HOPELESS CASE OR CAUSE FOR HOPE?: LUBANGA, KATANGA AND GENDER JUSTICE IN THE ICC

Josh Pallas

This paper will evaluate the status of the Rome Statute and International Criminal Court for prosecuting sexual violence, particularly rape. It will become evident that there is a disjuncture between the very progressive Rome Statute and the outcomes of the first two successful prosecutions of the Court which failed at providing gender justice. In Prosecutor v Lubanga, the prosecutor failed to charge crimes of sexual violence, yet proceeded to call evidence to this effect through trial. He was strongly rebuked by the judges for doing so. In Prosecutor v Katanga, the Prosecutor laid charges of rape inter alia. Katanga was acquitted of these charges because the Prosecutor failed to call evidence which could prove an effective chain of command. The paper will draw on Julia Quilter's analysis and explanation of a similar dissonance between law and practice in New South Wales, with particular reference to the concepts of the rape schema and iterability, habitus and field. Gender justice is failing at the ICC because of an internalized rape schema within the prosecutorial practice which inter alia perpetuates the myth that crimes of sexual violence are of a lesser importance than others. Notwithstanding the poor current outcomes for gender justice in the ICC, there are strong indications that this is changing and that the practice will soon reflect the progressiveness of the Rome Statute.

Josh Pallas is a Research Assistant in Politics and International Studies at the University of Wollongong, Australia. His research interests span international law, international relations and gender studies.

Introduction

Since its commencement of operation in 2002, the International Criminal Court (ICC or 'the Court') has been the primary judicial body enforcing international criminal laws on gender and sexual violence. However, over this time the ICC has developed a checkered history for adequately prosecuting these matters. The governing instrument of the Court, the *Rome Statute*, saw strong developments for gender justice, including (*inter alia)* a definition of gender and the inclusion of rape as both a crime against humanity and war crime with significantly broader definitions than the *ad hoc* tribunals. Notwithstanding this progressive constitution of the Court, the first two cases, *Lubanga* (2012) and *Katanga* (2014), demonstrate abject failures of gender justice.[1] Lubanga was not charged with any sexual violence crimes, and Katanga was found not guilty on those counts. This paper will draw upon concepts from critical theory to explain this dissonance between the progressive law and regressive practice which inhibits its implementation. The role of the Prosecutor will be criticized because of their instrumentality in effecting gender justice in the ICC. This paper will close by looking at the most recent developments under Prosecutor Bensouda which leave cause for hope that the ICC is moving towards greater outcomes for gender justice.

The Rome Statute

The two standalone charges of rape under the *Rome Statute* are rape as a war crime (*Rome Statute,* arts 8(2)(b)(xxii), 8(2)(e)(vi), and crime against humanity (*Rome Statute*, art 7(1)(g) Additionally, the ICC can consider rape as a

[1] The ICC has decided one other case *Prosecutor v Chui (Judgement)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-02/12-3, 18 December 2012). Chui was also Congolese and charged with *inter alia* rape as both a war crime and crime against humanity and acquitted. This case has a very complex procedural history which involved acquittal soon after his charges as co-defendant were severed from the proceedings in *Katanga*. This case will not be considered within this paper due to the pending appeal and complex procedural history.

constitutive element of genocide (*Prosecutor v Akayesu,* para 706*),* torture (*Prosecutor v Semanza,* paras 342-343) or slavery (*Prosecutor v Kunarac*, para 125). Importantly, the *Rome Statute* provided international criminal law with its first definition of gender for consideration in all cases (*Rome Statute*, art 7(3)). This first section outlines and contextualizes the jurisprudence around these standalone rape charges, to demonstrate how they can be seen as positive reforms for gender justice and why the creation of the ICC was strongly welcomed by gender justice advocates.

Article 7 (1) (g)-1 – Elements of Crime - Crime against humanity of rape

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population. The *Rome Statute* and *Elements of Crime* continue the international criminal law's trend of prosecuting rape as a crime against humanity (*ICTY Statute*, art 5(g); *ICTR Statute*, art 3(g)). *Prosecutor v Akayesu* initiated this legal construction of rape characterized by its widespread and systematic targeting of civilians (Carson 2011, 1220) - the *chapeau* element to the offence (*Rome Statute*, art 7(1). In *Prosecutor v Kunarac* it was held that the *physical act* of rape need not be widespread or systematic, so long as it occurred within a widespread or systematic attack on civilians (*Prosecutor v Kunarac*, para 407).

Thus Article 7 advances the traditional protection that the law has provided for rape victims.

As an indication of the growing concern for asymmetrical warfare, Article 7 covers both state and non-state actors in peacetime (*Rome Statute*, arts 1, 2(a)). When defining widespread or systematic, the *Rome Statute* mentions that acts must occur 'pursuant to or in furtherance of a State or organizational policy to commit such [an] attack' (*Rome Statute*, art 7(2)(a)). Joseph notes the important insertion of organizational policy which grants the Court jurisdiction over non-state actors (Joseph 2008, 72). This is particularly important because armed conflict is increasingly intrastate and involves non-state actors and non-combatants.[2] To prevent impunity, the *Rome Statute* covers non-state actors and applies in peace and war, as a response to the changing nature of conflict.

Another benefit is that the widespread or systematic element of a crime against humanity may see military and political leaders more readily prosecuted. This is in stark contrast to the charge of rape as a war crime, which can be brought against any individual perpetrator. To prevent impunity, it is important that the root causes of the criminality offending behavior are addressed. If sexual violence is a policy perpetuated by the political and military elite, it is important that the liability for these crimes is placed squarely upon those individuals. The actual perpetrators of the physical act are also culpable, but in a different way which can sometimes be derived from the

[2] Under customary international humanitarian law, special protections are granted to civilians. The laws of distinction outline the differences between civilians and combatants. However, with the rise of non-state actor participation in armed conflict, the laws of distinction are being broken down as the tools used to distinguish between civilians and combatants may no longer be good indicators. Examples of these tools are the presence of uniforms, strict reporting lines and whether the force considers themselves an army: International Committee for the Red Cross, *Customary IHL: Chapter I – Distinction between civilians and combatants* (2014) <https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1>.

policies that they were compelled to implement.[3] However this rationale for criminalization can be problematic when chains of command breakdown, it may be more difficult to sufficiently prove liability for leaders. Nevertheless, there are important developments created by Article 7, which has aligned the elements with the changing nature of conflict.

2. *Article 8 (2) (b) (xxii)-1 – Elements of Crime - War crime of rape*

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

The introduction of rape as a war crime is a novel codification of customary international humanitarian law by the *Rome Statute* and *Elements of Crime*. War crime rape must occur with sufficient proximity to armed conflict (*Rome Statute*, art 8(2)(b)). Article 8 covers both international and non-international armed conflict, drawing together two formerly disparate areas of customary international humanitarian law.[4]

Historically, sexual violence as a war crime was prosecuted under provisions regarding the protection of honor (De Than 2003, 349).[5] The ICTY *Statute* omitted rape as a war crime, and the ICTR *Statute* mentioned it as an element to the 'outrage upon personal dignity' war crime (art 4(e)). The case law has since pushed for the codification of a standalone rape war crime, with *Prosecutor v Furundzija* (para 172) beginning this. Joseph argues that the *Rome Statute* is the 'first time that sexual violence has been associated with grave breaches of the *Geneva Conventions*' (2008, 74). By characterizing rape as a war crime, in, and of itself, the *Rome Statute* symbolically and factually provides necessary significance to this crime.

Article 8 progressively allows for the prosecution of individual rapes. The *chapeau* element is not the 'widespread or systematic' approach adopted in Article 7.[6] Rather the offences must occur proximate to armed conflict (*Rome Statute*, art 8(2)). This allows for the prosecution of

[3] It is acknowledged that some combatants will always exceed their mandate and the parameters orders. For a discussion of this in relation to Private Lynndie England at Abu Ghraib see Jasbir K Puar, 'Abu Ghraib: Arguing against Exceptionalism', (2004) 30(2) *Feminist Studies* 522.

[4] The *Geneva Conventions* only applied to 'all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them': *Geneva Convention (I) For The Amelioration Of The Condition Of The Wounded And Sick In Armed Forces In The Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) art 2. Common Article 3 to all *Geneva Conventions* applied to all forms of armed conflict, and the *Additional Protocol II* to the *Geneva Conventions* also applied to non-international armed conflict. Common Article 3 and the *Additional Protocols* were not initially granted the same standing as the war crimes provisions of the *Geneva Conventions.* This led to some small divergences in international humanitarian law regarding what was criminalized in the respective forms of armed conflict and their elements.

[5] See also *Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War,* opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 27; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) art 76(1); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) art 4(2)(e).

[6] Compare *Rome Statute* art 7(1) with art 8(1).

perpetrators who may unaware of the context of their attack. Particularly in asymmetrical conflict, where it can be difficult to prove stable chains of command, Article 8 provides flexibility for Prosecutors to still charge rape. The ICC must 'in particular' focus on crimes which are 'part of a plan or policy or as a part of a large scale commission of crime' (*Rome Statute*, art 8(1)). To satisfy this element, the rape must occur as part of a serious criminal activity. As rape is considered a grave breach of the *Geneva Conventions*, the mere fact that it has happened could potentially prove this (*Prosecutor v Furundzija*, para 172). Therefore, individual acts of rape can be prosecuted under Article 8 which makes rape as a war crime much broader in scope than rape under Article 7.

The most theoretically significant development of Article 8 is the removal of historically pervasive references to women's honor and dignity. International humanitarian law has previously privileged the protection of female dignity and honor in provisions that omitted consideration of male victims.[7] This derives from an essentialized assumption that only women could be sexual violence victims and that the rapist's actions strip the victim of honor and dignity as a person (Coomaraswamy 2003, 91; 97-98). This legal severance between notions of rape, dignity and honor assists in remedying false assumptions and in constructing the restorative narrative that survivors never lost their inherent honor and dignity as humans (Andric-Ruzicic 2003, 103; 111). It is naïve to suggest that because the legal links between rape, honor and dignity have been severed, these assumptions are now eradicated. However, the developments of the *Rome Statute* show movement in the right direction towards affecting gender justice.

The previous analysis focused upon the differences between rape as a war crime and crime against humanity. However, there are many positive developments common to both Articles 7 and 8. The *actus reus*, in element 1, is framed to encompass people of all genders as potential perpetrators or victims. Additionally, the wording regarding penetration in element 1 criminalizes the use of any sexual organ, other body part or foreign object's, insertion into any human orifice. This language ensures that all forms of penetration are criminalized, including the historically omitted homosexual violence. This gender neutral approach provides a broader scope for prosecutions.

Element 2 draws together the jurisprudence regarding whether a coercive environment or absence of consent is required to prove rape. *Prosecutor v Akayesu* first defined rape as 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive' (para 688). Rather progressively, the *Akayesu* Court defined rape in a way that was not reliant on particular genders and body parts (*Prosecutor v Akayesu* para 686). The *Akayesu* Court drew an analogy between torture and rape, as crimes which are both 'used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person' (para 597). Conversely, the formulaic definition of *Prosecutor v Furundzija* (para 185) essentialized rape as:

i) sexual penetration, however slight:
(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
(b) of the mouth of the victim by the penis of the perpetrator;
(ii) by coercion or force or threat of force against the victim or a third person.

Prosecutor v Muhimana, finally drew together these approaches to defining rape which had created fragmented jurisprudence. The Court explicitly held that there was no inconsistency between *Akayesu* and *Furundzija*, stated that:

[C]oercion is an element that may obviate the relevance of consent as an evidentiary factor in the crime of rape. Further, this Chamber concurs with the opinion that circumstances prevailing in most cases charged under ICL, as either genocide, crimes against humanity, or war crimes, will be

[7] For examples, see *Geneva Convention (IV)* art 27; *Protocol I* art 76(1); *Protocol II* art 4(2)(e).

almost universally coercive, thus vitiating true consent (para 546).

The *Muhimana* formulation closely resembles what has been codified through common element 2. This ensures that victims will not unnecessarily have to recount their experiences when there is clear evidence of universal coercion. MacKinnon argues that defining rape in terms of coercion subverts power relations as it focuses on 'power – domination, [and] violence' compared with consent based approaches focusing on 'love or passion gone wrong' (MacKinnon quoted in Munro 2010, 21). The coercion approach ensures a contextualized understanding of the violence, while the consent approach can narrowly ignore this. That being said, the *Rome Statute* does not negate the importance of individual autonomy and consent.

Accordingly, the conclusion of the *Rome Statute* brought great cause for hope to the international legal community as it drew together the progressive elements of past legal instruments and decisions into one document. This document would then provide the framework for the prosecutions of sexual violence at the ICC in an unprecedentedly broad manner.

The Cases

After the creation of the reformist *Rome Statute* in 1998, the ICC began hearing cases in 2002. This paper will consider the first two cases decided *Lubanga* in 2012 and *Katanga* in 2014, to demonstrate how the strong reforms of the *Rome Statute* fared in Court.

Prosecutor v Lubanga

In 2012, Thomas Lubanga Dyilo, commander of a Congolese paramilitary group, was sentenced to fourteen years' imprisonment for the war crime of using child soldiers throughout 2002-2003. Controversially, Lubanga was not charged with crimes of sexual violence, despite the extensive evidence. The trial commenced in January 2009, following Confirmation of Charges in January 2007.[8]

In *Lubanga*, the then Prosecutor, Luis Moreno-Ocampo, adopted the policy of selective prosecution. In situations where there was a short investigative timeframe, the Prosecutor would focus on a few charges and ensure that they succeeded instead of gathering all possible evidence and expansively charging (Chappell 2014, 187). The Prosecutor proceeded on this narrow basis despite clear and extensive evidence of sexual violence drawn to his attention by civil society organizations (Chappell 2014, 188). Thus the first failure for gender justice in this trial was the decision to refrain from charging sexual violence crimes.

In 2009, after hearing evidence and witness testimony regarding sexual violence, Counsel for the Victims applied to the Trial Chamber to recharacterize the charges. Under Regulation 55, the Court has jurisdiction to recharacterize charges to conform to the admitted evidence.[9] This application succeeded, and the Court notified parties of its intent to recharacterize and include charges of sexual violence (Merope 2011, 316). However, an interlocutory appeal was lodged. The Appeals Chamber overruled the decision, finding that recharacterization cannot exceed the facts outlined in the Pre-Trial Chamber's confirmed charging documents (Merope 2011, 317). The substantive decision on recharacterization was remitted to the Trial Chamber which refused the application as the initial documents produced by the Prosecutor failed to include evidence of sexual violence (Chappell 2014, 188). Thus the Prosecutor's failure to include available evidence of sexual violence at first instance precluded any recharacterization of charges.

[8] Following an investigation, the Prosecutor is required to bring evidence to the Pre-Trial Chamber of the ICC which will either confirm or reject the charges that the Prosecutor seeks to bring against the accused. This mirrors the committal proceedings in Australian Courts: *Rome Statute* part V.

[9] This power derives from: *Regulations of the Court*, Doc No ICC-BD/01-02-07 (adopted 26 May 2004, as amended on 14 June 2007 and 14 November 2007) reg 55.

Throughout the trial, the judges became increasingly frustrated by the Prosecutor's reliance on sexual violence evidence. In 2010, Judge Fulford prevented the Prosecutor's repeated attempts to ask questions about sexual violence, as the evidence was irrelevant to the charges before the Court (*Lubanga Transcript of Argument*, 72, at lines 9-15). In closing statements, the Prosecutor explained that the evidence of sexual violence that he continued to lead was to prove the use of child soldiers (*Lubanga Transcript of Argument*, 50-56). His argument was rejected by the Court. Accordingly, the Lubanga trial saw tensions between the judges, who wanted to hear sexual violence charges but were hamstrung by procedure, and the Prosecutor, who persistently called evidence of these crimes, despite his failure to charge.

The judges were scathing of the poor prosecutorial practice in their verdict and sentence. The Court unanimously found Lubanga guilty of all charges, and sentenced him to fourteen years' imprisonment (*Prosecutor v Lubanga*, paras 92-104). In sentencing, the Court stated:

The Chamber strongly deprecates the attitude of the former Prosecutor in relation to the issue of sexual violence. He advanced extensive submissions as regards sexual violence in his opening and closing submissions at trial, and in his arguments on sentence he contended that sexual violence is an aggravating factor that should be reflected by the Chamber. However, not only did the former Prosecutor fail to apply to include sexual violence or sexual slavery at any stage during these proceedings, including in the original charges, but he actively opposed taking this step during the trial when he submitted that it would cause unfairness to the accused if he was convicted on this basis (para 60).

The Court's extraordinary remarks followed their lament of their inability to consider evidence of sexual violence due to poor prosecutorial practices (*Prosecutor v Lubanga*, para 629). The judges were scathing of the Prosecutor's conduct in *Lubanga*.

Judge Elizabeth Odio Benito handed down a strong separate opinion. Benito took issue with key elements of the verdict which effectively silenced witnesses who mentioned sexual violence by preventing consideration of their evidence on procedural grounds (Benito Dissenting Opinion, paras 14-17). Benito held that evidence of sexual violence was relevant to Lubanga's use of child soldiers (para 16). Benito was particularly conscious of ensuring that justice is done and seen to be done, stating that '[i]nvisibility of sexual violence in the legal concept leads to discrimination against the victims …who systematically suffer from this crime as an intrinsic part of the involvement with the armed group' (para 16) Thus Benito's opinion demonstrates strong gender sensitivity and further demonstrates the Court's frustration this case.

Accordingly, the *Lubanga* decision demonstrates a manifest failure in delivering gender justice caused by the Prosecutor's omission of sexual violence charges. Counsel for the Victims and the judges attempted to rectify this, but were prevented from recharacterizing. Overall *Lubanga* failed to provide a positive outcome for gender justice. Optimists suggest that there are positive signs such as the representation of victims and the fact that any evidence was even heard about sexual violence (Chappell 2014, 183). However, ultimately, the trial took too long, the sentence was too short and no charges of sexual violence were laid. Crucially, the Prosecutor's poor practice inhibited the attempts of other parties from rectifying this problem.

Prosecutor v Katanga

In May 2014, Germain Katanga, an Ituri Congolese rebel commander, was sentenced to twelve years' imprisonment for crimes against humanity and war crimes of murder, pillage and mass killing in the village of Bogoro in 2003. Katanga's charges were confirmed in September 2008 and his trial commenced in November 2009.[10]

[10] The original judgment is in French. Most remarks here are based on the official summary of the judgement published by the ICC in English: *Prosecutor v Katanga (Summary Judgement)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 8 March 2014). There are some direct quotes from the judgement, these are based on the translations completed by the

Katanga was found guilty in his capacity as an accomplice, after his charges were recharacterized down from principal, due to insufficient evidence (*Prosecutor v Katanga*, 4). The majority, Judges Diarra and Cotte, acquitted Katanga of rape (*Prosecutor v Katanga*, 29). Judge Van den Wyngaert acquitted Katanga of all charges (Ven den Wyngaert's Minority Opinion). The evidentiary issues principally concerned the nature of Katanga's command and control of the group. Katanga was acquitted of both rape as a war crime and crime against humanity. However, Judges Diarra and Cotte found that rape was established beyond reasonable doubt, but perpetrated by others *(Prosecutor v Katanga*, para 36). In drawing this conclusion, the Court expressly adopted the *Elements of Crime*. The Court held that the first element could be proven even if an individual does not undertake the penetration themselves. It is sufficient if 'the perpetrator is himself penetrated' or 'brings about the penetration' *(Prosecutor v Katanga*, para 963). The Court found that absence of consent is not an essential element, and that it is 'sufficient to demonstrate one of the circumstances of a coercive nature' (para 966). The Court affirmed the requirement for a crime against humanity that there must be a widespread or systematic attack against a civilian population (para 967). Similarly, to be a war crime the attack must be part of an armed conflict (para 968).
The Court clarified the *mens rea* element, noting that the accused must have intent and knowledge. The Court noted that it is:

[N]ecessary to demonstrate that the perpetrator 'intentionally [took] possession of the body of the victim' through deliberate action or failure to act: '(1) resulting in penetration; or (2) while he was aware that penetration would occur in the ordinary course of events. Furthermore, […] the perpetrator must have known that the act was committed by force, threat of force, coercion' (paras 976-977).

For the count of rape as a crime against humanity, the accused must know that the conduct was or intended to be, part of a widespread or systematic attack against civilians (*Prosecutor v Katanga*, paras 983-984). For the war crime, the accused must have known that the attack was part of an armed conflict (paras 983-984). Therefore, *Katanga* provides an initial insight in the way that the ICC interprets the rape provisions within the *Rome Statute*.
Coercion was relied on to satisfy the second element. For Witness 132, the Chamber held that the survivor was 'in a state of total submission' at the time of her vaginal rape by six combatants, to the extent that she believed that she would be killed if she did not comply with her attacker's demands (*Prosecutor v Katanga*, paras 989-990). Witness 249, also vaginally raped by six combatants, was assaulted, raped and threatened with death as she pleaded to be killed (para 993). Witness 353 witnessed other murders, was vaginally raped, and then forced to carry looted goods for her attackers (paras 1014-1016). Witness 353 testified that she had 'no other option than to obey' (paras 1014-1016). This small snapshot of the evidence, demonstrates how the Judges determine the presence of coercion, which firmly places the conduct of the accused at the forefront of the trial.
Despite the evidence, the Court remained unable to convict. The evidence failed to demonstrate proximity between Katanga as commander and the physical actors. Despite the fact that Katanga was considered the 'President' of the group, the Court could not find that he exercised exclusive control over the troops and their daily operations, or even the existence of an effective chain of command (*Prosecutor v Katanga*, paras 50-52). This lack of command structure led to Katanga's acquittal. Heller (2014) is scathing of the Prosecutor, arguing that the Court outright rejected his arguments, to such an extent that they recharacterized the charges to ensure that Katanga was found guilty of something. Katanga was

---

Women's Initiative for Gender Justice: Women's Initiatives for Gender Justice, *ICC partially convicts Katanga in third Trial Judgment acquitting Katanga of rape and sexual slavery* (16 May 2014), International Justice Monitor, < http://www.ijmonitor.org/2014/05/icc-partially-convicts-katanga-in-third-trial-judgment-acquitting-katanga-of-rape-and-sexual-slavery/>.

initially charged as a principal; however early in the proceedings the Court recharacterized the charges to accessory to fit the evidence (*Prosecutor v Katanga*, para 4). At the trial's commencement, the Women's Initiatives for Gender Justice presented evidence that the raped women within the Bogoro region were assigned officer husbands, which clearly demonstrates actual knowledge of sexual and gender crimes by commanders like Katanga (Women's Initiative for Gender Justice, 2014). So instead of outright dismissing the charges, the judges, through recharacterization, ensured that Katanga would at least be found guilty of some crimes, just not rape. This case demonstrates the flaws within the prosecutorial practice leading to an overwhelmingly negative outcome. Usefully, the Court interpreted, for the first time, the provisions regarding rape. However, despite finding enough evidence to prove that these crimes occurred beyond reasonable doubt, Katanga was acquitted due to insufficient evidence of command responsibility. The final outcome is disappointing for victims, and those who held high hopes for gender justice.

Evidently, there is a disjuncture between the written law and practice. The *Rome Statute* adopted some of the most progressive aspects of the previous international criminal law. It has an extensive list of crimes with gender sensitive elements which cease to essentialize rape in armed conflict. However, the first two cases to reach guilty verdicts fail to provide gender justice. Lubanga was not initially charged with sexual offences, an error that could not be overcome by the Court. *Katanga* saw poor prosecutorial practice and evidence gathering prevent any chance at a rape conviction. So the law and practice lead to divergent outcomes for gender justice. The law is very progressive and gender sensitive. But the prosecutorial practice stymies any of its benefits. Following the decisions in these two cases, the high hopes that the international community had for the ICC could easily descend into feelings that the Court was becoming yet another hopeless case for gender justice.

Making Sense of the Phenomenom

This section draws out the conclusion that the ICC is failing to deliver on gender justice as a result of a disjuncture between the *Rome Statute*'s strong reforms and its implementation. This section will particularly attempt to explain why this happens through the concept of an entrenched rape schema. It will conclude by outlining some indicators showing that the practice is finally converging with the *Rome Statute*'s aims and reforms for gender justice.

The Progressive Nature of the Rome Statue

The *Rome Statute* progressively criminalizes rape in armed conflict. It incorporates a range of novel crimes including rape as a war crime and a non-specific offence of sexual violence. It combines a range of competing rulings into comprehensive definitions of rape, providing gender sensitivity and flexibility.[11] The definitions established by the *Rome Statute* cover penetration by bodily organs or other implements and are sufficiently flexible to allow prosecutions of offences committed by, and against, persons of any gender. Most crucially, for the first time in international criminal law, the *Rome Statute* defines gender and accepts its socially constructed nature (art 7(3)). Symbolic as this may be, it is an important step for affecting gender justice in a jurisdiction which has often been marred by essentialized notions of inherent masculinity and femininity.

The *Rome Statute* also introduces strong evidentiary rules for the victim's protection. The ICC Registry includes a Victims and Witnesses Unit (art 43(6)), which is responsible for the protection of victims and their families. All staff within this unit are required to have specific expertise in dealing with trauma – some of which are also required to be sexual violence specialists (*Rome Statute*, art 68). Joseph indicates that this Unit 'does not assume a passive role in proceedings', as it advises the Prosecutor and Court on its expert field from the commencement of an investigation through to assisting in the delivery of mandated reparations works (Joseph

[11] See *Rome Statute* arts 7(3), 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi).

2008, 98). Additionally, Article 68 places an overarching obligation on the ICC to 'protect the privacy, dignity, physical, and psychological well-being and the security of the victims and witnesses'. Thus the *Rome Statute* takes a holistic approach to the protection of victims which extends beyond charging particular crimes and the courtroom.

Furthermore, the victims are able to participate within all ICC proceedings. Article 68(3) allows victims to be admitted as a party to proceedings if it will not prejudice the accused's rights and there is a demonstrated 'personal interest'. This novel invention of the *Rome Statute* often means that there are three parties to the Court proceedings, the Prosecutor, the Defense and Counsel for the Victims. There is also recourse for the victims to seek reparations.[12] Consequently, there are enhanced rules of evidence to protect victims. Rule 63(4) and Rule 70 prevent the need for corroboration of rape evidence. Rule 71 also prevent the introduction of evidence regarding the sexual history of the victim. Therefore, the *Rome Statute* provides representation for victims in proceedings against their alleged attacker and even recourse to seek reparations, whilst being protected by strong rules of evidence.

It is nearly universally acknowledged that the ICC is a positive development for the prosecution of sexual violence. It introduces strong reforms to the law and procedure in a gender conscious manner. Nevertheless, the prosecution rates, and practice of the law fails to deliver on these reforms.

Prosecutorial Deficiencies

Despite the *Rome Statute's* impressive legal reforms and the enduring prevalence of sexual violence, rape prosecutions in the ICC are failing. Over the ICC's 12-year history, there have only been two guilty verdicts. Much can be said about the slow wheels of justice in the Court which has only decided three cases over 12 years, but when all of the cases decided upon have occurred in the Democratic Republic of Congo where the instance of conflict rape remains staggeringly high, it begs the question: where is the victim's justice? There appears to be impunity for these crimes. Lubanga was not charged with sexual violence, and Katanga was acquitted. Furthermore, the lengths of their prison sentences in light of their crimes are incredibly short, with Lubanga receiving fourteen years' imprisonment and Katanga, twelve years. The gender justice record of this Court, despite its progressive foundations, is poor. Indeed, the justice record of the Court as a whole is questionable. The accused are kept in custody before and throughout the trial[13] - which becomes a period of years - without being found guilty, and the crimes are not being charged in totality. Why is the ICC in practice, failing to uphold the reformist *Rome Statute?* Why is there a disjuncture between the written law and practice?

The Rape Schema

Julia Quilter (2011) has attempted to theoretically engage with a similar disconnect in the state of New South Wales (NSW), Australia. Within this jurisdiction there has been significant legal reform to affect greater justice for rape victims (Quilter 2011, 27-28). Nevertheless, the legal practice prevents these reforms from achieving their outcomes. Quilter instructively highlights that:

> [W]hat has been increasingly recognized is that 'reforming' the law may *potentially* improve the situation of rape complainants, yet it relies precariously upon the *practices*… [R]ape laws, are being circumvented by the practices of the law (2011, 26).

Quilter suggests that overruled and repealed gendered rape laws remain the dominant force within the trial and form a rape schema which latently works against the reforms (2011, 26).

[12] Following the delivery of a sentence, the Trial Chamber will set a further date to hear submissions from all parties on reparations. The judges will then deliver a judgement on reparations outlining the quantum and where the funds will be distributed. They will also outline the goals and objectives to be met with the use of the funding and method for their distribution. The Court also outlines the reporting and oversight mechanisms too: *Rome Statute* art 75.

[13] For example, Lubanga was transferred to The Hague in 2006, and did not receive a guilty verdict until 2012: *Prosecutor v Lubanga (Judgement)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-2842, 14 March 2012).

Quilter notes that this rape schema is powerful insofar as it:

[R]econsolidated lies in its ability to subsume the specificities of any particular event, in effect erasing other information relevant to the uniqueness of the situation through which another narrative might be created (2011, 30).

Accordingly, the rape schema becomes prohibitive as it prevents the reconstitution of narratives in ways that align with theoretically and empirically sound accounts of sexual violence and provides more just outcomes.

The dominant features of the rape schema in NSW are based upon now discredited rules of law which were predicated upon false gendered assumptions. Quilter highlights four main components: remoteness of location, presence of physical injury, delay in complaint, and evidence of past sexual conduct (2011, 31). These factors remain pervasive because of legal practitioners repeated use of these practices in rape trials (Quilter 2011, 26). Quilter importantly views this schema as an implicit assumption of both the prosecution and defense, which is required for its perpetuation (2011, 26). Therefore, there are a set of assumptions which have endured, despite legislative repeal and removal, and continue to cause injustice for rape victims.

The rape schema is also useful for analyzing international criminal law. All of the components that Quilter identifies within NSW are similarly relevant.[14] A particularly pervasive one has been the presence of physical injury, which is still raised in Court despite repeated rejection (*Prosecutor v Kunarac*, paras 128-129). Another factor within the international criminal law's rape schema is proof that the victim's honor or dignity was destroyed, which can lead to particularly grueling testimony from victims.[15] However, the most sinister is the notion that sexual violence is of lesser importance than traditional war crimes, crimes against humanity or genocide, and therefore not prosecuted (*Prosecutor v Lubanga)*. This is clearly evident within *Lubanga.* Implicit in the Prosecutor's closing statement was the notion that evidence of sexual violence is only useful insofar as is assists in proving another crime, and not rape (*Prosecutor v Lubanga*, paras 50-56). Chappell quotes Moreno-Ocampo's justification, where he states, 'I had strong evidence about child soldiers. I was not ready to prove the connection between the killings and the rapes' (Chappell 2014, 187). In gathering evidence, Moreno-Ocampo made value judgements about priorities. Clearly he privileged child soldier charges over rape. It was not a case where there was no evidence of rape, as this was presented to him beforehand by non-governmental organizations (Chappell 2014, 187-88), and repeatedly at trial (*Prosecutor v Katanga*, 72). In *Katanga*, there were evidentiary issues for all charges before the Court which caused a recharacterization (para 29). However, the only recharacterized charges that failed before the Court, were rape as a crime against humanity and war crime (para 29). Again, this demonstrates selective evidence gathering based on an implicit assumption that sexual violence is of lesser importance than other crimes. Sexual violence under the *Rome Statute* is specifically of equal importance to other crimes as it is now a standalone war crime and crime against humanity. Therefore, the rape schema in international criminal law uses latent gendered assumptions which prevent the full implementation of the *Rome Statute*'s gender justice reforms. The rape schema, embedded through the Prosecutor, causes the dissonance between law and practice.

Further understandings from critical theory are illustrative in explaining how the rape schema endures beyond repeal. Quilter notes that:

The resilience of the legal profession, … has shifted an emphasis on 'law reform' per se towards multidimensional intervention particularly pedagogical intervention … [I]n order to change the practices of the law we need to change the things legal subjects 'know' and how they perform that (embodied) knowledge (Quilter 2011, 49-50).

To explain this, Quilter draws upon the work of Jacques Derrida on iterability or 'readability of the mark', which is defined as 'its repeatability in

[14] See Chappell (2014) for an outline of the similarities.
[15] See *Geneva Convention (IV)* art 27; *(Protocol I)* art 76(1); *(Protocol II)*, art 4(2)(e).

which repetition is never self-same' (2011, 51). For Derrida, the meaning of any symbol can be detached from the author's intention (Quilter 2011, 51-52). Thus when affecting law reform, the new mark becomes clothed in the meaning of the repealed mark. For sexual violence in international criminal law, this meaning has become entrenched through essentialized views of masculinity and femininity which prevailed for most of the last century (*Prosecutor v Furundzija*, 195). These notions are only presently being deconstructed through theories like social constructivism (Skjelsbaek 2001, 225). So the iterability of the ideas to be repealed is significantly stronger than that of the law reform.

Further theorizing about the stickiness of iterability, Quilter draws upon Pierre Bourdieu's concepts of the field and *habitus*. Bourdieu's field is a 'series of structuring forces upon interactions, "a set of objective power relations…imposed on all those who enter"' Bourdieu quoted in Quilter 2011, 53). The *habitus* is an 'embodied history, internalized as a second nature and so forgotten as history [sic]' (Bourdieu 1990, 54). Together, the *habitus* and field, are the colloquial, unwritten, "rules of the game", which are never made explicit; but are entrenched in practice and understood by all participants. In this way, they are a power relation which serves to discipline the actors into conformity with their requirements (Quilter 2011, 53). This is evident through the *Lubanga* and *Katanga* cases analyzed above, as despite the significant law reforms, sexual violence was either not charged or failed to be proven. Therefore, to ensure that law reform sticks in practice, its iterability must outweigh the iterability of previous marks. To ensure that this occurs, the *habitus* and field of international criminal law must at least be considered, and perhaps even changed itself. Iterability, *habitus* and field all play a significant role in determining whether the law as written and in practice will be effectively reformed.

Distinctions between NSW and the ICC

A marked distinction between the ICC and NSW is that the ICC is a relatively new Court with few decided cases. This means that the ICC's *habitus* and field remains malleable. The Court's structure also throws off balance the previous *habitus* and field of international criminal law practiced in the *ad hoc* tribunals.[16] Formal representation of victims within proceedings disrupts the flow of iterability that would have been prevalent in previous tribunals as it injects a new actor into the Court thus altering the legal practice (*Rome Statute*, 68(3). Furthermore, another party to the ICC proceedings, the judiciary, also appears to be progressive and diverse, which is markedly different to NSW.

Clear evidence that the *habitus* and field of the ICC is different to that which has dominated international criminal law is the diversity within the judiciary. A key feature of the NSW jurisdiction is judicial conservativism and lack of diversity (Quilter 2011, 27). Conversely on the current make up, six of the sixteen ICC judges (including the President and two Vice Presidents) and the Prosecutor are female. Ten of the judges are also from non-Western cultures. Of the judges from Western cultures, only one is from a dominantly English speaking country. Of the twenty-two former judges eight were female,[17] and one, openly homosexual. Only eleven were from Western cultures, and only four from dominantly English speaking countries. Chappell notes how exceptional these statistics are in international law, given that:

[S]ince its inception in 1922, the 15-member International Court of Justice only ever had one permanent female judge… [and] at both UN ad

[16] Prior to the creation of the ICC, the ICL was developed by the International Military Tribunal at Nuremberg, the International Military Tribunal for the Far East, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon. The International Court of Justice and domestic courts also hear cases on ICL from time to time.

[17] For more information on the Judges see International Criminal Court, *Former Judges* (2014) < http://www.icc-cpi.int/EN_Menus/icc/structure%20of%20the%20court/chambers/the%20judges/pages/former%20judges.aspx>

hoc tribunals, there has been at most three women judges out of 14 (2010, 487).

Therefore, the *habitus* and field of international criminal law has likely shifted with the creation of the ICC. This is evident through the radically diverse composition of the bench. In any event, even if the *habitus* and field have not shifted, such diversity is bound to cause its amendment, as there is strong evidence that women bring a different approach to judging (Davies 2012, 489-492). To allow for diversity on the bench, there must already be a difference in the *habitus* and field of the ICC.

Even though the implementation of gender justice is presently poor, there remains cause for hope, as not only the *Rome Statute* but the structure of the ICC appears to be amenable to change. In 2014, the current Prosecutor, Fatou Bensouda,[18] released a Policy Paper on gender and sexual crimes which signals a shift away from Moreno-Ocampo's approach (Chappell 2014, 187). Moreno-Ocampo rarely spoke or wrote on gender or sexual violence (Chappell 2014, 187). Contrastingly, in a 2012 speech, shortly after her election as Prosecutor, Bensouda noted the importance of crimes of sexual and gender based violence and called the creation of the now released Policy Paper a 'priority' for her office (Bensouda 2014). The Policy Paper notes that the gender and sexual based crimes are 'amongst the gravest under the Statute' and that their prosecution is a 'key strategic goal' for her office (Office of the Prosecutor 2014, 5). The Policy Paper also suggests that her office needs to enhance its expertise and skills in these prosecutions and gender sensitivity (Office of the Prosecutor 2014, 5). The document comprehensively and systematically outlines the particular prosecutorial focus for every *Rome Statute* article relevant to gender and sexual violence (Office of the Prosecutor 2014, 5). This demonstrates a shift in transparency and approach compared to Moreno-Ocampo who did not have a policy on these crimes. The early cases were principally conducted under his supervision and are manifest failures for gender justice. However, under Bensouda, the rhetoric alone demonstrates a shift away from the rape schema's damaging assumptions which appear to have marred prosecutions in *Lubanga* and *Katanga.* Her initial policy outlook appears to be moving towards a more gender conscious prosecutorial method which demonstrates that the iterability of the *Rome Statute* may be seeping into the Prosecutor's practices leaving cause for hope for observers of international criminal law.

Therefore, the progressive *Rome Statute* has failed to be implemented in an effective manner. This can be understood through the concepts of the rape schema, iterability, *habitus* and field, which together concern the entrenched and internalized nature of flawed gendered assumptions regarding sexual violence in international criminal law. This can assist in explaining why the *Rome Statute* in practice, is failing to deliver gender justice. The context surrounding these reforms remains embedded in a patriarchal *habitus* and field which entrenches a rape schema that views sexual violence as a crime of lesser importance. For any law reform to succeed, it must be more iterable than the rape schema. However, the ICC appears to be shifting away from this rape schema as it is an innovative jurisdiction with a new structure and greater judicial diversity. Recently, the Prosecutor has shown strong indications of a shift towards a gender responsive prosecutorial practice which gives sexual violence a new significance. Consequently, whilst the current situation in the ICC may not be amenable to positive outcomes for gender justice, reform is slowly occurring as the current Prosecutor shifts away from the problematic ideas of the gendered rape schema.

Conclusion

Sexual violence is a particularly abhorrent crime which remains a feature of armed conflict (Ban 2014). Since the 1990s international criminal law has attempted to seek justice for these crimes

[18] Prosecutor Bensouda was Elected in December 2011 and sworn in in June 2012: International Criminal Court, *Mrs, Fatou Bensouda, ICC Prosecutor* (2014) < http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/Pages/theprosecutor2012.aspx> .

through international legal fora. The creation of the ICC in 2002 was seen as a watershed moment for international criminal law, particularly because of its progressive gender justice reforms (Joseph 2008, 100-101). The governing *Rome Statute* defined gender for the first time (art 7) and established new heads of liability for sexual violence with progressive definitions (*Elements of Crimes*, arts 7(1)(g); 8(2)(b)(xxii); (8(2)(e)(vi)). It also shied away from language regarding particular genders and sexual actions. The *Rome Statute* further provides significant evidentiary and support mechanisms to the victims (arts 43; 68), and even qualified representation through legal proceedings and recourse to reparations (art 75). Overall, the *Rome Statute* is a strong development for gender justice leading to heightened hopes for a reduction of impunity for these crimes.

However, twelve years after its inception, with only two defendants sentenced, the ICC is failing to implement the *Rome Statute*'s reforms. The Court has only heard two cases through to sentence, both included shocking evidence of sexual violence, yet the defendants were not charged, or acquitted, of those offences. These failings are the consequence of poor prosecutorial practice and judgement in laying the charges and evidence gathering and demonstrate an internalized rape schema operating in international criminal law. Accordingly, the law and practice are divergent at the ICC. In fact, the practice is subversive of the law's aim to provide gender justice.

This disjuncture between the law and practice can be understood through the concepts of iterability, the *habitus* and field. These concepts from critical theory address the repeatability and stickiness of legal reform. A legal reform can fail to gain traction in practice when it is situated within a context which has very entrenched norms governing behavior like the rape schema. In international criminal law, this includes the view that sexual violence is a crime of lesser importance (Chappell 2014, 187-188). The *habitus* and field of international criminal law already appears to be malleable with a novel structure including victim's representation, and diversity of judges (Chappell 2010, 142). The current Prosecutor also appears to be shifting her focus towards crimes of gender justice through her actions and language (Bensouda 2014). Thus despite the current issues regarding coincidence between the law and practice, there is a shift towards convergence as the rape schema diminishes in importance. Therefore, there is cause for hope on the ICC's future performance for gender justice.

Acknowledgements

An earlier version of this paper was presented at the National Law Honours Student Conference, at the University of Technology, Sydney in 2014. Thank you to the other panelists and participants for their comments. Thank you also to Sarah Sorial for her comments on earlier version of this work.

Bibliography

Andric-Ruzicic, Duska. 2003. "War Rape and the Political Manipulation of Survivors." In *Feminists Under Fire: Exchanges across war zones*, edited by Wenona Giles et al, 103-114 Toronto: Between the Lines.

Bartlett, Katharine T. 1990. "Feminist Legal Methods." *Harvard Law Review* 103:(4) 829-888.

Bensouda, Fatou. "Gender Justice and the ICC: Progress and Reflection." Paper presented at the International Conference: 10 years review of the ICC. Justice for All? The International Criminal Court Conference, University of New South Wales, Sydney, 14 February 2014 < http://www.icc-cpi.int/NR/rdonlyres/FED13DAF-3916-4E94-9028-123C4D9BB0C9/0/StatementgenderSydeny140212.pdf >

Bourdieu, Pierre. 1990. *The Logic of Practice.* Translated by Richard Nice. Stanford: Stanford University Press.

Chappell, Louise. 2014. "Conflicting Institutions and the Search for Gender Justice at the International Criminal Court." *Political Research Quarterly* 67(1): 183-196.

Chappell, Louise. 2010. "Gender and Judging at the International Criminal Court" *Politics & Gender* 6(3): 484-495.

Coomaraswamy, Radhika. 2003. "A Question of Honour: Women, Ethnicity, and Armed Conflict.", in *Feminists Under Fire: Exchanges across war zones*, edited by Wenona Giles et al 91-101. Toronto: Between the Lines.

Davies, Margaret. 2012. "The Law Becomes Us: Rediscovering Judgment" *Feminist Legal Studies* 20: 167-181.

De Than, Claire, and Shorts, Edwin. 2003. *International Criminal Law and Human Rights.* London: Sweet and Maxwell.

Geneva Convention (I) For The Amelioration Of The Condition Of The Wounded And Sick In Armed Forces In The Field, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950).

Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950).

Geneva Convention (III) relative to the Treatment of Prisoners of War, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950).

Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

Heller, Kevin Jon. 2014. "Another Terrible day for the OTP." *Opinio Juris* March 8. < http://opiniojuris.org/2014/03/08/another-terrible-day-otp/>

International Criminal Court, *Elements of Crimes,* ICC-ASP/1/3(part II-B) (adopted 9 September 2003)/

International Criminal Court, *Former Judges* (2014) < http://www.icc-cpi.int/EN_Menus/icc/structure%20of%20the%20court/chambers/the%20judges/pages/former%20judges.aspx>

International Criminal Court, *Mrs, Fatou Bensouda, ICC Prosecutor* (2014) < http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/Pages/theprosecutor2012.aspx>

International Criminal Court, Public Affairs Unit, 'Defence and Prosecution discontinue respective appeals against judgment in Katanga case' (Press Release, ICC-CPI-20140625-PR1021, 25 June 2014), < http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1021.aspx>

International Criminal Court, *Regulations of the Court*, Doc No ICC-BD/01-02-07 (adopted 26 May 2004, as amended on 14 June 2007 and 14 November 2007).

International Criminal Court, *Rules of Procedure and Evidence*, Doc No ICC-ASP/1/3 (adopted 9 September 2003).

Joseph, Joshua H. 2008. "Gender and International Law: how the International Criminal Court can bring justice to victims of sexual violence." *Texas Journal of Women and the Law* 18: 61-101.

Ban, Ki-moon, Secretary-General, *Conflict-related sexual violence: Report of the Secretary-General*, UN SCOR, UN Doc S/2014/181 (13 March 2014).

MacKinnon, Catherine A. 2003. *Are Women Human?* Harvard: Harvard University Press.

MacKinnon, Catherine A. 1994. "Rape, Genocide, and Women's Human Rights." *Harvard Women's Law Journal* 17: 5-16.

Merope, Sienna, 2010. "Recharacterizing the Lubanga Case: Regulation 55 and the

Consequences for Gender Justice at the ICC." *Criminal Law Forum* 22:311-346.

Munro, Vanessa, E. 2010. "From Consent to Coercion." In *Rethinking Rape Law* edited by Clare McGlynn and Vanessa E. Munro, 17-29. London: Routledge.

Office of the Prosecutor, 'Policy Paper on Sexual and Gender-Based Crimes', (Policy Paper, International Criminal Court, June 2014)

Prosecutor v Akayesu (Judgement) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-96-4, I June 2001).

Prosecutor v Akayesu (Judgement) (International Criminal Tribunal for Rwanda, Chamber I, Case No ICTR-96-4-T, 2 September 1998).

Prosecutor v Akayesu (Sentence Judgement) (International Criminal Tribunal for Rwanda, Chamber I, Case No ICTR-96-4-T, 2 October 1998).

Prosecutor v Chui (Judgement) (International Criminal Court, Trial Chamber II, Case No ICC-01/04-02/12-3, 18 December 2012).

Prosecutor v Delalic, (Judgement) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-21-A, 20 February 2001).

Prosecutor v Furundzija (Judgement) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-17/1-A, 21 July 2000).

Prosecutor v Furundzija (Judgement) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998).

Prosecutor v Katanga (Judgement) (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-3436, 8 March 2013).

Prosecutor v Katanga (Minority Opinion of Judge Christine Van den Wyngaert) (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-3436-AnxI, 7 March 2014).

Prosecutor v Katanga (Sentencing Judgement) (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-3484, 23 May 2014).

Prosecutor v Katanga (Summary Judgement) (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 8 March 2014).

Prosecutor v Kunarac (Judgement) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-23 and IT-96-23/1-A, 12 June 2002).

Prosecutor v Kunarac, (Judgement) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-23-T and IT-96-23/1-T, 22 February 2001).

Prosecutor v Lubanga (Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court) (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-2049, 14 July 2009).

Prosecutor v Lubanga (Decision on the Presiding Judge in the appeals against the 'Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court') (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06-2151, 6 October 2009).

Prosecutor v Lubanga (Decision on the prosecution and the defence applications for leave to appeal the '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') (International Criminal Court, Trial

Chamber I, Case No ICC-01/04-01/06-2107, 3 September 2009).

Prosecutor v Lubanga (Judgement) (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-2842, 14 March 2012).

Prosecutor v Lubanga (Sentencing Judgement) (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-2901, 10 July 2012).

Prosecutor v Lubanga (Separate and Dissenting Opinion of Judge Odio Benito) (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-2842, 14 March 2012).

Prosecutor v Lubanga (Separate Opinion of Judge Fulford) (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-2842, 14 March 2012).

Prosecutor v Mucic, (Judgement on Sentence Appeal) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-21-Abis, 8 April 2003).

Prosecutor v Muhimana (Judgment and Sentence) (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR- 95-1B-T, 28 April 2005).

Prosecutor v Semanza (Judgement and Sentence) (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-97-20-T 7494-7261, 15 May 2003).

Prosecutor v Tadic (Judgement on Sentencing Appeals) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A and IT-94-1-Abis, 26 January 2000).
Prosecutor v Tadic (Judgement) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999).

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978).

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978).

Quilter, Julia Ann. 2011. "Re-framing the rape trial: insights from critical theory about the limitations of legislative reform." *Australian Feminist Law Journal* 35:23-56.

Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).
SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (25 May 1993) (*ICTY Statute).*
SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RES/955 (8 November 1994) (*ICTR Statute).*

Semanza v Prosecutor (Judgement) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-20-A, 20 May 2005)

Skjelsbaek, Inger. 2001. "Sexual Violence and War: Mapping Out a Complex Relationship." *European Journal of International Relations* 7(2):211-237.

Women's Initiatives for Gender Justice, 'Partial Conviction of Katanga by ICC Acquittals for Sexual Violence and Use of Child Soldiers The Prosecutor vs. Germain Katanga' (Press Statement, 7 March 2014) < http://www.iccwomen.org/images/Katanga-Judgement-Statement-corr.pdf >
Women's Initiatives for Gender Justice, *ICC partially convicts Katanga in third Trial Judgment acquitting Katanga of rape and sexual slavery* (16 May 2014), International Justice Monitor, < http://www.ijmonitor.org/2014/05/icc-partially-convicts-katanga-in-third-trial-judgment-acquitting-katanga-of-rape-and-sexual-slavery/>

Zarkov, Dubravka. 1997. “War Rapes in Bosnia: On Masculinity, Femininity and Power of the Rape Victim Identification.” 39(2) *Tijdschrift voor Criminologie* 39(2):140-151.