The Gendered Politics Behind the International Criminal Court

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The relationship between International Law and International Relations has long been contested by scholars of both fields. In addition to creating a new international judicial body, The Rome Statute of the International Criminal Court (ICC) undoubtedly brought several novelties into International Law with its principle of complementarity and inclusion of gender justice provisions. Perhaps more ambiguous is the practicality of these innovations for International Relations. The Office of the Prosecutor's (OTP) ability to launch and carry out preliminary examinations is one example of ICC conduct which has, until recently, gone mostly unnoticed by the literature on both sides (Wharton & Grey, 2019, p. 1). Preliminary examinations are among the most political aspects of ICC conduct and, therefore, an area of research worth examining by scholars of International Relations.

Under the Rome Statute, the OTP can launch preliminary examinations in countries where there is a reasonable basis to believe that crimes under the Statute have been committed (International Criminal Court, 1998, Article 18). Preliminary examinations, in general, refer to a phase that is "not yet an investigation, but a sort of pre-investigation carried out by the Prosecutor" (Stahn, 2017, p. 414). Their conduct is not heavily codified in the Rome Statute, which perhaps provokes their political nature. As legal scholar Carsten Stahn suggests:

[T]he conduct of preliminary examinations poses delicate issues in relation to the interplay between law and politics. They are less judicialized than later steps of the criminal proceedings. They involve a high degree of uncertainty and complex strategic choices in relation to transparency, the selection of situations, the timing of judicial intervention, the framing of accountability narratives, the form of engagements with governments, and the use of resources (Stahn, 2017, p. 414).

Thus, preliminary examinations are among the OTP's most influential policy instruments and entail a significant degree of 'soft power' due to the degree of prosecutorial discretion (Stahn, 2017, p. 416). The OTP's annual report on preliminary examinations activities covers some of the world's most daunting crises, for example, the annexation of Crimea in Ukraine, the conflict between Palestine and Israel, and the mass-scale deportation of Rohingya Muslims in Myanmar to Bangladesh (The Office of the Prosecutor, 2018).

The ICC is complementary to domestic courts. This means that, unlike the preceding United Nations' ad hoc tribunals, which had superiority over national courts, the ICC can only intervene when national courts cannot handle situations by themselves. Thus, domestic circumstances are an inherent part of ICC conduct; the ICC is a last resort which can only be used when signatory parties are unwilling or unable to resolve their own issues. Article 18 of the Rome Statute establishes specific criteria which need to be fulfilled during the preliminary examination stage for there to be a reasonable basis to open up an investigation, that is, jurisdiction, admissibility and the interest of justice (International Criminal Court, 1998). In considering admissibility, the complementary role of the Court should be taken into account; namely, it can only act when national courts are not equipped or willing to handle the alleged breaches to the Rome Statute. Thus, the complementarity principle delegates primary responsibility for addressing violations to the Rome Statute to national courts. To fully comply with the Rome Statute, states must introduce two forms of legislation, one in which they agree to cooperate with the ICC and another one which adjusts national criminal law to reflect the international standards set out under the Rome Statute (Chappell, 2011, p. 169).

Numerous provisions of the Rome Statute indicate that its drafters intended for sexual and gender-based crimes to be given specific attention during the investigation of potential cases before the ICC (Sacouto & Cleary, 2009, p. 338). Despite these advances, the Court's record concerning the investigation and prosecution of sexual violence and gender-based crimes has been somewhat underwhelming. In fact, until very recently (International Criminal Court, 2019a), there had not been a single successful prosecution for sexual and gender-based crimes at the Court. The ICC relies on the political will of state parties to bring domestic law in line with all aspects of the statute, including its provisions on gender-based crimes (Chappell, 2011, p. 169). Therefore, the responsibility in addressing crimes of such nature lies mainly with the state parties. It has been suggested that a 'gender justice complementarity shadow' is apparent at the ICC because the Court fails to provide a link between the Rome Statute's provisions on gender justice and the complementarity principle (Chappell, Grey, & Waller, 2013, p. 455). Female victims of sexual violence encounter specific problems in the justice system, both domestically and internationally. Sexual violence crimes are culturally charged and gendered and often reflect power imbalances between men and women within society (Chappell et al., 2013, p. 462). The impact of domestic circumstances on ICC conduct indicates an urgent need for paying special attention to gendered biases in assessing whether sexual and gender-based crimes have been committed during the preliminary examination stage. Due to the high amount of responsibility delegated to national courts, it makes sense that in order to tackle impunity for sexual and gender-based crimes, such crimes must be checked at the national level (Chappell et al., 2013, p. 457). To tackle the impunity for such crimes through complementarity, the ICC prosecutor must include an examination of gender biases in domestic legal systems when testing state action (Chappell et al., 2013, p. 457), in addition to an assessment of some more profound gendered politics which might potentially be at play.

The ICC has long been resistant to admitting the politics behind its conduct. At a recent press conference in Bangladesh, the Deputy Prosecutor of the ICC said the following:

Our mandate is purely legal. The ICC, and the Office of the Prosecutor have no political role to play. The ICC is a permanent, independent judicial institution. If we are authorised to do an investigation, we will work in strict conformity with the law, which in our case is the legal framework of the treaty of the ICC. We will do so independently, impartially and objectively; these are principles which guide all of our decisions and actions (International Criminal Court, 2019b).

Thus, the OTP's official position is, perhaps understandably, that preliminary examinations are purely legal, which would indicate that sexual and gender-based crimes will be prosecuted where there exists evidence about them having been committed. The literature does, however, suggest otherwise; there have been cases where evidence of widespread and systematic sexual and gender-based crimes was abundant, but even so, this evidence was overlooked by the Prosecutor due to an underlying alternative justification, such as the desire to reach an expeditious trial (e.g. Lubanga in Chappell, 2011, p. 171).

This is the central issue this dissertation addresses; that despite wide-ranging prosecutorial strategies, including specifically on sexual and gender-based crimes, such crimes remain under prosecuted. The purpose is to examine how the ICC regards domestic gendered politics and biases in evaluating sexual and gender-based crimes during the preliminary examination stage, and what the implications of it doing or not doing so are in terms of gender justice and deterrence. It will be argued that the Prosecutor is highly active in establishing norms during this early stage of proceedings and that the way she portrays sexual and gender-based crimes during preliminary examinations can thus have wide-ranging implications. First, feminist theories of international relations will be drawn upon to position the ICC, and preliminary examinations, within the broader international relations debate and argue that adopting a feminist theoretical framework is helps conceptualise the political nature of preliminary examinations and the gendered nature of sexual and gender-based crimes. Second, documents from the recently concluded preliminary examination into the situation in Bangladesh/Myanmar will be analysed to demonstrate some shortcomings in the OTP's approach to the examination of sexual and gender-based crimes. Finally, specific attention to gendered inequalities will be discussed in terms of gender justice and deterrence for sexual and gender-based crimes.

The International Criminal Court, Preliminary Examinations, and Feminist International Relations

ICC preliminary examinations raise many interesting issues about state sovereignty, which is often regarded as a starting point of international relations. Feminist approaches to International Relations are critical of the state-centric approach of 'mainstream' International Relations (Enloe, 2014; Tickner, 1997). They challenge the abstract rationalism of traditional approaches and emphasise looking at the broader context of women's realities in order to gain an understanding of international politics (Enloe, 2014). It can be useful to conceptualise feminist approaches to International Relations as more of an 'ethos' than theory because they do not make any general statements or assumptions about how international politics work. Instead, gender is used as a point of analysis and emphasis is placed on the necessity of looking beyond the exterior and bringing to the surface some deep inequalities that lie beneath. Feminist approaches, thus, care about more than the behaviour of 'traditional' actors in International Relations. This chapter will argue that adopting a feminist International Relations approach makes sense when regarding how the OTP examines sexual and gender-based crimes at the ICC because of the political nature of their conduct and the gendered nature of such crimes. Moreover, in adopting this theoretical framework, it argues that sufficient attention to sexual and gender-based crimes does not flow naturally from an inclusion of gender justice provisions in ICC documents and OTP strategies; the OTP must look into the broader domestic gendered context within which such crimes occur, and do so immediately at the preliminary examination stage.

At first sight, it might not seem that gender has anything to do with explaining the behaviour of states in the international system, and International Relations thus might seem like a gender-neutral discipline (Tickner, 1997, p. 612). The concerns of International Law, similarly, do not appear as having any particular impact on women: issues about things like sovereignty, territory, use of force and state responsibility appear gender-free in their application to the abstract entities of states (Charlesworth, Chinkin, & Wright, 1991, p. 614). International Law and International Relations are, however, both thoroughly gendered systems, in their obsession with inherently patriarchal structures such as states and international institutions. Some feminists refuse to engage with existing formal institutions, such as the ICC, precisely because of this thoroughly patriarchal nature. Similarly, several feminists have questioned the utility of attempts at legal reform in both domestic and international law due to the scepticism of accrediting too much power to law to alter political inequalities based on sex (Charlesworth et al., 1991, p. 614). However, others seek to use these institutions to advance gender equity goals. Those who pursue an engagement with existing institutional frameworks thus need to consider to what extent past gender norms and practices have influenced their design and operation (Chappell, 2011, p. 165), as well as looking at current gender biases affecting their ongoing proceedings. A feminist perspective, with its concern for gender as a category of analysis and commitment to genuine equality between the sexes, could illuminate many areas of International Law (Charlesworth et al., 1991, p. 644). By adopting a feminist lens to International Law and International Relations, the distinction between these two 'artificially separated disciplines' (Charlesworth & Chinkin, 2000, p. 51) becomes less pronounced.

Preliminary examinations have been identified in recent years as an important area of research, leading to an analysis of the process for opening a preliminary examination, the purpose of doing so, their duration, and how the principle of complementarity works at this stage of proceedings (Wharton & Grey, 2019, p. 1). In their extensive overview and analysis of preliminary examinations until end of 2018, Sara Wharton and Rosemary Grey (2019, p. 4) conclude that even though the prosecutor does not have full investigatory powers during preliminary examinations, she is very active during this phase. Assuming the truthfulness of this rationale, the prosecutor should be very active when it comes to all crimes at this stage, including sexual and gender-based crimes. This would, in adapting feminist theories who believe in the utility of engaging with existing institutions, require in-depth research into all aspects of inequality in situation countries during the preliminary examination stage. Louise Chappell (2016, p. 196) argues that the unwillingness of state delegates at Rome to link gender justice concerns to complementarity has resulted in these concerns being marginalised in preliminary examinations. She posits that this is a case of gender justice concerns being locked out in the initial developmental path of the ICC and that it reinforces Hilary Charlesworth's (1999, p. 381) point about the influences of silences and gaps in the law on poor gender justice outcomes. In looking through the lens of gender analysis, preliminary examinations present the epitome of an interplay between the law and politics.

Carsten Stahn is one of the most influential writers on preliminary examinations and has persuaded other academics to pay attention to this critical aspect of the ICC's procedure. He argues that preliminary examinations have turned into a new species of proceedings, "somewhere between internal analysis, atrocity alert, and monitoring of

situations" (Stahn, 2017, p. 413). According to Stahn, there are two competing ways of approaching preliminary examinations, the 'gateway' approach and the 'consequentialist' approach (Stahn, 2017, p. 419). The former is a narrow, ICC-centric understanding of preliminary examinations, which conceptualises preliminary examinations as purely investigation-centred. Preliminary examinations which last a short time would usually fall under this approach, such as the one in Libya, which only lasted for several days (Stahn, 2017, p. 418). The latter is broader and implies that there is a certain virtue in the conduct of preliminary examinations as such, irrespective of whether or not they lead to a formal investigation at the ICC. According to the 'consequentialist' approach, preliminary examinations may be geared towards incentivising domestic or regional justice efforts in cases where it would not otherwise occur.

Many of the underlying justifications of a 'consequentialist' (Stahn, 2017, p. 419) approach to preliminary examinations go against orthodox mantras of international criminal justice, such as its alleged distance from politics. They do, however, reside well with feminist IR methods because of feminisms' apprehensive view of the impartiality of orthodox institutions, such as the law. Many western theories about law conceptualise the law as an autonomous entity, distinct from the society it regulates. A legal system is thus regarded as different from a political system because it operates on the basis of abstract rationality and is able to achieve neutrality and objectivity (Charlesworth et al., 1991, p. 613). Feminist methods are, however, concerned with examining the fundamentals of the legal persuasion. They start with taking women seriously and accept that no single approach can deal with the complexity of international legal organisations, or the diversity of women within and outside these structures (Charlesworth et al., 1991, p. 634). In order to understand the context within which sexual and gender-based crimes become part of a systematic policy, feminist approaches would emphasise the need to regard women's distinctive realities from the start. Sexual and gender-based crimes do not happen within a vacuum; they are utilised in conflict specifically because they are regarded as among crimes of the most odious nature and as effective in bringing down communities. Rape of "enemy" women aims to destroy the very fabric of society, as women are often cast as the symbolic bearers of ethnic identity through their roles as reproducers of the community (Baaz & Stern, 2009, p. 500).

The OTP claims to recognise that sexual and gender-based crimes are among the gravest crimes under the Rome Statute, and posits that in assessing the gravity of alleged sexual and gender-based crimes, the Office will take into account "the multi-faceted character and the resulting suffering, harm, and impact of such acts" (The Office of the Prosecutor, 2014, p. 23). Despite some advances on sexual and gender-based violence in the drafting of the Rome Statute, including a specific OTP Policy Paper on Sexual and Gender-Based Crimes, the Court's record regarding the investigation of sexual and gender-based crimes has been mixed in its first two decades of operation. The case against Congolese militia leader Lubanga, the first person arrested by the ICC, received significant attention in this context. The OPT was criticised for failing to include sexual violence in the charges against him, despite numerous allegations of girls being kidnapped into his militia and being raped and/or kept as sex slaves (Sacouto & Cleary, 2009, p. 341). Contrary to what rationalist approaches to International Law and International Relations would assert, the gender justice provisions of the Rome Statute will not alone guarantee the effective investigation and prosecution of sexual violence and gender-based crimes at the ICC. Article 54 (1) (b) of the Rome Statute (International Criminal Court, 1998) directs the Prosecution to investigate and prosecute crimes in a gender-sensitive way, and to pay particular attention to sexual violence. The rationale was precisely that the effective investigation, prosecution, and trial by the court of sexual and gender violence crimes would not necessarily flow automatically from the inclusion of crimes of sexual and gender violence in the Statute.

Susana Sácouto and Katherine Cleary (2009, p. 338) examine some of the ongoing challenges in the successful prosecution of sexual violence and gender-based crimes and highlight the need for thorough and effective investigative strategies. However, in the decade passed since their writing, the OTP has adopted a Policy Paper on Sexual and Gender-Based Crimes, and the Prosecution's record remains mixed. The Policy Paper is helpful in the way that it indicates that an understanding of gender as a socially constructed norm and a gender perspective on their own are not necessarily enough: both must be applied to gender analysis done by the OTP (Oosterveld, 2018, p. 449). It thus helps to advance international criminal law by creating a gender-sensitive framework within which the Office of the Prosecutor undertakes its work (Oosterveld, 2018, p. 453). Thus, the OTP's Policy Paper on Sexual and Gender-Based Crimes is unequivocally an advancement, if only for the reason that it further highlights the importance of adequately investigating and prosecuting such crimes. Valerie Oosterveld (2018, p. 455) argued that many, if not most, states could benefit from the framework provided by the OTP's Policy Paper on Sexual and Gender-Based

Crimes, given their domestic difficulties in ensuring justice for survivors of "everyday" sexual assault. Moreover, she posits that it provides an outstanding framework for best practices in the investigation and prosecution of sexual and gender-based crimes. Yet, the success rate in prosecutions of sexual and gender-based violence has not improved. Between 2002–2014, the Office of the Prosecutor brought fifty-seven charges of sexual and gender-based violence in twenty cases, which represents a solid level of attention to these crimes in most cases. Thirty-five of these charges proceeded to the preliminary Confirmation of Charges stage, but only twenty of these charges were actually confirmed. At the judgment stage, the Prosecutor failed to secure a single conviction on these charges (Oosterveld, 2018, p. 445). In July this year (2019), the Prosecutor secured its first successful conviction for sexual and gender-based crimes in the case against DRC militia leader Ntaganda (International Criminal Court, 2019a), besides the Bemba case where the Congolese politician was eventually acquitted (International Criminal Court, 2018b). Thus, it is apparent that there still are shortcomings in the way the prosecutor investigates sexual and gender-based crimes. A gender analysis requires an examination of the gendered context within which sexual and gender-based crimes are committed.

To conclude whether the ICC is equipped to ensure the proper investigation and prosecution of such crimes, the conduct of the OTP must be investigated comprehensively. The Prosecutor's power to open a preliminary examination can have significant political consequences (Grey & Wharton, 2018, p. 593), and the conduct of such examinations entails a high degree of soft power. Paying close attention to preliminary examinations is, therefore, critical to understanding the OTP's work, to understanding which actors engage with, and seek to "use," the ICC, and to understanding important debates about the ICC's legitimacy (Wharton & Grey, 2019, p. 5). The caution the OTP showed in requesting a ruling on jurisdictional questions on the alleged crimes against the Rohingya suggest that it is aware that the decision to open a preliminary examination can have high stakes. The ICC's prosecutorial strategies have commonly been under attack for their inattention to SGBC, for example, in the DRC situation, both Lubanga and Ntaganda were initially charged only with crimes of conscripting child soldiers, even when it was widely acknowledged that they were probably responsible for sexual violence as well (Tiemessen, 2014, p. 452). This indicates an inattention to such crimes during the early stages of the cases, the preliminary examination and investigation because sexual and gender-based crimes eventually made it into the prosecution's case (International Criminal Court, 2019a). Thus, in adopting a feminist international relations approach, it can be suggested that in order to fully comprehend the broader context within in which sexual and gender-based violence is committed, one must look at the diverse and unique experiences of women in situation countries. Moreover, it would require a commitment to genuine equality between the sexes.

Case Study: The Preliminary Examination in Myanmar

The purpose of this case study is to analyse and put into context the way the OTP examines and portrays sexual and gender-based crimes during the preliminary examination stage. It will be argued that the Prosecutor, at this stage, does not sufficiently regard domestic gendered biases, resulting in some shortcomings which might potentially be harmful in ensuring successful prosecution for sexual and gender-based crimes.

Methodology

The case of Bangladesh/Myanmar (hereafter referred to as Myanmar for simplification) was selected for several reasons. First, because of how relatively new and rapidly evolving the ICC is, especially in terms of justice for sexual and gender-based crimes, a recently concluded preliminary examination quite obviously gives the best insight into how examinations are currently carried out by the Prosecutor. Second, evidence suggests that sexual and gender-based crimes are at the very core of the crimes instigating the examination, as such crimes were used as an instrument to carry out the crime of deportation. Third, there is evidence that the whole situation is triggered by issues which affect women in a different way than men, namely, Myanmar authorities' discriminatory policies against Rohingya Muslims. Fourth, since Myanmar is not a signatory party to the Rome Statute, and therefore has none of the duties entailed in the ICC's principle of complementarity to review national laws in accordance with the Statute, it is a 'blank slate' when it comes to the political effect of preliminary examinations, and poses interesting issues about the deterrence and retributive effect of their conduct. Myanmar's status as a non-signatory party to the ICC is, however, also recognised as a certain shortcoming, because of the potential difficulties in transferring the findings of this research to states which are signatory parties. The implications of this research agenda will, however, be examined in further detail below.

Material for this analysis was collected from the Rome Statute itself, its negotiations, and from recent ICC decisions and policy documents. This includes the Pre-Trial Chamber's decision on the Court's jurisdiction, the OTP's strategy documents and policy papers, and the Prosecutor's request to open up an investigation into the situation in Myanmar. Moreover, some documents from Myanmar authorities were analysed to develop an understanding of their position towards ICC interference and the status of the Rohingya. It shall be noted that in researching gender and justice issues in international law and international relations, it is not enough to only examine the actions taken; it is just as necessary to look at evidence of inaction, and pay close attention to gaps and silences (Charlesworth, 1999, p. 381). The definition of 'gender' adopted for this analysis is the one used by the OTP's Policy Paper on Sexual and Gender-Based Crimes (The Office of the Prosecutor, 2014, p. 3), as it attempts to avoid too-narrow understandings of gender by conceptualising it as a constructed norm, rather than a biological state, and thus clarifies the controversy around the Rome Statute's definition (Oosterveld, 2018, p. 448). Finally, it is essential to note that for the purpose of this research, the focal point will be violence against women. It is acknowledged that individuals of all genders can be victims of sexual and gender-based crimes. However, the data suggests that women constituted an overwhelming amount of the targets of such crimes in Myanmar. Moreover, women's access to justice can be affected by broader gender politics (Chappell et al., 2013, p. 456).

Background

On 6 September 2018, Pre-Trial Chamber I of the ICC decided that the Court may exercise jurisdiction over the alleged deportation of 700,000 Rohingya Muslims from Myanmar to Bangladesh (International Criminal Court, 2018a). Although Myanmar is not a signatory party to the Rome Statute, Bangladesh has been a member of the Court since 2010. The Pre-Trial Chamber concluded that since at least one element of a crime within the jurisdiction of the Court was committed on the territory of Bangladesh, a state party, the Court could assert jurisdiction. The Chamber also made clear that the ICC had jurisdiction over other crimes against humanity under the Rome Statute than that of deportation, including sexual violence. On 4 July 2019, the Prosecutor requested the Court's judges to authorise a formal investigation into alleged crimes against humanity, including deportation, other inhumane acts and persecution committed against the Rohingya people from Myanmar, reporting its belief that the criteria to open up formal investigations had been confirmed as fulfilled (The Office of the Prosecutor, 2019a).

Myanmar has been under military rule for decades, under which the Rohingya have suffered decades of particularly severe discrimination by the Myanmar Government as well as the public. The Rohingya are widely regarded as "illegal immigrants" from Bangladesh, despite their long-standing connection to Rakhine state where they reside in Myanmar (The Office of the Prosecutor, 2019a, p. 23). The ICC's investigation mainly focuses on a wave of violence that started on or about 25 August 2017, leaving more than 40% of all villages in northern Rakhine states partially or totally destroyed and driving at least 700,000 Rohingya people from Myanmar to Bangladesh. An additional estimate of 87,000 Rohingya had previously been driven out of Myanmar in a previous wave of violence in October 2016 (The Office of the Prosecutor, 2018). The United Nations Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict concluded that sexual violence was used "as a tool of dehumanization, a form of punishment and a 'push factor' or driver of forced displacement" (UN Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, 2018). The Prosecution submits that there is a reasonable basis to believe that the crimes were committed by the Myanmar armed forces ("Tatmadaw") and other Security Forces with some participation of non-Rohingya civilians and other Myanmar authorities (The Office of the Prosecutor, 2019a).

The Preliminary Examination and Gendered Inequalities in Myanmar – An Analysis

As previously mentioned, preliminary examinations are not heavily codified in the Rome Statute; rather, the OTP's policy papers and strategic documents have been used to fill the gap on how they should be conducted. In the OTP's 2019-2021 Strategic Plan, the Prosecutor has set six strategic goals for the period. Sexual and gender-based crimes are mentioned in the fourth goal, where the Prosecutor vows, somewhat vaguely, to refine and reinforce its approach to victims of Sexual and Gender-Based Crimes ("SGBC") (The Office of the Prosecutor, 2019b, p. 5). According to the Plan, the expected result is that "All preliminary examinations, investigations and prosecutions have a priority focus on SGBC and crimes against or affecting children" (The Office of the Prosecutor, 2019b, p. 37). The OTP's 2018 Report on Preliminary Examinations mentions that the preliminary examination in Myanmar "takes into account

a number of alleged coercive acts which may have resulted in the forced displacement of the Rohingya people, including […] sexual violence" (The Office of the Prosecutor, 2018, p. 13). Besides this brief mention, the Report is silent about such crimes in the context of Myanmar. This could be seen as an indication of inattention to sexual and gender-based crimes at this earliest stage of proceedings. However, it shall be noted that the Report was published only two months after the Pre-Trial Chamber confirmed the Court's jurisdiction and the examination formally started.

The OTP's request to the Pre-Trial Chamber for authorisation of an investigation, introduced half a year later, confirms that the coercive acts used to drive 700,000 Rohingya out of Myanmar included rape and other forms of sexual violence (The Office of the Prosecutor, 2019a). The document involves an overwhelming amount of evidence of sexual and gender-based violence. The OTP reports that rape and other forms of sexual violence were committed against Rohingya victims on a massive scale during the 2017 wave of violence. The main victims of rape and other forms of sexual violence were female, including pregnant women and girls as young as seven. Moreover, the coercive acts, including sexual violence, were carried out pursuant to a State policy to attack the Rohingya civilian population (The Office of the Prosecutor, 2019a).

The government of Myanmar has publicly dismissed the role of the ICC, referring to the Pre-Trial Chamber's decision as the result of manifest bad faith, procedural irregularities and general lack of transparency (Myanmar Government, 2018). A press release from the government states the following:

The allegations of deportation cannot be further from the truth. Myanmar reiterates that it has not deported any individuals in the areas of concern and in fact has worked hard in collaboration with Bangladesh to repatriate those displaced from their homes. Several bilateral agreements have been signed such as the "Arrangement on Return of Displaced Persons from Rakhine State" between the Governments of the Republic of the Union of Myanmar and the Government of the People's Republic of Bangladesh (Myanmar Government, 2018).

The Myanmar government's unwillingness to cooperate with the ICC is, thus, unambiguous. Moreover, Myanmar authorities have established their own inquiries into the situation in Rakhine State and seemed to conclude that the allegations about the persecution of Rohingya are false. The Rakhine State Parliament formed a state-level committee which took two investigation trips to villages in the area and failed to address any alleged responsibility of the Tatmadaw for the conditions. Moreover, its chairperson made a public statement following the investigation trips where he appeared to dismiss in an "extremely derogatory way" allegations that the Tatmadaw had raped Rohingya women (The Office of the Prosecutor, 2019a, p. 135). Moreover, a local investigation team found that "ARSA Bengali terrorists" had conducted attacks in Rakhine state, and that the Tatmadaw security forces were only responding to such attacks, and hence "did not commit shooting at innocent villagers and sexual violence and rape cases against women" (The Office of the Prosecutor, 2019a, p. 116). This clearly indicates that, in addition to an unwillingness to cooperate with the ICC, there is no desire from authorities to prosecute sexual and gender-based violence against the Rohingya locally. Despite this complete unwillingness, as the Pre-Trial Chamber maintained, Myanmar is not exempt from the legal obligation formed from international treaties and the standards set out by tribunals such as the World War Two trials and previous UN ad hoc tribunals and placed on all states to prevent and punish atrocity crimes (Hale & Rankin, 2019, p. 24).

Approximately 80% of those forced into Bangladesh from Myanmar are women and children (Women's Initiatives for Gender Justice, 2018, p. 37) and around 14% are single-mother households (The Norwegian Refugee Council, 2018, p. 2). This is an instant indicator of gendered inequality in the way the 2017 wave of violence hit the population; the overwhelming percentage of the population driven out of Myanmar being female is a could suggest that the discriminatory policies directed towards the Rohingya by Myanmar authorities hit women and men in a dissimilar way. In analysing the human rights violations the Rohingya are subject to, it appears that many of them are of such nature that they are bound to cause more distress on women. Since 2005, Myanmar has imposed a strict two-child rule for the Rohingya, which has caused women to have undergone illegal and unsafe abortions in an attempt to comply with the policy (Fortify Rights, 2014, p. 10). They have also caused pregnant women fleeing to refugee camps in Bangladesh, contributing to the number of single mother households in the camps. Circumstances in the refugee camps in Bangladesh are particularly unsafe for women; refugees experience safety risks, including exposure to sexual assault and trafficking in persons. Women and girls are particularly vulnerable to harm from

physical and sexual assault, trafficking in persons and other exploitation (The Office of the Prosecutor, 2019a, p. 37)

The OTP's request to open up an investigation acknowledges that the Rohingya have suffered decades of severe discrimination by the Myanmar authorities (The Office of the Prosecutor, 2019a, p. 106). This is potentially exacerbated by a growing anti-Muslim sentiment in Myanmar, with hate speech being spread through social media and rumours being spread about Muslims perpetrating sexual violence against Buddhist women. While the OTP, thus, recognises discrimination based on ethnic and religious terms, it does not specifically mention any gendered dimension of this discrimination. From the numerous mentions of discrimination in the OTP's request document, only one regards gender as a category of marginalisation. Discrimination based on gender is, therefore, never considered as a category of analysis for sexual and gender-based crimes, at least not in the OTP's documents which have been made available to the public. Two specific issues were encountered regarding the way in which Rohingya women are depicted in the OTP's documents. The former is the lack of regard to intersectionality; the second an overly victimised approach to women.

Intersectionality refers to when people experience discrimination based on more than one structure of marginalisation, such as gender and race, religion or ethnicity (Crenshaw, 1990, p. 1242). Feminists have increasingly referred to the importance of understanding the unique discrimination women are subject to, not only as being "women" but as a combination of "women" and other factors. Rohingya women in Myanmar are subject to a specific and distinct type of discrimination based on at least three structures of marginalisation; being Rohingya, being Muslim, and being women. Discriminatory state policies affect women differently and with more force based on these intersecting structures of marginalisation. As human rights organisation Fortify Rights noted,

Myanmar is not meeting any of these obligations with respect to Rohingya women in Rakhine State. Failure to "address multiple discrimination" here rises to the level of active persecution on the basis of ethnicity, religion, and gender (Fortify Rights, 2014, p. 50)

Thus, the OTP fails to recognise the specific and unique discrimination Rohingya women experience, which is important to acknowledge in the context of investigating sexual and gender-based crimes. The OTP's Policy Paper on Sexual and Gender Based Crimes mentions that in assessing whether genuine national proceedings are being carried out, discriminatory attitudes and gender stereotypes should be among the aspect assessed by the Office during the preliminary examination stage (The Office of the Prosecutor, 2014). The mere fact that Myanmar is not a signatory party and is unwilling to cooperate with the ICC, making the OTP's decision on whether genuine national proceedings are being carried out relatively easy, does not mean the Prosecutor should not adequately assess discriminatory attitudes in the situation country in this case.

The second issue has to do with the overwhelming victimisation of women. Women are almost solely only mentioned in the context of being 'victims' of sexual and gender-based violence in the OTP's request to open an investigation in Myanmar and other OTP documents related to the preliminary examination. Many feminists have criticised this sentiment and argued that a fixation on sexual and gender-based crimes tends to overly victimise women and regard them as nothing but passive subjects in international politics (MacKenzie, 2009, p. 241). Moreover, the Prosecutor's request includes several clauses where violence is reported, and it subsequently mentioned that children, women and the elderly were among the ones persecuted, e.g. "Conservative estimates indicate that the 2017 wave of violence resulted in the killing of up to 10,000 Rohingya (including children, women and elderly)" [emphasis added] (The Office of the Prosecutor, 2019a, p. 101). The consistent portrayal of women as passive victims, rather than as active agents, is problematic in many ways. By only mentioning women in a victimising context, the OTP reinforces gender stereotypes and indicates inequality in the way men and women are regarded in conflict. Moreover, it indicates an instant connection between non-combatants and women, which has been argued as unhelpful in reaching justice (MacKenzie, 2009, p. 241). The OTP's approach is, thus, reliant on gender stereotypes that assume men experience a conflict as soldiers and women as victims or non-combatants (MacKenzie, 2009, p. 241). As mentioned in the first chapter, a feminist analysis requires a genuine commitment to gender equality, which will not be reached unless women stop being regarded merely as passive victims.

Thus, this chapter has attempted to interrogate some of the silences (Charlesworth, 1999, p. 381) when it comes to

the preliminary examination of sexual and gender-based crimes in Myanmar. It concludes that in the OTP's gender analysis, there is a lack of examination of the broad context within which sexual and gender-based crimes are committed. During Preliminary examinations, the OTP seems to mostly gather evidence on the violence which was committed and position women as victims to these crimes. However, there is a lack of attention paid to the broader gendered implications behind the use of such violence with the purpose of bringing down societies and, in the case of Myanmar, driving a whole ethnic group out of the country. Only reporting the crimes committed against women rather than taking action against the biases that lie behind has harmful implications and reinforces the systems which discriminate against women.

The Wider Implications of Preliminary Examinations for Gender Justice and Deterrence

It has been concluded that there are certain shortcomings apparent in the OTP's gender analysis and the specific attention given to sexual and gender-based crimes during the preliminary examination stage. This stems from the Prosecutor not properly adopting a feminist method and thereby interrogating the broader gendered context within which such crimes are committed. The result is a disregard of intersectional discrimination and an overly victimising portrayal of women. The impact of this inattention is, however, yet to be examined. This chapter argues that the OTP is active in norm establishment during the preliminary examination stage. Moreover, it argues that a feminist international relations approach inevitably assumes a 'consequentialist' (Stahn, 2017, p. 419) approach to preliminary examinations, thus recognising that preliminary examinations may have a 'catalytic' influence when it comes to retributive justice and deterrence, however, the status of Myanmar as a non-signatory party to the Rome Statute potentially influences this approach.

A great deal of the literature on preliminary examinations focuses on the deterrence and retributive effect of their conduct (Appel, 2018; Bosco, 2010; Dancy & Montal, 2017). Some are sceptical of their effectiveness towards reaching justice (Dancy & Montal, 2017; Pedersen, 2019) while others are more optimistic and assert that preliminary examinations can contribute positively to deterrence and retribution (Hale & Rankin, 2019). Deterrence in terms of sexual and gender-based crimes, in particular, has, however, been given less attention in academia. If it were not for at least a hope for deterrence, the OTP probably would not formally announce and publicise the opening of new preliminary examinations, and produce annual reports on their progress. As Grey and Wharton (2018, p. 595) argue, the publicity of the conduct seems to suggest that the importance of this early stage of proceedings is not lost on the Prosecutor. Thus, the publishing of information on sexual and gender-based crimes could be seen as indicating at least some hope for deterrence of such crimes.

United Nation's Security Council Resolution 2106 (United Nations Security Council, 2013) on preventing sexual violence in conflict underscores that more consistent and rigorous investigation and prosecution of sexual violence constitutes a key aspect of deterrence and the prevention of such crimes, and that the prevention of sexual violence in armed conflict contributes to the maintenance of international peace and security. The Resolution further urges the inclusion of sexual violence in the definition of acts prohibited by ceasefires and in ceasefire-monitoring agreements and underscores women's participation in prevention and protection responses. The Resolution also acknowledges explicitly the vital role played by civil society organisations, including women's organisations, in enhancing community-level protection against sexual violence and in providing access to justice and reparations for victims or survivors (Women's Initiatives for Gender Justice, 2013). While the resolution certainly is not binding for the ICC, it expresses support for the work of the Court in the fight against impunity and encourages member states to support national and international programs that assist victims of sexual violence such as the Trust Fund for Victims established by the Rome Statute (Women's Initiatives for Gender Justice, 2013).

Morten B. Pedersen (2019) provides a relatively sceptical account of the pursuit of justice in the case of Myanmar. He posits that little thought is being given to the consequences for the victims of the crimes, and states that "there is very little chance of any Myanmar leader ever being brought before the ICC to answer for his or her crimes" (Pedersen, 2019, p. 10) because of the Myanmar government's unwillingness to cooperate with the Court. Moreover, he is sceptical of deterrence, arguing that Myanmar views the Rohingya as more of a threat than the risk of international prosecution.
Even if the military could be deterred from repeating the violence of 2017, overcoming deeper structural problems of

institutionalised discrimination, underdevelopment and inter-communal tensions that have long undermined the security and welfare of the Rohingya will require fundamental changes in institutions, policies and practices. These are matters that the quest for retributive justice has little to say about, yet will nonetheless have an impact on (Pedersen, 2019, p. 12).

A counter-argument to Pedersen's analysis is that many victims have, in fact, called for retributions and shown a willingness to use the ICC as a tool to advance justice (The Office of the Prosecutor, 2019a, p. 14). His assertion that "it may be that for some people, because the alleged crimes are of such an odious nature, the quest for justice is about something much bigger than the immediate victims […]." (Pedersen, 2019, p. 13), thus seems irrational regarding the vast amount of victims who have been willing to cooperate with the ICC in pursuing justice and retribution. The OTP's request to open an investigation in Myanmar includes references to submissions on behalf of 400 Rohingya women who were allegedly victims of the crime of deportation (The Office of the Prosecutor, 2019a, p. 9). Moreover, it mentions that victims of alleged crimes as well as human rights organisations representing victims have manifested their interest in seeing justice done (The Office of the Prosecutor, 2019a, p. 145). The Prosecution notes the following:

Neither in communications from victims, nor in any of the consultations with organisations representing victims or knowledgeable of the interests of victims, has the Prosecution received views that the interests of justice would not be served by an investigation (The Office of the Prosecutor, 2019a, pp. 145 – 146).

Thus, the conduct of a preliminary examination in Myanmar does not necessarily indicate inattention to retributions and deterrence; on the contrary, many victims seem to be on board with the ICC's interference. Kip Hale and Melinda Rankin (2019) argue the opposite to Pedersen. They posit that to contend ICC non-involvement in Myanmar because of the state's anticipated non-cooperation with the Court is rather unpersuasive since this is the case with most atrocity crime investigations. They claim that investigations are usually constrained by both domestic and international politics and that governmental leaders alleged to have participated in such crimes are always unlikely to be cooperative (Hale & Rankin, 2019, p. 25). They further argue that the ICC's decision on jurisdiction over alleged deportations of Rohingya has normative value, that is, it demonstrates a willingness to adhere to the law over politics and apply international criminal law as a 'standard' (Hale & Rankin, 2019, p. 26).

Thus, preliminary examinations can establish standards and create norms. Because of the soft power the Prosecutor carries as a result of the high level of prosecutorial discretion she is granted with; she is an immensely active actor in this norm creation. ICC preliminary examinations are part of the justice process and address violations through the lens of individual criminal responsibility. They are related to certain retributive rationales, such as prevention of violations and reaffirmation of norms. They provide incentives to domestic jurisdictions to address accountability dilemmas. Moreover, they express the harm and gravity of alleged violations and set out important signals about the type of atrocity situations that international criminal justice cares about (Stahn, 2017, p. 416). Focused attention to gender justice and gendered inequalities, therefore, could be effective in norm creation and reinforcement, thus directly or indirectly contributing to deterrence for sexual and gender-based crimes. The Pre-Trial Chamber's decision to confirm jurisdiction in Myanmar demonstrated a view that the law is a standard rather than something to be enforced in a hierarchical manner through the use of coercion or force (Hale & Rankin, 2019, p. 24). Stemming from this view, the whole preliminary examination can be seen as built on the assumption that even if there might not turn out to be a concrete way of coercion, there is some nobility in the norm establishment the whole procedure might entail.

The question of what implications the conduct of a preliminary examination will have is directly connected to what kind of approach it belongs to, namely, whether it falls under the 'gateway' or 'consequentialist' categories (Stahn, 2017, p. 419). Thus, it could be useful at this point to determine which category the Myanmar examination belongs to. How relatively rapidly the examination was carried out, taking less than a year from the ruling of the Court's jurisdiction and thus beginning of a preliminary examination until a request was made to open up a formal investigation, could seem as instantly pointing towards a narrow or 'gateway' conception of preliminary examinations. However, it can be argued that in adopting a feminist international relations perspective, one immediately assumes the 'consequentialist' approach. This is the approach which, like feminism, admits that preliminary examinations may

serve a number of rationales other than facilitating ICC investigations and prosecutions (Stahn, 2017, p. 419), and admits the political implications of their conduct. The request made from the ICC Prosecutor to the Pre-Trial Chamber to look into the alleged deportations of Rohingya Muslims from Myanmar to Bangladesh has been argued to be a constructive way to extend the 'system' of international criminal law, and in doing so challenging the relationship between state power and the law in international order (Hale & Rankin, 2019, p. 25). Thus, perhaps the mere decision the Prosecutor made; to request an examination into the situation in Myanmar, indicates that the preliminary examination falls into the 'consequentialist' category. Examinations, where this approach is applied, would usually last longer than Myanmar, such as the preliminary examination in Colombia, where this stage of proceedings has already lasted for 15 years (The Office of the Prosecutor, 2018, p. 35). However, the mere fact that an examination lasts for a shorter period does not have to eliminate the possibility of it being 'consequentialist'.

Carsten Stahn (2017, p. 434) argues that the contours of the 'consequentialist' approach need to be rethought, as existing policies rely too easily on goals such as prevention or complementarity as a justification of preliminary examination. He asserts that these claims involve a great deal of speculation and untested assumptions about societal effects. He posits that prevention might be a side-effect of a preliminary examination, but it should not necessarily be a primary purpose (Stahn, 2017, p. 434). One of the most convincing critiques of the 'consequentialist' approach is, therefore, the uncertainty surrounding its desired effects. Some can be positive, such as the mobilisation of civil society or domestic alliances to increase accountability, while others can be negative, such as raising victim expectations (Stahn, 2017, p. 434). This is certainly something which needs to be taken into account in assuming a 'consequentialist' approach to the preliminary examination of sexual and gender-based crimes. The final downside he mentions, namely, raising victims expectations, is probably the most persuasive argument in the context of Myanmar. Even though the ICC is acting with the support of victims, the difficulties that might be encountered in securing successful prosecution for the crimes they were subject to might be even harder to cope with after having their expectations raised in terms of retributive justice. Stahn argues that the ICC should not open a preliminary examination merely for the purpose of promoting rationales such as deterrence. However, he also recognises that using preliminary examination as a catalyst for other rationales requires a more profound commitment to an in-depth situational analysis over time (Stahn, 2017, p. 424). Thus, a commitment to a 'consequentialist' approach to preliminary examination is in accordance with the quest for an in-depth situational analysis of gendered inequalities through the whole procedure of the Prosecution.

The 'consequentialist' (Stahn, 2017, p. 419) approach only works in specific contexts. It is always difficult to speculate what effects the opening of a preliminary examination triggers domestically. Publicising a situation under preliminary examination may well have a 'catalytic' influence and act as leverage for 'positive complementarity' (Stahn, 2017, p. 423). 'Positive complementarity' refers to the OTP's approach to complementarity, which is to encourage States to carry out their primary responsibility to investigate and prosecute international crimes (The Office of the Prosecutor, 2013, p. 23). However, it is doubtful that preliminary examinations will trigger 'positive complementarity' in the case of Myanmar. Its status as a non-signatory party means that it has none of the duties entailed in the complementarity principle.

Moreover, Myanmar authorities have not shown any willingness to cooperate with the ICC. The Women's Initiatives for Gender Justice concluded that since the Myanmar Constitution places the military out of reach of the civilian government and justice system, the Rohingya, and other ethnic groups in Myanmar, who have suffered the horrific apparent human rights abuses at the hands of Myanmar's military and security forces, with no possibility for justice or accountability in Myanmar's courts (Women's Initiatives for Gender Justice, 2019, p. 160). So it might well be that in addition to the lack of political incentive for Myanmar authorities to reach justice and deter further violence, including sexual and gender-based violence, there are legal obstacles to doing so. Thus the State could be seen as immune to positive complementarity incentives. However, even though Myanmar might potentially be resistant to ICC incentives directed at stimulating national accountability regimes, the ICC's intervention indicates that atrocity crimes will not go unpunished. 'Positive complementarity' can, therefore, be viewed as a factor in the process of norm creation at the ICC. Since the Court seems to have the victims on its side in its attempt to reach justice if only for the fact that the victims feel the atrocities they have experienced have been recognised, ICC preliminary examination and investigation could be justified.

The status of Myanmar as a non-signatory party to the Rome Statute makes the whole situation unique and unprecedented. The ICC's expanded jurisdiction makes it an ideal case for the Court to flex its power as an actor with a universal reach. The request made by the Prosecutor to the Pre-Trial Chamber to open up a preliminary examination into the situation in Myanmar has been argued as a necessity in establishing her legal obligation or 'responsibility to prosecute' (Hale & Rankin, 2019, p. 23). While it is recognised that Myanmar's status as a non-signatory party to the Rome Statute might affect the adjustability of this research to signatory parties, the general logic is very much relevant for any preliminary examination at the ICC. This is especially the case since it has been established that the Prosecutor is an effective actor when it comes to norm creation, and that 'positive complementarity' is, essentially, a mere part of a norm establishment process.

This chapter has, thus, argued that during preliminary examinations, the OTP is highly active in establishing norms, which could potentially affect deterrence and retributions for sexual and gender-based crimes. Moreover, it has been argued that looking at preliminary examinations through a feminist international relations lens immediately assumes the 'consequentialist' (Stahn, 2017, p. 419) conception of such examinations, which acknowledges that the Prosecutor has political leverage at this stage. Finally, it has been confirmed that using preliminary examinations for other rationales, such as deterrence for sexual and gender-based crimes, requires a commitment to in-depth analysis over time, including gender analysis.

Conclusion

The title of this dissertation refers to an article written by legal scholar Carsten Stahn (2017, pp. 413-434) which has been referenced substantially in the analysis. It has the catchy title "Damned If You Do, Damned If You Don't", where the phrase refers to preliminary examinations at the ICC. This paper has ventured to argue that the Prosecutor is "Damned If She Doesn't" conduct an in-depth analysis of domestic gender biases immediately at the preliminary examination stage in cases where sexual and gender-based crimes are part of the dossier. The starting point was a genuine curiosity about why such crimes still remain under prosecuted, given the seemingly comprehensive attention the Court and the Prosecutor have given to their investigation.

It has been argued that adopting a feminist international relations approach makes sense in regarding how the OTP examines sexual and gender-based crimes at the ICC because of the political nature of their conduct and the gendered nature of such crimes. Neither international law nor international relations are gender-neutral. Seeking to use existing formal institutions such as the ICC to advance gender equity goals requires looking at how current gender norms affect their work and a genuine commitment to equality between the sexes. Feminist methods start with taking women and their distinctive realities seriously, even in attempting to understand 'high politics' such as state conduct and ICC procedure. A gender analysis, such as the one the Prosecutor is tasked with in the OTP's Policy Paper on Sexual and Gender-Based Crimes, thus, requires an understanding of the gendered context within which such crimes are committed.

The recently concluded preliminary examination in Myanmar shows that the OTP still has a long way to go. There are some clear indications of a lack of genuine commitment to feminist methods and gender equality. This includes a lack of regard of intersectionality which would be needed if the status of Rohingya women is to be fully understood, as well as an overly victimising depiction of women which reinforces gender stereotypes and the systems which discriminate against women. Preliminary examinations set the tone for the rest of the case conduct before the ICC, so it is important to get things right during this early stage of proceedings. It has been argued that the Prosecutor is incredibly active in norm establishment during preliminary examinations, especially given the publicity of the conduct and the high level of prosecutorial discretion she is granted with.

Preliminary examinations are inherently connected to politics, they involve a significant degree of contextual analysis and have certain overlaps with the mandate of human rights bodies. The situations currently under consideration include some of the world's most serious threats to peace and internationally recognised human rights. The severe human rights violations the Rohingya experience in Myanmar is one such situation. The confirmation of the Court's jurisdiction over the situation has been highly contested and regarded by many as the Prosecutor flexing her 'responsibility to prosecute' (Hale and Rankin, 2019, p. 23). However, due to the raised attention and arguably

political reasoning underlying the decision, there lies an opportunity for the Prosecutor to genuinely pursue gender justice in Myanmar, and show in practise that sexual and gender-based crimes are taken just as seriously as other crimes at the Court. Even though the logic behind 'positive complementarity' does not apply directly to Myanmar because of its status as a non-signatory party to the Rome Statute, the ICC's intervention indicates that atrocity crimes, including sexual and gender-based crimes, will not go unpunished.

In many, if not most, countries in the world, even where courts appear to be well-functioning, sexual and gender-based violence is under prosecuted due to deeply rooted gender inequality (Chappell et al., 2013). Thus, the argument this dissertation has made is relevant to various situations where sexual and gender-based crimes are being committed and addressed in courts. There is a consistent need to commit to an in-depth gender analysis over time in order to appropriately address such crimes because of this underlying gender bias. Paying attention to the distinctive and diverse realities of women world-wide will remain critical for understanding the conduct of International Law and International Relations.

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