



Mr. Luis Moreno-Ocampo
Prosecutor of the International Criminal Court

Interdisciplinary Colloquium

*Sexual Violence as International Crime: Interdisciplinary
Approaches to Evidence*

Center on Law and Globalization

Keynote Address

The Hague

16 June 2009

Minister Verhagen,
Excellencies,
Madame High Commissioner, Judge Meron,
Ladies and Gentlemen,

I have the privilege and the responsibility to be the first prosecutor of the ICC. My mandate is to put an end to impunity for the most serious crimes of concern to the international community, including gender crimes as part of genocide, crimes against humanity and war crimes, and to contribute to the prevention of such crimes. The Rome Statute pays particular attention to gender crimes.

Accordingly, since my appointment exactly 6 years ago, the Office has been developing our policies on gender crimes. We established the Gender and Children Unit (GCU) and appointed our Special Gender Adviser. We conducted investigations on gender crimes in all our cases. We are selecting and training our staff to develop our expertise in dealing with gender crimes. We are litigating before judges from five continents that apply an innovative legal design. We are preparing an internal operational manual describing in detail how to approach an investigation on gender crimes and how to treat victims and witnesses associated with such cases. We are developing a public policy paper on gender crimes to be presented this year.

In doing so, we have benefited extensively from the expertise of international and non governmental organizations. A number of experts, who are here this week, have paved the way, pushing for accountability of gender crimes; the *ad hoc* tribunals' jurisprudence has laid the groundwork for the development of international criminal law in this area. We appreciate the opportunity to continue such dialogue with all of you to refine our concepts, strategies and practices in dealing with gender crimes.

Gender crimes in the Rome Statute

"Gender violence" or "gender crimes" is a concept that is firmly established in the Rome Statute. Under Article 7 (1) (h), persecution against any identifiable group or collectivity on grounds of gender could constitute a crime against humanity if committed in connection with other types of crimes against humanity or other crimes under the jurisdiction of the Court. The term "gender" is defined for the purpose of the Statute as referring to "*the two sexes, male and female, within the context of society*". Various provisions of the Statute also proscribe what can be characterised as gender crimes, such as rape, sexual

slavery, enforced prostitution, forced pregnancy as a war crime and/or crime against humanity.

Importantly for my Office, Article 54 (1) (b) of the Statute specifically provides that in order to ensure the effective investigation and prosecution of the crimes under the jurisdiction of the Court, the Prosecutor shall *“take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children”*.

Sensitivity towards gender issues is even prescribed in relation to the protection of witnesses and victims. According to Article 68 (1) of the Statute, *“the Court ... shall have regard to all relevant factors, including gender and the nature of the crime, in particular, where the crime involves sexual or gender violence or violence against children.”*

Additionally, Article 42 (9) of the Statute requires the Prosecutor to appoint advisers with legal expertise on specific sexual and gender violence. As I mentioned earlier, the Office has established a unit, the Gender and Children Unit, comprised of advisers with legal and psycho-social expertise to deal specifically with gender and children issues. The GCU advises the Prosecutor directly and provides support to the Office’s divisions, from pre-analysis through to prosecution phases. We also appointed Professor Catharine MacKinnon as Special Gender Adviser last November. As many of you know, Professor MacKinnon has been instrumental in establishing the concept of sexual crimes being gendered and has made a significant contribution to the recognition of gender crimes in international criminal jurisprudence. Last week, she conducted the first of a series of trainings on gender crimes for the staff of the Office.

Furthermore, my Office ensures that we effectively investigate and prosecute sexual and gender-based crimes by taking a focused and integrated approach:

We have gender experts and focal points to assist all teams to deal with these crimes. All of the investigators and lawyers receive specialised training on the legal framework and methods for conducting these types of interviews. We work a lot on statistical analysis – which, as you know, can be particularly problematic in cases of gender and sexual violence, since these crimes are often under-reported. In one of our situations under analysis, Afghanistan, we are faced with a situation where a lot of reports would suggest that there are no gender crimes,

whereas in fact attacks against female public officers, female students and women's schools are a reality in this situation.

In relation to the Statute, I would like to emphasise the relation between sexual crimes and this new concept of gender crimes in the Statute.

Sexual crimes are crimes of violence or coercion. The concept of gender crimes added a different dimension to the analysis. The new concept emphasises that sexual crimes such as rape are crimes of gender inequality, enacted violently.

The recognition of "gender violence" or "gender crimes" as such is relatively recent in international law. For example, the 1979 Convention on the Elimination of All Forms of Discrimination against Women, did not address issues relating to violence against women. For a long time, the gender perspective was also not reflected in major international instruments related to international crimes such as the Convention against Torture and Inhuman, Cruel or Degrading Treatment or Punishment.

It was only in the early 1990s that there was greater understanding of gender crimes. In particular, the 1992 General Recommendation No. 19 by the Committee on the Elimination of Discrimination Against Women constituted a major step. It defined gender-based violence as a form of discrimination against women. The General Recommendation took the view that *"the definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately"*.

The Rome Statute is built on these understandings and we received a clear mandate to apply this new concept of "gender crimes" or "gender violence", which requires first an understanding of sexual crimes as social and cultural events rather than in any sense natural or biological events.

Gender crimes and genocide, crimes against humanity and war crimes

In the field of international criminal justice, the evolution that took place in 60 years is remarkable. Remember that Robert Jackson, the Chief Prosecutor of the Nuremberg Tribunal, decided not to present sexual crimes in the cases against the Nazi leaders.

The efforts since the mid-90s to obtain accountability for atrocities committed against women during the conflict in Bosnia helped establish how rape and other

sexual violence could be instrumentalised in a campaign of genocide. This equally contributed to the expanded understanding of sexual or gender violence as war crimes and crimes against humanity.

Perhaps the most groundbreaking decision advancing gender jurisprudence worldwide is the *Akayesu* judgment delivered by the Trial Chamber of the International Criminal Tribunal for Rwanda on 2 September 1998. For the first time in history, rape was explicitly recognized as an instrument of genocide. As described by the ICTR in the *Akayesu* case, rape is used to “kill the will, the spirit, and life itself”. The decision provided a definition of rape – “a physical invasion of a sexual nature under circumstances which are coercive” – placing gender crimes in a larger context.

The Special Court for Sierra Leone has addressed the issue of forced marriage. It will be a crime to be further addressed before the ICC in the future.

Under our statutory regime, we must present gender crimes in the larger context of an armed conflict, a widespread or systematic attack against a civilian population or genocide. As the Prosecutor of the ICC my challenge is to capture this “gendered” reality in our different cases and present them in connection with the contextual elements of the crimes as defined by the Rome Statute. I will use our current cases to provide you with examples of how gender crimes are committed today in such contexts.

War crimes: The Prosecutor v. Jean-Pierre Bemba; The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui

The decision to open an investigation into the situation in the Central African Republic (CAR) represented the first time for the international criminal justice system to deal with a situation where allegations of sexual crimes far outnumbered alleged killings. The evidence collected has shown that as the leader of the *Mouvement de Libération du Congo* (MLC), Jean-Pierre Bemba sent his soldiers to intervene in CAR to maintain power in the hands of the then President Patassé, which resulted in widespread acts of rape and other acts of sexual violence. The MLC used rape as a primary weapon of war to terrorize and punish civilian population for their alleged support of anti-government forces and to create a politically pliable population. In some cases, the MLC committed rapes in front of the family members of victims, inflicting further pain and humiliation. In the Document Containing the Charges against Bemba, we have included sexual violence and rapes under the counts of torture and rape, as

crimes against humanity and war crimes, as well as outrages upon personal dignity, in particular humiliating and degrading treatment, as a war crime.

With respect to the situation in the Democratic Republic of Congo (DRC), in the case against Germain Katanga, former leader of the *Force de Résistance Patriotique in Ituri* (FRPI) and Mathieu Ngudjolo Chui, one of the top leaders of the *Front des Nationalistes et Intégrationnistes* (FNI), the Prosecution is also presenting charges related to gender crimes, namely, sexual slavery and rape, both as crimes against humanity and war crimes. Both men are charged with ordering the attack upon the village of Bogoro, in the district of Ituri, on 24 February 2003. Hundreds of civilians were massacred during the attack, civilian's residences were looted and destroyed, and women and girls were raped.

According to the evidence collected, some women, who were captured at Bogoro and spared by hiding their ethnicity, were taken to FNI and FRPI camps, after being undressed or raped upon their capture. Once there, they were given as a "wife" to their captors or kept in the camp's prison. The women detained in these prisons were repeatedly raped by soldiers and commanders alike.

Crimes against humanity: The Prosecutor v. Joseph Kony

Our investigation into the situation in Uganda showed not only how the Lord's Resistance Army (LRA) systematically abducted girls for sexual enslavement and rape, but also how the LRA leader, Joseph Kony, controlled all aspects of how girls are abducted, distributed to LRA commanders and enslaved. He allocated abducted girls as a reward to the commanders, to be used as sex slaves. Kony himself has had as many as 50 abducted girls in his household at one time – girls who were enslaved and raped.

Our investigation showed that Kony issued strict orders governing the treatment of abducted girls. For example, no girls were to be "touched" before he decided on their distribution among commanders. Evidence also suggests that Kony preferred abductions of young girls because he believed they were less likely to be infected with sexually transmitted diseases and issued orders that no girls should be "touched" or raped for about six months to ensure that they were not affected with such diseases. The LRA attempted to mask their criminal acts by calling the enslaved girls "wives" or "sisters".

We are seeking to prosecute Kony on several counts, including sexual enslavement and rape as crimes against humanity and rape as a war crime.

Today, such crimes are continuing. Amid the civilians that were abducted from CAR, Sudan and the DRC pursuant to orders by Joseph Kony to abduct 1,000 new “recruits”, many women are used as sexual and domestic slaves.

Genocide: The Prosecutor v. Omar Al Bashir

In the Application for an Arrest Warrant against Sudanese President Al Bashir of 14 July 2008, we submitted that the crimes of rape and sexual violence committed in Darfur are an “integral part” of his attempt to destroy the Fur, Massalit and Zaghawa groups, and should be charged as genocide under Article 6(b) and 6(c) of the Rome Statute. Rape of women and girls in and around IDP camps for food or firewood is systematic, and benefiting from total impunity. Since 2003, thousands of women and girls belonging to the target groups have been raped in all three States of Darfur by members of the Militia/Janjaweed and Armed Forces, and this continues today. A third of the victims of rape are children. Rape is a silent weapon used to destroy the communities. One victim of rape explained: *“They kill our males and dilute our blood with rape. [They]...want to finish us as a people, end our history”*.

As Dr. Kelly Askin testified to the US Senate Committee on the Judiciary in April last year, *“The majority of rapes committed during wartime are committed publicly, and in gangs, with no fear of legal-much less societal or moral- repercussion”*.

The total denial by Al Bashir of these crimes, stating that rape does not exist in Sudan and that it is not in the Sudanese culture, is yet another affront to these victimized women. It is normal that President Al Bashir denies the crime, but the question is: why is the international community joining in the denial?

In March, the Pre-Trial Chamber of the ICC issued an arrest warrant against Al Bashir on counts of war crimes and crimes against humanity, excluding the three counts of genocide. I have requested leave to appeal this decision. We are arguing that the Chamber applied the wrong standard to evaluate our evidence: it failed to properly consider or give appropriate weight to the imposition of serious bodily and mental harm on members of the Fur, Massalit and Zaghawa groups, in particular through massive rapes during the attacks on the villages, and in and around the IDP’s camps.

I know you will have a special session dedicated to Darfur and we will be very interested to receive your views on the role of rape as part of the pattern of destruction inflicted upon targeted groups in Darfur.

Gender crimes as part of the crime of child soldiers: The Prosecutor v. Thomas Lubanga Dyilo

We also presented during the opening statement the gender dimensions of the crime of enlisting and conscripting children under the age of 15 years in the case against Thomas Lubanga Dyilo. The evidence showed how Thomas Lubanga instrumentalised sexual violations to subject child soldiers of both sexes to his will, and made them tools to further his own violent goals.

In the camps, child soldiers were exposed to sexual violence perpetrated by Lubanga's men in unspeakable ways. Young boys were instructed to rape. In the training camps, girl soldiers were the daily victims of rape by the commanders.

Girl soldiers, some aged 12 years old, were used as cooks and fighters, cleaners and spies, scouts and sexual slaves. One minute they would carry a gun, the next minute, they would serve meals to the commanders, the next minute, the commanders would rape them. They were killed if they refused. One child soldier became severely traumatised after killing a girl who refused to have sex with a commander. Our evidence showed that as soon as the girls' breasts started to grow, Lubanga's commanders could select them as their forced "wives" and transform them into their sexual slaves. One of our witnesses described how he observed daily examples of his commanders raping girl soldiers.

You can still meet many of them in the DRC, kept as "wives" by the commanders, or in the streets of Kinshasa and Bunia, rejected by their communities and struggling to make a living as prostitutes. These girl combatants are left on the margins of many Disarmament, Demobilization and Reintegration projects. As emphasised by the Special Representative of the United Nations Secretary-General Radhika Coomaraswamy, in her *amicus* brief to the Court, girl combatants are too often invisible because they are also wives and domestic aids and slip away or are not brought forward for demobilization programmes.

It is our responsibility to present the gender crimes suffered by the most vulnerable. During the course of the trial, my Office has made it its mission to

ensure that Thomas Lubanga Dyilo be held criminally responsible for the atrocities committed against those little girl soldiers, when he enlisted and conscripted them to be used as sexual prey, while also using them in combat. In the International Criminal Court, girls will not be invisible.

The Lubanga ruling could change the life of these girls; never again should they be left out of the assistance provided by demobilization programmes.

Conclusion

My Office is a part of a new system to end impunity. We have launched our investigation into incidents of sexual violence in the Kivus, in the DRC. The mandate of the ICC is to go up the chain of command to those most responsible, to those who ordered and financed the violence; as for the mid-level perpetrators, for the executioners, we need to empower the local courts and we are collaborating with the DRC authorities to build dossiers for domestic proceedings. However, the protection of witnesses and judges poses a major challenge to investigations and prosecutions in the DRC, particularly in the Kivus.

I would like to finish by wishing the working groups every success, and noting that I will appreciate receiving all your comments on our policies and practices.