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COMBATING IMPUNITY: EXAMINING *AMICUS CURIAE*, THE
INTERNATIONAL CRIMINAL COURT, AND
ACCOUNTABILITY FOR CONFLICT-RELATED SEXUAL
VIOLENCE IN THE ONGOING UKRAINE CONFLICT

Master's Thesis in Public International Law
Master's Programme in International Law and Human Rights
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Åbo Akademi 2023

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Abstract

Subject: Public International Law, Master's Degree Programme in International Human Rights Law	
Writer: Sharon Hofisi	
Title: Combating Impunity: Examining <i>Amicus Curiae</i> , the International Criminal Court, and Accountability for Conflict-Related Sexual Violence in the Ongoing Ukraine Conflict.	
Supervisor: Dr Mikaela Heikkilä	Supervisor:
Abstract: <p>This thesis examines the role of the International Criminal Court (ICC) in addressing conflict-related sexual violence (CRSV) in the ongoing conflict in Ukraine, with a focus on the legal frameworks and practical challenges in using <i>amicus curiae</i> to hold perpetrators accountable. By blending legal dogmatism and legal functionalism, this study seeks to provide a nuanced and comprehensive analysis of the ICC's efforts to utilize <i>amicus</i> to combat CRSV during active conflicts. The purpose of this research is to answer four key questions including: how effective has the ICC been in prosecuting individuals responsible for CRSV in the ongoing conflict in Ukraine? What legal and practical challenges explain the rampancy of CRSV in this context? The justification for this study lies in the urgent need to address the rampancy of CRSV as a humanitarian concern that demands attention from the international community. While recent legal developments have made CRSV punishable in axiomatic terms, much work remains to be done to ensure that these laws are effectively implemented and enforced. Furthermore, the ongoing conflict in Ukraine presents a complex and challenging context for addressing CRSV, making it a timely and relevant case study for examining the broader challenges of combatting sexual violence in conflict. The major finding of this research is that while CRSV are now punishable in axiomatic terms, the biggest challenge lies in implementing these laws effectively. The study suggests that the Ukraine government and ICC can play a crucial role in curbing impunity for CRSV by addressing the legal and practical impediments and strengthening international cooperation and coordination through <i>amicus curiae</i> assistance. The implications of this research include identifying specific legal and practical impediments to the ICC's efforts to address CRSV in the Ukrainian conflict and proposing strategies for <i>amicus</i> to help Ukraine emboss Ukraine's 'e-enemy' chatbot. The study highlights the benefits and drawbacks of <i>amicus</i> representations in ensuring victim participation and recognition in ICC proceedings and beyond. By complementing victim participation with <i>amicus</i> in ICC proceedings, the ICC can empower victims to play a more active role in seeking justice and holding perpetrators accountable for CRSV.</p>	
Keywords: International criminal court, CRSV, accountability, <i>amicus</i> representations, victim participation, Ukraine War, mobile app, e-enemy chatbot and civil society.	
Date: 22 March 2023	Number of pages: 121

Dedication

To Rajesh and Auxilia

Acknowledgments

Firstly, I would like to thank my supervisor, Mikaela Heikkilä in supporting me in many ways. She taught me the modules sources of public international law, introduction to international law, international criminal law, and laws of war. Her guidance and support made this thesis a success. I also attended the Developing Thesis Writing module offered by the Centre for Languages at Åbo Akademi University and would like to thank Malin and Christel for exceptional guidance and motivation on peer and teacher feedback. It made me go through the language response and thesis writing processes without event.

Catarina Krause taught me the modules international protection of human rights, human rights in Europe, Masters' seminar paper plan, Masters' seminar paper, Masters' thesis plan, and Masters' thesis paper. Initially I had serious reservations with the approach adopted in some modules, especially the use of opponents (without a right of reply on the part of the author) and over-emphasis on legal problems. I later appreciated the importance of the process when Catarina shared with me the manuscripts I had written. Specifically, I benefited from the comments that emphasize on legal analysis of issues. Her comments provided vital lessons on discussion of broad and substantive issues in international law.

I would also like to thank Professor Elina for her emphasis on 'killing my darlings' approach which emphasized brevity and coherence. I also thank *Jus Cogens* Association; Abo Akademi University for awarding me a 100% scholarship in the second year; Talent Boost team and ÅAU's mentorship program for selecting me as one of the 5 mentees from 50 applicants. Above all, I thank God for the gift of life and my mother for assuring me that she loves me. I also thank Professor Pamela Slotte, Meiraf Tesfaye, and Stephen Phillips for the different modules they taught me.

Acronyms

CAH-Crimes against humanity
CRSV-Conflict-related sexual violence
ICC-International Criminal Court
ICJ-International Court of Justice
ICTR-International Criminal Tribunal for Rwanda.
ICTY-International Criminal Tribunal for the Former Yugoslavia.
PSVWG-Prosecuting Sexual Violence Working Group.
OTP-Office of the Prosecutor
UN-United Nations
UNSC-United Nations Security Council

Chapter 1 Introduction

1.1. Overall Introduction and Aim of the Study

Third parties are an important pillar through which international courts resolve complex questions.¹ *Amicus curiae*, which translates to "friend of the court," *Amicus curiae* is a powerful legal mechanism that allows third-party individuals or organizations to submit arguments or evidence in court cases. *Amicus curiae* can play a critical role in challenging gender-based violence and dismantling the culture of impunity, complacency, and complicity in Conflict-related sexual violence (CRSV) cases at the International Criminal Court (ICC) or other preferred forums, including in Ukraine where CRSV is a pervasive problem. The procedural interests of an *amicus curiae* are debated, with one perspective being that they are not interested in the outcome of the case.² Another view is that an *amicus curiae* is a person or entity that is not directly involved in a legal action but has a significant interest in the matter at hand.³ A person or group, who is not a party to a legal case but has a strong interest in it, may request permission from the court to submit a brief called "*amicus brief*" with the intention of influencing the court's decision.⁴

There is a paucity of research on how *amicus curiae* can help combat impunity for CRSV during active conflicts, even though the concept of *amicus curiae* is commonly discussed in relation to international courts and tribunals after the conflict has ended.⁵ Astrid Wiik argues in relation to *amicus curiae* that:

Although the concept as such is largely unsettled, it is often understood as a procedural vehicle for non-parties, often for non-state actors without legal standing, to influence the decision-making processes of international courts and tribunals by submitting written and – occasionally – even oral statements to those courts.⁶

¹ See for instance, Gosego R. Legkove, Third Party Intervention at the International Court of Justice: Challenges and Prospects (2012) *SSRN Electronic Journal*.

² See the Public Law Project, *Third Party Interventions: A Practical Guide* (PLP: 2008) 3.

³ Legal Information Institute, 'Amicus Curiae,' <https://www.law.cornell.edu/wex/amicus_curiae> accessed 07 March 2023.

⁴ Ibid.

⁵ See for instance, Astrid Wiik, *Amicus Curiae before International Courts, and Tribunals* (Nomos, Hart Publishing, 2018) 7.

⁶ Wiik (n 5).

The corollary is that *amici curiae* do not usually visit courts in person and their participation is based on their advanced knowledge of CRSV causes and effects.⁷ The thesis aims to examine how *amicus curiae* can assist the ICC in prosecuting CRSV during active conflicts, while also considering the drawbacks of this approach in complementing victim participation. At the outset, this thesis notes how seeking a way to combat international crimes through third intervention is not proactive in itself,⁸ but learning from *amicus curiae* to drive an anti-impunity agenda in cases of impunity for CRSV, is.⁹ The need to proactively use *amicus curiae* during ongoing conflicts is based on the endemic atrocities committed by Russia in Ukraine.¹⁰

The departure point is that the UN Security Council (UNSC) has called for an end to the use of rape as a weapon of war in Ukraine, serving as the starting point for accountability efforts.¹¹ Pramila Patten, the UN Secretary General's Special Representative for Sexual Violence in Armed Conflict, has expressed concern that victims of sexual violence in conflict are often overlooked due to traditional notions that accurate record-keeping is not possible during active conflicts, and waiting for hard data and statistics would be too late for victims.¹² She argues that there is no need for hard data to respond to CRSV with a humanitarian approach or implement preventive measures, and that the international community should mobilize immediately.¹³

Patten's monumental concerns above are buttressed by the fact that the Ukrainian government has invited NGOs and private individuals to assist in investigating allegations

⁷ See Carlo Koos, 'Sexual violence in armed conflicts: research progress and remaining gaps' (2017) *Third World Quarterly* 38 (1) 1-17, 1.

⁸ See Tanja Altunjan, 'The International Criminal Court and Sexual Violence: Between Aspirations and Reality,' (2021) *German Law Journal*, 22 (5), 878-893.

⁹ International Federation for Human Rights, Justice Opportunity in the Fight against Impunity for Sexual Violence Crimes Committed during the Armed Conflict (2015) <<https://www.fidh.org/en/region/americas/peru/justice-opportunity-in-the-fight-against-impunity-for-sexual-violence>> accessed 31 January 2023. See also UNSG (1998), WCGJ (1997), WIJG (nd), WEN (1993), hrw (1998),

¹⁰ For further elaboration of the complexity of the Ukrainian conflict, see, Miron Lakomy, 'The Game of Ukraine: Conflict in Donbass as an Outcome of the Multilayered Rivalry.' 45 *Politeja* 6 (2016): 280-315, 282. 282.

¹¹ See Nikita Mekenzin, 'Reports of sexual violence in Ukraine rising fast, Security Council hears' (UN News: 2022) <<https://news.un.org/en/story/2022/06/1119832>> accessed 31 January 2023.

¹² Ibid.

¹³ Ibid.

of international crimes being committed in Ukraine due to their overwhelming situation. SEMA notes for instance that:

CRSV in Ukraine is ongoing yet lacks an adequate response. According to the 2018 UN Strategy plan, Ukraine has reportedly been struggling with the challenges around equal and fair justice. There is a failure to investigate sexual crimes committed in the context of armed conflict.¹⁴

International responsibility must be taken for breaches by subjects of international law in CRSV cases committed during ongoing conflicts to combat impunity, complicity, and complacency.¹⁵ The need to focus on investigating CRSV cases during conflicts has been aptly captured in concerns such as that:

Families are anxious and desperate for news. We hear it in their voices and read it in their words. Armed conflict makes it clearer than ever that families belong together...the consequences of a missing family member can be devastating, and families have a right to know what happened to their loved ones.¹⁶

The logical corollary from the foregoing seminal viewpoints is that *Amicus curiae* and victim participants are crucial in curbing impunity for CRSV during ongoing conflicts.

1.2. Research Question and Delimitations

This study aims to address four research questions, which collectively form a conceptualized "apple pie" representing the research problem of combatting impunity for CRSV. The questions aim to explore the use of *amicus curiae* to enhance victim participation in CRSV cases, the challenges in prosecuting CRSV under war crimes, crimes against humanity (CAH), and genocide, the potential benefits, and drawbacks of using *amicus curiae* in CRSV cases, and the role of the ICC in combatting impunity for CRSV during ongoing conflicts, using the ongoing conflict in Ukraine as a case study.

¹⁴ SEMA, 'Ukraine: Background of the Conflict and Key Challenges' < <https://www.semanetwork.org/network-members-ukraine/> < accessed 31 January 2023.

¹⁵ James Crawford & Simon Olleson, 'The Nature and Forms of International Responsibility,' in Malcom D. Evans (ed.), *International Law* (2nd ed, Oxford University Press: 2006) 451-477, 454.

¹⁶ ICRC, Ukraine: Wide-scale armed conflict inflicts emotional pain on families of missing loved ones (ICRC, 22 August 2022) < <https://www.icrc.org/en/document/ukraine-wide-scale-armed-conflict-inflicts-emotional-pain-families-missing-loved-ones>> accessed 16/02/2023.

The overarching research question is: *How effective can the ICC be in prosecuting individuals responsible for CRSV in the ongoing conflict in Ukraine?* The sub-assumption is that *amicus curiae* as experts have been instrumental in advancing sexual violence cases before the ICC. The second question is: *How do institutional impediments, however their tenor, explain the rampancy of impunity for CRSV impact on judges' assessment of CRSV evidence?* The sub-assumption here is that the international community has not mobilized enough support to prosecute perpetrators during active conflicts such as Ukraine. The third research question is: *What is the role of different forms of amicus curiae in criminal proceedings?* The sub-assumption is that *amicus* can strategically litigate before criminal courts. The fourth sub-question is: *What role can amicus curiae play in prosecuting CRSV cases in Ukraine?* The sub-assumption is that victim participation procedures at the ICC might not be able to protect all CRSV victims and as such different actors could help the Court in many ways.

By way of delimitation, the study focuses in detail on the ICC's approach to *amicus curiae* representations in CRSV cases, excluding other international or domestic courts and tribunals, which are perfunctorily considered. This allows for a more targeted analysis of the specific issues that are related to victim participation in ICC proceedings. The ICC's approach to victim participation, which includes allowing *amicus curiae* representatives to present evidence on behalf of victims, has significantly improved the concept of victim participation in international criminal proceedings. This victim-centred approach has helped to promote greater accountability for CRSV crimes and prioritizes the needs and rights of victims, which can have positive long-term effects on the healing and recovery of individuals and communities affected by CRSV crimes.

1.3. Material and Method

1.3.1. Methodology

1.3.1.1. The Research Design

Methodologically, legal research is based on methodological persuasion just like other sciences.¹⁷ Legal research methods deal with sources and their presentation, while legal research methodology focuses on the philosophy of legal science.¹⁸ The latter includes the examination of assumptions, hypotheses, and metanarratives of the researcher.¹⁹ This thesis uses mixed qualitative and transdisciplinary methodology to explore the creative contributions of *amicus curiae* in CRSV cases. Qualitative legal methodology involves examining people's perceptions of the law and justice, which is different from the case-based method of establishing legal precedent.²⁰ Qualitative research seeks to identify the presence or absence of critical aspects, whereas quantitative research involves measuring the degree to which something is present or absent.²¹ Transdisciplinary legal methodology is an approach that combines methods from different disciplines to study conventions and legal texts.²² The research instruments used to collect information include: the case study approach and the functional approach.

1.3.1.2. Case Study Approach

In this thesis, the ongoing conflict in Ukraine is used as a case study due to its significant and ongoing challenges related to conflict-related sexual violence (CRSV). The case study is used to highlight the urgent need for the international community to proactively mobilize expert organizations and individuals to gather crucial evidence and combat CRSV both during and after conflicts have ended.²³ The risk of prolonged conflict in Ukraine further

¹⁷ See Lassa, F.L. Oppenheim, 'The Science of International Law: Its Task and Method' (1908) 2 *AJIL* 313, 314 on the argument that public international law resembles any other science.

¹⁸ Irma J Kroeze, 'Legal Research Methodology and the Dream of Interdisciplinarity,' 16 (3) *Potschefstroom Law Journal* (2017) 35-65, 37.

¹⁹ *Ibid.*

²⁰ See Lisa Webley, 'Qualitative Approaches to Empirical Legal Reasoning,' in Peter Cane and Herbert Kritzer (eds.) *Oxford Handbook of Empirical Legal Reasoning* (OUP: 2010) 1.

²¹ Jerome Kirk & Marc. L. Miller, *Reliability and Validity in Qualitative Research* (Sage Publications: 1986) 9.

²² See Kroeze (n 18) 51.

²³ See Patten quoted in SEMA (n 14).

underscores the need to act proactively to combat impunity for CRSV in similar conflict contexts.²⁴

1.3.1.3. Functional Approach

The functional approach is utilized in applied legal research to prevent overreliance by legal researchers on theoretical and doctrinal legal analysis that might end up treating certain international doctrines as legal fiction.²⁵ The functional approach is utilized in legal researches that seek to address real-life problems or can make a difference in addressing such problems.²⁶ The emphasis is on the purpose of the legal regime or the big picture on how to punish and protect victims.²⁷ As such, the role of the ICC in prosecuting CSRV perpetrators in Ukraine is discussed in line with established notions such as Hans Kelsen's distinction between obligations and responsibilities attached to individual behavior.²⁸ This view is used to show why different individuals, including those who utilize Private Military and Security Companies (PMSCs), should be held accountable for any culpable conduct related to CRSV²⁹ and that they should take responsibility to address and remedy any situations for which they may be liable.³⁰ This includes ensuring accountability for CRSV crimes committed by PMSCs in Ukraine and elsewhere through prosecution and various forms of liability.³¹ The distinction between state and individual responsibility in

²⁴ See Patten quoted in SEMA (n14).

²⁵ Jan Klabbers, *International Law* (Cambridge University Press, 2013) 126.

²⁶ See for instance how state responsibility must be workable as captured by Lauri Mälksoo, 'State Responsibility and the Challenge of the Realist Paradigm: The Demand of Baltic Victims of Soviet Mass Repressions for Compensation from Russia,' 3 *Baltic Yearbook of International Law* (2003) 57-76, 61.

²⁷ Ulf Linderfalk, 'The Functionality of Conceptual Terms in International Law and International Legal Discourse,' 6 *EJLS* (2014) 27-50, 35.

²⁸ Hans Kelsen, *Principles of International Law* (Clark: New Jersey: 1959) 10.

²⁹ Alan Norrie, "Simulacra of Morality?" Beyond the Ideal/ Actual Antinomies of Criminal Justice,' in Antony Duff (ed.) *Philosophy and Criminal Law: Principle and Critique* (Cambridge University Press: 1998) 101-155, 114.

³⁰ James Crawford & Jeremy Watkins, 'International Responsibility,' in Samantha Besson & John Tasioulas (eds) *The Philosophy of International Law* (Oxford University Press: 2010) 299-315, 283.

³¹ James Crawford, Alain Pellet & Simon Olleson, 'Preface' in James Crawford, Alain Pellet, & Simon Olleson (eds) *The Law of International Responsibility* (Oxford University Press: 2010) v-vii, v; see also James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press: 2002) 233, on the argument that state responsibility can be applied to international criminal law based on Article 37's emphasis on penal action against individuals whose conduct cause the international wrongful act.

international law was shown in the ICTY case of *Prosecutor v Slobodan Milosevic*, which is relevant for the functional approach in that:

The accused in this case, as in all cases before the Tribunal, is charged as an individual. He is prosecuted based on individual criminal responsibility. No state or organization is on trial here. The indictments do not accuse an entire people of being collectively guilty of crimes, even the crime of genocide.³²

The functional approach in this thesis is also used to show how the Ukrainian government needs to uphold the responsibility to protect (R2P) their citizens from a duty and obligation perspective as contemplated by the international law.³³ This study does not simply identify the indeterminacy of legal rules, but also seeks to have forms and consequences of regulating individual and state responsibility that actually make a difference.³⁴ Legal dogmatic analysis is preoccupied with the rules on legal phenomenon alone and not the functions, processes and aims of such rules.³⁵ The study analyses legal sources *de lege feranda* and *de lege lata* to address actor-problem in complex wars and fight impunity for CRSV in ongoing conflicts.. Functional research is used as the golden thread in the mixed research design to reduce dependency on abstractions and deploy the best collective intelligence in complex global problems in this novel research.³⁶ Legal functionality is used with case study and legal heuristics to condense the arguments into collective and signalling effects that make legal regimes workable to demonstrate the need for prosecuting perpetrators of CRSV during ongoing conflicts.³⁷

1.3.1.4. Legal Materials and Limitations of the Study

The primary sources of international law that are enshrined in Article 38 of the Statute of the International Court of Justice include treaty law and customary international law. The

³² *Prosecutor v Milosevic*, Case No. IT-02-54-T, Prosecuting Opening Statement (12 February 2002) 4.

³³ UNGA, *2005 World Summit Outcome*, UN Doc. A/ 60/ 1 (24 October 2005) paras 138-39.

³⁴ See Katja Creutz *Transnational Privatised Security and the International Protection of Human Rights* (ECIRR: 2006) 9.

³⁵ *Ibid.*

³⁶ Douglas M. Johnson, 'Functionalism in the Theory of International Law,' 26 *Canadian Yearbook of International Law* (1988) 3-60, 9. See further Cresswell 2014 on mixed research.

³⁷ See Creutz (n 34) 41.

Rome Statute of the ICC is used here as a treaty. Some other treaties such as the Vienna Convention on the Law of Treaties (1969) are also referred to, together with the ICTY statute discussed below. First, the other sources depend on the ‘*specificity*’ provision in Article 21 of the Rome Statute. This provision provides in peremptory terms that ‘the Court shall apply, in the first place, the Statute, Elements of Crimes, and its Rules of Procedure and Evidence.’³⁸ Article 21 envisages a ranking of source usage. The second level refers to treaties, general principles, and rules of international law, including the established principles of the international law of armed conflict.³⁹ The third level of inquiry involves recourse to general principles of law derived by the court from national laws of legal systems of the world, with a proviso that those principles must be consistent with the Rome Statute.⁴⁰ The statute gives the ICC a seemingly unfettered discretion to apply principles and rules of law in previous decisions,⁴¹ underlining the concept of discretionary use of judicial precedent.

In terms of interpreting the sources, the ICC might utilize the intrinsic and extrinsic approaches. The intrinsic approach is based on the Article 21 of the Rome Statute that:

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 the grounds such as gender as defined in article 7, paragraph 3, age, race, color, language, religion, or belief, political or other opinion, national, ethnic, or social origin, wealth, birth, or other status.

Gleaning from Article 21 of the Rome Statute, the intrinsic approach used in this thesis would permit the ICC to use treaties, rules of procedure and evidence, previous decided cases, and general principles derived from national laws, especially where the ICC is seized with jurisdiction to adjudicate cases.

The extrinsic approach is based on the permissibility reading of Article 21 relating to, ‘where appropriate, applicable treaties, principles and rules of international law.’⁴² For

³⁸ Article 21 (1) (a).

³⁹ Article 21 (1) (b).

⁴⁰ Article 21 (1) (c).

⁴¹ Article 21 (2).

⁴² Article 21 (1) (b).

example, in terms of interpreting the sources, Article 31 of the Vienna Convention envisages a situation where ‘treaties shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its objective and purpose.’ Four principles have been discerned from Article 31 of the Vienna Convention: textuality, contextuality, teleology and good faith.⁴³ Textually, Article 31 can be interpreted literally using the ordinary meaning ascribed to the words by the drafters of a treaty unless there is an indication that the parties wanted to use some special meaning.⁴⁴ It is argued in this thesis that Article 21 of the Rome Statute does not seem to refer to ICC’s peremptory or discretionary usage of the ICTY’s and ICTY’s Statute or rules of procedure and evidence. It does however refer to the possible use of previously decided cases.⁴⁵ The contextual meaning depends on the surrounding or framework reading of the terms to be interpreted.⁴⁶ The framework can include annexes, preambles and instruments attached to the treaty which provide a holistic interpretation of the treaty provisions.⁴⁷ The teleological meaning is also known as the effective interpretation and requires that a term be interpreted to include the object and purpose of the treaty. This method involves the need to distinguish between the objective and purpose of legal provisions, which is a forward-looking step that looks at the goals of the treaty from motive which is back-ward looking and is based on historical factors.⁴⁸ There is also the good faith principle which is aimed at preventing absurd or unreasonable interpretation.⁴⁹ In addition, there is a need to pay attention to supplementary means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.⁵⁰ The supplementary meaning should confirm the meaning that is compatible with the main interpretation principles or with the need to prevent

⁴³ Mikaela Heikkilä, *International Criminal Tribunals and Victims of Crime* (2004) 8; cf. Anthony Aust, *Modern Treaty Law, and Practice* (Cambridge University Press: 2008) 186, on the argument that the textual reference is simply general and singular in nature.

⁴⁴ See Aust (n 43) cited in Heikkilä (n 43) 8.

⁴⁵ Article 21 (2).

⁴⁶ Aust (n 43) 188.

⁴⁷ Heikkilä (n 43) 8.

⁴⁸ See Ulf Linderfalk, *om tolkningen av traktater* (2001: Lund Universitet) as cited in Heikkilä (n 35).

⁴⁹ See Aust (n 43) 187.

⁵⁰ Heikkilä (n 43) 8.

ambiguity or manifestly absurd results as contemplated in Article 32 of the Vienna Convention.⁵¹

The ICTY and ICTR constitutive acts are not treaties, but resolutions adopted by the UNSC. Their primary status is based on the fact that the resolutions are derived from the UN Charter and can be interpreted using the Vienna Convention interpretation principles.⁵² The Rules of the Court are to be interpreted using the Vienna Convention principles as established in case law.⁵³ Such a position is meant to achieve a three-pronged purpose: to do justice; deter further crimes; and contribute to the restoration and maintenance of peace.⁵⁴ The Rome Statute uses Vienna Convention interpretation principles and allows human rights-based approach to interpretation,⁵⁵ together with strict (rather than analogous) construction.⁵⁶ *Amicus curiae* may also need to be aware of the need for the ICC to interpret ambiguous provisions in favor of the person being investigated, prosecuted and convicted.⁵⁷

Binding sources for interpretation include treaties and constitutive acts of the ICTY, ICTR, and ICC. *Ad hoc* tribunals, as temporary courts created on a need-basis to address specific legal issues or situations, often related to international crimes, have followed a hybrid approach using views of both human rights cases and domestic courts when applying the doctrine of judicial comity.⁵⁸ A cautionary approach has thus been preferred where courts are free to define their interpretive regime.⁵⁹ The Rome Statute allows the ICC judges' discretion to either depart or choose to be guided by previous decisions.⁶⁰ This is however compounded by the obligation imposed by judges to give full and reasoned decision which

⁵¹ Ibid.

⁵² See *Kanyabashi* Appeal Joint Separate and Concurring Opinion (Tieya and Nieto-Navia) ICTR-96-15 (3 June 1999) para. 11.

⁵³ See *Kanyabashi* case (n 52).

⁵⁴ *Tadic'* Decision IT-94-1 (10 August 1995) Decision on the Prosecutor's Motion Requesting Protective Measures for Witness L, par. 18.

⁵⁵ Article 21 (3) of the Rome Statute.

⁵⁶ Article 22 (2) of the Rome Statute.

⁵⁷ Ibid.

⁵⁸ See the Sloan (1996) 1066, on the argument that the *Tadic'* case saw the Trial Chamber juxtaposing reliance on international human rights norms and domestic law when it could find no support from one or more of them.

⁵⁹ Heikilää (n 43) 13.

⁶⁰ Article 22 (2) which [t]he Court may apply the principles and rules of international law as interpreted in its previous decisions.'

seem to point more to evidentiary guidelines rather than the ICC's interpretative discretion.⁶¹

This researcher utilized the ICC database to look for cases that involve sexual violence.⁶² The *amicus* briefs were examined in terms of the arguments and perspectives of the *amicus curiae*.⁶³ The international community's commitment to curb impunity for international crimes shown in the case of Russian President Putin, despite long-standing lack of solutions to state-on-state aggression. For example, Arkady Moshes notes that the explanations to the West's stance on Russia in Ukraine because of:

‘The size of the country, the internal effectiveness of Vladimir Putin’s political regime and its propaganda machinery, the threat of nuclear weapons, and Russia’s links to Asia and the Global South all play a part...but lack of consensus in the western approach to the war in Ukraine deserves special attention.’⁶⁴

ICC's targeting Putin shows commitment to curb impunity for international crimes. It could also be important in deterring both state leaders and strong individuals to appreciate that ICL does not condone impunity, complacency, and complicity for CRSV. The thesis appreciates that some cases may not have been reported on ICC data base owing to ICC procedures such as issuance of secrete warrants of arrests.

⁶¹ See section 74 (5) of the Rome Statute. See also Gabrielle McIntyre, Testing the Legitimacy, Consistency and Credibility of the International Criminal Court, 1 *QILJ* (2014) 25-57, 27.

⁶² <https://www.icc-cpi.int/>, accessed 6 March 2023.

⁶³ Quick searches were also done from legal databases such as LexisNexis, Heinonline by filtering the search results to include amicus briefs on CRSV.

⁶⁴ Arkady Moshes, *One Year of War in Ukraine: Why Western Policy towards Russia has not Changed Enough* (FIIA Comment, Feb 2023) 1.

Chapter 2

The Problem of Impunity for Conflict-Related Sexual Violence in Armed Conflicts

2.1 Chapter Introduction

The use of CRSV and gender-based violence as a weapon of war has become increasingly prevalent in modern-day conflicts, including in state-on-state violence like the ongoing conflict in Ukraine. Combatting this issue has become a common challenge, with international criminal law (ICL) being a key solution. However, the lack of effective implementation and enforcement mechanisms of ICL has allowed impunity for these crimes to continue. Factors such as chaos in armed conflicts and social stigma surrounding sexual violence contribute to this problem. To address this issue, the involvement of multiple actors, including amici and other experts, is crucial in investigating and collecting evidence of violations of ICL in complex wars. Therefore, this thesis aims to explore the potential role of amici in fighting impunity for conflict-related sexual violence through a transdisciplinary legal methodology, combining analysis of legal sources and case studies.

2.1.1. Setting the Parameters: Framing Individual Perpetrator Accountability through *De jure* and *De facto* Impossibility

The distinction between *de facto* and *de jure* impossibility of bringing perpetrators of human rights violations to account is important in ICL because it highlights the challenges and limitations of holding individuals accountable for their actions because of:

‘the impossibility, *de facto* or *de jure*, of bringing the perpetrators of human rights violations to account whether in criminal, civil, administrative or disciplinary proceedings since they are not subject to an inquiry that might lead to them being accused, arrested, tried, and if found guilty, convicted.’⁶⁵

⁶⁵ ECOSOC, Sub-Committee on Prevention of Discrimination and Protection of Minorities, Question of the Impunity of Perpetrators of Violations of Human Rights (Civil and Political Rights), UN Doc. E/CN.4/SUB.2/1996/18 (29 June 1996), see also UN Commission on Human Rights, “Report of the

The existence of *de jure* and *de facto* impunity has lasting effects on warring parties and victims, emphasizing the importance of ICL in combatting impunity for CRSV through appropriate sentencing and reparations to victims. While the terms *de facto* or factual and *de jure* or legal impossibility imply failure to act, the term has also been used in criminal law as *de jure* impunity and *de facto* impunity.⁶⁶

De jure impossibility refers to situations where legal barriers prevent the prosecution of perpetrators.⁶⁷ Legal reform or innovation may be required to address *de jure* impossibility and ensure consistency with ICL standards, as advocated in the functionalist approach.⁶⁸ *De facto* impossibility occurs when practical barriers, such as insufficient political will or resources, prevent the prosecution of perpetrators.⁶⁹ *De facto* impossibility can be addressed by improving the judicial system and victim support, as well as addressing government unwillingness to prosecute its own forces. This helps the ICC decide whether to prosecute domestically or on its own under complementarity.⁷⁰ Article 17 of the Rome Statute provides under the complementarity principle that the ICC can only intervene when a state is unwilling or unable to investigate and prosecute international crimes, and a case is admissible if:

1. The case is not being investigated or prosecuted by a state with jurisdiction over it.
2. The state is unwilling or unable to genuinely carry out the investigation or prosecution; and
3. the case is of sufficient gravity to justify ICC intervention.

Independent Expert to Update the Set of Principles to Combat Impunity,” E/CN.4/2005/102/Add.1, February 8, 2005, p. 6.

⁶⁶ UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147, part VIII, “Access to Justice,” (December 16, 2005).

⁶⁷ UN Commission on Human Rights (n 65).

⁶⁸ See section 1.3.1.3 of the thesis in chapter 1 for cross-referencing purposes.

⁶⁹ UN Commission on Human Rights (n 65).

⁷⁰ See Article 17 of the Rome Statute.

The Ukrainian government has empowered the ICC to prosecute war crimes, crimes against humanity, and genocide and as of 25 August 2022, about 25,000 war crimes were pending investigation in Ukraine, even though the courts had convicted Russian soldiers and sentenced them for offences such as murder and pillaging.⁷¹ A caveat that is also relevant for this chapter is that, even after the establishment of *ad hoc* tribunals clearly underlining the criminality of CRSV, impunity remained pronounced and victims remained very vulnerable.⁷² Women and girls have also remained largely affected by CRSV although men and boys also experience sexual violence during armed conflict.⁷³ As a result, addressing the root causes of CRSV requires coordinated efforts by states, third party actors like *amicus*, and other local, regional, and international bodies to promote a culture of respect for human rights and hold perpetrators accountable.

2.2. The Ukrainian Government's E-enemy Model and the Fight against CRSV across the Globe

This thesis is written within a context where the Ukrainian government seeks assistance to gather evidence of international crimes in its war against Russia.⁷⁴ The Ukrainian government launched automated mobile applications to report Russian soldier movements in affected areas such as Bucha, Irpin, and Gostomel.⁷⁵ The importance of the chatbot is that it was created by Ukraine's Ministry of Defence, a position critical to fight *de jure* and *de facto* impossibility of perpetrator accountability. Fundamentally, it has been noted that Ukrainian officials, lawyers, and human rights organizations are taking a lead in developing apps to:

⁷¹ Gaiane Nuridzhanian, Prosecuting War Crimes: Are Ukrainian Courts Fit to Do it? (*EJIL Talk*, 11 August 2022) < <https://www.ejiltalk.org/prosecuting-war-crimes-are-ukrainian-courts-fit-to-do-it/>> accessed 09 March 2023.

⁷² See Maria Grahn-Farley 'The Politics of Inevitability: An Examination of Janet Halley's Critique of the Criminalization of Rape as Torture in Feminist Perspectives on Contemporary International Law' in Sari Kuovo & Zoe Pearson, *Between Resistance and Compliance* (2011) 111. Cf historical concerns on ICL implementation from Zimmermann (1999), Zyberi (2015), Williamson (2007), Schomburg (2007), Scott (2016), Shelton (1994), Skouteris (2011), Smeulers (2011), Moir (2015).

⁷³ ICRC (n 16).

⁷⁴ Vera Bergengruen, How Ukraine is Crowdsourcing Digital Evidence of War Crimes (*The Daily Spot*, 18 April 2022 <<https://time.com/6166781/ukraine-crowdsourcing-war-crimes/>> accessed 09 March 2023.

⁷⁵ *Ibid.*

design new ways to catalogue and verify reams of video, photo, and eyewitness accounts of criminal behaviour by Russian forces. Ukraine has adapted popular government apps to allow citizens to document damage to their homes, used facial-recognition software to identify Russian military officials in photos, and rolled out new tools to guide users through the process of geo-tagging and time-stamping their footage in hopes it may help authorities hold the perpetrators responsible.⁷⁶

The corollary to the government's position above is that the mobile app provides a way for citizens to collect evidence securely and accurately, including through video recording platforms. The evidence collected through the Ukrainian mobile application could support prosecutions of international crimes committed by Russian and Ukrainian soldiers. This evidence could be used by the ICC or domestic courts in Ukraine to hold perpetrators accountable for CRSV in three broad ways.

First, the Ukrainian government's admission to include different actors to improve digital evidence shows its commitment to address the issue of CRSV and other crimes committed during the conflict. Second, the admission helps to build trust between affected states and international partners and organizations.⁷⁷ The Ukrainian government's openness to collaboration with the ICC and third-party experts, as demonstrated by their admission of needing help, allows for important legal institutions such as the Atrocity Crimes Advisory Group (ACA) created by the United States (US), United Kingdom (UK) and the European Union (EU) to assist in documenting, preserving, and analysing evidence of war crimes and atrocities.⁷⁸ Third, The Ukrainian government's admission of the need for help can lead to increased support and resources for efforts to combat impunity for CRSV and other crimes. International partners and CSOs can provide technical assistance, financial resources, and other forms of support to strengthen the domestic justice system and empower survivors. The US and other mechanisms such as the European Domestic Resilience Initiative (EDRI) have crafted measures to support Ukrainian domestic authorities, international efforts, strategic litigation, sanctions, and visa eligibilities of Russians, and strengthening domestic

⁷⁶ Ibid.

⁷⁷ See for instance the support from the United States of America and Europe reported at US Embassy Guatemala, 'Supporting Justice and Accountability in Ukraine,' (*USEG*, 22 February 2023) <<https://gt.usembassy.gov/supporting-justice-and-accountability-in-ukraine/>> accessed 09 March 2023.

⁷⁸ Ibid.

laws to ensure that international crimes committed under Russian aggression are punished.⁷⁹ Efforts have also been made to ensure that Ukrainian legal experts are trained on various international legal regimes, the case law of international courts and tribunals, and methods of collecting, evaluating, and synthesizing evidence in line with relevant admissibility rules.⁸⁰

2.2.1. Context-specificity: Scope, Profile, and Pattern of CRSV Crimes: Common Challenges Related to the Endemic Nature of War

The international community has specifically focused on supporting Ukraine to fight international crimes in many ways. These include inter alia:

The establishment of the United Nations Independent International Commission of Inquiry on Ukraine (UNCOI) to collect, consolidate, and analyse potential evidence and the individuals responsible for them. Second, the support of the UN Human Rights Monitoring Mission in Ukraine (UNHRMMU) to gather and examine evidence of war crimes and other abuses in Ukraine, including enforced disappearances, torture, and other ill-treatment, and CRSV. Third, invoking the Organization for Security Cooperation in Europe (OSCE) Moscow Mechanism to assess the possibility of war crimes and crimes against humanity committed by Russia's armed forces under OSCE commitments. Four, supporting the Joint Investigation Team on Ukraine under Eurojust Genocide Network to coordinate investigations and prosecution of genocide, crimes against humanity and war crimes between Ukraine and Member states Lithuania, Poland, Ukraine, Estonia, Latvia, Slovakia, Romania, and the International Criminal Court.⁸¹

With reference to the CRSV committed in Ukraine in late February to March 2022, the Independent International Commission of Inquiry for Ukraine has been asked to investigate, gather information and document any human rights abuses that have taken place in Kyiv, Chernihiv, Kharkiv, and Sumy, as requested by Human Rights Council resolution S-34/1.⁸² This is important as the recommendations can also help institutions

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ US Embassy Guatemala (n 77).

⁸² UNSG, 'Independent International Commission of Inquiry on Ukraine: Note by the Secretary General' (UNSG, 2022) < [A/HRC/49/71](https://www.un.org/A/HRC/49/71) (un.org)< <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2022/10/report/auto-draft/Inquiry-on-Ukraine.pdf>, accessed 28 October 2022.

involved in prosecuting CRSV. The ICC Prosecutor for example, has already opened investigations into allegations of war crimes, crimes against humanity and genocide.⁸³ The Inquiry report notes that:

‘Furthermore, the Commission documented patterns of summary executions, unlawful confinement, torture, ill-treatment, rape, and other sexual violence committed in areas occupied by Russian armed forces across the four regions on which it focused. People have been detained, some have been unlawfully deported to the Russian Federation, and many are still reported missing. Sexual violence has affected victims of all ages. Victims, including children, were sometimes forced to witness the crimes. Children have become the victims of the full spectrum of violations investigated by the Commission, including indiscriminate attacks, torture, and rape, suffering the predictable psychological consequences.’⁸⁴

From the above remarks, context-specificity, in many aspects, shows the extent of the problem of impunity in areas of study.

The scope of CRSV, the profile of victims, and patterns of crime are all impacted by the level of impunity, albeit in different ways. In the case of the war in Ukraine, it has been classified as an international armed conflict under Article 2 of the four 1949 Geneva Conventions, which means that armed hostilities involve two states or their respective armies, or other actors supporting them.⁸⁵ In relation to CRSV crimes for instance, the Inquiry Report observes that the profiles of female victims range from four to over 80 years who were raped in their homes or unused dwellings.⁸⁶ Between February 24 and October 21 2022, Human Rights Watch documented 86 CRSV cases, mostly by Russian soldiers, including rape, gang rape, forced nudity, and forced public stripping in various regions of Ukraine and in one penitentiary facility in Russia.⁸⁷ The displacement of more than six

⁸³ See Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation < [Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation | International Criminal Court \(icc-cpi.int\)](https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states)< <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>, accessed 28 October 2022.

⁸⁴ UNSG (n 82).

⁸⁵ UNSG (n 82) 4.

⁸⁶ UNSG (n 82) 14.

⁸⁷ Human Rights Watch, ‘World Report 2023: Ukraine Events of 2022,’ (HRW, 2023) < <https://www.hrw.org/world-report/2023/country-chapters/ukraine>, accessed 9 March 2023.

million Ukrainians and the security situation makes it difficult for victims to report the extent of impunity or to help health authorities to record the number of victims.⁸⁸ Such survivors could not access critical services such as essential medical, psychosocial, legal, socio-economic and time-sensitive medical care.⁸⁹ The extent of impunity is also difficult to gauge since victims face psychosocial problems and have sometimes witnessed the commission of CRSV on their loved ones.⁹⁰ This has also created fears of stigma, shame and fear of reprisals as factors that deter survivors from reporting CRSV or reporting.⁹¹

2.2.2. Common Challenges Related to Impunity and Dissonant Terminological Aspects of CRSV

The issue of prosecuting CRSV internationally is complex and multifaceted. While broad definitions of the crime exist, essential elements of CRSV are still undeveloped in many legal systems, which may contribute to cultures of impunity. The lack of a clear definition or linkage of CRSV to other forms of sexual violence, such as marital rape or intimate partner violence, can make it challenging to prosecute perpetrators and provide justice for victims. Additionally, most definitions do not address the barriers that victims face in accessing justice, including stigma, fear of retribution, lack of resources, and discriminatory legal systems. However, despite these challenges, there are many alternatives available to address the issue of CRSV and hold perpetrators accountable. Collaborative efforts between states, international bodies, and third-party actors can help strengthen domestic justice systems, empower survivors to participate in proceedings, and provide support to ensure the ICC can prosecute CRSV committed in conflict situations.⁹² This can result in a culture of impunity for perpetrators, who may believe that they can commit sexual violence without consequences.

The core of CRSV is that the accused commits sexual acts by force, coercion, or abuse of power, causing fear of violence or oppression against any victim, whether male, female,

⁸⁸ UNSG (n 82) 14.

⁸⁹ Human Rights Watch (n 87).

⁹⁰ UNSG (n 82) 14-17.

⁹¹ Human Rights Watch (n 87).

⁹² Ibid.

boy or girl.⁹³ Inadequate investigations of CRSV can result in difficulty building strong cases against perpetrators and can lead to dropped charges or acquittals.

Legal practitioners and courts lack adequate training on international crimes, including CRSV.⁹⁴ Law enforcement officials, judges, and other legal professionals may lack training and expertise necessary to effectively prosecute CRSV. Lack of understanding of CRSV as a distinct crime can perpetuate cultures of impunity and discourage survivors from seeking justice or receiving support, as demonstrated in the ICTY and ICTR. However, ad hoc tribunals have shown an inclination to adopt the broad definition of CRSV. For instance, the ICTY defined sexual violence in the following manner:

The infliction by an act/omission of severe pain or suffering, whether physical or mental, the actor omission must be intentional and must be aimed at obtaining information or a confession, or the punishing, intimidation, or coercing the victim or a third person, or discriminating, on any ground, against the victim or a third person⁹⁵.

In its broad form, CRSV has also been considered as including crimes of a sexual nature such as sexual slavery, rape, forced pregnancy, forced sterilization, forced prostitution, forced pregnancy, or any other form of sexual violence of a comparable gravity.⁹⁶ ICRC's broad categorization of CRSV may not align with ICTR's vague definition of sexual violence as acts or omissions that are coercive.⁹⁷ As a result, scholars have attempted to reconcile the definitional problems by distinguishing between forms of sexual violence of comparable gravity versus the need for *ad hoc* tribunals to set a minimum threshold of violence in the other forms of sexual violence crimes such as rape.⁹⁸ A minimum threshold

⁹³ ICRC (n 16).

⁹⁴ US Embassy Guatemala (n 77).

⁹⁵ See *Prosecutor v Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj* (IT-04-84-A), Appeals Chamber, 19 July 2010, para 290 relying on the precedence set out in *Prosecutor v Kuranac* Trial Judgment, para 497.

⁹⁶ ICRC (n 16).

⁹⁷ See ICTR, *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4, Judgment (Trial Chamber), 2 September 1998, para. 688. This approach was also followed by the in the case of ICTR, *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13, Judgment (Trial Chamber), 27 January 2000, para. 965.

⁹⁸ See Gloria Gaggioli, 'Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law' *International Review of the Red Cross* (2014), 96 (894), 503–538, 506.

of violence is necessary for international tribunals to align their interpretation of positive laws with international human rights monitoring bodies, such as the Torture Committee.⁹⁹ Addressing these critical gaps in the definition and application of CRSV is necessary to combat impunity and ensure justice and accountability for survivors.

2.3. Common Challenges Relating to the Nexus between CRSV and Protection Gaps in the CRSV-related Laws

2.3.1. Challenges Relating to Poor Implementation or Enforcement of ICL that Foster Impunity for CRSV

To date, ICL clearly establishes individual responsibility for international crimes. The problem remains with enforcement and implementation of ICL. Intentional tampering or destruction with crime scenes is a violation of international humanitarian law (IHL) and can constitute war crimes.¹⁰⁰ The Rome Statute for instance provides that ‘intentionally directing attacks against buildings, material, medical units, and transport, provided they are not military objectives, is a war crime when the conduct takes place in the context of and is associated with an armed conflict not of an international character.’¹⁰¹ In its case law, the ICC has held that intentional destruction of evidence can constitute a war crime under Article 8 (2) (b) (xii) of the Rome Statute.¹⁰²

ICC can use the principle of command responsibility to hold commanders and superiors accountable for crimes committed by their subordinates in situations of war, if they knew or should have known about them but failed to prevent them or punish the perpetrators.¹⁰³ When Russian soldiers have been reported to have done so in Ukraine when they

⁹⁹ For more detail on States and human rights obligations, see Sir Nigel Rodley, ‘Civil and Political Rights’ in Catarina Krause and Martin Scheinin (eds), *International Protection of Human Rights: A Textbook* (Abo Akademi University Institute for Human Rights 2012) 118.

¹⁰⁰ See for instance Article 8 (2) (b) (xii) of the Rome Statute.

¹⁰¹ Ibid.

¹⁰² See *Prosecutor v. Jean-Pierre Bemba Gombo*, where the Appeals Chamber found that the destruction of crime scenes by Bemba’s forces was a war crime under the Rome Statute.

¹⁰³ Article 28 of the Rome Statute.

indiscriminately destroy scenes of the crime,¹⁰⁴ individual criminal responsibility can arise in the following ways.

Soldiers who destroy or alter evidence at a crime scene may be committing a war crime, as it impedes investigators' ability to identify and prosecute perpetrators. The deliberate destruction of property that is not justified by military necessity violates IHL under the Geneva Conventions and their Additional Protocols, which regulate the conduct of armed conflicts, and this provision could apply to the destruction of crime scenes.¹⁰⁵ For starters, Article 53 of Additional Protocol provides that:

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations is prohibited, except where such destruction is rendered absolutely by military operations.

From the above quotation, the Occupying Power is prohibited from destroying any private or public property, unless it is an absolute military necessity.

Branches of international law such as IHL through the Fourth Geneva Convention for instance, protect women against rape, enforced prostitution and any form of assault.¹⁰⁶ Certain crimes, such as those discussed earlier, can be prosecuted as grave breaches of the IHL's Geneva Conventions in the context of Ukraine's international armed conflict or as violations of Common Article 3 of the Geneva Conventions, which applies to both international and non-international armed conflicts (IACs/ NIACs).¹⁰⁷ Because gender-specific crimes such as sexual slavery, rape, enforced sterilization, and forced pregnancy generally are identified either as crimes against humanity¹⁰⁸ or as war crimes,¹⁰⁹ Ukraine

¹⁰⁴ UNSG (n 82).

¹⁰⁵ Article 53 of the Additional Protocol I.

¹⁰⁶ Article 27. See also Common Article 3 of the Geneva Conventions and Protocol II to the Geneva Conventions applicable during internal conflicts.

¹⁰⁷ See Carin Benninger-Budel and Anne-Laurence Lacroix, *Violence against Women: A Report* (World Organization against Torture, 1999) 243.

¹⁰⁸ See Articles 7 (1) (g) of the Rome Statute adopted in 1998.

¹⁰⁹ Article 8 (2) (b) (xxii).

and the ICC should create a clear strategy to address the common issues related to CRSV, as laws must be clear for effective implementation.¹¹⁰ To illustrate this point, after the First and Second World War, it has been monumentally noted that:

Germany soldiers committed a great number of rapes and the Japanese soldiers engaged in inhuman sexual slavery during the World War II, but neither at Nuremberg nor at Tokyo was sexual violence acknowledged as a war crime.¹¹¹

ICL has developed significantly in the 1990s to address the failure of the Tokyo and Nuremberg trials to punish CRSV, and now CRSV and rape can be conceptualized as torture under ICL with an emphasis on combatting such offenses as a human rights issue.¹¹² Weak national laws can hinder the effective implementation of ICL, as noted by the UN Special Rapporteur on Violence against Women, its Causes and Consequences that:

‘States must address widespread impunity for perpetrators of rape and lack of justice for victims, and must harmonize their criminal laws with international human rights, criminal and humanitarian law... While all States reviewed in my report criminalize rape, many of them do it in a way that is not harmonized with human rights standards and international law.’¹¹³

Problems also arise in reconciling the provisions of treaty law such as the Fourth Geneva Convention, as well as Additional Protocol I and Additional Protocol II) and customary law applicable in both international and non-international armed conflict.¹¹⁴ In ensuring effective implementation and enforcement of ICL, it should also be acknowledged that there are complex problems associated with CSRV such as that:

¹¹⁰ This is generally based on Lon L Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964).

¹¹¹ Benninger-Budel and Lacroix, (n 107) 243.

¹¹² Maria Grahn-Farley ‘The Politics of Inevitability: An Examination of Janet Halley’s Critique of the Criminalization of Rape as Torture’ Law’ in Sari Kuovo & Zoe Pearson (eds.) *Feminist Perspectives on Contemporary International Law: between Resistance and Compliance* (2011) 111. See also Lilly (2007), Mahamedou (2007), and Luban (2000).

¹¹³ Ms Dubravka Šimonović, ‘Harmonization of criminal laws needed to stop rape – UN expert’ (OHCHR, 28 June 2021) < [Harmonization of criminal laws needed to stop rape – UN expert | OHCHR](https://www.ohchr.org/en/press-releases/2021/06/harmonization-criminal-laws-needed-stop-rape-un-expert)> <https://www.ohchr.org/en/press-releases/2021/06/harmonization-criminal-laws-needed-stop-rape-un-expert>> accessed 25 October 2022.

¹¹⁴ ICRC (n 16).

Its causes (direct and indirect) can be numerous, including the climate of impunity, which is rampant in armed conflicts, the absence of clear orders/instructions prohibiting sexual violence, the proliferation of small arms and light weapons used to threaten victims, the increased vulnerabilities of victims of armed conflicts (internally displaced persons, migrants, widows, etc.), and the destruction of community ties and individual coping mechanisms. Sexual violence can also be used in a strategic or tactical way by parties to armed conflicts. In all cases, it has devastating consequences – primarily for the victims themselves, of course, because of its negative physical, psychological, social, and economic effects, but also for the victims’ relatives, who face possible trauma, feelings of indignity and guilt at having been unable to protect their next-of-kin.¹¹⁵

Any implementation strategy must appreciate that ICL criminalizes the most serious violations of sexual violence at international level.¹¹⁶ ICC can use legal precedents from ICTY and ICTR on CRSV as it has been shown that:

The precedents set by the tribunals (ICTR and ICTY) established that rape can and will be prosecuted as an instrument of genocide, as torture, as a crime against humanity, as a grave breach of the Geneva Conventions and as a war crime...the *Akayesu* case...for the first time in history, it acknowledges that rape can be one of the means of committing the crime of genocide. This decision was based in part on the evidence that Akayesu had witnessed and encouraged rapes and sexual assaults of women during a genocidal campaign against the Tutsi while he was a communal leader.¹¹⁷

Accordingly, the ICTY in the *Celebici* case which characterised the rapes of Bosnian Serb women at the prison camp as acts of torture¹¹⁸ and in the *Furundzija* case,¹¹⁹ where a local Bosnian Croat military commander was found guilty of aiding and abetting a war crime, that is, the rape of a Bosnian woman.¹²⁰ In general, while IHL is the law of war, it is also incontrovertible that:

¹¹⁵ Gloria Gaggioli, (n 98) 505.

¹¹⁶ Gloria Gaggioli (n 98) 505.

¹¹⁷ Benninger-Budel and Lacroix, (n 107) 244.

¹¹⁸ *The Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo*, Judgment of the Trial Chamber, 16 November 1998, Case No. IT-96-21-T.

¹¹⁹ *Prosecutor v Antonio Furundzija*, Judgment of the Trial Chamber, 10 December 1998, *Prosecutor v Antonio Furundzija*, Judgment of the Trial Chamber, 10 December 1998, Case No.: IT-95-17/1-T.

¹²⁰ Benninger-Budel and Lacroix (n 107) 244.

Armies and rebels target women to humiliate and terrorise the opposition population. Sexual violence against women is often meant to demonstrate victory over the men of the other group who have failed to protect their women. Sexual violence has become a weapon of 'ethnic cleansing'. In this regard, forced impregnation is frequently used by forcing women of the 'other group' to bear children of the perpetrator.

The logical corollary is that the problem with CRSV is not the lack of laws, but rather the inadequate implementation and enforcement of existing regulations.

2.3.2. Challenges Relating to Social Attitudes and the Treatment of CRSV as a Hidden Crime or Crime of Shame.

The consideration of CRSV as a hidden crime or crime of shame is a social attitude that also disempowers victims and survivors of CRSV from reporting violations for fear of stigmatization or being ostracised by their abusers.¹²¹ Victims in Ukraine and other conflict zones face barriers to reporting CRSV, as seen in previous international tribunals where conservative estimates showed thousands of female victims estimated between 12,000-50,000 victims.¹²² Both conflicts, the former Yugoslavia and ongoing conflict in Ukraine, have been marked by allegations of CRSV and other grave breaches of ICL. In the former Yugoslavia conflict, CRSV was used as a weapon of war with thousands of women and girls subjected to rape, sexual slavery, and other forms of sexual violence, as evidenced by a plethora of cases.¹²³ The *Kunarac* case involved the rape and sexual enslavement of Bosnia women and girls by Bosnian Serb forces during the conflict in Bosnia and Herzegovina. The ICTY found that sexual violence was used as a tool of terror and

¹²¹ Professor Cecile Aptel, cited in ICRC, 'Sexual violence in armed conflict: Underlying causes and prevention strategies' (ICRC, 12 November 2015) < [Sexual violence in armed conflict: Underlying causes and prevention strategies | International Committee of the Red Cross \(icrc.org\)](https://www.icrc.org/en/event/sexual-violence-armed-conflict)< <https://www.icrc.org/en/event/sexual-violence-armed-conflict>< accessed 23 October 2022.

¹²² Catherine Niarchos, 'Women, War and Rape,' *Human Rights Quarterly*, 17(4) (1995) 649–690. See also EC Investigative Mission into the Treatment of Muslim Women in the former Yugoslavia (1993), para 14.

¹²³ See for instance *Prosecutor v. Kunarac et al* (Judgment of 22 February 2001) IT-96-23-T & it-96-23/1-T; *Prosecutor v. Delalic et al.* (Judgment of 16 November 1998, IT-96-21-T), and *Prosecutor v Blagojevic et al.* (Judgment of 17 January 2005, IT-02-60-T).

intimidation and constituted both a CAH and a violation of the laws or customs of war.¹²⁴ ICTY found that CRSV was used as a tool of terror and constituted both CAH and a violation of the laws and customs of war in the *Delaic* case, where Bosnian women were raped and sexually abused by Bosnian Croat forces during the conflict in Bosnia and Herzegovina.¹²⁵ In the *Blagojevic* case, the ICTY found that CRSV was used as a means of humiliating and degrading the victims and their families and constituted the crimes as described in the *Delaic* and *Kuranac* cases.¹²⁶ In the context of the ongoing conflict in Ukraine, there have also been allegations of CRSV, particularly in eastern Ukraine controlled by separatist groups.¹²⁷ The Ukrainian government and former Yugoslavian officials have, however, also both been accused of committing CRSV. In all this, the hidden nature or incidence of shame also emanates from the consideration of CRSV as a crime that depends on ‘*wars of interpretation*’ about victims and perpetrators.¹²⁸ Courts face the challenge of distinguishing charges of CRSV as a crime against men or women and determining the nature of harm based on naming or labels.¹²⁹

Conceptualizing CRSV as a hidden crime disempowers the victim and emboldens the perpetrator, allowing sexual atrocities to be used as deliberate and systematic methods of achieving victory in conflicts.¹³⁰ In the Yugoslavian situation, women were also raped in detention centres that were specifically established for that purpose as part of Bosnian Serb

¹²⁴ See *Kuranac* case *ibid*.

¹²⁵ See *Delaic* case (n 123).

¹²⁶ See the *Blagojevic* case (n 123).

¹²⁷ See Ukrainian Helsinki Human Rights Union, *Problems of Gender-based Violence in the Conflict Zone*, (UHHRU 2015) which documented 60 cases of CRSV by separatist groups. The UNHCR Report, *Arbitrary Detention, Torture, and Ill-treatment in the Context of Armed Conflict in Ukraine, 2014-2020* (UNHCHR 2020) 1, which estimates 340 victims of sexual violence (190-230 men and 120-140 women).

¹²⁸ Vesna Kesic, ‘Muslim Women, Croatian Women, Serbian Women, Albanian Women...,’ in *Balkan as Metaphor*, ed. Dusan Bjelic and Obrad Savic (Cambridge, MA and London: Massachusetts Institute of Technology Press, 2003), 317.

¹²⁹ Kirsten Campbell, ‘The Gender of Transitional Justice: Law, Sexual Violence and the ICTY’ (2007) *IJTJ*, 411–432, 425.

¹³⁰ Women 2000, ‘Sexual Violence and Armed Conflict: United Nations Response’ (*United Nations Department of Economic and Social Affairs*, April 1998) < [Document1 \(un.org\)](https://www.un.org/womenwatch/daw/public/cover.pdf) <<https://www.un.org/womenwatch/daw/public/cover.pdf>> accessed 23 October 2022.

military structures.¹³¹ While the ICTY as an international criminal tribunal has been known for prosecuting and convicting powerful officials for rape and other sexual war crimes,¹³² serious concern remains that the sexual violence cases that were transferred by the ICTY to the national courts of Bosnia and Herzegovina may not lead to accountability of perpetrators or empowerment of victims and survivors.¹³³ The challenge in transitioning from ICTY to national courts not realizing transformative justice, leaving victims vulnerable with hidden nature of CRSV has been explained thus:

‘Victims suffer enormously from physical and psychological after-effects and live with a feel of shame. Most victims do not talk about their experiences because many societies still tend to regard them as ‘dirt’ and ‘spoils of war’ or are afraid of revenge. Consequently, many women will neither report nor discuss the sexual violence that has been perpetrated against them, often resulting in the impunity of the perpetrator. For rape survivors who want to testify before court, an adequate witness protection is imperative.’¹³⁴

From the above, victims of CRSV need a victim-centred mechanism and effective witness protection to take an active role during legal proceedings.

2.3.3 The Prohibition of CRSV under State Practice or Customary International Law

The goal of this section is to show how ICL prohibits CSRV. Professor Lon Fuller and the Legal Process School argue that legal doctrines empower courts of law to make proper adjudication in cases that are brought before them.¹³⁵ Sexual violence is prohibited in customary international law, even if there is state practice contrary to the norm. Rule 93 of the ICRC study of customary international law establishes this rule and additional protocol I to the Geneva Conventions prohibits rape, crimes against honour, and enforced

¹³¹ Women 2000 (n 130) 2.

¹³² Rachele Marconi, ‘Former Yugoslavia’s survivors of sexual violence call for justice’ (*Legal Analysis*, 9 January 2020) <[Former Yugoslavia's survivors of sexual violence call for justice | LSE Women, Peace and Security blog](https://blogs.lse.ac.uk/wps/2020/01/09/former-yugoslavia-survivors-of-sexual-violence-call-for-justice/)<https://blogs.lse.ac.uk/wps/2020/01/09/former-yugoslavia-survivors-of-sexual-violence-call-for-justice/>> accessed 23 October 2022.

¹³³ Marconi (n 132).

¹³⁴ See Benninger-Budel and Lacroix, (n 107) 244.

¹³⁵ Lon L. Fuller, ‘The Forms and Limits of Adjudication,’ *92 Harv L. Review* (1978) 353.

prostitution.¹³⁶ The position is similar under the Additional Protocol II; the Fourth Geneva Convention, Statute of the ICTR which categorises sexual violence as a war crime;¹³⁷ Statute of the ICC which clearly links certain acts to Common Article 3 of the Geneva Conventions;¹³⁸ and human rights committees such as the CEDAW Committee.¹³⁹

State practice is important to prevent CRSV, and the UN Secretary General has noted that sexual violence is still used as a tactic in conflict by various groups such as *coups d'état*, terrorism, and international criminal networks.¹⁴⁰ The Secretary General implores institutions dealing with sexual violence to consider the definition of conflict-related sexual violence to mean:

Rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage, and any other form of sexual violence of comparable gravity perpetrated against women, men, girls, or boys that is directly or indirectly linked to a conflict.¹⁴¹

The Report of the Secretary General is critical as it lists parties who use or are suspected of using rape or other forms of sexual violence which are under the agenda of the United Nations Security Council.¹⁴² UN Secretary General identified parties in several countries, including Iraq, Syria, Myanmar, Mali, Sudan, South Sudan, Somalia, and the DRC, as using sexual violence as a tactic in conflict, prompting the potential for the UN Security Council to take action through hot spot mapping. Argument could be raised that the UN Convention against Torture (UNCAT) can also be used to help states which ratify CAT to

¹³⁶ Additional Protocol I, Article 75(2) (adopted by consensus) (cited in Vol. II, Ch. 32, § 996); Additional Protocol II, Article 4(2) (adopted by consensus) (§ 997).

¹³⁷ ICTR Statute, Article 4(e) (ibid., para 1577)

¹³⁸ ICC Statute, Article 8 (2) (b) (xxii) and (e) (vi) (1565).

¹³⁹ Committee on the Elimination of Discrimination against Women, General Recommendation 19 (Violence against Women) (ibid 1735).

¹⁴⁰ Letitia Anderson, 'Conflict-related Sexual Violence Report of the United Nations Secretary General,' (UN) 3. UNDOC/S/2022/272, 29 March 2022 < [SG-Report2021for-web.pdf](https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2022/04/auto-draft/SG-Report2021for-web.pdf) (un.org) < <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2022/04/auto-draft/SG-Report2021for-web.pdf> > accessed 25 October 2022.

¹⁴¹ Anderson (n 140) 5.

¹⁴² Anderson (n 140) 50-57.

make acts of torture offenses under their criminal law.¹⁴³ State practice can thus be used to foster a sustainable culture of human rights and to also encourage states to shun impunity for CRSV.

2.4. Institutional Challenges that make it Difficult to Curb Impunity under International Legal Justice

2.4.1 Impunity for CSRV Emanating from Legitimacy Issues as well as Allegations of Victor's Justice

Establishing international institutions to prosecute CRSV is not without institutional challenges, including issues of legitimacy, judicial discretion, and the efficacy of victim participation. Legitimacy of a court is dependent upon its ability to understand the normative framework that protect an accused person without fear or favour.¹⁴⁴ Such issues bear significantly on the concept of public confidence or institutional legitimacy based on the idea that decisions of a court can be fair or just.¹⁴⁵ The *Kunarac* case has been criticized for its potential to set a precedent where perpetrators of sexual violence could be charged with a lesser crime of torture rather than rape, which may lead to increased sexual violence in that:

If IHL ratifies the idea that rape intrinsically causes intense suffering, it may lead legitimately to the intense suffering that it causes through more rapes-we would see more rapes.¹⁴⁶

The above observation was made despite the fact that the making of parties to a war accountable for violence and rape specifically directed towards women is a central task of international law and important step towards justice.¹⁴⁷ The concern by Janet Halley *et al*

¹⁴³ See Article 4 (1).

¹⁴⁴ See Robert G. Bone, 'Party Rulemaking: Making Procedural Rights through Party Choice' (2012) 90 Tex L. Review 1329, 1384-5.

¹⁴⁵ See Kevin, E Davis and Helen Hershkoff, 'Contracting for Procedure' (2011) 53 Wm & Mary L Rev 507, 517.

¹⁴⁶ Janet Halley, Prabha Kotiswaran, Rachel Rebouché, Hila Shamir, *Governance Feminism: An Introduction* (University of Minnesota Press: 2018).

¹⁴⁷ United Nations Special Rapporteur on Torture Prof Manfred Nowak, Comment made on International Women's Day (ICRT, 2008) cited in Grahn-Farley (n 112) 111.

seems to disregard the notion that the sentences that were imposed at the ICTY and the ICTR were largely determined by the gravity of the offence, the degree of responsibility of the accused and the relevant aggravating factors.¹⁴⁸ The argument also ignores the fact that parties at both *ad hoc* tribunals allowed parties to produce any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused person has been found guilty on one or more of the charges in the indictment.¹⁴⁹

2.4.2. Impunity Stemming from the Exercise of Judicial and Prosecutorial Discretion

The *ad hoc* international tribunals such as the ICTY and ICTR faced the challenge of determining the weight of evidence against accused persons, which largely relied on the judges' discretion within the legal framework.¹⁵⁰ This created a problem related to the overarching constraints of offence proportionality that is imposed by the predominant retributive paradigm at international tribunals.¹⁵¹ The *Tadic* case exemplifies the challenges of achieving broader accountability for CRSV, as the ICTY's finding that the rape of Bosnian women did not constitute genocide was criticized for downplaying the gravity of sexual violence and perpetuating impunity.¹⁵² Amnesty International expressed concern that the *Tadic* case could set a negative precedent for international justice by undermining the principle of universal jurisdiction.¹⁵³ Mark Osiel suggests that the *Tadic* case has the potential to contribute to the politicization of international criminal justice and powerful states may use international tribunals to advance their own interests, which could lead to the erosion of the legitimacy and fairness of these institutions.¹⁵⁴ The exercise of prosecutorial discretion can

¹⁴⁸ Ralph Henham 'Evaluating Sentencing as a Force for Achieving Justice in International Criminal Law Trials' in Ralph Henham and Mark Findlay (ed) *Exploring the Boundaries of International Criminal Justice* (Ashgate 2011) 230.

¹⁴⁹ Henham (n 148) 231.

¹⁵⁰ Henham (n 148).

¹⁵¹ Henham (n 148).

¹⁵² William A. Schabas, 'The Ad Hoc Tribunals and the Promotion of International Justice,' 1 *Journal of International Criminal Justice* (2003) 1-22, 1.

¹⁵³ Amnesty International, 'International Criminal Tribunal for the former Yugoslavia: The *Tadic* case' (AI, 1999).

¹⁵⁴ Mark Osiel, 'The International Tribunal for the former Yugoslavia: Balancing Justice and Realpolitik,' 90 *American Journal of International Law* (1996) 305-327.

disempower victims and survivors through accepting plea agreements that are tailor-made to select certain truths that the perpetrator would reveal.¹⁵⁵

The pleas have been criticised for distorting truth and helping the accused persons to sanitize or censor versions of truth of what transpired during the conflict.¹⁵⁶ Thus were judges accept the plea bargain as was done at the ICTY and a split decision favours the accused person, the concern has been that the victims are further victimised through truth construction that is endorsed by judges and the adversarial parties to the proceedings.¹⁵⁷ The case of *Prosecutor v Radomir Kovac*¹⁵⁸ saw Kovac being charged with CAH for his role in the detention and sexual abuse of Bosnian women in the Foca region of Bosnia and Herzegovina. He pleaded guilty to one count of rape and one count of sexual assault and was sentenced to 20 years in prison because of the plea bargain. The plea bargain was criticised as allowing Kovac to avoid conviction on charges of enslavement and torture, and for not adequately reflecting the gravity of the crimes he had committed.¹⁵⁹ In the case of *Dragan Jokic*, who was charged with CAH for his role in the Srebrenica massacre, the ICTY saw him pleading to aiding and abetting extermination and was sentenced to 9 years in prison.¹⁶⁰ The plea bargain was criticised for not reflecting the full extent of his crimes, including his involvement in sexual violence.¹⁶¹ While some plea bargains were made,

¹⁵⁵ See the dissenting judgment of Presiding Judge Wolfgang Schamburg in *Prosecutor v Deronjic* (IT-02-61-S) Dissenting Judgment of Judge Wolfgang Schamburg, 30 March 2004.

¹⁵⁶ Schamburg (n 155).

¹⁵⁷ Henham (n 148)

¹⁵⁸ No. IT-96-23/2. See also, Rule 62*bis* (ii) of the ICTY Rules requiring that a guilty plea be 'informed' as clarified in the case of *Prosecutor v. Erdemovic*, Judgment of the Appeals Chamber, Case No. IT-96-22-A, 7 October 1999, 20: these could be compared to Article 65(5) of the Rome Statute of the ICC, which provides that any plea agreement is binding exclusively on the accused and the OTP.

¹⁵⁹ See Doris Buss, 'The Foca Case: The International Criminal Tribunal for the former Yugoslavia and the Fight against Impunity for Rape as a War Crime,' 24 *Human Rights Quarterly* (2002) 853-908, 853. See also, Christine Van Den Wyngaert, 'The Role of Plea Bargaining in International Criminal Justice,' in Martha Minow, Catarina Börjesson, & Parvathi Menon (eds.) *The Role of the Prosecutor in the International Criminal Justice System* (Oxford University Press, 2003).

¹⁶⁰ *Prosecutor v Jokic* IT-02-59-T.

¹⁶¹ See for instance, Sharon A. Williams, 'Sexual Violence and the ICTY: The Challenges of Prosecuting Sexual Violence Crimes in Armed Conflicts,' 6 *Journal of International Criminal Justice* (2008) 979-1006; see also Kevin Jon Heller, 'The Prosecutor's Role in Plea Bargaining at the International Criminal Court,' in Carsten Stahn & Mohamed M. EL Zeidy, *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press, 2011); and Susana SáCouto, *Transitional Justice and*

lengthy sentences were still imposed. For instance, in the case of *Prosecutor v Goran Jelusic* which included CSRV, Jelusic pleaded to one count of CAH but was sentenced to 40 years in prison.

2.4.3. Impunity and Complicity stemming from the limitations of the Victim's Therapy Paradigm

Some people believe that simply participating in the criminal justice process can be therapeutic for victims of sexual violence, even if they are not directly involved in the trial proceedings.¹⁶² This belief can contribute to the problem of impunity for sexual violence by downplaying the importance of holding perpetrators accountable for their actions and focusing instead on the perceived benefits of participation for victims. Many victims may not want to participate in the justice process at all, and those who do may not find it to be a healing experience. Analogically, the rape trial in a domestic criminal court for instance left a victim, Frances Andrade, feeling violated during cross examination for indecent assault against her former music teacher, Michael Brewer and within days she killed herself.¹⁶³ Although her case was not before the ICTY, but in the UK, her case shows that victims of sexual assault may feel traumatized and re-victimized during cross-examination, which can have long-lasting psychological effects. Illustrative of her emotional torture and second rape is the fact that female victims will feel:

The embarrassment...I had to talk about the most intimate things that I hadn't shared with anyone except a police officer, to relive all those moments I had only been brave enough to tell the police officer and never anyone else. You don't have to bring back the memories-they don't go away-but it is difficult to talk about them because of the shame you feel as a victim.¹⁶⁴

Accountability for Sexual Violence: The Case of Bosnia and Herzegovina,' in Dyan Mazurana, Angela Raven-Roberts & Jane Parpart (eds.) *Gender, Conflict and Peacekeeping* (Rowan & Littlefield, 2005).

¹⁶² Juan P.P.L. Acevedo, *Victim's Status at International and Hybrid Criminal Courts* (Abo Akademi University: 2014) 111.

¹⁶³ See Amelia Gentleman, 'Prosecuting sexual assault: 'Raped all over again' (The Guardian, 13 September 2013) < [Prosecuting sexual assault: 'Raped all over again' | Rape and sexual assault | The Guardian](https://www.theguardian.com/society/2013/apr/13/rape-sexual-assault-frances-andrade-court)< <https://www.theguardian.com/society/2013/apr/13/rape-sexual-assault-frances-andrade-court>, accessed 26 October 2022.

¹⁶⁴ Gentleman (n 163).

In adversarial trials, the latitude of cross-examination allows the defence team to ask any questions, which can be compared to the extent of sexual violence that women in Rwanda faced, including forced pregnancies and sexual mutilation.¹⁶⁵ Some were forced to be seductresses, spies giving the sad reality that practically every woman or adolescent girl who survived the genocide was raped.¹⁶⁶ It has been noted that most women also suffered psychological and physical after-effects (gynaecological and urinary infection, and sexually-transmitted diseases, especially HIV/AIDS).¹⁶⁷ Although rape has been redefined as a crime of coercion, threats and intimidation, this has not led to international condemnation of sexual violence in situations where women and girls have been systematically raped and forced into slavery, as seen in several countries including Sierra Leone, DRC, Algeria, Sudan, Japan, East Timor, Sri Lanka, Kosovo, Turkey, Colombia, and Afghanistan.¹⁶⁸

2.5 Other Factors that Promote Impunity for CRSV

The case of Ukraine demonstrate that responsibility is no longer latent or limited to substantive obligations on law of war and other disciplines like diplomatic relations.¹⁶⁹ The need to ensure that the individual criminal responsibility of officers of private military and security companies (PMSCs) in Ukraine shows the need to map individual perpetrators in complex wars. The test for imputing the acts of the citizen on the state has been that:

...The ruler of the state ratifies or approve the act of the one doing the injury or committing the wrong...because one citizen and an entire nation are not one and the same person.¹⁷⁰

¹⁶⁵ See Benninger-Budel and Lacroix (n 107) 244.

¹⁶⁶ Human Rights Watch, 'Shattered Lives: Sexual Violence during the Rwandan Genocide and its aftermath' (1996 < [Rwanda \(hrw.org\)](https://www.hrw.org) < <https://www.hrw.org/legacy/reports/1996/Rwanda.htm>, accessed 26 October 2022.

¹⁶⁷ Benninger-Budel and Lacroix (n 107) 245.

¹⁶⁸ See further details in the respective countries in Benninger-Budel and Lacroix (n 107) 244-254.

¹⁶⁹ See in detail Brownlie, *System of the Nations: State Responsibility, Part 1* (Clarendon Press, Oxford: 1983) 1.

¹⁷⁰ See Christian Wolf, *Jus Gentium Methodo Scientifica Pertractum*, 1764 (1st published 1750, trans, Joseph H. Drake, 1995) 160.

The test above has a no-fault requirement because it does not require the ruler to commit the act.¹⁷¹ Under ICL, the approach could be based on theories of punishment. There seems to be contested beliefs between the *ad hoc* tribunals and the ICC when it comes to the use of deterrent measures to punish perpetrators. While deterrence was considered as important to prevent commission of crimes in future by the ICTY,¹⁷² the ICC Prosecutor formulated the view that deterrence approaches tend to debase and devalue the idea of punishment to prevent future crimes.¹⁷³ The international community needs to be creative to protect victims of CRSV in evolving complex wars like the state-on-state aggression in Ukraine. Economic and mass violence can create conditions of insecurity and instability that contribute to the occurrence of CRSV. In this milieu, the linkages between conflict, peace and gender have been singled out to highlight the role of economic and mass violence in contributing to CRSV.¹⁷⁴ Conflict-related economic collapse can lead to widespread poverty while mass violence, including genocide and ethnic cleansing, can lead to CRSV being used as a tool of war, displacement, and insecurity.¹⁷⁵

Lack of access to justice; stigma and discrimination; and limited resources have been used to show how girls who experience CRSV at local levels may be relevant to CRSV more broadly. UNIPP for instance, argues that lack of access to justice is a key factor in the perpetuation of impunity for CRSV.¹⁷⁶ This can occur due to a range of factors, including weak enforcement mechanisms and lack of trust in the justice system.¹⁷⁷ Stigma and discrimination can contribute to CRSV since it can discourage victims from coming

¹⁷¹ Jan Arno Hessbruegge, 'The Historical Development of the Doctrine of Attribution and Due Diligence in International Law,' 36 *New York University Journal of International Law & Politics* (2004) 265-306, 289.

¹⁷² See the ICTY in *The Prosecutor v Drazen Erdemovic*, IT-96-22-T, ICTY Trial Chamber, Judgment and Sentence (29 November 1996), para 58; and *The Prosecutor v Jean Kambanda*, ICTR 97-23-S, Trial Chamber, Judgment and Sentence (4 September 1998) para 28.

¹⁷³ *The Prosecutor v Uhuru Muigai Kenyatta*, ICC/ 01/ 09-02/11, Trial Chamber, Status Conference (5 February 2014) 36.

¹⁷⁴ UNIFEM, *Preventing Conflict, Transforming Justice, Securing Peace: A Global Study on the Implementation of United Nations Security Council Resolution 1325* (UNIFEM, 2010).

¹⁷⁵ *Ibid.*

¹⁷⁶ UNIPP, *Breaking the Silence on Violence against Indigenous Girls, Adolescents and Young Women: A Call to Action* (UNIPP: 2019).

¹⁷⁷ *Ibid.* see also USIP, *Confronting Conflict-related Sexual Violence: Strengthening Prevention and Response Efforts* (United States Institute of Peace: 2018).

forward and seeking justice.¹⁷⁸ Limited resources contribute to CRSV by limiting the capacity of justice systems to investigate and prosecute cases.¹⁷⁹ This can then be linked to other factors such as limited funding, inadequate training and resources for law enforcement and judicial officials, and a lack of political will to address CRSV.

2.6. Conclusion

In conclusion, this chapter as guided by the research question on the rampancy of impunity for CRSV highlights the common challenges that contribute to the culture of impunity for CRSV, including poor implementation of international law, institutional challenges, post-conflict focus, and the need for nuanced understanding of the issue. A multi-actor approach such as including victim participants and *amici* could foster a culture of fighting impunity for CRSV during and after conflicts.

¹⁷⁸ UNIPP (n 176).

¹⁷⁹ Ibid. See also UNHCR, *Gender-based Violence in Conflict and Displacement* (UNHCR 2015).

Chapter 3

The Role of Amicus Curiae in Criminal Proceedings with a special focus on their role in criminal proceedings regarding international crimes

3.1. Overview of traditional participants in criminal trials

Because *amici* are not used in most criminal cases, it is important to discuss the role of the accused/defence, the prosecutor, the judges, witnesses and sometimes victims in criminal prosecutions. The participants depend on common, civil or *à la carte* legal systems. In common law systems, participants are part of an adversarial system while civil systems are largely inquisitorial. The role of the prosecutor in criminal proceedings is to formulate and bring charges against the accused, and in international criminal law, the prosecutor is often a representative of an international tribunal or court, such as the ICC. The Rome Statute of the ICC for instance provides for the appointment of a Prosecutor to investigate and prosecute international crimes.¹⁸⁰ The Prosecutor investigates and prosecutes international crimes, working with a team that includes special advisors.

The accused is the person or entity alleged to have committed a crime, and their specific rights vary depending on the court or tribunal in question. For example, the Rome Statute established rules of procedure and evidence that govern the rights of accused.¹⁸¹ The accused is also known as the defendant and is represented by the defense, which can be appointed by the court or chosen by the accused. The ICC has a Code of Professional Conduct for Counsel Appearing before the Court. In some situations, the adoption of *amici* followed the accused person's refusal to be represented by a lawyer as was done by the ICTY in the *Milosevic* case.¹⁸²

¹⁸⁰ Article 42 of the Rome Statute, the text is available at < <https://www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf>> accessed 20 February 2023.

¹⁸¹ See for instance Rule 62 of the ICTY Rules of Procedure and Evidence; see also Article 67 of the Rome Statute which is framed in the same way with Article 14 of the International Covenant on Civil and Political Rights.

¹⁸² Daniel D.N. Nsereko, 'Ethical Obligations of Counsel in Criminal Proceedings: Representing an Unwilling Client,' 12 (4) Criminal Law Reform (2001) 487-507, 506. See also Kent and Trinidad (2017), Grans (2017), Engström et al)

Judges preside over criminal trial or appeal proceedings and are responsible for ensuring that the trial is conducted fairly and impartially. In ICL, judges may be appointed by international tribunals and courts. For example, the judges of the ICC are elected by the Assembly of State Parties to the Rome Statute.¹⁸³ Witnesses provide testimony in criminal proceedings and have specific rights, including protection from intimidation and retaliation, respect for their safety and privacy, and assistance and support. The rights of witnesses in the Rome Statute of the ICC include the right to be protected from intimidation and retaliation, the right to have their safety and privacy respected, the right to be informed of the nature and purpose of the proceedings, and the right to receive assistance and support.¹⁸⁴

Victims are individuals who have suffered harm because of the alleged crime. In ICL, victims may be granted participation rights in criminal proceedings, such as the right to provide testimony or to seek reparations. The specific provisions governing the rights of victims vary depending on the court or tribunal in question. For example, the ICC has established a Victims Participation and Reparations Section to facilitate the participation of victims in proceedings before the Court.¹⁸⁵ The Rules of Procedure of the ICC define victims to mean ‘natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.’¹⁸⁶ Victim participation can take many forms, such as providing evidence, making submissions, and expressing views and concerns.¹⁸⁷ Additionally, the ICC established the Trust Fund for Victims (TFV) under Article 79 of the Rome Statute to provide for reparations to victims.

¹⁸³ Article 36 of the Rome Statute.

¹⁸⁴ Article 68 of the Rome Statute.

¹⁸⁵ Article 68 of the Rome Statute allows participation while Article 75 of the Rome Statute and Rule 94 of the ICC Rules of Procedure and Evidence address the issue of Victim Reparations.

¹⁸⁶ Rule 85 (b) of ICC RPE.

¹⁸⁷ Article 68 (n 183).

3.2. The Normative Basis of *Amicus* Appearance in Criminal Proceedings Dealing with International Crimes

The concept of *amicus curiae* is not typically considered to be a part of traditional participants in criminal proceedings dealing with international crimes. The common explanation is that criminal proceedings dealing with international crimes because the proceedings involve accusations of individual wrongdoing rather than broader issues of public interest that *amicus* briefs generally are designed to address.¹⁸⁸ Mark Findlay argues that the limited use of *amicus curiae* in criminal proceedings reflects the different goals and purposes of criminal law, which focuses on individual guilt or innocence compared to civil law, which is more concerned with broader issues of justice and fairness.¹⁸⁹ Courts which normally reject *amicus* appearance consider *amicus* briefs as an attempt to influence the outcome of a criminal trial, which could complicate the fairness of the proceedings.¹⁹⁰ The courts at common law were very unwilling to accept a lot of people to come and interfere with duels or trials by combat which involved disputes between two people.¹⁹¹

Amicus briefs are not presented by the parties involved in the case, but rather by individuals or organizations who are interested in the outcome of the case and wish to provide the court with extra information, perspectives, or evidence. Such an interest, under the rubric of public interest law, does not describe any area of legislative regulation or branch of law.¹⁹² As non-traditional participants, they could be useful in promoting transparency and accountability for international crimes.¹⁹³ *Amicus* can be an important mechanism for providing a more open and participatory process in international criminal proceedings in the absence of clear rules. For example, the protection of victims in the Rome Statute has been interpreted to mean that victims can now substantively participate in the court's

¹⁸⁸ Mark Findlay, *The Globalization of Crime* (Cambridge University Press: 2009) 84-85.

¹⁸⁹ Findlay (n 188).

¹⁹⁰ *ibid*

¹⁹¹ Alexander Tănase & George Papuashvili, 'Amicus Curiae Concept in Modern Justice.' (OSCE: 2022) 4.

¹⁹² Tasen & Papuashvili (n 191) 4.

¹⁹³ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press: 2010) 870.

proceedings at any stage although they cannot initiate proceedings. Concern has been raised that legal instruments of the ICC such as Rule 89 (1) of the Rules of Procedure and Evidence does not expressly provide the modalities of victim participation in the proceedings, leaving it to the Chamber to ‘specify the proceedings and the manner in which participation is considered appropriate.’¹⁹⁴ Article 68 (3) is unclear or vaguely framed as it only states that the Court should allow the views of victims to be presented at appropriate stages of the proceedings without further explanation.¹⁹⁵ *Amicus* could thus participate to help clarify issues since ICC’s brand of justice is neither purely adversarial, that is, common-law based, or purely inquisitorial, that is based on civil law tradition.¹⁹⁶

Because the possibility of vague phraseology, the court’s interpretation of legal texts can benefit from third parties such as *amici*. For instance, in a 2015 decision on *amicus curiae* in the case of *Prosecutor v Bemba et al.*, the ICC Trial Chamber II noted that:

There is no doubt that *amicus curiae* submissions may be particularly useful in situations where there is a need to provide additional expertise or perspective on legal or factual issues...in cases involving sexual violence, *amicus curiae* submissions can assist in ensuring that the specific and particular aspects of such crimes are fully appreciated and understood.¹⁹⁷

The judicial remarks in the *Bemba* case above are monumental for continued *amici* participation considering that CRSV or any international criminal cases usually involve many victims as also buttressed by the reference to victims in the plural form.¹⁹⁸ *Amicus* briefs have been located within the arguments that international criminal legal procedure allows for:

¹⁹⁴ Paolina Massida, ‘Foreword,’ in Markus T. Funk, *Victim’s Rights and Advocacy at the International Criminal Court* (Oxford University Press: (2010) xvii.

¹⁹⁵ *ibid*, 20.

¹⁹⁶ Funk (n 194) 64.

¹⁹⁷ Paras. 13 and 14. *Prosecutor v Bemba et al, ICC-01/05-01/08-3739, Decision* on the Defence Request for Leave to File Observations on the Application of the Principle of Complementarity and on the Admissibility of the Case Pursuant to Article 19 (2) (a) of the Statute, 5 February 2015.

¹⁹⁸ Rule 85 (a) of the ICC RPE.

Inquisitorial, adversarial and hybrid approaches to control crime, achieve fair trial by exposing the truth, effective and expeditious proceedings, victims' participation, protection of witnesses and victims, state sovereignty considerations and protection of community interests.¹⁹⁹

Linked to the above is the need to acknowledge that international criminal procedure considers the presumption of innocence together with victim's participation. As long as the court is guided by enabling statutes, rules of procedure and evidence, elements of the crime and possible case law.²⁰⁰ Amicus briefs can help ensure victim interests are considered in criminal proceedings and provide a more complete understanding of the issues, according to William A. Schabas.²⁰¹ Schabas also argues that *amicus* briefs can be useful in such cases where the prosecution and defence are not well-funded, and may not be able to fully address all the relevant legal and factual issues.²⁰² Amicus briefs can provide the court with a broader range of perspectives and information, leading to better decisions, such as when Cassese presented an opinion on whether the prosecutor could investigate in Darfur, Sudan.²⁰³ Cassese also submitted that the Prosecutor had exaggerated the security problems in the Darfur, and the court accepted his view, which led to the referral of the Darfur Situation.²⁰⁴

In addition, the use of *amicus* briefs can be done to guide the court in many ways. Schabas notes that the briefs can help ensure that critical observations are made by *amici* even without active participation as contemplated by Rule 103 of the ICC's Rules of Procedure and Evidence.²⁰⁵ The ICC denied leave to intervene as *amici* to the Women's Initiatives for Gender Justice despite arguments that *amicus* briefs can be a useful tool for ensuring that

¹⁹⁹ Gentian Zyberi, 'International Criminal Procedure Law: From Nuremburg to Rome,' (University of Oslo: 2015) 1.

²⁰⁰ Zyberi (n 199) 5.

²⁰¹ Schabas (n 193) 325; see also Situation in Darfur, Sudan (ICC-02/05-10), Decision Inviting Observations in Application of Rule 103 of the Rules of Procedure and Evidence, 24 July 2006, p. 6.

²⁰² William A. Schabas, *An Introduction to the International Criminal Court*, 4th ed. (Cambridge University Press: 2010) 51.

²⁰³ Schabas (n 202) 51.

²⁰⁴ Schabas (n 202) 51.

²⁰⁵ Schabas (n 202) 308.

the interests of victims and affected communities are considered.²⁰⁶ Amicus briefs can help to address the power imbalance between the prosecution and defence and empower the court to properly adjudicate the case by providing additional perspectives and information. For instance Redress and Uganda Victims Foundation submitted how victims were finding it difficult to get reparations before Ugandan courts thereby denying them access to justice and fostering impunity.²⁰⁷ Luke Moffet argues that such briefs are useful where large numbers of victims exist or where the interests of victims are not fully represented by the prosecution.²⁰⁸ He cites how Redress Trust submitted an amicus report on how the court needed to promote collective victim participation to strengthen victims together with the need to guard against group tensions, underrepresentation of gender and vulnerable groups as well as suppression of some victim's voices.²⁰⁹ Amicus briefs can provide judges with information relevant to the interests of victims and affected communities which can lead to fair and impartial proceedings. For instance, it has been shown, statistically, despite the amicus presence in the *Prosecutor v Akayesu* case before the ICTR,²¹⁰ the case affected between 84000-166000 women who were enslaved for rape.²¹¹ Amicus briefs can help the ICC to avoid one-sided solutions to international crimes, which may lead to perceptions of victor's justice. For example, the ICTR's failure to prosecute the Tutsi Rwandan Patriotic Front created challenges for addressing impunity.²¹² Amicus can help the ICC to have some judicial oversight over the prosecution's discretion to prosecute certain defendants and crimes over others than considering victims' interests.²¹³

²⁰⁶ *Prosecutor v Lubanga* (ICC-01/04-01/06-480), Decision on Request Pursuant to Rule 103(1) of the Statute, 26 September 2006.

²⁰⁷ *Prosecutor v Kony et al.*, Decision on the Admissibility of the Case under Article 19(1) of the Statute, ICC-02/04-01/05-377, 10 March 2009, para 50.

²⁰⁸ Luke Moffet, *Justice for Victims before the International Criminal Court* (Routledge: 2014) 112.

²⁰⁹ Moffet (n 208) 112; see also *Prosecutor v Gbagbo*, Redress Trust Observations to Pre-Trial Chamber I of the International Criminal Court Pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC-02/11-01/11-62, 16 March 2012.

²¹⁰ Judgment, ICTR-96-4-T, 2 September 1998, paras 505–508.

²¹¹ Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Intersentia 2005), p. 107.

²¹² Moffet (n 208) 71.

²¹³ Moffet (n 208) 71.

Another justification for the use of *amicus curiae* flows from Article 21 of the Rome Statute's application and interpretation section which enjoins the ICC to apply and interpret the law in ways that are consistent with internationally recognized human rights.²¹⁴ The problems with participation at the ICC through a human rights tenor can be motivated by the need to weigh the ICC's express reference to victim participation with what Mikaela Heikkilä referred to as the four ways of victim participation before the ICTR and ICTY (that did not allow victim participation proper), which are, *amicus curiae*, victim impact statements, writing a letter to the prosecutor or testifying as witnesses.²¹⁵ A human rights approach could (?) correct the mistakes of international tribunals such as the ICTR which rejected *amicus*' request for victims to appear with their collateral relatives for compensation.²¹⁶ The ICC could also use the approach to correct anomalies in the *Bagosora* case which held that *amicus* is neither a witness, an expert witness, or a party to the proceedings and is not called by either the Prosecutor or the defence.²¹⁷

The ICTR also seemed to curtail the powers of *amici* when it held that *amici* submitted by Belgium was incompetent to call witnesses.²¹⁸ It appears that the ICTY was also against state intervention as it rejected the request by *amici* to address issues regarding its rights, legal interests and responsibilities raised during trial.²¹⁹ Adopting a human rights approach as contemplated by Article 21(3) of the Rome Statute can benefit from the liberalization of *amicus* appearance at the ICC or the prioritization of appearance by invitation of the Court rather than by application. The leading example of international or regional courts that produce the best-case scenario in which *amici* is used is the Inter-American Court of Human Rights (IACHR).

²¹⁴ Article 21 (3).

²¹⁵ Mikaela Heikkilä, *International Criminal Tribunals and Victims of Crime* (Åbo Akademi University Press 2004) 26.

²¹⁶ *Prosecutor v Bagosora*, ICTR-6-7-T. see also Enloe (1994), Fatic (2000), Goldstone (2002), Gerd (2015).

²¹⁷ *Ibid.*

²¹⁸ *Prosecutor v Bagosora* (ICTR-96-7-T).

²¹⁹ *Prosecutor v Rajic*, IT-95-12-R61.

In the Inter-American context, the IACHR Rules of Procedure 2009 define *amicus curiae* as a non-party to the proceedings who is not related to case but makes submissions about factual issues and legal considerations relating to the subject matter of the proceedings whether orally or in writing.²²⁰ Specifically, the IACHR originally had a discretion to allow any person to present evidence before the court.²²¹ Besides natural persons, various bodies, authorities and commissions are allowed to get information, give opinion, evidence or submit expert reports before the court.²²² *Amicus* could also participate orally or in writing as well as influence the court's advisory jurisdiction.²²³ The IACHR's Rules of Procedure were then modified in 1991 to empower the court to invite persons or interested parties to present opinion evidence.²²⁴ In 1996, the Rules of Procedure were liberalized to allow intervention by non-parties at any stage of the contentious or advisory proceedings.²²⁵ The zenith of the proactive modifications of the IACHR's rules of procedure related to the participation of non-parties in the key stages of the proceedings such as application for reparations;²²⁶ interpretation of the court's judgments;²²⁷ and inclusion of the definition of *amicus curiae* in the Court's Rules.²²⁸ In terms of liberalization of *amicus* participation, the Inter-American Court of Human Rights has been lauded for having witnessed more *amicus* briefs compared to formal briefs from actual parties.²²⁹

In other regions, *amicus* use before African human rights bodies for instance has been seen from the perspective of improving the administration of African states in ways that improve societal commitment to human rights.²³⁰ Generally common law countries such as South

²²⁰ Article 2 (3) of the IACHR's Rules of Procedure 2009.

²²¹ See for instance Article 34 (1) of the Rules of Procedure 1980.

²²² See Article 34 (2) of the Inter-American Court of Human Rights Rules of Procedure 1980 as modified by the 1991 Rules.

²²³ See Article 50 of the Inter-American Court of Human Rights Rules of Procedure 1980.

²²⁴ See Article 54 (3) of the IACHR Rules of Procedure 1991.

²²⁵ See Article 44 (1) of the IACHR 1996.

²²⁶ IACtHR (Judgment) 31 May 2001, *Cesti Hurtado v. Peru*, para. 24.

²²⁷ IACtHR (Interpretation) 2 August 2008 *Miguel Castro Castro Prison v. Peru* (2008), para. 4

²²⁸ See Article 2 (3) of the IACHR's Rules of Procedure 2009 (n 217).

²²⁹ Hitoshi L. Mayer, 'NGO Standing and Influence in Regional Human Rights Courts and Commissions', 36 *Brooklyn Journal of International Law* (2011) 911.

²³⁰ Frans Viljoen & Adem Kassie Abebe, *Amicus Curiae Participation Before Regional Human Rights Bodies in Africa*, 58 *J. AFR. L.* 22, 24 (2014).

Africa, Ghana, Kenya²³¹ and Zimbabwe utilize the *amicus curiae* concept which also give detailed references to the African human rights system.²³² The European Court of Human Rights has also changed from a history of restricting third party intervention to allowing it to protect fundamental rights of European citizens and human rights of nationals of other regions outside Europe.²³³

Domestically, some countries utilize *amicus* to improve their country's commitment to the rule of law and justice.²³⁴ Such a normative framework can be found in rules of federal governments as is the case with the United States of America.²³⁵ These rules were utilized in sexual cases by Legal Momentum, National Women's Law Center, the Purple Campaign, and 42 additional organizations in a sexual discrimination case involving a former employee of the Federal judiciary.²³⁶ Another example is provide by Zimbabwe where *amicus* appearance is governed by the Constitutional Court Rules.²³⁷ The Zimbabwean Constitutional Court can invite any person with expertise to appear in a matter so that they file heads of argument in a matter.²³⁸

While the *amici* have no right to appear in any proceedings, they often enjoy the right to file heads of argument that raise new information about a case before a court of law if the contention so raised is useful to the court and does not regurgitate the submissions from the other parties.²³⁹ The application for *amicus curiae* appearance can be granted based on the

²³¹ *ibid*, 25.

²³² See for *Zimbabwe State v Willard Chokuramba, Justice for Children's Trust Intervening as Amicus Curiae, Zimbabwe Lawyers for Human Rights Intervening as Amicus Curiae*, CCZ 10/19.

²³³ Marco Frigessi di Rattalma, NGOs Before the European Court of Human Rights: Beyond Amicus Curiae Participation? In Tullio Treves et al (Eds) *Civil Society, International Courts and Compliance Bodies* 57 (2005).

²³⁴ John C. Mubangizi & Christopher Mbazira, Constructing the Amicus Curiae Procedure in Human Rights Litigation: What Can Uganda Learn from South Africa, 16 *L. Democracy & Dev.* 199, 200 (2012).

²³⁵ See Rule 26.1 of Federal Rule of Appellate Procedure and 26.1(a) (2) (A) and (a) (2) (C) Local Rules.

²³⁶ *Roe v United States* et al, 1:20-CV-00066-WGY.

²³⁷ See Rule 10 of the Constitutional Court Rules of Zimbabwe, SI 61 of 2016, available < [Constitutional Court Rules \(zimbabwelawreports.com\)](https://zimbabwelawreports.com/constitutional-court-rules.html) < <https://zimbabwelawreports.com/constitutional-court-rules.html>> accessed 9 November 2022.

²³⁸ Rule 10 (1) SI 61/2016 (n 237).

²³⁹ Rule 10 (5).

interests of justice, time consideration in filing the application as well as the rights and privileges of the parties.²⁴⁰

In connection to ICL, the ICTY and ICTR's legal frameworks allowed *amicus curiae* to attend by invitation from the tribunal or by making an application with or without leave.²⁴¹ The *amici* were supposed to be a non-party although they could have strong interests on the subject matter before the tribunals.²⁴² Intervention by *amicus* was not a right but a possibility and the chamber was not obliged to accept the request to intervene.²⁴³ The request had to be accompanied by a written brief and should describe the facts common to a series of legal disputes whose evaluation permits the formulation of a rule of law capable of filling a legal or procedural gap.²⁴⁴ The discussion above shows that the relationship between *amicus curiae* and victim participants is still very important.

3.3.The Support Given by NGOs to Victim Participants and to International Courts and Tribunals

3.3.1. The Role of NGOs to Victim Participants

This section shows that NGOs have largely been working with victim participants. The NGOs can be varied. NGOs are important in addressing conflict-related sexual violence (CRSV) in Ukraine and in the work of the International Criminal Court (ICC) because they can provide support to victims and their families, raise awareness about the issue, and advocate for accountability and justice. Their role began with the victims' movement, the early stage of this movement was dominated by women groups which wanted to end rape and sexual violence,²⁴⁵ with later movements balancing between generalist and specific

²⁴⁰ Rule 10 (4).

²⁴¹ Common Rule 74 of the ICTY and ICTR statutes.

²⁴² *Bagosora* Decision, ICTR-96-7, Decision on the *amicus curiae* application y. the Government of the Kingdom of Belgium (6 June 1998) 1.

²⁴³ Gaelle B. Goff & Anne Saris, *Amicus Curiae*, (ICHRDD: 2000) 47.

²⁴⁴ *Ibid.*

²⁴⁵ Heikkilä (n 215) 35.

cause victim groups.²⁴⁶ These victim groups could either provide services to the victims or could help the victims to appreciate procedural steps to address rape and sexual violence cases.²⁴⁷ Such organizations could thus end up serving a three-pronged function of improving the situation of crime victims without impinging on the function of the criminal courts; improving the status of victims in courts when they have procedural rights; and replacing court proceedings with more victim-friendly out-of-court procedures.²⁴⁸

NGOs assist both the victims and defendants and balance the penal approach with the defendant's rights.²⁴⁹ Each group would invoke different theories of punishment on how, who and when to punish such as retributive and utilitarian theories for example.²⁵⁰ The NGOs also helped to deal with both the concept of victims and witnesses. The concept of victim is broad to include complainants, injured parties, and complaining witnesses.²⁵¹ NGOs can use Dignan and Cavadino approach to show the philosophy and aim of the model, deal with victim-based measures and institutional frameworks as well as explain the role of victims in each preferred model of punishment as shown below.²⁵²

	Traditional victim-based measures		Restorative justice measures		
Name of Model	Retributive model	Welfare model	Civilian model	Victim/offender reparation model	Communitarian model
Philosophies and main aims of the model	Punishment of offenders based on just decision, public interest,	Help for victims	Humanizing treatment for offenders, redemption	Reconciliation between victims and offenders	Reintegrative shaming of offenders, reintegration

²⁴⁶ Ibid.

²⁴⁷ Andrew Ashworth, 'Some Doubts About Restorative Justice,' 4 (2) *Criminal Law Forum* (1993) 281-282, 296.

²⁴⁸ Ibid.

²⁴⁹ Andrew Karmen, *Crime Victims: An Introduction to Victimology* (Brooks/ Cole Publishing Company: 1984) 20.

²⁵⁰ Heikillä (n 215) 24.

²⁵¹ Matti Joutsen, *The Role of the Victim of Crime in European Criminal Justice Systems: A Cross-sectional Study of the Role of Victim* (Helsinki University: 1987) 19.

²⁵² James Dignan & Michael Cavadino, 'Towards a Framework for Conceptualising and Evaluating Models of Criminal Justice from a Victim's Perspective,' 4 *International Review of Victimology* (1996) 153-182, 156.

	and consistency		of offender, restoring conflict t parties for informal resolution	through mediation, diversion of offenders, empowerment of victims and offenders	of victims, empowerment of victims, offenders, and communities
Victim-based measures	Right of acknowledgment , compensation, victim impact statements or allocution	Criminal injuries compensation , victim support and general welfare benefits	Compensatio n or restitution	Apology, compensation, reparative work	Apology, compensation, reparative work, reintegration
Institutional framework	Prosecutor and courts acting principally in the public interest, limited recognition of private interests of victims	State-funded schemes, detached from criminal justice systems	Civil courts or mediation panel	Pre-prosecution or court based, statutory or voluntary agency offering mediation, multi-agency approach	Family group conferences, reintegrative ceremonies, courts as backup for exceptionally serious cases
Role of victims	Restricted victims, neglected except when required as witnessed, but limited moves to give victims a voice on matter of sentences and so on.	Victims as supplicant or claimant, client in need	Active role in bringing proceedings and negotiating outcome	Variable: active participant in mediation sessions, or more limited involvement	Active participant in family group conferences

3.3.2. The contributions of NGOs to the establishment and approach of international tribunals to CRSV.

NGOs played a significant role and worked with media platforms to expose the crimes in Croatia, Bosnia, and Herzegovina in 1991 and 1992.²⁵³ The starting point in this discussion could be the affirmations from the ICTY's former President on how impunity could be addressed through encouraging victims to either talk or not talk about psychosocial healing.²⁵⁴ The interview with psychologist Sara Sharatt emphasizes the need for specialized training for judges and legal professionals to handle CRSV cases and address systemic issues within a male-dominated legal system.²⁵⁵ This way judges struggle to protect themselves when they hear horrific stories about trauma.²⁵⁶ Kirk McDonald argues in relation to the rape and sexual assault testimony in the *Tadic* case that:

...sometimes I still choke up when I think of it. It was not just the graphic nature of it, although there was some vivid testimony. Mostly what affected me was the loss. When you hear people like this woman, let's say K, who testifies that she has lost 35 people in her family, and then the prosecutor asks her to look at photo after photo, and she says she was her uncle, and this was her father-in-law... You listen to that kind of loss, it's unbearable.²⁵⁷

The interview above is also buttressed by Kirk McDonald's concerns that addressing societal problems requires a tailored approach that addresses both formal and informal impediments.²⁵⁸ CRSV becomes difficult to charge in instances where affidavits reporting rape and other CRSV crimes are heavily redacted so as to delete everything about the raped woman's identity and the prosecutor was deciding not to charge the accused persons with rape.²⁵⁹ The interview also shows a brief discussion about the role of NGOs in addressing CRSV. NGOs are crucial in documenting and responding to CRSV in areas where government institutions are weak or non-existent, according to Judge McDonald, who emphasized the importance of working with local communities to ensure effective

²⁵³ Grace Harbour, International Concern Regarding Conflict-related Sexual Violence in the Lead-up to the ICTY's Establishment, in Serge Brammertz & Michelle Jarvis, *Prosecuting Conflict-related Sexual Violence at the ICTY* (Oxford University Press: 2016) 20.

²⁵⁴ Sara Sharatt, 'Interview with Gabrielle Kirk McDonald President of the International Criminal Tribunal for the former Yugoslavia,' in Sara Sharrat & Ellyn Kaschak (e.d), *Assault on the Soul: Women in the Former Yugoslavia* (Routledge: 2013).

²⁵⁵ Quoted in Sara Sharatt (n 254) 24.

²⁵⁶ Ibid.

²⁵⁷ Kirk MacDonalld quoted by Sharatt (n 254) 27.

²⁵⁸ Ibid: 28.

²⁵⁹ Ibid: 31.

interventions, such as her collaboration with Human Rights Watch on recognizing rape as a weapon of war at the ICTY.²⁶⁰ The interview also served to popularise to NGOs the fact that consent in rape is not a valid defence to CRSV and rape just like the defence of a victim's previous sexual conduct.²⁶¹ The interview also help sensitize CRSV advocates to appreciate the challenges related to gruesome cross-examination of victims in common-law legal systems.²⁶² This could be an important justification for *amicus* to ensure civil law and common law aspects are properly balanced. The interview also raises the need for legal professionals to value feminism as a theoretical lens which can promote equality and equity for both men and women victims.²⁶³

The ICTY for instance, through the Office of the Prosecutor (OTP), created a Prosecuting Sexual Violence (PSV) working group, which worked with NGOs, academics, policy makers and the international community.²⁶⁴ The work of NGOs culminated in the Cherif-Bassiouni Report which laid the foundation for the prosecution of CRSV.²⁶⁵ This led to massive international support to prosecute CRSV after conflict.²⁶⁶ NGOs investigated CRSV cases based on their own institutional mandates, such as the case with Amnesty International²⁶⁷ and Human Rights Watch Helsinki Chapter.²⁶⁸ The findings of NGOs buttressed the findings of organizations that exposed CRSV cases and produced institutional reports such as The UNSC Commission of Experts, UNCHR Special Rapporteur, European institutions, the European Commission Monitoring Mission (ECMM), the UN Protection force deployed to the former Yugoslavia (UNPROFOR) and country specific missions on CRSV.²⁶⁹ The exchanges between NGOs and institutions also

²⁶⁰ Ibid: 32.

²⁶¹ Ibid.

²⁶² Ibid. 33.

²⁶³ Ibid: 36.

²⁶⁴ Michelle Jarvis, 'Overview: The Challenge of Accountability for Conflict-related Sexual Violence, in Serge Brammertz & Michelle Jarvis, (n 269) 3.

²⁶⁵ Harbour (n 253) 19. See also Elias & Elias (2003).

²⁶⁶ Harbour (n 253) 20.

²⁶⁷ Amnesty International, *Bosnia and Herzegovina: Rape and Sexual Abuse by Armed Force: rape and sexual violence Report*, (Amnesty International Report January 1993).

²⁶⁸ Human Rights Watch Helsinki, *War Crimes in Bosnia-Herzegovina Volume 1* (August 1992) and *Volume 2* (HRWH, April 1993).

²⁶⁹ Harbour (n 253) 20-21. See also Dzankic (2019).

led to development of victim-specific investigation models. For example, the UN Special Rapporteur raised concern over mission fatigue and revictimization of victims through repeated interviews from NGOs.²⁷⁰ The ICTY was formed because evaluative models were designed tapping from media and NGO reports. A litigation framework was created owing to the influence of women movements which mobilized, strategized and lobbied for the prosecution of CRSV cases and ending the weaponization of CSRV.²⁷¹ The proactive role of NGOs also influenced the inclusion of explicit CRSV provisions in the Rome Statute establishing the ICC.²⁷² This was done as a matter of combating impunity for CRSV across gender divides and not just to endorse feminist consciousness in fighting heinous crimes against women.²⁷³

The NGOs which recorded systematic and organized use of CRSV made it possible for UN agencies to consider CRSV as part of genocidal crimes, and CAH.²⁷⁴ The role of NGOs and other actors also helped the ICTY for instance to go beyond the text of the law and engage in a process of internal reconstruction, deep reflection and deliberative reasoning, including realising that CRSV could be charged as part of the common purpose requirement under the joint criminal enterprise (JCE) doctrine.²⁷⁵ This is crucial considering statistical acknowledgment that:

²⁷⁰ UNHCR Special Rapporteur, UNCHR Forty-ninth session 10 February 1993 ‘Situation of Human Rights in the Territory of the former Yugoslavia: Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution 1992/S-1/1’ (14 August 1992) UN Doc E/CN.4/1993/50 (UNCHR Special Rapporteur Report) para 86.

²⁷¹ Julie Mertus, ‘When Adding Women Matters: Women’s Participation in the International Criminal Tribunal for the Former Yugoslavia’ (2008) 38 *Seton Hall LR* 1297, 1300.

²⁷² Kelly Dawn Askin, ‘One Small Step for Women: Female Provisions in the Rome Statute of the International Criminal Court’ (2002) 16 *BYU J Pub L* 317, 323–4. See Buss (2014).

²⁷³ This is contrasted with early views on the feministic perspectives on NGOs’ impact, see Cynthia Enloe, ‘Afterword: Have the Bosnian Rapes Opened a New Era of Feminist Consciousness?’ in Alexandra Stiglmayer (ed.), *Mass Rape: The War Against Women in Bosnia and Herzegovina* (University of Nebraska Press: 1994) 220. See also Chinkin (2009), Askin (2001), Baig et al (2016), Albrecht & Levy (2013), Brownmiller (1975).

²⁷⁴ See Amnesty International (n 267) 4 and how it influenced the UN Commission of Experts final reports, see UN Commission of Experts Reports, *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)* (Commission of Experts Final Report) paras 134–5, 250–3.

²⁷⁵ Jarvis (n 264) 6.

By 1993, the reported numbers of rape victims across the former Yugoslavia varied widely, with estimates ranging from 12,000 to 70,000. The reported victims included both men and women, though they were primarily females ranging in age from young children to the elderly, with the majority being of child-bearing age. While all parties to the conflict perpetrated sexual violence crimes, the largest number of reported victims were Bosnian Muslims, and the largest number of alleged perpetrators were Bosnian Serbs.²⁷⁶

The above made it possible for NGOS to be on the lookout against CRSV as was done later in Kosovo when regional and international NGOs documented rape and CRSV as a means of ethnic cleansing in Croatia, Bosnia, and Herzegovina.²⁷⁷ NGOs' work led the UNSC for the first time, to condemn rape and CRSV on women when it adopted Resolution 798.²⁷⁸ The UNSC recognised women's distinct need for protection in armed conflicts under the peace and security pillars through the adoption of Resolution 1325.²⁷⁹ This resolution has been lauded as a resolution that made the systematic use of rape against women in conflicts part of war crimes and CAH.²⁸⁰

NGOs also advocated for the inclusion of special staff such as appointing specially-trained women to the ICTY staff to deal with sensitive issues affecting women²⁸¹ and to ensure victims of rape and sexual assault were understood properly.²⁸² Women groups scored a first because there was acknowledgment of the existence of crimes against women²⁸³ as well as the need to provide counselling to victims of rape and sexual assault by an empowered ICTY staff.²⁸⁴ The NGOs that have been active at the ICTY include Human Rights Watch, Human Rights First and Amnesty International.²⁸⁵ Their evidence, though sometimes generic, general and insufficient was crucial in giving leads on CRSV crimes as

²⁷⁶ Harbour (n 253) 23.

²⁷⁷ Women 2000, *Sexual Violence and Armed Conflict: United Nations Response* (April 1998) section 2.6.

²⁷⁸ UNSC Res 798 (18 December 1992) UN Doc S/RES/798.

²⁷⁹ UNSC Res 1325 (31 October 2000) UN Doc S/RES/1325.

²⁸⁰ Women of Europe Newsletter No 32, 'Public Hearing and Resolution on Rape in Ex-Yugoslavia' (March 1993) (Women of Europe Newsletter) 3.

²⁸¹ Article 16 of the ICTY Statute.

²⁸² Article 22 of the ICTY Statute.

²⁸³ *Prosecutor v Duško Tadić*, ICTY-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (10 August 1995) para 24.

²⁸⁴ Rule 34 of the ICTY's Victims and Witnesses Section, ICTY Rules of Procedure and Evidence (adopted on 11 February 1994, last amended on 10 July 2015 (ICTY Rules).

²⁸⁵ Richard Goldstone, 'A View from the Prosecution' (2004) 2 *JICJ* 380, 382.

a result of their humanitarian work with refugees or helping professions such as psychiatrists and psychologists.²⁸⁶ NGOs also upheld the right of privacy of the victims and supervised their interviews by the *ad hoc* tribunals' Prosecutorial office. This was meant to prevent victimization, contamination of evidence, exploitation by the defence of inconsistencies wrongly publicised in the media.²⁸⁷ The NGOs also ensured that their personnel, by working with the *ad hoc* tribunals' OTP could not influence witness testimony.²⁸⁸ Effectively NGOs helped the OTP of the *ad hoc* tribunals to prepare adequately for cross-examination and to establish CRSV crime patterns that connected different perpetrators, the latter contributing to the chapeau or context of the crimes.²⁸⁹

Some NGOs like the International Centre for Human Rights and Democratic Development (ICHRDD) produced a guide for *amici* to enable *amici* to find basic texts for the ICTR as well as ICTY precedents.²⁹⁰ The guide for instance provides guidelines on the ICTR's work, the role of the Office of the Deputy Prosecutor in Kigali and at The Hague other contacts to be used when one wants to intervene as *amici*.²⁹¹ For instance, the ICHRDD provides that:

Victims and NGOs have several options: they can intervene at the beginning of the investigation (phase I), when the indictment is prepared by the Prosecutor (phase II), during the trial (phase III), and/ or after the trial (phase IV).²⁹²

NGOs have also supported ICC's fight against impunity for international crimes.²⁹³ They have served the role of being the ICC's champions and taskmasters, scrutinizing the ICC's

²⁸⁶ Richard J. Goldstone, 'The International Tribunal for the former Yugoslavia: A Case Study in Security Council Action' (1995) 6 *Duke J Comp & Intl L* 5, 8.

²⁸⁷ *Prosecutor v Lukić and Lukić*, ICTY-98-32/1-A, Appeal Judgment (4 December 2012) para 471.

²⁸⁸ *Ibid*.

²⁸⁹ Patricia Viseur Sellers, 'Prosecuting International Crimes: An Inside View: Intentional Prosecution of Sexual Assaults' (1997) 7 *Transnat L & Contemp Probs* 45.

²⁹⁰ See Gaelle B. Goff & Anne Saris, *Accessing the ICTR (ICHRDD)* 47.

²⁹¹ Goff & Saris (n 243) 37.

²⁹² *Ibid*: 38.

²⁹³ Benjamin N. Schiff, *Building the International Criminal Court* (Cambridge University Press: 2008).

declarations and actions.²⁹⁴ Access to correspondence between NGOs and the ICC is limited.²⁹⁵

NGOs often publish their advocacy letters or statements on their own websites or social media channels to inform the public about their positions on issues related to the ICC or international justice.²⁹⁶ For example Women's Initiatives for Gender Justice publicises information on the Hague Principles on Sexual Violence consisting of the Civil Society Declaration on Sexual Violence, international criminal law guidelines on sexual violence, and key principles for policy makers on sexual violence.²⁹⁷ It also works with women in armed conflict with a focus on countries with situations under investigation by the ICC.²⁹⁸ In this wake, Benjamin Schiff made monumental remarks that though NGOs:

Do not speak to the ICC with one voice because they pursue a range of objectives. However, through the NGO Coalition for the International Criminal Court (CICC), they coordinate with each other on the objectives they share. From the Statute Conference onward, the relationship between the ICC and the NGOs has probably been closer, more consistent, and more vital to the Court than have analogous relations between NGOs and any other international organization.²⁹⁹

The NGO coalition as an important stakeholder claimed membership of 2000 member organizations by mid-2006.³⁰⁰ The CICC members promote worldwide ratification of the Rome Statute maintain the integrity of the Roman Statute, and ensure the ICC will be fair,

²⁹⁴ Schiff (n 293) 144.

²⁹⁵ See also interview between McDonald and Sara Sharatt (n 270).

²⁹⁶ See for instance the websites of Human Rights Watch, Women's Initiatives for Gender Justice, Amnesty International, Coalition for the ICC, Open Society Justice Initiative, International Federation of Human Rights (FIDH), Global Centre for the Responsibility to Protect, International Center for Transitional Justice, No Peace Without Justice, REDRESS, International Refugee Rights Initiative, Lawyers for Justice in Libya, International Commission of Jurists, and International Criminal Court Bar Association.

²⁹⁷ See Women's Initiatives for Gender Justice (nd) Home, <https://4genderjustice.org/> accessed 18 March 2023.

²⁹⁸ Ibid.

²⁹⁹ Schiff (n 293) 144.

³⁰⁰ Ibid.

effective, and independent.³⁰¹ This is over and above their discussions and negotiations in the Preparatory Commission which developed the ICC's Rules of Procedure and Evidence and the Elements of Crime; and engaging with the Court at operational and staffing levels.³⁰² ICC Prosecutor Moreno Ocampo openly thanked the CICC and its partners such as Women's Caucus for appointing him on merit and for his role in prosecuting Argentine generals implicated in the 'dirty wars' of the 1970s, and as someone who had founded an anticorruption NGO in Argentina, and was a board member of Transparency International.³⁰³ It is the NGOs that initiated UNSC referrals,³⁰⁴ worked with local contacts and ensured high quality justice by working with the ICC's Registrar as defense and victim representatives.³⁰⁵

From the perspective of victim justice, NGOs like Human Rights Watch have also explained how and why they feel the Victim's Trust Fund is used as a tool to slow down the prosecution of cases or may encourage the prosecutor to take political decisions.³⁰⁶ They also questioned the efficacy of the ICC Office of the Prosecutor's strategies.³⁰⁷ NGOs criticised Luis Moreno Ocampo's prosecutorial strategy as focused on high-profile cases and seeking indictments against sitting heads of state, such as Sudanese President Omar al-Bashir. They believed this was too focused on spectacle and not doing enough to address the root causes of CAH. In all this, NGOs must take cognisance of the fact that Ukraine accepted the ICC's jurisdiction in 2014, which means that the ICC can investigate and prosecute international crimes committed on Ukrainian territory since that time. It remains to be seen how effective the warrant against Putin would be effective since that Russia is not a party to the ICC's Rome Statute and has therefore not accepted the ICC's jurisdiction.

³⁰¹ Based on CICC's membership form gleaned online and cited in Schiff (n 314) 147.

³⁰² See Schiff (n 293) 314ff.

³⁰³ See Schiff (n 293) 154.

³⁰⁴ ICC, Office of the Prosecutor, "Update on Communications Received by the Office of the Prosecutor of the ICC" (2006).

³⁰⁵ Schiff (n 293) 159.

³⁰⁶ ICC, Office of the Prosecutor, "Update on Communications Received by the Office of the Prosecutor of the ICC" (2006).

³⁰⁷ NGO CICC, "The Office of the Prosecutor: Taking Stock Three Years On," Monitor, No. 33 (2006), 3, also cited in Schiff (n 293) 162.

As a result, the ICC's ability to investigate and prosecute crimes committed by Russian nationals or forces in Ukraine is limited.

3.4. The Benefits Brought by *Amicus Curiae* to Parties before the ICTY, ICTR, and ICC and How they Compare with Benefits of Victim Participation at the ICC

NGOs and individuals can benefit from the resources provided by *amicus curiae*, such as academic expertise and ICC guidelines, to improve case selection strategies in all stages of case management. This could be through systematic review of the ICC's interpretation of the basic rules of the Court, namely the Rome Statute, the Rules of Procedure and Evidence and the Regulations of the Court; points of law and international criminal justice.³⁰⁸ *Amicus curiae* briefs can influence the ICC's decisions on complex legal and technical issues. Generalist literature on the appearance of *amicus curiae* before international criminal tribunals exists.³⁰⁹ *Amicus curiae* at the ICTY and ICTR played a significant role in shaping the role of *amicus* in international criminal trials, and it is seen as beneficial in providing additional information to the court.³¹⁰ Acceptance of a court decision by litigants due to the additional information provided by *amicus curiae* gives democratic legitimacy to the decision and ensures the success of each party.³¹¹ As a procedural possibility to intervene, the ICTR and ICTY Rules allow the Chamber to invite or grant leave to a state, organization or person to appear and make submissions on any issue specified by the

³⁰⁸ Cyril Laucci, *The Annotated Digest of the International Criminal Court* (Martinus Nijhoff Publishers: 2006) ix.

³⁰⁹ L. Bartholomeusz, "The *Amicus Curiae* Before International Courts and Tribunals", 5 *Non-State Actors & Richard J. Goldstone, 'The International Tribunal for the former Yugoslavia: A Case Study in Security Council Action' (1995) 6 Duke J Comp & International Law* (2005) 209; S. Williams and H. Woolaver, "The Role of the *Amicus Curiae* before International Criminal Tribunals", 6 *International Criminal Law Review* (2006) 151-189.

³¹⁰ Paul M. Collins Jr, 'Friends of the Court: Examining the influence of *amicus curiae* participation in the Supreme Court Litigation,' (2004) 38 (4) *Law and Society Review*, 807.

³¹¹ Paul M. Collins, *Friends of the Supreme Court: Interest Groups and Judicial Decision-making* (2008, Oxford University Press) 3.

Chamber.³¹² This Rule has been interpreted to mean that *amicus curiae* intervention allows victims to appear as victims with their representatives as *amici* before the tribunals.³¹³

Amici have been appointed to ensure fair trials, including in cases where accused persons refuse legal representation, as seen in the *Milosević* case.³¹⁴ In the *Bagosora* case before the ICTR, it was shown that *amicus* should not change the trial structure foreseen by the tribunal's Statute and Rules. Specifically, the Rules cannot be turned into plaintiffs or parties by using *amicus curiae* provisions.³¹⁵ Furthermore, the amendment of indictment to include sexual violence has been refused on the basis that the *amici* and the Chamber should not usurp the Prosecutor's role to prosecute the suspects.³¹⁶ Heikkilä opines that *amici* are not an institution whose roles should not be overestimated because:

Firstly, *amicus* participation by victims will only be accepted when the participation helps the Trial Chamber in the proper determination of the case (as was seen in the *Milosević* case). The discretion to decide whether it is helpful rests with the court. Secondly, if the Trial Chamber does not invite victims or victim groups to appear as *amici*, it can be difficult for victims to know about the possibility to appear as *amici* and to formulate the *amicus curiae* application so that leave to appear is granted.³¹⁷

Amicus curiae can still play a crucial role in the ICC's decision-making process despite the court's emphasis on victim participation and protection.³¹⁸ The ICC's Rules of Evidence and Procedure seek to give victims protection against CRSV by allowing their participation in the proceedings and providing them with specific protective measures relating to:

³¹² Common Rule 74 of the ICTR and ICTY.

³¹³ Virginia Morris and Michael P. Scharf, *The International Criminal Tribunal for Rwanda, Volume 1*. (Transnational Publishers: 1995) pp 167.

³¹⁴ *Milosević* Orders of 30 August 2001 (The *Kosovo* Case, 30 October 2001 (The *Croatia* Case) and 23 November 2001 (The *Bosnia* Case), see also Heikkilä (n 215) 156.

³¹⁵ *Bagosora* case Appeal Decision ICTR -98-7 Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing Indictments against Theoneste Bagosora and 28 Others (6 June 1998) 2.

³¹⁶ *Cyangungu* Decision, ICTR -99-46 Decision on the Application to File an *Amicus Curiae* Brief According to Rule 74 of the Rules of Procedure and Evidence on behalf of the NGO Coalition for Women's Human Rights in Conflict Situations (24 May 2001) 6-7.

³¹⁷ Heikkilä (n 155) 158.

³¹⁸ See section 3.2 of this thesis.

use of threat, force, coercion or taking advantage of a coercive environment to undermine the victim's voluntary and genuine consent; instances where the victim is incapable of giving genuine consent; silence of, or lack of resistance by a victim to the alleged sexual violence; and credibility, character, or predisposition to sexual availability of a victim or witness prior to the offence.³¹⁹

This is important since the international community has moved from generalist views that simply treated CRSV as forgotten crimes.³²⁰ A seismic shift has occurred where CRSV crimes are primarily seen as serving the role of protecting victims' and survivors' physical and mental integrity,³²¹ dignity and personal (sexual) autonomy.³²²

To draw comparisons with the ICC, it could be gleaned from the ICTY's decision in 2004 in *Prosecutor v Milosević* before the ICTY, that, the *amicus curiae* supported the accused person's application for an adjournment to enable him to adequately prepare for his defence.³²³ The Appeals Chamber rejected the *amicus curiae*'s argument that the three months' time given Milosevic to prepare his defence was too short since he had elected to defend himself.³²⁴ This case also provided clarity on the point that *amicus* called by the Trial Chamber did not have a right to appeal before the ICTY.³²⁵ *Amicus* could also not utilize Rule 73 of the ICTY's Rules of Procedure and Evidence which only applied to representatives of the parties before the Trial Chamber.³²⁶ Amendment of the *amicus* response was granted to the *amicus* Prosecutor in instances where the other part's notice of appeal was found to be defective and argumentative.³²⁷ Human Rights Watch urged the ICTY to include the charges of rape to Milosević's other counts since there were about ninety-six officially recorded cases.³²⁸

³¹⁹ See Rule 70 of the ICC Rules of Procedure and Evidence.

³²⁰ See generally Christine Chinkin, 'Gender-related Violence' in Cassese, *Companion* (2009) 76.

³²¹ Schomburg and Peterson, *AJIL*, 101 (2007) 126.

³²² See Richard Card, Alisdair Gillespie, & Michael Hirst, *Sexual Offences* (2008) paragraph 1.14.

³²³ *Prosecutor v Milosevic* IT -02-54-AR73.6 (Appeal Chamber) 20 January 2004, paragraph 3.

³²⁴ *Ibid.*

³²⁵ *Ibid* paragraph 4.

³²⁶ *Ibid.*

³²⁷ *Prosecutor v Hartman* (Decision of motion to strike and request to extend word limit), IT-02-54-r77.5-A, 6 November 2009.

³²⁸ Human Rights Watch, In-Depth Report Documents Milosevic Crimes New Statistics Show Direction from Belgrade (26 October 2001) < [In-Depth Report Documents Milosevic Crimes | Human Rights Watch](#)

With the assistance of *amicus* organizations in some CRSV cases, about thirty individuals were convicted of CRSV before the ICTR.³²⁹ The first case to convict an individual of CRSV witnessed *amicus* interventions from the Government of the United States of America and Juristes sans Frontières.³³⁰ At the ICTR the United Nations Secretary General's secretariat was allowed to appear as *amicus* in terms of Rule 74 of the Tribunal's Rules of Procedure and Evidence, to address the issue of waiver of immunity enjoyed by General Romeo Dallaire as former Force Commander of the United Nations Assistance Mission in Rwanda (UNAMIR).³³¹ Other *amicus curiae* which made it possible for Akayesu, a non-military accused person in CRSV, to be convicted of CRSV both under war crimes and crimes against humanity was the Coalition on Women's Human Rights in Conflict Situations, which includes Rwandan and international women's rights groups.³³²

The ICC Statute included gendered crimes based on the work of groups such as the Women's Caucus for Gender Justice in the International Criminal Court, which lobbied for a gender perspective in the Statute.³³³ In the *Prosecutor v Dominic Ongwen*, *amicus* was called to discuss the burden of proof in cases where an accused person raises the defence of insanity.³³⁴ In this case, Ongwen was kidnapped at ten years old but then rose within the ranks to be a commander who raped many women under the banner of the Lord Resistance Army in Northern Uganda. Southern Africa Litigation Centre and Prof. Bonita Meyersfeld also appeared as joint *amicus curiae* to make oral submissions on the issues relating to:

(hrw.org), <https://www.hrw.org/news/2001/10/26/depth-report-documents-milosevic-crimes>, accessed 9 November 2022.

³²⁹

³³⁰ *Prosecutor v Du [Ko Tadi] A/K/A/ "Dule*, IT-94-1-T (Trial Chamber Judgment), 7 May 1997.

³³¹ <https://unictr.irmct.org/en/news/secretary-general-present-amicus-curiae-submission-akayesu-trial>, accessed 9 November 2022.

³³² Human Rights Watch, Rwanda Tribunal to Rule on Akayesu Case, (1 September 1998), < [Rwanda Tribunal To Rule on Akayesu Case | Human Rights Watch \(hrw.org\)](https://www.hrw.org/news/1998/09/01/rwanda-tribunal-rule-akayesu-case)< <https://www.hrw.org/news/1998/09/01/rwanda-tribunal-rule-akayesu-case>, accessed 9 November 2022.

³³³ Women's Caucus for Gender Justice, Recommendations and Commentary for December 1997 PrepCom on the Establishment of an International Criminal Court, United Nations Headquarters December 1–12, 1997, at 31 (1997), < <https://4genderjustice.org/wp-content/uploads/2021/12/wcgi-prepcom-paper.pdf>, accessed 9 November 2022.

³³⁴ See *Situation in Uganda in the Case of the Prosecutor V. Dominic Ongwen, Amicus Curiae Observations by Public International Law & Policy Group*, ICC-02/04-01/15 A, 23 December 2021.

The distinct elements and harm of forced marriage, sexual slavery and forced pregnancy (SGB crimes); the cumulative charges and convictions of such SGB crimes; and the admissible evidence and probative value of various categories of evidence relating to SGB crimes.³³⁵

The major arguments of the joint *amicus* were to address the court on the propriety of having concurrent charges and convictions on the above crimes.³³⁶ This thesis discusses cases at the ICC that demonstrate the benefits of victim participation, including in cases involving CRSV, with Judge Christine van den Wyngaert noting extensive victim participation rights at both pre-trial and trial stages in 2011. Judge Wyngaert summed up the pre-trial rights to include:

‘Victim participation rights at the ICC during pre-trial mainly consist of attending public sessions, presenting views and concerns, having access to public filings and evidence, making opening and closing statements, addressing issues of law and fact in written submissions, and questioning defence witnesses if their personal interests are affected.’³³⁷

She also sums up the rights at the trial level to include that:

Significantly, victims can apply to be heard as witnesses, independently of the Prosecutor or the Defence.³³⁸ This has led to a separate stage in the proceedings: in the *Katanga* trial, there was a “victim’s case” that came after the Prosecution’s case and before the Defence’s case.³³⁹ Different from the pre-trial phase, *common legal representatives (not the victims themselves) at the trial stage have been allowed to access confidential documents and evidence and attend*

³³⁵ SALC, ‘The *Prosecutor v Dominic Ongwen*: Joint Amicus Curiae Submission by SALC and Prof. Bonita Meyersfeld’ (14 February 2022) < <https://www.southernafricalitigationcentre.org/2022/02/14/the-prosecutor-v-dominic-ongwen-joint-amicus-curiae-submission-by-salc-and-prof-bonita-meyersfeld-2/> > accessed 9 November 2022.

³³⁶ Ibid.

³³⁷ Wyngaert Van den Christine, Reflections on Victim Participation at the ICC.’ 44 *Case W. Res, J. Int’ L* (2011) 476-494, 485.

³³⁸ Trial Chamber III decided to allow victims to present their “views and concerns” in the form of unsworn statements as well. See *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-1935, Order Regarding Applications by Victims to Present Their Views and Concerns or to Present Evidence (Nov. 21, 2011).

³³⁹ Jennifer Easterday, Judges in Katanga, and Ngudjolo Trial Hear Testimony from Participating Victims, KATANGATRIAL.ORG (Mar. 15, 2011), <http://www.katangatrial.org/2011/03/judges-in-katanga-and-ngudjolo-trial-hear-testimony-from-participating-victims/> (“Upon resuming hearings after the Prosecution rested its case and the court observed its annual winter recess, the trial heard testimony from victim participants.”).

*closed sessions as well.*³⁴⁰ Reparations...Ultimately, victims do not only want to participate in the proceedings. They want to be recognized as victims and they want to be compensated for the harm suffered. While the Rome Statute is quite vague on victim's participatory rights, it is even vaguer on reparations. Indeed, the drafters could not agree on this subject and left it to the Court to further decide what it means. This is another example of a "constructive ambiguity" in the Statute, which places a high burden on the shoulders of the judges.³⁴¹ (italicization intentionally made for emphasis reasons)

The vagueness of provisions in the Rome Statute needs to be addressed by broadening the use of human rights jurisprudence in Article 21(3) of the Rome Statute,³⁴² or to extent the hybrid position in Article 68(3) of the Rome Statute to allow victims to appear at any stage of the proceedings.³⁴³

The internal judicial case management critique from Judge Wyngaert can be used by *amicus curiae* together with studies that focused on victim status and largely victim issues at the ICC such as from Mikaela Heikkilä.³⁴⁴ Judge Wyngaert's focus is on the ICC's management of victims' expectations and experiences throughout the legal process, while Heikkilä's argument covers challenges that victims face in accessing justice and the need to improve the international criminal justice system to better serve their needs.³⁴⁵ While both Judge Wyngaert and Heikkilä share a concern for victims' rights, their arguments differ in focus and scope, with Heikkilä focusing on the lack of victim participation in *ad hoc* tribunals and Judge Wyngaert highlighting the need for better victim management at the ICC, this highlights the need for *amicus* to address the lacuna in presenting views from the

³⁴⁰ *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07-474, Decision on the Set of Procedural Rights Attached to Procedural Status of Victims at the Pre-Trial Stage of the Case, para. 149 (May 13, 2008); *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07-1788, Decision on the Modalities of Victim Participation at Trial, paras. 118–25 (Jan. 22, 2010).

³⁴¹ Wyngaert (n 337) 486.

³⁴² *Situation in the Democratic Republic of the Congo*, ICC-01/04-101, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, para. 71 (Jan. 17, 2006),

³⁴³ *Situation in the Democratic Republic of the Congo*, ICC-01/04-556, Judgment on Victim Participation in the Investigation Stage of the Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007, para. 56 (Dec. 19, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc612293.pdf>

³⁴⁴ Heikkilä (n 215).

³⁴⁵ Heikkilä (n 215).

accused and victim management side. Comparing the ICTY and the ICC in relation to the participation of CRSV victims in the *Lubanga* case,³⁴⁶ Wyngaert for instance argues that:

Rule 85 of the Rules does not have the effect of restricting the participation of victims to the crimes contained in the charges confirmed by Pre-Trial Chamber I, and this restriction is not provided for in the Rome Statute framework. Rule 85(a) of the Rules simply refers to the harm having resulted from the commission of a “crime within the jurisdiction of the Court” and to add the proposed additional element—that they must be the crimes alleged against the accused—therefore would be to introduce a limitation not found anywhere in the regulatory framework of the Court.

Judge Wyngaert and Heikkilä's views support the use of amicus in CRSV cases to ensure victim participation, recognition, and representation, and to bring a range of expertise and perspectives to bear on the issues at hand. Judge Wyngaert's critique also differs from Anne-Marie de Brouwer's and Mikaela Heikkilä's discussion of the victim issues relating to protection, reparation, and assistance of victims.³⁴⁷ Wyngaert sees a distinction between victims as participants and victims as parties, arguing that Article 68(3) of the Rome Statute fails to elevate victims to the latter status.³⁴⁸ ICC victims are limited to being mere participants who can raise views and concerns, instead of being accorded more far-reaching roles as parties to the proceedings, which is problematic and different from the ICTY and ICTR.³⁴⁹ Judge Wyngaert's argument is limited to the status of victims as participants in ICC proceedings, whereas Brouwer and Heikkilä's argument takes a broader approach, emphasizing the importance of ensuring that victims have meaningful participation in all aspects of the proceedings.

Another interesting issue relates to how Judge Wyngaert's critique differs from Anne-Marie de Brouwer's focus on reparations to victims of sexual violence.³⁵⁰ While Wyngaert

³⁴⁶ *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-1119, Decision on Victims' Participation, par. 93 (Jan. 18, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc409168>.

³⁴⁷ Anne-Marie de Brouwer and Mikaela Heikkilä, 'Victim Issues: Participation, Protection, Reparation, and Assistance,' in Sluiter et al (Eds.) *International Criminal Procedure: Principles and Rules* (2013) 1299.

³⁴⁸ Wyngaert (n 337) 483.

³⁴⁹ *Ibid.*

³⁵⁰ Anne-Marie de Brouwer, 'Reparations to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and their Families.' *30 Leiden Journal of International Law* 207.

emphasizes the need for a victim-centred approach and transparency in all material aspects, Brouwer explores the legal framework for reparations at the ICC and the Trust Fund for Victims (TFV). Amicus could use these arguments to advocate for greater victim participation in proceedings and to ensure that reparations acknowledge and address the harm done to CRSV victims, including improving their access to compensation under the TFV.³⁵¹ *Amicus curiae* thus been instrumental in broadening the understanding of complex in different tenors of conflict. The relevant cases include *Al Mahdi on cultural heritage*.³⁵² *Amicus* submissions should ultimately deal with novel issues in a case and enable the court to be fully informed.³⁵³

3.5. The Complementary role of amicus to Victim Participation Procedures

This section elaborates on why amicus should complement victim participation even though it has its own drawbacks. While victim participation involves allowing victims to appear as parties in legal proceedings, *amicus curiae* would intervene because of the appointment of third-party experts to assist with legal issues in a case. *Amicus curiae* can help alleviate the burden on the court and the victims themselves by providing expertise and insight into specialized areas of law, which can benefit the court³⁵⁴ and the victims.³⁵⁵ Victim participation can be time-consuming, expensive, and may interfere with fair trials by creating conflicts of interest and making trials more adversarial.³⁵⁶ Victim participation can potentially undermine the rights of the accused, creating an imbalance in favour of the prosecution.³⁵⁷ Judge Wyngaert suggests that the effectiveness of victim participation in achieving its stated goals is not yet clear because of the vagueness of Article 21(3) of the

³⁵¹ Anne-Marie Brouwer & Marc Groenhuijsen, 'The Role of Victims in International Criminal Proceedings,' in Göran Sluiter & Sergey Vasilev (eds.) *International Criminal Procedure: Towards a Coherent Body of Law* (Cameron May: 2009) 149.

³⁵² ICC-01/12-01/15-172.

³⁵³ *Prosecutor v. Ruto and Sang*, Decision on the "Requests for Leave to Submit Observations under Rule 103 of the Rules of Procedure and Evidence", ICC-01/09-01/11 (OA 5), 13 September 2013, para.10.

³⁵⁴ *Prosecutor v. Katanga*, Order authorising the submissions of observations, ICC-01/04-01/07, 7 March 2013, para. 12

³⁵⁵ Wyngaert (n 337), 487.

³⁵⁶ Wyngaert (n 337) 487.

³⁵⁷ Ibid: 488ff.

Rome Statute.³⁵⁸ She suggests using *amicus* to mitigate the drawbacks of victim participation.³⁵⁹ This approach is fundamental because it could allow the voices of victims to be heard while avoiding the potential drawbacks of direct victim participation to the accused and the court at large.³⁶⁰

To demonstrate the drawbacks in sustaining victim participation management at the ICC, Wyngaert for instance demonstrates how many people are denied victim participation, remedies and ultimately healing in that:

Since the ICC started functioning, 9,910 applications for participation have been received. Of those applicants, roughly a third was allowed to participate in the proceedings thus far. For example, in the Democratic Republic of the Congo situation, 127 victims were given permission to participate in the *Lubanga* case,³⁶¹ and 366 in the *Katanga* case.³⁶² In the *Bemba* case,³⁶³ 1889 victims are participating. Under the current prevailing interpretation, the assessment of personal interest in the proceedings must be made anew each time a victim applies to participate at a different procedural stage.³⁶⁴

Judge Wyngaert cites the Bemba case (*Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08) to show how *amicus curiae* can provide valuable insights into the issue of sexual violence without compromising the impartiality of the trial or the rights of the accused.

Looking at the use of *amicus*, institutional drawbacks lie in the fact that international courts still grapple with the issue of how *amicus curiae* can uphold impartiality; properly

³⁵⁸ Ibid.

³⁵⁹ Ibid.

³⁶⁰ This could be linked to the concerns of Judge Kirk McDonald of the ICTY who indicated in her interview with psychologist Sara Sharatt, in note 254, that judges are sometimes traumatised and forced to spend time trying to ward off the trauma by consuming various novels. Put differently, in the absence of helping professionals like psychologists and psychotherapists, judges and court officials without specialised victim management training become highly traumatised. Reflective and reflexive adjudication becomes difficult under such circumstances.

³⁶¹ ICC, Trial Chamber I to Deliberate on the Case Against Thomas Lubanga Dyilo, ICC-CPI-20110826-PR714 (Aug. 26, 2011).

³⁶² ICC, Questions and Answers: Situation in the Democratic Republic of the Congo, *The Prosecutor v. Germain Katanga, and Mathieu Ngudjolo Chui*, § 7, ICCPIDS-CIS-DRC2-01-001/0

³⁶³ Press Release, Int'l Criminal Court, Central African Republic: VPRS Holds Training Seminar for Local Intermediaries Assisting Victims, ICC-CPI-20110729-PR705 (July 29, 2011).

³⁶⁴ Wyngaert (n 337) 482.

particularize its identity; and demonstrate the usefulness of amicus to the court.³⁶⁵ This is normally linked to the absence of guidelines either from women's groups or legal scholars to investigate CRSV ongoing conflicts within the IHL regulating non-international armed conflicts (NIAC.)³⁶⁶ To deal with those challenges, legal experts or law-based organizations can help link allegations of CRSV into the ICC's provisions relating to the penalization of CRSV either as crimes against humanity³⁶⁷ or war crimes.³⁶⁸ However, the other challenge is that feminist organizations have also not prepared dossiers on CRSV which, except for forced pregnancy, requires a gender-neutral analysis which apply equally to men and women.³⁶⁹ While it is trite that CRSV can be committed under coercive environment,³⁷⁰ there is general absence of *amici* clarification on how similar crimes such as enforced masturbation and sexual mutilations can be prosecuted.³⁷¹ These include categorizing the cases into those prosecuted under war crimes and crimes against humanity as almost universally coercive,³⁷² based on vitiated consent,³⁷³ or as dependent on either armed conflict or mere presence of the military.³⁷⁴

Wyngaert's argument suggests that ICC judges can balance victim participation with amicus curiae participation in CRSV cases, especially where CRSV victims also participate in cases where CRSV crimes are not included such as the *Lubanga* case.³⁷⁵ The lack of

³⁶⁵ See in detail, Francisco J. Rivera Juaristi, 'The Amicus Curiae in the Inter-American Court of Human Rights' (1982-2013), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2488073> [The Amicus Curiae in the Inter-American Court of Human Rights \(1982-2013\) by Francisco Rivera Juaristi: SSRN](#)> accessed 7 November 2022.

³⁶⁶ See Article 75 of Additional Protocol 1.

³⁶⁷ See for instance Article 7 (1) (g) of the Rome Statute.

³⁶⁸ See for instance Article 8 (2) (b) (xxxii) and (e) (vi) of the Rome Statute.

³⁶⁹ See Article 7 (3) of the Rome Statute. Generally, strands of feminists such as existentialist, Marxist, African and liberal feminists also focus on the need to consider ending violence against men to end violence against women.

³⁷⁰ See *Prosecutor v Akayesu* (ICTR-96-4-T, paras 598, 688. See also *Prosecutor v Muhimana* ICTR-95-1B-T paragraph 551. *Prosecutor v Kvočka and others*, it-98-30-1-T.

³⁷¹ See de Brouwer, *Prosecution* (2005) 133.

³⁷² *Prosecutor v Kunarac and others* IT-96-23 & it-96-23-1-A, paragraph 130.

³⁷³ *Prosecutor v Muhimana* ICTR-95-1B-T, paragraph 546.

³⁷⁴ See *Prosecutor v Bemba Gombo* ICC-01-05-01/08-424, paragraph 162 and *Prosecutor v Katanga and Ngudjolo Chui* ICC-01/04-01/07-717, paragraph 440.

³⁷⁵ *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-1119, Decision on Victims' Participation, para 93 (Jan. 18, 2008)

balance created problems between the Trial and Appeals Chamber which could be alleviated if victim participation is regulated effectively by appreciating that:

Despite these limitations, participatory rights for victims are quite extensive, both during pre-trial and trial. The implication is that the Chambers, in many of their decisions, must also consider submissions of the victims, in addition to the submission of the parties. This inevitably increases the length of our decisions, compared to, for example, those of the ICTY, where judges only must address the observations of the prosecution and the defence.³⁷⁶

As a result, it is important for judges to be aware of the drawbacks of both victim participation and the use of *amicus* and to weigh these drawbacks against their potential benefits in each individual case as a matter of judicial case management ethics. Judges must carefully balance the need for victim participation in CRSV cases with the need for fair and impartial trials, while ensuring that the rights of all parties involved are protected.

3.6. Concluding remarks

In conclusion, the discussion on the use of *amicus curiae* was guided by the third research question and its underlying assumption that *amicus* could have both drawbacks and benefits. Victim participation procedures are not a *cul-de-sac* and could be complemented by *amicus* to ensure impartiality, protect the rights of the accused, ensure the effectiveness of victim participation on a case-by-case basis, and balance victim participation with *amicus curiae* participation. These measures can help to ensure that the voices of victims are heard while promoting legal certainty, fair trials, and the protection of human rights as required by the Rome Statute. As the ICC continues to develop its jurisprudence and practice, the use of *amicus curiae* can provide an important means of enhancing the quality and legitimacy of international criminal justice institutions through victims' lens and other stakeholders.

³⁷⁶ Wyngaert (n 337) 485.

Chapter 4

Possible Roles for Amicus Curiae Regarding Sexual Violence in Ukraine

4.1. Mapping scenarios from the ICTY and the ICC

The chapter explores how *amici* can assist national and international courts in addressing the commission of CRSV as a crime aimed at displacing populations in Ukraine.³⁷⁷ This would be done by examining the areas where impunity has been pronounced in Ukraine. The other issue is to consider recommendations from important institutions that handled CRSV issues. For example, the ICTY's PSV Working Group worked with various experts and made strong recommendations for future anti-impunity approaches to contextualise CRSV and prosecute it under general crime categories such as torture, persecution, enslavement, and genocide since this approach easily links senior officials and can also be used with approaches that explicitly refer to CRSV.³⁷⁸

4.1.1. The possibilities of using *amicus curiae* to broaden the court's understanding of the scope of impunity for CRSV in Ukraine

The imposition of punishments in international crimes as well as the conceptualization of victim status is largely governed by retributive than restorative or rehabilitative inclinations.³⁷⁹ Concern has been raised that the ICTY and ICTR which provide the historical context for the ICC's current approach were predominantly adversarial in nature.³⁸⁰ It is now axiomatic that the ICC's Rome Statute has innovated on protecting victims' status, including in its preamble which affirms that 'millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.' In Ukraine, over 400 sexual violations have been documented, and there has

³⁷⁷ Jarvis (n 264) 7.

³⁷⁸ Jarvis (n 264) 7.

³⁷⁹ Mark Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity.' 99 *Northwestern University Law Review* (2005), 600.

³⁸⁰ See Alphons Orié, 'Accusatorial v. Inquisitorial Approach in International Proceedings Prior to the Establishment of the ICC and in the Proceedings before the ICC,' in Antonio Cassese, Paola Gaeta & John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University: 2002) 1440.

been a commitment from countries and organizations to investigate CRSV cases, representing a significant development for amici participation in such cases.³⁸¹ For instance, Vera Bergengruen notes how a chatbot created by Ukraine's Digital Ministry and dubbed '*e-enemy*' shows how:

Ukraine has developed various digital tools to crowdsource and corroborate evidence of alleged war crimes committed by Russian forces during the invasion. These tools include government apps for citizens to document damage to their homes, facial recognition software to identify Russian military officials in photos, and guides for users to geo-tag and timestamp their footage. These measures aim to assist authorities in holding the perpetrators accountable and have been developed in response to the large amounts of video, photo, and eyewitness accounts of criminal behavior by Russian forces.³⁸²

The ICC and all participants must understand the contextual factors that contribute to CRSV crimes in Ukraine. Recent literature on the Ukraine conflict, including Russia's motivations, Ukraine's demographics and geography, tensions between Russia and the West, and the impact of the war on international relations, could inform the work of amicus in investigating and prosecuting these crimes.³⁸³ The idealized image of Europe as a prosperous and democratic union is challenged by the bureaucratic and economically troubled reality of the European Union, as exemplified by its response to the Ukrainian conflict.³⁸⁴ Russian annexation of Crimea linked to Ukraine's move to sign the Association Agreement with the EU, which Russia objected to on ideological and geopolitical grounds, leading to the revolt in Donbas.³⁸⁵ President Poroshenko signed the economic part of the Association Agreement on 27 June 2015 during the height of Russian-sponsored war in the

³⁸¹ Henry Dyer, 'UK Sends Experts to Help Ukrainian Government Gather Evidence and Prosecute War Crimes,' (29 April, Business Insider India).

³⁸² Vera Bergengruen, 'How Ukraine Is Crowdsourcing Digital Evidence of War Crimes,' (18 April 2022, the Time) < <https://time.com/6166781/ukraine-crowdsourcing-war-crimes/>> accessed 27 November 2022.

³⁸³ Serhy Yekelchuk, *The Conflict in Ukraine: What Everyone Needs to Know* (Oxford University Press: 2015).

³⁸⁴ Yekelchuk (n 383) 87.

³⁸⁵ Yekelchuk (383) 164.

Donbas.³⁸⁶ Donbas war raised concerns that Russia's involvement was due to fears of US interference in Georgia and Ukraine's revolutions, as well as its support for separatists in Moldova since 1992.³⁸⁷ The Republic still used Russian coat of arms decades after the collapse of communism.³⁸⁸

The conflict in Ukraine has spread due to Moscow's desire to establish a protectorate in the Luhansk-Donetsk region and Kyiv's inability to sustain the fight against Russian-backed insurgents.³⁸⁹ Building their argument from a book, Zbigniew Brzezinski's book, *The Grand Chessboard* (1997), Menon and Rumer argue that Russia wants to preserve its empire as well as safeguarding its domestic and foreign policies through holding on to Ukraine.³⁹⁰ *Amicus* could provide material evidence such as testimony and documentation of CRSV incidents that could assist the courts in determining the commission of such crimes within the contexts of genocide, war crimes or crimes against humanity.³⁹¹ Experts could help the courts in terms of relevant information recorded, areas marked to warn others of existence of arms and munitions, and assistance that was sought from relevant authorities.³⁹² The research by Ferguson and Jenzen-Jones showed that separatists had a range of arms and munitions typical to separatist fighting units such as small arms, self-loading rifles, long machine guns, shotguns and bolt-action rifles, handguns, and improvised small arms.³⁹³

Reports on the systematic nature of CRSV attacks in Ukraine, such as that by Ferguson and Jenzen-Jones, are critical in determining the inclusion of CRSV under CAH in the Rome Statute, as guided by the ICC's OTP policy paper on sexual and gender-based crimes.³⁹⁴ Eeva Innola and Katri Pynnöniemi argue that the Ukrainian conflict involves

³⁸⁶ Ibid.

³⁸⁷ Ibid: 165.

³⁸⁸ Yekelchik ibid; see also Rajan Menon & Eugene Rumer, 'Conflict in Ukraine: The Unwinding of the Post-Cold War Order (Boston: 2015).

³⁸⁹ Menon & Rumer (n 388) 86.

³⁹⁰ Melon & Rumer (n 388) 87.

³⁹¹ Jonathan Ferguson & N.R Jenzen-Jones, *Raising Red Flags: An Examination of Arms and Munitions in the Ongoing Conflict in Ukraine* (Armament Research Services: 2014).

³⁹² See Ferguson & Jenzen-Jones (n 391) 3.

³⁹³ Ibid: 29-40.

³⁹⁴ ICC OTP, 'Policy Paper on Sexual and Gender-based Crimes,' <https://www.icc-cpi.int/itemsDocuments/20140916OTP-Policy_CSASGBVENG.pdf> accessed 19 March 2023.

various groups, including Russian troops, Russian-minded self-defence force, unidentified militiamen, Russian-minded volunteer groups, Ukrainian armed forces, voluntary battalions, separatists, rebels, people, and other terms.³⁹⁵ Terminology of the crisis in Eastern Ukraine where the ICC first was invited. Terms that have been used to describe the situation in Eastern Ukraine include:

Military operation, Ukrainian split, Civil war, Military intervention War, Separatist intervention, Real war, Divide and confuse -operation, Information war, Blockade operation, Anti-terrorism operation, Invasion, Chaos, East-Ukrainian uprising, Great theatre, Unlinear war, Killing of own citizens, Indirect intervention, Propaganda war, Ukraine-show, and State of war.³⁹⁶

The foregoing shows how a comprehensive understanding of conflict dynamics and contributing factors is important to gather evidence against parties involved in perpetrating CRSV in Ukraine. *Amicus* could help in the collection of evidence by looking at various aspects to describe conflict situations.³⁹⁷ Other important aspects to consider include the fact that knowledge of the perpetrators of such crimes now need not be exhaustive or detailed and experts can now present information as long as their evidence can be properly tested.³⁹⁸ This could also include discriminatory intent when committing such crimes as established by the ICTY precedents³⁹⁹ and positive law.⁴⁰⁰ The ICC has pointed to a parallel existence of “direct military engagement between the respective armed forces of the Russian Federation and Ukraine” and “the non-international armed conflict” in eastern

³⁹⁵ Eeva Innola & Katri Pynnöniemi, ‘Finland and Russia’s Metanarratives on the conflict in Ukraine,’ in Katri Pynnöniemi & András Rácz (eds.) *Fog of Falsehood: Russian Strategy of Deception and the Conflict in Ukraine* (FIIA: 2016) 171-172.

³⁹⁶ *Ibid.*

³⁹⁷ *Prosecutor v Tadic* (Judgment) ICTY-IT-1-T para.656.

³⁹⁸ See Rodney Dickson, ‘Article 7: Crimes against Humanity’ in Otto Triffterer (Ed) *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Baden-Baden 1999) 124.

³⁹⁹ See *Prosecutor v Kayishema & Ruzindana* (Judgment) ICTR-95-1-T (21 May 1999) para. 130.

⁴⁰⁰ See Article 3 of the ICTY Statute. This can be contrasted with Article 5 (h) of the ICTY Statute and Article 7 of the Rome Statute of the ICC which do not list discrimination as a requirement for crimes against humanity. Generally positive law follows the definition of crimes against humanity as contained in the Nuremburg Charter and Tokyo Charter.

Ukraine.⁴⁰¹ Case selection strategies become critical for the ICC,⁴⁰² and can be transposed to the selection of CRSV cases to be prosecuted before Ukrainian courts.

Other critical issues to consider for prosecuting CRSV as part of war crimes or CAH in Ukraine relate to the need to protect citizens from the responsibility to protect populations from genocide, war crimes and CAH,⁴⁰³ as well as the need to help them access effective remedies in the event of the punishment of perpetrators.⁴⁰⁴ It could also be critical to consider how statistical evidence of children born as a result of CRSV could be used to assess challenges to the security of women in conflicts under UNSC Resolution 1325 of 2000.⁴⁰⁵ Such children could help identify instances of rape, sexual exploitation, or sexual slavery by occupation forces, peacekeepers, humanitarian workers, and private militaries.⁴⁰⁶ There is also need for Ukrainian courts to learn from *ad hoc* tribunals and the ICC in terms of how they categorized CRSV. In the Former Yugoslavia, CRSV was used to systematically humiliate, degrade, and torture certain populations.⁴⁰⁷ There were opportunistic, single-act, or mass systematic rape which resulted in pregnancies meant to alter populations, resulting in over 20,000 women being raped in the Former Yugoslavia in 1993 and producing over 4,000 children in Bosnia and Herzegovina.⁴⁰⁸ The United Nations states that 250,000 women were raped in Rwanda during the 1994 genocide and the CRSV

⁴⁰¹ Maryna Rabinovych, 'The Domestic Dimension of Defining Uncontrolled Territories and Its Value for Conflict Transformation in Moldova, Georgia, and Ukraine,' in Hannah Shelest & Maryna Rabinovych (Eds.) *Decentralisation, Regional Diversity, and Conflict: The Case of Ukraine* (Palgrave MacMillan: 2020), see also ICC (2018) paras. 72-73; International Criminal Court. 2018. Report on Preliminary Examination Activities < <https://www.icc-cpi.int/itemsDocuments/181205-rep-otpPE-ENG.pdf> > accessed 21 March 2023.

⁴⁰² Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Regime* (Cambridge University Press: 2005) 57.

⁴⁰³ A/RES/60/1. Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity, Resolution adopted by the UN General Assembly, October 24, 2005.

⁴⁰⁴ A/RES/60/147. Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law, Resolution adopted by the UN General Assembly on December 16, 2005.

⁴⁰⁵ Donna Seto, *No Place for a Wartime Baby: The Global Politics of Children Born of Wartime Sexual Violence* (Routledge: 2013) ix.

⁴⁰⁶ United Nations Security Council 2000. Security Council Resolution 1325. S/ RES/1325, United Nations Security Council 2008. Security Council Resolution 1820. S/ RES/1820; See C. Csaky, *No One to Turn To: The Under-Reporting of Child Sexual Exploitation and Abuse by Aid Workers and Peacekeepers* (Save the Children: 2008).

⁴⁰⁷ S. Power. *A Problem from Hell: America and the Age of Genocide*. (Basic Books: 2002).

⁴⁰⁸ Seto (n 405) 32.

involved individual and gang rapes, rape with sticks, guns, or other objects; sexual enslavement, forced marriage, force labour, and sexual mutilation.⁴⁰⁹ Reliance in prosecuting CRSV in Ukraine can also be placed on cases where *amici* intervened benefited the CRSV greatly. The first benefit relates to broadening of the methods of punishing CRSV crimes. The *Akayesu* case before the ICTR for instance held that CRSV crimes could be punished under genocide.⁴¹⁰ Akayesu was punished both individually and for sanctioning the rapes of hundreds of Tutsi women.⁴¹¹ The support received by Ukrainian CRSV victims may also benefit from *amici*'s submitted briefs expanding the frameworks on protecting victims. A leading case in this regard before the ICTY was *Prosecutor v Furundžija*,⁴¹² where the Prosecutor's late disclosure of a witness' medical records on post-traumatic stress disorder (PTSD) was challenged by *amici* on grounds of the victim's right to privacy.⁴¹³ Other considerations could be UN Resolutions that seek to define women as women,⁴¹⁴ as child protectors,⁴¹⁵ and as protected civilians in conflicts.⁴¹⁶

4.1.2 *Amicus* in the Ukrainian Criminal Justice System

Amicus can use the ICC's jurisdiction over war crimes, CAH, and genocide to implore Ukrainian courts to hold individuals accountable for their CRSV crimes and support the ICC's efforts to prosecute those responsible. *Amicus* needs to be cognizant of the fact that Ukraine's legal system is characterized by a written code that sets out the rules and

⁴⁰⁹ Ibid: 33. It was difficult to quantify the number of children born of CRSV because victims were normally killed by their victimizers.

⁴¹⁰ *Prosecutor v Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgment (2 September 1998) paras 731–4.

⁴¹¹ Seto (n 405) 64.

⁴¹² *Prosecutor v Furundžija*, ICTY-95-17/1-T, Decision on Defendant's Motion to Strike the Testimony of Witness due to Prosecutorial Misconduct or, in the Event to a Conviction, for a New Trial (16 July 1998) (Furundžija Defence Motion to Strike) para 10.

⁴¹³ *Prosecutor v Furundžija*, ICTY-95-17/1-T, Amicus Curiae Brief Respecting the Decision and Order of the Tribunal of 16 July 1998 Requesting that the Tribunal Reconsider its Decision Having Regard to the Right of Witness 'A' to Equality, Privacy and Security of the Person, and to Representation by Counsel (6 November 1998) para 4.

⁴¹⁴ United Nations Security Council 2000. Security Council Resolution 1325. S/ RES/1325. (Women, Peace, and Security).

⁴¹⁵ UNSC Resolution 1612 (Children and Armed Conflict).

⁴¹⁶ UNSC Resolution 1674 (Protection of Civilians in Armed Conflict).

principles of law, which judges apply to individual cases.⁴¹⁷ Ukraine has jurisdiction to prosecute crimes committed within its territory, and while *amicus* briefs are less common in civil law systems, some jurisdictions like German do allow for their submission in certain circumstances.⁴¹⁸ Ukraine's Code of Civil Procedure and Code of Criminal Procedure allow for the submission of *amicus* briefs. Under the Civil Code, such briefs can be submitted in civil cases, including commercial and constitutional disputes as contemplated by Article 59, which provides that:

Persons who are not parties and who, in the opinion of the court, have a legitimate interest in the outcome of the case may submit written explanations, proposals, and arguments to the court.⁴¹⁹

Similarly, Article 17 of the Criminal Code allows for submission of briefs in cases involving complex legal and factual issues as it provides that:

Individual and legal entities that are not parties to the proceedings may participate in the case as assistants to the court and present to the court their position on the merits on the merits of the case or certain procedural issues.

This provision allows for the submission of *amicus* briefs in criminal cases.⁴²⁰ Unlike common law jurisdictions, the Ukrainian Criminal Code does not allow private prosecution and private individuals cannot independently initiate criminal proceedings, but the prosecutor's office may issue a certificate of no prosecution upon request of the person who reported the crime, at the prosecutor's discretion. The ICC and Ukraine's handling of CRSV issues is important to consider, given the complexity of the national context and the widespread reports of sexual violence documented by UN bodies and NGOs, including

⁴¹⁷ Law Library of Congress, 'Ukraine's Legal System and Legal Sector,' <https://www.loc.gov/law/help/ukraine-legal-system-and-legal-sector.php> accessed 22 March 2023; see also Law Library of Congress, Global Legal Monitor: Ukraine Civil Law Reform, <https://www.loc.gov/law/foreign-news/article/ukraine-civil-law-reform/> accessed 22 March 2023.

⁴¹⁸ See section 67 of the German Code <https://www.gesetze-im-internet.de/english_zpo/english_zpo.html#pO201> accessed 22 March 2022.

⁴¹⁹ See also, OSCE, 'Ukraine: Civil Procedure Code,' <<https://www.osce.org/ukraine/47711?download=true>> accessed 28 March 2023.

⁴²⁰ See also Law Library of Congress, 'Ukraine: Criminal Procedure,' <https://www.loc.gov/law/help/criminal-procedure/ukraine.php> accessed 22 March 2023.

threats of death for those who try to intervene. An example is a rape victim who told the perpetrator that he was the age of her grandson was told to ‘*keep quite otherwise I kill you.*’⁴²¹ The extent of the CRSV in Ukraine has largely been based on conservative figures since victims are afraid of opening and perpetrators destroy crime scenes, kill their victims, threaten single witnesses amongst other challenges. The UNOHCHR for example noted that:

The precarious security situation in parts of Ukraine, stigma and trauma associated with sexual violence, and lack of victims’ access to services are all factors contributing to underreporting of such cases. OHCHR documented 9 cases of rape (against 8 women and 1 girl), cases of sexual violence used as a method of torture or ill-treatment against men, and 11 cases of forced public stripping against both men and women considered to be ‘lawbreakers.’ OHCHR also recorded 8 cases of other forms of sexual violence (against 5 women, 1 man, 2 girls), such as forced nudity, unwanted sexual touching, sexual abuse, and threats of sexual violence. Many of the documented cases were associated with other human rights violations, such as wilful killings, incommunicado and arbitrary detention, torture, and looting. Thirty cases were committed by Russian armed forces or law enforcement, 2 cases were committed by Ukrainian armed forces or law enforcement and 11 cases were committed by civilians or members of territorial defence units. All forms of sexual violence are human rights violations under international law, and some cases documented by OHCHR may also amount to war crimes.⁴²²

In some instances, in areas such as Kyiv, a 59-year-old widow was forced to undress and raped by a soldier who first poked her with a rifle, placed it on her legs and buttocks amidst laughs from colleagues before knocking her on the sofa with a gun and raping her twice.⁴²³ Men have also been forced to watch in Kiev to watch their wives being raped and then being forced to perform sexual acts on their spouses, sometimes in front of their children.⁴²⁴ The majority of CRSV are committed by Russian soldiers close to their military bases and it has been noted that the gruesome crimes are committed against men:

The majority of CRSV cases against men occurred in the context of detention by Russian armed forces. Beatings in the genital area, electrocution to genitals, forced nudity, unjustified cavity and body searches, and threats of rape against detainees and their loved ones were used as a method of torture and ill-treatment to intimidate,

⁴²¹ UNOHCHR, Report on Conflict-related Sexual Violence in Ukraine: 21 February to 31 July (UNOHCHR: September 2022).

⁴²² UNOHCHR (n 421) 21.

⁴²³ Ibid.

⁴²⁴ UNOHCHR (n 421) 22.

punish, or extract confession. OHCHR also received some allegations of sexual violence and harassment of women at checkpoints during so-called ‘filtration’ processes organized by Russian armed forces.⁴²⁵

Amicus may be requested by the Ukrainian Prosecutor or rely on the UNOHCHR’s argument regarding the lack of lawful conduct instructions for Russian armed forces in relation to CRSV.⁴²⁶ *Amici* should use their approach to advise the court on ways to protect CRSV victims and address challenges in accessing services.⁴²⁷ For the ICC, the leading case to consider applicable in Ukraine could be the *Prosecutor v Bemba* case where *amicus curiae* briefs were submitted by several organizations on issues related to the definition and scope of sexual violence as a war crime.⁴²⁸ The *Bemba* case highlights the ICC’s willingness to receive *amicus curiae* submissions on key legal issues, such as the definition of rape by non-government forces, and its ability to prosecute non-state actors for CRSV crimes even outside of an armed conflict. The case of *Prosecutor v Ntaganda* is relevant to charges of CAH and war crimes.⁴²⁹ The case highlights how the Trial Chamber of the ICC invited *amicus curiae* submissions on the issue of rape against child soldiers under the age of 15. The Trial Chamber ultimately found that rape can be committed against child soldiers under the age of 15 if certain conditions are met.

The case of *Prosecutor v Germain Katanga and Mathieu Ngudjlo Chui*,⁴³⁰ established that sexual slavery and forced marriage can constitute CAH, but not war crimes, which can guide the training of Ukrainian legal actors and *amici* in preparing criminal charges. This becomes important in the training of Ukrainian legal actors and *amicus* when preparing the docket of criminal charges against perpetrators. The *Prosecutor v Dominic Ongwen*⁴³¹ case shows that the ICC can consider the defendant’s experiences as a child soldier in sentencing but does not absolve them of responsibility for the crimes committed. *Amici* can draw from

⁴²⁵ Ibid.

⁴²⁶ Ibid, para 58.

⁴²⁷ Ibid, paragraph 59.

⁴²⁸ ICC-01/05-01/08.

⁴²⁹ ICC-01/04-02/06.

⁴³⁰ ICC-01/04-01/07.

⁴³¹ ICC-02/04-01/15.

the case of *Prosecutor v Al Hassan Mahmoud*⁴³² to argue that the ICC can hold members of non-state armed groups accountable for CRSV crimes committed in Ukraine.

In terms of discussing the ICC's jurisdiction over crimes committed in Ukraine, the case on the *Situation in the Islamic Republic of Afghanistan* is instructive.⁴³³ The ICC can use this situation to explain how it can exercise jurisdiction over crimes committed by non-state actors and state actors in situations referred to it by the UNSC or where the crimes occurred on the territory of a state party to the Rome Statute. Specifically for Ukraine, the ICC can use the special permission it was given by Ukraine to prosecute Russian soldiers, and anyone accused of committing CRSV. In 2014, Ukraine accepted the ICC's jurisdiction over alleged crimes committed on its territory from 21 November 2013 to 22 February 2014. This means that the ICC has the authority to investigate and prosecute those accused of committing crimes within this time frame, including Russian soldiers and other individuals accused of committing CRSV. The ICC can use this special permission to hold perpetrators accountable for their actions and bring justice to the victims of these crimes.⁴³⁴

4.2. *Amici's* Fight against Impunity for CRSV and Likely Scenario

Amici curiae can play a vital role in providing the ICC with information on CRSV in Ukraine and the legal and moral reasons for ending it. Ending impunity for sexual and gender-based violence is crucial for the restoration of the rule of law and the establishment of sustainable peace post-conflict.⁴³⁵ The use of CRSV is universally condemned and the knowledge products on accountability for CRSV should be used as resources and tools to secure justice and accountability for survivors of CRSV in other areas.⁴³⁶ In another foreword on CRSV, High Commissioner Zeid Ra'ad Al Hussein of the United Nations Office of the High Commissioner observed that there is need to further accountability

⁴³² ICC-01/12-01/18.

⁴³³ ICC-02/17.

⁴³⁴ <<https://www.icc-cpi.int/situations/ukraine>> accessed 9 May 2023.

⁴³⁵ Phumzile Mlambo-Ngcuka, 'Foreword' in Serge Brammertz & Michelle Jarvis, *Prosecuting Sexual Related Violence at the ICTY* (Oxford University Press: 2016) vii.

⁴³⁶ *Ibid.*

efforts for CRSV crimes and make contributions to bring justice to the many CRSV victims, where they are.⁴³⁷

The *amicus curiae* should be aware of the ICC Office of the Prosecutor's policy on CRSV, which recognizes CRSV as a priority area for investigation and prosecution, and outlines the Office's approach to addressing these crimes.⁴³⁸ The ICC can learn from the experiences and best practices of other international tribunals, such as the ICTR, in developing guidelines for addressing CRSV in its own proceedings.⁴³⁹ The case of *Bemba* at the ICC and the reference made to the *amicus curiae* brief submitted by the International Federation for Human Rights highlights the significance of the role of civil society organizations in advocating for human rights and contributing to the development of international law.⁴⁴⁰ Russia's involvement in the conflict in Ukraine since February 2014 has led to a pattern of sexual violence being deployed in a brutal and deliberate fashion, with an increasing number of civilians subjected to conflict-related sexual violence (CRSV).⁴⁴¹ The above scenario forced the Ukrainian Office of the Prosecutor General (UOPG) to adopt a collaborative, multi-sectorial Victim and Witness-oriented strategy for prosecuting CRSV.⁴⁴²

⁴³⁷ Zeid Ra'ad Al Hussein, 'Foreword' in Serge Brammertz & Michelle Jarvis, *Prosecuting Sexual Related Violence at the ICTY* (Oxford University Press: 2016) viii.

⁴³⁸ ICCOTP, Prosecutor of the International Criminal Court (ICC), Karim A.A. Khan KC Publishes Policy on the Crime of Gender Persecution (*ICCOTP Press Statement*, 7 December 2022) < <https://www.icc-cpi.int/news/prosecutor-international-criminal-court-icc-karim-aa-khan-kc-publishes-policy-crime-gender>>, accessed 10 March 2023.

⁴³⁹ ICTR, Prosecution of Sexual Violence: Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda (ICTR: 2014) < <https://unictr.irmct.org/sites/unictr.org/files/publications/ICTR-Prosecution-of-Sexual-Violence.pdf> > accessed 10 March 2023

⁴⁴⁰ Dapo A. Tladi & Gerhard Werle, 'The Amicus Curiae before the International Criminal Court: Revisiting an Old Friend,' 4 *Journal of Transitional Justice* (2010) 442-468.

⁴⁴¹ Women's Initiatives for Gender Justice (WIGJ), 'A Sustainable Model for Responding to Conflict-related Sexual Violence in Ukraine,' (WIGJ, 2 December 2022) <https://4genderjustice.org/wp-content/uploads/2022/12/ASP-2022-Concept-note-CRSV-in-Ukraine-ENG.pdf> accessed 15 January 2023.

⁴⁴² WIGJ (n 442) 1.

The aim for this strategy is to promote locally owned solutions to curb CRSV in peace and war time using international practices and standards.⁴⁴³ Local understanding, input, and ownership are crucial elements in the development and implementation of effective strategies to address CRSV, and should be prioritized in all efforts to combat this heinous crime.⁴⁴⁴ International law recognizes that CRSV cases must be contextualized as crimes against humanity because they are used to directly target civilians.⁴⁴⁵ Furthermore, the Hague Principles on sexual violence provide the starting point for *amicus*.⁴⁴⁶ There are other principles on sexual violence which highlight the importance of taking into account survivors' individuality, autonomy, goals and safety, and of providing them with access to justice, while respecting their self-identity and adopting an inclusive and non-discriminatory approach.⁴⁴⁷

Effective collaboration and coordination among a diverse range of actors, including civil society organizations, the media, academia, and service providers, is crucial for designing and implementing a comprehensive strategy to combat CRSV.⁴⁴⁸ The approach above can also utilize the various ways to generalize or adopt context-specific CRSV forms as suggested by the ICTY's PSV Working Group.⁴⁴⁹ For instance, CRSV should be seen as a deliberate and targeted act of violence against civilians, while collateral damage is an unintentional consequence of military operations.⁴⁵⁰ Adopting a victim-centred approach in investigating and prosecuting CRSV crimes is crucial, and includes avoiding victim-

⁴⁴³ Ibid.

⁴⁴⁴ WIGI (n 442) 2.

⁴⁴⁵ *Prosecutor v Tadić*, ICTY-94-1-T, Trial Judgment (7 May 1997) (Tadić Trial Judgment) para 653.

⁴⁴⁶ These are summarised in the WIGI document (n 361).

⁴⁴⁷ See the Murad Code, 'The Global Code of Conduct for Gathering and Using Information about Systematic and Conflict-Related Sexual Violence,' <https://www.muradcode.com/murad-code#mc-principle1> accessed 15 January 2023.

⁴⁴⁸ FIDH, *Sexual and Gender-based Violence: A Glossary from A-Z*, (FIDH: nd) 9.

⁴⁴⁹ See Jarvis (n 264).

⁴⁵⁰ Zainad H. Bangura, *Sexual Violence: A Tool of War, Background Note* (2014) < <https://www.un.org/en/preventgenocide/rwanda/assets/pdf/Backgrounder%20Sexual%20Violence%202014.pdf> > accessed 15 January 2023.

blaming and properly addressing the terminologies associated with direct, indirect, and secondary victims.⁴⁵¹

4.3. *Amici's* Worst-case Scenario and need to Appreciate Country-specific Standards in Investigating and Prosecuting CRSV

Basic investigative standards (BIS) are important in introducing evidence related to CRSV crimes in Ukraine, as they ensure that evidence is collected and preserved in a way that meets legal and ethical standards, including the protection of the rights and dignity of survivors and witnesses. Various forms of evidence, including testimonial, documentary, physical, audio-visual digital, telecommunications and open source, are important to collect as they can be relevant for proving the commission of international crimes before domestic and international courts.⁴⁵² Documentary open source evidence is publicly accessible information, such as books, articles, reports, and public statements, that can be used to establish the background of a conflict and the extent to which certain information is known.⁴⁵³ Online open-source evidence includes news articles from online news outlets, reports from NGOs or experts available on their websites, and images or videos posted on social media platforms like Facebook, YouTube, Twitter, Instagram, or LinkedIn.⁴⁵⁴

The rationale for using privately owned evidence in digital or audio format has been to help establish the perpetrator's intent, whereabouts at the time of a crime, relations with other suspects, pattern of movement, or existence of a common plan.⁴⁵⁵ Telecommunication or information from service providers may be useful to provide corroboration on familial ties or chains of command through subscriber records, handset details as well as applications and audio-visual files.⁴⁵⁶ The onus to establish, that the information or evidence of the

⁴⁵¹ Reliance can be placed on the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa (Banjul 2015) 35.

⁴⁵² Global Rights Campaign, BIS Guide: Introduction to Evidence, <https://www.asser.nl/media/796074/introduction-to-evidence-2.pdf>, accessed 15 January 2023.

⁴⁵³ GRC (n 452) 2.

⁴⁵⁴ Ibid.

⁴⁵⁵ Ibid.

⁴⁵⁶ Ibid.

crime used by the public prosecutor to charge a perpetrator can be based on different evidentiary materials. For instance:

Direct evidence can be used to prove that a witness saw a missile hitting a school or a soldier shooting an unarmed civilian. Indirect evidence may be corroborated and allow inferences to be drawn. Hearsay evidence is generally admissible, whether oral or documentary, but its weight depends on the circumstances. Exculpatory evidence may point to the innocence of the accused including showing that the accused was in a different location. Corroborative evidence strengthens other evidence shown, for example, bullet casings found at the crime scene consistent with a witness' testimony. Expert evidence requires specialised skills of a technical nature and may include military experts who prove evidence of the command structure and weaponry used by a military organization.⁴⁵⁷

For evidence to be admissible within Ukrainian courts, it must be sufficient and interconnected to establish the presence or absence of the circumstances of the case being proven, and it must be obtained in accordance with the law. The relevance and reliability of the evidence are also important, as they must directly or indirectly confirm the circumstances of the case being proven and be authentic and reliable enough to be used in court.⁴⁵⁸ ICC can only intervene if a state party is unwilling or its prosecution amounts to a sham, in accordance with the complementarity principle. It has been noted that the key elements to consider for the ICC include:

The evidentiary weight or probative value which if it does not have a prejudicial effect, is admissible. This will depend on the intrinsic of the evidence and the quality of other evidence. The prejudicial effect is excluded even if it is relevant but can prejudice the trial's fairness, including the rights of the accused or the fair evaluation of testimony or other evidence. The probative value must thus prove something at issue reliably and significantly. The relevance of the evidence must pertain to the investigated matters and should make the existence of the fact probable.⁴⁵⁹

The role of *amicus curiae* should be to help ensure that evidence presented to the court is significant, reliable, credible, accurate, and authentic.⁴⁶⁰ The distinction between the ICC and

⁴⁵⁷ GRC (n 452) 3.

⁴⁵⁸ GRC (452) 4.

⁴⁵⁹ GRC (452) 4.

⁴⁶⁰ Ibid.

national legal approaches is critical in prosecuting CRSV in Ukraine. There is a peremptory provision 63(5) of the ICC's Rules of Procedure and Evidence provides that the ICC shall not apply national laws governing evidence other than in relation to general law principles under Article 21 of the Statute. The ICC is enjoined to follow flexible or liberal procedures when it comes to corroboration requirements in CRSV cases.⁴⁶¹ Rule 70 of the ICC Rules also deals with consent issues including that it cannot be inferred from words or actions of a victim where threats, force coercion or taking advantage of a victim undermined the victim's ability to give voluntary and genuine consent. There is also a need to take cognisance that the sexual history of the victim is immaterial as enshrined in Rule 70 (d) of the ICC Rules. In some cases, *in camera* proceedings can be conducted where the views of the Prosecutor, the defence, witnesses and their representatives regarding consent in CRSV.⁴⁶² The corollary to the above is that *Amicus curiae* submissions can be strengthened by considering country-specific standards and practices in the investigation and prosecution of CRSV in Ukraine.

4.4. Using Gender-related Tools that Can be Used to Collect CRSV Evidence in Ukraine

Amicus curiae can use gender-sensitive tools to collect comprehensive and sensitive CRSV evidence in Ukraine. The leading case on gender-sensitive techniques at the ICC is the *Prosecutor v Thomas Lubanga Dyilo* case,⁴⁶³ in which the ICC found Lubanga guilty of conscripting and enlisting child soldiers in the DRC. The Office of the Prosecutor used gender-sensitive interviewing techniques to gather evidence from witnesses, including child soldiers who had been subjected to CRSV. The ICC established a Victims and Witnesses Unit to provide support to witnesses, including psychological and medical care, and to ensure that their rights were protected throughout the proceedings.⁴⁶⁴ A gender analysis approach is necessary to ensure that the experiences and perspectives of women and girls who are disproportionately affected by CRSV are adequately represented and considered in

⁴⁶¹ Heikillä (n 215) 130.

⁴⁶² Rule 72 of the ICC Rules.

⁴⁶³ ICC-01/04-01/06, Judgment on the Appeal of Thomas Lubanga Dyilo against conviction, 1 December 2014.

⁴⁶⁴ See also the ICC, Annual Report on Preliminary Examination Activities 2019 (ICC: 2020) <<https://www.icc-cpi.int/Pages/item.aspx?name=20191205-preliminary-examination-report>, accessed 10 March 2023.

judicial proceedings.⁴⁶⁵ Gender analysis helps to identify and address gender-based violence, discrimination, and inequality in conflict-affected communities.⁴⁶⁶ Proper framing of concerns would help *amici* to establish the systemic nature of the harm, and to hold those who bear responsibility for creating or perpetuating the context in which the harm occurred.

4.5. Prospects for Utilising *Amicus* Intervention to Effectively Combat CRSV

4.5.1. Access to Courts, Prosecutor's Office, and other Expert Evidence

During the trial at the ICTR, the *amicus curiae* submitted arguments that the rape and sexual violence committed against Tutsi women constituted crimes of genocide. This helped the judges arrive at a definition of these crimes in the context of international criminal law.⁴⁶⁷ The ICC's legal framework addressed gaps in the legal frameworks of the ICTY and ICTR, and the admissibility of amicus evidence was evaluated differently in the ad hoc tribunals based on established rules and legal evidence. For example, Belgium's application for compensation of Tutsi families was rejected by the ICTR on the basis that:

Since an *amicus curiae* is not associated in the court action with the Prosecutor, he, she, or it may not seek a compensation. The precedent for this is ICTR, Bagosora case (ICTR-96-7-T) where claims made by Belgium in its *amicus curiae* brief regarding the appearance of victims and their collateral relatives as complainants and their compensation were rejected by the Chamber.⁴⁶⁸

However, the significance of amicus evidence varied in the ad hoc tribunals, with the ICTR allowing for *amicus* submissions under Rule 74 of its Rules of Procedure and Evidence, which provides that a Chamber may invite or grant leave to any State, organization, or person to appear before it and make submissions on any issue specified by the Chamber. Nevertheless, it was ultimately up to the court's discretion to invite an *amicus curiae* to address specific issues.

⁴⁶⁵ UN, International, Impartial and Independent Mechanism Gender Strategy and Implementation Plan (UN: 30 September 2022) 6; See also Article 69 (4) of the Rome Statute which is like Common Rule 89 to the ICTY and ICTR.

⁴⁶⁶ UN (ibid) 4.

⁴⁶⁷ Gaelle B. Goff & Anne Saris, *Accessing the ICTR* (ICHRDD: 2000: 48).

⁴⁶⁸ See Goff & Saris (n 467) 47.

4.5.2. Inclusive Methods to Gather CRSV by Multiple Actors

The production of prosecution manuals by the ICTY and ICTR can serve as a valuable resource for informing current prosecutors and legal practitioners on important substantive and procedural aspects related to the investigation and prosecution of CRSV crimes.⁴⁶⁹ Amicus briefs for CRSV cases should address evidentiary challenges, such as admissibility and emerging technologies. They should also analyse the impact of different types of injuries on victims and witnesses, as seen in the *Kunarac* case before the ICTY.⁴⁷⁰ Amicus organizations can work with witnesses and contribute to the pool of evidence, but relying solely on legal articles is not enough to convince the court to allow intervention, as seen in the case at the ICTR. In the *Musema* case,⁴⁷¹ the ICTR emphasized the need for amicus briefs to pertain to a specific point of law and cited the example of African Concern's intervention, where reference to the entire Article 3 of the Geneva Convention without specifying the relevant grounds was not sufficient. Furthermore, the brief must pertain to a point that will be raised during the trial, and which relates to the indictment.⁴⁷² If result follows the cause, it is only the expert's viewpoint that has been gaining traction during the proceedings. The involvement of multiple actors in gathering evidence for CRSV cases in Ukraine highlights the importance of interdisciplinary approaches in justice systems. It also underscores the need for courts to be structured in a way that allows for the integration of diverse expertise and perspectives to ensure fair and comprehensive assessments of evidence.⁴⁷³

Multiple actors, including those under the legal regimes of international tribunals and the ICC, could share evidence and contribute to a crime-free international community in

⁴⁶⁹ See ICTR, *Prosecution of Sexual Violence Best Practices Manual for the Investigation and Prosecution of Sexual Violence in Post-Conflict Regions* (ICTR, 30 January 2014) para 89 <http://www.unictt.org/en/documents/best-practices-manuals-and-conference-reports> accessed 19 February 2023.

⁴⁷⁰ *Prosecutor v Kunarac et al*, ICTY-96-23Bc23/1, Trial Judgment (22 February 2001) paras. 549-43.

⁴⁷¹ ICTR-96-13-T.

⁴⁷² See also Geoff & Saris (n 467) 51.

⁴⁷³ This is based on my conversations with Catarina Krause and Elina during my presentation of Chapter 2 as a seminar paper on whether it is feasible to establish tribunals during active conflicts.

Ukraine. The presence of more evidence gatherers and legal experts helps address gender issues in the courts, as seen in the ICTY and ICTR, and is encouraged by the Ukrainian government. For example, ICTY and ICTR Prosecutor Goldstone, appointed a Legal Advisor for Gender Issues to specifically address CRSV issues related to Rwanda and the former Yugoslavia.⁴⁷⁴ Patricia Viseur Sellers was appointed as the Legal Advisor for CRSV at the ICTR and ICTY, with responsibilities including providing advice on gender-related crimes, developing legal strategies for sexual assault cases, and assisting in the investigation of evidence. She also addressed internal gender issues such as hiring and promotion.⁴⁷⁵ The corollary is that legal and non-legal experts can learn from each other to effectively address CRSV issues.

4.6. Addressing Remaining Challenges on Prosecuting CRSV during Conflict

4.6.1 The Challenge Relating to Misconceptions on CRSV Cases

While the ICC has benefitted from the ad hoc tribunals' experiences of prosecuting CRSV, some challenges remain. Michelle Jarvis and Kate Vigneswaran identify four major hurdles that still make it difficult to prosecute CRSV.⁴⁷⁶ The first misconception about CRSV is the belief that rape and other sexual violence are matters of honor rather than violent acts, which has been disproven by reports such as Human Rights Watch's report on how rape shattered lives in Rwanda.⁴⁷⁷ This point is buttressed by the point that modern ICL has moved away from an honour-based understanding of sexual violence, despite the approach taken by the 1949 Geneva Conventions. The second hurdle is that prosecutors should avoid creating hierarchies of crimes, such as placing murder at the pinnacle of preferred crimes,

⁴⁷⁴ UNSC, *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia Since 1991* (23 August 1995) UN Doc A/50/365-S/1995/728 (Report to the UNSC 1995) para 44.

⁴⁷⁵ Patricia Viseur Sellers, 'Gender Strategy is not a Luxury for International Courts Symposium: Prosecuting Sexual and Gender-Based Crimes Before Internationalized Criminal Courts' (2009) 17(2) *AUJ Gender Soc Pol & L* 301, 307.

⁴⁷⁶ Michelle Jarvis & Kate Vigneswaran, 'Challenges to Successful Outcomes in Sexual Violence Cases,' in Brammertz & Jarvis (n 264) 34.

⁴⁷⁷ Human Rights Watch, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (HRW September 1996) 2.

to prevent trivializing CRSV compared to other international crimes.⁴⁷⁸ The third misconception is to treat CRSV as a personal and opportunistic crime. This leads to qualitative analysis of CRSV crimes, disregard of patterns of CRSV, and usually leads framers of CRSV charges to overlook the need to curb impunity for such crimes.⁴⁷⁹ The fourth misunderstanding is that CRSV crimes can only be prosecuted if they are systematic and widespread in nature, making them a private crime not contextualized in terms of how perpetrators weaponize it.⁴⁸⁰ This is disproved by the fact that systematic nature of CRSV does not make it a private crime. In fact, the systematic use of sexual violence as a weapon of war highlights the need for accountability and prosecution of these crimes as international crimes. In this regard, the 2004 OTP training programme on sexual violence crimes included issues relating to whether rapes must be systematic or widespread to be charged. The 2004 OTP training program on sexual violence crimes was a crucial step towards the improvement of the International Criminal Court's (ICC) ability to prosecute sexual violence crimes. This program was developed by the Office of the Prosecutor (OTP) and involved training legal practitioners on how to collect and analyse evidence related to sexual violence crimes, as well as how to apply gender-sensitive investigative techniques.⁴⁸¹

Sexual violence includes, but is not limited to rape, including vaginal and anal penetration by a body part or an object, or oral penetration by a sexual organ, by both the perpetrator or the victim; threats and attempts of any form of rape or threats and attempts of other sexual assaults; female genital mutilation including mutilation of the vagina, labia, clitoris, mutilation of breast and nipples, male genital mutilation or amputation, or other types of violence directed at sexual organs; sexual slavery, including conjugal slavery or concubinage; sexual torture, including electrocuting genitals or pinching nipples, or being forced to watch a partner or child be sexually abused; forced prostitution; forced

⁴⁷⁸ Michelle Jarvis & Kate Vigneswaran (n 476) 36.

⁴⁷⁹ Michelle Jarvis & Kate Vigneswaran (n 476) 37.

⁴⁸⁰ Michelle Jarvis & Kate Vigneswaran (n 476) 40.

⁴⁸¹ ICC, OTP training program on sexual violence (ICC: 2004).

pregnancy; forced sterilization and forced abortion; and forced nudity.⁴⁸² It is surprising how the misconceptions on CRSV in relation to men largely emphasizes the mischaracterisation of rape charges on the basis that men cannot be raped.⁴⁸³ Misconceptions about CRSV crimes add to common problems such as reluctance to report due to threats, time constraints, and lack of resources, while different organizations' approaches may affect evidence collection.⁴⁸⁴ Prosecutors need to exercise their discretion impartially and prioritize cases based on the available resources and the nature of the crimes, especially in the context of conflict where the volume of criminal conduct far exceeds the capacity of any prosecution office.⁴⁸⁵ The ICTY created a PSV Working Group to address barriers to investigation, accountability, and prosecution for CRSV. These barriers include misconceptions about CRSV, lack of dialogue between international and domestic actors, and extensive case volumes.⁴⁸⁶ The corollary to the above is that other barriers such as time and resource pressures and hidden gendered assumptions should be linked to the strategies that consider the context and not just the massive nature or extent of the commission of CRSV crimes.

4.6.3. Ensuring *Amicus Curiae* Complements Victim Participation

Cases such as the *Rajic* case before the ICTY laid down the position if the *amici curiae* fails to comply with legal rules and institutional policy considerations they could be prevented from participating in the case.⁴⁸⁷ In the *Tadic* case before the ICTY, the *amicus curiae* was granted leave to intervene before the finality of the court decision, but their intervention was limited to certain specific issues and legal interests raised during the trial.⁴⁸⁸ There are many situations where *amicus* briefs make the mistake that results in casting aspersions on

⁴⁸² Sara Ferro Ribeiro and Danaé van der Straten Ponthoz, *International Protocol on the Documentation, and Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law* (UK Foreign and Commonwealth Office: 2019) 18.

⁴⁸³ Ibid: 42.

⁴⁸⁴ Ibid: 43.

⁴⁸⁵ Michelle Jarvis & Kate Vigneswaran (n 476) 46.

⁴⁸⁶ Michelle Jarvis & Kate Vigneswaran (n 476) 70-71.

⁴⁸⁷ IT-95-12-R61 (ICTY).

⁴⁸⁸ ICTY, IT-94-1-T.

amicus' competence to call witnesses.⁴⁸⁹ Successful outcomes in prosecuting conflict-related sexual violence require a multi-faceted approach that includes gender focal points, policy-making, careful strategy development, attention to gender considerations in hiring, resource prioritization, training, and persistence by OTP staff members, as demonstrated by Chief Prosecutors Goldstone, Arbour, Del Ponte, and Brammertz.⁴⁹⁰

While jurisprudence of ICTY and ICTR could guide ICC and *amicus* on submitting additional evidence⁴⁹¹ or make sure prosecutors submit motions to amend charges to include CRSV,⁴⁹² ICC should ensure complementary roles of *amicus* and victim participants are clarified. The ICC can clarify Article 68 (3) of the Rome Statute on victim participation. This could correct challenges where the ICC has allowed *amicus* who appear as victim representatives to access confidential materials while denying the actual victims to do so.⁴⁹³ With every corrective action, *amicus* at the ICC could be proactive in ensuring legal pleadings are properly filed including drawing from comparative jurisprudence. For instance, Human Rights Watch had its brief rejected because the ICTY formulated the opinion that the Rules of Procedure and Evidence allowed a full tribunal in special session alone to amend its Rules.⁴⁹⁴

4.8. Concluding Remarks

This chapter was guided by the research question on the potential role that *amicus curiae* can play in prosecuting CRSV cases in Ukraine. It took cognisance that Ukraine has not ratified the ICC Statute and is not a State Party. The ICC has jurisdiction on the territory of Ukraine since November 2013, when Ukraine temporarily accepted the court's jurisdiction.

⁴⁸⁹ See *Bagosora* case, ICTR-96-7-T.

⁴⁹⁰ Michelle Jarvis & Najwa Nabti, 'Policies and Institutional Strategies for Successful Sexual Violence Prosecutions,' in Brammertz, & Jarvis, (n 264) 73-74.

⁴⁹¹ See *Akayesu* case, ICTR-96-4-T.

⁴⁹² *Ibid.*

⁴⁹³ *Katanga and Ngudjolo Chui*, ICC-01/04-01/07, 22 January 2010, par 121ff where the ICC rejected the need to balance Article 68 (3) and Rule 77 of RPE on inspection of material in Prosecutor's possession.

⁴⁹⁴ See *Karadzic* case, it-95-5-R61 and *Mladic* case, IT-95-18-R61. See also *Bemba* case, ICC-01/09-01/11, where the ICC said victims are not parties and do not have self-standing rights to present evidence.

This could mean that the ICC can investigate and prosecute alleged CRSV crimes committed in Ukraine since November 2013, but only if the crimes are not already being investigated or prosecuted by the Ukrainian authorities. The ICC's exercise of jurisdiction is important considering concerns from scholars that its approach to CRSV should go beyond legalism and consider social and cultural contexts in which these crimes occur so that the root causes of CRSV are addressed.⁴⁹⁵ Furthermore, the ICC it is essential for understanding and addressing gender-based violence in Ukraine's conflict through previous investigated and prosecuted cases,⁴⁹⁶ so that marginalised groups such as women, and other sections of the society are protected.⁴⁹⁷ The ICC could use *amicus* to bypass government or political agenda so that CRSV perpetrators are held accountable regardless of political affiliation or status⁴⁹⁸

The proper use of the complementarity principle is critical to norm-building and awareness creation around CRSV in Ukraine.⁴⁹⁹ The ICC as a permanent court is best placed to deter perpetrators from committing CRSV crimes with impunity.⁵⁰⁰ *Amicus* can improve the ICC's commitment to fight immunity for CRSV at all costs, including through adopting feminist or other approaches.⁵⁰¹ The ICC is the best court to prosecute CRSV in Ukraine because it has expertise and resources to adopt a victim-centred approach that prioritizes

⁴⁹⁵ Carsten Stahn, 'The ICC and Crimes of Sexual Violence: Beyond Legalism?' in William Schabas & Nadia Bernaz (eds.) *Research Handbook on International Criminal Law* (Routledge: 2019) 510-532.

⁴⁹⁶ Chiseche S. Mibenge, 'Gender-based Violence in Ukraine's Conflict: Understanding Intersectionality and Systemic Failure,' 19 *International Criminal Law Review* (2017) 202-220, 203.

⁴⁹⁷ *Ibid.*

⁴⁹⁸ This however takes cognisance of the fact that political processes relating to the politicisation of the ICC by powerful states as well as the possible veto of the UNSC referral system might be difficult for the ICC at times.

⁴⁹⁹ Elena Baylis, 'Complementarity and the Use of Domestic Prosecutions in the Fight against Gender-Based Violence,' 13 *International Criminal Law Review* (2015) 929-953; Elena Baylis, 'Addressing Conflict-related Sexual Violence: An Overview of Recent Developments and Ongoing Challenges,' in Loveday Hodson & Troy Lavers (Eds.), *Feminist Judgments: Rewritten International Judgments* (Routledge: 2020) 105-128, 107.

⁵⁰⁰ See also Doris Buss, 'The ICC and the Deterrence of Sexual Violence in Armed Conflict,' 23 *Social & Legal Studies* (2014) 239-260.

⁵⁰¹ See for instance Valerie Oosterveld, 'Gender-based Crimes against Humanity: Listening to the Victims,' 31 *Leiden Journal of International Law* (2018) 561-581; Valerie Oosterveld, 'Reforming the ICC's Investigation and Prosecution of Sexual and Gender-based Crimes: A Feminist Proposal,' 19 *International Criminal Law Review* (2017) 173-201; Valerie Oosterveld, 'Prosecuting Conflict-related Sexual Violence at the International Criminal Court: The Limits of Law,' 27 *Leiden Journal of International Law* (2014) 729-747.

the needs and perspectives of survivors.⁵⁰² This ultimately promotes accountability and a sense of justice for survivors and their communities and can help to prevent future cycles of CRSV.⁵⁰³

⁵⁰² Ibid.

⁵⁰³ Susana SáCouto, 'Prosecuting Sexual Violence in National and International Courts,' in Marysia Zalewski & Emma Foster (eds.) *Sexual Violence against Men in Global Politics* (Routledge: 2020) 91-105.

Chapter 5

Overall conclusion

In conclusion, the combatting of impunity and the promotion of accountability for conflict-related sexual violence (CRSV) in Ukraine and other active conflicts require the active involvement of victims, their representatives, *amicus* representatives, presiding judges, and the International Criminal Court (ICC). The fulcrum of this argument is that the ICC and *amici* can promote the dignity, safety, and well-being of survivors and contribute to a more balanced implementation of policies aimed at combating CRSV in Ukraine and beyond.⁵⁰⁴ It is envisaged that by allowing *amicus*, the ICC and *amici* can consider multiple and intersecting identities of survivors of CRSV such as gender, ethnicity, and socio-economic status. This intersectional approach can help to address the specific or lived experiences and needs of marginalised groups.⁵⁰⁵ This would help to address root causes of CRSV by addressing structural and systemic factors that contribute to those factors such as gender equality, militarization, and impunity. This approach can promote long-term prevention of CRSV.⁵⁰⁶

The possible roles of *amicus* were shaped by the landmark admission by the Ukrainian government on its incapacity to investigate heinous crimes. This admission justified the need for the ICC to collaborate with national authorities to ensure that justice is done for survivors.⁵⁰⁷ This thesis was guided by four research questions which were interrogated in the four chapters discussed above. Chapter 1 showed that the accountability in combatting conflict-related sexual violence (CRSV) in Ukraine necessitates the integration of legal functionalism and transdisciplinarity in the thesis. By adopting a legal functionalist approach, the thesis recognizes the transformative potential of the ICC, emphasizing the

⁵⁰⁴ See for example, Valerie Oosterveld, 'The International Criminal Court and the Prosecution of Sexual and Gender-based Crimes in Conflict Situations,' 51 *Canadian Yearbook of International Law* (2014) 139-167; see also ICC, 'ICC Policy Paper on Sexual and Gender Based Crimes' (ICC: 2014).

⁵⁰⁵ *Ibid.*

⁵⁰⁶ Carsten Stahn, 'A New Introduction to the ICC Policy Paper on Sexual and Gender-Based Crimes,' 12 *Journal of International Criminal Justice* (2014) 1009-1031.

⁵⁰⁷ See Elena Baylis, 'From Cooperation to Complementarity: Strengthening National Justice Systems in the Rome Statute System,' 12 *Journal of International Criminal Justice* (2014) 975-992.

role of *amicus curiae* in providing expertise, guidance, and legal analysis to the ICC judges on the issue of sexual violence. Looking at the rampancy of impunity discussed in Chapter 2 and the various contributions from other actors discussed in Chapter 3 of this thesis, there is ample need for both the ICC and *amici* to provide protection and support to CRSV victims, survivors, and witnesses. This can encourage survivors to come forward and participate in the legal processes to combat impunity for CRSV.⁵⁰⁸ The ICC and *amici* can use survivor-centred evidence to address the challenges of gathering evidence in CRSV cases.⁵⁰⁹

Chapter 2, which delved into the rampancy of impunity for CRSV, holds significant importance in shaping the conclusion in this thesis. By examining the prevalence of impunity, the chapter highlighted the urgent need for accountability measures in addressing CRSV in active conflicts beyond Ukraine. It underscored the need for the international community to implement ICLs relating to CRSV. This discussion on impunity set the foundation for the thesis's central argument that the ICC, with the support of *amicus curiae*, could play a vital role in filling the accountability gap and ensuring that CRSV cases are properly prosecuted. Chapter 3, which focuses on the role of *amicus curiae* in criminal proceedings, was crucial in justifying the distinction between *amicus curiae* intervention and victim participation, highlighting their distinct roles and contributions to the pursuit of justice in CRSV cases. The examination of *amicus curiae*'s role in Chapter 3 acknowledges the potential drawbacks, such as the risk of procedural complications and the need to balance the rights and interests of all parties involved. This nuanced understanding of *amicus curiae*'s role informs the conclusion by emphasizing the importance of their involvement in conjunction with victim participation procedures. While the ICC's victim participation procedures are crucial in ensuring the voices and experiences of survivors are heard, Chapter 3 underscores the complementary nature of *amicus curiae* interventions.

⁵⁰⁸ See Susana SáCouto, 'The International Criminal Court and Victim Participation in Practice: Assessing Progress,' 12 *Journal of International Criminal Justice* (2014) 1053-1078.

⁵⁰⁹ See Doris Buss, 'Evidence in Sexual and Gender-based Violence Cases: Innovations from the International Criminal Court,' 10 *International Journal of Law in Context* (2014) 97-116.

Chapter 4, which explores the potential roles of *amicus curiae* in Ukraine, holds significant importance in addressing the question of whether *amicus* is needed despite the well-developed victim participation procedures in the ICC. By examining the specific context of Ukraine and its national courts, this chapter sheds light on the unique challenges and dynamics of prosecuting CRSV cases in the country. Furthermore, the chapter's exploration of Ukraine's national courts helps identify specific challenges and limitations within the domestic justice system. This chapter could build from the use of *amicus* as victim representatives. This use would be important considering that Rule 91 of the ICC RPE allows the victims' legal representatives to also question other expert actors in issues that affect their personal interests.

Institutionally, the ICC has adopted policies on CSRV that are either strictly unique or tap from the experiences and suggestions of ICTY, ICTR, *amici* and legal critics. Outreach awareness can support these policies and help address stigma, myths, and misconceptions around CSRV and can empower survivors to seek justice⁵¹⁰ and can contribute to the recognition of harm caused by CSRV and can prevent future crimes.⁵¹¹ The importance of engaging with victims and survivors is well-established.⁵¹² *Amicus* can collaborate with CSOs working on CSRV in Ukraine. The role of CSOs in advocacy and policy development is widely recognized.⁵¹³ *Amicus* work can increase public legitimacy on the ICC's fight against impunity for CSRV and can exploit the role of media in this regard.⁵¹⁴ There still a need to monitor progress in the ICC and other international criminal

⁵¹⁰ See Oosterveld (n 559).

⁵¹¹ See Chiseche S. Mibenge, 'Gender, Intersectionality, and the International Criminal Court: The Kenyan Situation.' 12 *Journal of International Criminal Justice* 1033-1052.

⁵¹² See for instance, Sladjana Vukovic & Ewa Siewierska, 'Who is the Victim? The Politics of Victimhood in Post-1990s Serbia.' 32 *East European Politics* (2012) 90-109; David Finkelhor, 'Characteristics of Crimes against Juveniles.' 1 *Juvenile Justice Bulletin* (2012) 1-12.

⁵¹³ See for example, Jelena Dzankic, 'Civil Society and Democracy Promotion in the Western Balkans.' 15 *Journal of Civil Society* (2019) 1-18; Michael Edwards & David Hulme, 'Too Close for Comfort? The Impact of Official Aid on NonGovernmental Organizations.' 24 *World Development* (1996) 961-973.

⁵¹⁴ See for example, Brian McNair, *An Introduction to Political Communication* (Routledge: 2017); Manuel Castells, *Networks of Outrage and Hope. Social Movements in the Internet Age* 8 (John Wiley and Sons: 2015).

institutions in devising ways to combat international crimes and holding perpetrators to account.⁵¹⁵

Holding perpetrators accountable sends a strong message that CRSV is not tolerated, and impunity will not be allowed to persist.⁵¹⁶ For *amicus* and its role to promote perpetrator accountability in real time during active conflicts *amicus* can work with NGOs to help collect evidence and document crimes as they occur, as well as establishing specialised units within law enforcement agencies to investigate these crimes.⁵¹⁷ By implementing these measures, *amicus* could promote justice, accountability, and the rights of survivors to truth, effective remedy and justice.⁵¹⁸ This could also uphold the rights of CRSV victims in Ukraine and promoting accountability for perpetrators.⁵¹⁹ As a result, the discussion of *amicus curiae*'s possible roles in Ukraine took cognisance of concerns from ICC judges that measures adopted during trial should appreciate that victims may not be neutral but should also not be alienated from the criminal proceedings.⁵²⁰

From the foregoing discussion, the primary aim revolved around investigating the effectiveness of the ICC in prosecuting individuals responsible for CRSV in Ukraine. The overarching research question aimed at exploring the extent to which the ICC succeeds in holding perpetrators accountable for CRSV. To provide a comprehensive analysis, the

⁵¹⁵ See UNSC, *Report of the Secretary-General on Conflict-Related Sexual Violence*, S/2010/604 (UN: 2010); UN, *Report of the Secretary-General on Conflict-Related Sexual Violence*, S/2017/249 (UN: 2017); UN, *Report of the Secretary-General on Conflict-Related Sexual Violence*, S/2020/487 (UN: 2020).

⁵¹⁶ See for example, Megan Burke., Shane arcy & John Williams, *The International Criminal Court and Africa: One Decade On* (Routledge: 2015); Anne.Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence*; Marsha A. Freeman , 'International Criminal Justice for Women: The International Criminal Court and Gender-related Crimes against Women.' 18 *Indiana Journal of Global Legal Studies* (2011) 237-258; Vladmir Sekulovic, 'The International Criminal Court and the Challenges of Prosecuting Sexual and Gender-based Violence Crimes.' 15 *European Journal of Criminology* (2018) 736-753.

⁵¹⁷ See ICTY, 'Sexual Violence' <<https://www.icty.org/en/about/sexual-violence>> accessed 11 March 2023; ICC, 'The ICC'S Policy Paper on Sexual and Gender-based Crimes (ICCOTP: 2014).

⁵¹⁸ See the UNSC Resolution 1820 on Sexual Violence in Conflict (UNSC: 2008) which calls for increased efforts to prevent and respond to CRSV and to ensure accountability for perpetrators. See also the UN's Guiding Principles on Business and Human Rights (UN: 2011) on the need for effective remedies for victims of human rights abuses, including CRSV.

⁵¹⁹ See further UN, *Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (UN: 2005) which outline the right to effective remedy and reparation for CRSV.

⁵²⁰ Van den Wygaert (n 337) 488.

research problem primarily centres on evaluating the benefits and drawbacks of *amicus curiae* participation in comparison to victim participation. The degree of difficulty in addressing this research problem is high, as it requires an intricate examination of legal dogmatism and legal functionalism, while ensuring the inclusion of diverse source materials and their critical evaluation. The methodology employed combines legal dogmatism and legal functionalism, ensuring a holistic approach from the initial chapters to scenario mapping in chapter 4. Through thorough evaluation and analysis of the results, the thesis provided a comprehensive understanding of the research questions and successfully fulfilled its overarching aim.

Bibliography

Monographs and Articles

- Acevedo Juan Pablo Perez Leon, *Victims Status at International and Hybrid Criminal Courts: Victims' Status as Witnesses, Victim Participants/ Civil Parties and Reparations Claimants* (Abo Akademi University 2014).
- Albrecht Hans-Jorg & Levy, Sharon, 'Critical Criminology and Restorative Justice: Contributions to a More Transformative Victimology.' *Critical Criminology* (2013) 301-318.
- Altunjan, Tanja, 'The International Criminal Court and Sexual Violence: Between Aspirations and Reality,' *German Law Journal*, 22 (5), 878-893 (2021).
- Ashworth, Andrew, 'Some Doubts About Restorative Justice,' *Criminal Law Forum* (1993) 281-282, 296, 4 (2).
- Askin, K. Dawn, 'One Small Step for Women: Female Provisions in the Rome Statute of the International Criminal Court' (2002) 16 *BYU J Pub L* 317, 323– 4.
- Askin, K.D, 'Comfort women – shifting shame and stigma from victims to victimizers,' *International Criminal Law Review* 1 (2001), 5–32, 1.
- Aust, Anthony, *Modern Treaty Law and Practice* (Cambridge University Press, 2008).
- Baig, Laurel, Jarvis, Michelle, Salgado M. Elena, & Pinzauti, Giulia, 'Contextualising Sexual Violence,' in Serge Brammertz & Michelle Jarvis (eds), *Prosecuting Conflict-related Sexual Violence at the ICTY* (Oxford University Press, 2016).
- Bartholomeusz, L, 'The Amicus Curiae before International Courts and Tribunals,' *Non-State Actors & International Law* (2005), 5, p. 209.
- Baylis, Elena, 'Addressing Conflict-related Sexual Violence: An Overview of Recent Developments and Ongoing Challenges,' in Loveday Hodson & Troy Lavers (eds), *Feminist Judgments: Rewritten International Judgments* (Routledge, 2020).
- Baylis, Elena, 'Complementarity and the Use of Domestic Prosecutions in the Fight against Gender-Based Violence,' *International Criminal Law Review* (2015) 929-953, 13.

- Baylis, Elena, 'From Cooperation to Complementarity: Strengthening National Justice Systems in the Rome Statute System,' *Journal of International Criminal Justice* (2014) 975-992, 12.
- Bearpark, Andy and Schulz, Sabina, 'The Private Security Challenge in Africa: Problems and Options for Regulation' in Sabelo Gumedze (ed), *Private Security in Africa: Manifestation, Challenges and Regulation* (2007).
- Benninger-Budel, Carin & Lacroix, Anne-Laurence, *Violence against Women: A Report* (World Organization against Torture, 1999).
- Boas, Gideon, Bischoff L. James & Reid, L. Natalie, *Elements of Crime under International Law* (Cambridge University Press, 2008).
- Bone, Robert G, 'Party Rulemaking: Making Procedural Rights through Party Choice,' *Tex L. Review* (2012) 1329, 1384-5, 90.
- Boutros-Ghali, Boutros, *An Agenda for Peace: Preventive Diplomacy, Peace-making, and Peace-keeping* (United Nations, 1992).
- Brammertz, Serge, & Jarvis, Michelle, *Prosecuting Conflict-related Sexual Violence at the ICTY* (Oxford University Press, 2016).
- Brownlie, *System of the Nations: State Responsibility, Part 1* (Clarendon Press, Oxford, 1983).
- Brownmiller, S, *Against Our Will: Men, Women, and Rape* (Ballentine, 1975).
- Buss, Doris, 'The Foca Case: The International Criminal Tribunal for the former Yugoslavia and the Fight against Impunity for Rape as a War Crime,' *Human Rights Quarterly* (2002) 853-908, 24.
- Buss, Doris, 'The ICC and the Deterrence of Sexual Violence in Armed Conflict,' *Social & Legal Studies* (2014) 239-260, 23.
- Buss, Doris, 'Evidence in Sexual and Gender-based Violence Cases: Innovations from the International Criminal Court,' *International Journal of Law in Context* (2014) 97-116, 10.
- Campbell, Kirsten, 'The Gender of Transitional Justice: Law, Sexual Violence and the ICTY,' *IJTJ* (2007) 411-432, 425.
- Card, Richard, Gillespie, Alasdair, & Hirst, Michael, *Sexual Offences* (Jordans, 2008).

- Chinkin, Christine, 'Gender-related violence and international criminal law and justice,' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009).
- Coker, Christopher, *War in an Age of Risk* (Cambridge University Press, 2009).
- Collins Jr, Paul M, 'Friends of the Court: Examining the influence of amicus curiae participation in the Supreme Court Litigation,' *Law and Society Review* (2004) 807, 38 (4).
- Crawford, James, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (Cambridge University Press, 2002).
- Crawford, James & Olleson, Simon, 'The Nature and Forms of International Responsibility,' in Malcolm D. Evans (ed), *International Law (2nd ed, Oxford University Press, 2006)*.
- Crawford, James & Watkins, Jeremy, 'International Responsibility,' in Samantha Besson & John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010).
- Crawford, James, Pellet, Alain & Olleson, Simon, 'Preface' in James Crawford, Alain Pellet, & Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press, 2010).
- Collins, Paul M, *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (Oxford University Press, 2008).
- Cresswell, W. John, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (Sage, 2014).
- Creutz Katja, *Transnational Privatised Security and the International Protection of Human Rights* (ECIRR, 2006).
- Cryer, Robert, *Prosecuting International Crimes: Selectivity and the International Criminal Regime* (Cambridge University Press, 2005).
- Csaky, C, *No One to Turn To: The Under-Reporting of Child Abuse by Aid Workers and Peacekeepers* (Human Rights Watch, 2013).
- Davis Kevin. E & Hershkoff, Helen, 'Contracting for Procedure,' *Wm & Mary L Rev* (2011) 507, 53.

- de Brouwer, Annie-Marie, 'Reparations to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and their Families,' *Leiden Journal of International Law*, 30, 207.
- De Brouwer, Anne-Marie, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Intersentia, 2005).
- De Brouwer, Anne-Marie, and Heikkilä, Mikaela, 'Victim Issues: Participation, Protection, Reparation, and Assistance,' in Sluiter et al (Eds.) *International Criminal Procedure: Principles and Rules* (2013).
- De Brouwer, Anne-Marie, and Groenhuijsen, Marc, 'The Role of Victims in International Criminal Proceedings,' in Göran Sluiter & Sergey Vasilev (eds.) *International Criminal Procedure: Towards a Coherent Body of Law* (Cameron May, 2009).
- Dersso, Solomon A., *Promotion of Human Security in Africa: The Role of African Human Rights Institutions* (ISS, 2008).
- Dickson, Rodney, 'Article 7: Crimes against Humanity' in Otto Triffterer (Ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden, 1999).
- Di Rattalma, Marco Frigessi, 'NGOs before the European Court of Human Rights: Beyond Amicus Curiae Participation?' in Tullio Treves et al. (Eds), *Civil Society, International Courts, and Compliance Bodies*, (2005).
- Dignan James & Cavadino, Michael, 'Towards a Framework for Conceptualising and Evaluating Models of Criminal Justice from a Victim's Perspective,' 4 *International Review of Victimology* (1996) 153-182, 156.
- Drumbl, Mark, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity.' 99 *Northwestern University Law Review* (2005).
- Dzankic, Jelena, 'Civil Society and Democracy Promotion in the Western Balkans.' 15 *Journal of Civil Society* (2019) 1-18.
- Edwards Michael & Hulme, David, 'Too Close for Comfort? The Impact of Official Aid on Non-Governmental Organizations.' 24 *World Development* (1996) 961-973.
- Elias, T. O. & Elias, C. N., 'An Overview of International Criminal Law,' in Cherif M. Bassiouni (ed), *International Criminal Law* (Transnational Publishers, 2003).

- Engström, Viljam; Heikkilä Mikaela & Mustaniemi-Laakso, Maija, 'Vulnerabilisation: Between mainstreaming and Human Rights Reach,' *Netherlands Quarterly of Human Rights*, Vol. 40 (2) 118-136, 120.
- Enloe, Cynthia, 'Afterword: Have the Bosnian Rapes Opened a New Era of Feminist Consciousness?' in Alexandra Stiglmayer (ed.), *Mass Rape: The War Against Women in Bosnia and Herzegovina* (University of Nebraska Press, 1994).
- Evans, Malcolm D., *International Law* (2nd ed, Oxford University Press, 2006).
- Evans, Malcolm D., *The Responsibility of States for International Crimes* (Oxford University Press, 2000).
- Fallah, Katherine, 'Regulating Private Security Contractors in Armed Conflicts' in Sabelo Gumedze (ed.), *Private Security in Africa: Manifestation, Challenges and Regulation* (2007).
- Fatic, Alexandar, *Reconciliation via the War Crimes Tribunals?* (Ashgate, 2000).
- Ferguson, Jonathan and Jenzen-Jones, N.R., *Raising Red Flags: An Examination of Arms and Munitions in the Ongoing Conflict in Ukraine* (Armament Research Services, 2014).
- Findlay, Mark, *The Globalization of Crime* (Cambridge University Press, 2009).
- Fuller, L. Lon, *The Morality of Law* (New Haven: Yale University Press, 1964).
- Fuller, Lon L, 'The Forms and Limits of Adjudication,' 92 *Harv L. Review* (1978) 353.
- Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press, 2015).
- Gloria Gaggioli, 'Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law' *International Review of the Red Cross* (2014), 96 (894), 503–538, 506.
- Goldstone, Richard, 'A View from the Prosecution' (2004) 2 *JICJ* 380, 382.
- Goldstone, Richard, 'The International Tribunal for the former Yugoslavia: A Case Study in Security Council Action' (1995) 6 *Duke J Comp & Intl L* 5, 8.
- Goldstone, Richard, 'Prosecuting Rape as a War Crime' (2002) 34 *Case W Res JIL* 277, 280.

- Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press, 2015).
- Grahn-Farley, Maria 'The Politics of Inevitability: An Examination of Janet Halley's Critique of the Criminalization of Rape as Torture' Law' in Sari Kuovo & Zoe Pearson (eds.) *Feminist Perspectives on Contemporary International Law: between Resistance and Compliance* (Hart Publishing, 2011).
- Grans, Lisa, 'Honor-related Violence and Children's Right to Physical and Psychological Integrity,' *Nordic Journal of Human Rights*, 2017, Vol.1 (2), 146-161, 148.
- Halley, Janet, Prabha Kotiswaran, Rachel Rebouché, Hila Shamir, *Governance Feminism: An Introduction* (University of Minnesota Press, 2018).
- Harbour, Grace, 'International Concern Regarding Conflict-related Sexual Violence in the Lead-up to the ICTY's Establishment' in Serge Brammertz and Michelle Jarvis, *Prosecuting Conflict-related Sexual Violence at the ICTY* (Oxford University Press, 2016).
- Heikkilä, Mikaela, *Coping with International Atrocities through Criminal Law* (Åbo Akademi, 2013).
- Heikkilä, Mikaela, *International Criminal Tribunals and Victims of Crime* (Åbo Akademi University Press, 2004).
- Heikkilä Mikaela & Mustaniemi-Laakso, Maija, 'Vulnerability as a Human Rights Variable: African and European Developments,' *20 African Human Rights Law Journal*, 777-798, 778.
- Heller, K. Jon, 'The Prosecutor's Role in Plea Bargaining at the International Criminal Court' in Carsten Stahn and Mohamed M. EL Zeidy, *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press, 2011).
- Hessbruegge, J. Arno, 'The Historical Development of the Doctrine of Attribution and Due Diligence in International Law,' *36 New York University Journal of International Law & Politics* (2004) 265-306, 289.
- Henham, Ralph, 'Evaluating Sentencing as a Force for Achieving Justice in International Criminal Law Trials' in Ralph Henham and Mark Findlay (eds), *Exploring the Boundaries of International Criminal Justice* (Ashgate, 2011).
- Hussein, Zeid, 'Foreword' in Serge Brammertz and Michelle Jarvis, *Prosecuting Sexual Related Violence at the ICTY* (Oxford University Press, 2016).

- Innola, Eeva & Pynnöniemi, Katri, 'Finland and Russia's Metanarratives on the conflict in Ukraine,' in Katri Pynnöniemi & András Rácz (eds.) *Fog of Falsehood: Russian Strategy of Deception and the Conflict in Ukraine* (FIIA: 2016).
- Jarvis, Michelle, 'Overview: The Challenge of Accountability for Conflict-related Sexual Violence' in Serge Brammertz and Michelle Jarvis, *Prosecuting Conflict-related Sexual Violence at the ICTY* (Oxford University Press, 2016).
- Jarvis, Michelle and Nabti, Najwa, 'Policies and Institutional Strategies for Successful Sexual Violence Prosecutions' in Serge Brammertz and Michelle Jarvis, *Prosecuting Conflict-related Sexual Violence at the ICTY* (Oxford University Press, 2016).
- Jarvis, Michelle and Vigneswaran, Kate, 'Challenges to Successful Outcomes in Sexual Violence Cases' in Serge Brammertz and Michelle Jarvis, *Prosecuting Conflict-related Sexual Violence at the ICTY* (Oxford University Press, 2016).
- Johnson, Douglas, M, 'Functionalism in the Theory of International Law,' 26 *Canadian Yearbook of International Law* (1988) 3-60, 9.
- Joutsen, Matti, *The Role of the Victim of Crime in European Criminal Justice Systems: A Cross-sectional Study of the Role of Victim* (Helsinki University, 1987).
- Karmen, Andrew, *Crime Victims: An Introduction to Victimology* (Brooks/Cole Publishing Company, 1984).
- Kelsen, Hans, *Principles of International Law* (Clark, New Jersey, 1959).
- Kent Avidan & Trinidad, Jamie, 'The Management of Third-Party Amicus Participation before International Criminal Tribunals: Juggling Efficiency and Legitimacy,' 17 *International Criminal LR* (2017) 728, 740-5.
- Kesić, Vesna, 'Muslim Women, Croatian Women, Serbian Women, Albanian Women...' in Dusan Bjelic and Obrad Savic (eds), *Balkan as Metaphor* (Cambridge, MA, and London: Massachusetts Institute).
- Kirk, Jerome and Miller, Marc L., *Reliability and Validity in Qualitative Research* (Sage Publications, 1986).
- Klabbers, Jan, *International Law* (Cambridge University Press, 2013).
- Koos, Carlo, 'Sexual violence in armed conflicts: research progress and remaining gaps' (2017) *Third World Quarterly* 38 (1) 1-17, 1.

- Lakomy, Miron, 'The Game of Ukraine: Conflict in Donbass as an Outcome of the Multilayered Rivalry.' 45 *Politeja* 6 (2016): 280-315, 282.
- Lansdown, Gerison, *The Evolving Capacities of the Child* (UNICEF Innocenti Research Centre, 2005).
- Laucci, Cyril, *The Annotated Digest of the International Criminal Court* (Martinus Nijhoff Publishers, 2006).
- Legkowe, Gosego R. Third Party Intervention at the International Court of Justice: Challenges and Prospects (2012) *SSRN Electronic Journal*.
- Lilly, J., *Taken by Force – Rape and American GIs in Europe during World War II* (Palgrave Macmillan, 2007).
- Linderfalk, Ulf, 'The Functionality of Conceptual Terms in International Law and International Legal Discourse,' 6 *EJLS* (2014) 27-50, 35.
- Linderfalk, Ulf, *om tolkning av traktater* (Lund Universitet, 2001).
- Luban, David, 'The Trial of Adolf Eichmann: Retributive and Restorative Justice,' in Mark Osiel (ed), *Post-Genocide: Justice and Reconstruction* (Transnational Publishers, 2000).
- Mälksoo, Lauri, 'State Responsibility and the Challenge of the Realist Paradigm: The Demand of Baltic Victims of Soviet Mass Repressions for Compensation from Russia,' 3 *Baltic Yearbook of International Law* (2003) 57-76, 61.
- Massida, Paolina, 'Foreword' in Markus T. Funk, *Victim's Rights and Advocacy at the International Criminal Court* (Oxford University Press, 2010).
- Mayer, L. Hitoshi, 'NGO Standing and Influence in Regional Human Rights Courts and Commissions,' 36 *Brooklyn Journal of International Law* (2011) 911.
- Menon, Rajan and Rumer, Eugene, *Conflict in Ukraine: The Unwinding of the Post-Cold War Order* (Boston, 2015).
- Mertus, Julie, 'When Adding Women Matters: Women's Participation in the International Criminal Tribunal for the Former Yugoslavia' (2008) 38 *Seton Hall LR* 1297, 1300.
- Mcintyre, Gabrielle, 'Testing the Legitimacy, Consistency and Credibility of the International Criminal Court,' 1 *QILJ* (2014) 25-57, 27.

- Mibenge, S. Chiseche, 'Gender-based Violence in Ukraine's Conflict: Understanding Intersectionality and Systemic Failure,' 19 *International Criminal Law Review* (2017) 202-220, 203.
- Mibenge, S. Chiseche, 'Gender, Intersectionality, and the International Criminal Court: The Kenyan Situation,' 12 *Journal of International Criminal Justice* 1033-1052.
- Mlambo-Ngcuka, Phumzile, 'Foreword' in Serge Brammertz and Michelle Jarvis, *Prosecuting Sexual Related Violence at the ICTY* (Oxford University Press, 2016).
- Moffet, Luke, *Justice for Victims before the International Criminal Court* (Routledge, 2014).
- Mohamedou, Mohamad-Mahmoud Ould, 'The Nature and Characteristics of Contemporary Armed Conflict' in The Netherlands Red Cross, *Protecting Human Dignity in Armed Conflict* (The Hague, 2007).
- Moir, Lindsay, 'International Responsibility and Liability for Adverse Effects of Vaccines,' in Samuel P. Flogel & Holger P. Hestermeyer (eds), *German Yearbook of International Law* (Springer, 2015).
- Morris, Virginia and Scharf, P. Michael, *The International Criminal Tribunal for Rwanda, Volume 1* (Transnational Publishers, 1995).
- Mubangizi John C. & Mbazira, Christopher, 'Constructing the Amicus Curiae Procedure in Human Rights Litigation: What Can Uganda Learn from South Africa,' 16 *L. Democracy & Dev.* 199, 200 (2012).
- Niarchos, Catherine, 'Women, War and Rape,' *Human Rights Quarterly*, 17(4) (1995) 649–690.
- Nilsson, J., 'Crimes against humanity,' in A. Cassese, P. Gaeta & J.R.W.D. Jones (Eds.), *The Rome Statute of the International Criminal Court: a commentary* (Oxford University Press, 2009).
- Norrie, Alan, 'Simulacra of Morality?' Beyond the Ideal/ Actual Antinomies of Criminal Justice,' in Antony Duff (ed.), *Philosophy and Criminal Law: Principle and Critique* (Cambridge University Press, 1998), 101-155, 114.
- Nsereko, D.N. Daniel, 'Ethical Obligations of Counsel in Criminal Proceedings: Representing an Unwilling Client,' 12 (4) *Criminal Law Reform* (2001) 487-507, 506.

- Orie, Alphons, 'Accusatorial v. Inquisitorial Approach in International Proceedings Prior to the Establishment of the ICC and in the Proceedings before the ICC,' in Antonio Cassese, Paola Gaeta & John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University, 2002).
- Oosterveld, Valerie, 'Gender-based Crimes against Humanity: Listening to the Victims,' 31 *Leiden Journal of International Law* (2018) 561-581.
- Oosterveld, Valerie, 'Reforming the ICC's Investigation and Prosecution of Sexual and Gender-based Crimes: A Feminist Proposal,' 19 *International Criminal Law Review* (2017) 173-201.
- Oosterveld, Valerie, 'Prosecuting Conflict-related Sexual Violence at the International Criminal Court: The Limits of Law,' 27 *Leiden Journal of International Law* (2014) 729-747.
- Oosterveld, Valerie, 'The International Criminal Court and the Prosecution of Sexual and Gender-based Crimes in Conflict Situations,' 51 *Canadian Yearbook of International Law* (2014) 139-167.
- Oppenheim, Lassa, L.F., 'The Science of International Law: Its Task and Method' (1908) 2 *AJIL* 313, 314.
- Osiel, Mark, 'The International Tribunal for the former Yugoslavia: Balancing Justice and Realpolitik,' 90 *American Journal of International Law* (1996) 305-327.
- Power, S., *A Problem from Hell: America and the Age of Genocide* (Basic Books, 2002).
- Public Law Project, *Third Party Interventions: A Practical Guide* (PLP, 2008).
- Rabinovych, Maryna, 'The Domestic Dimension of Defining Uncontrolled Territories and Its Value for Conflict Transformation in Moldova, Georgia, and Ukraine,' in Hannah Shelest & Maryna Rabinovych (Eds.), *Decentralisation, Regional Diversity, and Conflict: The Case of Ukraine* (Palgrave MacMillan, 2020).
- Rattalma, M. Frigessi, 'NGOs Before the European Court of Human Rights: Beyond Amicus Curiae Participation?' in Tullio Treves et al (Eds), *Civil Society, International Courts, and Compliance Bodies* (2005).
- Ribeiro, Ferro and van der Straten, Ponthoz, Danaé, *International Protocol on the Documentation, and Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law* (UK Foreign and Commonwealth Office: 2019).

- SáCouto, Susana, 'Prosecuting Sexual Violence in National and International Courts,' in Marysia Zalewski & Emma Foster (eds.), *Sexual Violence against Men in Global Politics* (Routledge, 2020).
- SáCouto, Susana, 'The International Criminal Court and Victim Participation in Practice: Assessing Progress,' 12 *Journal of International Criminal Justice* (2014) 1053-1078.
- SáCouto, Susana, 'Transitional Justice, and Accountability for Sexual Violence: The Case of Bosnia and Herzegovina,' in Dyan Mazurana, Angela Raven-Roberts & Jane Parpart (eds.), *Gender, Conflict and Peacekeeping* (Rowan & Littlefield, 2005).
- Schabas, A. William, *An Introduction to the International Criminal Court*, 5th ed. (Cambridge University Press, 2021).
- Schabas, A. William, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010).
- Schabas, A. William, *An Introduction to the International Criminal Court*, 4th ed. (Cambridge University Press, 2010).
- Schabas, William A., *An Introduction to the International Criminal Court* (Cambridge University Press, 2007).
- Schabas, William A., 'The Ad Hoc Tribunals and the Promotion of International Justice,' 1 *Journal of International Criminal Justice* (2003) 1-22, 1.
- Scheffer, David, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012).
- Schiff, N. Benjamin, *Building the International Criminal Court* (Cambridge University Press, 2008).
- Schmitt, Michael N., *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge University Press, 2017).
- Schomburg, Wolfgang, and Peterson, Ines, 'Genuine Consent to Sexual Violence under International Criminal Law,' *AJIL*, 101 (2007) 121-140.
- Scott, Craig T., *Defending the Defenders: Developing a Legal Framework for the Protection of Human Rights Defenders* (Brill/Nijhoff, 2016).
- Seifert, Ruth, 'War and Rape: A Preliminary Analysis' (1994).

- Seto, Donna, *No Place for a Wartime Baby: The Global Politics of Children Born of Wartime Sexual Violence* (Routledge, 2013).
- Sharatt, Sara, 'Interview with Gabrielle Kirk McDonald President of the International Criminal Tribunal for the former Yugoslavia,' in Sara Sharrat & Ellyn Kaschak (eds), *Assault on the Soul: Women in the Former Yugoslavia* (Routledge, 2013).
- Shelton Dinah, "The participation of Nongovernmental Organizations in International Judicial Proceedings", 88 *American Journal of International Law* (1994), pp. 611-642.
- Sir Nigel Rodley, 'Civil and Political Rights' in Catarina Krause and Martin Scheinin (eds), *International Protection of Human Rights: A Textbook* (Abo Akademi University Institute for Human Rights, 2012), 118.
- Skouteris, Thomas, 'The Force of a Doctrine: Article 38 of the Permanent Court of International Justice Statute and the Sources of International Law' in Fleur Johns, Richard Joyce, and Sundhya Pahuja (eds), *Events: The Force of International Law* (Routledge, 2011).
- Smeulers, Allette & Grünfeld, Fred, *International Crimes, and other Gross Human Rights Violations: A multi- and Interdisciplinary Textbook* (MNP, 2011).
- Stahn, Carsten, 'The ICC and Crimes of Sexual Violence: Beyond Legalism?' in William Schabas & Nadia Bernaz (eds.), *Research Handbook on International Criminal Law* (Routledge, 2019).
- Tänase, Alexander & Papuashvili, George, *Amicus Curiae Concept in Modern Justice* (OSCE, 2022).
- Tladi A. Dapo & Werle, Gerhard, 'The Amicus Curiae before the International Criminal Court: Revisiting an Old Friend,' 4 *Journal of Transitional Justice* (2010) 442-468.
- Viljoen Frans & Abebe, Adem Kassie, 'Amicus Curiae Participation before Regional Human Rights Bodies in Africa,' 58 *J. AFR. L.* 22, 24 (2014).
- Viseur Sellers, Patrick, 'Prosecuting International Crimes: An Inside View: Intentional Prosecution of Sexual Assaults' (1997) 7 *Transnat L & Contemp Probs* 45.
- Vukovic Sladjana & Siewierska, Ewa, 'Who is the Victim? The Politics of Victimhood in Post-1990s Serbia.' 32 *East European Politics* (2012) 90-109.

- Webley, Lisa, 'Qualitative Approaches to Empirical Legal Reasoning,' in Peter Cane and Herbert Kritzer (eds.), *Oxford Handbook of Empirical Legal Reasoning* (OUP, 2010).
- Werle, Gerhard, *Principles of International Criminal Law* (2005).
- Wiik, Astrid, *Amicus Curiae before International Courts and Tribunals* (Nomos, Hart Publishing, 2018).
- Williamson, Jamie, 'Private Security Companies and Private Military Companies under International Humanitarian Law' in Sabelo Gumedze (ed), *Private Security in Africa: Manifestation, Challenges and Regulation* (2007).
- Williams S. and Woolaver, H, 'The Role of the Amicus Curiae before International Criminal Tribunals', 6 *International Criminal Law Review* (2006), pp. 151-189.
- Williams, A. Sharon, 'Sexual Violence and the ICTY: The Challenges of Prosecuting Sexual Violence Crimes in Armed Conflicts,' 6 *Journal of International Criminal Justice* (2008) 979-1006.
- Williamson, Jamie, 'Command Responsibility in the Case Law of the International Criminal Tribunal for Rwanda (2002) 13 *Criminal Law Forum*, 365-384, 383.
- Wolf, Christian, *Jus Gentium Methodo Scientifica Pertractum*, 1764 (1st published 1750, trans, Joseph H. Drake, 1995).
- Wood, E.J, *Cry Freedom* (Paddington Press, 2010).
- Wyngaert Van den Christine, 'Reflections on Victim Participation at the ICC,' 44 *Case W. Res, J. Int' L* (2011) 476.
- Wyngaert, Christine Van Den, 'The Role of Plea Bargaining in International Criminal Justice,' in Martha Minow, Catarina Börjesson, & Parvathi Menon (eds.), *The Role of the Prosecutor in the International Criminal Justice System* (Oxford University Press, 2003).
- Yekelchyk, Serhy, *The Conflict in Ukraine: What Everyone Needs to Know* (Oxford University Press, 2015).
- Zimmermann, Andreas, 'Preliminary Remarks on para.2 (c) - (f) and para 3' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden, 1999).

Zyberi, Gentian, *International Criminal Procedure Law: From Nuremberg to Rome* (University of Oslo: 2015).

Treaties and Statutes

Additional Protocol I to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts, adopted 8 June 1977, entry into force 7 December 1979.

Additional Protocol II to the Geneva Conventions relating to the Protection of Victims of non-international Armed Conflicts, adopted 8 June 1977, entry into force 7 December 1978.

African Court of Justice and Human Rights' Statute, adopted 1 July 2008.

Africa Union Constitutive Act, adopted 11 July 2000, entry into force 26 May 2001.

Charter of the International Military Tribunal for the Far East Charter ('Tokyo Charter') (adopted 19 January 1946).

Charter of the International Military Tribunal—Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (adopted 8 August 1945).

Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, 3 Official Gazette Control Council for Germany 50–5 (1946) (Control Council Law No. 10).

Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1949, enacted 12 January 1951) 78 UNTS 277.

Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field ("Geneva Convention I").

Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea ("Geneva Convention II"); Convention (III) relative to the Treatment of Prisoners of War ("Geneva Convention III").

Convention (IV) relative to the Protection of Civilian Persons in Time of War ("Geneva Convention IV"), Geneva (12 August 1949).

Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague (18 October 1907).

Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, (29 July 1899).

ICC Rules of Procedure and Evidence, ICC-ASP/1/3 and Corr.1 (3-10 September 2002) (as currently modified).

ICTY Rules of Procedure and Evidence (adopted on 11 February 1994, last amended on 10 July 2015) (ICTY Rules).

ICTY Rules of Procedure and Evidence Act (amended 2012).

Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 1994.

International Court of Justice Statute.

International Criminal Tribunal of the Former Yugoslavia Statute, adopted 8 November (amended until 28 February 2006).

International Criminal Tribunal on Rwanda Statute, adopted 8 November 1994 (amended until 14 August 2002).

International Military Tribunal Charter, 8 August 1945, London.

Istanbul Convention.

Local Rules of Procedure, United States of America.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, African Union 2003.

Regulation 44 of the ICC, ICC-BD/05-01-09/Rev.4.

Rome Statute of the International Criminal Court, adopted 17 July 1998, entry into force 1 July 2002.

The Inter-American Court of Human Rights Rules of Procedure 1980 as modified by the 1991 Rules.

United Nations Charter, adopted 26 June 1945, entry into force 24 October 1945.

Declarations, Resolutions and Recommendations

Code of Professional Conduct for Counsels before the IC, 2 December 2005, ICC-ASP/4/Res.1.

Montreux Document on Pertinent International Legal Objectives and Good Practices for States related to Operation of Private Military and Security Companies during Armed Conflict, UN Doc A/63/467.

UNGA, Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity, A/RES/60/1, Resolution adopted by the UN General Assembly, October 24, 2005.

UNGA, Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law, A/RES/60/147, Resolution adopted by the UN General Assembly on December 16, 2005.

United Nations Special Rapporteur on Torture Prof Manfred Nowak, Comment made on International Women's Day (ICRT, 2008).

UNSC Res 798 (18 December 1992) UN Doc S/RES/798.

UNSC Res 798 (18 December 1992) UN Doc S/RES/798.

UNSC Res 1325 (31 October 2000) UN Doc S/RES/1325.

UNSC Res 808 (22 February 1993) UN Doc S/RES/808 (S/RES/808).

United Nations Security Council 2000. Security Council Resolution 1325. S/ RES/1325.

United Nations Security Council 2008. Security Council Resolution 1820. S/ RES/1820.

UNSC Resolution 1612 (Children and Armed Conflict).

UNSC Resolution 1674 (Protection of Civilians in Armed Conflict).

UNSC Resolution 827 (1993) establishing Statute of the ICTY, adopted 25 May 1993.

UNSC Resolution 955 (1994) establishing the ICTR, adopted 8 November 1994.

Domestic law

Constitution of Zimbabwe, 2013.

Constitutional Court Rules of Zimbabwe, SI 61 of 2016, available at <https://zimbabwelawreports.com/constitutional-court-rules.html> accessed 9 November 2022.

Federal Rule of Appellate Procedure, United States of America.

International case law

Bagosora case Appeal Decision ICTR -98-7 Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing Indictments against Theoneste Bagosora and 28 Others (6 June 1998).

Cyangungu Decision, ICTR -99-46 Decision on the Application to File an Amicus Curiae Brief According to Rule 74 of the Rules of Procedure and Evidence on behalf of the NGO Coalition for Women's Human Rights in Conflict Situations (24 May 2001) 6-7.

IACtHR (Judgment) 31 May 2001, *Cesti Hurtado v. Peru*, para. 24.

IACtHR (Interpretation) 2 August 2008 *Miguel Castro Castro Prison v. Peru* (2008), para. 4.

Kanyabashi Appeal Joint Separate and Concurring Opinion (Tieya and Nieto-Navia) ICTR-96-15 (3 June 1999) para. 11.

Milosevic' Orders of 30 August 2001 (*The Kosovo Case*, 30 October 2001 (*The Croatia Case*), and 23 November 2001 (*The Bosnia Case*).

Prosecutor v. Al-Bashir, Decision, ICC-02/05-01/09 OA2 (21 May 2018).

Prosecutor v. Al-Bashir, Written observations of Professor Claus Kreß as amicus curiae, ICC-02/05-01/09 OA2 (18 June 2018), paras. 8-13.

Prosecutor v. Alfred Musema, Case No. ICTR-96-13, Judgment (Trial Chamber), 27 January 2000, para. 965.

Prosecutor v Akayesu (Trial Chamber judgment) ICTR-96-4-T (2 September 1998).

Prosecutor v Antonio Furundzija, Judgment of the Trial Chamber, 10 December 1998, Case No.: IT-95-17/1-T.

Prosecutor v Bagosora, ICTR-6-7-T.

Prosecutor v Bagilishema, ICTR-95-1A-A, Appeal Judgment (3 July 2002) (Bagilishema Appeal Judgment) para 50, where the effective control test was enunciated.

Prosecutor v Blaškić, ICTY-95-14-A, Appeal Judgment (29 July 2004) para 663.

Prosecutor v Bemba Gombo ICC-01-05-01/08-424, paragraph 162.

Prosecutor v Bemba et al, ICC-01/05-01/08-3739, Decision on the Defence Request for Leave to File Observations on the Application of the Principle of Complementarity and on the Admissibility of the Case Pursuant to Article 19 (2) (a) of the Statute, 5 February 2015.

Prosecutor v Blagojevic et al. (Judgment of 17 January 2005, IT-02-60-T).

Prosecutor v Deronjic (IT-02-61-S) Dissenting Judgment of Judge Wolfgang Schamburg, 30 March 2004.

The Prosecutor v Drazan Erdemovic', IT-96-22-T, ICTY Trial Chamber, Judgment and Sentence (29 November 1996), para 58.

Prosecutor v Du [Ko Tadi] A/K/A/ "Dule, IT-94-1-T (Trial Chamber Judgment), 7 May 1997.

Prosecutor v Furundzija, IT-95-17/1-T, Coalition for Women's Human Rights in Conflict Situations, Amicus Brief requesting that the Tribunal of 16 July 1998 to respect the right of Witness A to equality, privacy, and security of person and to representation by counsel, 5 November 1998.

Prosecutor v Furundzija, Center for Civil and Human Rights, Notre Dame Law School, Amicus Curiae Brief on Protective Measures for Victims or Witnesses of Sexual Violence and other Traumatic Events, 6 November 1998.

Prosecutor v Hartman (Decision of motion to strike and request to extend word limit), IT-02-54-r77.5-A, 6 November 2009.

Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-1935, Order Regarding Applications by Victims to Present Their Views and Concerns or to Present Evidence (Nov. 21, 2011).

Prosecutor v Jean Kambanda, ICTR 97-23-S, Trial Chamber, Judgment and Sentence (4 September 1998) para 28.

Prosecutor v Jokic IT-02-59-T.

Prosecutor v Karadzic, IT-95-5-R61.

Prosecutor v. Katanga, Case No. ICC-01/04-01/07-474, Decision on the Set of Procedural Rights Attached to Procedural Status of Victims at the Pre-Trial Stage of the Case, para. 149 (May 13, 2008).

Prosecutor v. Katanga, Case No. ICC-01/04-01/07-1788, Decision on the Modalities of Victim Participation at Trial, paras. 118–25 (Jan. 22, 2010).

Prosecutor v Katanga and Ngudjolo Chui ICC-01/04-01/07-717, paragraph 440.

Prosecutor v Kayishema & Ruzindana (judgment) ICTR-95-1-T.

Prosecutor v Kony et al., Decision on the Admissibility of the Case under Article 19(1) of the Statute, ICC-02/04-01/05-377, 10 March 2009, para 50.

Prosecutor v Kunarac and others IT-96-23 & it-96-23-1-A, paragraph 130.

Prosecutor v. Kunarac, Kovač, and Vuković, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001 ('Kunarac et al. Trial Judgement'), para 415.

Prosecutor v. Kunarac, Kovač, and Vuković, Case Nos. IT-96-23 & IT-96-23/1- A, Judgement, 12 June 2002 ('Kunarac et al. Appeal Judgement'), para. 85.

Prosecutor v Kvočka and others, it-98-30-1-T.

Prosecutor v Lubanga (ICC-01/04–01/06–480), Decision on Request Pursuant to Rule 103(1) of the Statute, 26 September 2006.

Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-1119, Decision on Victims' Participation, para. 93 (Jan. 18, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc409168>.

Prosecutor v Lukić and Lukić, ICTY-98-32/1-A, Appeal Judgment (4 December 2012) para 471.

Prosecutor v Milosevic, IT -02-54-AR73.6 (Appeal Chamber) 20 January 2004.

Prosecutor v Milosevic, Case No. IT-02-54-T, Prosecuting Opening Statement (12 February 2002) 4.

Prosecutor v Muhimana, ICTR-95-1B-T paragraph 551.

Prosecutor v Mladic, IT-95-18-R61.

Prosecutor v Perišić, ICTY- 04-81-A, Appeal Judgment (28 February 2013) (Perišić Appeal Judgment) para 86.

Prosecutor v Rajic, IT-95-12-R61.

Prosecutor v Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj (IT-04-84-A), Appeals Chamber, 19 July 2010, para 290.

Prosecutor v Tadic (Judgment) ICTY-IT-94-1-T.

Prosecutor v. Taylor, Decision, SCSL-2003-01-1 (31 May 2004).

The Prosecutor v Uhuru Muigai Kenyatta, ICC/ 01/ 09-02/11, Trial Chamber, Status Conference (5 February 2014) 36.

The Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo, Judgment of the Trial Chamber, 16 November 1998, Case No. IT-96-21-T.

Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) [1949] ICJ Report 174, 178ff.

Situation in Darfur, Sudan (ICC-02/05–10), Decision Inviting Observations in Application of Rule 103 of the Rules of Procedure and Evidence, 24 July 2006.

Situation in the Democratic Republic of the Congo, ICC-01/04-101, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, para. 71 (Jan. 17, 2006).

Situation in the Democratic Republic of the Congo, ICC-01/04-556, Judgment on Victim Participation in the Investigation Stage of the Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007, para. 56 (Dec. 19, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc612293.pdf>.

Situation In Uganda in the Case of the Prosecutor V. Dominic Ongwen, Amicus Curiae Observations by Public International Law & Policy Group, ICC-02/04-01/15 A, 23 December 2021.

Tadic Decision IT-94-1 (10 August 1995) Decision on the Prosecutor's Motion Requesting Protective Measures for Witness L, par. 18.

National Case law

Roe v United States et al, 1:20-CV-00066-WGY.

State v Willard Chokuramba, Justice for Children's Trust Intervening as Amicus Curiae, Zimbabwe Lawyers for Human Rights Intervening As Amicus Curiae, CCZ 10/19.

Other Documents

CRC, 'General Comment No 8' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (27 May 2008) UN Doc HRI/gen/1/Rev.9 (Vol II), p. 28.

CRC Committee, France, CRC/C/FRA/CO/5, 23 February 2016, para 74.

CRC, 'General Comment No 8' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (27 May 2008) UN Doc HRI/gen/1/Rev.9 (Vol II) 28.

ECOSOC, Sub-Committee on Prevention of Discrimination and Protection of Minorities, Question of the Impunity of Perpetrators of Violations of Human Rights (Civil and Political Rights), UN Doc. E/CN.4/SUB.2/1996/18 (29 June 1996).

General Comment No. 2 (2008) adopted by the Committee on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT Committee), para 22.

General Comment No. 16 (2005), adopted by the Committee that monitors the International Covenant on Economic, Social and Cultural Rights (ICESCR Committee), para 27.

Global Rights Campaign, BIS Guide: Introduction to Evidence <https://www.asser.nl/media/796074/introduction-to-evidence-2.pdf> accessed 15 January 2023.

ICC, Annual Report on Preliminary Examination Activities 2019 (ICC, 2020) <https://www.icc-cpi.int./Pages/item.aspx?name=20191205-preliminary-examination-report> accessed 10 March 2023.

ICC, Office of the Prosecutor, 'Update on Communications Received by the Office of the Prosecutor of the ICC' (2006).

ICC, Trial Chamber I to Deliberate on the Case Against Thomas Lubanga Dyilo, ICC-CPI-20110826-PR714 (26 August 2011).

ICC, Questions and Answers: Situation in the Democratic Republic of the Congo, The Prosecutor v. Germain Katanga, and Mathieu Ngudjolo Chui, § 7, ICCPIDS-CIS-DRC2-01-001/0.

ICC OTP, 'Policy Paper on Sexual and Gender-based Crimes' <<https://www.icc-cpi.int/itemsDocuments/20140916OTP-Policy> CSASGBVENG.pdf> accessed 19 March 2023.

International Criminal Court, 'Report on Preliminary Examination Activities' (2018) <https://www.icc-cpi.int/itemsDocuments/181205-rep-otpPE-ENG.pdf> accessed 21 March 2023.

ICC OTP, 'Prosecutor of the International Criminal Court (ICC), Karim A.A. Khan KC Publishes Policy on the Crime of Gender Persecution' (ICC OTP Press Statement, 7 December 2022) <https://www.icc-cpi.int/news/prosecutor-international-criminal-court-icc-karim-aa-khan-kc-publishes-policy-crime-gender> accessed 10 March 2023.

ICC, OTP Contact Pathway <https://otppathway.icc-cpi.int/index.html> accessed 20 January 2023.

ICC, 'ICC Policy Paper on Sexual and Gender Based Crimes' (ICC, 2014).

ICRC, 'Q&A: sexual violence in armed conflict' (ICRC, 19 August 2016) International Committee of the Red Cross <https://www.icrc.org/en/document/sexual-violence-armed-conflict-questions-and-answers> accessed 25 October 2022.

ICTR, 'Prosecution of Sexual Violence: Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda' (ICTR, 2014) <https://unictr.irmct.org/sites/unictr.org/files/publications/ICTR-Prosecution-of-Sexual-Violence.pdf> accessed 10 March 2023.

ICC, 'Jurisdiction in the General Situation' <https://www.icc-cpi.int/ukraine> accessed 20 January 2023.

ICTJ, 'Uganda Study On Opportunities For Reparations For Survivors Of Conflict-Related Sexual Violence: we cannot survive on hope and promise alone' (ICTJ, 2022), p. 19, available at: <https://www.un.org/sexualviolenceinconflict/wp->

[content/uploads/2022/10/report/auto-draft/GSF_Report_Uganda_EN_May2022_WEB.pdf](#), accessed 28 October 2022.

Murad Code, 'The Global Code of Conduct for Gathering and Using Information about Systematic and Conflict-Related Sexual Violence' <https://www.muradcode.com/murad-code#mc-principle1> accessed 15 January 2023.

NGO CICC, 'The Office of the Prosecutor: Taking Stock Three Years On,' Monitor, No. 33 (2006).

Press Release, Int'l Criminal Court, 'Central African Republic: VPRS Holds Training Seminar for Local Intermediaries Assisting Victims,' ICC-CPI-20110729-PR705 (29 July 2011).

SALC, 'The Prosecutor v Dominic Ongwen: Joint Amicus Curiae Submission by SALC and Prof. Bonita Meyersfeld' (14 February 2022) <https://www.southernafricalitigationcentre.org/2022/02/14/the-prosecutor-v-dominic-ongwen-joint-amicus-curiae-submission-by-salc-and-prof-bonita-meyersfeld-2/> accessed 9 November 2022.

Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation, International Criminal Court <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states> accessed 28 October 2022.

Ukrainian Helsinki Human Rights Union, Problems of Gender-based Violence in the Conflict Zone, (UHHRU, 2015).

UN, International, Impartial and Independent Mechanism Gender Strategy and Implementation Plan (UN, 30 September 2022).

UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147, part VIII, 'Access to Justice,' (December 16, 2005).

UN Commission on Human Rights, 'Report of the Independent Expert to Update the Set of Principles to Combat Impunity,' E/CN.4/2005/102/Add.1, February 8, 2005.

UN Commission of Experts Reports, Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) (Commission of Experts Final Report) paras 134–5, 250–3.

- UNGA, 2005 World Summit Outcome, UN Doc. A/60/1 (24 October 2005), paras 138-39.
- UNIFEM, Preventing Conflict, Transforming Justice, Securing Peace: A Global Study on the Implementation of United Nations Security Council Resolution 1325 (UNIFEM, 2010).
- UNIPP, Breaking the Silence on Violence against Indigenous Girls, Adolescents and Young Women: A Call to Action (UNIPP, 2019).
- UNHCR, Gender-based Violence in Conflict and Displacement (UNHCR 2015).
- UNOHCHR, Report on Conflict-related Sexual Violence in Ukraine: 21 February to 31 July (UNOHCHR, September 2022).
- The UNHCR Report, Arbitrary Detention, Torture, and Ill-treatment in the Context of Armed Conflict in Ukraine, 2014-2020 (UNHCHR, 2020).
- UNHCR Special Rapporteur, UNHCR Forty-ninth session 10 February 1993 'Situation of Human Rights in the Territory of the former Yugoslavia: Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution 1992/S-1/1' (14 August 1992) UN Doc E/CN.4/1993/50 (UNCHR Special Rapporteur Report) para 86.
- UNSC, 'Conflict-related sexual violence Report of the Secretary-General' (UNSC, 2021) UN Doc S-2022-272 https://www.stoprapenow.org/wp-content/uploads/2022/04/S_2022_272-2204086E.pdf accessed 28 October 2022.
- UNSG, 'Independent International Commission of Inquiry on Ukraine: Note by the Secretary-General' (UNSG, 2022) A/HRC/49/71 (UNSG Report) <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2022/10/report/auto-draft/Inquiry-on-Ukraine.pdf> accessed 28 October 2022.
- UN Women, 'Addressing Conflict-Related Sexual Violence Private Sector Opportunities for Engagement' (UN Women, 2022).
- US Embassy Guatemala, 'Supporting Justice and Accountability in Ukraine,' (USEG, 22 February 2023) <https://gt.usembassy.gov/supporting-justice-and-accountability-in-ukraine/> accessed 09 March 2023.
- UNSC, Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the

Former Yugoslavia Since 1991 (23 August 1995) UN Doc A/50/365-S/1995/728 (Report to the UNSC 1995) para 44.

United Nations Special Rapporteur on Torture Prof Manfred Nowak, Comment made on International Women's Day (ICRT, 2008).

Women's Caucus for Gender Justice, Recommendations and Commentary for December 1997 PrepCom on the Establishment of an International Criminal Court, United Nations Headquarters December 1–12, 1997, at 31 (1997) <https://4genderjustice.org/wp-content/uploads/2021/12/wcgj-prepcom-paper.pdf> accessed 9 November 2022.

Internet Sources

Amnesty International, 'International Criminal Tribunal for the former Yugoslavia: The Tadic case' (AI, 1999).

Anderson, Letina, 'Conflict-related Sexual Violence Report of the United Nations Secretary General' (UN) UNDOC/S/2022/272, 29 March 2022, accessed 25 October 2022, <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2022/04/auto-draft/SG-Report2021for-web.pdf>.

Arkady Moshes, One Year of War in Ukraine: Why Western Policy towards Russia has not Changed Enough (FIIA Comment, Feb 2023).

Amnesty International (2020). 'What I saw was death.' Available at: <https://www.amnesty.org/en/wp-content/uploads/2021/05/AFR4135452021ENGLISH.pdf>.

Amnesty International, Bosnia and Herzegovina: Rape and Sexual Abuse by Armed Force: rape and sexual violence Report, Amnesty International Report January 1993.

Anderson Letitia, 'Conflict-related Sexual Violence Report of the United Nations Secretary General' (UN) UNDOC/S/2022/272, 29 March 2022, accessed 25 October 2022, <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2022/04/auto-draft/SG-Report2021for-web.pdf>.

Aptel, Cecile cited in ICRC, 'Sexual violence in armed conflict: Underlying causes and prevention strategies' (ICRC, 12 November 2015), available at: <https://www.icrc.org/en/event/sexual-violence-armed-conflict>.

- Benninger-Budel Carin and Lacroix Anne-Laurence, 'Violence against Women: A Report' (World Organization against Torture, 1999).
- Bergengruen, V, 'How Ukraine Is Crowdsourcing Digital Evidence of War Crimes' (2022) Time <https://time.com/6166781/ukraine-crowdsourcing-war-crimes/> accessed 27 November 2022.
- Dyer, Henry, 'UK Sends Experts to Help Ukrainian Government Gather Evidence and Prosecute War Crimes' (29 April, Business Insider India).
- Easterday, Jennifer, 'Judges in Katanga, and Ngudjolo Trial Hear Testimony from Participating Victims' (Mar. 15, 2011), KATANGATRIAL.ORG, available at: <http://www.katangatrial.org/2011/03/judges-in-katanga-and-ngudjolo-trial-hear-testimony-from-participating-victims/>.
- Gentleman, A, 'Prosecuting sexual assault: "Raped all over again" (2013) The Guardian <https://www.theguardian.com/society/2013/apr/13/rape-sexual-assault-frances-andrade-court> accessed 26 October 2022.
- Goff, GB, & Saris, A, Amicus Curiae (ICHRDD, 2000).
- Goff, GB, & Saris, A, Accessing the ICTR (ICHRDD, 2000).
- Human Rights Watch, 'Rwanda Tribunal to Rule on Akayesu Case' (1998) Human Rights Watch <https://www.hrw.org/news/1998/09/01/rwanda-tribunal-rule-akayesu-case> accessed 9 November 2022.
- Human Rights Watch, 'Shattered Lives: Sexual Violence during the Rwandan Genocide and its aftermath' (1996) Human Rights Watch <https://www.hrw.org/legacy/reports/1996/Rwanda.htm> accessed 26 October 2022.
- Human Rights Watch, 'World Report 2023: Ukraine Events of 2022' (2023) Human Rights Watch <https://www.hrw.org/world-report/2023/country-chapters/ukraine> accessed 9 March 2023.
- Human Rights Watch Helsinki, War Crimes in Bosnia-Herzegovina Volume 1 (August 1992) and Volume 2 (HRWH, April 1993).
- Human Rights Watch, 'In-Depth Report Documents Milosevic Crimes New Statistics Show Direction from Belgrade' (26 October 2001) Human Rights Watch <https://www.hrw.org/news/2001/10/26/depth-report-documents-milosevic-crimes> accessed 9 November 2022.

- Human Rights Watch, 'Rwanda Tribunal to Rule on Akayesu Case' (1 September 1998) Human Rights Watch <https://www.hrw.org/news/1998/09/01/rwanda-tribunal-rule-akayesu-case> accessed 9 November 2022.
- ICC-CPI, 'International Criminal Court' <https://www.icc-cpi.int/> accessed 6 March 2023.
- ICRC, 'Ukraine: Wide-scale armed conflict inflicts emotional pain on families of missing loved ones' (2022) ICRC <https://www.icrc.org/en/document/ukraine-wide-scale-armed-conflict-inflicts-emotional-pain-families-missing-loved-ones> accessed 16/02/2023.
- Innola Eeva & Pynnöniemi, Katri, 'Finland and Russia's Metanarratives on the conflict in Ukraine,' in Katri Pynnöniemi & András Rácz (eds.) Fog of Falsehood: Russian Strategy of Deception and the Conflict in Ukraine (FIIA, 2016).
- International Federation for Human Rights, 'Justice Opportunity in the Fight against Impunity for Sexual Violence Crimes Committed during the Armed Conflict' (2015) FIDH <https://www.fidh.org/en/region/americas/peru/justice-opportunity-in-the-fight-against-impunity-for-sexual-violence> accessed 31 January 2023.
- Law Library of Congress, 'Ukraine's Legal System and Legal Sector' <https://www.loc.gov/law/help/ukraine-legal-system-and-legal-sector.php> accessed 22 March 2023.
- Law Library of Congress, 'Global Legal Monitor: Ukraine Civil Law Reform' <https://www.loc.gov/law/foreign-news/article/ukraine-civil-law-reform/> accessed 22 March 2023.
- Law Library of Congress, 'Ukraine: Criminal Procedure' <https://www.loc.gov/law/help/criminal-procedure/ukraine.php> accessed 22 March 2023.
- Legal Information Institute, 'Amicus Curiae' https://www.law.cornell.edu/wex/amicus_curiae accessed 07 March 2023.
- Marconi, Rachele 'Former Yugoslavia's survivors of sexual violence call for justice' (Legal Analysis, 9 January 2020) LSE Women, Peace, and Security blog <https://blogs.lse.ac.uk/wps/2020/01/09/former-yugoslavia-survivors-of-sexual-violence-call-for-justice> accessed 23 October 2022.
- Mekenzin, N, 'Reports of sexual violence in Ukraine rising fast, Security Council hears' (2022) UN News <https://news.un.org/en/story/2022/06/1119832> accessed 31 January 2023.

- Nuridzhanian, G, 'Prosecuting War Crimes: Are Ukrainian Courts Fit to Do it?' (2022) EJIL Talk <https://www.ejiltalk.org/prosecuting-war-crimes-are-ukrainian-courts-fit-to-do-it/> accessed 09 March 2023.
- OSCE, 'Ukraine: Civil Procedure Code' <https://www.osce.org/ukraine/47711?download=true> accessed 28 March 2023.
- Rivera, Juaristi, FJ, 'The Amicus Curiae in the Inter-American Court of Human Rights' (1982-2013) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2488073 accessed 7 November 2022.
- Secretary-General presents amicus curiae submission in Akayesu trial (1998) UN International Residual Mechanism for Criminal Tribunals <https://unictr.irmct.org/en/news/secretary-general-present-amicus-curiae-submission-akayesu-trial> accessed 9 November 2022.
- SEMA, 'Ukraine: Background of the Conflict and Key Challenges' <https://www.semanetwork.org/network-members-ukraine/> accessed 31 January 2023.
- Šimonović, D, 'Harmonization of criminal laws needed to stop rape – UN expert' (OHCHR, 28 June 2021) <https://www.ohchr.org/en/press-releases/2021/06/harmonization-criminal-laws-needed-stop-rape-un-expert> accessed 25 October 2022.
- USIP, *Confronting Conflict-related Sexual Violence: Strengthening Prevention and Response Efforts* (United States Institute of Peace: 2018).
- Women's Caucus for Gender Justice, *Recommendations and Commentary for December 1997 PrepCom on the Establishment of an International Criminal Court*, United Nations Headquarters December 1–12, 1997, at 31 (1997) <https://4genderjustice.org/wp-content/uploads/2021/12/wcgj-prepcom-paper.pdf> accessed 9 November 2022.
- Women's Initiatives for Gender Justice (nd) Home, <https://4genderjustice.org/> accessed 18 March 2023.
- Women's Initiatives for Gender Justice (WIGJ), 'A Sustainable Model for Responding to Conflict-related Sexual Violence in Ukraine,' (WIGJ, 2 December 2022) <https://4genderjustice.org/wp-content/uploads/2022/12/ASP-2022-Concept-note-CRSV-in-Ukraine-ENG.pdf> accessed 15 January 2023.
- Women of Europe Newsletter No 32, 'Public Hearing and Resolution on Rape in Ex-Yugoslavia' (March 1993) (Women of Europe Newsletter).

Women2000, 'Sexual Violence and Armed Conflict: United Nations Response' (United Nations Department of Economic and Social Affairs, April 1998) <https://www.un.org/womenwatch/daw/public/cover.pdf> accessed 23 October 2022.

Zainad H. Bangura, Sexual Violence: A Tool of War, Background Note (2014) <https://www.un.org/en/preventgenocide/rwanda/assets/pdf/Backgrounder%20Sexual%20Violence%202014.pdf> accessed 15 January 2023.