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The International Criminal Court and Gender Crimes

Speech

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Ladies and Gentlemen,

As all the presentations have recognized, the ICC is positioned at a particular formative moment in the evolution of the recognition of international crime. I would like to situate gender crimes, which have something of their own evolution, in that history.

The idea originated over 30 years ago in the creation of sexual harassment as a legal claim, where what had been just a sex crime – rape – was first understood as happening because of the social status location and power differential of the parties. That is, it was first understood as based in gender inequality, hence a violation of human and civil rights and a form of sex discrimination. This comprehension -- that what had been thought of as a crime without social particularity was a gender-biased violation -- was embraced and extended by the CEDAW Committee in its General Recommendation 19 in 1992. The idea, which has influenced other areas such as the international

definitions of torture and trafficking, then began to migrate back into the criminal justice system as such through the ad hoc tribunals, led by the ICTR in its Akeyesu case, sustained by Prosecutor Jallow in his prosecutions for rape as genocide, with important developments on individual liability for collective criminality in mass rape by the ICTY, and further extension to forced marriage as a crime against humanity under Prosecutor Rapp in the Special Court for Sierra Leone.

These developments spread the understanding in the international community that sexual assaults against women and girls were based on the sex of the victim or the perpetrator: the gendered inequality of their relation in the criminal act in social context. Until the Rome Statute, in international criminal law, this was an analysis of laws whose elements were defined in other terms. It was in the Rome Statute that a basis in gender first became an element of a crime in positive law – specifically, of persecution as a crime against humanity in Art 7. All the sex

crimes under all its articles -- rape, sexual slavery, enforced prostitution and trafficking in persons, forced pregnancy, and other sexual crimes of similar seriousness -- are now well understood to together make up this category of gender crime. Now for the first time, there is an explicit gender-based crime, and many crimes that are gender-based in reality are formally understood as gender-based in law -- unfortunately in my view not including gays and lesbians as such, but covering men and boys who are subjected to sexual atrocities and other gender-based aggression, as well as women and girls. Like many things, this one is better in French – *les crimes à caractere sexiste* – and unlike many things expressed in French, is also a bit more direct. Addressing such crimes, truly, in Prosecutor Moreno-Ocampo's words, begins a new era.

The most striking quality of the pursuit of these crimes by the ICC to date has been that they are there: their centrality to every prosecution so far, in a way that clarifies how the sexual abuse becomes a specific instrumentality in each conflict. On my

observation of the evidence, Lubanga made boys into rapists and girls into sex slaves in order to make them into soldiers he could command and use at will. Bemba and Katanga sent their forces to rape en masse as retaliation for prior attacks or for resources or political power or territory. Al Bashir centrally uses rape because it is effective in destroying peoples, and because the evidence it leaves is quieter than death, or so he thinks. And Joseph Kony violates the humanity of his forty wives and the whole schools he abducts and parcels out to his henchmen because he wants forty wives and the power of a cult leader. Rape in war is for the war aims. Rape in genocide is for the destruction of peoples. Sexual abuse as a crime against humanity, I have come to think, is an instrumentality unto itself. These rapes are done in order to do them. It is no accident that gender is first recognized as an express element in crimes against humanity. The future of conflict lies in crimes against humanity, the messiest of the “new wars,” organized principally along social hierarchical lines, of which gender is one, often combined with ethnicity, rather than by neat

military structures. Where reality is headed, it is right that law would head there too.

Put another way, gender crimes are prominent in our prosecutions because they are prominent in the contexts being prosecuted. This only becomes remarkable against the backdrop of the prior, and still prevalent, norm of denying their existence, ignoring them, shaming their victims, and or defining them in legally unproveable ways. In other settings, it has been as if there was a tacit agreement to look the other way as women and children were sexually abused -- minimizing, trivializing, denigrating, and silencing the victims, destroying their credibility and further violating their dignity, so abusers can continue unimpeded. This body of the ICC's first cases signals to the world that here, at least, this deal is off.

Challenges remain, of course, prominently including undoing, getting around, neutralizing or changing the many obstacles,

devices, traditions, norms, and doctrines that stalk the legal system, appearing gender neutral on their face but never having responded to the victims' experience in substance, and working to guarantee that law will never stop this. Abstract doctrines called fair and principled, in this setting, are often anything but.

The international arena, the ICC in particular, has a very specific chance here. Sexually violated women and international jurisdiction belong together, not only because both are denigrated for not resorting to force and neither has an army at its command. Most women and children are most violated at home, or close to home, in the localities that form the states that have been the traditional units of power in international law. The men at home are the least likely to do anything about it because they are the most likely to be doing it and to identify with those who do. The further away from home women go, the experience has been, the more rights they get. Distance appears to attenuate the male bond,

making it more likely that women's violations will be recognized as real. Short of Mars, the ICC is as good as we are going to get.

With this transhistorical and transcultural reality of gender crime is also highlighted the darker fact that as of yet, there is no "post-conflict" for gender crimes. The campaign of violence against women well-documented around the world, with substantial variation but also substantial impunity, is the longest-running siege of crimes against humanity in the real sense. The conflict goes on, the weapons forged daily, lying around to be seized for accelerated deployment in every conflict among men in which they become convenient, with no disarmament treaty in sight. A gender perspective thus raises the question, along with the question of what kind of justice we want, the question of what kind of peace we seek.

At OTP, in the next three years building on the last six, our hope, our vision, and actually our plan, under the inspired

leadership of the Prosecutor and the Deputy Prosecutor, is to pursue the gender crimes the Rome Statute defines wherever they happen of concern to the international community, and in the process to develop effective procedures and reality-based legal doctrines that respond to the practical imperatives for their effective prosecution. In order to stop these crimes and end this longest-running war. We will give victims a voice – their own. Perhaps our focus on those most responsible will someday include the rapists themselves as well as those who deploy and permit them, contributing powerfully to deterrence and sustaining the Nuremberg principle. Through positive complementarity approach – states wanted to keep the power to prosecute, now they need to exercise that responsibility – through the Registrar’s creative work, working with NGOs, which are crucial, and what I think of as “Division Béatrice”¹, complementarity will become a well-travelled two-way street. Knowing there will be no meaningful collective security in a world of gender injustice, by setting an

¹ The Jurisdiction, Complementarity and Cooperation Division (“JCCD”)

example, supporting institution-building, and through multi-leveled interface and cooperation, together we will transform the public response to *les crimes sexistes* in national jurisdictions worldwide, in and outside recognized zones of conflict, in wars among men and in so-called peacetime.