

## SEXUAL VIOLENCE IN ARMED CONFLICT

This panel was convened at 9:00 am, Saturday, April 12, by its moderator, Dawn Sedman of Oxford Brookes University, who introduced the panelists: Tonderai Chikuhwa of the Office of the Special Representative of the Secretary General on Sexual Violence in Conflict; Chris Dolan of the Centre for Refugee Law, Makerere University, Kampala, Uganda; Olga Jurasz of Open University; and Kimberly Theidon of Harvard University.\*

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

*By Olga Jurasz*<sup>†</sup>

The topic of prosecution of sexual and gender-based violence (SGBV) by international criminal courts and tribunals is not new. Since the mid-1990s, international criminal tribunals have been successfully prosecuting crimes of SGBV committed during the armed conflicts of the late 20<sup>th</sup> and early 21<sup>st</sup> centuries. This groundbreaking step, starting with the decision of the International Criminal Tribunal for Rwanda in *Prosecutor v. Akayesu*,<sup>1</sup> opened up unprecedented avenues of ensuring accountability for acts of SGBV at an international level. While 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. Furundžija*<sup>2</sup> 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.<sup>3</sup>

It is fair to say that the prosecution of SGBV at an international level is a genie that is certainly not going back into 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 reflections on what can be done in

\* Mr. Chikuhwa, Dr. Dolan, and Professor Theidon did not contribute remarks for the *Proceedings*.

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<sup>1</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment (Sept. 2, 1998), <http://www.unict.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf>.

<sup>2</sup> *Prosecutor v. Furundžija*, Case No. IT-95-17/1T, Trial Judgment (Dec. 10, 1998), <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>.

<sup>3</sup> *Prosecutor v. Gbagbo*, Case No. ICC-02/11-01/12, Warrant of Arrest for Simone Gbagbo (Feb. 29, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1344439.pdf>.

the future (and on 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 children under the age of 15 and using them to participate actively in hostilities, which is 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 testimony of witnesses during the trial about the acts of sexual violence taking place. The failure of the Office of the Prosecutor (OTP) effectively to 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.<sup>4</sup>

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.<sup>5</sup> While 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 troubling 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 conceptualize this crime and recognize its full scope. Regrettably, the OTP failed to take the opportunity to recognize and integrate the gender-based nature of crimes committed against girl child soldiers into these cases at 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 the involvement with the armed group.”<sup>6</sup> 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.”<sup>7</sup>

<sup>4</sup> Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-284, para. 629 (Mar. 14, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf> (emphasis added).

<sup>5</sup> Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges (Sept. 30, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf>.

<sup>6</sup> *Lubanga* para. 629 (Judge Odio Benito dissenting).

<sup>7</sup> *Id.*

Furthermore, the judgment in *Lubanga* highlights the significant failure of the Office of the Prosecutor effectively to 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, and inhuman treatment and persecution on the basis of gender.<sup>8</sup> However, due to the vague presentation of the case by the OTP and its failure to present sufficiently strong evidence, not a single charge was confirmed against Callixte Mbarushimana.

My second set of remarks 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)characterization (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.

To illustrate 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 Chamber 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.”<sup>9</sup> 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.”<sup>10</sup>

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 a certain ethnicity do not amount to sexual violence or, as the Chamber suggested, are not of a sexual nature, I am 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 a particular ethnicity would also be considered by the Chamber to be of a non-sexual nature.

As the *Muthaura* decision regrettably demonstrates, acts of sexual violence continue to be misconceptualized, mischaracterized, and even trivialized at an international level, particularly

<sup>8</sup> *Prosecutor v. Mbarushimana*, Case No. ICC-01/04-01/10, Warrant of Arrest for Callixte Mbarushimana (Oct. 11, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc954979.pdf>.

<sup>9</sup> *Prosecutor v. Muthaura*, Case No. ICC-01/09-02/11, Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, para. 27 (Mar. 8, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1037052.pdf>.

<sup>10</sup> *Prosecutor v. Muthaura*, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, para. 264 (Jan. 23, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf>.

when committed against men. One can only hope that the reasoning resonating from *Muthaura* will not create a dangerously restrictive precedent for the future cases before the ICC.

So is there a future for a successful prosecution of SGBV at the ICC? First of all, the picture is not entirely bleak. Recognition must be given to the fact that the ICC is, at least on a theoretical level, 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 to 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 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 the ways that crimes of sexual violence are investigated and prosecuted before the ICC.<sup>11</sup>

However, in order to put these tools to work, a gender-inclusive approach must be present throughout the processes of investigating, charging, and prosecuting crimes of SGBV. The conservative and rigid approaches applied 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 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 the Rome Statute.

Finally, all efforts directed at the development and achievement of gender justice at an international level must feed into domestic legal processes, enabling domestic prosecution of gender-based crimes. It ought not be 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, be 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 ever be a partial reality.

<sup>11</sup> Office of the Prosecutor, International Criminal Court, *Draft Policy Paper on Sexual and Gender Based Crimes* (Feb. 2014), <http://www.icc-cpi.int/iccdocs/otp/OTP-draft-policy-paper-February2014-Eng.pdf>.