

The Normative Evolution of Gender-Based Crimes Against Humanity

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Abstract

This article traces the history of gender-based crimes against humanity, examining the process by which the International Criminal Court came to recognize crimes exploiting gender-specific roles as differentiating from existing sexual offences. Focusing on the case of former Lord's Resistance Army commander Dominic Ongwen, various perspectives across international law are explored in order to elucidate the justification for creating new charges addressing gender-based crimes, including forced marriage. Considering the recent conviction of Mr. Ongwen, this essay provides excellent insight into the current paradigm shift occurring within international law concerning the prosecution of gender-based crimes against humanity.

Key Words: international law, gender, crimes against humanity, violence against women

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Biographie: Actuellement étudiant aux études supérieures en archéologie à l'Université de Lethbridge, Ali a cultivé un degré important d'expérience académique dans les domaines des relations internationales et de la psychologie, ses majeures jumelles, pendant ses études de premier cycle à l'Université de Toronto. En tant qu'étudiant et ancien analyste des affaires publiques pour le Département d'État des États-Unis, Ali a observé que les institutions clés du système international sont dynamiques par nature. Comme l'illustre cet article, Ali cherche constamment à explorer les contextes qui facilitent les changements normatifs au sein de ces institutions, ainsi que leurs conséquences sur la communauté internationale au sens large.

Résumé

Cet article retrace l'histoire des crimes contre l'humanité fondés sur le genre, en examinant le processus par lequel la Cour pénale internationale en est venue à reconnaître les crimes exploitant des rôles spécifiques au genre comme se distinguant des infractions sexuelles existantes. En se concentrant sur le cas de l'ancien commandant de l'Armée de résistance du Seigneur (Lord's Resistance Army) Dominic Ongwen, diverses perspectives du droit international sont explorées afin d'élucider la justification de la création de nouveaux chefs d'accusation concernant les crimes sexistes, y compris le mariage forcé. Compte tenu de la récente condamnation de M. Ongwen, cet essai donne un excellent aperçu du changement de paradigme qui s'opère actuellement au sein du droit international en ce qui concerne la poursuite des crimes contre l'humanité fondés sur le sexe.

Mots clés : droit international, genre, crimes contre l'humanité, violence contre les femmes

Introduction

On December 6, 2016, Dominic Ongwen was brought before the International Criminal Court (ICC) to hear the Prosecution's case against him. A member of the Ugandan Lord's Resistance Army, Mr. Ongwen stood accused of a plethora of war crimes and crimes against humanity, as defined by the Prosecutor, ranging from murder and torture to enslavement and sexual slavery (ICC, 2021a). Yet amongst the charges laid against him that day, one in particular resulted in a conviction debut bearing crucial implications for international criminal law: the charge of "forced marriage". As will be explored throughout this essay, utilizing this phrase for the charge of a crime against humanity reflected a powerful normative shift in how gender-based crimes against humanity are perceived, and consequently, adjudicated by the ICC. By examining the international community's reactions to cases ranging from Sierra Leone to Afghanistan, I posit that we can observe the evolution of a legal paradigm which considers the exploitation of gender-specific roles as constituting gender-based crimes against humanity, as opposed to one centred exclusively around the indictment of sexual violence.

Historical Context: Gender Based Crimes Against Humanity

For Mr. Ongwen to stand before the Prosecutor, accused of forced marriage among other crimes, an arduous path had to be taken that far predated the Rome Statute and the founding of the ICC. In order to contextualize the normative shift in how gender-based war crimes are being addressed; it is important to first trace this evolution of gender-based crimes on the international level. Though a multitude of cases occurred in World War Two which included the gender-based crimes that will be discussed in this essay, as human rights lawyer Kelly Askin (1997) states, "the Nuremberg trials did not adequately acknowledge or remedy gender-specific sex crimes committed during the course of the Second World War" (p. 215). Indeed, at the Genocide Convention of 1948, violations of which are serious infractions of international law did not include gender as one of the explicitly stated protected groups, amongst "national, ethnical, racial, or religious groups" (United Nations [UN], 1948, Art. 2).

However, this certainly does not mean that crimes committed against women went unaddressed during this time. As evidenced by the rulings of the International Military Tribunal for the Far East, those guilty of wartime rape in the Pacific Theatre of WW2 were indeed charged with war crimes in their indictments, “though rape was not explicitly stated in the Tokyo Charter” (Askin, 1997, p. 202). It seems evident that beyond the inclusion of sexual assault crimes committed during wartime constituting war crimes, gender-based crimes did not garner as much attention from the international legal community as race, ethnicity, or religious-based crimes, which claimed a clear status as crimes against humanity. The historical context of WW2 appears to have provided a sharp incentive for codifying crimes against the aforementioned groups, whereas gender-based crimes may not have been as explicitly salient (at least not without being supplemented by one of the other specified groups, such as “Chinese” women or “Jewish” men).

As the twentieth century moved along, a myriad of events highlighted issues with reducing the perception of gender-based crimes to sexual crimes alone. Prominent among these events was the Sierra Leone Civil War which devastated the country throughout the 1990s and left “thousands of women and girls of all ages... subjected to widespread and systematic sexual violence” (Palmer, 2009, p. 135). However, it was not the sexual violence alone that attracted legal attention, but the realization that this “violence frequently manifested itself through forced marriage involving abduction by the rebels and subjection to... forced labor. These women and girls were forced to assume all the obligations of a traditional wife” (Palmer, 2009, p.135). Signalling an important turning point in the understanding of gender-based war crimes, Sierra Leone and its several contemporary cases would outline a new framework through which gender-based war crimes were perceived; one inclusive of the exploitation of gender-specific roles alongside the traditionally accepted paradigm centred on sexual violence.

The magnitude of this normative shift became globally apparent in 1998 when the Rome Statute of the ICC became the first international legal document to codify gender-based persecution as a crime against humanity (UN General Assembly, 1998). Expanding further on the framework established by the Genocide Convention, the

Rome Statute stated that “persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law” (UN General Assembly, 1998, Art. 7) constituted clear crimes against humanity. The inclusion of gender as a distinct group was pivotal, implying a transformation concerning the perception of gender associated crimes at the international legal level, as there would be no reason to include this new criterion if the understanding of the crimes remained unchanged.

With this addition, however, came an interesting point of contention from several states, particularly those with governments exhibiting conservative ideologies, focused on concern for the use of “gender” as a term (Oosterveld, 2006). This was evident in the statements from the Azerbaijani delegation, who voiced fears that official recognition of the term “gender” could give rise to “human rights based on sexual orientation” (Oosterveld, 2006, p. 58) while echoing the possibility of current state laws affecting women falling into the category of crimes against humanity once the Rome Statute was ratified. Though the Azerbaijani delegation’s statement regarding current laws being perceived as crimes against humanity in the future validated the necessity of adding “gender” as a specificity, the point considering misunderstanding of the term gender was indeed an issue that required direct addressing. To accommodate all states and maximize the applicability and acceptance of this clause, an amendment – the aforementioned Paragraph 3 – was added to Article 7 of the Rome Statute proclaiming, “For the purpose of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above” (UN General Assembly, 1998, Art. 7, para. 3).

Following this, gender became officially enshrined as a specific group guaranteed protection in the case of persecution and, moving into the twenty-first century, the gender-based crime against humanity was formally established. For the first time, there existed a clearly defined section of international law carved out for interpreting gender-based crimes. No longer would the concept of “gender-based” crime be normatively bound within the lens of sexual violence alone,

as the legal tools now existed to focus on crimes aimed at exploiting cultural gender-specific roles and ascertain the extent to which they constitute crimes against humanity.

Sierra Leone: Catalyzing Normative Development

Now that the historical context behind this emerging norm has been established, it is important to inspect those key cases which have both aided in and properly utilized this new perception of gender-based crimes at the international level. To illustrate the importance of this shift in perception, I examine the aforementioned Sierra Leone civil war, which ravaged the country from 1991 to 2002, and intensely captured the attention of the international legal community due to the range of atrocities committed (Oosterveld, 2004). Amidst the images of dismemberment and mass murder which funnelled from Sierra Leone to the international media, the world also became aware of the scale of systemic sexual violence plaguing the conflict. However, it was the additional observation of “abducted girls being forced to assume all the obligations of a traditional wife” (Palmer, 2009, p. 135) that prompted a first among ad-hoc tribunals: the attempted inclusion of the forced marriage charge.

Following the first eight years of the war, the international community attempted to mediate an armistice with the 1999 Lomé Peace Accord. This was done with the goal of legitimizing the Revolutionary United Front (RUF) as a legal political party within the democratically elected state system, in order to avoid further bloodshed. The RUF, however, refused to wholly disarm and further escalated the conflict by detaining five hundred UN peacekeepers in the next year (Palmer, 2009). This violation of the Lomé agreement catalyzed the creation of the Special Court for Sierra Leone (SCSL), “in order to prosecute persons for violations of both international and Sierra Leonean law” (Palmer, 2009, p.145). With the intention of “promoting full respect for human rights and humanitarian law...concerned with the socio-economic well-being of the people of Sierra Leone” (UN Security Council, 1999, p. 3), the SCSL moved forward to address the wide range of atrocities committed in the civil war.

When it came to sexual violence, however, the SCSL opted for an unprecedented decision. With gender-based crimes being a fresh addition to the international community's humanitarian watchlist via the 1998 Rome Statute, (though it did not enter into force until 2002), it appeared this was the optimal time to break new ground in the legal treatment of gender-based crimes. This is indeed exactly what the SCSL hoped to accomplish via the forced marriage charge (Oosterveld, 2004). Keeping with the central theme of shifting away from a framework focused on sexual violence, the SCSL Trial Chamber considered the prosecution of crimes against humanity called "other inhumane acts," under which forced marriage was initially argued to fit. This move would have signified the first inclusion of the forced marriage charge at an ad-hoc tribunal, as previous tribunals such as the International Criminal Tribunal for the former Yugoslavia had widely focused on explicit wartime sexual violence, framing the issues through narratives such as ethnic cleansing through war rape (Askin, 1997).

However, this was a short-lived proposition as the SCSL Trial Chamber ruled that forced marriage was not its own separate crime against humanity, even under the umbrella of other inhumane acts, and instead fell under the domain of sexual violence, citing it as redundant (Palmer, 2009). The Appeals Chamber attempted to overturn this ruling, yet the Trial Chamber upheld its original verdict, stating that forced marriage did not have the merit to constitute a standalone crime, resulting in the accused being convicted of the war crime of sexual slavery (Palmer, 2009).

Though this dispute between the SCSL's Chambers may seem contrary to the emerging trend that I am arguing for, Sierra Leone nevertheless provided the catalyst for gender-based crimes other than sexual slavery and rape to enter the international legal spotlight. Additionally, Justice Doherty who sat on the SCSL Trial Chamber dissented from their ruling, agreeing that the very use of the term wife "is indicative of forced marital status which had lasting and serious impacts on the victims" (SCSL, 2007, p. 591), drawing upon the stigmatization reported by individuals who became bush wives for armed forces. Her argument was contingent on the evidence that there exists a line between war crimes perpetrated out of a desire for sexual domination and those done with the explicit intent of exploiting a

culturally associated gender role; in this case, the acquisition of an obedient “bush wife” (SCSL, 2007, p. 587).

While ultimately rejected by the SCSL trial chamber, Justice Doherty’s argument further bolsters my claim that the normative evolution of gender-based crimes against humanity is centred around expanding the legal lens to view these instances of persecution as more than just mass sexual violence. The advent of this manner of argument at the level of an ad-hoc tribunal was pivotal, ultimately facilitating similar future arguments and building the foundations which would one day culminate in the ICC convicting Dominic Ongwen of forced marriage. As a result, the proceedings at the SCSL represent a crucial milestone for the current paradigm shift concerning the perception of gender-based crimes against humanity.

Nigeria and Cambodia: Solidifying the Normative Transition

In the sixteen years since the Rome Statute has come into force, the international legal community appears to have progressed far beyond what it displayed in Sierra Leone regarding its approach toward gender-based crimes against humanity. Dominic Ongwen has been mentioned throughout this paper for his significance as the first individual to be convicted of forced marriage at the ICC. However, before exploring his particular case, it is prudent to first explore how the international legal community’s viewpoint changed so dynamically in under two decades.

Nigeria

To further observe this normative transition, it is imperative to consider the findings of the ICC Prosecutor (herein referred to as the “Prosecutor”) in both 2015 and 2016. One particularly germane area is the section dedicated to Nigeria, where in 2015, the Prosecutor stated that an analysis had revealed that Boko Haram’s attacks on women were for “punitive reasons”, such as punishing girls for attending school (Prosecutor, 2015, p. 47). Alongside this, “tactical reasons”, such as being forced to cook, clean, and perform other tasks commonly associated with typical female gender roles in that respective society, were also cited as further incentives for the nefarious behaviour of Boko Haram (Prosecutor, 2015, p. 47). Finally,

the Prosecutor concluded the section on Nigeria by stating that, “the Office is devoting particular efforts to determine the gender component of crimes committed in Nigeria. This includes specific analysis of whether any of the alleged conduct constitutes the crime against humanity of persecution on gender grounds” (Prosecutor, 2015, p. 51). This declaration signaled another turning point in the international legal community regarding the expansion of dialogue surrounding gender-based crimes against humanity. If the Prosecutor stayed the course, it would almost certainly set a precedent that would expedite the normative shift in the perception of gender-based crimes against humanity towards one more inclusive of gender role-associated crimes.

Segueing into the 2016 “Report on Preliminary Examination Activities”, we can directly observe that the Prosecutor indeed maintained momentum and explored the extent of gender-based crimes against humanity in Nigeria. Here, the Prosecutor proclaims that in keeping with the aforementioned policy on gender-based crimes, the Office conducted further analysis into Boko Haram’s activities to assess which acts were “targeted at females because of their sex and/or socially constructed gender roles, and therefore could qualify as gender-based crimes” (Prosecutor, 2016, p. 65). This statement serves as compelling evidence that the normative shift I have been arguing for throughout this essay has indeed begun to take hold at the international legal level.

Though Boko Haram’s crimes centred around sexual violence and sexual slavery are widely documented and condemned, we are now able to also observe a thorough accounting of their gender-based crimes not explicitly focused on sexual violence, from the targeting of schoolgirls to viewing women as prime suicide bombers (Prosecutor, 2016). This is bolstered even further by the final note on Nigeria in the 2016 report, which speaks of research being done to ascertain whether crimes committed by the Nigerian security forces against military-aged males suspected of Boko Haram activity may be severe enough to constitute the deliberate deprivation of rights on the basis of gender grounds (Prosecutor, 2016).

This particular comment from the Prosecutor perfectly encapsulates the extent to which the dialogue regarding the

composition of a gender-based crime against humanity has opened up, considering gender-based crimes were completely absent from the Nigeria-dedicated section of the 2014 Preliminary Examinations Report (Prosecutor, 2014). It is interesting to note that several of Justice Doherty's aforementioned comments from the Sierra Leone case present themselves here, particularly the notion that a difference does indeed exist between gender-based crimes committed out of intent for sexual violence, and those done with an exploitative intent aimed at culturally accepted gender roles (SCSL, 2007). Justice Doherty's arguments echoing through the Prosecutor's report after twenty years is indeed a testament to the emerging normative shift surrounding gender-based crimes against humanity, cementing it as a resilient and determined process. All things considered, the progression of Nigeria's case magnificently highlights the transition from a gender-based crime against humanity paradigm focused solely on sexual violence, to one equally considerate of crimes exploiting gender-specific roles.

Cambodia

Furthermore, evidence of this normative evolution spurred by the SCSL is not limited to the ICC, as exhibited by the Extraordinary Chambers in the Courts of Cambodia (ECCC). In 2018, former Khmer Rouge officials Nuon Chea and Khieu Samphan were convicted of "forced marriage as the crime against humanity of 'other inhumane acts'" (ICC, 2021b, p. 6). Building on the jurisprudence of the SCSL Appeals Chamber, the ECCC (2019) judgement highlighted the "fundamental right to consensually marry as a distinct element in defining forced marriage" (p. 1863).

The ECCC's conviction of Khmer Rouge leaders was also significant for its recognition of both females and males as victims, as well as noting that women were found to have been forcefully married at a significantly younger age than men, reflecting assumptions concerning gender roles and youth (ICC, 2021b, pp. 13-16). By recognizing forced marriage as constituting a separate gender-based crime against humanity, the ECCC corroborated the normative shift toward an international framework vigilant of both sexual violence and gender role exploitation.

Afghanistan: Continued Relevance of Normative Evolution

One final pertinent insight to consider when contemplating the emerging normative shift in the perception of gender-based crimes against humanity, is the case of Afghanistan. Similar to Nigeria, the ICC Prosecutor has been eyeing Afghanistan with particular interest since 2015 regarding the impact of gender-based crimes distinct from sexual violence, perpetrated in this case by the Taliban. This led the Prosecutor to state that, “the alleged acts amounting to the crime against humanity of persecution on gender grounds have had a particularly broad and severe impact on the lives of women... Girls’ education has come under sustained attack... widowed women were often particularly vulnerable to other forms of violence and abuse from family and community members” (Prosecutor, 2016, p. 51).

Even with a Western presence in the country, crimes against humanity consisting of “murder, imprisonment or other severe deprivation of physical liberty” (Prosecutor, 2016, p. 45) are believed to have been committed by the Taliban. These crimes were directed specifically at “women and girls who worked, took part in public affairs, or attended school past the age of puberty” (Prosecutor, 2016, p. 46). Once again, this comment highlights a normative transition away from the traditional framework which solely addresses gender-based crimes against humanity involving sexual violence. With this justification, the Prosecutor concluded their 2016 section by stating that their office is in the midst of deciding whether to launch an official investigation into the situation in Afghanistan. As predicted, and in keeping with the argued trend, the 2017 Prosecutor’s report confirmed the previous report’s suspicions and the Prosecutor formally requested authorization for an investigation into the “situation in Afghanistan in the period since 1 July 2002” (Prosecutor, 2017, p. 61).

Admittedly, there exists a multitude of reasons for which the investigation into Afghanistan gained legitimate momentum, including alleged United States war crimes of torture and the Taliban committing the crime against humanity of murder (Prosecutor, 2016). Indeed, I am by no means arguing that the investigation hinged entirely on gender-based crimes against humanity. It is evident, however, that following the emerging trend of unprecedented advances in the international legal system regarding cases involving gender-based crimes against

humanity, a paradigm once doubtful of acknowledging forced marriage as a separate offence from sexual slavery has evolved to address gender role exploitative crimes pertaining to Afghanistan.

With the recent Taliban takeover of the country heralding an imminent rise in gender-based crimes against humanity, the case of Afghanistan remains more salient than ever. Amnesty International (2022) announced that, “Essential services for survivors of gender-based violence in Afghanistan have been decimated following the Taliban’s takeover of the country” (para. 1), due to the closure of shelters and release of detainees convicted of gender-based offences from prison. In this harrowing landscape where crimes such as forced marriage will inevitably increase, the observed normative shift toward an international legal system prepared to prosecute all gender-based crimes against humanity, including those concerning the exploitation of gender-specific roles, remains exceptionally relevant.

Significance of Dominic Ongwen

In conclusion, the normative stage has finally been set to understand the impressive magnitude of the prosecution against Dominic Ongwen. Recalling that the SCSL Trial Chamber elected to not distinguish “forced marriage” from sexual slavery, it is a groundbreaking signal that Mr. Ongwen stood accused of that very charge before the ICC, now distinctly framed as a crime against humanity under the Rome Statute’s “other inhumane acts” (ICC, 2021a). While the charge alone represented a landmark normative development in the international legal system, an indisputable milestone occurred on February 4, 2021, when Dominic Ongwen became the first individual to be convicted by the ICC for the crime of forced marriage (ICC, 2021a).

As a result of this indictment, Mr. Ongwen’s trial represents the culmination of a chapter two decades in the writing, one fiercely argued for by many scholars, lawyers, and judges versed in the international legal system’s treatment of gender-based crimes. The inclusion of a forced marriage conviction is indeed a significant achievement for the evolution of international criminal law, demonstrating a normative shift towards a legal paradigm equally cognizant of both gender-based crimes against humanity resulting

from sexual violence, as well as those concerning the exploitation of gender-specific roles.

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