Gender-based crimes at the ICC- where is the future?

Conference or Workshop Item

GENDER-BASED CRIMES AT THE ICC: WHERE IS THE FUTURE?

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The topic of prosecution of sexual and gender-based violence (SGBV) by international criminal courts and tribunals it not new. Since mid-90s, international criminal tribunals have been successfully prosecuting crimes of SGBV committed during armed conflicts of the late 20th and early 21st century. This groundbreaking step, starting with the decision of the International Criminal Tribunal for Rwanda in *Prosecutor v. Akayesu*[2], opened up new unprecedented avenues of ensuring accountability for acts of SGBV at an international level. Whilst the arguments can be easily advanced regarding the efficiency of individual criminal tribunals as well as various flaws in defining some of the gender-based crimes in international law, the precedents set by cases such as *Akayesu* and *Prosecutor v. Furundzija*[3] introduced a new chapter in international criminal law. The jurisprudence of international criminal tribunals confirmed that acts of SGBV committed against women (as well as men) are an international crime and that perpetrators of such crimes are to be held accountable. Furthermore, it has also been shown that women as well as men can be prosecuted for committing acts of SGBV. This can be illustrated by the ICTR's decision in *Prosecutor v. Nyiramasuhuko*, where Pauline Nyiramasuhuko, the former Minister for Family Welfare and Advancement of Women in Rwanda was held guilty of crimes against humanity, in particular rape. More recently, the charges of rape and other forms of sexual violence as crimes against humanity were included in the ICC arrest warrant for Simone Gbagbo.[4]

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[2] *Prosecutor v. Akayesu*, Trial Judgment, ICTR-96-4-T (2 September 1998)

[3] *Prosecutor v. Furundžija*, Trial Judgment, IT-95-17/1T (10 December 1998)

[4] *Situation in the Republic of Côte d'Ivore: Prosecutor v Simone Gbagbo* (Warrant of Arrest for Simone Gbagbo) ICC-02/11-01/12 (29 February 2012)

It is fair to say that the prosecution of SGBV at an international level is a genie that is certainly not going back to the bottle. However, every new process (legal or otherwise) is bound to have its flaws and the process of seeking international justice for gender-based crimes has indeed been paved with many obstacles. Nonetheless, with terms of the individual International Criminal Tribunals coming to an end and with the Special Court for Sierra Leone most recently completing its mandate, all eyes are now on the ICC as the only international criminal court.

In my remarks, I would like to focus on three points. Firstly, I would like to explore the prosecution of SGBV at the ICC so far and the challenges associated with this process. Secondly, I would like to comment on the way that SGBV is (mis)understood and (mis)conceptualized by the ICC. Finally, I would like to offer some reflection of on what can be done in the future (and to what is perhaps already being done) to strengthen the process of building gender justice at the ICC.

In 2011, the ICC issued its first conviction in a case against Thomas Lubanga. Mr Lubanga was convicted on a single count of enlisting and conscripting of children under the age of 15 years and using them to participate actively in hostilities as a war crime under Article 8(2)(e)(vii) of the Rome Statute. Charges of sexual violence committed against child soldiers were not included in the original indictment against Mr Lubanga and no amendment of charges took place later in the case. This was particularly astonishing given the overwhelming amount of evidence gathered by leading NGOs as well as testimonies of witnesses during the trial about the acts of sexual violence taking place. The failure of the Office of the Prosecutor to effectively investigate crimes of sexual violence committed in the Ituri region of the Democratic Republic of Congo and to charge them was even pointed out by the Trial Chamber during the trial:

> *'It is to be noted that although the prosecution referred to sexual violence in its opening and closing submissions, it has not requested any relevant amendment to the charges.*

(...) Not only did the prosecution fail to apply to include rape and sexual enslavement at the relevant procedural stages, in essence it opposed this step. It submitted that it would cause unfairness to the accused if he was tried and convicted on this basis'.[5]

In a more recent case against Germain Katanga, the ICC Prosecutor actually charged the accused with rape and sexual slavery as war crimes and crimes against humanity.[6] Whilst the Trial Chamber elaborated on the elements of these crimes, the decision in *Prosecutor v. Katanga* resulted in acquittal of the accused on these charges.

The decision in *Lubanga* and (to an extent *Katanga*) exposed and confirmed some of the worrying aspects of prosecuting SGBV at the ICC. In *Lubanga*, the Prosecutor failed to show that sexual violence can be, and often indeed is, an integral element of other crimes, such as the recruitment of child soldiers. In the context of *Lubanga*, the recognition of the integral nature of a gender-based aspect of the crime of recruitment and use of child soldiers was necessary to adequately conceptualise this crime and recognise its full scope. Regrettably, the ICC (the OTP) failed to take the opportunity to recognize and integrate the gender-based nature of crimes committed against girl child soldiers into making their case during the trial. By failing in this judgment to integrate the issue of sexual violence into the scope of the crime of recruitment and use of child soldiers, the ICC made the full and real extent of this crime invisible. Judge Odio Benito, who issued a dissenting opinion in *Lubanga*, expressed her criticism in relation to rendering sexual violence an invisible aspect of the crime of recruitment and use of child soldiers, noting that the 'invisibility of sexual violence in the legal concept leads to discrimination of the victims (...) who systematically suffer from this crime as an intrinsic part of

[5] *Prosecutor v. Lubanga*, ICC-01/04-01/06-284 (14 March 2012), para.629
[6] *Situation in the DRC: Prosecutor v. Germaine Katanga and Mathieu Ngudiolo Chui* (Decision on the Confirmation of Charges) ICC-01/04-01/07 (30 September 2008)

the involvement with the armed group'.[7] Therefore, Judge Odio Benito considered the adoption of an approach inclusive of sexual violence 'a necessity and a duty of a Chamber, regardless of the impediment of the Chamber to base its decision pursuant to article 74(2) of the Statute'[8].

Furthermore, the judgment in *Lubanga* highlights the significant failure of the Office of the Prosecutor to effectively investigate crimes of SGBV and to gather substantive and reliable evidence in relation to these charges. Finally, *Lubanga* (and more recently *Katanga*) illustrate the broader problem of charges of sexual violence 'not making it' to the indictment or, if charges are successfully confirmed, not becoming grounds for conviction. This unfortunate issue arose in another case before the ICC, *Prosecutor v Mbarushimana*. The arrest warrant against Callixte Mbarushimana contained a very broad range of charges of SGBV, including rape, torture, mutilation, other inhumane acts, inhuman treatment and persecution on the basis of gender.[9] However, due to the vague presentation of the case by the Prosecution and failure to present sufficiently strong evidence, not a single charge was confirmed against Callixte Mbarushimana.

My second remark relates to the way in which sexual violence is conceptualized in the decisions of the ICC. In this context, what causes particular concern is the (mis)characterisation (if not marginalization) of charges of sexual violence committed against men. Even though the ad hoc tribunals have successfully prosecuted sexual violence against men, the ICC has failed so far to successfully charge and prosecute acts of sexual violence committed against men under Article 7(1)(g) of the Rome Statute.

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[7] *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842 (14 March 2012) (Judge Odio Benito dissenting), para.16
[8] Ibid.
[9] *Situation in the DRC: Prosecutor v. Mbarushimana* (Warrant of Arrest for Callixte Mbarushimana) ICC-01/04-01/10 (11 October 2010)

To illlustarte this point, I would like to turn to the decision of the Pre-Trial Chamber II of the ICC in the decision regarding the arrest warrant and the confirmation of charges decision in *Prosecutor v. Muthaura*. In this profoundly disappointing decision, The Pre-Trial Chamber II rejected the argument that forcible circumcision and penile amputation of Luo men constituted sexual violence. Furthermore, and most surprisingly, the Chamber held 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'.[10] As the Chamber did not find anything 'sexual' about these acts, instead of charging them as 'other acts of sexual violence' under Article 7(1)(g) of the Rome Statute, the Chamber suggested that these acts amount to 'other inhumane acts'. Furthermore, the Chamber argued that 'not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence'.[11] This approach is highly problematic (if not also illogical) and demonstrates the conservative approach of the Chamber towards more progressive interpretation of Article 7(1)(g) of the Rome Statute. If acts of forcible circumcision and penile amputation committed against men of certain ethnicity do not amount to sexual violence or as the Chamber suggested, are lacking sexual nature, I am left curious as to what type of acts are capable of fulfilling the threshold of 'other acts of sexual violence' under Article 7(1)(g). Consequently, one may wonder whether acts of forcible female genital mutilation targeted and committed against women of particular ethnicity would also be lacking inherently sexual nature.

As *Muthaura* decision regrettably demonstrates, acts of sexual violence continue to be misconceptualized, mischaracterized and even trivialised at an international level, particularly when committed against men. One may only remain hopeful that the reasoning resonating form *Muthaura* will not create a dangerously restrictive precedent for the future cases before the ICC.

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[10] *Situation in Kenya: Prosecutor v. Muthaura et al* (Decision on the Prosecutor's Application for Summonses to Appear for Frnacis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali) ICC-01/09-02/11 (8 March 2011), para.27

[11] *Situation in Kenya: Prosecutor v. Muthaura et al* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-02/11 (23 January 2012), para.264.

So, is there a future for a successful prosecution of SGBV at the ICC?

First of all, the picture is not entirely bleak. Recognition ought to be given to the fact that the ICC is, at least on a theoretical level, able and well equipped to successfully prosecute crimes of SGBV. In comparison with Statutes of other international criminal courts and tribunals, Article 7(1)(g) of the Rome Statute contains the most extensive list do date of crimes of SGBV. This includes the open-ended category of 'other acts of sexual violence', which opens the opportunity for progressive development of the ICC's jurisprudence on crimes of SGBV. The ICC Prosecutor is also supported by the Special Gender Advisor, who has extensive expertise on the matters related to SGBV and whose role is to assist the ICC Prosecutor. Furthermore, the current ICC Prosecutor, Ms Fatou Bensouda, made it very clear that ending impunity for SGBV is one of her key objectives. To that end, the recently published ICC Draft Policy Paper on sexual and gender-based crimes leaves some hope for positive changes in ways that crimes of sexual violence are investigated and prosecuted before the ICC.[12]

However, in order to put these tools to work, a gender-inclusive approach needs to be present throughout the processes of investigating, charging and prosecuting crimes of SGBV. The conservative and rigid approaches presented by some judges at the ICC need to be replaced by the forward looking and progressive interpretation of the existing provisions of the Rome Statute, in particular Article 7(1)(g), in order to allow the in depth examination and coherent conceptualization of the sexual and gender-based nature of international crimes. To that end, more focus ought to be given to the intersectional analysis of the crimes involving SGBV. It is

[12] ICC Draft Policy Paper on Sexual and Gender Based Crimes (February 2014, http://www.icc-cpi.int/iccdocs/otp/OTP-draft-policy-paper-February2014-Eng.pdf

essential to ensure that SGBV is made visible as an element integral to other crimes under the ICC's jurisdiction, not only those listed in Article 7 (1)(g) of Rome Statute.

Finally, all efforts directed at the development and achievement of gender justice at an international level need to feed into domestic legal processes, enabling domestic prosecution of gender based crimes. It ought not be to forgotten that the ICC is based on the principle of complementarity. It is neither the ICC's role nor its remit to prosecute all perpetrators of crimes of SGBV committed in a particular conflict. Therefore, it is of paramount importance that domestic legal systems, particularly those operating in post-conflict contexts, are well equipped to prosecute crimes of SGBV committed during armed conflict and in peacetime. In order to close this gap, it is important that both adequate legislation and rules of procedure and evidence within national jurisdictions enable successful prosecution of crimes involving SGBV. One can hope that in the near future the ICC will proceed to develop a progressive body of jurisprudence on SGBV. However, without the support of adequate, gender-sensitive domestic mechanisms, the achievement of gender justice will only be a partial reality.