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How have recent human rights and legal innovations regarding sexual and gender-based violence been interpreted by International Criminal Court prosecutors?

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Abstract

This thesis seeks to analyze the protection of human rights relating to sexual and gender-based discrimination and torture through the development of international criminal law. It seeks to do so by looking at the work of the Office of the Prosecutor and examining how it has approached sexual and gender-based violence crimes in its charging strategies. It will scrutinize relevant considerations as to why these strategies were adopted, and the outcomes that materialized by using such strategies.

Specifically, the thesis looks to compare and contrast the criminal charges brought against Bemba and Lubanga. These cases contained evidence of sexual violence against specific communities within the Democratic Republic of Congo and the Central African Republic. The thesis aims to determine in what ways such prosecutorial strategies have ensured justice for these human rights violations; both with regards to holding perpetrators accountable and also with regards to prioritizing the safety and protection of the victims. Throughout the thesis, the author will discuss the development of international protections against sexual and gender-based violence, specifically through the development of international criminal law and the corresponding international tribunals and mechanisms established to enforce such law.

Finally, the thesis will determine which strategy can be considered the most successful for achieving gender justice, and recommends how the Office of the Prosecutor might approach future cases with a sexual and gender-based violence element. It also considers how other branches of the court might also improve their approach to such criminality in future.

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Chapter 1

Historical and Current Context

It has become increasingly acknowledged that rape and sexual crimes are not only viewed as a spoil of war by combatants in conflict, but have in fact ‘always been a fundamental and accepted military tactic’.¹ Despite this recognition, gender-based violence continues to occur even in current conflicts today. This is no doubt due in large part to the extremely slow development of social perceptions of and legal protections against sexual and gender-based violence (SGBV) over the past century; the lack of extensive coverage in the Hague Conventions and Regulations of 1907, the Nuremberg Charter, and the 4th Geneva Convention of 1949 are testament to this.²

Research surrounding the intersection between international criminal law and sexual and gender-based violence (SGBV) has become increasingly prevalent in recent times due to the developing, albeit delayed, perceptions of firstly what constitutes a sexual or gender-based violence crime, combined with the increasing recognition of the severity of these crimes. Their prolific occurrence in numerous countries such as in the 1990s in the Former Yugoslavia, Rwanda, along with a variety of African nations such as Uganda and the Democratic Republic of Congo more recently, and in the ongoing Syrian conflict, has led to increased alarm regarding their wide occurrence and damaging effects and have given the international community the impetus to finally further regulate their occurrence.³ Thus, more recently, we

¹ Rhonda Copelon, “Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law,” *McGill Law Journal* 46 (2000) 220; Brook Sari Moshan, “Women, War and Words: The Gender Component in the Permanent International Criminal Court’s Definition of Crimes Against Humanity,” *Fordham International Law Journal* (1998) 157.

² International Conferences (The Hague), “Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land,” (October 18, 1907); United Nations, “Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement),” (August 8, 1945); Article 27 “Convention (IV) Relative to the Protection of Civilian Persons in Time of War,” (Geneva, August 12, 1949).

³ Ludovica Poli, “Criminalising Rape and Sexual Violence as Methods of Warfare,” in Fausto Pocar, Marco Pedrazzi, Micaela Frulli, *War Crimes and the Conduct of Hostilities: Challenges to Adjudication and Investigation*, (Massachusetts: Edward Elgar Publishing, 2013) 143; Helen Liebling, “Conflict and Postconflict

have seen the prosecution of SGBV at the ad hoc tribunals for the Former Yugoslavia and Rwanda and their codification within the Rome Statute; the statute aims to ‘put an end to impunity for the perpetrators of these crimes’ and ensure that ‘their effective prosecution [is] ensured.’⁴

The commission of sexual and gender-based violence is a violation of many human rights provisions. It is a breach of the ‘right to life, liberty and security’ of any person (male or female) as noted by Article 3 of the Universal Declaration of Human Rights (UDHR) and Articles 6 and 9 of the International Convention on Civil and Political Rights (ICCPR).⁵ It is a violation of the right to ‘enjoyment of the highest attainable standard of physical and mental health’ under Article 12 of the International Covenant on Economic, Social and Cultural Rights.⁶ From a gendered perspective, it is also a violation of the Convention on All Forms of Discrimination Against Women (CEDAW) which was noted to include protections against SGBV under General Recommendation 19.⁷ Indeed the Committees to CEDAW and the Committee Against Torture have also recognized that violence against women constitutes torture and such amounts

Sexual Violence in Africa: Case Studies of Liberia, Northern Uganda, and Eastern Democratic Republic of Congo” in Alissa Ackerman and Rich Furman (eds) *Sex Crimes: Transnational Problems and Global Perspectives* (New York: Columbia University Press, 2015), Chapter 9; UN Women, “Investigating Conflict-Related Gender-Based Crimes – Lessons from Iraq and Syria,” *ReliefWeb*, October 26, 2017, <https://reliefweb.int/report/syrian-arab-republic/investigating-conflict-related-sexual-and-gender-based-crimes-lessons>.

⁴ *Prosecutor v Anto Furundzija* (Trial Judgment) IT-95-17/1-T, International Criminal Tribunal for the Former Yugoslavia (ICTY) (10 December 1998); *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Judgment (2 September 1998); UN General Assembly, Rome Statute of the International Criminal Court, ISBN No.92-9227-227-6, (July 17, 1998) Preamble https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

⁵ UN General Assembly, Universal Declaration of Human Rights, 217 A (III) (December 10, 1948) <http://www.un.org/en/universal-declaration-human-rights/>; UN General Assembly, International Covenant on Civil and Political Rights, Treaty Series Vol.999, 171 (December 16, 1966).

⁶ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, Treaty Series, Vol.993, 3 (December 16, 1966).

⁷ UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, Treaty Series, Vol.1249, 13 (December 18, 1979); UN Committee on the Elimination of Discrimination Against Women, CEDAW General Recommendation No.19: Violence Against Women, 1992, <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>.

to a breach of Articles 5 of the UDHR and 7 of the ICCPR; it is additionally covered by the Convention Against Torture.⁸

While human rights primarily govern the relationship between states and individuals, there is also a duty on states to prevent breaches of these human rights by non-state actors.⁹ Prosecution of human rights breaches at the ICC through the complementarity principle, when they are committed on a mass scale and thus amount to breaches of international criminal law, is a crucial way to ensure accountability is achieved for individual perpetrators of human rights abuses, be they state or non-state actors.¹⁰

Significance and Objective

This paper seeks to compare the recent prosecutorial strategies of the Office of the Prosecutor (OTP) in the ICC with regards to SGBV crimes, specifically by comparing the OTP's varied legal approaches in the *Bemba* and *Lubanga* cases.¹¹ While there is much literature examining the importance of the ad hoc tribunals regarding the prosecution of SGBV, this paper seeks to add to the scholarship that scrutinizes more specifically the recent ICC cases in this area, the scholarship on which is somewhat more limited due to the dearth of SGBV convictions. Despite what often appears to be overwhelming evidence suggesting proliferation of SGBV, it is not always included in initial indictments issued by the OTP – be this as a result of systematic issues, legislative issues or social perceptions. If not even included in initial indictments, the chances of conviction for SGBV is automatically greatly reduced.

⁸ UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Treaty Series, Vol.1465, 85 (December 10, 1984).

⁹ UN General Assembly, Universal Declaration of Human Rights, 217 A (III), Preamble, (December 10, 1948) <http://www.un.org/en/universal-declaration-human-rights/>.

¹⁰ UN General Assembly, Rome Statute of the International Criminal Court, ISBN No.92-9227-227-6, (July 17, 1998) Article 17(1)(a) [261] <https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-a>.

¹¹ *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424 (15 June 2009); *Prosecutor v Lubanga*, ICC-01/04-01/06, (14 March 2012).

By comparing the circumstances under which SGBV – where it falls under the jurisdiction of the court – has and has not been prosecuted wherever it occurs as proscribed by the Rome Statute, and the reasoning for these irregularities, we can gain a clearer picture as to the root causes for the lack of final convictions for SGBV. This understanding will then help us to see if the lack of inclusion of SGBV in indictments can in fact *always* be viewed as a failure for gender justice, or whether gender justice can still be achieved under these circumstances.

As SGBV is primarily a gendered crime perpetrated typically against women and girls, this paper will measure the successes of the OTP's strategies primarily from a gender justice viewpoint, however it does acknowledge the forced use of SGBV by young boys in the *Lubanga* case and the importance of SGBV justice for all parties, male and female.

This research comes at a critical time where the ICC faces a variety of ongoing criticisms – both procedural and substantive in the case of SGBV prosecution - and increasing numbers of member states are threatening withdrawal from the Rome Statute.¹² It cannot be asserted that increased prosecution for SGBV would encourage increased trust, compliance and co-operation of member states with the court. The opposite may in fact be true – where, as a result of increasing criminal acts coming under the court's scrutiny in the realm of SGBV, states become less willing to co-operate with the ICC due to fear of their own prosecution. (Indeed as a court which relies extensively on state co-operation, worsening relations between the ICC and member states might ensure that the collection of evidence, testimony, official documents and policies become even less accessible to all parties involved in trials, thereby challenging

¹² Stephanie Hancock and Param-Preet Singh, "Interview: Finally, Justice for Victims in Afghanistan?" *Human Rights Watch*, November 20, 2017, <https://www.hrw.org/news/2017/11/20/interview-finally-justice-victims-afghanistan>.

the credibility of the ICC further.¹³ Or indeed it may result in more charges being dropped on the procedural basis of lack of evidence before any substantive charges are even scrutinized.¹⁴ It is crucial to embrace this potential reality however, so this paper therefore has to recognize that, in fact, increased prosecution of SGBV in the short-term might have an adverse impact on prosecution of SGBV in the long-term.) Nevertheless, the ICC is mandated to ensure the effective prosecution of SGBV to increase the protection of the rights of individuals – a function agreed upon by its current 123 States Parties - and this aim should not be compromised or limited as a result of coercion by states that do not comply with human rights obligations.¹⁵

In order to approach this analysis, this paper will address in turn the historical conceptualization of SGBV, including changing perceptions of sexual and gender-based violence since World War II, and the utilization of rape as a tool of war in 20th Century conflict. It will look at the development of international humanitarian law with regards SGBV, particularly within the statutes for and jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).¹⁶ Given these legal innovations, this paper will finally examine the more recent Rome Statute and how it has shaped the jurisprudence of the ICC, with specific focus on the *Bemba* case (where SGBV was included in initial indictments) contrasted to the *Lubanga* case (where no such inclusion in initial indictments existed, despite overwhelming evidence suggesting the occurrence of sexual violence against child soldiers.)¹⁷ Analysis will firstly determine the factors that shaped the Office of the Prosecutor’s approach to pursue SGBV charges in Bemba,

¹³ James Meernik, “Justice, Power and Peace: Conflicting Interests and the Apprehension of ICC Suspects,” *International Criminal Law Review* 13, (2013) 169-190; 169.

¹⁴ *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11, <https://www.icc-cpi.int/kenya/kenyatta>.

¹⁵ ICC, “Joining the International Criminal Court: Why Does it Matter?” *ICC*, 2018, https://www.icc-cpi.int/iccdocs/PIDS/publications/Universality_Eng.pdf.

¹⁶ UN Security Council, “Statute of the International Criminal Tribunal for the Former Yugoslavia,” S/RES/827, (May 25, 1993); UN Security Council, “Statute of the International Criminal Tribunal for Rwanda,” Resolution 955, (November 8, 1994).

¹⁷ *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424 (15 June 2009); *Prosecutor v Lubanga*, ICC-01/04-01/06, (14 March 2012).

and then compare where these criteria were not met in Lubanga. It will finally consider whether lack of inclusion of SGBV in the *Lubanga* initial indictment automatically meant gender justice was not achieved at all, or whether it could still be considered a success.

The author hypothesizes that despite the important incorporation of legal recourse for SGBV within the Rome Statute, justice for SGBV can still be improved by the OTP adopting a prosecutorial strategy which includes SGBV within all initial indictments of the OTP where there is some, even if not substantial amounts, of evidence suggesting its occurrence.

Literature Review

There are four main areas of literature that this paper will examine, in order to answer this research question.

Pre-Ad Hoc Tribunals: As mentioned above, legislation criminalizing SGBV has of course developed at a similar pace to the social perceptions of sexual and gender-based violence. This paper will examine the provision of SGBV in the major international legal texts, briefly noting the lack of provision for sexual violence in any of the Hague Conventions and Regulations of 1907 and the Nuremberg Charter, and then look more specifically towards its increasing coverage in the Statutes for the ICTY and ICTR, and finally the Rome Statute.¹⁸

The author will refer to the vast array of literature which heavily critiques the placement of SGBVs ‘under categories dealing with honor and dignity’, for example explored by Bedont and Hall-Martinez.¹⁹ This is because such contextual placement has been highlighted by scholars to emphasize that women who have experienced SGBV have been shamed, or are the ‘property of others, needing protection perhaps’; not that they are actually the subject of rights

¹⁸ UN General Assembly, Rome Statute of the International Criminal Court, ISBN No.92-9227-227-6, (July 17, 1998) Article 17(1)(a) [261] <https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-a>.

¹⁹ Barbara Bedont and Katherine Hall-Martinez, “Ending Impunity for Gender Crimes under the International Criminal Court,” *The Brown Journal of World Affairs* 6, No.1 (1999) 65-85; 70.

irrespective of their ties to or judgment by men.²⁰ Aolain, Haynes and Cahn also display concern within their writing that such an approach detracts from the vast levels of emotional and physical harm suffered by victims of SGBV, and does not fully convey the gravity of suffering that inevitably flows from these crimes.²¹ This paper will touch on the problems highlighted by scholars concerning the lasting effects of these archaic perceptions in current legislation.

ICTY and ICTR Legislation and Case Law: A common thread throughout the literature relating to SGBV in international law is to place great emphasis on the investigations and tribunals following the situations in the Former Yugoslavia and Rwanda. These tribunals are considered as turning points for the increased recognition of the severity of SGBV. Many authors applaud the ad-hoc tribunals, praising them as enlightening platforms that in fact uncovered both the prevalence of SGBV and the need to prosecute it at the international level. However not all of the analysis of the ICTY and ICTR legislation and jurisprudence is positive; Chapter 2 seeks to explore both sides of this debate and establish just to what extent the ad hoc tribunals paved the way for adequate SGBV prosecution.

Rome Statute: The third area of literature that will be examined will address the debate surrounding to what extent the legal and procedural framework provided by the Rome Statute allows for the Office of the Prosecutor to pursue charges of SGBV. It will draw from the previous sections mentioned to evaluate whether or not there has been an improvement in the protection of SGBV at the international criminal level. The paper will discuss the background to the Rome Statute, the language and definitions contained in the Statute, and finally the procedural difficulties that have arisen through the Rome Statute's provisions, including those that remain somewhat unclear to practitioners.

²⁰ Copelon, *Gender Crimes as War Crimes*, 221.

²¹ Fionnuala Ni Aolain, Francesca Haynes and Naomi Cahn, "Criminal Justice for Gendered Violence and Beyond," *International Criminal Law Review* 11 (2011) 425-443; 426.

Bemba and Lubanga Scholarship: The paper will then apply these Rome Statute challenges to the work of the OTP in practice. It will link the aforementioned issues regarding language, definitions and procedural challenges in the Rome Statute with evidence from the *Bemba* and *Lubanga* cases, and how these complications affected the ability of the OTP to pursue justice.

Research Design

This paper used three key methods to assess the development and structure of the current international legal mechanisms for prosecution of SGBV. Firstly, the author accessed primary source documents from civil society organizations, government agencies and extensive literature in the field to inform this paper. Secondly, the author reviewed legal cases and texts from the ICTY, ICTR and ICC and drew inconsistencies, developments, disappointments, and comparisons between the case law. Finally, this author conducted semi-structured qualitative in-person and phone interviews with key individuals within the spheres of international criminal law, gender justice, and the intersection between the two, including with members of the Office of the Prosecutor of the ICC, pro bono defense lawyers from the *Bemba* case, key academics in gender justice and members of non-governmental organizations. These interviews were conducted in person in New York and in The Hague.

As a research study which examined the context behind policy and legal decisions, this study greatly benefitted from qualitative research from interviews, which allowed the sharing of personal human experiences and interactions to explain complex legal issues. Specifically, interviews were designed to shed a light on the primary motivations for ICC prosecutorial strategy, and internal procedural constraints faced by ICC prosecutors, including problems with the practical applicability of the Rome Statute when prosecuting SGBV. It also sought to

uncover disharmony between the branches of the ICC as a larger body. Qualitative research was the only form of data collection used.

Gaining perspectives from interviews conducted both inside and out-with the ICC ensured that data was not biased entirely in favor of current OTP lawyers and their practices, and was scrutinized from third parties who were not directly involved in legal application of the Rome Statute. This was an attempt to ensure that data collected was well-rounded and ultimately as accurate as possible.

Study Design Limitations

Despite the calculated choices made in the research design process of this study, a number of limitations should be acknowledged.

A primary limitation of this study relates to the absence of testimony from both the victims of sexual and gender-based violence in the *Bemba* and *Lubanga* cases, or other victims of SGBV as an atrocity crime committed under ICC jurisdiction. Such narratives could have provided crucial insight into the priorities of local women with regards their hopes for legal intervention in SGBV crimes; for example how best to achieve gender justice, in which forms victim reparations are most desirable and so forth. The result of this lack of information has meant that the conclusions drawn regarding the successes of these cases for justice come from a primarily legal, and wider, viewpoint without affirmation at the local level. They remain somewhat hypothetical in some respects. The decision to not include victims' testimony was largely rooted in both the difficulties of locating many of these women, and also due to the risks of inducing mental distress throughout or post-interview for the victims of these brutal crimes. As someone lacking specific training in dealing with such issues or medical clinical experience, this would have been too hazardous for potential participants. However, by interviewing legal practitioners and NGO workers who have had direct exposure to such

victims, I was able to garner an idea of some of experiences and opinions of SGBV victims through these middle parties.

A second limitation relates to the fact that the data collected through these interviews was restricted to the specificities of the ICC context, and as the one of the few global courts pursuing international justice, it could be problematic to transfer these findings to any other settings or generalize this study's impact. Indeed the focus on only two cases which occurred in the African context further narrowed the scope of this study to crimes committed in one geographical region.

A final limitation of this research relates to the fact that the outcome of the *Bemba* case changed mid-way through research. Bemba was in fact acquitted from his SGBV charges in July of this year (2018), which somewhat disrupted the initial research conducted regarding gender justice in that case. Nonetheless, this is always a possibility when researching such current cases, and in fact added a discussion point in the interesting comparison of the case outcomes, which will be discussed further below.

Chapter Two: 20th and 21st Century Legal and Human Rights Innovations

This chapter seeks to provide a comprehensive background as to the legal innovations in the late-21st Century and early-20th Century regarding international criminal law and the inclusion of provisions against SGBV.

Rape as a Tool of War – Perception of SGBV Throughout History

Mass rape has occurred in conflict throughout history; in fact rape was utilized by combatants as a technique of warfare. Moshan refers to how ‘rape has always been a fundamental and accepted military tactic’ in her article ‘Women, War and Words’.²² She also describes how in various conflicts sexual violence is used as a ‘weapon of terror’ to demoralize and break down communities.²³ Along a similar vein, Jurasz emphasizes the political significance of women during times of war, for holding communities together, and thus how the destruction of these women signifies in some ways the final destruction of the civilizations.²⁴ Indeed Oosterveld recalls that during the time of the Peacekeeping Operations in Rwanda, Roméo Dallaire would comment that the ‘genocide was very gendered’ because the bodies of the women at roadblocks always demonstrated evidence of having been raped or sexually mutilated before being killed.²⁵ Rape was specifically ordered by command in this situation. ²⁶ By certain scholars, SGBV has been classified as a form of biological warfare.²⁷

²² Sari Moshan, “Women, War and Words” 157.

²³ Sari Moshan, “Women, War and Words” 159.

²⁴ Olga Jurasz, “About justice that is yet to come: a few remarks about the international pursuit of post-conflict gender justice,” *Journal of Gender Studies* 24(1) (2015) 58.

²⁵ Valerie Oosterveld referencing Roméo Dallaire who led the UN Peacekeeping Mission in Rwanda, , see <https://www.romeodallaire.com>; Phone Interview with Valerie Oosterveld, August 7, 2018, from New York City.

²⁶ Human Rights Watch, “Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath,” *Human Rights Watch*, September 1996, <https://www.hrw.org/reports/1996/Rwanda.htm>

²⁷ Beverly Allen, *Rape Warfare: The Hidden Genocide in Bosnia-Herzegovina and Croatia*, (Minneapolis: University of Minnesota Press, 1996) 123.

On the contrary, authors such as Baaz and Stern approach rape in wartime conversely; they assert that to reduce rape to a military strategy ‘accords too much rationality and intentionality to wartime violence’.²⁸ Oosterveld disputes this assertion however, noting that while SGBV might occasionally be random and isolated, SGBV in conflict can most often be foreseen; any assertion to the contrary is a myth. SGBV is well-documented to be a way that troops seek revenge or punish civilians; Oosterveld notes that judges of international criminal law must begin to acknowledge this in order so that we can progress the effectiveness our justice systems.²⁹

Not only do academics assert that SGBV can be used as a tactic of war, but traditionally SGBV was in fact seen as a spoil of war by combatants. Copelon discusses this in ‘Gender Crimes as War Crimes,’ condemning the fact that rape is deemed as a ‘necessary reward for fighting men’.³⁰ In particular increasing evidence continues to emerge regarding the use of comfort women in Japan for example, specifically providing sexual services to military forces throughout WW2; thus not only was sexual slavery utilized in history, but it was also systematically encouraged by governmental agencies.³¹ Copelon also gives an in-depth historical perspective regarding such practices in Asia during WWII, where women were reduced to being the ‘booty’ of war and yet there was little to no legal accountability for such acts in the post WWII military tribunals.³² Literature critically examines the idea women were an ‘entitlement’ of the victors; there is a large body of work critiquing this conceptualization of women as it reduces women’s value to objects whose sole purpose is the gratification of

²⁸ Maria Eriksson Baaz and Maria Stern, *Sexual Violence as a Weapon of War: Perceptions, Prescriptions, Problems in the Congo and Beyond*, (New York: Zed Books Limited, 2013) 85.

²⁹ Phone Interview with Valerie Oosterveld, August 7, 2018, from New York City.

³⁰ Copelon, “Gender Crimes,” 220.

³¹ Toshiyuki Tanaka, *Japan’s Comfort Women: Sexual Slavery and Prostitution During World War II and the US Occupation*, (New York: Routledge, 2002) 9.

³² Copelon, “Gender Crimes,” 221.

men.³³ The clear historical entrenchment of SGBV in conflict practices provides some insight as to why exactly the legal provision of SGBV is still somewhat lacking in modern times.

War Crimes Law

Pre-Ad Hoc Tribunals

Legislation criminalizing SGBV has of course developed at a similar pace to the social perceptions of sexual and gender-based violence, outlined above. One of the only early provisions legislating against SGBV was contained in the 1949 Geneva Conventions (notably, the Hague Conventions and Regulations of 1907 and the Nuremberg Charter lacked any provisions for sexual violence.)³⁴

Article 27 of the 4th Convention detailed women ‘shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault’.³⁵ Indeed the 1977 Additional Protocols similarly placed SGBV solely within the context and rhetoric of honor and dignity.³⁶ Bedont and Hall-Martinez are among many scholars that heavily critique the placement of SGBV ‘under categories dealing with honor and dignity’.³⁷ Such contextual placement appears to emphasize that women who have experienced SGBV have been shamed, or are the ‘property of others, needing protection perhaps’; not that they are actually the subject of rights irrespective of their ties to or judgment by men.³⁸ Aolain,

³³ Ethol Tolbach and Rachel Reed, “Understanding Rape” in Cheryl Brown Travis, *Evolution, Gender and Rape*, (Cambridge, MA: MIT Press, 2003) 130.

³⁴ International Conferences (The Hague), “Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land,” 18 October 1907; United Nations, “Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement)” (August 8, 1945).

³⁵ Article 27 “Convention (IV) Relative to the Protection of Civilian Persons in Time of War,” (Geneva, August 12, 1949).

³⁶ International Committee of the Red Cross, “Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I),” 1125 UNTS 3 (June 8, 1977) and “Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II),” 1125 UNTS 609 (June 8, 1977).

³⁷ Bedont and Hall-Martinez, “Ending Impunity,” 70.

³⁸ Copelon, “Gender Crimes,” 221.

Haynes and Cahn also display concern within their writing that such an approach detracts from the vast levels of emotional and physical harm suffered by victims of SGBV, and does not fully convey the gravity of suffering that inevitably flows from these crimes.³⁹

It is contested these linguistically ill-suited legal provisions can be linked to a genuine lack of understanding and empirical research with regards to the psychological, social and physical damage relating to the immediate and lasting effects of SGBV at the time. Texts from the immediate post-war period quite often suggested women encouraged rape, denied they wanted sex when really they did, and that most women had regular fantasies of rape.⁴⁰ There is a dearth of expertise and accurate information of the precise extent of harm that came with SGBV throughout the mid 20th-century, which can be somewhat explained by the similar lack of attention towards and support for the plight of women and feminist causes of the time (second-wave feminism which spearheaded campaigns to end violence against women only gained momentum throughout the latter 1960s and 70s.⁴¹)

ICTY and ICTR Legislation and Case Law

The investigations and tribunals following the situations in the Former Yugoslavia and Rwanda are often seen as turning points for the increased recognition of the severity of SGBV. Many authors applaud the ad-hoc tribunals, praising them as enlightening platforms that in fact uncovered both the prevalence of SGBV and the need to prosecute it at the international level. However not all of the analysis of the ICTY and ICTR legislation and jurisprudence is positive.

For example, there is a large amount of literature relating to one of the pivotal cases in the ICTR, *Akayesu*, which involved the first-ever conviction of rape as a crime against humanity.⁴² *Akayesu* also recognized rape as genocide and as a form of torture, while the case

³⁹ Aolain, Haynes and Cahn, "Criminal Justice," 426.

⁴⁰ Vivian C Fox, "Historical Perspectives on Violence Against Women," *Journal of International Women's Studies*, 4(1) (2002) 19.

⁴¹ Nicole Moulding, *Gendered Violence, Abuse and Mental Health in Everyday Lives*, (New York: Routledge, 2015) 10.

⁴² *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Judgment (2 September 1998).

also broadened the definition of SGBV out-with traditional domestic jurisdictions definitions' for example by recognizing that 'insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual'⁴³ could constitute rape, while sexual violence 'may include acts which do not involve penetration or even physical contact'.⁴⁴ Askin, Copelon and Bedont all praise these developments as they widened the scope of crimes which could be considered SGBV and thus better represented the actual realities of SGBV for victims.⁴⁵

However, this alleged definitional development in *Akayesu* did not translate into all later work of the ad hoc tribunals (attributable in part to the lack of *stare decisis* in international law). In the ICTY case of *Furundzija* the Trial Chamber adopted a much more mechanical approach to the definition of SGBV, which Olga Jurasz perceives to be somewhat restrictive.⁴⁶ In her article, 'About justice that is yet to come', Jurasz highlights the limitations of the *Furundzija* definition of rape, which asserted that acts have to fulfil an exhaustive list of criteria of what amounts to rape (as opposed to a more rounded approach in *Akayesu*) and thus could restrict the ability for rape to be prosecuted.⁴⁷ Jurasz does, however, commend the sentiment of this shift due to the fact that it detaches rape from subjective adjudication relating to the realm of an attack on human dignity (mentioned above) and brings it more in line with the clearer and procedurally sound requirements of other deliberate acts of aggression. This approach she acknowledges can in turn elevate the perceived seriousness of SGBV.

There were still drawbacks within the statutes that legislated the tribunals, however. For example, issues included the fact that rape was only considered a crime against humanity but not a war crime; that there was a lack of provision for forms of SGBV other than rape; and that

⁴³ Kelly Dawn Askin, "Gender Crimes Jurisprudence in the ICTR: Positive Developments," *Journal of International Criminal Justice* 3 (2005) 1010.

⁴⁴ *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Judgment (2 September 1998) at *[688].

⁴⁵ Kelly Dawn Askin, "A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003," *Human Rights Brief* 11, No.3 (2004) 17.

⁴⁶ *Prosecutor v Anto Furundzija*, (Trial Judgment) IT-95-17/1-T, ICTY (10 December 1998).

⁴⁷ Jurasz, "About Justice," 62.

there were extensive ‘structural barriers that... work[ed] against appropriate evidence gathering, witness identification and victim enablement’.⁴⁸ Indeed with regards actual enforcement of the law, the inclusion of SGBV in criminal indictments was somewhat sparse, and often the mention of SGBV only appeared in the dicta of cases. In the ICTR specifically, indictments including SGBV primarily only arose post-1997 after ‘concerted pressure from civil society’.⁴⁹ Even in the previously mentioned case of *Akayesu*, which turned out to be a critical development in the realm of prosecution of SGBV, there was no indictment for SGBV when charges were first brought. It was only the scrutiny of witness testimonies by Judge Pillay throughout the trials which acted as key catalyst for prosecution of SGBV in this case.⁵⁰ Cherie Booth highlights the pivotal role that ‘women judges’ have made in such SGBV cases; she hints that without such input these cases would not be effectively prosecuted.⁵¹

Other ICTY cases with relevant literary commentary that are worth noting - their benefits including holding leaders responsible for crimes committed under their authority and furthering the protection and anonymity of witnesses - include *The Celebici Cases*⁵² and *Tadic*.⁵³

The Drafting and Effects of the Rome Statute

The increasing social and political recognition of the importance to hold those accountable for mass atrocities – notably exemplified through the growing support for the doctrines of universal jurisdiction (see *Pinochet No.3*), the emerging norm status of the Responsibility to Protect doctrine and its conceptualization of sovereignty as responsibility,

⁴⁸ Bedont and Hall-Martinez, “Ending Impunity,” 70; Aolain, Haynes and Cahn, “Criminal Justice,” 438.

⁴⁹ Susana SaCouto, “Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court,” *Journal of Gender, Social Policy and the Law*, 17 No.2 (2009) 341.

⁵⁰ Cherie Booth, “Prospects and Issues for the International Criminal Court,” in Philippe Sands, *From Nuremberg to the Hague: The Future of International Criminal Justice*, (Cambridge University Press, 2003) 169.

⁵¹ Booth, “Prospects and Issues,” 167.

⁵² *Prosecutor v Zdravko Mucic aka ‘Pavo’, HAzim Delic, Esad Landzo aka ‘Zenga’, Zejnil Delalic* (Trial Judgement) IT-96-21-T, ICTY (November 16, 1998).

⁵³ *Tadic* (Appeal Judgement) IT-94-1-A, ICTY, (July 1999).

and the extensive pressure of non-governmental organizations and particularly pro-human rights governments - combined with the experience and insight gathered from the ICTR and ICTY statutes and case law, led to the desire to create a permanent ICC which could adjudicate crimes against humanity, war crimes and genocide to hold perpetrators of these atrocities to account.⁵⁴ Brady, Samson and Oosterveld all recognize the improvement of provisions protecting against SGBV in the Rome Statute.⁵⁵

Language and Definitions

Throughout the drafting process, the specific wording of provisions was heavily contested between progressive States Parties and their opposition; dissent primarily came from anti-choice or particularly religious groups. Bedont and Copelon display particularly strong and disgruntled language when describing the opposition to progressive language in the statutes; for example Copelon describes the group of Vatican and Arab League countries which opposed the use of the word ‘gender’ as opposed to sex as the ‘Unholy Alliance’.⁵⁶ Yet these countries objected to the inclusion of the term ‘gender’ within the statute as it allowed opportunity for fluid interpretation of gender on the grounds of evolving socially constructed roles, as opposed to distinct biological differences between men and women; biology is often the preferred distinction particularly for Islamic countries when defining social and legal practices. Even the inclusion of a definition of the term ‘gender’ in the Statute, which was eventually provided by the Secretary-General, is labelled as being ‘unworkable and impractical’ by Moshan.⁵⁷ Yet Oosterveld acknowledges that the shift in language from sex to

⁵⁴ *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex Parte Pinochet Ugarte (No.3)* [2000] 1 A.C. at *147; Petra Perisic, “Responsibility to Protect – an Emerging Norm of International Law?” *Academic Journal of Interdisciplinary Studies* 2 No.9, (October 2013) 443-450; 449; Bedont and Hall-Martinez, “Ending Impunity,” 65.

⁵⁵ Interview with Helen Brady and Nicole Samson, August 21, 2018, The Hague, The Netherlands; Phone Interview with Valerie Oosterveld, August 7, 2018, from New York City.

⁵⁶ Copelon, “Gender Crimes,” 236.

⁵⁷ Sari Moshan, “Women, War and Words,” 179.

gender was seen as a small victory to many.⁵⁸ At the same time, Bedont and Hall-Martinez describe the positive effects of the enumeration of gender-based crimes in a separate paragraph of crimes against humanity. This actually worked to highlight the severity and uniqueness of such crimes. The debate in this area is extensive; there appears to be a real lack of agreement within the literature as to whether the Rome Statute was actually a victory in terms of language for the protection of SGBV.

A further drafting issue ties to which acts would actually be considered SGBV; this continues to be a relevant and ongoing debate. While the Rome Statute appears to contain a wide definition of sexual crimes, asserting that ‘rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity’ are all covered, this definition is still critiqued as being too narrow by certain scholars such as Moshan. This is because while the clause initially appears to attempt to catch any other crimes that are not enumerated but are of ‘comparable gravity’, it may in fact unnecessarily restrict what constitutes a sexual crime and ‘regrettably’ imply ‘that violence against women is not always a grave offense’.⁵⁹ Further, while the inclusion of ‘forced pregnancy’ was actually considered by many to be a positive step forward in the protection of SGBV, it was considered to be watered down from the proposed terminology of ‘enforced pregnancy’ due to the fear of primarily Islamic and anti-choice societies that the statute would contain ‘misleading linkages to the issue of legislation of abortion’.⁶⁰

Yet conversely, the codification of the crime of ‘sexual slavery’ not only stimulated discussion among the international community during the drafting process regarding the specific harms often faced by women during war, but its inclusion displayed a deep and growing understanding by member states of the intricacies of distinct forms of SGBV (sexual

⁵⁸ Valerie Oosterveld, “The Definition of ‘Gender’ in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice,” *Harvard Human Rights Journal* 18 (2003) 56.

⁵⁹ Sari Moshan, “Women, War and Words,” 182.

⁶⁰ Bedont and Hall-Martinez, “Ending Impunity,” 68.

slavery was previously just referred to restrictively as ‘enforced prostitution’).⁶¹ Nonetheless, the varied literature unequivocally suggests a constant conflict throughout the drafting process relating to the balancing of different cultural and social definitions and norms regarding the value of women within different societies. This resulted in a somewhat compromised document that did not push SGBV related language and definitions to their full and progressive potential.

Procedural Debates

Fiona O’Regan makes an in-depth analysis of the procedural difficulties faced in applying the Rome Statute in the context of the recent *Bemba* case.⁶² Her article highlights the lack of agreement between the branches of the ICC – particularly the Pre-Trial Chamber (PTC) and the Office of the Prosecutor – with regards their distinct roles and powers. While this is not wholly surprising, due to the nature of the ICC as the first permanent court of its kind and its consequent inexperience, this procedural downfall must nonetheless be highlighted and conclusions drawn on whether this impacts the effectiveness of the court. Certainly, O’Regan’s early assertion that the lack of coherence and agreement over procedural provisions (in particular the functions of cumulative charging and Regulation 55) within the Rome Statute led to incorrect charges being brought in the indictment of Bemba was proved correct this year; precisely this played a role in his subsequent acquittal, which is discussed further below.

Mannix also discusses the various criticisms levelled at the OTP in ‘A Quest for Justice.’⁶³ She adopts a somewhat sympathetic tone towards the work of the ICC, due to the evidentiary and physical difficulties that are inevitably faced simply by being an international court. Mannix highlights for example the lack of ‘police force’ and extensive reliance on state

⁶¹ Valerie Oosterveld, “Sexual Slavery and the International Criminal Court: Advancing International Law,” *Michigan Journal of International Law* 25(3) (2004) 608-615.

⁶² Fiona O’Regan, “Prosecutor vs Jean-Pierre Bemba Gombo: The Cumulative Charging Principles, Gender-Based Violence, and Expressivism,” *Georgetown Journal of International Law* 43 No.4 (2012) 1323-1360; *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424 (June 15, 2009).

⁶³ Bridget Mannix, “A Quest for Justice: Investigating Sexual and Gender-Based Violence at the International Criminal Court,” *James Cook University Law Review*, 21 (2014) 11.

co-operation for effective prosecution of cases.⁶⁴ Language, cultural barriers and security risks are all addressed in her article too.⁶⁵ Mannix also explores the crucial input of NGOs and Women's Initiatives in ensuring gender justice, but references the *Katanga* and *Lubanga* decisions as examples of where procedural downfalls of the ICC have negatively impacted case outcomes regarding SGBV.⁶⁶

It is clear that most of the research and literature critiquing the ad hoc criminal tribunals and the ICC assess the effectiveness of prosecution for SGBV to varying degrees; there is a lack of consistency in overall assessment of the court's effectiveness. While most of the literature undoubtedly recognizes a level of improvement in the understanding and legislative coverage of SGBV from the early war crimes statutes immediately post-WW2, the current Rome Statute and work of the ICC is by no means perfect.

It will therefore be advantageous to examine the *Bemba* and *Lubanga* cases more closely to consider all of these critiques in practice and attempt to determine which factors actually impact the prosecutorial strategies adopted by the OTP. Once this identification is made, we are then able to consider which prosecutorial strategies are most effective in terms of gaining SGBV justice.

⁶⁴ Mannix, "A Quest for Justice," 11.

⁶⁵ Mannix, "A Quest for Justice," 11-13.

⁶⁶ *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07 OA 8, ICC, (September 25, 2009); *Prosecutor v Lubanga*, ICC-01/04-01/06, ICC, (March 14, 2012).

Chapter 3: Conditions for Inclusion of SGBV in Indictments

Background to the Bemba Case

On 23 May 2008, the Pre-Trial Chamber III issued an arrest warrant for Jean-Pierre Bemba Gombo, a Democratic Republic of Congo (DRC) national, following an application by the OTP.⁶⁷ The original charges pursued by the OTP against Bemba were for five counts of war crimes under Article 7 Rome Statute; specifically torture, rape, outrages against personal dignity, murder and pillaging.⁶⁸ Bemba was also charged with three counts of crimes against humanity; specifically torture, rape and murder.⁶⁹ The charges came following Bemba's alleged participation in the conflict on the Central African Republic territory between 25 October 2002 and 15 March 2003. Bemba was the 'President and Commander-in-Chief' of the Movement de Libération du Congo (MLC) through which he assumed *de jure* and *de facto* authority regarding military decisions.⁷⁰

In October 2010 the charges against Bemba were reduced to three counts of war crimes and two counts of crimes against humanity, based on the PTC's rejection of the OTP's attempt at cumulative charging.⁷¹ Nonetheless the rape charges against Bemba remained, making Bemba only the third person to ever face initial charges of sexual violence at the ICC. Bemba

⁶⁷ *Prosecutor v Jean-Pierre Bemba Gombo*, Warrant of Arrest for Jean-Pierre Bemba Gombo, ICC-01/05-01/08 (May 23, 2008) https://www.icc-cpi.int/CourtRecords/CR2008_03303.PDF.

⁶⁸ Specifically under Article 8(2)(c)(i) 'violence to life and person, in particular of all kinds, mutilation, cruel treatment and torture'; Article 8(2)(c)(ii) 'committing outrages upon personal dignity, in particular humiliating and degrading treatment'; Article 8(2)(e)(v) 'pillaging a town or place, even when taken by assault'; and finally Article 8(2)(e)(vi) 'committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2(f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions.'

⁶⁹ Specifically under Article 7(1)(f) 'torture' and Article 7(1)(g) 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity' as part of a 'widespread or systematic attack directed against any civilian population, with knowledge of the attack.'

⁷⁰ ICC Press Release, "The Confirmation of Charges Hearing in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo is Starting Monday 12 January 2009," *ICC Press Release*, January 9, 2009, https://www.icc-cpi.int/Pages/item.aspx?name=the+confirmation+of+charges+hearing+in+the+case+of+the+prosecutor+v_+jean_pierre.

⁷¹ *Bemba Charging Decision*, ICC/01/05-01/08-424, [204-05], [310-312].

was notably also the first to be charged as a military commander liable for the sexual violence committed by his subordinates.

The message from ICC prosecutors was clear; ‘crimes of sexual violence are important enough to prosecute’ and military leaders are always required to ‘punish subordinates for gender-based crimes.’⁷² The charges were hailed to signify a ‘milestone in the history of international criminal justice’ by ex-UN Special Representative on Sexual Violence in Conflict.⁷³

Analysis of Factors Encouraging SGBV Charges

This section seeks to identify some of the key factors that contributed to the pursuit of sexual violence charges by the OPT in the *Bemba* case.

Complementarity Principle: Firstly, with regards case admissibility, Trial Chamber III confirmed that the ICC could exercise jurisdiction over Bemba’s criminality within their Decision on the Admissibility and Abuse of Process Challenge. This decision identified that the CAR has ‘domestic inability to conduct this trial’ and thus was ‘unable’ to prosecute Bemba, as required by Article 17(1)(a) Rome Statute.⁷⁴ Jurisdiction therefore fell upon the ICC to prosecute the case.

Bensouda’s Influence on Pursuing SGBV Charges:

The lead prosecutor in the Bemba case, Fatou Bensouda, notably articulated SGBV as a top priority in her prosecutorial strategy at the ICC.⁷⁵ Before reaching the ICC, Bensouda

⁷² Brigid Inder of the Women’s Initiatives for Gender Justice quoted in David Smith, “Former Congo Vice-President Bemba Used ‘Rape as his Method’ of War,” *The Guardian*, November 22, 2010, <https://www.theguardian.com/world/2010/nov/22/congo-vice-president-trial-war-crimes>.

⁷³ Margot Wallstrom in Aaron Gray-Block, “Congo ex-VP Bemba on Trial in Hague for War Crimes,” *Reuters*, November 22, 2010, <https://www.reuters.com/article/us-warcrimes-bemba/congo-ex-vp-bemba-on-trial-in-hague-for-war-crimes-idUSTRE6AL2UL20101122>.

⁷⁴ UN General Assembly, Rome Statute of the International Criminal Court, ISBN No.92-9227-227-6, (July 17, 1998) Article 17(1)(a) [261] <https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-a>.

⁷⁵ ICC, “Case Information Sheet: Situation in the Central African Republic, *The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08,” Updated September 2018, <https://www.icc-cpi.int/CaseInformationSheets/BembaEng.pdf>.

pioneered women's rights in The Gambia and raised awareness of sexual violence directed at women during conflict.⁷⁶ She commended the gender-sensitive lens that emerged in the Rome Statute with regards atrocity crimes, noting that it enabled the ICC to afford SGBV 'the serious attention' that it deserved. The adoption of the 2012-2015 Strategic Plan with its specific focus on SGBV in Strategic Goal 3, along with the Sexual and Gender-Based Violence Policy Paper, which were both released during the *Bemba* trial and under Bensouda's tenure as Chief Prosecutor appear to further enhance SGBV protection under the Rome Statute and also indicate that SGBV would be prioritized under her leadership.⁷⁷ Oosterveld recognizes that the production of the Policy Paper by Bensouda, which 'added the background approach' to how to apply the term 'gender' in the international criminal law context, really enabled the entire OTP to 'become much more confident in the use of the term' in subsequent charging documents.⁷⁸ This provided crucial clarification on the definitional ambiguities of gender in the Rome Statute that were discussed previously. While Mannix purports that although many of the commitments expressed in the Policy Paper regarding SGBV really should have been 'standard procedure' since the adoption of the Rome Statute, this new impetus indicated that the court was beginning to head 'in the right direction.'⁷⁹ Bensouda has further reinforced her devotion to SGBV prosecution, for example by assuring the American Society of International Law that the OTP will continue to take SGBV 'very seriously' as the court moves forward.⁸⁰ It would therefore be an oversight to fail to acknowledge the impact Bensouda's influence had on the OTP's formulation of SGBV charges against Bemba; particularly when we compare this

⁷⁶ Marlise Simons, "Gambian Defends the International Criminal Court's Initial Focus on Africans," *NY Times*, February 26, 2007, <https://www.nytimes.com/2007/02/26/world/africa/26hague.html>.

⁷⁷ Office of the Prosecutor, "Strategic Plan 2012-2015," *ICC*, October 11, 2013, 27; Office of the Prosecutor, "Policy Paper on Sexual and Gender-Based Crimes," *ICC*, June 2014.

⁷⁸ Phone Interview with Valerie Oosterveld, August 7, 2018, from New York City.

⁷⁹ Mannix, "A Quest for Justice," 17.

⁸⁰ Fatou Bensouda, "Gender and Sexual Violence Under the Rome Statute," in Emmanuel Decaux et al, (eds) "From Human Rights to International Criminal Law: Studies in Honour of an African Jurist, the Late Judge Laïty Kama," (2007) 416; FORA TV, "Bensouda: ICC Prioritizes Crimes Against Women & Children," *Daily Motion*, 2011, <https://www.dailymotion.com/video/xhzfdm>.

to the relatively sparse inclusion of SGBV in indictments at the international criminal level previously.

Wide Range of Crimes Brought in Charges:

The thoroughness of Bensouda's SGBV pursuit against Bemba was commendable; SGBV was pursued as both a crime against humanity and a war crime in Bemba's charges. By making SGBV a central facet to the charges from the earliest stage in proceedings, as opposed to a secondary or less fundamental element, the OTP ensured that SGBV charges would be more capable of withstanding any scrutiny and potential reformulation conducted by the Pre-Trial Chamber. Indeed previous case law from the ad hoc tribunal in Rwanda does suggest that SGBV charges hold a higher standard of proof in the eyes of judges and are more susceptible to reduction by Chamber judges than other charges are.⁸¹ Accordingly, the OTP essentially covered all potential bases for SGBV charges against Bemba.⁸²

In a similar vein, this also negated the need for the PTC to utilize Regulation 55 to recharacterize the SGBV offences later on in the proceedings, which potentially could have impeded the rights of the defense and called into question the entire legitimacy of the trial (perceived unfairness such as this regarding altering aspects of Bemba's liability after the Confirmation of Charges Decision essentially led to the final Appeal being successful.)⁸³

⁸¹ Women's Initiatives for Gender Justice, "Partial Conviction of Katanga by ICC - Acquittals for Sexual Violence and Use of Child Soldiers, *The Prosecutor vs. Germain Katanga*," March 7, 2014, <http://www.iccwomen.org/images/Katanga-Judgement-Statement-corr.pdf>; Mannix, "A Quest for Justice," 23; Valerie Oosterveld mentioned in her interview that at the ad hoc tribunals there was clearly a 'de facto higher standard of proof required in command responsibility or in cases involving high-level superiors being linked to sexual and gender-based violence' (Phone Interview with Valerie Oosterveld, August 7, 2018, from New York City.)

⁸² At the Confirmation of Charges stage, the PTC applied to *Celibi* test and rejected the cumulative charging strategy of the Prosecutor, declining to confirm the torture and outrages upon personal dignity charges because they were subsumed within the rape charges. See *Bemba Charging Decision*, ICC/01/05-01/08-424, [204-05], [312].

⁸³ See *Bemba Charging Decision*, ICC/01/05-01/08-424, [203]; *Prosecutor v Jean-Pierre Bemba Gombo*, Appeal Judgment, ICC-01/05-01/08-3636-Red, (June 8, 2018) https://www.icc-cpi.int/CourtRecords/CR2018_02984.PDF.

Adequate Time to Investigate and Collect Substantial Evidence Before Arrest:

Another factor that appears to have aided the inclusion of SGBV charges against Bemba relates to the ability to conduct a thorough investigation against Bemba before his arrest, relatively free of time constraints. The CAR ratified the Rome Statute in 2001, and referred the case onto the ICC in December 2004.⁸⁴ Following analysis of information relating to these allegations, an investigation was officially opened in May 2007 (the fourth investigation of the ICC at the time).⁸⁵ Within five months, at least 600 rape victims were identified throughout investigations – notwithstanding the many more that likely had not come forward. ‘Credible reports’ of rape and other forms of sexual violence were cited, and evidence mounted.⁸⁶ The ICC opened a field office in October 2007 as a base for investigation teams and lawyers, greatly helped by the fact that the situation was referred to the ICC by the cooperating CAR Government.⁸⁷ Notably, the field office in Bangui was the fifth established by the ICC and thus this practice was becoming familiar to the OTP. The arrest warrant for Bemba was issued in May 2008.⁸⁸ The ICC then had a further two years to investigate crimes in the CAR before the trial began. The OTP had four years to formulate the charges against Bemba and were becoming better equipped to conduct SGBV-specific interviews and investigations.⁸⁹

Although Bemba was not in custody when arrested, he was in exile in Belgium – a party to the Rome Statute and thus the government had committed to cooperation with the ICC with

⁸⁴ ICC, “Central African Republic: Situation in the Central African Republic, ICC 01/05,” <https://www.icc-cpi.int/car>, accessed November 5, 2018.

⁸⁵ ICC, “Central African Republic.”

⁸⁶ UN News, “International Criminal Court Opens Probe into Central African Republic,” *UN News*, May 22, 2007, <https://news.un.org/en/story/2007/05/219572-international-criminal-court-opens-probe-central-african-republic>.

⁸⁷ UN News, “International Criminal Court.”

⁸⁸ *The Prosecutor v Jean-Pierre Bemba Gombo*, Warrant of Arrest for Jean-Pierre Bemba Gombo, ICC-01/05-01/08 (May 23, 2008) https://www.icc-cpi.int/CourtRecords/CR2008_03303.PDF.

⁸⁹ Interview with Helen Brady and Nicole Samson, August 21, 2018, The Hague, The Netherlands.

regards arresting alleged criminals being pursued by the ICC. This aided Bemba's swift arrest by Belgian authorities only a day after the issue of a warrant for his arrest.⁹⁰

It appears that the ICC's increasing familiarity with the processes of conducting investigations and establishing field offices, the referral of the case by the CAR as a cooperating state party to the Rome Statute, and the arrest easily and swiftly facilitated by the Belgian authorities enabled substantial evidence collection of SGBV crimes before Bemba was arrested. Indeed, knowledge that Bemba was situated in Belgium, a cooperating state to the Rome Statute, perhaps took temporal pressure off the OTP – the office was able to request a warrant for arrest once it had collected considerable amounts of evidence to substantiate their claims.

⁹⁰ ICC Press Release, "Jean-Pierre Bemba Gombo Arrested for Crimes Allegedly Committed in the Central African Republic," *ICC*, May 24, 2008, https://www.icc-cpi.int/Pages/item.aspx?name=jean_pierre+bemba+gombo+arrested+for+crimes+allegedly+committed+in+the+cent.

Chapter 4: Where This Criteria is Not Met in Lubanga

Background to *Lubanga* Case

The Chief Prosecutor of the ICC, Louis Moreno Ocampo, opened an investigation into the DRC in June 2004 at the request of the DRC Government; an arrest warrant was issued for Thomas Lubanga Dyilo in January 2006.⁹¹ Lubanga, the alleged ‘founder and leader of the Union des Patriotes Congolais (UPC)’ - also known as the Forces Patriotiques pour la Libération du Congo (FPLC) - was arrested for his involvement in the war crime of ‘conscripting [and] enlisting children under the age of fifteen years into the national armed forces [and] using them to participate actively in hostilities,’ a breach of international criminal law as prescribed by Article 8(2)(b)(xxvi).⁹² These crimes were alleged to have taken place in the DRC since July 2002. Crucially, Lubanga was the first ever suspect to be ‘arrested and transferred’ to the ICC.⁹³

The OTP’s choice of charges against Lubanga have been an ‘understandably controversial’ source of debate.⁹⁴ This is due to the fact that SGBV charges were not brought, despite an extensive amount of evidence that has come to light surrounding the UPC’s alleged commission of ‘atrocious sexual violence’ against both civilians and child recruits in the conflict. Smith noted that sexual assault ‘reached a massive scale in both frequency and brutality.’⁹⁵ Specifically, evidence suggests that sexual violence was perpetrated against abducted girls within the armed forces, as well as against boy child soldiers who were ‘ordered to commit crimes’ of SGBV.⁹⁶ Even the OTP recognized that a ‘pattern of rape’ and ‘torture’

⁹¹ *Prosecutor v Lubanga*, Warrant of Arrest, ICC-01/04-01/06, (Pre-Trial Chamber I) (February 10, 2006).

⁹² ICC Press Release, “First Arrest for the International Criminal Court,” *ICC News*, March 17, 2006, <https://web.archive.org/web/20070709004144/http://www.icc-cpi.int/press/pressreleases/132.html>; Rome Statute.

⁹³ ICC Press Release, “First Arrest.”

⁹⁴ Sienna Merope, “Recharacterizing the Lubanga Case: Regulation 55 and the Consequences for Gender Justice at the ICC,” *Criminal Law Forum* 22 (2011) 311-346; 312.

⁹⁵ K’Shanni O’Smith, “Prosecutor v Lubanga: How the International Criminal Court Failed the Women and Girls of the Congo,” *Howard Law Journal* 54 (2011) 437-500; 471.

⁹⁶ Joe Tan, “Sexual Violence Against Children on the Battlefield as a Crime of Using Child Soldiers: Square Pegs in Round Holes and Missed Opportunities in Lubanga,” in Terry D. Gill, Robert Greiß, Tim McCormack,

characterized the situation in the DRC.⁹⁷ Tan proffers that up to an additional seven charges should have been added to Lubanga's indictment under Articles 7 and 8 of the Rome Statute; namely sexual slavery as a war crime and a crime against humanity, inhuman treatment as a war crime, cruel treatment as a war crime, rape as a crime against humanity and a war crime, and forced marriage as a crime against humanity (as seen in *Prosecutor v Brima*.)⁹⁸

This chapter seeks to identify why the requirements for inclusion of SGBV in the OTP's charges, as identified in Chapter 3, were not met in this case by examining arguments from both the academic sphere and the legal sphere.

Why Did the OTP Not Bring SGBV Charges?

Issues from an Academic Perspective

Existing SGBV Bias Perpetrating the First Case of the ICC:

It is widely contended by academics that the lack of SGBV charges were as a result of the continuing perpetration of outdated gender norms within the ICC, which were raised in chapter two. (Notably, the Lubanga case came *before* the increased attention on SGBV that was initiated by Bensouda in her tenure as Chief Prosecutor, mentioned above.) Ferstman alleges that 'antecedent prosecutorial policies' led to this 'shortcoming.'⁹⁹ It was perceived to be a further example of the 'gender misrecognition' that has characterized much of the international criminal processes throughout the late 20th and early 21st centuries.¹⁰⁰ Oosterveld

Christophe Paulussen and Jessica Dorsey, *Yearbook of International Humanitarian Law 2012*, 15 (The Hague, The Netherlands: T.M.C. Asser Press, 2012) 147.

⁹⁷ ICC, "The Office of the Prosecutor of the International Criminal Court opens its first investigation," *ICC Press Release*, June 23, 2004, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation.aspx.

⁹⁸ Tan, "Sexual Violence Against Children," 142; *Prosecutor v Brima*, Case No. SCSL-2004-16-A, Appeals Chamber Judgment, (22 February 2008) at *[202].

⁹⁹ Carla Ferstman, "Limited Charges and Limited Judgments by the International Criminal Court – who bears the greatest responsibility?" *The International Journal of Human Rights* 16 No.5, (June 2012) 796-813; 797.

¹⁰⁰ Louise Chappel, *The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy*, (England: Oxford University Press, 2015) 111.

contends that the reluctance by the OTP to pursue SGBV offences - unless ‘incredibly obvious’ - came as a result of the ‘constructive ambiguity’ that surrounded the term ‘gender’ and indeed peppered many other articles of the Rome Statute; the OTP was uncertain as to how to interpret or define the term and thus shied away from approaching it at all.¹⁰¹ Resultantly, Ferstman notes that the entire range of harms perpetrated by Lubanga were not fully represented in the charges against him, and this hierarchical treatment of atrocity crimes meant that SGBV ‘victims [were] sidelined’ and the perception of the harm victims faced, both by their communities and the wider international sphere, was diminished. This perceived trivialization was so even though the Rome Statute was hoped to elevate the status of SGBV as atrocity crimes.¹⁰²

Considerations from a Legal Perspective

Motivation:

In spite of the assertions above, Moreno-Ocampo rejects the assertion that the lack of understanding of SGBV and the Rome Statute provisions resulted in its exclusion from the charges. In fact Moreno-Ocampo’s decision to exclude SGBV came in spite of his acknowledgement of his ‘duty to investigate gender crimes.’¹⁰³ He hired feminist expert Catherine MacKinnon as his Special Advisor on Gender Crimes in the Lubanga case and explains that he had a team of lawyers who were committed to pursuing gender justice who helped him to formulate the charges against Lubanga.¹⁰⁴

Arguably, Moreno-Ocampo’s ‘limited scope’ prosecutorial strategy played the more dominant role in this decision than any deliberate desire to evade prosecution for SGBV.¹⁰⁵ His

¹⁰¹ Phone Interview with Valerie Oosterveld, August 7, 2018, from New York City.

¹⁰² Ferstman, “Limited Charges,” 807.

¹⁰³ Interview with Louis Moreno Ocampo, November 10, 2018, New York City.

¹⁰⁴ Interview with Louis Moreno Ocampo, November 10, 2018, New York City.

¹⁰⁵ Interview with Louis Moreno Ocampo, November 10, 2018, New York City.

‘Paper on Some Policy Issues Before the Office of the Prosecutor’ acknowledged some of the key differences between domestic prosecution and international prosecution – such as ‘questions of security on the ground’, ‘possibilities for protection of witnesses,’ and the availability for other ‘necessary means of investigation.’¹⁰⁶ He highlighted a desire to avoid the exhaustive investigations’ and ‘long proceedings’ the other international tribunals had been plagued with.¹⁰⁷ The OTP also had to swiftly initiate its first investigation in order to begin developing the legitimacy of the court within the international community.¹⁰⁸

As such, principles of ‘efficiency’ and ‘low costs’ were prioritized by the OTP at this time. Indeed in Moreno-Ocampo’s 2006 Report on Prosecutorial Strategy, he expressed that the crimes pursued would be a ‘sample that is reflective of the gravest incidents’ while considering ‘as few witnesses as possible are called to testify.’¹⁰⁹ This initially does appear to continue to perpetuate the practice of hierarchical treatment of crimes at first glance, as only the subjectively ‘gravest’ crimes would be pursued, however upon closer inspection it must be noted that the crime of murder - which is one of the most frequently pursued by international tribunals - was also *not* included in the indictment due to lack of evidence.¹¹⁰ This somewhat unravels the argument that underlying and archaic prejudice played a role in the lack of indictment for SGBV in the Lubanga case.

This analysis would suggest that the Lubanga prosecutorial strategy differed from Bemba because, although there was motivation to pursue SGBV it was not Moreno-Ocampo’s top strategic priority. This is a crucial distinction.

¹⁰⁶ Office of the Prosecutor, “Paper on Some Policy Issues Before the Office of the Prosecutor,” *ICC Policy Paper*, September 2003, https://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf, 2.

¹⁰⁷ Tan, “Sexual Violence Against Children,” 121.

¹⁰⁸ Louise Chappell, “Conflicting Institutions and the Search for Gender Justice at the International Criminal Court,” *Political Research Quarterly* 67 No.1 (March 2014) 183-196; 187.

¹⁰⁹ Office of the Prosecutor, “Report on Prosecutorial Strategy,” *ICC*, September 14, 2006, https://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf, 5.

¹¹⁰ Interview with Louis Moreno Ocampo, November 10, 2018, New York City.

Lack of Evidence:

It must also be recognized that in fact evidence collection for SGBV is an undoubtedly troublesome process, and the *Lubanga* case was plagued with many of these complications. From the outset, investigations into all Rome Statute crimes face widely recognized barriers of evidence collection, such as the ‘remote’ location of the OTP; the temporal delays in accessing crime scenes and resulting susceptibility to evidence evaporation or tampering; the difficulties of accessing witnesses (often as a result of illness and death caused by the atrocity crimes); situations of ongoing war and conflict surrounding crime scenes and witnesses; language and cultural barriers; and potentially uncooperative State Parties.¹¹¹

OTP prosecution lawyer, Nicole Samson, explained that for evidence collection relating to SGBV, investigators face additional hurdles still. They have to balance the fragile elements of ensuring collection of the ‘best possible evidence’ that can actually be utilized within the criminal prosecution framework, while also trying to ‘avoid retraumatizing witnesses’ or prompting ‘secondary traumatization.’¹¹² Investigative questioning for SGBV is thus very specific; investigators must ensure that for sexual violence victims, the right kinds of questions are being asked - including what took place, how it took place, environmental factors, whether there was coercion in any way or whether the elements of rape or the sexual violence has been met – while doing so in a way that avoids the re-traumatization of the victim. In the early days of the court, it is uncertain whether investigators were consistently asking the correct questions about SGBV criminality. However, the focus on SGBV has increased in more recent years to include ‘specialized training for investigators’ and by bringing in ‘certain expertise’ from other entities that are specialized in sexual violence.¹¹³ As the ICC’s first investigation, investigatory

¹¹¹ Interview with Helen Brady and Nicole Samson, August 21, 2018, The Hague, The Netherlands.

¹¹² Interview with Helen Brady and Nicole Samson, August 21, 2018, The Hague, The Netherlands.

¹¹³ Interview with Helen Brady and Nicole Samson, August 21, 2018, The Hague, The Netherlands.

practices in *Lubanga* have been perceived as being somewhat underdeveloped and not as sensitive to the intricacies of SGBV as they are today.¹¹⁴

Indeed, investigatory questioning can only occur once witnesses are identified and agree to share their story. It appears that, despite the existence of the Witness Protection Program within the registry unit of the ICC, the reality is that the Court is still very limited in what it can offer a witness. There is little middle ground as to what the court can offer due to capacity constraints, despite taking its protection duties very seriously; consequently, witnesses must consider in large part the security concerns of meeting with investigators or lawyers or providing the depth of testimony required for criminal conviction. Melinda Reed notes that although the ICC takes measures to protect witnesses, they can never be implemented with 100% certainty.¹¹⁵ The lack of existence of an ICC police force, let alone an ICC police force situated within these situations, also reduces the capacity for witness protection even further; even if the OTP identifies witnesses to help at the investigation phase, ‘it can be a lot harder to get those same witnesses to agree to testify at a trial’ due to security issues.¹¹⁶ While the ad-hoc tribunals were focused on very specific regions, facts and contexts and could therefore adapt security practices accordingly, the ICC is faced with multiple situations and new contexts constantly; it is more difficult for the court to tap into existing security mechanisms or apply lessons from previous context-specific experiences. Consequently, it may follow that in the interest of protecting victims, relying on prosecutorial strategies at the ICC that push extremely hard for victim testimony to the extent that it endangers participants actually devalues the whole aim of international criminal justice as promoting security for vulnerable persons.

These security concerns were widely felt throughout the *Lubanga* investigations. Access to witnesses was severely hampered because some investigators had to ‘hide the fact that they

¹¹⁴ Interview with Melinda Reed, August 20, 2018, The Hague, The Netherlands.

¹¹⁵ Interview with Melinda Reed, August 20, 2018, The Hague, The Netherlands.

¹¹⁶ Interview with Helen Brady and Nicole Samson, August 21, 2018, The Hague, The Netherlands.

were conducting an investigation,’ and occasionally intermediaries were even employed in certain instances where witnesses were at risk of being identified.¹¹⁷ Further, some investigators were unwilling to follow up on their questioning believing that their witnesses were at ‘risk of immediate abduction.’¹¹⁸ Even the Trial Chamber recognized the extent of ‘security risks that adversely affected the investigations’ in *Lubanga*, which Mannix acknowledges is unusual as the PTC often produces ‘unimpressive assessments of the OTP’s practices by Pre-Trial and Trial Chambers’.¹¹⁹

In addition to investigators’ attempts to collect evidence, the OTP also relied heavily on Congolese Government and NGO-collected evidence. While there clearly was evidence suggesting sexual violence crimes were committed, investigators were unable to uncover sufficient evidence to prove that they were part of a larger UPC policy or were ‘systematic’ (as required by Article 7(1)) while ensuring safety for the victims of crimes.¹²⁰

Helen Brady reassures that the ‘only reason’ not to include charges for SGBV is ‘if there really is not evidence.’¹²¹ Similarly, Moreno-Ocampo openly notes that despite the search for evidence of SGBV in Lubanga and consultation with gender experts, they ‘just couldn’t find it’ before bringing the charges against Lubanga.¹²² Considering all of this analysis, combined with Moreno-Ocampo’s policy at the time of pursuing the least burdensome charges, it appears hard to criticize the OTP for being unable to uncover significant volumes of evidence to satisfactorily support a prosecution of SGBV against Lubanga.

¹¹⁷ Mannix, “A Quest for Justice,” 11; for specific discussion of security issues see *Prosecutor v Thomas Lubanga Dyilo*, Trial Chamber Judgement, ICC-01/04-01/07, (March 14, 2012) https://www.icc-cpi.int/CourtRecords/CR2012_03942.PDF at *16; 50-62; 74-89; 90-216; 218/219.

¹¹⁸ *Prosecutor v Thomas Lubanga Dyilo*, Trial Chamber Judgement, ICC-01/04-01/07, (March 14, 2012) https://www.icc-cpi.int/CourtRecords/CR2012_03942.PDF at *[160]

¹¹⁹ Mannix, “A Quest for Justice,” 11.

¹²⁰ Louise Chappell interviews Brigid Inder of the Women’s Initiatives for Gender Justice, who recalls communications with OTP in 2006, quoted in Louise Chappell, “Conflicting Institutions,” 189.

¹²¹ Interview with Helen Brady and Nicole Samson, August 21, 2018, The Hague, The Netherlands.

¹²² Interview with Louis Moreno Ocampo, November 10, 2018, New York City.

Lack of Time to Issue Charges:

Not only did Moreno-Ocampo's prosecutorial strategy encourage a swift investigation into Lubanga, but particular case-specific time-restraints also intensified this time-pressure; this meant that the OTP had to move ahead with the case despite not yet having extensive evidence of SGBV. While Lubanga was one of a few suspects who was being investigated by the OTP in 2006, he was notably already in the custody of the judicial authority of Kishasha. As Moreno-Ocampo contended, this made him 'the obvious target' for the first case of the ICC because he would be an easy suspect to apprehend due to already being in custody.¹²³ However, Moreno-Ocampo and his investigative team felt that, due to the various circumstances surrounding Lubanga's detention, he could have been released imminently for the charges for which he was in custody.¹²⁴ They had to close in and in doing so include only the crimes for which they had enough evidence.¹²⁵ Evidence was strongest for proving the use of child soldiers at the time the OTP decided it had to move, hence the formulation of child soldiers charges taking precedence; Moreno-Ocampo noted in response to his critics that 'scholars don't understand that it is factual; it is based on evidence. We had to arrest Lubanga.'¹²⁶

While the *Bemba* case had its own evidential hurdles that surfaced later on in the case, the *Bemba* team did believe it had enough evidence to carry forward SGBV charges at the time they had to issue the arrest warrant. This contrasts to *Lubanga* where they felt that, if they delayed issuance any further, they may lose track of the suspect entirely and he would escape prosecution completely. This also goes some way in explaining the differing prosecutorial strategy adopted in this case.

¹²³ Interview with Louis Moreno Ocampo, November 10, 2018, New York City.

¹²⁴ Interview with Louis Moreno Ocampo, November 10, 2018, New York City.

¹²⁵ Interview with Louis Moreno Ocampo, November 10, 2018, New York City.

¹²⁶ Interview with Louis Moreno Ocampo, November 10, 2018, New York City.

Refusal to Amend Charges Throughout Trial:

A further aspect of the prosecutorial strategy that warrants examination relates to the refusal of the OTP to amend the charges *throughout* the trial, as more evidence of SGBV came to light. For example, Mannix noted that at least ‘15 of the first 25 prosecution witnesses (including two expert witnesses) provided testimony of sexual crimes.’¹²⁷ Yet, although the OTP had ‘committed to continuing the investigation’ into other crimes and legally still could have applied to the Pre-Trial Chamber alter the charges up until January 2009, in 2006 Moreno-Ocampo ‘temporarily suspended’ this further investigation and focused instead solely on the child soldier charges in hand.¹²⁸

Despite this, many efforts were still made to encourage him to change the charges. Judge Odio Benito focused much of her questioning throughout the proceedings on the issue of SGBV; Chappel notes that of her ‘133 questions to prosecution witnesses, 107 related to sexual violence and the presence of women and girls in the armed forces.’¹²⁹ Additionally, the Women’s Initiatives for Gender Justice (WIGJ) submitted a request to the PTC to ‘review the Prosecutor’s exercise of discretion in the selection of charges’ and regarding whether SGBV charges should be considered, however this request was denied. The WIGJ did however submit a letter and report to the OTP which contained interviews with 31 victims of ‘acts of rape and sexual slavery committed by the UPC’ which were collected by the WIGJ on two field missions to the DRC.¹³⁰ Further, the legal representatives of the victims also filed an application to recharacterize the charges under Regulation 55, but this was considered to be beyond the power

¹²⁷ Mannix, “A Quest for Justice,” 19.

¹²⁸ Chappel, *The Politics of Gender*, 111.

¹²⁹ Chappel, *The Politics of Gender*, 112.

¹³⁰ Women’s Initiatives for Gender Justice, “Letter to Luis Moreno-Ocampo,” http://iccwomen.org/documents/Prosecutor_Letter_August_2006_Redacted.pdf accessed November 2, 2018, 6.

of the Trial Chamber (such recharacterization should be pursued with the Pre-Trial Chamber instead, under Article 61(7)(c)(ii).)¹³¹

Moreno-Ocampo admitted that, had the judge asked him to change the charge, he would have obliged, but this was not the case.¹³² He therefore did not recharacterize the charges, deeming that it was ‘late, in the middle of the trial’ and it was ‘unfair for Lubanga;’ the trial had already been delayed due to a ‘security problem, disclosure problems’ and so to further amend the charges would not have been ‘respecting the human rights of Lubanga.’¹³³ Particularly as the first case of the ICC, protecting Lubanga’s right to due process was crucial for upholding the legitimacy of the court and also for ensuring that his conviction was not overturned at a later date due to prejudice against the rights of the accused. Indeed, in the ICTY and the Special Court for Sierra Leone, requests to recharacterize charges relating to SGBV have previously been declined on the basis of ‘unfair prejudice to the accused’, so Ocampo’s concern was not unfounded.¹³⁴ Further, protection of the rights of the accused and procedural unfairness played a large role in the acquittal of Bemba earlier this year. This exercise of caution appears to have been very sensible.

¹³¹ ICC, “Regulations of the Court: Official Documents of the International Criminal Court ICC-BD/01-02-07,” Adopted 26 May 2004, 34, <https://www.icc-cpi.int/NR/rdonlyres/DF5E9E76-F99C-410A-85F4-01C4A2CE300C/0/ICCBD010207ENG.pdf>; Interview with Helen Brady and Nicole Samson, August 21, 2018, The Hague, The Netherlands.

¹³² Interview with Louis Moreno Ocampo, November 10, 2018, New York City.

¹³³ Interview with Louis Moreno Ocampo, November 10, 2018, New York City.

¹³⁴ *Prosecutor v. Lukic & Lukic* (ICTY), IT-98-32/1-PT, [63] (July 8, 2008).

Chapter 5 – Comparing the Outcomes of *Bemba* and *Lubanga*

Lubanga Outcome

Although SGBV charges were not individually pursued against Lubanga, differentiating it from *Bemba*, this section will now consider how in fact the prosecutorial strategy in Lubanga still prioritized a gendered aspect in the articulation of charges. It will consider whether, despite this different strategy, gender justice was still achieved.

SGBV charges were very interestingly incorporated into the charges for the conscription and enlistment of child soldiers to a large extent. Early in the Prosecution's submissions, Moreno-Ocampo stated that it was his office's mission to 'ensure that Thomas Lubanga [was] held criminally responsible for the atrocities committed against those little girl soldiers... used as sexual prey' during the conflict.¹³⁵ The Prosecution did highlight throughout the proceedings that enlisted and conscripted girls were 'the daily victims of rape by the commanders' in the training camps and that 'young boys were instructed to rape.'¹³⁶ They noted how girl soldiers were 'abused' and used 'as sexual slaves,' and 'this suffering [was] part of the suffering of the conscription.'¹³⁷ Thus the OTP clearly aimed to expose 'this gender aspect of the crime' of conscription which had been uncovered during investigations.¹³⁸ The OTP also contended that the sexual exploitation of girls and boys fulfilled an 'essential support function' to the group, as defined by the Paris Principles, and thus also constituted the *use* of children 'to participate

¹³⁵ *Prosecutor v Lubanga*, ICC-01/04-01/06, (26 January 2009) https://www.icc-cpi.int/NR/rdonlyres/89E8515B-DD8F-4251-AB08-6B60CB76017F/279630/ICCO_TPSTLMO20090126ENG2.pdf, 11.

¹³⁶ *Prosecutor v Lubanga*, ICC-01/04-01/06, (26 January 2009) https://www.icc-cpi.int/NR/rdonlyres/89E8515B-DD8F-4251-AB08-6B60CB76017F/279630/ICCO_TPSTLMO20090126ENG2.pdf, 8.

¹³⁷ International Justice Monitor, "Summary of the Closing Statements in The Prosecutor v Thomas Lubanga Dyilo," November 3, 2011, <https://www.ijmonitor.org/2011/11/summary-of-the-closing-statements-in-the-prosecutor-v-thomas-lubanga-dyilo/>.

¹³⁸ International Justice Monitor, "Summary of the Closing Statements."

actively in hostilities.’¹³⁹ Therefore, although only child soldier charges were brought, SGBV was arguably still at the ‘centerpiece’ of the Prosecution’s case.¹⁴⁰ Samson expressed that this was an attempt to ensure that SGBV was not isolated completely despite lacking the evidence to bring it as an individual charge; they tried to ‘put it into the bigger package of what happened.’¹⁴¹

Moreno-Ocampo actually contends that this construction of Lubanga’s criminality was a ‘very interesting new concept’ that might have ironically exposed the barbaric nature of the SGBV in this case more so than separate SGBV charges could have.¹⁴² He contended that by framing the SGBV evidence firmly within the context of the child soldiers charges, this distanced the girls from the perception that they were ‘bush wives’ which could have implications of duty, experience and older age.¹⁴³ These connotations could have ‘counteract[ed] the perception of the forced nature of the sexual violation of these children’ and consequently undermined the illegitimacy of the sexual violence against them.¹⁴⁴

Additionally, the OTP’s construction of charges may have sent a crucial message regarding rape of wives within the DRC. In Ituri, traditional perceptions of marriage specify that ‘once a girl is sexually ‘taken’ by a man, she is his property.’ Indeed an FAPC colonel admitted that ‘taking these girls out of these forced ‘marriages’ would be very difficult.’¹⁴⁵ Moreno-Ocampo recalls that many of the SGBV victims were therefore ignored because ‘they were the wife of the commander.’¹⁴⁶ Thus, by firmly placing the SGBV aspect within the child

¹³⁹ UNICEF, “The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups,” *UNICEF*, (February 2007) [2.1].

¹⁴⁰ Tan, “Sexual Violence Against Children,” 122; UN General Assembly, Rome Statute of the International Criminal Court, ISBN No.92-9227-227-6, (July 17, 1998) Article 8(e)(vii) <https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-a>.

¹⁴¹ Interview with Helen Brady and Nicole Samson, August 21, 2018, The Hague, The Netherlands.

¹⁴² Interview with Louis Moreno Ocampo, November 10, 2018, New York City.

¹⁴³ Interview with Louis Moreno Ocampo, November 10, 2018, New York City.

¹⁴⁴ Sonja C. Grover, *Humanity’s Children: ICC Jurisprudence and the Failure to Address the Genocidal Forcible Transfer of Children*, (Berlin: Springer Heidelberg, 2013) 127.

¹⁴⁵ UN Organization Mission in the Democratic Republic of the Congo (MONUC), “Special Report on Events in Ituri January 2002–December 2003,” (16 July, 2004) 44 [154].

¹⁴⁶ Interview with Louis Moreno Ocampo, November 10, 2018, New York City.

soldiers charges, it was further distanced from any ‘bush wives’ justification that stand-alone SGBV charges might have been subject to. Moreno-Ocampo wanted to clearly send the message that despite what the marriage might mean in the local context, you still ‘cannot rape girls who are forced to enlist’ or enter marriage.¹⁴⁷

These contentions may seem challenging in many respects from a feminist perspective, as they suggest that ICC Chambers and judges may have considered a culturally relativist perspective in judging this case, or not treated the crimes with appropriate gravity regardless of their position in society, when ideally SGBV should be considered illegal in all contexts. This idea also perpetuates the notion that bush wives are ‘power[less] and dehuman[ized],’ as noted by Grover.¹⁴⁸ Current social norms do acknowledge that SGBV should be considered crimes worthy of stand-alone charges, as discussed in chapters one and two.

Yet legally, this may have been a necessary concession to make. Earlier analysis demonstrated that legal institutions are considerably lagging behind many current socially accepted norms relating to SGBV. Hobbs notes that there is a truly systemized lack of accounting for SGBV that goes beyond the OTP and across the entire court.¹⁴⁹ Indeed, based on the case law of the ICC which is greatly lacking in convictions for stand-alone SGBV charges, any individual formulation of SGBV in initial charges would have far from guaranteed the conviction of Lubanga; there have still been no convictions for rape as a war crime, 16 years since the court began functioning.

In 2012, Lubanga was found guilty and convicted of the conscription, recruitment and use of child soldiers, and notably with a heavy emphasis and presentation of the SGBV elements that were involved in these crimes.¹⁵⁰

¹⁴⁷ Interview with Louis Moreno Ocampo, November 10, 2018, New York City.

¹⁴⁸ Grover, *Humanity’s Children*, 128.

¹⁴⁹ Interview with Siobhan Hobbs, August 20, 2018, The Hague, The Netherlands.

¹⁵⁰ ICC, “Judgement Pursuant to Article 74 of the Statute: ICC-01/04-01/06-2842: Trial Chamber I Decision,” ICC, April 5, 2012, https://www.icc-cpi.int/CourtRecords/CR2012_03942.PDF.

Bemba Outcome

The Bemba SGBV charges did not withstand the scrutiny of the ICC Appeal Chamber, however. On 8 June 2018, the Bemba conviction for war crimes and crimes against humanity which included rape, under the principle of command responsibility, was overturned by the Appeals Chamber.¹⁵¹ The first reason for this was because the Appeals Chamber decided that ‘the conviction exceeded the charges’ that were initially confirmed by the Pre-Trial Chamber in 2009.¹⁵² The Appeals Chamber held that the criminal acts added after the Confirmation Decision was issued did not constitute part of the ‘facts and circumstances described in the charges’ and thus Mr Bemba could not be convicted of them.¹⁵³ This decision was made by the Appeals Chamber, despite their acknowledgement that the Trial Chamber is permitted to utilize evidence of these same criminal acts ‘for the purposes of the contextual element of crimes against humanity.’¹⁵⁴ It appears astonishing and counterintuitive that evidence of criminality that is allowed to be considered for some aspects of a charge cannot be utilized as evidence of a charge in itself.

Other international legal experts have noted problems with the Appeals decision also; Streiff submits that the Appeals Chamber is essentially requiring the Pre-Trial Chamber proceedings to become a ‘mini-trial’ placing an unreasonable burden on the OTP to be ‘absolutely trial-ready’ at the confirmation of charges stage.¹⁵⁵ They believe that the Rome Statute is being interpreted in a too restrictive manner, demonstrating the remaining ambiguity surrounding the statute’s implementation. Whiting states that the confirmation hearing is supposed to be a ‘low hurdle, designed to weed out’ cases that clearly lack the basis to

¹⁵¹ *Bemba Appeal Judgment*, ICC-01/05-01/08-3636-Red, (June 8, 2018).

¹⁵² *Bemba Appeal Judgment*, ICC-01/05-01/08-3636-Red, (June 8, 2018) at *23; *Bemba Charging Decision*, ICC/01/05-01/08-424, at *[204-05], [310-312].

¹⁵³ *Bemba Appeal Judgment*, ICC-01/05-01/08-3636-Red, (June 8, 2018) at *[115].

¹⁵⁴ *Bemba Appeal Judgment*, ICC-01/05-01/08-3636-Red, (June 8, 2018) at *[117].

¹⁵⁵ Fritz Streiff, “The Bemba Acquittal: Checks and Balances at the International Criminal Court,” *International Justice Monitor*, July 18, 2018, <https://www.ijmonitor.org/2018/07/the-bemba-acquittal-checks-and-balances-at-the-international-criminal-court/>.

proceed.¹⁵⁶ Pre-Trial Judges need only have ‘substantial grounds to believe’ that the alleged crimes were committed by the accused; Whiting notes that this standard falls between the ‘reasonable grounds to believe’ arrest standard and the ‘beyond a reasonable doubt’ trial standard.¹⁵⁷ In other words, it was sufficient to note at the PTC that Bemba was criminally responsible for the ‘war crimes and crimes against humanity of murder, rape and pillage by his soldiers in CAR from October 26, 2002, until March 15, 2003,’ and not for each and every single criminal act that would prove these accusations.¹⁵⁸ This change has been deemed ‘unwarranted and contrary to the aims of achieving justice.’¹⁵⁹

The second reason Bemba’s conviction was overturned was because the Appeals Chamber concluded that the Trial Chambers made an ‘unrealistic assessment’ as to whether Bemba took ‘all the necessary and reasonable measures... to prevent or repress the crimes committed by MLC troops.’¹⁶⁰ They decided that this decision was ‘tainted by serious errors’ because a commander should not be blamed for not having done something they had ‘no power to do.’¹⁶¹ Indeed that fact that the MLC was operating abroad placed great difficulties on ‘Mr Bemba’s ability, as a remote commander, to take measures’ to prevent or punish his troops’ criminality.¹⁶² This finding was despite the fact that Bemba had sent these fighters to the CAR in the first place.¹⁶³

A primary consequence of these findings is that, going forward, there is a severe lack of clarity as to the functions of each chamber of the ICC, which threatens the ability of the court to prosecute in line with the rule of law. Helen Brady of the OTP notes that ‘there was quite a

¹⁵⁶ Alex Whiting, “Appeals Judges Turn the ICC on its Head with Bemba Decision,” *Just Security*, June 14, 2018, <https://www.justsecurity.org/57760/appeals-judges-turn-icc-head-bemba-decision/>.

¹⁵⁷ Whiting, “Appeals Judges Turn.”

¹⁵⁸ Whiting, “Appeals Judges Turn.”

¹⁵⁹ Streiff, “The Bemba Acquittal.”

¹⁶⁰ *Bemba Appeal Judgment*, ICC-01/05-01/08-3636-Red, (June 8, 2018) at *[173] and *[196].

¹⁶¹ *Bemba Appeal Judgment*, ICC-01/05-01/08-3636-Red, (June 8, 2018) at *[166] and *[167].

¹⁶² *Bemba Appeal Judgment*, ICC-01/05-01/08-3636-Red, (June 8, 2018) at *[171].

¹⁶³ Oumar Ba, “What Jean-Pierre Bemba’s Acquittal by the ICC Means,” *Al Jazeera*, June 13, 2018, <https://www.aljazeera.com/indepth/opinion/jean-pierre-bemba-acquittal-icc-means-180612121012078.html>.

change to the standard of review of factual findings’ by the Appeals Chamber; unless Trial Chamber findings are ‘unreasonable’ you do not ‘disturb’ them, as argued by the Prosecution in the appeal.¹⁶⁴ She notes that the decision has now also thrown up questions of how the Prosecution can bring charges relating to SGBV, how they are to charge, and how to approach the question of taking all necessary and reasonable measures.¹⁶⁵ The issue was further complicated when the Appeals Chamber expressed that their judgment relating to adding criminal acts after confirmation would not necessarily always require an amendment to the charges and that this question ‘may be left open.’¹⁶⁶

Further, the fact that the outcome essentially led to three different opinions in one which creates a ‘fragmentation of law.’¹⁶⁷ This is especially frustrating for the prosecutors because, as the court is still in its infancy, lack of consensus on these legal questions shows that the court is still very much in the process of developing established jurisprudence on some very critical issues.¹⁶⁸ It is consequently a huge task for both prosecutors and defense teams to build their cases when it is so unclear how a single chamber is likely to decide, let alone when there is clearly so much disagreement across chambers. Samson does recognize that this is a consequence of the fact that an international court does have to appease and facilitate an amalgamation of legal systems and approaches.¹⁶⁹ ICC judges originate from both common law and civil law jurisdictions which are based on different legal philosophies which practice different approaches relating to the appropriate procedures for collecting and admitting evidence, the value of witness evidence and the value of cross-examination for example. Samson explains that this ‘hybrid’ nature of the ICC can at times result in ‘confusions in the

¹⁶⁴ Interview with Helen Brady and Nicole Samson, August 21, 2018, The Hague, The Netherlands.

¹⁶⁵ Interview with Helen Brady and Nicole Samson, August 21, 2018, The Hague, The Netherlands.

¹⁶⁶ *Bemba Appeal Judgment*, ICC-01/05-01/08-3636-Red, (June 8, 2018) at *[115].

¹⁶⁷ Interview with Helen Brady and Nicole Samson, August 21, 2018, The Hague, The Netherlands; Interview with Chiara Loiero, August 21, 2018, The Hague, The Netherlands.

¹⁶⁸ Interview with Helen Brady and Nicole Samson, August 21, 2018, The Hague, The Netherlands.

¹⁶⁹ Interview with Helen Brady and Nicole Samson, August 21, 2018, The Hague, The Netherlands.

courtroom.’¹⁷⁰ Powderly and Hayes condemn the fact that none of the Judges in the Bemba Appeal addressed how each of their differing ‘conclusions and approaches should be interpreted or relied on... in future cases.’¹⁷¹ This legal uncertainty also threatens the court’s ability to ensure protection of the rule of law.¹⁷²

Notwithstanding the clear issues that the Bemba judgment has thrown up for future ICC jurisprudence, these disparities and concerns directly impacted the overall abilities of the court to achieve gender justice in this case. Bemba’s initial conviction was ‘heralded’ as ‘historic and profoundly significant’ for gender justice and for the recognition of the barbarity of SGBV for victims. Yet this new, high standard of review which the Appeals Chamber imposed in Bemba facilitated impunity for SGBV. The reality is that there was ‘overwhelming evidence’ of SGBV in the CAR conflict and this unreasonably high procedural standard imposed by the Appeals Chamber prevented any accountability for these crimes.¹⁷³ It did not allow for the admission of new evidence that so often arises post-confirmation of charges – a situation that is very specific to SGBV trials where SGBV victims do not wish to come forward unless totally certain that the defendant ‘will actually stand trial,’ especially where they are a senior figure within their community.¹⁷⁴

With regards the issue of Bemba’s inability to fulfil his responsibilities due to his remoteness, Sadat argues that in fact remoteness is not a defensible excuse for a commander’s failure to properly exercise control over troops. She suggests in fact that remoteness warrants heightened supervision from the commander and a more stringent demonstration of ‘due

¹⁷⁰ Interview with Helen Brady and Nicole Samson, August 21, 2018, The Hague, The Netherlands.

¹⁷¹ Joseph Powderly and Niamh Hayes, “The Bemba Appeal: A Fragmented Appeals Chamber Destabilises the Law and Practice of the ICC,” *Human Rights Doctorate Blog*, June 26, 2018, <https://humanrightsdoctorate.blogspot.com/2018/06/the-bemba-appeal-fragmented-appeals.html>.

¹⁷² Interview with Chiara Loiero, August 21, 2018, The Hague, The Netherlands.

¹⁷³ Laurie Green, “First-Class Crimes, Second-Class Justice: Cumulative Charges for Gender-Based Crimes at the International Criminal Court,” *International Criminal Law Review* 11, (2011) 529-541; 533.

¹⁷⁴ Powderly and Hayes, “The Bemba Appeal.”

diligence' due to the increased risks involved in deploying troops remotely.¹⁷⁵ Indeed with the increase in use of modern communication methods commanders do have 'almost immediate' access to lines of communication with their troops anyway.¹⁷⁶ The responsibility of a commander to take measures against the commission of rape by troops above merely send[ing] a letter to an NGO is heightened yet again based on the sheer frequency of its occurrence as a tool of war, as previously discussed; the use of SGBV by troops in the CAR was clearly not out-with the realm of possibility, and Bemba should have pre-emptively implemented internal measures to prevent it.¹⁷⁷ An alternative outcome regarding Bemba's responsibilities as a military commander would not only have been desirable in the Bemba case, but would also have sent a particularly desirable message and precedent in the constantly evolving climate of international conflict today; that commanders will not be shielded from SGBV criminality purely due to geographical remoteness.¹⁷⁸

As an aside, a total eight out of the eleven judges that heard and decided in this case concluded that Bemba was 'guilty beyond reasonable doubt,' representing a clear majority of ICC judges.¹⁷⁹ This does show some coherence in legal arbitration at the ICC. Nonetheless, Oosterveld does recommend that the 'next step' for all of the international tribunals is to ensure 'gender-sensitive judging.' She believes that as a larger group of arbiters of international justice, 'we are not necessarily there yet' and a greater level of coordination is required.¹⁸⁰ She notes that some of these discrepancies highlighted above might be avoided where judges are collectively trained specifically for judging at the international level to ensure more coherence

¹⁷⁵ Leila N Sadat, "Fiddling While Rome Burns? The Appeals Chamber's Curious Decision in Prosecutor v Jean-Pierre Bemba Gombo," *EJIL Blog of the European Journal of International Law*, June 12, 2018, <https://www.ejiltalk.org/fiddling-while-rome-burns-the-appeals-chambers-curious-decision-in-prosecutor-v-jean-pierre-bemba-gombo/>.

¹⁷⁶ Sadat, "Fiddling."

¹⁷⁷ Powderly and Hayes, "The Bemba Appeal."

¹⁷⁸ Sadat, "Fiddling."

¹⁷⁹ UN General Assembly, Rome Statute of the International Criminal Court, ISBN No.92-9227-227-6, (July 17, 1998) Article 66(3) <https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-a>.

¹⁸⁰ Phone Interview with Valerie Oosterveld, August 7, 2018, from New York City.

and understanding in the application of international criminal laws and especially those relating to SGBV. She highlights the successes of forms of judicial training at the domestic level in Canada and how this could be rolled out on a wider level. It is important to ensure that judges are kept informed on evolving perspectives relating to gender issues and can thus apply a ‘better analysis of gender issues’ in the courtroom.¹⁸¹ Indeed increasing the number of female judges serving in the Chambers could also improve the court’s propensity towards gender-sensitive judging.¹⁸²

Another issue that academics have highlighted in *Bemba* that arguably impacted the pursuit of gender justice relates to the PTC’s rejection of cumulative charging at the confirmation of charges stage. The PTC ascertained that material elements of torture and outrages upon personal dignity were elements of rape and thus were subsumed by the rape charges.¹⁸³ By doing so, they ‘failed to recognize the distinctive harms of rape, torture and outrages upon personal dignity.’¹⁸⁴ O’Regan emphasizes that subsuming these distinct elements into one crime shows a lack of insight into the intricacies of each of their harms and effects; the trauma stemming from ‘witnessing the torture or suffering of family members’ for example is unique from the damage personally suffered by sexual assault victims.¹⁸⁵ The PTC failed to acknowledge that the harms that result from each of these acts are distinct, and thus the full breadth of criminality, which was a missed opportunity for utilizing the law’s ‘expressive function’ which more closely articulated ‘societal values.’¹⁸⁶

¹⁸¹ Phone Interview with Valerie Oosterveld, August 7, 2018, from New York City.

¹⁸² Interview with Melinda Reed, August 20, 2018, The Hague, The Netherlands.

¹⁸³ *Bemba Charging Decision*, ICC/01/05-01/08-424, [204-05], [312].

¹⁸⁴ Green, “First-Class Crimes,” 533.

¹⁸⁵ O’Regan, “Prosecutor vs Jean-Pierre,” 1358.

¹⁸⁶ O’Regan, “Prosecutor vs Jean-Pierre,” 1324.

The Larger Question of Gender Justice and Where to Go from Here

There is a clear irony in the outcomes of these two cases. SGBV was included in the Bemba initial indictments yet he was acquitted and the judgment has raised some clear obstacles for seeking gender justice in future cases. SGBV was not included in the Lubanga initial indictments yet he was convicted of child-soldier-related charges, with a heavy emphasis on the SGBV aspect of these crimes.

In comparing the success of these cases we of course must consider what gender justice really is. Is justice incarcerating a criminal, or providing solace to that criminal's victims? These are in fact very different situations; one prioritizing the outcome of the criminal, the other prioritizing the outcome for the victim.

If we consider justice as the former, then arguably *Lubanga* was a success in terms of gender justice; the perpetrator of criminal wrongs, including SGBV, was found guilty and sentenced to 14 years in prison. Although he was found to be indigent and thus unable to pay compensation to victims, his general criminality was punished through incarceration.¹⁸⁷ Perhaps the innovation of placing sexual violence firmly *within* the context of a different crime in *Lubanga* was in fact a sensible middle ground for the OTP to take, at least until the other chambers of the ICC catch up to the progressive stance required to actually convict those in positions of command for the SGBV committed by their subordinates. And, in many ways, the OTP should be commended for listening to the security risks of the victims who were testifying, and for taking a step back when victims were facing dangers throughout investigation (which was touched on in Chapter 4.)

Others would argue we must consider justice as the latter, and the fact that *Bemba* was overturned is not so important as the fact that criminal charges specifically for SGBV were

¹⁸⁷ ICC, "Lubanga Case: Trial Chamber II Issues Additional Decision on Reparations: ICC-CPI-20171215-PR1351," *ICC Press Release*, December 15, 2017, <https://www.icc-cpi.int/Pages/item.aspx?name=pr1351>.

represented in their own right, debated, discussed, given time and consideration, and the full extent of the victims' suffering was presented within charges. This ties back to O'Regan's notions of legal expressivism, for example. This outcome did mean that victims of course were not able to benefit from reparations paid by Bemba or see him incarcerated for his actions.

This paper would in fact assert that the goal of the ICC is to achieve accountability for violations, and thus the outcome of *Lubanga* was surprisingly preferable in terms of seeking gender justice. It is nearly impossible for the ICC to pursue all the aims that have over time become associated with it at the same time; these include 'justice', 'accountability', 'peace-building' and the 'alleviation of victims suffering.'¹⁸⁸ As such, the court must be more realistic as to what it can and cannot achieve.¹⁸⁹ Numerous scholars and practitioners note that fighting the 'impunity gap' and gaining 'accountability' should be its top priority.¹⁹⁰ By failing to more accurately and narrowly define its realistic goals, undesirable compromise inevitably results in the case outcomes. This is clearly exemplified in both *Lubanga* and *Bemba* where overall, it seems that essentially neither outcome condemned the full extent of the both criminals' illegal actions, and neither outcome required the criminals to pay remedy to their victims in a monetary sense.

This paper would also argue that the *Lubanga* outcome would also provide more of a deterrence factor to potential future perpetrators. It would be extremely hard to measure whether awareness of sexual violence was advanced more across communities by Bemba going to trial for SGBV committed in the CAR, albeit unsuccessfully, or by the successful conviction of Lubanga for his conscription and use of child soldiers which heavily involved SGBV.

¹⁸⁸ Fatou Bensouda, "International Justice and Diplomacy," *NY Times*, March 19, 2013, <http://www.nytimes.com/2013/03/20/opinion/global/the-role-of-the-icc-in-international-justice-and-diplomacy.html>; Quoted in UN News, "UN and International Criminal Court have Joint Roles in Ending Impunity, Ban Says," *UN News Centre*, October 17, 2012, <http://www.un.org/apps/news/story.asp?NewsID=43312#.Wib7w7aZORs>

¹⁸⁹ Interview with Chiara Loiero, August 21, 2018, The Hague, The Netherlands.

¹⁹⁰ Interview with Chiara Loiero, August 21, 2018, The Hague, The Netherlands; Interview with Melinda Reed, August 20, 2018, The Hague, The Netherlands.

However, when we consider that Bemba returned to the DRC and was considering running for a Presidency in the DRC shortly after his acquittal, with immense support from his countrymen (now deemed ineligible for unrelated reasons), and contrast that to Lubanga's position as a prisoner incarcerated by the ICC for use and abuse of child soldiers, there is a strong case that the outcome of Lubanga was more valuable in terms of educating the world that imposing regimes of devastation, suffering and sexual violence on communities will not go unpunished. This can only be beneficial to the pursuit of gender justice.¹⁹¹

Indeed, evidence shows that there is a limit as to the scope of reparations that can be awarded by the court to victims anyway; Melinda Reed noted that by tying reparations specifically to orders of the court actually limits the reach of reparations significantly.¹⁹² As the ICC cases focus on crimes committed by a specific person, in a specific time frame, in a specific geographical area, those eligible for reparations represent 'the tiniest little piece of a giant puzzle.'¹⁹³ Furthermore, the Trust Fund for Victims, although beneficial is still tied to the criminal proceedings and thus also has a limited capacity for helping victims.¹⁹⁴ As Reed noted, the Trust Fund for Victim's assistance mandate is not big enough to address the situation in CAR, let alone all of the many situations before it.¹⁹⁵ Largely, this is due to the fund's lack of resources (particularly strained when a convicted criminal is deemed as indigent and the fund is forced to take this burden.) As reiterated by Reed, the reparations mechanism of the ICC will probably not satisfy many of the needs of victims anyway.¹⁹⁶

By pursuing prosecutorial strategies which focus heavily on a narrow range of crimes, prioritize speed and efficiency of investigations and still bring in gendered aspects where there

¹⁹¹ BBC News, "Jean-Pierre Bemba 'Cannot run for DRC President'," *BBC News*, August 25 2018, <https://www.bbc.com/news/world-africa-45305644>.

¹⁹² Interview with Melinda Reed, August 20, 2018, The Hague, The Netherlands.

¹⁹³ Interview with Melinda Reed, August 20, 2018, The Hague, The Netherlands.

¹⁹⁴ Trust Fund for Victims, 'Home,' accessed October 7, 2018, <https://www.trustfundforvictims.org/en/home>.

¹⁹⁵ Interview with Melinda Reed, August 20, 2018, The Hague, The Netherlands.

¹⁹⁶ Interview with Melinda Reed, August 20, 2018, The Hague, The Netherlands.

is evidence to do so (as in *Lubanga*,) we could ensure at least criminal accountability at the international level while other bodies can then prioritize the needs of SGBV survivors where the hard law has been unable to. Space can then be opened up for the prioritization of victims' needs through the creation of bodies separate from the court's outcomes, to more fully cater to the extremely wide victim pools resulting from these vast breaches of human rights. Alternative routes prioritizing victims' justice could come in the form of increased use of Peace Commissions. Increased support could be given to the plethora of organizations that already work at the local level to implement community-level rebuilding projects and that prioritize recognition of the suffering of victims; these can go a long way to providing personal contentment within victims. These could be in the form of commemorative statues and benches within communities, and benefit a larger community affected as opposed to just one specific classification of victims. There is a plethora of actors – including NGOs, think-tanks, academics, local governments and the UN – with mechanisms ready to prioritize victims and work across the current 'silos and divides'; the international community should look to strengthening them to serve victims' needs.¹⁹⁷

This strategy is only favorable for gender justice however if there remains a concerted effort by the OTP to present evidence of SGBV wherever it exists in all trials, to ensure that SGBV is still thoroughly represented. It would be hoped that as the Trial and Appeal Chamber judges will become increasingly exposed to discussion of this type of criminality, they will gain a deeper understanding of its severity and eventually existing archaic SGBV-related perceptions can be progressed. Although this is not a desirable solution long-term – with the hope that SGBV charges will increasingly receive the gender-sensitive judging they deserve through their continued presentation at trial by the OPT and eventually the OTP can bring them in their own right – this could allow at the very least for justice to be achieved in every case in

¹⁹⁷ Interview with Siobhan Hobbs, August 20, 2018, The Hague, The Netherlands.

the interim while the ICC gains legitimacy, coherence, and reaches internal agreement on each Chamber's function.

Conclusion

This paper has sought to gain a crucial understanding of how the developments over the last 50-100 years have shaped the prosecution strategies of the OTP regarding SGBV today.

The Rome Statute was viewed as an improvement on pre-Ad Hoc Tribunal legislation with regards terminology, but nonetheless compromises made during the drafting of the Rome Statute are still posing problems today. We saw that the ambiguous definition of the term ‘gender’ led to resistance towards its inclusion in early OTP indictments. While linguistic clarifications were instigated by Bensouda more recently, the delay reduced the court’s ability to pursue gender justice in its first 10 years of functioning. Indeed ambiguities within by the Rome Statute regarding the roles of the distinct chambers have already proved difficult to interpret in practice, and have only been further distorted by the recent *Bemba* case. Furthermore, while the Rome Statute’s wide incorporation of SGBV crimes was commended as progress based on ICTY and ICTR experiences, the Statute’s implementation by the ICC still takes a narrow lens; for example, the PTC’s refusal to allow cumulative charging regarding rape, torture and outrages on personal dignity still displays a lack of understanding of the intricacies of SGBV and therefore impedes efforts to achieve gender justice. With all of these complications considered in the *Bemba* and *Lubanga* cases, it is apparent that the Rome Statute is, as it is currently interpreted, not yet capable of providing the fullest extent of gender justice possible for the most severe breaches of international human rights obligations.

Additionally, it has come to light that until these drawbacks are rectified throughout the entire court, the OTP has to be particularly calculated in its strategy when deciding the charges it chooses to bring. The OTP must consider the realities of SGBV perceptions by the judges who are going to decide case outcomes. Even in a case like Bemba where the lead prosecutor prioritized a gender lens within charges, the OTP brought a wide range of SGBV crimes, and the OTP had adequate time to investigate Bemba before his arrest, a conviction for SGBV was

still unsuccessful. Conversely, in Lubanga, where none of the aforementioned criteria was fulfilled, a conviction for crimes heavily rooted in SGBV was successful. It therefore does not follow that initial inclusion in indictments automatically results in gender justice.

Thus, although the initial hypothesis for this paper was that the OTP should adopt a prosecutorial strategy that incorporates charges of SGBV in any and all cases in which they occur, the author would conclude that in fact this will not be the most effective strategy of prosecution in the current climate where gender-sensitive judging does not yet fully exist, ICC conviction rates for SGBV crimes remain low, and evidence collection for these crimes still poses great risks to victims. To ensure gender justice, the OTP must adopt a strategy that is narrow, ensures investigations are swift, and prioritizes SGBV criminality but also embeds it into other crimes where possible to ensure convictions. As mentioned above, although this is certainly by no means a preferable strategy considering the expressivist aspect of the law, at the very least justice (by our definition of justice as accountability) would be more consistently achieved. This strategy at least should persist in the coming years as social perceptions of SGBV slowly catch up with the law, just as it did in the 20th century. Once this is achieved, the other chambers should fully commit to pursuing gender justice and stand-alone SGBV charges will more likely withstand their scrutiny, or indeed at least be considered within sentencing decisions. In the meantime, victim's justice should be prioritized through avenues that do not tie reparations and aid directly to legal outcomes but instead outsource it to organizations with the existing experience, capacity, resources and understanding to truly fulfil all of the needs of all victims to the larger atrocity that occurred – not just victims of the crimes for which the specific defendant on trial is responsible.

In order to continue to put this pressure on the other chambers to conduct gender-sensitive judging, we must look to the pursuit of gender justice more broadly. Current initiatives being explored by the WIGJ for example seek to focus on the basis of the principle

of complementarity; by seeking to strengthen the pursuit of gender justice in local and domestic systems, this will hopefully reflect in the outlook of these same judges at the international level (ICC judges are put forward by their respective countries.)¹⁹⁸ Or indeed, prioritizing an effort to initiative gender-sensitive training for ICC judges could be extremely beneficial.

¹⁹⁸ Interview with Melinda Reed, August 20, 2018, The Hague, The Netherlands; Interview with Siobhan Hobbs, August 20, 2018, The Hague, The Netherlands; see Women’s Initiatives for Gender Justice, “Monitoring Domestic Courts,” accessed September 25, 2018, <https://4genderjustice.org/home/what-we-do/monitoring-domestic-courts/>.

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