THE PROSECUTOR V. THOMAS LUBANGA DYILO AND *THE PROSECUTOR V. GERMAIN KATANGA*: FUNCTION, PURPOSE, AND JUSTICE AT THE INTERNATIONAL CRIMINAL COURT

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The International Criminal Court

The International Criminal Court (ICC, or 'The Court') in The Hague, Netherlands came into force on July 1, 2002 as an independent judicial institution to prosecute individuals responsible for serious international crimes (Mazurek, 2009, 4). The jurisdiction and functioning of the Court is governed by the Rome Statute. The Rome Statute was established on July 17, 1998 in Rome, Italy by the United Nations Diplomatic Conference of Plenipotentiaries (Schabas, 2017, 21). The Rules of Procedure and Evidence is another instrument the Court uses that provides additional details for proper application of the Rome Statute. This paper will draw on both treaties in order to discuss the mechanisms of the Court.

Serious atrocities of international concern include genocide, crimes against humanity, war crimes, and crimes of aggression. One of the main purposes of the Court is to ensure "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation" (Rome Statute of the International Criminal Court, July 27, 1998, 2187 U.N.T.S. 90. (Hereafter, Rome Statute)). Before the ICC was officially established, there were *ad hoc* tribunals created in order to address atrocities occurring in former Yugoslavia and Rwanda (Schabas, 2017, 11). The International Criminal Tribunal for the Former Yugoslavia (ICTY) and The International Criminal Tribunal for Rwanda (ICTR) no longer formally exist, but they "did more than simply set legal precedent…they also provided a reassuring model of what an international criminal court might look like" (Schabas, 2017, 13). In addition to the *ad hoc* tribunals, the Nuremberg Trials are also known to have

inspired the landscape of the Court. Following World War II in 1945, individuals who were members of the Nazi Party in Germany were prosecuted for war crimes, crimes against peace, and crimes against humanity (Mazurek, 2009, 2). It is therefore important to acknowledge that while the Court has only been in session since 2002, there were tribunals and other bodies of experts like the International Law Commission whose main mission was to develop and codify international law throughout the twentieth century (Schabas, 2017, 9). The formation of the Court was not abrupt, and was born out of a history of events, conventions, and tribunals that helped contribute to its current state.

The procedural regime of the Court is composed of a hybrid of two systems: the English common law tradition and the civil law system (Schabas, 2017, 232). The ICC is also guided by general principles of criminal law. The principles of criminal law will be discussed at great length later in the paper, but for the purpose of the introduction it is necessary to mention a few key ideas. The principle of personal culpability holds that individuals are only accountable for their own conduct (Leyh, 2018, 5). This directly corresponds to the *mens rea*, or "guilty mind," criterion which proves intent of a crime. Article 30 in the Rome Statute is where this principle appears to determine an individual's knowing and intentional behavior (Rome Statute, Art. 30). Next, the right to a fair trial is critical for upholding criminal law standards and affirming the Court's legitimacy (Anoushirvani, 2010). There are certain duties, powers, and rights allocated to the prosecutors, the accused, the victims and witnesses during the case. These rights are explained to a great degree in Articles 54, 67, and 68 of the Rome Statute. Another principle is the presumption of innocence. In a criminal trial, the burden of proof falls on the prosecutor, and in order for the accused to be found guilty, the evidence must be proved beyond a reasonable doubt (Schabas, 2017, 202). This principle can be found in Article 66 of the Rome Statute. Aside

from the beyond a reasonable doubt rule, the standard of proof is not developed in either the Rome Statute or the Rules of Procedure and Evidence (*The Prosecutor v. Thomas Lubanga Dyilo*, 2012). This has been a topic of controversy among the Court.

Sentencing guidelines for convicted criminals at the ICC are addressed in Articles 77 and 78 of the Rome Statute. Further guidelines can be found in Rule 145 of the Rules of Procedure and Evidence. Rule 145(2) specifically asks the Court to weigh both "Mitigating and Aggravating Circumstances" when determining a criminal's sentence, and additionally provides a non-exhaustive list of examples of each circumstance (Rules of Procedure and Evidence, Rule 145). Many scholars believe the Court has failed to consider penal theories and an explicit sentencing framework (Stein, 2014). They claim the Court is unable to satisfy theories of retribution, deterrence, rehabilitation, and restorative justice, which may prohibit the Court from administering transitional justice. For example, the maximum length of imprisonment indicated in Article 77 is 30 years; Stein argues this rule is incompatible with the theory of retribution because the punishment is not proportionate to most breaches of international law (Stein, 2014, 22). Drew Breesley also argues the sentencing guidelines are too low, and the Court's focus should be on the theory of punishment (denouement) and deterrence (Breesley, 2016, 4). One of the main difficulties the Court faces are the varying opinions coming from different regions around the world. Dirk Van Zyl Smit contests that long periods of imprisonment conflict with human rights law, and cites Solari Tuleda, a Peruvian diplomat:

> "Life imprisonment did not seem to be compatible with the Latin American legal system. The criterion adopted in the American Convention on Human Rights, for instance, was that penalties should not only be correlational in nature but should also rehabilitate the convinced person so that he could resume his place in society. A more realistic penalty would be imprisonment for a

> minimum of ten years and a maximum of twenty-five years, which was the longest term of imprisonment in many Latin American countries." (Smit, 1999, 22).

While Smit supports penal theories that value rehabilitation and restorative justice, an ongoing struggle for the Court will be to establish an explicit guideline that considers both the respect of victims and the rights of offenders.

Theories of punishment connect to the concerns about the Court's ability to balance international criminal law-based principles versus human rights-based ones. Although human rights principles underpin the Rome Statute according to Schabas, Brianne McGonigle Leyh argues that the Court is pragmatic in its approach to adopt or refrain from a human-rights based approach. Leyh points to an example from when the Court changed the mode of liability too late in a case, infringing on criminal law principles like fair labeling, the standard that requires the offense to clearly express the charges of the accused (Leyh, 2018). She later describes how the Court embraced a human rights-based approach by adopting a broad interpretation of Article 68(3), giving victims the right to participate and have a core interest in the determination of the facts (Leyh, 2018, 10). Her article ultimately shows that the Court is both unclear about its obligations to human rights and commitment to criminal law principles (Leyh, 2018). The Court's inability to define its role as a criminal law or human rights-based institution leaves many questions unanswered pertaining to its main purpose and overall function.

The Court articulates its sources of law in Article 21 of the Rome Statute. Titled "Applicable Law," the Court follows a three-tiered hierarchy (Schabas, 2017, 190).

Article 21(a) says:

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

> Article 21 (b): In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
>
> Article 21(c): Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards. (Rome Statute, Art. 21)

The crimes listed in the Rome Statute are defined in Articles 5, 6, 7, and 8. These include the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. (Rome Statute, Art. 5). Where the second category is concerned, Article 21(b) refers to sources like The Vienna Convention on the Law of Treaties and the Geneva Conventions of 1949 and their two Additional Protocols of 1977 (Schabas, 2017, 191). As for the third category, Article 21(c) says the Court can resort to principles found in domestic legal systems (Schabas, 2017, 192). Judge Colin Flynn finds Article 21(c) troublesome and argues, "there is no clear guidance from the statute itself as to which legal systems should be the subject of comparison, and indeed how many would suffice." (Flynn, 2020, 22). Sources of the law themselves can thus be uncertain when proceeding through a trial.

For an individual to be prosecuted at the Court, the first step is to determine whether the case is admissible. The complementarity principle, a founding principle of the Rome Statute, is the notion that when a case is genuinely being prosecuted by the national judicial system it is inadmissible to the Court (SáCouto, 2010, 1). The admissibility test is explained in Article 17. The complementarity principle was included in the Rome Statute for several reasons, but most

importantly because the drafters saw benefits to prosecuting individuals domestically, wishing for the Court to be a last resort for punishing egregious crimes (SáCouto, 2010, 8). If the case is not being prosecuted willingly in the offender's national court system, it will be admissible before the Court.

The next steps for the Prosecutor of the case will be to advance a preliminary examination, initiation of investigation, and investigation. This paper will focus on the nature of the investigation as it relates to the gathering of evidence. As mentioned earlier, Article 54 of the Rome Statute authorizes "duties" and "powers" to the prosecutor in respect to the investigation. For instance, Article 54(b) mandates prosecutors to have respect for the "interests and personal circumstances of the victims and witnesses," and Article 54(3) allows the prosecutor to conduct activities like collecting and examining evidence (Rome Statute, Art. 54). The Prosecutor must strictly follow Article 54 to ensure the accused receives a fair trial, which is one of the fundamental principles of criminal law. If there are reasonable grounds to believe the person has committed a crime within the Court's jurisdiction, the Prosecutor may issue a warrant of arrest or a summons to appear from the Pre-Trial Chamber (Schabas, 2017, 254-255). Next, there is a confirmation hearing to determine if the case goes to an official trial (Schabas, 2017, 266). The Court avoids using the term "indictment," and instead provides a "document containing the charges," to the defense (Schabas, 2017, 266). If the charges are confirmed, the case is brought from the Pre-Trial Chamber to the Trial Chamber. If there is an appeal to be made at any point in the trial, the request will be brought to the Appeals Chamber.

The Ituri Conflict in the Democratic Republic of Congo

The Ituri region lies in the northeastern Democratic Republic of Congo (DRC). Bunia, the capital city of Ituri, is described as the "deadliest region in the world, outstripping Iraq, Colombia, and Afghanistan combined" (Eichstaedt, 2011, 8). Research conducted by the International Rescue Committee in 2008 shows that 5.4 million "excess deaths" occurred between 1998 and 2007 across the DRC (Eichstaedt, 2011, 8). War in this region was provoked by the Rwandan Genocide in 1994, where Hutu extremists were responsible for mass murdering Tutsi populations (Eichstaedt, 2011, 16).[1] Former DRC dictator Mobutu Sese Seko openly supported the Hutu extremists in Rwanda, which provoked the Rwandan invasion of the DRC along with other neighboring countries (Eichstaedt, 2011, 16). The First Congo War (1996-1997) and the Second Congo War (1998-2003) were further exacerbated by the mineral wealth of the DRC and the fight over natural resources.

While the complicated nature of both wars will not be examined in this paper, it is critical to understand that the Ituri Conflict was perpetuated by these events. Additionally, it is equally important to recognize that the DRC was formally colonized by Belgium in 1885 as the Congo Free State to exploit its natural resources (Makurek, 2009, 6).[2] The Ituri region consists of many different ethnic groups, with two largest ones being the Hemas and Lendus, who struggle against each other for power, natural resources, land use, and arms trafficking (Stain, 2014, 8). The Union des Patriotes Congolais (UPC) and its military coalition, Forces Patriotiques pour la Libération du Congo (FPLC), led by Thomas Lubanga Dyilo, is an armed group operated by ethnic Hema militia (Makurek, 2009, 5). The UPC came into force on September 15, 2000 in

[1] With respect to all perpetrators and victims of the Rwandan Genocide, this paper acknowledges that there is a much more elaborate history of the events that took place and that can be subject for a different paper.
[2] The nature of European colonial rule and its effect on tensions between ethnic groups is a valuable topic to be explored in a different paper.

order to maintain political and military control over the region (Stain, 2014, 8). The Force de Résistance Patriotique en Ituri (FRPI), led by its top commander Germain Katanga, is an armed group operated by ethnic Lendu militia (Eichstaedt, 2011, 22). As the struggle for control over natural resources heightened, ethnic tension in the Ituri region drove armed conflict in the early twenty-first century.

Thomas Lubanga Dylio, Germain Katanga, and the ICC

The ICC Prosecutor submitted an arrest warrant for Thomas Lubanga Dylio (Lubanga) on January 13, 2006 (Makurek, 2009, 6). On March 17, 2006 the DRC government, where Lubanga was already in custody, handed him over to the Court (Makurek, 2009, 7). Lubanga was then the first person ever to stand trial before the Court. Lubanga was charged with the enlistment and conscription of child soldiers. His warrant for arrest reads:

> HAVING FOUND that there are reasonable grounds to believe that from July 2002 to December 2003 members of the FPLC carried out repeated acts of enlistment into the FPLC of children under the age of fifteen who were trained in the FPLC training camps of Bule, Centrale, Mandro, Rwampara, Bogoro, Sota and Irumu;
>
> HAVING FOUND that there are reasonable grounds to believe that from July 2002 to December 20Û3 members of thé FPLC carried out repeated acts of conscription into the FPLC of children under the age of fifteen who were trained in the FPLC training camps of Bule, Centrale, Mandro, Rwampara, Bogoro, Sota and Irumu;
>
> HAVING FOUND that there are reasonable grounds to believe that the alleged UPC/FPLC's policy/practice of enlisting into the FPLC, conscripting into the FPLC and

> using to participate actively in hostilities children under the age of fifteen was implemented in the context of and in association with the ongoing conflict in Ituri; (Prosecutor v. Lubanga (Case No.ICC-01/04-01/06) Warrant of Arrest, February 10, 2006)

Lubanga's crimes directly violate the war crimes listed under Article 8(2)(e)(vii), "conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities," of the Rome Statute. Lubanga was criminally responsible under 25(3)(a) of the Rome Statute (*Lubanga.* Warrant of Arrest. 2006).

Although Lubanga was only arrested for crimes involving the widespread recruitment of child soldiers under the age of fifteen, Lubanga took part in other atrocities. Witnesses and victims said he participated in '"widespread killings, torture, and rape"' (Stein, 2014,.8). There are many allegations that he instructed child soliders to rape populations of the DRC to terrorize people, and he enlisted girl soldiers in his militia to be sex slaves (Smith, 2011, 1-2). This paper will later critique the fact that Lubanga was not charged with crimes related to rape and sexual slavery and what that means for the Court's ability to deliver transitional justice.

On July 10, 2012, Lubanga was found guilty and sentenced as a co-perpetrator for recruiting, conscripting, and enlisting children under the age of fifteen into the UPC/FPLC to participate in hostilities in the Ituri region (*Prosecutor v. Lubanga* (Case No.ICC‑01/04‑01/06 Hearing to Determine the Decision Pursuant to Article 76, July 10, 2012). The Chamber confirmed they were able to find Lubanga guilty for the charges beyond a reasonable doubt. The Court ordered Lubanga to serve fourteen years of imprisonment (*Lubanga,* Decision. 2012). But, in accordance with Article 78(3) of the sentencing statute, the Court reduced Lubanga's

imprisonment to just eight years due to the fact that he was in custody within the Court for six years (Stein, 2014, 11). They did not find any aggravating circumstances because the Court could not prove any additional factors beyond a reasonable doubt (Stein, 2014, 10). However, the court was able to find mitigating circumstances with a different standard of proof that helped reduce Lubanga's sentence. Lastly, the court required Lubanga to pay significant reparations to the Victim Compensation Fund. Once criminals like Lubanga are found guilty, victim reparations are a pivotal next step to ensure the sensitivities of the issues are recognized and the pathway to justice and peace is plausible.

Although Germain Katanga (Katanga) was arrested by DRC officials in March of 2005, he was transferred to The Hague on October 17, 2007 after the Court granted his warrant of arrest in July 2007 (Sácouto, 2010, 2-3). Katanga was prosecuted for genocide and crimes against humanity in the DRC, but the Trial Chamber still determined the Prosecutor's case to be admissible before the Court (Sácouto, 2010, 2-3). The question of admissibility became a contesting issue in *Prosecutor v. Katanga* throughout the trial. Katanga's case is also significant because it was the first case at the Court to charge a criminal with crimes relating to sexual and gender-based violence (SGBV).

Katanga's charges all involve crimes against humanity and war crimes related to his attack on Bogoro, a Hema village, on February 24, 2003. Katanga, the former top commander of the Lendu militia (FRPI) was armed with semiautomatic weapons, grenades, machetes and other hand weapons in order to kill community members of Bogoro (Eichstaedt, 2001, 22). The helpless villagers fled and hid, but by the end of the attack around 275 civilians were killed (Eichstaedt, 2001, 23). Kenzia Bonebana, one of the hundreds of victims, recounts her story, "'It was very sad, we had children with us,' she lost six of her own daughters and additional nieces

and nephews… '"We lost everything…we wish that justice can be rendered so peace can be restored'" (Eichstaedt, 2001, 27). In addition to the killings, women were captured as sex slaves and cooks (Eichstaedt, 2001, 23). The atrocities related to this attack provided ample grounds for the Court to prosecute Katanga.

Katanga's charges listed in the Prosecutor's arrest warrant are the following:

CONSIDERING that for the foregoing reasons, there are reasonable grounds to believe that Germain Katanga is criminally responsible under article 25(3)(a) or, in the alternative, under article 25(3)(b) of the Statute, for:

i) murder as a crime against humanity, punishable under article 7(1)(a) of the Statute;
ii) wilful killing as a war crime, punishable under article 8(2)(a)(i) or article 8(2)(c)(i) of the Statute;
iii) inhumane acts as a crime against humanity, punishable under article 7(1)(k) of the Statute;
iv) inhuman treatment as a war crime, punishable under article 8(2)(a)(ii) or cruel treatment as a war crime, punishable under article 8(2)(c)(i) of the Statute;
v) the war crime of using children under the age of fifteen years to participate actively in hostilities, punishable under article 8(2)(b)(xxvi) or article 8(2)(e)(vii) of the Statute;
vi) sexual slavery as a crime against humanity, punishable under article 7(1)(g) of the Statute;
vii) sexual slavery as a war crime, punishable under article 8(2)(b)(xxii) or article 8(2)(e)(vi) of the Statute;

viii) the war crime of intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities, punishable under article 8(2)(b)(i) or article 8(2)(e)(i) of the Statute;

ix) pillaging a town or place, even when taken by assault as a war crime, punishable under article 8(2)(b)(xvi) or article 8(2)(e)(v) of the Statute;(Prosecutor v. Katanga (Case No. ICC‑01/04‑01/07) Urgent Warrant of Arrest for Germain Katanga, July 2 2007).

On May 23, 2014, Katanga was found guilty and sentenced for crimes committed during the Bogoro attack. In specific terms, he was sentenced for the crime of murder, the crime of conducting an attack on a civilian population, the crime of destroying enemy property, and the crime of pillaging, resulting in one count of crimes against humanity and four counts of war crimes. (*Prosecutor v. Katanga* (ICC-01/04-01/07) May 23, 2014). The Court found him guilty of these charges beyond a reasonable doubt, and ordered Katanga to serve twelve years of imprisonment. The Trial Chamber claimed in the hearing that "the punishment must reflect the gravity of the offense itself" (*Katanga,* 2014). Mitigating circumstances were considered and rejected, and just three aggravating factors were found (*Katanga,* 2014). Furthermore, the Court ordered Katanga to be responsible for 1,000,000 USD in reparations pursuant to article 75 of the Statute. Due to Katanga's indigence, the Victim Trust Fund Board agreed to pay the reparations in full (ICC Press Release, 2018).

This paper will analyze the International Criminal Court's principles, sentencing guidelines, and its ability to offer victim redress in the context of the Thomas Dyilo Lubanga and Germain Katanga cases. The first chapter will develop international criminal law principles enshrined in the Rome Statute, explain why they are important, and assess whether or not the Court respected these principles during *Lubanga* and *Katanga.* The second chapter focuses on

the Court's sentencing regime. This aspect will be studied to determine the Court's ability to satisfy penal theories, while also answering the question concerning the purpose of punishment and sentencing and what this meant to the Court in *Lubanga* and *Katanga.* The concluding chapter discusses how the Court serves the interest of victims, applying a critical feminist jurisprudential critique in order to introduce recommendations that can help find a clear nexus between the Court and transitional justice for individuals and communities harmed by armed conflict in the DRC.

Chapter One: International Criminal Law Principles

> *"The aphorism "justice must not only be done but must appear to be done" is deeply rooted in the norms of justice; in fact it is a prerequisite for ministering justice. The absence of bias, real or apparent, is what legitimizes a judicial body to administer justice"* ~Trial Chamber of The Court (*Prosecutor v. Katanga,* ICC-01/04-01/07, 9 June 2008).

The Rome Statute is guided by criminal law principles in order to achieve its purpose of ending impunity for the world's most serious war crimes. The Statute's elements draw from sources of common law, the Romano-Germanic system (civil law), Sharia law, and other regimes to define its criminal law principles (Schabas, 2017, 189). The Court's adherence to criminal law principles encourages the international community to believe it is working in the interest of justice. The Court's respect for criminal law principles is equally important for its ability to gain legitimacy, especially for a judicial institution that was not yet established until 2002. Although human rights underpin the Statute, and this is explicitly articulated in Article 21(3), The Court is a designated criminal law court (Leyh, 2018, 2). Both fields of criminal and human rights law share a common base, but international criminal law courts like the ICC focus on individual criminal responsibility, whereas human rights law concerns governing documents that direct state responsibility (Leyh, 2018, 1-2). A key distinction between the two is that human rights law may be interpreted broadly to achieve protection and their stated goals and principles in criminal law dictate a stricter construction, and cases of ambiguity are resolved in favor of the accused, indicated in Article 22(2) (Schabas, 2017, 201). Focusing on both *Lubanga* and *Katanga* act as a test to analyze how effectively the Court was and is able to uphold criminal law principles. The Court's capacity to be sincere to the principles described in this chapter will determine if the Lubanga and Katanga cases were fairly prosecuted.

The Complementarity Principle

The Court's use of the complementarity principle determines whether a case brought to the Court is admissible, and steers the relationship between the Court and states. A case is only admissible before the Court if it is not already being carried out in a national judicial system or if a national court is unable or unwilling to carry out a prosecution (Leyh, 2018, 6). The issues of admissibility are outlined in Article 17 (Rome Statute). Article 17(1) states:

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
>
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
>
> (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
>
> (d) The case is not of sufficient gravity to justify further action by the Court.

A tricky feature of Article 17(1) is that it requires a "same conduct test." The same conduct test permits the Court to take the case if the *exact same* charges are not being investigated or prosecuted at the national level (Sácouto, 2010, 4). To illustrate this, the defense in *Katanga* offered a hypothetical situation where an individual is under prosecution for participating in crimes against humanity in nine villages, when the individual actually participated in ten different attacks. Therefore, the tenth attack that is not prosecuted at the national court would be admissible before the Court according to the same conduct test (Sácouto, 2010, 4). National

judicial systems are thus prioritized under the principle of complementarity, allowing the Court to be a last resort in taking legal action.

The *Lubanga* case exemplifies the Court utilizing the complementarity principle correctly. The atrocities committed in the Ituri region of the DRC were self referred to the Court on March 3, 2004 (Schabas, 2017, 32). In the letter, the DRC explained "the competent authorities are unfortunately unable to investigate the crimes mentioned above or initiate the necessary prosecutions without the participation of the ICC," meaning that the DRC was giving up its admissibility to charge crimes related to the Ituri conflict (Schabas, 2017, 32). Lubanga was already in a Congolese prison when he was arrested by the Court in March of 2006 (Mazurek, 2009, 7). In light of the conflict, the rule of law in the DRC deteriorated significantly, giving serious criminals impunity (Smith, 2011, 3). Even though Lubanga was being held in detention, he did not stand trial in the DRC, and this allowed the Pre-Trial Chamber to assess if the arrest of Lubanga was necessary (Schabas, 2017, 257). During the Court's investigation, it received information that Lubanga would be released from the Congolese prison within a month, and "'he will easily be in a position to flee and disappear'" (Schabas, 2017, 32). The case was not only referred to the Court by the DRC, but the national court system was giving up its efforts to charge Lubanga as well. Lubanga was charged with enlisting and conscripting child soldiers in conjunction with Article 25(3)(a), a war crime that was not being actively pursued by the DRC national court at the time (*Prosecutor v. Lubanga*, ICC-01/04-01/06, 10 Feb. 2006). Thus, Lubanga's prosecution by the Court was admissible, ruling the Court's ability to act in accordance with the complementarity principle.

The application of the complementarity principle in the *Katanga* case was not as simple. Katanga was transferred to the Court on October 17, 2007 after already being in Congolese

detention (Sácouto, 2010, 3). The ICC charged Katanga with numerous crimes related to his planned attack on the village of Bogoro in the Ituri region, including murder and sexual slavery (*Prosecutor v. Katanga,* ICC‑01/04‑01/07, July 2 2007). Katanga immediately contested against the Court that his case was inadmissible because he argued the DRC had been investigating his crimes in relation to the attacks in the Ituri district, and this included the attack on Bogoro (Bastros, 2010, 3). He referred to Article 17(1) to make his argument, determining that the same conduct test applied; and "because the DRC was prosecuting Katanga for crimes comparable in gravity and based on comparable conduct…" (Sácouto, 2010, 4). Instead of turning to the same conduct test, the Trial Chamber found a second reason to confirm admissibility: unwillingness (Bastros, 2015, 5). The Trial Chamber found that Congolese authorities willingly surrendered him to the Court, and "'chose not to investigate or prosecute a person before its own courts, but nevertheless every intention of seeing that justice is done'" (Bastros, 2015, 5). The Trial Chamber's key findings were that the question of unwillingness, stated in Article 17(1)(b), has to be considered only when a domestic prosecution is not ongoing in accordance to the same conduct test described in Article 17(1)(a) and that "inaction" of the State renders a a case admissible before the Court, subject to Article 17(1)(d) (*Katanga*, ICC-01/04-01/07 OA 8, 25 Sept. 2009). There are a few problems with the Trial Chamber's reasoning. To start, the Trial Chamber never examined the same conduct test, jumping immediately to the unwillingness question. Second, the term "unwillingness" is undefined in the Statute, allowing the Chamber to interpret a broad definition in how they apply it. These issues were addressed by the Appeals Chamber, who assessed the admissibility challenge differently.

While the Trial Chamber decided that Katanga's case was admissible from the interpretation and application of "unwillingness" in Article 17(1)(b), the Appeals Chamber

concurred for different reasons. The Appeals chamber determined the unwillingness question as unnecessary and based its reasoning on the same conduct test (Sácouto, 2010, 5). It added that asking the unwillingness question before asking if there are ongoing investigations "would put the cart before the horse" (*Prosecutor v. Katanga,* ICC-01/04-01/07, 25 Sep. 2009). Article 17(1)(a) uses plain language in the present tense: "the case *is* being investigated or prosecuted by a State which has jurisdiction over it" (Rome Statute, Art. 17). Because the DRC ended its prosecution after the case was directed to the Court, the same conduct test showed the DRC and ICC were not pursuing the case at the same time. The Appeals Court judgment reads, "under article 17(1)(a) and (b) of the Statute, the question of unwillingness or inability has to be considered only (1) when there are, at the time of the proceedings in respect of an admissibility challenge, domestic investigations or prosecutions that could render the case inadmissible before the Court, or (2) when there have been such investigations and the State having jurisdiction has decided not to prosecute the person concerned" (*Prosecutor v. Katanga,* ICC-01/04-01/07, 25 Sep. 2009). Although the Appeals Chamber accurately applied the same conduct test in Article 17(1)(a), its decision is inconsistent with founding ICC principles of being a last resort. The DRC closed national proceedings simply because the Court pursued the case, *not* because of any real inability (Sácouto, 2010, 6). The complementarity principle was applied correctly by the Appeals Court, but a major argument could be that the timing of the DRC was rather convenient, allowing the Court to go forward with the case. If the same conduct test were applied earlier in the trial, the DRC could have still been pursuing the case, resulting in inadmissibility before the Court. Whether by planned decision making or luck, the DRC dropping the *Katanga* case allowed the Court to respect the complementary principle- even if the determination was met with skepticism (Sácouto, 2010).

The complementarity principle is important for many reasons. By prioritizing national courts, there are benefits like evidence and witnesses being readily accessible, restoring faith in national judicial systems, and safeguarding the Court's resources for crimes that go unpunished (Sácouto, 2010, 2). Additionally, some legal scholars argue that the Court is selective in investigating crimes and choosing defendants to prosecute (Thynne, 2009, 11). This sort of "selective justice," manifests into larger issues. Sácouto states that domestic proceedings should be prioritized because otherwise the Court "prosecutes a case that is narrower in scope than the domestic case that is interrupted, and large numbers of victims may be denied the benefits associated with trial of crimes committed against them" (9). To combat this, Sácouto and other scholars suggest the idea of "positive complementarity." Positive complementarity calls for the Court encouraging genuine national proceedings whenever possible (Sácouto, 2010, 2). The complementarity principle is meant to place confidence in domestic judiciaries, if it is not applied currently within the Court, benefits associated with it are at a large risk. The ICC should work closely with domestic judicial systems to ensure rule of law is intact and are provided the tools to punish serious crimes. Strengthening the DRC's own judiciary could push the positive complementarity theory into proper action.

The Right to a Fair Trial through the Lens of Article 54

The right to a fair trial is essential in ensuring the Court's legitimacy. Article 54 in the Rome Statute addresses the "duties and powers" of the prosecutor which when implemented, contributes to the ability to hold a fair trial. The rights laid out in Article 54 are outlined below:

1. The Prosecutor shall:

(a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;
(b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and
(c) Fully respect the rights of persons arising under this Statute.

2. The Prosecutor may conduct investigations on the territory of a State:
   (a) In accordance with the provisions of Part 9; or
   (b) As authorized by the Pre-Trial Chamber under article 57, paragraph 3 (d).

3. The Prosecutor may:

(a) Collect and examine evidence;
(b) Request the presence of and question persons being investigated, victims and witnesses;
(c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate;
(d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;
(e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and
(f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence. (Rome Statute, Art. 54).

This section of the chapter primarily targets Article 54(1)(a), (b), and Article 54(3)(e) to showcase two major critiques concerning the way Article 54 was applied to the Lubanga case, and why the Prosecutor's duties and powers were questioned.

The Prosecutor's use of 54(3)(e) in *Lubanga* raised concerns as to whether or not exculpatory evidence could be withheld from the trial. Article 54(3)(e) allows prosecutors to

withhold evidence they found in the investigation period when obtained in return for confidentiality (Rome Statute, Art. 54). In *Lubanga,* the Prosecutor received evidence from the United Nations mission in the DRC and other non-governmental organizations (NGOs) under a confidentiality agreement (Schabas, 2017, 245). This was worrisome to the Trial Chamber, especially after allegations that over fifty percent of the evidence was confidential, and some exculpatory, potentially hindering the right to a fair trial (Schabas, 2017, 245). The decision to disclose possible exculpatory materials was decided by the Appeals Chamber, where it weighed Article 54 with the rights permitted in Article 67(2), which requires the Prosecutor to disclose evidence that might show innocence or mitigate guilt (Rome Statute, Art 67). The Appeals Chamber determined, "the prosecution should receive documents or information on a confidential basis solely for the purpose of generating new evidence - in other words, the only purpose of receiving this material should be that it is to lead to other evidence" (*Lubanga,* ICC-01704-01/06, 13 June 2008). In conclusion, the Court said that the disclosure of exculpatory evidence is a fundamental right of the accused, and that the Prosecutor incorrectly used Article 54(3)(e) when entering the agreement with the evidence providers (*Lubanga,* ICC-01704-01/06, 13 June 2008). This was just one example of the *Lubanga* case violating the right to a fair trial.

Legal scholars are also skeptical about the prosecution's ability to follow Article 54(1)(a) and Article 54(1)(b). Particularly the mandate that the Prosecutor must "extend the investigation to cover all facts and evidence relevant" in the investigation (Rome Statute, Art. 54). The Prosecutor in the Lubanga case did not fulfill this condition. While there was significant evidence that Lubanga committed crimes of rape and sexual slavery, "the Court's Prosecutor has focused on child soldiers in the investigation of the situation of the DRC that led to Lubanga's arrest, because the strength of the evidence and a desire 'to highlight the misery of children's

lives'" (Mazurek, 2009, 15). Lubanga was only charged for enlisting and conscripting child soldiers under the age of fifteen; The Women's Initiatives for Gender Justice submitted a document with 55 detailed accounts of SGBV victims related to Lubanga (Thynne, 2009, 12).

Additional proof that Lubanga was responsible for additional crimes was stated by the UN Special Representative of the Secretary-General on Children in Armed Conflict: "When the Special Representative spoke to girl combatants in the Eastern DRC, they spoke of being fighters one minute, a "wife" or "sex slave" the next, and domestic aides…" (Thynne, 2009, 18). K'shaani Smith's note on the *Lubanga* case mirrors Thynne with significant evidence, claiming that Lubanga also instructed child soldiers to rape on enemies to terrorize them (Smith, 2011, 1). By failing to include rape and sexual slavery in Lubanga's charges, the Prosecutor failed the international community and the victims of the conflict. Not only was the Prosecutor too narrow in his evidence gathering, hindering Article 54(1)(a), but by not valuing all pieces of the investigation he directly ignored the language in Article 54(1)(b) to "respect the interests and personal circumstances of victims and witnesses... in particular where it involves sexual violence, gender violence or violence against children" (Rome Statute, Art 54). The selection of issues the Prosecutor chose to investigate in *Lubanga* had many negative consequences that will be explained further in chapter three, mwhich focuses on victims' redress.

The Right to a Fair Trial through the Lens of Article 67

While Article 54 addresses the rights of the Prosecutor, Article 67 covers the rights of the accused. Article 67 is important to *Lubanga*, *Katanga*, and all criminal law cases because it helps guarantee the individual on the defense is receiving a fair chance in trial. A large piece of Article

67 is making sure the accused understands the wording and processes of the legal procedure so there is opportunity to refute or accept the charges being brought to them (Rome Statute, Art. 67). The pertinent provision of Article 67 states the following:

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
    (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;
    (b) To have adequate time and facilities for the preparation of the defense and to communicate freely with counsel of the accused's choosing in confidence;
    (c) To be tried without undue delay;

This section of the chapter will first highlight ways the *Lubanga* case utilized Article 67 to achieve a fair trial. The remaining paragraphs will evaluate whether or not the Court effectively used 67(1)(a) in the Katanga case and 67(1)(c) in both the *Lubanga* and *Katanga* cases.

The right to a fair hearing for the accused implies impartiality at every stage, and this can be exemplified through segments of the *Lubanga* trial. Schabas describes Article 67, saying "the general right to a 'fair hearing' established in the *chapeau* of Article 67 of the Statute provides defendants with a powerful tool to go beyond the text of the Statute and to require the Court's respect for the rights of an accused keep pace with the progressive development of human rights law" (Schabas, 2017, 207). The Court adhered to these principles in the *Lubanga* case by confirming Lubanga's identity and reading out his rights, asking if Lubanga wanted the arrest warrant to be read, and providing Lubanga with paid legal assistance and translations throughout the proceedings (Maurek, 2009, 8). In addition, the Court explained to Lubanga that he could pose questions, examine and request witnesses, and present evidence at any time (Maurek, 2009, 8). By audibly confirming Lubanga's rights set forth in Article 67, the Court set the precedent in its first ever case that a fair trial would be respected. Not only does this paint the Court as a fair

and transparent judicial body, but Anoushirvani argues it is a duty of the Court in order to attain legitimacy among the international law community (Anoushirvani, 2010, 7). The Court mainly upholds their commitment to a fair trial, but there are a few examples where Article 67 was unclearly interpreted and the rights of the accused were blurred.

When the Court changed the mode of liability during the *Katanga* case, Article 67(1)(a) was challenged. The defense should be informed of the "cause and content" of the charges, but in *Katanga,* the legal characterization changed six months after the trial had started. Katanga was originally charged with war crimes and crimes against humanity under Article 25(3)(a), described as "indirect co-participation," but later the Trial Chamber decided he would instead be accused under Article 25(3)(d)(ii), meaning "common purpose" (Leyh, 2018, 7-8). Under Regulation 55 of the Regulations of the Court, the Chamber is allowed to change the legal characterization of the facts to accord with the crimes (Schabas, 2017, 308). While this is permitted, legal scholars like Leyh argue that judges overstepped their role, participated in illiberal and contradictory doctrines, and affirmed the nature of an impartiality deficit (Leyh, 2018, 10). Changing the mode of liability too late in the case impacted the narrative of the case severely. For instance, if the application of Regulation 55 did not happen, Katanga could have received his final judgment much earlier, and "he would likely have been acquitted" (Leyh, 2018, 9). Not all of the judges agreed therefore with the majority. Judge Van den Wyngaert wrote a dissenting opinion, stating that "'it is impermissible to fundamentally change the narrative of the charges in order to reach a conviction…that was not originally charged by the prosecution'" (Schabas, 2017, 309-310). In sum, changing the mode of liability late in the trial hindered the ability for Katanga to receive a fair trial under Article 67(1)(a).

The right to be tried without undue delay, outlined in Article 67(1)(c) was also undermined during both the *Lubanga* and *Katanga* cases. The principle of a guaranteed, speedy trial is a fundamental principle in any criminal law court. The ICC initially predicted that the average length of proceedings would be around three years, but *Lubanga* and *Katanga* took about six years each (Schabas, 2017, 210). In her note, Mazurek says, "as for the length of the trial proceedings, the Court is at risk of being ineffective," showing that Lubanga was arrested in 2006, his trial began in 2009, and he was sentenced in 2012 (Mazurek, 2009, 18). In conjunction with Mazurek's arguments, Judge Van den Wyngaert relays similar concerns regarding the length of the proceedings in her dissenting opinion of *Katanga*'s sentencing. She states, "the right to be tried without undue delay is clearly laid out in major international human rights instruments" and and after outlining the length of the Katanga trial, remarks, "to me, this is an inordinately long delay" (*Katanga,* ICC-01/04-01/07, 3 July 2014*)*. The ICC should reflect on the length of these cases in respect of the accusers, witnesses, and victims of the cases. The right to a speedy trial should be prioritized to ensure efficiency within the Court and afford the accusers the right to a fair trial.

The Presumption of Innocence and the Standard of Proof

The presumption of innocence principle, implying that the burden of proof falls on the prosecution, is written in Article 66. It is the prosecution's responsibility to collect evidence to prove the accused is guilty of the charges 'beyond a reasonable doubt,' which is the standard of proof (Schabas, 2017, 202). Article 66 is concise to its point:

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
2. The onus is on the Prosecutor to prove the guilt of the accused.

3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

This general rule is complemented by Article 22(2) of the Statute, which expresses the *in dubio pro reo standard* (Rome Statute, Art 22). The inclusion of this standard calls for the Court to favor the accused in circumstances of ambiguity (Rome Statute, Art 22). This way, the defense receives a fair trial and a chance to prove innocence.

Because the standard of proof is beyond a reasonable doubt, the bar to gather truth-telling evidence is rather high. When the Court prosecutes a case, there are many evidentiary challenges that make it even hard to reach this high bar. Aliza Shatzman argues these challenges in both *Lubanga* and *Katanga* included lack of attainable eyewitnesses, cultural barriers, ages and memories of victims and witnesses, and the crimes being too dangerous to investigate (Shatzman, 2021). ICC cases rely heavily on eyewitness testimony, and since the crimes occurred in the DRC, it is difficult to find and relocate witnesses to The Hague. Additionally, "child soldier cases are especially challenging. Children are highly vulnerable to forgetting events because of the trauma they suffered…" (Shatzman, 2021, 3). The reliability of children impacted the *Katanga* case. Katanga was initially charged with forcing children under the age of fifteen to participate in hostilities, but the Chamber could not prove this war crime beyond a reasonable doubt, so it was not included in his sentencing (*Katanga,* ICC-01/04-01/07, 23 May 2014). Proving guilt beyond a reasonable doubt was also challenging due to the Ituri conflict's dangerous nature. The security of investigators were at risk in zones where armed militias were hostile to any foreigners that they perceived as working for the Court (Shatzman, 2021, 6). For that reason, evidence was limited and weakened, ultimately making it especially demanding to meet the standard of proof during the prosecution. It can be argued that the beyond a reasonable

doubt principle benefitted both Lubanga and Katanga; this will be examined later in the Punishment and Sentencing theory chapter.

The standard of proof includes the *mens rea* (‘guilty mind’) principle in order to confirm guilt. Criminal law is predicated on two components: *actus reus* (‘a guilty act’) and *mens rea* (Schabas, 2017, 221). The *mens rea* principle is outlined in Article 30 as the “mental element”:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly. (Rome Statute, Art. 30).

The ICC rarely has to turn to Article 30 because most war crimes and crimes against humanity have a built-in mental element. For example, genocide is defined with the language of intent and an attack against a civilian population is defined with the word knowledge (Schabas, 2017, 222).

Substantial evidence in *Lubanga* and *Katanga* allowed the *mens rea* principle to meet the standard of proof. Katanga’s crimes involving his planned attack on the village of Bogoro all proved to be done with intentional and knowing behavior (*Katanga*, ICC-01/04-01/07, 23 May 2014). A majority of the crimes he committed, like murder, already had a built-in mental element in the law's language, so the judges did not have to turn to Article 30 (Rome Statute, Art. 7-8). The mental element in *Lubanga* was also proved beyond a reasonable doubt. In order to sentence Lubanga as a co-participant, stated in Article 25(3)(a), the prosecution found Lubanga guilty for

agreeing and participating on a *common plan*, which was to enlist children under fifteen to participate in hostilities (Shatzman, 2021, 16). Because it became clear to the prosecution that Lubanga was willingly planning this act, the *mens rea* principle was affirmed. Even after *mens rea* was indicated, Lubanga's defense attempted to appeal against the accusations that Lubanga had knowingly participated in the crimes. Article 31 of the Rome Statute describes the grounds in which an individual can be exempt from criminal responsibility, and Article 32 declares that a mistake of fact or law can exclude criminal responsibility if it negates the mental element of the crime (Rome Statute, Art 31 & 32). In *Lubanga,* the defense argued that because the Rome Statute was so new and its laws were not disseminated around the DRC, the crimes he was being convicted for could be considered *ex post facto* law (Schabas, 2017, 229). The Chamber determined that this argument was invalid, and instead explained there was a clear distinction between negating *mens rea* with the argument of retroactivity versus simple ignorance of the law (Schabas, 2017, 229). The inclusion of the *mens rea* principle is not only an effective tool to confirm guilt, but raises the standard of proof, placing an extra test on individuals to ensure convictions are accurate.

Chapter Two: Punishment & Sentencing Theories at the International Criminal Court

Article 77 Applicable penalties

1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:
   (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
   (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.
2. In addition to imprisonment, the Court may order:
   (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
   (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

Article 78
Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.
2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.
3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b).

Penal theories and sentencing guidelines are mainly addressed in Articles 77 and 78 of the Rome Statute. Article 77 describes the “applicable penalties” and Article 78 outlines the “determination of the sentence” (Rome Statute, Art. 77-78). Since Lubanga was the first criminal to stand trial at The Court, Luis Moreno-Ocampo, the Chief Prosecutor of the ICC explained the importance of ending “...impunity and atrocities all over the world” (Anoushirvani, 2010, 3).

Lubanga's case was therefore a pivotal moment in history, showing the international community that individuals *would* be held responsible for war crimes and crimes against humanity. While this message signaled that punishment would be *inevit*able, this chapter will explore what the primary purpose of punishment and sentencing means to the Court. Legal scholars Ashley Joy Stein and Drew J. Breesley will help guide these discussions and critiques. This chapter will contextualize the *Lubanga* and *Katanga* cases in the center of these debates and analyze the effectiveness of each of their sentences.

Discord on the Topic of Sentencing Ideologies

Domestic legal regimes often act in accordance with a penal theory which aids the sentencing decision of a criminal. The most common penal theories are retribution, deterrence and rehabilitation (which are categorized as utilitarian), and restorative justice (Stein, 2014). The Rome Statute does not explicitly state if the ICC aligns with a certain punishment theory, or describe any objectives of sentencing. The closest the Court gets to addressing this question is in the preamble: "*Affirming* that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, *Determined* to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes" (Rome Statute, Preamble). The main explanation as to why the Rome Statute does not distinctly indicate a sentencing ideology is because it is responsible for representing multiple states with varying legal traditions (Breesley, 2016, 3). Life imprisonment, for example, was a contested topic during the creation of the Rome Statute. Many European and Latin American states were opposed to life imprisonment, calling it inhumane and cruel (Schabas, 2017, 324). In

order to account for many different opinions, the Rome Statute remains inconclusive on a consensus, leaving the Trial Chamber with broad discretion over punishment and sentencing decisions.

Rule 145: Inconsistencies Between Aggravating and Mitigating Factors

Stated in the Rules of Procedure and Evidence, Rule 145 contains a non-exhaustive list of both aggravating and mitigating circumstances that can affect the length of an individual's sentence. Rule 145 is meant to complement Articles 77 and 78 in determining a holistic decision by asking the judges to weigh related factors to the crime.

Rule 145: Determination of sentence

1. In its determination of the sentence pursuant to article 78, paragraph 1, the Court shall:
    (a) Bear in mind that the totality of any sentence of imprisonment and fine, as the case may be, imposed under article 77 must reflect the culpability of the convicted person;
    (b) Balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime;
    (c) In addition to the factors mentioned in article 78, paragraph 1, give consideration, inter alia, to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behavior and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.
2. In addition to the factors mentioned above, the Court shall take into account, as appropriate:
    (a) Mitigating circumstances such as:
        (i) The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress;
        (ii) The convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court;

(b) As aggravating circumstances:
(i) Any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature;
(ii) Abuse of power or official capacity;
(iii)Commission of the crime where the victim is particularly defenseless;
(iv) Commission of the crime with particular cruelty or where there were multiple victims;
(v) Commission of the crime for any motive involving discrimination on any of the grounds referred to in article 21, paragraph 3;
(vi) Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned.

3. Life imprisonment may be imposed when justified by the extreme gravity of the crime and the individual circumstances of the convicted person, as evidenced by the existence of one or more aggravating circumstances.

The standard of proof for both aggravating and mitigating circumstances is unstated in the Rome Statute of Rules of Procedure and Evidence, so it was therefore up to the judges in *Lubanga* to provide guidance (Stein, 2017, 6-7). The Chamber determined in the sentencing judgment that "since any aggravating factors established by the Chamber may have a significant effect on the overall length of the sentence Mr. Lubanga will serve, it is necessary that they be established to the criminal standard of proof, namely 'beyond a reasonable doubt'" (*Lubanga,* ICC-01/04-01/06, 10 July 2012). Thus, the Court set precedent for the *Katanga* case as well, making the standard of proof for aggravating circumstances beyond a reasonable doubt. The Court also defined the standard of proof for mitigating circumstances: "the defense submits that it is not limited to the facts relied on during the confirmation stage of the proceedings, and the standard of proof to be applied should be that of a balance of probabilities" (*Lubanga,* ICC-01/04-01/06, 10 July 2012). 'The balance of probabilities,' being the standard of proof for mitigating factors, meant that they were assessed differently from aggravating factors. Their unequal application to Lubanga's sentence created numerous incoherences.

In determining Lubanga's sentence, the judges were unable to find aggravating circumstances beyond a reasonable doubt. The most prominent aggravating factor that was considered in Lubanga's hearing were instances of sexual violence (*Lubanga,* ICC-01/04-01/06, 10 July 2012). The evidence presented by the victims in the "Decision on Sentence Pursuant to Article 76 of the Statute" are the following:

"70. P-0046 testified that the girls she interviewed informed her of incidents of sexual violence that occurred as a result of children having been integrated into the FPLC. The girls P-0046 interviewed indicated that they *had been sexually abused and raped by commanders and other soldiers*, the youngest of whom was 12 years old.

71. P-0016 suggested that *female recruits at Mandro were raped, irrespective of their age* and notwithstanding a strict prohibition in this regard. However, P-0016 also said that it was difficult to determine the age of the recruits who were raped from their appearance" (*Lubanga,* ICC-01/04-01/06, 10 July 2012).

Despite eyewitness testimony and other evidence concerning the issue, sexual violence was not found as an aggravating factor for the purposes of sentencing. Many legal scholars, including Stein, find this disappointing. Because of the unequal standard of proof, aggravating factors are much harder to prove than mitigating factors, causing a lenient punishment that does not consider the gravity of the crime (Stein, 2014, 19). Stein also points to this becoming a circular problem. If the Prosecutor could did not initially charge Lubanga with sexual violence because it was not found beyond a reasonable doubt, then it could not possibly be considered beyond a reasonable doubt later in the trial as an aggravating circumstance (Stein, 2014, 19). The

sentencing regime in *Lubanga* ultimately favors the accused in a way that marginalizes victims of SGBV. This perpetuates damaging effects addressed in Chapter Three.

The Trial Chamber found mitigating circumstances by the balancing of probabilities, shortening Lubanga's sentence. Nowhere in the Rome Statute is the 'balancing of probabilities' defined, allowing judges to have broad discretion over what this means (Schabas, 2017, 325). The only clear meaning is that it consists of a lower standard of proof than 'beyond a reasonable doubt.' Mitigating factors that were found consisted of "necessity, peaceful motives and demobilization orders" and "cooperation with the court" (*Lubanga,* ICC-01/04-01/06, 10 July 2012). After considerations made in relation to Rule 145, the Court sentenced Lubanga to fourteen years of imprisonment. Many critics refer to his sentence as "lenient" and "unproportional" (Beesley, 2016). Judge Odio Benito did give a dissenting opinion on the sentencing decision, stating, "as noted by the Majority of the Chamber, Mr. Lubanga may not have 'deliberately discriminated against women in committing these offence,' but the crimes for which he was convicted resulted in the discrimination of women, particularly girls under the age of 15 who were subject to sexual violence (and consequently to unwanted pregnancies, abortions, HIV and other sexually transmitted diseases)..." (*Lubanga,* ICC-01/04-01/06, 10 July 2012). Judge Benito argued gender discrimination in the form of sexual violence was proven beyond a reasonable doubt, and thus should have contributed to Lubanga's overall sentence as an aggravating factor. The confirmation of mitigating factors combined with the absence of aggravating ones resulted in Lubanga's sentence being too light for the atrocities he committed.

Despite the imbalance between standards of proof, the Court was able to find three aggravating factors and zero mitigating ones in the *Katanga* case. Four aggravating factors were initially taken into account: "Particularly defenseless victims," "Particular cruelty of the

commission of the crime," "motive involving discrimination," and "abuse of power or official capacity" (*Katanga,* ICC-01/04-01/07, 23 May 2014). The first three were all proven beyond a reasonable doubt, which is peculiar since sexual violence in *Lubanga* was not. In order to determine if the first three were found beyond a reasonable doubt, the legal representative of victims and Prosecutor shared evidence that the crimes "were committed with cruelty and that the inhabitants of Bogoro included vulnerable people, particularly children," and thus the crime was considered as discriminatory in nature (*Katanga,* ICC-01/04-01/07, 23 May 2014). The mitigating factors investigated were "personal circumstances," relating to Katanga's age and family life, and "subsequent conduct," emphasizing Katanga's contributions to the "peace process" and his cooperation with the Court (*Katanga,* ICC-01/04-01/07, 23 May 2014). The Court did not find these two circumstances by the balancing of probabilities, so they were not determined as mitigating. Katanga was sentenced to twelve years of imprisonment (*Katanga,* ICC-01/04-01/07, 23 May 2014). Due to the gravity of Katanga's crimes relating to his planned attack on Bogoro, it is fair to say that the judges effectively applied aggravating circumstances to his sentence. By acknowledging the added harm Katanga had inflicted on the Bogoro community and its victims, the pathway to justice becomes more feasible than in the case of Lubanga.

The Court and Theories of Retribution

A great penal reformer in the eighteenth century, Cesare Beccaria, said "punishment should not be harsh, but should be inevitable (Schabas, 2017, 321). His statement portrays what would be the opposite of the theory of retribution. Retribution focuses on the offender, and the punishment is set forth simply to be proportional to the crime (Stein, 2014, 15). The punishment increases as the crime gets more serious according to the theory of retribution. Also referred to as "proportional justice," it seeks to gather communal disapproval for criminal behavior (Breesley,

2016, 5). A retributionist would most likely argue the Lubanga and Katanga sentences were too light. A retributionist would push for proportionality, seeking a punishment that fit the gravity of the crimes- in this case for murder, attacking a civilian population, enlisting young children in hostilities, and more.

Lubanga's and Katanga's sentences did not satisfy the theory of retribution because their punishment was not proportionate with the crime. Article 81(2)(a) refers best to the proportionality requirement. "A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of *disproportion* between the crime and the sentence" (Rome Statute, Art. 81). The Appeals Chamber defines proportionality as the degree of harm caused by the crimes and perpetrator and how it relates to the determination of the length of the sentence (Schabas, 2017, 326). Lubanga enlisted hundreds of children in armed conflict, severely scarring victims both physically and emotionally. Katanga's planned attack on Bogoro was met with the same level of cruelty; crimes were committed with machetes, bodies were carved by the limbs before they were killed, and even those who were not slaughtered still suffer from trauma (*Katanga*, ICC-01/04-01/07, 23 May 2014). Despite these facts, Lubanga only served fourteen years of imprisonment and Katanga just twelve. "Insignificant punishments are a slap in the face of victims," remarks Breesley, who does not find their sentences to be fair or just (Breesley, 2016, 14). Stein also argues that their punishment was not comparable to the crime, and therefore the Court was unable to satisfy the theory of retribution (Stein, 2014, 22). While retributionists condemn the Court for lenient sentencing, there are critics of the retribution theory who do not equate harsher sentences with a higher level of justice.

Article 77 of the Rome Statute does offer that for crimes of extreme gravity, the Court may impose life imprisonment, but there is pushback to this type of sentence. It is curious that the language in Article 77 refers to "crimes of extreme gravity," considering that all cases brought to the Court are categorized as severe and heinous (Schabas, 2017, 324). To date, no criminal has been punished before the Court with life imprisonment, and this could be the result of many states during the founding of the Rome Statute describing life imprisonment a "cruel, inhuman and degrading form of punishment…" (Schabas, 2017, 324). It can be inferred that the crimes both Lubanga and Katanga committed, if met with the theory of retribution, would have resulted in a sentence close to life imprisonment or that within itself. If this is true, the Rome Statute does not follow retributive penal theories. Law professor Dirk Van Zyl Smit is an opponent of life imprisonment, articulating the reasons why it directly contradicts international human rights law (Smit, 1999). International human rights law forbids certain forms of cruel punishment, and it can be argued that life imprisonment therefore infringes these human rights norms (Smit, 1999, 12). Furthermore, because the proportionality test is met with some subjectivity, those who challenge the theory of retribution believe in some cases the harshness of life imprisonment is disproportionate to the results that can be achieved by using it, like deterring the crime altogether or improving the wellbeing of society (Smit, 1999, 35). For these reasons, the Court did not follow a retributive approach, but that does not mean that this penal theory best fits the sentencing regime of the Court.

The Court and Theories of Utilitarianism

Returning back to the inevitability question that was posed in the previous section, some utilitarian punishment theories emphasize the importance of inevitability over harshness. Theories of utilitarianism include deterrence and rehabilitation, which focus on the ultimate

betterment of society (Stein, 2014, 16). Deterrence is based on the idea that an individual will choose not to commit a crime for fear of punishment, or will choose not to reoffend (Breesley, 2016, 6). Rehabilitation is the theory that seeks to help and reform those who have committed crimes in order to create a "greater social good" (Stein, 2014, 16). Breesley argues that the Court is primarily a utilitarian institution; this hypothesis is somewhat convincing considering the fact that the previous section outlined the reasons why the Court does not satisfy a retributive model. Nevertheless, this section will show that by analyzing the *Lubanga* and *Katanga* cases, the Court does not follow a utilitarian approach either.

In order for a sentence to truly deter a crime, it must be threatening to the point where the costs outweigh the benefits of committing the crime. Because the Court deals with the most severe international cases, the assumption is that the penalty would be high for the atrocities individuals commit, and therefore would have the power to deter the act altogether. Turning to *Lubanga*, the first issue prohibiting the Court from satisfying the theory of deterrence is the narrow investigation the Prosecutor conducted that limited Lubanga's charges only to concern child soldiers (*Lubanga,* ICC-01/04-01/06, 10 February 2006). Lubanga was only sentenced in accordance with one crime, instead of the several additional allegations he faced, leaving him with just fourteen years of imprisonment (Smith, 2011). A fourteen-year sentence is slim for the gravity of the crime according to the theory of retribution, and therefore does little to deter the offender. A significant amount of evidence also shows that Lubanga committed multiple offenses, and because he was only charged with one, a message gets sent to the international community that impunity is possible for certain crimes (Stein, 2014, 22). Likewise, since Katanga received only fourteen years of imprisonment for an attack that cost hundreds of lives, and retributionists find his sentence disproportional, there is little chance the offender would be

deterred. Further arguments that suggest criminals being prosecuted at The Hague are unable of being deterred regardless of how strongly the theories of utilitarianism guide the Court's sentence. For example, two perpetrators can be considered beyond deterrence: psychologically unstable and ideological extremists (Breesley, 2016, 12). Of course, there are individuals who have no connection to the rules of war or any sort of recognizable morality, and considering the atrocities committed by Lubanga and Katanga, this point is worth noting.

The ICC was also incapable of fulfilling the theory of rehabilitation during the Lubanga and Katanga trials. Rehabilitation is adopted by many European countries for the purpose of allowing criminals to reintegrate into society (Stein, 2014, 16). It is thus hard to imagine ICC criminals, who are responsible for the world's most serious crimes, re-entering society and resuming a normal life after all the harm they have caused to civilian populations. A rehabilitative pathway was not discussed in either *Lubanga* or *Katanga* due to the gravity of the crimes, and international criminal law does not traditionally place much weight on rehabilitative practices. Individuals responsible for atrocities serious enough to be brought to the Court do not often commit these acts because of inherent character flaws, but rather due to extreme circumstances associated with armed conflict (Breesley, 2016, 15).

While the Court is not actively encouraging international law criminals to re-enter society, an effort to lighten sentences may be viewed under the rehabilitation umbrella. The charges Lubanga and Katanga were tried for in the DRC were not exactly the same as those the Court pursued, but the crimes were all related to the Ituri conflict (Schabas, 2017, 328). In accordance with Article 78(2), which reduces detention if the criminal has previously been detained in connection with the crime, Judge Christine Van den Wyngaert dissented with regard to Katanga's sentence, requesting it to be reduced (Schabas, 2017, 328). She said in her opinion,

"According to the Majority…Germain Katanga was not detained by the Congolese authorities for the crimes committed in Bogoro on 24 February 2003. I respectfully disagree. In my view, the available documents are far from clear with regard to the reason(s) for detention and it would be unfair to hold this ambiguity against Germain Katanga" (*Katanga,* ICC-01/04-01/07, 23 May 2014). Judge Wyngaert's efforts to reduce the sentence was not quite motivated by the theory of rehabilitation, but it is the closest example of the Court mitigating a sentence for the well-being of the offender. All in all, Breesley argues that rehabilitation may work in domestic court systems, but is ill-suited for the worst crimes known to mankind being prosecuted at the Court (Breesley, 2016). The ICC does not satisfy rehabilitative theories nor should it, ultimately meaning this observation is not necessarily a negative one.

The Court and Theories of Restorative Justice

Restorative justice seeks to encourage peace by bringing together those affected by the crimes and giving them a role in deciding how best to repair the harm (Stein, 2014, 17). Restorative justice is heavily focused on delivering justice to victims and the communities to achieve reconciliation. In order to assess whether or not the Court has satisfied the theory of restorative justice, attention must be turned to how the ICC has contributed to reparative and peaceful transitions in conflict zones. Restorative justice places a strong emphasis on the individual, with special attentiveness to victims. This is usually given through mechanisms like monetary reparations, medical support, and trauma centers (ICC, 2018). Stein argues that the Court is unlikely to satisfy restorative justice through the *Lubanga* and *Katanga* cases because affected witnesses and victims have experienced minimal efforts from the Court to help

rehabilitate victims from the DRC (Stein, 2014, 22). The last section of this chapter will explore a few reasons for the Court's inability to fulfill this sentencing theory.

Methods of restorative justice are not the Court's key focus either. Due to the limited charges Lubagna and Katanga underwent, lenient sentencing regimes indirectly affect culpability, whose responsibility drags on to influence the requirement of reparations- one of the most tangible forms of restorative justice. The principle of culpability implies that convicted individuals are *only* accountable for their own "conduct" (Leyh, 2018, 5). Criminal "conduct" strictly includes the crimes that were proven beyond a reasonable doubt. Although Lubanga and Katanga were accused of being involved in numerous more crimes than they were actually charged with, the personal culpability principle lessens their responsibility. A general element of reparations must "define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted…" (Leyh, 2018, 23). Lubanga was just charged with conscripting child soldiers, but the Court avoided his involvement in gender-based crimes throughout the Ituri conflict (Thynne, 2009, 3). According to the principle of culpability, because Lubanga was only found guilty for a sliver of the atrocities he allegedly contributed to, a sliver of reparations will also only be considered. Therefore, the Court limited the number of victims recognized to receive reparations (Leyh, 2018, 23). The Court's inability to fully investigate and charge Lubanga with gender-based crimes undermined the potential for restorative justice.

The Court is additionally unable to satisfy the theory of restorative justice because of the lack of legal precedent and language surrounding sexual and gender-based violence (SGBV). *Katanga* was the first ever case at the Court to address SGBV in a non-international and international context. While Elena Gekker states that the ICC is revolutionary in recognizing victims of SGBV, she argues that the Court has not yet adopted a developed jurisprudence on

crimes related to SGBV (Gekker, 2014). Katanga was initially charged with SGBV crimes, one of which could have been forced marriage, but the Rome Statute does not recognize it as an issue of sexual slavery, and therefore lacks a developed definition (Gekker, 2014, 17). The ICC's inability to create jurisprudence for the specificities of forced marriage comes at the expense of victims, who are unable to be recognized if the crime itself cannot be either. In fact, "recognizing forced marriage under a crime of sexual slavery would allow for the specific act to be prosecuted to the full extent" and would "count as an aggravating factor used in sentencing once the general crimes of sexual slavery have been found" (Gekker, 2014, 21). The inability to recognize the women and girls subjected to forced marriage as a sexual slavery crime prevented the Court from affording any restorative justice to those individuals.

Sentencing Regimes and the Proper Fit for the Court

A mixed mode of both retributive and utilitarian theories would best complement the Court in building a productive sentencing regime. Although there has been little inquiry into what the ultimate penalty should be for crimes of extreme gravity, many critiques of the Court's punishment decisions echo one another: they are too light and lenient. This starts with some form of retribution in order to address these qualms. Retribution should instead guide the Court to lengthen sentences beyond the 30 year maximum stated in Article 77(1)(a). There should instead be a minimum sentence, yet to be determined, that is severe in a way that is proportional to the severity of the crime. The Court should follow the state of Finland, where the penal code states, "punishment should be measured so that it is in just proportion to the damage and the danger

caused by the offense…" (Stein, 2014, 15). Criminals being prosecuted at the Court commit war crimes, crimes against humanity, and crimes of genocide.

Lubanga's twelve year and Katanga's fourteen year sentences are arguably disproportionate to the harm they perpetrated. In most countries, criminals receive life in prison for a single murder (Breesley, 2016, 15). This theory should also be met with the utilitarian feature of deterrence in order to guarantee a moral social good. Deterrence is important because it can address the crime before it even happens, showing individuals that the harm is wrong and inevitably punishable. The ICC's prosecution of Lubanga and other individuals who were involved in the widespread recruitment of child soldiers has been linked to the successful demobilization of over 3,000 child soldiers in Nepal and Sri Lanka (Breesley, 2016, 9). The Court's demonstration and commitments "to put an end to impunity" will be the most meaningful to the international community if it is able to articulate a clear consensus on a sentencing and punishment theory. While rehabilitation should not be the main concern of the Court's sentencing regime, restorative justice can play a role in the next steps to thoughtfully account for victims.

Chapter Three: Victim Redress and Selective Justice for Gendered Crimes

The most important attribute of the Court is its ability to deliver justice for victims. This raises the question about whether, if, and how, international law ought to be developed to address the needs of victims of war (Camins, 2023, 24). The ICC is one of the first international tribunals to recognize the interests of victims and codify protective measures to guarantee their support in the trial process (Mouthaan, 2013). The Court permits victims' "views and concerns to be presented and considered at stages of the proceedings…" in accordance with Article 68(3).

The Rome Statute is also groundbreaking in its references to gender-based crimes and discrimination against women and girls (Thynne, 2009, 8). Article 54(1)(b) says the Prosecutor should pay close attention to " the interests and personal circumstances of victims and witnesses, including age, gender… in particular where it involves sexual violence, gender violence or violence against children…" (Rome Statute, Art. 54). Victims of crimes against humanity and war crimes suffer significant physical, mental and psychological harm, so it is critical that the Court honors the additional duty to provide them with reparations and support beyond just sentencing the offender. While this chapter first shows the revolutionary progress in what the Court affords victims, it introduces a critique to a selective justice paradigm. Sexual violence and gendered crimes were present in *Lubanga* and *Katanga*, but its victims were treated unequally. By identifying the clear examples of how the Court failed to address gendered crimes in both cases, this chapter uses a critical feminist jurisprudential lens to find ways transitional justice can be achieved by the Court.

A Brief Overview on how the ICC Serves the Interests of Victims

> Article 68(3): Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered …Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate.

The ICC recognizes victims and allows them meaningful participation in all stages of the prosecutorial process. Victim participation is voluntary, allowing harmed individuals to communicate their views to the Court (Mouthaan, 2013, 2). In order for a victim to participate in the proceedings, they have to individually apply and show that they meet the victim definition set forth in Rule 85 and "demonstrate a link between the harm suffered and the crimes charged" (*Lubanga,* ICC-01/04-01/06, 18 Jan 2008). Victim participation is dependent on the prosecutor's selection of charged crimes, which limited victims of gender-based crimes that were not focused on in *Lubanga* and *Katanga* (Mouthaan, 2013, 12).

The second way the Rome Statute serves the interest of victims is through reparations, legally outlined in Article 75. Judge Claude Jorda and Jermome de Hemptinne state "'the making of legal reparations for those who have suffered harm constitutes an essential criterion for the restoration of social harmony between communities that have been at war…'" (Dannenbaum, 2010, 4). Mia Swart provides a definition of reparations: the range of measures that may be taken in response to an actual or threatened violation of international human rights law and international humanitarian law (Swart, 2012). While the Rome Statute does not define 'reparations,' they can take many forms along monetary and symbolic lines. Similar to victim

participation, reparations can be limited to victims of gendered crimes. These topics will be explored in their own designated sections. It is necessary to note that delivering transitional justice in the form of participation and reparations to a post-atrocity state can only partially repair victims. Dannenbaum raises a crucial point: "The critical issue for any reparations regime in a transitional society is not whether victims are made whole, but rather how victims are treated relative to one another," says (Dannebaum, 2010, 34). The following sections will critique the Court's ability to treat victims equally in accordance with the articles that were meant to protect and redress victims.

Victim Participation

Article 68 outlines the right for victims to be protected and to participate before the Court. Article 69 specifically addresses what witnesses and others testifying can share during the trial:

Article 69 Evidence

1. Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.

3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

Because Article 69 does not speak explicitly about victims, it leaves a gap of discretion for the judges to determine how victims interact with evidence during their participation. The Rome Statute and the Rules of Procedure and Evidence do not say anything about a victim's ability to actually lead evidence (proving the existence or non-existence of material facts) during the trial procedures (Schabas, 2017, 346). Opinions on this issue go unsettled, with dissenting judges

claiming that victims leading evidence contradicts the defense's entitlement to the disclosure of all evidence well before trial (Schabas, 2017, 347). This question was first left to judges in *Lubanga.* Both the prosecution and defense argued that victims did not have the right to lead evidence, according to Article 69(3), claiming that it would breach the principle of equality of arms, a fair opportunity for both sides of the party to present their cases under conditions that do not place them at a disadvantage vis-à-vis his opponent (Leyh, 2018, 14). The Appeals Chamber in *Lubanga* decided that "the right to introduce evidence during trials before the Court is not limited to the parties, not least because the Court has a general right to request the presentation of all evidence necessary for the determination of the truth…" (*Lubanga,* ICC-01/04-01/06, 18 Jan 2008). The Court thus stated that victims have the right to lead evidence, presenting a broad interpretation of 69(3), as well as relying on Article 68 to make their decision. The Court stated "68(3) of the Statute is clear that victims have the right to participate directly in the proceedings…" and the meaning of leading evidence in relation to a victim's views and concerns, can fall under the general umbrella of participation. Victims are also allowed to challenge evidence, question witnesses, experts, and the accused, and call new witnesses (Mouthaan, 2013, 6). Leyh argues the Court's application of Article 68 and 69 in the *Lubanga* case challenged the liberal foundations of the criminal law process (Leyh, 2018, 11). Instead, the Appeals Chamber's interpretation steered the Court toward a human rights-based approach (Leyh, 2018, 12). Reliance on human rights law standards ties directly to the well-established right to truth, which was conveyed as one of the main reasons for the Appeals Chamber to enable victims to lead evidence.

The limited number of victims permitted to participate and lead evidence in the *Lubanga* and *Katanga* cases highlight the gendered divisions between the "victims of the case" and the

"victims of the situation." In the Appeals Court's decision on victim participation a judge states "the applicants [for victim status] must demonstrate that there is a sufficient causal link between the harm they suffered and the crimes for which there are reasonable grounds to believe that Thomas Lubanga is criminally responsible…" (*Lubanga,* ICC-01/04-01/06, 18 Jan 2008). Because victims' rights are dependent on the prosecutor's choice of crimes and events to prosecute, *Lubanga* and *Katanga* showcased how victims of gender-based crimes can be a forgotten category due those crimes going unnoticed. In the *Lubanga* trial, the prosecution focused on the issue of child soldiers, sidelining victims of gender-based crimes, such as sexual violence and slavery (Mouthaan, 2013, 12). Similarly in *Katanga,* the Chamber acquitted him as an an accessory to rape and sexual slavery as international crimes outlined in the Rome Statute (Women's Intitiative for Gender Justice, 7 March 2014). The refusal for individuals subjected to gendered violence to be acknowledged as legal victims should not take away their victim status as a whole, but by getting denied protections and rights before the Court they are significantly disadvantaged. The ICC's failure to address crimes specific to women comes through the reasoning that "victims of the case" and "victim of the situation" are different; the Court said, "victims of the Situation in the DRC will be unrelated to the substance of the present case" (*Lubanga,* ICC-01/04-01/06, 18 Jan 2008). Crimes of SGBV were not even fully investigated in *Lubanga,* even though there are inherent gendered aspects of child solders, including training boys to rape as well as the sexual enslavement of women and girls as a war crime (Mouthaan, 2013, 15). While the ICC giving participatory rights echoes a trend in human rights law, the system displayed in *Lubanga* and *Katanga* do not meet the expectations of victims of gender-based crimes, resulting in the inequality of this vulnerable category of victims.

There are other instances where the Court's participation regime was limited as a whole, ultimately hindering the possibility for transitional justice. NGOs and other third-party organizations may submit a request to participate as *amicus curiae* in order to assist the Court with additional evidence and information. In *Lubanga,* the Women's Initiative for Gender Justice, expressing a grave concern for the narrow charges, applied as *amicus curiae* to submit evidence of gender-based crimes (Pritchett, 2008, 18). Lubanga's defense team firmly rejected the request, along with the prosecution who believed the Women's Initiative was "'promoting its own interests without demonstrating any link to a matter capable of resolution in the proceedings'" (Pritchett, 2008, 19). This statement was yet another loss for the community of victims who suffered from crimes related to SGBV. It is peculiar that with a substantial amount of evidence, the Women's Initiative was not given the opportunity to participate and submit information that had the possibility to be inculpatory.

While a victim's right to participate and lead evidence can assist the administration of justice, there are a few conflicts of interests Articles 68 and 69 create. Besides the unequal treatment of victims of gendered crimes, Mouthaan argues the Court has failed to adopt a consistent set of guidelines in determining the degree of participation for each victim (Mouthaan, 2013, 6). In *Katanga,* judges displayed a systematic approach where victims who met the Rule 85 criteria could participate and were granted the same set of rights. In *Lubanga,* there was a somewhat 'piecemeal approach,' where each victim had to prove how their personal interests were affected by the case (Mouthaan, 2013, 6-7). The inconsistencies between trials have introduced questions as to how victims will be treated in future cases and what they can expect.

The rise of victim participation within the Court may directly interfere with the founding ICC principle that grants the accused to be tried without undue delay. It also underscores the

tension between the Court as a criminal law institution and the Court as a human rights one. For example, an increase in victim participation applications, as many as 12,641 by 2012, causes unduly delay of the trial and a larger burden on judges (Mouthaan, 2013, 15-16). Another key concern is that '"an extensive interpretation of victims' rights could conflict with two cardinal principles which are vital to the work and functioning of the Court: the function of the Court as a judicial institution, and the imperative of impartiality'" (Mouthaan, 2013, 16). Lastly, it is clear victim participation and restorative justice do not go hand and hand due to the limited charges prohibiting all victims from participating in *Lubanga* and *Katanga*. Since restorative justice is not being fulfilled by the Court's attempt to serve the interests of victims, the Court must find a definite purpose and overall goal of victim participation.

Victim Reparations

Article 75: Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

Reparations are a key ingredient for the Court to reach transitional justice among victims and communities affected by international crimes. An order for reparations must meet at least five elements: it must be directed against the convicted person, it must inform the convicted

person of their liability, it must specify whether reparations are individual or collective, it must define the harm inflicted to the victims, and it must identify the eligible victims based on the link between the harm suffered by victims and the convicted crimes (Schabas, 2017, 351). On March 8, 2018, the Appeals Chamber of the Court finally delivered a decision confirming Katanga's reparations order. After being found guilty for murder, attacking a civilian population, and destruction of property and pillaging, his order for reparations amounted to 1,000,000 USD. An additional 250 USD was also awarded to each of the 297 identified victims to go toward housing and education assistance, income generating activities, and psychological rehabilitation (ICC Press Release, 8 March 2018). On July 18, 2019, the Trial Chamber held that Lubanga was liable for 10,000,000 USD of reparations in respect to the 425 victims of child soldier crimes found eligible (ICC Press Release, 18 July, 2018). The Chamber emphasized the main purposes of reparations: they should address the harm victims have suffered, with children and women should be addressed as a priority, among other goals (Swart, 2012, 11). Due to both Katanga's and Lubanga's indigent status, they were not personally required by the Court to pay reparations and instead the funds came from the Court's sibling institution, the Trust Fund for Victims (TFV).

Selectivities Presented in Article 75

Similar to participatory requirements, reparations further prioritize victims of the case over victims of sexual and gender-based crimes. Article 75 reparations are dependent on the link between harm suffered and charged crimes (Dannenbaum, 2010, 29). Due to the Court's inability to charge both Katanga and Lubanga for gendered crimes, the opportunity to apply for reparations was taken away from hundreds of victims. The limited charges in Lubanga led a coalition of NGOs to write a letter to the Prosecution calling on, "'the negative impact on the

right of victims to reparations,' and Redress arguing "'the lack of recognition of some of the most heinous and flagrant crimes denies victims their right to justice and reparation'" (Dannenbaum, 2010, 29). The fact that gendered violence was not fully investigated in Lubanga and not found in Katanga is astonishing, given that it fulfills the war crimes and crimes against humanity described in both Article 7 and 8 of the Statute (Rome Statute, Art.7-8). In 2004, the United Nations Secretary General issued an alert about the crimes taking place in the DRC; it stated violations including women subject to sexual slavery, rape and torture in the Ituri region and Lubanga's involvement in 18 confirmed cases of rape, with victims as young as age 11 (Pritchett, 2011, 13). In the Katanga hearing, three female witnesses testified specifically to rape, sharing their stories of being gang raped by soldiers during the attack on Bogoro (Gekker, 2014, 16). It is not like there was an insufficient amount of evidence proving that gendered violence occurred, and therefore the restrictions indicated by Article 75 exacerbate the othering of SGBV victims.

Reparations have their limitations. Due to the Court dealing with a high level of mass atrocities, the harm suffered by victims is extremely difficult to compensate (Megret, 2010, 8). When imagining effective reparations, monetary ones are normally the types that come to mind first. Reparations being limited to strictly a financial scheme limits the possibility for sustainable, long-term recovery. It is important not to limit a victim's needs to a sole dimension, and instead to account for holistic approaches that better serve victims on an individual basis. Megret argues that monetary reparations "tend to be oriented toward the past rather than the future," and compensation regimes need to be more forward thinking (Megret, 2010, 10). Megret lastly calls attention to the tension between individual and collective beneficiaries. By allocating reparations on an individual basis and breaking victims up in disaggregated segments, there is a risk that

reparations will lose their societal dimension and collective nature (Megret, 2010, 12). There are therefore mechanisms in place for reparations to go beyond the limitations of Article 75.

The Trust Fund for Victims (TFV) is largely independent from the Court, allowing it to provide other resources to fill the gap of inadequate reparation orders pursuant to Article 75. Since the basis for reparations remains connected to the determination of charged crimes and accused guilt, SGBV victims who went unnoticed in *Lubanga* and *Katanga* can be recognized by the TFV. Article 79 provides for the creation of the TFV and it was established in 2002 "for the benefit of victims of crimes within the jurisdiction of the Court, and the families of such victims" (Schabas, 2017, 253). One of the main functions of the TFV is to organize and distribute funds, most likely from States Parties who give millions of dollars, because to date, no offenders before the Court have been able to pay reparations out of their own pockets (Schabas, 2017, 353).

In addition to this added safety net, the TFV is important because it can give reparations to victims excluded from the limitations of Article 75. Rule 98, sub-paragraph 5, of the Rules of Procedure and Evidence provides that "other resources" of the Trust Fund may be used to benefit victims (Dannenbaum, 2010, 12). This gives the TFV greater control over who and where reparations go to for independent projects. Dannenbaum argues that instilling the TFV as an independent institution will better deliver transitional justice by addressing victims beyond the ones charges in the case(Dannenbaum, 2010, 29). He says, "the Court has a limited mandate and will only ever try a small number of individuals, thus providing symbolic rather than comprehensive criminal justice" and "the same rationale does not simply transpose to the issue of paying reparations to victims" (30). In 2008, the TFV launched an appeal for 10 million euros to assist 1.7 victims of sexual violence in the DRC and three other countries. The Board Chair of the TFV, Simone Veil stated '"women and girls are most often the primary victims of war…this

Board believes administering targeted support for those most vulnerable under the jurisdiction of the ICC is necessary '" (Dannenbaum, 2010, 38). Women and girls assaulted in crimes related to the *Lubanga* and *Katanga* cases were finally being recognized. By widening the TFV's scope of who qualifies for victim reparations, they play a crucial role in closing the gap between victims of charged crimes and victims "of the situation."

Recommendations for reparations seek to reconcile the shortcomings of both Article 75 and TFV. The first concern is that reparations may not address the ongoing needs of victims, especially in the context of mental health (Camins, 2023, 10). Long after an armed conflict ends, victims can suffer from lifelong psychological trauma. Quick fixes in the scope of monetary reparations may avoid providing victims with true rehabilitation and supportive services. Camins suggests Victim Assistance (VA) programs to care for victims, which would have a strong focus on incentivizing social and economic inclusion (Camins, 2023, 22). In order to mend the gap in measures to assist victims in the transitional space between war and peace, international law should "provide a safety net for victims who are not entitled to access violation-based forms of redress following armed conflict" (Camins, 2023, 26). This potential lies in the TFV, whose independence is critical in order to source other reparations for victims excluded from Article 75's limited guidelines.

Megret introduces "Sites of Consciousness" to the reparations regime to meet the goals of addressing collective victim needs, make sense symbolically of the harm caused, and provide a complex narrative of events to ultimately integrative international criminal justice with transitional justice (Megret, 2010). The "sites of consciousness" would look like commemorative forms of shrines, memorials and museums and, "play a key role in bridging the legal concepts of victim reparation, humanitarian ideas of victim assistance and the larger needs of transitional

societies" (Megret, 2010, 4). This alternative mode of reparations embodies the living memory of those who are missing and still suffering in an attempt to provide closure to community members (Megret, 2010, 16). "Sites of Consciousness" have the potential to address the needs of victims who do not get the chance to participate at the Court because their victim-status does not have a direct link to charged crimes. In the case of *Lubanga* and *Katanga*, victims of crimes like rape and sexual slavery who did not receive Court-ordered reparations might access justice through the TFV as an independent body, VA programs, and finally, "sites of consciousness."

Victim Equality and Transitional Justice

In analyzing the victim participation and reparations regime at the Court, one point remains clear: victims of sexual and gender-based crimes were treated inequality in *Lubanga* and *Katanga.* Limiting rights that victim status includes in the Rome Statute (protection, participation and reparations) to harms that are prosecuted before the Court furthers women's secondary status in armed conflict and in a general sense. Throughout *Lubanga* and *Katanga*, women spoke about the sexual violence they endured in the DRC. The inability for the Prosecution to include rape and sexual slavery charges in the indictment in *Lubanga* and the acquittal of *Katanga's* charges of rape and sexual slavery during trial showcase a streamlimed approach that ignores the needs of the most vulnerable victims (Smith, 2011, 22). Rape is used as a weapon of war. Allowing gendered crimes and the struggle for women and girls in the DRC to go ignored perpetuates the cycles of impunity for SGBV (Smith, 2011, 16). Pritchett argues "it is therefore indisputable: the conflict in the DRC has a woman's face" (Pritchett, 2008, 3). Pritchett asks what is lost when women victims are denied redress at the Court (Pritchett, 2008, 24). Access to protection, participation and reparations are lost, and so much more. To accurately respond, a consideration of the nexus between the Court and transitional justice must be addressed, and put simply:

transitional justice for some is not transitional justice at all. If justice is a true objective of the Court, there needs to be an approach adopted that is not only victim-based, but interested in the equal treatment of victims.

Conclusion

Respecting criminal law principles, penal theories, and the equal treatment of victims can be met with a new, alternative ICC purpose: expressing global norms. This idea was formally introduced by Margaret deGuzman, who argues the Court should be driven by the maximization of "the Court's expressive impact," conveying a social message that the crimes brought to the Court are the most serious crimes of concern to the international community as a whole (Mouthaan, 2013, 19). As the ICC is approaching its twenty-two year anniversary, its goals to end impunity all over the world need to be met with the current expectation that only a minute number cases get chosen for prosecution. This level of selectivity leaves a large proportion of atrocities and their perpetrators unacknowledged. In order to strive for a more inclusive justice, a justice that is not just subject to what events the Court decides to investigate and who the investigators chose to arrest, the Court must disseminate global norms that exhibit respect for international law and human rights. Because the Court is a single judicial body, it does not have the scope to account for every international crime. But, the ICC can focus on tangible efforts to strengthen its legitimacy, which will help its overall reach to deter and denounce international crimes.

The *Lubanga* and *Katanga* cases highlight the Court's ability to adhere to criminal law principles, sentencing guidelines, and victim redress. The Rome Statute is an important legal document to help guide judges to determine what principles are applicable to each case and how

to effectively prosecute war crimes and crimes against humanity. A key instance in *Lubanga* where criminal law principles were held in question was when the Prosecutor withheld evidence, some of which was exculpatory, due to a confidentiality agreement the investigator made. Another example was when the Prosecutor did not extend the investigation to cover all the facts, making Lubanga's document containing charges quite narrow. In *Katanga,* the prosecution undermined criminal law principles by unclearly determining a verdict for the same conduct test, which resulted in different interpretations and applications of the complementarity principle. As for sentencing guidelines, the inability to set forth a purpose for sentencing and to satisfy penal theories is another challenge facing the Court. The Court's sentencing regime should address the idea of proportionality to administer criminal justice. The Court should additionally make the standard of proof for aggravating and mitigating circumstances in Rule 145 the same to account for any inconsistencies and to determine extra factors fairly.

Lastly, the Court is seen to have only delivered selective justice during *Lubanga* and *Katanga*. This result needs to be addressed and reworked so that transitional justice can meet the needs of all victims, especially victims of SGBV. If prosecuting crimes of mass atrocity are structured and executed to account for criminal law principles and clear sentencing purposes, the Court has a much greater chance to guarantee all victims an avenue to transitional justice and reconciliation. The inclusion of all victims to actively participate in *Lubanga* and *Katanga* instills the "prosecution to end impunity of gender-based crimes, heightens the profile of gender-motivated violence in the international community, challenges gender relations and hierarchies that perpetuate discriminatory practices, and sets important precedents for future cases tired at the international level" (Pritchett, 2008, 25). The ICC should target underrepresented international crimes like gender-based violence in order to develop global

norms, giving the Court a more dynamic role (Mouthaan, 19, 2013). After analyzing the Court's role in prosecuting Lubanga and Katanga, the Court's main function should be to advance international criminal law clearly and effectively in order to prioritize justice.

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