

Prosecuting Sexual Crimes within the Procedural Framework of the ICC

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I Introduction

1 Aim of the Thesis

Historically, mankind has experienced multiple mass atrocities both in times of war and peace. Overcoming such atrocities by criminalizing and prosecuting them has become an ultimate goal for mankind especially after World War II, but it took many years in order to accomplish this task. Therefore, the formation of International Criminal Law after World War II was a breakthrough since it marked the first step to criminalize individuals responsible of such crimes and other crimes in the context of mass atrocities.¹⁾

The establishment of the International Criminal Court (henceforth, ICC) under the Rome Statute was another landmark in order to prosecute the gravest crimes within its jurisdiction²⁾ namely, (a) The crime of genocide (b) Crimes against humanity (c) War crimes (d) The crime of aggression.³⁾ The ICC, which functions as a permanent international criminal court consists of four main organs, which are the Presidency, the Chambers, the Office of the Prosecutor (henceforth, OTP) and the Registry.⁴⁾ Each organ is responsible to enhance fairness and transparency of the Court.

Empirically, when mass atrocities are committed in an organized manner, they are often accompanied by sexual crimes. For example, it is not difficult to recall the cases of Thomas Lubanga, Jean-Pierre Bemba and Germain Katanga that was brought to the ICC. Lubanga is said to have “made boys into rapist and girls into sex slaves in order to make them into child soldiers he could command and use at will.”⁵⁾ In the two latter cases, Bemba and Katanga were charged with “sending their forces to rape en masse as retaliation for prior attacks, for resources, or for political power.”⁶⁾ Even though the existence of such sexual crimes may be recognized, specific difficulties arise in a procedural regard when prosecuting sexual crimes in mass atrocities. Such difficulties may relate to the protection of victims and dealing with evidence of sexual crimes since both require sensitive and precise measures during the procedure.

So far, research to some degree has been conducted in substantive law aspects of sexual crimes.⁷⁾ However, procedural approaches, which arise when actually prosecuting such crimes, have so far not been sufficiently dealt within legal scholarship. Therefore, this paper will explore procedural aspects of prosecuting sexual crimes in the ICC, based on the question “What kind of procedural framework does the ICC have in order to prosecute sexual crimes?” The thesis will cover the procedural points that only relate to sexual crimes to specifically explore the issue evolving this topic. The exploration of this issue is meaningful in the sense that it will uncover how the rules set in the ICC facilitate the prosecution of sexual crimes, which is complex and not fully delved into.

In order to precisely assess the sexual crimes that fall under the scope of the ICC, the definition of the term and the specific crimes stated in the Rome Statute

(henceforth, RS) will be outlined in the beginning. This will be followed by an analysis of general criminal procedure models and how the procedure model of the ICC may affect the prosecution of sexual crimes. Then the discussion will move on to the analysis of specific rules on sexual crimes in the Rules of Procedure and Evidence of the ICC (henceforth, RPE) , which will be followed by an examination of how the rules of the RPE are implemented in the actual cases that have been prosecuted within the ICC. Finally, the ‘Policy Paper on Sexual Violence and Gender-Based crimes’ by the OTP will be introduced to briefly touch upon the future prospects of change in prosecuting sexual crimes in the ICC.

2 Clarification of Definitions

When discussing this topic, it is significant to first clarify the definition of the term sexual crimes. The complexity of the crime lies in its disposition since it can be interpreted and defined in several ways. To avoid confusion, this thesis will define the term from what can be derived from the RS and the Elements of Crimes. Sexual crimes that fall under the jurisdiction of the Court are listed under Articles 7.1(g), 8.2(b) (xxii) and 8.2(e) (vi) of the RS.⁸⁾ The Elements of Crimes goes further into detail, by requiring “the perpetrator to have committed an act of a sexual nature against a person, or to have caused another to engage in such an act, by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, physical oppression, or abuse of power, or by taking advantage of a coercive environment or a person’s incapacity to give genuine consent”⁹⁾ in the crimes related to rape, enforced prostitution and sexual violence.¹⁰⁾ This implies that both non-physical and physical acts, which harm a person, will count as sexual crimes.¹¹⁾

Additionally, it is important to note that there is also gender-based crimes, which is often confused with sexual crimes.¹²⁾ As for the definition of gender, Article 7.3 of the RS states, “the term ‘gender’ refers to the two sexes, male and female, within the context of society.”¹³⁾ Although unfortunately this definition excludes sexual minorities due to the opinion of conservative countries,¹⁴⁾ it is said that the definition is well balanced since it acknowledges both aspects of biological sex and socially constructed roles.¹⁵⁾ Deriving this definition, gender-based crime is often

recognized as a crime committed against persons due to their “socially constructed gender roles.”¹⁶⁾

The OTP recognizes these as two different crimes, noting that gender-based crimes refer to attacks committed on women and men that are not always in the form of sexual violence.¹⁷⁾ The most significant difference between the two terms is that gender-based crimes can also contain crimes with non-sexual element whereas sexual crimes definitely contain sexual element. Though sexual crimes are in most cases gender-based crimes, in order to avoid confusion, this thesis will mainly use the term sexual crimes since it aims to look into crimes that involve harm on the sexual nature of a person.¹⁸⁾

3 Sexual Crimes that Fall within the Jurisdiction of the ICC

Sexual crimes that fall within the jurisdiction of the ICC will be explained in advance of discussing procedural aspects. As stated earlier, sexual crimes are specifically enumerated in the articles of the RS. The Statute is phenomenal in the sense that it is one of the first international conventions that recognized multiple types of sexual crimes in its core crimes.¹⁹⁾ Article 7.1(g) of the Statute explicitly mentions that “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity”²⁰⁾ constitutes crimes against humanity.²¹⁾ Article 8(b)(xxii) also recognizes “committing rape, sexual slavery, enforced prostitution, forced pregnancy...forced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions”²²⁾ as war crimes.²³⁾ It is also important to note that rape was defined as genocide in the *Prosecutor v. Jean -Paul Akayesu* of the ICTR.²⁴⁾ Although this was not reflected in the RS of the ICC, this case increased the recognition of interpreting rape as a form of genocide.²⁵⁾

In light of criminalizing sexual and gender-based crimes, the progression of the ICC is plausible. The incorporation of several types of sexual crimes within the Statute enabled the ICC procedural framework to contain rules and supportive methods related to such crimes, which will be further analyzed in the following chapter.

II Introduction of Criminal Procedure Models and how they are Applied in the ICC

This chapter will analyze the procedure model of the Court, which constructs the basis of its procedural framework. The procedure model of the ICC is considered to be complex since it is a mixture of two criminal procedure models namely the adversarial model and the inquisitorial model.²⁶⁾ The former model is mainly adopted within common law countries. In this case, usually the prosecutor initiates the proceedings and enjoys discretion while the court plays a passive role.²⁷⁾ On the other hand, the latter is often seen in civil law countries. In this case, discretion of the prosecutor is relatively small and the court is more active in seeking the truth.²⁸⁾ Although these two models are seen in certain civil law, common law countries, it is said that they have somehow merged through the adaptation of laws and there is no country that purely demonstrates either model.²⁹⁾

As it can be assumed from the above, the two models share few in common. Though there are several differences that could be analyzed, this chapter will only cover what they differ in the role of the victims and rules related to evidence. This is because these two points especially relate to the difficulty the Court faces when prosecuting sexual crimes and is specifically covered in the RPE, which will be analyzed in the following chapter.

Difference in the role of victims can be seen in their involvement in the process of prosecution. In the adversarial model, the victims will only appear in court as witnesses, and play a very small role during the procedure.³⁰⁾ On the other hand, in the inquisitorial model the victims have the right to play an active role in the procedure as ‘civil petitioners’ where they will be able to have access to the case file and also call for certain investigations.³¹⁾

Rules related to evidence also differ within these two models. In the adversarial model, both the prosecution and defense gathers the evidence. They are required to disclose the evidence to the other party before the hearings. In addition, the rules on the admission of evidence tend to be strict and hearsay evidence is often inadmissible.³²⁾ The inquisitorial model is known for its flexibility in the rules of evidence. An investigating judge will collect the evidence of both parties through

the questioning of witnesses and documents, which provides more potential to explore the specifics.³³⁾

Comparing and analyzing these two models is significant when discussing the procedure model of the ICC. This is because although the adversarial model was the mainstream in the past international criminal tribunals, the inquisitorial model has been integrated since the International Criminal Tribunal for the former Yugoslavia (henceforth, ICTY) due to the fact that the inconvenience of the adversarial model became apparent. The judges of the ICTY realized that if they kept following the adversarial model, the court will have no knowledge of the case before the opening of the trial and the disclosure of evidence will be late. Thus the RPE of the ICTY was made more flexible allowing the court to have more control on evidence and witnesses.³⁴⁾

Inheriting the progressive aspects of the ICTY, the ICC's procedure model was constructed in a way that is adjustable to different kind of circumstances. The merge of the adversarial model and the inquisitorial model enhanced the role of victims and encouraged the acceleration of effectiveness in prosecutions by speeding up the process.³⁵⁾ The implementation of the active involvement of the victims especially distinguishes the procedural framework of the ICC from its predecessors. Victims, which were given small role in the ICTY, are given the chance to attend the hearings and examine/cross-examine witnesses in the ICC.³⁶⁾ The ICC is worthy of praise in which is evaluated as it "recognizes victims as persons and legal subject of their own right"³⁷⁾ and they are given "an independent voice and role in the proceedings."³⁸⁾ Additionally, this hybrid model enhances flexibility in deciding the admissibility of evidence, which can be seen in Rule63 of the RPE. This rule applies the principle of free admissibility of evidence just like other international criminal tribunals,³⁹⁾ and it is rare since in some inquisitorial model countries, evidence is controlled under strict rules.⁴⁰⁾

As explored in the above, the procedure model of the ICC can be explained as being *sui generis*.⁴¹⁾ The ICC procedure model enables active participation of victims and free admissibility of evidence. Since the role of victims and evidence is important when prosecuting sexual crimes, it is assumable that the uniqueness and flexibility of the ICC's procedure model is an effective structure that increases the

potential of prosecuting sexual crimes.

III Analysis of the Rules of Evidence and Procedure of the ICC

Although it is rarely discussed in spotlight, with no doubt it is obvious that the RPE is the fundamental bedrock of the procedural framework of the Court. Analyzing the RPE is significant when exploring this thesis's theme since there are several rules set in order to carry out fair prosecution of sexual crimes. The rules related to the prosecution of sexual crimes in the RPE can be categorized into two divisions; rules related to victims and witnessed on the one hand and rules related to evidence on the other. These two divisions will be delved into which will clarify the measures taken in the ICC to conduct an effective, fair prosecution on sexual crimes.

1 Rules Related to Victims and Witnesses

The role of victims has been brought into spotlight recently and continues to be an important factor in the prosecution process. Progression of the victim-approach has been seen in the field of international human rights law and the endorsement of the 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power' contributed to the construction of victim's rights.⁴²⁾ Additionally, the promotion of the victim's access to justice and respect for their dignity has been implemented in the RPE to elevate the role of victims.

In the past international tribunals, victims were often left in a vulnerable position due to the fact that the law did not give full recognition to their security and privacy.⁴³⁾ In order to give full recognition to the 'right to justice' of the victims, and also overcome the criticism that the ad hoc tribunals in the past lacked provisions to listen to the victim's voices in its RPE, the RS and the RPE of the ICC implemented specific rules related to victims and witnesses.⁴⁴⁾ Such rules apply to the victims of sexual crimes as well without exception and create a core value for a fair prosecution. On the other hand, it is also traumatizing when the victims and witnesses are asked to recollect their memories in the case of sexual crimes. In order to give full protection and at the same time seek justice, the ICC has taken

into account certain measures to create a protective environment for the victims and witnesses of sexual crimes while they take part in the trial as active participants.⁴⁵⁾

Victims are defined as “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”.⁴⁶⁾ People that fall under this definition fall under certain protection under Article 68 of the RS and people especially affected by sexual violence are taken into account due to their vulnerability.⁴⁷⁾ Article 68.1 of the RS states that the “Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses...in particular, but not limited to, where the crime involves sexual or gender violence....”⁴⁸⁾ Additionally, although the accused is entitled to public hearing,⁴⁹⁾ proceedings by *in camera* and evidence by electronic device is allowed when protection is necessary for the victims of sexual crimes.⁵⁰⁾

The RPE goes into further detail than the RS by specifically enumerating rules that the Court must take into account when victims and witnesses of sexual crimes are involved. Due to the complex disposition of the Court, the RPE specifies the Court’s responsibility to protect victims and witnesses into two sections. The first section is mentioned in Subsection 2 of Chapter 2 “Composition and administration of the Court” and the second section is mentioned in Section III of Chapter 4 “Provisions relating to various stages of the proceedings”. These two sections will be assessed below by looking into specific rules in each section.

(1) Subsection 2 “Victims and Witnesses Unit”

Rule 16 of the RPE mentions the responsibility of the Registrar⁵¹⁾ on victims and witnesses. It explicitly mentions that the Registrar must take “gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings.”⁵²⁾

In addition, Rule 17 of the RPE requests The Victims and Witnesses Unit to take certain steps in order to arrange the participation of the victims in a protective manner.⁵³⁾ Setting The Victims and Witnesses Unit within the Registry⁵⁴⁾ is specified in Article 43 of the RS,⁵⁵⁾ which is aimed to provide protective measures and counseling for witnesses and victims that will appear before the Court. The Unit

must “include staff with an expertise in trauma, including trauma related to crimes of sexual violence.”⁵⁶⁾ Additionally, derived from Article 43, Rule 17 recognizes the vulnerability of the witnesses involved in testimony and encourages the training of the workers at Court on issues of trauma and sexual violence.⁵⁷⁾ It also states that gender-sensitive measures will be taken in the facilitating the testimony of victims of sexual violence at “all stages of the proceedings.”⁵⁸⁾

(2) Section III. Victims and Witnesses

Rule 86 of the RPE outlines the general principle of victims and witnesses as the following; “A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence.”⁵⁹⁾ It is crucial that the rule explicitly recognizes the vulnerability of victims and witnesses of sexual crimes and mentions that special assistance will be provided for them.⁶⁰⁾

Rule 87 of the RPE outlines certain protective measures the Court must apply in order to protect particular vulnerable victims and witnesses.⁶¹⁾ It is required to order protective measures pursuant to Article 68.1 and 2 of the RS when certain requests are made.⁶²⁾ Rule 87.3 explicitly states that when certain requests of protective measures are made, a hearing shall be conducted *in camera* “to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness.”⁶³⁾ Under this rule, the Court can order measures (a) through (e) of Rule 87.3.⁶⁴⁾

In Rule 88.1 of the RPE, the Chamber is given the right to order special measures in the facilitation of the testimony of victims of sexual violence.⁶⁵⁾ This is derived from Article 68 of the RS, which states the responsibility of the Court to protect victims and witnesses in their participation of the proceedings. The presence of a permitted lawyer, psychologist or a family member during the testimony of the trial is an example of the special measure that could be taken.⁶⁶⁾ There is also deliberation on protecting the privacy of the victim and witness by the

Chamber, for it must be “vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation, paying particular attention to attacks on victims of crimes of sexual violence.”⁶⁷⁾ Recording of questioning is also allowed in particular cases, which includes the use of recording to “reduce re-traumatization of a victim of sexual or gender-violence.”⁶⁸⁾

2 Rules Related to Evidence

Evidence, broadly recognized as “something that tends to prove or disprove the existence of an alleged fact”⁶⁹⁾ plays an important role when dealing a case. Evidence can be categorized into two types, incriminatory or exculpatory depending on its nature. It would be the former type if the evidence itself will establish guilt and would be the latter type if the evidence itself will show the innocence of the accused.⁷⁰⁾ The ICC has a rather flexible rule on evidence and allows the admission of all relevant and necessary evidence of the case. Especially, rules on evidence of sexual crimes are distinguished from other cases and the RPE distinguishes it by containing provisions on issues of corroboration, consent and past behavior.⁷¹⁾

Rule 63.4 of the RPE explicitly mentions that the Court shall not legally require corroboration especially for crimes of sexual violence.⁷²⁾ Corroborating evidence is a type of evidence which confirms other evidences, especially evidences that are not yet affirmed to be reliable.⁷³⁾ Given the fact that in some countries, judges have used the rule of requiring corroboration unfairly, Rule 63 was adopted in order to avoid stereotypical judgment and give voice to the vulnerable victims.⁷⁴⁾ This rule is the expressive proof of the Court taking serious account on these crimes.

Moreover, Rule 70(a) through (d) of the RPE recognizes the issue of consent, which is often a controversial point in sexual and gender-based crimes. Under this rule, consent cannot be inferred in the following circumstances. Firstly, in situations where the victim’s ability to give genuine consent is undermined due to threat of force and other coercion. Secondly the conduct or remark of the victim when the victim cannot give genuine consents cannot be presupposed as consent. Thirdly, it should not be assumed that the victim had consent due to the lack of resistance and silence to the alleged sexual violence. It is also important to note that under Rule

70, it is prohibited to assume the sexual availability of the victim from the sexual nature of the conduct of the person before or after the crime.⁷⁵⁾ Additionally, evidence related to the sexual conduct of the victim or witness whether prior or subsequent does not fall under/within the sphere of the jurisdiction of the ICC.

Consecutive to the above rules is the rule on the *in camera* proceeding, which is encouraged in Article 68 of the RS. As part of the protection of the victims and witnesses of sexual crimes, the Court allows *in camera* proceedings and the submission of evidence by the use of electronic devices.⁷⁶⁾ Rule 72.1 of the RPE guides the method of the *in camera* proceeding especially when the Court intends to introduce evidence on the consent of the victim.⁷⁷⁾ The rule states that “Where there is intention to introduce or elicit, including by means of the questioning of a victim or witness, evidence that the victim consented to an alleged crime of sexual violence, or evidence of the words, conduct, silence or lack of resistance of a victim or witness referred to in principles (a) through (d) of rule 70, notification shall be provided to the Court which shall describe the substance of the evidence intended to be introduced or elicited and the relevance of the evidence to the issues in the case.”⁷⁸⁾ The Chamber is required to hear *in camera* the views of the Prosecutor; the defence, the witnesses and the victims before deciding whether the evidence referred to in Rule 72.1 is “relevant or admissible.”⁷⁹⁾ This kind of particular procedure will avoid criticizing and re-traumatizing the victim when inquiring about the consent.⁸⁰⁾

IV Implementation of the Rules in the Prosecution Procedure of the ICC

As it has been discussed in the previous chapter, the Court has several rules in order to protect victims of sexual crimes in the procedure. To clarify whether the rules concerning cases on sexual crimes are implemented, this chapter will present examples by delving into a certain case that involved sexual crimes. Specifying how the rules are implemented in the actual case will not just reveal how the rules function but also help assess the effectiveness of the rules.

The case of *Prosecutor vs Bemba* was symbolic since Jean-Pierre Bemba was accused of murder, rape and pillaging and was convicted for such crimes for the

first time in the history of the ICC.⁸¹⁾ In this case, several measures were requested in order to protect the victims and witnesses at trial. The measures requested were such as use of witness numbers and pseudonyms, “limited closed sessions... wherein information that would identify victims of rape, sexual violence, or related crimes”⁸²⁾ and allowing some victims to accompany “a psychologist, a trustworthy person, or family member at trial”⁸³⁾ which falls under the scope of Rule 88.⁸⁴⁾ It was also explicitly mentioned, “the fact that a witness is a victim of sexual violence is a specific factor to be taken into account when considering protective or special measures pursuant to Rules 87 and 88 of the Rules.”⁸⁵⁾ In this case, special measures were sought for 10 victims of sexual crimes, due to some of them fearing the stigma after being revealed of their identity.⁸⁶⁾ It is important to note that it was considered that the measures “will enable the witnesses to provide full accounts of the events at issue with minimal re-traumatization, to protect their privacy and the privacy of family members, and to avoid the stigma that is associated with rape and/or HIV infection.”⁸⁷⁾

V Exploration of the OTP Policy Paper on Sexual-Gender Based Crimes

As one of the main organs of the ICC, the OTP⁸⁸⁾ is especially responsible for examining the information on the crimes and conducting the investigations, which influence the procedural framework of the Court.⁸⁹⁾ Although the Court has taken steps to a fair trial on sexual and gender-based crimes since its establishment, the OTP reaffirmed the necessity of a more effective investigation and strategy to deal with the issue on a higher level. After the elevation of this issue as one of its key strategic goals in the Office’s Strategic Plan 2012–2015, the OTP has increased concentration on formulating strategies that stand on a gender perspective, which resulted in the adaptation of the ‘Policy Paper on Sexual and Gender-Based Crimes’ in 2014.⁹⁰⁾ Without legal binding, this strategy paper provides a futuristic image of the OTP’s perspective towards dealing sexual crimes.⁹¹⁾ The adoption of the policy itself is phenomenal in the sense that it has evidently confirmed the direction of the Office to implement a gender perspective⁹²⁾ in all stages of its work. This section will analyze the certain strategies set by the Office and assess its influence on the

prosecution of sexual crimes.

As mentioned in Chapter III, the Court has several rules in order to deal with evidence and victims and witnesses on a protective measure. In spite of the Court having several rules, it has struggled to fully cover sexual crimes in its proceedings. An example of this difficulty was seen in the case of *Prosecutor vs Lubanga*. Originally the suspect Thomas Lubanga was indicted as committing the crime of conscripting and enlisting children under the age of 15.⁹³⁾ In addition, it was also argued that he should be indicted also for rape and other sexual crimes, since many witnesses made it evident of the existence of rape and the state that some girls were forced to work as the wives of the commanders during the testimonies.⁹⁴⁾ However, Confirmation of Charges against Lubanga included no such sexual crimes in the end. Considering this point, the TCI of Lubanga Case set out as follows:

“Although the former Prosecutor was entitled to introduce evidence on this issue during the sentencing hearing, he failed to take this step or to refer to any relevant evidence that had been given during the trial. As a result, in the view of the Majority, the link between Mr Lubanga and sexual violence, in the context of the charges, has not been established beyond reasonable doubt. Therefore, this factor cannot properly form part of the assessment of his culpability for the purposes of sentence.”⁹⁵⁾

Prosecutor Ocampo, who was the Prosecutor of the ICC⁹⁶⁾ at that time, was criticized for the fact that he failed to mention the evidence of sexual crimes during the sentence hearing though a good amount of evidence was collected to prove sexual violence.

Prosecutor Bensouda, who took office after Prosecutor Ocampo under these circumstances, was determined to take leadership in the prosecution of sexual crimes that eventually led to the adoption of the policy paper.⁹⁷⁾ The context of the policy paper is quite simple since it explains certain strategies the Office will focus on by clarifying their consideration on the gender inequalities and the sexual crimes that occur. Starting with an outline of the Court’s general policy, the paper covers certain measures the Office will take into consideration during preliminary examinations, investigations, and prosecution. It presents an in depth overview of the specific rules and articles of the RPE and the RS the Office will implement in

each procedure when cases involve sexual crime. Additionally, the OTP goes into further detail and proposes that the Office will consult with experts and propose their testimony. From socio-political to medical, the Office will endeavor to propose experts' testimony on various aspects since it is expected to be helpful in order to identify sexual crimes.⁹⁸⁾ The policy paper also explicitly mentions the role of civil society and how it could contribute to the function of the Court from several perspectives. They can support the Court on legal and medical issues related to sexual crimes and enhance advocating the recognition of the issue itself.⁹⁹⁾

The policy paper is innovative since it officially emphasizes what the ICC lacks within the prosecution of sexual crimes and the submission of the paper itself is phenomenal. Not only will the paper guide the course of direction the Court must follow in implementing its procedural rules into actual cases, but also give a clear message that the Court will lean into the issue of sexual crimes even more.

VI Conclusion

Overcoming mass atrocities and creating justice to maintain peace has been one of the most difficult issues assigned to mankind. Though it is still in the stage of advancement, the world has continued seeking justice since the Nuremberg Tribunal in order to create a more effective procedural framework in prosecuting the gravest crimes. Established with high hopes in creating a fairer procedural framework, the ICC has dealt with several crimes within its jurisdiction so far and has shown its advancement step by step.

Under the question of "What kind of procedural framework does the ICC have in order to prosecute sexual crimes?" this thesis aimed to present an overview of the rules within the ICC to prosecute sexual crimes. Starting off with the clarification of the definition of sexual crimes and gender-based crimes, sexual crimes that fall within the jurisdiction of the Court were explained. This was followed by an analysis of criminal procedure models and how the procedure model of the ICC affects the prosecution of sexual crimes. The discussion then moved on to the analysis of specific rules on sexual crimes in the RPE, which demonstrated that the ICC is aimed at an effective prosecution of sexual crimes and at the same

time providing sufficient protection to the victims of such crimes. A brief examination of the cases that involved sexual crimes was given in order to see how the rules are implemented within the actual trials. In the final discussion, the 'Policy Paper on Sexual Violence and Gender-Based Crimes' by the OTP was introduced in order to assess the future strategy that will be taken so that sexual crimes will be looked into more effectively.

In the course of this study, it was possible to reveal the existence of certain measures taken in the prosecution of sexual crimes and also heighten hopes in how the ICC may further develop. At the same time, several scholarly works referenced in this thesis revealed the difficulty to define what kind of rules and procedural framework will enhance the prosecution of such crimes. The complexity of the ICC's procedural framework and changing strategies by each Prosecutor seems to hinder the quest to create a clear guideline focused on sexual crimes. Although the OTP Policy Paper envisions the ICC to develop into a court that will overcome the difficulties within the prosecution of such crimes, the strategy lacks legal binding, which makes it difficult to be fulfilled.

In spite of these obstacles, some methods will be proposed in order to pave the way to construct a more effective procedural framework for the prosecution of sexual crimes in the ICC. Firstly more research should be carried out on how much the rules related to sexual crimes in the RPE are implemented in the actual cases. Exploring the past cases that involved sexual crimes and looking into the process of each step taken could complement this. Secondly, consideration on other possibilities on rules of the RPE should be made. This could be conducted by analyzing what methods countries take when they prosecute sexual crimes at a national level. Effective measures for the prosecution of sexual crimes can be extracted through the analysis, which could be applied to the ICC in the future.

Advancing the procedural framework for sexual crimes at the ICC may be accompanied by many difficulties. However, by approaching this issue from various perspectives and proposing diverse solutions will enable the continuation of this progression.

- 1) A Cassesse, *International Criminal Law* 2nd edn(Oxford: Oxford University Press 2008) 4.
- 2) R Cryer, H Friman, Darryl Robinson and E Wilmshurst, *An Introduction to International Criminal Law and Procedure* 2nd edn (Cambridge: Cambridge University Press 2010) 150, 151.
- 3) Ibid.
- 4) W Schabas, *An Introduction to the International Criminal Court* 4th edn(Cambridge: Cambridge University Press 2011) 399.
- 5) C MacKinnon, 'Creating International Law: Gender As Leading Edge' *Harvard Journal of Law & Gender* Volume36 111.
- 6) Ibid.
- 7) Stephanie Coop has conducted significant research so far in Japan on sexual and gender-based violence within International Criminal Law. See ステファニー・クーブ「国際刑事法におけるジェンダー暴力」日本評論社 (2012) for further reference.
- 8) Art 7.1(g), 8.2(b)(xxii) and 8.2 (e)(vi) Rome Statute are outlined below;
 - Art7.1(g) "Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity."
 - Art8.2(b)(xxii) "Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article7, paragraph 2(f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions."
 - Art8.2(e)(vi) "Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions. "
- 9) See ICC OTP, Policy Paper on Sexual and Gender-Based Crimes (June 2014) 3.
- 10) Ibid.
- 11) Ibid.
- 12) Ibid.
- 13) See Art 7.3 Rome Statute.
- 14) O Triffter and K Ambos, *Rome Statute of the International Criminal Court A Commentary* 3rd edn (Munchen: Verlag C.H Beck 2016) 293.
- 15) Ibid.
- 16) See ICC OTP, Policy Paper on Sexual and Gender-Based Crimes (June 2014) 3.
- 17) Ibid.
- 18) Ibid.
- 19) For an example, the recognition of rape as a form of crimes against humanity was left out in the Nuremberg Charter. For further remarks, see Schabas W Schabas, *An Introduction to the International Criminal Court* 4th edn (Cambridge: Cambridge

University Press 2011) 115.

- 20) See Art 7(g) Rome Statute.
- 21) See Art 7 Crimes against Humanity Rome Statute.
- 22) See Art 8(b) (xxii) Rome Statute.
- 23) See Art 8 War Crimes Rome Statute. Art 8(e) (vi) is not mentioned in the above since it applies to armed conflicts not of an international character.
- 24) C MacKinnon, 'The ICTR's legacy on sexual violence' (2008) *New England Journal of International and Comparative Law* Volume14 212-213.
- 25) O Triffter and K Ambos, *Rome Statute of the International Criminal Court A Commentary* 3rd edn (Munchen: Verlag C.H. Beck 2016) 208.
- 26) A Cassesse, *International Criminal Law* 2nd edn (Oxford: Oxford University Press 2008) 353.
- 27) Ibid., 355-362
- 28) Ibid.
- 29) A Cassesse, *International Criminal Law* 2nd edn (Oxford: Oxford University Press 2008) 353.
- 30) Ibid., 361. Further reference can be seen in R Cryer, H Friman, D Robinson and E Wilmshurst, *An Introduction to International Criminal Law and Procedure* 2nd edn (Cambridge: Cambridge University Press 2010) 478.
- 31) A Cassesse, *International Criminal Law* 2nd edn (Oxford: Oxford University Press 2008) 361.
- 32) Ibid., 356-357, 363.
- 33) Ibid.
- 34) Ibid., 369, 367, 369, 373.
- 35) Ibid., 369, 371, 376. For example, Cassesse hints that the demand to speed up the procedure was one reason why the inquisitorial model was incorporated.
- 36) A Cassesse, *International Criminal Law* 2nd edn (Oxford: Oxford University Press 2008) 374.
R Cryer, H Friman, Darryl Robinson and E Wilmshurst, *An Introduction to International Criminal Law and Procedure* 2nd edn (Cambridge: Cambridge University Press 2010) 439.
- 37) K Ambos, *Treatise on International Criminal Law Volume III: International Criminal Procedure* 1st edn (Oxford: Oxford University Press 2016) 169.
- 38) Ibid.
- 39) See Rule63 General provisions relating to evidence.
- 40) K Ambos, *Treatise on International Criminal Law Volume III: International Criminal Procedure* 1st edn (Oxford: Oxford University Press 2016) 447, 448.
- 41) K Ambos, 'International criminal procedure: "adversarial", "inquisitorial" or mixed?' *International Criminal Law Review* Volume3 35.

- 42) R Cryer, H Friman, Darryl Robinson and E Wilmshurst, *An Introduction to International Criminal Law and Procedure* 2nd edn (Cambridge: Cambridge University Press 2010) 479.
- 43) K Ambos, *Treatise on International Criminal Law Volume III: International Criminal Procedure* 1st edn (Oxford: Oxford University Press 2016) 167,168.
- 44) Ibid., 169.
- 45) Ibid., 169.
- 46) R Cryer, H Friman, Darryl Robinson and E Wilmshurst, *An Introduction to International Criminal Law and Procedure* 2nd edn (Cambridge: Cambridge University Press 2010) 481.
- 47) See Rule 86 Rules of Procedure and Evidence.
- 48) See Art 68.1 Rome Statute.
- 49) See Art 67.1 Rome Statute.
- 50) See Art 68.2 Rome Statute.
- 51) Art 43.2 states, "The Registry shall be headed by the Registrar, who shall be the principal administrative officer of the Court."
- 52) See Rule 16.1(d) Rules of Evidence and Procedure.
- 53) See Rule 17.2 (a) (i) Rules of Evidence and Procedure.
- 54) Art 43.1 Clarifies the role of the Registry as the following; "The Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court."
- 55) See Art 43.6 Rome Statute.
- 56) See Art 43.6 Rome Statute.
- 57) See Art17.2 Rules of Evidence and Procedure.
- 58) See Rule 17.2(b) (iii) Rules of Evidence and Procedure.
- 59) See Rule 86 Rules of Evidence and Procedure.
- 60) For further reference, see Online Commentary www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/rules-of-procedure-and-evidence/#c1386.
- 61) See Rule 87 of Rules of Procedure and Evidence.
- 62) See Rule 87.1 Rules of Procedure and Evidence
- 63) See Rule 87.3 Rules of Procedure and Evidence.
- 64) The measures (a) through (e) will be listed in the following; (a) That the name of the victim, witness or other person at risk on account of testimony given by a witness or any information which could lead to his or her identification, be expunged from the public records of the Chamber (b) That the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing such information to a third party (c) That testimony be presented by electronic or other special means, including the use of technical means enabling the alteration of pictures or voice, the use of audio-visual technology, in particular videoconferencing

and closed-circuit television, and the exclusive use of the sound media (d) That pseudonym be used for a victim, a witness or other person at risk on account of testimony given by a witness (e) That a Chamber conducts part of its proceedings in camera.

- 65) See Rule 88.1 Rules of Procedure and Evidence.
- 66) D Lupig, 'Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court' *Journal of Gender, Social Policy and Law* 483.
- 67) See Rule 88.5 of Rules of Procedure and Evidence.
- 68) D Lupig, 'Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court' *Journal of Gender, Social Policy and Law* 482.
- 69) K Ambos, *Treatise on International Criminal Law Volume III: International Criminal Procedure* 1st edn (Oxford: Oxford University Press 2016) 446.
- 70) *Ibid.*, 447.
- 71) See ICC OTP, Policy Paper on Sexual and Gender-Based Crimes (June 2014) 36.
- 72) See Rule 63.4 Rules of Evidence and Procedure.
- 73) K Ambos, *Treatise on International Criminal Law Volume III: International Criminal Procedure* 1st edn (Oxford: Oxford University Press 2016) 474.
- 74) See Online Commentary Rule 70. <https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/rules-of-procedure-and-evidence/#c1386>
- 75) See Rule 70 Rules of Procedure and Evidence. For further reference, see Online Commentary Rule 70. <https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/rules-of-procedure-and-evidence/#c1386>
- 76) See Article 68.2 Rome Statute.
- 77) See Rule 72.1 Rules of Evidence and Procedure.
- 78) *Ibid.*
- 79) See Rule 72.2 Rules of Evidence and Procedure.
- 80) See Online Commentary Rule 72. <https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/rules-of-procedure-and-evidence/#c1386>
- 81) See Bemba conviction a step forward for ICC and Africa – BBC News <http://www.bbc.com/news/world-africa-36585195> for reference.
- 82) Corrigendum to "Prosecution's request for Protective and Special Measures for Prosecution Witnesses at Trial", *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08, TCIII, ICC, 6 July 2010, 3.
- 83) *Ibid.*
- 84) See Rule 88 Rules of Evidence and Procedure.
- 85) Corrigendum to "Prosecution's request for Protective and Special Measures for Prosecution Witnesses at Trial", *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08, TCIII, ICC, 6 July 2010, 5.
- 86) *Ibid.*, 6, 9.

- 87) Ibid., 6.
- 88) Art 42.1 of the Rome Statute clarifies the role of the OTP as the following; “The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court.”
- 89) W Schabas, *An Introduction to the International Criminal Court* 4th edn (Cambridge: Cambridge University Press 2011) 377.
- 90) N Hayes, ‘Investigating and Prosecuting Sexual Violence at the ICC’ in C Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press 2015) 827-829.
- 91) See ICC OTP, Policy Paper on Sexual and Gender-Based Crimes (June 2014) 10, 11.
- 92) For further explanation on the term ‘gender perspective’, see ICC OTP, Policy Paper on Sexual and Gender-Based Crimes (June 2014) 3.
- 93) Decision on Sentence pursuant to Article 76 of the Statute *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06, TCI, ICC, 10 July 2012, 4.
- 94) Ibid., 47 and other pages. For further reference, other pages that include reference on rape should be looked into.
- 95) Decision on Sentence pursuant to Article 76 of the Statute, *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06, TCI, ICC, 10 July 2012, 28.
- 96) Art 42.2 states, “The Office shall be headed by the Prosecutor.”
- 97) N Hayes, ‘Investigating and Prosecuting Sexual Violence at the ICC’ in C Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press 2015) 826, 827.
- 98) See ICC OTP, Policy Paper on Sexual and Gender-Based Crimes (June 2014) 37. It is interesting to note that in the Bemba Case, Professor Andrea Tabo and Dr. Elisabeth Schauer were called as expert witnesses on the relevant pattern of sexual violence dealt in the case.
- 99) See ICC OTP, Policy Paper on Sexual and Gender-Based Crimes (June 2014) 40.