

The untold story of the girl soldiers of the Congo: the International Criminal Court case of Prosecutor v Lubanga.

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Abstract: Thomas Lubanga was convicted of the conscription, enlistment and active use of child soldiers in the International Criminal Court (ICC)¹. The decision served to increase international awareness of child soldiers. However, the majority had ignored the plight of the girl child soldier by ignoring the role gender played in defining the experiences of girl soldiers. Yet, there is widespread evidence of the sexual abuse of girls by their commanders. Thematic prosecutorial focus on conscription of child soldiers, marginalizes attention and cultural change relating to gender based violence.

Key words: Lubanga, ICC, Child soldiers, feminism

Introduction

Historical records show that child soldiers have fought in conflicts since the beginning of the 15th century.² The modern use of child soldiers was facilitated by access to the AK-47, a light weapon which can easily be used by children. Africa boasts a younger population so children would be the first choice for recruitment into armed factions or rebel groups.³ Though the use of child soldiers have been prohibited by a number of international treaties the Rome Statute criminalises their use in articles 8 (2) (b) (xxvii) and 8(2) (e) (vii).⁴ Thomas Lubanga has been convicted of encouraging the use of children in the conflict in Ituri, a region of the Democratic Republic of the Congo (DRC). This paper examines how the majority of the Appeals Chamber provided inadequate protection of the interests of girl soldiers. It will discuss the construction of gender in international law, the refraction of this construction in the Rome Statute and how this filtered down to produce a gender-biased judgement.

Background information

¹ Judgment pursuant to Article 74 of the Statute, *Prosecutor v Lubanga* ICC-01/04-01/06-2842, 14 March 2012 Trial Chamber I (hereinafter the Lubanga judgement)

² Vincent, J " War in Uganda: North and South" in (ed) S.P Reyna and R.E Downs *Deadly Developments: Capitalism States and War* (Gordon and Breach publishers, Netherlands,1999) at [110]

³ Dunson, D *Child, Victim, Soldier: the Loss of Innocence in Uganda* (Orbs Books, New York,2008) at [12] : Unlike developed countries, approximately 50% of the African population is 15 years or younger

⁴ The Rome Statute of the International Criminal Court 2187 UNTS 90 (opened for signature 1 July 1998 entry into force 1 July 2002), art 8(2)(b) (xxvii) art 8(2) (e) (vii) (known hereinafter as the Rome Statute)Lubanga was tried under art 8 (2) (e)(vii) the crime of: conscripting, enlisting or using persons under the age of 15 in active participation in hostilities

The situation in Ituri was referred to the ICC prosecutor by Joseph Kabila, the DRC president. After an investigation, Lubanga's warrant was issued in 2005.⁵ He was captured and delivered to the ICC in 2006.⁶ The Appeals Chamber found that Lubanga provided an essential contribution to the plan to build an army that used young people to take control of Ituri. Lubanga was sentenced to 14 years imprisonment.⁷ He was only tried for the crime of using child soldiers though he was responsible for an array of crimes; for example he had enslaved the people of Bunia to work in nearby gold mines in 2002.⁸

It is estimated that 30,000 children in Ituri were abducted or enlisted in Lubanga's armed faction. Additionally Lubanga had kept child bodyguards and encouraged the policy of forcible abduction of children to keep the conflict alive and replenish the army.⁹ This working paper seeks to critique the majority Appeals Chamber decision that the widespread and systematic rape and sexual violence which characterised the lives of girl soldiers was not considered active use of children in hostilities. Consequently Lubanga was not, in his capacity as a military leader, held responsible for the actions of soldiers fighting in his armed faction. This result is due to the narrow definition that was adopted by the majority in defining which tasks constitute active participation. The definition perpetuates legal constructions which have acted to exclude female interests from being represented in international law.

Gender in international law

Prima facie the law does not recognise the concept of gender. This working-paper argues that gender constructions hide behind the construction of the law and women's interests have accordingly been marginalised. This section consists the following parts: 1) understanding the construction of the legal person and 2) examining the position of women in the international sphere.

The legal person

Law is a social construct, the result of interplay between two or more social actors. Philosophically speaking, the law strives to distance itself from its reality by adopting the abstracted language of universality. The construct of the legal person exemplifies this. The person is seen as genderless, ageless and devoid of ethnicity in the eyes of the law. Such a construction was necessitated by the need for the law to apply to everyone. Nevertheless, there is an inconsistency in this construct as it cannot

⁵ The Hague Justice Portal "Thomas Lubanga" (23 february 2011) the Hague Justice Portal < <http://www.haguejusticeportal.net/index.php?id=8156>>

⁶ As above

⁷ International Criminal Court "Thomas Lubanga Sentenced to 14 Years Imprisonment" (press release, July 2012) < <http://www.icc-cpi.int/NR/exeres/3EABAD63-FC6B-448A-9614-5BA2AECF10CF.htm>>. : See the *Lubanga* judgement at [613] At [1142] at [1162] and [1169]

⁸ Brownman, R "Lubanga, the DRC and the African Court: Lessons Learnt From the First International Criminal Court Case" (2007) 7 *African Human. Rights Law Journal* 412 at [417]

⁹ The *Lubanga* judgement At [1019]

escape social concepts of gender. In social-linguistic terms, ideas which constitute male and female are organised in a binary; the binary organises qualities of male and female as complementary opposites which intrinsically values the male at the expense of the female.

The binary evolved due to biological and the gendered division of labour and space. The male was defined as active, autonomous, modern, rational and dwelt in the public space. The female was defined as weak, passive, dependent, emotional and resided in the private space under the regulation of men.¹⁰ In fact, the legal person is an embodiment of the masculine side of the binary as the law arose in public sphere, the sphere of men. It is well known that historically women were considered the chattels of men and had to struggle to attain separate legal personhood. In that time, rape and sexual violence was considered a property offence.¹¹

Gender in international law

The gendered binary exists in international law. The binary is equally a spatial division of labour. As abovementioned, the abstracted notion of the law evolved from the increasingly complex dealings within the public realm. Traditionally the law's boundaries lay where the domestic world began. This trend is still evident in international law. Hilary Charlesworth's critique of international law describes that it is based on masculine concepts of state sovereignty, autonomy and, ultimately, rational choice. Like its domestic counterpart, international law marginalises women by refusing to regulate the "feminine" private space.¹²

More specifically, women's protection in international law has never evolved in meaningful way. Women are still objectified to a certain extent. In Bosnia the rape of Muslim women was seen as an effort to destroy the honour of Bosnian men. The International Criminal Tribunal for the former Yugoslavia (ICTY) also characterised rape in terms of the effect it had in eradicating the identity of male group members.¹³ In armed conflict, where rape was considered a war objective, two features were prominent: 1) there was a lack of adequate legal protection and enforcement for sexual crimes and 2) women were still socially constructed, to some extent, as

¹⁰Adkins, L. "Feminist Social Theory" in (ed) Austin Harrington *Modern Social Theory: An Introduction* (Oxford University Press, US, 2005) at [234]; Charlesworth, H. and Chinkin, C. *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, USA, 2000)

¹¹ Askin, K.D, "Prosecuting Wartime Rape And Gender Related Crimes Under International Law: Extraordinary Advances And Enduring Obstacles" (2003) 23 *Berkeley Journal of International Law* 288 at [297] : the perception of women as objects and of them belonging to men coupled with the lack of adequate legal protection had caused sexual offending a warfare goal which are most notably seen in the ICTY and the ICTR.

¹² Charlesworth, H. and Chinkin, C. above n 10, At [30] John Locke, a prominent legal philosopher, sharply delineated between the public male space and the female space was devoid of politics, indeed the female space was needed so the male could have the freedom to participate in the political public world

¹³ Askin, K.D "Gender Crimes Jurisprudence in the ICTR" 3 *Journal of International Criminal Justice* 1007 at [1009]

objects for men.¹⁴ Though the Rome Statute attempts to give women greater protection from sexual violence, the structure of article 7(1)(g) perpetuates the binary construction in the international and has contributed to the exclusion of girls' experiences in *Lubanga*.

The Rome Statute

Feminists have lauded the Rome Statute as an instrument which affords greater women's protection.¹⁵ However, I would argue that the structure of the Rome Statute serves to maintain women's secondary status and prevents the evolution of more thorough women's protection regimes vis-à-vis international crimes. The problem lies in the construction of art 7(1) (g) which constitutes "Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" as Crimes Against Humanity.

The Statute takes a different approach to previous International criminal courts by localising all manner of sexual offending in art 7(1)(g). It has the effect of "scrubbing clean" the remaining three crimes in the Rome Statute. Landmark court cases such as *Akayesu*, show how the International Criminal Tribunal of Rwanda (ICTR) included the rape and sexual torture of Tutsi women as an act of genocide against the Tutsi people.¹⁶ Subsequent ICTR rulings have found sexual violence constitutes torture and that propaganda which incites sexual violence amounts to persecution of a group.¹⁷ ICTY cases, such as *Celebici* and *Furundzija*, take a similar approach in considering sexual violence as offending which forms part of the crimes of genocide, persecution and war crimes.¹⁸

The effect of art 7(1)(g) is that it obscures the understanding that women's innate sexualisation and objectification means that crimes such as genocide, torture and persecution will be enacted in a sexualised manner. The above cases show a nascent trend of valorising women's experiences and creating a concurrent women's narrative of these crimes. Combined with the male narrative of international crimes, a

¹⁴ At [1009]

¹⁵ Bedont, B "Gender Crimes Under the International Criminal Court"(1999) 6 *Brown Journal of World Affairs* 65; McDougal, G.Jl "Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed conflict" U.N. DOC. E/CN.4/sub.2/2000/21(2000) Gallagher, K "Towards a Gender Inclusive Definition of Child Soldiers: Prosecutor v Thomas Lubanga" (2010- 2011) 155 *Eyes on The ICC* 115 at [132]; Pritchett, S.M "Entrenched Hegemony, Efficient Procedure of Selective Justice? An Inquiry into Charges for Gender Based Violence" (2008) 17 *transnational & contemporary Problems* 265 at [281]

¹⁶ *Prosecutor v. Jean-Paul Akayesu* ICTR-96-4-T, T597, 2 September 1998 (ICTR) at [690]

¹⁷ *Laurent Semanza (Judgement and Sentence)*, ICTR-97-20-T 15 May 2003 (ICTR): *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze (Appeal Judgment)* ICTR-99-52-A, 28 November 2007 (ICTR) (known as the Media Judgement)

¹⁸ *Prosecutor v. Delalić et al. (Čelebići case)*, *Judgement* Case No. IT-96-21-A, App. Ch., 20 February 2001 (ICTY): *Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, 10 December 1998 (ICTY): Pritchett, S. M, above n 15, at [277]

female narrative would lead to wider victim representation and a fuller sense of justice. By isolating sexual violence in art 7(1)(g), the Statute no longer recognises that crimes will almost always be enacted in a sexualised manner on women due to their social sexualisation and corporality. It maintains women's peripheral status because art 7(1)(g) fails to make sexual violence part of the narrative of larger sexual offending. Consequently, sexual violence is viewed in a vacuum which serves to isolate and marginalise females.

One of the live issues of *Lubanga* is how the term "active use of persons under 15 in hostilities" would be defined. It is the focus of this working paper because, the Appeals Chamber was essentially asked to decide which actions would be defined as active participation in hostilities and which did not. The prosecutor's did not bring the case for sexual abuse as active participation forward. This is partly due to the Statute's construction which, prima facie, would view the sexual abuse of girls as a separate crime to use of child soldiers. It demonstrates the lack of will to protect the sexualised female body.¹⁹ As the ICC carries tremendous normative weight as it only prosecutes the "most serious of crimes", the continued exclusion of the widespread abuse of girls indicates that female protection is not a high priority.²⁰ The prosecutor's choice ignores the fact that often girls are recruited for the purpose of providing sexual services to the armed group. Girl soldiers are treated as trophies for good performance and are subsequently considered "wives" whilst in reality they resemble sexual chattel. Girls status as "wives" means that they are extremely unlikely to resort to DRC domestic law as women need the permission of their husbands to initiate proceedings.²¹ The ICC has effectively precluded legal redress for these girls and justice has been brought at the expense of the most vulnerable person: the girl child.²²

In defining which actions performed by children would amount as active participation, the Appeals Chamber relied on the PREPCOMMs definition.²³ The term active participation denotes the male actor and already disadvantages the female. The

¹⁹ Graf, R. "The International Criminal Court and Child Soldiers: An Appraisal of the Lubanga Judgement" (2012) *Journal of International Criminal Justice* 25, at [41]

²⁰ The Rome Statute, Preambular paragraph three

²¹ Pritchett, above n 15, at [293]

²² Susanna Greijer "The Thematic Prosecution of Crimes Against Children" in (ed) Morten Bergsmo *Thematic Prosecution of International Sex Crimes* (Torkel Opsahl Academic E-Publisher, Beijing, 2012) 136 at [156]; O'Smith, K. "Prosecutor v Lubanga: How the ICC failed the Women and Girls of the Congo" (2010-2011) 54 *Howard Law Journal* 467 at [469]

²³ PrepCom Draft Statute at [21] cited in Hebel, H. V. and Robinson, D. "Crimes Within the Jurisdiction of the Court" in (ed) Roy Lee *The International Criminal Court* (R. Lee, Kluwer Law International, 1999)

The words... active participation in military activities [are] linked to combat such as scouting, spying, sabotage and use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer's married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included."

activities which are included in the definition are tasks typically assigned to boys.²⁴ Whilst activities which fall outside the definition are domestic and support functions which are assigned to girls.²⁵ The acceptance of the PREPCOMM definition perpetuates a misunderstanding of gender roles which in turn shows a misconception of the crime itself. The intention of recruiting girls for the purpose of being reward as “wives” shows that girls perform an “essential service” and their sexual abuse should go to the heart of the definition of active participation.²⁶ More importantly a more expansive definition would encompass the fact that harm does not result from being exposed to enemy fire but from the group that does the recruiting. Children are often tortured, brutalised, sexually abused and live in inadequate conditions as part of training.²⁷ The effect of the Appeals Chamber decision is that it serves to further disadvantage female interests through limited understandings of the way that hidden gendered constructions operate in the Rome Statute.

The majority decision

The Appeals Chamber was asked to provide a test to determine which tasks would be considered active participation. The majority defined active participation as a service provided by the child which exposed him/her to damage by becoming a potential target.²⁸ The majority was also invited to make a separate ruling on whether the systematic sexual abuse of girls would amount to active participation. But the majority declined the opportunity to do so as they felt bound by the case that the prosecutor brought forward.²⁹ Nonetheless, the definition formulated by the majority serves to exclude sexual abuse in any case because it envisions active participation to be something that occurs on the front lines, not in the “safety” of the camp.

Though it interprets the Rome Statute narrowly, the interpretation is based on the gender binary assumption which views the male as the active agent. Instead of eradicating the stereotypical image of the boy soldier the majority serves to perpetuate it through its adoption of the active participation definition. It fails to capture the larger purpose which views the act of child recruitment as a cause of harm to the child regardless of whether they are at risk of being enemy targets. Child soldiers experience harm because they are taken away from their families, they are forced to complete rigorous training, they witness the horror and aftermath of fighting

²⁴ Gallagher, above n 15, at [126]

²⁵ Pritchett, above n 15, 265 at [293]

²⁶ The Separate Opinion of Judge Elizabeth Odio-Benito, *Prosecutor v Lubanga* ICC-01/04-01/06-2842, 14 March 2012, Trial chamber 1 at [19-21] (hereinafter known as the minority judgement of Odio-Benito). The minority was willing to go outside the bounds set by the prosecutor to make a decision on the status of sexual abuse of girl soldiers.

²⁷ At [19]

²⁸ The *Lubanga* judgement at [820]

²⁹ The minority judgement of Odio- Benito at [8

and are often mistreated by the armed faction they fight for. The majority judgement is a real example of how avoidable dealing with sexual offending has become since the advent of the Rome Statute as previous international cases have felt compelled to deal with the offending. *Lubanga* shows how the hidden masculine assumptions of the legal person, coupled with the isolation of sexual offending has made it relatively easy for the court to sidestep important human rights issues in the name of trial efficiency.

Conclusion

This working paper aims to expose the incompleteness of the justice offered by the ICC in the Lubanga case. It has endeavoured to show that this incompleteness is a symptom of an intrinsic construction which privileges the male at the expense of the female. The construction of the legal person originally only extended to the male. The idea of females as separate legal persons developed incrementally and, as a result, women's protection never evolved in a way which gave meaningful protection. Women form the margins of international law. Though ICTR and ICTY cases were starting to create a female narrative of international crimes, this progress was stifled by the structure of the Rome Statute which isolated sexual offending making it easier to avoid bringing a case forward. This is evidenced by the prosecutor's choice to exclude girl soldiers' experiences from the case and in turn shaped the majorities reluctance to engage with the issue. Access to justice is a hallmark of human rights and the ICC's decision serves to silence the voices of young girls across the DRC.