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(In)Compatible Visions of Justice? Personal Culpability and Gender Justice at the ICC

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Although the International Criminal Court (ICC) has been heralded as a success story for gender justice, in practice prosecutions of sexual and gender-based crimes (SGBC) have often ended with acquittal at the court. Gender studies in international relations explain the lack of successful SGBC prosecutions by looking to the influence of older gender biases in international law, which preclude the successful implementation of the novel Rome Statute provisions criminalizing SGBC. This article suggests that "forgetting" the gender justice norm insufficiently explains the outcome of the ICC's SGBC prosecutions. The article argues that ICC judges "remembered" another norm of criminal justice, long forgotten in international trials – strict compliance with the personal culpability principle – which has resulted in tension between different visions of justice in the court's practice: delivering substantive justice for SGBC victims v. safeguarding the defendant's rights by upholding criminal law principles.

Keywords: gender justice, international criminal law, International Criminal Court, personal culpability, sexual and gender-based crimes

INTRODUCTION

The notion of international criminal "justice" has been subject to various interpretations. Many identify international criminal law (ICL) with some form of substantive justice, such as upholding human rights (Stahn 2012, 255), promoting victims' well-being (Askin 2003, 347; DeGuzman 2011, 522–523), denouncing mass atrocities as socially unacceptable (Damaška 2008; Drumbl 2007, 173–174), or establishing a historical record of violence (Darcy 2007, 400). Such utilitarian

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understandings of international criminal justice are challenged by another vision of justice: justice as fairness towards the defendant (*Prosecutor v. Katanga* ICC-01/04-01/07-3436-AnxI, ¶¶ 310-311). From that perspective, strict compliance with criminal law principles and respecting the defendants' rights protects ICL from degenerating into illiberal show trials (Robinson 2008). By contributing to ICL's evolution as a discipline, various organizations, academics and legal professionals have promoted *their* vision of justice. As this article will discuss, at different stages of ICL's development certain ideas have prevailed, but, nevertheless, remained contested by other visions of justice.

Human rights activists have long struggled to promote justice for the victims of sexual and gender-based crimes (SGBC) in ICL. From that perspective, the international prosecution of the perpetrators of such crimes, and especially the leadership figures who deploy sexual violence as a war strategy (Mouthaan 2011, 777–778), would help deter future crimes (S. Smith 2008, 344), express condemnation of SGBC (Green 2011, 532), and offer psychological support to the victims (K. Smith 2011, 487–489; Pritchett 2008, 298). After bringing attention to the question of gender justice at the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) (Zawati 2014, 145), non-governmental organizations (NGOs) perceived the establishment of the permanent International Criminal Court (ICC) as an even greater opportunity for advancing gender justice. Due to their efforts, the Rome Statute granted the ICC broad jurisdiction over SGBC (Joseph 2008, 63) and gender justice advocates committed to cooperating with the new court in implementing those provisions in practice. But the ICC's gender justice record has been extremely disappointing – until February 2020, all but one SGBC prosecutions have ended with acquittal.[1] One study identified SGBC as the "most vulnerable" to dismissal or acquittal charges at the ICC (Women's Initiatives for Gender Justice (WIGJ) 2012a).

The lack of SGBC convictions has often been attributed to the prosecutor's "failure to investigate thoroughly" such crimes (WIGJ 2012a; K. Smith 2011, 496–500; Pritchett 2008, 291–293). While ineffective prosecutorial strategies could obstruct gender justice in particular cases, they do not by themselves explain the systemic failures

1. If the *Ntaganda* conviction is upheld on appeal, it will become the first ICC conviction for SGBC. Data source: ICC "Defendants" database, available at https://www.icc-cpi.int/Pages/defendants-wip.aspx.

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to achieve gender justice at the ICC. The early ICC prosecutorial strategy of "focused investigations," which contemplated prosecuting a limited set of crimes to represent the broader patterns of criminality (ICC 2006), was indeed criticized for abandoning SGBC prosecutions in the *Lubanga* case out of expediency concerns (Chappell 2014, 187). But over the years the ICC prosecutor has adopted a strategy of "in-depth open-ended investigations" (ICC 2014, 25) and dedicated a policy paper to SGBC, recognizing various forms of sexual and gender-based violence, including the suffering of male victims (Ibid., 5-8). The prosecution's 2019–2021 Strategic Plan reaffirms its commitment to assist the participation of SGBC victims in proceedings (ICC 2019, 23–24).

While the implementation in practice of the ICC prosecutor's declared commitment to advancing gender justice merits further analysis, this article specifically focuses on the norms influencing *judicial* decisions on SGBC charges. The article examines prosecutorial discretion to the extent that it appears to be influenced by the judges' attitude toward the evidence presented. At the ICTY and ICTR judges have often admitted evidence which would not meet the quality standards of domestic trials, essentially lowering the burden on the prosecutor in proving the defendant's guilt (Combs 2010), but the recent judgments in *Bemba* and *Gbagbo* suggest that ICC judges have taken the opposite approach, precluding successful SGBC prosecutions in those cases. This merits an inquiry into judicial reasoning.

Louise Chappell's seminal work has focused on the existence of long-standing gender biases in international law, which preclude the successful implementation of the novel Rome Statute provisions that criminalize SGBC and obstruct activists' efforts to promote gender justice (Chappell 2014; 2016. See also Pritchett 2008, 269–274). From that perspective, the judges' restraint in convicting persons for SGBC is perceived as regressing to old biased norms and "forgetting" the new just ones (Chappell 2016, 127).

This article seeks to contribute to existing gender studies in international relations and the international criminal justice literature by arguing that the challenges faced by gender justice at the ICC cannot be explained only as regressive practices, but should also be understood in terms of the *interaction* between the gender justice norm and the declared need for greater respect for the principle of personal culpability in criminal law. The culpability principle requires that a person should be punished only for their own conduct and precludes the attribution of guilt by mere association with the actual wrongdoers (Robison 2008, 926). The idea

that international trials should strictly follow the general principles of criminal law, similarly to domestic penal systems, has been promoted since the ICC's establishment (Eser 1993) and has gained increasing prominence in ICL scholarship (Danner and Martinez 2005, Guilfoyle 2011) and judicial opinions (*Prosecutor v. Katanga* ICC-01/04-01/07-3436-tENG, ¶¶ 54–57).

While gender justice does not negate the culpability principle, the difficulties of investigating such crimes (Askin 2003, 346) often require a broad interpretation of the notion of "culpable conduct." From this perspective, concerns for "over-inculpat[ing]" the defendant should be balanced with the interests of SGBC victims (WIGJ 2018, 147; see also Moffett 2015, 262). However, a detailed analysis of ICC jurisprudence suggests that the *defendant*-oriented vision of justice, upheld by the majority of ICC judges, has significantly narrowed the prospects for obtaining *victim*-oriented gender justice. Firstly, the *Katanga and Ngudjolo*, *Bemba* and *Gbagbo and Blé Goudé* cases suggest that, reluctant to punish the accused without evidence of their direct involvement in the crimes, ICC judges have often served acquittals, some of which might have ended up as convictions under the ICTY/ICTR standards. Secondly, as *Ntaganda* demonstrates, successful SGBC prosecutions are more likely in cases against mid-level rebel commanders, rather than political and military leaders, which questions the deterrent and expressive impact of such prosecutions.

This article relies on a comprehensive content analysis of judicial reasoning in all ICC trials involving SGBC charges[2] – *Katanga and Ngudjolo*, *Bemba*, *Gbagbo and Blé Goudé*, *Ntaganda*, *Ongwen* – and the seminal first ICC trial against Thomas Lubanga. The interdisciplinary theoretical framework combines insights from international relations theory regarding the role of norms and ideas in ICC practice and from legal studies in order to understand the rationale behind the court's decisions. The study employs process tracing to analyze the relationship between the norm of strict compliance with the culpability principle and the outcomes of SGBC investigations. The primary data source is content analysis of ICC documents, including submissions by the prosecutor, transcripts of hearings, judicial decisions and dissenting opinions, concerning the dismissals of charges and acquittals of SGBC. Furthermore, NGOs' statements, legal filings, academic papers, and blog posts are examined to assess the reception of ICC judgments from

2. Apart from *Muthaura and Kenyatta*, which was terminated.

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different perspectives among the broader community supporting international criminal justice. By going beyond the commentaries of gender justice advocates this article makes an important contribution in demonstrating that what might seem to be gender unjust outcomes, nevertheless, present legitimate judgments for others.

The article does not argue that ICC judgments are unjust, nor that gender biases in ICL have been completely countered. It seeks to assist advocates by presenting a detailed analysis of the specific vision of justice, which seems predominant at the ICC at the moment, and suggests that the promotion of gender justice in ICL should focus on establishing a vision of balanced relationship between substantive and procedural justice. This article proceeds as follows: section two examines the development of the gender justice norm, section three turns to the promotion of strict compliance with the personal culpability principle in ICL, section four examines the tension between the two visions of justice in practice at the ICC, and section five concludes.

THE LONG ROAD TO GENDER JUSTICE

"Gender justice" concerns a variety of inequalities resulting in women's subordination to men (Goetz 2007). In the ICL context, Louise Chappell delineates three dimensions of gender justice: "representation" of female judges and gender experts, "recognition" of SGBC in jurisprudence and of women and gender experts during proceedings, and "redistribution" through reparations (Chappell 2016, 32–33). This article focuses on a key aspect of gender justice as a form of international *criminal* justice – its enforcement in practice through successful SGBC prosecutions. Other mechanisms, such as truth commissions and national reparations programs, also provide avenues for expressing women's voices and for socio-economic gender justice, even if, just as with criminal trials, there is much to be desired from these approaches (Nesiah et al. 2006; Muddell and Scanlon 2009). But criminal trials present the only *retributive* gender justice mechanism. From this perspective, without determining which individuals bear criminal responsibility for SGBC, redistributive measures such as reparations appear as "grossly insufficient substitutes for accountability" (Moffett 2015, 278). Since the codification of SGBC in the Rome Statute has been analyzed in depth elsewhere (Oosterveld 2005; Joseph 2008;

Chappell 2016, 92–103), this article focuses on the hardest aspect of gender justice to implement – obtaining convictions for SGBC (Chappell 2016, 27).

Gender justice advocates focus on ICL's potential to bring "justice" to the victims of SGBC. WIGJ holds that the victims and survivors of SGBC "inform the voice" of the organization.[3] From this perspective, to fulfil the victims' demands for justice, it is crucial not only to criminalize SGBC as ICL offences and initiate prosecutions based on such provisions, but to actually obtain convictions in those cases. Otherwise, SGBC would be illegal "in a purely formal and empty sense" (Green 2011, 535). Furthermore, since testifying about SGBC could be extremely traumatic and carries the potential for further social stigmatization of the testifying victims, failing to obtain a conviction has been identified as a "[b]etrayal" of the victims' trust in proceedings" (Merope 2011, 342). At the ICC the impact of acquittals could also preclude other, non-carceral forms of gender justice being realized, because it could prevent SGBC victims from receiving reparations (Moffett 2015, 271).

It has been argued that successful prosecutions could deter sexual violence by substantiating the threat of future punishment (McKinnon 2008, 106–107; S. Smith 2008, 344) and that international trials have the power to *express* the wrongfulness of SGBC – historically overlooked as less significant than other international crimes (DeGuzman 2011, 526; Green 2011, 532; Pritchett 2008, 299). From this perspective, international prosecutions signal that SGBC are not merely the incidental by-products of conflict, but constitute a "weapon of war," used to destroy the social fabric of communities (Askin 2003, 298; Bedont and Hall-Martinez 1999, 80; Mouthaan 2011, 777–778). Finally, criminal prosecutions are argued to have a restorative impact on the SGBC victims, who are often stigmatized and ostracized in post-conflict communities. By recognizing the suffering of the victims and shaming the perpetrators of SGBC, international trials are argued to reverse victims' stigmatization and to bring the latter a sense of closure (Askin 2003, 347; DeGuzman 2011, 522–523). Some consider international trials to be the best chance for SGBC victims to access justice given the inefficiency of the judicial system in many post-conflict societies (K. Smith 2011, 487–489; Pritchett 2008, in 298).

3. According to the organization's website. See https://4genderjustice.org/who-are-we/, accessed on 20/10/2019.

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Another advantage of international trials is that they are uniquely situated to hold accountable the most blameworthy persons, often considered to be political and military leaders (*Prosecutor v. Katanga and Ngudjolo* ICC-01/04-01/07-717, ¶ 503). Prosecuting leadership figures is crucial for fulfilling ICL's deterrent aspirations, since high-ranking officials are best placed to prevent mass atrocities, and for expressing the wrongfulness of the crimes by demonstrating that "no-one is above the law" (Cryer 2009, 54). Furthermore, prosecuting leadership figures is key to recognizing SGBC as a war strategy devised from the top, rather than as the incidental crimes of the rank-and-file (Mouthaan 2011, 791).

Nevertheless, critical feminist literature has problematized the "overcriminalization" of wartime rape (Henry 2014, 97). From this perspective, the narrow focus on SGBC committed during conflict obscures the key role of perpetuated gender inequalities in *enabling* sexual violence during both war and peace (Aroussi 2017, 493). It is argued that posing a "flawed" distinction between wartime and peacetime SGBC and emphasizing the coercive environment in which women find themselves during conflict, has instituted the erroneous assumption of the "equal autonomy" between men and women in everyday life (Grewal 2010, 73–76). Furthermore, ICL has been criticized for invariably defining women as voiceless "victims," negating their agency in conflict and obscuring the ways in which women could support and participate in war (Engle 2005; Matthews 2019, 103–106). The conflation of "gender" and "female" in ICL has also been criticized as neglecting the male victims of SGBC (Henry 2014, 103–104).

The advocates of pursuing gender justice through international trials have taken note of the critical scholarship and argued that such concerns could still be resolved *within* the ICL framework and that international prosecutions for SGBC should not be rejected altogether (Chappell 2016, 8–10; Henry 2014, 104–107). Here, critical scholarship is taken seriously for highlighting the problematic aspects of ICL prosecutions of SGBC, but faith in the "incremental, transformative change" of legal rules, which will improve ICL's ability to serve gender justice over time, is retained (Chappell 2016, 9; Henry 2014, 106).

This is a compelling argument, but it provides a narrow account of the conditions under which such positive transformation of international criminal justice could occur. It focuses on the evolution of the gender justice norm but insufficiently examines its interactions with other norms that are simultaneously gaining prominence in ICL. In effect, the successful promotion of gender justice has been perceived solely as the

result of the competing forces of gender advocacy and old gender biases in international law. The analysis focuses on one dimension – advocacy bringing the gender justice agenda *forward* vis-à-vis biases pulling such developments *backwards*. The rest of the article discusses this evolutionary account of gender justice and then presents a complementary framework for analyzing the conditions under which gender justice could be advanced or obstructed in ICL by taking into consideration the interaction of gender justice with the culpability principle.

The Evolutionary Account of Gender Justice in International Criminal Law

The gender justice literature emphasizes the historical progress achieved in ICL due to activists' efforts. Although the prohibition of rape in international law has been instituted since the Lieber Code of 1863, there has been "extraordinarily little appetite" historically to prosecute such conduct, often perceived as "spoils of war" (Hayes 2010, 129). The ICTY's and ICTR's groundbreaking findings profoundly impacted the development of a new norm of gender justice. Despite the fact that the tribunals' Statutes failed to sufficiently reflect the magnitude of SGBC (Zawati 2014, 69), the tribunals successfully prosecuted various SGBC as instruments of genocide, crimes against humanity and war crimes (Askin 2003, 288). The gender justice literature observes that the tribunals' landmark decisions could not have been achieved without the efforts of feminist legal scholars and activists (Pritchett 2008, 288–289; Zawati 2014, 145) and the support of judges, including Judge Odio Benito, Judge Florence Mumba, and Judge Pillay, who have promoted the recognition of SGBC in landmark cases such as *Čelebići*, *Furundžija*, and *Akayesu* (Askin 2003, 318; Chappell, Durbach and Benito 2014, 649).

The ICC's establishment was perceived as a unique opportunity for gender justice advocates to promote the codification of the new gender justice norm into law (Bedont and Hall-Martinez 1999, 65–85). Scholars have emphasized the crucial role of the Women's Caucus for Gender Justice, which united over 300 women's organizations during the Rome Statute negotiations (Joseph 2008; Oosterveld 2005). The Caucus embarked upon "sensitizing the mostly male delegates to gender issues" (Bedont 1998) and accomplished important advances for gender justice: incorporating the term "gender" in the Rome Statute (Oosterveld

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2005, 58) and criminalizing a significantly more expansive list of SGBC compared to the Statutes of the ICTY and ICTR (Joseph 2008, 63; 78–92). Based on its drafting history, the ICC appears as a key victory for gender justice advocacy in ICL, which makes the scarcity of successful prosecutions of SGBC at the court particularly striking.

In the gender justice literature such scarcity is attributed to the regressive forces of gender biases. In her seminal work, Louise Chappell explains the challenges to deliver gender justice at the ICC with the existence of *informal* norms, which bind the interpretation and application of new formal laws (Chappell 2014, 184–185). From this perspective, "no institution is ever 'new,' each is built on the gendered foundations of past rules, norms and practices" (Chappell 2016, 36). The "nestedness" of new institutions, such as the ICC, into pre-existing practices profoundly impacts the possibilities of delivering gender justice. Largely the creation of Western powerful men, international law has for long silenced women's voices (Pritchett 2008, 270). This has enabled the incorporation of discriminatory gender norms into the interpretation of seemingly impartial laws, which seek to protect men and women equally, but fail to recognize the peculiar experiences of different groups during conflicts (Chappell 2014, 185; Mouthaan 2011, 782). Such "gender bias" has resulted in treating SGBC as crimes of lesser significance (Chappell 2014, 185; Mouthaan 2011, 783), as incidental conducts committed by individual soldiers, rather than a political or a military strategy devised by leaders (Mouthaan 2011, 791), and as crimes that are too hard to investigate (MacKinnon 2008, 32–33).

From this perspective, the unsuccessful prosecutions of SGBC at the ICC are explained by the court's temporal nestedness within old gender-biased practices (Chappell 2016, 103–104). The progressive Rome Statute has "made ground in terms of gender justice" but it has ultimately left it to the court officials to use that opportunity and prevent the re-assertion of gender-biased practices (Chappell 2014, 186). According to Chappell, perceptions about the difficulties of investigating SGBC have occasionally influenced prosecutorial discretion (Ibid., 191). She further argues that ICC judges have either ""*forgotten*" existing international law developments or are *unaccustomed or uncomfortable* with applying the expansive gender recognition rules" (Chappell 2016, 110, emphasis added). Overall, the problem is perceived as one of insufficient institutionalization of the new gender justice norm into the court's informal practices and a regression to old biases.

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While *temporal* nestedness has historically presented an important obstacle to advancing gender justice, I argue that it fails to sufficiently explain the ICC's current practices. From a temporal perspective the ICTY and ICTR have been far more susceptible to gender biases than the ICC, given their rudimentary statutes and the pre-existing culture of impunity for SGBC. Indeed, the tribunals have endured gender justice failures – they have been criticized for delivering "only symbolic gender justice" by convicting "just a few" perpetrators (Pritchett 2008, 278; Zawati 2014, 117). Nevertheless, given the circumstances within which the tribunals operated, they made a significant achievement by "prosecuting such crimes at all" (Hayes 2010, 129). Their "groundbreaking" judgements attracted international attention to SGBC and set the foundation for their further prosecution in ICL (Zawati 2014, 145). From a temporal perspective, the ICC was left with the task to continue the tribunals' effort rather than to put in motion the wheels of gender justice altogether.

The ICC seemed better-equipped to address gender biases than the tribunals. Not only did the Rome Statute go "much farther than the mandates of either the ICTY or ICTR" (Chappell 2016, 101), but the court also benefited from the cooperation between outsider activists and feminist-oriented court bureaucrats, which could help implement gender justice in practice (Chappell 2014, 575). When the court started operating, the Women's Caucus transformed into the Women's Initiative for Gender Justice (WIGJ), which committed to assisting the prosecution of SGBC, including by submitting *amicus curiae* observations and collecting testimonies about SGBC in situations under investigation (WIGJ 2010a). The prosecutor has also appointed as special advisers persons with extensive gender justice expertise (WIGJ 2013a, 67, fn. 293). If any court was well equipped to fight gender stereotypes, it was the ICC – both in terms of formal rules and the support of motivated advocates.

The following section proposes that ICC judges did not simply "forget" the tribunals' legacy and the work of gender justice activists as much as they "remembered" a different norm of criminal justice, which had for long been treated as a norm of secondary importance in ICL. That norm has significantly influenced the prospects for promoting gender justice at the ICC.

THE ADVANCE OF DEFENDANT-ORIENTED JUSTICE

Unlike other branches of international law, which typically govern the rights and responsibilities of states, ICL imposes *individual* criminal responsibility, similar to domestic criminal law (Drumbl 2007, 6; Van Sliedregt 2012, 65). The assessment of individual criminal responsibility is premised on the principle of personal culpability, which holds that persons could only be punished for their own conducts and not for their mere *association* with the wrongdoers (Danner and Martinez 2005, 85; Robinson 2008, 926). In criminal law, all ambiguities concerning the defendants' responsibility should be resolved in their favour (Danner and Martinez 2005, 84). The deference to the defendants' interests is justified with the harshness of criminal law punishment: deprivation of freedom and social stigmatization of the convicted person (Robinson 2013, 140).

Upholding these principles has proved challenging in relation to mass atrocities. Unlike most domestic offences, international crimes generally exhibit "system criminality" carried out by multiple physical perpetrators (Nollkaemper 2009; Drumbl 2007, 4), but ultimately devised by a "mastermind, pulling the strings" from afar (Van Sliedregt 2012, 22). The complex nature of system criminality has propelled ICL judges to develop specific legal theories called "modes of liability", which link a particular person to the crimes by determining the ways in which individual culpability is manifested in mass-participation crimes (Jackson 2015, 87). In order to capture the essence of conduct of the "big fish" without evidence of their direct involvement on the ground, international tribunals have often interpreted broadly the notion of "personal culpability" and developed modes of liability which cast a wide net over those persons who might be considered perpetrators (Osiel 2009, 2–4). At Nuremberg individuals have been convicted for participating in a conspiracy or a "criminal organization" (Van Sliedregt 2012, 23; Yanev 2015, 442–447). The ICTY has developed the "joint criminal enterprise" (JCE) mode of liability, pursuant to which each member of a criminal enterprise is considered equally guilty of the collective crime, regardless of the part that person played in its commission (Robinson 2008, 940). International tribunals have also relied on the "command responsibility" mode, pursuant to which military and civilian superiors are deemed criminally responsible for failing to prevent, repress, or punish the crimes committed by their

subordinates, regardless of the superior's actual knowledge of those crimes (Ambos 2002).

The ingenuity of ICL modes of liability, which link the defendants to the crimes without requiring evidence of their direct involvement, has significantly benefited the prosecution vis-à-vis the defendants, with one commentator describing JCE as means to "just convict everyone" (Badar 2006). However, the enhanced ability to convict the "big fish" accomplished by an expansive interpretation of the notion of "personal culpability," has proven controversial from many ICL experts. Due to the tenuous relationship between the defendant's conduct and the crime – neither JCE, nor command responsibility requires proof that the accused has carried out some of the elements of the specific crime – such modes of liability have been criticized for coming "dangerously close" to attributing guilt by association (Danner and Martinez 2005, 79; May 2008, 266). In effect, in ICL the burden of proof has sometimes appeared reversed – rather than the prosecutor proving the defendants' guilt, the latter have been expected to prove their innocence by rebutting any association with the crimes (Robinson 2008, 934).

Sidestepping criminal law principles in ICL has historically been justified in relation to "superior exigencies" (Cassese 2003, 72). Despite the controversial legal foundations of the Nuremberg judgment, it has been defended on moral and political grounds for replacing "private, uncontrolled vengeance" with a "measured process of fixing guilt" to individual perpetrators (Shklar 1964, 158) and for putting the foundations of a true system of international criminal justice (Bass 2000, 204–205). Later on, the expansion of the notion of personal culpability has been increasingly justified on the grounds of protecting human rights (Stahn 2012, 255). The punishment of negligent commanders for their troops' crimes has been justified with minimizing the loss of human life by incentivizing superiors to control their subordinates (Clark 1973, 78). JCE has been defended as preventing individual perpetrators from escaping accountability by hiding behind "the fog of collective criminality" (Cassese et al. 2009, 294). The ICTY's reliance on modes of liability such as JCE and command responsibility, which are "at odds with the basic premises of individual accountability," has been attributed to the judges' perception that easing the burden on the prosecutor will enable serving justice for the victims of mass atrocities (Fletcher 2011, 187).

Since historically the notion of international criminal "justice" has been associated with political and moral goals, such as ending impunity for mass

atrocities and promoting ICL's development, the culpability principle has often been perceived as an "inconvenient obstacl[e]" to attaining that specific vision of justice (Robinson 2013, 132). Yet, when "the first permanent general, future oriented international criminal court" (Kaul 2012, 5), which would "teach" countries how to conduct criminal proceedings (Fletcher and Ohlin 2005, 540), started operating and ICL entered its mature phase, it became increasingly difficult to assess the value of proceedings merely with regard to their political and moral outcomes. Instead, compliance with criminal law principles became the new benchmark of legitimacy in ICL (Amann 2003, 180–181).

The ICC's establishment constituted an opportunity for promoting not only gender justice but also a return to criminal law principles. Many legal scholars and professionals perceive compliance with such principles not merely as a way for ingenious criminals to avoid punishment, but as a means for protecting the integrity of the legal process from political or moral biases (Ohlin (2007), p. 88). From this perspective, while laudable political and humanitarian goals might exist, pursuing those in the context of trials assessing an individual's guilt or innocence amounts to an intolerable illiberal transgression (Robinson 2008). While in the context of previous tribunals, authoritative opinions have emphasized the quality of the political goals animating international trials, denouncing any attempts to completely depoliticize ICL as untenable (Shklar 1964, Bass 2000), the ICC age has witnessed the surge of the "liberal" critique of ICL, which advocates for abandoning the controversial practices of previous tribunals and for convergence between ICL and domestic criminal law (Robinson 2013, 128; see Ambos 2007; Danner and Martinez 2005; Fletcher and Ohlin 2005; May 2004; 2008; Robinson 2008).

While some advocated for the codification of SGBC as international crimes in the Rome Statute, others successfully promoted the codification of general criminal law principles that would strictly regulate *the attribution of criminal responsibility* for international crimes in accordance with the culpability principle.[4] In effect, the Rome Statute presents a highly systematized account of modes of liability: Article 25(3)(a) stipulates that a person may be held criminally responsible if that person has *committed* the crime personally (direct perpetration), in

4. See Eser 1993; Draft Statute for an International Criminal Court (Siracusa-Draft). 1995. 55–57. https://www.legal-tools.org/doc/39a534/pdf/.

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co-operation with others (co-perpetration), or by using other persons as tools to physically commit the crime (indirect perpetration). Article 25(3)(b)-(d) lists modes of participating in a crime as an *accessory*, for example, by instigating or aiding the crime (*Prosecutor v. Lubanga* ICC-01/04-01/06-2842, ¶ 977). Finally, Article 28 introduces a comprehensive definition of the elements of command responsibility.[5] Thus, the efforts of advocates of criminal law principles were fulfilled in terms of the *formal* codification of rules in the Rome Statute.

Nevertheless, as with the gender justice norm, formal codification in no way guaranteed that the judges would strictly follow those rules in practice. The Nuremberg judgment and the ICTY had proclaimed the personal culpability principle[6] but their practice has significantly questioned their fidelity to that principle (Ambos 2007, 173; May 2008, 266). Some considered it "unrealistic" that the formal codification of criminal law principles would actually restrain ICC jurisprudence from pursuing political or humanitarian goals (Wessel 2006, 415). While the Rome Statute narrows the scope of situations in which a person could be held criminally responsible compared to the broad language of the ICTY Statute which has left room for the development of JCE (Ambos 2007, 172–173), it nevertheless provides opportunities for easing the burden on the prosecution, should the judges decide to use those. For example, the mode of liability under Article 25(3)(d) enables the judges to punish "any other" contribution to the collective crime, which has not been covered by Article 25(3)(a)-(c) (see WIGJ 2013b, 77–88), and Article 28(a)(i) – to punish negligent commanders who "should have known" of the crimes committed by their troops (see Ibid., 93). The open language of these provisions has raised concerns that the Rome Statute has, nevertheless, left the door open to sidestepping the personal culpability principle in practice (Ambos 2002, 871; Ohlin 2007).

Yet, ICC judges have appeared to share the determination of those scholars seeking to turn ICL into a system akin to domestic criminal justice and have proclaimed in various decisions fidelity to the principles of criminal law.[7] ICC judges rejected the JCE mode of liability (*Prosecutor v. Lubanga* ICC-01/04-01/06-803-tEN, ¶¶ 328–340) and

5. See WIGJ's (2013b) comprehensive report on ICC's modes of liability.

6. See International Military Tribunal Nuremberg, Judgment of 1 October 1946, in *The Trial of German Major War Criminals*, Part 22, https://www.legal-tools.org/doc/45f18e/pdf/, 500; *Prosecutor v. Tadić* CaseNo.IT-94-1-A, Judgment (July 15, 1999) ¶ 186, http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf.

7. See *Prosecutor v. Katanga* ICC-01/04-01/07-3436-tENG, ¶¶ 54-57; *Prosecutor v. Bemba* ICC-01/05-01/08-3636-Anx2, ¶ 74; *Prosecutor v. Gbagbo and Blé Goudé* ICC-02/11-01/15-1263-AnxB-Red, ¶ 10.

adopted a new mode, according to which only those persons who have had "control" over the commission on the crime, and not everyone who participated in a criminal group, could be considered guilty of the crime (Ibid., ¶¶ 330–332). Furthermore, unlike the ICTY which had convicted persons for *foreseeing* a crime's commission (*Prosecutor v. Tadić* IT-94-1-A, ¶ 220), ICC judges eventually determined that persons could bear criminal responsibility only if they had intended the crime or had been certain that it would result from their actions (see WIGJ 2013b, 46–47). ICC judges further stipulated that command responsibility under Article 28 applied only to a limited set of factual situations and could not be used as a "fall-back to secure a conviction at any cost" (*Prosecutor v. Gbagbo and Blé Goudé*, CaseNo.ICC-02/11-01/15-1263-AnxB-Red, ¶ 2032).

Overall, the combined efforts of scholars and judges have significantly limited the reach of the ICC's modes of liability. This is not to suggest that the culpability principle is the only norm upheld in ICC jurisprudence. Even in domestic systems considerations for delivering "substantive justice" on occasion qualify the application of criminal law principles and ICC judges seemingly simply aimed to diminish the "prevalence and extravagance" of such practices in ICL (Robinson 2008, 929). In practice, narrowing the scope of the modes of liability has proven sufficient to significantly obstruct the advancement of gender justice at the ICC.

THE INTERATION BETWEEN DEFENDANT-ORIENTED AND VICTIM-ORIENTED JUSTICE AT THE ICC

In practice, upholding victims' interests, including those of SGBC, is difficult to square with protecting the defendant's rights (Danner and Martinez 2005, 86–89; Robinson 2008, 930–931). Other branches of international law, such as human rights law and international humanitarian law, could afford to focus on victims' suffering because neither of those systems imposes the same harsh punishment on the defendant as ICL, but that is not the case with criminal trials (Danner and Martinez 2005, 86). This has led some to argue that to achieve "respect and fidelity to law" victim's rights could not be the overriding concern of international trials (May 2004, 4) and to describe the ICTY's concern for victims' rights as antithetical to criminal law principles (Fletcher 2011, 187).

It merits emphasizing that as a form of victim-oriented justice, gender justice does not reject the culpability principle. Gender justice advocates in no way suggest that the accused should be convicted without due regard of the evidence establishing their guilt – WIGJ observes that acquittals are a sign of an "effective and independent judicial institution" (WIGJ 2018, 57). The consideration of victims' interests in international trials does not require a specific outcome such as a conviction, but a "balance" between the interests of the victims and the accused, rather than "focusing exclusively" on the latter (Moffett 2015, 262).

It is precisely in the attempt to balance the interests of those parties where the tension between gender justice and defendant-oriented justice plays out. Achieving gender just outcomes, while respecting the culpability principle as such, often requires a very broad understanding of what counts as "culpable conduct". From this perspective, concerns for "over-inculpat[ion]" of individuals are legitimate, but overly strict interpretation of the modes of liability should not come at the price of impunity for SGBC (WIGJ 2018, 147). Yet, this appears problematic from a criminal law perspective. As the following section discusses, in practice ICC judges have prioritized compliance with the culpability principle to delivering substantive justice. The outcome of SGBC prosecutions appears to be influenced by the judges' preferences of the accused's direct participation in the crimes, and not exclusively by gender biases. While increased emphasis on the culpability principle at the ICC does not preclude the prospect of gender justice altogether, it has significantly limited its scope. Furthermore, even though the prosecution has increasingly paid attention to SGBC in the charges, the judges' reluctance to ease the burden on the prosecutor has resulted in pursuing only a limited set of such crimes – those to which the defendant could be clearly linked.

Guilty, but not for SGBC: *Lubanga* and *Katanga*

The landmark first ICC trial put on the stand Thomas Lubanga – the President of the *Union des Patriotes Congolais* (UPC), an insurgent group operating in north-eastern Democratic Republic of the Congo (DRC) (WIGJ 2012b, 132). SGBC in north-eastern DRC had been well documented (Human Rights Watch 2005) and *Lubanga* seemed the first opportunity to deliver gender justice at the new court. Yet, Lubanga was charged only with enlisting, conscripting and using children under the

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age of 15 to participate actively in hostilities, which commentators attributed to expediency considerations (Chappell 2014, 187; Freedman 2017, 54–60).

After numerous calls by NGOs (WIGJ 2010a, 98–104; Human Rights Watch 2006), the gender justice community eventually appeared to convince the prosecutor to recognize UPC's SGBC. Since those crimes were not brought as additional charges, the prosecutor's strategy at trial was to subsume evidence of SGBC under the charge of using child soldiers "to participate actively in hostilities." The prosecutor emphasized that "girl soldiers" were raped by UPC commanders on a daily basis and that abducted young women were often forced to become the combatants' "wives" (*Prosecutor v. Lubanga* ICC-01/04-01/06-T-107-ENG, 11, lines 21–24; WIGJ 2010b, 162). At least 21 out of 25 prosecutor's witnesses testified about girl soldiers (WIGJ 2012b, 160).

Expanding the scope of the case in such manner, however, risked infringing on the defendant's rights by introducing "new criminal acts" into the trial (*Prosecutor v. Lubanga* ICC-01/04-01/06-2360, ¶ 5). Despite the prosecutor's efforts to recognize the suffering of girl soldiers, the majority of judges, worried about the defendant's rights, considered that since SGBC were not reflected in the charges, the evidence of such violence was "irrelevant" for the final judgment (*Prosecutor v. Lubanga* ICC-01/04-01/06-2842, ¶ 896). Notably, the judges did not negate the suffering of UPC's SGBC victims, but they shifted the responsibility for obstructing gender justice entirely onto the prosecution's failure to bring separate charges of sexual violence (*Prosecutor v. Lubanga* ICC-01/04-01/06-2901, ¶ 60). The Majority absolved themselves from any expectations of upholding victims' interests and signaled that at the ICC the judges' primary concern would be protecting the defendants' rights.

Not all judges agreed with that position. In a powerful dissent Judge Odio Benito argued that sexual violence should have been recognized as an intrinsic part of the crime of using children "to participate actively in hostilities".[8] A former ICTY judge, Odio Benito has described herself "as an activist who expresses concern for the violation of human rights" (Sharratt and Odio Benito 1999, 41). However, while her gender justice advocacy had gained support among ICTY colleagues (Chappell, Durbach and Odio Benito 2014, 649), her efforts were not as successful at the ICC. The dissenting judge's idea of merging sexual violence with

8. See *Prosecutor v. Lubanga* ICC-01/04-01/06-2842, Separate and Dissenting Opinion of Judge Odio Benito, ¶¶ 16–17, ¶ 8.

the crime of using child soldiers heavily borrowed from human rights law and non-binding soft-law, rather than criminal law prohibitions (Tan 2012, 140; 134). From a criminal law perspective, Odio Benito's suggestion was perceived as "an unwarranted form of judicial activism" (Ibid., 132). Hence, the outcome of the first ICC trial seemed to be the result of the prosecution "forgetting" to recognize SGBC from early on and the Majority "remembering" the norm of protecting the defendant's interests. As subsequent cases demonstrate, while the prosecution increasingly recognized SGBC in the charges, the judges continued to prioritize the defendant's rights over the victims' interests.

The next ICC trial – *Katanga and Ngudjolo* – appeared more promising for recognizing SGBC suffering, as this time the prosecutor heard the calls of gender justice advocates and brought separate charges for sexual slavery and rape, committed during a 2003 attack against the Bogoro village in north-eastern DRC, which had been allegedly carried out by forces acting under Katanga and Ngudjolo's command (WIGJ 2012b, 224).

The judges' defendant-oriented approach, however, again precluded the realization of gender justice. The main obstacle to establishing their criminal responsibility was that Katanga and Ngudjolo had not personally participated in the Bogoro attack. The prosecution took advantage of the mode of liability of "indirect" perpetration under Article 25(3)(a) and argued that the accused bore criminal responsibility for the crimes committed during that attack by virtue of their alleged control over the combatants who had physically committed the crimes (*Prosecutor v. Katanga and Ngudjolo* ICC-01/04-01/07-717, ¶ 473). Proving the accused's "control" over the crimes, however, was challenging. The judges expressed concern about the credibility of some of the prosecutor's key witnesses, which resulted in Ngudjolo's acquittal of *all* charges (*Prosecutor v. Ngudjolo* ICC-01/04-02/12-3-tENG, ¶ 343). Faithful to the personal culpability principle, ICC judges stated that they could not even "contemplate" Ngudjolo's conviction based on the available evidence (*Prosecutor v. Ngudjolo* ICC-01/04-02/12-3-tENG, ¶ 110).

Nevertheless, some credible evidence existed that Katanga had contributed to the attack by providing weapons to the combatants (*Prosecutor v. Katanga* ICC-01/04-01/07-3436-tENG, ¶ 1680). Although that evidence was insufficient to prove that Katanga had "controlled" the commission of the crimes by his troops (Ibid., ¶ 1420), it was sufficient for a conviction based on the less demanding mode of *accessory* liability under Article 25(3)(d): contributing "in any other way" to a group acting

with a criminal purpose (Ibid., ¶ 1596). As open as the statutory language seemed, ICC judges interpreted the provision narrowly, concluding that to avoid the imposition of guilt by association, Katanga could only be held criminally responsible for those crimes which he had known, and not merely foresaw, that would be committed as part of the combatants' plan to attack Bogoro (Ibid., ¶¶ 1620–1621). The judges specified that the accused's knowledge must be established in view of "each specific crime" and that "general criminal intention" would be insufficient for conviction (Ibid., ¶ 1642). The judges concluded that while Katanga had known that the combatants would murder civilians and pillage their property as part of their plan to destroy Bogoro, he did not know with certainty that rape and sexual slavery were also part of that plan, and Katanga was acquitted of SGBC (Ibid., ¶ 1663).

Gender justice advocates attributed the judges' reluctance to infer Katanga's knowledge that SGBC would be committed in Bogoro as regression to the bias of perceiving rapes as incidental crimes, rather than a war strategy (WIGJ 2014a; Kortfält 2015, 537–538; Stahn 2014, 821). But the failure to recognize SGBC in *Katanga* could also be explained by the prioritization of the culpability principle over victims' interests. Declaring Katanga guilty for the combatants' SGBC would have required a broader interpretation of the notion of culpability, which neither the ICC judges, nor many commentators were comfortable with. The prosecutor had relied on Katanga's general awareness that SGBC "constituted a common practice" in the conflict region (*Prosecutor v. Katanga and Ngudjolo* ICC-01/04-01/07-717, ¶ 568). Consequently, Katanga could have been convicted for the SGBC under the JCE mode, according to which a person could bear criminal responsibility for sexual violence that had constituted merely a 'foreseeable' consequence of the joint criminal purpose.[9] But advocates of respecting the culpability principle have strongly argued against interpreting Article 25(3)(d) as to allow mere foreseeability of the crimes to attract criminal responsibility (Ambos 2007, 172–173). Specifically regarding the *Katanga* case, scholars had expressed concerns that convicting the accused for the SGBC committed by the combatants would amount to the attribution of guilt by association (Gil and Maculan 2015, 360; Van Sliedregt 2012, 170). Indeed, already before the trial started one judge had hesitated to confirm the SGBC charges on the grounds that the accused's knowledge

9. See *Prosecutor v. Kvočka et al.*, CaseNo.IT-98-30/1-T, Judgment (November, 1 2001), ¶ 327, emphasis added, https://www.icty.org/x/cases/kvocka/tjug/en/kvo-tj011002e.pdf.

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had not been easily discernible from the facts.[10] WIGJ similarly observed that from the early stages of the case it had been evident that the evidence of SGBC needed to be reinforced at trial (WIGJ 2014a, 1).

Hence, recognizing SGBC in *Katanga* was not only a question of advancing gender justice, but also a question of whether the ICC would take a broad approach to establishing the defendant's criminal responsibility, akin to that of the ICTY, or comply strictly with the culpability principle. While from a gender justice perspective, it might have seemed unjust not to hold anyone criminally responsible for the sexual violence committed in Bogoro, for others it would have been unjust to attach the significant stigma of being convicted for mass atrocities to a person without proving that he had knowingly pursued the commission of such crimes. From that latter perspective, "[s]ympathy for the victims' plight" still constituted a powerful stimulus, but did not fall within the mandate of a criminal court such as the ICC, which had to be "first and foremost fair *towards the accused*" (*Prosecutor v. Katanga* ICC-01/04-01/07-3436-AnxI, ¶¶ 310–311, emphasis added).

Indeed, despite some discrepancies in their narratives, the judges accepted the testimonies of the victims and recognized that SGBC had been committed in Bogoro (*Prosecutor v. Katanga* ICC-01/04-01/07-3436-tENG, ¶¶ 988-996, ¶¶ 1010–1012) and that the perpetrators' statements of taking someone "as a wife" actually referred to a coercive condition of sexual exploitation (Ibid., ¶¶ 1000–1001). But the judges did not consider that Katanga should be personally punished for those crimes by virtue of his conduct, suggesting that the aim of strict compliance with the culpability principle strongly influenced the decision. This reasoning became even more pronounced in subsequent ICC decisions.

Linking Leadership Figures to the Crimes: *Bemba* and *Gbagbo and Blé Goudé*

In cases concerning leadership figures removed from the scene of the crimes, the ICC's emphasis on personal culpability has resulted in complete acquittals. Jean-Pierre Bemba Gombo, a former DRC vice-president, was charged with numerous instances of rapes and other crimes committed in the Central African Republic (CAR) by the organization under his command – *Mouvement de Libération du Congo*

10. *Prosecutor v. Katanga and Ngudjolo* ICC-01/04-01/07-717, Partly Dissenting Opinion of Judge Anita Ušacka, ¶ 19.

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(MLC) (WIGJ 2012b, 252–253). The conviction of a high-level accused such as Bemba triggered overwhelmingly positive reactions among gender justice activists (Wakabi 2016). Some observed the potential deterrent impact on other "commanders who permit rape and sexual violence by their troops" (Mattioli-Zeltner 2016). Yet, on appeal the tension between concerns for protecting Bemba's rights and the demands for substantive justice for MLC's crimes became evident.

Since Bemba had not been present in the CAR when MLC troops had committed the crimes, the prosecutor used the "command responsibility" mode under Article 28, arguing that Bemba had failed to prevent, repress, or investigate MLC's crimes (*Prosecutor v. Bemba* ICC-01/05-01/08-3636-Red, ¶ 12). Because of the broad understanding of culpability on which command responsibility rests – requiring a mere failure to exercise control, rather than an actual involvement in the crimes – command responsibility has been forwarded as the most appropriate doctrine for prosecuting SGBC, given the challenges of proving that leadership figures have explicitly ordered the commission of such crimes (Kortfält 2015, 554). Yet, precisely for that reason command responsibility has triggered significant concerns from the perspective of criminal law principles (Damaška 2008, 350–351; Darcy 2007, 391–392).

The Appeals Chamber (AC) Majority decided to restrict the scope of command responsibility rather than risk convicting Bemba simply by virtue of his association with the direct perpetrators of the crimes. The judges placed heightened emphasis on the commander's "material ability" to do something about his subordinates' crimes (*Prosecutor v. Bemba* ICC-01/05-01/08-3636-Red, ¶ 167). According to the Majority, the trial judges who had convicted the accused had paid "insufficient attention" to the fact that MLC troops had been operating in a foreign country, which had challenged Bemba "as *a remote commander*, to take measures" (Ibid., ¶¶ 170–173, emphasis added). Since the Majority considered that Bemba's ability to respond to MLC's crimes had not been proven, they acquitted him of all charges, including those of rape (Ibid., ¶ 197).

The acquittal raised concerns among gender justice advocates that the ICC was applying the culpability principle "overly strictly," which had a detrimental impact on SGBC prosecutions (WIGJ 2018, 147). NGOs called the decision "a devastating outcome" for the thousands of victims (REDRESS 2018). Eventually, the ICC's Trust Fund for Victims announced plans to launch a program aiming to assist the victims of SGBC in the CAR (WIGJ 2018, 57–58). But the ICC did not hold

anyone criminally responsible for the victims' suffering, potentially obstructing the deterrent and expressivist impact of the trial.

Yet, from the Majority's perspective, upholding victims' interests was not the ICC's responsibility. The Majority held that even if strict compliance with the culpability principle could lead to "the acquittal of persons who may actually be guilty," that was a "price that must be paid" to uphold the integrity of proceedings (*Prosecutor v. Bemba* ICC-01/05-01/08-3636-Anx2 ¶¶ 4–5, emphasis added). From that perspective, judgments should not be heralded as a "victory" for the victims but simply as "dispassionate application" of the law (Ibid., ¶¶ 75–79).

Several months later, the *Gbagbo and Blé Goudé* case would reaffirm the majority of ICC judges' support for that position. The trial against the former Ivoirian president Laurent Gbagbo and his former Minister of Youth Charles Blé Goudé concerned crimes committed against perceived supporters of Gbagbo's opponent during the 2010–2011 post-election crisis in Côte d'Ivoire. This "milestone" case brought the first former head of state to trial at the ICC (Rosenberg 2017, 471). The charges involved *inter alia* numerous rapes of women and a violent attack at a women's march demanding Gbagbo's resignation, committed by forces allegedly acting under Gbagbo's control (WIGJ 2018, 66).

There was no evidence that Gbagbo had been directly involved in any of the alleged crimes.[11] To link Gbagbo to the crimes, the prosecutor argued that the former president had devised with his close entourage a plan to "retain power by all means, including though the use of force against civilians" (*Prosecutor v. Gbagbo* ICC-02/11-01/11-T-17-Red-ENG, p. 57, lines 7–9). Similarly to the *Katanga and Ngudjolo* case, the prosecutor held that Gbagbo had indirectly co-perpetrated the crimes under Article 25(3)(a) by virtue of his position "at the center of all decisions" that led to the implementation of the alleged plan and, consequently, to the commission of the crimes (Ibid., p. 8, lines 7–9). Yet, the prosecutor was unable to link the high-level officials to the crimes on the ground under any mode of liability.

From early on the judges expressed concerns that the prosecution's evidence was "apparently insufficient" (*Prosecutor v. Gbagbo* ICC-02/11-01/11-432, ¶ 15). In January 2019, the judges by majority acquitted the defendants, citing that "pervasive" evidentiary problems precluded the prosecutor from proving key elements of her case (*Prosecutor v. Gbagbo*

11. The judges made findings on: "every single mode of liability, except direct personal perpetration". *Gbagbo* ICC-02/11-01/11-T-17-Red-ENG, p. 28, lines 15-16.

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and Blé Goudé ICC-02/11-01/15-1263-AnxB-Red, ¶ 36). The judges were concerned that the prosecution had presented a lot of evidence proving the *non-criminal* aspects of Gbagbo's alleged plan to stay in power but offered nothing to prove specifically the *criminal* elements of that plan, which prevented them from finding that the accused had controlled the perpetrators on the ground (Ibid., ¶ 85). The Majority also rejected what they perceived as the prosecutor's attempt to use command responsibility merely "to secure a conviction," in case it could not be proven that the accused had committed the crimes pursuant to Article 25(3)(a) (*Prosecutor v. Gbagbo and Blé Goudé*, CaseNo.ICC-02/11-01/15-1263-AnxB-Red, ¶ 2030–2032). With regard to Blé Goudé, the Majority concluded that the prosecutor's arguments appeared so "abstract and generic" that it was "difficult to imagine" that any of the physical perpetrators had been conscious of Blé Goudé's alleged assistance to their crimes (Ibid., ¶ 2020).

Along with NGOs who called the decision a "crushing disappointment" for the victims (Amnesty International 2019), one judge – Judge Herrera – also demonstrated concern for the women who had suffered rape (*Prosecutor v. Gbagbo and Blé Goudé* ICC-02/11-01/15-1263-AnxC-Red, ¶¶ 6–7). Yet, just as in *Lubanga* and *Bemba*, from the majority's perspective, the court's responsibility was restricted to assessing the criminal charges in the case and not to serve "political" or "humanitarian goals" by upholding the victims' interests, lest the ICC become "a court in name only" (*Prosecutor v. Gbagbo and Blé Goudé* ICC-02/11-01/15-1263-AnxB-Red, ¶ 10). Thus, the desire to differentiate the ICC from the controversial practices of its predecessors and to depoliticize ICL has precluded the realization of gender justice in *Gbagbo and Blé Goudé*. Nevertheless, there remains an avenue for somewhat limited gender justice to be obtained at the ICC.

Gender Justice Perspectives at the ICC: *Ntaganda* and Ongoing Trials

Recent ICC decisions reveal what gender justice in compliance with the personal culpability principle might look like. Unlike *Bemba* and *Gbagbo and Blé Goudé*, those cases do not concern high-level officials, but mid-level commanders involved in the day-to-day conduct of insurgent groups, which enables the establishment of their contribution to the crimes without overstretching the culpability principle. Yet, the window of opportunity for obtaining gender justice, which has been

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opened in such cases through the interaction between victim-oriented and defendant-oriented justice, appears significantly narrow.

The most prominent such case concerns Bosco Ntaganda – a former subordinate to the first convicted person at the ICC, Thomas Lubanga, who headed the UPC's military wing. The abundant SGBC evidence gathered during the *Lubanga* trial prompted such charges against Ntaganda (ICC 2012). Ntaganda's charges reflected SGBC committed against civilian women, but also provided the opportunity for recognizing the suffering of girl soldiers who had been subjected to rapes and sexual enslavement within the UPC – a goal that remained unfulfilled in *Lubanga* (WIGJ 2018, 81). Unsurprisingly then, Ntaganda's conviction was heralded by NGOs as a positive outcome for the victims (Human Rights Watch 2019).

The crucial factor for successfully prosecuting SGBC in that case was Ntaganda's "*proximity* to the commanders and soldiers" who committed the crimes and "his own *personal* violent conduct" towards civilians and soldiers (*Prosecutor v. Ntaganda* ICC-01/04-02/06-2359, ¶ 855, emphasis added). Ntaganda was convicted under Article 25(3)(a) for perpetrating SGBC both indirectly, through the UPC's army, and personally – for raping girl soldiers himself (Ibid., ¶¶ 734–735, ¶ 857). It has been suggested that international judges are generally reluctant to find that commanders have raped victims personally, because of their biased assessment of the validity of SGBC testimony (McKinnon 2008, 105). But, Ntaganda's denial that he had raped girl soldiers was found non-credible by the judges, who remained convinced of the credibility of the witness who testified to that account despite the challenges which the defense tried to raise against her testimony (*Prosecutor v. Ntaganda* ICC-01/04-02/06-2359, ¶ 407 and fn. 1158). Unlike *Bemba* and *Gbagbo* where the accused's physical remoteness from the crimes risked the attribution of guilt by association, Ntaganda's discernible involvement in the UPC's crimes made his conviction for SGBC possible without resorting to an expansive approach to culpability. The "solid, methodically reasoned judgment" and the transparent evaluation of the evidence left little doubt about the defendant's guilt (Guilfoyle 2019). Hence, both gender justice advocates and those concerned with upholding criminal law norms were satisfied.

Similar opportunity for realizing gender justice through the prosecution of mid-level commanders has emerged in the ongoing trial against Dominic Ongwen, a former commander of the infamous Lord's Resistance Army (LRA), which has for decades terrorized civilians in Northern Uganda (WIGJ 2018, 122–123). Ongwen has been charged

with a broad range of SGBC, including forced marriage and forced pregnancy, committed indirectly by Ongwen's troops and personally by Ongwen (*Prosecutor v. Ongwen* ICC-02/04-01/15-422-Red, ¶¶ 136–140). The abundant evidence of Ongwen's direct participation in the alleged conducts, supported by the testimonies of several of his "wives" (Ibid., ¶¶ 71–104), has given hope to NGOs that the experiences of LRA's SGBC victims will be recognized at the ICC (WIGJ 2016).

Yet, in both cases the interaction between the gender justice norm and the culpability principle has produced only limited opportunities for recognizing SGBC. Firstly, the prosecutor's increasing awareness of the judges' strict requirements concerning culpability has resulted in pursuing only spatially and temporally limited in scope SGBC charges. Ntaganda was not prosecuted for some of the most notorious crimes he had been associated with. After leaving the UPC, Ntaganda had subsequently held positions in command in other insurgent groups and in the DRC's armed forces and had been allegedly involved in crimes against humanity, including SGBC (Tampa 2019). Yet, while the prosecutor noted those crimes, she alleged Ntaganda's criminal responsibility only for the UPC crimes committed in 2002–2003, regarding which the *Lubanga* case had already revealed evidence of Ntaganda's personal participation. Concerning Ntaganda's conduct at the UPC, the prosecutor was able to submit 69,000 pages for consideration (WIGJ 2014b). It is not clear whether such evidence existed concerning his conduct in other armed groups.

Likewise, even if Ongwen is convicted, not all victims of SGBC would be recognized as such. Apparently acting under the impression that the judges had imposed stricter limitations on the scope of the charges that could be brought against the accused than was the case in practice, the prosecutor decided to bring charges only for SGBC committed before 31 December 2005. In effect, the victims of SGBC committed after that date were not recognized as such (*Prosecutor v. Ongwen* ICC-02/04-01/15-422-Red, ¶ 105). The judges noted that the prosecutor's reasoning had been mistaken (Ibid., ¶¶ 106-107), but it appears that, aware of the reluctance of ICC judges to ease the burden on the prosecution, the ICC prosecutor has preferred not to bring charges of which she has not been certain that they would be upheld later on during proceedings.

Secondly, a major limitation of gender justice in both cases has been the lack of accountability of leadership figures for the SGBC committed through their organizations, which generally requires the adoption of a more expansive approach towards culpability. The prosecutor has appeared increasingly aware of the difficulties of prosecuting high-level

accused and has focused her strategy on targeting mid-level perpetrators to ultimately link their commanders to the crimes (ICC 2013, 14). The UPC's leader, Lubanga, was not held accountable for SGBC. Ntaganda had been a key figure in the organization's military wing, but the case against him was once dismissed by the ICC on the grounds that he had not been "a core actor" during the 2002–2003 conflict in north-eastern DRC (*Prosecutor v. Lubanga* ICC-01/04-02/06-20-Anx2, ¶ 87). Ntaganda largely rose to prominence during the period after he left the UPC, but he was not charged with any crimes committed during that period (Tampa 2019). Similarly, Ongwen had occupied the lowest rank compared to other LRA commanders who had allegedly committed atrocities in Northern Uganda in 2002–2005 (ICC 2005, 8). A new prospect for obtaining gender justice at the ICC has recently emerged in the *Al Hassan* case, but the accused is yet again a member of a local insurgent organization, which had terrorized the civilian population in Timbuktu in 2012–2013 (*Prosecutor v. All-Hassan* ICC-PIDS-CIS-MAL-02-006/19_Eng). As *Bemba* and *Gbagbo and Blé Goudé* have demonstrated, the accountability of high-level accused for SGBC has been significantly obstructed by the ICC judges' strict compliance with the culpability principle, which limits the potential deterrent and expressivist benefits of pursuing gender justice through ICL.

CONCLUSION

Building on the gender justice literature in ICL this article suggested that the trends of "forgetting" and "remembering" norms operate together in international trials. The outcomes of the ICC's SGBC prosecutions should be examined not only as a one-dimensional dynamic between progressive gender advocacy and regressive gender biases, but also in terms of the interaction between gender justice and the culpability principle of criminal law. The recognition of SGBC in ICL often necessitates broad interpretation of the notion of culpable conduct. Previous international tribunals have found defendants guilty of SGBC by relying on modes of liability that do not require evidence of the defendant's direct involvement in the crimes. But the ICC's stricter compliance with the culpability principle has resulted in multiple acquittals of SGBC.

While from a gender justice perspective, this might appear as regression to old gender biases, a detailed analysis of ICC jurisprudence has also revealed the significant influence of the increased emphasis on

defendant-oriented justice at the court on SGBC prosecutions. Calls for gender justice have remained the minority position not because the majority of ICC judges have failed to recognize the suffering of SGBC victims but because, according to the majority's vision of justice, a criminal court such as the ICC is not the appropriate venue for addressing such concerns. In fact, ICC judges have appeared rather progressive in several decisions concerning gender justice that do not directly involve the attribution of criminal responsibility to a given accused. For example, the court recognized for the first time in ICL that, as a matter of law, a person could bear criminal responsibility for SGBC committed within an armed group and not just by the opposing warring party (WIGJ 2018, 139–142), and recognized the crime of forced marriage as a distinct crime from sexual slavery (*Prosecutor v. Ongwen* ICC-02/04-01/15-422-Red, ¶ 95). Furthermore, the *Ngudjolo*, *Bemba* and *Gbagbo and Blé Goudé* cases demonstrate that the judges' restrictive approach to culpability has precluded the successful prosecution of leadership figures not just of SGBC, but of all crimes they have been charged with. Hence, the concerns of gender justice advocates that international tribunals have been reluctant to convict leadership figures removed from the scene of the crimes only for SGBC, but not for crimes such as murder (McKinnon 2008, 104–105), do not find empirical support at the ICC. While Katanga was acquitted only of SGBC, this decision also seemed to be influenced by the judges' reluctance to resort to a broad JCE-like notion of liability to convict him for such crimes. Furthermore, ICC judges' readiness to convict commanders for personally perpetrating SGBC, where the evidence supports such findings, suggests that the guiding principle for ICC decisions has been the ability to easily discern the accused's participation in the crime, rather than the crime's nature.

Nevertheless, the prospect for recognizing SGBC at the ICC, qualified by the emphasis on the culpability principle, has limited gender justice. The judges' commitment to the culpability norm has seemingly affected the prosecutorial strategy, which has focused on targeting mid-level insurgent commanders and only for a temporally and spatially constrained set of crimes, in which the defendant's personal involvement is most evident. Given the pace of ICC proceedings, slowed down by the challenges of international investigations, it might take a long time before a senior official is convicted, which questions the deterrent, didactic, and psychological aspirations of SGBC prosecutions at the court.

This raises questions about the possibilities of pursuing meaningful gender justice through ICL. Gender justice advocates have responded to

critical feminist scholarship by arguing that over time the quality of gender justice in ICL could improve (Chappell 2016, 8–10; Henry 2014, 104–107). This argument focuses on the goal of gender justice advocacy to prevail over backwards biases. By contrast, this article's findings suggest that gender justice advocates should also engage with the implications for advancing gender justice in the context of ICC's increased emphasis on personal culpability. This article suggests that the future dialogue between gender justice advocates and the court should focus on the appropriate balance between the interests of victims and defendants.

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LEGAL SOURCES

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