IJR
THE INSTITUTE FOR JUSTICE AND RECONCILIATION

POLICY BRIEF

Number 22 | January 2017

Sexual violence, the ICC and modern-day crimes against humanity

Katy Hindle

Abstract

In recent years, global policy has become increasingly focused on conflict-related sexual violence. This is a welcome interruption to the history of relative inaction on the issue. At the same time, the emphasis on conflict-related sexual violence as distinct from non-conflict-related sexual violence may risk perpetuating a discourse that overlooks the pervasive sexual violence that takes place in non-conflict settings and the causal interconnectedness between the two types. Until recently, the international criminal law framework has similarly found almost exclusive application to situations of armed conflict. However, two situations currently under investigation by the International Criminal Court (ICC) demonstrate growing attention to violence that is unrelated to war and armed conflict, like the pre-election and post-election unrest in Kenya (2007–2008) and in Côte d'Ivoire (2010–2011). Against this backdrop, the ICC's recent conviction of Jean-Pierre Bemba Gombo for crimes committed in the Central African Republic in 2002–2003 is particularly significant. The conviction represents an important first by the ICC for crimes of sexual violence and marks an end to a long-standing impunity for sexual crimes under international law. In addition, the framing of rape and sexual violence convictions as crimes against humanity, which can be committed outside of war and armed conflict, suggests important possibilities for the prosecution of non-conflict-related sexual violence. The ICC's approach to these aspects of the Prosecutor v Bemba *conviction is commendable and may grow the credibility and reach of the ICC in years to come.*

Introduction

Over the past three years, there has been increased international focus on crimes of sexual violence that take place during conflict (conflict-related sexual violence). Conflict-related sexual violence need not be limited to war-time settings and includes all forms of sexual violence that are linked, whether directly or indirectly, and whether in times of war or peace, to conflict. In April 2013, the Group of Eight (G8) adopted a historic Declaration of Commitment to Ending Sexual Violence in Conflict, which has been endorsed by at least 122 United Nations (UN) member states.[1] Also in 2013, the UN Security Council adopted a resolution confirming a zero tolerance approach to sexual violence in conflict and calling on all actors to combat impunity for such crimes.[2] The following year saw even greater attention brought to the issue, against the backdrop of a June 2014 Global Summit on Ending Sexual Violence in Conflict, hosted by the government of the United Kingdom.[3] One important outcome of the summit was the launch of a new international protocol setting standards for investigating and documenting cases of sexual violence in conflict.[4] Although the protocol is not binding, it has been widely accepted and is being implemented in Columbia, Iraq, Uganda and Bosnia.[5] June 2014 also saw the release of two other important global policy guidelines: one a policy paper issued by the Office of the Prosecutor (OTP) for the International Criminal Court (ICC) on sexual and gender-based crimes (OTP Policy Paper), and the other a

guidance note issued jointly by the UN Secretary-General and UN Women on reparations for victims of conflict-related sexual violence.[6] In 2015, the UN General Assembly adopted, by consensus, a resolution declaring 19 June the International Day for the Elimination of Sexual Violence in Conflict.[7] The aim of the resolution, which was sponsored by 114 countries, is to commemorate the breakthrough adoption on 19 June 2008 of Security Council resolution 1820 (2008), in which the UN Security Council condemned sexual violence as a tactic of war and declared it an impediment to peacebuilding.[8] Resolution 1820 is one of several resolutions aimed at promoting a Women, Peace and Security Agenda, which highlights the important role of women in the prevention and resolution of conflict and the promotion of peace and security.[9]

On the back of these major developments to end sexual violence in conflict and the impunity that surrounds it, the ICC issued its first ever judgment to include convictions for crimes of sexual violence on 21 March 2016. The trial leading to this landmark conviction focused on sexual violence as a weapon of war and resulted in a verdict declaring Jean-Pierre Bemba Gombo (Bemba), effectively acting as a military commander, responsible for war crimes and crimes against humanity committed by his troops in the Central African Republic (CAR) between October 2002 and March 2003.[10]

For several reasons, explored in this policy brief, the *Prosecutor v Bemba* conviction is a significant and positive development and a key milestone in the prosecution of sexual violence crimes. The reasoning and findings of the ICC Chamber in the *Prosecutor v Bemba* case also raise some important questions about how and why we distinguish conflict-related sexual violence and the consequences that follow from such a distinction.

This policy brief begins with an assessment of why and how conflict-related sexual violence is distinguished, suggesting that the process can overlook an important interrelatedness between conflict-related and non-conflict-related sexual violence. The next section discusses the consequences of distinguishing conflict-related from non-conflict-related sexual violence, suggesting that although historically the distinction is relevant, it is becoming increasingly marginal. Thereafter, the policy brief outlines a contemporary construction of crimes against humanity as a category of international crime, which suggests that the category may be much broader than typically assumed. With reference to this construction, the following section of this policy brief outlines the ICC's conviction in *Prosecutor v Bemba* for rape as a crime against humanity and considers whether the ICC's approach offers new avenues for prosecutorial direction by the OTP and other actors in the Rome Statute system. In view of the requirements for a conviction of rape as a crime against humanity in *Prosecutor v Bemba*, the final sections of this policy brief suggest possibilities for peacetime prosecution of rape and sexual violence as crimes against humanity and offer recommendations for greater scrutiny and intervention in respect of sexual violence and gender injustice outside of armed conflict.

The distinction between conflict-related and non-conflict-related sexual violence

Why do we distinguish conflict-related sexual violence from non-conflict-related sexual violence?

Sexual violence in conflict occurs with frightening predictability. Although its use as a war tactic remains relatively undocumented before the 1990s, historians have recently established that it was used in Greece, medieval England, the American Revolution, pre-colonial and colonial warfare in Africa, the Bangladeshi war and World War II.[11] Historically, the response of international humanitarian law and justice mechanisms has largely been to dismiss sexual violence as an 'inevitable consequence of war'.[12] The Nuremburg and Tokyo tribunals established in the aftermath of the Second World War, for example, did not accommodate the testimony of rape victims and largely failed to address and prosecute sexual violence, despite the fact that evidence of sexual and gender-based violence had been presented.[13]

In the 1990s, as a result of feminist advocacy and confirmed reports of widespread sexual violence during the genocide in Rwanda and the wars in Yugoslavia, significant attention was paid to the extent and severity of sexual violence in conflict. However, despite being identified as a global concern and priority, it is alarming that, in 2015, mass rapes were documented in the eastern Democratic Republic of the Congo, South Sudan and Sudan, and widespread and systematic sexual violence was documented in the Syrian Arab Republic and areas of Iraq, without recourse to accountability.

In 1998, the Rome Statute sanctioned the position that widespread and systematic acts of sexual and gender-based violence constitute acts of war crimes and crimes against humanity and may amount to acts of genocide.[14] Since then, there has been growing recognition under

contemporary international criminal and humanitarian law that sexual violence in conflict is a specific and deplorable crime. This recognition, and the associated identification of the specific features of conflict-related sexual violence, is significant. Sexual violence that happens during conflict takes on especially terrifying dimensions and has specific characteristics that make it distinguishable. It is used strategically, extensively and intentionally to terrorise, expel, control and subjugate communities affected by conflict.[15] Often, reactions to sexual violence apportion blame and dishonour to the victim and, as a result, sexual violence is used specifically in conflict to represent the defilement and dishonouring of groups and nations.[16] Sexual violence is extensively under-reported, difficult to prosecute and routinely met with impunity. For these reasons, it is appropriate and valuable to treat conflict-related sexual violence as different from other forms of sexual violence.

However, it is equally important to recognise that sexual violence in wartime is a manifestation and worsening of the pervasive gender inequality that exists in times of peace. Although significantly aggravated by situations of conflict, sexual violence, gender inequality and discrimination against women during times of peace are the conditions that enable and perpetuate sexual violence in conflict. Peacetime conditions that tolerate harmful norms and stereotypes about women, discriminatory laws, attitudes and policies, and impunity for sexual and gender-based violence that routinely deny women their rights to bodily integrity and sexual autonomy, render women vulnerable to sexual violence in conflict. Similarly, harmful social constructions about the roles, attributes and characteristics of men also work to reproduce damaging masculinities during times of war and conflict. Social constructions of power, domination and subjugation that are often associated with hegemonic masculinity often play out in war zones in ways that see men and women as potential perpetrators and victims.[17]

The OTP Policy Paper recognises that conflict-related and non-conflict-related sexual violence are distinct, and addresses several of the specific dimensions of conflict-related sexual violence. For example, it emphasises the importance of victim-responsive approaches and addresses the unique challenges associated with investigating and prosecuting conflict-related sexual violence. Importantly, however, the OTP Policy Paper addresses sexual violence in both conflict and non-conflict settings and underscores the links between the two types. The introductory section categorically states that sexual violence is not unique to conflict settings; in relation to institutional development, the policy document recognises the need to strengthen expertise about sexual and gender-based crimes in conflict and non-conflict situations. In relation to preliminary examinations, the OTP Policy Paper emphasises the need for prompt responses to upsurges of violence, which is much broader than conflict. As a policy framework, these aspects of the OTP Policy Paper focus attention on the gendered aspects of the OTP mandate and its scope beyond the conflict settings that have historically attracted attention under the international criminal system.

How do we distinguish conflict-related sexual violence from non-conflict-related sexual violence?

Again, without disregarding the particular form of sexual violence that occurs in conflict, the process for differentiating cases of sexual violence that happen in conflict from cases of sexual violence that happen outside of conflict can be complicated and can be a hurdle to prosecution. Conflict-related sexual violence is typically constructed as being either (i) a by-product or consequence of conflict and instability, or (ii) a strategic weapon of war, although these constructions are problematic. Discourses that frame rape as a weapon of war do not accommodate for crimes of sexual violence that are carried out opportunistically, rather than systematically, in settings of conflict. This is despite evidence that sexual violence is routinely carried out by military and other perpetrators in opportunistic as well as systemic ways in atmospheres of instability that engender opportunities for violence.[18] These framings can also ignore the extensive civilian and intimate partner violence that is carried out in conflict settings. Often aggravated by circumstances of conflict, rape is carried out by a group of perpetrators that is much wider than armed groups at an alarming rate.[19] In January 2017, the ICC asserted its jurisdiction in cases involving rape and sexual slavery that are committed by one person against a person who is a member of the same armed force, holding that 'there is never a justification to engage in sexual violence against any person' and that 'such conduct [rape and sexual slavery] is prohibited at all times, both in times of peace and during armed conflicts, and against all persons, irrespective of any legal status'.[20]

Under international criminal law, there has been some acknowledgement that conflict-related sexual violence need not be limited to instances in which the victim and perpetrator are on opposing sides of a conflict. In *Prosecutor v Bosco Ntaganda*, the Pre-Trial Chamber found that the rape and sexual slavery of girl soldiers in Ntaganda's armed group by other members of that group could constitute war crimes under article 8(2)(e)(vi) of the Rome Statute. Nevertheless, as a result

of popular framings of rape and sexual violence as a weapon of war, there has been a tendency to rank the horror of sexual violence when it is perpetrated by armed or rebel groups, militaries, terrorists and extremists above sexual violence when it is perpetrated by non-combatants.[21]

The most recent report by the UN Secretary-General on conflict-related sexual violence contains a recommendation about the need to broaden the scope of the definition. However, the recommendation goes on to call for the need to recognise that, in addition to being a weapon of war, conflict-related sexual violence can be a weapon of terrorism and extremism, which does little to overcome the concern over the 'weapon of war' discourse. Interestingly, the initial analytical and conceptual framing of conflict-related sexual violence expressly recognised that violence need *not necessarily* be linked to military and political objectives that serve a strategic aim.[22] In a broad definition endorsed by UN Action Against Sexual Violence in 2011, it was specified that sexual violence committed against civilians, violence committed in or around UN-managed refugee and internally displaced persons camps, or violence committed during disarmament, demobilisation and reintegration processes fall within the scope of conflict-related sexual violence. For purposes of prevention and early warning systems, the scope was even bigger, potentially including sexual violence used as a tactic of political repression (such as in pre- and post-election unrest in Kenya, Côte d'Ivoire and Guinea) or used in contexts of concomitant conflict and natural disaster (such as in Haiti after the 2010 earthquake).

The difficulty of defining sexual violence as conflict-related is also complicated by the process for determining the temporal boundaries of war, which are far from precise.[23] A number of feminist scholars have argued that the tendency to view war as exceptional or as a dated event rather than a process has exclusionary effects that overlook certain acts and spaces of violence. As Laura Sjoberg explains, wars generally 'start earlier and go on longer than traditional interpretations identify and reach deeper into societies than conventional reports portray'.[24]

What are the consequences of distinguishing sexual violence as conflict-related?

Historically, crimes that occur during armed conflict have attracted greater prosecutorial potential under international law. This is because, if crimes are linked to armed conflict, they invoke the application of international humanitarian law and serious violations attract criminal responsibility. In relation to crimes of sexual violence, the prohibition of wartime rape can be traced back to the Lieber Code of 1863, a purported codification of customary international law, which declared that rape was prohibited under the penalty of death.[25] Subsequent to the Lieber Code, conflict-related sexual violence under international law was also prohibited by the 1907 Hague Convention and Regulations, the Geneva Convention and its first Protocol, and the statutes establishing the international criminal tribunals of both Rwanda and the former Yugoslavia.[26]

The responsibility to prosecute violations of international humanitarian law lies primarily with individual states. However, under international criminal law, the ICC can exercise jurisdiction in cases where states are genuinely unable to prosecute.[27] The Rome Statute establishing the ICC includes an expansive list of sexual crimes within two particular categories: war crimes and crimes against humanity. Although not expressly included as an underlying crime to genocide, international criminal tribunals have acknowledged that sexual crimes, if committed with the specific intent to destroy a particular group, can constitute crimes of genocide.[28] Their inclusion in the Rome Statute make crimes of rape and sexual violence among the most serious of crimes under international law. In addition, the OTP has recently adopted a prosecutorial strategy that sees particular focus on crimes of sexual and gender-based violence, as evidenced by the OTP Policy Paper. Because crimes of conflict-related sexual violence fall so squarely within the prosecutorial scope and jurisdictional ambit of the ICC, there is a greater chance not only of prosecution but also retribution and the opportunity to establish truth and an accurate historical record.[29] In reality, the application of international humanitarian and criminal law in cases of conflict-related sexual violence has been extremely limited and largely unsuccessful, in part because sexual violence cases are particularly difficult to investigate and prosecute. However, cases of sexual violence have arguably also not been given adequate attention and, while important steps are being taken, particularly by the Gender and Children's Unit in the OTP, there still remains resistance to investigating sexual violence crimes in international law.[30]

However, sexual violence that takes place outside of conflict is nevertheless subject to ICC jurisdiction and scrutiny in at least two important ways. Firstly, as noted in the OTP Policy Paper, 'whilst sexual and gender-based crimes in the context of armed conflict or mass violence fall within the jurisdiction of the Court, they are not unique to these contexts'.[31] The OTP Policy Paper goes on to note that the work of the ICC is

important in guiding national jurisdictions and other actors to address sexual and gender-based crimes in any context, indicating that the OTP views its mandate as related and extending to peacetime contexts.

A second way in which sexual violence that occurs outside of conflict falls within the mandate of the ICC is in the context of crimes against humanity, which do not require a nexus with conflict. Crimes against humanity have been central to the work of the ICC, with charges having being brought in all situations that the court has pursued to date. Accordingly, how crimes against humanity are defined and how the technical requirements are interpreted and established is directly relevant to the direction and future of their prosecution. The approach in *Prosecutor v Bemba* to the material elements of crimes against humanity was to interpret the requirements relatively widely and in a way that could extend the reach of the ICC to a wider set of situations and actors.

Crimes against humanity in the modern age

Unlike war crimes, crimes against humanity do not require a nexus to conflict in order to find application of the Rome Statute. Under article 7, sexual and gender-based crimes may be charged as crimes against humanity when they are committed 'as part of a widespread or systematic attack directed against civilian a civilian populations'.[32] Once a situation involving crimes committed as part of a widespread or systematic attack against a civilian population has been established, the technical requirements set out in article 7(2) further prescribe that they must amount to a course of conduct, involving the multiple commission of acts 'pursuant to or in furtherance of a state or organisational policy to commit such an attack'. The rationale for including these further requirements was apparently to exclude unrelated, uncoordinated or isolated acts, but their inclusion has been the subject of much debate.[33] Interestingly, however, neither the International Criminal Tribunal for Rwanda (ICTR) nor the International Criminal Tribunal for the former Yugoslavia (ICTY) required that the actions of an accused had to be supported by 'a form of policy or plan' on the basis that this was not required under their respective statutes or customary inter-national law.[34]

The legal framework on crimes against humanity allows the ICC to investigate and prosecute crimes that occur outside of armed conflict and, more recently, the ICC has turned its attention to three such situations. It is investigating situations of post-election violence in Kenya in 2007–2008 and in Côte d'Ivoire in 2010–2011, as well as the situation in Libya since 2011. Although these situations all have a link to violence, it is conceivable that other situations that may not involve typical forms of violence could also fall within the purview of the ICC, provided that the contextual elements are met. For example, circumstances involving repeated patterns of state-sponsored human rights violations – such as in Eritrea, where arbitrary detention and persecution is ongoing – could meet the contextual elements of crimes against humanity.

In addition to greater application of the crimes against humanity framework to situations that do not qualify as conflicts, the ICC's interpretation of the state or organisational plan or policy requirements also suggests growing application to a wider set of acts and actors. In *Prosecutor v Bemba* and in the decision to investigate the post-election violence in Kenya, the ICC recognised that organisations need not be state-like but may be 'groups of persons who govern a specific territory or […] any organisation with the capability to commit a widespread or systematic attack against a civilian population'.[35] In relation to what constitutes a policy for the purposes of article 7(2), the ICC's decision regarding post-election violence in Kenya was that policies need not be designed at the highest level of state to meet the definition and could be inferred from a series of events influenced by a range of contributory factors such as the establishment of military structures, the mobilisation of armed forces, the general content of a political programme. or discriminatory measures directed against particular groups. These approaches to the crimes against humanity framework suggest that the requirements in article 7(2) are intended mainly to exclude random and uncoordinated acts.[36]

Similarly, the OTP Policy Paper takes an expansive approach to the requirements of article 7. It states that article 7 does not require each act of sexual or gender-based violence to be widespread or systematic, provided that the act is linked with a widespread or systematic attack. Accordingly, it is possible that if an individual commits a crime against a single person or a small number of victims, he or she could be found guilty if the acts were committed in the context of widespread and systematic violence.

The OTP Policy Paper also sanctions a wide reading of article 7(1)(h), which criminalises (as a crime against humanity) persecution on gender and other grounds. It indicates that the article could be relied on to end impunity for systematic persecution on the basis of gender, and suggests that valuable precedent in refugee law about persecution on the basis of gender may frame the OTP's reading of the article going forward.[37] These OTP policy positions all support a

broad and inclusive approach to intervention, which accommodates the evolving forms and settings of crimes against humanity in the modern age.

Against the backdrop of the difficulties inherent in distinguishing conflict-related and non-conflict-related violence, these developments concerning the requirements for crimes against humanity are promising and, if pursued, may indicate new avenues for ensuring accountability for serious crimes. Although concerns about prosecutorial overreach and the capacity of the ICC to open itself up to a wider set of cases are valid, they may be overcome by the doctrine of positive complementarity, which imagines international justice as a multidimensional system. The ICC's doctrine of positive complementarity underscores two important principles: the first is that the ICC should not interfere in cases where national courts have sufficient capacity to try serious crimes, and the second encourages the ICC actively to help and support states to try serious crimes.[38] Figures from 2013 indicate that 59 countries have complementarity legislation in place to investigate and prosecute crimes in terms of the Rome Statute.[39] There are several other jurisdictions that have partial legislation in place to incorporate crimes against humanity within their legal systems.[40]

The ICC's conviction for rape as a crime against humanity in *Prosecutor v Bemba*

The ICC's judgment in *Prosecutor v Bemba*, delivered in March 2016, was the first case before the ICC in which a military commander was prosecuted and convicted on the basis of command responsibility for crimes of rape (including of men) committed by forces under their effective control. The case therefore marks a decisive moment in the ICC's record on ensuring accountability for crimes of sexual violence.[41] It was also the first time a reparations order issued by the ICC specifically addressed the crime of rape. In addition to rape, Bemba was also convicted for crimes of murder and pillaging; in relation to the rape and murder convictions, these were established under two categories of crimes: war crimes and crimes against humanity. The focus of the summary below is on the ICC's conviction for rape as a crime against humanity.

The ICC's findings in relation to rape

In relation to the underlying acts giving rise to conviction in *Prosecutor v Bemba*, the ICC found that soldiers of the Mouvement de Libération du Congo (MLC) had knowingly, intentionally and by force committed acts of rape in the Central African Republic between 26 October 2002 and 15 March 2003.[42] This finding was based on evidence obtained from both male and female victims of rape, reflecting the gender-neutral construction of the crime in the Rome Statute, and the case marked the first conviction in international criminal law for the rape of men.

The conviction also marked the first time that someone was convicted under the mode of command responsibility; although Bemba had not committed crimes of rape himself, he was convicted as a military commander for crimes committed by soldiers under his command. Under article 28(a)(i) of the Rome Statute, liability can be established on the basis that an accused should have known about the commission of relevant crimes by forces under his or her effective command and control or under his or her effective authority and control, as the case may be.[43] If crimes are indeed committed, as a result of failure by the accused to exercise proper control, and if the accused knows that crimes are being committed but fails to take necessary and reasonable measures to prevent and repress the commission of crimes, an accused can be held criminally liable. In *Prosecutor v Bemba*, the court considered as factors suggesting control and authority that Bemba was able to issue orders, appoint, demote and dismiss inferiors, and prevent or repress the commission of crimes. This last factor is important, because it requires people in positions of control and authority to take measures to repress the commission of crimes if they have knowledge that they are taking place.[44] Further, in cases of command responsibility where the accused is geographically remote, the ICC has previously accepted that it may not be possible to plead evidential details concerning the specificity of underlying criminal acts, such as identity or number of victims, precise dates and specific locations.[45] As argued by De Vos, this puts military commanders on notice: failure to take measures to address crimes committed by troops, through the provisions of training, order and hierarchical example, can render individuals criminally liable.[46]

The law applicable to the crime of rape turns on material and mental elements. The two material elements, described in the Elements of Crimes that supplement the Rome Statute, include (i) the invasion of the body of a person that (ii) takes place in a particular set of circumstances. The element of bodily invasion has been interpreted broadly, to include any parts of the body of male or female perpetrators and/or victims. The OTP Policy Paper reflects this approach and, in *Prosecutor v Bemba*, the ICC's findings were based on evidence obtained from both male and female victims of rape. Where bodily invasion has taken place, the second material element of the crime requires that the circumstances surrounding the invasion give it a

criminal character.[47] Importantly, neither the Rome Statute nor the Elements of Crime require proof of circumstances involving a victim's lack of consent. This is significant because it lowers the evidentiary burden of proving rape. Instead, the material elements of the crime will be met in circumstances where bodily invasion involved (i) force; (ii) the threat of force or coercion, caused by fear of violence, duress, detention, psychological oppression or abuse of power; (iii) a perpetrator taking advantage of a coercive environment; or (iv) a person who was incapable of giving genuine consent.[48] In relation to circumstances involving a coercive environment, the ICC in *Prosecutor v Bemba* acknowledged that the presence of hostile forces is not strictly required. Factors like the number of people involved in committing the crime or the fact that rape may have taken place alongside other crimes could contribute to creating a coercive environment for purposes of meeting this material element.

Neither the Statute nor the Elements of Crimes defines the mental element for the crime of rape. As such, the mental element set out in Article 30 of the Statute, which requires intent and knowledge, applies. The requirement of intent and knowledge is twofold: it must be shown not only that the perpetrator acted intentionally, meaning to engage in the conduct of rape, but also that the perpetrator was aware that he or she was committing an act of rape. This element requires that the perpetrator was aware that he or she was committing an act of rape in circumstances involving force, the threat of force, a coercive environment, or involving a person incapable of giving genuine consent.

The ICC's findings that the crimes of rape constituted crimes against humanity

As noted above, article 7 of the Rome Statute establishes the contextual elements of crimes against humanity, requiring that in order for the crimes listed in article 7 to be regarded a crime against humanity, they must have been committed (i) as part of a widespread or systematic attack; (ii) against a civilian population; and (iii) with knowledge of the attack. Article 7(2) sets out the further precondition that an attack must amount to a course of conduct, involving the multiple commission of acts 'pursuant to or in furtherance of a state or organisational policy to commit such an attack'.

Applying these preconditions to the facts established in *Prosecutor v Bemba*, the ICC found that the acts in question were part of an attack against the civilian population, had been committed as a course of conduct, and were intended to humiliate and punish victims, destabilise communities and self-compensate for the lack of sufficient remuneration. In relation to the requirement that the acts had been committed pursuant to, or in furtherance of, a state or organisational policy, the ICC noted that an 'organisation' does not need to have well-developed structures – it must simply have mechanisms that allow it to coordinate a particular purpose. The ICC also accepted that the policy aspect does not require formality: it was held that the existence of a policy can be inferred from factors like recurrent patterns, instructions or documents that condone or encourage the commission of crimes, and the use of resources to further the policy or motivation.[49] In *Prosecutor v Bemba* the ICC was satisfied that a policy to attack the civilian population – although not formalised – was evident from the modus operandi of the MLC's operations. Therefore, the ICC found that the underlying crimes of rape had been carried out in a context that satisfied the requirements of article 7 of the Rome Statute and were crimes against humanity.

The ICC's interpretation of the preconditions required by article 7, particularly in relation to the organisation and policy aspects, points to a generous and purposive reading that accommodates the evolving nature of modern-day crimes against humanity. Tellingly, in its discussion of the definition of organisation, the ICC specifically mentioned that aspects of the requirement were assessed 'in view of modern day asymmetric warfare' that could be carried out by private groups that are even less developed than quasi-state organisations.[50] This line of jurisprudence, which imposes low and inclusive thresholds, could have important ramifications for how crimes against humanity are prosecuted and investigated going forward.

Conclusions and recommendations

Recent ICC jurisprudence and OTP policy suggest that sexual and gender-based crimes that take place outside of conflict are increasingly falling within the mandate and scope of international criminal law. Although the ICC's conviction in *Prosecutor v Bemba* for rape as a crime against humanity was related to conflict, the ICC's present focus on situations involving violence outside of war and armed conflict zones may bring new prosecutorial reach to sexual and gender-based crimes in situations that do not qualify as situations of conflict. This approach would be well aligned with the prosecutorial policy established by the OTP Policy Paper and is consistent with literature that recognises the interconnectedness between peacetime and wartime sexual violence. If pursued, this type of approach would do well to underscore the importance of adopting parallel and reinforcing approaches to prosecuting sexual violence in whichever context it occurs. There are several positive implications of the jurisprudence established in *Prosecutor v Bemba*

for sexual and gender-based crimes. The command responsibility mode of liability clearly establishes that commanders have a duty to exercise disciplinary authority if they are aware that sexual and gender-based crimes are being committed under their watch. Training, hierarchical example and other measures should be taken in instances where the commission of sexual and gender-based crimes by troops under a commander's authority are anticipated.

Practically, the ICC and OTP may not currently have the capacity to pursue such a wide range of cases, and concerns about prosecutorial overreach may result. However, the doctrine of positive complementarity encourages the ICC actively to help and support states to try serious crimes. Against this backdrop, there may be important avenues for the OTP to work closely with national processes for sexual and gender-based crimes that occur outside of conflict – for example, framing serious, widespread and systematic crimes as crimes against humanity in certain situations. These kinds of strategies could also have an effect on how national processes and domestic courts view pervasive sexual and gender-based crimes that occur during peacetime.

There is no room for ambivalence about everyday gender injustice; transforming the conditions that enable sexual violence before, during and after conflict is an important priority. As an important complement to the prosecutorial principles and strategies set out in the OTP Policy Paper, strategies for responding to the gendered complexities of everyday society are much needed and states should be encouraged to adopt laws and measures aimed at prosecuting gender injustice and promoting gender equality. In domestic cases that involve serious or widespread allegations of sexual violence or other crimes contained in the Rome Statue, application of the Rome Statute (or relevant enabling legislation) and the principles of international humanitarian and criminal law should be encouraged and supported. In light of the *Prosecutor v Bemba* case, there is scope for domestic criminal justice systems to imagine sexual and gender-based crimes, if systematic and committed in furtherance of state or organisational policy, as possible crimes against humanity. Collabora-tion and synchronicity between international and domestic legal systems and consistent prosecution at both the international and local level are important.

Efforts by both the ICC and states parties to the Rome Statute should work together to promote accountability and prevent sexual violence in all contexts, so that the ever important focus on conflict related sexual violence works in ways that address it globally both within and outside of conflict. This might include monitoring and investigation of situations that do not involve conflict and outright violence. Where appropriate, protective intervention before the outbreak of conflict may be strategically important as a means of mitigating the potential for sexual violence to worsen if conflict erupts.

Endnotes

1 Declaration on Ending Sexual Violence in Conflict, launched at the 68th session of the United Nations General Assembly in September 2013, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274724/A_DECLARATION_OF_COMMITMENT_TO_END_SEXUAL_VIOLENCE_IN_CONFLICT.pdf (accessed 5 July 2016).

2 UN Security Council Resolution 2106 adopted on 24 June 2013, available at http://womenpeacesecurity.org/media/pdf-scr2106.pdf (accessed 4 July 2016).

3 Information about the Global Summit to End Sexual Violence in Conflict, held from 10 to 13 June 2014, is available at https://www.gov.uk/government/topical-events/sexual-violence-in-conflict (accessed 5 July 2016).

4 International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/319054/PSVI_protocol_web.pdf (accessed 5 July 2016).

5 Information about the uptake of the Protocol on the Documentation and Investigation of Sexual Violence in Conflict is available in the G7's report on the Implementation of the GB Declaration on Preventing Sexual Violence in Conflict, November 2015, available at https://www.g7germany.de/Content/EN/_Anlagen/G7/2015-11-24-g7-erklaerung_svc_en.pdf?__blob=publicationFile&v=3 (accessed 13 July 2016).

6 Office of the Prosecutor of the International Criminal Court, 2014, Policy Paper on Sexual and Gender Based Crimes, available at https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf (accessed 25 June 2016) and UN Women and the Office of the United Nations Secretary General, 2014 Guidance Note on Reparations for Conflict Related Sexual Violence, available at http://www2.unwomen.org/~/media/headquarters/attachments/sections/news/stories/final%20guidance%20note%20reparations%20for%20crsv%203-june-2014%20pdf.ashx?v=1&d=20141013T121449 (accessed 13 July 2016).

7 UN General Assembly Resolution 69/293 passed on 19 June 2015, available at http://www.refworld.org/docid/55acc4ee4.html (accessed 5 July 2016).

8 UN General Assembly Resolution 69/293 of 2015 on the Commemoration of the International Day for the Elimination of Sexual Violence in Conflict, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/293 (accessed 15 July 2016).

9 UN Security Council Resolution S/RES/1325 of October 2000, available at www.un.org.

10 Trial Chamber III of the ICC *The Prosecutor v Jean-Pierre Bemba Gombo* 21 March 2016 No ICC-01/05-01/08 hereinafter Bemba.

11 For a comprehensive account of the history of sexual violence in conflict, see Elizabeth D. Heineman (ed), 2011, *Sexual Violence in Conflict Zones: From the*

Ancient World to the Era of Human Rights, published by the University of Pennsylvania Press.

12 LaShawn R. Jefferson, 'In War as in Peace: Sexual Violence and Women's Status', in World Report 2004: Human Rights and Armed Conflict 325 (Human Rights Watch 2004), available at https://www.hrw.org/legacy/wr2k4/download/15.pdf (accessed 13 July 2016). See also the Foreword by Chief ICC Prosecutor Fatou Bensouda to the International Criminal Court special issue of the *International Feminist Journal of Politics*, 2014, 16(4): 538–542.

13 Nicola Henry, 2009, Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence' in *The International Journal of Transitional Justice* 3(1): 114–134.

14 Although sexual and gender-based violence are not referred to in the provisions of the Rome Statute that deal with genocide, the accompanying Elements of Crimes Document specifies that acts of rape and sexual violence may amount to 'serious bodily or mental harm' for the purposes of Article 6(b) of the Rome Statute.

15 Xabier Agirre Aranburu, 2010, Sexual Violence Beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases, in *Leiden Journal of International Law* 23: 609–627 at page 622.

16 Veleska Langeveldt, 2014, The African Union's Response to Gender-based Violence, published as a policy brief for the Institute for Justice and Reconciliation, No. 15, available at http://dspace.africaportal.org/jspui/bitstream/123456789/34605/1/IJR%20Brief%20No%2015%20web%20final.pdf?1 (accessed 14 July 2014).

17 For an analysis of social construction of masculinity and femininity in the war context, see Inger Skjelsbæk, 2001, Sexual Violence and War, in *European Journal of International Relations* 7(2): 211–237.

18 Kelly Askin, 2003, Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles, in *Berkeley Journal of International Law* 21(2): 288–349 at 288.

19 Paul Kirby, 2015, Ending Sexual Violence in Conflict: The Preventing Sexual Violence Initiative and its critics, in International Affairs 91(3): 457–472 at 462.

20 ICC Trial Chamber VI *The Prosecutor v Bosco Ntaganda* ICC-01/04-02/06 (3 January 2017), para. 49.

21 Paul Kirby, 2015, Ending Sexual Violence in Conflict: The Preventing Sexual Violence Initiative and its critics, in International Affairs 91(3): 457–472 at 463.

22 This framing was informed in part by UN Security Council Resolution 1820 of 2008 and recorded in the UN Analytical and Conceptual Framing of Conflict Related Sexual Violence note. For a summary of the analytical and conceptual framing note, see Stop Rape Now: UN Action Against Sexual Violence in Conflict, Analytical and Conceptual Framing of Sexual Violence in Conflict', available at http://www.pakresponse.info/LinkClick.aspx?fileticket=QmSWiCA4rUw%3D&tabid=71&mid=433 (accessed 6 July 2016).

23 For an assessment of the complications and imprecision of defining temporal boundaries of war, see Colin Flint, 2016, *Reconstructing Conflict: Integrating War and Post War Geographies*, published by Routledge.

24 Laura Sjoberg, 2006, at page 53, cited in Colin Flint, 2016, *Reconstructing Conflict: Integrating War and Post War Geographies*, published by Routledge.

25 The Lieber Code was an attempt to codify customary international law into the US Army Regulations on the laws of land warfare and was used as the basis for several subsequent war codes, See article 44 of the Lieber Code: Instructions for the Government of the United States in the Field by Order of the Secretary of War, Washington D.C. (April 24 1863); Rules of Land Warfare, War Department, Doc. No. 467, Office of the Chief of Staff (G.P.O. 1917) (approved Apr. 25, 1914) cited in Kelly Askin, 2003, Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles, in *Berkeley Journal of International Law* 21(2): 288–349 at 299.

26 Article XLVI of the Hague Convention IV was commonly understood as encompassing sexual assault. See, for instance, Professor J.H. Morgan, who reported the rape of Belgian women during the First World War using the terminology 'the outrages upon the honour of women by German solders have been frequent' in Susan Brownmiller, 1975, Against Our Will: Men, Women and Rape, at 42, cited in Kelly Askin, 2003, Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles', in *Berkeley Journal of International Law* 21(2): 288–349 at 297.

27 H.D.T. Gutierrez Posse, 2006, The relationship between international humanitarian law and the international criminal tribunals, in *International Review of the Red Cross* 88(861): pages 65–86 at 86.

28 See the Akayesu judgment, delivered on 2 September 1998 by the Trial Chamber of the ICTR. *The Prosecutor v Jean-Paul Akayesu*, Trial Chamber I Judgment, ICTR 96-4-T, 2 September 1998, para 2.

29 Martti Koskenniemi advances four main functions of international criminal trials: retribution, deterring or changing behaviour, promoting the rule of law, or establishing truth and a historical record. See Martti Koskenniemi, 2002, Between Impunity and Show Trials, in J.A Frowein and R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law*, Volume 6, 2002, 1–35.

30 For an analysis of some of the complexities of prosecuting wartime rape, see Kelly Askin, 2003, Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles, in *Berkeley Journal of International Law* 21(2): 288–349.

31 OTP Policy Paper, June 2014, paragraph 8.

32 See article 7 of the Rome Statute and related parts of the Elements of Crimes.

33 Machteld Boot, Rodney Dixon & Christopher K. Hall, 1999, Article 7: *Crimes Against Humanity*, in Otto Triffterer (ed), Commentary on the Rome Statute of the International Criminal Court, 1999 at 123 and 159. Cited in Leila Nadya Sadat, 2003, Crimes Against Humanity in the Modern Age, in *The American Journal of international Law* 107: 334–377 at 353.

34 *Prosecutor v Kunarac* Case Nos IT-96-23 and IT-96-23/1-A para 98 n.114.

35 *Prosecutor v Bemba*, ICC PT. Ch. II, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 81.

36 Scholarly support for this interpretation is explained in Robert Cryer, Hakin Friman, Darryl Robinson & Elizabeth Wilmshurst, 2007, *International Criminal Law and Procedure*, at 198. Cited in Leila Nadya Sadat, 2003, Crimes Against Humanity in the Modern Age', in *The American Journal of international Law* 107: 334–377 at 376.

37 See footnote 34 of the OTP Policy Paper, June 2014.

38 Paul Kirby, 2015, Ending Sexual Violence in Conflict:

The Preventing Sexual Violence Initiative and its critics, in *International Affairs* 91(3): 457–472 at 467.

39 Coalition for the International Criminal Court, 2013, *Status of the Rome Statute Around the World*, available at http://www.iccnow.org/documents/RomeStatuteUpdate_2013_web.pdf (accessed 18 July 2016).

40 Most notably, France, Israel and Canada. See Leila Nadya Sadat, 2003, Crimes Against Humanity in the Modern Age, in *The American Journal of international Law* 107: 334–377 at 341.

41 For an analysis of the significance of the case for purposes of sexual violence convictions, see Dieneke De Vos, 2016, ICC Issues Landmark Judgment: Bemba convicted as commander-in-chief for sexual violence crimes, on IntlLawGrrls: voices on international law, policy, practice, available at https://ilg2.org/2016/03/21/icc-issues-landmark-judgment-bemba-convicted-as-commander-in-chief-for-sexual-violence-crimes-part-12/ (accessed 1 July 2016).

42 The definition of the crime of rape is contained in article 7 of the Rome Statute and is further described in the Elements of Crimes.

43 See Regulation 55 Notification, para. 5 cited in *Prosecutor v Bemba* at para. 53.

44 *Prosecutor v Bemba*, at para. 61 and 706–718.

45 See *Prosecutor v Bemba* judgment, para. 43 which refers to similar rulings in ICTY, *Kupreskic* et al. Appeal Judgment, paras 89 to 90; ICTY, Kvocka et al. Appeal Judgment, para. 65; and ICTR, *Ntakirutimana and Ntakirutimana* Appeal Judgment, para. 75. The Court in *Prosecutor v Bemba* also cited the *Lubanga* Appeal Judgment, paras 122 to 123, which adopted a similar approach to relaxation or specificity, citing with approval ICTY, *Blaskic* Appeal Judgment, paras 210 to 213.

46 Dieneke de Vos, March 2016, ICC Issues Landmark Judgment: Bemba convicted as commander-in chief for sexual violence crimes, in IntLawGrrls: voices on law, policy, practice, available at https://ilg2.org/category/international-criminal-law/ (accessed 12 July 2016).

47 *Prosecutor v Bemba* at 102.

48 Elements of Crimes, Article 7(1)(g)-1, para. 2, and (8)(2)(e)(vi)-1, para. 2.

49 Interestingly, the ICC noted that although motivation can infer that a policy exists, perpetrators need not necessarily be motivated by the policy.

50 A note on the findings of Trial Chamber II on this is repeated in *Prosecutor v Bemba* at paragraph 158.

ABOUT THE AUTHOR

Katy Hindle is a public interest lawyer and works on research, policy and advocacy in the areas of gender, health and human rights. She has an LLB and B SocSc Hons degree in International Relations from the University of Cape Town and an LLM from the University of California in Los Angeles. She completed articles of clerkship at Edward Nathan Sonnenbergs and since being admitted as an attorney, has worked at Sonke Gender Justice the Centre for Human Rights (University of Pretoria) and the South African Institute for Advanced Constitutional Law (University of Johannesburg).

ABOUT THE INSTITUTE FOR JUSTICE AND RECONCILIATION

The Institute for Justice and Reconciliation (IJR) was launched in 2000 by officials who worked in the South African Truth and Reconciliation Commission, with the aim of ensuring that lessons learnt from South Africa´s transition from apartheid to democracy are taken into account and utilised in advancing the interests of national reconciliation across Africa. IJR works with partner organisations across Africa to promote reconciliation and socio-economic justice in countries emerging from conflict or undergoing democratic transition. IJR is based in Cape Town, South Africa. For more information, visit **http://www.ijr.org.za**, and for comments or enquiries contact info@ijr.org.za.

IJR acknowledges the support of Kingdom of the Netherlands for this policy brief.

This policy brief is part of a larger project on accountability for conflict-related sexual violence. For more information on the project, please contact Kelly-Jo Bluen at kellyjobluen@gmail.com

Kingdom of the Netherlands

CONTACT US

Tel: +27 21 202 4071
Email: info@ijr.org.za

Physical and Postal Address

105 Hatfield Street
Gardens
8001
Cape Town
South Africa

IJR
THE INSTITUTE
FOR JUSTICE AND
RECONCILIATION

www.ijr.org.za

The opinions expressed in this paper do not necessarily reflect those of the Institute for Justice and Reconciliation (IJR). Authors contribute to the IJR Policy Briefs series in their personal capacity.

© IJR 2017

Designed and typeset by COMPRESS.dsl