

Expert Panel: Prosecuting Sexual Violence in Conflict - Challenges and Lessons Learned

A critique of the Katanga Judgment

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There are numerous reasons for impunity for sexual and gender-based crimes, and we are all familiar with many of these. Obstacles at the domestic level include discriminatory corroboration requirements and constructions of 'consent', amongst others. In the international courts, some of the factors have been and continue to be assumptions about who is a victim of sexual violence, lack of prioritization in investigation plans and the past practice of including charges for sexual violence in plea bargain agreements. But there is a factor underlying these issues that contributes to the unique and epidemic levels of impunity for sexual violence, which I would like to highlight in this presentation, 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, including Judge Doherty's dissenting opinion in the AFRC trial before the Special Court for Sierra Leone, in which she found forced marriage to be a distinct crime from the crime of sexual slavery.¹

However overall, I think 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.

¹ *The Prosecutor against Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, SCLC-04-16-T, 20 June 2007, 'Partly Dissenting Opinion of Justice Doherty on Count 7 (sexual slavery) and Count 8 (forced marriages)', p 582-596, available at <<http://www.rscsl.org/Documents/Decisions/AFRC/613/SCSL-04-16-T-613.pdf>>.

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.

To explore this point, I am going to draw on the one of the cases at the International Criminal Court (ICC) which I think demonstrates many of these blind spots. The case 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 sexual violence charges of rape and sexual slavery.²

In my view, this 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.

Prosecutor v. Germain Katanga

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

² ICC-01/04-01/07-3436, p 709-710. Katanga was also acquitted of the war crime of using child soldiers under Article 25(3)(a). ICC-01/04-01/07-3436, p 710.

Walendu-Bindi *collectivité*, later known as the FRPI,³ and the FNI fueled, as asserted by the Prosecution, by ethnic rivalry.⁴

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.⁵ 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.⁶

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.⁷ 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.⁸ 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.⁹ In other words, it appears that the Judges made an explicit connection between the type of contribution to the plan and the types of crimes committed.

³ ICC-01/04-01/07-3436, paras 679-680.

⁴ ICC-01/04-01/07-3436, paras 433, 1463, 1688-1691.

⁵ ICC-01/04-01/07-3436, paras 988-999, 1002-1019.

⁶ ICC-01/04-01/07-3436, paras 1657-1664.

⁷ ICC-01/04-01/07-3436, paras 1671, 1679-1681.

⁸ ICC-01/04-01/07-3436, paras 1672-1673.

⁹ ICC-01/04-01/07-3436, paras 1676-1681.

Based on this reasoning, what would be the equivalent contribution for 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.¹⁰ 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.¹¹

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'.¹² However, the Chamber did not seem to consider that the attempts by the population to flee the gunfire may also have made it vulnerable to rape, capture and enslavement.

¹⁰ ICC-01/04-01/07-3436, paras 1658, 1690-1691.

¹¹ ICC-01/04-01/07-3436, paras 1662, 1690-1691.

¹² ICC-01/04-01/07-3436, para 1678.

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

- (1) Whether the crimes were numerous and committed repetitively
- (2) Whether the crimes were necessary to fulfilling the common purpose
- (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
- (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.¹³

I don’t have time on this panel to address these points in detail, but I would like to briefly focus on three of the indicators: numerosity and repetition; rape and sexual slavery as components of an ethnically motivated attack; and whether these crimes were necessary to fulfil the common purpose.

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 60 people were killed in the attack, destruction of property occurred on a grand scale, and pillaging was widespread.¹⁴ And because of the scale of these crimes, it was able to conclude that they 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 insufficient number of these crimes, based on the evidence presented by the Prosecution.¹⁵

¹³ ICC-01/04-01/07-3436, para 1663.

¹⁴ ICC-01/04-01/07-3436, paras 841, 950.

¹⁵ ICC-01/04-01/07-3436, para 1663.

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 numerosity was an essential indicator then what was being 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 their testimonies, at least 17 acts of rape were committed during the attack on Bogoro? All of these witnesses were also enslaved at a Ngiti camp 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 numerosity and repetition.

On the second and third criteria, which I will briefly address together, the Chamber found that the acts of rape and sexual slavery were not ethnically motivated and they were not necessary to the plan to wipe out Bogoro village.¹⁶ In reaching this conclusion, the Chamber appears to have ignored the body of jurisprudence from the ICTY and ICTR which established that sexual and gender-based crimes are commonly used and effective means through which to achieve exactly this type of plan.¹⁷

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'.¹⁸

We were troubled by this statement, obviously because of the view that rape and slavery are less grave and because it reinforces a traditional hierarchy of crimes, which the Rome Statute

¹⁶ ICC-01/04-01/07-3436, para 1663.

¹⁷ See eg *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.

¹⁸ ICC-01/04-01/07-3436, para 1663.

explicitly dismantles. But we were also intrigued as to how the judges assessed the disclaimers of Hema ethnicity.

We reviewed the publicly available transcripts of the testimonies of the three sexual violence witnesses, and based on this material, it appears that all of them were asked about their ethnicity by combatants and all testified that when they tried to claim they were not Hema, the combatants disbelieved each of them and they were told that they were lying.¹⁹ They were asked about their ethnic identity repeatedly before and after being raped and when they arrived at the militia camp after being abducted. Each denial was met with disbelief. It would appear that perhaps the Judges focused on the assertions of the witnesses disclaiming Hema ethnicity, rather than whether their assertions were believed. At best, determining that the rapes were unrelated to the issue of ethnicity does not appear to be a reasonable assessment of the evidence.

In closing, what we see in this judgement, emblematic of so many cases, is a perhaps subconscious but clear bias requiring sexual violence to be a more explicit component of a common plan, than is expected for any other category of crimes; that the preparation considered necessary to commit rape and sexual slavery is different from the preparation 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.

Although rape in armed conflict occurs on a daily basis, responsibility for this crime is still exceptional.

I think this judgment demonstrates the ways in which the ongoing practice of gender inequality, distorts and impedes the possibility of gender justice.

¹⁹ ICC-01/04-01/07-T-213-Red-ENG, p 24-26; ICC-01/04-01/07-T-139-Red-FRA, p 11-12, 61, 64; ICC-01/04-01/07-T-135-Red-FRA, p 58-59.