



fidh

The Impact of Litigation on Combating Sexual Violence and its Consequences in Africa

Sharing experience and practical advice

Cover photo: The former Chadian dictator Hissène Habré is escorted by prison guards into the courtroom for the first proceedings of his trial before the Extraordinary African Chambers in Dakar, on the 20th of July 2015. More than a quarter-century after his blood-soaked reign came to an end, former Chadian dictator Hissène Habré went on trial in a Senegalese court, in what is seen as a test case for African justice. © Seyllou / AFP

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ABBREVIATIONS AND ACRONYMS

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Commission on Human and Peoples' Rights
ACJPS	African Center for Justice and Peace Studies (Sudan)
AJS	Association des juristes sénégalaises (Senegal)
ATFD	Association tunisienne des femmes démocrates (Tunisia)
AU	African Union
AVIPA	Association des victimes, parents et amis du 28 septembre (Guinea)
CIPEV	Commission of Inquiry into Post-Election Violence (Kenya)
CPA	Criminal Procedure Act (South Africa)
ECOWAS	Economic Community of West African States
EIPR	Egyptian Initiative for Personal Rights (Egypt)
FIDH	International Federation for Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
IHRDA	Institute for Human Rights and Development In Africa
KHRC	Kenya Human Rights Commission (Kenya)
KNCHR	Kenya National Commission on Human Rights (Kenya)
LHR	Lawyers for Human Rights (South Africa)
MDT	Mêmes Droits pour Tous (Guinea)
NPA	National Prosecuting Authority (South Africa)
OGDH	Organisation guinéenne de défense des droits de l'Homme (Guinea)
SORMA	South African Criminal Law (Sexual Offenses and Related Matters) Amendment Act
TGI	Court of first instance (<i>Tribunal de Grande Instance</i>) (Tunisia)
TJRC	Truth Justice and Reconciliation Commission (Kenya)
TRC	Truth and Reconciliation Commission (Liberia)
ULIMO	United Liberation Movement of Liberia for Democracy (Liberia)



Darfur refugees, Djabal camp, FIDH investigation mission in Eastern Chad. © Karel Prinsloo

PREFACE

By Sheila Muwanga, FIDH Vice President, Drissa Traoré, FIDH Secretary General, Hafidha Chekir and Arnold Tsunga, former FIDH Vice Presidents

On 2 September 1998, the International Criminal Tribunal for Rwanda (ICTR) delivered a landmark decision in the case of *The Prosecutor v. Jean Paul Akayesu*, applying a broad definition of rape and other forms of sexual violence and, for the first time in the history of international criminal justice, finding a defendant guilty of rape as a constitutive act of the crime of genocide and a crime against humanity.

According to the judges in ICTR Trial Chamber I, rape consists of “*a physical invasion of a sexual nature, committed on a person under circumstances which are coercive*” and sexual violence is “*not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact*”. The judges considered that when the crime of rape is committed in a context of genocide, crimes against humanity or armed conflict, the notion of the consent of the victim becomes meaningless. It was inconceivable in such coercive contexts to require an absence of consent to be demonstrated by victims of rape.

Despite its historic significance, the *Akayesu* judgement did not have an immediate impact on investigations, prosecutions and convictions of those responsible for sexual violence at the ICTR. On the contrary, decisions issued in subsequent cases applied different, more restrictive definitions of sexual violence and required a higher standard of proof to convict a person charged with rape, partly contributing to the result that of the 52 individuals prosecuted for rape or other forms of sexual violence before the ICTR, only 13 were convicted.

Today, 20 years after the decision in the *Akayesu* case, it may seem untimely to devote a report to the impact of litigation on the fight against sexual violence and its consequences in Africa, given the number of victims still waiting for truth, justice and reparation. Yet, there have been achievements and they need to be analysed and publicized in order to maximize their impact.

The decision in *Akayesu* itself eventually made an impact. Although there is still no standard, consolidated definition of sexual violence and questions continue to arise over the notion of consent, the decision made a significant contribution to the debate in other international criminal tribunals, several national courts and within the ICTR itself. It seems that it is now recognized, for example, that the definition of rape can no longer be captured in a “*mechanical description of objects and body parts*”, nor can the definition be gendered to suggest that only women can be victims.

Litigation has numerous impacts. Firstly, on victims, when the harm they suffered is recognized, reparation measures are granted and action is taken to stop them being forgotten. There have also been normative and legislative impacts, on the definition of sexual violence or the adoption of specific criminal laws; procedural impacts, on investigation techniques, prosecutions, evidentiary

requirements, forms of liability and victim participation. Finally, impacts can be seen at a social level, with changes to behavior and perceptions of sexual violence.

This report focuses on such impacts. The examples cited show that although proceedings before national, regional and international courts specifically dealing with sexual violence remain complex, often lengthy and fraught with challenges, litigation is an important vehicle for change, particularly when combined with other actions, including advocacy and awareness-raising.

Through the articles written by experts which have been selected for this publication, the *Fédération internationale pour les droits humains* (FIDH – International Federation for Human Rights) and Lawyers for Human Rights (LHR) seek to focus particular attention on examples of litigation, many of them innovative, initiated by victims and the lawyers or organizations supporting them, in conflict or crisis situations as well as relatively stable situations, the challenges encountered and the strategies and techniques used to overcome them.

FIDH and LHR hope that this publication will contribute to exchanging experiences and sharing initiatives between those who are or would like to be involved in litigation in support of victims of sexual violence in Africa.

We are grateful to all the people and organizations who contributed to this publication, sharing their experiences and recommendations on achieving impact through litigation.



Darfur refugees, Djabal camp, FIDH investigation mission in Eastern Chad. © Karel Prinsloo

INTRODUCTION

There is increasing activity aimed at combating sexual violence and its consequences in Africa, including judicial or quasi-judicial proceedings against alleged perpetrators. For the past several years, FIDH and Lawyers for Human Rights (LHR) have been involved in this fight to assert the rights of victims and obtain justice and reparation. Actions are conducted in collaboration with FIDH member organizations, before national courts (as in Guinea, Mali, Côte d'Ivoire and Tunisia), regional jurisdictions (for example, the African Commission on Human and Peoples' Rights), hybrid jurisdictions (before the Special Criminal Court in Central African Republic) and international jurisdictions (such as the International Criminal Court). LHR supports victims of sexual violence through litigation action engaged before South African courts.

This publication, a collection of nine articles, presents some of these litigation actions, undertaken in various countries in Africa, including by FIDH, LHR and FIDH other member and partner organizations. The articles, written by lawyers, human rights activists and specialists on issues related to sexual violence, show that using litigation to support survivors of sexual violence can be complex, given a combination of several factors including: a lack of political will in the States concerned; the presence of alleged perpetrators in positions of authority within the State apparatus; victims' fear of reprisals or stigmatisation; the length of proceedings and the frustration which may be experienced by the complainants; the risk of re-traumatization of victims and the need for appropriate psychological or medical support; complainants' lack of capacity, technical or financial means; an inadequate legal framework; and the persistence of a situation of conflict or serious crisis.

The articles explore all of these challenges in detail, while explaining the techniques and strategies adopted to try to overcome them and to bring about various types of impact, not only in relation to the victims themselves but more generally within societies. The text boxes, which highlight specific points raised in each article, provide further information, suggesting additional techniques and strategies.

This collection of articles is aimed primarily at lawyers and human rights organizations supporting victims of sexual violence and those who would like to support them through strategic litigation. It shares experiences and good practices and although it does not address the full range of issues linked to litigation on sexual violence, it attempts to discern some of the main trends observed on the African continent.

The collection is divided into three chapters.

Chapter I: Bringing about changes to legal norms through litigation to strengthen the fight against sexual violence

This chapter illustrates the ways in which survivors of sexual violence have fought for justice in the courts in their respective countries – South Africa, Tunisia and Senegal – in contexts of relative political stability and security but where resistance to changes to perceptions and behavior towards victims of sexual violence persists, as well as limits on the initiation of substantive discussions about major issues such as the right to abortion, including in cases of rape. The three examples highlighted show how the actions taken by the complainants have resulted in legal reforms or have the potential to do so, contributing to improved recognition of victims of sexual violence and strengthening the possibilities of taking legal action at the national level.

Chapter II: Addressing the challenge of providing legal and judicial support to victims of sexual violence perpetrated in situations of conflict or serious crisis

This chapter describes the obstacles encountered in asserting victims' rights to justice and reparation following crimes of sexual violence committed on a large scale, which may amount to international crimes. The examples include Sudan, where it is estimated that there have been thousands of victims of sexual violence since the outbreak of conflict in Darfur in 2003; Kenya, where post-electoral violence in 2007-2008 gave rise, over a period of several weeks, to the commission of rapes and other forms of sexual violence; and Guinea, where the massacre which took place on 28 September 2009 and the days that followed involved the perpetration of sexual violence against approximately one hundred victims. The articles demonstrate that in these three situations, as in many others, legal proceedings

are rendered complex by many factors, including the alleged responsibility of political leaders who remain in office, in the commission of crimes. They also show that supporting victims in such contexts, including through litigation, remains essential and contributes to a wide range of results.

Chapter III: Having recourse to other bodies when national jurisdictions fail to deliver justice to victims of sexual violence

This chapter offers an analysis of the impact of litigation initiated before bodies other than national jurisdictions. It presents some innovative initiatives such as those undertaken by the organization Civitas Maxima in support of victims of sexual violence in Liberia, before jurisdictions in other States. It also looks at litigation before African regional mechanisms, such as the African Commission on Human and Peoples' Rights (ACHPR), conducted by organizations like the Institute for Human Rights and Development in Africa (IHRDA). Finally, this chapter contains an article on proceedings initiated before the International Criminal Court (ICC), in particular in Central African Republic, Uganda, Democratic Republic of Congo, Kenya, Côte d'Ivoire and Mali and the contribution of these proceedings to the combat against sexual violence in Africa.



I. BRINGING ABOUT CHANGES TO LEGAL NORMS THROUGH LITIGATION TO STRENGTHEN THE FIGHT AGAINST SEXUAL VIOLENCE

South Africa

*In **South Africa**, following a complaint filed by 6 women and 2 men victims of sexual violence committed between 1970 and 1989, when they were between the ages of 6 and 15 years-old, the Constitutional Court declared, in 2017, Section 18 of the Criminal Procedure Act, which provides that sexual violence offenses, other than rape and “forced rape”¹ are subject to a 20-year prescription period, to be unconstitutional.*

*In their article, **Sanja Bornman** and **D. Dangaran**, from **Lawyers for Human Rights (LHR)**, FIDH’s member organization in South Africa, examine in detail the historic significance of this judgment. They demonstrate in particular the importance of having an adequate definition of rape and other forms of sexual violence and emphasize the need to take into account the various obstacles which may prevent survivors of sexual violence from filing complaints within the legal time limits.*

They also share some of the legal arguments developed by the claimants and the organizations which supported them, and which may be useful in other proceedings.

The authors consider that the judgment of the South African Constitutional Court sends a clear message that there can be no impunity for perpetrators merely due to the passage of time. This judgment resonates outside the borders of South Africa, where several countries subject offenses of sexual violence to prescription periods. A Box presenting the various prescription periods applied to sexual violence in Africa supplements the issues raised in this article.

1. Committed by a third person who is under duress.

No More Time Limit to Prosecute Sexual Offenses in South Africa

By Sanja Bornman, Managing Attorney in the Lawyers for Human Rights Gender Equality Programme, and D. Dangaran, J.D. Candidate 2020, Harvard Law School

Introduction

On 15 June 2017, the High Court in Johannesburg declared Section 18 of the South African Criminal Procedure Act (CPA) unconstitutional. Section 18 of the CPA placed an absolute bar on the right to institute a prosecution for sexual offenses, other than rape and compelled rape, after a 20-year period. In essence, it means that sexual offenses other than rape and compelled rape prescribe after 20 years – including but not limited to such offenses as sexual assault and incest. The decision followed litigation before the Johannesburg High Court by eight adult applicants, on 22 and 23 May 2017.

Nicole Levenstein, Paul Diamond, George and Katherine Rosenberg, Daniela McNally, Lisa Wagner, Shane Rothquel and Marinda Smith alleged that they were sexually assaulted by Sydney Frankel, an adult man, when they were between the ages of 6 and 15 years old. He was a friend of their families, and exploited the trust and vulnerability of the applicants. These offenses took place between 1970 and 1989, and as a result of Section 18 of the CPA, and because more than 20 years had lapsed since the offenses were committed by Frankel, the National Prosecuting Authority (NPA) was not legally permitted to pursue criminal charges against him. The offenses had, arbitrarily, prescribed. This prescription is what drove the applicants to seek relief in the High Court, and to challenge the constitutionality of Section 18 – not only in their own interest, but also in the public interest.

Since 2007, South African law defines rape as the unlawful and intentional sexual penetration of a person without their consent.² Sexual assault is defined as the unlawful and intentional sexual violation of a person, without their consent.³ These definitions are wide and gender-neutral. If committed after 2007, Frankel's actions as described by the applicants would have constituted rape and sexual assault under these definitions. However, at the time of Frankel's crimes against the applicants, in the 1970s and 1980s, the applicable common law definition of rape was narrow and gendered, and limited to the penetration of the female vagina by the male penis. Due to this, and the legal principle against retroactivity of criminal offenses, the applicants could not charge Frankel with rape in 2017, and could at most charge Frankel with indecent assault, as per the definitions applicable at the time of Frankel's actions.

Frankel died shortly before the matter was heard in court. However, the applicants still won a significant victory for both child and adult victims of sexual offenses. On 15 June 2017, Acting Judge Clare Hartford handed down the judgment, and declared that Section 18 was inconsistent

2. Section 3 of the Criminal Law (Sexual Offenses and Related Matters) Amendment Act of 32 of 2007

3. Section 5 of the Criminal Law (Sexual Offenses and Related Matters) Amendment Act of 32 of 2007

with the Constitution and invalid to the extent that it bars, in all circumstances, the right to institute a prosecution for all sexual offenses other than rape and compelled rape. The judgment is widely regarded as a momentous decision for sexual violence activists, and a legal victory for all survivors of sexual abuse.

On 14 June 2018, the Constitutional Court issued a unanimous judgment that confirmed the High Court's judgment. The Court held that the distinction in Section 18 erroneously perceives some sexual offenses as more serious than others, accepting that survivors of sexual assault face similar disincentives when reporting either rape or other sexual offenses. The Court also issued an interim reading-in that will become final if Parliament fails to enact legislation after a 24-month suspension of the invalidation.

I. The South African Context

South Africa has high levels of gender-based violence, and sexual violence. In the 2016/17 financial year, 39,828 rapes, and 6,271 sexual assaults were reported to the police.⁴ However, in the same year, the National Prosecuting Authority reports that only 2,334 sexual offense cases, including rape and other sexual offenses, were finalised.⁵ Domestic violence and hate crimes are not currently regarded as self-standing crime categories, and no statistical information is made publicly available by the South African Police Service in this regard. This means that important information about the true size and nature of the gender-based violence problem in South Africa remains missing, and it falls largely to civil society to conduct its own research and estimates in this regard.

While fairly comprehensive legislation exists in order to deal with gender-based violence, and crimes against children, including the Criminal Law (Sexual Offenses and Related Matters) Amendment Act of 2007, and the Domestic Violence Act of 2008, these are poorly implemented. This is evidenced by a wealth of government and civil society research in relation to sexual and domestic violence,⁶ and the real experiences of survivors.

As a result, the country is plagued by severe underreporting of sexual offenses, and it is highly unlikely that the reported statistics reflect the true number of incidents. Estimates of under-reporting range from just one in nine cases being reported, to only one in 25 cases, depending on the nature of the offense and the geographical location of the victim.⁷ Systemic barriers to timely reporting, and ultimately access to justice, include but are not limited to: poor detective work, low prosecution and conviction rates, insufficient support services for victims, and secondary victimisation.⁸ All these

4. Official South African Police crime statistics, available at https://www.saps.gov.za/services/final_crime_stats_presentation_24_october_2017.pdf

5. National Prosecuting Authority Annual Report 2016/17 available at <https://www.npa.gov.za/sites/default/files/annual-reports/NDPP-Annual%20Report-2016-17.pdf>

6. Artz, L. (2016). *If You Don't Stand-up and Demand, Then They Will Not Listen: Sexual Offenses Law and Community Justice*, Gender, Health and Justice Research Unit, University of Cape Town, South Africa; *Stop Violence Against Women* (2015) Department of Women, Children & People with Disabilities; Bornman, Dey, Meltz, Rangasami, Williams, *Protecting Survivors of Sexual Offenses: The Legal Obligations of the State With Regard to Sexual Offenses in South Africa* (2013), The Women's Legal Centre; Vetten, L. *Policy Brief 4: Will any police officer do? The organization of the South African Police Service's (SAPS) response to sexual offenses* (2012) Tshwaranang Legal Advocacy Centre; *"We'll Show You You're a Woman" Violence and Discrimination against Black Lesbians and Transgender Men in South Africa* (2011) Human Rights Watch; Vetten, L, Le, T, Leisegang, A and Haken, S. (2010). *The Right and the Real: A Shadow Report Analysing Selected Government Departments' Implementation of the 1998 Domestic Violence Act and 2007 Sexual Offenses Act*. Johannesburg: Tshwaranang Legal Advocacy Centre.

7. Machisa M, Jewkes R, Morna CL, and Rama K (2012) *"The war @ home: Preliminary findings of the Gauteng Gender Violence Prevalence Study"*, Gender Links and the Medical Research Council.

8. A victim of a sexual offense has already been victimised once, by the perpetrator of the offense. Secondary victimisation is what happens to the victim when they encounter unsympathetic, prejudiced, or incompetent role players in the criminal justice system. This could be a police officer who asks the victim "what she was wearing", or "why was she out so late at night", or

factors are further exacerbated by procedural barriers, such as the one posed by Section 18. This is why its removal from the law was necessary.

II. Arguments in the High Court

The applicants' challenge to criminal law prescription was initially limited to sexual offenses against children, as they were children when they were sexually abused. However, three civil society organizations (the Teddy Bear Clinic for Abused Children, the Women's Legal Centre, and Lawyers for Human Rights) joined the matter as friends of the court, and argued that any declaration of constitutional invalidity should be expanded to include adults, so that all sexual offenses would be free from prescription.⁹

In reaching its conclusions, the court examined the history of the development of the CPA, and the powers of the National Prosecuting Authority (NPA).¹⁰

1. The Arbitrary and Irrational Differentiation Between Sexual Offenses Victims

As it stood, Section 18 of the CPA caused sexual offenses other than rape and compelled rape to prescribe after the lapse of 20 years. The applicants and the friends of the court all criticised the arbitrarily-drawn distinction between penetrative and non-penetrative sexual offenses (which impacts disproportionately on women and children) based on a subjective perception of the seriousness of the abuses, and this argument was accepted by the Court in its judgment in relation to both children and adults.¹¹

The Women's Legal Centre, in its heads of argument, pointed out that *"patriarchal notions assume that penetrative sexual offenses are more serious than non-penetrative sexual offenses and that these notions no longer accord with the [South African] Constitution"*.¹² The court accepted that the trauma suffered by victims of sexual offenses is independent of the perceived seriousness of the offense.

The parties substantiated their position with expert evidence, highlighting the comparable health outcomes of penetrative and non-penetrative sexual abuse. The expert evidence submitted by the Teddy Bear Clinic consistently demonstrated that victims of any and all forms of sexual abuse were equally prone to experiencing physical and psychological trauma, and that trauma and Post-Traumatic Stress Disorder were common consequences of all sexual offenses and not limited to rape and compelled rape.¹³

In their submission, Lawyers for Human Rights pointed out that the distinction between sexual offenses, as brought about by Section 18 of the CPA, does not accord with the theory of punishment, prevention, retribution, and deterrence as principles of criminal law in South Africa. The practical effect of Section 18 is to shield certain perpetrators (of non-penetrative sexual offenses) from prosecution, due to an arbitrary lapse of time.¹⁴

tells her to "sort it out at home". It could be an impatient and unkind prosecutor, or an insensitive medical practitioner doing the forensic examination, or an abusive defense lawyer.

9. Johannesburg High Court Judgment 15 June 2017, page 4 at §8.

10. Johannesburg High Court Judgment 15 June 2017, at D and E respectively.

11. Johannesburg High Court Judgment 15 June 2017, page 31 at §63.

12. Johannesburg High Court Judgment 15 June 2017, page 24 at §54.2.

13. Johannesburg High Court Judgment 15 June 2017, page 26 at §55.

14. Johannesburg High Court Judgment 15 June 2017, page 27 at §58.

2. Challenges of Sexual Assault Disclosure

The Court found that Section 18 of the CPA also fails to recognize the complexity of reporting sexual offenses, including assault, and that reporting in the South African context rarely fits into a narrow legal timeline. For many victims of sexual offenses, the act of reporting their experiences to authorities, and taking legal action against the perpetrator, can be an emotionally, psychologically, socially, and even economically taxing and lengthy process. In particular, the reporting of childhood sexual assault is often delayed until adulthood.¹⁵ For this reason, the prescription period of 20 years, imposed by Section 18 of the CPA, does not accommodate the legal rights and/or needs of many sexual assault victims.¹⁶

The South African High Court first set a legal precedent regarding delayed reporting in 2004. In *Van Zijl v Hoogenhout*, the victim challenged the civil prescription of sexual offenses in cases where memory of the childhood events had been suppressed, and only recovered deep into adulthood. In this case, the court acknowledged the nature of trauma and its effect on memory, and determined that delayed disclosure could not be held against victims of sexual abuse. More specifically, the court brought attention to the psychological consequences of sexual abuse that prevent victims from prosecuting cases more immediately. These include victims dissociating¹⁷ from reality, as a mechanism to cope with their trauma, as well as victims transferring responsibility for the sexual violence they experienced from their perpetrators onto themselves. In recognition of these experiences, the court emphasized that the purpose of prescription is to penalize unreasonable inaction, and not to punish claimants who are unable to act.¹⁸

The court also found that Section 18 ignored other environmental factors that may prevent victims from seeking legal redress immediately after an incident. For example, the victim may be pressured or threatened by the perpetrator to remain silent, or may lack the resources and family support to pursue legal action.¹⁹ In communities where rape culture and patriarchal norms are still prominent, negative social reactions to disclosure may also discourage the victim from coming forward. In light of all of these personal and environmental variables, it was imperative to revize Section 18 to remove a statutory limitation on sexual offenses, so that the law does not wrongfully punish victims of sexual abuse from pursuing justice based on an unrealistic and arbitrary timeline for disclosure.

3. Section 18 Violates Constitutional Rights

The court emphasized the South African government's responsibility in ensuring the constitutional rights of the community, many of which are explicitly violated by Section 18 of the CPA. These include, among others:²⁰

- (1) The right to human dignity;
- (2) The right to equality and non-discrimination;
- (3) The right to be protected from abuse as children;
- (4) The right to be free from all forms of violence from both public and private sources;
- (5) The right to access to court;
- (6) The right to a fair trial.

15. TBC Heads of Argument, The Nature of Disclosure, page 11 at §23.

16. TBC Heads of Argument, The Nature of Disclosure, page 11 at §23.

17. In psychology, dissociation is any of a wide array of experiences from mild detachment from immediate surroundings, to more severe detachment from physical and emotional experiences.

18. Johannesburg High Court Judgment 15 June 2017, page 22 at §63.

19. Johannesburg High Court Judgment 15 June 2017, page 16 at §50.4 – 50.5/

20. Johannesburg High Court Judgment 15 June 2017, page 7 at §18.

At the individual level, Section 18 of the CPA violates Section 10 of the Constitution, the right to human dignity, because it stops victims of non-penetrative sexual offenses from seeking the same legal redress as victims of penetrative sexual offenses, despite the fact that non-penetrative offenses are no less damaging to a person's dignity. This in turn infringes upon the right to equality and non-discrimination in Section 9(1) of the Constitution, which provides that *"everyone is equal before the law and has the right to equal protection and benefit of the law"*. This section of the Constitution requires that there must be a rational connection between a legitimate government purpose, and a differentiation between categories of people under the law. In this case, the court found that there is no rationale for differentiation between sexual offenses on the basis of the principle of substantive trial fairness or specific fair trial rights.

Meanwhile, at the societal level, the South African government has a duty to protect all persons against sexual violence, as outlined by Section 7(2) of the Constitution. Effective protection must involve strong enforcement of all sexual offenses as criminal acts, without statutory limitations, rather than the perpetuation of arbitrary legal distinctions between sexual offenses that serve no legitimate government purpose.

The court was also satisfied that an accused person's fair trial rights could not be automatically affected by the removal of prescription from the law that governs sexual offense prosecutions. This is because prosecutors will always have the discretion to decide whether or not to prosecute a particular sexual offense case, regardless of how much time has lapsed, based on the strength of the evidence available and the content of the police docket. In some cases, strong evidence will remain or could be discovered after the lapse of substantial time, and in other cases evidence will be weak regardless of timeous reporting. Each case, and the accused's fair trial rights, must be assessed on a case-by-case basis, and cannot automatically be said to erode by lapse of time and an arbitrary distinction between offenses.²¹

Based on the arguments provided above, the High Court in Johannesburg declared Section 18 of the CPA unconstitutional in June 2017. Following the High Court Judgment, the case moved to the Constitutional Court for confirmation of the declaration of constitutional invalidity. The matter came before the Constitutional Court in November 2017, and judgment was reserved. In January 2018, the Parliament of South Africa pre-empted the matter to an extent by publishing for public comment an Amendment Bill that brings Section 18 of the CPA in line with the judgment of the High Court.

III. Arguments in the Constitutional Court

The Constitutional Court confirmed the judgment of the High Court in June 2018, creating binding precedent and changing the codified law. As a result, prosecutors are now able to pursue charges, and criminal courts across South Africa will be able to hear all sexual offense matters, regardless of the amount of time that has lapsed between the occurrence of the incident and its reporting. In reaching its conclusion, the Court answered two questions: Is Section 18 inconsistent with the Constitution? If so, what is the appropriate relief?

1. The Arbitrary and Irrational Differentiation Between Sexual Offenses Victims

The Constitutional Court began its analysis of the rationality of Section 18 by tracing its historical development.²² Under common law, all offenses prescribed after a period of 20 years. Under new

21. Johannesburg High Court Judgment 15 June 2017, page 39 at §83.

22. Constitutional Court Judgment 14 June 2018, page 18 at §42.

legislation, murder became the first and only offense that would not prescribe. In the 1977 CPA, Legislature declared that all offenses for which the sentence of death may be imposed, which at the time included rape, murder, and treason, among others, would not prescribe.²³ When the death penalty was declared unconstitutional in 1997, Section 18 was amended to include a list of serious offenses that would not prescribe, which included rape. In 2007, the Criminal Law (Sexual Offenses and Related Matters) Amendment Act (SORMA) broadened the definition of rape to include all forms of sexual penetration, and added the offenses of compelled rape and using a child or person who is mentally disabled for pornographic purposes to the list of crimes that would not prescribe.²⁴ It is apparent that this list deals selectively with survivors of sexual violence, calling for an examination of rationality.²⁵

Although Parliament has the authority to make laws, it is required to exercise that power within the law and cannot act irrationally.²⁶ The Court must objectively enquire whether a legislative provision is rationally related to a governmental objective.²⁷ The government's purposes in passing SORMA were to afford complainants of sexual offenses the least traumatising protection the law can provide; introduce measures which seek to enable the relevant organs of State to give full effect to the Act; and combat and ultimately eradicate the high incidence of sexual offenses committed in the Republic. These goals apply to all sexual offenses, so the Minister of Justice and Correctional Services conceded that a policy that distinguishes between penetrative and non-penetrative offenses cannot pass constitutional muster.²⁸ The Court stated the primary rationale for differentiating between sexual offenses in Section 18 was that certain sexual offenses are more serious than others,²⁹ which the Court found irrational because Section 18 did not recognize the similar harm experienced by survivors of all forms of sexual assault and thus worked against the interests of survivors.³⁰

2. The Challenges of Sexual Assault Disclosure

Citing the friend of the court brief by the Women's Legal Centre, the Constitutional Court found that survivors of all sexual offenses have numerous reasons why they might not want to or be able to report or disclose their sexual assault right away, and should not be penalized for the consequences of abuse by being blamed for the delay.³¹ The Court expanded reasoning from *Van Zijl v Hoogenhout* that rape had the inherent effect of rendering child survivors unable to report the crime, sometimes for several decades, to survivors of all sexual violence.³² The Court also cited its *Bothma v Else* decision to explain that '*in these days survivors of sexual assault feel more empowered to come to grips with and denounce sexual abuse they had suffered as children*' because of information about their condition and rights and support they received from public interest groups. The Court declared that '*what was said by the Supreme Court of Appeal in Van Zijl and by this Court in Bothma applies with equal force to survivors of all sexual violence though it was made in the context of rape.*'³³

23. Constitutional Court Judgment 14 June 2018, page 18 at §44.

24. Constitutional Court Judgment 14 June 2018, page 19 at §45.

25. Constitutional Court Judgment 14 June 2018, page 20 at §46–47.

26. Constitutional Court Judgment 14 June 2018, page 19 at §47.

27. Constitutional Court Judgment 14 June 2018, page 21 at §48.

28. Constitutional Court Judgment 14 June 2018, page 21 at §49.

29. Constitutional Court Judgment 14 June 2018, page 21 at §51.

30. Constitutional Court Judgment 14 June 2018, page 22 at §52.

31. Constitutional Court Judgment 14 June 2018, page 22 at §53 (stating that survivors develop resilience over time, may engage in communities that are more accepting of women who are sexually abused, may have a supportive partner later in life who believes her and encourages her to report to the police, and may receive courage to report by learning someone else reported a sexual offense committed by the same perpetrator).

32. Constitutional Court Judgment 14 June 2018, page 23 at §54.

33. *Ibid.*

The Court found it ‘of pivotal importance to the case’ that the systemic sexual exploitation of [women] and children depends on ‘secrecy, fear and shame,’ referencing *Van Zijl* to show that self-blame can disable the victim from appreciating that the perpetrator is responsible.³⁴ This is exacerbated by the fact that Frankel was in a position of authority and power over them. The Court notes that rape trauma syndrome, which about one in three survivors of sexual assault develops, adds another layer of difficulty onto the process of disclosure because a survivor will weigh the possibility of reprisals from the perpetrator together with the possible lack of support from the police and small possibility of a conviction.³⁵ Because of these psychological hindrances, the Court found that the decision not to disclose or report, for any length of time, cannot determine the question of guilt or innocence in the case against the perpetrator; that is left to the National Prosecuting Authority (NPA) and the courts.³⁶

The Court found there is therefore no rational basis for differentiation between rape or compelled rape and other forms of sexual offenses in regards to the right to prosecute after a lapse of 20 years because the psychological harm the offenses produce may be similar.³⁷

3. Adhering to International Law

Section 39(1)(b) of the Constitution enjoins a court to consider international obligations and instruments of international human rights when interpreting the Bill of Rights.³⁸ The Court found that Section 18 undermines South Africa’s compliance with its duty – under the Convention on the Elimination of Discrimination against Women, the Convention on the Rights of the Child, and the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa – to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms, and to take reasonable and appropriate measures to prevent the violation of these rights.³⁹

4. Retrospectivity, the Right to Fair Trial, and Remedy

Before discussing the remedy, the Court first addressed the fundamental right not to be subjected to retrospective provisions: the accused may not be found guilty of a crime unless the conduct was recognized by the law as a crime at the time it was committed.⁴⁰ Again referencing *Bothma*, the Court agreed with the High Court’s conclusion that Frankel could have been prosecuted for indecent assault at the time it was committed, so invalidating Section 18 does not give rise to a new offense and the defendant’s right to fair trial was not infringed upon because the defendant could have been charged for this in the past.⁴¹ The NPA would retain discretion on whether to prosecute based on various factors, including the length of the delay and the availability of evidence.

In issuing its remedy, the Court suspended the invalidity for 24 months but implemented an interim reading-in that includes all sexual offenses in the exception to the twenty-year prescription, which will become final if Parliament fails to enact legislation after the suspension.⁴² The Court held that the invalidity of Section 18 applies retrospectively to claims since 27 April 1994, when the ‘interim Constitution

34. Constitutional Court Judgment 14 June 2018, page 24 at §56.

35. Constitutional Court Judgment 14 June 2018, page 24 at §57.

36. Constitutional Court Judgment 14 June 2018, page 25 at §58.

37. Constitutional Court Judgment 14 June 2018, page 25 at §59.

38. Constitutional Court Judgment 14 June 2018, page 26 at §61.

39. Constitutional Court Judgment 14 June 2018, page 25 at §60.

40. Constitutional Court Judgment 14 June 2018, page 26–27 at §62–63.

41. Constitutional Court Judgment 14 June 2018, page 27 at §65.

42. Constitutional Court Judgment 14 June 2018, page 32 at §76.

came into operation'.⁴³ The High Court did not confine relief sought to children, after encouragement from friends of the court.⁴⁴ The Constitutional Court did not address the issue specifically, but similarly provided broad relief for child victims and adult victims of sexual assault alike by confirming the High Court's order as just and equitable.⁴⁵

Conclusion

The Constitutional Court's confirmation of the High Court judgment is a landmark case. The decision removes a major procedural barrier for child and adult victims of sexual offenses to access justice, and may create scope for even further development of the civil law of prescription in relation to damages for sexual offenses, after the ground-breaking judgment in *Van Zijl*; now that criminal law prescription in relation to all sexual offenses is unconstitutional, it opens the door to similar arguments against the three-year civil law prescription in relation to civil damages for sexual offenses, even when victims have not suppressed memories of the events, as in *Van Zijl*. The declaration of constitutional invalidity developed the law to recognize that there might be myriad justifiable reasons for a child or adult victim of a sexual offense to delay reporting, ranging from psychological and emotional reasons, to systemic reasons – none of which should become permanent barriers due to an arbitrary prescription period that ultimately only serves perpetrators.

The normative value of the judgment for society should also not be underestimated. The judgment sends the clear message that: there is no impunity for perpetrators, merely due the passage of time; there is no hierarchy of sexual offenses; and non-penetrative offenses can be just as damaging and devastating as penetrative offenses. This begins to challenge myths around what constitutes "serious" rape and sexual assault, and recognizes that a victim's delay in reporting any sexual offense does not automatically justify an adverse inference about the seriousness, veracity, or strength of their sexual offense case – by a police officer, a prosecutor, a presiding officer,⁴⁶ or indeed by society as a whole.

Furthermore, this judgment not only has great significance for South African law, but also for other African jurisdictions that may find it comparatively persuasive in legal submissions and arguments before courts, in relation to the rights of victims of sexual violence. In November 2017, the African Commission on Human and People's Rights (ACHPR) adopted *Guidelines on combating sexual violence and its consequences* across the African continent. In its recommendations, the ACHPR advocates that States must take appropriate measures to ensure that prescription does not apply to the most serious sexual offenses, in order to guarantee that victims will have access to justice for these offenses throughout their lives. South Africa's Constitutional Court confirmation of the constitutional invalidity of Section 18 as it applies to sexual offenses effectively ensures compliance with the guidelines and can become a leading example to other African States by proving South Africa's proactive commitment to addressing high rates of sexual violence, and procedural barriers in particular.

43. Constitutional Court Judgment 14 June 2018, page 32 at §77.

44. Constitutional Court Judgment 14 June 2018, page 7 at §11.

45. Constitutional Court Judgment 14 June 2018, page 33 at §78.

46. A presiding officer is the person adjudicating the trial. In South Africa, that is either a Magistrate (lower courts) or a Judge (higher courts).

Overview of Prescription Periods for Crimes of Sexual Violence in Africa

The *Guidelines on Combating Sexual Violence and its Consequences in Africa*⁴⁷ recommend that States take the necessary measures to ensure that prescription does not apply to the most serious sexual offenses, but also that prescription is prohibited for penalties provided for such offenses.

Statutes of limitation may indeed constitute obstacles for victims of sexual violence attempting to file a complaint. The specific nature of the trauma endured by the victims implies that the crime may only be reported many years later. Statutes of limitations may limit access to justice and reparation, and violate the rights to human dignity, non-discrimination, freedom and security of the victim, thus penalizing the victims instead of the perpetrators.

Statutes of limitation depend on the legal system of each country. There are three major systems in Sub-Saharan Africa: common law (with no prescription in Kenya, Ghana and Uganda, for example); civil law (an average of ten years for crimes, such as in Mali and Côte d'Ivoire); a combination of civil and common law (an average prescription period of twenty years for crimes, as in Zimbabwe and Botswana).

Where statutes of limitation exist, they vary depending on whether rape or other forms of sexual violence are considered to be crimes or misdemeanours, whether the age of the victim is taken into account or not, and the definition of rape and other forms of sexual violence. However, the trauma suffered by victims of sexual offenses is independent of the perceived seriousness of the crime. Statute of limitation laws of certain countries can be particularly damaging for victims: Tanzania, for example, has a prescription period of sixty days for sexual harassment.⁴⁸ In some Nigerian States, victims have two months to report some sexual offenses.⁴⁹

On the other hand, a few countries, including South Africa,⁵⁰ Ghana⁵¹ and Namibia,⁵² taking into consideration the gravity of sexual violence, the stigmatisation surrounding these crimes and the complexity of reporting such crimes, have abolished all time limitations on sexual offenses; thus eliminating arbitrary and irrational differentiation between sexual offenses victims.

47. African Commission on Human and Peoples' Rights, *Guidelines on Combating Sexual Violence and its Consequences in Africa*, 60th Ordinary Session, Niger, 2017.

48. See section 138-D (5) of *Tanzania: Sexual Offenses Special Provisions Act*, 1998.

49. See sections 218 & 221 of *Nigeria: Criminal Code Act*, 1990.

50. Indeed, South African courts are statutorily required to not draw inferences only from evidence of delay in reporting a sexual offense. See section 59 of *South Africa: Criminal Law (Sexual Offenses and Related Matters) Amendment Act*, 2007. See also the article preceding this Box which give details on the recent legal developments observed in South Africa in relation with prescription.

51. Subsections 97-111(5) of Chapter 6 of the *Republic of Ghana's Criminal Code Act*, 1960 (Act 29).

52. See section 7 of *Namibia: Combating of Rape Act*, No. 8 of 2000.



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Tunisia

In **Tunisia**, on 20 November 2014, the Tunis Court of Appeal sentenced two police officers to 15 years' imprisonment for the rape of Meriem Ben Mohamed, committed two years earlier while they were on duty. In its article, **Hafidha Chekir, former FIDH Vice President and Member of the Executive Bureau of the Association tunisienne des femmes démocrates (ATFD)**, FIDH's member organization in Tunisia, looks in detail at the context that prevailed at the time of this verdict, which was unprecedented in recent Tunisian history. FIDH and ATFD supported and legally represented Meriem Ben Mohammed before the Tunisian courts. Hafidha Chekir also describes the courage that Meriem Ben Mohammed needed to file a complaint and challenge the widespread impunity enjoyed by the police, while facing multiple insults and threats. The decision inspired the Tunisian legislature to adopt a comprehensive law on violence against women in 2017, for which women's rights organizations had been pushing for 30 years. The article is followed by Meriem Ben Mohammed's own account, which describes her perception of the impact of the proceedings and verdict.

Police-Related Sexual Violence: Breaking Down the Wall of Silence. The Meriem Ben Mohamed Case

By Hafidha Chekir, former FIDH Vice President,
Member of the Executive Bureau of the Tunisian Association of Democratic Women
(*Association tunisienne des femmes démocrates - ATFD*)⁵³

Rape is an indescribable tragedy. It is an atrocity that grieves the human conscience and can hardly be overcome by the victim without the solidarity, support and guidance of his or her relatives and psychological and legal support, often provided by civil society.

1. The Night of 3 to 4 September 2012

In this case, Meriem Ben Mohamed,⁵⁴ a 27 year-old woman, was raped by two police officers on the night of 3-4 September 2012. This student who just finished her studies in finance was romantically involved with a young man named Ahmed.⁵⁵ One night, while they were together in a car in the north suburb of Tunis, a police vehicle pulled up alongside them. Three police officers got out. One of them took the young man away to extort money from him. The other two raped the young woman in turn by forcing her to perform acts of fellatio and penetration.

Meriem had to then make multiple round trips between police stations and hospitals to have the physical evidence of the rape, try to obtain a medical certificate (which she was finally refused) and file a complaint under the look of guilt of some police officers. Several of them refused to allow the couple to file a complaint. The two victims will therefore have to persevere to take legal action against their perpetrators.⁵⁶

2. 'Guilty of Having Been Raped'⁵⁷

Although they managed to file a complaint, Meriem and Ahmed were charged with 'breaching public morality', after the police alleged that they had surprised them during sexual intercourse on the night of 3 September. This accusation was relayed by the Ministry of the Interior, led at the time by Ali Larayedh, a member of the Islamist party Ennahdha then in power, whose spokesman stated in the media that the two young people were found in an 'immoral position'. The prosecutor charged Meriem

53. With the collaboration of Meriem Ben Mohamed, feminist activist, Yosra Frawes, ATFD president and FIDH delegate in Tunisia and Daisy Schmitt, FIDH women's rights office.

54. First name chosen by the victim.

55. First name chosen by the victim.

56. The events that took place during the night of 3-4 September 2012 and in particular the couple's difficult process for filing a complaint were the subject of a film: Kaouthar Ben Hania's *La belle et la meute*, (Beauty and the Dogs) released on 18 October 2017.

57. This title refers to that of the book written by Meriem in which she recounts her story: Meriem Ben Mohamed, in collaboration with Ava Djamshidi, *Coupable d'avoir été violée* (Guilty of having been raped). *Femmes en Tunisie : liberté en péril* (Women in Tunisia: Freedom in Peril), Michel Lafon, 2013.

and Ahmed with 'public indecency' pursuant to Article 226 of the Penal Code.⁵⁸ The couple's lawyers, Radhia Nasraoui and Emna Zahrouni, decided to publicize the case and denounced the accusation as a means of intimidation against Meriem and her partner to get them to withdraw their complaint.⁵⁹ If the authorities condemned the rape, they did not take exception to this senseless accusation on the pretext of respecting the independence of the judiciary, and considered that the proceedings initiated did not constitute pressure against the complainant, while declaring that the status of victim does not confer any immunity.⁶⁰

The young woman was also pressured by the families of the police officers. She received phone calls and was insulted when she entered the courtroom, and insult letters were sent to her family. The families of the perpetrators tried to argue that they were young and poor, if they had been rich they would not have been put in prison, one of them may have had to cancel his marriage. The lawyer for the police officers, also an active member of Ennahdha, used despicable arguments. He claimed that it was not a rape, that there was exaggeration, that Meriem was having sex with her partner and that she made advances to the police.

In parallel, ATFD, the Tunisian League for Human Rights (LTDH, *Ligue tunisienne des droits de l'Homme*), the Organization against Torture in Tunisia (OCTT, *Organisation contre la torture en Tunisie*) and the World Organization Against Torture (OMCT, *Organisation mondiale contre la torture*) set up a support committee, campaigned in the media and appointed lawyers to represent Meriem before the courts. Other associations, such as the Femen, joined the rally, brandished signs and chanted slogans of support in front of the court.

Thanks to the rally and communication strategy of civil society, Meriem's tenacity and the work of the lawyers, the complaint filed against the couple finally ended in November 2012 with a dismissal.

The complaint filed by Meriem broke two taboos of Tunisian society: that of rape and impunity, particularly of representatives of the security forces. The police officers were thus charged and were tried before the Tunis Court of First Instance (TGI).

3. The Verdict of the Court of First Instance: A Partial Victory

On 31 March 2014, the two police officers were sentenced in first instance to seven years in prison. This decision acknowledged the heinous crime of which Meriem was the victim: *'rape by law enforcement officials in the performance of their duties, using the threat of prosecution for immorality and carrying their weapons'*.⁶¹ The decision also acknowledged that her fiancé, Ahmed, was extorted by an armed and uniformed police officer and sentenced him to two years in prison and a fine of 20,000 dinars.

Thus and as Gilbert Naccache, writer and activist, states, *'after an exhausting journey, full of deliberately deployed obstacles, strewn with insults and accusations that were all the more unbearable as they came*

58. 'Anyone who knowingly commits public indecency shall be punished by six months' imprisonment and a fine of 48 dinars', Article 226 of the Penal Code, http://www.e-justice.tn/fileadmin/fichiers_site_francais/codes_juridiques/Code_penal_12_07_2010_fr.pdf.

59. <https://www.youtube.com/watch?v=pviDDv-lysM>. *Libération*, "Le procès d'une femme violée par des policiers secoue la Tunisie" (The trial of a woman raped by police officers shakes Tunisia), 1 October 2012, https://www.liberation.fr/planete/2012/10/01/le-proces-d-une-femme-violee-par-des-policiers-secoue-la-tunisie_850246.

60. *Business News*, 29 September 2012, <http://www.businessnews.com.tn/tunisie--ministere-de-la-justice--des-declarations-sur-laffaire-de-la-fille-violee-nuisent-au-prestige-de-la-justice-et-a-la-reputation-du-pays,520,33693,1>.

61. Gilbert Naccache, "Affaire du viol de Meriem : les chiens continuent à aboyer" (Meriem's rape case: dogs continue to bark), (article published on its Facebook page on 1 April, 2014), *Mediapart*, 3 April 2014, <https://blogs.mediapart.fr/salah-horchani/blog/030414/tunisie-affaire-du-viol-de-meriem-meriem-et-ahmed-merci>.

*from several sides, Meriem and her fiancé managed to have their torturers charged first, and then, after a year, to have them convicted’.*⁶²

However, this judgment was strongly criticized by lawyers and supporters of the victims. On the one hand, because of the sentence considered too light, not proportionate to the charges brought against the accused.⁶³ Human rights defenders obviously did not advocate for applying the penalty incurred at the time, which was the death penalty⁶⁴ pursuant to Article 227 of the Penal Code,⁶⁵ but expected a heavier sentence, which better reflected the seriousness of the crime committed.

On the other hand, Meriem’s supporters strongly criticized certain reasons of the judgment which reiterated the arguments put forward by the defense to mitigate the seriousness of the facts aimed at damaging the victim’s reputation by allegations concerning her alleged lack of virginity at the time of the events, largely deduced from the extramarital love relationship she had with Ahmed.

The difficulty lay in particular in the definition of rape given by the former Article 227 of the Penal Code. This article provided for the death penalty for *‘the crime of rape committed with violence, use or threat of use of a weapon’* and life imprisonment for the crime of rape committed outside these circumstances. It did not define the facts constituting the crime of rape. The vague and limited nature of this definition has led to a restrictive interpretation of the crime of rape by Tunisian courts, which only considered rape when it was committed against women with violence, thus suggesting that in the absence of violence, the victim could have consented to the act of penetration. When the victim was an adult and her virginity was in doubt, the qualification of rape was often ruled out. This case law was used by the defense, which claimed that the events had taken place without violence. Despite Meriem’s testimony, which described in particular the fact that her perpetrators had caused her injuries, particularly to her hands and lips (bruises were noted by the forensic doctor) and threatened her, the violence could not be proven. The police denied that they were armed at the time of the incident.

It was probably the lack of evidence of the acts of violence that led the judges to order such a lenient sentence. Meriem also denounced the bias of the judge who did not even bother to hear her and whose behavior, she said, suggested a lenient sentence for her perpetrators. Such a verdict was explained by the implicit responsibility that society makes female victims assume. For the vast majority of Tunisian men, and in the dominant patriarchal logic, marked by religiosity, a woman who is alone with a man at night is doubly guilty. She is guilty of not being at home and of being in a public space, a male space *par excellence*. She is also guilty of being with a man with whom she is not bound by any legal relationship, only relations between persons united by marriage being considered legitimate by the Personal Status Code,⁶⁶ even if they are carried out in violence (marital rape is not criminalized by law).⁶⁷ *‘Socially, rape remains a taboo problem, women who have been raped are portrayed as women who have lost their honor and that of their families. At the social and cultural level, the rape victim is found guilty, stigmatized and rejected by those around her. It is up to her to safeguard her honor: if she is raped or harassed, it is because she did not know or behaved in such a way that she lost it’.*⁶⁸

62. *Ibid.*

63. *Le Parisien*, “Tunisie : sept ans de prison pour deux policiers accusés de viol” (Tunisia: seven years in prison for two police officers accused of rape), 31 March 2014.

64. The prosecutor had initially requested the death penalty against the two rapists.

65. This article has since been reformed through Organic Law No. 2107 58 of 11 August 2017, on the elimination of violence against women (hereinafter referred to as ‘The Elimination of Violence against Women Act’), <http://www.legislation.tn/sites/default/files/news/tf2017581.pdf>. The content of this reform is discussed in the second part.

66. The Personal Status Code was adopted on 13 August 1956, just after independence, to organize the family.

67. Marital rape was not included as an aggravating circumstance in the 2017 Elimination of Violence against Women Act.

68. ATFD, *Retour sur l’histoire pour un avenir sans violences à l’encontre des femmes*. (A look back at history for a future free of violence against women). Tunis, 2017, p. 44, <https://tunisia.unfpa.org/sites/default/files/pub-pdf/Etude%20archives%20ATFD.pdf>.

Despite the fact that women's rights defenders constantly call for the recognition and protection of women's human rights, including their sexual rights, their right to control their bodies and their right to sexual freedom, these rights are often ignored or even violated in the name of tradition. In Tunisia, sexuality and the violence surrounding it, the importance given to the concepts of 'honor' and virginity of women, and the absence of freedom and omnipresence of a patriarchal system are all factors that seriously undermine women's fundamental rights.

The conservative stench of the Court of First Instance judgment was damaging to Meriem, who after having to undergo a medical examination, saw her private life and intimacy spread out in the public square. To a certain extent, the Court of First Instance judges took over from the lawyers, magistrates and other detractors who accused her of her freedom. On several occasions in her statements, Meriem had to justify herself, stating that she was not having sex in her car when she was assaulted by the police. On several occasions, she had also reaffirmed her willingness to lead a free life and that shame was indeed in the camp of her assailants.

Despite the complaints made to Meriem, it remains that despite the fact that the victim was an adult, that she had a partner and that there was no evidence of acts of violence, the perpetrators were nevertheless convicted, even though they were members of the police force. Although disappointing in several respects, this judgment still demonstrates the judges' refusal to align themselves with traditional jurisprudence by promoting a more progressive interpretation of the law, and constitutes a considerable step forward in the fight against impunity for sexual violence in Tunisia.

The rape legislation has since been amended to extend the list of circumstances that may surround a rape beyond violence, and to clarify that these are not constituent elements of the definition of rape itself but aggravating circumstances that allow judges to increase the sentence when they occur (see *infra*).

4. A Heavier Sentence on Appeal

In view of the shortcomings of the Court of First Instance judgment, the prosecutor therefore appealed to obtain a heavier sentence, indicating that '*the facts should be qualified as coercive sex with the threat of violence*'. Meriem's assailants also appealed the verdict. During the appeal trial, Meriem was able to testify and convince the judges that she had indeed suffered violence at the time of the rape.

On 20 November 2014, the Tunis Court of Appeal sentenced the two police officers guilty of raping Meriem to fifteen years in prison. The sentence was doubled thanks to Meriem's testimony, which proved the violence that accompanied the rape. The third police officer who had extorted money from his partner had his sentence confirmed.

FIDH and its member organizations in Tunisia welcomed the verdict of the Tunis Court of Appeal, which described it as 'a victory for Meriem but also for all women in Tunisia and especially for the victims of sexual violence'.⁶⁹

69. FIDH, Tunisian Association of Democratic Women, Tunisian League for the Defense of Human Rights, Tunisian Organization against Torture, "Viol de Meriem : justice rendue" (Rape of Meriem: justice rendered), 27 November 2014, <https://www.fidh.org/fr/regions/maghreb-moyen-orient/tunisie/viol-de-meriem-justice-rendue>.

5. The Decisive Support of Civil Society

This victory is first and foremost the result of Meriem's courage, supported by her companion and her family throughout this ordeal. Support, guidance and solidarity of Tunisian and international civil society, particularly ATFD and FIDH, have also been crucial in helping Meriem to overcome the violence she has suffered and to bring the perpetrators to justice.

Thanks to these organizations, Meriem was able to benefit from medical and psycho-social support, but also from legal assistance. During her trial, she was represented by lawyers appointed by ATFD and FIDH. Many activists have shown unconditional support for her both in Tunisia and abroad. It should also be noted that a female member of the police also supported her in her action and encouraged her not to give in to pressure from other officers.

Following the stigmatization of Meriem in Tunisia, FIDH also facilitated her exile and that of her partner to France and supported her in her administrative procedures to allow her to continue to reside legally and study in that country with peace of mind.

This mobilization provided Meriem with the support she needed to get through this ordeal, but it also greatly assisted with convincing the judges to drop the charges against her, convict the aggressors and impose harsher sentences on police officers on appeal.

6. Women's Freedom of Speech and Reform of the Penal Code

This case has dealt a blow to the impunity that prevails in cases of sexual violence in Tunisia. The reasons for this impunity are multiple and include the taboo surrounding this violence, the stigmatization and guilt of the victims, the pressure exerted by the victims' family and friends not to file complaints and avoid putting "shame" on families, the lack of training and corruption of police services, as well as discriminatory provisions in the legislation – some of which have recently been repealed.

It is in particular thanks to cases such as this one, which deal with violence against women and particularly sexual violence, that other women dare to break down the wall of silence surrounding the violence they experience. For example, the case has led to denunciations of police violence used to restrict women's freedom in the public space. Several women harassed, filmed or even beaten by police officers to punish them for their presence on the public highway in circumstances deemed not to comply with Tunisian social norms have denounced the behavior of police officers by asserting their right to privacy.

This case is also one of the cases that led the legislator to adopt a law to combat violence against women in 2017.⁷⁰ For 30 years, Tunisian women's rights organizations have been advocating to prevent violence, punish the perpetrators, protect and support the victims. The legislator has decided to approach violence against women in a comprehensive way that integrates all forms of violence regardless of where it occurs and regardless of the victim's relationship with the perpetrator.

According to the 2017 legislation, sexual violence includes any act or word by which *'the perpetrator aims to subject the woman to his own sexual desires or the sexual desires of others, by means of coercion, deceit, pressure or other means, such as to weaken or harm the will, regardless of the perpetrator's relationship with*

70. FIDH, "La Tunisie vote une loi historique pour mettre un terme à toutes les formes de violence à l'encontre des femmes" (Tunisia passes landmark legislation to end all forms of violence against women), 28 July 2017, <https://www.fidh.org/fr/nos-impacts/la-tunisie-vote-une-loi-historique-pour-mettre-un-terme-a-toutes-les>.

*the victim.*⁷¹ The definition of rape includes *'any act of sexual penetration, of any kind, and regardless of the means used, committed against a person of the female or male sex without her/his consent.'*⁷² This new definition thus clarifies the constituent elements of rape, which exclusively include sexual penetration and lack of consent. The law automatically establishes the absence of consent for any minor under 16 years of age. The penalty is twenty years in prison, or life imprisonment when an aggravating circumstance occurs. The list of such circumstances includes violence and the use or threat of use of weapons, but also includes the use of products, medicines or narcotics, rape of minors under 16 years of age, incest or gang rape. It should however be noted that if the new Tunisian law explicitly provides that rape can be perpetrated against any person independently of her/his sex, it doesn't mention that the same applies for other forms of sexual violence. It is precisely on the provision relating to rape that the *Meriem Ben Mohamed* case had a particular impact. Because the decisions handed down by the Court of First Instance and the Tunis Court of Appeal have raised public awareness of the elements that constitute rape: it is now clear that the legal characterization of rape does not require an act of violence, and is independent of the question of the victim's virginity, which is indifferent and must therefore not be asked.⁷³ This case broke the link between rape and these two elements and this is clearly reflected in the new Article 227 of the Penal Code. Only the act of penetration and the lack of consent matter. In this regard, Tunisian justice and legislation are precursory and many legislators around the world would be well advised to draw inspiration from the definition of rape provided for in the Organic Law on the Elimination of Violence against Women adopted by the Tunisian Parliament in August 2017.

Thus, Meriem's perseverance and determination, with the support of civil society, enabled her to change her status vis-à-vis the criminal judge from that of accused of indecent assault to that of rape victim. The success of this judicial procedure, in addition to leading to the conviction of the perpetrators, has led to a form of rehabilitation. This victory is all the more important as law enforcement officials enjoy extremely strong impunity and protection in Tunisia, as in the vast majority of countries in the world, and particularly in cases of violence against women and sexual violence. This case sends a clear message that in Tunisia, law enforcement officials cannot be above the law, and that men in general cannot dispose of women's bodies with impunity.

71. Article 3 of the Elimination of Violence against Women Act.

72. Article 15 of the Elimination of Violence against Women Act, modifying Article 227 of the Penal Code.

73. In Tunisia, when a woman claims to have been raped, she often has to undergo a virginity test.

Testimony of Meriem Ben Mohammed

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This case turned my entire life upside down. I fight every day to overcome what happened and continue a normal life, but it will never be like before. I have lost many things, but I have also gained some. I have learned to live with it; I try to see the positive side of things but it's not easy. The trial was hell for me, but it allowed me to speak and that was a form of therapy. The horrible things I experienced during the trial destroyed many things in me and in my life but also made me stronger and I never regretted filing my complaint, even in the darkest moments. I will never regret it because it contributed to fighting impunity. I would have liked justice to be done, without the case taking on such magnitude; I think of those who aren't fortunate enough to receive the support that I did. I will never be able to thank the people and associations that supported me, and continue to support me, enough, especially ATFD, FIDH and OMCT. I consider myself lucky to have them by my side.

The case had a huge impact in Tunisian society. It shook the country. Public opinion divided into two camps: those who supported my fight, who were in the minority, and those who considered that I was guilty. That affected me a lot, my defenders saved me. Most Tunisian people, including women, who had experienced the dictatorship, said that it was my fault – a young Tunisian woman going out at night in a short skirt – and thought the police were right. Others said that I was lying. Some friends don't talk to us anymore. There are neighbours who humiliated my father. It was awful. The case shocked Tunisians, it was the first time that a woman had filed a complaint, in particular against police officers. I expected to get justice, especially after the revolution, but without the case taking on such significance.

I still see the fact that I was accused of offending public decency as a great injustice. I will always remember the tears shed by my lawyers, which shows they felt the huge injustice I suffered. A victim should never be the subject of this type of accusations. To this day, I have not accepted it. I also see it as State permission to rape women, to protect rapists and put those who seek justice in prison; a spokesperson from the Ministry of Interior, who therefore represents the State, went on television to say that it was dark, that I was wearing a short skirt and that I was in an indecent situation. It is as if he authorized the rape and sided with the police officers.

Part of Tunisian society has not accepted it either and it was the support given to me by civil society which resulted in the charges against me being dropped. But there are also a majority who were against me, which shows that Tunisian society is still not ready and has not integrated human rights and especially women's rights. They consider that the woman is always guilty, without even trying to find out the truth.

This conviction is unique; in Tunisia the security forces are never troubled, and rape is a taboo subject. As for the sentence, nothing would have been enough for me, but given the prevailing impunity in Tunisia, today I can say that I am happy that they were convicted, even though it was difficult and was also thanks to support from NGOs.

This case led to a change within Tunisian society, given the number of women who now dare to speak out and report their attackers. After the case, several women broke their silence and dared to speak. This led to awareness of the fact that sexual violence is never the fault of the victim, that victims are not asking for what happens to them. Lots of women realized that they are not alone. I think the treatment of victims is still problematic and needs to evolve but that will come with time, as long as women carry on the fight. The struggle must continue and there is still a long way to go. We have to refuse to give up and carry on fighting, whatever the consequences.

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This testimony was collected by FIDH, 2019.



Saint-Louis, Senegal. © Herv Gyssels / Photononstop

Senegal

*In **Senegal**, in February 2014, in the town of Ziguinchor, Casamance, in the far south-west of Senegal, an 11 year-old girl gave birth to twins. Her pregnancy was the result of rape when she was aged 10. Senegalese law prevented her from getting an abortion and she carried the pregnancy to term. In Senegal, abortion is prohibited by law. There is only one exception, in the event of danger to the life of the woman, which has strict procedural limits. In the same year, FIDH published an investigation report on the challenges posed by Senegalese law on abortion and looked into the specific case of this girl. Since then, with support from her family and Senegalese women's rights organizations, including the Senegalese Female Lawyers Association (Association des juristes sénégalaises, AJS), she has been fighting for her rights to be recognized before the national courts. In this article, **Amy Sakho, an activist lawyer and member of the AJS and coordinator of the Task Force for medical abortion in Senegal** and **Justine Duby, FIDH programme officer**, look at the challenges raised by these legal actions. The article is followed by a Box on the provisions on the right to abortion contained within the Guidelines adopted by the African Commission on Human and Peoples' Rights.*

Legalizing Abortion in Cases of Rape: Challenges Facing Legal Action in Senegal

By Amy Sakho, activist lawyer and member of the Senegalese Female Lawyers Association (*Association des juristes sénégalaises*, AJS), and Coordinator of the Task Force for medical abortion in Senegal, and Justine Duby, FIDH Programme Officer

Introduction

In February 2014, GJ,⁷⁴ an 11 year-old girl, gave birth to twins in the town of Ziguinchor, in the far south-western region of Casamance in Senegal. Her pregnancy was the result of a rape she suffered when she was only 10 years old. As Senegalese law did not allow her to have an abortion, she was forced to carry her pregnancy to term, despite the risk it posed on her life. In Senegal, abortion is prohibited by law and constitutes a crime. Every year, dozens of women are prosecuted, sentenced and imprisoned for having recourse to clandestine abortions. Only one exception is allowed, when abortion is the only way to save a woman's life, and, even then, the intervention is surrounded by drastic procedural restrictions as to be rendered virtually impossible. As far as we know, no abortion has ever been legally authorized for a rape victim in Senegal.⁷⁵

Yet rape is a very widespread form of violence against women and girls in the country. Although few statistics are available, a study conducted by UN Women in 2012 revealed that 50% of the cases of violence against women reported to the police were rapes.⁷⁶ In the courts and in hospitals, rape makes up one-third of recorded cases of violence against women.⁷⁷

In Senegal, tens of thousands of illegal abortions are carried out every year, two-thirds (63%)⁷⁸ of them by unqualified persons, and are considered to constitute a very high risk to the life and health of women and girls. When rape victims are unable to obtain an illegal abortion, they are forced to carry to term an often unwanted pregnancy that can have devastating consequences on their physical and psychological health, as well as their life. These risks are increased tenfold in the case of early pregnancy.

Figures for infanticide are also particularly high in Senegal, which is partly explained by the ban on legal and safe abortion. According to a report from the United Nations and AJS (2015), infanticide is the second-most frequent cause of female incarceration: 16% of women in jail in Senegal are there for this reason.⁷⁹

74. The victim's initials are used in order to preserve her anonymity.

75. In Africa, 38 countries still have legislation prohibiting recourse to abortion in the case of rape, according to Guttmacher Institute, *Status of the world's 193 countries and six territories/nonstates, by six abortion-legality categories and three additional legal grounds under which abortion is allowed*, 2017, https://www.guttmacher.org/sites/default/files/report_downloads/aww_appendix_table_1.pdf.

76. ONU Femmes, *La situation des violences faites aux femmes : le mode de réponse et soutien aux survivantes dans les régions de Dakar, Diourbel, Fatick, Kaolack, Louga, Saint-Louis et Thiès*, April 2012.

77. Report by FIDH, RADDHO, LSDH, AJS, *"Je ne veux pas de cet enfant, moi je veux aller à l'école", La prohibition de l'interruption volontaire de grossesse au Sénégal* ('I do not want this child, I want to go to school' The prohibition of voluntary termination of pregnancy in Senegal), December 2014, <https://www.fidh.org/fr/regions/afrique/senegal/16561-rapport-senegal-je-ne-veux-pas-de-cet-enfant-moi-je-veux-aller-a-l-ecole>.

78. It is reckoned that 51,500 abortions were provoked in Senegal in 2012, the vast majority of them carried out clandestinely. See Guttmacher Institute, *L'avortement au Sénégal* (Abortion in Senegal), Fact Sheet, April 2015, <https://www.guttmacher.org/fr/fact-sheet/lavortement-au-senegal>.

79. OHCHR, AJS, *Rapport sur la situation des droits des femmes dans les lieux de détention au Sénégal* (Report on the Situation

Unable to have a safe and legal abortion, GJ was forced to carry her pregnancy to term, which involved a considerable risk to her health and serious consequences on her life. In 2014, GJ's family initiated proceedings against the Senegalese State with the aim of holding it responsible for all violations of GJ's rights and their consequences, and of achieving the legalization of medical abortion. Despite the failure of those proceedings, this was the first case lodged against the Senegalese State with the aim of instigating reform of the legal framework surrounding abortion and ensuring that the sexual and reproductive rights of Senegalese women and girls are respected, in line with the State's regional and international obligations. This case highlights the challenges of legal support for victims of sexual violence before the Senegalese courts and obstacles to legal reforms (I), despite the parallel efforts of civil society in the fields of advocacy, training and sensitization (II).

I. Promoting the Right to Legal and Safe Abortion in Case of Rape: Challenges and Obstacles of Legal Support for a Victim of Sexual Violence Before the Senegalese Courts

1. Prohibition of Abortion in Case of Rape

Senegal's abortion law is one of the most restrictive in the world. Article 305 of the Penal Code totally bans abortion: *"Anyone who has procured or attempted to procure abortion to a pregnant woman, with or without her consent, whether by food, beverage, drugs, manipulation, violence or any other means, will be sentenced to a term of imprisonment of from one to five years and a fine of from 20,000 to 100,000 francs CFA [from 35 to 170 USD]"*. The same article also punishes medical personnel who carry out these interventions with prison sentences, fines and prohibition to exercise their profession, without possibility of conditional sentence.

The Code of Medical Ethics does allow for an exception to this formal ban, specifying that *"a therapeutic abortion may be carried out only if such an intervention is the only way of safeguarding the life of the mother"*. Three doctors must nevertheless certify that the life of the pregnant woman can be saved only through such intervention, with one of the three being chosen from among experts to the court. In addition, the Code provides for a conscientious objection clause for physicians. Generally, doctors are reluctant to perform abortions.⁸⁰

2. Rape, Pregnancy and Unwanted Motherhood: Serious Consequences Leading to Multiple Violations of Women's Rights

In July 2013, GJ, then 10 years old, was raped twice over a period of a few days by a neighbour, who was at least thirty years her senior, while her mother was selling vegetables at the local market. Owing to the threats by the attacker to kill her mother, GJ did not tell her about the rape and was unable to receive emergency contraception. After several weeks, noticing that her daughter was vomiting regularly, GJ's mother took her to the hospital. Medical examinations revealed that GJ was pregnant with twins.

While this pregnancy presented a very high risk to the girl's health and life, doctors did not propose carrying out an abortion, either legal or illegal. Neither did the victim's family seek an abortion, being unaware of the possibility of resorting to such a procedure. Ziguinchor is situated in Casamance,

of women's rights in detention centers in Senegal), March 2015, http://westafrica.ohchr.org/IMG/pdf/rapport_femmes_detention.pdf.

80. Information derived from the work of AJS in representing victims.

a very poor and marginalized region of Senegal, where access to education, especially sexual and reproductive education, is very limited.⁸¹ Broadly speaking, the abortion rate is higher in Dakar, the capital, than in the country's rural areas (21 abortions compared to 16 per 1,000 women aged between 15 and 44),⁸² where women and girls are in less of a position to avoid unwanted pregnancies and births. Given the risks associated with her pregnancy, including the effects on her physical and mental health, doctors should have proposed an abortion for GJ.

But, even when victims and their immediate family know that it is possible to seek an abortion in the case of fatal risk to the woman or girl, in practice the prospect of having to deal with a generally conservative medical establishment who will strictly apply the drastic conditions imposed by the law, coupled with the fear of not obtaining authorization in good time, prevents women and girls from invoking this exception. The fact that abortion is perceived as being subject to religious prohibition constitutes an additional obstacle. All these impediments are intensified in rural areas and the poorest regions such as Casamance, where the influence of conservative religious communities is much stronger. Furthermore, most people living in poverty in Senegal are never examined by a doctor throughout their life, and the medical certificate required to authorize an abortion costs 10,000 francs CFA (around 20 US dollars), nearly 20% of average monthly income.⁸³

In February 2014, seven months into her pregnancy, GJ gave birth prematurely by caesarean section, since *"she could no longer physically sustain the pregnancy [...] which was presenting complications"*, stated Mrs. Cissé Fatou Cissé, her *"badiengokh"*.⁸⁴ Until girls are fully grown (between 15 and 18 years), early pregnancies constitute a major risk, with increased maternal mortality and morbid complications during pregnancy and childbirth. Caesarean sections are frequent since they help avoid serious complications (tearing of the perineum, uterine rupture, haemorrhages, etc.). Nevertheless, caesarean sections may also involve risk and after-effects (psychological trauma, abdominal pain, infection, disability, and death), particularly when the intervention is carried out in an environment where the safety of the operation cannot be guaranteed, and possible complications adequately treated.⁸⁵

In addition to the serious physical and psychological consequences of the rape and the risks that the pregnancy generated on GJ's health, the unwanted pregnancy and motherhood resulting from the impossibility of having an abortion has affected the girl's life in many ways. In a conversation with AJS in April 2014, GJ declared: *"I want him [the rapist] to be killed because he has prevented me from carrying on with my schooling"*. During her pregnancy, GJ was indeed compelled to abandon her education, and has not been able to return to school since. Even a private school, contacted by her family, refused to accept her. Not being able to continue her schooling, which ceased at level CE2 [second primary year], considerably reduces the girl's prospects of finding a job, especially one that is qualified and well paid, as well as her life perspectives.

Unwanted pregnancy and motherhood also constitute a significant financial burden, whose consequences can be particularly serious for low-income families, especially single-parent families like GJ's. To cover part of these expenses, GJ's family sought the help of relatives, associations, and certain public services. This case sheds light on the considerable gaps in funding for the care

81. Guttmacher Institute, IPPF, *Santé sexuelle et reproductive des jeunes Sénégalaises* (Sexual and Reproductive Health of Young Senegalese Women), May 2014, https://www.guttmacher.org/sites/default/files/factsheet/fb-dd-senegal-fr_0.pdf

82. Guttmacher Institute, *L'avortement au Sénégal* (Abortion in Senegal), *op. cit.*

83. Report by FIDH, RADDHO, LSDH, AJS, *"Je ne veux pas de cet enfant, moi je veux aller à l'école", La prohibition de l'interruption volontaire de grossesse au Sénégal* (The prohibition of the voluntary termination of pregnancy in Senegal), *op. cit.*

84. This word means "aunt" in the Wolof language. Human rights organizations use the word to refer to women volunteers who provide education for women and girls who have been victims of sexual violence. See report by FIDH, *"Je ne veux pas de cet enfant, moi je veux aller à l'école"*, *ibid.*

85. World Health Organization: "Caesarean sections should only be performed when medically necessary says WHO" [available only in English], 9 April 2015, https://www.who.int/reproductivehealth/topics/maternal_perinatal/cs-statement/en/#

and rehabilitation of victims of rape. The costs, a majority of which are borne by victims' support organizations, are very high. To the cost of the medical certificate must be added that of the care to be provided following the rape, during the pregnancy and labor, including the cost of a possible caesarean section, or abortion. The child born must then be cared for, vaccinated, fed, etc. Not to mention possible legal costs as well as the cost of school reintegration, when it is possible.

The ban on abortion in the case of rape infringes the rights of women and girls to life, health, education, non-discrimination, and dignity, while also hindering their access to justice and employment, and their participation in political, public, social and cultural life.

3. Obstacles to Access to Justice and Reparation

The criminal proceeding against the perpetrator of the rape

Towards the end of 2014, GJ's mother, represented by a lawyer belonging to AJS, filed a complaint before the prosecutor of the tribunal of Ziguinchor. The organization also covered certain legal expenses and provided GJ with medical and psychological support. The experience of AJS demonstrates that, in the absence of appropriate holistic support for victims of sexual violence (medical, psychological, social, legal and judicial), their chances of accessing justice and reparation are considerably reduced or even non-existent.

After the complaint was lodged, instead of a police inquiry, which would have allowed the investigative and judicial process to be accelerated, a judicial inquiry was opened. At the end of six months, while the inquiry was still following its course, the alleged perpetrator was automatically set free, as the committal order in his regard had not been renewed on account of negligence on the part of the judicial personnel managing the case. The perpetrator was thus released, and subsequently left Senegalese territory with a view to escaping conviction. As a consequence, the case could not proceed.

The administrative proceeding against the State of Senegal

- The alleged violations and the plaintiffs' demands

As the criminal procedure was not successful, the mother, who is also GJ's legal representative, herself represented by a lawyer from AJS, lodged an administrative appeal with the High Court of Dakar (*Tribunal de Grande Instance*) in April 2015. The complaint demonstrates the responsibility of the Senegalese State, which did not take appropriate measures to prevent the sexual violence and its many consequences on the victim's health and life and those of her relatives, including measures that would have enabled her to resort to medical abortion, appropriate pre- and post-natal medical and nutritional care, financial support to cover the costs of the unwanted pregnancy, as well as to pursue her education.

The complaint alleges that the State of Senegal notably violated its regional and international obligations under the Maputo Protocol (articles 4,⁸⁶ 12⁸⁷ and 14, 2), c)⁸⁸); the African Charter on the

86. Notably its paragraphs e) and f) requiring that states must take appropriate measures to **punish the perpetrators** of violence to women, and put in place accessible mechanisms and services to provide **information, rehabilitation, and effective compensation** to victims.

87. Paragraph a), notably guaranteeing equality of opportunity and access in respect of **education and training**.

88. Article 14.2.c provides that states are responsible for "protecting the reproductive rights of women, in particular by **authorising medical termination** in the case of sexual aggression, rape, or incest, and when the pregnancy endangers the mental and physical health of the mother, or the life of the mother or the foetus".

Rights and Welfare of the Child (notably its article 11, 6)⁸⁹); CEDAW (articles 10⁹⁰ and 12, 2)⁹¹); and the Convention on the Rights of the Child (notably articles 19⁹² and 24⁹³).

The plaintiffs have thus demanded that the State of Senegal should be held responsible for all violations of the victim's rights,⁹⁴ and required to take all legislative and/or regulatory, administrative, institutional and planning measures to ensure that these rights are respected, notably by authorizing medical abortion as provided by the Maputo Protocol, in consequence modifying the Penal Code and the Code of Medical Ethics. It is also required that the State pay compensation 1/ to the victim, for the material and psychological harm caused by its own deficiencies, and 2/ to the family to pay for *"the twins' maintenance and education until they reach the age of majority"*.

The High Court in Dakar eventually dismissed the plaintiffs' complaint, on the grounds that their demands were *"unfounded"*, and that they had not provided the material evidence necessary to prove the alleged violations, notably the rape and other violations resulting from the inability to resort to an abortion.

- Difficulties in establishing evidence

The plaintiffs and the AJS were not able to collect this evidence due to the absence of invoices and/or witness statements attesting to GJ's abandonment of her schooling or the costs incurred to cover her healthcare or any other of her needs or those of her children. Owing to the absence of these elements, the plaintiffs did not appeal.

The legal action impelled and sustained by the AJS at the national level therefore did not prevail, and did not for the moment succeed in modifying the law relating to abortion. Currently, AJS is exploring the prospect of referring the case to various regional judicial and quasi-judicial mechanisms such as the Court of Justice of the Economic Community of West African States (ECOWAS/CEDEAO), which does not require internal avenues of recourse to have been exhausted.

II. The Guilty Inertia of the Authorities Despite the Efforts of Civil Society and Multiple Appeals by the United Nations

Despite the actions undertaken by civil society, and the stands taken by several United Nations organisms in favor of legalizing medical abortion, the Senegalese authorities remain up to now reluctant to reforming the legislation, and continue to violate women's rights for fear of losing the

89. Article 11.6 requires that states "take all appropriate measures to ensure that girls who become pregnant before having completed their **education** have the opportunity to pursue it in accordance with their individual aptitudes".

90. Article 10 requires that "States party [to the Charter] take all appropriate measures to eliminate discrimination against women, with a view to assuring equal rights to those of men in respect of **education**", and notably its paragraph f which commits States to ensure "the reduction of **fees in respect of girls abandoning their studies**, and to organise **programmes for girls and women who have left school prematurely**".

91. Article 12.2 requires that "states party [to the Charter] will provide women with appropriate and if necessary free services during pregnancy and childbirth and after childbirth, as well as adequate nutrition during pregnancy and breastfeeding".

92. Article 19 guarantees the right of every child to protection against all forms of violence, physical or psychological threat or brutality, abandonment or negligence, ill-treatment or exploitation, **including sexual violence**. Notably, the state must put effective procedures in place to establish **social programmes** aimed at providing children with the support they need.

93. Article 24 guarantees the right of the child to enjoy the best possible state of health, and to benefit from medical and rehabilitation services. Notably, the state must take measures to "ensure that mothers receive **appropriate pre- and post-natal care**".

94. Right to life, security, physical integrity, protection against all forms of violence, including sexual violence; the right to dignity and health, including sexual and reproductive health; right to food security, education, justice, and reparations.

support of a conservative section of the electorate. This section aims to highlight the work done by civil society to instigate a change.

1. National and International Advocacy for the Adoption of a Law Legalizing Medical Termination of Pregnancy

The Task Force and the legislative bill

In parallel with support for this victim before the courts of Senegal, a national advocacy has been undertaken in favor of the adoption of a bill partially decriminalizing abortion. In 2013, the Directorate of Reproductive Health of the Senegal Ministry of Health set up a Task Force⁹⁵ comprising associations, jurists, sociologists, physicians, midwives, journalists, and religious and academic figures, with the purpose of promoting the adoption of a reform legalizing medical termination. This still-active committee defines strategies and undertakes activities of advocacy, sensitization, and training of authorities and Senegalese society aimed at changing the social perception of abortion and modifying the existing legal framework. The Task Force comprises three working groups charged with undertaking activities among (1) parliamentarians, (2) community leaders (leading religious and traditional figures; young people and students), and (3) the media (see below). The Task Force is coordinated by the AJS.

In 2014, this Task Force produced a bill on medical abortion authorizing such intervention in all cases listed by the Maputo Protocol, including cases of rape. Only the authorization of a doctor confirming that the woman or girl is in one of the situations is necessary for the termination to be carried out. The bill was delivered to the Ministry of Justice in 2014, but has still not been examined in Cabinet. It has, however, been presented to the Committee for the Reform of the Penal Code.

The Task Force is now undertaking advocacy among parliamentarians (elected in July 2017), with a view to instigating the production of a bill legalizing termination for the instances provided for by the Maputo Protocol, to be submitted to the National Assembly.

International advocacy for adoption of the reform

In November 2014, FIDH carried out a fact-finding mission with its member and partner organizations in Senegal (RADDHO, LDDH, Wildaf Senegal), with the aim of documenting violations of the right to abortion and their consequences, and reforming the legislation in terms of abortion. Following this mission, the organizations concerned published a report entitled *“Je ne veux pas de cet enfant, moi je veux aller à l’école”: La prohibition de l’interruption volontaire de grossesse au Sénégal* (“I do not want this child, I want to go to school”: The Prohibition of Voluntary Termination of Pregnancy in Senegal), notably recommending the adoption of the bill on medical termination. This report served as the basis for a national advocacy exercise with the Senegalese authorities at the United Nations, led by FIDH and its local partners during the course of 2015 and 2016.

In 2015, the report was submitted to the Committee on the Elimination of Discrimination against Women, to the Committee on the Rights of the Child, and to the Working Group on the Issue of Discrimination Against Women in Law and in Practice. FIDH and AJS have also carried out a joint advocacy mission with experts from the CEDAW Committee, in advance of the periodic review of Senegal by the Committee. This advocacy allowed these bodies to take into account certain concerns

95. This is a multidisciplinary technical committee comprising the Directorate of Reproductive Health at the Ministry of Health, associations, jurists, sociologists, doctors, midwives, journalists, and religious and academic figures, established to pursue advocacy for reform of the law in respect of reproductive health.

of FIDH and its partner organizations, and to formulate recommendations for the attention of the Senegalese authorities.

In its closing observations published in October 2015,⁹⁶ CEDAW urged the country to revise its legislation to decriminalize abortion and legalize intervention in the event of danger to the life or health of the pregnant woman, rape, incest, or severe fetal impairment.

In April 2015, the Chair of the Working Group on the Issue of Discrimination Against Women in Law and in Practice undertook a visit to Senegal, during the course of which she took up the question of the ban on abortion, in accordance with the recommendations of FIDH. This visit gave rise to a declaration and a report by the Working Group condemning Senegal's failure to respect its regional and international commitments in respect of access to abortion and its implications for the rights of women and girls. The Working Group expressed its support for reform, and recommended that abortion should be systematically permitted for girls less than 16 years old.⁹⁷

In a similar spirit, the United Nations Committee on the Rights of the Child, in its closing observations on Senegal in March 2016, declared its concern at the criminalization of abortion and at the fact that the procedure was authorized only under restrictive conditions.⁹⁸ The committee of experts recommended the Senegalese authorities to amend both the Penal Code and the Code of Medical Ethics with a view to decriminalizing abortion in all circumstances.

Following this advocacy, the Senegalese authorities created a Technical Committee for the Review of Legislative and Regulatory Provisions Discriminating Against Women, attached to the Ministry of Justice, and composed in particular of members of the Ministries of Justice, of Women, Family, and Childhood, and of Health and Social Action, as well as two members of AJS. This committee was charged with studying and proposing the revision of national laws and regulations not in accordance with Senegal's regional and international commitments. In 2016, it produced a report recommending that the authorities legalize abortion in the cases provided for by the Maputo Protocol, relying in particular on the draft law of the Task Force. This report has been used at national level in activities set in motion in the context of the project "Support for Gender Equality and Equity" (Appui pour l'Équité et l'Égalité de Genre – PASNEEG) led by the Ministry of Women, the Family, and Gender involving AJS, and in 2016 was circulated to parliamentarians, especially those who supported the reform. However, it has not yet been forwarded to the office of the President of the Senegalese Republic.

National and international advocacy carried out by civil society has not yet allowed the adoption of the bill that partially legalizes abortion for lack of political will of the Senegalese authorities. Shortly before the re-election of President Macky Sall in February 2019, he declared that the question of medical abortion "would be addressed in a near future in Senegal".⁹⁹ Although the question of legalizing medical abortion might not be a priority for the new authorities, this public statement shows mobilization by civil society has allowed the question of partial decriminalization of abortion to become part of the political agenda, and a bill to be produced. It has also opened the way to recommendations by both

96. CEDAW, *Closing Observations on Senegal, concerning the third to seventh periodical reports presented in a single document*, 6 October 2015, CEDAW/C/SEN/CO/3-7, https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/SEN/CO/3-7&Lang=en.

97. Working Group on the Issue of Discrimination Against Women in Law and in Practice, *Report on its mission to Senegal*, 7 April 2016, A/HRC/32/44/Add.1, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/070/94/PDF/G1607094.pdf?OpenElement>. See also the Declaration by the Chair of the Working Group following her visit to Senegal, 17 April 2015, available only in English, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15862&LangID=E>.

98. United Nations Committee on the Rights of the Child, *Closing Observations concerning the third to fifth periodical reports on Senegal, presented in a single document*, CRC/C/SEN/CO/3-5, 7 March 2016, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/044/23/PDF/G1604423.pdf?OpenElement>.

99. Interview of President Macky Sall on 31 January 2019, I-Télé, <https://www.youtube.com/watch?v=sVuX9xanvts>.

international and national organisms in favor of abrogating the current law, contributing towards increasing the pressure on the authorities to legalize medical abortion, notably in the case of rape, and constituting important tools for civil society in the pursuit of its program of advocacy.

2. Increasing Awareness, Information and Training

The strategy of the Task Force for the adoption of a law legalizing medical abortion targets not only the Senegalese political authorities, but also legal practitioners, religious and traditional figures, the youth, and the media. The objective is to play a part in breaking the social taboo surrounding abortion and sexual violence, encourage the development of a debate on this question at the heart of Senegalese society, and, *in fine*, reinforce support among the population for the bill and for victims of sexual violence.

Increasing awareness at the community level

The Task Force undertakes sensitization projects at community level, targeting girls and boys in particular, but also parents, local elected representatives, teachers and educators, health providers, and community leaders, especially local “godmothers” (*badiengokh*). The objective is to sensitize these groups to sexual violence and its consequences, and to the risks and consequences of clandestine abortions and unwanted pregnancies, to provide information on medical abortion, and to give due recognition to the needs and interests of girls who are victims of rape. The aim of the awareness project is thus to combat the stigmatization of victims of sexual violence, and to deconstruct the social taboo surrounding medical abortion in cases of rape and incest.

The Task Force is also raising awareness among religious leaders, with the aim of combating the taboo that surrounds sexual violence and abortion in cases of rape and incest, in part due to the fact that sexual relations outside marriage and the practice of abortion are perceived as being forbidden by religion. These activities led to the joint production of a religious argument in favor of the legalization of medical abortion used in the political advocacy led by the Task Force.

Involvement of the media

The Task Force has also established a communication strategy, and, more importantly, is working with Senegalese journalists and media in order to raise awareness about sexual violence and the right to medical abortion, as well as the needs of women and girls, including those who have been victims of rape, in respect of abortion. The goal is for the media to broadcast content that talks about sexual violence and its consequences, medical abortion and the realities faced by women and girls to raise public awareness and advance social debate around this issue.

Since 2014, the Task Force has conducted various interviews each year; radio programs, including community radios; sensitization workshops with journalists, including community journalists and traditional communicators, and editors; published articles and studies; and held conferences. It has also organized writing competitions for young people on abortion, after which some were awarded and had their work published in the media. It has also produced communications materials, including a Facebook page, to provide up-to-date information and documentation on safe abortion and sexual violence and its consequences.

The training of magistrates and lawyers

At the same time, the Task Force and AJS are running training projects on the Maputo Protocol for legal practitioners. According to AJS, the lack of knowledge of the Maputo Protocol by many lawyers

and magistrates constitutes a significant barrier to access to justice and appropriate reparations for victims of sexual violence. According to Amy Sakho, *“Many lawyers who defend women incarcerated for abortion or infanticide do not use the Maputo Protocol. What we are looking for is that these lawyers always refer to the Protocol and demand its application by the judges. But many legal practitioners are unaware of the Protocol’s content, and so fail to use it when presenting cases. We provided training for judges in December 2017, and there are judges who are willing to apply the Protocol when they become aware of it. But for this to happen, lawyers must still cite it when making their case”*. She added: *“A training program is necessary in order to change perceptions on sexual violence and enable practitioners to understand the issues that victims are faced with”*.

The AJS believes that better training of lawyers and magistrates would lead to favorable decisions for victims of sexual violence, including decisions on the reform of the legal framework on abortion.

Conclusion

The legal action undertaken by GJ and her mother, supported by the AJS, is emblematic of the fight of victims of sexual violence and associations to obtain justice and compensation, as well as a legal reform on abortion to better protect victims of the dramatic consequences of unwanted pregnancies and births resulting from rape.

It also highlights the challenges faced by both victims, human rights defenders and lawyers who accompany them, to enable them to access justice and appropriate reparations, and to promote legal change. The difficulties are different and mutually reinforcing: stigma around sexual violence and abortion; lack of knowledge of the realities endured by victims, including the consequences of sexual violence on their health and their lives; difficulties in gathering evidence; lack of training and awareness of police, justice, health, lawyers themselves, political authorities on sexual violence and its consequences and the needs of victims in terms of abortion; ignorance by practitioners of the law of regional and international obligations of the Senegalese State and regional and international standards in handling cases relating to sexual violence, etc.

The multidimensional activities of civil-society organizations have nonetheless achieved national and international impacts: a legislative bill, recommendations of the various bodies of the United Nations, the establishment of a law-revision committee. The actions of advocacy, training, and awareness-raising activities are also beginning to shift perceptions regarding sexual violence and abortion, and have put the issue of legalization of safe abortion on the political agenda.

Capacity-building (financial, human, material), synergies and coordination among actors engaged with victims of sexual violence could overcome some of the obstacles identified and increase the impact of their experiences, actions to combat sexual violence and its consequences, including actions to legalize abortion in case of rape. The reform nevertheless depends on the political will of the Senegalese authorities to promote a change in favor of the recognition of the sexual and reproductive rights of women and in particular the right to medical abortion.

The Right to Abortion in Rape Cases: What Do the Regional Instruments Say?

The Maputo Protocol

Article 14(2) (c) of the Maputo Protocol provides that States must take all appropriate measures to “*protect the reproductive rights of women by authorizing medical abortion*”, in particular in cases of rape. 36 out of 54 States have ratified the Protocol.

The African Commission on Human and Peoples’ Rights (ACHPR) has also issued a General Comment (no. 2 on Article 14(1) (a), (b), (c) and (f) and Article 14(2) (a) and (c)) which provides clear guidance on the general and specific obligations of States Parties to promote the effective incorporation and implementation of the provisions of Article 14 of the Maputo Protocol.

The ACHPR Guidelines on Combating Sexual Violence and its Consequences in Africa

This instrument reminds Member States of the African Union that under regional and international law they are required to adopt appropriate laws, regulations and programs to ensure the application in law and practice of the right to medical abortion in cases of rape. According to the *Guidelines*:

(7) It is prohibited to prohibit... abortion

- Women who have had abortions or who seek emergency medical care after having undergone a clandestine abortion must not be subject to criminal prosecutions.
- Health professionals who provide abortion services in cases of rape must not be subject to sanctions.
- Health care providers must not be obliged to report cases of clandestine abortions that they witness.

(8) The right to decide: third parties must not interfere in a woman's choice

- Adult women: adult women victims of sexual violence must be able to make a decision to have an abortion without the need for permission from any third party, especially their spouse or partner.
- Minors: States must create favorable conditions to facilitate access to medical abortion for minors who are victims of rape. Minors who are victims of rape must be guaranteed access to medical abortions without the need for prior approval from parents or guardians, where there are valid reasons to believe that these minors could suffer reprisals, violence, threats, coercion, abuse or abandonment.
- The requirement of multiple signatures or approvals from health professionals to access medical abortions in cases of rape should be abolished.
- It must be ensured that access to information and services on medical abortion cannot be refused on the grounds of opposition from a third party or conscientious objection.

(9) Effective access to medical abortion services

States are obliged to:

- Eliminate unnecessary or irrelevant restrictions on the profile of service providers authorized to perform medical abortions in order to ensure that there are sufficient numbers of health professionals who can provide such services.
- Train providers of intermediate care, such as midwives and other healthcare professionals to perform risk-free abortions.



Darfur refugees, Djabal camp, FIDH investigation mission in Eastern Chad. © Karel Prinsloo

II. ADDRESSING THE CHALLENGE OF PROVIDING LEGAL SUPPORT TO VICTIMS OF SEXUAL VIOLENCE PERPETRATED IN SITUATIONS OF CONFLICT OR SERIOUS CRISIS

Sudan

*In **Darfur, Sudan**, crimes of sexual violence have been one of the main features of the conflict which broke out in 2003. It is estimated that there have been thousands of victims. In this article, following an investigation mission on the situation in Darfur, **Tchérina Jerolon, Deputy Director of the FIDH Africa Desk and Amir Suliman, Legal adviser at the African Center for Justice and Peace Studies (ACJPS)**, FIDH's Sudanese member organization, describe how in a context in which the Sudanese authorities were still recently calling on refugees and displaced persons to return to their pre-conflict homes, the issue of justice for victims of crimes against civilians and in particular crimes of sexual violence is ignored. Despite the obstacles, victims continue to claim justice and reparation. The article is followed by a Box on documenting crimes of sexual violence.*

DARFUR, 16 YEARS LATER The Arduous Struggle of Victims of Sexual Violence Against Oblivion and Denial of Justice

By Tchérina Jerolon, Deputy Director of the FIDH Africa Desk,
and Amir Suliman, Legal adviser at the African Center for Justice and Peace Studies (ACJPS)

Introduction

When, on 3 June 2019, Sudanese security forces, mainly members of the Rapid Support Forces (RSF), attacked civilians participating in peaceful sit-in in front of the army headquarters, at least

123 people were killed and more than 500 injured¹⁰⁰. The RSF used live ammunition to dislodge the demonstrators, dumped several bodies in the Nile, attacked hospitals and medical staff. Cases of rape and other forms of sexual violence were also reported very quickly, some doctors estimating that at least 70 women and men were raped on the same day. The allegations of rape committed by the RSF were not surprising. These forces, mainly composed of former Janjaweed militia men, are notoriously known to have been the main responsible for serious crimes, including sexual crimes, committed against civilians since the outbreak in 2003 of the Darfur conflict¹⁰¹.

Sexual crimes were indeed one of the main characteristics of this conflict. Dozens of investigation reports¹⁰² rapidly revealed unbearable accounts of women and girls who were victims of rape, in many cases gang rapes perpetrated in public during military assaults on their villages; women and girls who were abducted and held for several days in military camps in sexual slavery; or raped in or around displaced persons camps where they thought they had found safety; and reports of disemboweled pregnant women, genital mutilation and forced nudity¹⁰³. Men were not spared. There are numerous testimonies of genital mutilation perpetrated against men.

Such crimes, perpetrated for strategic reasons as well as opportunistically, were widespread and systematic. They were an integral part of the *modus operandi* of the Sudanese security forces and their proxies, the Janjaweed militia, during attacks mainly targeting civilian populations of Fur, Massalit and Zaghawa ethnicity, perceived as being close to the SLM/A, JEM¹⁰⁴ and other armed groups opposing the Sudanese government. It is estimated that several hundred villages were attacked in the north, south and west of Darfur and that thousands of women and girls were raped and victims of other forms of sexual violence during such attacks.¹⁰⁵

Sexual violence, amounting to international crimes, has had devastating effects on the civilian populations. Families and entire communities have been destroyed or suffer long-term consequences, given the serious physical, psychological and social impacts.¹⁰⁶

Sixteen years after the outbreak of the conflict, the scars are still very apparent. They are exacerbated by the fact that the situation of victims of sexual violence remains characterized by a total absence of justice and reparation from the Sudanese authorities. Although they have been informed of the extent and seriousness of crimes of sexual violence committed against civilian populations, the authorities

100. FIDH, ACJPS, SHRM, "Sudan, Violent Crackdown on Protesters Requires Urgent Action by International Community", 5 June 2019, <https://www.fidh.org/en/region/Africa/sudan/sudan-violent-crackdown-on-protesters-requires-urgent-action-by>.

101. On this subject, see the op-ed written by Tchérina Jerolon and Daisy Schmitt on the occasion of the International Day for the elimination of sexual violence in conflict. This article was published on June 19, 2019 in the *Daily Vox*, *Sudan Tribune* and *Daily Nation*: "Victims of Sexual Violence in Sudan Deserve Justice", <https://www.fidh.org/en/region/Africa/sudan/victims-of-sexual-violence-in-sudan-deserve-justice>.

102. See the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 1 February 2005, S/2005/60, p. 93, §333 et seq., <https://undocs.org/en/S/2005/60>.

103. *Ibid.*; Amnesty International, *Sudan, Darfur. Rape as a Weapon of War. Sexual Violence and Its Consequences*, July 2004, <https://www.amnesty.org/download/Documents/92000/afr540762004en.pdf>; HRW, *Sexual Violence and its Consequences among Displaced Persons in Darfur and Chad*, April 12, 2005, <https://www.hrw.org/legacy/backgrounder/africa/darfur0505/darfur0405.pdf>; Refugees International, *Ending sexual violence in Darfur: an advocacy agenda*, November 2007, <https://www.refworld.org/pdfid/47a6eb950.pdf>.

104. The SLM/A (Sudan Liberation Movement/Army) and the JEM (Justice and Equality Movement), two Darfur rebel movements, launched armed attacks against the Sudanese authorities from early 2003, mainly to denounce the policy of marginalization, or the deep disparities in the distribution of power and wealth between the central government in Khartoum and so-called "peripheral" regions, such as Darfur.

105. According to the ICC Prosecutor's indictment against Sudanese President Omar Al-Bashir, "since March 2003, thousands of women and girls (...) were raped in all three states of Darfur by members of the Armed Forces and Militia/Janjaweed". International Criminal Court, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, §106, 4 March 2009, ICC-02/05-01/09-3, https://www.icc-cpi.int/CourtRecords/CR2009_01517.PDF.

106. See HRW, *Sexual Violence and its Consequences among Displaced Persons in Darfur and Chad*, *op. cit.*

have not taken any significant steps to end such crimes, prosecute those responsible, provide reparation to victims or put in place guarantees of non-repetition. The new government formed in September 2019 will need to address quickly the crucial issue of combating impunity for crimes committed in Darfur, which is one of the conditions for a successful political transition, inclusive of the entire population of the country.

During a mission conducted in eastern Chad in 2018, FIDH and ACJPS¹⁰⁷ spoke to approximately one hundred refugees from Darfur, including victims of sexual violence. Complementary investigations into the situation of people still living in northern, southern and western Darfur have enabled us to collect testimonies and information about victims of crimes committed in these regions, including survivors of sexual violence.

These investigations show that where crimes of such magnitude and seriousness are committed but political considerations negate all efforts to achieve justice and reparation (I), it is necessary to think strategically about potential actions to support victims and seek guarantees of non-repetition. Such strategies include: continuing to document crimes, using quasi-judicial mechanisms and targeted advocacy, in order to contribute to fighting oblivion and denial of justice (II).

I. Political Considerations Have Negated All Efforts to Achieve Justice and Reparation for Victims of Sexual Violence

On the 1st of February 2005, the International Commission of Inquiry established by the United Nations to investigate crimes committed in Darfur concluded that, *"It is apparent from the information collected and verified by the Commission that rape or other forms of sexual violence committed by the Janjaweed and Government soldiers in Darfur was widespread and systematic and may thus well amount to a crime against humanity"*.¹⁰⁸ Two months later the United Nations Security Council referred the situation in Darfur to the Prosecutor of the International Criminal Court (ICC), citing the Commission's conclusions.

On the 1st of June 2005, the Office of the ICC Prosecutor decided to open an investigation into the situation in Darfur. Less than a week later, the Sudanese authorities announced the establishment of a special court responsible for the investigation and prosecution of perpetrators of crimes committed in the region (the Special Criminal Court on the events in Darfur).

Despite national and international investigations into the crimes committed in Darfur and ample evidence to identify those responsible, to date none of the judicial mechanisms mandated to investigate and prosecute perpetrators have enabled justice to be delivered to the victims of crimes of sexual violence committed during the conflict.

The investigations undertaken by the ICC led to the issuance of six arrest warrants between 2007 and 2010, including three against high-ranking officials in the Sudanese State political and security apparatus – the President, Omar Al Bashir, the Minister of the Interior, Muhammad Hussein and the Minister of State for Interior Affairs, Ahmad Harun – for their alleged responsibility for war crimes,

107. African Center for Justice and Peace Studies (ACJPS), Sudanese human rights organization, member of FIDH.

108. UN Security Council, *Report of the International Commission of Inquiry on Darfur to the Secretary-General*, S/2005/60, 1 February 2005, §360, <https://undocs.org/S/2005/60>.

crimes against humanity and, in the case of Al Bashir, the crime of genocide, committed in Darfur. The charges against each of the three suspects include rape.

However, more than ten years after the first arrest warrants were issued, none of the suspects have been arrested and several of them still occupy posts within the Sudanese State apparatus. Omar Al Bashir, who had been in power for almost 30 years, has been able to travel to at least 18 countries, including States Parties to the ICC Rome Statute,¹⁰⁹ without being arrested and transferred to the Court. Muhammad Hussein is currently Minister of National Defense and Ahmad Harun is Governor of South Kordofan. They also bear responsibility for serious crimes committed in other regions of Sudan, such as the Nuba Mountains.

Faced with the failure to execute the ICC arrest warrants and the resulting situation of impunity, the Security Council has gradually become inert. Meanwhile the African Union has prioritized the protection of the Sudanese regime's interests and has not assumed responsibility in response to the seriousness of the crimes committed.

While the Special Court established by the Sudanese authorities has prosecuted and convicted several members of rebel groups – often after proceedings which failed to respect the right to a fair trial – to date it has mainly addressed common law offenses (theft of livestock, matrimonial disputes, etc.). Since its creation, the Court has not dealt with a single case of rape or other forms of sexual violence.

When he was interviewed, late 2018, a lawyer practicing in Darfur and offering support to displaced persons expressed his concern: *"The judges in this court are not at all qualified to deal with international crimes. Furthermore, the majority of them are members of the ruling party"*. Another lawyer told FIDH and ACJPS that, *"The displaced persons we meet continue to seek justice but the Public Prosecutor and the police tell them that it's too late, the crimes are subject to statutes of limitation... The public prosecutor even refuses to look at the cases... We could carry on submitting complaints on behalf of victims but we continue to face multiple obstacles: the immunity of those bearing the greatest responsibility,¹¹⁰ the loss of evidence, including forensic evidence"*. With regards to the ICC, he added, *"Displaced persons continue to support the International Criminal Court. But they know that while the regime remains in power they will not get justice"*.

In the Djabal and Goz Amir refugee camps in eastern Chad, visited by teams from FIDH and ACJPS, the accounts documented revealed refugees' dashed hopes of being able to return to their country one day to finally be heard, rebuild their lives and receive justice and reparation. A very small proportion of the refugees interviewed expressed the intention to return to Darfur in the framework of the ongoing voluntary repatriation procedure. Reasons cited included: the lack of security, the presence of their tormentors throughout the regions and a strong conviction that rape and other serious crimes continue to be committed there while the perpetrators remain untroubled.

According to *Khadije*,¹¹¹ who at the time of our interview was returning from a visit to several villages in Darfur, *"Nothing has changed. Women are still raped. Why should we return to Darfur?... Before we go back there, the criminals who attacked us should leave the country. For the moment they are still there. None of them has been prosecuted by the International Criminal Court"*. There were many similar accounts, citing the impossibility of returning while perpetrators have not been prosecuted and security has not been re-established.

109. For example, Chad on several occasions, Djibouti in 2011, Democratic Republic of Congo in 2014 and South Africa in 2015.

110. United Nations – African Union Hybrid Operation in Darfur.

111. Names have been changed to protect the identity and security of the persons interviewed.

Many refugees also expressed a total lack of confidence in any justice system whatsoever, without being fully informed of existing initiatives. In several cases, those interviewed, particularly the young people, did not know, unlike Khadije, about the existence of the ICC, its investigations and the arrest warrants issued against several high-ranking Sudanese officials.

For example, **Meriem**, a survivor of a gang rape perpetrated by at least three members of the Janjaweed stated, *"I still often think about what happened to me... But I don't expect anything of the future... I have never returned to my village. The criminals are still there. I will never go back there until our country is free"*. When asked about her knowledge of ICC proceedings to hold the perpetrators accountable, she replied *"I have no information on such legal proceedings and I've never heard of the International Criminal Court"*.

II. Strategies to Fight Oblivion and Denial of Justice

Dashed hopes of receiving justice and reparation from the International Criminal Court and the Special Court have led to a review of strategies and actions aimed at asserting the rights of victims of sexual violence. Several human rights organizations, including ACJPS, have worked on reviving these strategies.

Continue to document crimes

Crimes in Darfur are perpetrated in a context in which the authorities abhor any action aimed at documenting violations by independent human rights organizations. The authorities have also strictly limited the scope of UNAMID's operations,¹¹² since its deployment to the country. These obstacles significantly contribute to the continued perpetration of crimes, to crimes being relegated to oblivion and to the widespread impunity of the perpetrators. This is all the more evident in relation to sexual violence, which is more difficult to document and which is not adequately taken into account and is even denied by the Sudanese authorities.

In March 2007, in an interview given to NBC, Omar Al Bashir declared, *"It is not in Sudanese culture, or people of Darfur to rape. It doesn't exist. We don't have it"*.¹¹³ In February 2018, following a mission to the country, the United Nations Special Representative of the Secretary General on Sexual Violence in Conflict expressed concern that the Sudanese authorities continue to use this rhetoric of denial, stating, *"It deeply saddened me to hear interlocutors in Sudan doubting and questioning victims [of sexual violence] as well as the appalling nature of these crimes"*. She further expressed alarm that, *"The pervasive culture of denial is the most serious obstacle to eradicating this heinous crime"*.¹¹⁴

In order to fight this denial policy, the documentation of sexual violence, while hazardous, is essential. Organizations like ACJPS continue to undertake such investigative work, despite the difficulties it entails – in a context in which security remains fragile – in terms of access to affected areas and populations, the safety of investigators, the safety of victims and witnesses interviewed, willingness of victims to

112. <https://www.undocs.org/en/S/2018/389>, p. 6, §22.

113. NBC News, "Sudan's al-Bashir Denies Role in Darfur Violence", 20 March 2017, http://www.nbcnews.com/id/17691868/ns/nbc-nightly_news_with_brian_williams/t/sudans-al-bashir-denies-role-darfur-violence/#.W-wDRDjLCl ce/#.W-wDRDjLCl.

114. "Special Representative of the Secretary-General on Sexual Violence in Conflict Ms. Pramila Patten Concludes Visit to Sudan and Calls for End to Culture of Denial for Conflict-Related Sexual Violence", Press Release, 27 February 2018, <https://www.un.org/sexualviolenceinconflict/press-release/special-representative-of-the-secretary-general-on-sexual-violence-in-conflict-ms-pramila-patten-concludes-visit-to-sudan-and-calls-for-end-to-culture-of-denial-for-conflict-related-sexual-violence/>.

testify and even the specialist training required on techniques for investigating crimes of sexual violence. However, such documentation remains important and needs to be supported and strengthened: to fight against the denial policy practiced by the authorities and such crimes being forgotten; the loss of too much of the evidence which could one day be used in effective, independent and impartial judicial or

quasi-judicial proceedings; and to contribute the initiation of structural reforms, including at the national level, in terms of the treatment of victims of sexual violence and the support provided to them.

Use existing quasi-judicial mechanisms

Sudan is State Party to very few regional and international human rights protection instruments, providing victims of violations with few opportunities to have recourse to supranational quasi-judicial mechanisms to assert their rights.

Sudan is the only Member State of the African Union (other than Somalia) not to have signed or ratified the Convention on the Elimination of All Forms of Discrimination Against Women. It is not Party to the Convention Against Torture, has not accepted the possibility to submit individual communications to the United Nations Human Rights Committee and has not ratified the Protocol to the African Charter on the establishment of the African Court on Human and Peoples' Rights. The new transitional government should proceed as soon as possible to ratify the main regional and international human rights instruments, in particular to promote fundamental rights and provide remedies for victims of violations.

To date, the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child are the only quasi-judicial mechanisms to which complaints may be referred concerning violations for which the Sudanese State bears responsibility.¹¹⁵

Overall, very few complaints concerning sexual violence have so far been submitted to the ACHPR. Among those that have been submitted, several concern events which took place in Darfur. Although proceedings are ongoing, it can be expected that, should they result in favorable decisions for victims, they will have an impact, in terms of case law as well as recommendations addressed to the Sudanese authorities on structural reforms (for example, calling for the immunity of members of the defense and security forces to be waived, in particular where they bear responsibility for sexual violence). Without prejudice to the opinion of the ACHPR and taking into account the challenges related to the implementation of its decisions, favorable jurisprudence for victims would also represent a form of official recognition of the crimes they experienced.

Conduct more targeted advocacy

Until 2015, the provisions of the Sudanese Criminal Code on rape contributed to further exposing victims, rather than attempting to deliver justice. Article 149 of the Criminal Code of 1991,¹¹⁶ defined rape as the crime of *zina* (adultery or non-consensual sexual relations between a man and a woman who are not married to each other).

Women found guilty of *zina* risked being sentenced to death by stoning (in the case of married women) or 100 lashes (in the case of unmarried women). Such provisions of the Criminal Code have had serious

¹¹⁵ See Box on African regional mechanisms.

¹¹⁶ Article 149 of the Criminal Code 1991: "*Rape (1) Whoever commits Zina or Sodomy with any person without such person's consent is said to commit rape. (2) Consent given to the offender who has guardianship or power over the victim is not a consent within the meaning of this section. (3) Whoever commits rape shall be punished with one hundred lashes and with imprisonment which may not exceed ten years unless rape constituted the offense of Zina or Sodomy punishable with death.*"

consequences on victims of rape. In order to prove rape, a woman had to admit that she had sexual relations outside marriage and demonstrate that they were non-consensual.

In the context of sexual violence committed in Darfur, this provision represented a significant barrier to the willingness and ability of women victims of rape to report the crimes they experienced and a further obstacle to going to court.

Several women's rights organizations participated in advocacy with the Sudanese authorities to reform Article 149 of the Criminal Code, in order to increase protection against rape and improve respect for victims' rights.

In February 2015, the authorities reformed the Criminal Code, including amendments to Article 149. The definition of rape was extended to include, for example, acts of penetration with objects. The reform also provided examples of contexts in which the issue of consent is irrelevant (for example where the attacker uses force, intimidation, coercion, threats of violence, detention, psychological persecution, or abuse of power). In relation to evidence, the new provision may contribute to less onerous requirements in practice, so that it may include, for example, testimony of the victim, the use of DNA tests, testimonies of men or women, testimonies of experts.

However, the new definition of rape, although more extensive than the previous definition, remains very limited with regard to regional and international standards.¹¹⁷ The new article still contains elements which could continue to limit the possibility for victims to go to court (it still includes references to adultery and to the notion of temptation and clarification of the applicable penalties remains necessary). In addition, it is not certain that this reform has been widely disseminated throughout the country, particularly in Darfur where lawyers we interviewed were not aware of it.

Targeted advocacy with the Sudanese authorities (in particular legislators and judges) is continuing to ensure the adoption of legislation to fully guarantee the rights of victims of sexual violence and which does not constitute an additional barrier to their quest for justice before national courts.

Conclusion

Three United Nations reports published in 2018 sounded the alarm about the persistence of sexual violence against civilian populations in Darfur, Sudan. The United Nations Secretary General described the prevalence of sexual violence, in particular around displaced persons camps.¹¹⁸ His Special Representative on Sexual Violence In Conflict, returning from a country mission, reported accounts of women who were unable to return to their pre-conflict homes due to fears of being raped.¹¹⁹ The Panel of experts on Sudan reported that rapes committed around displaced persons camps were not only opportunistic acts but also perpetrated with the aim of instilling fear in the victims and discouraging civilians from returning to their pre-conflict homes.¹²⁰

117. See the ACHPR *Guidelines on Combating Sexual Violence and its Consequences in Africa*, https://www.fidh.org/IMG/pdf/achpr_guidelines_on_combating_sexual_violence.pdf.

118. Report of the Secretary-General on conflict-related sexual violence, 23 March 2018, §70-74, S/2018/250, <https://undocs.org/S/2018/250>.

119. "Special Representative of the Secretary-General on Sexual Violence in Conflict Ms. Pramila Patten Concludes Visit to Sudan and Calls for End to Culture of Denial for Conflict-Related Sexual Violence", 27 February 2018, <https://www.un.org/sexualviolenceinconflict/press-release/special-representative-of-the-secretary-general-on-sexual-violence-in-conflict-ms-pramila-patten-concludes-visit-to-sudan-and-calls-for-end-to-culture-of-denial-for-conflict-related-sexual-violence/>.

120. Final report of the Panel of Experts on the Sudan established pursuant to resolution 1591 (2005), §118-122, 28 December 2017, <https://www.undocs.org/S/2017/1125>.

Following the dismissal of Omar Al-Bashir on 11 April 2019, after 30 years of dictatorship, requests for his transfer to The Hague to be tried before the International Criminal Court (ICC) were reinvigorated. Ten years ago, on 4 March 2009, the ICC issued an arrest warrant against Omar Al-Bashir for his alleged responsibility for war crimes and crimes against humanity committed in Darfur. In July 2010, the ICC issued a second arrest warrant, this time for the crime of genocide. The charges against Al-Bashir included rape, a move that initially raised hopes that the thousands of victims of sexual crimes committed in Darfur could finally obtain justice.

But ten years after the issuance of these arrest warrants, the victims are still awaiting justice and reparation, even though sexual violence is now systemic in Sudan, encouraged by the impunity still enjoyed by perpetrators, as demonstrated by the massacre of 3 June, and recalled in the United Nations reports mentioned above.

The current context in Sudan offers the new authorities of the country and the international community an opportunity to take concrete measures to combat impunity for the most serious crimes. In this new political configuration, the voice of victims of sexual crimes committed in Darfur must be audible.

Prior to the establishment of the Sovereign Council, former leaders of the transitional authorities (TMC) announced that they refused to transfer Omar-Al Bashir to the ICC and that he would be tried in Sudan, where he is being prosecuted for crimes mainly related to corruption. On 23 September 2019, the Sovereign Council announced the creation of a commission of inquiry to shed light on the June 3 massacre that took place near the Ministry of Defence in Khartoum. However, no formal commitment to extradite former President Al-Bashir to the ICC has been made. In such a context, the responsibility of the international community is important. Finally, it must speak with a single voice to remind that, in order to be credible and sustainable, any political transition process initiated and sustained in Sudan must include justice and reparation measures for victims of the most serious crimes, in particular victims of sexual crimes.

Political mobilization in support of the transfer to the ICC of those allegedly responsible for the crimes committed in Darfur must thus send a strong signal in favour of the non-repetition of these crimes. The regional quasi-judicial mechanisms dealing with complaints about crimes committed in Darfur, including sexual crimes, must consider these cases more expeditiously and finally allow the voice of victims to be heard. Other justice measures, including for example support for the adoption of targeted sanctions or the activation of judicial proceedings using universal jurisdiction, must be considered. These are long and complex processes. These bottlenecks lead to a redefinition of action strategies to ensure that victims eventually obtain justice and reparation. The impacts are not likely to be immediate. But continued mobilization to publicize the crimes, seek to hold the perpetrators accountable and enable victims to obtain justice and reparation remains essential.

Documenting Crimes of Sexual Violence in Situations of Conflict or Serious Crisis

Documentation means gathering statements from victims and witnesses, collecting evidence, cross-checking information. It contributes to establishing the truth about the violations committed, advocating with the authorities to end the crimes and support victims, bring legal actions and alert the international community. For human rights defenders, it is the first stage in supporting victims to seek truth and justice. Nevertheless, it carries risks, in particular for the persons interviewed.

Providing a witness statement can jeopardize their security or affect their mental health, especially when they already suffer from psychological trauma. Indeed, revisiting experiences of sexual violence can provoke all sorts of psychological damage. The fact-finding process must use a methodology which respects the 'do no harm' principle.

A range of standards and tools have been developed on this,¹²¹ aimed at protecting the well-being of persons participating in the investigation, while ensuring that it is effective.

In order to avoid any re-traumatization, the documentation process needs to be carefully prepared and planned and risks must be anticipated. Interviews are an opportunity to inform the persons interviewed about the procedure and its objectives in order to verify that they give their consent. It is then key to listen and to ask non-directive questions without intimidation, in order to collect accurate and reliable information. Data is stored, verified and cross-checked before being used, while respecting the health and security of those who experienced the crimes reported.

121. PEACE Model, *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*, March 2017, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/598335/International_Protocol_2017_2nd_Edition.pdf; FIDH, *Documenter les graves violations des droits humains et accompagner les victimes dans leur quête de justice, Guide pratique*, (Documenting Serious Violations of Human Rights and Supporting Victims to Seek Justice, Practical Guide), July 2015, https://www.fidh.org/IMG/pdf/documenter_les_graves_violations_des_droits_humains_et_accompagner_les_victimes_dans_leur_quete_de_justice-guide_pratique.pdf.



Sexual and gender based violence (SGBV) survivors wait outside the High Court on April 13, 2016 in Nairobi, prior to attend their appeal trial regarding a petition they filed at Kenya's High Court to compel the government to address the SGBV that occurred during the 2007/2008 post-election violence. © Tony Karumba / AFP

Kenya

*In **Kenya**, during post-election violence in 2007-2008, almost a thousand people were victims of sexual violence.*

*In this article, **Esther Waweru, lawyer and human rights expert**, explains that, while the potential for legal proceedings before the International Criminal Court has not yet been realized, victims and civil society organizations have decided to activate innovative proceedings before Kenyan courts to challenge State responsibility.*

The article describes the strategies used to overcome various legal obstacles and cites concrete examples of legal and communication strategies adopted, experts consulted and requests submitted.

It is followed by a Box on the evidence required by certain jurisdictions in proceedings on sexual violence, such as a medical certificate and the obstacles that these requirements can represent.

The Impact of Legal Proceedings in Kenya on Victims of Sexual Violence Committed During the Post-Election Unrest in 2007-2008

By Esther Waweru, Lawyer, human rights expert

Introduction

This article discusses the legal proceedings in two cases before the High Court in Kenya that seek justice and accountability for sexual violence suffered by the victims of the 2007-2008 post-election violence in Kenya. It gives a historical background of the political and legal landscape regarding sexual violence, the legal and policy framework, an analysis of the two cases and finally makes recommendations for consideration by State and non-State actors.

Background

In December 2007, Kenya went through a highly contested general election whose results – which declared the incumbent President Mwai Kibaki the winner – were challenged and rejected by the opposition group, at the time led by Raila Odinga. At the time, there was low public confidence in the Judiciary as an objective arbiter of electoral disputes and as such the opposition leader did not challenge the election results in court as stipulated in law, but called for mass action and a repeat of the presidential election.¹²² Amidst these calls, the incumbent, President Mwai Kibaki, was clandestinely sworn in at dusk as the President. This sparked widespread violence and retaliatory attacks across virtually the entire country.¹²³ The violence, which was both spontaneous and planned, resulted in widespread human rights violations. Various government and human rights organizations' reports have documented that over 350,000 persons were internally displaced, 1,133 killed, property destroyed and lost, thousands maimed and women and men sexually assaulted and abused.¹²⁴ Regrettably the documentation of sexual and gender-based violence during this period was not, then and even to date, as accurate as one would wish, obviously owing to a number of factors that will be discussed later in this article.

The Truth Justice and Reconciliation Commission (TJRC) Report documents reports of sexual violence in times of conflict from the post-independence period to 28 February 2008 after the 2007-2008 Post Election Violence and remains a notable source of information on the nature, extent and severity of the sexual and gender-based violence that was meted against women and men in conflict situations in Kenya.¹²⁵

122. <https://www.news24.com/Africa/News/Odinga-calls-for-mass-action-20071231>.

123. <https://www.nation.co.ke/news/1056-224116-lu3osez/index.html>.

124. Commission of Inquiry into the Post-Election Violence (CIPEV) Report, 2008, available at http://www.knchr.org/Portals/0/Reports/Waki_Report.pdf.

125. Truth Justice and Reconciliation Commission Report summary available at <http://kituochasheria.or.ke/wp-content/uploads/2016/04/TJRC-Report-2013-GS-with-isbn1.pdf>.

The challenges associated with documenting sexual violence incidences are numerous and are compounded in conflict settings. One must appreciate that whereas there may be frameworks and structures in place in society in which sexual violence can be reported and addressed, these are almost non-existent, ineffective or non-operational in times of civil strife and conflict.

In 2007-2008, the situation in Kenya rendered it almost impossible for victims of sexual violence to access justice or redress (including medical assistance) for their suffering. In most instances, women and men who suffered sexual violence were also victims of other violations and for the initial hours following the horrifying incidents were faced with hard choices of whether to save their lives or to report the violations.

Over and above these, the victims reported the harsh, cold and repulsive treatment that they received from police officers when they went to report the events at the police stations, in addition to the general lack of preparedness to address sexual violence. In some instances women were cajoled and verbally abused by police officers who offered no assistance. Some victims, having suffered various violations, reported that some police officers would ask them to choose between reporting the loss of life of family members, loss of property or the rape incidences. The manner in which rape and sexual violence in general was trivialized contributed immensely to the low numbers of reported cases and follow-up action on sexual violence.

To compound the challenges further, was the fact that in most instances, sexual violence was reportedly perpetrated by security agents, some of them police officers, who were also expected to receive complaints of violence. Victims, fearing intimidation and further harm, were therefore forced not to report.

This background is of importance in putting into context the preexisting structural deficiencies and obstacles that form the genesis of the challenges that victims face in seeking accountability for sexual violence. In the Kenyan context the procedure for seeking accountability for sexual violence requires that one must, within 72 hours of the incident, report to a police station, get a P3 Form filled in by the police surgeon, have a medical exam conducted and a medical report prepared to support the complaint. These documents are crucial and integral to the accountability process – whether pursuing criminal or civil action against the perpetrators. In the absence of these documents, it is virtually impossible to seek and get justice for sexual violence. These bottlenecks and impediments, from the very outset, made it impossible for accountability processes to be initiated.

What Is the Legal Framework on Sexual Violence in Kenya?

One would argue that Kenya's legal framework has no limitation on provisions for protection from sexual violence. Various pieces of legislation have been enacted over time providing for the prevention and protection against sexual violence and further making provisions for the prosecution of sexual violence offenders. These include:

- (7) The Sexual Offenses Act which makes *'provision about sexual offenses, their definition, prevention and the protection of all persons from harm from unlawful sexual acts'*;
- (8) The Penal Code which prohibits sexual offenses such as defilement, attempted defilement, rape, attempted rape and sexual harassment; and
- (9) The Children's Act which safeguards the rights and welfare for the children and protects them against sexual exploitation.

In addition to these enacted laws, the Government of Kenya has adopted policies that complement the law such as the National Guidelines on the Management of Sexual Violence¹²⁶ which recognize sexual violence as a human rights and health issue affecting both men and women and provide for the necessary procedures and services for the management of survivors of sexual violence.

Furthermore, Kenya is a State Party to notable regional and international human rights instruments which offer legal protection from sexual violence. These include the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment, the Convention Against All Forms of Discrimination Against Women (CEDAW), the Rome Statute of the International Criminal Court, the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol).

The Constitution of Kenya, 2010, as the Supreme Law, contains a robust bill of rights that safeguard the rights underpinned in these legal instruments and recognizes that all international law that Kenya has ratified forms part of Kenyan law.

The Quest for Justice for Sexual Violence in Kenya

Despite the existence of these legal and policy frameworks to prevent and address sexual violence, survivors of sexual violence continue to face major challenges in the pursuit of justice and redress. As indicated earlier, some of the biggest challenges and obstacles that victims of sexual violence face in pursuing accountability include the bureaucratic bottlenecks, collapse of infrastructure and frameworks, absence of support mechanisms and the strict legal requirements.

For instance, Kenya falling under the Common Law regime requires the person alleging a fact to prove it beyond reasonable doubt (in criminal cases) and on a balance of probabilities (in civil cases). This was and remains a major challenge for victims of sexual violence particularly in conflict and crisis setups. To overcome this, one of the key strategies in seeking justice for the survivors of sexual violence from the 2007-2008 post-election violence was to institute representative and class action constitutional petitions.

The evidentiary threshold for human rights and constitutional cases has been argued to be beyond a balance of probabilities but lower than beyond strict proof. The then newly promulgated Constitution of Kenya 2010 offered the opportunity to circumnavigate some of the structural legal challenges in seeking accountability for sexual violence and indeed for human rights violations that had hitherto prevented many victims of human rights violations from seeking and getting justice.

Of particular note is that the new Constitution offers a robust and elaborate chapter on the bill of rights as well as enhanced access to justice and further empowers any person or organization to move to Court in the event of a breach or threatened breach of the Constitution or the Bill of Rights. This in a way helped the groups in court to contend the violations of the rights of other victims.

There are two notable cases that are currently pending before the Kenyan High Court Constitutional and Human Rights Division.

126. Available at www.endvawnow.org/uploads/browser/files/national_guidelines.pdf.

Nairobi High Court Petition Number 122 of 2013 *COVAW*¹²⁷ & *Others versus the Attorney General & Others*¹²⁸ (hereinafter the Sexual Violence Case)

This is a case that was instituted in 2013 by four human rights organizations¹²⁹ and eight (two male and six female) survivors of sexual and gender-based violence from the 2007-2008 post-election violence. The case is instituted against: the Attorney General, the Director of Public Prosecutions, the Independent Policing Oversight Authority Chairperson, the Inspector-General of the National Police Service, the Minister for Medical Services and the Minister for Public Health and Sanitation. The petitioners aver that the State failed to protect them from sexual violence and further failed to provide the necessary remedies and redress after the violations, including emergency medical services and investigating and holding the perpetrators to account.

Nairobi High Court Petition Number 273 of 2011 *FIDA Kenya & Others versus the Attorney General & Others* (hereinafter the IDPs Case)

This case was instituted by three human rights organizations¹³⁰ and 27 internally displaced persons (on their own behalf and as representatives of over 350,000 IDPs from the 2007-2008 post-election violence). The case illustrates four main classes of violations: loss of life, grievous bodily harm, loss of property and sexual and gender-based violence. The case was instituted after the government of Kenya failed to set up a special judicial mechanism to address the post-election violence.

Strategies Employed in the Two Cases

1. Pre-filing strategy development

The preparatory works before the filing of the cases started in 2010 with a robust process of developing the strategies and case theories and the desired outcome and effects of the cases. In the development of the cases, the petitioners first embarked on an elaborate process of mapping the victims of displacement and collected and verified evidence of the four key thematic violations at the center of the case. Evidentiary gaps were identified and addressed at the very preliminary stages. Potential key victim and expert witnesses on the thematic violations were identified and prepared to go through the judicial proceedings. Witness and victim support, albeit limited due to resource constraints, was offered by the petitioner organizations. This was crucial particularly for the victims of sexual violence and those who lost their family members.

For the sexual violence case, the partners developed a case strategy that interrogated the due diligence of the State based on its national, regional and international human rights obligations with regard to sexual violence in conflict setting.

In both cases, the partners were alive to the fact that the State held certain information that was not readily available to them and which would be useful in the cases. In this regard, the petitioners

127. Coalition on Violence Against Women (COVAW).

128. <https://sgbvjusticekenya.net/about/>.

129. COVAW, Physicians for Human Rights, Independent Medico-Legal Unit (IMLU) and ICJ-Kenya as petitioners. Kenya Human Rights Commission (KHRC) and Article 19 are enjoined in the case as Interested Parties while the Kenya National Commission on Human Rights (KNCHR), Redress and Katiba Institute are *amicus curiae*.

130. Federation of Women Lawyers Kenya (FIDA Kenya), Kenya Human Rights Commission (KHRC) and the Kenyan Section of the International Commission of Jurists (ICJ Kenya).

made applications for the State to provide crucial information such as data relating to the number of survivors under the right to information under Article 35 of the Constitution of Kenya. However, despite the court orders, the State did not provide the information sought.

2. Identification of victims and petitioners and respondents

The identification of victims and the partners was an elaborate process that took a long time. Specific persons had to be engaged and charged with conducting the initial interviews and mapping the victims, information and whether and how it affected the case theories developed. This would be cross referenced with existing reports such as the Commission of Inquiry into Post-Election Violence (CIPEV) and the Kenya National Commission on Human Rights' (KNCHR) *On the Brink of the Precipice* reports. The identification of victims and petitioners ensured that the accounts were consistent and could withstand cross examination and that the accounts were a proper representation of the different classes of sexual violence victims – across different geographical areas, ages, sexes (both men and women), type of sexual violence, type of perpetrators both State and non-State.

3. Drafting and framing of pleadings and factual and legal arguments

The drafting required a framing of the State's due diligence and the interpretations at the international level. In particular, the partners ensured that the pleadings were coherent and articulated sexual violence as a national and international crime that, in the present cases, amounted to crimes against humanity under international law.

4. Remedies sought

Both cases were innovative in crafting the reliefs sought from the Court, which ranged from declaratory orders to specific orders directing certain action by the State including: the creation of a specialized unit to investigate and prosecute sexual and gender-based crimes committed during the post-election period; a database of survivors of sexual and gender-based violence from the post-election period; provision of compensation, rehabilitation, psycho-social, medical and legal services for the victims; punitive, exemplary and general damages; and an independent mechanism for monitoring the reparations ordered by the court.

5. In-Court strategies

The parties employed a variety of strategies at the hearing of the cases including presenting oral and affidavit evidence before the court. The selection of the evidence and witnesses who testified in Court was geared towards ensuring that all the elements of the cases were addressed and corroborated by both factual as well as expert evidence. The testimony of nationally, regionally and internationally recognized experts in the field of sexual and gender-based violence as well as reparations for sexual violence was a major strategy that was employed in both cases. In the sexual violence case, the witnesses testified on the fact that the crimes committed were by both State and non-State actors. Other in-court strategies were employed, such as the request for victims of sexual violence to testify in camera and for the court to take their evidence on affidavit without having them give oral evidence.

6. Communication and advocacy strategy

The legal strategy in each of the above cases was accompanied by a complementary communication and advocacy strategy. While the cases were proceeding in court, the petitioners engaged in advocacy outside of the judicial proceedings, on the understanding that Kenya's transitional justice agenda was beyond the courts and that certain wins could be made outside the ambit of the court. Part of this strategy was to ensure that the cases remained alive and visible to the general public and relevant stakeholders.

Civil society organizations made reference to the cases within their engagements with human rights mechanisms at the regional and international levels and continuously called on the Kenyan government to honor its obligations under the Constitution, regional and international law. For instance, the victims of sexual violence and one of the petitioners in the sexual violence case addressed State representatives and other actors at the African Commission on Human and Peoples' Rights (ACHPR) in Banjul, the Gambia, in 2016 and the Assembly of State Parties to the International Criminal Court (ICC) in New York in 2016.

Some of the Challenges Faced Include:

- a) In the sexual violence case the Attorney General did not respond to the case, for over a year resulting in delays in the start of the hearing. In January 2014, the partners organized a Twitter Thunderclap on the eve of the hearing date calling on the Attorney General to file the State response. This was a huge success and the following day the Attorney General filed the State response.
- b) Developing a coherent and cogent legal strategy. This had to change severally within the life of the cases to fit with the different dynamics and developments of the cases.
- c) Collection and verification of survivors' accounts. As with most personal experiences and witness accounts, there was need to ensure that the accounts documented by the litigation team were corroborated and verifiable. This was essential before the filing of the case and had an impact on the case theories, which had to be adjusted in certain respects for instance with regard to the remedies that would be sought.
- d) Partner organization selection and coordination was a significant challenge. In both cases, some of the original organizations that had been identified as potential partners had to be replaced due to a number of factors that demonstrated a lack of commitment to the litigation process. In addition to this, the coordination of a large consortium of partners was a challenge owing to the different funding, decision-making and organizational level challenges. However, the value-add, expertise and strength that each partner brought on board as well as the need for joint fundraising held the consortiums together.
- e) Survivor Support and Sustainability. Public interest cases require the sustained vigor, motivation and commitment of the parties involved. It has been over eight years since the litigation projects started and yet none of the cases has been decided. The process has been characterized by a re-traumatization of the survivors, fatigue, despair, distractions, interference and undue influence on the survivors and victim petitioners and the organizations to some degree. The partner organizations have striven to ensure that the individual petitioners and survivors are regularly briefed of the court process and what to expect, supported to attend court as well as provided with psycho-social support.

Redress, Reparations and Remedies

Whereas there are no clear set guidelines for the provision of remedies and reparations for victims and survivors of sexual violence, the national courts have on a case by case basis provided remedies and modalities for reparations. The two cases discussed provided the Court, within their prayers, with proposals on what a desirable reparations framework would be, including a monitoring process with judicial oversight.

The TJRC Reparations Policy Framework contains recommendations that offer guidance to judicial and quasi-judicial organs when addressing the issue of reparations and remedies for survivors and victims of sexual violence.

In 2013, President Uhuru Kenyatta made a public apology to the victims of human rights abuses and pledged the establishment of a KES 10 Billion Victims' Reparations Fund. However in the absence of a proper reparations framework with a verifiable database of victims – mapping their different classes and needs – the reparation for victims of sexual violence would be difficult to successfully achieve.

Recommendations

- i) In appreciation of the difficulties and challenges associated with reporting and documenting sexual violence crimes during conflict times, the State should ensure that there are proper mechanisms and measures taken to prevent the occurrence of these crimes.
- ii) Where they do happen, the State should ensure that the survivors are able to access the requisite medical treatment, report the incidences and have them recorded, investigated and prosecuted. Further, in light of the above, the courts should be urged to take judicial notice of the circumstances that would prevent survivors from obtaining relevant documentation that would be used as evidence to prove their cases.
- iii) Organizations that support victims and survivors of sexual violence should have a clear client management policy from the outset that includes support, especially psycho-social support, to the victims throughout the litigation process.
- iv) Development partners and funding organizations should dedicate adequate funding towards sexual violence litigation projects, understanding that this is a long, tedious and expensive exercise that requires both human and financial resources and whose results and impacts may sometimes be realized after many years.

Advocating for Effective Reparation Measures for Victims of Sexual Violence

Victims of sexual violence very rarely receive reparation for the harm they have suffered. In theory, such reparation can be provided by the person responsible for the violence, the State or a regional or international mechanism.¹³¹

In practice, there are numerous obstacles. In addition to the difficulty of being able to genuinely repair the pain, the trauma and loss resulting from such violence, victims are often faced with prescription,¹³² the perpetrators' lack of resources and the absence of effective procedures to guarantee implementation of reparations decisions.

In cases of judicial reparation, it is sometimes necessary to have established the guilt of the perpetrator of violence, which further reduces the likelihood of obtaining such redress given the high level of impunity for sexual violence. However, reparation can also be of an administrative nature, disconnected from judicial or quasi-judicial proceedings. The manifold consequences of sexual violence argue in favor of a holistic approach to reparation, which includes both individual and collective measures, developed in consultation with victims themselves.¹³³

A combination of all forms of reparation (restitution, compensation, rehabilitation, satisfaction, guarantees of non-repetition)¹³⁴ allows the physical, psychological, social and financial harm resulting from such violence to be taken into account. Reparation for sexual violence, which affects both women and men, must also have a transformative aspect in order to overcome and contribute to eliminating gender inequality and discrimination which encourage such violence and can impede equal access for women and men to reparation measures.¹³⁵

Finally, in order to facilitate victims' access to reparation which has been granted to them, the ACHPR *Guidelines on Combating Sexual Violence and its Consequences in Africa* recommend the establishment of national funds¹³⁶ to centralize resources and ensure effective reparation for sexual violence.¹³⁷

131. See *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Resolution 60/147 adopted by the United Nations General Assembly, 16 December 2005, <https://www.ohchr.org/fr/professionalinterest/pages/remedyandrepairation.aspx>.

132. On prescription, see the article "South Africa: No More Time Limit to Prosecute Sexual Offenses in South Africa" and the box "Overview of Limitation Periods for Crimes of Sexual Violence in Africa", pages 15-23 and 24 of this publication.

133. United Nations, *Guidance Note of the Secretary General, Reparations for conflict-related sexual violence*, June 2014, §3 and 6, https://www.ohchr.org/Documents/Issues/Women/WRGS/PeaceAndSecurity/ReparationsForCRSV_FR.pdf.

134. *Ibid.*, §1; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims*, *op. cit.*, §9.

135. *Ibid.*, §4; *Nairobi Declaration on women's and girls' right to a remedy and reparation*, 2007, §3 (H), https://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf.

136. Statute of the International Criminal Court (Rome Statute), Article 79.

137. *Guidelines*, *op. cit.*, §53-63.



Anonymous. Photographed at the national stadium, where she was returning for the first time since her arrest by the security forces on September 28, 2009. "I was at the stadium on September 28th. The military arrested me and sent me at the Alpha Yaya Diallo camp (the main military camp in Conakry), where I was mistreated for 24 hours along with other young women. I want justice to be done because the impunity of the military in Guinea continues and the State does not guarantee the safety of its citizens." From the book *Waiting for Justice*. ©Tommy Trenchard / Panos / FIDH

Guinea

*In **Guinea**, on 28 September 2009, the repression of a meeting of a group named the "Forces Vives" at the main stadium in Conakry resulted in more than 157 deaths. More than one hundred women were raped, some of them over a period of several days during which they were detained in military camps. Since then, they have been fighting for justice and reparation before the Guinean courts. FIDH, OGDH and AVIPA are supporting them in this struggle. After eight years, the judicial investigation closed at the end of 2017 has led to the indictment of 12 individuals, including senior military and political officials. In this article **Mathilde Chiffert, lawyer and former FIDH representative in Guinea, and Halimatou Camara, member of the pool of lawyers representing victims of the massacre**, reflect on the key role played by civil society organizations in legal proceedings initiated in Guinea. Although serious challenges are to be overcome before proceedings lead to the conviction of the perpetrators as the outcome of a fair trial, progress made by the justice system more than ten years after the facts is already significant.*

The Impact of Legal Proceedings Initiated by Victims of Sexual Violence: The 28 September 2009 Massacre Case

By Mathilde Chiffert, Lawyer, former FIDH Representative in Guinea
and Halimatou Camara, Member of the pool of lawyers representing victims
of the 28 September 2009 massacre before national courts

As in the case of the thousands of citizens assassinated inside the infamous “Boiro Camp”, the repression perpetrated on 28 September 2009 in the Conakry stadium represents a serious and enduring trauma for Guinean society. On that day, activists from all Guinean political parties were assembled to demand democracy and protest against the candidacy of the head of the ruling military junta, Captain Moussa Dadis Camara, in the presidential election scheduled to take place several months later.

In retaliation, at least 157 were killed, more than a hundred women raped by members of the military and militia supporting the junta and hundreds were seriously wounded. This repression continued outside the stadium and during the following days. Dozens of individuals were arbitrarily arrested and subjected to torture, including many women who were raped over several days in military camps. For the first time in Guinea, through rape perpetrated on a major scale, the aim was to diminish the status of women considered to be “opponents” and to attack their “honor” and that of their families and communities.

The case of the 28 September stadium massacre has unique symbolic value since it is the only legal proceeding concerning crimes committed by senior political and military officials which has involved a genuine investigation by investigating magistrates. Since 1958, when it gained independence, Guinea has lived under military dictatorships whose brutal methods of governance and law enforcement have led to the death of tens of thousands of political opponents, both actual and alleged. These victims and their beneficiaries thus perceive the legal proceedings initiated by the victims of the 28 September massacre as a unique and historic opportunity to put a lasting end to political violence and the impunity of perpetrators and, to some extent, a chance for them to achieve justice for past crimes.

The International Criminal Court (ICC) whose Prosecutor opened a preliminary examination of the situation in Guinea several weeks after the events, has played a part in this achievement. However, the fact that crimes committed on 28 September 2009 have not been ignored or met with silence, in favor of political deals, like many others before them, is above all due to the victims who have shown courage and persistence in their demand for justice. By accepting to testify in a fragile security situation and on some occasions to confront the alleged perpetrators and continuously mobilizing to ensure that the perpetrators eventually answer for their crimes, these victims have played a key role in advancing justice.

Although serious challenges are to be overcome before proceedings lead to the conviction of the perpetrators at the outcome of a fair trial, progress made by the justice system more than ten years after the facts has been significant. The joint efforts of civil society and the ICC Office of the Prosecutor

(hereafter referred to as the “Office of the Prosecutor”) have enabled the most vulnerable victims to be placed at the center of these unusual proceedings, while giving them a voice at the international level (I). The challenges related to supporting victims of sexual violence before Guinean courts are substantial and confirm the urgent need for the Guinean State to define and adopt a specific criminal policy on victim support which is appropriate to their needs for medical and social care (II).

I. Origins and Progress of Highly Sensitive Legal Proceedings

A. Victims' Mobilization and the Involvement of the International Criminal Court

Immediately after the events, human rights associations, in particular activists from the *Organisation guinéenne de défense des droits de l'Homme et du citoyen* (OGDH), became involved in an impressive documentation activity, systematically collecting testimonies of victims and encouraging them to quickly form an association. This brave work, conducted as a matter of urgency in order to avoid the loss of evidence needed for future investigations, at the same time as members of the ruling military junta were attempting to eliminate evidence of their abuses at all costs, rapidly assembled the evidence which would go on to form the basis of the judicial investigation.

Several weeks later, the ICC Office of the Prosecutor received the information and testimonies reporting the extreme violence with which the demonstration organized in the national stadium in Conakry had been repressed. During the preliminary examination which was promptly opened, the Office of the Prosecutor concluded that the acts committed on 28 September and the following days could be categorized as crimes against humanity. The Office of the Prosecutor therefore made a commitment that justice would be delivered to the victims, either by the national courts, or by the ICC.

Under the complementarity principle set out in the Rome Statute establishing the ICC, the Guinean authorities bear primary responsibility for bringing the main perpetrators of the crimes to justice. Complementarity is a key principle of the Rome Statute: the ICC can only act as a means of last resort meaning that a case is only admissible before the Court in the absence of credible national proceedings. Thus in February 2010, the Public Prosecutor at the Court of Appeal in Conakry referred the crimes committed at the Conakry stadium to three investigating magistrates, who immediately opened a judicial investigation aimed at shedding light on events and establishing the criminal liability of those responsible.

At the end of the political transition which began in 2010 and following the presidential election organized the same year, a huge program to reform the justice sector was initiated in Guinea. Efforts aimed at restoring credibility to the judicial institution by reasserting its authority in relation to the executive power represented a unique opportunity for the public prosecution and investigating magistrates involved in genuine investigations and prosecutions against the most senior political and military officials. At the same time, the involvement of the Office of the Prosecutor represented a “sword of Damocles” pushing the national authorities to respect the obligation to investigate and sanction the crimes committed, as well as to prevent political interference and potential threats against or pressures on the magistrates responsible for the case. Over the past nine years, the Office of the Prosecutor has been to Guinea numerous times to meet with victims, lawyers, Guinean magistrates and political authorities in order to assess the progress of the investigation and encourage the holding of a trial at the earliest opportunity.

Collaboration with the Office of the Prosecutor played an important role for victims and their lawyers. On the basis of information it received on developments in legal proceedings at the national level, it was able to call on the authorities to accelerate investigations and to adopt concrete measures aimed at establishing the truth and holding the perpetrators to account. The positive influence of the ICC was apparent on several occasions when the Prosecutor of the Court, relaying requests for the performance of judicial acts submitted to the investigating judges in the case by OGDH and FIDH lawyers, facilitated the indictment of senior army officials. This was particularly the case with Captain Moussa Dadis Camara, head of the military junta at the time of the events, Colonel Claude Pivi, responsible for presidential security and Colonel Moussa Thiegboro Camara, responsible for fighting organized crime, as well as several direct perpetrators of rape and torture who were identified by victims.

B. The Establishment of a Pool of Lawyers and the Active Participation of Victims and Associations in All Stages of Proceedings

The capacity of victims to participate actively and in a coordinated way in national proceedings, while having access to international bodies, in particular the ICC, was made possible by the coordination activities undertaken by victims' associations and other civil society organizations.

In May 2010, three months after the opening of the investigation, FIDH sent its first mission to Conakry to assist Guinean human rights organizations involved in supporting victims of the events of 28 September. The victims interviewed during this mission, who had little if any information about the purpose and conduct of the legal investigation, expressed distrust in the Guinean justice system and the judges in the case. The initiation of legal proceedings at the national level was even viewed by some as a ploy aimed at protecting the alleged perpetrators.

In response, OGDH, supported by FIDH, brought victims and the main associations representing them together, with the aim of building a coalition and defining the basis of a common strategy on legal action to establish the truth, demand justice and receive reparation. Thus, OGDH, FIDH and the Association des victimes, parents et amis du 28 septembre (AVIPA) joined the proceedings as civil parties alongside the victims and then established a pool of national and international lawyers, responsible for supporting and representing victims during hearings in front of the investigating judges.

In 2010, the Criminal Procedure Code did not expressly provide for the possibility for associations to join proceedings as civil parties. However, since it was not prohibited by law, civil parties were allowed by Guinean magistrates, thereby recognising the legal status of civil society organizations and victims' associations as parties to proceedings. This principle was subsequently formally introduced in national law through amendments to the Criminal Procedure Code adopted in 2016, opening the way for more legal proceedings to be initiated by Guinean civil society organizations, in particular concerning sexual violence, before the national courts.

Eight years after the establishment of the pool of national and international lawyers, 450 victims of the 28 September massacre have been supported to appear before the judges by lawyers mandated by OGDH and FIDH. The active participation of victims, in particular victims of sexual violence, has without a doubt contributed to the progress of investigations and has strengthened the investigation in terms of the identification of alleged perpetrators.

A significant step was taken, for example, on 30 April 2013, with the indictment and pre-trial detention of a gendarme, who was alleged to have raped a woman, with two other officers from the gendarmerie, in the stadium on 28 September 2009. This woman, with support from OGDH and FIDH lawyers, overcame her fears to join proceedings as a civil party, identify one of the rapists and request a confrontation with him. As a result of the active participation of victims in proceedings in this way, for the first time in this case and in the history of Guinean justice, a member of the armed forces was charged as a direct perpetrator of sexual violence.

II. Challenges Related to Supporting Victims of Sexual Violence Before Guinean Courts

A. Institutional and Legal Difficulties

Over fifty women victims of sexual violence were heard during the investigation. However, the absence of specialised investigation and prosecution units within the Guinean court system to provide support to vulnerable victims and the lack of relevant training for magistrates, registrars and lawyers – largely male professions – did not encourage victims to testify in a climate of trust.

Worse still, during the first few months of the investigation, the offices of magistrates assigned to the case were situated within the headquarters of the Force spéciale de sécurisation du processus électoral (FOSSEPEL), a military building. Some of the victims, when attending hearings, experienced physical discomfort at the sight of uniforms. Advocacy undertaken by civil society, victims' associations and their lawyers directed at the Ministry of Justice resulted in the office of the investigating judges to be relocated within the Court of Appeal in order, as far as possible, to prevent the re-traumatization of victims and guarantee a minimum level of serenity.

In addition to the difficulties related to the absence of specific training of judicial authorities and court officers on techniques for interviewing victims of sexual violence, the lawyers involved in supporting victims of the event of 28 September faced problems related to the rules of evidence and in particular the evidentiary value of a medical certificate confirming that sexual violence took place.

The standard practice of Guinean magistrates is to require a medical certificate to prove the harm suffered by victims; a testimony alone is considered insufficient. In addition, the perspective of a forthcoming trial requires requests for reparation to be precisely determined, based on an assessment of damages following medical expertise. These are serious limits on access to justice for victims of sexual violence.

In order to overcome this problem, the victims' lawyers argued that it was impossible in practice for many of the victims to access healthcare following the events of 28 September 2009, in particular due to the efforts undertaken by the regime at the time to conceal evidence. Indeed, during the afternoon of 28 September, members of the military took over the public hospitals in Conakry, threatened medical staff and blocked the entrance to the injured and members of their families, seriously affecting the treatment of victims and further traumatizing them.

In general, difficulties related to the production of a medical certificate are extremely common in Guinea in cases concerning sexual violence. There are many reasons: lack of financial means, especially in the case of minors; difficult access in remote regions; fear of reprisals and stigmatization, etc. For this reason, beyond the specific case on the events of 28 September and as stipulated in the ACHPR

Guidelines on combating sexual violence and its consequences in Africa, the arguments put forward by the lawyers and the advocacy undertaken by organizations participating as parties to proceedings aimed to encourage the judicial authorities to adopt a reversal of the burden of proof in favor of victims, exonerating them from the requirement to produce any evidence other than their testimony.

Finally, advocacy must continue to push for Guinean courts to have specialized staff and in particular investigating judges, interpreters and psychologists with specific training on interviewing techniques in cases of sexual violence as well as on providing support to victims.

B. The Need for Medical and Social Care

Providing support to victims of sexual violence, many of whom were abandoned by their families following the events, quickly revealed the inadequacy of legal support alone. The work undertaken by the associations supporting them identified significant needs within these particularly vulnerable groups concerning medical, psychological and social support.

Given the mainly legal nature of support offered by civil society during the years immediately after the events, these needs were not catered for, or only partially on a case by case basis, so that today many victims continue to suffer from serious health problems and psychological difficulties. Furthermore, the lack of medical and social care results in some victims distancing themselves from ongoing legal proceedings, the length of which in the absence of healthcare, can appear prohibitive. Taking charge of victims' medical, psychological and social needs can therefore contribute to supporting them in their quest for justice.

In order to respond to these needs, OGDH and FIDH recently put in place a medical assistance fund to help victims of violence, in particular women victims of sexual violence who are often most in need and suffer most from stigmatization in a society where these issues are still largely taboo. The fund has enabled various healthcare expenses to be covered, in particular medical consultations, operations and hospitalization, pharmaceutical expenses and costs of the victims' transport to and stay at the point of care.

Beyond providing medical care to victims, the activities of OGDH, FIDH and their partners also identified a significant need to provide psychological support to victims. Yet, providing psychological care to victims of sexual violence is a recent practice in Guinea and remains fairly marginal. Several countries in the sub-region have put in place specialized poles, often receiving victims of armed conflict or crimes against humanity, as in Senegal, for example, in relation to the victims of the Rwandan genocide in 1994. The development of such centers with their in-depth knowledge of the specific issues faced in the region could pave the way for the establishment of particularly valuable networks which are in a position to encourage training and promote exchanges of experience. To this end, FIDH has established a partnership with the Centre africain de prévention des conflits (CAPREC), based in Thiès, Senegal, which received and treated several victims of the events of 28 September 2009.

A workshop to share experiences was organized with CAPREC and the Association guinéenne des psychologues cliniciens (AGPC), which provides individual support on a weekly basis to approximately thirty victims of sexual violence who expressed an interest. In addition to such individual support, meetings to discuss and collectively prepare for potentially traumatizing situations before the courts, such as hearings, may be particularly useful, given the lack of specific training of the majority of judicial staff and court officers.

C. Challenges Related to the Organization of the Trial

The judicial investigation was eventually closed in December 2017, after eight years. Although the political, technical and logistical obstacles to be resolved before a trial is held are real but can be overcome, it is primarily up to the national authorities to decide when those responsible for this massacre will be judged. These unusual and highly sensitive proceedings will require preparation and organization at a level commensurate with these challenges.

This trial will indeed represent an unprecedented event in Guinean legal history, since approximately 450 people, victims of the most serious crimes, are now civil parties in proceedings. In this capacity, they should be able to exercise all the rights recognized to parties to proceedings. Some, who are both victims and witnesses to the events, will have the opportunity to be heard. Yet, effective participation of victims requires adequate protection to be granted. Victims who expose themselves by coming to participate in proceedings will need to receive protection measures such as closed hearings on sensitive matters.

Furthermore, given the very high number of rapes and other forms of sexual violence perpetrated, the extreme vulnerability of some of the victims should be taken into account by the Tribunal and a psychological support protocol should be put in place. Appearing before the courts is a difficult exercise, in particular for victims of sexual abuse. It means agreeing to describe traumatic events, sometimes experienced as shameful and socially stigmatizing. The Court should therefore ensure, in particular, that questioning, especially by defense lawyers avoids any attempt at harassment or intimidation.

Finally, on the basis of the requests submitted by the civil parties, appropriate reparation measures, proportional to the seriousness of the harm suffered, should be ordered by the Court at the conclusion of the trial. As stipulated by the Guidelines, these measures must be designed to meet the needs of victims and must take into consideration all forms of harm, including physical, psychological, material, financial, and social harm, immediate or otherwise, suffered by the victims.

To this end, a joint reflection should be undertaken with all relevant stakeholders; first and foremost victims' associations but also the Guinean political authorities, United Nations representatives in Guinea and all funders involved in fighting impunity. This will constitute an opportunity to define the possible forms of reparations, which must in any event comply with the fundamental principles and relevant international guidelines, and to reflect on the most appropriate way of enabling all victims of the events to benefit from them, so that they can deal with their difficulties, both material, psychological and physical.

“The raid of defense and security forces the day of the massacre on 28 September seriously compromised the possibility for raped women to obtain medical certificates”.

“Can one require medical evidence of rape when it is known that women faced great danger in hospitals the day of the massacre and the following days?”

Halimatou Camara,

Lawyer in the 28 September 2009 Massacre Case



III. HAVING RECOURSE TO OTHER BODIES WHEN NATIONAL JURISDICTIONS FAIL TO DELIVER JUSTICE TO VICTIMS OF SEXUAL VIOLENCE

Liberia

*In **Liberia**, during the armed conflicts which marked the country for almost 15 years, rapes, sexual slavery and other forms of sexual violence were perpetrated on a massive scale by all parties to the conflict.*

Despite the seriousness of these crimes, documented by the national Truth and Reconciliation Commission, more than 20 years after their commission none of the alleged perpetrators have been prosecuted by the national justice system.

Meanwhile, several of them have left the country for the United States, Belgium, the United Kingdom and Switzerland. In these countries, victims, supported by Liberian human rights defenders and international organizations such as Civitas Maxima, are trying to obtain trials against these ex-combatants.

*In this article, **Lisa-Marie Rudi, legal adviser at Civitas Maxima**, describes the administrative proceedings initiated against so-called “Jungle Jabbah” in the United States, for immigration fraud, during which several victims of sexual violence were able to testify and which ended with him being sentenced to 30 years’ imprisonment.*

Although he was not found guilty of sexual violence, Lisa-Marie Rudi explains the ways in which this procedure had an impact on victims and why forthcoming proceedings in other countries should prompt the Liberian authorities to create the conditions to enable victims to obtain justice in their own country.

The Impact of the “Jungle Jabbah” Trial on the Fight Against Sexual Violence in Liberia

By Lisa-Marie Rudi, Legal advisor at Civitas Maxima

Background – Sexual Violence During the Civil Wars in Liberia

The Liberian civil wars (1989-1997 and 1999-2003) resulted in over 150,000 deaths.¹³⁸ During these successive conflicts, numerous violations of human rights and international crimes including torture, forced labor and pillage were committed by all fighting factions. These violations also led to a breakdown in systems of governance and economic sectors.¹³⁹ More than 38,000 children were recruited by rebel groups as child soldiers¹⁴⁰ and a significant proportion of the population was displaced. Men and women were victims of sexual violence during both conflicts.¹⁴¹ Various studies have sought to quantify the incidences of sexual violence perpetrated during these conflicts but the results are unclear. Some estimate that up to 77% of all Liberian women have suffered from a form of sexual violence.¹⁴² Others suggest that this figure is closer to between 10 and 20% of women and 7% of men.¹⁴³ Combatants experienced significantly higher rates. Another study demonstrated that 42.3% of women and 32.6% of men who participated in fighting were exposed to sexual violence during the conflicts.¹⁴⁴

The Report of the Truth and Reconciliation Commission and Impunity

The Truth and Reconciliation Commission (TRC) was set up under the 2003 Peace Agreement which ended the conflict. Established in 2006,¹⁴⁵ it conducted investigations over two years, before publishing its report in 2009.

138. Background, Website of the United Nations Mission in Liberia, <https://unmil.unmissions.org/background>.

139. See figures on [peacebuildingdata.org](http://www.peacebuildingdata.org), <http://www.peacebuildingdata.org/research/liberia/results/civil-war/war-related-violence>

140. Child Soldiers International, Charles Wratto, “If we didn’t pick up the guns, we would have been killed”, <https://www.child-soldiers.org/news/if-we-didnt-pick-up-the-guns-we-would-have-been-killed>.

141. Johnson, Asher, Rosborough *et al.*, “Jama, Association of Combatant Status and Sexual Violence with Health and Mental Health Outcomes in Liberia” (2008), <http://jama.jamanetwork.com/article.aspx?articleid=182379>.

142. Prof. O. Oamnyondo RN, Marie-Claire, Consultant to the World Health Organization, “Sexual Gender-Based Violence and Health Facility Needs Assessment (Montserrado and Bong Counties), Liberia”, September 2004, www.who.int/hac/crises/lbr/Liberia_GBV_2004_FINAL.pdf.

143. Cohen, Dara Kay; Green, Amelia Hoover, “Dueling incentives – Sexual violence in Liberia and the politics of human rights advocacy”, *Journal of Peace Research*, 30 May 2012, <http://jpr.sagepub.com/content/49/3/445.full.pdf>, p. 446, 450. Cohen draws on “four independent sources of data: quantitative data taken from statements made to the TRC, two peer-reviewed investigations on violence in Liberia and the 2008 Liberia Demographic and Health Survey (Liberia Institute of Statistics and Geo-Information Services, 2008). *Ibid.*, p. 447. See also Cohen, Dara Kay; Green, Amelia Hoover, “Were 75 percent of Liberian women and girls raped? No. So why is the U.N. repeating that misleading ‘statistic’?”, *Washington Post*, 26 October 2016, https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/26/were-75-percent-of-liberian-women-and-girls-raped-no-so-why-is-the-un-repeating-that-misleading-statistic/?utm_term=.f7a64c865edf.

144. Johnson, Asher, Rosborough *et al.*, “Jama, Association of Combatant Status and Sexual Violence with Health and Mental Health Outcomes in Liberia” (2008). <http://jama.jamanetwork.com/article.aspx?articleid=182379>, *op. cit.*, p. 676-690.

145. Irin, “Liberia : Ellen Johnson Sirleaf installe la Commission Vérité et Réconciliation”, 22 February 2006, <https://reliefweb.int/report/liberia/liberia-ellen-johnson-sirleaf-installe-la-commission-v%C3%A9rit%C3%A9-et-r%C3%A9conciliation>.

The final Liberian TRC report documents sexual violence perpetrated in both conflicts. The report describes brutal acts of rape, gang rape and multiple rapes, as well as rape with objects including guns, cassava plants, sticks, boots and knives. The report explains that these acts often overlapped with forced labor. Women, many of whom were obliged to serve the combatants, were also sexually abused and/ or kept as sexual slaves.¹⁴⁶ The TRC report also states that women's experiences during the conflicts often went unreported and hence were under-represented in recorded violations.¹⁴⁷

The section of the TRC report which sparked the most controversy contains recommendations calling for the opening of criminal prosecutions against the perpetrators of crimes committed during the conflicts. In its recommendations, the TRC called for the establishment of an Extraordinary Criminal Tribunal to try 116 people identified as having committed serious crimes, including crimes of sexual violence.¹⁴⁸

The recommendations called for the prosecution of persons who were still in positions of power and influence, including the senator Prince Johnson, or suggested that they should be barred from holding public office,¹⁴⁹ like former president Ellen Johnson Sirleaf, Nobel Peace Prize Laureate.¹⁵⁰ This partly explains why the TRC recommendations today remain unimplemented.¹⁵¹

Prosecutions before the Liberian courts are currently impossible due to the political influence of alleged war criminals and inadequate judicial capacity. Transparency International only gives Liberia 31 out of 100 points on the corruption scale, which places it in 122nd place out of 180 countries.¹⁵² Human rights reports have been denouncing the lack of judicial independence for years.¹⁵³ Furthermore, many alleged war criminals continue to hold senior positions of power and there has not been a single prosecution for war crimes in Liberia; the most blatant example is probably that of Senator Prince Johnson, one of the most notorious former leaders of an armed group, whose brutal crimes are well documented.¹⁵⁴ When the new president George Weah took office in January 2018 after peaceful elections, many Liberians hoped that he would mark a new era in which investigations and prosecutions concerning the atrocities committed during the Liberian civil wars would finally become a reality on Liberian territory. However, until today, these hopes have not been borne out. Unfortunately, during his campaign and since taking office, Weah has remained vague about his intention to implement the TRC recommendations.¹⁵⁵ Finally, none of the existing international tribunals have a mandate to prosecute the crimes committed in Liberia.

146. *Liberia Truth and Reconciliation Commission Report Volume II: Consolidated Final Report*, 30 June 2009, p. 40.

147. *Ibid.*, p. 70.

148. *Ibid.*, p. 349.

149. *Ibid.*, p. 361.

150. Irin, "Justice and peace 10 years on in Liberia", 4 July 2013, <http://www.irinnews.org/report/98356/briefing-justice-and-peace-10-years-liberia>.

151. On the reasons why recommendations have not been implemented, see James-Allen, Paul; Weah, Aaron; Goodfriend, Lizzie, *Beyond the Truth and Reconciliation Commission: Transitional Justice Options in Liberia*, International Center for Transitional Justice, May 2010, <https://www.ictj.org/sites/default/files/ICTJ-Liberia-Beyond-TRC-2010-English.pdf>.

152. <https://www.transparency.org/country/LBR#>

153. See for example US State Department 2017 *Human Rights Report on Liberia*: "The constitution provides for an independent judiciary, but judges and magistrates were subject to influence and engaged in corruption", available at <https://www.state.gov/j/drl/rls/hrpt/2016/af/265270.htm>.

154. See for example <http://www.newnarratives.org/stories/liberia-is-former-warlord-prince-johnson-fit-to-rule/> and <https://www.youtube.com/watch?v=c5xJpj7EmQM>.

155. <https://frontpageafricaonline.com/politics/president-weah-shows-uncertainties-over-implementing-trc-recommendations/>.

Sexual Violence in Liberia Today: A Consequence of the Conflicts and Impunity

The total absence of convictions of perpetrators of conflict-related sexual violence contributes to normalizing such violence, even after the conflict has ended.¹⁵⁶ According to Nicola Jones, researcher at the Overseas Development Institute (ODI): “War can create an environment in which sexual violence is normalized. After the conflict, men are often aggressive, ‘hyper-masculine’ and struggle to adapt to peacetime”.¹⁵⁷ This is the case in Liberia, where one of the consequences of the conflict and the absence of prosecutions for the crimes perpetrated is the widespread perception that crimes of sexual violence can be committed with impunity.¹⁵⁸

Such impunity for crimes committed during the conflicts, combined with the culture of ‘hyper-masculinity’ which is a legacy from the war,¹⁵⁹ as well as the incapacity of state institutions to adequately and effectively prevent and sanction perpetrators of such crimes mean that the rate of sexual violence in Liberia remains very high, even 15 years after the war.

In 2015, according to the United Nations, only 805 cases of rape were reported and only 2% of the perpetrators of rape were convicted.¹⁶⁰ In the first half of 2016, rape, in particular against minors, was the second most reported crime in Liberia.¹⁶¹ However the number of reported cases is far from reflecting the prevalence of sexual violence in Liberia. Stigmatization, fear, cultural norms, as well as victims’ lack of confidence in the local authorities mean that many fail to report crimes.¹⁶² It is therefore difficult to obtain accurate figures on the actual rate of sexual violence in Liberia and the number of unrecorded crimes of sexual violence is without doubt much higher than the number reported to the authorities.

The “Jungle Jabbah” Case, or Using the Offense of Immigration Fraud to Achieve Justice

Until last year, during the “Jungle Jabbah” trial, none of the victims of sexual violence perpetrated during the first civil war in Liberia had ever testified before a judge.¹⁶³

Mohammed Jabbateh, also known by his nom de guerre “Jungle Jabbah”, was arrested in April 2016, while living in Philadelphia in the United States, and charged with four counts of fraud and perjury.

156. Domingo, P., Holmes, R., Rocha-Menocal, A. and Jones, N., with Bhuvanendra, D. and Wood, J., *Assessment of the evidence of links between gender equality, peacebuilding and statebuilding: literature review*, Overseas Development Institute, 2013; Ni Aoláin, F. “Women, Vulnerability and Humanitarian Emergencies”. *Legal Studies Research Paper Series Research Paper No. 10-27*, Minneapolis: University of Minnesota Law School, 2010.

157. *Jeune Afrique*, “Libéria, les viols dus à une culture de ‘l’hyper masculinité’ héritée de la guerre”, 9 June 2014, <http://www.jeuneafrique.com/depeches/16007/politique/liberia-des-viols-dus-a-une-culture-de-lhyper-masculinite-heritee-de-la-guerre/>.

158. Government of Liberia/UN Joint Programme on Sexual and Gender Based Violence, *In-depth Study on Reasons for High Incidence of sexual and gender-based violence in Liberia – Recommendations on Prevention and Response*, October 2011.

159. Overseas Development Institute, “Legacy of war: Hyper-masculinity drives sexual violence harming teenage girls, warns think tank”, June 2014, <https://www.odi.org/news/716-legacy-war-hyper-masculinity-drives-sexual-violence-harming-teenage-girls-warns-think-tank>.

160. OHCHR, “Addressing Impunity for Rape in Liberia”, October 2016, p. 6, http://www.ohchr.org/Documents/Countries/LR/SGBV_ReportLiberia_October2016.docx.

161. *Ibid.*

162. Overseas Development Institute, Nicola Jones, Janice Cooper, Elizabeth Presler-Marshall and David Walker, “The fallout of rape as a weapon of war”, June 2014, <https://www.odi.org/publications/8464-fallout-rape-weapon-war>.

163. The only two Liberians who have been put on trial are Charles Taylor, former president, who was sentenced to 50 years’ imprisonment by the Special Court for Sierra Leone related to crimes perpetrated in Sierra Leone and Chuckie Taylor, his son, who has US nationality, sentenced to 90 years’ imprisonment in Miami for torture committed during the second civil war in Liberia.

He was alleged to have obtained asylum in the United States by concealing his role as commander within the rebel group, the United Liberation Movement of Liberia for Democracy (ULIMO) and the abuses he committed or ordered during the first civil war in Liberia. On 18 October 2017, he was found guilty before a jury of having lied to immigration officers by denying having ordered, incited, assisted or otherwise participated in the atrocities committed during the first civil war in Liberia.¹⁶⁴ According to the indictment, he was in particular involved in conscription of child soldiers, enslavement, participation in murders and sexual violence.¹⁶⁵ During a hearing on 19 April 2018, he was sentenced to 30 years' imprisonment.¹⁶⁶

Although Mohammed Jabbateh was not directly charged with sexual violence, this case is an example of the use of an alternative judicial mechanism to enable survivors of sexual violence to make their voices heard.

During the trial, more than 15 witnesses came from Liberia to testify about crimes committed against them by the ULIMO armed group. Sexual violence figured prominently in the crimes described by witnesses during the trial. In his opening statement, the prosecutor described the *modus operandi* of the ULIMO, highlighting the way in which the combatants used sexual violence to terrorize populations. According to the prosecution, when attacks on villages were over, "Jungle Jabbah" ordered the women survivors, including teenagers, to become sexual slaves to the ULIMO combatants. Those who refused were punished with death.

Three direct victims of rape, including a victim of "Jungle Jabbah" himself,¹⁶⁷ described in detail the crimes they suffered at the hands of the ULIMO combatants.¹⁶⁸ Several others explained that they were witnesses to sexual violence. One witness described having seen "Jungle Jabbah" put a pistol into her sister's vagina and pull the trigger.¹⁶⁹

In cross examination, the attorney for the defense asked all the witnesses why they had not reported the crimes to the Liberian authorities prior to meeting the American authorities who were investigating Mohammed Jabbateh. Their answers reveal the extent to which Liberian victims had no hope of obtaining justice in their country. Witness 2, questioned about whether she had ever reported that Jabbateh had raped her to anyone in the 23 years before the US government talked to her, replied that she had told people but that she never "*took it to the government*" because "*they wouldn't do anything about it*". Until the «Jungle Jabbah» trial she had never had the impression that the authorities would listen to her.

Legally it was impossible to prosecute Mr Jabbateh for war crimes or crimes against humanity in the United States because US law does not allow it.¹⁷⁰ Nevertheless, the trial for immigration fraud

164. Indictment, *United States v. Mohammed Jabbateh a/k/a "Jungle Jabbah"*, United States District Court for the Eastern District of Pennsylvania, §27, <https://www.justice.gov/usao-edpa/file/840546/download>.

165. *Ibid.*

166. Civitas Maxima, *Legal monitoring of the Mohammed Jabbateh case*, <https://www.civitas-maxima.org/en/trials/legal-monitoring-of-the-jungle-jabbah-case/reports/2018-04-20-jungle-jabbah-sentenced-to-30>.

167. Witness 2, see Civitas Maxima, *Legal monitoring of the Mohammed Jabbateh case*, <https://www.civitas-maxima.org/en/trials/legal-monitoring-of-the-jungle-jabbah-case/reports/2017-10-04-trial-day-2-opening-statements> and <https://www.civitas-maxima.org/en/trials/legal-monitoring-of-the-jungle-jabbah-case/reports/2017-10-05-trial-day-3-the-governments>.

168. Witness 2, 3, and 14, see Civitas Maxima, *Legal monitoring of the Mohammed Jabbateh case*, <https://www.civitas-maxima.org/en/trials/legal-monitoring-of-the-jungle-jabbah-case/reports/2017-10-05-trial-day-3-the-governments> and <https://www.civitas-maxima.org/en/trials/legal-monitoring-of-the-jungle-jabbah-case/reports/2017-10-11-trial-day-5-week-2-begins>.

169. Witness 4, Civitas Maxima, *Legal monitoring of the Mohammed Jabbateh case*, <https://www.civitas-maxima.org/en/trials/legal-monitoring-of-the-jungle-jabbah-case/reports/2017-10-05-trial-day-3-the-governments>.

170. For further explanation of the US legal grounds, see Insinga, Alexandra, "Mohammed Jabbateh Conviction: A Human Rights Trial Cloaked in Immigration Crimes", <https://www.justsecurity.org/46801/mohammed-jabbateh-conviction-human-rights-trial-cloaked-immigration-crimes/>.

represented an opportunity for many victims to testify to the horrors they experienced for the first time. One of the witnesses expressed this satisfaction when the defense attorney asked why he had waited 20 years before reporting the crimes to the authorities, replying *"I would tell you that I do not have a specific year to say that I was waiting for, but I was waiting for justice"*.¹⁷¹

Ultimately, by refusing the advantages of immigration to war criminals, exposing their abuses and sentencing them to terms of imprisonment, trials for immigration fraud enable victims to have a sense of justice. When Jabbateh's sentence was announced, victims in Liberia celebrated it as an important victory.¹⁷² According to a press article, one survivor said, *"The things that he did in Liberia here, especially Gbarqueta in Gbarpolu, let him bear the penalty... He ran away from here to America, taking himself to be a good person. Let him bear the penalty"*.

Alternative Justice Mechanisms and the Liberian Victims' Movement

The Jabbateh case is a manifestation of a movement of victims in Liberia who are increasingly refusing to accept the *status quo*. Having been abandoned by their own legal authorities, they are supported by international lawyers and Liberian human rights defenders¹⁷³ to seek opportunities to assert their rights outside their country and by using alternatives to traditional judicial mechanisms. Several other trials against former rebel commanders from Liberia will take place in 2018 and 2019, in particular trials against Thomas Jucontee Woewiyu in Philadelphia, Agnes Taylor in London, Alieu Kosiah in Bellinzona, Switzerland and Martina Johnson in Gent, Belgium.¹⁷⁴ It is expected that survivors of sexual violence will come to testify in all these trials and some will have the right, as civil parties, to claim compensation in the event of conviction.

The impact of these extraterritorial proceedings on the fight against sexual violence in Liberia has yet to be evaluated. Liberian human rights defenders are trying to use arrests and trials in Europe and the United States to put pressure on the new Liberian president, George Weah, to take action against impunity. On the day of his inauguration, twenty international, African and Liberian human rights organizations sent an open letter to the Liberian president calling on him to support the opening of investigations into the atrocities committed during the conflicts and the initiation of criminal prosecutions before national courts against the alleged perpetrators.¹⁷⁵ Likewise, the Deputy Secretary General of the United Nations, Amina Mohammed, strongly recommended that the President implement the recommendations issued by the Truth and Reconciliation Commission.¹⁷⁶ As a result of the extraterritorial proceedings, the President faces a situation in which the international community as well as his own citizens are questioning why justice has to be sought elsewhere and cannot be ensured in their own country.

171. Civitas Maxima, Strategic Plan 2017, p. 25.

172. *Front Page Africa*, "Jungle Jabbah: Gbarpolu, Cape Mount Celebrate Jailing of Ex-warlord in America", 24 April 2018, <https://frontpageafricaonline.com/news/2016news/jungle-jabbah-gbarpolu-cape-mount-celebrate-jailing-of-ex-warlord-in-america/>.

173. In particular, Civitas Maxima (www.civitas-maxima.org) and its sister organization, the Global Justice and Research Project (www.globaljustice-research.org).

174. Woewiyu was Minister of Defense and then Minister of Labour under the Taylor regime. He is accused of having lied on his immigration application concerning his involvement in war crimes. Agnes Taylor is the ex-wife of Charles Taylor. She has been charged with torture in London. Alieu Kosiah was a commander of the group ULIMO and is suspected of having committed war crimes during the first Liberian civil war. Martina Johnson was artillery commander in Taylor's rebel group during the first civil war.

175. *Front Page Africa*, "Human Rights Groups Urge President Weah to Prosecute War Crimes", January 2018, <https://frontpageafricaonline.com/news/2016news/human-rights-groups-urge-president-weah-to-prosecute-war-crimes/>.

176. *West African Journal Magazine*, "UN Pressures Liberia to Implement TRC Report", 23 March 2018, <https://westafricanjournalmagazine.com/2018/03/23/un-pressures-liberia-to-implement-trc-report/>.

The survivors of sexual violence are confronted with the legacy of the war and impunity in Liberia on a daily basis. Trials like that of “Jungle Jabbah” not only give Liberian victims the opportunity to make their voices heard but contribute to a movement demanding access to justice and an end to impunity. In a country where sexual violence remains endemic, even 15 years after the end of the conflicts, extraterritorial trials represent a first step in this fight against impunity. The absence of fair trials in Liberia is becoming increasingly incomprehensible to the population, as foreign courts find Liberian nationals guilty of these crimes. It is now for Liberia to take the second step and grant victims of sexual violence the opportunity to effectively assert their rights before national courts.

Establishing a Mixed Tribunal Within a National Justice System to Combat Sexual Violence: The Hissène Habré Case

The possibility of initiating legal proceedings in one State against perpetrators of serious crimes, including crimes of sexual violence, committed in another State, on the basis of universal or extra-territorial jurisdiction, constitutes an important tool to ensure accountability where the national justice system of the country in which the crimes were committed is unable or unwilling to prosecute these crimes and where the International Criminal Court (ICC) does not have jurisdiction to do so. But what happens when the legal system which could invoke universal jurisdiction is not in a position (because it is also unable or unwilling) to prosecute? We look back at the case of Hissène Habré, President of Chad between 1982 and 1990 before seeking exile in Senegal, which eventually took place in Dakar in a hybrid tribunal: the Extraordinary African Chambers (EAC) within the Senegalese Court system.

Victims of crimes committed by the former dictator, supported by Chadian, Senegalese and international civil society organizations, first attempted to seek justice in Chad (the first complaint was filed there in October 2000) and in Senegal from January 2000 due to Habré's presence in Senegal, for crimes against humanity, extermination, torture and acts of cruelty, as well as enforced disappearances. However, faced with legal obstacles, victims supported by their lawyers and NGOs took the case to Belgium, where they filed a complaint with an application to participate as civil parties in November 2000, on the basis of universal jurisdiction; these proceedings led to a Belgian judge issuing an international arrest warrant in September 2005 against Habré for crimes against humanity, war crimes, torture and violations of international humanitarian law, together with an extradition request addressed to Senegal. Following legal and constitutional reform in Senegal, in September 2008 victims supported by associations filed a new complaint against Hissène Habré, with an application to participate as civil parties, with the prosecutor of the Dakar Appeal Court.

Senegal's unwillingness to extradite or prosecute Habré eventually led to recourse to the African Union and the International Court of Justice (ICJ). On 18 November 2010, the ECOWAS Court of Justice decided that Senegal should prosecute and try Habré *"strictly within the framework of ad hoc proceedings of an international nature"*.¹⁷⁷ On 20 July 2012, the ICJ found that Senegal had an obligation to extradite or prosecute the former head of State for his crimes.¹⁷⁸ These decisions led to the establishment in August 2012, by the African Union and the Senegalese authorities, of the EAC,¹⁷⁹ a so-called "hybrid" or "mixed" model comprising national judges and judges from other member States of the African Union (Burkina Faso, Mali), which opened in February 2013. The case was conducted in accordance with national procedural law and a 2007 Senegalese law making it possible, on the basis of extraterritorial jurisdiction, to try cases of genocide, crimes against humanity and war crimes at the national level, even when committed outside the territory.¹⁸⁰

177. Court of Justice of the Economic Community of States of West Africa (ECOWAS), *Hissein Habré case cl REPUBLIC OF SENEGAL*, GENERAL ROLE No. ECW/CCJ/APP/07/08 JUDGEMENT NO: ECW/CCJ/JUD/06/10, 18 November 2010.

178. Questions relating to the obligation to prosecute or extradite (*Belgium v. Senegal*), judgment, I.C.J. Reports 2012, p. 422, <https://www.icj-cij.org/files/case-related/144/144-20120720-JUD-01-00-EN.pdf>.

179. FIDH, Questions & Answers on the Hissène Habré case, 26 April 2017, <https://www.fidh.org/en/region/Africa/chad/questions-answers-on-the-hissene-habre-case>.

180. For a timeline of the Hissène Habré case leading up to the verdict in May 2016, see the FIDH website, <https://www.fidh.org/en/issues/litigation/litigation-against-individuals/hissene-habre-case/chronology-of-the-hissene-habre-case>.

After three years of proceedings, on 30 May 2016 the Extraordinary African Chambers sentenced Hissène Habré to life imprisonment for crimes including mass sexual violence committed when he was in power between 1982 and 1990.¹⁸¹ Habré was found guilty of war crimes in his capacity as commander and of crimes against humanity and torture as a member of a joint criminal enterprise, including rape and sexual slavery. He was also found guilty as a direct perpetrator of multiple rape of one of the civil parties who testified during the trial, although this charge had not been included in the committal order since the evidence emerged during the trial. Victims' legal representatives fought tirelessly for such charges to be included during the trial, in order to reflect the evidence emerging from the testimony of a victim who accused Hissène Habré of committing rape as a direct perpetrator. The verdict was also made possible by an *amicus curiae* submitted to the judges which analysed the multiple forms of sexual violence under customary international law and called on the Chambers to revise the charges in order to reflect the accounts of victims of sexual violence.¹⁸² A gender expert was also appointed to advise the judges working on the case. The trial verdict was confirmed on appeal on 27 April 2017, however the Appeals Chamber acquitted Hissène Habré of rape as a direct perpetrator for procedural reasons: this offense related to new evidence which was not mentioned in the order for committal to the EAC and which had not been examined at the investigation stage by the EAC investigating judges. This appeal verdict and in particular the partial acquittal of Hissène Habré for rape as a direct perpetrator led many experts to underline the importance of including charges of sexual violence at the pre-investigation and investigation stage. In this respect, the presence of experts in gender crimes is essential in order to support victims of sexual violence and ensure optimal conditions for them to provide their testimonies to the judicial authorities.

This trial brought justice to thousands of victims of repression and opened up possibilities for reparation. The Appeal Chamber ordered Hissène Habré to pay reparation to 7,396 civil parties, amounting to a total of over 82 billion FCFA (approximately 154 million USD). This should be financed through the Victims' Trust Fund which is to be established and linked to the EAC; a fund responsible for centralising the proceeds of seizures, as well as voluntary contributions from various sources. Although the Trust Fund Statute was adopted in January 2018,¹⁸³ it has not yet begun to implement the reparation measures owed to victims.

181. FIDH, "Hissène Habré convicted of international crimes: a historic verdict for victims", Press release, 3 June 2016, <https://www.fidh.org/en/region/Africa/chad/hissene-habre-convicted-of-international-crimes-a-historic-verdict>.

182. Although the judges did not formally accept the admission of the *amicus curiae* in the case, the judgement nevertheless reflects many of the arguments which it raised. See Extraordinary African Chambers, *Amicus curiae* brief of the Human Rights Center at the University of California, Berkeley, School of Law, and international experts on sexual violence under international criminal law, 8 December 2015, <https://www.law.berkeley.edu/wp-content/uploads/2015/04/MICUS-CURIAE-BRIEF-OF-THE-HUMAN-RIGHTS-CENTER-AT-THE-UNIVERSITY-OF-CALIFORNIA-BERKELEY-SCHOOL-OF-LAW-AND-INTERNATIONAL-EXPERTS-ON-SEXUAL-VIOLENCE-UNDER-INTERNATIONAL-CRIMINAL-LAW-Eng.pdf>.

183. HRW, "Hissène Habré Case: Trust Fund for Victims", 7 February 2018, <https://www.hrw.org/news/2018/02/07/hissene-habre-case-trust-fund-victims>.



African Union Summit in Addis-Ababa, Ethiopia, on 3 July 2017. © Minasse Wondimu Hailu / Anadolu Agency / AFP

African Regional Mechanisms

*Human rights defenders have been using **African human rights protection mechanisms** for several years as tools to assert the rights of victims of violations to justice and reparation, in cases where national jurisdictions are inadequate. Initiating such procedures has resulted in significant decisions for victims' rights. In relation to victims of sexual violence, the case-law of the African mechanisms is emerging but remains under development. In this article, **the experts from the Institute for Human Rights and Development in Africa (IHRDA)** describe several proceedings which have been initiated before these mechanisms in support of victims of sexual violence. The authors give a mixed assessment of the impact of this litigation, given the continued lack of willingness on the part of the states concerned to implement the resulting decisions and recommendations. The authors also examine the procedural challenges and make specific recommendations to the mechanisms, as well as to the lawyers and organizations who wish to use them.*

Litigating Sexual Violence Before African Regional Mechanisms

By the Institute for Human Rights and Development in Africa (IHRDA)

Introduction

The importance of litigating cases of sexual violence at the regional level cannot be overstated. Regional litigation has filled in the gaps faced at the domestic level as concerns litigating sexual violence, effectively promoting human rights. The regional mechanisms available for litigation such as the African Commission on Human and Peoples' Rights (ACHPR), the African Court on Human and Peoples' Rights, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and the Economic Community of West African States Court of Justice (ECOWAS Court) have provided an important avenue for recourse to victims who have otherwise failed to find redress at the national level. It can be said that as a result, there has been improved advocacy on issues of sexual violence ; simultaneously, attempts to remedy these violations have been made. Legal standards have been set beyond the individual cases and human rights law advanced.

The gains made through litigation of sexual violence have however been fraught with challenges that remain to be addressed. These are similar across the various mechanisms and relate to procedural issues or the effectiveness of regional litigation overall. The greatest of the challenges faced remains that despite successful litigation leading to progressive decisions and judgments that detail sexual violence as a human rights violation; there remains a failure to implement the relevant judicial decisions by State parties. Whether the failure to enforce regional decisions and judgments by States arises from a perceived infringement into State sovereignty, particularly as relates to the State's power to establish its own laws; or rather that the regional judicial decisions contrast with established government practice, there still remains an unsettling lack of implementation of decisions that obstructs the fight against sexual violence and its consequences in States.

To highlight the challenges faced litigating issues of sexual violence regionally; this article will draw attention to decisions rendered from three of the regional Human Rights bodies in the African system; the ACHPR, the ECOWAS Court and the ACERWC.

The Egyptian Initiative for Personal Rights (EIPR) Case Before the ACHPR

The Egyptian Initiative for Personal Rights (EIPR) and INTERIGHTS, two non-government organizations with observer status before the ACHPR, brought a case against Egypt on behalf of four victim women who had suffered various violations at the hands of both private actors and State agents during the course of a political demonstration in 2005.¹⁸⁴

184. *Egyptian Initiative for Personal Rights and INTERIGHTS v. Égypt* [2011], CADHP, Communication No 323/06.

Four female journalists – Shaimaa Abou Al-Kheir, Nawal Ali Mohammed Ahmed, Abir al-Askari and Iman Taha Kamel – were in front of the press syndicate when a riot, culminating in violence, broke out at the political demonstration organized by the political group, the Egyptian Movement for Change (Kefaya), between their members and supporters The National Democratic Party, the then ruling party. Each of the victims was violently beaten and sexually assaulted, with some of them additionally verbally assaulted. While State security officers were present, they failed to intervene to stop the attacks. Eye-witnesses and security officers' accounts were not taken into consideration by investigators and the victims further received threats from Egypt's State Security Intelligence (SSI) asking them to withdraw their complaint. The sham investigation led to the failure to establish the perpetrators despite knowledge and/or participation by the security officials in the violent attacks and as a result prosecution at the domestic level was ruled impossible. EIPR and INTERIGHTS therefore brought their case before the ACHPR claiming that a number of rights of the victims, including their right to non-discrimination as women, as per the African Charter on Human and Peoples' Rights ('African Charter') had been violated by Egypt.

Regarding the victims' right to non-discrimination (against women) claimed to have been infringed by Egypt, the ACHPR held that the abuse suffered by the victims was gender-specific and therefore amounted to discrimination on the grounds of sex. The discriminatory intent underlying the attacks was apparent from the *"abusive language generally used to degrade and rip off the integrity of women who refuse to abide by traditional, religious and even social norms"*.¹⁸⁵ Similarly, the gender-based nature of the assaults was made clear through the type of harassment and physical violence used which can only be directed at women.¹⁸⁶ As a result, the ACHPR held that instances such as these *"where women are targeted due to their political opinion for the mere fact of being women, and are not assured the necessary level protection by the State in the face of that violence, a range of their fundamental human rights are at stake, including their right to sexual equality"*.¹⁸⁷

This decision was the first issued by the ACHPR on women's rights. Despite this significance however, there was no consideration of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ('the Maputo Protocol') as Egypt is yet to ratify this instrument. Nonetheless, the important recognition by the Commission that gender-based violence is a form of discrimination against women has influenced the understanding of States' obligations in this regard. States have a duty to protect women against sexual harassment and other forms of gender-based violence by thoroughly investigating, prosecuting and punishing the cases where it occurs. To neglect this duty constitutes a violation of women's rights. Whilst this should impact on States' behavior going forward, Egypt has not taken any action as per the ACHPR's recommendation to investigate the violations and bring the perpetrators to justice. It has further failed to comply with the additional recommendations proposed by the ACHPR by not ratifying the Maputo Protocol; failing to amend its laws in line with the African Charter and; failing to pay compensation to each of the victims for the physical and emotional damages/traumas they suffered in relation to the case.¹⁸⁸ This illustrates the difficulty faced in decisions rendered at the regional level overall; while victories are won in theory for victims; practical implementation for actual fulfillment and recognition of their rights remains a challenge. The notion that recommendations issued by the ACHPR are simply that – recommendations – forms a major challenge and in effect denies justice to victims. Moreover, that

185. *Ibid.*, at §143.

186. *Ibid.*, at §144.

187. *Ibid.*, at §155.

188. The London School of Economics Centre for Women, Peace and Security, *"EIPR and Interights v Egypt"*, <http://blogs.lse.ac.uk/vaw/landmark-cases/a-z-of-cases/eipr-and-interights-v-egypt/>. Egyptian Initiative for Personal Rights, "Three years of willful disregard: Egyptian government refuses to implement ruling of African Commission ordering renewed investigation of Black Wednesday case. Survivors of mass sexual assaults have no recourse to remedies", <https://eipr.org/en/press/2016/05/three-years-willful-disregard-egyptian-government-refuses-implement-ruling-african>.

mass sexual violence against women in the same circumstances has escalated following the events leading to the EIPR decision may further illustrate the futility often found in litigating at the regional level.¹⁸⁹ By failing to enforce the recommendations given, an environment in which sexual violence is prevalent has effectively resulted.

The *Dorothy Njemanze et al.* Decision at the ECOWAS Court and a Pending Case Before the ACERWC

The claimants Dorothy Njemanze, Edu Ene Okoro, Justina Etim and Amarachi Jessyforth, supported by the Institute for Human Rights and Development in Africa (IHRDA), Alliances for Africa, Nigerian Women Trust Fund and the law firm of SPA Ajibade, brought a suit against the Federal Republic of Nigeria based on the violent, cruel, inhuman, degrading and discriminatory treatment they had suffered at the hands of various law enforcement agents in Abuja, Nigeria. Between January 2011 and March 2013, each of the claimants was abducted by State agents and then sexually, physically and verbally assaulted before being threatened and unlawfully detained. These State agents included those employed by the Abuja Environmental Protection Board, the Nigerian police and the Nigerian military. They were each arrested and called prostitutes simply on the grounds that they were found on the streets of Abuja at night. They were then further physically assaulted before being held unlawfully without charge in inhuman conditions. On 14 September 2014, they brought their case before the ECOWAS Court claiming violations amongst others, of the State's duty to recognize and fulfill human rights; the right to non-discrimination; the right to equality before the law; the right to dignity; the right to life, integrity and security of the person and the right to discrimination as specific to women, as guaranteed by various international instruments including the African Charter and the Maputo Protocol.

On 12 October, 2017, the ECOWAS Court held that the branding of the women as prostitutes constituted verbal abuse, as the use of the word is humiliating, derogatory and degrading.¹⁹⁰ The use of the word therefore violated the right of these women to dignity. The Court further held that the unlawful arrests of the women, as the arrests were not premised on legal grounds, violated the women's right to liberty. Additionally, the Court held that based on the facts presented, the whole operation that saw the arrest of the plaintiffs for prostitution by various State agents on different dates, simply because they were women who are out late at night, was specifically targeted against women.¹⁹¹ As such, this operation in that it was targeted against women who are out late night, evidences gender-based discrimination.¹⁹² The arrests therefore violated the women's right to be free from discrimination and this was further reinforced by the lack of the investigation carried out by State agents on the alleged crime (prostitution) the women were accused of committing.

The *Dorothy Njemanze et al.* case is significant in as much as it is the first case whereby the Maputo Protocol has been pronounced upon by a regional court. The Court found that the obligation for States to eliminate discrimination against women (Article 2); the right to dignity (Article 3); the right to life, integrity and security of the person as well as the duty of the State to safeguard it (Article 4(1) and 4(2)); the duty to eliminate harmful practices (Article 5); the duty to ensure access to justice and equal protection before the law (Article 8); and the State's duty to ensure female victims' right to a remedy (Article 25) as mandated and guaranteed by the Maputo Protocol had been infringed by Nigeria.

189. Human Rights Watch, "Egypt: Epidemic of Sexual Violence", <https://www.hrw.org/news/2013/07/03/egypt-epidemic-sexual-violence>, "Egypt's Sexual Assault Epidemic", <https://www.aljazeera.com/indepth/features/2013/08/201381494941573782.html>.

190. *Dorothy Chioma Njemanze, Edu Orokoro, Justina Etim and Amarachi Jessyford v. Federal Republic of the Nigeria* [2017,] ECOWAS, ECW/CCJ/JUD/08/17, page 40.

191. *Ibid.*

192. *Ibid.*

While a favorable judgment for most of the victims, the second plaintiff was excluded from award as it was held by the ECOWAS Court that her claim was barred by provisions of the Rules of the Court which provided for a three year limitation period. This issue of statutory limitation of human rights claims was again challenged in a more recent judgment as French and English versions of the ECOWAS Rules of Court differ on the matter. A few months after *Dorothy Njemanze et al.* was delivered, the ECOWAS Court ruled that indeed cases of human rights violations were not covered by the statutory limitations and it was therefore able to hear all human rights violations cases regardless of when they occurred.¹⁹³ This inconsistency in procedure and application or interpretation of the law serves to erode victims' confidence in the system of regional litigation especially as victims of sexual violence who often face stigma and look at the system as a final chance to obtain justice.

Moreover, delays in procedure (with several adjournments) served to further frustrate the process of litigation and justice for all the victims concerned in the case. While again, this is characteristic of litigation more broadly at the regional level, as concerns issues of sexual violence, this is especially problematic as delays in hearing may serve to re-traumatize the victims concerned. This is a similar obstacle faced at the ACERWC where a case concerning a minor represented by IHRDA remains pending three years after it was first filed. Additionally, the numerous delays consequently impact on difficulties encountered accessing justice especially in regard to the expense to attend hearings. The regional mechanisms available for litigation are often situated outside of the victims' home-country and immediate reach and therefore require a considerable amount of expenses for frequent travel. This is further amplified with numerous delays and in effect could be seen to hinder effective access to justice for many victims unable to meet the cost.

Ancillary to the challenges faced with delays litigating before regional mechanisms is the additional challenge of frivolous applications made by government parties so as to hinder the litigation process. In the still pending case before the ACERWC filed by IHRDA on behalf of a minor, the respective State concerned has attempted to frustrate the case by filing an application to reverse the admissibility decision in the matter. As this was done after the admissibility of the case before the ACERWC had been considered, this served to further delay the proceedings. These frivolous applications moreover serve to infer that the State concerned is unlikely to implement should a positive decision in favour of the victims be awarded by the relevant State party.

Conclusion

The challenges faced litigating issues of sexual violence regionally largely remain procedural in nature and are therefore not impossible to overcome. As concerns States' unwillingness to implement decisions rendered by regional mechanisms, it is recommended that firstly, measures are employed to ensure that relevant State Parties are informed of decisions from regional mechanisms as they affect them. This can be done by the relevant regional mechanism ensuring wide and public access to the respective judgment/decision for example on their website or through notice of publication in the State's national newspapers. Where they exist, National Human Rights Institutions (NHRIs) should also be briefed by the respective regional mechanism to ensure that they disseminate information on respective judgments/decisions. This will go a long way in informing the public of a decision rendered and in effect, serve as a form of accountability for the State due to pressure that may then be exerted by civil society and the press in the State concerned. Civil society organizations involved in litigation should also endeavor to adopt implementation strategies to ensure that their work does not only end at successful litigation for victims.

193. *Federation of African Journalists et al. v The Republic of The Gambia* [2018], CEDEAO, ECW/CCJ/JUD/04/18.

Secondly, it should be made clear which respective State agency is responsible for implementing a decision rendered by a regional mechanism. This in turn will make follow-up of the decision should this be undertaken, much easier. This can be achieved simply by the relevant regional mechanism, State concerned, the NHRI and the complainants in the case jointly agreeing on the government entity responsible for implementation. Depending on the content of the recommendations, this could be a different entity in different countries (e.g. the Ministry of Foreign Affairs might be responsible for overall communications but ill-suited for actual implementation).

Recommendations made by regional mechanisms must also be clear both in language and scope so as to avoid cases whereby States are unable to act due to the vagueness of the recommendation concerned. To this end, regional mechanisms should also additionally endeavor to publish guidelines for implementation for States Parties to follow so as to facilitate the process of enforcement of regional judgments. The regional mechanisms should also undertake to implement follow-up procedures as is for example done by the ACERWC whereby Parties are required to make submissions on implementation and even as may be necessary, attend implementation hearings. This would greatly ensure that States act and parties are aware of progress being made on the ground following completion of the hearing. As concerns the ACHPR, despite follow-up powers granted by Rule 112(8) little is ever done by the Commission to ensure that decisions are being implemented. As such, it is recommended that the Commission implement the Rule and undertake outreach to other organs of the African Union so as to raise the profile of its decisions and as a form of persuasion for the State concerned to implement.

Regional mechanisms should ensure that the both consistent procedural and substantive law is allowed for so as to support effective litigation. Delays and adjournments should be best avoided with and where possible, technical capacity at the mechanisms improved. This will allow for victims, particularly those of sexual violence, to feel confident in the system of regional litigation and importantly, allow them to avoid continuing trauma with a form of closure provided by litigation. This will importantly also serve to show that not only is justice available, it is indeed accessible and effective for victims of sexual violence.

How Should Incidents of Sexual Violence Be Referred to Regional and International Bodies for the Protection of Human Rights (African Union and United Nations)?

Complaints relating to violations of human rights, including cases of sexual violence, may be referred to the **African Commission on Human and Peoples' Rights (ACHPR)**, the **African Court of Human and Peoples' Rights (African Court)**, and the African Committee of Experts on the Rights and Welfare of the Child (**Committee of Experts**).

For each of these bodies, complaints may be registered by non-governmental organizations or individuals, subject to certain conditions. Firstly, complaints may be registered solely to implicate the responsibility of a State – and, for example, not that of one or more individuals or a company – in the commission of acts of sexual violence. The responsibility of a State may be invoked under various scenarios: for example, if the State in question has not taken the necessary measures to put an end to acts of sexual violence by one or more individuals, investigate such incidents, prosecute those responsible, and provide justice and reparation to victims.

The arraigned State must be a party to one of the founding instruments of the body in question: for the ACHPR the **African Charter of Human and Peoples' Rights**; for the African Court the **African Charter and its Protocol** establishing the African Court; for the Committee of Experts the **African Charter on the Rights and Welfare of the Child**.

Competence for proceeding with the registration of complaints varies appreciably between the different bodies:

- The **ACHPR** accepts referrals by individuals or NGOs, including cases where the latter have no observer status with the ACHPR. Such individuals or NGOs need not necessarily be native to or have legal status within the state arraigned.
- The **African Court** too accepts referrals by individuals or NGOs, but on condition that the state arraigned has made a **declaration under Article 34.6 of the Protocol establishing the Court**.¹⁹⁴ By virtue of this declaration, a state authorizes the Court to receive such complaints emanating from individuals or NGOs. NGOs entitled to make referrals to the Court are exclusively those that have obtained observer status with the ACHPR.
- The **Committee of Experts** accepts referrals from individuals or NGOs recognized either by a State that is a member of the African Union and party to the Charter or by the United Nations.¹⁹⁵ A complaint may be referred without the consent of the child or children concerned, provided that their best interests can be demonstrated.

For these three bodies, complaints cannot be registered **until domestic remedies have been exhausted**, and within a **reasonable period following** the exhaustion of those remedies.

194. Up to now, only 9 Member States of the African Union have made this declaration (Benin, Burkina Faso, Côte d'Ivoire, Gambia, Ghana, Mali, Malawi, Tanzania, Tunisia).

195. This formula envisaged by the charter establishing the Committee perpetuates a legal grey area as to what is meant by an NGO "recognized" by the African Union or the United Nations. For example, certain NGOs argue that "recognized" by the African Union means "having observer status with the ACHPR", an interpretation that is opposed by certain States.

There are, however, many possible grounds for exceptions to these conditions.¹⁹⁶

Complaints relating to instances of sexual violence may also be registered with other, sub-regional bodies such as the **Court of Justice and Human Rights of ECOWAS** or the **East African Court of Justice**.¹⁹⁷

For cases related specifically to acts of sexual violence, plaintiffs may invoke violations of several dispositions of African statutes for the protection of human rights. For example, the **African Charter of Human and Peoples' Rights** contains dispositions guaranteeing the right to physical and moral integrity, the prohibition of slavery, human trafficking, torture, and cruel, inhuman, or degrading punishments (Article 5), the right to enjoy the best attainable state of physical and mental health (Article 16), and the principle of non-discrimination (Article 2). The **Protocol to the African Charter relating to the rights of women in Africa** (Maputo Protocol, 2003) obliges States parties to the Protocol to adopt specific measures to combat violence against women, notably acts of sexual violence, and to authorize medical abortion in cases of sexual aggression, rape, and incest (Article 14). The **African Charter on the Rights and Welfare of the Child** also guarantees the protection of children against sexual abuse and sexual exploitation. Plaintiffs can also rely on statutes contained in the *Guidelines* of the ACHPR on the struggle against sexual violence in Africa.

Existing jurisprudence relating to acts of sexual violence can prove of use in preparing a complaint.¹⁹⁸ In particular, plaintiffs may refer to the tool put in place by IHRDA (African Human Rights Case-law Analyser), which collates all decisions adopted by African bodies for the protection of human rights. It must, however, be said that African quasi-judicial bodies have until now delivered very few decisions related specifically to the perpetration of acts of sexual violence, mainly owing to the small proportion of complaints relating to this question.¹⁹⁹

Several elements may contribute to explaining this situation, including: obstacles to the access to justice that are encountered by victims of acts of sexual violence within their countries, and which continue to limit the possibility of initiating national judicial proceedings or bringing them to a conclusion (stigmatisation, fear of reprisals and rejection, amicable arrangements, multiple disfunctions at the levels of the police and the justice system, etc.); the length of proceedings before the African Commission, the non-obligatory character of decisions by the African Commission and the Committee of Experts, and an enduring relative ignorance of their procedures; a need for improved training for NGOs and lawyers on the question of sexual violence; and the small number of States that have made the declaration enabling NGOs and individuals to bring cases before the African Court.

The referral of facts related to violent sexual acts to these bodies may nevertheless bring victims real opportunities to obtain truth, justice, and reparation, while serving to reinforce a regional jurisprudence still in the process of construction, thus further encouraging States

196. Details of these exceptions are to be found in the guides to African quasi-judicial bodies produced by FIDH. See FIDH, *Admissibility of Complaints Before the African Court*, June 2016, https://www.fidh.org/IMG/pdf/admissibility_of_complaints_before_the_african_court_june_2016_eng_web-2.pdf.

197. It should be noted that, in order to invoke these two bodies, it is not necessary to have exhausted internal avenues of recourse.

198. See notably some of the examples cited in the preceding article on regional bodies.

199. Here too, see the preceding article on regional bodies.

to respect their regional obligations in the matter. It is important to bring strategic thinking to bear on the goals to be obtained (for the victims, in the form of reparations, legislative reforms, jurisprudential development), and to take cognizance of the investment potential of all litigation in favour of victims of sexual violence (on the material and psychological level, and in terms of human resources and time). In order to help optimise the processing of complaints registered with regional bodies, it may moreover prove necessary to share experiences within NGO- and lawyer-networks involved in the (quasi-)judicial support of victims.

At the United Nations, evidence of acts of sexual violence and their consequences for the rights of victims can be registered with the Committee for the Elimination of all forms of Discrimination Against Women (CEDAW), the Special Rapporteur on acts of Violence Against Women, their causes and consequences (SRVAW), and the Working Group on the issue of Discrimination Against Women in Law and in Practice (Working Group).

Treaty bodies

The CEDAW is a treaty body that may be invoked when acts of sexual violence or the consequences of such acts constitute a violation of the **Convention on the Elimination of all forms of Discrimination Against Women (CEDAW Convention)**.

Complaints relating to acts of sexual violence or the consequences of such acts can also be registered with other treaty bodies such as the **Human Rights Committee (CCPR)** in the case of violation of the **International Covenant on Civil and Political Rights (ICCPR)**; the **Committee on Economic, Social and Cultural Rights (CESCR)** for violations of the **International Covenant on Economic, Social and Cultural Rights (ICESCR)**; the **Committee Against Torture (CAT)**; and the **Committee on the Rights of the Child (CRC)**.

For all these bodies, complaints may be registered by non-governmental organizations (NGOs)²⁰⁰ or individuals, but only after domestic remedies have been exhausted, and within a reasonable period following the exhaustion of those remedies.

Complaints registered with treaty bodies may address solely the responsibility of a State that is (1) party to the treaty in question and (2) party to that treaty's optional protocol recognizing the Committee's competence to receive individual complaints.²⁰¹

The responsibility of a particular State may be invoked under several scenarios. For example, if the State in question has not taken the necessary measures to put an end to the perpetration of acts of sexual violence, to investigate such cases, to prosecute those responsible, and to provide justice and reparation to the victims.

A State's responsibility may also be invoked if it has not taken the measures necessary to prevent the consequences of acts of sexual violence from entailing the supplementary violation of rights guaranteed by the treaties. It is for example possible to approach the CEDAW with a complaint bearing not directly on the acts of sexual violence but on the

200. On condition of having obtained the consent of the victim in writing, except in certain cases (for example if the person is in detention without access to the outside world, or if he or she has been the victim of a forced disappearance), in which case the author of the communication must indicate clearly why it has not been possible to obtain the victim's formal consent.

201. Except for the Committee against Torture, which can be competent only if the State that is Party to the treaty has made a declaration under Article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

various violations of the rights of women constrained to bring to term a pregnancy resulting from a rape because they have not had access to abortion services. In this case, violations in particular of their right to health (Article 12 of the CEDAW Convention),²⁰² to education (Article 10), or to non-discrimination (Article 2) can be raised. Plaintiffs may thus in the context of their argument invoke violations of several protected rights, depending on the interpretation of those rights adopted by each of the committees.²⁰³

When a committee concludes that there has been a violation of the dispositions of a treaty, the state being party to that treaty is invited to provide information on the measures taken to give effect to the committee's recommendations.

Existing jurisprudence pertaining to acts of sexual violence is useful in preparing a complaint. Plaintiffs may in particular consult the tool set in place by the United Nations (*Jurisprudence database*), which collates all the decisions taken by treaty bodies.

Special procedures

The **Working Group on discrimination against women in law and in practice** and the **Special Rapporteur on acts of violence against women, their causes and their consequences**, are special procedures of the Human Rights Council.

Complaints citing acts of sexual violence or their consequences can also be registered via other special procedures, such as the special rapporteurs on human trafficking, especially of women and children, on torture and other cruel, inhuman, or degrading treatment, on modern forms of slavery, especially their causes and consequences, on the right of all people to enjoy the best possible state of physical and mental health, and on the sale and sexual exploitation of children, as well as the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity.

Special procedures are simpler to invoke than treaty bodies, and are the most rapid means. These bodies can be invoked for individual complaints against an individual or group of individuals related to acts of sexual violence. The violations concerned may be in the past, current, or, when there is a strong risk that they may materialize, potential. The complaint may involve the responsibility of a State or an intergovernmental organization, an individual, an armed group, a business, a security or military enterprise, or a private group. It may be referred by any organization or individual. So long as the role of the authority in question is not of a judicial or investigatory nature, such an authority may intervene in any situation at its discretion, with no requirement that the state in question should have ratified a particular instrument. Certain authorities may also intervene when they receive information on a general situation involving violations of human rights relevant to their mandate. The specific criteria, procedures, and conditions required for introducing a complaint or transmitting information vary depending on the body invoked. For example, the SRVAW can be invoked or informed of acts of sexual violence only if those acts are directed against women by reason of their sex. The Working Group may be invoked for

202. For example, CEDAW has recommended to the Chilean State that it “decriminalise abortion in all cases”, that it “amend the legislation that makes abortion a criminal offense”, and that it “suppress the punishments inflicted on women who abort”, including the victims of rape. See: CEDAW, *Concluding observations, Chile*, 14 March 2018, CEDAW/C/CHL/CO/7, §38 a); CEDAW, General Recommendation No. 24: Article 12 of the Convention (Women and Health), 1999, §31 c); in the context of *L.C. v. Peru*, Communication No. 22/2009, U.N. Doc., CEDAW/C/50/D/22/2009 (2011), §9(b)(iii), CEDAW has pronounced in favour of the decriminalisation of abortion when the pregnancy results from a rape.

203. This interpretation may be found in the general recommendations / general comments, and concluding observations on the periodical reports of affiliated States and decisions on individual complaints.

a complaint relating to an instance of discrimination associated with a law, policy, or practice that would engender, facilitate, or encourage the commission of acts of sexual violence against women or girls, such as laws and practices tolerating or encouraging sexual mutilation, virginity tests, forced marriages, etc. The Special Rapporteur on human trafficking may be invoked for a situation or case involving human trafficking for the purpose of exploitation or sexual slavery.

Upon reception of an allowable complaint, the general procedure is that the holder of the mandate sends a letter of allegation to the government concerned so as to draw its attention to the presumed violations of human rights, asking it to provide information on the alleged facts, inviting it to respect its international obligations, and, as appropriate, take measures to prevent the acts concerned, put an end to them, inquire into the facts, and provide information on the measures taken. Certain bodies may also recommend the state in question to punish those responsible and provide reparations for the victims, but in practice this remains quite a rare step. The State concerned is called upon to respond and provide information and observations on the allegation, but the recommendations of the mandated body are not binding. In the case of current or potential violations, bodies mandated under special procedures may also make urgent appeals for the attention of states, requesting the implementation of interim measures, which also remain non-binding. These communications and any responses made by the State in question are published sixty days after being communicated to the state by the body mandated.

Special procedures may also be asked to intervene in the role of *Amicus Curiae* before national judicial authorities for the purpose of advising on the adoption of measures of legislative reform that might have a positive or negative effect on the struggle against acts of sexual violence and their consequences.²⁰⁴

Before framing a complaint, it is useful to consult the communications published under the relevant special procedures. In particular, plaintiffs may consult the tool provided by the United Nations ([Communication report and search](#)) which collates all communications sent under special procedures together with responses received. Also included under special procedures is information on complaints summarized in the [periodic reports on communications](#) submitted to each ordinary session of the Human Rights Council.²⁰⁵

Country-specific procedures and commissions of inquiry

It is also of use to NGOs and lawyers involved in support for victims of acts of sexual violence to inform bodies charged with monitoring the human-rights situation in specific countries, as well as [commissions of inquiry and fact-finding missions](#) mandated by the Human Rights Council.

204. The Working Group on Discrimination against Women has, for example, made *amicus* submissions before the Constitutional Court of the Republic of Korea and the supreme courts of the United Kingdom and Brazil when they had to pronounce on the constitutionality of legislation relating to abortion. In Korea, the Working Group argued in favour of the decriminalisation of abortion, and its opinion was followed by the Constitutional Court, which delivered a decision in this sense in April 2019. See Submission to the Honorable Justices of the Constitutional Court of the Republic of Korea, *Review of the constitutionality of the country's criminal law on abortion* (case 2017Hun-Ba127), March 2019, <https://www.ohchr.org/Documents/Issues/Women/WG/ConstitutionalCourtRepublicKorea.pdf>.

205. See also the [database](#) established by the NGO Plan International, which collates all decisions, reports, resolutions, general observations and recommendations, conclusions and declarations of regional (including African) and international bodies (including special procedures) for the protection of human rights concerning the rights of girls: of use for the formulation of complaints relating to acts of sexual violence committed against girls.



Jean-Pierre Bemba Gombo. © Michael Kooren / AFP / Getty Images

International Criminal Court (ICC)

“

“The ICC didn’t do its job.”

“We saw Bemba landing in an helicopter, looting our homes, leaving with our goods, giving his orders here.”

“Look, I have the scars of Bemba’s militias all over my body.”

“I am worried.”

“The actions Bemba took here have aroused followers.”

“This acquittal is going to increase tensions in Central African Republic, others will think they risk nothing.”

“Don’t you think that Bemba’s acquittal will lead others to backslide?”

“After we have testified, participated in and been attending numerous meetings, nothing more, nobody came to see us anymore.”

“What hurts me the most is that we don’t exist anymore in the whole world.”

”

Quotes of victims of PK12 and Damara participating in the proceedings against Jean-Pierre Bemba after his acquittal by the International Criminal Court in June 2018

*FIDH and its member organizations in the Central African Republic (CAR), the **Central African League for Human Rights (LCDH)** and the **Central African Observatory for Human Rights (OCDH)**, have been present alongside the victims since 2002, and conducted a mission with the victims of the Bemba case in September 2018, in order to explain the reasons for the acquittal, to gather their feelings about this unfair verdict as well as their expectations in view of the assistance activities that will soon be carried out by the Trust Fund for Victims set up by States Parties to the **ICC Statute**.*

The International Criminal Court's Contribution to the Fight Against Impunity for Sexual and Gender-Based Crimes in Africa

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1. The International Criminal Court: A Key Player in Strengthening Accountability for Sexual and Gender-Based Crimes

Due to sustained advocacy by the Women's Caucus for Gender Justice throughout the entire Rome Statute negotiations, the founding ICC texts which were adopted between 1998 and 2002 constitute ground-breaking tools in the fight against sexual and gender-based crimes (SGBC). These texts fully integrate a gender perspective in order to fill the legal and institutional gaps that had hindered the mission of other jurisdictions including the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.

First and foremost, the texts specifically list different sexual and gender-based crimes (rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other forms of sexual violence) amounting to crimes against humanity and war crimes.²⁰⁷ These specific categories of crimes were developed to facilitate their prosecution by the Office of the Prosecutor (OTP) and trial by judges by allowing them to better understand these crimes while ensuring their visibility. The texts also provide for special procedural guarantees to protect victims and witnesses, taking into account their gender and the nature of the crime where it involves sexual or gender-based violence,²⁰⁸ and encourage the participation of victims of sexual violence in all stages of the proceedings and their testimony.²⁰⁹ Some rules of procedure and evidence aim also to protect victims of sexual violence, for example by not making it mandatory to corroborate such violence, establishing that consent cannot

206. This article draws on various FIDH publications related to sexual and gender based crimes in Africa, including the findings of FIDH's report: *Unheard, Unaccounted: Towards Accountability for Sexual and Gender-Based Violence at the ICC and Beyond*, December 2018, https://www.fidh.org/IMG/pdf/sgbv_721a_eng_au_20_nov_2018_13h_web.pdf.

207. Rome Statute, Articles 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi). Also see the Elements of Crimes related to these provisions.

208. Rome Statute, Articles 54(1)(b) and 68(1); Rules of Procedure and Evidence (RPE), Rule 86.

209. RPE, Rule 16(1)(d), 17(2)(b)(iii), 88, 112.

be inferred by reason of the silence of the victim, or her/his lack of resistance, or the inadmissibility of evidence related to sexual conduct of a victim or witness.²¹⁰ At the institutional level, to ensure parity and expertise on gender issues, the Rome Statute provides for a fair representation of female and male judges, the presence of judges with legal expertise on issues related to violence against women,²¹¹ the appointment of advisers with legal expertise on sexual and gender-based violence by the Prosecutor,²¹² and the recruitment of specialists to help victims of trauma related to crimes of sexual violence within the Registry dedicated to helping victims and witnesses, this unit is also tasked with providing training on issues of sexual violence.²¹³

This corpus was subsequently enriched by the OTP, which as of 2013, shortly after the arrival of Prosecutor Fatou Bensouda, adopted policies and strategic plans²¹⁴ to enhance the integration of sexual and gender-based crimes, as such, in all areas of the OTP's work in order to fill the gaps of the first cases in this area (see 2). An analysis tool was introduced in 2016 to determine whether and, in what ways, the crimes the OTP investigates were related to gender inequalities in order to assess gender-sensitive aspects of each crime.²¹⁵ At present, the OTP is the only Court organ to have adopted a policy to enhance gender integration.

The ICC's capacity to combat impunity for sexual and gender-based crimes is further strengthened by the contribution of NGOs to the ICC's mission, many of whom have relevant expertise in this area. These organizations can take part in documenting such crimes and draw the Court's attention through communications submitted under Article 15 of the Statute. They may also help identify, assist and support victims including in potential interactions with the Court. For example, FIDH has documented and provided the ICC with information on cases of SGBC in a number of countries under preliminary examination (Guinea) or under investigation (Burundi, Côte d'Ivoire, Mali, Central African Republic – CAR, Democratic Republic of the Congo – DRC, Sudan).

However, the ICC's prospects for holding perpetrators accountable for SGBV began to erode over the first years of its operations. To date, and twenty years after the adoption of the ICC Statute, there has not been a single successful final conviction for sexual and gender-based crimes.

2. Not a Single Successful Final Conviction for Sexual Crimes

Since its inception, the Court's record in terms of accountability for SGBC has been very disappointing to date. However, the innovative tools at its disposal and some recent developments suggest that this trend may improve in the future.

Absence of SGBC charges

In some situations, despite there being evidence of sexual violence, the OTP did not include charges

210. RPE, Rules 63(4), 70 and 71.

211. Rome Statute, Articles 36(8)(a)(iii), 36(8)(b).

212. Rome Statute, Article 42(9).

213. Rome Statute, Article 43(6); Rule 17(2)(a)(iv).

214. *Strategic Plan 2012-2015*, 11 October 2013, §58-63, <https://www.icc-cpi.int/iccdocs/otp/OTP-Strategic-Plan-2013.pdf>; *The Office of the Prosecutor's Policy Paper on Sexual and Gender-Based Crimes*, June 2014, <https://www.icc-cpi.int/iccdocs/otp/otp-policy-paper-on-sexual-and-gender-based-crimes-june-2014.pdf>; *Strategic Plan 2016-2018*, 16 November 2015, §48-51, https://www.icc-cpi.int/iccdocs/otp/EN-OTP_Strategic_Plan_2016-2018.pdf; *The Office of the Prosecutor's Policy Paper on Case Selection and Prioritisation*, September 2016, §46, https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf; *Strategic Plan 2019-2021*, 17 July 2019, §33-37, <https://www.icc-cpi.int/itemsDocuments/20190726-strategic-plan-eng.pdf>.

215. *The Office of the Prosecutor's Policy Paper on Sexual and Gender-Based Crimes*, op. cit., §20; FIDH, *Unheard, Unaccounted*, op. cit.

of SGBC in arrest warrants or summons to appear in several cases. In the case against **Thomas Lubanga**, leader of the Union of Congolese Patriots (UPC) rebel movement, the charges against him were, for example, limited to enlistment, conscription and use of child soldiers despite NGOs initiatives to get the Prosecutor to include crimes of rape and sexual slavery committed by the UPC.²¹⁶ The Prosecutor had repeatedly refused to add such charges before or even during the trial. The judges also refused, both at the trial and reparation stages, to take into account the sexual violence against child soldiers, particularly young girls, as acts inherent to the crime of enlisting, conscripting and using child soldiers.²¹⁷ In around one third of the cases before the ICC,²¹⁸ charges of sexual violence were limited to rape.

Sexual violence charges are invisible

In other cases, SGBC charges were brought forward/confirmed against the accused under other crimes such as torture, failing to use the specific categories provided for this purpose, thus making SGBCs invisible. For example, in the case against Uhuru Kenyatta – parliamentarian and political leader supporting the re-election of former president Mwai Kibaki at the time the crimes were committed and current President of the Republic of Kenya – the latter was “*charged as an indirect co-perpetrator of other forms of sexual violence in relation to the forced circumcision of Luo men in Kenya. Unfortunately, the Pre-Trial Chamber of the ICC re-characterized the crime as ‘other inhumane acts’, which did not accurately reflect the crime where Luo men were castrated or circumcised with crude objects in order to emasculate them.*”²¹⁹ This decision is revelatory as to a potential lack of sensitization, even expertise, of judges with regard to sexual violence, particularly against men.

Absence of confirmed/dismissed charges

In six cases against nine accused, some if not all charges of SGBC were ultimately not confirmed by the judges or were dropped by the Prosecutor.²²⁰ SGBC charges seem to be particularly vulnerable to attrition or re-qualification at the confirmation charges phase. According to a study carried out by FIDH, this appears to be related more to the legal pleading, contextual elements and modes of liability charged than to the strength of the underlying evidence of SGBC.²²¹ This pattern appears to have improved in the recent decisions on confirmation of charges in cases against Bosco Ntaganda, former chief of a Congolese rebel group²²² and **Dominic Ongwen**, rebel leader of the Lord's Resistance Army in Uganda, where all charges of SGBC were successfully confirmed for trial; and **Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud** (hereinafter “**Al Hassan**”), alleged member of Ansar Eddine and *de facto* chief of Timbuktu Islamic police.

216. See *Joint letter to the Chief Prosecutor of the International Criminal Court “DR Congo: ICC Charges Raise Concern”*, 31 July 2006, <https://www.fidh.org/en/region/Africa/democratic-republic-of-congo/concern-about-your-communication>; as well as FIDH report, *The Office of the Prosecutor of the ICC: nine years on*, December 2011, p. 11-12, <https://www.fidh.org/IMG/pdf/cpiproc579ang.pdf>.

217. Trial Chamber I, Situation in the Democratic Republic of the Congo in the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, Separate and Dissenting Opinion of Judge Odio Benito, §15-21; The Appeals Chamber, Situation in the Democratic Republic of the Congo in the Case of *The Prosecutor v. Thomas Lubanga*, Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, ICC-01/04-01/06-3129, §192-198.

218. *Mbarushimana*, *Mudacumura*, *Al-Bashir*, *Kushayb*, *Arun*, *Hussein*, and *Khaled* cases.

219. Interview with Anushka Sehmi, Lawyer/Assistant to counsel for the legal representatives of victims (*Ongwen – CPI* case), FIDH Video, *Unheard, Unaccounted*, December 2018, https://www.youtube.com/watch?time_continue=66&v=o8mk-_09iHk.

220. *Bemba* case (torture and outrages not confirmed); *Katanga* case (outrages not confirmed); *Ngudjolo* case (outrages not confirmed); *Mbarushimana* case (no charges confirmed); *Gbagbo and Blé Goudé* case (“other forms of sexual violence” dismissed); *Kenyatta*, *Muthaura* (all charges dropped) and *Ali* case (no charges confirmed).

221. FIDH, *Unheard, Unaccounted*, *op. cit.*, p. 17.

222. *Forces Patriotiques pour la Libération du Congo* (FPLC), military section of the Congolese rebel movement UPC led by Thomas Lubanga.

Acquittals

Finally, five accused were ultimately acquitted of the SGBC charges against them: former Congolese militia leaders **Germain Katanga** and **Mathieu Ngudjolo Chui**,²²³ founder and commander in chief of the Mouvement de Libération du Congo, former Vice-President of the DRC accused of crimes committed in the Central African Republic, **Jean-Pierre Bemba**; and most recently former Ivorian president **Laurent Gbagbo** and his minister **Charles Blé Goudé**.

Jean-Pierre Bemba had been convicted in first instance in March 2016 and this decision, which was the first conviction for SGBC, remains one of the main breakthrough in an assessment of the Court's record on accountability for sexual crimes. Jean-Pierre Bemba was found guilty of rape against women and men as a war crime and a crime against humanity committed in the Central African Republic in 2002 and 2003 and sentenced to 18 years in prison. This verdict was historical for a number of reasons. This was the first conviction handed down by the Court for sexual crimes, in a case where the large-scale nature of the rapes had been highlighted by the Prosecutor.²²⁴ This decision also shed light on the practice of rape against men, particularly taboo, and as a result under-documented and rarely prosecuted as such. This case was the first in the history of international criminal justice where sexual violence against men was prosecuted on the basis of rape charges, not torture or other charges that did not specify the sexual nature of the crime.²²⁵ Lastly, it was also the first time that an accused had been convicted as a military commander for crimes committed by troops under his control. However, on 8 June 2018, the Appeals Chamber of the ICC acquitted Jean-Pierre Bemba from all charges against him, including sexual crimes. Despite the dissenting opinion of two judges, the Chamber considered, by a majority, that Jean-Pierre Bemba as commander, could not be held responsible, in particular on the grounds of his distance from his troops and the place the crimes occurred. This decision, which was heavily criticized,²²⁶ ruined the chances of thousands of victims to one day get justice and reparation (see below 4.).

While the decision that led to Mr. Bemba's acquittal is particularly criticized for departing from well-established case law – thus making it more difficult for the Prosecution to prove the involvement of a commander – the case against **Germain Katanga** is emblematic of the failure of the ICC to effectively implement its Statute's progressive provisions regarding accountability for SGBC. In this case, the OTP brought charges of sexual slavery, rape and outrages upon personal dignity against the accused – all but the last one were confirmed by the Pre-trial Chamber. However, in 2014, after nearly three years of trial, Germain Katanga was acquitted of all SGBC charges and convicted only in respect of attacks on a civilian population, destruction of property, pillaging and murder, as war crimes and crimes against humanity.²²⁷ The judges reasoned that the amassing and distribution of weapons in the weeks leading to the attack was explicitly connected to the commission of murders, pillaging, destruction of property, and an attack upon a civilian population. The judges did not make the same connection between the preparation of the attack and the commission of sexual crimes. Furthermore, the judges recognized Germain Katanga's intent to commit murder and an attack against a civilian population as well as his knowledge that pillaging and destruction of property would be committed, but did not even consider that he could have known sexual crimes would be committed. This decision completely disregards the possible links between an attack on a civilian population and the commission of sexual crimes.

223. Germain Katanga was in charge of the *Force patriotique de l'Ituri* (FRPI) and Mathieu Ngudjolo of the *Front des nationalistes et intégrationnistes* (FNI), two allied militias opposing the UPC led by Thomas Lubanga.

224. ICC Prosecutor Luis Moreno Ocampo. ICC Press statement, "Prosecutor opens investigation in the Central African Republic", 22 May 2007, <https://www.icc-cpi.int/Pages/item.aspx?name=prosecutor%20opens%20investigation%20in%20the%20central%20african%20republic>.

225. FIDH, *Unheard, Unaccounted*, op. cit., p. 16, 21-22.

226. *Ibid.*, p. 22.

227. Trial Chamber II, Situation in the Democratic Republic of the Congo in the Case of *The Prosecutor v. Germain Katanga*, Judgment pursuant to article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436-ENG..

The Prosecutor did not appeal this judgment. One year later, **Mathieu Ngudjolo Chui** was acquitted of all charges brought against him, including rape and sexual slavery.²²⁸

In a further blow to the fight against impunity for sexual crimes, on 15 January 2019, Trial Chamber I of the ICC acquitted **Laurent Gbagbo** and **Charles Blé Goudé**, both accused of rape, of all charges brought against them, concluding that the Prosecutor had failed to demonstrate several core constitutive elements of the crimes. This decision confirmed the total impunity now granted to the perpetrators of the crimes of 2010-2011 post-electoral violence in Côte d'Ivoire.²²⁹

In numerous situations where sexual and gender-based violence has been committed, in some cases on a large scale, and where evidence of such violence exists, they have often been not included in the charges or made invisible, have not been confirmed or have been overturned following judgments. Repeatedly, the Court has failed to take advantage of the opportunities offered by the texts and the assistance provided by NGOs. Sexual and gender-based violence has often not been taken into account, or even neglected, in favor of other crimes,²³⁰ other requirements such as speed, because of insecurity related to ongoing conflicts,²³¹ limited resources available to the Court, but also a lack of expertise and experience in this area by judges and investigators.

While it is true that the International Criminal Court is complementary to national jurisdictions, that its mandate and resources do not allow it to try all crimes, and require it to focus only on the most senior officials, it must ensure that its decisions are as representative as possible of the different types of crimes committed, including sexual and gender-based crimes which are considered among the most serious.

3. The First Steps Toward Improvement

As of the last few years, and the implementation of the Prosecutor's Policy Paper on Sexual and Gender-Based Crimes of 2014, significant progress has been made.

One accused, **Bosco Ntaganda**, was convicted in July 2019 by Trial Chamber VI of 18 counts of war crimes and crimes against humanity committed in Ituri (DRC) in 2002-2003, including rape, sexual slavery and forced marriage as an inhuman act. This decision represents a major step forward and a huge victory for the victims of sexual violence in the war that has been raging for several decades in the Democratic Republic of the Congo. On 7 November 2019, Bosco Ntaganda was sentenced to 30 years' imprisonment²³², the most severe sentence handed down by the ICC to date. However, the verdict is currently subject to appeals, so it still has to be confirmed by the Appeals Chamber.

As part of the Court's progress in establishing accountability for sexual and gender-based crimes, it is also important to note that one trial is currently ongoing in the case against **Dominic Ongwen**, which

228. The Appeals Chamber, Situation in the Democratic Republic of the Congo in the Case of *The Prosecutor v. Mathieu Ngudjolo Chui*, Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled "Judgment pursuant to article 74 of the Statute", 7 April 2015, ICC-01/04-02/12-271-Corr.

229. FIDH, "ICC/Côte d'Ivoire: Towards total impunity for 2010-2011 crimes after acquittal of Laurent Gbagbo and Charles Blé Goudé", 15 January 2019, <https://www.fidh.org/en/issues/international-justice/icc-cote-d-ivoire-towards-total-impunity-for-2010-2011-crimes-after>. At the time of writing, the acquittal has not yet been published.

230. "Some participants noted that in the early cases, SGBV simply was not investigated at the outset – other crimes, such as murder and pillaging took precedence in a focused charging strategy, leaving SGBV to be added on later, after important strategic prosecutorial decisions had already been made", FIDH, *Unheard, Unaccounted*, op. cit., p. 17.

231. *Ibid.*, p. 14-15.

232. Trial Chamber VI, Situation in the Democratic Republic of the Congo in the Case of *The Prosecutor v. Bosco Ntaganda*, Sentencing Judgment, 7 November 2019, ICC-01/04-02/06-2442.

consists of 19 SGBC charges, including rape, sexual slavery, forced marriage as an inhumane act, and for the first time in international criminal law charges of forced pregnancy.

The setback in the proceedings against **Ahmad Al Faqi Al Mahdi** (hereafter "**Al Mahdi**"), head of the Islamic police in Timbuktu (northern Mali) during the occupation of the city by armed jihadist groups, however, illustrates that these improvements are precarious. Al Mahdi was charged and convicted of crimes against religious and historic buildings and monuments, excluding crimes committed against persons, and despite there being evident of SGBC. In March 2015, FIDH, its member organization in Mali (AMDH) and five other human rights organizations in Mali filed a complaint on behalf of 33 victims of crimes committed in Timbuktu before the High Court of the Commune 3 of Bamako, aimed at Al Mahdi as well as 14 others for their part in [...] ordering war crimes and crimes against humanity, including sexual and gender-based crimes.²³³ The 33 victims had denounced the crimes committed by the Islamic police and a 'Manners' Brigade' also led by Al Mahdi until September 2012, which included acts of torture, arbitrary detention, rape, forced marriage, sexual slavery and other forms of sexual violence. In this context, FIDH had sought to encourage, to no avail, the OTP of the ICC to consider credible allegations of Al Mahdi's involvement in further international crimes committed against civilians, including rape, sexual slavery and forced marriage.²³⁴

However, this new failure must be put into perspective by the confirmation, on 30 September 2019, of charges brought against **Al Hassan**, including SGBC charges.²³⁵ Al Hassan was also targeted in the national complaint lodged by FIDH in March 2015. The charges confirmed against him include rape and sexual slavery, but the decision issued by Pre-Trial Chamber I is confidential and, at the time of writing, the redacted version has not yet been published. For the first time before the ICC, the Prosecutor had charged an accused with persecution on gender grounds.²³⁶ The case was referred to a Trial Chamber.

Finally, in the case opposing **Patrice-Edouard Ngaïssona** and the Prosecutor, while the arrest warrant against him did not include any SGBC charges, in August 2019, the latter added charges of crimes against humanity and war crimes, including rape and attempted rape.²³⁷ The confirmation of charges phase is currently ongoing and the Pre-Trial Chamber is not expected to issue its decision for several months.

These last developments confirm what seems to be a trend of the OTP to improve the systematic investigation and prosecution of SGBC.

It would also appear that more frequent and regular training of the staff of the International Criminal Court, mainly the Office of the Prosecutor, is being held on SGBC investigations and prosecutions, support for victims of sexual crimes and the gender perspective.

233. FIDH, "Mali : 33 victimes de Tombouctou et 7 associations portent plainte contre 15 auteurs présumés des crimes de guerre et crimes contre l'humanité" (Mali: 33 victims in Timbuktu and 7 associations file a complaint against 15 alleged perpetrators of war crimes and crimes against humanity), 6 March 2015, <https://www.fidh.org/fr/regions/afrique/mali/mali-33-victimes-de-tombouctou-et-7-associations-portent-plainte> (in French only).

234. FIDH, "Mali: The hearing of Al Mahdi before the ICC is a victory, but charges must be expanded", 30 September 2015, <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/mali-the-hearing-of-abou-tourab-before-the-icc-is-a-victory-but>; FIDH Q&A: The Al Mahdi case at the ICC, 18 August 2016, <https://www.fidh.org/en/region/Africa/mali/q-a-the-al-mahdi-case-at-the-icc>.

235. International Criminal Court, "Al Hassan case: ICC Pre-Trial Chamber I confirms charges of war crimes and crimes against humanity and commits suspect to trial", 30 September 2019, <https://www.icc-cpi.int/Pages/item.aspx?name=pr1483>.

236. FIDH, "Al Hassan to the ICC: a milestone for justice", 3 April 2018, <https://www.fidh.org/en/region/Africa/mali/mali-al-hassan-to-the-icc-a-milestone-for-justice>; FIDH, "ICC : Towards the first trial for crimes against humanity committed in northern Mali?", 8 July 2019, <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/icc-towards-the-first-trial-for-crimes-against-humanity-committed-in>.

237. Office of the Prosecutor, *Public redacted version of "Document Containing the Charges"*, ICC-01-14/01-18-282-Conf-AnxB1, 19 August 2019, 18 September 2019, ICC-01/14-01/18-282-AnxB1-Red, https://www.icc-cpi.int/RelatedRecords/CR2019_05689.PDF.

4. The Impact of Proceedings on Victims of Sexual Violence. The Case of the Central African Republic: Between Hope and Disappointment

The decisions taken by the ICC have a real impact on the lives of victims. While taking part in the proceedings and sentencing of those responsible are undeniably a source of satisfaction and hope for the survivors of sexual violence interviewed by FIDH, the failures observed to date in the prosecution and conviction of perpetrators have led to deep disappointment, resentment and disheartenment.

Satisfaction over the conviction of Jean-Pierre Bemba at first instance (the only accused convicted of sexual crimes by the ICC) and taking part in the proceedings

In the proceedings against Jean-Pierre Bemba, the testimony of victims, either as witnesses of the Prosecution or as participating victims, was decisive in ascertaining the guilt of the accused in first instance. This testimony, delivered remotely from Bangui or in the courtroom of Trial Chamber III in The Hague, was therapeutic for some victims: *"I gave my testimony about what I lived through. It was important. I spoke before... the judges, my heart was soothed. I will always thank the Court because I was finally able to speak about the pain that I carry in my heart."*, *"I was happy to testify before the Court... That was a relief."*, *"I went to the ICC. I felt calmer... I am happy that I did that."*, *"I was allowed to say things that I was carrying in the deepest part of myself that were gnawing away at me so much. I had never spoken to anyone except for my lawyer. At the beginning, I thought that I was already done for. But when I testified, I felt something release inside me. I felt completely relieved, it really helped me a lot."* Despite negative impacts on the health of survivors when testifying, which may be linked to relapse into trauma and which demonstrates the importance of more rigorous medical and psychological support for witnesses by the ICC,²³⁸ the victims participating in the first instance phase of the trial interviewed by FIDH reported a positive experience which helped their psychological health.

Some victims interviewed also reported mixed reactions when they returned to their communities after testifying: *"When I got home, some people recognized me. I continue to have problems, people envied me because I had gone to testify in The Hague. Out in the country, people are full of complexes. They thought that I had some kind of an advantage over them. The ones who were more aware encouraged me. I spoke in Sango in front of everyone; they thought it was for the good of the country. Now the stigmatization is a little less. They don't exclude me any more"*.²³⁹

The Trial Chamber's acknowledgement of Jean-Pierre Bemba's responsibility for the crimes committed and his sentence of 18 years' imprisonment also had a positive effect on the victims. Some expressed a sense of satisfaction: *"I was relieved to see that Jean-Pierre Bemba was convicted."* *"(...) my heart is starting to feel a little easier"*.²⁴⁰ Others, however, disagreed with the sentence imposed, which they considered too lenient: *"18 years in prison, that's not much, because what he did to me was my death. Something should be added to the punishment, that would be better."*; and their disappointment due to lack of reparations: *"The fact that he was convicted did not make me feel relieved, because a lot of us are dying, and nobody did anything for us after that, we are still unhappy"*.²⁴¹

The relief and satisfaction felt among the victims participating to the first instance phase of the trial, after their testimony and Jean-Pierre Bemba's conviction were in line with the pain and disappointment felt after the acquittal.

238. FIDH, 'All I Want Is Reparation': Views of Victims of Sexual Violence About Reparation in the Bemba Case Before the International Criminal Court, November 2017, p. 44, <https://www.fidh.org/IMG/pdf/rca705ang.pdf>.

239. *Ibid.*, p. 42.

240. *Ibid.*

241. *Ibid.*

Disappointment after acquittal on appeal

Jean-Pierre Bemba's acquittal generated very strong reactions from victims participating in the proceedings. The shock upon hearing the appeal verdict was even greater because most of them heard it on the radio, without any explanation of the content of the decision, nor its implications. During a mission in the Central African Republic (Bangui and Damara) led by FIDH and its member organizations (LCDH and OCDH) in September 2018, several of them expressed their misunderstanding of the reasons, and the process that had led to such a decision, even though they had lived for 15 years with the certainty that the violence they suffered was indeed ordered by Jean-Pierre Bemba and that he was the highest official responsible for the rapes, murders and pillages inflicted on their communities.²⁴²

Most victims also expressed anger and sadness, a rejection of the International Criminal Court for which they feel abandoned (see box opposite). The satisfaction with the promise for justice represented by Bemba's conviction at first instance has vanished.

Beyond the affront that this acquittal represents for the victims, the absence of a conviction on appeal also means that the long-awaited reparations will ultimately never come.²⁴³ Some victims with HIV, have fallen into despair and have decided to stop taking antiretroviral treatment. The last hope for these people to receive any assistance in the near future now lies in the Trust Fund for Victims, which, after suspending the start of its assistance activities as of 2013, announced after Bemba's acquittal that it would accelerate the relaunch of its programme in the form of physical and psychological rehabilitation as well as material support.²⁴⁴ The Trust Fund announced that it will be prioritizing victims who had been participating in the Bemba case as well as, more widely victims of sexual and gender-based violence in the country.²⁴⁵ While some activities have been carried out very quickly in this regard, the assistance plan has not yet been made public.

Finally, several people expressed their concern that the impunity enjoyed by Bemba may encourage the militias currently operating in the country to commit more crimes. The Special Criminal Court, responsible for trying serious violations of human rights law and international humanitarian law committed in the CAR since 1 January 2003, and which became operational at the end of 2018, nevertheless has the role of contributing to the fight against impunity and acting as a deterrent to criminals.

Conclusion

Given its limited mandate and resources, the International Criminal Court does not have the capacity to address the need for justice and the expectations of SGBC alone, particularly in devastated States such as the Central African Republic where national justice is not functioning. If too much hope is

242. FIDH, "The Bemba Case: Heavily criticized, the ICC must maintain victims' legal representation as the establishment of assistance programmes for victims is awaited", 1 October 2018, <https://www.fidh.org/en/region/Africa/central-african-republic/the-bemba-case-heavily-criticised-the-icc-must-maintain-victims-legal>; Marceau Sivieude, "Centrafrique : L'acquittement de Jean-Pierre Bemba est un choc pour les victimes et un échec pour la CPI" (Jean-Pierre Bemba's acquittal comes as a shock to the victims and a failure to the ICC), *Le Monde Africa*, 13 June 2018, https://www.lemonde.fr/afrique/article/2018/06/13/l-acquittement-de-jean-pierre-bemba-est-un-choc-pour-les-victimes-et-un-echec-pour-la-cpi_5314262_3212.html (in French only).

243. FIDH, *'All I Want Is Reparation'*, *op. cit.*

244. ICC, "Following Mr Bemba's acquittal, Trust Fund for Victims at the ICC decides to accelerate launch of assistance programme in Central African Republic", 13 June 2018, <https://www.icc-cpi.int/Pages/item.aspx?name=180613-TFVPR>.

245. Report to the Assembly of State Parties on the projects and the activities of the Board of Directors of the Trust Fund for Victims for the period 1 July 2017 to 30 June 2018, 23 July 2018, ICC-ASP/17/14.

placed on this jurisdiction, it is likely that it will continue to disappoint in the future, since the judicial process is by definition uncertain. However, as the Rome Statute enters its third decade, in a world where sexual violence is so often used as a weapon of war, the Court's record, which has not yet confirmed a successful conviction for SGBC, remains disappointing. Despite innovative tools at its disposal, evidence in several situations and cases, and the persistence of survivors and civil society, the Court has failed to bring about justice, even in a symbolic way, to the thousands of victims of these particularly heinous crimes. International justice reflects the same patterns observed at the national level that so often leads to impunity for sexual violence. International and national justice should, nevertheless, be able to reinforce each other and share good practices and lessons learned in view of effectively applying the principle of complementarity. It remains to be seen whether, beyond the progress made in terms of more systematic capacity building in SGBC, Fatou Bensouda's criminal policy will bear fruit and contribute to successful convictions. The hopes of thousands of women and men who have survived sexual crimes in Uganda, the DRC or Mali now lie on the ongoing and upcoming trials in the cases against Dominic Ongwen, Bosco Ntaganda and Al Hassan, that have the potential to have a positive impact on affected communities and contribute to truth, justice and reparation processes at the national level.

CONCLUSION AND RECOMMENDATIONS

The various contributions in this collection of articles provide a number of practical tips for human rights defenders and lawyers who accompany and support victims of sexual violence in litigation or quasi-litigious actions on the African continent and at the international level. These practical tips include advocacy for the reform of the national legal framework; documentation of sexual violence; engagement in or support for judicial proceedings for victims; media coverage and communication around these proceedings, as well as public awareness. These practical guidelines are not intended to be exhaustive, but to outline some possible actions that could help foster an enabling environment to combat sexual violence and its consequences in Africa.

Concerning the mobilization in favour of the reform of the national legal framework:

- Advocate, where relevant and possible, for processes of reform of the national legal framework, aimed at removing any legal constraints on the activation of litigation actions by/for victims of sexual violence. These reforms may include, for example, the lifting of statutes of limitation (see article on **South Africa**), the adoption of a definition of rape and other forms of sexual violence in accordance with international law (see articles on **Tunisia** and **Sudan**) or the decriminalization of abortion (see article on **Senegal**);
- As part of these advocacy actions, promote, where possible, effective coordination of actions within civil society (see article on **Senegal**);
- Advocate at the national level for the dissemination, awareness-raising and implementation by national authorities of the provisions contained in regional and international instruments to combat sexual violence (**Maputo Protocol**, **ACHPR Guidelines on combating sexual violence and its consequences in Africa**, **CEDAW Convention**).

Concerning the documentation of sexual violence:

- Ensure that any action to document sexual violence is carefully prepared and planned in advance (including how information, evidence, testimony, will be collected and used), and follows a methodology that aims to do no harm to victims and witnesses (e.g. to avoid re-traumatisation or endangerment). Ensure that those who carry out documentation activities receive appropriate training to investigating techniques (see articles on **Sudan**, **Guinea**, the **documentation** box, the box on the **Hissène Habré case**).

Concerning the involvement in and/or support of legal proceedings for victims of sexual violence:

- Define long-term strategies for the judicial accompaniment of victims (see articles on **Kenya** and **Guinea**).
- Consider, where relevant and possible, promoting coordination of judicial action between civil society organizations for victims of sexual violence in a given country (see articles on **Kenya** and **Guinea**).

- Advocate, where relevant and possible, for the establishment of specialized investigation and prosecution units within the relevant national jurisdictions to assist victims of sexual violence (see articles on **Kenya** and **Guinea**). Advocate for national courts to have specialized staff (judges, interpreters, psychologists, etc.) specifically trained in hearing techniques relating to acts of sexual violence as well as methods for accompanying victims (see articles on **Kenya** and **Guinea**).
- Encourage, where relevant and possible under national law, judicial authorities to adopt a reversal of the burden of proof in favour of victims of sexual violence committed in conflict or crisis situations, exempting them from having to provide any evidence other than their testimony (see the articles on **Kenya** and **Guinea**).
- Where offenses of sexual violence are provided for by applicable law, ensure that they are used in advocacy and litigation, in order to ensure the visibility of this specific form of violence, and to reflect the reality of the facts, the circumstances in which they were committed, the intention of the perpetrators, the gravity of the acts suffered by the victims and the physical, psychological, social and material consequences resulting therefrom. The sexual nature of acts should be inferred from the nature and context of the acts, but also from the perception that perpetrators, victims and witnesses may have of them, taking into account in particular their culture and environment. Judicial strategies should aim to combat misclassification/reclassification of such violence resulting in making its sexual nature invisible, including violence against men (see article on the **ICC**).
- Consider the possibility of supporting legal proceedings brought by/for victims of sexual violence, through the introduction of amicus curiae, when permitted by the court (see the articles on **South Africa**, **Liberia** and the box on the **Hissène Habré case**).
- Consider the possibility of using expert testimony in legal proceedings brought by/for victims of sexual violence, where permitted by the court (see the articles on **Kenya**, **Liberia** and the box on the **Hissène Habré case**).
- Consider, where relevant and possible, undertaking mobilizing and solidarity actions, including with the general public, in support of victims involved in complex legal proceedings (see articles on **Tunisia** and **Kenya**).
- Conduct a specific study on the possibilities of providing medical and psychological support to victims of sexual violence involved in legal proceedings promoted by civil society organizations. Advocate for the adoption by the authorities of a general policy to support victims of sexual violence in legal proceedings that is adapted to their medical, psychological, material or social needs, as well as their protection needs (see the articles on **Tunisia**, **Kenya**, **Guinea**).
- Advocate for the establishment, at the national, regional and international levels, of judicial and administrative reparation mechanisms for victims of sexual violence, using a holistic and transformative approach to reparations, to address structural inequalities that fuel sexual violence (**reparations** box);
- Consider the advisability of seizing regional and international mechanisms, in accordance with their admissibility criteria, in the event that national judicial redress for victims of sexual violence is not available or unsuccessful (see the articles on **Senegal**, **Sudan**, **regional mechanisms** and the box on **referral to regional and international mechanisms**).

Concerning the media coverage of litigation proceedings and the raising of public awareness:

- Contribute to the wide dissemination of innovative judicial decisions to contribute to public awareness and information sharing between lawyers and activists supporting victims of sexual violence (see article on **South Africa**).
- Consider, where relevant and possible, opportunities for media coverage of litigation brought by/for victims of sexual violence (see articles on **Tunisia** and **Kenya**).

CONTRIBUTING ORGANIZATIONS AND EXPERTS

The **African Center for Justice and Peace Studies (ACJPS)** is dedicated to creating a Sudan committed to all human rights, the rule of law and peace, in which the rights and freedoms of the individual are honored and where all persons and groups are granted their rights to non-discrimination, equality and justice. ACJPS's objectives are to document human rights violations and protect those at risk; to hold perpetrators of serious human rights violations and international crimes to account ; to ensure effective access to justice and obtain reparation for victims of gross human rights violations and serious violations of international humanitarian law; and to strengthen respect for human rights in Sudanese governance, society and culture.

The **Association des juristes sénégalaises (AJS)** is an apolitical and non-partisan NGO whose mission is to promote, popularize and contribute to the protection of human rights, especially those of women and children; to provide help, assistance, advice and training to the population; to combat all forms of discrimination and to work towards the establishment of egalitarian gender relations; to sensitize public authorities and international institutions to work for the advancement and empowerment of women; to foster and maintain the spirit of mutual assistance and partnership with any national, regional and international organization pursuing the same objective at the national, regional and international levels; to establish relationships and exchanges between women of all countries pursuing legal careers or having pursued legal careers; to gather information on the legal, economic and social conditions of women around the world, their status and professional life, and make it widely available. AJS has opened several Law Shops in Senegal to provide legal assistance to victims of human rights violations, including women and girls victims of sexual violence. AJS is particularly involved in the fight for the legalization of medical abortion in Senegal.

The **Association tunisienne des femmes démocrates (ATFD)** is an independent feminist and human rights organization working to achieve real and complete equality between men and women. The objective of the ATFD is that all women fully enjoy all their human rights in a democratic framework that respects human dignity, social justice and equality and banishes the patriarchal order and all forms of discrimination and violence against women.

Civitas Maxima is an NGO that facilitates the documentation of international crimes, and pursues the redress of such crimes on behalf of victims who do not have access to justice, by: collaborating with and building the capacity of local grass-roots partners to document crimes in the State where those crimes were committed; coordinating a network of investigators and lawyers to help victims gain access to justice and hold perpetrators accountable before foreign domestic or international courts and tribunals, however, whenever and wherever possible; generating awareness and informed debate around victims' cases, with a view to empowering local communities to pursue their own quests for justice. Its vision is a world where all forgotten victims of international crimes have access to fair and impartial justice mechanisms, and perpetrators are held accountable.

Esther Waveru is a human rights lawyer with over 12 years' experience advocating for the advancement, enjoyment and protection of human rights. She is an Advocate of the High Court of Kenya. She currently works at the Africa Regional Office of Equality, now as a Legal Adviser focusing on ending sex

discrimination in law. She also coordinates the Solidarity for African Women's Rights (SOAWR) Coalition comprising of over 50 women's rights organizations in 25 countries in Africa. She has been involved in strategic impact litigation to safeguard the rights of girls, women and sexual minorities at the national, regional and international levels. She has been involved in advocating for law and policy reforms and implementation within various human rights and legal spaces in Kenya, Africa and internationally. She has worked with and supported victims of gross human rights violations arising from the 2007-2008 post election violence in Kenya to get justice at the national and international judicial organs including the International Criminal Court. Esther Waweru has previously worked as the Senior Legal Adviser for Africa at the Center for Reproductive Rights, as a Program Manager at the Kenya Human Rights Commission and as a litigating counsel in a Nairobi law firm.

Halimatou Camara is a lawyer at the Guinean Bar since 2012. Since 2015, she has been coordinating a legal clinic of the Joint Project of FIDH and its member organizations in Guinea, the Guinean Organization for Human Rights (OGDH) and the organization *Même droits pour tous* (MDT). The objective of this project is to support access to justice for victims of serious human rights violations committed in Guinea, particularly during the massacre of 28 September 2009. Halimatou Camara has been a member of the Order's Council since January 2019 and is very active in the fight against violence against women, particularly in the Guinean courts for victims of sexual violence.

The **Institute for Human Rights and Development in Africa (IHRDA)** is a pan-African non-governmental organization working to promote awareness of human rights in Africa and improve the effectiveness of the African Human Rights system. IHRDA envisions an African continent where all have access to justice via national, African and international human rights mechanisms. Its work can be summarized in three words: defend, educate, inform. IHRDA has litigated in over thirty-five cases in more than sixteen countries throughout Africa, pro bono. The institute diversifies the scope of its efforts to ensure the effective implementation of decisions and recommendations.

Lawyers for Human Rights (LHR) is an independent human rights organization with a 40-year track record of human rights activism and public interest litigation in South Africa. It provides free legal services to vulnerable, marginalized and indigent individuals and communities who are victims of unlawful infringements of their constitutional rights. The LHR Gender Equality Program launched in 2016. Using a combination of impact litigation, advocacy, and policy/law reform work, this Program pursues systemic remedies for gender-based violence and discrimination, in South Africa and the region.

Mathilde Chiffert is a lawyer and former FIDH representative in Guinea. She has coordinated the joint project of FIDH and its member organizations in Guinea, the *Organisation guinéenne pour les droits de l'Homme* (OGDH) and the organization named *Mêmes Droits pour Tous* (MDT). This project aims to support access to justice for victims of serious human rights violations committed in Guinea, especially during the massacre of 28 September, 2009.



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For FIDH, transforming societies relies on the work of local actors.

The Worldwide Movement for Human Rights acts at national, regional and international levels in support of its member and partner organisations to address human rights abuses and consolidate democratic processes. Its work is directed at States and those in power, such as armed opposition groups and multinational corporations.

Its primary beneficiaries are national human rights organisations who are members of the Movement, and through them, the victims of human rights violations. FIDH also cooperates with other local partner organisations and actors of change.

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FIDH takes action for the protection of victims of human rights violations, for the prevention of violations and to bring perpetrators to justice.

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FIDH works for the respect of all the rights set out in the Universal Declaration of Human Rights: civil and political rights, as well as economic, social and cultural rights.

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