

Article

## **INTERSECTIONALITY: A TOOL FOR THE GENDER ANALYSIS OF SEXUAL VIOLENCE AT THE ICC**

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### ABSTRACT

The *Policy Paper on Sexual and Gender-Based Violence* commits the ICC Prosecutor to conduct a ‘gender analysis’ based on the understanding of gender as a social construct and its interplay with other factors of discrimination. However, international criminal law has not yet grappled with understanding ‘socio-legal’ approaches on gender and discrimination. Based on different case studies, this article explores ways in which ‘intersectionality’ can make a contribution regarding sexual violence crimes in aspects such as the gravity assessment, the contextualisation of crimes, and the drafting of charges. It demonstrates that intersectionality’s ‘broader approach’ improves the understanding of crimes to tackle them more effectively.

Keywords: Intersectionality; Sexual and Gender-based Violence; Gender Analysis; Discrimination; Contextualisation; International Crimes.

### **Introduction**

The term ‘intersectionality’ was coined by Kimberé Crenshaw in the field of law linked to the phenomenon of race feminism. Crenshaw raised awareness that discrimination is not single-axis (gender only, or race only, etc.) but is often ‘intersectional’ as it involves multiple layers simultaneously —as gender, race ‘and’ class discrimination.<sup>1</sup> For instance, intersectionality posits that poor Black women have been discriminated against as a result of their gender, race and economic status altogether. Therefore, the root causes of their

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<sup>1</sup> K. Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ 1, Article 8, *University of Chicago Legal Forum*, (1989) pp. 139-167.

discrimination and the right measures of redress are neglected if the law is interpreted considering only one axis of discrimination.<sup>2</sup>

Dealing with sexual and gender-based violence (SGBV) as an international crime requires understanding ‘gender’ a social concept defined as ‘male and female within the context of society’ under the Rome Statute.<sup>3</sup> Human rights mechanisms are recognising that gender is ‘inextricably linked’ to other social factors of discrimination (religious, racial, political, disability, etc.);<sup>4</sup> in this way, they are incorporating social approaches to international human rights law (IHRL) when dealing with SGBV to clarify the ‘interplay’ between gender and interconnected forms of discrimination.

In 2014, in the *Policy Paper on Sexual and Gender-Based Crimes (Policy Paper)* of the International Criminal Court (ICC), the Prosecutor established a ‘gender analysis’ at the centre of prosecutorial work which seeks to understand: i) gender as a social construct and ii) the multi-faceted nature of SGBV, in particular, the ‘intersection of factors’ of discrimination (such as gender, race, age, religion, political opinion, etc.) in relation to these crimes.<sup>5</sup> However, despite the centrality of ‘gender’ and discrimination in the Prosecutor’s gender analysis, practitioners recognise that international criminal law (ICL) has not yet grappled with understanding the role of ‘gender’ —and other interlinked factors of discrimination— which are essential for the effective investigation and prosecution of SGBV.<sup>6</sup> ‘Intersectionality’ can bring the needed socio-legal approaches on gender and discrimination to ICL, because this theory explains the multiple dimensions of discrimination that underpin situations of social abuse. Hence, this article explores the topic ‘how intersectionality can help the ICC Prosecutor’s work on SGBV.’ The article explains the progressive integration of intersectionality by IHRL and its alignment with the Prosecutor’s *Policy Paper (II)*. Then, it explores how intersectionality can contribute the operationalisation of the *Policy* during the preliminary examination (III), investigation (IV) and prosecutorial stages (V), supporting each stage with a case study. This analysis has benefited from the input of interviews held with ICL practitioners and academics.<sup>7</sup>

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<sup>2</sup> *Ibid.* The criticism that intersectionality brought concerning a partial approach to discrimination was first addressed in the American legal system. Black American women claimed being discriminated both for being women and Black. However, if they sought redress in court, treating categories of discrimination as mutually exclusive distorted the complex (multi-layered) nature of the discrimination they experienced. For instance see *Emma DeGraffenreid et al, v General Motors Assembly Division, St. Louis et al.*, United States District Court E. D. Missouri 413 F Supp 142 (E D Mo 1976) at 143; *Tommie E. Moore v. Huges Helicopter, Inc., A Division of Summa Corporation*, United States Court of Appeal Ninth. 708 F2d 475, 16 June 1983.

<sup>3</sup> 1998 Rome Statute of the International Criminal Court, A/CONF.183/9.

<sup>4</sup> 2010 Convention on the Elimination of all forms of discrimination against Women (CEDAW), *General Recommendation N° 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/2010/47/GC.2, 19 October 2010, para. 18.

<sup>5</sup> International Criminal Court (ICC) Office of the Prosecutor (OTP), *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, paras. 19, 20, 27, 45; footnote 17.

<sup>6</sup> S. Brammertz & M. Jarvis, *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford: OUP, 2016, p.10.

<sup>7</sup> Interviews have been conducted with an ICC officer, a Prosecutor from the International Criminal Tribunal for the Former Yugoslavia (ICTY), a SGBV investigator, a Judge from the Special Tribunal for Sierra Leone (STSL), and an academic.

## **I. Intersectionality: A Tool to Understand Human Rights Violations and International Crimes.**

Human rights mechanisms have started to refer to ‘intersectionality’ as a method to understand the social factors that underpin human rights violations. In this way, they are incorporating socio-legal approaches to IHRL.

### **I.1 Intersectionality and International Human Rights Law**

Discrimination —on the grounds of gender, race, colour, religion, ethnicity, or other status— is at the basis of human rights violations.<sup>8</sup> And often, various grounds of discrimination intersect. The 1995 World Conference on Women called on governments ‘to intensify efforts to ensure equal enjoyment of all human rights and fundamental freedoms for all women and girls who face *multiple* barriers to their empowerment and advancement because of such factors as their race, age, language, ethnicity, culture, religion or disability, or because they are indigenous people.’<sup>9</sup> Since then, UN bodies have started to recognize that intersectional discrimination may underpin human rights violations; especially gender-related situations which deal with socially constructed identities, attributes and roles of women and men.<sup>10</sup>

The Committee on the Elimination of Discrimination against Women (CEDAW) General Recommendation N°28 acknowledges that SGBV involves not only (single-axis) gender discrimination, but also gender ‘intersecting’ with other forms of discrimination. This recommendation reflects the value of intersectionality for an IHRL analysis of SGBV in two ways: i) as a critical tool of analysis of the interrelated causes of discrimination beyond sexual violence, and ii) as a practical tool for policy-makers to use the insight of the analysis to adopt measures that eliminate gender and interrelated inequalities. General Recommendation N°28 declares:

‘Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2 [of the Convention on the Elimination of All Forms of Discrimination against Women *AM*]. The discrimination of women based on sex and gender is ‘inextricably linked’ with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways than men. States parties must legally recognize and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned. They also need to adopt and pursue policies and programmes designed to eliminate such occurrences.’<sup>11</sup>

In parallel with the diversification of grounds of discrimination, human rights committees recognise ‘intersecting’ forms of discrimination: the CEDAW,<sup>12</sup> the Committee on the

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<sup>8</sup> 1966 International Covenant on Civil and Political Rights, GAR 2200A (XXI), UNTS 999, p. 171, Article 2 (1).

<sup>9</sup> United Nations, Report of the Fourth World Conference on Women Beijing 4-15 September 1995, A/CONF.177/20/Rev.1, New York 1996, P. 4. Emphasis added.

<sup>10</sup> It is worth noting that ‘gender’ must not be confused with women’s issues. See, Office of the High Commissioner for Human Rights, *Women’s Rights are Human Rights*, New York and Geneva, 2014, p.35.

<sup>11</sup> CEDAW 2010, *supra* note 4, para. 18. Emphasis added.

<sup>12</sup> *Ibid.*

Elimination of Racial Discrimination (CERD) in 2000,<sup>13</sup> the Committee on the Rights of the Child (CRC) in 2014,<sup>14</sup> and the Committee on the Rights of Persons with Disabilities (CRPD) in 2016.<sup>15</sup> They consider intersectionality as a ‘tool’ to understand the complex nature of discrimination affecting certain vulnerable groups which is necessary to address the root, structural causes of their abuse.<sup>16</sup> Under the intersectional lens, human rights violations concern sexual and reproductive rights,<sup>17</sup> harmful traditional practices,<sup>18</sup> and sexual violence,<sup>19</sup> among others.<sup>20</sup>

The CERD’s General Recommendation 25 recognises that the intersection of racial and gender discrimination during armed conflict primarily affects women. It causes unwanted pregnancies, stigmatisation, a lack of access to remedies, discrimination in the legal system and in the private sphere.<sup>21</sup> The CERD stressed the need for a ‘methodology’ that considers the gender dimensions of racial discrimination (their ‘interlinked’ character) giving particular attention to: (a) The form and manifestation of racial discrimination; (b) The circumstances in which racial discrimination occurs; (c) The consequences of racial discrimination; and (d) The availability and accessibility of remedies and complaint mechanisms for (racial) discrimination.<sup>22</sup> Intersectionality can provide such ‘methodology’ because it explains the social factors of discrimination connecting them to the context of abuse.

Regional human rights mechanisms also integrate an intersectional approach to discrimination. The decision *Egyptian Initiative for Personal Rights and Interights v. Egypt*<sup>23</sup> before the African Commission on Human and Peoples’ Rights illustrates a line of reasoning sensitive to the ‘interplay’ of social factors of discrimination when analysing human rights breaches. The plaintiffs were four women who alleged being subject to sexual assault and other violations by the Egyptian authorities in the context of a demonstration in May 2005. In examining the State responsibility, the African Commission found:

‘[t]he incidents alleged took place in a form of a systematic sexual violence targeted at the women participating or present at the scene of the demonstration. Furthermore, perpetrators of the assaults seemed to be aware of the context of the Egyptian society; an Arab Muslim society where a woman’s virtue is measured by keeping herself physically and sexually unexposed except to her husband. The

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<sup>13</sup> Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation N° 25, Gender Related Dimensions of Racial Discrimination*, U.N. Doc. A/55/18, annex V, Fifty-sixth session, 2000, 20 March 2000.

<sup>14</sup> 2014 CEDAW, *Joint general recommendation N° 31 of the Committee on the Elimination of Discrimination against Women/general comment N° 18 of the Committee on the Rights of the Child on harmful practices*, CEDAW/C/GC/31-CRC/C/GC/18, 14 November 2014, para. 15.

<sup>15</sup> Committee on the Rights of Persons with Disabilities (CRPD), *General comment N° 3 (2016), Article 6: Women and girls with disabilities*, CRPD/C/GC/3, 2 September 2016.

<sup>16</sup> F. Banda and C. Chinkin, *Gender, Minorities and Indigenous Peoples*, Minority Rights Group International, 2004, at 25.

<sup>17</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/22, 2 May 2016, paras. 30, 31.

<sup>18</sup> Joint general recommendation No. 31, *supra* note 14, para. 15.

<sup>19</sup> CERD 2000 *supra* note 13.

<sup>20</sup> CRPD 2016 *supra* note 15, para. 2.

<sup>21</sup> CERD 2000 *supra* note 13, paras. 2, 3.

<sup>22</sup> *Idem*, para. 5.

<sup>23</sup> *Communication 323/06: Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, African Commission on Human and Peoples’ Rights (ACHPR), Banjul, 16 December 2011.

perpetrators were aware of the consequences of such acts on the victims, both to themselves and their families, but still perpetrated the acts as a means of punishing and silencing them from expressing their political opinions.<sup>24</sup>(...) For these reasons, based on the above analysis, the African Commission finds the Respondent State in violation of Articles 2 [prohibition of discrimination, *AM*] and Article 18 (3) of the African Charter [State duty to eliminate discrimination against women and to ensure protection of their rights].<sup>25</sup>

The decision of the African Commission can be explained in terms of an intersectional approach to discrimination. According to the CERD's framework: the 'form' and 'manifestation' of violence was the sexual assault (and other gendered humiliation), which took place in 'circumstances' of political repression against perceived opponents, and in a 'context' in which gender norms dictate that females must show virtue by being sexually unexposed. The 'consequences' of the sexual assaults were the political silencing and the social stigmatization of the victims and their community. For these reasons, which were known to the perpetrators, the 'function' of sexual violence was both to repress ideological opposition (political discrimination) and to stigmatise and humiliate the women and their families, according to moral precepts and expectations in the Arab society (gender discrimination). Intersectionality enables to discern that the nature of sexual violence was necessarily compounded by gender 'and' political discrimination. Their combination reflects that structural inequalities —gender and political— in the context of violence increased the vulnerability of certain groups, as women in the opposition, to this form of abuse.

In 2015, in the case *González Lluy et al. v. Ecuador*, the Inter-American Court of Human Rights expressly used the concept 'intersectionality' to explain the nature of discrimination beyond human rights violations. The case does not deal with sexual violence (it concerns the rights to life, physical integrity and education) but is relevant because it defines and officialises intersectionality as a judicial approach to discrimination in the Inter-American system, and in consistency with UN committees. According to the Court:

'The Court notes that [in Talía's case] numerous factors of vulnerability and risk of discrimination 'intersected' that were associated with her condition as a minor, a female, a person living in poverty, and a person living with HIV. The discrimination experienced was caused not only by numerous factors, but also arose from a specific form of discrimination that resulted from the intersection of those factors; in other words, if one of those factors had not existed, the discrimination would have been different.'<sup>26</sup>

In his concurrent opinion, Judge Eduardo Ferrer Mac-Gregor Poisot elaborated on the nature of intersectional discrimination in terms of vulnerability, harm and impact. According to him, intersecting factors 'create a unique and distinct burden of risk of discrimination,' and when intersectional discrimination takes place it causes 'a unique harm, which is distinct from the discriminations assessed separately' resulting in 'different qualitative experiences, creating consequences for those affected in ways that are different from the consequences suffered by those who are subject to only one form of discrimination.'<sup>27</sup>

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<sup>24</sup> *Idem*, para. 152.

<sup>25</sup> *Idem*, para. 167.

<sup>26</sup> *Case of Gonzales Lluy et al. v. Ecuador, Preliminary objections, merits, reparations, and costs*, Judgement, Inter-American Court of Human Rights (IACtHR), September 1, 2015, para. 290. Emphasis added.

<sup>27</sup> *Idem*, Concurrent opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, paras. 11-12.

Considering its interpretation by human rights bodies, this literature gathers that an ‘intersectional’ approach to discrimination may follow these steps. Firstly, the multiple factors of discrimination are identified in the context where the abuse is committed; for instance, gender, ethnic, historical, economic, religious, legal, and other factors. At this stage, the analysis is inter-categorical: gender and other grounds of discrimination are identified as separate —cumulative— causes of SGBV. Secondly, the analysis understands the ‘intersection’ —interlink— of the factors identified. Dealing with sexual and ‘gender-based’ violence, the approach focuses on the dynamics between gender and the other categories; assessing if their interplay generates a new process of discrimination which explains the causes underpinning SGBV. To assess their ‘intersection,’ it may be useful to consider factors such as those highlighted by the CERD (*supra*), namely: (a) the form and manifestation of discrimination; (b) the circumstances of its commission; (c) its consequences; and (d) the availability and accessibility of remedies.<sup>28</sup> Thirdly, with a deep understanding of the dynamics of discrimination, practitioners (in human rights; policy-making) can identify more effectively the nature of the human rights violated and the reparation measures needed to address gender and interconnected inequalities at the root of abuse.

## **I.2 Intersectionality and International Criminal Law**

In 2014, the Office of the ICC Prosecutor issued its *Policy Paper on Sexual and Gender-Based Crimes (Policy Paper)* providing guidance and transparency on prosecutorial work dealing with SGBV.<sup>29</sup> For the first time the Office of the Prosecutor of an international criminal tribunal committed to carry out a ‘gender analysis’ throughout preliminary examinations, investigations and prosecutions of SGBV. ‘Gender’ —defined by the *Policy* as in IHRL— ‘refers to males and females, within the context of society. This definition acknowledges the *social* construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys.’<sup>30</sup> What characterizes the *Policy*’s ‘gender analysis’ is the centrality of the relationship between gender and discrimination which the Prosecutor seeks to understand. According to the *Policy*: ‘gender analysis’ examines the underlying differences and inequalities between women and men, and girls and boys, and the power relationships and other dynamics which determine and shape gender roles in a society, and give rise to assumptions and stereotypes. In the context of the work of the Office, this involves a consideration of whether, and in what ways, crimes, including sexual and gender-based crimes, are related to gender norms and inequalities.’<sup>31</sup>

The *Policy Paper* does not expressly recognise ‘intersectionality’ but incorporates its core elements to the implementation of the gender analysis, following the same *rationale* as intersectionality under the IHRL approach. First, the *Policy* recognises that ‘multiple’ factors of discrimination may underlie SGBV, declaring: ‘Both sexual and gender-based crimes may be motivated by underlying inequalities, as well as a ‘multiplicity’ of other factors, *inter alia*, religious, political, ethnic, national, and economic reasons.’<sup>32</sup> And the Prosecutor will seek to identify these multiple factors of discrimination in the social context: the ‘[g]ender analysis looks at the roles of females and males; the different patterns of involvement, behaviour, and activities that they have in economic, social, and legal systems; the constraints they face

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<sup>28</sup> CERD 2000, *supra* note 13.

<sup>29</sup> *Policy Paper* 2014, *supra* note 5.

<sup>30</sup> *Idem*, p. 3. Emphasis added.

<sup>31</sup> *Idem*, p. 4, para. 20.

<sup>32</sup> *Idem*, para. 19. Emphasis added.

relative to one another; and available opportunities.<sup>33</sup> Secondly, the gender analysis aims at understanding the ‘interconnection’ among the multiple factors of discrimination in relation to the crimes, reflected in the statement: ‘[i]t is important to view different types of discrimination as a totality, and not in isolation, as they can overlap with one another.’<sup>34</sup> Importantly, to discern discrimination as a totality, the *Policy* provides: ‘Pursuant to article 21(3) [a consistent application of the Rome Statute with human rights law], the Office will (...) Understand 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.’<sup>35</sup> Therefore, by incorporating the ‘intersection of factors’ of discrimination to the gender analysis the *Policy Paper* seeks to understand: i) interlinked (intersectional) forms of discrimination beyond SGBV, and ii) a consistent interpretation and application with IHRL. For these reasons, the *Policy Paper* is aligned with an intersectional approach to discrimination.

### III. The Preliminary Examination

During the preliminary examination, intersectionality explains the ‘multi-faceted’ nature of discrimination underpinning SGBV, enabling the Prosecutor to identify ‘gravity’ factors related to the manner of committing the crimes, their nature, harm, and impact in the situation under examination.

#### III.1 Intersectionality: A Tool to Assess the Gravity of Sexual Violence

The purpose of the preliminary examination is to analyse the ‘seriousness’ of any information received on crimes or a referral from a State Party or the Security Council, to determine the existence of a reasonable basis to proceed with an investigation.<sup>36</sup> It is a key period of analysis and decision-making to identify the kind of criminality that could be investigated,<sup>37</sup> despite the fact that the Prosecutor lacks investigative powers and relies on the information received and available open-source.<sup>38</sup>

The factors of gravity assessed by the Prosecutor during the preliminary examination are stated in the *Regulations of the Office*. These include the scale, nature, manner of commission, and the impact of the crimes.<sup>39</sup> The ‘scale’ of the crimes may be assessed in light of, *inter alia*, the number of victims, the extent of the damage, and the geographical or temporal spread of the crimes.<sup>40</sup> The ‘nature’ of the crimes refers to the specific elements of each offence (such as killings, SGBV, crimes committed against children, persecution, or the imposition of

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<sup>33</sup> *Idem*, footnote 17.

<sup>34</sup> *Idem*, footnote 25.

<sup>35</sup> *Idem*, para. 27. Emphasis added.

<sup>36</sup> 1998 Rome Statute, *supra* note 3, articles 15 and 53; ICC, *Regulations of the Office of the Prosecutor*, ICC-BD/05-01-09, 23 April 2009, regulation 25.

<sup>37</sup> ICC, Office of the Prosecutor, *Policy Paper on Preliminary Examinations*, November 2013, paras.66, 77, 81.

<sup>38</sup> 1998 Rome Statute, *supra* note 3, article 15.

<sup>39</sup> *Regulations of the Office*, 2009, *supra* note 36, regulation 29(2).

<sup>40</sup> *Policy Paper on Preliminary Examinations* 2013, *supra* note 37, para. 62.

conditions of life on a group calculated to bring about its destruction).<sup>41</sup> The ‘manner’ of committing the crimes includes *inter alia*, the means employed, the degree of participation and intent of the perpetrator, the systematic character of the crimes, the existence of an organised policy, the abuse of power, and ‘elements of particular cruelty, including the vulnerability of the victims, any motives involving ‘discrimination,’ or the use of rape and sexual violence as a means of destroying groups.’<sup>42</sup> The ‘impact’ of the crimes may be assessed in light of, *inter alia*, the sufferings endured by the victims, their increased vulnerability, the terror instilled, or the social, economic and environmental damage inflicted on communities.<sup>43</sup>

In addition, the *Policy Paper* stresses the particular ‘gravity’ of sexual violence crimes, recognising that these crimes are ‘among the gravest under the Statute.’ Furthermore, to assess their gravity during the preliminary examinations ‘the Office will take into account the multi-faceted character and the resulting suffering, harm, and impact of such acts.’<sup>44</sup> Thus, the *Policy* considers the ‘multi-faceted’ nature of SGBV as a factor which enhances the seriousness of the harms and impact of the crimes.

Indeed, the multi-faceted character of SGBV is a key factor to assess its gravity. The landmark decision *Akayesu* of the International Criminal Tribunal for Rwanda (ICTR) exemplifies how multi-faceted discrimination (in that case gender and race) aggravated the ‘nature’ of SGBV resulting in the perpetration of the gravest of crimes, genocide. In *Akayesu*, the ICTR held: ‘In light of all the evidence before it, the Chamber is satisfied that (...) [t]hese rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.’<sup>45</sup>

The Court’s reasoning that the gravity of the rapes constituted acts of genocide can be explained in terms of intersectionality. Applying the CERD’s framework (see II.2) to assess the interplay of gender and racial discrimination would show that: the ‘form’ and ‘manifestation’ of sexual violence represented massive rape against ‘Tutsi women,’ two vulnerable identities of the victims, who were targeted in the ‘context’ of an ethnic campaign opposing Hutus against Tutsis (and moderate Hutus). Rape and sexual violence inflicted serious bodily and mental ‘harm’ and were indeed considered ‘one of the worst ways of inflict harm on the victim as he or she suffers both bodily and mental harm.’<sup>46</sup> The ‘impact’ of such violence was the physical and psychological destruction of Tutsi women, their families and communities. These factors reflect that the multi-faceted (interlinked) nature of gender and racial discrimination resulted in sexual violence against Tutsi women having the function (meaning) of being ‘an integral part of the process of destruction’ of the group.<sup>47</sup>

Intersectionality, by explaining the ‘multi-faceted’ dimensions of discrimination within the broad context of violence, brings about insight over certain factors of gravity, which are useful

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<sup>41</sup> *Idem* para. 63.

<sup>42</sup> *Idem* para. 64.

<sup>43</sup> *Idem* para. 65.

<sup>44</sup> *Policy Paper* 2014, *supra* note 5, para. 45.

<sup>45</sup> *Prosecutor v. Jean-Paul Akayesu*, Judgement, Case No. ICTR-96-4-T, Trial Chamber I, 2 September 1998, para. 731.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

during the preliminary examination. These include: discrimination (pre-existing the crimes), vulnerability, patterns of crimes, the harm inflicted by them and their impact.

Firstly, intersectionality unveils factors that ‘pre-determine’ SGBV, as pre-existing factors that facilitate its commission. Analysing structural inequalities prior to the crimes enables to identify their relationship with the discriminatory nature of contemporary conflicts (such as race, religion, political opinion, etc.). Regarding SGBV, intersectionality reveals how pre-existing gender discriminatory attitudes are exacerbated during conflict and trigger SGBV;<sup>48</sup> for instance, if SGBV crimes affect women disproportionately, such gender-based crimes were committed because the victims were women, according to —pre-existing— expectations in that particular society.<sup>49</sup> Also, bringing awareness that high levels of gender inequality and sexual violence pre-existed the conflict can help to prove knowledge of the prevalence of SGBV by alleged perpetrators who may have taken advantage of (utilised, tolerated, exploited) this violence for criminal purposes; noting that contextual and structural factors matter more to link the crimes to high-ranking (non-physical) perpetrators.<sup>50</sup> Further, awareness of pre-existing factors of discrimination helps to remove misconceptions dealing with SGBV,<sup>51</sup> which according to prosecutors is key to investigate and prosecute it effectively. In particular, some of the misconceptions entail the following aspects: that rape is a matter of honour rather than a violent act; that SGBV is not as serious as other crimes; that it is personally motivated and/or opportunistic; it can only be prosecuted if it is systematic and widespread; that SGBV does not concern men; and that it cannot be charged against non-direct perpetrators.<sup>52</sup>

Secondly, intersectionality identifies ‘discrimination’ underpinning SGBV and victims’ ‘vulnerabilities.’ It looks at the context to understand how situations of abuse affect groups of people differently according to their distinct characteristics (e.g. male or female, age, ethnicity, etc.).<sup>53</sup> The analysis ‘dissects’ and points out how certain groups are discriminatorily targeted on the basis of their individual identities, which are vulnerabilities in the context of crimes.<sup>54</sup> From this perspective, intersectionality relates victims’ vulnerabilities (gender, age, race, political opinion, etc.) to the grounds of discrimination that drive perpetrators.<sup>55</sup> And, concerning SGBV, it reveals gender interrelated with other vulnerabilities as multi-faceted grounds of discrimination to perpetrate the crimes.

Third of all, intersectionality can help to explain the gravity of the patterns of crimes (the common features regarding victims, perpetrators and the *modus operandi* of criminality).<sup>56</sup> Because the analysis explains the dynamics of discrimination —the mutual influences and reinforcement of discriminatory factors— it reveals the lack of randomness of the crimes and how discrimination unfolded during the criminal campaign. This understanding is also

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<sup>48</sup> Interview with a gender expert, The Hague, 20 December 2016.

<sup>49</sup> *Prosecutor v. Žejnil Delalić et al.*, Judgement, IT-96-21-T, Trial Chamber, 16 November 1998, para. 493.

<sup>50</sup> Stressed during interviews held with a gender expert and an ICTY prosecutor.

<sup>51</sup> Interview 2016, *supra* note 48.

<sup>52</sup> Brammertz & Jarvis 2016, *supra* note 6, pp. 34-42.

<sup>53</sup> Interview with a lawyer working at the ICC Office of the Prosecutor, The Hague, 13 December 2016.

<sup>54</sup> *Ibid.*

<sup>55</sup> On the close relationship between vulnerabilities and discrimination, see Crenshaw, *supra* note 1.

<sup>56</sup> X. Aguirre Aranburu, ‘Sexual Violence beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases,’ in *Leiden Journal of International Law*, 23, 2010, pp. 609–627, p. 610.

helpful to prove the existence of an ‘attack’ against a civilian population (for the purposes of crimes against humanity) by uncovering that civilians were attacked due to an ‘overall system’ of discrimination, which made the nature of the acts non-random but organised.<sup>57</sup> Thus, understanding the overall functioning of criminal discrimination allows a better assessment of the broader picture of criminality and the scope of the criminal conduct.<sup>58</sup>

Fourthly, intersectionality helps to explain the ‘harms’ and ‘impact’ of SGBV. According to an ICC officer, understanding the harms and impact of crimes requires interpreting the context of violence by approaching the victims. In particular, one must look at the meaning of violence for victims and their communities because crimes do not take place in the vacuum but are perpetrated with meaning and intent in a particular social context.<sup>59</sup> Intersectionality looks at the context of crimes both from the perspective of victims —seeing their identities, vulnerabilities, and how they experienced SGBV— and from the perspective of perpetrators —seeing the overall system of discrimination and how violence intended to affect the victims. This insight of the functioning (and meaning) of SGBV allows to understand the harms caused (not only physical but also ‘connected’ harms such as emotional, to private life, economic, cultural),<sup>60</sup> and the impact of violence on the victims and their communities.<sup>61</sup>

### III.2 The Lubanga Case

The *Lubanga* case before the ICC, illustrates how the lack of an intersectional approach to discrimination led to obscuring the gravity of the crimes and, in particular, to overlook the perpetration of SGBV. This case exemplifies that the intersection of gender and young age heightens the risk of girls’ exposure to sexual abuse, especially in contexts of high vulnerability as an armed conflict. This intersection has been recognised by the CEDAW and the CRC’s Joint General Recommendation N° 31/General Comment N° 18:

‘the Committees draw States parties’ attention to the fact that sex- and gender-based discrimination ‘intersects’ with other factors that affect women and girls, in particular those who belong to, or are perceived as belonging to, disadvantaged groups, and who are therefore at a higher risk of becoming victims of harmful practices’ (...) ‘Harmful practices are persistent practices and forms of behaviour that are grounded in discrimination on the basis of, among other things, sex, gender and age, in addition to multiple and/or ‘intersecting’ forms of discrimination that often involve violence and cause physical and/or psychological harm or suffering.’<sup>62</sup>

According to the facts in *Lubanga*, from 2002 to 2003, a large number of children under fifteen years-old were recruited and used in hostilities by the militia *Union des Patriotes Congolais/Forces patriotiques pour la liberation du Congo* (UPC/FPLC). The UPC/FPLC, led by Thomas Lubanga, aimed at establishing Hema control in Ituri (Democratic Republic of the Congo, DRC)

<sup>57</sup> Interview with a SGBV investigator and lawyer, The Hague, 18 January 2017.

<sup>58</sup> On the importance of contextualizing SGBV to understand the broader patterns of crimes, see Brammertz & Jarvis 2016, *supra* note 6.

<sup>59</sup> Interview 2016 *supra* note 57.

<sup>60</sup> F. Ní Aoláin, D. F. Haynes & N. Cahn, ‘Criminal Justice for Gendered Violence and Beyond’11, *International Criminal Law Review*, 2011, pp. 425-443.

<sup>61</sup> Interview 2016, *supra* note 57.

<sup>62</sup> Joint General Recommendation 2014, *supra* note 14, paras. 6, 15. Emphasis added.

through military operations against the Lendu militia and civilians. In 2006, the Prosecutor charged Thomas Lubanga as a co-perpetrator for the war crimes of conscripting and enlisting children under the age of fifteen years into an armed group, and using them to participate actively in hostilities under articles 8(2)(e)(vii) and 25(3)(a) of the Statute.<sup>63</sup> In March 2012, the Court found Lubanga guilty as a co-perpetrator of these crimes.<sup>64</sup>

Despite not being charged, evidence during the trial revealed that grave crimes of SGBV had been committed against girl soldiers within the UPC/FPLC. The Court had refused to consider these crimes because the Prosecutor had not applied to include them in the confirmation of charges.<sup>65</sup> The Prosecutor was aware that SGBV had been committed against girl soldiers within the militia, as he had received reliable information about the serious character of those acts during the investigation.<sup>66</sup> Also, the Document Containing the Charges (DCC) against Lubanga mentioned, for every crime charged, the existence of both boys and girls within the militia. However, the Prosecutor decided not to analyse how 'gender' (the social roles of boys and girls as male and female) had affected their stay in the armed group, where children live in very coercive environments and perform many roles.<sup>67</sup> Supposing that the Prosecutor had been aware that grave patterns of SGBV had been committed he could have decided, as a policy issue, not to charge these crimes. Yet, this decision would be questionable if it entailed overlooking the 'gravity' of the crimes whose identification is the purpose of the preliminary examination, and of the ICC jurisdiction.<sup>68</sup> As practitioners acknowledge, prosecutors have a natural discretion to select the charges but these should be reflective of the criminal conduct.<sup>69</sup> In *Lubanga*, in addition to hindering the investigation and charging of SGBV, the absence of a gender analysis from the preliminary examination had the effect of precluding the Court from evaluating this form of criminality for the purposes of establishing individual criminal responsibility,<sup>70</sup> and of ordering reparations (as the harms must be linked to the crimes for which the person is convicted).<sup>71</sup>

Intersectionality would have looked into the received evidence of SGBV received and carried out a gender analysis of discrimination by 'contextualising' the alleged crimes. Firstly, the analysis would identify the multiple social factors of discrimination that made children vulnerable within the UPC/FPLC. Looking at the broader picture of discrimination in the DRC allows discerning that structural factors pre-disposed to the perpetration SGBV, in particular: gender inequality, the armed conflict (especially economic wars), and age. 'Gender' inequality is pervasive in all spheres of life in the DRC. For instance, the value of

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<sup>63</sup> *Prosecutor vs. Thomas Lubanga Dyilo*, Public Redacted Version Document Containing the Charges, Article 61(3)(a), ICC-01/04-01/06, Pre-Trial Chamber I, 28 August 2006.

<sup>64</sup> *Prosecutor vs. Thomas Lubanga Dyilo*, Judgment, ICC-01/04-01/06, Trial Chamber I, 14 March 2012, para. 1358.

<sup>65</sup> *Idem*, paras. 629, 630.

<sup>66</sup> B. Inger 'Partners for Gender Justice', in A.M. Brouwer, C. Ku, R. Römken and L. Herik, *Sexual Violence as an International Crime: Interdisciplinary Approaches*, Vol. 12 Series on Transitional Justice, Cambridge: Intersentia 2013, 315-338, p. 325.

<sup>67</sup> M. Drumbl, *Reimagining Child Soldiers*, Oxford: Oxford University Press, 2012.

<sup>68</sup> Rome Statute 1998, *supra* note 3, articles 15, 53; Policy Paper on Preliminary Examinations 2013 *supra* note 37, paras. 61, 66.

<sup>69</sup> Brammertz & Jarvis 2016, *supra* note 6.

<sup>70</sup> *Lubanga* Judgment 2012 *supra* note 64, paras. 629, 630.

<sup>71</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012 with AMENDED Order for reparations (Annex A) and public annexes 1 and 2, ICC-01/04-01/06, A A 2 A 3, Appeals Chamber, 3 March 2015, para. 196.

hegemonic masculinity (associated to high sex drive, financial means to maintain various wives, or men seen as protectors of women) is socially built in opposition to feminine roles (linked to weakness and subordination to men). Furthermore, from a legal point, women must obey heads of family (according to the Congolese Family Code); and women are discriminated against in access to economic independence and education.<sup>72</sup> The armed conflict in the DRC is also an economic war for the control of natural resources, and linked to international economic interests.<sup>73</sup> According to scientific evidence, in financially motivated armed conflicts, combatants tend to commit more abuses (as SGBV) because they lack an ideal, because they do not aspire to rule over civilians, and because military hierarchies tend to condone or encourage abuse as a means to re-assert masculinity and channel the anxiety caused by the conflict.<sup>74</sup> These circumstances, ‘coupled’ with a context of high gender inequality, result in militias with higher prevalence of sexual violence.<sup>75</sup> ‘Age’ was another factor of vulnerability for girls, in particular during an armed conflict. The Machel Report ‘Impact of Armed Conflict on Children’ declared that SGBV poses a continual threat to women and girls during armed conflict ‘but adolescent girls are particularly at risk for a range of reasons, including size and vulnerability.’<sup>76</sup> It recognised that rape is not incidental to conflict as ‘[i]t can occur on a random and uncontrolled basis due to the general disruption of social boundaries and the license granted to soldiers and militias.’<sup>77</sup>

Secondly, intersectionality would consider whether the multiple identified factors of discrimination intersect by assessing if their simultaneous interaction created a heightened risk (vulnerability) of SGBV for girl soldiers. Had the Prosecutor carried out a gender analysis, he would have been on the alert that these factors —recruitment into an armed group, gender discrimination and age— increased the risk of girl soldiers ‘exposure to SGBV. For instance, the UN highlights these factors in the ‘matrix’ of risk indicators of conflict-related sexual violence which are frequently used by investigators and prosecutors.<sup>78</sup> Moreover, their ‘intersection’ is recognised as a heightened risk of sexual violence.<sup>79</sup> The (serious) evidence of SGBV received by the Prosecutor should have been analysed in the light of these risk factors of discrimination whose combined interpretation provided ‘reasonable’ grounds to believe that SGBV crimes had been committed against girl soldiers. Intersectionality would have explained that, in *Lubanga*, the multiple identified factors of discrimination identified — gender, age and soldiery status— were inseparable factors in the commission of the crimes: girl soldiers were sexually abused because they were female (reflecting gender discrimination) ‘and’ because of their young age, as children are conveniently recruited by militias for their vulnerability and malleability to perform different roles (discrimination based on age).

In *Lubanga*, as a result of the intersectional analysis, the Prosecutor could have better informed his assessment of the ‘gravity’ during the preliminary examination concerning factors such as the manner, nature, and impact of the crimes.

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<sup>72</sup> Sara Meger, ‘Rape of the Congo: Understanding sexual violence in the conflict in the Democratic Republic of Congo’, 28: 2 *Journal of Contemporary African Studies*, April 2010, 119- 135, pp 128- 129.

<sup>73</sup> *Idem*, pp. 131-132.

<sup>74</sup> *Idem*, pp. 128-130.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Impact of Armed Conflict on Children*, A/51/306, 26 August 1996, paras. 91, 92.

<sup>77</sup> *Idem*, para. 94.

<sup>78</sup> UN Matrix Early Warning Indicators of Conflict-Related Sexual Violence, 2011.

<sup>79</sup> Joint General Recommendation 2014, *supra* note 14, paras. 6, 15

Firstly, intersectionality would have reflected that the manner of committing the crimes was graver because the vulnerability of victims and the grounds of discrimination were not only aged-based but also gender-based.<sup>80</sup> Thus, the analysis would have reflected the ‘multi-faceted’ nature of sexual violence (gender and age) which the *Policy* considers a gravity factor. Secondly, intersectionality would have explained the nature of the crimes more accurately in terms of harm and conduct, as they did not only consist of recruiting and using children in hostilities, but also involved crimes of sexual violence, considered amongst the gravest under the Statute.<sup>81</sup> Intersectionality in *Lubanga* would have called for a supplementary approach to the charges —recruitment and use of child soldiers in hostilities and sexual violence— instead of obscuring SGBV and encapsulating the experiences of all victims in the same category of crimes (i.e conscripting and enlistment of children).<sup>82</sup> Thirdly, the impact of the crimes would have been understood more realistically with intersectionality. In the charges, the Prosecutor generalised the impact of the violence on children stating that: ‘the children’s experiences [both boys and girls] are representative of those of other children enlisted, conscripted and used by the FPLC.’<sup>83</sup> Yet, understanding the intersection of gender and age from the preliminary examination could have showed the additional and serious gender impact of SGBV on girl victims; including unwanted pregnancies (often leading to maternal or infant death), disease, HIV, psychological traumatising, and social isolation.<sup>84</sup>

The application of intersectionality during the preliminary examination in *Lubanga* demonstrates the need for social (intersectional) approaches to discrimination as a way to understand the multi-faceted nature of SGBV and the gravity of the crimes at the moment when the preliminary examination begins. The lack of consideration of gender and interrelated factors in *Lubanga* led to downgrading the gravity of the crimes and to hindering victims’ access to justice in terms of: narrowing the scope of the criminal conduct, obscuring the multiple harms, generalising (homogenising) the impact of violence, and precluding reparations measures for victims of SGBV.

#### **IV. The Investigation Stage**

After the preliminary examination, if the Prosecutor considers the existence of a reasonable basis to believe that crimes within the Court jurisdiction have been committed, an investigation begins.<sup>85</sup> The aim of the investigation is to select those cases which reflect the gravest crimes (in terms of seriousness, types of victimisation, scale and impact)<sup>86</sup> and to gather the necessary evidence by using the investigative powers to charge the crimes.<sup>87</sup>

##### **IV.1 Intersectionality to Connect SGBV to the Context of Discrimination**

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<sup>80</sup> Policy Paper Preliminary Examinations 2013 *supra* note 37, para. 64

<sup>81</sup> Policy Paper 2014, *supra* note 5, para. 45.

<sup>82</sup> Khadija Ali, ‘Sexual and Gender Based Crimes in International Criminal Law: Moving Forwards or Backwards?’ 9: 10 *International Journal of Social, Behavioral, Educational, Economic, Business and Industrial Engineering*, 2015, pp. 3497-3501, p. 3580.

<sup>83</sup> *Lubanga*, Document Containing the Charges 2006, *supra* note 63, para. 87.

<sup>84</sup> Dissenting Opinion Judge Odio Benito, *Lubanga* Judgment, *supra* note 64, para. 20

<sup>85</sup> Rome Statute 1998, *supra* note 3, article 53. According to article 15, if the Prosecutor acts *motu proprio*, s/he requires an authorization of the Pre-Trial Chamber to start an investigation.

<sup>86</sup> ICC *Regulations of the Office of the Prosecutor*, ICC-BD/05-01-09, 23 April 2009, regulation 34(2).

<sup>87</sup> Rome Statute 1998, *supra* note 3, article 54.

Prosecutors of SGBV emphasise the importance of ‘contextualising’ sexual violence (which they consider a condition for successful prosecutions)<sup>88</sup> during investigations. Contextualising entails situating sexual violence in the context where it takes place, reflecting its ‘connections’ with other crimes and its function within the broader scope of criminality. And this connection requires examining discrimination beyond SGBV from different ‘angles’ such as: the individual acts of perpetrators, the harms inflicted to victims, what else happened to the victims, looking more broadly at how these individual acts fit into wider patterns of criminal conduct, and the effects of the crimes at large.<sup>89</sup> As a way to establish these connections, practitioners recognise the need for social approaches, in particular, to explain the role of gender and its interaction with other factors within the context of crimes.<sup>90</sup> As a result, prosecutors can understand the full scope of the criminal conduct during investigations.<sup>91</sup>

Similarly, the *Policy Paper* reflects the need to contextualise SGBV during investigations and commits the Prosecutor to adopt a nuanced approach to ‘gender’ by considering, in particular: a gender perspective,<sup>92</sup> victims’ experiences in connection with the context of crimes, and factors of gender bias (discrimination). According to the *Policy Paper*: ‘In conflict situations, sexual violence crimes rarely occur in isolation from other crimes. The victim’s experience should therefore be understood and documented in a comprehensive manner, as well as with a specialised focus on sexual or gender-based crimes, where relevant.’<sup>93</sup> Furthermore, the *Policy* stipulates that:

‘[t]he investigation will take into consideration various *indicia*, including discriminatory policies, violent acts selectively targeting a particular gender, gender-related propaganda, relevant utterances issued by the direct perpetrators, elements of an individual suspect’s background, and prior conduct that are indicative of relevant intent and adverse gender biases in the response of suspected groups or authorities to the crimes.’<sup>94</sup>

Expert practitioners from different backgrounds who have been interviewed for this study (prosecution, investigation, judges, and academia) have acknowledged the need for social approaches to ICL as a way to connect sexual violence to the context of crimes. Intersectionality can be helpful to establish these connections because it has for object of study certain categories which are also important in ICL to establish these links. These categories are mentioned by the *Policy Paper* being *inter alia*: a gender perspective, a gender analysis, gender inequalities, vulnerabilities, discrimination, intersecting factors of discrimination, victims’ experiences, harms, impact, and (pre-existing) inequalities.<sup>95</sup> Intersectionality connects these categories to the context of crimes by inquiring (making and answering questions) from a gender-informed perspective. For instance, subtle questions to contextualise SGBV would be: what were the identity markers of the victims? What traits of their identities made them vulnerable in the context of crimes? How did victims experience violence? How did they perceive the crimes? What harms did they experience? What impact did the crimes have in their personal lives and as members of the community? Were perpetrators aware of their (vulnerable) identity? How was SGBV victimisation compounded with pre-existing

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<sup>88</sup> Brammertz & Jarvis 2016, *supra* note 6, 172-220.

<sup>89</sup> *Idem*, p 175.

<sup>90</sup> *Idem*, pp. 10, 11, 173-175-177.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Policy Paper* 2014, *supra* note 5, para. 53.

<sup>93</sup> *Idem*, para. 59.

<sup>94</sup> *Idem*, para. 67.

<sup>95</sup> *Ibid.*

discrimination? How were victims' vulnerabilities linked to the general context of criminality? How was their victimisation compounded by other violations? How did the perpetrator intend to use the compounding effects of sexual violence combined with other violence and discrimination?<sup>96</sup>

As a result of its nuanced contextualisation, intersectionality reveals the nature of discrimination underpinning SGBV. Jurisprudence has shown the current relevance of a gender-sensible contextualisation of SGBV crimes (carried out during investigations) for judges, as a means to assist them in reaching a decision. In the case *Prosecutor v. Sesay and Others*, before the Special Court for Sierra Leone (SCSL), the Trial Chamber concluded that different acts of sexual violence were committed to terrorise the civilian population in the internal armed conflict.<sup>97</sup> In order to reach this conclusion, the Court found useful the Prosecutor's gender analysis which enabled the judges to examine factors connected to discrimination. For instance, the analysis addressed sensible questions such as: 'who were the targeted victims; what other acts often took place alongside the sexual violence; how these victims were affected by the sexual violence and how this victimisation was compounded by pre-existing societal discrimination; how was the experience of these victims also compounded by other violations; and how the perpetrators relied on the compounding effects of sexual violence combined with other violence and discrimination.'<sup>98</sup> Similarly, concerning the Rwandan genocide, in the case *Prosecutor v. Emmanuel Rukundo* before the ICTR, Judge Pocar partially dissented from the opinion of the Appeals Chamber arguing that, by considering sexual violence 'opportunistic,' the Majority did 'not fully appreciate the seriousness of the discriminatory intent of the crime [sexual assault].'<sup>99</sup> He explained that opportunistic motives did not exclude genocidal intent, which could have been appreciated from factors surrounding the context of Rukundo's sexual assault. In particular, Judge Pocar stressed the need to look at the vulnerable identity of the victim to understand the nature of the discriminatory intent: A Tutsi woman who was fleeing the conflict and who dirty and hungry had approached Rukundo, whom she knew was a priest and trusted him. Also, the Judge noted that the perpetrator knew the victim and her vulnerability in the context of 'mass violence against Tutsis' in the area; and that there was specific evidence of his role in the repeated abductions, killings, and utterances against Tutsis.<sup>100</sup>

## IV.2 The Muthaura Case

In January 2008, following elections in Kenya, the Mungiki criminal organisation (supporters of the ruling PNU Party) carried out widespread and systematic attacks against ODM supporters, who claimed electoral fraud. In addition to political confrontation, the attacks were largely organised along ethnic lines as they opposed Kikuyus (perceived as PNU supporters) to non-Kikuyus (perceived loyal to the ODM), belonging mostly to the Luo, Luhya and Kalenjin ethnic groups. Violence in Nakuru and Naivasha caused deaths, rapes,

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<sup>96</sup> Regarding a nuanced contextualisation of SGBV, see: V. Oosterveld, 'Contextualising Sexual Violence in the Prosecution of International Crimes', in *Thematic Prosecution of International Sex Crimes*, Morten Bergsmo, Beijing: TOAEP, 2012, pp. 189- 205.

<sup>97</sup> *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF accused)*, Judgment, SCSL-04-15-T, Trial Chamber, 2 March 2009, para. 1352.

<sup>98</sup> Oosterveld 2012 *supra* note 107, p. 199

<sup>99</sup> *Prosecutor v. Rukundo*, Decision on Jurisdictional Appeals, Partially Dissenting Opinion of Judge Pocar, ICTR-2001-70-A, Appeals Chamber, 20 October 2010, para. 4

<sup>100</sup> *Idem*, paras. 4, 12.

forcible circumcision and displacement.<sup>101</sup> The Prosecutor found reasonable grounds to believe that crimes against humanity of murder, forced displacement, other inhumane acts, rape and other forms of sexual violence had been committed.<sup>102</sup> He requested the arrest of Muthaura, Kenyatta and Ali as responsible under Article 25(3)(a) or (d) of the Statute.

The Court confirmed charges against Muthaura and Kenyatta, but it rejected the qualification of penile amputation and forced circumcision as ‘other forms of sexual violence’. Instead, the Pre-Trial Chamber requalified these acts as ‘other inhumane acts.’ The Prosecutor had submitted ‘that these [crimes] 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.’<sup>103</sup> However, the Pre-Trial Chamber considered that ‘not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence.’<sup>104</sup> The Court found that ‘the evidence placed before it does not establish the sexual nature of the acts of forcible circumcision and penile amputation visited upon Luo men. Instead, it appears from the evidence that the acts were motivated by ethnic prejudice and intended to demonstrate cultural superiority of one tribe over the other.’<sup>105</sup>

With this declaration,<sup>106</sup> the Court narrowed its analysis of the nature of the specific crimes to one single factor of discrimination —ethnicity. Similarly, the Prosecutor did not explain the multiple factors conditioning the criminal context —as gender, ethnic and political; but alluded only to the gendered nature of circumcisions that intended to attack victims’ ‘identities as men’ and to destroy their masculinity, not elaborating further on this argument.

The intersectional analysis in *Muthaura* would posit that the nature of violence in the circumcisions was at the intersection of gender, ethnic, and political discrimination. The analysis would contextualise these crimes by establishing their ‘connections’ with social factors of discrimination (gender, ethnic, and political) in the Kenyan context, resulting in an improved understanding of their nature.

In order to establish these connections, intersectionality looks at the social ‘meanings’ of circumcision in the broader context of the Kenyan society. And it identifies its gender and ethnic senses. In Kenya, circumcision is practiced among different ethnic tribes with the notable exception of the Luo and Turkana, who do not traditionally circumcise their males.<sup>107</sup> While the Kikuyu majority has traditionally associated manhood with circumcision, the Luos have traditionally not considered circumcision a sign of cultural manhood. Nevertheless, nowadays, the practice is extending throughout the country for health reasons,

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<sup>101</sup> Prosecutor’s Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09, Pre-Trial Chamber II, 15 December 2010.

<sup>102</sup> Request for authorisation of an investigation pursuant to Article 15, ICC-01/09, Pre-Trial Chamber II, 26 November 2009, para. 93.

<sup>103</sup> *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on the Confirmation of Charges Pursuant to Article 61(7) (a) and (b) of the Rome Statute, ICC-01/09-02/11, Pre-Trial Chamber II, 23 January 2012, para. 264.

<sup>104</sup> *Idem*, para. 265.

<sup>105</sup> *Idem*, paras. 266, 270.

<sup>106</sup> *Idem*, para 266.

<sup>107</sup> J. Finke, ‘Kikuyu circumcision’, *Traditional Music and Cultures of Kenya*, 15 December 2006, available at <http://www.bluegecko.org/kenya/tribes/kikuyu/circumcision.htm#meaning> (last visited 16 March 2017); ‘The Luo Tribe,’ *Kenyan information guide*, 2015, available at <http://www.kenya-information-guide.com/luo-tribe.html> (last visited 16 March 2017).

including the prevention of sexually-transmitted diseases.<sup>108</sup> For those in favour of circumcision as a traditional practice, it constitutes a fact of crucial importance which symbolises (with the cutting off the foreskin or clitoris) the passage of a child into adulthood, the assumption of adult responsibilities, and the acceptance of the male as a full member of the tribe.<sup>109</sup> Thus, circumcision has a strong gender identity, because its repercussions extend to the community and to the society.<sup>110</sup> On the contrary, many among those who do not practice circumcision as a tradition consider it a mutilation of manhood. It is perceived as cutting-off men from the universal image that associates masculinity with the male phallic organ; circumcision amputates masculinity, leaving men deeply damaged in their identity representation as male.<sup>111</sup> Moreover, it is discussed whether it modifies sexual practices between partners by reducing men's sensitivity and sexual appetite, as well as by decreasing women's rewarding experience of sex when compared to non-circumcised men.<sup>112</sup>

This broader perspective of the ethnic and gender meanings of circumcision was important when looking at the context in which the specific crimes took place. Circumcisions were perpetrated in a context of 'political' confrontation which explains their brutal, painful, and traumatic nature as a way to punish political opponents.<sup>113</sup> Also, since circumcision is a cultural practice that differentiates Kikuyus from Luos, 'forced' circumcision sought to humiliate the victims and to demonstrate 'ethnic' superiority. In addition to political and ethnic reasons, sexual violence was committed in a 'gendered' manner reflected in the different treatment of women and men. Women and girls (perceived as loyal to the ODM) were raped by PNU supporters;<sup>114</sup> often in the form of gang-rape, in their own homes, and in front of their families who were forced to observe.<sup>115</sup> On the other hand, men were subject to sodomization, penile amputation, and forced circumcision.<sup>116</sup> As a result, in *Muthaura*, the gender, ethnic and political identities of men (Luo male perceived as ODM supporters) were all necessary interconnected factors to compound the targeting 'as' circumcisions. The Prosecutor could have used a broader approach to discrimination to connect the circumcisions to the criminal context and, as a result, understand the nature of the crimes more accurately. As means to contextualise the crimes the Prosecutor could have supported the investigation with testimonial evidence; including expert witnesses (with knowledge about the meanings of circumcision in Kenya) to strengthen arguments about their discriminatory nature. Gender-sensitive questions which could have helped to contextualise the circumcisions may be: What was the identity of the victims? What meant circumcision in their tradition? How did circumcision affect their lives as men and in their community? Who were the perpetrators? Where they aware of the identity of the victims? Could perpetrators

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<sup>108</sup> K. Macintyre & al. 'Attitudes, Perceptions and Potential Uptake of Male Circumcision among Older Men in Turkana County, Kenya Using Qualitative Methods', *PLoS ONE* 9.5, Switzerland: Nathan Ford World Health Organization, May 2014.

<sup>109</sup> Finke 2006, *supra* note 107.

<sup>110</sup> *Idem*.

<sup>111</sup> J. Zoske, 'Male Circumcision: A Gender Perspective', 6: 2, *Journal of Men s Studies*, Winter 1998, pp.189-208.

<sup>112</sup> K. O'Hara and J. O'Hara, 'The effect of male circumcision on the sexual enjoyment of the female partner', 83, Supplement 1, *BJU International*, January 1999, pp. 79-84.

<sup>113</sup> Decision on the Confirmation of Charges 2012 *supra* note 103, paras. 118, 262.

<sup>114</sup> Muthaura, Application Pursuant to Article 58, 2010, *supra* 101, para. 9.

<sup>115</sup> Report of the Kenyan Commission of Inquiry into the Post-Election Violence (CIPEV), (Waki Report), October 2008, p. 244; *Muthaura, Request for authorization of an investigation* 2009, *supra* note 102, para. 97.

<sup>116</sup> Waki Report 2008, *supra* note 115, pp.107, 239, 251.

expect the effects of circumcisions, as a specific form of violence, on the victims? How were the circumcisions compounded with other crimes?

With this perspective — of the gender, ethnic and political *nature* of SGBV— the Prosecutor may have charged the circumcisions as crimes against humanity in two ways: firstly, as ‘other forms of sexual violence’, and secondly as ‘other inhumane acts.’<sup>117</sup>

Firstly, circumcision is a sexual and gender-based crime. It is a ‘sexual’ crime because it targets a sexual organ.<sup>118</sup> Its sexual nature is recognised by the report of the Commission of Inquiry into the Post-Election Violence (CIPEV) in Kenya which notes: ‘while women normally are the main victims of sexual violence when order breaks down, men too had experienced horrid types of sexual violence after the Kenyan election. These included sodomy, forced circumcision, and even mutilation of their penises.’<sup>119</sup> Also, in *Milutinovic*, the ICTY Trial Chamber referred to the legal study of the Commission of Experts set up by Security Council Resolution 780(1992) whose ‘Annex expressly provided that sexual assaults other than rape, such as ‘enforced prostitution and painful circumcision’ are ‘considered to be crimes of a very serious nature with a wide range of severe effects on the victim.’<sup>120</sup> In addition, the circumcisions had a ‘gendered’ nature which, as noted by the Prosecutor, sought to attack men’s manhood in the context of society.<sup>121</sup> Still, the Prosecutor could have elaborated further on why the men’s gender identities were being targeted through circumcisions, in light of the ‘political’ context confronting different ‘ethnic’ communities. As a gender expert notes, the Prosecutor has to present the evidence in a way that makes judges feel comfortable with gender notions. This includes explaining that SGBV does not only affect women but also men.<sup>122</sup> Charging the circumcisions as ‘other forms of sexual violence’ was an opportunity to explain that SGBV affects both women and men.

Secondly, circumcision constitutes also ‘other inhumane acts,’ as the Court considered. However, in *Muthaura*, the circumcisions did not constitute only, as the Court held, acts of ‘ethnic prejudice and intended to demonstrate cultural superiority of one tribe over the other.’<sup>123</sup> They were criminal acts involving a gender, political and ethnic discrimination which is a graver kind of discrimination than the single (ethnic) form found by the judges. From this point of view, intersectionality would have been useful to charge circumcisions as ‘other inhumane acts’, by stressing the ‘aggravated’ nature of the multi-faceted discrimination, gender, ethnic and political, to prove the element of ‘similar’ nature or gravity (to other crimes against humanity) required by this crime.<sup>124</sup>

## V. The Prosecutorial Stage

<sup>117</sup> 1998 Rome Statute, *supra* note 3, articles 7(1)(g), 7(1)(k).

<sup>118</sup> Interview 2017, *supra* note 57.

<sup>119</sup> Waki report 2008, *supra* note 115, pp. 238 - 239.

<sup>120</sup> *Prosecutor v. Milan Milutinovic et al*, Judgment, IT-05-87-T, Trial Chamber, 26 February 2009, para. 184.

<sup>121</sup> Decision on the Confirmation of Charges 2012, *supra* note 103, para. 264.

<sup>122</sup> Interview 2016, *supra* note 48.

<sup>123</sup> Decision on the Confirmation of Charges 2012, *supra* note 103, para. 266.

<sup>124</sup> Interview 2016, *supra* note 48. A threshold of gravity “similar” to any other crime against humanity is a requirement of the crime ‘other inhumane acts’. 2010 ICC *Elements of Crimes*, Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May - 11 June 2010, article 7(1)(k).

After the investigation, the Prosecutor charges an individual with the crimes that he or she intends to bring to trial. The charges must be confirmed by the Pre-Trial Chamber (substantial grounds threshold)<sup>125</sup> and, upon confirmation, the Prosecutor must prove those charges in trial beyond reasonable doubt.<sup>126</sup>

### **V.1 Intersectionality to Reflect the Full Nature of SGBV in the Charges**

As previous sections have indicated, SGBV transcends physical violence and involves gender interlinked with other forms of discrimination. This situation raises the challenge for the Prosecutor to understand the specific nature of SGBV and to bring those charges which express the criminal conduct more accurately.<sup>127</sup> The *Policy Paper* engages the Prosecutor to charge crimes which reflect the ‘full scope’ of SGBV and to stress the ‘role of gender’ in submissions. It provides:

‘In principle, the Office will bring charges for sexual and gender-based crimes explicitly as crimes *per se*, in addition to charging these acts as forms of other violence within the Court’s subject-matter jurisdiction, where the material elements are met, e.g., charging rape as torture, persecution, and genocide. The Office will seek to bring *cumulative* charges in order to reflect the severity and multi-faceted character of these crimes fairly, and to enunciate their range supported by the evidence in each case.

Where supported by the evidence, the Office will also charge acts of sexual and gender-based crimes as different categories of crimes within the Court’s jurisdiction (war crimes, crimes against humanity, and genocide), in order to properly describe, *inter alia*, the nature, manner of commission, intent, impact, and context.

The Office will also seek to highlight the gender-related aspects of sexual and other crimes within its jurisdiction, e.g., domestic labour and ‘household’ duties in the context of sexual slavery or enslavement.’<sup>128</sup>

As described above, intersectionality brings forward the ‘nature’ of SGBV by explaining the role of gender and interconnected factors of discrimination. This perspective is useful to see what charges are most reflective of the criminal conduct and to not ‘obscure’ gender and interconnected aspects of discrimination in drafting the charges. At this stage, intersectionality can support prosecutorial work in: 1) labelling the charges; 2) charging the counts, and 3) phrasing the charges.

Firstly, intersectionality identifies the nature of criminal discrimination, which is useful to decide how to ‘label’ conducts in two ways: i) discerning the discriminatory intent of certain crimes which may involve SGBV, such as torture, persecution, and genocide, and ii) appreciating the gravity element of other crimes which may be charged, such as other inhumane acts or torture.<sup>129</sup>

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<sup>125</sup> 1998 Rome Statute, *supra* note 3, article 61.

<sup>126</sup> *Idem*, article 66.

<sup>127</sup> L. Baig, M. Jarvis, E.M. Salgado and G. Pinzauti, ‘Contextualizing Sexual Violence’ in Brammertz & Jarvis, *supra* note 6, pp. 172-220.

<sup>128</sup> *Policy Paper* 2004, *supra* note 5, paras. 71-74. Emphasis added.

<sup>129</sup> Interview 2017, *supra* note 57; Elements of Crimes 2010, *supra* note 135.

Secondly, intersectionality facilitates charging counts of SGBV because its understanding of the nature of discrimination allows appreciating better the ‘scope’ of the criminal conducts involved; and, therefore, the elements of the specific crimes committed. With this insight, the Prosecutor may charge as many counts as their specific elements of crimes have been identified and not subsumed by one another. This comprehensive approach to charging is in line with the purpose of the *Policy* to charge SGBV cumulatively or as different categories of crimes.<sup>130</sup>

‘Persecution’ is an underlying crime against humanity which can benefit, in particular, from intersectionality in drafting the charges. It requires proving two specific elements: a severe deprivation of fundamental rights (objective element), and targeting for reason of a group identity based on ‘any’ discriminatory ground prohibited by international law (subjective element).<sup>131</sup> Indeed, international criminal tribunals have seen the ‘intersection’ of gender and other factors of racial, religious, and politically-based discrimination during persecution, although they have not expressed it in those terms.<sup>132</sup> For instance, in *Brdanin* the ICTY Trial Chamber held regarding sexual violence as an act of persecution: ‘The Trial Chamber is satisfied beyond reasonable doubt that, in the circumstances surrounding the commission of these rapes, these acts were carried out with the intent to discriminate against the Bosnian Muslim and Bosnian Croat women on racial, religious or political grounds.’<sup>133</sup>

The contribution of intersectionality to charge persecution is recognised by SGBV practitioners and academics. First, intersectionality can identify ‘gender’ discrimination during persecution campaigns in which the violations of rights experienced by men and women tend to be very different.<sup>134</sup> Secondly, intersectionality can explain the complexity of the (discriminatory) persecutory intent and reflect it in the charges; which may involve charging cumulative grounds of persecution. Given that SGBV involves gender intersecting with other grounds of discrimination, as a way to avoid distorting the nature of persecution in any given case, the Prosecutor could ‘approach intersectionality by identifying interlinked grounds of persecution in indictments, and the ICC’s judges could consider persecution without necessarily delinking these grounds.’<sup>135</sup> For instance, during a persecution campaign involving SGBV, Oosterveld explains that prosecutors should present a ‘separate’ analysis of each intersecting ground of discrimination, and then explain how the crime was compounded by all the discriminatory grounds as necessary factors of the attack.<sup>136</sup> In this manner, when analysing the ground ‘gender’ (alone), the Prosecutor may address questions to prove the nature of gender discrimination such as: ‘what role did the social construction of masculinities and femininities play in the persecution? How did the perpetrators use male and female norms to shape or carry out the persecution? How were men, women, girls and boys targeted? Were men targeted in different ways than women? If men and women were targeted in similar ways, were the underlying persecutory acts carried out in different ways based on gender? Was sexual violence used as one of the underlying persecutory acts? In

<sup>130</sup> *Policy Paper* 2014 *supra* note 3, paras. 71-74.

<sup>131</sup> Elements of Crimes 2010, *supra* note 124, article 7(1)(h).

<sup>132</sup> V. Oosterveld, ‘Gender, Persecution, and the International Criminal Court: Refugee Law’s Relevance to the Crime Against Humanity of Gender-Based Persecution’, 17:49 *Duke Journal of Comparative & International Law* (2006) pp. 49-89, p. 62.

<sup>133</sup> *Prosecutor v Radoslaw Brdanin*, Judgment, IT-99-36-T, Trial Chamber II, 1 September 2004, paras. 1011, 1013.

<sup>134</sup> Interview with an ICTY Prosecutor, The Hague 10 January 2017.

<sup>135</sup> Oosterveld 2006, *supra* note 132, p. 86.

<sup>136</sup> V. Oosterveld ‘Prosecuting Gender-Based Persecution as an International Crime’, in Brouwer & al *supra* note 66, pp. 57-78, p. 73.

considering the ‘intersecting’ ground, the Court should ask: in what manner did gender intersect with, for example religion? Was this intersection a key aspect of the persecution? Did the intersection compound the gendered harms?’<sup>137</sup>

Thirdly, intersectionality can assist in drafting the charges in, at least, three ways:

a) *Intersectionality explains the overall system of discrimination.* Therefore, it helps to ‘prove that the pattern of criminal harms was committed on a criminal discriminatory basis.’<sup>138</sup> When drafting the charges this means that intersectionality can support a broad documentation of the ‘overall’ discriminatory nature of the crimes. And, regarding crimes against humanity, intersectionality can help arguing that a civilian population was targeted (for instance) ‘because of’ its political opinion and because of gender reasons, and to give reasons for that.<sup>139</sup> Although proving the overall patterns of discrimination is not sufficient to infer individual criminal responsibility (which requires ‘linking’ an individual to the crimes) it is a good basis to establish such connection;<sup>140</sup> for example, by looking into how individuals with responsibility took advantage of the context of discrimination to unleash the crimes.<sup>141</sup>

b) *Intersectionality explains the discriminatory nature of SGBV in the charges.* This applies to all crimes involving SGBV even if no specific discriminatory intent is required by the elements of crimes (e.g. rape and other forms of sexual violence).<sup>142</sup> Explaining the overall discrimination underlying SGBV matters because it assists judges in understanding the criminal conduct; and it enables not to obscure the role of gender discrimination in the charges. Nonetheless, bringing awareness of discrimination beyond SGBV will be particularly helpful as a means to: i) to explain the specific discriminatory intent of certain crimes which may involve SGBV, such as torture, persecution, and genocide, and ii) to explain discrimination as an aggravating factor of specific crimes which may involve SGBV, such as torture, and other inhumane acts.<sup>143</sup>

c) *Intersectionality enables not to obscure gender harms while charging.* Because, to understand SGBV, intersectionality approaches the context of criminality which involves dealing with victims’ experiences, especially understanding their harms and the impact of SGBV; for instance, by examining gender cultural issues, listening to victims, talking to experts. Since intersectionality uncovers gender interplaying with other forms of contextual discrimination, it looks at the harms from a gendered perspective not limited to the physical harm but inclusive of ‘connected’ harms (such as those caused to the family, to the community, economic harms).<sup>144</sup> To ensure that gender harms are not obscured in the charges, intersectionality encourages using expert and victim testimonies as a way to support evidence in submissions; in line with the approach of the *Policy Paper*.<sup>145</sup> ‘Expert’ evidence is core to intersectionality because, according to practitioners, experts bring social approaches on SGBV to ICL.<sup>146</sup> These social approaches SGBV i) help prosecutors to explain the meanings (and nature) of sexual violence,

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<sup>137</sup> *Ibid.* Emphasis added.

<sup>138</sup> Interview 2017, *supra* note 57.

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.*

<sup>141</sup> Interview 2016, *supra* note 53.

<sup>142</sup> Elements of Crimes *supra* note 124, for rape: articles 7 (1) (g)-1, 8 (2)(b) (xxii)-1, 8 (2) (e) (vi)-1; for other forms of sexual violence, articles 7 (1)(g)-6, 8 (2) (b) (xxii)-6, 8 (2)(e)(vi)-6.

<sup>143</sup> Interview 2017, *supra* note 57.

<sup>144</sup> Ní Aoláin et al 2011, *supra* note 60.

<sup>145</sup> *Policy Paper* 2014 *supra* note 5, paras. 82 and 97.

<sup>146</sup> These conclusions are drawn from the interviews held.

and ii) raise awareness of gender issues in court (e.g. use of words) improving gender-sensitive procedures as part of the good administration of justice. And bringing ‘victims’ testimony is justified because intersectionality is, above all, victim-centred. Bringing victims’ voices to the fore allows intersectionality: i) to use their narratives as qualitative information to present the nature of discrimination; and ii) to not obscure the harms by ‘reflecting the harms of victims as experienced by them.’<sup>147</sup>

## V.2 The Mbarushimana Case

During 2009 an armed conflict in the Kivu provinces opposed the DRC Government, supported by the Rwandan authorities, to the *Forces Démocratiques pour la Libération du Rwanda* (FDLR),<sup>148</sup> a militia movement formed by Rwandese rebel groups; including former *génocidaires* fled to the RDC after the Rwandan genocide.<sup>149</sup> The Prosecutor identified patterns of violence against civilians that comprised FDLR attacks at more than 7,000 houses, the razing of villages, 700 killings, 290 rapes and other forms of sexual violence, inhumane acts, and persecution based on gender.<sup>150</sup> The purpose of the FDLR offensive was to create a ‘humanitarian catastrophe’ to force the DRC and Rwanda Governments to negotiate and acquire political leverage.<sup>151</sup>

The Prosecutor sought an arrest warrant against Mbarushimana, Executive Secretary of the FDLR for his essential contribution to the criminal campaign;<sup>152</sup> requesting his arrest for six counts of war crimes and five counts of crimes against humanity.<sup>153</sup> Crimes against humanity included persecution on gender-grounds, namely: ‘persecution by intentionally and in a discriminatory manner targeting women and men seen to be affiliated with the FARDC on the basis of their gender, through torture, rape, inhumane acts and inhuman treatment, in various locations in North and South Kivu Provinces.’<sup>154</sup> Thus, the Prosecutor’s Arrest Warrant had identified the ‘intersection’ of gender and political persecution by referring to the victims as ‘women and men seen to be affiliated with the FARDC on the basis of their gender.’<sup>155</sup> However, when bringing the charges, the Prosecutor did not ‘charge’ persecution on gender but —only— on political grounds, for the FDLR’s deliberate and discriminatory targeting of women and men suspected of being affiliated to the FARDC, through torture, rape, inhuman acts and inhuman treatment.<sup>156</sup> On 16 December 2011, the Pre-Trial Chamber found substantial reasons to believe that war crimes had been committed, but it refused to confirm charges for crimes against humanity due to the lack of ‘sufficient’ evidence

<sup>147</sup> Interview 2017, *supra* note 57.

<sup>148</sup> *Prosecutor v. Calixte Mbarushimana*, ICC, Case Information Sheet, ICC-PIDS-CIS-DRC-04-003/12, 15 June 2012.

<sup>149</sup> *Prosecutor v. Calixte Mbarushimana*, Prosecution’s Application under Article 58, Situation in the Democratic Republic of the Congo, ICC-01/04, Pre-Trial Chamber I, 20 August 2010.

<sup>150</sup> *Idem*, paras. 7, 95.

<sup>151</sup> *Prosecutor v. Calixte Mbarushimana*, Decision on the Prosecutor’s Application for a Warrant of Arrest, ICC-01/04-01/10, Pre-Trial Chamber I, 28 September 2010, para. 28.

<sup>152</sup> Prosecution’s Application under Article 58, 2010, *supra* note 149, para. 121.

<sup>153</sup> *Idem*, pp. 13-17.

<sup>154</sup> *Idem*, p. 17.

<sup>155</sup> V. Oosterveld, ‘Prosecuting Gender-Based Persecution as an International Crime’, in Brouwer et al, pp. 57-78, *supra* note 66, p. 71.

<sup>156</sup> *Procureur v. Calixte Mbarushimana*, Document de notification des charges présenté par l’Accusation en application de l’article 61-3 du Statut de Rome, ICC-01/04, Pre-Trial Chamber I, 15 juillet 2011, p. 47.

presented of an attack against the civilian population pursuant to an ‘organisational policy.’<sup>157</sup>As a result, persecution, an underlying crime against humanity, was not examined.

In *Mbarushimana*, intersectionality would have articulated the brutal and large-scale nature of SGBV at the ‘intersection’ of gender and political discrimination. And this insight could have served to explain, in detail, the nature of discrimination in the charges, bringing substantial evidence of: i) an ‘attack’ against the civilian population and, ii) of the underlying crime of persecution.

Firstly, whereas the Prosecutor did not elaborate on the gender ‘and’ political nature of the ‘attack’ in the charges, this was done in the arrest warrant which, thereby, recognised (intersecting) discrimination as a fundamental trait of the ‘attack’:

‘Sexual violence —regardless of the gender of the survivor— in addition to being a violation of individuals based on their gender group membership, is a particularly efficient manner to provoke ostracisation of those violated, to break down communities, and to spread disease. In other words, it works well to create a long lasting humanitarian catastrophe. When carried out at the rates reported by international organizations in the Kivu Provinces, it amounts to sexual violence against the individual that is also persecution on the basis of ‘gender’ against the collective. The rape of women and girls is carried out because they, as females, are easily targeted and can be put forth as objects of FDLR domination vis-à-vis the men in their families. Men and boys who for example are forced to rape, suffer from persecution on the basis of gender, targeted to show FDLR dominance through violating their manhood in this manner. The total result is that communities live in fear of the FDLR under already difficult circumstances, have to care for survivors, and deal with the effects of disease; these combined challenges make communities more vulnerable and make more effective a campaign to create a humanitarian catastrophe.’<sup>158</sup>

Yet, when bringing the charges, the Prosecutor did not refer to gender and political discrimination to sustain the existence of an ‘attack;’ despite the fact that explaining the nature of discrimination ‘against’ civilians could have helped to prove that the FDLR ‘actively promote[d] or encourage[d] such an attack’ and, therefore, that it was part of an ‘organisational policy’ (as required by Article 7(3) of the Elements of Crimes).<sup>159</sup> Also, explaining the nature of (gender and political) discrimination would have reflected the ‘gravity’ of the attack by stressing the multi-faceted vulnerabilities, harms and impact of violence, which the *Policy* considers gravity factors<sup>160</sup> By not bringing arguments related to discrimination, the substantiation of the ‘attack’ against the civilian population was severely curtailed in the charges. Alternatively, intersectionality would have explained the patterns of crimes as a result of an ‘overall system’ of gender and political discrimination of grave and large scale proportions against civilians; arguing that the ‘nature’ of discrimination reflected the concerted, non-random (and therefore organised) character of the attack.<sup>161</sup>

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<sup>157</sup> *Prosecutor v. Callixte Mbarushimana*, Decision on the Confirmation of Charges, ICC-01/04-01/10, Pre-Trial Chamber I, 16 December 2011, para. 263.

<sup>158</sup> Prosecution’s Application under Article 58, 2010, *supra* note 149, para. 97. Emphasis added.

<sup>159</sup> Elements of Crimes 2010, *supra* note 124.

<sup>160</sup> *Policy Paper* 2014, *supra* note 5, para. 45.

<sup>161</sup> *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07, Pre-Trial Chamber I, 30 September 2008, para. 396 (regarding an organizational “policy”): “Indeed, an attack which is planned, directed or organised - as opposed to spontaneous or isolated acts of violence - will satisfy this criterion.”

Intersectionality could have supported the phrasing of an ‘attack’ by arguing that civilians were targeted ‘because of’ their political ideas and on the basis of their gender. And it would have given reasons for such discrimination (as explained below).

Secondly, to phrase the charges of persecution, intersectionality would have stressed SGBV and its multi-faceted (gender and political) nature. Yet, despite its gravity, the Prosecutor did not elaborate on SGBV when bringing charges of persecution —only in the charges of rape, sexual violence, torture, and inhuman acts—<sup>162</sup>thus missing an opportunity to prove the two elements of this crime.

Regarding the element ‘severe deprivation’ of fundamental rights, SGBV constitutes a violation of the human right to ‘physical integrity’ which prosecutors consider particularly suitable to prove persecution; especially when presented as a widespread violation.<sup>163</sup> This opportunity was not seized in *Mbarushimana*. The Prosecutor did not mention the violation of the right to physical integrity but referred to violations of the right to life, the prohibition of torture and other inhumane and degrading acts, the right to health, and the right to property.<sup>164</sup> SGBV was overlooked, despite the fact that its grave nature —in terms of scale, manner, harm, inflicted impact— were especially helpful to substantiate the ‘severe’ deprivation of fundamental rights more convincingly and realistically.

Regarding the element ‘discriminatory intent,’ the patterns of crimes had a very marked ‘gendered’ nature which should have been reflected in the charges; in line with the *Policy Paper* which stresses the gendered nature of violence during persecution campaigns.<sup>165</sup> In the charges, intersectionality would have emphasised that SGBV entailed two grounds of criminal discrimination: gender and political. First, the analysis would have established each ground of discrimination separately, and then their intersection. ‘Gender’ discrimination was reflected in the different manner of targeting men and women. Women and girls were targeted in a large scale and brutal manner, mainly through rape. Over hundreds of women were raped, often victims of gang rape. SGBV allegedly involved acts of mutilation, disfigurement, beatings, savage rape, frequently culminating in murder or death from internal injuries.<sup>166</sup> There were incidents of pregnant women being raped, having their bellies cut open, and being cut into pieces, beatings and other forms of sexual violence, and women taken captive to the forest and kept there for days for repeated rape. Other women were tied to trees with objects forcefully inserted in their vaginas by way of, or in addition to, being raped.<sup>167</sup> While men and boys, in fewer instances, were forced to rape females under threat of being killed.<sup>168</sup> Other men were subjected to ‘gushahura’ —a term used to express the mutilation of genitals by Rwandan *génocidaires*.<sup>169</sup>

*Political* discrimination could also be appreciated in the manner of committing SGBV, as reflected the utterances, the proximity of SGBV to hostilities, and its brutality. The FDLR addressed explicit threats to ‘punish’ and ‘intimidate’ civilians by means of warning letters, by public meetings threatening the population not to collaborate with the enemy, or sending such messages by mouth, and killing local chiefs. Victims of rape were told by perpetrators

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<sup>162</sup> Document de notification des charges 2011, *supra* note 156.

<sup>163</sup> Brammertz & Jarvis 2016, *supra* note 6, pp. 198-200.

<sup>164</sup> Document de notification des charges 2011, *supra* note 156, para. 105.

<sup>165</sup> *Policy Paper supra* note 5, para. 67.

<sup>166</sup> Prosecution’s Application under Article 58, 2010, *supra* note 149, para. 13.

<sup>167</sup> Document de notification des charges 2011, *supra* note 156, para. 75.

<sup>168</sup> *Idem*, para. 13.

<sup>169</sup> Document de notification des charges 2011, *supra* note 156, para.66.

that they were being punished for joining the DRC Government's 'side'.<sup>170</sup> They expressed their intent to cause fear and to punish civilians perceived as sided with the DRC and with the Rwandan Governments.<sup>171</sup> Moreover, their ultimate purpose was to create a 'humanitarian catastrophe', as a way to achieve their political goals. Before the confirmation of charges, the Court had recognised that the scale and targeting of a high number of civilians for 'political' motives were factors confirming reasonable grounds to believe in the existence of a widespread and systematic attack.<sup>172</sup>

After a separate analysis of the gender and political nature of discrimination, their 'interlink' in compounding the attack could be better understood. The gendered impact of sexual violence on the community was the reason 'why' perpetrators committed this crime, because it was 'through' its extended gendered impact that they could create the humanitarian crisis as a means to fulfil their political goals. However, perpetrators would not achieve their goals by targeting in a gendered discriminatory manner 'any' group, but only civilians perceived as politically linked with the enemy. Therefore, SGBV was committed due to gender and political reasons. And, because both grounds were necessary to compound the crimes, the Prosecutor should have reflected them in the charges, either: i) by charging persecution cumulatively on gender 'and' political grounds, or ii) by charging persecution on one ground but reflecting its intersection (interconnection) with the other ground in phrasing the charges, ensuring that the gendered nature of the harms and impact were not obscured.

## Conclusion

This article has discussed the value of intersectionality as a means to provide 'socio-legal' approaches on gender and discrimination to ICL dealing with SGBV. The case studies have demonstrated that 'intersectionality' connects SGBV to social factors of the criminal context and, in this way, sheds light on multiple aspects of the crimes. With hindsight, the application of intersectionality offers possibilities but also presents challenges to ICL.

'Possibilities' to help in the application of ICL include: 1) establishing the (multiple) vulnerabilities of victims and the multi-faceted nature of discrimination as factors aggravating the crimes (providing guidance to select cases for investigation, and to assess the severity in sentencing); 2) connecting gender and other social factors of discrimination to the context in which crimes are committed in order to understand the inflicted harms, impact and nature of SGBV; 3) identifying the nature of 'criminal discrimination' beyond the crimes to: i) establish the discriminatory 'intent' of torture and persecution; ii) establish the 'gravity' element of torture and of other inhumane acts; and iii) identify the 'overall system of discrimination' to prove an attack against the civilian population (as a crime against humanity); 4) proving the 'broad system' of criminal discrimination underpinning the crimes, by setting a good basis to establish 'linkage' evidence that this system was used by senior leaders; and 5) promoting a 'consistent' application of ICL and IHRL on gender and discrimination, susceptible of application to other international crimes not involving SGBV. These socio-legal approaches to ICL—which are not exhaustive—are valuable topics for further research.<sup>173</sup>

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<sup>170</sup> Prosecution's Application under Article 58 2010, *supra* note 149, para. 93

<sup>171</sup> *Ibid.*

<sup>172</sup> *Idem*, paras.25, 26. Emphasis added.

<sup>173</sup> Intersectionality can benefit other areas of ICL which go beyond the scope of this research, but which arise as reflections from it. These include: 6) facilitating access to evidence during investigations, which requires understanding gender issues when interacting with victims and communities; 7)

Yet, the application of intersectionality to ICL also presents ‘pitfalls.’ For instance, intersectionality is disproportionately ‘victim-centred.’ Its contextualisation of crimes seeks to understand the dynamics of discrimination, their harms that they cause, their impact and their nature by looking mostly at victims’ perspectives. Intersectionality pays less attention to the perpetrator’s side despite the fact that a ‘broader’ perspective is desirable to increase the objectivity of findings, and given that the Prosecutor must investigate both exonerating and incriminating evidence.<sup>174</sup> Rebalancing the intersectional analysis with witness and documentary evidence more mindful of perpetrators’ perspective would enable to be more critical about the role of discrimination that intersectionality seeks to grasp. Another challenge of intersectionality concerns its ‘methodology,’ which focuses on qualitative methods, despite the fact that its analysis could benefit from ‘quantitative’ approaches.<sup>175</sup> The findings of this analysis would be more objective if they are complemented with quantitative methods that provide more representative and reliable data - for example, this may include, conducting surveys (to victims and witnesses) whose questions could be formulated from an intersectional perspective.

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empowering victims in the judicial process by reflecting their harms as experienced by them, and 8) informing gender-sensible reparations (in prosecutorial submissions and judicial decisions) especially with measures which do “no harm,” that include not only physical but also other gender-connected harms, and that seek to address the structural gender inequalities which made the victims vulnerable.

<sup>174</sup> 1998 Rome Statute, *supra* note 3, article 54.

<sup>175</sup> O. Hankivsky & R. Cormier, ‘Intersectionality: Moving Women’s Health Research Forward’, Vancouver: Women’s Health Research Network, 2009, pp. 27-28.