.[46] This argument goes directly in line with the critique concerning the binary nature of criminal trial, based on a dualistic division of victim/perpetrator, and the few bystanders of the conflicts included in the judicial process.[47]

Moreover, some intrinsic features of the criminal justice system impede the restorative function of ICL. For instance, the criminal system is based on fundamental guarantees for the accused to have a fair trial, such as the right to remain silent.[48] When an accused invokes this right, victims will never have the chance to hear why their torturer decided to act this way. Plea bargaining can also be a frustrating avenue for victims, who may feel the accused benefitted from a lenient sentence and avoided confrontation by the prosecution; a victim might even feel betrayed by the prosecution in such cases.[49]

The healing aspect of ICL has thus been treated critically, and reconciliation following international trials can barely be described as successful.[50] Nevertheless, a lot of documentation exists on the aspirations of transitional justice, which is not the central subject of this thesis.

[46] Drumbl 2007 A*, supra* note 26, at 150.
[47] Laurel E. Fletcher, "From Indifference to Engagement: Bystanders and International Criminal Justice" (2004) 26 Mich J Intl L 1013, at 1015-1016. [Fletcher 2004]
[48] *Ibid*, at 1015.
[49] Drumbl 2007 A*, supra* note 26, at 62
[50] Drumbl 2007 A*, supra* note 26, at 150. Drumbl refers to Fletcher 2004, *supra* note 47. See also, Amann 2002, *supra* note 28, at 116.

B. Giving Priority to Prosecution of Sex Crimes: The Added Value of the Expressive Function

Generally speaking, the expressive function of criminal law can be defined as the public understanding of the rule of law and socially accepted norms and meanings through trial, conviction and punishment of behaviours that are considered reprehensible by the community.[51] In other words, the expressive rationale "proactively promotes law-abiding behaviour" among the population.[52]

According to Sloane, who refers to decisions from international tribunals, the purpose of ICL is not simply to carry out revenge, but rather a way to express the disapproval of the international community when facing massive crimes, which is related to the expressive rationale.[53] The expressive rationale "also transcend[s] retribution and deterrence in claiming as a central goal the crafting of historical narratives, their authentication as truths, and their pedagogical dissemination to the public."[54] Moreover, the expression of norms and narrative through international trials following massive human rights violations, could have a collateral healing effect for the survivors. Indeed, the potential of international criminal law to allow them to express their stories, express the gravity of the violence they were subjected to, to denounce the banalization of violence against women and to affirm "the wrongness of the acts perpetrated"[55] could have certain healing proprieties.

[51] Amann 2002, *supra* note 28, at 118.
[52] Drumbl 2007 A*, supra* note 26, at 174.
[53] Sloane 2006, *supra* note 34, at 83-84.
[54] Drumbl 2007 A*, supra* note 26, at 173.
[55] deGuzman 2012, *supra* note 22, at 35.

Tribunals promote global norms "through their own indictments, investigations, and trials, they also do so by encouraging national prosecutions".[56] In contrast with the other three philosophical justifications supporting criminal justice, the expressive rationale has been said to be the one that matters the most at the international level as well. Indeed, the retributive, deterrent and restorative rationales have received less recognition from scholars who have studied the philosophical foundations of international criminal law, owing to a lack of concrete demonstration of effectivity or their simple lack of success.[57]

The expressive rationale of criminal justice is the most prominent function of criminal law in regards to sex crimes.[58] On the one hand, sex crime prosecution has the potential to express norms in order to counter the profound inequalities between men and women existing within societies in challenging the patriarchal notions of gender that are still prevailing.[59] The 2006 United Nations Special Rapporteur on violence against women, Yakin Ertürk, has noted in her report that prosecution of domestic violence has a direct link with the transformation of patriarchal society, by communicating strong values of respect towards women and a strong message that the society will not tolerate violence

[56] deGuzman 2012, *supra* note 22, at 33. See also for a similar argument Amann 2002, *supra* note 28, at 120.
[57] *Drumbl* 2007 A*, supra* note 26, See also for a more complete overview of the expressive value of ICL Sloane 2006*, supra* note 34, at 70, 72, 83. He explains that "Each conventional goal of punishment in national law offers insights, but analysis of the extent to which retributive and deterrence theories can or should be coherently transposed to the international context reveals that the primary value that international punishment can realistically serve consists in its expressive functions". See also Amann 2002, *supra* note 28, at 123-124.
Nonetheless, international criminal law, as it has currently developed, falls slightly short of those objectives. Yet, the dissemination of judgments could be a way to enhance the expressive potential of ICL. On that matter, see Sloane 2006, *supra* note 34, at 90. "Finally, international criminal tribunals should work to enhance the expressive potential of sentencing by ensuring the widespread publication and dissemination of judgments to the broadest possible audience and by maximizing the level of cooperation and jurisprudential exchange between national and international criminal justice institutions."
[58] Michelle Madden Dempsey, "Toward a Feminist State: What Does 'Effective' Prosecution of Domestic Violence Mean?" (2007) 70 Mod L Rev 908, at 914. [Dempsey 2007]
[59] *Ibid*, at 909.

against women.[60] On the other hand, criminal law also has the potential to be a forum for storytelling, where the truth is voiced. In the context of sexual offences, criminal law could enhance our knowledge of women's experience of sexual violence and address this violence by creating appropriate social norms and allowing women to express their stories as faithful as possible to the reality.

Feminist scholars have been particularly drawn to the potential of ICL to express gender-related norms, while recognizing the risk that the expressive function of ICL is overwhelmed by male domination endemic to criminal law and ICL's institutional structures. Even if the three previously mentioned justifications do not preclude thematic prosecution focusing on sex crimes, feminist scholars who have studied international criminal law has also argued that the expressive rationale of ICL is the most significant one.[61] Undeniably, the law is not neutral, is socially constructed and construed, and is a powerful vehicle for norms. In other words, the expressive rationale posits two main purposes: "crafting law to express valued social messages and employing law as a mechanism for altering social norms."[62] This facet of the law, and especially in the context of sex crime prosecution, should be relevant to reduce gender-based inequalities and violence. The law is a powerful vehicle to shape social norms, which in turn lead to further law reform. ICL is therefore an interesting forum to recognize rape as a weapon of war, since it can change the way we understand how rape is used in war. Nevertheless, the

[60] Yakin Ertürk, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women - The Due Diligence Standards as a Tool for the Elimination of Violence Against Women*, Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, to the United Nations Commission on Human Rights, E/CN.4/2006/61 (2006), at 20.
[61] deGuzman 2012, *supra* note 22, at 13; See also Buss 2011, *supra* note 7, at 411.
[62] deGuzman 2012, *supra* note 22, at 32.

law is influenced by values that emanate from a patriarchal society, therefore undermining the expressive value of ICL.

ICL has traditionally operated to invisibilize sexual violence linked with war. Not only rape had been seen as an inevitable consequence of war and as collateral damage throughout history[63], but also international law was formulated by and to protect men's interests, therefore historically overlooking sexual violence against women[64], ignoring or marginalizing women's experiences[65]. As a consequence, the standard that is reflected in criminal trials of sexual offences is a from a male's perspective, therefore reinforcing their power in society.[66] The institutionalized norm is from a male perspective[67], which limits the expressive value of ICL. The capacity of ICL to express norms could be a strong asset to the gender equality quest, nevertheless, its intrinsic structure and foundations have historically limited its expressive value.

Some of those limits to the expressive value can be found in domestic criminal law before being found in ICL. Looking at the historical under-enforcement of gender-based

[63] Rhonda Copelon, "Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law" (200-2001) 46 McGill L J 217, at 243. [Copelon 2000] Copelon writes: "Most of the time rape has been invisible, or has come to light as part of the competing diplomacies of war, illustrating the viciousness of the conqueror or the innocence of the conquered. When was is done, it is comfortably cabined as a mere inevitable 'by-product,' a matter of indiscipline, of soldiers revved up by war, needy, and briefly 'out of control,'" See also Nicola Henry, *War and Rape: Law, Memory and Justice* (London: Routledge, 2011), at 6 [Henry 2011], and Hagay-Frey 2011, *supra* note 22, at 18; Alison Cole, "International Criminal Law and Sexual Violence: An Overview", in Clare Mcglynn and Vanessa Munroe, eds, *Rethinking Rape Law : International and Comparative Perspectives* (New York: Routledge 2010) [Cole 2010]; UN Security Council Res 1820, UN Doc S/RES/1820 (2008).

[64] Hagay-Frey 2011, *supra* note 22, at 11. For further details on how international law have silence women's voices through its normative structure, see Hilary Charlesworth, Christine Chinkin & Shelley Wright, "Feminist Approaches to International Law", (1991) 85 Am J Int'l L 613. [Charlesworth, Chinkin & Wright, 1991]

[65] Alice Edwards, "Everyday rape: International human rights law and violence against women in peacetime", in Clare Mcglynn and Vanessa Munroe, eds, *Rethinking Rape Law : International and Comparative Perspectives* (New York: Routledge 2010), at 93. [Edwards 2010]

[66] Lois Pineau, "Date Rape: A Feminist Analysis" (1989) 8:2 L & Phil, at 219. [Pineau 1989]

[67] Edwards 2010, *supra* note 65, at 93. Hagay-Frey 2011, *supra* note 22, at 12.

values through domestic criminal law will provide an important insight to subsequently understand the expressive shortcomings in ICL.

i. The General Under-Enforcement of Gender-Based Offences in Domestic Law

Historically, gender-based violence has been under-prosecuted and under-enforced. Thus, the potential of criminal law to express better gender norms and more accurate narratives was, and is still, undermined. For decades, criminal law remarkably failed to sanction gender-based violence for several reasons and survivors of this violence have remained invisible, both in times of peace and war.[68] Although the incessant work of feminist advocates cannot be overlooked, their victories have been limited and the remaining shortcomings are directly related to structural features of the criminal law model and/or too deeply integrated prejudices among the actors of the judicial system. As a result, the expression of norms and the transmission of stories from women through legal processes remain a challenge in the realm of sexual violence, both at the level of domestic and international criminal law. Since international criminal law was modelled after western domestic criminal law, and domination of men over women did not only appear in wartime, but also in peacetime[69], it becomes relevant to look at both legal framework to understand the profound ramifications of patriarchy within the judicial system.

In the first place, sex crimes are under-prosecuted at the national level, despite the reforms of sexual assault law that have taken place in various jurisdictions worldwide,

[68] deGuzman 2012, *supra* note 22, at 36, See also Henry 2011, *supra* note 63, Chapter 3.
[69] Hagay-Frey 2011, *supra* note 22, at 27.

especially in Western justice systems.[70] From the outset of the judicial process, the obstacles are numerous and embedded within the judicial system, starting from going to the police station to make a statement[71] and the police investigation, statistics have shown that rape is rarely reported. When it is, and the police conduct an investigation, it is often considered unfounded and the case is closed. In Canada for instance, only 9% of sexual assault victims will report their abuse to the police, and out of this 9%, only 3% of the alleged perpetrators will be convicted.[72] Indeed, women victims of sexual assault still experience shame nowadays and are reluctant to report their assault. When reported, survivors have to first face judgmental police officers, who are influenced by stereotypes about what constitutes a "real" victim. Afterward, prosecutors have to believe the complainant and consider that sufficient evidence exists to convince a judge "beyond reasonable doubt" to convict an accused. While in court, it has been documented how the judicial system can be hostile and *re*traumatizing for survivors.[73] Women have to reveal traumatic experiences that constitute very intimate events in a hostile environment, in front of many people they do not know.

What is more, many cases of sexual assault pit the accused's version to the complainant's. When the case turns on the credibility of the complainant, this may give

[70] Melanie Randall "Sexual Assault Law, Credibility, and 'Ideal Victims': Consent, Resistance, and Victim Blaming" (2010) 22 CJWL 397. [Randall, 2010]

[71] Janice Du Mont, Karen-Lee Miller, and Terri L. Myhr, "The Role of 'Real Rape' and 'Real Victim' Stereotypes in the Police Reporting Practices of Sexually Assaulted Women" (2003) 9:4 Violence Against Women 466, at 478. See also Randall 2010, *supra* note 70, at 411-412.
Women who were presenting physical injuries or who have been physically coerced appeared to be more inclined to report their assault than other women, which demonstrates how women feel about reporting sexual assault and the fear of not being believed. But it also speaks a lot about the perception of what constitute a crime among the population, especially of rape, that is a violent crime that rarely leave physical marks.

[72] Radio-Canada News, "Les Canadiens réticents à dénoncer les agressions sexuelles" (11 July 2017). Online : <https://ici.radio-canada.ca/nouvelle/1044655/canada-statistique-canada-agression-sexuelle-enquete-sociale generale>.

[73] Randall 2010, *supra* note 70, at 411.

the impression that the burden of proof shifts from the state to the victim, who must prove they did nothing to "deserve" what happened. Indeed, the credibility assessment is still profoundly rooted into stereotypes about the ideal victim.[74] The phenomenon of victim-blaming leads to categorization of victims as "good" or "bad", as the woman who resisted and the one who had drinks that night. As a matter of fact, women labelled as "bad victims" can be marginalized and stigmatized.[75] In addition, the absence of physical injuries can make it harder to prove the *actus reus* of the infraction.[76] Again, the credibility of the victim is at stake. Together, those obstacles make the criminal threshold for conviction of "beyond reasonable doubt" very difficult to reach. In short, domestic criminal law is very much affected by the gender inequalities that are deeply entrenched in societal structures and social interactions.[77]

International criminal law reproduces the shortcomings from domestic law, in addition to facing its own challenges when looking at the prosecution of sexual violence. On top of those additional challenges, the "[i]nequalities are intensified during wartime condition"[78] and women find themselves in situation of even greater vulnerability.

The scarce resources and the duration of the conflict spread over few months, even years, are issues that must be taken into consideration. The necessity to investigate a vast territory, years after the facts, in a foreign country and culture are obstacles to the research of the truth and efficient prosecutions. Moreover, stereotypes are as much

[74] *Ibid*, at 414.
[75] Randall 2010, *supra* note 70, at 409-410. For instance, marital rape and rape of prostitutes are very good examples. As underlined by Randall, socio-economic background and race are factors that contribute to this categorization.
[76] Pineau 1989, *supra* note 66, at 217.
[77] Randall 2010, *supra* note 70, at 400. Randall eloquently "assert[s] that the assumption that law reform is itself able to effect social change overstates the power of law and furthermore underestimates how deeply entrenched gender inequality remains, especially in relation to ideologies and practices relating to sexuality and gender roles."
[78] Hagay-Frey 2011, *supra* note 22, at 36.

entrenched on the international level than they are on the domestic level, and the lack of training of judicial actors in relation to gender violence has been problematic. For instance, investigators have long neglected to investigate sexual violence, either because they did not have sufficient resources or because they had to give priority to certain type of crimes. Indeed, those infamous adages have been heard at the ICTY: "I've got ten dead bodies, how do I have time for rape? That's not important" and "So, a bunch of guys got riled up after a day of war, what's the big deal?".[79] Not only were those investigators swamped in work, but the understanding of the gender dimensions of violence was cruelly lacking.

Furthermore, the high burden of proof in criminal law – guilt beyond a reasonable doubt – may be especially difficult to reach in international criminal context as well. The events have most often taken place years ago, witnesses have fled the country or have passed away since the conflict, or might partially remember the events, due to traumatic circumstances or the simple fact that time has passed.

In a contest of credibility between the two parties, as in the domestic context, deeply entrenched stereotypes concerning women and the victims of rape operate to the disadvantage of the complainant. For many reasons, ranging from not remembering details, not having complained earlier, not having resisted or fled, shattered the credibility of the victims. A single doubt can lead to an acquittal, despite the reality that the resistance of the victim is no longer part of the element of the crime, at the international

[79] Peggy Kuo, "Prosecuting Crimes of Sexual Violence in International Tribunal" (2002) 34 Case W Res J Intl L 305, at 310-311. [Kuo 2002]

levels and in most domestic jurisdictions[80], and that jurisprudence has established that it is normal for victims of sexual assault not to remember every detail of traumatic events.[81] For those reasons, investigators and prosecutors were, for a long time, reluctant to look into sexual violence that happens during an armed conflict.[82]

ii. The Slow Crystallization of International Norms

Feminist expressive aspirations have been undermined in the international context by the resistance to recognizing sexual and gender-based ICL, despite the expressive potential of ICL. Historically, rape was considered a violation of honour[83], instead of a gender crime under international law. This categorization undoubtedly had a negative impact on the willingness of prosecutorial team to take it seriously as a part of their "quest against impunity". As Hagay-Frey wrote, "[…] treating rape as solely an injury to honour reduces the motivation to prosecute an attacker for this crime, as compared to a 'more serious' physical injury."[84]

As in the domestic context, violence against women has been under-investigated, under-prosecuted and under-condemned/sentenced.[85] A short overview of the relevant

[80] On the international level, see Alison Cole, "*Prosecutor v Gacumbitsi*: The new definition for prosecuting rape under international law" (2008) Intl Crim L Rev 8, at 80. [Cole 2008] and on the domestic level, see Randall 2010, *supra* note 70, at 415.
[81] Nicola Henry, "The Impossibility of Bearing Witness: Wartime Rape and the Promise of Justice" (2010) 16:10 Violence Against Women 1098, at 1105. [Henry 2010]
[82] deGuzman 2012, *supra* note 22, at 38.
[83] Judith G. Gardam & Michelle J. Jarvis, *Women, Armed Conflict and International Law* (The Hague: Kluwer International Law, 2001). [Gardam & Jarvis, 2001]
[84] Hagay-Frey 2011, *supra* note 22, at 3.
[85] deGuzman 2012, *supra* note 22, at 36. See also Jeanne Gregory et Sue Lees, "In Search of Gender Justice: Sexual Assault and the Criminal" (1994) 48 The New Politics of Sex and the State 80, at 80-81.

international legislation and jurisprudence of international tribunals sets the stage for understanding these deficiencies in the treatment of sex crimes by ICL.

Despite the special protection granted to women in the Geneva Conventions of 1949[86], sexual violence was not specifically considered as a grave breach of international humanitarian law. A careful reading of the Geneva Convention and the Additional Protocol of 1977 reveals that sexual violence was only prohibited on the basis of the notion of honour and family rights.[87] In the aftermath of the Second World War, the first international tribunal was created, the International Military Tribunal of Nuremburg (IMT). During the existence of the IMT, sexual violence did not receive any attention by the prosecutorial staff, although such violence was widespread on all sides of the conflict. The same observation is true for the Tokyo Trials by the International Military Tribunal for the Far East, which prosecuted the Japanese accused for international crimes during the Second World War.[88] As an indication, there were reportedly over 100, 000 rapes in Berlin during the final two weeks of the war alone, as well as the well-documented phenomenon of "comfort women" in Japan, which was basically a euphemism for sexual slaves.[89]

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[86] Special protection in the Geneva Convention based on to « modesty », « honour » and/or « weakness ».
Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 17512 UNTS 3 (entered into force 21 October 1950). [GCI]
Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea,12 August 1949, 17512 UNTS 3 (entered into force 21 October 1950). [GCII]
Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950). [GCIII]
Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950). [GCIV]
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 17512 UNTS 3 (entered into force 7 December 1978). [API]
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 17513 UNTS 609 (entered into force 7 December 1978). [APII]
[87] Gardam & Jarvis 2001, *supra* note 83, at 62 and 64; Art. 12 GCI, Art 12 GCII, Art. 14 GC III, Art. 27(2) GCIV, Art. 76 PAI, and Art. 4(2)(e) and (f) PAII, *supra* note 86.
[88] Cole 2010, *supra* note 63, at 48-49.
[89] *Ibid*. The case of "comfort women" was totally ignored by international tribunal.

Nevertheless, significant progress was achieved with the creation of the ICTY and the ICTR, established by the United Nations Security Council.[90] For instance, the ICTY Statute enacted rape as a crime against humanity and the ICTY Rules of Procedure and Evidence established in court-protective measures, as well as a rule that corroboration of testimony was not mandatory in cases of sexual violence.[91] The Rules of Procedure and Evidence also created the first Victims and Witnesses Unit that was responsible for providing assistance, from protective measures to representation in court for sexual violence victims.[92] The jurisprudence of the ICTY redressed some of the historical omissions by stating that rape can constitute torture and outrage against personal dignity[93], enslavement[94] and persecution[95]. Also, post-traumatic stress disorder was recognized as a factor that might lead to contradictory statements in witness testimonies.[96] Finally, the ICTY adopted a definition of rape that was based on the demonstration of lack of consent due to coercive circumstances.[97] For illustrative

[90] *United Nations Security Council Resolution 827 Establishing the International Tribunal for the former Yugoslavia,* UN SC Res 827 under the Chapter VII of the UN Charter, S/RES/827 (1993); *United Nations Security Council Resolution 955 Establishing the International Tribunal for Rwanda,* UN SC Res 955 under the Chapter VII of the UN Charter, S/RES/955 (1994).

[91] *Statute of the International Criminal Tribunal for the Former Yugoslavia*, SC Res. 827, 3217th Mtg., UN Doe. S/RES/827 (1993) [ICTY Statute], art. 5; *Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia*, UN Doc. IT/32/ Rev.39 (22 September 2006), Rules 96. [Rule of Procedure ICTY]

[92] *Ibid*, Rule of Procedure ICTY, Rule 34.

[93] *Furundžija* Trial Judgment*, supra* note 5. The Chamber also found that the harm threshold for torture can be reach trough act of rape/sexual violence, para 267.

[94] *Kunarac* Trial Judgment*, supra* note 3, para 177-195. See also *Prosecutor v Kunarac et al.,* IT-96-23, Appeals Judgment (2 June 2002), at para 113. (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber). [*Kunarac* Appeals Judgment] The notion of enslavement is described here, based on the concept of ownership: even though women could leave, coercive circumstances, psychologically detained. This development constituted a pavement for the jurisprudence on sexual slavery by the Special Court for Sierra Leone.

[95] *Prosecutor v Kvocka and als*., IT-98-30/1, Trial Judgment, (2 November 2001) at 232-234. (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber). Although gender was not a discriminatory ground in ICTY Statute, sexual violence was recognized as persecution by the Chamber in this case.

[96] *Furundžija* Trial Judgment*, supra* note 5, at 113.

[97] *Kunarac* Appeals Judgment, *supra* note 96, at 463-464.

purposes, 80 cases were prosecuted by the ICTY, and of those 80, only 21 included charges for sex crimes.[98]

As for the ICTR, sexual violence against women also occurred on a very large scale during the Rwandan genocide. There were reportedly 500,000 women raped during the four-month period of the genocide. The Tribunal's Statute also incorporated the crime of rape as specific crime against humanity[99] and as a violation of common Article 3 of the Geneva Conventions[100]. The Court also adopted an interesting and quite extensive definition of rape in the *Akayesu* case: "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive".[101] This definition was considered as a 'conceptual approach' of rape.[102] That said, although this definition was relied upon by the first rape case at the ICTY, the *Ćelebic* case[103], the consent-based definition elaborated by the ICTY in the *Kunarac* case[104] was most frequently relied upon afterwards.[105] Moreover, the *Akayesu* case was the first to find that rape could be

[98] Cole 2010, *supra* note 63, at 53.
[99] *Statute of the International Tribunal for Rwanda*, UNSC Res 955, UN Doc S/RES/955, Annex (1994), Article 3(g). [ICTR Statute]
[100] *Ibid*, Article 4(e).
[101] *Akayesu* Trial Judgment, *Supra* note 2, para 597-598.
[102] For a comprehensive explanation and historical overview of the definition see Cole 2008, *supra* note 80, at 57-58.
[103] *Ćelebici* Trial Judgment, *Supra* note 4, at para 479.
[104] *Kunarac* Trial Judgment, *Supra* note 3, para 438.
[105] Cole 2010, *supra* note 63, at 54 and Cole 2008, *supra* note 80, at 62. See also Grewald 2015, *supra* note 21, at 156. The difficulty with the consent-based approach is that "since the factual circumstances of rape usually do not permit the discovery of corroborating evidence such as additional witnesses. Forensic evidence can assist in identifying the perpetrator, but if there is no evidence of a physical struggle, determination of the guilt can often depend on the evaluation of the credibility of the victim and accused. For this reason, the witness can be exposed, during her/his testimony, to intrusive questioning on her/his private life, designed to raise questions about consent and belief in consent, as well as to present her/him as unreliable or disreputable"
Nevertheless, other feminists have argued that assuming consent is absent when coercive circumstances prevail avoids the debate about "the many different conditions of inequality within which women (and, in some cases men) often negotiate sex, the debate is foreclosed by a resort o the classic trope of war as a site of mal violence and female submission.".
Grewald also refer to the concept of "patriarchal protectionist bargain" elaborated by Iris Marion Young in Iris Marion Young, "The logic of masculinist protection: Reflections on the current security state" (2003) 29:1 Signs: J of Women in Culture and Society 1.

considered as an act of genocide since it could be considered "serious bodily or mental harm" under the Genocide Convention[106], "if coupled with the specific intent to destroy the targeted group."[107]

Despite these innovations, the legacy of the ICTR cases suggests that sexual violence remains under-prosecuted. As in many ICTY cases, the ICTR did not initially charged rape in the case of *Akayesu*, and the prosecution "even went so far as to say that it was impossible to document rape because the women would not talk about it".[108] All in all, despite the interesting definition of rape and the emblematic case of *Akayesu,* the legacy of the ICTR is quite disheartening.[109]

The legacy of the SCSL is also mitigated, albeit a new crime of sexual violence was created and the crime of sexual slavery was developed. Indeed, the SCSL "[…] fell short of adequately prosecuting gender-based crimes due to, inter alia, the ambiguity of gender-based crimes in its statutory laws, procedural problems, lack of clear prosecutorial strategy, and limitations on the court's jurisdiction and mandate."[110] The SCSL was established in Sierra Leone, where the atrocities took place, and was a hybrid tribunal, with a mix of national and international judges. Like the *ad hoc* tribunals, the SCSL proved to be unwilling to include sexual violence in its first indictments.[111] That being said, the SCSL major contribution to the sexual violence jurisprudence is the development of the concept of "bush wives" / "forced marriage". The concept was initially rebuffed by Trial

[106] *Convention on the Prevention and Punishment of the Crime of Genocide*, Adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948.
[107] *Akayesu* Trial Judgment, *Supra* note 2, at 698-734. See also Cole 2010, *Supra* note 22, at 54.
[108] Copelon 2000, *supra* note 63, at 225.
[109] *Grewal* 2015, supra note 21, at 151.
[110] Hilmi M. Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals* (Oxford: Oxford University Press, 2014), at 9. [Zawati 2014]
[111] Cole 2010, *supra* note 63, at 56.

Chamber in the *Prosecutor v. Brima, Kamara and Kanu*, the *Armed Forces Revolutionary Council case* (the 'AFRC case'), which rejected the charge of forced marriage since the judges found it redundant with the offence of sexual slavery. The Appeal Chamber, however, found that "forced marriage" was a specific offence with specific elements. Indeed, the Appeal Chamber underlined the specific nature of the conjugal relation, including forced household chores as well as forced sexual services, which they found causing harm serious enough to fulfil the threshold of a crime against humanity.[112] The trial chamber in the RUF case went farther and found the accused guilty of rape as a crime against humanity, "forced marriage" as a crime against humanity, of inhumane acts, and of outrage against personal dignity as a violation of common article 3 of the Geneva Conventions.[113] The case of Charles Taylor followed a similar path.[114]

Finally, the ICC was created in 1998 with the adoption of the Rome Statute and initiated its activity in 2002 after sufficient States had ratified the Statute.[115] As mentioned above, the Statute expressly included several sexual offences. Despite this advancement, the first indictment issued by the ICC did not include sexual violence, in a similar way to the other tribunals. Indeed, the first case was against Thomas Lubanga who was charged for use, conscription and enrolment of child soldiers, but not for sexual violence, despite

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[112] *Prosecutor v Alex Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, SCSL-04-160T, Trial Judgement, (20 June 2007) [AFRC Trial Judgement]. The trial chamber found that the crime of forced marriage was redundant with the offense of sexual slavery, which was overturned by the Appeal Chamber.

[113] RUF Trial Judgment, *supra* note 6. See also Cole 2010, *supra* note 63, at 57.

[114] *Prosecutor v Charles Taylor*, SCSL-03-01-T, Trial Judgment (18 May 2012) (SCSL Trial Chamber II), para 1207. [Taylor Trial Judgment] See also *Ntaganda*, *Decision confirming the Charges, supra* note 14, at para 79.
For further comment on the subject, see Rosemary Grey, "The Ntaganda Confirmation of Charges Decision: A Victory for Gender Justice?" (12 June 2014), *Beyond The Hague* (Blog), online: Blog *Beyond the Hague*, https://beyondthehague.com/2014/06/12/the-ntaganda-confirmation-of-charges-decision-a-victory-for-gender-justice/, (Consulted on 16 August 2017) [*Grey* Blog] and Rosemary Grey, "Sexual Violence against child soldiers" (2014) 16:4 Feminist Journal of Politics 601, at 610. [Grey 2014]

[115] Rome Statute, *supra* note 8.

the evidence the Prosecutor put forward during the trial.[116] Later, charges of rape and sexual slavery were, for the first time at the ICC, laid against Germain Katanga.[117] The Prosecutor, however, did not successfully demonstrate that the rape and sexual slavery that occurred was part of the common plan elaborated by the group, and therefore failed to establish the individual responsibility of Katanga.[118] While the Chamber did not convict Katanga for sexual violence, they nevertheless stated that they believed rape happened in the village of Bogoro.[119] The first conviction for rape was rendered in March 2016 in the case against Jean-Pierre Bemba.[120] M. Bemba was convicted of having committed rape as a military commander, meaning that he had the knowledge that rape was being committed by soldiers under his command, and that he did nothing to prevent from commissioning of the infractions. His conviction was overturned by the Appeals Chamber in June 2018 and Bemba was acquitted of all charges on the basis of a Trial chamber's error on the mode of liability pursuant to Article 28 of the Statute.[121] Moreover, the definition of rape elaborated by the court was not based on consent, which makes this decision significant, and probably set the tone for the future of the ICC.[122] This definition differs from the previous definitions adopted by the *ad hoc* tribunals, since the only

[116] The Prosecution tried to amend the indictment to include charges of sexual violence, amendment that was denied by the trial chamber based on the Accused rights.
[117] *The Prosecutor v Germain Katanga*, ICC-01/04-01/07-3436-tENG, Judgment pursuant to article 74 of the Statute (7 March 2014). [*Katanga* Trial Judgment]
[118] *Ibid*, at paras 1650, 1664.
[119] *Ibid*, paras 985-999 and 1664.
The Court explains that : "Hence, although the acts of rape and enslavement formed an integral part of the militia's design to attack the predominantly Hema civilian population of Bogoro, the Chamber cannot, however, find, on the basis of the evidence put before it, that the criminal purpose pursued on 24 February 2003 necessarily encompassed the commission of the specific crimes proscribed by articles 7(1)(g) and 8(2)(e)(vi) of the Statute. Accordingly, and for all of these reasons, the Chamber cannot find that rape and sexual slavery fell within the common purpose."
[120] *Bemba* Trial Judgment, *supra* note 43, at paras 631-638.
[121] *Ibid*, at 735-741. *Bemba* Appeals Judgment, *supra* note 43, para 2-11.
[122] *Ibid*, at para 105; Clark 2016, *supra* note 43, at 676-677. *Bemba* Trial Judgment, *supra* note 43, para 106; And International Criminal Court, *Elements of Crimes*, UN Doc. PCNICC/2000/1/Add.2 (2000), ASP, (3-10 September 2002), articles 7(1)(g) and 8(2)(b)(xxii). [Element of Crimes]

element the prosecutor had to prove was whether the use of force, a threat of force or coercion, or the fact that the perpetrator had "taking advantage of a coercive environment". This definition was lauded as "inherently suited to the realities and complexities of conflict situations".[123] Clark argues, for example, that the *Bemba* decision detaches the concept of 'coercive environment' from the issue of consent, and "potentially creates the space for a greater focus on what the victim *experienced* within the context of that environment".[124]

Despite the recent success of the different international tribunals and the progress made with the development of the Statute, sex crimes remain nonetheless under-prosecuted.[125] In order for criminal law to truly express global norms, charges must be brought against perpetrators, and convictions have to be secured. In the current state of things, the relative under-enforcement of sex crimes does not allow the expressive potential of ICL to be fully exploited. Indeed, as the expressive value of ICL is embedded in the communication of norms through trials, decisions, and conviction, and the under-enforcement directly impedes ICL from expressing global norms concerning the prohibition of sexual violence. Therefore, in order to remedy this under-enforcement, sexual violence must be part of the ambient discourse about what behaviours are forbidden during war, since ICL, as exposed above, can be a powerful vehicle for norm expressions, while keeping in mind its limits.

[123] Clark 2016, *supra* note 43, at 678.
[124] *Ibid*, at 677.
[125] deGuzman 2012, *Supra* note 22, at 39.

II. The Expressive Function Examined (Part I): Building a Historical Record or Creating a Partial Truth?

Following mass atrocities, the afflicted population experiences the need to remember, to reframe the event and to deal with the widespread trauma. International tribunals have played a role of storytellers and archivists of mass violence and memory sites to a certain extent.[126] As pointed out by Drumbl, if "[l]egal process can narrate history and thereby express shared understandings of the provenance, particulars, and effects of mass violence, punishing the offender contributes yet another layer of authenticity to this narration."[127] The ICTY identified its important contribution to the writing and archiving of the experiences of the war.[128] That being said, criminal law and international criminal law are limited in their capacity to express all types of narratives. This section will explore the ways in which the legal truth emanating from judicial decisions only reveals a certain part of wartime narrative, and how criminal law contributes to this partial truth.

By creating a record of a conflict, triers of fact and lawyers choose the important events that correspond to the fact that needs to be proven. The facts that are essential to establish the elements constituting the offence required by the criminal law are most likely not, or at least not always, the facts that are considered important by the affected communities. For judicial actors, some facts might seem irrelevant and without any probative value, while those facts might be part of the narrative communities would want to put forward and remember.[129] Consequently, the values and the narratives that are

[126] Doris Buss, "Learning Our Lessons? The Rwanda Tribunal Record on Prosecuting Rape", in Clare Mcglynn and Vanessa Munroe, eds, *Rethinking Rape Law: International and Comparative Perspectives* (New York: Routledge 2010), at 61.
[127] *Drumbl* 2007 A*, supra* note 26, at 174.
[128] *Buss* 2014, *supra* note 15, at 75.
[129] *Drumbl* 2007 A*, supra* note 26, at 177.

expressed by criminal trials do not always fit the narrative of the victims and could exclude significant parts of it.

In the same vein, feminist scholars have argued that international trials distort the truth. As a matter of fact, the judicial process creates a partial truth, leaving blind spots within the historical record, focusing on a unique narrative and often decontextualizing sexual violence.[130] The shortcomings of domestic and international criminal law in the context of sexual violence are also factors that contribute to this partial account of the truth, limited to and by rules of procedure and evidence.

The underlying and common thread among these critiques is the fact that the law is not neutral; it produces meaning and has the power to voice or silence some narratives.[131] When assessing the contribution of wartime sexual violence prosecution to feminist struggles, one should keep in mind that:

> [L]aw pronounces the 'truth' about a situation; it creates meaning and is an authoritative, selective and slanted source of the past. International criminal law thus produces, legitimates and mediates harm according to its internal and external mechanisms of legal governmentality.[132]

Given that, some feminist scholars have formulated critiques concerning the drawback of the recent fixation on wartime sexual violence within the international legal realm on the inclusion of certain women's experiences of conflicts.[133] For instance, Henry has argued that "the unprecedented attention to wartime sexual violence within international criminal law can have two interconnected, troubling effects: (1) excluding other gendered harms

[130] *Buss* 2014, *supra* note 15, at 88.
[131] Henry 2014, *supra* note 19, at 97.
[132] *Ibid*.
[133] Grewal 2015, *supra* note 21, at 153-154. See also Nicola Henry, *supra* note 19. Grewal has directly criticized the work of certain feminists in their attempt to make sexual violence the priority in international prosecution agenda.

(and in the process, constructing an ideal victim subject) and (2) constructing a hierarchy of rape."[134] Further, criminal law is often defined with a binary model – either an event is a crime or it is not – which disregards nuance and narrative that does not fit in those predetermined binaries. These two critiques are explored in further details in the following sections.

A. The Unique Narrative and the Blind Spots

i. The Concept of "Gender Grammar of Violence"

The concept of "gender grammar of violence" illustrates how legal processes shape the narrative and distort it from the reality experienced by women. In fact, it does so by mapping only certain aspects of it, thus creating a unique view on the reality of gender violence, either for political reasons or as a response to the necessity of increasing the rate of conviction.

The concept of "gender grammar of violence" was developed by Sharon Marcus in the context of an analysis of legal approaches to rape in Western societies and was imported by Doris Buss into scholarship on ICL.[135] This theory consists of analyzing the "language through which gender inequality is defined, altered, and, potentially, contested" and identifying how features of people, such as identity, race and gender are placed into the 'rape script'. Buss applies the concept of "gender grammar of violence" to a case study: the recognition of 'rape as a weapon of war' by Trial Chamber and Appeals

[134] Henry 2014, *supra* note 19, at 97. See also Nicola Henry, "Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence" (2009) 3 The International Journal of Transitional Justice 114. [Henry 2009]
[135] Buss 2009, *supra* note 11, at 155.

Chamber of the ICTR in the *Akayesu* case. She found that, by declaring that rape was systematically used as a weapon of war, the Chambers placed race (Hutu/Tutsi) and gender (male/female) within a script that naturalized rape and reduced the harm experienced by women during the Rwandan genocide.[136] More precisely, the Tribunals limited the script of sexual violence to Tutsi women raped by Hutu man, whereas the reality was much more complicated, as demonstrated by Buss.[137] Thus, by looking at this "gender grammar of violence", we can observe how the court influenced and distorted the reality of women by mapping very specific features of the conflict and simplifying it. Another consequence of this narrative inferred from the rape script is the blind spot that it leaves on the armed conflict record. Again, in the case of recognition of rape as a weapon of war, the Tribunal completely silenced other alternative histories, such as the one about Hutu women who were also raped because their husbands were Tutsi, for instance.[138]

The same pattern was found in the case of the Balkan wars, where the ICTY recognized that the Bosnian Muslim women were raped by Serbians, as part of a Serbian policy of ethnic cleansing. This dominant narrative of rape excluded the non-Muslim and Serbian women that were also raped during the war.[139] This judicial practice at the ICTY perpetuated an essentialized perspective of ethnic identity as well as reinforcing ethnic differentiation, therefore excluding Serbian women that have been victims as well.[140] In fact, the ICTY left aside the victims of the conflict that belonged to the community of the

[136] *Ibid.*
[137] *Ibid.*
[138] *Ibid*, at 156.
[139] Karen Engle, "Feminism and Its Dis(contents) : Criminalizing Rape in Bosnia and Herzegovina (2005) 99:4 The American Journal of International Law 778, at 791. [Engle 2005]
[140] *Ibid*, at 807.

"losers of the war", as did the ICTR with Hutu women for instance. Roughly speaking, the side that comes out as the winner of the war will most likely have less difficulty to see the harms suffered by his population recognized than the other side (and this is true about the Second World War and the Nuremburg Trial/Tokyo Trial, the conflict in the Former Yugoslavia and the ICTY prosecuting mainly Serbians and finally the genocide in Rwanda and the ICTR prosecuting mainly Hutus).

The reason behind the creation of a unique and dominant narrative is the necessity for international tribunals to have a strong, coherent and irrefutable storyline, especially in the context of the crime of genocide. This finding can lead to the conclusion that law has the power to erase some narratives,[141] whether it is motivated by good or bad intentions. Not only has the fixation on prosecuting rape resulted in the exclusion of some women's accounts of the war because of their ethnic origins, but it also excluded women who, for instance, politically resisted or military participated in the conflict, as exposed in the following section on exploring women agencies. Their voices have been removed from the dominant narrative.[142]

ii. Decontextualizing Sexual Violence

Feminists have insisted on the importance of recognizing that violence against women reflects the power structures, gender and racial discrimination as well as socio-economic inequalities underlying societies prior to an armed conflict.[143] These pre-existing

[141] Henry 2014, *Supra* note 19, at 97.
[142] *Ibid*, at 103.
[143] Buss 2011, *supra* note 7, at 413. See also Annie Bunting, "'Forced Marriage' in Conflicts Situations: Researching and Prosecuting Old Harms and New Crimes" (2012) 1 Can J Hum Rts 165, at 183. [Bunting 2012]

vulnerabilities increase exponentially in context of widespread violence and lead to massive violation of human rights, especially against women. Meanwhile, those structural inequalities are generally absent from the discourse and narratives elaborated by international criminal courts.[144] As a matter of fact, international trials do not necessarily address this dimension since they do not:

> […] generally articulate the broader, systematic forms of injustice as the origins of armed conflict. Trials do not result in the "larger dream" of substantive justice for women in post-conflict societies. In fact the international legal order may render invisible everyday violence and, including the nature and origins of gender-based harms that manifest in pre, during- and post-conflict situations.[145]

This is also a consequence of treating sexual violence within criminal proceedings – to be discussed further – which focus on individual responsibility without paying attention to the context and the broader picture. By doing so, the context in which sexual violence take place is obviated from the judicial record, therefore reducing the potential of ICL to meet feminist expressivist aspirations.

For instance, in Rwanda, the gender violence started years before the conflict imploded. Women were used as objects to terrorize the enemy, as a way to gain military advantages. This did not happen in one day; rather, the hate was cultivated years

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[144] Buss 2014, *supra* note 15, at 74. Buss emphasizes the mixed discourse on the subject: "The apparent willingness of some transitional justice institutions to recognize gender violence and inequality has been the subject of both feminist activism and critique. For many feminists, international criminal courts offer an arena where the gendered effects of armed conflict can be made more visible, thereby ending the historic erasure of women from the postwar accounting of violence and its effects. Naming and recognizing gendered forms of harm, including sexual harm, has been an important feminist political and legal objective, seen as essential to a transitional reconstitution of social and political order.
At the same time, feminist scholars have critiqued the ways in which transitional justice institutions persistently elide 'victim' with 'women', and 'women' with 'sexual violence'. The result is a series of 'blind spots' in transitional justice both about women's experience of conflict and the structural effects of inequality that are hinged to large-scale violence. Not only is the complexity of violence stripped away by a 'narrower, gendered focus on gross violations of human rights' (Ross, 2003: 9) but archetypal representations of the (sexually abused) 'woman victim' too easily stand in as a conceptual shorthand for the complexity of atrocity." [citations omitted]

[145] Henry 2014, *supra* note 19, at 105. [citations omitted].

before.[146] Nonetheless, this was not a prominent feature of the story brought together by the ICTR.

The cultural distance as well as language barriers between international judicial actors and the local reality are other factors that impede international courts from taking into consideration the historical, political and socio-economic context as well as local traditions.[147] According to Maria Eriksson Baaz and Maria Stern, tackling sexual and gender violence could hardly be feasible without taking the context into which the violations occur.[148]

B. The Criminal Trial Limitations

Some of the limitations encountered in domestic prosecutions of sexual violence have been reproduced within the international criminal legal framework and have significant impact on the integrity of the wartime narrative.

i. Telling a Story Within a Criminal Court : the Limits of Legal Testimonies

One of those observable limitations is the impossibility for a witness to tell a story in a natural way; rather, stories must be told in a legal fashion. For instance, the victims of sexual violence in Bosnia and Herzegovina had some hope that an international trial would bring them to heal and justice, as well as creating a historical record that would

[146] Cole 2010, s*upra* note 63, at 53.
[147] Gardam & Jarvis, 2001, *supra* note 83, at 21-51.
[148] Maria Eriksson Baaz and Maria Stern, *The Complexity of Violence : A critical analysis of sexual violence in the Democratic Republic of the Congo (DRC)* (2010) (Sida Working Paper on Gender based Violence, Swedish International Development Cooperation Agency), at 56.

take into account what they experienced, allowing them to speak for all the other women who had suffered the same way but could not or did not want to testify at the ICTY.[149] Rather, the adversarial criminal proceedings did not allow the witnesses to testify as they wanted, in a "coherent narrative"[150], since the purpose of witness testimony is to fulfil the burden of proof of the prosecution by meeting every essential element of the crime, in a legal "sterile language and performance of the law".[151] Criminal law was never designed to allow victims to heal, much less to ensure their stories would be remembered. The criminal law model rests on the reconstitution of a narrative framework based on legal facts. In other words, "by design, the legal process does not allow witnesses to tell their own coherent narrative; it chops their stories into digestible parts, selects a handful of parts and sorts and refines them to create a new narrative – the legal anti-narrative […]."[152] For that reason, women's experience cannot be expected to be represented in its entirety. There is a fundamental distinction between "'questions of law' and 'questions of fact'", and even though credibility can be a question of fact, those facts will be presented to the court in a legal form.[153] In the *Foča* case, the line of questioning from the prosecution was solely focused on the identification of the perpetrators and the acts they had committed, without any interest in the narrative of the witness feelings or any 'irrelevant' information she wanted to share about her rape.[154] One woman revealed how she was raped multiple times by describing how her soul suffered instead of her body, choosing "defiance instead of […] victimization", thus not quite fitting the legal definition

[149] Mertus 2004, *Supra* note 45, at 111-112.
[150] *Ibid*, 113.
[151] *Ibid*.
[152] *Ibid.*
[153] Pineau 1989, *supra* note 66, at 110.
[154] Mertus 2004, *Supra* note 45, at 116-118.

of rape.[155] A complete different narrative emerged from this testimony. Instead of a chronological description of physical actions from the perpetrator to the victim, it was much more concentrated on her psychological suffering that resulted from the action of the perpetrator.

Some of the women who testified before the ICTY were disappointed with the adversarial process in place, and they almost unanimously "experience[d] the trial as dehumanizing and re-traumatizing experiences".[156] A similar observation was made concerning the ICTR where, for instance, a victim was questioned during a week by six different defense attorneys in a multiple accused case about her rape, even though not all the six accused were charged with sexual violence. Questions were sometimes unnecessary and humiliating. The victim was even laughed at by judges.[157]

Others were reluctant to testify, fearing the obligation to be subjected to a cross-examination, the obligation to face her assailant or the hostile environment of a tribunal for instance. This fear might also emanate from the consequences of publicly denouncing sexual violence, even though confidentiality is often promised to witnesses and victims, such as reprisals and abandonment from their family and community. This lack of willingness to testify hampers the capacity of international justice to act as a transitional justice paradigm that would allow all types of narrative to be part of the reconstruction, by reducing the diversity of testimony.[158]

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[155] *Ibid.*
[156] Mertus 2004, *Supra* note 45, at 112.
[157] Binaifer Nowrojee, "Your Justice is Too Slow: Will the ICTR Fail the Rwanda's Rape Victims?" (2005) Occasional Paper 10, United Nations Research Institute For Social Development, at 20-24. [Nowrojee]
[158] Kimi Lynn King and Megan Greening, "Gender Justice or Just Gender? The Role of Gender in Sexual Assault Decisions at the International Criminal Tribunal for the Former Yugoslavia" (2007) 88:5 Social Science Quarterly 1049, at 1052, especially footnote 6: "The U.N. War Crimes Commission Chair and Rapporteur M. Cherif Bassiouni estimated 12,000 unreported and reported rapes (United Nations, 1995b). MacKinnon (1994) estimated a higher

Moreover, criminal proceedings are based on a simplistic model of binaries that does not depict a realistic picture of a social reality. Indeed, criminal law is based on "[b]inaries of innocent/guilt; good/bad; not-criminal/criminal" which results in a "[…] model of criminality defined and upheld through rape prosecutions [that] is simplistic".[159] This categorizing might reduce women to a discourse of powerlessness and vulnerability, thus excluding various narratives. As Annie Bunting pointed out, international trials have often depended on the construction of African warlords, focus only on sexual violence, excluding structural violence and produces historical narrative that "may not in fact provide rich and nuanced history".[160] She interestingly argues that "the real potential of narratives of forced marriage and enslavement lie not in legal testimonies but rather in the collaborative storytelling told in respectful environment for social justice, despite, or outside, the court processes."[161] That being said, Bunting concludes that:

> […] legal testimonies and legal knowledge offer limited accounts of experience in conflict situations. Produced for a different purpose than scholarly research or political advocacy, legal testimonies are an important, but partial or incomplete, source of information. At the same time, memoirs and even interviews with anthropologists cannot completely avoid the "framing constraints" of narratives of violence, abduction, captivity, and enslavement.[162]

number (50,000). Interviews with ICTY personnel in 2001, 2003, and 2005 revealed that women were reluctant to testify for fear of reprisal, condemnation, and abandonment."

[159] Buss 2011, *supra* note 7, at 416.

[160] Annie Bunting and Joel Quirk. *Contemporary Slavery: Popular Rhetoric and Political Practice* (Vancouver ; Toronto : UBC Press, 2017), at 133.[Bunting 2017]

[161] *Ibid,* Chapter 5, at136.

[162] *Ibid,* at 152. [Citations omitted]

ii. Individual Liability vs Collective Harms

Furthermore, the focus on individual liability instead of recognizing collective and/or systemic problems is among the fundamental characteristics of criminal law, although crimes are often the result of societal problems. Buss posits that the evidence that would be produced in the trial "about sexual violence against women as a broad social phenomenon is largely seen as irrelevant within the context of an individual trial."[163] This very narrow view of the situation excludes by nature parts of women's stories that do not correspond to the determination of individual responsibility. That being said, the ICC has succeeded in pointing out violence committed against women without even finding the accused guilty of sexual offences. The ICC trial against Mr. Germain Katanga is a suitable example.[164]

III. The Expressive Function Examined (Part II): Reinforcing Victimhood, Denying Agency.

Women's experiences of war have been typically depicted rather monolithically within ICL, relegating women to the rank of victims only, possibly denying their agency and reinforcing the notion of victimhood. The historical record produced by international tribunals have essentialized women by reducing them to the state of victim, more

[163] Buss 2011, *supra* note 7, at 416.

[164] *Katanga* Trial Judgment, *supra* note 117, para 1663. The Trial chamber found that the women who testified concerning sexual violence, including rape and sexual slavery, told the truth and acknowledge their suffering, but did not found Katanga guilty of those crimes in light of the lack of evidence that those crimes were not part of the common plan. The recognition of the harm suffered by women was nevertheless taking into consideration to convict Katanga of other crimes such as the crime of attacking civilian population as a war crime.

precisely victim of sexual violence[165], by limiting their true essence to being victim, and to their bodies[166].

A. Ignoring Other Types of Gender-Based Harms

In fact, several other types of gender crimes have been committed against women in armed conflict, which are not raised as gender violence by tribunals.

It has been argued that giving priority to the prosecution of sexual violence has limited the harm suffered by women to violence surrounding their body and their sexuality[167], therefore excluding other types of harm suffered by those women.[168] In other words, gender violence against women has been often limited to rape, consequently ignoring or trivializing other types of violence based on gender, such as lack of reproductive health assistance.[169] For instance, in Sierra Leone, pregnant girls within the armed group suffered from infections and had complicated children delivering, as well as short or no recovery period after having giving birth before going back to the front lines. Some girls from the RUF armed group were subjected to dangerous practices : “one technique to initiate childbirth involved jumping on a girl's pregnant belly; at other times, pregnant girls had their legs bound in order to postpone birth.”[170] Other similar issues that have been neglected are the “physical and social experience in relation to pregnancy, birthing and

[165] Buss 2014, *supra* note 15, at 74.
[166] Mertus 2004, *Supra* note 45, at 115.
[167] Engle 2005, *supra* note 139, at 814-815. Engle refers especially to the fact that the ICTY treated sexual violence against women and men in the same way, therefore dismissing the gender dimension of the rapes that occurred, and focusing solely on the sex part of the violence.
[168] Henry 2014, *supra* note 19, at 98.
[169] *Ibid.*
[170] Augustine Park, “Other Inhuman Acts, Forced Marriage, Girls soldiers and the Special Court for Sierra Leone” (2006) 15:3 Soc & Leg Stud 315, at 322. [Park 2006].

child rearing. Unequipped with parenting skills, and without pre- and post-natal care, girls sometimes induce[d] abortions on their own, reject[ed] their babies, and in some cases, commit[ed] infanticide."[171] The raising of children alone, following rejection from families and communities and the incapacity to work afterward are also consequences based on gender that have an important impact of girls and women who have experienced armed conflict.[172] Sexually transmitted diseases, especially HIV/AIDS, as a result of sexual violence is another gender violence that has been ignored.[173]

Henry wrote that the isolation of women's sexuality as the origin of oppression, and the exclusion of other types of harms, "reinforces the sexed body as an inevitable target of sexual violence."[174] From an expressive perspective, those ignored harms, altogether, result in the consolidation of a heteronormativity that perpetuates an essentialist view of women.

B. Reinforcing Heteronormative Conceptions of Womanhood

Postmodern feminists have argued that "women are represented in feminist and broader discourses as 'already raped' and 'already rapeable' because women are perpetually defined and identified by their sexual victimization."[175] Calling them 'raped women' has the effect of limiting them to broken women,[176] therefore "reinforcing both gender essentialism and cultural essentialism".[177] Defining the harm women have suffered in this

[171] *Ibid*, at 321-322.
[172] Gardam & Jarvis 2001, *supra* note 83, at 38-48.
[173] Park 2006, *supra* note 170, at 323.
[174] Henry 2014, *supra* note 19, at 97.
[175] Henry 2014, *supra* note 19, at 101 [Citation omitted].
[176] Engle 2005, *supra* note 139, at 814
[177] Mertus 2004, *Supra* note 45, at 115.

way reproduces sexualized stereotypes. This is especially detrimental since this is operated by the law, which is a "discourse of power".[178] As Smart argues, the increasing criminalization of rape reduces women to sexual subjects, and rendering their bodies sites of power.[179] In the same vein, feminist scholars have also argued that the fixation on wartime sexual violence has had the "effect of eroticizing rather than challenging the hegemonic relations."[180] This eroticization also brings the neocolonialist feminist perspective into the debate, underlying the voyeuristic nature of Westerners prosecuting sexual violence that occurred in African countries.[181]

Moreover, as Grewal explains it, "[w]omen's participation in war continues to be defined primarily in terms of sex and sex difference: a process which does little to destabilize hegemonic understandings of both while rendering sexual violence against men largely invisible."[182] As Grewal concludes, the actions of feminist activists in ICL, by limiting the experience of women to sexual violence, does not challenge the normativity behind those crimes is not highlighted. To the contrary, it reinforces the "heteronormativity and the patriarchal structure"[183] that exists. This critique is reflected in the distinction with the treatment of the sexual violence against men during an armed conflict. For instance, when men's genitals were cut off by the opposite armed group as a sign of power and domination, international tribunals have called this violence torture, instead of sexual or gender violence. The focus is on the physical pain, rather than on the social signification

[178] Henry 2014, *supra* note 19, at 101. See also Carol Smart, "Law's power, the sexed body and feminist discourse" (1990) 17 J of L & Soc 194, at 204. [Smart 1990]
[179] Smart 1990, *supra* note 178, at 203.
[180] Henry 2014, *supra* note 19, at 101.
[181] *Ibid.*
[182] Grewald 2015, *supra* note 21, at 155. (Footnote omitted)
[183] *Ibid*, at 157. According to Grewald: "Thus, it is only by challenging normative gender roles and identities *in all contexts* that we can really hope to reduce the gendered impact of armed conflict on women". Grewal main arguments rely on two examples: the definition of consent about rape and the crime of forced marriage elaborated by the SCSL.

of the acts.[184] This clearly demonstrates that men, because of the patriarchal order that prevails, do not want to qualify the harm they have suffered in sexual terms, which would send the message of vulnerability and powerlessness. In fact, the non-prosecution of male rape and other sexual violence might actually tend to show a similar pattern.

Ultimately, the study of international trials, such as the *Kunarac* case, shows that the victim does not always matter to the attorneys or to the Tribunal; only the actions she suffered that made her a victim are relevant.[185] This brings us to the following observation: treating women as victims undermines their agency. Hence, the reinforcement of victimhood is truly detrimental to the expressive function of criminal law, since it sends a message that women need protection, but does not necessarily question the profound reasons underlying the violence perpetrated against them in the first place, and the system of value underlying an essentialist heteronormativity.

C. Ignoring Woman's Participation in Armed Conflict as Combatants

Women have continuously been denied the recognition of their active participation in hostilities. This participation can range from political resistance, to voluntarily enrolling in armed groups to survive or to embody political ideals, to being abducted and forced to fight against the 'enemy'. Casting light only on the sexual violence those women have experienced and not considering that those women were part of an armed group, by

[184] *Ibid,* at 155.
[185] Mertus 2004, *Supra* note 45, at 115. The indictment against Dragoljub Kunarac is part of the trial known as the *Foča* Trial. This trial was about the campaign orchestrated by the Bosnian Serbian forces against the Muslim armed forces, and the Muslim civilians, in the region of Foča. Civilians were detained arbitrarily, and Muslim women and girls were raped during this detention. The evidence showed that raped was actually used as an instrument of terror. The defendant Kunarac was convicted of torture, rape and enslavement as a crime against humanity and of torture and rape as violations of the laws or customs of war. *The Prosecution v Kunarac et al.*, (IT-96-23 &23/1), Case Information Sheet, ICTY, online: www.icty.org/x/cases/kunarac/cis/en/cis_kunarac_al_en.pdf [*Kunarac* Information Sheet]

choice or by force, may be reductive of their reality. It leaves out their motivations or the complexity of what they endured, and they are only defined as “raped women”, denying sexual and political agency, and replacing it by victimhood.

As an example, Engle claims that in Bosnia Herzegovina, feminist activists, journalists and lawyers were intensely looking for ‘raped women’ to document the massive rapes that occurred in the former Yugoslavia. In their quest for raped women, there was no place for other stories than rape stories, therefore making it barely impossible for “all Bosnia Muslim women to be identified as anything other than a ‘raped women’”.[186] A journalist who was writing a book on mass rape in Bosnia-Herzegovina, after interviewing many survivors, qualified Bosnian Muslim women who joined the army after having been raped to get revenge as ‘exceptional’, since most of the raped women were actually broken and powerless.[187] Worst, a psychiatrist who worked in a clinic located in Zagreb, wrote about women who took up arms to get revenge after being sexually assaulted and defined them as ‘pathological’.[188]

The importance here is not to emphasize that women also have the potential to be perpetrators as well as victims and that they need to face trial as much as men. Rather, it is to argue that this part of women’s experience of the war cannot be neglected without distorting the wartime narrative.[189] The capacity of criminal law to express norms and narratives is hampered by the reification of women as victims, since it does not challenge

[186] Engle 2005, *supra* note 139, at 795. The journalist is Alexandra Stiglmayer, she is the editor of the book named *Mass rape : the war against women in Bosnia-Herzegovina*, Lincoln, Neb. ; London : University of Nebraska Press, c1994, in which she wrote « The Rapes in Bosnia-Herzegonia ».
[187] *Ibid,* at 796.
[188] *Ibid.* The psychiatrist is Dr. Vera Fonegovic-Smalc, she published “Psychiatric Aspects of the Rapes in the War Against the Republics of Croatia and Bosnia-Herzegovina, in *Mass Rape : the War Against Women in Bosnia-Herzegovina*, Lincoln : University of Nebraska Press, c1994.
[189] Henry 2014, *supra* note 19, at 99.

the postulates of patriarchal society in which women are perceived as weak, vulnerable, and passive. Not considering that some women participated actively in hostilities or were politically involved is denying their agency and send a message of gender inequality.

D. Undermining Agency Through the Definition of Consent

The definition of consent is constructed in various ways depending on the tribunal's jurisprudence that is being analyzed. The ICTY restrictively interpreted the definition of consent, by stating that the existence of "coercive circumstances" would equal to an absence of consent. This definition implied that the women who had been abducted in the "rape camp" of Foca[190] were unable to consent to any sexual encounters since coercive circumstances were established by the prosecution. The judges established a presumption of coercion, denying "at a formal level that Muslim women would have chosen, the way that we normally use the term 'choice' in these matters, to have sex with a male Serbian soldier during the war", thereupon denying women's agencies.[191] The Appeals Chamber of the ICTR, in the *Gacumbitsi* case[192], clarified the issue of consent raised by the Trial Chamber and the Appeals Chamber in the *Kunarac* case about the non-consent and the knowledge thereof as elements of the crime of rape as a crime against humanity. The Appeals Chamber concluded that the Prosecution bears the burden to prove those elements "beyond a reasonable doubt"[193], notwithstanding

[190] The Foca case is the name used for the *Kunarac, Kovac and Vukovic* case. See Kunara Trial Judgment, *supra* note 3 and Kunarac Appeals Judgement, *supra* note 96.
[191] Engle 2005, *supra* note 139, at 806.
[192] *Prosecutor v. Gacumbitsi,* ICTR-2001-64-A, Judgment (7 July 2006), paras 152-155. [*Gacumbitsi* Appeals Judgment]
[193] *Ibid*, at para 157. The Court stated the following: "As with every element of any offence, the Trial Chamber will consider all of the relevant and admissible evidence in determining whether, under the circumstances of the case, it is appropriate to conclude that non-consent is proven beyond reasonable doubt. But it is not necessary, as a legal matter, for the Prosecution to introduce evidence concerning the words or conduct of the victim or the victim's relationship to

Rule 96[194] that refers to the "defence" of consent, which was greatly restrained by that Chamber.[195]

The jurisprudence of the *ad hoc* tribunals has settled for a presumption of non-consent in coercive settings, in a way, lessened the burden of the prosecution, since the lack of consent of the victim does not have to be proven, but rather the coercive circumstances only. This can be considered as a sort of response to a major critique by feminist of criminal law concerning the difficulty to attain the burden of proof.

The ICC also adopted its own definition of consent in the *Bemba* trial judgment issued in March 2016, which eliminated non-consent from the elements the prosecutor must prove to convict an accused of rape as a war crime or crime against humanity. The Trial Chamber draws its definition from the Elements of Crimes[196], and confirmed that "where 'force', 'threat of force or coercion', or 'taking advantage of a coercive environment' has been proven, the Prosecution has fulfilled his burden of proof, and there is no need to prove the absence of consent from the victim."[197] In addition, the Trial Chamber has established a wide definition of "coercive circumstances". While the ICTY had already provided a wide conception of "coercive circumstances" it was still linked to the consent of the victims. The ICC truly detached its interpretation of what constitutes a coercive environment from the notion of consent.[198] Although some have argued that this

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the perpetrator. Nor need it introduce evidence of force. Rather, the Trial Chamber is free to infer non-consent from the background circumstances, such as an ongoing genocide campaign or the detention of the victim. Indeed, the Trial Chamber did so in this case. Knowledge of non-consent may be proven, for instance, if the Prosecution establishes beyond reasonable doubt that the accused was aware, or had reason to be aware, of the coercive circumstances that undermined the possibility of genuine consent. [Citation omitted]

[194] *Rule of Procedure and Evidence of the International Criminal Tribunal for Rwanda*, UN Doc. ITR/3/Rev. 15 (10 November 2006), Rule 96.

[195] *Ibid*, at para 156.

[196] Element of Crimes, *supra* note 122, article 7(1)(g)(2).

[197] *Bemba* Trial Judgement, *supra* note 43, para 106. The Appeals judgement conclusions did not address this matter.

[198] Clark 2016, *supra* note 43, at 678.

definition “more effectively captures the totality of the crime than an approach that places consent at the centre of the inquiry”[199], it removes the possibility for the victim consent in a way. Again, women are depicted as incapable of taking decisions for themselves. The impact of this finding on the expressive potential of criminal law as for the women who took part into hostilities and are absent from the wartime judicial record.

To conclude, international trials have undeniably contributed to adding wartime rape to the collective memory, and have also led the international community to better understand sexual violence.[200] The expressive rationale of the law is considered to be the principal philosophical foundation of a feminist agenda that gives a central place to the expression of norms and narrative expression. In de Guzman’s opinion, ICL should give priority to the prosecution of sex crimes, since establishing and reflecting norms concerning women’s rights is crucial in the context of under-enforcement of prohibition of violence against women. Nonetheless, feminist scholars warned us of the risk that the function of the ICL in crystallizing and expressing norms against sexual violence will backfire and work against women’s interests. [201] The existing structures seem to fail to resolve the historical lack of consideration for every woman’s experience of gender-based violence, as well as the context in which this violence emerges. Moreover, the main impact of the reinforcement of victimhood on the expressive capacity of ICL revolves around the production of knowledge about women’s experiences of an armed conflict limited to their bodies, thereby reproducing long-denounced stereotypes of vulnerable, docile and powerless women.

[199] *Ibid*.
[200] Henry 2014, *supra* note 19, at 96.
[201] deGuzman 2012, *Supra* note 22, at 35, 42.

Chapter Two: Learning Lessons from Previous Prosecutions

Previous prosecutions of similar crimes can strengthen our understanding of the factors that can enhance or limit the expressive capacity of a crime as well as provide constructive lines of inquiry for analyzing the "new crimes", which will be done in Chapter 3. In other words, lessons can be learned from those previous prosecutions. Two significant cases in this context can serve as examples: (i) the ICC prosecution of Mr. Thomas Lubanga Dyilo, the emblematic child soldiers' case, and (ii) the SLSC cases of the RUF and AFRC, the "bush wives" cases. First, the *Lubanga* case is similar to the "new crimes" in the fact that the victims share the same characteristics since they are child soldiers, and less importantly, from the same armed group as the perpetrator. Second, the "bush wives" cases raised similar issues related to harm suffered by the victims. Both crimes raised some similar issues concerning mainly the vulnerabilities of the victims and the membership to the same armed group as the accused.

A comprehensive analysis of the "new crimes" of rape and sexual violence against child soldiers ought to include a study of the strengths as well as the limitations of the crimes of conscription, enlisting and/or using children under the age of fifteen to participate actively in hostilities. Indeed, one of the essential elements of the "new crimes" is the specific type of victim, namely girl child soldiers. The specific characteristics is their age combined with the fact that they have participated in hostilities or have been conscripted / enlisted into armed groups. The landmark decision in the *Lubanga* case will be one of the starting points to study the expressive capacity of ICL relatively to the crimes

related to child soldiers, even though Mr. Lubanga was neither charged, nor convicted for offences of sexual nature[202].

Section II of this Chapter will examine how limitations of the expressive function have manifested within the prosecution of offences related to child soldiering, as illustrated particularly by the *Lubanga* case. This section will therefore offer insights on the expressive dangers that could also find echo in the new crimes of sexual abuses against child soldiers. The critiques around that crime, and consequently of the *Lubanga* trial, concern essentially the removal of agency from those young persons considered child soldiers as well as the exclusion of certain narratives from the court record.[203]

Section III, similarly, explores the lessons that can be learned about overcoming the expressive dangers of prosecuting acts of rape and sexual enslavement that occurred within the same armed group, this time through the example of "forced marriage", from the Sierra Leonean experience. Once again, the "bush wives" cases and the contexts in which the new crimes will be prosecuted share important similarities. These include the fact that the victims of the crime were girls who were part of an armed group, forced to perform domestic chores, and were subjected to sexual abuse by commanders and soldiers of their own armed group as well as having to engage in hostilities in most cases. As to be expected in the case of the "new crimes", the characterization of the crime in the

[202] *Lubanga* Trial Judgment, *supra* note 13, at para 606.
The Trial Chamber I decided that, although allusion to sexual violence were made by the Prosecution, throughout the presentation of its case, they did not seek to add any charges related to sexual violence during the proceedings, therefore preventing the Chamber to make any legal findings on the matter without impeding the right of the Accused. In other words, the representation on sexual violence against child soldier were not made at the appropriate stage of the proceedings.
Prosecutor v Thomas Lubanga, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute: Separate and dissenting opinion of Judge Odio Benito (14 March 2012), at para 20. [Dissenting opinion Justice Benito]
The Judge Odio Benito however wrote a dissenting opinion, concluding that sexual violence against child soldiers should be included in the criminal conduct of "use to participate actively in hostilities".
[203] Mark Drumbl, *Reimagining Child Soldiers*, (Oxford: Oxford University Press, 2012), at 51 [Drumbl 2012].

"bush wives" cases caused a broad debate among feminist scholars, concerning the appropriate infraction, whether it was the crime of "forced marriage", sexual slavery or simply slavery. Further, this section will explore feminist literature on the "bush wives" prosecutions, questioning the value of focusing on sexual harms compared to other gender violence, the reification of victimhood and the omission of certain experiences of women called "bush wives" within the wartime narrative.

Altogether, both case studies have similar lessons to offer concerning the international development of the prosecution of the "new crimes", especially around questions of agency, victimhood and the inclusion of diverse experiences within the creation of the wartime narratives. Those two particular cases also serve to confirm the expressive concerned developed above, in Chapter 1.

I. Expressive Dangers in Relation to Child Soldier Related Crimes : The *Lubanga* Trial as a Case Study

The use of children in armed conflict is an ancient phenomenon, as for sexual violence against them in the context of war. The *Additional Protocol I* (API)[204] and the *Additional Protocol II* (APII)[205] adopted in 1977 were the first international legal instruments to prohibit the recruitment of children under the age of fifteen as well as their use during hostilities, followed by a similar prohibition in the *Convention on the Rights of the Child*[206] adopted in 1989. The minimal legal age to participate in hostilities is thus a creation of the international community, which, more recently, has evolved into an international norm. An

[204] PAI*, supra* note 86, article 77(2).
[205] PAII*, supra* note 86, article art 4(3)(c).
[206] *Convention on the Rights of the Child*, adopted 20 November 1989, 1577 UNTS 3 (CRC), (entered into force 2 September 1990) art 38(2).

emblematic judicial interpretation of this prohibition can be found in the first ICC Appeals Decision issued on December 1st, 2014[207], confirming a guilty verdict rendered by Trial Chamber I on 14 March 2012[208] against Thomas Lubanga, former leader of a rebel group fighting in the eastern part of the Democratic Republic of Congo. He was convicted of two war crimes: (i) conscription and enlisting of children under the age of 15; and (ii) using children to participate actively in hostilities.[209] Mr. Lubanga therefore became the first person to be convicted of crimes related to child soldering by the ICC. The international community praised the decisions, understandably so, given how horrific this practice is.

Although the first decisions on child soldiers were issued by the SCSL[210], the *Lubanga* case is significant "in that it offers an early interpretation of key aspects of the child-soldiering generally"[211], interpretation issued by the first permanent Court. The case has also been noted for its expressive value. Drumbl states that :

> "[w]ith the international community as an audience, *Lubanga* […] fulfills an important expressive role in denouncing the conscription, enlistment, and use of child soldiers, thereby enhancing the reach and normative value of international criminal law. The *Lubanga* proceedings, as well as the SCSL judgments, serve important didactic and pedagogical goals of teaching the international community about the tragedy of child soldiers."[212]

The recognition of the human rights and IHL violations by former members of armed groups recruiting and actively using children to participate in hostilities by an international

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[207] *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01 /04-01/06, Decision on Appeal Against Conviction, (1 December 2014) (ICC Appeals Chamber). [*Lubanga* Appeals Decision]
[208] *Lubanga* Trial Chambear, supra note 13.
[209] Rome Statute, *supra* note 8, Article 8(e)(vii).
[210] *Prosecutor v. Fofana* (CDF), Case No. SCSL-04-14-T, Judgment (Spec. Ct. Sierra Leone, Trial August 2, 2007), at <http://www.sc-sl.org/
[211] Mark A. Drumbl, "*Prosecutor V. Thomas Lubanga Dyilo*. Décision sur la confirmation des charges. Case No.ICC-01/04-01/06" (2007) 101:4 AJIL 841, at 846. [Drumbl 2007 B]
[212] *Drumbl* 2007 A*, supra* note 26, at 846.

criminal court is strengthening accountability for international crimes.[213] The expressive theory of law is served, in some ways, by the fact that combatants are held accountable for their actions.[214]

Nonetheless, the international legal approach to the phenomenon of child soldering is reductive and lacks nuance.[215] As a result, the normativity emerging from those crimes fails to track expressive aspirations of its proponents.[216] The legal concept of child soldiers is problematic in that child soldiers are pictured in a stereotypical way depriving them of their agency and establishing an imperfect wartime record.

A. The Normative Value of the *Lubanga* Decisions

i. The Overstated Equation Between Accountability and Norm Expression

It can be argued that the *Lubanga* Decision has a certain expressive potential.[217] The prohibition around the conscription and use of child soldiers is defined and strongly denounced by the international community. This decision clearly had as a purpose to reinforce international norms against using children in wars. It was constructed in this sense and received by the international community as such. The ICC, as an institution, sought to condemn the practice of child soldering and demonstrate that this norm was universal, and not only a Western conception of childhood.

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[213] *Damaska* 2008, *supra* note 35, at 345.
[214] Elizabeth S. Anderson & Richard H. Pildes, "Expressive Theories of Law: A General Restatement" (2000) 148 U PA L REV 1503, at 1513. (footnotes omitted)
[215] Drumbl 2012, *supra* note 203, at 101.
[216] Drumbl 2012, *supra* note 203, at 38.
[217] Triestino Mariniello, "*Prosecutor* v *Thomas Lubanga Dyilo*: The First Judgment of the International Criminal Court's Trial Chamber" (2012) 1 International Human Rights Law Review 137, at 146-147; See also Drumbl 2012, *supra* note 203, at 846.

That being said, Drumbl suggests that the deterrent effect of international prosecutions against recruiters and commanders using child soldiers is overstated and contributes to diverting the attention from more efficient avenue or justifications to put an end to the practice of child soldering.[218] By focusing on the deterrent effect of international prosecution, penal responsibility and jail punishment as a sentence, instead of focusing on the communication of a norm or on a "sensitization about the criminal aspect of recruitment of children"[219], the prosecutors have placed more weight on prohibition itself than on any real effort toward prevention. The norms that are created and the changes that could result from those norms are greatly restrained. Drumbl wonders if unravelling the reasons for enrolling child soldiers would "help clarify the sources of child soldering" and argues that "[s]uch clarification is necessary for the success of dissuasive efforts and effective sanction of adult commanders."[220] The legal imagination originating from the international legal community's discourse around child soldiers annihilates the reality of youth voluntarism.[221] Simply blaming child soldier recruiters without questioning the sources of this phenomenon might not communicate a comprehensive message and truly transform the practices on the ground. Experts have testified in the *Lubanga* trial, for example, that consent of children to engage in hostilities was not relevant[222], argument that was upheld by the Court. Nevertheless, the reasons for children to enroll in an armed group are various, and they can range from an orphan's need for security, to the need for revenge after having seen family members killed in front of their own eyes. As Karanja

[218] *Ibid*, at 135-136.
[219] The Redress Trust, "Victims, Perpetrators or Heroes? Child Soldiers Before the International Criminal Court", (2006), online:< https://www.essex.ac.uk/armedcon/story_id/000403.pdf>, at 18. [citations omitted]
[220] Drumbl 2012, *supra* note 203, at 12.
[221] *Ibid*, at 13.
[222] *Ibid*, at 155, referring especially to Special Representative Coomarawany *amicus curiae.*

has argued, “unless political, social and economic conditions that engender armed hostilities are eliminated”, the recruitment of children by governmental armed forces or non-state armed groups will continue.[223] There are also different consequences in the aftermath of an armed conflict for children who have voluntarily enrolled, also depending on the armed group.[224] Thus, ignoring the structural and societal reasons behind the phenomenon is unlikely to bring genuine changes.

ii. Domestic Chores: Between Protection and Norm Expression

A significant tension that appeared in the *Lubanga* case revolved around the interpretation and the scope of the concept of direct participation in hostilities. In international humanitarian law, civilians who actively participate in hostilities lose their protection, and consequently become a legitimate target to the opposite armed group. Courts interpreting IHL have therefore considered it crucial to adopt a narrow interpretation to protect the largest number of civilians. In the context of the international criminal responsibility for using children in armed conflict, in contrast, narrowly construing participation in armed conflict would limit the protection afforded to children used in armed conflict. That narrow interpretation, in the context of child soldiers, however, involves a risk of limiting the scope of criminal law, more specifically concerning child soldiers carrying domestic chores. The Appeals Chamber in the *Lubanga* decision responded to this tension by narrowly construing the concept of “participation in hostilities”, in order to

[223] Stephen Kabera Karanja "Child Soldiers in Peace Agreements: The Peace and Justice Dilemma!" (2008) 8:3 Global Jurist 1, at 38.
[224] Drumbl 2012, *supra* note 203, at 155.

guarantee a larger protection in international humanitarian law, but thereby excluded many children involved in armed conflict from being covered by ICL.

The crime of using children in an armed conflict not of an international nature is provided by Article 8(2)(e)(vii) of the Rome Statute. This crime adopted the expression to "actively participate in hostilities" as opposed to "direct participation in hostilities" found in IHL in APII's Article 4(3)[225] that specifically prohibits the use of children in hostilities. Traditionally, the expressions "direct" and "active" participation in hostilities were perceived as synonymous within the language of IHL.[226]

The ICC first Trial Chamber ruled on the debate around the definition and scope of what constitutes "active participation in hostilities" for child soldiers. The Court held that the expression "active participation in hostilities" was preferable to "direct participation in hostilities", so as to grasp wider types of involvement in an armed conflict, keeping in mind the tasks that are performed by children. The Trial Chamber I stated that :

> [t]he extent of the potential danger faced by a child soldier will often be unrelated to the precise nature of the role he or she is given. Those who participate actively in hostilities include a wide range of individuals, from those on the front line (who participate directly) through to the boys or girls who are involved in a myriad of roles that support the combatants. All of these activities, which cover either direct or indirect participation, have an underlying common feature: the child concerned is, at the very least, a potential target. The decisive factor, therefore, in deciding if an "indirect" role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target. [227] [emphasis added]

[225] APII, *supra* note 86, article 4 (3)(c).
[226] Joshua Yuvaraj, "When Does a Child 'Participate Actively in Hostilities' under the Rome Statute? Protecting Children from Use in Hostilities after Lubanga" (2016) 32 Utrecht J of International and European Law 69, at 70. (footnote omitted) [Yuvaraj 2016]
[227] *Lubanga* Trial Judgment, *supra* note 13, at para 628. [citations omitted]

The Trial Chamber I concluded that the girls assigned to perform domestic chores, together with other tasks, were exposed to dangers, therefore making them become potential legitimate target since they participate in hostilities.[228] The interpretation of participation in hostilities adopted by the ICC was therefore a broad one.

The Appeals Chamber overruled this finding, stating that the Trial Chamber I erred in law.[229] The Appeals Chamber clearly stated that girls performing domestic work were not participating in hostilities, because of the lack of connection between the tasks accomplished and the military activities.[230] In making this assessment, the ICC is sending a complicated, even contradictory, message. Testimonies from former girl child soldiers demonstrated that sexual violence was part of the everyday life, as well as dangers, chores, physical and psychological violence.[231] The Appeals Chamber, in an effort to protect those girls from being considered legitimate military target, excluded them from the scope of a crime.[232] Nevertheless, those girls remain legitimate collateral damage if they are located near potential legitimate military target that respect the basic rules and principles of IHL, such as the principle of proportionality.

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[228] *Ibid*, at para 882.

[229] *Ibid*, at para 340. "The Appeals Chamber considers that the Trial Chamber erred in law in finding that "[t]he decisive factor […] in deciding if an 'indirect' role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target". However, the Appeals Chamber finds that the Trial Chamber did not err in finding that the expression 'to participate actively in hostilities', imports "a wide interpretation to the activities and roles that are covered by the offence of using children under the age of 15 actively to participate in hostilities". (footnotes omitted) In assessing whether an activity or role falls within the scope of article 8 (2) (e) (vii) of the Statute, it is necessary to analyse the link between the activity for which the child is used and the combat in which the armed force or group of the perpetrator is engaged."

[230] *Ibid*, at para 339. "Finally, although the Trial Chamber concluded from its assessment of the evidence that "girls under the age of 15 were used for domestic work, in addition to the other tasks they carried out as UPC/FPLC soldiers", it did not ultimately find that this equated to use to participate actively in hostilities."

[231] *Ibid*, at paras 890-896.

[232] Diane Marie Amann, "Children" in William A. Schabas ed., *The Cambridge Companion to International Criminal Law*, (Cambridge: Cambridge University Press 2016), at 264. [Amann 2016]

As a result, the socio-pedagogical role of ICL is impeded. Unacceptable human rights violations are perpetrated, but they fell into a gap that sends a narrow message to the international community.

It has to be noted that Justice Odio Benito, in her separate and dissenting opinion in the first instance, concluded that the criminal conduct to "use to participate actively in hostilities" for child soldiers could actually include child soldiers performing sexual services/sexual abuses.[233] Joe Tan argued that this finding could be detrimental to girl soldiers, since it would enlarge the definition of "active participation in hostilities", and may cause them to lose their civilian protection or the protection allowed to person *hors combat*.[234]

Ana Martin Beringola pointed out the irony behind the prohibition of using child soldiers in warfare in ICL, since the purpose of the crime is "to protect children from being involved in warfare, [whereas] this war crime cannot ensure the protection of child soldiers from sexual slavery, including within their own group".[235]

In the end, the legalities around the definition of "active participation in hostilities" culminates in reducing the scope of the child soldiering crimes, which both (a) denies girls who do domestic chores or are subjected to sexual exploitation in the service of warfare protection under ICL, leaving them with the only protection against sexual abuses, which has traditionally been overlooked for members of an armed group, and (b) presents a distorted picture by excluding these girls from the narrative of child soldiers.

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[233] Dissenting opinion Justice Benito, *supra* note 202, para 20.
[234] Joe Tan, "Chapter 6: Sexual Violence Against Children on the Battlefield as a Crime of Using Child Soldiers: Square Pegs in Round Holes and Missed Opportunities in Lubanga." (2012) YB Intl Human L 15, at 141.
[235] Ana Martin Beringola, "Ensuring Protection of Child Soldiers from Sexual Violence: Relevance of the *Ntaganda* Decision on the Confirmation of Charges in Narrowing the Gap", (2016) 8 Amsterdam L F 58, at 59. [Beringola 2016]

B. The impact of the Stereotypical Approach of Child Soldiers on the Historical Narrative

i. The Reification of Victimhood

Child soldiers have been depicted in many ways, both as young irreparable, psychologically devastated youths and as faultless, passive victims forced to participate in hostilities, rescued by humanitarian organizations following the end of armed conflicts.[236] Those two images are connected with a discourse of victimhood and are highly influenced by Western opinions and values in order to avoid post-war punitive policies for those children.[237] Child soldiers have also been depicted as bloodthirsty children, bad seeds, little evils; images unfortunately highly informed by racial stereotypes.[238] Last, child soldiers have also been depicted as heroes, especially in the context of independence war, though this image is not a common one in modern armed conflicts.[239]

Owing to the above, Drumbl is right to ask the extent to which former child soldiers are well served by those stereotypes, especially the very typified image of the passive children that never chose to participate in hostilities or enrolled within an armed group.[240] Those stereotypes emanate from the international communities and are afterward reflected by ICL.[241] It is important to clarify that the idea behind Drumbl's argument is not to call for criminal prosecution of child soldiers, in the same way that this is not the

[236] Drumbl 2012, *supra* note 203, at 6-7.
[237] *Ibid*, at 6-11.
[238] *Ibid*, at 8.
[239] *Ibid*, at 7-8.
[240] *Ibid*, at 1-2.
[241] *Ibid*, at 35-40.

rationale behind the arguments that are presented in this thesis.[242] However, Drumbl comments on the discomfort of the international community around opening the door to prosecuting child soldiers, discomfort that evacuates the very important question of accountability.[243] A discourse that fails to engage with the accountability of child soldiers themselves has consequences, such as silencing actions from child soldiers, or the multiple factors that have motivated them to join the armed forces or an armed group, as well as depriving them of their agency and rendering them dependent on humanitarian programs.[244] Further, such a discourse may lead children who have engaged with armed groups believe they have to behave as helpless and dependent in order to obtain help, which bias narrative records, therefore creating a partial account of their experiences.[245]

The elaboration of victimhood around those stereotyped images of the passive and weak victim, as demonstrated above with feminist theory[246], have impacted the aftermath of the violations. The victims are confined in their roles as powerless, and perpetuate this image through the post-war era.[247] Indeed, the programs that are created, especially to help child soldiers to reintegrate their lives were deficient, in part because of the fact that they were based on "passive victim image".[248] Other programs have been disadvantageous for girls specifically, due to stereotypes reinforced by narrow and distorted conceptions of what a child soldier truly is. For instance, in Sierra Leone, former child soldiers received help only if they could give back their weapons, which many girls

[242] *Ibid*, at 21. On this point, Drumbl concurs with the dominant international ideology, but not for the same reasons.
[243] *Ibid*, at 103.
[244] *Ibid*, at 37.
[245] *Ibid*, at 51. See also Alcinda Honwana, *Child Soldiers in Africa*, (Philadelphia: University of Pennsylvania Press, 2006), at 15.
[246] Chapter 1, Section IV.
[247] Engle 2005, *supra* note 139, at 812.
[248] Drumbl 2012, *supra* note 203, at 168-175.

among the armed group did not possess. Also, according to Park, those programs did not consider the specific needs for girls that were subjected to sexual violence.[249]

ii. The Child Perpetrator's Dilemma

The question of accountability of child soldiers themselves is very controversial. The development of the Dominic Ongwen's Case at the ICC[250] might bring some light on this issue in a near future, since Ongwen is charged of many war crimes and crimes against humanity, including enrolling and using child soldiers. What is interesting about this case, is that Ongwen started his military career while he was still a child, and worked his way up to the top of his armed group. This trial has raised a lot of questions, such as the moral question of punishing a man who was a child soldier himself.[251]

In the first place, the victimhood discourse, or as Drumbl calls it the "faultless passive victim" image, flattened a "'three-dimensional status of child soldiers as the perpetrator, witnesses, and victims into a two-dimensional portrayal of child soldiers as victims and witnesses alone."[252] By doing so, the international legal community is creating a record that does not correspond to the reality, and this shortcoming has the potential to generate many consequences, such as impeding the children's agency, but also lessening the accountability of the armed group about crimes that have been perpetrated against populations.

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[249] Park 2006, *supra* note 170, at 323.
[250] Domic Ongwen is the first accused to be tried as a perpetrator for crimes he committed while being a commander of the armed group he incorporated as a child soldiers. Fanny Leveau, "Liability of Child Soldiers Under International Criminal Law" (2013) 4:1Osgoode Hall Rev of L & Policy 36, at 59. [Leveau 2013]
[251] *Ibid*.
[252] Drumbl 2012, *supra* note 203, at 20.

As a matter of fact, the participation in hostilities by those children is ignored. The fact that they were combatants is overlooked and is not a part of the historical record that is put together by international tribunals. Those children were not only victims, but they have committed atrocities as well, which has to be taken into consideration in the wartime narrative, without insinuating that children should be accountable for the crimes they have committed, and leading to more criminal prosecutions. Instead of the image of child soldiers as passive victims, it would be more appropriate to perceive them as participants, or "partial victims", although this is not necessarily a legal paradigm possible under ICL. This shift from a passive image to a more dynamic one could prevent the composition of a partial or non-representative wartime narrative, as well as enhancing the possibilities for a better reintegration of those former child soldiers in their respective lives.[253]

In sum, the victimhood discourse of child soldiering reflected in the *Lubanga* case denies children's agency and negatively impacts the expressive capacity of ICL. The ICC's failure to properly contextualize the crime impeded norm expression and coherent expression of a wartime narrative. The focus on the deterrent effect of those prosecutions, coupled with the victimhood discourse, "may favor superficial explanations of mass atrocity that frustrate aggrieved communities and survivors by failing to reflect actual lived experienced.[254]" The faultless victim discourse denying the agency of child soldiers is detrimental to the norms that emerge from international tribunals, the genuine reasons behind the scourge is never addressed, and thus the situation does not improve on the field.

[253] *Ibid*, at 96-97.
[254] *Ibid,* at 136.

The ICC is therefore sending a contradictory message concerning child soldiers in the *Lubanga* case, which will greatly influence the prosecution of the "new crimes" that will be discussed in Chapter 3.

II. Overcoming Expressive Lacunas: The Sierra Leone "Bush Wives" Prosecutions as a Case Study

The SCSL was a hybrid tribunal established in 2002, composed of both international and national judges, prosecutors and defense attorneys, following a request made in 2000 by the Government of the Sierra Leone to the United Nations, after a bloody civil war that lasted for a decade.[255] The *Lomé Peace Agreement* signed on 7 July 1999 provided for the creation of a Truth and Reconciliation Commission as a parallel forum, also established in 2002.[256] The Court closed in 2013.

The Trial Chambers and Appeals Chambers of the SCSL were the first to convict former military commanders of the crime of "forced marriage", articulated as a crime against humanity under the category of "other inhumane acts", contained in Section 2(i) of the SCSL Statute[257]. The crime of "forced marriage" was not a crime recognized by ICL prior to the SCSL rulings.[258] This section will show how judges from the SCSL, in

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[255] *The Special Court for Sierra Leone and Residual Special Court for Sierra Leone*, Freetown and The Hague, online: <http://www.rscsl.org/>

[256] Sierra Leone Truth and Reconciliation Commission Report, *The mandate of the TRC,* Vol. 1, Chap. 1, online: <http://www.sierraleonetrc.org/index.php/view-report-text-vol-1/item/vol-one-chapter-one?category_id=19>, paras 1-2.

[257] Statute of the Special Court for Sierra Leone, Security Council Resolution 1315 (2000), (14 August 2000), [SCSL Statute], Article 2(i).

[258] *Bunting* 2012, *supr*a note 143, at 167. The crime was charged under the crime of 'other inhumane act', since 'forced marriage' was not a listed crime. See also *Prosecutor v Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, SCSL-04-15-A, Appeals Judgment (26 October 2009) (Special Court for Sierra Leone) online: UNHCR http://www.unhcr.org/refworld/docid/4ae9b31c2.htm, at para 735 [RUF Appeals Decision].
The Appeals Chamber described the offense in those words:

establishing a separate crime of "forced marriage", played a role in creating a historical record. An overview of the main decisions on "bush wives" will demonstrate how this crime was prosecuted, which will be followed by a feminist analysis of those decisions in the next section.

At first, the majority of Trial Chamber II in the *AFRC* case, ruled that the Prosecution did not provide the Court with sufficient evidence that the crime of "forced marriage" was not a subsumed crime under sexual slavery. Therefore, the Court rejected this charge as a separate crime against humanity from sexual slavery.[259] The Majority concluded that the crime of "forced marriage" was not distinct from the crime of sexual slavery since the crime was mostly about the ownership link and the sexual aspect, while the marital status was merely relevant.[260] Notwithstanding that conclusion, the Majority acknowledged the existence of gender stereotypes in the Sierra Leone prior to the civil war and their subsequent impacts and consequences in wartime.[261]

In her partly dissenting opinion, contrary to the Majority, Justice Doherty was satisfied that the evidence provided by the Prosecution in relation to the conduct element of "forced marriage" was of sufficient gravity to meet the threshold required by the residual

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"With respect to forced marriage, the Appeals Chamber recalls that the offence 'describes a situation in which the perpetrator[,] ... compels a person by force, threat of force, or coercion to serve as a conjugal partner.' The conduct must constitute an "other inhumane act," which entails that the perpetrator: (i) inflict great suffering, or serious injury to body or to mental or physical health; (ii) sufficiently similar in gravity to the acts referred to in Article 2.a through Article 2.h of the Statute; and that (iii) the perpetrator was aware of the factual circumstances that established the character of the gravity of the act. As a crime against humanity, the offence also requires that the acts of the accused formed part of a widespread or systematic attack against the civilian population, and that the accused knew that his crimes were so related."

[259] AFRC Trial Judgment, *supra* note 112, at paras 703-707. Describing the dissenting opinion, see Neha Jain, "Forced Marriage as a Crime against Humanity", (2008) 6 J Intl Crim Just 1013, at 1019, 1032. [Jain 2008] Jain explains that: "The Opinion stressed the unique psychological suffering caused by the use of the label 'wife', which could lead to stigmatization and rejection of the victims by their families and community. This could cause prolonged mental suffering by negatively impacting the ability of the victim to re-integrate into the community."

[260] AFRC Trial Judgment, *supra* note 112, at para 704.

[261] *Ibid*, at para 10. See also Rachel Slater, "Gender Violence or Violence Against Women? The Treatment of Force Marriage in the Special Court for Sierra Leone" (2012) 13 Melb J Intl L 732, at 749. [Slater 2012]

category of "other inhumane acts".[262] She came to the conclusion that the crime of "forced marriage", contrary to the crime of enslavement and sexual slavery, did not always involve physical violence, but was mostly characterized by mental and moral suffering.[263] Considering that the conduct of "forced marriage" was not a duplicate of sexual slavery, nor of enslavement, and was of "similar gravity and nature to the other enumerated crimes against humanity", as well as that "the act causes serious bodily or mental harm", Justice Doherty concluded that "forced marriage" was a distinct crime against humanity.[264] She also reviewed the international and domestic laws as well as the jurisprudence concerning marital relationships and found that the consent of both spouses was required for marriage to be legal.[265] In the case of "bush wives", she posited that the required consent was absent, and so she would have convicted the accused of "forced marriage".[266]

In 2008, the Appeals Chamber overturned the Decision of the Trial Chamber on the crime of "forced marriage" and concluded that the evidence presented before the court in relation to that conduct amounted to a crime against humanity under the category of "other inhumane acts".[267] The Court determined that the forced marital status on girls and women resulted in a "long-term social stigmatization" for the survivors,[268] in a similar finding from Justice Doherty.

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[262] *Prosecutor v Alex Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, SCSL-04-160T, Trial Judgement, (20 June 2007), Partly dissenting opinion of Justice Doherty on count 7 (sexual slavery) and count 8 ('forced marriage'). [Partly Dissenting Opinion Justice Doherty], at para 57.
[263] *Ibid*, at paras 69-70.
[264] *Ibid*, at para 71.
[265] *Ibid*, at paras 58-68.
[266] *Ibid*, at paras 69-70.
[267] *The Prosecutor v Alex Tamba Brima*, SCSL-2004-16-A, Appeals Judgment (22 February 2008), at 199-203. [AFRC Appeals Judgment]
[268] *Ibid*, at paras 197, 199.

One year passed between the Appeals Judgment in the *AFRC* case and the Trial Chamber I came to a similar decision in the case of *The Prosecutor v Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, the Revolutionary United Front case ('RUF case'). The accused in this case were convicted for the crime of "forced marriage" as well.[269]

In short, the factual basis for those convictions was the fact that women were subjected to sexual violence and were forced into a conjugal association with rebel soldiers without explanation of what was implied as marital status.[270] According to survivor testimonies, their responsibilities included cooking, bearing children, and supporting the rebel to whom they were assigned to and by whom they were sexually abused, which sometimes could be more than only one soldier.[271] The Trial Judgment in the *RUF* case, in coming to a similar conclusion as in the *AFRC* Appeals Judgment, later stated that the use of "bush wives" was "important to the *RUF* both as a tactic of war and means of obtaining unpaid logistical support for troops".[272]

It is also interesting to point out that in the case of *The Prosecutor v Norman, Fofona and Kondewa*, *Civil Defense Forces* case ('CDF'), the Prosecutor sought leave to amend the indictments they first filed against the accused to add charges of rape, sexual slavery and "forced marriage" (under 'other inhumane acts') as crimes against humanity. This request was denied by the Trial Chamber I as well as by the Appeals Chamber, even though the Prosecutor had argued about the importance of prosecuting gender-based

[269] *The Prosecutor v Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, SCSL-04-15-T, Judgment (2 march 2009) [RUF Trial Judgment].
[270] AFRC Trial Judgment, *supra* note 115, at 704.
[271] *Bunting* 2012, *supra* note 143, at 172 and 174. Besides, the marital union, as it was taking place in the 'bush', would not have been considered legally married in Sierra Leone, neither under customary nor civil law. For a more thorough description and examples of histories, see Bunting, which conducted a field research in Sierra Leone, Liberia and Uganda.
[272] RUF Trial Judgment, *supra* note 269, para 2107.

violence for the historical record to be accurate and represent the experience of women in the Sierra Leonean war.[273] The Trial Chamber's main reason for rejecting the prosecution's request was the defendant's right to be informed in due time of the charges laid against them. In light of the above, despite the Prosecutor efforts, prosecutions are a limited tool for creating a historical record, as other considerations, such as the accused's fair trial rights, may outweigh judges' roles in writing a comprehensive and gender-sensitive historical record. That said, Justice Winter wrote a partly dissenting opinion from the majority of the Appeals Chamber, in which she stresses the role of the Special Court with regards to the prosecution of sexual violence.[274]

The *Taylor* trial at the SCSL did touch upon sexual slavery against child soldiers, although it was not labelled as such. The SCSL found that a girl soldier who was forced to provide sexual services to members of her own armed group "was not taking an active part in the hostilities at the time of the sexual violence" and found that it was a war crime.[275] The SCSL referred to a witness as both child soldier and a sexual slave.[276]

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[273] Valerie Oosterveld, "Lessons from the Special Court for Sierra Leone on the prosecution of gender-based crimes", (2009) 7:2 J of Gender, Social Policy & the L 407, at 426. [Oosterveld 2009] See also *Prosecutor v Samuel Hinga Norman* & al, Decision on the Prosecution Appeal Against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, SCSL-04-14-T-319 (17 January 2005) (CDF Appeals Chamber); See also *Prosecutor v Samuel Hinga Norman & al.*, Decision on Prosecution Request for Leave to Amend the Indictment, SCSL-04-14-PT-113 (20 May 2004).

[274] *Prosecutor v Moinina Fofana & al.*, SCSL-04-14-A, Appeals Judgment (Justice Winter, partially dissenting), at paras 77, 82-85.

[275] *Taylor* Trial Judgment, *supra* note 114, at para 1207.

[276] Grey Blog 2014, *supra* note 117. Grey maintains that : "To many, the Pre-Trial Chamber's construction of a binary in which a child soldier is *either* subjected to sexual violence *or* taking direct part in hostilities may seem logical. The construction of this binary also serves a practical purpose: it enables the Prosecutor to prosecute Bosco Ntaganda for the alleged sexual abuse of child soldiers in the UPC-FPLC, a useful development given the missed opportunities in *Lubanga*. More broadly, it allows the ICC to prosecute sexual violence perpetrated against child soldiers by members of the same group, by charging this violence as war crimes under the Rome Statute. These are important steps forward for gender justice.
However if the aim is also to recognize the survivors' experiences of the crimes and promote a nuanced understanding of sexual violence, it may be worth exploring other ways to prosecute sexual violence against child soldiers by their commanders, in future cases before the Court."
See also a discussion on the topic by Amann, *supra* note 232, at 269.

A- The Feminist Debate around the Appropriate Infraction to Tackle Gender-Based Violence in Sierra Leone

The judicial decisions canvassed above in the "bush wives" cases generated debate among feminists over whether the crime of "forced marriage" is the appropriate one to reflect the breadth of women and girls' experiences who stayed within rebel groups in Sierra Leone. As widely exposed in the previous Chapter, the prosecution of sex crimes requires great prudence, given the performative nature of criminal law and its shortcomings regarding the prosecution of gender-based violence. In addition, a discussion on sexual violence in the context of the Sierra Leonean conflict shares some similarities with the DRC's conflict and the alleged violations in the *Ntaganda* case, which we will consider in our discussion in Chapter 3. Therefore, questioning if the scope and definition of this type of crime is relevant to avoid repeating mistakes.

Every feminist scholar who wrote on the issue would have recognized the seriousness of the crime committed against the women called "bush wives" by classifying it as a crime against humanity. They differed, however, on which categorization of the harms experienced by women survivors was more suitable to convey a full narrative of the women's suffering, and whether that suffering ought to be qualified as "forced marriage", sexual slavery or simply enslavement. For the purpose of this work, arguments in relation with the "bush wives" cases will be presented and detailed in order to be contrasted with potential feminist arguments about the "new crimes" in the *Ntaganda* case in Chapter 3.

i. Other Crimes Against Humanity of "Forced Marriage"

The scholars who applauded the decisions of the SCSL to convict former militiamen of the crime of "forced marriage" mostly argued that the stigma associated with the forced marital status had to be acknowledged and consequently the multiple dimensions of the harms that results from this situation.[277] In many scholars' opinions, the crime of "forced marriage" was the appropriate crime to reflect all the consequences associated with the imposition of a marital status in the specific context of the Sierra Leone. Prosecuting this crime exclusively as sexual slavery or enslavement would leave aside some aspects of the story, outside of the sexual dimension itself, that is the result of gender violence. In other words, the historical record would not be complete. According to Amy Palmer, framing this crime within the context of *marriage* had important consequences for women in the Sierra Leone:

> The distinction between forced marriage and sexual slavery is prevalent in the conjugal duties the victim is forced to fulfill. […] There are similarities between forced marriage and sexual slavery, because the conjugal status is imposed on the female through coercion or threats. However, there are differing mental and psychological elements of the effect the label of "wife" has on the female. There may be diminished capacity on behalf of the female to leave her "husband". The female may also feel societal pressure beyond the concern that accompanies raising children from the marital type union. She may be unable to reintegrate into her family and community because she bears the stigma of having been married to a rebel and having assisted in rebel activities. Even today, an unknown number of females still remain with their rebel husbands despite the fact the conflict is over.[278]

[277] Slater 2012, *supra* note 261, at 755. See also Micaela Frulli, "Advancing International Criminal Law : The Special Court for Sierra Leone Recognizes Forced Marriage as a 'New' Crime Against Humanity", (2008) 6 JICJ 1033, at 1036. [Frulli 2008]

[278] Amy Palmer, "An Evolutionary analysis of gender-based war, crimes and the continued tolerance of 'forced marriage'"(2009) 7 Northwestern J of Intl Human Rights 133, at 134, at 134. [Palmer 2009] [Footnotes omitted]

Moreover, Palmer suggested that the acknowledgment of the "forced marriage", so as described above, "as a crime against humanity sends a profound message that the exploitation of a weaker gender group during wartime is a criminal act under international law."[279]

This element was an important argument made by Justice Doherty in her partial dissent in the *AFRC* trial judgment, based on the prosecutor's expert evidence presented at trial.[280] The Appeals conviction in the *AFRC* case mostly followed the reasoning of Justice Doherty's arguments.[281] That said, the stigma and the gender dimensions of the crime of "forced marriage" were barely invoked in the *RUF* case, although the Defendants were found guilty of having perpetrated the crime of "forced marriage".[282] Neha Jain similarly claims that the decisions issued by the SCSL regarding "forced marriage" demonstrated that there was more than solely a sexual dimension to the suffering of Sierra Leonean women that had been abducted and forced into conjugal association by armed groups. The SCSL was thereby setting "a welcome precedent for the prosecution of other gender crimes in international law that are of equal gravity".[283] Valerie Oosterveld shared a similar view to Jain. She questioned the majority in the *AFRC* Trial Chamber focus on the sexual aspects of the act, that reduced the complex reality experienced by women in the *AFRC* militia and left aside "the broader socio-economic aspects of gender-based crimes – in the case of "forced marriage", the non-sexual aspects of the crime […]".[284] Oosterveld also examined the legal mistake made by the *AFRC* majority Trial

[279] *Ibid.*
[280] Partly Dissenting Opinion of Justice Doherty, *supra* note 262, paras 16, 23-34, 36.
[281] AFRC Appeals judgment, *supra* note 267, paras 175-203.
[282] RUF Trial Judgment, *supra* note 269, at paras 164-172,
[283] Jain 2008, *supra* note 259, at 1032.
[284] Valerie Oosterveld, "The Special Court for Sierra Leone, Child Soldiers and Forced Marriage: Providing Clarity or Confusion?", (2007) 45 Can YB Intl Law 131, at 155.

Chamber division of the act of "forced marriage" in sexual and non-sexual dimension. That mistake led the Chamber to categorize the sexual aspect of the crime as an existing crime of rape and sexual slavery, and to reject the rest of the acts, the non-sexual part, as act of insufficient gravity to be charged under the crime of "other inhuman act".[285] It can be said the above in terms of the norm expression, prosecuting a wider range of gender violence, other than predominantly of sexual nature, might be considered as a great advancement in promoting gender equality.

Slater, on the other hand, considers the "forced marriage" convictions a missed opportunity because the SCSL did not do enough to recognize the gender nature of the crime. She rightly argues that, although the previously mentioned decisions underline the sexual and non-sexual dimension of the crime of "forced marriage", those decisions do not underline explicitly the consequences of the crime of "forced marriage". Slater considers that the approach preconized by Justice Doherty in her *AFRC* Trial dissent, meaning by underlying the gender nature of the crime to be the correct one. However, this perspective was not sufficiently exploited in the subsequent judgment of the SCSL, in her opinion.[286] She argues that "the victim's status as a woman and 'wife' were central to the abuse and consequently transformed the abuse from violence against women into gender violence". This perspective on "forced marriage" allows us to acknowledge the "influence of constructed roles of 'women' and 'wife' and argues that ownership stems this socially constructed role", which cannot be grasped by the crime of enslavement.[287] She posits that this crime highlights the preexisting sense of ownership of man over

[285] *Ibid,* at 156.
[286] Slater 2012, *supra* note 261, at 733, 742.
[287] *Ibid*, at 742-743.

women in the Sierra Leonean culture in a pre-war context and rather than acknowledging "forced marriage" as a collateral consequence of war.[288] To that effect, Slater explains how to describe a gender, and accordingly, what is a gender crime:

> Gender is, then, a normative concept defining what is expected of men and women and their relative positions and roles in society, against which actual experiences are measured. Gender violence is violence connected to these socially constructed roles.
>
> […]
>
> A woman may be subjected to violence as a woman or because of her gender. Equally, a man might be subjected to violence as a man or because he is a man. Only the latter is gender-related persecution or 'gender-specific violence'.[289]

She also underlines the capacity of ICL to send messages and influence behaviours, and argues that, by recognizing the gendered nature of the harm perpetrated in "forced marriage", the result could enhance gender equality.[290]

Moreover, Slater rightly discusses the necessity to clearly name the type of violence a court is dealing with to "accurately reflect real experiences, to clearly see the existing problems and to combat such problems in the future [..]"[291]. That being said, her work on "forced marriage" is not a critical assessment of the crime itself and wrongly assesses the critiques addressed by other feminist scholars. Slater accuses feminists who consider the term enslavement to better reflect harm experienced by girls and women in Sierra Leone to be worried only about the potential distinction the crime of forced marriage could create between female and male violence. She does acknowledge

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[288] *Ibid*, at 743. Slater further argues that "[v]iewing forced marriage as a gender crime points towards the influence of constructed roles of 'woman' and 'wife' and argues that ownership stems from this socially constructed role. This establishes a different perspective to labelling forced marriage as a gender-neutral crime of enslavement where the ownership stems from actual physical control over the victim."
[289] *Ibid*, at 746. [Citations omitted]
[290] *Ibid*, at 745.
[291] *Ibid*, at 747.

the problem of oversimplification but chose what was in her view the lesser of two evils. Moreover, Slater touches upon the critique addressed by Buss and the concept of "gender grammar of harm", but does not apply it to her analysis.[292]

In Rosemary Grey's opinion, the approach by the SCLS was a successful one, since it allowed us to have a full picture of the sexual violence against girls that were captured by armed groups. However, Grey considered that the SCSL did "not specifically highlighted the issue of sexual violence against girl soldiers, as such."[293]

The conception of "forced marriage" as a distinct crime from rape and sexual slavery can help avoid reducing the harm experienced to the unique sexual dimension, and therefore avoids the problem of essentializing women. Moreover, the prosecution of this crime as being of a similar gravity the other crimes against humanity enumerated in the SCSL's Statute, adds an additional grain of sand toward achieving the ultimate goal of gender equality and ending gender violence.

At first sight, following those arguments, the crime of "forced marriage" would appear as a positive way to express substantive norms. That being said, in many respects, this crime remains problematic, and the scholars in favour of this crime barely engage with the problems that will be explored here, in Part II-B below.

ii. The Crime Against Humanity of Sexual Slavery

Other scholars have advocated that the appropriate crime to grasp the gender violence endured by the victims and survivors of the conflict in Sierra Leone is the crime of sexual

[292] *Ibid*, at 747, for the entire discussion on the subject, see also pages 743, 745, 749.
[293] Grey 2014, *supra* note 114, at 608.

slavery. They argue that this crime would better encompass the coercive circumstances, the powers attached to the right of ownership over women as well as the sexual dimension of the crime. Indeed, Barbara Bedont and Katherine Hall-Martinez claimed that "[t]he term sexual slavery is preferable to enslavement and enforced prostitution because it includes the sexual aspect of the crime of slavery, while also highlighting the coercive element involved where women are forced to provide sexual services."[294] Moreover, the concept of "forced marriage" was decried by Karine Bélair, according to whom this concept would be an understatement and "the situation of abducted Sierra Leonean women were, and in some cases still is, one of sexual slavery, poorly veiled by the euphemism 'marriage'."[295] What concerned Bélair with the crime of "forced marriage" is that, in her view, the relationship between the "bush wives" and their "husbands" it had nothing to do with marriage.[296]

iii. The Crime Against Humanity of Enslavement

A third group of scholars considered the crime of enslavement to be the most appropriate, claiming that the central element that should be considered is the respect for the survivors' agency. Annie Bunting argues that the harms suffered by girls and women in Sierra Leone should not be classified as "forced marriage", but instead as enslavement. The main reason is connected with the need to protect survivors' agency[297], as well as the gravity

[294] Bedont & Hall-Martinez, *supra* note 7, at 71.
[295] Karine Belair, "Unearthing the customary law foundations of "forced marriages" during Sierra Leone civil war: the possible impact of international criminal law on customary marriage" (2006) 15 Colum J Gender & L 551 [Bélair 2006] at 577 & 562.
[296] *Ibid.*
[297] Bunting 2012, *supra* note 143, at 180-181. See also Bunting 2017, *supra* note 160.

of the crime perpetrated[298]. According to Bunting, labelling this crime as "forced marriage" is a gendering process as well as reducing the harm to the conjugal, while charging this crime as sexual slavery reduces the harm to the sexual. Hence, enslavement reflects a more comprehensive reality, including the aspect of "human exploitation, bondage, control and violence".[299] In her opinion, the crime of enslavement is much less stigmatizing than the other two previously mentioned and is associated with rebellion, counter-power and strength.[300] In light of this argument, it could be added that the crime of enslavement would also relay norms of equality and produces knowledge about women experience of war that would embody all the elements that constitute gender violence, without creating a gendered victimhood.[301] Bunting also recalls that slavery is one of the most serious crimes within international criminal law, which sends a strong message.[302] To that effect, the Appeals Chamber in the *Ntaganda* case confirmed that the prohibition against sexual slavery and rape were now considered as *jus cogens* norms, making those crimes basically as serious as the crime of enslavement.[303]

B- The Reification of Stereotypes Through the Notion of "Bush Wives"

In light of the above, it is possible to identify two different perspectives on the impact of naming the forced conjugal association on the women as marriage. On the one hand, there are scholars that believe naming this gender violence "forced marriage", emphasis

[298] Bunting 2012, *supra* note 143, at 179.
[299] *Ibid*, at 181.
[300] *Ibid*, at 181.
[301] *Ibid*, at 182.
[302] *Ibid*, at 169.
[303] *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-1962, Judgment on the appeal of Mr Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9", (15 June 2017), Appeals Chamber, at paras 1-2, and 68. [Ntaganda's Final Appeal Decision in respect of Count 6 and 9]

on the word *marriage*, will reveal the gender construction beneath the concept of marriage and send a clear message. On the other hand, there are scholars who believe that this crime will only reify gender stereotypes and that the historical record will not contribute to the creation of gender equal norms.

On the first perspective, Rachel Slater argues that the crime of "forced marriage" has the potential to debunk stereotypes if the crime is charged specifically as "forced marriage" as a gender crime.[304] Slater based her argument on the fact that "[a]lthough forced marriage formed a part of the campaign of terror perpetrated by rebel groups against civilians, the control the rebel 'husband' had over his 'wife' was, in significant part, an expression of gender inequalities in Sierra Leone society as well as an expression of the conflict."[305] And more importantly, Slater stated that the prosecution of this crime would enhance the expressive potential of ICL:

> These points towards the expressive function of labelling forced marriage as a gender crime to ensure that the central role of social constructions of gender is acknowledged. In labelling a crime as a gender crime, a causative claim as to the impact of constructions of gender norms and power relations is made out, which is absent in a gender-neutral characterization. Thus, violence is not simply 'wrongs done to women' but is a product of 'the socially produced capacity for women to be wronged'.[306]

Oosterveld, while acknowledging the relative merit of the crime of forced marriage, questioned the description of "forced marriage" adopted by the Appeals Chamber of the SCSL in the *AFRC* case and asked whether this definition does not, in fact, "codify a

[304] Slater 2012, *supra* note 261, at 758. In Slater's opinion, there could be two types of offense regarding forced marriage. The first would be forced marriage and the second one would be forced marriage as a gender crime: "Forced marriage as a gender crime, then, would contain the same basic constitutive elements as forced marriage but with the added element that the conduct be connected in a significant way to the gender roles and power inequalities between the genders."
[305] *Ibid,* at 757.
[306] *Ibid,* at 759 [citations omitted].

patriarchal gender stereotype as to the assumption of what are a wife's conjugal duties (cooking, cleaning, having sex, caring for children)?".[307] Indeed, it could be argued that this definition of the crime is necessarily reifying gender stereotypes, and as a result, cannot be considered as an advancement of the prosecution of sexual violence. Ultimately, this is the most convincing argument to oppose to the prosecution of the crime of "forced marriage", since there is a "risk of reinforcing a very gendered version of the crimes experienced by women and men".[308] The stereotypes associated with the conjugal context in Sierra Leone might not challenge the decisions rendered by the SCSL on the matter of "bush wives", but rather consecrated them.

Bunting has carried out empirical research on forced marriage and women's experience of trauma in conflict in African countries who struggle with widespread armed conflict.[309] She rightly points out that the importance "to challenge the preoccupation with gendered victimhood" in the DRC and the absence from the discourse on the men who were forced to take a wife. [310] This brings us again to the heteronormativity enforced in ICL described in Chapter 1 Section III-B. By creating crimes that strengthens the heteronormative social construction, it becomes impossible to challenge the patriarchal structure, and by consequence to express gender-sensitive norms through international trials.

[307] Oosterveld 2007, *supra* note 284, at 158.
[308] Bunting 2012, *supra* note 143, at 181.
[309] *Ibid*, at 168, Bunting's empirical research was carried out in Sierra Leone, Liberia, Uganda, Rwanda and Democratic Republic of Congo.
[310] *Ibid,* at 182.

In sum, in light of the criticisms addressed by scholars with regard to the crime of "forced marriage", the "new crimes" of sexual violence against girl child soldiers charged by the ICC could appear as a more suitable option than the crime of "forced marriage", as charged by the SCSL. Indeed, the sexual dimension is acknowledged by the crime of rape as well as the crime of sexual slavery, while the ownership link is also conveyed by the latter.

In fact, the OTP had referred directly to "forced marriage" in the case of Thomas Lubanga Dyilo, although it did not expressly charged him with any sexual offences.[311] In the *Ntaganda* Case, it seems as the prosecution changed strategy. The prosecution stated that, during the first attack on Mongbwalu which Mr. Ntaganda allegedly led, rapes were committed by his soldiers, following the encouragement of their superiors, women were also taken as captive at the military camp, and assigned to commanders as their "concubines".[312] Although the OTP did not follow the trend established by the SCSL and did not indict Mr. Ntaganda for the crime against humanity of "forced marriage", it did charged him with sexual slavery. Due to a lack of evidence, the Pre-Trial Chamber did not confirm the charge of sexual slavery for the first attack. For that reason, the defence of Mr. Ntaganda disputed the used of the term "concubines" in the *Updated Document containing the Charges* (UDCC) from the OTP.[313] The Prosecution argued that the term

[311] *Lubanga* Trial Judgment *supra* note 13, at paras 574, 629. 574. It is submitted by the prosecution that the term "child soldiers" includes all children under the age of 18 who participate in any circumstances in an armed group or force. Therefore, it is argued that this protection is not restricted to those children who actively fight, but rather it includes any child whose role is essential to the functioning of the armed group, for instance by working as a cook, porter, messenger or when individuals are used for sexual purposes, including by way of forced marriage.
[312] *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-203-AnxA, Document Containing the Charges, (10 January 2014) at para 72. [DCC 2014] and *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-458-AnxB, Updated Document Containing the Charges, (16 February 2015) at para 72. [Updated DCC 2015]
[313] *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-405, Decision on the updated document containing the charges (21 November 2015), at para 30. [Decision on the Updated DCC]

"concubines" was used because it was the word that could be found in the witness statement, and that it had no legal meaning.[314] The Trial Chamber ruled that the term "concubine" could indeed be construed as being linked with the crime of sexual slavery, which was not confirmed by the Pre-Trial Chamber for the attack of the locality of Monbgwalu.[315] Therefore the prosecution had to remove this expression. This is an example where we can find references to forced marriage in the context of the ICC. The prosecution integrated both crimes; sexual slavery and forced marriage.

In the next chapter, I will be asking whether the ICC's approach with the "new crimes" will resolve the issues that arose in relation to the "bush wives" case and whether this approach will be more successful than the one in the previous prosecutions in relation to the child soldiers matter.

[314] *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-403, Prosecution's Additional Observations on the Areas of Disagreement in the Updated Document Containing the Charges (21 November 2014), at para 29.
[315] Decision on the Updated DCC, *supra* note 313, para 43.

Chapter Three : The Imperfect Expressive Function of ICL in Relation to the "New Crimes" of Rape and Sexual Slavery of Child Soldiers at the ICC

The first Chapter of this thesis explored feminist criticisms of sex crime prosecutions in the legal literature, in both domestic and international criminal law. It emphasized the rising importance given to expressive value of those prosecutions in the context of a feminist agenda, focusing on expressing gender-equality and a historical narrative reflecting women's experience of war. In Chapter 2, I have explored past experiences and lessons learned from prosecution of child soldier related-offences in the *Lubanga* trial at the ICC and the jurisprudence at the SCSL, that will greatly inform the subsequent analysis. In Chapter 3, I will unfold the expressive dangers in relation to the "new crimes" that are charged in the *Ntaganda* case, by looking at the preliminary decisions in the present case, the likelihood that this case will enhance the jurisprudence on sexual violence as well as the limits of the law in this regard.

The first section of this Chapter contains an overview of the prosecution history in the *Ntaganda* pre-trial and trial stage, focussing on the defence claim that the ICC does not have jurisdiction over the crimes of rape and sexual slavery of child soldiers and the response of the Court. Although jurisdictional matters are not a central focus of this thesis, the debate that emerged from the Defence assertions as well as the Court's final decision is relevant to the evaluation of the expressive function of ICL in relation to the transformation of gender norms in this specific case. As a matter of fact, the Court established that the prohibition of rape and sexual slavery are norms of *jus cogens* under

international law[316], which means that those norms are universal and superior to any other norms under international law, and more importantly, must be respected in any circumstances.[317] The second section will start by laying out the dangers concerning the expressive function in the specific prosecution of the "new crimes", building on assessments that were made in the previous chapters. I will argue that the "new crimes" exclude certain survivors and their narratives by focusing only on certain types of victims. Additionally, I will argue that those "new crimes" create a hierarchy of suffering that hamper its expressive value. I will also explore the victimhood those crimes might potentially generate and the impact this could have on the expressive capacity of ICL to express gender sensitive norms and genuinely challenge patriarchal stereotypes.

I- Procedural Background and the Jurisdiction Challenge over the "New Crimes"

Mr. Bosco Ntaganda was the Deputy Chief of Staff and commander in charge of the military operations of the *Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo* ('UPC/FPLC') during the Second Congo War which lasted between August 1998 and June 2003.[318]

On 12 January 2006, the OTP submitted a first application for an arrest warrant to the Pre-Trial Chamber[319] while Mr. Ntaganda was still at large, followed by a second

[316] *The Prosecutor v Bosco Ntaganda,* ICC-01/04-02/06-1707, Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9 (4 January 2017) at paras 49-51, (Trial Chamber VI). [Second Decision on Defense Submissions]
[317] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, Article 53 (entered in force 27 January 1980).
[318] *Ntaganda* Decision on the Confirmation of the Charges*, supra* note 14, at para 15.
[319]*The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-1-US-Exp-tEN, Decision on the Prosecution Application for a Warrant of Arrest, (22 August 2006), (Pre-Trial Chamber I); a redacted version is also available see *The Prosecutor*

application in May 2012 and a warrant issued on 13 July 2012[320], including the charges of rape and sexual slavery against child soldiers. Mr. Ntaganda surrendered to ICC custody voluntarily in March 2013.[321]

On 10 January 2014, the OTP filed the *Document Containing the Charges* ('DCC')[322] during the preparation for the Confirmation of charge hearing that was held in January 2014. This document contained eighteen counts of crimes against humanity and war crimes for the period between July 2002 and December 2003, including rape and sexual slavery against civilians as war crimes and crimes against humanity.[323] The charges that are of particular interest for this thesis are "Count 6: Rape of UPC/FPLC child soldiers, a war crime, punishable pursuant to article 8(2)(e)(vi)" and "Count 9: Sexual slavery of UPC/FPLC child soldiers, a war crime, punishable pursuant to article 8(2)(e)(vi)".[324] Those "new crimes" were created by the OTP with the aim of reflecting the

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v Bosco Ntaganda, ICC-01/04-02/06-1- Red-tENG, Decision on the Prosecution Application for a Warrant of Arrest, (6 March 2007) (Pre-Trial Chamber I). A warrant of arrest was issued alongside this decision.

[320] *The Prosecutor v Bosco Ntaganda,* ICC01/04-02/06-36-Conf-Exp, Decision on the Prosecutor's Application under Article 58 (13 July 2012), (Pre-Trial Chamber II); a public redacted version is also available, see, *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-36-Red, Decision on the Prosecutor's Application under Article 58, (13 July 2012), (Pre-Trial Chamber II)

[321] Bosco Ntaganda in the ICC's custody, Press release, 22 March 2013, International Criminal Court, online: <https://www.icc-cpi.int/Pages/item.aspx?name=pr888>

[322] DCC 2014, *supra* note 312, at 57-58.

[323] *Ibid*, at paras 41-52.

[324] *Ibid,* at 57-58, as well as in the Updated DCC 2015, *supra* note 312, at paras 100-102:

"100. From 2 July 2002 to 31 December 2003, UPC/FPLC commanders and soldiers raped and sexually enslaved their soldiers without regard to age, including child soldiers under the age of 15. Some child soldiers became pregnant as a result of their rape. Child soldiers were often raped by more than one UPC/FPLC commander or soldier. These child soldiers were raped routinely when they were not participating in hostilities, such as during military training and after battles had taken place. UPC/FPLC commanders and soldiers referred to child soldiers (and other girls and women in the UPC/FPLC above the age of 15) as *guduria*, a large cooking pot, to mean that they could be used for sex whenever the soldiers wanted them for that purpose. 101.UPC/FPLC commanders exploited girl child soldiers in the UPC/FPLC for domestic chores, for cooking, and for sex. As soldiers in the UPC/FPLC, girls and women were subjected to sexual abuse in a coercive and harsh military structure; without the possibility to leave the armed group.

101. UPC/FPLC commanders exploited girl child soldiers in the UPC/FPLC for domestic chores, for cooking, and for sex. As soldiers in the UPC/FPLC, girls and women were subjected to sexual abuse in a coercive and harsh military structure; without the possibility to leave the armed group. UPC/FPLC commanders raped their soldiers under threat of death often while the commanders were armed. Girls and women in the UPC/FPLC could not resist.

102. The UPC/FPLC also used rape of its own soldiers as a form of punishment."

reality of girls that were part of the UPC/FPLC, had to participate in hostilities, to perform domestic chores as well as being sexually abused by one or many commanders and soldiers of the rebel armed group.[325] Although charges of sexual nature have previously been brought against Mr. Germain Katanga[326] and against Mr. Jean-Pierre Bemba before the ICC, as discussed earlier, this is the first time the OTP expressly charged a defendant with these charges of rape and sexual slavery of child soldiers, following the international trend that was initiated by the SCSL, as discussed earlier in Chapter 2 section II. These crimes can be considered "new crimes" as discussed in the previous sections for the fact that crimes against women of the same armed group have been long ignored, such as all crimes against member of a groups own member, and since it is the first time the crimes of rape and sexual slavery, as war crimes, are charged targeting specific victims.

On 9 June 2014, the charges laid against Mr. Ntaganda were confirmed by the Pre-Trial Chamber II ('Pre-Trial Chamber') at the end of the Confirmation of charges hearing, including the charges of sexual violence against child soldiers.[327] During the hearing, the defence tried to make a jurisdictional argument that would have limited the scope of the new sexual crimes substantially, but that this effort ultimately failed. In its Decision on the confirmation of charges, the Pre-Trial Chamber addressed the argument raised by the Defence concerning the jurisdiction of the Court over such crimes. The Defense argued that the Pre-Trial Chamber did not have jurisdiction over those crimes since "international humanitarian law ('IHL') does not protect persons taking part in hostilities from crimes committed by other persons taking part in hostilities on the same

[325] *Ibid.*
[326] *Katanga* Trial Judgment, *supra* note 117, para 10.
[327] *Ntaganda* Decision on the Confirmation of the Charges, *supra* note 14, at paras 76-82.

side of the armed conflict"[328] and victims of crime under Article 8(2)(e)(vi) of the Statute are limited to the victims that are protected by Common Article 3 of the Geneva Conventions, meaning "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause […]"[329]. Accordingly, the Pre-Trial Chamber had to assess whether the child soldiers were taking active part in hostilities during the period of the charges and whether this participation could encompass the time when they were subjected to sexual violence.[330] While the Pre-Trial Chamber clarified that children under the age of 15, although having a special protection under IHL, could be considered taking direct/active part in hostilities, the Pre-Trial Chamber found that they could not be considered taking part into any hostilities during the specific time they were being sexually abused.[331] Nonetheless, the Defence challenged the jurisdiction of the Court on the same matter the day before the opening of the trial, on September 1st, 2015.[332]

The OTP filed a response to the Defence submission, arguing that Article 8(2)(e)(vi) of the Statute does not introduce the elements of Common Article 3 of the Geneva Conventions in relation with the protection of person not taking part in hostilities, but rather the gravity threshold set out in this Article, therefore emptying the Defence argument.[333] In the event that the Chamber was to consider that Article 8(2)(e)(vi) of the

[328] *Ibid*, at paras 76-82.
[329] Geneva Conventions, supra note 86, Common Article 3:
[330] *Ntaganda* Decision on the Confirmation of the Charges, *supra* note 14, at para 77.
[331] *Ibid*, at paras 78-79.
[332] *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-804, Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect to Count 6 and 9 of the Document containing the charges (1 September 2015).
[333] *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-1278, Prosecution's response to Mr Ntaganda's "Consolidated submissions challenging jurisdiction" regarding Counts 6 and 9, 14 April 2016, at para 48.

Statute requires to fall within the protected persons of Common Article 3, the Prosecution argued that such "requirement is satisfied by proof that the victim was not taking active part in hostilities, no matter whether they are a civilian or a member of armed force"[334]. Undeniably, according to the Prosecution, children that have been forcibly recruited are protected under the Common Article 3, notwithstanding their military affiliation.[335] Finally, the OTP argued that sexual violence is prohibited under any circumstances, according to IHL framework.[336]

The Legal Representative of the Former Child Soldiers ('LRV') also submitted a response to the Defence motion. The LRV stated that Common Article 3 was not relevant to establish the scope of the protection child soldiers should be granted, and that, in any case, child soldiers could not be qualified as regular members of the armed group and taking part into hostilities due to their particular status.[337] Moreover, the LRV argued that, should the Chamber considers child soldiers as regular members of the armed group and recognized their participation in hostilities, child soldiers hold a special protection under IHL in any circumstances.[338]

Following a judicial saga, the Trial Chamber VI[339] (the 'Chamber') rendered a decision on 4 January 2017, stating that the Court has jurisdiction over the crimes contained in Counts 6 and 9 of the DCC. The Chamber found that "[…] not all victims of war crimes listed in Article 8(2)(e) need to be protected persons for the purposes of

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[334] *Ibid,* para 58.
[335] *Ibid,* paras 58-60.
[336] *Ibid,* paras 55-57.
[337] *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-1279, Former child soldiers' Response to the "Consolidated submissions challenging jurisdiction of the Court in respect of Counts 6 and 9 of the Updated Document containing the charges" (14 April 2016) at paras 11, 19. [Consolidated LRV Response]
[338] *Ibid,* paras 24-25.
[339] The Trial Chamber IV is the Trial Chamber in charge of the *Ntaganda*'s trial.

Common Article 3".[340] The Court found that the *chapeaux* of Article 8(b) and 8(e), unlike 8(a) and 8(c), do not contain references to a specific victim status criteria.[341]

The most interesting findings of the Chamber are the conclusions that "limiting the scope of protection in the manner proposed by the Defence is contrary to the rationale of international humanitarian law […]"[342] and that "[…] there is never a justification to engage in sexual violence against any person; irrespective of whether or not this person may be liable to be targeted and killed under international humanitarian law."[343] The Chamber, quite strongly, established that the prohibition of rape and sexual slavery attained the *jus cogens* status under international law.[344]

Following this decision, the Defence filed an appeal of this decision on 26 January 2017, which was declined by the Appeals Chamber.[345] On 15 June 2017, the Appeals Chamber of the ICC unanimously ruled that members of armed groups were not automatically excluded from the prohibition of Articles 8 (2) (b) (xxii) and (2) (e) (vi) of the Statute committed by members of the same armed group, as long as the nexus between the act and the armed conflict is established.[346] The Court also established that the victim of those crimes does not have to be a protected person in accordance with Common Article 3 of the Geneva Conventions.[347]

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[340] Second Decision on Defense Submissions*, supra* note 316*,* at paras 37, 44.
[341] *Ibid*, para 40.
[342] *Ibid*, para 47
[343] *Ibid*, para 49
[344] *Ibid*, para 51.
[345] *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-1754, Appeal from the Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, 26 January 2017.
[346] *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-1962, Judgment on the appeal of Mr Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9" (15 June 2017) at paras 1 et 2, and 68. (ICC Appeals Chamber) [Final Appeal Decision in respect of Count 6 and 9]
[347]*Ibid*, at para 46.

From an expressive perspective, this decision is a promising development, since it underscores the seriousness of the crime and this very seriousness has prevented it from being undermined by jurisdictional matter.

The *Ntaganda* trial will be ending with the closing statements from the parties on August 28, 2018.[348] The final judgment is yet to be rendered.

II- The Expressive Dangers in Relation to the Prosecution of the "New Crimes"

Expressivism, as a philosophical foundation of ICL, is a strong justification to give priority to the prosecution of sex crimes in international tribunals, as established in the previous chapters. Yet various dangers are associated with this expressive function, particularly the limited norms that can be expressed in order to promote a feminist agenda, and the partial historical record that is constructed throughout international trials. For the purpose of this analysis, I will focus on girl survivors and combatants, although boys and men have also been victims of sexual violence among the UPC/FPLC.

The situation of girl soldiers is a particularly complex one. Those girls may have been coerced to participate in hostilities, and subjected to sexual abuses, degrading treatments and other forms of gender-based violence at the same time. Some may also have been participating in hostilities and in sexual encounters by choice, or at least on some occasion. The level of victimization also varies significantly according to the individual experience.[349] Although the *Ntaganda* case represented an opportunity to clarify the issue of girl soldiers that is fairly recent in the sexual violence jurisprudence, as

[348] *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06, ICC website: <https://www.icc-cpi.int/drc/ntaganda>
[349] Grey 2014, *supra* note 114, at 601. [reference omitted]

illustrated by the SCSL and being the first case at the ICC on the matter, inherent expressive problems ought to be exposed.

Rosemary Grey, who has also examined the potential and the limits of ICL in relation to the crimes of sexual violence against child soldiers with reference to *Ntaganda*, has suggested that norms can be expressed by applying the strategy of "thematic prosecutions" towards sex crimes against child soldiers.[350] This strategy has been supported and elaborated upon in particular by deGuzman.[351] Grey suggests that:

> […] by giving visibility to sexual violence against child soldiers, the ICC may increase awareness of the 'varied actual experiences' of child soldiers, promote a more gender-sensitive understanding of their exploitation in line with the 2007 Paris Principles and encourage disarmament, demobilization and reintegration programs to better address the specific needs of girl soldier.

Nina Jorgenson, who wrote on the international legal framework in relation to child soldiers, has argued in a similar direction. In her view, "[t]he proper way to ensure that 'little girl soldiers' remain visible is to bring the appropriate charges of sexual violence against the perpetrators of crimes against them."[352]

This approach entails many expressive difficulties, however, as established in Chapter 1 of this thesis, especially in light of partial historical record and the reification of the notion of victimhood sexual prosecution have historically conveyed as consequences.

The argument proposed by Henry is relevant for this section: "the unprecedented attention to wartime sexual violence within international criminal law can have two interconnected, troubling effects: (1) excluding other gendered harms (and in the process,

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[350] *Ibid,* at 603.
[351] deGuzman 2012, *supra* note 22, and deGuzman 2011, *supra* note 27.
[352] Nina H. B. Jorgensen, "Child Soldiers and the Parameters of International Criminal Law", (2012) 11 Chinese J Intl L 657, at 684. [Jorgensen 2012]

constructing an ideal victim subject) and (2) constructing a hierarchy of rape."[353] Putting the spotlight of denunciation on the rape and sexual slavery experienced by a limited number of girls under the age of 15 could have unexpected consequences such as considering their sexual suffering as more serious than the experiences of other, therefore creating an unwanted gradation of suffering and again, diverting the attention from other types of gender-based violence, such as violence resulting from the socio-economic situation, amongst other things.

A- Expressing Norms Through Marginalization

The first major limit to the expressive function with respect to the "new crimes" is the exclusion of the experiences of certain survivors which reduces the scope of the crime and, as a result, the norms that can be expressed. The point here is not to completely deny the expressivist capacity in the context of the "new crimes". We have learned from the *Lubanga* case that prosecuting militiamen that have enrolled or used child soldier brings accountability, thereby expressing some norms.[354] However, the problem here is mainly that the crimes rely on the definition of child soldiers that excludes some girls based on their age and the task they have to perform. Therefore, the expressed norms and, especially, the narrative that can be expected from this jurisprudence are imperfect.

[353] Henry 2014, *supra* note 19, at 97.
[354] See Chapter 2, Section I.

i. Excluding Certain Harms' Impact of the Norm Expression

As established above, the recent fixation on prosecuting rape in ICL has had as a consequence an incapacity to include a "diversity of victims"[355], and the "new crimes" are no exceptions. Criminal prosecution of wartime rape has excluded certain experiences and marginalized some survivors.

The alleged objective behind those new offences is to criminalize the acts of commanders who enroll, conscripts and/or use child soldiers and abuse them, sexually as well as through other forms of abuse. In other words, this criminalizes a recurrent behaviour of armed groups who use their power and charisma to take advantage of vulnerable persons, especially of young girls in times of conflict.[356] Yet, the OTP has decided to only focus on a small part of the girls and women who suffered from those acts – those who are sexually abused. The "new crimes" of rape and sexual slavery against child soldiers are intrinsically exclusive of certain victims and survivors' stories, which inevitably have a negative impact on the authenticity of the wartime narrative, and on the expression of gender-equal norms. Although rape and sexual slavery are themselves crimes under Article 8 of the Statute, they were traditionally meant to address sexual violence against civilians. The distinction between civilians and combatants is primordial in IHL and in ICL and is characterized by the participation in hostilities. Violence against members of armed forces/groups have been mostly ignored for this reason, in addition to the historical under-enforcement of sexual and gender-based violence that was underscored in Chapter 1 section I-B.

[355] Henry 2014, *supra* note 19, at 97.
[356] DCC 2014*, supra* note 312, at para 107.

In the first place, girls who are forced to provide sexual services are excluded from the legal concept of “active participation in hostilities”, so that they would not lose their civilian protection under IHL, as established by the Appeals Chamber in the *Lubanga* case. That being said, the direct consequence of this Decision was that those girls would be excluded from the definition of child soldiers and thus, the abused suffered by those vulnerable girls could not be prosecuted under the “new crimes” in the *Ntaganda* trial, since one of the essential elements of the crimes is to be a child soldier. Another consequence of this decision was that those girls could be considered acceptable collateral damages under IHL, since they are close to the armed group which can be considered as a military target depending on the circumstances. Also, scare attention have been given to violation of IHL happening within a rebel armed group, since prosecution mainly concentrates on the violence endured by the enemy population. Hence, there was a dissonance between the *Lubanga* final judgment and the *Ntaganda* “new crimes” scope. This legal gap could have created a serious expressive gap, considering the exclusion of vulnerable girls sexually, physically and psychologically abused from the scope of the “new crimes” on the basis of the tasks they performed within the armed group. The final decision on the jurisdictional matter in the *Ntaganda* case, stating that sexual violence is forbidden under any circumstances, brought an answer to that expressive gap that would have been fatal.

Moreover, as Beringola argued, before the *Ntaganda* case and the development around the “new crimes”, there was discrimination “between children who are protected and those unprotected from sexual violence, depending on the kind of support they

provide to the armed group"[357], despite the fact that all children should be protected from sexual violence under the *Convention on the Rights of the Child*, which is universally ratified[358]. She underlined the new interpretation provided by the ICC in which child soldiers could no longer be considered taking active or direct participation in hostilities at the specific moment of their sexual abuse[359], following this finding by the Pre-Trial :

> The Chamber clarifies that those subject to rape and/or sexual enslavement cannot be considered to have taken active part in hostilities during the specific time when they were subject to acts of sexual nature, including rape, as defined in the relevant Elements of Crimes. The sexual character of these crimes, which involve elements of force/coercion or the exercise of rights of ownership, logically preclude active participation in hostilities at the same time."[360] [emphasis added]

Although Beringola's argument has a certain merit, the key concept here is the exclusion of those girls "during the specific time when they were subject to acts of sexual nature". This interpretation excludes every other experience of gender-based violence that is not of a sexual nature and protect girls only during the specific moment of the act – although sexual slavery can be a crime that takes place on a long period of time.

Again, in bringing "sexual violence to the front and elevat[ing] acts of sexual violence as an independent variable of the legal analysis"[361], as proposed by the *Ntaganda* case, does ICL reify stereotypes and limit women's experience of war to the sexual body? In light of the previous chapters of this thesis, it can be argued that the

[357] Beringola 2016, *supra* note 245, at 63.
[358] *Ibid*, at 64.
[359] *Ibid*, at 64.
[360] *Ntaganda* Decision confirming the charges, *supra* note 14, para 79.
[361] Beringola 2016, *supra* note 235, at 65.

answer to this question is a positive one, unless we see this case as a first, door-opening one.

In the second place, only child soldiers may qualify as victims under these crimes. The Rome Statute provides that a child soldier is someone younger than the age of 15. A distinction is therefore operated between children under the age of 15 and above it. As a result of the legal fiction[362] that creates the offences related to child soldiers, sexually assaulting a girl soldier of 14 would be a crime, whereas it would not be true for a girl aged 16. Not only is the definition of child soldiers puzzling and deficient – for the reasons explained in the above Chapter 2 Section IB with regards to the passive victim discourse, but the message that the OTP and the ICC sends through those "new crimes" is as well.

In fairness, the Prosecution did acknowledge, at the outset of the case, the broad range of potential victims of those crimes. Indeed, in their first DCC issued in 2014, document in which the OTP detailed the charges and the facts supporting those charges, it was mentioned that girls and women soldiers in the UPC/FPLC were subjected to sexual violence and sexually enslaved:

> 100. From 2 July 2002 to 31 December 2003, UPC/FPLC commanders and soldiers raped and sexually enslaved *their soldiers without regard to age* [emphasis added], including child soldiers under the age of 15. Some child soldiers became pregnant as a result of their rape. Child soldiers were often raped by more than one UPC/FPLC commander or soldier. These child soldiers were raped routinely when they were not participating in hostilities, such as during military training and after battles had taken place. UPC/FPLC commanders and soldiers referred to child soldiers (and other girls and women in the UPC/FPLC above the age of 15) as *guduria*, a large cooking pot, to mean that they could be used for sex whenever the soldiers wanted them for that purpose.

[362] Drumbl, 2012, *supra* note 203, at 17-25. Drumbl explains what is a *legal fiction*, term he borrowed from the legal philosopher Lon Fuller, which is an illustration of a phenomenon that is the most obvious and allow us to simplify the reality. In the case of child soldering, the *legal fiction* serves various purposes.

> 101. UPC/FPLC commanders exploited girl child soldiers in the UPC/FPLC for domestic chores, for cooking, and for sex. As soldiers in the UPC/FPLC, *girls and women* [emphasis added] were subjected to sexual abuse in a coercive and harsh military structure; without the possibility to leave the armed group. UPC/FPLC commanders raped their soldiers under threat of death often while the commanders were armed. Girls and women in the UPC/FPLC could not resist. [363]

Despite the inclusion of a broad range of victims, the Pre-Trial Chamber adjudicated the case in pre-trial and rendered the *Decision on the confirmation of the Charges*, without any reference to the expression *girls and women* as initially used by the OTP. The Pre-Trial Chamber decided to support counts 6 and 9 only by the following facts, which became the basic narrative and scope of this case:

> 76. With regard to counts 6 and 9, the Chamber notes that the Prosecutor charges Mr. Ntaganda with the rape and sexual slavery of "UPC/FPLC child soldiers under the age of 15" […] [364]

All the subsequent adjudications about the jurisdiction of the Court over those crimes were limited only to child soldiers, without any allusion to other potential victims within the armed group. As a result, the expressive capacity of ICL is greatly hampered by the narrow scope of these crimes, as well as the norms that are expressed consequently. The exclusion of some narratives risk marginalizing the girls and women whom stories are not comprised by the "new crimes". The knowledge produced by the ICC in relation to the girls and women part of the UPC/FPLC was defined according to legal objectives, despite the exclusion of certain harms and victims.

In some regards, the creation of those "new crimes" reproduces the concept of *gender grammar of violence* developed by Marcus and applied by Buss to international

[363] DCC 2014, *supra* note 312, at paras 100-108.
[364] *Ntaganda* Decision on the Confirmation of the Charges, *supra* note 14, at paras 76-82.

criminal law, where a “rape script” is defined around some narratives while excluding others. By establishing a distinction based on the age of the victims, it naturalizes rape and reduces the harm of other Congolese women who suffered the same fate.

In the same vein, the communication of norms is impeded. In order to express norms that the Prosecution deems of the first importance, they emphasize one type of harm and leave blind spot on the wartime narrative. Therefore, the fact that some women are overlooked by those crimes also sends a message, and consequently, ICL fails to alleviate gender inequalities and gender violence within those blind spots.

With regards to the historical record, it becomes very clear that many narratives are being excluded. By leaving blind spots, not only norms are wrongly expressed, but the narrative is incomplete as well.

The concrete results of the prosecution of those “new crimes” are still unknown, since the trial will be coming to an end in August 2018 with the closing statements. Nonetheless, the consequences are predictable. The line-drawing and categorization are inherent features of domestic criminal law and ICL that have an important impact on the expressive potential. Limiting the scope of crimes and putting victims in boxes can only limit the expressive capacity of ICL.

ii. Creating a Hierarchy of Suffering

Apart from marginalizing certain experiences, another consequence that arises from the *gender grammar of violence* as it will evolve with those “new crimes” is the creation of a hierarchy of suffering. As explained by Henry, a collateral consequence of the new fixation

on prosecuting wartime sexual violence is the creation of a hierarchy of rape.[365] Indeed, the stigmatization of violence against child soldiers sets aside other girls and women who took part in hostilities, and were also forced to engage in non-consensual sexual relations and had to accomplish forced labour as well as domestic chores. It sends a message that the suffering of those girls and women, which is probably very similar to the suffering of 14 years-old girls, is not of sufficient gravity to be treated the same way by the law. The special protection granted to children, combined with the fixation of prosecuting sexual violence generates a distinction in gravity between children under the age of 15 and girls and women older than 15 years-old.

As a consequence, the expected jurisprudence on this crime sends, in a way, the message that some violence against women deserves more attention and to be more strongly reprehended and the expressive function of ICL is poorly served. Outside of the relatively narrow group of girls that are targeted by those offences, gender-based exploitation might officially be a crime, but it remains under-enforced, and patriarchal assumptions are still awaiting to be questioned. The OTP, with the "new crimes", is engaging with a truly issue, but only superficially. In fact, by putting priority here in particular, it only scratches the surface of a much broader problem.

At a practical level, the problem is the fact that the "new crimes" are related to the offence of child soldiers. The approach of Justice Odio Benito, in which she considered that sexual violence is an intrinsic element of the child soldering-related crimes[366], might have been more interesting in respect to the norm expression.[367] If it was necessary to

[365] Henry 2014, *supra* note 19, at 97.
[366] Dissenting opinion Justice Benito, *supra* note 202, para 20.
[367] Tilman Rodenhauser, "Squaring the Circle?: Prosecuting Sexual Violence against Child Soldiers by their 'Own Forces'" (2016) 14:1 J Intl Crim Just 171, at 5. [Rodenhauser 2016]

express a strong message that sexual violence will not be tolerated and to eradicate the violence among the armed group, where the commanders are taking advantage of more vulnerable people within their own group, then the offence created by the Prosecution is incomplete.[368] Broadening the offences to include all the girls and boys that were recruited, enrolled and used to participate actively in hostilities, and that is subsequently abused by members of their own armed group should be targeted by the "new crimes".

The vulnerability of girls during armed conflict in general is increased, and this might be no exception for girls among armed groups. Therefore, in a regime meant to protect the most vulnerable and to punish the most hideous crimes, special attention must be paid to children. Park raised this point, that can nuance the arguments that were developed above:

> While being vigilant not to impose western conceptions of girlhood and womanhood onto a non-western context, scholars must also be cognizant of not eliding the experiences of women and girls. I am not interested in producing a hierarchy of victimization or oppression but the particularity of girls' vulnerability must be considered. Qualitative research suggests that the 'wives' to all parties of the Sierra Leonean conflict were not *typically* adult women; rather, 'wives' were *typically* girls: 'most commanders' 'wives' ranged in age from 9 to 19'. A possible explanation for this phenomenon is that children generally are more vulnerable to abduction and press-ganging (or even voluntary recruitment) than are adults.[369]

Offences targeting specifically vulnerable populations are common in criminal law. For instance, with sexual assault contacts against children under the age of 16 in Canadian criminal law[370], and they have an expressive purpose that cannot be underestimated. Acknowledging the vulnerability of children does serve expressive goals.

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[368] Henry 2014, *supra* note 19, at 97.
[369] Park 2006, *supra* note 170, at 322. [citation omitted]
[370] *Criminal Code*, RSC 1985, c C-46, S 151.

That being said, it is clear that drawing lines can also erase the complexity of experiences and have a distorting effect. The specific prohibition against younger girls creates a certain hierarchy of harms and seriousness, without necessarily excluding other victims and creating a double-standard of prosecution. In the context of an armed conflict, one cannot forget the principles pillar of IHL, which relies on the historical distinction between civilians and combatants.

iii. Limiting Harms to the Sexed Bodies

As explored in this thesis, addressing different types of gender-based violence and types of harms is an important feature of expressing gender-sensitive norms. As argued in Section III of the first Chapter, limiting women's experience of violence to sexual violence bolsters gender essentialism.

Those "new crimes" focuses on rape and sexual slavery, without considering indirect gender violence those girls and women might have experienced. As Grewal posits, narrowing women's experience of war to their bodies and sexuality reiterates the heteronormativity and, by extension, the patriarchal configuration of the social structure. The "new crimes" are again focused on rape and sexual violence against women. As in the case of the SCSL, other gender violence, such as reproductive violence[371], has occurred within the armed group.

[371] Park 2006, *supra* note 170, at 322.

B- Creating a Stereotyped Wartime Narrative

As discussed in Chapter 1, women's experiences of conflicts have been depicted in a very limited way by international tribunals, and these depictions typically revolve around sexual harms. Thus, women are essentialized and referred to as victims, rarely as combatants, therefore denying their sexual and political agency.

This section draws upon the conclusion established above and will demonstrate that the prosecution of the "new crimes" will not differ from the way that rape and sexual slavery have been previously prosecuted by other international tribunals. On the one hand, the new crimes will reify the victimhood discourse by considering girls' soldiers as passive victims. On the other hand, those crimes will render invisible the fighting positions many of those girls and women have occupied. The main conclusion that can be drawn from this next section is the *Ntaganda* case will likely result in the expression of a certain norm, but a poor wartime narrative will be developed through the trial.

i. The Victimhood Discourse Enhanced by the "New Crimes"

In the case of sexual violence against girl child soldiers, the discourse of victimhood has two dimensions. The first reflects the trends explored in Chapter 2 section B to consider child soldiers as passive victims. The second resides in the fact that women in armed conflict have traditionally been in a position of weakness, as explored in the first Chapter of this thesis.

As previously established in this thesis, the popular representations of child soldiers, and even more when it comes to girl child soldiers, is that of a passive victim, and fails to include all the roles they actually can play within an armed group.[372]

Chapter 1 relied on postmodern feminist theory to demonstrate that the fixation on prosecuting sexual violence has "isolated women's sexuality as the basis of oppression, which serves to reinforce the sexed body as an inevitable target of sexual violence"[373]. The law consecrates these women as passive and vulnerable, undermining their agency. Law, as a generator of knowledge and truth, unfairly depicts women as victims and cements their role. Its focus on sexual violence has proven to reinforce "heteronormativity and patriarchal structure".[374]

The OTP developed the crimes of rape and sexual enslavement of girl child soldiers in the *Ntaganda* case around the notion of vulnerability. In the DCC, the Prosecution described the role of women and girls in the armed group, which seemed to be limited to domestic chores as well as to their sexual bodies. The Prosecution voiced his view in those words:

> 101.UPC/FPLC commanders exploited girl child soldiers in the UPC/FPLC for domestic chores, for cooking, and for sex. As soldiers in the UPC/FPLC, girls and women were subjected to sexual abuse in a coercive and harsh military structure; without the possibility to leave the armed group. UPC/FPLC commanders raped their soldiers under threat of death often while the commanders were armed. Girls and women in the UPC/FPLC could not resist.[375]
>
> […]

[372] Grey 2014, *supra* note 114, at 613. See also Myriam S. Denov, *Child Soldiers: Sierra Leone's Revolutionary United Front* (Cambridge: Cambridge University Press, 2010), at 13. [Denov 2010]
[373] Henry 2014, *supra* note 19, at 97.
[374] Grewald 2015, *supra* note 21, at 155.
[375] DCC 2014, *supra* note 312, at para 101.

> 103. Bosco NTAGANDA and other commanders knew or should have known that in the ordinary course of events UPC/FPLC troops, including children under the age of 15, would be raped and sexually enslaved by their own commanders and other UPC/FPLC soldiers. The girls and women who were part of the UPC/FPLC were particularly vulnerable. They were lodged in training camps with male commanders and soldiers who had authority over them, who abused that authority and who were armed and violent. These girls and women were made to perform domestic chores in commanders' residences. They could not leave camp without permission and they had to obey their superiors and commanders or face punishment. No distinctions were made regarding age within the UPC/FPLC; all recruits and trained soldiers were treated in the same way.[376]

By focusing on the domestic chores girls and women had to perform and the sexual violence they endured, the prosecution reproduces once again the exclusion of women in roles of combatants. It is very clear how the OTP perceive the role of those girls within the military: outside of the fighting realm. This discourse once again is consistent with previous sex crimes prosecutions in that it reifies the powerlessness and vulnerable stereotype around women and girls.

ii. Negating Active Role in Hostilities

History has proved that women's participation in hostilities whether in political and/or a military role has been perceived as marginal and is rarely remembered. Once again, the Prosecution in the *Ntaganda* case has not mentioned the participation of women. The resulting picture of the experience of girls and women among the military continues to be incomplete. The OTP translated those women and girls' experiences into a monolithic block of experience, where survivors are pictured as victims, but never as combatant.

[376] *Ibid*, at para 103.

Girls under the age of 15 are denied the right to take an informed decision to take active part into hostilities following the international community elaboration of the legal fiction about child soldiers as explain in the previous chapter of this thesis.[377]

The agency of those girl soldiers also is not considered an aspect to take into consideration in the prosecution of those sexual crimes. The motivations and the complex rationales behind girl soldiers' participation in hostilities are completely obviated from the war account the Prosecution is trying to depict. The resistance and the strength those girls and women have manifested ought to be part of the wartime narrative. We could consider here a limit of the law, ICL might not be the appropriate place to insert this information into the wartime narrative. In fact, this is maybe a limit of the expressive function of the law, where the retributivist and deterrence could play a better role. Also, the structure of criminal law itself, built on binaries and limitative categories – often stereotyped categorize – is most certainly a limit of the law in terms of expressing an inclusive narrative.

Grey posits that, in her opinion, the Decision on the confirmation of the charges in the *Ntaganda* case "challenges this misleading and disempowering narrative of girls' roles in armed groups, by recognizing the girls in question as child soldiers *and* as victims of

[377] *Lubanga* Appeals Decision, *supra* note 207, at paras 577, 610. I refer more particularly to the conclusion drawn by the Court from the testimony of Radhika Coomaraswamy during M. Lubanga's trial: "577. The prosecution also rehearses the broad approach taken by the UN Special Representative of the Secretary General on Children and Armed Conflict, Ms Radhika Coomaraswamy (CHM-0003, "Ms Coomaraswamy" or "Special Representative") on this issue, who suggested that children who were given roles as cooks, porters, nurses and translators, together with those who were sexually exploited, should be viewed as providing essential support and that the Court should ensure that girls are not excluded in this context" [footnotes omitted], as well as the conclusions drawn by the Court from the testimony of Elisabeth Schauer: "610. The expert witness, Elisabeth Schauer (CHM-0001), suggested in her report and during her evidence before the Chamber that from a psychological point of view children cannot give "informed" consent when joining an armed group, because they have limited understanding of the consequences of their choices; they do not control or fully comprehend the structures and forces they are dealing with; and they have inadequate knowledge and understanding of the short- and long-term consequences of their actions. Ms Schauer (CHM- 0001) concluded that children lack the capacity to determine their best interests in this particular context. [footnotes omitted]".

sexual violence."[378] She also highlights the possible positive consequence of this decision in increasing the international awareness concerning the specific needs of girl child soldiers in reintegration and demobilization programs.[379] Taking into consideration the previous section on the victimhood discourse around those child soldiers, it is difficult to imagine how this amalgam could be construed as positive in expressive terms. Drumbl, in this vein, came to the conclusion within the course of his analysis that strengthening the passive victim discourse around child soldiers may lead to a dependence on humanitarian help, and as an even more pervert collateral effect, confine them in a powerless role.[380] The same conclusions can be drawn here, in the case of the prosecution of the "new crimes".

In sum, as for the *Lubanga* case and the "bush wives" cases in the Sierra Leone, the accountability generated by the prosecution of sexual crimes cannot be underestimated. The potential of this prosecution of gender-based crimes expressing a strong, modern, gender equal norm, on the other hand, is not such an obvious conclusion. As this study demonstrates, the wartime narrative that is most likely to emanates from the prosecution of this "new crimes" is, at best, imperfect.

[378] Grey 2014, *supra* note 114, at 613.
[379] *Ibid*, at 613.
[380] Drumbl 2012, *supra* note 203, at 51.

Conclusion

As Damaska has conveyed in an interesting piece entitled “What is the point of international criminal law”, the socio-pedagogical role of ICL – which Damaska associated with the expressive theories of criminal law – might be the ultimate aim of international criminal justice, in order to be successful in its endeavour. This is also what de Guzman argued more directly in relation to the prosecution of sex crimes. She suggested that international tribunals should give priority to the prosecution of this type of crimes in light of the expressive potential ICL have to offer. The aim of this thesis was to explore the expressive capacity of ICL to express norms and a wartime narrative that could challenge gender stereotypes and patriarchal structures that are still present in conflict, post-conflict situations and the international mechanisms that deal with those situations. Chapter 1 detailed at length how feminist scholars sought to warn us about the expressive dangers associated with the prosecution of sex crimes, dangers that are intrinsically linked to the limits of the law, and more particularly in this case to ICL. Indeed, the history of the prosecution of sexual violence has demonstrated that, to a large extent, women have been depicted as powerless and passive victims, reifying the truly detrimental victimhood discourse and distorting the historical record. Chapter 1 also set out, in broad terms, the limits of ICL and of its expressive potential, namely the norms expressed through those trials as well as the wartime narrative.

Two case-studies provided us significant insights on the result that could be expected from the prosecution of the “new crimes”. A critical analysis of the child-soldiering related crimes by the ICC (at to a lesser extent by the SCSL) has underlined the relentless victimhood discourse uttered about child soldiers. Thereafter, a

comprehensive study of the prosecution of the crime of "forced marriage" by the SCSL provided us with some answers concerning the reification of stereotypes and the expression of an essentialist heteronormativity through its jurisprudence. Indeed, the feminist debate around the appropriate crime to be prosecuted showed how the crime of "forced marriage" could reify oppressive stereotypes about conjugal association, how the crime of sexual slavery could essentialized the harm suffered by women by limiting it to its sexual dimension, while the crime of enslavement could be more empowering women.

Lessons learned from prior prosecutions that raise similar issues to the "new crimes", combined with the critiques of feminist scholars on the prosecution of sexual violence in domestic and international criminal law, informed this analysis of the expressive capacity of the "new crimes". In Sarah T. Deuitch's opinion, the prosecution of the "new crimes" is a clever use of limited resources put toward ending impunity for sexual violence and giving a voice to the most vulnerable girls.[381] Considering the above, I argued that on the contrary, the prosecution of the "new crimes" would not differ from previous prosecutions. The norms expressed by the prosecutions will most likely not shake the dominant value system based on patriarchal assumptions and stereotypes. With regards to the wartime narrative, I contend that, while those girl soldiers will be given a voice through international proceedings, the historical record will remain imperfect and far from a gender perspective, and might not constitute an empowering and inclusive narrative.

[381] Sarah T. Deuitch, "Putting the Spotlight on Terminator : How the ICC Prosecution of Bosco Ntaganda Could Reduce Sexual Violence During Conflict" (2015-2016) 22 Wm & Mary J Women & L 655, at 682.

As discussed in this thesis, deGuzman urges for the international community to recognize that rape is the worst crime of all and to give priority to the prosecution of sex crimes, on the basis of the expressive capacity of ICL. However, this approach of the sex crimes prosecution and the expressive role is mistaken. As Henry argued, the spotlight on sexual violence has had negative impact on women's quest for equality and justice. She rightly claimed that the increased criminalization of wartime sexual violence has brought up the dilemma about the power of the law to produce knowledge and meaning. This dilemma places us between the importance to clearly underline the gravity of sex crimes and the risk to silence certain experiences and narratives. In light of this, Henry suggests that we should adopt a modest approach to ICL in order to embrace both the limits and the strengths of the law.[382]

This is the approach that should prevail in the case of the prosecution of the "new crimes". The outcome of this trial is most likely to result in the creation a hierarchy of suffering, an exclusion of some girls and women's experiences, and a decontextualisation of the violence from its socio-cultural, political and economic roots. Although Grey has argued that *Ntaganda* case is finally challenging the narrative in which girls are passive and recognized the girls' role in hostilities as well as their status of victims[383], the focus remains on the sexual dimension of the violence those girls have endured. At this point, these girls are still voiceless and reduced to their sexuality.

This thesis as demonstrated that ICL meets expressivist expectations quite poorly, and that the prosecution of the "new crimes" will make no exception. Consequently, international scholars and lawyers ought to engage in a reflection on what should be done

[382] Henry 2014, *supra* note 19, at 106. [Citations omitted]
[383] Grey 2014, *supra* note 114, at 613.

about the limited expressive capacity of ICL in relation to the “new crimes” and more broadly on the ramification of carrying out with wartime sexual violence prosecutions.

I truly believe that the expressive function of ICL remains the most persuasive one and that it should not simply be rejected by scholars. Domestic criminal law has proved that, very slowly, it has the potential to send messages about behaviours that are socially accepted. By anticipating the expressive needs with particular crime, the creation of the crime itself could become more efficient at reaching a satisfying outcome. The way crimes are shaped can in return shape the legal knowledge produced.

The alternatives available to respond to the limited expressive capacity of ICL are diverse and could be interesting research questions.

For instance, an alternative solution might be to recognize and acknowledge that international trials need to be processes and contextualized through other ways of recording and expressing history. A more flexible court process, such as what Truth and reconciliation commissions have to offer, in order to complement international criminal trial, could be one interesting alternative.

Neither domestic criminal law nor ICL alone can bring drastic societal changes. The ICL framework remains intrinsically patriarchal, and until its framework and structure itself are reformed, our expectations should be moderated. However, as mentioned earlier, abandoning the push for more sexual-based offences or gender-based offences in ICL might not be the appropriate solution.

Wartime violence is a complex issue, and these alternatives that both call attention to it and avoid the reductiveness of international criminal trials might be the key to enhancing gender equality.

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