

## **The Limits and Possibilities of Transitional Justice**

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In considering the wars in the Central African Republic (CAR), Darfur, and the Democratic Republic of Congo (DRC) where the use of sexual and gender-based violence (SGBV) is widespread, this paper seeks to accomplish two tasks. The first task is descriptive: to give an overview of the manner in which the International Criminal Court (ICC) has responded to SGBV in the three countries. The second task is a modest attempt to analyze why SGBV continues to be inadequately addressed. Here, the paper considers the practical challenges that are inherent in transitional justice as a tool, particularly in its preference of some harms and narratives over others.

The paper also considers the conceptual challenges that come with understanding SGBV itself, in particular the implications of a focus on sexual violence over other forms of violence, and that of a focus on women over other feminized identities. The paper concludes with the suggestion of some useful debates for the consideration of scholars and practitioners, including the possibilities of a consideration of rape as torture, and the ramifications of focusing on criminal outcomes of political crises, to the neglect of necessary political solutions. In sum, the paper offers that transitional justice can only make a modest contribution to addressing SGBV, and that complex political crises underlying and causing violence must not be left on the wayside as we advocate around the criminal symptoms.

### **TRANSITIONAL JUSTICE RESPONSES TO SEXUAL AND GENDER BASED VIOLENCE**

#### **CENTRAL AFRICAN REPUBLIC (CAR)**

Between October 2002 and March 2003, CAR President Ange-Félix Patassé invited the forces of Jean-Pierre Bemba, the Commander in Chief of Mouvement de Libération du Congo (MLC) to fight a rebel movement led by François Bozizé, the former Chief of Staff of the CAR army. In February 2003, FIDH referred the case to the ICC, following an extensive field mission to the conflict-affected areas where they found widespread rape, particularly from the forces of Bemba [1].

A key feature of in the CAR conflict was the high reported number of victims of rape. Under the presidency of Bozizé, who won the war, the highest court in the CAR determined that they would not be able to address the rape cases. In December 2004, the CAR government made a state referral to the ICC. According to the OTP, CAR became "the first time the Prosecutor ... open[ed] an investigation in which allegations of sexual crimes far outnumber alleged killings [2].

Evidence was compiled by local women's groups, which documented over 1,000 cases of rape. An organisation of victims kept a registry of the violations while providing support to the victims of sexual violence, sexual slavery and forced pregnancy. Once the ICC

decided to open an investigation into the CAR in 2007, this evidence was handed over. The ICC subsequently deemed 600 of the reports on rape valid, and determined that they could establish from them a pattern [3]. In 2008, the ICC issued arrest warrants for Bemba, for charges including rape, particularly for violations committed in an area called PK 12 and in the town of Mongoumba. Bemba was also charged with committing outrages upon human dignity/ humiliating and degrading treatment in the same locations [4]. "Mr. Bemba's arrest is a warning to all those who commit, who encourage, or who tolerate sexual crimes," said the Prosecutor of the ICC, Mr Luis Moreno Ocampo [5]. Ocampo went on to say, "There are no excuses for hundreds of rapes. There are no excuse for the rape of a little girl, with her parents watching. There are no excuses for commanders ordering, authorizing or acquiescing to the commission of rapes and looting by their forces [6]."

This arrest was significant for impunity on at least two levels. First, by arresting the former vice-president of DRC and leader of the country's opposition, the ICC was making a statement about how high it could go [7]. Second, for NGO observers, this was a crucial case in centralizing sexual violence in international justice. Many observers had started to fear that non-prosecution of sexual violence was leading to a situation where rape was "perpetrated by civilians such as demobilised child soldiers, who saw rape occurring habitually," resulting in a communities in which rape "permeated into a pattern of conduct in the population [8]." With the case of Bemba focusing on rape, advocates against SGBV saw light at the end of their tunnel.

## **DARFUR**

SGBV violations in Darfur are at least two-fold. First is the abuse by the government forces and the Janjaweed against women and girls, and second are the failures of the laws governing rape, which amount to further abuse: rape is charged as adultery, and therefore those coming forth to report rape are in danger of further victimization, unless they have witness of "four competent men", a requirement that can be hard to fulfill [9]. In a report done by Refugee International (RI) in 2007, it was reported that not only was rape widespread in Darfur, but the government did not acknowledge its existence. For instance, President Bashir was on international media declaring that "it is not in the Sudanese culture or in the culture of the people of Darfur to rape. It doesn't exist [10]." This happened at the same time as MSF reported treating hundreds of women for rape in Darfur [11].

In March 2007, RI reports that 2 women were sentenced to death by stoning because of adultery. They advocated against the conflation of rape and adultery arguing that it was not an inherently Muslim approach, citing Pakistan where the law had been reformed to allow for such a differentiation [12]. In her March 2008 report, the UN Special Envoy for Sudan also found that rape continued to be widespread in Darfur, and that there was reluctance on the part of victims to report to the police [13]. State military functionaries are immune from prosecution. Victims also lack services, and are unwilling to go to NGOs to receive them: in the atmosphere of strong regulation by the government over the NGOs, victims are suspicious about the neutrality of the NGOs serving them.

The ICC includes rape as part of the charges in the arrest warrants of Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb") [14]. Both warrants include two charges for rape, both as crime against humanity and as a war crime. The first charge is for the rapes of Fur women in Bindisi and surrounding areas on 15 August 2003. The second count of sexual violence is for the rape of at least 10 mainly Fur women and girls from Arawala town in December 2003 constituting both a crime against humanity and a war crime. They are also charged of contributing to outrage upon personal dignity of the same women. Considering that the arrest warrant of Ali Kushayb has 50 counts and that of Ahmad Harun 42, the two counts of rape are thin charges, but they are there. Again, a hopeful sign for advocates about the possibilities of international law in addressing SGBV.

## **DEMOCRATIC REPUBLIC OF CONGO**

Of the three cases, rape in the DRC has been by far the most visible. UNICEF says that it happens at "a scale and brutality unparalleled elsewhere in the world." Women get traumatic fistula after rape is perpetrated with objects including guns. Girls carry colostomy bags because of destroyed internal organs. Particularly in Eastern DRC, organizations like Human Rights Watch have documented many atrocities, and there have been a large number of reports, books and advocacy efforts focused on the subject [15].

However, the DRC is the case where perhaps there has been most dissatisfaction so far with regard to bringing accountability for rape. For instance, the charges against Thomas Lubanga did not include rape, and Radhika Coomaraswamy, the UN Special Representative on Children and Armed conflict, presented an amicus curiae to the ICC asking them to interpret the recruitment of child soldiers to include sexual violence suffered by abducted girls [16]. She urged the court to "reject" an interpretation of the "using [children] to participate actively in hostilities" clause that excluded girls, citing the fact that the Cape Town principles recognize as child soldiers the girls "recruited for sexual purposes and for forced marriage [17]."

In *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, the charges on the arrest warrants include sexual and gender based violence. The two are charged, in particular, with the planning and executing an attack aimed at wiping out the village of Bogoro on 24 February 2003, including rape and sexual slavery of women in that village [18]. Hearings to confirm the charges for which the prosecutor seeks to hold the two accountable started on 27 June 2008. This case so far has demonstrated some of the shortcomings of the international platform of international justice in addressing rape. In late May/early June 2008, IWPR reported that the sexual charges against the two would be scrapped due to contention over how to protect the witnesses whose testimonies would have backed up the charges of sexual violence, provoking outrage amongst activists [19]. The issue of the protection of witnesses- in particular whether the ICC could practice "preventive relocation" for prosecution witnesses, is a discussion between the VWU and the OTP that is still ongoing [20]. The witness' testimony was later accepted after they

came under the protection of the ICC protection system [21]. But the fact that international legal procedures can cause such potential hiccups informs SGBV advocates that the ICC will not be the panacea.

## **LIMITS OF TRANSITIONAL JUSTICE IN ADDRESSING SGBV**

The paper so far has outlined the efforts to address rape from a judicial perspective. A broader analysis of TJ and SGBV demonstrates challenges arising on at least two levels: a practical level and a conceptual one.

On the practical level, challenges arise from the inadequacies of TJ as a tool to address SGBV. At the level of formal, international justice described in the three cases, only a handful of people will be brought to trial, as part of what Bells calls a paradox of attenuated justice that seems necessary at moments of transition [22]. Further, these perpetrators' cases may not have central to their charges the SGBV crimes. International Justice takes into account the greatest crimes, and SGBV is seldom considered in that package. The case of Bemba signals a hopeful direction, but the fact that Lubanga case did not consider that some children might be recruited for sexual purposes is a drawback.

Focusing attention away from international justice to regional, hybrid or even domestic justice mechanisms reveals that a variation of same challenges are replicated. Kelsal and Stepakoff demonstrate in their work on Sierra Leone that women may have been psychologically harmed by the manner in which women's stories on sexual violence were silenced, for the benefit of the "integrity of the proceedings [23]. Formal justice at the national domestic level, while arguably capable of processing more perpetrators, has many challenges that have been adequately addressed elsewhere. At the formal level, transitional justice becomes a national (or international) project and not a moment of individualizing harm and privatizing it [24].

Informal, or restorative justice, is offered as the alternative framework for seeking justice for SGBV, since here accountability is locally defined and understood. However, measures like TRCs are not without their problems. Conceptually, restorative justice focuses on "restoring," while for most women, a restoration to normalcy would mean giving up the "perverse equality gains" achieved women at moments of transition, and a return to inequality [25]. In a practical example, Rosser shows the shortcomings of the Historical Clarification Commission of Guatemala in narrowly conceptualizing sexual violence and leaving out "reproductive" crimes [26].

Some restorative justice measures have inequalities embedded into them, as Allen has shown with regard to Uganda [27]. Further, these alternative justice measures themselves can have different priorities from those held by private individuals. Others have argued that the way in which women understand harm, and the manner in which harm may be defined by various transitional justice measures may be different. Women may much prefer to focus on secondary effects of violence, while transitional justice defines the primary [28].

Some conceptual challenges in addressing SGBV arise from the very understanding of the content of SGBV , and consequently, can impact the appropriateness of the tools chosen to address it. In other words, the problem must be well understood in order for the right tool to be applied to it, and the challenge is that there is no consensus about the nature of the problem.

Some scholars have expressed a worry that the focus on sexual violence can draw attention away from other areas of violence in women's lives. According to Nesiah, a focus on SGBV can hide other important facets of women's experiences from view. Such neglected experiences may include "internally displaced women, women who became sole breadwinners as a result of human rights abuse against spouses, women refugees who fled to other countries, or women prisoners [29]."

In other words, in writing into the transition story the oft-neglected story of SGBV, we write out many other women's experiences. Nesiah adds, "while sexual violence is critical, it does not capture the complex and multidimensional ways in which women experience abuse. Moreover, reducing women's violations to sexual abuse reproduces more widespread prejudices that reduce women to sexual beings alone [30]." In her view, there is a risk that the stories of rape are appropriated for activist agendas, reducing complex women into "just points on a graph that will help us buttress statistics about sexual abuse [31]."

A second conceptual challenge is offered by Skjelsbaek, who argues that sexual violence is not related to intrinsic male or femaleness. She also and rejects theories based on "essentialist" claims of rape as stemming from militaristic masculinity that targets all women or some women [32]. Instead, she considers sexual violence to stem from constructed power relations, where some groups are feminized and others masculinized. She offers that the association of of femininity and victimization is inevitable, so that men, ethnic groups, and other identities in a war zone are feminized and 'othered', while the rapist is masculinized. even men can be raped. Such a construction can help us understand why men can be raped and why female soldiers can be instrumental in the capture and subjugation of younger women in combat zones. In this view, then, responses that assume that it is women who are targeted rather than feminized groups are bound be misapplied.

## **CONCLUDING CONSIDERATIONS**

The discussions above illustrate that our challenges are not only in a quest to make transitional justice measures deliver, but also in defining the contours of the problem for which we are mobilizing the transitional justice response. But for the purposes of the practical activist, these debates are incomplete, since they do not provide guidance for one who wants to understand why SGBV elicits such faint responses and what needs to change in order for the problem to be tackled robustly. Here I suggest some discussions that may be more helpful.

The first would be a debate on how to rescue SGBV from the realm of 'soft' law in which most issues affecting women tend to fall, and into 'hard' law [33]. We know that some scholars have raised the issue of rape as torture [34]. Perhaps the rise in attention to the use of guns and other objects to rape women (and men) as we have seen in Eastern Congo, where the outcome is physical and visible - young girls are walking around with colostomy bags and traumatic fistula because of destruction of internal organs - makes this case more strongly than "traditional" rape. What is the status of this debate on rape as torture, if there is one? Why has there been no active effort to have rape be thus recognized, in order for it to fall under the Convention against Torture, with the benefit of the Convention's robust sanctions? What would need to be done for such recognition to be given, since it is possible that seeking such recognition would be a more useful direction to apply energy than to yet another document or declaration, or any other 'soft law' condemnation?

The second necessary debate would be on what sustainably addressing of SGBV might look like. In advocacy, is it possible that focus on SGBV leads to a decoupling of the criminal outcome from the political conflict from which it originated, even when it is clear that addressing the political conflict is what will sustainably address the needs of vulnerable populations?

Further, given the high stigma for SGBV and the fact that reintegration of victims back into their communities can be one of the hardest processes, is it possible that singling out victims of rape for the purposes of redress as understood by the international community, can be disrupting, unless coupled with strategies to support community reintegration of the affected women? On the realm of practical action where advocates capitalize on the victimization of rape to pursue a (necessary) agenda of redistribution and the economic empowerment of women, do we have empirical evidence of how such redistribution is causally related to sustainably addressing SGBV in conflicts? This is not to say that the "symptoms" should not be addressed. But we have a challenge when all advocacy efforts assume they are inherently beneficial, while they may decrease rather than increase the agency of affected women. Further, it is possible to leave the political problem on the wayside, or worse, for advocacy to become an act of "doing something", a substitute for a political solution.

The last point is that we must also debate - and soul-search- on whether the focus on rape and other criminal outcomes of these political processes criminalizes African wars (and makes them deserving of courts and policing rather than robust diplomacy and political settlements), feeding into an image of Kaplan's 'Coming Anarchy'. The problem of rape needs to be solved, but the solution is not another condemnatory declaration. What are the triggers of meaningful action, who are the people at the helm of that trigger, are they being engaged? It might be that activists need to be pitching their tents outside the doors of the political actors who must resolve the conflict, while also looking to formal and formal accountability processes to make modest contributions to the problem. It means that the paths taken by advocates have to provoke and demand that things be different, especially at the level of politics.

I raise these issues not to distract us from the advocacy goal of drawing attention to rape of women, but as a way to point to gaps where scholars and practitioners must engage. At its most modest, transitional justice can be taken to be a process that can help populations to re-imagine the possibilities of citizenship and democracy, bringing into the picture those who have been outside the reach of the state. This is particularly the case of women who have experienced SGBV, who, through transitional justice debates, can be allowed to see themselves as citizens owed protection by the state debate. Beyond that, as discussed above, transitional justice has major shortcomings when it comes to addressing SGBV. Academic and practitioner debates too have left many questions unaddressed. While action is important, such action must be considered within a broader picture, and this broader picture is messy and political, but it cannot be ignored.

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