



Pravna fakulteta  
Univerza v Ljubljani



# The victims' safeguard before the International Courts

University of Ljubljana (Faculty of Law) – December 15th, 2017

PhD. Francesco Trapella  
(Research Fellow in Criminal Procedure,  
University of Ferrara – Italy)

# Evolution of victims' role in International Criminal Justice

- ICTY – ICTR: Victim is considered just as a **witness**.
- SCSL – ICC: Victim is considered as a **rights owner**.



Cour  
Pénale  
Internationale

---

International  
Criminal  
Court

# Evolution of victims' role in International Criminal Justice

## ICTY – ICTR

- Feeling of **empathy** of the judge for the victims.
- Attention to reports of the victims' suffering insofar they are **useful to the ascertainment of the crime.**

## SCSR – ICC

- Authentic system of victims' **rights.**
- Victims' prerogatives should be **safeguarded before the judge.**

- Special Sections aimed at supporting victims and witnesses (**VWS**)

# Gynocide

- Rape
- Annihilation of a gender (female gender)
- Destruction of a religious, ethnical, political community



Armenian Gynocide (1917)

# Gynocide

- Terminological juxtaposition “Genocide” – “Gynocide”.
- Gynocide = Genocide through the rape and the annihilation of female gender.
- Gynocide as a crime against humanity (ex. art. 7, Statute of Rome).



# Gynocide

- The point of view of the victim
  - Systematic repetition of the offensive conducts
  - Aim of destroying a group
  - War context
  - Violation of *ius belli*
- The point of view of the judge
  - Guardian of the victims' prerogatives



# A Methodological Introduction

- The International Criminal Researcher should have a practical approach to describe his topic.
- Criminal Rules acquire relevance only with reference to real circumstances.
- This is the typical reasoning adopted by judges deciding core-crime cases.

# 3 cases...

- Kunarac, Kovac and Vukovic (ICTY)
- Nyiramasuhuko (ICTR)
- Bemba (ICC)



Cour  
Pénale  
Internationale

---

International  
Criminal  
Court



# Kunarac, Kovac and Vukovic

- Case analyzed by the International Tribunal for the Former Yugoslavia between 1998 and 2002
- Crimes took place during the Bosnian War between 1992 and 1993
- The defendants were Serbian-Bosnian militiamen



# Kunarac, Kovac and Vukovic

- The crimes took place in Foča (during the Bosnian War and until 2004, Srbinje).

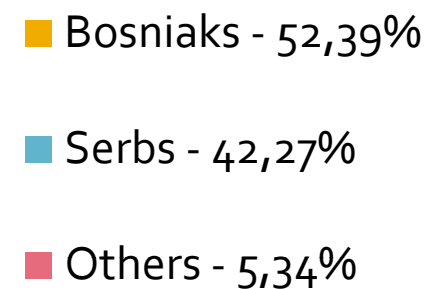
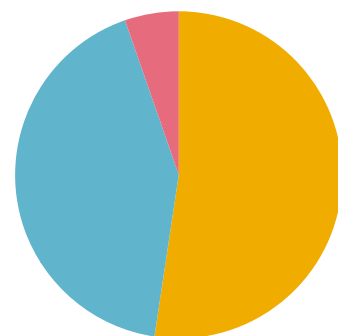


# Kunarac, Kovac and Vukovic

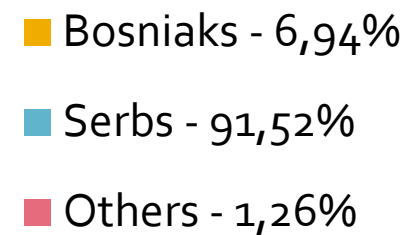
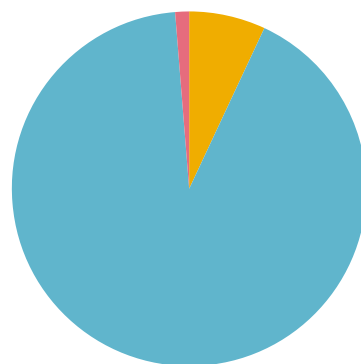
- Accused of having committed acts of rape against young muslim women;
- The crimes were part of a plan, aimed at destroying the muslim majority present in the Foča zone.

# Kunarac, Kovac and Vukovic

Population of Foča - 1991



Population of Foča - 2013



# Kunarac, Kovac and Vukovic

- The plan of the defendants: **ethnic replacement** (through rape, annihilation of femal gender ...)
  - “You will give birth to Serbian Children”
  - “You won’t know which will be the father of your Children”.

# Kunarac, Kovac and Vukovic

- Nowadays ...
  - Foča is part of Srpska Republika (red section of the map)
  - During the Bosnian War and until 2004 Foča changed name in Srbinje (in Serbian Language)



# Kunarac, Kovac and Vukovic

- What is the meaning of Srbinje???  
“Place of the Serbs” ... From:
  - “*Srbi*” stands for “Serbs”
  - “*-nje*” is a Slavic locative suffix.

# Kunarac, Kovac and Vukovic

- Rape is used as an instrument of destruction of a religious group.
- Rape is characterized by the lack of consent, in the victims, to sexual intercourses (case *Furundžija* – 1998).





# Kunarac, Kovac and Vukovic

- Usual criminal cases:

- The lack of consent is enough to ascertain the rape.



- Core-crime cases:

- The lack of consent is not enough to ascertain the rape;
- The judge should focus on the context :
  - War
  - Ethnical replacement
  - Weakness of the victims in relation to militiamen

# Kunarac, Kovac and Vukovic

- First instance trial: the Tribunal focused on the intimate will of the victims.
- Appeal: the Tribunal focused on the War context and refuted the defendants' thesis (*"victims didn't resist the sexual intercourses; for this reason the accusations are ill-founded"*).

# Kunarac, Kovac and Vukovic

- How do evaluate victims' reliability?
  - The Prosecutor drafted some criteria to evaluate the credibility of victims/witnesses.
  - There are 3 groups of witnesses.
  - For each group, there are different criteria.



# Kunarac, Kovac and Vukovic

- 1<sup>o</sup> Group: persons which didn't know the defendants before the War; they had the possibility to observe them while the crimes had been taking place. (Completely reliables)



Klanfa's Apartment in Brena Building (Foča)

# Kunarac, Kovac and Vukovic

- 2<sup>o</sup> Group: persons which knew the defendants before the War; they didn't have the possibility to observe them during the War. (A narrow margin of error)

# Kunarac, Kovac and Vukovic

- 3<sup>o</sup> Group: persons which didn't know the defendants before the War; they had the possibility to observe them once time during the crimes.  
(Their statements should be corroborated with other elements)

# Kunarac, Kovac and Vukovic

- The type of offence:
  - Similarity between the victims' reports
  - Same time and same place
  - Public violence (each victim reported: *a*) the violences suffered by herself; *b*) the violences suffered by other women).



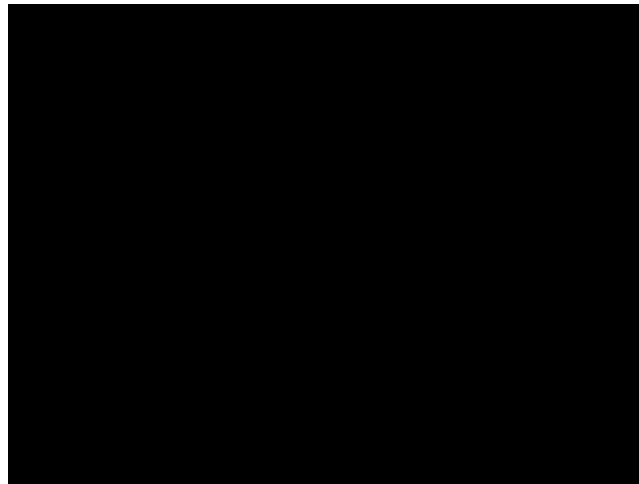
# Kunarac, Kovac and Vukovic

- The Prosecutor required **8 kinds of evidence** to corroborate victims' statements:
  - the direct identification of the defendants by people who declared that they had suffered (or witnessed) violence;
  - the direct identification of the defendants by witnesses who saw them taking the victims away from their homes;
  - the identification of the defendants by witnesses to whom *Zaga* – one of the pseudonyms of Kunarac's – had been indicated;
  - the identification of the defendants by the witnesses that didn't know their names but were aware of what was happening in Foča;
  - circumstantial evidence suitable for reconstructing the events on the basis of known and demonstrable facts;
  - the identification of the defendants by the witnesses who knew them before the beginning of the war;
  - the analysis of the defendants' models of behaviour;
  - the examination of the accused persons



# Kunarac, Kovac and Vukovic

Witness 50



# Kunarac, Kovac and Vukovic

- Witness 50
  - Examined at the hearings of 29th and 30th March 2000
  - Examined with safeguards aimed at protecting her against the view of defendants and the risk of secondary victimization
  - Identified with a number to hide her personal data

# Kunarac, Kovac and Vukovic

- The story of Witness 50.
  - Transfert to Buk Bijela Motel
  - Rapes in hotel and barracks
  - Transfert to Foča High School



Foča High School

# Kunarac, Kovac and Vukovic

- The questions of the Prosecutor...
  - *Where you taken in a group?*
  - *Who took you out?*
  - *Did you know this man before the war?*
  - *Did you know his name before the war?*
  - *Did you learn his name during the war?*
  - *At the time that he took you out at Buk Bijela, did you know his name?*

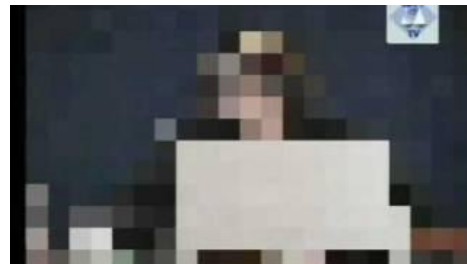
# Kunarac, Kovac and Vukovic

- The Prosecutor's questions are useful:
  - to give the evidence of the facts (victim as witness)
  - to evaluate the reliability of the victim/witness



# Kunarac, Kovac and Vukovic

- ... the testimony of Witness 50 is interesting for another reason ...
  - 1995: before the investigative authorities, Witness 50 didn't report the violences suffered by Vukovic
  - March 26, 2000: during a private meeting with the Prosecutor, Witness 50 changed opinion: she wanted to make the world aware of the facts occurred in Foča



# Kunarac, Kovac and Vukovic

- Witness 50 (1995): *"those words could not leave my mouth"*
- Witness 50 (2000): *"I wanted everyone to hear about it"*



# Kunarac, Kovac and Vukovic

- The reliability of Witness 50:
  - Initial reticence (1995)
    - The War had just ended
    - Presence of Serbian soldiers in the area
  - In-depth description of the facts occurred in Buk-Bijela and Foča (2000)
    - Witness 50 gave elements able to demonstrate her reliability and the evidence of the facts.



# Kunarac, Kovac and Vukovic

- Elements confirming the reliability of Witness 50:
  - War context
  - Other victims' statements
  - Witness 50 didn't know Vukovic before the War, but she had the possibility to observe him while the crimes had been taking place
- (Also) for all these reasons: condemnation of three defendants both in the first degree and in appeal.

# Nyiramahasuhuko

- The case was analysed by ICTR between 1998 and 2015 (First-instance sentence was issued in 2011; Appeal-sentence was issued in 2015)
- She was the Minister for the Family Welfare in Rwanda.



# Nyiramasuhuko

- 1990-1994: plan aimed at destroying the Tutsi Ethnic Group.
- 1994: plan of “pacification” of the Butare Province.



# Nyiramasuhuko

- Instruments of destruction of Tutsi Group:
  - Ethnical hate and violence;
  - Training of Hutu Militias;
  - Supply of weapons;
  - Lists of people to be killed

# Nyiramasuhuko

- 25th April 1994: trap for Tutsi in Butare Stadium
- Nyiramasuhuko persuaded Tutsi that Red Cross had organized a point of rescue in the Stadium but ...



Butare Stadium

# Nyiramasuhuko

- ... she commanded *Interahamwe* to kill men and rape women before burning them.



# Nyiramasuhuko

- What is *Interahamwe*???
- A Hutu paramilitary Organization;
- A Group backed by Hutu-led Governement;
- Armed wing of Hutu during the Tutsi Genocide.



# Nyiramasuhuko

- She was accused of having committed crimes against humanity.
- The crimes were part of a plan aimed at destroying the Thutsi part of population.
- There were a lot of similarities with Kunarac and Others.



# Nyiramasuhuko

- The criteria drafted to evaluate the reliability of witnesses:
  - The previous knowledge of the accused by the witnesses;
  - The possibility for the witness to observe the defendant while committing the crime;
  - The possible influence of third persons;
  - The temporal gap between the commission of the crimes and the report;
  - The existence of some external circumstances which could have undermined the witnesses' reliability.

# Nyiramasuhuko

- Similarity between Kunarac and Other and Nyiramasuhuko in order to provide some evidence of reliability of victims/witnesses:
  - Identification of Victim/Witness with a code
  - Previous private meetings before the Prosecutor and the Victim/Witness
  - Other elements preexisting the Trial, corroborating Victims' statements.

# Nyiramasuhuko

- Evaluation of the evidence (Article 90(A) ICTR RPE):
  - Free conviction of the judges;
  - Circumstances influencing the evaluation of witnesses' reliability:
    - the uncertainty concerning the report of the facts;
    - psychological implications of the crimes;
    - difficulties in recalling dates or details regarding specific events.

# Nyiramasuhuko

- Witness RL:
  - Questions useful to give evidence of the facts;
  - Questions useful to evaluate her reliability
    - In order to her relationship with other witnesses (ex. QI);
    - Concerning bloody events committed in the church of Ngoma or in the clinic of Matyazo (1994).



# Nyiramasuhuko

- The principal similarity between *Kunarac and Others* and *Nyiramasuhuko* ...
- ... Victims are sources of evidence.
  - The judge need to evaluate their reliability;
  - The judge drafted some criteria to evaluate their reliability;
  - Empaty of the judge for victims (it justified safeguards aimed at protecting them against the risk of secondary victimization).

# Bemba

- President of Movement for the Liberation of Congo
- Convicted in first-instance by ICC on the 21th of June, 2016 (18 years of prison)



# Bemba

- Statute of Rome provides:
  - Participation of victims in the proceeding;
  - Compensation of the damage they suffered;
  - Protection against the consequences of crime (ex. secondary victimization).



# Bemba

- Article 85 RPE (Who's the victim???)
  - Direct victims
    - Sister of Witness P69 has been killed by MLC's soldiers
  - Indirect victims
    - Witness P69 was present at his sister's homicide and was shocked
    - Witness P87 was present at her brother's homicide; 15 years since the facts, she had suicidal tendencies



# Bemba

- Consequences of the crime:
  - Physical
    - Lost of virginity, AIDS, Undesidered pregnancies ...
  - Psychological
    - Fear, anxiety, anger ...
  - Psychiatric
    - Post-traumatic stress disorder, depression ...
  - Social
    - Disowning by the family



# Bemba

- Victims' statements:
  - Useful to ascertain the crime;
  - Useful to choose the more suitable form of protection and assistance (restorative justice).



# Bemba

- Critiques received by ICC System:
  - Duration of the proceeding;
  - Concrete management of the cases;
  - Lack of USA support;
  - Indirect execution system.
- Victims don't obtain justice quickly.



# Minimal Conclusions

- What is the contribution given by the International Criminal Justice to safeguard victims' prerogatives?
  - Protection of victims as witnesses (criteria to evaluate their testimonies)
  - Protection of victims as rights' owners (choice of the most suitable assistance with regard to the consequences of the crime)

# Minimal Conclusions

- It is useful to:
  - Realize the purposes of Article 9 of the Directive 2012/29/UE (and, more generally, of EU Law).
  - Realize best practices in National Systems

**The End**

**Thank you all!**