

**The investigation and prosecution
of sexual and gender-based crimes
(SGBC) under the International
Criminal Court (ICC)
and protective measures for SGBC
victims/witnesses**

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Abstract

This dissertation explores the legal framework of the protective measures for the victims/witnesses of sexual and gender-based crimes within International Criminal Court. One of the themes of the dissertation is to examine both the legally binding legislation (ICC Statute, ICC Rules of Procedure and Evidence) and legally non-binding regulations/policies (ICC Policy Paper on sexual and gender-based crimes, ICC OTP Strategic Plan 2012-2015) during the investigation and prosecution stages of sexual and gender-based crimes from the gender perspectives.

The primary purpose of the dissertation is to critically assess the existing ICC Policy Paper on sexual and gender-based crimes with a reference to ICTY Manual on Developed Practices through the gender lens and elaborate on the wider socio-cultural context of gender bias and discrimination in the criminal process of investigating/prosecuting sexual and gender-based crimes.

Gender sensitivity issue in the duties of ICC investigators and prosecutors is also detailed in this paper as a crucial element to ensure that evidence collection process helps but not harms the victim/witness of sexual violence.

Another key argument in the thesis will be the analysis of the delicate balance between the protective measures for victims/witnesses of sexual and gender-based violence and the right to a fair trial of the accused both in policy and practice on the basis of ICC Prosecutor v. Lubanga case. The paper will critically examine the risk of re-traumatisation of the victims of sexual crimes, credibility of the evidence in the context of the application of procedural protection measures (such as closed sessions and anonymous testimonies) versus due process and the right of the accused to public hearing.

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CHAPTER 1: INTRODUCTION

A. Executive Summary

"ICC Statute marks an advance in the gender sensitiveness of international law as it includes a comprehensive definition of gender-based war crimes and crimes against humanity that encompass rape and other sexual abuses."¹ - Marlies Glasius

Rape was not perceived to be an offence against the woman and her dignity² until the second half of the 20th century. Only with the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993, the International Criminal Tribunal for Rwanda (ICTR) in 1994, and the International Criminal Court (ICC) in 1998 was rape defined as a dreadful and harrowing crime separate from the concept of family honour, marking a significant achievement for feminist legal scholars.

Women activists played a powerful role in the establishment of ICTY, ICTR, and especially ICC. With the media outreach and exposure to the degree of the atrocities in the conflict of former Yugoslavia and later Rwanda, women's groups consolidated around the campaigns that the impunity against sexual violence should be put to an end.³ The recognition of rape as a crime against humanity⁴ for the first time in the frames of ICTY was a ground-breaking achievement built up by the hard work of the investigators, fact-finding missions, and most certainly by the given testimonies of sexual violence victims/survivors.

The case for a sexual crime is a long journey before it reaches the trial stage in the international criminal court. In my dissertation, I explore the main research question on how ICC policies (anchored on the ICTY practice) shape the new understanding of sexual and gender-based crimes at the investigation and prosecution stages of the criminal process, how the holistic,

¹ Marlies Glasius, *The International Criminal Court: A Global Civil Society Achievement*, ISBN 9780415459952 Published October 22, 2007, Routledge

² Cynthia Enloe, *Afterword: Have the Bosnian Rapes Opened a New Era of Feminist Consciousness? in Mass Rape: The War against Women in Bosnia-Herzegovina 220* (Alexandra Stiglmayer ed., Marion Faber trans., 1994)

³ Barbara Bedont and Katherine Hall-Martinez, *Ending Impunity for Gender Crimes under the International Criminal Court*, 1999, *Brown Journal of World Affairs*

⁴ Keina Yoshida, *The Cinematic Jurisprudence of Gender Crimes: The ICTY and Film*, LSE, 2015

conceptualised approach to try sexual and gender-based crimes improves the achievement of justice for the victims, and how it balances with the right to a fair trial of the accused⁵.

From the gender perspective, I further analyse the adopted ICC Policy Paper on sexual and gender-based⁶ crimes with a reference to the ICTY manual on developed practices⁷ to observe the scale of improvements in acknowledging the specific issues of SGBC regarding safeguarding, protection measures, credible evidence collection and strategy building, as well as the risk of re-traumatisation and social stigma beyond the trial. I examine the duties of the investigators for the protection of witnesses, the essentiality of their expertise and in-depth knowledge of the particularities of gender crimes, the gender/cultural sensitivity factor in the process of evidence collection, and a comprehensive understanding of gender bias and discriminatory practices.

I also consider how the gender-competent and sensitive investigation of the SGBCs promote better protection mechanisms for the victims and describe the procedural and legal challenges in balancing the provision of the protective measures for the victims with the right to a fair trial for the accused based on the Prosecutor versus Lubanga ICC case⁸.

B. Legal framework of the protective measures for the victims/witnesses of SGBCs

ICC Statute Articles 7(1)(g)-6 sets out sexual and gender-based crimes (hereafter "SGBC") (including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity) constituting crimes against humanity. It means that under Article 7 SGBCs may be charged as crimes against humanity when they are committed "as part of a widespread or systematic attack directed against civilian populations". Also, ICC Statute Article 8(2)(b)(xxii)-6 and (2)(e)(vi)-6 sets out SGBCs as war crimes. The sexual crime is defined as:

⁵ In this document the terms defendant and the accused are used interchangeably

⁶ ICC Policy Paper on Sexual and Gender-Based Crimes, 2014 <https://www.icc-cpi.int/iccdocs/otp/otp-policy-paper-on-sexual-and-gender-based-crimes--june-2014.pdf>

⁷ ICTY Manual on Developed Practices, 2009 file:///C:/Users/Smart/Desktop/LLM_studies/Dissertation/Dissertation-Literature/Literature-Section1_Gender_Sensitivity-ICL/ICTYPractice-Manual.pdf

⁸ The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06

“The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such a person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.”⁹

In the introductory chapter of my dissertation, I focus on the overview on how ICC Statute¹⁰ and ICC Rules of Procedure and Evidence (hereafter “RPE”)¹¹ posit the protective measures for victims/witnesses¹² of sexual and gender-based crimes in the investigation and prosecution phase of the criminal process.

Colin T McLaughlin in his article “Victim and Witness Measures of the International Criminal Court: A Comparative Analysis”¹³ talks about key indicators on the establishment of the protection measures of SGBC victims/witnesses under ICC Statute and ICC RPE.

Particularly, ICC Statute Article 68(1) stipulates few factors for ICC to consider when granting “appropriate measures of protection, including age, gender, health, and the nature of the crime, like sexual violence.”¹⁴ ICC RPE Rule 68 (2) specifically refers to the importance of the protective measures in cases of sexual crimes.¹⁵

Also, under ICC RPE Rule 16(d) it is specified that “gender-sensitive measures should be taken to facilitate the participation of victims of sexual violence at all stages of the proceedings.”¹⁶ To decrease the risk of re-traumatisation of SGBC victims ICC RPE Rule 88¹⁷ permits the presence

⁹ ICC Elements of Crime; <https://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf>

¹⁰ Rome Statute of the International Criminal Court; <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>

¹¹ ICC Rules of Procedure and Evidence (RPE); <https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf>

¹² In this document the terms victim and witness may be used interchangeably and not necessarily in their technical or legal definitions.

¹³ Colin T. McLaughlin, Victim and Witness Measures of the International Criminal Court: A Comparative Analysis, 6 LAW & PRAC. INT’L Cts. & Tribunals 189 (2007)

¹⁴ ICC Statute, Article 68(1)

¹⁵ ICC Rules of Procedure and Evidence, supra note 1, Rule 68(2).

¹⁶ ICC RPE, Rule 16(d)

¹⁷ ICC RPE Rule 88

of a family member, lawyer, or a psychologist at the trial proceedings to minimise the risk of re-traumatisation and harassment for SGBC victims.

ICC Statute Article 43(6)¹⁸ is valuable in the sense that it instructs the setup of the Victims and Witness Unit (hereafter “VWU”) within the responsibilities of the Registry. Under this Article, it is also highlighted that it is crucial to have staff with expertise in trauma, especially in cases of sexual violence. In addition, ICC addresses the necessity to create a special measure of having trained professional staff to deal with the psychological trauma of the victims of sexual violence. The value of VWU was demonstrated in the Bemba case¹⁹, the first-time conviction of SGBC under ICC.

Moreover, the function of the Victim Protection and Reparations Service (hereafter “VPRS”) was exemplary during the Bemba case with its victim-oriented approach²⁰. For instance, victims were allowed to testify without their testimony included as evidence, thus decreasing the re-traumatisation risk and the fear of confronting the assailant. The Bemba case allowed 5,229 victims the right to participation and so far, it is the highest number of victims granted participation during the trial.²¹ Some legal scholars would argue that such practice proves to be ineffective but, surely, if more victim voices are heard during the proceedings, more awareness is raised about the magnitude of sexual violence during the armed conflict and beyond.

These indicators under the ICC Statute and ICC RPE are indeed progressive in setting up the protective measures for the victims of SGBC, nevertheless, they are not unprecedented. Security Council resolution 798 of 18 December 1992 referred to the "massive, organized and systematic detention and rape of women, in particular Muslim women, in Bosnia and Herzegovina"²² and the UN Secretary-General in his report²³ emphasises the necessity to protect victims of sexual violence. ICTY noted this report and created certain measures protecting victims of sexual violence, though there is an argument that it was reflected in ICTY RPE thanks to the efforts of

¹⁸ ICC Statute, Article 43(6)

¹⁹ ICC, Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo, Trial Chamber III, ICC Doc ICC-01/05-01/08-T-220-ENG CT WT 01-05-2012 1/56 NB T, 1 May 2012

²⁰ ICC, The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08

²¹ Executive Summary, Open Society Justice Initiative, The Trial of Jean-Pierre Bemba at the ICC: Judgment (Open Society Foundations 2016) 3

²² UN Security Council resolution 798 <http://unscr.com/en/resolutions/doc/798>

²³ Report, Sexual Violence and Armed Conflict: United Nations Response, 2000; <https://www.un.org/en/preventgenocide/rwanda/pdf/sexual-violence-and-armed-conflict-1998-UN-report.pdf>

women's civil society groups²⁴. The protective measure at ICTY was first applied in the Tadic case²⁵ where full anonymity to the witness was granted.

Shavana Musa mentions in her article "Considering gender-based approaches in international prosecutions of sexual violence"²⁶ that ICC should establish a niche where the ICC staff, prosecutors and judges would be able to ensure that victims feel secure to testify, as they can contribute to the wider challenge of reducing gender-based violence in the world. For instance, as stated in the annotated research,²⁷ after testifying in the international courts, women who experience sexual abuse, leave the court with an increased level of trauma. Particularly, the trauma goes beyond the courtroom in the case of women who come from conservative societies with the acute perception of 'honour' where they are being stigmatised as 'spoiled goods'.²⁸

C. Introductory Comments

In sum, notwithstanding all these protective measures under ICC Statute and RPE, the necessity to tackle the sexual and gender-based crimes in the wider socio-economic context and cultural harm is vital. Comprehensive gender analysis of the ICC should address the consequences of the stigma. The number of staff at the Registry, VWU, VPRS should be increased to effectively tackle gender-based abuses.

The acknowledgment of the witness' safety and the possibility of the re-traumatisation factor is paramount to consider when these victims testify against sexual crimes. Sexual crimes are psychologically so burdensome that they potentially can lead to re-traumatisation and internalisation of the crime repeatedly causing post-traumatic syndrome disorder (PTSD).

Although ICC pays special attention to protection measures for the victims of sexual violence, since, unfortunately, sexual crimes will not stop happening during the armed conflict, it will be the

²⁴ Patricia M. Wald, *Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal*, 5 *Yale H.R. & Dev. L.J.* 217 (2002)

²⁵ Tadić (IT-94-1)

²⁶ Shavana Musa, *Considering Gender-Based Approaches to International Prosecutions of Sexual Violence*, 46 *CAMBRIAN L. REV.* 116 (2015-2016)

²⁷ Henry, N, *Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence* (2009) 3(1) *International Journal of Transitional Justice* 114-134

²⁸ Askin, K.D, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, (2003) *Berkeley Journal of International Law* 298

duty of ICC not only to charge the perpetrators of the sexual crime but also protect the victims from the possible risk of re-traumatisation.

Undoubtedly, ICC should integrate holistic approaches to the protection of victims. The Prosecution must work intensively with the victim and witness support units within ICC. Interviewers, prosecutors, and investigators must be trained on gender-sensitive issues. In the following chapter of my dissertation, I elaborate on the ICC policy on Sexual and Gender-based crimes generated by the ICC Chief Prosecutor Bensouda with the relevant reference to the ICTY manual on developed practices.

CHAPTER 2: Gender assessment on ICC Policy Paper on SGBCs

A. Background and Lessons learned from ICTY Manual on Developed Practices

“The message to perpetrators and would-be perpetrators must be clear: sexual violence and gender-based crimes in conflict will neither be tolerated nor ignored at the ICC”-ICC Prosecutor

Fatou Bensouda²⁹

The prosecution of SGBC at the international criminal court has various challenges – the high volume of cases, numerous perpetrators, crimes of a distant past, the reluctance of victims to testify and so on. In addition, the evidence collection requires a certain set of skills and professionalism to prove not only the case of the sexual crime itself but to go beyond and show the proof of the widespread and systematic character of it.

Victims of SGBC are fearful to testify (even in some cases under the protective measures) as in reality the courts cannot provide long-lasting protection to avoid re-perpetration or threat in their local communities. In addition, investigators sometimes lack the sensitivity and relevant professional skills to gather evidence about sexual violence without exposing victims to further psychological harm and re-traumatisation. These factors make the investigation of sexual and

²⁹ International Criminal Court Prosecutor press-conference on the ICC Policy Paper on Sexual and Gender-Based Crimes, June 2014 <https://ijrcenter.org/2014/06/12/international-criminal-court-prosecutor-publishes-policy-paper-on-sexual-and-gender-based-crimes/>

gender-based violence extremely difficult and therefore many cases of sexual crime do not go beyond the investigation phase.

As Mugambi Jouet states: “After all, the verdict of a criminal case is more a measure of proof than of truth because an acquittal does not mean that a defendant is innocent. It just means that the prosecution was unable to prove guilt...”³⁰.

Under ICC, the Office of the Prosecutor (hereafter “OTP”) is the body responsible for investigating and prosecuting crimes under the ICC jurisdiction, including the crimes of sexual and gender-based violence³¹. Within the frame of this mandate, the ICC Prosecutor Fatou Bensouda prioritised the investigation and prosecution of SGBC.³² In June 2014 she launched the ICC Policy Paper³³ on sexual and gender-based crimes. In the report “Accountability for sexual and gender-based crimes at the ICC: an analysis of Prosecutor Bensouda’s legacy” generated by the Women’s Initiative for Gender Justice and FIDH³⁴ the Policy is marked as a ground-breaking document in advancing the accountability for sexual and gender-based crimes with an important precedent and a legacy.

In this chapter, I focus on the improvements and achievements set by ICC Policy with reference to the lessons learned from ICTY Manual on developed practices through the gender lens.

Since the establishment of ICTY, all international criminal tribunals have been improving and developing the rules of procedure of evidence collection balancing along the very delicate line of not re-traumatising the victim/survivor, protecting them from social and cultural stigma whilst

³⁰ Mugambi Jouet, Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court, 26 St. Louis U. PUB. L. REV. 297 (2007)

³¹ Article 54(1)(b) of the Rome Statute requires the Prosecutor to “[t]ake appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so [...] take into account the nature of the crime, in particular where it involves sexual violence [and] gender violence”

³² ICC, Press Release, “The Prosecutor of the International Criminal Court, Fatou Bensouda, publishes comprehensive Policy Paper on Sexual and Gender-Based Crimes” (hereafter “ICC Press Release on the publishing of SGBC Policy Paper”), ICC-OTP20140605-PR1011, 5 June 2014

³³ ICC Policy Paper on sexual and gender-based crimes, 2014 https://www.icc-cpi.int/iccdocs/otp/policy_paper_on_sexual_and_gender_based_crimes-20_june_2014-eng.pdf

³⁴ FIDH, WIGJ, Accountability for sexual and gender-based crimes at the ICC: an analysis of Prosecutor Bensouda’s legacy; June 2021; <file:///C:/Users/Smart/Downloads/cpiproc772ang-1.pdf>

having a credible source of evidence. A clear understanding of all the challenges, a distinct set of strategies, training on sexual violence and gender sensitivity would prepare an investigator to find the right approach to the sexual violence victim and to amplify the victim's voice to be heard. ICTY Manual on Developed Practices³⁵ refers to the sensitive sources of information gathering from vulnerable victims/witnesses, as well as compiling guiding principles in interviewing victims of sexual assault.³⁶ In the manual, it is noteworthy that key elements of interviewing the victims of sexual assault are given – starting from knowing the physical and psychological security situation of the victim, the linguistic vigilant use of the term 'victim' versus 'survivor', the 'not to harm' golden rule and prioritisation of the witness's wellbeing over evidence collection. ICTY also established the precedent of creating the Victims and Witnesses Section ('VWS'), as an independent and impartial body within the Registry of the ICTY, and VWS staff directly communicated with the witnesses demonstrating sensitivity and a particular set of communication skills to deal with vulnerable people traumatised by sexual violence.

A positive and progressive achievement as it is, the ICTY manual on developed practices did not reflect on certain crucial aspects of sexual and gender-based violence. I would like to focus, therefore, on what has not been covered in the ICTY manual.

Without undermining the sufferings of boys and men from sexual violence, sexual violence has a gendered nature, and it disproportionately affects women and girls. 60,000³⁷ Bosnian women in the former Yugoslavia have been raped. However, ICTY guidelines on interviewing victims of sexual violence did not consider a female perspective and/or vitalise the necessity of female interviewers in the investigation process of sexual crimes.

In her book "Gender, Shame and Sexual Violence: The Voices of Witnesses and Court Members"³⁸ Sara Sharratt mentions that out of 219 pages of the ICTY manual on developed

³⁵ ICTY Manual on Developed Practices, ICTY - UNICRI 2009, Turin, Italy

³⁶ ICTY Manual on Developed Practices, Annex 3 - Guiding principles for interviewing victims of sexual assault

³⁷ Cynthia Enloe, "Afterword: Have the Bosnian Rapes Opened a New Era of Feminist Consciousness?" in *Mass Rape: The War against women in Bosnia-Herzegovina* 220 (Alexandra Stiglmayer ed., Marion Faber trans., 1994)

³⁸ Sara Sharratt, *Gender, Shame and Sexual Violence The Voices of Witnesses and Court Members at War Crimes Tribunals*; 2016, Sonoma State University, USA and University of Peace, Costa Rica

practices sexual assault is named only on 3 pages. The manual is gender-neutral and just simple pronouns of 'her' or 'him' do not qualify as having a gender perspective or the understanding of gender asymmetry and/or power imbalance and inequality.

The training and capacity building of judges and their gender sensitivity is another cornerstone yet to be achieved as the professional set of skills and legal knowledge does not include a sensitive approach to victims of sexual violence. As one senior woman ICTY judge said:

'I often found myself tutoring my male colleagues on what it means to a woman to be raped. You have to be insistent that this was a serious crime, and they could not have consented under the situation that they were in [captivity].'³⁹

Also, in the ICTY manual on developed practices little or no reference is given to how judicial and administrative procedures should respond to the needs of the victims, how victims are informed of the roles within the Court, timelines of the proceedings, etc. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law⁴⁰ refers to the significance of informing the victims of their rights. It implies direct interaction between victims and those assigned to assist them throughout the criminal process.

Sara Sharratt refers to the findings in her study⁴¹ based on the victim/witness testimonies that it was not clear at what stage the witnesses were provided with information. The witnesses felt the need for the rights and obligations to be explained by the investigators and prosecutors. Furthermore, prosecutors should 'take the time to prepare witnesses well, explaining procedures,

³⁹ Ibid

⁴⁰ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res 60/147, UN Doc A/RES/60/147 (21 March 2006).

⁴¹ Sara Sharratt, research study on the testimonies of victims/witnesses described in her book "Gender, Shame and Sexual Violence", 2016

protective measures ... as well as likely defence strategies designed to undermine the witness' credibility'⁴².

The ICTY Manual on developed practices undoubtedly had an impact on the further creation of ICC policy paper on sexual and gender-based crimes in 2014.

B. Gender assessment of the ICC Policy Paper on SGBCs

Although a revolutionary breakthrough in defining and prosecuting sexual and gender crimes, the ICC did not sufficiently tackle the systemic and underlying gender difficulties present in earlier tribunals. To demonstrate the nature of gender incompetent and insensitive questioning it is noteworthy to mention that one ICC prosecutor asked the following question of a female victim of gang rape and witness of massacre in her community:

*'Were you injured during those rapes?'*⁴³

This is a classic demonstration of gender insensitivity, as well as an unwillingness and/or inability to acknowledge rape as one of the most serious crimes by the ICC court personnel. However, there have been steps taken to tackle the complexities of sexual and gender-based crimes and the ICC Policy Paper on sexual and gender-based crimes developed in 2014 is one of those positive steps.

Between 2002–2014, the Office of the Prosecutor ("OTP") of ICC brought 57 charges of sexual and gender-based violence in 20 cases⁴⁴ which demonstrates a serious degree of attention to sexual crimes in most cases. Only 20 out of 57 charges were confirmed⁴⁵ and at the judgment stage, the Prosecutor failed to secure a single conviction on these charges.⁴⁶

⁴² Sara Sharratt, *Gender, Shame and Sexual Violence; The Voices of Witnesses and Court Members at War Crimes Tribunals*; 2016, Sonoma State University, USA and University of Peace, Costa Rica, page 132

⁴³ IBID, n 6, 102

⁴⁴ Louise Chappell, *The Politics of Gender Justice at the International Criminal Court*, ISBN: 9780199927890, 2015, supra note 5, at 104 (referring to research produced by Rosemary Grey)

⁴⁵ Ibid at 105

⁴⁶ Ibid

In 2014 ICC Prosecutor Fatou Bensouda on behalf of ICC OTP released Policy Paper on Sexual and Gender-Based Crimes (hereafter “Policy Paper”).⁴⁷ The policy paper was essential given the difficulties the OTP was experiencing in retaining the charges of sexual and gender-based crimes. As Louise Chappell stated: “The predominant path of the ICC’s early years has been toward gender misrecognition and ongoing gender status subordination.”⁴⁸

The charges on sexual and gender-based crimes specifically were vulnerable and the cause of that vulnerability was rooted partially in the inadequate misconception of gender amongst staff, non-sensitive gender investigations, and evidence gathering processes.⁴⁹ The ICC judges also lacked gender competence, shown the failure to consider former international criminal law developments on SGB crimes (See Prosecutor v. Jean-Pierre Bemba Gombo case).⁵⁰

The Policy Paper is only OTP guidelines and does not have a binding force on ICC Statute. It is an outcome of the thorough and substantive work and collaboration of OTP with international organisations, women’s civil society groups, academics, and, of course, ICC State Parties.

Below, I elaborate on the key achievements of the Policy Paper in the investigation stage of sexual and gender-based crimes and highlight the concerns it may represent.

First and foremost, light should be brought on the terms ‘sexual’ and ‘gender-based’ crimes. These terms are used to cover sexual crimes under the jurisdiction *ratione materiae* of the ICC listed under articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi) of the Rome Statute.⁵¹

The Policy Paper starts with the focus of the ICC to be “the first international instrument expressly to include various forms of sexual and gender-based crimes — including rape, sexual slavery,

⁴⁷ Press Release, Int’l Criminal Court, The Prosecutor of the International Criminal Court, Fatou Bensouda, publishes comprehensive Policy Paper on Sexual and Gender-Based Crimes (June 5, 2014), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1011&ln=en>

⁴⁸ Chappell, *supra* note 5, at 103

⁴⁹ Chappell, *supra* note 5, at 109–10 (citing, *inter alia*, Solange Mouthaan, The Prosecution of Gender-Based Crimes at the ICC: Challenges and Opportunities, 11 INT’L CRIM. L. REV. 775 (2011))

⁵⁰ Chappell, *supra* note 5, at 110, 117–19; Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Decision Pursuant to Art. 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, par. 190, 202, 204–05, 302–12 (June 15, 2008), https://www.icc-cpi.int/CourtRecords/CR2009_04528.pdf

⁵¹ Rome Statute, Article 54 (1)(b)

enforced prostitution, forced pregnancy, enforced sterilisation, and other forms of sexual violence — as underlying acts of both crimes against humanity and war crimes committed in international and non-international armed conflicts. The Statute also criminalises persecution based on gender as a crime against humanity.⁵² Sexual and gender-based crimes may also fall under the Court’s jurisdiction if they constitute acts of genocide or other acts of crimes against humanity or war crimes.⁵³

By recognising sexual and gender-based violence as a grave crime and identifying the efficient investigation/prosecution of sexual and gender-based crimes as a key strategic goal in the Strategic Plan 2012-2015⁵⁴, the OTP is committed to integrating a gender perspective and analysis in the investigation and prosecution of these crimes, enabling sufficient and thorough training for staff with a victim-responsive approach.

The OTP also acknowledges that the civil society can play a vital role in addressing and thus preventing sexual and gender-based crimes. The OTP seeks to support and strengthen cooperation with these organisations, particularly those which have experience in documenting sexual and gender-based crimes and working with victims of these crimes⁵⁵.

In this part of my dissertation, particularly, I focus on 4 aspects of the Policy Paper:

- 1) Interpretation of the term ‘gender’
- 2) Gender sensitivity of ICC investigators/prosecutors
- 3) Gender analysis of underlying inequalities and discrimination
- 4) Application of International Human Rights Law (Article 21(3) to ICC Statute.

- 1) Interpretation of the term ‘gender’

⁵² ICC Statute, Article 7(1)(h)

⁵³ ICC Policy Paper on Sexual and Gender-Based Crimes, par. 1

⁵⁴ International Criminal Court Office of the Prosecutor Strategic plan June 2012-2015, 2013, <https://www.icc-cpi.int/iccdocs/otp/OTP-Strategic-Plan-2013.pdf>

⁵⁵ ICC Policy Paper on Sexual and Gender-Based Crimes, par. 14

The Policy Paper is promising and impactful as it elaborates the thorough insight into the concept of gender. In fact, Policy Paper approaches the concept of gender from a multifaceted perspective unlike in the ICC Statute with its ‘constructive ambiguity’⁵⁶ definition.

ICC Statute Article 7(3) defines: “For the purpose of this Statute, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above.”⁵⁷

The Policy Paper tries to alter the narrow understanding of gender and indicates that gender-based crimes are targeted at people or groups of people because of the socially constructed norms of maleness and femaleness⁵⁸. The rape or sexual assault against men and boys reflects the socially constructed gender norm – when masculinity is meant to be humiliated, where maleness must be ashamed.

To some extent, the Policy Paper challenges the precedents of merging ‘gender’ with the terms of ‘women’, or ‘female’ or ‘sex’ in the international criminal law history.⁵⁹ The rigid interpretation of gender only into biological sex may affect the narrow approach to the prosecution and adjudication of SGBCs. For instance, Valerie Oosterveld in her article “The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law” refers to the indictments⁶⁰ whereas the Prosecutor of the Special Court for Sierra Leone only charged sexual violence against women and girls. When the evidence was available that boys and men were subjected to sexual violence too, the Trial Chambers have decided that because of the restrictive language of the indictment referring to solely ‘women and girls’ it could not be considered to include boys and men⁶¹.

⁵⁶ Valerie Oosterveld, Constructive Ambiguity, and the Meaning of “Gender” for the International Criminal Court, 16 INT’L FEMINIST J. POL. 563, 566–67 (2014)

⁵⁷ ICC Statute Article 7(3)

⁵⁸ ICC OTP Policy Paper, par. 16

⁵⁹ Chappell, *supra* note 5, at 90

⁶⁰ Prosecutor v. Brima, Kamara and Kanu, Case No. SCSL-04-16-PT, Further Amended Consolidated Indictment, par. 51–57 (Feb. 18, 2005), <http://www.rscsl.org/Documents/Decisions/AFRC/141/SCSL-04-16-PT-147.pdf> [<http://perma.cc/BS64-289Y>]; Prosecutor v. Sesay, Kallon and Gbao, Case No. SCSL-04-15-PT, Corrected Amended Consolidated Indictment, par. 54–60 (Aug. 2, 2006), <http://rscsl.org/Documents/Decisions/RUF/617/SCSL-04-15-T-619.pdf> [<http://perma.cc/XGG6-9LEX>]; Prosecutor v. Taylor, Case No. SCSL03-01, Amended Indictment, par 14–17 (Mar. 16, 2006), <http://www.rscsl.org/Documents/Decisions/Taylor/074/SCSL-03-01-I-75.pdf> [<http://perma.cc/M6GB-TJBH>]

⁶¹ Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgment, par 124–34 (May 18, 2012)

The perception of gender crimes as a product of socially constructed norms should not eliminate the fact that some gender crimes may be influenced by the biological sex of the victim as in the case of forced pregnancy. This is because both sexual and gender-based crimes “may be motivated by underlying inequalities”⁶² and therefore in general gender perception is interconnected with the gender discrimination and bias in the society.

2) Gender sensitivity of ICC investigators/prosecutors

The Policy Paper acknowledges the adoption of gender sensitivity in all work of OTP.

The Policy Paper also recognizes that “the staff in the Office of the Prosecutor need to adopt a gender perspective in order to usefully understand the role of gender and gendered experiences of individuals and communities involved in a particular crime scenario.”⁶³ According to the policy, a gender perspective “requires an understanding of differences in status, power, roles, and needs between males and females, and the impact of gender on people’s opportunities and interactions.”⁶⁴

In the field investigation phase, the understanding of gender sensitivity ensures that investigators have a cultural understanding and knowledge on specific gender stereotypes and discrimination in the region of investigation.⁶⁵ The Policy Paper acknowledges the essential component of the staff training for the efficient investigation and prosecution of SGBCs.

Specifically, the Policy Paper says that OTP will strengthen the integration of a gender perspective into all areas of the operation – preliminary examinations, development of case hypotheses, prosecution and investigation strategy development, analysis of the crime pattern,

<http://www.rscsl.org/Documents/Decisions/Taylor/1283/SCSL-03-01-T-1283.pdf>; Prosecutor v. Brima, Kamara and Kanu, Case No. SCSL-04-16-T Judgment, para 92–95 (June 20, 2007), <http://rscsl.org/Documents/Decisions/AFRC/613/SCSL-04-16-T-613s.pdf>

⁶² ICC Policy Paper on sexual and gender-based crimes, par. 19

⁶³ ICC OTP POLICY PAPER, par. 3

⁶⁴ Ibid

⁶⁵ Linda Bianchi, The Prosecution of Rape and Sexual Violence: Lessons from Prosecutions at the ICTR, in *SEXUAL VIOLENCE AS AN INTERNATIONAL CRIME: INTERDISCIPLINARY APPROACHES* 123, 132 (Anne-Marie de Brouwer et al. eds., 2013)

etc. Additional efforts will be consolidated to ensure that the staff have sufficient knowledge and skills to implement their mandate in regard to the investigation of sexual and gender-based crimes. The gender-sensitive staff will develop skills to manage the possible effects of trauma and re-trauma related to SGBCs.

Article 54(1)(b) of the ICC Statute requires that the Prosecutor “take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses.”⁶⁶

The Policy Paper reflects on this article by adopting a victim-responsive approach. It means that the OTP will engage with more effective consultation with the victims and their representatives to protect and consider their interests and concerns acknowledging that the expectations, interests/concerns of the victims may vary.

3) Gender analysis of underlying inequalities and discrimination

The Policy Paper encourages gender analysis at every stage of sexual and gender-based crime investigation.

The Policy Paper construes the concept of ‘gender’ and applies its comprehensive perception; it essentially highlights the factor of gender sensitivity at every stage of OTP work for more efficient investigation and prosecution on sexual and gender-based crimes. In addition, in my perspective, it implies gender analysis to examine the underlying inequalities between women and men. This means that OTP aims to consider the relation of societal gender norms, inequalities, and discrimination in the investigation process of sexual and gender-based crimes, it aims to acknowledge the factors of power dynamics shaping gender roles and creating gender stereotypes and bias.

⁶⁶ Article 54(1)(b) of the Statute

The uniqueness of the reflection on the gender analysis in the investigation of SGBC is the recognition of the interconnectedness of the concept of gender inequality, the power imbalance in the society with the actual sexual and gender-based crimes. The gender analysis opens new horizons on understanding the reasons of the underreported nature of those crimes due to religious and cultural stigma, the importance of intersectional factors like age, race, disability, religion, social origin, ethnicity, sexual orientation, and gender identity.⁶⁷

The reflection of the intersectional nature of sexual and gender-based crimes in the Policy Paper organically links to the application of international human rights law stipulated in Article 21(3) of the ICC Statute.

4) Application of international Human Rights Law (Article 21(3) of ICC Statute)

In my previous research⁶⁸ on the feminist input in the establishment of the ICC Rome Statute, it became evident that women's rights groups put hard work and efforts to include Article 21(3) in the Statute. The Article particularly states: "*The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.*"⁶⁹

⁶⁷ It is important to view different types of discrimination as a totality, and not in isolation, as they can overlap with one another. See, for example, the Committee on the Elimination of Discrimination against Women (CEDAW) General recommendation No. 28, which notes that "The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity." CEDAW, General recommendation No. 28 on the core obligations of States Parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, para. 18. See also Prosecutor v. Thomas Lubanga Dyilo, Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06-2904, para. 191, Under Article 21(3) of the Statute, reparations shall be granted to victims without adverse distinction on the grounds of gender, age, race, colour, language, religion or belief, political or other opinion, sexual orientation, national, ethnic or social origin, wealth, birth or other status.

⁶⁸ Independent Research Module "The introduction of 'gender', elements of crimes of sexual violence to the International Criminal Court, and the feminist contribution to the adoption of the Rome Statute

⁶⁹ Article 21(3) of ICC Statute

The inclusion of this Article in the ICC Rome Statute is of vital importance as it mandates the Statute to be consistent with the international human rights law.⁷⁰ This creates grounds to apply the definition of gender “in accordance with internationally recognised human rights as they evolve during the time and without any adverse distinction founded, inter alia, on gender or other status.”⁷¹ Another progressive stance that the OTP takes through the adoption of the Policy Paper is that it takes a persuasive position that the interpretation of Article 7(3) is directly interconnected with the application of international human rights law (Article 21(3) in its evolving nature to recognise new forms of discrimination and “to put an end to violence and discrimination on the basis of sexual orientation or gender identity.”⁷²

The Policy Paper notes the recommendation of the Committee on the Elimination of Discrimination Against Women that discrimination against women is viewed as a totality, taking into account, among other factors, sexual orientation and gender identity⁷³. Organically linking the definition of gender (Article 7(3)) and application of the international human rights law (Article 21(3)), the OTP Policy Paper conducts a thorough gender analysis in the view of the intersectional factors of discrimination.

C. Concluding Observations

In sum, on the analysis of the Policy Paper, the key achievements are the detailed and thorough approach on the gender analysis with the underlying forms of intersectional discrimination, gender stereotypes, and power imbalance, as well as a comprehensive definition of gender as an acknowledgement of it as a socially constructed norm with certain gender roles, behaviours, and

⁷⁰ See the Committee on the Elimination of Discrimination against Women (CEDAW), General recommendation No. 30, noting that, ‘International criminal law, including, in particular, the definitions of gender-based violence, in particular sexual violence must also be interpreted consistently with the Convention and other internationally recognized human rights instruments without adverse distinction as to gender.’ CEDAW, General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, CEDAW/C/GC/30, 18 October 2013, para. 23. See also, for example, the efforts of the UN Human Rights Council and the Office of the High Commissioner for Human Rights (OHCHR) to put an end to violence and discrimination on the basis of sexual orientation or gender identity: The Free & Equal Initiative of the OHCHR at <https://www.unfe.org/> and statement of 26 September 2013 by the High Commissioner for Human Rights, Navanethem Pillay, and several world leaders to end violence and discrimination against lesbian, gay, bisexual, and transgender (LGBT) persons at <https://www.unfe.org/en/actions/ministerial-meeting>.

⁷¹ ICC OTP POLICY PAPER, par 15, 26

⁷² ICC OTP POLICY PAPER, supra note 1, par 15–16 n.23

⁷³ Id. at 16 n.25

understanding of maleness and femaleness. In recognition of those factors, OTP also provides guidelines and training for the staff on gender sensitivity and a gender perspective in the investigation of SGBCs in all aspects of its work.

The multifaceted approach ensures the past mistakes on viewing gender crimes narrowly will not be repeated⁷⁴. The Policy Paper carefully considers the standardisation of these crimes and has already led to improvements, for example, in the case of Dominic Ongwen⁷⁵.

No charges for sexual and gender-based crimes had been included in the initial arrest of Ongwen in 2005. Nevertheless, later in 2015 when he was transferred to ICC, Prosecutor Bensouda raised the charges from 7 to 70 and 19 of out these 70 charges were on SGBC (including rape, sexual slavery, forced pregnancy, forced marriage as an inhumane act of enslavement). ICC Pre-Trial Chamber II unanimously confirmed all charges against Ongwen in 2016⁷⁶.

It remains to hope that those key achievements and progress in the prosecution of sexual and gender-based crimes will continue to improve and become institutionalised, legally binding for future generations. It is believed that the present Prosecutor Khan⁷⁷ will build upon Prosecutor Bensouda's legacy in investigating and prosecuting SGB crimes towards Rome Statute's dedication to delivering gender justice.⁷⁸

Chapter 3: Gender sensitivity in the investigation process of SGBC

A. Gender sensitivity in performing the duties of investigators/prosecutors

“No witness-no case” - Warren J. Murray Jr⁷⁹

⁷⁴ Carsten Stahn, Justice Delivered or Justice Denied? The Legacy of the Katanga Judgment, 12 J. OF INT'L CRIMINAL JUSTICE 809, 820–21 (2014)

⁷⁵ See, e.g., Prosecutor v. Dominic Ongwen, ICC-02/04-01/15, Decision on the Confirmation of Charges against Dominic Ongwen, par 102–40, [https://www.icc-cpi.int/Court Records/CR2016_02331.pdf](https://www.icc-cpi.int/Court%20Records/CR2016_02331.pdf) [http://perma.cc/3VKZ-TQ9F]

⁷⁶ ICC, The Prosecutor v. Dominic Ongwen, Public redacted version of “Document Containing the Charges”, 21 December 2015, ICC-02/04-01/15-375-Conf-AnxA, ICC-02/04-01/15-375-AnxA-Red2, 25 May 2016, pp. 35-56.

⁷⁷ Prosecutor Khan was elected by the Assembly of States Parties on 12 February 2021. He took office on 16 June 2021.

⁷⁸ Fatou Bensouda, Statement Gender Justice and ICC: Progress and Reflections, 2012

⁷⁹ Dermot Groome, No Witness, No Case: An Assessment of the Conduct and Quality of ICC Investigations, 3 PENN St. J.L. & INT'L AFF. 1 (2014)

In Chapter 2 an analysis was done on the adopted Policy Paper on sexual and gender-based crimes by OTP. Now I examine the duties of the investigators regarding the protection of the victims and witnesses - privacy, welfare, and the avoidance of re-traumatisation. Particularly, I look into how the victim voices are collected, their right to be informed, what protective measures are applied for evidence gathering, what duties do the investigators have, and how the investigators are trained to help not to harm the victims/witnesses of the sexual crime before bringing the cases of sexual violence into the stage of prosecution before the tribunal.

Dermot Groome describes his personal experience as a prosecutor in the article "No witness, no case: an assessment of the conduct and quality of ICC Investigations"⁸⁰ and talks about that the most significant aspect of the prosecutor's job being to identify and secure the evidence and make it credible and reliable for the foundation of the criminal case. He emphasises that the investigations must be methodical, thorough and should explore all possible avenues. The investigators must have a clear investigation plan and crucially be trained and experienced.

Let's discuss what are the duties of the investigators in collecting evidence on sexual and gender-based crimes and how they should perform them to adhere to the golden rule of 'no harm'.

Socio-economic, political, cultural, and psychological circumstances have impact on how the investigator has access to the evidence on SGBC. Collecting evidence on sexual crimes is probably one of the most challenging under international criminal law.

Article 54 of the ICC Statute sets out the duties and powers of the Prosecutor where Article 54(a) states that the Prosecutor shall: "In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally"⁸¹ and in Article 54(b)⁸² states that the Prosecutor shall: "Take appropriate measures to ensure the

⁸⁰ IBID

⁸¹ ICC Statute, Article 54(a)

⁸² ICC Statute, Article 54(b)

effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children.”

One of the objectives of the adopted OTP Strategic Plan 2012-2015 focuses on “the advancement of a culture of best practice in relation to the investigation and prosecution of sexual and gender-based crimes.”⁸³ So OTP adopts a new method to implement more in-depth and open-ended investigations so that more credible evidence can be collected from diversified sources.

This new approach ensures that adequate resources are utilised. It also provides an opportunity for a comprehensive investigation of sexual and gender-based crimes. The efficient mobilisation of resources, both human and financial, enables sufficient time for the collection and analysis of evidence, as well as identification and selection of witnesses.

OTP policy highlights that most of the time the conduct of the investigations is taking place during the continuing conflict, and lack of cooperation from national agencies, therefore the investigation phase must be vigilant in considering the specific challenges of the investigation of sexual and gender-based crimes. Collection of various types of proof, forensic, documentary and/or indirect or circumstantial from diversified sources mostly strengthens the case, and analysis techniques such as databases, statistics, and mapping help identifying the criminal patterns and structures.

Network building among diverse local groups is a recognised asset as it also assists in building a strategy to identify from low-level perpetrators to mid and high-level most responsible perpetrators. In network building the role of the local communities and grassroots civil society organisations should not be diminished in order to enlarge the evidence and information access

⁸³ OTP, Strategic Plan June 2012-2015, 11 October 2013, paras. 5 and 32

and establish a base for support of victims and witnesses. The selection of the intermediaries for the effective investigations is crucial to engage victims and witnesses in understanding the local social and cultural narratives so as not to harm and traumatise the victims.

Investigators need to be well-equipped with knowledge of the local political, social, cultural environment, traditional and religious practices. This should include verbal and non-verbal communication techniques, knowledge on euphemisms, accurate terms and an appropriate reference to body parts to engage the victim in the investigation process. The experience of the victim should be understood, human empathy and prioritisation of the victim over the evidence collection should be considered in the interview process with careful reference to the gender dimension.

B. Protective measures for the victims and witnesses of SGBC during investigations

Article 68(1) of ICC Statute requires: “The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In doing so, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3⁸⁴ and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”⁸⁵ The issues that may arise from facilitating the balance between the applied protective measures for the victims of SGBC and the fair trial of the accused will be discussed in the next chapter. Hereafter I would like to elaborate on the aspects of the protective measures for the prosecutors/investigations to perform their duties.

⁸⁴ ICC Statute, Article 7 par. 3

⁸⁵ Article 68(1), ICC Statute; <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>

Regulations 36(3) of the Regulations of OTP⁸⁶ specifically highlights the importance of taking various measure to protect the safety, physical and psychological well-being, dignity and privacy of the victims and witnesses. It, particularly, means that:

- a) The selection of the witnesses, the careful psychological and security assessment with regard to the right to be informed has to be recognised, inter alia with the management of the expectations and interests of the victims and witnesses. The OTP should liaise with Registry's Victims and Witnesses Unit ("VWU")⁸⁷ on matters to assist, provide their right to be informed, the possibility of being called to testify, the impact and scope of the possible disclosure of the information and, of course, on reparations.
- b) The psychosocial analysis is essential for victims/witnesses of sexual and gender-based crime and should be held by the psychosocial experts, whose duty is to consider the welfare of the witnesses, the potential harm or risk of re-traumatisation during the interview process, and ability to testify without unnecessary pressure. A psychosocial expert must be present at the interview process and determine whether at the particular time that person can be questioned without the risk of re-traumatisation.
- c) Another aspect of the protective measures for the victims/witnesses is the security assessment whereas the OTP is conscious that the victims/witnesses of the sexual and gender-based crimes are potentially under the risk of social stigma, further discrimination, isolation, and exclusion from the family and community, and/or even physical harm. Therefore, in order to minimise this risk efforts should be consolidated to collect also insider testimonies, statistics, medical and pharmaceutical records, other credible data generated by States, the UN, reputable human rights organisations.

⁸⁶ Regulations of the Office of the Prosecutor, 2009 <https://www.icc-cpi.int/resource-library/Documents/RegulationsOTPEng.pdf>

⁸⁷ In accordance with article 43(6) of the Statute, the Registrar has set up a Victims and Witnesses Unit within the Registry, with a mandate to provide, in consultation with the Office, protective measures and security arrangements, counselling, and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses

Meanwhile, the collected evidence should amount to charge beyond reasonable doubt and at the same time is not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial (Article 68(3)).⁸⁸

As Susanna Sacouto and Katherine Cleary mention in their article ‘The Importance of effective investigation of sexual violence and gender-based crimes at the International Criminal Court’⁸⁹: “If the Court is to fulfil its obligation to adequately investigate and prosecute sexual violence and gender-based crimes, it must ensure that the expertise and resources are in place that will allow it to overcome these kinds of challenges. Otherwise, the Court risks failing to achieve one of the most fundamental aims of the Rome Statute, outlined in its Preamble, that “the most serious crimes of concern to the international community as a whole must not go unpunished.”⁹⁰

C. Concluding Observations

In conclusion, I can state that the history of the jurisprudence of the ad hoc international criminal tribunals did not pay enough attention to the underlying difficulties of investigating sexual and gender-based crimes. In the course of time with the adoption of ICC Statute and its RPE and at the later stage with the adoption of ICC OTP Policy Paper on SGBC, the understanding of SGBC, the necessity of thorough investigations, crucial expertise resources, and gender-sensitive analysis was acknowledged. In other words, broader context beyond the ‘incidental’⁹¹ nature of those crimes has been considered.

As we know through the Policy Paper on SGBC the OTP Operations Manual⁹² also applies the progressive new perspective on evidence collection on sexual and gender-based crimes – the investigation will consider the overall context in regard to gender discriminatory policies, any

⁸⁸ Article 68(3), ICC Statute

⁸⁹ Ibid

⁹⁰ See Rome Statute, supra note 1, pmbi. (Stating that in order to ensure proper prosecution of serious international crimes, measures must be taken at the national level and there must be enhanced international cooperation)

⁹¹ Susana Sacouto and Katherine Cleary, *The Importance of Effective Investigation of Sexual Violence and Gender-based Crimes at the International Criminal Court* 2009

⁹² The Operations Manual is a confidential internal practice manual that addresses all aspects of OTP operations. It is regularly updated to ensure continuous improvement, incorporating lessons learned, new strategies, and opportunities to strengthen the practices of the Office (adopted in February 2010)

gender-related propaganda, and/or gender bias. The innovative aspect of best practices⁹³ is aimed to be considered in the relationship building process with victims/witnesses of SGBCs.

Chapter 4: Balancing the right of the victims/witnesses to protective measures with the right to a fair trial of the accused

A. Protective measures for the victims and witnesses of SGBCs under ICC and ICTY

"...Protective measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."- Rome Statute, Article 68(1)⁹⁴

ICC Statute, ICC RPE, ICC Policy Paper on SGBC set out important aspects and procedures for the implementation of duties of the investigators and on the protection mechanisms for the victims and witnesses of sexual and gender-based crimes.

In this chapter of my dissertation, I explore the legal and procedural balance under ICC (with a reference to ICTY) between the protective measures and the rights of fair trial of the accused, how closed sessions and the anonymity of the witnesses, on one hand, provide better protective measures available for the victims/witnesses but on the other hand, these measures might jeopardise the fair trial and rights of the accused.

Nhu B. Vu talks about the importance of the witness protection measures in her article "The Necessity of Maintaining protective measures in balancing the rights of victims and the accused"⁹⁵. She states that the fact that both the ICTY and the ICC Statutes, RPE provisions⁹⁶,

⁹³ The Office also took into account the best practices manual of the ad hoc tribunals. See, ICTY Manual on Developed Practices, 2009; Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict regions; Prosecuting Mass Atrocities – Lessons from the International Tribunals

⁹⁴ ICC Statute, Article 68(1)

⁹⁵ Nhu B. Vu, The Necessity of Maintaining Protective Measures in Balancing the Rights of Victims and the Accused, Eyes on the ICC 23 (2007)

⁹⁶ Statute of the International Criminal Tribunal for the Former Yugoslavia, Resolution 1660, (28 February 2006), Article 29, (hereafter referred to as ICTY Statute); Rome Statute of the International Criminal Court, 1 July 2002, Article 69, 93, (hereafter referred to as the Rome Statute); ICTY R. & Evid. (22 Sept. 2006); ICC R. & Evid. (3-10 Sept. 2002), 65, 171

as well as VWU include protective measures in their policies points to the importance of witness testimony to each institution.⁹⁷

Both the courts of ICC and ICTY were created to try individuals who allegedly committed the most horrifying crimes against humanity, seek justice for the victims/witnesses of those crimes, and prevent those crimes from future occurrence. For the assurance of the legitimacy of these courts it is essential that these courts are anchored in the due process guaranteed to defendants. Therefore, some legal scholars agree that on one hand such protective measures for the victims/witnesses as closed sessions and anonymous testimonies are prejudicial to the accused and others conclude that those protective measures should be preserved in extraordinary circumstances as in the cases of sexual and gender-based crimes.

I bring arguments in favour and against applying some protective measures in the cases of sexual and gender-based crimes. Protective measures may include the redacted records of the names of the witnesses from public records, the distortion of the voice and facial features of witnesses, the conduct of closed or in-camera sessions, as well as the application of the measures of complete anonymity of the witnesses/victims. These measures, especially the one of complete anonymity are jeopardising the rights of the accused as s/he is fully unaware of the identity of the witness. And in this intersection, the rights of the accused and the protective measures of the victims/witnesses are conflicting endangering the legitimacy of the courts.

B. Closed Sessions, Anonymity, and other forms of protective measures

1) Closed (In-camera) sessions

Both ICTY and ICC define the right of the accused to confront the witnesses against him/her stipulated under Article 21(4)(e) of the ICTY Statute and Article 67(1)(e) of the Rome Statute⁹⁸, and a right to a public trial under Article 21(2) of the ICTY Statute and Article 67(1) of the Rome

⁹⁷ ICC Statute, Article 43(6); ICTY R. & Evid. 69; ICC R. & Evid. 16-i 9

⁹⁸ ICTY Statute, Article 21(4)(e); Rome Statute, Article 67(1)(e)

Statute.⁹⁹ In the case of the closed session, the defendant's right to a public hearing is compromised.

Judge Patricia Wald mentions that 58 out of 118 witnesses testified using pseudonyms or some form of facial/voice distortion in the Radislav Krstic case¹⁰⁰ (Srebrenica trial) which meant that over 50% of the witnesses did not testify publicly.¹⁰¹ She thinks that such heavily applied practice infringes on the rights of the accused. Tolbert and Swinnen believe that the lack of a public hearing leads to the "secret administration of justice."¹⁰² Pozen states that the public hearing is the safeguard to ensure the fair and legitimate nature of the international criminal courts.¹⁰³

These scholars stretched this argument so far that in the case of collision of the rights of the accused with the protection of witnesses/victims, the latter must yield to the rights of the accused¹⁰⁴ or as Tolbert and Swinnen state: "...the right of the accused is an unequivocal endorsement that an accused's entitlement to a fair trial has primacy over measures for the protection of witnesses."¹⁰⁵ In the work of these scholars, I did find little or no reference to sexual and gender-based crimes and even if we hypothetically assume that the right of the accused surpasses the protective measures of the victims/witnesses, it is curious at what point the rights of the accused obtain this superiority.

On the other side of the argument in favour of closed (in-camera) sessions, Judge Mumba, former Vice-President of the ICTY, states that the right of the accused to the public hearing is not compromised by the in camera sessions as there is a distinct preference for the public hearing stipulated in the Article 20(4) of the ICTY Statute and for open sessions in Rule 78, and closed

⁹⁹ ICTY Statute, Article 21(2); Rome Statute, Article 67(I).

¹⁰⁰ Prosecutor v Radislav Krstic, ICTY, Judgment 2004, <https://www.icty.org/x/cases/krstic/acjug/en/>

¹⁰¹ ICTY Judge Patricia Wald, supra note at 224, citing Pros. v. Krstic, Case No. IT-98-33 -T, Judgment, at xvi (2 Aug. 2001)

¹⁰² David Tolbert and Frederick Swinnen, The Protection of, and Assistance to, Witnesses at the ICTY, in *The Dynamics of Int'l Crim. Justice: Essays in Honour of Sir Richard May*, 193 (2006) at 211

¹⁰³ Joanna Pozen, Justice Obscured: The Non-Disclosure of Witnesses' Identities in ICTR Trials, 38 N.Y.U.J. INT'L L. & POL., 281 (2006), at 314.

¹⁰⁴ Mohamed Othman, The 'Protection' of Refugee Witnesses by the International Criminal Tribunal for Rwanda, 14 INT'LJ. REFUGEE L. 495 (2002), at 496.

¹⁰⁵ Tolbert and Swinnen, supra note 29, at 205; Othman, supra at 496; ICTY R. & Evid. 75(): stating that protective measures can be taken, "provided that the measures are consistent with the rights of the accused"; Rome Statute, Article 68(1) stating that protective measures "shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."

sessions are only to be granted when absolutely necessary¹⁰⁶. Furthermore, Judge Mumba indicates the practice of national courts whereby the courts accept in-camera sessions in order to protect the victims of sexual crime from re-traumatisation. Judge Mumba also argues that even if the entire trial were held in-camera, the right to a public trial will not be violated.¹⁰⁷ Furthermore, she is stretching the argument that the purpose of the public trial is mainly for educational purposes and that “lack of publicity” does not affect the rights of the accused to a fair trial.¹⁰⁸ And she asserts another polarised opinion that the “accused’s right to a public hearing must yield...in light of the affirmative obligation...to victims and witnesses.”¹⁰⁹ She notes that in the Krstic case, although over fifty percent of witnesses required protective measures, nine out of 118 witnesses testified in closed sessions, equalling only to 7.6%.¹¹⁰

In my opinion, the provision of granting possible closed sessions for the victims of sexual and gender-based crimes is justified given the necessity not to re-traumatise the victims of SGBC. However, the decision should be made not automatically but on a case-by-case basis. The circumstances, individual character of the victim/witness should be determined as some victims of sexual assault are keen to openly defy the accused, while others are reluctant.

2) Protection from Public and Media

As to other forms of victim/witness protection mechanisms, Colin T. McLaughlin in his “Victim and Witness Measures of the International Criminal Court”¹¹¹ article mentions protection of victims from media outreach and protection from the confrontation of the victim with the accused.

¹⁰⁶ Florence Mumba, Ensuring a Fair Trial whilst Protecting Victims and Witnesses- Balancing of interests? in ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOR OF GABRIELLE KIRK McDONALD, vol. 3 (2001) at 365

¹⁰⁷ Id, at 365, citing ICCPR Art. 14.1: “The press and the public may be excluded from all or part of a trial for reasons of morals, public order, or national security in a democratic society, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

¹⁰⁸ Id, at 365

¹⁰⁹ Id, at 366

¹¹⁰ Wald, supra note I, at 224

¹¹¹ Colin T. McLaughlin, Victim and Witness Measures of the International Criminal Court: A Comparative Analysis, 6 LAW & PRAC. INT’L Cts. & Tribunals 189 (2007)

ICC RPE Rule 87 permits the protection of the victims/witnesses from the public or media.¹¹² Under this rule, the Court may conceal the name or any identifying information of the witness from the public records. The court may also decide to prohibit the prosecution and defence from disclosing the identifying information on the witness/victim to a third party.¹¹³ Also, the testimonies can be given electronically, including voice and/or picture alteration, videoconferencing, closed-circuit television, and exclusive use of the sound media, and as well, the Court may provide pseudonyms to be used for witnesses/victims.

3) Protection from Confrontation with the Accused

This is one of the most debateable protection measures which potentially may collide with the right of the fair trial of the accused. ICC RPE explicitly does not allow for the victim/witness to be protected from a confrontation with the accused. However, Rule 88(5) states that the Court must be “vigilant in controlling the manner of questioning”.¹¹⁴ The protection measure from confrontation with the accused is specifically important for the victims of sexual violence to avoid the re-traumatisation of the victim, to be in a safe space to testify. The challenging aspect of this protective measure is reaching the balance between the rights of the accused and the meaningful protection of the witnesses. Two rights of the accused -the right to confront the witness and the right to a public trial¹¹⁵ could be compromised here. Thus, ICC Court has to make a balancing decision and determine which witnesses need to be shielded from the confrontation with the accused.

4) Anonymity

The ultimate protection to the most vulnerable, frightened witnesses is the protection measure of anonymity. The complete anonymity of the witness creates predicaments in regard to the accused

¹¹² ICC Rules of Procedure and Evidence, supra note 1, Rule 87(3)

¹¹³ ICC Rules of Procedure and Evidence, supra note 1, Rule 87(b)(3)

¹¹⁴ ICC Rules of Procedure and Evidence, supra note 1, Rule 88(5)

¹¹⁵ ICC Rules of Procedure and Evidence, supra note 1, Rule 67

to properly prepare for the trial. Obviously, the protective measure of anonymity creates much debate and criticism.¹¹⁶

Arguments against anonymity as a protective measure: It is noteworthy that so far, complete anonymity¹¹⁷ has only been granted in the Tadic case.¹¹⁸ The decision to grant complete anonymity in the Tadic case was split whereas two out of three judges voted in favour of full anonymity, and one partially dissented.¹¹⁹ The factor of anonymity undermines the process of cross-examination which Monroe Leigh, former president of the American Society for International Law and a legal advisor to the US State Department, describes as a nearly non-possible task for the defendant's lawyer to fulfil without knowing the witness's name, location, background, etc.¹²⁰

In the dissenting statement, Judge Stephen emphasised that not identifying the witness throughout the trial potentially cannot be resolved without the breach of the rights of the accused to a fair trial.¹²¹ Furthermore, he notes that ICTY Rule 69A: "the Prosecutor may apply to a Judge or Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal"¹²² suggesting that the non-disclosure cannot be indefinite.

Arguments in favour of anonymity as a protective measure: It is noteworthy that neither ICTY Statute nor RPE directly and explicitly allows the grant of the anonymity to witness testimonies but the Trial Chamber in Tadic case relied on Article 22 of ICTY Statute stating: "shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's

¹¹⁶Christine Chinkin, Due Process and Witness Anonymity, 91 AJIL 75 (Jan. 1997); Monroe Leigh, The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused, 90 AJIL 235 (Apr. 1996)

¹¹⁷ "Complete anonymity" does not entail non-disclosure from judges.

¹¹⁸ Mumba, supra note 360-361

¹¹⁹ Judge Gabrielle Kirk McDonald of the US and Judge Lal Chand Vohrah of Malaysia voted in favour of granting anonymity while Judge Ninian Stephen of Australia partially dissented.

¹²⁰ Leigh, supra note 117, at 236; Pros. v. Dusko Tadic A/K/A/ "Dule," Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Case No. IT-94-I-T, 10 Aug. 1995, at T7, available at <http://www.un.org/ict/tadic/trialc2/decision-e/5o8iopmn.htm> (accessed 2 Apr. 2007) (hereafter referred to as Stephen Separate Opinion in Tadic Anonymity Decision)

¹²¹ Pozen, supra note 52, at 321; Helen Brady, Protective and Special Measures for Victims and Witnesses, in Roy S. Lee, ed., THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE, (2000), 434, at 451; Leigh, supra note 117, at 236.

¹²² ICTY R. & Evid., 69A.

identity".¹²³ Judge McDonald asserted that Rules 75A and 75B (iii) allowed the chamber to apply appropriate measures for the protection of victims as long as these measures are consistent with the right of the accused.¹²⁴

Five conditions¹²⁵ were stipulated to allow the anonymous testimony of the witness:

- 5) There must be a real danger to the safety of the witness or for the witness's family
- 6) The testimony makes a difference to the Prosecutor's case and the evidence must be sufficiently relevant
- 7) There must be no prima facie evidence that the witness is unreliable.
- 8) There is ineffective or non-existent witness protection programme and lack of police force for the witness protection
- 9) If less restrictive measures were capable of achieving the required protection, then that measure should be applied.

Some scholars emphasise the necessity of granting the protective measure of anonymity in the exceptional circumstances of sexual crimes. The gender-sensitive approach of acknowledging that the victims of rape are under the threat of stigma and social exclusion back in their home communities are the deciding factors on granting the protective measure of anonymity. Sometimes the social stigma is so powerful that the rape victim would prefer death to a cultural condemnation of the local community.¹²⁶

ICC debates over the use of Anonymity: The learned lessons and applied practice from ICTY did not serve sufficient grounds to consider anonymous testimony at ICC. The debates at the

¹²³ ICTY Statute, Article 22.

¹²⁴ Tadic Anonymity Decision, supra note 39, at 58.

¹²⁵ Id, at par 62-66

¹²⁶ Human Rights Watch, "Forms of Violence Against Women in Pakistan," available at <http://hrw.org/campaigns/pakistan/forms.htm> (accessed 2u Apr. 2uu7); "Murder of Women under the Guise of 'Honor' Violence Again. Palestinian Women and Girls, 18: 7(E) HuM. RTs WATCH, available at <http://hrw.org/reports/2006/opt i1o6/>

Preparatory Commission of ICC Statute development resulted in not addressing the issue and thus the words 'anonymous witness' are non-existent both in ICC Statute and RPE.

States such as Denmark, Finland, Spain, Australia, Russia, and Singapore were opposed to the inclusion of the anonymous testimonies of the witnesses on the same grounds as in the Tadic case – violation of the right to a fair trial of the defendant and the limitation of the examination of the witness. On the other hand, states such as Italy and Netherlands opined that the Court should allow the discretion to allow anonymity and stated that a fair trial does not include the absolute right of the accused to know the identity of the witness. During the debates over the anonymity of the testimonies the Kostovski v The Netherlands case¹²⁷ at the European Court of Human Rights (ECHR) was examined and ECHR also set out 5 conditions when anonymous testimonies of the witnesses were allowed. It is valuable to highlight that the identities of the witnesses are known to the Judges, and it is in their full discretion to evaluate the reliability and trustworthiness of the testimony.

As credible human rights organisations were actively engaged in the Preparatory Commission¹²⁸ for the adoption of the Rome Statute, there was a controversial debate between Human Rights Watch, Amnesty International, and Women's Caucus for Gender Justice. The former organisations asserted the necessity of only delayed disclosure with sufficient time for the defendant to prepare for trial, meanwhile, Women's Caucus for Gender Justice argued that the Court should have the discretion to allow complete anonymity in exceptional circumstances.¹²⁹

As ICTY Judge McDonald¹³⁰ rightly points out many trials occur during the ongoing violent conflict and that factor should also be considered at the granting decision of anonymity. Notwithstanding that VWU at the ICC has a significant improvement in enabling relocation of the witness after the testimony with the frames of Witness Protection Program, under the conditions of the ongoing

¹²⁷ ECHR, Case of Kostovski v The Netherlands (Article 50)

¹²⁸ Preparatory Commission for the International Criminal Court <https://legal.un.org/icc/prepcomm/prepfra.htm>

¹²⁹ Brady, supra note 128, at 452 -53.

¹³⁰ Decision on the Prosecutor's motion requesting protective measures for victims and witnesses: Prosecutor v. Duško Tadić: Case No. IT-94-1-T, Trial Chamber II, 10 August 1995

armed conflict the protection of the witnesses may seriously be undermined. Also, as underlined by Judge Stephen the factor of the informants or insider witnesses should be carefully considered especially in the testimonies against higher-level defendants.¹³¹

C. Concluding Observation

Again, the exceptional circumstances for the witnesses of sexual and gender-based crimes are to be weighed carefully, given their vulnerability during the trial, as well as beyond it. And, also, in sum, I would reiterate that the unique setting per each case has to be heavily analysed in the decision to grant anonymity. In fact, in the pursuit of the ultimate aims of ICC to tackle impunity and provide victim justice, the silenced voices of the victims are damaging the legitimacy of the international court.

Chapter 5: Victim's contribution to the formulation of the charges in balance with the rights of the accused to a fair trial

"Fair trial means not only fair treatment to the defendant but also to the prosecution and to the witnesses." – Trial Chamber, Tadic case

A. Case analysis of Prosecutor versus Lubanga (ICC case) with reference to Prosecutor versus Kupreškić (ICTY case)

The law and the policies depict the theoretical narrative, but let's discuss how in practice the protection mechanisms for victims/witnesses and the credible evidence collection by investigators relate to the fair trial of the defendant marked by due process of law.

In this chapter, I examine the Prosecutor versus Lubanga case¹³² to analyse how the witness protection/participation collided with the rights of the accused in practice, as well as linking it with the Kupreškić case at ICTY. Also, I focus on Lubanga versus ICC case from the perspective of

¹³¹ Stephen Separate Opinion in Tadic Anonymity Decision, supra note 129, at 8.

¹³²The Prosecutor v. Thomas Lubanga Dyilo ICC-01/04-01/06; <https://www.icc-cpi.int/CaselInformationSheets/lubangaEng.pdf>

victim's justice, the necessity of the victim's protection mechanisms, and partially on their participation in the formulation of the charges against the accused and their right to a fair trial.

it is interesting to observe this case from the perspective of witness protection/participation in the formulation of the charges. For instance, the ICC was obliged to announce a three-month delay to Lubanga's hearing on the grounds of the necessity of increased protection measures for victims/witnesses.¹³³ This case is remarkable on the other accounts as well.

On 15 July 2010 ICC Trial Chamber I issued an extraordinary ruling. In a split decision (known as Impugned Decision¹³⁴), the Court gave notice to both parties "that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court."¹³⁵ Later, in December of the same year, the Appeals Chamber invalidated the Trial Chamber decision on the change of the legal characterisation of the facts.

The controversial ruling¹³⁶ of the Trial Chamber and Appeals Chamber may not sound very surprising if we observe the Lubanga case closely. Let's have a look at certain aspects for an in-depth understanding of the reasons behind the Impugned decision and its further dismissal by the Appeals Chamber.

One aspect is that at a certain stage of the trial a big wave of criticism by legal scholars and human rights organisations arose in regard to limiting the charges against Lubanga only to conscription and use of child soldiers¹³⁷ and no charges of sexual violence and gender-based crimes were included in the Prosecution case.¹³⁸

¹³³ Katy Glassborow, Inst. for War & Peace Reporting, ICC Investigative Strategy Under Fire, in SPECIAL REPORT: SEXUAL VIOLENCE IN THE DEMOCRATIC REPUBLIC OF CONGO 8, 8-9 (Caroline Tosh & Yigal Chazan eds., 2008)

¹³⁴ ICC-01/04-01/06-T-314 ENG, p. 17, line 8.

¹³⁵ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2049, Decision Giving Notice to the Parties and Participants that the Legal Characterization of the Facts may be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court (July 14, 2009) [hereinafter Majority Opinion]

¹³⁶ Presiding Judge Adrian Fulford is from the United Kingdom, Judges Rene Blattmann and Elizabeth Odio Benito are from Bolivia and Costa Rica respectively

¹³⁷ ICC-01/04-01/06-803-tEN, p 156-157

¹³⁸ ICC-01/04-01/06-1573-Anx1, p 28-29

The failure to secure any convictions for sexual and gender-based crimes against Thomas Lubanga Dyilo was partially attributed to the factors of inadequate investigation, weak evidence-building strategies, and lack of gender sensitivity and expertise among OTP investigators. In the letter addressed to Mr. Luis Moreno Ocampo, Chief Prosecutor of ICC, Women's Initiative for Gender Justice raised the concern "... that gender-based crimes have not been adequately investigated in this case, and indeed, there is no indication in the document filed on 28 June 2006 that they have ever been a serious subject of investigation at all."¹³⁹

Another aspect of the controversy of this case is that on one hand the ICC grants a wide range of rights throughout the entire process of the trial and reflects the claim of justice by the victim, but on the other hand for the legitimacy reasons it has to maintain the procedural fairness for all parties of the trial. Anthony C Diala in his article "Victims' Justice and re-characterising facts in the Lubanga trial at the ICC"¹⁴⁰ talks about the challenges of this Impugned Decision, the necessity of the substantive justice for the victims, and the balancing factor of it with the rights of the defendant to a fair trial.

Before divulging his arguments, let's refer to the brief background of the Lubanga case.

Thomas Lubanga Dyilo was allegedly the President of the Union des Patriotes Congolais ("UPC") in the Democratic Republic of Congo. UPC was allegedly in charge of the large-scale torture, murder, and rape of the civilians, as well as being involved in the conscription of child soldiers. He was arrested and transferred to the Hague in March 2006. In August 2006, he was officially charged with 6 counts of war crimes on the enlistment of child soldiers, pursuant to Article 8(2)(b) xxvi and Article 8(2)(e) vii of the ICC Statute in addition to 25(3)(a) of the ICC Statute. In January 2007, Pre-Trial Chamber confirmed the counts of the charges for the enlistment of child soldiers and their participation in the hostilities.¹⁴¹ 30 witnesses (28 of which were Prosecutor's witnesses) testified with various degrees of protective measures.¹⁴²

¹³⁹ IBID

¹⁴⁰ Anthony C. Diala, *Victims' Justice and Re-Characterizing Facts in the Lubanga Trial at the ICC*, 7 *Eyes on The ICC* 59 (2010)

¹⁴¹ *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/o6-803-tEN, Decision on the Confirmation of Charges, pp. 156-57 (Jan. 29, 2007)

¹⁴² IBID, Anthony C. Diala

In May 2009 one of the victims through the Legal Representative (hereafter “LR”) requested the Pre-Trial Chamber to consider a legal re-characterisation of the charges and include sexual slavery and inhuman and/or cruel treatment. The proposal of the request sought to include Lubanga’s involvement and responsibility as a co-perpetrator for the charges of:

- (a) Sexual slavery as part of a widespread or systematic attack directed against a civilian population within the meaning of Articles 7(1)g) and 25(3)(a) of the Statute [a crime against humanity];
- (b) Sexual slavery as part of a plan or policy or part of a large-scale commission of this crime within Articles 8(2)(b)(xxii) and 25(3)(a) of the Statute [a war crime];
- (c) Sexual slavery as part of a plan or policy or part of a large-scale commission of this crime within Articles 8(2)(e)(vi) and 25(3)(a) of the Statute [a war crime];
- (d) Inhuman treatment as part of a plan or policy or part of a large-scale commission of this crime within Articles 8(2)(a)(ii) and 25(3)(a) of the Statute [a war crime];
- (e) Cruel treatment as part of a plan or policy or part of a large-scale commission of this crime within Articles 8(2)(c)(i) and 25(3)(a) of the Statute [a war crime].

In particular, the LR relied on the Regulation 55(1) of the Regulations of the Court¹⁴³ that the Chamber has the power to change the legal classification of the facts at any time during the trial and emphasised that the proposed re-characterisation was not intended to replace the chosen charges by the Prosecution, but to apply to the facts amounting to constitute several other violations of the crimes under the ICC Statute.¹⁴⁴

The Defence submitted arguments that Regulation 55 is to correct legal qualifications but does not give the power to the Court to incorporate new legal qualifications, as well as referring to the

¹⁴³ REGULATIONS OF THE COURT, ICC-BD/01-02-07, <https://www.icc-cpi.int/NR/rdonlyres/DF5E9E76-F99C-410A-85F4-01C4A2CE300C/0/ICCBD010207ENG.pdf>

¹⁴⁴ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-o/o6-1891, Demande conjointe des repr6sentants 16gaux des victimes aux fins de mise en euvre de la procedure en vertu de la norme 55 du Regalement de la Cour, par. 42 (May 22, 2009)

limited power of the judges to re-quality charges and substitute with a lesser offence already included in the original charge.¹⁴⁵

The debateable argument the Defence submitted that "... neither a widespread or systemic attack directed against a civilian population, nor the sexual crimes sought to be included by the LR's submission"¹⁴⁶ and "... it cannot seriously be argued that the charges concerning the enlistment and conscription of young girls under the age of fifteen would implicitly include ... the offence of sexual slavery"¹⁴⁷. Ultimately, the Defence argues that ordering new qualifications of the crime would profoundly affect the fundamental rights of the accused (ICC Statute, Article 67(1) (a-c) - including to allow the reasonable notice and adequate time for the defence to prepare, as well as to try without undue delay.¹⁴⁸

Anthony Diala in his article argues that Pre-Trial Chamber exceeded its rights, encroached Prosecutor's powers by issuing the Impugned Decision in such a manner, as well as creating a new challenge for the ICC – the challenge of understanding the extent of the victim's contribution to the formulation of the charges. In many ways, as highlighted several times, in my dissertation, ICC Statute and the RPE grants a wide range of rights for the victims to participate in the criminal proceedings from the inception of investigation to the final phase of judgment. Unfortunately, neither the Statute nor RPE refers explicitly to the degree of the contribution of the victim to the formulation of the charges and the possible risk of undermining the right of the accused to a fair trial.

The majority opinion¹⁴⁹ in the Impugned Decision decided that Regulation 55(2) authorised the Trial Chamber to re-characterise the charges with restriction to the facts and circumstances in the Document Containing the Charges (hereafter "DCC").¹⁵⁰ As to rights of the accused under

¹⁴⁵ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1975, (Prosecution's Response to the Legal Representatives), June 19, 2009

¹⁴⁶ Id, par 30-33

¹⁴⁷ Id. par. 37

¹⁴⁸ Id, par 50-71

¹⁴⁹ Majority Opinion, supra note 1, 29

¹⁵⁰ Id, par 32

Article 67 of the Statute, the majority opinion reasoned that The Regulations 55(2) and (3) envisage specific safeguarding measures for the rights of the accused to a fair trial.¹⁵¹

On the minority opinion, the Presiding Judge from the UK Adrian Fulford dissented on the grounds that Regulation 55 has an indivisible or singular process for the modification of the legal characterisation of the facts and that the nature of the modifications requested by the Legal Representative is prohibited by ICC Statute Article 61(9).¹⁵²

Judge Fulford referred to another aspect of the submitted request of 5 proposals by the LR whereas the original charges were limited to war crimes, but in the request, there is a reference to the crime against humanity. And as Judge Fulford states: "[T]he five "proposals" involve changes to the document containing the charges of such a wide-ranging and fundamental nature that they constitute additional charges. On the formulation advanced by the victims, the accused would be at risk of conviction on 11 (rather than 6) charges ... Each of the five proposals is founded on a new form of criminal responsibility. These proposals - if endorsed - would involve additional, and arguably more serious, offences being levied against the accused, in breach of Article 61(9)."¹⁵³

At the Appeal Stage, the Defence argued that Regulation 55 was unlawfully applied because it exceeded the rights of the Court stretching to the point that Regulation 55 was fundamentally incompatible with Articles 61 (4) and 61 (9) of the Statute.

The Defence cited the judgment of ICTY that the re-characterisation "at the close of the trial may only be in the favour of a less serious offence."¹⁵⁴ In this instance, the Defence referred to the Prosecutor v Zoran Kupreškić case,¹⁵⁵ whereas ICTY Trial Chamber stated: "If . . . the Trial Chamber finds in the course of the trial that the evidence conclusively shows that the accused

¹⁵¹ Id par 29

¹⁵² Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2054, Minority Opinion on the "Decision Giving Notice to the Parties and Participants that the Legal Characterization of Facts may be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court," 4, 44 (July 17, 2009) [hereinafter Minority Opinion].

¹⁵³ Minority Opinion, supra note 31, T 43-44

¹⁵⁴ (Citing Prosecutor v. Zoran Kupreskic et al., Case No. IT-95-16-T, Trial Judgement (Jan. 14, 2000)

¹⁵⁵ Kupreškić et al. (IT-95-16), <https://www.icty.org/en/case/kupreskic>

has committed a more serious crime than the one charged, it may call upon the Prosecutor to consider amending the indictment... Similarly, if the Trial Chamber finds in the course of the trial that only a different offence can be held to have been proved, it should ask the Prosecutor to amend the indictment.”¹⁵⁶ After consideration of the legal characterisation of the facts and factual circumstances in the Kupreškić case, ICTY Court rejected the re-characterisations of the facts, inter alia that such re-characterisation would create a prejudice against the accused and would violence their right to proper notice and trial of undue delay.”¹⁵⁷

B. Concluding Observations

The conflicting balance between the rights of the victim to justice and the right of the defendant to a fair trial is quite fragile and delicate to consider. In the pursuit of justice for the victim in the Lubanga case it would be possible to think that the right to presumption of innocence for the defendant is violated.

In the Lubanga case, the request of the LR on the re-characterisation of the legal facts is the reflection of the victim’s dissatisfaction with the lack of the charges of sexual crimes and inhuman treatment against Lubanga. The exclusion of the charges of sexual and gender-based crimes in the Lubanga case is potentially the source of disbelief in the justice system and re-traumatisation of the victims/witnesses of the sexual and gender-based crimes. But on the other hand, where does the victim’s desire for justice and willingness to contribute to the formulation of the charges end, and the right of the accused to a fair trial start. ICC’s legal framework is not elaborative and sophisticated enough to answer this dilemma. Notwithstanding this, Article 68(3) of ICC Statute provides that without prejudice to the rights of the accused, “[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court.”¹⁵⁸ In

¹⁵⁶ Kupreskic et al. Trial Judgement, supra note 40, T 747-48.

¹⁵⁷ Id. T 729-38, 740 (citing the Permanent Court of International Justice, Lotus case, 7 Sept. 1927, Judgment No. 9, Series A no. 10, p. 31; Brazilian Loans case, 12 July 1929, Series A, no. 14, P. 124; Military and Paramilitary Activities in and against Nicaragua, 27 June 1986, ICJ Reports 1986, pp. 24-25, T 29

¹⁵⁸ Article 68(3) of ICC Statute

addition, ICC RPE supports the idea of the victim's contribution to the formulation of the charges by 3 provisions:

- 1) Rule 92 (2) provides that in order to ease victims' application to participate in the proceedings, the Court shall notify them "concerning the decision of the Prosecutor ... not to prosecute pursuant to Article 53"¹⁵⁹
- 2) Rule 92 (3) provides that the Court shall notify victims about the convening of a confirmation of charges hearing.¹⁶⁰
- 3) Rule 92(5) provides that the Registrar shall, in time manner, notify victims or their LRs all "[r]equests, submissions, motions and other documents relating to such requests, submissions or motions."¹⁶¹

Mugambi Jouet in his work "Reconciling the conflicting rights of victims and defendants at the international criminal court"¹⁶² posits that the rights of the victims (he calls them alleged victims) and the rights of the defendants are in everlasting conflict whereas at the criminal proceedings the right to due process of the defendant must surpass the participatory rights of the victim. At the base of this argument is that the due process and fair trial rights of the defendants are longstanding and asserted in the ICCPR and UNDR, while the participatory rights of the victim in the proceedings is a relatively new notion in international criminal law. He argues that the judge must reject the alleged victim's participation in the trial unless s/he proves to be an actual victim at trial.

On the other side of the argument Marion Brienen and Ernestine Hoegen¹⁶³, who are victims' rights advocates argue that treating people as alleged victims will only aggravate their pain, re-traumatise, and reflect the lack of respect to victims' sufferings.

The argument in favour of the victim's contribution to the formulation of the charges fits organically into the ICC aim of restorative justice for victims. This aim is focused on the interests of victims

¹⁵⁹ ICC RPE, Rule 92(2) <https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf>

¹⁶⁰ Id, Rule 92(3)

¹⁶¹ Id. Rule 92(5)

¹⁶² Mugambi Jouet, Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court, 26 St. Louis U. PUB. L. REV. 249 (2007)

¹⁶³ Observations on European common law systems are based on BRIENEN & HOEGEN

as opposed to just prosecuting crime perpetrators. Unfortunately, in the Lubanga case, the aim of restorative justice for victims of sexual and gender-based crimes failed. In maintaining the balance between the rights of victim's justice and the right of the accused to a fair trial, the silenced voices of the victims are damaging to the credibility and legitimacy of the international court.

Chapter 6: CONCLUSION

"Severe traumatization, feelings of guilt and shame are accompanied by the fear of rejection by husband or family and by the fear of reprisals against themselves"- Radhika Coomaraswamy, the UN former Special Rapporteur on violence against women¹⁶⁴

As M. Eriksson said, "The fact that violence against women is a universal phenomenon and pervasive in all cultures points to its roots in patriarchy."¹⁶⁵ The patriarchal supremacy is acutely expressed against the most vulnerable population of the society and in most cases, it has a gendered character. Sexual and gender-based crime is not a pure act of sexual satisfaction but a systematic expression of domination and power, a tool of humiliation and intimidation. It is a demonstration of a belief being beyond the reach of the law, or even worse, within the acceptable norms tolerated by the law.

It needs to be fully acknowledged that sexual and gender-based crimes mark victims with a wide range of traumas and pain – physical, psychological, social, and economic. Yes, in the course of the development of the international criminal law improvements and progressive amendments regarding the acknowledgement of SGBC have been available – ICC Policy Paper on Sexual and Gender-based crimes developed by Prosecutor Fatou Bensouda on behalf of ICC OTP is a classic example of such progress. Notwithstanding it, still, a long journey is ahead to recognise the systematic gender bias and discriminatory stereotypes during wartime and especially in fragile peacetime.

¹⁶⁴ Preliminary Report on Violence against Women, its causes and consequences, UN Doc. E/CN.4/1995/42, para 281 (1994)

¹⁶⁵ Maria Eriksson, "Defining Rep: Emerging Obligations for States under International Law", 2011

Naturally, it is not expected that the law can be fully transformational and can address the structural victimisation or gender bias complexities in all its forms and shapes. However, the law's analysis through procedural processes, policy papers, and regulations at the international court can work towards understanding the trauma of SGBC victims and not exacerbate their harm and sufferings. For centuries the patriarchal system legitimised sexual violence against women, aggravated the pain and created cultural norms of its acceptance. With the ICC development, the international criminal law must further fulfil its remit and take into account a much wider societal context in the investigation and prosecution of sexual crime.

As stipulated in the ICC Policy Paper gender analysis should be contextualised and understood in the frames of the gender inequality concept. In practice, it means that investigators, prosecutors, judges, and all officials at the international courts should be trained how to deal with SGBV victims, be gender-sensitive, aware of how to help, and not to harm and co-operate on the ground within the local context. As Moreno-Ocampo, former ICC Prosecutor, once stated, much more work must be done on "an integrated approach and [on] how to combine justice with other areas, such as rehabilitation and development, in order to produce better communities."¹⁶⁶

In her article "Contributing to the Achievement of Justice for Victims of Sexual and Gender-Based Violence by Implementing the Legacy and Experience of International Criminal Courts and Tribunals"¹⁶⁷ Mispa Roux elaborates on the necessity of the holistic approach to achieving justice for the victims of the sexual crime and emphasises 3 aspects: 1) individual criminal accountability; 2) reparation as a penalty; and 3) eradication of the culture of silence, denial, and stigmatisation of victims.

Out of these three aspects I highlight imperative, yet largely ignored aspect of the culture of silence. The victim-blaming, shaming culture, and societal stigma most often cause the failure of bringing the perpetrators of the sexual crime into justice. The long-standing experience of the lack

¹⁶⁶ KEYNOTE ADDRESS: INTEGRATING THE WORK OF THE ICC INTO LOCAL JUSTICE INITIATIVES Luis MORENO-OCAMPO, 2005, <https://core.ac.uk/download/pdf/235401692.pdf>

¹⁶⁷ Mispa Roux, *Contributing to the Achievement of Justice for Victims of Sexual and Gender-Based Violence by Implementing the Legacy and Experience of International Criminal Courts and Tribunals*, 2020

of gender-sensitive policies and, more crucially their further implementation into practice usually leaves the victim of sexual violence isolated and doomed by the social and cultural stigma for the rest of their life.

Elaborating on Stephen Riley's¹⁶⁸ and Louise Chappell's¹⁶⁹ thoughts there must be legally binding norms to address the welfare and security of SGBC victims within the constitutional design of the international criminal law. International criminal law should be perceived as a reactionary but at the same time evolutionary in the interpretation of SGBC victimhood and perpetration. The concepts of victimhood and perpetration should be observed in the wider, multi-faceted context during the prosecution of those crimes. In other words, international criminal law should efficiently address structural defects in the view of socio-economic and cultural needs of SGBC victims.

Towards breaking the cycle of sexual violence during wartime and conceptualise it in the wider social-cultural context, ICC should intensify the co-operation with organisations (both international and grassroots) working in the areas of sexual and gender-based violence. The most inclusive approach of embracing various stakeholders into the investigation stage of the sexual and gender-based crimes would enable better protection of the victims. The training element on SGBC is tantamount in the trial proceedings starting with the training of the local law enforcement bodies, local judges, and medical professionals – this will enable them to observe the SGBC as a systemic occurrence. Gender inequality is one of the reasons for the systemic nature of sexual and gender-based violence and ICC should be positioned to adopt a holistic approach in addressing sexual and gender-based crimes.

For my research I read many various articles and scholastic publications on the protection measures for the victims/witnesses -they encompass diverse, sometimes conflicting views on approaches to achieve victim justice. Some of the publications did not even refer to the aspect of sexual and gender-based crimes while elaborating on their methods for the protective measures

¹⁶⁸ Riley, S., *Architectures of Intergenerational Justice: Human Dignity, International Law, and Duties to Future Generations*, (2016) 15(2) *Journal of Human Rights* 272-290

¹⁶⁹ Chappell, L. *The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy* (Oxford University Press 2015)

for victims/witnesses. Through my feminist lens, I observed a pattern where mostly male authors tactically overlooked sexual and gender-based crimes or touched upon them vaguely.

Within my dissertation, I focused on the availability of policies and regulations on sexual and gender-based crimes within ICC with a brief historic review of ICTY on the matter, addressed the question of the collection of credible evidence, duties of investigators and stipulated protection measures for victims/witnesses within ICC Statute and RPE. I also tried to maintain impartiality and analyse the legal aspect of balancing the rights of the victims/witnesses with the rights of fair trial and due process for the accused.

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