FACULTY OF POLITICAL AND SOCIAL SCIENCES

A Gender-Sensitive Reflection on the Jurisprudence of the International Criminal Court

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Abstract

This article reviews the existing jurisprudence of the International Criminal Court (hereafter: ICC) to assess whether the Court uses the legal tools of the Rome Statute in an effective way to act against gender injustices. Starting with an overview of the evolutions in international humanitarian law and international criminal law, the article describes how the acquired progress of the International Criminal Tribunal for Rwanda and International Criminal Tribunal for the former Yugoslavia culminated in the establishment of the ICC by the Rome Statute, which penalises the broadest range of sexual and gender-based crimes ever in international criminal law. Nonetheless, the article argues that the jurisprudence of the ICC misses out several opportunities that could improve gender sensitiveness before the Court. Whilst the Rome Statute might have been path-breaking, the jurisprudence of the ICC doesn't live up its expectations. By examining five cases, this article provides insight in the dynamics of truth-seeking before the Court, the politics of discretion to which the judges of the ICC give shape, and the sense and nonsense of the reparations proceedings. The main finding is that more flexibility is needed to broaden the scope of the charged crimes and the judicially established elements of responsibility in order to convict more perpetrators. Finally, the author of the article acknowledges the limits of her own research and takes a critical stance towards (international) law in general. In pursuance of gender justice, it is necessary to question the fundamental assumptions of (international) law, and to reflect on alternative gender-sensitive frameworks.

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Introduction

Approximately twenty years ago, states and NGOs created the International Criminal Court (hereafter: ICC). This permanent international criminal court appeared to be very gender-sensitive from the start, since the Rome Statute, the legal document which established and still governs the ICC, penalised more sexual and gender-based crimes than ever. The recognition of a broad range of sexual and gender-based crimes in international criminal law marked a major milestone in feminist legal theory. However, the question emerges whether this recognition in the Rome Statute is purely theoretical or whether it has a significant impact on legal practice. Moreover, is the jurisprudence of the ICC ground-breaking in the history of international criminal law? The article provides us with a nuanced answer. The Rome Statute is the result of steady progress in international criminal law with regards to sexual and gender-based violence, but the jurisprudence of the ICC does not take on all the institutional opportunities in pursuance of gender justice.

In a first part, the article situates itself within literature on gender and law. Based on legal feminist scholars, the article sets out the events that led to the creation of the ICC. The second part comprises an in-depth assessment of the jurisprudence of the ICC. As the latter is the main object of the research, the article faces the following question: "Does the International Criminal Court use its designed tools in an effective way to act against gender injustices?" More specifically, the article explores how the ICC establishes a judicial reality. This analysis is complemented with a critical discussion of the extent to which the judges of the ICC exert their discretionary power to further a gender-sensitive approach. Additionally, the ICC approach concerning the long-term effects of the damage caused by sexual and gender-based crimes is evaluated. On the basis of these three levels, an answer is formulated to the research question. Lastly, I take a normative stance towards international law and reflect on the architecture of my own research. This part aims at providing a counterweight to the more institutionalist approach of the main analysis.

The Rome Statute is a product of the international political context in the 1990s, reflecting the contingent power imbalances. These imbalances do not only concern geographical and cultural inequality, but also gender inequality. The ICC may not take on all the opportunities it received from its Statute, but the Rome Statute definitely does not address all the problems when trying to act against gender injustice. The research does not take the legal framework of our first permanent international court for granted and questions its constituting principles. This takes us twenty years back to the debates when the Rome Statute was drafted. Those debates are no less relevant today and we need them as an inspiration to change and improve the design of the (future) international, hybrid[1], national, and local criminal courts.

[1] "Hybrid courts are defined as courts of mixed composition and jurisdiction, encompassing both national and international aspects, usually operating within the jurisdiction where the crimes occurred." (Office of the United Nations High Commissioner for Human Rights, 2008, p. 1)

From Idea to Action

Gender and Law

The discipline which deals with the intersection of gender and law, is called "feminist jurisprudence" or "feminist legal theory". Although Cain (1988) makes a distinction between the concepts and argues that feminist jurisprudence is the *ideal* which should be realised *through* feminist legal theory, most scholars are using these concepts alternately. Feminist legal theory or feminist jurisprudence distinguishes itself from other social and legal disciplines by its methods: questioning the differentiated impact of social rules and practices on individuals (with different gender identities), feminist practical reasoning based on concrete realities, and consciousness-raising (Bartlett, 1990). This article combines looking at the concrete impact of ICC jurisprudence and the law on individuals, and consciousness-raising.

Feminist jurisprudence incorporates different schools of thought. In the 1980s, a debate emerged between liberal legal scholars who favoured formal equality between the two sexes ("sameness") and scholars, who, echoing Gilligan (1982), presumed fundamental differences (Baer, 2008; Cain, 1988; Fineman, 2005). Moreover, within the latter position, there is a distinction between difference/cultural feminists and dominance/radical feminists (Baer, 2008; Barnett, 1998; Cain, 1988; Fineman, 2005). Whereas cultural feminists acquiesce in the sociological differences between gender identities, radical feminists, such as Catherine MacKinnon, link the subordination of women to the alienation of their sexuality and take a more critical stance towards (the power of) social relations. However, what unifies the aforementioned positions is that they conceive of the law as an instrument for the improvement of sexual and gender inequality, as well as a facilitator of sexual and gender subordination (West, 2019). Later on, intersectional feminism (Crenshaw, 1989; Harris, 1990) and postmodern, queer, sex-radical and sex-positive feminism(s) enriched the existing corpus of feminist legal theory by questioning existing binaries and categorisations (Bartlett, 1990, pp. 877-880).

Feminist jurisprudence is substantively as diverse as there exist different personal experiences caused by the law (Charlesworth et al., 1991; Smith, 2010). Contrary to the normative, ideational contributions of the above-mentioned academics, there is a more topical body of work which analyses concrete materialities, including institutions and social relations. Examples are to be found, amongst others, in legal feminist books and articles on labour, reproductive autonomy, and criminal law. This article will engage with international law, more specifically international humanitarian law[2] and international criminal law. Based on a survey of Rimmer and Ogg (2019), the two fields count for 15 per cent of the publications on gender and international law. This will be even less within feminist jurisprudence in general. The article therefore mainly contributes to the small but significant body of feminist theory on international humanitarian and criminal law.

[2] International humanitarian law is included in this article on the ICC for the reason that international criminal law is partly derived from international humanitarian law.

The Road to Success?

Sexual and gender-based crimes weren't always visible in international law (Buss, 2007; Copelon, 2000; SaCouto, 2012). The rules on the appropriate conduct during wartime[3] were for the first time significantly codified in the Hague Conventions of 1899 and 1907 (Shabas, 2001, p. 2). Nevertheless, the only way in which sexual or gender-based crimes could be charged was through the crime of honour (Copelon, 2000, p. 221). This means that the *intrinsic* violence of sexual and gender-based crimes in war was not acknowledged. Moreover, individual criminal responsibility[4] didn't exist yet, so the protection of women against sexual and gender-based violence in war had to be qualified as a duty for a state (Shabas, 2001, p. 2).

The limits of this newly developing legal regime became painfully clear after World War II when the first international criminal tribunals, the International Military Tribunal and the International Military Tribunal for the Far East, trivialised violence other than murders. Despite large evidence of the various types of harm in war, differing according to one's gender, the tribunals remained blind to it and took over the existing patriarchal nature of international humanitarian law. Created by men, international humanitarian law traditionally focused on the agency and experiences of the hegemonic man in war. Consequently, "a social system that is male-identified, male-controlled, male-centred will inevitably value masculinity and masculine traits over femininity and feminine traits" (Becker, 1999, pp. 24-25). However, Ni Aolain (2001, p. 311) remarked that "the validation and creation of collective memory both in the immediate aftermath of the Holocaust and since then have indelibly affected the legal mechanisms that have emerged since that time." Outrages upon personal dignity [*sic*], rape, enforced prostitution and any form of indecent assault were incorporated within the four Geneva Conventions as humanitarian crimes *per se* after the adoption of Additional Protocol II to the Geneva Conventions in 1977. Also in 1977, special protection for women was provided through article 76 of Additional Protocol I to the Geneva Conventions, which entailed protection against "rape, forced prostitution and any other form of indecent assault". It should be noted that women were still seen as victims in war. From this rigid point of view, women and children didn't exist as actors in their own right, just as men were not addressed as victims (Gardam & Jarvis, 2001, pp. 10-11).

Although disrespect of one's personal dignity, rape, enforced prostitution and forms of indecent assault during a war were formally recognised, there was no formal definition of these crimes. In 1998, the judgment in the Akayesu case before the International Criminal Tribunal for Rwanda (hereafter: ICTR) changed this situation. During the trial of Akayesu, a *bourgmestre* at the time of the Rwandan genocide, witnesses brought evidence of mass rapes, notwithstanding the fact that charges of sexual and gender-based crimes were not included in the original indictment (Oosterveld, 2005, pp. 121-122). It was mainly on the initiative of Judge Navanethem Pillay that the Prosecutor amended the original indictment and included

[3] Later on, this field of study became known as the international laws of war or international humanitarian law.
[4] Historically, international law, and international relations in general, were seen as concerns for nation states. After the two World Wars, individuals became subjects of international law with the development of international (human) rights.

supplementary charges of sexual violence (Bedont & Hall Martinez, 1999, p. 74; Chappell, 2013, p. 192; Oosterveld, 2005a, pp. 121-122). Pillay, the only female judge of the Court, was the one who pursued to ask witnesses about the sexual violence they experienced. Eventually, the ICTR convicted Akayesu for, amongst others, rape, defined as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive" (ICTR-96-4-T, para. 688). Moreover, the Akayesu case was ground-breaking for characterising the mass rapes in Rwanda as an act of genocide (Goldstone & Dehon, 2003, p. 121), pushing the legal framework of the ICTR to its limits.[5]

A similar event occurred before the International Criminal Tribunal for the former Yugoslavia (hereafter: ICTY). In the Nikolić case, the Prosecutor was encouraged by Judge Odio Benito[6] to amend his indictment after hearing testimonies on sexual violence in the Former Yugoslavia (IT-94-2-R61, para. 33). Since the ICTY Statute only penalised sexual violence as a crime against humanity, which made sexual and gender-based crimes outside a war context visible, sexual violence was not institutionally penalised as a war crime. Nevertheless, the Chamber made clear in the Nikolić case that it was willing to qualify sexual violence as "grave breaches or war crimes" (IT-94-2-R61, para. 33; Goldstone & Dehon, 2003, p. 124). This legal reasoning expanded the institutional scope of the ICTY. The jurisprudence of the ICTY was furthermore pioneering in the case of Kunarac et al. for its assessment of sexual enslavement – a crime that didn't formally exist before the ICTY – on the basis of rape and enslavement (Askin, 2004, p. 19) and for its understanding of sexual violence in terms of sexual autonomy (IT-96-23-T & IT-96-23/1-T, para. 457).

Around the same time as the significant evolutions of the jurisprudence within the ICTR and ICTY, negotiations for the establishment of a permanent international criminal court were held (Bassiouni, 2002, p. 545). An in-depth assessment of the different negotiation rounds of the Rome Statute would lead us too far (see Moshan, 1998; Oosterveld, 2005b, for more), all the while the main legal issues during the discussions remained the same. Bedont and Hall-Martinez (1999) identified two concepts around which an opposition of the Vatican, together with several Arab countries and right-wing groups from North America was formed: 'forced pregnancy' and 'gender'. According to the aforementioned opposition, the notion of forced pregnancy was problematic as it would implicitly allow for abortion, an undertaking which the leaders of the opposing countries did not want to support. Furthermore, the suggested definition of gender would include people from various sexual orientations which, in light of the different proposed articles for the Rome Statute that would prohibit gender-based persecution and gender-based discrimination[7], made the opposition fear that they could be held responsible before the ICC for their conservative policies.

The Rome Statute is the result of negotiated compromises in different areas. Whilst forced pregnancy as a crime is included in articles 7(1)g, 8(2)(b)(xxii) and 8(2)(e)(vi), the definition of gender appears very

[5] Rape and sexual violence were not penalised as genocide, but they were enumerated under the crimes against humanity and war crimes ("violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II").
[6] Judge Odio Benito became an ICC judge afterwards and continued her gender activism in the famous Lubanga case.
[7] Articles 7(1)(h) and 21(3) of the Rome Statute, respectively.

remarkable. Based on article 7(3) of the Rome Statute, gender is understood as follows: “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.” The reference to “two sexes” appears to contradict the reference to the societal context, because gender in the sociological sense is more comprehensive. Moreover, the second sentence is unnecessary, but affirms the reluctant attitude of the opposition (Copelon, 2000, p. 237). On the other hand, Valerie Oosterveld (2005b), a scholar who engaged with other women’s rights activists in the different negotiations of the Rome Statute, refers to the definition of gender with the term “constructive ambiguity”. She argues that the ambiguity of the gender definition is successful, because it gives the judges of the ICC some manoeuvring space when interpreting what gender in a particular situation means. While multilateral platforms and international jurisprudence were reticent to define gender, UN entities had adopted their own definitions (Oosterveld, 2005b, pp. 66-67).[8] Considering these definitions, there is an opportunity to interpret the gender definition of the ICC with a larger focus on the societal aspect.

Although there remained some reservations in the academic literature with regard to the Rome Statute (for example Moshan, 1998), the reaction of the international community was largely positive (Bedont & Martinez, 1999; Copelon, 2000). A broad range of gender and sexual-based crimes were finally recognised under international criminal law, without being linked to personal dignity or honour (Copelon, 2000, p. 233; Moshan, 1998, p. 176). These crimes are enumerated under two of the four ‘core’ crimes of the Rome Statute, namely crimes against humanity and war crimes, and include rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, any form of sexual violence of comparable gravity / also constituting a grave breach of the Geneva Conventions, and persecution on gender grounds.[9]

Beside the improvements in substantial law, the ICC Rules of Procedure and Evidence (2013b)[10] include various guarantees for vulnerable victims and witnesses (Bedont & Martinez, 1999) and the institutional representation of different gender identities is ensured (Bedont & Martinez, 1999; Chappell, 2016). However, Moshan (1998) points at the loopholes in the Rome Statute regarding sexual and gender-based crimes: perpetrators need to commit crimes with intent, which is hard to prove; the explicit definition of gender might make the persecution of gender-based crimes more difficult; and crimes against humanity require that those crimes are part of a widespread or systematic attack against a civilian population. How these theoretical issues express themselves in practice is the subject of the second part of the article.

[8] Existing definitions were, for example, “the term "gender" refers to the ways in which roles, attitudes, values and relationships regarding women and men are constructed by all societies all over the world” (UN Economic and Social Council, 1995, para. 13) or “gender refers to the social differences between men and women that are learned, changeable over time and have wide variations both within and between cultures” (UN Economic and Social Council, 1996, para. 10; see Chappell, 2005b, for more).

[9] Articles 7(1)g, 7(1)h, 8(2)b(xxii), and 8(2)e(vi) of the Rome Statute.

[10] For example: Rules 16(1)d, 17(2)(b)(iii), 18(d), 19, 87, 88 and 112(4) of the Rules of Procedure and Evidence to the Rome Statute. Rules of Procedure set out the procedural rules. Contrary to a Statute, it doesn’t establish an institution.

Methodological Considerations

The format of the research is a case study, "an intensive study of a single unit for purpose of understanding a larger class of (similar) units" (Gerring, 2004, p. 342). Applying the definition to the research, the unit that is being studied in-depth is the jurisprudence of the ICC. The cases before the ICC feature choices including the standard of evidence, victim participation, the qualification of crimes, and the interpretation of the law. Taking all the different variables into account, trends can be analysed, and a well-founded conclusion on the jurisprudence of the ICC can be drawn. In addition to the choice for a case study, I chose for a qualitative research (Ritchie et al., 2013) into the jurisprudence of the ICC, for the reason that it is better suited to assess hardly quantifiable concepts, especially notions such as 'gender sensitivity' and 'gender (in)justice'.

I started the research reading some general literature on feminist legal theory, gender in war, and the ICC. This enabled me to have a broad view on the discussions that circumscribe my topic. Afterwards, I started reading my primary sources, *i.e.* the jurisprudence of the ICC itself. I looked at the jurisprudence with an open view, questioning the literature I already read before. Because of the limited time a master student has to work on her or his research, I chose not to read all the existing jurisprudence of the ICC. Firstly, I limited my research with regard to the amount of cases. Currently, twenty-seven cases have been brought before the ICC[11], of which six cases have been definitively tried: the Prosecutor v. Ahmad Al Faqi Al Mahdi, the Prosecutor v. Bemba et al., the Prosecutor v. Jean-Pierre Bemba Gombo, the Prosecutor v. Germain Katanga, the Prosecutor v. Thomas Lubanga Dyilo and the Prosecutor v. Mathieu Ngudjolo Chui.[12] In these cases, the defendant is convicted or acquitted[13], and this cannot be reversed by an appeal anymore. After a general examination, I dropped the first two cases for the purposes of my research. The Al Mahdi case centred around the war crime of directing an attack against buildings dedicated to religion and historic monuments (ICC-01/12-01/15-84-Red 24-03-2016, paras. 23-24). Of course, the crime has had a differentiated impact on each person within the community, but the case wasn't fit to be compared with the other cases of the ICC because it didn't deal with sexual and gender-based crimes. The same happened with the case of Bemba et al. – not to confuse with the case on Mr. Bemba only – in which infringements on the ICC Rules of Procedure were brought against Bemba and four other individuals. Neither this case would be appropriate for my particular case study. Nevertheless, I included one of the two cases under appeal, namely the Ntaganda case, because Mr. Bosco Ntaganda was the first person before the ICC to be convicted for sexual and gender-based crimes, amongst other crimes. The reasoning of the Trial Chamber in the judgment of Ntaganda seemed too valuable to not include it.

[11] Twenty-one cases, including four of the cases that have been definitively tried and that remain at the reparations stage, are officially ongoing. In other words, six of the twenty-seven cases have been officially closed, because of acquittals (2) or because of insufficient evidence (4).
[12] https://www.icc-cpi.int.
[13] Two of the six cases were acquittals: the Prosecutor v. Jean-Pierre Bemba Gombo and the Prosecutor v. Mathieu Ngudjolo Chui.

Secondly, given the volume of each case, it was impossible to read all the documents of a case.[14] Therefore, I focused on the most important decisions of the Chambers within the ICC, *i.e.* the warrants of arrest, the confirmations of charges, the decisions pursuant to Article 74 of the Statute (the judgment), the decisions pursuant to Article 76 of the Statute (the sentence), any appeals, and the orders for reparations pursuant to Article 75 of the Statute. The latter were *de dato* May 10, 2020 only available in the cases of Bemba, Katanga and Lubanga.

The leading question throughout my research is: "Does the International Criminal Court use its designed tools in an effective way to act against gender injustices?" Before answering the research question, a definition of 'gender (in)justice' is necessary to clarify the scope of the research. Much academic literature deals with concepts such as gender, gender discrimination, gender (in)equality and gender (in)justice without furnishing a circumstantial definition of what the author specifically means with that particular, vague concept. I propose my own definition which grasps the peculiarities of my research, without prejudice to the general character of the concept. Therefore, gender injustice needs to be understood as the discrepancy between the state of things and the concrete treatment that each individual desires through the acknowledgment of the differentiated struggles one faces on the basis of his/her/its own gender, considering that other individuals – with the same or another gender identity – may have other desires and that the particular treatments are reconcilable. This definition covers both a subjective and an intersubjective component, in addition to a descriptive and a normative component. The adjective 'gender-sensitive' is subsequently used to indicate the commitment to end gender injustice(s). Additionally, I will consistently refer to "sexual and gender-based crimes" for the reason that it has the potential to include the most comprehensive range of crimes in which people are disadvantaged on the basis of their gender or in which people are sexually violated in order to reproduce the hegemonic gender norms (Campbell, 2007, p. 429).

Notwithstanding other possible means to realise the ideal of gender justice, the research has the jurisprudence of the ICC as object. Since academic works have not compared different ICC cases yet, the article unravels the underlying jurisprudential tendencies. Additionally, the article bridges the different approach of the legal and social discipline. It engages with jurisprudence as a sociological field of interest, without losing sight of the legal finesses, and integrates the social and the legal on the substantive and the methodological level. The following part analyses the jurisprudence of the ICC, which contributes to institutional literature on international criminal law within feminist jurisprudence (*supra*). The third part returns to the fundamental theoretical questions that shape the discipline.

[14] The amount of documents in the examined cases ranges from approximately 2,500 to 4,000. The overwhelming majority of documents are documents for internal use or procedural documents. Subsequently, I focused on the most important documents from a legal point of view: the warrants of arrest, the confirmations of charges, the judgments, the sentences, any appeals, and the orders for reparations of five cases. This already resulted in approximately 4300 pages of jurisprudential literature in total.

Actions of the ICC: Food for Thought

Although the Rome Statute penalises the broadest spectrum of sexual and gender-based crimes ever in the history of international criminal law, few people are convicted on the basis hereof. Women's Initiatives for Gender Justice, an NGO which centres its activities around gender justice *through* the ICC, incorporates the evolutions regarding gender justice within the jurisprudence of the ICC in so-called "Gender Report Cards". The latest Gender Report Card dates from 2018, and although it is not fully updated, it presents relevant statistics on the existing cases. As regards the five cases under review, four cases encompassed sexual and gender-based crimes.[15] Of these four, only Ntaganda was convicted for this type of crimes, more precisely for rape as a crime against humanity, rape as a war crime, sexual slavery as a crime against humanity and sexual slavery as a war crime. It is additionally remarkable that four cases deal with the militia violence of the Second Congo War[16], whereas the Bemba case examines the abuses in the CAR after the coup of 2002.

The following three sections will assess the gender sensitivity of the ICC on three levels. These levels are chosen as a reflection of the three distinct stages before the ICC. At the pre-trial stage, the crimes with which the Prosecutor charges a defendant need to be confirmed in the "Confirmation of Charges". The idea behind this procedure is to not spend time on cases for which there is not enough evidence. In the following stage, the trial stage, the Court judges whether the defendant is convicted or acquitted, and it determines the appropriate sentence. Lastly, the Court orders eventual reparations in the reparations/condemnations phase.

Truth-Seeking Before the Court

A criminal procedure always gives prominence to the quest for the truth. The cases that are brought before the ICC likewise feature this truth-seeking. Through the submission of evidence, a judicial truth is established of which the ideal is to correspond as much as possible to reality. It is consequently crucial that thorough evidence is submitted in order to achieve justice for the victims of grave violations of international criminal law (see Campbell, 2007; Mouthaan, 2011; SaCouto & Cleary, 2009, for more). Similar to every regular criminal procedure, the Prosecutor is the person charged with the responsibility for the investigations which precede the legal proceedings. According to several official documents (ICC Office of the Prosecutor, 2014; ICC Office of the Prosecutor, 2019), current Prosecutor Bensouda and her Office committed to adopt a gender-perspective at the different stages of the legal process, in particular at the investigation stage. A legal framework that allows for gender expertise and gender-sensitive measures during the trial proceedings supports the Office of the Prosecutor. However, in the end, it is the judges who appreciate the evidence.

[15] This is a relatively high ratio (80 per cent) considering the findings of Women's Initiatives for Gender Justice. In 2018, sixteen cases of the then twenty-six cases brought before the ICC (61,5 per cent) were related to sexual and gender-based violence (Women's Initiatives for Gender Justice, 2018).

[16] The Second Congo War started from 1998 and officially ended in 2003. Because the Rome Statute entered into force July 1, 2002, the ICC could not address crimes before the latter date.

When sexual and gender-based violence needs to be proven, evidence is given by witnesses through testimonies.[17] In light of the evidentiary threshold before the ICC, which determines whether evidence is admissible and reliable, it is significant that the judges tolerate certain inaccuracies in the accounts of witnesses (ICC-01/05-01/08-424, paras. 55-57; ICC-01/05-01/08-3343, paras. 228-233; ICC-01/04-01/07-3436, paras. 82-87; ICC-01/04-01/06-2842, paras. 102-106; ICC-01/04-02/12-3-tENG, paras. 48-53; ICC-01/04-02/06-2359, paras. 77-83). Whereas the truth in criminal law should be established 'beyond reasonable doubt', flexibility of the judges with regards to testimonies is necessary considering the nature of the crimes. It is common knowledge that people who faced tragic circumstances suffer(ed) from various mental health issues, for example post-traumatic stress disorder, and try to distance themselves from an atrocious past. Moreover, a large period of time between the horrifying events and the proceedings before the Court causes memories to fade. In the case of Lubanga (ICC-01/04-01/06-2842, para. 105), a psychologist elaborated on the effect of trauma on memory before the ICC, indicating the commitment of the judges to mitigate the difficulties for witnesses and victims when testifying. The Ntaganda case (ICC-01/04-02/06-2359, para. 88), on the other hand, demonstrates that delayed reporting of rape is permitted because of "cultural or communal stigmatisation, shame and fear, as well as the general lack of trust in authorities".

The Rules of Procedure and Evidence (ICC, 2013b) contain several rules to address particular evidence-gathering issues regarding sexual and gender-based crimes. Firstly, there is a prohibition on corroboration[18], especially in relation to sexual violence crimes. Echoing this prohibition, the judges of the Court agree that one testimony of sexual and gender-based violence is sufficient to establish the existence of a crime (ICC-01/05-01/08-424, para. 53; ICC-01/05-01/08-3343, paras. 245-246; ICC-01/04-01/07-3436, para. 110; ICC-01/04-01/06-2842, para. 110; ICC-01/04-02/12-3-tENG, para. 72; ICC-01/04-02/06-2359, paras. 75-76), although they mostly relied on additional evidence to assess the credibility of a witness. This can be seen as an attempt to avoid the corroboration prohibition. Secondly, the obstacles that witnesses and victims face in order to share their experiences are being tackled through provisions which aim at enhancing their protection.[19] Protective measures consist of, amongst others, preventive relocation, anonymity, hearings in closed sessions and redactions of certain documents, and the Court is adequately making use of these opportunities at the benefit of witnesses and victims. Protective measures are furthermore deemed to have no negative impact on the credibility of the witnesses' statements (ICC-01/04-01/07-717, para. 170; ICC-01/04-02/06-2359, para. 84). Nevertheless, a testimony can be ruled out if the disclosure of it would make the protective measures pointless (ICC-01/04-01/07-3436, paras. 97-100; ICC-01/04-01/06-803-tEN, para. 144; ICC-01/04-01/06-2842, para. 18; ICC-01/04-02/12-3-tENG, paras. 63-66).

[17] There are no official complaints before national authorities, nor have victims been medically examined after the crimes. Hence, testimonies are often the only evidence for sexual and gender-based crimes.
[18] Rule 63(4) Rules of Procedure and Evidence. Corroboration is the confirmation of evidence with other evidence. This means that, when corroboration would be required, one single piece of evidence would not be enough to establish the truth and subsequently a crime.
[19] For example: articles 64(7) and 68 Rome Statute.

The ICC made progress in enabling victims to participate in the judicial proceedings[20] – mostly through the designation of one or more common legal representatives of the victims –, which can be healing for the processing of the crimes victims experienced. This participation includes monitoring the procedures, submitting remarks, and testifying in hearings. In every case under review, victims were allowed to participate. The number of victims differed from one case to another, ranging from around hundred to more than thousand participating victims. As regards the victims who in addition testified as witnesses, the judges of the ICC prioritised the statements in their testimonies when the latter contradicted the information of their victim application forms (ICC-01/04-02/06-2359, para. 85). The testimonies have, in other words, a higher evidentiary value than the victim application forms. Hence, to make sexual and gender-based violence fully visible in international criminal law, victim participation at the Court has to be representative of the actual victims. The ICC should maintain a general view on the conflict, and the ratio of participating victims at the Court per gender identity should reflect the ratio of the real victims of a conflict per gender identity. It is therefore unfortunate that only thirty-four female victims, as opposed to ninety-five male victims, participated in the proceedings of the Lubanga case.[21] Despite the improvement in international criminal law with respect to the recognition of victims, victim participation has been overall evaluated with mixed feelings (see SaCouto, 2012, for more) since most victims slip through the cracks in the legal system.

To conclude, it is still common that a person is not convicted for the crimes he/she committed, a problem the judges of the ICC affirm themselves (ICC-01/04-01/07-3436, para. 70; see also ICC-01/04-02/12-3-tENG, para. 36):

> Finding an accused person not guilty does not necessarily mean that the Chamber finds him or her innocent. Such a determination merely demonstrates that the evidence presented in support of the accused's guilt has not satisfied the Chamber "beyond reasonable doubt".

Even if the judges *de facto* know that a defendant is guilty for multiple crimes, they are only authorised to establish crimes considering the presented evidence. Accordingly, jurisprudence is partially a product of the formalised nature of its legal framework. How the judges of the Court exert their discretionary power[22] at the trial stage – what I refer to as the politics of discretion (in legal matters) – is the subject of the next section.

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[20] Mainly based on article 68(3) Rome Statute, but also on the basis of articles 15(3) and 19(3) Rome Statute.

[21] Lubanga was only found guilty of enlistment, conscription and active use of children in hostilities. As the following sections will show, the judges of the ICC require a connection between the charged crimes and the harms of victims. Thus, only victims of the crimes of enlistment, conscription and active use of children in hostilities can be formally recognised. Ideationally, all victims of the same large-scale violence should be acknowledged, including victims of the related sexual and gender-based violence.

[22] Discretionary power, also 'discretion' or 'margin of appreciation', is a legal term to point at the manoeuvring space a judge has within a particular legal framework. A legal framework always formulates some rules, but because it is impossible to encompass all legal issues, the judges are authorised to fill up the 'soft spots'. The next section will elaborate on the tendencies of this 'politics of discretion' before the ICC.

Politics of Discretion

The legal procedure before the ICC is very formalised: the different steps to be taken before the Court are detailed in formal documents. From a critical point of view, this formality can hinder the effectivity of the ICC for the sake of justice. As the Lubanga case will demonstrate below, a certain flexibility of the Trial Chambers is preferable in the future to broaden the scope of the charged crimes, and accordingly the liability of the defendant for them. One crime encompasses various types of criminal behaviour. In this way, from a victim-centred perspective, most of the suffering *can* be acknowledged – leaving in the middle whether the judges would really do this considering their discretionary power. The right to a fair trial *vis-à-vis* the accused, including the principle of legality[23], has to be preserved too. The judges of the ICC are thus entrusted with the task of making a delicate balancing act.

The scope of the trial phase is limited to the facts and charges established in the Confirmation of Charges of the pre-trial phase (Article 74(2) Rome Statute; ICC-01/04-01/06-2842, para. 7). When the Prosecutor fails to encompass all factual aspects of (a) particular criminal event(s) at the pre-trial stage, the judges are not able to establish additional consequences or additional crimes when they are coming to the fore afterwards. On that account, the Prosecutor before the ICC, and prosecutors in general, carry a big responsibility.[24] A case in point is the Lubanga case, in which former Prosecutor Moreno Ocampo only charged Mr. Lubanga, President of a Congolese militia during the Second Congo War, with the crimes of enlistment and conscription of children under the age of fifteen years and active use of those children in hostilities, in his own words to "move my case fast. So I had strong evidence about child soldiers. I was not ready to prove the connection between the killings and the rapes. And then I decided to move just with the case I had proofs" (2009; as cited in Chappell, 2013, p. 187). Criticising a similar hasty, selective prosecutorial approach before the ICTR, MacKinnon (2008, p. 106) stated that:

> At times, it may be harder to determine if someone was raped than if that person was killed, but rape often leaves distinctive marks, psychological as well as physical. Identifying the rapist is not essentially more difficult – and may, at times, be easier – than identifying the murderer, who may leave no witnesses.

[23] The principle of legality is a general principle of law, which is codified in article 15 of the International Convention on Civil and Political Rights, amongst others. Paragraph 1 of this article states that: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby." The principle of legality is incorporated in the Rome Statute in articles 22 and 23.

[24] It is however possible for the Pre-Trial Chamber during the confirmation phase to invite the Prosecutor to conduct further investigation regarding a particular charge as well as to amend the legal qualifications of a charge (Article 61(7) Rome Statute *juncto* Regulation 52b Regulations of the Court). The Trial Chamber is further authorised to modify the legal qualification of the crimes, considering the factual scope of the Confirmation of Charges.

Based on the above, it seems that (former) prosecutors unjustly prefer not to charge individuals with sexual and gender-based crimes for reasons of efficiency. As a consequence, the only possibility for sexual and gender-based crimes to be tackled, is as a corollary of a charged crime. In the Lubanga case, the judges of the ICC faced the question whether sexual and gender-based violence *vis-à-vis* enlisted and conscripted children under the age of fifteen years could be addressed as part of the charged crimes – leaving aside the sexual and gender-based violence against whole communities on a massive scale.

Different sections of the judgment on the criminal liability of Lubanga (ICC-01/04-01/06-2842, paras. 36, 606, 890-896) refer to the various experiences of children who were enlisted, conscripted and used actively in hostilities: young girls were raped and sexually enslaved, they ended up pregnant and were relinquished by their own communities, boys and girls were beaten and whipped… Whilst the Legal Representative of the Victims and the Prosecutor argued that the prohibition on enlistment and conscription of children under the age of fifteen years and active use of those children in hostilities aims at protecting also those children that have suffered from sexual and gender-based violence (ICC-01/04-01/06-2842, paras. 577-578, 589-599), the Trial Chamber eventually concluded that the specified violence exceeds the scope of the Confirmation of Charges, reproaching the Prosecutor of having been unsuccessful in providing factual and circumstantial evidence of sexual and gender-based violence at the pre-trial stage, and of failing to fix these shortcomings at the relevant procedural stages (ICC-01/04-01/06-2842, para. 629).

One of the judges, Judge Elizabeth Odio Benito, submitted a dissenting opinion on this particular issue. She favoured an inclusive understanding of the crimes of enlistment and conscription of children under the age of fifteen years and active use of those children in hostilities, with respect to the sexual and gender-based violence from which female victims suffered. Quoting Odio Benito (2012, p. 6):

> Although the Majority of the Chamber recognises that sexual violence has been referred to in this case, it seems to confuse the factual allegations of this case with the legal concept of the crime, which are independent. By failing to deliberately include within the legal concept of "use to participate actively in the hostilities" the sexual violence and other ill-treatment suffered by girls and boys, the Majority of the Chamber is making this critical aspect of the crime invisible. Invisibility of sexual violence in the legal concept leads to discrimination against the victims of enlistment, conscription and use who systematically suffer from this crime as an intrinsic part of the involvement with the armed group.

Just because the procedure before the ICC is very formalised, the judges should compensate this by broadening the scope of the charged crimes. The Lubanga case and the dissenting opinion of Judge Odio Benito have been the subject of debate amongst legal scholars and feminist authors. Chappell (2013; see also

Chappell, 2016), for instance, made an institutional analysis of the case by contrasting the formal rules of the Rome Statute with the informal gender-biased norms which circumscribe international law. Admitting that Chappell's reasoning is very interesting, this section describes the processes which *preceded* the so-called informal rules. The dissenting opinion of Odio Benito reveals contentious dynamics between individual judges. The informal rules to which Chappell refers, are a result of multiple contentious dynamics at the micro-level.

That the rigidity of the law poses problems for the accountability of perpetrators in particular is demonstrated by the little convictions of persons before the ICC, especially on the basis of sexual and gender-based crimes. Of the four persons charged with sexual and gender-based crimes, only Ntaganda was convicted for rape and sexual slavery, both as a crime against humanity and a war crime. As previously said, the formal recognition of sexual and gender-based crimes under international criminal law is considered a milestone by various authors. The question that still emerges in this context is how sexual and gender inequality and violence can be accounted for (D'Aoust, 2017).

Persons are under the Rome Statute responsible as individuals or as superiors, on the condition that several requirements are fulfilled. Individuals either committed a crime within the jurisdiction of the Court as an individual; jointly with another or through another person; ordered, solicited, induced or facilitated the commission of such a crime; contributed to the commission or attempted commission of such a crime by a group of persons acting with a common purpose; or attempted to commit such a crime (Article 25(3) Rome Statute). Note that the crimes by these individuals should have been committed with intent and knowledge (Article 30 Rome Statute). Commanders and other superiors are responsible for the crimes committed by the forces under their effective command/authority and control if the crimes are the result of their failure to exercise control properly over such forces. The latter is the case when the commander or superior knew or should have known that the forces committed or were about to commit crimes and failed to take all necessary and reasonable measures to prevent or repress their commission or to let the events being investigated in a criminal procedure (Article 28 Rome Statute).

Because the Rome Statute doesn't provide for further descriptions of the various types of criminal responsibility[25], the judges had to operationalise articles 25(3) and 28 of the Rome Statute with own established elements.[26] Furthermore, the fulfilment of these elements had to be evidenced with *concrete* documentation, which challenges general allegations of sexual and gender-based violence as weapons of war. Connecting this with the findings on truth-seeking before the ICC (*supra*), the elements that the judges of the ICC require to be fulfilled already need to be considered during the investigation stage. This was undeniably

[25] What means "jointly with another of through another person", for example? Or what is "effective command/authority?"
[26] I will call this 'elements of responsibility' analogous to the Elements of Crime (ICC, 2013a).

hard because the Prosecutor could not anticipate these requirements in the first cases, which undoubtedly led to the acquittals of Bemba and Ngudjolo for the reason that they were not deemed responsible for the crimes in the CAR and the DCR, respectively. Since the judges could not expect the Prosecutor to know in advance what strict elements would be established, the judges could have been more flexible regarding the evidence in determining the responsibility of a defendant.

The Katanga case is an exemplary case to demonstrate the limits of the strict established elements on the responsibility as a co-perpetrator (Article 25(3)a Rome Statute). Although the Pre-Trial Chamber admitted that it found no evidence to conclude that rape and sexual slavery were part of the common plan of Katanga and others to attack a Congolese village (Bogoro), it concluded that the implementation of that common plan would "inevitably result in the rape or sexual enslavement of civilian women there" based on the fact that rape and sexual slavery were a common practice in the DRC during the conflict (ICC-01/04-01/07-717, paras. 550, 567-569). Nonetheless, it is unfortunate that the Trial Chamber wasn't as flexible as the Pre-Trial Chamber. It didn't acknowledge the systematic sexual and gender-based violence and refuted the previously quoted argument of the Pre-Trial Chamber by stating that:

> No evidence is laid before the Chamber to allow it to find that the acts of rape and enslavement were committed on a wide scale and repeatedly on 24 February 2003, or furthermore that the obliteration of the village of Bogoro perforce entailed the commission of such acts, even though the acts were entertained by the Chamber in its findings on the crime of attack against civilians as a war crime. Moreover, the Chamber notes that contrary to the other crimes which formed part of the common purpose, in the case at bar it was not established that the Ngiti combatants of Walendu-Bindi had, prior to the battle of Bogoro, committed crimes of rape or sexual slavery. (ICC-01/04-01/07-3436, para. 1663)

All the more in view of the margin of appreciation the judges dispose(d) of, the elements of responsibility had to be more flexible. Considering the Katanga case, structural violence is not acknowledged due to the strict operationalisation of individual and command responsibility. The future will show whether the scope of the established elements will be opened up for systematic sexual and gender inequality and violence. Nonetheless, the Prosecutor is now able to scrutinise the ways in which a person can be held accountable before the ICC due to the settled case law (ICC Office of the Prosecutor, 2014).

More limited is the margin of appreciation with respect to the crimes themselves. The elements of all the crimes that are penalised by the Rome Statute are detailed in an official document (ICC, 2013a) which leaves little to the imagination. At present, only the sexual and gender-based crimes of rape and sexual enslavement were charged before the ICC. Those crimes subsequently deserve the attention to be examined in-

depth. With the exception of the variable elements depending on the crime to be a crime against humanity or a war crime, rape is conceptualised as follows (ICC, 2013a, pp. 5, 19, 25):

> The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. The invasion was committed 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 person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

This definition is a step backward compared with the definition in the Akayesu case before the ICTR (*supra*). Body parts definitions [*sic*] are narrower and characterise rape in a mechanical way (MacKinnon, 2006, p. 945). Along the same lines, sexual slavery is conceptualised (ICC, 2013a, pp. 6, 19, 26):

> The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.

The jurisprudence of the ICC regularly quotes the Elements of Crime when stating that an 'invasion' with regard to the crime of rape is deemed gender-neutral (ICC-01/05-01/08-3343, para. 100; ICC-01/04-01/07-717, para. 439; ICC-01/04-02/06-2359, para. 933). Consequently, rape can be committed by both male and female perpetrators on both male and female victims. It is meaningful that the ICC acknowledges male and female victims of rape, notably in the Bemba and Ntaganda cases, although the only victims in the charges of sexual slavery have been girls and women. A thorough investigation in the experiences of boys and men regarding sexual slavery is therefore unmistakeable. Interestingly but properly, the judges accept that the crimes of rape and sexual slavery can be committed against members of the same militia. In the decision on the confirmation of charges (ICC-01/04-02/06-309, paras. 76-82) and the judgment of Ntaganda (ICC-01/04-02/06-2359, para. 965), the Chambers characterised all child victims of rape and sexual slavery as "not taking active part in hostilities", notwithstanding their membership of an armed group, so that they could be protected under international humanitarian law and thus under the Rome Statute. Based on the prohibition to conscript, recruit and use children in a conflict, this characterisation is absolute. This is a step forward, since active perpetrators are not protected under international humanitarian law. Whether members

aged above fifteen years old are protected under the same provisions of international humanitarian law, is by analogy determined by their active participation in the hostilities.

Relating to the other elements of rape and sexual slavery, the judges of the ICC recognise the systematic societal nature of those crimes (ICC-01/05-01/08-3343, para. 567; ICC-01/04-01/07-3436, para. 519), albeit not the responsibility of individuals for this structural problem (*supra*). The second condition of rape, namely the force, threat of force, or coercion is understood in circumstantial terms. Within the factual scope of the charges, it does not have to be proven that the victim didn't give their consent (ICC-01/05-01/08-3343, para. 105; ICC-01/04-02/06-2359, para. 934; Rule 70 Rules of Procedure and Evidence). Moreover, a "coercive environment" does not necessarily require physical force (ICC-01/05-01/08-424, para. 162; ICC-01/04-01/07-717, para. 440). Implicit threats of force, such as the fact of carrying a gun (ICC-01/04-02/06-2359, para. 944), and the realisation of only one of the coercive circumstances or conditions (ICC-01/04-01/07-3436, para. 965) is sufficient. With reference to sexual slavery, the right of ownership is achieved more difficultly. Mere imprisonment or the duration thereof do not suffice (ICC-01/04-02/06-309, para. 53) although the Katanga case demonstrates that sexual slavery in a so-called 'marriage' and domestic servitude is accepted by the Court (ICC-01/04-01/07-717, para. 431) and that the subjective nature of deprivation from the point of view of the victim is likewise important (ICC-01/04-01/07-3436, para. 977).

The reality expressly exposes that sexual and gender-based violence in war occurs on a massive scale, extending the gender inequalities within a society that were present before the war (Enloe, 2004, pp. 95-97; Esuruku, 2011). Referring to Cockburn (2013, p. 441), "wartime rape is by no means 'senseless violence'. Rather, it is a social, relational phenomenon, with complex meanings capable of being explored, analysed, and understood." In addition, sexual and gender-based violence are seen as a means to destroy a whole community (ICC-01/04-02/06-2359, para. 1020). The section can thus be concluded with a positive note: the ICC mainly focuses on the social context when assessing whether sexual and gender-based crimes occurred. This is a step forward towards the acknowledgment of systematic sexual and gender-based violence and inequality. The extent to which the long-term consequences of sexual and gender-based violence are taken into account in the reparations proceedings before the ICC is being examined in the next section.

Continuous Effects of Crimes

Crimes are not isolated events; they have repercussions in the longer term. Much feminist literature elaborates on the long-term effects of sexual and gender-based violence in conflicts. Men feel thwarted in their masculinities, both because they could not protect their family (Esuruku, 2011, p. 30; Myrttinen et al., 2016, p. 108) and because they were victims of sexual and gender-based violence themselves (Schulz, 2018); women take on different roles in society than what was the case traditionally (Esuruku, 2011, p. 25; Gardam & Jarvis, 2001, p. 51); sexual and gender-based violence has trans-generational effects, which is typically the case with children that are born as a consequence of rape; LGBTQI individuals and communities face an

enhancing vulnerable situation during and after the war (Myrttinen et al., 2016, pp. 112-114)… Moreover, not only victims, but communities as a whole experience damage due to sexual and gender-based violence in war (Ni Aolain, 2001, p. 308).

The ICC principally deals with the consequences of crimes in the sentencing and reparations proceedings. These judicial procedures focus on the harms that resulted from the crimes for which a person is convicted, based on the judgment, and the appropriate actions to repair these harms. Reparations can be individual or collective and consist of monetary compensations, service-based collective reparations, the erection of monuments, symbolic events, measures for education assistance, psychological help etc. (ICC-01/04-01/07-3728-tENG; ICC-01/04-01/06-3379-Red-Corr-tENG). However, not every person is entitled to claim reparations. The legal framework of the ICC defines victims as "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court".[27] Because of the relative vagueness of this definition – the link between the harm of a person and the crime, as well as the specification of "any crime within the jurisdiction of the Court" is not specified –, it was up to the judges of the ICC to clarify which persons could obtain victim status. Additionally, the Rome Statute doesn't give victims a *right* to reparations (Article 75 of the Rome Statute).

The first time the judges were confronted with the consequences of a judgment was in the Lubanga Dyilo case. In the sentencing judgment and the decision establishing the principles and procedures to be applied to reparations of the Lubanga case, it became clear that the judges were reluctant to set out clear-cut principles in order to broaden the scope of the reparations and acknowledge the multiple harms with which victims were confronted. Keeping in mind that Mr. Lubanga was solely found guilty for "the crimes of conscripting and enlisting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities[28] from early September 2002 to 13 August 2003" (ICC-01/04-01/06-2842, para. 1358), the aforementioned attitude was desirable to reach as many disadvantaged people as possible. In this way, it could be avoided that some people were slipping through the cracks. The Trial Chamber dealing with the Lubanga case stated in the sentencing judgment (ICC-01/04-01/06-2901, para. 67), for example, that it

> is entitled to consider sexual violence under Rule 145(l)(c) of the Rules as part of: (i) the harm suffered by the victims; (ii) the nature of the unlawful behaviour; and (iii) the circumstances of manner in which the crime was committed; additionally, this can be considered under Rule 145(2)(b)(iv) as showing the crime was committed with particular cruelty.

This gender-sensitive reasoning notwithstanding, the majority of the same Trial Chamber was not able to sufficiently conclude that the sexual and gender-based violence against child recruits could be attributed to

[27] Rule 85(a) of the Rules of Procedure and Evidence (ICC, 2013b).
[28] Within the meaning of Articles 8(2)(e)(vii) *juncto* 25(3)(a) of the Rome Statute.

Lubanga. The decision establishing the principles and procedures to be applied to reparations in the Lubanga case was the object of an appeal, in which the Appeal Chamber denounced the inconsistent and inconcrete approach of the Trial Chamber, amongst others. Whether a person can be qualified as a victim, and thus get reparations for their harms in a legal way, is dependent on three conditions: "he or she must provide identification, and sufficient proof of the harm suffered and of the causal nexus between the crime and the harm" (ICC-01/04-01/06-3379-Red-Corr-tENG, para. 40). In other words, a clear causal link between the suffered harm and the crime for which the defendant is convicted, is required. When a person is not convicted for sexual and gender-based crimes, problems arise: these harms cannot be 'repaired' before the ICC.

The judges in the following cases acted along the same lines. Whilst they acknowledged transgenerational harm of crimes (ICC-01/04-01/07-3728-tENG, para. 132), sexual and gender-based violence in general (ICC-01/04-01/07-3728-tENG, paras. 146-154), and the social effects of sexual and gender-based violence and its lasting damage (ICC-01/05-01/08-3399), a nexus between the harms and the crimes for which a person is convicted could not be established. However, in each case in which reparations were ordered, the Trust Fund for the Victims (hereafter: TFV), an entity autonomous of the judicial procedure which aims at "making reparative justice a reality for victims"[29], was invited to consider the excluded harms as part of its assistance mandate.[30] Especially victims of sexual and gender-based violence are being addressed through these *extra-judicial* measures. The foregoing questions the nature and relevance of a judicial procedure in pursuing justice. When the victims are however treated within the judicial machinery, their actions are streamlined in accordance with the Rome Statute and the Rules of Procedure and Evidence.

It can be concluded that the long-term effects of the committed crimes are acknowledged by the (judges of the) ICC, despite the fact that they cannot link these harms to the crimes for which a convicted person before the ICC is liable. This conclusion needs to be connected to the previous section in which the argument was made that the necessity of justice pushes the judges of the ICC to be more flexible and explore the limits of the Rome Statute's institutional design. As the judges in the Lubanga case stated: "the success of the Court is, to some extent, linked to the success of its reparation system" (ICC-01/04-01/06-2904, para. 178). Justice therefore needs to be pursued in the judgment-, sentencing, and reparations phase. Hence, a glimmer of hope is to be found in the condemnation of Ntaganda for rape and sexual slavery as a crime against humanity and as a war crime. The future will show to what extent the judges of the ICC will incorporate the continuous effects of the harms, caused by the sexual and gender-based crimes for which a person before the ICC is (finally) convicted.

[29] https://www.trustfundforvictims.org/en.
[30] According to Rule 98(5) of the Rules of Procedure and Evidence.

Gender-Sensitive Jurisprudence?

Does the International Criminal Court use its designed tools in an effective way to make an end to gender injustices? The results of the research demonstrate that the jurisprudence of the ICC doesn't explore the limits of its institutional design, *i.e.* the Rome Statute, compared with the jurisprudence of the ICTR or the ICTY. It is a major disappointment that the submitted evidence doesn't lead to convictions despite the multiple institutional gender-sensitive measures that aim at mitigating the evidentiary issues, especially with regards to sexual and gender-based crimes. This is related to the formality of the institutional framework. Although the judges of the ICC dispose of a broad margin of appreciation, they prefer strict instead of flexible interpretations. Various types of criminal behaviour are not included within the scope of charged crimes. Remember the Lubanga case in which sexual and gender-based violence was not targeted as part of the crimes of enlistment, conscription and active use of children in hostilities. Moreover, the judges favour a rigid operationalisation of the elements of responsibility. The subsequent lack of flexibility caused a renunciation of systematic sexual and gender-based violence. These missed opportunities made that the jurisprudence of the ICC closed the door for the most gender-inclusive mandate possible, considering the limitations of the Rome Statute. However, there are also positive notes. Especially the crimes of rape and sexual slavery are assessed in their social context, and the TFV is able to consider particularly the suffering(s) of victims of sexual and gender-based violence, albeit extrajudicially.

Rethinking the Underlying Ideas

This research started from a thematical institutional approach, which centred around the jurisprudence of the ICC in light of its legal framework. Nonetheless, to counterbalance this approach, the last part of the article takes a critical stance and questions the presumptions that underlined the research. The design of the Rome Statute, and (international) law in general, are a product of a political process, which incorporates systemic inequalities. Although, in my opinion, state-centric approaches to international politics are not able to grasp the different peculiarities of our global world order, MacKinnon (1983) and Charlesworth et al. (1991) provide us with some fundamental remarks on the relationship between international law and the sociology of gender. To go a little more in depth, it is important that we review the idea that law is autonomous of society, because it is not (Charlesworth et al., 1991, p. 613). Law is dialectically related to the society in which it exists. It is influenced by societal dynamics, but it is also a means in which changes are received with social approval. Let this be the starting point of every author who aims at reflecting on (international) law. Only from there on are we capable to see the ways in which the law mirrors contingent power relations and perspectives (Baer, 2008, pg. 3; Charlesworth et al., 1991, p. 621; MacKinnon, 1983, p. 645; Ogg & Rimmer, 2019, p. 5), which benefits the hegemonic male.[31]

One of the most significant distinctions within (international) law is that of the public versus the private sphere (Charlesworth et al., 1991). The private is what concerns individuals; the public is what concerns the common good. However, in history, several sexual and gender-based crimes needed to be turned into something political so that they could be qualified as related to the common good, while everyday sufferings because of structural sexual and gender-based violence and inequality were – and still are – not visible (Copelon, 2000, pp. 223, 239-240; see also Enloe, 2014, pp. 160-161; Mouthaan, 2011, p. 777). As a consequence, rape and sexual slavery, amongst others, are internationally penalised through the Rome Statute, while they remain 'exceptional' events. The sexual and gender-based crimes that can be brought before the ICC have to be "part of a widespread or systematic attack directed against a civilian population"[32] or have to be committed in the context of a national or international armed conflict.[33] Marital rape, genital mutilation, and homophobic violence are examples of crimes on a massive scale that don't fall within the scope of the internationally formally recognised sexual and gender-based crimes. But how would justice look like if the latter crimes could be addressed before a court? Would that justice then be bizarre, gender-sensitive, or simply just? Nonetheless, the law is portrayed as universal, objective, and rational, as opposed to particular, subjective, and emotional (Baer, 2008, p. 3; Charlesworth et al., 1991, p. 627). This representation already has a bias in favour of what is generally referred to as the 'normal man', who embodies the former characteristics. Through gender (legal) methodology, "an intuitive/emotional, holistic, non-invasive, concrete, and

[31] This concept is developed by R. Connell (1982) and reformulated by Connell & Messerschmidt (2005).
[32] Crimes against humanities need to meet this requirement, amongst others (Article 7 of the Rome Statute).
[33] War crimes need to meet this requirement, amongst others (Article 8 of the Rome Statute).

contextualized epistemology of connection" (Baer, 2008, p. 7), an alternative can be developed of what counts as 'good law' (Fineman, 2005). Under the motto "the international is personal" (Enloe, 2014), it has to be remarked that international actions, of which international law is just one aspect, are experienced in a different way according to one's gender and amongst persons with the same gender identity.

By only focusing on the designed tools of the Rome Statute, one tends to forget the previous debates, which suddenly don't remain in the background anymore. The legal framework of the Rome Statute should not be normalised, since the power relations and perspectives on gender at the time of its drafting are all-pervasive. The works which discussed the Rome Statute and the emergence of the International Criminal Court continue to be crucial for the development of a more gender-sensitive jurisprudence, because, based on the liberal and radical legal feminists, I too believe that the law can be a vehicle for justice. This ideal of justice is to be achieved through the acknowledgment that the law has a differential impact on different persons. Furthermore, every single person has their own approach *vis-à-vis* justice. So, what if from now on the law would be regarded as particular, subjective, and emotional?

My research is undeniably influenced by my own ideas and embodiments with respect to gender (Chisholm & Tidy, 2017, p. 100). It is also limited by its method (*supra*). Therefore, I consider my research to be one possible gender-sensitive reflection on the jurisprudence of the ICC. Moreover, gender is but one ground to assess the jurisprudence of the ICC. Echoing preceding authors, intersectional dynamics need to be a source of inspiration for further research (Crenshaw, 1989; Harris, 1990). How the interrelation between gender and ethnicity (see Buss, 2007, for more) or gender and religion is addressed before the ICC still has to be studied in-depth, amongst other things. While the Rome Statute is celebrated as a milestone in international criminal law, it still doesn't address every sexual and gender-related issue. Let this research thus be one step towards a better knowledge on the modes in which the ICC is (not) achieving gender justice, whether it be from a reflexive institutional point of view or not.

Conclusion

This article started with an overview of the evolution within international criminal jurisprudence, which preceded the creation of the International Criminal Court. The invisibility of particular sexual and gender-based crimes was steadily being eliminated, although not all sexual and gender-based violence has been addressed. Since the end of World War II, steps have been made towards a formal recognition of several sexual and gender-based crimes. Significant progress was made through the jurisprudence of the ICTR and the ICTY, which pushed the jurisprudence of the respective courts to the limits of their institutional designs. This evolution culminated in the establishment of a permanent international criminal court, the ICC, whose legal framework has been intensely debated.

Yet, how the (actors of the) ICC employ the legal tools of the Rome Statute has been underexposed. The research that formed the basis of this article aimed at changing this situation. The jurisprudence of the ICC was explored on different levels to provide an evaluation of the judicial truth, the politics of discretion to which the judges of the ICC give shape, and the reparations proceedings. Whilst the Rome Statute was a milestone in international criminal law, the jurisprudence of the ICC isn't. There are a lot of neglected opportunities despite the generous margins of appreciation which allowed the Court to broaden its mandate with regard to sexual and gender-based crimes. Flexibility is needed to broaden the scope of the charged crimes and the judicially established elements of responsibility. Accordingly, more perpetrators can be convicted for sexual and gender-based crimes. However, it is very much welcomed that the jurisprudence of the ICC takes into account the societal aspects of sexual and gender-based crimes.

The need for an on-going debate within feminist legal theory on international criminal law remains all the more present in view of the many ways in which the legal framework of the Rome Statute can be improved. The struggle for a gender-inclusive society has not ended yet. This is demonstrated by the fundamental remarks different academics make on (international) law, which is still biased on a structural level. Subsequently, gender-sensitive jurisprudence starts with a critical reversal of the contemporary (international) law by acknowledging the concrete differentiated impact the law has on each individual, whether they have the same gender identity or not. Profound reflections may encourage essential changes so that gender justice will no longer be just an ideal.

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