

Analysis: The ICC's Treatment of Sexual and Gender-Based Violence Crimes

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This article assesses the ICC's jurisprudence, statutes and institutional structure with regard to SGBV crimes in light of its stated mandate and its 20th anniversary on July 17, 2018 as a permanent international court.

Introduction

The International Criminal Court (ICC) has been hailed the "victim's court", given its wide victim participation scheme at all stages of proceedings in comparison to its predecessor Tribunals.[1] Article 54(1)(b) of the *Rome Statute* requires the Prosecutor to ensure the effective investigation and prosecution of crimes within the Court's jurisdiction taking into account the nature of the crime, particularly when it involves sexual violence, gender-violence, or violence against children.[2] To date, the ICC has only rendered one successful conviction for sexual and gender-based violence (SGBV) crimes in the decision of Mr. Jean-Pierre Bemba, which was later overturned by a divided Appeals Chamber on June 8th, 2018.[3] This article assesses the ICC's jurisprudence, statutes and institutional structure with regard to SGBV crimes in light of its stated mandate and its 20th anniversary as a permanent international court. Particular focus is given to the interaction between the *Lubanga* Appeals Chamber (AC) decision for reparations and ineffective prosecutorial strategy for SGBV

crimes, which rendered an outcome that lacked both symbolic justice and financial support for the injuries of SGBV victims. The *Lubanga*AC decision only allows for reparations for charged crimes which result in a guilty verdict. Thus, if SGBV crimes are dropped or do not result in a conviction, SGBV victims cannot benefit from individual reparations orders (although they *may*indirectly benefit from collective orders or TFV assistance programs).[4] This occurs despite consistent social science data suggesting SGBV victims are the most in need of psychological and physical support services. However, SGBV crimes that have been dropped against the accused can be considered as aggravating factors in sentencing, upon a guilty conviction for a different crime according to the *Policy Paper on Sexual and Gender-Based Crimes 2014*.[5] Key lessons learned from prosecutorial planning related to SGBV crimes of former Tribunals are also considered in this paper as well as the recent cases of Mr. Dominic Ongwen and Mr. Jean-Pierre Bemba (AC). Until the Court can remedy deficiencies related to both prosecutorial strategy and the link between high-level actors and SGBV crimes by using extended modes of liability, it should revisit its reparations regime to reflect the reality that SGBV crimes invariably accompany armed conflict, whether or not an SGBV charge or conviction succeeds.

Reparations

The ICC offers both individual and collective reparations for victims with certain conditions. Reparations are an important advancement for victims and witnesses, as some victims, "have stated a preference for obtaining reparations even over seeing perpetrators tried in court."[6] They are a step forward from the International Criminal Tribunal for the former Yugoslavia where victims had to sue perpetrators directly and domestically in national courts to attempt to receive compensation.[7] ICC victims are of course still able to sue perpetrators directly domestically. However, given access to justice concerns generally (financial means of the victim, deficiency in the rule of law and court systems in corrupt countries), as well as conflict of laws concerns regarding enforcement (some perpetrators may be foreigners), the reparations regime has strategic advantages. Reparations as an alternative to civil liability may not meet the tort law benchmark of restoring the victim to their position had the harmful act not occurred, but the funds may certainly help ameliorate the victim's position.

The *Lubanga* and *Katanga* decisions both include perpetrators acquitted of sexual violence and encapsulate ICC jurisprudence on reparations with the latter decision confirming the former. In *Katanga*, the Chamber noted reparations should be granted "without adverse distinction on the grounds of gender, age, race, colour, language, religion or belief, political or other opinion, sexual orientation, national, ethnic or social origin, wealth, birth or other status."[8] Despite this assertion with regard to gender, if the accused is not convicted of an SGBV crime, then the specific needs of predominately female victims may not be fully met by the reparation order due to the *Lubanga* AC decision. The Appeals Chamber in *Lubanga* confirmed the Trial Chamber's principle, "reparations are to be awarded based on the harm suffered as a result of the commission of any crime within the jurisdiction of the Court."[9] Sexual violence was not defined as a harm committed by Mr. Lubanga because Mr. Lubanga was not charged of crimes of sexual violence and also because sexual violence

was not included within the gravity of Mr. Lubanga's crimes.[10] In conclusion, if the Prosecutor does not bring charges that encompass the full scale of victimization at the outset, errors and omissions cannot be resolved at the reparations stage.[11]

The Appeal Chamber's reasoning in *Lubanga* regarding reparations may be sound in theory (earmark funds for convicted charges), but it ignores the reality and broader context in which sexual violence has accompanied most armed conflicts since time immemorial. *Lubanga* reinforces the gender bias of international criminal law as SGBV crimes in armed conflict are treated as collateral damage insufficient to warrant repair.[12] Ultimately, it is the victims of sexual violence who are likely the most in need of financial aid, as well as physical and mental support services. The World Wide Movement for Human Rights interviewed dozens of survivors and victims who participated in the *Bemba* trial for the Central African Republic.[13]Victims interviewed prioritized the need for individual compensation, as well as the need for community education regarding sexual assault stigmatization, because these factors have prevented them from reconstructing their lives with dignity.[14] Fifteen years have passed since the events of Bemba occurred, yet victims continue to live in extreme poverty suffering both physical and psychological harm including but not limited to: (1) contracting HIV/AIDS from rape, (2) being ostracized, shunned and/or rejected by their family or partner because they were raped, (3) abandonment by partners because they were raped, and (4) the abandonment of children born from rape.[15] Whether used as a systematic tool of warfare or considered a byproduct of war, the ICC's complete failure to address SGBV crimes at the individual level undermines its stated commitment to restorative justice.

The TFV

The Trust Fund for Victims (TFV) operates separately from the ICC and aims to implement programs that address harms resulting from enumerated crimes with a primary focus on providing reparations and assistance programs.[16] As permitted by the *Rome Statute,* the TFV often intervenes in situations where an accused is ordered to pay reparations by the Court, but is indigent.[17] Despite the supposedly semi-autonomous mandate of the TFV with its separate Board of Directors, the ICC Pre-Trial Chamber ruled the TFV's first and foremost responsibility is to ensure sufficient funds are available for a Court reparation order pursuant to article 75 of the *Rome Statute*.[18] About a quarter of the TFV budget is reserved for reparation orders and while the TFV controls the remainder of its funds, the TFV must ask the Court to launch an assistance program.[19] Although the TFV is already active in some countries such as Uganda and the Democratic Republic of Congo with assistance programs with gender-specific interventions,[20] the TFV should explicitly earmark a large(r) portion of its assistance program funds to ameliorate the position of SGBV survivors.

Sentencing

In the *Policy Paper on Sexual and Gender-Based Crimes 2014*, the Office of the Prosecutor (OTP) commits to proposing sentences which give due consideration to the gender and sexual dimensions of the crimes charged with consideration at the individual and community level.[21] The *Policy Paper*

interestingly states, “even where the evidence **precluded** the inclusion of sexual and gender-based crimes in the charges, the Office will give due consideration to any sexual or gender dimension involved in the crimes charged, which may be treated as an aggravating factor or as part of the gravity factor for the purpose of sentencing.”[22] This provision reads like a reactive attempt to rectify the OTP’s lack of ability to charge the accused with a gender-based crime where one existed but could not be proved on the evidence. Additionally, it is at odds with *Lubanga,* decided one year after the *Policy Paper,* where the Court consciously decided not to take into account SGBV crimes that had been excluded from charges when making reparation orders. If evidence of SGBV-related crimes that were precluded from the accused’s charge can be considered during sentencing, they should absolutely be considered for the purposes of determining reparations. Sentencing temporally puts the accused’s freedom at stake and is a matter of natural justice, while reparations have significantly less influence on the accused given that more often than not, the accused is indigent and reparations are paid by the TFV. Additionally, given the principle of proportionality in the quantification of reparations, those convicted are only responsible for a fraction of the actual estimated costs of their overall harm. [23] Reparations can have a direct impact on ameliorating the life of SGBV survivors, while adding a couple years to a sentence that explicitly excludes SGBV charges is unlikely to improve the quality of life of SGBV survivors. Ultimately, the real issue lies in ineffective prosecutorial strategy and a poor reparations regime, which should both be addressed as they are more likely to result in substantive justice and financial aid to SGBV victims.

Prosecutorial Strategy

Compared to other crimes, charges for SGBV crimes are more vulnerable to being dismissed, re-characterized (narrowed) or dropped in the early stages of proceedings.[24] The Women’s Initiatives for Gender Justice studied 9 cases before the ICC and found 7 of 204 charges sought by the Prosecution had not been included in arrest warrants or summons to appear, five of which were SGBV charges.[25] Additionally, there have been criticisms of the laying of charges for sexual violence, as well as the ‘narrowing’ of charges where crimes such as torture and outrages upon personal dignity are ‘subsumed’ by the charge of rape.[26] For example, with regard to the situation in Uganda, five cases including that of Joseph Kony, were joined in a for a warrant.[27] Widespread sexual violence was reported by many civil society actors in Uganda, yet only 2/5ths of the accused were charged with sexual violence related crimes.[28] Of those two cases, the charges were considered insufficient given that they could also have included forced marriage, sexual slavery, and other inhumane acts.[29] Cumulative charging is apposite and required to capture the full magnitude and totality of harm suffered by victims, although the Pre-Trial Chamber in *Bemba* ruled in the alternative on this issue.[30] Additionally, gender-based crimes must not be mechanically equated with the narrow category of sexual violence, and instead gender-based violence can serve as evidence for seemingly gender-neutral crimes such as “other inhumane acts.”[31] Lastly, even when the charges laid are comprehensive, the Prosecutor faces an upward battle in proving SGBV crimes as demonstrated by the heavily criticized decision of *Katanga* and more clearly, by the ICC’s 0% success rate in convicting SGBV crimes. In *Katanga,* the Court arguably required a more deliberate intent or higher level of proof

regarding Mr. Katanga's contribution to crimes of rape when compared to other charges.[32]

There are unique challenges to prosecuting SGBV crimes, including the difficulty in collecting timely evidence due to underreporting, and difficulties in linking high-level commanders to low-level perpetrators of sexual violence.[33] A key lesson learned from the Special Court for Sierra Leone is that the consideration of evidence must be gender sensitive.[34]The Prosecutor sought and was denied based on timeliness, an amendment to the *Civil Defence Forces* (CDF) case indictment to include four new charges relating to sexual violence.[35] The majority thought the additional time needed by the accused to respond to these charges would cause an unreasonable delay of the trial.[36] However, it may take longer to secure evidence of gender-based crimes (especially sexual violence crimes) because of psychological trauma to survivors who may live in fear of ostracization and reprisals, as well as the general underreporting of these crimes.[37] Additionally, prosecutorial planning may be to blame for the insufficiency of SGBV charges laid, along with a tendency to focus on "easier to prove" crimes such as murder.[38] To combat this tendency, the Best Practices Manual of the International Criminal Tribunal for Rwanda (ICTR) suggests an "integrated approach" where sexual violence is given the same priority as other crimes, rather than marginalized or collateral treatment.[39] In contrast, the ICTR used a target-based approach which required investigating high-level actors. However, as these actors were not always the direct perpetrators of sexual violence, the requisite evidentiary link to the crime was lacking and so this approach failed.[40] Thus, the ICTR Best Practices Manual suggests using a crime-based approach which requires an investigation of the crime, followed by identification of the perpetrators.[41] Ineffective prosecution undermines both the deterrent effect and restorative justice aims of the ICC as powerful men continue to enjoy impunity for sexual violence they helped perpetrate, failed to prevent, or failed to appropriately punish and condemn within their ranks.

Future Considerations

The prosecution of Mr. Dominic Ongwen has potentially far-reaching consequences for SGBV victims, particularly if they are participating as witnesses at trial with independent legal representation. Mr. Dominic Ongwen was charged with 70 counts of war crimes and crimes against humanity, including SGBV crimes, although it should be noted the SGBV crimes were excluded from the original charges.[42] 1400 of 2026 victims participating in the *Ongwen* case are using two external legal representatives, while the remainder are relying on the Office of the Public Counsel for the Victims (OPCV).[43] Pre-Trial Chamber II decided the external lawyers did not qualify for financial assistance from the ICC, similar to legal aid, while the OPCV would be funded by the Court.[44] Civil society organizations are concerned this decision may create a two-tiered system given the precedent that victims who choose their own legal counsel may not receive legal aid from the court.[45]

The reversal of the only successful conviction for SGBV crimes by the Appeals Chamber decision of *Bemba* was seen as a devastating blow to not just the victims in the Central African Republic but the millions of SGBV survivors the ICC has in its jurisdiction by its own account.[46] Jean-Pierre Bemba's conviction was overturned largely on an analysis of the elements of command responsibility and procedural grounds which are beyond the scope of this paper. Nonetheless, Bemba was also the first

successful conviction for criminal responsibility of a military commander and the broader repercussions of its nexus with rape as a weapon of war deserve some scrutiny.[47] Jurisdiction principles such as admissibility, complementarity, and sufficiency in gravity, ensure peripheral cases are not tried by the ICC, unlike its predecessor Tribunals which were able to prosecute the direct lower-level perpetrators of sexual violence.[48] Direct perpetrators of sexual violence will necessarily escape ICC liability and international justice under the premise that their commanders will be held to account. Yet, the expanded modes of liability remain unexploited tools with remoteness issues and the difficulty of making a requisite link between the criminal SGBV act and the directions of high-level actors, illustrated in this case by the fact that Mr. Bemba gave commands from a different country.[49] Ultimately, the ICC has unrealized potential to have serious impact symbolically and normatively to end the rampant impunity for SGBV, if it can definitively solve this troublesome linking issue.[50]

Conclusion

The OTP has had the benefit of learning from the best practices of previous ad hoc international Tribunals that did not have the privilege of experience and precedent making its failure to successfully prosecute SGBV crimes all the more disappointing. First and foremost, the OTP must remedy issues with prosecutorial planning and investigation in future SGBV cases. In the interim, more can be done in relation to reparations and the TFV to ensure funds are reaching SGBV survivors that need them the most, given funds are currently contingent on elusive successful SGBV convictions. It is the responsibility of the Prosecutor under the Rome Statute article 54(1)(b) to ensure effective prosecution, including inter alia SGBV crimes. Victims of SGBV crimes should not be further disadvantaged monetarily by the OTP's inability to fulfill its own mandate.

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