# TRANSFORMING LEGAL CONCEPTS AND GENDER PERCEPTIONS

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## 1. INTRODUCTION

There are numerous reasons for impunity for sexual and gender-based crimes. Obstacles at the domestic level include discriminatory corroboration requirements and constructions of 'consent', and inadequate and incomplete legal prohibitions on these crimes, amongst other issues. In the international courts and tribunals, some of the impediments to successful prosecutions for these crimes have been due to assumptions about who is a victim of sexual violence, lack of prioritisation in investigation plans and in the past the inclusion of sexual violence charges in plea bargain agreements. Beyond these considerations, there is an underlying element that contributes to the unique and epidemic levels of impunity for sexual violence, and that is the partial integration, rather than the full integration, of women and concepts of gender within the structure of justice.

The law, in its legal concepts and practice, typically lags behind the human experience, and nowhere is this more poignant than in relation to sexual violence and gender-based crimes. There has been landmark jurisprudence which has recognised the gender dimensions of sexual violence, as well as the gender dimensions of other forms of criminality. Such jurisprudential highlights include: the recognition of rape as an underlying act of genocide;[1] sexual violence as a form of torture;[2] the recognition of forced marriage as a distinct crime from the crime of sexual slavery;[3] and non-invasive acts such as forced nudity as a form of sexual violence.[4] Each of these judgments has shed light on a specific aspect of sexual and gender-based violence as international crimes, and collectively, this jurisprudence provides a pathway of legal reasoning available for others to draw and expand upon.

1 *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96–4-T, 2 September 1998.
2 *The Prosecutor v. Duško Tadić*, IT-94–1-T, 7 May 1997.
3 *The Prosecutor v. Brima, Kamara & Kanu*, SCSL-04–16-T, 20 June 2007, Dissenting Opinion of Justice Doherty.
4 *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96–4-T, 2 September 1998.

Yet, despite the overwhelming numbers, millions, of mostly women and girls throughout history, and continuing today, who have been victimised through acts of sexual and gender-based crimes, only 16% of those accused of war crimes, crimes against humanity and genocide have been convicted of sexual violence through international legal mechanisms.[5]

Notwithstanding the important benchmarks, overall there has been limited and inconsistent jurisprudential progress in interpreting the law and engendering the legal concepts through a lens for crimes not obviously, but often inherently, gendered.

Systemic 'blind spots' resulting in both direct and indirect gender-based discrimination persist amongst investigators, prosecutors and judges and are reflected in the selective incorporation of 'gender' within the development of legal theories and the incomplete integration of these issues within legal concepts and liability regimes. In practice, these 'blind spots' lead to an insufficient assessment of the evidence, too few prosecutions for sexual violence and unintended invisibility of gender issues in the adjudication and interpretation of the law, including in relation to gender-based crimes.

This historic and ongoing marginalisation in the law has created a gender debt, and unless and until we transform both legal norms and gender perceptions, the justice process will continue to fail current and future generations of victims/survivors.

This article will explore two cases before the International Criminal Court which demonstrate the normative power of some of these legal blind spots and exemplify occasions on which the law, in its application and adjudication, has lagged behind the human experience of crimes considered amongst the most grave.

## 1.1. *THE PROSECUTOR V. THOMAS LUBANGA DYILO*[6]

The case of *The Prosecutor v. Thomas Lubanga Dyilo* (Lubanga) provides one of the sharpest examples at the ICC of the need to engender the law.[7] Mr Lubanga, former President of the *Union des Patriotes Congolais* (UPC) and Commander-in-Chief of the *Forces Patriotiques pour la Liberation du Congo* (FPLC), was

5 Brigid Inder, Executive Director, Women's Initiatives for Gender Justice, Special Advisor on Gender to the ICC Prosecutor, speech at the 'Launch of the Policy on Sexual and Gender-based Crimes by the ICC Office of the Prosecutor', 7 December 2014 (United Nations, New York), available at: www.iccwomen.org/documents/Global-Summit-Speech.pdf. Research on file with the Women's Initiatives for Gender Justice.

6 This section is based on an interview with Brigid Inder, Executive Director, Women's Initiatives for Gender Justice, referenced in Durbach and Chappell 2014, pp. 543–562.

7 *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04–01/06–2842, 14 March 2012. See also Women's Initiatives for Gender Justice, 'First Conviction by the ICC', 14 March 2012, available at: www.iccwomen.org/documents/Press-Statement-on-Lubanga-conviction.pdf.

charged with the war crimes of conscripting and enlisting children under the age of 15, and using them to participate actively in hostilities in the Ituri province of the Democratic Republic of the Congo (DRC), between 1 September 2002 and 13 August 2003.[8] Mr Lubanga was ultimately convicted for these crimes as a co-perpetrator under Article 25(3)(a) of the Rome Statute.[9]

Although Mr Lubanga was not indicted explicitly for gender-based crimes, testimony about these acts comprised a significant part of the trial. At least 21 out of 25 prosecution witnesses testified about the presence of girl soldiers within the UPC and at least 15 witnesses testified about crimes of sexual violence including the rape of girl soldiers by UPC commanders and other combatants within their ranks.[10] The testimonies of former child soldiers and other former members of the UPC militia, described some of the gender dimensions within the crimes for which Mr Lubanga was convicted – acts of sexual violence, the roles to which girls within the UPC were assigned, and the treatment of female soldiers.

Interviews conducted in 2006 and 2007 by the Women's Initiatives for Gender Justice (or Women's Initiatives) with former UPC child soldiers highlighted the horror of being conscripted, and enlisted, by this militia.[11] Reportedly, girls were regularly raped, many from the moment of abduction, with some of the most intense periods of sexual violence occurring during the initial abduction phase and once they were relocated to the militia training camps.[12]

According to the interviewees, the life of a child soldier within the UPC was marked by violence, hardship and suffering on a daily basis. The Women's Initiatives' documentation indicates that at the training camps, the children were deprived of sleep, forced to consume drugs, and shown how to fight. Newly enlisted and conscripted children were often made to walk at the front of the troops in battle to provoke gunfire, thus enabling UPC armed fighters to see where the opposing militia combatants were located. The children, girls and boys, young men and women, were made to fight and forced to kill.[13]

Sexual violence, in armed conflict, is often used as an effective mechanism for demonstrating control and ownership including over child soldiers, and for severing attachment with their families and childhood associations prior

8 *The Prosecutor v. Thomas Lubanga Dyilo,* ICC-01/04–01/06–803-tEN, 29 January 2007. See also, Women's Initiatives for Gender Justice, *Gender Report Cards on the International Criminal Court 2008*, *2009, 2010, 2011 and 2012*.

9 *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04–01/06–2842, 14 March 2012.

10 Women's Initiatives for Gender Justice, *Gender Report Card on the International Criminal Court 2012*, p. 160.

11 Documentation on file with the Women's Initiatives for Gender Justice. Inder 2013.

12 Brigid Inder, Executive Director, Women's Initiatives for Gender Justice, 'The ICC, Child Soldiers and Gender Justice', *The Parliament Magazine,* 21 November 2011, Issue 338; Inder 2013.

13 Brigid Inder, Executive Director, Women's Initiatives for Gender Justice, 'The ICC, Child Soldiers and Gender Justice', *The Parliament Magazine,* 21 November 2011, Issue 338.

to abduction. Based on documentation material produced by the Women's Initiatives for Gender Justice, rape and sexual enslavement of girls within the UPC appear to have been integral components of induction into the militia group, occurring to such an extent that perhaps rape could be considered an indicator of enlistment and conscription for girl soldiers. Being raped, witnessing rape and being forced to rape were regular occurrences within the militia group, especially for new conscriptees.[14]

In addition, girls and young women within the UPC were sometimes assigned as bodyguards to commanders and often simultaneously designated as their sexual property. As bodyguards they were required to procure other girls and young female civilians for the sexual pleasure of their commander. Amongst the many roles children are required to play within militias, including within the UPC, it appears that only girls and other female 'soldiers' are involuntarily assigned to militia leaders for the purpose of sex.

It is clear from the testimony in the Lubanga case, emblematic of experiences of other children instrumentalised as combatants by militias and armed forces worldwide, that the crimes of enlistment, conscription and use are gendered.

According to the testimony of Radhika Coomaraswamy, UN Secretary General's Special Representative (SRSG) on Children in Armed Conflict who was called by the Prosecution as an expert witness in the Lubanga trial, girls and young women within militias are required to perform multiple combat and non-combat roles.[15] Based on the work of her Office, SRSG Coomaraswamy testified that girl soldiers are often forced to provide domestic services within militia camps, they may also be required to patrol check-points or act as porters or scouts.[16] Girl soldiers are also forced into sexual slavery,[17] or given as 'bush wives' to commanders.

The UPC's enlistment, conscription and use of children and the gendered expressions of these crimes are not unique to this militia group or to the children of Ituri, north-eastern DRC.[18]

The commonality of the commission of these crimes and the harmed suffered, challenge the traditional legal concept of what it means to be victimised through the crimes of enlistment, conscription and use. The Lubanga case, therefore, was a significant opportunity for a review of the legal concepts of these crimes in light of the inherent gender dimensions exposed by the evidence in relation to the charges and the universality of this experience.

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14 *Ibid*.

15 Transcript of the International Criminal Court, ICC-01/04–01/06-T-223-ENG, 7 January 2010, p. 30, lines 11–19.

16 *Ibid*, p. 14, lines 10–14.

17 *Ibid*, p. 14, lines 10–14, p. 30, lines 11–19.

18 *Annual report of the Special Representative of the Secretary-General for Children and Armed conflict*, A/HRC/28/54, 29 December 2014, available at: www.un.org/ga/search/view_doc.asp?symbol=A/HRC/28/54%20&Lang=E&Area=UNDOC.

Disappointingly, the Lubanga Trial Chamber did not appear to apply the full extent of the victimisation, harm and criminality apparent in the evidence to their consideration of the legal concepts of enlistment, conscription and use. The Chamber's apparent focus on culpability alone and its preoccupation with the absence of explicit charges for crimes of sexual violence, appear to have distracted the majority of the bench from fully applying the evidence to the crimes. It also appears to have led to a number of assumptions including: that without explicit sexual violence charges, there were no gender dimensions to be considered in relation to the charges; and that sexual violence could only be considered in the context of culpability and not in the context of the legal concepts of enlistment, conscription and use.

In the judgment, the Trial Chamber declined to substantively discuss the evidence of sexual violence in relation to the charges and made no legal finding on whether sexual violence could or should be properly included within the scope of the crime of use.[19] In addition, the majority did not address sexual violence or any other gender dimensions of this crime, or the crimes of enlistment and conscription.

Judge Elisabeth Odio Benito, offered a dissenting opinion specifically on the approach of the Chamber to the legal concept of 'use' and the issue of sexual violence, where she argued that:

> Although the Majority of the Chamber recognises that sexual violence has been referred to in this case, it seems to confuse the factual allegations of this case with the legal concept of the crime, which are independent. By failing to deliberately include within the legal concept of 'use to participate actively in the hostilities' the sexual violence and other ill-treatment suffered by girls and boys, the Majority of the Chamber is making this critical aspect of the crime invisible. Invisibility of sexual violence in the legal concept leads to discrimination against the victims of enlistment, conscription and use who systematically suffer from this crime as an intrinsic part of the involvement with the armed group.[20]

Attention to legal concepts in the context of a trial does not detract or add to the finding of guilt or innocence against an accused. Such considerations are not confined by the facts of a case and exist outside of the evaluation of the performance of the prosecution. Consideration of legal concepts is an investment in the development of the law, intended to add greater clarity and accuracy to its application.

The case against Thomas Lubanga was a missed opportunity for the law to catch up with the reality of the experiences of child soldiers and to contribute

19 *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04–01/06–2842, 14 March 2012, para. 630; Women's Initiatives for Gender Justice, *Gender Report Card on the International Criminal Court 2012*, p. 162.

20 *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04–01/06–2842, 14 March 2012, Dissenting Opinion of Judge Odio Benito, para. 16.

to international jurisprudence on these issues. As exemplified by the Lubanga judgment, the evolution of the law governing these crimes has not kept pace with the forms of conflict and the expansion and nuance of the gendered forms of criminality inherent in the crimes of enlistment, conscription and use of children in armed conflict.

## 2. INCLUSIVE JUSTICE

In many respects, there is a heightened judicial obligation in cases before the ICC, for judges to fully consider the legal concepts and in so doing ensure that the theory of the crime adequately captures the reality it exists to adjudicate.

Article 21(3) of the Rome Statute, perhaps one of the Statute's most important provisions, states that the application and interpretation of law must be consistent with internationally recognised human rights and be without adverse distinction founded on grounds such as gender.[21] This article creates a positive obligation for prosecutors and judges to ensure that in applying and interpreting the law, factors historically utilised to discriminate against groups and identities of people, such as gender, age, race, colour, sexual orientation and social origin, are dismantled in favour of inclusive justice. Avoiding 'adverse distinctions' in the application of the law cannot be achieved without being alert to the legal concepts, for this is where inherent bias or unintended discriminations are often embedded.

### 2.1. *THE PROSECUTOR V. GERMAIN KATANGA*[22]

The second case which demonstrates the need to transform both legal norms and gender perceptions relates to Germain Katanga (Katanga), who was convicted as an accessory under Article 25(3)(d) for the war crimes of attack upon a civilian population, destruction of property, pillaging and murder as both a war crime and crime against humanity, but he was acquitted under Article 25(3)(d) of the

21 Rome Statute of the International Criminal Court, 17 July 1998, Article 21(3) provides: 'The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.' See also *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04–01/06–2904, 7 August 2012, para. 191; Office of the Prosecutor of the International Criminal Court, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, para. 27 and footnotes 23, 25.

22 This section is based on a speech given by Brigid Inder, Executive Director, Women's Initiatives for Gender Justice at the expert panel on 'Prosecuting Sexual Violence in Conflict', 11 June 2014, Global Summit to End Sexual Violence in Conflict (London), available at: www.iccwomen.org/documents/Global-Summit-Speech.pdf.

sexual violence charges of rape and sexual slavery.[23] Katanga was also acquitted under Article 25(3)(a) of the crimes of enlistment, conscription and use.

The Katanga judgment, the first at the ICC to analyse sexual violence, is emblematic of so many of the ways in which sexual violence is treated differently and where a higher standard is required to satisfy the threshold of beyond reasonable doubt.

Katanga was convicted as an accessory for his role as the commander of the Walendu-Bindi *collectivité*, a Ngiti militia group, which together with the Lendu militia group, *Front des Nationalistes et Intégrationnistes* (FNI), attacked Bogoro village in eastern DRC in February 2003. This was a village populated mostly by those of Hema ethnicity. At that time, the *Union des Patriotes Congolais*, a Hema militia group, was involved in an armed conflict with the Walendu-Bindi *collectivité,* later known as the FRPI,[24] and the FNI fuelled, as asserted by the Prosecution, by ethnic rivalry.[25]

In its judgment, the majority of the Trial Chamber found the three witnesses who testified in relation to the charges of sexual violence credible and stated that it believed rape and sexual slavery had been committed by Katanga's militia during and after the attack on Bogoro.[26] However, the Chamber found Katanga not guilty of contributing to the acts of sexual violence as it did not believe these crimes formed part of the common purpose of the attack, unlike the crimes of directing an attack against a civilian population, pillaging, murder and destruction of property, for which he was convicted.[27]

It reached these findings based on evidence that in the weeks leading up to the attack Katanga had been responsible for the transportation, stockpiling and distribution of arms and a large amount of ammunition to his militia.[28] The Trial Chamber found that these actions contributed to all of the crimes associated with the attack under Article 25(3)(d), except for the acts of sexual violence.

According to the majority, transporting, stockpiling and distributing weapons and ammunition demonstrated planning, intent and preparation for the attack and proved Katanga's contribution to the common purpose.[29] But more than that, it appears that the majority also explicitly connected the amassing and distribution of weapons with the ability of the combatants to commit the crimes of murder, destruction of property, pillaging and an attack on the civilian population.[30] In other words, it appears that the Judges made an

23 *The Prosecutor v. Germain Katanga*, ICC-01/04–01/07–3436, 7 March 2014, pp. 709–710. Katanga was also acquitted of the war crime of using child soldiers under Article 25(3)(a).
24 *Ibid*, paras. 679–680.
25 *Ibid*, paras. 433, 1463, 1688–1691.
26 *Ibid*, paras. 988–999, 1002–1019.
27 *Ibid*, paras. 1657–1664.
28 *Ibid*, paras. 1671, 1679–1681.
29 *Ibid*, paras. 1672–1673.
30 *Ibid*, paras. 1676–1681.

explicit connection between the type of contribution to the plan and the types of crimes committed.

Based on this reasoning, what would be the equivalent contribution to commit the crime of rape? What would judges be satisfied with, in a comparable way, to demonstrate the intent to rape, in order for this crime to be considered part of the common purpose?

Why couldn't the same preparation and contribution the Judges found beyond reasonable doubt facilitated the ability of the militia to commit all the crimes for which Katanga was convicted, why could this not also satisfy the Chamber in relation to the ability of the militia to rape and sexually enslave women of the village?

Alternatively, if amassing weapons connected Katanga to the commission of murder quite literally because it provided them with the ability to kill, would the gathering of a large number of combatants in the context of an armed conflict readying themselves to attack a civilian population not be an equivalent demonstration of the ability to commit acts of rape and other forms of sexual violence?

Katanga was found guilty of murder and for an attack against a civilian population under *dolus directus* in the first degree, meaning that these were acts he intended to engage in.[31] In its judgment, the Chamber did not find Katanga guilty of intending to commit rape and sexual slavery, but it also does not appear to have even considered *dolus directus* in the second degree, meaning whether Katanga knew that in the ordinary course of the attack, crimes of sexual violence would occur. By contrast, under this theory of intent, the majority did find him guilty of pillaging and destruction of property, believing he knew that in the ordinary course of events that these crimes would be committed.[32]

The majority decision describes the intensity of the fire power deployed in the attack, which according to the judges 'compelled it [the population] to flee, leaving it vulnerable to shooting and forcing it to abandon its property'.[33] However, the Chamber did not seem to consider that the attempts by the female members of the population to flee the gunfire might also have made them vulnerable to rape, capture and enslavement.

## 3. INDICATORS OF THE COMMON PURPOSE

In considering whether the crimes charged were part of the common purpose, the Judges identified four indicators:

31 *Ibid*, paras. 1658, 1690–1691.
32 *Ibid*, paras. 1662, 1690–1691.
33 *Ibid*, para. 1678.

– whether the crimes were numerous and committed repetitively;
– whether the crimes were necessary to fulfilling the common purpose;
– whether the perpetrators of rape and sexual slavery – in this case, the Ngiti combatants of Walendu-Bindi – had committed these crimes prior to the attack on Bogoro; and
– whether the rape and sexual slavery were ethnically motivated, in light of the Prosecution's theory that ethnic hatred was a key dimension of the common plan.[34]

## 3.1. WHETHER THE CRIMES WERE NUMEROUS AND COMMITTED REPETITIVELY

The Judges in this case were convinced that the crimes for which Katanga was convicted were within the common plan, in part because of the volume of these crimes within the attack. According to the judgment, more than sixty people were killed in the attack, destruction of property occurred on a grand scale, and pillaging was widespread.[35] Because of the scale of these crimes, the Chamber was able to conclude that these crimes must have been intended, and therefore part of the common plan.

On the charges of rape and sexual slavery, the judges stated that they were satisfied these crimes had been committed by Katanga's combatants during and after the attack on Bogoro, but they did not find these crimes to be part of the common purpose, in part because of the apparently low number of times these crimes were committed, based on the evidence presented by the Prosecution.[36]

Firstly, the issue of numbers is very complex, for what we count and how we count reflects what we value. There were three sexual violence witnesses in this case. Each of them testified to being raped multiple times. If numerousity was an essential indicator then what was counted was critical – was it the number of women raped or the number of times they were raped? Did the Chamber consider the evidence and determine that three women had been raped or that according to the testimonies, at least 17 acts of rape were committed during the attack on Bogoro? All of these witnesses were also enslaved at a camp in Ngiti following the attack. The terms of their enslavement varied from one month to one and a half years, during which time they were, in the words of one of the witnesses, 'at the disposal' of combatants and raped repeatedly. This evidence, which the judges stated they believed, did not satisfy the indicator of numerousity and repetition.

34 *Ibid*, para. 1663. See also Women's Initiatives for Gender Justice, *Gender Report Card on the International Criminal Court 2014*, pp. 179–180; Women's Initiatives for Gender Justice presentations at panel discussion on 'First Reflections on the ICC Katanga Judgment', 12 March 2014, T.M.C. Asser Institute (The Hague).

35 *The Prosecutor v. Germain Katanga*, ICC-01/04–01/07–3436, 7 March 2014, paras. 841, 950.

36 *Ibid*, para. 1663.

## 3.2. WHETHER THE CRIMES WERE NECESSARY TO FULFILLING THE COMMON PURPOSE

The Trial Chamber appeared to require that in order to find that rape and sexual slavery formed part of the common purpose, it had to be established that but for the commission of these crimes, the common purpose could not have been achieved.[37] However, the Trial Chamber does not provide explicit support for its finding that a crime must be necessary to achieving the common purpose in order for it to form part of the common purpose. Furthermore, this finding departs from established jurisprudence of the ad hoc tribunals which have found to the contrary.[38] For example, murder may be committed as part of a common purpose to forcibly transfer or deport the civilian population of a village, although murder is not necessary to achieving that common purpose. The same is true for rape.

It is well established that rape and sexual slavery are among the means regularly used during conflict to destroy communities. These crimes were found to have been highly effective as tools of ethnic cleansing in Bosnia and Rwanda, used to destroy the social fabric of communities and ensure that inhabitants would not return once the fighting ceased.

In concluding that it did not have evidence to find that the attack of Bogoro village necessarily occurred through the commission of rape and sexual violence, and therefore these crimes were not part of the common purpose, the Chamber appears to have ignored the well-established lineage of jurisprudence establishing that sexual and gender based crimes are commonly used to achieve such aims.[39]

## 3.3. WHETHER THE PERPETRATORS OF RAPE AND SEXUAL SLAVERY – IN THIS CASE, THE NGITI COMBATANTS OF WALENDU-BINDI – HAD COMMITTED THESE CRIMES PRIOR TO THE ATTACK ON BOGORO

In its judgment, the Chamber does not provide explicit support for its conclusion that the Ngiti combatants had not committed rape and sexual slavery prior to the Bogoro attack, and the relevance of this requirement also appears to be questionable. Necessitating the commission of these crimes in prior attacks

37 *Ibid*, para. 1663.

38 See e.g. *The Prosecutor v. Nikola Šainović, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić*, IT-05–87-A, 23 January 2014; *The Prosecutor v. Milan Martić*, IT-95–11-A, 8 October 2008.

39 See e.g. *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96–4-T, 2 September 1998; *The Prosecutor v. Duško Tadić*, IT-94–1-T, 7 May 1997; *The Prosecutor v. Anto Furundžija*, IT-95–17/1-T, 10 December 1998; *The Prosecutor v. Zejnil Delalić*, IT-96–21-T, 16 November 1998; *The Prosecutor v. Dragoljub Kunarac et al.*, IT-96–23-T, IT-96–23/1-T, 22 February 2001; *The Prosecutor v. Radislav Krstić*, IT-98–33-T, 2 August 2001.

committed by a militia group may have the effect of creating a threshold that is very difficult to meet. Whilst the prior commission of such crimes makes it easier to rationalise that the subsequent commission is possible and believable, *requiring* these acts to have been previously committed by the militia, is inherently flawed. For example, would this mean that any time acts are committed for the first time by a militia group, they cannot be found to form part of the common purpose and therefore will not result in convictions? At present, such reasoning appears to only apply to crimes of sexual violence.

In its confirmation of charges decision, Pre-Trial Chamber I, by majority, concluded that there was evidence that not only in subsequent attacks, but also 'in previous … attacks against the civilian population, the militias led and used by the suspects to perpetrate the attacks, [including the FNI and FRPI], repeatedly committed rape and sexual slavery against women and girls in Ituri.'[40] This was one of the factors, along with other reports and witness statements, it found supported its conclusion that although there was insufficient evidence to establish substantial grounds to believe that the common plan specifically instructed the soldiers to rape or sexually enslave women, there was sufficient evidence to establish substantial grounds to believe that in the ordinary course of events, the implementation of the common plan would inevitably result in the rape or sexual enslavement of civilian women in Bogoro.[41]

It is not reasonable to require the prior commission of rape to determine whether this crime also occurred in the incident at hand, as required by the Katanga Trial Chamber. However, if there is evidence of the prior commission of rape or other forms of sexual violence, it is reasonable to consider this material and such evidence should not be ignored, as reflected in the approach taken by the Pre-Trial Chamber I in the same case.

## 3.4. WHETHER THE RAPE AND SEXUAL SLAVERY WERE ETHNICALLY MOTIVATED, IN LIGHT OF THE PROSECUTION'S THEORY THAT ETHNIC HATRED WAS A KEY DIMENSION OF THE COMMON PLAN

In one of the most memorable statements of the judgment, the majority stated 'that women who were raped, abducted and turned to slavery had their life "spared" and escaped a certain death because they pretended to belong to an ethnicity other than Hema'.[42]

40 *The Prosecutor v. Germain Katanga*, ICC-01/04–01/07–717, 30 September 2008, para. 568.

41 *Ibid*, paras. 434, 442.

42 *The Prosecutor v. Germain Katanga*, ICC-01/04–01/07–3436, 7 March 2014, para. 1663. See also Women's Initiatives for Gender Justice, *Gender Report Card on the International Criminal Court 2014*, pp. 179–180.

This is a deeply troubling statement and reinforces a traditional hierarchy of crimes, which the Rome Statute explicitly dismantles. The Chamber's assessment of the evidence is also intriguing.

A review of the publicly available transcripts of the testimonies of the three sexual violence witnesses indicates that each of these witnesses was asked about her ethnicity by the Ngiti combatants and all testified that when they tried to claim they were not Hema, the combatants disbelieved them and they were told that they were lying.[43]

Witness 353 testified that her assailants questioned her about her ethnicity; that she denied being Hema, and responded that she was of Nande ethnicity. At that moment, one person recognised her and stated that she was Hema, to which she replied that she was not Hema but that she was living with a Hema. Two combatants then argued about whose 'wife' she would become and decided that she would become both of their 'wives'.[44]

Witness 132 testified that when she was found by her assailants, they told her to take off her clothes. They then accused her of being Hema, which she denied. The combatants continued to inquire about her ethnicity and insist that she was Hema. They raped her, told her she had become their 'wife', and took her to a camp where she was interrogated, imprisoned in a hole and raped again repeatedly. She recounted that one day, when the 'chief' of the camp asked her about her ethnicity, she claimed she was Nande, and he replied 'no, you are Hema'. According to the transcript, '[a]fter that, he decided that she would not be released'.[45]

Witness 249 also testified that she was asked about her ethnicity but only after she was repeatedly raped. She claimed not to be Hema but was told 'that she was Hema because they smelled her odour'. She was also told that if she would not inform her captors of the location of the Hema, she would have to choose between her life and becoming their 'wife'. She testified that she 'told them to make that choice'. Witness 249 also testified that she 'told [the combatants] that it would be better for them to kill me rather than treat me like that, like an animal'.[46]

Based on their testimonies, it is clear that all of these witnesses were asked about their ethnic identity, before and after being raped and when they arrived at the militia camp following their abduction. Each denial was met with disbelief. It

43 Transcripts of the International Criminal Court, ICC-01/04–01/07-T-213-Red-ENG, 4 November 2010, p. 2–26; ICC-01/04–01/07-T-139-Red-FRA, 11 May 2010, pp. 11–12, 61, 64; ICC-01/04–01/07-T-135-Red-FRA, 4 May 2010, pp. 58–59.

44 Transcript of the International Criminal Court, ICC-01/04–01/07-T-213-Red-ENG, 4 November 2010, pp. 24–26, 48. See also Women's Initiatives for Gender Justice, *Gender Report Card on the International Criminal Court 2014*, p. 179.

45 Transcript of the International Criminal Court, ICC-01/04–01/07-T-139-Red-FRA, 11 May 2010, pp. 9–13, 19–20, 22–23, 25, 28–30, 37, 40, 45, 48, 59, 61, 64. See also Women's Initiatives for Gender Justice, *Gender Report Card on the International Criminal Court 2014*, p. 179.

46 Transcript of the International Criminal Court, ICC-01/04–01/07-T-135-Red-FRA, 4 May 2010, pp. 40–43, 58–59. See also Women's Initiatives for Gender Justice, *Gender Report Card on the International Criminal Court 2014*, p. 179.

would appear that perhaps the judges focused on the assertions of the witnesses disclaiming Hema ethnicity to conclude that the crimes committed against them were unrelated to their ethnic identity. The fact that all of the witnesses were asked about their ethnicity suggests that this factor was of great relevance to the perpetrators, regardless of the actual ethnic identities of the witnesses, or whether their denials of Hema ethnicity were believed. At best, determining that the acts of rape and sexual slavery were unrelated to the issue of ethnicity does not appear to be a reasonable assessment of the evidence.

The Katanga judgment, emblematic of so many cases before the international tribunals, appears to demonstrate: a subconscious but clear bias requiring sexual violence to be a more explicit component of a common plan, than is expected of any other category of crimes; that the contribution considered necessary to commit rape and sexual slavery is different from the contribution necessary to commit other crimes which occur simultaneously; and that the scale and volume of sexual violence may be rendered invisible by an incomplete assessment of the evidence.

## 4. LOOKING AHEAD

Moving beyond the initial ICC jurisprudence, there are a number of forthcoming trials and judgments which provide important opportunities for a deeper consideration of these issues. In learning from its mistakes in the Lubanga case, the Prosecution included, and Pre-Trial Chamber II confirmed,[47] ground-breaking charges of rape and sexual slavery committed against child soldiers within its case against Bosco Ntaganda. This is the first time in international criminal and humanitarian law that a commander has been charged with crimes committed against children in his own militia group and under his command. The Prosecution's case against LRA commander Dominic Ongwen contains the largest number and widest range of charges for sexual and gender-based crimes brought by the Office of the Prosecutor (OTP) to date.[48] The case against Laurent Gbagbo and Charles Blé Goudé in relation to the post-election violence occurring between November 2010 – May 2011 in Côte d'Ivoire, includes charges of rape and persecution carried out through acts including rape.[49] This brings to trial the first former Head of State charged with crimes of sexual violence.[50] The judgment in the main case against Jean-Pierre Bemba, a former Vice-President of the DRC and the first

47 *The Prosecutor v. Bosco Ntaganda*, ICC-01/04–02/06–309, 9 June 2014.

48 *The Prosecutor v. Dominic Ongwen*, ICC-02/04–01/15–305-Red2, 24 September 2015.

49 *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11–01/15–1, 11 March 2015. See also *Prosecutor v. Laurent Gbagbo*, ICC-02/11–01/11–656-Red, 12 June 2014; *The Prosecutor v. Charles Blé Goudé*, ICC-02/11–02/11–186, 11 December 2014.

50 *Prosecutor v. Laurent Gbagbo*, ICC-02/11–01/11–656-Red, 12 June 2014.

accused charged with command responsibility under Article 28(a) of the Rome Statute, is due to be issued in 2016. This case contains charges of rape as a war crime and crime against humanity and includes testimony from a male witness regarding the rape committed against him and female members of his family, allegedly by troops under Bemba's command.[51]

Learning from its case-based results during the first ten years of its work, in June 2014 Prosecutor Bensouda launched the OTP's Policy on Sexual and Gender-based Crimes.[52]

This is the first such policy developed by an international tribunal or court to address these issues. Eighteen months in production and involving a number of internal consultations with staff of the OTP and a review process with external stakeholders, the Policy outlines a comprehensive approach to integrating gender issues and concepts within each area of the OTP's operations – preliminary examination, investigations and analysis, and prosecutions. It addresses both legal practices and policy imperatives, and combines overarching principles for the OTP as a whole, as well as substantive operational strategies. Along with its historic status, the policy also includes an important innovation incorporating gender-analysis as a critical tool applicable to each step of the OTP's work and at every stage of proceedings. Until this policy, gender analysis had not been systematically used as a tool within the practice of international criminal law. Responding with a sense of urgency in relation to strengthening its work on sexual and gender-based crimes, implementation of some of the concepts and strategies contained within the Policy began while it was still in production. These efforts are visible in several of the cases identified above.

Importantly, the policy-based approach to sexual and gender-based crimes adopted by the OTP emphasises institutional responsibility, organisational methodologies and collective competence. These components are deemed necessary to achieve meaningful and sustainable progress towards fully integrating women and girls, and concepts of gender, within the structure of justice.

There are sound reasons for hopeful expectation regarding the gender-justice outcomes the OTP is becoming capable of producing. However, as demonstrated in the Lubanga and Katanga judgments, real progress on these issues is simply not possible without greater judicial attention to legal concepts, and the willingness to transform static legal reasoning with respect to individual criminal responsibility in sexual and gender-based crimes.

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51 *Transcript of the International Criminal Court*, ICC-01/05–01/08-T-51-Red-ENG, 21 January 2011, p. 36, line 4 to p. 40, line 11.

52 Office of the Prosecutor of the International Criminal Court, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014.

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