

Tackling Gender Bias in the Prosecution of International and Transnational Crimes

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Abstract

The recent conviction of Dominic Ong'wen by the ICC despite the pleas of the defense team highlighting the unfortunate and involuntary circumstances under which he came to commit the crimes he was convicted of, has elicited much debate over the fairness of the strict application of international laws. The conviction has also highlighted the difference in the treatment male and female members and accomplices of the LRA are accorded with the females being treated as victims and programs put in place for their rehabilitation and reintegration. On the other hand their male counterparts are either treated as criminals to either be pardoned or prosecuted. This work, using the LRA as a case study, sought to highlight the negative bias towards males in the prosecution of international and transnational crimes and manners in which this bias is exhibited. It also outlined the negative consequence of selective prosecution on sustainable rehabilitation and punishment of wrongdoers. Furthermore, this work provides pragmatic solutions on attaining holistic, efficacious and objective means of ensuring that all parties, regardless of their genders are adequately brought to book for their criminalities.

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1.0 Introduction

1.1 Definition and scope

International crimes constitute of serious offences that not only concern humanity as a whole, but also challenge the collective human conscience.² The crimes generally regarded as international crimes as outlined by the Rome Statute are genocide, war crimes, crimes against humanity and the crime of aggression.³ Clear definitions for transnational crimes, on the other hand, remain elusive⁴ with some scholars indicating that transnational crimes,⁵ unlike international crimes create direct criminal liability, create indirect responsibility by imposing the responsibility upon respective states to criminalise certain acts.⁶ For the purpose of this article however, transnational crimes will entail those crimes, other than international crimes outlined in amendment 28A of the Malabo Protocol.⁷

1.2 Background

The day 25th December 1989 saw the first time that a woman would answer for crimes committed in her own right since the post-WWII trials that saw several female Nazi officers like Ilsa Koch convicted of war crimes.⁸ It would take decades for another female to be formally charged with committing an international crime. On the fateful day in Romania, Elena [Ceaușescu](#) stood by her husband Nicolae [Ceaușescu](#), as they were dispatched by a firing squad after being found guilty of genocide and corruption-related

² R Cryer H Friman, D Robinson and El Wilmshurst, *An introduction to international criminal law and procedure* (2nd edn) (2010) 4

³ Rome Statute 1998, Art 5

⁴ Evelyne Owiye Asaala, *Fighting Impunity through the Prosecution of International Criminal Law*(Doctorate Thesis), (University of Witwatersrand 2017)

⁶ CC Jalloh, *The nature of the crimes in the African Criminal Court*, (Journal of International Criminal Justice 2017)

⁷ Protocol to the Amendment to the Protocol on the Statute of the African Court of Justice 2014 (Malabo Protocol), Art 28A

⁸ William L. Shirer, *The Rise and Fall of the Third Reich*. (Simon & Schuster 1990) p. 885.

crimes by a hastily constituted local military tribunal.⁹ It can still be argued however, that Romania's former first lady only met her indictment as a result of her proximity to her husband; a fate she could have avoided if she was not his spouse. This, however, is rebuttable considering she had consolidated political power in her own right. She had become become an influential member of the governing political body of Romania at the time, holding a sway over decisions taken by the regime.¹⁰

Since the inception of the International Criminal Court, only one woman, Simone Gbagbo, has been formally indicted for an international crime initiated and committed of her own accord, free of coercion or prevailing attitudes.¹¹ Despite the ICC's indictment, Allasane Outtara's regime opted to try her locally, citing social and political stability as the reason owing to her husband's lingering support within the country.¹² This move arguably planted the seed of complacency in prosecuting the atrocities committed by troops and militias loyal to Gbagbo which precipitated ting the Second Ivorian Civil War.¹³ The ICC indicted Simone alongside her husband Laurent Gbagbo, a former Ivorian president. No other females have since been indicted of international or transnational crimes by any international tribunal save for Pauline Nyiramasuhuko¹⁴ and the nuns Conslota Mukagango and Julienne Mukabutera who were convicted in relation to their

⁹ Roger Boyes, *Ceausescu looked in my eyes and he knew that he was going to die*, (The Times 2009); see also, Sinziana Demian, *In Romania, Ceausescu's death haunts Christmas*, (Global Post. Cluj-Napoca 2009) <https://www.pri.org/stories/2009-12-25/romania-ceausescus-death-haunts-christmas> Accessed 13th February 2010

¹⁰ Victor Sebestyen, *Revolution 1989: The Fall of the Soviet Empire*, ([Pantheon Books](#) 2009)

¹¹ *The Prosecutor v Simone Gbagbo* ICC-02/11-01/12

¹² Kiran Moodley, *Simone Gbagbo, former Ivory Coast first lady, sentenced to 20 years in prison*, (*The Independent* 2015)

¹³ *The Prosecutor v. Laurent Gbagbo* ICC-02/11-01/11-656-Red

¹⁴ Peter Landesman, *A Woman's Work*, (The New York Times Magazine 2002) <https://www.nytimes.com/2002/09/15/magazine/a-woman-s-work.html?pagewanted=all&src=pm>

roles in the Rwandan Genocide.¹⁵ The former was held responsible for arming Hutu militants and ordering attacks against Tutsi's which often involved sexual assault.¹⁶ The latter pair was found guilty of facilitating the slaughter of Tutsi refugees seeking refuge from their attackers by informing the militia men of their whereabouts.¹⁷ Does this then mean that men have a greater affinity to the perpetration or facilitating the commission of international and transnational crimes? What of the female soldiers seen armed and donning military attire in armies and rebel factions accused of committing international crimes, whose fellow ranking soldiers have been tried and convicted of the same? This article seeks to analyse the extent of this gender bias in the existing international legal framework and in practice.

2. 0 A case study of the Lord's Resistance Army(LRA)

2.1 Dominic Ong'wen's case

The recent conviction of long-time rebel Dominic Ong'wen by the ICC was viewed by some quarters as populist show that not only highlighted the discriminatory results of applying Eurocentric legal standards to African conditions, but also highlighted the manifest gender inequality that the international criminal regime possesses.¹⁸ The case evoked discussions of whether Ong'wen was more victim than perpetrator within the hospices of the LRA.

¹⁵ Andrew Osborn, *Belgium puts nuns in docks over genocide*, (The Guardian 2001) <https://www.theguardian.com/world/2001/apr/17/warcrimes#:~:text=The%20two%20Benedictine%20nuns%2C%20Sister,dock%20by%20two%20other%20accused>. See also; Keith B. Richburg, *Rwandan Nuns Jailed in Genocide*, (The Washington Post 2001) <https://www.washingtonpost.com/archive/politics/2001/06/09/rwandan-nuns-jailed-in-genocide/fce3308b-3e6e-4784-8490-0887f69c7a39/>

¹⁶ Andrew Osborn, *Belgium puts nuns in docks over genocide*, (The Guardian 2001) <https://www.theguardian.com/world/2001/apr/17/warcrimes#:~:text=The%20two%20Benedictine%20nuns%2C%20Sister,dock%20by%20two%20other%20accused>

¹⁷ Ibid

¹⁸ *The Prosecutor v. Dominic Ongwen* ICC-02/04-01/15

2.2 The LRA

The LRA, formed and led by Joseph Kony, is a rebel faction that intended to bring the territory of Uganda under Kony. It has perpetrated numerous atrocities since its inception including murder, rape, genocide and other heinous crimes.¹⁹ Dominic Ong'wen was abducted as a child, and indoctrinated over the next half decade into the ways of the LRA through fear, mysticism, brainwashing, and constant threats of violence.²⁰ Other males were recruited in a similar manner and would end up serving the LRA as soldiers and junior commanders.²¹

Similarly, girls and young women were abducted and forced to serve as wives, cooks and sex slaves of the LRA troops.²² Among them were women that rose up the ranks to command respect only subordinate to Kony himself. They also stayed with the young abductees when the male troops went out for their raids and military operations inculcating them into the LRA's way of life.²³

This backdrop evokes surprise as to why to-date, only male members of the LRA, most of whom were abducted were treated as perpetrators while their female counterparts are viewed as victims. It evokes the question as to why Dominic Ong'wen and other male abductees are to spend the remainder of

¹⁹ Julian Borger, *O&A: Joseph Kony and the Lord's Resistance Army*, (*The Guardian* 2012) <https://www.theguardian.com/world/2012/mar/08/joseph-kony-lords-resistance-army> Accessed 12th February 2021

²⁰JRP, *Complicating Victims and Perpetrators in Uganda: On Dominic Ongwen*, (JRP Field Note 7 2008) http://justiceandreconciliation.com/wp-content/uploads/2008/07/JRP_FN7_Dominic-Ongwen.pdf Accessed 12th February 2021

²¹ Anonymous, *Should child soldiers be prosecuted for their crimes?*, (*The New Humanitarian*, 2011) <https://www.thenewhumanitarian.org/2011/10/06/should-child-soldiers-be-prosecuted-their-crimes> Accessed 12th February 2021

²² JRP, *Complicating Victims and Perpetrators in Uganda: On Dominic Ongwen*, (JRP Field Note 7 2008) http://justiceandreconciliation.com/wp-content/uploads/2008/07/JRP_FN7_Dominic-Ongwen.pdf Accessed 12th February 2021

²³ Anonymous, *Dominic Ongwen - from child abductee to LRA rebel commander*, (BBC News 2021) <https://www.bbc.com/news/world-africa-30709581>, Accessed 12th February 2021

their lives languishing behind bars when their accomplices being their wives, either go free, tour the world amassing wealth from book sales, interviews and talks,²⁴ when both were taken under similar circumstances and are equally culpable for the offences committed by the LRA with their roles as aiders, abettors or accomplices.

2.3 Adjudication LRA-related crimes: practice and opinions

Different justifications have been given by courts, scholars and stakeholders for the prosecution or lack thereof of LRA members and combatants including;

2.3.1 The extent of involvement

Accounts have been advanced that the men have been directly involved in the perpetration of crimes such as executing killings, tortures, and destroying houses whereas their female counterparts only performed domestic and conjugal duties, and were never part of the atrocities as they were left behind in camps while the atrocities were perpetrators.²⁵

The Rome Statute assigns criminal responsibility not only to perpetrators of crimes but also those who aid and abet in the commission or attempted commission of the crimes.²⁶ This means that even those who do not commit the actual crimes are as culpable as the perpetrators. This provided that they act with the intention of assisting the perpetrators in committing crime or in

²⁴ Anonymous, *My husband the warlord: an extract from the memoir of Joseph Kony's wife*, (The Guardian 2015) <https://www.theguardian.com/world/2015/dec/22/joseph-kony-lra-book-evelyn-amony-memoir-extract>, Accessed 12th February 2021 ; see also Anonymous, *Florence Ayot, "My children are always reminded that their father is a notorious rebel commander*, (The New Humanitarian 2012) <https://www.thenewhumanitarian.org/report/95645/uganda-florence-ayot-my-children-are-always-reminded-their-father-notorious-rebel-commander> , Accessed 12th February 2021

²⁵ Anonymous, *My husband the warlord: an extract from the memoir of Joseph Kony's wife*, (The Guardian 2015) <https://www.theguardian.com/world/2015/dec/22/joseph-kony-lra-book-evelyn-amony-memoir-extract>, Accessed 12th February 2021

²⁶ Rome statute of the International Criminal Court 1998, Art 25 (3)(c)

the knowledge that the perpetrators intend to commit a crime.²⁷ The women's performance of domestic duties ensured that the militants remained fed and energized to perform the atrocities. They also nursed the injured combatants back to health as well as helped carry and nurse children who had been abducted by the LRA, just as Ong'wen was carried around for his first few weeks with the LRA.²⁸ The women also helped inculcate younger girls in the group, preparing them to be wives of the soldiers²⁹. All these acts meet the threshold under the Rome Statute for aiding and abetting, adorning them with similar liability over the crimes.

2.3.2 The fear factor

It has been advanced that all the acts performed and the cooperation exhibited by the girls and women abducted were coerced by through fear and a threat to harm.³⁰ This paints a picture that abducted females were disproportionately vulnerable compared to their male counterparts, something that is contrary to proven reality.³¹

It has been demonstrated that fear was dished out equally among all abductees regardless of gender, and threats of violence as well as actual violence metered unto males as well.³² During the inculcation period, the

²⁷ Ibid, Art 25 (3)(d)

²⁸ JRP, *Complicating Victims and Perpetrators in Uganda: On Dominic Ongwen*, (JRP Field Note 7 2008) http://justiceandreconciliation.com/wp-content/uploads/2008/07/JRP_FN7_Dominic-Ongwen.pdf Accessed 12th February 2021

²⁹ Ibid

³⁰ J. Kelly, L. Branham, L. & M.R. Decker, M.R, *Abducted children and youth in Lord's Resistance Army in Northeastern Democratic Republic of the Congo (DRC): mechanisms of indoctrination and control*. (Conflict & Health, 2016) **10**, 11

³¹ Ibid

³² Anonymous, *Florence Ayot "My children are always reminded that their father is a notorious rebel commander*, (The New Humanitarian 2012) <https://www.thenewhumanitarian.org/report/95645/uganda-florence-ayot-my-children-are-always-reminded-their-father-notorious-rebel-commander> , Accessed 12th February 2021

males were forced to kill and mutilate at gunpoint, rendering them similarly slaves of the LRA.³³ This fear persisted long after the indoctrination.

Both genders were thus equally privy to the fear evoked by the LRA and performed the acts or duties they did either to please Kony or gain his favour to improve their chances of survival, or under the threat of death or grievous harm.

Intention to carry out a crime or to cause the resultant consequences, and knowledge of the likely consequences that one's conduct may cause, form the mental element required for criminal responsibility.³⁴ This there means that in the absence of this mental element, perpetrators cannot be criminally liable. The fear and coercion experienced by both male and females by the LRA therefore voided their criminal responsibility. Both genders involved should thus be spared from criminal conviction. In practice, only the female ex-LRA members are treated as victims and offered rehabilitation as their male counterparts are prosecuted for international crimes, both locally and at the ICC.

2.3.2 The choice to escape

It has been advanced that Dominic Ongwen and other male combatants on various occasions had the opportunity to escape but instead chose to stay with Kony.³⁵ It was similarly suggested by the ICC that these combatants were males who after many years in the jungle knew the terrain and could have easily absconded.³⁶

The fear used by Kony, encompassing 'mystical powers', which his brainwashed followers genuinely believed he possessed played a role in

³³ Ibid

³⁴ Rome statute of the International Criminal Court 1998, Art 30

³⁵ *The Prosecutor v. Dominic Ongwen* ICC-02/04-01/15

³⁶ Ibid

preventing both males and females from escaping from the camp.³⁷ They had also witnessed people who had attempted to escape being killed or mutilated. Ong'wen recalled having been forced skin alive a third abductee with whom he had tried to escape.³⁸ Assuming that his fear affected one gender more would be unfair because the fear of impending harm is not gender specific and can affect someone's action or inaction regardless of their ability to maneuver the forests.

In addition, the women and girls left behind when the troops went out for raids and expeditions for extended periods at a time,³⁹ had similar opportunity to flee. Having traversed the wilderness with the troops, they also had an idea of the routes and paths to the nearest villages, outposts and to rescue.

Another rebuttal of this position is the simple fact that as some of Kony's male troops fled and surrendered to authorities, sometimes accompanied by females, some women stayed with the LRA.⁴⁰

2.4 Conclusion

It is clear from the aforementioned that both the men and women abducted by the LRA were subjected to similar conditions which encompassed the same levels of threats and fear. They are also similarly implicated in the same crimes despite their different degrees of participation, all of which make them legally culpable for committing international crimes.

³⁷ Anonymous, *Dominic Ongwen - from child abductee to LRA rebel commander*, (BBC News 2021)

<https://www.bbc.com/news/world-africa-30709581>, Accessed 12th February 2021

³⁸ Ibid

³⁹ Anonymous, *My husband the warlord: an extract from the memoir of Joseph Kony's wife*, (The Guardian 2015)
<https://www.theguardian.com/world/2015/dec/22/joseph-kony-lra-book-evelyn-amony-memoir-extract>, Accessed 12th February 2021

⁴⁰ Anonymous, *My husband the warlord: an extract from the memoir of Joseph Kony's wife*, (The Guardian 2015)
<https://www.theguardian.com/world/2015/dec/22/joseph-kony-lra-book-evelyn-amony-memoir-extract>, Accessed 12th February 2021

3.0 Women only treated as accomplices

Of the forty-four(44) people who have been indicted of international crimes by the ICC, only one is female.⁴¹ Simone Gbagbo was indicted alongside her husband for crimes against humanity.⁴² This is owing to her position to the proximity her husband's regime and her role in co-creation of policies that resulted in the commission of the crimes. She was however locally tried unlike her husband who was handed over to the ICC for prosecution, despite being accused for committing the same acts⁴³

The bias in the treatment of males demonstrated in Simone Gbagbo's case pales in comparison with the treatment of Isabella dos Santos, the daughter of Angola's former president Eduard dos Santos. Although it can be demonstrated that her deliberate actions, albeit with her father's initial assistance led to her irregular enrichment, she is still viewed as a beneficiary of her father's corrupt regime.⁴⁴ Dos Santos stands accused irregularly enriching herself while majority of Angolans live in poverty.⁴⁵ The only repercussions she has suffered are some of her foreign held investments being seized and accounts frozen. Angolan authorities are yet to issue an international arrest warrant for her arrest and subsequent prosecution.⁴⁶

This selective approach effecting justice against women implicated in committing international and transnational crimes has resulted in women not facing the full brunt of the law, as their cases are determined from a perspective of being chance accomplices of male counterparts despite having

⁴¹ Sarah J Goodman, *The Effectiveness of the International Criminal Court: Challenges and Pathways for Prosecuting Human Rights Violations*, (Inquiries Journal 2020) Vol. 2 No 9

⁴² *The Prosecutor v Simone Gbagbo* ICC-02/11-01/12

⁴³ Moodley, Kiran (2015-03-10). "[Simone Gbagbo, former Ivory Coast first lady, sentenced to 20 years in prison](#)". *The Independent*.

⁴⁴ Kerry A. Dolan and Rafael Marques de Morais., *Daddy's Girl: How An African 'Princess' Banked \$3 Billion In A Country Living On \$2 A Day*. (Forbes 2013) <https://www.forbes.com/sites/kerryadolan/2013/08/14/how-isabel-dos-santos-took-the-short-route-to-become-africas-richest-woman/?sh=304ea90545f5>

⁴⁵ Ibid

⁴⁶ Anonymous, Angola mulling arrest warrant for Isabel dos Santos – prosecution, (News 24 2020)

played an equal or even greater role in the related crime, and given arguably more favourable treatment than their counterparts.

4.0 Conclusion and recommendations

4.1 Conclusion

It is clear from the aforesaid, that the current international criminal law regime is biased towards men, and skewed towards the permissible disregard of female perpetrators unless they are implicated in extreme acts of crime. This approach is unfair considering men have been convicted of even the lowest degrees of complacency in conduct with regards to the said crimes. The application of the law has also been biased towards men resulting in an unequal rate of convictions and indictments which do not truly reflect the extent of participation of both genders in the commission of international and transnational crimes.

4.2 Recommendations

Going forward, legal regimes should be revised to eliminate leeway through which one gender can be erroneously allowed to escape the full repercussions of their criminal conduct under the guise of victimhood, or being merely an accomplice. The application of the laws should also be strictly uniform regardless of gender.

Some of the ways of achieving this could be through a wholesome approach at the prosecution of international and transnational crimes. This can be done in association with an objective presumption-free approach at investigations into the crimes.

4.2.1 Wholesome approach:

This approach simply refers to the scenario where the actual perpetrators of the crimes, their aiders as well as their abettors are assigned equally attention and burden for their crimes. As mentioned earlier, the Rome Statute already recognises aiders and abettors as being equally liable for the crime as the

actual perpetrator,⁴⁷ in practice however, this is not always the case. In the case of the LRA for instance, women were primarily viewed as victims⁴⁸ and therefore not probed as a suspect would have been. The lenses should be lifted and a new approach where every suspect who is potentially guilty, receives an equal amount of attention as their counterparts.

4.2.2 Presumption-free

The presumption of innocence until one is proven guilty until one's complicity in a crime is established by a legitimate tribunal of good standing is the hallmark of justice that has been embedded in numerous constitutions the world over.⁴⁹ Kenya⁵⁰ and South Africa's⁵¹ constitutions are but some of the few countries that have enshrined the right in their respective constitutions. The right ensures that a person has a right to fair hearing before the truth is established. Laudable as it may be, the right can be counterproductive if selectively applied to the detriment of some suspects. For instance, when it is automatically assumed that all women and persons under eighteen are victims or acted out of coercion, and focus only placed on the grown men involved in a crime, a miscarriage of justice may be implemented as equally guilty women and young adults might escape prosecution as the wrath and full glare of the law is directed towards men who are presumed to be the 'expected' architects of the various crimes.

4.2.3 Ramifications

⁴⁷ Rome statute of the International Criminal Court 1998, Art 25 (3)(c)

⁴⁸ Anonymous, *My husband the warlord: an extract from the memoir of Joseph Kony's wife*, (The Guardian 2015) <https://www.theguardian.com/world/2015/dec/22/joseph-kony-lra-book-evelyn-amony-memoir-extract>, Accessed 12th February 2021 ; see also Anonymous, *Florence Ayot, "My children are always reminded that their father is a notorious rebel commander*, (The New Humanitarian 2012) <https://www.thenewhumanitarian.org/report/95645/uganda-florence-ayot-my-children-are-always-reminded-their-father-notorious-rebel-commander> , Accessed 12th February 2021

⁴⁹ Christopher Moore, *The Law Society of Upper Canada and Ontario's lawyers, 1797–1997*. (University of Toronto Press 1997)

⁵⁰ Constitution of Kenya 2010, Art 41

⁵¹ Constitution of South Africa 1997, Art 35

The use of either approach or a blend of the two would ensure that a comprehensive prosecution of criminalities is undertaken. An unbiased approach in the investigation and prosecution of crimes where every person is presumably innocent and suspects not given biased leases on evading culpability will result in a scenario where all the contributors to the crimes are equally prosecuted in their own right. Where all responsible persons are held accountable for their illegal conduct, rehabilitation becomes more efficacious as it will be targeted to all responsible individuals.

Furthermore, holding all responsible parties accountable will prevent injustice as the legal burden will be proportionally distributed among all the involved parties, preventing the disproportionate punishment and vilification of a few individuals in the process. It will also provide a greater sense of retribution for all the victims of the crimes as no perpetrator will fall from focus as a result of a limited prosecutorial scope. Ultimately, a greater sense of justice will be achieved for the perpetrators and the victims alike, enhancing the efficacy and credibility of the concerned legal regimes.

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