Post-Conflict Justice, Gender and International Law: (Too) Great Expectations?

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OLGA JURASZ, OCT 15 2013

The recent judgment of the Appeals Chamber of the Special Court for Sierra Leone (SCSL) in the (in)famous case against Charles Taylor[1] prompts, once again, a reflection about the broader context of post-conflict justice and the role of international law in achieving it.

The judgment in *Taylor* is symbolic for two reasons. First, Charles Taylor, the former president of Liberia, is the first head of State who has been prosecuted and convicted by an international criminal court since the Nuremberg Trials. The symbolic and political dimension of this decision is therefore of particular importance. Secondly, the decision in Taylor marks the end of the SCSL's judicial activities, concluding years of prosecuting violations of international humanitarian law (IHL)[2] and international crimes committed during Sierra Leonean civil war. As the term of the SCSL comes to an end, questions arise about the effectiveness of international criminal courts and tribunals as well the role of so-called 'international justice'.

The Modern System of International Criminal Justice

The international criminal justice system has significantly evolved over the past three decades, with particular focus on bringing to a much desired end the impunity for human rights violations and international crimes committed during armed conflicts. The SCSL is one of several international criminal courts and tribunals, which were created over the past 25 years in response to the heinous crimes committed during atrocities of the end of 20th and beginning of 21st century. Some other examples include two ad hoc international criminal tribunals, the International Criminal Tribunal for the Former Yugoslavia (the ICTY) and the International Criminal Tribunal for Rwanda (the ICTR). The ICTY and the ICTR were created to prosecute those responsible for war crimes, crimes against humanity, genocide and other violations of the international humanitarian law committed during two major armed conflicts of the late 20th century: the war in the Former Yugoslavia and in Rwanda. Their establishment and subsequent jurisprudence were the setting stones in shaping the modern international criminal justice system.

However, the major development in international criminal justice was the adoption of the Rome Statute in 2002, which established the International Criminal Court (the ICC) – the world's first international criminal court. The ICC, which has jurisdiction over international crimes committed both in the context of armed conflict and during peacetime, will soon become the only international criminal court, given that the terms of international criminal tribunals will soon run out. However, with the ICC taking rather slow steps to build its own jurisprudence (the ICC has successfully completed only one case so far, *Prosecutor v. Thomas Lubanga Dyilo,*[3] in March 2012), it is still the jurisprudence of the international criminal courts and tribunals that provide the most comprehensive framework of assessment of the process of building international post-conflict justice.

Post-Conflict Justice and International Law: Pitfalls and (Occasional) Wins?

The process of ending impunity for crimes committed during armed conflict at an international level is certainly not an easy one. The process in itself is essentially fairly new (only spanning the past 25 years or so in addition to some early experiences from Nuremberg) and, as such, it is susceptible to errors: after all, there is no manual on how to

create a faultless international criminal justice system. Rather, it is a process which has been continuously developing and has made, I would argue, some notable steps towards advancing post-conflict justice.

What is crucial to understand is that international law (IL), and international criminal law (ICL) in particular, operate within certain boundaries. ICL is not designed to prosecute every single war criminal at an international level. Not only would that be impossible in terms of the availability of time and resources, but it would also call into question the role of domestic legal systems in achieving post-conflict justice. In relation to the ICC, it would challenge the principle of complementarity.[4] Instead, the vast majority of cases heard before international courts and tribunals so far involved individuals who were in a relatively high position of power and decision-making when committing international crimes, such as local commanders (*Furundžija*),[5] generals (*Blaškić*),[6] politicians (*Akayesu*,[7] *Tadić*),[8] heads of armed groups (*Rutaganda*)[9] or heads of state (*Taylor*).

ICL established the concept of individual criminal responsibility for international crimes, which means that individual persons have obligations under ICL and, if found in breach of the rules of ICL, they may be prosecuted and held criminally responsible before international criminal courts and tribunals. The notion of individual criminal responsibility allows to for the successful prosecution of persons (subject to sufficient evidence and in accordance with the rule of presumption of innocence),[10] even if they have not personally perpetrated the criminal act. It is therefore sufficient that the accused has planned, aided or abetted[11] the criminal act in order to hold him or her criminally responsible, as the recent decision in *Taylor* showed. Furthermore, the decision in *Taylor* upheld the view that an individual may be criminally liable for international acts committed in a different jurisdiction. Charles Taylor was convicted for crimes committed in the neighbouring country (Sierra Leone) as he planned and abetted the commission of international crimes by providing assistance to a rebel group in Sierra Leone. Finally, the fact that the accused was a Head of State (or any governmental official for that matter) at the time when crimes were committed does not mitigate the punishment nor give the individual immunity from prosecution.[12]

Secondly, it is necessary to note that international law is only one of the avenues/disciplines that can be utilised in the pursuit of achieving post-conflict justice. From the perspective of transitional justice, ICL's contribution is limited to the prosecution of international crimes committed during armed conflict, and even so, only selected cases can be heard at international criminal courts and tribunals. International law is not designed to deal with the broad spectrum of consequences of armed conflict and to expect it to address all aspects of the aftermath of war, for example trauma suffered by victims, PTSD, lack of resources, poverty (just to name a few), would simply be unreasonable. That said, there is a significant scope for other, extra-judicial forms of realising post-conflict justice (e.g. truth and reconciliation commissions) as well as for other disciplines (medicine, psychology, development etc.) to address broader aspects of the impact of armed conflict.

However, what ICL can and does offer is the notion of symbolic justice. By prosecuting the key perpetrators of international crimes at an international level, ICL sends a clear message that those guilty of atrocious crimes committed during armed conflict are not left unpunished. For centuries, this has been the major pitfall of post-conflict reality, whereby the voices of victims were not heard and the crimes committed during wars were treated as an integral or nearly natural component of armed conflict, creating a fertile ground for the flourishing impunity of perpetrators.

That said, the most commonly heard criticism of international criminal justice system relates to prosecutorial selectiveness and the fact that many victims will never see their perpetrators on trial as the key focus of international cases remains on prosecuting the 'big fish', leaving those personally responsible for the commission of criminal acts unpunished. However, whilst this criticism is valid, it is also the exact reason for why domestic prosecutions of war crimes should be taking place in parallel with the international prosecutions. The developments in prosecuting perpetrators of international crimes at an international level will only be fully effective and meaningful if the domestic legal systems respond to a challenge of prosecuting war criminals. In this context, the jurisprudence of international courts and tribunals may provide a useful legal authority to domestic courts in relation to how certain crimes committed in context of armed conflict have been conceptualised in international trials.

The multiple complexities of bringing a case before the international court or tribunal should not be underestimated

either. Needless to say, armed conflicts involve a range of actors (both State and non-State ones, such as guerrilla fighters), both of whom commit international crimes and serious breaches of IHL during the conflict. These are well documented by the media and the news reports nowadays are often presenting information confirming this dynamic and showing the overwhelming suffering of the civilian population in modern armed conflicts. However, whilst there is often little doubt in public opinion regarding the suffering of a civilian population and the widespread violations of human rights (see, for instance, recent reports from Syria), bringing the string case before international court and tribunal is a much more complicated matter. Not only must the prosecutor prove the case against the accused beyond the reasonable doubt, but also rules of evidence and procedure must be complied with at all stages of the process. Obtaining reliable evidence might be a particularly challenging task as victims often fear reprisals for giving evidence against their perpetrators or are hesitant to act as witnesses due to shame, possible stigma or even the fear of being ostracised by their communities, as has often been the case with victims of wartime sexual violence.

However, despite the multifold complexities associated with the process and even though the vast majority of victims will not see their perpetrators being tried before an international court or tribunal, the judgments of international courts and tribunals are still relevant in that they document that international crimes have been committed and, one may hope, give victims a sense of closure and restoration of their dignity.

Gender Justice?

One of the most notable steps in the past three decades of the evolution of ICL is the successful prosecution of sexual violence at an international level. The acts of wartime sexual violence, in particular rape, have now been successfully prosecuted as war crimes, crimes against humanity and genocide. They have also been confirmed to be constituent acts committed as a part of the crime of torture and sexual enslavement.

For centuries, sexual violence has been used as a weapon of war in armed conflicts and has been treated as an integral part of war, written into the notion of collateral damage. Accordingly, this has been mirrored in the vast impunity of combatants who have committed acts of sexual violence. Although the various obstacles associated with the prosecution of international crimes apply, at the very least, to cases involving charges of sexual violence, the prosecution of sexual violence by international courts and tribunals has been a major milestone.

The first successful prosecution of rape by an international criminal tribunal took place in 1998 in*Prosecutor v. Akayesu*, when the ICTR prosecuted rape as a crime against humanity and as a constitutive act of genocide. Interestingly, the original indictment did not include rape charges. The amendment of charges was caused by the spontaneous testimony of one of the witnesses during the trial, who revealed that acts of sexual violence had been taking place.[13] International law rarely works, but it certainly did in *Akayesu*, where the amendment of the charges against the defendant resulted in a landmark judgment for (nowadays much more developed) gender crimes jurisprudence.

Although the case-law on gender-based crimes significantly evolved since *Akayesu*, the promise of ‘gender justice’ is far from being completely achieved. The positive developments are (too) often undermined by the ‘missed opportunities’ in advancing gender justice. One of the most recent ‘missed opportunities’ is illustrated by *Lubanga*, where the ICC failed to prosecute gender crimes committed in the context of the recruitment of child soldiers in DRC,[14] despite there being arguably sufficient evidence at the disposal of the Office of the Prosecutor.[15] Major obstacles are also posed by the persisting stereotypical attitudes towards gender crimes amongst some of the court members as well as international lawyers,[16] which have negative implications on the process criminalising gender-based crimes.

Nonetheless, the prosecution of wartime sexual violence at an international level has been fundamental in overcoming the long-established impunity for gender-based crimes. It is meaningful for victims that the very crimes committed against them are now recognized internationally and prosecuted as international crimes. Whilst the international trials of perpetrators may play a limited role in forming an actual reparation to victims, the public acknowledgement and prosecution of gender-specific harms suffered by them during the trial can be seen as an important part of bringing symbolic justice to the victims.

Conclusion

In the past 25 years, we have witnessed a rather dynamic evolution of ICL. The prosecution of war crimes, crimes against humanity and genocide as well as prosecution of gender-based crimes has strongly defined the shape of international criminal justice system as we know it today. The obstacles associated with the process of building 'international justice' are numerous and not uncommon. With the international criminal tribunals coming to the end of their respective terms, one may hope to see the ICC standing up to the challenge of leading international criminal justice and building on the positive developments in the ICL so far.

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[1] *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-A, 26th September 2013, available at: http://www.sc-sl.org/LinkClick.aspx?fileticket=t14fjFP4jJ8%3d&tabid=53

[2] International humanitarian law (IHL) is a branch of public international law. IHL acts as a *lex specialis* and applies to situations of international and non-international armed conflicts as well as during the occupation.

[3] Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2842, 14 March 2012

[4] The principle of complementarity (para 6, Preamble to the Rome Statute) means that the ICC can only have a jurisdiction over the case when the national legal system fails or proves unable or unwilling to prosecute a particular individual accused of committing international crimes. Furthermore, the ICC cannot exercise jurisdiction if the case is investigated or prosecuted within the domestic legal system, unless it can be proven that the State is nonetheless unwilling or unable to carry out 'genuine' proceedings. See generally: R. Cryer et al., *An Introduction to International Criminal Law and Procedure*, (CUP, Cambridge: 2007)

[5] *Prosecutor v Furundžija*, IT-95-17/1-T, 10 December 1998

[6] *Prosecutor v Blaškić*, IT-95-14-A, 29 July 2004

[7] *Prosecutor v Akayesu*, ICTR-96-4-T, 2 September 1998

[8] *Prosecutor v Tadić*, IT-94-1-A, 15 July 1999

[9] *Prosecutor v Rutaganda*, ICTR-96-3-T, 6 December 1999

[10] Presumption of innocence means that the accused is innocent until proven guilty. The burden lies on the prosecution to prove defendant's guilt beyond the reasonable doubt.

[11] Article 6(1) SCSL Statute, available here: http://www.sc-

sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3D& ; Article 25 (Individual criminal responsibility) and Article 27 (Irrelevance of official capacity) ICC Statute, available here: http://untreaty.un.org/cod/icc/statute/romefra.htm

[12] Article 6(2) SCSL (in relation to Charles Taylor)

[13] K.D. Askin, "A Decade of The Development of Gender Crimes in International Courts and Tribunal: 1993 to 2003", (2004) 11 No.3 *Human Rights Brief* 16

[14] Brigit Inder, Reflection: Gender Issues and Child Soldiers- the Case of Prosecutor v Thomas Lubanga Dyilo, 25 August 2011, available at: http://www.iccwomen.org/documents/Gender-Issues-and-Child-Soldiers.pdf

[15] United Nations General Assembly, Report of the International Criminal Court, UN Doc. A/60/177, 1 August 2005, para. 37; available at: http://www.icc-cpi.int/NR/rdonlyres/EDBEBEC0-7896-46EC-9AD6-7C867F67CF1B/278503/ICC_Report_to_UN.pdf; Human Rights Watch, 'Seeking Justice: The Prosecution of Sexual Violence in Congo War', 8 March 2005, available at: http://www.hrw.org/reports/2005/03/07/seeking-justice; Amnesty International, 'Democratic Republic of Congo: Mass Rape- Time for Remedies', 25 October 2004, available at: http://www.amnesty.org/en/library/info/AFR62/018/2004

[16] S. Sharrat, 'Voices of Court Members: A Phenomenological Journey- The Prosecution of Rape and Sexual Violence at the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Bosnian War Crimes Court (BIH), pp.353-369, in: A.- M. de Brouwer et al. (eds)*Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia, Cambridge: 2013)

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