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SYMPOSIUM ON THE ROME STATUTE AT TWENTY

THE PACE OF PROGRESS: ADDRESSING CRIMES OF SEXUAL AND GENDER-BASED VIOLENCE IN THE GENERATION AFTER ROME

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When it was adopted in 1998, the Rome Statute of the International Criminal Court (ICC) represented a significant breakthrough regarding sexual and gender-based crimes—crimes that, for centuries, had proliferated in armed conflicts but had been disregarded, mischaracterized, or misunderstood as the inevitable by-products of war or a legitimate part of its spoils. Not only did the Rome Statute explicitly treat a broad range of sexual acts as crimes against humanity and war crimes, but it also recognized gender-based violence as a crime and incorporated a number of provisions aimed at ensuring greater institutional attention to sexual and gender-based crimes. However, abstract possibilities do not always translate into concrete results, and the ICC has been slow to effectuate its innovative statutory provisions. This essay will explore some of the obstacles encountered and opportunities missed by the Court over the last twenty years, as well as highlighting welcome strides made in recent years to fulfill, at least in part, the promise of Rome.

Missing Charges

Initial expectations were quickly dashed in the ICC's first case, *Thomas Lubanga Dyilo*, which involved the conscription of child soldiers and their use in armed conflicts. The prosecutor did not seek to bring charges related to sexual or gender-based violence, nor was mention made of such violence at the confirmation stage. Yet, at trial, evidence of crimes of sexual violence became a central motif of the prosecutor's case.

At the close of trial and in response to a question about the relevance of this evidence, the prosecutor explained:

> [W]hat we believe in this case is a different way to present the gender crimes. … And it is important to have the charge as confined to the conscription, because if not … the girls are considered wife and ignored as people to be protected and demobilised and cared [for]. That is why the Prosecutor decided to confine the charges—to present the suffering and sexual abuse and the gender crime suffered by the girls in the camps just as conscription, showing this gender aspect of the crime.[1]

It is difficult to appreciate the prosecutor's logic. Was he seeking to establish the crime of conscription as an overarching crime accomplished through various means, including sexual violence? Even if so, crimes committed

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[1] Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-T-356, Prosecutor Closing Arguments, 54 (Aug. 25, 2011).

towards the implementation of an overarching crime can still be charged separately. Likewise, there seems little basis for his assertion that charging crimes of sexual violence would have meant "ignoring" the female child soldiers and precluding them from receiving support available to male child soldiers. Moreover, such an approach may not satisfy the prosecutor's duty when investigating and prosecuting crimes "to take into account the nature of the crime, in particular where it involves sexual violence, gender violence, or violence against children."[2]

Whatever the rationale, by failing to bring charges of sexual violence when there was abundant evidence, the prosecutor devalued and arguably legally mischaracterized the experiences of the affected child soldiers with a decision that risked perpetuating some of the very biases that the Rome Conference sought to eliminate.

Insufficient Evidence

The ICC's second trial, in the *Germain Katanga and Mathieu Ngudjolo Chui* case, represented an advance in that both accused were tried for charges including rape and sexual slavery as war crimes and crimes against humanity. It also reflected progress in that these crimes were alleged to be part of an overall plan of concerted criminal action rather than treated simply as acts ancillary to a conflict. Nonetheless, these advances were undercut by the results of the case.

In December 2012, the trial chamber acquitted Ngudjolo Chui of all charges, and in March 2014, the chamber recharacterized the mode of liability for Katanga, concluding that he would be treated as an accessory to a common plan. Significantly, the majority of the trial chamber then proceeded to find that while it was satisfied that rape and sexual slavery had been committed by Katanga's soldiers, it was not satisfied that these acts fell within the common plan to wipe out the Hema civilian population. This holding contrasted with the chamber's findings that acts of murder, attacks on the civilian population, and pillage fell within that common plan.

On its face, the trial chamber's finding of insufficient evidence related to the crimes of sexual violence was not altogether surprising, given that these were the sole charges not confirmed unanimously and the prosecutor called only three witnesses to testify as to their rape and sexual enslavement. But why did the prosecutor not seek to bring more evidence in relation to these crimes? Was the limited evidence the result of the unique challenges involved in identifying and presenting witnesses willing to testify about sexual violence? Were efforts to demonstrate prosecutorial efficiency prioritized? One is left to wonder too whether the evidentiary standard applied by the chamber—including its requirement that criminal acts be considered "necessary" to fulfill the common plan—will ever be met in another case involving similar allegations.

Perpetuation of Outdated Norms

While the *Katanga* judgment raises questions as to the priority given during the Court's early years to obtaining and presenting evidence of crimes of sexual and gender-based violence, the trial chamber's majority holding in *Katanga* that acts of rape and other sexual violence did not fall within the common plan also raises more fundamental questions.

Notably, the chamber was satisfied that the crimes of sexual violence "formed an integral part of the militia's design to attack the predominately Hema civilian population of Bogoro,"[3] yet that finding was not sufficient to support the inference that these crimes were part of the common plan. This is puzzling given that the chamber found "that by taking part in the implementation of the design, the Nigiti militia's objective was to drive the civilian population from Bogoro by killing it, destroying its homes and by pillaging the property and the livestock essential

[2] Rome Statute of the International Criminal Court art. 54(1)(b), July 17, 1998, 2187 UNTS 3.

[3] Prosecutor v. Katanga, ICC-01/04-01/07-3436, Judgment Pursuant to Article 74 of the Statute, para. 1664 (Mar. 7, 2014).

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to its survival."[4] The chamber's reasoning suggests that the "design"—to which the crimes of sexual violence were "integral"—and the "common plan" were one and the same. These analytical ambiguities were never addressed on appeal, and the chamber's ruling arguably has the regrettable effect of perpetuating traditional notions that sexual violence simply reflects the spontaneous, private acts of wayward soldiers outside of any coordinated plan.

Admittedly, in cases at the International Criminal Tribunal for the former Yugoslavia, acts of sexual violence were likewise found to fall outside a common plan. There, however, convictions were still entered where the acts of sexual violence were the possible natural and foreseeable consequence of the common plan's implementation.[5] The ICC's approach to common purpose liability allows for no such result. Only time will tell how the Court will address the particular challenges highlighted by *Katanga* in this regard.

Restrictions on the Scope and Characterization of Crimes

It was not until March 2016, in the *Jean Pierre Bemba* case, that the ICC entered its first convictions for crimes of sexual violence, including rape as a crime against humanity and as a war crime—with the trial chamber finding that crimes were committed against both men and women without regard to gender. These historic convictions were ultimately vacated on appeal, however. And even before that, the charges confirmed by the pre-trial chamber arguably did not reflect the full extent of the sexual harms allegedly caused or the entire breadth and nature of allegedly criminal activity at issue.

First, at the arrest warrant stage, the pre-trial chamber declined to include proposed charges of other forms of sexual violence as a crime against humanity, in particular the forcing of civilian women, men, and children to undress to publicly humiliate them. The chamber held—in contrast to the ad hoc tribunals' jurisprudence[6]—that these acts were not of comparable gravity to other enumerated acts in the Statute.

Then, at the confirmation stage, the chamber declined to confirm the charges of rape as torture as a crime against humanity and outrages upon personal dignity as a war crime. Inter alia, the chamber observed that presenting the same facts under different legal headings risked imposing an unfair burden on the defense and delaying the proceedings. The chamber accordingly held that only distinct crimes could be cumulatively charged and that the charges of rape as torture and outrages upon personal dignity were cumulative of the charge of rape as both a crime against humanity and a war crime.

Much of the pre-trial chamber's reasoning seems unsound. First, the chamber did not appear to examine fully the legal elements of each offence. Had it done so, it would have found that each has a materially distinct element.[7] Second, it is not apparent that requiring the defendant to respond to evidence of the same conduct under different legal headings is unfair. Indeed, the chamber adopted this very approach to the extent that it allowed acts of rape to be charged as both crimes against humanity and war crimes.

More fundamentally, the chamber's decision to consider the crimes of torture and outrages upon personal dignity to be "encompassed"[8] within—and thus essentially reduced to—the crime of rape disregards the meaningful

[4] *Id.* at para. 1665.

[5] *See, e.g.*, Prosecutor v. Krstić, Case No. IT-98-33-T, Judgement, paras. 616–617, 727 (Int'l Crim. Trib. for the Former Yugoslavia, Aug. 2, 2001).

[6] *See, e.g.*, Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, paras. 766–774 (Int'l Crim. Trib. for the Former Yugoslavia, Feb. 22, 2001) [hereinafter Kunarac Judgement]; Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Judgement, paras. 33, 522, 611, 613 (Apr. 28, 2005).

[7] *See, e.g.*, Int'l Criminal Court, Elements of Crimes, ICC-PIDS-LT-03-002/11, 7–8 (2011) [hereinafter Elements of Crimes]; *see also* Kunarac Judgement, *supra* note 6, at para. 557.

[8] Prosecutor v. Bemba, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, para. 310 (June 15, 2009).

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legal distinctions among these crimes.[9] As a consequence, the full extent of the harms suffered by the victims of these crimes was arguably not captured by the charges, nor was the full extent of the accused's alleged criminality.

The chamber's rulings thus raise questions about the responsibility of the Court to ensure the proper characterization of criminal conduct and represent another step backward. Importantly, however, in recent years, other chambers have departed from this precedent, underscoring, for instance, that certain crimes "may, although based on the same set of facts, be not alternative to each other, but concurrently lead to a conviction."[10]

Failure to Address Basic Definitions and Principles

The case of *Francis Kirimi Muthaura*, *Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, which involved alleged sexual violence committed against men, reflects another missed opportunity to address the proper characterization of offences, clarify the conceptual scope of crimes of sexual violence, and articulate the relationship between sexual and gender-based crimes.

In its decision on the prosecutor's application for an arrest warrant, the pre-trial chamber took a narrow view of what acts fall within the scope of other forms of sexual violence. In particular, the chamber rejected the argument that the alleged forcible circumcision of Luo men constituted sexual violence, finding that "the acts of forcible circumcision cannot be considered as acts of a 'sexual nature'" and were more appropriately characterized as "other inhumane acts" as a crime against humanity.[11]

At the confirmation stage, the prosecutor submitted that "these weren't just attacks on men's sexual organs as such but were intended as attacks on men's identities as men within their society and were designed to destroy their masculinity."[12] The chamber was not convinced. It ruled that "not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence"[13] and that "the determination of whether an act is of a sexual nature is inherently a question of fact."[14] The chamber concluded that the evidence did not "establish the sexual nature of the acts of forcible circumcision and penile amputation visited upon Luo men"[15] but instead appeared to show that "the acts were motivated by ethnic prejudice and intended to demonstrate cultural superiority of one tribe over the other"[16] and were thus better characterized as "other inhumane acts."

The chamber's rulings raise the important question of what makes violence "sexual." If a violent attack against a person's sexual organs is not necessarily a crime of sexual violence, then what is? The Elements of Crimes offer only limited guidance.[17] By avoiding this question, the chamber missed a vital opportunity to clarify the law. Moreover, if what constitutes a sexual act is indeed a question of fact, the chamber failed to articulate which

[9] *See, e.g.*, Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement and Sentence, paras. 289–99 (Jan. 27, 2000); Prosecutor v. Karemera, Case No. ICTR-98-44-A, Judgement, para. 610 (Sept. 29, 2014).

[10] Prosecutor v. Ongwen, ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges Against Dominic Ongwen, para. 32 (Mar. 23, 2016).

[11] Prosecutor v. Muthaura, ICC-01/09-02/11-1, 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).

[12] Prosecutor v. Muthaura, ICC-01/09-02/11-T-5-Red, Confirmation of Charges Hearing, 88 (Sept. 21, 2011).

[13] Prosecutor v. Muthaura, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, para. 265 (Jan. 29, 2012).

[14] *Id.*

[15] *Id.* at para. 266.

[16] *Id.*

[17] Elements of Crimes, *supra* note 7, at 10.

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facts are relevant to that determination. Is the determining factor the perpetrator's "motivation," as the chamber's reasoning suggests, or intent? What about the impact on the victim or the relevant communities' perception of the nature of the act?

Furthermore, in finding that the acts were "motivated by ethnic prejudice" rather than "being sexual in nature," the chamber appears to suggest that acts cannot be both sexual in nature and based on nonsexual motivations. As numerous studies have shown, however, most sexual violence is not motivated by sexual desire but by a desire to humiliate, to dominate, or to punish.[18] The fact that sexual violence may be committed for reasons other than sexual desire thus does not mean the acts themselves are not sexual in nature. The chamber's apparent expectation to the contrary suggests continued adherence to outmoded understandings of sexual violence.

Of course, in criminal law, what matters is intent, not motive. Notably, in this case, according to the prosecutor, the perpetrators intended to attack the masculine identity of the Luo men by attacking their sexual organs. In other words, the prosecutor focused on the crime's gendered aspects, not its sexual nature. The prosecutor, however, did not advocate for an elucidation of why gender-based violence should be characterized as a sexual crime. The chamber, in turn, missed an opportunity to clarify the legal relationship between sexual and gender-based violence.

As this case never finished in judgment, these issues were not addressed in later rulings. As a result, some twenty years after Rome, there is still no legal standard at the Court for what constitutes an act of a sexual nature and no jurisprudential delineation of the relationship between sexual and gender-based crimes.

Conclusion

The ICC's chambers and prosecutor have both encountered a variety of obstacles and missed opportunities when it comes to turning the promise of Rome in relation to sexual and gender-based crimes into reality. Indeed, the prosecutor has failed to secure any final convictions for these crimes.

This is not to suggest that the ICC has failed to make any progress, however. In the case of *Bosco Ntaganda*, for example, no charges of sexual violence were proposed in 2006, but in 2012 a second arrest warrant was granted, this time including charges of rape and sexual slavery as crimes against humanity and war crimes. In 2014, the pre-trial chamber held in that same case that rape and sexual slavery of child soldiers by members of the same armed group can constitute war crimes. Not only does the ruling make clear that crimes need not be committed against an opposing side, but it also reflects a rejection of the traditional notion that sexual violence is simply a by-product of war.

In the *Dominic Ongwen* case, the prosecutor once again brought a wide array of amended charges, including rape and sexual slavery as crimes against humanity and war crimes and forced marriage as an inhumane act as a crime against humanity. The *Ongwen* case is remarkable not simply for the breadth of charges, but also because it is the first case in any international court to include charges involving forced pregnancy and to specifically consider the reproductive autonomy of women and girls.

These are some of the positive indications that—as the prosecutor's Policy Paper on Sexual and Gender-Based Crimes of June 2014 (the first such policy adopted by an international court) is mainstreamed into the work of the Office of the Prosecutor—the prosecutor is increasingly prioritizing pursuit of, and the chambers will be called upon to consider an ever more nuanced and deliberate approach in addressing, crimes of sexual and gender-based violence. While in its first twenty years, the ICC's progress in the area of sexual and gender-based crimes was middling at best, in the years to come, the ICC may finally start to deliver on the potential heralded at Rome.

[18] *See, e.g.*, Secretary General, Conflict-Related Sexual Violence, U.N. Doc. S/2015/203 (Mar. 23, 2015); Secretary-General, Implementation of Security Council Resolutions 2139 (2014), 2165 (2014), 2191 (2014), 2258 (2015) and 2332 (2016), UN Doc. S/2017/244 (Mar. 22, 2017).

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