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GENDER BASED CRIMES AT THE INTERNATIONAL CRIMINAL COURT

Sophie O'Connell

Abstract

The International Criminal Court (ICC) was established in 2002 and its Statute (Rome Statute¹) was heralded as an advanced enumeration of gender based crimes. However, in the three cases before the Court in which charges have been confirmed: *The Prosecutor v Thomas Lubanga Dyilo*² (*Lubanga*), *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chii*³ (*Katanga and Ngudjolo*) and *The Prosecutor v Jean-Pierre Bemba Gombo*⁴ (*Bemba*) there are either no charges for gender based crimes as in *Lubanga*⁵ or the charges are not comprehensive. This article examines why despite the extensive provision in the Rome Statute the ICC is failing to advance the prosecution of gender based crimes. It also considers the wider impact of this failure in particular on the ICC's role in assisting national courts to prosecute war crimes and in deterring the commission of such crimes.

Keywords: Gender based crimes, International Criminal Court, Rome Statute.

Introduction

Rape and sexual violence in armed conflict have been treated with impunity, considered inevitable or the 'spoils' of war.⁶ Copelon notes that before the 1990s gender crimes were largely invisible or trivialised. She highlights, as examples, the 'comfort women' in Japan in the 1930s and 1940s and the failure of the international criminal tribunals for Rwanda and Socialist Federal Republic of Yugoslavia (SFRY) to prosecute gender based crimes in the early stages.⁷ It is only in the international criminal tribunals, created in the 1990s, that the international community started to address gender based crimes committed in conflicts. McGlynn notes that in response to mass rape in the SFRY, feminists campaigned for the

¹ Rome Statute of the International Criminal Court, UN Doc A/CONF 183/9

<http://untreaty.un.org/cod/icc/statute/romefra.htm>

² ICC-01/04-01/06 Details of all the cases currently before the Court are available on <http://www.icc-cpi.int>

³ ICC-01/04-01/07

⁴ ICC-01/05-01/08

⁵ ICC-01/04-01/06

⁶ Copelon, R., 'Gender crimes as war crimes: integrating crimes against women into international criminal law,' (November 2000) *McGill Law Journal* p.219

⁷ *Ibid.*

international criminal tribunals to prosecute these crimes and recognise the 'systematic, harmful nature of rape.'⁸ The international criminal tribunals for Rwanda and the SFRY were instrumental in developing gender jurisprudence in international criminal law. The International Tribunal for Rwanda⁹ (ICTR) in the landmark case of *Prosecutor v Akayesu*¹⁰ recognised rape and sexual violence as constituting acts of genocide and of rape as a form of torture. Askin describes its significance, in terms of the law developed, as 'unparalleled.'¹¹ The International Criminal Tribunal for former Yugoslavia (ICTY) also developed gender jurisprudence recognising the egregious nature of rape and sexual violence. Two important cases were *Celebici*¹² in which the ICTY held that rape constituted torture, and *Foca*¹³ where it held that rape was a crime against humanity, and convicted the defendant of sexual enslavement.

Against this backdrop of developing gender jurisprudence in the international tribunals, the final drafting of the Statute for an International Criminal Court took place.¹⁴ Copelon observes that the international criminal tribunals were an 'important foundation for the codification of sexual violence [in the Statute].'¹⁵ The Statute¹⁶ was adopted in Rome on 17 July 1998 and the International Criminal Court (ICC/the Court) came into force on 1 July 2002. The Rome Statute has been hailed as the 'most advanced articulation in the history of gender based violence.'¹⁷ There were, and are, high expectations of the Court's role in prosecuting gender based crimes. The extent to which the ICC is meeting its obligation to prosecute these crimes will be examined by analysis of cases where charges have been confirmed currently before the Court.

⁸ McGlynn, C., 'Rape as "Torture"?' Catharine Mackinnon and Questions of Feminist Strategy," (2008) 16 *Feminist Legal Studies* at p.72. The international criminal tribunals did not initially include rape as a crime.

⁹ Established under SC Res 955 S-RES-955 (1994). See [http://www.undemocracy.com/S-RES-955\(1994\).pdf](http://www.undemocracy.com/S-RES-955(1994).pdf)

¹⁰ ICTR-96-4-T (1998) For the judgment see: <http://www.unict.org/Portals/0/Case/English/Akayesu/judgment/akay001.pdf>

¹¹ Askin, K. D., 'Gender crimes jurisprudence in the ICTR: positive developments,' (2005) 3 (4), *Journal of International Crime Justice* p.1012

¹² IC-96-21-T *The Prosecutor v Zejnil, Deliac et al* (1998) ('*Celebici*' case) <http://www.icty.org/x/cases/music/tjug/en/cel-tj981116e.pdf>

¹³ IT-96-23-T *The Prosecutor v Dragoljub, Kunarac et al* (2001) ('*Foca*' case) <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>

¹⁴ The United Nations International Law Commission submitted a draft Statute in 1994 and further drafting took place between 1996 and 1998.

¹⁵ Copelon, 'Gender crimes as war crimes,' p. 231

¹⁶ Rome Statute of the International Criminal Court, UN Doc A/CONF. 183/9 <http://untreaty.un.org/cod/icc/statute/rome.htm>

¹⁷ Women's Initiatives for Gender Justice, Inder, B., *Making a Statement: A Review of Charges and Prosecutions for Gender Based Crimes before the International Criminal Court*, (February 2010) <http://www.iccwomen.org/publications/articles/docs/MaS22-10web.pdf>

1 Gender Based Crimes in the Rome Statute

The ICC has jurisdiction over ‘the most serious crimes of concern to the international community as a whole.’¹⁸ These include crimes against humanity and war crimes.¹⁹ Crimes against humanity are defined in Article 7 and draw on definitions from international war crimes tribunals. While rape had previously been included in three of five international war crime statutes, additional forms of sexual violence had never been explicitly defined;²⁰ the statutes of the international tribunals for Rwanda and SFRY did not list crimes of sexual violence other than rape. In direct contrast, the Rome Statute specifies gender based crimes including sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence of comparable gravity.²¹ This is an important recognition of the varied forms that gender based crimes may take; their specific enumeration highlights them as among the most serious. With regard to war crimes the definition stems from the Geneva Conventions²² where serious crimes are listed as ‘grave breaches’. However, rape and sexual violence are not included. The improvement on this position witnessed in the Rome Statute is that it specifically enumerates both rape and different forms of sexual violence as war crimes.

Another important difference is that the Rome Statute, unlike the Geneva Conventions, does not link sexual violence to an attack on a woman’s honour. The Geneva Conventions refer to rape and sexual violence in terms of ‘family honour and rights,’²³ which Copelon asserts is a ‘characterisation that has reinforced the secondary importance as well as the shame and stigma of victimised women.’ She highlights that by characterising rape and sexual violence in this way, the crime becomes an offence against male dignity and an attack on their property. The Rome Statute cites rape and other forms of sexual violence as crimes in their own right, thereby emphasising the serious and egregious nature of the crimes, rather than reinforcing stereotypes of shame and honour.²⁴

¹⁸ Rome Statute Preamble and Article 1

¹⁹ Rome Statute Article 5 also includes genocide and aggression. As these are not charged in the cases in which the charges have been confirmed they are not considered here.

²⁰ Askin, K. D., ‘Crimes within the Jurisdiction of the International Criminal Court,’ (1999) 10 (1) *Criminal Law Forum*, p.42

²¹ Rome Statute Article 7(1)(g)

²² The Geneva Conventions of 1949 comprise of four treaties three of which were revised after the Second World War and a fourth added. Two Protocols were added in 1977, Protocol I expands on the treatment of victims in an international conflict and Protocol II deals with internal conflict. A third Protocol was added in 2005. <http://www.icrc.org/web/eng/sitengo.nst/html> (last accessed 12 May 2010)

²³ Article 27 of the Fourth Geneva Convention and the 1977 Additional Protocols

²⁴ See also the discussion in Bedont, B, and Martinez, K., “Ending Impunity for Gender Crimes under the International Court,” (1999) VI(1), *The Brown Journal of World Affairs*, p.70

The Elements of Crimes²⁵ sets out definitions of the crimes contained in Articles 6-8 of the Statute to aid in their interpretation. In the Elements of Crimes, torture can constitute a crime against humanity, or a war crime in an international or internal armed conflict.²⁶ To charge an act as torture it must meet the threshold of 'severe' physical or mental pain, which is not problematic in many instances of rape or sexual violence.²⁷ The stumbling block in other jurisdictions - for example, the European Court of Human Rights and the Inter-American Court of Human Rights - is the requirement for State involvement.²⁸ These jurisdictions have recognised that rape constitutes torture but only in cases where State involvement is clear.²⁹ The definition in the Elements of Crime does not mention the State; it is sufficient that the victim is under the control of the accused,³⁰ or that there is a specific purpose.³¹ This gives the Court wider scope for charging rape as torture than in other jurisdictions.

2 Gender Based Crimes in Cases in which Charges have been Confirmed

The Office of the Prosecutor (OTP), part of the ICC, is responsible for conducting investigations and prosecutions. The trial process starts in the Pre-Trial Chamber which hears the preliminary evidence and confirms or declines the charges. The Trial Chamber hears the substantive case and there is also an Appeals Chamber. The Chambers consist of three judges (or a single judge in the Pre-Trial Chamber) who are appointed to a Division on the basis of their experience in that area. Currently, there are three cases before the Court in which charges have been confirmed. Two relate to the situation in the Democratic Republic of the Congo (DRC) and are at trial stage: *The Prosecutor v Thomas Lubanga Dyilo*³²

²⁵ ICC-ASP/1/3 part II-B <http://www.icc-int/menus/ICC/Legal+Texts+and+Tools/Official+Journal/Elements+of+Crimes.htm>

²⁶ Rome Statute Articles 7(1)(f), 8(2)(a)(ii)-1 and 8(2)(c)(i)-4 respectively

²⁷ Feminists are divided as to whether all rape should constitute torture, first put forward by Catharine Mackinnon in Mackinnon, C., *Towards a Feminist Theory of the State*, (1991, Harvard University Press). McGlynn questions whether reconceptualising rape as torture will obscure the gendered nature of the crime and the extent to which it occurs. She advocates a more nuanced approach recognising that the label of torture serves an important purpose in highlighting the particular nature of some rapes. McGlynn, 'Rape as a "Torture"?' pp.77-78

²⁸ Pearce, H., 'An examination of the international understanding of political rape the political significance of labelling it torture,' (2002) *International Journal of Refugee Law* p.549 Although the ECHR requires state involvement, McGlynn is optimistic that the European Court of Human Rights will recognise torture beyond the paradigmatic state actor and victim scenario. McGlynn, C., 'Rape, torture and the European Convention on Human Rights,' (2009) 58(3), *International and Comparative Law Quarterly* pp.565-595

²⁹ See *Sukran Aydin v Turkey* (1998) 25 E.H.R.R. 251; *Raquel Marti de Mejia v Peru* (1996) Case 10.970, Report No. 5/96 Inter-American Court of Human Rights O.E.A./Ser.L./V/II.91, Doc 7

³⁰ ICC-ASP/1/3 part II-B Article 7(1)(f) <http://www.icc-int/menus/ICC/Legal+Texts+and+Tools/Official+Journal/Elements+of+Crimes.htm>

³¹ ICC-ASP/1/3 part II-B Articles 8(2)(a)(ii)-1 and 8(2)(c)(i)-4 <http://www.icc-int/menus/ICC/Legal+Texts+and+Tools/Official+Journal/Elements+of+Crimes.htm>

³² ICC-01/04-01/06

(Lubanga) and *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*³³ (Katanga and Ngudjolo). The third case relates to the situation in the Central African Republic (CAR) and is *The Prosecutor v Jean-Pierre Bemba Gombo*³⁴ (Bemba), which is at the pre-trial stage. The trial was due to start on 14 July 2010 but has been postponed.

Thomas Lubanga is the first defendant to be tried before the ICC. He was the founder and leader of the Union des Patriotes Congolais (UPC) militia, which along with other militia groups was active in the Ituri region in the DRC. On opening the investigation into the DRC in 2004, the Chief Prosecutor noted that reports from States and Non Governmental Organisations (NGOs) pointed to a pattern of rape and torture.³⁵ Similarly, from its investigations in two field missions (the second focusing on the activities of the UPC) in 2006, the Women's Initiatives for Gender Justice (Women's Initiatives)³⁶ concluded that 'the use of rape and other forms of sexualised violence are widespread and systematic ... there was a pattern of rape, abduction, sexual slavery, torture and inhumane treatment.'³⁷ This report and others from the United Nations and NGOs documenting gender based crimes were sent to the OTP.³⁸ However, Lubanga has not been charged with any gender based crimes. The only charges are for the enlistment and conscription of child soldiers.³⁹ Moreover, despite witness testimony that the situation was worse for girl soldiers, who were both fighters and sexual slaves, no girls have been recognised as victims of rape or sexual violence.⁴⁰

In response to a request from the victims' Legal Representative, the Pre-Trial Chamber considered there to be sufficient evidence to examine whether the charges of inhumane treatment and/or cruel treatment and sexual slavery could be included. The Chamber issued a notice of the possibility of triggering the procedure under which the facts could be re-

³³ ICC-01/04-01/07

³⁴ ICC-01/05-01/08

³⁵ ICC-OTP-20040623-59 <http://www.icc-cpi.int/menu/icc/press%20and%20media/press%20releases2004/the%20office%20of%20the%20%20prosecutor%20of%20the%20international%20criminal%20court%20situation%20icc%200164/related%20cases/icc%200164%200106/court>

³⁶ Women's Initiatives for Gender Justice has grown out of the Women's Caucus for Gender Justice formed in 1997 to work on the drafting of the Statute. It is an international human and women's rights organisation which advocates for gender inclusive justice at the International Criminal Court. See <http://www.iccwomen.org>

³⁷ Women's Initiatives for Gender Justice, Inder, *Making a Statement* p.22

³⁸ *Ibid.* p.25

³⁹ ICC-01/04-01/06-08 Decision on the Confirmation of Charges (29 January 2007) <http://www.icc-cpi.int/iccdocs/doc/doc266175.pdf>

⁴⁰ *Ibid.* p.71

characterised as different charges under Regulation 55(2).⁴¹ The Trial Chamber's inventive interpretation was to suggest each part of the regulation applied to different stages of the trial process, which would allow the facts to be re-characterised without an adjournment. This was appealed by the Prosecution⁴² and Defence⁴³ and the Appeals Chamber overturned the Pre-Trial Chamber's decision, reasoning that it had misinterpreted the regulation, and the charges amounted to additional charges which if included could jeopardise the rights of the accused.⁴⁴ Ultimately, the Pre-Trial Chamber could not circumvent the Prosecutor's failure to set out all relevant charges before the Confirmation Hearing.

It is clear that evidence of gender based crimes was widely available and known to the Prosecutor. The witnesses' testimony has been described as 'supporting the additional charges of rape and other forms of sexual violence.'⁴⁵ In addition, there was no reason why the Prosecutor could not follow up the evidence as the 'women were willing and prepared to be interviewed and provide information'⁴⁶ and Women's Initiatives also noted that despite security issues it was possible to obtain this information. This raises the question as to why the Prosecutor did not charge Lubanga with any gender based crimes. There appear to be three main reasons for this failure:⁴⁷ Firstly, the lack of gender competence in managing investigations into gender based crimes and the absence of a Gender Legal Adviser, despite the statutory requirement to appoint to this position.⁴⁸ Secondly, the failure to establish contacts and build relationships with women's and other community groups to enable evidence to be followed up. Independent investigations by the OTP are described as a 'minor factor'⁴⁹ in the collection of evidence, reflecting the difficulties of working in conflict situations and a lack of resources to investigate on the ground. Developing contacts and

⁴¹ ICC-01/04-01/06-2049 Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with regulation 55(2) of the Regulations of the Court. (14 June 2009) Judge Fulford dissenting. <http://www.icc-cpi.int/NR/exeres/C62EF245-F3BF-4986-B2A7-FACADFA4226.htm>

⁴² ICC-01/04-01/06-2074 Prosecution's Application for Leave to Appeal (12 August 2009) <http://www.icc-cpi.int/NR/exeres/F9BBEF99-DFBD-427D-A6D5-4E159AC7AB98.htm>

⁴³ ICC-01/04-01/06-2073 Defence's Application for Leave to Appeal (11 August 2009) <http://www.icc-cpi.int/iccdocs/doc/doc724108.pdf>

⁴⁴ ICC-01/04-01/06-2055 Appeals Chamber Judgment on the appeals of Mr Lubanga Dilyo and the Prosecutor against the decision of the Pre-Trial Chamber I of 14 June 2009 entitled: "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with regulation 55(2) of the Regulations of the Court." (8 December 2009) paras.109-112 <http://www.icc-cpi.int/iccdocs/doc/doc790147.pdf>

⁴⁵ Women's Initiatives for Gender Justice, *Gender Report Card on the International Criminal Court* (2009) http://www.iccwomen.org/news/docs/GRC09_web-2-10 (last accessed 12 May 2010) p.71

⁴⁶ Women's Initiatives for Gender Justice, Inder, *Making a Statement* p.24

⁴⁷ *Ibid.*

⁴⁸ Rome Statute Article 42(9)

⁴⁹ Stuart Verrijn, H., 'Case Comment: The ICC in trouble,' (2008) 6(3) *Journal of International Criminal Justice* p.414

networks is vital for the OTP, as Schabas notes the investigative process is more difficult for the OTP than a national prosecuting authority, as the OTP does not have unfettered access to witnesses and evidence and relies on the co-operation of States.⁵⁰ Thirdly, Women's Initiatives highlighted a lack of commitment in the OTP to identify and investigate gender based crimes. As well as the absence of a Gender Adviser, at the most senior levels in the OTP there are three times as many men as women.⁵¹ The importance of employing women with relevant expertise at all levels should not be underestimated. For example, at the international criminal tribunals the increase in importance attached to gender crimes could be traced to the participation of women.⁵²

The OTP's second investigation in the DRC does appear to have more of a gender focus. The charges confirmed against Katanga and Ngudjolo include rape and sexual slavery, constituting crimes against humanity and war crimes.⁵³ Katanga and Ngudjolo face the same charges for their alleged co-perpetration of an attack on Bogoro village in Ituri, in 2003. However, the charges only relate to this attack despite evidence of widespread gender based crimes committed by the militia forces, namely the Force de Resistance Patriotique en Ituri (FRPI) and Front des Nationalistes et Integrationnistes (FNI), of which they were senior commanders.⁵⁴ Evidence cited by the Prosecutor includes gang rape, rape in front of family members including children, loss of consciousness and unborn babies due to rape, pregnancy, and severe psychological and physical injuries as a result of crimes committed by the militia.⁵⁵ Given this evidence, the charges against Katanga and Ngudjolo are considered to be only 'partially' representative of the nature of the sexual violence committed against women.⁵⁶

Potential problems with the OTP's investigations and presentation of evidence regarding gender based crimes became apparent at the Pre Trial Confirmation of Charges hearing of

⁵⁰ Schabas, W., *An Introduction to the International Criminal Court*, (2001, Cambridge University Press) p.104

⁵¹ In 2008, Professor Catharine MacKinnon, feminist legal scholar, was appointed as Special Adviser on Gender Issues.

⁵² Bedont, B, and Martinez, K., *The Brown Journal of World Affairs* p.73

⁵³ The gender based charges confirmed are: Sexual slavery constituting a crime against humanity (Article 7(1)(g)); Sexual Slavery constituting a war crime (Article 8(2)(b)(xxii); Rape constituting a crime against humanity Article 7(1)(g); Rape constituting a war crime (Article 8(2)(b)(xxii).

⁵⁴ 'The Women's Initiatives has documented 112 cases of rape, sexual enslavement, forced marriage and torture, among other crimes, committed primarily by the FRPI, FNI and UPC militia groups in the Ituri region.' Inder, *Making a Statement* p.19

⁵⁵ *Ibid.* p.15

⁵⁶ *Ibid.*

Katanga and Ngudjolo.⁵⁷ The majority confirmed the charges of rape and sexual enslavement as crimes against humanity and war crimes but Judge Anita Usacka partly dissented.⁵⁸ In her view there was sufficient evidence of rape and sexual enslavement committed by FRPI and FNI forces, but insufficient evidence to infer that Katanga or Ngudjolo had intended or knew of their commission.⁵⁹ She highlighted the general evidence of widespread rape and sexual violence committed by the militia, and reference to one previous attack in which there had been incidences of rape and sexual slavery, as too non-specific to link the accused with the crimes.⁶⁰ In her view it would have been better to adjourn the hearing and request additional evidence from the Prosecutor to connect Katanga and Ngudjolo with the crimes.⁶¹ This is perhaps indicative of a lack of thorough investigation into gender based crimes in the DRC; the inclusion of charges for gender based crimes in the indictment is useless without an explanation of how crimes committed against women are, like other acts, part of a systematic campaign calculated to cause a devastating impact on women and their communities. Judge Usacka's analysis must cast doubt on whether the Prosecutor's evidence of rape and sexual slavery - the only gender based charges in the DRC cases - will meet the higher evidential burden at trial.

Securing comprehensive gender based charges has also been problematic in the *Bemba*⁶² case. Bemba is alleged to be the President and Commander in Chief of the Mouvement de Liberation du Congo (MLC), a militia force operating in CAR between October 2002 and March 2003. The situation in CAR was different to other conflicts because there was extensive material documenting over 1,000 incidents of rape, with the country relatively stable, and witnesses ready to testify.⁶³ The Prosecutor announced that allegations of rape would be the focus of investigations.⁶⁴ In his evidence at the Confirmation of Charges hearing, the Prosecutor cited gang rape, rape at gunpoint, ripping off clothes before rape and rape in front of families and in public.⁶⁵

⁵⁷ ICC-01/04-01/07 (30 September 2008) Decision on the Confirmation of Charges. Pre Trial Chamber I Situation in the Democratic Republic of Congo in the case of *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* Partly Dissenting Opinion pp. 214-226 <http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf>

⁵⁸ ICC-01/04-01/07

⁵⁹ *Ibid.* para.19

⁶⁰ *Ibid.* para.21

⁶¹ *Ibid.* para.29

⁶² ICC-01/05-01/08

⁶³ Women's Initiatives for Gender Justice, Inder, , *Making a Statement* p.30

⁶⁴ ICC-OTP-PR-20070522-22 (22 May 2007) Prosecutor opens investigations in the Central African Republic, , see commentary in Inder, *ibid* p.32

⁶⁵ ICC-01/04-01-07 (30 September 2008) Decision on the Confirmation of Charges para.308

The Pre-Trial Chamber confirmed the charges of rape as constituting a crime against humanity and a war crime. The Pre-Trial Chamber rejected the Prosecutor's cumulative charging approach of using the same evidence for the charge of rape and for charges of torture and outrages on personal dignity based on rape.⁶⁶ Although, the Elements of Crimes states that 'a particular conduct may constitute one or more crimes,'⁶⁷ the Pre-Trial Chamber reasoned that as there was insufficient evidence for the charges of torture and outrages on personal dignity⁶⁸ and this would place an undue burden on the Defence. The Prosecutor applied for leave to appeal, arguing that there was sufficient evidence in the amended Document Containing the Charges (DCC) and therefore the defendant's rights were not affected.⁶⁹ Women's Initiatives, granted leave to submit observations as an *amicus curiae*, stated that the Chamber had applied the cumulative charging test too narrowly, resulting in victims potentially being denied access to justice.⁷⁰ Women's Initiatives noted that precedent had been established by the ICTY in *Prosecutor v Furundzija*,⁷¹ for torture to be charged where rape victims were forced to watch family members raped.⁷² The Pre-Trial Chamber rejected the Prosecutor's leave to appeal on the basis that there is to be a 'restrictive approach'⁷³ to granting appeals. In this case the Chamber was of the opinion that refusing an appeal would not affect the fairness or expeditiousness of the trial;⁷⁴ it reasoned that the victims would still be able to participate fully in the trial, and there remained the possibility that the Trial Chamber would re-characterise the evidence as torture and outrages on personal dignity.⁷⁵

Charges of torture and outrages on personal dignity are an important recognition of the extreme and inhumane nature of the act and its impact. The inhumanity of the public nature of these rapes has been documented by the Prosecutor. The gravity of the impact on the

⁶⁶ ICC-01/05-01/08 (15 June 2009) Decision on the Charges of the Prosecutor pursuant to Article 61(7)(a) and (b) against Jean-Pierre Bemba Gombo para. 199 <http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf>

⁶⁷ Elements of Crimes General Introduction

⁶⁸ ICC-01/05-01/08 (15 June 2009) Decision on the Charges of the Prosecutor pursuant to Article 61(7)(a) and (b) against Jean-Pierre Bemba Gombo paras.291,299,300,307,311

⁶⁹ ICC-01/05-01/08 (22 June 2009) Prosecution's Application for Leave to Appeal the Decision pursuant to Article 61(7)(a) and (b) against Jean-Pierre Bemba Gombo, para.34 <http://www.icc-cpi.int/iccdocs/doc/doc701573.pdf>

⁷⁰ ICC-01/05-01/08-451

⁷¹ IT-95-17/1 (1998) <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>

⁷² ICC-01/05-01/08-466 (31 July 2009) for detailed discussion of the *amicus curiae* see Women's Initiatives for Gender Justice, *Gender Report Card* (2009) pp.140-143

⁷³ Rome Statute Article 82 (1) (a)

⁷⁴ ICC-01/05-01/08 (15 June 2009) Decision on the Charges of the Prosecutor pursuant to Article 61(7)(a) and (b) against Jean-Pierre Bemba Gombo

⁷⁵ *Ibid.* para.56. The Pre-Trial Chamber made it clear that this would be possible under regulation 55. Women's Initiatives in their submission as *amicus curiae* had contested this on the basis Statutes and Rules are applicable law not regulations.

women and their communities is described by Women's Initiatives: 'Many were rejected by their families, ostracised by their communities, contracted HIV, gave birth to children as a result of the rape and continue to experience medical complications and high levels of violence related trauma.'⁷⁶ The charges of torture and outrages on personal dignity may well better reflect the real impact of the rapes committed in CAR. The Pre-Trial Chamber's decision limits the Prosecutor's ability to bring comprehensive charges for gender based crimes in the *Bemba*⁷⁷ case and while the Pre-Trial Chamber's decision is not binding on other pre-trial chambers, it sets a precedent which, if followed, will limit the scope of charges for gender based crimes.

3 The Wider Impact

The failure to fully charge gender based crimes has repercussions beyond simply denying justice to the victims. It was envisaged that the OTP would both prosecute 'the leaders who bear the greatest responsibility for the crimes,' and work with national courts to prosecute lower level perpetrators.⁷⁸ This was certainly the role anticipated by the Prosecutor, who on assuming office said that 'the absence of trials before this court, as consequence of the regular functioning of national institutions, would be a major success.'⁷⁹ Given the problems discussed with the OTP's investigation and presentation of evidence in gender based crimes, it is difficult to see how it can assist national courts in the prosecution of these crimes. Furthermore, if the ICC does not treat gender based crimes as grave violations, there is less impetus for States to do so. Encouraging States to meet their obligations under the Rome Statute is particularly important as in many of the countries women have limited legal rights.⁸⁰ Furthermore, preliminary analysis by Women's Initiatives has found that States are excluding some of the gender provisions in the Rome Statute when implementing domestic legislation.⁸¹

Another key area in which failure to prosecute gender based crimes has a wider impact is the ICC's role in deterring the commission of such crimes. The ICC has a 'gravity threshold'

⁷⁶ Women's Initiatives for Gender Justice, Inder, , *Making a Statement* p.29

⁷⁷ ICC-01/05-01/08

⁷⁸ Paper on some policy issues before the Office of the Prosecutor, ICC-OTP, September 2003, p.3 in Murphy, R., 'Gravity issues and the ICC,' (2006) 17(3/4)*Criminal Law Forum* p.294 See also the Preamble of the Rome Statute which recalls that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."

⁷⁹ See Schabas, W., 'Complementarity in practice some uncomplimentary thoughts,' (2008) 19(1)*Criminal Law Forum* p.5

⁸⁰ Women's Initiatives for Gender Justice, Inder, *Making a Statement* p.31. For example, in the Central African Republic marital rape is not illegal, women do not have the right to inherit, there are few convictions for rape, domestic violence is considered acceptable and female genital mutilation is widely practised.

⁸¹ Women's Initiatives for Gender Justice, *Gender Report Card* p.50

and will prosecute only the 'most serious crimes of concern to the international community.'⁸² The Pre-Trial Chamber has interpreted the most serious crimes to mean those which maximise the ICC's deterrent effect.⁸³ To this end, only the most senior leaders suspected of being responsible for the most serious crimes will meet the gravity threshold. This fits with the OTP's role in prosecuting the leaders while lower level commanders are to be dealt with at the national level. The Chamber has made it clear that in its opinion only by

concentrating on this type of individual can the deterrent effect of the activities of the Court be maximised, because other senior leaders in similar circumstances will know that solely by doing what they can to prevent the systematic or large scale commission of crimes within the jurisdiction of the Court, can they be sure they will not be prosecuted by the Court.⁸⁴

As Lubanga has not been charged with any gender based crimes, and the charges against Katanga and Ngudjolo, and Bemba are limited, it is hard to see exactly how these prosecutions will deter others from carrying out rape and other forms of sexual violence. Similarly, the decision to interpret cumulative charging narrowly in the *Bemba*⁸⁵ case seems inconsistent with the aim to maximise the ICC's deterrent effect. Furthermore, de Brouwer⁸⁶ notes that in half the cases under investigation by the Court there are no charges for gender based crimes. In the cases in which gender based crimes have been charged, these charges are considered to be too narrow in light of the suspect's position and available evidence of widespread sexual violence, including evidence linking the suspect to the crimes, in the conflicts under investigation. It is obvious that any deterrent effect will only be maximised if those leaders who are prosecuted by the ICC are charged with crimes which reflect the full extent of the atrocities for which they are responsible.

The Rome Statute has comprehensive provisions relating to gender crimes but the ICC is failing to fulfil its obligation to investigate, charge and prosecute these crimes. This is clearly illustrated in the ICC's first case, *Lubanga*,⁸⁷ in which no gender based charges were brought despite overwhelming evidence of such crimes. Although in *Katanga and Ngudjolo*⁸⁸ charges of rape and sexual enslavement have been confirmed, the analysis in the dissenting opinion in the Chamber casts some doubt on whether the evidence linking the accused to the charges will be sufficient at trial. If this were to be the case there would be no gender

⁸² Rome Statute Preamble

⁸³ ICC-01/04-01/06-8 *The Prosecutor v Lubanga* Decision on the Prosecutor's Application for Warrant of Arrest, (10 February 2006) <http://www.icc-cpi.int/iccdocs/doc/doc191959.pdf>

⁸⁴ *Ibid.* para.54

⁸⁵ ICC-01/05-01/08

⁸⁶ De Brouwer, A., 'Supranational Criminal Prosecution of Sexual Violence,' in Jones, J., Gear, A., Fenton, R., and Stevenson, K., (eds), *Gender Sexualities and the Law* (Forthcoming 2010, Routledge)

⁸⁷ ICC-01/04-01/06

⁸⁸ ICC-01/05-01/08

crime convictions in the DRC cases - unbelievable in a country with such high rates of sexual violence.⁸⁹ The DRC cases highlight the OTP's lack of gender competence in managing investigations, a particular problem being the failure to establish relationships with local NGOs and affected communities and follow up evidence relevant to the elements of the crime. It is not clear yet if the Pre-Trial Chamber's narrow interpretation of cumulative charging in *Bemba*⁹⁰ will be followed, but it is a worrying precedent which may restrict access to justice for the victims of gender based crimes. These omissions are in danger of undermining the broader aims of the Court: to work with States to assume their obligations in prosecuting gender based crimes and to deter the commission of such crimes. However, we must recognise that the Court is in its infancy and is applying certain provisions for gender based crimes for the first time; if it can address these early problems, there remains hope it will live up to expectations.

⁸⁹ It is difficult to estimate the incidences of sexual violence in DRC. The United Nations Emergency Relief Co-ordinator reported that in one Eastern Congo Province between January - August 2007 4,500 cases of sexual violence had been reported. He commented that the 'sexual violence was so brutal as to defy belief.' <http://www.latimes.com/news/opinion/la-oe-holmesoct112007,06685881.story?coll=la-opinion-center> (last accessed 12 May 2010)

⁹⁰ ICC-01/05-01/08