

Great expectations: A critique of the International Criminal Court's commitment to victims of sexual and gender-based violence

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Abstract

The creators of the International Criminal Court (*ICC*) made a bold and novel commitment to victims, through remarkable participation and reparation schemes. In doing so, it contemporaneously committed the Court to restorative and victim-centric ideals, and shifted the field of International Criminal Law (*ICL*) into uncharted territory. Victims of particularly unprecedented attention at the Court were those of sexual and gender-based violence (*SGBV*), who had been notoriously excluded from the ambit of the preceding ad hoc tribunals. The ICC now nears twenty years of operation, and so this article uses *SGBV* victims as a case study through which broader critiques of the ICC's institutional capabilities can be launched. It delves into the figure of the *SGBV* victim within a socio-cultural context to posit an 'ideal' justice response. Through this new lens, it turns to critique the Court's commitment to deliver justice for victims, and the validity of the restorative and victim-centric ideals.

Keywords

Sexual and gender-based violence, gender, justice, International Criminal Court, restorative, victim-centric.

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1.0 Introduction

The drafters of the International Criminal Court (*ICC*)'s constituent document, the Rome Statute, brought in remarkable new participation and reparative schemes for victims, signalling a shift in traditional International Criminal Law (*ICL*) practice towards more victim-centric ideals. To accompany this substantive commitment, the Court has continued to rely strongly upon victims as its legitimating discourse:² victims are the “essential precondition” to the legitimacy of the ICC;³ the “principal metric of its relevance and validity”⁴; and its *raison d'être*.⁵ The Prosecutor has stated that her Office acts “where no-one else is doing justice for the victims.”⁶

Of particular focus within this group were victims of sexual and gender-based violence (*SGBV*). *SGBV* was defined broadly to capture all forms of its perpetration; the Prosecutor was given special responsibilities with regards to *SGBV* prosecution; and the needs of *SGBV* victims were accommodated throughout the Rules of Procedure and Evidence (*Rules*). Prior to the creation of the ICC, *SGBV* had largely been relegated within *ICL* as a collateral consequence of war, something undeserving of retribution.⁷ Rape was a reward for the victor,⁸ an expression of male wartime trauma,⁹ a crime against a woman's honour or dignity;¹ “one of the satisfactions of conquest, like a boot in the face”;¹ or was excluded out of “shyness, prudishness, reserve, ignorance, revulsion, confusion, or intentional omission.”¹

The ICC entered as the forum that could accommodate and serve justice to these victims; and its drafters and advocates certainly endorsed this promise.¹ The commitment to victims also

² Christian De Vos, Sara Kendall, Carsten Stahn ‘Introduction’ in Christian De Vos, Sara Kendall, Carsten Stahn (eds) *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015) 1 p 15; Laurel Fletcher ‘Refracted Justice: The Imagined Victim and the International Criminal Court’ in Christian De Vos, Sara Kendall, Carsten Stahn (eds) *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015) 302 pp 323-324.

³ Judge Silvia Fernández de Gurmendi ‘Keynote speech at Event marking Day of International Criminal Justice’ (International Criminal Court, 26 June 2015) <https://www.icc-cpi.int/iccdocs/presidency/150626_Remarks_at_event_marking_International_Justice_Day.pdf> accessed 15 May 2020 p 2.

⁴ Sergey Vasiliev ‘Victim Participation Revisited: What the ICC is Learning About Itself’ in Carsten Stahn (ed) *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2426839> accessed 15 June 2020 p 4.

⁵ Sara Kendall and Sarah Nouwen ‘Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood’ (2014) 76 *L & CP* 235 p 239, citing Prosecutor Fatou Bensouda.

⁶ International Criminal Court ‘Statement by the Prosecutor of the International Criminal Court Fatou Bensouda’ (22 October 2012) <<https://www.icc-cpi.int/Pages/item.aspx?name=otpstatement221012>> accessed 15 June 2020.

⁷ See Nicola Henry ‘Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence’ (2009) 3(1) *IJTJ* 114.

⁸ Kas Wachala ‘The tools to combat the war on women's bodies: rape and sexual violence against women in armed conflict’ (2012) 16(3) *IJHR* 533 p 533.

⁹ Donna Pankhurst ‘Sexual violence in war’ in Laura Shepherd (ed) *Gender Matters in Global Politics: A Feminist Introduction to International Relations* (Routledge, 2014) pp 152-156.

¹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War Of 12 August 1949, Article 27.

¹ Susan Brownmiller ‘Making Female Bodies the Battlefield’ in Alexandra Stiglmayer (ed) *Mass Rape: The War Against Women in Bosnia Herzegovina* (University of Nebraska Press, 1994) p 181.

¹ Kelly Askin *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (Martinus Nijhoff Publishers, 1997) p 97.

¹ See, for instance, *Supra* note³6.

demonstrated the drafters' intentions to imbue the ICC with a restorative mandate,¹ perhaps out of a desire to compensate for victims' silence at the preceding *ad hoc* tribunals. Traditionally, ICL was purely retributive;¹ a framework centred on holding perpetrators accountable,¹ with victims at the margins.¹

While these aspirations were and are still admirable, this article questions the ICC's ability to deliver on this promise of justice to SGBV victims; and critiques the validity of the restorative mandate in doing so. Firstly, it steps away from ICL to examine theories behind SGBV and the socio-cultural context of its perpetration. This gives a broad understanding of the most effective justice response for SGBV and frames the subsequent analysis. Secondly, it reviews the ICC's track record in relation to SGBV victims, before finally turning to a more institutional critique of the ICC's capabilities and the validity of the ICC's restorative and victim-centric ideals.

2.0 Understanding sexual and gender-based violence

2.1 Theorem behind its occurrence

There are several explanations behind the mass perpetration of SGBV. The answer, realistically, will be context-specific and "fluid"¹; but three main theories set the scope of explanation. The most simple theory is that SGBV is committed opportunistically, by perpetrators – often in a chaotic mental state – capitalizing on the outside chaos and anarchy that often accompanies conflict.¹ An extensive field study of soldiers in the Democratic Republic of the Congo (DRC) – the context for ICC cases including *Katanga*, *Lubanga* and *Ntaganda* – found two of the central discourses to SGBV were an "unavoidable consequence of men being deprived of sex"; the substitution for "normal" sexual encounters, driven simply by libido and desire,² and that SGBV became⁰ a channel for anger and rage.²

These discourses both appear to work into the opportunistic or anger theory that Kirby labelled "unreason". In the unreason theory, perpetrators are driven by their anger, desire, entitlement, need for control and misplaced fear. The theory explains the enactment of fantasies

¹ Fletcher Supra note 2 p 304; Sara Kendall 'Beyond the Restorative Turn: the Limits of Legal Humanitarianism' in Christian De Vos, Sara Kendall, Carsten Stahn (eds) *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015) 352 p 358; Supra note 4 pp 64-65; Rome Statute of the International Criminal Court, Article 75(1); Assembly of States Parties Court's Revised Strategy in Relation to Victims (ICC-ASP/11/38, 5 November 2012) <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-38-ENG.pdf> accessed 20 June 2020 p 6; International Criminal Court 'ICC President tells World Parliamentary Conference "ICC brings retributive and restorative justice together with the prevention of future crimes"' (11 December 2012) <<https://www.icc-cpi.int/Pages/item.aspx?name=pr860>> accessed 15 June 2020.

¹ Sergey Vasiliev 'Article 68(3) of the ICC Statute and Personal Interests of Victims in the Emerging Practice of the ICC' in Carsten Stahn and Göran Luiter (eds) *The Emerging Practice of the International Criminal Court* (Koninklijke Brill, 2009) 675 p 678.

¹ Kendall Supra note 14 p 352.

¹ Ibid p 360.

¹ Maria Eriksson Baaz and Maria Stern 'Why Do Soldiers Rape? Masculinity, Violence, and Sexuality in the Armed Forces in the Congo' (2009) 53 *IntlStud Q* 495 p 506.

¹ Kelly Askin 'Can the ICC Sustain a Conviction for the Underlying Crime of Mass Rape without Testimony from Victims?' in Richard Steinberg (ed) *Contemporary Issues Facing the International Criminal Court* (Brill Nijhoff, 2016) p 276.

² Maria Eriksson Baaz and Maria Stern 'Knowing Masculinities in Armed Conflict?' in Fionnuala Ní Aoláin, Naomi Cahn, Dina Haynes and Nahla Valji *The Oxford Handbook of Gender and Conflict* (Oxford University Press, 2018) p 536; Supra note 18.

² Supra note 18.

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on the bodies of others,² and particularly brutal or nefarious instances of SGBV (the severing of body parts, sodomy or use of torturous instruments) within the narrative of “celebratory and transgressive violence, psychopathology, perverse homosociality and the kind of opportunism that can find no justification in a financial reward”.²³

The other two theories do not accept this spontaneity. For scholars who consider that SGBV is too widespread, frequent, calculated and effective not to be part of a larger political scheme,² the theory of instrumentality tends to fill this gap. Instrumentality imputes the perpetrator with rational, calculated thought. Based in the Machiavellian theorem that “no one will ever pass up an opportunity to gain a one-sided advantage by exploiting another party”,² SGBV is a tool, used by self-interested actors, in pursuit of military or some other gain.² This theory is taken as authoritative by many feminist scholars who find that “rape is a very cheap method of warfare.”²⁷

In the Central African Republic (CAR) – the context for the ICC cases *Bemba*, *Yekatom* and *Ngaijssona* – this was prevalent. Commanders of the armed groups used SGBV as a tool of warfare along sectarian lines – the basis for the conflict – and it formed an integral part of armed assault.² In the DRC, too, purposes for instrumental rape included psychological destruction, submission, control (“imposing silence”), impoverishment, depopulation (“targeting women because it is women who carry the seeds of the whole society”), and extermination through spreading sexually transmitted diseases. People “understood that this has got nothing to do with sexual pleasure”, particularly when DRC women were raped with rifles or other instruments.² The use of literal weapons in SGBV – for example, rape with a grenade³ – is perhaps the strongest indicator of SGBV's instrumentality in warfare. The same object is used to rape or to kill, both being acts of war.

At the end of the spectrum is the theory of mythology, which attributes the most meaning to SGBV crimes. The mythology theory holds that SGBV victims are targeted because of their identity, and what it symbolises socio-culturally. In this sense, SGBV is innately connected to that society's hierarchy of gender and rights,³ an expression of cultural idioms,³ and it is “intermeshed” in competing discourses of nationalism, belonging, insecurity, violence and

² Paul Kirby ‘How is rape a weapon of war? Feminist International Relations, modes of critical explanation and the study of wartime sexual violence’ (2012) 19(4) EJIR 797 p 809-810.

² Ibid p 809.

² Inger Skjelsbæk ‘Sexual violence and war: Mapping out a complex relationship.’ (2001) 7(2) EJIR 211 p 213.

² Supra note 22 p 809; Jack Hirshleifer ‘The dark side of the force’ (1994) 32(1) Economic Inquiry 1 p 3.

² Paul Kirby ‘Refusing to be a Man?: Men's Responsibility for War Rape and the Problem of Social Structures in Feminist and Gender Theory’ (2012) 16(1) Men and Masculinities 93 p 106; Supra note 22 pp 807-808; Supra note 18 p 500; United Nations Security Council Resolution 1820 (S/RES/1820, 19 June 2008) <<https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CAC%20S%20RES%201820.pdf>> accessed 22 May 2020 p 1.

² Dara Kay Cohen *Rape During Civil War* (Cornell University Press, 2016) p 32.

² Human Rights Watch “‘They Said We Are Their Slaves’: Sexual Violence by Armed Groups in the Central African Republic’ (5 October 2017) <<https://www.hrw.org/report/2017/10/05/they-said-we-are-their-slaves/sexual-violence-armed-groups-central-african>> accessed 15 June 2020.

² Chris Dolan ‘War is Not yet over’ Community Perceptions of sexual violence and its Underpinnings in eastern DRC (International Alert, November 2010) p 21.

³ Supra note 28.

³ Sara Davies and Jacqui True ‘Reframing conflict-related sexual and gender-based violence: Bringing gender analysis back in’ (2015) 46(6) Security Dialogue 495 p 501.

³ Supra note 22 p 811.

responsibility.³ Mythology traces its³ roots to the works of feminists such as Simone de Beauvoir, and her theory of women as Other: the “second sex” whose identity is entirely defined by the patriarchy she emerges from. Through Kirby’s explanation, SGBV as part of mythology reproduces these systems of patriarchy, and goes beyond the other two theories of desire or political or material advantage to “perpetuate a system of collective being”.³

Brownmiller, in her formative work on wartime rape, sees there to be movement between the three theories: “When a victorious army rapes, the sheer intoxication of the triumph is only part of the act. After the fact, the rape may be viewed as part of a recognisable pattern of national terror and subjugation. I say ‘after the fact’ because the original impulse to rape does not need a sophisticated political motivation beyond a general disregard for the bodily integrity of women.”³ Indeed, Brownmiller’s⁵ statement may be symbolic of international criminal law’s own progressive perception of SGBV. The opportunist theory appears to have been central to the traditional exclusion of SGBV from criminal tribunals; as SGBV was historically relegated as a natural, unavoidable collateral of war – as Kirby said, “just what soldiers do.”³ As will be seen below, the ICC’s focus on SGBV may signify the collective realisation that SGBV is more than the disregard for bodily integrity, and a developing acceptance of the instrumental or mythological theories.

These three understandings through which SGBV is perceived – opportunism, instrumentality and mythology – contextualise the following sociological understandings of SGBV, although opportunism tends to limit nuanced understanding. The latter two give a wider landscape of sociological material from which to draw conclusions about the nature of SGBV trauma.

2.2 The impact of sexual and gender-based violence

2.2.1 For the individual

The physical consequences of SGBV are often acute and demand immediate action. Medical treatment is usually required urgently – as the most common effects from SGBV are fistulas, mutilation, infertility, menstrual and sexual dysfunction, sexually transmitted infections and HIV, cervical cancer, PTSD, anxiety and depression. Many women require abortions, or assistance raising the children born of rape.³ SGBV therefore exacerbates the already vulnerable position of women post-conflict,³ and many SGBV victims die after conflict ends.³

³ Supra note 18 pp 499-500. ³

³ Supra note 22 pp 811-813. ⁴

³ Susan Brownmiller *Against Our Will: Men, Women, and Rape* (Penguin, 1975) p 37.

³ Supra note 22 p 809. ⁶

³ Lauren Ng and Theresa Beñancourt ‘Risk and Resilience: The Physical and Mental Health of Female Civilians during War’ in Fionnuala Ní Aoláin, Naomi Cahn, Dina Haynes and Nahla Valji *The Oxford Handbook of Gender and Conflict* (Oxford University Press, 2018) pp 357-360; Anne-Marie de Brouwer ‘Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families’ (2007) 20 LJIL 207 p 208; Celia Palmer and Anthony Zwi ‘Women, Health and Humanitarian Aid in Conflict’ (1998) 22(3) *Disasters* 236 pp 239-242.

³ Sahla Aroussi ‘Perceptions⁸ of Justice and Hierarchies of Rape: Rethinking Approaches to Sexual Violence in Eastern Congo from the Ground up’ (2018) 12(2) IJTJ 277 p 284; Ng and Betancourt Supra note 36 pp 356-362; Judith Gardam ‘The Silences in the Rules That Regulate Women during Times of Armed Conflict’ in Fionnuala Ní Aoláin, Naomi Cahn, Dina Haynes and Nahla Valji *The Oxford Handbook of Gender and Conflict* (Oxford University Press, 2018) pp 38-39; Dr U C Jha *Human Rights and Justice: International Documents* (Vij, 2010) p 229; Patricia Justino ‘Violent Conflict and Changes in Gender Economic Roles: Implications for Post-Conflict Economic Recovery’ in Fionnuala Ní Aoláin, Naomi Cahn, Dina Haynes and Nahla Valji *The Oxford Handbook of*

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SGBV victims are often thrown out of their homes or land, rejected by their husbands and families, and rendered unable to work. When a woman becomes known as an SGBV victim, “it is a loss and she needs to be removed from the family.”⁴ They therefore require⁰ immediate economic assistance to prevent falling into poverty,⁴ or relying on high-risk strategies to survive.⁴ Economic assistance is² also key to helping the SGBV victim remain in the community and prevent ostracization: “if one day I find a way of rebuilding my house and putting a roof over my head, even my husband and all the other members of my community who now despise me would say yes this woman was raped but she is capable of doing good things in her life and for the community”. That can reinstate survivors’ self-esteem, respectability and confidence.⁴

2.2.2 In the community

(a) Entrenchment of female inferiority

In a hetero-masculine, patriarchal society, masculinity is attributed to perpetrators, and femininity is attributed to victims.⁴ Women are placed in a⁴ state of dependence⁴ in the domestic sphere of motherhood, reproduction, feeding and care of the household.⁴ They are “beautiful souls”⁴ yet “lowered to the rank of a thing”⁴ and often legally placed into the same category as children – leading to the sardonic phrase “womenandchildren.”⁴ They are passive, vulnerable, naïve, nonviolent, innocent, docile, simple, subordinate and – crucially – in need of protection

Gender and Conflict (Oxford University Press, 2018) pp 75-77; Patricia Hynes ‘On the battlefield of women’s bodies: An overview of the harm of war to women’ (2007) 27 Women's Stud. Int. Forum 431 pp 433-435, 440-441; Supra note 30 pp 502-503; see also Mayra Buvinic, Monica Das Gupta, Ursula Casabonne, Philip Verwimp Violent Conflict and Gender Inequality: An Overview (Oxford University Press, 2012) <https://openknowledge.worldbank.org/bitstream/handle/10986/19494/wbro_28_1_110.pdf?sequence=1&isAllowed=y> accessed 27 May 2020; de Brouwer Supra note 36 pp 208–209; Elisabeth Wood ‘Variation in Sexual Violence during War’ (2006) 34(3) Policy Soc. 307 pp 318, 325; Elisabeth Wood ‘Conflict-related sexual violence and the policy implications of recent research’ (2014) 96 International Review of the Red Cross 457 p 477; Pramilla Patten ‘Unlocking the Potential of CEDAW as an Important Accountability Tool for the Women, Peace and Security Agenda’ in Fionnuala Ní Aoláin, Naomi Cahn, Dina Haynes and Nahla Valji The Oxford Handbook of Gender and Conflict (Oxford University Press, 2018) p 174; United Nations Committee on the Elimination of All Forms of Discrimination Against Women Gender-Based Violence and Discrimination against Women and Girls in the Democratic Republic of the Congo (October 2018) <https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/COD/INT_CEDAW_ICO_COD_32830_E.pdf> accessed 27 May 2020; Judith Gardam and Hilary Charlesworth ‘Protection of Women in Armed Conflict’ (2000) 22(1) HRQ 148 pp 152-154.

³ de Brouwer Supra note 37 p 209.

⁴ Supra note 29 p 22.

⁴ Rashida Manjoo ‘Introduction: reflections on the concept and implementation of transformative reparations’ (2017) 21(9) IJHR 1193 p 1200; Aroussi Supra note 38 pp 284-286.

⁴ Ng and Betancourt Supra note 37 p 355.

⁴ Aroussi Supra note 37 p 286³

⁴ Lejla Hadzimesic ‘Consequences of Conflict Related Sexual Violence on Post-Conflict Society: Case Study of Bosnia and Herzegovina’ in Fionnuala Ní Aoláin, Naomi Cahn, Dina Haynes and Nahla Valji the Oxford Handbook of Gender and Conflict (Oxford University Press, 2018) p 511.

⁴ Simone de Beauvoir *Le Deuxième Sexe* (Éditions Gallimard Paris, 1949) p 193.

⁴ Maria Olujic ‘Embodiment of Terror: Gendered Violence in Peacetime and Wartime in Croatia and Bosnia-Herzegovina’ (1998) 12(1) Med. Anthropol. Q. 31 p 34; Supra note 29 p 60; Claudia Card *Confronting Evils: Terrorism, Torture, Genocide* (Cambridge University Press, 2010) p 71.

⁴ Supra note 22 p 811.

⁴ Supra note 44 p 115.

⁴ Cynthia Enloe ‘Womenandchildren: Propaganda Tools of Patriarchy’ in Greg Bates (ed) *Mobilizing Democracy: Changing the U.S. Role in the Middle East* (Common Courage Press, 1991).

from men.⁵ Their chastity is key to⁰their identity and determinative of honour or shame.⁵ Their sexual identity is entirely defined in relation to the husband –they are expected to be submissive to them: “human beings who are there first and foremost to satisfy.”⁵ In conflict, women become objects of abuse, rather than subjects of war⁵ – as “wartime transforms individual bodies into social bodies.”⁵

For, while women are vulnerable, they are also symbolic bearers of society’s identity through their roles as biological, cultural, and social reproducers of the community.⁵ In this way, the mythological theory becomes one of embodiment. Women’s bodies become a place of figurative construction: where “nationalist aspirations, territorial battles, national victory, and defeat” are “literally inscribed” on their bodies.⁵ SGBV is therefore the wielding of a “symbolically masculine and superordinate position, whereas being the object of sexual control and coercion is feminine and subordinate.”⁵

Men, conversely, are the active to the passive; the productive to the reproductive,⁵ the “taker”, the killer, the macho warrior and heterosexual soldier.⁵ They conquer and possess women, yet are responsible for their protection – of honour, as well as literally – and the protection of the family and nation.⁶ Male control over women is justified and naturalized through social, religious, cultural and moral norms, whereby the dominance of masculinity appears innate; divinely and biologically ordained.⁶ This role is assumed from a very early age. Men in the DRC are inculcated from age seventeen “with the mind-set that he must always be superior to the woman.”⁶

If to be a female is to be synonymous with subordination, then it is perceivable – through

⁵ Dubravka Zarkov ‘From Women and War to Gender and Conflict?: Feminist Trajectories’ in Fionnuala Ní Aoláin, Naomi Cahn, Dina Haynes and Nahla Valji *The Oxford Handbook of Gender and Conflict* (Oxford University Press, 2018) p 18; Supra note 18 p 508; Supra note 20 p 535; Olujic Supra note 46 p 39; Debra Bergoffen ‘Exploiting the Dignity of the Vulnerable Body’ (2009) 38(3) *Philosophical Papers* 307 p 315; Eva Hellman ‘Open Space and Double Locks: The Hindutva Appropriation of Female Gender’ in Arvind Sharma and Katherine Young (eds) *Fundamentalism and Women in World Religions* (T&T Clark, 2007) pp 17-18.

⁵ Hadzimesic Supra note 43 p 510; Olujic Supra note 45 p 34; Colleen Duggan and Ruth Jacobson ‘Reparation of Sexual and Reproductive Violence: Moving from Codification to Implementation’ in Ruth Rubio-Marín (ed) *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (Cambridge University Press, 2009) p 129; Bergoffen Supra note 50 p 315.

⁵ Supra note 29 p 35.

⁵ Hadzimesic Supra note 44 p 509.

⁵ Olujic Supra note 46 p 31.

⁵ Supra note 20 p 535.

⁵ Jinee Lokaneeta ‘Violence’ in Lisa Disch and Mary Hawkesworth (eds) *The Oxford Handbook of Feminist Theory* (Oxford University Press, 2016) p 1017.

⁵ Ruth Rubio-Marín ‘Gender and Violence in Focus: A Background for Gender Justice in Reparations’ in Ruth Rubio-Marín (ed) *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (Cambridge University Press, 2009) p 34.

⁵ Mary Beth Mills ‘Gendered Divisions of Labour’ in Lisa Disch and Mary Hawkesworth (eds) *The Oxford Handbook of Feminist Theory* (Oxford University Press, 2016) p 292.

⁵ Maria Eriksson Baaz and Maria Stern ‘Understanding Sexual Violence in Conflict and Post-Conflict Settings’ in Mary Evans, Clare Hemmings, Marsha Henry, Hazel Johnstone, Sumi Madhok, Ania Plomien and Sadie Wearing (eds) *The Sage Handbook of Feminist Theory* (Sage Publications, 2014) p 590; Anna Kulemann ‘Gender and the International Criminal Court: A Critical Assessment’ (University of Kent, 2016) <<https://www.e-ir.info/2016/12/06/gender-and-the-international-criminal-court-a-critical-assessment/>> accessed 26 May 2020.

⁶ Olujic Supra note 46 pp 34, 38; Supra note 18 p 499; Supra note 45 p 136.

⁶ Supra note 57 p 24.

⁶ Supra note 29 p 35.

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the instrumentality and mythology theories – that SGBV is used as a tool to smear and vilify the enemy, to assert dominance. In the Lord's Resistance Army (*LRA*)'s activities in Uganda, soldiers committed SGBV crimes not simply to demonstrate their masculinity but also to affirm their power.⁶ A perpetrator “succeeds in masculinity by ‘feminizing’ the enemy and, by association, rendering him weaker”.⁶ Joseph Kony, one of the *LRA* leaders who has eluded the ICC, endorsed SGBV as part of his ideology to show superiority over the Ugandan government.⁶ SGBV is, therefore, domination over the enemy in a specifically gendered way. Certainly, perpetrators' assumptions of strict male gender roles are key to this – and the eradication of any effeminate characteristics often forms a part of soldier training.⁶

SGBV against males, then, is the epitome of gendered domination. How shamefully emasculating to be forcefully sodomised by another man, when masculinity is the very vector of man's deserved identity? In this way, SGBV against males is full of learned masculinities. This is not often homosexual, but about feminizing the enemy and asserting the masculinity of the perpetrator.⁶ A male SGBV victim stated that “they wanted us to feel as though we were women and this is the worst insult, to feel like a woman.”⁶ There is a sense that male SGBV victims suffer a greater harm than female victims, because it strips them of their masculine identity, emasculates them and lowers their social status to that of women.⁶ Male SGBV victims are then taken more seriously – “when it's a man, people see that it's serious, when it's a woman, they're a bit negligent”.⁷ Male victims “feel more destabilized” than the women, because of the subversion of their masculine status and because it is biologically “incomprehensible” – “there is no orifice which was created for that purpose”.⁷

SGBV is here seen to be a lived reality of the gender norm that male dominates female. Through the mythological theory, SGBV appears firmly planted within sociological inequities. It is more than physical violence. It serves to reinforce the gender stereotypes that embed this female inferiority and the violability of the female body in the first place. In this sense, this is why SGBV must be viewed as a systemic rather than random phenomenon, and the opportunist theory cannot be sustained. Shrugging SGBV off as opportunist devalues what SGBV victims have experienced as a one-off, and overlooks the roots of it – systemic, misogynist inequity – that could be critical to both healing and prevention.⁷ The ICC, by its mandate, is an

⁶ Dubravka Zarkov 'The Body of the Other Man: Sexual Violence and the Construction of Masculinity, Sexuality and Ethnicity in Croatian Media' in Caroline Moser and Fiona Clark (eds) *Victims, Perpetrators or Actors? Gender, Armed Conflict and Political Violence* (Zed Books, 2001) p 78.

⁶ Kristina Lažauninkaitė 'Victims of sexual violence affected by the Lord's Resistance Army conflict: addressing sexual violence within Ugandan national law and the International Criminal Court (ICC)' (Msc Victimology and Criminal Justice Thesis, Tilburg University 2016) p 16.

⁶ *Ibid* p 12.

⁶ Maria Stern and Marysia Żalewski 'Feminist Fatigue(s): Reflections on Feminism and Familiar Fables of Militarisation' (2009) 35(3) *Rev. Int. Stud.* 611 pp 621-622; *Supra* note 18 p 499; Kirby *Supra* note 26 p 108.

⁶ Miranda Alison 'Wartime sexual violence: women's human rights and questions of masculinity' (2007) 33 *Rev. Int. Stud.* 75 pp 81, 87.

⁶ *Supra* note 29 p 46.

⁶ Leila Ullrich 'But what about men?' *Gender disquiet in international criminal justice* (Theoretical Criminology, November 2019) <<https://journals-sagepub-com.proxy.uba.uva.nl:2443/doi/pdf/10.1177/1362480619887164>> accessed 24 May 2020 p 11; c.f. Janine Clark 'Masculinity and male survivors of wartime sexual violence: A Bosnian case study' (2017) 17(4) *Confl. Secur. Dev.* 287 p 288.

⁷ *Supra* note 29 p 46.

⁷ *Ibid*.

⁷ See Kiran Kaur Grewal 'International Criminal Law as a Site for Enhancing Women's Rights? Challenges, Possibilities, Strategies' (2015) 23 *Fem. Leg. Stud.* 149 pp 160-161; *Supra* note 22 p 816.

extraordinary court to deal with the most extraordinary lapses of justice. Yet it is the ordinariness of SGBV, its installation in things as thick as identity and society, that makes it an extraordinary issue.

(b) Destruction of the community

SGBV does not only create victims at an individual, physical level. As noted, above, women's bodies – while vulnerable – hold in them collective ideals of honour, chastity and the reproduction of their community. Therefore, when a perpetrator sexually violates a victim, he shames and violates the collective the body represents, and all the norms – albeit patriarchal – that construct it; the conflict is writ small on an individual body, “destroyed [...] as the collective fantasy proceeds”.⁷ Women's vulnerability³ is a subordinate characteristic, but it is this very subordination – the men's dominion over it – that makes their sexual virtue a commodity, an investment, a valuable thing, through which its violation becomes so disastrous for the men. Women may be defined inferiorly in relation to the men who dominate them, but when war and conflict is for the most part a men's game,⁷ the instrumentality theory makes clear that SGBV becomes a powerful weapon. The stigma that the community places on sexually impure or violated women becomes a self-imposed weapon: SGBV turns their women into what the community feels compelled to hate, disown, and reject.

In this way, SGBV devastates the community. As noted, above, the victims suffer the most immediate harm. However, man's identity as protector of 'his' women is also shattered through SGBV – he has failed to protect, and so failed as a man.⁷ As a war tactic, failing in a masculine identity is essential to morale as a fighter.⁷ Regrettably, a frequent consequence of this attack on men's honour is that the blame for SGBV is shifted squarely onto the woman,⁷ which brings about that fate of stigma “worse than death”.⁷ Children, too, are reported to have fled their families “in order to avoid having to look at the face of their mother who was raped in front of them”.⁷ The effectiveness of SGBV in harming an entire community – the instrumentality theory in action – explains its prolificacy and why “brutalization mirrors culturally specific tropes”.⁸ SGBV destroys the relationships and bonds of intimacy that are critical to the life of any viable community.

Thus, SGBV is “normally committed by individual men but [...] not best understood in individualistic terms.”⁸ SGBV is much more than the physical act of violence. It is about gender

⁷ Olujic Supra note 46 p 46. See also Supra note 22 p 811; Cynthia Enloe *Maneuvers: The International Politics of Militarizing Women's Lives* (University of California Press, 2000) p 134.

⁷ United Nations Declaration of Minimum Humanitarian Standards Adopted by an expert meeting convened by the Institute for Human Rights (UN Doc. E/CN.4/Sub.2/1991/55, 2 December 1990) <<https://casebook.icrc.org/case-study/un-minimum-humanitarian-standards>> accessed 26 May 2020 para 31.

⁷ Dara Kay Cohen 'Explaining Rape during Civil War: Cross-National Evidence (1980–2009)' (2013) 107(3) *Am. Political Sci. Rev* 461 p 463; Baaz and Stern Supra note 59 p 590; Hadzimesic Supra note 44 p 510; Bergoffen Supra note 50 p 318; Olujic Supra note 46 pp 31-32; Supra note 29 p 21.

⁷ Debra Bergoffen 'Rape as a Weapon of War' (Institut für die Wissenschaften vom Menschen Newsletter 101, 2010) <https://issuu.com/institute_for_human_sciences/docs/iwmpost_101/13> accessed 26 May 2020 p 13.

⁷ Hadzimesic Supra note 44 p 518; Supra note 56; Supra note 45 pp 243-244.

⁷ Doris Buss 'Knowing Women: Translating Patriarchy in International Criminal Law' (2014) 23(1) *Soc. Legal. Stud* 73 p 74.

⁷ Supra note 29 p 22.

⁸ Supra note 22 p 812.

⁸ Larry May and Robert Strikwerda 'Men in Groups: Collective Responsibility for Rape' in Karen Warren and Duane Cady (eds) *Bringing Peace Home: Feminism, Violence, and Nature* (Indiana University Press, 1996) p 178.

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roles, misogyny and patriarchy – as discussed above – but it is also a societal issue of honour, shame, and blame. Certainly, it implicates the men as well as the women, and can destroy part of the fabric of the community as well as irreversibly stigmatise the victim.

2.3 The ideal justice response for SGBV

It is apparent that the physical act of SGBV betrays complex motivations and has complex consequences. From these understandings, it is possible to draw conclusions about what the most effective justice response would mean for SGBV victims in the local context.

Of first priority is the need to provide immediate physical and economic assistance to the individual victim. Indeed, NGOs working with SGBV victims report the concept of ‘justice’ for them is synonymous with these immediate needs being met, and SGBV victims have a limited interest in criminal prosecutions because the aforementioned needs are more pressing.⁸ They find that there is “arguably little value in soliciting the participation of victims [at the ICC] unless material steps are taken to address their immediate needs, and to restore their dignity as human beings.”⁸ While it may be the accused, standing before the ICC, who bears some form of overall responsibility for a victim’s SGBV injury, the day-to-day trauma takes priority.⁸ Additionally, it must be noted that when criminal justice does form part of the SGBV victims’ perceptions of justice – usually, after these immediate needs have been met – then retributive justice, and the ICC’s Western method of criminal prosecution, lacks cultural relevance to local traditional methods of prosecution.⁸ This disconnect is returned to below.

In addition to addressing immediate individual harm, a better justice response to SGBV logically includes a reparative scheme that attacks the sociological roots behind the violence that were revealed above. The TFV reports that SGBV trauma and the stigma that accompanies it often requires “sustained, long-term, and perhaps lifelong interventions”,⁸ and “lengthy, sustained engagement on multiple levels.”⁸ So, if SGBV is enforced by entrenched gendered injustices, then the gender roles and stereotypes would ideally be challenged to effect change; and if it is exacerbated by collective issues of shame and blame, then community-wide discourses around stigma and responsibility would take place. SGBV victims should be at the centre of this discourse⁸ – the passive object becomes the active subject – otherwise reparations

⁸ Henry Supra note 7 p 118. ²

⁸ Anushka Sehmi ‘Now that we have no voice, what will happen to us?’ Experiences of Victim Participation in the Kenyatta Case’ (2018) 16(3) JICJ 571 p 585.

⁸ Peter Dixon ‘Reparations and the politics of jurisdiction’ in Christian De Vos, Sara Kendall, Carsten Stahn (eds) *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015) 326 p 330; Fletcher Supra note 2 p 322.

⁸ Fletcher Supra note 1 p 322; Christian Harris ‘Uncharted Waters: Reparations through Indigenous Forms of Transitional Justice for Namibian Victims of a Colonial Genocide’ in Everisto Benyera (ed) *Indigenous, Traditional, and Non-State Transitional Justice in Southern Africa* (The Rowman & Littlefield Publishing Group, 2019) 205 p 207.

⁸ Anne Dutton and Fionnuala⁶Ní Aoláin ‘Between Reparations and Repair: Assessing the Work of the ICC Trust Fund for Victims Under Its Assistance Mandate’ (2019) 19(2) *Chic. J. Int. Law* 490 p 540.

⁸ *Ibid* p 546.

⁸ Judy El-Bushra ‘How Should We Explain the Recurrence of Violent Conflict, and What Might Gender Have to Do with It?’ in Fionnuala Ní Aoláin, Naomi Cahn, Dina Haynes and Nahla Valji *The Oxford Handbook of Gender and Conflict* (Oxford University Press, 2018) pp 54-58; Grewal Supra note 72 p 158; see also International Meeting on Women’s and Girls’ Right to a Remedy and Reparation Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation (Nairobi, 2007) <https://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf> accessed 27 May 2020.

would likely reflect masculine priorities.⁸ The DRC's post-conflict reparations failed to do this, and "the structural inequalities [...] have also been allowed to go unchallenged."⁹

Transformative reparations, which have garnered widespread international support⁹ for focusing on subverting socioeconomic inequalities, should certainly form part of the ideal justice response in light of SGBV's sociological roots. However, these must supplement, and not replace, reparations for individual harm. The reason for this is that transformative reparations focus on socioeconomic structures, which can circumvent the needs of the individual victim – from which the worst result would be "treating them as symptoms of a more serious or important justice issue."⁹ As Urban Walker wrote, "there is deep irony in promoting a transformative agenda for reparations when most victims go begging for the most elementary forms of direct

⁸ El-Bushra Supra note 88 p 51; Charlesworth Supra note 38 pp 166.

⁹ Aroussi Supra note 38 p 293⁰.

⁹ Joanne Conaghan 'Reassessing the Feminist Theoretical Project in Law' (2007) 27 J. Law & Soc 357 p 359; Kristin Kalla 'Advancing Justice and Making Amends Through Reparations: Legal and Operational Considerations' in Fionnuala Ní Aoláin, Naomi Cahn, Dina Haynes and Nahla Valji *The Oxford Handbook of Gender and Conflict* (Oxford University Press, 2018) pp 259-261; United Nations Secretary-General Guidance Note: Reparations for Conflict-Related Sexual Violence (June 2014) <<https://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf>> accessed 22 May 2020 p 8; Louise Chappell 'The gender injustice cascade: 'transformative' reparations for victims of sexual and gender-based crimes in the Lubanga case at the International Criminal Court' (2017) 21(9) IJHR 1223 p 1225; Aroussi Supra note 38 p 293; Sarah Williams and Jasmine Opdam 'The Unrealised Potential for Transformative Reparations for Sexual and Gender-Based Violence in Sierra Leone' (2017) 21(9) IJHR 1281 p 1282; United Nations Office of the High Commissioner for Human Rights Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (A/RES/60/147, 21 March 2006) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement>> accessed 27 May 2020; Anne Saris and Katherine Lofts 'Reparation Programmes: A Gendered Perspective' in Carla Ferstman, Mariana Goetz, and Alan Stephens (eds) *Reparations for Victims of Genocide, Crimes Against Humanity and War Crimes: Systems in Place and Systems in the Making* (Brill, 2009) pp 79-99; Supra note 56 p 113; Margaret Urban Walker 'Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations' (2016) 10(1) IJTJ 108 pp 108-125; Fionnuala Ní Aoláin 'Advancing Feminist Positioning in the Field of Transitional Justice' (2012) 6(2) IJTJ 205 pp 205-228; Pramilla Patten 'Unlocking the Potential of CEDAW as an Important Accountability Tool for the Women, Peace and Security Agenda' in Fionnuala Ní Aoláin, Naomi Cahn, Dina Haynes and Nahla Valji *The Oxford Handbook of Gender and Conflict* (Oxford University Press, 2018) p 178; Kirby Supra note 25 p 106; see also Andrea Durbach, Louise Chappell and Sarah Williams 'Foreword: special issue on 'transformative reparations for sexual violence post-conflict: prospects and problems' (2017) 21(9) IJHR 1185 pp 1185-1192; Luke Moffett 'Reparations in Transitional Justice: Justice or Political Compromise?' (Queen's University Belfast Law Research Paper No. 2019-07, 5 January 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2997871> accessed 27 May 2020; Office of the Prosecutor Policy Paper on Sexual and Gender-Based Crimes (June 2014) <<https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>> accessed 15 June 2020 para 102; Nairobi Declaration International Meeting on Women's and Girls' Right to a Remedy and Reparation Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation (Nairobi, 2007) <https://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf> accessed 27 May 2020 p 2; United Nations Women A Window of Opportunity: Making Transitional Justice Work for Women (October 2012) <<https://www.unwomen.org/~media/Headquarters/Attachments/Sections/Library/Publications/2012/10/06B-Making-Transitional-Justice-Work-for-Women.pdf>> accessed 27 May 2020 p 18; Convention on the Elimination of All Forms of Discrimination against Women General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations (CEDAW/C/GC/30, 18 October 2013) para 77.

⁹ Margaret Urban Walker 'Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations' (2016) 10(1) IJTJ 108 p 123.

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relief.”⁹ The transformative and the individual reparations must work together: for attacking stigma collectively removes the barrier for SGBV victims to come forward and accept individual assistance.

The importance of having a justice response that combines immediate individual and transformative societal reparations circles back to the understanding that the woman's role as biological reproducer and carer of the community is central to SGBV's power and pervasiveness as a tool of conflict. Even in misogyny, women's bodies are a centre-point: their bodies bear and raise the bodies of children, and care and bear responsibility for the bodies of men; and in this way, the rupture of SGBV trauma tears through the community entière. Not only does unaddressed collective trauma tend to be transferred from generation to generation,⁹ but it is also logical that the structural conditions for SGBV will perpetuate if not uprooted, and continue to pervade in impunity after conflict, or the next time conflict occurs.⁹

3.0 The ICC – has it delivered justice for SGBV victims?

3.1 The source of the expectation

As noted above, the ICC placed SGBV victims in particular focus amid its pioneering victim-centric mandate. In a decisive shift away from the statutes of the *ad hoc* predecessor tribunals, the drafters defined SGBV broadly – as “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence of comparable gravity”, and included it across several crime chapeaux.⁹ The drafters also ensured that the Office of the Prosecutor (OTP) had appropriate resources for SGBV investigation and prosecution.⁹ The OTP then focused⁷ on effective investigation and prosecution of SGBV as a key strategic goal in its 2012-2015 Strategic Plan, and produced a comprehensive Policy Paper on Sexual and Gender-based Crimes in 2014.⁹

SGBV victims were also delineated as persons of special protection under a dramatic new – and seemingly unconstrained – victim participation scheme. Article 68(3) provides that where

⁹ Ibid pp 123-124.

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⁹ El-Bushra Supra note 88 pp 54, 58.

⁹ Alexandra Zetes ‘Beyond Passive Victimhood: The Narrative and Reality of Women in Transitional Justice’ (2016) 48 N. Y. Univ. J. Int. Law Politics 1293 p 1300; Fionnuala Ni Aoláin and Catherine Turner ‘Gender, Truth and Transition’ (2007) 16 UCLA Women's L.J. 229 p 235; Kalla Supra note 91 p 261.

⁹ SGBV was listed as a crime against humanity in article 7(1)(g) and as a war crime in international (8(2)(b)(xxii)), and non-international (8(2)(e)(vi)) armed conflicts. The Statute also criminalized persecution based on gender as a crime against humanity (article 7(1)(h)) and SGBV, but particularly rape (see Mark Klamberg (ed) Commentary on the Law of the International Criminal Court (Torkel Opsahl Academic EPublisher, 2017 p 27) could form part of the crime of genocide through imposing measures intended to prevent births within the group (article 6(g)).

⁹ Article 42(9) obliges the Prosecutor to appoint advisers with legal expertise on SGBV, whose primary role is to provide counsel to the Prosecutor on strengthening the OTP's approach and strategic responses to SGBV crimes (see International Criminal Court ‘The Prosecutor of the International Criminal Court, Fatou Bensouda, appoints Patricia V. Sellers as her Special Adviser on Gender’ (19 December 2017) <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1352>> accessed 2 June 2020). SGBV has been a particular focus of the current Prosecutor, Fatou Bensouda, who noted: “These are serious crimes that must be addressed—and we hope, deterred—through the force of the law.” (International Criminal Court ‘ICC Prosecutor, Fatou Bensouda, attends international conference in Sweden on gender equality: “Gender crimes are prominent in our prosecutions because they are prominent in situations investigated”’ (19 April 2018) <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1383>> accessed 22 May 2020). The Prosecutor must also take into account the SGBV nature of a crime under investigation or prosecution (article 54(1)(b)) and may employ a certain questioning procedure for an SGBV victim witness, if it will assist in reducing any subsequent traumatization. (Rule 112(4)).

⁹ Office of the Prosecutor Supra note 91.

the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined appropriate by the Court.⁹ Under article 68(1), the Court shall take appropriate measures for the safety, physical and psychological well-being, dignity and privacy of victims and witnesses – and in particular, take note of the nature of the crime where it involves SGBV.¹

The drafters also embedded sensitivity for SGBV victims into the rules surrounding witness testimony – through, for example, forbidding the inference of consent from a SGBV victim’s silence or lack of resistance;¹ ensuring the implementation of special measures to facilitate the testimony of a SGBV victim if required; and ensuring the Victims and Witnesses Unit is staffed with experts in trauma related to crimes of sexual violence.¹

Finally, SGBV victims also stood to benefit from the article 75 reparations scheme, which groundbreakingly catapulted victims into the role of right-bearing parties,¹ entitled to make a claim for and obtain reparations against a convicted person.¹ The Trial Chamber in *Lubanga* further posited that article 75 gives SGBV victims the right to gender-sensitive reparations.¹

These commitments to SGBV victims across the stages of the Court’s proceedings gave substance and expectation to the victim-centric, restorative rhetoric that is discussed in more detail below. But how has the Court fared in practice? The next section reviews the Court’s track record with regards to SGBV victims in three areas: convictions, participation, and reparations.

3.2 Convictions

The clearest measure of justice “delivered” – at least from a retributive standpoint – is through reviewing the Court’s record of SGBV prosecution and conviction. This has, however, been a series of false starts and ‘almost’s.

In the trial of the ICC’s first defendant, *Lubanga*, former Prosecutor Luis Moreno Ocampo failed to bring any SGBV charges,¹ despite it being non-contentious that SGBV crimes had

⁹ Which ‘stages and proceedings’ were covered was not defined, but the views and concerns must be presented in a manner not prejudicial to or inconsistent with the rights of the accused, including the right to be tried without undue delay under Article 67(1)(c), and a fair and impartial trial.

¹ Rome Statute of the International Criminal Court, Article 68(1). Such measures may involve undertaking the proceedings in camera or allowing the presentation of evidence by electronic or other special means (Article 68(2)). The article is supplemented by several rules – Rule 85 defines ‘victim’, and Rules 89-93 further delineate the application, legal representation, and participation process.

¹ Rules of Procedure and Evidence, Rule 70(c). See also Rules of Procedure and Evidence, Rules 63(4), 70(a)-70(d), 71. At the ICC, consent is not entirely removed as a defence – the parties must notify the court and explain the relevance of the evidence if they wish to introduce it (Rule 72) – but the drafters of the Rules clearly wanted to enforce a rebuttable presumption against consent. See Eithne Dowds ‘Conceptualizing the role of consent in the definition of rape at the international criminal court: a norm transfer perspective’ (2018) 20(4) *Int. Fem. J. Politics* 624 pp 630-632.

¹ Rome Statute of the International Criminal Court, Article 43(6). See also Rules 16(1)(d), Rule 17(2)(a)(iv), 17(2)(b)(iii), 88(5), 86, 88(1).

¹ Rome Statute of the International Criminal Court, Article 75(1); Assembly of States Parties Court’s Revised Strategy in Relation to Victims (ICC-ASP/11/38, 5 November 2012) <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-38-ENG.pdf> accessed 20 June 2020 p 6.

¹ Rome Statute of the International Criminal Court, Article 75(2); Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 (3 March 2015) paras 64-76.

¹ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision establishing the principles and procedures to be applied to reparations (7 August 2012) paras 207-209.

¹ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Warrant of Arrest (10 February 2006) page 4.

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been committed.¹ Next, in *Katanga*, the⁸ accused was acquitted⁷ of the charges of being an accessory to rape and sexual slavery as war crimes and crimes against humanity,¹ due to insufficient evidence.¹ While the tide appeared to change in *Bemba*, in which the Trial Chamber convicted the accused of rape as a war crime and crime against humanity,¹ this success was short-lived. The Appeals Chamber reversed the Trial Chamber’s decision in 2018, because the criminal acts did not fall within the “facts and circumstances described in the charges” in article 74(2); and the Chamber erred in finding that Bemba had failed to take all necessary and reasonable measures to prevent or repress the crimes committed.¹

The cases that have followed signal that an upheld conviction is surely on its way; at the very least, it signals that the OTP is on a crash course of learning how best to investigate and prosecute SGBV. *Ngatanga* may be the ICC’s first success for SGBV victims, as Trial Chamber VI found Ntaganda guilty as an indirect perpetrator of rape and sexual slavery as a crime against humanity and a war crime,¹ and sentenced him to thirty years for his crimes.²¹ Now, however, the Defence seeks reversal and acquittal in appeals.¹ In particular, the Defence has submitted that the Trial Chamber’s findings regarding the rape or sexual enslavement of child soldiers,¹ and the virtual certainty of rape and sexual slavery as consequences of the common plan, were “manifestly unreasonable”.¹ There must certainly be fear that the outcome in *Bemba* will repeat itself, and that SGBV victims will be denied their victory.

The trials of *Ongwen*, *Al Hassan* and *Ngaissona* are also promising. Trial Chamber IX is deliberating on the highest number of SGBV charges to date,¹ in which the accused is alleged to be both a direct perpetrator and under indirect criminal responsibility.¹ Ongwen is charged

¹ Brigid Inder ‘Reflection: Gender Issues and Child Soldiers the Case of Prosecutor v Thomas Lubanga Dyilo’ (International Justice Monitor, 31 August 2011) <<http://www.lubangatrial.org/2011/08/31/reflection-gender-issues-and-child-soldiers-the-case-of-prosecutor-v-thomas-lubanga-dyilo-2/>> accessed 22 May 2020. Women’s Initiatives for Gender Justice (WIGJ) submitted more than thirty testimonies demonstrating that SGBV was “systematic”, and “an integral component of the attacks against the civilian population.

¹ Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, Judgment pursuant to Article 74 of the Statute (7 March 2014) p 659.

¹ Ibid para 1664. Although the witnesses were credible, the Trial Chamber could not find, on the basis of the evidence before it, that the criminal purpose pursued encompassed the crimes of rape and sexual slavery.

¹ Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute (21 March 2016) para 752.

¹ Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, *Judgment on the appeal of Mr Jean-Pierre Bemba against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”* (8 June 2018) para 196. This was devastating to SGBV victims, for whom, as the Prosecutor commented, the “carnage and suffering caused by those crimes w[as] very real.” See International Criminal Court ‘Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba Gombo’ (13 June 2018) <<https://www.icc-cpi.int/Pages/item.aspx?name=180613-OTP-stat>> accessed 22 May 2020.

¹ Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06², *Judgment* (8 July 2019) pp 536-537.

¹ Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06³, *Sentencing Judgment* (7 November 2019) p 117.

¹ Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, *Mr. Ntaganda’s Notice of Appeal against the Judgment pursuant to Article 74 of the Statute* (9 September 2019) p 17.

¹ Ibid p 15.

¹ Ibid.

¹ See International Criminal Court ⁷ ‘Alleged crimes (non-exhaustive list)’ <<https://www.iccpi.int/uganda/ongwen/pages/alleged-crimes.aspx>> accessed 22 May 2020; Rosemary Grey *Prosecuting Sexual and Gender-based Crimes at the International Criminal Court* (Cambridge University Press, 2019) pp 174-176.

¹ Prosecutor v. Dominic Ongwen, Case No. ICC-02/04-01/15, *Decision on the confirmation of charges against Dominic Ongwen* (23 March 2016) para 86.

with forced marriage as an “other inhumane act” within article 7(1)(k), crimes against humanity, and forced pregnancy within article 7(1)(g) and as a war crime under article 8(2)(e)(vi),¹ which signals that the OTP is starting to prosecute a broader range of SGBV crimes. In the trial of *Al Hassan*, the accused¹ is charged with sexual slavery and forced marriage as an inhumane act.¹ In *Ngaissona*, the Trial Chamber has partially confirmed the charges against the accused and found that there were substantial grounds to believe he was responsible in some capacity for rape as a war crime and crimes against humanity.¹

However – for the purposes of this article at least – speculative success of an upheld conviction is not success in the concrete, tangible, sense of the word. It stands that the only conviction for SGBV crimes – *Ntaganda* – will soon be fought to the teeth in the Appeals Chamber. *Lubanga*, *Katanga* and *Bemba* were deeply disappointing, but they are not yet anecdotes of the ICC’s ‘early days’ failings to secure a conviction for SGBV. The Court might seem at the end of that phase, but it is not yet out of it. It is not as simple – or fair – as saying that the Court has failed to uphold any SGBV convictions. Its eventual success will be the product of many years of struggle. On the record of convictions and prosecutions alone, however, the Court has not delivered on its expectations of justice for SGBV victims.

3.3 Participation in the trial

As noted above, the pioneering participation scheme was one in which victims became “actors of international justice rather than its passive subjects.”¹ It came with high² expectations.¹ However, in practice² the article has drained the Courts’ capacity and left the judiciary with the inordinately difficult task of taming its scope.¹ For the most part, it has² meant that victims – not just those of SGBV – have been unable to realize their generous participatory role envisaged at the outset. Of the 5229 victims granted participant status in *Bemba*,¹ the Court only permitted three victims to present their “views and concerns”.¹

The huge numbers of victim applicants and limited Court capacity has resulted in an overburdened “black hole”¹ of an application process under rule 85; article 68(3) is of limited evidentiary value, and cannot be weighed by the judges in the determination of guilt or innocence, or in sentencing;¹ and common legal representation has become the only feasible

¹ Ibid para 96.

¹ International Criminal Court ‘Al Hassan Case’ <<https://www.icc-cpi.int/mali/al-hassan>> accessed 10 June 2020.

¹ Le Procureur c. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Case No. ICC-01/12-01/18 *Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (13 Novembre 2019) pp 302-305.

¹ Prosecutor v. Patrice-Edouard Ngaissona and Alfred Yekatom, Case No. ICC-01/14-01/18s, *Public redacted version of “Document Containing the Charges” ICC-01-14/01-18-282-Conf-AnxB1, 19 August 2019* (18 September 2019) para 629.

¹ Office of the Prosecutor *Policy Paper on Victims’ Participation* (April 2010) <<https://www.icc-cpi.int/NR/rdonlyres/9FF1EAA1-41C4-4A30-A202-174B18DA923C/281751/PolicyPaperonVictimsParticipationApril2010.pdf>> accessed 15 June 2020 p 1.

¹ Supra note 4.

¹ Klamberg Supra note 96 pp 524-527.

¹ Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, *Case Information Sheet* <<https://www.icc-cpi.int/CaseInformationSheets/bembaEng.pdf>> accessed 10 June 2020.

¹ Supra note 110 para. 17.

¹ Supra note 4 p 21.

¹ Supra note 110 para 25; see also T Markus Funk *Victims’ Rights and Advocacy at the International Criminal Court* (Oxford University Press, 2015) p 469; Supra note 15 p 654.

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modality of representation.¹ This emasculates 'participation';¹ it risks tokenism and presumes homogeneity; and it obviates the possibility for individual or nuanced views, or anything other than representation of the majority opinion.¹ Perhaps, then, article 68(3) was an over-commitment; the drafters' over-compensation for victims' silence at the ICC's predecessors.²

Testifying as a victim witness has not been much more gratifying. Despite the rules providing sensitivity to SGBV victim witnesses noted above, the process of international criminal law remains a "blunt tool": "it too is violent".¹ Firstly, SGBV victim witnesses come to the Court with a complex and emotional narrative. They often struggle to express this trauma in a consistent or linear way, which clashes with the Court's prerogative to extract specific facts that go to the responsibility of the accused.¹ Further, there is a disconnect between the victim's experience and what is legally useful. Questions to the witness are narrow and highly specific, all timing and circumstantial facts: for example, the location of the rape in relation to relevant military buildings, the language the offenders were speaking, or the type of military stripes on their uniform.¹ This makes "potentially therapeutic story-telling" impossible.¹ For this reason, Judge Van den Wyngaert explained the importance of expectation management: "[The ICC] is not the appropriate forum for victims to express their feelings, as this would detract from the serenity of the trial and would not serve a useful purpose from the perspective of a criminal proceeding."¹

The stakes of coming to the ICC as a female SGBV victim are astonishingly high. SGBV victims are hesitant to come forward because of the fear of ostracization and reprisals;¹ where a woman and her sexuality are perceived as belonging to a man, and reporting would forever brand her as sexually impure.¹ An SGBV victim would likely have to "travel by car (something she might have never experienced) on a dirt track for eight hours, cross an international border, and take a nine hour air flight to The Hague [...] to testify – when she would likely relive the trauma by delivering her narrative of what occurred and answering detailed questions about it."¹ Upon return, she would likely be divorced by her husband, expelled from her land and crops, exiled from her village – "the only place she has ever known".¹ Witness PPPP-0001 testified to the brutal impact of this stigma, describing how she was left by her former partner, often spat on by

¹ Christine Chung 'Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?' (2008) 6 Nw. J. Int'l Hum. Rts. 459 p 509; Mariana Pena and Gaelle Carayon 'Is the ICC Making the Most of Victim Participation?' (2013) 7 IJTJ 518 p 535.

¹ Supra note 4 p 56.

¹ Claire Garbett 'The International Criminal Court and restorative justice: victims, participation and the processes of justice' (2017) 5(2) Restorative Justice 198 p 209.

¹ Doris Buss 'Performing Legal Order: Some Feminist Thoughts on International Criminal Law' (2011) 11 Int. Crim. Law Rev. 409 p 415.

¹ Henry Supra note 7 pp 125-126.

¹ See Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, *Transcript* (1 May 2012) <https://www.icc-cpi.int/Transcripts/CR2015_08681.PDF> accessed 22 May 2020.

¹ Julie Mertus 'Shouting from the Bottom of the Well: The Impact of International Trials for Wartime Rape on Women's Agency' (2004) 6(1) Int. Fem. J. Politics 110 p 115.

¹ Christine Van den Wyngaert 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' (2011) 44(1) Case W. Res. J. Int'l L. 475 p 489.

¹ Louise Chappell 'Conflicting Institutions and the Search for Gender Justice at the International Criminal Court' (2014) 67(1) Political Res Q. 183 p 191.

¹ Duggan and Jacobson Supra note 51.

¹ Richard Steinberg 'Introduction to Part 6' in Richard Steinberg (ed) *Contemporary Issues Facing the International Criminal Court* (Brill Nijhoff, 2016) p 272.

¹ Ibid.

other villagers, and could no longer work for money to provide for her children.¹ These repercussions can often be overlooked, and present another obstacle to meaningful and beneficial participation in the ICC by SGBV victims.

Added to this is the intensely intimate nature of the “facts” that the witness must confirm: to speak about the most private parts of the body in front of a full courtroom is formidable at least.¹ This is exacerbated by⁴ the defence’s adversarial role of revealing inconsistencies in the witness’ testimony, which can throw SGBV victims “off balance”¹ due to their particular⁴ vulnerability.¹ It is the binary nature of the adversarial criminal¹ trial – the contest between guilt and innocence, between believing the victim or not – that is reductive, simplistic, and an inhospitable environment for nuanced experience.¹

The Court invokes victims as its *raison d-êtr*e, and yet has limited practical scope for the kinds of expression that victims wish to convey; for, despite this scheme, the Court clearly remains a criminal trial concerned with retribution. This itself is indicative of the more fundamental overstatement of the Court’s so-called restorative capabilities – and is returned to below.

3.4 Reparations

Finally, with *Ntaganda* at the appeals stage, no SGBV charges have thus far been upheld and so the victims of those crimes are as yet precluded from benefiting from the article 75 scheme. In terms of the Court’s track record, it therefore requires the shortest of assessments – but, beyond this, the Court-ordered reparations scheme is at odds with the immediate individual needs of the SGBV victim that were revealed above.

Firstly, any charges that the accused is convicted of are highly conditional on multiple factors – for example, prosecutorial strategy (*Lubanga*), or jurisdictional limits and operational challenges (*Katanga*, *Bemba*). Any eventual Court-ordered reparations order for a successfully upheld SGBV conviction is therefore likely to reflect but a fraction of the crimes that actually occurred, and go to but a lucky fraction of the victims.

Secondly, reparations are secondly exceptionally slow. If *Ntaganda*, *Ongwen* and the other pending cases eventually result in a Court-ordered reparations order for upheld SGBV charges, this is bound to take years and is unlikely to be comprehensive. In *Katanga*, 297 victims were each awarded \$250USD in March 2017 – three years after *Katanga* had been convicted of the charges in March 2014.¹ While this is a more⁴ significant sum in the local context, it pales in

¹ Supra note 135 p 54.

¹ Kelly Askin ‘Can the ICC Sustain a Conviction for the Underlying Crime of Mass Rape without Testimony from Victims?’ in Richard Steinberg (ed) *Contemporary Issues Facing the International Criminal Court* (Brill Nijhoff, 2016) p 276.

¹ Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, *Transcript* (2 May 2012) <https://www.icc-cpi.int/Transcripts/CR2015_08681.PDF> accessed 22 May 2020 p 33.

¹ Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, *Transcript* (3 May 2012) <https://www.icc-cpi.int/Transcripts/CR2012_05411.PDF> accessed 22 May 2020 p 7. In the testimony of *Bemba* Witness PPPP-0001, the presiding judge had to reprimand the defence: “I remind you, we all know this lady is vulnerable [...] the witness was visibly tired, upset, distressed, not understanding a word of what you were saying, and you were pushing hard [...] One thing is to put questions to the witness, the other thing is to try to trap a witness, an illiterate and uneducated person [...] It’s your obligation to defend the interest of your client, and the Chamber is here in order to ensure a fair trial. So don’t come in with your conspiracy theory.”

¹ Supra note 133 p 418.

¹ Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, Order for Reparations pursuant to Article 75 of the Statute (24 March 2017) paras 168, 300.

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light of the Court's overall expenditure for that year – €147,250,700.¹ Schabas suspects that if the victims understood the millions invested in professional salaries and international travel “in order to ensure the respect of their rights, they might ask if they could simply be given the money instead.”¹ Beyond this, perhaps the difference between the overall expenditure and the *Katanga* order again goes to evidence the drafters' overstatement of the Court's victim-centricity and restorative capabilities, their understatement of the cost of retribution, and the priority that the latter would take over the former.

Finally, both individual and collective¹ Court-ordered reparations can only be directed to identified victims who are eligible based on the link between the harm suffered by the victims and the crimes of which the person was convicted.¹ This is at odds with the need for a justice response that goes as broad and as deep as the society-wide structural injustices that consolidate SGBV, which is necessarily further-reaching than those victims that happen to be granted eligibility for reparations. Eventually, the Court will surely secure a SGBV conviction and issue Court-ordered reparations; however, these are likely to be too tentative, too fragmentary, and too late.

The ICC's track record with regards to SGBV victims, therefore, has fallen short in all three areas. But in light of its self-stated commitment to SGBV victims, and its reliance upon victims as its legitimating discourse, can it ever be expected to? Does the ICC have the institutional capabilities that the ideal SGBV justice response requires, as drawn from Section Two? Three arguments follow to propose that – due to incompatibilities between the ICC 'solution' and the SGBV 'problem', and the commitment to victims being set unreasonably high at the outset – it cannot.

4.0 The ICC – will it ever deliver justice to SGBV victims?

4.1 Retribution's narrowness precludes understanding of SGBV

The Court's primary function as a mechanism of criminal justice renders it unable to recognise or touch the systemic injustice that Section Two revealed is so pertinent to SGBV. By focusing on an individual accused, the Court's vision becomes narrow. It concerns itself with the accused's criminal actions or commands that have directly or indirectly caused harm to the victim. However, this obviates the understanding that SGBV is not most realistically traced to the responsibility of a single accused, but is engendered in society-wide norms and practices. It is the product of something much broader than what one could point a finger at in the defendant's box, however, the Court is bound to this narrow point of view; and not equipped to widen its scope of enquiry.

Moreover, this may indicate a fundamental incompatibility between the ICC 'solution' and the SGBV 'problem' – that the ICC is designed to try and exhibit aberrations in justice, presuming that justice is the norm. Retribution is generally sufficient as 'justice' in the West, because of the inherent presumption that justice will resume after putting the aberration on trial.

¹ Assembly of States Parties Proposed Programme Budget for 2017 of the International Criminal Court (ICC-ASP/15/10, 17 August 2016) <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-10-ENG.pdf> accessed 22 May 2020 p 7.

¹ William Schabas 'The International Criminal Court at Ten' (2011) 22 *Crim. Law Forum* 493 pp 500-501.

¹ Rules of Procedure and Evidence, Rules 97(1), 98(2), 98(3). Collective Court-ordered reparations orders theoretically have a broader ambit, as they can be issued to groups who have suffered a shared violation. The Appeals Chamber in *Katanga* specifically cited SGBV victims as the type of group that could benefit from such an order. See *Prosecutor v. Thomas Lubanga Dyilo* *Supra* note 103 para 33; *Supra* note 146 para 274.

¹ *Supra* note 147 para 31. ⁵

This presumption no doubt stems from the West's freedom – superficially, at least – from the deep systemic injustices that ignite SGBV in conflict in the ways it does in the DRC, CAR, and Uganda. This article has revealed, however, that the solution to SGBV will necessarily involve a much deeper upheaval of the norms that consolidate it. This incompatibility, coupled with the limits of Court-ordered reparations and the gendered nature of the law, give rise to real doubt as to the ICC's ability to 'do better' for the SGBV victims.

SGBV seems to end its journey at the ICC as a fragment of itself: what is seeded in patriarchal culture, gender norms and discriminatory expectations, and perpetrated *en masse*, is sliced and scored through the ICC's jurisdictional limits, charge selection, evidential availability, participatory rules and regulations, a victim's willingness and availability to come forward and resilience to see the trial through; until it is but fragmentary facts, extracted adversarially in a far-away room. The pursuit of criminal responsibility is not well oriented to SGBV's causes, or its remedy. Indeed, it appears that SGBV trauma translates more to a humanitarian response than a criminal one.

4.2 The commitment to victims and restoration was overstated

The commitment to victims stemmed from drafters' intention to imbue the ICC with restorative goals; and the reliance upon victims as central to the ICC's legitimacy and purpose. This author submits that the drafters overestimated the Court's ability to call itself restorative and legitimate because of what it could offer to victims, and the broad participatory and reparations schemes were perhaps created out of a certain naivety of what the Court could actually accomplish.

(a) The Court's restorative capabilities were overstated

The Court remains an overwhelmingly retributive, Western construction – with the exception of the TFV assistance mandate discussed below – and it is because of this that it can, fundamentally, not be expected to do better for these victims. The commitment made to victims – while dramatic, certainly – did not the subvert the Court's primary prerogative of ascertaining the guilt or innocence of the accused. Indeed, article 68(3) ensures that victims' interests must and will always be ancillary to the accused's fundamental right to a fair trial.¹

It is this subsidiarity – the constant weighing of victims' rights against other rights and values – which must account for victims' interests being continually compromised.¹ The whittling down of article 68(3) is something more fundamental than ambiguous phrasing: it is the product of the prioritisation of retribution. With regards to reparations, too, Vasiliev asserts that this right is an "afterthought" rather than a primary objective – as proceedings take place irrespectively of whether requests have been made for reparations.¹

Being veritably 'restorative' requires displacing retribution as the primary goal;¹ and,

¹ Rome Statute of the International Criminal Court, Article 68(3); see also Guénaél Mettraux, Shireen Avis Fisher, Dermot Groome, Alex Whiting, Gabrielle McIntyre, Jérôme De Hemptinne, Göran Sluiter Expert Initiative on Promoting Effectiveness at the International Criminal Court (December 2014) <https://asp.iccpi.int/iccdocs/asp_docs/ASP19/Ind_Exp_Initiative.pdf> accessed 22 May 2020 pp 178-183 paras 8, 10, 19, 26, 32; Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Minority Opinion of Judge Christine Van den Wyngaert (7 March 2014) para 311; Luke Moffett 'Meaningful and Effective? Considering Victims' Interests Through Participation at the International Criminal Court' (2015) 26 *Crim. Law Forum* 255 p 287.

¹ Fletcher *Supra* note 2 p 305⁵

¹ *Supra* note 15 p 678. ⁵

¹ *Supra* note 15 pp 676-677. ⁵

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while the ICC certainly added some restorative ideals into the mix, it did not displace retribution. Inserting participatory and reparative rights could not have been expected to automatically convert the Court into a cushy and embracing experience for SGBV victims if the defence rights, procedures and regulations, or any of the foundations that make a retributive trial were not correspondingly stripped away. This is not about naively calling upon the Court to displace these retributive pillars, but instead to be realistic about the fact that retribution is at the core of international criminal law, and, as this article has revealed, there is limited scope for a concurrent restorative mandate. The Court's failure to uphold its commitment to SGBV victims may therefore be, as Kendall asserts, a by-product of trying to bend a retributive field to suit restorative aims; of trying to route restorative justice practices through this historically punitive field.¹ This author submits that, from both a capacity and a moral standpoint, it is unsustainable to place victims on a figurative pedestal and promise them restorative justice through the forum of the Court. Beyond this, the dominance of the retributive discourse means that it is unrealistic to expect the Court to deliver justice for SGBV victims.

(b) The Court's victim-centricity was overstated

As has been noted throughout this article, victims are used as a legitimating function of the Court, and the Court seeks justice in their name.¹ This author submits that this was also overstated, given the disconnect revealed between what justice means for an SGBV victim and the elusive, long-awaited, highly technical justice sought after at the ICC. Certainly, justice is not a homogenous thing. But the Court is a geographical and cultural world away from SGBV victims' lived realities, and certainly not incorporative of the traditional African justice that bears more familiarity and meaning for the victims the ICC claims to serve.¹ Arguably, it plays more to the justice of its mostly-Western funders, or its mostly-global north employees.¹

Critics propose that victims are only invoked symbolically to legitimise international prosecutions;¹ and that the ICC undermines victims' autonomy and dignity to seek redress on their own terms.¹ Fletcher asserts that the 'victim' at the base of this legitimating discourse is in fact 'imagined'; constructed by the Court for the purpose of garnering political support.¹ Even milder critics question the validity of the discourse: "no other party is so much set before the public gaze yet so much ignored as victims";¹ and "The new conception of victimhood is being propelled by various judicially driven institutions for victims that [...] claim to work on behalf of victims, but on the other hand are unable to provide victims with the basic necessities for addressing their suffering."¹ This criticism plays into the broader murmurings of Western

¹ Kendall Supra note 14 p 353. 6

¹ Supra note 5. 5 7

¹ Aroussi Supra note 38 p 293; Supra note 29 p 39. 8

¹ Supra note 133 pp 421-422; Aroussi Supra note 38 p 293; C.f. the Gacaca process in Rwanda: Anne-Marie de Brouwer and Etienne Ruvebana 'The Legacy of the Gacaca Courts in Rwanda: Survivors' Views' (2013) 13 ICLR 937 pp 963-964; see also Carsten Stahn 'Reparative Justice after the Lubanga Appeal Judgment' (2015) 13(4) JICJ 801 p 801.

¹ Moffett Supra note 152 p 264. 0

¹ Ibid p 287. 6 1

¹ Fletcher Supra note 2 pp 313, 324. 2

¹ Christine Schwöbel-Patel 'Spectacle in international criminal law: the fundraising image of victimhood' (2016) 4(2) Lond. Rev. Int. Law 247 p 252.

¹ Kamari Maxine Clarke 'We ask for justice, you give us law': the rule of law, economic markets and the reconfiguration of victimhood' in Christian De Vos, Sara Kendall, Carsten Stahn (eds) *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015) p 277.

paternalism and even neo-colonialism:¹ that the Court paints itself as the “heroic agency”,¹ traced in voyeurism,¹ who saves “nameless starving, weeping, mourning strangers as part of a narrative in which we [in the First World] are spiritually enriched by the knowledge of our superiority and capacity to rescue and redeem these others.”⁶

This article does not seek to delve into hegemonic debates, but prefers to ascribe to the view that the ICC placed victims on a pedestal out of compensation for the *ad hoc* tribunals’ silence, and genuine hope that it could do better for them. However, this author does submit that – while refraining from crying imperialism – there was a degree of presumed superiority in the Court’s genesis that a Western-style retributive court could be the solution for conflict across the globe, jurisdiction permitting. Relying upon victims as the legitimating discourse is flawed if the Court finds itself incapable of following through on their priorities in a tangible, material way. Just as it is unsustainable to promise restoration to victims and instead operate as all but a traditional criminal trial, the Court must be alert to the disconnect between the justice it seeks, and the justice of the victims it claims to exist for. For the purposes of this article, the overstatement of its victim-centricity indicates that the commitment to victims was set unreasonably high at the outset; and the Court can, fundamentally, not be expected to deliver justice to these SGBV victims.

4.3 The law itself is gendered and may perpetuate SGBV stereotypes

Above it was discussed that a key part of SGBV’s impact on the community is the entrenchment of female inferiority, and that a discourse that subverts these patriarchal roles will be key in the justice response. However, international criminal law itself is not gender neutral, but a product of having been, until recently, developed and interpreted almost entirely by men.¹ These traces of patriarchy render it an incompatible forum for dealing with the kinds of feminist discourses required.

To illustrate, rape is defined as an active body penetrating a passive body.¹ Feminist critics have argued that this penetrator–penetrated definition is “performative” of the patriarchal stereotype of the passive, penetrable, vulnerable woman.¹ This is also reflected in the related

¹ Leila Ullrich ‘Beyond the ‘Global-Local Divide’’ (2016) 14(3) JICJ 543; Moffett *Supra* note 152 p 264; see also Frederic Megret ‘In whose name? The ICC and the search for Constituency’ in Christian De Vos, Sara Kendall, Carsten Stahn (eds) *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015) p 42; Christine Schwöbel-Patel ‘The ‘Ideal’ Victim of International Criminal Law’ (2018) 29(3) EJIL 703 pp 703-724; Carsten Stahn ‘Justice Civilisatrice? The ICC, Post-colonial Theory, and Faces of “the Local”’ in Christian De Vos, Sara Kendall, Carsten Stahn (eds) *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015) pp 46-84; Adam Branch ‘Uganda’s Civil War and the Politics of ICC Intervention’ (2007) 21 *Ethics Int. Aff.* 179 pp 179-198; Michael Newton ‘A synthesis of community-based justice and complementarity’ in Christian De Vos, Sara Kendall, Carsten Stahn (eds) *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015) pp 109, 144.

¹ *Supra* note 163 p 255.

¹ Stahn *Supra* note 165 p 78.

¹ Anne Orford *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press, 2003) p 33.

¹ R Blain Andrus *Lawyer: A Brief 5,000-year History* (2009) p 321; Kulemann *Supra* note 58; Hellman *Supra* note 50 p 106.

¹ Marie-Alice D’Aoust ‘Sexual and Gender-based Violence in International Criminal Law: A Feminist Assessment of the Bemba Case’ (2017) 17(1) *Int. C.L.R.* 208 p 217.

¹ Kirsten Campbell ‘The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia’ (2007) 1(3) *IJTJ* 411 p 429; Grewal *Supra* note 72 p 158.

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fields of international humanitarian and human rights law – in line with the “womenandchildren” relegation, women are defined passively, always situated in their relationship with others,¹ and the protection rules relate only to women’s sexual and reproductive aspects designated to be important from a male perspective.¹

Beyond this, feminist scholars argue that the adversarial criminal system is inherently male-defined.¹ By focusing primarily on punishment, rather than victim healing and the sociological foundations of crime, it embodies the construction of hierarchical and coercive rule, “which serves as the foundation of male domination for women”. In this sense, it is “quintessentially male”.¹ The former Special Adviser on Gender credited these “old informal gender legacies” to explain the Court “sliding back into old habits” and failing to prosecute SGBV in *Lubanga*.¹ Such portrayal “has little to do with women’s experience of sexual violence”¹ instead pertaining to a concept of honour that is socially constructed and sustained by dominant masculinities.¹

The law therefore entrenches the stereotypes that have ‘normalised’ SGBV as something inherently more ‘female’, and as a crime not deserving of its own retribution. An example of this can be seen in the *Kenyatta* case, when the ICC regrettably reinforced this idea.¹ The Trial Chamber held that “these weren’t just attacks on men’s sexual organs as such but were intended as attacks on men’s identities as men within their society and were designed to destroy their masculinity.”¹ As such, the institution may contribute to institutionalisation of the problem, subconsciously legitimising men’s masculinity as something superior to femininity – the violation lying in the emasculation and “being made to feel like a woman”. As the ICC’s comments in *Kenyatta* indicate, the remnants of patriarchy in the Court may entrench, rather than uproot, the gender stereotypes that are at the core of SGBV. For the purposes of this argument, it is submitted that the “gender legacies” which have shaped and regrettably continue to inform international law, provide an inhospitable environment for addressing the predominantly female-centric issue of SGBV.

5.0 An allegorical clear path? Greater investment in the Trust Fund for Victims’ Assistance Mandate

If victims truly are the *raison d’être* of the Court, then the TFV’s assistance mandate

¹ Louise Chappell ‘Women, Gender and International Institutions: Exploring New Opportunities at the International Criminal Court’ (2003) 22(1) Policy Soc. 3 pp 5-7; Lara Stemple ‘Male Rape and Human Rights’ (2009) 60(3) Hastings L. J. 605 p 625. See also Supra note 44 p 31, citing Poulain de la Barre.

¹ Gardam Supra note 37 pp 38-39; Jha Supra note 37 p 229 footnote 4; Supra note 170 pp 214-216; Supra note 138 pp 185-186. See also Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, Article 76.

¹ Henry Supra note 6 p 122; Hilary Charlesworth ‘Feminist Methods in International Law’ (1999) 93(2) AJIL 379 p 388; see also Hilary Charlesworth, Christine Chinkin and Shelley Wright ‘Feminist Approaches to International Law’ (1991) 85(4) AJIL 613 pp 613-645.

¹ Aya Gruber ‘Rape, Feminism and the War on Crime’ (2009) 84 Wash. L. Rev. 581 pp 616-617.

¹ Louise Chappell *The Politics of Gender Justice at the International Criminal Court* (Oxford University Press, 2015) p 2. See also Ullrich Supra note 69; Supra note 138 p 185.

¹ Judith Gardam ‘Women and the law of armed conflict: Why the silence?’ (1997) 46(1) Int’l & Comp. L.Q. 55 p 57.

¹ Amy Barrow ‘UN Security Council Resolutions 1325 and 1820: constructing gender in armed conflict and international humanitarian law’ (2010) 92 International Review of the Red Cross 221 p 225.

¹ Ullrich Supra note 68; Grewal Supra note 72.

¹ Prosecutor v. Uhuru Muigai Kenyatta, Case No. ICC-01/09-02/11, Transcript (22 September 2011) <https://www.icc-cpi.int/Transcripts/CR2011_17009.PDF> accessed 25 May 2020 p 88.

deserves more attention as it circumvents many of the Court's constraints while not diluting its retributive function. The TFV is a *sui generis* body, specifically created because of the Court's inclusion of restorative alongside retributive ideals,¹ and the second mandate to the TFV's role implementing Court-ordered reparations measures.¹ Programmes under the mandate can commence as early as the Prosecutor commences an investigation under article 13 of the Statute, and the TFV can operate in this way without any conviction.¹ It is independent of⁸ the prosecutorial strategy, and accordingly SGBV victims need not establish that their harm links back to a specific charge at the Court. Beneficiaries of the assistance mandate are simply victims of Rome Statute crimes, and their families.¹

In this sense, the mandate has been referred to as the “Swiss cheese” model because assistance is provided predominantly to “patch the holes of a restrictive reparations process by targeting those not eligible to participate in it.”¹ The TFV, through the⁸ assistance mandate, has already worked extensively with victims of many forms of SGBV. It targets both specific individuals and community-wide discourse, works to educate and empower SGBV victims as well as address their physical and psychological needs,¹ attacks stigma and discrimination,¹ and promotes inclusion, shared responsibility, and peaceful coexistence among community members.¹ The assistance mandate is therefore more aligned with the humanitarian, rather than criminal nature, of many SGBV victims' needs. Crucially, its ability to engage with anti-stigma and educational discourses means that it can work to dismantle the kinds of engrained social norms that perpetuate SGBV and render it so pervasive as a tool of conflict. In this way, it is well-aligned with the ideal justice response discussed above, while unconnected to the difficulties plaguing the Court-ordered reparations and participation scheme.

Yet, the assistance mandate is drastically underfunded, stretched across multiple countries,¹ and there are more beneficiaries than it can serve. It operates purely on voluntary contributions,¹ is outside of the regular funding given to Court bodies such as the VPRS, and

¹ International Criminal Court ‘Trust Fund for Victims (TFV) Background Summary’ <https://www.icc-cpi.int/NR/rdonlyres/E582AE21-D718-4798-97ED-C6C9F0D9B42D/0/TFV_Background_Summary_Eng.pdf> accessed 21 June 2020 p 2.

¹ Rome Statute of the International Criminal Court, Article 79; Rules of Procedure and Evidence, Rule 98(5); Trust Fund for Victims Annual Report Summary 2016 <https://www.trustfundforvictims.org/sites/default/files/reports/summary_EN_ONLINE.pdf> accessed 27 May 2020 p 12.

¹ The Trust Fund for Victims⁸Supra note 182 p 5.

¹ Regulations of the Trust Fund for Victims (Resolution ICC-ASP/4/Res.3, 3 December 2005), Regulation 48; see also Dutton and Aoláin Supra note 86 p 523.

¹ Peter Dixon ‘Reparations, Assistance and the Experience of Justice: Lessons from Columbia and the Democratic Republic of Congo’ (2016) 10 IJTJ 88 p 104.

¹ The Trust Fund for Victims⁸Supra note 182 p 5.

¹ Dutton and Aoláin Supra note 88 pp 515–516.

¹ Trust Fund for Victims ‘Programming guiding principles’ <<https://www.trustfundforvictims.org/en/what-we-do/programming-guiding-principles>> accessed 27 May 2020; Trust Fund for Victims Strategic Plan 2014-2017 Summary (2014) <<https://trustfundforvictims.org/sites/default/files/imce/TFV%20Brochure%20%20Strategic%20Plan%20Summary%202014-2017.pdf>> accessed 27 May 2020 p 7.

¹ Dutton and Aoláin Supra note 86 pp 539-541, 544.

¹ Rules of Procedure and Evidence, Rule 98(5); Regulations of the Trust Fund for Victims Supra note 246, Regulation 21; Assembly of States Parties Report to the Assembly of States Parties on the projects and the activities of the Board of Directors of the Trust Fund for Victims for the period 1 July 2017 to 30 June 2018 (ICC-ASP/17/14, 23 July 2018) <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP17/ICC-ASP-17-14-ENG.pdf> accessed 10 June 2020; The Trust Fund for Victims Supra note 181 p 5.

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there is no obligation for ICC states parties to contribute or prioritise the mandate over competing aid commitments.¹ This author submits, in accordance with other critics,¹ that the TFV should be given greater attention and, ideally, investment.

At the very least, the ICC core body needs a higher level of understanding about the assistance mandate. TFV staff have recounted the extensive time and resources spent advocating for and explaining its role at the ICC, and the sense of disconnect between the ICC and the reality on the ground.¹ Dutton and Aoláin concluded that, “in the Authors’ view, it is not clear that the ICC fully appreciates the extent and scope of the Trust Fund’s contribution to its success and its acceptance.”¹ Bridging this gap between the TFV and the ICC is an important and necessary first step; but as outlined here, meaningful monetary investment is critical for the TFV to achieve its potential to bring change for SGBV victims.

It is important to remember that the potential of the TFV assistance mandate is not the only one on the line. The Court’s struggles to achieve its potential has, in many ways, been the overarching narrative of this article – and so, where opportunities exist for the Court to deliver on the commitment it made to victims, and make solid the fragility of its victim-centric legitimating discourse, it must take them seriously. The assistance mandate is one such opportunity. It has the potential to add colour and meaning to the ICC’s very narrow, black and white enquiry into guilt, bound and made rigid by rules and the dominating pursuit of retribution. The assistance mandate can give victims a chance to engage with therapeutic storytelling of their experiences, to reclaim their status, and can help to ease their material and psychological grievances.

The author submits that, as a final point, the assistance mandate is the only real basis on which the Court can countenance asking victims to stand up in the courtroom and play into the dominating discourse: to give those narrow, black and white facts; to be questioned by the defence; to risk so much in terms of their already damaged personal lives. The ICC must recognise this, and shift some of its weight behind the things that are truly victim-oriented. Otherwise, in another twenty years, it may well find that its legitimacy is in tatters: that the well-meaning new articles have simply not achieved anything of substance for the victims; and that the kindlings of the critics who call it neo-colonialist have become a wildfire. The TFV assistance mandate, however, has potential to be the allegorical ‘clear path’ – and it deserves greater attention for this.

6.0 Conclusion

This article has attempted to reveal that, while the ICC holds a unique and crucial role in prosecuting international crimes, it is not the beginning and the end of justice. At the end of the twentieth century, in a narrow window of relative peace, the international community managed to create this glorified institution, and imbued it with all the hopes of the values it stood for. The weight of the silence of victims, excluded from the tribunals’ predecessors, were placed as its centre, and anointed with promise and expectation. The very establishment of the ICC is a political miracle, and one that would certainly not be possible today. But there is an

¹ Frederic Megret ‘Of Shrines, Memorials and Museums: Using the International Criminal Court’s Victim Reparation and Assistance Regime to Promote Transitional Justice’ (2010) 16 *Buff. Hum. Rts. L. Rev* 1 p 14.

¹ Dutton and Aoláin *Supra* note 86 p 547.

¹ *Ibid* p 538.

¹ *Ibid* pp 538-539.

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understandable tendency to look up to the ICC as the answer to everything. Coming from the West, and as has been discussed, there might be some innate bias in the belief that it is.

When the ICC placed victims at the centre of its mandate, and sought to serve the millions who “have been victims of unimaginable atrocities”,¹ it committed to a bold⁹ and novel step in international criminal law. Victims are the one commonality of every conflict, and so bringing them into the picture of international criminal tribunals was an entirely legitimate exercise. Challenges in doing so, however, were inevitable. SGBV, and the victims of it, have served as the example and the reason: the challenge of prosecuting SGBV demonstrates the ICC’s limits, and reinforces the imperative that international justice is pursued, and that every effort goes in to making it effective. This article has therefore not sought to define the ICC’s limits out of pessimism, but out of pragmatism: out of a belief that defining its limits is a necessary objective in being able to chart the best way forward.

SGBV is distinct from other crimes: with its roots in patriarchy, misogyny and entrenched stereotypes, innately connected to the society in which it is committed; the lived reality of male domination of women or other men; and reinforcement of the stereotypes that embed female inferiority and violability. Female sexuality is held, paradoxically, between subordination and veneration, and while committed on the physical bodies of women and sometimes men, the trauma also manifests in the collective bodies that sustain these gender roles. This creates the need for a justice response that at once provides immediate assistance to the individual and transforms the societal norms that consolidate it.

And so, while the Court brought upon itself a mandate where victims were an “essential precondition”¹ to its legitimacy, with regards to SGBV victims,⁶ the remedy must necessarily go as deep as the norms that consolidate it. Yet, this article suggests that ICC reparations scheme is simply not designed to go so far; that the ICC is not well-placed to attend to either immediate or transformative assistance; that the ICC may be traced in patriarchy itself; and that its function of putting aberrations of justice on trial is a mismatched solution to SGBV’s deep structural and societal roots. More fundamentally, the Court is at its core a predominantly retributive construction, that will forever preclude a veritably restorative or victim-centric order of priorities.

This should not mean that the needs of SGBV victims and the ICC are mutually exclusive. The ICC must continue to seek to secure a conviction for SGBV, to counter impunity and deter repetition; and to continue to recognise SGBV as a crime, worthy of international attention and retribution. The TFV’s assistance mandate, however, circumvents many of the ICC’s obstacles, and has the potential to pull the worlds of the ICC and SGBV victims closer together. It is therefore a highly valuable and productive asset to the ICC in achieving its victim-centric mandate.

This should mean, though, that the ICC must realistically state its capabilities lest it risk being a master of none of them. Certainly, the drafters would have hoped that it could satisfy retributive and restorative goals concurrently; however, this thesis has revealed that in the realities of a busy Court, the scope for the latter will be continually compromised. The Court does not have to be the omnipotence of justice: criminal responsibility is only one side of the story, and can only be part of the response.

The ICC is an extraordinary body, which took an extraordinary step in international justice

¹ Rome Statute of the International Criminal Court, Preamble.

¹ Supra note 2.

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Great expectations: A critique of the International Criminal Court's commitment to victims of sexual and gender-based violence

nearly twenty years ago. Its permanence is no doubt necessary, given the apparent plethora of reasons for which mankind will fight: land, irreconcilable ideologies and ethnicities, distinctions in pigmentation of the skin; the list is endless. However, as a permanent arbiter of justice it must approach the next twenty years with pragmatism, and realism as to its true purpose and competence. Above all, it must remain attuned to the bodies – of victims, and communities – it stands to serve.