The Evolution of the Sexual and Gender-Based Violence Prohibition Norm at the International Criminal Court: A Process of Socialization with Appropriate Application

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Statement of Independence

I hereby confirm that I have written the present dissertation independently, without assistance from external parties and without use of other resources than those indicated, that I have provided the sources for any portion of my dissertation that uses direct quotations or borrowed ideas/concepts/results/etc. from other works, including Internet sources, and that I have not previously submitted the present dissertation, either in full or in part, for grading at this or any other academic institution.

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Inga Kravchik

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Abbreviations

AU	African Union
AI	Amnesty International
AC	Appeals Chamber
ASP	Assembly of States Parties
CAR	Central African Republic
CEDAW	Committee on the Elimination of All Forms of Discrimination against Women
DRC	Democratic Republic of the Congo
DDR	Disarmament, Demobilization and Reintegration
DCC	Document Containing the Charges
FIDH	Fédération internationale des ligues des droits de l'Homme
HRW	Human Rights Watch
ICRC	International Committee of the Red Cross
ICs	International Courts
ICJ	International Court of Justice
ICC	International Criminal Court
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IL	International Law
ILC	International Law Commission
IRs	International Relations
LRs	Legal Representatives
LGBT	Lesbian, Gay, Bisexual, and Transgender
LRA	Lord's Resistance Army
MONUC	Mission de l'Organisation des Nations Unies en République Démocratique du Congo
MONUSCO	Mission de l'Organisation des Nations Unies pour la stabilisation en République démocratique du Congo

OPCV	Office of Public Counsel for Victims
OTP	Office of the Prosecutor
OHCHR	Office of the United Nations High Commissioner for Human Rights
PTC	Pre-Trial Chamber
R2P	Responsibility to Protect
SGBC	Sexual and Gender-Based Crimes
SGBV	Sexual and Gender-Based Violence
SRSG/CAAC	Special Representative of the Secretary-General for Children and Armed Conflict
SRSG/SVC	Special Representative of the Secretary-General on Sexual Violence in Conflict
TAN	Transnational Advocacy Network
TC	Trial Chamber
UPDF	Uganda People's Defence Force
UPC/FPLC	Union des Patriots Congolais/Forces Patriotiques pour la Libértaion du Congo
UN	United Nations
UNICEF	United Nations Children's Fund
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
VPRS	Victims Participation and Reparations Section
WCGJ	Women's Caucus for Gender Justice
WIGJ/WIs	Women's Initiatives for Gender Justice/Women's Initiatives
WPS	Women, Peace and Security

Abstract

This thesis analyses the evolution of the sexual and gender-based violence prohibition norm at the International Criminal Court. Underpinned by social constructivist research on international norms, insights into the appropriate application of legal norms, as well as feminist institutionalist and legal perspectives, the evolution is identified as an outcome of a socialization process with the norm's appropriate application. The case study, based on qualitative data analysis, embraces seven stages of this process, each accompanied by a triangulation inquiry. Connecting research on the evolution of norms in international relations with that on resistance practices against international courts, this analysis studies the constellation and agency of the involved actors, institutional and structural as well as socio-political factors. The findings of this study should contribute to the understanding and conceptualization of the evolution of international norms, specifically in the fields of human rights and gender justice from an interdisciplinary perspective, joining political, social and legal aspects through a feminist lens.

Keywords

International relations; social constructivism; norm evolution; socialization; contestation; misrecognition; appropriate application of legal norms; feminist institutionalism/legal studies; agency; resistance; transnational advocacy networks; civil society; ICs; IL; ICC; ICL; IHL; IHRL; sexual and gender-based violence/crimes; gender justice; non-discrimination.

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Contents

1. Introduction

As the International Criminal Court ('ICC') approaches the twentieth anniversary of its constitutive treaty, the Rome Statute[1] on July 1, 2022, this study endeavours to demonstrate and explain the progress that has been achieved by the Court throughout its operation with respect to the application of the relatively recently emerged international legal norm in International Criminal Law ('ICL') on the prohibition of sexual and gender-based violence ('the SGBV prohibition norm'). This norm prescribes its "designated followers"[2], that is, actors who have been mandated with its legal implementation, to bring those responsible for the commission of war crimes, crimes against humanity and the crime of genocide constituted by SGBV conducts (sexual and gender-based crimes, 'SGBC') to individual criminal accountability. For the purposes of this study, the definition of this norm primarily embraces the SGBV conducts that have been included in the Rome Statute, *i.e.*, "[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" under its Article on crimes against humanity[3], as well as "rape, sexual slavery, enforced prostitution, forced pregnancy […], enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions" (or "a serious violation of article 3 common to the four Geneva Conventions") under its Articles on war crimes[4]. Furthermore, the Article on crimes against humanity also includes the innovative crime of persecution that can be based, among other grounds, on "gender" and connected to any SGBC referred to in the Article or to any crime falling under the jurisdiction of the ICC[5]. While the SGBV conducts included under the crimes against humanity and war crimes Articles of the Rome Statute are otherwise virtually identical, the elements of crimes within the jurisdiction of the Court constitute a substantial difference. That is, the definition of the conduct per se is the same under both concepts, yet, for the conduct to constitute a crime against humanity, it has to be demonstrated that it "was committed as part of a widespread or systematic attack directed against a civilian population" and that the "perpetrator knew that the conduct was part of or intended the conduct to be part of"[6] such an

[1] Rome Statute (1998), adopted on July 17, 1998 and entered into force on July 1, 2002, the current number of States Parties amounts to 123 (ICC Doc. No. ICC-PIDS-ASP-FS03-E2021-04_Eng from April 2021).
[2] On the differentiation between norm 'setters' and 'followers' see Wiener (2007); also Günther (1988)
[3] Rome Statute (1998), Art. 7(1)(g)
[4] *Ibid*., Art. 8(2)(b)(xxii), Art. 8(2)(e)(vi)
[5] *Ibid*., Art. 7(1)(h)
[6] ICC ASP (2002b), Art. 7(1)(g)

attack. For the conduct to constitute a war crime, on the other hand, it has to be demonstrated that it "took place in the context of and was associated with an international armed conflict" or "with an armed conflict not of an international character" and that the "perpetrator was aware of factual circumstances that established the existence of an armed conflict"[7]. That is, in contrast to war crimes, for SGBV to constitute a crime against humanity and fall under the jurisdiction of the Court, it does not necessarily have to have been committed in the context of or associated with an armed conflict. The same applies to the crime of genocide when constituted by "causing serious bodily or mental harm to one or more persons" who "belonged to a particular national, ethnical, racial or religious group" by means "includ[ing], but […] not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment"[8].

Although the institutionalization of the SGBV prohibition norm in the Rome Statute was partly criticized by commentators for not being progressive enough[9], as it had been restricted by the negotiations process in many respects[10], this development has been quite significant especially when one considers the fact that the norm emerged on the international arena just a few years before its institutionalization as a part of a more general agenda of "women's rights as human rights"[11] promoted by the feminist "transnational advocacy network" ("TAN"[12]) in the early-mid 1990s[13]. The previous instruments of ICL which were established by the international community after the WWII, the statutes of the Nuremberg and Tokyo tribunals, did not include any SGBV conducts, nor were they prosecuted, although the transcripts of the trials referred to rape, forced prostitution, and other forms of sexual assaults[14]. The International Humanitarian Law ('IHL') treaties regulating armed conflicts had likewise generally neglected SGBV conducts committed during wartime, treating them as less grave than other 'serious' war crimes and conceptualized them as rather violating the status of the men, to whom the actual female victims/survivors 'belonged'[15]. While the Hague Convention of 1907 merely required "respect" for "family honour and rights"[16], which was understood as

[7] *Ibid*., Art. 8(2)(b)(xxii), Art. 8(2)(e)(vi)
[8] *Ibid*., Art. 6(b)
[9] Moshan (1998); Oosterveld (2005a)
[10] Bedont/Hall Martinez (1999); Copelon (2000); Glasius (2002); Oosterveld (2005a)
[11] In 1990 Charlotte Bunch put forward a theory on the connection between violence against women and international human rights in her article "Women's Rights as Human Rights: Toward a Re-Vision of Human Rights", which largely contributed to the framing of the network's following campaign (Bunch, 1990; Keck/Sikkink, 1998, 184-185; Friedman, 2003, 319-321).
[12] Keck/Sikkink (1998, 1999)
[13] This network mainly involved NGOs, states and their representatives, academics, journalists, judges and prosecutors, who promoted women's rights and the protection of women against violence in conflicts on the international level (Keck/Sikkink, 1998; Bunch/Reilly, 1994; Copelon, 1994, 2000)
[14] Ní Aoláin *et al.* (2011), 156-157
[15] Bedont/Hall Martinez (1999); Askin (2003); Ní Aoláin *et al.* (2011)
[16] Hague Convention (1907), Art. 46

protection against sexual attacks[17], the Forth Geneva Convention of 1949 stipulated the protection of women in a somewhat more progressive way "against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault"[18]. Similar language is also contained in the Additional Protocols I[19] and II[20] of 1977 to the Geneva Conventions of 1949. By explicitly referring to SGBC as forms of "indecent assaults" which attack the honour of women, these instruments ignored and relativized the physical and psychological harm that such conducts inflict upon victims/survivors as well as SGBV conducts committed against men. That is, while the conceptualization of SGBV under IHL and ICL until 1990s was extremely discriminating against women who have been historically mainly subjected to such conducts, it furthermore also limited the recognition of victims/survivors of such conducts exclusively to women who *a priori* belong to their families and specifically to men.

1.1. The emergence of the SGBV prohibition norm in ICL

As mentioned above, this patriarchal, misogynous conceptualization of SGBV which has been entrenched in IHL and ICL first began to change in the 1990s, which was facilitated by the international condemnation of widespread and systematic perpetration of SGBV during the conflicts in the former Yugoslavia and Rwanda, not only as their so-called by-products, but rather as the instruments of waging war and genocide[21]. Significantly, the initial appearance of this change embedded in international documents was facilitated by a feminist human rights perspective and ensured by its advocates in the outcomes of the Vienna World Conference on Human Rights in 1993 and the World Conference on Women in Beijing in 1995[22].

[17] Askin (2003), 300
[18] Geneva Convention IV (1949), Art. 27
[19] Protocol I (1977), Art. 76
[20] Protocol II (1977), Art. 4(2)(e)
[21] Reilly (1996); Keck/Sikkink (1998)
[22] Copelon (1994, 2000)

In preparation for Vienna, the advocates of women's rights collected extensive information on SGBV perpetrated during the conflict in the former Yugoslavia, which they used during the Conference[23]. Eventually, the *Vienna Declaration and Programme of Action* expressed the "dismay" of the international community at "massive violations of human rights especially in the form of genocide, "ethnic cleansing" and systematic rape of women in war situations"[24]. Moreover, the Declaration emphasized the necessity to eliminate "all forms of sexual harassment, exploitation and trafficking in women" and the "gender bias in the administration of justice"[25]. The same provision called upon states to eliminate violence against women which, when committed in wartime constitutes "violations of the fundamental principles of international human rights and humanitarian law", and stressed the need for "a particular effective response" especially for violations including "systematic rape, sexual slavery, and forced pregnancy"[26].

In Beijing, women's rights advocates likewise emphasized the necessity to prosecute individuals responsible for the perpetration of SGBV in conflict. The representatives of victims/survivors of SGBV from Rwanda announced their demands for the International Criminal Tribunal for Rwanda to recognize rape as a crime against humanity and a "tool of ethnic cleansing", and to bring those responsible for its commission to individual criminal accountability[27]. As an outcome of those efforts, the *Beijing Declaration and Platform for Action* included a separate section on "Women and Armed Conflict"[28], which recalled the *Vienna Declaration and Programme of Action*[29]. The Beijing Declaration stressed that women and girls are especially vulnerable during armed conflicts due to "their status in society and their sex" and recognized that "rape, including systematic rape, sexual slavery and forced pregnancy" constitute humanitarian law violations and can be caused by "policies of ethnic cleansing", which must be condemned and punished[30]. Notably, the Declaration urged governments, international, and regional organizations to "aim for gender balance when nominating or promoting candidates for judicial and other positions in all relevant international bodies", *i.a.*, for the positions in the International Criminal Tribunal for the former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR')[31]. It appealed furthermore to the responsible entities to "[e]nsure that these bodies are able to

[23] Keck/Sikkink (1998), 180-183; Bunch/Reilly (1994), 9-14
[24] Vienna Declaration and Programme of Action (1993), I, para.28
[25] *Ibid*., II(B)(3), para.38
[26] *Ibid*.
[27] Reilly (1996), 40-42
[28] The Beijing Declaration and the Platform for Action (1995), IV(E)
[29] *Ibid*., *e.g*., para.132
[30] *Ibid*., paras.131-132, 135
[31] *Ibid*., para.142(b)

address gender issues properly"[32] as well as to "[r]eaffirm that rape in the conduct of armed conflict constitutes a war crime and under certain circumstances it constitutes a crime against humanity and an act of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide"[33]. What's more, it emphasized the necessity to investigate and prosecute all wartime gender-related crimes properly "including rape, in particular systematic rape, forced prostitution and other forms of indecent assault and sexual slavery"[34].

The recognitions included in the outcomes of Vienna and Beijing signified the emergence of the SGBV prohibition norm within the developing international human rights regime, which would continue to permeate the terrains of ICL and IHL, *i.a.*, by means of these established international "soft law" instruments[35]. Along with these recognitions, another crucial evolution was brought about by the United Nations Security Council ('UNSC') through its establishment of ad hoc tribunals for the conflicts in the former Yugoslavia and Rwanda, the ICTY and the ICTR, in 1993[36] and 1994[37] respectively. Adopted by the most powerful entity in international politics, acting under Chapter VII of the UN Charter[38], the statutes of the tribunals included a precedential codification of the conduct of rape in ICL as a crime against humanity[39]. As (in contrast to the outcomes of Vienna and Beijing) these statutes were binding for states and the established tribunals, this development promoted the legalization of the SGBV prohibition norm in ICL, providing it with significant authority.

Building on this progress, women's rights activists and their allies continued to influence the creation and operation of ad hoc tribunals on both institutional and legal levels[40]. They initiated and embedded precedential changes in the rules of procedure and evidence with respect to investigations and prosecutions of SGBV, which later migrated into the Rome Statute of the ICC[41]. Simultaneously, they stimulated the establishment of legal precedents of prosecuting and adjudicating SGBV conducts in ICL, despite the absence of those conducts'

[32] *Ibid*., para.142(c)
[33] *Ibid*., para.145(d)
[34] *Ibid*., para.145(e)
[35] *Cp.* Reilly (1996); Keck/Sikkink (1998)
[36] UNSC Doc. No. S/RES/827 from May 25, 1993
[37] UNSC Doc. No. S/RES/955 from November 8, 1994
[38] Charter of the United Nations (1945), Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression
[39] United Nations (2009), Art. 5(g); UNSC Doc. No. S/RES/955 from November 8, 1994, Art. 3(g), Art. 4(e) (the ICTR statute also explicitly includes rape as a war crime)
[40] Human (and specifically women's) rights lawyers (including, for instance, Prof. Rhonda Copelon and Prof. Christine Chinkin) played an essential role during the establishment of the tribunals: they reported on SGBV and promoted the incorporation of gender provisions in the tribunals' institutional designs by lobbying diverse UN bodies. Furthermore, following the tribunals' establishment, they urged their responsible staff to investigate and prosecute SGBV committed in the context of the respective conflicts (Green *et al.*, 1994).
[41] Copelon (2000); Ní Aoláin *et al.* (2011)

explicit codification in the statutes of the tribunals[42]. For instance, although only the conduct of rape was included as a crime against humanity in both their statutes and additionally as a war crime in the statute of the ICTR, eventually rape was also prosecuted as constituting a war crime of torture[43]. Along with rape, sexual violence (prosecuted as "other inhumane acts" of "forced undressing") was recognized to constitute a crime against humanity and a crime of genocide[44], while aiding and abetting sexual mutilation of a male prisoner[45] and sexual violence committed against men were deemed to constitute war crimes of inhuman and cruel treatment[46]. While women's rights advocates monitored the cases prosecuted by the tribunals and pushed for the consideration of SGBV from outside the tribunals, their internal allies inserted changes in the definitions and interpretations of ICL in cases of SGBV from the inside[47].

Perhaps, one of the most noteworthy examples of the impact produced by the tribunals on the evolution of the SGBV prohibition norm in ICL has been reflected in the outcome of the ICTR's famous *Akayesu* case, in which, for the first time in the history of the international law, the Judges defined conducts of rape and sexual violence and established that under certain conditions they could constitute the crime of genocide[48]. This result was largely generated by the efforts of women's rights advocates during the proceedings of the case, which had initially not covered SGBV charges. The presence of (at that time) the only female Judge at the ICTR on the bench, Judge Navanethem Pillay, who luckily possessed extensive expertise in International Human Rights Law ('IHRL') and SGBV, also significantly impacted this outcome. During the hearings, she pursued questioning the witnesses on issues of sexual violence after they had been occasionally mentioned during the trial. As a consequence of this inquiry, she postponed the proceedings, requested the Prosecution to investigate the matter and to consider the amendment of the indictment with sexual violence charges[49]. Eventually, the charges were amended and as a result, the progressive definitions of rape[50] and sexual violence[51] which were based on these proceedings and included in the

[42] Goldstone/Dehon (2003), 124; Askin (2004), 18; Mertus *et al.* (2004); Haddad (2011); Ní Aoláin *et al*. (2011)
[43] ICTY Doc. No. IT-96-21-T from November 16, 1998
[44] ICTR Doc. No. ICTR-96-4-T from September 2, 1998
[45] ICTY Doc. No. IT-94-1-T from May 7, 1997
[46] ICTY Doc. No. IT-96-21-T from November 16, 1998
[47] Green *et al.* (1994), 176-177; Copelon (2000), 225; Askin (2003), 318, (2004), 17; Goldstone (2002), 281; Oosterveld (2005)
[48] ICTR Doc. No. ICTR-96-4-T from September 2, 1998, paras.10A, 688, 731-734
[49] Copelon (2000); Goldstone (2002); Askin (2003, 2004); Haddad (2011); Grey (2014); Chappell (2016)
[50] As "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive" (ICTR Doc. No. ICTR-96-4-T from September 2, 1998, paras.598, 688)
[51] As "any act of a sexual nature [including rape] which is committed on a person under circumstances which are coercive"; the definition notes that it "is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact" as forced undressing, and states that this crime "falls within the scope of" crimes against humanity, war crimes and genocide as set in the statute (ICTR Doc. No. ICTR-96-4-T from September 2, 1998, para.688)

Akayesu judgement filled a gap in the international law and played a pivotal role for the further prosecution of these crimes[52]. Although the ICTR's statute enlisted only rape as a crime against humanity and war crime, sexual violence was prosecuted as "other inhumane acts" constituting a crime against humanity[53] and both rape and sexual violence as "causing serious bodily or mental harm to members of the group" constituting a crime of genocide[54]. Significantly, this interpretation of genocide that may be potentially constituted by conducts of rape and sexual violence ultimately migrated into the elements of this crime set within the legal framework of the International Criminal Court[55].

1.2. The institutionalization of the norm in the ICC's legal framework

During the negotiations on the Rome Statute between March 1996 and April 1998, which virtually coincided with the proceedings held at the ICTY and ICTR, women's rights advocates pursued promoting the SGBV prohibition norm in ICL. Due to their participation in the negotiations process as "Women's Caucus for Gender Justice" ('WCGJ'), the norm was eventually institutionalized in the Rome Statute. WCGJ ultimately persuaded the states to codify and include in the legal framework of the Court a number of SGBV conducts as war crimes, crimes against humanity and under certain conditions as constituting the crime of genocide as well as precedential gender-sensitive procedural provisions that could facilitate their investigations and prosecutions[56]. Brigid Inder, the former executive director of Women's Initiatives for Gender Justice ('WIGJ'), the NGO that has been closely monitoring the implementation of the ICC's gender justice mandate, who also served as Special Advisor on Gender to the ICC's Office of the Prosecutor ('OTP') under Prosecutor Fatou Bensouda

[52] Copelon (2000), 227; Goldstone (2002), 283; Askin (2003), 321
[53] UNSC Doc. No. S/RES/955 from November 8, 1994, Art. 3(i)
[54] *Ibid*., Art. 2(2)(b); ICTR Doc. No. ICTR-96-4-T from September 2, 1998, paras.696-697, 734
[55] ICC ASP (2002b), Art. 6(b)(1)
[56] Moshan (1998); Copelon (2000); Chappell (2003); Sikkink (2011); MacKinnon (2013); O'Rourke (2013)

between 2012-2016[57], shared feelings of pride and gratefulness in her interview with respect to WIGJ's "foremother", WCGJ, and those "brilliant and extraordinary women" who had achieved this progress and who continue to inspire her and her colleagues[58]. She emphasized that Rhonda Copelon, one of the leading women's rights and gender justice advocates who had been at the forefront of the emerging norm on the prohibition of SGBV in ICL, was the "braintrust of the Caucus"[59]. Brigid Inder stressed that her outstanding intellect continued to encourage the other like-minded individuals and groups to further advance the evolution of the norm "long after the negotiations and long after her passing"[60].

While the initial draft of the Statute did not even mention the term "gender", WCGJ provided for its final inclusion throughout the negotiations, despite opposition by the so-called 'Unholy Alliance', whose adherents refused to recognize the socially constructed nature of gender roles based on their religious beliefs[61]. This notorious coalition strictly opposed the inclusion of the issues that would promote women's rights and gender justice, such as the prohibition of gender-based discrimination and the rights to abortion, sexual orientation and gender identity[62]. In fact, they feared that the inclusion of the crime of forced pregnancy under the crimes against humanity and war crimes Articles of the Statute could have impacted the national laws in countries that prohibit abortion[63]. This explains the minute included in the definition of the crime, stating that it "shall not in any way be interpreted as affecting national laws relating to pregnancy"[64]. Likewise, in order to deter of the criminalization of persecution based on sexual orientation and/or gender identity, they significantly restricted the definition of 'gender' that could be reached[65]. "[R]efer[ring] to the two sexes, male and female, within the context of society"[66], the definition in essence ignores and excludes any other gender identity outside of cis-women and -men and applies this binary to every use of 'gender' in the legal framework of the Court. The definition was broadly criticized as "unworkable and impractical", restricting, highlighting only two biological sexes, and failing to refer to the social construction of gender[67]. While this criticism is entirely fair, the very existence of the

[57] WIGJ (2016b)
[58] Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018
[59] Regrettably, Prof. Rhonda Copelon passed at sixty-five of cancer on May 6, 2010 (Gormley, 2010)
[60] Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018
[61] The 'Unholy Alliance' consisted of Christian and Islamic fundamentalist states such as the Vatican, Ireland, Egypt, Iran, Oman, Syria, the United Arab Emirates, and of North-American religious right wing groups such as JMJ (Jesus, Maria and Joseph), Children's Fund of Canada, REAL Women of Canada and the International Human Life Committee (Bedont/Hall Martinez 1999; Copelon 2000; Glasius 2002).
[62] Copelon (2000); Glasius (2002); Oosterveld (2005a)
[63] *Ibid*.
[64] Rome Statute (1998), Art. 7(2)(f)
[65] Copelon (2000), 236; Oosterveld (2005a), 57-58, 76-77
[66] Rome Statute (1998), Art. 7(3)
[67] Moshan (1998), 178-179; Oosterveld (2005a), 80-81

term ‘gender’ and its inclusion in various Articles, which we largely owe to the efforts of WCGJ fighting for its inclusion during the negotiations on the Rome Statute, has been nonetheless extremely valuable for the evolution of the SGBV prohibition norm in and through ICL[68]. If creatively used, as Valerie Oosterveld notes, the “constructive ambiguity” still embedded in the definition to some extent[69] may enable the actors involved in the interpretation and application of the law at the ICC to contribute to its further development by exposing social realities and patterns of discrimination that underpin the perpetration of certain crimes falling under the jurisdiction of the Court. Although the efforts of WCGJ had been successfully resisted by their powerful opponents to a certain extent, the achieved ‘compromises’ eventually also revealed otherwise largely accepted recognition of the SGBV prohibition norm and advanced its content and status under international law. Despite its deficiencies, with this historic international institutionalization and legalization of the norm in ICL, the states provided the ICC’s staff with precedential instruments that could assist them with its implementation, that is, the investigation and prosecution of SGBC within the jurisdiction of the Court[70].

Another key provision on the applicable law included in the Rome Statute stipulates its application and interpretation in “consisten[cy] with internationally recognized human rights […] without any adverse distinction founded on grounds such as gender […]”[71]. This clause additionally supports the investigation and prosecution of the abovementioned SGBC explicitly included in the Statute. Simultaneously, it enables the exposure of the potentially gender-based nature of crimes and elements that may include the intent, the experiences of victims/survivors and the consequences of other crimes falling under the jurisdiction of the Court. Curiously, outside of this significant reference, human rights are explicitly noted only twice in the Statute: in the Article on the “Evidence” of crimes submitted to the Court, which prohibits its admissibility when obtained in a violation of internationally recognized human rights[72] and in the Article on the “Qualifications, nomination and election of judges”, which requires the candidates to possess “competence in relevant areas of international law such as international humanitarian law and the law of human rights”[73]. The selection criteria furthermore require, *inter alia*, that the selection process “take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence

[68] *Cp.* Oosterveld (2005a)
[69] Oosterveld (2005a, 2014)
[70] *Cp.* Ní Aoláin *et al.* (2011)
[71] Rome Statute (1998), Art. 21(3)
[72] *Ibid*., Art. 69(7)
[73] *Ibid*., Art. 36(3)(b)(ii)

against women or children"[74]. The prioritization of 'violence against women' over 'gender-based violence' as a formulation embedded in this provision reflects the origin of the SGBV prohibition norm as well as the specifically targeted persons who have historically been the overwhelming majority of victims subjected to such crimes and who have been discriminated against by the law and its structures based on their gender. In fact, the misogyny and discriminatory perception of women internalized throughout social structures that generates violence against women has been likewise largely projected on male targets of sexual violence intended by perpetrators, in order to "devalorize" them through feminization[75].

Interestingly, the Article on the "Office of the Prosecutor" embraces different language with respect to the legal expertise of the advisors it may appoint, specifying that this expertise should include the issues of "sexual and gender violence and violence against children"[76]. Furthermore, the "[d]uties and powers of the Prosecutor with respect to investigations" include the requirement to "take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children"[77]. Also noteworthy in this regard is the Article on the "Protection of the victims and witnesses and their participation in the proceedings", which directs the Court to "take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses" and by doing so to consider, *inter alia*, their gender, especially "where the crime involves sexual or gender violence or violence against children"[78]. The same Article provides for "an exception to the principle of public hearings" allowing the Chambers to "conduct any part of the proceedings *in camera*" or "the presentation of evidence by electronic or other special means" if such measures might be required for the protection of victims, witnesses or an accused, particularly in "the case of a victim of sexual violence or a child who is a victim or a witness"[79].

[74] *Ibid*., Art. 36(8)(b)
[75] Sjoberg (2016)
[76] Rome Statute (1998), Art. 42(9)
[77] *Ibid*., Art. 54(1)(b)
[78] *Ibid*., Art. 68(1)
[79] *Ibid*., Art. 68(2)

1.3. Since the institutionalization

Empowered by these provisions, the ICC has been expected by its gender justice constituencies[80] to implement its mandate of investigating and prosecuting SGBV which falls under its jurisdiction when states are not able or willing to do so themselves[81]. Significantly, although the US, Russia and China are not State Parties to the Rome Statute, the UN Security Council, constituted by their permanent membership along with the United Kingdom and France, has recognized gender as a central issue to international peace and security within its Women, Peace and Security ('WPS') agenda[82]. In its responses to the perpetuity of large-scale SGBV in conflict committed especially against women, the UNSC has also consistently stressed the importance of bringing the perpetrators of such crimes to criminal accountability as an integral part of its WPS agenda[83]. Even though the ICC is officially not a part of the UN system, but an independent body, the cooperation between both organisations is crucial in many respects and has been regulated by the special Negotiated Relationship Agreement between the ICC and the UN[84] and the Best Practices Manual for this cooperation[85]. The role and powers of the UNSC embedded in the Rome Statute with respect to the ICC's exercise of its jurisdiction, investigations and prosecutions has been even more critical for the functioning and the authority of the Court[86]. Following its Resolution 1325 from 2000 that launched the WPS agenda, the UNSC has continued to maintain this agenda by consistently recalling, *inter alia*, the *Beijing Declaration and Platform for Action* of 1995 and recognizing the important contribution of civil society, especially of women's rights organizations, to the implementation of the agenda[87]. In its additional nine Resolutions, it has urged the UN Member States, *inter alia*, to protect and fulfil women's human rights in conflict and post-conflict situations, to adopt a gender-sensitive perspective within transitional justice mechanisms, and to prosecute the perpetrators of SGBV[88]. Notably, the UNSC has also explicitly called upon parties to armed conflicts "to respect fully international law applicable

[80] Chappell (2016)
[81] Rome Statute (1998), Art. 17
[82] UNSC Doc. No. S/RES/1325 from October 31, 2000; UNSC Doc. No. S/RES/1820 from June 19, 2008; UNSC Doc. No. S/RES/1888 from September 30, 2009; UNSC Doc. No. S/RES/1889 from October 5, 2009; UNSC Doc. No. S/RES/1960 from December 16, 2010; UNSC Doc. No. S/RES/2106 from June 24, 2013; UNSC Doc. No. S/RES/2122 from October 18, 2013; UNSC Doc. No. S/RES/2242 from October 13, 2015; UNSC Doc. No. S/RES/2467 from April 23, 2019; UNSC Doc. No. S/RES/2493 from October 29, 2019
[83] *Ibid.*
[84] UNGA Doc. No. A/58/874 from August 20, 2004; ICC/UN (2004); UNGA Doc. No. Res. A/RES/58/318 from September 20, 2004
[85] United Nations (2016)
[86] Rome Statute (1998), Art. 13(b), Art. 16
[87] *Supra* note 82
[88] *Ibid.*

to the rights and protection of women and girls" and while doing so "to bear in mind the relevant provisions of the Rome Statute" of the ICC[89] consistently recalling the inclusion of SGBC in the Rome Statute[90]. In fact, since 2013 the UNSC has also recognised the role of the ICC's work in "the fight against impunity for the most serious crimes of international concern committed against women and girls"[91].

However, despite the broad recognition of the ICC's role in the prevention of the most serious crimes of concern to the international community by putting an end to impunity for perpetrators of crimes embedded both in the Rome Statute, which entered into force on July 1, 2002 and established the ICC, as well as on the highest level of international peace and security politics, numerous exogenous and endogenous obstacles have drastically jeopardized the prospects of the ICC's implementation of its mandate, also specifically with respect to SGBC. The lack of the political will among many states that are also Parties to the Rome Statute to fulfil their cooperation obligations towards the Court, which are vital for the implementation of its mandate, reveals one such exogenous obstacle[92]. The devastating effects of this obstacle for the functioning of the Court, especially in situations over which the exercise of its jurisdiction was resisted by the affected states (that is, either when initiated by the Prosecutor of the Court[93] or by the UNSC when referring a situation to the Prosecutor acting under Chapter VII of the Charter of the United Nations[94]) will be reflected in the next chapter. This chapter will provide an overview of all cases that have been brought before the ICC so far. This overview will also demonstrate that, even among the situations referred to the ICC by the States Parties themselves[95], the Office of the Prosecutor was essentially only able to open cases against the individuals who had (allegedly) committed crimes falling under the jurisdiction of the Court, while being in opposition to those governments that wished for their prosecution. While the ICC, as an entirely new international institution, has been essentially forced to pursue the cases and situations that it could afford in order to build up its institutional capacities and indeed, has been widely criticized for doing so in a supposedly

[89] UNSC Doc. No. S/RES/1325 from October 31, 2000, para.9
[90] UNSC Doc. No. S/RES/1820 from June 19, 2008; UNSC Doc. No. S/RES/1888 from September 30, 2009; UNSC Doc. No. S/RES/1960 from December 16, 2010; UNSC Doc. No. S/RES/2106 from June 24, 2013; UNSC Doc. No. S/RES/2467 from April 23, 2019
[91] UNSC Doc. No. S/RES/2122 from October 18, 2013, para.12; UNSC Doc. No. S/RES/2242 from October 13, 2015, para.14; UNSC Doc. No. S/RES/2467 from April 23, 2019, para.15
[92] For instance, in 2015, during the African Union Summit in Johannesburg, the government of South Africa, which is a State Party to the Rome Statute, failed to comply with its obligations towards the ICC by refusing to arrest and deliver the Sudanese President at the time, Omar Al Bashir to the Court, against whom two warrants of arrest were issued by the Court in March 2009 and July 2010. He was accused of crimes against humanity, war crimes, and genocide (ICC Doc. No. ICC-CPI-20170706-PR1320 from July 6, 2017). Among other states, in 2020, the US (which is not a State Party to the Rome Statute), under the Trump administration, resisted the ICC's investigation of crimes potentially committed by the US personnel in the situation in Afghanistan in an especially drastic way by putting sanctions on Prosecutor Bensouda, her family and colleagues (HRW, 2020; Bashi, 2021). These sanctions were renounced under President Biden on April 2, 2021 (Blinken, 2021).
[93] Rome Statute (1998), Art. 15
[94] *Ibid*., Art. 13(b)
[95] *Ibid*., Art. 14

selective way, this tendency rather reflects the structural deficiencies of international politics and the lack of the political will to support the Court when it comes to the implementation of its mandate.

Nevertheless, while states' non-cooperation has significantly challenged the ICC's implementation of its mandate in general terms, the investigation and prosecution of SGBV especially in the initial years of the Court's operation appears to have been more obstructed by endogenous deficiencies. Despite the SGBV prohibition norm's validity[96] being generally recognized in the international community since the norm was embedded in the Rome Statute, and although it has been legalized and institutionalized in ICL since the Statute's entry into force and the ICC's establishment, the ICC's staff essentially failed to implement its mandate relating to the investigation and prosecution of SGBC falling under the Court's jurisdiction during the first decade of its work. As the next chapter ('2. Mapping the application of the SGBV prohibition norm at the ICC') will demonstrate, even if the suspects had been transferred to the Court and the OTP could proceed with its case under relatively favourable conditions free of pushbacks or backlash from the affected states[97], the charges of SGBV were either not brought despite such allegations or were not investigated and prosecuted in an efficient way. The OTP often failed to provide sufficient evidence or to persuade the Judges, who, in turn, were also partly inclined to reject such charges or to adjudicate on them in a somewhat biased way. That is, the application of the SGBV prohibition norm by the OTP was quite unsatisfactory, which in turn, resonated in the subsequent interpretation of the law by the Judges.

The chapter '2. Mapping the application of the SGBV prohibition norm at the ICC' demonstrates general recognition of the norm's validity among actors involved in the operation of the Court. Yet, during the early years of this newly established institution with a sensitive and challengeable mandate, they appeared largely unfamiliar with the norm's application and "meaning-in-use"[98] in the diverse contexts of the Court's cases. On the one hand, the expertise of the "designated followers" of the norm with their different socio-cultural backgrounds[99] did not necessarily cover issues of SGBV to the extent of their precedential institutionalization in the Rome Statute. While interpretation and application of

[96] Based on the differentiation between norms' validity and application (Deitelhoff/Zimmermann, 2013)
[97] Madsen *et al.* (2018)
[98] Wiener (2004), 190, borrowed from Milliken (1999)
[99] Wiener (2007, 2009); Wiener/Puetter (2009)

the law are stipulated by individual experiences[100], the "normative baggage"[101] of the involved actors appeared to be shaped by the hegemonic perception of "law as male"[102]. Their interpretation of the law was often decontextualized[103] in a way that was eventually obstructive for the appropriate application[104] of the norm, which emerged as the outcome of the feminist critique of legal structures that have traditionally used to discriminate and marginalize women[105]. On the other hand, the cases and situations that the ICC has been dealing with stem from various cultural and political contexts, within which various sexual and/or gender-based conducts may have been committed with differing intents and may have formed different crimes (or even several crimes) falling under the jurisdiction of the Court. That is, despite the norm's codification in the ICC's legal framework, its "meaning-in-use"[106] in those different contexts and situations has to be elaborated and comprehended by the actors through processes of learning and socialization with its appropriate application[107].

However, by the beginning of the second decade of the Court's operation, which coincided with the issuance of the judgement in its first case against Thomas Lubanga Dyilo from the Democratic Republic of the Congo[108] ('Thomas Lubanga' or 'Lubanga') and the accession of the second Chief Prosecutor Fatou Bensouda[109] ('Prosecutor Fatou Bensouda' or 'Prosecutor Bensouda'), the OTP actively engaged in the process of prioritization of the SGBV prohibition norm throughout all areas of its work. In fact, as the empirical analysis will depict, Fatou Bensouda, who had previously served as the Deputy Prosecutor to the OTP, began to emphasize her goals of such prioritization already prior to her election to lead the Office by the Assembly of States Parties ('ASP') to the ICC in December 2011[110]. Her election therefore also reaffirmed the support of the Court's more general constituency for the implementation of its gender justice mandate. Since Prosecutor Bensouda had taken Office, those intentions were also enforced in all Strategic Plans of the OTP issued under her leadership[111]. Furthermore, the prescriptive status of the norm and its appropriate application by the OTP on various levels of its work were specifically elaborated on in its *Policy Paper*

[100] Günther (1988)
[101] Wiener (2007, 2009)
[102] Olsen (1990); see also MacKinnon (1983, 1991)
[103] *Ibid*.
[104] On the appropriate application of legal norms see Günther (1988)
[105] *Cp. e.g*., Copelon (2000); Askin (2003, 2004); Oosterveld (2004, 2005a,b, 2009, 2011, 2013); Reilly (2007); Melandri (2009); SáCouto/Cleary (2009); Amnéus (2011); Wallström (2012); Vojdik (2014); Zawati (2014); Chappell (2014, 2016); Vikhrest (2015); Grey (2019)
[106] Wiener (2004), 190, borrowed from Milliken (1999)
[107] *Cp.* Günther (1988); Wiener (2007, 2009)
[108] ICC Doc. No. ICC-01/04-01/06-2842 from March 14, 2012; ICC Doc. No. ICC-01/04-01/06-2902 from July 10, 2012
[109] ICC Doc. No. ICC-CPI-20120615-PR811 from June 15, 2012
[110] ICC Doc. No. ICC-ASP-20111201-PR749 from December 1, 2011
[111] ICC OTP (2013b, 2015, 2019)

on Sexual and Gender-Based Crimes, issued in June 2014[112], and maintained in its subsequently issued *Policy Paper on Case Selection and Prioritisation* and *Policy on Children* in 2016[113]. Significantly, in the meantime, those aspirations have been validated by the successful legal outcomes in the prosecution and adjudication of SGBV. The *Ntaganda* (DRC) and *Ongwen* (Uganda) cases, in which the verdicts were recently issued[114], as well as the *Al Hassan* (Mali) case that is currently on trial at the time of writing[115], have already established important precedents and demonstrated progress in the application of the SGBV prohibition norm by both the OTP and the Judges. These evolutions have not only advanced conceptual clarification on the norm's "meaning-in-use"[116] and specifically strengthened its status under International Criminal Law, but also generally promoted the convergence of International Humanitarian Law and International Human Rights Law.

1.4. Methodology

Which factors and actors have contributed to the OTP and the Chamber's socialization with the appropriate application of the SGBV prohibition norm, in terms of investigation, prosecution and adjudication of cases involving SGBV allegations since the beginning of the ICC's operation? In order to pursue this question, I first undertake a mapping of all cases which have been brought before the Court so far, which have involved charges of SGBV and which could be continued to the further procedural stages, based on which I make my initial observations. Thus, the chapter '2. Mapping the application of the SGBV prohibition norm at the ICC' provides an insight into the application of the norm at various stages of the Court's proceedings, beginning with the issuance of arrest warrants and indictments against the suspects and continuing through the confirmation of the charges up to the trial and judgment.

[112] ICC OTP (2014)
[113] ICC OTP (2016a,b)
[114] ICC Doc. No ICC-01/04-02/06-2359 from July 8, 2019; ICC Doc No. ICC-01/04-02/06-2442 from November 7, 2019; ICC Doc. No. ICC-01/04-02/06-2666-Red from March 30, 2021; ICC Doc. No. ICC-02/04-01/15-1762-Red from February 4, 2021; ICC Doc. No. ICC-02/04-01/15-1819-Red from May 6, 2021
[115] ICC Doc. No. ICC-CPI-20190930-PR1483 from September 30, 2019; ICC Doc. No. ICC-CPI-20200713-PR1531 from July 14, 2020; ICC Doc. No. ICC-PIDS-CIS-MAL-02-010/20_Eng from October 2020
[116] Wiener (2004), 190, borrowed from Milliken (1999)

As the chapter explains, I have mainly considered the cases in which the suspects could be delivered to the Court and the proceedings could actually unfold, revealing actors' interpretation of the law and its application to sexual and/or gender-based crimes.

I conducted my empirical analysis against the background of the norm's embeddedness in the legal framework of the ICC by the time of its establishment as well as the other relevant instruments of International Law including International Humanitarian Law [117] and International Human Rights Law[118]. Additionally, I took into consideration the OTP's Strategies and Policies that were developed and issued throughout the process of institutional revision on the prescriptive status of the SGBV prohibition norm in application during the second decade of the Court's operation. The case files of the Court, most of which are available on its online database, have provided a crucial foundation for this study in that they reflect the perception of the norm among involved actors and the narratives of the cases constituted through their interpretation and application of the law. However, these official documents have not always revealed what had influenced certain decisions and which challenges might have hindered alternative choices. My analysis has been strongly supported by qualitative, semi-structured (some of them anonymized) interviews which I mainly conducted in The Hague in May 2017 and December 2018 with representatives who have been mostly involved in the operation of the Court since its first decade, from both the OTP and the Chambers, as well as by secondary sources produced by feminist institutionalists and legal theorists[119]. The interview with Brigid Inder – the executive director of the WIGJ during the period of the *Lubanga* proceedings, who was subsequently appointed by the second Chief Prosecutor Fatou Bensouda as the OTP's Special Gender Advisor[120] – was especially valuable for understanding the resistance dynamics[121] largely driven by her organization against the misrecognition[122] of the SGBV prohibition norm in the ICC's first case. Qualitative data analysis of the Court's documents, case files, semi-structured interviews and secondary sources was undertaken, revealing the *Lubanga* case to be a critical trigger for institutional revision with respect to the appropriate application of the SGBV prohibition norm. This

[117] For the purposes of this study, I primarily considered the Geneva Conventions of 1949 and their Additional Protocols of 1977
[118] For the purposes of this study, I primarily considered international and regional human rights instruments focussed on the protection of women's and children's rights
[119] *E.g*., Sellers (2009, 2018); Mackay *et al*. (2010); Ní Aoláin *et al.* (2011); Hayes (2013); MacKinnon (2013); Askin (2014); Oosterveld (2013, 2014); Mackay (2014); Chappell (2014, 2016); McDermott (2017); Powderly/Hayes (2018); SáCouto (2018); Grey (2014, 2019); Grey *et al*. (2019, 2020a,b)
[120] WIGJ (2012a)
[121] Based on the analytical framework of Madsen *et al.* (2018)
[122] Based on the misrecognition concept applied by Chappell (2016)

evolution followed Lubanga's judgement[123] and was launched under the Court's second Chief Prosecutor Fatou Bensouda.

In accordance with my established data, although Thomas Lubanga was ultimately only convicted of the war crimes of child soldiers' enlistment, conscription and use to participate actively in hostilities, without any consideration of SGBV committed under his alleged responsibility[124], the SGBV prohibition norm was eventually *de-facto* applied in this case as a discourse[125]. That is, it was applied through social practice that enabled the emerging constitution of its "meaning-in-use"[126]. Despite the *de-jure* misrecognition and even contestation of the applicability in this case, discursive interactions, which facilitated the reaffirmation of the norm's validity in its context[127] can be traced throughout the trial. The norm's validity in this context was ultimately *de-facto* accepted by virtually all relevant actors involved in the proceedings and enrooted in the judgement, in spite of legal constraints and collisions with other involved norms[128]. As my findings reveal, this discourse was generated by non-state actors from both the outside and within the Court, who engaged in resisting the misrecognition of the norm's application from the outset of the case and continued to do so throughout the proceedings.

Based primarily on the socialization "spiral" model of Thomas Risse and Kathryn Sikkink[129] and the analytical framework on patterns of (state) resistance against International Courts/International Law ('ICs'/'IL') developed by Mikael R. Madsen *et al.*[130], I have identified a socialization process with appropriate application of the SGBV prohibition norm that emerged in the ICC by the beginning of the *Lubanga* proceedings due to non-state resistance against the norm's misrecognition. This involves seven stages to date: 1) the applicatory misrecognition of the norm[131], 2) the denial of misrecognition, 3) tactical concessions, 4) elaboration of the normative "meaning-in-use"[132], 5) reaffirmation of the validity and *de-facto* recognition of applicability, 6) refinement of the prescriptive status, and 7) further conceptual clarification through aspired appropriate application. While the OTP's misrecognition of the norm's application has been identified as the first stage of the

[123] ICC Doc. No. ICC-01/04-01/06-2842 from March 14, 2012
[124] *Ibid*.
[125] On the application of norms as discourses see Günther (1988)
[126] *Cp.* Wiener (2009), 188-189
[127] *Cp.* Günther (1988)
[128] On collisions between legal norms see Günther (1988)
[129] Risse/Sikkink (1999)
[130] Madsen *et al.* (2018)
[131] Elaborated against the background of the misrecognition concept applied by Chappell (2016) and the differentiation between contestation of the validity and application of norms depicted by Deitelhoff/Zimmermann (2013)
[132] Wiener (2004), 190, borrowed from Milliken (1999)

socialization process, the following four stages were generated by the norm's advocates' and their allies' resistance against the misrecognition throughout the proceedings. The last two stages were activated, in turn, by the internal actors of the Court (primarily the OTP) as an outcome of persuasion[133] achieved by the advocates of the norm in *Lubanga*, that is, beyond this case, yet based on its lessons. Noteworthily, while the "spiral" model is based on processes of socialization with norms by states, and the analytical framework of resistance patterns against ICs/IL mainly on such reactions by states, this study deals with an institutional socialization process that was triggered by non-state resistance against the inappropriate application of the law by actors involved in institutional operation. Despite its restricted agency in comparison to states[134], non-state resistance in the given case could be revealed as transformative in terms of the produced outcomes identified on both legal and institutional levels. Although both theoretical frameworks were developed in contexts in which states-related processes were the focus of study, they could be likewise valuably elaborated for the application in non-state contexts.

Following the chapter '2. Mapping the application of the SGBV prohibition norm at the ICC', the theoretical framework tackles the most recent social constructivist research on the evolution of international norms[135], by specifically considering the research on application discourses in law and politics[136] and on resistance practices against ICs/IL[137]. This analysis takes place against the background of insights from feminist institutionalism and legal theory[138], which emphasize the potential of the law to influence individual perceptions of identities. These fields support the claim that discrimination of women rests on the absence or deficient implementation of legal norms, which should enforce women's rights and gender justice. The following chapter, '4. Explanatory framework', connects these theoretical concepts by adjusting them to the context of the case study and by elaborating on their explanatory potential with respect to my research questions. The chapter '5. Empirical findings' depicts my findings in accordance with the explanatory framework, that is, the institutional socialization 'spiral' approaching the appropriate application of the SGBV prohibition norm. Each stage of the process has been analysed against the triangulation

[133] *Cp.* Deitelhoff (2006)
[134] Madsen *et al.* (2018)
[135] *E.g.*, Finnemore/Sikkink (1998); Keck/Sikkink (1998, 1999); Price (1998); Risse/Sikkink (1999); Risse (2000); Payne (2001); Checkel (2001, 2005); Wiener (2004, 2007, 2009); Deitelhoff (2006); Badescu/Weiss (2010); Sikkink (2011); Deitelhoff/Zimmermann (2013)
[136] *E.g.*, Günther (1988); Risse (2000); Wiener (2004, 2007, 2009); Wiener/Puetter (2009); Deitelhoff/Zimmermann (2013)
[137] Alter *et al.* (2016a,b, 2017); Alter (2018); Madsen *et al.* (2018)
[138] *E.g.*, MacKinnon (1983, 1991, 2013); Olsen (1990); Askin (1997, 2003, 2004, 2014); Copelon (2000); Chappell (2003; 2014, 2016); Oosterveld (2004, 2005a,b, 2009, 2013, 2014); Reilly (2007); Sellers (2009, 2018); Mackay *et al.* (2010); Ní Aoláin *et al.* (2011); Hayes (2013); Chappell/Waylen (2013); Mackay (2014); Grey (2014, 2019); McDermott (2017); Powderly/Hayes (2018); SáCouto (2018); Grey *et al.* (2019, 2020a,b)

suggested by Madsen *et al.*, which includes the constellation of the involved actors, institutional and structural factors, and broader socio-political cleavages [139] ultimately advancing the evolution of the 'spiral'. Significantly, although the analytical framework on patterns of resistance against ICs/IL insinuated that, in contrast to state resistance, non-state resistance would only be able to influence legal outcomes and not institutional changes[140], this case reveals the transformative power of non-state actors who, under certain conditions, may impact the pattern of evolution in institutional identity. This analysis should serve as a contribution to the abovementioned research fields, which have constituted its theoretical and explanatory frameworks and inspired its manifestation, especially with respect to the evolution of International Law, including International Criminal Law, International Humanitarian Law and International Human Rights Law from a feminist perspective, serving to connect institutional, socio-political and legal elements.

[139] Madsen *et al.* (2018)
[140] *Ibid*.

2. Mapping the application of the SGBV prohibition norm at the ICC

2.1. Overall cases

To date, the ICC has opened twenty-nine cases from nine situations under investigation, including cases from the Democratic Republic of the Congo ('DRC'), Uganda, the Central African Republic ('CAR', I and II), Darfur (Sudan), Kenya, Libya, Cote d'Ivoire, and Mali. Four further situations including Georgia, Burundi, Afghanistan and Bangladesh/Myanmar are also being investigated, however the Office of the Prosecutor has not yet announced any information on potential cases in these situations. Among the nine situations mentioned above, five were referred to the ICC by States Parties to the Rome Statute themselves[141] (DRC, Uganda, CAR (I and II), Mali), two situations were referred to the ICC's Prosecutor by the UN Security Council[142] (Darfur and Libya, both non-States Parties), and in two situations, Prosecutor Luis Moreno Ocampo (the ICC's first Chief Prosecutor, also 'Prosecutor Moreno Ocampo' or 'Prosecutor Ocampo') himself initiated the investigations (*proprio motu*)[143] (Kenya and Cote d'Ivoire, both States Parties to the Rome Statute).

Thus, fourteen cases stem from situations, which were referred to the Court by the States Parties[144]. Among these, in only two cases do the suspects still remain at large[145]. Nine cases

[141] According to Article 14(1) of the Rome Statute (1998), "[a] State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes".
[142] According to Article 13(b) of the Rome Statute (1998), a situation in which crimes under the ICC's jurisdiction have been committed, can be referred to the Prosecutor of the Court by the UN Security Council "[…] acting under Chapter VII of the Charter of the United Nations", which means that this can be also applied to the States not Parties to the Rome Statute.
[143] According to Article 15(1) of the Rome Statute (1998), "[t]he Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court".
[144] These include *Lubanga*/DRC (ICC Doc. No. ICC-PIDS-CIS-DRC-01-016/17_Eng from December 15, 2017), *Katanga*/DRC (ICC Doc. No. ICC-PIDS-CIS-DRC-03-014/17_Eng from March 27, 2017), *Ntaganda*/DRC (ICC Doc. No. ICC-PIDS-CIS-DRC-02-016/19_Eng from February 2020), *Mbarushimana*/DRC (ICC Doc. No. ICC-PIDS-CIS-DRC-04-003/12 from June 15, 2012), *Mudacumura*/DRC (ICC Doc. No. ICC-PIDS-CIS-DRC-05-006/18_Eng from April 2018), *Ngudjolo Chui*/DRC (ICC Doc. No. ICC-PIDS-CIS-DRC2-03-004/09_Eng from March 12, 2010), *Ongwen*/Uganda (ICC Doc. No. ICC-PIDS-CIS-UGA-02-019/20_Eng from December 2020), *Kony et al.*/Uganda (ICC Doc. No. ICC-PIDS-CIS-UGA-001-006/18_Eng from April 2018), *Bemba*/CAR I (ICC Doc. No. ICC-PIDS-CIS-CAR-01-020/18_Eng from March 2019), *Bemba et al.*/CAR I (ICC Doc. No. ICC-PIDS-CIS-CAR-02-014/18_Eng from September 2018), *Yekatom&Ngaïssona*/CAR II (ICC Doc. No. ICC-PIDS-CIS-CARII-03-012/20_Eng from July 2021), *Said*/CAR II (ICC Doc. No. ICC-CPI-2021024-PR1559 from January 24, 2021), *Al Mahdi*/Mali (ICC Doc. No. ICC-PIDS-CIS-MAL-01-08/16 from October 7, 2016), and *Al Hassan*/Mali (ICC Doc. No. ICC-PIDS-CIS-MAL-02-010/20_Eng from October 2020)
[145] *Mudacumura*/DRC (ICC Doc. No. ICC-PIDS-CIS-DRC-05-006/18_Eng from April 2018) and *Kony et al.*/Uganda (ICC Doc. No. ICC-PIDS-CIS-UGA-001-006/18_Eng from April 2018)

were opened in the situations referred to the Court by the UNSC[146]. Among these, one case was closed due to insufficient evidence of the suspect's responsibility[147], and in one case the suspect is awaiting the pre-trial[148]. In the remaining seven cases, the suspects are still at large. Among the six cases that were opened in the situations from States Parties to the Rome Statute on the initiative of the Prosecutor[149], three cases were closed due to insufficient evidence[150] and in three cases the suspects remain at large[151]. This illustrates that the Court has been most successful in moving forwards with its cases from situations that were referred by the States Parties themselves. Most suspects from these situations were also delivered to the Court; that is, the proceedings against them could be opened and are either currently ongoing or have been completed, while in cases opened due to referral by the UNSC, and especially in cases initiated on *proprio motu*, the OTP has been somewhat hindered in its attempts to obtain evidence on the ground and/or most suspects could not be delivered to the Court for the proceedings to begin.

Three cases (*Bemba et al.*/CAR I[152], *Barasa*/Kenya[153], *Gicheru&Bett*/Kenya[154]) of those twenty-nine were focused on offences against the administration of justice. From the

[146] These include *Harun*/Darfur (ICC Doc. No. ICC-PIDS-CIS-SUD-001-007/20_Eng from June 15, 2020), *Abd-Al-Rahman*/Darfur (ICC Doc. No. ICC-PIOS-CIS-SUD-006-001/20_Eng from June 15, 2020), *Al Bashir*/Darfur (ICC Doc. No. ICC-PIDS-CIS-SUD-02-006/18_Eng from April 2018), *Abu Garda*/Darfur (ICC Doc. No. ICC-PIDS-CIS-SUD-03-004/16_Eng from March 7, 2016), *Banda*/Darfur (ICC Doc. No. ICC-PIDS-CIS-SUD-04-007/18_Eng from April 2018), *Hussein*/Darfur (ICC Doc. No. ICC-PIDS-CIS-SUD-05-004/18_Eng from April 2018), *Gadaffi*/Libya (ICC Doc. No. ICC-PIDS-CIS-LIB-01-014/20_Eng from November 2019), *Khaled*/Libya (ICC Doc. No. ICC-PIDS-CIS-LIB-02-002/18_Eng from April 2018), *Al-Werfalli*/Libya (ICC Doc. No. ICC-PIOS-CIS-LIB-03-003/18 from July 2018)

[147] *Abu Garda*/Darfur (ICC Doc. No. ICC-PIDS-CIS-SUD-03-004/16_Eng from March 7, 2016)

[148] *Abd-Al-Rahman*/Darfur (ICC Doc. No. ICC-PIOS-CIS-SUD-006-001/20_Eng from June 15, 2020)

[149] These include *Ruto&Sang*/Kenya (ICC Doc. No. ICC-PIDS-CIS-KEN-01-012/14_Eng from April 2016, ICC), *Kenyatta et al.*/Kenya (ICC Doc. No. ICC-PIDS-CIS-KEN-02-014/15 from March 13, 2015), *Barasa*/Kenya (ICC Doc. No. ICC-CPI-20131002-PR948 from October 2, 2013), *Gicheru&Bett*/Kenya (ICC Doc. No. ICC-PIDS-CIS-KEN-005-001/20_Eng from December 2020), *Gbagbo&Ble Goude*/Cote d'Ivoire (ICC Doc. No. ICC-PIDS-CIS-CIV-04-05/20_Eng from July 2021), *Simone Gbagbo*/Cote d'Ivoire (ICC Doc. No. ICC-PIDS-CIS-CI-02-006/18_Eng from April 2018)

[150] *Kenyatta et al.*/Kenya (ICC Doc. No. ICC-PIDS-CIS-KEN-02-014/15 from March 13, 2015), *Ruto&Sang*/Kenya (ICC Doc No. ICC-PIDS-CIS-KEN-01-012/14_Eng from April 2016, ICC), *Gbagbo&Ble Goude*/Cote d'Ivoire (ICC Doc. No. ICC-PIDS-CIS-CIV-04-05/20_Eng from July 2021)

[151] *Barasa*/Kenya (ICC Doc. No. ICC-CPI-20131002-PR948 from October 2, 2013), *Gicheru&Bett*/Kenya (ICC Doc. No. ICC-PIDS-CIS-KEN-005-001/20_Eng from December 2020), *Simone Gbagbo*/Cote d'Ivoire (ICC Doc. No. ICC-PIDS-CIS-CI-02-006/18_Eng from April 2018)

[152] In *Bemba et al.* the first verdict for the offences against the administration of justice, *inter alia*, as related to the crime of rape in the main *Bemba* case, was issued on October 19, 2016. Bemba himself was found guilty of "having corruptly influenced witnesses", "having presented their false evidence as co-perpetrator", and of "having solicited the giving of false testimony by witnesses". Four further accused were fully or partly convicted for the counts of the offences against the administration of justice (ICC Doc. No. ICC-01/05-01/13-1989-Red from October 19, 2016, VII). The Appeals Chamber upheld Bemba's conviction in this case (ICC Doc. No. ICC-01/05-01/13-2275-Red from March 8, 2018). Ironically, this AC had issued this decision exactly three months before another Appeals Chamber issued his acquittal on all charges against him in the main case. In addition to imprisonment for eighteen years, to which Bemba had been initially sentenced in the main case against him, he was sentenced to twelve months for his guilt in this case as well as to a 300,000 Euro fine, which the Chamber ordered to be transferred to the Trust Fund for Victims (ICC Doc. No. ICC-01/05-01/13-2123-Corr from March 22, 2017, paras.250, 261-262). The other four accused in this case were sentenced for their guilt to six months, eleven months, two years, and two years and six months respectively (ICC Doc. No. ICC-01/05-01/13-2123-Corr from March 22, 2017, paras.67, 97, 147, 195). However, since Bemba was subsequently acquitted from all charges brought against him in the main case and had already been imprisoned by then for a period of time that extended twelve months, he was released after the issuance of the Appeals Chamber's decision on his acquittal in the main case from June 8, 2018 (ICC Doc. No. ICC-01/05-01/08-3636-Red from June 8, 2018; ICC Doc. No. ICC-01/05-01/13-2291 from June 12, 2018).

[153] ICC Doc. No. ICC-CPI-20131002-PR948 from October 2, 2013

[154] ICC Doc. No. ICC-PIDS-CIS-KEN-005-001/20_Eng from December 2020

remaining twenty-six, in three cases (*Abu Garda*/Darfur[155], *Banda*/Darfur[156], *Al-Werfalli*/Libya[157]) SGBV was neither charged nor does there seem to have been any such allegations. In the *Said*/CAR II, the suspect was just recently delivered to the Court at the time of writing. His case files have not yet been publicized, except for a short statement on the website of the Court[158]. According to this statement, the warrant of arrest against Said apparently did not include any direct SGBV charges. However, at this stage one cannot determine whether the charges of other crimes for which he is allegedly responsible have been based on evidence of SGBV.

Virtually all other twenty-two cases seem to have involved commission of various SGBC that have been allegedly perpetrated specifically against women and girls and yet, many of those crimes remained largely disregarded, insufficiently investigated or inappropriately prosecuted and adjudicated[159]. In at least three cases, including the first case of the Court against Thomas Lubanga (DRC), *Ruto&Sang* (Kenya), and *Al Mahdi* (Mali), SGBV was not charged, despite allegations that it had been committed under the responsibility of the accused[160]. The verdicts in these three cases have already been issued[161].

The *Lubanga* case from the situation in the Democratic Republic of the Congo ('DRC'), which was referred to the ICC by its authorities, was among the first cases in which the OTP brought its charges[162]. Only Kony *et al*. (still at large) and Ongwen, both from Uganda, were charged before this case. Lubanga was the first individual whose case proceeded to the confirmation of charges in November 2006 and to the trial in January 2009 and against whom the ICC's first verdict was finally issued on March 14, 2012[163]. He was convicted for the war crimes of conscripting and enlisting children under the age of fifteen years into his armed forces and using them to participate actively in hostilities and was sentenced to fourteen years of imprisonment[164]. From the initial stages of the proceedings, WIGJ persistently expressed

[155] ICC Doc. No. ICC-PIDS-CIS-SUD-03-004/16_Eng from March 7, 2016
[156] ICC Doc. No. ICC-PIDS-CIS-SUD-04-007/18_Eng from April 2018
[157] ICC Doc. No. ICC-PIOS-CIS-LIB-03-003/18 from July 2018
[158] ICC Doc. No. ICC-CPI-2021024-PR1559 from January 24, 2021
[159] *Cp.* Chappell (2016); Grey (2019)
[160] *Ibid.*
[161] *Lubanga*/DRC (ICC Doc. No. ICC-PIDS-CIS-DRC-01-016/17_Eng from December 15, 2017), *Ruto&Sang*/Kenya (ICC Doc. No. ICC-PIDS-CIS-KEN-01-012/14_Eng from April 2016, ICC), *Al Mahdi*/Mali (ICC Doc. No. ICC-PIDS-CIS-MAL-01-08/16 from October 7, 2016)
[162] ICC Doc. No. ICC-PIDS-CIS-DRC-01-016/17_Eng from December 15, 2017
[163] ICC Doc. No. ICC-01/04-01/06-803-tEN from January 29, 2007; ICC Doc. No. ICC-01/04-01/06-2842 from March 14, 2012
[164] ICC Doc. No. ICC-01/04-01/06-2842 from March 14, 2012, para.1358; ICC Doc. No. ICC-01/04-01/06-2902 from July 10, 2012, para.99

their criticism with respect to the OTP's disregard of SGBV committed under Lubanga's alleged responsibility, both within the context of the recruitment charges, *i.e.*, against the child soldiers, as well as more generally against the civilian population[165]. However, the OTP was not willing to consider their concerns back then, nor was the Pre-Trial Chamber ('PTC') prepared to interfere with the issue[166]. Although the matter eventually arose again and received much attention during the proceedings, this initial neglect ultimately excluded the *de-jure* consideration of those conducts in the judgement. Nevertheless, this first case has not merely been of "particular significance in the ICC's public image"[167], rather, as the following analysis will demonstrate, the application of the SGBV prohibition norm as a discourse[168], which was inserted by gender justice advocates and maintained throughout the *Lubanga* proceedings, ultimately had a transformative effect on institutional socialization with the appropriate application of the norm, which in turn, advanced its further evolution.

In the *Ruto&Sang* case from the situation in Kenya, opened on the initiative of the Prosecutor[169], the reason for not bringing charges of SGBV against the suspects remains essentially unclear[170]. Alleged difficulties with the investigation of this case have been attributed to "cooperation challenges and obstacles relating to the security of witnesses"[171]. The suspects were requested to appear before the Court in March 2011[172] and in January 2012, the Judges, by majority, confirmed the charges brought against them[173]. Their trial began on September 10, 2013 and exactly two years afterwards, on September 10, 2015, the Prosecution completed the presentation of its case. This was followed by the Defence's argument that there was "no case to answer" [174]. On April 5, 2016, the Trial Chamber ('TC'), by majority, vacated charges against Ruto and Sang and terminated the case "without prejudice to re-prosecution in future"[175]. The OTP did not appeal this decision[176].

[165] WIGJ (2006b); ICC Doc. No. ICC-01/04-01/06-403 from September 7, 2006; Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018
[166] ICC Doc. No. ICC-01/04-01/06-480 from September 26, 2006
[167] Grey (2019), 128
[168] On application of legal norms as a discourse see Günther (1988)
[169] ICC Doc. No. ICC-PIDS-CIS-KEN-01-012/14_Eng from April 2016
[170] Grey (2019), 213
[171] Prosecutor Bensouda's opening statement to the trial, cited in Grey (2019), 215-216
[172] ICC Doc. No. ICC-01/09-01/11-373 from January 23, 2012, para.3
[173] *Ibid*., paras.349, 367 (murder, forcible transfer and persecution based on political grounds as crimes against humanity under the alleged mode of Ruto's liability as indirect co-perpetrator and Sang's as contributor to the commission or attempted commission of crimes)
[174] ICC Doc. No. ICC-CPI-20160405-PR1205 from April 5, 2016
[175] *Ibid*.
[176] Grey (2019), 216

The *Al Mahdi* case from the situation referred to the Court by the authorities of Mali[177] appears strategic in many respects, yet, not with respect to Al Mahdi's alleged responsibility for the commission of SGBV. Despite reports by human rights organizations claiming that Al Mahdi – who was the head of the Hisbah (the Morals Police Brigade linked to Ansar Dine) and who was involved in crimes committed by these groups in Timbuktu, Mali – was also allegedly responsible for commission of rape, sexual slavery, forced marriage and other sexual violence[178], the case against him did not include any such references. Al Mahdi was charged on September 18, 2015 with only the commission of the war crime of intentionally directing attacks against buildings dedicated to religion and historic monuments[179]. He was surrendered to the Court by the authorities of the Republic of Niger on September 26, 2015[180], and after he expressed the wish to plead guilty on March 1, 2016 during the confirmation proceedings, charges against him were confirmed on March 24, 2016[181]. He formally admitted his guilt on the first day of his trial, August 22, 2016, which lasted for only three days[182]. On September 27, 2016, Al Mahdi was convicted and sentenced to nine years of imprisonment[183], which is the lowest sentence among all that have been imposed by the Court to date.

The *Al Mahdi* case was the most expeditious in the ICC's practice. It was the first case in which the war crime of intentionally directing attacks against cultural property was charged and the first case in which an accused pleaded guilty[184]. However, even though this case was initiated after the issuance of the OTP's Policy Paper on Sexual and Gender-Based Crimes, which stipulates the application of gender analysis to all crimes falling under the jurisdiction of the Court[185], it lacked any reference either to sexual violence or gender-based offences and was yet described by the OTP as "unprecedented in terms of its […] efficiency"[186]. This perception appears, however, rather misleading and reveals a "gap between the emerging feminist literature on cultural heritage and the narrative heard in the ICC"[187]. Rosemary Grey notes that the domination of male perspectives and misrecognition of female perspectives with regard to issues of cultural heritage and property were partly considered by the Court in

[177] ICC Doc. No. ICC-PIDS-CIS-MAL-01-08/16 from October 7, 2016
[178] FIDH (2015, 2016)
[179] ICC Doc. No. ICC-01/12-01/15-84-Red from March 24, 2016, para.4
[180] *Ibid*., para.5
[181] *Ibid*., para.58
[182] ICC Doc. No. ICC-01/12-01/15-171 from September 27, 2016, para.7
[183] *Ibid*., para.109
[184] ICC Doc. No. ICC-01/12-01/15-78-Anx1-Red2 from August 19, 2016; ICC Doc. No. ICC-PIDS-CIS-MAL-01-08/16 from October 7, 2016
[185] ICC OTP (2014)
[186] ICC (2016)
[187] Grey (2019), 236

the reparation phase of the case, while they had been essentially disregarded before[188]. The executive director of WIGJ, Brigid Inder, who already held the position of the OTP's Special Gender Advisor by the time, stated that "many were surprised and disappointed by the narrowness of the charges in this case"[189]. She also indicated that the OTP was going to bring other cases in the situation of Mali "including ones which address sexual violence"[190]. This implication was, in fact, proved in the following *Al Hassan* case (against Al Mahdi's comrade, a *de-facto* chief of the Islamic Police in Timbuktu, where he also allegedly participated in the destruction of ancient mausoleums[191]). Thoroughly applying a gender analysis to conducts committed under his alleged responsibility, the OTP has been, indeed, "unprecedentedly efficient" in the *Al Hassan* case in terms of investigation and prosecution of SGBV[192]. Perhaps, the fact that the *Al Mahdi* case was addressed by the OTP in a distinctive way, disadvantageous from the perspective of gender-based issues, has ultimately contributed to subsequent progress in *Al Hassan*, which I address later in more detail.

The agreement between the Prosecutor and Al Mahdi regarding his admission of guilt is only available to the public as a corrected version[193]. Curiously, it includes four redacted paragraphs that describe the actions for which Al Mahdi took responsibility in exchange for the OTP's agreement to cooperate on a number of issues[194]. The redacted description of this agreement includes a recommendation to the Chamber of a sentence of nine to eleven years of imprisonment as well as support for his request for release after serving two thirds of his sentence, also stipulated by a redacted condition[195]. The provision on penalty and sentencing specifies that the Trial Chamber was going to take into account, *inter alia*, "mitigating circumstances (including, for example, cooperation with the Court)"[196]. Collectively, these pieces of evidence would indicate that the *Al Mahdi* case might have contributed to the progressive evolutions that followed in *Al Hassan*: Brigid Inder's aforementioned and surprisingly soft comment on the *Al Mahdi* case, the agreement's implication that the accused's willing cooperation with the Court would result in a recommendation of the lowest sentence, the reduced availability of this agreement to a redacted version, as well as the connection between the two cases. This assumption would also explain why the *Al Mahdi*

[188] *Ibid*.
[189] WIGJ (2016a)
[190] *Ibid.*
[191] TRIAL International (2018)
[192] ICC Doc. No. ICC-PIDS-CIS-MAL-02-010/20_Eng from October 2020
[193] ICC Doc. No. ICC-01/12-01/15-78-Anx1-Red2 from August 19, 2016
[194] *Ibid*., paras.15-19
[195] *Ibid*., para.19
[196] *Ibid*., para.12

case was so restricted also in terms of its engagement with issues of gender, despite the fact that it was brought after the issuance of the OTP's Policy Paper on SGBC.

2.2. Cases including SGBV charges

In seventeen of the remaining nineteen cases, SGBV was charged as separate crimes as well as indirectly, as constituting other crimes[197], and in two cases, indirectly so[198]. In eight cases among these nineteen, the suspects have still not been delivered to the ICC at the time of writing, which means that their cases remain pending and may not proceed to the next stage of the proceedings until the execution of their arrest and transfer to the Court's custody[199]. That is, although the arrest warrants in these cases include SGBV charges, they have not progressed to the confirmation of charges procedure. Therefore, their evaluation remains marginal for the purposes of the given analysis of institutional socialization with appropriate application of the SGBV prohibition norm, which also includes investigative, prosecutorial and adjudicative indicators. Hence, I will not specifically elaborate on each of them further, except in cases where it is pertinent to the argument at hand.

Generally noteworthy has been the tendency to charge SGBV both as separate crimes and as conducts constituting other crimes, a strategy that was also applied by the ad hoc tribunals for

[197] These include *Katanga* and *Ngudjolo Chui*/DRC (ICC Doc. No. ICC-01/04-01/07-717 from September 30, 2008), *Ntaganda*/DRC (ICC Doc. No. ICC-01/04-02/06-36-Red from July 13, 2012; ICC Doc. No. ICC-01/04-02/06-203-AnxA from January 10, 2014), *Mbarushimana*/DRC (ICC Doc. No. ICC-01/04-01/10-2-tENG from September 28, 2010), *Mudacumura*/DRC (ICC Doc. No. ICC-PIDS-CIS-DRC-05-006/18_Eng from April 2018), *Kony et al.*/Uganda (ICC Doc. No. ICC-02/04-01/05-53 from September 27, 2005), *Ongwen*/Uganda (ICC Doc. No. ICC-02/04-01/15-375-AnxA-Red from December 22, 2015), *Bemba*/CAR I (ICC Doc. No. ICC-PIDS-CIS-CAR-01-020/18_Eng from March 2019), *Yekatom&Ngaïssona*/CAR II (ICC Doc. No. ICC-01/14-01/18-282-AnxB1-Red from September 18, 2019), *Harun*/Darfur (ICC Doc. No. ICC-PIDS-CIS-SUD-001-007/20_Eng from June 15, 2020), *Abd-Al*-Rahman/Darfur (ICC Doc. No. ICC-02/05-01/07-3-Corr from April 27, 2007; ICC Doc. No. ICC-02/05-01/07-74-Red from June 11, 2020), *Hussein*/Darfur (ICC Doc. No. ICC-PIDS-CIS-SUD-05-004/18_Eng from April 2018), *Al Bashir*/Darfur (ICC Doc. No. ICC-02/05-01/09-1 from March 4, 2009; ICC Doc. No. ICC-02/05-01/09-94 from July 12, 2010), *Kenyatta et al.*/Kenya (ICC Doc. No. ICC-01/09-02/11-382-Red from January 23, 2012), *Gbagbo&Ble Goude*/Cote d'Ivoire (ICC Doc. No. ICC-02/11-01/11-656-Red from June 12, 2014), *Simone Gbagbo*/Cote d'Ivoire (ICC Doc. No. ICC-PIDS-CIS-CI-02-006/18_Eng from April 2018), and *Al Hassan*/Mali (ICC Doc. No. ICC-PIDS-CIS-MAL-02-010/20_Eng from October 2020)

[198] These include *Gadaffi*/Libya (ICC Doc. No. ICC-01/11-01/11-1 from June 27, 2011) and *Khaled*/Libya (ICC Doc. No. ICC-01/11-01-13-1 from April 18, 2013)

[199] These include *Kony et al.*/Uganda (ICC Doc. No. ICC-PIDS-CIS-UGA-001-006/18_Eng from April 2018), *Harun*/Darfur (ICC Doc. No. ICC-PIDS-CIS-SUD-001-007/20_Eng from June 15, 2020), *Al Bashir*/Darfur (ICC Doc. No. ICC-PIDS-CIS-SUD-02-006/18_Eng from April 2018), *Gadaffi*/Libya (ICC Doc. No. ICC-PIDS-CIS-LIB-01-014/20_Eng from November 2019), *Simone Gbagbo*/Cote d'Ivoire (ICC Doc. No. ICC-PIDS-CIS-CI-02-006/18_Eng from April 2018), *Hussein*/Darfur (ICC Doc. No. ICC-PIDS-CIS-SUD-05-004/18_Eng from April 2018), *Mudacumura*/DRC (ICC Doc. No. ICC-PIDS-CIS-DRC-05-006/18_Eng from April 2018), and *Khaled*/Libya (ICC Doc. No. ICC-PIDS-CIS-LIB-02-002/18_Eng from April 2018)

former Yugoslavia and Rwanda due to the lack of separate SGBC in their respective statutes, and which was also favoured by gender justice advocates during the negotiations on the Rome Statute[200]. The latter maintained the view that such dual approach would secure the evolution of SGBC in international law, while simultaneously revealing their commission as a means of perpetrating other crimes[201]. For instance, the *Gadaffi* and *Khaled* cases from the situation in Libya, referred to the Court by the UNSC, do not include separate charges of SGBV but rather of other crimes committed, *inter alia*, by means of rape and sexual violence. These include the crime against humanity of persecution in *Gadaffi*[202] and crimes against humanity of torture, persecution and other inhuman acts as well as war crimes of torture, cruel treatment and outrages upon personal dignity in *Khaled*[203]. However, as previously mentioned, none of the suspects from the situation in Libya has been transferred to the ICC's custody to date. In contrast, Libya challenged the jurisdiction of the ICC in the *Gadaffi* case due to his domestic prosecution, which allegedly also included charges of rape. Afterward, his Defence also contested the admissibility of the case due to the suspect's conviction, which was issued by a Libyan court on July 28, 2015 for, *inter alia*, the crime of rape, and sentenced to death. Yet, pursuant to a subsequently issued law, Saif Gadaffi was apparently released shortly after his conviction. According to this law, proceedings would be re-opened and sentence imposed if the accused committed any further offences within a period of time composing five years[204]. Nonetheless, after the review of the case, including the submissions made by its Parties and Participants, the PTC rejected the admissibility challenge of the Defence by majority in April 2019 and reaffirmed that the case was admissible before the ICC[205]. The Appeals Chamber ('AC') unanimously upheld this decision in March 2020[206].

Also remarkable among the eight pending cases is the *Al Bashir* case against the former President of Sudan in the situation of Darfur, which was also referred to the Court by the UNSC. To date, this is the only case at the ICC that includes charges of genocide, *inter alia*, through the commission of "rape and other forms of sexual violence"[207]. Furthermore, it includes both separate and indirect charges of SGBV as crimes against humanity and/or war crimes. Al Bashir's first arrest warrant from March 2009 included a direct charge of rape as a

[200] Copelon (2000); Askin (2004); Oosterveld (2005b); Chappell (2003, 2014, 2016)
[201] *Cp. ibid.*
[202] ICC Doc. No. ICC-01/11-01/11-1 from June 27, 2011, para.71
[203] ICC Doc. No. ICC-01/11-01-13-1 from April 18, 2013, paras.7-10; see also Grey (2019), 222-224
[204] ICC Doc No. ICC-01/11-01/11-640 from June 5, 2018, paras.24-26, 62, 87; see also Grey (2019), 219-220
[205] ICC Doc No. ICC-CPI-20190405-PR1446 from April 5, 2019
[206] ICC Doc. No. ICC-CPI-20200309-PR1518 from March 9, 2020
[207] ICC Doc. No. ICC-02/05-01/09-94 from July 12, 2010, paras.25-26

crime against humanity, but also charges of the crime against humanity of extermination and of the war crime of attacking civilian population, based on evidence of sexual violence committed against women and girls[208]. The initial attempt of the Prosecutor to also charge Al Bashir with genocide was, however, denied by the majority of the PTC[209]. The OTP appealed this decision and after the re-examination of the matter, the Chamber issued a second arrest warrant against him that included three counts of genocide committed against ethnic groups in Darfur by (i) killing, (ii) causing serious bodily or mental harm, and by (iii) deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction[210]. The second count was based on, *inter alia*, conducts of "rape and other forms of sexual violence" inflicted upon members of those ethnic groups[211]. The Judges noted that "[a]ccording to the Elements of Crimes the specific material element of this count of genocide is that the perpetrator caused serious bodily or mental harm to one or more persons, which may include acts of torture, rape, sexual violence or inhuman or degrading treatment"[212]. Interestingly, Grey observed that the Prosecutor had based his allegations of genocide, *inter alia*, on "an incident in which seven men from a primarily Fur camp were stripped naked and flogged"[213]. However, as mentioned above, at present the suspect has not yet been transferred to the ICC's custody due to the lack of states' cooperation[214], which makes his case pending and the possibility to analyse it unfortunately restricted.

Another notable case among the eight of those pending has been the case against Simone Gbagbo from the situation in Cote d'Ivoire, initiated by the Prosecutor. To date this is the only case targeting a female suspect at the ICC. Simone Gbagbo was a university professor in Abidjan and a first lady as the wife of the former President of Cote d'Ivoire Laurent Gbagbo[215], who was likewise prosecuted by the ICC but ultimately acquitted of all charges[216]. Simone Gbagbo was charged in February 2012 with the same crimes her husband had been charged with before her[217]. Those charges included, *inter alia*, separate counts of crimes against humanity of rape and of other forms of sexual violence as well as one count of the

[208] ICC Doc. No. ICC-02/05-01/09-1 from March 4, 2009, 6-8; Grey (2019), 184
[209] *Ibid.*
[210] ICC Doc. No. ICC-02/05-01/09-94 from July 12, 2010, 28
[211] *Ibid.*, paras.25-26
[212] *Ibid.*, para.26
[213] Grey (2019), 184
[214] President Al Bashir, who ruled Sudan for almost thirty years, was overthrown in April 2019. Although some proceedings against him seem to have been taking place in Sudan, the military regime that currently holds power has not yet extradited him to the ICC and it remains uncertain whether it intends to do so (Deutsche Welle, 2019; Die Zeit, 2020); see also Grey (2019), 179-180; see also the decision on non-cooperation of South Africa (ICC Doc. No. ICC-CPI-20170706-PR1320 from July 6, 2017)
[215] Grey (2019), 231-232
[216] ICC Doc. No. ICC-PIDS-CIS-CIV-04-05/20_Eng from July 2021
[217] ICC Doc. No. ICC-02/11-01/12-1 from February 29, 2012, para.7; see also Grey (2019), 232

crime against humanity of persecution based on conduct of rape[218]. However, in September 2013, Cote d'Ivoire challenged the admissibility of her case before the ICC due to domestic proceedings that had been supposedly initiated on similar allegations[219]. In December 2014, the Judges of the ICC rejected this challenge, based on the lack of any tangible progress in the domestic proceedings[220], which was also upheld on appeal[221]. In 2015, Simone Gbagbo was indeed, convicted, and sentenced to twenty years of imprisonment as the outcome of the proceedings held against her in Cote d'Ivoire[222]. Nonetheless, in 2017 she was acquitted of war crimes charges brought against her and in 2018 was pardoned by the President Ouattara among 800 other individuals who had been involved in the same situation of violence[223]. Her case at the ICC is still open and pending until the suspect's arrest and transfer to its custody[224].

When viewing the larger picture of cases brought before the ICC, SGBV charges may seem at first to figure among them quite strongly; and yet, only slightly more than half of those cases could proceed to the confirmation of charges proceedings and of those charges, not all were ultimately confirmed. At the time of writing a conviction for the commission of SGBV was delivered in just two cases: against Bosco Ntaganda from the DRC[225], the case in which lessons learned in *Lubanga* were implemented in the most efficient way, and against Dominic Ongwen from Uganda[226], one of the most progressive cases in terms of investigation, prosecution and adjudication of SGBV. Nevertheless, in contrast to the analysis of *appropriate application* of the SGBV prohibition norm, which requires reflection on procedural levels going beyond arrest warrants, those numbers of SGBV charges still reveal recognition of the norm's *validity* and legitimacy in ICL, virtually from the outset of the Court's operation[227]. That is, where asserted as reasonable, the OTP tried to apply the norm. On the other hand, the period of time in which those charges were brought, except for in *Kony et al.*, as well as the scope of these charges, also suggest that the responsible actors did so in accordance with lessons learnt from the misrecognition of its application in the first case against Thomas Lubanga. This is especially revealed in certain cases, on which I will

[218] *Ibid.*
[219] ICC Doc. No. ICC-02/11-01/12-75-Red from May 27, 2015, para.7
[220] *Ibid*., paras.14, 50-51
[221] *Ibid*., 3-4
[222] Grey (2019), 233
[223] *Ibid*.
[224] ICC. Doc. No. ICC-PIDS-CIS-CI-02-006/18_Eng from April 2018
[225] ICC Doc. No. ICC-01/04-02/06-2359 from July 8, 2019
[226] ICC Doc. No. ICC-02/04-01/15-1762-Red from February 4, 2021
[227] On differentiation between validity and appropriate application of norms see Günther (1988); Deitelhoff/Zimmermann (2013)

elaborate further in subchapter '5.2.7. Further conceptual clarification through aspired appropriate application: consequences for the law' of the empirical chapter. In fact, as the analysis of institutional socialization with the appropriate application of the SGBV prohibition norm will demonstrate, its advocates had already triggered the process in the initial stages of the *Lubanga* proceedings, *i.e.*, before the other cases were opened, except for *Kony et al*. In contrast to *Lubanga*, Kony's arrest warrant (which was issued before Lubanga's) included not only charges of the crimes against humanity of rape and sexual slavery but also charges of the war crimes of child soldiers' recruitment, which included references to sexual slavery inflicted upon children within its context[228]. However, apart from these references, the arrest warrant did not include separate charges of the war crimes of sexual slavery committed against child soldiers as they were subsequently brought in *Ntaganda*, in accordance with the requirements of gender justice advocates in *Lubanga*. While Kony has remained at large for over fifteen years and the case against him cannot progress to further procedural stages, the inclusion of these charges in his arrest warrant does not say much about the OTP's efficiency at the time to investigate and prosecute these conducts. Nor can it tell us about the adjudication and interpretation of the law by the Judges, which would have followed had the case proceeded further. That is, even if SGBV was charged in a great number of cases, this does not mean that those charges will necessarily be confirmed, let alone that the accused would eventually be convicted. Nonetheless, as this thesis will demonstrate, the socialization process with appropriate application of the SGBV prohibition norm has already begun and has achieved significant outcomes on both legal and institutional levels, which should further advance the performance of the Court's organs in this respect.

2.3. SGBV on the confirmation of charges stage

As elaborated above, from the nineteen cases including SGBV charges, only eleven have reached the confirmation of charges stage to date. Among those eleven, in nine cases, SGBV

[228] ICC Doc. No. ICC-02/04-01/05-53 from September 27, 2005, para.5

charges were either partly or completely confirmed[229]. In one case from those eleven, against Ali Muhammad Ali Abd-Al-Rahman from the situation in Darfur, all charges of SGBV brought by the OTP against the suspect, both separately and indirectly, were recently confirmed at the time of writing[230]. However, before the case proceeds to trial, the PTC's decision on the confirmation of the charges can still be appealed. The first arrest warrant against Abd-Al-Rahman was issued in April 2007 and included among the fifty-one overall charges direct counts of rape as a crime against humanity and a war crime. Likewise, it also included counts of the war crimes of outrages upon personal dignity and attacking a civilian population as well as of the crime against humanity of persecution, which were all based on evidence of SGBV[231]. Ten years later, in November 2017, the OTP applied for an amendment of the first arrest warrant with three further gender-based counts: murder of at least 100 civilian *Fur* men as a war crime and a crime against humanity and commission of other inhuman acts against over 100 civilian *Fur* men as a crime against humanity[232]. In January 2018, the PTC issued the second arrest warrant against the suspect by including those additional allegations, which was only reclassified as public in June 2020 after the suspect had been transferred to the ICC's custody[233]. The confirmation of charges proceedings took place between May 24 and 26, 2021[234], and on July 9, 2021, the Judges of the PTC confirmed all the charges brought by the OTP against the suspect and committed him to trial[235].

In another case from those eleven, against Callixte Mbarushimana from the DRC, which also included separate and indirect SGBV charges[236], the Judges of the PTC, by majority, declined to confirm any allegations brought against the suspect due to insufficient evidence presented by the OTP in their support[237]. He was released after the issuance of this decision[238]. The OTP subsequently appealed the majority's decision; however, its appeal was ultimately unanimously dismissed[239]. Grey observes that during the confirmation hearing against Mbarushimana, the OTP also addressed various gendered effects of the crimes with which he

[229] *Katanga*/DRC, *Ngudjolo Chui*/DRC (ICC Doc. No. ICC-01/04-01/07-717 from September 30, 2008), *Ntaganda*/DRC (ICC Doc. No. ICC-01/04-02/06-2359 from July 8, 2019), *Bemba/* CAR I (ICC Doc. No. ICC-01/05-01/08-3343 from March 21, 2016), *Gbagbo&Ble Goude*/Cote d'Ivoire (ICC Doc. No. ICC-02/11-01/11-656-Red from June 12, 2014), *Ongwen*/Uganda (ICC Doc. No. ICC-02/04-01/15-422-Red from March 23, 2016), *Yekatom&Ngaissona*/CAR II (ICC Doc. No. ICC-01/14-01/18-403-Red-Corr from May 14, 2020), *Kenyatta et al.*/Kenya (ICC Doc. No. ICC-01/09-02/11-382-Red from January 23, 2012), and *Al Hassan*/Mali (ICC Doc. No. ICC-PIDS-CIS-MAL-02-010/20_Eng from October 2020)
[230] ICC Doc. No. ICC-02/05-01/20-433 from July 9, 2021
[231] ICC Doc. No. ICC-02/05-01/07-3-Corr from April 27, 2007
[232] ICC Doc. No. ICC-02/05-01/07-74-Red from June 11, 2020
[233] *Ibid.*
[234] ICC Doc. No. ICC-CPI-20210526-PR1593 from May 26, 2021
[235] ICC Doc. No. ICC-02/05-01/20-433 from July 9, 2021
[236] ICC Doc. No. ICC-01/04-01/10-2-tENG from September 28, 2010
[237] ICC Doc. No. ICC-01/04-01/10-465-Red from December 16, 2011; ICC Doc. No. ICC-PIDS-CIS-DRC-04-003/12 from June 15, 2012
[238] *Ibid.*
[239] ICC Doc. No. ICC-01/04-01/10-514 from May 30, 2012

was charged[240]. Nonetheless, as mentioned above, if the evidence provided by the OTP appeared insufficient either in support of the allegedly committed crimes or of the suspect's responsibility for their commission, even a broad charging strategy with respect to SGBV would not yet imply that the norm was appropriately applied[241].

2.4. Acquitted on SGBV charges

From the nine cases in which SGBV charges have been confirmed and which then proceeded to trial, in four cases the accused were subsequently acquitted of all charges brought against them[242] and in one case, against Germain Katanga from the DRC, the accused was ultimately convicted for the commission of other crimes but acquitted specifically on sexual violence charges[243].

Charges of rape and sexual slavery as war crimes and crimes against humanity were brought for the very first time at the ICC in July 2007 in initially joined cases against Ngudjolo Chui and Katanga as indirect co-perpetrators and confirmed in September 2008[244]. While noteworthy in many respects, these cases have not ultimately strengthened the SGBV prohibition norm. In addition to charges of rape and sexual slavery, the suspects were also charged as responsible for the commission of the war crime of outrages upon personal dignity, based on the witness testimony of a civilian woman who had been forced to undress und humiliated[245]. However, this charge was not confirmed for trial due to insufficient evidence of the link to their criminal accountability[246]. While the majority of the PTC confirmed charges of rape and sexual slavery against both suspects, Judge Anita Ušacka

[240] Grey (2019), 163
[241] *Cp.* Chappell (2016); also Grey (2019), 160, 164-165
[242] *Ngudjolo Chui*/DRC (ICC Doc. No. ICC-01/04-02/12-3-t from December 18, 2012), *Bemba*/CAR I (ICC Doc. No. ICC-01/05-01/08-3636-Red from June 8, 2018), *Gbagbo&Ble Goude*/Cote d'Ivoire (ICC Doc. No. ICC-PIDS-CIS-CIV-04-05/20_Eng from July 2021), *Kenyatta et al.*/Kenya (ICC Doc. No. ICC-01/09-02/11-696 from March 18, 2013; ICC Doc. No. ICC-01/09-02/11-983 from December 5, 2014; ICC Doc. No. ICC-PIDS-CIS-KEN-02-014/15 from March 13, 2015)
[243] ICC Doc. No. ICC-01/04-01/07-3436-tENG from March 7, 2014
[244] ICC Doc. No. ICC-01/04-01/07-717 from September 30, 2008
[245] *Ibid*., paras.373-377
[246] *Ibid*., paras.570-572, 577

partly dissented with their decision[247]. While she agreed that there were substantial grounds to believe that these crimes had been committed, the evidence of the suspects' link to these crimes was, in her opinion, inadequate[248]. Judge Ušacka warned the OTP that the evidence had to be strengthened, especially due to the higher burden of proof during the trial[249]. She made use of the Article 61(7)(c)(i) of the Rome Statute and suggested to "adjourn the hearing […] and request the Prosecutor to provide further evidence which links the suspects with the crimes"[250]. Interestingly, this provision was also referred to by WIGJ about two years before in their *amicus curiae* letter which suggested that the Judges of the PTC in *Lubanga* request that the Prosecutor consider conducting further investigations and amend the indictment with SGBV charges[251]. In contrast to *Ngudjolo Chui* and *Katanga* however, in *Lubanga* SGBV was not so much as mentioned in the indictment[252]. Similar to Judge Ušacka, WIGJ also warned the OTP during the pre-trial stage in *Ngudjolo Chui* and *Katanga* about the limited number of sexual violence witnesses[253]. In this respect Carsten Stahn notes that although such restriction might be justified by mitigation of re-traumatization, the reliance "on three witnesses to prove complex sexual violence charges in mass atrocity cases" was rather inadequate[254].

Similar to Lubanga, Ngudjolo Chui und Katanga were also charged with the war crime of child soldiers' recruitment as direct co-perpetrators[255], which the PTC confirmed for trial[256]. However, even though it was mentioned during the proceedings that children grew up in the armed forces, were trained and used there for "multiple purposes" under the alleged responsibility of the suspects, like in *Lubanga*, no gender-based aspects of the recruitment, nor any references to SGBV that might have been committed against child soldiers within the context of their recruitment were taken into consideration[257]. In *Ngudjolo Chui* and *Katanga*, the Judges also applied the definition of the conduct of using children "to participate actively in hostilities" comprised in the war crime of child soldiers' recruitment[258], which was set by the PTC in *Lubanga*[259]. This definition, as the *Lubanga* case study will demonstrate, was

[247] *Ibid*., Partly Dissenting Opinion of Judge Anita Ušacka; see also Grey (2019), 152-156
[248] ICC Doc. No. ICC-01/04-01/07-717 from September 30, 2008, Partly Dissenting Opinion of Judge Anita Ušacka, paras.13-29
[249] *Ibid*.; while in the pre-trial stage "the Prosecutor shall support each charge with sufficient evidence to establish *substantial grounds* to believe that the person committed the crime charged" (Art. 61(5) of the Rome Statute, emphasis added), during the trial "the Court must be convinced of the guilt of the accused *beyond reasonable doubt*" (Art. 66(3) of the Rome Statute, emphasis added).
[250] ICC Doc. No. ICC-01/04-01/07-717 from September 30, 2008, Partly Dissenting Opinion of Judge Anita Ušacka, para.29
[251] ICC Doc. No. ICC-01/04-01/06-403 from September 7, 2006, para.7
[252] ICC Doc. No. ICC-01/04-01/06-2842 from March 14, 2012
[253] WIGJ (2014b)
[254] Stahn (2014), 821
[255] ICC Doc. No. ICC-01/04-01/07-717 from September 30, 2008, para.24
[256] *Ibid*., para.574
[257] *Ibid*., paras.254-255, 258, 568(iv)
[258] Rome Statute (1998), Art. 8(2)(b)(xxvi)
[259] ICC Doc. No. ICC-01/04-01/07-717 from September 30, 2008, para.250

criticised by the UN Special Representative of the Secretary General for Children and Armed Conflict Radhika Coomaraswamy as gender blind[260].

Although as Grey mentions, "the attention to gender [in *Ngudjolo Chui* and *Katanga*] was progressive", which was also reflected in Prosecutor Ocampo's opening statement to the trial, emphasizing that "women were victimised on the basis of their gender" and "attacked in particular because they were women"[261], both accused were ultimately acquitted on charges of rape and sexual slavery[262]. Ngudjolo Chui was, moreover, unanimously acquitted on all charges brought against him by the OTP[263]. Although Prosecutor Bensouda immediately appealed this first "historic"[264] acquittal at the ICC, after a lengthy process the Appeals Chamber upheld the verdict[265]. Also unanimously acquitted on charges of sexual violence and child soldiers' recruitment due to insufficient evidence of the link to his responsibility[266], Katanga was ultimately convicted by majority of the Trial Chamber for other crimes in the second verdict issued by the ICC since *Lubanga*[267]. Curiously, in order to do so, the Judges changed the mode of his alleged liability from initially charged "indirect co-perpetration" to "contribution to the commission of crimes by a group of persons acting with a 'common purpose'"[268]. Judge Christine Van den Wyngaert, by minority, dissented with the modification of the legal characterization of Katanga's mode of liability, which she argued was unfair with respect to his rights[269]. Stahn indicates on the other hand that the Judges applied "a separate and unjustifiably higher standard" when assessing Katanga's alleged responsibility for crimes of rape and sexual slavery as compared to other crimes[270]. This view has been shared by a number of commentators[271] including Kelly Askin who assessed this approach as an "appalling double standard". She observed that:

> While most judges seem to accept that leaders and others can be convicted of crimes such as killings, torture and pillage even when they are far from the crime scenes, there is great reluctance to hold individuals accountable for sex crimes unless they are the physical perpetrators, they were present when crimes were committed, or they can be linked to evidence encouraging the crimes.[272]

[260] ICC Doc. No. ICC-01/04-01/06-1229-AnxA from March 18, 2008, paras.17-26
[261] Grey (2019), 152
[262] ICC Doc. No. ICC-01/04-02/12-3-tENG from December 18, 2012; ICC Doc. No. ICC-01/04-01/07-3436-tENG from March 7, 2014
[263] ICC Doc. No. ICC-01/04-02/12-3-tENG from December 18, 2012
[264] Stahn (2014), 813
[265] ICC-01/04-02/12-271-Corr from April 7, 2015
[266] ICC Doc. No. ICC-01/04-01/07-3436-tENG from March 7, 2014, XII; Chappell (2016), 120; Grey (2019), 158-159
[267] *I.a.*, murder as a war crime and a crime against humanity, and war crimes of attacking civilian population, destructing enemy's property, and pillaging (ICC Doc. No. ICC-01/04-01/07-3436-tENG from March 7, 2014)
[268] ICC Doc. No. ICC-01/04-01/07-3436-tENG from March 7, 2014, XII
[269] ICC Doc. No. ICC-01/04-01/07-3436-AnxI from March 7, 2014
[270] Stahn (2014), 821
[271] See also Grey (2019), 272
[272] Askin (2014), n.p.

Initially the OTP intended to appeal Katanga's acquittal on charges of rape and sexual slavery; yet, this intention was subsequently withdrawn and the judgement left unchallenged despite its weaknesses[273] in terms of "errors of fact and law" that eventually regressed the jurisprudence on SGBV[274] as Rosemary Grey and the (then) Special Gender Advisor to the OTP Brigid Inder argue. The Legal Representatives of the victims, whose clients had testified on SGBV charges during the trial, were likewise deeply displeased with this decision by the OTP[275]. Bigid Inder, who held the position of the executive director of WIGJ at the time, also criticized the Judges' "somewhat perverse" treatment of "Katanga's contribution to the demobilization of children illegally enlisted and conscripted into his militia group" as a mitigating factor in his sentencing decision that in her view "demonstrat[ed] an imbalance in the level of empathy extended to Katanga as compared to the victims of his crimes"[276]. As the second individual convicted by the ICC after Lubanga, Katanga was sentenced to twelve years of imprisonment[277].

In the *Bemba* case, charges of rape as a war crime and a crime against humanity committed against both male and female victims were brought in May 2008[278] and the suspect was arrested in Belgium the next day after the issuance of his arrest warrant[279]. *Bemba* is the first case in which the Prosecutor, following the suggestion of the PTC during the confirmation hearing, charged the suspect under the "command responsibility" mode of his alleged criminal liability[280]. It is also the second case, after *Ngudjolo Chui* and *Katanga*, in which rape charges were confirmed at the ICC[281]. Initially, the OTP also tried to charge Bemba with "other sexual violence" as a war crime and a crime against humanity based on evidence of forced nudity[282]. However, the PTC found that those allegations were already covered by the charge of the war crime of outrages upon personal dignity[283] and were not of sufficient gravity to constitute a crime against humanity of other sexual violence[284]. This view contradicted the previous jurisprudence on forced nudity in ICL developed by the ICTR and ICTY[285]. In its famous *Akayesu* case, the ICTR Judges established, for instance, that sexual

[273] Grey (2019), 156, 159
[274] WIGJ (2014b)
[275] Grey (2019), 271
[276] WIGJ (2014a)
[277] ICC Doc. No. ICC-01/04-01/07-3484-t from May 23, 2014, para.147
[278] ICC Doc. No. ICC-01/05-01/08-1-tENG from May 23, 2008; see also Grey (2019), 196-197
[279] ICC Doc. No. ICC-01/05-01/08-14-tENG from June 10, 2008, para.8
[280] Grey (2019), 190; ICC Doc. No. ICC-01/05-01/08-3343 from March 21, 2016, para.6
[281] ICC Doc. No. ICC-01/05-01/08-424 from June 15, 2009, paras.72, 282; WIGJ (2009), 64
[282] ICC Doc. No. ICC-01/05-01/08-14-tENG from June 10, 2008, para.5
[283] *Ibid*., para.63
[284] *Ibid*., paras.39-40
[285] *Cp.* Grey (2014); Chappell (2016)

violence also covers the conduct of forced nudity and can even constitute the crime of genocide[286], which is obviously not less grave than a crime against humanity. Besides, the drafters of the Rome Statute and the Elements of Crimes also considered forced nudity to be an act of sexual violence[287]. The drafting history demonstrates too that the definition of sexual violence crime was supposed to embrace both types of acts of sexual nature: those committed by a perpetrator against the victims on the one hand, and those in which a perpetrator forces the victims to engage, including forced nudity, on the other[288].

The OTP also charged Bemba with SGBV indirectly by bringing charges of torture as a crime against humanity and a war crime that were based on sexual violence evidence[289]. Similar to other cases that include indirect SGBV charges, this approach aimed to demonstrate how and to which intent sexual violence had been perpetrated under the alleged responsibility of the suspect[290]. However, the PTC Judges unanimously refused to confirm these charges as well as the previously mentioned charge of the war crime of outrages upon personal dignity based on SGBV evidence[291]. They claimed that the OTP's "cumulative charging approach", while "followed by national courts, and international tribunals under certain conditions", would have been "detrimental to the rights of the Defence since it places an undue burden on the Defence"[292]. However, the Chamber also argued that the OTP had not provided sufficient evidence in support of those charges[293] and noticed that the Trial Chamber could still consider the evidence of SGBV presented during the trial and the possibility to re-characterize the charges[294]. In contrast to the declined charge of forced nudity, which remained uncontested[295], the OTP requested leave to appeal the decision on "cumulative charging", which was also supported by the Legal Representatives of the victims and WIGJ in their *amicus curiae* brief from July 2009[296]. The latter was signed by the former Gender Advisor to the Prosecutor of the ICTY Patricia Viseur Sellers[297], who worked with WIGJ as their legal counsel in 2009[298] and was subsequently appointed by Prosecutor Bensouda in December 2012 to the post of Advisor on International Criminal Law Prosecution Strategies and since December 2017, took over the position of Special Gender Advisor to the OTP, which was previously held by Brigid

[286] ICTR Doc. No. ICTR-96-4-T from September 2, 1998, paras.10A, 688, 731-734
[287] Oosterveld (2005b), 124; Grey (2019), 292, 319-320
[288] Dörmann (2003), cited in Grey (2019), 320
[289] ICC Doc. No. ICC-01/05-01/08-14-tENG from June 10, 2008, paras.41, 45, 58, 68
[290] WIGJ (2009), 63-64
[291] ICC Doc. No. ICC-01/05-01/08-424 from June 15, 2009
[292] *Ibid*., paras.198-205
[293] *Ibid*., paras.297-300, 307-312
[294] WIGJ (2009), 67
[295] Grey (2019), 294
[296] ICC Doc. No. ICC-01/05-01/08-532 from September 18, 2009, paras.8, 44-48
[297] ICC Doc. No. ICC-01/05-01/08-466 from July 31, 2009
[298] WIGJ (2011a), n.p.

Inder[299]. Working with Sellers, WIGJ argued that "[i]nternational jurisprudence [...] has found it appropriate and necessary to charge each crime contained within specific acts of sexual violence in order to capture the extent of the harm suffered by victims and the multiple purposes of this type of violence in armed conflicts"[300]. Their brief also referred to the Elements of Crimes falling under the jurisdiction of the Court that explicitly state "a particular conduct may constitute one or more crimes"[301]. Since those allegations related not only to sexual violence committed directly against the victims but also against their family members, including children who had been forced to witness those conducts, WIGJ also referred to IHRL in the context of Article 21(3) of the Rome Statue that prohibits any discrimination when applying and interpreting the law[302]. Specifically, they recalled the Convention on the Prohibition of all Forms of Discrimination against Women (1979) and the Convention on the Rights of the Child (1989) and argued that the rejection of applying cumulative charging would "diminish the effective access of victims to justice even in the absence of infringement on the due process rights of the accused"[303]. Despite those interventions, the PTC Judges denied the OTP's request to appeal their decision on "cumulative charging"[304].

Chappell noticed that due to the lack of evidence provided by the OTP on the one hand, but also "the unwillingness of the Pre-Trial Chamber to recognize existing developments of international law" on the other, in *Bemba* the decreasing trend of confirmed SGBV charges particularly came to the fore[305]. However, his verdict from March 21, 2016, which was the third issued by the ICC, initially delivered the Court's first conviction of rape as a war crime and a crime against humanity[306]. The Trial Chamber found him unanimously guilty of two crimes against humanity, murder and rape, and of three war crimes, murder, rape and pillaging[307]. He was sentenced to a total of eighteen years of imprisonment, the summarized term established by eighteen years for rape, and sixteen years for murder and pillaging respectively[308]. Grey notes that while determining the sentence for the crimes of rape, the Judges considered their especially aggravating nature and the serious damages that were inflicted upon the victims as their consequences including the physical (such as infertility and

[299] Grey (2019), 264
[300] WIGJ (2011a), n.p.
[301] *Ibid*.; ICC Doc. No. ICC-01/05-01/08-466 from July 31, 2009, para.29/ref.34; ICC ASP (2002b), General introduction, para.9
[302] ICC Doc. No. ICC-01/05-01/08-466 from July 31, 2009, paras.34-39
[303] *Ibid.*
[304] Grey (2019), 194-195
[305] Chappell (2016), 117
[306] ICC Doc. No. ICC-01/05-01/08-3343 from March 21, 2016
[307] *Ibid*., para.752
[308] ICC Doc. No. ICC-01/05-01/08-3399 from June 21, 2016, paras.94-97

HIV), the psychological, as well as the social rejection and stigmatization by their respective communities[309].

However, the Defence appealed Bemba's judgement, which, ultimately, resulted in his unexpected and disappointing acquittal (from the perspective of many observers) issued by majority of the Appeals Chamber on all charges, for which the Trial Chamber had previously found him guilty[310]. Three of the five Judges that composed the AP assumed that the evidence provided by the OTP was insufficient for the proof of his command responsibility for the committed crimes[311]. That is, from eleven Judges involved in *Bemba* proceedings (PTC, TC, AC), three confirmed the charges against him for trial, five agreed that he was guilty, and three disagreed on his guilt. Apparently, the acquittal was also based on a standard of appellate review that many commentators found legally problematic[312]. Specifically, it caused a wave of indignation among the Court's "gender justice constituency"[313] that not only resented the withdrawal of the Court's first rape conviction but also the reasoning of the Judges on legal issues and its potential implications for the future cases[314]. Ultimately, the case has unfortunately not contributed much to the development of the SGBV jurisprudence in ICL, nor did it turn out to be a strong enough case for the maintenance of its first rape conviction status at the ICC.

In the *Gbagbo*[315] and *Ble Goude*[316] cases from the situation in Cote d'Ivoire, the suspects were charged with crimes against humanity of rape, other sexual violence, and persecution based on evidence of rape. The PTC Judges denied confirming the charges of other sexual violence, but confirmed, by majority, charges of rape and persecution against both suspects[317]. After the confirmation of their respective charges, their cases were joined[318] for the trial that began on January 28, 2016[319]. However, on April 23, 2018, after the presentation of the OTP's case, the accused claimed that the evidence against them was inadequate and requested leave to present a "no case to answer" submission[320]. The Trial Chamber satisfied their

[309] Grey (2019), 199
[310] ICC Doc. No. ICC-01/05-01/08-3636-Red from June 8, 2018; see also Grey (2019), 199-205
[311] ICC Doc. No. ICC-01/05-01/08-3636-Red from June 8, 2018
[312] *E.g.*, Carlson (2018); Powderly/Hayes (2018); SaCouto (2018); Grey (2019)
[313] On "gender justice constituency" see Chappell (2016)
[314] *E.g.*, Carlson (2018); Powderly/Hayes (2018); SaCouto (2018); Grey (2019)
[315] ICC Doc. No. ICC-02/11-01/11-6-Conf from November 23, 2011
[316] ICC Doc. No. ICC-02/11-01/11-30 from December 21, 2011
[317] ICC Doc. No. ICC-02/11-01/11-656-Red from June 12, 2014, paras.195-196 (*Gbagbo*); ICC Doc. No. ICC-02/11-02/11-186 from December 11, 2014, paras.117-118 (*Ble Goude*); Grey (2019), 228
[318] ICC Doc. No. ICC-02/11-01/15-1 from March 11, 2015, para.68
[319] ICC Doc. No. ICC-PIDS-CIS-CI-04-03/16 from January 2016
[320] ICC Doc. No. ICC-02/11-01/15-1174 from June 4, 2018, para.4

request and scheduled the start of a corresponding hearing for October 1, 2018[321], which ultimately led to the acquittal of both accused, by majority, on January 15, 2019 on all charges brought against them. The OTP appealed this decision on September 16, 2019[322]. However, on March 31, 2021, the Appeals Chamber, by majority, confirmed the Trial Chamber's acquittal decision of January 15, 2019[323].

In the *Kenyatta et al.* case, three men from the situation in Kenya were placed on trial: the then Deputy Prime Minister and Minister of Finance of Kenya, Uhuru Muigai Kenyatta, the Head of the Public Service, Secretary to the Cabinet of the Republic of Kenya and the Chairman of the National Security and Advisory Committee, Francis Kirimi Muthaura, and the Chief Executive of the Postal Corporation of Kenya, Mohammed Hussein Ali[324]. The charges included five counts of crimes against humanity, *i.a.*, of rape, forcible circumcision of Lou men as other inhuman acts, and persecution by, *i.a.*, means of rape and forcible circumcision of Lou men as other inhuman acts that had been allegedly committed under the suspects' responsibility in the context of the post-election violence that took place in Kenya in 2007-2008[325]. Kenyatta and Muthaura were charged with the commission of those crimes as indirect co-perpetrators, and Ali as a contributor to their commission[326].

Interestingly, based on the evidence of forced nudity, genital mutilation and forced circumcision of Luo men, the Prosecutor sought to charge the suspects with the crime of "other forms of sexual violence"[327]. However, the Pre-Trial Chamber declined the OTP's interpretation of these conducts, claiming that they did not bear any sexual character but had been solely based on political grounds and therefore rather constituted "other inhuman acts"[328]. Perhaps unsurprisingly, this was the same PTC that had previously denied confirming charges of forced nudity (which constituted the war crime of outrages upon personal dignity) and torture constituted by sexual violence in *Bemba*[329]. Although nearly two years had passed since the confirmation of charges procedure in *Bemba*, the Judges still applied a similarly regressive approach in gender terms, which collided with the intentions of

[321] *Ibid*., paras.10-13; ICC Doc. No. ICC-02/11-01/15-1189 from June 22, 2018; see also Grey (2019), 230
[322] ICC Doc. No. ICC-PIDS-CIS-CIV-04-05/20_Eng from July 2021
[323] *Ibid*.
[324] ICC Doc. No. ICC-01/09-02/11-1 from March 8, 2011
[325] *Ibid*., paras.13, 27, 42, 57
[326] *Ibid*., para.56
[327] *Ibid*., para.13; see also Grey (2019), 210
[328] ICC Doc. No. ICC-01/09-02/11-1 from March 8, 2011, para.27
[329] ICC Doc. No. ICC-01/05-01/08-424 from June 15, 2009

the Rome Statute's drafters to cover "genital mutilation" along with "forced nudity" under the definition of sexual violence[330].

In their decision on the confirmation of charges, the Judges acquitted Ali on all charges brought against him due to insufficient evidence[331] but confirmed all charges brought against Kenyatta and Muthaura under their alleged mode of liability as indirect co-perpetrators[332]. During the confirmation proceedings, the Prosecutor again claimed "that [circumcision conducts] 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"[333]. However, the PTC Judges reiterated their interpretation of circumcision and penile amputation acts as not being of sexual nature and confirmed them for trial as charges of "other inhumane acts", constituted by "acts causing severe physical injuries"[334]. Louise Chappell denounces this interpretation "the most egregious misrecognition of male sexual violence at the ICC" and at the time, WIGJ also blamed the OTP for its failure to demonstrate "the broader gendered context" of those conducts, including the coercive environment of their commission, the intent and the purpose[335]. Grey notes that in July 2012, during the trial of Kenyatta and Muthaura, Prosecutor Bensouda raised this issue again. Supported by the Legal Representatives of the victims, she requested the Trial Chamber to consider re-characterizing the charges of "other inhumane acts" as "other forms of sexual violence", based on evidence of forced circumcision, which would have explicitly revealed the sexual nature of the committed conducts. However, ultimately the issue remained unresolved due to the subsequent withdrawal of all charges against the accused after the Defence had questioned the decision on their confirmation[336]. During the status conference on the clarification of the matter raised by the Defence, which was held on March 11, 2013, the OTP notified the Judges about its intention to withdraw the charges against Muthaura due to "serious investigative challenges" including the death of some witnesses, the eventual unwillingness of some witnesses to testify and/or their admission of having been bribed, as well as the "limited cooperation" of Kenya's authorities[337]. The Trial Chamber issued its decision on the withdrawal of all charges against Muthaura on March 18, 2013[338]. In a meanwhile, on April 9, 2013, the accused Kenyatta became Kenya's president, which certainly did not ease the

[330] Oosterveld (2005b), 124; Grey (2019), 292
[331] ICC Doc. No. ICC-01/09-02/11-382-Red from January 23, 2012, para.430
[332] *Ibid*., para.428
[333] *Ibid*., para.264
[334] *Ibid*., paras.264-266
[335] Chappell (2016), 123
[336] ICC Doc. No. ICC-01/09-02/11-696 from March 18, 2013, para.3; Grey (2019), 212, 293-294
[337] ICC Doc. No. ICC-01/09-02/11-687 from March 11, 2013, para.11; ICC Doc. No. ICC-01/09-02/11-696 from March 18, 2013, para.6
[338] ICC Doc. No. ICC-01/09-02/11-696 from March 18, 2013

OTP's investigative endeavours for the provision of evidence that would have supported its charges against him. Due to insufficient evidence in its possession and the need to "undertake additional investigative steps", the Prosecution sought to adjourn Kenyatta's trial "until the Government of Kenya complies with its co-operation obligations under the Rome Statute"[339]. However, despite its own ruling on Kenya's failure to fulfil the duty of cooperation with the Court[340], the Trial Chamber rejected adjourning the trial[341]. This ultimately forced the OTP to withdraw the charges against Kenyatta too on December 5, 2014, due to insufficient evidence for the proof of his guilt "beyond reasonable doubt"[342].

2.5. On trial for the commission of SGBV

In contrast to the above-mentioned first case from the situation in Mali against Al Mahdi, the OTP's charging strategy against Al Hassan, who was also a member of Ansar Dine and a *de-facto* chief of the Islamic police[343], has been one of its most progressive to date[344]. His arrest warrant from March 27, 2018 included (along with the war crime of attacking buildings dedicated to religion and historic monuments, for which Al Mahdi had been already convicted[345]) twelve separate and indirect SGBV charges including crimes against humanity of rape, sexual slavery, persecution (on religious and gender grounds), torture and other inhuman acts based on evidence of SGBV, *i.a.*, forced marriages, and war crimes of rape, sexual slavery, violence to person, torture, outrages upon personal dignity and impositions of sentences by improper court based on evidence of SGBV[346]. Furthermore, the OTP charged Al Hassan with various modes of his criminal liability including direct perpetration and co-perpetration as well as ordering, soliciting or inducing the commission of those crimes[347].

[339] ICC Doc. No. ICC-01/09-02/11-981 from December 3, 2014, paras.1, 4; ICC Doc. No. ICC-01/09-02/11-983 from December 5, 2014, para.2; ICC Doc. No. ICC-PIDS-CIS-KEN-02-014/15 from March 13, 2015
[340] ICC Doc. No. ICC-01/09-02/11-982 from December 3, 2014
[341] ICC Doc. No. ICC-01/09-02/11-981 from December 3, 2014
[342] ICC Doc. No. ICC-01/09-02/11-983 from December 5, 2014, para.2; ICC Doc. No. ICC-PIDS-CIS-KEN-02-014/15 from March 13, 2015
[343] ICC Doc. No. ICC-01/12-01/18-2-tENG from March 27, 2018, para.7
[344] *Cp.* Grey (2019)
[345] ICC Doc. No. ICC-01/12-01/15-171 from September 27, 2016
[346] ICC Doc. No. ICC-01/12-01/18-2-tENG from March 27, 2018; ICC Doc. No. ICC-01/12-01/18-35-Red2-tENG from May 22, 2018
[347] *Ibid.*

The OTP emphasized that the general pattern of crimes, for which Al Hassan has been allegedly criminally responsible, exposed particular "harassment and systemic gender-based violence perpetrated against women and girls"[348]. While all victims/survivors were subjected to violations of their fundamental rights[349], "women were hounded in the city streets, in schools, at the hospital and on their doorsteps", they were "harassed daily and subjected to abusive, systematic searches, which were accompanied by humiliating and degrading measures on all manner of pretexts, including breach of the dress code", and "detained in inhumane conditions regardless of their age or physical condition […] [while] some were raped or subjected to other sexual violence"[350]. The charge of persecution based on gender, brought virtually for the first time at the ICC[351], specified that women and girls were "particular targets of physical violence and of degrading and humiliating treatment, and that they were subjected to sexual violence and forced marriage as part of […] [their] persecution"[352].

Al Hassan was surrendered to the ICC by Malian authorities on March 31, 2018[353] and the hearing on the confirmation of charges brought against him was held in July 2019[354]. On September 30, 2019, the PTC unanimously confirmed all those charges[355], which has marked the first confirmation of a gender-based persecution charge, *i.a.*, by, as Grey *et al*. note, explicitly "allud[ing] to the concept of intersectionality, […] recognizing that women were persecuted on religious and gender grounds, and moreover, that those with darker skin were treated worse than those with fairer skin"[356]. The trial against Al Hassan began on July 14, 2020[357] with the opening statement of Prosecutor Bensouda, in which she emphasized that her Office "has pledged to systematically fight impunity for gender-based crimes where the evidence supports such heinous crimes"[358]. She underlined that under the alleged responsibility of the accused, women had been particularly targeted:

> Women and girls were pursued into their very homes; they were abused, punished, beaten, imprisoned, and subjected to corporal punishment, for a variety of so-called breaches from

[348] ICC Doc. No. ICC-01/12-01/18-35-Red2-tENG from May 22, 2018, paras.38, 55, 57, 60, 63, 77-79, 81-85, 89-95, 98-100, 138
[349] *Ibid.*, para.88
[350] *Ibid.*, para.91
[351] Grey notes that persecution based on gender was also pursued in the OTP's preliminary examinations into the situations in Afghanistan and Nigeria (2019, 282)
[352] ICC Doc. No. ICC-01/12-01/18-35-Red2-tENG from May 22, 2018, para.94
[353] *Ibid.*
[354] ICC Doc. No. ICC-CPI-20190930-PR1483 from September 30, 2019
[355] *Ibid*.
[356] Grey *et al*. (2019), 977
[357] ICC Doc. No. ICC-CPI-20200713-PR1531 from July 14, 2020
[358] ICC (2020), n.p.; ICC Doc. No. ICC-PIDS-CIS-MAL-02-010/20_Eng from October 2020

failure to wear prescribed clothing, giving water to a man, not having gloves at the market to pay and receive money, amongst others.[359]

The trial against Al Hassan resumed on September 8, 2020 by the OTP's presentation of its evidence and is currently ongoing[360]. Grey has foreshadowed that his case might become "a landmark […] in the ICC's jurisprudence on gender-based crimes"[361]. Along with the focus of the OTP on gender-based crimes committed also by Taliban and Boko Haram, it could open "a series of thematic prosecutions on gender-based violence which is committed by religious extremists/Islamists who seek to enforce their interpretation of religion through violent rule"[362].

The arrest warrants in the *Yekatom&Ngaïssona* case (CAR II) were issued in November and December 2018 respectively[363]. Both suspects were subsequently transferred to the ICC's custody[364]. The public redacted version of the arrest warrant for Alfred Yekatom, a parliament member and an alleged former commander of forces involved in the internal conflict in the Central African Republic, included various charges, *i.a.*, of war crimes of child soldiers' recruitment and intentional attacks against buildings dedicated to religion[365], on which the ICC had already set significant precedents, also specifically in terms of SGBV[366]. However, the description of his child soldiers' recruitment charges mentioned only boys[367] and the charges were not based on any evidence of SGBV, nor did they refer to any SGBV aspects of these crimes or to any SGBV conducts that might have been committed within their context. Yekatom was charged with several modes of alleged criminal liability for crimes including direct co-perpetration, ordering, soliciting, inducing and facilitating the commission of crimes as well as command responsibility[368].

Similar was the description of charges against Patrice-Edouard Ngaïssona, an alleged former senior leader of forces involved in the internal conflict in the CAR[369]. Rape and sexual

[359] *Ibid*.
[360] ICC Doc. No. ICC-PIDS-CIS-MAL-02-010/20_Eng from October 2020
[361] Grey (2019), 243
[362] *Ibid*.
[363] ICC Doc. No. ICC-01/14-01/18-1-Red from November 17, 2018; ICC Doc. No. ICC-01/14-02/18-2-Red from December 13, 2018
[364] ICC Doc. No. ICC-PIDS-CIS-CARII-03-009/20_Eng from March 17, 2020
[365] ICC Doc. No. ICC-01/14-01/18-1-Red from November 17, 2018, 3-4; ICC Doc. No. ICC-PIDS-CIS-CARII-03-009/20_Eng from March 17, 2020
[366] See the evolutions in the *Ntaganda*/DRC case (described in the following subchapter '2.6. Convicted for the commission of SGBV') and in the *Al Hassan*/Mali case (described above).
[367] ICC Doc. No. ICC-01/14-01/18-1-Red from November 17, 2018, para.18(g)
[368] *Ibid*., paras.18-20
[369] ICC Doc. No. ICC-01/14-02/18-2-Red from December 13, 2018

violence were only mentioned within the context of the conflict's description[370]. Subsequently, in February 2019, cases against Yekatom and Ngaïssona were joined[371] and in September, the OTP amended the charges in its Document Containing the Charges ('DCC'), which was submitted just before begin of the confirmation hearing[372]. According to its public redacted version, Ngaïssona was additionally charged with rape and attempted rape as crimes against humanity and war crimes[373]. Rape and attempted rape were likewise referred to in the context of the amended charges of crime against humanity of persecution and of the war crime of attack directed against civilian population[374]. Moreover, the description of the child soldiers' recruitment charges was amended with reference to sexual violence inflicted upon "some children" within its context[375].

The confirmation of charges hearing took place in September-October 2019, and the decision was issued in December 2019[376]. Charges of rape as a war crime and a crime against humanity against Ngaïssona were confirmed[377] and rape was also mentioned in the context of his confirmed charge of the war crime of directing attacks against civilian population[378]. However, the confirmed charge of the war crime of child soldiers' recruitment against Yekatom did not include any references to SGBV[379]. Nor were there any references to potential gender-based elements in the context of the confirmed charges of directing attacks against buildings dedicated to religion[380]. While rape was mentioned in the context of the charge of crime against humanity of persecution confirmed against both the accused, in contrast to the *Al Hassan* case, the intersection of gender and religious grounds was not highlighted here, even though the charge was apparently also based on rape committed against either Muslim women and girls or Christians who were perceived as helping the former[381]. The absence of this reflection is puzzling, especially since the OTP had by then for a long time aspired to apply the concept of intersectionality in its Policy Paper on SGBC[382] and, as previously mentioned, had already been doing so in *Al Hassan*[383]. As Grey, Oosterveld and Orsini argued: "After all, it has been six years since the Office of the

[370] ICC Doc. No. ICC-01/14-01/18-1-Red from November 17, 2018, paras.6, 10; ICC Doc. No. ICC-01/14-02/18-2-Red from December 13, 2018, paras.6, 10
[371] ICC Doc. No. ICC-PIDS-CIS-CARII-03-009/20_Eng from March 17, 2020
[372] ICC Doc. No. ICC-01/14-01/18-282-AnxB1-Red from September 18, 2019
[373] *Ibid*., para.9, pp.142-162
[374] *Ibid*., paras.323, 377, 412, 579
[375] *Ibid*., para.114
[376] ICC Doc. No. ICC-PIDS-CIS-CARII-03-009/20_Eng from March 17, 2020; ICC Doc. No. ICC-01/14-01/18-403-Red-Corr from May 14, 2020
[377] ICC Doc. No. ICC-01/14-01/18-403-Red-Corr from May 14, 2020, 105-106
[378] *Ibid*., 103
[379] *Ibid*., 101
[380] *Ibid*., 101, 104
[381] *Ibid*., 102-103, 106
[382] ICC OTP (2014), paras.27, 67
[383] ICC Doc. No. ICC-CPI-20190930-PR1483 from September 30, 2019

Prosecutor committed, in its Gender Policy, to understanding how gender intersects with other factors, and to using the provision on gender-based persecution to the 'the fullest extent possible'"[384].

After the charges had been confirmed, and, perhaps due to the lesson learned in *Bemba* who was acquitted from all charges on appeal[385], Prosecutor Bensouda tried to amend charges of rape against Ngaïssona with an additional piece of evidence[386], and also indicated her intention to amend charges against Yekatom with war crimes of rape and sexual slavery[387]. However, the PTC rejected the request with respect to the charges against Ngaïssona, arguing that such an amendment would have caused "undue prejudice to the Defence" and "significant delays in the proceedings"[388]. Furthermore, the Judges also signalled their scepticism about the Prosecutor's intention to amend the charges against Yekatom[389]. Nevertheless, the OTP subsequently requested the amendment of his charges with rape and sexual slavery and indicated that those allegations were based on the revealed evidence of crimes committed against child soldiers within the context of their recruitment[390]. In this respect, the OTP referred to the precedent set in Ntaganda's case, who had been convicted for his responsibility for the war crimes of rape and sexual slavery committed against child soldiers[391]. The OTP claimed that Prosecution "has an interest in ensuring that justice is sought for crimes of sexual violence, especially when committed against the vulnerable"[392]. The OTP also thoroughly tackled the obstacles that had previously hindered it from bringing those charges[393] and argued that the amendment would not have founded an unfair prejudice to the Defence[394]. Nonetheless, the PTC also rejected this request[395]. Supported by the Legal Representatives of the victims, the OTP tried to appeal both decisions in which the Judges had denied its request to amend the charges against the accused[396]; yet the Judges also rejected its appeal requests[397] and thus, as Grey *et al*. argue, have "clos[ed] the door on the opportunity

[384] Grey *et al.* (2020b); ICC OTP (2014), para.67
[385] Grey *et al.* (2020a)
[386] ICC Doc. No. ICC-01/14-01/18-468-Red from March 31, 2020, paras.1-2, 6-10
[387] *Ibid*., paras.4, 12
[388] ICC Doc. No. ICC-01/14-01/18-517 from May 14, 2020, para.21
[389] *Ibid*., paras.37-38
[390] ICC Doc. No. ICC-01/14-01/18-518-Red from May 22, 2020, para.3
[391] *Ibid*., para.14
[392] *Ibid*., para.5
[393] *Ibid*., paras.23-30
[394] *Ibid*., paras.31-38
[395] ICC-01/14-01/18-560 from June 19, 2020, para.11
[396] *Ibid*., paras.7-8, 11-12
[397] *Ibid*.

for a more gender-informed judgment in this case"[398]. The trial of Yekatom and Ngaïssona opened on February 16, 2021 and is ongoing at the time of writing[399].

2.6. Convicted for the commission of SGBV

Prosecutor Bensouda has indicated that along with *Ntaganda*, lessons learned in *Lubanga* were also considered in the *Katanga*, *Ngudjolo Chui*, *Mudacumura* and *Mbarushimana* cases (all from the same situation in the DRC), which led to the inclusion of SGBV charges in their arrest warrants[400]. That said, the *Ntaganda* case has been particularly noteworthy in many respects. The charges, which were initially brought against Ntaganda in his first arrest warrant from August 22, 2006, were identical with the charges brought against Lubanga, *i.e.*, they only included the war crimes of child soldiers' recruitment without any references to SGBV[401]. After the issuance of judgement in *Lubanga* however, on May 14, 2012, Prosecutor Moreno Ocampo amended charges against Ntaganda for the first time with rape and sexual slavery *committed against civilian population* as both war crimes and crimes against humanity[402]. Subsequently, Prosecutor Bensouda additionally amended his indictment with the separate war crime charges of rape and sexual slavery *committed against child soldiers* within the context of their recruitment[403] as well as with the crime against humanity of persecution and with the war crime of attacks on civilian population that were also based on evidence of SGBV[404].

All SGBV charges brought by the OTP in this case were confirmed on June 9, 2014[405]. While the Defence consistently tried to challenge the legality of the war crime charges of rape and sexual slavery *committed against child soldiers* based on an asserted collision with the

[398] Grey *et al*. (2020b)
[399] ICC Doc. No. ICC-CPI-20210216-PR1568 from February 16, 2021; ICC Doc. No. ICC-PIDS-CIS-CARII-03-012/20_Eng from July 2021
[400] Bensouda (2014), 540
[401] ICC Doc. No. ICC-01/04-02/06-2-Anx-tENG from August 22, 2006
[402] ICC Doc. No. ICC-01/04-02/06-36-Red from July 13, 2012, para.5
[403] ICC Doc. No. ICC-01/04-02/06-203-AnxA from January 10, 2014, paras.100-108
[404] *Ibid*., paras.158-166
[405] ICC Doc. No. ICC-01/04-02/06-309 from June 9, 2014, paras.49-57, 76-82; ICC Doc. No. ICC-PIDS-CIS-DRC-02-011/15 from January 2017; see also Grey (2019), 144-146

understanding of the war crimes concept in IHL[406], the argumentation of the OTP, which was rather inspired by IHRL understandings, ultimately persuaded all Judges throughout all stages of the proceedings[407]. Although the PTC still reiterated that IHL does not protect persons "taking part in hostilities from crimes committed by other persons taking part in hostilities on the same side of the armed conflict"[408], it also argued that the "sexual character of these crimes, which involve elements of force/coercion or the exercise of rights of ownership, logically preclude active participation in hostilities at the same time"[409]. Consequently, it unanimously ruled that "child soldiers under the age of 15 years continue to enjoy protection under IHL from acts of rape and sexual slavery, as reflected in Article 8(2)(e)(vi) of the Statute"[410].

While the PTC focused specifically on the protection of *child soldiers*, the Judges of the TC went even further in their unanimous precedential interpretation of the law and in the argumentation that generally embraced *combatants of same armed forces* and explicitly recognized that they "are not per se excluded as potential victims of the war crimes of rape and sexual slavery […] whether as a result of the way these crimes have been incorporated in the Statute, or on the basis of the framework of international humanitarian law, or international law more generally"[411]. Significantly, the TC Judges argued in this respect that the prohibitions of rape and sexual slavery have "attained *jus cogens* status under international law"[412], *i.e.*, they constitute peremptory norms of general international law "accepted and recognized by the international community of States [...] from which no derogation is permitted" and "reflect and protect fundamental values of the international community, [that] are hierarchically superior to other rules of international law and are universally applicable"[413].

In response to the appeal of this ruling of the Trial Chamber by Ntaganda's Defence, the Appeals Chamber unanimously upheld it as "aligned with the established framework of international law" despite its "seemingly unprecedented nature"[414]. While some commentators

[406] According to the traditional interpretation of the Geneva Conventions and their Protocols Additional, only crimes committed against persons who did not participate in hostilities, *i.e.*, civilian population and prisoners of war, but not combatants, could be defined as war crimes (Geneva Convention III, 1949, Art. 3; Protocol II, 1977, Art. 4; see also Kalshoven/Zegveld, 2001; McDermott, 2017)
[407] ICC Doc. No. ICC-01/04-02/06-309 from June 9, 2014; ICC Doc. No. ICC-01/04-02/06-1707 from January 4, 2017; ICC Doc. No. ICC-01/04-02/06-1962 from June 15, 2017; ICC Doc. No. ICC-01/04-02/06-2359 from July 8, 2019; ICC Doc. No. ICC-01/04-02/06-2666-Red from March 30, 2021; see also Grey (2019), 276-277
[408] ICC Doc. No. ICC-01/04-02/06-309 from June 9, 2014, para.76
[409] *Ibid*., para.79
[410] *Ibid*., paras.80, 76-82
[411] ICC Doc. No. ICC-01/04-02/06-1707 from January 4, 2017, para.54
[412] *Ibid*., para.51
[413] UNGA Doc. No. A/74/10 from 2019, Chapter V, 142, Concl.2-3
[414] ICC Doc. No. ICC-01/04-02/06-1962 from June 15, 2017, para.67

disagreed with Judges' interpretation of certain legal issues in their argumentation[415], other praised it as "re-align[ing] the normative war crimes paradigm that prohibits intra-party sexual violence"[416]. Patricia Viseur Sellers, appointed by Prosecutor Bensouda in December 2017 as Special Gender Advisor to her Office[417], called the AC decision "a 'high point' in the ICC's evolving jurisprudence […] [that] 'hasn't really hit the international criminal law consciousness yet'"[418].

On July 8, 2019, the Judges of the Trial Chamber found Ntaganda guilty, *i.a.*, of all charges of rape and sexual slavery as an indirect co-perpetrator, and of the crime against humanity of persecution based, among other acts, on SGBV as direct perpetrator and indirect co-perpetrator[419]. His case has been – since Bemba's acquittal – the first in which the ICC has convicted an individual for his responsibility for the commission of SGBV[420] and sentenced to the lengthiest imprisonment of thirty years[421]. On March 30, 2021, the AC confirmed the TC's judgement by majority and furthermore unanimously confirmed the TC's sentencing decision[422].

Along with *Ntaganda* and *Al Hassan*, the case against Dominic Ongwen from the situation in Uganda represents one of the ICC's most progressive in terms of SGBV investigation, prosecution and adjudication. Indeed, some commentators have called it "most innovative case on gender-based crimes"[423] and a "milestone in the history of the Court"[424]. Ongwen's arrest warrant was issued in July 2005 and like in *Ntaganda*, his initial charges did not include any SGBV[425]. However, after he appeared before the ICC in January 2015, following his surrender to the US forces in the Central African Republic, the OTP conducted further investigations in Uganda[426] and eventually, his indictment was amended with, *i.a.*, a historical list of separate and indirect SGBV charges[427]. These included forced marriage as a crime

[415] *E.g.*, McDermott (2017); Heller (2017)
[416] Sellers (2018), 16
[417] ICC Doc. No. ICC-CPI-20171219-PR1352 from December 19, 2017
[418] Interviewed and cited by Grey (2019), 142
[419] ICC Doc. No ICC-01/04-02/06-2359 from July 8, 2019; ICC Doc. No. ICC-CPI-20190708-PR1466 from July 8, 2019
[420] ICC Doc. No ICC-01/04-02/06-2359 from July 8, 2019, paras.995, 998, 1001, 1004, 1006, 1007
[421] ICC Doc No. ICC-01/04-02/06-2442 from November 7, 2019, para.246
[422] ICC Doc. No. ICC-01/04-02/06-2666-Red from March 30, 2021; ICC Doc. No. ICC-CPI-20210330-PR1582 from March 30, 2021
[423] Grey (2019), 171
[424] Tonella (2021), n.p.
[425] ICC Doc. No. ICC-02/04-01/05-57 from July 8, 2005
[426] Grey (2019), 173-174
[427] ICC Doc. No. ICC-02/04-01/15-375-AnxA-Red from December 22, 2015, paras.128-134; ICC Doc. No. ICC-02/04-01/15-375-AnxA-Red2 from May 25, 2016, paras.127-134

against humanity constituted by 'an other inhuman act'[428], forced pregnancy as a crime against humanity and war crime, rape as a crime against humanity and war crime, sexual slavery as a crime against humanity and war crime, torture as a crime against humanity and war crime, enslavement as a crime against humanity and outrages upon personal dignity as a war crime[429]. Moreover, the OTP charged Ongwen with various modes of his alleged criminal accountability for the commission of these crimes, including direct perpetration and indirect co-perpetration[430].

The charges of forced marriage and forced pregnancy were also brought for the first time in the practice of the Court[431]. Likewise, for the first time, the OTP used DNA evidence and prior-recorded testimony given by victims/witnesses of these crimes[432]. DNA evidence was used as proof that Ongwen has fathered children who were born as a result of rape and forced pregnancy that he had committed against his several alleged forced "wives"[433]. The granted request to record and preserve the testimony given by eight of his alleged 'wives' in a closed session in accordance with Article 56 of the Statute on "a unique investigative opportunity" allowed the OTP to secure their testimony on the one hand while simultaneously avoiding their re-traumatization through repeated questioning on the other[434].

The charging strategy of the OTP was also precedential with respect to the exposed differences in specific elements inherent to seemingly equivalent crimes of sexual slavery and forced marriage including the intent of the perpetrator, experiences of victims/survivors, and the consequences of these conducts[435]. The Legal Representatives of the victims also supported this differentiation among these crimes, which, similarly to the crime of forced pregnancy, affect virtually only women and girls[436]. Significantly, the Judges agreed with the OTP's argumentation and interpretation of these crimes' meanings, despite the attempts of the Defence to contest this strategy[437].

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[428] Since 'forced marriage' is not explicitly included in the Rome Statute, the OTP charged the suspect with 'an other inhuman act' as a crime against humanity committed by the means of this conduct (Rome Statute, 1998, Art. 7(1)(k)). When confirming the charges, the PTC referred to the jurisdiction of the Special Court for Sierra Leone, which had stated that in certain situations 'forced marriage' can be defined as a crime against humanity constituted by 'an other inhuman act' (ICC-02/04-01/15-422-Red from March 23, 2016, paras.86-92).
[429] ICC Doc. No. ICC-02/04-01/15-375-AnxA-Red from December 22, 2015, paras.128-134; ICC Doc. No. ICC-02/04-01/15-375-AnxA-Red2 from May 25, 2016, paras.127-134
[430] *Ibid*.
[431] Grey (2019), 171
[432] *Ibid*.
[433] *Ibid*., 176
[434] *Ibid*., 175
[435] *Ibid*., 287-288
[436] *E.g.*, ICC Doc. No. ICC-02/04-01/15-1719-Red from February 24, 2020; ICC Doc. No. ICC-02/04-01/15-1720-Red from February 28, 2020
[437] *Cp.* Grey (2019), 287-288

On March 23, 2016, the Judges of the PTC confirmed, *i.a.*, all SGBV charges brought against Ongwen under various modes of his alleged criminal accountability, including direct perpetration and indirect co-perpetration[438] and committed him for trial, which began on December 6, 2016[439]. Notably, the case specifically reflected on Ongwen's criminal responsibility for both direct perpetration and indirect co-perpetration of those crimes. For instance, as the alleged perpetrator of SGBC such as rape, sexual slavery, forced labour, forced marriage and forced pregnancy that he allegedly directly committed against eight girls/young women[440], he was also charged with indirect co-perpetration of a similar list of SGBC committed against girls and women who had been abducted and forced to work as domestic servants[441], to exercise the role of 'wives' of the LRA (Lord's Resistance Army) fighters or forced into sexual slavery[442].

Curiously, along with the innovative prosecution of SGBV, the *Ongwen* case also reflected on the victim/perpetrator dichotomy as a characteristic consequence of child soldiers' recruitment. Abducted by the LRA as a child, Ongwen spent about twenty-eight years with the group and grew up into its ranks as a commander with effective authority, power and control over his subordinates[443]. Based on this victimization as a consequence of his abduction and recruitment by the LRA when he was a child, the Defence claimed that the case should be dismissed[444]. The OTP recognized that Ongwen's victimization might have been considered at the sentencing stage, yet claimed that he could not be exempted from the responsibility for the committed crimes[445]. The Judges agreed with the OTP and found that the Defence had not sufficiently demonstrated that Ongwen had been seriously threatened, that those threats were beyond his control and/or that he behaved proportionately to such threats[446]. They argued that it seemed to have been generally possible for LRA abductees to escape, which Ongwen did not try to do[447].

On February 4, 2021, the Judges found Dominic Ongwen guilty of sixty-one from seventy charges that had been brought against him by the OTP and of all nineteen separate and

[438] ICC Doc. No. ICC-02/04-01/15-422-Red from March 23, 2016, paras.66-124
[439] ICC Doc. No. ICC-PIDS-CIS-UGA-02-019/20_Eng from December 2020
[440] ICC Doc. No. ICC-02/04-01/15-375-AnxA-Red2 from May 25, 2016, paras.66-127
[441] Also so called 'ting tings', *i.e.*, household servants (Grey 2019, 174); the closing brief of the OTP explained that abducted "girls were initially distributed as *ting tings*, but after two weeks they could also become 'wives'" (ICC Doc. No. ICC-02/04-01/15-1719-Red from February 24, 2020, para.132)
[442] ICC Doc. No. ICC-02/04-01/15-375-AnxA-Red2 from May 25, 2016, paras.129-132
[443] ICC Doc. No. ICC-02/04-01/15-375-AnxA-Red2 from May 25, 2016; ICC Doc. No. ICC-02/04-01/15-1762-Red from February 4, 2021; ICC Doc. No. ICC-02/04-01/15-1819-Red from May 6, 2021; Grey (2019), 173
[444] Grey (2019), 176
[445] Tonella (2021), n.p.
[446] Grey (2019), 176
[447] *Ibid*.

indirect charges of SGBV[448], which has marked the most comprehensive conviction for SGBV to date. For the first time at the ICC, an individual was found criminally responsible for the commission of forced marriage as a crime against humanity of an inhumane act perpetrated directly and indirectly, and for the first time in the world's history, of forced pregnancy perpetrated by him directly as a crime against humanity and war crime[449]. The Judges acknowledged his victimization as a former abductee and child soldier recruited by the LRA, yet, they also noted that Ongwen "committed the relevant crimes when he was an adult and, importantly, that, in any case, the fact of having been (or being) a victim of a crime does not constitute, in and of itself, a justification of any sort for the commission of similar or other crimes"[450].

Ongwen's sentencing decision was issued on May 6, 2021[451]. The OTP recognized that the "individual circumstances" relating to his victimization should be considered by the Chamber in its determination of the sentence[452] and recommended a joint sentence "of not less than 20 years of imprisonment"[453]. The Chamber recognized Ongwen's "individual circumstances" as "a relevant mitigating circumstance for the purpose of the entirety" of the sentence[454]. However, the Judges also considered and recognized the presence of aggravating circumstances, specifically relating to all nineteen charges of SGBV[455]. By majority, they sentenced Ongwen to the joint sentence of twenty-five years of imprisonment[456]. That said, at the time of writing, the Defence Council of Ongwen has already notified the Appeals Chamber of its intent to appeal the trial judgement[457] and either Party to the proceedings may also still appeal the sentence[458].

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[448] ICC Doc. No. ICC-02/04-01/15-1762-Red from February 4, 2021, para.3116
[449] *Ibid*., 1073-1076
[450] *Ibid*., para.2672
[451] ICC Doc. No. ICC-02/04-01/15-1819-Red from May 6, 2021
[452] ICC Doc. No. ICC-02/04-01/15-1806 from April 1, 2021, para.154
[453] *Ibid*., paras.155-161; For instance, if there had not been such circumstances to consider, the OTP would have recommended thirty years for each of the SGBV conducts of which Ongwen was found guilty (para.11).
[454] ICC Doc. No. ICC-02/04-01/15-1819-Red from May 6, 2021, para.370
[455] *Ibid*., paras.285, 330
[456] *Ibid*., paras.386-396; The minority of the TC, constituted by Judge Raul C. Pangalangan, partly dissented with the majority's decision, declaring that due the "extreme gravity" of the committed crimes and "deep and permanent physical and psychological harm caused to the victims and their families", an appropriate sentence for Ongwen would have been thirty years of imprisonment (ICC Doc. No. ICC-02/04-01/15-1819-Anx from May 6, 2021, paras.8-13).
[457] ICC Doc. No. ICC-02/04-01/15-1826 from May 21, 2021
[458] ICC Doc. No. ICC-PIDS-CIS-UGA-02-021/21_Eng from May 7, 2021

The overall picture of these cases reflects that the OTP has significantly improved its performance in investigating and prosecuting SGBV, specifically since the beginning of the second decade of the Court's operation. As Grey indicates, almost half of all charges brought by the OTP by July 2018 were charges of SGBV[459]. The OTP has also been increasingly charging SGBV as both separate crimes and as conducts constituting other crimes under various modes of the suspects' alleged criminal responsibility for their commission. In fact, during the first decade of the Court's operation, most SGBV charges brought against the suspects who appeared or could be delivered before the Court were either not confirmed for trial (*Mbarushimana*/DRC[460]) or the accused were ultimately acquitted, either specifically of the SGBV charges (*Katanga*/DRC[461]) or of all charges brought against them, including SGBV charges (*Ngudjolo Chui*/DRC[462], *Bemba*/CAR[463], *Gbagbo&Ble Goude*/Cote d'Ivoire[464], *Kenyatta et al.*/Kenya[465]). In contrast, virtually[466] all those amended or brought indictments with precedential charges of SGBV under Prosecutor Bensouda were confirmed for trial (*Ntaganda*/DRC[467], *Ongwen*/Uganda[468], *Al Hassan*/Mali[469]) and in the *Ntaganda*[470] and *Ongwen*[471] cases, both of the accused have already been found guilty of all those charges. While Ongwen's judgement is still expected to be appealed at the time of writing[472], Ntaganda's judgement and sentencing decision have already been upheld on appeal[473], which has finally reaffirmed the ICC's first conviction of SGBV. As the description of these cases has shown, the OTP's investigatory and prosecutorial strategies with respect to SGBV have also considerably resonated with Judges' reactions and acceptance of the OTP's argumentation and interpretation of the law in support of these largely precedential charges. These cases have indeed demonstrated advanced implementation of the OTP's new strategies issued under Prosecutor Bensouda since 2012 and especially of its Policy Paper on SGBC, which aspires to prioritize SGBV in its investigations and prosecutions[474].

[459] Grey (2019), 253; Grey also notes another recent positive tendency within the OTP of portraying female victims/survivors of SGBV as human rights bearers, capable of exercising their agency, which could also be vital for the investigation and prosecution of such crimes (2019, 299-302).
[460] ICC Doc. No. ICC-01/04-01/10-465-Red from December 16, 2011; ICC Doc. No. ICC-PIDS-CIS-DRC-04-003/12 from June 15, 2012
[461] ICC Doc. No. ICC-01/04-01/07-3436-tENG from March 7, 2014
[462] ICC Doc. No. ICC-01/04-02/12-3-tENG from December 18, 2012
[463] ICC Doc. No. ICC-01/05-01/08-3636-Red from June 8, 2018
[464] ICC Doc. No. ICC-PIDS-CIS-CIV-04-05/20_Eng from July 2021
[465] ICC Doc. No. ICC-01/09-02/11-696 from March 18, 2013; ICC Doc. No. ICC-01/09-02/11-983 from December 5, 2014; ICC Doc. No. ICC-PIDS-CIS-KEN-02-014/15 from March 13, 2015
[466] As previously mentioned, in the case of *Yekatom&Ngaissona*/CAR II, which is currently on trial, the attempts of the OTP to amend its charges with SGBV in accordance with previously learned lessons were rejected by the PTC, which has significantly restricted the scope of SGBV charges in this case.
[467] ICC Doc. No. ICC-01/04-02/06-309 from June 9, 2014
[468] ICC Doc. No. ICC-02/04-01/15-422-Red from March 23, 2016
[469] ICC Doc. No. ICC-CPI-20190930-PR1483 from September 30, 2019
[470] ICC Doc. No ICC-01/04-02/06-2359 from July 8, 2019
[471] ICC Doc. No. ICC-02/04-01/15-1762-Red from February 4, 2021
[472] ICC Doc. No. ICC-02/04-01/15-1826 from May 21, 2021
[473] ICC Doc. No. ICC-01/04-02/06-2666-Red from March 30, 2021; ICC Doc. No. ICC-CPI-20210330-PR1582 from March 30, 2021
[474] See ICC OTP (2013b, 2014, 2015, 2019). These will be further discussed in the empirical chapter of the thesis (subchapter '5.2.6. Further refinement of the prescriptive status: consequences for the institution')

However, the difficulty of gathering the required evidence of SGBV (both in terms of access challenges as well as the OTP's responsibilities towards victims/survivors and witnesses[475]) still seems to be impeding these efforts. While the OTP has to provide sufficient evidence for the support of its charges "beyond reasonable doubt"[476], it is also expected to submit it before the confirmation of charges, which restricts its possibilities to amend the charges and/or the submitted evidence in their support (in both substantial and procedural terms), even if the amendment was relevant to the already confirmed charges. This has specifically come to the fore in the *Yekatom&Ngaïssona* case from the CAR II situation, in which the Judges denied the OTP's request to amend the indictment with additional SGBV charges[477] and an additional piece of evidence in support of the already confirmed charges of rape[478] after the issuance of the confirmation decision, despite the attempts undertook by the OTP to explain why it had not done so before[479]. That is, on the one hand, much progress was achieved in the implementation of gender justice during Prosecutor Bensouda's term. Yet simultaneously, certain shortcomings have persisted, including insufficient or belatedly submitted evidence, as well as restricted ability to demonstrate the multifaceted nature of SGBV to the Judges who, in turn, appeared at times to be lacking such an understanding or seemed to apply a higher standard of proof to SGBV compared to other crimes[480]. Indeed, the discrepancy between the number of overall SGBV charges brought by the OTP since the beginning of the Court's operation and the portion of those charges that have been confirmed is still imposing[481]. This is not to mention the fact that only two convictions for SGBV have been issued by the Court to date. As Grey contends, it might take some time before the enthusiasm within the OTP to prosecute SGBV "matche[s] with the ability to present sufficiently strong evidence for these charges to be confirmed"[482]. This gap, however, can also be explained by the very fact that among the nineteen cases, in which SGBV was charged, either as separate crimes and/or as conducts that constituted other crimes, the suspects are still at large in eight cases, which means that the proceedings could not be continued. As elaborated above, among the remaining eleven cases that achieved the confirmation stage, nine cases saw SGBV charges either partly or completely confirmed for trial. This tendency displays the willingness of the OTP to address SGBV and, as the *Ntaganda*, *Ongwen* and *Al Hassan* cases have most clearly demonstrated, its readiness to improve its performance in this respect. Nevertheless, some

[475] Grey *et al.* (2020a); See for instance the evolutions in the *Kenyatta et al.* case (subchapter '2.4. Acquitted on SGBV charges')
[476] Rome Statute (1998), Art. 66(3)
[477] ICC Doc. No. ICC-01/14-01/18-518-Red from May 22, 2020, para.3
[478] ICC Doc. No. ICC-01/14-01/18-468-Red from March 31, 2020, paras.1-2, 6-10
[479] ICC Doc. No. ICC-01/14-01/18-517 from May 14, 2020; ICC Doc. No. ICC-01/14-01/18-518-Red from May 22, 2020; ICC Doc. No. ICC-01/14-01/18-560 from June 19, 2020
[480] *Cp.* Stahn (2014); Chappell (2016); Grey (2019)
[481] *Cp.* Grey (2019), 265-266
[482] Grey (2019), 254

deficiencies which hindered its efficient prosecution of such crimes in other cases also still persist. Moreover, as the analysis of the acquittals on SGBV charges implies, shortcomings in investigations and prosecutions have to be analysed in the context of each and every case and situation, as each involves different specific patterns of committed SGBV and knowledge of how to deal with these specifics within the OTP needs to be developed. On the other hand, the contexts in which some of these cases took place might have also largely created the obstacles that hindered the OTP from implementing its mandate, especially due to the ICC's restricted resources, and therefore an understanding of how to overcome these obstacles needs to be built. In order to 'match' the OTP's SGBV aspirations with its abilities to implement them, the investigation division should be able to investigate such conducts in an integral way from the initial steps of its operations in terms of both expertise and access, since the evidence that they obtain would, in turn, influence the prosecutorial strategy built on it. The quality of the latter and the supporting evidence has a strong influence on the Judges' interpretation and adjudication of the cases[483].

Nonetheless, the progress achieved in the transformation of the perception of the SGBV prohibition norm, of its status within the OTP specifically and, as a consequence, within the Court more generally has been noteworthy in many respects and, as the case study will demonstrate, this was largely enabled by the actions of gender justice advocates exercised from the outset of the Court's operation. By persistently resisting the misrecognition of the norm throughout the *Lubanga* proceedings, gender justice advocates inserted and maintained discursive interactions among involved actors on the norm's "meaning-in-use"[484], which eventually generated its application as a discourse[485]. That is, they created space for the reaffirmation of the norm's validity in the context of the case, despite its *de-jure* misrecognition and triggered the emerging socialization of the Court's staff with its appropriate application.

As the following analysis will demonstrate, along with pressure exercised by gender justice advocates from the outside, the involvement of dedicated women throughout institutional structures, during and beyond *Lubanga* has, as it had done before in ICL[486], considerably contributed to this evolution. While women working as external gender justice advocates launched and upheld the process from the outside, women within institutional structures

[483] *Cp.* Sellers (2009); Hayes (2013); Grey (2019)
[484] Wiener (2004), 190, borrowed from Milliken (1999)
[485] Günther (1988)
[486] Copelon (2000); Askin (2003, 2005, 2014); Chappell (2016); Grey (2019)

supported their agenda from the inside through their direct participation in discursive interactions. The space created by gender justice advocates has likewise been sustained beyond *Lubanga* by further efforts under the ICC's second (female) Chief Prosecutor to refine the prescriptive status of the SGBV prohibition norm in application, which has gradually further advanced its conceptual clarification. The outcomes of this evolution can be observed on both institutional and legal levels and have by and large reinforced the status of the norm under international law, as well as the process of institutional socialization, leading towards the norm's internalization and habitualization.

A closer look at the composition of Judges in those cases which have delivered unsatisfactory outcomes for gender justice also implies, however, that the sex of the individuals involved in the proceedings is not a determining factor, but rather the expertise of these individuals in gender justice issues[487]. This is of course not meant to undermine fair gender representation as an inherent part of any institutional design related to peace and justice activities[488] or to underestimate the merits of women whose agency had generated the emergence and evolution of SGBV prohibitions in ICL, ultimately benefitting not only women and girls but also men and boys[489]. Rather, this observation is intended to highlight that the internalized perception of SGBV as being less serious than other crimes brought before the ICC could also be observed among women involved in ICL structures. The lack of knowledge and expertise in gender justice issues is unfortunately not surprising considering the still overwhelmingly patriarchal structures in law and throughout societies. These structures, even if driven by informal rather than formal rules[490], have certainly impacted the bearers of their "gender legacies"[491] who, just like the perpetrators of SGBV[492] are not all male.

Curiously, one of my interviewees from the ICC's Chambers suggested that gender expertise trainings, in contrast to the OTP, would be rather inappropriate for Judges. He argued that such trainings would presuppose some sort of bias that might be imposed upon Judges, who need to retain objectiveness required for their practice of fair adjudication[493]. This statement is interesting against the background of those instances when Judges actually interpreted and

[487] See for instance the analysis of the *Katanga* and *Bemba* cases (subchapter '2.4. Acquitted on SGBV charges')
[488] *Cp.* The Beijing Declaration and the Platform for Action (1995), para.142
[489] SGBV committed against men was prosecuted already by the ICTY (as forming other crimes such as torture (*e.g.*, ICTY Doc. No. IT-94-1-T from May 7, 1997; ICTY Doc. No. IT-96-21-T from November 16, 1998)), but also in a number of cases at the ICC including *Bemba*, *Ntaganda*, *Mbarushimana*, *Mudacumura*, *Kenyatta et al*. and *Gadaffi*. These cases comprised (either separately or as forming other conducts) charges of SGBV committed against male victims/survivors (Grey 2019, 255, 302). As Grey notes, this recognition might also benefit men and boys, not only in accountability mechanisms but also in the humanitarian and healthcare areas.
[490] Chappell (2016)
[491] On "gender legacies" see Mackay (2014); Chappell (2016); Grey (2019)
[492] *E.g.*, Sjoberg (2016)
[493] Interview with A. (ICC Chambers), The Hague, May 2017 (anonymized)

applied the law in cases of SGBV in a fairly, even if unconsciously, biased way, affected by the informal rules that undermine gender as a category which could underlie the commission of crimes, their experience and consequences[494]. In fact, according to the WIGJ's data, in the first decade of the Court's operation, its judiciary was only present or participated in one gender event per year in 2004, 2005 and 2006, while from 2007 until 2012, the Judges did not participate in any gender-related trainings or seminars. In contrast, the Registry and especially the OTP staff took part in various gender training workshops and seminars, many of which were organized and conducted by WIGJ[495]. As a number of commentators have similarly demonstrated[496], the responsibility for the appropriate application of the law to SGBC rests partially with the Judges and thus, their expertise surrounding these topics is crucial. Having said this, as the cases described above have also shown, the appropriate application of the law to SGBC ultimately largely depends on the ability of the OTP to persuade the Judges through the provision of strong evidence and argumentation, shaped by gender analysis and perspectives[497].

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In the following, I elaborate on the theoretical and explanatory frameworks that underpin my analysis of the socialization with appropriate application of the SGBV prohibition norm at the ICC. Against this background, the *Lubanga* case study demonstrates how this process emerged and identifies actors and factors that have contributed to this evolution. Likewise, the empirical analysis goes beyond *Lubanga* by tackling the consequences that have further sustained and enforced this institutional socialization on one hand and demonstrated the transformative nature of non-state resistance against the initial misrecognition of the norm on the other.

[494] See for instance the analysis of the adjudication in the *Bemba* and *Kenyatta et al.* cases (subchapter '2.4. Acquitted on SGBV charges')
[495] WIGJ (2005-2012), *Gender Report Cards on the International Criminal Court*
[496] *E.g.*, Askin (2014); Stahn (2014); Chappell (2016); Grey (2019)
[497] *Cp.* Sellers (2009); Chappell (2016); Grey (2019)

3. Theoretical framework

3.1. Evolution of norms and institutions from the perspective of social constructivism

In their influential article on the evolution of norms, Martha Finnemore and Kathryn Sikkink stress that researchers still disagree upon the question of motivations that influence actors' behaviour[498]. One of the leading approaches in studying international relations ('IRs'), the rational choice approach, claims that actors comply with norms out of self-interest based primarily on the "logic of consequentialism"[499] and, as utility-maximizing individuals, calculate their strategic actions according to their preferences[500]. Yet, as Finnemore and Sikkink notice, the actors' definition of their self-interest depends on its specification in light of their perception of norms related to a situation in question[501]. The social constructivist approach, which has significantly advanced the IR's research on the evolution of norms, emphasizes two aspects here without depriving actors of rationality or the ability to strategize for the achievement of their goals[502]. On the one hand, social constructivism is largely informed by the "logic of appropriateness"[503], which emphasizes the role of norms and rules reflecting shared meanings that can be reproduced through actors' practices for the construction of social reality[504]. On the other hand, while structures and institutions may influence actors' behaviour and alter their preferences, they are simultaneously interdependent and mutually constituted, *i.e.*, actors exist and operate within the context of social structures when they create and recreate them[505]. Intersubjective communication in context in light of given structures generated by the "logic of arguing"[506] plays another significant role in the production and reproduction of knowledge[507]. While interests and/or norms may produce pressure and thus influence actors' behaviour, intersubjective

[498] Finnemore/Sikkink (1998)
[499] March/Olsen (1989, 1998)
[500] See Finnemore/Sikkink (1998); Guzzini (2000); Deitelhoff (2006)
[501] Finnemore/Sikkink (1998), 912
[502] *E.g.*, Guzzini (2000); Finnemore/Sikkink (1998); Keck/Sikkink (1998); Risse/Sikkink (1999); Risse (2000); Deitelhoff (2006)
[503] On the differentiation between the "logic of consequentialism" and the "logic of appropriateness" see March/Olsen (1989, 1998)
[504] Guzzini (2000), 148, 163-164; Risse (2000); Deitelhoff (2006)
[505] Risse (2000), 5
[506] Risse (2000)
[507] *Ibid*.; also Wiener (2004, 2007, 2009); Deitelhoff (2006)

communication by means of rational discourse should promote genuine persuasion that would ultimately modify what has been perceived as normatively appropriate[508]. With it, actors' rationality is not exclusively based on the utility maximization, but rather it embraces the appropriate in the normative sense[509]. Nevertheless, the means of their engagement in persuasion can be still also based on strategies informed by the "logic of consequentialism". That is, actors' behaviour is influenced by a combination of all three logics (consequentialism, appropriateness and arguing) and the dominance of one over the others differs in each situation[510].

Rationality, which is "intimately connected" to norms, plays a significant role for normative influence and behaviour[511]. The perspective that actors' usefulness can be characterized not only in material terms, but also in terms of the social or ideational, makes norm entrepreneurs a certain type of utility-maximizer[512]. In fact, the "extremely rational" nature of norm entrepreneurs is reflected in their strategic interactions with other actors, in their framing of normative agendas and in their advocacy, which collectively aim to "chang[e] contours of common knowledge"[513]. Margaret E. Keck and Kathryn Sikkink emphasize that for norm entrepreneurs' strategic rationality, norms are of equal importance to institutions and rules. They argue that the individuals whose actions are primarily governed by ideas and beliefs instead of material interests could bring about change[514]. Nicole Deitelhoff refers to rationality in the Habermasian sense, according to which it "is not limited to an instrumental understanding whereby actors choose the best strategy to maximize or satisfy their predetermined preferences"[515]. She stresses that, in accordance with Habermas' discourse theory, legal norms are created by rational discourses based on "argumentative rationality" stipulated by principles such as inclusiveness, sincerity and equal communicative rights. That is, actors engage in rational discourses for the achievement of shared understanding of a certain situation and norms applicable to it[516].

Identity is another vital component of social construction, formed through the environment and relations of actors to certain groups. Identity affects interests, behaviour, choices,

[508] Risse (2000); Deitelhoff (2006), 11-14
[509] Finnemore/Sikkink (1998), 888, 910
[510] Risse (2000)
[511] Finnemore/Sikkink (1998), 888
[512] *Ibid*., 910
[513] *Ibid*., 910-911, Finnemore and Sikkink note that the term 'common knowledge' was adopted from game theorists in IRs; see also Risse (2000); Deitelhoff (2006)
[514] Keck/Sikkink (1999), 90-92
[515] Deitelhoff (2009), 35
[516] *Ibid*., 35, 43; Risse (2000)

priorities and what is perceived as rational[517]. On the other hand, norms, which are internalized through learning and socialization processes, have the capacity to shape actors' interests and identities[518]. Michael Barnett stresses the role of identity in the mobilization around and/or prioritization of a certain policy, especially when an "identity conflict" is at play[519]. He highlights that identities are social and relational and emerge through actors' interactions with each other. This implies "that the identities of political actors are tied to their relationship to those outside the boundaries of the community and the territory, respectively"[520]. He argues that an identity conflict may occur when "competing definitions of the identity […] call for contradictory behaviours" or when a certain identity "calls for behaviour that is at odds with the demands and the defining characteristics of the current challenge"[521]. Identity stipulates interests and defines which actions would be legitimate and which not. Thus, actors may interpret meanings differently based on their identities. Despite the prevalence of this feature in political life, in certain periods of identity conflict, different groups may engage in a competition over the establishment of the identity's evolution in a certain context and direction[522].

Power also plays a major role in social construction when it comes to interaction between actors pursuing their respective goals. Yet, reflexivity that reveals the relationship between knowledge and power likewise represents one of its central components[523]. Power should explain the relationship between social construction of meanings or knowledge (epistemology) and construction of social reality (ontology)[524]. Thus, political power is indicated by the ability to instigate change and produce knowledge that contributes to the construction of social reality and can be achieved through collective action that is based on certain beliefs and worldviews[525]. Stefano Guzzini identifies two levels in constructivism: the "level of observation" or "epistemological constructivism", and the intersubjective "level of action" or "sociological constructivism"[526]. When tracing back the construction of reality, one needs to theorize the link between these levels in relation to intersubjective power[527]. This

[517] Guzzini (2000), 149, 154
[518] Deitelhoff (2006), 66; Risse likewise emphasizes that, in addition to the norms' influence on actors' behaviour, they also define actors' identities: "Human rights norms not only protect citizens from state intervention but also (and increasingly) define a 'civilized state' in the modern world" (2000, 5).
[519] Barnett (1999), 9
[520] *Ibid*., 9
[521] *Ibid*., 10
[522] *Ibid*.
[523] Guzzini (2000), 150
[524] *Ibid*., 170
[525] *Ibid*., (2000), 169-172, based on Bourdieu
[526] Guzzini (2000), 156
[527] *Ibid*., 160-162

should reveal which norms produced an impact and how the actors deployed their authority in intersubjective interaction, in order to achieve their goals.

While meanings are socially constructed, actors interpret the world against the background of "a shared system of codes and symbols, of languages, life-worlds, social practices"; that is, ontologically the construction of social reality is based on intersubjectively shared knowledge[528]. The interpretation of meanings is fundamental. Yet, this might not necessarily be conscious but rather based on the background knowledge of the interpreting agents[529]. The role of fields or social subsystems that embrace "a network of positions, a set of interactions with a shared system of meaning" is essential in this regard; they represent "playgrounds where agents realize individual strategies, playing within, and thereby openly reproducing, the rules of a given game"[530]. While practices that emerge within them are grounded in "taken-for-granted"[531] beliefs, the relationship between the field and the structure is of particular interest[532]. Whereas the latter is perceived as "the product of collective history", "field-specific sets of dispositions" or "the habitus" reflects "the materialization of collective memory" and is defined as "a product of history which in itself […] produces history"[533]. A habitus arises out of past experiences and "provides schemes of perception, thought and action which tend to reproduce practices in conformity with the field throughout time"[534]. Collective memory refers thus to the "'natural' way of doing, perceiving and thinking things"[535]. Guzzini emphasizes that such socialization processes occur on a social level and presuppose that an agent's identity is shaped through its affiliation with certain groups[536]. Actors' behaviour is thus not necessarily consciously chosen, but rather dictated by the habitus. Their identities, interests and strategies are therefore field-specific and can be comprehended through the analysis of the field[537]. That is, while behaviour of actors operating in a certain field would be ruled by the habitus inherent to its agents, acting competently according to its rules would be encouraged by the "sense of acceptability" within such a field[538].

[528] *Ibid*., 159-160
[529] This refers to both the social production of common sense as well as of scientific knowledge (Guzzini 2000, 162). Guzzini stresses that while scholars are also social actors, the social sciences and social analyzes in which they engage may in turn, affect the social world (*Ibid*., 175).
[530] Guzzini (2000), 165-166, based on Bourdieu
[531] Finnemore/Sikkink (1998)
[532] Guzzini (2000), 165-166, based on Bourdieu
[533] *Ibid*.
[534] *Ibid*., 166
[535] *Ibid*.
[536] *Ibid*.
[537] *Ibid*.
[538] Guzzini (2000), 167

If collective memory with regard to a certain norm has not been formed yet in practice, processes of learning and socialization might need to take place in order for it to be internalized. Along with certain socio-political contexts that likewise additionally influence such processes[539], identity, power and agency of actors may influence the trajectory of collective memory formation. This may also occur in the field of the law or in the social subsystems of its implementation, embodied by such institutions as international courts. As international courts operate based on the involvement of actors with various cultural backgrounds and frameworks that combine various legal systems, processes of learning and socialization in order to internalize certain norms and their "appropriate application"[540] seem inevitable. Those actors' perception of particularly new norms and conceptions may vary, depending, for instance, on their corresponding knowledge and experience in the application of such norms. If a subsystem is new in itself, its practices, structures and procedures in relation to a new norm and its appropriate application might also first need to be developed.

In contrast to norms that refer to "single standards of behaviour", institutions reflect how "behavioural rules are structured together and interrelate"[541]. They represent "a relatively stable collection of practices and rules defining appropriate behaviour for specific groups of actors in specific situations"[542]. The process of institutionalization involves the development of those rules and practices in a certain context, which embraces "the codes of meaning" and "the ways of reasoning"[543]. James G. March and Johan P. Olsen argue that the character of institutions is influenced by the historical path of their development, while identities and competencies emerge out of political interactions that produce not only rules and practices but also beliefs[544]. They identify two mechanisms of historical path dependence: the first mechanism refers to "the effect of political interaction on construction of identities" that may occur either deliberately by development of certain rules and institutions that should regulate preferences and behaviour, or unintentionally, for instance, through evolving practice of experts in certain areas, *i.e.*, when international organizations not only produce decisions but also create meanings and identities, and promote socialization with specific concepts and norms[545]. The second mechanism refers to the "development of competence and capabilities through accumulation of experience" in implementation of rules and practices, that is, through such processes as learning, interpretation and reasoning, which, even if developed in a certain

[539] See Checkel (2001); Chappell (2016); Madsen *et al*. (2018)
[540] Günther (1988), I address this concept in the subchapter '3.6. Appropriate application of legal norms'
[541] Finnemore/Sikkink (1998), 891
[542] March/Olsen (1998), 948
[543] *Ibid*., 948
[544] *Ibid*., 959-966
[545] *Ibid*., 959-964

context, may expand initial institutional objectives more generally[546]. In this regard, the socialization of the ICC's staff with appropriate application of the SGBV prohibition norm triggered by the advocates since its misrecognition in *Lubanga* has involved both mechanisms of the historical path dependence. The resistance against its misrecognition generated processes of learning and socialization through intersubjective communication among the Court's internal actors. This then contributed to the evolution of new strategies, policies and practices aiming at the appropriate application of the norm, impacting the formation of institutional identity.

3.2. Social constructivist research on evolution of norms in IRs

Constructivists in the field of international relations have devoted essential efforts to research on norms commonly defined as "a standard of appropriate behaviour for actors with a given identity"[547]. This includes studying processes and dynamics that precede the formation of a habitus and should explain how exactly a habitus is constructed and reconstructed[548]. Before norms acquire power to influence actors' behaviour, they represent ideas, "beliefs held by individuals, [which] help to explain political outcomes"[549]. Judith Goldstein and Robert O. Keohane distinguish between three types of beliefs: "worldviews", "principled beliefs" and "causal beliefs"[550]. While worldviews are the most influential for human action, principled beliefs include normative ideas about what is 'right' and what is 'wrong'. Causal beliefs explain the interrelation between cause and effect, suggesting ways of achieving certain goals. While the latter are more liable to change, modifications of worldviews or principled beliefs have crucial effects for political action[551]. Thereby, when ideas become institutionalized, they

[546] *Ibid*., 964-966
[547] Finnemore/Sikkink (1998), 891
[548] *E.g.*, Finnemore/Sikkink (1998); Keck/Sikkink (1998); Price (1998); Risse/Sikkink (1999); Risse (2000); Deitelhoff (2006); Wiener (2007, 2009); Krook/True (2010); Deitelhoff/Zimmermann (2013)
[549] Goldstein/Keohane (1993), 3
[550] *Ibid*., 7-8
[551] *Ibid*., 8-10

have the potential to influence public policy for decades[552]. Research on norms is thus primarily interested in their power to influence actors' behaviour[553].

Norms have the capacity to stabilize and change: internalized norms that embody shared expectations regulate and constrain behaviour and thereby stabilize international structure. On the other hand, normative shifts promote system transformation and realize opportunities for change[554]. "International distribution of ideas" is determinate for international structure, *i.e.*, shared ideas, expectations and beliefs provide for stability and order, but they can also explain change[555]. Risse and Sikkink identify that norms may gain a "prescriptive status" even before they have been internalized[556]. Finnemore and Sikkink suggest differentiating norms as "regulatory" if they order and constrain certain behaviour, and/or as "constitutive" if they are able to produce new actors and interests[557]. Antje Wiener, in turn, distinguishes between "fundamental norms" that have been established by an agreement among states such as human rights or prohibition of torture, "organising principles" that direct policies and strategies such as transparency or gender mainstreaming, and "standardised procedures" that entail specific rules and regulations. One norm can delegate more than one type, while the increase in its specificity and clearance should decrease its potential for being contested[558]. Deitelhoff emphasizes that while both bear an intersubjective character, social norms (in contrast to principles) define concrete behaviour, whose non-compliance must be justified and explained. Hence, legal norms obtain an even more concrete character and may embody various features of ethics, morality, convention and/or custom[559].

Due to their differing qualities, some norms are more likely to become internalized and to influence behaviour than others. For example, as Finnemore and Sikkink point out, "universalistic claims about what is good for all people in all places" are likely to become efficient[560]. However, norms also represent "an inherently contested phenomenon"[561]. Mona Lena Krook and Jacqui True theorize norms as processes that might shift their content over time. That is, the content that embraces features of "internal" and "external dynamism" is not

[552] *Ibid*., 12, 20-21
[553] Risse/Sikkink (1999), 9
[554] Finnemore/Sikkink (1998); Risse/Sikkink (1999)
[555] Finnemore/Sikkink (1998), 894
[556] Risse/Sikkink (1999)
[557] Finnemore/Sikkink (1998), 891; also in March/Olsen (1998)
[558] Wiener (2009), 184-185
[559] Deitelhoff (2006), 37-44
[560] Finnemore/Sikkink (1998), 906-907
[561] Price (1998), 637

static but a "subject to on-going contestation"[562]. While the former refers to the meaning or definition of a norm that can be reformulated over time, the latter reflects how a norm's environment may influence its content. Yet, the activation of this effect requires a norm's advocates to demonstrate the appropriateness of their ideas and demands to previously accepted frameworks[563]. The relationship of new norms to already existing ones is significant specifically within the field of international law. The appropriateness of a new claim has to 'fit' into the previous legal framework and has to be constructed in a way that would make its suitability obvious[564]. Contestations over a norm's content may especially come to the fore when it is applied. Even if the validity of a certain norm has already been accepted, its application in certain situations involving various interests and characteristics might be contested and require clarification[565]. Factors such as the ability to grant a certain grade of legitimation to states that adopt (or comply with) a norm, the prominence implied either by a norm's quality or by the states that promote it, and its intrinsic characteristics including clarity, specificity and content may strengthen the potential of a certain norm to influence behaviour[566]. Keck and Sikkink argue, for instance, that certain issues are particularly able to produce resonance and to generate diffusion due to their intrinsic characteristics[567]. For example, if they relate to issues of 1) bodily harm to vulnerable individuals, especially when a clear chain that refers to those who bear the responsibility exists, and 2) legal equality of opportunity. While the former relates to the normative logic, the latter is of judicial and institutional character. If a norm's advocates organize around an issue that involves these two characteristics, the chances of success in their advocacy are better than in cases that lack such characteristics[568].

A number of theorists have highlighted the interrelationship between international law, international organizations and norms, noting that international law and organizations act as "the primary vehicles" in the emergence and evolution of legal norms, while the latter play a significant role in the regulation of international institutions[569]. Though often described as anarchy without central government, the international system is guided by the rules that "are made and reproduced by human practices"[570]. Norms not only impact the "rules of the game" which actors apply in their interactions but may also additionally influence and constitute

[562] Krook/True (2010), 110
[563] *Ibid*., 109-111
[564] Finnemore/ Sikkink (1998), 908-909
[565] Günther (1988); Deitelhoff/Zimmermann (2013)
[566] Finnemore/Sikkink (1998), 906-907
[567] Keck/Sikkink (1998, 1999)
[568] Keck/Sikkink (1999), 98-99
[569] Finnemore/Sikkink (1998), 916; Risse/Sikkink (1999), 8
[570] Guzzini (2000), 155

actors' social identities[571]. International institutionalization urges states to conform to the expectations of the international community[572] and promotes the adoption of institutionalized norms by its members[573]. Norms construct social behaviour and are attributed to its moral judgement[574], they represent collective expectations that international law and international organizations have the authority to proclaim, affirm and legitimate for the members of the international community[575]. As Nicole Deitelhoff and Lisbeth Zimmermann stress, norms "reflect routines of behaviour and allow expectations to emerge as to which behaviour is appropriate in a specific situation"[576].

Norms can diffuse in different directions. Emerging on a domestic level, they can progress bottom-up to encompass the regional, where they might diffuse horizontally among the states of the region, from region to region (although a diffusion within regions is more effective than between regions) and climb to the international level[577]. Likewise, they can diffuse top-down from an international to state level[578]. Shocks like wars, disclosures of grave atrocities, major depressions or financial crises can strengthen the potential of ideas to influence and encourage their adoption[579]. For instance, grave human rights violations committed during the conflicts in the former Yugoslavia and in Rwanda shocked the world community to an extent that catalyzed the evolution of the individual criminal accountability norm in international law, now in place for such cases of serious international crimes[580]. Finnemore and Sikkink suggest that other "world time contexts" such as the process of globalization and the establishment of the United Nations provide new action opportunities for norm diffusion, the extension of international structures and the encouragement of various negotiation processes, all of which may also accelerate the "speed of normative change"[581].

[571] Risse (2000), 5
[572] Goldstein/Keohane (1993), 24
[573] Risse/Sikkink (1999)
[574] Finnemore/Sikkink (1998), 892
[575] Risse/Sikkink (1999), 7-9
[576] Deitelhoff/Zimmermann (2013), 4
[577] Finnemore/Sikkink (1998); Sikkink (2011)
[578] Goldstein/Keohane (1993); Risse/Sikkink (1999); O'Rourke (2013)
[579] Goldstein/Keohane (1993); Finnemore/Sikkink (1998); Sikkink (2011)
[580] Sikkink (2011), 254
[581] Finnemore/Sikkink (1998), 909

3.3. Main logics of behaviour emphasized by research on norms in IRs

James G. March and Johan P. Olsen take an institutional perspective on international organizations, suggesting that main logics of human behaviour include two logics: the "logic of anticipated consequences and prior preferences" or the "logic of consequentialism", and "the logic of appropriateness" based on "senses of identity" and referring to norm-conforming behaviour[582]. The logic of consequentialism has often been inferred for the interpretation of international politics and for explanation of individual behaviour that are ruled by the consideration of their potential consequences. It implies that actors who operate according to it are egoistic and self-interested maximizers[583]. In contrast, actors who follow rules and practices that "are socially constructed, publicly known, anticipated, and accepted" operate in accordance with the logic of appropriateness, which implies that identities, rules and institutions are constitutive and regulative, "are moulded by social interaction and experience" and play a major role in influencing behaviour[584].

Finnemore and Sikkink explain that in contrast to the instrumental approach inherent to the logic of consequentialism, which is exclusively agent-driven, the logic of appropriateness is shaped through a structure-driven factor that primarily embraces the elements of social structure such as norms and institutions, which influence actors' behaviour and choices in accordance with what is perceived as desirable, expected and appropriate[585]. Yet, it still offers space for agent choice in situations of "varied and conflicting rules and norms all making claims for different courses of action"[586]. Whereas the logic of consequentialism explains change primarily by pointing to interests, consequences and pressures, the logic of appropriateness refers to construction of rules, institutions, identities, and the development of capabilities[587]. In reality, actors seem to act according to both logics; they calculate consequences and trade-offs and try to find a balance between utility maximization and a framework of rules in a given situation or context[588]. In fact, as Deitelhoff notices, normative change would be highly questionable if actors' behaviour was ruled only by existing

[582] March/Olsen (1989), (1998), 949
[583] March/Olsen (1998), 950-952
[584] *Ibid*., 951-952
[585] Finnemore/Sikkink (1998), 912-913
[586] *Ibid*., 914
[587] March/Olsen (1998), 968
[588] *Ibid*., 952-953

structures and institutions, since already established norms would need to be modified in accordance with new demands[589]. That is, intentional contestation of already established standards of appropriateness would, in turn, imply that actors operated "against their own identity"[590]. Nevertheless, one logic may prevail over the other and its prevalence might depend on the preciseness and clarity with which it could explain a certain behavioural choice[591]. Based on the assumption that "all action is consequential", rules can also be seen as instruments that facilitate "implementation of consequential action"[592]. Moreover, the two logics can converge through a certain evolution: when behaviour in certain situations becomes increasingly rule-based and constrained due to accumulated experience, actors start to behave in a certain way for instrumental consequential reasons but "develop identities and rules as a result of their experience, thus shifting increasingly toward rule-based action, which they then pass on to subsequent actors"[593].

As for the specific evolution of legal norms, Klaus Günther claims, in turn, from the legal theory perspective, that appropriate application of legal norms should be driven by the "logic of appropriate argumentation", which embraces the consideration of all relevant facts and circumstances of a situation in question as well as the satisfaction of the integrity principle[594]. According to his analysis, the argumentative zone in legal discourses should regulate the relationship between "the programming" (the rules or the set conditions of application) and "the coding" (application and interpretation of the rules)[595]. Thus, as a dominant mechanism in law, the logic of appropriate argumentation interrelates with both the logic of consequentialism (in terms of its embeddedness in rationality) and with the logic of appropriateness (in terms of its stipulated requirement of normative consistency, which embraces principles such as coherence and impartiality). By focusing on the logic of appropriate argumentation, Günther essentially refers to appropriate behaviour of legal actors involved in the application (and evolution) of legal norms, which I will address later in more detail. Thomas Risse's "logic of arguing" rather suggests possibilities for a change in perceptions of the rational and the appropriate, through the demonstration of the integrity of a certain normative claim in further contexts and structures[596]. Thereby, the logic of arguing may also be used – in conjunction with the logics of consequentialism and appropriateness –

[589] Deitelhoff (2006), 81-82
[590] *Ibid*., 82
[591] March/Olsen (1998), 952
[592] *Ibid*., 953
[593] *Ibid*.
[594] Günther (1988), 347-353; I will come back to his analysis later in more detail (subchapter '3.6. Appropriate application of legal norms')
[595] *Ibid*., 327, 331-332, based on Luhmann
[596] Risse (2000)

by outside actors, such as the advocates of a certain legal norm, for the promotion of its appropriate application within legal structures, despite the differences in the aims and interests between them and the legal actors involved in these structures.

Thomas Risse argues that the "logic of arguing" represents a significant mode of social interaction, which actors use for persuasion of other actors[597]. Wiener indicates that the logic of arguing has shifted the previous general assumption in social constructivism on "normative facticity", a shift that should structure actors' behaviour towards "contested normative legitimacy" through processes of deliberation[598]. Focus on argumentation processes should reveal how actors may contribute to the elaboration of normative "meanings-in-use" in specific contexts and situations, which should generate appropriate application[599]. While actors' behaviour is influenced by the logic of appropriateness in accordance with social constructivism on one hand, and the logic of consequentialism as the rational choice suggests on the other, the logic of arguing aims at "reaching a mutual understanding based on a reasoned consensus"[600] that would be underpinned by rule-guided behaviour, grounded in normative rationality as well as instrumental rationality and strategic utility-maximization[601]. These three (pure) logics of human behaviour normally intersect in everyday life at varying points on each scale, each determined by a certain act. That is, one should not ask which mode ruled actors' behaviour, but rather which prevailed in a certain situation[602]. Like discourses that occur in the international public sphere[603], applicatory discourses in law are also influenced by various logics: while the logic of consequentialism rules actors' aspiration to persuade the others in their views and opinions, the logic of appropriateness defines which claims would be perceived as legitimate and coherent with other norms. Yet, it is the logic of arguing that comes to the fore when actors are uncertain and lack knowledge about a situation in question[604]. That is, when actors are unsure about the rational and the appropriate in a given context, the logic of arguing bears the capacity of persuading the others and finding "shared truth" that should contribute to the evolution of law[605]. As Deitelhoff suggests, the logic of appropriateness alone may not give answers to the question of where the standards of the appropriateness come from. It delegates those standards however, after actors have come to a

[597] *Ibid*.
[598] Wiener (2007), 52-53
[599] *Ibid*.
[600] Risse (2000), 1-2
[601] *Ibid*., 1-4
[602] *Ibid*., 18
[603] *Ibid*., 22-23
[604] Risse (2000); also in Deitelhoff (2006), 90-97
[605] *Ibid*.

conclusion about the appropriate, which is an outcome that has yet to be elaborated on through processes of communicative interaction[606].

In a similar manner to the state socialization of international human rights norms, institutional socialization also embraces all three logics of behaviour, with each logic having varied levels of influence during different stages of the process. Risse stresses that human rights issues relate to actors' identity and define who belongs to a civilized community[607]. He observes that governments who care about their reputation as modern and civilized nations would probably not reject the validity of human rights issues, for fear of "being labelled as 'pariah' states"[608]. For that reason, while justifying their interests or behaviour, actors normally try to refer to universally acknowledged norms[609]. Furthermore, when pressure by their critics increases, they might start to make "tactical concessions" and engage in "rhetorical action"; for instance, out of fear of loosing their legitimacy[610]. In doing so, they may engage in a public dialogue with their opponents that shifts their rhetoric towards the reaffirmation of previously contested norms, which ultimately, if the pressure continues, can evolve into arguing[611]. That is, communicative behaviour between actors who contest a norm on the one side and promote it on the other may gradually change[612]. In the beginning of communicative interaction, both sides might contest each other's legitimacy, while their behaviour is mostly ruled by the logic of consequentialism[613]. Through a process of "argumentative self-entrapment" (the dynamic which is reflected in the "spiral" model[614]) however, the logic of arguing may start to prevail over time[615]. Although actors might seem pressured into this position, its outcome could be still defined as a "true argumentative exchange" under the conditions of mutual acceptance, the establishment of a shared understanding of a situation and agreement on norms inherent to its understanding and interpretation[616]. Thus, while learning and socialization processes should strengthen the link between agents and social structure, arguing serves as a mechanism for their promotion[617].

[606] Deitelhoff (2006), 287-288
[607] Risse (2000), 28-29
[608] *Ibid*., 17
[609] *Ibid*., 17, 22
[610] *Ibid*., 29-30
[611] *Ibid*.
[612] *Ibid*.
[613] Risse (2000), 31-32
[614] Risse/Sikkink (1999), I will return to the model in subchapter '3.8.3. The "spiral" model of state socialization with international human rights norms'.
[615] Risse (2000), 31-32
[616] *Ibid.*
[617] *Ibid*., 34

Based on Jürgen Habermas' critical theory of communicative action, Risse claims that focus on arguing should demonstrate the development of "common knowledge" about situation in question and corresponding 'rules of the game'[618]. Such development may occur through processes of argumentation under the condition of actors' mutual openness towards the alteration of their views, preferences and even identities[619]. That is, all participants should be "open to being persuaded by the better argument" in the absence of power and social hierarchies[620]. Before actors may engage in appropriate rule-guided behaviour, they must identify which norms would be appropriate in certain situations, through a process of exploration that determines whether their assumptions about the world are correct[621]. When forced to justify their choices, they engage in arguing or the "logic of truth-seeking", which may help them to establish the truth through a collective communicative process[622]. In this process, they justify the norms and principles that guide their behaviour and unify their perception of the situation in question[623].

Risse distinguishes between three various communication modes: "bargaining", "rhetorical action" and "truth-seeking arguing"[624]. Bargaining is based on instrumental rationality, fixed preferences and their maximization[625]. Rhetorical action is situated in-between the logics of consequentialism and arguing and prevails when actors engage in strategic argumentation that aims to justify their preferences. It can be effective in persuading others if at least one side in the communicative process is open to its influence[626]. Arguing, in turn, differs from the rhetorical action, in that all involved actors should be open to the alteration of their beliefs by a "better argument"[627]. Deitelhoff emphasizes that while actors engaging in rhetorical action might share certain norms, their socialization of these norms is rather poor[628]. In other words, they do not internalize them[629]. While they cannot simply ignore these norms, they can also use them for the achievement of their goals[630]. Nonetheless, as Risse identifies, rhetorical action might well gradually evolve into arguing or "true reasoning", aimed at the achievement of a "reasoned consensus" when "[i]nterests and identities are no longer fixed, but subject to

[618] *Ibid*., 2
[619] *Ibid*.
[620] *Ibid*., 7
[621] *Ibid*.
[622] *Ibid*., 6-7
[623] *Ibid*.
[624] *Ibid*., 2
[625] *Ibid*., 8
[626] *Ibid*., 8-9
[627] *Ibid*.
[628] Deitelhoff (2006), 104
[629] *Ibid*.
[630] *Ibid*.

interrogation and challenges and, thus, to change"[631]. Deitelhoff emphasizes, however, that it might still be difficult to identify the motives of actors' behaviour, which can demonstrate whether either persuasion or rather instrumental adaption have taken place[632]. She suggests that persuasion can be observed in an indirect way, that is, in a change of positions or preferences among target actors that cannot be plausibly explained otherwise, as well as in the direction of those new positions[633]. She indicates that persuasion has probably taken place if the direction of change has embraced universalistic and generalizable features[634].

Risse stresses Habermas' three types of validity claims: about "the truth of assertions made", "the moral rightness of the norms underlying arguments", and "the truthfulness and authenticity of the speaker"[635]. These claims can be challenged in an "ideal speech situation", in which only a "better argument" really counts and the speakers' goal "is to achieve argumentative consensus with the other, not to push through one's own view of the world or moral values"[636]. Although, an "ideal speech situation" is rarely given in the real world of international politics[637], it could be created in structures of law that are expected to operate primarily in accordance with the logic of appropriateness and the principle of integrity. These frameworks should guide "appropriate arguing" and eventually, the evolution of the law[638]. Based on Habermas' arguments, Risse identifies several requirements for the generation of argumentative rationality: the ability to empathize, the sharing of a "common life-world" that includes shared culture, values and understanding of norms to which actors refer in their argumentation, and mutual recognition of participants as equals with equal access to communicative discourse, *i.e.*, the absence of a hierarchical power relationship[639]. A common life-world could be, for instance, provided by international institutionalization of certain norms that would constitute the 'rules of the game' and a normative framework for approaching a certain issue[640]. Similar to international institutions that often serve as spaces for new policies to be deliberated and developed[641], international courts provide such spaces for the development of the law. Certainly, the common life-worlds that exist within international institutions are rather "thin" when compared to those of national communities[642].

[631] Risse (2000), 10
[632] Deitelhoff (2006), 151-152
[633] *Ibid*.
[634] *Ibid*.
[635] Risse (2000), 9-10
[636] *Ibid*., 10
[637] *Ibid*., 10, 18; also Risse/Sikkink (1999), 14
[638] Günther (1988)
[639] Risse (2000), 10-11, 14-16
[640] *Ibid*., 15
[641] *Ibid*.
[642] Deitelhoff (2006), 117-119

Nevertheless, institutional structures play a role in providing trust, normative embeddedness and procedural mechanisms[643]. This is a context that should foster communicative deliberations among actors, vital for processes of learning, persuasion and socialization[644]. Actors involved in their operation may not necessarily share common knowledge in relation to certain situations, which would influence their perception of the appropriate and the rational and, perhaps, their ability to empathize[645]. However, under certain conditions, "islands of persuasion"[646] can still be forged at various stages of their communication, through discursive interaction and arguing[647]. Deitelhoff, who stresses the role of institutional contexts for processes of persuasion – driven by mechanisms of communicative deliberation – , suggests additionally differentiating among quasi-institutional, macro-institutional and micro-institutional levels[648]. While the quasi-institutional level indicates the density of a norm's embbededness in the institutional framework, the latter two levels correspondingly reveal established decision-making processes and procedural rules that may enable actors' interactions[649].

A situation in which arguing takes place can be indicated by a number of factors and conditions. These include non-hierarchy among actors, argumentative consistency independent from the audience, the ability of weaker actors (such as NGOs) to convince more powerful actors, and actors' engagement in justifications and explanations of their choices (rather than "self-serving rhetoric" and ignorance of accusations)[650]. Other conditions which foster "truth-seeking behaviour" include the appearance of uncertain interests and/or lack of knowledge about the situation in question as well as the avoidance of aggravating language, signalling empathy for the counterpart's legitimate concerns, even if they are not shared[651]. Unequal power relationships may influence the legitimacy of certain actors' access to argumentative discourse as well as the perception of their arguments' legitimacy[652]. According to Risse however, the most important concern is not whether such relationships are present or absent in discourses, but rather "to what extent they can explain the argumentative outcome"[653]. He suggests that NGOs often engage in arguing because they do not possess the

[643] *Ibid*.
[644] *Ibid*.
[645] Risse (2000), 16
[646] Deitelhoff (2006), 25-34
[647] *Ibid*.
[648] Deitelhoff (2006), 152-153
[649] *Ibid*.
[650] Risse (2000), 19
[651] *Ibid*., 19, 25
[652] *Ibid*., 16
[653] *Ibid*., 18

material resources to proceed otherwise[654]. They must "rely on the power of the better argument" in order to persuade others of the correctness of their views[655]. They do so when they try to mobilize international public opinion and to persuade their audience about certain norm violations, when norm-violating actors start to justify their actions, or when they try to persuade their target actors to change their behaviour[656]. Audiences are more likely to be persuaded by an NGO that articulates knowledge of a certain issue with moral authority, in comparison to actors who speak in promotion of their own interests[657].

3.4. Conventional[658] (or behaviourist[659]) approach to norms

The earlier social constructivist approach, also called the conventional[660] or behaviourist[661] approach, primarily emphasizes the power of norms to influence actors' behaviour and policy decisions. Furthermore, it highlights the role of actors' strategic interaction in processes such as the emergence, evolution, legalization, institutionalization, and socialization of norms[662]. That is, this approach largely focuses on the influence of the logic of appropriateness and the logic of consequentialism on actors' behaviour[663]. Martha Finnemore and Kathryn Sikkink's norm evolution model reflects some prominent theoretical insights generated by this approach[664]. The authors argue that international norms have an evolutionary "life cycle" which includes three stages[665]. These stages involve various behavioural logics, social processes and actors with certain motives and influence, which can explain change[666]. According to their model, the life cycle of a norm begins with its "emergence", after which it evolves through a "norm cascade" and finally achieves "internalization" when it becomes

[654] *Ibid*., 28-29
[655] *Ibid*., 28
[656] *Ibid*., 28-29
[657] *Ibid*., 22-23
[658] Wiener (2009); Wiener/Puetter (2009)
[659] Wiener (2004)
[660] Wiener (2009); Wiener/Puetter (2009)
[661] Wiener (2004)
[662] *E.g.*, Finnemore/Sikkink (1998); Keck/Sikkink (1998, 1999); Price (1998); Risse/Sikkink (1999); Deitelhoff (2006); Sikkink (2011)
[663] Wiener (2004)
[664] Finnemore/Sikkink (1998)
[665] *Ibid*., 888
[666] *Ibid*.

"taken-for-granted"[667]. In order for a norm to transition into the cascade stage, it passes a "tipping point", when "a critical mass of relevant state actors adopt the norm"[668]. While Finnemore and Sikkink emphasize that norm entrepreneurs play a crucial role, specifically in the initial stages of norm emergence and evolution[669], their impact remains significant – as this research also demonstrates – virtually throughout all stages of norms' life cycles. Throughout, they continue to put pressure on their target actors to adopt a norm and/or to ratify a certain treaty and to comply with their corresponding obligations[670].

Norm entrepreneurs aim to promote their agenda by means of persuasion, which is the main mechanism of norm emergence. For the achievement of this effect, they engage in creating, structuring and framing a certain new appropriateness. Information and expertise represent their most crucial tools. Altruism, empathy and ideational commitment motivate their actions, however, they do not act against their own interests. The "organizational platforms" from which they often act are equally important for the achievement of their goals. Such platforms can be represented by NGOs that promote specific norms and might have even been created for this purpose. Similarly, norm entrepreneurs also act from within international organizations, which may stand for a variety of norms and agendas. These, in turn, impact the content of the norms that they promote[671]. Norm entrepreneurs and their platforms can become part of a "transnational advocacy network"[672] that promotes a certain norm. For the achievement of their goals, norm entrepreneurs and their platforms might need the support of states or more powerful actors who can become their allies[673]. Indeed, while norm entrepreneurs generated the emergence of the SGBV prohibition norm in the early-mid 1990s, eventually states had to come to an agreement on its institutionalization in the Rome Statute. And yet, this may not have occurred without the pressure produced by norm entrepreneurs throughout the process of negotiation[674].

While in the life cycle of a norm, entrepreneurs trigger the stage of emergence; the subsequent norm cascade is mainly enforced by states and international organizations that aspire to

[667] *Ibid*., 895-905
[668] *Ibid*., 895, the authors note that the "critical mass" is constituted by a minimum of about one third of all states including states "without which the achievement of the substantive norm goal would be undermined" and should be comprised of states that have a "certain moral stature" (1998, 901).
[669] *Ibid*., 896-901
[670] Finnemore/Sikkink (1998); Risse/Sikkink (1999); Deitelhoff (2006)
[671] Finnemore/Sikkink (1998), 896-901
[672] Theorized by Keck/Sikkink (1998), I will come back to this concept later (subchapter '3.8.1. "Transnational advocacy networks" and the "boomerang" effect')
[673] Finnemore/Sikkink (1998); Keck/Sikkink (1998, 1999)
[674] Copelon (2000); Chappell (2003); Oosterveld (2005a); Sikkink (2011); O'Rourke (2013)

persuade the remaining others[675]. This stage is characterized by a socialization process that involves the adoption and implementation of norms as its primary mechanism[676]. Finnemore and Sikkink argue that states might comply with a certain norm because of their concerns about their image and identity as members of the international community[677]. Since norm entrepreneurs would try to hold their target actors personally responsible for the consequences of their actions, states might prefer to comply with norms in order to avoid "the unpleasant experience of dissonance" through blaming and shaming[678]. International institutionalization of a certain norm should clarify its content and promote it towards and through a cascade that might, in turn, include processes of socialization and imitation. That is, the main role in promoting a norm shifts from the norm entrepreneurs to states, international organizations and networks, which have already been persuaded and may persuade the remaining others. Here, imitation can be triggered, for instance, by pressure for conformity, states' aspiration towards international legitimation and their leaders' desire for increased self-esteem[679]. The third stage in the life-cycle of a norm, its internalization, should be achieved as soon as a norm has become "taken for granted"; that is, it is not anymore questioned but rather complied with "almost automatically"[680]. "Iterated behaviour" and "habitualization" represent key mechanisms that can facilitate the internalization of norms among actors. The main motive here would be conformity with laws and norms that become entangled in bureaucratic practices and inherent to the exercise of certain professions[681].

Finnemore and Sikkink developed a valuable constructivist model that helps to explain and understand how international norms emerge, evolve and become internalized among actors. Likewise, the findings provided by the behaviourist approach, which largely builds on the role that the logic of consequentialism and the logic of appropriateness play in actors' behaviour[682], are fundamental for research on the evolution of norms in IRs. At the same time, subsequent research in this field has identified that this approach is perhaps too optimistic and does not say much about the space between the institutionalization and internalization of norms. Similarly, the life cycle model can explain the emergence, evolution and institutionalization of the SGBV prohibition norm throughout the 1990s. However, the misrecognition of the norm in the ICC's first case, in contrast to the legitimate collective

[675] Finnemore/Sikkink (1998), 895, 902
[676] *Ibid*., also in Risse/Sikkink (1999), 5
[677] Finnemore/Sikkink (1998), 902-904
[678] *Ibid*.
[679] *Ibid*.
[680] *Ibid*., 904
[681] *Ibid*., 904-905
[682] Wiener (2004)

expectations on its implementation[683], has challenged the idea that actors – especially those "designated followers"[684] of a certain norm, or those who have been already persuaded in its validity – would not only comply with that norm but also promote other actors' socialization of the norm, and thus its further overall evolution. The so-called reflexive[685] or critical[686] approach to norms helps to address this gap by exposing and analyzing the processes, mechanisms and factors that may hinder or facilitate norm evolution especially after the adoption and/or institutionalization of norms have already taken place.

3.5. Reflexive[687] (or critical[688]) approach to norms

Growing scepticism with regard to the *de-facto* legitimacy and authority[689] of international norms and their influence on actors' behaviour sharpened the constructivists' attention on particular processes, including the application, contestation, reaffirmation, collision and clarification of norms[690]. The critical approach[691] to norms emphasizes their "dual quality", *i.e.*, that "they are both structuring and socially constructed through interaction in a context"[692]. By specifically focusing on processes of social interaction and communication, various dynamics of contestation could be identified. This becomes one of the central issues of concern, as an inherent characteristic that might accompany norms throughout their evolution. Thus, the critical approach tackles problems, which were revealed in the life cycle model, by considering the contestation processes that may emerge instead of socialization in later stages of norm evolution. When it comes to the application of already institutionalized norms, issues of contestation may arise within the space between their "formal" and "shared

[683] Finnemore/Sikkink (1998); Risse/Sikkink (1999)
[684] On the differentiation between norm 'setters' and 'followers' see Wiener (2007); also Günther (1988)
[685] Wiener (2004)
[686] Wiener (2009); Wiener/Puetter (2009)
[687] Wiener (2004)
[688] Wiener (2009), Wiener/Puetter (2009)
[689] Alter (2018)
[690] *E.g.*, Risse (2000); Wiener (2004, 2007, 2009); Wiener/Puetter (2009); Badescu/Weiss (2010); Krook/True (2010); Deitelhoff/Zimmermann (2013)
[691] Wiener (2009); Wiener/Puetter (2009)
[692] Wiener (2007), 49

recognition"[693]. In contrast to the perception of contestation from the behaviourist perspective, which understands contestation as a sign of norm's weakening stability, the critical approach has demonstrated that contestation may potentially benefit the overall evolution of norms and their meanings, as long as they remain uncontested in their core[694]. That is, processes of contestation which involve intersubjective deliberation on normative "meanings-in-use"[695] under the consideration of specific contexts and characteristics of situations have potentially strengthening effects on the overall evolution of norms, through the clarification of their content that should promote appropriate application[696].

3.5.1. Elaboration of normative "meanings-in-use"[697] through social interaction in context

Antje Wiener elaborates on the structure of normative "meanings-in-use"[698] which can be produced through discursive interventions and revealed through a contextual analysis of social practices[699]. Based on concepts from reflexive sociology and democratic constitutionalism, she proposes a differentiation between the "behaviourist"[700], "modern" or "conventional"[701] approach to norms on the one hand, and what she calls a "reflexive"[702], "critical"[703] or "societal"[704] approach on the other. While the former mainly highlights the power of norms to structure and influence actors' behaviour, the latter emphasizes the constitution of normative meanings through discursive interventions, *i.e.*, social practices that enable (re-) construction of normative meanings-in-use[705]. In contrast to the behaviourist approach, which predominantly perceives norms as stable, the critical perspective stipulates

[693] Wiener/Puetter (2009)
[694] Wiener (2004, 2007, 2009); Badescu/Weiss (2010); Deitelhoff/Zimmermann (2013)
[695] Wiener (2004), 190, borrowed from Milliken (1999)
[696] Günther (1988); Wiener (2004, 2007, 2009); Badescu/Weiss (2010); Deitelhoff/ Zimmermann (2013)
[697] Wiener (2004), 190, borrowed from Milliken (1999)
[698] *Ibid*.
[699] Wiener (2004, 2007, 2009)
[700] Wiener (2004)
[701] Wiener (2009), Wiener/Puetter (2009)
[702] Wiener (2004)
[703] Wiener (2009), Wiener/Puetter (2009)
[704] Wiener (2007)
[705] Wiener (2004, 2007, 2009)

that the meanings of norms are flexible, and influenced by their context in-use[706]. However, both approaches are valuable in their respective capacities to deliver explanations for certain choices and changes[707]. That is, while the behaviourist approach emphasizes the structuring power of norms and helps to reveal the prevailing influence of one norm over another, the reflexive or critical approach focuses on norms' constructed nature, flexibility, and the social practices occurring around them[708]. Furthermore, the critical approach underlines the potential of contestation to reveal normative meanings-in-use and trigger normative change through discursive interventions in certain contexts, which may produce more meaningful outcomes than the mere ensuring of compliance with norms[709]. Due to their "inherently contested quality", norms "acquire meaning in relation to the specific contexts in which they are enacted" while contestation "is a necessary component in raising the level of [their] acceptance"[710]. The contexts of social practices are essential for studying the evolution of normative meanings-in-use[711]. In fact, they are "central to the construction of meaning as a social outcome of the process"[712]. They embrace space and time, legal framework of reference, normative, structural, institutional and organizational settings, which play a significant role for both compliance and contestation[713]. Although actors operate within the boundaries of a certain normative structure, they can also reconstruct it through strategic interaction[714]. According to the 'elite learning' perspective, an organizational environment, such as that of an international organization, provides for a supranational context, in which norms can be developed and internalized before being transmitted to national levels[715]. This perspective is still based on the assumption of a powerful norm that would be able to persuade the others in its validity[716]. Wiener argues that in assuming the power of certain norms due to their type, the behaviourist approach underestimates the fact that norms can be also flexible, and their meanings can change over time and depending on context[717]. Especially when formulated in international treaties, in often intentionally vague terms for the purposes of achieving an agreement, such ambiguities may contribute to "variation in the interpretation of meaning" in various contexts[718]. What's more, discursive interventions in processes of interpretation may play a constitutive role in changing and shaping the content of

[706] *Ibid*.
[707] *Ibid*.
[708] *Ibid*.
[709] Wiener (2004), 192; (2007), 51; (2009), 179
[710] Wiener/Puetter (2009), 4, 7
[711] Wiener (2004), 192
[712] *Ibid*.
[713] Milliken (1999); Wiener (2004)
[714] *Ibid.*
[715] Checkel (1999, 2001); Wiener (2004)
[716] *Ibid.*
[717] Wiener (2004), 198-199; (2007), 51
[718] *Ibid.*

international legal norms[719]. If we accept that structures are constituted by and changed through social practices, it can also be said that norms can remain stable over long periods of time, and still remain open for contestation and potential change[720]. Social practices such as discursive interventions activate processes of contestation, which, in turn, trigger "an on-going process of re/construction" [721] or evolution "in relation with social interaction"[722]. That is, when it comes to the implementation of norms, their meanings-in-use might first need to be developed and adapted to the various contexts of their expected application[723]. This process should generally play a productive role in the establishment of their legitimacy[724].

Studying discursive interventions as social practices in context should help to reveal how the structure of a norm's meanings-in-use is "enacted" and how contestation can further shape the normative interpretations of "all participating actors"[725]. The reflexive approach stresses the dual quality of norms as simultaneously structuring and constructed[726]. This implies that their meanings in certain contexts evolve through discursive interventions that, in turn, contribute to shaping the structure of their use[727]. Contestation emerges when the meaning of a norm is disputed in a certain context, creating space for the exposure of other potential meanings[728]. This has a capacity to strengthen the shared understanding and social legitimacy of the norm, ultimately generating sustained compliance [729]. Contestation makes norms visible and politically significant [730]. Generated by the "logic of contestedness" it can arise by "contingency", in the context of a certain norm's application. It can also emerge in "situations of crisis", common for transnational[731] processes, in which normative understandings are especially prone to diverge[732]. Contestation should advance the evolution of norms "through practice and in context"[733]. Guided by this logic, actors develop a shared understanding of a certain norm's meaning-in-use, which, when achieved, should ultimately contribute to the norm's (perhaps limited period of) stability[734]. "Conflictive interaction" thus plays a central

[719] Wiener (2009), 185
[720] Wiener (2004), 200; (2007), 51
[721] Wiener (2004), 201
[722] Wiener (2007), 55
[723] Wiener (2007, 2009)
[724] *Ibid.*
[725] Wiener (2007), 51; (2009), 176
[726] Wiener (2004), 201
[727] *Ibid*.
[728] *Ibid*.
[729] *Ibid*.
[730] Wiener (2007, 2009)
[731] The term "transnational" refers to "interactions across national boundaries where at least one actor is a nonstate agent" (Price 1998, 615).
[732] Wiener (2009), 182-183
[733] Wiener (2007), 55
[734] *Ibid*., 57-58

role in the establishment of social legitimacy and recognition of norms, based on shared understanding of their meanings[735].

Suggesting that contestation is "a key condition for democratic governance" and "a necessary condition for establishing legitimacy", Wiener also explains its value from the perspective of democratic constitutionalism[736]. She stresses that in contrast to values that can be individually held, norms are social constructs[737]. Shared understanding of their meanings and their social acceptance is generated by shared cultural contexts[738]. She argues that, in the absence of "a constituted polity" in non-domestic contexts that would provide its members with a shared life-world, "cultural validation" of norms is crucial for their legitimacy[739]. Based on Habermas, she claims that formal acceptance of legal norms by transnational elites cannot guarantee the acceptance of their shared legitimacy, which would require discursive and communicative procedures dealing with their meanings within certain contexts[740]. In an analysis conducted with Uwe Puetter, she observed the increase in state contestation of various norms embedded in international law[741]. The authors questioned, whether the legalization of norms was simultaneously met with their legitimization, which would ultimately enforce compliance[742]. Due to the "inherently contested quality" of norms rooted in and interconnected with processes of their application in context[743], their formal validity in international treaties and agreements does not guarantee their shared interpretation, while contestation remains a necessary component for their factual acceptance[744]. In this sense, Wiener suggests differentiating between the "legal validity" of norms established through their inclusion and institutionalization in treaties, their "social (or shared[745]) recognition", stipulated by their habitual appreciation and social familiarization, and their "cultural validation" on the individual level, which should be most flexible for the establishment of a normative meaning, especially in transnational spheres of governance beyond the state[746]. If social recognition of a certain norm is missing, some form of contestation, such as misinterpretation or denial, is likely to occur despite its legal validity[747]. The achievement of the social recognition would require, in turn, social interaction with the norm in various

[735] Wiener (2004), 198
[736] Wiener (2007), 48
[737] *Ibid*., 50
[738] Wiener (2004), 200
[739] Wiener (2007), 59
[740] *Ibid*., 61
[741] Wiener/Puetter (2009), 3; Wiener (2007), 55
[742] *Ibid.*
[743] Wiener/Puetter (2009), 2
[744] *Ibid*., 7
[745] Wiener/Puetter (2009)
[746] Wiener (2007), 62-63; (2009), 177-178
[747] Wiener (2009), 179, 181

contexts[748]. Wiener explains this "disturbance" between formal validity and social (or shared) recognition of norms by the "decoupled" nature of the norm-setting and norm-following contexts on the one side and different experiences of individuals with those norms in-use on the other[749]. Although formal validity is significant, in contexts beyond the state, compliance depends on the shared recognition of norms[750]. Wiener and Puetter highlight three conditions essential for the acceptance of norms' prescriptiveness: the degree of appropriateness depending on their social recognition, perception of their legitimacy depending on persuasion, and the degree of their understanding that can be established through "the interactive process of cultural validation"[751]. While the former two can be achieved within the context of international organizations, the latter rather occurs on the individual level[752]. In the absence of the former two, individuals would interpret norms and their meanings against the background of their own "individual normative baggage" and knowledge[753]. Thus, cultural validation of norms in certain contexts should establish a link between a norm's formal validity and social recognition because both community-based in nature[754].

Wiener and Puetter similarly suggest that neither their "documented language" nor persuasion alone would be sufficient for the acceptance of legal norms[755]. Rather, institutions would need to develop their understanding in practice by considering the context of their application[756]. Especially when it comes to a new international legal norm whose designated followers are not necessarily experts on its application, their understanding of its meaning-in-use may vary based on their diverse backgrounds[757]. Furthermore, different interpretations of norms can arise not only due to the lack of shared understanding of their meanings among actors, but also due to the absence of any understanding of their meanings in certain contexts[758]. This can especially occur in diverse social environments like that of international organisations[759]. In this regard, constitutionalism provides valuable insights for research on norms in its differentiation between organisational social practices as "formal" rules, and cultural social practices as "informal" rules, that seem to be especially liable in transnational spaces beyond the state[760]. This differentiation between formal and informal rules as social practices that

[748] *Ibid.*
[749] *Ibid.*, 180-181; also in Günther (1988)
[750] Wiener/Puetter (2009), 4-5
[751] *Ibid*., 5-6
[752] *Ibid*., 6
[753] *Ibid.*
[754] *Ibid*., 11; Wiener (2009)
[755] Wiener/Puetter (2009), 7-9
[756] *Ibid*.
[757] *Ibid*., 8-9
[758] *Ibid*.,13
[759] *Ibid*.
[760] *Ibid*., 10

influence actors' behaviour supports the view that legitimacy and *de-facto* authority of norms does not only require their formal validation in treaties and conventions but also their social or shared recognition, which can be achieved through contextualized social interaction[761].

3.5.2. Strengthening effects through contestation and conceptual clarification

Cristina G. Badescu and Thomas G. Weiss also examine whether misuse of a norm can contribute to its diffusion through contestation and conceptual clarification[762]. They derive their hypothesis from the evolution of the Responsibility to Protect ('R2P') norm, which strongly contrasts and contradicts the processes described by Finnemore and Sikkink in the 'norm cascade' stage of their life cycle model[763] that included positive precedents of application, socialization and imitation[764]. Similar to the misrecognition of the SGBV prohibition norm in the ICC's first case, the R2P example revealed phases of 'denial' and 'tactical concessions', identified by Risse and Sikkink in their "spiral" model[765], as well as modes of social interaction such as instrumental adaptation and argumentative discourse[766]. Badescu and Weiss suggest in this regard that one should look at the reaction of actors and discourses caused by misapplication, especially in cases of emerging norms that have not been widely applied in practice[767]. They claim that previous research on norms mostly overlooked the possible benefits of misapplication, which has the potential to trigger contestation and debate[768]. Referring to developments in customary international law caused by "misuses and breaches", which have triggered the emergence of new norms, they suggest that "illegal acts" can also be beneficial in this regard[769]. Contestation and discourses generated by resistance against misapplication can provide actors with the possibility of

[761] *Ibid*., 11
[762] Badescu/Weiss (2010), 355
[763] Finnemore/Sikkink (1998)
[764] Badescu/Weiss (2010)
[765] Risse/Sikkink (1999), the "spiral" model will be elaborated on in subchapter '3.8.3. The "spiral" model of state socialization with international human rights norms'
[766] *Ibid*.; Risse (2000)
[767] Badescu/Weiss (2010), 357
[768] *Ibid*., 358
[769] *Ibid*., 358-359

clarification of its underlying issues[770]. Clarification of "what the concept is, and is not" can ultimately advance the evolution of norms[771]. Therefore, the discourses that are produced by resistance against misapplication of norms represent a valuable topic of study, perhaps more so than a narrow focus on compliance[772]. Yet, it is the element of resistance that appears to be necessary for the activation of this effect: "That is, only when actively contested can misrepresentation help as much as positive precedents in clarifying on-going debate over scope and boundaries"[773]. Misapplication and abuses can thus ultimately contribute to norm evolution and even help to reinforce norms but only if "strong voices thoughtfully and persuasively" resist such tendencies[774]. Furthermore, contestation should similarly strengthen advocacy networks and collaboration of various actors in their norm promotion efforts[775]. And yet, in line with the behaviourist approach to norms, Badescu and Weiss admit that if a norm continues to be contested, its influence might also remain inconsistent[776].

3.5.3. The binary between the validity and application of norms

Nicole Deitelhoff and Lisbeth Zimmermann have made another significant contribution to research on the evolution of international norms by differentiating between the contestation of their validity on the one side and of their application on the other[777]. They point out that norms could be reinterpreted through contestation processes, which may either strengthen or weaken them over time, depending on what exactly has been contested: their validity or application[778]. Due to various contexts and situations of norm application, contestation is a "normal practice" that may reinterpret or change the normative content and finally produce a strengthening effect[779]. Thus, contestation is not only 'normal'; it bears the capacity for reaffirmation of a norm's validity and refinement in terms of its future application. In contrast, contestation of a norm's validity, which is a "source of normative obligation",

[770] *Ibid*.
[771] *Ibid*., 366
[772] *Ibid*., 358-359, 366-367
[773] *Ibid*., 366
[774] *Ibid*., 361
[775] *Ibid*., 359, 368
[776] *Ibid*., 365
[777] Deitelhoff/Zimmermann (2013)
[778] *Ibid*., 1-4
[779] *Ibid*., 4

founded in a "shared basis of normative expectations"[780], rather has a weakening effect and may lead to its decay[781]. That is, contestation can only strengthen a norm as long as it remains "applicatory" in nature[782] and does not engage in "justificatory discourses" over its validity and recognition per se[783].

Both the context of a certain situation and consideration of the "appropriateness principle" play a key role in "applicatory discourses"[784]. These discourses may contribute to norm evolution due to their potential to expose certain characteristics of normative application in situations that have not been considered before[785]. Even if application of a norm remains inconsistent and unsatisfactory, as long as those "inconsistencies" are of applicatory nature and do not entail contestation of the norm's validity, the recognition of a norm per se should be preserved[786]. Deitelhoff and Zimmermann stress that when norms define positive duties, that is, duties to undertake certain actions in certain situations (for instance, to investigate and prosecute SGBV), applicatory discourses are especially liable[787]. They also observe that factors such as missing institutionalization of a norm and aggressive strategies from norm entrepreneurs, resulting in harsh and uncompromised resistance, can contribute to radicalization of contestation[788].

Establishing a binary differentiation between contestation of validity and contestation of application can thus contribute to a more sophisticated discernment of various contestation processes. Thereby, it can facilitate the understanding of their separate potential consequences for a norm in question. In fact, this differentiation may also help to identify the intentions behind actors' behaviour that may, in turn, reveal their perception of certain norms. However, it may also seem that cases embedded in complex normative situations reveal a rather ambiguous type of contestation. When misapplication has taken place (for instance, due to certain strategies and priorities) but the validity of a norm is not explicitly questioned, the assumption that its legitimacy would remain preserved seems problematic in some contexts.

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[780] *Ibid*.
[781] *Ibid*., 1, 5, 14
[782] *Ibid*., 4
[783] *Ibid*., 5; see also Günther (1988)
[784] Deitelhoff/Zimmermann (2013), 5
[785] *Ibid*., 9
[786] *Ibid*.
[787] *Ibid*., 5, 8, 14
[788] *Ibid*., 13-14; As I will demonstrate in the case study, WIGJ were aware of the possibility that their actions could provoke an adverse reaction and tried to be sensitive in their manner of approaching the Court's staff. For instance, they consciously called their own fieldwork and interviews with SGBV survivors "documentation" while avoiding the term "investigation", which is specifically applied within criminal justice systems. By doing so, they tried to avoid a confrontation that could have arisen with the OTP due to the professional pride of its staff (Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018).

In such cases, it is rather difficult for outside observers to draw a clear line between the applicatory and justificatory discourses. How can one establish which kind of norm contestation has occurred in a certain case and which intentions had caused it? And how can one assess the (in-) appropriateness of norm application specifically in the field of law?

3.6. Appropriate application of legal norms

Klaus Günther offers a valuable framework for the "appropriate application" of law in single cases, which is based on a number of legal and philosophical works[789]. He argues that the rationales that are inherent to the validity and application of a certain norm are different but it is the deliberations of both that ultimately rule actors' behaviour[790]. The application of a norm is a cognitive process that should stipulate the consideration of all significant characteristics of a situation in question[791]. That is, neglect or an "inappropriate consideration" of a significant aspect, wrong assessments and/or lack of sensitivity towards certain circumstances may cause "inappropriate application" of a certain norm in a certain context[792]. "Appropriateness" is a criterion that depends on a situation and stipulates the consideration of all its relevant facts and characteristics[793]. The "sense of appropriateness" must be developed against the background of a norm's validity as well as a thorough assessment of all relevant facts and characteristics related to a certain situation[794]. Individual "faculty of judgement" acquired through "virtuously practiced use of prudence" avoids a generalized or unsophisticated application of norms, enabling the determination of "appropriate norm application"[795]. This should be in accordance with appropriate assessment of the situation in question, which should thoroughly consider all its relevant facts and characteristics[796].

[789] Günther (1988), *e.g.*, on Wittgenstein, Mead, Kant, Aristotle, Hegel, Piaget, Kohlberg, Luhmann, Tugendhat, Höffe; my translation
[790] *Ibid*., 210
[791] *Ibid*.
[792] *Ibid*.
[793] *Ibid.*
[794] *Ibid.*
[795] *Ibid*., 12-21
[796] *Ibid.*

Günther emphasizes that the rationales and practices intrinsic to the validation and application of norms are inherently different[797]. Reasons that justify their adoption and validity differ from the reasons that stipulate the decisions about their application in certain situations, which might also involve other significant norms[798]. The validity of a certain norm can be established through a successive consideration of situations, in which it has been or should be applied[799]. On the other hand, its validity alone does not automatically imply the appropriateness of its application in a specific situation, which must first be examined under the consideration of all its relevant criteria[800]. The assumption that the validity and application discourses sometimes cannot be differentiated is deceptive, according to Günther, due to the different criteria of relevance in both discourses[801]. Whereas validity discourses focus on the generalizability of certain interests independently from a certain situation, application discourses should highlight the interests that are peculiar to a certain situation[802]. A discourse about validity needs to be provided with content that it cannot produce by itself, as it evaluates whether certain content embraces a generalizable interest[803]. While a certain norm could be appropriate in a certain situation, the interest it represents may not be generalizable[804]. Furthermore, there is usually a difference between the authorities that are involved in processes of norm adoption and proclamation of its validity and those mandated with its application[805]. Hence, those involved in the validation of a norm cannot foresee all possible application situations in advance and thus this process does not represent a general solution for its subsequent application[806]. That is, validity and application of a legal norm have different authoritative origins; while the former is a product of legislation, the latter stems from jurisprudence[807]. Although legislation certainly embraces issues of application within certain comprehensible contexts and situations, this is normally based on the assumption of ideal conditions inherent to such situations[808]. If legislation had knowledge at its disposal that could cover all cases in which a norm could be applied, the appropriateness of its application could be embraced within the definition of its validity[809]. However, as Günther stresses, it is clearly quite impossible to ever obtain such knowledge[810]. Therefore, there is a

[797] *Ibid.*, 25-26
[798] *Ibid.*
[799] *Ibid.*
[800] *Ibid.*, 214
[801] *Ibid.*, 160
[802] *Ibid.*
[803] *Ibid.*, 161
[804] *Ibid.*
[805] *Ibid*., 28-43
[806] *Ibid*.
[807] *Ibid*., 319-320
[808] *Ibid*.
[809] *Ibid*., 51-59
[810] *Ibid*.

need to examine each situation individually to determine whether it would be appropriate and right to apply a certain norm and if so, how[811]. Such examination would stipulate the consideration of all relevant facts and characteristics of the situation[812]. A process of "building a norm" that would be appropriate to apply in a specific context may be nevertheless challenged and impacted by the "historical stand of our experiences and our knowledge"[813]. This might cause different perceptions of the same situation, based not only on distinctive experiences and interpretations but also on competing interests and colliding expectations[814]. While it would be impossible to consider *all* characteristics of a certain situation since they could be endless, directing all available experience and knowledge at its evaluation would contribute to the evolution of the involved norms and their clarification in application[815]:

> Through confrontations with new experiences in application situations we learn to recognize the until now for appropriate held norms in their relative inappropriateness and to change them in view of newly discovered or differently interpreted characteristics.[816]

The continued validity of a norm with extended content, revealed through the consideration of the context of a certain situation, could be, in turn, determined by a "justification discourse"[817]. This would engage the validity and application of a norm in a "historical process of mutual revisions"[818].

Günther asserts that norms could be applied as discourses, in which processes of argumentation embrace justifications on validity claims, within certain applicatory contexts[819]. In this way, a particular dynamic would emerge in a particular situation and isolate "a surprising plenty of unforeseen aspects, nuances or changes of the semantic content of various applicable norms"[820]. This dynamic and the necessity to consider all relevant facts and characteristics of a situation in question might, in turn, require certain modifications, reservations and even shifts in priority[821]. While the "morality" of the ultimate action should be assessed two-fold, *i.e.*, based on 1) an appropriate application of 2) a valid norm, the application discourse requires the consideration of all relevant facts and characteristics of a

[811] *Ibid*.
[812] *Ibid*.
[813] *Ibid*.
[814] *Ibid*.
[815] *Ibid.*
[816] *Ibid*., 59
[817] *Ibid*., 161
[818] *Ibid.*
[819] *Ibid*., 60
[820] *Ibid*., 63-64
[821] *Ibid*., 64

real situation in order to obtain an understanding of "appropriate action" in a certain specific context[822]. However, as previously mentioned, in many situations of moral conflict, one may have the perception of indivisibility between the validity and application of a certain norm. Günther argues that such an impression may appear if the scope of the characteristics that one considers in a certain situation is identical with the scope of those predictable, unchangeable characteristics (for norm compliance) that should have been hypothetically considered, including its consequences and effects. Also considered should be the qestion of weather the interests of those who would be affected in this situation would remain the same as those of the hypothetically affected (in situations with predictable and unchangeable characteristics)[823].

Based on Albrecht Wellmer, Günther claims that new experiences and the pressure caused by "fights over recognition" have the capacity to change collective understandings[824]. Collective "moral learning" stipulates however, the application of the "impartiality principle", which enables normative consideration of new experiences and a change of previously justified and internalized moral views and practices[825]. The process of moral learning would be thus based on the development of understanding whether, and if so, how a certain norm can be appropriately applied in the context of newly isolated characteristics of a certain situation[826]. It would also be necessary to establish whether the extension of a norm's application area would be valid and in the interests of all affected[827]. If the application of a moral principle, such as the impartiality principle, is already institutionalized and prescribed by a certain framework, the application of moral norms should not remain a problem, however, what might remain problematic is their "clever application"[828]. This refers to the strategic treatment of specific circumstances of a situation that do not harmonize with the semantic content of a morally valid norm[829]. Günther argues however, that leaving the application of morally valid norms to clever application might provoke ignorance of the specifics of a situation[830]. In contrast, the idea of "impartial application" requires the admission of specific circumstances in a certain situation as well as their consideration in light of competing normative standpoints[831]. Since the constellation of characteristics and the way this may change cannot

[822] *Ibid*., 76-77
[823] *Ibid*., 78
[824] *Ibid*., 79-80
[825] *Ibid*.
[826] *Ibid*.
[827] *Ibid*.
[828] *Ibid*., 92
[829] *Ibid*., 93-94
[830] *Ibid*.
[831] *Ibid*.

be foreseen, the relationship of a norm to all other aspects of a situation must be reconsidered in each and every case[832]. The decision in favour of one or another norm would obviously be a selective one which, as Günther claims, would be appropriate if it were based on previous consideration of all characteristics of the situation in which it should be applied[833]. The universalistic content of a moral norm can be thus "exhausted" in various situations throughout a longer period of time, since its validity is restricted to the historically produced knowledge and experience of its potential applicability[834]. New interpretations of situations would require modification and revision of a norm's content, which would, in turn, stipulate a renewed examination of the norm's validity, with regard to those new contexts[835]. It is the principle of impartial application that would demand the consideration of new interpretations of situations[836]. This principle should allow such "exhaustion" of a norm's universalistic content through the application of a valid norm in expanded and modified contexts[837]. That is, in real situations we do not deal with validity claims that require justification, but rather with various possibilities of interpretation, which require joint clarification of an appropriate way to proceed[838]. By reference to Richard M. Hare's approach, which embraces "intuitive" and "critical thinking", Günther suggests "arguing about the appropriate" as a process which can foster moral learning and can be enabled by new experiences[839]. Critical thinking can allow reflection on our intuitive principles by way of considering all relevant characteristics of a situation and thus, the identification of a specific norm that would be appropriate for a certain situation[840]. According to the "experimental approach" of critical thinking, one could examine whether he/she would still have accepted all hypothetical principles that embraced the situation's characteristics if he/she were to act under the same circumstances in the position of the person responsible[841].

In his deliberations on the application of a moral principle, Günther refers to Karl-Otto Apel, who advanced the principle of "reasonableness" as an appropriate application criterion[842]. According to this principle, a certain action would be reasonable if 1) it is morally necessary and 2) can be complied with by a responsible actor in light of a certain situation[843]. Due to its

[832] *Ibid*.
[833] *Ibid*.
[834] *Ibid*., 95
[835] *Ibid.*
[836] *Ibid*.
[837] *Ibid.*
[838] *Ibid*., 103
[839] *Ibid*., 277-282
[840] *Ibid*.
[841] *Ibid.*
[842] *Ibid*., 90-91
[843] *Ibid*., 90-92

subjective nature, judging the reasonableness of a certain action needs to be based not only on consideration of the specific circumstances of the situation in question, but also on its meaning "for the individual disposition of the responsible person"[844]. Various perspectives on a certain situation can be produced by a number of factors, including the respective environment, its cultural semantics, social institutions and socialization with certain norms[845]. However, at the end of the day, it is the deliberations about reasonableness that are undertaken by the responsible person in his/her individual situation, which play a decisive role in influencing his/her behaviour and choices[846]. That is, based on Émile Durkheim's reflections on "the uncertainty of collective consciousness under the circumstances of high complexity", Günther claims that application of a norm would not be determined by its imperative character, but rather by an individual rational consideration of an abstract rule, with regard to an unpredictable case[847].

Günther also maintains his hypothesis by reference to Georg H. Mead's theory on the emergence of intersubjective meanings and Wittgenstein's analysis of compliance with rules, both estimated as outcomes of social processes[848]. According to Mead, internalization of social expectations implies the development of a "me" that stands in contrast to an "I"[849]. While the former represents a response to the expectations of others, the latter is a spontaneous and unpredictable reaction of an individual, and both of them "in harmony" represent the "self"[850]. An individual relates to the expectations of others in a situation[851]. He/she learns his/her own perspective through confrontation with those of others[852]. While the relationship between the "me" and a "situation" would be defined by the social perspectives of its participants, it would be the "I" that might have the capacity to change the social and normative structures[853]. When an individual reacts to internalized expectations of other community members, he/she reflects their various perspectives in accordance with his/her own life experience[854]. Individual interpretation of one's own interests through internal consideration of the relationship between the "me" and the "I" would explain various individual perspectives towards the "standards of the community"[855].

[844] *Ibid*., 92
[845] *Ibid*., 95-97
[846] *Ibid*.
[847] *Ibid*., 111
[848] *Ibid*., 113-114
[849] In Günther (1988), 133
[850] *Ibid*.
[851] *Ibid*.
[852] *Ibid*.
[853] *Ibid*., 137-138
[854] *Ibid*., 140
[855] *Ibid*., 141

Ludwig Wittgenstein, in turn, highlighted the role of a custom or a habit that should enable intersubjective compliance with rules: we learn the ways in which we comply with rules, through socialization and practice[856]. The environment that defines how one should comply with rules plays a significant role in this process, while appropriate application criteria practiced within it would determine whether compliance has occurred or not[857]. Günther stresses that, according to Wittgenstein, the meaning of a rule cannot be disconnected from its application in a situation, that is, dissent about the right application of a rule is, in essence, dissent about the identity of the rule's meaning[858]. Yet, appropriate application cannot be achieved by understanding the identity of the rule's meaning alone, but rather, its interactive use should develop the understanding of its appropriate application in certain situations[859]. Mead's concept of a social situation, which explains the emergence of meanings, embraces the component of morality[860]. His ethical model for constructively building a hypothesis stipulates "the consideration of all values involved in one situation"[861]. He compares the obligation to consider all aspects and interests of a specific situation (which he calls application of universalist ethic for the construction of a "social hypothesis") with empirical research that obliges a researcher to consider *all* facts related to his/her research question[862]. While a situation determines which interests are involved, the ethical approach requires the consideration of all those interests before the decision on how to approach them in a rational way can be taken[863]. That is, according to Mead's method of impartially building a moral hypothesis, a right or an appropriate norm in a given situation can be identified through the consideration of all involved interests[864]. In this sense, Günther proposes assessing a potentially applicable norm as a hypothesis that would have to be evaluated against the background of all other aspects of a situation, stipulated by the principle of impartiality[865]. Situations are "socially defined" by the interests of the involved actors, which may include values, standards and rules, all of which should be considered when building an impartial normative hypothesis[866]. Furthermore, each situation in which a norm is applied can involve actors with certain cultural identities and biographies, who may empathize with certain members of the community[867].

[856] *Ibid*., 125
[857] *Ibid*., 126
[858] Günther (1988), 127
[859] *Ibid*.
[860] In Günther (1988), 114
[861] *Ibid*.
[862] *Ibid*., 141
[863] *Ibid*., 142
[864] *Ibid*., 143
[865] Günther (1988), 144
[866] *Ibid*.
[867] *Ibid*.

Günther also refers to Jean Piaget's notion of equity, which embraces various aspects of the "mutual respect principle": a "universal aspect" that requires everyone to recognize each other as equals, independent from any differences or situations; and the "particular aspect" that requires the consideration of all individual differences and special circumstances[868]. However, the perspectives of participants in a situation are restricted by their affiliation with a certain community and they might ignore "colliding" characteristics of a situation in order to avoid threatening the integrity of the whole system[869]. Based on Lawrence Kohlberg, Günther stresses, however, that even a disappointing choice in a case of "collision" would be justified if the intention behind it was directed at the implementation of another important duty[870]. A duty left unfulfilled due to specific aspects that had hindered its "good" implementation would be thus a case with "mitigating circumstances"[871]. Moreover, certain individual rights may also hinder the application of a legitimate norm in specific situations, which might provoke "norm collisions"[872]. A single case may involve collisions of conflicting rights and/or principles, which would require the capacity to consider all relevant circumstances of a situation and to build an appropriate, possibly modified, normative hypothesis for their solution[873]. The consideration of all relevant characteristics of a situation may even produce a number of appropriate normative hypotheses[874]. The interpretation of colliding issues should then allow the identification of the best and most "adequate" hypothesis under the specific circumstances of a situation[875]. That is, even while designated followers of norms should be generally familiar with the situations, in which they could be applied, when it comes to new constellations in unforeseen situations, their appropriate treatment would require the application of the equity principle[876]. Similar to Piaget's notion of equity, Günther emphasizes that the idea of impartiality embraces two discourses: on validity that is independent of any situational context, and on application that needs to consider all characteristics of a situation in question[877]. That is, the validity of a certain norm cannot guarantee the appropriateness of its application in single cases. Only when the application of a valid norm is also impartial in light of all relevant circumstances in a given situation can it been seen as appropriate[878]. Such relevant characteristics of a situation include all eligible aspects of a given environment, even

[868] *Ibid*., 152-153, 166
[869] *Ibid*., 157
[870] *Ibid*., 169
[871] *Ibid*.
[872] *Ibid*., 173
[873] *Ibid*., 173-174
[874] *Ibid*., 191-194
[875] *Ibid*.
[876] *Ibid*., 205-206
[877] *Ibid*., 257-258
[878] *Ibid*.

if they have not yet obtained validity[879]. The application of a norm would be appropriate if it were coherent with those aspects and characteristics[880]. Impartial application would inevitably and systematically cause collisions among norms that could be solved by specific rules, which would allow the consideration of the context in question[881].

Günther's thoughts on solutions for the collisions of norms and for building of preferences are based on Robert Alexy's suggestion to build a "complete consideration context among all relevant characteristics of a situation"[882]. An application discourse, which considers a situation embedded in a certain context, should differentiate between "definitive" or "absolute" and "prima facie" duties[883]. This would make it possible to establish which norm would trump the other. One should also consider the difference between principles and rules: whereas the former provide guidelines for rational action, the latter have a definitive institutionalized structure, that stipulates legal and factual aspects and demands certain action if their conditionality is met[884]. Due to their open structure conflicting principles may remain valid even if one has to be prioritized due to concrete factual and legal characteristics in complex situations[885]. According to Alexy, conflicts can be solved through the establishment of preferences (built on the circumstances of a case) which would stipulate the justification for a certain choice[886]. In contrast to conflicting principles, in a case of conflicting rules, only one rule can be valid, unless another is amended with an exception clause[887]. An appropriate norm should be crystalized through the consideration of its relation to other norms or principles applicable in a situation and of factual conditions that would allow for its implementation[888].

In his deliberations, Günther also refers to the Aristotle's theory of *phrónesis*, which focuses on appropriate behaviour under unforeseeably changing circumstances[889]. It implies that what would be "good" in a certain situation cannot be defined in an abstract way, but rather requires consideration of specific circumstances in each single case[890]. According to this theory, one can acquire the capacity to make a correct assessment of specific circumstances

[879] *Ibid*., 257
[880] *Ibid*.
[881] *Ibid*., 258
[882] *Ibid*., 259-260
[883] *Ibid*., 261-275
[884] *Ibid*.
[885] *Ibid*.
[886] *Ibid*.
[887] *Ibid*.
[888] *Ibid*.
[889] *Ibid*., 217-218
[890] In Günther (1988), 217-218

through "experience gained in various situations"[891]. Even ethical virtues are a product of experience that we have to develop in order to ascertain their good or correct application in different situations[892]. We come closer to "perfection" through conscious and reflected (rather than accidental) moral behaviour[893]. This is an outcome of a "moral insight" or *phrónesis*, which is a "product of experience with ourselves in various situations"[894]. Coming closer to perfection is "just all about an update according to specific situations"[895]. The convergence of ethical virtues with moral insight should thus help to identify appropriate validity or a valid appropriateness[896]. That is, *phrónesis* can update the normative content of a certain environment, according to the situations through which it has been formed[897]. Günther also stresses Hans-Georg Gadamer's interpretation of *phrónesis*, that defined the understanding of application as a "historical understanding", *i.e.*, the consideration of all relevant characteristics of a situation is virtually implied as a method of gradual "revis[ion] [of] one's own prejudices within their historical horizon"[898]. Application discourses that involve different interpretations require comprehension of those other views and their comparison with one's own, in light of certain circumstances, which can allow for their mutual modification. Actors are bound by already acquired moral knowledge and the principle of equity when applying legal norms. In this context, *phrónesis* as a "capacity to appropriately articulate given normative bonds in a situation" can allow the "bringing together [of] the normative valid and the appropriate in a situation"[899].

Based on the aforementioned works, Günther claims that the logic of appropriate argumentation in legal discourses should embrace a complete description of a situation through the consideration of all its relevant facts and characteristics and also satisfy the coherence principle[900]. Under the application of the impartiality principle, which stipulates a complete description of a situation in question, one needs to "play through" all possible meanings of a norm in a given situation in order to justify a selective decision[901]. That is, according to the impartiality principle, a norm can be applied after all its meanings that could be identified through a complete description of a situation have been considered[902]. An

[891] *Ibid*., 222
[892] Aristotle described ethical virtues as virtues of a character that can be developed over time (Günther 1988, 219).
[893] In Günther (1988), 224-225
[894] *Ibid*.
[895] *Ibid*.
[896] *Ibid*., 225
[897] *Ibid*., 232
[898] Günther (1988), 240
[899] *Ibid*., 249-250
[900] *Ibid*., 294
[901] *Ibid*.
[902] *Ibid*., 295

incomplete description of a situation may lead instead to biased decision-making and inappropriate norm application[903]. A complete description of a situation has to be analysed under the consideration of all other applicable norms[904]. This means it should be subjected to "normative exhaustion" that might lead to norm collisions or conflicts, whose solution would, in turn, require critical thinking and the capacity for moral judgement[905]. Due to the lack of knowledge about all possible application situations and their characteristics, norm collisions normally cannot be predicted[906]. However, even if norms collide within the context of a concrete situation, their collisions do not imply conflicts among their claims to validity[907]. A decision in favour of one norm over the other would imply a preference for a "relatively better state of affairs best possible within a context of a certain situation"[908]. That is, according to the logic of appropriate argumentation, the application of a certain norm should be consistent with the application of all other valid norms and meanings in a situation under the consideration of all its relevant circumstances[909]. Furthermore, appropriate application of a certain norm would also require its consistency with all other applicable norms inherent to a certain environment (for instance, the ICC's Rules of Procedure and Evidence)[910]. While the universality of a norm is crucial for its validity, its appropriateness in a certain situation requires the fulfilment of the coherence principle in relation to all other applicable norms[911]. The fulfilment of the consistency criterion, in turn, would stipulate the determination, which norm can be justifiably applied under the consideration of all other applicable norms in a situation[912]. A "constructively aspired coherence" is thus not set in advance, but rather has to be created on a case-by-case basis[913].

Based on Niklas Luhmann, Günther stresses that law, as a structure consisting of social systems, has a selective character[914]. It is a selective mechanism that brings expectations into the social structure[915]. While its complexity and contingency can be reduced through decisions taken by political legislators, jurisprudence has to handle its application and the disappointments that it might provoke[916]. The differentiation between legislation and

[903] *Ibid*., 296
[904] *Ibid*., 298
[905] *Ibid*.
[906] *Ibid*., 300
[907] *Ibid*.
[908] *Ibid*., 301
[909] *Ibid*., 303-304
[910] *Ibid*.
[911] *Ibid*., 306
[912] *Ibid*., 307
[913] *Ibid*.
[914] *Ibid*., 324-325
[915] *Ibid*.
[916] *Ibid*., 326

jurisprudence as institutions for the establishment of the validity and the application of norms indicates the law as a system[917]. Its decisions are bound by legislation, yet they remain independent from politics or ethics[918]. They are rather stipulated by the 'structure of conditions' (*Bedingungsstruktur*) between the elements of crimes and legal consequences[919]. Luhmann differentiates between cognitive and normative aspects of the legal system, arguing that it is normatively closed and cognitively open[920]. It is closed in its independence from the other systems to rule about right and the wrong, while it simultaneously remains open towards changes in its external environment[921]. It is an autonomous system, capable of learning within the boundaries of its normative unity (*normative Geschlossenheit*), while the combination of already set conditions (legislation) and binary coding (right and wrong) enables its reproduction[922]. The relationship between "the programming" and "the coding" is a "precarious balancing act" that can be regulated within an argumentative zone, located in between the two[923]. This balance is required to stabilize behavioural expectations on one hand, while providing for situational flexibility (that would appropriately consider different expectations) on the other[924]. Indeed, a loss of certainty would endanger the function of the law to satisfy expectations under the conditions of limited time and knowledge[925]. On the other hand, political and moral principles should also be given space for the consideration of as many aspects of a situation as possible, within the application of the law[926]. For the achievement of this effect, application procedures of institutionalized legal norms that would stipulate the consideration of all relevant characteristics of a situation should be also institutionalized[927]. Based on Herbert L. A. Hart, Günther specifies that the "inevitable vagueness" of legal rules is predetermined by the lack of knowledge about the facts, which prevents the possibility of foreseeing of all possible combinations of characteristics in single application situations[928]. Due to these unforeseen combinations of circumstances, actors' aims may change throughout the application process[929]. To meet this challenge, legal rules are vested with an "open structure" that provides a "paradigm" for clear cases, while their application in more complex cases might depend on judicial discretion[930]. To satisfy the

[917] *Ibid*.
[918] *Ibid*.
[919] *Ibid*.
[920] In Günther (1988), 327
[921] *Ibid*.
[922] *Ibid*.
[923] *Ibid*., 331-332
[924] *Ibid*.
[925] *Ibid*., 339-340
[926] *Ibid*.
[927] *Ibid*., 337
[928] Günther (1988), 340-341
[929] In Günther (1988), 340-341
[930] *Ibid*.

requirement of the complete description of a situation, a judge would have to consider all applicable norms and their meanings as well as their coherence in each single case[931]. Referencing Ronald Dworkin's concept of "integrity", (which stands for an ideal coherence principle, according to which normative decisions should be taken), Günther suggests that integrity should be also understood as a principle of appropriate argumentation[932]. Integrity is an independent principle that unfolds when relating to other principles such as justice and a fair trial[933]. It encourages the consistency of a decision with other relevant principles. Integrity should guide normative emergence in legislation and normative application in adjudication[934]. As for the latter, coherence among involved principles and rights must be fulfilled. Dworkin claims that judges do not "invent" new laws but rather "discover" them through the justification of their decisions in light of the integrity principle, which includes the obligation of equal treatment[935]. The application of this method would inevitably provoke collisions of norms and principles, which would require that the best interpretation is identified, based on a most extensive and coherent justification[936]. This interpretation should be derived "from the standpoint of political morality" and stipulated by the requirement of equal respect and treatment; that is, compliance with the principle of impartiality[937].

That is, appropriate application of a legal norm, guided by the logic of appropriate argumentation that stipulates the consideration of all relevant facts and characteristics of a situation and the fulfilment of the impartiality and coherence principles, *i.e.*, of integrity, should not only reinforce the *phrónesis* effect in relation to the 'discovery' of the norm's various meanings-in-use, but also its validity and universalistic content. In this way, the appropriate application of a formally valid norm should enable the process of its cultural validation on the individual level[938]. This also has the capacity to provide the norm with social or shared recognition[939] and *de-facto* authority[940]. While the advocates of a norm may reveal and resist its inappropriate application, misapplication or incidents of applicatory contestation, providing knowledge and expertise for its appropriate application. Ultimately, it is the responsibility of legal actors mandated with the implementation of legal norms to address

[931] *Ibid*., 345
[932] Günther (1988), 350
[933] In Günther (1988), 350
[934] *Ibid*.
[935] *Ibid*.
[936] *Ibid*.
[937] Günther (1988), 350
[938] *Cp.* Wiener/Puetter (2009)
[939] *Ibid*.
[940] On *de facto* authority of international law see Alter (2018)

such deficiencies and thus to strengthen the authority of legal systems, structures and institutions.

3.7. "Misrecognition" of gender justice at the ICC

> While the Rome Statute establishes a "new" framework (albeit with some important omissions) for addressing gender injustices, it operates within a context where longstanding gender legacies continue to influence its interpretation.[941]

Proceeding from theoretical deliberations on processes of norm evolution, the role of contestation in cases of already institutionalized norms and their appropriate application, I would like to link the above-discussed approaches with the relevant findings from feminist institutionalism. Perhaps the most representative analysis in this regard has been conducted by Louise Chappell, who has tackled the obstacles, which hindered the International Criminal Court in the implementation of its gender justice mandate, by scrutinizing the interactions between the actors and institutions involved in its work[942]. She focused her analysis on the timeframe from the beginning of the Court's operation until the end of 2014, which, as she claims, is "a very short period" from the perspective of the historical institutionalism[943]. However, it is also a significant one in that it may have shaped certain patterns for its institutional future[944]. She argues that "gender legacies of the law" did not disappear through formal institutionalization of gender justice norms in the ICC's legal framework, but rather remained largely responsible for contestation processes and dynamics that impeded their implementation[945]. That is, despite the formal institutionalization of the ICC's gender justice mandate, those internalized informal gender-blind rules (that should have been replaced with

[941] Chappell (2016), 3
[942] *Ibid*.
[943] *Ibid*., 24
[944] *Ibid*.
[945] *Ibid*., 3

the new formal rules) still continued influencing actors' interpretation and application of the law[946].

Chappell defines "gender justice" based on Nancy Fraser's framework from 2007, which embraces the intersecting elements of recognition, redistribution and representation that should enable the elimination of injustice[947]. According to Fraser's framework, Chappell stresses that these elements should all be simultaneously fulfilled in order to achieve overall gender justice at the ICC[948]. Fraser defines the lack of these elements correspondingly as misrecognition, maldistribution and misrepresentation[949]. Based on her model, Chappell identifies shortcomings in the ICC's implementation of gender justice during the first decade of its operation within all three categories[950]. While redistribution relates to the restorative justice mandate of the Court, including the participation of victims in its proceedings and their entitlement to reparations in cases of convictions[951], its fair gender implementation would still largely depend on the recognition of gender justice. However, of the three elements, the recognition of gender justice appeared to have been the most fragile[952]. The implementation of fair gender representation has been, perhaps unsurprisingly, the most successful, especially within the judiciary[953]. Chappell observed, however, that female actors did not necessarily possess better gender expertise than their male colleagues[954]. In fact, ICL jurisprudence has witnessed examples when male judges proved to be supportive of gender-just interpretation and application of the law and vice versa, when female staff tended to be rather biased[955]. This is certainly not to say that gender-balanced representation as a matter of gender equality and just participation on decision-making levels is irrelevant. However, this tendency indicates that the appointment of female staff in accordance with the statutory provisions might be easier to implement than the eradication of the internalized rules inherent to the common life-world in which they used to operate.

While the elements of representation and redistribution are significant and will be occasionally (where relevant) reflected upon throughout this analysis, the recognition of gender justice, which seems to be the most unstable in operation, represents the main issue of

[946] *Ibid*.; on the differentiation between formal and informal rules see also Wiener/Puetter (2009)
[947] Chappell (2016), 5-10
[948] *Ibid*.
[949] *Ibid*.
[950] *Ibid*., 191-192
[951] *Ibid*., 130
[952] *Ibid*., 191-192
[953] *Ibid*., 192
[954] *Ibid*.
[955] *E.g.*, in Askin (1997); Bedont/Hall Martinez (1999); Copelon (2000); Mertus *et al*. (2004)

concern in this study which mainly focuses on the ICC's implementation of retributive (as opposed to restorative) justice in cases of SGBV. The absence of this fundamental condition of overall gender justice, *i.e.*, its misrecognition, not only impacts fair gender distribution at the ICC, it also demonstrates the lack of socialization with the SGBV prohibition norm among actors involved in its work, independent from the element of fair gender representation. Based on Fraser's definition of misrecognition as grounded in inequality and androcentrism inherent to, *inter alia*, legal institutions, which used to discriminate women and the "feminine", Chappell suggests that the eradication of such traits should stipulate the establishment of a pattern that would promote recognition of gender equality throughout institutional structures[956]. Such already applied strategies as codification of gender-sensitive definitions of crimes (related to the element of recognition), provision of a fair representation of female and male personnel (representation), and providing victims with possibility to voice their concerns (redistribution) should help to eliminate gender bias within legal institutional structures and to facilitate the recognition of gender justice[957]. However, these strategies appear insufficient due to the influence of gender legacies of the law on designated followers of the new rules, even if they are fairly represented[958]. These legacies could be revealed as largely responsible for the compromised recognition of SGBV in the first decade of the Court's operation[959]. Despite the ever-broadening codification and inclusion of SGBV and gender-sensitive provisions in the legal framework of the Court (which provided the SGBV prohibition norm with *de-jure* legitimacy and formal recognition) the responsible staff, including both the OTP and the Judges, tended to ignore gender issues, which led to their inappropriate application of new gender norms[960]. Although the statistics related to SGBV charges throughout all cases of the Court suggest that the OTP has sought to bring these charges, it has mainly done so in a narrow scope (focusing solely on rape)[961]. Furthermore, the OTP has often failed to investigate SGBC appropriately and/or to provide sufficient evidence, which has ultimately caused the Judges' reluctance to confirm or to convict the accused of such charges[962]. While this reluctance could be, independent of the OTP's omissions, occasionally attributed to gender-bias in the Judges' interpretation of the law, these misrecognitions appeared to be generally applicatory in nature.

[956] Chappell (2016), 88-89
[957] *Ibid*., 92
[958] *Ibid*., 103
[959] *Ibid*.
[960] *Ibid*., 88
[961] *Ibid*., 108-109
[962] *Ibid*.

Chappell argues that gender justice outcomes at the ICC were stipulated by three "interlinked institutional factors": the formal institutional framework, informal rules, and the "nested environment" of the Court[963]. While formal rules enforce institutions, provide them with legitimacy and play a crucial role in the determination of actors' choices and behaviour, they "never operate alone"[964]. Informal rules, while often hidden upon initial examination, also play a similarly significant role in influencing social behaviour[965]. In fact, they can either strengthen or hinder the implementation of formal rules[966]. Even though the formal rules on SGBV appeared to have been ignored, narrowly interpreted or even contested during the first decade of the ICC's operation, their existence has been of crucial importance for the correction of those misrecognitions[967]. Specifically, they have provided the advocates of gender justice with instruments for resistance against such inappropriate tendencies[968]. Chappell defines informal rules as gender legacies of the law, and conceptualizes them as the "temporal nestedness" of the Court[969]. She claims that these informal rules have influenced the interpretation of formal rules by their designated followers, in a way that differed from the intentions of their designers[970]. She argues this was especially notorious in the first case against Thomas Lubanga. She also recognized that neither the Prosecutor nor the Judges could be generally suspected of being gender-biased based on their public statements or previous professional interests[971]. As for the Judges, she suggested that the fear of being criticized for judicial activism might have contributed to their tendency towards rather narrow interpretation of the law[972]. In contrast to the temporal nestedness of the Court, its "nested environment" or "spatial nestedness" embraces the international system and its actors, including states and international organizations[973]. Chappell notes that this factor might produce both a positive and negative impact on the ICC's implementation of gender justice[974]. For instance, international recognition of women's rights as human rights in the international arena in the early-mid 1990s, the progressive gender jurisprudence of ad hoc tribunals, as well as the evolving Women, Peace and Security agenda of the UNSC have positively shaped the environment in which the Court was 'nested'. On the other hand, the negative impact of its

[963] *Ibid*., 11
[964] *Ibid*., 12-13
[965] *Ibid*.
[966] *Ibid*.
[967] *Ibid*., 194-197
[968] *Ibid*.
[969] *Ibid*., 197-199
[970] *Ibid*.
[971] *Ibid*.
[972] *Ibid*.
[973] *Ibid*., 199-201
[974] *Ibid*.

nested environment could be revealed in the unwillingness of some states to support the ICC's gender justice mandate and its investigations and/or to contribute to victims' reparations[975].

Due to these institutional factors, it is difficult to foresee in which direction institutions could develop. Nonetheless, decisions taken in the early stages of an institution's operation might not only "lock in" but also "lock out" certain patterns of institutional development, which would inevitably influence the institutional logic of appropriateness[976]. That is, actors have the power to influence the direction of institutional development[977]. In order to do so, along with the formal rules, they can also use "constructive ambiguit[ies]"[978] embedded within institutional frameworks[979]. However, as Chappell also stresses in line with the theoretical works elaborated above, actors who interpret and apply the rules, *i.e.*, their designated followers, are not their "institutional architects"[980]. In fact, they might even have different aims and interests determined by the environment in which they operate[981]. Therefore, the successful implementation of gender justice and the evolution of social gender norms and practices might need to be fostered by institutional gender mainstreaming[982].

Based on the assumption that legitimacy is indispensable for the survival and authority of international institutions, Chappell emphasized two relevant ways in which their legitimacy can be defined: while *normative legitimacy* is grounded in institutions' claims to exercise authority, their *sociological legitimacy* is determined by their constituencies' perception of their factual authority[983]. That is, the normative legitimacy of the ICC has been established by states' development, adoption and ratifications of the Rome Statute[984]. However, its actual "right to rule" would be reassessed and reaffirmed by its various constituencies over time[985]. That is, those constituencies with their various subjective expectations have the capacity to influence the Court's legitimacy[986]. Their further support and thus, the sociological dimension of the Court's legitimacy would, in turn, inevitably depend on its institutional performance and realization of its institutional objectives[987]. Gender justice constituency, for instance, has been playing a significant role for the ICC's authority on both normative and sociological

[975] *Ibid*.
[976] *Ibid*., 14-15
[977] *Ibid*.
[978] Oosterveld (2014)
[979] Chappell (2016), 14-15
[980] *Ibid*.
[981] *Ibid*.
[982] *Ibid*., 17-18
[983] *Ibid*., 19
[984] *Ibid*., 201-202
[985] *Ibid*.
[986] *Ibid*., 20-23
[987] *Ibid*.

levels due to its engagement and agency, not only during the negotiations on the Rome Statute but also in the initial period of its operation[988]. That is, the loss of its support could create "a serious legitimacy crisis" for the Court[989]. Nevertheless, while the contribution of actors such as NGOs and other advocates who monitor and criticize the implementation of institutional mandates is essential for the legitimacy of international institutions[990], Chappell argues that they should not be judged too harshly, due to the peculiar context in which they operate[991]. Furthermore, an international institution such as the ICC has multiple constituencies with various expectations and demands, which certainly doesn't make their simultaneous satisfaction easy[992]. Nonetheless, even if certain constituencies are disappointed by institutions, they may still continue to support them and their authority if those institutions are willing to address the criticism and the shortcomings that were identified in their operation[993], to fulfil those constituencies' requests at least "some of the time", as well as to review and adjust their policies, strategies and practices when a need to do so arises[994].

Chappell grounds her further deliberations on the ICC's legitimacy on the model developed by Benjamin N. Schiff (2010) comprising three dimensions of its legitimacy, which exist on the level of its *design*, and on its *operational*, and *consequential* levels[995]. Likewise, he identifies various constituencies of the Court, including states (both parties and not parties to the Rome Statute), international organizations, NGOs, expert observers, victims, and perpetrators[996]. According to his model, Chappell argues that gender justice constituency (consisting of various actors who advocated for the inclusion of gender justice mandate in the Rome Statute and have been promoting its implementation since the ICC's establishment) accepted and strongly supported the legitimacy of the ICC in terms of its design, despite the compromises and reservations that were adopted during the negotiations on the Rome Statute in relation to its SGBV provisions[997]. However, the failure to apply those provisions appropriately in the early stages on the operational level diminished their hopes from the outset of the Court's practice[998]. What's more, as was already mentioned above, the perception of its legitimacy varied throughout different areas of its mandate. While best results could be revealed in gender-just representation, the recognition of SGBV was rated as

[988] *Ibid*., 4
[989] *Ibid*.
[990] *Ibid*., 20-23
[991] *Ibid*.
[992] *Ibid*.
[993] *Ibid*.
[994] *Ibid*., 201-202
[995] *Ibid*., 202
[996] *Ibid*.
[997] *Ibid*., 128, 203
[998] *Ibid*.

the worst[999]. Nonetheless, "signs of hope" including the Court's improved implementation of its overall gender justice mandate by the end of the first decade of its operation, the willingness among its responsible staff as well as the efforts (especially by the OTP) to correct the past failures with regard to SGBV prosecution have contributed to the maintenance of the Court's legitimacy among its gender justice constituency[1000]. However, the fulfilment of those promises and aspirations would have to be evaluated over time, which would, once more, influence the reassessment of its sociological legitimacy[1001]. Judges would likewise have to demonstrate their willingness and ability to adjudicate SGBV appropriately, in accordance with the Court's legal framework and previous gender jurisprudence, developed by other international tribunals[1002]. This could occur by enabling a convergence between the Court's gender justice rules and practices, thus making its legitimacy "more robust"[1003]. However, Chappell also fairly notes that the Court's constituencies should avoid undeserved judgments about its consequential legitimacy as well as demanding more than it is able to deliver[1004]. Indeed, due to the context of the Court's operation, its restricted resources, power and mandate, as well as its relatively newly established structures and lack of experience with situations and cases it has to handle, its constituencies might need to be patient and support the Court in its gradual, successive development into the institution they expect and wish it to become.

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While the formal recognition of the SGBV prohibition norm in ICL refers to the positive duty to investigate and prosecute SGBV in cases falling under the jurisdiction of the ICC, the absence of this expected behaviour reveals its misrecognition. In contrast to contestation of international norms, which refers to actors' conscious and/or intentional actions to contradict the expected behaviour associated with norms, either with respect to their validity or application, it appears that the misrecognition of norms (especially in cases of positive duties,

[999] *Ibid*.
[1000] *Ibid*., 203-204
[1001] *Ibid*.
[1002] *Ibid*., 129, 206
[1003] *Ibid*.
[1004] *Ibid*., 205

i.e., duties to undertake certain actions in certain situations[1005]) can occur on either conscious or unconscious levels and expresses itself as an absence of the behaviour that is expected in accordance with the formal recognition of norms. However, both phenomena – the contestation and misrecognition of norms – seem to be related in terms of their types, causes, dynamics, and consequences. Based on the theoretical concepts described above, I have identified the misrecognition of the SGBV prohibition norm in the ICC's first case against Thomas Lubanga Dyilo as applicatory in nature (as opposed to the misrecognition of its validity. I will return to this differentiation in the explanatory framework). Furthermore, in accordance with findings of social constructivist research on international norms, in this case the advocates of the norm played an essential role in the identification of and resistance against this misrecognition. Whereas both social constructivist approaches to norms emphasize the significance of norm advocates in processes of international norms' evolution, the critical approach, by focusing on the dual quality of norms as "both structuring and socially constructed through interaction in a context"[1006], specifically underlines the crucial role of such actors in activating and engaging in further processes of socialization with norms, even after they have already been institutionalized and formally validated. In fact, as this research also reveals, the agency of norm advocates can be fundamental to processes of intersubjective deliberation and arguing, which can clarify norms' meanings-in-use in specific contexts and situations. This should, in turn, promote learning and socialization with the appropriate application of norms and ultimately strengthen their power to influence the behaviour of actors with given identities[1007]. As the empirical chapter will demonstrate, the applicatory misrecognition of the SGBV prohibition norm in the ICC's first case was essentially tackled by the advocates of the norm as an open space in which they could intervene and facilitate processes of learning and socialization with the norm's appropriate application. Ultimately, debates surrounding the conceptual clarification of the norm's meaning-in-use in the particular context of the case were triggered through this process. These debates not only produced the effects of learning and socialization, but also reinforced the content and status of the norm. That is, the achievement of these outcomes was essentially generated by the norm advocates' agency, which resisted the misrecognition of the norm, fostering processes and dynamics to strengthen its position.

[1005] Deitelhoff/Zimmermann (2013)
[1006] Wiener (2007), 49
[1007] *E.g.*, Risse (2000); Checkel (2001, 2005); Wiener (2007); Badesu/Weiß (2010); Deitelhoff/Zimmermann (2013); also in Günther (1988)

3.8. Agency of norm entrepreneurs in processes of norm evolution

A number of researchers studying norms in IRs have emphasized the central role that individuals and their organizational platforms such as NGOs play in developing political strategies to promote their ideas and ultimately advance the evolution of norms[1008]. Actors promoting norm evolution processes have been referred to as "norm entrepreneurs"[1009], "norm advocates"[1010] or "agents of pro-change-coalitions"[1011]. These are rational actors motivated by their ideas and beliefs rather than material concerns, who pursue "strategic social construction" and elaborate political strategies for the alteration of common knowledge[1012] that was also once constructed and perceived as normal or appropriate[1013]. Their motivation is shaped by such qualities as altruism (since they normally promote issues without direct benefit for themselves), empathy toward others and their feelings, and ideational commitment[1014]. The latter means that they deeply believe in the appropriateness of their ideas, *i.e.*, the promotion of new norms occurs within the spectrum of the logic of appropriateness, which influences rule-guided behaviour[1015]. One of the main mechanisms for the advancement of their agendas is persuasion. It demands the creation, structuring and framing of a certain new appropriateness, for which information and expertise are the most crucial tools[1016]. Deitelhoff emphasizes that the capacity of a certain norm to produce impact depends on its advocates' interpretative capability to use framing as a central mechanism of persuasion[1017]. However, the agency of norm advocates in persuasion processes may also vary depending on their access to procedures, recognition of their expertise and authority, and their potential leverage[1018].

The relationship between new norms and already existing ones, particularly within the field of international law, is especially significant: a new claim has to be appropriate and 'fit into'

[1008] *E.g.*, Goldstein/Keohane (1993); Keck/Sikkink (1998, 1999); Price (1998); Finnemore/Sikkink (1998); Risse/Sikkink (1999); Risse (2000); Deitelhoff (2006); Badescu/Weiss (2010); Sikkink (2011); O'Rourke (2013)
[1009] Finnemore/Sikkink (1998)
[1010] Keck/Sikkink (1998, 1999); Risse/Sikkink (1999)
[1011] Sikkink (2011)
[1012] Finnemore/Sikkink (1998), 910
[1013] Goldstein/Keohane (1993); Finnemore/Sikkink (1998); Keck/Sikkink (1998, 1999)
[1014] Finnemore/Sikkink (1998), 898
[1015] *Ibid*.
[1016] *Ibid*., 895-900; see also Deitelhoff (2006)
[1017] Deitelhoff (2006), 73-77
[1018] *Ibid*., 154

previous legal frameworks. What's more, it has to be constructed in a way that would make its consistency with prior norms obvious[1019]. The space, in which new norms emerge, is already occupied by other norms that can contest or compete with them[1020]. While framing their agenda, norm entrepreneurs might need to challenge the logic of appropriateness that was defined by prior norms[1021]. Finnemore and Sikkink emphasize two types of arguments that impact persuasion: 1) structural and logical, and 2) psychological and affective[1022]. The first type is central to legal normative claims, since legal norms have to fit into the existing legal structure or framework[1023]. The second type relates to communication and argumentation that involve emotions[1024]. It implies that it is not only "logic alone" that ultimately matters or influences certain behaviour in favour of one norm or another[1025]. Michael Barnett highlights the ability of actors motivated either by their principled beliefs or instrumental gains to exercise agency and strategically frame their agendas to achieve changes in the "cultural landscape"[1026]. Barnett notes that frames can be constituted not only through certain narratives, they may be also shaped throughout discursive interventions[1027]. He stresses that in times of "cultural contradictions and competing visions of the future", norm entrepreneurs must frame issues in a way that would "reconcile these contradictions"[1028], "alert individuals [about] how their interests […] [are] at stake" and persuade them to ultimately contribute to a certain outcome[1029]. That is, while emotions might not necessarily play a decisive role in legal applicatory discourses, when pushing for their agenda, advocates of legal norms must still frame their issues in a simultaneously appropriate and alarming way that would allow them to attract attention while also demonstrating that their ideas are logical and converge with the existing structures[1030].

Rodger A. Payne sees strategic framing applied by norm entrepreneurs as a kind of "manipulation"[1031]. He argues that by engaging in this technique, norm entrepreneurs "exploit material levers all the time", which implies that they do not necessarily convince, but rather coerce others to change their preferences and behaviour[1032]. Using frames strategically, they "situate issues within a broader social and historical setting" so that their target audiences

[1019] Finnemore/Sikkink (1998), 908-909
[1020] *Ibid.*, 897
[1021] *Ibid.*
[1022] *Ibid.*, 914-915
[1023] *Ibid.*
[1024] *Ibid.*, 915; on the role of emotions in IRs see Koschut (2017)
[1025] *Ibid.*
[1026] Barnett (1999), 7
[1027] *Ibid.*, 8
[1028] *Ibid.*, 15
[1029] *Ibid.*, 22
[1030] Finnemore/Sikkink (1998); Keck/Sikkink (1998, 1999); Barnett (1999)
[1031] Payne (2001), 41
[1032] *Ibid.*

recognize their resonance and suitability with already accepted norms[1033]. In a situation in which different frames compete with each other, or in which it is difficult to predict whether a frame that was useful in one situation would be as convincing in another similar context, norm entrepreneurs might "strategically abandon one frame and employ another to seek the same end result"[1034]. Multiple frames may produce a "single desired outcome" just as one frame may also produce several outcomes[1035]. Payne stresses that frames can be also strategically "distorted" in order to achieve a desired outcome, and that some form of coercion involving resources or power might influence the ultimate preference of one frame over another[1036]. He acknowledges that, due to challenges which norm entrepreneurs face in their work, the "strategic manipulation of material levers" that they sometimes employ is not surprising[1037]. However, he claims that the "sophisticated means-ends calculations" of norm advocates and their engagement in strategic social construction as an "inherently manipulative practice" differed from his perception of communicative rationality, in which actors' engagement in processes of communication and argumentation for "finding shared truth" is presupposed[1038]. He stresses that such processes bear the capacity to facilitate shared understandings and normative change, rather than the "distortions" caused by norm entrepreneurs' strategic framing which might have been introduced in discourses[1039]. This assumption, however, seems to be based on the presumption of an "ideal speech situation" that is rarely given in spaces involving unequal power relationships[1040]. Norm entrepreneurs are often structurally forced to engage in strategic framing or even some sort of manipulation in order to construct a space in which their legitimate concerns can be addressed in communicative processes. Such distortions could be also seen as creative "pedagogical techniques", used to expose certain issues as clear and obvious, and prompt actors' learning (for instance, on how to apply certain norms appropriately) if the need to do so arises[1041]. Thus, on the one side, the moral legitimacy of such measures might depend on the intentions and the context in which norm advocates resorted to them; on the other, they may serve as the instruments for the creation of the discursive space in which processes of communication, argumentation and persuasion can then occur. In any case, pure distortions would not be especially efficient, particularly in the legal sphere, where "the rule of law as a social

[1033] *Ibid.*, 43
[1034] *Ibid.*, 44-45
[1035] *Ibid.*, 45
[1036] *Ibid.*, 45-47
[1037] *Ibid.*, 54
[1038] *Ibid.*, 47
[1039] *Ibid.*, 54
[1040] Risse/Sikkink (1999), 14; Risse (2000), 9-10, 18, based on Habermas
[1041] On "norm teaching" and "norm learning" see Price (1998), 617, based on Finnemore (1993)

practice"[1042] stipulates the evolution of legal norms and their meanings and where the ultimate normative results must correspond with the principle of integrity, revealing any potentially distorted or inconsistent issues[1043].

In her study on the negotiations on the Rome Statute, Nicole Deitelhoff identified that in this case, persuasion could be achieved through a two-level process[1044]. On one level, norm entrepreneurs aiming at the development and adoption of a progressive statute, acted as "discourse brokers" who "prepared" the persuasion environment by instigating political pressure, engaging in information and leverage politics[1045] and pushing through their agenda, which eventually allowed for the opening of a discursive space for the issues of their concern[1046]. The actual persuasion, in fact, took place on a second level, through discursive communication among the state delegates, some of whom became allies of the norm entrepreneurs and could use their knowledge and expertise while also promoting their agenda[1047]. By taking over the active role in this transnational process of persuasion, the state delegates acted as the norm entrepreneurs' allies. Here they played, in some respects, a similar part to that of the internal opposition as described in Risse and Sikkink's "spiral" model[1048], which was based on the "boomerang" effect generated by "transnational advocacy networks", as theorized by Keck and Sikkink[1049].

3.8.1. "Transnational advocacy networks" and the "boomerang" effect

The "boomerang" model of Margaret E. Keck and Kathryn Sikkink emphasizes the role that norm entrepreneurs play in evolution and diffusion of international norms, revealing their various tactics and strategies as well as the stages and effects of their influence on normative

[1042] Wiener (2004), 197
[1043] Günther (1988)
[1044] Deitelhoff (2006)
[1045] On information and leverage politics see Keck/Sikkink (1998, 1999)
[1046] Deitelhoff (2006), 78
[1047] *Ibid.*
[1048] Risse/Sikkink (1999), I will return to the model in subchapter '3.8.3. The "spiral" model of state socialization with international human rights norms' in more detail.
[1049] Keck/Sikkink (1998, 1999)

change[1050]. The model also introduces and theorizes the term "transnational advocacy networks" ("TANs"), which may involve various norm entrepreneurs whose collective efforts can reach out beyond borders through cooperation and exchange of information, serving their shared values, goals and interests[1051]. Main actors involved in TANs include international and domestic NGOs, research organizations, foundations, social movements, the media, churches, trade unions, academics, as well as parts of regional and international organizations or parts of governments[1052]. International and domestic NGOs play a particularly crucial role in TANs since they often act as initiators of pressure, provide information and lobby other actors to join their forces and promote their agendas[1053]. Furthermore, TANs also mainly emerge through the links between those NGOs produced by their activists' networking, for instance, during international conferences or forums where they meet, engage and exchange knowledge and experience to foster their agendas[1054]. Keck and Sikkink observe that an increase in international organizations and conferences, lower costs of travel as well as new communication technologies have facilitated their activities in past years[1055]. However, while the use of the latter has recently become more widespread due to the COVID-19 pandemic, it remains to be seen how the pandemic may have also impacted TANs and their agency in terms of the difficulties to travel, to organize international conferences and to participate in them in person. Similarly to the norms that they promote, the actions of TANs are also simultaneously structuring and constructed[1056]. That is, they embody various roles: those of agents, "communicative structures" and "political spaces", within which the exchange of information may proceed formally and informally, just like the circulation of the personnel[1057]. They are "characterized by voluntary, reciprocal and horizontal patterns of communication and exchange" and consist of "actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services"[1058]. Their ability to provide information in a productive and accurate way that, in turn, allows them to frame and insert their agendas creatively and effectively represents their "most valuable currency"[1059]. Efficiently using this 'currency' while monitoring compliance and putting pressure on responsible actors for the adoption of new policies, TANs influence powerful entities such as states and international organizations

[1050] *Ibid.*
[1051] Keck/Sikkink (1999), 91-92
[1052] *Ibid.*; Risse/Sikkink (1999), 18
[1053] Keck/Sikkink (1999), 92-93
[1054] *Ibid.*
[1055] *Ibid.*, 93
[1056] *Ibid.*, 90
[1057] *Ibid.*, 90-92
[1058] *Ibid.*, 89-91
[1059] *Ibid.*, 92-93

and promote implementation and evolution of international norms[1060]. Permanently seeking to maximize influence in areas of their interest, they contribute to changes in their target actors' priorities and identities, which should, in turn, produce similar changes in policies and eventually, behaviour[1061].

Keck and Sikkink base their model on the "boomerang" effect, which TANs may produce through the joint pressure of external or international and internal or domestic norm entrepreneurs, while pushing norm-violating states towards norm compliance[1062]. This effect can be induced when domestic groups have allies on the international level that can target their states from the outside and thus empower their internal opposition[1063]. Keck and Sikkink's model describes various tactics including information, symbolic, leverage and accountability politics that TANs use to achieve their goals[1064]. These tactics are also used to produce "frame resonance" that reflects their ability to win a "struggle over meaning" and impart their understanding of a certain issue on their target actors[1065]. The term 'information politics' refers to the ability of actors involved in TANs to move information quickly in an efficient and rational way to destinations where it can produce "the most impact"[1066], *i.e.*,:

> They provide information that would not otherwise be available, from sources that might not otherwise be heard, and make it comprehensible and useful to activists and publics who may be geographically and/or socially distant.[1067]

'Symbolic politics' refers to the ability to identify and use powerful symbols and stories that reflect remote situations, with the potential to create awareness around an issue at stake[1068]. 'Leverage politics' indicates the use of other actors' power to enable advocates to produce more influence than they would have achieved alone[1069]. That is, in certain situations, information and symbolic politics might be not sufficient for the achievement of their goals and the support of more powerful allies might be needed in order to strengthen the pressure and effectiveness of their agency[1070]. Leverage can bear a material and moral character: while the former normally embraces links to some kind of goods or money, the latter implies elements of shaming[1071]. 'Accountability politics', in turn, suggests actors' ability to remind

[1060] *Ibid*., 89
[1061] *Ibid*., 90
[1062] Keck/Sikkink (1998), 12-14; (1999), 93-94
[1063] *Ibid*.
[1064] Keck/Sikkink (1998), 16-25; (1999), 94-98
[1065] Keck/Sikkink (1998), 17; (1999), 95
[1066] Keck/Sikkink (1998), 18-22; (1999), 95
[1067] Keck/Sikkink (1999), 95
[1068] Keck/Sikkink (1998), 22-23; (1999), 96-97
[1069] Keck/Sikkink (1998), 23-24; (1999), 97
[1070] *Ibid*.
[1071] *Ibid*.

(potential) norm violators of their obligations[1072]. Keck and Sikkink observe that activists often try to persuade their target actors to take positions on certain issues which, in the case of a (potential) violation, would allow them to remind those actors about their promises and to shame actors who care about their reputation[1073]. By engaging in these politics, TANs can produce five stages of influence on their target actors, like states and/or international organizations. These include: 1) issue creation and agenda setting, 2) influence on target actors' discursive positions, 3) influence on institutional procedures, 4) influence on policy change, and finally 5) influence on target actors' behaviour[1074]. The first stage aims to generate attention by provoking meetings, debates and hearings on certain issues[1075]. The second can be traced in cases when TANs succeeded in persuading their target actors to discursively support certain agendas that can, in turn, facilitate the generation of relevant institutional procedures, *i.e.*, the achievement of the third stage[1076]. However, only reaching the fourth stage, that is, concrete policy changes, would indicate tangible influence, which could (although not automatically) affect actors' behaviour[1077]. In fact, Keck and Sikkink note that at the end of the day "official policies may predict nothing about how actors behave in reality"[1078].

3.8.2. 'Teaching' techniques of transnational civil society

In line with Keck and Sikkink, Richard Price also demonstrates how transnational civil society can promote normative change and states' socialization with norms by triggering processes of 'moral entrepreneurship' and 'emulation'[1079]. He identifies that norm advocates and their allies engage in processes of moral persuasion and social pressure in the initial stages of normative change campaigns when their success is rather uncertain[1080]. Decision-makers, on the other side, tend to do so only when they feel that the norm has been

[1072] Keck/Sikkink (1998), 24-25; (1999), 97-98
[1073] *Ibid.*
[1074] Keck/Sikkink (1998), 25-26; (1999), 98
[1075] *Ibid.*
[1076] *Ibid.*
[1077] *Ibid.*
[1078] Keck/Sikkink (1999), 98
[1079] Price (1998), 614, 616, 637
[1080] *Ibid*., 640

significantly supported by other relevant actors (*i.e.*, they try to avoid an "outlier status"), the effect that can be produced by a process of emulation based on identity politics[1081]. Price reveals efforts of transnational civil society as "catalytic" in "teaching" states about new appropriate behaviour[1082]. Based on Martha Finnemore, he differentiates between processes of "norm learning" and "norm teaching", where the latter includes "pedagogical ingredients of information, persuasion, shame, and discipline that are the tools available to the otherwise underpowered agents of transnational civil society"[1083]. While teaching stimulates actors to learn, which implies that they are exogenously stimulated to do so, Price stresses that states are prone to being taught about the appropriateness of certain behaviour[1084]. Similarly to Keck and Sikkink[1085], Price identifies four "pedagogical techniques" that have been applied by transnational civil society and proven to be as especially influential: 1) dissemination of information; 2) establishment of networks; 3) grafting a new norm onto already existing ones; and 4) demanding that target actors publicly justify their positions[1086]. By 1) generating and publicly disseminating information, transnational civil society engages in setting the agenda, creating worldwide concern and publicly problematizing issues which should be tackled by states[1087]. However, in contrast to epistemic communities, transnational civil society does not provide experts whose knowledge would be requested "in times of uncertainty", rather, they can be seen as "moral entrepreneurs (albeit with expertise) bound by a common agenda of creating international norms […] [by] engag[ing] in moral proselytizing through persuasion"[1088]. As agenda-setters, NGOs can politicize issues that were not previously perceived as political[1089]. By doing so, they can reveal for instance "the practice of violence as an area of politics rather than an anonymous realm of military practice"[1090]. "Two barriers" can hinder their efforts in this regard, however: "the lack of access" (to a policy process or a strategy) and "the lack of information" relating to confidential or secret issues[1091]. And yet, despite these obstacles, transnational civil society has proven they are able to identify and politicize situations as crisis issues that, in turn, fostered states' response and subsequent normative changes[1092]. Furthermore, by 2) networking with officials on domestic and international levels transnational civil society may generate "a community of morally

[1081] *Ibid*.
[1082] *Ibid*., 638-639
[1083] Price (1998), 617, based on Finnemore (1993)
[1084] *Ibid*., 621
[1085] Keck/Sikkink (1998, 1999)
[1086] Price (1998), 617
[1087] *Ibid*., 619-622
[1088] *Ibid*., 620
[1089] *Ibid*., 622
[1090] *Ibid*.
[1091] *Ibid*., 626
[1092] *Ibid*., 622, 639-640

persuaded political allies"[1093] who may then provide them with assistance and support in their access to political processes, in which they can then voice and insert their concerns[1094]. That is, networking has capacity to facilitate advocates' access to policy-making processes and to generate or reinforce the transformation of decisions from "insulated" choices into political matters that may, in turn, produce change[1095]. Like Keck and Sikkink[1096], Price also observes that contemporary technology and electronic media developments have accelerated the establishment of networks, their cross-border communication and cooperation, and the reduction of their transaction costs[1097]. Similar to framing, 3) grafting techniques denote advocates' engagement in the detection of a new norm's resonance with already established and recognized norms that should promote its further development and influence[1098]. This process embraces a "mix of genealogical heritage and conscious manipulation [that is] involved in such normative rooting and branching"[1099]. That is, activists may emphasize the new norm's interconnection with other accepted norms and/or concepts (such as the prohibition of discrimination), highlight its meaning within certain branches of international law as well as for the evolution of certain issues and discourses[1100]. In order to 4) pressure their target actors to justify their decisions, transnational civil society may engage in shaming, which influences actors who are concerned with their status and reputation[1101]. Similarly to Keck and Sikkink's observation of activists' accountability politics[1102], Price also notes that the effect of shaming is facilitated if target actors have already been previously persuaded to express their rhetorical support for a norm in question[1103]. This provides it with legitimacy on the one side and its advocates with political space for pressure on the other[1104].

[1093] *Ibid*., 627
[1094] *Ibid*., 623-624
[1095] *Ibid*., 625
[1096] Keck/Sikkink (1999), 93
[1097] Price (1998), 625-627
[1098] *Ibid*., 628, 630
[1099] *Ibid*., 628
[1100] *Ibid*.
[1101] *Ibid*., 617, 635
[1102] Keck/Sikkink (1998), 24-25; (1999), 97-98
[1103] Price (1998), 635
[1104] *Ibid*.

3.8.3. The "spiral" model of state socialization with international human rights norms

Building on Keck and Sikkink's theorization of TANs and the 'boomerang' effect that they can produce[1105], Risse and Sikkink have developed another influential model that identifies various processes, stages and dynamics of state socialization with international human rights norms[1106]. Their "spiral" model depicts how principled ideas can be transformed into norms about appropriate behaviour that then, in turn, influence identities, interests and choices[1107]. The model illustrates how actors can be persuaded "to interpret their material and political interests and preferences in light of the idea" and to accept certain obligations that this idea delegates as appropriate, even if initially they do so out of instrumental motivations[1108]. Risse and Sikkink emphasize the importance of cooperation and links among TANs, that is, between actors working on international and/or transnational and domestic levels, for processes of norm diffusion and resistance against norm-violating behaviour[1109]. While domestic actors may reach out to their international/transnational allies, the function of the latter who can push the "target states" from the outside, is specifically vital in the early stages of the 'spiral'[1110]. They may question norm-violating behaviour on the international level while triggering processes such as moral consciousness-raising and shaming, as well as ultimately empowering and encouraging internal actors to maintain their efforts from within domestic structures[1111]. Internal actors on the other side should play another indispensable role in the overall process by upholding the further evolution of a successful 'spiral' through internal pressure, persuasion and argumentation[1112].

Risse and Sikkink identify three types of socialization processes including 1) adaptation and strategic bargaining, 2) moral consciousness-raising, shaming, argumentation, dialogue, and persuasion, and 3) institutionalization and habitualization, which may take place simultaneously[1113]. Instrumental adaptation 1) occurs when actors accused of violating a norm "adjust to pressures by making some tactical concessions" and might even engage in strategic

[1105] Keck/Sikkink (1998, 1999)
[1106] Risse/Sikkink (1999), 11-35
[1107] *Ibid*., 6-11
[1108] *Ibid*., 14
[1109] *Ibid*., 5
[1110] *Ibid*., 17-24
[1111] *Ibid*., 22-28
[1112] *Ibid*., 25-35
[1113] *Ibid*., 11

bargaining processes, which reveals their nature as "expected utility-maximizers", in accordance with rational choice arguments[1114]. In early stages of a socialization process, norm-violating actors may adjust their behaviour for instrumental reasons "without necessarily believing in the validity of the norms"[1115]. However, even if old leadership might have instrumentally adapted to a norm, new leadership may be sincerely willing to promote its internalization[1116]. The second type of a socialization process relates to discursive practices, *i.e.*, communication and argumentation 2), through which norm advocates may "entangle" their target actors "in a moral discourse which [the latter] cannot escape in the long run"[1117] and that should ultimately enable persuasion in the validity of norms[1118]. Risse and Sikkink note that such practices can occur with respect to both claims: relating to the validity of norms in themselves and/or to their validity in certain situations[1119]. Furthermore, the authors argue that, due to the lack of "ideal speech situations" in realms involving unequal power relationships, actors might rely upon and engage in "a mix of instrumental and argumentative rationalities" throughout the process[1120]. Institutionalization and habitualization 3) should, in turn, indicate that the socialization process has achieved its final stage, that a norm is "taken for granted" and that it is internalized and complied with, without external pressure and "irrespective of individual beliefs"[1121].

The 'spiral' model differentiates between fives phases of state socialization with norms: 1) repression, 2) denial, 3) tactical concessions, 4) prescriptive status, and 5) rule-consistent behaviour[1122]. The first phase, repression, is characterized by an oppressive situation in a state with an opposition, which is too weak to resist it, and the activation of a TAN that plays a decisive role in questioning such behaviour on an international level[1123]. The second phase, denial, relates to the reaction of norm-violating actors to criticism produced by a TAN[1124]. In this stage, norm-violating actors may assert that the TAN's actions represent an "illegitimate intervention in the internal affairs of the country"[1125]. Risse and Sikkink argue that such a dynamic implies that target actors "are at least implicitly aware that they face a problem in terms of their international reputation" and indicates that the socialization process has

[1114] *Ibid*., 11-12
[1115] *Ibid*., 12, 16
[1116] *Ibid*., 10
[1117] *Ibid*., 16
[1118] *Ibid*., 13-16
[1119] *Ibid*., 13
[1120] *Ibid*., 14-15, 16-17
[1121] *Ibid*., 11, 17, based on Finnemore/Sikkink (1998)
[1122] *Ibid*., 22-35
[1123] *Ibid*., 22
[1124] *Ibid*., 22-23
[1125] *Ibid*., 23

started[1126]. This suggestion is also supported by the observation that even when engaging in denial, norm-violating actors would not normally openly contest the validity of a norm in question, but rather refer to another "allegedly more valid international norm"[1127]. However, at this stage, norm-violating actors can still resist their critics' pressure, which, if successful, would make further evolution of a socialization process considerably challenging[1128]. If a norm in question is already "more fully institutionalized" however, the "disappearance of the denial phase" should occur more quickly (and/or should ease the transition of the 'spiral' to the third stage)[1129]. Additionally, the maintenance of pressure and the vulnerability of target actors to it likewise play a crucial role here[1130]. The third phase of tactical concessions is achieved if resisting actors manage to bring norm-violating actors into a position of undertaking strategic "cosmetic changes" for satisfaction and "pacification" of their critics[1131]. Such a dynamic, in turn, would have the potential to encourage internal opposition to resist norm-violating behaviour from within domestic structures[1132]. In fact, the decisive effect that can be produced here is the "shift" of the resistance, from the TAN's activities to those of the domestic opposition[1133]. Risse and Sikkink notice that this stage is "the most precarious", since its outcome either leads to the further evolution of the socialization process or to a backlash[1134]. The former should carry the day if internal norm entrepreneurs succeed in gradually transforming the discourse from being based on instrumental to argumentative rationality[1135]. Since norm-violating actors have already (re-) affirmed the validity of a certain norm in their tactical concessions, even if perhaps initially out of instrumental deliberations, they might gradually get "entrapped in their own rhetoric" and engage in the argumentative discourse based on the logic of arguing, which can be further maintained by their "reputational concerns"[1136]. That is, while the "dominant mode of social interaction" might change throughout the 'spiral', from instrumental rationality in its initial stages towards argumentative in the later[1137], this dynamic of ""self-entrapment" into argumentative behavior" is underpinned by instrumental reasons on the one hand, and argumentative rationality on the other[1138]. Moreover, justification attempts by norm-violating actors would imply the recognition of the transnational and domestic opposition and consideration of their

[1126] *Ibid*., 23-24
[1127] *Ibid*.
[1128] *Ibid*., 24
[1129] *Ibid*.
[1130] *Ibid*.
[1131] *Ibid*., 25
[1132] *Ibid*.
[1133] *Ibid*.
[1134] *Ibid*.
[1135] *Ibid*., 26-28
[1136] *Ibid*.
[1137] *Ibid*., 34
[1138] *Ibid*., 28

criticism, which would, in turn, empower their positions[1139]. In fact, such a reaction may lead to the transnational critics' engagement with their target state in a "true dialogue […] [based on argumentative rationality] [on] how to improve the […] situation"[1140]. The acceptance of a norm's prescriptive status would indicate that the socialization 'spiral' had achieved its fourth stage[1141]. It can be identified, for instance, by actors' regular references to a norm in their discursive practices, their engagement in a dialogue with their critics and institutionalization processes that would suggest their recognition of a norm's validity[1142]. That is, dominant modes of social interaction here include argumentative rationality and commencing institutionalization[1143]. Risse and Sikkink assume that it would not be possible, however, to establish whether actors' discursive practices are based on instrumental deliberations or "true beliefs"[1144]. Nevertheless, what is of most significance is that "their words and deeds ultimately match"[1145]. Even if compliance were still missing or insufficient, their attempts to justify their norm-violating behaviour, their apologies and promises for better application in the future would indicate their recognition (or reaffirmation) of the norm's validity[1146]. Yet, the achievement of the prescriptive status also requires that actors not only refer to a norm discursively but also try to improve its application in practice, for instance, by creating new institutions, training officials for the improvement of their expertise in norm application and by providing mechanisms for complaint[1147]. A norm that has gained a prescriptive status should thus, "over time", also achieve the final stage of the socialization process, *i.e.*, its internalization, which enables rule-consistent behaviour[1148]. However, as subsequent studies have similarly proven[1149], Risse and Sikkink stress that despite the achievement of a prescriptive status and a policy solution for (better) implementation, instances of non-compliance or misapplication may still occur[1150]. Therefore, ongoing monitoring of a norm's application, including both exogenous and endogenous pressure, is still required to be further maintained[1151]. Dominant modes of social action and interaction that they identified in the final stage of the socialization process include institutionalization and habitualization[1152]. That is, only when compliance becomes "habitual practice of actors" can internalization be

[1139] *Ibid.*
[1140] *Ibid.*
[1141] *Ibid.*, 29
[1142] *Ibid.*, 29-30
[1143] *Ibid.*, 30
[1144] *Ibid.*, 29
[1145] *Ibid.*
[1146] *Ibid.*, 29-30
[1147] *Ibid.*
[1148] *Ibid.*, 30
[1149] *E.g.*, Wiener (2004); Wiener/Puetter (2009); Krook/True (2010); Badescu/Weiss (2010); Deitelhoff/Zimmerman (2013); Chappell (2016); Alter (2018)
[1150] Risse/Sikkink (1999), 31
[1151] *Ibid.*
[1152] *Ibid.*, 33-34

considered achieved[1153]. Risse and Sikkink notice that in the process of norm socialization, it takes time for actors to engage in such communication and it requires the active presence of all necessary elements of the "relevant social structure", including specific norms and actors who monitor compliance and resist its absence[1154]. What's more, the model is not evolutionary and the progress of the 'spiral' can be interrupted throughout the process, which might provoke "a stabilization of the status quo of norm violation"[1155].

3.8.4. Two levels of agency: "social protest" and "social learning"

Jeffrey T. Checkel defines normative socialization as "a process of inducting actors into the norms and rules of a given community"[1156]. He argues that its final stage, internalization, which enables sustained compliance[1157], should be seen in light of the intervening social interaction processes, which ultimately lead actors there[1158]. Checkel likewise suggests that a switch in actors' behaviour from that, which reveals the logic of consequentialism, to the logic of the appropriateness, implies their socialization with a certain norm[1159]. When this has occurred, he argues, compliance should be sustained without additional pressure or incentives[1160]. He has traced the dynamics that can lead to such shift and explained why actors comply with norms[1161].

Based on the assumption that both rational choice and social constructivism provide valuable explanations of normative socialization processes, Checkel specifically highlights the role of social protest or mobilization and social learning that can facilitate compliance[1162]. He indicates, for instance, that the 'boomerang' effect, theorized by Keck and Sikkink, represents a mechanism of social protest[1163]. In line with critics of a linear socialization process[1164], he

[1153] *Ibid*., 33
[1154] *Ibid*., 31
[1155] *Ibid*., 34
[1156] Checkel (2005), 804
[1157] *Ibid*.
[1158] Checkel (2001), 554
[1159] Checkel (2005), 804
[1160] *Ibid*.
[1161] Checkel (2001, 2005)
[1162] Checkel (2001), 557
[1163] *Ibid*.
[1164] *E.g.*, Wiener (2004, 2007, 2009); Badescu/Weiss (2010); Deitelhoff/Zimmermann (2013)

argues that influence achieved by social sanctioning and social protest, which seems to be largely ruled by rational choice, does not so much reveal norm internalization, but rather, constrained behaviour[1165]. That is, whereas the "sanctioning force" is embodied by a social norm and inserted by its advocates, the prevailing behavioural logic appears to be that of the consequentialism[1166]. In fact, strategic social construction implies that agents engage in strategic interaction and calculate ways to maximize their utility value[1167]. However, their actions continue to be motivated by their normative values and beliefs[1168]. The assumption that social sanctioning and mobilization around norm-violating actors may, indeed, influence agents' behaviour (due to pressure put on them according to the logic of consequentialism) suggests that the outcome of such a process would not reveal learning and/or persuasion[1169]. Yet, in some cases, norms may still "constitute agents" in terms of their interests and identities[1170].

Checkel claims that a "mutual constitution" of agents and structures, *i.e.*, a "reproduction of social reality" [1171], should be reflected in light of intervening processes of social interaction[1172]. He argues that in contrast to social protest, which is associated with political pressure, social learning explains changes in actors' preferences, their socialization and compliance with norms as outcomes of their engagement in processes of deliberative, in contrast to strategic, interaction[1173]. That is, argumentative persuasion as "a social process of interaction that involves changing attitudes about cause and effect in the absence of overt coercion"[1174] represents a mechanism that can trigger social learning and can be identified by focusing on the "micro- and agency level"[1175]. Checkel suggests that while the rationalist approach stresses the ability of actors with fixed preferences to update past knowledge for the improvement of their previous strategies through "simple learning", the social constructivist perspective can unveil a process of "complex social learning" that may shape and change their preferences, interests and identities "through and during interaction"[1176].

[1165] Checkel (2001), 557-558
[1166] *Ibid*., 558
[1167] *Ibid*., 558-559
[1168] *Ibid*.
[1169] *Ibid*., 569
[1170] *Ibid*., 557
[1171] *Ibid*., 579
[1172] *Ibid*., 559
[1173] *Ibid*., 560, 579
[1174] *Ibid*., 562
[1175] *Ibid*., 560
[1176] *Ibid*., 561

Checkel theorizes five conditions comprising historical context and institutional setting that facilitate processes of social interaction and actors' proneness to persuasion, change of preferences, and ultimately compliance[1177]. The first condition is "a novel and uncertain environment – generated by the newness of the issue, a crisis or serious policy failure" that motivates actors to analyse such information[1178]. The second refers to actors' relative newness to the issue at stake, which might facilitate their openness to learning and persuasion[1179]. The third condition stipulates that a persuader belongs to an authoritative group, which is respected by the person being persuaded[1180]. The fourth condition claims that actors should not be lectured or demanded to comply, but rather convinced by the strength of an argument[1181]. The fifth stipulates that processes of social interaction occur in "less politicized and more insulated, private settings"[1182]. Furthermore, Checkel notes that factors such as change at the elite level and certain timing may also additionally explain policy change[1183].

Checkel reasons that while social sanctioning and social protest are primarily exercised by NGOs that often engage in lecturing and place pressure on their target actors, social learning is rather fostered by experts from the field, especially those belonging to an authoritative group respected by those being persuaded, who engage in "calm dialogue" through arguing and exploration[1184]. If the persuasion is successful, the outcome of the process could be seen as "learning new understandings" and not "strategic adaptation"[1185]. That is, persuasion and learning represent outcomes of deliberative practices that reveal social construction as less strategic[1186]. However, Checkel also acknowledges that as an "obvious feature of social life", compliance with norms could be explained by both mechanisms of social learning and instrumental choice[1187]. Both likewise demonstrate the power of norms to influence actors' behaviour, whether out of instrumental deliberations (which, while potentially less sustainable in the long-term, can also be subject to a slower socialization process) or as an outcome of learning (which could be more sustainable in the long-term and facilitate socialization)[1188].

[1177] *Ibid*., 562-564; see also Chappell (2016) on "spatial" and "temporal nestedness" of the Court
[1178] Checkel (2001), 562
[1179] *Ibid*., 563
[1180] *Ibid*.
[1181] *Ibid*.
[1182] *Ibid*.
[1183] *Ibid*., 571, 577
[1184] *Ibid*., 574
[1185] *Ibid*., 575
[1186] *Ibid*., 579
[1187] *Ibid*., 581
[1188] *Ibid*., 571, 577

In his later approaches to socialization and compliance with norms, Checkel differentiates between their three mechanisms: "strategic calculation", "role-playing" and "normative suasion", based on three modes of rationality respectively: instrumental, bounded and communicative[1189]. Strategic calculation, as an inherent feature of social life rooted in rationalism, generally implies that behaviour is motivated by some kind of incentive, material and/or social: "[the agents] carefully calculate and seek to maximize given interests, adapting their behaviour to the norms and rules favoured by the international community"[1190]. Checkel argues that this mechanism alone couldn't provide for actors' socialization with norms, since the switch from the logic of consequentialism to that of the appropriateness does not occur here[1191]. As Risse and Sikkink claim in their 'spiral' model, tactical concessions based on instrumental adaptation may indeed, under certain conditions, "entrap" agents in their own rhetoric, which can lead them into an argumentative mode. Yet, it is argumentative rationality that must eventually prevail to enable further evolution of the socialization process towards rule-consistent behaviour[1192]. Checkel stresses, in turn, that in contrast to strategic calculation based on the logic of consequentialism, role-playing and normative suasion operate in accordance with the logic of appropriateness[1193]. However, they represent "two different types" of actors' socialization with norms[1194]. The mechanism of role-playing, highlighted by organizational theory and cognitive/social psychology, perceives agents as "boundedly rational"[1195]. That is, they are bound to their respective roles within certain organizational or institutional environments as well as to certain social expectations of appropriateness, whose fulfilment requires the acquirement of certain knowledge by "learning a role"[1196]. That is, actors adopt and adapt to those specific roles because of their appropriateness[1197], which should be especially fostered within organizational or institutional settings that are characterized by a long, sustained and intense contact[1198]. Their engagement in role-playing implies that their behaviour is already (predominantly) ruled by the logic of appropriateness and not rational calculation[1199]. Individuals with previous experience in regional or international settings can be rather accustomed to the adoption of new roles in supranational contexts, more so than those who lack such experience[1200]. As soon as an agent (be they an

[1189] Checkel (2005), 805
[1190] *Ibid*., 809
[1191] *Ibid*.
[1192] Risse/Sikkink (1999), 25-35
[1193] Checkel (2005), 804-805
[1194] *Ibid*.
[1195] *Ibid*., 810
[1196] *Ibid*., 804, 810
[1197] *Ibid*., 804-805
[1198] *Ibid*., 810-811
[1199] *Ibid*., 804-805, 810
[1200] *Ibid*., 811

individual or an entity such as a state or an organization) has started to believe in the appropriateness or righteousness of a certain norm and then also changes their interests, values and perhaps even identity accordingly, normative suasion has prevailed and should enable norm internalization[1201]. In contrast to role-playing, which is still rather non-reflective, the mechanism of normative suasion, which can be enacted by means of communication, argumentation and persuasion, suggests reflective internalization of "new appropriateness understandings"[1202]. It also implies that the switch from the logic of consequentialism to that of the appropriateness has been completed[1203]. In this respect, Checkel emphasizes that although strategic calculation may also lead to compliance and finally even the internalization of norms, socialization is deeper and more stable if it has been achieved in a reflective way through normative suasion[1204].

Checkel highlights that strategic calculation, role-playing and normative suasion represent links between international institutions and socializing outcomes[1205]. At the same time, institutions play a significant role in socialization processes by serving either as their promoters or as sites where social learning takes place[1206]. Risse and Sikikink, for instance, consider the crucial role of institutions as promoters of socialization in their 'spiral' model[1207]. Checkel, in turn, notes that individuals operating within institutional and organizational settings adopt their respective roles and act according to the expectations connected to those roles, even though social pressure there is virtually "absent or deflected"[1208]. Nevertheless, both perspectives seem to agree upon the view that actors' reflective internalization of norms can be eventually achieved through processes of dialogue, persuasion and complex social learning based on communicative or argumentative rationality. Such processes, however, are often generated by an individual's agency that might be primarily grounded in other rationalities – that of appropriateness and consequentialism.

Similar to Checkel's differentiation between social protest and social learning, both of which have the capacity to further processes of actors' socialization with norms, Nicole Deitelhoff, in her study on the negotiations on the Rome Statute, identifies (as already previously mentioned) the mechanism of persuasion as being based on two levels of actors' agency:

[1201] *Ibid*., 804-805
[1202] *Ibid*., 812
[1203] *Ibid*.
[1204] *Ibid*., 813
[1205] *Ibid*., 808
[1206] *Ibid*., 806, 815
[1207] Risse/Sikkink (1999)
[1208] Checkel (2005), 807

"manipulative persuasion" (social protest) and "argumentative persuasion" (social learning)[1209]. She demonstrates that while NGOs involved in the negotiations were motivated by the logic of appropriateness, they acted primarily strategically, based on the logic of consequentialism. That is, they largely "prepared" normative and institutional settings in a way that influenced processes of communication and argumentation among state delegates[1210]. They supported decision-making actors by providing them with necessary expertise. Those decision-making actors then used this knowledge and operated, in turn, essentially as NGOs' allies during their engagement in a rational discourse and genuine processes of persuasion, which generated a change of interests based on the exchange of arguments[1211]. That is, the agenda of NGOs ultimately achieved its targets by means of social learning or argumentative persuasion. However, due to their restricted access and limited power, this effect required their previous engagement in some sort of social protest or manipulative persuasion.

3.9. Resistance practices against international courts

Many parallels with findings delineated above can be drawn from the interdisciplinary research that embraces legal and political science perspectives and focuses on resistance practices against the authority of international courts ('ICs') and/or international law ('IL'). Similar to research on contestation of international norms, this research has been also largely focused on state criticism directed at the authority of ICs/IL (although it considers the role of non-state actors as well), while legal communities including adjudicators applying the law have been generally depicted as "the curators" or "the trustees" of the rule of law[1212]. Comparable to the distinction between *legal* or *formal validity* and *social* or *shared recognition* of norms[1213], Karen Alter also distinguishes between the *de-jure* and *de-facto*

[1209] Deitelhoff (2006)
[1210] *Ibid*., 78
[1211] *Ibid*.
[1212] Alter (2018), 6
[1213] Wiener (2007, 2009); Wiener/Puetter (2009)

authority of IL[1214]. She claims that IL can gain *de-facto* authority and influence actors' behaviour only if its "formal power" can be actually "wielded" by relevant actors[1215]. Furthermore, the binary differentiation between normative *contestation of application* and *validity* [1216] has been correspondingly theorized here as *ordinary* and *extraordinary criticism/resistance* [1217]. While ordinary critique occurs within the legitimate space of normative deliberation, the extraordinary crosses line of validity[1218]. For instance, Alter suggests that the lack of any hierarchy among international rules characterizes the reality of "international regime complexity", in which IL is embedded, and which might explain state contestation of certain norms by appeals to other competing norms[1219]. She observes that misapplication of "inconvenient" law, justified by references to other binding rules (a tactic that she calls "maneuvering within and around the international regime complex") has been applied by states in order to avoid certain legal obligations[1220]. She argues this could be considered extraordinary criticism of IL, although substantial studies of this aspect are lacking[1221]. She also claims, however, that while such tactics might contest the validity of certain norms, or "erode" the legal authority of a certain international regime[1222], this should not automatically weaken the authority of IL generally[1223]. On the other hand, actors' use of power in order to influence the interpretation of the law and the promotion of certain political agendas within the legal field is considered ordinary criticism[1224]. While such criticism could even target the validity of certain issues, it occurs (like appointment politics that might aim to promote certain agendas) within the legitimate area of "practicing law"[1225] and is articulated by inference of legal language[1226]. In line with the aforementioned studies that reveal strengthening effects of applicatory norm contestation[1227], Karen Alter and Mikael R. Madsen *et al*. also assert that ordinary criticism/resistance directed at the authority of ICs/IL (or "even harsh critique from failed backlash attempts"[1228]) can benefit their functioning[1229]. This may occur, for instance, when the criticism provides ICs with legal or political information that "they might otherwise not have been aware of"[1230].

[1214] Alter (2018), 5
[1215] *Ibid*.
[1216] Deitelhoff/Zimmermann (2013)
[1217] Alter (2018); Madsen *et al*. (2018)
[1218] *Ibid*.
[1219] Alter (2018), 6
[1220] *Ibid*., 7, 13, 17, 19-21
[1221] *Ibid*., 13, 19-21
[1222] On "erosion" of international norms see Rosert/Schirmbeck (2007)
[1223] Alter (2018), 21; also Madsen *et al*. (2018)
[1224] Alter (2018), 13-15
[1225] *Ibid*., 14
[1226] *Ibid*., 13-15
[1227] Wiener (2004, 2007, 2009); Badescu/Weiss (2010); Deitelhoff/Zimmermann (2013)
[1228] Madsen *et al*. (2018), 217
[1229] Alter (2018), 25; Madsen *et al*. (2018), 217
[1230] Madsen *et al*. (2018), 217

Focusing on various forms, types and patterns of resistance against ICs/IL, Madsen *et al*. have developed and theorized an analytical framework that is oriented towards cases of "reactionary action directed against" ICs and/or their rulings[1231]. The authors differentiate between two forms of resistance: 1) a "pushback", which seeks to resist within the system by exercising ordinary critique, and 2) a "backlash" that rather seeks to overturn the system through extraordinary critique[1232]. They define the first as "a form of resistance occurring within the playing field of ICs and typically concerning specific legal developments in jurisprudence and case-law", and the second as "resistance that goes beyond the ordinary playing field of law and includes a critique of not only law but also the very institution – the court – and its authority"[1233]. Although a pushback may be also directed at "reversing developments in law"[1234], the authors argue that such a process is "both normal and useful"[1235] and "even a necessary dynamic of legal systems"[1236] that does not aspire to question the authority of an IC as such[1237]. In contrast, a backlash rather reveals "a reactionary critique of progress"[1238] that seeks to resist "advancements in law"[1239], promoting a backwards institutional transformation and a limitation of institutional powers, a suspension or even a closing of an institution[1240]. That is, while a pushback complies with the 'rules of the game', a backlash contests the rules and aims at "limiting the competencies or abolishing an IC altogether"[1241].

The framework identifies three types of critique through which actors can resist ICs/IL[1242]. They can do so by resisting 1) the judicial functioning of an IC, which involves issues of its membership, its case load, the access to an IC, substantive elements of its adjudication and compliance with its judgements[1243]. Likewise, actors can resist 2) the institutional set-up of an IC, for instance, by cutting its budget, blocking and/or promoting certain candidates for appointment, dissolving some of its legal procedures or even the court itself[1244]. Finally, resistance against ICs/IL can be exercised by means of 3) a "negative public discourse regarding an IC", which can take various forms and involve various patterns[1245]. The exposed

[1231] *Ibid*., 209
[1232] *Ibid*., 199-203
[1233] *Ibid*., 199
[1234] *Ibid*., 203
[1235] *Ibid*.
[1236] *Ibid*., 202
[1237] *Ibid*., 202-204
[1238] *Ibid*., 200
[1239] *Ibid*., 201
[1240] *Ibid*., 200-203, 206
[1241] *Ibid*., 209
[1242] *Ibid*.
[1243] *Ibid*., 209-211
[1244] *Ibid*., 211
[1245] *Ibid*., 211-212

forms of such a discourse include critique of an IC's legal reasoning quality, of its judgements, or simply a critique based on "popular resentment towards ICs"[1246]. While the former two types of critique seem to be primarily exercised by Member States, the latter can be characterized by various patterns depending on the involved actors (such as state officials, transnational legal communities, politicians or ordinary citizens) and on how these actors engage in their resistance (for instance, within parliaments or regional/international organizations, through media channels or public discussions)[1247].

What's more, the framework developed by Madsen *et al*. suggests analyzing three factors that mainly underlie resistance processes and their dynamics. As mentioned above, the authors consider the constellation of the involved actors to be a crucial factor that identifies the pattern of a certain resistance[1248]. Their framework differentiates between resisting parties on the one side and ICs and their supporters on the other[1249]. Whereas a pushback against ICs/IL can be exercised by individual Member States and/or other actors operating in legal and political fields (such as domestic courts, NGOs and bar associations) a backlash, due to the nature and structure of ICs, specifically requires the "collective action of Member States" and generally a broad mobilization of their various audiences[1250]. That is, the authors argue that Member States, due to their power to enable a potential termination or institutional reform of a particular court, play an essential role in the generation of a backlash[1251]. While institutional actors representing international organizations may also significantly influence resisting or counter-resisting campaigns[1252], non-state resistance generally carries the potential to produce a pushback or "prompt broader mobilisations". These may eventually include governments, which then, in turn, could also produce a backlash[1253]. Along with the constellation of the involved actors, the framework emphasizes key influences on resistance processes and their dynamics, from institutional factors on the one hand as well as broader societal trends and "structural cleavages" on the other[1254]. While the former relates to issues such as judicial functioning, institutional set-ups and jurisdiction[1255], the latter refers to the socio-political context. This context can reveal whether a certain issue around which resistance has

[1246] *Ibid*., 211
[1247] *Ibid*., 211-212
[1248] *Ibid*., 199
[1249] *Ibid*., 203-206
[1250] *Ibid*., 198, 204-205
[1251] *Ibid*., 204
[1252] *Ibid*., 205-206
[1253] *Ibid*., 204
[1254] *Ibid*., 200-201, 215-216
[1255] *Ibid*., 215

mobilized may have a particular resonance and "gain momentum"[1256]. Whereas ICs are themselves influenced by international evolutions in certain areas, they can likewise contribute by "their mere operation" to certain socio-political trends and/or cleavages[1257]. That is, broader socio-political cleavages in relation to a certain subject can be likewise exposed in the operation of an IC, the resistance against which in some ways reflects resistance against "more general societal trends" embodied in its operation[1258]. These institutional and socio-political factors considered by the framework seem to correspond, for instance, with what Checkel had theorized as the historical context and institutional setting in which processes of social interaction are embedded, as well as with Deitelhoff's theorization of normative and institutional settings that enable processes of communication and persuasion in her case study[1259]. Some correspondence can be similarly identified with Chappell's references to the "temporal" and "spatial nestedness" of the ICC, which influence the application and interpretation of the law by its staff[1260] and may likewise influence processes and dynamics of resistance against certain tendencies identified in its work.

While Alter *et al*. also differentiate between successful and unsuccessful types of resistance, depending on whether the aims of the resistance have been achieved (for instance, a successful pushback or unsuccessful backlash)[1261], Madsen *et al*. elaborate on four potential outcomes that can be produced in accordance with the form of a resistance[1262]. Simultaneously, the authors suggest that the achieved outcomes may conversely indicate which form of resistance has taken place[1263]. While a pushback or ordinary resistance can be 1) consequential or 2) inconsequential (only) for the law, a backlash or extraordinary resistance can be 3) consequential or 4) inconsequential for both the law and the targeted institution[1264]. The achievement of a particular outcome, and thus the form of the resistance, can also be seen as dependent on the reaction of the affected court. That is, the framework considers the agency that ICs can also exercise "as actors in the process"[1265]. This is significant in that the court may develop particular strategies or "techniques of judicial resilience"[1266] in response, which would be "reflected in decisions about institutional

[1256] *Ibid*., 216
[1257] *Ibid*., 200-201, 203
[1258] *Ibid*., 200-201
[1259] Checkel (2001); Deitelhoff (2006); also Risse (2000) (on common life-world that should underpin actors' engagement in argumentative rationality)
[1260] Chappell (2016), 199-201
[1261] Alter *et al*. (2016a)
[1262] Madsen *et al*. (2018), 206
[1263] *Ibid*., 200
[1264] *Ibid*., 206
[1265] *Ibid*., 201
[1266] *Ibid*., 212

management or legal reasoning"[1267] and can "mitigate the effects of resistance" or even "pre-emptively prevent resistance"[1268]. The authors generally suggest studying processes of resistance independently from its outcomes, although they are "causally linked"[1269]. Such a focus, they argue, can also help to identify the role that an IC may play in the process[1270].

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The resistance traced in the given case in terms of its processes, dynamics and achieved effects is in many respects analogous with the role of TANs analyzed by Risse and Sikkink in their 'spiral' model on state socialization with international norms[1271]. As the authors demonstrate, while TANs engage in social protest and mobilization based on instrumental rationality in the initial stages of the 'spiral', they can eventually "entrap" their target actors in the mode of argumentative rationality. That is, the 'spiral' model describes the process of socialization with norms, within which argumentative rationality can be attained in the absence of an "ideal speech situation", which stipulates the involvement of actors with (relatively) equal status[1272]. In contrast, the outcome of persuasion described by Deitelhoff in her study on the negotiations on the Rome Statute, *i.e.*, achieved in a justificatory discourse, was enabled by the involvement of actors with (relatively) equal status on the second level of the persuasion process (through "argumentative persuasion" or social learning)[1273]. A similar development could be identified in the given case of resistance that promoted a debate on the validity of the SGBV prohibition norm in the context of a certain legal case, *i.e.*, in an applicatory discourse. Although various processes of norm evolution[1274] take place in different spaces, they all involve the same logics of behaviour, different varieties of which can prevail at their various stages, and reveal the dual quality of norms as both structuring and constructed. What's more, these processes are interconnected: while socialization processes with the appropriate application of norms which take place within supranational institutions

[1267] *Ibid*., 201
[1268] *Ibid*., 212
[1269] *Ibid*., 201
[1270] *Ibid*., 201-202
[1271] Risse/Sikkink (1999)
[1272] Risse/Sikkink (1999), 14; Risse (2000), 9-10, 18, based on Habermas
[1273] Deitelhoff (2006)
[1274] Such as successful persuasion of state representatives in justificatory discourses on the international level, an institutional socialization with appropriate application of internationally validated norms occurring within supranational organizations, or a state socialization with international norms on a national level.

depend on the recognition and embeddedness of their validity on the international level, the former can reinforce the latter in terms of those norms' universalistic content. Simultaneously, both levels can influence the agreement and socialization with international norms on national levels, just like individual states may engage in the promotion of certain norms within regions or within the international system. Norm advocates working on national or transnational levels may not only trigger such processes, but also maintain their further evolution. In doing so, they can engage in various logics of behaviour.

Correspondingly with Deitelhoff's findings[1275], the agency of actors who resisted the misrecognition of the SGBV prohibition norm in the ICC's first case could be identified on two levels: that of 1) social protest and mobilization, which was generated in the initial stages of the resistance and was primarily based on the logics of consequentialism and appropriateness, as well as on the subsequently attained level of 2) social learning, based on argumentative rationality and discursive interaction. Furthermore, the resisting actors, motivated by their values and beliefs, first "prepared"[1276] the normative and institutional settings by engaging in strategic interaction, while their allies with better access to the proceedings engaged in and maintained internal processes of intersubjective communication, based on the logic of appropriate argumentation. This eventually generated the successful outcomes of reflective learning and persuasion. These processes were facilitated by the common life-world that the internal allies shared with the target actors of the resistance and a fairly "ideal speech situation" based on relatively equal status among the participants. Simultaneously, the exogenous norm advocates continued to support their internal allies' engagement in these processes with their knowledge and expertise. The transition from social protest to the level of social learning, *i.e.*, from instrumental to argumentative rationality was, however, enabled by a similar dynamic to that described by Risse and Sikkink in the 'tactical concessions' stage of their 'spiral' model[1277]. Here, the intervention of an influential institutional actor, who represented the United Nations and whose expertise was recognized as legitimate within the Court, generated the target actors' engagement in tactical concessions and rhetorical action with respect to the norm's validity. The framing used by the UN Representative in her intervention was adapted to the context of the legal case in question, and thus additionally enabled this dynamic. While her authority and the appealing nature of her approach to the target actors' life-world facilitated their openness to a dialog, the internal

[1275] Deitelhoff (2006)
[1276] *Ibid*., 78
[1277] Risse/Sikkink (1999)

allies of the resistance used this effect to further maintain the discourse by means of argumentative rationality.

Due to the effectively exercised agency of these various actors, their resistance has ultimately produced successful outcomes on both levels described by Madsen *et al*.: that of the law and the institution[1278]. However, while their framework considers various patterns of resistance based on the involvement of certain actors, the authors imply that, due to the structure and nature of ICs, to make an impact on the institutional level would require the broad participation of state actors and could be seen as part of a backlash. The authors primarily regard state resistance against ICs/IL as a dispute in which political actors tend to resist decisions or sometimes even challenge the legitimacy of legal actors who have sought to constrain their powers with legal tools. Simultaneously, the framework implies that while a pushback may involve various logics of behaviour (of consequentialism, appropriateness and arguing, depending on the resistance' type and pattern), actors engaging in a backlash are predominantly ruled by their aspiration to undermine the authority of an IC and to prevent its influence on their interests and power, that is, through rational calculation and the logic of consequentialism. Such theorization gives rise, however, to the question of how to define a case of non-state resistance that has achieved successful outcomes on both legal and institutional levels, perhaps also due to the responsive reaction of the court, yet does not correspond with the definitions of a backlash nor entirely with that of a pushback. Although Madsen *et al*. do not explicitly address such cases, their framework has been highly supportive for the explanation of such resistance processes and dynamics. This can, in turn, contribute to the further understanding of various patterns, forms and types that resistance against an IC can take.

In the following chapter, the theoretical works and their findings described above have been applied and integrated into the explanatory framework, as they pertain to the case in question. This framework explains the process of socialization with appropriate application of the SGBV prohibition norm that has taken place in the ICC. I argue that this process was triggered and maintained by a non-state resistance against the misrecognition of this norm in the ICC's first case against Thomas Lubanga Dyilo. Although, the resistance had a pattern that involved only non-state actors, it has generated successful outcomes with respect to their agenda on both legal and institutional levels. While the success of the resistance was

[1278] Madsen *et al*. (2018)

facilitated by the constellation of the involved actors, their agency was (in accordance with the analytical framework of Madsen *et al*.) substantially impacted by institutional and structural factors as well as broader socio-political cleavages in which their resistance and the generated socialization process with the appropriate application of the norm were embedded. The type of this resistance, in its initial stages, mostly corresponds with what Madsen *et al*. describe as a negative public discourse (with respect to the misrecognition of the norm by the responsible actors involved in the operation of the Court). Based on the 'boomerang' effect[1279], I also demonstrate that while the exogenous norm advocates generated the resistance from outside the Court, they also ultimately thrived in "preparing"[1280] the normative and institutional settings for its further maintenance within the Court's internal structures. Their internal allies (empowered by better procedural access and a common life-world shared with the target actors) took over an active role in later stages of the resistance. By maintaining the discourse through initiation of internal proceedings, they engaged in processes of intersubjective legal deliberation based on the logic of appropriate argumentation with respect to the appropriate application of the norm in the context of the given case. While the resistance indeed threatened to present the Court in a negative light, it did not aspire to damage its structures or authority. On the contrary, as strong supporters of the Court since the negotiations on the Rome Statute, the advocates of the norm used pressure as a teaching technique for the benefit of their target actors. That is, on the one hand, their resistance has signaled that the SGBV prohibition norm's misrecognition in the ICC's cases would not be tolerated by its significant constituencies, who supported but could also undermine its authority. On the other hand, this resistance has contributed to their target actors' learning and persuasion, which generated a reflective socialization process with the appropriate application of the norm within the Court's institutional structures. This process brought about a responsive reaction of the Court, expressed as reaffirmations of the norm's validity and *de-facto* recognition of its applicability within the context of the *Lubanga* case. This evolution allowed for a further refinement of the norm's prescriptive status on the institutional level which, as a consequence, avanced its appropriate application on the legal level.

[1279] Keck/Sikkink (1998); Risse/Sikkink (1999)
[1280] Deitelhoff (2006), 78

4. Explanatory framework

4.1. Applicatory misrecognition of the SGBV prohibition norm in the ICC's first case

According to the concepts and differentiations elaborated above, at the time of its misrecognition in the ICC's first case, the SGBV prohibition norm already bore a fundamental and regulatory[1281] character, shaped by ethical and moral ideas and beliefs as well as by its institutionalization in the Rome Statute. While the latter was achieved due to the former, the criminal prosecution of SGBV has been enabled through the institutionalization of the norm and this should prevent the perpetration of SGBV in the future. And yet, the institutionalized content of the norm has not been specific enough for it to be constitutive, nor to operate as an organizing principle or a standardized procedure[1282]. Although its institutionalization already defined concrete behaviour in cases of SGBV expected from legal actors involved in the operation of the Court (which also implies its legal and procedural character[1283]) it was not detailed in every individual potential case or situation, and it was yet to be customized or habitualized among those actors. Nevertheless, despite the formal recognition of the norm, which had generated collective expectations with regard to its implementation, its misrecognition in the ICC's first case has demonstrated the lack of its social or shared recognition[1284], which hindered its appropriate application. As the given case will demonstrate however, the advocates of the norm succeeded in triggering learning and socialization processes that have ultimately contributed to their target actors' emerging understanding of the norm's various meanings-in-use, which could eventually foster its habitualization and internalization. These processes have also enabled the transformation of the norm's character, making it more specific, clear and prescribed.

[1281] Finnemore/Sikkink (1998)
[1282] Wiener (2009)
[1283] Deitelhoff (2006), 181-183
[1284] Wiener (2007); Wiener/Puetter (2009)

In its first case against Thomas Lubanga, actors responsible for investigation and prosecution of crimes, for bringing charges and confirming them for trial misrecognized the applicability of the SGBV prohibition norm within the context of child soldiers recruitment crimes, despite interventions undertaken by its advocates in attempt to prevent this development. The empirical findings of my research imply that despite the legal or formal validity[1285] of the norm and its *de-jure* legitimacy[1286], its social or shared recognition, *i.e.*, its *de-facto* legitimacy[1287] appeared insufficient at the time due to a number of factors. To tackle this kind of phenomenon, I further elaborate on the concept of misrecognition, which was borrowed from Nancy Fraser by Louise Chappell[1288]. I do so against the background of theoretical findings, particularly produced by research on norm contestation and those detailed above, contributing to further understanding of norm evolution processes and dynamics. In fact, a norm that, despite its formal validity, has not yet gained social or shared recognition among its designated followers because its meanings-in-use in certain contexts still need to be developed in practice, logically cannot be contested since the grounds on which it could be contested have not yet been established. That is, while the application of the SGBV prohibition norm at the time was neither habitually practiced in international law generally, nor within the new institutional framework of the ICC, in order for its application to be contested, it had to be first considered, understood and recognized in various contexts and situations.

I suggest that the concept of misrecognition can be developed into a more precise, multi-faceted and advanced tool for analysis, when coupled the theoretical binary between contestation of validity and application[1289], which was similarly drawn in research on resistance against ICs/IL as extraordinary and ordinary[1290]. In fact, as the reconstruction of the *Lubanga* proceedings has demonstrated, neither the validity of the norm nor its formal legitimacy was ever explicitly subjected to any contestation, and yet, it was often ignored or narrowly interpreted. The statistics of the overall SGBV charges throughout the first decade of the Court's operation also indicate that the Office of the Prosecutor, in fact, attempted to bring such charges in other cases, but did so insufficiently in terms of the scope, investigation and/or prosecution[1291]. These observations and public statements by both the Prosecutor and

[1285] *Ibid*.
[1286] Alter (2018)
[1287] *Ibid*.
[1288] Chappell (2016)
[1289] Deitelhoff/Zimmermann (2013)
[1290] Madsen *et al*. (2018)
[1291] Chappell (2016), 108-109; also reflected in chapter '2. Mapping the application of the SGBV prohibition norm at the ICC'

Judges with regard to SGBV[1292] imply that the actors principally recognized the validity of the norm. However, its application continued being rather ambiguous and at times, indeed, inappropriate. That is, misrecognition in *Lubanga* seems to have been caused by similar factors that had been identified by research on applicatory (state) contestation of international norms. Due to a number of those factors, which will be elaborated on further, I suggest that the given omission in the ICC's first case represents misrecognition of the SGBV prohibition norm's application (and not of its validity). That is, ignorance of this norm caused by inappropriate application of the law within a specific context of the case did not simultaneously imply the misrecognition of its validity. Thus, similar to contestation, misrecognition can also be understood within a binary relationship, where it is opposed to either the validity or application of a certain norm. In fact, as this study has demonstrated, misrecognition of norms' application may (like contestation of norms' application[1293]) ultimately produce a strengthening effect on a norm in question through its conceptual refinement, clarification and reaffirmation, and may also aid the improvement of its prescriptive status in application. And yet, also here, such effects were enabled by socialization mechanisms that the resistance against the misrecognition first generated. By engaging in social protest and promoting social learning, they enabled discursive interactions among legal actors involved in the proceedings. These intersubjective legal deliberations based on the logic of appropriate argumentation contributed to the evolution of their target actors' understanding of the normative meaning-in-use in the context of the given case. That is, this evolution was facilitated by the consideration of all relevant facts and characteristics of the case (some of which had been previously ignored) and of the integrity principle, and eventually advanced actors' emerging socialization with the appropriate application of the norm.

At first sight, the given case might seem to embrace features of both misrecognition modes – those relating to both the norm's application and its validity. On the one side, it is not the formal validity but applicability of the norm which was misrecognized and explicitly questioned. Indeed, the reconstruction of case proceedings reveals the lack of its shared recognition or *de-facto* authority. This appears to have been caused by factors such as actors' insufficient experience and expertise in meanings of the norm in-use, the norm's assumed legal incoherence within the context of child soldiers' recruitment crimes, and influence of informal rules in maintaining the perception of SGBV as less serious. On the other side,

[1292] *Ibid*., 197-199
[1293] *E.g.*, Badescu/Weiss (2010); Deitelhoff/Zimmermann (2013)

however, these factors imply a kind of unconscious misrecognition of its validity too, albeit in a certain applicatory context which was largely unknown at the time. That is, while the norm's validity in terms of its application within a certain context and with all its relevant characteristics was questioned, the validity of its core was not. Based on my empirical findings, analysed against the background of research on norm contestation[1294], resistance against ICs/IL[1295], deliberations on appropriateness in legal application discourses[1296] as well as the study on SGBV misrecognition in the first decade of the ICC's operation[1297], I suggest the case in question should be addressed as applicatory misrecognition. The responsible actors did not seem to explicitly or consciously seek to undermine the validity of the norm per se, but rather, its misrecognition can be explained by analysis of the contextual factors of the case, and additionally proven by the Court's ultimate response to its critics.

4.1.1. What makes this a case of applicatory misrecognition?

As the empirical chapter demonstrates, despite WIGJ's requests, the Office of the Prosecutor initially generally contested the application of the SGBV prohibition norm in the *Lubanga* case, which seems to have been mainly based on a strategic choice to focus solely on child soldiers' recruitment crimes. However, ultimately due to general ignorance of SGBV (that is, of SGBV that had been committed against whomever, including child soldiers as relevant facts and circumstances of their recruitment) the OTP misrecognized the application of the norm within the context of its case. Despite the responsible actors' apparent, initial, general unwillingness to consider SGBV, a number of characteristics inherent to the context of this case eventually exposed the applicatory nature of this misrecognition. The revealed lack of social or shared recognition among the designated followers of the norm supports the view that their socialization with its application was just about to begin. The actors did not explicitly contest the validity of the norm; in fact, at various times they stressed its legitimacy, and yet, simultaneously failed to apply it appropriately in the given "circumstances of high

[1294] Deitelhoff/Zimmermann (2013)
[1295] Madsen *et al*. (2018); Alter (2018)
[1296] Günther (1988)
[1297] Chappell (2016)

complexity"[1298]. The assumption that the given case represents misrecognition of the SGBV prohibition norm in terms of its application can be intelligibly illustrated against the background of arguments developed by Klaus Günther in his analysis of appropriateness in legal and moral application discourses[1299]. Following his suggestion, I have endeavoured to consider all relevant contextual factors and characteristics of the situation in which the case in question was embedded, and which ultimately revealed its applicatory nature.

This case of misrecognition involved a norm that had already been formally recognized and legalized by states through their participation in justificatory discourse during the negotiations on the Rome Statute. The adoption of the norm by the legislation was finalized by the Rome Statute's entry into force, the establishment of the ICC and the institutionalization of the norm in its legal framework, which ultimately enforced its *de-jure* validity[1300]. During this process, however, its validity was articulated in a rather broad and generalized way that did not cover all the possible situations in which it should be applied. While the legislation establishes the general validity of norms, it is the jurisprudence that has to manage their application in certain situations and the potential disappointments such decisions might provoke. Although the jurisprudence's decisions remain independent from politics or ethics, they are simultaneously bound by the legislation that establishes the 'structure of conditions' (*Bedingungsstruktur*) between the elements of crimes and legal consequences[1301]. The 'inevitable vagueness' of this relatively new norm in terms of its application was probably predetermined by a lack of knowledge, which made it difficult to foresee all possible combinations of characteristics in single application situations[1302], as well as the necessity of forging an agreement between multiple negotiating states[1303]. In fact, many legal rules seem to be vested with an "open structure" that provides a "paradigm" for clear cases, however, their application in more complex situations can depend on judicial discretion[1304]. Their designated followers, in this case, legal actors involved in the operation of the ICC and mandated with the application of those various norms and rules included in its legal framework, should gradually develop understanding of their meanings-in-use in each individual case through their judicial practice, based on appropriate application of those norms and rules in various situations. Considering the diversity of situations and cases that the Court has to resolve, such appropriate normative understanding could be developed through a thorough assessment of all relevant facts and

[1298] Günther (1988), 111, based on Durkheim
[1299] Günther (1988)
[1300] *E.g.*, Rome Statute (1998), Art. 7(1)(g), Art. 7(1)(h), Art. 8(2)(b)(xxii), Art. 8(2)(e)(vi), Art. 54(1)(b)
[1301] Günther (1988), 326, based on Luhmann
[1302] Günther (1988)
[1303] Wiener (2004), 198-199; (2007), 51
[1304] Günther (1988), 340-341, based on Hart

circumstances related to various single contexts, against the background of the valid norms they involve. The required qualities for such evaluation can be, in turn, acquired over time, through experience gained through actors' engagement in "appropriate acting" in light of the characteristics of various situations[1305].

"Appropriate acting" in application requires 'playing through' all possible meanings in one situation for the justification of a selective decision[1306]. This decision should be taken under the consideration of the impartiality principle, which stipulates a complete description of a situation in question[1307]. This principle is institutionalized in the Rome Statute under Article 21(3) requiring, *inter alia,* application and interpretation of the law "without any adverse distinction founded on grounds such as gender"[1308]. The impartiality principle should enable appropriate application of norms through the consideration of a complete description of a situation and all involved interests without discrimination. In contrast, incomplete consideration of relevant characteristics of a situation or ignorance of certain interests may lead to a biased decision-making and inappropriate application of norms[1309]. The applicatory misrecognition of the SGBV prohibition norm in the given case is an example of such bias and inappropriate application and could have been avoided by compliance with the impartiality principle in the given circumstances of the case.

Norm advocates used resistance practices against this misrecognition and succeeded in inserting the application of the norm as a discourse as well as maintaining it throughout the proceedings. This has ultimately advanced actors' understanding of its meaning-in-use in the specific context of the case. Their pressure triggered collective "moral learning"[1310] about the appropriate application of the norm in the various contexts which fall under the jurisdiction of the Court. The discourse that they enacted revealed relevant characteristics and circumstances of the case, ignorance about which had previously caused its wrong assessment and actors' inappropriate acting. Apart from various institutional challenges related to the context of the Court's first case, the legal application of the norm in the context of child soldiers' recruitment charges was also not entirely clear. Perhaps, due to the responsibility to prosecute the first case under "circumstances of high complexity"[1311], the actors preferred to simplify and rationalize their actions by virtually disregarding issues that could have otherwise caused

[1305] Günther (1988), 294
[1306] *Ibid*.
[1307] *Ibid*.
[1308] Rome Statute (1998), Art. 21(3)
[1309] Günther (1988), 295-296
[1310] *Ibid*., 79-80
[1311] *Ibid*., 111, based on Durkheim

obscurity or even threatened the conviction. However, the resistance exercised by norm advocates in their "fight over recognition"[1312] forced the responsible actors to face the vagueness and complexity of the case and to deal with it at least discursively. In doing so, the advocates referred to the impartiality principle captured in Article 21(3) and stressed the statutory obligation that mandates the legal staff of the Court to apply and interpret the law "without any adverse distinction founded on grounds such as gender"[1313]. This obligation eventually proved to be crucial for the appropriate understanding of the recruitment crimes against children, and ultimately exposed the constitutive elements of the recruitment practices that involved the commission of SGBV, primarily, but not exclusively, against girls. The advocates emphasized this obligation against the background of documented SGBV committed in the Ituri region of the Democratic Republic of the Congo under the alleged responsibility of the accused, supposedly also within the scope of the recruitment practices. In doing so, they fostered internal deliberations on the interpretation of the situation and joint clarification on appropriate acting within its context that, in turn, generated processes of learning and subsequent revision on the normative content and meanings-in-use. Those deliberations exposed, in turn, supposed legal incoherence of the norm within the context of child soldiers' recruitment charges from the perspective of the traditional IHL understanding of the war crimes concept. Furthermore, due to the initial absence of any mention of SGBV in the description of the charges, the belated attempts of the OTP to request its consideration in the case ultimately correlated with the individual rights of the accused. However, the advocates creatively used "constructive ambiguit[ies]" [1314] embedded in the Court's procedural framework which also still had to be interpreted and elaborated, and argued from the perspective of IHRL, which along with IHL, constitutes another significant part of the Court's legal identity. In doing so, they claimed that the traditional IHL understanding of the war crimes concept was outdated, discriminated against the recruited children on the grounds of their gender and ignored the harm that was inflicted upon them due to their gender.

A complete consideration of all relevant facts and characteristics of the situation, of all involved interests, and of the relation among potentially applicable norms and principles to each other from the outset of the case should have enabled impartial assessment of their application, constructive building of preferences and finally, appropriate acting. Although the advocates succeeded in inserting the application of the norm as a discourse, initial ignorance

[1312] *Ibid*., 79-80
[1313] Rome Statute (1998), Art. 21(3)
[1314] Oosterveld (2014)

and misrecognition of this norm finally hindered the *de-jure* consideration of SGBV in this case. That said, the discourse which arose generated actors' sense of the appropriateness with respect to a potential application of the norm in the context of the given case and therefore also provoked their emerging reflective socialization with its appropriate application. This evolution was subsequently reflected in new prosecutorial strategies, policy and practice, as well as in the Court's jurisprudence. The application of the norm in the following case from the DRC situation against Bosco Ntaganda in accordance with the requirements of its advocates in *Lubanga* has demonstrated the success of their resistance. While the OTP engaged in learning processes on appropriate application of the norm in its practices, the Judges ultimately dissolved its supposed incoherence in the context of the child soldiers' recruitment war crimes (that is, in situations when SGBV was committed against combatants of one's own army) by interpreting the law in a progressive way that was eventually saluted by the Court's gender justice constituency. In this case, the Judges not only explicitly declared the *jus cogens* status of rape and sexual slavery prohibitions under IL[1315], which has strengthened the SGBV prohibition norm's further evolution, they simultaneously expanded the understanding of the war crimes concept more generally. This advancement has proved the cognitive capacity of the law as an autonomous system that has been able to learn within the boundaries of its normative closeness[1316]. That is, the system has managed to reproduce itself against the background of its initially set conditions (legislation) by distinguishing the right from the wrong[1317] in accordance with the principle of integrity[1318]. The balance between fulfilling the social function of stabilizing the behavioural expectations on the one side and appropriate consideration of various interests on the other was hence achieved in the argumentative zone between programming and coding[1319]. The achievement of this balance and the institutionalization of procedures which aim at the appropriate application of the norm and which stipulate consideration of all relevant SGBV facts and characteristics in cases and situations were, however, triggered by the resistance of norm advocates against its misrecognition in *Lubanga*. They fostered the development of understanding of the normative meanings-in-use in harmony with the principle of integrity. This represents an ideal coherence principle, according to which, normative decisions should be taken and that, according to

[1315] Based on Hilary Charlesworth and Christine Chinkin (1993), Kelly D. Askin (2003) argues, however, that the *jus cogens* status – at least for crimes of rape and sexual slavery, when they constitute war crimes, crimes against humanity, genocide, torture and slavery – was already recognized before, at latest by the time of these crimes' inclusion and institutionalization in the Rome Statute. Nevertheless, as the analysis of the SGBV prohibition norm's misrecognition within the context of the recruitment charges in *Lubanga* has demonstrated, the lack of actors' understanding of the norm's meaning or appropriate application in this case was partly caused by a lack of legal clarity on its content, specifically from the IHL perspective.
[1316] Günther (1988), 32, based on Luhmann
[1317] *Ibid*.
[1318] On principle of integrity see subchapter '3.6. Appropriate application of legal norms' (Günther's references to Dworkin, 1988)
[1319] Günther (1988), 324-327, 331-332, based on Luhmann

Günther, should be understood as a principle of "appropriate argumentation"[1320]. The alleged incoherence was clarified and, indeed, enabled the "discovery" of new rules through appropriate arguing in light of the integrity principle, which similarly embraces the obligation of equal treatment, that is, compliance with the principle of impartiality[1321]. This dynamic, even if exogenously generated, demonstrates that the misrecognition of the SGBV prohibition norm in *Lubanga* bore an applicatory character. The vagueness that enveloped the norm and its potential application in the context of the first case was ultimately clarified in order to avoid such repetitions in the future, through a learning process that its advocates "prepared"[1322] and framed and in which the target actors engaged.

One could reasonably blame the ICC's first Prosecutor Luis Moreno Ocampo for his Office's ignorance of certain relevant case characteristics in violation of the impartiality principle. After all, he persisted in disregarding issues of SGBV, despite WIGJ's concerns, which were communicated to his Office in the initial stages of the proceedings. In fact, if he had taken their recommendations seriously, the learning process might have been shorter and SGBV victims and survivors in *Lubanga* would have been provided with a gleam of justice. However, the assessment of the situation from the Prosecutor's perspective in that place and time, including the socio-political, legal and institutional contexts in which he had to decide upon the charges, reveals some "reasonableness"[1323], and to a certain extent, justification for his behaviour. The discourse that emerged throughout the proceedings has demonstrated actors' confusion. This arose out of their aforementioned perception of legal incoherency among involved norms due to the lack of clarity on the application of the SGBV prohibition norm in cases of combatants who had been subjected to such crimes within their own forces, which might have also created inconsistency with the interests of the accused. Along with this significant factor, the context in which the case was embedded also involved socio-political, institutional and structural factors, which created "circumstances of high complexity"[1324] and must have challenged the deliberations on reasonableness for the responsible actor in his individual situation and role. Those factors also fundamentally revealed the absence of actors' socialization with the norm, specifically in terms of its application, due to its relative newness and to the newness of the Court's structures. The application of the norm was not yet habitualized or customized in ICL, rather, it represented a new area. This was an issue that,

[1320] *Ibid*., 347-353, based on Dworkin
[1321] *Ibid*.
[1322] Deitelhoff (2006), 78
[1323] Günther (1988), 90-92
[1324] *Ibid*., 111, based on Durkheim

despite its *de-jure* authority still legitimately required exploration by its designated followers through practice and processes of learning and socialization on the one side, which apparently needed some acceleration by "fights over recognition"[1325] on the other. If the Prosecutor had considered all legitimate interests involved in the case along with the principle of impartiality while bringing the recruitment charges, SGBV victims and survivors in this case could have been provided with a token of justice even in spite of the supposed collision among the involved norms, *i.e.*, a potential violation of the coherence principle. That is, the formal inclusion of SGBV facts in the indictment from the initial stages of the case might have allowed their consideration in the judgement, at least as "aggravating circumstances". The Prosecutor himself proposed this during the trial, yet still failed to amend the charges. As the argumentation of the Judges suggested, this compromise might have been accepted if corresponding evidence had been introduced in a procedurally appropriate way. However, the disregard of the impartiality principle hindered the responsible actors in their capacity to recognize the applicability of the norm in one or another way. This might have been avoided had they possessed the knowledge and experience in the initial stages of the case that they had obtained by the end. As the development in the *Ntaganda* case has demonstrated, the ultimate solution to the alleged legal incoherence of the SGBV prohibition norm with other norms involved in the case would have required not only actors' "moral judgement capacity"[1326] but also specific adjudication that would have resolved the supposed collision between the norms. The learning process in *Lubanga* provided such conditions and fertile ground for the emergence of this adjudication. The "critical thinking" that could have fostered the process of "moral learning" while managing new experiences[1327] was hindered at the time by various contextual challenges. Their burden might be better comprehended through the "experimental approach", according to which, one could ask oneself whether one would have behaved differently considering all hypothetical norms and principles involved in the situation's characteristics and had to act under the same circumstances in the position of the responsible actor, based on certain (then, restricted) knowledge and experience[1328]. Those challenges must have likewise impeded the application of the "mutual respect principle" which, similarly to the principle of impartiality, stipulates appropriate treatment of new constellations in unforeseen situations[1329] and could have fostered the process of learning in this case. The "universal aspect" of this principle, which requires the recognition of everyone as equals

[1325] *Ibid*., 79-80
[1326] *Ibid*., 298
[1327] *Ibid*., 277-282, based on Hare
[1328] *Ibid*.
[1329] *Ibid*., 152-153, 166, 205-206, based on Piaget

independently from any differences or situations, was not satisfied with regard to the interests of the SGBV victims and survivors. What's more, its "particular aspect", which demands the consideration of all individual differences and special circumstances[1330] and which should allow for the identification of the most "adequate" normative hypothesis through the identification and resolution of potential collisions and incoherencies under the circumstances of a specific situation[1331] also remained unsatisfied. Nonetheless, the assumption that this misrecognition occurred i) due to the (perceived) collision of the norm with other relevant norms involved in the case and ii) by the intention directed at the fulfilment of another important duty and not at the questioning of the norm's validity, suggests its applicatory nature with "mitigating circumstances" that hindered "good" implementation, due to specific aspects of the overall situation[1332].

This premise was additionally proven by the eventually receptive reaction of the Court's organs and senior staff towards the norm advocates' criticism about the misrecognition. The consideration of their concerns was mirrored in the judgement, the OTP's following strategies, policy revisions and amendments of other cases with SGBV charges, as well as in the Court's subsequent jurisprudence. Nevertheless, the advocates had to make a number of attempts to generate an emerging *phrónesis* effect in gender justice terms, which stipulates the "capacity to appropriately articulate given normative bonds in a situation", *i.e.*, "bringing together the normative valid and the appropriate"[1333]. This capacity can be obtained through experience in assessing all relevant and specific characteristics in various situations[1334]. Produced as a "historical understanding" through a gradual "revis[ion] [of] one's own prejudices within their historical horizon"[1335], *phrónesis* should, in turn, enact a sense of appropriateness in application discourses, that is, in this case, an appropriate application of the SGBV prohibition norm.

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[1330] *Ibid*.
[1331] *Ibid*., 191-194
[1332] *Ibid*., 169, based on Kohlberg
[1333] *Ibid*., 249-250, based on Aristotle
[1334] *Ibid*., 217-218, 222, 224-225, 232
[1335] *Ibid*., 240, 251, based on Gadamer's interpretation of Aristotle

A mixture of various interdependent factors explains the applicatory nature of the norm's misrecognition by its designated followers in the Court's first case. Those responsible actors might did not consciously mean to contest the validity of the norm in the context of the case. However, by excluding even any mention of SGBV in the charges, to some extent they virtually, perhaps unconsciously did so. Even without conscious intent, this disregard nevertheless revealed a lack of the norm's shared recognition and of its *de-facto* influence on actors' behaviour. As depicted by the constructivist research on norms, missing socialization may cause continued contestation, not only of a norm's application but ultimately also of its validity, to the extent of its *de-facto* authority. One might find console in the observation that it makes little difference whether actors truly believe in the validity of a norm, so long as the socialization process has already begun[1336]. Whether this process begins and continues to evolve without violations and stagnations, however, can largely depend on the degree of agency of norm advocates in resisting processes of contestation, misapplication and/or misrecognition[1337].

4.2. The insertion of the socialization 'spiral'

For the depiction of actors' socialization with the SGBV prohibition norm, triggered in the given case by its advocates, I suggest applying the Risse and Sikkink's 'spiral' model, which consists of five stages: 1) repression, 2) denial, 3) tactical concessions, 4) prescriptive status, and 5) rule-consistent behaviour[1338]. Although this model originally illustrated the process of state socialization with international human rights norms, it can be adapted to cases of institutional socialization, *i.e.*, for the reflection of norm socialization processes within international institutions, which Risse and Sikkink rather refer to as drivers or promoters of state socialization[1339]. This analysis does not imply a reduction in the role of international institutions; on the contrary, it aspires to demonstrate that in certain contexts (and specifically

[1336] Risse/Sikkink (1999)
[1337] *Ibid.*; Badescu/Weiss (2010); Deitelhoff/Zimmermann (2013)
[1338] Risse/Sikkink (1999)
[1339] See also Checkel (2005); Alter (2018)

in cases of relatively new norms), such institutions and actors operating within them may need to first socialize with those norms themselves. The stages of socialization encompassed in the original 'spiral' model could be identified in the given case, despite the fact that the norm had already been previously institutionalized. This supports the assumption that the *de-jure* authority of a norm does not necessarily imply its *de-facto* power[1340]. As Risse and Sikkink also note, compliance with a norm might be still lacking, even if actors have already recognized its validity[1341]. That is, depending on the context, it seems that a process of actors' socialization with norm validity which progresses through an entire 'spiral' might need to be followed by at least one more 'spiral' in order to socialize with its application. It is also possible that another 'spiral' would be needed in cases where the application became unclear due to new constellations of those cases' contextual characteristics.

Based on my empirical findings, I build on the original 'spiral' model, expanding it to seven stages, which I have identified within the process of the institutional socialization with the SGBV prohibition norm, which was largely generated by its advocates throughout the *Lubanga* proceedings. Those stages included 1) applicatory misrecognition of the norm, 2) denial of misrecognition, 3) tactical concessions, 4) elaboration of the normative meaning-in-use, 5) reaffirmation of the validity and *de-facto* recognition of applicability, 6) refinement of the prescriptive status, and 7) further conceptual clarification through aspired appropriate application. I am not including the last stage of "rule-consistent behaviour" identified by Risse and Sikkink, which embraces the internalization of the norm and its taken-for-granted status, since it appears too early to indicate in this case. This has been demonstrated by the overview of its application throughout all cases at the ICC. The norm's taken-for-granted status could furthermore vary in the future, depending for instance on the priorities and socialization with the norm among the new additions to leading responsible staff. That is, even though the socialization process has begun and already demonstrated impressive progress, it is still ongoing. The norm advocates have played a critical role in triggering the evolution of the 'spiral', until at least stage five, at which point, the target actors seemed to be persuaded through processes of learning and intersubjective deliberations and reacted to criticism in a responsive way. From the sixth stage on, the initiatives promoting the further socialization with the norm have been, indeed, taken by the responsible actors themselves. However, this norm is relatively new and the Court has had to deal with its various meanings in different contexts and situations, which will need to be comprehended through its

[1340] Alter (2018); also Wiener (2004, 2007, 2009); Deitelhoff/Zimmerman (2013); Chappell (2016)
[1341] Risse/Sikkink (1999), 29-31

appropriate application. What's more, restricted resources may cause strategic prosecutorial decisions, which could again lead to ignorance of the norm. For these reasons, recurrences of misrecognition may still occur, which would, in turn, require further interventions by its advocates. Moreover, as already indicated above, further evolution of the socialization process towards actors' internalization of the norm in terms of its appropriate application will also depend on the recently inaugurated third Chief Prosecutor of the ICC, Karim A. A. Khan from the United Kingdom[1342] ('Prosecutor Khan'), who has taken over the lead over the OTP for nine years from his predecessor, Prosecutor Bensouda. While Prosecutor Bensouda has significantly contributed to the progress in the institutional socialization with the appropriate application of the norm throughout stages six and seven, Prosecutor Khan can build on this progress and advance the evolution of the process even further.

Against the background of binary differentiation between normative validity and application, as well as between the underlying discourses, which aim to achieve them[1343], I suggest keeping in mind that actors may socialize with both the validity of a certain norm and with its application. What's more, because of the given context of a relatively new international legal norm, the understanding of (and eventually compliance with) its various meanings-in-use requires the consideration of all relevant facts and characteristics in each single case and situation. This consideration should take place against the background of the principles of coherence and impartiality, which should enable actors' socialization with the norm's appropriate application[1344]. Even if socialization with the norm's validity could be regarded as successful because, as outcomes of the learning process in *Lubanga* its 5) *de-jure* authority has been reaffirmed and 6) prescriptive status refined, the socialization with its appropriate application has virtually just emerged. Actors' internalization of the norm's *de-facto* authority and habitualization in practice would, in turn, depend on its consistent appropriate application in other situations and cases. This includes various contextual constellations that should ultimately promote further understanding of its various meanings-in-use. Based on this differentiation and my empirical findings, I argue that the achievement of institutional socialization with the norm's validity has been reflected in the outcomes caused by the 'spiral' dynamic. These have provided the already institutionalized formally valid norm with reaffirmation of its *de-jure* authority and refinement of its prescriptive status, allowing for enactment of its *de-facto* authority in application. That is to say, socialization with the norm's

[1342] ICC Doc. No. ICC-CPI-20210212-PR1567 from February 12, 2021; ICC Doc. No. ICC-CPI-20210610-MA266 from June 10, 2021
[1343] Günther (1988); Deitelhoff/Zimmermann (2013)
[1344] *Cp*. Günther (1988)

appropriate application has been facilitated by this development but it has essentially only just begun.

Similar to the state socialization 'spiral'[1345] built on the 'boomerang' effect[1346], the success of the institutional socialization 'spiral' launched in the given case by exogenous norm advocates was also significantly stipulated by their cooperation with their internal allies. In slight contrast to the original definition of the 'boomerang' effect (based on the involvement of a transnational advocacy network consisting of actors working on both international and national levels), I identify this process in the given case as it relates to institutional socialization with the norm rather as trans-institutional advocacy space, that involved actors from both the outside and within the Court. While it may be that not all of their actions have been coordinated through a specific network, they were all motivated by the same ideas and beliefs, which resisted misrecognition of the norm and aspired to promote gender justice. Those exogenous actors who were involved in this space included not only actors working on the international level, but also those from the domestic level of the situation in question. Like in the dynamic described by the original 'spiral' model, exogenous norm advocates triggered the process of socialization by resisting the misrecognition of the norm from outside the Court. To this end, they initially engaged in social protest and mobilization[1347] and deployed a number of tactics that encouraged their internal allies to join their efforts. These allies then maintained their pressure by initiating and engaging in processes of persuasion based on argumentative rationality from within the institutional structures[1348], which, in turn, facilitated the process of learning among the actors involved in the proceedings. This trans-institutional cooperation between the external and internal norm advocates created trans-institutional space, in which they could structure and coordinate their efforts to achieve their goals. That is, their cooperation has significantly strengthened the capacity of the resistance to process within institutional structures of the Court and, in fact, to insert further reflective mechanisms of socialization[1349]. As depicted in the theoretical framework, such mechanisms can ultimately advance a more sustained effect than mere critique and protesting[1350]. Similar to Deitelhoff's observations on the negotiations of the Rome Statute[1351], this case has also revealed the agency of the norm advocates, which was exercised on two levels throughout the

[1345] Risse/Sikkink (1999), 5
[1346] Keck/Sikkink (1998)
[1347] Checkel (2001)
[1348] *Cp*. Risse/Sikkink (1999), 33-34; Deitelhoff (2006)
[1349] Checkel (2005)
[1350] See Risse (2000); Checkel (2001); Deitelhoff (2006)
[1351] Deitelhoff (2006)

socialization 'spiral'. Firstly, they expressed critique and protested in a mainly exogenous manner, but also provided information and "prepared"[1352] the actors for subsequent processes of internal discursive deliberations. Secondly, their internal allies argued with and persuaded the target actors of the resistance involved in the proceedings.

The given case has also revealed all three types of socialization processes identified by Risse and Sikkink in their 'spiral' model, including 1) instrumental adaptation and strategic bargaining, 2) moral consciousness-raising, shaming, dialogue, argumentation, and persuasion, and lastly 3) (further) institutionalization and (emerging) habitualization[1353]. Instrumental adaptation and strategic bargaining[1354] tended to prevail in the early stages of the proceedings due to the target actors' reaction to the norm advocates' tactics of moral consciousness-raising and shaming. Learning, persuasion and (further) institutionalization of the norm's prescriptive status which aimed at the habitualization of its appropriate application appeared to be outcomes of legal discursive interaction in relation to the meaning of the norm in the context of the given case based on the logic of appropriate argumentation. This had been activated during the proceedings due to the trans-institutional cooperation between the advocates and their allies. That is, the logic of consequentialism that prevailed in influencing actors' behaviour in the beginning of the proceedings was successively replaced by argumentative discourses[1355] on the appropriate application of the norm, which facilitated the dominance of the logic of appropriateness by the end of the proceedings. Moreover, in accordance with the original 'spiral' dynamic, the transition from instrumental to argumentative rationality was preceded by the target actors' engagement in rhetorical action that "entrapped" them "in a moral discourse which they [could not] escape in the long run"[1356].

Although it was already too late for the *de-jure* implementation of gender justice in *Lubanga*, the approximation of shared understanding on the appropriate application of the norm in the context of the given case subsequently influenced the behaviour of the responsible actors on both legal and institutional levels. The eventually achieved reaffirmation of the norm's validity and *de-facto* recognition of its applicability in the given case were reflected in the judgement, which suggests that the norm advocates succeeded in persuading their target

[1352] *Ibid*., 78
[1353] Risse/Sikkink (1999), 5
[1354] *Ibid*., 11-12, 16
[1355] *Ibid*., 13
[1356] *Ibid*., 16, 25-28

actors. The authenticity of this effect was subsequently proven by the institutional refinement of the norm's prescriptive status in application which was undertaken through the development and issuance of new prosecutorial policies and strategies against the background of lessons learned in *Lubanga*. These policies and strategies have prioritized SGBV investigations and prosecutions and aimed to implement best practices in this regard on all levels of the OTP's work. This evolution has indicated an emerging institutionalized process that aims at the habitualization and internalization of appropriate acting with respect to the norm's application. Additionally, persuasion and learning effects achieved in *Lubanga* could be traced in the progress of bringing SGBV charges in subsequent cases[1357]. Again, this is not to say that the refined prescriptive status of the norm in application implies that it has reached the point of being taken-for-granted [1358] and no longer requires any monitoring of compliance[1359], but rather that the socialization with the norm's appropriate application has been institutionally triggered and might still involve further deliberations with regard to its various meanings-in-use in various situations. Furthermore, as previously mentioned, compliance with the appropriate application of a norm in each single case might be also influenced by the restricted resources of the Court and change of leadership on the prosecutorial level. In accordance with the observation made by Risse and Sikkink[1360], even if the old leadership (under which the misrecognition occurred and the socialization process began) had indeed been persuaded out of instrumental deliberations guided predominantly by the logic of consequentialism, the changes that were introduced under the following leadership, on stages six and seven of the socialization 'spiral' seem to have been mostly influenced by the logic of appropriateness. That is, the OTP's following leadership throughout the second decade of the Court's operation has been willing to promote institutional socialization with the appropriate application of the SGBV prohibition norm and eventually also the implementation of gender justice. It remains to be seen if under the new Prosecutor Karim A. A. Khan's lead[1361] the achieved progress in this respect would be sustained (as a minimum effort in honour of the significant efforts that were made under Prosecutor Fatou Bensouda) and developed further by means of the norm's appropriate application in various cases and situations.

[1357] See subchapter '5.2.7. Further conceptual clarification through aspired appropriate application: consequences for the law'
[1358] Risse/Sikkink (1999), 17
[1359] *Ibid*., 11
[1360] *Ibid*., 10
[1361] ICC Doc. No. ICC-CPI-20210212-PR1567 from February 12, 2021; ICC Doc. No. ICC-CPI-20210610-MA266 from June 10, 2021

Instead of a situation of repression, which under certain conditions triggered the original 'spiral' of state socialization, the given case of institutional socialization was essentially caused by the OTP's leading staff's 1) applicatory misrecognition of the SGBV prohibition norm. However, the link between the first stage and the further evolution of the 'spiral' was provided by the norm advocates' resistance against the misrecognition. That is, in a similar manner to the repression situations as theorized in the original 'spiral' model, or to processes of contestation against the application of international norms[1362], the applicatory misrecognition in the given case appears to have served rather as the opening into the space in which the socialization process with the norm could be launched. Like in the dynamic described by Risse and Sikkink[1363], the advocates from outside the Court used this opening productively and managed to mobilize around the issue and to criticize the behaviour of the responsible actors. They did so in the beginning of the proceedings in an attempt to influence the trajectory of the case by raising the awareness of the responsible actors through initiation of a dialogue, through shaming, and by drawing their attention to issues of SGBV that appeared to have been unfairly overlooked.

The 2) denial of misrecognition relates to the reaction of the responsible actors to the criticism expressed by the norm advocates. This was, analogously to the observation by Risse and Sikkink in cases of state socialization, at least indirectly, blamed as "illegitimate intervention in the internal affairs"[1364] of the Court. However, such a reaction also implies that the actors were "at least implicitly aware that they face[d] a problem in terms of their international reputation", which indicated the begin of the socialization process[1365]. In fact, during this phase, the Prosecutor neither openly contested the validity of the norm nor its (at least legal) applicability. Rather, he effectually questioned the legitimacy of the actors who tried to intervene in the sphere of his influence and basically ignored the data that they had gathered and communicated to his Office. Despite the further dissemination of this data to the Judges of the PTC, the denial to engage with those "illegitimate" critics had taken place until an authoritative and influential advocate with internationally acknowledged expertise in the issue areas of women's and children's rights joined the resistance. In fact, in comparison to the criticism expressed by WIGJ, the intervention of the UN Special Representative of the Secretary-General for Children and Armed Conflict, Radhika Coomaraswamy (hereafter also 'SRSG/CAAC' or 'SRSG'), and her opinion perhaps more significantly and tangibly

[1362] See for example Badescu/Weiss (2010); Deitelhoff/Zimmermann (2013)
[1363] Risse/Sikkink (1999), 22
[1364] *Ibid*., 23
[1365] *Ibid*., 23-24

threatened the image of the Prosecutor and the Court. By the time of her intervention, the OTP seemed to have become aware of the seriousness of this issue and of its potential negative consequences. On the other side, in contrast to WIGJ who had requested that the OTP investigated SGBV allegedly committed under the responsibility of the suspect against *whomever*, that is, including both civilian population and child soldiers, the UN Special Representative Radhika Coomaraswamy applied a narrower framework in her interventions focusing on SGBV that had been allegedly committed only against the child soldiers that is, within the context of the prosecutorial charges, which ultimately, perhaps additionally to her influential UN status, also legally authorized her participation in the proceedings and enabled her to influence internal discursive interactions. While WIGJ's actions and argumentation were influenced by the logic of appropriateness in broader terms and the logic of consequentialism in terms of norm application in future cases of SGBV, the UN SRSG Coomaraswamy acted as a mediator in a rather procedurally rational way.

While the WIGJ's request to participate in the proceedings had been denied, the application of the UN SRSG was ultimately approved (although by another Chamber of the Court). The reaction of the Prosecutor to her intervention was remarkable in that he suddenly engaged in making 3) tactical concessions by rhetorically reaffirming the validity of the norm with respect to the child soldiers and reflecting Coomaraswamy's arguments in his position. Nonetheless, he continued to refrain from amending the charges, which contradicted with his own statements in this respect. Due to the UN SRSG Coomarasway's authoritative status, but also her procedurally sharper approach, focusing on SGBV committed explicitly against the child soldiers, she succeeded in furthering the evolution of the socialization 'spiral' to the point that the Prosecutor undertook "cosmetic changes" for the "pacification"[1366] of his critics. Although those tactical concessions were made in a rather rhetorical form and were most likely primarily motivated by instrumental rationality, they also implied a tendency of resorting to argumentative rationality. Like Risse and Sikkink suggested in their study[1367], this dynamic, in turn, seems to have encouraged the norm advocates' internal allies to join the resistance from within the institutional structures. While those tactical concessions seemed to have encouraged them from within, their exogenous partners supported them from outside the Court. Also here, a stage of tactical concessions triggered a transition, which transferred the leading role in resistance from the external advocates of the norm to their internal allies[1368].

[1366] *Ibid*., 25
[1367] *Ibid*.
[1368] *Ibid*.

The Prosecutor's attempts to make amendments to the misrecognition of the norm (even if only rhetorically) imply that he recognized the criticism invoked against it, which in turn, empowered the internal actors to maintain and take over the resistance[1369].

While the norm had already been formally institutionalized, which must have additionally facilitated the progression of the 'spiral's' rationality mode within the phase of tactical concessions – from the instrumental towards the argumentative – the discourse surrounding its application was still subjected to procedural challenges due to the *de-jure* exclusion of SGBV issues from the case. Despite the Prosecutor's concessions and statements expressed towards the Judges that they should consider SGBV committed against the child soldiers in case of Lubanga's conviction, he still refrained from amending the charges accordingly in a legally appropriate way. Yet, advocates of the norm managed to get around those challenges using creative tactics, which allowed them to maintain internal discursive deliberations on the application of the SGBV prohibition norm in the context of the given case throughout the trial. The argumentative rationality that they had inserted with respect to the issue, has ultimately entangled the actors in a process that reflected 4) elaboration of the norm's meaning and appropriate application in the specific context of this case. Also, specifically the Prosecutor engaged in arguing, although perhaps initially out of instrumental deliberations and "reputational concerns"[1370]. In later stages of the proceedings, he insisted on the consideration of SGBV in the judgment, for which, however, he failed to undertake necessary procedural steps that would have allowed the Judges to do so. The opinions of the latter were, in turn, divided: while the majority were willing to explore potential ways of considering SGBV in spite of procedural constraints, the minority submitted a strong argument based on the rules of legal procedure. This dissent led to further debates among Parties and Participants and was ultimately resolved by the Appeals Chamber in favour of procedural fairness, which finally excluded any *de-jure* consideration of SGBV in *Lubanga*. Nevertheless, those internal discursive deliberations on the application of the norm have reflected a change in the "dominant mode of social interaction" in this respect, from instrumental rationality in the initial stages to the argumentative in the later[1371]. What's more, the application of the norm as a discourse allowed the actors to come closer to understanding its meaning and appropriate application in the context of the given case[1372].

[1369] *Ibid*., 28
[1370] *Ibid*.
[1371] *Ibid*., 34
[1372] Günther (1988)

Despite the *de-jure* exclusion of SGBV consideration, the judgement still reproduced those deliberations on the meaning and potential application of the norm in the context of this specific case. Moreover, the reflection of the Judges on those deliberations also signalled their 5) reaffirmation of the norm's validity and *de-facto* recognition of its applicability, if it had been exercised in a procedurally appropriate way. Additionally, Judge Elizabeth Odio Benito, the norm advocates' ally from the bench, continued to insist that her colleagues were not entirely right in refusing any consideration of SGBV. In her partly dissenting opinions to the judgment and the sentencing decision, she echoed the advocates' arguments on the appropriate application of the norm introduced throughout the proceedings. Although her opinions might have collided with procedural rules and other legal norms involved in the case, by doing so she has conserved the discourse that reflects the inappropriateness of justice denial to SGBV victims and survivors in the judgement.

Through their elaboration on the misapplication of the norm, which implicitly blamed the Prosecutor for his unclear approach to SGBV, the Judges also indicated its prescriptive status in application. This shaming, along with learning and socialization effects, might have contributed to the OTP's subsequent amendment of the previously analogous indictment against Bosco Ntaganda with charges of SGBV committed against the civilian population under his alleged responsibility. In fact, before Prosecutor Ocampo left the Office shortly after the issuance of the *Lubanga* judgement, he had amended the charges in *Ntaganda*, partly in accordance with the initial broader framing of the resistance against the misrecognition of the norm introduced by WIGJ in *Lubanga*. In contrast to the narrower framing that was later applied by the UN SRSG Coomaraswamy, their requirements included separate charges of SGBV committed not only against the child soldiers within the context of their recruitment but also against the civilian population. Moreover, under Prosecutor Bensouda's subsequent leadership, the OTP engaged in the 6) refinement process of the norm's prescriptive status, which aims to ensure the appropriate application of the norm on all levels of its work. As a part of this process, Prosecutor Bensouda prioritized the implementation of the norm as an integral part of her Strategic Plans throughout the entire period of her term (from June 15, 2012 until June 15, 2021). Likewise, she amended the indictment against Ntaganda with further, separate charges of SGBV, committed against the child soldiers within the context of their recruitment. This has finally fully satisfied the norm advocates' demands introduced in *Lubanga*. In close cooperation with its former critics, this process produced the *Policy Paper*

on Sexual and Gender-Based Crimes[1373], which is intended to guide appropriate investigation and prosecution of SGBV by means of progressive tactics and techniques. The application of the Policy[1374] has, in turn, refined the character of the norm from the fundamental to the organizing principle that should become a standardized procedure[1375] through the integration of a reporting mechanism. This evolution should habitualize the actors involved in the OTP's operation with appropriate application of the norm throughout its various stages of work and in various cases and situations. That is, since the issuance of the *Lubanga* judgement, the OTP and its senior staff not only regularly reaffirmed the validity of the norm and aspired its appropriate application in their discursive practices, they also triggered tangible institutional changes in this respect, which were developed through dialogue, exchange and cooperation with their former critics[1376]. This ultimately receptive reaction has not only revealed actors' socialization with the norm's validity, but also the emerging process of their socialization with its appropriate application as a consequence of learning and persuasion, enabled by the advocates of the norm during the *Lubanga* proceedings.

Significantly, the process of socialization with the appropriate application of the SGBV prohibition norm could be revealed not only in the institutional policy changes but also in the application of the law that has, in turn, already contributed to its 7) further conceptual clarification. This further evolution of the institutional socialization 'spiral' could be likewise traced back as having been affected by learning and persuasion processes in *Lubanga*. In fact, as the empirical chapter will demonstrate, the subsequent application of the norm has been especially successful in those cases in which either lessons learned directly in *Lubanga* (*Ntaganda*) or the effects of the emerging socialization process with the appropriate application of the norm could be particularly well implemented due to the contexts of those cases (*Ongwen*, *Al Hassan*).

Although socialization and habitualization processes are underway, appropriate application of the norm in each single case and situation is still not taken-for-granted. Aside from actors' socialization, various factors inherent to the nature of the Court – including its restricted resources and capacities on the one side and the different contexts and constellations of cases and situations on the other – may influence the implementation of the norm in the future. Yet,

[1373] ICC OTP (2014)
[1374] Since approximately 2016 (Conversation with D. (ICC OTP), Summer School on ICL and Human Rights, Syracuse, June 2018 (anonymized))
[1375] Wiener (2009)
[1376] *Cp.* Risse/Sikkink (1999), 29-30

while certain structural and political obstacles might be more difficult to overcome and would require cooperation and willingness by a number of actors, legal obstacles should be gradually reduced by the consistent appropriate application of the norm – a standard aspired to in the OTP's Policy Paper on SGBC[1377]. The implementation of this Policy should allow legal exploration of the norm's further meanings-in-use and ultimately successively enable actors' socialization and habitualization with its appropriate application, independently from the contexts of future cases. Nevertheless, since strategic preferences that can be potentially instigated by certain obstacles and pressures may still hinder such evolution, norm entrepreneurs should continue monitoring compliance, regardless of the fact that the 'policy solution' has been adopted[1378].

The institutional socialization 'spiral' that was triggered and sustained by the norm advocates' resistance against the misrecognition of the SGBV prohibition norm in the Lubanga case throughout virtually all of its stages has ultimately exposed and validated the power of the norm to influence the behaviour of actors with certain identities. This could be detected through a "particular mix of material pressures with communicative processes"[1379]. The maintenance of authority and legitimacy for an international institution like the ICC might be even more significant, and indeed vital, than for separate states that comply with certain norms as a prerequisite for being recognized as members of certain communities[1380]. The successfully transformative outcomes of the resistance imply, on the one side, that the advocates had managed to persuade the responsible actors involved in the implementation of the Court's mandate that the appropriate application of the norm, or at least tangible efforts to do so, would strengthen its image and international legitimacy. On the other, the reaction of those actors, which was revealed on both institutional and legal levels, also specifically implied that they had been persuaded to further socialize with the appropriate application of the norm in various contexts and situations in a reflective way. This included progressive investigative, prosecutorial and judicial practices, which were increasingly based on the logic of appropriate argumentation. This development has already contributed to the norm's further evolution and reinforcement. That is, both the logics of consequentialism and appropriateness have influenced norm advocates' actions and the reaction of their target actors to their criticism. The achievement of this effect, however, had been essentially activated by the advocates' engagement in the logic of arguing, which generated the internal discursive

[1377] ICC OTP (2014)
[1378] *Cp.* Krook/True (2010), 123; Chappell (2016)
[1379] Risse/Sikkink (1999), 37
[1380] *Ibid*., 38

deliberations increasingly based on the logic of appropriate argumentation with respect to the meaning of the SGBV prohibition norm in the context of the recruitment crimes against children, and enabled actors' learning, persuasion and eventually their further socialization with the appropriate application of the norm.

4.3. Resistance practices against the misrecognition of the norm in the ICC's first case

The role that international courts ('ICs'), especially those adjudicating on human rights issues, play in strengthening, developing and re-producing legal norms is certainly crucial, especially considering the authority that they inherently possess as legitimate legal institutions and obtain from the international community, which mandates them with implementation of such norms. Due to this generally accepted role, ICs have been mainly perceived as the 'good cops' or "the curators" of the rule of law[1381], which can promote international norms[1382] and whose decisions or authority have been on occasion subjected to state resistance, especially when they try to intervene in the sphere of states' political influence[1383]. In contrast, non-state criticism directed against ICs' omissions to appropriately apply the law and to implement their mandates does not seem to have been widely studied. Similarly, neither the agency of this "pattern"[1384] of resistance, nor the responses of ICs to the critique expressed by their non-state audiences has received much attention. As the given case has demonstrated, non-state resistance against misrecognition of legal norms within ICs has a strong potential to contribute to the evolution of such international legal institutions' expertise and authority and therefore, to ultimately strengthen the global human rights regime. In fact, in times of "pushbacks" and "backlashes"[1385], ICs need to empower and strengthen their status within structures of international order. This can be achieved through efficient application of the law

[1381] Alter (2018)
[1382] *Cp.* Risse/Sikkink (1999)
[1383] Madsen *et al*. (2018); Alter (2018)
[1384] Madsen *et al*. (2018)
[1385] *Ibid*.

and implementation of their mandates in a way that maintains, enforces and further develops the content of the human rights doctrine.

The empirical data on non-state resistance against applicatory misrecognition of the SGBV prohibition norm produced by its advocates in the ICC's first case, against Thomas Lubanga Dyilo, suggests its multifarious character. Building upon the analytical framework of Madsen *et al*.[1386], I call this form 'transformative resistance'. This form has revealed features of both pushback (which operates through ordinary critique within the system) and backlash (which rather aims to overturn the system through extraordinary critique). Madsen *et al*. suggest that non-state resistance could not be considered as a backlash due to its inability to endorse any substantial institutional changes without the support of states. However, the non-state resistance in the present case indicates a form of resistance that goes beyond mere pushback. Although its pattern did not rely on facilitation of broader mobilization through states, it involved internal actors from the Court. Furthermore, its effectiveness throughout and beyond the *Lubanga* proceedings and its ultimately achieved outcomes on both legal and institutional levels would suggest a form of resistance which transcends pushback.

Although the norm advocates' resistance emerged as a criticism of certain decisions expressed within the system and did not seek to harm or abolish the Court[1387], it gradually evolved into somewhat more than ordinary critique. Its rather multifarious character could be traced in (1) the ways the advocates exercised their agency, allowing them to insert and maintain their agenda in the Court's institutional structures and procedures, in (2) the advocates' interpretation of the law and argumentation, which ultimately contributed to the extension of the traditional IHL understanding of the war crimes concept by its convergence with the human rights doctrine, and in (3) their objectives to overturn the system of internalized beliefs, which seems to have caused the misrecognition of the norm by the Court's key personnel. That is, the achievement of the advocates' goals through generation of their target actors' socialization with appropriate application of the SGBV prohibition norm appeared as *transformative*. In fact, if this transformation had not emerged, the Court's authority and legitimacy at least among certain constituencies could have been significantly damaged[1388]. On the one side, the advocates targeted certain decisions and the application of the law within an institutional system, which they did not seek to overturn as such. However, their agency

[1386] *Ibid*.
[1387] *Ibid*., 199-203
[1388] *Cp.* Chappell (2016)

appeared quite extraordinary, since it involved strategies that went beyond the boundaries of ordinary critique[1389] and regular channels of intervention in the Court's proceedings. Indeed, it seems their resistance, to some extent, virtually endeavoured to stretch the 'rules of the game' and ultimately, to even stretch the content of some norms embedded in its legal framework. Thanks to their creativity, the exogenous advocates ultimately succeeded in inserting their agenda into the Court's internal structures, in resisting the misrecognition of the norm's (then rather unclear) applicability in the context of the given case, and as a consequence of their resistance, in triggering the extension of the war crimes concept beyond its traditional understanding in IHL, through the application of the human rights lens. Their endogenous allies, in turn, supported their agenda and maintained it throughout the proceedings by inserting the logic of appropriate argumentation with respect to the application of the norm in the context of the recruitment crimes against children into internal processes of discursive deliberation. That is, their resistance was not seeking to harm, suspend or close the Court, as the definition of a backlash suggests[1390]. Rather, they aspired for the transformation of its institutional identity through its agents' socialization with appropriate application of the SGBV prohibition norm. Thereby, the advocates, indeed, virtually aimed to achieve a certain "overhaul of an institutional set-up"[1391], that could enable such transformation. As the evolution of the socialization 'spiral' triggered by their resistance has demonstrated, they have, indeed, eventually, largely achieved their goals despite the absence of state involvement. One could assume that the transformative power of this resistance is limited, since the Member States of the Court had already formally validated the norm through its legalization and inclusion in its legal framework. However, as this case has demonstrated, the *de-jure* validity of the norm did not automatically imply its *de-facto* power or shared recognition when it came to its application. It was the non-state resistance exercised by the advocates of the norm against its misrecognition that has ultimately activated the transformative process of institutional socialization with its appropriate application.

The constellation of the actors involved in the pattern of the resistance and their strategies could be determined as powerful enough for the production of influence and successful outcomes in terms of transformations on both legal and institutional levels. In fact, by triggering progressive ICL adjudication, their human rights centred approach has ultimately also contributed to the convergence of IHL with IHRL. Their constellation represented a

[1389] Madsen *et al*. specify that ordinary critique may take place, for instance, in legal journals, during professional meetings, public and political discussions (2018, 202)
[1390] *Ibid*., 203-204
[1391] *Ibid*., 203

"segment of a certain audience"[1392] that mainly promoted equal treatment and rights of those who have been predominantly, systematically subjected to SGBV, both in war and in peace, *i.e.*, women and girls. However, where applicable, they also considered SGBV incidents committed against men and boys. Their resistance challenged those "broader societal cleavages"[1393] in relation to the status of the norm that came to the fore in application, in the form of its missing shared recognition. Nevertheless, its institutionalization in the legal framework of the Court caused by the broader political context in which it was embedded on the international level, in turn, provided resistance against its misrecognition with a strong potential for success.

Similar to the dynamic identified by Deitelhoff in her study on persuasion enabled by the transnational advocacy network (in which it advocated for the adoption of a progressive Statute for the future ICC during the negotiations in Rome)[1394], this case has also revealed a two-tiered pattern of agency produced by the actors involved in the trans-institutional advocacy space. The resistance practices exercised by the exogenous advocates of the norm and their endogenous allies produced a 'boomerang' effect[1395] involving two levels of agency[1396] and succeeded in launching and furthering the institutional socialization 'spiral'. The exogenous norm entrepreneurs were involved on both levels of the resistance and appeared to be a key force in its initiation. On the first level, WIGJ framed their resistance broadly and engaged in a kind of a social protest[1397] from outside the Court by requiring investigation and prosecution of SGBV committed against all victims and survivors under the alleged responsibility of the suspect, *i.e.*, including civilian population and child soldiers. Besides this, they had also shared their knowledge, expertise and data with their internal allies, which "prepared"[1398] the latter for their involvement in the second level. The second level was characterized by a narrowed-down framing, focusing on SGBV committed explicitly against the child soldiers within the context of their recruitment; that is, within the context of the prosecutorial charges. In this way, the initial demands of the resistance were strategically reframed, requiring an amendment of the indictment with SGBV charges to comply with the principles of impartiality, equality and fairness[1399], in the interests of those who allegedly had been subjected to SGBV within the context of recruitment conducts. This

[1392] *Ibid*., 205
[1393] *Ibid*., 200-201
[1394] Deitelhoff (2006)
[1395] Keck/Sikkink (1998, 1999)
[1396] Deitelhoff (2006)
[1397] Checkel (2001)
[1398] Deitelhoff (2006), 78
[1399] *Cp. ibid.*, 219

narrowed-down framing was initially specifically stressed and applied by the UN SRSG Coomaraswamy for the introduction of a gender justice agenda in the proceedings and an insertion of internal discursive interactions on appropriate application of the norm in the given context of the case. The target actors' reaction to this approach seems to have, in turn, encouraged the advocates' endogenous allies to support this agenda from within the institutional structures by maintaining the logic of appropriate argumentation with respect to the application of the norm. Thus, a reduced framing allowed the advocates' agenda to break through into the courtroom and for this agenda to be maintained through internal discursive interactions on the meaning and application of the norm in the context of the given case. On the other hand, the former broader framing applied by WIGJ in their protest against the misrecognition of the norm reflected general expectations of the gender justice constituency with regard to the appropriate implementation of the Court's mandate on bringing the individuals responsible for the commission of SGBV to criminal accountability. According to these expectations, SGBV should be treated as separate crimes[1400] to be complied with in addition to the principle of non-discrimination based, *inter alia*, on gender, when interpreting and applying the law, also in the context of other crimes falling under the Court's jurisdiction[1401]. That is, the "tipping point"[1402] of the resistance was indeed enabled through the reframing of its normative setting. This, similarly to Deitelhoff's observations[1403], allowed for the triggering of institutional procedures and target actors' engagement in processes of internal discursive deliberation on the application of the norm in the context of the recruitment crimes against children, increasingly based on the logic of appropriate argumentation. On the other hand, the outcomes of the resistance, including the ultimately receptive reaction from the key staff of the Court involved in the *Lubanga* proceedings and the following changes on both institutional and legal levels revealed the process of actors' socialization with appropriate application of the norm in accordance with both framings.

Although *Lubanga* is not the only case in which the OTP and/or the Judges have misrecognized the application of SGBV provisions or not sufficiently applied them[1404], the resistance dynamic produced by gender justice advocates in this first case of the Court initially and essentially prompted the socialization 'spiral', with the potential to promote collective learning on their appropriate application. In contrast to state resistance or cases of

[1400] Rome Statute (1998), Art. 7(1)(g), Art. 7(1)(h), Art. 8(2)(b)(xxii), Art. 8(2)(e)(vi)
[1401] *Ibid*., Art. 21(3)
[1402] Finnemore/Sikkink (1998)
[1403] Deitelhoff (2006), 237
[1404] Chappell (2016); Grey (2019); also see chapter '2. Mapping the application of the SGBV prohibition norm at the ICC'

"reactionary critique of progress" promoted by ICs/IL especially in the field of human rights[1405], the non-state resistance that will be depicted here targeted the Court's own omission to apply the law in accordance with its legal framework, specifically from the IHRL perspective, from the outset of its operation. Unlike state resistance against progressive evolutions in IL advanced by ICs, which seems to have been mainly influenced by the logic of consequentialism and instrumental deliberations, the non-state resistance in the given case was primarily informed by the logic of the appropriateness. As opposed to state resistance that differentiates between resisting parties on the one side and an IC and its supporters on the other[1406], in this case the resisting actors were also the supporters who wished for and expected the Court to evolve into a strong, progressive and authoritative institution that can sustainably contribute to the elimination of grave human rights violations.

Despite these differences, the analytical framework of Madsen *et al*. has also proved helpful in explaining the non-state resistance dynamic in the given case that was stipulated by analogous contextual factors, including the constellation of the involved actors, its institutional and structural 'embeddedness', and the broader socio-political environment, shaped by historical legacies[1407]. Additionally, as indicated above, the pattern of the resistance was characterized by two levels of framing on which the advocates of the norm and their allies exercised their agency[1408]. The reconstruction and analysis of the empirical case in question will demonstrate that their activities on both levels enabled the 'boomerang' effect[1409] and, empowered by certain conditions, prompted the process of institutional socialization with the appropriate application of the norm that proved to be *transformative*. That is, the evolution of the socialization 'spiral' could be, in turn, revealed to be affected by similar factors as the resistance dynamic. It will therefore be unpacked against the background of triangulation that embraces the constellation of actors, institutional and structural, and broader socio-political factors.

[1405] Madsen *et al*. (2018), 200-209
[1406] *Ibid*., 206
[1407] Madsen *et al*. (2018); on "spatial and temporal embeddedness" of the Court and "gender legacies of the law" see also Chappell (2016); on "historical context and institutional setting" see Checkel (2001)
[1408] *Cp.* Deitelhoff (2006)
[1409] Keck/Sikkink (1998, 1999); Risse/Sikkink (1999)

4.4. Triangulation of the analysis

The various concepts and processes relating to evolution of international norms and referred to in this study, including of misrecognition (or contestation), resistance or criticism and socialization, appear similar not only in terms of the binaries of validity/application or extraordinary/ordinary, which seem to be inherent to these phenomena, but also in terms of their dynamics, which seem to be caused by similar factors, including the constellation of the involved actors, structural and institutional factors as well as broader socio-political aspects[1410]. Although stipulated by certain conditions, actors and their agencies seem to have been credited – also in this analysis – with the main role in initiating and furthering resistance against norm misrecognition that may generate the process of socialization and produce transformative effects.

4.4.1. Constellation of the involved actors

Since the institutionalization and legalization of the SGBV prohibition norm in the legal framework of the ICC, which was established on July 1, 2002, its gender justice constituency that had promoted the emergence, evolution and formal recognition of the norm by the international community, had certain legitimate expectations with regard to its implementation by the newly established Court. Disappointed by the misrecognition of the norm in its first case against Thomas Lubanga Dyilo, a number of non-state advocates of gender justice and their allies engaged in resistance practices from both outside and inside the Court, that aimed at the socialization of its staff with appropriate application of the norm. Their small but diverse constellation allowed for various agency types enabled by those actors' motivation, knowledge, expertise and experience as well as their status, leverage and affiliation with certain structures and institutions. While WIs initially played the role of the social protester against the misrecognition of the norm by raising awareness about it among

[1410] Madsen *et al*. (2018); *Cp.* Günther (1988); Keck/Sikkink (1998, 1999); Risse/Sikkink (1999); Checkel (2001, 2005); Badescu/Weiss (2010); Deitelhoff/Zimmrmann (2013); Chappell (2016)

involved actors, during the course of further resistance, their role modified to somewhat of a "discourse broker"[1411], who provided their internal allies with expertise and support. The UN SRSG Radhika Coomaraswamy, in turn, represented the international community as an authoritative expert, whose views and opinions were respected and recognized as legitimate among the target actors of the resistance, and perhaps, more welcomed in the proceedings than those of the social protesters. Their internal allies, on the other hand, had access to the institutional structures that allowed them to exercise their agency in resistance throughout the proceedings.

4.4.1.1. Exogenous actors

One of the main triggering forces in the trans-institutional advocacy space was the international NGO Women's Initiatives for Gender Justice ('WIGJ'/'WIs'). They recruited domestic actors from the situation in question, that is, from the Ituri region in the DRC, who became their partners on the ground and assisted them in the documentation of information that was subsequently used in the resistance. WIs also cooperated with internal actors from the Court who became their allies and maintained their agenda from within its internal structures when operating on the reduced framing level. That is, this cooperation virtually provided WIs with access to the institutional structures and internal discursive deliberations. In this process, WIs continued supporting their internal allies with knowledge and expertise from behind the curtains. Thus, by cooperating with other actors and coordinating their efforts transnationally and trans-institutionally, efficiently generating and distributing information, acting as initiators of pressure and providing their internal allies with assistance and support, WIGJ played a crucial role in the greater dynamic of resistance[1412]. Yet, similar to the phenomena Deitelhoff identified in her study[1413], their actions seem to have been more influenced by the logics of appropriateness and consequentialism than by that of arguing. However, this tendency was also maintained by their denied access to the proceedings, *i.e.*, if

[1411] Deitelhoff (2006), 78
[1412] *Cp.* Keck/Sikkink (1999), 91-92; Risse/Sikkink (1999), 18
[1413] Deitelhoff (2006), 263

they had been allowed to participate on their request, they would have most likely also engaged in the logic of arguing.

The UN Special Representative on Children and Armed Conflict Radhika Coomaraswamy, another significant exogenous actor in this case, also considerably empowered the resistance by her recognized international authority. Although it could be said that (perhaps also due to her status) Coomaraswamy acted rather independently from the other advocates and in a somewhat more diplomatic way, she nevertheless advocated for the appropriate application of the SGBV prohibition norm and implementation of gender justice in the context of the given case. For example, she was able to impart strong influence on the decision-making actors. This was revealed, for instance, in the Prosecutor's discursive practices, that included "emulation"[1414] of her arguments. This effect might have been achieved due to the Prosecutor's identification with her status as a respected international politician and lawyer, and by recognition of her expertise on women and children's rights. On the other hand, as already mentioned above, in her intervention she applied reduced framing, pointing explicitly at SGBV that had been committed under the alleged responsibility of the accused against the child soldiers; that is, within the scope of the prosecutorial recruitment charges. This reduced focus, in contrast to that on SGBV committed against all alleged victims and survivors, also made her criticism procedurally legitimate and strategically reasonable, since the charges had been already confirmed. Her agency was crucial for fostering the further evolution of the socialization 'spiral' in two respects: initially she essentially introduced gender justice agenda in the proceedings by her intervention as *amicus curiae*, which caused the Prosecutor's 'tactical concessions' with respect to the issue of SGBV. Furthermore, her subsequently granted request for participation in the proceedings as an expert witness must have additionally contributed to the maintenance of internal discursive interactions on the elaboration of the normative meaning in the context of the given case.

[1414] Price (1998), 640

4.4.1.2. Endogenous actors

The endogenous actors from the Court played, in turn, a role similar to the domestic opposition, as it had been theorized based on the 'boomerang' effect from the perspective of state socialization with norms[1415]. This 'domestic opposition' included mainly the Legal Representatives of the victims and Judge Elizabeth Odio Benito. Judge René Blattmann also occasionally supported the advocates' agenda, yet, apparently in a rather temporary and unsustainable way. Other actors from various organs of the Court, including the OTP and the Chambers, might have also supported the resistance against the misrecognition of the norm. Yet, their agency will not be considered here (directly) for a number of reasons: because they exercised it indirectly (due to the necessity for confidentiality in their positions)[1416], because their direct impact could not be identified in available sources (such as the case files) and due to restricted access to the interviewees who might have possessed such information.

While the Legal Representatives of the victims ('LRs'), as previously mentioned, also actively operated within the advocacy space as the endogenous allies of the norm advocates, with whom WIGJ engaged in an informal exchange of information and jointly structured their resistance practices[1417]. Judge Odio Benito played a similar role to that of the UN SRSG Coomaraswamy from the inside the institutional structures, *i.e.*, the role of a powerful actor involved in the resistance as an endogenous ally. She actively supported its agenda, despite the risk of being accused of bias and pursued her questioning in a way that encouraged the witnesses to testify on SGBV committed against child soldiers. Due to her judicial status, she could not be explicitly affiliated with the trans-institutional advocacy space; yet she reflected the concerns and requirements of the resistance from the bench by the means that she had at her disposal.

[1415] Risse/Sikkink (1999)
[1416] Interviews with A. and B. (ICC Chambers), The Hague, May 2017, December 2018 (anonymized)
[1417] Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018

4.4.1.3. The 'boomerang' effect

The trans-institutional advocacy space that emerged in this case thus embedded the actions of both exogenous and endogenous actors (the WIGJ and those who supported their efforts from the ground in the DRC, and LRs respectively). These actors cooperated with each other and jointly framed their agenda using a number of tactics and techniques. Moreover, they had powerful allies from both within (Judge Odio Benito) and outside (UN SRSG Coomaraswamy) the Court, who both played an undoubtedly powerful role in the ultimate success of the overall resistance. Each of these actors fulfilled a distinctive but ultimately integral role for its outcomes. Their 'teaching'[1418] about the appropriate norm application in the context of the given case was "catalytic"[1419] in prompting learning and socialization processes among their target actors. Triggered by the exogenous actors who put the Court under pressure from the outside and maintained by the endogenous actors who had been encouraged by the former and took over their agency from within the institutional structures, the 'boomerang' effect[1420] has played a critical role in the given case of non-state resistance and effectively fostered the further evolution of the institutional socialization 'spiral'[1421]. Eventually, the gender justice 'boomerang' achieved its addressees due to these joint efforts, which succeeded in persuading them to recognize the legitimacy of the resistance's claims, despite perplexity about their applicability.

The constellation of the involved actors and their joint agency was, to all appearances, particularly vital for the dynamic of the resistance and eventually, for its successful outcomes on both legal and institutional levels. This appears to have been essentially stipulated by three factors: (1) the ability of WIGJ, despite their denied access to the proceedings, to build an alliance with the internal actors and to insert their agenda and concerns into the Courtroom by the means of the 'boomerang' effect. That is, they empowered their internal allies to exercise their agency by maintaining and advancing the internal discursive deliberations on the appropriate application of the norm in the context of the given case throughout the proceedings. Through their cooperation with the LRs, WIs also succeeded in assisting former child soldiers who had been subjected to SGBV within the context of their recruitment in their application for the recognition of an official victim status. Furthermore, the documentation of

[1418] Price (1998), based on Finnemore (1993)
[1419] *Ibid*., 638-639
[1420] *Cp.* Keck/Sikkink (1998, 1999)
[1421] *Cp.* Risse/Sikkink (1999)

SGBV committed under the alleged responsibility of the suspect, which they submitted to the Court, appeared to have supported and enabled Judge Odio Benito's witness questioning during the trial[1422]. What's more, while WIs' direct intervention had been denied during the Lubanga proceedings, eventually, their expertise in gender issues was explicitly recognized by their target actors, *inter alia*, through the appointment of their (then) executive director Brigid Inder as Special Gender Advisor to the OTP, and was considered in the institutional refinement process of the norm's prescriptive status. That is, WIs' contributions to the resistance dynamic and its ultimate outcomes on different levels have been clearly quite significant, even if they could not directly participate in the internal discursive interactions, but rather exercised their agency from behind the curtains.

Another central factor (2) has been the involvement of the UN SRSG Radhika Coomaraswamy with her authoritative status and internationally recognized expertise, which significantly prompted the advancement of the socialization 'spiral'. While WIGJ had to reframe the mode of their agency from an initially rather alert and direct approach to a more subtle and indirect method after they were refused access to the proceedings, the UN SRSG could more easily gain access to and influence the behaviour of the responsible actors. Furthermore, as previously mentioned, the UN SRSG, in contrast to the WIGJ, applied a framing, which focused on SGBV that had been committed against (predominantly female) child soldiers under the alleged responsibility of the accused, that is, within the context of the prosecutorial charges. This approach legitimized her interventions in legal and procedural terms and fostered internal discursive deliberations on the appropriate application of the norm in the context of the given case. Nevertheless, the reconstruction of the proceedings suggests that perceptions of the actors' legitimacy differed among the Court's staff and seemed to have influenced the treatment of their respective requests. Although two different Chambers were involved (the Pre-Trial Chamber in the WIGJ case and the Trial Chamber in the UN SRSG Coomaraswamy's case) with different Judges who decided upon their applications, the way in which the UN SRSG Coomaraswamy's intervention was treated (also by the Prosecutor) implied that, due to her status, the target actors were more prone to being influenced by her than by WIs' arguments. Due to the target actors' receptive reaction to her intervention, Coomaraswamy reinforced the 'boomerang' effect by encouraging internal allies to maintain her requests further throughout the trial. Additionally, as mentioned above, her initially granted *amicus curiae* status was later reclassified on her request to that of an expert witness,

[1422] Interview with C. (an actor from the international civil society, who worked with the WIGJ), The Hague, December 2018 (anonymized)

which allowed her to testify during the hearings. By doing so, she could endorse her agenda more firmly in the internal discursive deliberations on the meaning of the SGBV prohibition norm which was eventually reflected in the judgement. In fact, due to her status, knowledge and experience, which focused on both violence against women and children involved in armed conflicts, one could have hardly wished a better authority in the context of this case. That is, despite the differences in singular effects that the exogenous actors could produce, both played their respective integral parts in the overall resistance dynamic and by furthering the socialization 'spiral' with the appropriate application of the norm, eventually achieved successful outcomes on both legal and institutional levels.

Lastly, (3) the presence of gender justice advocates' allies on various levels of the Court's institutional structure was also ultimately essential for the maintenance of internal discursive deliberations on the elaboration of the normative meaning in the context of the given case throughout the proceedings, as well as for their reflection in the judgement. While the LRs of the victims sustained the resistance by their use of the "constructive ambiguit[ies]"[1423] provided in the legal framework of the Court in their internal interventions, Judge Odio Benito, who is known for her progressive expertise in gender justice issues, supported their efforts from the bench by exercising her judicial agency and authority. Altogether, their resistance against the misrecognition of the SGBV prohibition norm in the Court's first case considerably advanced the further evolution of the socialization 'spiral' towards the target actors' reaffirmation of the norm's validity and *de-facto* recognition of its applicability under the fulfilment of required procedural criteria.

As the present case has demonstrated, non-state resistance based on the involvement of both exogenous and endogenous actors, who target their aims in an effective way from both inside and outside of the institutional structures can reverse patterns of norms' applicatory misrecognition by transforming actors' priorities, choices, and eventually, identities. In this case, the norm advocates applied a number of tactics, including efficient generation and distribution of information, framing, shaming, as well as the use of symbolic, leverage, and accountability politics[1424]. Using various strategies and techniques, they succeeded in raising awareness about the inappropriateness of the norm's misrecognition. What's more, by triggering and reinforcing the 'boomerang' effect (revealed here as a powerful mechanism of resistance and mobilization, which has the capacity to dismantle borders, not only

[1423] Oosterveld (2014)
[1424] Keck/Sikkink (1998, 1999)

transnationally but also trans-institutionally) they likewise succeeded in generating their target actors' learning and further reflective[1425] socialization with appropriate application of the norm through internal discursive deliberations that were increasingly based on the logic of appropriate argumentation[1426]. As the outcomes of this process have indicated, the non-state resistance against the applicatory misrecognition of the SGBV prohibition norm in the context of the given case eventually managed to win the "struggle over [the norm's] meaning"[1427].

4.4.1.4. Two levels of framing

When framing their agenda, the norm advocates needed to consider the environment in which the given case was embedded, and specifically the relationship between the SGBV prohibition norm and other involved legal norms. Their claims had to fit into the legal framework of the Court as well as into the context of the case. Their applicability to these contexts had to be demonstrated as logical and appropriate[1428]. In this process, the advocates needed to adapt their requests to the context of the prosecutorial charges throughout the proceedings[1429]. As mentioned above, the given case of resistance embraced a pattern of agency with two levels that was based on two framings[1430]. Initially, WIGJ applied a broader framing by requesting the amendment of the child soldiers' recruitment charges with separate charges of SGBV that had been committed under the alleged responsibility of Lubanga against any alleged victims/survivors, that is, including the civilian population and the child soldiers. However, their requests based on this framing and their access to the proceedings were denied by the OTP and the Judges of the PTC, who then also confirmed the recruitment charges that excluded any SGBV consideration for the trial. Subsequently, the UN SRSG on Children and Armed Conflict Radhika Coomaraswamy applied a narrowed-down framing by focusing on exclusively the SGBV that had been committed against the child soldiers, that is, within the scope of the prosecutorial charges. Her expertise and authority were probably also perceived

[1425] *Cp.* Checkel (2005)
[1426] Günther (1988)
[1427] Keck/Sikkink (1999), 95
[1428] *Cp.* Finnemore/Sikkink (1998), 908-909; Keck/Sikkink (1998, 1999)
[1429] *Cp.* Barnett (1999), 8
[1430] *Cp.* Deitelhoff (2006)

as specifically valuable within the context of this narrower framing. Since the charges had been already confirmed by the time of her intervention, this approach also turned out as strategically more efficient and legitimate in procedural terms[1431]. It allowed for the introduction of gender justice issues in the proceedings, which the advocates' internal allies could subsequently maintain by means of intersubjective discursive deliberation on appropriate application of the SGBV prohibition norm in the context of the given case. These internal communicative interactions (that could practically only be triggered after the confirmation of the charges for trial) in turn, revealed the target actors' contestation of the norm's applicability in the given case in both procedural and legal terms. WIGJ likewise adapted their resistance to the reduced framing by continuing to support the LRs' agency within its context. Yet, although this approach proved to be rather efficient within the context of the given case, the initially applied broader framing also ultimately impacted the target actors. The outcomes of the resistance in terms of their learning and socialization with the appropriate application of the SGBV prohibition norm reflected the advocates' requests, which had been embraced in both framings. While various logics of behaviour were involved on both levels of the resistance, the logics of consequentialism and appropriateness seemed to prevail within its broader framing, while the logic of arguing appeared to be the main mode that guided the application of the narrower framing. Furthermore, intersubjective discursive deliberations among legal actors involved in the proceedings were increasingly ruled by the logic of appropriate argumentation due to the narrower framing. While the broader framing was driven by the advocates' aspiration to prevent the emergence of an institutional SGBV prohibition norm misrecognition pattern[1432], the narrow framing, based on the logic of arguing, was essentially adapted to the prosecutorial charges and enabled the logic of appropriate argumentation with respect to the norm's application to be inserted in the specific context of this legal case. The advocates of the norm and their allies also used certain instruments, tactics and techniques in accordance with the logics that prevailed in ruling their behaviour on these two levels. While the initial broader framing required broader mobilization along with alliance building with internal actors (especially since the advocates' access request to the proceedings based on this framing had been denied), the narrower framing was rather oriented towards efficient "grafting"[1433] of the norm in the context of the legal case in question. This necessitated the ability of actors involved in the resistance to engage in processes of effective communication and argumentation with their target actors,

[1431] *Cp.* Payne (2001), 44-45
[1432] Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018
[1433] Price (1998), 627-631

i.e., a "calm dialogue" that occurred within a common life-world and was characterized by a restricted number of participants who belonged to an authoritative group, respected by the targets of persuasion[1434].

4.4.1.5. Strategies, instruments and techniques of actors involved in the resistance

In addition to the strategic framing mentioned above, the advocates also applied other methods that generally complied with accepted 'rules of the game'. However, they also resorted to additional (somewhat innovative, perhaps even extraordinary) channels if the ordinary ones appeared insufficient to achieve their goals. Guided by the logics of consequentialism and appropriateness, they creatively interpreted, and at times perhaps even tried to stretch the rules to some extent, which also required their engagement in the logic of arguing. The strategies, instruments and techniques that allowed them to do so included the efficient generation and distribution of information, shaming and networking as well as symbolic, leverage and accountability politics[1435].

The ability of norm entrepreneurs to provide information in a productive and accurate way and to distribute it efficiently among their target actors and allies represented a crucial element of their resistance, especially during its initial stages, when it took the form of protest. While the exogenous advocates provided the necessary information, their endogenous allies could productively use it in internal discursive deliberations[1436]. Due to their restricted resources and power, WIGJ extensively engaged in information politics[1437] for the exercise of their "pedagogical" skills[1438]. Using electronic technology, they succeeded in generating first-hand information on SGBV committed under the alleged responsibility of Lubanga at a

[1434] Risse (2000); Checkel (2001), 574; Deitelhoff (2006), 273
[1435] Keck/Sikkink (1998, 1999); Price (1998)
[1436] *Cp.* Keck/Sikkink (1999), 92-93
[1437] *Cp. ibid*., 95
[1438] Price (1998), 617, based on Finnemore (1993)

relatively low cost[1439]. Subsequently, they distributed this information among actors involved in the case, that is, to the "destinations" where it has ultimately made an impact[1440]. As a driving force of the resistance, WIs initiated, linked and coordinated efforts between external actors on the ground in the DRC and those who were involved in the proceedings[1441]. This accumulated information likewise provided them with the tools for the exercise of symbolic and accountability politics[1442]. References to experiences of SGBV victims and survivors documented in their report as well as the statements of the Prosecutor, in which he claimed that his Office was going to consider SGBV in the investigation and prosecution of cases from the DRC situation, allowed them to problematize the issue of its misrecognition and to create concern among their target actors[1443]. Additionally, due to the legal environment of their concerns, WIs had to generate and frame the information in a legally appropriate and persuasive way, in order to satisfy the standards of criminal prosecution[1444]. On the one hand, they wanted to provide the Court with reliable information that it could use in the trial[1445]. On the other, they wanted to oppose the perception that NGOs merely "politicize" their agenda[1446]. Indeed, institutions like ICs might not necessarily request knowledge from NGOs in the first place, but rather resort to the expertise of actors like the UN SRSG Radhika Coomaraswamy or members of epistemic communities[1447]. This attitude towards NGOs was also revealed in this case and required that WIs engage in 'workarounds' for the distribution of their information. In fact, the response of the Prosecutor to their appeals (or at times, the lack of it) implied his at least initial perception of them as "illegitimate" 'aliens'[1448]. And yet, by the means of their 'workarounds', WIs engaged in shaming the OTP by ultimately demonstrating the existence of what the OTP claimed was not there. For the generation of support for their agenda among actors with access to the institutional structures and procedures, WIs also engaged in networking[1449]. Their cooperation with the Legal Representatives of the victims who introduced and maintained their agenda throughout the

[1439] On the role of electronic media and technology see Finnemore/Sikkink (1998); Keck/Sikkink (1998, 1999); Price (1998)
[1440] Keck/Sikkink (1999), 95
[1441] Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018
[1442] Keck/Sikkink (1999), 97-98
[1443] *Cp.* Price (1998), 619, 621
[1444] As will be elaborated in chapter '5. Empirical findings', before the information was circulated among the Court's organs, the WIGJ had supervised its generation by their partners on the ground and while doing so, tried to ensure that such standards would have been fulfilled to the best extent possible (subchapter '5.2.2.1. The denial to include SGBV in the indictment'). Significantly, the cooperation with local communities and actors, *i.a.*, for generation of information and documentation of SGBC, was subsequently included in the OTP's Policy Paper on SGBC, which was elaborated in cooperation with Brigid Inder, the then executive director of WIGJ and Special Gender Advisor to the ICC's OTP (ICC OTP, 2014, paras.55, 107).
[1445] Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018
[1446] Price (1998), 622
[1447] *Cp. ibid*., 620
[1448] Risse/Sikkink (1999), 23
[1449] Price (1998), 623, 627

proceedings[1450] also allowed them to exercise leverage that they might have been unable to achieve otherwise[1451].

Due to their position in the internal structures of the Court, the LRs could, in turn, transform the issues that had been previously perceived as political into legal concerns, which required a reaction from the responsible actors[1452]. Using information and symbolic politics, they referred to strong images in their statements that reflected their agenda in a powerful way and bore a strong potential of creating awareness around the issue[1453]. They also tackled the omission to investigate and prosecute SGBV that had been committed against child soldiers under the alleged responsibility of the accused, in terms of accountability politics. That is, while their shaming addressed the actors who had ignored the issue of SGBV, it also suggested that the prestige and legitimacy of the newly established Court might also be potentially threatened as a consequence[1454]. Perhaps unconsciously, however, this tactic indicated the possibility of both moral and material costs that could have been caused by the potential discretization of the Court's authority[1455].

The UN SRSG, Radhika Coomaraswamy, used the information that she possessed from her professional experience and expertise in her interventions, which encompassed knowledge of specific vulnerabilities imposed overwhelmingly on girl soldiers during and after their involvement in armed conflicts. Based on this knowledge, she shamed both the Prosecutor and the Pre-Trial Chamber Judges for their misrecognition to apply the SGBV prohibition norm within the context of the child soldiers' recruitment crimes. Throughout her argument, she also employed accountability politics by referring to regional and international human rights instruments that supported her claims and should have been considered by the Court's staff when applying and interpreting the law. In fact, her criticism could have damaged not only those actors' but also the Court's reputation, and ultimately produced desired influence by fostering the further evolution of the socialization 'spiral'[1456].

Judge Odio Benito also used information and symbolic politics while questioning the witnesses, which appeared to be based on the documentation of SGBV produced by WIGJ[1457].

[1450] *Cp. ibid*., 623-624
[1451] Keck/Sikkink (1999), 95-97
[1452] *Cp.* Price on the ability of norm advocates to transform decisions from "insulated" into political matters (1998, 625)
[1453] *Cp.* Keck/Sikkink (1999), 95-97
[1454] *Cp. ibid.*, 97
[1455] *Cp. ibid.*
[1456] *Cp.* Risse/Sikkink (1999), 25-28
[1457] Interview with C. (an actor from the international civil society, who worked with the WIGJ), The Hague, December 2018 (anonymized)

In her argumentation, while criticizing her colleagues' reluctance to consider SGBV issues in the judgement, she also sustained the accountability politics that had been previously applied by the UN SRSG Coomaraswamy. That is, by exercising her judicial powers from the bench, she ensured the maintenance of internal discursive interactions on the appropriate application of the SGBV prohibition norm in the context of the given case throughout the trial, up until the judgment.

Using these strategies, instruments and techniques, the norm advocates and their allies not only succeeded in putting pressure on actors who were responsible for the misrecognition of the SGBV prohibition norm by inferring the logic of consequentialism, they also generated the influence of the logic of appropriateness by demonstrating the inappropriateness of the misrecognition in the context of the recruitment crimes against children, which in turn required their engagement in the logic of arguing. Eventually, their overall resistance advanced the internal discursive deliberations on the meaning of the norm and its application in the context of the given case, which were increasingly ruled by the logic of appropriate argumentation, and eventually promoted their target actors' reflective socialization with the appropriate application of the norm.

4.4.1.6. Arguing as a means of promoting reflective learning, persuasion and socialization

A number of scholars have suggested that by framing their agendas in a way that would influence actors' behaviour, norm entrepreneurs often engage in "coercion" or "social sanctioning" and "strategic social construction", involving calculation and instrumental considerations[1458]. That is, even if motivated by normative ideas and beliefs, by engaging in "instrumental rationality"[1459] they do not persuade the others per se[1460]. As elaborated above, the given case has also revealed the features of such a mode of action, which was mainly

[1458] *Cp.* Risse/Sikkink (1999); Payne (2001); Checkel (2001); Deitelhoff (2006)
[1459] Risse/Sikkink (1999)
[1460] *Cp.* Payne (2001); Checkel (2001); Deitelhoff (2006); also Risse/Sikkink (1999)

pursued within the broader framing of the initial stages of the resistance. In fact, this approach allowed for consciousness-raising among responsible actors and has been revealed to be valuable for their learning outcomes in the long-term. Yet, although this was politically and morally legitimate, from a legal perspective it could be perceived that "political" pressure was put on the Prosecutor in terms of his strategy in the Court's first case. The reduced framing, in contrast, appeared to be legally legitimate, although the advocates still needed to demonstrate this to their target actors. They did so by engaging in arguing as the dominant mode of interaction that, in turn, also embraced elements of rule-guided behaviour, grounded in normative rationality on the one side, as well as instrumental rationality and strategic deliberations on the other[1461].

Advocates' and their allies' (perhaps unconscious) engagement in a kind of "strategic distortion"[1462] of ambiguously formulated procedural provisions embedded in the legal framework of the Court (based on both civil and common-law systems) also enabled spaces in which their agenda and arguments could be introduced and maintained. Although such "distortions" could be seen as "manipulative"[1463], they are essentially a result of the Court's nature and integral to the interpretation and application of its law. In fact, those "constructive ambiguit[ies]"[1464] allowed the resistance to insert their agenda in the proceedings, and to further uphold the internal discursive interactions, which advanced processes of learning and socialization with the norm's appropriate application among the Court's staff. That is, this "manipulation"[1465] was also triggered by the advocates' and their allies' communicative rationality, due to the context of their resistance (especially under the initial broader framing), which was largely characterized by the conditions that deviated from an "ideal speech situation"[1466]. By engaging in creative interpretation of the Court's procedural framework, which has ultimately served as a productive 'teaching' technique[1467], they eventually succeeded in improving the speech situation with respect to SGBV issues. Indeed, the (perhaps unconsciously strategic) application of this technique in the given case of resistance assisted the actors in "finding shared truth"[1468] with regard to both the normative meaning-in-use in the context of the given case and the interpretation of ambiguous procedural provisions.

[1461] *Cp.* Risse (2000), 1-4
[1462] Payne (2001), 45
[1463] *Ibid*., 47
[1464] Oosterveld (2014)
[1465] Payne (2001), 41
[1466] Risse/Sikkink (1999), 14; Risse (2000), 9-10, 18, based on Habermas
[1467] Price (1998), based on Finnemore (1993)
[1468] Payne (2001), 47

Generated by the logic of arguing, a collective communicative process within the legitimate legal space helped the actors to clarify common knowledge about the situation in question and the corresponding 'rules of the game' within its specific context[1469]. The discursive deliberations which emerged were increasingly ruled by the logic of appropriate argumentation (which stipulates the consideration of the principles of coherence and impartiality) on the application of the norm in this context. These revealed a lack of clarity on the issue among the responsible actors, which also fostered their willingness to learn[1470]. The emergence of the learning process seemed to have been caused by different 'teaching' strategies[1471] that involved multiple incentives and generated various logics of behaviour. In fact, before argumentative rationality took over as a dominant mode of interaction, the Prosecutor had engaged in various communication modes, such as bargaining (based on instrumental rationality) as well as rhetorical action (based on strategic argumentation) for the justification of certain choices, which eventually "entrapped" him and enabled further transition[1472]. While his engagement in bargaining and rhetorical action could be revealed in his opening statement to the trial and also partly throughout the proceedings, his closing statement was significantly ruled by argumentative rationality.

Although the case proceedings did not represent an entirely "ideal speech situation"[1473] due to the unequal powers attributed to the involved actors in accordance with their respective roles, some requirements for the establishment of argumentative rationality could be satisfied. This was due to the intrinsic characteristics and newness of the norm in question, as well as actors' newness to the issue at stake, the involvement of persuaders with a relatively equal or authoritative status, and the common life-world in which the deliberations were embedded in a kind of insulated setting[1474]. Actors' statements throughout the proceedings suggested their general recognition of the norm's validity and ability to empathize with victims and survivors of SGBV. Despite their diversity in terms of their various cultural and legal backgrounds and experiences, they shared a common legal identity, and generally, mutually recognized the legitimacy of each other's arguments based on fundamental legal understandings, principles and norms. Nevertheless, as their deliberations in the given case have demonstrated, sharing a common life-world did not necessarily mean that the actors also shared common knowledge. The absence of common knowledge not only impacted their diverging interpretation on

[1469] Risse (2000), 2-7
[1470] *Cp.* Checkel (2001), 562-563
[1471] Price (1998), based on Finnemore (1993)
[1472] Risse/Sikkink (1999), 25-28; Risse (2000) 8-10
[1473] Risse/Sikkink (1999), 14; Risse (2000), 9-10, 18, based on Habermas
[1474] Risse (2000); Checkel (2001); Deitelhoff (2006)

appropriate application of various norms embedded in the legal framework of the Court, but also their willingness to engage in intersubjective discursive interactions for the clarification of such issues. The target actors' recognition of those sharing their life-world and authoritative status as "equals" legitimized these actors to impact (or access and impact) the discourse[1475], to voice their concerns in this process and to influence the elaboration of common knowledge. That is, while the perception of WIGJ's participation in the proceedings and their arguments (especially within the sensitive context of the Court's first case) were somewhat perceived as "illegitimate"[1476], their internal allies or external actors like the UN SRSG Coomaraswamy had much better chances of being able to insert the agenda that had been initially excluded from the case by the OTP. In contrast to the international public sphere, to which NGOs can gain easier access[1477], international legal proceedings, particularly in certain sensitive contexts, still remain rather exclusive in terms of their participants. This is despite the *amicus curiae* regulation that can be used by external actors for the request of such access[1478]. Yet, similar to international public discourses, a "civilizing"[1479] effect can be also exogenously generated in international legal proceedings when actors succeed in creating space for argumentation and deliberation, specifically on issues that potentially define who belongs to a "civilized community"[1480].

For the generation of learning and persuasion among legal experts involved in the proceedings, the advocates needed to engage in arguing based on solid legal knowledge. Yet, they framed their arguments not only as structurally appropriate and logical by references to legal provisions that underpinned their claims, but also as psychologically affective[1481] by making reference to the experiences of SGBV victims and survivors. In this regard, they stressed the characteristics of the SGBV prohibition norm within the context of the child soldiers' recruitment charges, including issues of 1) bodily harm to vulnerable individuals and an allegedly clear connection to those responsible for that harm, which related to the normative logic[1482]. And secondly, the issue of 2) legal equality of opportunity[1483] that was undermined by the misrecognition of SGBV, which was committed overwhelmingly, yet not exclusively, against girls, within the context of their recruitment, and which revealed

[1475] Risse (2000), 10-11, 14-16
[1476] Risse/Sikkink (1999), 23; Risse (2000), 16
[1477] Risse (2000), 21-22
[1478] ICC ASP (2002a), Rule 103: "At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate".
[1479] Risse (2000), 22
[1480] *Ibid*., 28-29
[1481] Finnemore/Sikkink (1998); Keck/Sikkink (1998, 1999)
[1482] Keck/Sikkink (1999), 98-99
[1483] *Ibid*.

structural deficiencies in the given case. By reflecting these issues in their arguments, especially from the perspective of IHRL, the advocates and their internal allies succeeded in persuading their target actors in the *de-facto* inappropriateness of the norm's misrecognition. Although the prospects to correct the *de-jure* misrecognition ultimately played out as hopeless in *Lubanga*, by articulating with IHRL instruments on behalf of the international community, their resistance has eventually not only contributed to the reaffirmation of the norm's validity and emerging socialization with its appropriate application specifically, but also generally to the convergence of IHL and IHRL[1484]. The effective use of legal expertise in the relevant fields of the international law (including IHL, IHRL, and the emerging body of ICL that is essentially based on the former two), as well as in regional human rights instruments thus constituted a crucial aspect of their agency.

Eventually, the resistance against the misrecognition of the SGBV prohibition norm successfully changed the communicative mode of behaviour between its agents and target actors from instrumental rationality reflected in denial and bargaining, through strategic argumentation reflected in tactical concessions and rhetorical action, to argumentative rationality, which eventually took over in internal discursive deliberations on the normative meaning-in-use[1485]. The maintenance of argumentative rationality in relation to the issues that were *de-jure* excluded from the proceedings was, in turn, influenced by a number of factors, which included (1) the access of the advocates' internal allies to institutional structures and procedures, (2) their argumentative ability to productively use the "constructive ambiguit[ies]"[1486] embedded in the Court's legal framework and through this, their (3) compelling of the target actors of the resistance to maintain their participation in the discursive deliberations. (4) Due to argumentative consistency inherent to legal applicatory discourses, based on the consideration of the principles of coherence and impartiality, these deliberations were successively ruled by the logic of appropriate argumentation[1487]. That is, eventually, by means of argumentative rationality, the actors approximated a shared understanding of the situation[1488], of the norm's meaning and appropriate application within the specific context of the case. This gained knowledge, in turn, furthered the socialization 'spiral' towards the reaffirmation of the norm's validity and *de-facto* recognition of its

[1484] On the ability of certain framings to produce various outcomes see also Payne (2001), 45
[1485] Risse/Sikkink (1999); Risse (2000)
[1486] Oosterveld (2014)
[1487] *Cp.* Günther (1988); Risse/Sikkink (1999); Risse (2000)
[1488] Risse (2000), 29-32

applicability under the fulfilment of certain procedural criteria, which were revealed in the judgement.

Similar to dynamics of actors' behaviour identified in international public discourses[1489], the given case has also exposed the involvement of various logics. While the logic of consequentialism predominated when actors proceeded strategically to achieve their highest-priority goals, the logic of appropriateness prevailed when they started to realize the inappropriateness of the norm's misrecognition within the context of the case. When the actors appeared uncertain about the situation and their own interests in the given context, argumentative rationality took over. That is, a switch of the dominant mode from instrumental to argumentative rationality took place. The former mode seems to have primarily governed actors' behaviour in the initial stages of the proceedings, until the logic of arguing (triggered by the resistance against the misrecognition) generated the activation of the logic of appropriateness, which eventually impacted the target actors' engagement in strategic argumentation by the time the trial began. This transformation implied that the process of their socialization with the appropriate application of the norm was already underway[1490]. The mode of appropriate argumentation[1491], which was subsequently achieved during internal discursive interactions served, in turn, as a mechanism for reflective legal learning and persuasion[1492]. This has strengthened the link between the agents and structure[1493] and facilitated the further evolution of the socialization 'spiral'[1494].

Whilst institutions may either promote socialization processes[1495] or be the sites of such processes[1496], actors involved in their operation usually adopt certain roles and act in accordance with the expectations connected to those roles[1497]. In doing so, they can socialize with norms through processes such as social learning and social influence[1498]. However, these sometimes need to be initially triggered by someone else[1499]. Checkel's three mechanisms of socialization, which include strategic calculation, role-playing and normative suasion and are based on instrumental, bounded and communicative modes of rationality[1500], reflect Risse's

[1489] *Ibid*., 22-23
[1490] *Cp.* Checkel (2005), 804
[1491] Günther (1988)
[1492] *Cp.* Checkel (2005)
[1493] Risse (2000), 34
[1494] *Cp.* Risse/Sikkink (1999)
[1495] *Cp. ibid.*
[1496] Checkel (2005), 806, 815
[1497] *Ibid*., 806-808
[1498] *Ibid*.
[1499] *Ibid*.
[1500] *Ibid*., 805

deliberations on the difference between three logics of behaviour, to some extent[1501]. In contrast to strategic calculation, which is rooted in a rationalism that implies behavioural motivation by some kind of material and/or social incentives, the latter two mechanisms of role-playing and normative suasion operate in accordance with the logic of appropriateness [1502] . However, they represent two different types of socialization mechanisms[1503]. In the context of the given case, a specific role-playing mechanism was revealed at the stage of 'tactical concessions', when the Prosecutor, based on strategic argumentation, started to engage in rhetorical action, activated by the norm advocates' agency. This revealed his adaptability to certain social expectations of appropriateness in accordance with his role in the case. Simultaneously, he continued to engage in strategic bargaining on the application of the norm, which seems to have been similarly influenced by his bounded rationality in the context of the given case. Despite the fact that the role-playing mechanism was activated (suggesting the influence of the logic of appropriateness on actors' behaviour rather than mere rational calculation[1504]), their understanding of the normative meaning and application in the context of the given case still seemed rather non-reflective. The mechanism of normative suasion, which was eventually enacted by processes of intersubjective communication based on argumentative rationality, suggested the emergence of a reflective socialization process with appropriate application of the norm. That is, normative suasion promotes a switch from the logic of consequentialism to that of the appropriateness[1505]. This implies that actors actually start *to believe* in the inappropriateness of their prior choices. While the advocates of the norm and their internal allies succeeded in triggering this mechanism during the *Lubanga* proceedings, its outcomes could be identified in the judgement (which reaffirmed the norm's validity and *de-facto* recognized its applicability) as well as in the following stages of the socialization 'spiral' which involved refinement of the norm's prescriptive status and aspired appropriateness in its application.

[1501] *Cp.* Risse (2000)
[1502] Checkel (2005), 804-805, 809
[1503] *Ibid*.
[1504] *Ibid*., 810-811
[1505] *Ibid*., 812

4.4.1.7. Stages of influence

By successfully deploying these strategies, instruments and techniques and engaging in arguing in order to ultimately activate its target actors' reflective learning, persuasion and socialization with appropriate application of the norm, the resistance produced impact on various levels. The advocates initiated a dialogue with actors from the Court, and also generated and distributed information on SGBV for which the suspect was allegedly responsible. Through these actions, they (1) set the agenda and created awareness about the potential oversight that they claimed to have identified in the case[1506]. The further resistance against the misrecognition of the norm was largely undertaken by means of symbolic, leverage and accountability politics. These methods formed the advocates' and their allies' arguments throughout processes of communication and deliberation, similarly influencing (2) the discursive positions of the responsible actors[1507]. Their creative interpretation of the procedural "constructive ambiguit[ies]"[1508] included in the legal framework of the Court additionally allowed the advocates and their allies to trigger (3) institutional procedures, which fostered the maintenance of internal discursive interactions on the conceptual clarification of the normative meaning-in-use in the context of the given case[1509]. Curiously, in this regard, the claim that learning and persuasion can be triggered by authoritative experts from the field rather than by NGOs that mainly put pressure and engage in lecturing[1510] cannot be fully confirmed in this case. Despite the undoubtedly crucial influence of the UN SRSG Radhika Coomaraswamy's intervention, WIGJ likewise, albeit perhaps rather insensibly, engaged in the process of (4) internal discursive deliberations based on argumentative rationality through their cooperation with the LRs of the victims. Thus, they have also largely contributed to the reflective learning and persuasion outcomes. As elaborated above, the LRs could introduce WIs' arguments in the proceedings, despite the fact that the latter were denied access to direct participation in the "calm dialogue"[1511] taking place. The subsequent appointment of their executive director, Brigid Inder, as the OTP's Special Gender Advisor under the Prosecutor Bensouda additionally corroborates this assertion and affirms recognition of their agency by their target actors. Furthermore, Inder's

[1506] *Cp.* Keck/Sikkink (1998, 1999)
[1507] *Cp. ibid.*
[1508] Oosterveld (2014)
[1509] *Cp.* Keck/Sikkink (1998, 1999)
[1510] Checkel (2001), 574
[1511] *Ibid*.

appointment indicated that WIGJ had achieved a further stage of influence through their deeper, official infiltration into (5) the institutional structures of the Court. In fact, this appointment allowed their executive director's participation in the OTP's process of refining the normative content and developing (6) a new policy that strengthened the prescriptive status of the norm in application[1512]. Although this evolution does not imply that actors' behaviour would automatically and sustainably change and should be therefore still consistently monitored[1513], some relevant developments could already be identified in this regard. That is, the advocates of the norm succeeded in producing a multilateral impact on all these levels (in both legal and institutional terms), despite their initially restricted access to the internal structures and proceedings of the Court. The framing of the resistance's concerns as a "crisis issue"[1514], which could eventually be demonstrated in both political and legal terms, facilitated (7) the willingness of the target actors to learn how to overcome the crisis and to prevent its potential consequences. This dynamic ultimately enabled their further (8) reflective socialization with the appropriate application of the SGBV prohibition norm. On the whole, the resistance against the misrecognition of the norm in the context of the Lubanga case succeeded in influencing (9) the behaviour[1515] of its target actors that could be traced back throughout and beyond the proceedings. The stages of influence which have been identified here reflect the processes that were generated by the norm advocates' and their allies' use of 'teaching' techniques[1516], which triggered and revealed the potential of the norm to "constitute" actors' interests, preferences and identities[1517].

Although compliance could be also explained as actors' "strategic adaptation"[1518], rather than persuasion, it similarly demonstrates the power of a certain norm to influence behaviour, even if based on instrumental deliberations. While such adaptation could be considered unsustainable in the long-term, the given case has also revealed reflective changes in actors' positions and preferences and signals institutional socialization with the appropriate application of the norm, not only within the context of the recruitment crimes against children but rather in universalistic terms. This exposes the triggered mechanism of normative suasion and the switch to the logic of appropriateness[1519], *i.e.*, a true case of learning and

[1512] *Cp.* Keck/Sikkink (1998, 1999)
[1513] Keck/Sikkink (1999), 98
[1514] Price (1998), 622, 639-640
[1515] *Cp.* Keck/Sikkink (1998, 1999)
[1516] Price (1998), based on Finnemore (1993)
[1517] *Cp.* Checkel (2001), 557
[1518] Checkel (2001), 575, 579, 581
[1519] Checkel (2005)

persuasion[1520]. Furthermore, as research on state socialization with human rights norms has demonstrated, it might be irrelative whether initial compliance occurs based on strategic deliberations or on persuasion[1521]. If a socialization process is already underway, it may, over time and under certain conditions, enable actors' habitualization and internalization of those norms[1522].

On the individual level, a number of factors could be identified as being especially effective for the responsiveness of the target actors throughout their processes of learning and socialization in the given case. The target actors' lack of expertise and experience with the application of the norm seems to have contributed to their insecurity about their interests and thus facilitated their openness to learning[1523]. However, their willingness to learn was initially further enhanced by the intervention of an advocate who belonged to the respected and authoritative group with acknowledged experience and expertise in the relevant area[1524]. The change of the OTP's leadership[1525] significantly contributed to the further evolution of the socialization 'spiral' also beyond *Lubanga*, towards a general refinement of the normative prescriptive status in application. On the other hand, the constellation and agency of exogenous and endogenous actors involved in the resistance played, perhaps, the most crucial role in influencing this overall development. Nevertheless, a number of institutional and structural as well as socio-political factors[1526] that could be identified as intrinsic to the context of the ICC's first case, in turn, additionally strengthened the power of the norm to influence actors' behaviour and contributed to the success of the resistance against its misrecognition.

[1520] *Cp.* Deitelhoff (2006)
[1521] Risse/ Sikkink (1999)
[1522] *Ibid*.
[1523] *Cp*. Checkel (2001), 563
[1524] *Cp. ibid.*
[1525] *Cp. ibid.*, 571, 577
[1526] Madsen *et al*. (2018); *cp.* Checkel (2001); Chappell (2016)

4.4.2. Institutional and structural factors

Both strands of research – on evolution of international norms and resistance against ICs/IL – have revealed institutional and structural factors to be especially essential for the generation and maintenance of the processes underpinning these phenomena[1527]. These factors should provide not only for trust, common life-worlds[1528] and normative embeddedness[1529] that would offer points of reference for involved actors, but also for procedural mechanisms that could enable and activate those processes and mechanisms[1530]. In given case of actors' socialization with the SGBV prohibition norm, such factors were inherent to its evolution. While on the quasi-institutional level, the norm has been already formally recognized, indicating its authority, the macro- and micro-institutional levels have provided its advocates with ways to initiate dialogue and communication processes with their target actors[1531]. Similar to Deitelhoff's observations in her study on persuasion during the negotiations on the Rome Statute, in this case the norm advocates also managed to change not only the normative setting of the case in accordance with their requests, but also the institutional setting of the proceedings for the maintenance of their requests[1532].

As research on norms[1533] and gender justice implementation[1534] have demonstrated, despite formalization, legalization and institutionalization, actors might need time for socialization with norm application, especially with new norms in various contexts and situations. As long as this process has not taken place, internalized old informal rules might prevail in influencing actors' behaviour. In the context of a newly established institution with a generally challenging mandate, self-evident implementation of progressive provisions by actors who at the time did not necessarily possess required knowledge, expertise and experience was not "taken for granted"[1535]. Furthermore, the misrecognition occurred in the context of the Court's very first case, which put additional pressure on the responsible actors involved in its prosecution and adjudication. Framing their ideas and beliefs as a part of the global human rights agenda, gender justice advocates have largely contributed to the emergence and

[1527] *E.g.*, Risse/Sikkink (1999); Risse (2000); Checkel (2001); Deitelhoff (2006); Chappell (2016); Madsen *et al*. (2018)
[1528] Risse (2000); Deitelhoff (2006)
[1529] Chappell (2016)
[1530] Deitelhoff (2006)
[1531] *Cp. ibid*., 152-153
[1532] *Cp. ibid*., 276
[1533] *E.g.*, Wiener (2007, 2009); Deitelhoff/Zimmermann (2013); also Günther (1988)
[1534] *E.g.*, Mackay (2014); Chappell (2016); Grey (2019)
[1535] Finnemore/Sikkink (1998), 895

evolution of the SGBV prohibition norm as an inherent part of contemporary ICL and "infected"[1536] many others to support their issues of concern and become their allies. Over a relatively short period, they acquired access to structures and leverage that have provided them with the tools to persuade their target actors in the rightness of their beliefs and in the legitimacy of their requests. Their interests have, in a certain way, differed from those of the Rome Statute's designated followers, who are expected (often under challenging socio-political conditions) to follow many various norms in consistency with the integrity principle. In fact, especially actors who were involved in the operation of the Court during the first decade of its work, had perhaps not previously applied such progressive gender provisions in practice, and therefore additionally lacked this kind of expertise and experience. As previously mentioned, gender justice advocates' resistance against the misrecognition of the norm took place in the context of the Court's first case, which created an especially tense environment influenced by various pressures. Nevertheless, although this context impeded gender justice advocates' efforts, the embeddedness of women's (and children's) rights and emerging gender equality structures in international law generally and in the developing body of ICL specifically, provided important passageways which allowed the resistance to insert their concerns into the internal discursive deliberations, despite an anticipated collision with other interests and norms involved in the case.

Specifically, the advocates' use of institutions and structures became increasingly powerful once they succeeded in transforming their resistance from external pressure into the space of internal deliberation and social interaction, and in legitimizing discussion of the issue within the "insulated" legal setting in which argumentative rationality and not "coercion" prevailed[1537]. At the same time, the newness of the issue and the "novel and uncertain" environment around it motivated the actors to analyse and comprehend the situation and its characteristics[1538]. On the other hand, the context of the Court's first case seems to have similarly significantly influenced the dynamic of the resistance, which aimed to prevent the emergence of a pattern of misrecognition[1539]. Motivated by this consideration, the advocates proceeded to resist the dynamic of misrecognition, despite the procedural restrictions that would have, in any case, excluded the *de-jure* consideration of SGBV in *Lubanga*. By

[1536] Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018
[1537] *Cp.* Checkel (2001), 562-563
[1538] *Cp. ibid.*
[1539] Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018

creatively using "constructive ambiguit[ies]"[1540] embedded in the provisions of the Court's legal framework, they succeeded in introducing a number of discourses throughout the proceedings, which allowed them to maintain their agenda and internal discursive deliberations on the interpretation and application of the norm in the context of the case.

The first discourse was introduced by WIGJ in their *amicus curiae* request. It addressed the interpretation of the Pre-Trial Chamber Judges' powers to intervene with the prosecutorial strategy. By claiming that the Judges could have requested the Prosecutor to reconsider his strategy with regard to SGBV allegations, they provoked a debate that ultimately resulted in the denial of their requests. However, it also raised awareness among the involved actors about a potential applicatory misrecognition of the SGBV prohibition norm. The second discourse on the application and interpretation of the law in accordance with internationally recognized human rights, that is, without any discrimination based, *inter alia*, on gender, was also introduced in their *amicus* request. However, since their participation in the proceedings was denied, WIs did not gain the opportunity to engage in a "calm dialogue"[1541] with the internal actors and to elaborate on those points in the context of the given case in the Courtroom. The third discourse was introduced by the UN SRSG Radhika Coomaraswamy, who tackled the role of girls in armed forces and the definition of the *use* element embedded in the child soldiers' recruitment crime, which has not been defined in the legal framework of the Court. Similar to the WIs, Coomaraswamy referred to a number of human rights instruments that had been adopted on international and regional levels for the protection of children involved in armed conflicts, *inter alia*, from acts of SGBV. The fourth discourse was introduced by the Legal Representatives of the victims and addressed the issue of legal re-characterization of charges for the consideration of SGBV that was not included in the indictment but had been allegedly committed within the context of child soldiers' recruitment. Like the first discourse introduced by WIGJ, this request also suggested that the legal framework of the Court has granted Judges the powers to intervene with prosecutorial strategy under certain circumstances. The Trial Chamber's majority initially supported this perspective; yet, ultimately it was reversed on appeal. Ironically, the fifth discourse on the consideration of SGBV as aggravating circumstances, despite the absence of its mention either in the indictment or in the list of the prosecutorial evidence, was introduced by the Prosecutor Ocampo himself. While he had consistently contested the application of the norm

[1540] Oosterveld (2014)
[1541] Checkel (2001), 574

throughout the pre-trial stage, he suddenly announced this suggestion in his opening statement to the trial. Since he reflected the arguments that had been previously introduced by the UN SRSG Coomaraswamy, this change in his rhetoric seemed to be a 'tactical concession' following her intervention. Ocampo and Coomaraswamy's suggestions for the application of the norm still significantly differed: while Coomaraswamy wanted SGBV to be explicitly taken into account when defining the crime, Ocampo proposed that its commission be addressed as aggravating circumstances and even then, failed to amend the charges accordingly – a lapse which has ultimately restrained the Judges from the consideration of his suggestion. Nevertheless, while the Prosecutor's rhetoric in this respect was apparently impacted by his engagement in strategic argumentation at the beginning of the trial, the logic of appropriate argumentation could be increasingly indicated in his position by the end of the proceedings.

While the introduction and maintenance of these discourses were based on creative interpretation of the Court's legal framework, Judge Odio Benito furthermore upheld them in her questioning of the witnesses throughout the proceedings. This seems to have been based, *inter alia*, on the WIs' dossier with documented SGBV committed under the alleged responsibility of Lubanga[1542] on the one hand, while she also reflected and perpetuated those discourses in her dissents to the judgement on the other. In relation to the sentencing judgment, she dissented with the majority's deliberations and additionally unpacked another "constructive ambiguity" in her arguing by suggesting that the sentencing strategy be oriented not only towards the perpetrator's crimes but also towards the inclusion of the survivors' perspective. In doing so, she reasoned that such consideration revealed damages produced by gender-based consequences of those crimes, which should have been taken into account while issuing the sentencing decision. Although this suggestion could also not be applied *de-jure* in the judgment due to procedural restrictions, it similarly maintained the discursive deliberations on the meaning of the SGBV prohibition norm and its appropriate application by reaffirming its validity and exposing the characteristics and interests that should have been considered in the context of this case.

Although the interpretations of "constructive ambiguit[ies]" embedded in the legal set-up of the Court provoked debates which revealed their collisions with rules of legal procedure and the right of the accused to a fair trial and were therefore eventually declined by the majority

[1542] Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018

of the Judges, they still enabled the resistance to introduce and maintain issues of SGBV throughout the proceedings, notwithstanding their *de-jure* exclusion from the case. Those internal discursive deliberations, in turn, essentially reaffirmed the norm's validity in the case records and paved the way for its appropriate application in future cases. That is, these deliberations facilitated processes of actors' learning and reflective socialization with the norm's meaning-in-use. Along with the institutional and structural factors that influenced this dynamic and assisted the advocates in their resistance practices against the misrecognition of the norm, broader socio-political cleavages[1543] in relation to the norm similarly played out as essential elements that influenced the evolution of the socialization 'spiral'.

4.4.3. Broader socio-political cleavages

The broader socio-political cleavages around the relatively new norm and its status at that period of time (which were revealed in the lack of its shared recognition) impacted not only its initial perception among involved actors and the resistance against this perception, but also the process of actors' socialization with its validity and appropriate application. The "world time"[1544] factor stimulated the potential of the norm to influence actors' behaviour due to the political evolutions that had taken place in early-mid 1990-s. These included international recognition of women's rights as human rights and the condemnation of rape and sexual violence in conflict that generated the emergence of the SGBV prohibition norm in the realm of the international law, as well as legal evolutions in terms of women's and children's rights that occurred within the human rights field since then on regional and international levels. Further development of women's rights in cases of SGBV committed in conflicts specifically through the jurisprudence of the ICTY and ICTR and other international or hybrid tribunals have additionally strengthened the SGBV prohibition norm in the emerging body of ICL. Its following inclusion with an expounded content in the Rome Statute among the prohibitions of gravest human rights violations, *i.e.*, as crimes against humanity and war crimes, represented a crucial milestone that had been largely enabled by the efforts of its advocates. In fact, as the

[1543] Madsen *et al*. (2018)
[1544] Risse/Sikkink (1999), 19

negotiations account suggests, without their activism in Rome, the SGBV provisions included in the Statute would have been much more trivial[1545]. And yet, in spite of persistent, powerful opposition from the religious and patriarchal ranks, they ultimately achieved the historical codification and institutionalization of SGBV prohibition in ICL. In the spirit of those successes, the advocates of gender justice remained determined to monitor the application of the norm by the newly established Court and to resist its misrecognition by using, *inter alia*, its previously gained formal validity and socio-political acceptance and by promoting its shared recognition[1546].

Both strands of development in IHRL and ICL provided norm advocates with leverage and accountability tools for the further promotion of their goals in the interpretation and application of the law, as well as in the alteration of traditional gender-blind understandings in IHL. Although the advocates' ideas and beliefs have been only relatively recently recognized and institutionalized, their relevance has been maintained within various socio-political discourses on the international level. And yet, those socio-political cleavages about the status of the SGBV prohibition norm remain present around the globe, just as persistent as the advocates' resistance against its misrecognition, which needs support of institutions such as the ICC – an institution which, after all, had been mandated by the international community to do so. Since the adoption of the norm in the Rome Statute, its implementation has been also supported within the United Nations structures, and specifically by the UN Security Council, which has explicitly condemned the commission of SGBV in conflict. Significantly, within the context of its Women, Peace and Security resolutions, the UNSC has also stressed the importance of criminal prosecutions in SGBV cases, which has additionally strengthened the socio-political status of the norm[1547]. This reaffirmation of the norm's validity and outspoken support for its socio-political status on the highest level of international politics has been essential, especially since only two among the permanent five members of the Council are parties to the Rome Statute (UK and France), while the others (USA, Russia and China) have contested its legitimacy to various extents. Although the ICC is generally an independent body from the UN structures, its work still depends considerably on the UNSC in particular and also represents, at least normatively, an important part of the global governance regime.

[1545] *E.g.*, Copelon (2000); Askin (2003); Oosterveld (2005)
[1546] Wiener (2007, 2009); Wiener/Puetter (2009)
[1547] The first UNSC Resolution on WPS (S/RES/1325 from October 31, 2000) emphasized "the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls". This statement has been similarly reaffirmed and maintained in all following UNSC Resolutions on WPS (UNSC Doc. No. S/RES/1820 from June 19, 2008; UNSC Doc. No. S/RES/1888 from September 30, 2009; UNSC Doc. No. S/RES/1889 from October 5, 2009; UNSC Doc. No. S/RES/1960 from December 16, 2010; UNSC Doc. No. S/RES/2106 from June 24, 2013; UNSC Doc. No. S/RES/2122 from October 18, 2013; UNSC Doc. No. S/RES/2242 from October 13, 2015; UNSC Doc. No. S/RES/2467 from April 23, 2019)

However, due to its largely independent status and the cleavages among the UNSC's permanent members with respect to its authority and legitimacy (specifically when their respective interests might be affected by its work), the ICC has not enjoyed much of the UNSC's support (in contrast to the ICTY and ICTR, established by the UNSC in 1990s). Despite its cooperation agreement with the UN[1548], this generally structural independency may also cause additional challenges for the ICC's operation. The lack of its own police and the dependency on states' cooperation and support puts immense pressure on the Court's staff. Perhaps this pressure was especially challenging for those who had been involved in the early stages of its operation, when it had to perform efficiently and persuasively. As previously mentioned, this tense environment must have contributed to the reluctance of the internal actors to yield to the additional pressure produced by the norm advocates in the early stages of the *Lubanga* proceedings, trying to intervene with the legal expertise and authority of the Court's staff. Within the socio-political context in which the ICC's first case was embedded, it also seems it was not easy for gender justice advocates to overpower institutional and structural pressures and restrictions and to achieve their goals despite the legitimacy of their demands. Nevertheless, this context seems to have offered a productive environment that bore a certain potential for the promotion of the norm's shared recognition and the reduction of socio-political cleavages. This could be achieved through the norm's cultural validation on the individual level by means of actors' socialization with its appropriate application.

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Despite the relatively recent legalization and institutionalization of the SGBV prohibition norm in ICL and its still fragile nature, which has been challenged by tenacious norms of patriarchal supremacy, reflected in its recurring inefficient application, its formal recognition on political and legal levels has strengthened its potential to create appealing socio-political resonance and to empower the agency of its advocates. These effects have, in turn, facilitated processes of learning and socialization with its appropriate application among its designated followers. The outcomes of these processes have been revealed on both institutional and legal

[1548] ICC/UN (2004)

levels and have culminated to have a *transformative* effect in terms of changing attitudes, interests and priorities that can finally also impact identities. Although this transformation was mainly triggered by the agency of the actors involved in the resistance and fostered by institutional and structural factors, as well as by the socio-political environment in which this process was embedded, the receptiveness of the Court's staff and organs towards their criticism has undoubtedly played a decisive role in the evolution of the socialization 'spiral', which could have otherwise stagnated. That said, this receptiveness could also be considered as one of the outcomes produced by the successful resistance against the misrecognition of the norm in the Court's first case.

4.5. The outcomes of the resistance

This study has aspired to explain the process of socialization with the appropriate application of the SGBV prohibition norm triggered in the ICC's first case by the non-state resistance against its misrecognition. By the activation of the 'boomerang' effect and internal discursive deliberations based on argumentative rationality, the advocates of the norm and their allies furthered the evolution of their target actors' understanding on the normative meaning-in-use in the context of the given case. Simultaneously, due to the ultimate receptiveness of the internal actors involved in the proceedings, the launched socialization 'spiral' has successively permeated deeper into the institutional structures and eventually crucially influenced the Court's institutional identity. The reaffirmation of the norm's general validity and legitimacy through *de-facto* recognition of its applicability in the context of the given case made it politically more visible and significant[1549], which in turn facilitated the refinement of its prescriptive status in application and prompted a cascade of consequences on both legal and institutional levels. While the dynamic of the resistance largely explains the target actors' receptiveness to its criticism throughout the process, in the absence of this ultimately positive resonance, those progressive legal and institutional consequences and

[1549] *Cp.* Günther (1988); Deitelhoff (2006); Wiener (2009); Deitelhoff/Zimmermann (2013)

further evolution of the 'spiral' might not have been achieved[1550]. However, the inserted application of the norm as a discourse, which was increasingly based on the logic of appropriate argumentation[1551], enabled actors' cultural validation of the norm and promoted its shared recognition[1552]. That is, the internal discursive deliberations enabled learning and persuasion, and assisted the actors in the reduction of socio-political cleavages (between its advocates and their target actors) with respect to the norm's status and appropriate application, which updated their common knowledge and increased the target actors' receptiveness towards the resistance's concerns. This evolution has, in turn, also changed the target actors' interests, priorities and, eventually, beliefs. This transformation has the capacity to consequentially impact identities: that of the actors and the institution[1553]. These outcomes indicate that this resistance is a mix of ordinary and extraordinary types[1554], *i.e.*, it is a non-state, yet *transformative* resistance that has produced long-term consequences for both the law and the institution. Moreover, this case has proved the assumption that if successively resisted by generations of learning and persuasion, based on processes of communication and discursive deliberation, applicatory contestation may potentially produce strengthening effects through conceptual clarification of the normative meaning in various contexts and situations[1555]. Apart from 'teaching' its target actors the lessons[1556] that "they might otherwise not have been aware of"[1557], the given case of resistance and its target actors' responsiveness to its criticism could be also revealed to be beneficial for the Court in terms of its long-term authority and legitimacy. The advocates of the norm and their allies virtually transformed the misrecognition in *Lubanga* into a 'tipping point'[1558] that furthered actors' socialization with the norm's appropriate application beyond this case's proceedings, through a 'cascade'[1559] of progressive outcomes on both institutional and legal levels. This receptiveness has ultimately strengthened the Court's legitimacy on the consequential level, despite the threat that had arisen on the operational level[1560].

[1550] *Cp.* Madsen *et al*. (2018)
[1551] *Cp.* Günther (1988)
[1552] *Cp.* Wiener (2007, 2009); Wiener/Puetter (2009)
[1553] *Cp.* Keck/Sikkink (1999), 90
[1554] Madsen *et al*. (2018)
[1555] *Cp.* Günther (1988); Payne (2001); Deitelhoff (2006); Wiener (2007, 2009); Badescu/Weiss (2010); Deitelhoff/Zimmermann (2013)
[1556] Price (1998), based on Finnemore (1993)
[1557] Madsen *et al*. (2018), 217
[1558] Finnemore/Sikkink (1998)
[1559] *Ibid*.
[1560] Chappell (2016), 202, based on Schiff (2010)

4.5.1. The response of the Court

Chappell suggests that legitimacy, which is indispensable for the survival of international institutions, could be defined in a normative way when grounded in their claims to exercise authority, and in a sociological way, depending on the perceptions of the institutions' constituencies[1561]. This distinction is comparable with Alter's differentiation between *de-jure* and *de-facto* legitimacy[1562] and reflects similarities with Wiener's differentiation between formal validity and social/shared recognition[1563], implying that a formal or *de-jure* recognition of a norm or an institution does not necessarily infer their power to actually influence actors' behaviour. Despite the normative legitimacy of the ICC, its *de-facto* authority or its actual "right to rule" would be reassessed over time by its various constituencies and either contested or reaffirmed[1564]. Chappell claims that the sociological legitimacy of the Court would thus depend on its willingness to respond to the demands of its various constituencies, at least "some of the time", and to review and adjust its policies, strategies and practices when the need to do so arises[1565]. At the same time, the Court has multiple constituencies with different expectations and demands that might be not easy to satisfy simultaneously; and yet, those constituencies may influence its legitimacy. However, even in cases of disappointment, constituencies may continue supporting institutions if they are willing to address the criticisms and shortcomings that have been identified in their work[1566].

The gender justice constituency of the Court accepted and strongly supported its legitimacy on the level of its design[1567], despite the compromises and reservations that had been adopted in the Rome Statute in relation to SGBV provisions. However, those initial omissions of the Court's organs to apply those provisions appropriately on the operational level diminished their trust from the outset of its operation[1568]. Here, the loss of the gender justice constituency's support, which had played a significant role in the Court's design and in the initial period of its practice, could have created "a serious crisis" for its legitimacy[1569]. Nonetheless, "signs of hope"[1570] have contributed to the maintenance of the Court's

[1561] *Ibid*., 19
[1562] Alter (2018)
[1563] Wiener (2004, 2007, 2009)
[1564] Chappell (2016), 22, 201-202, based on Schiff (2010)
[1565] *Ibid*., 201-202
[1566] *Ibid*., 20-23
[1567] *Ibid*., 202, based on Schiff (2010)
[1568] *Ibid*., 128, 203
[1569] *Ibid*., 4
[1570] *Ibid*., 203-204

legitimacy among its gender justice constituency. These include achievements within the aspects of representation and redistribution, as well as improvements within the recognition aspect of its gender justice mandate, reflected in the willingness among the OTP's leading staff to correct its initial oversights in the application of gender provisions and indeed, tangible efforts to do so. Furthermore, the improved faculty of Judges to adjudicate SGBV in accordance with the expectations of the Court's gender justice constituency has helped this cause, as demonstrated in some subsequent cases. Although the implementation of the OTP's gender justice aspirations embedded in its new strategies and policies will have to be evaluated over time, which would, in turn, impact the gender justice constituency's reassertion of the Court's (sociological) legitimacy on the operational level, the responsive reaction of its organs towards their criticism has, in a meantime, already allowed for its positive reassertion on the consequential level. The reaffirmations of the norm's validity and aspirations to improve its application also proved the applicatory nature of its misrecognition in *Lubanga*, stipulated by certain contextual characteristics. And yet, if the responsible actors' reaction had been less receptive, this misrecognition could have weakened not only the authority of the norm but also that of the Court, at least among some of its constituencies. In contrast, the responsive reaction of the Court to the resistance of gender justice advocates could be partly traced back to the time of the *Lubanga* proceedings in (1) the reactions of its senior staff to their criticism since the beginning of the trial and in (2) the judgement. Furthermore, the long-term responsiveness of the Court's organs revealed the generated mechanism of normative suasion[1571] that has been furthering the socialization of actors involved in its operation with the appropriate application of the SGBV prohibition norm, also beyond *Lubanga*. This could be identified in the multilateral outcomes and changes including (3) the subsequent revisions undertaken by the OTP on the institutional level with regard to its strategies and policies for the investigation and prosecution of SGBV and (4) the following progressive implementation of those developed objectives, at least in some cases, which has, in turn, advanced (5) precedential outcomes on the level of the Court's adjudication and jurisprudence. This receptiveness has demonstrated the ability of the Court's organs and leading staff to fulfil the cognitive capacity of the law as an autonomous system, capable of learning within the boundaries of its normative closeness[1572], which has rehabilitated and strengthened the Court's authority and legitimacy, at least in the eyes of some of its constituencies.

[1571] Checkel (2005)
[1572] Günther (1988), 327, based on Luhmann

4.5.2. Consequential for law

The consequences of learning, persuasion and socialization processes, which were generated in the *Lubanga* case, became tangible for the law immediately after the issuance of the judgement. Before Prosecutor Ocampo left his Office, he applied for the amendment of the indictment in the identical case from the same situation in the DRC, against Bosco Ntaganda, with separate charges of rape and sexual slavery, allegedly committed under his responsibility against the civilian population[1573]. Although child soldiers' recruitment charges against Ntaganda remained unmodified at this time, this amendment has partly fulfilled the initial requests of WIGJ to investigate and prosecute SGBV generally, when committed against both the civilian population and child soldiers (despite the fact that their broad framing of resistance appeared rather unsuccessful in the context of the *Lubanga* case). That is, although the OTP at the time was apparently not yet prepared to amend the child soldiers' recruitment charges with SGBV, it already drew some important lessons and consequences with respect to the application of the norm in cases of SGBV committed against the civilian population. Additionally, nearly one and a half years later, Prosecutor Bensouda amended charges against Ntaganda with rape and sexual slavery that had been committed against girl soldiers as well under his alleged responsibility[1574]. Furthermore, the amended indictment elaborated on the specific situation of girls and women in armed forces that necessarily subjects them to additional gender-based vulnerabilities, taking the form of sexual offences[1575]. Significantly, when the Defence contested these charges, due to the supposed inconsistency of the SGBV prohibition norm with the war crimes of child soldiers' recruitment from the perspective of the traditional IHL understanding – an issue that had already been tackled in *Lubanga* – the Judges took the side of the OTP's interpretation[1576]. They extended this understanding in a way that seemed to have been encouraged by the human rights approach of gender justice advocates in *Lubanga* and in doing so, have advanced the convergence of IHL and IHRL[1577]. Eventually, the adjudication in *Ntaganda* has delivered significant precedential decisions, which have essentially clarified and perhaps, to some extent, even upgraded the status of rape and sexual slavery prohibitions in IL[1578]. The Judges explicitly declared their *jus cogens*

[1573] ICC Doc. No. ICC-01/04-02/06-36-Red from July 13, 2012
[1574] ICC Doc. No. ICC-01/04-02/06-203-AnxA from January 10, 2014
[1575] *Ibid*.
[1576] ICC Doc. No. ICC-01/04-02/06-309 from June 9, 2014; ICC Doc. No. ICC-01/04-02/06-1707 from January 4, 2017; ICC Doc. No. ICC-01/04-02/06-1962 from June 15, 2017; see also Grey (2019), 276-277
[1577] ICC Doc. No. ICC-01/04-02/06-1707 from January 4, 2017; ICC Doc. No. ICC-01/04-02/06-1962 from June 15, 2017
[1578] *Ibid.*

status, which means no derogation is allowed, independent from the status of the individuals who were subjected to such crimes[1579]. On July 8, 2019, seven years after the issuance of the Lubanga's judgement, Ntaganda was ultimately convicted for all SGBV charges that had been brought against him[1580] and sentenced to a total of thirty years of imprisonment[1581], judgments which have also been already confirmed on appeal[1582]. After the acquittal of Jean-Pierre Bemba Gombo in June 2018[1583], whose initial judgement from 2016 included the first conviction for rape in the ICC's history[1584], Ntaganda replaced him as the first individual at the ICC to be found guilty as responsible for crimes of rape and sexual slavery. His precedential judgment and the evolution of the law in terms of the norm's status and conceptual clarification were largely enabled by gender justice advocates' resistance against its misrecognition in *Lubanga*. While the successes implemented in *Ntaganda* have been the most obvious legal consequences of this resistance, in late 2015 Prosecutor Bensouda also amended charges against Dominic Ongwen from the situation in Uganda, with an extensive list of SGBV conducts[1585]. These amended changes reflected the OTP's new strategies and policies, developed since she took over its lead, against the background of lessons learned in *Lubanga*. Similarly to Ntaganda, Ongwen was found guilty of all nineteen SGBV charges brought against him, which has marked the most comprehensive conviction for SGBV to date[1586]. Another case, opened in 2018 against Ag Abdoul Aziz Al Hassan from the situation in Mali, was also already praised by gender justice constituency of the Court as precedential[1587], due to a number of specific gender-based crimes (not necessarily sexual in nature) which were included in the indictment[1588]. This progress has been similarly stipulated by the OTP's increasing socialization with the appropriate application of the SGBV prohibition norm, underpinned by its refined prescriptive status in application, which has been developed and introduced on the institutional level since *Lubanga*. These and some other, perhaps less significant legal developments, which were the consequences of this institutional socialization process, will be illustrated in more detail in the empirical part of this study.

[1579] *Ibid.*
[1580] ICC Doc. No. ICC-01/04-02/06-2359 from July 8, 2019
[1581] ICC Doc. No. ICC-01/04-02/06-2442 from November 7, 2019
[1582] ICC Doc. No. ICC-CPI-20210330-PR1582 from March 30, 2021
[1583] ICC Doc. No. ICC-01/05-01/08-3636-Red from June 8, 2018
[1584] ICC Doc. No. ICC-01/05-01/08-3343 from March 21, 2016
[1585] ICC Doc. No. ICC-02/04-01/15-375-AnxA-Red from December 22, 2015
[1586] ICC Doc. No. ICC-02/04-01/15-1762-Red from February 4, 2021
[1587] *Cp.* Grey (2019)
[1588] ICC Doc. No. ICC-01/12-01/18-2-tENG from March 27, 2018; ICC Doc. No. ICC-01/12-01/18-35-Red2-tENG from May 22, 2018

4.5.3. Consequential for the institution

As indicated above, the resistance of gender justice advocates has had outcomes on the institutional level as well, *i.e.*, it has contributed to the development of structural changes within the OTP, which can facilitate the socialization of its staff with the appropriate application of the SGBV prohibition norm on various stages of its work. This evolution should, in turn, enable more general institutional socialization with gender-sensitive application of the law in this area throughout the organs of the Court. Prosecutor Bensouda undertook a number of steps in this regard since she took over the Office in 2012 after the issuance of the *Lubanga* judgement. Her repeated rhetorical dedications to the prioritization of SGBV and crimes committed against children[1589] were reflected and institutionalized in the OTP's Strategic Plans, issued under her supervision since 2012[1590]. What's more, in August 2012, she appointed the then executive director of WIGJ Brigid Inder as a Special Gender Advisor to her Office for the purposes of "strengthen[ing] the institutional approach to a range of gender issues and support[ing] office-wide strategic responses to gender-based crimes"[1591]. On the occasion of Inder's inauguration, Prosecutor Bensouda stated the following:

> Further integrating a gender perspective into all areas of our work and strengthening recognition of the gendered nature of sexual violence is a priority for my office. Ms. Inder is a renowned expert on gender issues and brings to this post a deep knowledge of the cases, policies and the institutional history of the ICC. [1592]

Furthermore, a statement placed on the ICC's website about Inder's appointment has emphasized her experience in working with women and communities affected by armed conflicts, as well as in designing documentation initiatives on SGBV and assisting victims/survivors of such crimes[1593]. Ironically, she had applied this expertise in the resistance of her organization against the misrecognition of the SGBV prohibition norm in *Lubanga*, which at the time, the OTP and the Court denied considering in the proceedings. While this expertise and experience still reached the *Lubanga* proceedings indirectly through the application of practices and tactics elaborated above, in her new role as the Special Gender Advisor to the OTP, she was able to contribute to the further socialization of its staff with appropriate application of the norm, directly from within the institutional structures. The

[1589] ICC (2011, 2012); ASIL (2011)
[1590] ICC OTP (2013b, 2015, 2019)
[1591] ICC Doc. No. ICC-OTP-20120821-PR833 from August 21, 2012
[1592] *Ibid.*
[1593] *Ibid.*

Policy Paper on SGBC, developed under her involvement and issued in 2014, requests the application of gender analysis and gender perspective to all crimes falling under the jurisdiction of the Court by all divisions of the OTP on all stages of their work[1594]. Further progressive aspects of this Policy Paper will be elaborated on in more detail in the empirical part of the thesis[1595].

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The legal precedents and developments depicted above suggest that the OTP's implementation of its new strategies and policies, directed at gender-sensitive investigations and prosecutions, may eventually also diffuse the effects of the socialization process among the Judges, when it comes to the adjudication and further evolution of the normative meanings-in-use. The multilateral consequences of the resistance against the misrecognition in *Lubanga* reveal the emergence of change, not only on the policy level but also in the practice of actors' behaviour. The maintenance of the OTP's prioritization of SGBV upheld in its last Strategic Plan, that is, by and large for the whole period of nine years of the Prosecutor Bensouda's mandate, demonstrates that the socialization process has been ongoing. This, if further sustained, should over time promote habitualization and internalization of the norm's appropriate application as an inherent part of the Court's institutional identity. Albeit still ongoing, this development has already proved to be transformative for the shared recognition of the norm among the Court's staff as well as for its appropriate application in practice.

[1594] ICC OTP (2014)
[1595] See subchapter '5.2.6.1.3. The OTP's 'Policy Paper on SGBC''

5. Empirical findings

The following empirical chapter will discuss the evolution of the proceedings in the ICC's first case, against Thomas Lubanga Dyilo, based on the previously elaborated theoretical and explanatory frameworks. There are two main issues that I will address here, which I argue triggered the process of socialization with the appropriate application of the SGBV prohibition norm among the Court's staff, specifically those in the OTP and consequently, in the Chambers. The first issue relates to the misrecognition mainly by the OTP, but also to some extent by the PTC Judges, who failed to appropriately apply the norm in this case. The second issue will tackle the non-state resistance of norm advocates against this misrecognition as well as processes and dynamics that it inserted throughout the proceedings. By means of their influence and agency, the advocates launched the institutional socialization 'spiral' with the appropriate application of the norm that was received by the Court's senior staff in a fairly responsive way. Those inserted discursive interactions have, in turn, contributed to the elaboration of the normative meaning-in-use in the context of this specific case, as well as to the reaffirmation of the norm's validity and *de-facto* recognition of its potential applicability in such a context, under the fulfilment of certain conditions and criteria. This learning process has eventually strengthened the status of the norm in terms of both its validity and application and fostered the evolution of the 'spiral' towards its habitualization and internalization. The advocates impacted this process on different levels: from discursive practices, through institutional procedures, up to policy changes. This multilateral influence ultimately also led to changes in the behaviour of the actors involved in the operation of the Court. Although initial omissions to apply the norm appropriately meant that Lubanga could not be prosecuted for SGBV allegedly committed under his responsibility, the effects of learning through the application of the norm as a discourse contributed to the long-term reflective socialization with its appropriate application. This could be traced in significant transformations on both legal and institutional levels.

This chapter will demonstrate the emergence and evolution of the institutional socialization 'spiral' with the appropriate application of the SGBV prohibition norm, which was inserted by the means of its advocates' resistance against its applicatory misrecognition in the ICC's first case against Thomas Lubanga Dyilo. As elaborated in the explanatory framework

(subchapter '4.2. The insertion of the socialization 'spiral''), this process involved seven stages: 1) applicatory misrecognition of the norm, 2) denial of misrecognition, 3) tactical concessions, 4) elaboration of the normative meaning-in-use, 5) reaffirmation of the validity and *de-facto* recognition of applicability, 6) refinement of the prescriptive status, 7) further conceptual clarification through aspired appropriate application. The first stage of the 'spiral' reflects the misrecognition to apply the SGBV prohibition norm within the context of the case against Thomas Lubanga. While analysing the applicatory nature of the misrecognition in the context of the recruitment charges brought against Lubanga, I will tackle largely interdependent elements, including the constellation of the involved actors, structural and institutional aspects as well as socio-political factors that have contributed to this misrecognition. The same triangulation[1596] will be similarly reflected in the analysis of each stage of the 'spiral'.

While the misrecognition itself would appear to be the first stage of the socialization process, it also served as an opening that allowed for the infiltration of the 'spiral' into institutional structures. However, this evolution depended on a number of factors. As the given case will demonstrate, the resistance of norm advocates was a triggering force that fostered the 'spiral' towards its further stages. The constellation of both external and internal actors as well as their cooperation enabled the 'boomerang' effect, which significantly contributed to this evolution and played out as crucial for the insertion of internal discursive deliberations on the meaning of the norm in the context of the given case. Although the first five stages of the socialization process took place during the *Lubanga* proceedings and revealed the successful application of the norm as a discourse reflected in the judgment, the initial disregard of SGBV within the context of the child soldiers' recruitment charges could not be altered *de-jure*. However, actors' reaffirmation of the norm's validity and *de-facto* recognition of its applicability in the context of the given case revealed the effects of learning and persuasion that could be produced by this process. The last two stages of the socialization 'spiral' that could be identified so far have been similarly achieved based on this learning experience. However, this evolution goes beyond *Lubanga* and represents the successful long-term outcomes of the resistance on both legal and institutional levels. These outcomes are evidenced in the OTP's new policies and strategies as well as their implementation and increasingly progressive application of the law in cases involving SGBV allegations, which

[1596] Mainly based on Madsen *et al*. (2018), see subchapter '4.4. Triangulation of the analysis'

has, in turn, generated the subsequent evolution of the norm's content and the strengthening of its status through adjudication and jurisprudence.

In fact, the OTP started to implement these lessons after the issuance of the *Lubanga* judgement, which virtually coincided with the appointment of the Court's second Chief Prosecutor Fatou Bensouda. Bensouda undertook tangible measures on strategic, institutional and policy levels that have explicitly contributed to the socialization with the appropriate application of the SGBV prohibition norm on various levels of the OTP's work. While some of the subsequent progressive amendments with SGBV charges reflect the requests of the norm advocates in *Lubanga* (specifically in *Ntaganda*, partly in *Ongwen*), the prosecution of the *Ongwen* and *Al Hassan* cases has revealed the outcomes of further socialization. However, a number of shortcomings that were exposed in other cases have indicated that this process is still ongoing. Additionally, challenges for the appropriate application of the norm in each individual case may arise from the fact that the Court depends on the cooperation and support of states, which are indispensable for its work. The appropriate application also depends on the nature of various contexts of the Court's operation, which involve different situational characteristics. Nonetheless, its thorough internalization within institutional structures will surely depend on the decision-making actors and specifically on the Court's new Chief Prosecutor, Karim A. A. Khan, who replaced Fatou Bensouda in June 2021[1597]. He will benefit from the developments that have been achieved within the Office and the Court in this regard and will have the opportunity to further advance this progress.

[1597] ICC Doc. No. ICC-CPI-20210212-PR1567 from February 12, 2021; ICC Doc. No. ICC-CPI-20210610-MA266 from June 10, 2021

5.1. The factual context of the case

5.1.1. The role of Thomas Lubanga in the conflict

The Second Congo War in the DRC, also called "Africa's Great War", which officially lasted almost five years from August 1998 till July 2003, has been defined as the deadliest since World War II[1598]. It involved nearly twenty armed groups and nine national armies who fought over rich resources of the Ituri region, a district in the Orientale Province of the DRC, famous for its deposits of gold, diamonds, hardwood timber, coltan and oil[1599]. The political party *Union des Patriots Congolais* ('UPC') and its military wing *Forces Patriotiques pour la Libértaion du Congo* ('FPLC') both led by Thomas Lubanga Dyilo ('Thomas Lubanga' or 'Lubanga') were involved in the perpetration of war crimes in the context of this conflict[1600]. National authorities have also allegedly fuelled the conflict for the maintenance of their own interests in Ituri by, *inter alia*, providing support to different militia groups[1601]. Jim Freedman[1602], who was monitoring the conflict, described "the spread of dread throughout the region"[1603] and indicated that both opponents of the DRC, Uganda and Rwanda, as well as its allies Angola and Zimbabwe were mainly interested in looting the resources of Ituri, while the maintenance of the conflict served as an excuse for their continued presence in the area[1604]. In order to ensure their access to the resources, the Ugandan forces, for instance, allied with different local groups, which, in turn, created tension between these groups and led to violence[1605]. While they made themselves appear to be peacekeepers, the actual aim of their "mission" was to keep "the conflict alive and the insecurity high"[1606]. In doing so they ensured the dependency of local armed groups on their weapons and support, which allowed them to stay in the region and to continue doing their businesses[1607]. Apparently, although the

[1598] ICC Doc. No. ICC-01/04-01/06-T-107-ENG from January 26, 2009, 16, lines 7-8; Kammer (2012), 1
[1599] *Ibid.*
[1600] *Ibid.*
[1601] *Ibid.*
[1602] Jim Freedman from the panel of experts installed by the UNSC for the identification of the roots and the actors fuelling the conflict in the DRC, observed the conflict and subsequently the trial against Thomas Lubanga, which he has described from an athropological perspective in his book *A Conviction in Question: The First Trial at the International Criminal Court* (2017).
[1603] Freedman (2017), XV
[1604] *Ibid*., 14
[1605] *Ibid*., 8
[1606] *Ibid*., 8-9
[1607] *Ibid*., 9

UN Security Council was aware of what was happening in Ituri, its members could not agree on how to proceed about the situation and preferred to effectively ignore it as long as the Ugandan soldiers were "keeping peace" in the region[1608].

The Ituri region is populated by twenty different ethnic groups, among which the *Hemas*, the *Alurs*, the *Biras*, the *Lendus*, and their Southern subgroup, the *Ngitis*, prevail[1609]. The conflict between the groups began in summer 1999 due to disputes over the allocation of land and the appropriation of natural resources[1610]. Thomas Lubanga, the *de-jure* and *de-facto* head of the UPC/FPLC, was born in Ituri in 1960 and belongs to the *Hema* ethic group. He obtained a degree in psychology at the university of Kisangani and operated in diverse activities including farming and gold trading before he entered politics around 1999-2000 and was elected in the Ituri District Assembly[1611]. Reportedly, he was planning to become a ruler over an autonomous Ituri region[1612]. In his fight against the DRC's President Kabila, he secured support from either Ugandan or Rwandan authorities at different periods of time[1613]. Lubanga was apparently "the most notorious" among the armed groups leaders[1614]. According to Freedman, he wanted to destroy all *non-Hema* settlements, to exterminate the neighbouring ethnic group, the *Lendu*, and to kill anyone who supported Kabila's government, including the local governor[1615].

Initially, the Ugandan authorities provided Lubanga's forces with arms and military training in his military camps[1616]. However, the governments of the DRC and Uganda signed the *Luanda Agreement* in September 2002, which was amended in February 2003 and aimed at the promotion of a political pacification process in Ituri and the establishment of the Ituri Pacification Commission, which was allegedly joined by all armed groups except for Lubanga's[1617]. Subsequently, the Ugandan authorities attacked the UPC/FPLC in Bunia in March 2003 and forced them to leave and to ally with a group that was backed by Rwanda[1618]. That is, as soon as the relationship with the Ugandans deteriorated, the Rwandan authorities took over the assistance of his forces with arms, ammunition, uniforms, and even military

[1608] *Ibid*., 10
[1609] ICC Doc. No. ICC-01/04-01/06-803-tEN from January 29, 2007, paras.1-2
[1610] *Ibid*., para.4
[1611] *Ibid*., paras.5-6
[1612] Freedman (2017), XV
[1613] *Ibid*.
[1614] *Ibid*., XV, 8
[1615] *Ibid*.
[1616] ICC Doc. No. ICC-01/04-01/06-803-tEN from January 29, 2007, paras.169-180
[1617] *Ibid*., paras.190-193
[1618] *Ibid*.

instructors[1619]. According to the information included in the case files, the Rwandan government was even involved in some of the UPC/FPLC's policy and strategy decisions[1620].

After the Ugandan forces left Bunia in May 2003, the UPC/FPLC re-established their control in the area[1621]. The UN Mission in the DRC, *Mission de l'Organisation des Nations Unies en République Démocratique du Congo*, (the 'MONUC'), had been deployed there from late April 2003 to protect the UN personnel and facilities as well as the meeting places of the Ituri Pacification Commission[1622]. Acting under Chapter VII of the UN Charter, the UNSC, in its Resolution 1484 from May 30, 2003 authorized the deployment of the Interim Multinational Emergency Force in Bunia in close coordination with the MONUC until September 1, 2003[1623]. This mission aimed to maintain security and protection of the civilian population and the UN personnel[1624]. Virtually all parties from the region, the governments of the DRC, Uganda, Rwanda, and the Ituri parties to the pacification process had supported the request of the UN Secretary General Kofi Annan from May 15, 2003, on which this resolution was then based[1625]. Emphasizing the obligation of all parties to the conflict to respect IHL and human rights and stressing that "there will be no impunity for violators", this request called for the deployment of a multinational force in Bunia, the cessation of the hostilities and of all support, especially military assistance, to the armed groups and militias in the region[1626]. Following this resolution, the Council of the European Union also authorized an operation called ARTEMIS, which began on June 12, 2003[1627]. Nevertheless, between June and December 2003, the armed conflict in Ituri remained ongoing and involved the UPC/FPLC and other military groups[1628]. The authorities of the DRC managed, however, to place Thomas Lubanga under house arrest in Kinshasa in August 2003, where he remained detained until the end of the year[1629]. Nonetheless, he was apparently still able to control the political framework of the UPC/FPLC even during his detention[1630].

[1619] *Ibid*., paras.169-180
[1620] *Ibid*., paras.190-191
[1621] *Ibid*., paras.197
[1622] *Ibid*.
[1623] *Ibid*.; UNSC Doc. No. S/RES/1484 from May 30, 2003
[1624] *Ibid*.
[1625] UNSC Doc. No. S/RES/1484 from May 30, 2003, 1
[1626] *Ibid*., paras.5-7
[1627] ICC Doc. No. ICC-01/04-01/06-803-tEN from January 29, 2007, para.197
[1628] *Ibid*.
[1629] *Ibid*., para.199
[1630] *Ibid*.

5.1.2. Reported rape and sexual violence

According to a number of sources, armed forces involved in the Ituri conflict committed crimes of rape and sexual violence systematically and on a large-scale against both civilian population and child soldiers[1631]. Based on the investigations conducted by the MONUC and human rights organizations, the UN Secretary General Kofi Annan wrote a letter to the President of the UN Security Council on July 16, 2004 – about one and a half years before the OTP issued its arrest warrant against Thomas Lubanga[1632]. This letter reported the perpetration of rape, sexual slavery, forced marriage and sexual assault against women and young girls – including under the age of fifteen – by the UPC/FPLC soldiers[1633]. Those crimes were extensively mentioned in both the report's general section and in its singular section on the *Most serious human rights abuses committed in Ituri district from January 2002 to 31 December 2003*[1634], the period of time that fell under the timeframe of the Lubanga's indictment. According to this letter, the MONUC received eighteen reports of rape that had been allegedly committed by the UPC/FPLC soldiers[1635]. Some of the victims were children under fifteen and most of them were abducted while they were looking for food or water, and taken to military or private places where they were then sexually abused[1636].

Based on the interviews with victims/survivors of mass rape in the DRC, Amnesty International ('AI') likewise reported on systematic and widespread rape and sexual violence perpetrated as a weapon of war by the UPC/FPLC soldiers in the Ituri district[1637]. Human Rights Watch ('HRW') also highlighted the perpetration of SGBV against women and girls in eastern Congo, which had been explicitly committed on ethnic grounds[1638]. It identified that in May 2003, which also fell under the timeframe of Lubanga's indictment, the UPC/FPLC soldiers raped 125 women and girls while re-establishing their control over Bunia[1639]. The same report indicated that despite insufficient availability of evidence, some testimonies illustrated that Lubanga's combatants also committed rape and other sexual assault against

[1631] UNSC Doc. No. S/2004/573 from July 16, 2004; Amnesty International (2004); HRW (2005)
[1632] UNSC Doc. No. S/2004/573 from July 16, 2004
[1633] *Ibid.*
[1634] *Ibid.*, paras.1, 5, 35, 37, 80, 108, 152
[1635] UNSC Doc. No. S/2004/573 from July 16, 2004
[1636] *Ibid*, para.80
[1637] Amnesty International (2004), 4, 14
[1638] HRW (2005), 7-8
[1639] *Ibid*., 20

men and boys[1640]. Due to the widespread and grave nature of committed SGBV, HRW urged the ICC in its recommendations from March 2005 – about one year after the opening of the OTP's investigations into the DRC's situation and nearly one year before the arrest warrant against Lubanga was issued – to "[e]nsure that crimes of sexual violence committed in eastern Congo that constitute war crimes or crimes against humanity are made a priority of investigations and prosecutions"[1641].

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The following empirical section of the thesis includes seven subchapters ('5.2.1. – 5.2.7.'), in accordance with the seven stages of the institutional socialization with the appropriate application of the SGBV prohibition norm, which has taken place at the ICC virtually since the beginning of its operation. Each of the seven subchapters incorporates an analysis, based on the theoretical and explanatory frameworks applied and elaborated in this thesis, specifically on Risse and Sikkink's 'spiral' model[1642] and Madsen *et al.*'s triangulation approach[1643], for the explanation of the socialization dynamic. This was largely generated and maintained by the non-state resistance against the misrecognition to apply the SGBV prohibition norm in the ICC's first case, against Thomas Lubanga Dyilo.

[1640] *Ibid.*, 19-21
[1641] *Ibid.*, 6
[1642] Risse/Sikkink (1999)
[1643] Madsen *et al.* (2018)

5.2. The socialization 'spiral' with the appropriate application of the SGBV prohibition norm at the ICC

5.2.1. The applicatory misrecognition of the SGBV prohibition norm

The DRC ratified the Rome Statute in April 2002, and in April 2004, its government referred the 'situation' taking place in its territory since July 1, 2002 to the ICC[1644]. The ICC has established their jurisdiction over crimes included in the Rome Statute that had been committed either within the territory of the DRC or by its nationals[1645]. On June 23, 2004, Prosecutor Ocampo announced the opening of the first investigation into the situation[1646] and on January 13, 2006 he requested the Pre-Trial Chamber I to issue an arrest warrant against Thomas Lubanga Dyilo[1647] due to his alleged individual criminal responsibility under Article 25(3)(a)[1648] of the Rome Statute for the perpetration of three war crimes: 1) enlisting and 2) conscripting children under the age of fifteen years into the armed group FPLC and 3) using them to participate actively in hostilities[1649] during the period of time between July 2002 and the end of 2003[1650]. Despite the reports on rape and sexual violence allegedly committed by Lubanga's forces during this period of time, the Prosecutor decided not to charge him with those conducts. One of the noteworthy explanations in this regard was the understanding of the SGBV prohibition norm within the OTP as legally incompatible with the war crimes of child soldiers' recruitment[1651]. According to this understanding, the application of the norm to conducts committed against child soldiers within the context of their recruitment, *i.e.*, virtually against the combatants of one's own army, would have apparently collided with or required "stretching" of the war crimes concept from the traditional IHL perspective[1652] (discussed further in more detail). Moreover, the possibility of arresting Lubanga appeared

[1644] ICC Doc. No. ICC-01/04 from 2004
[1645] *Ibid*.
[1646] ICC Doc. No. ICC-OTP-20040623-59 from June 23, 2004
[1647] ICC Doc. No. ICC-01/04-01/06-2-tEN from February 10, 2006, 2
[1648] This refers to the individual mode of criminal liability "whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible" (Rome Statute, 1998, Art. 25(3)(a)).
[1649] Rome Statute (1998), Art. 8(2)(b)(xxvi) and/or 8(2)(e)(vii)
[1650] ICC Doc. No. ICC-01/04-01/06-2-tEN from February 10, 2006, 4
[1651] Interview with F. Guariglia (ICC OTP), The Hague, December 2018
[1652] *Ibid*.

somewhat unexpectedly, due to his possible release from the detention in the DRC, which, as the OTP indicated, had impacted its decision to limit the charges against him[1653]. The PTC I found reasonable grounds to satisfy the OTP's application and issued the arrest warrant on February 10, 2006[1654]. The request for Lubanga's arrest and surrender to the ICC was transmitted to the DRC on February 24 and executed on March 16, 2006[1655]. One day later he was already transferred to the Court's detention centre in The Hague[1656].

The indictment that was subsequently issued by the OTP in August 2006 defined the nature of the conflict as non-international and the mode of Lubanga's alleged liability as a "co-perpetrator, jointly with other FPLC officers and UPC members and supporters", including his Deputy Chief-of-Staff Bosco Ntaganda[1657]. While supposedly, most of the armed groups involved in the conflict recruited children, the UPC/FPLC was observed as "an army of children" with nearly 30,000 awaiting demobilization in 2003[1658]. Curiously, Freedman suggested that, in comparison to other crimes allegedly committed under Lubanga's responsibility such as rape, enslavement and torture, which also seem to have been committed with genocidal intent, the recruitment of children was not necessarily the gravest characteristic conduct[1659]. The OTP's first Director of the Preliminary Examination Unit Paul Seils also reflected this view by assuming that the recruitment charges "barely scratched the surface of the conflict"[1660]. Fabricio Guariglia (the OTP's former Senior Appeals Council and Head of the Appeals Section during 2004-2013, currently the OTP's Director of the Prosecutions Division) explained that the Prosecutor had an "imperative to bring the case forward"[1661]. "The case was played out", he argues, with the evidence of child soldiers' recruitment being clear while the evidence of sexual violence that would have justified and supported SGBV charges was insufficient "in the assessment of the Office at the time"[1662]. However, the then executive director of WIGJ, Brigid Inder, assumed that the OTP had not sufficiently investigated SGBV in this case, despite its origin from the notorious "rape capital of the world"[1663]. She recollected that she and her colleagues were shocked and alarmed by

[1653] ICC Doc. No. Ref-RP20060906-OTP from September 12, 2006, 8; also Grey (2019)
[1654] ICC Doc. No. ICC-01/04-01/06-2-tEN from February 10, 2006
[1655] ICC Doc. No. ICC-01/04-01/06-803-tEN from January 29, 2007, para.16
[1656] *Ibid.*
[1657] ICC Doc. No. ICC-01/04-01/06-356-Anx2 from August 28, 2006, paras.7, 20, 23
[1658] ICC Doc. No. ICC-01/04-01/06-T-107-ENG from January 26, 2009, 16, lines 7-8; also Kammer (2012), 1
[1659] Freedman (2017), 54-55
[1660] Verini (2016), n.p.
[1661] Interview with F. Guariglia (ICC OTP), The Hague, December 2018
[1662] *Ibid*.
[1663] Inder, Brigid (2011), n.p., referring to the phrase "rape capital of the world", Inder cited Margot Wallström, the former UN Secretary-General's Special Representative on Sexual Violence in Conflict, who used this phrase in 2010 in her description of the conflict in eastern DRC. Wallström observed that "the core of the problem [relating to sexual violence as a dominant feature of the conflict] [...] [was] impunity, which [...] [was] the rule rather than the exception" (United Nations, 2010, n.p.).

the limited indictment against Lubanga that ignored rape and sexual slavery offences[1664]. She explained their reaction with two main concerns: on the one hand, it was known within the international community that such crimes had been committed in the DRC by various actors and were well-documented by human rights organizations and the UN. On the other hand, the acceptance and availability of progressive provisions in the Rome Statute for the prosecution of SGBV implied and gave hope that such crimes would not remain unpunished[1665].

Although two years ultimately separated the confirmation of charges in 2007 from the trial that began in 2009, it became clear that the Prosecutor was not going to amend the indictment with SGBV, despite human rights NGOs' requests to do so[1666]. This reluctance could have been caused by a number of issues ranging from the assumed failure to investigate SGBV sufficiently through strategic deliberations to fear of losing the case, which might have been, in turn, caused by a lack of understanding about how to prosecute SGBV in the context of the recruitment charges. Additionally, at later stages, procedural restraints and time pressure must have likewise challenged deliberations about a potential amendment. However, the decision to restrict the charges to the recruitment crimes and the absence of separate charges of SGBV committed generally against whomever under the alleged responsibility of Lubanga did not in fact necessarily mean that the OTP's leading staff contested the validity of the SGBV prohibition norm. Indeed, allegations of other grave crimes committed by Lubanga's forces were also not charged in this case. Furthermore, the Prosecutor personally acknowledged its general validity in IHL and ICL in his previous statements[1667]. That is, this restricted charging appears to be a strategic decision caused by the context of the Court's first case. As the OTP's former Leading Investigator in Congo, Bernard Lavigne, suggested, the Prosecutor's decision was "sudden" and "political", and it obliged the investigators "to change [their] planning and investigative work and concentrate on a new target"[1668].

On the other hand, the ignorance of SGBV such as rape and sexual violence allegedly committed against child soldiers within the context of their recruitment as its characteristic feature as well as the lack of any mention of it in the charging documents has revealed the ignorance of its legal prohibition, or the misrecognition to apply the SGBV prohibition norm in the given context. Occasional statements from the Prosecutor and his tactical concessions

[1664] Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018
[1665] *Ibid.*
[1666] WIGJ (2012b), 133; Chappell (2016), 111
[1667] ICC Doc. No. ICC-01/04-01/06-403 from September 7, 2006, para.20
[1668] Verini (2016), n.p.

following the resistance of the norm advocates against this misrecognition, in fact, implied that it was not the validity of the norm per se that was misrecognized here. And yet, he still failed to undertake tangible efforts that would have allowed any *de-jure* consideration of SGBV in this case. Nonetheless, the inserted application of the norm as a discourse that involved all relevant actors ultimately allowed both the reaffirmation of the norm's validity and the *de-facto* recognition of its potential applicability in the context of the given case. In accordance with the method tackled in '4.4. Triangulation of the analysis', in the following subchapters I will discuss the factors that seem to have stipulated this applicatory misrecognition.

5.2.1.1. The summary

5.2.1.1.1. The constellation of the involved actors

The constellation of actors involved in the operation of the OTP at the time played a key role in the misrecognition in question and also strongly influenced socialization dynamic. Their behaviour, in turn, was surely influenced by the context of institutional and structural factors, as well as the broader socio-political environment in which the case was embedded[1669]. While it is difficult to estimate whether and to what extent the OTP actually investigated the commission of SGBV, the fact that its Document Containing the Charges ('DCC'), the indictment, ultimately did not include any mention of it[1670] implies that these conducts were ignored and excluded from consideration by actors involved in the OTP's work. In its report from September 12, 2006, the OTP stated that it had initially investigated a number of different crimes but finally decided to restrict the indictment to the child soldiers' recruitment charges. It argued that the evidence the Office had been able to gather during its investigations would best support these charges, and specifically demonstrate the linkage

[1669] *Cp.* Madsen *et al*. (2018); Checkel (2001); Chappell (2016)
[1670] ICC Doc. No. ICC-01/04-01/06-356-Anx2 from August 28, 2006

between the suspect and the commission of those crimes. In fact, as other cases also indicated, the proof of the linkage between suspects/accused and crimes committed under their alleged responsibility has been a significant obstacle for the prosecution of SGBV at the ICC[1671]. That is, it was possibly more challenging to provide evidence of Lubanga's linkage to SGBV committed by his subordinates, than of his linkage to the 'gender-neutral' conducts which were traditionally understood at the time as defining the crimes of child soldiers' recruitment. Nevertheless, the discursive deliberations on the application of the SGBV prohibition norm inserted by the resistance against its misrecognition demonstrated that provision of this evidence was not impossible. In fact, they implied that even a mention of SGBV in the indictment could have already impacted its *de-jure* consideration in the final outcome of the case. However, in sticking to a narrow gender-blind charging strategy, the OTP's staff ultimately overlooked a range of SGBV acts that had been allegedly committed against child soldiers, overwhelmingly female, within the context of their enlistment, conscription and use in the Lubanga's armed forces. Neither the indictment nor the submitted list of the OTP's evidence addressed this issue in any way[1672]. This disregard was incisively reflected in Freedman's observation that the child soldiers' recruitment crimes "look easy enough to prove, since there may be lots of child soldiers around to testify, but they are too fresh for prosecutors to know much about them"[1673].

In the course of the trial, both the OTP and the Court were continuously faced with the consequences of this oversight. Although the norm advocates and their internal allies succeeded in consistently interrupting the misrecognition dynamic, ultimately they could not reverse its *de-jure* outcomes in *Lubanga*. However, through their practices of resistance, they managed to trigger mechanisms of socialization with the appropriate application of the norm among involved actors. Significantly, they instigated elaboration of its meaning and application in the context of this specific case through internal discursive deliberations that were increasingly based on the logic of appropriate argumentation[1674]. Their target actors, *i.e.*, nearly all participants in the trial, in turn, appeared willing to engage in this process, which involved finding compromise in accordance with principles of coherence and impartiality[1675]. This proved the applicatory nature of the given case of misrecognition and implied the ability of the responsible actors to comply with the existing structures. In doing so, they ultimately

[1671] *E.g.*, the *Katanga* and *Bemba* cases (see subchapter '2.4. Acquitted on SGBV charges'); Interview with B. (ICC Chambers), The Hague, May 2017, December 2018 (anonymized)
[1672] ICC Doc. No. ICC-01/04-01/06-356-Anx2 from August 28, 2006
[1673] Freedman (2017), 56
[1674] *Cp.* Günther (1988); Risse (2000); Wiener (2004, 2007, 2009); Checkel (2005); Deitelhoff (2006)
[1675] *Ibid.*

promoted the "genuine existence of the rule of law […] [where] legal communities become the keepers of the keys to legal authority, collectively defining what law means, and how law applies to a specific issue or case"[1676].

5.2.1.1.2. Institutional and structural factors

Perhaps the most obvious institutional factor to have influenced actors' misrecognition to apply the norm was (1) the very context of the Court's first case, which naturally put pressure on its organs and staff. This pressure compelled the Court to deliver its first conviction and by doing so, prove to its Member States and the international community its ability to implement its mandate of ending impunity for grave human rights violations. There was also pressure to prove the Court's legal competence in doing so that would, in turn, strengthen its authority. Along with other factors, this pressure seems to have influenced the initial unwillingness of the OTP to consider SGBV committed generally against whomever under the alleged responsibility of Lubanga and its exclusive focus on child soldiers' recruitment crimes[1677]. At least two legal experts – an employer from the Court and an academic from the field[1678] (both male) – estimated the choice of this strategy in *Lubanga* as a rational decision:

> Initially I don't think they [the OTP] made any mistake […] [because] it makes total sense for a new institution to start off with the small case. To try to keep it simple. There will be so many procedural issues that come up and so many problems that arise purely because it had been the first case. That it was good to keep it like clean, nice and simple. That was the idea.[1679]

In fact, virtually all interviewees mentioned the challenge of prosecuting a first case within new, untested institutional structures while the world watches and expects a spectacular performance. As Freedman remarked, in this respect: "It was not just what kind of justice would be rendered for Lubanga. The Court itself was on trial"[1680]. This factor undoubtedly put

[1676] Alter (2018), 24
[1677] Interview with A. (ICC Chambers), The Hague, May 2017 (anonymized)
[1678] *Ibid*.; Conversation with E. (an academic from the field), Summer School on ICL and Human Rights, Syracuse, June 2018 (anonymized)
[1679] Interview with A. (ICC Chambers), The Hague, May 2017 (anonymized)
[1680] Freedman (2017), Introduction, xvi

additional pressure on the institution that has been authorized, as Brigid Inder stressed, with an already "incredibly difficult mandate":

> It [the Court] is working in extraordinary complex situations, with often quite limited infrastructure, often with issues of corruption, perhaps a lack of independence of the judiciary […] [and] they are doing tremendously; they are doing very well in aspects of implementing a tremendously challenging mandate.[1681]

Time pressure (2) must have also influenced the prosecutorial decision to restrict the charges to a small, assessable set. As previously mentioned, the OTP indicated that it had to act fast, due to somewhat unexpected news about Lubanga's possible release from his detention in the DRC, where he had spent nearly a year before his transfer to The Hague[1682]. However, despite the rationality of this strategic choice under time-sensitive circumstances and the risk that the suspect might have otherwise escaped, it seems that the OTP could still have proceeded with its investigations after the issuance of the arrest warrant and Lubanga's transfer to the Court have been accomplished. In fact, between his handover to the detention centre in The Hague and the issuance of the actual indictment, more than five months had passed. Curiously, as will be demonstrated further, during this period, WIGJ actually succeeded in documenting SGBV committed under Lubanga's alleged responsibility.

However, additional factors such as (3) insufficient expertise and experience of the Court's key staff in application of gender analysis and the (4) relative newness of the issue in the specific context of the case seem to have hindered the ability of the responsible actors to recognize SGBV as inherent to the recruitment conducts[1683]. (5) Informal internalized rules or perception of SGBC as somewhat inferior or especially difficult to investigate and prosecute must have also influenced this neglect[1684], despite the attempts of WIGJ (that will be elaborated later) to persuade the OTP otherwise. Altogether, these factors seem to have hindered actors' ability to have a complete understanding of the situation and contributed to their ignorance of its certain relevant characteristics. As it turned out in the course of their learning process, this ignorance, in turn, caused non-compliance with the principle of impartiality and misrecognition of certain interests. As the depiction of the proceedings' further development will demonstrate, these aspects also impeded actors' ability to take appropriate measures for the correction of this omission once it was revealed and continued to

[1681] Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018
[1682] ICC Doc. No. Ref-RP20060906-OTP from September 12, 2006, 8; also Grey (2019), 251
[1683] *Cp.* Chappell (2016)
[1684] *Ibid.*

impede them throughout the period in which procedural rules allowed them to make amendments.

Furthermore, due to the institutional structure of the Court based on a legal framework that entails norms and rules stemming from various legal systems and bodies (reflecting the reality of the international regime complexity in which IL is embedded[1685]), "maneuvering within and around"[1686] this complexity by its designated followers appears to be a natural way to discover the meanings of those norms and rules in-use and to learn how to apply them in a coherent way. However, this tactic could also be similarly deployed for the justification of certain choices[1687]. The variety of (6) "constructive ambiguit[ies]"[1688] within the legal framework represents a generally inclusive setting, from which actors may creatively 'scoop out' what they need, while shaping an appropriate and coherent way of applying them within various specific contexts of the Court's cases and situations. On the other hand, such complexity also represents a certain challenge, which the actors involved in the operation of the Court must learn to overcome in an appropriate way in order to achieve an appropriate result. The given case has exposed a number of such "maneuvering" instances deployed by various actors, either consciously as a tactic to achieve certain goals, or unconsciously in the process of learning how to apply and interpret certain rules. One of those most significant instances in the context of this case was the OTP's explanation which excluded SGBV (allegedly committed against child soldiers within Lubanga's forces) from consideration, due to the - at the time - assumed legal incompatibility of its prohibition with the war crimes of child soldiers' recruitment. That is, from the traditional IHL perspective, the application of the former within the context of the latter would have provoked the collision of norms or required the "stretching" of the latter and thus of the war crimes concept more generally[1689].

The reality of international regime complexity reflected in the "constructive ambiguit[ies]", which are embedded in the legal framework of the Court, seems to have, in turn, along with the aforementioned institutional and structural factors, hindered the faculty of the responsible actors. Due to these factors, they were limited in their capacity to solve (7) the lack of clarity and the assumed incoherence in the application of the SGBV prohibition norm within the context of the child soldiers' recruitment crimes, from the traditional IHL understanding of

[1685] Alter (2018), 6
[1686] *Ibid*., 19-21, Alter refers to "maneuvering within and around the international regime complex" as an extraordinary resistance tactic applied by states for the avoidance of certain legal obligations.
[1687] *Ibid*., 6
[1688] Oosterveld (2014)
[1689] Interview with F. Guariglia (ICC OTP), The Hague, December 2018

the war crimes concept. That is, the misrecognition of the SGBV prohibition norm's application was also caused by actors' aspiration to comply with the principle of coherence. However, in doing so, they risked simultaneously violating the principle of impartiality in relation to the interests of those victims/survivors, who had been subjected to SGBV within the context of their recruitment. Ironically, while the OTP's initial strategy of a "clean, nice and simple"[1690] case that excluded SGBV from the consideration might have appeared smart and rational to some commentators, eventually, its ignorance was revealed to be incompatible with gender provisions embedded in the legal framework of the Court. That is, the misrecognition to apply the norm was legally inappropriate, despite ambiguity with respect to the legal context of the case.

5.2.1.1.3. Broader socio-political cleavages

Although the SGBV prohibition norm was already formally recognized, legalized and institutionalized within the legal framework of the Court and was also supported by the UNSC as a constituent element of its WPS agenda, the misrecognition of the norm's application in the Court's first case revealed the lack of its shared or social recognition among the Court's staff. The controversial nature of the negotiations on the inclusion of gender provisions in the Rome Statute[1691] had indicated the perpetuity of socio-political cleavages, even in relation to the acceptance of the norm's validity. Although the advocates of gender justice ultimately succeeded in persuading the state representatives to institutionalize the norm in the Rome Statute in a relatively precedential and broad way, this outcome was not taken for granted; rather, it was a compromise resulting from contestation from various other constituencies of the Court[1692]. As indicated by the constructivist research on norms[1693] and the insights from feminist institutionalism[1694], such socio-political cleavages do not vanish through formal institutionalization; rather, they continue to exist within new institutional structures, underpinned by internalized informal rules that may continue to govern actors'

[1690] Interview with A. (ICC Chambers), The Hague, May 2017 (anonymized)
[1691] *E.g.*, Copelon (2000); Oosterveld (2005)
[1692] *Ibid*.
[1693] *E.g.*, Wiener (2004, 2007, 2009); Wiener/Puetter (2009)
[1694] *E.g.*, Mackay *et al*. (2010); Mackay (2014); Chappell (2016); Grey (2019)

behaviour. These informal rules, reinforced by the other institutional and structural factors elaborated above, perhaps unsurprisingly, came to the fore in the Court's first case and reflected socio-political cleavages between the norm's advocates and designated followers with respect to its status.

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As elaborated in chapter '4. Explanatory framework', the evolution of the institutional socialization 'spiral' with the SGBV prohibition norm was generated by resistance practices from its advocates against the OTP's misrecognition and failure to apply the norm appropriately. That is, this misrecognition has essentially served as the open space from which the 'spiral' could be launched – a space into which the norm advocates stepped in order to achieve their goals. What's more, due to the applicatory nature of the norm's misrecognition and the successful resistance against it, the socialization process with its appropriate application has eventually produced strengthening effects in terms of its elaborated meaning in the context of the *Lubanga* case specifically, as well as generally in relation to its refined prescriptive status and further conceptual clarification.

5.2.2. The denial of misrecognition

Women's Initiatives for Gender Justice ('WIGJ'/'WIs'), the NGO monitoring and advocating for women's rights and implementation of the ICC's gender mandate, headed by its executive director Brigid Inder from its establishment in early 2004 until 2018, played a major role in the resistance process against the misrecognition of the SGBV prohibition norm's application in *Lubanga*. In fact, it appears that WIs triggered the process of actors' socialization with the

norm's appropriate application by pushing the 'spiral' to the 'denial' stage of its evolution. Their work has been based on a dual approach that includes monitoring the ICC's implementation of its gender justice mandate on the one hand, and activities on the ground where crimes were committed on the other. Brigid Inder emphasizes that this duality "was of great benefit to the Court rather than coming purely from a legalistic point of view"[1695]. The intention behind this approach was to transmit the experiences of people who had been subjected to SGBV into the institutional structures of the Court:

> I wanted to make sure advocacy was really grounded in the lived experience of those who were living through suffering from the conflict under investigation, so that we would keep people at the heart of our advocacy, people at the heart of the legal process because that's not something the legal process does very well. It sometimes gets so caught up in the technical issues, which are fascinating and interesting, […] but sometimes they forget the facts about people's lives.[1696]

Furthermore, WIs' dual approach aimed at the "sharpening of the advocacy's quality"[1697]. The idea has been to make their advocacy more accurate by ensuring that their organization reflected to the Court the knowledge and concerns of the affected communities and individuals. At the same time, they also kept the latter informed about the developments in the cases. Moreover, WIs do not only consult with local organizations, but also partner with them for their country-based programs, which they have been running in the DRC since 2006. While one of those programs was established for the documentation of SGBV in support of criminal prosecutions on both domestic and ICC levels, another program has been focusing on providing assistance to victims/survivors of sexual violence, securing their access to medical care, health services and social support[1698]. As the following will demonstrate, the application of this dual approach in their resistance practices in *Lubanga* has proven successful in a long-term perspective, even if the responsible actors from the institutional structures of the Court initially denied their agency.

[1695] Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018
[1696] *Ibid*.
[1697] *Ibid*.
[1698] *Ibid*.

5.2.2.1. The denial to include SGBV in the indictment

As soon as it became clear that the arrest warrant against Thomas Lubanga was restricted to the recruitment crimes against children, WIGJ tried to persuade the OTP to investigate and prosecute SGBV committed under his alleged responsibility. To this end, they initiated two meetings with the OTP's senior staff, during which they expressed their concerns about the absence of SGBV charges and, perhaps, the insufficient investigation of these crimes. They wanted to convince the OTP to keep the investigation open and to pursue gathering evidence of sexual violence perpetrated by Lubanga's forces. However, the Prosecutor was not persuaded that there had been any policy behind the commission of SGBV or that it was widespread and systematic[1699]. Despite the reports produced by the UN[1700] and human rights NGOs[1701] that indicated the contrary, the leading staff of the OTP assumed that there was not enough evidence of SGBV "because either the evidence did not exist or crimes of rape and other forms of sexual violence committed by the UPC were opportunistic and were not conducted on a large scale"[1702]. Brigid Inder suggests that an element of professional pride might have made the OTP especially resistant to the WIs' requests, which they expressed not only in the interests of gender justice and victims/survivors of SGBV, but also in the interests of the OTP and the Court. However, she assumes that the OTP did not want to be seen amending its own charges in its first case at the behest of an NGO[1703]:

> They were adamant that they would not be doing that, that they were satisfied with their charges, they didn't feel that they wanted to amend their charges, they didn't feel they had time to amend their charges because now he was here and things were going to move quickly.[1704]

During their first meeting, on March 29, 2006, which took place one and a half months after the arrest warrant was issued, WIs were told that the Prosecutor was not going to charge Lubanga with SGBV due to "insufficient time to do so"[1705]. The second meeting was held less than a month later, on April 12, 2006, but was ultimately as disappointing as the first one[1706]. Brigid Inder recollects that despite the attendance of a women's rights activist from the DRC

[1699] WIGJ (2006b)
[1700] UNSC Doc. No. S/2004/573 from July 16, 2004
[1701] Amnesty International (2004); HRW (2005)
[1702] WIGJ (2006b), 5
[1703] Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018
[1704] *Ibid*.
[1705] WIGJ (2006b), 5
[1706] ICC Doc. No. ICC-01/04-01/06-403 from September 7, 2006, para.27

who had been on the ground through the UPC/FPLC military presence and activities and could share ample relevant information, the OTP's senior staff did not take her seriously and proceeded to deny those concerns. This denial led WIs to take further steps in their resistance, which required generation of reliable information on SGBV committed under Lubanga's alleged responsibility by the means of documentation missions on the ground[1707].

Despite these apparently discouraging meetings, WIs subsequently organized two field missions in the DRC, which were conducted in May and July 2006 by three people, lasting for about twenty-two days. These three people were hired by WIs as consultants and were not professional criminal investigators, but rather local human and women's rights advocates. WIs trained them and established a documentation program for the identification and interviewing of victims/survivors of sexual violence committed in Ituri by any perpetrator. While they mainly aimed to identify people who had been targeted by Lubanga's forces, additionally, they wanted to ascertain other groups and/or actors who had also committed sexual violence. That is, although this first mission was quite broad, its main focus remained on crimes committed by the UPC/FPLC[1708].

Brigid Inder explains that the interviews needed to be conducted discreetly in order to guarantee the security for the team and interviewees. In the process of preparation, WIs established a security protocol for cases of threats or intimidation. The context and the manner of conducting the interviews also had to be framed in accordance with a certain security criteria. Before the first mission took place, the team – in coordination with WIs – had taken measures that allowed them to create safe spaces for those community members who were willing to talk to these outsiders. Since the mission took place shortly before the presidential elections of July 2006, they had developed a strategy based on campaigning that encouraged participation in the elections[1709]. The team genuinly provided voter information, calling on people to register and to vote, "getting them motivated to participate and they were sincere and hardworking in these efforts"[1710]. In addition, this allowed them to move around the area and to talk to people. Under the guise of this campaign, "in the evenings and/or while

[1707] Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018
[1708] *Ibid*.
[1709] *Ibid*.
[1710] Follow-up interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), by email, August 2021

people were waiting […] [the team] […] [was] discretely interviewing […] [them] for the documentation project"[1711].

After this first round of interviews and documentation, WIs analysed the data and identified individuals who they wanted to re-interview due to unclear, incomplete or contradictory information. They asked the team to return to the location of the second mission, to clarify these areas, this time keeping the focus on the exclusively UPC/FPLC-related crimes. The second documentation mission was framed as an HIV/AIDS workshop that was held with the community members. The interviewees were clear about the strategy and its actual purpose, and the team could pursue with the documentation on the margins of the workshop[1712]. Brigid Inder explains that "[t]hey were able to do two things during the workshop"[1713]:

> [People] understood that this gave the public facade for the safety of those who were coming into the interview, to be there, to have a reason to be there, […] where suspicion would not fall on them, or the team, and they could have […] a workshop but actually be interviewed and then return home safely.[1714]

Brigid Inder elaborates that these efforts to reach out to victims/survivors of SGBV in the insecure environment and to document the crimes committed against them under the alleged responsibility of Lubanga did service at least on two levels (in addition to the campaign and the workshop as such). On the one hand, these victims/survivors were provided with the possibility of access to justice for the harm that had been done to them in a thoughtful, sophisticated and sensitive way. Furthermore, based on the information given in the interviews about health problems, injuries, traumatization and extreme poverty conditions under which the survivors of SGBV were living, WIs pursued a dual approach and started an assistance program in the area. Brigid Inder recollects that through these missions, they became very concerned about the impoverished situation of the people and wanted to support them instead of just "extracting" the information and leaving as it had been apparently often done by human rights organizations in the past[1715].

On the other hand, WIs could then deliver to the Court knowledge and information, which they had generated directly from the people to whom the Court has been mandated to provide

[1711] *Ibid*.
[1712] Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018
[1713] Follow-up interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), by email, August 2021
[1714] Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018
[1715] *Ibid*.

justice. In fact, this task was supposed to be exercised by the Court's personnel, and another reason behind the missions was, of course, to persuade the OTP that the evidence of SGBV was readily available and the victims/survivors were willing to testify[1716]. As the further evolution of resistance practices will reveal, these efforts ultimately also served a cause in a broader sense, by engaging in information politics[1717] that facilitated processes of learning and socialization with the appropriate application of the SGBV prohibition norm among the Court's staff.

After the second mission had been completed, WIs only included interviews in their dossier, which they were confident could be useful for the Court' organs. Inder explains that they left out other interviews, not because they did not trust the interviewees, but rather because of the time pressure. There was no time for additional interviews that might have covered identified gaps, since WIs needed to persuade the OTP of their cause before it might have become too late[1718]. The dossier that they eventually produced based on these missions included fifty-five individual interviews with female survivors of rape and sexual violence, thirty-one of which had been allegedly attacked by the UPC/FPLC combatants. On August 16, 2006 they submitted this dossier to the OTP, which included confirmations from the survivors of their willingness to cooperate and engage with the investigations conducted by the ICC's organs and urged the Prosecutor to re-open the investigations[1719].

Brigid Inder recalls that they asked their interviewees in advance about their willingness to also be potentially interviewed by the ICC. While some of them agreed immediately, WIs asked those who were not sure and needed time to think about it for their permission to share their stories with the OTP anonymously and to contact them later in case the ICC would have been interested in interviewing them. When they came back to the interviewees later, all of them agreed to be interviewed by the ICC. Inder explains that this approach gave people space to think about their involvement in the official legal proceedings without feeling pressured or under the obligation to please the WIs' employees by giving an immediate consent. This might not have been in case had there been direct interrogation by the legal staff from the Court, *i.e.*, without the intermediary role played by the WIs and their team on the

[1716] *Ibid*.
[1717] *Cp.* Keck/Sikkink (1998, 1999)
[1718] Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018
[1719] Inder (2011), n.p.

ground[1720]. In contrast to the assumption that rape and sexual violence are especially difficult to investigate because victims/survivors and witnesses of these crimes often refuse to share their testimony, Inder recollects that it was rarely the case that people were reluctant to speak about what happened to them. From her perspective however, it was easier for the survivors to talk to an NGO (at least initially) than to the staff from the ICC, despite the efforts of the latter to undertake measures that should have guaranteed the safety and security of potential witnesses. That is, the interviewees felt more comfortable in a less official context than in a judicial interrogation.

> It's much less intimidating to talk to an NGO, especially women's rights and human rights activists from your own country, who speak your language, who look like you, who can relate to you, who are of your culture than it is to ICC investigator; because the formality of the Court is intimidating […] being interviewed by professional investigators [is more intimidating] than it is by [a] human rights/women's rights advocate who is documenting your testimony.[1721]

In their letter attached to the dossier, WIs emphasized the inherent, widespread and systematic nature of rape and other sexual violence committed in Ituri and assured their cooperation and assistance to the OTP regarding the information included in the dossier[1722]. However, they were also reasonably frustrated about the OTP's notification from June 28, 2006 on the suspension of further investigations and the decision not to amend the charges[1723], which was announced at essentially the same time when their team was on the documentation mission. The notification did not make mention of sexual violence, while the manner in which it was written indicated that this aspect may not have been sufficiently investigated[1724]. While it included the explanation that the OTP did not have sufficient time to collect the required evidence on other crimes[1725] and implied that investigations into other allegations against Thomas Lubanga might still continue and if necessary, additional charges would be brought against him "after the close of the present proceedings"[1726], this intention did not come to fruition. Disappointed by this decision, WIs tried to communicate to the OTP that this perceived lack or inaccessibility of SGBV evidence was in fact a misconception[1727]. Before the final indictment was issued, they wanted to demonstrate that sexual violence had been committed specifically by Lubanga's forces on a "reasonably significant scale", that the

[1720] Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018
[1721] *Ibid*.
[1722] WIGJ (2006b), 2-3, 7
[1723] ICC Doc. No. ICC-01/04-01/06-170 from June 28, 2006
[1724] *Ibid*.
[1725] *Ibid*., para.8
[1726] *Ibid*., para.10
[1727] WIGJ (2006b), 6-7; ICC Doc. No. ICC-01/04-01/06-403 from September 7, 2006, para.19; Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018

survivors were willing to give testimony, that some of their interviewees could be eyewitnesses, since they identified Lubanga in the camp where they had been sexually enslaved and finally, that it was still not too late to amend the charges[1728]. They described how they had gained access to this information and relayed that their team on the ground would have been willing to assist the OTP in its investigations. Inder explains that they did not call this information evidence, but rather considered it to be worthwhile material that could be of interest to the OTP, and possibly to its investigators, who could have used these interviews for the generation of evidence. That is, WIs wanted to make it clear that they were not trying to build the case; rather, they wanted to persuade the Prosecutor and his Office to consider this potentially valuable information in their first case[1729].

WIs framed their requests from the perspective of comprehensive investigation and prosecution of SGBV, that had been committed by Lubanga's forces generally against any and all victims. Simultaneously, due to the systematic and widespread perpetration of these crimes, they also specified the importance of their investigation within the context of the child soldiers' recruitment crimes, *i.e.*, within the context of the prosecutorial charges[1730]. They referred to a number of reports produced by Amnesty International, Save the Children Fund, and the Coalition to Stop the Use of Child Soldiers on SGBV committed by militia groups in the DRC and claimed that members of the UPC/FPLC forces raped girls and subjected them to sexual slavery, which constituted an inherent part of their abduction for the recruitment purposes[1731]. They expressed those concerns in the initial stages of the case when it was still procedurally possible to amend the charges against Lubanga. However, the OTP has never responded to the WIs' correspondence that was included with their dossier[1732]. Approximately two weeks after this dossier was sent to the OTP, on August 28, 2006, the OTP issued its official indictment, the Document Containing the Charges, which did not include any mention of SGBV, nor was it mentioned in the annexed list of the evidence[1733]. This exclusion has doomed gender justice to a cascade of *de-jure* misrecognition in this case.

[1728] Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018
[1729] *Ibid*.
[1730] *Ibid*.
[1731] WIGJ (2006b), 4
[1732] Inder (2011), n.p.
[1733] ICC Doc. No. ICC-01/04-01/06-356-Anx2 from August 28, 2006

Based on past experience with the Prosecutor[1734], WIs also indicated in their letter that they would continue pursuing their agenda, even if the OTP remained reluctant to put their concerns into action[1735]. That is, they planned to apply for an *amicus curiae* status for participation in the proceedings on the confirmation of charges[1736] and to request the Pre-Trial Chamber Judges to intervene in the prosecutorial strategy, which appeared to have overlooked relevant allegations against the suspect[1737]. They argued that the Rome Statute provides PTC Judges with supervisory powers for the implementation of their confirmation of charges mandate, which implies that they could invite the Prosecutor to re-investigate certain conducts[1738]. However, while the WIs may have found this to be a reasonable request, this announcement might have been perceived by the Prosecutor as pressure and coercion by "illegitimate" 'aliens'[1739] and additionally incited his ignorance of their concerns.

5.2.2.2. The denial during the confirmation of charges procedure

Brigid Inder recollects that although it was a stressful and difficult job to intervene in the ICC's organs in its very first case, WIs still perceived this role as a privilege and pleasure, and were determined to resist a potential pattern of SGBV misrecognition in its practice:

> If we let that slide then we would not be ever able to demand it in the future, and we wanted to say that the same was expected in every case. [This case is] not exceptional. We don't want a special sexual violence case. We want gender justice issues, gender-based crimes, gender and sexual-based crimes to be considered in every single investigation; considered, investigated, charged and prosecuted, so we knew we had to make [sic] a very strong stand on this one.[1740]

They did so through their vital role and agency in the overall resistance, also as the first NGO in the history of the Court that applied for an *amicus curiae* status. Inder assumed that nobody

[1734] Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018
[1735] WIGJ (2006b), 7
[1736] ICC ASP (2002a), According to Rule 103(1), "At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate".
[1737] WIGJ (2006b), 7
[1738] *Ibid*., based on Art. 61(7) of the Rome Statute
[1739] *Cp.* Risse/Sikkink (1999), 23
[1740] Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018

had likely expected that this would come from the relatively small women's rights organization rather than another more prominent human rights organization. Although they were aware that the possibility of being granted the status was rather small, by using this procedure, they inserted the gender justice agenda in the public records of the case and handed over their dossier to the Judges[1741]. On September 7, 2006, some two weeks after the OTP had issued the indictment, WIs submitted their application pursuant to Rule 103(1) of Rules of Procedure and Evidence[1742], requesting that the Judges of the PTC allow their participation as *amicus curiae* both in writing and orally in the confirmation of the charges proceedings[1743]. They urged the Chamber to intervene in the prosecutorial charging strategy, which seemed to have ignored allegations of SGBV committed, *inter alia*, within the context of child soldiers' recruitment crimes under the alleged responsibility of the suspect. They referred to the Prosecutor's statements on the gravity of large-scale SGBV committed in the DRC as a weapon of war with the aim of destroying communities[1744] as well as to his announced intention to investigate those crimes and continue receiving further information on their perpetration from any available sources[1745]. They also emphasized that it was publicly known from reliable sources such as the UN, Amnesty International and Human Rights Watch, that among other groups, the UPC/FPLC forces had extensively committed rape and sexual violence in Ituri[1746]. Referring to the OTP's notification about the suspension of further investigations from June 28, 2006[1747], WIs expressed their concerns about a potential inadequacy of the OTP's investigation into SGBV allegations in the case against Thomas Lubanga[1748]. They asked the Judges to consider that the Prosecutor was aware of those crimes and had even declared his intention to investigate them, but apparently, either did not do so at all or put insufficient effort in doing so. They also described their own efforts in this regard, including their meetings with the OTP's senior staff in March and April 2006, their following documentation missions in the DRC in May and July, and their dossier as the outcome of those missions that they had sent to the Prosecutor in August, before the issuance of the indictment. In this overall context, WIs urged the Judges to request the Prosecutor's explanation of his disregard for external communications that had provided his Office with

[1741] *Ibid*.
[1742] ICC ASP (2002a), Rule 103(1)
[1743] ICC Doc. No. ICC-01/04-01/06-403 from September 7, 2006, para.2
[1744] *Ibid*., para.20
[1745] *Ibid*., para.12
[1746] *Ibid*., para.20(4)
[1747] ICC Doc. No. ICC-01/04-01/06-170 from June 28, 2006, para.3
[1748] ICC Doc. No. ICC-01/04-01/06-403 from September 7, 2006, para.19

evidentiary materials on SGBV allegations against Lubanga and to invite him to reconsider further investigations into those allegations[1749].

By the means of their argumentation, WIs introduced a discourse on both the powers and the role of the PTC Judges, including their mandate to supervise the integrity of the charges brought by the Prosecutor in the confirmation of charges procedure, the outcome of which would necessarily affect the future course of the trial. They claimed that the legal framework of the Court provides the PTC Judges with a system of checks and balances designated for judicial supervision, to be applied over prosecutorial discretion before the confirmation of charges for trial[1750]. This issue appeared to be a "constructive ambiguity"[1751], which, one could argue, the WIs also creatively used for the insertion and maintenance of their agenda in the institutional structures of the Court.

5.2.2.2.1. The powers of the Pre-Trial Chamber Judges

According to Art. 61(7) of the Rome Statute on the confirmation of charges, a PTC "shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged". The Judges may (a) confirm or (b) decline to confirm the charges, if they determine that the evidence brought by the OTP was insufficient to believe that the suspect had committed the crimes he/she was charged with[1752]. The third sub-provision (c) entitles the Judges with the possibility to "[a]djourn the hearing and request the Prosecutor to consider: (i) [p]roviding further evidence or conducting further investigation with respect to a particular charge; or (ii) [a]mending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court"[1753]. WIs argued that the PTC could apply the sub-provision (c) with regard to serious SGBV allegations, which were neither mentioned in the DCC nor in the list of the evidence submitted by the OTP. They claimed that such interpretation would have been

[1749] *Ibid*., para.21
[1750] *Ibid*., para.7
[1751] Oosterveld (2014)
[1752] Rome Statute (1998), Art. 61(7)(a,b)
[1753] *Ibid*., Art. 61(7)(c)(i,ii)

in the interests of its judicial supervision mandate over the prosecutorial discretion in the confirmation of the charges procedure in accordance with the unique procedural framework of the Court including the role of the pre-trial stage[1754]. They also underlined that the interpretation of the PTC's powers and role in the proceedings in the Court's first case would have set an important precedent for future cases[1755].

Indeed, at first sight this provision seems to authorize the PTC Judges to supervise the coherency and integrity of charges brought by the OTP before they admit a case to trial. However, the discursive interactions on the application of Art. 61(7)(c) that followed the WIs' request revealed its "constructive ambiguity"[1756] due to the rather vague elaboration of this provision in the legal framework of the Court. Its interpretation might depend on the approach of the respective Judges towards prosecutorial discretion and their willingness to intervene in it, which, in turn, might depend on the context of a particular case and on the subject matter in question. Furthermore, it would also depend on the *phrónesis*[1757] faculty of Judges to consider the context and all relevant characteristics of the case in question, as well as all involved interests without any discrimination, which should, in turn, enable their intervention in cases of potential miscarriage of justice. In fact, in terms of gender-based crimes, Grey *et al*. suggest that judicial expertise in gender analysis should promote "gender-sensitive judging"[1758] and thus, appropriate interpretation and application of law in cases of SGBV. According to Art. 61(4), the Prosecutor could have continued his investigations and amended the charges until the beginning of the confirmation hearings[1759], which implies that there was still time to do so, if the Judges had requested him to reconsider. Additionally, in the *Decision on the Final System of Disclosure and the Establishment of a Timetable* from May 15, 2006, single Judge Steiner emphasized that investigations must be completed by the time of the confirmation hearing "except for exceptional circumstances which might justify subsequent isolated acts of investigation"[1760]. Judge Steiner did not elaborate on the concept of the "exceptional circumstances", but as Kai Ambos and Dennis Miller argue, "if the search for the material truth so requires […] [its] threshold […] should not be too high"[1761].

[1754] ICC Doc. No. ICC-01/04-01/06-403 from September 7, 2006, paras.7-8
[1755] *Ibid*., para.4
[1756] Oosterveld (2014)
[1757] Günther (1988), 249-250, based on Aristotle
[1758] Grey *et al*. (2020)
[1759] Rome Statute (1998), Art. 61(4)
[1760] ICC Doc. No. ICC-01/04-01/06-102 from May 15, 2006, para.131
[1761] Ambos/Miller (2007), 339

WIs acknowledged that the Prosecutor was sovereign to decide upon his charges, but they also argued that this discretion could not be totally excluded from "any form of judicial supervision or review"[1762]. Similarly, they recognized the constraints inherent to the nature of the Court to pursue a rather selective track with regard to its cases and charges. However, they simultaneously claimed that such choices must be made carefully because they "ultimately affect the entire international community"[1763]. They argued that the PTC Judges were responsible for the supervision of the Prosecutor's charging strategy, including the context in which the alleged crimes had been committed, before they admitted the case to trial. This implied that they would have been obliged to intervene[1764]

> if the Prosecutor, in exercising his or her discretion, ha[d] for instance failed to take into account relevant matters, or ha[d] taken into account irrelevant matters, or ha[d] reached a conclusion which no sensible person who has properly applied his or her mind to the issue could have reached.[1765]

Significantly, in their argumentation, WIs also referred to another vital provision embedded in the Rome Statute in Art. 21(3), that stipulates the application and interpretation of law in consistency "with internationally recognized human rights" and prohibits any discrimination, *inter alia*, based on "grounds such as gender"[1766]. That is, if not in relation to *any* victims/survivors of SGBV, by disregarding its commission explicitly against the child soldiers, the OTP essentially failed to comply with this provision.

In line with its previous attitude towards WIs' agency, the OTP rigorously opposed the possibility of their *amicus curiae* intervention in its response to their application. It even criticized WIs for their arbitrary designation of their role in the proceedings as a "participant" and not yet an "applicant" in their request[1767], which it called illegitimate, irrelevant and inappropriate for the "proper determination" of the case, and urged the Judges to reject it as "inadmissible"[1768]. While in this response the OTP confirmed that it had received WIs' correspondence including their dossier[1769] (which it had previously failed to do), it did not hesitate to reproach them for the inclusion of their factual observations in their *amicus* request, which WIs had obviously done for the purpose of its substantiation[1770]. With regard to the Art. 61(7), the OTP argued that, in accordance with its chapeau, which should establish

[1762] ICC Doc. No. ICC-01/04-01/06-403 from September 7, 2006, para.7(2)
[1763] *Ibid*., para.8
[1764] *Ibid*., paras.5-7
[1765] *Ibid*., para.7(2)
[1766] *Ibid*., para.8
[1767] ICC Doc. No. ICC-01/04-01/06-478 from September 25, 2006, 1
[1768] *Ibid*., para.12
[1769] *Ibid*., para.8
[1770] *Ibid*., para.4

the magnitude of legal interpretation for the following paragraphs and subparagraphs, its provisions could be only applied to the existing charges brought by the Prosecution[1771]. From the perspective of the OTP, the supervisory powers of the PTC provided under subparagraphs (c)(i) and (ii) had been designed to be applied to the crimes that appeared to fall under a different legal qualification or characterization than described in the prosecutorial charges, which could be requested by the PTC to be amended accordingly. The OTP reasoned that this provision did not bestow the PTC with such a power to request that the Prosecutor consider amending his indictment with additional (new) charges or the provision of the evidence that would have supported such new charges[1772].

Unsurprisingly, in line with the OTP's argumentation, the Defence also claimed that the WIs' application was illegitimate. It referred to the Prosecutor's decision on the suspension of further investigations from June 28, 2006, and stated that any initiatives regarding SGBV would have been "redundant for the purposes of *this* confirmation hearing" (emphasis in original)[1773]. Moreover, it blamed WIs for their ostensible attempt "to digress [the proceedings] into the realm of policy debate"[1774] as well as for the potentially compromised expeditiousness of the proceedings and rights of the defendant[1775].

Similarly to the OTP, the Pre-Trial Chamber of three judges, the Presiding Judge Claude Jorda[1776], Judge Silvia Steiner[1777] and Judge Akua Kuenyehia[1778] also missed the opportunity to correct the misrecognition of the SGBV prohibition norm before confirming the charges and authorizing them for trial by ultimately denying to grant leave to the WIs' application[1779], despite the consideration of their dossier on *Rape and Sexual Violence in Ituri, in the Oriental*

[1771] *Ibid*., para.18
[1772] *Ibid*., paras.16-20
[1773] ICC Doc. No. ICC-01/04-01/06-442 from September 19, 2006, para.15
[1774] *Ibid*., paras.3, 10, 18
[1775] *Ibid*., para.6
[1776] Aside from his judicial functions and experience in inquisitorial legal tradition, Judge Jorda (France) has been also involved in academia, and has gained expertise in fields such as human rights, international humanitarian and international criminal law, as well as in the role of victims in the development of the latter. He served for the ICTY between 1994 and 2003, also as its President for the last four years of his mandate. As one of the Appeals Chamber Judges at the ICTR, he ruled on the appeal of the historical judgement (specifically in SGBV terms) in the *Akayesu* case. He retired from the PTC in *Lubanga* and the Court in August 2007 due to ill health and was replaced by the Japanese Judge Fumiko Saiga. However, he remained present throughout the confirmation of the charges procedure until the decision was issued in January 2007 (ICTY website, 2021).
[1777] With a background in inquisitorial civil law system, Judge Steiner (Brazil) was additionally serving as a Presiding Judge for the *Bemba* case in both the Pre-Trial and Trial Chambers between 2005 and 2016. In contrast to *Lubanga*, in the *Bemba* case, the OTP had brought a number of SGBC charges against the suspect; however, most of them were not confirmed by the PTC for trial (see subchapter '2.4. Acquitted on SGBV charges').
[1778] Judge Kuenyehia from Ghana has also been involved in academia, in addition to her judicial mandate. She has obtained expertise in women's rights and gender issues and wrote a number of articles on women's rights and family law in Africa, particularly in Ghana. In her lecture on human rights and global justice, *The International Criminal Court: Challenges and Prospects*, she stated that the ICC would need "to develop the jurisprudence relating to the gender crimes codified in the Statute" (Kuenyehia 2010, 96). She was the only Judge involved in the PTC in *Lubanga* whose legal background stemmed from the common law system.
[1779] ICC Doc. No. ICC-01/04-01/06-480 from September 26, 2006

Province of the Democratic Republic of the Congo[1780]. In doing so, the Judges similarly denied WIs access to the internal discursive deliberations on the application of Art. 61(7) and the interpretation of their supervisory powers in the confirmation of the charges proceedings[1781]. They simply declared that the WIs' request had "no link with the present case", which was restricted to the child soldiers' recruitment charges brought by the OTP[1782]. However, the Chamber agreed that the concerns expressed by WIs might have been relevant within the context of the greater situation in the DRC[1783] and invited them to re-file their *amicus* application accordingly[1784].

Despite this denial, Brigid Inder recalled that the Chamber's reference to their statements communicated some merit for the WIs' efforts[1785]. Their first statement cited in the Chamber's decision questioned the quality of the OTP's investigations of SGBV by declaring that

> the absence of charges for gender crimes against Thomas Lubanga Dyilo at this stage [was] undeniably due to ineffective investigations conducted by [their] office which were limited in scope, poorly directed and displayed a lack of commitment to gather the relevant information and evidence to enable gender based crimes to be brought against the first indictee at the ICC.[1786]

In another statement, cited by the Chamber, WIs requested the re-opening of the OTP's investigations by stating that "it [was] not too late for the OTP to correct its current investigatory oversight" and that it should do so by "immediately open[ing] investigations into gender based crimes and pursu[ing] the leads and incidents outlined for [them] in the enclosed report"[1787]. Perhaps, by citing these statements, the Judges implied that the OTP could have reconsidered WIs' concerns without their specific request. Or perhaps, by doing so in the conjunction with their invitation to re-file the WIs' request in relation to the greater situation in the DRC, they implicitly cautioned the OTP with regard to its SGBV investigations in future cases. In any case, by their denial of the WIs' request, which likely had a number of causes, the Judges decided to rely upon the OTP's strategy and not to put additional pressure on the proceedings in this first case.

Ambos and Miller noticed that the interpretation of Art. 61(7) "was deliberately left open

[1780] *Ibid*., 3; the dossier itself is confidential and cannot be analyzed in the context of this contribution
[1781] ICC Doc. No. ICC-01/04-01/06-480 from September 26, 2006
[1782] *Ibid*., 3
[1783] *Ibid*.
[1784] *Ibid*., 4
[1785] Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018
[1786] ICC Doc. No. ICC-01/04-01/06-480 from September 26, 2006, 3
[1787] *Ibid*.

during the negotiations" on the Rome Statute[1788]. Since the legal framework of the Court has not been based either on the civil or the common law system, but rather a combination of elements from both[1789], the interpretation of the PTC Judges' powers as eligible to intervene in the prosecutorial strategy would have probably collided with the prosecutorial discretion principle (which is strongly provided in the Statute)[1790] even in spite of the absence of any explicit rule in the legal framework of the Court preventing the PTC from such requests towards the Prosecutor[1791]. Therefore, it seems that the primary functions of the PTC have been limited to the "filtering-out of unmeritorious cases"[1792] that do not provide sufficient evidence, the preparation of cases for trial in terms of procedural economy and the resources of the Court, and the protection of suspects from unjustifiable exposure to trial[1793]. While the OTP should be the "primary organ responsible for determining the content of the charges and their amendment", the PTC may "exercise control over the procedure, without having itself any powers in relation to the actual content of the charges"[1794]. Thus, monitoring the integrity of charges in terms of relevant facts, contextual characteristics of cases as well as involved interests that might have been ignored does not seem to belong to the primary functions of the PTC. Ambos and Miller argue that this perspective seems to be likewise substantiated by the principle restricting the judicial interpretation of the law to the facts that were presented by the parties, *i.e.*, *da mihi factum, dabo tibi ius* – "give me the facts and I shall give you the law"[1795].

Ironically, the Judges ultimately applied the Art. 61(7) provision in another context: they amended the Prosecutor's description of the conflict's nature from non-international to partly international, virtually of their own accord[1796]. Despite this, they were apparently not prepared to intervene in the prosecutorial strategy in terms of SGBV. Even if the Judges were reasonably reluctant to request that the Prosecutor reconsider amending the indictment with additional SGBV charges, they might have been legitimized to make such a request in relation to the SGBV committed within the context of the child soldiers' recruitment crimes if they had granted WIs their request to participate in the proceedings and to present their views and concerns in the courtroom. In contrast, the denial of Judges to do so ultimately maintained the

[1788] Ambos/Miller (2007), 360
[1789] *Ibid*., 356
[1790] *Cp.* Jacobs (2011); Heller (2013)
[1791] Ambos/Miller (2007), 359
[1792] Nerlich (2012), 1347
[1793] *Cp.* Ambos/Miller (2007); Nerlich (2012)
[1794] Jacobs (2011), n.p.
[1795] Ambos/Miller (2007), 359
[1796] ICC Doc. No. ICC-01/04-01/06-803-tEN from January 29, 2007; This will be discussed in subchapter '5.2.2.4.1.1. The amendment of the charges' in more detail

applicatory misrecognition of the SGBV prohibition norm in *Lubanga* and doomed further efforts of its advocates towards the *de-jure* recognition of its applicability to a continuous procedural blockade.

Following the suggestion of the PTC, WIs re-filed their request as *amicus curiae* in the DRC *situation* about two months after their first application[1797]. They again expressed concerns about what they perceived to be the inadequacy of the OTP's investigations on SGBV in the DRC[1798]. They argued that the PTC Judges should be able to intervene with the prosecutorial discretion in this respect, specifically because the legal framework of the Court does not provide victims/survivors with a mechanism that would allow them to challenge Prosecutor's decisions that affect their interests[1799]. They drew a comparison with the oversight powers of the Judges to intervene with the prosecutorial discretion when it comes to the rights of a defendant, which should not be different in cases of a potential failure to fulfil the rights and interests of victims[1800]. Perhaps in a more political and moral way, WIs argued that the interests of the latter reflect the interests of their families, communities, and ultimately of the entire international community, whose fulfilment has been one of the main goals of the ICC's mandate. The implementation of its mandate stipulates in turn, *inter alia,* the eradication of historical impunity in cases of SGBV, which would remain compromised as long as those interests were ignored and their legitimacy misrecognized[1801].

In response to this re-filed application, the Prosecutor continued to insist upon his discretion and to deny WIs' request for *amicus curiae* status. He stated that his Office did not exclude the possibility of amending the indictments against other suspects from the DRC situation with SGBV charges[1802]. Indeed, charges of rape and/or sexual violence were later brought against all other five suspects from the DRC: Germain Katanga, Mathieu Ngudjolo Chui, Callixte Mbarushimana, Sylvestre Mudacumura and Bosco Ntaganda[1803]. Curiously, Prosecutor Bensouda subsequently indicated that the inclusion of SGBV charges in those cases had been influenced by lessons learned in *Lubanga*[1804].

In line with the observations of the OTP, the Judges ultimately denied WIs' second *amicus*

[1797] ICC Doc. No. ICC-01/04-313 from November 10, 2006
[1798] *Ibid*., paras.26-28, 34-35
[1799] *Ibid*., paras.18-20
[1800] *Ibid*., paras.10-11
[1801] *Ibid*., paras.9, 11-12, 36
[1802] ICC Doc. No. ICC-01/04-316 from December 5, 2006, para.19
[1803] See chapter '2. Mapping the application of the SGBV prohibition norm at the ICC'
[1804] Bensouda (2014), 540

request[1805]. The charges against Lubanga had already been confirmed, the investigation into the situation in the DRC was still ongoing, and the OTP indicated that it was aware of the SGBV issue and it was considering bringing such charges in its other potential cases. That is, from the perspective of the Court, there seemed to be no need so far for any outside intervention[1806]. In fact, evidence of this assumption from the OTP could already be traced in its warrants of arrest against Katanga and Ngudjolo Chui, which were then yet to be unsealed[1807].

Despite those denials, by creatively using the provisions embedded in the legal framework of the Court, WIs succeeded in raising the awareness of the responsible actors and setting the agenda about the potential misrecognition of the SGBV prohibition norm in the context of the case against Lubanga. They made their concerns visible in spite of some actors' initial refusal to consider their legitimacy. Furthermore, in doing so, WIs imposed the discursive interactions with respect to the potential misrecognition of the norm among those actors and fostered the further evolution of the socialization process. Those endowed with power within the structures of the Court had not only refused to consider the application of the norm in this case but also attempted to partly delegitimize and indeed, to prevent the agency of its advocates from influencing the proceedings by denying their access to the courtroom. Nevertheless, despite their denied access to the legitimized and legitimizing space of the law, which wields the power to recognize and authorize, but also to exclude, discriminate and marginalize, WIs triggered further evolution of the 'spiral' that eventually entrapped their target actors in the socialization dynamic[1808].

5.2.2.3. The denial of victim status to victims/survivors of SGBV

The denial of the OTP and the PTC Judges to address issues of SGBV likewise subsequently impacted the proceedings on the recognition of victim status in *Lubanga*. In fact, one could reasonably wonder why the Legal Representatives of the victims stayed silent during the

[1805] ICC Doc. No. ICC-01/04-373 from August 17, 2007
[1806] *Ibid.*
[1807] ICC Doc. No. ICC-01/04-01/07-1-US-tENG from July 2, 2007; ICC Doc. No. ICC-01/04-02/07-1-US-tENG from July 6, 2007
[1808] *Cp.* Risse/Sikkink (1999)

process of WIs' application for the *amicus* status. The public records of the Court do not contain their observations on this dispute, which is puzzling, as one could also reasonably assume that their clients might have been subjected to SGBV within the context of their recruitment or witnessed such instances. Indeed, in this light, the opening statements of the LRs to the trial[1809] may appear somewhat confounding. In these statements, they suddenly and extensively referred to SGBV and actively advocated for its consideration in the case. Indeed, if such appeals had been raised during the proceedings on the confirmation of the charges, they could have, under certain circumstances, changed the trajectory of the *de-jure* SGBV misrecognition. The silence of the LRs in the pre-trial stage might have been caused by the institutional procedure, which establishes which individuals are eligible to be granted victim status and to participate in the proceedings in a certain case. This selection would be, in turn, predetermined by the charges brought by the OTP against the suspect. The awakened vigilance of the LRs with respect to SGBV issues, which had come to the fore by the beginning of the trial despite this structural restriction, can be partially explained by their cooperation with WIs. Despite the denial of their concerns by the OTP and the PTC, WIs did not step back but proceeded infiltrating into the internal structures of the Court and in this process, built an alliance with the Legal Representatives of the victims.

5.2.2.3.1. The procedural denial cascade

The legal framework of the Court enables victims/survivors of crimes that it prosecutes to present their views and concerns by means of participation in proceedings through their Legal Representatives, provided that the Judges have determined this as appropriate at certain stages of the proceedings[1810]. In order to do so, they must submit a written application form to the Registrar, who then transmits this to a relevant Chamber and provides the Prosecution and the Defence with its copies[1811]. The latter two may comment on applications within a period of time set by a Chamber[1812], which may, in turn, either on its own initiative or on the initiative

[1809] See subchapter '5.2.4.1. Opening statements of the Legal Representatives of the victims'
[1810] Rome Statute (1998), Art. 68(3); ICC ASP (2002a), Rule 89; Carnero Rojo (2016)
[1811] ICC ASP (2002a), Rule 89(1)
[1812] *Ibid*.

of the parties, deny an application if an applicant did not satisfy criteria of a certain case or situation[1813]. The ICC's Rules of Procedure and Evidence define victims as "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court"[1814]. In its decision from July 28, 2006 on applications for the participation in the proceedings, the PTC I determined four criteria that must be fulfilled in order to grant such status: 1) the applicant must be a natural person, 2) who has suffered harm, 3) from the crime that falls within the jurisdiction of the Court, 4) while a causal link between the crime and the harm must have been established[1815]. Specifically, recognition of victim status in single cases within separate situations stipulates proof of "sufficient causal link" between the harm and the crimes described in the charges[1816].

In July and August 2006, the Court received forty-one confidential and forty-three *ex parte*[1817] applications from individuals who wanted to participate as victims in the *Lubanga* proceedings[1818]. Among those applicants a number of female civilian victims/survivors testified on rape and sexual violence that had been allegedly committed by the UPC/FPLC soldiers against them and their family members. One of those women submitted that the soldiers had killed her husband and four of her children and afterwards abducted and sexually enslaved her and her daughter for a period of six months[1819]. A number of applicants similarly submitted that they and other women had been brutally raped or sexually assaulted either in their homes or on the roads by the UPC/FPLC militiamen[1820]. One woman stated that she had been raped while her husband was forced to witness her rape being deprived of any possibility to intervene[1821].

Despite these communications, submitted on August 22, 2006, seven days after WIs sent their dossier with the documentation of SGBV in Ituri to the OTP and six days before the issuance of the indictment against Lubanga, the Prosecutor declared that the applicants who had been allegedly subjected to SGBV did not satisfy the criteria of being recognized as victims in this case because either the crimes committed against them were not included in the arrest warrant against Lubanga or the timeframe of those crimes didn't correspond with the timeframe

[1813] *Ibid*., Rule 89(2)
[1814] *Ibid*., Rule 85(a)
[1815] ICC Doc. No. ICC-01/04-01/06-228-tEN from July 28, 2006, 7
[1816] *Ibid*., 9
[1817] ICC ASP (2002a), According to Rule 89(3), such an application "may also be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child or, when necessary, a victim who is disabled".
[1818] ICC Doc. No. ICC-01/04-01/06-345 from August 22, 2006; ICC Doc. No. ICC-01/04-01/06-390 from September 6, 2006, para.2
[1819] ICC Doc. No. ICC-01/04-01/06-345 from August 22, 2006, para.13
[1820] *Ibid*., paras.20-22, 32-36
[1821] *Ibid*., para.30

specified in the arrest warrant[1822].

On September 6, 2006, the OTP favoured six *ex parte* applicants who were identified as its witnesses[1823]. Three of them also referred to SGBV committed by the UPC/FPLC troops against both civilian populations and child soldiers of both sexes. One of the applicants, on behalf of a former male child soldier, admitted that the militiamen had raped girls before killing them during their attacks[1824]. Another applicant, also on behalf of a former male child soldier, acknowledged that the victim had been ordered to mutilate sexual organs of Lendu individuals[1825]. Another one, on behalf of a former female child soldier, testified about her rape by a UPC/FPLC commander during her confinement in his residence[1826].

Ten additional applications were also subsequently submitted in September 2006[1827], virtually at the time of WIs' application for the *amicus* status. Among those ten, eight applicants referred to SGBV that had been allegedly committed against them or their family members. While all of them described acts of rape, gang rape, sexual slavery, forced nudity and forced marriage that had been inflicted upon the civilian population, one of the applicants claimed that she had been also conscripted in the UPC/FPLC forces as a child soldier[1828]. Those victims/survivors belonged to different ethnic groups, including *Hema* and *Lendu*, however, some of them indicated that *Lendu* had been at times intentionally targeted due to their ethnicity[1829]. At least three female *Lendu* applicants[1830] claimed that SGBV acts including rape, sexual slavery and forced marriage had been committed against them and other *Lendu* women because of their ethnic origin[1831].

One of the female *Lendu* applicants described that the UPC/FPLC soldiers had abducted her together with other boys and girls in 2003, repeatedly raped her and forced to become a soldier:

> She was detained in an underground cell in REDACTED where she was raped daily by UPC militiamen and their commanders. Later, she received military training. She was drugged and taken to the frontlines in REDACTED. Before being trained as a soldier, she was used as a

[1822] *Ibid*., paras.19, 51
[1823] ICC Doc. No. ICC-01/04-01/06-390 from September 6, 2006, para.22
[1824] *Ibid*., para.14
[1825] *Ibid*., para.15
[1826] *Ibid*., para.16
[1827] ICC Doc. No. ICC-01/04-01/06-589 from October 19, 2006, para.2
[1828] *Ibid*., paras.16, 19, 21, 23, 25, 28, 30, 33
[1829] *Ibid*., paras.25-26
[1830] *Ibid*., paras.23, 25, 33
[1831] *Ibid*., para.33

human shield or a scout in the frontlines, along with the other children.[1832]

That is, according to her testimony, she was not only conscripted in the UPC/FPLC by force and used to participate actively in hostilities but also systematically subjected to SGBV within the context of her recruitment. However, during the consideration of her application, a question arose about whether the applicant was under fifteen years old – as the definition of the recruitment crimes against children requires – at the time of her subjection to those offences. This detail was decisive for her recognition as a former child soldier and as a victim whose testimony could be considered in the case against Lubanga. In order to resolve this issue, the Prosecution requested the presentation of documentary evidence that would have proven the applicant had been younger than fifteen years old at the time of the alleged offences[1833].

The only applicant of the ten aforementioned whose victim status was recognized and her participation in the proceedings approved by the Prosecution, was a mother of a former male child soldier, who had allegedly been abducted by the UPDF (the Ugandan military forces, Uganda People's Defence Force) to transport ammunition when he was ten and subsequently recruited by the UPC/FPLC where he served as a soldier and a bodyguard[1834]. As for the remaining nine applicants, the OTP declared that they did not fulfil the criteria for being recognized as victims because the crimes that they had described in their applications were neither included in the arrest warrant, nor in the charges against the suspect, which played a determining role in the Court's differentiation of victims and non-victims[1835].

This sample of victims/survivors who applied in the initial stage of the *Lubanga* case for their recognition and participation in the proceedings suggests that the OTP and the Judges must have known about SGBV allegations against him, not only from the public reports produced by the UN and international NGOs as well as the WIs' confidential dossier, but also from the context of those applications. Although they included references not only to SGBV committed against civilian population, but also against child soldiers within the context of their recruitment in the UPC/FPLC forces, their denial seemed to be foreshadowed by the previous misrecognition of the OTP to consider SGBV in this case, as well as by the following rejection of the Judges to intervene with this course, at least within the context of the recruitment charges. The selection of those applicants who were ultimately officially

[1832] *Ibid*., para.28
[1833] *Ibid*., para.38
[1834] *Ibid*., para.35
[1835] *Ibid*., paras.37-39

recognized as victims in line with the facts described in the prosecutorial charges might explain, to a certain extent, the silence of the LRs on issues of SGBV in the pre-trial stage. On the other hand, the subsequent efforts of WIs in this regard, which will be elaborated on further, demonstrate why the LRs ultimately broke their silence by the beginning of the trial.

In 2006, eighty to one hundred individuals applied for victim status in the DRC situation[1836]. Among those, seventeen applicants had been allegedly subjected to SGBV committed by the UPC/FPLC, and one was a Prosecution witness[1837]. The PTC recognized four applicants, who were representing their male children, as victims and granted them the right to participate in the confirmation of charges proceedings[1838]. Back in 2006, neither victims of SGBV nor any female former child soldiers were recognized as victims[1839]. Although the legal framework of the Court provides victims with potential access to participation in the proceedings[1840], the decisions that approve and grant such status (and with it the admission of their views and concerns to the courtroom) rest in hands of parties to the proceedings and Judges. In fact, although Rule 93 of the ICC's Rules of Procedure and Evidence on *Views of victims or their legal representatives* allows the Judges to ask not only the recognized victims or their LRs to present their views on any question before the Court, but also other victims if appropriate[1841], in *Lubanga* they did not attempt to make use of this provision.

[1836] WIGJ (2006a), 20
[1837] *Ibid*.
[1838] ICC Doc. No. ICC-01/04-01/06-803-tEN from January 29, 2007, para.19
[1839] WIGJ (2006a), 20
[1840] Rome Statute (1998), Art. 68; ICC ASP (2002a), Rules 89-93
[1841] ICC ASP (2002a), Rule 93

5.2.2.4. The outcomes and implications of the denial

5.2.2.4.1. The decision on the confirmation of the charges

In January 2007, the PTC Judges established that there were substantial grounds on which to believe that Thomas Lubanga Dyilo, the President of the UPC and the Commander-in-Chief of its military wing FPLC, was individually criminally responsible as a co-perpetrator[1842] for war crimes; namely, the crimes of enlisting and conscripting children under fifteen years into the FPLC and using them to participate actively in hostilities in a conflict of an international character from early September 2002 to June 2, 2003 under Art. 8(2)(b)(xxvi) and in a conflict not of an international character from June 2, 2003 to August 13, 2003 under Art. 8(2)(e)(vii) of the Rome Statute[1843].

Interestingly, while the Judges were elaborating on Lubanga's mode of liability as a co-perpetrator, which means (as the OTP suggested) that he had engaged in "'joint control' over the crime as a result of the 'essential contribution' ascribed to him"[1844], they also considered the role of his Deputy, Bosco Ntaganda, against whom the Prosecution at the time had already issued an unsealed warrant of arrest. Although proceedings against Ntaganda began years later, his co-responsibility for crimes committed in Ituri already loomed on the horizon during the pre-trial stage in *Lubanga*. As was previously mentioned and will be elaborated on further, the case against Ntaganda subsequently offered the opportunity for the ICC's organs to implement lessons learned in *Lubanga*. The Judges found sufficient evidence to believe that between early September 2002 and the end of 2003, Thomas Lubanga, together with other FPLC senior commanders including Bosco Ntaganda, was involved in an agreement or a common plan to enlist or conscript children into FPLC, to subject them to military training and to use them for the purposes of their military activities, such as the protection of military objectives and FPLC military quarters. Furthermore, among others, Lubanga and Ntaganda also used children as their personal bodyguards[1845]. With regards to the context and circumstances in which those conducts had been committed, the Judges – in accordance with

[1842] Rome Statute (1998), Art. 25(3)(a)
[1843] ICC Doc. No. ICC-01/04-01/06-803-tEN from January 29, 2007, para.410
[1844] *Ibid.*, para.322
[1845] *Ibid.*, para.377

the charging documents – restricted their consideration to elements such as strict military discipline and singing aggressive military songs[1846], without any mention of SGBV.

Lubanga's role in the recruitment was established as a "key overall co-ordinat[or]", which included, *i.a.*, provision of financial resources and maintenance of contact to other participants, encouragement of the population to supply the FPLC with young recruits, inspection of the military training camps and the use of children under the age of fifteen as his personal bodyguards[1847]. The Chamber agreed that even if he did not play a key coordinating role in recruitment activities during his house arrest in August until the end of 2003, (a role which might have been assumed by other co-perpetrators including Bosco Ntaganda)[1848] he still continued to exercise *de-facto* power within the UPC/FPLC[1849].

Curiously, although the Judges substantially confirmed the OTP's charges against Lubanga for trial, they also amended them – virtually of their own accord – with regard to the nature of the conflict described by the OTP in its indictment[1850].

5.2.2.4.1.1. The amendment of the charges

Despite the Judges' previous silence in the debate on the application of Art. 61(7)(c) generated by WIs in their *amicus* request, in their decision on the confirmation of charges, they eventually relied upon this provision in relation to a different issue and interpreted it even more broadly than had been suggested by the WIs. In doing so, the Chamber modified the nature of the conflict described in the OTP's indictment from a non-international conflict to one which is partly of an international character. While they agreed that from June 2 to August 13, 2003, the conflict was not of an international character, they amended it to international from early September 2002 to June 2, 2003, due to the involvement of the

[1846] *Ibid.*, para.379
[1847] *Ibid.*
[1848] *Ibid.*, para.383
[1849] *Ibid.*, paras.396-397
[1850] *Ibid.*, paras.202-204

Ugandan (and partly Rwandan) forces and specifically the support they provided to the UPC/FPLC[1851].

In its argumentation, the Chamber referred to Art. 61(7)(c)(ii), yet, it ultimately amended the OTP's indictment virtually on its own volition. Essentially, in contrast to what had been requested in this provision, the Judges claimed that it was unnecessary to adjourn the hearing and to request that the Prosecutor amend his charges, since the protection provided by the Statute in cases of recruitment crimes[1852] did not depend on the characterization of an armed conflict[1853]. They argued that the purpose of this provision was instead:

> to prevent the Chamber from committing a person for trial for crimes which would be materially different from those set out in the Document Containing the Charges and for which the Defence would not have had the opportunity to submit observations at the confirmation hearing.[1854]

This claim was widely criticized by the commentators, who pointed to the fact that although the conduct remained the same, the context in which that conduct took place, *i.e.*, the characterization of the conflict, also formed part of the charges, which only the Prosecutor had the authority to amend[1855]. In fact, both the OTP and the Defence disagreed with the broad interpretation of the Judges and requested leave to appeal their amendment[1856]. The Chamber, however, rejected this request[1857]. The Prosecutor argued that the Judges deprived him of his discretion provided in the Statute for the amendment of charges and exceeded the scope of their powers under Art. 61(7)[1858]. The Defence also declared that the Chamber acted in contravention with the provision because it had modified the charges without having adjourned the proceedings, which would have given the parties more time and possibility to

[1851] *Ibid.*, paras.200-237; By exercising its role somewhat more actively than prescribed by Art. 61(7), the PTC established that from July 2002 until June 2003, the conflict in Ituri was *of an international character* (paras.205-226). In doing so, it referred to the Geneva Conventions, to the jurisprudence of the ICTY (para.209-211), to a witness' testimony (para.219), and to the judgement of the International Court of Justice ('ICJ') in the case of the DRC vs. Uganda from December 19, 2005 (para.212-217; here the PTC noted that in its judgement the ICJ also relied on a report by MONUC, which found that the Ugandan Army "benefite[d] from the situation and supporte[d] alternately one side or the other according to their political and financial interests". The ICJ found that Ugandan forces not only intervened and were present in the territory of the DRC, they had also substituted their own authority in Ituri as an occupying power, "incited ethnic conflicts and took no action to prevent such conflicts". Doing so, the ICJ ruled that Uganda "violated the principle of non-use of force in international relations and the principle of non-intervention and that it can be considered as an occupying Power". Considering all those facts, the PTC came to a decision that the armed conflict in Ituri was *of an international character* from July 2002 to June 2, 2003, the date of the Ugandan army's withdrawal from the territory (para.220). As for the role of Rwanda, the PTC found that it had been supplying the UPC with ammunition, arms and soldiers, advice and even giving orders to the UPC, which in turn provoked Uganda to stop its assistance (paras.221-222). However, since the Chamber was not able to find that "Rwanda played a role that can be described as direct or indirect intervention in the armed conflict in Ituri" (para.226), it determined that from June 2, 2003 until December 2003, the armed conflict in Ituri was *not of an international character* (paras.227-237).
[1852] Rome Statute (1998), Art. 8(2)(b)(xxvi), Art. 8(2)(e)(vii)
[1853] ICC Doc. No. ICC-01/04-01/06-803-tEN from January 29, 2007, paras.202-204
[1854] *Ibid*., para.203
[1855] *Cp.* Jacobs (2011); Heller (2013)
[1856] ICC Doc. No. ICC-01/04-01/06-915 from May 24, 2007, para.2
[1857] *Ibid*., 21
[1858] *Ibid*., para.41

react[1859]. The Chamber argued, however, that firstly, the legal characterization of the conflict as international in nature had already been mentioned in the arrest warrant. Secondly, it pointed out that the Defence had raised this issue itself during the hearings[1860] when all other participants could have expressed their views[1861]. Additionally, the Judges emphasized that the Trial Chamber could still change the legal characterization of the charges during the trial by applying another provision embedded in the legal framework of the Court, *i.e.*, Regulation 55 (also Reg. 55) of the Regulations of the Court, which the parties could request it to consider[1862].

In any case, aside from the issue of broad interpretation, which seems to have correlated with the prosecutorial discretion over the amendment of the charges[1863] and which was ultimately applied despite the Prosecutor's disagreement[1864], this incident is noteworthy against the background of the Judges' refusal to request the OTP's reconsideration of amending its charges with SGBV at the WIs' suggestion. Apparently, such reconsideration could have been requested, at least with respect to SGBV committed within the context of the recruitment crimes under the alleged responsibility of the suspect, based on virtually the same provision that the Judges eventually used in another context. That said, the Judges' argumentation also seems to have been influenced by deliberations on procedural economy and implies that the amendment of the conflict's nature would not have been especially detrimental for the OTP or the Defence. The issue had also already been mentioned in the arrest warrant and raised during the hearings. Nevertheless, the Judges' interpretation and application of their powers in accordance with the same provision, albeit in relation to different issues, suggests a double standard. That is, while the Judges appeared rather ruthless in their interpretation and application of the law while amending the nature of the conflict described in the prosecutorial charges, their refusal to even consider or discuss any amendment of the indictment with SGBV implies their misrecognition of the SGBV prohibition norm, at least in applicatory terms.

[1859] *Ibid*., para.42
[1860] ICC Doc. No. ICC-01/04-01/06-803-tEN from January 29, 2007 (the issue was raised by the Defence and the Legal Representative of one of the victims (a/105/06), who stressed that the Ugandan and Rwandan involvement in the conflict in Ituri was a "matter of common knowledge", para.200).
[1861] ICC Doc. No. ICC-01/04-01/06-915 from May 24, 2007, para.43
[1862] *Ibid*., para.44
[1863] *Cp.* Jacobs (2011); Heller (2013)
[1864] ICC Doc. No. ICC-01/04-01/06-803-tEN from January 29, 2007, paras.200-237

5.2.2.4.1.2. The definition of the recruitment crimes

The war crimes of child soldiers' recruitment in armed forces were introduced in IHL in 1977 with the adoption of the Protocols Additional to the Geneva Conventions of 1949. When the PTC Judges were defining these crimes, they recalled Art. 77(2) of the Protocol Additional I[1865], which applies to international conflicts and states that:

> Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.

In the Rome Statute, the definition of the war crimes of child soldiers' recruitment embraces three various conducts, which it outlines as "[c]onscripting or enlisting children under the age of fifteen years *into the national armed forces* or using them to participate actively in hostilities" (emphasis added) when committed in international armed conflicts[1866], and as "[c]onscripting or enlisting children under the age of fifteen years *into armed forces or groups* or using them to participate actively in hostilities" (emphasis added) when committed in an armed conflict not of an international character[1867]. The Judges established that the elements of *enlistment* and *conscription* refer to two distinct forms of recruitment – the former being voluntary and the latter forced – yet, both are equally defined as war crimes[1868]. They found sufficient evidence to believe that children under the age of fifteen had been both enlisted and conscripted in the UPC/FPLC during the conflict of an international character between July 2002 and June 2, 2003, while afterwards – during the conflict of non-international character until December 2003 – they were still present in the ranks of FPLC[1869]. The Chamber's interpretation of the acts which fall under the crime of *using children under the age of fifteen to participate actively in hostilities* (which is neither defined by the Protocols Additional nor by the Rome Statute and its Elements of Crimes) was based on the Commentary on the Protocol Additional I. This Commentary was over twenty years old, issued by the International Committee of the Red Cross ('ICRC') in 1987. In Art. 77 of the Protocol

[1865] *Ibid*., para.242-243; Protocol Additional II, which applies to conflicts not of an international character, provides for the same protection from recruitment in armed forces or groups and the participation in hostilities for children under the age of fifteen (1977, Art. 4(3)(c))
[1866] Rome Statute (1998), Art. 8(2)(b)(xxvi)
[1867] *Ibid*., Art. 8(2)(e)(vii)
[1868] ICC Doc. No. ICC-01/04-01/06-803-tEN from January 29, 2007, paras.244-246
[1869] *Ibid*., paras.249, 254

Additional I, the Committee recognized the emerging legal normativity of the prohibition of child soldiers' recruitment in IHL, generated by the convergence of IHL with IHRL, that is, by the

> development of both the fourth Convention and of other rules of international law which govern the protection of fundamental human rights in time of armed conflict, particularly the International Covenant of 1966 on Civil and Political Rights and the Declaration of the Rights of the Child, adopted unanimously in 1959 by the United Nations General Assembly.[1870]

The Judges referred to the activities identified by the ICRC as *the examples* of the *use* that should not be inflicted upon children involved in armed conflicts including "gathering and transmission of military information, transportation of arms and ammunition or the provision of supplies"[1871]. The ICRC also explicitly noticed that the intention behind the provisions embedded in Art. 77 of the Protocol Additional I "was clearly to keep children under fifteen outside armed conflict, and consequently they should not be required to perform such services"[1872]. The logic that seems to have initially guided the interpretation of the child soldiers' *use* had legitimately presupposed that the execution of certain activities would expose him/her to a threat of being targeted as an adversary by the enemy pursuing its 'legitimate interests' (from the IHL perspective) in waging a war. However, in contrast to the conventional meaning of a war crime, such as attacking civilian population, that constitutes the crime here is not an attack directed against children per se, but rather *dooming* them to the fate of becoming a potential legitimate military target[1873]. Apparently, this perspective slightly deviates from the inherent nature of IHL instruments, whose acceptance by states appears to be essentially induced by the promise of reciprocity, *i.e.*, the agreement to and/or undertaking of those restrictions in combat, in exchange for protections guaranteed to their own combatants and civilian population from conducts that might otherwise be committed by the adversary[1874]. In accordance with this understanding, a war crime used to be a violation committed against the rules and laws of waging a war codified in IHL and effectively accepted by parties to a conflict, based predominantly on the logic of consequentialism. In contrast, the adoption and institutionalization of the child soldiers' recruitment crimes in Protocols Additional to the Geneva Conventions in 1977 seems to have been rather guided by the logic of appropriateness. This logic materialized through the convergence of the already available protections for civilian populations, guaranteed by the fourth Geneva Convention in

[1870] ICRC (1987), Protocol I, Art. 77, 899, para.3176
[1871] ICC Doc. No. ICC-01/04-01/06-803-tEN from January 29, 2007, para.260
[1872] ICRC (1987), Protocol I, Art. 77, 901, para.3187
[1873] *Cp. ibid.*
[1874] *Cp.* Kalshoven/Zegveld (2001)

IHL, with the evolving body of IHRL and prevailed in the codification of this crime. That is, this appears to be a human rights approach, in that the rights of the child found acceptance among the drafters of the Protocols, due to the international evolution and recognition of the human rights regime, which took place between the adoption of the Geneva Conventions in 1949 and the Protocols Additional in 1977[1875]. In fact, the ICRC even mentioned that the first paragraph of the provision under Protocol Additional I, Art. 77(1) (which states that "[c]hildren shall be the object of special respect and shall be protected against any form of indecent assault"[1876]) is similar to the wording used in the provision on the protection of women[1877]. They suggested, "as experience has shown that children, even the very youngest children, are not immune from sexual assault"[1878]. When relying on the Commentary issued by the ICRC in 1987, the Judges could have considered the later international and regional evolutions of the human rights regime in terms of the rights of the child in conflict[1879]. Given the development of the human rights regime, along with the evolution of the SGBV prohibition norm and the ever-increasing entrenchment of those perspectives in the emerging body of ICL, as well as the reports on SGBV committed against children within the context of their recruitment under the alleged responsibility of the suspect, the Judges should have been more aware than the ICRC were in 1987, that child soldiers' recruitment crimes may in fact be committed by means of and involve SGBV conducts.

However, despite the WIs' request to discuss the issue in the courtroom, the Judges essentially disregarded those developments when defining the recruitment crimes. Specifically, they failed to recognize and reflect the intersection of three crucial issues. Two of those issues have received much attention within the international community since the early-mid 1990s, which facilitated the further convergence of IHRL with IHL, which was, in turn, by the time of the negotiations on the Rome Statute, accepted by the states as an inherent part of the ICL framework. The first issue relates to the formal recognition and institutionalization of SGBV prohibitions in ICL, which emerged in the early-mid 1990s and which have ultimately been included in the Rome Statute as war crimes[1880], crimes against

[1875] *Cp.* ICRC (1987), Protocol I, Art. 77, 899, para.3176
[1876] Protocol I (1977), Art. 77(1)
[1877] *Ibid*., Art. 76(1)
[1878] ICRC (1987), Protocol I, Art. 77, 900, para.3181
[1879] *E.g.*, Cape Town Principles and Best Practices on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa (UNICEF, 1997), Solemn Declaration on Gender Equality in Africa (African Union, 2004). These instruments were referred to in Radhika Coomaraswamy's observations (the UN SRSG on Children and Armed Conflict). These were submitted pursuant to Rule 103 of the ICC's Rules of Procedure and Evidence (ICC Doc. No. ICC-01/04-01/06-1229-AnxA from March 18, 2008), which will be elaborated on further in subchapter '5.2.2.-3.2. Triggering the further evolution of the socialization 'spiral''.
[1880] Rome Statute (1998), Art. 8(2)(b)(xxii), Art. 8(2)(e)(vi)

humanity[1881] and under certain circumstances, as elements that may constitute the crime of genocide[1882]. Despite its perhaps less extensive elaboration in ICL, the second issue, related to the rights of children in conflict, was still further developed and sharpened by the international (and regional) human rights approach[1883]. Acts of SGBV committed against child soldiers within the context of their recruitment thus virtually epitomize the intersection of these two issues. Indeed, this intersection had already been indicated by the ICRC in its Commentary from 1987[1884], on which the PTC Judges relied in their interpretation of the recruitment crimes against children[1885]. While the Judges referred to those general (apparently gender-blind) examples of the activities that define child soldiers' *use* within armed forces included in the Commentary[1886], they essentially ignored this indication, as well as those subsequent evolutions, specifically within international and regional human rights fields, which have pointed out the gender-based vulnerabilities of children involved in armed conflicts[1887]. What's more, the Judges were not only acting within the field of the law in which SGBV prohibitions had already been formally recognized and institutionalized; rather, they had been mandated to implement these prohibitions and the rights of those who were subjected to such crimes, also through the use of the Court's additional applicable law, in "consisten[cy] with internationally recognized human rights"[1888]. The third relevant issue inherent to the nature of the case in question relates to the conceptualization of violence committed against combatants of one's own army from the IHL perspective, which seemed to have confused the responsible actors and, perhaps, caused their denial to deal with the issue. Indeed, while the OTP and the Judges should have been aware of the former two issues, the third assumed a rather precedential character and remained unclarified for another ten years. In fact, while the Trial Chamber in the initially identic *Ntaganda* case finally resolved the lack of clarity in this regard (and the Appeals Chamber confirmed their interpretation)[1889], their progressive adjudication was enabled because the OTP had appropriately prepared its charges and evidence, which allowed the Judges to comprehend the issue. In their precedential decision from 2017, the Judges of the Trial Chamber in *Ntaganda* settled the issue by recognizing that crimes committed against combatants of one's own army within a context of an armed conflict may also constitute war crimes, a perspective that further advanced the

[1881] *Ibid*., Art. 7(1)(g)
[1882] ICC ASP (2002b), Art. 6(b)(1), Art. 6(d)
[1883] *E.g.*, Cape Town Principles and Best Practices on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa (UNICEF, 1997), Solemn Declaration on Gender Equality in Africa (African Union, 2004)
[1884] ICRC (1987), Protocol I, Art. 77, 900, para.3181
[1885] ICC Doc. No. ICC-01/04-01/06-803-tEN from January 29, 2007, para.260
[1886] *Ibid*.
[1887] *Supra* note 1883
[1888] Rome Statute (1998), Art. 21(1,3)
[1889] ICC Doc. No. ICC-01/04-02/06-1707 from January 4, 2017; ICC Doc. No. ICC-01/04-02/06-1962 from June 15, 2017

convergence of IHL with IHRL[1890]. Yet, it appears that a range of triggering processes needed to occur before such interpretation and application of the law specifically to issues of SGBV could be achieved, *i.e.*, before the socialization 'spiral' could proceed to further stages of its evolution. Significantly, while this development was impacted by the intersection of these three issues which were similarly inherent to the nature of the *Ntaganda* case, it should also generally apply to other crimes committed within same armed forces falling under the jurisdiction of the Court, under conditions stipulated by the definition of war crimes[1891]. Aside from the processes that facilitated actors' learning and socialization with the appropriate application of the SGBV prohibition norm (which were generated by the resistance of gender justice advocates against its misrecognition in *Lubanga*), this evolution appears to have been enabled due to (1) the inherent nature of child soldiers' recruitment crimes slightly differing in its conceptualization in IHL from other war crimes, as well as to (2) their characteristic intersection with SGBV, as was revealed *de-facto* in *Lubanga* and *de-jure* in *Ntaganda*.

In contrast to the developments in *Ntaganda* from 2017, in 2007, the PTC Judges in *Lubanga* stuck to the conventional understanding of war crimes in IHL. They relied on the Commentary on Protocol Additional I, produced by the ICRC in 1987 which, while being rather gender-insensitive, was not exclusionary in its reading, and upon a gender-blind prosecutorial strategy which certainly integrally impacted the course of the proceedings. The Draft Statute for the ICC (to which the Judges referred in their interpretation of *active participation in hostilities* within the *use* crime definition[1892]) also indicated gender-insensitivity and the prevalence of the traditional IHL approach to recruitment crimes. These attitudes were revealed in the assumption that the *use* element of the crimes could be defined by child soldiers' "active participation in combat-related activities such as scouting, spying, sabotage, and the use of children as decoys, couriers or at military check-points"[1893]. However, while the wording of the Draft Statute entailed the formulation "*also* covers active participation in combat-related activities *such as*" (emphasis added)[1894] and did not explicitly restrict the activities to those that would potentially endanger the safety of children by the enemy's 'legitimate' militant reaction, the Judges established that the crime of *use to participate actively in hostilities* did not cover activities that were "clearly unrelated to hostilities" such as "food deliveries to an airbase or the use of domestic staff in married

[1890] *Ibid*.
[1891] *Ibid*.
[1892] See the General Rule of Interpretation of the Vienna Convention on the Law of Treaties (United Nations, 1969), Art. 31
[1893] ICC Doc. No. ICC-01/04-01/06-803-tEN from January 29, 2007, para.261
[1894] *Ibid.*

officers' quarters"[1895]. This gender-insensitive interpretation was, perhaps, also guided by the Judges' previous socialization with the conventional IHL understanding of war crimes, based on the reciprocity principle that is guided by the logic of consequentialism rather than that of the appropriateness and stipulates that engagement in a certain activity would render an agent a military target, which can be legitimately attacked by a hostile party. This kind of interpretation could have also been influenced by the Judges' unwillingness to set a significant precedent in the Court's first case. However, their explicit reference to use of "domestic staff in married officers' quarters" and "food deliveries"[1896] as examples of activities unrelated to hostilities, which were hence excluded from the definition of the *use* of child soldiers reveals their inability to apply gender-sensitive analysis and appears, indeed, almost cynical in the context of the case that involved allegations of SGBV of a kind which is often committed against female child soldiers hand in hand with their additional domestic work obligations. The assumption suggested in the wording, which refers to "*married* officers' quarters" (emphasis added)[1897] as if officers' marital status would have automatically presupposed their decent behaviour towards domestic staff reveals a narrative that was far from the reality in Ituri and the activities, to which child soldiers, especially girls, had been reportedly subjected by Lubanga's forces. And yet, in its definition of the recruitment crimes, the Chamber apparently preferred to rely on the prosecutorial strategy and to ignore such realities, which were inherent to the context of the case. The Judges ultimately established that the active participation of child soldiers in hostilities under Lubanga's alleged responsibility involved direct participation in combat, as well as roles as couriers, guards for military objectives and commanders, which had a direct connection to hostilities[1898]. Neither the crimes to which child soldiers had been allegedly subjected within the context of their recruitment, nor gender-based nature of the activities inflicted upon them were taken into consideration.

Again, the impetus for such interpretation was obviously based on the conventional logic of IHL, which would have legitimized a hostile party's attack if launched against a military guard or a spy but not against a domestic servant. According to this logic, recruitment of children, either voluntary or forced, for purposes other than being used in the battlefield or for the execution of tasks related to hostilities should not expose them to a threat of being a potential military target of a hostile party. Otherwise, the latter would violate the rules and

[1895] *Ibid.*, para.262
[1896] *Ibid.*
[1897] *Ibid.*
[1898] *Ibid.*, paras.263-267

laws of waging a war and bears the responsibility for harm inflicted upon illegitimate military targets. In contrast, if recruited in order to be used in hostilities, those who exposed them to participation in military activities and thus to being perceived by the adversary as legitimate military targets, should be deemed responsible for threatening their safety. However, this logic neither seems to have generated the codification of this crime as the ICRC suggested in its Commentary[1899] nor does it unveil or tackle the crimes that might potentially be committed against affected children within the context of their recruitment by members of the armed forces.

The context of the given case, including its institutional and structural restrictions as well as broader socio-political environment in which it was embedded, seems to have additionally influenced actors' unwillingness to deviate from the traditional understanding of a war crime concept in IHL, which might have suggested the inapplicability of the SGBV prohibition norm within the context of the recruitment crimes. The reluctance to consider sexual violence committed against child soldiers under the alleged responsibility of the suspect, as well as the gender-based nature of their recruitment, not only unveiled the lack of those actors' human rights and gender analysis expertise, but also the persistence of the misogynist logic in IHL and ICL. This logic prevailed in their application and interpretation of the law, despite the prohibition of gender-based discrimination when doing so[1900] and ultimately predominantly marginalized the interests of female child soldiers. Fortunately, the denial that took place in the pre-trial stage of the proceedings did not prevent gender justice advocates from further resistance against those misrecognitions. As a matter of fact, the issue of the recruitment crimes' definition was raised again after the charges had been confirmed. Before the beginning of the trial, the UN Special Representative of the Secretary-General for Children and Armed Conflict, Radhika Coomaraswamy, intervened in the proceedings and criticized the approach of the PTC Judges in its definition of the crimes for discriminating against girl soldiers involved in armed forces.

[1899] ICRC (1987), Protocol I, Art. 77, 899, para.3176
[1900] Rome Statute (1998), Art. 21(3)

5.2.2.5. The summary

5.2.2.5.1. The constellation of the involved actors

Evidently, WIGJ was the only actor that resisted the misrecognition of the SGBV prohibition norm on the pre-trial stage of the proceedings and by doing so, triggered the socialization process to progress to the 'denial' stage. That is, they succeeded in setting the misrecognition agenda in the institutional structures of the Court on both discursive and procedural levels. Despite the power of the internal actors, who tried to exclude this agenda from the proceedings, WIs were determined to resist their internalized patriarchal norms and to promote new rationality based on feminist ideas and beliefs about gender justice and equality. Through their resistance, they not only challenged the negligence of the SGBV prohibition norm in *Lubanga*, but also laid the foundation to the manifestation of its illegitimacy. By pointing to its discriminatory nature, WIs acted as a representative of the international community, reminding the OTP about its mandate to investigate and prosecute SGBV, whether committed specifically against child soldiers within the context of their recruitment or generally against whomever, *i.e.*, including the civilian population. Considering the initial focus of WIs on the latter, one could assume that they could have been more influential if they had specifically emphasized the inherent nature of SGBV within the scope of the actual charges. In fact, they tried to draw the OTP's and the PTC's attention to precisely this issue as well, but the focus of their advocacy generally remained broader. In their interventions, WIs requested comprehensive investigation and prosecution of SGBV and the amendment of the indictment with corresponding, separate, additional charges. Although this broad framing of their agenda might appear strategically less advantageous in a short-term, it ultimately produced, perhaps, a more significant impact with respect to actors' long-term socialization with the appropriate application of the norm.

Initially, the OTP actively denied any consideration of SGBV in its case, which was focused on child soldiers' recruitment. In addition to the prosecutorial strategy in the first case, this may have been partially influenced by the Prosecutor's professional pride and unwillingness

to amend his charges on behalf of an NGO[1901]. Eventually, due to the ignorance of SGBV committed also against child soldiers under the suspect's alleged responsibility (as relevant facts and circumstances of their recruitment) the OTP misrecognized a potential applicability of the SGBV prohibition norm within the context of its own case. The *de-jure* exclusion of SGBV issues, in turn, triggered the subsequent cascade of procedural denial, a process which included applications submitted by victims/survivors of SGBV and consequently, the presentation of their views and concerns in the courtroom by the Legal Representatives. The LRs subsequently remained silent when WIs tried to intervene in the confirmation of charges procedure. In addition to the OTP's consistent denial of WIs' requests, the PTC Judges likewise virtually ignored their concerns by rejecting their *amicus curiae* request to participate in the proceedings of the confirmation of charges. Despite their awareness about the Prosecutor's potential oversight, they preferred to rely on his strategy. Perhaps they neither wanted to put additional pressure on the OTP nor to set any essential precedents in the Court's first case[1902]. Unfortunately, their outdated, gender-blind definition of the recruitment crimes continually maintained the refusal to address those conducts in a comprehensive, gender-sensitive way. That is, they effectively failed to consider all relevant characteristics of the recruitment crimes as well as the interests of all involved actors, based on the principle of impartiality. Their behaviour reflects the aspiration to fulfil the principle of coherence with respect to the prosecutorial charges and discretion, as well as to the procedural rules. This, however, if not excluded then significantly restricted the possibilities for such consideration. Indeed, in its initial failure to investigate and prosecute SGBV in this case, the OTP virtually limited the agency of other involved actors in this regard. Nevertheless, the Judges could have attempted to correct this trajectory by allowing the WIs to present their views and concerns in the courtroom. They refused to do so despite their possession of WIs' dossier with the documentation of SGBV in Ituri, which should have made them aware of the issue.

[1901] Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018
[1902] *Ibid*.

5.2.2.5.2. Institutional and structural factors

WIs' agency to set their agenda in the institutional structures of the Court and to trigger the evolution of the socialization 'spiral' to the 'denial' stage was principally facilitated by (1) the meaning of the Court's first case for its gender justice constituency. Their expectations about its ability to end historical impunity for SGBV were profound and uncompromising. Indeed, as Brigid Inder notes, the performance of the Court in this regard would have been decisive for the evolution of its institutional pattern[1903]. In this context and in spite of an otherwise tense environment around the first case, WIs were no less adamant in their resistance against the misrecognition of the norm than the Prosecutor in his restricted charges. In fact, the (2) context of the Court's first case, along with (3) time pressure put on its staff in this context have, on the other hand, undoubtedly impacted their willingness to engage with NGO's concerns. The (4) pressure of international expectations among its various constituencies with respect to its outcome made it a highly anticipated test case for the newly established institution with an ambitious mandate. That is, not only Thomas Lubanga, but also, indeed, the Court itself was on trial. The Prosecutor had to win the case and the Judges probably did not want to put a spoke in a wheel. However, despite these pressures which likely significantly contributed to the OTP's denial to consider any exogenous interventions in its strategy, WIs used (5) the "constructive ambiguit[ies]"[1904] embedded in the rules and mechanisms established on the "macro-institutional" and "micro-institutional" levels[1905] of the Court's design as the pathways for the initiation of dialogue and communication processes with their target actors. By doing so, they introduced a discourse on the judicial powers in the confirmation of charges procedure with respect to the prosecutorial discretion as well as a discourse on the application and interpretation of the law in accordance with internationally recognized human rights, *i.e.*, without any discrimination, *i.a.*, based on gender. The reaction of the actors however, revealed their (6) insufficient human rights and gender analysis expertise when applying and interpreting the law in respect to the child soldiers' recruitment crimes. The (7) relative newness of the SGBV prohibition norm, specifically in the context of the recruitment crimes had probably contributed to its perception as something doubtful and, perhaps, inferior in its seriousness[1906]. Nonetheless, such perception, in turn, exposed (8) the

[1903] *Ibid*.
[1904] Oosterveld (2014)
[1905] Deitelhoff (2006)
[1906] *Cp.* Chappell (2016)

persistence of internalized patriarchal rules among the actors, which hindered their ability to predict and exclude undesirable implications of such negligence in terms of further procedural integrity, the implementation of gender justice, and finally the legitimacy of the Court[1907]. On the other hand, along with the aforementioned pressures (9) the newness of the institutional legal framework with its various "constructive ambiguit[ies]" probably enhanced the reluctance of the actors to address certain issues, for the avoidance of which they engaged in "maneuvering within and around" its regime complexity[1908]. In this respect, (10) the lack of clarity and the assumed incoherence on the application of the SGBV prohibition norm within the context of the war crimes of child soldiers' recruitment seems to have significantly influenced the denial of the actors to consider SGBV in this case. The anticipated collision of the norms, in turn, revealed (11) actors' socialization with and adherence to rather obsolete IHL norms. Additionally, the initial exclusion of SGBV issues from the case had likewise caused (12) the exclusion of the views and perspectives of its victims/survivors in the proceedings, which in conjunction with virtually all other factors likely thwarted the faculty of the Judges to develop an appropriate definition of child soldiers' recruitment crimes other than to maintain the one that suited into the narrative of the case. That is, the initial misrecognition of the norm by the OTP caused a cascade of denials that was maintained by the PTC Judges in their refusal to intervene. This refusal was based on (13) internalized legal norms and perhaps, (14) procedural economy deliberations, which took precedence within the challenging context of the newly established Court and its first case, whose outcome was about to impact its legitimacy. The perception of the SGBV prohibition norm as somewhat inferior in the context of such an outcome exposed the lack of its shared/social recognition and cultural validation among the responsible actors[1909]. This similarly affected their preference for following the habitual and seemingly efficient, predictable, secure and rational way of implementing the law. Nevertheless, for an institution and its personnel operating under immense pressures, diverse expectations and restrictions, making occasional mistakes is to be expected. That said, the ability to learn from those mistakes and to correct them appropriately in the future can be seen as a crucial test for the Court to prove itself as an authoritative international institution consciously aspiring towards an appropriate implementation of its mandate.

[1907] *Ibid.*
[1908] Alter (2018), 19-21
[1909] *Cp.* Wiener (2007, 2009); Wiener/Puetter (2009)

5.2.2.5.3. Broader socio-political cleavages

The impact of these institutional and structural factors on the evolution of the socialization 'spiral' towards the 'denial' stage was additionally reinforced and stipulated by the perpetuity of socio-political cleavages with respect to the SGBV prohibition norm's perception and status in ICL, reflected in the lack of its shared/social recognition. As previously mentioned, contestations of its validity or partial validity by some states and NGOs during the negotiations on the Rome Statute represented vivid examples of such cleavages, which come to the fore especially within the environments that used to silence such issues in their practices. These cleavages are evidenced in the behaviour of various actors who were involved and intervened in the *Lubanga* case. The denials of the responsible actors to deal with SGBV issues in the context of the case revealed, on the one hand, the lack of the norm's shared recognition among the Court's staff and the perpetuity of those cleavages, despite the norm's formal recognition and institutionalization. On the other, these denials advanced their engagement in processes of learning on the norm's meaning-in-use, cultural validation, and ultimately socialization with its appropriate application. If further sustained, these processes should, in turn, reduce the socio-political cleavages with respect to the norm's perception and status between its advocates and designated followers, and promote its shared recognition.

5.2.2-3. Between denial and tactical concessions

5.2.2-3.1. Winning the "islands" of recognition[1910]

Despite being met with denials in the pre-trial stage, WIs continued to undertake further attempts for the maintenance of their agenda. However, since the charges were already confirmed, they also had to adjust their activities, shifting from applying a broader framing in the pre-trial stage to a narrower one, which focused only on SGBV that had been committed within the context of the recruitment crimes. Furthermore, due to the previous denials, they also needed to continue to exercise their agency in a rather discrete way. They did so by assisting a female survivor to obtain official recognition of her victim status in the case and by subsequently cooperating with her Legal Representative, Carine Bapita. This alliance ultimately allowed WIs, who continued working on the issue from the 'backstage', to insert their agenda in the proceedings by means of their cooperation with internal actors who had access to the institutional structures.

The female survivor in question was one of those previously mentioned (hereafter also 'L.S.'[1911]), who had been allegedly subjected to repeated acts of rape and sexual slavery within the context of her conscription and use by Lubanga's forces[1912]. While the Court had postponed the proceedings on her recognition as a victim in the case due to the assumed uncertainty of her age at the time of her recruitment[1913], WIs assisted her in gaining the requested documents and re-filing her application. In fact, they also aspired to do so before the beginning of the confirmation hearings, so that L.S. could be recognized, allowed to participate and present her views. They had accompanied her back to the DRC and helped her to obtain her birth certificate, which demonstrated that she was younger than fifteen at the time of her recruitment. Brigid Inder recollects that they we aware that the Chamber would want to be provided with a convincing explanation for the confusion about L.S.'s age. WIs had thoroughly interviewed not only L.S. herself but also her father, who could explain the

[1910] *Cp.* Deitelhoff (2006), 25-34
[1911] This abbreviation is referred to exclusively for the purposes of this thesis and is not based on any name or characteristic that could be associated with the victim/survivor
[1912] ICC Doc. No. ICC-01/04-01/06-589 from October 19, 2006, para.28
[1913] *Ibid*., para.38

discrepancy between the dates, and prepared a new application that included the birth certificate and two signed affidavits from L.S. and her father[1914]. They submitted these to the PTC on November 2, 2006[1915], seven days before beginning of the confirmation hearings[1916].

Unfortunately, the PTC had not come to a decision on L.S.'s status prior to the beginning of the confirmation hearings, which ultimately excluded her from participation[1917]. However, her victim status was eventually recognized, shortly after the PTC Judges issued their decision on the confirmation of the charges and the case was transmitted to the Trial Chamber (the 'TC' or the 'Chamber'), set up by the Presidency of the Court. The latter, mandated with the appointment of Judges for the Chambers, assigned Judge Adrian Fulford from the United Kingdom as the Presiding Judge, as well as Judge Rene Blattmann from Bolivia and Judge Elizabeth Odio Benito from Costa Rica to adjudicate the trial[1918]. They ruled that the previous inconsistency with regard to the age of L.S. was clarified by establishing that she was eight years old at the time of her abduction, and that the UPC/FPLC militiamen forcibly held her for the purposes of her recruitment[1919]. Curiously and somewhat in contrast to the assumptions of the PTC in its definition of the recruitment crimes, the Judges of the TC argued that it was unnecessary for their recognition as victims of the recruitment crimes to prove whether recruited children affected by sexual violence had been also otherwise used to participate actively in hostilities: "The fact they were recruited when under the age of fifteen years [was] sufficient proof of enlistment, conscription or use under the Statute"[1920]. Although the Prosecution had opposed L.S.'s recognition as a victim in the case, submitting "that the fact that soldiers of the UPC allegedly forcibly took and raped her, and made threats to her life, result[ed] in an insufficient causal link between her abduction and the charges against the accused"[1921], the Chamber rejected this argumentation. The Judges stated that "[t]o the contrary, it [was] reasonable to conclude, on a *prima facie* basis, that she suffered other crimes (viz. rape and threats to her life), as well as being a victim of the charges brought against the accused which the Chamber [was] considering"[1922] and argued that it was unnecessary

> in those circumstances, […] to engage in the critical question that otherwise arises in this application as to whether the „use" of children for sexual purposes alone, and

[1914] Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018
[1915] WIGJ (2006a), 25
[1916] ICC Doc. No. ICC-01/04-01/06-803-tEN from January 29, 2007, para.30
[1917] WIGJ (2006a), 25
[1918] WIGJ (2007), 36
[1919] ICC Doc. No. ICC-01/04-01/06-1556-Corr-Anx1 from December 15, 2008, paras.100-101
[1920] *Ibid*., para.103; ICC Doc. No. ICC-01/04-01/06-2842 from March 14, 2012, para.599
[1921] ICC Doc. No. ICC-01/04-01/06-1556-Corr-Anx1 from December 15, 2008, para.102
[1922] *Ibid*.

> including forced marriage, can be regarded as conscription or enlistment into an armed force, or the use of that person to participate actively in the hostilities, in accordance with Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii) of the Rome Statute. As just set out, the applicant has presented enough evidence to conclude, *prima facie*, that she was abducted in the broad context of the systematic conscription of children under the age of 15 into the military forces of the UPC.[1923]

After L.S.'s official recognition as a victim, WIs together with the Victims Participation and Reparations Section ('VPRS')[1924] of the Court assisted her in finding a lawyer for her legal representation during the proceedings. L.S. chose the aforementioned Carine Bapita, with whom WIs then continued to cooperate. The opening statement Bapita presented to the trial, in which she extensively referred to SGBV allegedly committed by the UPC/FPLC within the context of the charges against Lubanga, was the outcome of this cooperation[1925]. That is, despite the previous denials in the pre-trial stage, WIs managed to maintain their agenda in the internal structures of the Court from the outset of the trial. As Inder recalls, "[…] we were able to get it through, we were able to keep trying to find places to get it in the case and in the public record of the case"[1926]. In fact, eventually they not only succeeded in assisting L.S. in obtaining formal recognition as a victim in the case[1927], they simultaneously attained the support of actors involved in the proceedings which could disseminate their concerns further.

As compared to the pre-trial stage, by the beginning of the trial, the number of recognized victims had significantly increased. Up to 103 victims, including some former girl soldiers were granted victim status, represented by seven Legal Representatives and the Office of Public Council for Victims ('OPCV') and authorized to participate in the proceedings[1928]. WIGJ continued to support female victims/survivors in their applications for victim status. Some of them were granted this status, which provided WIs with the ability "to ensure the inclusion of gender-based crimes and the experiences of girl soldiers"[1929] in the proceedings, through their further cooperation with the LRs of the victims. By the end of the trial, overall 129 victims were authorized to participate in the proceedings, among which only thirty-four were female[1930]. While all of them claimed that they suffered harm connected to the charges

[1923] *Ibid*., para.103
[1924] Victims Participation and Reparations Section ('VPRS') is a section of the Registry, which assists victims in applying for participation in the proceedings and for reparations as well as in finding legal representatives in cases in which they are officially recognized as victims (ICC, 2021b)
[1925] Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018
[1926] *Ibid*.
[1927] WIs also continued to support this young woman in terms of her vocational training, safety and recovery (*ibid*.)
[1928] WIGJ (2009), 69, 95-96
[1929] *Ibid*., 69
[1930] ICC Doc. No. ICC-01/04-01/06-2842 from March 14, 2012, para.15

against the accused, thirty victims (eighteen female and twelve male) stated that they had been either subjected to or witnessed sexual violence[1931].

5.2.2-3.2. Triggering the further evolution of the socialization 'spiral'

After the PTC had issued its decision on the confirmation of charges, the UN SRSG Radhika Coomaraswamy also expressed concerns in her application for the participation in the proceedings as *amicus curiae* about some of the PTC Judges' deliberations[1932]. As a constitutional lawyer, international senior politician, human rights advocate and a winner of the International Law Award of the American Bar Association, she probably had better chances for being granted such status than WIGJ. Furthermore, she possessed extensive expertise and experience on both women's and children's rights. Between 1994 and 2003 she served as the UN Special Rapporteur on Violence against Women and from 2006 until 2012, that is, exactly at the time of the *Lubanga* proceedings, she was operating as the UN Special Representative of the Secretary-General for Children and Armed Conflict. While employed the latter position, she visited numerous places around the world, including the DRC, where children were subjected to violence in conflict and advocated for their rights and protection[1933].

Coomaraswamy submitted her *amicus* request on December 7, 2007, before the beginning of the trial[1934]. Among the questions she wanted to tackle in her intervention, she referred to multiple roles that children, and especially girls, play in armed forces. Specifically, she criticized the PTC's restricted interpretation of the conduct of *using children to participate actively in hostilities* as outlined in the recruitment crimes[1935]. In accordance with the public records of the case, on January 4, 2008, approximately one month after the submission of her request, the Registrar *confidentially* informed the Chamber about this, since "it [was] not

[1931] *Ibid*., para.16
[1932] See ICC Doc. No. ICC-01/04-01/06-1175 from February 18, 2008, pursuant to Rule 103(1) of the ICC's Rules of Procedure and Evidence (ICC ASP, 2002a)
[1933] United Nations (2021a); New York University (2021)
[1934] ICC Doc. No. ICC-01/04-01/06-1105-Conf from January 4, 2008, 2. She requested leave to submit her observations in her letter from December 7, 2007, together with Professor of Law Mr. Jaap E. Doek who also submitted a separate letter dated December 14, 2007, both received by the Registrar of the Court on December 17, 2007.
[1935] ICC Doc. No. ICC-01/04-01/06-1175 from February 18, 2008, para.1(b)

known whether the Special Representative would have been granted leave to present her observations"[1936]. This approach seems to imply that if the leave had not been allowed, the application might have remained invisible in the records of the case. The Prosecutor was notified of this submission on January 7 and on January 23, 2008, he communicated his support of this application (also initially confidential), in which he acknowledged "unique insight and expertise" of the UN SRSG Coomaraswamy in issues that might require some deliberations by the Chamber in the cause of the proceedings[1937]. The Defence naturally requested the Chamber to reject her application in its following response from January 28, 2008. Similar to its argumentation in respect of WIs' *amicus* application, the Defence assumed that Coomaraswamy aimed to promote "the views and objectives of her organisation", rather than "wishing to assist the Court with a question of law"[1938]. Curiously, the Legal Representatives of the victims did not submit any response to her application[1939]. On February 18, 2008, despite the disagreement of the Defence, the Trial Chamber invited the UN SRSG Radhika Coomaraswamy to submit her observations[1940], and on February 20, 2008, the communications were reclassified as public[1941]. Perhaps, Coomaraswamy was granted the *amicus* status and access to the proceeding (despite her intention to talk to gender issues as one of central themes of her intervention) due to her acknowledged merits and authority representing the United Nations[1942]. That said, in contrast to the WIs' efforts in the pre-trial stage, she raised these issues solely and explicitly within the context of the child soldiers' recruitment charges. In fact, she was the first exogenous actor who was allowed to raise issues of SGBV in the courtroom.

In her joint observations with Prof. Jaap E. Doek from March 18, 2008[1943], the UN SRSG Coomaraswamy emphasized the particular vulnerability of girls involved in armed conflicts[1944]. Doek and Coomaraswamy suggested that the phrase *participate actively in hostilities*, which is included in the formulation of recruitment crimes in the Rome Statute, implies a broader range of activities that may fall under the definition of the *use* conduct than the one that had been previously used in IHL and focused on *taking a direct part in hostilities*. They also argued this broader definition adequately corresponded with the policy of the United Nations for disarmament, demobilization, and reintegration ('DDR'). In this respect

[1936] ICC Doc. No. ICC-01/04-01/06-1105-Conf from January 4, 2008, 2
[1937] ICC Doc. No. ICC-01/04-01/06-1126-Conf from January 23, 2008, 2
[1938] ICC Doc. No. ICC-01/04-01/06-1175 from February 18, 2008, para.3
[1939] *Ibid*., para.5
[1940] *Ibid*., para.11
[1941] *Ibid*., para.12
[1942] See the *Negotiated Relationship Agreement between the International Criminal Court and the United Nations* (ICC/UN 2004)
[1943] ICC Doc. No. ICC-01/04-01/06-1229 from March 18, 2008
[1944] ICC Doc. No. ICC-01/04-01/06-1229-AnxA from March 18, 2008, para.17

they cited the *UN Operational Guide to the Integrated Disarmament, Demobilization, and Reintegration Standards*, which claimed that

> [n]o distinction should be made between combatants and non-combatants when [DDR] eligibility criteria are determined, as these roles are blurred in armed forces and groups, where children, *and girls in particular*, perform numerous combat support and non-combat roles that are essential to the functioning of the armed force or group. (emphasis added)[1945]

Doek and Coomaraswamy questioned the PTC's interpretation of the *active participation* standard in its decision on the confirmation of charges, which required the establishment of a direct connection to the hostilities[1946]. Arguing that such approach was "ill-conceived and threaten[ed] to exclude a great number of child soldiers – particularly girl soldiers – from coverage under the using crime"[1947], they referred to soft law instruments shaped on international and regional levels from the IHRL perspective much later than the Commentary of the ICRC to the Protocol Additional I from 1987, on which the PTC based its definition. They stressed that the *Cape Town Principles and Best Practices* adopted in April 1997 at the UNICEF *Symposium on the Prevention of the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa* recognized that a definition of a child soldier "includes girls recruited for sexual purposes and for forced marriage […] [and] does not, therefore, only refer to a child who is carrying or has carried arms"[1948]. Furthermore, the *Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups* adopted by fifty-eight states in February 2007, while nearly one month after the PTC had issued its decision, effectively upgraded the *Cape Town Principles* by expanding the recognition of a child soldier status to "all children used for sexual purposes"[1949]. The UN SRSG Coomaraswamy and Prof. Doek stressed that girls are particularly subjected to sexual violence and urged the Court to "deliberately include any sexual acts perpetrated, in particular against girls, within its understanding of the 'using' crime"[1950]. Concluding their observations, they underlined that girl soldiers often remain invisible because of their use as wives or domestic aides, which ultimately also excludes them from the DDR programs:

> Commanders prefer to 'keep their women', who often father their children, and even if the girls are combatants, they are not released with the rest. Their complicated status makes them particularly vulnerable. They are recruited as child soldiers and sex slaves but are invisible

[1945] *Ibid*., para.18
[1946] *Ibid.*, para.19
[1947] *Ibid*., para.20
[1948] *Ibid*., para.24
[1949] *Ibid.*
[1950] *Ibid*., para.25

when it comes to the counting.[1951]

By drawing the attention of the Court to those developments and acknowledgments in respect to the context, gender-based vulnerabilities and consequences for children who have been involved and misused in conflicts, the UN SRSG Coomaraswamy criticized both the OTP's oversight in their to consideration of the role of girl soldiers within the scope of the recruitment charges, as well as the PTC's oversight when it came to confirming those charges and defining the crime of the *use of children to participate actively in hostilities* in a restricted, outdated and gender-blind manner. In her intervention, Coomaraswamy emphasized the intersection of sexual violence, gender, child soldiers and conflict, and the recognition of this intersection in a number of international and regional human rights instruments, implying that the trial would be engaged in discrimination if issues of SGBV continued to be excluded[1952]. As the following analysis will demonstrate, by means of this intervention, the UN SRSG utilized the logic of arguing in the context of the case in question and successfully influenced the Prosecutor on the discursive level. However, this influence did not reach a substantial level, as his subsequently amended indictment has revealed. Nonetheless, although the achieved changes appeared rather 'cosmetic' in nature, the evolution of the socialization 'spiral' to the 'tactical concessions' stage furthered the subsequent 'entangling' process, in which actors switched from mainly applying the logic of consequentialism to that of the appropriateness through engagement in argumentative rationality[1953].

5.2.2-3.3. The Amended Document Containing the Charges

Despite the intervention of the international community's senior representative in questions relating to children and armed conflict, in which she engaged in shaming of the Court's senior staff for their gender-insensitivity throughout the trial, the OTP's indictment against Lubanga (the Document Containing the Charges, 'DCC'), which was amended nearly nine months

[1951] *Ibid*., para.26
[1952] *Ibid*., paras.24-26
[1953] *Cp.* Risse/Sikkink (1999); Risse (2000)

later, remained essentially silent on issues of SGBV[1954]. Noteworthy, however, were the repeated references to the co-responsibility of Lubanga's Deputy Chief-of-Staff Bosco Ntaganda[1955], whose indictment the OTP would amend nearly six years later in accordance with the requests of gender justice advocates in *Lubanga*[1956]. By late 2008 however, the public redacted version of the DCC against Lubanga included only one reference to SGBV, mentioning that child soldiers had been encouraged to rape *Lendu* women during attack[1957]. The Prosecutor, indeed, elaborated later in his opening statement to the trial on this kind of SGBV committed against male child soldiers within the FPLC[1958]. Yet, apart from this relatively minor remark, no other indications of SGBV were suggested in the amended DCC. The *enlistment* and *conscription* conducts were described as constituted by abduction, military training, and provision with uniforms and weapons[1959]. And the *use of children to participate actively in hostilities* was characterized by activities such as participation in fighting[1960], body guarding, guarding of the UPC/FPLC's property[1961], and carrying weapons and ammunition[1962]. The OTP also referred to the impact of those crimes on children's lives in terms of their suffering from post-traumatic stress disorder and the hindering of their chances to re-establish contact with families and communities or continue their education[1963]. However, no single mention was made about the implications of SGBV for the future lives of these children.

[1954] ICC Doc. No. ICC-01/04-01/06-1573-Anx1 from December 23, 2008, para.9
[1955] *Ibid*., paras.23, 44, 63, 65, 67, 70, 72, 78, 81, 86; Prosecutor Ocampo also mentioned Ntaganda in his subsequent opening statement to the trial and explicitly identified him in a video together with Lubanga visiting a training camp (ICC Doc. No. ICC-01/04-01/06-T-107-ENG from January 26, 2009, 17, lines 11-25).
[1956] By the beginning of Lubanga's trial, Ntaganda's warrant of arrest was unsealed, including identical charges with those against the former. However, Ntaganda's indictment was subsequently amended twice with SGBV charges: in 2012 after the issuance of the judgement in *Lubanga* and in 2014 (see subchapters '2.6. Convicted for the commission of SGBV' and '5.2.7.1. *Ntaganda* case').
[1957] ICC Doc. No. ICC-01/04-01/06-1573-Anx1 from December 23, 2008, para.55
[1958] Discussed in subchapter '5.2.3. Tactical concessions'
[1959] ICC Doc. No. ICC-01/04-01/06-1573-Anx1 from December 23, 2008, paras.41-42, 45, 58-64, 71-74, 76-77, 80-82
[1960] *Ibid*., paras.53-57, 74, 79, 83
[1961] *Ibid*., paras.23, 40, 72, 85, 97
[1962] *Ibid*., para.76
[1963] *Ibid*., paras.99-101

5.2.2-3.4. Tension in the courtroom

The trial against Lubanga finally began on January 26, 2009, two years after the decision on the confirmation of the charges had been issued. This substantial gap, during which the OTP could have conducted further investigations, resulted from the stay of the proceedings due to its non-disclosure of potentially exculpatory evidence[1964]. It turned out that the OTP was obligated not to disclose the evidence that it had obtained from the United Nations on condition of confidentiality[1965]. However, the Defence claimed that the Prosecution had intentionally bound itself to non-disclosure to keep the evidence hidden and was pushing for disclosure[1966]. Indeed, in accordance with the statutory guarantees for rights of the accused to a fair trial, the Prosecutor must disclose potentially exculpatory evidence to the Defence if he/she believes that such evidence "shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or […] may affect the credibility of prosecution evidence". The same provision stipulates that „[i]n case of doubt as to the application of this paragraph, the Court shall decide"[1967]. However, the Prosecution appeared unable to disclose its evidence even to the Trial Chamber, which reasonably displeased the Presiding Judge Adrian Fulford, caused the stay of the proceedings and even the Chamber's consideration to temporarily release the accused[1968]. As Jim Freedman recalled, when the trial was about to begin, Judge Fulford addressed the Prosecutor on the issue in a harsh tone:

> Was the judge not the one to decide what was and was not admissible? And who, after all, did the UN think it was with its judgment about what was and was not to be made available?[1969]

The issue in itself is not the focus of this work and will not be reflected in further detail unless it appears meaningful. Noteworthy, however, was the tone of the Presiding Judge Fulford that was not only cheerfully maintained by the Defence, but generally demonstrated the tension that spread in the courtroom between the Presiding Judge and the Prosecutor from the outset of the trial[1970]. Freedman had the impression that due to this atmosphere, Judge Fulford remained especially rigorous with the OTP's counsellors by challenging them, supporting

[1964] ICC Doc. No. ICC-01/04-01/06-1401 from June 13, 2008
[1965] *Ibid*., para.36; Art. 54(3)(e) of the Rome Statute (1998) provides that the OTP may "[a]gree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents".
[1966] ICC Doc. No. ICC-01/04-01/06-1401 from June 13, 2008, *e.g.*, paras.33, 35; Freedman (2017), 68
[1967] Rome Statute (1998), Art. 67(2)
[1968] ICC Doc. No. ICC-01/04-01/06-1401 from June 13, 2008, paras.92(iii), 94
[1969] Freedman (2017), 69
[1970] *Ibid*., 69-70

seemingly "trivial objections" from the Defence and frequently ruling against the Prosecution on "contentious matters of procedure"[1971]. Freedman's metaphor in this regard might sound exaggerated, but it conveys a vivid impression of the mood that seemingly prevailed in the courtroom during the trial:

> The trial was becoming a war of attrition among three legal rivals: the prosecutor, the defence counsellor and the judge.[1972] […] The efforts of each to prevail and show a redoubtable presence in the courtroom overshadowed Thomas Lubanga's own criminal schemes to prevail in Ituri.[1973]

In any case, Judge Fulford clearly had enough reasons for his discontentment with the work of the OTP. While this tension had apparently already been caused by its commission of procedural irregularities before the beginning of the trial, since the trial began, Prosecutor Ocampo proceeded irritating the Court with procedurally controversial argumentation, in which he ironically and unexpectedly engaged in the interests of gender justice.

5.2.3. Tactical concessions

By the beginning of the trial on January 26-27, 2009, the Parties and the Legal Representatives of the victims announced their opening statements, which revealed that the UN SRSG Coomaraswamy's intervention had eventually made an impact on the position of the Prosecutor, who then reflected her arguments in his opening statement to the trial[1974]. Although the UN Special Representative's position was only reflected rhetorically, the Prosecutor did call on the Judges to consider SGBV committed against child soldiers "by Thomas Lubanga's men in unspeakable ways" within the context of their recruitment[1975]. This was despite an absence of any mention of such aspects in the Prosecution's DCC or list of evidence and a potential collision of such a request with the rights of the accused as well as the rules of procedure and evidence. The Prosecutor repeatedly referred to SGBV,

[1971] *Ibid*., 97
[1972] *Ibid*.
[1973] *Ibid*., 105
[1974] ICC Doc. No. ICC-01/04-01/06-T-107-ENG from January 26, 2009, 11-13
[1975] *Ibid*., 11, lines 17-24; 13, lines 5-8

emphasizing that child soldiers had been raped and forced to rape[1976], and cited the testimonies of such violence, which indicated that "[the commanders] really encouraged [the child soldiers] to rape women, and […] [sent them] to look for women. So [the child soldiers] took them and brought them to the camp, and then [the child soldiers] did those bad things"[1977]. He also specified the gender-based differentiation that stipulated the commission of certain acts: while "boys were instructed to rape […], girl soldiers were the daily victims of rape by the commanders"[1978]. In fact, he implied that these conducts, specifically against girl soldiers, virtually fell within the scope of all three recruitment counts including the enlistment, conscription and use of child soldiers[1979]. Moreover, the Prosecutor stressed that, along with fighting and spying, girl soldiers had been forced to exercise domestic services such as cooking and cleaning and simultaneously subjected to rape, sexual slavery and forced marriage[1980]:

> One minute they will carry a gun, the next minute they will serve meals to the commanders, the next minute the commanders will rape them. They were killed if they refused to be raped. One child soldier became severely traumatised after killing a girl who refused to have sex with the commander.[1981]

When he addressed the fates of the "forced ex-wives" of Lubanga's commanders, he specified that their communities often rejected them, which forced them into prostitution and imposed additional harm upon them, beyond the already inflicted physical, emotional and psychological damage they had experienced[1982]. By explicitly referring to the statements made by the UN SRSG in this regard, he also problematized the exclusion of girl soldiers from the disarmament, demobilization and reintegration programs due to their "invisibility" "because they're also wives and domestic aids [who] slip away"[1983]. He declared that

> it [was the] responsibility of the Office of the Prosecutor of the International Criminal Court to prove the crimes committed against the most vulnerable, and during the course of this trial [his] office [was going to] make it its mission to ensure that Thomas Lubanga [was] held criminally responsible for the atrocities committed against those little girl soldiers [while they were] enlisted and conscripted [for being] used as sexual prey when he used them in combat.[1984]

[1976] *Ibid*., 4, lines 19-21; 5, lines 2-4
[1977] *Ibid*., 10, lines 6-10
[1978] *Ibid*., 11, lines 23-24
[1979] *Ibid*., 11, lines 17-25; 12, lines 1-6
[1980] *Ibid*., 11, lines 17-25; 12, lines 1-16
[1981] *Ibid*., 12, lines 1-6
[1982] *Ibid*., 12, lines 13-17; These societal consequences of girl soldiers' recruitment, in turn, reveal the misogyny and discrimination against women and girls rooted in societal structures, which maintain unequal gendered power dynamics not only in times of war, but also in times of peace.
[1983] *Ibid*., 12, lines 19-22
[1984] *Ibid*., 12, lines 23-25; 13, lines 1-4

Calling upon the Judges to ensure that girl soldiers affected by SGBV would not be left out of the demobilization programs, he also proclaimed that: "In this International Criminal Court, the girl soldiers will not be invisible"[1985]. His unexpectedly re-framed, gender-sensitive rhetoric could also be observed in other contexts of his statement: when he questioned the voluntarily nature of the *enlistment* as opposed to the (forced) *conscription* conduct, he compared the deprived freedom of choice in an oppressive environment inherent to the context of *enlistment* to the deprivation of consent to sexual intercourse with a militiaman[1986]. Furthermore, when considering the sentencing in case of a conviction and arguing about the severity of crimes committed under the alleged responsibility of Lubanga, he claimed that "the defendant stole the childhood of the victims by forcing them to kill and rape"[1987].

Additionally, in his opening statement, the Prosecutor also addressed the issue of the interpretation of the crime of *using children to participate actively in hostilities*, from a similar angle to that applied by the UN SRSG Coomaraswamy. In doing so, he referred to Graca Machel, the human rights activist from Mozambique who had been mandated by the United Nations to produce a report on the impact of wars on children[1988]. Since the presentation of her report in 1996 (one year before the definition of the *Cape Town Principles and Best Practices*[1989]), the international community has nurtured the idea that child soldiers must be recognized as such, independently from the functions that they had performed in the armed forces and should benefit from all protections afforded not only to civilian populations under IHL but also generally under IHRL[1990]. The Prosecutor argued that since then, "the international community's concern has turned back to the rights of those principally affected, the children" whose protection in conflict required a re-interpretation via a shift focus away from "the consequences [of their participation in hostilities] on the opponent", towards a framing from the human rights perspective[1991]. Indeed, Freedman refers to Graca Machel as the "game-changer"[1992] and recollects that her report resonated within the international community stronger than "all of the declarations or conventions put together" and "made the world sit upright and take the matter seriously"[1993].

[1985] *Ibid*., 13, lines 5-8
[1986] *Ibid*., 14, lines 13-16
[1987] *Ibid*., 34, lines 18-20
[1988] *Ibid*., 15, lines 15-18
[1989] See Cape Town Principles and Best Practices on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa (UNICEF, 1997)
[1990] ICC Doc. No. ICC-01/04-01/06-T-107-ENG from January 26, 2009, 15, lines 15-23
[1991] *Ibid*., 15, lines 8-23
[1992] Freedman (2017), 58
[1993] *Ibid*., 59

Nevertheless, as the Prosecutor declined to amend the indictment against Lubanga correspondingly, his (otherwise reasonable) statements and requests to the Court were naturally doomed to a collision with rules and norms of legal procedure. It's no wonder that such inconsistency prompted a disgruntled attitude from Judge Fulford towards the Prosecution. Fabricio Guariglia reflected in his interview that "this somewhat erratic approach to sexual violence, whereby [Prosecutor Ocampo] decide[d] not to charge it and […] refer[red] to it regardless" was part of his approach, ever since the sexual violence issue had "popped up at trial"[1994]. At the time, the OTP was neither persuaded that it would have been rational to expand the traditional legal understating of the war crimes concept by encompassing sexual violence that had been committed against child soldiers within the context of their recruitment, nor were those conducts sufficiently investigated for the provision of substantial proof for such allegations[1995]. However, the issue began to challenge the OTP's strategy and the Prosecutor had to react. In this context, it seems that the former Prosecutor could not sufficiently explain to the Chamber why he thought it was reasonable to leave out charges of sexual violence while still referring to them and requesting their consideration[1996]. Guariglia reiterates that the intentions or motivations behind this approach remained a mystery to many at the Court[1997].

5.2.3.1. The summary

5.2.3.1.1. The constellation of the involved actors

The intervention of the UN SRSG Radhika Coomaraswamy, supported by Prof. of Law Jaap E. Doek, seems to have largely triggered the evolution of the socialization 'spiral' towards the 'tactical concessions' stage. Perhaps, largely due to her status and authority as well as internationally acknowledged expertise and experience in the issues of both sexual violence against women and vulnerabilities of children in armed conflict, she acted as somewhat of a

[1994] Interview with F. Guariglia (ICC OTP), The Hague, December 2018
[1995] *Ibid*.
[1996] *Ibid*.
[1997] *Ibid*.

mediator between the international community and the Court and succeeded in influencing the position of the Prosecutor on the discursive level. This influence is evidenced in the Prosecutor's references to and reflection of her statements in his opening statement to the trial. Coomaraswamy's main arguments took on a narrower framing than the previous arguments from WIGJ, *i.e.*, they focused explicitly on SGBV committed within the context of child soldiers' recruitment. These arguments obviously impacted the Prosecutor to a significant extent, despite the apparent uncertainty on how to tackle the issue in legal terms. However, the Prosecutor continued to refrain from amending the indictment with SGBV even though – as it subsequently turned out – there was still plenty of time to do so between the UN SRSG's intervention and the beginning of the trial[1998]. The Prosecutor's individual position and responsibility in this first case (in conjunction with a number of institutional and structural factors, socio-political cleavages, as well as the fact that SGBV had not been sufficiently investigated by his Office) must have restricted him from amending the indictment. His following concessions with respect to the SGBV issue were somewhat superficial or "cosmetic" and may have also been a strategic choice, *i.e.*, caused largely by the logic of consequentialism in order to "pacify" critics of the misrecognition[1999]. That said, the Prosecutor's rhetoric revealed his engagement in discourse on the meaning of the SGBV prohibition norm in the context of the given case. This change, based on strategic argumentation[2000], also revealed the Prosecutor's adaptability to certain social expectations of appropriateness in accordance with his role[2001]. That is, his behaviour exposed the role-playing mechanism, which was similarly ruled by bounded rationality, and operates in accordance with the logic of appropriateness[2002]. Simultaneously, the Prosecutor refrained from undertaking any substantial steps that would have proved the authenticity of his statements. This suggests that, although the impact of the logic of appropriateness (rather than mere rational calculation) was present, it was still rather non-reflective[2003]. Nevertheless, as Risse and Sikkink suggest, actors' engagement in rhetorical action may, even if initially based on strategic argumentation, successively "entrap" them into the mode of argumentative rationality[2004]. The latter could, in turn, trigger normative suasion, facilitating a switch from the logic of consequentialism to that of the appropriateness and the further evolution of a

[1998] It has to be mentioned however, that the OTP might have not known at the time *when* the trial was going to begin. For instance, in June 2008, about three months after the UN SRSG's observations had been submitted (ICC Doc. No. ICC-01/04-01/06-1229 from March 18, 2008), the Trial Chamber terminated the proceedings due to the OTP's non-disclosure of the potentially exculpatory confidential evidence, which ultimately delayed the beginning of the trial (ICC Doc. No. ICC-01/04-01/06-1401 from June 13, 2008).
[1999] *Cp.* Risse/Sikkink (1999), 25
[2000] *Cp.* Risse (2000)
[2001] *Cp.* Checkel (2005)
[2002] *Ibid*.
[2003] *Ibid*.
[2004] Risse/Sikkink (1999); Risse (2000)

reflective socialization process[2005].

5.2.3.1.2. Institutional and structural factors

Rather than investigating and prosecuting SGBV properly, the Prosecutor's unsatisfactory course of action caused this issue to be doomed to the fate of playing hostage to the proceedings. Nevertheless, even in spite of the perhaps largely strategic nature of the Prosecutor's concessions, the somewhat embarrassing way in which he addressed the issue indicated (1) confusion and lack of understanding of the appropriate application of the SGBV prohibition norm in the context of the case in question[2006]. Just as this confusion had been caused by (2) the newness of the issue and had previously influenced the actors' refusal to deal with it, under the new constellation of the involved actors, this lack of clarity must have influenced the willingness of the Prosecutor to engage in disourse on its meaning-in-use[2007]. In procedural terms, the presentation of the UN SRSG's views on the trajectory of the trial was enabled by (3) the possibility to apply for an *amicus curiae* status within the Court's institutional framework. Yet, as the analysis of WIGJ's application for the same status has demonstrated, along with the consistency of such a request with the prosecutorial charges, the question of whether an *amicus curiae* status would be granted or not could likewise depend on the position of an applicant. The (4) position of the UN SRSG Radhika Coomarsawamy involved power and leverage that seem to have contributed to the ultimately responsive reaction of the Prosecutor[2008]. In fact, even though the ICC has been an international organ generally independent from the UN[2009], the authority of the UN Representatives embodying the international community certainly has a strong potential to influence the evolution of the Court's identity, especially when it comes to the issues of human rights that define who belongs to a "civilized community"[2010]. Furthermore, (5) the narrowed-down framing of the UN SRSG's intervention, which focused solely on SGBV committed against child soldiers within the context of their recruitment, demonstrated the direct connection of her concerns to

[2005] Checkel (2005); *cp.* Deitelhoff (2006)
[2006] *Cp.* Checkel (2001)
[2007] *Ibid.*
[2008] *Ibid.*
[2009] See the *Negotiated Relationship Agreement between the International Criminal Court and the United Nations* (ICC/UN, 2004)
[2010] Risse (2000), 28-29

the case in question[2011]. Underpinned by arguments (6) based on international and regional human rights instruments aiming at the protection of children and their rights in conflicts, her criticism was provided with (7) legal legitimacy and triggered the Prosecutor's engagement in strategic argumentation[2012].

5.2.3.1.3. Broader socio-political cleavages

In contrast to previous denials, the tactical concessions stage finally exposed signs of a gradual decrease in socio-political cleavages between advocates of the SGBV prohibition norm and their target actors. Regardless of the intentions behind the tactical concessions of the Prosecutor and whether they had been ruled by the logic of consequentialism, appropriateness or both, in the given context and circumstances of the case they implied the recognition of the criticism expressed against the misrecognition of the norm by its advocates[2013]. This evolution suggested an emerging process of the norm's cultural validation on the individual level, which could eventually also promote its shared recognition[2014]. However, while the argumentation of the UN SRSG Coomaraswamy was based on the IHRL perspective, which is better equipped for comprehensively enforcing the SGBV prohibition norm, especially in the specific context of the recruitment crimes, Prosecutor Ocampo's rhetoric and, indeed, the substantial failure to amend the charges, indicate not only confusion about the norm's appropriate application, but also a rather ambivalent perception of this perspective. This tendency also indicated that the Prosecutor's behaviour was ultimately primarily guided by traditional understandings in IHL with merely "cosmetic" [2015] consideration of IHRL. That said, the mandate of the Prosecutor also differs from that of the UN SRSG and embraces various responsibilities and interests that had to be integrated within the delicate context of the first case. Despite those challenges, the Prosecutor's engagement in rhetorical action and his references to the arguments framed from the IHRL perspective implied increasing recognition of its integration in ICL, which in turn, had the capacity to further shrink cleavages and strengthen the content and status of the SGBV prohibition norm.

[2011] *Cp.* Deitelhoff (2006)
[2012] *Cp.* Risse/Sikkink (1999); Risse (2000); Checkel (2001)
[2013] *Cp.* Risse/Sikkink (1999)
[2014] *Cp.* Wiener (2007, 2009); Wiener/Puetter (2009)
[2015] Risse/Sikkink (1999), 25

5.2.4. Elaboration of the normative meaning-in-use

5.2.4.1. Opening statements of the Legal Representatives of the victims

After the OTP's presentation of its opening statement, the Legal Representatives of the victims broadly addressed the issue of misrecognized SGBV committed against the child soldiers within the context of their recruitment. In this process, they engaged in symbolic, accountability and leverage politics[2016] and argued against the procedural difficulties their clients had faced when being granted access to the courtroom, which were disproportionate if compared to the rights of the Defence. Despite the institutional framework that provides victims with the opportunity to present their views and concerns during proceedings, "in practice it is still extremely difficult for [them] to participate"[2017]. LRs highlighted the specific vulnerability of girl soldiers, who, along with being used in fighting were also systematically subjected to rape and sexual slavery[2018]. This being said, they referred to the UN Security Council Resolutions that have urged states to prevent and eliminate use of children in armed conflicts by prosecuting those responsible for such conducts[2019] as well as to "[t]ake special measures to promote and protect the rights and meet the special needs of girls affected by armed conflict, and to put an end to all forms of violence and exploitation, including sexual violence, particularly rape"[2020].

Paolina Massidda, the Principal Counsel of the independent Office of Public Counsel for Victims, spoke about physical and psychological harm suffered by girls who had been subjected to sexual violence, and emphasized their stigmatization by families and communities, which often silenced the victims[2021]. She declared that in contrast to various interests of the Prosecution, the victims who decided to fight against impunity and testify

[2016] *Cp.* Keck/Sikkink (1998, 1999)
[2017] ICC Doc. No. ICC-01/04-01/06-T-107-ENG from January 26, 2009, 65-66
[2018] *Ibid*., 49, 67
[2019] *Ibid*., 62-63; UNSC Doc. No. S/RES/1291 from February 24, 2000; UNSC Doc. No. S/RES/1314 from August 11, 2000; UNSC Doc. No. S/RES/1379 from November 20, 2001; UNSC Doc. No. S/RES/1539 from April 22, 2004; UNSC Doc. No. S/RES/1612 from July 26, 2005
[2020] UNSC Doc. No. S/RES/1379 from November 20, 2001, para.8
[2021] ICC Doc. No. ICC-01/04-01/06-T-107-ENG from January 26, 2009, 40, lines 1-11

before the Court solely sought the establishment of the truth[2022] by means of trial that could provide them with "cathartic and salutary virtues at the individual level […] [and] restorative virtues at the family, society and community level"[2023]. Concluding her statement, Principal Counsel Massidda announced that her "learned colleague Carine Bapita" was going to elaborate more substantially on the subject of SGBV committed against child soldiers[2024].

As a result of her cooperation with WIGJ[2025], Legal Representative Bapita tackled the issue with essential thoroughness and comprehensiveness. She stated that among the twenty-four victims she was representing five girls were sexually enslaved along with their use as spies, messengers and porters[2026], and described those multiple roles that especially girl soldiers were forced to exercise in UPC/FPLC:

> Indeed, the girls filled a number of combat support functions, as well as functions not linked to combat but essential for the functioning of the armed force or group. And so it was that these girls could in turn find themselves acting as combatant, wife or sex slave, domestic servant and cook.[2027]

While her depiction of the multiple roles inflicted upon girl soldiers within the context of their *use* in the armed forces seems to reflect the statements of the UN SRSG Coomaraswamy, in accordance with broader comprehensive claims made by WIGJ, she emphasized that SGBV had been also committed against child soldiers as an integral part of the processes of their *enlistment* and *conscription*[2028]. That is, while "[a]ll the girl soldiers were raped and exploited by their leaders and the soldiers in their units, their comrades"[2029], some of the children were constantly subjected to sexual violence under threat of torture, abuse and imprisonment from the time of their abduction throughout their training and stay with the UPC/FPLC[2030]. Additionally, LR Bapita addressed the issue of marginalization of women and girls in the DRC, which multiplied the harm of physical injuries and psychological traumatization after their return home[2031]. Coming back from the bush – some of them with unwanted pregnancies – they were doomed to subsequent re-traumatization due to rejection by their families and

[2022] *Ibid*., 41, lines 5-7
[2023] *Ibid*., 41, lines 21-24
[2024] *Ibid*., 40, lines 11-12
[2025] Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018
[2026] ICC Doc. No. ICC-01/04-01/06-T-107-ENG from January 26, 2009, 52, lines 3-4, 18-25
[2027] *Ibid*., 53, lines 1-5
[2028] Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018
[2029] ICC Doc. No. ICC-01/04-01/06-T-107-ENG from January 26, 2009, 53, lines 9-12
[2030] *Ibid*., 53, lines 13-21
[2031] *Ibid*., 54, line 6

communities[2032]. Bapita declared that those victims wanted to participate in the proceedings and see that the violence they had been subjected to was correctly documented and their abusers prosecuted. They wanted justice, recognition and reparation of harm imposed on them in order to proceed with their lives without this burden[2033]. Concluding her statement, LR Bapita addressed the Judges, informing them of her reservation of the right to request consideration of sexual slavery allegedly committed within the context of the recruitment charges against Thomas Lubanga[2034].

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In contrast to the Prosecutor, whose rhetoric on SGBV committed against child soldiers seemed to be rather based on strategic argumentation, the Legal Representatives maintained the discourse on the reaffirmation and application of the SGBV prohibition norm within the context of child soldiers' recruitment crimes by engaging in the logic of appropriateness. In fact, despite the potential correlation of their criticism with the case of the Prosecutor and the rights of the Defence, they proceeded to insist on the consideration of SGBV not only rhetorically – as the Prosecutor did – but also procedurally.

Following the opening statements, the Prosecution presented its case from January 28 until July 14, 2009. During this period, the Chamber heard testimonies of twenty-eight witnesses, including three expert witnesses invited by the Prosecution and two by the Court. A significant part of those testimonies revealed evidence of SGBV[2035]. At least fifteen witnesses testified that they had been either subjected to or witnessed rape and sexual violence committed within the context of the recruitment crimes under the alleged responsibility of Lubanga. These statements surfaced either while the witnesses were testifying or responding to the questioning by the Participants and the Judges[2036].

[2032] *Ibid*., 54, lines 11-19
[2033] *Ibid*., 55, lines 13-15
[2034] *Ibid*., 57, lines 4-7
[2035] WIGJ (2009), 55, 68
[2036] *Ibid*., 71

These testimonies were met with the LRs' subsequent initiative to request that the Judges legally re-characterize the facts contained in the charges in accordance with these testimonies, as announced by Carine Bapita in her opening statement. This enabled the maintenance of discursive interactions on the conceptual clarification and elaboration of the normative meaning-in-use during the trial and hence, the further evolution of the institutional socialization 'spiral' with the appropriate application of the norm.

5.2.4.2. Expert witnesses' testimonies on SGBV

The presentation of evidence by over sixty witnesses who testified before the Court during the entire trial lasted from January 28, 2009 until May 20, 2011. Expert witnesses called by the OTP and the Chamber who tackled the issues of SGBV committed against child soldiers, and specifically girls within the context of their recruitment, included the UN SRSG/CAAC Radhika Coomaraswamy (whose *amicus* status was subsequently reclassified to that of an expert witness on her request), the Expert on Child Soldiers and Trauma Elisabeth Schauer, and the former Child Protection Adviser for the MONUC Kristine Peduto[2037].

5.2.4.2.1. Expert witness Elisabeth Schauer

The Expert on Child Soldiers and Trauma Elisabeth Schauer was called by the Chamber to testify in the Court as an expert witness. She provided the Judges with her report on February 25, 2009[2038] and commented on it in her oral questioning, conducted in April 2009[2039]. In her report, she defined a child soldier as "any person under 18 years of age who forms part of an armed force in any captivity, and those accompanying such groups, other than purely as family members, as well as girls recruited for sexual purposes and forced marriage"[2040]. She underscored that along with their use in combat or logistics operations surrounding military actions, child soldiers recruited in armed forces are systematically subjected to sexual

[2037] ICC Doc. No. ICC-01/04-01/06-2842 from March 14, 2012, para.11
[2038] ICC Doc. No. ICC-01/04-01/06-1729 from February 25, 2009; ICC Doc. No. ICC-01/04-01/06-1729-Anx1 from February 25, 2009
[2039] ICC Doc. No. ICC-01/04-01/06-T-166-ENG from April 7, 2009
[2040] ICC Doc. No. ICC-01/04-01/06-1729-Anx1 from February 25, 2009, 4-5

violence and sexual slavery[2041]. Specifically in relation to girl soldiers, expert witness Schauer highlighted that their "key gender-based experiences" in wartime incorporated "sexual violence, including torture, rape, mass rape, sexual slavery, enforced prostitution, forced sterilization, forced termination of pregnancies, giving birth without assistance and being mutilated"[2042]. Along with inquiries into the psychological consequences of these conducts for girls during her questioning, Judge Odio Benito also asked Schauer's opinion about the consideration of SGBV within the concept of the *use* of child soldiers. Expert witness Schauer confirmed that sexual violence and other gender-based misuse such as performing roles in cooking and cleaning represented "additional burden" to actual soldiering[2043]. Judge Odio Benito insisted on a clarification by asking her: "In your opinion, if I am abducted and I only become a commander wife, and I never take part in any combat, I can be considered soldier?" Schauer's response was: "Yeah, yeah. By definition, yes"[2044].

5.2.4.2.2. Expert witness Kristine Peduto

Freedman characterized Kristine Peduto, the former Child Protection Adviser for the MONUC, called to testify as an expert witness by the OTP, as a "front-liner" as "the first child protection officer to arrive in Ituri at the height of the conflict with the job of caring for children"[2045]. She testified in July 2009, towards the end of the Prosecutor's presentation of his case[2046]. Freedman suggested that she knew the OTP was expecting her to "steer clear of the many incidents of rape", so she didn't speak up unless she was explicitly asked[2047]. It was not until close to the end of her interrogation when one of the Legal Representatives of the victims, Herve Diakiese, finally "broke the silence"[2048] on behalf of the victims that he was representing and asked her about the experiences of girl soldiers recruited in UPC/FPLC[2049]. Kristine Peduto told the Court of conditions of their recruitment, which were much worse than those of the boys. In addition to all regular activities, they had to cook for the officers[2050], and *all the girls she met* "had been sexually abused, [most often] by their commanders […] or

[2041] *Ibid*., 6
[2042] *Ibid*., 28
[2043] ICC Doc. No. ICC-01/04-01/06-T-166-ENG from April 7, 2009, 96
[2044] *Ibid.*
[2045] Freedman (2017), 106-107
[2046] ICC Doc. No. ICC-01/04-01/06-T-207-ENG from July 9, 2009; ICC Doc. No. ICC-01/04-01/06-T-209-ENG from July 14, 2009
[2047] Freedman (2017), 111-112
[2048] *Ibid*., 166
[2049] ICC Doc. No. ICC-01/04-01/06-T-207-ENG from July 9, 2009, 17
[2050] *Ibid*., 21

sometimes by other soldiers"[2051]. Such abuse was systematic and many girls got pregnant as a result and had voluntary or involuntary abortions[2052]. She specified that those who got pregnant were "thrown out" because "they were no longer useful"[2053]. This would occur when they were no longer "useful for combat, and when they could no longer satisfy the sexual pleasures of those who were subjecting them to sexual abuse"[2054]. When Judge Odio Benito pursued questioning expert witness Peduto on the issue, she confirmed that according to the testimonies obtained from the children and other MONUC sources, girls had been virtually exclusively subjected to sexual violence[2055] along with their use in combat and logistical activities[2056].

5.2.4.2.3. Expert witness Radhika Coomaraswamy

After her intervention as *amicus curiae*, the UN SRSG/CAAC Radhika Coomaraswamy asked the Court for the reclassification of her status to an expert witness. Judge Fulford announced her wish during a closed session on May 19, 2009 just three days before the Legal Representatives submitted their joint request for the legal re-characterization of the charges[2057]. Her application was approved and on January 7, 2010, she testified before the Court[2058]. Her previous *amicus* report from March 2008 was considered to be the starting point of her testimony. She stressed that the UN General Assembly, in its Resolution 51/77, mandated her with raising awareness on issues concerning children and armed conflict and fostering cooperation with relevant international organizations in this regard[2059]. This Resolution reaffirmed that

> rape in the conduct of armed conflict constitute[d] a war crime and […] under certain circumstances […] a crime against humanity and an act of genocide […], and call[ed] upon all States to take all measures required for the protection of women and children from all acts of gender-based violence, including rape, sexual exploitation and forced pregnancy, and to strengthen mechanisms to investigate and punish all those responsible and bring the perpetrators to justice.[2060]

[2051] *Ibid*., 30-31
[2052] *Ibid*.
[2053] *Ibid*., 37
[2054] *Ibid*.
[2055] ICC Doc. No. ICC-01/04-01/06-T-209-ENG from July 14, 2009, 30
[2056] *Ibid*., 9-11
[2057] ICC Doc. No. ICC-01/04-01/06-T-176-Red2-ENG from May 19, 2009, 27
[2058] ICC Doc. No. ICC-01/04-01/06-T-223-ENG from January 7, 2010
[2059] *Ibid*., 8
[2060] UNGA Doc. No. A/RES/51/77 from February 20, 1997, para.28

She also emphasized that the UN Security Council likewise mandated her with monitoring and reporting on grave violations against children in its Resolution 1612 from July 2005[2061] recalling the responsibility of states "to end impunity and to prosecute those responsible for genocide, crimes against humanity, war crimes and other egregious crimes perpetrated against children"[2062]. In this regard, the Security Council noted "the advances made for the protection of children affected by armed conflict" but "remain[ed] deeply concerned over the lack of overall progress on the ground, where parties to conflict continue[d] to violate with impunity the relevant provisions of applicable international law relating to the rights and protection of children in armed conflict"[2063].

As for the *Lubanga* case, expert witness Coomaraswamy underscored the historical importance of setting a precedent by defining the framework of the recruitment crimes against children[2064]. Therefore, she tried to persuade the Chamber "to adopt interpretative principles that protect children in light of the reality on the ground", independent from the charges[2065]. She stressed that trials conducted by the ICC were followed "with great interest" in the field, and their deterrent effect has been already tangible, considering "a large number of armed groups engaging with the United Nations [were being influenced] to release children from their ranks and to cease all new recruitment"[2066]. Coomaraswamy spoke about the changing nature of conflicts and suggested that the traditional understanding of warfare and the war crimes concept were inappropriate in the context of this change, especially in African wars, where children, and particularly girls, played multiple roles ranging from direct participation in combat to sexual slavery and forced marriage[2067]. In addition to her previous argumentation, built on references to the *UN Policy on Disarmament, Demobilisation and Reintegration* and the *Paris Principles* from 2007, in her call upon the Chamber to take into consideration the "central abuse" inflicted upon girl soldiers, she also stressed that the Sierra Leone Tribunal had already moved beyond the traditional understanding of warfare to embrace the roles that children were forced to play when recruited and used in armed forces[2068]. Coomaraswamy claimed that child soldiers should be treated not as combatants in

[2061] ICC Doc. No. ICC-01/04-01/06-T-223-ENG from January 7, 2010, 8
[2062] UNSC Doc. No. S/RES/1612 from July 26, 2005, 1
[2063] *Ibid*.
[2064] ICC Doc. No. ICC-01/04-01/06-T-223-ENG from January 7, 2010, 8-9
[2065] *Ibid*., 9
[2066] *Ibid*., 9-10
[2067] *Ibid*., 10-14. While being questioned by the then Deputy Prosecutor Fatou Bensouda, Ms Coomaraswamy also noted that these new realities had urged the United Nations to ask Graca Machel to conduct a study on the impact of armed conflict on children in 1996, which then led to the establishment of the UN SRSG/CAAC's Office in 1997, mandated by the UNGA's Resolution 51/77 from February 20, 1997 (20).
[2068] *Ibid*., 15-16

IHL terms, but rather as a "special category" whose vulnerabilities should be protected through consideration of the realities of their recruitment[2069].

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The testimonies of the expert witnesses and their following questioning on the issue of the specific conditions of girls' involvement in armed forces by Judge Odio Benito and the Legal Representatives of the victims maintained intersubjective discursive deliberations on the elaboration and clarification of the SGBV prohibition norm's meaning in the context of the war crime of child soldiers' recruitment[2070]. Those interactions demonstrated the special roles and vulnerabilities of girls involved in armed forces, including the inherent nature of rape and sexual violence committed against them within the context of their recruitment.

5.2.4.3. The joint request of the Legal Representatives of the victims

Four months after the trial began, the Legal Representatives of the victims, who were predominantly lawyers from the DRC[2071], jointly undertook an attempt to persuade the Trial Chamber to legally re-characterize the charges and include the conducts of sexual slavery and cruel and inhuman treatment committed against child soldiers within the context of their recruitment[2072]. In fact, the majority of the Chamber, Judge Elizabeth Odio Benito and Judge René Blattmann, agreed to consider their request; yet, the Presiding Judge Adrian Fulford dissented[2073]. His strong dissent, supported by both Parties to the proceedings, led to the disproval of the majority's decision on appeal, which eventually bound the Court to *de-jure*

[2069] *Ibid*., 16
[2070] *Ibid*., 30-31, 35-36
[2071] WIGJ (2009), 96
[2072] ICC Doc. No. ICC-01/04-01/06-1891-tENG from May 22, 2009
[2073] ICC Doc. No. ICC-01/04-01/06-2049 from July 14, 2009

non-consideration of SGBV in *Lubanga*[2074]. However, these interactions among internal legal actors, enabled by the LRs' request, generated further intersubjective discursive deliberations based on the logic of appropriate argumentation. That is, these deliberations occurred under the consideration of the principles of coherence and impartiality, and fostered the processes of the actors' learning, cultural validation and normative suasion with respect to the SGBV prohibition norm's meaning and appropriate application in the context of the given case, which should promote reflective socialization[2075].

5.2.4.3.1. Triggering discursive interactions on the application of Regulation 55

On May 22, 2009, the LRs jointly requested the Trial Chamber for "a legal re-characterisation of the facts as, respectively, sexual slavery pursuant to Articles 7(1)(g) or 8(2)(b)(xxii) or 8(2)(e)(vi) of the Rome Statute, and inhuman and/or cruel treatment pursuant to Articles 8(2)(a)(ii) or 8(2)(c)(i) of the Statute", a procedure to be applied under Regulation 55 of the Regulations of the Court[2076]. The 'Participants' in the trial, which, in contrast to the 'Parties', also includes the Legal Representatives of the victims, can initiate the application of the Regulation[2077], which importantly maintains the right of the victims to present their views and concerns if their personal interests have been affected, so long as they do not compromise the rights of the accused to a fair trial[2078]. Regulation 55 stipulates the *Authority of the Chamber to modify the legal characterization of facts* and includes three sub-regulations[2079]. The first sub-regulation relates to the issuance of the judgement and grants the Judges the authority "to change the legal characterisation of facts [in accordance] with the crimes under articles 6, 7 or 8, or […] with the form of participation of the accused […], *without exceeding the facts and circumstances described in the charges and any amendments to the charges*" (emphasis

[2074] ICC Doc. No. ICC-01/04-01/06-2205 from December 8, 2009
[2075] *Cp.* Günther (1988); Checkel (2005); Deitelhoff (2006); Wiener (2007, 2009); Wiener/Puetter (2009)
[2076] ICC Doc. No. ICC-01/04-01/06-1891-tENG from May 22, 2009; ICC Doc. No. ICC-01/04-01/06-2049 from July 14, 2009, para.1
[2077] ICC Doc. No. ICC-01/04-01/06-1891-tENG from May 22, 2009, paras.9-10; ICC Doc. No. ICC-01/04-01/06-2049 from July 14, 2009, para.3
[2078] Rome Statute (1998), Art. 68(3)
[2079] ICC Doc. No. ICC-BD/01-01-04 from May 26, 2004, Reg. 55

added)[2080]. The second sub-regulation – in contrast to the first – could be applied *at any time during the trial* and allows the Judges to consider the possibility of modifying the legal characterization of facts[2081]. Also in contrast to the first sub-regulation, the second does not explicitly require that the Chamber must avoid "exceeding the facts and circumstances described in the charges and any amendments to the charges"[2082]. If the Chamber decides to consider a re-characterization of legal facts, it shall notify the Participants of the trial about its intention, hear the evidence, and allow them to make written or oral submissions[2083]. It may likewise suspend the hearing in order to provide the Participants with sufficient time for their effective preparation[2084]. The third sub-regulation stipulates "in particular" that the Chamber shall ensure the rights of the accused to a fair trial in terms of his or her preparation for the defence[2085], guarantee that he or she has been provided with the possibility to re-examine the witnesses, to call new witnesses and to present other evidence[2086].

In their request, the LRs cited the opening statement of Carine Bapita, in which she had highlighted the issue of "widespread practice of acts of sexual violence perpetrated systematically against children – girls in particular – who were forcibly recruited into the UPC/FPLC" [2087]. They also referred to the criticism of the UN SRSG Radhika Coomaraswamy in relation to the Pre-Trial Chamber's restricted approach to the definition of the *use of child soldiers to participate actively in hostilities*[2088]. Echoing her argumentation which was based on international normative developments with regard to the understanding of child soldiers' status (reflected, *inter alia*, in the *Cape Town Principles and Best Practices on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa* from 1997 and the *Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups* from 2007)[2089] they claimed that girl soldiers had been subjected to sexual slavery within the context of the charges brought against the accused[2090]. They emphasized that within those developments, sexual violence and forced marriage were explicitly acknowledged as the purposes for the recruitment of girls[2091]. They also highlighted the age of child soldiers was defined as up to

[2080] *Ibid*., Reg. 55(1)
[2081] *Ibid*., Reg. 55(2)
[2082] *Ibid*., Reg. 55(1)
[2083] *Ibid*., Reg. 55(2)
[2084] *Ibid*.
[2085] *Ibid*., Reg. 55(3)(a)
[2086] *Ibid*., Reg. 55(3)(b)
[2087] ICC Doc. No. ICC-01/04-01/06-1891-tENG from May 22, 2009, para.3
[2088] *Ibid*., para.29
[2089] *Ibid*., paras.26-27, 29-31
[2090] *Ibid*., paras.35-38, 40-42
[2091] *Ibid*., para.26

eighteen years in these documents (as opposed to under fifteen in the Rome Statute)[2092]. Furthermore, they indicated that the *African Union's Solemn Declaration on Gender Equality in Africa* from 2004 similarly condemned the abuse of girl soldiers as sexual slaves and forced wives[2093] while the *UN Operational Guide to the Integrated Disarmament, Demobilization and Reintegration Standards* recognized that girl soldiers perform multiple combat- and non-combat-related roles in armed groups[2094].

The LRs declared that while *all* children were victims of inhuman and/or cruel treatment inflicted upon them by members of UPC/FPLC during their recruitment, girls had been additionally subjected to various acts of sexual violence and specifically sexual slavery, which should "receive an appropriate legal characterization"[2095]. They argued that since those violations had been committed within the context of their military training, they were "directly related to their status as recruits and therefore a direct consequence of their forcible recruitment into the UPC/FPLC"[2096]. In this respect, the LRs emphasized that since beginning of the trial a large number of witnesses had already testified on "numerous cases of inhuman and cruel treatment and sexual violence witnessed and/or suffered by them after being forcibly recruited in the UPC/FPLC"[2097]. They identified that two former FPLC soldiers and six former child soldiers among the Prosecutor's witnesses had testified on *widespread and/or systematic* use of girls as sex slaves and/or forced wives by the UPC/FPLC commanders, which suggested that those acts could be addressed not only as war crimes but also as crimes against humanity[2098]. They claimed that the elements of those crimes fell within the context of the facts and circumstances described in the charges against the accused[2099], and therefore, Lubanga was allegedly criminally responsible for their commission as a co-perpetrator along with other UPC/FPLC commanders including Bosco Ntaganda[2100]. Last but not least, the LRs emphasized that their intention was not to substitute the legal characterization of facts chosen by the OTP and confirmed by the PTC[2101]; rather, they requested "an additional legal characterization [that] may be applied to the same facts since they may constitute a violation of several prohibitions set out in the Rome Statute. In the instant case, the crimes of inhuman

[2092] *Ibid*.
[2093] *Ibid*., para.31
[2094] *Ibid*., para.27
[2095] *Ibid*., para.11
[2096] *Ibid*., para.38
[2097] *Ibid*., para.15
[2098] *Ibid*., paras.34, 41
[2099] *Ibid*., paras.35-36
[2100] *Ibid*., para.37
[2101] *Ibid*., para.42

and/or cruel treatment and sexual slavery occurred in the context of the charges confirmed against Thomas Lubanga Dyilo"[2102].

5.2.4.3.2. The responses of the Parties

5.2.4.3.2.1. The Office of the Prosecutor

The Prosecution agreed that the Trial Chamber possessed the authority to consider a modification of legal facts[2103] and submitted that it "[did] not completely discount adding supplementary legal characterisation to those chosen by the Prosecution, provided the Chamber [did] not exceed the facts and circumstances contained in the charges"[2104]. The OTP emphasized that even if additional facts had been proved during the trial, the Chamber may still not convict the accused of different crimes based on those facts, unless the Prosecution amended its charges[2105]. Nevertheless, the OTP noted that if the Judges ultimately decided not to re-characterize the facts as requested by the LRs, and yet, eventually convicted Lubanga on existing charges, they should consider the evidence of sexual slavery and cruel and/or inhuman treatment at the sentencing stage[2106]. Its response pointed out that the Prosecutor had already referred to cruel treatment and sexual slavery committed within the context of the recruitment crimes as well as to his intention to therefore request "a very severe punishment" in his opening statement to the trial[2107]. That is, despite their absence in the description of the charges, the OTP suggested that in case of a conviction the Chamber, whose interpretation of the law is restricted by the facts and circumstances contained in the indictment, should consider those acts as aggravating circumstances. And yet, the OTP simultaneously implied that it was not going to amend its charges[2108]. Similar to the tactical concessions made by the Prosecutor in his opening statement, such argumentation seems to have been largely strategic

[2102] *Ibid*.
[2103] ICC Doc. No. ICC-01/04-01/06-1918 from May 29, 2009, para.3
[2104] ICC Doc. No. ICC-01/04-01/06-1966 from June 12, 2009, paras.8, 17
[2105] *Ibid*., para.8
[2106] *Ibid*., para.19
[2107] *Ibid*.
[2108] *Ibid*.

in nature[2109]. However, it also indicated a lack of clarity on the norm's meaning and appropriate application in the specific context of the case, which contributed to the OTP's engagement in intersubjective discursive deliberations based increasingly on the logic of appropriate argumentation, *i.e.*, under the consideration of the coherence and impartiality principles[2110]. This dynamic has ultimately maintained and furthered the institutional socialization process with appropriate application of the norm.

Fabricio Guariglia suggests two reasons that could explain the former Prosecutor's "murky" strategy with regard to sexual violence[2111]. Firstly, the absence of sufficient evidence in the OTP's possession that could have supported such charges, which implies that sexual violence had not been sufficiently investigated; and secondly, the traditional understanding of the war crimes concept among the OTP's staff at that point in time, which embraced conducts committed against civilian populations and (under certain circumstances) adversary parties, but not against one's own soldiers[2112]. He clarified that the OTP's "belated attempt to stretch the concept of use in hostilities to encompass the sexual violence committed against girl child soldiers" was problematic because the facts were anyways not articulated[2113]. When the issue became pressing at trial there was neither clarity on how to deal with it nor were the staff provided with any guidance by the leadership of the Office[2114]. "Everything was a bit up in the air"[2115], he suggests. Apparently affected by this ambiguity, the Prosecutor engaged in bargaining and offered a trade-off by requesting the Judges to consider sexual violence inflicted upon child soldiers as aggravating circumstances of the committed recruitment crimes. Guariglia assumes that if the Chamber had accepted this request "that would have been an appropriate result in that case in those circumstances"[2116]. But by then the Judges probably already doubted the credibility of the Prosecutor's "zigzagging" approach to sexual violence: "And I think that is true, I mean there was a lot of uncertainty as to how to deal with that situation in *Lubanga*"[2117].

[2109] *Cp.* Risse/Sikkink (1999); Risse (2000)
[2110] *Cp.* Günther (1988); Checkel (2001)
[2111] Interview with F. Guariglia (ICC OTP), The Hague, December 2018
[2112] *Ibid*.
[2113] *Ibid*.
[2114] *Ibid*.
[2115] *Ibid*.
[2116] *Ibid*.
[2117] *Ibid*.

5.2.4.3.2.2. The Defence

The Defence claimed that the LRs in effect aimed to push for the amendment of the indictment against the accused with additional charges of sexual slavery and inhuman and/or cruel treatment[2118]. It argued that since an amendment of charges was only admissible before the beginning of the trial, granting such a request would undermine the principle of a fair trial and violate the rights of the accused[2119]. The testimonies on sexual violence heard during the trial were also therefore "irrelevant […] since those facts did not feature, even cursorily, in the Decision on the confirmation of charges"[2120]. Furthermore, significantly, the Defence stated that child soldiers were not entitled to such protections under IHL:

> The protection guaranteed by the law of armed conflicts is only for the benefit of civilians and persons associated with the enemy and does not extend to acts committed by soldiers against members of their own forces.[2121]

As previously mentioned, this debate on the application of the SGBV prohibition norm in the context of the war crimes of child soldiers' recruitment arose again almost eight years later in the *Ntaganda* case. While by then, the OTP had implemented lessons learned in *Lubanga* by progressively applying the law therein, the Defence pursued maintaining this outdated perspective until the Trial Chamber issued its precedential decision in this respect[2122], which was subsequently confirmed by the Appeals Chamber[2123]. The Judges in *Ntaganda* explicitly recognized that combatants of the same army forces were "not per se excluded as potential victims of the war crimes of rape and sexual slavery […] whether as a result of the way these crimes have been incorporated in the Statute, or on the basis of the framework of international humanitarian law, or international law more generally"[2124]. Until this point, however, due to the overall context of the *Lubanga* case, the Defence's argument remained essentially uncontested.

[2118] ICC Doc. No. ICC-01/04-01/06-1975-tENG from June 19, 2009, paras.7, 17
[2119] *Ibid*., paras.50-71
[2120] *Ibid*., para.33
[2121] *Ibid*., para.44
[2122] ICC Doc. No. ICC-01/04-02/06-1707 from January 4, 2017
[2123] ICC Doc. No. ICC-01/04-02/06-1962 from June 15, 2017
[2124] ICC Doc. No. ICC-01/04-02/06-1707 from January 4, 2017, para.54

5.2.4.3.3. The decision of the Trial Chamber on the LRs' request

In their observations on the responses of the OTP and Defence, the LRs reiterated their request, insisted on the commencement of the Regulation 55 procedure and on their leave to submit written or oral observations on the matter[2125]. The Trial Chamber, by majority, Presiding Judge Fulford dissenting, based on Regulation 55(2) granted leave to their request and ruled that the facts might be legally re-characterized[2126]. Judge Odio Benito and Judge Blattmann (both with backgrounds in inquisitorial legal systems in contrast to Judge Fulford) argued that Regulation 55 differentiated between two stages of the proceedings: while the sub-regulation 1 related to the final judgement and did not allow the Chamber to "exceed[…] the facts and circumstances described in the charges and any amendments to the charges", the sub-regulation 2 could be applied at "any time during the trial" and did not include such limitation[2127]. The Judges interpreted that the application of the latter was virtually only stipulated in the sub-regulation 3 that "for the purposes of sub-regulation 2" required guaranteed protection of the rights of the accused to a fair trial that included appropriate time for the preparation of his/her defence, a possibility to re-examine the witnesses, to call new witnesses or to present other evidence[2128]. They argued that while the safeguards under the sub-regulations 2 and 3, including the opportunity for the Participants to make written or oral submissions on the issue in question and a potential suspension of the hearing, especially for the purposes of the defendant's effective preparation, did not apply to the sub-regulation 1, they logically underpinned the possibility of changing the legal characterization of facts during the trial[2129]. Curiously, the Judges went even further in their interpretation by suggesting that not only the legal characterization but also the facts and circumstances themselves as described in the charges could have been changed due process:

> A right to call new evidence or to examine previous witnesses is only relevant to challenge evidence that is provided to substantiate a different factual basis. However, if the modification only concerns the substantive law applicable to the same factual basis that is contained in the relevant charging documents a right to call new evidence is not necessary, and thus, is not expressly conferred on the defendant by Regulation 55(1).[2130] […] It follows that the limitations provided in Regulation 55(1) to the "the facts and circumstances described in the charges" are not applicable to the present

[2125] ICC Doc. No. ICC-01/04-01/06-1998-tENG from June 26, 2009, paras.10-14
[2126] ICC Doc. No. ICC-01/04-01/06-2049 from July 14, 2009
[2127] *Ibid*., paras.27-29; ICC Doc. No. ICC-BD/01-01-04 from May 26, 2004, Reg. 55
[2128] *Ibid*.
[2129] ICC Doc. No. ICC-01/04-01/06-2049 from July 14, 2009, paras.30-31
[2130] *Ibid*., para.30

procedural situation, which is governed by Regulation 55(2) and (3).[2131]

Accordingly, Judges Odio Benito and Blattmann, by majority, approved the application of the procedure for the legal re-characterization of the facts based on the submissions of the LRs and the evidence heard during the trial[2132].

5.2.4.3.4. Dissenting opinion of the Presiding Judge Adrian Fulford

The Presiding Judge Adrian Fulford from the United Kingdom seems to have interpreted the "constructive ambiguit[ies]"[2133] embedded in the legal framework of the Court in accordance with his background in the adversarial system of the common law, which, in contrast to the inquisitorial system of the civil law, does not allow any inquisitions by judges[2134]. Freedman describes Judge Fulford as the "meticulous sovereign in a trial chamber", who was apparently frustrated with the OTP's work[2135]. His disaffection with the Prosecutor Ocampo's somewhat erratic approach (and, as Freedman observed, with the Prosecutor's personality) might have intensified his scrupulousness on the issue of the rights of the accused to a fair trial[2136]. Although the OTP also eventually disagreed with the majority's interpretation of Regulation 55 for its own reasons, Judge Fulford appeared to be generally against any consideration of sexual violence due to the absence of its mention in the prosecutorial charging documents[2137]. As Freedman observed,

> [o]nly when the associate judge from Costa Rica, Elizabeth Odio Benito, insisted on asking witnesses about girl soldiers did the judge relent and allow it, but this was rare, for he had little time for what he felt were diversions from the courtroom's main considerations.[2138]

Therefore, Judge Fulford claimed that the majority's ruling was contrary to the provisions comprised in the legal framework of the Court and undermined the rights of the accused[2139]. He argued that all three sub-regulations of the Regulation 55 should be interpreted in an

[2131] *Ibid*., para.32
[2132] *Ibid*., para.33
[2133] Oosterveld (2014)
[2134] ICC Doc. No. ICC-01/04-01/06-2069-Anx1 from July 31, 2009
[2135] Freedman (2017), 65
[2136] *Ibid*., 73
[2137] ICC Doc. No. ICC-01/04-01/06-2069-Anx1 from July 31, 2009
[2138] Freedman (2017), 162
[2139] ICC Doc. No. ICC-01/04-01/06-2069-Anx1 from July 31, 2009

indivisible way[2140]. In his view, in order to avoid legal collisions, the restriction encompassed in the sub-regulation 1 to the non-extension of the facts and circumstances described in the charges should be also applied to the sub-regulation 2[2141]. He assumed that the modification proposed by the LRs would have virtually introduced five additional charges: sexual slavery as a crime against humanity under Art. 7(1)(g), and as a war crime committed in a conflict of a non-international under Art. 8(2)(e)(vi), and of an international character under Art. 8(2)(b)(xxii), inhuman treatment as a grave breach of the Geneva Conventions under Art. (8)(2)(a)(ii), and cruel treatment as a serious violation of the Common Article 3 to the Geneva Conventions under Art. 8(2)(c)(i)[2142]. Judge Fulford claimed that only the Prosecutor had the power to amend the charges – before the commencement of the trial – and only the Pre-Trial Chamber was authorized to "frame and alter" the charges by allowing or refusing to do so[2143]. The Trial Chamber, in contrast, possessed only two powers with regard to the charges: 1) "to grant or reject an application by the prosecution to withdraw the charges", and 2) "to modify the legal characterization of the facts under Regulation 55"[2144]. As a part of this argument, he referred to the Regulation 52, which defines the Document Containing the Charges as consisting of (a) the name of the suspect and the identifying information, (b) *the facts* "including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial", and (c) *the legal characterization of the facts* "to accord both with the crimes under Articles 6, 7 or 8 and the precise form of participation"[2145]. Judge Fulford reasoned that the second power attributed to the Trial Chamber with regard to the charges thus relates to a potential modification of *the legal characterization of the facts*, yet, *not of the facts themselves* as they had been described by the OTP in its DCC and in the confirmation of charges decision issued by the PTC. Consequently, since none of those documents contained any mention of allegations of sexual slavery, its consideration would have necessarily exceeded the facts and circumstances described in the charges and thus been in contrary to the statutory provisions[2146].

[2140] *Ibid*., paras.4, 28-29
[2141] *Ibid*., Judge Fulford also emphasized that such an alteration would be necessarily incorporated in the final decision, which would collide with Art. 74(2) stipulating that "[t]he decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges". He also referred to the Chamber's previous decision from December 13, 2007 (para.31), in which it had argued that the application of Reg. 55 would not collide with Art. 74(2) because the Regulation foresees a modification of the legal characterization and not an amendment of the facts and circumstances described in the charges (*cp.* ICC Doc. No. ICC-01/04-01/06-1084 from December 13, 2007, para.47)
[2142] ICC Doc. No. ICC-01/04-01/06-2069-Anx1 from July 31, 2009, paras.34-43
[2143] *Ibid*., paras.13 (with reference to Art. 61(9)), 45
[2144] *Ibid*., para.14
[2145] ICC Doc. No. ICC-BD/01-01-04 from May 26, 2004, Reg. 52
[2146] ICC Doc. No. ICC-01/04-01/06-2069-Anx1 from July 31, 2009, paras.43, 46, 49

In support of his argumentation, which was based on the assumption that only PTC Judges may have the power to "frame and alter" prosecutorial charges before the commencement of trial, Judge Fulford correspondingly interpreted other "constructive ambiguit[ies]"[2147] relating to the powers of the TC Judges embedded in Article 61(11) of the Statute on the *Confirmation of the charges before trial*, which provides that the Trial Chamber "shall be responsible for the conduct of subsequent proceedings and *may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings*" (emphasis added)[2148]. This is also reiterated in Article 64 on the *Functions and powers of the Trial Chamber*, which provides that it "may, as necessary" "[e]xercise any functions of the Pre-Trial Chamber referred to in Article 61, paragraph 11"[2149]. These provisions seem to grant the Trial Chamber significant powers, subject to consideration of whether their potential application would be "relevant and capable […] in those proceedings"[2150]. That is, even if the criteria of *relevance* were fulfilled, whether the amendment of the facts described in the charges was *capable of application* during the trial remained disputable. Judge Fulford claimed that those provisions were not applicable in the given situation due to the collision of such application with Article 61(9), which provides that the Prosecutor may amend the charges even after their confirmation; only, however, before the beginning of trial[2151]. Moreover, Judge Fulford argued that the legal framework of the Court provides the accused with significant certainty about the charges, which cannot be amended once the trial has begun[2152]. Ironically, while advocating for the rights of the accused, he furthermore referred to Article 21(3) on the obligations of the Chamber "to apply the law in accordance with internationally recognized human rights"[2153], the provision on which gender justice advocates also built their argumentation against the misrecognition of SGBV in this case[2154].

In addition to his claim that under Regulation 55, a potential legal re-characterization may not exceed the facts and circumstances described in the charges[2155], Judge Fulford also questioned whether it would be generally possible to modify legal characterization of the facts without simultaneously amending the charges (entailing both the facts and their legal

[2147] Oosterveld (2014)
[2148] Rome Statute (1998), Art. 61(11)
[2149] *Ibid*., Art. 64(6)(a)
[2150] *Ibid*., Art. 61(11)
[2151] ICC Doc. No. ICC-01/04-01/06-2069-Anx1 from July 31, 2009, para.15
[2152] *Ibid*., para.16
[2153] *Ibid*., paras.22, 26
[2154] *Cp.* ICC Doc. No. ICC-01/04-01/06-403 from September 7, 2006, 6, para.8; ICC Doc. No. ICC-01/04-01/06-1229-AnxA from March 18, 2008 (although the UN SRSG Radhika Coomaraswamy did not explicitly refer to this provision in her observations, her argumentation was predominantly framed from an international human rights perspective)
[2155] ICC Doc. No. ICC-01/04-01/06-2069-Anx1 from July 31, 2009, para.17

characterization), which would again collide with Article 61(9)[2156]. He suggested that the resolution of this issue might need to be considered on a case-by-case basis[2157]. Concluding his dissent, Judge Fulford invited the Parties to appeal the majority's decision and while doing so, to request that its implementation be suspended in order for the trial to continue on the basis of the initial charges until the Appeals Chamber has issued its ruling[2158].

5.2.4.3.5. The appeals and following deliberations

In their applications for leave to appeal the majority's ruling, both the Defence[2159] and the Prosecution[2160] reflected the dissenting opinion of Judge Fulford[2161]. In the interest of the expeditiousness of trial, both the Prosecution[2162] and the Defence[2163] also requested that the impugned decision be suspended until the Appeals Chamber had ruled upon their appeals[2164]. In its application, the Defence mainly claimed that the modification requested by the LRs would have virtually amended the indictment with five additional charges and would thus contradict the legal framework of the Court and undermine the rights of the accused to a fair trial[2165]. The Prosecution primarily contested the intention of the majority to intervene with its prosecutorial discretion with respect to its charges[2166] and to possibly extend the facts included in the indictment and decision on the confirmation of the charges[2167]. Interestingly, in support of its appeal, the OTP also subsequently claimed that, based on the "new facts" unveiled during the current proceedings, it might present new charges before the PTC in the future[2168]. In this context, it referred to the Trial Chamber's dismissal of the defendant's request to exclude the possibility of bringing in the future charges of other crimes committed

[2156] *Ibid*., para.18
[2157] *Ibid*., para.19
[2158] *Ibid*., paras.54-55
[2159] ICC Doc. No. ICC-01/04-01/06-2073-tENG from August 11, 2009
[2160] ICC Doc. No. ICC-01/04-01/06-2074 from August 12, 2009
[2161] The Defence especially emphasized Judge Fulford's arguments about the contradiction of the majority's decision with Art. 74(2) stipulating that the judgement "shall not exceed the facts and circumstances described in the charges and any amendments to the charges", Art. 61(9) stipulating that the Prosecutor can only amend the charges "before the trial has begun" and Art. 67(1) on the rights of the accused to a fair trial (ICC Doc. No. ICC-01/04-01/06-2073-tENG from August 11, 2009, paras.23-27).
[2162] ICC Doc. No. ICC-01/04-01/06-2074 from August 12, 2009, paras.25-26
[2163] ICC Doc. No. ICC-01/04-01/06-2073-tENG from August 11, 2009, paras.45-47
[2164] ICC Doc. No. ICC-01/04-01/06-2112-tENG from September 10, 2009, para.76; ICC Doc. No. ICC-01/04-01/06-2120 from September 14, 2009, paras.18-21
[2165] ICC Doc. No. ICC-01/04-01/06-2073-tENG from August 11, 2009, para.34
[2166] ICC Doc. No. ICC-01/04-01/06-2074 from August 12, 2009, paras.3-4
[2167] *Ibid*., para.22
[2168] ICC Doc. No. ICC-01/04-01/06-2120 from September 14, 2009, para.36

under his alleged responsibility within the context of the current charges[2169]. Even though no such new charges have been subsequently brought against Lubanga, the OTP's following amendments in *Ntaganda* with charges of rape and sexual slavery[2170] might have been, indeed, based on those facts.

The Legal Representatives requested that the Trial Chamber reject, on grounds of inadmissibility, the applications of the Prosecution and the Defence for leave to appeal the majority's ruling, since the ruling was not yet a *decision* in legal terms but rather a *notification* (that legal characterization of the facts might be subject to change), which is not appealable[2171]. However, the TC unanimously stated that although the impugned decision was not a final determination but rather a notification, the question of the correct application of Reg. 55 had to be resolved before the initiation of any further proceedings[2172]. It argued that depending on the resolution of those issues, the trajectory of the trial could be significantly altered in terms of additional time and resources for preparation of Parties and Participants and provision of necessary evidence[2173]. Therefore, the TC unanimously decided to grant leave to appeal on two questions[2174]. The first question addressed the majority's potential misinterpretation of Reg. 55 and the power of the TC under Reg. 55(2) and (3) to consider "facts and circumstances that, although not contained in the charges and any amendments thereto, buil[t] a procedural unity with the latter and [were] established by the evidence at trial"[2175]. The second tackled the issue of whether the majority was wrong to allow legal characterization of the facts to enter the procedure, based on the consideration of the five additional offences comprised in the Statute[2176].

Following the decision of the Trial Chamber, the Legal Representatives applied for leave to participate in the proceedings of the appeals and to submit the views and concerns of their clients on the issues in question, whose determination would have impacted the personal

[2169] *Ibid*.; This debate had been caused by the Prosecutor's statements from January 2009 on his continuing investigations into other crimes, for which Lubanga might have been responsible. These induced the Defence to request the TC to exclude the possibility of bringing other cases against the accused related to any other conduct within the context of the conflict in the DRC. The Prosecution resisted this request, and the TC ultimately ruled that it neither had the authority over investigations of the Prosecutor into other crimes for which the accused might have been criminally responsible, nor could it rule on the exclusion of bringing charges against the accused for his alleged responsibility for other crimes, independently from whether there might have been any connection to the current charges (ICC Doc. No. ICC-01/04-01/06-T-104-ENG from January 16, 2009, 7-9).
[2170] See subchapter '5.2.7.1. *Ntaganda* case'
[2171] ICC Doc. No. ICC-01/04-01/06-2079-tENG from August 17, 2009, para.42
[2172] ICC Doc. No. ICC-01/04-01/06-2107 from September 3, 2009, para.29
[2173] *Ibid*., paras.29, 33
[2174] *Ibid*., para.26; the Judges decided to grant leave to appeal after the consideration of the applications against the criteria including (a) the appealability of the issue, (b) whether it could "significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial", and (c) whether "an immediate resolution by the Appeals Chamber could materially advance the proceedings". The Chamber determined that those criteria were satisfied in regard to both issues.
[2175] *Ibid*., para.41
[2176] *Ibid*.

interests and rights of the victims to reparations[2177]. The LR Luc Walleyn, whom Freedman characterized as "a thoughtful human rights lawyer"[2178], claimed that all his clients – eighteen former child soldiers – had been subjected to acts of inhuman and degrading treatment or sexual slavery in the context of their recruitment[2179]. Paolina Massidda, the Principal Council of the OPCV and the LR of four victims who also participated in the trial as Prosecution witnesses, likewise stated that all of her clients had suffered from inhuman and/or cruel treatment and one had suffered additionally from various acts of sexual violence, which were inflicted upon them within the context of their recruitment[2180]. The LR Carine Bapita submitted her application on behalf of five further victims, all of whom had been subjected to "all sorts of inhuman treatment, including all kinds of sexual violence"[2181]. The Prosecution supported the applications of the LRs and, despite the disagreement of the Defence[2182], the Appeals Chamber found that all twenty-seven victims fulfilled the necessary criteria to be allowed to present their views and concerns with regard to the appeals' questions[2183] and requested the filing of their submissions[2184].

In their submissions, the Legal Representatives requested that the Appeals Chamber deny the suspensive effect of the Trial Chamber's decision[2185]. They argued that for such an effect to be granted, the AC had stipulated the fulfilment of an irreversibility criterion in its previous decision, whereas neither the Prosecution nor the Defence demonstrated that it would have been met in the context of their appeals[2186]. They also reasoned that the TC had already adjourned the hearings until the Appeals Chamber rendered its ruling[2187]. With respect to the first question of the appeal, the LRs concurred with Judge Fulford's interpretation of Reg. 55 on a single procedure that did not allow the extension of the facts and circumstances described in the charges[2188]. However, based on international human rights case law, they insisted that the incidents to which they referred formed "specific circumstances" that had occurred within the scope of the facts described in the charges against the accused[2189]. That is,

[2177] ICC Doc. No. ICC-01/04-01/06-2121-tENG from September 14, 2009; ICC Doc. No. ICC-01/04-01/06-2122-tENG from September 15, 2009; ICC Doc. No. ICC-01/04-01/06-2134-tENG from September 18, 2009
[2178] Freedman (2017), 77
[2179] ICC Doc. No. ICC-01/04-01/06-2121-tENG from September 14, 2009, paras.11-13
[2180] ICC Doc. No. ICC-01/04-01/06-2122-tENG from September 15, 2009, paras.23-26
[2181] ICC Doc. No. ICC-01/04-01/06-2134-tENG from September 18, 2009, para.15
[2182] ICC Doc. No. ICC-01/04-01/06-2205 from December 8, 2009, paras.32-33
[2183] *Ibid*., para.36
[2184] ICC Doc. No. ICC-01/04-01/06-2168 from October 20, 2009; ICC Doc. No. ICC-01/04-01/06-2173-tENG from October 23, 2009, para.13
[2185] ICC Doc. No. ICC-01/04-01/06-2173-tENG from October 23, 2009, paras.15-18
[2186] *Ibid*.
[2187] *Ibid*.; ICC Doc. No. ICC-01/04-01/06-2143 from October 2, 2009
[2188] ICC Doc. No. ICC-01/04-01/06-2173-tENG from October 23, 2009, para.25
[2189] *Ibid*., paras.26-27, 32-33

their consideration would not have constituted an amendment thereto[2190]. The LRs argued that the five offences in question represented both the purpose and the consequence of the recruitment crimes against children, which are specific and complex in their nature[2191]. In their argumentation, they referred to the Convention on the Abolition of Slavery from 1956 and declared that the "primary purpose" of the recruitment of girls had been their use as sex slaves, independent from their potential additional use as combatants[2192]. Simultaneously, as has been confirmed by witnesses in the course of the trial, sexual slavery was one of the main consequences of the recruitment inflicted upon girls[2193]. Considering the second question of the appeal, on whether the majority was wrong to consider the five additional offences while deliberating on a potential legal re-characterization of the facts, the LRs argued that the Trial and not the Appeals Chamber had the jurisdiction to rule upon this question, based on heard testimonies and observations submitted by the Parties and Participants to trial[2194]. They reiterated that their request of the Judges of the TC to do so was based on the "sufficient factual elements", which had been exposed during the proceedings[2195]. The LRs claimed that it was the obligation of the TC to establish the truth and issue the judgement based on the entire proceedings, whilst the legal re-characterization of the facts in accordance with crimes included in the Statute would contribute to the determination of the truth and would be in the interests of the victims, justice and the international community[2196]. Furthermore, based on Article 21 of the Statute and human rights protection instruments of the United Nations and African Union[2197], they argued that the Chamber was not restricted by international custom when applying the law but could also apply the principles that have emerged "as a result of cooperation between international organisations and even principles derived from international legal conscience and the nature of the international community"[2198].

After the Prosecution[2199] and the Defence[2200] had responded to the LRs' submissions by contesting the interpretations that collided with their corresponding perspectives, the Appeals Chamber, composed of five judges[2201], unanimously reversed the ruling of the Trial Chamber on the possibility to include the crimes of sexual slavery and inhuman and/or cruel treatment

[2190] *Ibid*.
[2191] *Ibid*., para.31
[2192] *Ibid*., para.30
[2193] *Ibid*.
[2194] *Ibid*., paras.36, 42
[2195] *Ibid*., para.39
[2196] *Ibid*., para.41
[2197] *Ibid*., para.43
[2198] *Ibid*., para.44
[2199] ICC Doc. No. ICC-01/04-01/06-2178 from October 28, 2009
[2200] ICC Doc. No. ICC-01/04-01/06-2180-tENG from October 28, 2009
[2201] The Appeals Chamber was composed of the Presiding Judge Sang-Hyun Song, Judge Erkki Kourula, Judge Anita Usacka, Judge Daniel David Ntanda Nsereko and Judge Christine Van den Wyngaert (ICC Doc. No. ICC-01/04-01/06-2205 from December 8, 2009)

while modifying the legal characterization of the facts described in the charges against Thomas Lubanga[2202]. They disagreed with Judge Fulford's doubts on the general appropriateness of Regulation 55 within the legal framework of the Court[2203] and argued that its principal purpose was the elimination of

> the risk of acquittals that are merely the result of legal qualifications confirmed in the pre-trial phase that turn out to be incorrect, in particular based on the evidence presented at the trial […], [which would be] […] contrary to the aim of the Statute 'to put an end to impunity' […].[2204]

However, substantially, the AC Judges agreed with Judge Fulford on the indivisible nature of Reg. 55 and determined that it "may not be used to exceed the facts and circumstances described in the charges or any amendment thereto"[2205]. They also agreed with his argument that such extension would contradict Article 74(2) of the Rome Statute stipulating that the final judgement "shall not exceed the facts and circumstances described in the charges and any amendments to the charges"[2206]. That is, the consideration of the facts which arose during the trial but which had not been included in the charges would collide with this provision even if those facts – as the majority of the TC had argued – "buil[t] a unity, from the procedural point of view, with the course of events described in the charges"[2207]. Furthermore, the AC Judges likewise agreed with the view that only the Prosecutor had been granted the power to amend the charges under Art. 61(9) of the Statute[2208]. Regrettably, they did not tackle the essential question of whether the legal framework of the Court provided the Prosecutor with a possibility to do this after the trial had begun and revealed in its course initially overlooked crucial facts and characteristics explicitly relating to the context of the case in question, which should have been considered in the interests of justice and appropriate application of the law. The Judges also did not address the argument of the victims' LRs on the fulfilment of an irreversibility criterion for the suspensive effect of the impugned decision, which was initially requested by both Parties to the proceedings (and opposed by the LRs)[2209]. However, by this time both the AC and the Prosecutor agreed with the LRs' argument that the TC had already adjourned the hearings until the AC rendered its ruling[2210]. Therefore, the AC decided that there was "no need to rule on the requests for suspensive effect"[2211].

[2202] ICC Doc. No. ICC-01/04-01/06-2205 from December 8, 2009
[2203] *Ibid*., para.46, these doubts were also supported by the Defence (para.73)
[2204] *Ibid*., para.77
[2205] *Ibid*., para.1
[2206] *Ibid*., paras.89-93
[2207] *Ibid*., para.92
[2208] *Ibid*., paras.94-95
[2209] *Ibid*., paras.23-27
[2210] ICC Doc. No. ICC-01/04-01/06-2143 from October 2, 2009
[2211] ICC Doc. No. ICC-01/04-01/06-2205 from December 8, 2009, para.27

5.2.4.4. The summary

5.2.4.4.1. The constellation of the involved actors

5.2.4.4.1.1. The Legal Representatives of the victims

Among internal actors involved in the *Lubanga* case, the Legal Representatives of the victims acted as the main driving force, who not only maintained internal discursive interactions on the appropriate application of the SGBV prohibition norm in their opening statements to trial but also triggered these interactions further throughout the proceedings. Their claims and arguments seem to have been inspired by their cooperation with WIGJ and the UN SRSG's previous intervention and ultimately managed to persuade the majority of the Judges on both the validity and potential applicability of the norm in this case, even if ultimately reversed due to procedural constraints. Additionally, the LRs were likely encouraged by the OTP's tactical concessions (which had been essentially caused by the UN SRSG's intervention[2212]) as well as by witnesses' testimonies on widespread and systematic SGBV committed against child soldiers in the context of their recruitment. Although their suggestions on the application of the norm appeared procedurally problematic and collided with other legal norms such as prosecutorial discretion and the rights of the accused to a fair trial, by exercising their agency within the internal structures of the Court, they maintained resistance against the misrecognition of the SGBV prohibition norm and furthered the evolution of its institutional socialization, not only in terms of its validity but also its appropriate application. In contrast to the Prosecutor, whose extensive references to SGBV in his opening statement were based on strategic argumentation[2213], the LRs' strategy remained consistent with their opening statements throughout the trial. They triggered changes on both discursive and procedural levels[2214] by initiating a legal procedure that enabled further maintenance of internal discursive deliberations on the normative meaning-in-use. That is, while the actions of the LRs were motivated by the logics of consequentialism and appropriateness, by engaging in

[2212] *Cp.* Risse/Sikkink (1999); Checkel (2001)
[2213] *Cp.* Risse/Sikkink (1999); Risse (2000)
[2214] *Cp.* Keck/Sikkink (1998, 1999)

the logic of arguing they also generated other internal actors' argumentative rationality[2215]. That which emerged through this dynamic internal discursive deliberation was, in turn, based on the logic of appropriate argumentation, under the consideration of the principles of coherence and impartiality[2216], and eventually advanced actors' reflective learning and socialization with appropriate application of the norm[2217].

However, despite the support of the Legal Representatives' request by the majority of the Judges and, indeed, the Prosecutor's previous concessions on the validity of the norm as well as requests towards the Trial Chamber on its consideration in application, the charges remained standing as they were and no intention about their corresponding amendment was expressed by the OTP. On the contrary, the Prosecutor insisted that the facts and circumstances described in his charges must be preserved without any extension. In the absence of action from the Prosecutor, which would have supported his previous concessions, the dissenting opinion of the Presiding Judge Fulford was strong enough to demonstrate the collision of the LRs' request with the rules of procedure and evidence as well as the principle of a fair trial. Under such conditions, the possibilities for the victims, whose interests, as Paolina Massidda had claimed[2218], differed from those of the Prosecution, to push through the consideration of SGBV committed within the context of the recruitment charges were eventually exhausted. Despite those rather unpromising perspectives, the LRs continued to uphold internal discursive deliberations on the issue throughout the appeals procedure. Using the inspiration, encouragement, knowledge and expertise provided by the exogenous gender justice advocates, they managed to maintain their agency as long as the institutional structures and procedures allowed them to do so.

[2215] *Cp.* Risse/Sikkink (1999); Risse (2000)
[2216] Günther (1988)
[2217] *Cp.* Checkel (2005); Deitelhoff (2006)
[2218] ICC Doc. No. ICC-01/04-01/06-T-107-ENG from January 26, 2009, 41, lines 5-7

5.2.4.4.1.2. Exogenous stimulation

5.2.4.4.1.2.1. Women's Initiatives for Gender Justice

The Legal Representatives' resistance seemed to have been largely influenced by stimulation from their exogenous ally, Women's Initiatives for Gender Justice. By means of their cooperation, WIs eventually succeeded (albeit partly, due to procedural constraints) to insert their agenda in the proceedings, by providing their internal allies with knowledge and expertise on SGBV committed under the alleged responsibility of Lubanga[2219]. Their impact was already reflected in the opening statements of the LRs, especially in that of Carine Bapita, with whom they specifically cooperated. Furthermore, the following joint request of the LRs to trigger the *de-jure* consideration of SGBV under Regulation 55 resembled similar efforts from WIs in the pre-trial stage represented in their *amicus curiae* application. In fact, both the WIs and the LRs called upon the Judges to undertake the required procedural steps for the consideration of SGBV, committed not only within the *use* element of the recruitment crimes – as was emphasized by the UN SRSG Coomaraswamy – but also within the *enlistment* and *conscription* of child soldiers[2220]. However, as the internal discursive deliberations on the appropriate application of the norm in this context have demonstrated, in the absence of the Prosecutor's willingness to amend his charges correspondingly, both attempts were probably overreaching in their interpretation of the Court's procedural framework. Yet, both succeeded in generating and maintaining internal discursive interactions on the elaboration and clarification of the normative meaning-in-use based on the logic of appropriate argumentation, which (under the consideration of the coherence and impartiality principles) fostered reflective processes of actors' learning and socialization with appropriate application of the norm[2221]. Despite the Prosecutor's initial engagement being merely strategic argumentation, he became entangled in the legal discourse, which he could not "escape in the long run"[2222].

[2219] *Cp.* Keck/Sikkink (1998, 1999); Deitelhoff (2006)
[2220] Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018
[2221] *Cp.* Günther (1988); Risse/Sikkink (1999); Risse (2000); Checkel (2005); Deitelhoff (2006); Wiener (2007)
[2222] Risse/Sikkink (1999), 16, 25-35

5.2.4.4.1.2.2. The UN SRSG/CAAC Radhika Coomaraswamy

The UN SRSG/CAAC Radhika Coomaraswamy's intervention, which focused on the inherent nature of the connection between SGBV and the recruitment crimes against children, as well as the specific role of girl soldiers in armed forces impacted not only the Prosecutor's engagement in tactical concessions, it must have likewise encouraged the LRs' resistance against the misrecognition of the SGBV prohibition norm[2223]. They also reflected her arguments in their criticism, framed by accountability and leverage tactics and based on references to international and regional human rights instruments[2224], which were developed by members of the international community for the protection of children from sexual violence in conflicts. However, whereas the UN SRSG Coomaraswamy tackled the issue of SGBV committed only within the context of the *use* of child soldiers, the LRs adapted her arguments to a boarder perspective that was advocated for by WIGJ, that is, to SGBV inflicted upon children also within the context of their *enlistment* and *conscription*, as both purpose and consequence of those conducts[2225].

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Inspired and encouraged by the exogenous advocates of gender justice, the LRs successfully exercised their agency by catching the boomerangs that had been thrown to them from the outside of the Court[2226], joining and mutually reinforcing those perspectives in their argumentation, and inserting them in the internal discursive deliberations on the appropriate application of the SGBV prohibition norm in the context of the child soldiers' recruitment crimes, despite the collisions of their interpretations with rules of legal procedure and evidence. By doing so, they upheld the further evolution of the institutional socialization 'spiral' with both the validity and appropriate application of the norm through processes of

[2223] *Cp. ibid.*, 25-28
[2224] *Cp.* Keck/Sikkink (1998, 1999)
[2225] Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018
[2226] *Cp.* Keck/Sikkink (1998, 1999); Risse/Sikkink (1999)

reflective learning, cultural validation and persuasion on its meaning-in-use, not only with respect to the context of the given case but also more generally[2227].

5.2.4.4.1.2.3. Expert witnesses

Expert witnesses also played a significant role in encouraging and maintaining internal processes of clarification on the normative meaning-in-use by testifying on sexual violence and its consequences inflicted upon girls recruited in the UPC/FPLC ranks. Fortunately, the presentation of their testimonies took place sequentially: before the LRs submitted their joint request, as well as along with and after the following proceedings, which on the one hand, contributed to its substantiation, while on the other, continued to maintain internal discursive deliberations on the SGBV prohibition norm's meaning in the context of child soldiers' recruitment crimes even beyond the AC's reversal of the majority's ruling. Elisabeth Schauer, the Expert on Child Soldiers and Trauma, had provided the Court with her report and testified before the LRs jointly requested the legal re-characterization of the facts[2228]. The testimony of Kristine Peduto, the former Child Protection Adviser for MONUC, coincided with the internal deliberations upon the re-characterization issue [2229] . Furthermore, after Radhika Coomaraswamy's status was reclassified from the initially granted *amicus curiae* to that of an expert witness, which she had applied for just about couple of days before the LRs' request[2230], she additionally provided the Court with her testimony after the settlement of the re-characterization issue[2231]. This allowed her to pursue deliberating on the gender agenda within the courtroom, despite the ultimate denial of the LRs' request. That is, the expert witnesses' testimonies and their questioning by Judge Odio Benito before the LRs' joint request, along with and after the following proceedings contributed to the substantiation of gender justice arguments in discursive interactions on the elaboration of the SGBV prohibition norm's meaning in the context of child soldiers' recruitment crimes.

[2227] *Cp.* Günther (1988); Risse/Sikkink (1999); Risse (2000); Checkel (2005); Deitelhoff (2006); Wiener (2007, 2009); Wiener/Puetter (2009); Badescu/Weiss (2010); Deitelhoff/Zimmermann (2013)
[2228] ICC Doc. No. ICC-01/04-01/06-1729 from February 25, 2009; ICC Doc. No. ICC-01/04-01/06-1729-Anx1 from February 25, 2009; ICC Doc. No. ICC-01/04-01/06-T-166-ENG from April 7, 2009
[2229] Freedman (2017), 106-107
[2230] ICC Doc. No. ICC-01/04-01/06-T-176-Red2-ENG from May 19, 2009, 27
[2231] ICC Doc. No. ICC-01/04-01/06-T-223-ENG from January 7, 2010

5.2.4.4.1.3. Endogenous stimulation

5.2.4.4.1.3.1. The Office of the Prosecutor

In comparison to his previous rather vehement refusal to deal with issues of SGBV, the Prosecutor made significant (although apparently largely tactical) concessions in this respect in his opening statement. In fact, he admitted not only the validity of SGBV allegations, but also the potential applicability of the norm prohibiting SGBV conducts in ICL in some form in the context of this case, notwithstanding a missing indication of such allegations in his charging documents and indeed – as it turned out – any intention to amend them correspondingly. However, as previously discussed, the Prosecutor clearly neither knew how exactly the norm could have been appropriately applied in the context of the given case, nor did his Office possess sufficient evidence for doing so in an efficient way. Nevertheless, while entering into this bargaining process, the Prosecutor largely reflected the position of the UN SRSG Coomaraswamy[2232]. Although tactical, his concessions must have encouraged the LRs to pursue their resistance further beyond the merely discursive level[2233]. When they requested the *de-jure* consideration of sexual violence committed against child soldiers within the context of their recruitment on the procedural level[2234], the Prosecutor must have appeared to be in a somewhat delicate or awkward position. Apparently, due to the factors that restrained him from amending the charges, his strategy was instead to recognize the commission of SGBV against the child soldiers, yet, only *de-facto*, and to frame this as aggravating circumstances of the recruitment crimes. The OTP's support of the LRs' request and of the presentation of the views and interests of the victims in this respect corroborates the assumption that the Prosecution *de-facto* recognized the validity of their claims. Indeed, this support also contributed to the maintenance of the internal discursive deliberations on the elaboration of the SGBV prohibition norm's meaning and appropriate application in the context of child soldiers' recruitment crimes. On the other hand, the OTP's appeal of the majority's ruling and persistence upon non-extension of facts and circumstances described in the indictment corresponds with the suggestion that its staff was unprepared – substantially and conceptually – to the *de-jure* amendment of the charges with SGBV. This ultimately

[2232] *Cp.* Risse/Sikkink (1999); Risse (2000); Checkel (2001)
[2233] *Cp.* Risse/Sikkink (1999)
[2234] On discursive and procedural levels of influence see Keck/Sikkink (1998, 1999)

caused the procedural inadmissibility of the issue and therefore, the denial of the AC to allow any consideration of SGBV in the deliberations of the TC on the responsibility of the accused (as a co-perpetrator) for the commission of the child soldiers' recruitment crimes[2235].

5.2.4.4.1.3.2. The Judges

The ruling of the Trial Chamber's majority on the LRs' request undoubtedly likewise enabled the internal discursive deliberations on the SGBV prohibition norm's meaning and appropriate application in the context of this case to be maintained. Perhaps the civil law backgrounds of both Judge Odio Benito and Judge Blattman influenced their willingness to interfere with the investigatory issues of the case. Yet, due to the mixture of the ICC's legal framework, based on both civil and common law, their interpretation of its procedural law appeared to be overreaching, at least considering the Prosecutor's lack of intention to amend his charges in accordance with his concessions. Nonetheless, even if their interpretation of Regulation 55 was too broad, overstretching the Court's rules of legal procedure and evidence, in contrast to the PTC Judges, they took the risk and the issue seriously and approved the LRs' attempt to correct the unfair trajectory of the trial caused by the misrecognition of the gender-based characteristics and consequences of the crimes. Furthermore, while questioning the witnesses on issues of SGBV, Judge Odio Benito seems to have made use of the WIGJ's dossier, which had been attached to the case records during the pre-trial stage via the *amicus* mechanism[2236]. In contrast to the situation during the pre-trial stage, when the PTC denied WIs' *amicus* application which had essentially introduced the SGBV issue in the proceedings, the already emerged process of internal discursive deliberations on this issue since the beginning of the trial probably encouraged the TC's majority's support of the LRs' request[2237]. In fact, by the time of their request, this process was already ongoing and involved a number of actors, including the Prosecutor and the LRs themselves, who reflected the positions of the UN SRSG and WIGJ in their opening statements to the trial, which were then also corresponded by witnesses' testimonies. Considering this development, the TC's majority's reasoning on the LRs' following request

[2235] ICC Doc. No. ICC-01/04-01/06-2205 from December 8, 2009
[2236] Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018
[2237] *Cp.* Risse/Sikkink (1999)

was apparently predominantly guided by the logic of the appropriateness in terms of the SGBV prohibition norm's meaning in the context of the child soldiers' recruitment crimes. However, their ruling ultimately collided with other legal norms and principles of coherence and impartiality (specifically affecting the rights of the accused) in the overall legal context of the case, *i.e.*, it was insufficiently guided by the logic of the appropriate argumentation[2238]. Therefore, the unanimous decision of the Appeals Chamber that ultimately reversed the majority's ruling was certainly based on a number of reasonable grounds, including the lack of any reference to SGBV in the OTP's charging documents against the accused and his rights to a fair trial, the ultimate lack of the Prosecutor's intention to amend the indictment and his opposition towards any extension of the facts and circumstances described in the charges, not to mention the already tense context of the Court's first case. Unfortunately, despite its reasonableness, the Appeals Chamber's decision eventually excluded any *de-jure* consideration of SGBV and virtually pinned down further resistance efforts against the *de-jure* misrecognition dynamic in this case. While this dynamic entrapped the proceedings, the internal actors' engagement in the intersubjective discursive deliberations based on the logic of appropriate argumentation promoted their cultural validation of the SGBV prohibition norm and their reflective learning on its meaning and appropriate application in the context of child soldiers' recruitment crimes. This process ultimately held space for the reaffirmation of the norm's validity as well as *de-facto* recognition of its potential applicability, despite the simultaneously upheld dynamic of its *de-jure* misrecognition[2239].

5.2.4.4.2. Institutional and structural factors

A number of institutional and structural factors likewise facilitated the generation and maintenance of internal discursive interactions on the elaboration of the SGBV prohibition norm's meaning and appropriate application in the context of child soldiers' recruitment crimes. (1) The internal norm advocates' and their allies' access to institutional structures and

[2238] *Cp.* Günther (1988)
[2239] *Cp. ibid*.; Risse/Sikkink (1999); Risse (2000); Checkel (2005); Deitelhoff (2006); Wiener (2007, 2009); Wiener/Puetter (2009); Badescu/Weiss (2010); Deitelhoff/Zimmermann (2013)

their ability to trigger and partake in institutional procedures[2240], which took place in (2) "less politicized and more insulated, private [legal] settings"[2241] between (3) relatively equal positions of mutually respected participants[2242] undoubtedly played significant roles in this process. (4) The relative newness of the norm in ICL generally and specifically, (5) the lack of clarity on its application in the particular context of child soldiers' recruitment crimes, as well as (6) the newness of the environment, must have also contributed to the willingness of the involved actors to engage in processes of learning through discursive deliberations, which were increasingly based on the logic of appropriate argumentation, under the consideration of the principles of coherence and impartiality[2243]. In addition, (7) the "constructive ambiguit[ies]"[2244] embedded in the legal framework of the Court served the norm's advocates and their allies as a means of upholding those deliberations, even if they also needed to be interpreted and their meanings-in-use elaborated on considering the case in question. In fact, the interpretation of those provisions by the Legal Representatives and the majority of the Trial Chamber might have been too broad and, perhaps, doomed to being ultimately denied. Yet, despite the risks and uncertainties, (8) their interpretation turned out to be productive for the initiation of the processes through which they ultimately succeeded in influencing institutional communicative interactions with respect to the SGBV prohibition norm's appropriate application, not only on the discursive but also on the procedural level[2245]. With the support of their exogenous allies, they upheld the further evolution of the institutional socialization process with the appropriate application of the norm, which involved virtually all of the internal actors who participated in the trial.

5.2.4.4.3. Broader socio-political cleavages

Although the socio-political cleavages between the SGBV prohibition norm's advocates and their target actors continued to slow down the evolution of the socialization 'spiral', this impairment apparently began to decrease once the Prosecutor engaged in making tactical

[2240] *Cp.* Deitelhoff (2006)
[2241] Checkel (2001), 563
[2242] *Cp.* Risse (2000); Checkel (2001); Deitelhoff (2006)
[2243] *Cp.* Günther (1988); Checkel (2001)
[2244] Oosterveld (2014)
[2245] On discursive and procedural levels of influence see Keck/Sikkink (1998, 1999)

concessions, which were essentially framed from the human rights perspective. However, as the internal interactions on the elaboration of the norm's meaning and appropriate application in the context of the given case involved virtually all internal actors who participated in the trial with their respective interests and occurred not only on the discursive but also on the procedural level, which required deeds not words, the potential of those socio-political cleavages to influence actors' behaviour came to the fore again in light of some previously discussed institutional and structural factors. Although the procedural constraints were perhaps too powerful to allow for the consideration of the facts and circumstances that were not included in the indictment once the trial began, the Prosecutor did not even attempt to amend his charges with their inclusion in accordance with his rhetorical claims. What's more, the vehemently divergent, uncompromising positions between the Trial Chamber's majority and minority implied their varying perceptions of the urgency of the issue. While in their intersubjective deliberations, the actors mostly dealt with issues of procedural applicability, the ultimate lack of deeds by those who had authority and agency suggests their lack of seriousness towards the norm and the rights of the victims/survivors subjected to sexual violence within the context of their recruitment. On the other hand, actors' increasing engagement in the logic of appropriate argumentation, based on the principles of coherence and impartiality in the overall context of the case (*i.e.*, also with respect to the right of the accused to a fair trial) explains this behaviour, especially in view of conceptual uncertainties and the unpreparedness of the OTP to resolve them under the contextual pressure of the first case, its already delayed determination and expectations of the first conviction[2246]. When the issue of the *de-jure* modification of charges by the consideration of sexual violence offences was brought up, this represented a potential revision of outdated war crime protections comprised in IHL, from the more progressive human rights perspective, embracing non-discrimination based on such grounds as gender when applying and interpreting the law[2247]. However, ultimately this potential was only continually advocated for by gender justice advocates and their allies involved in intersubjective deliberations. Nonetheless, engagement from other internal actors and the resulting entanglements in the logic of appropriate argumentation were increasingly based on references to IHRL. This also provided fertile ground for increasing recognition and comprehensive integration of the human rights approach in the practice of the Court[2248]. In turn, this should continue shrinking the cleavages

[2246] *Cp.* Günther (1988)
[2247] Rome Statute (1998), Art. 21(3)
[2248] *Cp.* Risse/Sikkink (1999)

that contribute to misrecognitions of the SGBV prohibition norm in ICL and promote institutional socialization with its appropriate application.

5.2.5. Reaffirmation of the norm's validity and de-facto recognition of its applicability

5.2.5.1. Closing submissions

5.2.5.1.1. The Legal Representatives of the victims

Despite the decision of the Appeals Chamber that reversed the ruling of the Trial Chamber's majority on the LRs' joint request, in their closing submissions to the trial, they reiterated their appeal to the consideration of sexual violence committed against girl soldiers within the context of their recruitment as its purpose and consequence[2249]. Specifically, they emphasized the arguments that had been introduced in the proceedings by the UN SRSG Coomaraswamy with respect to the use of girl soldiers recruited in armed forces as sex slaves[2250]. Based on principles established by international and regional organizations that explicitly condemned and prohibited such offences, the LRs called on the Chamber to interpret the conduct of the *use of child soldiers to participate actively in hostilities* embraced in the recruitment crimes in a gender-sensitive way[2251]. They restated that during their military training, their female clients had been subjected to repeated rape and sexual violence by their commanders[2252]. They argued, as they had previously done in their joint request, that the factual elements of sexual slavery and inhuman and/or cruel treatment crimes were explicitly connected to the recruitment charges brought by the OTP against Thomas Lubanga. Therefore, despite the Appeals Chamber's decision, which had denied any consideration of these offences in the

[2249] ICC Doc. No. ICC-01/04-01/06-2744-Red-tENG from May 31, 2011
[2250] *Ibid*., para.10
[2251] *Ibid*., para.11
[2252] *Ibid*., para.40

deliberations on Lubanga's criminal responsibility as a co-perpetrator in the commission of the recruitment crimes, the LRs requested the Judges this time to take these offences into account while determining the sentence in case of conviction, either as "circumstances of manner" or as "aggravating circumstances" within the meaning of Rules 145(1)(c) and 145(2)(b) of Rules of Procedure and Evidence, a suggestion that was also supported by the Prosecution[2253].

5.2.5.1.2. The Office of the Prosecutor

In spite of the Appeals Chamber's decision, and virtually in contradiction with his own opposition against any extension of facts and circumstances described in the charges, Prosecutor Moreno Ocampo, on behalf of his Office, repeatedly referred to evidence of SGBV committed against girl soldiers within the context of their recruitment. In its closing brief, the OTP indicated that the conditions under which young girls had been held in the military camps were worse than for boys and that girl soldiers had been systematically raped and sexually misused in addition to other ill treatment imposed on all children, such as imprisonment, beatings and whippings[2254]. Based on witnesses' testimonies and the description of girls' "quite catastrophic psychological and physical state" the OTP stated that along with being subjected to military training, they "were assigned domestic chores and became the sexual slaves of the commanders"[2255] while their systematic sexual abuse, moreover, often resulted in pregnancies[2256]. Therefore, the Prosecutor called on Judges to apply a "wider interpretation" of the conduct of *use of child soldiers to participate actively in hostilities* in their adjudication by considering sexual violence offences committed against girl soldiers within its context[2257]. He argued that for the protection of girl soldiers "recruited for sexual purposes and forced marriage" the crime of *use* should be interpreted in accordance with the suggestion brought up by the UN SRSG/CAAC Radhika Coomaraswamy[2258]. Consequently, in the view of the Office, the term "child soldiers" should cover "all children

[2253] *Ibid*., paras.61-62
[2254] ICC Doc. No. ICC-01/04-01/06-2748-Red from June 1, 2011, para.18
[2255] *Ibid*., para.205, see also paras. 229, 231, 395, 405
[2256] *Ibid*.
[2257] *Ibid*., para.143
[2258] *Ibid*., paras.139-143

under the age of 18 who participate in any circumstances in an armed group or force" while legal protections from being recruited should "not [be] restricted to those children who actively fight, but rather […] includ[e] any child whose role is essential to the functioning of the armed group […] *or when individuals are used for sexual purposes, including by way of forced marriage*" (emphasis added)[2259].

5.2.5.2. Closing statements of the Participants

The closing statement of the Prosecution was introduced by the then Deputy Prosecutor Fatou Bensouda. While she emphasized that the international community provided the OTP with a special mandate "to pay particular attention to gender crimes and crimes against children"[2260], the Deputy Prosecutor claimed that according to the evidence heard during the trial "girls [had been] particularly singled out for particular abuse"[2261] committed in the UPC/FPLC forces, which included rape, sexual enslavement and forced marriage[2262]. She argued that those girls should not be exclusively considered "wives", but rather as the victims of recruitment crimes, in need of particular protection through demobilization programs and the Court[2263].

In this respect, bearing in mind the aforementioned closing brief of the OTP as well as the procedural restrictions and the absence of any mention of SGBV in the prosecutorial charging documents, Judge Odio Benito asked Deputy Prosecutor Bensouda to clarify how the Prosecution expected the Judges to consider the conducts committed under the alleged responsibility of the accused[2264]. Prosecutor Moreno Ocampo insisted on responding to this question personally[2265]. He declared his Office believed that girls had been raped and sexually enslaved within the context of their recruitment and that Thomas Lubanga bore responsibility for those crimes. Yet, the OTP did not possess the evidence that would have demonstrated the link between those crimes and the accused[2266]. Hence, the Prosecution decided to address the

[2259] *Ibid*., paras.139, 142; ICC Doc. No. ICC-01/04-01/06-2842 from March 14, 2012, paras.574, 577
[2260] ICC Doc. No. ICC-01/04-01/06-T-356-ENG from August 25, 2011, 9
[2261] *Ibid*.
[2262] Subsequently, Prosecutor Bensouda amended the indictments in the *Ntaganda* and *Ongwen* cases with the charges of these particular crimes, however, in two differing ways (see subchapters '5.2.7.1. *Ntaganda* case' and '5.2.7.2. *Ongwen* case')
[2263] ICC Doc. No. ICC-01/04-01/06-T-356-ENG from August 25, 2011, 10
[2264] *Ibid*., 53-54
[2265] *Ibid*., 54
[2266] *Ibid*.

issue "in a different way"[2267]. Based on the observations of the UN SRSG Coomaraswamy, Prosecutor Ocampo reaffirmed the importance of highlighting the gender-based nature of those crimes within the context of the recruitment "because if not […], the girls are considered wife [sic] and ignored as people to be protected and demobilised and cared [for]"[2268].

Following the OTP's statement, the Legal Representatives Paolina Massidda and Carine Bapita reiterated that girl soldiers had been used by UPC/FPLC commanders for purposes that went beyond traditional military tasks, *i.e.*, as sexual slaves, and as a result, often became pregnant. The LRs claimed that sexual violence also represented a direct consequence of the recruitment crimes committed against girls. Therefore, they again called upon the Chamber to recognize all SGBV imposed upon girl soldiers within their context as aggravating circumstances (while determining the sentence in case of conviction)[2269].

5.2.5.3. The Judgement

On March 14, 2012, the Trial Chamber I issued the first judgement of the ICC pursuant to Article 74 of the Rome Statute[2270], which stipulates that

> [a] decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.[2271]

The Judges unanimously found Thomas Lubanga Dyilo guilty as a co-perpetrator of war crimes of enlisting and conscripting children under the age of fifteen into the UPC/FPLC and using them to participate actively in hostilities within the meaning of Articles 8(2)(e)(vii) and 25(3)(a) of the Statute from early September 2002 to August 13, 2003[2272]. Moreover, they

[2267] *Ibid*.
[2268] *Ibid*.
[2269] *Ibid*., 59-60, 71
[2270] Article 74 of the Rome Statute (1998) defines the requirements for the decision, which includes the presence of all judges of the Chamber (Art. 74(1)), who should attempt to reach a unanimous decision, otherwise a majority ruling is also acceptable (Art. 74(3)).
[2271] Rome Statute (1998), Art. 74(2). Sergey Vasiliev elaborates that although the term "entire proceedings" was not defined by the legal instruments of the Court, "this element can be interpreted as requiring the Court to adopt a holistic approach to the evaluation of evidence when deciding on the merits of the case. The evaluation should be informed by the consideration of the procedural context in which the evidence is submitted and the conduct of the relevant actors in the courtroom, which are the pertinent aspects of 'entire proceedings'" (Vasiliev 2016).
[2272] ICC Doc. No. ICC-01/04-01/06-2842 from March 14, 2012, para.1358

established that due to their gender, additional tasks and injuries had been imposed upon girl soldiers within the context of their recruitment. Evidence heard during the trial revealed that while the UPC/FPLC commanders used them for the purposes of "domestic work", they were also subjected to rape and sexual violence[2273].

In its analysis on the issues of law, the Chamber referred to the statements made by the UN SRSG Coomaraswamy on the various forms of violence to which child soldiers are exposed within the context of their recruitment "includ[ing] rape, sexual enslavement and other forms of sexual violence"[2274]. The Judges noted her claim that "sexual exploitation of boys and girls by armed forces or groups constitute[d] an 'essential support function'" within the meaning of the *use of child soldiers to participate actively in hostilities*[2275]. They argued however, that according to the ruling of the Appeals Chamber, the decision of the Trial Chamber may not "exceed the facts and circumstances […] described in the charges and any amendments to them"[2276]. Therefore, they ruled that "facts relating to sexual violence [that] were not included in the Decision on the Confirmation of Charges" were irrelevant in this case and it would have been "impermissible for the Chamber to base its Decision pursuant to Article 74(2) on the evidence introduced during the trial"[2277].

As a consequence and in spite of their previous recognition that children under fifteen years who were either enlisted, conscripted or used to participate actively in hostilities were victims of those crimes independent from the role they exercised in the armed forces[2278], the TC's majority, constituted by Judge Fulford and Judge Blattmann, denied defining the crimes in a way that would have reflected the subjection of girl soldiers to sexual violence, inherent to their recruitment and due to their gender. While defining the *use* element of the recruitment crimes in the judgement, the Judges switched to the traditional understanding of the war crimes concept and, guided by its logic, determined that the "decisive factor" was "whether the support provided by the child to the combatants exposed him or her to real danger by becoming a potential target"[2279]. However, although they eventually only considered activities such as participation in fighting and body- and military guarding in this definition, they did also mention that girl soldiers had been additionally obliged to execute domestic work and

[2273] *Ibid*., para.913
[2274] *Ibid*., para.606
[2275] *Ibid*., para.630
[2276] *Ibid*.
[2277] *Ibid*.
[2278] ICC Doc. No. ICC-01/04-01/06-1556-Corr-Anx1 from December 15, 2008, para.103
[2279] ICC Doc. No. ICC-01/04-01/06-2842 from March 14, 2012, para.820

cooking[2280]. Furthermore, along with brutal beatings for misconduct and disobedience that sometimes led to deaths[2281], the Chamber likewise addressed issues of sexual violence under the *Conditions of use of child soldiers* [2282]. The section dealing with sexual violence sketched, *inter alia*, the testimony of the OTP's expert witness Kristine Peduto, who had been involved in the child protection program of the MONUC in Bunia and in the process of demobilization of children recruited by the UPC/FPLC during the period of time covered by the charges. Based on her testimony, which was described as "detailed, credible and reliable, particularly when it was based on her personal experience of working with demobilised children in the region"[2283], the section indicated that the children had "provided her with a clear account of systematic sexual violence in the camps"[2284] and "all the girls she met in the demobilisation centres, except for a few, who had been protected by certain women in the camps, told [her] that they had been sexually abused, most frequently by their commanders but also by other soldiers"[2285]. Furthermore, it was noted that some girls became pregnant, which then resulted in abortions because otherwise they would have been "thrown out of the armed group and ended up on the streets of Bunia"[2286]. The judgement also referred to the testimony of a former FPLC high-ranking official whose tasks included "giving instructions to children" while they were undergoing military training[2287]. He told the Court that recruits had been raped by trainers, guards, and also the commander of the training centre. Apparently, it was "common practice amongst some high-ranking UPC officials [to use] young girl recruits as domestic servants in their private residences", which implied that they were also sexually abused there[2288].

By addressing those claims in the judgment, despite the aforementioned ruling of the Appeals Chamber, the Judges indicated their reaffirmation of the SGBV prohibition norm's validity and *de-facto* recognition of its applicability to the recruitment crimes. Nonetheless, the absence of such allegations in the OTP's charges against the accused and in the PTC's decision on their confirmation created a procedural burden for the *de-jure* consideration of SGBV offences committed against child soldiers within the context of their recruitment in the Chamber's decision on the responsibility of the accused[2289]. Moreover, the Judges implied

[2280] *Ibid*., paras.878-882
[2281] *Ibid*., paras.883-889
[2282] *Ibid*., 363-397
[2283] *Ibid*., para.645
[2284] *Ibid*., para.891
[2285] *Ibid*., para.890
[2286] *Ibid*., paras.890-891
[2287] *Ibid*., paras.683-684
[2288] *Ibid*., para.892
[2289] *Ibid*., paras.629-630, 890-896, 913

that the OTP might have had a possibility to correct this trajectory during the trial in the context of the Legal Representatives' joint request to modify the legal characterization of the facts and circumstances described in the charges[2290]. Yet, the Prosecutor appealed the majority's ruling in respect to this request and raised objections to any factual amendment of the indictment:

> Not only did the prosecution fail to apply to include rape and sexual enslavement at the relevant procedural stages, in essence it opposed this step. It submitted that it would cause unfairness to the accused if he was tried and convicted on this basis.[2291]

Hence, the Chamber declared that it found itself unable to make "any findings of fact on this issue, particularly as to whether responsibility is to be attributed to the accused"[2292]. However, it came to the conclusion that the evidence of sexual violence might be considered in due course, during the sentencing and reparations stages of the proceedings[2293].

5.2.5.3.1. Separate and dissenting opinion of Judge Elizabeth Odio Benito

Judge Elizabeth Odio Benito, a feminist and human rights lawyer from Costa Rica, stood at the forefront of the SGBV prohibition norm's emergence during international human and women's rights conferences in early-mid 1990s[2294]. Likewise, as one of the first two female Judges at the ICTY, she significantly contributed to the further evolution of the norm by co-designing gender sensitive rules in the tribunal's legal procedure and enforcing the development of international gender justice jurisprudence[2295]. By the time of the negotiations in Rome, this jurisprudence served as a reference for the participating gender justice advocates, who were promoting the inclusion of SGBV and gender sensitive provisions in the Statute of the future ICC[2296]. Ironically, while sitting on the bench of its first case, stemming from "the rape capital of the world"[2297], in the context of which, as Freedman mentioned,

[2290] *Ibid*., para.629
[2291] *Ibid*.
[2292] *Ibid*., para.896
[2293] *Ibid*., paras.631, 896
[2294] Green *et al*. (1994)
[2295] Mertus *et al*. (2004)
[2296] *Cp*. Green *et al*. (1994); Askin (1997); Bedont/Hall Martinez (1999); Copelon (2000); Goldstone (2002); Glasius (2002); Mertus *et al*. (2004); Oosterveld (2005b)
[2297] Wallström, cited in United Nations (2010), n.p.; also in Inder (2011), n.p.

everybody knew SGBV had been perpetrated systematically and on a large scale[2298], she faced the misrecognition of progressive gender provisions embraced in the legal framework of the Court. In this situation, it seems she did all she could in order to demonstrate the inappropriateness of this misrecognition.

Notably, Judge Odio Benito's method of witness questioning during the trial appeared to make use of the dossier submitted to the Court by WIGJ with their *amicus curiae* application in the pre-trial stage[2299]. In fact, although Judge Blattmann also initially supported the joint request of the LRs, it was her voice raising from the bench seemingly at every opportunity to ask questions that empowered and allowed witnesses to tell the Court about SGBV committed against child soldiers by Lubanga's forces[2300]. As Freedman noticed, she was the only person on the bench who "dared to defy Judge Fulford's ban on the subject of sexual violence against girls"[2301]. Even if procedural restrictions prevented this from occurring often, "when the subject came up, she would boldly put forward a question about girl recruits and what had happened to them [while] Judge Fulford had little choice but to cede her the floor"[2302]. In spite of both the Appeals Chamber's ruling, which virtually prohibited the consideration of SGBV issues, and the risk of being blamed as biased, which could have damaged her judicial image, Judge Odio Benito pursued maintaining discursive deliberations on the SGBV prohibition norm's meaning and appropriate application in the context of child soldiers' recruitment crimes, which eventually contributed to the reaffirmation of its validity and *de-facto* recognition of its applicability.

Significantly, while the majority of the Trial Chamber refused to enter the legal definition of the child soldiers' recruitment crimes, despite its absence in the statutory framework of the Court, and instead decided to leave the issue to case-by-case analysis, Judge Odio Benito disagreed with them and explained her deliberations in her dissent to the judgement[2303]. In her opinion, the Chamber needed to differentiate between the legal definition of the crimes and the evaluation of the case[2304]. The denial of the majority to enter their "comprehensive legal definition" would have left this open and thus dependent on charges brought by the OTP in

[2298] Freedman (2017)
[2299] Interview with C. (an actor from the international civil society, who worked with the WIGJ), The Hague, December 2018 (anonymized)
[2300] As previously mentioned, Judge Odio Benito repeatedly asked the witnesses to tell the Court about gender-specific treatment of girl and boy soldiers in Lubanga's forces and about sexual violence, to which they had been allegedly subjected during their recruitment. Furthermore, Louise Chappell identifies that out of the 133 questions that Judge Odio Benito addressed to the Prosecution's witnesses, 107 were about sexual and gender-based violence, especially committed against girls (2016, 112-113).
[2301] Freedman (2017), 169
[2302] *Ibid*.
[2303] ICC Doc. No. ICC-01/04-01/06-2842 from March 14, 2012, 608, paras.2-4
[2304] *Ibid*., 609, para.5

future cases[2305]. Judge Odio Benito claimed that the Chamber would thus fail to appropriately interpret the provisions of the Rome Statute (which aim at the protection of children's rights in armed conflicts) and by doing so, "step backwards in the progressive development of international law"[2306]. She argued that the failure of the Prosecutor to submit SGBV allegations "as separate crimes or rightfully includ[e] them as embedded in the crimes of which Mr. Lubanga […] [was] accused" was "irrelevant" when it came to the responsibility of the Chamber to consider "the harm suffered by the victims as a result of the crimes"[2307], and to legally unveil SGBV as inherent to the nature of these crimes by entering their legal definition[2308]. That is, she argued the Chamber was obliged to define the crimes independently from the charges brought by the OTP against the accused, "taking into consideration other applicable law", in accordance with Art. 21(3) of the Rome Statute, which stipulates consistency with internationally recognized human rights while interpreting and applying the law[2309]. Judge Odio Benito framed her argumentation from the human rights perspective and referred in this respect to the principles developed on international and regional levels as previously cited by the UN SRSG Radhika Coomaraswamy, the LRs of the victims and the Prosecutor. These include the *Cape Town Principles and Best Practices on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa* from 1997, the African Union's *Solemn Declaration on Gender Equality in Africa* from 2004, and the *Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups* from 2007[2310]. Likewise, she referred to international and regional treaties that should protect the rights of the child and prohibit the recruitment of children, including the *African Charter on the Rights and Welfare of the Child* from 1990, the *Convention on the Rights of the Child* from 1989, its *Optional Protocol on the Involvement of Children in Armed Conflict* from 2000, and the *Worst Forms of Child Labour Convention* of the International Labour Organization from 1999[2311]. She stated that all these instruments aimed at protection of children from numerous risks and threats, including SGBV, to which they are inevitably exposed in armed conflicts[2312], and declared that it would be

> contrary to the "object and purpose" of the Rome Statute, contrary to international recognised human rights and discriminatory under Article 21(3), not to define the legal concepts of enlistment, conscription and use to participate actively in the hostilities, independently of the

[2305] *Ibid*., 610, para.7
[2306] *Ibid*.
[2307] *Ibid*., 610-611, para.8
[2308] *Ibid*., 614-615, para.20
[2309] *Ibid*., 609-611, paras.6-8
[2310] *Ibid*., 609-610, para.6
[2311] *Ibid*.
[2312] *Ibid*.

evaluation of the evidence tendered during trial or the scope of the charges brought against the accused.[2313]

While requesting the entering of the legal definition of all three conducts of the recruitment crimes and by doing so, calling for the consideration of the harm suffered by the victims as a result of these conducts[2314], Judge Odio Benito further focused on the element of the use of child soldiers to participate actively in the hostilities[2315]. She emphasized that while sexual violence committed against both girls and boys was inherent to all elements of recruitment, its fundamental nature came to the fore especially in light of the girls' use as sexual slaves and/or "forced wives" by members of armed groups, which provided their forces with "essential support"[2316]. That is, while sexual violence and enslavement were inflicted upon them as a consequence of all three conducts of the recruitment crimes, these offences often simultaneously represented the very purpose of the girls' *use*[2317]. Judge Odio Benito stated that sexual violence was thus "embedded in the enlisting, conscription and use of children under 15 in hostilities", that it should be recognized "as a failure to afford […] protection" and as such – whether committed within or outside the armed group – constituted war crimes[2318]. She claimed that it would be "discriminatory to exclude sexual violence which shows clear gender differential impact from being a bodyguard or porter which is mainly a task given to young boys"[2319]. In this regard, Judge Odio Benito also tackled the problematic related to the traditional understanding of the war crimes concept, whose restrictedness was made clear in the context of the recruitment crimes against children and needed to be redefined from the human rights perspective. She claimed that children are entitled to protection from recruitment, independently from the specific roles that would place them at risk of becoming an adversary's potential military target. This protection also embraces violations of children's fundamental rights, to which they would be inevitably subjected in an armed group that recruited them, *i.e.*, violations committed within the armed forces to which they belonged[2320]. Furthermore, while she stated that the invisibility of sexual violence within the crime's legal concept would predictably lead to discrimination of those who had suffered it, Judge Odio Benito also highlighted gender-specific consequences and complications such as unwanted pregnancies, deaths, HIV and other diseases, psychological traumatization and social stigmatization that would be unavoidably inflicted upon girl soldiers through their

[2313] *Ibid*.
[2314] *Ibid*., 608-611, paras.2-8
[2315] *Ibid*., 613-615, paras.15-21
[2316] *Ibid*., 614-615, para.20
[2317] *Ibid*., 615, para.21
[2318] *Ibid*.
[2319] *Ibid*.
[2320] *Ibid*., 614, paras.18-19

subjection to sexual violence and argued that these aspects should be taken into consideration[2321]. While she mainly focused her dissent on the responsibility of the Chamber to define the recruitment crimes against children with consideration of the inherent nature of sexual violence to these crimes, independently from the OTP's charges, she likewise underlined that the Chamber could have evaluated sexual violence crimes as "distinct and separate crimes" if the Prosecutor had brought corresponding charges[2322].

5.2.5.4. The Prosecution's sentence request

In its subsequent sentence request, the Prosecution once again broadly referred to rape and sexual violence committed against girl soldiers during their recruitment in the UPC/FPLC forces[2323]. Based on the testimony given by the expert witness Elisabeth Schauer, the OTP also elaborated upon the impact of rape and sexual violence on (former) child soldiers[2324]. The Prosecution noted that "the Chamber recounted the evidence given by witnesses deemed to be reliable and credible on sexual violence and rape" and that the Chamber raised the possibility of its consideration at the sentencing stage[2325]. They submitted that the offences inflicted upon girl soldiers within the context of virtually all recruitment conducts[2326] demonstrated "that the crimes were committed with particular cruelty and against victims who were particularly defenceless, as contemplated in Rule 145(2)(b)(iii)"[2327] and should be therefore treated as an aggravating factor at the sentencing stage[2328]. Furthermore, the OTP argued that rape, sexual violence and "conjugal subservience" including forced marriage and domestic work were explicitly committed against female child soldiers and were thus "under international human rights standards" gender-based in their nature[2329]. In this respect, the Prosecution claimed that Article 21(3) of the Rome Statute obliges the Court to apply and interpret the law "without adverse distinction on specific grounds – such as gender – and to be

[2321] *Ibid*., 613-615, paras.16, 20-21
[2322] *Ibid*., 614-615, para.20
[2323] ICC Doc. No. ICC-01/04-01/06-2881 from May 14, 2012
[2324] *Ibid*., para.23
[2325] *Ibid*., para.30
[2326] *Ibid*., paras.31-34
[2327] ICC ASP (2002a), Rule 145(2)(b)(iii) stipulates that "Commission of the crime where the victim is particularly defenceless" may constitute aggravating circumstances.
[2328] ICC Doc. No. ICC-01/04-01/06-2881 from May 14, 2012, para.31
[2329] *Ibid*., paras.35-36

consistent with internationally recognized human rights" [2330] while Rule 145(2)(b)(v) additionally outlines that "[c]ommission of the crime for any motive involving discrimination" – such as gender-based discrimination – may constitute aggravating circumstances[2331].

5.2.5.5. The sentencing decision

In its sentencing decision[2332] that followed on July 10, 2012, the Chamber "strongly deprecate[d] the attitude of the former Prosecutor in relation to sexual violence"[2333]: while he refrained from charging Thomas Lubanga with such offences, he extensively referred to them in his opening submissions; likewise, while he actively pursued opposing the amendment of his indictment with those allegations during the proceedings, he once again highlighted issues of sexual violence in his closing submissions and insisted on their consideration in the sentencing judgement as aggravating circumstances[2334]. Nevertheless, in spite of the absence of any mention of sexual violence in the charging documents and in the Confirmation of Charges Decision, as well as of the Appeals Chamber's ruling on the LRs' request[2335], the Trial Chamber, by majority consisting of the Presiding Judge Fulford and Judge Blattmann, argued that it might be entitled to consider sexual violence committed against child soldiers within the context of their recruitment in their sentencing decision. They deliberated about this consideration under Rule 145(1)(c) as (i) the harm suffered by the victims by taking into account (ii) the nature of the unlawful behaviour and (iii) the circumstances of manner (under which the crimes were committed), as well as under Rule 145(2)(b)(iv) on the commission of the crime with particular cruelty[2336]. However, such a consideration stipulated that the Judges would have had to have been "satisfied beyond reasonable doubt" that 1) child soldiers under fifteen had been subjected to sexual violence and 2) that the responsibility for its commission

[2330] *Ibid*., para.35
[2331] ICC ASP (2002a), Rule 145(2)(b)(v) stipulates that "Commission of the crime for any motive involving discrimination on any of the grounds referred to in Article 21, paragraph 3" may constitute aggravating circumstances.
[2332] According to Article 76(1) of the Rome Statute (1998) "the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence". Article 76(2) furthermore states that "the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence" (Rome Statute, 1998).
[2333] ICC Doc. No. ICC-01/04-01/06-2901 from July 10, 2012, para.60; *cp.* Chappell (2016), 113-114
[2334] ICC Doc. No. ICC-01/04-01/06-2901 from July 10, 2012, paras.60-62
[2335] In fact, as Nina H.B. Jorgensen noted, the decision of the AC finally created "a legal impediment to the consideration of the evidence of sexual violence in the Lubanga case which in the event tied the hands of the Trial Chamber at both the judgement and the sentencing stage" (2012, 665).
[2336] ICC Doc. No. ICC-01/04-01/06-2901 from July 10, 2012, para.67

could be attributed to the accused[2337]. In this respect they ultimately ruled that they were "unable to conclude that sexual violence against the children who were recruited was sufficiently widespread that it could be characterized as occurring in the ordinary course of the implementation of the common plan for which Mr Lubanga is responsible", and that "nothing suggest[ed] that Mr Lubanga ordered or encouraged sexual violence, that he was aware of it or that it could otherwise be attributed to him in a way that reflects his culpability"[2338]. The Judges indicated that although the Prosecutor could have introduced evidence in this regard during the sentencing stage[2339], he failed to do so, which left the majority unconvinced that the link between sexual violence and Lubanga's role in its commission within the context of the charges against him was beyond reasonable doubt[2340]. In their decision, the Judges also noted the submissions by the LRs of the victims and the OTP on the discriminatory motive on the basis of gender that had underlain the committed crimes and caused gender-specific harm to female victims of rape, sexual violence and "conjugal subservience", which should be treated as an aggravating factor[2341]. However, once again, since the Chamber was not provided with any evidence of deliberate discrimination against girls in perpetrating sexual violence offences within the context of the charges against the accused, the majority refused to treat this alleged motive as an aggravating circumstance[2342]. While issuing its sentencing decision, the majority differentiated between the conducts: for enlistment, Lubanga was sentenced with twelve years of imprisonment, for the conscription, thirteen, and the use of children under the age of fifteen to participate actively in hostilities, with fourteen years of imprisonment, *i.e.*, they adjudged Lubanga to the overall sentence of fourteen years of imprisonment[2343]. As to the issues of sexual violence, the Judges did, as Louise Chappell put it, "leave the door open"[2344] to possibly take these into account at the reparations stage[2345]. Fabricio Guariglia suggests that the consideration of sexual victimization as aggravating circumstance "would have been an appropriate result in that case in those circumstances"[2346]. He agreed however, that by then the Chamber had, unfortunately but understandably, "already lost credibility in [the OTP's] approach" to SGBV committed against child soldiers[2347].

[2337] *Ibid*., paras.68-69
[2338] *Ibid*., paras.74-75
[2339] According to Article 76(2) of the Rome Statute (1998)
[2340] ICC Doc. No. ICC-01/04-01/06-2901 from July 10, 2012, para.75
[2341] *Ibid*., para.79
[2342] *Ibid*., para.81
[2343] *Ibid*., paras.98-99
[2344] Chappell (2016), 114
[2345] ICC Doc. No. ICC-01/04-01/06-2901 from July 10, 2012, para.76
[2346] Interview with F. Guariglia (ICC OTP), The Hague, December 2018
[2347] *Ibid.*

5.2.5.5.1. Dissenting opinion of Judge Elizabeth Odio Benito

Judge Elizabeth Odio Benito dissented with the decision of the majority not to consider the effects produced by sexual violence in the sentencing decision[2348]. She agreed that "no aggravating circumstances [were] to be considered"[2349], however, she disagreed with the disregard of "the damage caused to the victims and their families, particularly as a result of the harsh punishments and sexual violence"[2350], the consideration of which had been previously requested by their LRs based on Rule 145(1)(c) of Rules of Procedure and Evidence[2351]. She argued that the Chamber had received "ample evidence" on harm inflicted upon child soldiers by sexual violence, which it had "the authority and the obligation" to consider when determining the sentence[2352]. In this respect, she also referred to the testimonies of the expert witnesses Schauer, Peduto and Coomaraswamy on the harm that had been caused to the victims and their families specifically by rape and sexual violence[2353]. She stressed that according to their testimonies, girl soldiers were particularly and unavoidably subjected to various SGBC "on a regular basis" and cited Elisabeth Schauer on this matter:

> sexual violence, including torture, rape, mass rape, sexual slavery, enforced prostitution, forced sterilization, forced termination of pregnancies, giving birth without assistance and being mutilated are some of the key gender-based experiences of both women and girls during armed conflicts.[2354]

Judge Odio Benito also emphasized that pursuant to the testimony given by Schauer, children born of rape suffered from "transgenerational effects" of crimes that had been committed against their mothers[2355]. Moreover, with regard to the issue of the "deliberate discrimination against women" she claimed that even if the accused had not had such intent, his crimes led to discrimination that was reflected in the specific targeting of girls and, in turn, caused a number of gender-specific consequences, which

> impair[ed] and most likely nullif[ied], perhaps for the rest of their lives, the enjoyment of other human rights and fundamental freedoms […], (including *inter alia*, their right to

[2348] ICC Doc. No. ICC-01/04-01/06-2901 from July 10, 2012, 43, para.7; 49, para.19; 50, para.22; Chappell noted that Judge Odio Benito's dissenting opinion provoked a backlash and contestation from the commentators, who asserted that her line of questioning the witnesses during the trial and her argumentation for the consideration of sexual violence in the sentencing decision were prejudiced (2016, 115-116).
[2349] ICC Doc. No. ICC-01/04-01/06-2901 from July 10, 2012, 41, para.1
[2350] *Ibid*., 41, para.2; According to Rule 145(1)(c) when determining the sentence, the Chamber may "give consideration, *inter alia*, to the extent of the damage caused, in particular the harm caused to the victims and their families" (ICC ASP, 2002a).
[2351] ICC Doc. No. ICC-01/04-01/06-2744-Red-tENG from May 31, 2011, paras.61-62
[2352] ICC Doc. No. ICC-01/04-01/06-2901 from July 10, 2012, 42, para.6; 43, para.8
[2353] *Ibid*., 43-46, paras.9-13; 47-48, paras.16-17
[2354] *Ibid*., 45-46, para.13
[2355] *Ibid*., 49, para.19

education, their right to health, including sexual and reproductive health, and their right to a family life).[2356]

As to the calculation of the sentence, Judge Odio Benito contested the method of the majority; she argued that all three conducts had subjected children to "severe physical and emotional harm and death" and suggested to sentence Thomas Lubanga to fifteen years for each of the recruitment conducts equally, and to the total joint sentence of fifteen years of imprisonment[2357].

5.2.5.6. The summary

5.2.5.6.1. The constellation of the involved actors

Despite the cascade of *de-jure* misrecognition, the persistent resistance of gender justice advocates and their allies facilitated the further evolution of their target actors' socialization with the appropriate application of the SGBV prohibition norm. Indeed, virtually all participants but the Defence reaffirmed the validity of the norm in the context of the recruitment crimes and *de-facto* recognized its applicability under the fulfilment of procedural appropriateness. That is, while the internal advocates of the norm and their ally Judge Odio Benito pursued resisting the norm's misrecognition and insisting upon its validity and applicability until the end of the proceedings (despite potential collisions with rules of legal procedure), their agency, supported by the expert witnesses' testimonies and exercised through the continuation of intersubjective deliberations on the norm's meaning-in-use and potential application, allowed them to uphold their agenda, to maintain the entrapment of the other actors involved in the trial in this discursive dynamic and to enable the furtherance of the 'spiral'[2358]. While they used the knowledge, expertise, and in some cases also authority of their external allies (by referring to the statements of the UN SRSG Coomaraswamy), they acted on their own behalf and, using their structural power, pursued entangling their target

[2356] *Ibid*., 50, para.21
[2357] *Ibid*., 51-52, paras.24-27
[2358] *Cp.* Risse/Sikkink (1999); Wiener (2007)

actors in argumentative rationality, framed from the human rights perspective[2359]. Although the deliberations on the appropriate application of the norm in the context of the recruitment crimes still reflected some ambiguity and need for further clarification, the target actors appeared to become successively entrapped in this perspective rather than the traditional IHL logic and, indeed, persuaded in its appropriateness in the given context.

It was significant that the LRs insisted on the consideration of sexual violence committed against their clients as both the purpose and consequence of their recruitment. Using symbolic and accountability tactics[2360], the LRs argued that their clients were suffering severe harm as a consequence of the sexual violence inflicted upon them within the context of the distinctive conducts of enlistment, conscription and use, and called upon the Judges to consider this harm in their judgement. Likewise, through their references to the statements of the UN SRSG Coomaraswamy, they used leverage politics[2361] and called upon the Chamber to interpret the *use* conduct of the recruitment crimes in a gender-sensitive way and to look at sexual violence within its definition in order to appropriately reflect the purpose of this conduct[2362].

Even more significant, perhaps, was the norm advocates' main target actor's adoption of a similar approach in his closing submissions and statements. In fact, the Prosecutor engaged in similar symbolic, accountability and leverage tactics in his extensive references to rape, sexual slavery and forced marriage offences committed against girls as a consequence of all recruitment conducts[2363]. Furthermore, by making references to the arguments of the UN SRSG Coomaraswamy on the *use* of girls in armed forces, he also reflected the nature of sexual violence as purpose and insisted on its consideration and on a "wider" gender-based interpretation of the element of the *use* in the judgement[2364]. Notably, in the process of evolving understanding of the SGBV prohibition norm's meaning and appropriate application, the OTP continuously and increasingly engaged in argumentative rationality framed from the human rights perspective and emphasized the prohibition of gender-based discrimination, embraced both in this perspective and in the Statute, when applying and interpreting the law[2365]. The statements of Prosecutor Ocampo on SGBV were also supported in the open session by his then Deputy Prosecutor, Fatou Bensouda, who stressed that the

[2359] *Cp.* Keck/Sikkink (1998, 1999); Risse/Sikkink (1999); Risse (2000)
[2360] *Cp.* Keck/Sikkink (1998, 1999)
[2361] *Ibid*.
[2362] ICC Doc. No. ICC-01/04-01/06-2744-Red-tENG from May 31, 2011, paras.10-11, 40; ICC Doc. No. ICC-01/04-01/06-T-356-ENG from August 25, 2011, 59-60, 71
[2363] ICC Doc. No. ICC-01/04-01/06-2748-Red from June 1, 2011, paras.18, 205, 229, 231, 395, 405; ICC Doc. No. ICC-01/04-01/06-2881 from May 14, 2012, paras.23, 32-33
[2364] ICC Doc. No. ICC-01/04-01/06-2748-Red from June 1, 2011, paras.139-143
[2365] Rome Statute (1998), Art. 21(3); ICC Doc. No. ICC-01/04-01/06-2881 from May 14, 2012, paras.35-36

Court has been mandated "to pay particular attention to gender crimes and crimes against children"[2366], the crimes that were going to become the priorities of the OTP under her upcoming lead. By making those statements, the OTP reaffirmed the validity of the SGBV prohibition norm and *de-facto* recognized its applicability in the context of the recruitment crimes. However, its argumentation still reflected some confusion about the appropriate application of the norm. Indeed, apart from the lack of evidence of a link to the accused, as Fabricio Guariglia explained, the understanding of the norm's application in the context of the recruitment crimes and in the light of the war crimes concept was rather ambiguous at that period of time within the OTP[2367]. Furthermore, as the intersubjective discursive deliberations on its appropriate application have demonstrated, for any *de-jure* consideration of the norm in the judgement, the OTP would have had to amend its charging documents respectively, which it ultimately did not do.

The Judges of the Trial Chamber, all of whom blamed the OTP and specifically Prosecutor Ocampo for his inconsistent approach to sexual violence, were divided in their opinions on the potential *de-jure* application of the norm. Yet, they all reaffirmed its validity and *de-facto* recognized its applicability to the recruitment crimes. While the majority decided to stick with procedural consistency and the ruling of the Appeals Chamber and was ultimately unwilling to consider sexual violence in any form[2368], Judge Odio Benito criticized their attitude and pursued maintaining the discursive deliberations on alternative possibilities to apply the norm in the context of the given case. She continued to deliberate on its meaning within the legal definition of the recruitment crimes independently from the responsibility of the accused in the given case[2369]. While doing so, she also framed her argumentation from the human rights perspective[2370], emphasizing the damage imposed by SGBV on the victims and their families[2371] and claimed that it would be discriminatory to exclude SGBV from the legal definition of the crimes[2372]. She also emphasized that sexual violence as a consequence was inherent to all recruitment conducts[2373] while it also represented a purpose within the meaning

[2366] ICC Doc. No. ICC-01/04-01/06-T-356-ENG from August 25, 2011, 9
[2367] Interview with F. Guariglia (ICC OTP), The Hague, December 2018
[2368] ICC Doc. No. ICC-01/04-01/06-2842 from March 14, 2012, para.629; ICC Doc. No. ICC-01/04-01/06-2901 from July 10, 2012, paras.75, 79, 81
[2369] ICC Doc. No. ICC-01/04-01/06-2842 from March 14, 2012, 608-611, paras.2-8
[2370] *Ibid*., 609-611, paras.6-8
[2371] ICC Doc. No. ICC-01/04-01/06-2901 from July 10, 2012, 41, para.2
[2372] ICC Doc. No. ICC-01/04-01/06-2842 from March 14, 2012, 615, para.21; ICC Doc. No. ICC-01/04-01/06-2901 from July 10, 2012, 50, para.21
[2373] ICC Doc. No. ICC-01/04-01/06-2842 from March 14, 2012, 610-611, 614-615, paras.8, 20

of the *use* of girl soldiers and referred in this respect to the argumentation of the UN SRSG Coomaraswamy[2374].

These reaffirmations and recognitions with regard to the validity and applicability of the SGBV prohibition norm, specifically within the OTP but also the Chamber, demonstrated significant changes in actors' attitudes towards the norm, which were not limited to the discursive level[2375]. The OTP made actual (albeit compromised and insufficient) attempts to allow the *de-jure* application of the norm on the procedural level[2376]. Also, the majority of the TC took its application into consideration with respect to the sentencing decision[2377]. This emerging transformation through processes of learning and reflective socialization with the appropriate application of the norm was generated and maintained by gender justice advocates' and their allies' resistance against its misrecognition, through intersubjective discursive deliberations, which were increasingly based on the logic of appropriate argumentation. This was informed by the human rights approach and contributed to actors' developing understanding of the SGBV prohibition norm's meaning and appropriate application both generally, and specifically in the context of the given case, through the consideration of all its relevant facts and characteristics, *i.e.*, in accord with the principles of coherence and impartiality[2378].

5.2.5.6.2. Institutional and structural factors

Although the advocates of gender justice could ultimately only partially achieve their goals, by persistently contesting the unjust trajectory of the trial, they managed to insert and maintain intersubjective deliberations that, despite applicatory constraints, facilitated their target actors' recognition of the validity of their concerns on both discursive and procedural levels[2379]. In fact, despite the *de-jure* misrecognition of the SGBV prohibition norm, their interventions, which were framed from the human rights perspective, eventually contributed

[2374] *Ibid*., 613-615, paras.15-21
[2375] On levels of influence see Keck/Sikkink (1998, 1999)
[2376] ICC Doc. No. ICC-01/04-01/06-2881 from May 14, 2012, para.31
[2377] ICC Doc. No. ICC-01/04-01/06-2901 from July 10, 2012, para.67
[2378] *Cp.* Günther (1988); Risse/Sikkink (1999); Risse (2000); Checkel (2005); Badescu/Weiss (2010); Deitelhoff/Zimmermann (2013)
[2379] On levels of influence see Keck/Sikkink (1998, 1999)

to the reaffirmation of its validity and *de-facto* recognition of its applicability to the recruitment crimes also from the ICL perspective, in spite of potential collisions with traditional IHL understandings. This effect was significantly enabled by (1) the access of the norm's internal advocates and their allies to the institutional structures of the Court and thus, their agency to influence discursive deliberations within the courtroom[2380]. To meet their aims, the advocates of the norm, their ally Judge Odio Benito, and eventually also the OTP engaged in (2) the interpretation of the provisions embedded in the legal framework of the Court by means of argumentative rationality, framed from the human rights perspective[2381]. Simultaneously, (3) the "constructive ambiguit[ies]"[2382] inherent to those provisions allowed for the maintenance of deliberations on the appropriate application of the norm within their meaning and in the context of the given case. Although confusion with respect to the norm's meaning in the context of the recruitment crimes was still evident to some extent, the actors recognized general applicability of the norm in one or another or in several ways, which, in turn, revealed (4) the continual replacement of their internalized informal rules with new formal ones and (5) their advancing socialization, not only with the validity but also the appropriate application of those rules[2383]. Ironically, it was perhaps, of all things (6) the intersection of the SGBV prohibition norm with the prohibition of child soldiers' recruitment that enabled this effect, due to (7) the exposed inherent nature of SGBV in child soldiers' recruitment, despite the fact that this was initially totally absent in the prosecutorial case theory. That is, this intersection eventually contributed to the successful outcomes of the resistance against the applicatory misrecognition of the SGBV prohibition norm in *Lubanga*. Indeed, while from the traditional IHL perspective the combatants were not explicitly protected from crimes that might be committed against them within their own forces, the irrationality of this understanding, and indeed its vehement deviation from the human rights perspective, came to the fore specifically through this intersection. On the other hand, the irrationality exposed through this specific intersection of both prohibitions in the context of the given case and thus, (8) the inappropriateness of the SGBV prohibition norm's misrecognition from the IHRL and ICL perspectives, might not have been revealed and *de-facto* recognized in the absence of the resistance[2384]. In fact, it appears that (9) by inserting argumentative rationality framed from the human rights perspective, the advocates of the norm and their allies managed to persuade actors involved in the *Lubanga* proceedings in (10)

[2380] *Cp. ibid*.; Price (1998); Risse/Sikkink (1999); Risse (2000); Deitelhoff (2006)
[2381] *Cp.* Finnemore/Sikkink (1998); Keck/Sikkink (1998, 1999); Price (1998); Risse/Sikkink (1999); Risse (2000); Checkel (2001, 2005); Deitelhoff (2006)
[2382] Oosterveld (2014)
[2383] *Cp.* Günther (1988); Wiener/Puetter (2009); Badescu/Weiss (2010); Deitelhoff/Zimmermann (2013); Chappell (2016)
[2384] *Cp.* Price (1998); Badescu/Weiss (2010)

the inappropriateness of the traditional IHL logic primarily based on consequentialism, which needed to be redefined through IHRL to be rather based on the logic of appropriateness. This effect was, in turn, facilitated by their (11) maintenance of internal discursive deliberations on the elaboration of the SGBV prohibition norm's meaning and appropriate application in the context of the recruitment crimes. While these deliberations were increasingly based on actors' (12) engagement in the logic of appropriate argumentation, they promoted (13) cultural validation of the norm as well as (14) a transformation in their argumentative rationality from being predominantly based on consequentialism towards the sense of appropriateness[2385].

5.2.5.6.3. Broader socio-political cleavages

By the end of the proceedings, the influence of socio-political cleavages surrounding the status of the SGBV prohibition norm in ICL between its advocates and their target actors had patently diminished. The persistent resistance of the advocates and their allies proved to be successful, to the extent that emerging transformations among their target actors' legal perceptions and logics were revealed, which in turn, impacted their understanding of the normative meaning-in-use. While in the previous stage, both the OTP and the majority of the TC clearly refrained from any procedural modifications with regard to sexual violence, their willingness during the closing stage to nevertheless continue engaging in intersubjective deliberations on the potential *de-jure* applicability of its prohibition on discursive and procedural levels[2386] – even in spite of the Appeals Chamber's ruling – demonstrated the advancement of cultural validation of the norm and a substantial change in their attitudes towards its status[2387]. Furthermore, the increasing entanglement of the OTP in argumentative rationality based on the human rights perspective implied the Office's growing recognition of this perspective, rather than the traditional IHL approach, as appropriate in the context of the given case. Similarly, the OTP's and the Judges' acknowledgement of the validity and applicability of the human rights perspective to the prosecution and adjudication of crimes

[2385] *Cp.* Günther (1988); Finnemore/Sikkink (1998); Keck/Sikkink (1998, 1999); Price (1998); Risse/Sikkink (1999); Risse (2000); Checkel (2001, 2005); Deitelhoff (2006); Wiener (2007, 2009); Wiener/Puetter (2009); Badescu/Weiss (2010)
[2386] On levels of influence see Keck/Sikkink (1998, 1999)
[2387] *Cp.* Wiener (2007, 2009); Wiener/Puetter (2009)

falling under the jurisdiction of the Court, that is, also to the war crime of the recruitment of child soldiers, was revealed through their references to the issue of non-discrimination based on grounds such as gender in the application and interpretation of the law, in "consisten[cy] with internationally recognized human rights"[2388]. Although the majority ultimately denied the consideration of SGBV in the judgement in any form, the Judges made clear that this decision was enforced by procedural restraints, which they had to defend and prioritize. This attitude towards procedural consistency was furthermore reinforced by the fact that the OTP appeared unable to undertake measures that could have offered a legal possibility to diminish the effect of these constraints. Nonetheless, the increasing recognition and integration of the human rights approach (which has a stronger potential to strengthen the SGBV prohibition norm and its appropriate application) is evidenced in the deliberations of virtually all involved actors on both discursive and procedural levels, while the Defence naturally only advocated for the human rights of the accused. This demonstrates the continuing shrinking of the socio-political cleavages that had contributed to the *de-jure* misrecognition of the norm[2389]. The reaffirmation of its validity and *de-facto* recognition of its applicability in the given case revealed, in turn, the norm's increasing shared recognition[2390], which advanced the further evolution of the institutional socialization 'spiral' with its appropriate application.

[2388] Rome Statute (1998), Art. 21(3)
[2389] *Cp.* Chappell (2016)
[2390] *Cp.* Wiener (2007, 2009); Wiener/Puetter (2009)

5.2.6. Further refinement of the prescriptive status: consequences for the institution

5.2.6.1. Towards the prioritization of SGBV under Prosecutor Bensouda

The timeframe of the adjudication in *Lubanga* virtually coincided with the appointment of the new Chief Prosecutor for the OTP[2391]. The mandate of Prosecutor Ocampo was already practically completed before the issuance of the decision on sentencing in July 2012. On December 12, 2011, the former Deputy Prosecutor Fatou Bensouda was unanimously elected by the Assembly of States Parties to take over his position and was sworn in on June 15, 2012[2392]. Prior to the election process, Fatou Bensouda had already participated in various gender training sessions[2393] and declared during her public appearances that gender justice as well as issues related to children would belong to the priorities of the OTP in case of her election, which she also repeatedly reiterated thereafter[2394]. Fatou Bensouda gave her first public statement as the newly elected Prosecutor of the ICC during the launch of the *Gender Report Card on the ICC 2011*, issued by WIGJ the day after her election[2395]. She began her speech by emphasizing that she had "always placed a big emphasis on addressing and prosecuting sexual and gender-based crimes", whether as Attorney General and Minister of Justice in her home country Gambia, Trial Attorney at the ICTR or Deputy Prosecutor at the ICC[2396]. She stressed that the OTP established its Gender and Children Unit "comprised of advisers with legal and psycho-social expertise to deal specifically with gender and children issues" while "Professor Catharine A. MacKinnon was appointed as Special Gender Adviser to the Prosecutor of the ICC on 26 November 2008, and provide[d] strategic advice to his Office on sexual and gender violence"[2397]. Furthermore, the OTP aspired to "integrate a 'gendered' perspective into its investigations and cases" and at that point, had "participated in

[2391] The mandate of the ICC's Chief Prosecutor is restricted to nine years, see Rome Statute (1998), Art. 42(4)
[2392] ICC Doc. No. ICC-CPI-20120615-PR811 from June 15, 2012; WIGJ (2012b), 8, 77
[2393] WIGJ (2005, 2006a, 2007-2010, 2011b, 2012b)
[2394] WIGJ (2012b), 40
[2395] *Ibid.*
[2396] ICC (2011), 2
[2397] *Ibid.*, 2-3

11 gender-related trainings and attended 13 gender-related events throughout the world"[2398]. Fatou Bensouda defined herself as the "OTP's focal point for gender issues" and stated that she has "endeavoured to ensure that the gender perspective is always taken into account in investigations and prosecutions [of the Office]"[2399]. With regard to the *Lubanga* case, she claimed that although the accused had not been charged with SGBV, the OTP "explained the gender dimension" of the recruitment crimes during the trial and "took note of the reactions of civil society and their preference for these aspects to be explicitly charged"[2400]. Moreover, she explicitly thanked WIGJ

> for their support, to [her] and to the OTP throughout these years […] [and] recognize[d] […] the important work of Women's Initiatives, as well as that of local gender groups in situation countries, that provide sometimes the only form of support available for gender crimes victims, who often are excluded and shunned from their communities.[2401]

Concluding her statement, she announced that she would strengthen the cooperation between her Office and these groups and was counting on their support in the implementation of the ICC's gender mandate[2402].

Shortly before her inauguration, on the International Day of the African Child on June 4, 2012, *i.e.*, between the issuance of the judgement[2403] and the sentencing decision[2404] in *Lubanga*, Fatou Bensouda gave another keynote speech at the *Eng Aja Eze* Foundation in New York entitled *The incidence of the Female Child Soldier and the International Criminal Court*[2405]. In this speech, she explicitly tackled the "critical issue of girl child soldiers" and referred to the testimony given by the UN SRSG/CAAC Radhika Coomaraswamy during the *Lubanga* proceedings, in which she had stressed the multiple roles imposed upon girls involved in armed forces, including their subjection to sexual slavery[2406]. Fatou Bensouda elaborated further on this issue by addressing the main functions which girls are forced to exercise, as well as on their vulnerabilities and stigmatization[2407]. She also addressed the issue of the *Disarmament, Demobilization and Reintegration* in the context of girls' multiple roles in conflicts that had been similarly emphasized by the UN SRSG Coomaraswamy in *Lubanga*[2408]. Furthermore, she tackled the ways those issues had been reflected within the

[2398] *Ibid.*, 3
[2399] *Ibid.*
[2400] *Ibid.*
[2401] *Ibid.*, 4
[2402] *Ibid.*
[2403] ICC Doc. No. ICC-01/04-01/06-2842 from March 14, 2012
[2404] ICC Doc. No. ICC-01/04-01/06-2901 from July 10, 2012
[2405] ICC (2012); WIGJ (2012b), 41
[2406] ICC (2012), 2
[2407] *Ibid.*
[2408] *Ibid.*

OTP and the efforts that had been undertaken to contribute to better protection of former female child soldiers' rights and needs[2409]. Although 'gender violence' and 'gender crimes' were relatively newly recognized concepts in international law, the outcomes that had been achieved in this field through the jurisprudence of the ICTY and ICTR in the 1990s contributed to the inclusion of gender provisions in the Rome Statute, which represented significant "progress in the human rights field"[2410]. Those provisions obliged the OTP and the Court to specifically consider SGBV and violence committed against children in their work and required the Prosecutor to appoint advisors with such expertise[2411]. While addressing the charges of rape, sexual slavery, and recruitment of child soldiers that had been brought by the OTP in various cases until that point, Fatou Bensouda declared, "[these] heinous crimes go hand in hand, especially when they involve female children"[2412]. In this respect, she reflected upon the interaction of the OTP with five female child soldiers in *Lubanga* and spoke about the consequences of sexual violence as well as issues of re-traumatization, protection and assistance during investigations[2413]. In her deliberations on the *Lubanga* judgement, which she called "a landmark decision in relation to gender crimes and child soldiers", she stressed that in its opening statement to the trial from January 2009, the OTP presented the gender dimensions of the recruitment crimes particularly committed against girls[2414]. She reiterated that, despite the lack of specific sexual violence charges, the OTP had demonstrated the inherent connection between sexual violence and the recruitment crimes by "elicit[ing] evidence of sexual abuse […] suffered by the female child soldiers within the UPC/FPLC military"[2415]. Noteworthy also was the ICC's soon-to-be Chief Prosecutor's reference to the dissenting opinion of Judge Elizabeth Odio Benito, in which Odio-Benito had "agree[d] with the Prosecution that gender crimes were embedded in the recruiting of children and in their use in hostilities" and "found that the invisibility of sexual violence in the legal concept leads to discrimination against the victims of recruitment"[2416]. She further affirmed that "the Office […] made it its mission to ensure that Thomas Lubanga Dyilo [was] held criminally responsible for the atrocities committed against those little girl soldiers, when he enlisted and conscripted them to be used as sexual prey, while also using them in combat"[2417]. While this statement exaggerated the efforts of the OTP in respect to SGBV in *Lubanga*, it did, however, simultaneously imply recognition of the applicability of the SGBV prohibition norm to the

[2409] *Ibid.*, 4-7
[2410] *Ibid.*, 3
[2411] Rome Statute (1998), Art. 42(9), Art. 54(1)(b), Art. 68(1); ICC (2012), 4
[2412] ICC (2012), 6
[2413] *Ibid.*, 6-7
[2414] *Ibid.*, 7-8
[2415] *Ibid.*, 8
[2416] *Ibid.*
[2417] *Ibid.*

recruitment crimes against children. Significantly, Fatou Bensouda distinguished the agency of various participants in the case, including the LRs of the victims and WIGJ that had contributed to this recognition[2418]. Moreover, she noted that the *Lubanga* case had contributed to the maintenance of international debates on child recruitment issues, in which the UN SRSG Coomaraswamy continued to take active part[2419]. Concluding her speech, Fatou Bensouda announced her intention to guarantee that neither SGBC nor their victims were ignored by the Court under her future lead of its OTP[2420].

5.2.6.1.1. The appointment of Brigid Inder as a Special Gender Advisor to the OTP

Remarkably, the leader of WIGJ, the organization whose legitimacy had been contested and efforts denied under previous Chief Prosecutor in *Lubanga*, was officially recognized by the OTP as the expert on gender issues just a few months after the issuance of the judgement. Her role was to assist the OTP in its work under the new Prosecutor. In fact, while WIs had also supported Fatou Bensouda's candidacy during the elections procedure[2421], just over two months after her inauguration, she appointed their Executive Director Brigid Inder as the Special Gender Advisor to her Office[2422]. When Prosecutor Bensouda announced this decision, she declared that

> [f]urther integrating a gender perspective into all areas of [the Office's] work and strengthening recognition of the gendered nature of sexual violence [was] a priority for [her] office. [And that] Ms. Inder [was] a renowned expert on gender issues and [brought] to this post a deep knowledge of the cases, policies and the institutional history of the ICC.[2423]

Furthermore, the additional background information on Brigid Inder in the announcement noted that she had submitted

> several filings before the ICC highlighting the rights of victims, the importance of prosecutions for gender-based crimes, and gender and reparations issues. […] [And] has designed conflict-related documentation initiatives on gender-based crimes, protection

[2418] *Ibid.*, 9
[2419] *Ibid.*
[2420] *Ibid.*, 10
[2421] WIGJ (2011c)
[2422] ICC Doc. No. ICC-OTP-20120821-PR833 from August 21, 2012; WIGJ (2012a,b)
[2423] ICC Doc. No. ICC-OTP-20120821-PR833 from August 21, 2012, n.p.

> responses for women's human rights defenders and assistance programmes for victims/survivors of gender-based crimes.[2424]

WIGJ described this appointment as "a recognition of the impact of the Women's Initiatives' advocacy for gender justice under Ms Inder's leadership"[2425]. They referred to a number of positive reactions to this appointment among civil society actors, experts, and academics, such as Professor Valerie Oosterveld, who had represented the Canadian delegation to the negotiations on the Rome Statute[2426]. Professor Oosterveld commented that she was

> extremely pleased that Brigid Inder has been appointed to provide strategic advice to the ICC's Office of the Prosecutor on gender issues. Ms Inder's deep expertise in the field of gender justice will be of immense assistance to the Prosecutor, as she implements her goal of further integrating a gender perspective into all areas of the OTP's work.[2427]

Brigid Inder indicated that in her contribution to the OTP's work she would focus on better access to justice for SGBV victims/survivors, on the appropriate identification of SGBV issues in the OTP's cases, on ensuring that SGBV charges were specifically brought, and on the strengthening of the institutional knowledge and structural responses of the Office to gender issues more broadly[2428]. When Inder was about to finish her mandate, after nearly five years serving as the OTP's Special Gender Advisor, Prosecutor Bensouda called her "a champion and tireless defender of women's rights and gender justice in her own right" who has made "notable contributions" to the OTP's work, "in particular, to the development of the Office's Policy Paper on Sexual and Gender-Based Crimes"[2429].

5.2.6.1.2. The OTP's Strategic Plan for 2012-2015

The OTP's Strategic Plan for 2012-2015, the first issued under Prosecutor Fatou Bensouda, foresaw a number of modifications to the previous strategy, which aimed to assist the Office to adapt to existing challenges in its investigations and prosecutions[2430]. The Plan introduced a general modification of the OTP's strategy, exchanging its previous leading principle of

[2424] *Ibid.*
[2425] WIGJ (2012a), 1
[2426] *Ibid.*, 2-3
[2427] Oosterveld, cited in WIGJ (2012a), 3
[2428] WIGJ (2012a), 4
[2429] ICC Doc. No. ICC-CPI-20171219-PR1352 from December 19, 2017
[2430] ICC OTP (2013b), 5

"focused investigations" with "the principle of in-depth, open-ended investigations while maintaining focus"[2431]. In addition, one of its six elaborated strategic goals aimed to prioritize sexual and gender-based crimes and crimes against children[2432] by "enhanc[ing] the integration of a gender perspective in all areas of [the Office's] work and continu[ing] to pay particular attention to sexual and gender based crimes and crimes against children"[2433]. It aspired to implement innovative practices for the collection and presentation of evidence of such crimes, while simultaneously keeping a victim-centred, gender-sensitive approach in mind in order to avoid re-traumatization[2434]. The Plan stated that "alternative ways of proving sexual and gender-based violence" should be developed for the maintenance of "a professional office with specific attention to performance management and measurement"[2435]. Furthermore, the OTP should continue learning, not only from its own experience but also from that of other tribunals in investigating and prosecuting SGBV[2436]. The Plan set a number of objectives for the achievement of this goal in 2013-2015, which included the finalization of the OTP's Policy Paper on SGBC in 2013 and of its Policy on Children in 2014[2437].

5.2.6.1.3. The OTP's 'Policy Paper on SGBC'

The OTP issued its Policy Paper on Sexual and Gender-Based Crimes in June 2014[2438]. It was developed through a process of internal reflection on appropriate investigations and prosecutions of SGBV as one of the outcomes of the OTP's progressing socialization with the appropriate application of the SGBV prohibition norm and would support its further internalization and habitualization[2439]. The development of the Policy was based on consultations with the OTP's staff, both at the headquarters and in the field via videoconference, as well as on close collaboration with its Special Gender Advisor Brigid

[2431] *Ibid*., 6, para.4
[2432] *Ibid*., 27, para.58
[2433] *Ibid*., 7, para.5 (goal 3)
[2434] *Ibid*., 27, paras.59-60, 62
[2435] *Ibid*., 31, para.79
[2436] *Ibid*., 27, para.61
[2437] *Ibid*., 27, para.63
[2438] ICC OTP (2014)
[2439] Interviews with F. Guariglia (ICC OTP) and B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018

Inder[2440]. Additionally, the Office was provided with input by external experts, states representatives, international organizations, and civil society[2441]. Inder recollects that the process took eighteen months while she had an impression that "everyone in the Office felt embarrassed about the [*Lubanga*] case" and "the Prosecutor's [Moreno Ocampo] conduct", about how they had treated it and how it impacted the Office's image: "and I think, they wanted to put it behind them"[2442].

The Policy includes definitions of sexual crimes, gender-based crimes, as well as of terms such as "gender perspective" and "gender analysis"[2443]. It specifically recognizes SGBC as "among the gravest under the Statute" and prescribes the consideration of their "multifaceted character and the resulting suffering, harm, and impact" on all stages of the OTP's work[2444]. While the definition of "gender" embedded in the Statute refers "to the two sexes, male and female, within the context of society"[2445], the Policy declares that the Office "will apply and interpret this in accordance with internationally recognised human rights pursuant to article 21(3)" [2446] and emphasizes the importance of this provision [2447]. It refers to the recommendation made by the Committee on the Elimination of Discrimination against Women ('CEDAW', the UN human rights body dealing with women's rights) on the interpretation of ICL in consistency with "internationally recognized human rights instruments without adverse distinction as to gender"[2448]. Furthermore, the Policy notes "the efforts of the UN Human Rights Council and the Office of the High Commissioner for Human Rights (OHCHR) to put an end to violence and discrimination on the basis of sexual orientation or gender identity"[2449]. It specifically refers to the statement by the High Commissioner for Human Rights, Navanethem Pillay, who had previously served as a Judge at the ICTR and sat on the bench in its historical *Akayesu* case, "to end violence and discrimination against lesbian, gay, bisexual, and transgender (LGBT) persons"[2450]. Although these references have only been included in the footnote of the Policy, their mentioning certainly represents significant proof of the OTP's advancing socialization with the appropriate application of the SGBV prohibition norm, through a developing holistic

[2440] *Ibid*.
[2441] ICC OTP (2014), 12, para.13
[2442] Interview with B. Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018
[2443] ICC OTP (2014), 3-4
[2444] *Ibid*., 23-24, para.45
[2445] Rome Statute (1998), Art. 7(3), the definition also includes the note that the term "does not indicate any meaning different from the above"
[2446] ICC OTP (2014), 12, para.15
[2447] *Ibid*., 15, para.26
[2448] *Ibid*., (footnote 23)
[2449] *Ibid*.
[2450] *Ibid*.

approach shaped by the human rights perspective. In this respect and pursuant to Article 21(3) of the Statute, the Policy aspires to ensure the application and interpretation of statutory provisions in accordance with internationally recognized human rights, "including those relating to women's human rights and gender equality", to take into consideration the socially constructed nature of gender roles and to "[a]void any gender discrimination in all aspects of [the Office's] work" as well as to "[p]ositively advocate for the inclusion of sexual and gender-based crimes and a gender perspective in litigation before the Chambers"[2451].

The definition of "gender-based crimes" included in the Policy details that such crimes must not be necessarily of sexual nature but may include various attacks on individuals based on their gender[2452]. On the other hand, sexual crimes do not necessarily have to be committed by means of physical violence, but also include conducts such as forced nudity[2453]. The Policy defines "gender perspective" as "an understanding of differences in status, power, roles, and needs between males and females, and the impact of gender on people's opportunities and interactions"[2454]. Adopted in the operation of the OTP, this should enable its staff to better comprehend the crimes falling under the jurisdiction of the Court[2455]. The application of "gender analysis" should, in turn, enable the "consideration of whether, and in what ways, crimes, including sexual and gender-based crimes, are related to gender norms and inequalities"[2456]. The Policy requires the staff to embrace gender perspective and gender analysis in respect to all crimes falling under the jurisdiction of the Court and on all stages of the OTP's work, including preliminary examinations, development of case hypothesis, investigations and prosecutions, that is, also while screening, selecting, interviewing and questioning witnesses and defining measures of their protection, as well as on sentencing and reparations stages[2457].

Another significant aspect of the Policy has been the recognition that the intersection[2458] of various factors may cause inequality and motivate the commission of SGBV[2459]. In accordance with Article 21(3), the Policy requires the OTP's staff to develop an

[2451] *Ibid*., 16, para.27
[2452] *Ibid*., 3
[2453] *Ibid*.
[2454] *Ibid*.
[2455] *Ibid*.
[2456] *Ibid*., 4
[2457] *Ibid*., 5, 14
[2458] This recognition has virtually introduced the theoretical framework of intersectionality into the OTP's work. The concept of intersectionality was elaborated by Kimberlé Crenshaw in 1989 in her article *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics* and has been used since then as a tool helping to understand how various aspects of human identities including gender, sex, sexual orientation, religion, disability, ethnical origin, etc. may in their intersection cause various modes of discrimination (Crenshaw 1989).
[2459] ICC OTP (2014), 13, para.19

understanding of "the intersection of factors such as gender, age, race, disability, religion or belief, political or other opinion, national, ethnic, or social origin, birth, sex, sexual orientation, and other status or identities which may give rise to multiple forms of discrimination and social inequalities"[2460]. While the explicit reference to 'sexual orientation' reflects the OTP's progressive interpretation of the law from the human rights perspective, some commentators might claim that this affirmation even goes beyond the OTP's mandate embedded in the statutory provisions. In any case, despite the inclusion of this reference as well as widespread or even systematic commission of offences on the basis of sexual orientation in various parts of the world (that might otherwise fall under the jurisdiction of the Court), such cases have yet not figured in the ICC's practice.

The Policy refines and clarifies how the OTP's staff should apply the SGBV prohibition norm on various stages of its operation, while simultaneously reaffirming the Office's commitment to the prioritization of these crimes in its work. It should provide guidance for the "implementation and utilisation of the provisions of the Statute and the Rules so as to ensure the effective investigation and prosecution of sexual and gender-based crimes" throughout all procedural stages, "[p]rovide clarity and direction on issues pertaining to sexual and gender-based crimes in all aspects of operations", "[c]ontribute to advancing a culture of best practice in relation to the investigation and prosecution of sexual and gender-based crimes" and "through its implementation, […] the ongoing development of international jurisprudence regarding sexual and gender-based crimes"[2461]. While the Policy defines the Office's strategic approaches with respect to SGBC, its confidential Operations Manual additionally includes further guidelines, standards and regulations in this regard[2462].

5.2.6.1.3.1. Investigations

With regard to the OTP's investigations and strengthening of SGBV cases, the Policy stipulates the consideration of specific means for gathering forensic, indirect and circumstantial evidence, as well as that, which specifically links to the responsibility of the

[2460] *Ibid*., 16, para.27
[2461] *Ibid*., 10-11, para.6
[2462] *Ibid*., 11, para.11

accused[2463]. Additionally, to reduce the risk of re-traumatisation, investigators should make an effort to gather other types of evidence such as "insider testimony, the statistical or pattern-related evidence from relevant experts, medical and pharmaceutical records, empirical research and reports, and other credible data produced by States, organs of the United Nations, intergovernmental and non-governmental organisations, and other reliable sources"[2464]. While preparing for investigative missions, the Office should build networks with local communities and civil society organizations on the ground[2465]. The staff involved in investigations of SGBV should receive required training, also relating to cultural, traditional and religious issues[2466]. Intermediaries involved in investigations of SGBV should also be prepared to engage with victims and witnesses of such crimes in a way that precludes re-traumatization, while the Office should monitor and evaluate their performance[2467]. Moreover, its Operations Manual should include further detailed guidelines and questionnaires that reflect best practices for the investigation of SGBC and appropriate treatment of victims and witnesses of such crimes[2468].

Significantly, the OTP's Policy prescribes its entire staff involved in investigations of SGBV to integrate a gender perspective "at each stage of the investigative process"[2469]. Along with investigations of direct SGBC, the consideration of gender dimensions should be also ensured in the course of investigations of other crimes falling under the jurisdiction of the Court[2470]. Particularly, the Policy stresses the importance of focusing "to the fullest extent possible" on the innovative crime of persecution that may be perpetrated based on various grounds, including gender[2471], which would require the consideration of *indicia* such as "discriminatory policies, violent acts selectively targeting a particular gender, [and] gender-related propaganda"[2472].

[2463] *Ibid*., 25, para.51
[2464] *Ibid*., 28, para.65
[2465] *Ibid*., 26, para.55
[2466] *Ibid*., 26-27, para.57
[2467] *Ibid*., 26, para.56
[2468] *Ibid*., 28, para.68
[2469] *Ibid*., 25, para.53
[2470] *Ibid*., 27, para.59
[2471] Rome Statute (1998), Art. 7(1)(h)
[2472] ICC OTP (2014), 28, para.67

5.2.6.1.3.2. Prosecutions

With regard to prosecutions, the Policy prescribes, "wherever there is sufficient evidence"[2473], bringing charges of SGBV both directly and when it forms other crimes, for instance "rape as torture, persecution, and genocide"[2474]. It also explicitly requires the consideration of gender-related aspects, not only in the course of sexual violence prosecution but also in relation to conducts such as "domestic labour and 'household' duties in the context of sexual slavery or enslavement"[2475]. While this dual approach was promoted by gender justice advocates during the negotiations on the Rome Statute and is, indeed, reflected in the legal framework of the Court, the Policy explicitly reaffirms that crimes such as torture, mutilation, intentionally directing attacks against the civilian population, persecution, inhuman acts, outrages upon personal dignity or the recruitment of child soldiers may also enhance aspects related to SGBV[2476]. Furthermore, SGBV charges should be brought, wherever possible, under different categories, *i.e.*, as war crimes, crimes against humanity, and genocide[2477], which would "properly describe, *inter alia*, [their] nature, manner of commission, intent, impact, and context"[2478]. Additionally, the Policy prescribes the consideration of all possible modes of liability when prosecuting SGBV, including individual, joint, through another person, by ordering, soliciting, inducing, aiding, abetting, otherwise assisting, contributing to commission or attempted commission of such offences, as well as command or superior responsibility for their commission or attempted commission. When appropriate, SGBV charges should be brought under various modes of liability[2479]. These affirmations indicate the OTP's recognition that bringing cumulative charges of SGBV (forming various crimes, under various categories and modes of liability) is not only legitimate, but would also "fairly" "reflect the severity and multi-faceted character of these crimes"[2480].

With respect to the protection of victims and witnesses of SGBV during the proceedings, the Policy stresses that, in accordance with Art. 68(2) of the Statute – "[a]s an exception to the principle of public hearings" – "any part of the proceedings" can be held "*in camera*" or the

[2473] *Ibid*., 29, para.71
[2474] *Ibid*., 6, para.7; 29, para.72
[2475] *Ibid*., 30, para.74
[2476] *Ibid*., 13, para.18; 20, para.35
[2477] The Policy also specifically emphasizes the OTP's position "that acts of rape and other forms of sexual violence may, depending on the evidence, be an integral component of the pattern of destruction inflicted upon a particular group of people, and in such circumstances, may be charged as genocide" (ICC OTP, 2014, 18, para.31)
[2478] ICC OTP (2014), 6, para.8; 30, para.73
[2479] *Ibid*., 6, para.9; 31, para.77; 32, para.83
[2480] *Ibid*., 6, para.7; 29, para.72

evidence of such crimes can be presented "by electronic or other special means"[2481]. With respect to the alleged evidentiary burden often asserted as especially challenging in cases of SGBC, the Policy noteworthily emphasizes that "to prove its case, as a matter of law, should be no more substantial or onerous than for other crimes", and should be ensured by the OTP's staff in their investigations, prosecutions and litigation before Chambers[2482]. The Policy also requires the consideration of the impacts of SGBC – such as physical and psychological harm and social damage inflicted upon victims, their families and communities – as aggravating factors, reflecting the gravity of these crimes in the OTP's sentencing proposals in such cases[2483]. The Policy stresses that, in accordance with Rule 145(2)(b)(v) of the Rules of Procedure and Evidence, "discrimination on any of the grounds referred to in article 21, paragraph 3", including when based on gender, likewise constitutes an aggravating factor when revealed as a motive for the commission of the crime[2484]. Interestingly, the Policy also notes that the OTP should emphasize the sexual or gender-based nature of crimes that could be treated as aggravating factors for the purposes of sentencing even in cases "where the evidence precluded the inclusion of sexual and gender-based crimes in the charges"[2485].

5.2.6.1.3.3. Cooperation

Based on past experience, the Policy aspires to improve the practice of the OTP's staff in establishing contacts and networks with and within affected communities[2486]. It recognizes the crucial role of civil society in preventing and addressing SGBV and aims to support and strengthen cooperation "particularly [with] those [organizations], which have experience in documenting sexual and gender-based crimes and working with victims of these crimes"[2487]. Furthermore, the Policy prescribes the staff in its further networking initiatives to consult with the Special Gender Advisor of the Office on "how to undertake effective network building, including with grassroots organisations, in order to enlist their assistance and support in

[2481] *Ibid*., 34, para.88; Rome Statute (1998), Art. 68(2)
[2482] ICC OTP (2014), 35, para.91
[2483] *Ibid*., 7, para.10; 37, para.99
[2484] *Ibid*., 38, para.100
[2485] *Ibid*., 38, para.101
[2486] *Ibid*., 5, para.4
[2487] *Ibid*., 7, para.14

efforts to reach out more to the victims"[2488]. It also stresses the significance of the OTP's cooperation and periodic consultations with several bodies of the UN, including the UN Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict ('SRSG/SVC')[2489], the UN Office of the Special Representative of the Secretary-General for Children and Armed Conflict ('SRSG/CAAC'), the UN Entity for Gender Equality and the Empowerment of Women ('UN Women'), and with the Office of the UN High Commissioner for Human Rights ('OHCHR')[2490]. Noteworthily, virtually all these bodies – including the OTP itself – were led by women at the time[2491].

5.2.6.1.3.4. Institutional development, implementation and monitoring

The Policy refers to the Gender and Children Unit within the OTP, which was established in 2003 to contribute to proper investigations and prosecutions of SGBV[2492]. However, it recognizes the need to strengthen internal expertise in SGBV by providing corresponding training on an ongoing basis and recruiting the staff with expertise and experience in this area[2493].

Another significant aspect of the Policy addresses the monitoring of its implementation, *i.e.*, of the OTP's investigation and prosecution practices with respect to SGBV. Such monitoring should enable identification, documentation and implementation of best practices and promote "learning and the preservation of institutional knowledge gained from experience"[2494]. The Policy and other relevant guidelines for the OTP's work, such as its Operations Manual, should also be regularly reviewed and updated in accordance with relevant developments[2495].

[2488] *Ibid*., 40, para.107
[2489] Established in February 2010 under Margot Wallström; in 2012 the Office was taken over by Zainab Hawa Bangura, and in 2017 by Pramila Patten (United Nations, 2021b)
[2490] ICC OTP (2014), 40, para.106
[2491] Margot Wallström (SRSG/SVC), Radhika Coomaraswamy (SRSG/CAAC), Leila Zerrougui (SRSG/CAAC, the legal expert in human rights and the administration of justice, specialized in women's and children rights, who had been also previously involved in the UN stabilization mission in the DRC MONUSCO took over the position in 2012), and Navanethem Pillay (OHCHR) (United Nations, 2021b,c; ICC OTP, 2014)
[2492] ICC OTP (2014), 41, para.112
[2493] *Ibid*., 7, paras.14-15; 43, para.118
[2494] *Ibid*., 8, paras.16-17
[2495] *Ibid*., 43, paras.120-122

5.2.6.1.4. The OTP's Strategic Plan 2016-2018

The second Strategic Plan issued under Prosecutor Bensouda for 2016-2018 entails reflection on the implementation of the OTP's goals set by the previous Strategic Plan[2496]. The achieved goals include the issuance of the Policy Paper on SGBC and its emerging implementation by various divisions and sections of the Office "in all aspects of their work", as well as an update of the investigation template "to cover a systematic planning and reporting in relation to SGBC"[2497]. Likewise, gender analysis methodology guidelines were developed and would be applied in new investigations[2498]. A special model for interviewing vulnerable witnesses and training of investigators were also in the process of preparation[2499]. Although the finalization of the Policy on Children set for 2014 was not yet accomplished, the respective working group was engaged in its development, and had already completed consultations with staff and experts, while interviews with children and youths were in the process of preparation[2500].

The Strategic Plan for 2016-2018 upholds the goal of "integrat[ing] a gender perspective in all areas of the Office's work […] [while] pay[ing] particular attention to sexual and gender-based crimes […] and crimes against and affecting children, in accordance with Office policies"[2501]. Along with further implementation of the Policy on SGBC, which also stipulates application of gender analysis to all crimes falling under the jurisdiction of the Court, the Plan specifically reaffirms that the accomplishment of this goal furthermore requires application of innovative methods when investigating and prosecuting SGBC, adequate recruitment and training for staff, and the adoption of victim-responsive approach with an aim to avoid re-traumatization. It also maintains the aspiration of the Office to monitor the implementation of the Policy on SGBC and aims to finalize the Policy on Children in 2016[2502].

[2496] ICC OTP (2015), 43-49
[2497] *Ibid*., 46, para.22
[2498] *Ibid*.
[2499] *Ibid*.
[2500] *Ibid*., 46, para.23
[2501] *Ibid*., 6, para.4
[2502] *Ibid*., 19-20, paras.49-53

5.2.6.1.5. The OTP's 'Policy Paper on Case Selection and Prioritization' and 'Policy on Children'

The OTP's Policy Paper on Case Selection and Prioritization, issued in September 2016, refers to gravity of crimes as "a case selection criterion"[2503]. This criterion involves, *inter alia*, the commission of SGBC and crimes against children[2504], which determine "the most serious crimes within a given situation that are of concern to the international community as a whole", on which the OTP aims to focus its investigations and prosecutions[2505]. Furthermore, the Policy prescribes the OTP's staff to "pay particular attention to crimes that have been traditionally under-prosecuted, such as crimes against or affecting children as well as rape and other sexual and gender-based crimes"[2506].

The OTP's Policy on Children, issued subsequently in November 2016, refers to the main "six grave violations" committed against children in armed conflicts, identified by the Office of the UN SRSG/CAAC, including recruitment or use as soldiers and sexual violence[2507]. The Policy states that children are "particularly vulnerable to sexual and gender-based crimes"[2508] and declares that the Office "pays particular attention to the gender-specific impact on, harm caused to, and suffering of children" subjected to such crimes[2509]. The Policy prescribes taking gender-sensitive measures during investigations of crimes committed against children[2510] and it also requires the consideration of the "especially devastating" impact of such crimes, including SGBC, in terms of the serious harm caused to victims' families and communities, when analysing the gravity of potential cases[2511].

The Policy recognizes that children can be differently affected by crimes "based on their sex, gender, or other status or identities"[2512], and can be forced to exercise various roles and tasks when involved in armed forces and groups "including those of combatant, sexual slave, cook, porter, spy or scout"[2513]. Therefore, while in their deliberations on the *Lubanga* case, the

[2503] ICC OTP (2016a), para.35
[2504] *Ibid*., paras.39-40
[2505] *Ibid*., para.35
[2506] *Ibid*., para.46
[2507] ICC OTP (2016b), 19, para.38 (footnote 48)
[2508] *Ibid*., 6, para.2
[2509] *Ibid*., 24, para.52
[2510] *Ibid*., 30, para.70
[2511] *Ibid*., 26, para.58
[2512] *Ibid*., 12, para.18
[2513] *Ibid*., 21, para.43

Judges ruled that activities such as domestic service "may not be deemed to constitute 'us[e] ... to participate actively in hostilities' within the meaning of the Statute", the OTP will charge and prosecute such conducts, where applicable, under other provisions "for instance, the prohibitions against enslavement"[2514]. That is, where appropriate, when prosecuting child soldiers' recruitment, the OTP will bring multiple charges, including of sexual slavery and other SGBC, which "may be committed against children by members of the very armed forces or groups into which they are recruited"[2515].

In its Policy on Children, the Office also aspires to apply and interpret the law in accordance with internationally recognized human rights "including those relating to children" as prescribed by Article 21(3) of the Statute[2516]. Furthermore, the Policy maintains the OTP's objective (previously set in its Policy Paper on SGBC[2517]) of integrating the perspective of intersectionality in its work, according to which, various attributes including gender, sex, and sexual orientation may be the basis of manifold discrimination[2518]. Likewise, the Policy recognizes that children can be subjected to the crime of persecution "on intersecting grounds, such as religion, ethnicity and gender"[2519].

5.2.6.1.6. The OTP's Strategic Plan 2019-2021

In the OTP's last Strategic Plan issued under Prosecutor Bensouda in July 2019, for the period of time until 2021, which marks the end of her mandate as the head of the Office, the prioritization of SGBC and crimes against children throughout all its preliminary examinations, investigations and prosecutions continued to be upheld[2520]. The Plan prescribes the maintenance of "a systematic application" of Policies on SGBC and on Children, and the evaluation of their effectiveness in practice[2521]. Additionally, a focus was set upon the OTP's

[2514] *Ibid*.
[2515] *Ibid*., 34, paras.85-86; here the Policy also refers to the *Lubanga* judgement and the decision on the OTP's amendment of charges in *Ntaganda*
[2516] *Ibid*., 18, para.37
[2517] ICC OTP (2014), 13, para.19; 16, para.27
[2518] ICC OTP (2016b), 18, para.37
[2519] *Ibid*., 24, para.51
[2520] ICC OTP (2019), 5, 37
[2521] *Ibid*., 5

approach to victims of these specific crimes "in particular"[2522]. It was stated that this approach should be "refined and reinforced", and these victims' interaction with the OTP and participation in the proceedings advanced[2523]. Furthermore, the Office should finalize its work on the adoption of the policy on the protection of cultural heritage, "which will also cover the important issue of victimization in the context of such crimes"[2524]. For the time being, a "systematic identification and review" of SGBC and crimes against children should serve as the "performance measurement" of the Office and reporting on all activities in this regard should demonstrate its "sufficient effort and findings on these priority crimes"[2525].

5.2.6.1.7. The OTP's 'Draft Policy on Cultural Heritage'

Before Prosecutor Bensouda finished her mandate on June 15, 2021[2526], the draft of the Policy on Cultural Heritage had been developed and published "for consultation and comments by States, civil society, and the wider community of stakeholders"[2527]. The draft extensively refers to the *Al Mahdi* case from the situation in Mali[2528], in which Prosecutor Bensouda did not bring any SGBV charges, in spite of such allegations[2529] and despite the fact that the case was opened after the OTP's issuance of its Policy Paper on SGBC[2530]. However, after the received criticism from the gender justice constituency of the Court on the OTP's apparent failure to apply a gender perspective and gender analysis in the *Al Mahdi* case[2531] (a choice that seemed to be of a rather strategic nature[2532]), the Office corrected this misrecognition in its subsequent case from the same situation. In the *Al Hassan* case[2533] the OTP introduced precedential charges of SGBV, which have also been unanimously confirmed by the

[2522] *Ibid*., 5, 23-24
[2523] *Ibid*.
[2524] *Ibid*., 5, 24
[2525] *Ibid*., 37
[2526] ICC Doc. No. ICC-OTP-20210615-PR1597 from June 15, 2021
[2527] ICC Doc. No. ICC-OTP-20210323-PR1579 from March 23, 2021
[2528] ICC OTP (2021), *e.g.*, paras.6, 45, 70, 80
[2529] FIDH (2015, 2016)
[2530] ICC Doc. No. ICC-01/12-01/15-84-Red from March 24, 2016
[2531] WIGJ (2016a); Grey (2019), 236
[2532] See the analysis in subchapters '2.1. Overall cases' and '5.2.7. Further conceptual clarification through aspired appropriate application: consequences for the law'
[2533] Analysed in subchapters '2.5. On trial for the commission of SGBV' and '5.2.7.3. *Al Hassan* case' as one of the ICC's most progressive cases on SGBV so far. See also Grey (2019)

respective PTC Judges for trial[2534]. As the analysis of this case indicates, *Al Hassan* has not only delivered the first confirmation of the persecution charge based on gender (and religious grounds), it has also revealed the OTP's ability to apply the concept of intersectionality in accordance with the aspirations set in the Policy Paper on SGBC, which has also positively resonated with the Judges' unanimous acceptance of the OTP's approach[2535]. While the trial of Al Hassan is currently ongoing[2536], the Draft Policy on Cultural Heritage reflects lessons learned by the OTP in its cases from the situation in Mali as well as from other international courts' jurisprudence and experience, also specifically with respect to SGBV committed within the context of, as means for perpetrating or as inherently interconnected to crimes against cultural heritage[2537].

The Draft Policy recognizes that SGBC, when committed as war crimes, "may be designed to affect the cultural heritage of a community", for instance, by subjecting individuals to crimes of sexual slavery and forced pregnancy "because of their shared cultural heritage, or because of their personal importance for the cultural heritage of that group"[2538]. Furthermore, the Draft Policy stresses that victims of SGBC which are committed as crimes against humanity including the crime of persecution based on gender, may be "targeted for their membership in a group with a shared cultural heritage or because of their personal importance for the cultural heritage of that group"[2539]. In this respect, the Draft Policy elaborates that "murder and violence specifically committed against the women of a community could produce a cultural vacuum, because these women are the oral transmitters of the community's culture, and the crimes were committed in order to ensure the loss of its oral cultural knowledge"[2540]. Significantly, as relates to the crime of genocide by causing serious bodily or mental harm to members of the group, the Draft Policy enumerates rape and sexual abuse as means by which this crime can be committed[2541]. By referring to the ICTR's jurisprudence on genocide in its historical *Akayesu* case (in which Judge Navanethem Pillay was sitting on the bench) the Draft Policy states that SGBC "may contribute specifically to the destruction, not only of the specific victims of [these] crimes, but also to their constituent group" and notes that "a group's shared cultural heritage may specifically motivate sexual and gender-based genocide,

[2534] ICC Doc. No. ICC-CPI-20190930-PR1483 from September 30, 2019
[2535] *Ibid*.; Grey *et al*. (2019), 977
[2536] ICC Doc. No. ICC-CPI-20200713-PR1531 from July 14, 2020; ICC Doc. No. ICC-PIDS-CIS-MAL-02-010/20_Eng from October 2020
[2537] ICC OTP (2021)
[2538] *Ibid*., para.59(iii)
[2539] *Ibid*., para.71
[2540] *Ibid*.
[2541] *Ibid*., para.79

and sexual and gender-based crimes may be motivated in part to offend the victim group's cultural heritage"[2542].

5.2.6.2. The summary

5.2.6.2.1. The constellation of the involved actors

As the institutional refinement process of the SGBV prohibition norm's content and appropriate application has demonstrated, the resistance against its misrecognition throughout the *Lubanga* proceedings had succeeded in persuading the internal responsible staff to maintain the institutional process of socialization with its appropriate application, also beyond *Lubanga*[2543]. In fact, this stage of the 'spiral' is characterized by the consequences that the resistance had generated in the institution[2544], which indicate that resistance has been transformative. Notably, while this stage was essentially initiated by the internal actors, those who were involved in the internal process of further refining the prescriptive status for the norm's application also included its advocates, whose knowledge and expertise had been initially largely denied in *Lubanga*. Due to the progressing socialization process however, their efforts and merits were gradually recognized and engaged in the institutional structures.

Perhaps the main instigator in this process was the second Chief Prosecutor of the OTP, Fatou Bensouda, who had already virtually become the gender justice advocates' ally prior to her election. Apart from some subsequent shortcomings (which seem to have been largely caused either by strategic deliberations or substantial challenges and were partially reflected and corrected by the OTP in its later cases[2545]), Prosecutor Bensouda essentially kept the promises she gave to the gender justice constituency of the Court by remaining generally consistent in this respect. In fact, throughout her mandate, she has since prioritized SGBC and crimes

[2542] *Ibid*.
[2543] *Cp.* Deitelhoff (2006); Chappell (2016)
[2544] *Cp.* Madsen *et al*. (2018)
[2545] See the analysis in subchapter '5.2.7. Further conceptual clarification through aspired appropriate application: consequences for the law'

against children not only discursively but also on the levels that affected institutional procedures, policies, and ultimately, behaviour[2546] within the OTP. Significantly, Prosecutor Bensouda was not a newcomer to the Office; on the contrary, she had been there since the beginning of the Court's operation and was involved in the *Lubanga* proceedings. This involvement also explains her unequivocal reaffirmation of the norm's validity and aspiration towards its appropriate application. Her implementation has reflected the SGBV prohibition norm advocates' agency and the discursive deliberations on *Lubanga* in the refinement process of the norm's prescriptive status under her lead.

One of the first noteworthy changes that Prosecutor Bensouda introduced to her Office was the appointment of the then executive director of WIGJ, Brigid Inder, whose resistance efforts in *Lubanga* against the misrecognition of the SGBV prohibition norm had been largely ignored and even contested by the OTP, as its Special Gender Advisor. Brigid Inder, in turn, participated in the process of the institutional refinement of the normative meanings-in-use and prescriptive status in application specifically embedded in the Policy Paper on SGBC. Throughout this process, she inserted the WIGJ's agenda and requirements with respect to the investigations and prosecutions of SGBV. She highlighted their knowledge, expertise and experience in SGBV documentation, cooperation with local actors and civil society, and victim-centred approaches in the internal structures of the OTP, which is evidenced in new strategies and policies in the form of the Office's institutionally set goals and aspirations. Ultimately, the concerns of Inder's organization with regard to the OTP's applicatory misrecognition of the norm, which they had expressed throughout the *Lubanga* proceedings on various levels of interaction with the institutional structures of the Court, were finally acknowledged, and their previously denied agenda for the norm's appropriate application was successfully transformed into the one of the priorities of the OTP.

Throughout the process of further refinement of the prescriptive status of the norm, Prosecutor Bensouda repeatedly referred to the statements given during the *Lubanga* proceedings by the UN SRSG/CAAC Radhika Coomarsaway, with whom the OTP held also subsequent consultations. Similarly, such consultations took place with other UN organs dealing with human, women's and children's rights, including the Office of the UN SRSG/SVC, led at the time by Margot Wallström, the OHCHR, led at the time by

[2546] On various levels of influence see Keck/Sikkink (1998, 1999)

Navanethem Pillay[2547] as well as the UN Women. Moreover, throughout the process, Prosecutor Bensouda also underlined and recognized the efforts undertaken in the *Lubanga* case by Judge Elizabeth Odio Benito and the Office of Public Counsel for Victims led by Paolina Massidda. That is, the actions and argumentation of those who had taken part in the resistance process against the misrecognition of the SGBV prohibition norm in *Lubanga* became a point of reference in the institutional process of normative refinement and elaboration of the prescriptive status for its appropriate application. Furthermore, this process was presumably also supported by a number of other actors, both external and especially by those involved in the operation of the OTP. Their specific involvement and role could not be, however, revealed within the boundaries of this research due to restrictions on public data and access to the interviewees. Nevertheless, it has been noteworthy that virtually all actors who had been involved in resistance practices against the misrecognition of the norm either directly participated in this process or their concerns were taken into consideration throughout.

5.2.6.2.2. Institutional and structural factors

The further refinement of the prescriptive status for the application of the SGBV prohibition norm depicted above and reflected in the Strategic Plans and (Draft) Policies of the OTP reveals effects of (1) institutional learning and socialization with the appropriate application of the norm, achieved through (2) the discursive interactions inserted and maintained by gender justice advocates and their allies in *Lubanga*. Those effects exposed (3) the clarification in actors' understanding of the normative meanings-in-use on various stages of the OTP's work, including preliminary examinations, investigations, prosecutions and sentencing, as well as in areas such as cooperation with external actors and gender-sensitive treatment of victims and witnesses of SGBV. By prescribing the integration and application of a gender perspective and gender analysis on all levels of the OTP's operation, cumulative charging of SGBV, the interpretation of the law from the human rights perspective and the

[2547] The former ICTR Judge who was sitting on the bench in its historical *Akayesu* case and was cited in the OTP's Policy Paper on SGBC (ICC OTP, 2014, 15, para.26, footnote 23). The OTP's Draft Policy on Cultural Heritage also makes references to the jurisprudence of the *Akayesu* case (ICC OTP, 2021, para.79).

inclusion of the concept of intersectionality in its work, (4) the OTP has recognized its failure to apply the norm in the past and has aspired to correct and prevent such misrecognitions through the now institutionalized and monitored (yet still ongoing) process of socialization of its staff with appropriate application of the norm. This should, in turn, allow for its successive internalization and habitualization.

Perhaps one of the most significant institutional factors that had advanced this evolution of the socialization 'spiral' was (5) the OTP's leadership change and the election of Fatou Bensouda as the ICC's second Chief Prosecutor[2548]. As previously mentioned, (6) due to her former role as Deputy Prosecutor and head of the OTP's prosecutions division, she was aware of the resistance against the misrecognition of the SGBV prohibition norm in *Lubanga*, and (7) as one of the OTP's senior representatives, was also involved in discursive deliberations on its meaning-in-use, *i.e.*, in the reflective processes of learning and socialization with the norm's appropriate application[2549]. In fact, her efforts to not only prioritize the norm within the context of the recruitment crimes, but also to introduce a general "overhaul of an institutional set-up"[2550] in terms of the integration of a gender perspective and gender analysis on all levels of the OTP's work reveal (8) a persuasion effect[2551] achieved by the resistance against its misrecognition. That is, the advocates of the norm and their allies managed to persuade their target actors by the means of discursive deliberations and argumentative rationality and to contribute to the transformative consequences that should promote the further evolution of the institutional socialization with the norm's appropriate application, aiming at its internalization.

An additional factor that has likewise surely contributed to the further refinement of the norm and the elaboration of its prescriptive status has been (9) the appointment of Brigid Inder as the OTP's Special Gender Advisor at a timely moment for the introduction of institutional, strategic and policy changes[2552]. In contrast to the previous Special Gender Advisor to the OTP[2553], Brigid Inder was based in The Hague and WIGJ, which she was leading at the time, had been and continue to primarily focus their advocacy on the implementation of the ICC's

[2548] *Cp.* Checkel (2001)
[2549] *Cp.* Risse/Sikkink (1999); Risse (2000); Checkel (2005); Deitelhoff (2006); Wiener (2007, 2009); Wiener/Puetter (2009)
[2550] Madsen *et al*. (2018), 203
[2551] *Cp.* Deitelhoff (2006)
[2552] *Cp.* Finnemore/Sikkink(1998); Checkel (2001)
[2553] The appointment of Catherine MacKinnon as the OTP's first Special Gender Advisor was announced on November 28, 2008 (ICC Doc. No. ICC-OTP-20081126-PR377 from November 28, 2008). By this time, the charges against Lubanga were already confirmed (since January 29, 2007). For this reason and in the context of the previously discussed factors which had caused the applicatory misrecognition of the SGBV prohibition norm as well as the following denial of gender justice advocates' resistance efforts, the chance that she would have been able to persuade the Prosecutor to amend the indictment with SGBV charges (if she had tried to do so) was rather small.

gender justice mandate. That is, they possess (10) specific expertise and experience gathered in the field where the ICC has been active, including in areas such as the documentation of SGBV, cooperation with local partners, and gender-sensitive approaches towards victims and witnesses of such crimes[2554]. While (11) the validity of their knowledge was recognized through Inder's appointment as Special Gender Advisor to the OTP, she could bring this into the OTP's internal structures and further the process of refinement of the prescriptive status for the application of the norm. At the same time, (12) her organization's previous engagement in resistance practices and discursive deliberations on the appropriate application of the norm in *Lubanga* must have reinforced her competency (and the other actors' perception of her competency[2555]) with respect to its implementation within the ICC's institutional structures.

The OTP's new strategies and policies prescribe and interpret the appropriate application of the norm against the background of lessons learned in *Lubanga* and in accordance with "internationally recognized human rights"[2556]. This reveals (13) the transition from the logic of consequentialism to the logic of appropriateness[2557] within the OTP as relates to the understanding of the norm's meaning and application, the emergence of which could be already largely observed during the previous stage of the 'spiral'. While the Court's legal framework seems to entail some "constructive ambiguit[ies]"[2558] which might also be relevant to the application of the SGBV prohibition norm (due to the unique nature of this framework based on various fields and systems of law), (14) the OTP's attitude under Prosecutor Bensouda – whether in the context of the recruitment crimes or otherwise – appeared unambiguously inclined to prioritize the human rights approach when applying and interpreting the law in relation to SGBC and crimes against children. The (15) OTP's networking and cooperation with UN experts and institutions dealing with human, women's and children's rights[2559] throughout the refinement process must have additionally supported the prioritization of the human rights perspective with (16) authority inherent to these experts and institutions[2560]. In fact, references to their authority throughout the process in turn reveal (17) the OTP's engagement in leverage politics in order to underpin the prioritization of

[2554] *Cp.* Finnemore/Sikkink (1998); Keck/Sikkink (1998, 1999); Price (1998)
[2555] *Cp.* Risse (2000); Checkel (2001); Deitelhoff (2006)
[2556] Rome Statute (1998), Art. 21(3)
[2557] *Cp.* Checkel (2005)
[2558] Oosterveld (2014)
[2559] These institutions were led at the time by gender justice advocates and their allies, such as the former ICTR Judge Navanethem Pillay who had been previously involved in the evolution of the SGBV prohibition norm in ICL.
[2560] *Cp.* Finnemore/Sikkink (1998); Keck/Sikkink (1998, 1999); Price (1998); Risse (2000); Checkel (2001); Deitelhoff (2006); Badescu/Weiss (2010)

SGBV in its work[2561]. The change in attitude towards the norm, in turn, exposed (18) the continuing replacement of the internalized informal rules, which had been largely shaped by traditional IHL understandings and had contributed to the misrecognition of the norm in *Lubanga*, with new formal rules, which were rather shaped by IHRL understandings. That is, actors' (19) application of those new rules as a discourse in *Lubanga* advanced not only their socialization with the norm's appropriate application, but also their (20) cultural validation of the norm in the specific context of the case and, as a consequence, their (21) shared recognition of its universalistic content[2562]. Additionally, (22) the inherent connection between the SGBV prohibition norm and the prohibition of child soldiers' recruitment, which was revealed by (23) the advocates' framing of their agenda and was recognized by their target actors involved in the discursive interactions in *Lubanga*, seems to have (24) "chang[ed] contours of common knowledge"[2563]. This change appears to have made the OTP aware of the necessity to integrate a gender perspective and apply gender analysis to all crimes falling under the jurisdiction of the Court, as well as to analyse the intersection of relevant characteristics "which may give rise to multiple forms of discrimination and social inequalities"[2564] and thus, to the commission of certain crimes[2565]. What's more, the ongoing process of institutional learning and socialization with the appropriate application of the norm, *inter alia*, through (25) the OTP's emerging integration of the concept of intersectionality in its work, which has been based on lessons learned in, yet implemented beyond *Lubanga*, reveals (26) an emerging *phrónesis*, a "capacity to appropriately articulate given normative [gender] bonds in a situation"[2566] among the OTP's staff. This capacity has provided the OTP with additional lessons on the meaning of the norm in other specific contexts (through which it has been further formed)[2567]. The integration of these lessons in the OTP's recently issued Draft Policy on Cultural Heritage also reveals (27) a *phrónesis* effect, which has updated and additionally strengthened the norm's universalistic content and authority[2568].

[2561] *Cp.* Keck/Sikkink (1998, 1999)
[2562] *Cp.* Günther (1988); Deitelhoff (2006); Wiener (2007, 2009); Wiener/Puetter (2009)
[2563] Finnemore/Sikkink (1998), 910-911; *cp.* also Keck/Sikkink (1998, 1999); Price (1998); Risse (2000); Deitelhoff (2006)
[2564] ICC OTP (2014), 16, para.27
[2565] *Cp.* Günther (1988)
[2566] Günther (1988), 249-250 (based on Aristotle and Gadamer's interpretation of the Aristotle's theory of *phrónesis*)
[2567] *Cp. ibid*., 217-218, 222, 224-225, 232, 240-250
[2568] *Cp. ibid*.; Deitelhoff (2006)

5.2.6.2.3. Broader socio-political cleavages

The diminished socio-political cleavages between the SGBV prohibition norm's advocates and their target actors, which could be observed during the previous stage of the 'spiral' continued to narrow throughout the refinement process, simultaneously fostering the 'spiral's' further evolution. In combination with the constellation of the involved actors as well as institutional and structural factors, these continuously diminishing socio-political cleavages contributed to the introduction of the institutionalized process of actors' socialization with the appropriate application of the norm through the further refinement of its prescriptive status within the OTP. This process should in turn not only further reduce cleavages and promote the norm's internalization and habitualization within the OTP[2569], but also potentially produce a similar outcome among the staff of the Court more generally. The advocates of the non-state resistance against the misrecognition of the norm managed to inoculate their vision with respect to the status and appropriate application of the norm within the institutional structures, partly through their physical infiltration into these structures. The institutional transformations that they have facilitated included not only the elaboration of new strategies and policies, but also changes in legal perceptions and logics that impact actors' understanding of the normative meanings-in-use and ultimately rule their behaviour[2570]. That is, the internalized rules that had largely caused the misrecognition of the SGBV prohibition norm and tend to produce cleavages relating to its status and implementation have been replaced with new rules that should enable actors' socialization with its appropriate application[2571]. Despite differences in their backgrounds involving various cultures, legal systems, expertise and experience in human rights and gender issues, all the OTP's staff were entangled in the socialization process through its institutionalization, which includes monitoring mechanisms. The systematic prioritization of the human rights approach in the OTP's refinement process evidences this ongoing and institutionalized transformation with respect to the prescriptive status of the norm in application from the logic of consequentialism, inherent to IHL, towards the logic of appropriateness, characteristic of IHRL. This transformation suggests actors' engagement in reflective internalization of "new appropriateness understandings"[2572] in application and can be predicated to maintain further shrinking of the cleavages that had contributed to the applicatory misrecognition of the norm in the past. The institutionalization

[2569] *Cp.* Risse/Sikkink (1999)
[2570] *Cp.* Checkel (2005)
[2571] *Cp.* Chappell (2016)
[2572] Checkel (2005), 812

of this process should furthermore promote cultural validation of the norm and understanding of its meanings in various contexts and situations on the individual level, its shared recognition and acceptance of its prescriptiveness[2573] and eventually, the overall institutional socialization with its appropriate application.

5.2.7. Further conceptual clarification through aspired appropriate application: consequences for the law

The following analysis is predominantly based on the same data, which was discussed in chapter '2. Mapping the application of the SGBV prohibition norm at the ICC'. Some repetition of this information has been included for the sake of an analysis which aims to demonstrate the evolution of actors' socialization with the appropriate application of the SGBV prohibition norm in terms of successful legal outcomes on both prosecutorial and jurisprudential levels, *i.e.*, consequences for the law[2574] that were generated by the resistance against the misrecognition of the norm in *Lubanga*. Since the aforementioned institutional and structural changes were initiated under Prosecutor Bensouda (since 2012) nine additional cases have been brought before the Court by her Office (*Mudacumura*/DRC[2575], *Bemba et al.*/CAR I[2576], *Yekatom&Ngaïssona*/CAR II[2577], *Barasa*/Kenya[2578], *Gicheru&Bett*/Kenya[2579], *Khaled*/Lybia[2580], *Al-Werfalli*/Lybia[2581], *Al Mahdi*/Mali[2582], and *Al Hassan*/Mali[2583]). Moreover, Prosecutor Bensouda amended the already existing cases against Ntaganda/DRC[2584], Ongwen/Uganda[2585], and Abd-Al-Rahman/Darfur[2586] with additional

[2573] *Cp.* Wiener (2007, 2009); Wiener/Puetter (2009)
[2574] Madsen *et al*. (2018)
[2575] ICC Doc. No. ICC-PIDS-CIS-DRC-05-006/18_Eng from April 2018
[2576] ICC Doc. No. ICC-PIDS-CIS-CAR-02-014/18_Eng from September 2018
[2577] ICC Doc. No. ICC-PIDS-CIS-CARII-03-012/20_Eng from July 2021
[2578] ICC Doc. No. ICC-CPI-20131002-PR948 from October 2, 2013
[2579] ICC Doc. No. ICC-PIDS-CIS-KEN-005-001/20_Eng from December 2020
[2580] ICC Doc. No. ICC-PIDS-CIS-LIB-02-002/18_Eng from April 2018
[2581] ICC Doc. No. ICC-PIOS-CIS-LIB-03-003/18 from July 2018
[2582] ICC Doc. No. ICC-PIDS-CIS-MAL-01-08/16 from October 7, 2016
[2583] ICC Doc. No. ICC-PIDS-CIS-MAL-02-010/20_Eng from October 2020
[2584] ICC Doc. No. ICC-01/04-02/06-1707 from January 4, 2017; ICC Doc. No. ICC-01/04-02/06-1962 from June 15, 2017
[2585] ICC Doc. No. ICC-02/04-01/15-422-Red from March 23, 2016
[2586] ICC Doc. No. ICC-02/05-01/07-74-Red from June 11, 2020

charges. In three cases among the twelve (*Bemba et al.*/CAR I[2587], *Barasa*/Kenya[2588], and *Gicheru&Bett*/Kenya[2589]) the Prosecutor brought charges of crimes against the administration of justice; neither these cases nor the *Al-Werfalli*/Lybia[2590] case included (or still include) any allegations of SGBV against the accused/suspects. Both Mudacumura/DRC, charged with war crimes of rape, torture and mutilation based on evidence of sexual violence[2591], and Khaled/Lybia, charged with indirect charges of SGBV including crimes against humanity of torture, persecution and other inhuman acts and war crimes of torture, cruel treatment and outrages upon personal dignity based on acts of rape and sexual violence[2592], are still at large[2593], as are Al-Werfalli, Barasa, and Gicheru&Bett[2594], and therefore proceedings against them are pending.

Among the remaining six cases, in *Al Mahdi* the accused was exclusively charged with the war crime of destruction of cultural heritage[2595]. This decision was criticized by NGOs who claimed he was also responsible for the commission of SGBV[2596]. As discussed in chapter '2. Mapping the application of the SGBV prohibition norm at the ICC', *Al Mahdi* also appears to have been somewhat of a strategic case, which enabled the OTP to proceed quickly on a new thematic issue while also perhaps, attempting to gain access to another suspect (*Al Hassan*). The indictment against Abd-Al-Rahman includes both direct and indirect charges of SGBV, while the first arrest warrant against him was already brought under Prosecutor Moreno Ocampo[2597]. The second arrest warrant brought under Prosecutor Bensouda includes additional charges of (gender-based) murder of *Fur* men as a war crime and a crime against humanity, and other (gender-based) inhuman acts committed against *Fur* men as a war crime[2598]. The suspect has been in the ICC's custody since June 9, 2020 and the opening of the confirmation of charges procedure has been provisionally scheduled for May 24, 2021[2599]. Since the *Al Mahdi* case did not involve any SGBV allegations and the charges against Abd-Al-Rahman have not yet been confirmed, I will not consider them in any further detail here.

[2587] ICC Doc. No. ICC-01/05-01/13-2275-Red from March 8, 2018. Although charges of offences against the administration of justice brought against Bemba in *Bemba et al.* also related to the charge of rape brought against him in his main case, he was eventually acquitted on all charges in the main case (ICC Doc. No. ICC-01/05-01/08-3636-Red from June 8, 2018). Therefore, I will not include the *Bemba et al.* case in the following analysis.
[2588] ICC Doc. No. ICC-01/09-01/13-1-Red2 from September 26, 2013
[2589] ICC Doc. No. ICC-01/09-01/15-1-Red from September 10, 2015
[2590] ICC Doc. No. ICC-01/11-01/17-2 from August 15, 2017
[2591] ICC Doc. No. ICC-01/04-01/12-1-Red from July 13, 2012; Grey (2019), 255
[2592] ICC Doc. No. ICC-01/11-01-13-1 from April 18, 2013
[2593] ICC Doc. No. ICC-PIDS-CIS-DRC-05-006/18_Eng from April 2018; ICC Doc. No. ICC-PIDS-CIS-LIB-02-002/18_Eng from April 2018
[2594] ICC Doc. No. ICC-PIOS-CIS-LIB-03-003/18 from July 2018; ICC Doc. No. ICC-CPI-20131002-PR948 from October 2, 2013; ICC Doc. No. ICC-PIDS-CIS-KEN-005-001/20_Eng from December 2020
[2595] ICC Doc. No. ICC-PIDS-CIS-MAL-01-08/16 from October 7, 2016
[2596] FIDH (2015, 2016)
[2597] ICC Doc. No. ICC-02/05-01/07-3-Corr from April 27, 2007
[2598] ICC Doc. No. ICC-02/05-01/07-74-Red from June 11, 2020
[2599] ICC Doc. No. ICC-PIOS-CIS-SUD-006-001/20_Eng from June 15, 2020

Among the four remaining cases brought (*Yekatom&Ngaïssona*, *Al Hassan*) and amended (*Ntaganda*, *Ongwen*) under Prosecutor Bensouda in which the accused have been charged with direct, indirect and also precedential counts of SGBV, the latter three represent the most significant evolutions in terms of the appropriate application of the SGBV prohibition norm by the OTP and as a consequence, also by the Chambers. While Al Hassan is currently on trial at the time of writing, the long-awaited judgements against Ntaganda[2600] and Ongwen[2601] recently delivered successful outcomes of progressive SGBV prosecution and adjudication. The case against Yekatom&Ngaïssona who also are currently on trial has been less successful in both prosecutorial and adjudicatory terms. However, the OTP has attempted in this case to employ some of the previously learned lessons on the appropriate application of the SGBV prohibition norm. As discussed in chapter '2. Mapping the application of the SGBV prohibition norm at the ICC', the initial charges against Yekatom and Ngaïssona did not include any SGBV[2602]. However, shortly before the confirmation hearing, the OTP amended charges against Ngaïssona with rape and attempted rape as crimes against humanity and war crimes[2603]. Likewise, rape and attempted rape were referred to in the context of the amended charges of persecution as a crime against humanity and of attack directed against civilian population as a war crime[2604]. Furthermore, the description of child soldiers' recruitment charges was amended with the acknowledgement that some children had allegedly been subjected to sexual violence[2605]. Ultimately, the Judges of the PTC also confirmed the amended charges of rape, persecution and attack directed against civilian population, including references to rape[2606]. However, despite available hints of evidence, the intersection of gender and religious grounds was not highlighted within the context of the persecution charges that were confirmed against both the accused[2607]. Although the OTP has aspired in its Policy Paper on SGBC to apply the concept of intersectionality[2608] and, in fact, has been already doing so in *Al Hassan*[2609], it once again retreated from elaborating on this matter in *Yekatom&Ngaïssona*. Rosemary Grey suggests that this neglect might have been caused by the Court's staff's continued unfamiliarity with concepts of gender and intersectionality as well as by the informal rules which, despite formally achieved progress, still seem to have

[2600] ICC Doc. No. ICC-01/04-02/06-2359 from July 8, 2019; ICC Doc. No. ICC-CPI-20210330-PR1582 from March 30, 2021
[2601] ICC Doc. No. ICC-02/04-01/15-1762-Red from February 4, 2021
[2602] ICC Doc. No. ICC-01/14-01/18-1-Red from November 17, 2018; ICC Doc. No. ICC-01/14-02/18-2-Red from December 13, 2018
[2603] ICC Doc. No. ICC-01/14-01/18-282-AnxB1-Red from September 18, 2019, para.9, pp.142-162
[2604] *Ibid*., paras.323, 377, 412, 579
[2605] *Ibid*., para.114
[2606] ICC Doc. No. ICC-01/14-01/18-403-Red-Corr from May 14, 2020, 102-103, 105-106
[2607] *Ibid.*
[2608] ICC OTP (2014), paras.27, 67
[2609] ICC Doc. No. ICC-01/12-01/18-35-Red2-tENG from May 22, 2018, para.94

continually influenced the perception of gender, in contrast to race, religion, nationality or ethnicity as a rather "[ir]relevant category of victimization"[2610].

After the charges had been confirmed, Prosecutor Bensouda attempted to amend the indictment against Yekatom with crimes of rape and sexual slavery committed against child soldiers within the context of their recruitment under his alleged responsibility based on the legal evolutions set in *Ntaganda*[2611]. The OTP also tried to explain to the Judges of the PTC why it had not raised these allegations before[2612]. Furthermore, as Grey *et al*. suggest, due to lessons learned through Bemba's acquittal[2613], the OTP tried to amend the already confirmed charges of rape against Ngaissona with additional evidence[2614]. However, arguing that such amendments would have been unfair towards the Defence and would have significantly delayed the proceedings, the PTC denied those requests as well as the Prosecutor's following appeal requests, supported by the Legal Representatives of the victims[2615]. Although the OTP mentioned in the description of charges (before their confirmation) that some children had allegedly been subjected to sexual violence[2616] and subsequently (somewhat belatedly) attempted to draw the attention of the Chamber to SGBV committed against child soldiers under the alleged responsibility of the accused, the Judges' denial to address the issue has ultimately excluded it from being prosecuted in this case (despite the previously learned lessons in *Lubanga* and *Ntaganda*).

Although the OTP did not initially introduce the issue of SGBV committed against child soldiers in *Yekatom&Ngaïssona* because of certain obstacles[2617], the evolution of the case has demonstrated that its ongoing socialization with appropriate application of the SGBV prohibition norm and the lessons learned in previous cases[2618] have compelled it to subsequently try to introduce the issue and to amend its evidence of SGBV in this case. That said, the OTP has so far failed to maintain its emerging application of the concept of intersectionality to crimes committed on various grounds including gender. In fact, while the PTC has essentially blocked its attempts at more integral and strong prosecution of SGBV in this case, the OTP also stands to learn how they can more convincingly persuade the Judges from this experience.

[2610] Grey (2019), 280-281
[2611] ICC Doc. No. ICC-01/14-01/18-518-Red from May 22, 2020, paras.3, 5, 14
[2612] *Ibid*., paras.23-30
[2613] Grey *et al*. (2020a), n.p.
[2614] ICC Doc. No. ICC-01/14-01/18-468-Red from March 31, 2020, paras.1-2, 6-10
[2615] ICC Doc. No. ICC-01/14-01/18-517 from May 14, 2020; ICC Doc. No. ICC-01/14-01/18-560 from June 19, 2020
[2616] ICC Doc. No. ICC-01/14-01/18-282-AnxB1-Red from September 18, 2019, para.114
[2617] ICC Doc. No. ICC-01/14-01/18-518-Red from May 22, 2020, paras.23-30
[2618] *Ibid*., para.14

Ntaganda, *Ongwen* and *Al Hassan* can be described as the most successful cases of the OTP in terms of SGBV so far. As elaborated in chapter '2. Mapping the application of the SGBV prohibition norm at the ICC', Prosecutor Bensouda amended previous indictments in *Ntaganda*[2619] and *Ongwen*[2620] and brought precedential charges of SGBV in *Al Hassan*[2621] in accordance with the previously learned lessons and aspirations set in her Office's Strategic Plans and Policies on SGBC and Children. Eventually, on July 8, 2019, Ntaganda was found guilty of all SGBV charges brought against him[2622]. The verdict was also confirmed by the Appeals Chamber[2623] and – considering Bemba's acquittal – represents the ICC's first conviction of an individual for the commission of SGBC. Ntaganda was sentenced to thirty years of imprisonment[2624], which was confirmed by the Appeals Chamber[2625]. Similarly, on February 4, 2021, Ongwen was found guilty of all SGBV charges brought against him[2626]. He was sentenced to twenty-five years of imprisonment[2627]. It is worth noting that at the time of writing, the Defence Council of Ongwen had already notified the Appeals Chamber of its intent to appeal the trial judgement[2628] and either Party to the proceedings may also still appeal the sentence[2629]. Nonetheless, both the *Ntaganda* and *Ongwen* cases have already introduced examples of precedential prosecution and adjudication of SGBV and have strengthened the content and status of the norm on its prohibition. Likewise, all SGBV charges (including the crime against humanity of persecution based on both gender and religious grounds) were confirmed in *Al Hassan*[2630] for trial that opened on July 14, 2020, and is currently ongoing[2631]. In the following subchapters, I will reflect on the legal evolutions implemented in these three cases against the background of the institutional process of socialization with appropriate application of the SGBV prohibition norm.

[2619] ICC Doc. No. ICC-01/04-02/06-309 from June 9, 2014
[2620] ICC Doc. No. ICC-02/04-01/15-422-Red from March 23, 2016
[2621] ICC Doc. No. ICC-PIDS-CIS-MAL-02-010/20_Eng from October 2020
[2622] ICC Doc. No ICC-01/04-02/06-2359 from July 8, 2019
[2623] ICC Doc. No. ICC-CPI-20210330-PR1582 from March 30, 2021
[2624] ICC Doc No. ICC-01/04-02/06-2442 from November 7, 2019, para.246; ICC Doc. No ICC-01/04-02/06-2359 from July 8, 2019, paras.995, 998, 1001, 1004, 1006, 1007
[2625] ICC Doc. No. ICC-CPI-20210330-PR1582 from March 30, 2021
[2626] ICC Doc. No. ICC-02/04-01/15-1762-Red from February 4, 2021, para.3116
[2627] ICC Doc. No. ICC-02/04-01/15-1819-Red from May 6, 2021
[2628] ICC Doc. No. ICC-02/04-01/15-1826 from May 21, 2021
[2629] ICC Doc. No. ICC-PIDS-CIS-UGA-02-021/21_Eng from May 7, 2021
[2630] ICC Doc. No. ICC-CPI-20190930-PR1483 from September 30, 2019
[2631] ICC. Doc. No. ICC-CPI-20200713-PR1531 from July 14, 2020

5.2.7.1. Ntaganda case

In the case against Bosco Ntaganda, the implementation of lessons learned in *Lubanga* (as both cases were from the same situation in the DRC) has been especially notable in terms of the advancing socialization of actors involved in the operation of the OTP with the appropriate application of the SGBV prohibition norm. In fact, as depicted in chapter '2. Mapping the application of the SGBV prohibition norm at the ICC', while Ntaganda's initial charges were identical with Lubanga's, *i.e.*, they did not include any SGBV references[2632], Ntaganda was ultimately convicted for his responsibility for the commission of rape and sexual slavery as both war crimes and crimes against humanity, as the first individual at the ICC[2633]. Grey notices that although some NGOs noted the absence of SGBV charges in his arrest warrant back in 2006, the resistance against this was not as tangible as in Lubanga, since Ntaganda was neither in the ICC's custody nor was his trial imminent at the time[2634]. However, the resistance in Lubanga has eventually impacted the Ntaganda case too. After the issuance of the judgment in the former, the indictment in the latter was amended twice: under Prosecutor Moreno Ocampo and Prosecutor Bensouda, in accordance with the requirements of gender justice advocates in *Lubanga*. The first amendment with charges of rape and sexual slavery *committed against civilian population* as both war crimes and crimes against humanity under Prosecutor Moreno Ocampo[2635] fulfilled one part of the requests expressed by WIGJ in the initial stages of the *Lubanga* proceedings: to prosecute SGBV committed under the alleged responsibility of the suspect, not only against child soldiers but also against a civilian population. The second amendment, initiated by Prosecutor Bensouda, introduced war crimes charges of rape and sexual slavery *committed against child soldiers*[2636], a precedent which at the time was still largely perceived as incoherent under IHL but which ultimately fulfilled all requests of gender justice advocates in *Lubanga*. Moreover, Prosecutor Bensouda also requested an amendment with additional charges of the crime against humanity of persecution and the war crime of attacks against the civilian population, which were likewise based on evidence of SGBV[2637].

[2632] ICC Doc. No. ICC-01/04-02/06-2-Anx-tENG from August 22, 2006
[2633] ICC Doc. No ICC-01/04-02/06-2359 from July 8, 2019; ICC Doc. No. ICC-01/04-02/06-2666-Red from March 30, 2021
[2634] Grey (2019), 144
[2635] ICC Doc. No. ICC-01/04-02/06-36-Red from July 13, 2012, para.5
[2636] ICC Doc. No. ICC-01/04-02/06-203-AnxA from January 10, 2014, paras.100-108
[2637] *Ibid*., paras.158-166

The amendment of Ntaganda's indictment with the war crimes of rape and sexual slavery committed against child soldiers despite its legally controversial nature at the time was not only "ground-breaking"[2638], it also demonstrated progress within the OTP with respect to actors' understanding of the appropriate application of the SGBV prohibition norm and its various meanings-in-use. This evolution was generated by the lessons learned in Lubanga as well as the OTP's following internal deliberations, including consultations with external legal experts[2639]. It reflects the precedent of aspired integration of a gender perspective and application of gender analysis to all crimes falling under the jurisdiction of the Court, especially when committed against children, encompassed in the OTP's subsequently issued new policies[2640]. In contrast to the misrecognition in Lubanga, the advancing socialization process with appropriate application of the norm facilitated integral charging, provision of sufficient evidence, and prosecution of SGBV based on an elaborated logic of appropriate argumentation, inspired by IHRL understandings, which also resonated with all Judges involved in the proceedings on the pre-trial[2641], trial[2642] and appeal[2643] levels, despite previously assumed legal incoherence inherent to those charges from the IHL perspective[2644]. Significantly, in their argumentation, which was based, *i.a.*, on the views of the feminist legal scholar Kelly D. Askin, the Judges referred to prohibitions of slavery, torture and genocide as *jus cogens* norms under international law and stated that rape and sexual slavery that may constitute such crimes therefore have the same status[2645]. While the Pre-Trial Chamber had confirmed all SGBV charges in this case for trial[2646], the Trial Chamber ultimately convicted Ntaganda as an indirect co-perpetrator of the war crimes and crimes against humanity of rape and sexual slavery committed against a civilian population, as an indirect co-perpetrator of the war crimes of rape and sexual slavery committed against child soldiers, and as a direct perpetrator and indirect co-perpetrator of the crime against humanity of persecution based, *i.a.*, on acts of SGBV[2647]. The Appeals Chamber also upheld the Trial Chamber's judgement and in doing so, reaffirmed the ICC's first and precedential conviction of an individual for the commission of SGBC[2648]. As elaborated in chapter '2. Mapping the application of the SGBV

[2638] Grey (2019), 146
[2639] Interview with F. Guariglia (ICC OTP), The Hague, December 2018
[2640] ICC OTP (2014); ICC OTP (2016a,b)
[2641] ICC Doc. No. ICC-01/04-02/06-309 from June 9, 2014
[2642] ICC Doc. No. ICC-01/04-02/06-1707 from January 4, 2017; ICC Doc. No ICC-01/04-02/06-2359 from July 8, 2019
[2643] ICC Doc. No. ICC-01/04-02/06-1962 from June 15, 2017; ICC Doc. No. ICC-01/04-02/06-2666-Red from March 30, 2021
[2644] As previously mentioned, according to the Geneva Conventions and their Protocols Additional, only crimes committed against persons who did not participate in hostilities (*i.e.*, civilian populations and prisoners of war, but not combatants), could be defined as war crimes (Geneva Convention III, 1949, Art. 3; Protocol II, 1977, Art. 4; McDermott, 2017)
[2645] ICC Doc. No. ICC-01/04-02/06 from January 4, 2017, para.51
[2646] ICC Doc. No. ICC-01/04-02/06-309 from June 9, 2014, paras.49-57, 76-82; ICC Doc. No. ICC-PIDS-CIS-DRC-02-011/15 from January 2017; see also Grey (2019), 144-146
[2647] ICC Doc. No ICC-01/04-02/06-2359 from July 8, 2019
[2648] ICC Doc. No. ICC-CPI-20210330-PR1582 from March 30, 2021; ICC Doc. No. ICC-01/04-02/06-2666-Red from March 30, 2021

prohibition norm at the ICC', these progressive recognitions set by the adjudication in this case have not only reaffirmed and strengthened the validity of the SGBV prohibition norm, but also contributed to further clarification on its appropriate application in ICL through the convergence of IHL with IHRL.

The sentencing decision in this case also reflects the implementation of lessons learned by the OTP in *Lubanga* and its ability to persuade the Judges in accordance with those lessons[2649]. The thirty years of imprisonment to which Ntaganda has been sentenced, constitute more than a double amount of Lubanga's sentence[2650]. This was adjudged based on, *i.a.*, twenty eight years for rape of civilian population committed against women, girls and men as a war crime and a crime against humanity, twelve years for sexual enslavement of civilian population as a war crime and a crime against humanity, eighteen years for the war crime of the enlistment, conscription and use of child soldiers to participate actively in hostilities[2651], seventeen years for rape of female child soldiers as a war crime, fourteen years for sexual slavery of female child soldiers as a war crime, and thirty years for the crime against humanity of persecution committed against women, girls and men by means including SGBV[2652]. Moreover, the Judges recognized such factors as the "very young age", "particular defencelessness" and "repeated victimization" of child soldiers as aggravating[2653], and took into account the "grave nature and consequences of sexual violence crimes, in particular against children"[2654]. In this respect, they considered the physical and psychological harm inflicted upon female child soldiers, such as unwanted pregnancies and sexually transmitted diseases as well as ostracization, stigmatization and social rejection[2655]. Similarly, in relation to rapes and sexual slavery committed against civilian population, such factors as "particular defencelessness", "repeated victimization", and "particular cruelty" were acknowledged as aggravating[2656].

The interpretation and application of the law by both the OTP and the Judges in this case has fairly implemented the expectations of the ICC's gender justice constituency expressed throughout the *Lubanga* proceedings. In fact, *Ntaganda* has demonstrated that the Court's organs took those concerns seriously and corrected the omissions that had been admitted in its

[2649] ICC Doc No. ICC-01/04-02/06-2442 from November 7, 2019; ICC Doc. No. ICC-CPI-20210330-PR1582 from March 30, 2021
[2650] ICC Doc. No. ICC-01/04-01/06-2901 from July 10, 2012
[2651] For his responsibility for the commission of this crime (without aggravating circumstances) Lubanga was sentenced to fourteen years of imprisonment (ICC Doc. No. ICC-01/04-01/06-2901 from July 10, 2012; see subchapter '5.2.5.5. The sentencing decision').
[2652] ICC Doc No. ICC-01/04-02/06-2442 from November 7, 2019, para.246; ICC Doc. No ICC-01/04-02/06-2359 from July 8, 2019, paras.995, 998, 1001, 1004, 1006, 1007
[2653] ICC Doc. No. ICC-01/04-02/06-2442 from November 7, 2019, paras.126-127
[2654] *Ibid*., para.95
[2655] *Ibid*., para.130; ICC (2019), para.29
[2656] ICC Doc. No. ICC-01/04-02/06-2442 from November 7, 2019, paras.121-124

first case. In chronological terms, the OTP had even amended the indictment against Ntaganda with precedential war crimes charges of rape and sexual slavery committed against child soldiers[2657] before its Policies on SGBC and on Children were officially issued and significantly in advance of their attempts to systematically implement these policies through various areas of its work[2658]. However, the amendments were also impacted by the process of actors' socialization with the appropriate application of the SGBV prohibition norm, which had been triggered and maintained in *Lubanga* and continued to progress ever since based on the lessons learned throughout. Indeed, the OTP implemented these lessons on various levels in the *Ntaganda* case, just as its Policy on SGBC prescribes: by charging SGBV in an integral, direct and indirect way as war crimes and crimes against humanity under various modes of Ntaganda's alleged liability, by integrating a gender perspective and applying gender analysis to prosecution of those crimes, and by providing sufficient evidence of the accused's responsibility for those crimes. This ultimately persuaded the Judges, despite the previously assumed issues of legal incoherence repeatedly raised by the Defence[2659]. As previously mentioned, the sentencing judgement against Ntaganda has further demonstrated that the OTP – in accordance with lessons learned in *Lubanga* and goals set in its Policies on SGBC and on Children – appropriately reflected on the grave nature of SGBC committed against both child solders and civilian population as well as on the devastating consequences of those crimes, especially for children, which the Judges took into consideration while issuing their decision that sentenced Ntaganda to the lengthiest imprisonment ever adjudged by the Court[2660].

[2657] ICC Doc. No. ICC-01/04-02/06-203-AnxA from January 10, 2014
[2658] ICC OTP (2014 (June); 2016)
[2659] ICC Doc. No. ICC-01/04-02/06-309 from June 9, 2014; ICC Doc. No. ICC-01/04-02/06-804 from September 1, 2015; ICC Doc. No. ICC-01/04-02/06-892 from October 9, 2015; ICC Doc. No. ICC-01/04-02/06-909 from October 19, 2015; ICC Doc. No. ICC-01/04-02/06-1256 from April 7, 2016; ICC Doc No. ICC-01/04-02/06-1707 from January 4, 2017; ICC Doc. No. ICC-01/04-02/06-1710 from January 10, 2017; ICC Doc. No. ICC-01/04-02/06-1754 from January 26, 2017; ICC Doc. No. ICC-01/04-02/06-1962 from June 15, 2017; ICC Doc. No. ICC-01/04-02/06-2359 from July 8, 2019; ICC Doc. No. ICC-01/04-02/06-2666-Red from March 30, 2021
[2660] ICC Doc. No. ICC-01/04-02/06-2442 from November 7, 2019; ICC Doc. No. ICC-CPI-20210330-PR1582 from March 30, 2021

5.2.7.2. Ongwen case

The case against Dominic Ongwen (Uganda), along with *Ntaganda*, is another progressive example, which demonstrates the OTP's advancing socialization with appropriate application of the SGBV prohibition norm in accordance with its strategic plans and policies. As depicted in chapter '2. Mapping the application of the SGBV prohibition norm at the ICC' and similar to the *Ntaganda* case, the arrest warrant brought against Ongwen in 2005 under Prosecutor Moreno Ocampo did not include any charges of SGBV[2661]. However, after further investigations in Uganda which followed the appearance of Ongwen before the ICC in January 2015[2662], Prosecutor Bensouda requested an amendment of his indictment, *i.a.*, with a historical list of both separate and indirect SGBV charges of crimes against humanity and war crimes constituted by the commission of offences such as forced marriage (as 'an other inhuman act'), forced pregnancy, rape, sexual slavery, torture, enslavement and outrages upon personal dignity under various modes of the suspect's liability, as well as with the war crimes charges of child soldiers' recruitment[2663]. Significantly, the PTC Judges also confirmed all these charges for trial[2664]. This demonstrates the progressing faculty within the OTP to integral and gender-sensitive investigations, provision of sufficient evidence and prosecution of such crimes, despite the fact that some of these charges were brought for the first time at the ICC[2665]. In fact, as elaborated in chapter '2. Mapping the application of the SGBV prohibition norm at the ICC', the OTP also applied innovative investigative and prosecutorial techniques with respect to its precedential charges of forced marriage and forced pregnancy for the first time within the Court. This ultimately allowed its staff to gain and preserve the evidence in a gender-sensitive way[2666]. Likewise, in what has arguably been the most comprehensively prosecuted case of SGBV at the ICC to date, the OTP has demonstrated its developing gender-sensitive approach, which has included integration of a gender perspective and application of gender analysis, through highlighting the differences between the crimes of sexual slavery and forced marriage, which also intersect to a certain extent[2667]. Supported by the LRs of the victims, the OTP reflected the intent of the perpetrator, the experiences of the virtually exclusively female victims/survivors as well as gender-based consequences of these

[2661] ICC Doc. No. ICC-02/04-01/05-57 from July 8, 2005
[2662] Grey (2019), 173-174
[2663] ICC Doc. No. ICC-02/04-01/15-375-AnxA-Red from December 22, 2015, paras.128-141; ICC Doc. No. ICC-02/04-01/15-375-AnxA-Red2 from May 25, 2016, paras.127-141
[2664] ICC-02/04-01/15-422-Red from March 23, 2016; see also Grey (2019), 283-284
[2665] This specifically relates to the crimes of forced marriage and forced pregnancy (Grey 2019, 171)
[2666] Grey (2019), 171, 175-176
[2667] See for instance also the OTP's closing brief, ICC Doc. No. ICC-02/04-01/15-1719-Red from February 24, 2020; Grey (2019), 287-288

conducts and succeeded in persuading the Judges to accept its approach despite the contestation of the Defence[2668].

In this case the OTP has once again maintained the aspiration laid down in its Policy Paper on SGBC to bring such charges under various modes of suspects' criminal liability. While prosecuted for his alleged direct perpetration of abduction and various following SGBV conducts including rape, sexual slavery, forced labour, forced marriage and forced pregnancy against eight girls/young women[2669], Ongwen also faced charges as an indirect co-perpetrator of SGBC committed against girls and women who had been abducted and forced to work as domestic servants, to perform the role of "wives" of the LRA fighters[2670] or forced into sexual slavery[2671]. Interestingly, while one of the girls among Ongwen's direct victims/survivors was only ten years old at the time, the description of crimes committed against her included an explicit notice that she was "a civilian taking no active part in hostilities"[2672]. Similarly, the description of the conducts with which Ongwen was charged as indirect co-perpetrator also included the same notice regarding the women concerned[2673].

Despite the fact that the *Ongwen* case is progressive in many respects and was prosecuted under various modes of the accused's criminal accountability[2674], it does not seem to have contributed to the evolution of gender-sensitive legal understandings of the recruitment crimes against children. That is, within its case theory, the OTP did not elaborate on SGBV that might have been also committed against children in the context of their abduction, conscription, and use to participate actively in hostilities[2675]. While the narrative of the case is somewhat ambiguous in this respect[2676], it has demonstrated that women and girls had been abducted in order to be explicitly used as sex slaves and so-called forced wives of the LRA fighters and, as previously mentioned, did not otherwise actively participate in hostilities conducted by the LRA. The child soldiers, in contrast, appear to have been abducted for exclusively combat-related activities: conscripted into the armed forces, they were trained, given uniforms and arms, and exercised duties and conducts such as gathering information,

[2668] *Ibid*.; ICC Doc. No. ICC-02/04-01/15-1720-Red from February 28, 2020
[2669] The arrest warrant referred to eight girls/young women who had been allegedly forcibly enslaved, forced into being his 'wives', and subjected to a number of SGBC by Ongwen directly. At least three of them also seem to have been subjected to forced pregnancies that resulted from repeated acts of rape (ICC Doc. No. ICC-02/04-01/15-375-AnxA-Red2 from May 25, 2016, paras.66-127).
[2670] Also so called 'ting tings', *i.e.*, household servants (Grey 2019, 174); the closing brief of the OTP explained that abducted "girls were initially distributed as *ting tings*, but after two weeks they could also become 'wives'" (ICC Doc. No. ICC-02/04-01/15-1719-Red from February 24, 2020, para.132)
[2671] ICC Doc. No. ICC-02/04-01/15-375-AnxA-Red2 from May 25, 2016, paras.128-134
[2672] *Ibid*., para.106
[2673] *Ibid*., para.132
[2674] ICC Doc. No. ICC-02/04-01/15-1762-Red from February 4, 2021, paras.35-36
[2675] ICC Doc. No. ICC-02/04-01/15-375-AnxA-Red2 from May 25, 2016, paras.135-141
[2676] Grey (2019), 175

transporting arms, ammunition, and foodstuffs, scouting, spying, and escorting, collecting and carrying pillaged goods and burning and pillaging civilian houses[2677]. Despite the inherent nature of SGBV to the recruitment crimes against children exposed in the *Lubanga* and *Ntaganda* cases, as well as the aims subsequently set in the OTP's Policies on SGBC and on Children in accordance with those lessons, this narrative neither seems to integrate a gender perspective nor to apply gender analysis to the offences committed against children within the context of their recruitment. It does not say anything about the role of girls in the armed forces, although they had been recruited by the LRA as child soldiers, just like their male counterparts. The Legal Representatives of the victims also stressed that both girls and boys had been abducted, conscripted in the LRA, and used in hostilities[2678]. In their closing brief they referred to the recognition in *Ntaganda* that perpetration of rape and sexual slavery against child soldiers within their own forces may constitute war crimes[2679], and stated that some of the child soldiers "served as escorts and bodyguards of LRA commanders, including Mr Ongwen, and were forced into sexual intercourses"[2680].

Indeed, against the background of previously learned lessons, the OTP's tackling of this case by focusing separately on the abduction of women and girls specifically for sexual, reproductive and domestic labour purposes, and on the conscription and use of child soldiers exclusively for combat-related activities has been somewhat confusing. On the one hand, this narrative has certainly revealed various gender-specific conducts, risks and consequences by thoroughly addressing the crimes committed by and within the LRA against abducted women and girls. Moreover, the OTP highlighted the strategic rather than opportunistic nature of those crimes, which were motivated by the intention of "forcing [those women and girls] to act as wives of LRA commanders and fighters" while their "numerous children […] were themselves then ingested into the ranks of LRA"[2681]. Additionally, the OTP addressed the inherent gender-based nature of sexual violence and other crimes that had been perpetrated against women and girls in the LRA[2682]. On the other hand, the OTP's case theory did not embrace a gender perspective and analysis with respect to crimes committed against child soldiers, whether female or male, within the context of their recruitment. As mentioned above, this neglect has been especially puzzling with respect to girl soldiers, considering their specific role in armed forces, which was recognized in *Lubanga* and *Ntaganda* cases. It has

[2677] ICC Doc. No. ICC-02/04-01/15-375-AnxA-Red2 from May 25, 2016, paras.136-138; ICC Doc. No. ICC-02/04-01/15-1719-Red from February 24, 2020, para.100
[2678] ICC Doc. No. ICC-02/04-01/15-1720-Red from February 28, 2020, 61-67
[2679] *Ibid*., para.111
[2680] *Ibid*., para.114
[2681] Grey (2019), 174-175
[2682] *Ibid*., 177

unfortunately also maintained the SGBV narrative that had previously largely excluded boys. Since *Lubanga* and *Ntaganda* unequivocally demonstrated that the specific use of child soldiers and the violence committed against them in the context of their recruitment had been essentially gender-based, the lack of gender analysis and perspective in prosecuting these crimes in *Ongwen* is indeed perplexing, particularly due the progressive legal evolutions which had taken place in this regard in *Ntaganda*.

The perception that SGBV committed against boys and men has been still largely overlooked (even in otherwise progressive cases) was additionally strengthened by the LRs' attempt to challenge this disregard in *Ongwen* and introduce the issue of sexual violence that had been allegedly committed against male individuals within the LRA. They requested the Judges for leave to present evidence of sexual violence by forced desecration of dead bodies allegedly imposed upon three men during one of the LRA attacks[2683]. This conduct, along with forced rape, might be characteristic of sexual violence perpetrated mainly against men and boys. However, since such allegations were not figured in the OTP's indictment, the Chamber denied the LRs' request for the presentation of those men's testimony, due to its irrelevance within the scope of the charges against the accused[2684]. Despite this denial, the LRs continued to reiterate the importance of taking into consideration sexual violence committed against men. Curiously, while the Defence contesting their claims declared that "homosexual acts were not ordered, condoned or tolerated in the LRA", the LRs stressed the unfortunateness of the neglect of this issue in the proceedings, especially in the context of the situation in Uganda, whose political culture has been moulded by homophobic legislation and social stigmatization of male victims of sexual violence[2685]. Certainly, additional crimes allegedly committed under the responsibility of former commanders who have been accused of mass atrocities might be revealed during their trials, and their consideration would depend on the scope of those allegations and the context of the case. By referring to this incident and by exposing the failure to analyse the recruitment crimes against children from a gender perspective, the LRs have demonstrated, however, that the OTP should continue expanding its systematic application of a gender-sensitive approach to all crimes that it investigates and prosecutes, without negligence towards SGBV committed also against boys and men, as its Policy Paper on SGBC prescribes.

[2683] *Ibid*., 178
[2684] *Ibid*.
[2685] *Ibid*.

In its closing brief, the OTP reiterated its narrative of the case by stating that "[b]oys were abducted to become LRA fighters, and girls were abducted to become forced wives and *ting tings*" of the LRA commanders and fighters[2686]. Perhaps, as Grey also noticed, the OTP aspired in this case to focus on gender-based crimes that had been perpetrated in a strategic rather than opportunistic way[2687]. While doing so, it has indeed, remarkably implemented its strategies and policies towards integral investigation and prosecution of SGBV based on systematic application of a gender perspective and analysis. So far, it has reasonably drawn attention to SGBV committed against women and girls and this is crucial due to its historical marginalization; yet, the analysis of such violence against men and boys remains rather insufficient.

As the progressing socialization of the OTP with appropriate application of the SGBV prohibition norm suggested, the long-awaited judgment of the ICC in the *Ongwen* case issued on February 4, 2021, has indeed delivered new significant precedents in SGBV adjudication in the ICL jurisprudence[2688]. While the Judges, for the first time in the ICC's history, found an individual criminally responsible for the commission of forced marriage as a crime against humanity of an other inhumane act (perpetrated directly and co-perpetrated indirectly), it has also been the first time in world history that an individual has been convicted of forced pregnancy perpetrated by him directly as a crime against humanity and war crime[2689]. From the seventy counts which were eventually brought against Ongwen by the OTP, the Judges found him guilty of sixty-one, comprising all nineteen separate and indirect charges of SGBV[2690]. This verdict has thus contributed to further conceptual clarification on the legal content of the SGBV prohibition norm and its meanings-in-use, enabled through its increasingly appropriate application by the OTP, which ultimately also resonated with the Judges. In accordance with the charges, the Chamber also found Ongwen criminally responsible for both direct perpetration and indirect co-perpetration of SGBV as well as for indirect co-perpetration of child soldiers' recruitment crimes[2691]. In her statement on SGBV following the issuance of the verdict, Prosecutor Bensouda announced that it represented "another concrete expression of [her] Office's declared policy in action to address these serious underreported crimes"[2692]. However, corresponding to the narrative presented by the OTP with respect to the child soldiers, the verdict makes no reference to any issues of SGBV

[2686] ICC Doc. No. ICC-02/04-01/15-1719-Red from February 24, 2020, para.69
[2687] Grey (2019), 174-175
[2688] ICC Doc. No. ICC-02/04-01/15-1762-Red from February 4, 2021
[2689] *Ibid*., 1073-1076; Grey (2019), 171
[2690] ICC Doc. No. ICC-02/04-01/15-1762-Red from February 4, 2021, para.3116
[2691] *Ibid*., paras.3115-3116
[2692] ICC Doc. No. ICC-CPI-20210204-PR1565 from February 4, 2021

(imposed upon children) within the context of their recruitment. The Judges established that children participated in the hostilities, "served as escorts [...] in general and specifically in Dominic Ongwen's household" and "facilitated LRA attacks by raising alarms, burning and pillaging civilian houses, collecting and carrying pillaged goods from attack sites and serving as scouts"[2693].

In relation to Ongwen's sentence, the OTP (by specifically pointing to the crimes of forced marriage, forced pregnancy, rape and sexual slavery) elaborated on the gravity of SGBC committed by the accused individually and indirectly as well as on the physical, mental, psychological and social consequences and harm of these crimes suffered by the victims, their families and society[2694]. The OTP submitted that several aggravating circumstances were present to these crimes: the commission of a crime against "multiple victims" under Rule 145(2)(b)(iv) of the Court's Rules of Procedure and Evidence[2695], against "particularly defenceless" victims under Rule 145(2)(b)(iii), with "particular cruelty" under Rule 145(2)(b)(iv), and for a discriminatory motive on grounds of gender under Rule 145(2)(b)(v)[2696]. The OTP suggested that, based on the gravity of SGBC committed by the accused, the aggravating circumstances present to those crimes and the accused's culpable conduct, he should have received a sentence of thirty years of imprisonment[2697]. However, due to his "individual circumstances"[2698], the OTP recommended a sentence of twenty years for each of the SGBC that he had committed[2699].

Similarly, the OTP elaborated on the gravity of the recruitment crimes against children, their various consequences and harm suffered by the victims, their families and society, as well as on the aggravating circumstances that were present to these crimes[2700]. In contrast to SGBC but in accordance with its narrative of the case, the OTP did not refer here to an aggravating circumstance of the commission of a crime for the discriminatory motive based on the grounds of gender. The OTP stated that it would have suggested sentencing Ongwen to twenty-four years of imprisonment for the commission of the recruitment crimes against children[2701]. However, due to his "individual circumstances", the OTP recommended sixteen

[2693] ICC Doc. No. ICC-02/04-01/15-1762-Red from February 4, 2021, paras.3102-3103
[2694] ICC Doc. No. ICC-02/04-01/15-1806 from April 1, 2021, paras.12-21
[2695] ICC ASP (2002a)
[2696] ICC Doc. No. ICC-02/04-01/15-1806 from April 1, 2021, paras.22-25
[2697] *Ibid*., para.11
[2698] The OTP agreed that Ongwen's "abduction as a child and his experience in the LRA as a child and adolescent" were relevant to the sentencing decision and were thus to be considered by the Chamber in its determination of the sentence (ICC Doc. No. ICC-02/04-01/15-1806 from April 1, 2021, para.154)
[2699] ICC Doc. No. ICC-02/04-01/15-1806 from April 1, 2021, para.11
[2700] *Ibid*., paras.37-53
[2701] *Ibid*., para.36

years of imprisonment for each of the committed recruitment conducts[2702]. Considering all crimes for which Ongwen was found guilty, the OTP suggested that a joint sentence "of not less than 20 years of imprisonment" would be appropriate under the conditions of the accused's "individual circumstances"[2703].

The Legal Representatives of the victims requested life imprisonment as "the only appropriate punishment in light of the extreme gravity of the crimes which were marked by their infamous cruelty and inhumaneness, causing immeasurable harm to the victims, their families and their communities" [2704]. However, due to the accused's "specific individual circumstances" in terms of his own abduction and recruitment in the LRA as a child, which the Chamber recognized as "a relevant mitigating circumstance for the purpose of the entirety" of the sentence[2705], the Judges refrained from following the LRs' suggestion (which they would have otherwise considered appropriate) and determined, by majority, the joint sentence consisting of twenty-five years of imprisonment[2706]. In their sentencing decision, the Judges considered and acknowledged the presence of three aggravating circumstances in respect to all nineteen charges of SGBC, for the commission of which Ongwen was found guilty[2707]. The Judges agreed with the OTP that the crimes were committed against "multiple victims"[2708], that the victims had been "particularly defenceless"[2709] due to the very young age of some of the victims (one of the girls had been abducted when she was only seven years old and she became Ongwen's "wife" with twelve), and that there was a discriminatory motive for the crimes committed against women and girls, *i.e.*, based on the grounds of gender[2710]. In relation to the recruitment crimes against children, the Judges similarly established the presence of the aggravating factors of "particular cruelty" and multiplicity of victims[2711], as well as of victims' "particular defencelessness"[2712]. In accordance with the narrative of the case, the sentencing decision does not tackle any gender issues that might have been inherent to the recruitment crimes committed against children under Ongwen's responsibility.

[2702] *Ibid*.
[2703] *Ibid*., paras.155-161
[2704] ICC Doc. No. ICC-02/04-01/15-1819-Red from May 6, 2021, para.12
[2705] *Ibid*., para.370
[2706] *Ibid*., paras.386-396. The minority of the TC, constituted by Judge Raul C. Pangalangan, partly dissented with the majority's decision, declaring that due the "extreme gravity" of the committed crimes and "deep and permanent physical and psychological harm caused to the victims and their families" an appropriate sentence for Ongwen would be thirty years of imprisonment (ICC Doc. No. ICC-02/04-01/15-1819-Anx from May 6, 2021, paras.8-13).
[2707] ICC Doc. No. ICC-02/04-01/15-1819-Red from May 6, 2021, paras.285, 330
[2708] which constitutes an aggravating circumstance under Rule 145(2)(b)(iv) (*ibid*., paras.286, 331)
[2709] which constitutes an aggravating circumstance under Rule 145(2)(b)(iii) (*ibid*., paras.287, 332)
[2710] which constitutes an aggravating circumstance under Rule 145(2)(b)(v) (*ibid*., paras.288, 333)
[2711] under Rule 145(2)(b)(iv) (*ibid*., paras.360-368)
[2712] under Rule 145(2)(b)(iii) (*ibid*., para.369)

5.2.7.3. Al Hassan case

As described in chapter '2. Mapping the application of the SGBV prohibition norm at the ICC', the *Al Hassan* case, opened by Prosecutor Bensouda in the situation of Mali embraces (in contrast to the previous *Al Mahdi* case) an extensive focus on SGBV and (similar to *Ntaganda* and *Ongwen*) demonstrates the progress of the OTP's socialization with appropriate application of the SGBV prohibition norm in accordance with its strategies and Policy on SGBC. Al Hassan has been charged with separate charges of SGBV, including rape and sexual slavery as war crimes and crimes against humanity, and with indirect charges of SGBV, including the crimes against humanity of torture and of other inhumane acts (constituted by forced marriages) as well as the war crime of outrages upon personal dignity, which have been based on evidence of SGBV[2713]. Similarly to Ntaganda and Ongwen and in accordance with the OTP's Policy Paper on SGBC, Al Hassan has been also charged with those crimes under various modes of his alleged criminal liability[2714].

Interestingly, as Grey noticed, the conduct of forced marriage constituting the crime against humanity of 'other inhuman acts', which had been charged for the first time at the ICC in the *Ongwen* case, appears in *Al Hassan* to be somewhat differently motivated[2715]. While in *Ongwen*, the main intent behind this crime had been the disconnection of the affected girls and women from their respective communities, in *Al Hassan* its commission was depicted as motivated – along with sexual abuse[2716] – by the perpetrators' aspired "integration" into the respective community[2717]. In her opening statement, Prosecutor Bensouda noted that Al Hassan, together with others "assisted members of the Islamic police to enter into those so-called marriages, or participated in marriage negotiations, *de facto* exerting pressure on families and women through their presence and influence"[2718].

Perhaps the most significant contribution of the *Al Hassan* case to the prosecution and adjudication of SGBV is reflected in the OTP's charge of the crime against humanity of persecution based (for the first time) on the intersecting grounds of gender and religion, which

[2713] ICC Doc. No. ICC-01/12-01/18-2-tENG from March 27, 2018; ICC Doc. No. ICC-01/12-01/18-35-Red2-tENG from May 22, 2018
[2714] *Ibid*.
[2715] Grey (2019), 288-289
[2716] ICC (2020), n.p.
[2717] Grey (2019), 288-289
[2718] ICC (2020), n.p.

the Judges of the Pre-Trial Chamber also confirmed for trial[2719]. Indeed, when Grey asked the OTP's current Special Gender Advisor, Patricia Sellers, about "the possibility of charging persecution on intersecting grounds" in February 2018 (about a month before the issuance of Al Hassan's warrant of arrest[2720]), Sellers anticipated this to become "the natural evolution" and "part of a norm"[2721]. In fact, the OTP specifically highlighted that the crime had been perpetrated under the alleged responsibility of the accused not only based on religious grounds but in an especially severe way against women and girls[2722]. Due to the intersection of gender and religion, they had been subjected to numerous crimes including corporal punishments, imprisonment under inhumane conditions as well as sexual violence and forced marriages[2723]. That the PTC Judges unanimously accepted the interpretation of the crime allegedly committed under Al Hassan's responsibility as based on both gender and religious grounds[2724] and by doing so, as Grey *et al*. note, explicitly "alluded to the concept of intersectionality"[2725], likewise demonstrates that the OTP had succeeded in persuading them to do so by providing sufficient evidence and appropriately building its argumentation from the perspectives of both gender and intersectionality. If the OTP – in accordance with aspirations set in its Policy Paper on SGBC[2726] – continues maintaining this strategy during the trial by revealing multilateral discrimination and motivation behind the conduct, it may also persuade the Trial Chamber Judges to accept its argument. However, as previously mentioned, in *Yekatom&Ngaïssona*, the OTP has so far refrained from continuing to relate to the concept of intersectionality (with respect to gender and religious grounds) despite the evidence of rape committed against Muslim or Christian women and girls, on which the charge of persecution is apparently based[2727]. This inconsistency in applying the concept is puzzling against the background of its efficiency in *Al Hassan*, let alone against that of the OTP's espoused aspirations to "[u]nderstand the intersection of factors such as gender, age, race, disability, religion or belief […]"[2728] when applying and interpreting the law in accordance with internationally recognized human rights[2729] as well as to apply "the provision relating to persecution on the basis of gender […] to the fullest extent possible"[2730].

[2719] ICC Doc. No. ICC-01/12-01/18-2-tENG from March 27, 2018; ICC Doc. No. ICC-01/12-01/18-35-Red2-tENG from May 22, 2018; Grey notices that persecution based on gender was also pursued in the OTP's preliminary examinations into the situations in Afghanistan and Nigeria (2019, 282)
[2720] ICC Doc. No. ICC-01/12-01/18-2-tENG from March 27, 2018
[2721] Grey (2019), 314 (from the interview with Sellers)
[2722] ICC (2020), n.p.
[2723] ICC Doc. No. ICC-01/12-01/18-35-Red2-tENG from May 22, 2018, para.94; ICC Doc. No. ICC-01/12-01/18-2-tENG from March 27, 2018
[2724] ICC Doc. No. ICC-CPI-20190930-PR1483 from September 30, 2019
[2725] Grey *et al*. (2019), 977
[2726] ICC OTP (2014), para.27
[2727] ICC Doc. No. ICC-01/14-01/18-403-Red-Corr from May 14, 2020, 102-103, 106
[2728] ICC OTP (2014), para.27
[2729] Rome Statute (1998), Art. 21(3)
[2730] ICC OTP (2014), para.67

5.2.7.4. The summary

5.2.7.4.1. The constellation of the involved actors

The legal precedents described above have further clarified the conceptual content and strengthened the status of the SGBV prohibition norm. These legal developments were enabled due to the OTP's progressing socialization with appropriate application of the norm as a consequence of gender justice advocates' resistance against its initial misrecognition. While this process had already begun under Prosecutor Ocampo during the *Lubanga* proceedings, he ultimately amended Ntaganda's charges partly in accordance with the demands expressed in their initial stages by WIGJ. Throughout Prosecutor Bensouda's term, the norm was virtually transformed into one of the OTP's institutional priorities. This has already produced tangible results, despite the restricted resources of the Court. The actors who had been involved in the OTP's development of its new SGBV strategies and the Policy, those involved in the subsequent implementation of these principles, as well as other legal experts consulted throughout the institutional revision and with respect to some precedential yet legally contested charges, have essentially sustained the process and eventually enabled these progressive legal outcomes. These actors primarily include Brigid Inder of WIGJ, appointed by Prosecutor Bensouda as Special Gender Advisor to her Office in 2012, shortly after her inauguration and Patricia V. Sellers, the former Gender Advisor to the Prosecutor of the ICTY, also appointed by Prosecutor Bensouda in 2012 as her Advisor on International Criminal Law Prosecution Strategies and then in late 2017 to take over the position of the Special Gender Advisor to her Office. As noticed above, the OTP's staff who were involved in its work on various levels of its operation were included in the process of the institutional refinement of the norm's content and status and, as the legal outcomes have demonstrated so far, have successfully applied the OTP's espoused aspirations in their subsequent work.

As could be expected, the progress in the OTP's appropriate application of the norm in terms of its development of innovative investigative techniques, increasingly integral charging and prosecutorial strategies (including both separate and indirect charges of SGBV under various modes of the suspects' liability) as well as the provision of sufficient evidence in support of those allegations ultimately also resonated with the Judges' interpretation of the law in this

respect. What's more, in effect the Judges fully accepted the OTP's approach in these cases, which was largely based on a human rights perspective, despite the precedential nature of some of its charges. In fact, all Judges involved in *Ntaganda*, *Ongwen* and *Al Hassan* on all stages of the proceedings have confirmed all SGBV charges brought by the OTP, and in the former two cases, they have already unanimously convicted the accused of all those charges. This level of judicial resonance (despite the fact that some of the charges were also assumed to be incoherent from the IHL perspective and were contested not only by the Defence but also by some exogenous commentators) proves the authority that the SGBV prohibition norm has gained within the body of the law that previously tended to ignore it. The Judges based their argumentation not only on international law provisions and specifically IHRL, but also referred to academic work produced by the feminist legal scholar Kelly Askin. This reference similarly points to the influence that can be and has been summoned by various gender justice constituents of the Court, be it by activism and protest in civil society and/or knowledge, experience and authority gained in the field, throughout the UN structures or academic research. The level of receptivity among the Judges involved in these cases demonstrates that their adjudication and the argumentation on which they base it largely depend on the ability of the OTP to prepare and present its SGBV charges and evidence in an appropriate way. The fact that in some cases the Judges seem to have hindered the OTP's attempts to prosecute SGBV thus points to the improvement potential of the latter in their application of the norm. That is, the Judges' entanglement in the socialization 'spiral' can be (re-) generated through the appropriate application of the norm by the OTP, which needs to play the leading role in sustaining this process.

The Legal Representatives of the victims have likewise continued to maintain institutional socialization with the appropriate application of the norm by supporting the OTP's attempts to amend indictments with SGBV charges and/or evidence, as they did in *Yekatom&Ngaissona*. They have done so while still resisting the shortcomings with respect to SGBV committed against child soldiers and generally against male victims/survivors identified even within such progressive case as *Ongwen*. The OTP – due to its restricted resources as well as other obstacles that may hinder its work – has continued pursuing specific prosecutorial strategies in some cases which appear to have been (least in part) based on the logic of consequentialism, rather than that of appropriateness and thereby, have threatened the further evolution of the 'spiral'. However, the Legal Representatives have continued to remind the

OTP's staff about the aspirations set in its Policy Paper on SGBC in situations where the implementation of these aspirations was not being fulfilled.

5.2.7.4.2. Institutional and structural factors

The further conceptual clarification of the SGBV prohibition norm through its improving application by the OTP and the Judges was largely facilitated by similar institutional and structural factors that had generated the previous stage of the socialization 'spiral': the further refinement of its prescriptive status. The positive consequences of the socialization process specifically for the law demonstrate the significance of (1) the institutional revisions and changes in this respect[2731], while also simultaneously proving (2) the effect of persuasion among actors who aim to strengthen not only the validity but also the appropriate application of the norm in various contexts and situations[2732]. These consequences and the further evolution of the law have been enabled by (3) actors' cultural validation of the norm and (4) their developing understanding of its various meanings-in-use[2733] which has ultimately contributed to its increasingly appropriate application[2734]. In fact, the precedential legal outcomes in these cases have demonstrated that under Prosecutor Bensouda's leadership the OTP not only aspired to improve its performance in this regard, but has also done so in an essentially progressive way, in accordance with the aspirations set out in its strategies and policies. While (5) the investigation of these cases embraced innovative techniques that allowed the Office to gain and preserve evidence in a gender-sensitive way, (6) its integral prosecution of SGBV included separate and indirect charges under various modes of the accused's criminal liability, considered intersecting factors – including gender – that had caused the commission of those sexual and non-sexual gender-based crimes committed against women and girls, as well as the differences in terms of the intent, experiences and consequences among seemingly similar conducts. Also (7) at the sentencing stage, the OTP specifically reflected on the grave nature of the committed SGBC, on aggravating circumstances that were present to these crimes as well as on the gender-based experiences

[2731] *Cp.* Risse/Sikkink (1999)
[2732] *Cp.* Deitelhoff (2006)
[2733] *Cp.* Wiener (2007, 2009); Wiener/Puetter (2009)
[2734] *Cp.* Günther (1988)

and harm inflicted upon victims/survivors, which were then considered by the Judges in their sentencing decisions. These tangible effects of the actors' socialization with appropriate application of the norm also attests to the previously identified (8) switch occurring within the OTP with respect to the perception of the norm from the logic of consequentialism (that tended to dominate actors' behaviour in the beginning of the Court's operation) towards the logic of appropriateness[2735]. This switch was generated during the *Lubanga* proceedings by (9) actors' engagement in the logic of appropriate argumentation, largely underpinned by IHRL understandings, and has been maintained throughout the institutionalized refinement process of the norm's prescriptive status during the second decade of the Court's operation. As mentioned above, (10) the OTP's advanced application of the norm in these different cases and situations has likewise positively resonated with the Judges' adjudication and interpretation of the law. While the OTP's arguments accepted by the Judges were substantially based on (11) progressive interpretation of ICL and IHL, they were (12) essentially framed from the human rights perspective, notably reflected in its Policy Paper on SGBC. This perspective was adopted by the OTP as an outcome of (13) persuasion by gender justice advocates who had broadly used it as a point of reference in their resistance against the misrecognition of the SGBV prohibition norm in Lubanga[2736]. By (14) specifically applying the human rights approach with respect to the norm's various meanings-in-use, the OTP has effectively contributed to (15) the clarification of the "constructive ambiguit[ies]"[2737] embedded in the Statute from this perspective, which has also generally promoted the convergence of IHL with IHRL.

The (16) involvement of the aforementioned actors within the OTP, especially its Special Gender Advisors and legal experts who consult its staff, have played an essential role throughout the socialization process. Although the informal rules influencing the perception of the norm may not yet have been entirely replaced with new formal rules prescribing its appropriate application, (17) the process is still ongoing and maintained by the institutionally enforced monitoring of the implementation of the Policy Paper on SGBC through the reporting mechanisms of the OTP. The Legal Representatives of the victims have likewise continued acting as promoters of gender justice, identifying and criticizing occasionally occurring deficiencies in the prosecution and adjudication of SGBV. Significantly, most of (18) the actors who proceeded upholding the socialization process with the appropriate

[2735] *Cp.* Checkel (2005)
[2736] *Cp.* Deitelhoff (2006)
[2737] Oosterveld (2014)

application of the norm during the second decade of the Court's operation had been involved in one or another way in its emergence and maintenance throughout the *Lubanga* proceedings. That is, they not only benefited directly by (19) learning through this process, they also subsequently considered those lessons throughout the institutional structures of the Court.

Furthermore, (20) all three cases stem from States Parties to the Rome Statute that referred their respective "situations" to the Prosecutor of the ICC themselves. That is, despite certain difficulties that certainly still existed, the investigation of these cases might have been less challenging for the OTP than in the cases that were initiated *proprio motu* or following the referral of the UN Security Council. Moreover, it is likely that *Ntaganda* and *Al Hassan* directly benefited from the previous investigations in *Lubanga* and *Al Mahdi* cases. While the *Ongwen* case was the first to be prosecuted from its corresponding situation in Uganda, the commencement of the proceedings had been perpetually delayed since the beginning of the Court's operation and by the time its progressive amendments had been made, it also benefited from (21) the advanced socialization process with the appropriate application of the norm. These cases have been (22) neither entirely new to the OTP in terms of the evidence and prosecutorial possibilities (23) nor were they focused on actors from governmental structures whose allies could have restricted the OTP's investigations of crimes committed under their alleged responsibility and/or their surrender to the Court, but rather on leaders of armed groups that have been reported for prosecution by those holding power. That is, these cases offered (24) potentially productive conditions, which encouraged the OTP's faculty to implement its Policy on SGBC to the best extent possible, developed against the background of the evolution in *Lubanga*. Yet, even if restricted by certain conditions and circumstances, this progress (which was led by Prosecutor Bensouda) has revealed (25) notably improved application of the SGBV prohibition norm during the second decade of the Court's operation and as a result, significant legal precedents have ultimately further clarified the norm's content and strengthened its status under international law.

5.2.7.4.3. Broader socio-political cleavages

The progress in the appropriate application of the SGBV prohibition norm was similarly facilitated by perpetually narrowing socio-political cleavages between the norm's advocates and their target actors with respect to the perception of the norm's status. Within the OTP, these cleavages have been subjected to systematic elimination through the institutionalized and monitored refinement process of the norm's prescriptive status. Furthermore, this development has been upheld through the actual implementation of those aspirations on all levels of the OTP's work, *i.e.*, through an increasingly appropriate application of the norm, which enabled its cultural validation among the OTP's staff and has also positively resonated with the Chambers. This evolution has advanced the conceptual clarification and actors' understanding of the norm's content and various meanings-in-use, increased its shared recognition and, has ultimately strengthened its status[2738], which can be identified in the successful legal outcomes in these cases. The unanimous receptivity of the OTP's interpretation and application of the law with respect to SGBV charges among the Judges involved on all levels of the proceedings has thus exposed the further reduction in cleavages with respect to the norm's status through a continuing transformation of its perception throughout the institutional structures. While this transformation has affected the perception formed around the norm's status in ICL and IHL, it has essentially been enabled through an IHRL lens. The predomination of the human rights approach in relation to the norm's application, which was adopted from the norm's advocates towards the end of the *Lubanga* proceedings and largely applied in the internal actors' argumentative rationality since the second decade of the Court's work, has continued to supplant the logic of consequentialism with the logic of appropriateness[2739]. That is, the logic of appropriate argumentation, effectively underpinned by the human rights perspective, has been generally continuously upheld throughout the further evolution of the socialization 'spiral'. Significantly, while in the beginning of the Court's operation, the misrecognition to (appropriately) apply the norm implied actors' perception of it as being of somewhat lesser significance[2740]. Through its progressing application throughout the second decade of the Court's operation, the norm has virtually developed into one of the main features of the Court's institutional identity. If the socialization process with its appropriate application continues to be maintained, actors

[2738] *Cp.* Günther (1988); Wiener (2007, 2009); Wiener/Puetter (2009)
[2739] *Cp.* Risse/Sikkink (1999)
[2740] *Cp.* Chappell (2016)

entangled in the institutional structures of the Court can be expected to adopt this feature as a part of their own professional identity, in spite of differences in their respective backgrounds, previous experience and expertise. Their cultural validation of the norm through its application in various contexts and situations based on the logic of appropriate argumentation should, in turn, further promote its conceptual clarification and strengthen its shared recognition, status and authority[2741].

Following the misrecognition of the SGBV prohibition norm, its advocates and their allies triggered and maintained the socialization process with its appropriate application right up to their partial involvement in the institutional refinement process of the norm's prescriptive status (representing substantial consequences for the institution[2742]). As an outcome of their successful resistance, which turned out to be transformative, the last stage of the socialization 'spiral' (consequences for the law[2743]) has so far demonstrated progressive institutional alteration in terms of significantly decreasing cleavages between the norm's advocates and their target actors in relation to the perception of the norm's status. The 'spiral' has ultimately entangled the Court's staff in the process of increasingly integral compliance with the formal rules, which should enable the appropriate application of the norm on various levels of its work while simultaneously continuing to supplant the informal rules that had previously tended to hinder its appropriate application[2744]. The maintenance of this process – consistently monitored both internally and externally – may over time, further reduce shortcomings, advance actors' internalization and habitualization of the norm's appropriate application[2745], and as a consequence of this experience in various contexts and situations, promote further evolution of its content and meanings-in-use[2746].

[2741] *Cp.* Günther (1988); Wiener (2007, 2009); Wiener/Puetter (2009)
[2742] *Cp.* Madsen *et al*. (2018)
[2743] *Ibid.*
[2744] *Cp.* Risse/Sikkink (1999); Wiener/Puetter (2009); Chappell (2016)
[2745] *Cp.* Risse/Sikkink (1999)
[2746] *Cp.* Günther (1988); Wiener (2007, 2009); Wiener/Puetter (2009)

6. Conclusion

While the SGBV prohibition norm was somewhat fundamental[2747] in international law by the time of the ICC's establishment, its institutionalization in the Court's legal framework allowed it to obtain a prescriptive[2748] and regulatory[2749] status. As the analysis of socialization with the norm's appropriate application at the ICC has demonstrated, during the second decade of the Court's operation, the norm's prescriptive status was refined based on previously made experience with its meanings-in-use. Through the process of refinement – which included the development of policies and strategies with respect to the norm's implementation, producing new interests – it has furthermore also gained a constitutive[2750] character. That is, it has gained the qualities of an organising principle and a standardized procedure, which should decrease the potential of non-compliance in the future[2751]. What's more, the progress in socialization with the norm's appropriate application also suggests progressing cultural validation of its various meanings-in-use by actors involved in its implementation and consequently, its increasingly shared recognition[2752]. The successful legal outcomes in terms of precedential prosecution and adjudication of SGBV in *Ntaganda*, *Ongwen* and *Al Hassan* have ultimately advanced the norm's conceptual clarification and strengthened its universalistic content and status[2753]. Enabled by the consideration of relevant facts and characteristics inherent to these cases[2754], this evolution reflects institutional changes aiming at the norm's appropriate application, which was generated by the norm's advocates' and their allies' resistance against its misrecognition in *Lubanga*. This progress suggests their target actors' wish to "exhaust" the norm's validity and universalistic content in various contexts of the Court's cases[2755].

Despite the fact that "good implementation"[2756] of the SGBV prohibition norm was impeded in the ICC's first case by a partly unforeseen combination of specific aspects[2757] and a lack of

[2747] *Cp.* Wiener (2009)
[2748] *Cp.* Risse/Sikkink (1999)
[2749] *Cp.* Finnemore/Sikkink (1998); March/Olsen (1998)
[2750] *Cp. ibid*.
[2751] *Cp.* Wiener (2009)
[2752] *Cp.* Wiener (2007, 2009); Wiener/Puetter (2009)
[2753] *Cp.* Günther (1988)
[2754] *Cp. ibid*.
[2755] *Cp. ibid*., 95
[2756] *Ibid*., 169
[2757] *Cp. ibid*., 340-341

internalization among involved actors[2758], the process of the institutional socialization with the norm's appropriate application generated by non-state resistance against its misrecognition has revealed the effects and benefits of learning and persuasion. As the analysis here has depicted, these successful outcomes of the resistance were facilitated by the constellation of the involved actors as well as various institutional and structural factors. Furthermore, the socio-political cleavages between the norm's advocates and designated followers with respect to its status and perception, which were previously partially responsible for its misrecognition, began to gradually reduce, which facilitated the socialization process. At the initial stages of the 'spiral', the attitude towards the norm among its target actors was largely one of denial, which was reflected in their choices and behaviour and was predominantly ruled by the logic of consequentialism. By the end of the *Lubanga* proceedings, which eventually embraced the application of the norm as a discourse, the logic of appropriateness supplanted the logic of consequentialism by means of the logic of appropriate argumentation[2759]. The latter entangled the actors in the logic of appropriateness and eventually advanced their understanding of the norm's meaning-in-use from its perspective in the context of the given case[2760]. Ultimately, the engagement in processes of argumentation and discursive deliberation on the appropriate application of the norm, underpinned by the logic of appropriateness, has changed their behaviour and aims both throughout the case and (as a consequence of the successful persuasion[2761]) beyond the proceedings. The misrecognition which took place in *Lubanga* was mitigated by the reaffirmation of the norm's validity and *de-facto* recognition of its applicability by virtually all actors involved in the proceedings, as well as the following refinement process of the norm's prescriptive status and content in accordance with lessons learned, which rehabilitated the Court's authority among its gender justice constituency[2762]. Although this process was generated by the norm's advocates, their target actors gradually became open to being persuaded and to learn from this experience. This, in turn, revealed the power the norm had acquired as it was embedded in the legal framework of the Court and more generally in IL as well as in international socio-political structures. Yet, the actions that had entrapped the actors in those structures had been triggered by non-state resistance against the misrecognition of the norm[2763]. The norm advocates and their allies involved in the resistance played specific roles depending on their respective positions and exercised their agency in activating and further

[2758] *Cp.* Chappell (2016); Grey (2019)
[2759] *Cp.* Günther (1988); Risse/Sikkink (1999); Risse (2000)
[2760] *Cp.* Risse/Sikkink (1999); Risse (2000); Wiener (2007, 2009)
[2761] *Cp.* Deitelhoff (2006)
[2762] *Cp.* Chappell (2016)
[2763] *Cp.* Risse/Sikkink (1999)

maintaining the socialization 'spiral' throughout and beyond *Lubanga*. Significantly, the consequences of their resistance could be observed in accordance with both the broader and narrowed down framings[2764] applied during *Lubanga* on both legal and institutional levels and revealed the transformative nature of this resistance, as it influenced patterns of institutional evolution and identity. In the longer term, the legal outcomes of the prioritization process (which was fostered by the OTP's refinement of the norm's prescriptive status and which was largely based on the consideration of internationally recognized human rights[2765]) not only advanced the norm's further conceptual clarification and authority under ICL, but also generally promoted the convergence of IHL and IHRL.

The OTP has also begun, even if somewhat cautiously, to engage with the concept of intersectionality, which is essentially based on the human rights perspective[2766], and its application has already positively resonated in the Judges' interpretation of the law and adjudication[2767]. That is, as the successful legal outcomes of the socialization process have also demonstrated, the increasingly appropriate application of the norm by the OTP in terms of its investigations, provision of sufficient evidence and prosecutions has led to increased acceptance among the Judges, which in turn, has facilitated further conceptual clarification of the norm, strengthening its legal and eventually, socio-political status. Although the adjudication of SGBV by the ICC's Judges has from time to time exposed gender-biased attitudes, other progressive examples have proved that the OTP bears the main responsibility and potential for advancing the overall institutional socialization with appropriate application of the SGBV prohibition norm. That is, the implementation of gender justice at the ICC largely depends on the ability of the OTP's staff to persuade the Judges, based not only on substantial argumentation and evidence but also on procedural accuracy.

Notably, while the socialization process has exposed increasing recognition and consideration of women's and girls' interests, the application of gender analysis and integration of gender perspective to crimes committed against men and boys is still deficient and should be improved in the future[2768]. Likewise, crimes committed against persons based on their sexual orientation and/or gender identity deviating from male/female binary that might fall within the jurisdiction of the Court have not yet been addressed in any formal way, although the OTP

[2764] *Cp.* Deitelhoff (2006)
[2765] *E.g.*, ICC OTP (2014), paras.15, 26-27
[2766] *Ibid.*, paras.26-27
[2767] See subchapter '5.2.7.3. *Al Hassan* case'
[2768] *Cp.* Grey (2019)

has committed itself to the consideration of the evolution of internationally recognised human rights in this respect in its work[2769]. The OTP's recently instigated application of the intersectionality concept, which reveals various factors, including gender, that can underlay the commission of crimes and influence the experiences of victims/survivors as well as the consequences of such crimes, is another key towards a more comprehensive unlocking of the norm's various meanings-in-use[2770]. While the norm's conceptual clarification has indeed been advanced with respect to sexual violence offences, such efforts in relation to non-sexual crimes based, *inter alia*, on gender, are missing. This gap should be addressed by a systematic approach based on the application of gender analysis and integration of gender perspective to all crimes falling under the jurisdiction of the Court, as aspired in the OTP's Policy Paper on SGBC[2771]. While appropriate application of the SGBV prohibition norm can contribute to the exposure and recognition of 'gender' as a ground (intersecting with others) based on which crimes may have been committed, the concept of intersectionality bears the potential to reinforce its appropriate application. That is, the appropriate application under the consideration of all relevant facts and characteristics of a situation in question and the fulfilment of the impartiality and coherence principles, *i.e.*, of integrity[2772], and the concept of intersectionality go hand in hand. They can mutually reinforce each other and enable progressive prosecution of crimes which may have been previously overlooked.

Despite the progress achieved in socialization with the appropriate application of the SGBV prohibition norm under Prosecutor Bensouda, which has ultimately strengthened not only the authority of the norm but also that of the Court, some repeated omissions also stand as a reminder about the obstacles and restricted resources that still continue to hinder the norm's "good implementation"[2773] and occasionally cause the OTP to resort to strategic choices. Those partially persisting deficiencies also indicate that the institutional process of socialization with the appropriate application of the norm has virtually just begun and will need to be sustained under the OTP's new leadership by the recently inaugurated third Chief Prosecutor of the ICC, Karim A. A. Khan from the United Kingdom[2774]. Likewise, the process needs to be further maintained by the other internal actors, including the Judges,

[2769] ICC OTP (2014), paras.26-27
[2770] *Cp.* Grey (2019)
[2771] ICC OTP (2014)
[2772] Günther (1988)
[2773] *Ibid*., 169
[2774] ICC Doc. No. ICC-CPI-20210212-PR1567 from February 12, 2021; ICC Doc. No. ICC-CPI-20210610-MA266 from June 10, 2021; Prosecutor Khan's participation in a panel discussion with, *inter alia*, former Prosecutor Bensouda on her legacy of accountability for SGBC, which was organized by the International Federation for Human Rights and Women's Initiatives for Gender Justice on the occasion of the International Day for the Elimination of Sexual Violence in Conflict and took place on June 18, 2021 (just two days after his inauguration) has been a promising episode in this respect (WIGJ, 2021).

through their supervision of the OTP's work and gender-sensitive adjudication, as well as the Legal Representatives of the victims, who have already been successfully reminding both the OTP and the Judges about their responsibilities in cases involving SGBV allegations. Simultaneously, as the OTP's Policy Paper on SGBC also recognizes[2775], the international community – including the UN structures, states, academia, and civil society organizations working both nationally and transnationally – should continue encouraging and supporting the ICC's investigations and prosecutions of SGBC that might fall under its jurisdiction, and should persist with monitoring the implementation of its gender justice mandate.

[2775] ICC OTP (2014), paras.105-108

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7.1.5. Interviews (qualitative, semi-structured expert interviews)

Interview with Brigid Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), The Hague, December 2018

Follow-up interview with Brigid Inder (former Executive Director of the WIGJ/ former Special Gender Advisor to the ICC's OTP), by email, August 2021

Interview with Fabricio Guariglia (ICC OTP), The Hague, December 2018

Interview with A. (ICC Chambers), The Hague, May 2017 (anonymized)

Interview with B. (ICC Chambers), The Hague, May 2017 (first interview), December 2018 (follow-up interview) (anonymized)

Interview with C. (an actor from the international civil society, who worked with the WIGJ), The Hague, December 2018 (anonymized)

7.1.6. Informal conversations

Conversation with D. (ICC OTP), Summer School on ICL and Human Rights, Syracuse, June 2018 (anonymized)

Conversation with E. (an academic from the field), Summer School on ICL and Human Rights, Syracuse, June 2018 (anonymized)

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