CONTINUITY AND CHANGE: PROSECUTION OF SEXUAL VIOLENCE IN THE INTERNATIONAL CRIMINAL COURT

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List of Acronyms

CAR	Central African Republic
DRC	Democratic Republic of Congo
ICC	International Criminal Court
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IMTFE	International Military Tribunal of the Far East
OTP	Office of the Prosecutor
WIGJ	Women's Initiative for Gender Justice
WWII	World War Two

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Abstract

This research seeks to explore gender legacies of International Criminal Law and how these can be diluted or strengthened according to context. The inclusion of sexual violence against women and girls in ICC cases, like the Thomas Lubanga Dyilo and Jean-Pierre Bemba Gombo cases analysed in this study, may depend on a number of contextual factors. Three key factors were found to matter most: personality and personal decisions of the Prosecutor; institutional changes inside the ICC, and pressures from NGOs. All three were found to be relevant in the enhanced prioritisation of sexual violence crimes in the case of Bemba compared with their exclusion from the Lubanga case. In exploring why sexual violence was first excluded and then included in the prosecution and the trials of the ICC, this study interrogates institutional and contingent factors that influence decision-making at the investigation, charging, trial, sentencing and judgement stages of international criminal trials at the ICC. By tracing institution processes and their 'nestedness' in past legacies, the exclusion and subsequent inclusion of sexual violence in ICC trials, the question of inclusion and exclusion was found to be more nuanced than expected, with elements of inclusion and exclusion of sexual violence in both the Lubanga and Bemba cases.

Relevance to Development Studies

As a student of social justice perspective, I am prompted to interrogate some of the gender justice implications of decisions made by those responsible for enacting International Criminal Law at the ICC, taking two contrasting examples – the Thomas Lubanga Dyilo case and the contrasting Jean-Pierre Bemba case. In light of this, the study is in a field that is more and more directly relevant to development studies – transitional criminal justice. The aim is to build onto an existing body of knowledge around the inclusions and exclusions of justice proceedings, and to explore (non)prosecution of wartime sexual violence - in the ICC.

Keywords

Sexual violence, ICC, Prosecutor, Lubanga, Bemba, Institutional, Personal and contingent influences on inclusion/exclusion decisions.

Chapter 1: Introduction, nature of the problem

> 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. We will spare no effort to bring accountability for these crimes and in so doing, contribute to deterring the commission of such heinous crimes in the future. As a matter of policy, the Office will systematically include relevant charges in its cases on the basis of evidence of criminality. ICC Prosecutor Fatou Bensouda, ICC Press Release: Policy Paper (5th June 2014)

1.0 Background

The creation of the International Criminal Court (ICC) through the coming into force of the Rome Statute on 1st July 2002, marked a coming of age for prosecution of a wide range of wartime crimes at the international level, including crimes of sexual violence. The preamble of the Rome Statute provides for the purposes of the ICC, which include putting "an end to impunity" for "the most serious crimes of concern to the international community as a whole." Namely genocide[1], crimes against humanity[2] and war crimes[3] (Preamble: Rome Statute). Unlike the forerunner statutes establishing the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the Rome Statute has been lauded as one of the most progressive international statutes that enumerates a broad range of sexual violence crimes (Copelon 2000:220)).

This broader enumeration brought hope to victims of sexual violence crimes as well as feminist organisations that were very instrumental in negotiating for the inclusion of wide-ranging sexual violence crimes in the Rome Statute as well as reasonable gender representation in the organs of the court during the Preparatory Commission sessions. These sessions were spearheaded by the Women's Caucus for Gender Justice (Bedont and Martinez 1999: 66).

Admittedly, the process of gendering the Rome Statute was riddled with contestations which emanated from different constituents involved in designing the Rome Statute. The negotiation process was akin to the metaphorical

[1]Rome Statute of the International Criminal Court, Article 6
[2]Rome Statute of the International Criminal Court, Article 7
[3]Rome Statute of the International Criminal Court, Article 8

"messiness" suggested by historical institutionalists to explain the controversies that characterise institutional design processes (Lowndes and Roberts 2013: 172).

One of the most contentious gender issue during the Rome negotiations, was the inclusion of enforced pregnancy as a crime. This contestation emanated specifically from some Arab states and conservative pro-life religious representatives who were of the opinion that the recognition of enforced pregnancy as a crime under the Rome Statute would compel states to permit abortion in national legislation (Glasius 2002: 156, Bedont and Martinez 1999:65). Moreover, the definition of gender was also controversial with contenders from the catholic factions alleging that the proposed broad definition of gender would result in the official recognition of homosexuals as sexual victims and perpetrators (Glasius 2002: 157, Bedont and Martinez 1999: 69).

Nevertheless, the controversies that surrounded the inscribing of gender provisions in the Rome Statute did not hinder the subsequent recognition of a wide range of sexual violence crimes in the Statute which was adopted in July 1998 by 120 States (Glasius 2002: 157). Indeed, feminist actors hoped that the new formal rules conferred on the ICC by the Rome Statute were capable of curing the longstanding gender bias of International Criminal Law that trivialised wartime sexual violence against women; because it was viewed as an opportunistic crime, a by-product of war and an honour crime (Copelon 2000, Askin 2013, Chinkin and Charlesworth 2000, Chappell 2016).

However, due to the contentious process of gendering the Rome Statute, feminist actors remained aware that 'hangovers' of International Criminal Law would potentially constrain the realisation of gender justice outcomes by the ICC. History had taught them that the codification of wartime sexual violence as a crime in International Criminal Law did not guarantee prosecution of sexual violence. For instance, the experience of the Yugoslav and Rwandan Tribunals, especially during their earlier years, revealed a reluctance to investigate and prosecute sexual violence crimes because they were deemed less grave than other atrocities committed during war. It was only after relentless vigilance by feminist advocacy actors and judges that prosecution of sexual violence begun to be prioritised in the Tribunals (Copelon 2000, Sellers 2009, Kuo 2002, Jarvis and Vigneswaran 2016, Askin 2013, Chappell 2016).

Literature suggests that the decisions to prosecute or not prosecute sexual violence crimes in the Tribunals, was influenced to a large extent by embedded gendered attitudes towards conflict related sexual violence against women. Consequently, these attitudes undermined the legal status of these crimes in International Criminal Law (Jarvis and Vigneswaran 2016, Sellers 2009, Kuo 200, Copelon 2002, Askin 2013).

Valerie Oosterveld (2005), is of the view that the ICC would likely prioritise prosecution of sexual violence crimes owing to learning from the ICTR and the ICTY. This view was particularly reinforced by the fact that the inclusion of a wide range of sexual violence crimes into the Rome Statute was partly because of the jurisprudence of the ICTY and the ICTR (Oosterveld 2005:121, Hayes 2015:802). The scepticism of most feminist actors is captured in the following words of Janet Halley:

> "…by themselves, these rules do nothing to change the meaning of IHL[4] and ICL[5], their enforcement, or the level and types of violence in which people engage. The degree to which one very specific set of feminists were able to inscribe into the Rome Statute legal language compatible with their very specific ideological commitments is quite remarkable. But whether the ICC will understand these words in a feminist way, and certainly whether the world will begin looking more like one envisioned by feminist reformers, are entirely distinct questions" (2008:121).

Arguably, the sentiments of Janet Halley, which were echoed by many gender justice feminists, gave a foretaste of ensuing omissions in the prosecution of sexual violence at the ICC, especially in the first trial, the trial of Thomas Lubanga Dyilo. Nonetheless, feminist actors remained hopeful that the International Criminal Court adjudications would act as a deterrent to the systematic practice of wartime rape and other forms of conflict related sexual violence. The trial of John-Pierre Bemba, was regarded as a milestone in the ICC for being the first trial in the ICC to secure a conviction for crimes of sexual violence (WIGJ 2016).

[4]International Humanitarian Law

[5]International Criminal Law

1.1 Purpose of the Study

This paper seeks to investigate the reasons behind the prioritisation or lack of prioritisation of wartime sexual violence crimes in the Lubanga and Bemba trials.

The paper does not intend to provide a legal analysis for the exclusion of sexual violence from the selected cases. Instead of concentrating on the legal constraints, that influenced the exclusion and inclusion of sexual violence, it will look at the institutional factors particularly how institutional actors, historical factors and contingent factors shaped the decision making, and influenced strategic choices of the court in the selected two cases.

1.2 Key Research Questions

How did institutional, personal and contingent influences lead to the exclusion and inclusion of sexual crimes from the Lubanga and Bemba case, prosecuted at the ICC?

The main question helps to illuminate a plausible paradox. On the one hand, the coming into force of the Rome Statute- which enumerates a wide range of sexual violence crimes and brought with it hope for justice for the forgotten victims of sexual violence crimes. On the other hand, a reality that was emblematic of historical prosecutions of wartime sexual violence under International Criminal Law that trivialised and overlooked the prosecution of sexual violence crimes thereby threatening to dilute the gender gains of the Rome Statute.

1.3 Sub questions

1. To what extent did prosecution of sexual crimes in the ICTY and ICTR influence how to prosecute war crimes in the ICC, in relation to sexual violence?

   This question is useful to trace the historical trends of prosecution of wartime sexual violence under International Criminal Law

2. What internal, external and contingent influences affected the prosecution process and the trial in the Lubanga and Bemba cases, in relation to sexual violence?

   This question seeks to unearth the internal institutional dynamics that may have potentially influenced the inclusion and exclusion of sexual violence in the Lubanga and Bemba cases. These research questions guided the selection and

collection of current scholarship on the narrow themes of my inquiry and set the bounds of materials to include and exclude in a systematic review.

1.4 Organisation of the Paper

In the sections that follow; Chapter 2 will provide a review of the theoretical and conceptual scholarship on the feminist institutionalism theory. This theory is mainly concerned with assessing the gendered nature of institutions. The emphasis will be on drawing out key theoretical concepts developed by feminist institutionalist scholars in order to make sense of the evolution of international prosecutions of wartime sexual violence.

Having defined the theoretical and conceptual parameters, Chapter 3 recounts the evolution of international prosecutions of wartime sexual violence during different historical times in order to situate the International Criminal Court within the evolution of International Criminal Law. Chapter 4 will set out and operationalise the theoretical framework that will be used for my own investigation. In this chapter, I will also describe the research design and data generation strategies as well as present an analysis framework for analysing key findings.

Chapter 5 will consist of the key findings of the Lubanga trial and more specifically tracing the non-prioritisation of sexual violence in this case through the analytical lens of the feminist institutionalism theory. Chapter 6 will explore the prioritisation of sexual violence charges in the Bemba trial based on the conceptual underpinning of feminist institutionalism theory. Chapter 7 will provide a summary and conclusion.

Chapter 2: Feminist Institutionalism Theory

2.0 Introduction

In order to analyse institutional and contingent factors that led to the non-prioritisation of sexual violence in the Lubanga trial and its subsequent prioritisation in the Bemba trial, this paper relies on concepts developed under feminist institutionalism theory. This theory will be used to explore the analytical relationship between institutions (formal and informal), institutional nestedness, institutional change and the institutional outcomes of continuity and change in the selected cases. I will also discuss prosecution discretion within the ICC under this section because it is a useful concept to understand relations of power that affect institutional outcomes in the ICC.

2.1 Feminist institutionalism

Feminist institutional theory, which is a variant of the new institutionalist theory, alludes to the common agreement (among new institutionalists) that institutions-formal and informal- matter; because they structure institutions as well as enable and constrain behaviour of institutional actors (Chappell 2016:10, Chappell and Waylen 2013:599). What feminist institutionalism contributes to new institutionalism is a more nuanced understanding of institutional continuity and change by interrogating the gendered nature of institutions (Mackay 2014:549, Kenny 2014:679, Mackay 2011:181).

The arguments of feminist institutionalists are founded upon the assumption that gender lies at the heart of institutional 'rules of the game' (Chappell 2016, Waylen 2009, Krook and Mackay 2011). Further literature suggests that feminist institutionalists generally use concepts developed by older variants of new institutionalism-historical, discursive, sociological and rational choice to examine and analyse the gendered nature of institutions, including institutional design, institutional outcomes, and institutional change (Chappell 2016, Chappell and Waylen 2013, Mackay 2011, Kenny 2014).

The common agreement among all new institutionalists it that institutions enable and constrain behaviour of actors, however, their divergence lies in their

"understanding of the nature of the beings whose action or behaviour is being structured" (Steinmo 2008:126).

Feminist institutionalists, who use the concepts developed under historical institutionalism to analyse institutions, are concerned with how institutions persist and change over time. They premise their arguments on the notion that institutions are lasting legacies embedded in particular contexts. Further, they assert that institutions play a dual role of constraining and enabling behaviour of actors. Institutions constrain behaviour since they delineate the parameters - through the formal rules- within which actors can exercise agency. However, this structuralist view of institutions is not absolute because actors are driven by their personal interests which influence institutional outcomes (Waylen 2009: 5, Thelen and Steinmo, 1992 as cited in Mackay et al 2010:575). This approach is most useful for this study which is concerned with interrogating the persistence of gender legacies of International Criminal Law.

2.2 Formal and Informal Rules

Institutions are operationalized through formal and informal rules which co-exist in institutions "to rule out some actions and to rule in others" (Ostrom 2005:18). While formal rules are "consciously designed and clearly specified" (Lowndes 2005:292), such as the Rome Statute, informal rules are "socially shared rules, usually unwritten, that are created, communicated and enforced outside of officially sanctioned channels" (Gretchen and Levitsky 2004:727). A similar view is held by Azari and Smith (2012) who owe the existence of informal institutions to the presence of "shared expectations [that fall] outside the official rules of the game [and] structure political behaviour" (2012:39).

Feminist institutionalist theorists are especially keen to examine the gendered nature of informal rules because it enables them to understand why even the most well designed formal rules do not produce gender just outcomes (Chappell and Waylen 2013:612, Chappell 2016: 5, Kenny 2014:681). This is because as William Riker (1995) asserts, "in any new institution one should expect to see hangovers from the past" (1995:130). For instance, examining the gendered nature of International Criminal Law provides some insight into why the gendered formal rules which were codified in the ICTY and ICTR did not stop the operation of gendered informal rules that characterised International

Criminal Law that overlooked and trivialised wartime sexual violence and consequently led to the omission of sexual violence prosecutions in certain instances.

Fiona Mackay (2014), reasons that even when institutions are formed by conscious design, one of the limitations of institutional design is that new institutions often have no ability to contain the embeddedness of informal rules. This is because "new institutions are shaped inevitably by 'legacies of the past' including material legacies, 'habits of the hearts and 'frames of mind'…" (Mackay 2014:6). For instance, Louise Chappell (2014) conducted a study on the ICC and demonstrated how gender bias of international law hampered the recognition of women's experiences during war in the Lubanga trial (2014: 193).

Over and above informal institutions being embedded in institutions, they are also not easy to trace or study because of their hidden nature (Chappell and Waylen 2013: 613). Gretchen and Levitsky (2004) offered a possible solution for easier location of informal rules within institutions by suggesting that informal rules "could encompass virtually all behavior that is not accounted for by the written-down rules." (2004:727). However, they place a disclaimer on this broad conceptualisation by asserting that informal rules are not synonymous to "weak institutions", "informal behavioural irregularities" and "culture" (Gretchen and Levitsky 2004:727).

Further, the interaction between formal and informal rules has been a key focus of feminist institutionalists because they assert this interaction results in "myriad, complex and often unexpected effects; whereas some informal rules compete with and subvert democratic institutions, others complement and even help sustain them" (Helmke and Levistky 2006, 3). This interaction affects political outcomes (Gretchen and Levitsky 2004, 730, Azari and Smith 2012:37). It has been argued that informal rules may interact with formal rules in a complementary manner meaning that the informal rules operate to 'fill in the gaps' or silences of the formal rules. This typology is useful for assessing the use of informal rules when the formal rules such as codified laws are ambiguous. In contrast, informal rules can interact with formal rules to produce conflicting outcomes meaning that informal rules may operate to "structure actors' incentives in ways that are incompatible with the formal rules" (Gretchen and Levitsky 2004, 730).

Gender and rules interact in a number of ways. According to Louise Chappell (2003), gender and rules interact in three ways which include; 'rules about gender'- which distinguish and structure the behaviour of male and female actors; rules which may have gendered effects and actors who 'work with rules'. The latter interaction is of importance for this research paper because it provides a useful perspective to examine how gender norms, values, beliefs and attitudes held by actors "impact on the ways in which [institutional actors] create, interpret, communicate, enforce, shape and comply with rules" (Lowndes and Roberts 2013 as cited in Chappell 2003:606).

Therefore, in relation to this research paper, the concept of formal and informal rules provides a useful tool to uncover the gender legacies of International Criminal Law that operate as informal rules and potentially influenced the exclusion of sexual violence in the indictment against Lubanga as well as selective change in the Bemba trial.

2.3 Institutional Nestedness

Situating institutions(formal and informal rules) in their temporal context through tracing historical institutional processes that play out as formal and informal rules, is especially crucial for 'new' institutions because according to feminist institutionalists it helps in "situating particular moments of institutional design and restructuring within wider long-term processes [and] help us better understand how contemporary outcomes are shaped by and "nested" within legacies of the past, opening up some opportunities for change but perhaps also closing off others" (Mackay 2009; Chappell 2011; Kenny 2013 as cited in Kenny 2014:683).

Pierson (2004) further suggests that researchers ought to situate the institution under examination in a given historical context in order to trace how institutional processes evolve over a temporal period and consequently give rise to continuity and change (2004:12). According to Chappell (2014), the emerging focus of feminist institutionalists on the intersection between gender, newness and gendered outcomes "is prompted by a curiosity about whether a temporal element makes any difference to the way agents and structures interact to produce outcomes" (Chappell 2014:573).

"Nested newness" is a metaphor used to capture the ways in which the new is embedded in time, sequence, and its institutional environment" (Mackay

2014:552). This concept as used by feminist institutionalist scholars seeks to present institutions as gendered and draws insights from theoretical underpinnings of historical intuitionalists. Fiona Mackay, who developed this concept describes nested newness as:

> "New formal institutions even those that seem to represent a break with the status quo, are neither blank slates nor free floating. Rather, they are indelibly marked by past institutional legacies and by initial and ongoing interactions with already existing institutions (formal structures and rules, informal practices, norms and ideas) within which they are 'nested and interconnected" (Mackay 2014:3).

Further, the concept of nested newness enables feminist institutionalists to explore reasons why codified gender rules are susceptible to regress even in new institutions that are seemingly gender neutral (Mackay 2014:550). Mackay further suggests that the concept helps to locate the gendered institutional context within which new institutions operate through locating mechanisms by which institutional innovation is resisted and accepted. Two concepts are proposed to explain gendered institutional resistance: "remembering the old and forgetting the new" and the "liability of newness" (Mackay 2014:551).

Mackay (2014) explains the concept of 'remembering the old' as the tendency by new institutions to fall back on informal rules that are detrimental to the achievement of gender just outcomes because they privilege men's concerns over women's concerns (2014:558). On the other hand, Mackay uses the term of 'forgetting the new' to refer to the pattern of actors in new institutions who deliberately resist the new and explains that:

> In some instances, there has been active resistance and explicit attempts to reverse or abolish nascent gender reforms … But it may also take the form of institutional amnesia and political drift, whereby new rules are forgotten, new actors marginalized, and new ideas, policies and practices are discarded or neglected in broader processes (Mackay 2014:556).

Moreover, gendered institutional resistance is attributable to the "liability of newness", a concept developed by Arthur Stinchcombe. The concept suggests that the survival of a new institution is pegged on its ability to overcome vulnerabilities-liability of newness- that challenge its legitimacy (Stinchcombe 1965: 155). He further posits that the death of new institutions is often caused by the fact that they do not have a "learning experience. Thus, he argues that,

> "New organizations, especially new types of organizations generally involve new roles, which have to be learned; […] The process of inventing new roles, the determination of their mutual relations and of structuring the field of rewards and sanctions so as to get the maximum performance, have high costs in time, worry, conflict, and temporary inefficiency" (Stinchcombe 1965:148).

Therefore, in the institutional quest for legitimacy, institutional actors have to "seek to achieve legitimacy both internally by means of norms of appropriateness and externally by means of the endorsement of power holders in the wider environment" (Mackay 2014: 556).

This concept is useful for this study because it helps to make sense of the embeddedness and persistence of gender legacies in International Criminal Law.

2.4 Institutional Change

Feminist institutionalism provides useful insights on gendered institutional change and suggest that "dynamics of institutional power relations, resistance, reproduction, continuity and change need to be filtered through a gendered lens" (Mackay 2014, Chappell 2016 and Kenny 2014).

For new institutionalists, institutions are generally stable. However, perceptions of institutional change vary among historical feminist institutionalists. For some, change results from exogeneous shocks at critical junctures which are essentially described as "periods of contingency during which the usual constraints on action are lifted or eased". These exogeneous shocks result in drastic institutional change (Capoccia and Kelemen 2007 as cited in Mahoney and Thelen 2010:7, Wolfgang and Thelen 2005:5).

Other feminist institutionalists who use concepts under historical institutionalism, attribute institutional change to gradual institutional change which provides a less deterministic explanation for institutional change (Mahoney and Thelen 2010:4, Wolfgang and Thelen 2005:5). The basis for this conceptualisation is attributed to endogenous change that may take the form of gradual incremental change. This is because "institutions often change in gradual ways over time" (Mahoney and Thelen 2010:1). Endogenous change may result from ambiguities in the formal rules which in the view of Mahoney and Thelen are permanent features of institutions. The permanency of ambiguities is reflected in actions of actors who take advantage of ambiguities in formal rules to advance their self-interests (Mahoney and Thelen 2010: 11).

Therefore, "ambiguities provide critical openings for creativity and agency" (Sheingate 2010:169). Further to this, endogenous gradual change may occur when rules are broadly interpreted by the actors mandated to enforce rules. This understanding helps explain how "incremental change in gender justice outcomes is a result of "gaps" or "soft spots" between the rule and its interpretation or the rule and its enforcement." (Mahoney and Thelen 2010:14).

Based on the existence of these ambiguities, feminist institutional scholars also suggest that the design phase of new institutions presents a 'permissive' opportunity for change agents to bring in new actors, new norms and values into new institutions (Pierson 2004:13). Similarly, Fiona Mackay (2014) suggests that feminist change agents play a key role during institutional creation because they lobby for the 'locking in' of gender justice elements in order to counter "historic gender bias and gendered power imbalances found in most traditional political institutions" (Mackay 2014: 549). This assertion holds true in the negotiation process for the inclusion of a wide range of sexual violence crimes into the Rome Statute, where feminist change agents under the umbrella body of the Women's Caucus for Gender Justice, strategically mobilised for the codification of a wide range of sexual violence crimes.

However, feminist actors involved in gendering formal rules ought to engage in continuous vigilance to ensure that the gender gains codified in formal rules are continuously recognised and utilised beyond the design phase. This is because if the implementation of these rules is not monitored constantly, then the gender gains would end up falling through the cracks (Waylen 2009:10).

The usefulness of this concept for this research paper is that it offers a plausible explanation for the incremental change in prosecution of sexual violence in the ICC by tracing the endogenous changes within the ICC that resulted in enhanced prioritisation of sexual violence crimes in the Bemba trial as opposed to the Lubanga trial.

The choice to select this conceptual framework, was informed by two academics that have applied the feminist institutionalist approach to interrogate the prosecution of sexual violence by the ICC. Louise Chappell (2014) used it to assess conflicting institutional rules that hampered attainment of gender justice in the Lubanga trial while Rosemary Grey (2015) used a feminist institutionalist lens to examine historical legacies and new opportunities influencing the prosecution of sexual violence in the ICC. I will also build on this approach by

conducting an in-depth analysis of two cases-Bemba and Lubanga- to highlight institutional continuity and change in the prosecution of sexual violence cases in the ICC.

2.5 Prosecutorial Discretion in the ICC

Prosecutors, who are key institutional actors in the international criminal justice system, effectuate gender legacies. This actor enjoys autonomy through prosecutorial discretion.

Examining prosecutorial discretion, enables us to locate the political context within which the prosecutor operates. The Prosecutor is a very critical actor of the ICC because he or she provides the "key to the [courts] actions" (Cassese A. :1994 as cited in Danner 2003:512). Indeed the "Prosecutor sits at a critical juncture in the structure of the Court, where the pressures of law and politics converge." (Danner 2003:510).

The Prosecutor of the ICC enjoys prosecutorial discretion by virtue of the fact that the OTP is an independent organ of the court that investigates and prosecutes individuals alleged to have committed crimes of the greatest concern to the international community (Article 34: Rome Statute). This discretion confers significant power on the Prosecutor to make charging decisions.

However, such decisions by the Prosecutor must take into consideration the "gravity of the crime", "the interests of victims and the "interests of justice" (Article 53 (1)(c): Rome Statute). These considerations notwithstanding, prosecutorial discretion is not absolute. Several mechanisms of accountability constrain the prosecutor's autonomy. The official mechanisms include oversight by the Trial Chamber and the UN Security Council. The latter external actor has significant influence on prosecutorial discretion since the Rome Statute empowers it to defer a case under investigation or prosecution (Article 16: Rome Statute). The Trial Chamber exercises oversight over prosecution discretion through Article 6 (7) (c) of the Rome Statute that allows it to request an amendment of the charge based on the evidence admitted by the Prosecutor. Additionally, Article 55 of the Rome Statute confers authority on the Pre-Trial and Trial chambers to recharacterize charges based on the evidence adduced.

NGOs drive the non-official accountability mechanism. The accountability owed to these actors by the Prosecutor is hinged on legitimacy. Therefore, "through their reactions to the Prosecutor's discretionary decisions—especially

by their choices whether or not to cooperate with the Prosecutor—these entities have the ability to call him "to account" for his discretionary acts" (Danner 20005:511).

The ICC being a new institution operates in a fragile environment, where legitimacy of external actors is crucial for its 'survival' (Chappell 2016:10). NGOs (WIGJ, HRW, IBA) monitoring the compliance of the ICC in implementing gender justice provisions of the Rome Statute have been keen to mobilise for accountability from the Prosecution through formal and informal strategies. For instance, the WIGJ has utilised the formal rules in the Rome Statute by filing *amicus curiae*[6] briefs. Additionally, it has also used informal channels including writing letters to the Prosecution; holding meetings with the prosecution and documenting progress of implementation of gender justice provisions in gender report cards (WIGJ 2012). All these strategies have given rise to an awareness by the prosecution that choices made in exercise of prosecutorial discretion, must take into consideration concerns of feminist actors because lack of these critical actors support potentially undermines the legitimacy of the court (Bensouda 2014:549).

[6] An impartial adviser to a court of law in a case of public interest

Chapter 3: Genealogy: prosecuting wartime sexual violence

3.0 Introduction

This chapter recounts the evolution of international prosecutions of wartime sexual violence. I illuminate how sexual violence has been prosecuted under International Criminal Law during two historical periods in order to situate the International Criminal Court within the evolution of International Criminal Law. The first phase, is the period prior to establishment of the ad hoc tribunals of the ICTR and ICTY while the second phase is the period after establishment of the ad hoc tribunals.

3.1 Prior to ad hoc tribunals

Historical accounts of war depict sexual violence against women as "an inevitable by-product of war" (Askin 2013: 19), as if it were naturally associated with war. Consequently, this dominant perception resulted in excusing the presence of sexual violence thereby leading to its invisibilisation and trivialisation in international criminal justice proceedings of the WII tribunals (Haddad 2010:110). A similar view was held by Rhonda Copelon (2000), which is captured in the statement that:

> Before the 1990s, sexual violence in war was, with rare exception, largely invisible. if not trivialized, it was considered a private matter or justified as an inevitable by-product of war, the necessary reward for the fighting men (Copelon 2000: 220).

The criminalisation of wartime sexual violence can be traced back to the 18th century when the protection of women was based on the fact they were viewed as the property of men (Koenig, Lincoln and Groth 2011:3). However, this criminalisation has progressed significantly "from vague protections [in the 18th century] to protections that recognise conflict related sexual violence as war crimes, crimes against humanity and crimes of genocide [in the Rome Statute]" (Koenig, Lincoln and Groth 2011:6).

The 1949 Geneva Conventions laid the basic foundation for the development of legal classification of the crime of rape, however these norms

had little if any impact on the prosecution of sexual violence during war (Koenig, Lincoln and Groth 2011:6). This lack of impact is demonstrated in the deliberate exclusion of sexual violence crimes in the Nuremberg trials. The Nuremberg Charter, establishing the Nuremberg Tribunal in 1946 after the WWII, did not contain explicit provisions of sexual violence crimes. However, despite this omission in the charter, sexual violence emerged during the trials but was overlooked by the Tribunal (Mibenge 2013: 13). Plausible explanations for disregarding sexual violence crimes in the Nuremberg Tribunal have been advanced by feminist scholars.

Similarly, Beth Schaak (2009) attributes the omission of sexual violence crimes in prosecutions before the tribunal to the fact that sexual violence crimes are much more difficult to investigate in comparison to other crimes.

Just like the Nuremburg Charter, the International Military Tribunal of the Far East(IMFTE) Charter of 1945 did not contain any express provisions on sexual violence. This characterisation of sexual violence in the IMFTE reinforces the notion that wartime sexual violence

> was consistent with the legal status of women [who] were regarded as virtual property certainly they were without legal capacity-and rape committed by a member of the community was considered an injury to the male estate and to the community, but not to the woman (Niarchos 1995: 660).

Perhaps the view of women as belonging to men led to the IMFTE failing to prosecute Japanese soldiers for the wide spread sexual slavery of the Korean, Chinese, Filipino and Indonesian women commonly referred to as the 'comfort women' who provided forced sexual services to the Japanese army during WWII (Aoláin 2014:4).

3.2 After the ad hoc tribunals

50 years after the WWII tribunals, the contemporary war tribunals-ICTY and the ICTR- interrupted the historical impunity to conflict related sexual violence and history was made in the ICTY and the ICTR when rape was recognised as torture in the Mucić trial and as an instrument of genocide in the Akayesu trial respectively (Askin 2013:50). However, the process of prosecuting conflict related sexual violence in these tribunals was not foolproof from the influences of gender legacies that characterised the earlier historical period

discussed above. The struggles of surfacing sexual violence crimes in the tribunals will be discussed in the next subsections.

3.3 The ICTY Experience of Prosecution

In response to the Balkan war in the early 1990s the Security Council established the ICTY in 1993 through the Statute of the International Criminal Tribunal of the former Yugoslavia. The mandate of the court included holding perpetrators accountable for rape as a crime against humanity (Article 5) alongside many other war crimes. However, the reality of prosecution of conflict related sexual violence hung over this new institution and the implementers of the ICTY Statute remained aware that "even with the best of intentions, it would be difficult to dismantle centuries of inaction concerning wartime sexual violence and to travel a new more visionary path" (Jarvis and Salgado 2013:102).

Peggy Kuo (2002), a former prosecutor at the ICTY, expressed how certain investigators at the beginning of the work of the Tribunal failed to comprehend the gravity of sexual violence crimes that were committed during the Balkan war. Their trivialisation of the incidences of sexual violence is captured in the following statement:

> I've got ten dead bodies; do I have time for rape? That's not as important," or, "So a bunch of guys got riled up after a day of war, what's the big deal? (2002:311).

The process of surfacing sexual violence crimes in the ICTY, sometimes led to disagreements among colleagues working in the OTP office. For some, the claim for the recognition of sexual violence crimes was viewed as a 'personal problem of certain women and few committed men' (Sellers 2009:311). These contestations shed light on how the formal rules of sexual violence crimes which were codified in the ICTY Statute faced resistance from the gender legacies of International Criminal Law.

Additionally, sometimes sexual violence crimes were overlooked in the Tribunal due to competing interests of time constraints vis-a vis interests of justice. For instance, the initial indictment against Lukic lacked charges of sexual violence crimes despite the fact that there was sufficient evidence in the possession of the OTP. The position taken by Carla Del Ponte, who was the prosecutor who brought the initial charges was that her obligation to

expeditiously handle the work of the OTP within the time mandated by the UN Security Council prevented her from adding sexual violence charges to the Lukic indictment. In her opinion, including sexual violence charges would delay the trial further (Sellers 2009:19).

In June 2016, ICTY Prosecutors launched a book documenting insider perspective on the challenges of prosecution of sexual violence crimes in the ICTY (Book Launch: ICTY website). As documented, the investigators and prosecutors highlighted that the major misconception about wartime sexual violence especially in the earlier years of the tribunal, was the dominant assumption that "rape and similar acts are matters of honour rather than violent crimes" (Jarvis and Vigneswaran 2016:35). Therefore, the seriousness of sexual violence was discounted because it was seen as being 'opportunistic' and a 'personally motivated' crime (Jarvis and Vigneswaran 2016:37).

This perception influenced the omission of sexual violence in indictments especially when decisions on prioritisation of crimes had to be made considering the reality of time constraints and time limit. Therefore, there was a tendency of "disregarding sexual violence unless it [was]perceived to be large scale, systematic and/or committed pursuant to orders." (Jarvis and Vigneswaran 2016:38).

Further, another compounding factor identified in the book, that led to overlooking sexual violence crimes in the ICTY during its earlier years was the placement of crimes in hierarchical order. This trend was borrowed from national systems where crimes are categorised into serious and less serious crimes. Consequently, since sexual violence is not considered a serious crime in most national jurisdictions some staff members of the OTP 'viewed the prosecution of sexual violence as a 'soft or less prestigious assignment' (Jarvis and Vigneswaran 2016:37) and preferred investigating and prosecuting crimes of murder.

Despite the intermittent instances when the ICTY failed to prosecute sexual violence crimes, the Tribunal has been recognised as having made "real strides towards debunking some of the historical myths about wartime sexual violence (Jarvis and Salgado 2013:103). In fact, the court's records indicate that as of September 2016, a total of 78 individuals had been charged with sexual violence (ICTY website).

3.4 The ICTR Experience of Prosecution

Following the Rwandan genocide of 1994, the UN Security Council set up the ICTR to try individuals for the atrocities committed in Rwanda. It is estimated that a total of 354,440 women were sexually violated during the genocide (Kaitesi 2014:79). The statute establishing the Tribunal, made express provision for the prohibition of rape as a crime against humanity (Sellers 2009: 315).

However, despite the recognition of rape in the ICTR Statute the track record of the ICTR in prosecution of sexual violence crimes was rather disappointing in comparison to the ICTY. It is reported that only 70% of the trials before the court contained charges of rape, and for the 30% that included explicit charges, only 10% ended up in convictions and 20% ended up in acquittals (Nowrojee 2005:3).

During its first trial-the Akayesu trial, rape had been initially excluded in the indictment against the accused person. It was only added after evidence of sexual violence arose during trial and the subsequent intervention by feminist activists and Judge Navanethem Pillay (Oosterveld 2005: 122, Copelon 2000: 228). In fact, during the judgement, the Trial Chamber noted that the intervention by feminist actors was "indicative of public concern over the historical exclusion of rape and other forms of sexual violence from the investigation and prosecution of war crimes. The investigation and presentation of evidence relating to sexual violence is in the public interest" (ICTR-96-4-T page 171).

The practice of the ICTR demonstrates the crucial role played by the Prosecutor in surfacing sexual violence crimes. This is because prosecutorial discretion allows the Prosecutor to make decisions regarding what charges to bring against an accused person. In the ICTR there were differing outcomes of sexual violence prosecution during the tenures of different prosecutors (Nowrojee 2005:3, Oosterveld 2005:124).

Some Prosecutors included sexual violence as an integral part of their prosecution strategy while some just lacked the political will to prosecute sexual violence crimes. During the tenure of the first prosecutor, Richard Goldstone (1994-1996) sexual violence crimes were rarely included in indictments against perpetrators even though he made public pronouncements prior to commencement of the work of the tribunal that "sexual violence would be

punished" (Nowrojee 2005:9). The reason advanced by Goldstone for failing to investigate and prosecute sexual violence crimes was the presumption that African women would not be willing to speak out about their sexual violence experiences (Nowrojee 1996:95) and therefore it was not necessary for the Prosecution to "devote scarce resources to investigating rape because Rwandan women [would] not come forward to talk;" (Human Rights Watch 1996).

In contrast, during the three-year tenure of Louise Arbour, who took over office from Richard Goldstone, sexual violence crimes were deliberately and systematically included in new indictments. Old indictments which did not contain charges of sexual violence were also amended to include sexual violence.

When Carla Del Ponte assumed office in 1999, as the third prosecutor of the ICTR, there was a marked decrease in the number of indictments that contained sexual violence charges. It has been reported that Carla Del Ponte, disbanded the sexual assault investigations team which had been set up by the first prosecutor. This move further exacerbated the exclusion of prosecution of sexual violence crimes. (Nowrojee 2005: 10, Schaak 2009:7, Sellers 2009:319).

One of the cases that saw the ICTR face unprecedented backlash from feminist actors was the Cyangugu case. In this case, the Prosecutor failed to include sexual violence crimes in the indictment against the accused persons. In an effort to cure this omission, the Coalition for Women's Human Rights in Armed Conflict filed an *amicus curiae* brief through which they sought to implore the Chamber to exercise its supervisory mandate over the Prosecutor as provided under rule 25 of the ICTR, by directing the Prosecution to amend the indictment so as to include charges of sexual violence crimes (Schaak 2009:7).

This move by the feminist organisation was vehemently opposed by the Chambers and the Prosecution. As a result, the trial proceeded without any amendments to the formal accusation. Additionally, the case received more criticism because prior to the filing of the amicus curiae brief, the Prosecution had made an application to amend the indictment in order to include charges of rape. However, it is reported that Carla Del Ponte was called into a meeting by the Judges shortly after filing the application to amend charges and a few days after the meeting she announced that she would withdraw the charges of rape (Nowrojee 2005:15).

3.5 Gender Legacies of the Tribunals

It can be implied, from the literature on prosecution of wartime sexual violence in the WWII and *ad hoc* tribunals, that gender legacies of International Criminal Law operated to 'lock out' the prosecution of sexual violence crimes in several ways. The gender legacies identified in the previous subsections are:

- Sexual violence crimes are less serious than other crimes
- Women victims of sexual violence will be unwilling to give evidence during trial
- Sexual violence against women is an 'opportunistic' and 'personally motivated' crime rather than as systemic acts
- Sexual violence crimes are matters of honour rather than violent crimes
- Sexual violence crimes are harder to investigate and prosecute in comparison to other crimes

All these perceptions are indicative that even if the recognition of rape against women in International Criminal Law has evolved considerably from vague protections in the 18th Century to more nuanced protections in the 20th Century, broader codification of sexual violence crimes did not insulate the prosecutors and judges of the *ad hoc* tribunals from the long-held misconceptions that wartime rape of women was opportunistic, isolated, a by-product of war or less important in comparison to other crimes occurring during conflicts.

3.6 Conclusion

This Chapter traced the operation of gender legacies in the prosecution of wartime sexual violence in the WWII tribunals and the 1990's *adhoc* Tribunals of the ICTY and the ICTR. Ideally, the essence of this is so as to set the historical context within which the ICC is nested.

Chapter 4: Research methodology and generating data outputs

4.0 Introduction

To investigate the reasons behind the prioritisation or lack of prioritisation of wartime sexual violence crimes in the ICC, I will interrogate the cases of Lubanga and Bemba. On the one hand, the Lubanga case was selected for this research because sexual violence crimes were not prosecuted in this trial despite information that sexual violence characterised the conflict in DRC. On the other hand, the Bemba case was selected because it was the first trial in the ICC that resulted in a conviction for the crimes of sexual violence. Therefore, through these cases I seek to examine how institutional, personal and contingent influences lead to the inclusion or exclusion of wartime sexual crimes from prosecution in these two cases.

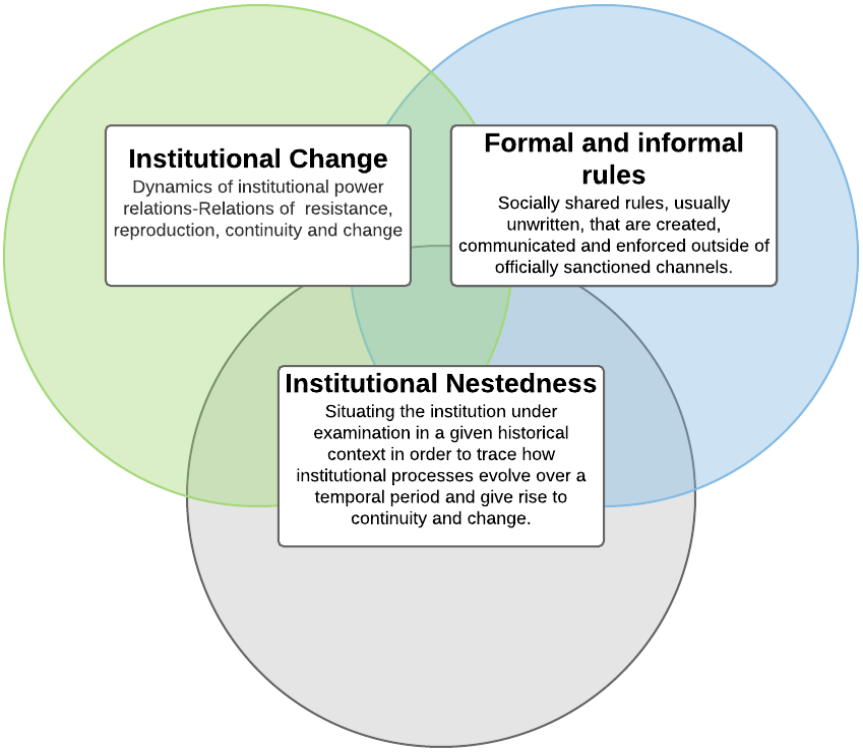
4.1 Operationalising an Analytical framework

Drawing from the literature discussed above, I am interested in tracing the interaction of informal rules that operate in institutional settings vis a vis the official pronouncements in texts/statutes that formally structure these institutions. I operationalised the theoretical discussions into a framework for analysis aimed at interrogating the gendered nature of institutions and evaluating the interactions between three major concepts as they apply to the two cases:

1. **Formal and informal rules:** Formal rules are defined by Lowndes (2005) as "consciously designed and clearly specified" (2005:292), while informal rules are "socially shared rules, usually unwritten, that are created, communicated and enforced outside of officially sanctioned channels" (Gretchen and Levitsky 2004:727).
2. **Institutional Nestedness:** Defined as "situate[ing] the institution under examination in a given historical context in order to trace how institutional processes evolve over a temporal period and consequently give rise to continuity and change" (Mackay 2009; Chappell 2011; Kenny 2013 as cited in Kenny 2014:683)

3. **Institutional change:** For some historical institutionalists, change results from exogenous shocks at critical junctures which are essentially described as "periods of contingency during which the usual constraints on action are lifted or eased" (Capoccia and Kelemen 2007 as cited in Mahoney and Thelen 2010:7, Wolfgang and Thelen 2005). For Mahoney and Thelen 2010:4, Wolfgang and Thelen 2005:5, institutional change is a gradual process caused by endogenous changes.

The interactions of my chosen variables for analysis can be visualised in the following analytical framework.



Source: Author's own construction inspired by Mackay, 2014; Chappell, 2011; Mahoney and Thelen 2010, Lowndes 2005.

4.2 Generating data inputs

To understand the enhanced prioritisation of sexual violence crimes in the case of Jean-Pierre Bemba, in contrast with their exclusion from the Lubanga case, this paper employs a qualitative case study methodology. Gerring (2007) describes a case study as "an intensive study of a single case (or a small set of cases) with an aim to generalize across a larger set of cases of the same general type" (2007:65).

The primary source material used for this research is official texts, available on the ICC website such as the court records and documentation including court transcripts, press statements by the OTP, court decisions and court filings for the two cases that are being explored in this research. These documents are the most credible sources that capture the charges against the accused persons, the contestations that occurred during the trials and the narrative on the facts of the case.

I further relied on other written sources including commentaries by NGOs- especially the Gender Report Cards published by the WIGJ- academics and expert blogs. I also obtained information from a documentary film about the ICC- 'The Reckoning: The Battle for the International Criminal Court'. This film documented the work of the ICC during its first years of operation and was a useful source of information to understand the choices made by the Prosecutor not to include sexual violence crimes in the Lubanga trial.

To triangulate my data and validate the written material, I conducted semi-structured in-person interviews with two key informants. They included, an official of the court, Ms Gloria Atiba, who is the head of the Gender and Children's Department in the Office of the Prosecutor and one interviewee from the ICTY who preferred not to be named. However, the latter had very useful insights regarding the treatment of sexual violence crimes in the ICTY where she has taken an active role in prosecuting wartime sexual violence. Her views will be incorporated as background material.

Additionally, I conducted semi-structured Skype interviews with three key informants. They included Ms Brigid Inder, who is the Executive Director of the Women's Initiative for Gender Justice, which is an organisation involved in monitoring its implementation of its gender justice mandate of the ICC;2 academics, Professor Louise Chappell, who has studied the politics of

prosecuting sexual violence in the ICC in great detail and Dr. Rosemary Grey who has also studied the patterns of prosecuting sexual violence in the ICC. All my interviews were recorded after gaining consent form the interviewees.

The views of the NGO representative, the academics, the representative from the ICTY were made in their personal and professional capacities based on their professional interaction with the ICC as monitoring actor, researchers and strategic partner respectively. However, the views of the ICC respondent reflect the official position of the ICC regarding the choices made by the prosecution in order to exclude sexual violence crimes in the Lubanga trial and its later inclusion in the Bemba trial.

As I am interested in tracing the operation of embedded informal rules that operate parallel to the official pronouncements in texts, this posed some methodological challenges because these rules are not apparent. They are hidden (Chappell and Waylen 2013: 613). While conducting an ethnographic study would have been more suitable for this research, because it is a more reliable method for studying hidden elements of institutions, as has been posited by Brooke and Jacqui (2010), however, due to the limitation of time and availability of respondents, this approach was not a viable option.

To counter this methodological limitation, I utilised the methodology of locating 'silences' which is a methodology used by feminist researchers to "make visible the invisible" (Brooke and Jacqui 2010:57). This methodology of locating silences, allows researchers to infer meanings from institutional outcomes and choices made by institutional actors (Chappell 2016:17).

Chapter 5: Key Findings: Exclusion of sexual violence crimes

> Mr. President, your Honours, it is a responsibility of the Office of the Prosecutor of the International Criminal Court to prove the crimes committed against the most vulnerable, and during the course of his trial my office will make it its mission to ensure that Thomas Lubanga is held criminally responsible for the atrocities committed against those little girl soldiers when he enlisted and conscripted them to be used as sexual prey (…) In this International Criminal Court, the girl soldiers will not be invisible. Luis Moreno-Ocampo, Chief Prosecutor Opening Statement in Prosecutor v. Lubanga ICC-01-04-01/06 (26 January 2009).

5.0 Introduction

This chapter seeks to respond to the main question and the second sub question by locating the interlinked institutional factors that influenced the exclusion of sexual violence crimes in the indictment against Lubanga. The Lubanga trial did progress significantly all the way to the reparation stage. However, I will limit the scope of my findings to the first three phases of the trial-investigation and charging, trial and judgment and sentencing phase- which are the most useful for understanding the operation of institutional and contingent factors that influenced the exclusion of sexual violence crimes in this trial.

5.1 Contextualising Continuity: Lubanga Trial

During the seminal trial of the ICC in 2006 – known as the Lubanga trial- there was great expectation from the international community and more specifically the victims of atrocities committed in Ituri district in DRC from September 2002 to August 2003; that the ICC would bring them justice (ICC-01/04-01-06:14). Consequently, the ICC was under pressure to demonstrate to the international community that the commitment made in July 2002 in Rome, by 120 UN member states, to put an end to impunity for crimes of the greatest concern to the international community including sexual violence crimes, was indeed achievable.

It has been reported that sexual violence characterised the "second Congo war" which begun in 1998 and continued until 2004 (ICC-01/04-01-06: 13). In fact, Margot Wallstrom, the UN's special representative of sexual violence in conflict (as she was at the time) in her address to the UN Security Council on Women Peace and Security in 2010 referred to DRC as the 'rape capital of the world' (Wallstrom 2010: UNSC verbatim record). It was therefore no surprise that following the transfer of Lubanga to the ICC by the government of DRC on 16 March 2006, (ICC-PIDS-CIS-DRC-01-014/16_Eng), there was an unspoken expectation that justice would finally be found for the victims of sexual violence in Ituri.

In exercise of prosecutorial discretion, the former ICC Prosecutor-Moreno Ocampo- brought charges against Thomas Lubanga Dyilo on 20 March 2006 for war crimes of "enlisting and conscripting of children under the age of 15 years into the Force patriotique pour la libération du Congo [Patriotic Force for the Liberation of Congo] (FPLC) and using them to participate actively in hostilities in the context of an armed conflict not of an international character from 1 September 2002 to 13 August 2003 (punishable under article 8(2)(e)(vii) of the Rome Statute)" (ICC-PIDS-CIS-DRC-01-014/16_Eng).

One of the criticisms made against the Prosecutor was the limited scope of charges, especially given the publicly available information that numerous atrocities including killings, torture, and sexual violence had been committed by the FPLC during the conflict in Ituri (Barbanègre et al 2014:2).Human rights organisations -Avocats Sans Frontières, Center for Justice and Reconciliation, RCD[7], FIDH[8], HRW[9], ICTJ[10]WIGJ[11]- also criticised the former Prosecutor-Moreno Ocampo for failing to bring representative charges of the crimes committed in Ituri. In their opinion, the decision not to include charges of sexual violence would perpetuate the culture of impunity for sexual violence crimes and would result in injustice for the victims (Avocats Sans Frontières et al 2006). Despite this backlash from civil society organisations the Prosecutor did not bring explicit charges of sexual violence against Lubanga but rather

[7]Coalition Nationale pour la Cour Pénale Internationale
[8]Fédération Internationale des Ligues des Droits de l'Homme
[9]Human Rights Watch
[10]International Center for Transitional Justice
[11]Women's Initiative for Gender Justice

> kept rewriting history and giving different justifications for why he did not include sexual violence… By the time of the trial, the Prosecutor completely rewrote the script and said he was always intending to mainstream sexual violence in the body of the charges. (Chappell skype interview, 29 August 2017).

While the Prosecutor made attempts to highlight to the Trial Chamber the gendered nature of the crime of actively using girl soldiers in hostilities, by presenting witnesses who testified about the sexual violation of girl soldiers, it was a case of too little too late. A majority of the Trial Chamber concluded that the evidence adduced in court on sexual violence was only relevant in providing the context, but they would not delve into attributing the crimes of sexual violence to the accused person because there were no explicit charges of sexual violence in the indictment against Lubanga (ICC-01/04-01/06-2842 paragraph 896).

5.2 Legitimacy over interests of justice

A prerequisite of the investigations into any situation by the ICC is that the prosecution develops an investigative strategy which in effect guides the investigators on which evidence to gather and in respect to which crimes. The prosecutions' investigative strategy adopted in the Lubanga trial was a streamlined strategy which focused on short investigations and expeditious trials. The streamlined strategy also allowed the prosecution to focus on only one part of the "criminality in a conflict if there were prevailing security reasons" (OTP 2006:9).

Interviews conducted by the Institute of War and Peace Reporting with former ICC investigators who worked on the Lubanga trial expressed their disappointment in the streamlined investigation strategy used in the Lubanga trial. In their opinion, the strategy led to the omission of sexual violence charges in the Lubanga indictment: One of the investigators recalled that:

> For a year and a half, we didn't just investigate the use of child soldier's sexual violence was part of the overall investigation – but the decision to focus on the use of child soldiers meant that all the things we had done for the last year and a half was gone. (Glassborow 2008).

Even though the investigators attributed the lack of sexual violence charges in the Lubanga trial as resulting from the narrowed focus of the investigations,

they nevertheless expressed that they did encounter difficulties in tracing victims of sexual violence in Ituri district. They highlighted that:

> Finding the victims who [could] help you link the highest commanders to the rapes and enslavement that happened at the times and places that are the focus of the investigation [was] very difficult. (Glassborow 2008).

The claim made by these investigators is not peculiar to the ICC investigations in the Lubanga case. As was highlighted in the preceding chapter, the *ad hoc* tribunals also struggled to overcome this gender legacy of International Criminal Law that presumes that it is harder to gather and prosecute evidence of wartime sexual violence crimes. In fact, one of the key informants interviewed for this research was of the view that the lack of explicit sexual violence charges against Lubanga was due to the "attitudes and the approaches of the practitioners who were inside the OTP" (Interview with Lil* on 7 September 2017 in The Hague). In her opinion,

> The Prosecution struggled with properly surfacing evidence of sexual violence and it's not explained by the fact that victims will not come forward and testify because we know that they will if conditions are right, or at least many of them will (Lil* [12]interview, 7 September 2017, The Hague).

Consequently, in exercise of prosecution discretion, the former Prosecutor, Luis Moreno Ocampo, brought charges of enlisting, conscripting and using of children under the age of 15 years to participate actively in hostilities (ICC-PIDS-CIS-DRC-01-014/16_Eng). The justification made by Moreno Ocampo for bringing these narrow charges was that:

> I knew to arrest Lubanga, I had to make it fast. So, I had strong evidence about child soldiers. I was not ready to prove connections to Lubanga in some of the killings and rapes, and then I decided to move just with the cases I had proofs. (Yates 2009: The Reckoning).

Additionally, during an exit interview of Moreno Ocampo conducted by the ICC forum in 2014, Mr. Ocampo expressed in a heroic manner the decision by the OTP not to expand the charges against Lubanga to include killing and rape and said:

> We needed to reissue that warrant before Lubanga releases because in those days, for me to have one prisoner was my main goal. I had to cross the river and have one prisoner. And then I asked, "Where are we with the killings?" Not enough evidence. "Where are we with the rapes?" Not enough evidence.

[12] Pseudo name used because respondent requested not to be named.

> "So, what do we've got?" Child soldiers. "Okay, we move with child soldiers." We left open the possibility to expand the charges… But, at the end, we never did it. So, and I love it at the end. I love it to highlight the child soldiers case (Ocampo interview on 24 February 2014: ICC forum).

Various inferences can be drawn from the foregoing statements by Ocampo. To begin with, the Prosecutors remarks suggest that expediency, time constraints and evidence informed the Prosecutor's choices. This was because the Prosecutor was under pressure, from the international community, to get the court started and there was also an imminent threat that Lubanga would be released from prison in DRC (Schabas 2008:744, Chappell 2014:187).

Therefore, considering the competing factors of time constraints and expediency, Ocampo exercised his prosecutorial discretion and limited the charges against Lubanga to child soldier crimes based on the available evidence while disregarding the evidence of crimes of sexual violence against the girl soldiers (Barbanègre et al 2014:2). As argued by Pritchett (2008)

> "a Prosecutorial strategy of efficiency and streamlined indictments has proven that when timelines are pressing, budgets are stretched, and security situations are challenging, charges of gendered violence are abandoned for "easier" or "more obvious" crimes." (2008:292).

Further to this, it can be inferred that expediency seems to have been driven by a quest for legitimacy. The concept of 'liability of newness' developed by Arthur Stinchcombe argues that new institutions suffer from the 'liability of newness' because they "have low levels of legitimacy" (Freeman et al 1983:693). The ICC being a new institution, nested in a global political context, was striving to gain legitimacy from the international community. Indeed, this struggle for legitimacy is reflected in Ocampo's statement during his exit interview where he said that "in those days, for me to have one prisoner was my main goal" (Ocampo interview on 24 February 2014: ICC forum).

This demonstrates that the Prosecutor was keen to get the court running albeit to prove to the international community that the ICC could achieve its mandate of putting an end to impunity for the crimes of greatest concern to the international community. Scahabas (2008) argues in relation to the choice of Ocampo to charge Lubanga with limited charges, that this was because "the exercise of prosecutorial discretion had more to do with the fact that this was an accused who was accessible to a Court starved for trial work." (2008:744).

Ultimately, the pursuit of expediency and legitimacy by the former prosecutor superseded the interests of justice for the girl soldiers, who were subjected to sexual slavery during the conflict in Ituri, DRC. In fact, the sexual violence experiences of girl soldiers were highlighted by Radhika Coomraswamy[13] ,who testified as an expert witness during the trial, and expressed that:

> Girls play multiple roles, sometimes involving conflict -- combat, scouting and pottering, but also including and being forced into sexual slavery or bush wives (ICC-01/04-01/06-T-223-ENG ET: page 14 line 12-14).

However, Moreno Ocampo forgot the new rules of the Rome Statue that provided more protection for victims of wartime sexual violence who had been isolated for a long time in International Criminal Law. Niamh Hayes (2013) argues that:

> unfortunately, … the rock that had been painstakingly hauled up the hill by prosecutors and practitioners in the other international criminal tribunals were permitted to tumble back to square one, as the International Criminal Court under Luis Moreno Ocampo regressed in both strategy and practice and competent (2013:9).

The lingering question therefore remains why the prosecutor expressed in his opening statement a resolve to end impunity for the sexual violence crimes against the girl soldiers despite not having sufficient evidence at the time to sustain charges of sexual violence crimes It is reported that Moreno Ocampo was quick to build the public anticipation through grandstanding acts because he was keen to get public approval (Flint and Waal 2009: 31).

5.3 Overlooking wartime sexual violence

History informs us that conflict related sexual violence was on many occasions overlooked by the ICTR and the ICTY, especially during the early years of operation of these tribunals. It has been documented that these crimes were overlooked because they were regarded as opportunistic, isolated, harder to prosecute and less grave than other crimes (Jarvis and Vigneswaran 2016:37,

[13] Under- Secretary- General of the United Nations, Special Representative for Children and Armed Conflict until 13 July 2012.

Askin 2013:33). Indeed, these gender legacies were also visible in the Lubanga trial which has been labelled as the case that 'failed the girls of DRC' (Smith 2011:468).

The concept of institutional nestedness alerts us to the fact that new institutions are "neither blank slates nor free floating. Rather, they are indelibly marked by past institutional legacies" (Mackay 2014:3). Arguably, institutional legacies are operationalised in new institutions by actors 'remembering the old' by using informal rules to justify actions (Mackay 2014:558). These concepts help to explain the choices made by the Prosecution to ignore evidence of sexual violence crimes. During the opening of the trial, Moreno Ocampo, reiterated that "In this International Criminal Court, the girl soldiers will not be invisible" (ICC-01-04-01/06). However, despite this initial commitment, the Prosecutor deliberately forgot to use the variety of sexual violence charges codified in the Rome Statute to charge Lubanga with explicit charges of sexual violence.

Brigid Inder, the executive director of the WIGJ, recollected a discussion she had with Ocampo in April 2006 following the omission of sexual violence charges in the formal accusation against Lubanga and her remarks which were echoed by other interviewees reflect the embeddedness of the gender legacy that sexual violence occurring during wartime is an opportunistic crime and therefore inherently disconnected from the conflict:

> Firstly, they did not believe it was a widespread policy, they thought it was committed by errant units within the UPC. They hadn't conducted those investigations to be able to bring forth the evidence and they assumed the reluctance of victims to testify and be willing to speak (Brigid Inder Skype interview, 8 September 2017).

The actors interviewed for this research acknowledged that perhaps at the beginning of the trial the prosecutor had to move fast to secure the arrest of Lubanga. However, the Prosecutor had a period of over two years between the confirmation of charges hearing which commenced on 9 November 2006 and the commencement of the trial on 26 January 2009. In the opinion of the interviewed actors, this was sufficient time to conduct further investigations on crimes of sexual violence and use the formal rules codified in the Rome Statute to amend the indictment against Lubanga. The majority view of the interviewees is captured in the following statement by Rosemary Grey, a scholar who pointed out that:

> To the extent that there was a misperception about sexual violence, I think the misperception was because the OTP did not fully comprehend the expectations of the international community around that crime. They didn't predict the backlash that would come on the court if they failed to bring charges of sexual violence (Rosemary Grey Skype interview, 11 September 2017).

After it became apparent that the Prosecutor, Mr. Moreno Ocampo, had not included sexual violence crimes in the indictment against Lubanga, NGOs[14] embarked on efforts to mobilize for accountability from the Prosecution through informal channels. The most prominent criticism came from the Women Initiatives for Gender Justice[15] (WIGJ) who held closed door meetings with senior officials in the OTP as well as provided the Prosecution with dossier on the sexual violence crimes committed in Ituri by the UPC under the command of Lubanga (WIGJ 2012)

However, the OTP was not convinced that the dossier provided to it on the sexual violence crimes could be sustained at trial. This position of the OTP is reaffirmed by the statement made by the ICC official interviewed for this research who expressed that:

> Yes, there was a two-year gap but during that period we did not sit still. There were so many activities being conducted regarding investigating crimes…It has never been because of negligence or because of disinterest by the OTP. It has never been a plan to overlook sexual crimes. We were mindful that they were allegations, but we were also mindful that the office should present to the court a strong case not just allegations and whatever case presented to the court, our decisions should be justified by whatever evidence we have collected. We did not overlook sexual violence crimes at all. (Gloria Atiba interview,22 September 2017, The Hague).

She further clarified that the strategy of the OTP in the Lubanga trial was to highlight the gender component of the crimes of enlisting, conscripting, and using children actively in hostilities. In her opinion,

> Highlighting the gender component of those crimes was completely different to proving those crimes. For proving it's a higher threshold and at that point we did not have the evidence to prove so the strategy was what we used what

[14] Avocats Sans Frontières et al-Joint letter to the Prosecutor of the international Criminal Court

[15]This is an international women's human rights organisation whose mandate entails advocating for gender justice through the International Criminal Court and through domestic mechanisms including peace negotiations and justice processes

> we had which was why the roles of the girls and the boys were highlighted and made part of the case Gloria Atiba interview, 22 September 2017, The Hague).

The concept of 'nested newness' informs us that new institutions are greatly influenced by the past. Therefore, as Chappell argues, "it is unlikely that even 'new' institutions will offer an entirely 'clean slate' for actors" (Chappell 2011:179). This insight on the operation of new institutions helps us draw some inferences from the statements made by Gloria Atiba.

It seems, that the past practices of the tribunals, which demanded a high numerical evidentiary threshold for sexual violence crimes in comparison to other crimes may have influenced the decision by the Prosecution to overlook sexual violence crimes in the Lubanga case (Jarvis and Salgado 2013:103). The position of the OTP was that it did not have sufficient evidence to sustain the prosecution of sexual violence crimes at trial. However, the WIGJ had provided the OTP with a dossier containing testimonies of victims of sexual violence (WIGJ 2008:19) but the OTP rejected it on grounds that:

> "decisions [to prosecute sexual violence crimes could only] be justified by whatever evidence [the OTP] collected" (Gloria Atiba interview,22 September 2017, The Hague).

The ICTY and the ICTR also grappled with this misconception especially during the early years of their operation. Sexual violence crimes were only charged if the prosecution was convinced that the crimes were widespread and systematic (Jarvis and Salgado 2013:100).

However, despite this assertion that the Prosecution did not have sufficient evidence, the Prosecution seemed to change its case theory during the trial phase because it is documented that a total of 15 out of 25 prosecution witnesses testified about sexual violence crimes (ICC-01/04-01/06-2120 14-09-2009 paragraph 12). While the Prosecution claimed that its strategy was to mainstream the sexual violence experiences of the girl soldiers into the child soldier charges, this strategy came off as an afterthought. It seemed as if the OTP had inadequately conceptualised the expressive value of the Lubanga case at the beginning.

It seems that the decision to arrest Lubanga was rushed because at the time Moreno Ocampo "needed one prisoner" (ICC-01/04-01/06). Consequently, this lack of a solid case strategy made the case against Lubanga malleable to

changes based on pressures exerted by NGOs specifically regarding the absence of sexual violence crimes.

5.4 Conflicting Rules

As the Lubanga case progressed there was an increased awareness by the OTP that the ICC was losing legitimacy among feminist actors and the victims of sexual violence crimes in DRC. In response to this threat, the OTP employed the remedial strategy of mainstreaming the sexual violence experiences of the girl soldiers into the existing charges against Lubanga. A possible explanation for this change can partly be explained by the concept of gradual institutional change. This concept attributes institutional change to incremental changes that result from exogenous or endogenous shocks (Mahoney and Thelen 2010:1).

In November 2006, the WIGJ attempted to use the formal rules-The ICC rules of Evidence and Procedure- by making an application to file an *amicus curiae* brief. Through this brief, the WIGJ sought to implore the court to consider supervising prosecutorial discretion by suggesting that the Chamber invoke the provisions of Article 61 (7) (ii) and direct the Prosecution to include explicit sexual violence charges. The Trial Chamber denied this application on grounds that the "request had no link to the present case" (ICC-01/04-01/06).

Additionally, more pressure was placed on the Prosecution by the Legal Representatives of the Victims to explicitly recognise the sexual violence experiences of the girl soldiers. On May 2009, the Legal Representatives of the Victims made an application to the Trial Chamber for the legal recharacterization of charges under Regulation 55 of the ICC. In their application, they reminded the Trial Chamber of the new rules contained in Article 61 (7) (c) of the Rome Statute that empower the Chambers to exercise oversight over Prosecution discretion. This application was premised on the evidence of sexual violence that emerged during presentation of the Prosecution case. Thus, they sought for an amendment of charges to include charges of sexual slavery and cruel and inhumane treatment. (ICC-01/04-01/06-2120 14-09-2009 paragraph 12).

By a majority opinion of the Trial Chamber the application by the representatives of victims was granted and subsequently the Chamber issued a notice to the parties that the legal characterisation of the facts would be subject to change (ICC-01/04-01/06-2049). However, the Appeals Chamber

overturned the decision of the Trial Chamber citing that Regulation 55 cannot be used to exceed the facts and circumstances of the indictment (ICC-01/04-01/06-2205, paragraph 88). Yet again an attempt to include charges of sexual violence in the trial was defeated. This time, the ambiguities contained in the formal rules and differing interpretations of the formal rules hampered the inclusion of sexual violence crimes.

Thus, by employing the methodology of locating silences, it can be argued that two main catalysts triggered a slight institutional change in the Lubanga trial. These catalysts were both internal and external. The first catalyst was the external pressure/negative feedback exerted by NGOs on the OTP and threatened to create a legitimacy crisis for the new court. The second was internal pressure from the Legal Representatives of the Victims who used the formal rules of the Rome Statute that allow victim participation in trials to exert pressure on the OTP causing the OTP to remember the new provisions of the Rome Statute. Therefore, because of these triggers, the Prosecutor opted to mainstream the sexual violence experiences of girl soldiers into the pre-existing crimes as a remedy to the initial omission.

Additionally, the ambiguities in the formal rules regarding recharacterization of charges caused different actors in the ICC to exercise 'creativity and agency'. (Sheingate 2010:169). The use of creativity and agency helps explain how "incremental change in gender justice outcomes is a result of "gaps" or "soft spots" between the rule and its interpretation or the rule and its enforcement." (Mahoney and Thelen 2010:14). For instance, the Prosecutor took advantage of the "soft spots in the formal rules and mainstreamed sexual violence crimes rather than charging them explicitly. Ambos Kai (2012) notes that

> "the prosecutor was trying to squeeze the sex crimes into the crime of using child soldiers instead of requesting an amendment of the charges" (Kai Ambos 2012:156)

What is inferred from the conduct of the former Prosecutor is that enhancing the legitimacy of the court, informed how he used creativity and agency in order 'please' the feminist actors. The formal rules in the Rome Statute do not compel the Prosecutor to prosecute sexual violence crimes explicitly but rather provide the Prosecution with a variety of choices of sexual violence crimes that they can chose form to best reflect the range of criminality in cases before the court. Therefore, in exercise of this discretion, Moreno Ocampo, decided

not to include explicit charges of sexual violence crimes despite having sufficient evidence. Chappell (2014) argues that

> "Prosecutorial discretion provided the "grey zone" or gap through which informal institutions of international law were able to reassert themselves and disrupt the implementation of new rules of the Rome Statute" (Chappell 2014:191).

The Trial Chamber also exercised agency by using the formal rules to allow the application by the Legal Representatives for Victims to recharacterize the charges to include charges of sexual slavery. However, on appeal, the Appeal Chamber denied the same application citing that the formal rules did not permit such change at the trial stage. The fact that the Trial Chamber and the Appeals Chamber interpreted the same rules differently confirms the assertion that ambiguous formal rules leave room for exercise of creativity and agency by actors which can result in the broad interpretation of rules to the detriment of gender justice. Therefore, the broad interpretation of the law by the Appeals Chamber in exercise of their agency hampered the prosecution of sexual violence crimes. One of the interviewees explained this discrepancy and stated that since the Lubanga case was the first to be tried at the ICC,

> …it was not entirely clear what was the relationship between the chambers and the prosecutor. There seemed to be a tussle throughout the trial about who had authority over what. There was a lot of testing the framework of this new court. The chamber was cautious not to be seen to overreach and preferred to take a more hands-off approach, because they were not entirely comfortable about what the Rome Statute gave them power to do in relation to the Prosecutors' exercise of discretion. What this shows is that there mustn't have been judges in the Pre-Trial Chamber who were very pro-accountability of sexual violence. (Rosemary Grey Skype interview, 11 September 2017).

However, the choice by the former Prosecutor to remember the gender legacy of treating sexual violence crimes as lesser crimes reverberated throughout the trial. Attempts by the Prosecutor to remedy omission of sexual violence crimes in the indictment by presenting evidence of sexual violence during trial was a case of too little too late. In fact, the conduct of the Prosecutor was frowned upon by the judges. During one instance, Judge Fulford instructed the Prosecution to desist from questioning on sexual violence by stating that:

> …the Prosecution made a choice with the charges that were brought against this accused, which do not include allegations against him that he is responsible in some way criminally for the suggestion that young women were raped by

> UPC soldiers. At the very least, for reasons of trial economy, you will please move on to another subject. (ICC-01/04-01/06-T-276-Red2-ENG line: 72).

During the judgment and sentencing phase, the Trial Chamber found Lubanga guilty for the crimes of enlisting, conscripting and using child soldiers. In the judgment, the Chamber addressed the issue of non- inclusion of explicit sexual violence charges and faulted the OTP for referring to sexual violence in their opening statement but failing to include it in the indictment (ICC-01/04-01/06-2842). The critique made by the Chamber is illustrated in the following statement:

> Not only did the prosecution fail to apply to include rape and sexual enslavement at the relevant procedural stages, in essence it opposed this step. It submitted that it would cause unfairness to the accused if he was tried and convicted on this basis (ICC-01/04-01/06-2842 paragraph 629)

There was a dissenting opinion from Justice Odio Benito who sought to bring out the gendered dimension of the crimes and opined instead that "sexual violence was an intricate element of "using to participate actively in the hostilities as a legal aspect of the crime." (ICC-01/04-01/06-2842 paragraph 16). Despite the fact that this was a minority decision, academic and civil society commentators have expressed that the decision left a lasting legacy which has contributed to the subsequent prioritisation of sexual violence in the trials before the ICC (Benito 2014:648, WIGJ 2012).

In an interview with Judge Benito conducted by Louise Chappell and Andrea Durbach (2014) seeking to get an opinion of gender justice from the bench she reiterated the Trial Chambers critique of the Prosecutor's non-inclusion of sexual violence charges against Lubanga and stated that:

> Errors by the Prosecutor in the investigation, gathering of evidence and preparation of cases can be summarized as the main problems. This has meant, specifically in terms of gender crimes, that they have not been included in the charges (as in the Lubanga case) or have been dismissed by the judges as inconclusive (Benito 2014: 651).

Ultimately, the choice by the Prosecutor to mainstream the acts of sexual violence against the girl soldiers into the main charges of child soldiers resulted in the non-prosecution of sexual violence charges.

5.5 Conclusion

In this chapter, the concepts of liability of newness, gradual institutional change, remembering the old, formal and informal rules were used to analyse the exclusion of sexual violence crimes in the indictment against Lubanga. It seems that the choices made by the former prosecutor, Moreno Ocampo, to charge Lubanga with limited charges was because the legitimacy of the ICC was at stake and therefore Moreno Ocampo needed to get the court running. Further, this quest for legitimacy was exacerbated by the influences of the gender legacies of International Criminal Law in of gender legacies of International Criminal Law.

Chapter 6: Key Findings: Inclusion of sexual violence crimes

6.0 Introduction

The significance of the Bemba trial in the history of prosecuting sexual violence in the ICC is that it was the first trial in which the accused person was convicted for crimes of sexual violence, specifically rape as a crime against humanity and a war crime(ICC-01/05-01/08-3343:2016). This conviction came in March 2016, 14 years after the ICC commenced its operation.

During this 14-year period, there were two failed attempts by the prosecutor to successfully prosecute sexual violence charges. In the two cases that followed the Lubanga trial-Katanga and Ngudjolo trials-sexual violence crimes were included in the indictments against the accused persons. However, these crimes were dismissed on grounds that 1) The crimes of sexual violence could not be linked to the accused person in the Ngudjolo case 2) Sexual violence crimes were not part of the common plan in the Katanga case (Hayes 2015:807).

6.1 Contextualizing change: Bemba trial

In contrast to the Lubanga trial, an institutional change of heart seemed to be witnessed during the Bemba trial which began on 5 July 2010.This was the first trial in the ICC in which the accused, Bemba, was convicted for sexual violence crimes(ICC-01/05-01/08-3343). In his press release announcing the arrest of Bemba, the former Prosecutor, Moreno Ocampo announced that testimonies of the victims of sexual violence would be "strong evidence for the Prosecution" because, the weight of evidence of rapes outweighed that of the killings (ICC-OTP-20080524-PR316).

On 15 June 2009, the Pre-Trial Chamber II confirmed the expansive charges against Bemba of "effectively acting as a military commander within the meaning of Article 28(a)5 for the crimes against humanity of murder, Article 7(1)(a), and rape, Article 7(1)(g), and the war crimes of murder, Article 8(2)(c)(i), rape, Article 8(2)(e)(vi), and pillaging, Article 8(2)(e)(v), allegedly committed on

the territory of the Central African Republic ("CAR") from on or about 26 October 2002 to 15 March 2003" (ICC-01/05-01/08-3343:2016).

The brief facts of the case are that the accused person, Bemba, was the president of the Mouvement de Libération du Congo (MLC) political party in DRC and the Commander-in-Chief of its military wing, the Armée de Libération du Congo (ALC). During the armed conflict in the Central African Republic (CAR) for the period between 26 October 2002 to 15 March 2003, Bemba deployed his MLC troops in CAR where they "pursued a plan of terrorizing and brutalizing innocent civilians, in particular during a campaign of massive rapes and looting" (ICC-OTP-20080524-PR316).

The conflict in CAR was an armed conflict between the CAR government supported by MLC troops on the one hand against rebel groups led by General Bozizé on the other. During the operation in CAR, Bemba who was based in DRC, retained control of the military operation and strategy of the MLC troops in CAR. Seven years of trial led to a conviction of Bemba on 21 March 2016 to serve 18 years imprisonment for all the charges that had been preferred against him including rape as a war crime and a crime against humanity (ICC-01/05-01/08-3343:2016).

6.2 Institutional change

In the Bemba trial, the former Prosecutor seemed to have overcome the longstanding gender legacies of International Criminal Law that justified overlooking the prosecution of wartime sexual violence against women. This is because he remembered to utilise the wide range of sexual violence crimes codified in the Rome Statute to charge Bemba.

The initial indictment against Bemba contained a total of ten charges. Eight of which were supported by evidence of sexual violence. These crimes included rape as a crime against humanity; other forms of sexual violence consisting a crime against humanity; rape as a war crime; other forms of sexual violence constituting a war crime, torture constituting a crime against humanity (through acts of rape and other sexual violence) and torture constituting war crime, and outrages upon personal dignity constituting a war crime (through acts of rape). The Prosecution further acknowledged that MLC soldiers committed these acts

of sexual violence to punish women who were presumed to sympathise with rebels (ICC-01/05-01/08-112-Red 15-12-2009: Paragraph 50).

This enhanced prioritisation of sexual violence prosecution has been accounted for varyingly by different actors. For the current ICC Prosecutor, Fatou Bensouda the renewed commitment to prosecute sexual violence was due to the backlash from NGOs following the omission of explicit sexual violence crimes in the Lubanga case. During an interview with David Scheffer[16] in 2014 she expressed that:

> I think that presentation of the evidence has to a very large extent vindicated the office. However, we did learn from what civil society was saying, what they were talking about…and you will find…in all our cases, or most of them, we have charged…sexual and gender based crimes for instance (Bensouda interview on the international Criminal Court and Gender Based Crimes,11 December 2014).

In agreement, Brigid Inder, who I interviewed for this research reiterated the sentiments of the Prosecutor and stated that:

> The WIGJ critique of the OTP in the Lubanga case, persistent monitoring, closed door and public advocacy served as a catalyst for prioritising sexual violence in the Bemba trial, because the Prosecution became aware that politically, they had to prioritise sexual violence crimes. (Brigid Inder Skype interview, 8 September 2017).

However, Gloria Atiba from the ICC refuted the assertion that constant external pressure from NGOs resulted in the prioritisation of sexual violence in the Bemba case. She stated that:

> Even if NGOs had not said one bad word against us for what had happened previously, we would have done the same. Because there was no way you could close your eyes to the evidence which we ourselves had collected. We had the evidence, so we made use of the evidence. So, it was not because of the backlash (Gloria Atiba interview, 22 September 2017, The Hague).

In defence of the Prosecutions position to include charges of sexual violence against the indictment against Bemba, Gloria Atiba mentioned that the conditions in Bangui, CAR were conducive for the collection of evidence of sexual violence. Of most importance was the security situation, which was much

[16] Professor at Northwestern University school of law and a former U.S. ambassador for war crimes during the 1990s

better than DRC and the OTP also received good cooperation from NGOs on the ground. In her interview, she stated that:

> It was relatively easier to gather evidence in CAR in comparison to DRC because there were NGOs that worked with victims that were ready to cooperate with us. So, it was easier in a way to be able to identify the witnesses and seek their cooperation with the court. Additionally, our theatre of operation was in the city in Bangi so it was doable to interact with witnesses and conduct interviews. The situation in Bangi was one situation where the allegations of SV outweighed allegations for other crimes (Gloria Atiba interview, 22 September 2017, The Hague).

The concept of gradual institutional change and more specifically how incremental change occurs through external or internal triggers provides us with insights to interrogate these contradictory statements justifying institutional change. To begin with, the insider perspectives seem to differ. On the one hand the current Prosecutor owes the enhanced prioritisation of sexual violence to the pressure by NGOs. While on the other hand the head of the Gender and Children's Department attributes institutional change to endogenous shocks and contingent factors such as better security in CAR. According to her by the time Bemba was brought to trial,

> "the OTP was active, running and functioning and a lot of things had been put in place. We were in a position where we could support the witnesses a lot more" (Gloria Atiba interview, 22 September 2017, The Hague).

She seems to allude to the notion that the gradual institutional change resulted from "a series of small adjustments" within the OTP. (Mackay 2011:187).

However, the concept of nested newness informs us that new institutions do not operate in a vacuum. They emerge and operate within defined contexts (Mackay 2014:3). Further, their success lies partly in their ability to "overcome vulnerabilities" that compromise their legitimacy in the eyes of critical actors (Stinchcombe 1965: 155). Therefore, suggesting that the ICC operates within apolitical context -free from any influences by external actors- seems misplaced and obscures the reality of a new court striving for legitimacy from the international community. It seems that despite the OTP being an independent organ of the ICC, it works within a political context. While the influence of politics may not be apparent, the fact that the Prosecutor acknowledged "listening to what the civil society was saying" (Bensouda interview on the international Criminal Court and Gender Based Crimes) and

therefore changed strategy of prosecuting sexual violence crimes, demonstrates the critical role of external actors- NGOs in shaping institutional outcomes.

6.3 Selective Change

While indeed the Prosecution did demonstrate incremental change in the prosecution of sexual violence crimes after the Lubanga trial due to the negative feedback from NGOs and the Chambers (Grey 2015: 249), the findings suggest that perhaps the change observed in the Bemba trial is selective change.

Selective change because the Pre-Trial Chamber by remembering the old tendency of treating certain sexual violence crimes as less serious to rape, decided to recognise a limited number of sexual violence charges. The initial indictment against Bemba contained a total of ten charges, eight of which relied on evidence of sexual violence. However, during the confirmation of charges hearing, the Pre-Trial Chamber declined to recognise the distinctive crimes of torture and outrages upon personal dignity. In relation to torture as a war crime the Pre-Trial Chamber stated that:

> The Chamber considers that in this particular case, the specific material elements of the act of torture, namely severe pain and suffering and control by the perpetrator over the person… are also the inherent specific material elements of the act of rape. However, the act of rape requires the additional specific material element of penetration, which makes it the most appropriate legal characterisation in this case (ICC-01/05-01/08-424 15-06-2009: Paragraph 204).

For the crimes of outrages upon personal dignity, the Pre-Trial Chamber reasoned that these acts ought to be subsumed by the crimes of rape because rape was "the most appropriate legal characterisation of the conduct presented (ICC-01/05-01/08-424 15-06-2009: Paragraph 312).

The choices made by the Pre-Trial Chamber to make visible rape as a crime against humanity and a wartime crime while obscuring the distinctive crimes of torture and outrages upon personal dignity, shows a leakage of, "legacies of the past' including material legacies, 'habits of the hearts and 'frames of mind'…" (Mackay 2014:6). For example, the characterisation of rape as a weapon of war in the ICTR and ICTY shaped "what could be known about sexual violence" in Rwanda and the Former Yugoslavia (Buss 2009:148). In the same vein, the hypervisibility of rape in the CAR conflict seems to have led to the obscuring of

the crimes of torture and outrages upon personal dignity as constituting sexual violence crimes. Thus, the choice by the Pre-Trial Chamber not to recognise other forms of sexual violence in the conflict resulted from the conception that the physical acts of rape were underlying the other forms of sexual violence (ICC-01/05-01/08-424 15-06-2009). Marie D'Aoust (2017) notes,

> "making rape visible in the context of atrocity is deceptively easy; looking at rape as war crime and crime against humanity shows an extraordinary violence divorced from the lived experiences of routine sexual violence, serving to deflect attention from the systematic violence committed against women" (2017:218).

Because the acts of rape gave impetus to the other crimes, there Pre-Trial chamber seemed to forget that the intention of designers of the Rome Statute. For example, with regard to sexual violence crimes, the intention of the Rome Statute designers was that the distinct crimes of torture and outrages upon personal dignity would avail victims of sexual violence extensive recourse in International Criminal Law.

Further, Article 6 (7) (c) of the Rome Statute allows the Pre-Trial Chamber to exercise oversight over prosecution discretion. This oversight gives the chambers greater leeway to broadly interpret the formal rules. Interpretation can result in resistance to the formal rules through forgetting the new as was demonstrated by the reluctance of the Pre-Trial Chamber to treat torture and outrages upon personal dignity as distinct crimes. The Pre-Trial Chamber seemed to have forgotten the jurisprudence of the ICTR on forced nudity in the Akayesu case where the Chambers held that sexual violence including forced nudity and rape could constitute crimes of genocide, crimes against humanity and war crimes (ICTR-96-4. Thereby in the present case, the Pre-Trial Chamber would have confirmed all the sexual violence charges presented by the prosecution because they represented the full range of sexual violence crimes that characterised the war in CAR. Mahoney and Thelen (2010) caution us that "even when institutional rules have been created to accommodate relatively complex situations, actors face information processing limitations" (2010:12).

6.4 Conclusion

The concepts of formal and informal rules, institutional nestedness and its associated concept of forgetting the new were used to analyse the selective institutional change in the Bemba trial. Further, the concept of gradual

institutional change provided a useful lens to analyse how the mobilisation for accountability from the Prosecution by civil society during the Lubanga trial, acted as an exogeneous trigger to gradual institutional change. This culminated in the Prosecution charging Bemba with a broad range of sexual violence charges albeit to reflect the extent of criminality in the CAR conflict. However, even though the prosecution succeeded in prosecuting rape as a crime against humanity and as a war crime in the Bemba trial, the charges of torture and outrages upon personal dignity which relied on evidence of sexual violence were excluded by the Pre-Trial Chamber. The Pre-Trial Chamber seemed to forget the new rules of the Rome Statute that recognised the crimes of torture and outrages upon personal dignity as distinct crimes. The choice by the Pre-Trial Chamber to only focus on rape in this trial obscured the varieties of sexual violence crimes that characterised the CAR conflict and led to the partial attainment of gender justice.

Chapter 7: Conclusion

The aim of this study was to explore the institutional and contingent factors that led to the inclusion and exclusion of sexual violence crimes in the Lubanga and Bemba trials at the ICC. The main question is centred on decisions made and what influenced the prosecution decision-making process around sexual violence. The prioritisation or lack of prioritisation of wartime sexual violence against women and girls in the Lubanga and Bemba cases was due to three key factors: personality and personal decisions of the Prosecutor; institutional changes inside the ICC, and pressures from NGOs.

Feminist institutionalism theory provided a useful lens to interrogate the question of inclusion and exclusion of sexual violence crimes in the Lubanga and Bemba trials. The findings reveal that the process of prosecuting sexual violence crimes in the ICC is far from straight forward but rather a dynamic process. While the Rome Statute guarantees accountability for these crimes, these codified rules do not insulate the institutional actors from the pressures associated with the prosecution of sexual violence crimes. Consequently, the question of inclusion and exclusion was found to be more nuanced than anticipated in the Lubanga and Bemba trials.

Both the Lubanga and Bemba cases had elements of inclusion and exclusion. The ICC, being a new institution in the realm of transitional justice, operating in a highly political context, inevitably placed pressure on the Prosecutor to exercise a delicate balance between the quest for legitimacy and the interests of justice. Thus, the former Prosecutor, Moreno Ocampo, was pre-occupied with gaining legitimacy for the court from the international community albeit to prove that the court was capable of putting an end to impunity for the most serious crimes.

This was demonstrated in his grandstanding acts that had him making pronouncements aimed at building public expectation but in reality, lacking the goodwill to make good his public assertions. This was especially so in the Lubanga trial. The lack of explicit sexual violence charges in the indictment against Lubanga and the subsequent external pressure from NGOs resulted in the mainstreaming of sexual violence acts against the girl soldiers into the main charges of conscripting, enlisting and using children actively in hostilities. This

came off as an afterthought that emanated from the imminent loss of legitimacy among feminist actors. In the trial against Bemba, the Prosecutor was careful to include of a broad range of sexual violence charges in the indictment as a result of the negative feedback from NGOs.

Within the ICC, actors seemed to be at loggerheads about the application of the formal provisions encoded in the Rome Statute. The ambiguities in the formal rules gave rise to different interpretations of the formal rules which resulted in sexual violence being excluded in the two trials. For the Bemba case the broad interpretation of the formal rules coupled with the gender legacies of International Criminal Law led to the exclusion of a variety of sexual violence crimes by the Pre-Trial chamber. In the Lubanga case the Trial and Appeals chamber were at odds on application of regulation 55 which in turn obscured the prosecution of explicit sexual violence crimes.

Moreover, the gender legacies of International Criminal Law reverberated in the practice of the ICC in the two trials. These legacies which included the assumption that sexual violence crimes are harder to prosecute, are opportunistic crimes or require a higher numerical threshold to prove influenced decisions made by the Prosecutor to prioritise or not prioritise sexual violence crimes in the two cases. The findings reveal that these gender legacies were strengthened and diluted in the two trials. The dilution of these gender legacies was often triggered by external pressure from feminist actors who exercise continuous vigilance and consequently mobilised for accountability for the prosecution of sexual violence crimes.

Three key factors were identified in this study as influencing the inclusion or exclusion of sexual violence crimes in the Lubanga and Bemba cases. However, the findings reveal that external pressure from feminist NGOs seemed to influence the Prosecutors decisions the most. This is because the ICC is 'nested' in a political context, that grants critical external actors capacity to shape decisions taken by internal institutional actors. Therefore, in order for the practices of the ICC regarding prosecution of sexual violence crimes to be aligned to the formal rules of the Rome statute, then it seems that constant vigilance by feminist NGOs is required.

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