

SEXUAL VIOLENCE AND THE MALE PERSPECTIVE

I. INTRODUCTORY REMARKS

1. Good morning ladies and gentlemen.
2. My remarks will touch on the elements of an access-to-justice based approach to addressing sexual violence against men. My brief presentation will focus on: (i) some history on how sexual violence crimes became incorporated into international criminal law, (ii) the initiatives at the International Criminal Court in dealing with sexual and gender based violence cases, and (iii) the challenges to end impunity faced by the ICC.

II. HOW RAPE BECAME A CRIME AGAINST HUMANITY

3. Now for some history - permit me to give a brief reminder of how sexual violence came on board the platform of international law. This is important because hitherto, the prosecution of gender-based crimes was

unsatisfactory and in some cases non-existent. The Nuremberg trials in 1945 of prominent Nazis and the Tokyo trials in 1946 are cases in point. No rape charges were brought at these two trials despite mass rapes having been committed.

4. It is through case law or “judge-made law” that has brought into focus gender based violence in international law. Historic precedents by the *ad hoc* tribunals such as the International Criminal Tribunal for Rwanda and the Former Yugoslavia have been pioneers in the recognition of gender-based violence especially rape as one of the gravest crimes and serious breaches of international humanitarian law. Described as perhaps the most ground breaking decision advancing gender jurisprudence worldwide was the landmark case of Jean- Paul Akayesu (1998). This was the first case to provide a definition of rape under international law. Rape was now identified as one of

the ingredients of genocide and a crime against humanity.

5. Subsequently at the ICTY, there were developments in various cases starting with the *Celebici* case in 1998, a judgment which entailed the first conviction of an accused person for rape as torture. The Trial Chamber said upon conviction, **“there can be no question that acts of rape may constitute torture under customary law”**¹. In another case, the *Foca Rape* Case in 2001, the ICTY found rape as a crime against humanity for the first time in relation to the war in Bosnia in the 1990s because it was satisfied the acts of rape were crimes against humanity as **“they were part of a systematic and widespread campaign as the acts included elements of enslavement”**.
6. Based on the case law cited above, the NGOs with the support of some governments lobbied successfully for

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<http://www.icty.org/x/cases/mucic/press/en/PR364%20Celebici%20case%20the%20Judgment%20of%20the%20Trial%20Chamber..pdf>>

inclusion of gender based crimes as crimes against humanity in the Rome Statute which explicitly recognises rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other forms of sexual violence, as war crimes and crimes against humanity.

III. THE INITIATIVES AT THE INTERNATIONAL CRIMINAL COURT

7. The Rome Statute gives the court broad mandate to ensure the safety, physical and psychological well being, dignity and privacy of victims and witnesses, especially where the crimes involve sexual or gender violence or violence against children. The Office of the Prosecutor is required to respect the interests and personal circumstances of victims and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children. All organs of the Court are also required to

take appropriate measures to protect sexual and gender violence victims at all phases of the proceedings. Importantly, the Court's statutory scheme places no gender limitations on these considerations – they apply to men and women equally.

8. The Statute places special emphasis on these victims. In general, trials at the ICC are conducted in public. However, full publicity can be very difficult for victims of sexual violence. The prospect of testifying to sexual violence and having the whole world know that this happened to them may even prevent people from coming forward to testify. In response to these difficulties, Article 68(2) of the Statute permits exceptions to the general principle of public proceedings. This provision says that these exceptional measures, unless otherwise ordered, “shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, [...], having

regard to all the circumstances, particularly the views of the victim or witness.”

9. Procedurally, the ICC can take many measures to facilitate the testimony of vulnerable sexual violence witnesses. First, the Chamber can order a number of protective measures, such as: (i) face and voice distortion, so the public cannot see a witness’s real face or hear their real voice; (ii) use of a pseudonym in place of a witness’s name and (iii) redaction of all identifying information from public broadcasts and all public transcripts. Second, the Chamber can order special measures to help facilitate the testimony of a witness. These may include: (i) having a support person sit next to the witness while they testify; (ii) requiring the parties to ask neutral, non-confrontational questions when discussing sexual violence and (iii) installing a partition so that the witness can testify without having to see and be seen by the accused.

10. However, despite the allegations that rape had been committed in the cases before the ICC, the first sexual violence trials at the court did not lead to convictions. In *Ngudjolo*, the Chamber determined that rape had occurred, but could not prove beyond reasonable doubt that Mr Ngudjolo was leading the combatants who were found to have committed these crimes.² In *Katanga*, the Chamber also determined that rape had occurred, but could not find that this crime was part of the common purpose of Mr Katanga's group.³

11. Rape also appeared in the confirmed charges in the *Muthaura and Kenyatta* case. Of note, in this case the Pre-Trial Chamber found substantial grounds to believe that forcible circumcision and penile amputation against men occurred. Charges based on these facts were confirmed as "other inhumane acts", but not as

² Ngudjolo TJ, ICC-01/04-02/12-3-tENG, paras 337-38, 503.

³ Katanga TJ, paras 1023, 1664.

sexual violence crimes against these men. The Pre-Trial Chamber explained that:

[T]he evidence placed before it does not establish the sexual nature of the[se] acts [...]. Instead, it appears from the evidence that the acts were motivated by ethnic prejudice and intended to demonstrate cultural superiority of one tribe over the other. Therefore, the Chamber concludes that the acts under consideration do not qualify as other forms of sexual violence.⁴

All charges in this case, including those based on penile amputation, were withdrawn before the commencement of trial due to insufficient evidence.

12. The first rape conviction in ICC history came on 21 March 2016 when three judges, including myself, convicted Jean-Pierre Bemba Gombo for rape as a war crime and a crime against humanity. These crimes were committed in the Central African Republic by a contingent of troops that Mr Bemba had effective authority and control over. Mr Bemba did not commit these crimes himself as such, but rather was convicted

⁴ ICC-01/09-02/11-382-Red, para. 266.

for failing to exercise control properly over his forces, i.e. command responsibility. He was sentenced to 18 years of imprisonment, and his case is currently on appeal.

13. In particular, Mr Bemba was held responsible for the rape of one man in addition to many women and girls. On the same day this man's wife, daughters, and granddaughter were attacked, three armed soldiers forcefully penetrated his anus with their penises in his compound while his family and neighbour looked on. After these events, he could not walk and he was only treated with traditional leaves. This man testified that people in his community disrespected him and that he considered himself a "dead man".⁵

14. It must also be noted that all three active ICC trials have confirmed sexual violence charges. The *Gbagbo/Blé Goudé*, *Ntaganda* and *Ongwen* trials all have rape charges. Mr Ongwen is also charged with a number of

⁵ Bemba TJ, ICC-01/05-01/08-3343, para. 494.

other crimes predicated on sexual and gender based violence: forced marriage, torture, enslavement, forced pregnancy, outrages upon personal dignity, and sexual slavery. The *Ntaganda* case involves sexual slavery charges as well.

15. When accused are convicted, for sexual violence or any other crime, victims are entitled to reparations under the ICC statutory scheme.
16. ICC reparations orders must define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted. This requirement was the reason why no reparations were ordered for sexual violence crimes in the *Katanga* case.⁶ The reparations order in the *Bemba* case is currently pending.
17. The Rome Statute also creates a Trust Fund to assist the most vulnerable victims with physical and psychological rehabilitation and enables them to

⁶ ICC-01/04-01/07-3728-tENG, para. 152.

receive assistance. The Fund also helps with projects aimed at rebuilding the lives of victims at the community level. It receives funding from state parties, institutions and individuals. This has helped to launch 34 projects that have been approved by the court, most of which are under way in the Democratic Republic of Congo (DRC) and Uganda with projects due to start in Central African Republic (CAR) to support victims of sexual violence (Gender Report Card 2009). So far over one million victims mostly of gender based violence have received assistance. Should a convicted person not be able to pay for reparations ordered against them, the Trust Fund can also complement this award.

18. In addition to the Trust Fund, the court has a Victims and Witnesses Unit which provides support and protection to victims and witnesses, in particular, victims of gender based violence and children. This unit promotes gender sensitive measures to facilitate the testimony of victims of sexual violence. They have

mental health experts on staff to recommend protective and special measures for witnesses who come into their care. They are also required to have staff with expertise in trauma, including trauma related to crimes of sexual violence.⁷

IV. CHALLENGES TO ENDING IMPUNITY

19. The Rome Statute is geared towards ending impunity. In reality the ICC is a court of last resort which will prosecute individuals where States have taken no action, or are genuinely unwilling or unable to prosecute. Furthermore, as a matter of policy, the ICC attempts to focus only on those who bear the greatest responsibility for the most serious crimes. As such, it generally falls to States to investigate and prosecute the “mid to lower level perpetrators” and to do this; they need the collective will to improve their capacity to prosecute such crimes. The ICC cannot end impunity alone; there is need for extensive cooperation from state

⁷ Article 43(6) of the Statute.

parties, international organizations and NGOs as well as continuous capacity building for judges, legal counsels, the office of the prosecutor and investigators in dealing with gender based violence. These are all mechanisms that can be used to ensure accountability for gender based crimes.

V. CONCLUSION

20. Notwithstanding the existence of the Rome Statute, there is still evidence that gender based violence is being used as a weapon of war in many conflicts. Because of this, I call upon all states to ratify the Rome Statute and make it part of their national laws and thereby domesticating it. In this way, we can all be part of a joint and universal effort to fight impunity.

H.E Vice-President Joyce Aluoch

International Criminal Court.