

RAPE AND SEXUAL VIOLENCE

HUMAN RIGHTS LAW AND
STANDARDS IN THE
INTERNATIONAL CRIMINAL
COURT

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1. INTRODUCTION AND OVERVIEW

This document¹ identifies how the crimes of rape and sexual violence must, as a requirement of its own statute and a matter of international human rights law, be interpreted and applied with equality between men and women by the International Criminal Court (the Court). The Court has yet to rule on this matter in its jurisprudence.

Such incorporation of human rights law and standards in the prosecution of rape and sexual violence should be undertaken by other international courts, as well as national courts, in order to discharge states' duties under treaty and customary law.

In order to incorporate human rights law and standards in its practice, the Court's interpretation of the definition of the crimes should address the behaviour and actions of the perpetrator, and how this affects the victim's ability to exercise free and genuine choice, that is, to enjoy his or her human right to physical and mental integrity and sexual autonomy, without discrimination. The Court's deliberation should not just address the victim's purported 'consent' in isolation.

Human rights law and standards requires that investigations and prosecutions of the crimes of rape and sexual violence must be undertaken with careful attention given to the task of challenging stereotypes, which tend to undermine women's equality before the law. The integrity of investigations and prosecutions should not be tainted by stereotypical assumptions, including assumptions about sexual violence towards men and boys, as well as towards women and girls.

All references to the term 'consent' within the Elements of Crimes must be interpreted consistently with a fuller, more accurate and human-rights based understanding of the word consent – that a consensual decision is a decision made without force, threat of force, coercion, or taking advantage of a coercive environment. Where evidence of force, threat of force or coercion is present, there should absolutely be no additional element of law of consent for the prosecution to prove.

Acts of rape which are committed in the jurisdiction of the Court can be identified as war crimes and crimes against humanity of rape and torture. The requirement in human rights

¹ Amnesty International is profoundly grateful to the following lawyers who generously gave their time in conversation on the content of this document and in providing comments on previous drafts: Kelly Dawn Askin, Anne-Marie de Brouwer, Professor Hilary Charlesworth, Professor Christine Chinkin, Professor Rebecca Cook, Professor Rhonda Copelon, Joanna Evans, Kiran Grewal, Katherine Hall-Martinez, Sara Hossain, Michelle Jarvis, Professor Liz Kelly, Professor Catharine MacKinnon, Valerie Oosterveld, Madeleine Rees, Lucy Moxham, Professor Stephen Schulhofer, Patricia Viseur Sellers and Janet Walsh. Amnesty International is also grateful to the Women's Initiatives for Gender Justice, who hosted a conference the Hague in 2008, where many ideas raised in this document were discussed at length. While the organization has benefitted from discussion with others, all views expressed in this document should be attributed to Amnesty International alone.

law to eradicate stereotypes requires all acts of rape within the jurisdiction of the Court to be prosecuted as torture, in order to address stereotypical assumptions that rape, particularly rape of women and girls, is not a serious crime, and to acknowledge and make clear the perpetrators' use of rape and sexual violence to intimidate, discriminate and humiliate victims.

2. THE DEFINITIONS OF RAPE AND SEXUAL VIOLENCE MUST BE CONSISTENT WITH HUMAN RIGHTS PRINCIPLES

Sexual violence, including rape, is one of the most significant aspects of discriminatory violence against women.² The realities of rape and sexual abuse in armed conflict³ and in peacetime⁴ have been documented extensively over many years. The right to equality, including equality before the law, are violated by such crimes and the impunity that the perpetrators enjoy in the overwhelming majority of cases.⁵ Men and boys who are raped

² Even though men and boys are also raped and subjected to sexual violence, the overwhelming majority of cases related to women and girls. Violence against women is defined as follows:

“For the purposes of this Declaration, the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”

Article 1, UN Declaration on the Elimination of Violence against Women, UN Doc A/RES/48/104, 20 December 1993.

Gender based violence is defined by the UN Committee on the Elimination of Discrimination against Women (CEDAW) in their General Recommendation 19 as “violence that is directed against a woman because she is a woman or that affects women disproportionately.” Paragraph 6, General Recommendation No. 19 (11th session, 1992).

³ Kelly D. Askin “*War Crimes against Women: Prosecution in International War Crimes Tribunals*” Kluwer Law International, 1997; Judith G. Gardam and Michelle J. Jarvis, “*Women, Armed Conflict and International Law*” Kluwer Law International, 2001.

⁴ For an overview, see the “*In-depth study on all forms of violence against women: Report of the Secretary-General*” UN Doc A/61/122/Add.1, 6 July 2006.

⁵ In the case of *González et al. (“Cotton Field”) v. Mexico* Judgment of November 16, 2009, paragraph

frequently fear bringing complaints of rape to the attention of the authorities, due to the victim's fear of stigma.⁶

The scope of definitions of rape and sexual violence in the *ad hoc* International Criminal Tribunals for Rwanda and Yugoslavia have been the subject of intense scholarly attention⁷ and significant jurisprudence,⁸ mainly on the central question of how rape should be defined, whether by reference to the victim's lack of consent, or whether the perpetrator used coercion, force, or threat of force, or took advantage of coercive circumstances. However, the way that international human rights law and standards relating to rape and other sexual crimes affect this central question of the definition of rape has so far not received a similar level of attention,⁹ even though Article 21(1)(c) and Article 21(3) of the Rome Statute of the

400, the Inter-American Court of Human Rights made the following comment on the situation in Ciudad Juarez and Chihuahua, a comment which can be universally applied to crimes of sexual violence against women:

"The impunity of the crimes committed sends the message that violence against women is tolerated; this leads to their perpetuation, together with social acceptance of the phenomenon, the feeling women have that they are not safe, and their persistent mistrust in the system of administration of justice."

⁶ Reports indicate that the overwhelming majority of rapists of men and boys are other men. For an overview of the issues, see Sandesh Sivakumaran '*Male/Male Rape and the "Taint" of Homosexuality*' Human Rights Quarterly 27 (2005) 1274-1306. P. Oosterhoff, P. Zwanikken, E. Ketting '*Sexual torture of men in war-time Croatia was common*' British Medical Journal, 29 May 2004; BMJ 2004;328:1280; '*Sexual torture of Men in Croatia and Other Conflict Situations: An Open Secret*', Reproductive Health Matters, 2004; 12(23):68-77. Amnesty International has documented one example of rape of a civilian man by a woman, an armed combatant, in *Democratic Republic of Congo: North Kivu. No end to war on women and children* AI Index 62/005/2008, 29 September 2008, page 12.

⁷ Major academic articles include: Wolfgang Schomburg and Ines Peterson '*Genuine consent to sexual violence under international criminal law*' the American Journal of International Law, Volume 101:121-141, 2007; Alison Cole '*Prosecutor v Gacumbitsi: the New Definition for Prosecuting Rape under International Law*' International Criminal Law Review 8(2008) 55-86; Kristen Boon '*Rape and forced pregnancy under the ICC Statute: human dignity, autonomy and consent*' 32 Columbia Human Rights Law Review page 625-675, 2001; significant texts include Anne-Marie L.M. de Brouwer '*Supranational Criminal Prosecution of Sexual Violence: the ICC and the Practice of the ICTY and the ICTR*' Intersentia, the Hague, in 2005. Anne-Marie L.M. de Brouwer, *Case note on Gacumbitsi*, André Klip and Göran Sluiter (eds) Annotated Leading Cases of International Criminal Tribunals, The International Criminal Tribunal for Rwanda, Volume 24, page 583.

⁸ *Prosecutor v Akayesu*, ICTR-96-4-T (2 September 1998) [hereinafter *Akayesu* Trial Judgment], *Prosecutor v Furundžija*, IT-95-17/1-T (10 December 1998) [hereinafter *Furundžija* Trial Judgment], *Prosecutor v Kunarac, Kovac and Vukovic* IT-96-23-T & IT-98-30/1-T (22 February 2001) [hereinafter *Kunarac* Trial Judgment] *Prosecutor v Kunarac, Kovac and Vukovic* IT-96-23 & IT-96-23/1-A (12 June 2002) [hereinafter *Kunarac* Appeals Judgment] *Prosecutor v Gacumbitsi* ICTR-2001-64-A (7 July 2006) [hereinafter *Gacumbitsi* Appeals Judgment].

⁹ Notable exceptions to this are Patricia Viseur Sellers, "The Prosecution of Sexual Violence in Conflict: the Importance of Human Rights as a Means of Interpretation" published by the UN High Commissioner

International Criminal Court (the Rome Statute)¹⁰ require that the decisions of the Court must be consistent with “internationally recognized human rights law.”

Article 9 of the Rome Statute requires that the Elements of Crimes be applied, but solely to assist the Court in the application and interpretation of Articles 6, 7 and 8, the definitions of the crimes within the Court’s jurisdiction. In determining whether the Elements of Crimes is consistent with the Rome Statute, and in all interpretation of the Rome Statute, the Court must apply Article 21(3) which governs all other provisions in the Rome Statute.¹¹

3. THE DEFINITIONS OF RAPE AND SEXUAL VIOLENCE SHOULD BE

for Human Rights, accessible on

http://www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf last accessed 21 April 2010; and Catharine MacKinnon “A comment on Akayesu” in “*Are women human?*” Harvard University Press, Cambridge, Massachusetts, 2006, page 237-246.

¹⁰ Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9 17 July 1998,, *entered into force* July 1, 2002.

Article 21: Applicable Law

1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender, as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

¹¹ Daniel Sheppard “*The International Criminal Court and “Internationally Recognized Human Rights: Understanding Article 21(3) of the Rome Statute.”* International Criminal Law Review 10(2010) 43-71, particularly for views on what constitutes “internationally recognized human rights” on pages 63-71.

INTERPRETED CONSISTENTLY WITH HUMAN RIGHTS LAW AND STANDARDS

The human right of equality and non-discrimination in the enjoyment of physical and mental integrity¹² requires that there should be equality in weight given to the free and full

¹² In its General Recommendation 19, (11th session, 1992), paragraph 7, The Committee on the Elimination of All Forms of Discrimination against Women identified gender based violence, including rape and sexual violence, as a form of discrimination, and stated that:

“Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include:

- (a) The right to life;
- (b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment;
- (c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict;
- (d) The right to liberty and security of person;
- (e) The right to equal protection under the law;
- (f) The right to equality in the family;
- (g) The right to the highest standard attainable of physical and mental health;
- (h) The right to just and favourable conditions of work.”

The Committee added:

“24. In light of these comments, the Committee on the Elimination of Discrimination against Women recommends that: [...]”

(b) States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity.”

agreement to sexual contact¹³ of both or all parties to that contact, whether or not such sexual contact involves penetration.¹⁴ The use of force, or threat of force or coercion, by the perpetrator makes it impossible for the victim to exercise their right to physical and mental integrity, and therefore their sexual autonomy.

The approach outlined in the Elements of Crimes definitions of rape and sexual violence is consistent with the existing obligations under international human rights law, as the crime is defined in terms of the perpetrator negating the victim's ability to give free and uncoerced agreement to sexual contact, through use of force, threat of force, or coercion. An open-ended and non-exhaustive list of the various forms and ways in which coercion can be applied is included in the definition.

The non-contextual elements of the definition of rape as a crime against humanity and a war crime in the Elements of Crimes are the same; the only differences in the elements of these two crimes are the legal contextual ones distinguishing rape as a crime against humanity from rape as a war crime. The common elements are:

- “1. The perpetrator invaded [A footnote here reads: ‘The concept of “invasion” is intended to be broad enough to be gender-neutral.’] the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the

¹³ The terms “sexual contact” “sexual act” and “committing sexual acts” shall be used in this document to describe the physical acts through which crimes of rape or sexual assault are committed, in order to identify the physical conduct without making assumptions about whether it was sought or unsought, therefore identifying it as either legal or criminal activity. The use of this term is to allow a description in the text of the physical acts which occurred, while reflecting the reality that rape and sexual violence is not “sexual intercourse”(a term which implies agreement by the participants). The use of this term allows a clear differentiation to be made between conduct which is criminal, and conduct which is protected behaviour under human rights law, when it is actively wanted and agreed to by the participants. For a comprehensive overview of the issues, see “*Sexuality and human rights*” a discussion paper, published by the International Council on Human Rights Policy, 2009. <http://www.ichrp.org/en/projects/137?theme=6> last accessed on 20 April 2010.

¹⁴ Rape is a particular kind of sexual violence, where the definition is confined to the act of penetration of the body, whereas the definition of other kinds of sexual violence is potentially extremely wide, due to the variety of methods chosen by perpetrators to commit these crimes: as stated in the Triffterer Commentary, “Sexual violence is a term broader than rape. The term is used to describe any kind of violence carried out through sexual means or by targeting sexuality” (Otto Triffterer *Commentary on the Rome Statute of the International Criminal Court* Hart Publishing, 2008, page 214). According to the ICTR in the Akayesu judgement, sexual violence, which includes rape, is considered “any act of a sexual nature committed under circumstances that are coercive.” (*Akayesu*, above, note 8: paragraph 598). The ICTR continued: “Sexual violence is not limited to a physical invasion of the human body and may include acts that do not involve penetration or physical contact. Sexual violence covers both physical and psychological attacks directed at a person’s sexual characteristics.” (*Akayesu*, Trial Judgment above, note 8: paragraph 688) However, the aspects of coercion and violation of sexual autonomy are common to both the definition of rape and the definition of sexual violence, and are of relevance to the investigation and prosecution of both crimes.

perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent. [A footnote here reads: 'It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.']¹⁵

The non-contextual elements of the definition of sexual violence as a crime against humanity and a war crime in the Elements of Crimes are the same; the only differences in the elements of these two crimes are the legal contextual ones distinguishing sexual violence as a crime against humanity from sexual violence as a war crime. The common elements are:

The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.¹⁶

International human rights law relating to prosecution of rape refers to the requirement that for sexual contact to be legal, "Consent must be given voluntarily, as a result of the person's free will, assessed in the context of the surrounding circumstances."¹⁷

Where the perpetrator uses force, threat of force, or coercion, then it is not possible that consent is "genuine consent" – the term used in the Elements of Crimes footnotes – a consent given voluntarily, as the result of a person's free will.

Indeed, the perception that women can exercise free will and agree to sexual contact (whether or not such contact involves penetration) when they are subjected to force, threats or coercion, is a significant part of the stereotyping which undermines women's equality before the law: that the use of force and coercion are a lawful, appropriate aspect of sexual behaviour.

¹⁵ Elements 1 and 2 of the Elements of Crimes relating to Article 7(1)(g)-1, Article 8(2)(b)(xxii)-1, Article 8(2)(e)(vi)-1.

¹⁶ Element 1 of Article 7(1)(g)-6; Element 1 of Article 8(2)(b)(xxii)-6; Element 1 of Article 8(2)(e)(vi)-6, of the Elements of Crimes.

¹⁷ *M.C. v Bulgaria*, application 39272/98, judgment of 4 December 2003, European Court of Human Rights, paragraph 163.

3.1 TO BE LAWFUL, SEXUAL ACTS MUST BE AGREED TO BY BOTH PARTIES EQUALLY

An individual's sexual autonomy is an aspect of physical and mental integrity, the core human rights value protected by the criminalization of sexual violence. Unfortunately, however, sexual autonomy is frequently conflated with narrow views of 'consent' under domestic criminal law which do not capture the reality of how acts of rape and sexual violence are committed, and this misunderstanding affects how such acts are treated in criminal investigations, prosecutions and in criminal judgments.

Sexual autonomy and consent are two distinct concepts. The concept of 'consent' as used in domestic criminal law imports a notion of individual choice, typically without a consideration of the reality of abuse of power (whether evidenced through physical force, or other forms of coercion) and other factual conditions that may prevail before, during and perhaps after the sexual acts in question. A consideration of whether an individual was able to exercise sexual autonomy, by contrast, takes into account the overall dynamic and environment surrounding those sexual acts and how these had an impact on the victim's ability to make a genuine choice.

Women's right to equality before the law is frequently violated in domestic criminal jurisdictions because their evidence is distrusted. Women, therefore, have been treated unequally in that their right to freedom from sexual coercion by a perpetrator is extremely limited. In domestic jurisdictions, rape and sexual assault laws have often put people in terms of a 'proposer' of sexual acts, and the 'acceptor' is deemed to consent to the act unless their resistance is made clear, especially by using physical resistance. This is contrary to an approach to the criminal law which incorporates the human right to equality. As stated in an intervention to the European Court of Human Rights in the case of *M.C. v Bulgaria*,

"The equality approach starts by examining not whether the woman said 'no', but whether she said 'yes'. Women do not walk around in a state of constant consent to sexual activity unless and until they say 'no', or offer resistance to anyone who targets them for sexual activity. The right to physical and sexual autonomy means that they have to affirmatively consent to sexual activity."¹⁸

In this case, the European Court of Human Rights noted that "the development of law and practice in that area [of the crime of rape] reflects the evolution of societies towards effective equality and respect for each individual's sexual autonomy"¹⁹ and also made it clear that

¹⁸ Submission of Interights to the European Court of Human Rights in the case of *M.C v Bulgaria*, 12 April 2003, para 12.

¹⁹ *MC v Bulgaria*, above note 17, paragraph 165. On the issue of the "evolution of societies" and the definition of rape, Professor Stephen Schulhofer proposes a comparison between the law of theft and the law of rape, in terms of how the law developed its understanding that crimes could be committed without use of force:

including references only to physical force and resistance in definitions of rape are contrary to human rights law:

“[A]ny rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy.”²⁰

Most recently, in their views on the case of *Karen Tayag Vertido v the Philippines*, the Committee on the Elimination of Discrimination against Women made the recommendation that the respondent state:

“[Enact] a definition of sexual assault that either:

- requires the existence of “unequivocal and voluntary agreement” and requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting, or
- requires that the act take place in “coercive circumstances” and includes a broad range of coercive circumstances.”²¹

Therefore, both logically and legally, both parties to sexual acts must be unforced and uncoerced in participating in sexual acts for those acts to be legal. As a significant academic commentator on international criminal law said:

“What is important is that the focus of the ICC definition is on the coercive circumstances, not on the lack of consent of the victim. Consent is not an issue when

“In the sixteenth century, the common law of theft protected an owner's property only when a wrongdoer physically removed it from the owner's possession, against the owner's will and by force. Shippers and servants who made off with property entrusted to them and scoundrels who obtained possession under false pretences could not be prosecuted, and the law of theft didn't protect intangible interests or immovable property at all. As commerce and the nature of valuables became more complex, the law evolved, slowly at first, to fill the intolerable gaps, although many of them survived into the early twentieth century. Today the law of theft protects property owners comprehensively. It guards against embezzlement by employees and dispossession by fraud, and it protects intangible items of value such as debts, property rights, trade secrets, and most recently, computer software. It punishes virtually all interference with property rights without the owner's genuine consent. Yet there has been no comparable evolution and modernization of the law of sexual assault. In nearly all states, rape laws continue to require proof of physical force. And the law's conception of what counts as physical force remains extremely demanding.”

Stephen Schulhofer “*Unwanted Sex: the culture of intimidation and the failure of law*” Harvard University Press, 1998, pages 3 and 4.

²⁰ *M.C. v Bulgaria*, above, footnote 17, paragraph 166.

²¹ *Karen Tayag Vertido v the Philippines*, Communication No. 18/2008, UN Doc CEDAW/C/46/D/18/2008, 1 September 2010, para. 8.9.

force, threat of force, coercion or coercive circumstances exist, or when the person is incapable of giving consent. With this wording, the [Elements of Crimes] seem to have incorporated the views of the Akayesu and Furundzija Judgments on the types of circumstances that turn sexual acts into criminal acts, and added thereto the factual impossibility of giving consent on the basis of natural, induced or age-related factors.”²²

The term “genuine consent” is a term used in the Elements of Crimes definitions of rape, enforced prostitution, and enforced sterilisation; also in Rule 70 of the Rules of Procedure and Evidence. In order to be consistent with international human rights law, all references to the term ‘consent’ or ‘genuine consent’ used in the Court’s practice should be interpreted and applied in the light of the treatment of consent in human rights law which calls for free consent, free of force, coercion, discrimination and violence.²³ In other aspects of human rights law, including the rights of internally displaced people²⁴ and the freedom from enforced medical experimentation²⁵ references are made to conditions for assessing whether or not a real choice has been made about significant issues affecting the well-being of individuals. The reference to ‘natural, age-related, or induced capacity’ implies that an individual’s ability to perceive and reason in order to make decisions about their own interests and wishes should be paramount. Furthermore, in the reference to ‘genuine

²² Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: the ICC and the practice of the ICTY and ICTR* School of Human Rights Research Series, Volume 20, Intersentia, the Hague, 2005: page 134.

²³ In the Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995), the statement was made that:

“The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behaviour and its consequences.”

²⁴ Guiding Principles on Internal Displacement, Principle 7(3)(c) requires that “the free and informed consent of those to be displaced shall be sought” is among the guarantees which should be complied with, in situations where displacement is not occurring in the emergency stages of armed conflict and disasters. Guiding Principles on Internal Displacements, UN Doc E/CN.4/1998/53/Add.2, 11 February 1998.

²⁵ World Medical Association Declaration of Helsinki: Ethical Principles for Medical Research Involving Human Subjects: Adopted by the 18th WMA General Assembly, Helsinki, Finland, June 1964, and amended by the: 29th WMA General Assembly, Tokyo, Japan, October 1975:35th WMA General Assembly, Venice, Italy, October 1983: 41st WMA General Assembly, Hong Kong, September 1989: 48th WMA General Assembly, Somerset West, Republic of South Africa, October 1996; 52nd WMA General Assembly, Edinburgh, Scotland, October 2000. 53rd WMA General Assembly, Washington 2002 (Note of Clarification on paragraph 29 added) 55th WMA General Assembly, Tokyo 2004 (Note of Clarification on Paragraph 30 added) 59th WMA General Assembly, Seoul, October 2008.

consent' in the definitions of enforced sterilization as war crimes and a crime against humanity in the Elements of Crimes, it is noted that deception is incompatible with genuine consent.²⁶

The International Criminal Court should take the opportunity of its first cases of rape and sexual violence to emphasise that the use of force, threat of force, and coercion necessarily defeat the possibility of 'genuine consent' and that any person who engages in sexual acts when he or she uses force, threat of force or coercion, including taking advantage of coercive circumstances, is acting illegally and committing an act of rape or sexual violence.²⁷

Some domestic courts might consider that for sexual activity to be legal, a requirement that both parties know clearly that any sexual acts between them are occurring in such an uncoerced and unforced way is both an interference in private life and burden on individuals in their private lives. However, protection of individuals' physical and mental integrity is a primary duty of states, which should be implemented through the criminal law, as well as through other methods such as education, training of criminal justice officials, and action to address stereotypes in the media. In a ruling relating to domestic violence, and emphasising the need for the state to abide by this primary duty, the European Court of Human Rights said that "[i]n some instances, the national authorities' interference with private or family life of the individuals might be necessary in order to protect the health and rights of others or to prevent commission of criminal acts."²⁸ Human rights law recognizes that the state has duties of due diligence to prevent violence by private actors, as well as state agents or public officials, and should take a variety of actions in order to discharge that duty.²⁹

Logically and legally, therefore, the assessment of the perpetrator's action, and whether or not that person used force, threat of force, or coercion, must be the primary consideration. Where the perpetrator has used such force, threat of force, or coercion, it is not possible for the victim to exercise free will, and, therefore, to exercise their right to physical and mental

²⁶ See for example, the footnote to Article 7(1)(g)-5, the definition of the crime against humanity of enforced sterilization.

²⁷ Some comments have been made relating to rape and sexual violence in Confirmation of Charges decisions in the Pre-Trial Chambers of the ICC: the grounds of coercion mentioned in Akayesu paragraph 688 are mentioned in the Katanga/Chui confirmation of charges (paragraph 440) and Bemba (paragraph 162). Furthermore, entering a house with arms is mentioned as coercive (Bemba, paragraph 172) and being detained by soldiers in a pit is also identified as coercive (Katanga/Chui paragraph 352). *Situation in the Democratic Republic of Congo in the case of the Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of charges, 30 September 2008, Case ICC-01/04-01/07; *Situation in the Central African Republic in the case of Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, Case ICC-01/-5-01/08.

²⁸ *Opuz v Turkey*, European Court of Human Rights, Application number 33401/02, judgment, 9 June 2009, paragraph 144.

²⁹ *González et al v. Mexico*, above note 5, paragraphs 249-258, succinctly summarizes key aspects of the duty of due diligence.

integrity. No further examination of the facts should be necessary.

3.2 EXAMPLES OF HOW FORCE, THREAT OF FORCE, AND COERCION UNDERMINE INDIVIDUALS' SEXUAL AUTONOMY IN EXISTING JURISPRUDENCE AND INTERNATIONAL PRACTICE

The exercise of sexual autonomy is fundamental to lawful sexual conduct. The right to sexual autonomy has been expressed in positive terms by the Beijing Platform for Action:

“The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Equal relationships between men and women in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behaviour and its consequences.”³⁰

Examples of the circumstances in which sexual autonomy is violated are also necessary to illustrate the concept. As the ICTY Trial Chamber concluded in the *Kunarac* Trial judgment, the violation of sexual autonomy can be evidenced in a variety of ways:

“[T]he absence of genuine and freely given consent or voluntary participation may be *evidenced* by the presence of various factors specified in other jurisdictions, such as force, threat of force, or taking advantage of a person who is unable to resist. A clear demonstration that such factors negate the victim's ability to give free and genuine agreement is found in those jurisdictions where absence of consent is an element of rape and consent is explicitly defined not to exist where facts such as use of force, the unconsciousness or inability to resist of the victim, or misrepresentation by the perpetrator.”³¹

As discussed below, there are at least four conditions under which, *prima facie*, the exercise of sexual autonomy is presumed to have been compromised, which reflect the Elements of Crimes definition of rape and sexual violence.³²

³⁰ The Beijing Platform for Action, paragraph 97. Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995).

³¹ *Kunarac* Trial Judgment, above note 8, paras 457-458, (emphasis in the original text).

³² The Elements of Crimes give guidance on the application of the crime of rape referring primarily to the actions of the perpetrator which foreseeably affect the victim's possibility to exercise sexual autonomy as well as conditions specific to the victim which undermine the capacity to consent within the circumstances occurring at the time of the alleged offence.

- (1) Situations where the perpetrator uses force or threatened to use force;
- (2) The perpetrator used coercion, or where he or she creates fear of violence, applies duress (including detention), psychological oppression, or abuses his or her power;
- (3) Coercive environments, from which a perpetrator takes advantage of a victim; or
- (4) Other conditions, including age, where various forms of natural incapacity or reduced capacity exist which affect the individual's ability to give genuine consent.

(A) USE OR THREAT OF FORCE

The use or threat of force is the most obvious circumstance in which sexual autonomy is not exercised: it is "clear evidence of non-consent."³³ Force or threats of force and coercion in various guises are listed as methods by which crimes of rape and sexual violence are perpetrated, therefore threats of force and force should not be seen as the required elements of the crime; coercion is sufficient. Moreover, resistance to force on the part of the victim or survivor is treated as irrelevant to the commission of the crime.³⁴ Rule 70 of the Court's Rules of Procedure and Evidence provides that "[c]onsent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence."³⁵ This is consistent with human rights law, notably *M.C. v Bulgaria*, as outlined above.

Force should not be interpreted as "excessive physical force" or "life-threatening physical force" or "overwhelming physical force" as jurisprudence in national jurisdictions have often described it,³⁶ but, simply, "force" in the ordinary used of the term. It is significant to the

³³ *Kunarac* Appeal Judgment, above note 8, at para 99.

³⁴ For instance, the Appeals Chamber in *Kunarac* declared that it rejected "the Appellants 'resistance' requirement ... for which they [had] offered no basis in customary international law." The suggestion that "nothing short of continuous resistance" would provide adequate notice that the sexual acts were unwanted was found to be "wrong on the law and absurd on the facts." *Kunarac* Appeal Judgment, above note 8, at paragraph 128. Likewise, in the *M.C. v. Bulgaria* case decided by the European Court of Human Rights, it was determined that "requiring proof of physical resistance in all circumstances risks leaving certain types of rape unpunished and thus jeopardizing the effective protection of the individual's sexual autonomy." The court went on to find that member States had positive obligations under the Convention to "require[] the penalization and effective prosecution of any non-consensual act, including in the absence of physical resistance by the victim." *M.C. v. Bulgaria*, above, note 17 at para. 157. In *Karen Tayag Vertido v the Philippines*, the Committee on the Elimination of Discrimination against Women "[stressed] that there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence." Para 8.5, *Karen Tayag v the Philippines*, above, footnote 21.

³⁵ ICC Rules of Procedure and Evidence, Rule 70(3).

³⁶ See Schulhofer, above note 19, page 4, in relation to the system in the United States of America.

proper interpretation of the definition of rape and sexual violence, that in other parts of the Elements of Crimes, the term “forcibly” is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment.”³⁷

(B) COERCION

The recognition of coercion as an essential element of the crime of rape and of other sexual crimes is a significant development because it recognizes an inequality between perpetrators and victims. The South African Law Commission has aptly described this development:

A shift from ‘absence of consent’ to ‘coercion’ represents a shift in the focus of the utmost importance from the subjective state of mind of the victim to the imbalance of power between the parties This perspective also allows one to understand that coercion constitutes more than physical force or threat thereof, but may also include various other forms of exercise of power over another person: emotional, psychological, economical, social or organizational power.³⁸

The European Court of Human Rights judgment in *M.C. v. Bulgaria* is an example of the kinds of circumstances which create a coercive environment. In this case, the alleged perpetrators created a coercive environment, which they then took advantage of, rather than taking advantage of an existing coercive environment. The Court noted that prosecutors failed to take the opportunity to “prove [...] the perpetrators’ *mens rea* by assessing all the surrounding circumstances, such as evidence that they had deliberately misled the [victim] in order to take her to a deserted area, thus creating an environment of coercion.”³⁹

Investigators and prosecutors should look at all the surrounding circumstances before making recommendations and decisions on charging the accused in order to ensure effective prosecutions which fully uphold the rights of victims. Putting the surrounding circumstances before the court allows full consideration of whether and to what extent the act may have been coerced.

Five forms of coercive circumstances are discussed below, however, these provide non-exhaustive illustrations of the circumstances in which coercion is used in the commission of sexual violence.

(B)(i) FEAR OF VIOLENCE

Fear of violence differs from submission to sexual violence due to threatened violence. Fear of violence is a more subtle, but equally compelling, form of coercion as victims may silently and without complaint acquiesce in order to avoid further risk to their safety. As recognized

³⁷ See the footnotes for Article 6(e) (genocide by forcibly transferring children) Element 1, Article 7(1)(d) the crime against humanity of forcible transfer of population, Element 1. 0

³⁸ South African Law Reform Commission, Discussion Paper 85 (Project 107) Part A: Sexual Offences: the Substantive Law, p. 114, para. 3.4.7.3.14. 12 August 1999.

³⁹ *M.C. v. Bulgaria*, above note 17, at paragraph 180.

by the European Court of Human Rights in *M.C. v. Bulgaria*, “rapists often employ subtle coercion or bullying when this is sufficient to overcome their victims.”⁴⁰ Indeed, fear of violence is often a reaction to the perpetrator’s actions that seem likely to escalate to more overt threats or actual infliction of force: victims are coerced to submit to sexual acts quickly and quietly lest the perpetrator step up his or her coercive behaviour to violence.⁴¹ The fear of violence thus nullifies the possibility that the victim is exercising his or her sexual autonomy as an equal participant in sexual acts.

(B)(ii) DURESS

Duress is typically understood in domestic criminal law as a defence to conduct or circumstances that threatened the life or safety of the defendant or of another. Duress, however, should never be a defence to a crime under international law, but only a possible ground for mitigation of punishment. Duress as a mode of perpetrating crimes of sexual violence is a much broader concept; it includes extortion. In *Akayesu*, the Trial Chamber found that “threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion.”⁴² Duress also includes making “threats which a person in his [or her] situation would be unable to resist.”⁴³ An example of such duress is found in the *Kvočka* trial judgment, where the Trial Chamber emphasized that while the defendant did fulfil a purported ‘agreement’ with the victim to move her husband to better conditions within the detention camp in exchange for sexual acts, it was still coercive to threaten that the victim’s husband would remain in inhumane conditions and at risk of torture or cruel, inhuman or degrading treatment unless the victim submitted to the perpetrator’s demands that she participate in sexual acts.⁴⁴

(B)(iii) DETENTION

Sexual conduct between inmates or detainees and persons in authority enforcing detention are presumed to be criminal acts of rape or sexual violence, due to the inherently coercive nature of detention.

⁴⁰ *M.C. v. Bulgaria*, above note 17, paragraph 146.

⁴¹ *Furundžija* Trial Chamber Judgment, above, note 8, at paragraph 174, refers to “a reasonable fear [that the victim] or a third person will be subjected to violence, detention, duress or psychological oppression.” Amnesty International notes that the decision of whether or not a fear is “reasonable” can itself be beset by assumptions and stereotypes. In the case of *Karen Tayag Vertido v the Philippines*, the Committee on the Elimination of All Forms of Discrimination against Women notes that “[the] judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general.” (para 8.4, *Karen Tayag Vertido v the Philippines*, above note 21.

⁴² *Akayesu* Trial Judgment, above, note 8, at paragraph 688.

⁴³ *Schulhofer*, above note 19, at page 126.

⁴⁴ *Prosecutor v Kvočka et al*, Case No IT-98-30/1, (Trial Chamber, 2 November 2001, para. 555.

The *Kunarac* Appeals judgment refers to the fact that In Germany⁴⁵ and the United States, this conduct is an offence even where the sexual conduct was identified as “consensual.”⁴⁶ Similarly, in *Kunarac*, the Appeals Chamber stated that in such cases, there is a “need to presume non-consent.”⁴⁷ In *Kunarac*, the victims were “held in *de facto* military headquarters, detention centres and apartments maintained as soldiers’ residences. As the most egregious aspect of the conditions, the victims were considered the legitimate sexual prey of their captors.”⁴⁸ The women were repeatedly and regularly raped, often by more than one individual, and “those who sought aid or resisted were treated to an extra level of brutality.”⁴⁹ The Appeals Chamber found that “such detentions amount to circumstances that were so coercive as to negate *any* possibility of consent.”⁵⁰ The Appeals Chamber in *Krnjelac* found that the detainees were in a coercive situation, that is, a prison regime, which would negate any value to alleged consent to charges of deportation and expulsion.⁵¹

Detention is an inherently coercive environment, regardless of whether the accused individual was directly responsible for placing the victim into detention or not. Where detention is lawful, those responsible for initiating and supervising the detention have a duty of care not to abuse those in their power.⁵² Where detention is unlawful, this is further evidence of coercion.

There may be situations in which both the perpetrator and the victim are detained, and the perpetrator takes advantage of the coercive environment caused by the detention [see below, section 4 on “Taking advantage of a coercive environment”]. International human rights and humanitarian law standards governing detention, such as recommendations of the Special

⁴⁵ Chapter 13 of the German Criminal Code, Section 174a imposes criminal liability for committing “sexual acts on a prisoner or person in custody upon order of a public authority.” Section 174b punished sexual abuse by means of exploiting a position in public office. In neither instance is the absence of consent an element.

⁴⁶ See *New Jersey v. Martin*, 235 N.J. Super. 47, 56, 561 A.2d. 631, 636 (1989) (recognizing the inequality and inherent coerciveness of sexual conduct between detainees and persons of authority).

⁴⁷ *Kunarac* Appeals Judgment, above note 8, at paragraph 131.

⁴⁸ *Kunarac* Appeals Judgment, above note 8, at paragraph 132.

⁴⁹ *Kunarac* Appeals Judgment, above note 8, at paragraph 132.

⁵⁰ *Kunarac* Appeals Judgment, above note 8, at paragraph 132.

⁵¹ *Prosecutor v Krnjelac “Foca”* Appeals Judgment, 17 Sept 2003, Case No. IT-97-25, para. 227. The Appeals Chamber ultimately found that the conditions of detention placed the detainees under duress and that the prisoners were in no position to exercise genuine consent; their transfer was a form of deportation and expulsion: see paras 226- 233.

⁵² Lovisa Stannow, David Kaisner in the two successive articles in the New York Review of Books: The rape of American Prisoners, 11 March 2010, <http://www.nybooks.com/articles/archives/2010/mar/11/the-rape-of-american-prisoners/>; the Way to Stop Prisoner Rape, 25 March 2010, <http://www.nybooks.com/articles/archives/2010/mar/25/the-way-to-stop-prison-rape/> last accessed on 5 May 2010.

Rapporteur on Torture,⁵³ the Geneva Conventions⁵⁴ and the Standard Minimum Rules on the Treatment of Prisoners⁵⁵ make demands on states to segregate detainees by sex and by age. While these recommendations may protect detainees from some forms of violence at the hands of other detainees, they will not by themselves provide protection from same-sex violence or the abuse of power by persons in authority, including other detainees who wield *de facto* authority within the place of detention.

(B)(IV) PSYCHOLOGICAL OPPRESSION

The definition of rape in the Elements of Crime acknowledges that psychological pressure may constitute coercion in the commission of sexual violence. The definition of rape in *Furundžija* includes “a reasonable fear [that the victim] or a third person will be subjected to violence, detention, duress or psychological oppression.”⁵⁶ Rightly, the concept of force “is given a broad interpretation and includes rendering the victim helpless.”⁵⁷ In *Kunarac*, the Trial Chamber accepted that the definition of rape in various jurisdictions covered situations in which the victim was rendered “incapable of resisting.”⁵⁸

Psychological oppression can be more easily used by perpetrators where there is a pre-existing relationship or psychological bonds between the victim and the perpetrator, such as that between family members and children, teachers and students, doctors and patients, religious leaders and adherents, employer and employee and peacekeepers and members of protected populations: while sexual contact between people who maintain such relationships should not be seen in themselves as inherently coercive, courts should be more vigilant to the use of psychological oppression by alleged perpetrators where such relationships exist.⁵⁹

⁵³ Special Rapporteur on torture, compiled recommendations. UN Doc E/CN.4/2003/68, 17 December 2002, paragraph. 26(j).

⁵⁴ Third Convention relative to Treatment of Prisoners of War, Geneva 12 August 1949, Article. 24: Fourth Convention relative to the Protection of Civilian Persons in Time of War, Article 76.

⁵⁵ Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its Resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

⁵⁶ *Furundžija* Trial Chamber Judgment, above, note 8, at paragraph. 174.

⁵⁷ *Furundžija* Trial Chamber Judgment, above, note 8, at paragraph. 180.

⁵⁸ *Kunarac* Trial Chamber Judgment, above note 8, at paragraph. 447. The Trial Chamber referred, in particular, to the Swiss Penal Code and to Danish law to support its reasoning.

⁵⁹ The effect of psychological oppression being used to commit rape was described to Amnesty International as follows:

“So what is marital rape like? Anyone can imagine it who has seen a film in which a woman is attacked, beaten and raped in a park, in her own apartment or anywhere else. The thing is: it is exactly the same as any other rape. Someone grabs your hair, slaps your face or hits it with a clenched fist, kicks you in the stomach, or simply holds a knife to your throat...The difference between rape in films and marital rape is that we cannot scream, as our child might wake up in the

The shaming or humiliation of the victim is often part of the psychological oppression. This is especially potent where the fact of the sexual violence is publicized, or the perpetrator threatens to publicize the sexual acts as a form of blackmail to secure the victim's submission. In many communities survivors of sexual violence may be doubly victimized – once by the original perpetrator and again by their communities as a blight on community or family 'honour'. In its worst form, this re-victimization is violent and even fatal, but even the risk of ostracism and shunning from the community constitute potent psychological oppression.⁶⁰

(B)(V) ABUSE OF POWER

Although abuse of power in many circumstances may overlap with coercion in detention, it is a broader element including situations where the perpetrator is in a position of political, military or other power over the victim. Examples of such an abuse of power include coercion through promises that the victim will receive better treatment and assurances that third parties will be protected from harm in exchange for yielding to the perpetrator.

The *Kvočka* case provides a clear example of an abuse of power. Although the crimes charged occurred in the context of detention, the reasoning applies to other types of abuse of power situations. In *Kvočka*, the Trial Chamber accepted evidence from women who had been coerced into sexual acts with the promise of improved (albeit still abusive) treatment for themselves and their families and held that the accused had “grossly abused his position and took advantage of the vulnerability of the detainees.”⁶¹ One witness testified that she had been forced into sex with the accused in exchange for food, water and assurances that her husband would be moved into better section of the detention camp. The Trial Chamber found that instead of discrediting the testimony of the witness, her evidence “suggests that [the accused] regularly attempted to bribe or coerce victims to ‘agree’ to sexual intercourse in

other room. Or that our child is right there, next to us, her or his face distorted with terror. And another difference is that the person who does this to us is someone we used to love, someone we once trusted more than anyone else. And there's another difference, too: that others say that we invented the whole thing. That we tell lies. Or if this can really happen, it is not such a big deal.”

Hungary “*Cries unheard: the failure to protect women from rape and sexual violence in the home.*” AI Index EUR 27/002/2007, May 2007, page 4.

⁶⁰ Amnesty International documents such facts in many of its reports on sexual violence, from all regions of the world. It is often irrelevant whether the sexual violence occurred during armed conflict, crimes against humanity or in peace-time, as the focus is on perceptions of the “purity” or otherwise of the woman or girl concerned. For example, Amnesty International reported on the situation of women who had been raped in the Bosnian war in the early 1990s, and that “[m]any victims... pointed out that the public perception of rape was preventing them from rebuilding their lives and integrating with the society. [One complained that] “I do not have any rights. Wherever I go people perceive me – I am sorry to use this word – as a whore. But did I choose this life?” (“*Whose Justice? the women of Bosnia and Herzegovina are still waiting*” (AI Index EUR/63/006/2009) page 59).

⁶¹ *Kvočka* Trial Chamber Judgment, above note 42, paragraph 548.

exchange for favours.”⁶²

In *Delalić*, the Trial Chamber noted that the involvement of a state agent or public official was inherently coercive, especially in the context of armed conflict:

The condemnation and punishment of rape becomes all the more urgent where it is committed by, or at the instigation of, a public official, or with the consent or acquiescence of such an official.⁶³

The Trial Chamber went on to say that it is difficult to imagine circumstances in which rape by, or at the instigation of a public official, “could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation.”⁶⁴

Abuse of power may be relevant even where the accused does not exercise official authority or power. For example, in *Musema*, the accused was the owner of a tea factory. The Trial Chamber held that he was in a position of power over his employees and others in his prefecture, as he was seen as someone who wielded considerable power in the region.⁶⁵ Although the Trial Chamber’s finding related to whether or not the accused was responsible for the acts of others, the decision recognizes that coercive power may be exercised outside formal state or military structures through other relationships of power and influence which come before the Court and are increasingly prevalent in armed conflict situations.

Relatively recent and highly publicized instances of abuse of power arose in the context of peacekeeper or humanitarian aid worker abuse of the populations they were discharged to protect and aid.⁶⁶ This abuse of power is especially troubling because of the *de facto* fiduciary relationship between the parties and the fact that peacekeepers may be immune from prosecution.

Allegations of peacekeepers and aid workers engaging in sexual abuse and exploitation surfaced in late November 2001.⁶⁷ In early 2004, the international media reported on the

⁶² *Kvočka* Trial Chamber Judgment, above note 42, paragraph. 555. While the accused was not convicted of rape of this particular victim on procedural grounds, the Trial Chamber’s reasoning is clear that the defendant’s conduct with respect to this victim constituted rape.

⁶³ *Prosecutor v Delalic*, Case No IT-96-21 (16 November 1998) paragraph. 495.

⁶⁴ *Prosecutor v Delalic*, Case No IT-96-21 (16 November 1998), paragraph 495.

⁶⁵ *Prosecutor v Musema*, ICTR-96-13-A, Trial Chamber Judgment 27 January 2000, paragraphs. 880-81.

⁶⁶ Several academics have analysed this abuse of power and UN responses. See generally Muna Ndulo, *The United Nations Responses to the Sexual Abuse and Exploitation of Women and Girls by Peacekeepers during Peacekeeping Mission* 27 Berkeley J. Int’l Law 127 (2009); Susan A. Notar, *Peacekeepers as Perpetrators: Sexual Exploitation and Abuse of Women and Children in the Democratic Republic of the Congo* 14 Am. U.J. Gender Soc. Pol’y and L. 413 (2006).

⁶⁷ Human Rights Watch, *Democratic Republic of Congo, Seeking Justice: The Prosecution of Sexual Violence in the Congo War: Summary* (March 2005). These allegations were made by two consultants

sexual exploitation and abuse of young Congolese women and girls by United Nations peacekeepers in the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC).⁶⁸

Various United Nations texts define what amounts to sexual abuse and sexual exploitation. The MONUC Code of Conduct defines an act of sexual abuse and/or exploitation as (a) any exchange of money, employment, goods or services for sexual intercourse, (b) sexual activity with a person under the age of 18, or (c) other sexual misconduct that has a detrimental effect on the image, credibility, impartiality or integrity of the United Nations.⁶⁹ A more comprehensive definition was promulgated by the Secretary-General in a 2003 bulletin addressed to all staff of the United Nations, including staff of separately administered organs and programs on special measures for protection from sexual exploitation and sexual abuse.⁷⁰

The bulletin defines sexual abuse and sexual exploitation as two different concepts and violations. It defines sexual exploitation as “any actual or attempted abuse of a position of vulnerability, differential power, or trust for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.”⁷¹ Sexual abuse is defined as an “actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.” These are both comprehensive approaches, which define any form of sexual exploitation in the context of peacekeeping operations as a form of serious misconduct regardless of the purported consent of the victim.⁷²

Such rules function as a preventive measure, to make it part of a professional responsibility and duty to abstain from sexual activity while undertaking a responsible and authoritative role – in the same way that criminal law in certain domestic jurisdictions makes it a criminal act for a detention or prison officer to have sex with detainees or prisoners. While it functions to stop officials abusing people who lack power, it also stops them from giving beneficiaries who

commissioned to study the issue of sexual exploitation and violence in the refugee communities in Guinea, Liberia and Sierra Leone. Ndulo, 27 Berkeley J. Int'l Law 127 at 141-42.

⁶⁸ Jonathan Clayton & James Bone, *Sex scandal in Congo threatens to engulf UN's peacekeepers*, The Times 23 December 2004.

⁶⁹ Office of Internal Oversight Servs., Report of the Office of Internal Oversight Services on its Investigations into Allegations of Sexual Exploitation and Abuse in the Ituri Region (Bunia) in the United Nations Organization Mission in the Democratic Republic of the Congo, P 25, U.N. Doc. A/61/841 (5 April 2007) at p. 19.

⁷⁰ The Secretary-General, Secretary-General's Bulletin, Special measures for protection from sexual exploitation and sexual abuse, § 1, U.N. Doc. ST/SGB/2003/13 (9 October 2003).

⁷¹ See above note 67.

⁷² In the Secretary-General's Bulletin, “sexual exploitation” means “any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another. Similarly, the term “sexual abuse” means the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.”

are willing to exchange sexual acts for improved access to services, goods, benefits or money an unfair advantage over others to whom the official owes a duty of care and fairness in distributing aid, protection, or other assistance.

These rules are to prevent rape and sexual violence, and in so doing, prevent abuse of power. Like detention, between peacekeepers and protected populations, there is a professional relationship which requires respect, to avoid any tainting by abuse of power. As with detention, these are reasonable and proportionate limitations on conduct in a professional context, rather than a limit on expression of sexuality in itself.

C. TAKING ADVANTAGE OF A COERCIVE ENVIRONMENT

It has been stated by various authorities, including the Special Rapporteur on Sexual Slavery,⁷³ that the very existence of an armed conflict constitutes an inherently coercive environment due to the pervasive potential for violence. In *Akayesu*, it was found that a military presence among displaced persons was sufficient to make the situation inherently coercive.⁷⁴

Taking advantage of a coercive environment differs from other forms of coercion in that the perpetrator is not directly responsible for creating the coercive situation. The coercive environment exists independently of the perpetrator's actions but the perpetrator uses the existing coercive environment to his or her advantage, as mentioned above in the discussion of rape of one detainee by another. Inclusion of the term "taking advantage of a coercive environment" in the Elements of Crimes recognizes that the effects of armed conflict permeate every aspect of individuals' lives and has impact beyond the battlefield. Increasingly, armed conflict is waged in towns and cities, among the civilian population, and therefore has a debilitating effect on the local economy and pervades nearly every facet of everyday life. Such conflict situations include active "hostilities, detention, occupation and generalized terror and deprivation."⁷⁵

The conditions under which female detainees are often held offer one illustration of a coercive environment. One pattern identified by the 1992 Commission of Experts in the former Yugoslavia involved instances of civilians being allowed to enter the detention camps, select women, remove them from the camp, rape them and then either return them to the camp or kill them. Civilians were taking advantage of the coercive environment in the camps, but not responsible for the detention itself. This situation is distinguished from the detention situation described above (page 19) in that guards have specific obligations towards the

⁷³ Report of the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict, including internal armed conflict, Subcommission on prevention of discrimination and protection of minorities UN Doc E/CN.4/Sub.2/1998/13, 22 June 1998, paragraph 25.

⁷⁴ *Akayesu* Trial Chamber Judgment, above, note 8, at paragraph. 688.

⁷⁵ Women's Caucus for Gender Justice paper submitted to the Preparatory Commission for the International Criminal Court (16-26 Feb 1999).

detainees, while the civilians entering the camp owe no such duty of care,⁷⁶ but are still able to perpetrate abuse.

Peacekeeper and aid worker abuse of power over the populations they serve may be both coercion through an abuse of power and taking advantage of coercive environments that were not created directly by the presence of peacekeepers and aid workers in the region. Individuals of all kinds are able to take advantage of the situation of disorder, confusion and lawlessness to commit rape and other sexual crimes, including non-combatants, other displaced persons, criminals and gang members or members of quasi-independent groups unconnected to the armed conflict. An approach that takes into account these possibilities offers justice to greater numbers of victims.

The case of *M.C. v Bulgaria* gives a further example of the kinds of situation which constitute a coercive environment. In this case, the alleged perpetrators created (rather than took advantage of) a situation which was coercive, by luring the victim to an isolated rural area, late at night.

D. INCAPACITY

In addition to force, threats of force and coercion, the Elements of Crime recognize that rape and other sexual crimes can be committed against a person incapable of securing their sexual autonomy because they lack the capacity to do so. Incapacity is fully consistent with the concept of sexual autonomy because a victim of sexual crime is unable to exercise his or her autonomy if, in the words of the Elements of Crimes, they are affected by natural, induced or age-related incapacity.⁷⁷

A non-exhaustive list of circumstances in which an individual may be found to lack capacity to exercise sexual autonomy includes:

- (a) natural incapacity, for example, mental incapacity to understand the quality of the act;
- (b) induced incapacity, for example, diminished capacity due to ingestion of

⁷⁶ Final Report of the UN Commission of Experts, Established pursuant to Security Council Resolution 780 (1992) Annex VIII, part 1 of 10, Prison Camps. UN Doc S/1994/674/Add.2, 27 May 1994, preliminary remarks.

⁷⁷ Human rights law has taken a significant step forward in this area with the entry into force of the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006), entered into force May 3, 2008. Its preambular paragraph (n) refers to “[the recognition] of the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices”; a general principle of the convention [Article 3] is “respect for inherent dignity, individual autonomy, including the freedom to make one’s own choices, and independence of persons” and there is also a provision on special protection from exploitation, violence and abuse (Article 16). The Disabilities Convention therefore has a dual approach, to promote the autonomy of disabled people to the extent that the disability of each individual permits this, but also ensuring an active approach to protection for those who require it.

- drugs and/or alcohol;⁷⁸ and
- (c) age-related incapacity, for example, the competence of children to give free and informed agreement to sexual activity, as recognized in the Convention on the Rights of the Child.⁷⁹

Determinations about whether or not an individual lacked capacity to choose, freely and genuinely, to engage in sexual contact should be made on a case-by-case basis as they are largely questions of fact. In making that determination, however, the Court will need to consider such factors as the survivor's capacity to perceive, understand and communicate and whether specific developmental, mental health or perceptual problems, especially those induced by drugs or alcohol, had rendered the individual incapable of genuine exercise of sexual autonomy.

3.3 ANY REFERENCE TO THE TERM "CONSENT" MUST ALWAYS BE UNDERSTOOD IN A MANNER CONSISTENT WITH HUMAN RIGHTS LAW AND STANDARDS.

While the definition of rape and sexual violence in the Elements of Crimes is focused on the perpetrator's use of force, threat of force, or coercion, there are still many references within the text to consent (as set out in the footnote to Elements of Crimes).

Any reference to consent must be interpreted as genuine agreement and the exercise of sexual autonomy (as set out in *M.C. v Bulgaria*) and the Court should make it clear that consent cannot be exercised where there is force, threat of force, or coercion.

Rule 70 of the Rules of Procedure and Evidence of the International Criminal Court requires that

"In cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles:

- a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
- b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
- c) Consent cannot be inferred by reason of the silence of, or lack of resistance by a

⁷⁸ Induced incapacity, arguably, may also be due to deception. For example, in the case of *M.C. v Bulgaria*, a victim was misled in order to take her to an isolated place to commit the crime. In the Elements of Crimes, deception is inconsistent with giving genuine consent to sterilization (see for example, the footnote to Article 7(1)(g)-5, the crime against humanity of enforced sterilization, Element 2).

⁷⁹ See section 4 on the evolving capacity of children to make decisions.

victim to the alleged offence.”

It is possible to apply to the Court to adduce evidence of consent. The closed court (*in camera*) procedure outlined in Rule 72 acts as a protection to the victim or witness from being obliged to give evidence relating to consent where it cannot have relevance, that is, where the perpetrator used force, threat of force, or coercion, or took advantage of a coercive environment. Given that the human rights protection of Article 21(3) of the Rome Statute is expressly mentioned in this Rule, as well as Article 69 (4) of the Rome Statute, relating to fair evaluation of testimony as well as fair trial, the right of women to equality before the law in relation to sexual crimes is reinforced. Where evidence of consent which relies on gender stereotyping is proposed, Article 21(3) references to human rights would make such evidence inadmissible.

All references to “consent” within the Elements of Crimes must be interpreted consistently with a fuller, more accurate and human-rights based understanding of the word consent – that a truly consensual decision is a decision made without force, threat of force, coercion of any kind, or taking advantage of a coercive environment. Where sexual contact takes place without such uncoerced and free decision-making, the victim’s right to physical and mental integrity, and sexual autonomy, is violated. Where evidence of force, threat of force or coercion is present, there should absolutely be no additional element of law of consent for the prosecution to prove to convict a defendant on a charge of rape or sexual violence.

3.4 IS IT POSSIBLE FOR GENUINE CHOICE TO BE EXERCISED IN A SITUATION OF COERCION?

Rule 70 of the Rules of Procedure and Evidence expressly guides the Court to not infer consent in situations where force, threat of force, or coercion have been used by the perpetrator, or the perpetrator has taken advantage of a coercive environment.⁸⁰ In cases relating to forced marriages⁸¹ and slavery⁸² both courts were sceptical about arguments that women had become reconciled to their situation, and were, therefore, in a consensual marriage with men who had initiated the purported relationship through force or coercion. Similarly, in the *Kunarac* case where the defendant alleged that a victim had in fact “seduced” him the ICTY was robust in its rejection of his testimony. In *Kunarac*’s initial trial, he alleged that one witness had initiated sexual contact with him and therefore he had no reason to think that she was not consenting. The Trial Chamber’s opinion was that given the

⁸⁰ For a thorough examination of the legal issues and negotiating history of Rule 70, see *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* edited by Roy Lee (Transnational Publishers, 2001), pages 369- 391.

⁸¹ *The Special Court for Sierra Leone’s Consideration of Gender-Based Violence: Contributing to Transitional Justice?* Valerie Oosterveld, *Human Rights Review* (2009) 10:73-98., see pages 84-88 for a discussion of the judgments, including dissenting opinions, relating to the crime of forced marriage.

⁸² *Hadijatou Mani Koraou v Republic of Niger* ECOWAS Community Court of Justice (27 October 2008) paragraphs 78-80.

circumstances, it was “highly improbable” that he should realistically think that she was consenting, given “the general context of the existing war-time situation and the specifically delicate situation of the Muslim girls detained in Partizan or elsewhere in the Foca region during that time.”⁸³ In the *Bemba* confirmation of charges hearing, mention is made of evidence being admitted that some women in the area where attacks take place “had sexual relations with soldiers on a voluntary basis, thus challenging the requirement of force.”⁸⁴ However, the Chamber found such evidence “untenable”⁸⁵ but appears to make this comment solely in relation to the specific witness statements before it, rather than the general comment that some women had voluntary relationships with soldiers.

The *Kunarac* Appeals Judgment states that:

It is worth observing that circumstances giving rise to the instant appeal and that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible.⁸⁶

The comment in the *Kunarac* Appeals Judgment should not be read as implying that there is a normative requirement of strict liability for rape where sexual contact in all forms of armed conflict or where crimes against humanity are taking place. Instead, it reflects the immediate factual reality of armed conflict situations and how coercion operates on the decision-making of those caught up in it. The coerciveness of such factual circumstances is a matter of evidence for the prosecution to prove beyond reasonable doubt in each case. Examples of such situations may include:

- a witness giving evidence that, through lack of safe and secure shelter or housing, she was unable to make herself secure from attackers;
- witnesses giving evidence that the presence of armed personnel acted as an overt or implied threat of violence;

⁸³ *Kunarac* Trial Judgment, paragraph 644-646.

⁸⁴ *Prosecutor v Jean-Pierre Bemba Gombo, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo* ICC-01/05-01/08, 15 June 2009, paragraph 167 (subsequently referred to as *Bemba* Confirmation of Charges Decision).

⁸⁵ *Bemba* Confirmation of Charges Decision, paragraph 168.

⁸⁶ *Kunarac* Appeals, above note 8, at paragraph 130. However, two scholars have noted: “It cannot be assumed that any sexual contact occurring in circumstances of genocide, crimes against humanity or war crimes on its face constitutes a crime. Also in such situations, autonomous relationships between individuals remain possible and may even be formed between members of opposing parties.” (Wolfgang Schomburg and Ines Peterson ‘*Genuine consent to sexual violence under international criminal law*’ *American Journal of International Law*, Volume 101:121-141, 2007 at page 125.) Although this may be a possibility, assessments of evidence in most cases before international human rights courts leads most frequently to findings of force, threat of force, or coercion.

- witnesses giving evidence that separated from their communities, while migrating or fleeing, a perpetrator took advantage of their inability to escape;
- a witness giving evidence that she had dependent children with her at the time of the attack, and that she was unable to refuse unwanted sexual contact for fear of diverting the perpetrator's sexual interest or violence to a dependant child or children.

4. CRIMES OF RAPE AND SEXUAL VIOLENCE AGAINST CHILDREN MUST BE UNDERSTOOD IN TERMS OF COERCION, NOT CONSENT

Definitions of rape and sexual violence based on force, threat of force, and coercion should be applied in cases relating to children with awareness of the rights of children, particularly Article 34 of the Convention on the Rights of the Child. Girls and boys are more easily targeted, forced, threatened and coerced than adults. The definition of rape and sexual violence which uses force, threat of force, or coercion can be applied accurately to the evidence of how child victims experience these crimes, and how perpetrators take advantage of power differentials in order to commit these crimes. This demonstrates factually the benefits of this legal approach, in comparison with approaches based on consent alone.

For example, where the definition of rape and sexual violence is based on force, threat of force, or coercion, there is no need for statutory rape provisions, which specify an age limit below which it is assumed a child cannot consent to sexual contact. Such statutory rape provisions fail to do justice to victims where the age limit is set either too high or too low.

Where the age limit is set too high, it denies adolescents the right to make their own choices relating to sexual activity, as it makes them liable to criminal prosecution for exercising their human rights.⁸⁷

Where the age limit is set too low, it tends to deny adolescents, particularly adolescent girls, the protection of the criminal law. Once girls are over the age stipulated in the statutory rape

⁸⁷ The reference to the evolving capability of the child in Article 5 of the Convention on the Rights of Child has been rightly seen as allowing for adolescents and young people to make their own choices relating to sexual education and sexual activity under the age of 18.

provision, they are frequently assumed to have agreed to sexual contact, irrespective of whether the evidence indicates that they were forced, threatened, or otherwise coerced.

Consent-based approaches to the crime of rape do not capture the reality of how children under 18 are targeted for sexual violence. The kinds of fearful submission to sexual acts that may be manifested by children (for example, as described in the case of *M.C. v Bulgaria*) are frequently portrayed as 'consent' by alleged perpetrators. This portrayal is particularly common when the alleged victim is an older child, especially an adolescent girl. The importance of the coercion-based approach to the definition of rape and sexual violence is that it focuses on the perpetrator's actions, and how this affected the behaviour of the victim.

The human rights of children are essential to an effective integration of relevant human rights principles into the jurisprudence of the Court, as so many children, particularly girls, are targeted for sexual violence and rape.⁸⁸ With its reference to age-related incapability of giving genuine consent and its focus on coercion, as well as force and threat of force, the Elements of Crimes definition of rape is well equipped to address the particular situation of girls and boys, and how perpetrators use coercion to commit sexual crimes against children.

Sexual crimes against girls and boys are frequently reported in armed conflict and situations where crimes against humanity and genocide are taking place, as well as in peacetime. Although the ages of victims of rape and sexual violence are often emphasised in jurisprudence, which tends to show the egregiousness of these crimes, a stronger human rights approach, using international standards could be used to show how children fall victim to these crimes, and the kinds of coercion used by perpetrators against children.

Article 34 of the Convention on the Rights of the Child, requires the state to "protect the child from all forms of sexual exploitation and sexual abuse" including "the inducement or coercion of a child to engage in any unlawful sexual activity."

Professor Paulo Sergio Pinheiro, appointed by the UN Secretary-General to prepare a global report on violence against children, noted that:

"Studies suggest that young children are at greatest risk of physical violence, while sexual violence predominantly affects those who have reached puberty or adolescence. Boys are at greater risk of physical violence than girls, while girls face greater risk of sexual violence, neglect and forced prostitution."⁸⁹

In the follow-up report to Professor Pinheiro's study, by UNICEF, it was noted that:

⁸⁸ *"From invisible to indivisible: promoting and protecting the right of the girl child to be free from violence"* UNICEF, April 2008: see particularly pages 45-59, "Violence in the Community" which includes a section on violence against girls in armed conflict.

⁸⁹ Report of Paulo Sergio Pinheiro, independent expert appointed by the UN Secretary-General pursuant to General Assembly Resolution 57/90 of 2002, UN Doc A/61/299, paragraph 30, citing E.G. Krug et al, (editors) *the World Report on Violence and Health* (Geneva, World Health Organization 2002, page 5).

“Given vulnerabilities associated with their age, physicality and lack of negotiating power, it is likely that adolescent girls are among the highest of all risk groups for sexual violence perpetrated against them by members of their community. However, for many girls around the world, sexual aggression by boys and men is normative, and therefore not perceived by girls (or boys) as criminal unless it crosses the bounds into more conformist definitions of rape. [...] Average estimates of coerced first sex among adolescent girls around the world range from 10 percent to 30 percent, but in some settings, such as Korea, Cameroon and Peru, the number is closer to 40 percent.”⁹⁰

An approach to the definition of rape based on force, threat of force and coercion, such as that outlined in the Elements of Crimes, brings the focus of the criminal law back to the actions of the perpetrator, and particularly whether the perpetrator’s actions were particularly coercive because of the young age of the victim, and, therefore, can be used to good effect in further protecting the human rights of children and adolescents under the age of 18.

5. BEYOND THE DEFINITION: HOW HUMAN RIGHTS PRINCIPLES CAN BE APPLIED AND INTERPRETED IN THE INTERNATIONAL CRIMINAL COURT’S HEARINGS AND JURISPRUDENCE

The effective prosecution of rape and other crimes of sexual violence is frequently undermined by stereotypes and prejudice on the part of police officials, prosecutors and judges, as well as juries.⁹¹ States are obliged by international human rights law and standards

⁹⁰ UNICEF, 2008, above note 88, at page 47.

⁹¹ *Unwanted Sex: the culture of intimidation and the failure of law*, Stephen J. Schulhofer, Harvard University Press, 1998; *Sexual Assault and the justice gap, a question of attitude*, Jennifer Temkin and Barbara Krahé, Hart Publishing, 2008; *A gap or a chasm*, Liz Kelly, Jo Lovett and Linda Regan, UK Home Office Research Study 293, February 2005; *Different systems, similar outcomes? Tracking attrition in rape cases across Europe*, Jo Lovett and Liz Kelly, Child and Women Abuse Studies Unit, London Metropolitan University/European Commission DAPHNE Program, 2009. See also Amnesty International publications such as: *Les violences faites aux femmes: une affaire d’État* Amnesty International 8 February 2006, Paris; *Jamaica: Sexual violence against women and girls in Jamaica* “Just

to dispel discriminatory practices and views in order to implement the right to equality.⁹²

This modification of prejudices and stereotypes is a task for governments as a whole, not just judiciaries, either international or domestic. However, judgments in individual cases have an important role in indicating to society the conduct which is criminal and unacceptable, and the reasons for such decisions, and particularly addressing attitudes which seek to excuse or justify criminal conduct,⁹³ identifying false stereotypes and through detailed reference to the evidence before the court, making clear the reality of how perpetrators commit crimes.⁹⁴

The definition of rape based on a force, threat of force and coercion approach outlined in the

a little sex" 21 June 2006, AI Index AMR 38/002/2006, *Case Closed: Rape and Human Rights in Nordic Countries* Amnesty International 2008, Copenhagen, Stockholm, Helsinki, Oslo.

⁹² The Convention on the Elimination of All Forms of Discrimination against Women, Article 5(a) contains the obligation

"[T]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."

See also: the International Convention on the Elimination of Racial Discrimination, Article 5 c) and d); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6, 13 September 2000, Article 2(2); Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, 33 I.L.M. 1534 (1994); Article 6 (b), Article 7(a) and 7(b) of the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006), Article 8(1)(b); Committee on Economic, Social, and Cultural Rights, Article 19 of General Comment 16, (UN Doc E/C.12/2005/4) 12 August 2005 and Article 20 of General Comment 20, UN Doc E/C.12/GC 20, 2 July 2009; Article 7, CEDAW General Recommendation 25 on temporary special measures, Thirtieth Session, 2004.

⁹³ In the case of *Opuz v Turkey*, the European Court of Human Rights referred to 'the existence of a *prima facie* indication that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence.' (*Opuz v Turkey*, Application 33401/02, judgment 9 June 2009, Paragraph 198.) In *Karen Vertido v the Philippines*, the Committee on the Elimination of All Forms of Discrimination against Women said that:

"[S]tereotyping affects women's right to a fair and just trial [in this case, as a victim of rape] and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence in general."

Karen Tayag Vertido v the Philippines, Communication No. 18/2008, UN Doc CEDAW/C/46/D/18/2008, 1 September 2010, para 8.4.

⁹⁴ Rebecca Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives*" University of Pennsylvania Press 2010, pages 78-81.

Elements of Crimes would lead to a much more respectful method of questioning and cross-examining victims and witnesses than a definition centred on the issue of consent. Instead of being required to ask directly whether or not the victim consented to the sexual act – questioning that has frequently caused extreme distress and humiliation to witnesses⁹⁵ – advocates should only ask about how the circumstances of the act, and the behaviour of the perpetrator, affected the victim or witness, whether they were able to make unfettered decisions about the acts in question. The jurisprudence and the application of human rights principles indicates that such an assessment under Rule 72 should be absolutely exceptional (see above Section 3.3).

Certain of the Rules of Procedure and Evidence reflect good practice adopted in some national jurisdictions, which seek to eradicate prejudice and stereotypes, primarily stereotypes denigrating women and girls. For example,

- Rule 63(4) takes steps to ensure that there is no place in the Court for any legal requirement that women and girls are likely to lie about sexual assaults, and, therefore, their evidence should only be considered probative when corroborated by other evidence.
- Rule 70(a) requires the Court to reject a defendant's argument that consent can be inferred by words or conduct of a victim where the victim's ability to give voluntary and genuine consent is undermined by force, threat of force or coercion.
- Rule 70(b) requires the Court to reject a defendant's argument that consent can be inferred by words or conduct of a victim where the victim is unable to give genuine consent.
- Rule 70(c) requires the Court to reject a defendant's argument that because the victim was silent in the face of force, threat of force, or coercion, or did not resist sexual violence, that the victim consented. This goes some way to addressing the discriminatory assumption that women are sexually available unless or until they express their rejection of sexual advances, as it refers only to silence in the face of force, threat of force, or coercion.
- Rule 70(d) requires the Court to disregard prejudicial attacks on a victim's credibility as a witness through the use of evidence of that person's previous sexual history; it also requires the Court not to infer from previous sexual history evidence that a victim or witness is "predisposed to be sexually available." This will be a particularly important provision to consider if the Court is hearing evidence of sexual violence against sex workers.

Other stereotypes and prejudices which affect particularly women's right to equality before the law which the Court should address as they arise in individual cases are:

⁹⁵ See for example, Binaifer Nowrojee "*Your justice is too slow*" Will the ICTR Fail Rwanda's Rape Victims?' published by UNRISD, 15 November 2005, available at <http://www.unrisd.org/unrisd/website/document.nsf/%28httpPublications%29/56FE32D5C0F6DCE9C125710F0045D89F?OpenDocument> last accessed 11 May 2010

- that women in particular are assumed to be sexually available unless or until they express their opposition; while Rule 70(c) goes some way to addressing this, it only refers to situations where a victim is subjected to force, threat of force, or coercion. In general, no-one should be assumed to be sexually available simply because she or he has not expressed opposition to sexual contact. Any party to sexual contact should only be assumed to be freely and genuinely agreeing if they have expressed that agreement;⁹⁶
- that women and girls bear responsibility for sexual attacks because they have been out late at night, or in isolated places, and have, therefore, failed to protect themselves;
- that women and girls are likely to make false accusations of rape and sexual violence.⁹⁷ This is a particularly irrational stereotype as women and girl complainants usually have very little to gain and everything to lose by making allegations of rape, there is rarely an incentive for them to lie; many complainants pursue their search for truth and justice at enormous cost to themselves, in terms of stigma and rejection by their families and communities. Furthermore, such discriminatory assumptions lead to a disproportionate and unreasonable emphasis being placed on having evidence other than the victim's testimony – irrespective of how clear, detailed, and consistent such testimony is - such as medical evidence on examination of the victim's body, traces of semen, and independent witness testimony. While there are detailed standards for the gathering of medical evidence to support claims of torture, including rape and sexual violence, the availability of competent medical examiners who can undertake such examinations in an appropriately sensitive and professional manner is often not available, especially in conflict situations. Given that perpetrators will often attack only when others are not present, independent witness evidence is often not available. According to leading commentators, “a Chamber could make a ruling on proof on the basis of a single testimony, after assessing its relevance, probative value and credibility.”⁹⁸
- that victims of rape are ‘shamed,’ ‘to blame’ or ‘guilty’ because they have been raped. This is a frequently-used stereotype which discourages women and girls from coming forward to bring complaints, due to fear of retribution, in some societies,

⁹⁶ The Committee on the Elimination of All Forms of Discrimination makes a number of recommendations about legislation on rape and sexual violence, among these, enacting a definition of rape and sexual violence which requires the existence of “unequivocal and voluntary agreement” *Karen Tayag Vertido v Philippines*, above note 21, para 8.9.

⁹⁷ Philip Rumney “*False allegations of rape*” the Cambridge Law Journal (2006) 65, 128-158 contains a detailed analysis of the methodological difficulties of defining the term “false rape claims” and assessing how many rape claims are truly false, rather than dismissed out of hand by police and justice officials.

⁹⁸ Roy S. Lee, above, note 78, at page 357.

prosecution, or ostracism by those around them. The Court should take every opportunity in its jurisprudence to make it clear that victims of rape are victims of a serious crime, and firmly reject any attempts to hold a victim culpable for its occurrence;

- that because such victims are perceived to have exchanged sexual acts for their lives or to protect others, victims should not complain about rape, or the harm caused by rape is minimised. Such cases should always be seen as rape involving threat or coercion, and the circumstances should not be used as a method of justifying or minimizing the crime committed by the perpetrator;
- that forms of so-called “persuasion” which involve applying psychological pressure on women and girls to agree to sexual contact are acceptable;
- that if a woman or girl agrees to spend time with a man in a private place, this constitutes agreement to sexual contact which detracts from the criminal liability of the perpetrator;
- that women or girls (even young children) “seduce” men by being dressed in a certain manner, that their appearance signals agreement to sexual acts.

Prejudices and stereotypes about men and boys who have been raped are also significant barriers to justice. Frequently male victims of sexual violence are unwilling to report crimes because they fear that they will not be believed; they fear ostracism: they fear homophobia (irrespective of whether they are homosexual or not) and may be at particular risk of further violations of their human rights, mainly that they will face prosecution themselves, if they complain of rape in countries where homosexual acts are illegal.⁹⁹ Furthermore, officials in criminal justice systems, and also, health service providers frequently deny male victims appropriate and professional service.¹⁰⁰

Therefore, the International Criminal Court should ensure competent and sensitive treatment of victims of sexual crimes in the hearing of evidence, irrespective of gender of the victim or the perpetrator,¹⁰¹ and take steps to challenge stereotypes in its jurisprudence, for example, by referring explicitly to stereotypical assumptions and referring to the detailed realities of

⁹⁹ For an overview of the issues, see Sandesh Sivakumaran, above, note 6.

¹⁰⁰ P. Oosterhoff, P. Zwanikken, E. Ketting, above, note 6.

¹⁰¹ While it is clear that women could be guilty of sexual violence against another women, charges of rape could be brought where a woman commits sexual acts with another woman where the lips of vulva, rather than the vagina, are penetrated with bodily parts, or an object. In the *Furundžija* Trial judgment, above note 2, paragraph 174 there is a reference to

”....penetration of the vagina, the anus or mouth by the penis, or of the vagina or anus by another object. In this context, it includes penetration, however slight, of the vulva, anus or oral cavity, by the penis and sexual penetration of the vulva or anus is not limited to the penis.”

the evidence they have heard, and how the stereotypes undermine equality before the law.

6. ACTS OF RAPE AND SEXUAL VIOLENCE CAUSING SEVERE PAIN AND SUFFERING MUST BE CHARGED AS TORTURE.

All acts of rape amounting to crimes against humanity or war crimes charged within the jurisdiction International Criminal Court are factually and legally contiguous with the crime of torture as a war crime¹⁰² or a crime against humanity,¹⁰³ and should be charged as such,

¹⁰² Article 8(2)(a)(ii)-1 War crime of torture

Elements:

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.
3. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
4. The perpetrator was aware of the factual circumstances that established that protected status.
5. The conduct took place in the context of and was associated with an international armed conflict.
6. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

Article 8(2)(c)(i)-4 War crime of torture

Elements:

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.
3. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.
4. The perpetrator was aware of the factual circumstances that established this status.
5. The conduct took place in the context of and was associated with an armed conflict not of an

irrespective of whether the perpetrator is a man or woman, or the victim is a man or woman, in order to comply with Article 21(3) in relation to the right to equality before the law, without being subjected to discriminatory stereotyping.¹⁰⁴ There are references to prohibited purposes in the definitions of torture as war crimes, not as crimes against humanity. However, the idea that torture need be purposive, premeditated and targeted is an important part of how and why it is understood to be such a serious crime, and a reason why a victim is seen as worthy of sympathy and care. Rape, in contrast, is commonly considered as an inescapable and normal part of life, particularly in armed conflict. Acts of rape should be co-charged as rape and torture in order to address the following stereotypes:

- That rape is a less important crime;
- That rape is inevitable and inescapable, rather than a intentional act of violence;
- That rape is a natural result of perpetrators' sexual urges, rather than an intentional act of humiliation, discrimination and intimidation.

international character.

6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Jurisprudence identifies acts of rape as constituting severe pain and suffering of a type to constitute torture, and the comments in *Akayesu* (para 687) emphasise the purposes of rape, which reflect the second element of the war crime of torture. Potentially the crime of rape is more limited, given that it is only applicable if the victim or victims are protected persons under the terms of international humanitarian law.

¹⁰³ Article 7(1)(f) Crime against humanity of torture

Elements

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. Such person or persons were in the custody or under the control of the perpetrator.
3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.
4. The conduct was committed as a part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

In most situations in which rape takes place, victims will be in a situation of custody or control by the perpetrator, which permit the perpetrator to commit the crime through application of force, threat of force, or coercion.

¹⁰⁴ Jurisprudence in this section of the document identify acts of rape as constituting severe pain and suffering of a type to constitute torture, and the comments in *Akayesu* Trial Judgment (above, note 8 at para 687) emphasise the purposes of rape, which reflect the second element of the war crime of torture.

The crimes of rape in the jurisdiction of the Court should always be prosecuted cumulatively as rape and torture, due to the fact that such crimes inflict severe pain or suffering and, in the case of war crimes, because of use of reasons based on sexual and gender-based discrimination by rapists in perpetrating these crimes.¹⁰⁵ The effects of rape on victims lead to discriminatory outcomes in many aspects of their lives, which require acknowledgment and reparation. Women and girls are considered frequently after being victim of a rape to be “worthless” or “dishonoured” in a manner which would not be considered in this way to the same extent if the perpetrators were prosecuted for torture. It is therefore important for the Prosecutor and the Court reflect that the crimes of rape are correctly identified as torture in the jurisdiction of the Court, and to do so irrespective of the gender of the victim both in its charging practices and the elaboration of its jurisprudence.

Furthermore, the rule of international human rights law against stereotyping on the grounds of sex¹⁰⁶ would require that acts of rape, whether perpetrated against men or women, be charged both as rape and torture, in order to address such stereotyping effectively. In the *Bemba* confirmation of charges decision, charges of rape as a crime against humanity alone were confirmed, as Pre-Trial Chamber II considered that although the two crimes could be prosecuted as both rape or torture,¹⁰⁷ to charge as both would be burdensome to the Defence.¹⁰⁸ The Pre-Trial Chamber also decided that the charge of rape would require that penetration be proved as a further specific element, therefore, of the two charges, to charge the criminal conduct as rape alone would be sufficient.¹⁰⁹ While specificity and efficiency are important principles, as long as there is clarity about the facts alleged, charging the conduct both as rape and torture still allow defence lawyers to prepare their case. The requirement under Article 21(3) is a significant factor to consider, given the legal obligation under human rights law to address stereotyping, and the effect of charging of torture as an aspect of how victims are perceived by, and treated by, others in their communities. Amnesty International notes that the Pre-Trial Chamber identified a power of the Trial Chamber to re-characterise a crime’s legal basis.¹¹⁰ Given the identification as rape as a specific form of torture in human rights law and standards, the Trial Chamber should identify these acts as crimes of rape and torture.

6.1 SEVERE PHYSICAL OR MENTAL PAIN OR SUFFERING

Studies of the physical and psychological harms caused by rape and sexual violence are severe and long-lasting. Medical conditions caused by physical injuries sustained during rape and sexual violence, include gynaecological injuries, sexually transmitted infections, and

¹⁰⁵ In contrast, a footnote to the definition of torture as a crime against humanity in the Elements of Crimes notes that “[i]t is understood that no specific purpose need be proved for this crime.” Article 7(1)(g) –i, Crime against humanity of rape.

¹⁰⁶ See note 92 for the international human rights law treaty provisions relating to gender stereotyping.

¹⁰⁷ Paragraphs 191-195.

¹⁰⁸ Paragraph 202.

¹⁰⁹ Paragraph 204.

¹¹⁰ Paragraph 206.

infertility. Pregnancy resulting from rape, the difficulties of seeking an abortion, or the challenges of raising a child born of rape, add to the pain and suffering inflicted upon girls and women of child-bearing age who are targeted for rape. The psychological injuries include depression, post-traumatic stress, and suicidal thoughts.¹¹¹

The leading human rights law judgments in *Mejia v Peru*,¹¹² *Aydin v Turkey*,¹¹³ and *Miguel Castro Castro Prison v Peru*¹¹⁴ all recognize that the pain and suffering caused by an act of rape is of a severity to constitute torture, both physically and psychologically. Successive Special Rapporteurs on torture and other cruel, inhuman or degrading treatment or punishment have also identified rape and sexual assaults as forms of torture.¹¹⁵ The Human

¹¹¹ See, for example, Amnesty International documents “Japan: Still waiting after 60 years: Justice for survivors of Japan’s military sexual slavery system.” AI Index ASA 22/012/2005, 28 October 2005, pages 13-15; “Bosnia and Herzegovina: Whose justice? the women of Bosnia and Herzegovina are still waiting” AI Index EUR 63/006/2009, pages 54-55.

¹¹² *Raquel Martí de Mejía v. Perú*, Case 10.970, Report No. 5/96, Inter-Am.C.H.R., OEA/Ser.LV/II.91 Doc. 7 at 157 (1996).

¹¹³ *Aydin v Turkey* judgment of 25 September 1997 (Application 57/1996/676/866) European Court of Human Rights, paragraph 86.

¹¹⁴ *Miguel Castro Castro Prison v Peru*, Inter –Am Court of Human rights (Ser c) No 160, 25 November 2006.

¹¹⁵ The first Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Pieter Kooijmans, identified the following forms of torture in 1986 (UN Document E/CN.4/1986/15, 19 February 1986, page 29):

“Sexual aggression

Rape

Insertion of objects into the orifices of the body

Chevalet, that consists of placing the prisoner naked, on an iron bar – the prisoner is unable to touch the ground – that is moved violently, this causes sever tearing of the perineum[.]”

The second Special Rapporteur on torture, Nigel Rodley, affirmed Pieter Kooijman’s analysis of rape as a form of torture, which he made in his oral introduction to his 1992 report to the Commission on Human Rights: “[s]ince it was clear that rape or other forms of sexual assault against women in detention was a particular ignominious violation of the inherent dignity and the right to physical integrity of the human being, they accordingly constituted an act of torture.” Nigel Rodley also mentioned the various contexts in which rape and sexual violence are committed, and the consequences for women in terms of stigma, health risks to pregnant victims, and even prosecution for unlawful sexual conduct. (UN Doc E/CN.4/1995/34, paragraphs 15-24).

During his tenure as Special Rapporteur on torture, Manfred Nowak also identified rape as torture, reiterating international jurisprudence on the issue, and adding further detail on why rape is such a serious violation of rights, being used to cause humiliation, destroy families and communities, as raped women “are often infected with sexually transmitted diseases or may experience unwanted pregnancies, miscarriages, forced abortions or denial of abortion.” (UN Doc A/HRC/7/3, para 26, and 34-36).

Rights Committee has said that “[t]o assess compliance with article 7 of the Covenant, as well as with article 24, which mandates special protection for children, the Committee needs to be provided information on national laws and practice with regard to domestic and other types of violence against women, including rape”¹¹⁶

The Committee on the Elimination of All Forms of Discrimination (CEDAW) has identified gender-based violence, which includes rape, as a violation of the right not to be tortured.¹¹⁷

The Committee against Torture has also recognized rape as a form of torture.¹¹⁸

The Appeals Chamber in the *Kunarac* case was unequivocal:

“Severe pain or suffering, as required by the definition of the crime of torture, can thus be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering.”¹¹⁹

6.2 DEGRADATION

The pain and suffering caused by rape is of a particular and individual type due to the sexual nature of the assault, and being put to sexual “use” which degrades the person who suffers the violation, increasing the psychological pain or suffering.

Perpetrators are aware of this effect of penetration of a sexual nature. Such penetration necessarily involves forcing partial or complete nakedness, and is targeted at the genital and anal areas of the body, areas of the body that are almost always kept private. In some contexts, these parts of the body are associated with pleasure and intimacy and, therefore, harm done to them is exceptionally psychologically and physically damaging. In other contexts, these parts of the body are seen as shameful, and any contact with them other than that specifically permitted (for example, in legally or religiously sanctioned marriage) is seen as degrading and humiliating in itself, and this adds to the victim’s experience of severe pain or suffering caused by the sexual violence.¹²⁰

Successive Special Rapporteurs on violence against women have also recognized rape as a form of torture: for an overview of developments, see “15 years of the United Nations Special Rapporteur on violence against women, its causes and consequences,” available at <http://www2.ohchr.org/english/issues/women/rapporteur/docs/15YearReviewofVAWMandate.pdf> last accessed on 5 May 2010.

¹¹⁶ General Comment 28, Equality of rights between men and women (article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), 29 March 2000.

¹¹⁷ General Recommendation 19, paragraph 7, above, note 2.

¹¹⁸ General Comment 2, UN Doc CAT/C/GC/2. 24 January 2008, paragraphs 18 and 22.

¹¹⁹ *Kunarac* Appeals Judgment, above note 8, paragraph 151.

¹²⁰ In their report on the Situation of detainees in Guantanamo Bay, UN Doc E/CN.4/2006/120, five

Furthermore, there is a social context to sexual contact, whether wanted or unwanted: a stigma, normally of the person who is penetrated, due to perceptions of sexual orientation or sexual availability, which reinforces gendered hierarchies. For example, victims of male rape are often considered to “have been used as a woman”, something too shocking to be addressed; identified wrongly as gay because they have been raped, or if a victim is gay, he is assumed to have consented; furthermore, rape of men is seen as the normal and inevitable outcome of imprisoning men together.¹²¹

Frequently the perpetrator publicizes the rape, through carrying it out in the presence of others, in order to degrade and humiliate the victim further; in other cases, the perpetrator uses threats to publicize sexually explicit information or photographs of the victim in order to coerce the victim into submission. The judgment in *Prosecutor v Akayesu*, the first case on rape in the *ad hoc* criminal tribunals, identified rape as a form of torture:

“Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”¹²²

The identification of rape as a form of torture, including because both crimes contain the elements of “punishment, coercion, discrimination or intimidation,” was confirmed by the ICTY:

The Trial Chamber considers the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity. The condemnation and punishment of rape becomes all the more urgent where it is committed by, or at the instigation of, a public official or with the consent or acquiescence of such an official. Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long-lasting. Furthermore, it is difficult to envisage circumstances in which rape, by or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict.¹²³

special rapporteurs on human rights, including the Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, identified stripping detainees naked in itself as causing “extreme psychological pressure, which can amount to degrading treatment, even torture.” (paragraph 51).

¹²¹ See Stannow and Kaisner, above note 52.

¹²² *Akayesu*, above note 8, paragraph 687.

¹²³ *Delalic*, above note 63, paragraph 495.

6.3 DISCRIMINATION

The definition of torture in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) requires that the perpetrator acts for a prohibited purpose or reason, including “for any reason based on discrimination of any kind.”¹²⁴

Often, perpetrators commit their crimes in a way that expresses their discriminatory motivation, for example, as a method of intimidating the civilian population of a particular ethnicity within a territory to leave through public perpetration of rape and sexual violence against women and girls, or an aspect of the crime, for example, crimes are accompanied with insults which are sexually or racially demeaning.

However, the Appeals Chamber of the Yugoslavia Tribunal has ruled that as long as one of the perpetrator’s motives is for a prohibited purpose or reason, it does not matter whether the perpetrator has other motives, the criminal intent is still present.¹²⁵ This recognition is particularly important in situations, such as that described in the *Kunarac* Appeal Judgment, where perpetrators may say that they did not have a particular intent which would justify a prosecution of torture, that they engaged in sexual contact with the victims solely for reasons of sexual pleasure and gratification. The ICTY Appeals Chamber showed that it was aware of the discriminatory motivations behind the choice of victims who were targeted and that this can constitute a prohibited purpose which justifies a charge of torture.

“The Appellants argue that the intention of the perpetrator was of a sexual nature, which, in their view, is inconsistent with an intent to commit the crime of torture. In this respect, the Appeals Chamber wishes to assert the important distinction between ‘intent’ and ‘motivation’. The Appeals Chamber holds that, even if the perpetrator’s motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture or that his conduct does not cause severe pain and suffering, whether physical or mental, since such pain or suffering is a likely and logical consequence of his conduct. In view of the definition, it is important to establish whether a perpetrator intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to their victims, in pursuance of one of the purposes prohibited by the definition of the crime of torture, in particular, the purpose of discrimination.”¹²⁶

Furthermore, the Committee against Torture in its General Comment 2, said that

”[...]Elements of intent and purpose in article 1 do not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under

¹²⁴ Convention against Torture, Article 1.

¹²⁵ *Kunarac* Appeal Judgment, above note 8, at paragraph 153.

¹²⁶ *Kunarac* Appeal Judgment, above note 8, at Paragraph 153.

the circumstances.”¹²⁷

The ICTY Trial Chamber has concluded that the rape of certain persons belonging to a particular gender has in itself been identified as a form of discrimination. In *Prosecutor v Delalić*, the Trial Chamber said that “the violence suffered by Ms. Čečić in the form of rape, was inflicted upon her by Delić because she is a woman...this represents a form of discrimination which constitutes a prohibited purpose for the offence of torture.”¹²⁸ This reasoning was applied in a subsequent case, where multiple forms of discrimination were identified, including that of gender:

“The Trial Chamber further finds that the rape and other forms of sexual violence were committed only against the non-Serb detainees in the camp and that they were committed solely against women, making the crimes discriminatory on multiple levels. Radić did not rape any of the male non-Serb detainees. As recognized in Čelebići, raping a person on the basis of sex or gender is a prohibited purpose for the offence of torture.”¹²⁹

This principle was confirmed by the Appeal Chamber,¹³⁰ although the Appeal Chamber did not address sex or gender as a prohibited ground of discrimination: the Trial Chamber approach is more complete in its understanding of human rights principles and this ground of discrimination should be included by the Court in its jurisprudence, in order to fulfil the requirements of Article 21(3) of the Rome Statute.

Perpetrators’ use of sexual crimes embody gendered discrimination in that these crimes target the gender identity and sexual identity of victims – whether the victims are men or women. Due to the lower status of women in society, the harmful impact is often more serious to women. However, victims may experience the effects of rape as a crime as sexualised discrimination and humiliation, their identity within society, based on gender roles, is often entirely demeaned – in ways that play on discriminatory sexual stereotypes, of both genders (women are targeted for sexual violence as a way of humiliating men, emphasising that they cannot protect women in their families, when this is a social or cultural requirement).

Therefore, although the Pre-Trial Chamber ruled in the case of Bemba that charging rape as rape only, not as rape and torture, is for the sake of efficiency, Amnesty International suggests that there is an important human rights legal standard to be adhered to in cumulative charging; that is, that signalling rapes concurrence with torture emphasises that

¹²⁷ Committee Against Torture, General Comment 2, Implementation of article 2 by States Parties, U.N. Doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007) paragraph 9.

¹²⁸ *Prosecutor v Delalic*, above note 63 para 941.

¹²⁹ *Prosecutor v Kvočka et al*, Case No IT-98-30/1, (Trial Chamber, 2 November 2001) para 560, issue confirmed by the Appeal Chamber, 28 February 2005, para 369-70, although the Appeal Chamber did not address sex or gender as a prohibited ground of discrimination.

¹³⁰ *Prosecutor v Kvočka*. Appeal judgment of 28 February 2005, paragraph 369-70.

rape is a serious crime, identified as a form of torture, and a crime as serious as torture. Given gender stereotyping about rape, particularly rape of women and girls, this would be an important addition to the Court's future jurisprudence, as well as a requirement under Article 21(3).

7. CONCLUSION

Article 21(3) has been described as “one of the more important provisions of the Rome Statute.”¹³¹ The obligation under Article 21(3) is potentially wide-reaching, requiring that all organs of the International Criminal Court demonstrate understanding of the human rights violations which constitute crimes under the jurisdiction of the Court, and how international human rights legal analysis can inform and elucidate the criminal law applied by the Court. Indeed, “[Article 21(3)] provides a standard against which all the law applied by the court should be tested.”¹³²

With regard to the prosecution of rape, the provisions of Article 21(3) that require interpretation in accordance with internationally recognized human rights; consistency with the principle of non-discrimination based on gender is particularly important. Rape laws have been traditionally riddled with and reflective of discriminatory views toward women. Though defined for centuries as a war crime, even the most obvious situations of rape were rarely prosecuted either internationally or domestically. It is only in recent decades that respect for women's sexual autonomy has begun to reshape the law of rape both under international and, increasingly, under domestic law. Accordingly, the Court's duty to ensure that the interpretation and application of the Rome Statute is consistent with international human rights and is stripped of gender discriminatory stereotypes and practices is of paramount significance if international justice is to be properly universal and gender inclusive.

Beyond that, the Elements of Crimes further detail the proof required to establish rape at the same time as the Rules of Procedure and Evidence establish the boundaries of relevance and fair inference consistent with the principle against gender discrimination. The Elements provide a useful starting place for judicial interpretation. Thus, hidebound, discriminatory notions of penetration, force or consent that are contained in domestic law or proposed by defence lawyers must be rejected by all Court personnel. At the same time, article 9 makes clear that the Elements are not binding on the Court but rather designed to guide the Court in its interpretation. Thus, where the Elements—or a given interpretation of the Elements—would conflict with the principles of article 21, the Elements should not be followed and the Court should craft a consistent human rights-based standard.

¹³¹ Triffterer's commentary on the Rome Statute of the International Criminal Court, Second Edition, page 712.

¹³² Mahnoush H. Arsanjani, *the Rome Statute of the International Criminal Court*, 93 Am. J. Int'l L (1999), 22, at page 29.

The Court's determinations in this matter will have significant impact on the interpretation of the definition of rape in legislation and judicial deliberation in rape cases at the national level across the world. In this respect, the Rome Statute, with its principles of complementarity and consistency with human rights and non-discrimination based on gender, is not simply the vehicle for creating the Court, but also a potential model for the proper treatment of rape and sexual violence at the domestic level. This enhances the responsibility of the Court to apply these principles forthrightly and with understanding of the subtleties of gender discrimination—whether affecting female or male victims—especially in the arena of rape and sexual violence.

As well as the law and standards recognized by human rights courts and institutions relating to the prosecution of rape and sexual violence, successive resolutions by the Security Council relating to women, peace and security have underlined the importance of investigating and prosecuting sexual violence, which underscores the importance of this issue to the enhancement of international peace and security, as well as within national jurisdictions.¹³³ The Court has a significant role in promoting women's equality before the law in ensuring that rape and sexual violence is consistently, fully, and competently prosecuted. Domestic prosecutions for rape and sexual violence are usually not undertaken comprehensively, indeed, impunity remains the rule. The principle of complementarity should be a catalyst for improved prosecutorial strategy at the domestic level, as well to improve rules of procedure and evidence that respect the rights of victims and witnesses. The ability and willingness of domestic courts to prosecute rape according to procedures that respect the rights of victims and witnesses can be used to assess whether or not domestic courts are indeed willing and able to prosecute such crimes at all.

In a criminal trial, where the court hears directly from victims and witnesses, there are opportunities to improve understanding of the effects of these crimes on the victim's human rights, and how they perceive the effect of the crime on their human rights. This document outlines the content of some of the human rights law and standards that are relevant to crimes of rape and sexual violence. Through the respectful and human rights-based provisions of the Rome Statute and Rules of Procedure and Evidence, the Court will benefit from information from witnesses and victims about how their human rights were violated by criminal acts, and this will, in its turn, provide more guidance to judicial systems across the world.

¹³³ Security Council Resolutions 1325 of 31 October 2000 (UN Doc. S/RES/1325) and 1820 of 19 June 2008 (UN Doc S/RES/1820).