



**fidh**

# Unheard, Unaccounted: Towards Accountability for Sexual and Gender-Based Violence at the ICC and Beyond

Cover photo: *Pregnant women waiting to receive birth kits at a camp of Internally Displaced People in Goma, Democratic Republic of Congo, in November 2008.* © Yasuyoshi Chiba / AFP

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# ABBREVIATIONS AND ACRONYMS

<b>AJR</b>	Association for Justice and Reconciliation (Guatemala)
<b>AMDH</b>	Association Malienne des Droits de l'Homme (Mali)
<b>ASP</b>	Assembly of States Parties (to the ICC Statute)
<b>CAH</b>	Crimes Against Humanity
<b>CALDH</b>	Center for Human Rights Legal Action (Guatemala)
<b>CAR</b>	Central African Republic
<b>CIA</b>	Central Intelligence Agency
<b>CSO</b>	Civil Society Organisations
<b>DRC</b>	Democratic Republic of Congo
<b>EAC</b>	Extraordinary African Chambers
<b>ECCC</b>	Extraordinary Chambers in the Courts of Cambodia
<b>FIDH</b>	International Federation for Human Rights
<b>IAP</b>	International Association of Prosecutors
<b>IBA</b>	International Bar Association
<b>ICC</b>	International Criminal Court
<b>ICJ</b>	International Court of Justice
<b>ICL</b>	International Criminal Law
<b>ICTJ</b>	International Center for Transitional Justice
<b>ICTR</b>	International Criminal Tribunal for Rwanda
<b>ICTY</b>	International Criminal Tribunal for the former Yugoslavia
<b>ILDO</b>	International Law Development Organisation
<b>KSC</b>	Kosovo Specialist Chambers
<b>LAG</b>	FIDH Litigation Action Group
<b>JCCD</b>	Jurisdiction, Cooperation and Complementarity Division (of the ICC OTP)
<b>LIDHO</b>	Ligue Ivoirienne des Droits de l'Homme (Côte d'Ivoire)

<b>LRV</b>	Legal Representative for Victims
<b>MIDH</b>	Mouvement Ivoirien des Droits humains (Côte d'Ivoire)
<b>MoU</b>	Memorandum of Understanding
<b>NGO</b>	Non-Governmental Organisation
<b>OPCD</b>	Office of Public Counsel for Defence
<b>OPCV</b>	Office of Public Counsel for Victims
<b>OSCE</b>	Organisation for Security and Cooperation in Europe
<b>OTP</b>	Office of the Prosecutor (of the ICC)
<b>PGA</b>	Parliamentarians for Global Action
<b>PIOS</b>	Public Information and Outreach Section (of the ICC Registry)
<b>PSV</b>	Prosecuting Sexual Violence in Conflict Network
<b>RPE</b>	Rules of Procedure and Evidence (of the International Criminal Court)
<b>SAS</b>	Situation Analysis Section (of the ICC OTP)
<b>SCSL</b>	Special Court for Sierra Leone
<b>SGBC</b>	Sexual and Gender-Based Crimes
<b>SGBV</b>	Sexual and Gender-Based Violence
<b>STL</b>	Special Tribunal for Lebanon
<b>SV</b>	Sexual Violence
<b>TFV</b>	Trust Fund for Victims
<b>UN</b>	United Nations
<b>UNMG</b>	Unión Nacional de Mujeres Guatemaltecas (Guatemala)
<b>VPRS</b>	Victims Participation and Reparation Section (of the ICC Registry)
<b>VWS</b>	Victims and Witnesses Section (of the ICC Registry)
<b>WC</b>	War Crimes
<b>WIGJ</b>	Women's Initiatives for Gender Justice

# INTRODUCTION

*"The harm done to the victims transcended their bodies and their minds because after returning to their homes, after having fled to the mountains to seek refuge, they were completely dispossessed, their community had changed irrevocably; their homes had been destroyed, their animals killed. The women victims were enslaved; they suffered a loss of liberty and were subject to the constant control and domination of the soldiers. They were obligated to take shifts cooking, washing the soldiers' clothes, and were repeatedly raped, which caused palpable emotional harm."*

— Presiding Judge Yasmin Barrios, Sepur Zarco Case, High Risk "A" Tribunal (Guatemala), 26 March 2016

*"Accountability for sexual and gender-based crimes, that may amount to genocide, crimes against humanity and war crimes is a key element for the restoration of victims' rights and reconstruction of societies. NGOs and civil society's action in support of victims is crucial."*

— Dimitris Christopoulos, FIDH President

*"The victims of such devastating crimes will not find solace in our words and promises, but what we manage to deliver in concrete terms."*

— Prosecutor Fatou Bensouda, Chief Prosecutor of the International Criminal Court, 9 December 2014<sup>1</sup>

In 2013, a Guatemalan national tribunal convicted former Head of State Efraín Ríos Montt for the genocide of the Maya Ixil people, recognising rape as an integral component of that crime. Three years later, the same Guatemalan tribunal found two military officers guilty of holding indigenous women in sexual slavery after forcibly disappearing their husbands. In 2016, evidence of forced marriage was finally presented at the Extraordinary Chambers in the Courts of Cambodia (ECCC), raising awareness of the significant and long-enduring harm suffered by both women and men under the Khmer Rouge. On 27 April 2017, the Extraordinary African Chambers (EAC) in Senegal sentenced Hissène Habré, former president of Chad, on appeal, to life imprisonment for crimes including widespread sexual violence under his regime.

These moments of justice in recent years represent hard-fought successes for victims of sexual and gender-based violence (SGBV): proof of the insuppressible determination of survivors, their families, their communities and their advocates. Such legal victories hopefully herald a sea of change in terms of international recognition of SGBV crimes and of the willingness of prosecutors, both nationally and internationally, to tackle cases that have in the past been marginalised or invisibilised. These successes also build on decades of diligent efforts and lessons learned by investigators and prosecutors at international or internationalised tribunals, including the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL), as well as increasingly creative strategic litigation by teams of human rights lawyers working hand-in-hand with victims' associations around the world.

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1. ICC Prosecutor, Fatou Bensouda, launches Policy on Sexual & Gender-Based Crimes: Ensuring victims have a voice in court today can prevent these crimes tomorrow #EndSexualViolence, Press Release, 9 December 2014, ICC-OTP-20141209-PR1073.

Nonetheless, the fight for accountability for sexual and gender-based violence is far from over. The recent acquittal of Jean-Pierre Bemba by the Appeals Chamber of the International Criminal Court (ICC), following the first ICC Trial Chamber conviction for rape as war crime and crime against humanity, is one of the illustrations. For each successful prosecution, an untold number of victims of SGBV remain without redress. Even when responsible parties are convicted, survivors most often do not receive reparation or assistance.

The ICC Rome Statute contains strong provisions promoting gender justice at procedural, substantive and institutional levels, aiming to fight against impunity of the perpetrators of SGBV internationally. States Parties to the ICC Statute must incorporate and implement such provisions domestically. This sends a strong message to national actors about the gravity of such crimes, ostensibly reinforcing opportunities to investigate, prosecute and deter future crimes both at national and international level. However, thus far the ICC has been unpredictable in its implementation of provisions relating to SGBV, and many victims in situations under investigation by the Court have been disappointed. The ICC's potential to play a serious and leading role in fighting impunity for such crimes, enabling victims to access justice and reparation, and preventing future crimes, must be reinforced. The ICC is currently prosecuting individuals on charges including rape, sexual slavery, forced marriage, and sexual violence against child soldiers.

At national level, SGBV victims face particular difficulties in accessing justice, including persistent problems relating to shame and stigmatisation, limited expertise within the judicial sector, absence or insufficient criminalisation of sexual and gender-based crimes in national penal codes, and lack of adequate protective measures, to name only a few. Providing SGBV survivors with comprehensive redress remains a serious challenge at every level.

Further, a surprising number of discussions about SGBV at national, regional and international levels continue to be plagued by deep biases and misconceptions about gender-based and sexual violence. Some officials already seem to be “fatigued” by SGBV issues after only a handful of investigations, or continue to consider SGBV a “women’s issue” or a “lesser” crime or more difficult to prosecute. Moving the investigation of sexual and gender-based violence from its “niche” position to a central place alongside other crimes, is still a hurdle. Gender analysis must still be mainstreamed at every level.

Observing these apparent contradictions – significant advances with respect to accountability for SGBV on the one hand, and continued entrenched resistance on the other – the International Federation for Human Rights (FIDH) decided to embark on a project exploring this paradox. Nowadays, how can the ICC and national courts be strengthened to most effectively address accountability for SGBV?

This report examines both past and more recent setbacks and success stories in order to understand not only the impact of recurring obstacles to SGBV victims’ access to justice and lessons learned from these hurdles, but also to identify the most effective strategic approaches for overcoming those obstacles at the domestic and international level to increase accountability in the future.

## **Background on the work of FIDH**

One of FIDH’s core mandates is to promote international justice and to fight impunity for serious international crimes, including genocide, crimes against humanity, and war crimes. FIDH and its member organisations document crimes, assist victims before national and international justice systems, and advocate for the adoption and implementation of independent procedures and judicial mechanisms.

Through its Litigation Action Group (LAG),<sup>2</sup> FIDH intervenes before national courts (including in their exercise of extra-territorial or universal jurisdiction), before hybrid tribunals – such as the Extraordinary Chambers of the Courts of Cambodia (ECCC) –, regional and international courts – such as the ICC.

FIDH actively participated in the negotiations of the ICC founding texts and the establishment of the Court, particularly in advocating for a progressive body of rights for victims at all stages of the Court's proceedings. Through its permanent representation to the ICC in The Hague since 2004, FIDH follows the ICC's activities on a daily basis and contributes to building and strengthening a constructive dialogue between civil society and the Court.

FIDH also feeds into the preliminary examinations and investigations of the Office of the Prosecutor (OTP) of the ICC, by submitting – along with its member and partner organisations in the countries concerned – Article 15 communications on crimes, in order to provide grounds for investigations and prosecutions by the Court.

FIDH maintains a cross-cutting gender focus in all its work on international justice, and actively trains member and partner organisations on SGBV documentation and analysis, particularly in the context of armed conflict or widespread human rights violations (e.g. Afghanistan, CAR, DRC, Guinea, Iraq, Mali, and Ukraine). FIDH has documented or provided information on SGBV to the ICC– or other relevant bodies – on cases arising in countries around the world (e.g. Burundi, CAR, Côte d'Ivoire, DRC, Guinea, Mali, Peru, Sudan, Syria, Iraq and Ukraine).

## Project methodology

This report examines the means of increasing accountability for SGBV at the ICC and beyond, by assessing the efforts of both the ICC and civil society in their pursuit of justice for victims of these crimes. The report is based on the analysis of a series of comprehensive, semi-structured **interviews with 42 practitioners and experts** (hereinafter “participants”) in this field from five continents, including ICC staff, civil society representatives, academic, and national and international experts. The research was conducted from June to November 2016.

The interviews were conducted for the purpose of providing an overview of the current state of play in relation to this issue, to set out the opinions of participants regarding recurring challenges in their work, and to identify creative strategies being implemented at national and international levels to improve accountability.

The interviews were used in the drafting of a concept paper and the programme for discussions at a **high-level expert meeting**, held in The Hague on 7-8 November 2016. Nine of the original interviewees participated in this meeting, as well as **13 additional expert participants**. The meeting grouped practitioners from the ICC and national jurisdictions, as well as representatives of national and international non-governmental organisations (NGOs), for the purpose of increasing their awareness and understanding of each other's work and to facilitate cooperation towards the elimination of recurring obstacles to accountability for SGBV.

Discussions at the expert meeting were held on three central questions underpinning the research, and identified as recurring themes throughout the interview process:

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2. The FIDH Litigation Action Group (LAG) is a global network of around 90 lawyers, magistrates and legal experts from FIDH member organisations, assisting and supporting – including as legal representatives – victims of international crimes. For more information on FIDH Litigation activities, see: <https://www.fidh.org/en/issues/litigation/>

1. Accountability for SGBV at the ICC
2. The relationship between the ICC and civil society
3. Other avenues for accountability for SGBV

All research, including the interviews and expert meeting, was conducted under the Chatham House Rule.<sup>3</sup> As such, the information presented in this report has been anonymised and generalised so that it cannot be attributed to any individual participant. Where quotes are used to indicate a relevant example, identifying features of the speaker have been removed. No public reference is or will be made to any participant's name or position in this or any future report stemming from this research.

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3. The Chatham House Rule reads as follows: *"When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed."*



Victim participating in the Bemba Trial appearing before the ICC without protection measures. The Bemba Case (Central African Republic). © Frank Schinski / ICC-CPI

# I. ACCOUNTABILITY FOR SGBV AT THE ICC

## 1.1 From a progressive corpus of founding texts to immediate setbacks on SGBV

### 1.1.1 The ICC Statute: a model for gender justice

When the ICC Statute was adopted in Rome in July 1998, it was heralded as a model for gender justice. Due to sustained advocacy by the Women's Caucus for Gender Justice<sup>4</sup> bringing together feminist and women's rights organisations, as well as human rights organisations before and during the Rome Conference, the Statute and its supporting documents address many of the legal, institutional, and evidential pitfalls that had plagued the *ad hoc* tribunals and many national legal frameworks in post-conflict jurisdictions.

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4. The Women's Caucus on Gender Justice at the ICC includes feminist and women's' rights organisations as well as feminist activists. It was created to influence the drafting of the ICC Statute and other founding ICC texts to codify a broad list of sexual and gender-based crimes falling under the ICC jurisdiction, and gender justice principles, including on the Gender balance and expertise in the ICC.

The Statute and its accompanying documents incorporate the broadest range of sexual and gender-based crimes in the history of international law and contain a number of other important gender justice principles. Such principles include ‘fair representation’ of gender in the election of judges,<sup>5</sup> inclusion of a special adviser to the Prosecutor on sexual and gender-based violence,<sup>6</sup> procedural protections for witnesses and victims taking into account gender<sup>7</sup> as well as expertise within the Victims and Witnesses Section (VWS) on trauma related to sexual violence,<sup>8</sup> a commitment to gender-sensitive measures aimed at inclusive victim and witness participation in proceedings,<sup>9</sup> and particular rules of procedure and evidence to protect victims of sexual violence.<sup>10</sup>

### Definition of Sexual and Gender-Based Crimes (SGBC)

Although there is not one all-encompassing and consolidated definition of SGBC, the OTP provides the following definitions in the 2014 Policy Paper on Sexual and Gender-Based Crimes (SGBC Policy):<sup>11</sup>

**“Sexual crimes:** Sexual crimes that fall under the subject-matter jurisdiction of the ICC are listed under articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi) of the Statute, and described in the Elements of Crimes (Elements). In relation to ‘rape’, ‘enforced prostitution’, and ‘sexual violence’, the Elements require the perpetrator to have committed an act of a sexual nature against a person, or to have caused another to engage in such an act, by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, or by taking advantage of a coercive environment or a person’s incapacity to give genuine consent. An act of a sexual nature is not limited to physical violence, and may not involve any physical contact – for example, forced nudity. Sexual crimes, therefore, cover both physical and non-physical acts with a sexual element.

**Gender-based crimes:** Gender-based crimes are those committed against persons, whether male or female, because of their sex and/or socially constructed or perceived gender roles. Gender-based crimes are not always manifested as a form of sexual violence. They may include non-sexual attacks on women and girls, and men and boys, because of their gender”.

Sexual and gender-based crimes may also be prosecuted through other non SGBC charges, such as torture (articles 7 (1) (f) of the Rome Statute), torture or inhumane treatment (article 8 (2) (a) (ii) of the Rome Statute), persecution (article 7 (1) (h) of the Rome Statute), outrages upon personal dignity (articles 8 (2) (b) (xxi) and 8 (2) (c) (ii) of the Rome Statute), other inhumane acts (article 7 (1) (k) of the Rome Statute), mutilation (articles 8 (2) (b) (x) and 8 (2) (e) (xi) of the Rome Statute) or serious bodily or mental harm (article 6 (b) of the Rome Statute).

5. Article 38(8)(a)(iii) and 38(8)(b), Rome Statute of the International Criminal Court (hereinafter “ICC Statute”)

6. Article 42(9), ICC Statute

7. Article 54(1)(b), Article 68(1), ICC Statute; Rule 86, Rules of Procedure and Evidence of the International Criminal Court (hereinafter “RPE”)

8. Article 44(6), ICC Statute; Rule 17(a)(iv), RPE

9. Rule 16(1)(d), Rule 17(b)(iii), RPE

10. Rule 63(4), Rule 70, Rule 71, Rule 88, Rule 112, RPE

11. Office of the Prosecutor of the International Criminal Court, Policy Paper on Sexual and Gender-Based Crimes, June 2014, available at: <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf> (hereinafter SGBC Policy).

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 conviction for sexual and gender-based crimes at the ICC.

### 1.1.2 Immediate setbacks on SGBV

The first cases of the ICC reflected failures by prosecutors and judges to fully capitalise on the unique legal provisions available to the Court. In situations where SGBV was massively and systematically committed, investigations undertaken by the ICC were often insufficient to secure arrest warrants containing the full range of SGBV charges (which were often inexistent or simply limited to rape), or confirmation of charges or conviction. They also show a lack of prioritisation of SGBV in OTP early investigation plans. The lack of ICC judges' expertise and sensitization in SGBV may also be one of the reasons for the absence of SGBV charges *per se* in ICC cases.

#### A. The Lubanga case: a missed opportunity

The first ICC arrest warrant against the DRC militia leader Thomas Lubanga was limited to crimes of enrolling, conscripting, and using child soldiers in hostilities, amounting to war crimes committed in the DRC Ituri Province between 2002 and 2003. However, no charges of sexual or gender-based crimes were included by the OTP, despite evidence of his involvement in widespread rape and other SGBV crimes. Numerous NGOs called upon the ICC Prosecutor to continue its investigations in light of other serious crimes committed by the Union of Congolese Patriots (UPC) led by Thomas Lubanga, including rape and sexual slavery.<sup>12</sup> In a joint letter addressed to the ICC Prosecutor, eight human rights NGOs expressed their disappointment that "the OTP in the DRC has not yielded a broader range of charges against Mr Lubanga (...) including rape."<sup>13</sup>

Concurring reports indicate that the ICC Prosecutor's strategy at that time was to bring this first case swiftly to court, "for the sake of quickly getting a first trial going",<sup>14</sup> also given the risk that Thomas Lubanga, in detention in the DRC at that time, was likely to be released within a short period of time without being prosecuted nationally.<sup>15</sup> Indeed, Mr Lubanga was arrested in March 2005 and his detention was likely to end mid-March 2006.<sup>16</sup> The OTP therefore issued an arrest warrant on 10 February 2006, on what it estimated to be the strongest charges at that time and Mr Lubanga was transferred to the ICC on 16 March 2006. The OTP explained in a communication to the Pre-Trial Chamber I, dated 28 June 2006, that it could not continue its investigation, given the limitations posed (especially by the security situation in Ituri), and could thus include no further charges.<sup>17</sup>

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12. 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: <https://www.fidh.org/IMG/pdf/cpiproc579ang.pdf>

13. 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>

14. Patrick Wegner, "What went wrong during the Lubanga trial?", in *Justice in Conflict*, 14 March 2012: <https://justiceinconflict.org/2012/03/14/what-went-wrong-during-the-lubanga-trial/>

15. "When the ICC intervened, Lubanga was already in detention in the DRC facing charges including murder and torture. Instead of encouraging a national trial, the OTP claimed that there was a danger that Lubanga would be set free and came forward with charges of conscripting child soldiers", Patrick Wegner, "What went wrong during the Lubanga trial?", in *Justice in Conflict*, 14 March 2012: <https://justiceinconflict.org/2012/03/14/what-went-wrong-during-the-lubanga-trial/>

16. "Even if the transfer was opportunistic, the Prosecutor argued that it was compelled by events. Under DRC law, Lubanga could be held for up to a year (...) The ICC Prosecutor feared that Lubanga would be released (...)", Benjamin N. Schiff, *Building the International Criminal Court*, Cambridge University Press, 2008, p. 220-221.

17. OTP, "Prosecutor's Information on Further Investigation", ICC-01/04-01/06-170, 28 June 2006: [https://www.icc-cpi.int/CourtRecords/CR2006\\_02549.PDF](https://www.icc-cpi.int/CourtRecords/CR2006_02549.PDF)

However, as Patricia Viseur Sellers – recently appointed as the Prosecutor’s Special Adviser on Gender – commented in an interview given to FIDH after the verdict against Mr Lubanga was delivered in 2012: “the Prosecutor could have amended the indictment at any time prior to trial or even at a reasonable moment during the presentation of the prosecution case [to include charges for crimes of sexual violence]. The Prosecutor has suggested that to do so would have been detrimental to the due process rights of the accused. However, in the event of granting the Prosecutor’s move to amend, the Trial Chamber could have allowed the accused whatever time he needed to prepare his case in light of additional charges.”<sup>18</sup>

The Trial Chamber further chose not to amend the charges during the course of the proceedings, despite a number of prosecution witnesses describing acts of sexual violence in their testimonies. As SGBV had not been included in the charges, a majority of judges ruled that sexual violence could not be taken into account in the judgment,<sup>19</sup> and not even as an aggravating circumstance affecting sentencing. Judge Odio Benito dissented, in part, due to her view that sexual violence was an inherent component in the use of child soldiers, in addition to highlighting the discriminatory impact of sexual violence on girl child soldiers.<sup>20</sup>

The findings in the Lubanga judgment further impacted the reparations proceedings against Lubanga. The Appeals Chamber rejected the Trial Chamber’s holding that reparations awards should include SGBV victims.<sup>21</sup> The Appeals Chamber held that a reparations order must “define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted,”<sup>22</sup> and that in the Lubanga case, SGBV could not be defined as harm resulting from the crimes for which Lubanga was convicted.

## **B. Invisibility of SGBV crimes**

In one third of the cases (Mbarushimana, Mudacumura, Al Bashir, Kushayb, Arun, Hussein, Khaled), the only charge of SGBV was the charge of rape. Other acts of sexual violence were prosecuted through charges of torture, persecution, or outrages upon personal dignity. That strategy increased the invisibility of SGBV crimes failing to take advantage of the extensive new possibilities to qualify and prosecute rape, sexual slavery, and other acts of sexual violence as SGBV crimes *per se*, rather than prosecute them as other crimes such as torture.

Nonetheless, in DRC and Sudan, crimes of sexual violence were endemic in the war strategies of all parties. In Sudan, rape and other types of sexual violence were widely reported including threats of rape, abduction, sexual slavery, sexual violence, forced nudity, and sexual assault.<sup>23</sup> In DRC, commonly called the “capital of rape”, studies have shown that “four women are raped every five minutes, and that two million Congolese women have been raped during their lifetime. Women and girls of all ages are affected, and to a lesser extent men and boys. Rapes are accompanied by unimaginable cruelty”, taking on “unbearable proportions” and cruelty and the many abuses [seem] merely to increase in number exponentially. Rapes committed with such brutality that they sometimes resulted in death, sexual

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18. FIDH, “Crimes of sexual violence and the Lubanga Case: Interview with Patricia Viseur Sellers”, 16 March 2012: <https://www.fidh.org/en/region/Africa/democratic-republic-of-congo/Crimes-of-sexual-violence-and-the>

19. Prosecutor v Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, 14 March 2012 (hereafter Lubanga Judgment).

20. *Ibid.*, Separate and Dissenting Opinion of Judge Odio Benito, para 15-21.

21. Prosecutor v Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-3129, 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 (hereafter Lubanga Reparations Appeals Decision).

22. *Ibid.*, para 1.

23. UN Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General: [http://www.un.org/news/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/news/dh/sudan/com_inq_darfur.pdf), pp. 87-96; BBC, “Thousands made slaves in Darfur”, 17 December 2008: <http://news.bbc.co.uk/2/hi/africa/7786612.stm>

slavery (particularly of young girls forcibly drafted into armed forces), forced prostitution, sexual and genital mutilation, forced incest, forced pregnancies, sometimes with the aim of changing ethnicity (in particular in conflicts between the Hema and the Lendu), rapes of women on the pretext of “searching for minerals in their genitalia”, sexual violence committed on the basis of membership of an ethnic group or in the name of ritual practices (such as violence against pygmies for “medical purposes” or to become “invincible”), rape of political opponents, rape as punishment of civilians who prevented access to or trafficked in minerals or who refused to pay bribes at road barriers. In most cases, sexual violence also involved other violence such as murder and other forms of torture and cruel, inhuman and degrading treatment. Rape was therefore used as a weapon; to enslave victims, terrorise the population, seek revenge for alleged support to the enemy and increase stigmatisation (reinforced by the taboos surrounding such crimes). Women stated that the war was being conducted on their bodies.”<sup>24</sup>

The invisibility of SGBV crimes can also result from requalification of the charges by the Pre-trial Chamber. In the Kenya situation, the OTP issued a summons to appear against Kenyatta, Muthaura, and Ali in respect of charges including “other forms of sexual violence” (Article 7 (1) (g)) through forcible circumcision), but the Pre-trial Chamber considered this crime should fall under “other inhumane acts” (Article 7 (1) (k)) for Kenyatta and Muthaura. Charges against Ali were not confirmed. The Pre-Trial Chamber reached this decision “in light of the serious injury to body that the forcible circumcision causes and in view of its character, similar to other underlined acts constituting crimes against humanity.”<sup>25</sup> This decision is revelatory as to a potential lack of sensitization of judges and/or a lack of recognition of sexual violence against men.

### C. SGBV charges dismissed by the judges or withdrawn by the OTP and acquittals

#### a. SGBV charges dismissed or withdrawn

In five cases, SGBV charges were not confirmed by the ICC Pre-trial Chamber: in the **Bemba, Katanga and Ngudjolo cases**, charges of sexual violence as outrages upon personal dignity and torture were not confirmed, while other charges of sexual violence (rape and sexual slavery) were confirmed – in the Bemba case, the defendant was ultimately acquitted; in the **Mbarushimana and Ali cases**, none of the charges (including charges of SGBV) were confirmed.

In two cases against four accused, charges of SGBV were confirmed but later withdrawn by the OTP: in the **Gbagbo and Blé Goudé case**, other forms of sexual violence were withdrawn, but charges of rape and persecution through rape remained. In the **Kenyatta and Muthaura case**, all charges, including charges of SGBV were dropped by the OTP.

SGBV charges seem to be particularly vulnerable to attrition or re-qualification at the confirmation of charges phase (see chart below), although as discussed above 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 SGBV (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

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24. UN Mapping DRC 1993–2003, Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, August 2010: [http://www.ohchr.org/Documents/Countries/CD/DRC\\_MAPPING\\_REPORT\\_FINAL\\_EN.pdf](http://www.ohchr.org/Documents/Countries/CD/DRC_MAPPING_REPORT_FINAL_EN.pdf); FIDH report *DRC: Denial of justice for the victims of sexual crimes*, December 2013: <https://www.fidh.org/en/region/Africa/democratic-republic-of-congo/14338-drc-denial-of-justice-for-the-victims-of-sexual-crimes>

25. ICC Pre-trial Chamber II, Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, ICC-01/09-02/11-01, §27.

made). This pattern appears to have improved in the recent **Ntaganda** and **Ongwen** confirmation decisions, where all charges for SGBV were successfully confirmed for trial.

## b. Acquittals for SGBV

The **Katanga case** (DRC) is emblematic of the failure of the ICC to effectively implement its progressive provisions regarding accountability for SGBV.

The OTP brought charges of sexual slavery and thereafter, rape and outrages upon personal dignity, against Germain Katanga, commander of a Ngiti militia group, allegedly responsible for war crimes and crimes against humanity committed during the attack on the village of Bogoro, Eastern DRC, on 24 February 2003. On 30 September 2008, Pre-Trial Chamber I confirmed charges of sexual slavery and rape. However, on 7 March 2014, and after a trial running from 24 November 2009 to 23 May 2012, Katanga was acquitted of all SGBV 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.<sup>26</sup> 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 attack upon a civilian population. The judges did not make the same connection between the preparation of the attack and the commission of crimes of sexual violence.

In a critique of the Katanga Judgment, Brigid Inder of WIGJ,<sup>27</sup> states the following:

“Based on this reasoning, what would be the equivalent contribution for rape? What would judges be satisfied with, in a comparable way, to demonstrate the intent to rape, in order for this crime to be considered part of the common purpose? Why couldn’t the same preparation and contribution the Judges found beyond reasonable doubt facilitated the ability of the militia to commit all the crimes for which Katanga was convicted, why could this not also satisfy the Chamber in relation to the ability of the militia to rape and sexually enslave women of the village?”

Furthermore, the judges recognised 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 crimes of sexual violence would be committed. “The Chamber did not find Katanga guilty of intending to commit rape and sexual slavery, but it also does not appear to have even considered *dolus directus* in the second degree (i.e. whether Katanga knew that in the ordinary course of the attack, crimes of sexual violence would occur”<sup>28</sup>).

The ICC Prosecutor, however, did not appeal this judgment, a decision that was criticised by participants (see further 1.2.2 A and E).

One year later, **Mathieu Ngudjolo Chui** (DRC) was acquitted on appeal, of all charges brought against him, including rape and sexual slavery.<sup>29</sup> As commander of the militia group FNI (Front de nationalistes et intégrationnistes), he was accused of war crimes and crimes against humanity perpetrated during the same 24 February 2003 attack of the Bogoro village.

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26. The Prosecutor v Germain Katanga, Case No. ICC-01/04-01/07-3436, Judgment Pursuant to Article 74 of the Statute, 7 March 2014.

27. WIGJ Executive Director, “Expert Panel: Prosecuting Sexual Violence in Conflict - Challenges and Lessons Learned. A Critique of the Katanga Judgement” at Global Summit to End Sexual Violence in Conflict, 11 June 2014.

28. *Ibid.*

29. The Prosecutor v Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/12-271-Corr, 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.

## Overview of SGBV Charges at the ICC to Date

Level of accountability for SGBV	Defendant/Situation (date of issuance of arrest warrant or summons to appear)	SGBV crimes charged CAH – crimes against humanity WC – war crimes	Status of case and charges
<b>No charges of SGBV as such were included in the arrest warrant or summons to appear</b>	<b>Lubanga / DRC</b> (10.02.2006)	No charges of SGBV	Reparation stage
	<b>Abu Garda / Darfur (Sudan)</b> (2009)	No charges of SGBV	Case closed
	<b>Banda / Darfur (Sudan)</b> (28.08.2009)	No charges of SGBV	Not in ICC custody. Trial vacated. Believed dead
	<b>Mouammar Gaddafi / Libya</b> (16.05.2011)	No charges of SGBV	Case closed
	<b>Saif Al Islam / Libya</b> (16.05.2011)	No charges of SGBV	Inadmissible (ongoing national proceedings)
	<b>Al Senussi / Libya</b> (16.05.2011)	No charges of SGBV	Inadmissible. Case Closed
	<b>Mahmoud Al-Werfalli / Libya</b> (15.08.2017)	No charges of SGBV	Not in ICC custody
	<b>Ruto &amp; Sang / Kenya</b> (8.03.2011)	No charges of SGBV	Case closed
<b>Al Mahdi / Mali</b> (28.09.2015)	No charges of SGBV	Reparation stage	
<b>Charges of SGBV not confirmed by the judges / dropped by OTP</b>	<b>Mbarushimana / DRC</b> (28.09.2010)	Torture, rape, other inhumane acts and persecution (CAH); torture, rape, inhuman treatment and mutilation (WC)	Case closed
	<b>Kenyatta, Muthaura &amp; Ali / Kenya</b> (8.03.2011)	Rape, other forms of sexual violence, other inhumane acts and persecution (CAH)	Case closed
<b>The defendant was acquitted of SGBV charges</b>	<b>Katanga / DRC</b> (2.07.2007)	Rape and sexual slavery (CAH); rape, sexual slavery and outrages upon personal dignity (WC)	Outrages not confirmed for trial; acquitted of SGBV charges in March 2014
	<b>Ngudjolo / DRC</b> (6.07.2007)	Rape and sexual slavery (CAH); rape, sexual slavery and outrages upon personal dignity (WC)	Outrages not confirmed for trial; acquitted of all charges in December 2012. Case closed
	<b>Bemba / CAR</b> (23.05.2008 and 10.06.2008)	Rape, other forms of sexual violence and torture (CAH); rape, other forms of sexual violence, torture and outrages upon personal dignity (WC)	Other forms of SV not included in arrest warrant; torture and outrages not confirmed; found guilty of rape in March 2016. Acquitted on all charges in June 2018.

## Overview of SGBV Charges at the ICC to Date

Level of accountability for SGBV	Defendant/Situation (date of issuance of arrest warrant or summons to appear)	SGBV crimes charged CAH – crimes against humanity WC – war crimes	Status of case and charges
<b>Charges of SGBV were included in the arrest warrant or summons to appear</b>	<b>Kony &amp; Otti / Uganda</b> (8.07.2005)	Rape and sexual slavery (CAH); rape (WC)	Not in ICC custody – Otti is believed dead
	<b>Mudacumura / DRC</b> (13.07.2012)	Rape, torture and persecution (CAH); rape, torture and mutilation (WC)	Not in ICC custody – CAH not included in arrest warrant
	<b>Al Bashir / Darfur (Sudan)</b> (4.3.2009 and 12.07.2010)	Serious bodily or mental harm (genocide); rape (CAH)	Not in ICC custody
	<b>Harun &amp; Kushayb / Darfur (Sudan)</b> (27.04.2007)	Rape and persecution (CAH); rape and outrages upon personal dignity (WC)	Not in ICC custody
	<b>Hussein / Darfur (Sudan)</b> (01.03.2012)	Rape and persecution (CAH); rape and outrages upon personal dignity (WC)	Not in ICC custody
	<b>Khaled / Libya</b> (18.04.2013)	Torture, cruel treatment and outrages upon personal dignity (WC), Torture, other inhumane acts and persecution (CAH) through acts of sexual violence, rape and threats of rape	Not in ICC custody
	<b>Simone Gbagbo / Côte d'Ivoire</b> (29.02.2012)	Rape, other forms of sexual violence and persecution (CAH)	Not in ICC custody
	<b>Al Hassan / Mali</b> (27.03.2018)	Torture, rape and sexual slavery, persecution and other inhumane acts including forced marriage (CAH), torture, outrages upon personal dignity, rape and sexual slavery (WC)	In ICC custody. Confirmation of charges hearing scheduled for 6 May 2019
<b>Charges of SGBV were confirmed by the judges, and the accused was sent to trial</b>	<b>Ongwen / Uganda</b> (8.07.2005; additional charges of SGBV added on 22.12.2015)	Torture, rape, sexual slavery, forced pregnancy, other inhumane acts (forced marriage), persecution and enslavement (CAH); Torture, rape, sexual slavery, forced pregnancy, cruel treatment, outrages upon personal dignity and attacks against the civilian population (WC)	All charges confirmed; trial started on 6 December 2016
	<b>Ntaganda / DRC</b> (22.08.2006 and 13.07.2012)	Rape, sexual slavery and persecution (CAH); rape and sexual slavery (WC)	All charges confirmed, trial began September 2015
	<b>Gbagbo</b> (23.11.2011) & <b>Blé Goudé</b> (21.12.2011) <b>/ Côte d'Ivoire</b>	Rape, other forms of sexual violence and persecution through rape (CAH)	Other forms of SV dropped by OTP; trial began in January 2016
<b>The defendant was convicted on charges of SGBV</b>	No final conviction on charges of SGBV (Only Jean-Pierre Bemba was convicted on SGBV charges in first instance, but was acquitted of all charges in appeal)		

## D. Lack of lessons learned from other international criminal courts and tribunals

Several participants indicated that some of the problems facing the ICC in its first ten years related to a reluctance to learn lessons from the ICTY, ICTR or other international courts and tribunals. While ICTY and ICTR practice in relation to SGBV was far from perfect, participants suggested that the desire to “do things differently” has not necessarily led to doing things better and has at times created a tendency to try to reinvent the wheel.

These learnable lessons included, for instance, the appropriate gender composition of teams, the integration of gender advisers, systematically seeking evidence of sexual violence during investigations, and appointing the proper experienced staff to warn of pitfalls around SGBV. Undergoing processes to address implicit biases about SGBV among staff is another useful lesson (e.g. reviewing early witness interviews and identifying where certain questions were not asked due to misconceptions or biases surrounding SGBV).

A strengthened outreach programme proved to be one of the particularly successful legacies of the Special Court for Sierra Leone. A number of lessons about making justice meaningful to victims and affected communities could have been taken from that experience, while still taking into consideration the difference in scope of the two courts. In the words of one participant, the trials in Sierra Leone “were pointless without an in-depth field-based outreach process.”

Nonetheless, there was a feeling among participants that some senior staff at the ICC wanted to “start fresh” and not be “tainted” by the working methods of the other tribunals, even though they ultimately made many of the same mistakes. The ICC could have avoided struggling through the same difficulties faced by other tribunals by applying a greater focus on existing lessons learned. One participant suggested for the ICC to proactively and periodically engage in a review process on SGBV; to evaluate progress, trends, and feedback (particularly on SGBV prosecutions) every five or so years. Other tribunals have also not always engaged in sharing their “lessons learned” with other international tribunals and courts. Although the ICTY legacy project on SGBV has been fruitful, engaging in a similar review of best practices and lessons learned, an approach that is both backwards and forwards-looking, would have been even more beneficial, especially to other international criminal courts and tribunals.

## 1.2 Developments on SGBV within the OTP

### 1.2.1 Fundamental developments

#### A. The Bemba case: first ICC Trial Chamber conviction for SGBV crimes, eventually overturned on appeal

In March 2016, the ICC Prosecutor obtained the first conviction on charges of SGBV in the Bemba case.<sup>30</sup> Jean-Pierre Bemba Gombo, founder and commander in chief of the *Mouvement de Libération du Congo* (MLC), was found guilty of rape against women and men as a war crime and a crime against humanity committed in the Central African Republic (CAR) in 2002 and 2003. He was convicted as military commander for crimes committed by troops under his control.

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30. The Prosecutor v. Jean-Pierre Bemba, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/05-01/08-3399, 21 June 2016.

This was a groundbreaking case for the ICC, as it was the first one to focus heavily on crimes of sexual violence. In the words of the then ICC Prosecutor Luis Moreno Ocampo, it was the first ICC “investigation in which allegations of sexual crimes far outnumbered alleged killings”.<sup>31</sup> The decision convicting and sentencing Bemba to 18 years’ imprisonment was therefore historical, as the first ICC conviction on charges of SGBV. This case also highlighted the under-documented and under-prosecuted practice of rape against men. In the history of international criminal law, the Trial judges’ judgement represented the first time that sexual violence against men had been charged as the crime of rape or that a defendant had been charged of rape based on the testimony of male victims.<sup>32</sup> In addition, it was the first time ICC judges held an accused criminally responsible as a military commander for crimes committed by troops under his control. This verdict showed that those high in command can be effectively charged and held accountable for their crimes, including for sexual and gender-based crimes. Throughout Bemba’s trial, the participation of witnesses of sexual violence marked the largest number of similar witnesses in any ICC case.

However, on 8 June 2018, the Appeals Chamber of the ICC, by a 3-2 majority,<sup>33</sup> acquitted Bemba from all charges<sup>34</sup> overturning the important development that the Trial Chamber’s conviction and sentencing represented.

The Appeals Chamber’s majority decision to acquit Bemba from all charges of war crimes and crimes against humanity relied on two main arguments. Firstly, the majority found that the Trial Chamber had convicted Bemba for specific criminal acts that were outside of the scope of the case. Secondly, the majority found that the Trial Chamber made ‘serious errors’ in their finding that Bemba, a ‘remote’ commander of the MLC, can be held liable under Article 28 of the ICC Statute for the remaining crimes committed by the MLC troops during the CAR operation. The Appeals majority decision stirred a mixture of concerns,<sup>35</sup> including by ICC Prosecutor Ms. Bensouda,<sup>36</sup> and international law experts who found the decision a loss for “its lack of clarity, retroactive application of new law, and negative consequences in this and future cases”.<sup>37</sup> Not only does the Appeals majority decision requires a higher level of detail in the manner of which the Prosecutor brings charges in future cases – contradicting the Chamber’s earlier jurisprudence and international practice –, but its interpretation of the concept of command responsibility, particularly in relation to remote commanders allegedly bearing criminal responsibility as superiors, will also carry significant impact on holding commanders criminally liable for the conduct of their troops.

With Bemba’s acquittal, thousands of victims of SGBV and other crimes who participated throughout the proceedings of the Bemba case and were anxiously awaiting the reparation order are left deeply

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31. 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>

32. Niamh Hayes, “The Bemba Trial Judgment – A Memorable Day for the Prosecution of Sexual Violence by the ICC”, on PhD Studies in Human Rights Weblog, 21 March 2016, available at: <http://humanrightsdoctorate.blogspot.com/2016/03/hayes-bemba-trial-judgement-memorable.html>

33. Dissenting opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, N°ICC-01/05-01/08 A, 8 June 2018: [https://www.icc-cpi.int/RelatedRecords/CR2018\\_02987.PDF](https://www.icc-cpi.int/RelatedRecords/CR2018_02987.PDF)

34. The Prosecutor v. Jean-Pierre Bemba, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”, ICC-01/05-01/08-3636-Red, 8 June 2018: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/05-01/08-3636-Red>

35. FIDH, “Acquittal of Jean Pierre Bemba on appeal: an affront to thousands of victims”, 8 June 2018, available at: <https://www.fidh.org/en/region/Africa/central-african-republic/acquittal-of-jean-pierre-bemba-on-appeal-an-affront-to-thousands-of>

36. Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba Gombo, 13 June 2018, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=180613-OTP-stat>

37. Leila N. Sadat. “Fiddling While Rome Burns? The Appeal’s Chamber’s Curious Decision in Prosecutor v. Jean Pierre Bemba Gombo”, on EJIL: Talk!, 12 June 2018, available at: <https://www.ejiltalk.org/fiddling-while-rome-burns-the-appeals-chambers-curious-decision-in-prosecutor-v-jean-pierre-bemba-gombo/#more-16264>

disappointed and disheartened.<sup>38</sup> Given the total impunity in the Central African Republic, the Bemba case represented their only prospect for justice and reparation. Further to that, the stark reality of having not a single successful conviction for SGBV crimes looms over the ICC while its founding treaty enters its 20th anniversary.

## B. New OTP policies and strategies on SGBV

In recent years, the OTP has taken steps to improve its strategy regarding accountability for SGBV and to address its past failures.

As one of the first acts of the current Prosecutor, Fatou Bensouda, the adoption of its **Policy Paper on Sexual and Gender-Based Crimes (SGBC Policy) in June 2014** showed a genuine commitment to giving priority to SGBV. Further, as the policy was developed in part through a consultative process with civil society organisations, including FIDH, it provided a much-needed avenue for feedback to the OTP on its SGBV-related history.

The OTP has reiterated the public commitment to ensure SGBV will be a focus of its work by highlighting SGBV crimes in its **Strategic Plan for 2016-2018**<sup>39</sup> and in the **September 2016 Policy Paper on Case Selection and Prioritisation**, in which it states that the OTP “will pay particular attention to crimes that have been traditionally under-prosecuted, such as [...] rape and other sexual and gender-based crimes.”<sup>40</sup>

In addition, to address the problem of invisibility and lack of prosecution of SGBV crimes as such, the OTP SGBC Policy provides that: “In principle, the Office will bring charges for sexual and gender-based crimes explicitly as crimes *per se*, in addition to charging these acts as forms of other violence.”<sup>41</sup>

### OTP's Policy Paper on Sexual and Gender-Based Crimes

The SGBC Policy stipulates the OTP's commitment to combatting the invisibilisation of SGBV through a number of operational measures to be implemented at all stages of work, consciously adopting a victim-responsive and victim-sensitive approach, and integrating a gender perspective and analysis, from preliminary examinations through investigations, prosecutions, and appeals. This includes examining how crimes within the ICC's jurisdiction relate to engrained gender inequalities and societal power dynamics. The Policy enumerates a series of strategies to address challenges arising from under-reporting of SGBV, stigmatisation, limited domestic proceedings, and evidentiary challenges. The Policy addresses the OTP's charging strategy, committing to charge SGBV wherever evidence permits, and to charge SGBV explicitly and innovatively. It further addresses issues such as witness and victim protection, staff training, modes of liability, sentencing recommendations, cooperation, complementarity, and strengthening interactions with civil society.

38. 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, available at: <https://www.fidh.org/IMG/pdf/rca705ang.pdf>

39. Office of the Prosecutor of the International Criminal Court, Strategic Plan 2016-2018, 16 November 2015, paras 49-53, available at: [https://www.icc-cpi.int/iccdocs/otp/EN-OTP\\_Strategic\\_Plan\\_2016-2018.pdf](https://www.icc-cpi.int/iccdocs/otp/EN-OTP_Strategic_Plan_2016-2018.pdf)

40. Office of the Prosecutor of the International Criminal Court, Policy Paper on Case Selection and Prioritisation, September 2016, para 46, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=policy-paper-on-case-selection-and-prioritisation> (hereafter OTP Policy on Case Selection).

41. *Ibid.*, para. 72.

The mandatory investigation of SGBV in all situations and cases resulted from the SGBC Policy, with internal justification having to be reported to the Prosecutor for any departure from this mandate.<sup>42</sup> This commitment to investigate potential commissions of SGBV by default illustrates the OTP's recognition of the prevalence of SGBV in times of conflict or widespread human rights abuses, even if such crimes are under-reported or deprioritised domestically.<sup>43</sup>

The second development was the creation of a **gender analysis<sup>44</sup> tool, which is in its early stages of implementation since its adoption in August 2016.**<sup>45</sup> The tool is a 'living document' comprised of guidelines regulating the collection, analysis, and reporting on information specifically related to the gender dimensions relevant in a particular context and regarding alleged crimes.

A third development, intertwined with the first two, has been **the recruitment of additional staff with specific experience and expertise in SGBV**, including training with OTP staff.<sup>46</sup> As has been stressed repeatedly by participants in this project, key individuals are invaluable in the concrete implementation of strategies to increase accountability for SGBV and dispel myths and misconceptions. Nonetheless, a concerning trend highlighted by participants, has been the hiring of such staff members as consultants – through Justice Rapid Response (JRR) or UN Women rosters – and not as ICC staff. It may have complicated the acceptance of such persons as full members of ICC teams and if their contracts are not amended, their presence will only be temporary. This highlights the continued fragile practical implementation of this policy.

## C. The impact of the SGBC policy in recent cases

### a. The Ongwen and Ntaganda cases

The impact of these developments can already be seen in the wide range of charges for sexual and gender-based crimes based on expanded evidence and additional investigations presented in the ***Ntaganda*** and ***Ongwen*** cases.

For instance, the ***Ongwen case*** (Uganda) includes – for the first time in international criminal law – charges of forced pregnancy. As one of the leaders of the Lord's Resistance Army (LRA), Ongwen is being tried for international crimes, including a wide range of SGBC, committed from 1 July 2002 to 2004 in Northern Uganda in the context of an insurgency against the Government of Uganda and the Ugandan Army. These instances of inclusion and confirmation of SGBV charges indicate an inestimable strengthening of the prosecutorial strategy.

The initial arrest warrant of July 2005 against Dominic Ongwen did not contain any SGBV charges. Yet, after Dominic Ongwen was arrested and transferred to the ICC, on 22 December 2015 the ICC Prosecutor

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42. OTP, "The Prosecution of Sexual and Gender-Based Crimes by International Courts", Speech given at the international conference of the ASP, 16 July 2016, Dakar, p. 5.

43. This operational aspect of the policy has been articulated by OTP representatives in updates on the implementation of the SGBC Policy, presented to States and civil society organisations since 2015. See, for example, Bensouda, Fatou, The Office of the Prosecutor's Policy Paper on Sexual and Gender-Based Crimes: One Year After, Remarks delivered at Fourteenth Assembly of States Parties, Fourth Plenary Meeting: Complementarity, 19 November 2015, available at: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP14/ASP14-PD-COMP-Prosecutor-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/ASP14-PD-COMP-Prosecutor-ENG.pdf)

44. Gender Analysis is defined in the 2014 OTP Policy Paper on Sexual and Gender Based Violence as: "Gender analysis' examines the underlying differences and inequalities between women and men, and girls and boys, and the power relationships and other dynamics which determine and shape gender roles in a society, and give rise to assumptions and stereotypes. In the context of the work of the Office, this involves a consideration of whether, and in what ways, crimes, including sexual and gender-based crimes, are related to gender norms and inequalities".

45. Information provided to FIDH researchers by ICC officials and remarked upon in public updates, such as the one mentioned above. The gender analysis guidelines remain internal and unavailable to the public at this time.

46. No information is available publicly, however, regarding the number or level of these recruitments.

brought additional charges of SGBV including rape, sexual slavery, forced pregnancy, forced marriage as an inhumane act, amounting to crimes against humanity and war crimes.<sup>47</sup> Nineteen out of the seventy charges brought against him relate to SGBV. It is also to be noted that this was the first time that the Prosecutor included the charge of forced marriage as an inhumane act (Art. 7(1)(k)) amounting to crimes against humanity, even though the Rome Statute does not explicitly include this gender crime as such. The recognition of the duration of the continuous commitment of the alleged crimes of forced marriage and forced pregnancy constitute a new chapter in the prosecution of SGBV at the ICC. It was indeed very disconcerting to see that the OTP did not initially include SGBV charges, given that, in Fatou Bensouda's own words, "the regime of sexual abuse of girls and women in the LRA is one of its defining features (...). The women were treated as spoils of war, awarded as prizes without any more say in the matter than if they had been animals or inanimate objects (...). As a battalion commander (...) Dominic Ongwen faithfully carried out the LRA's brutal policy toward girls and women."<sup>48</sup>

However, the March 2018 decision by the ICC Trial Chamber IX not to grant the request made by the legal representatives of victims, to hear at the Ongwen trial the testimony of three male victims of sexual violence, on the basis that sexual violence against men and boys falls beyond the scope of the confirmed SGBV charge (which only referred to crimes against women and girls), represents a setback in the implementation of the OTP strategy.<sup>49</sup> As described by the legal representatives of victims in their request to the Trial Chamber, "sexual violence committed by the LRA was not limited to violence against women and girls. A significant number of participating male victims were either victims of rape, forced to carry out rapes, or forced to abuse the corpses of killed abductees in sexualised ways."<sup>50</sup> The Trial Chamber's decision can be seen as restrictive: the testimonies of male victims of sexual violence would shed light on and can fall within the scope of several of the confirmed crimes, including attacks on civilian population, torture, cruel treatment and persecution; men and boys who were forced against their will to commit acts of sexual violence against women and girls can be seen as indirect victims of the confirmed charges of torture and rape through sexual violence. Their testimonies would have also assisted the Chamber in having a more comprehensive understanding of the forms of violence used by the LRA and shed the light on the true nature of sexual violence against men, without prejudicing the fair trial rights of the accused. This recent setback also highlights the need for the OTP to adequately address sexual violence against men and boys at the earliest stage, through thorough investigations of sexual violence against all gender groups.

In the **Ntaganda case** (DRC) charges of rape, sexual slavery and persecution amounting to crimes against humanity and war crimes were confirmed in June 2014.<sup>51</sup> Bosco Ntaganda, deputy chief of staff and commander of operations of the rebel group *Forces Patriotiques pour la Libération du Congo* (FPLC), is accused of playing a key role in attacks upon civilians committed in the Eastern Ituri Province in 2002-2003. The Defense argued that the Court did not have jurisdiction over crimes of sexual violence as war crimes because such crimes could not be committed against fighters of the same-armed group as the perpetrator. But on 15 June 2017, the Appeals Chamber welcomingly confirmed its jurisdiction over crimes of sexual violence allegedly perpetrated by Ntaganda against child soldiers enrolled in his own armed group.<sup>52</sup>

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47. The Prosecutor v. Dominic Ongwen, "Document containing the Charges", ICC-02/04-01/15-375-AnxA-Red, 22 December 2015.

48. OTP, "Prosecution's Pre-Trial Brief", ICC-02/04-01/15-533, 6 September 2016, §500 and §502.

49. ICC Trial Chamber IX, "Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests", No. ICC-02/04-01/15, 6 March 2018, available at: [https://www.icc-cpi.int/CourtRecords/CR2018\\_01601.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_01601.PDF)

50. LRV, "Victims' requests for leave to present evidence and to present victims' views and concerns in person", No. ICC-02/04-01/15, 2 February 2018, para. 16, available at: [https://www.icc-cpi.int/CourtRecords/CR2018\\_00685.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_00685.PDF)

51. Prosecutor v Bosco Ntaganda, Case No. ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014 (hereafter Ntaganda Confirmation of Charges).

52. ICC Appeals Chamber, "Judgment on the appeal of Mr Ntaganda against the 'Second Decision on the Defense's Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9'", ICC-01/04-02/06-1962, 15 June 2017.

Moreover, innovative approaches for the preservation of evidence, linked to the OTP policy developments, have been implemented since the adoption of the SGBC Policy. One example is the use of Article 56 to secure testimony from SGBV witnesses in the **Ongwen case** prior to trial.<sup>53</sup> In that instance, the Trial Chamber allowed the inclusion of a number of previously recorded, confidential witness testimonies to be included in evidence, upon the request of the Prosecutor, rather than requiring the witnesses to re-testify at trial.<sup>54</sup>

## **b. The Malian cases: a mixed implementation of the SGBC policy**

However, these developments represent the beginning rather than the end of the story. As the decision not to charge crimes of sexual violence in the **Al Mahdi case** shows, more progress must be made on the consistent and transparent implementation of the SGBC Policy, the Case Selection Policy, and resulting tools.

### **• The setback of the Al Mahdi case: a blow to the SGBC policy?**

Ahmad Al Faqi Al Mahdi was a member of Ansar Eddine, a movement associated with Al Qaeda in the Islamic Maghreb, and head of the “Hisbah” (the “morality police”) in Timbuktu until September 2012.

On 6 March 2015, FIDH, AMDH and five other human rights organisations in Mali filed a complaint before domestic courts in Bamako on behalf of 33 victims of crimes committed in Timbuktu during the period under investigation by the ICC. The complaint accuses Al Mahdi and 14 others of war crimes and crimes against humanity, including sexual and gender-based crimes. This filing follows an earlier complaint filed in November 2014 on behalf of 80 victims of rape and sexual violence committed during the occupation of northern Mali.<sup>55</sup>

The ICC issued an arrest warrant for Al Mahdi on 18 September 2015 and he was transferred to The Hague less than ten days later. He was charged with, and pled guilty to, the war crime of intentionally directing attacks against religious and historic buildings in Timbuktu. He was convicted on 27 September 2016 and sentenced to nine years in prison.<sup>56</sup>

FIDH and other human rights organisations had urged the OTP to expand charges to include SGBV and other crimes committed against civilians, including rape, sexual slavery and forced marriage. The single-charge conviction felt like a return to SGBV marginalisation for many human rights advocates and victims of SGBV in Mali, who continue to push for ICC investigations into these crimes in Mali.<sup>57</sup>

Three years after the issuance of Al Mahdi’s arrest warrant, the OTP seems to have adjusted its strategy for Mali to include the reality of SGBV crimes in the second Malian case.

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53. Article 56(1)(a) states that “Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber.”

54. The Prosecutor v Dominic Ongwen, Case No. ICC-02/04-01/15-422, Decision on Request to Admit Evidence Preserved under Article 56 of the Statute, 10 August 2016.

55. FIDH, Q&A: The Al Mahdi case at the ICC, 17 August 2016, available at: <https://www.fidh.org/en/region/Africa/mali/q-a-the-al-mahdi-case-at-the-icc>

56. The Prosecutor v Ahmad Al Faqi Al Mahdi, Case No. 01/12-01/15-171, Judgment and Sentence, 27 September 2016, available at: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/12-01/15-171>

57. FIDH, “Mali: Al Mahdi trial on destruction of cultural heritage opens at the ICC”, 17 August 2016, available at: <https://www.fidh.org/en/region/Africa/mali/mali-al-mahdi-trial-on-destruction-of-cultural-heritage-opens-at-the>

## • The Al Hassan case: a positive development in the OTP strategy on Mali

On 27 March 2018, the OTP issued an arrest warrant against Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud for crimes against humanity and war crimes, including torture, outrages upon personal dignity, persecution (including on gender grounds), rape and sexual slavery.<sup>58</sup> Alleged member of Ansar Eddine, Al Hassan was the chief of the Islamic police in Timbuktu during the city's occupation by Jihadist groups in 2012 and 2013. According to information gathered by FIDH and member and partner organisations in Mali, Al Hassan was directly involved in sexual violence committed against several dozens of women who were victims of rape and sexual slavery, among other offences.<sup>59</sup>

This is the first prosecution in the Mali situation before the ICC for charges of sexual and gender-based violence, and it is the first time the OTP includes the crime of persecution on gender grounds into its charges. Victims who lodged a complaint against Al Hassan with the Malian courts in March 2015, welcome this prosecution, taking place at a time when the national judicial proceedings appear to be at a standstill.

This confirms what seems to be a trend of the OTP to improve the systematic investigation and prosecution of SGBC.

### 1.2.2 Areas for improvement of OTP policies and strategies

#### A. Transparency of decision-making

The *Al Mahdi case* indicates that transparency of communication about decision-making is critical if justice is to be meaningful for victims and affected communities. The OTP ought to have communicated more effectively outside the Court to explain why they did not pursue further charges.

A similar situation occurred in the decision of the OTP not to appeal the verdict in the *Katanga case* in March 2014, in which the defendant was found guilty of murder, attacking a civilian population, destruction of property and pillaging, but acquitted for the SGBV charges of rape and sexual slavery.<sup>60</sup> One participant put it simply: "bad facts make bad law"; in other words, decisions made about what evidence to gather during investigations and how to present it during prosecution are irreversible, and if not handled properly, will inevitably lead to an unsatisfactory verdict. However, the reasoning behind the decision not to appeal was not effectively communicated to victims and affected communities, leading to significant dissatisfaction, misunderstanding, and disappointment.<sup>61</sup>

While the current implementation of the OTP SGBC policy requires an internal justification not to prosecute SGBV charges, it would be important for victims and could be in OTP's interest to publicly present the reasons motivating such a decision.

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58. See ICC presentation of Al Hassan Case: <https://www.icc-cpi.int/mali/al-hassan>

59. FIDH and partner organisations press statement, "Mali – 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>

60. The Prosecutor v. Germain Katanga, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/07-3436-tENG, 7 March 2014, available at: [https://www.icc-cpi.int/CourtRecords/CR2015\\_04025.PDF](https://www.icc-cpi.int/CourtRecords/CR2015_04025.PDF)

61. See, for example, Women's Initiatives for Gender Justice, Appeals Withdrawal by Prosecution and Defence, Prosecutor vs. Germain Katanga, 26 June 2014, available at: <http://www.iccwomen.org/documents/Katanga-Appeals-Statement.pdf>. WIGJ was "extremely concerned and disappointed" by the Prosecutor's decision not to appeal, stating that the "decision to withdraw from this process is highly unexpected. The judgment, now uncontested, is a step backwards in the body of jurisprudence on sexual violence, and we are concerned about the possible ramifications for the ICC in its future cases."

## B. A comprehensive gender focus

Participants in the FIDH research suggested that a gender focus within the OTP continues to translate to an almost exclusive focus on sexual violence issues and on female victims. It is important that the current focus of SGBC be broadened to a true and inclusive gender focus that encapsulates the broad range of sexual and non-sexual harm suffered by both male and female victims.

However, participants stressed that the Court should build on that success by continuing to pursue prosecutions for SGBV against men and boys, particularly as victims are met with continued stigmatisation and invisibilisation in most circumstances despite the prevalence of such violence.<sup>62</sup> In this regard, the March 2018 decision by the ICC Trial Chamber IX not to accept the request by the victims' legal representatives to hear the testimony of three male victims of sexual violence during the **Ongwen** trial,<sup>63</sup> highlights the need for the OTP to allocate sufficient time and resources to investigate sexual violence against all gender groups, so as to be able to include the adequate SGBV charges as soon as possible and before trial.<sup>64</sup>

Participants also urged the Court to act on opportunities to explicitly charge gender-based violence outside of circumstances involving sexual violence, such as gender-based persecution. The **Ongwen case** provides a notable example in the right direction, with charges of forced marriage as a crime against humanity. The Prosecutor stressed that forced marriage does not necessarily constitute (or solely constitute) a sexual crime, but rather a *gendered* crime, as it may involve not only repeated rape, but also forced domestic duties and social responsibilities, including in some cases, pregnancy and motherhood.<sup>65</sup> As such, the OTP charged it under Article 7(1)(h) – “Other inhumane acts” – rather than one of the provisions linked explicitly to sexual violence.

In addition, another avenue for the ICC in relation to gender-based crimes would be to investigate crimes perpetrated against individuals based on their actual or perceived gender identity or expression. One participant stressed that “the ICC should be a global leader in the investigation of attacks against the LGBTI community”.

## C. Encouraging positive complementarity at early stages

Responsibility for the prosecution of the majority of international crimes lies with States and the ICC only holds jurisdiction over crimes if they are not being (or cannot be) genuinely investigated or prosecuted at a national level. Consequently, the Court relies on the cooperation of States, international

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62. See, for example, ICTJ, *When No One Calls it Rape: Addressing Sexual Violence against Men and Boys*, 7 December 2016, available at: <https://www.ictj.org/publication/sexual-violence-men-boys>

63. ICC Trial Chamber IX, “Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests”, No. ICC-02/04-01/15, 6 March 2018, para. 55-59, available at: [https://www.icc-cpi.int/CourtRecords/CR2018\\_01601.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_01601.PDF)

64. Article 61(9) of the ICC Statute enables the Prosecutor, after the charges are confirmed and before the trial has begun, “with the permission of the Pre-Trial Chamber and after notice to the accused, [to] amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held.”

65. ICC, the Prosecutor v. Dominic Ongwen, Decision on the Confirmation of Charges, 23 March 2016, available at: [https://www.icc-cpi.int/CourtRecords/CR2016\\_02331.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_02331.PDF). For example, see para 93: “According to the Chamber, the central element of forced marriage is the imposition of “marriage” on the victim, i.e. the imposition, regardless of the will of the victim, of duties that are associated with marriage, as well as of a social status of the perpetrator’s “wife”. The fact that such “marriage” is illegal and not recognised by, in this case, Uganda, is irrelevant. What matters is that the so-called “marriage” is factually imposed on the victim, with the consequent social stigma. The element of exclusivity of this forced conjugal union imposed on the victim is the characteristic aspect of forced marriage and is an element which is absent from any other crime with which Dominic Ongwen is charged. As held by the SCSL, unlike sexual slavery, forced marriage implies a relationship of exclusivity between the “husband” and “wife”, which could lead to disciplinary consequences for breach of this exclusive arrangement and, therefore, is “not predominantly a sexual crime”.

organisations, and civil society to engage in what is known as “positive complementarity”<sup>66</sup> or the ICC’s role and ability to catalyse or influence the quality of domestic proceedings.

FIDH research indicates that there is an urgent need to improve cooperation with national authorities to actively facilitate positive complementarity in practice and not simply in theory. It is important to increase the scrutiny of gender analysis at the preliminary examination phase, before any decision is taken as to the opening of an investigation.<sup>67</sup> Although this has been done to an extent in certain situations dealing with isolated cases, such as Guinea,<sup>68</sup> a comprehensive and consistent approach to SGBV complementarity in all preliminary examinations would be welcomed. For example, progress at a national level in the systematic investigation and prosecution of SGBV in Colombia has been slower to advance and leaves room for improvement with regard to complementarity.<sup>69</sup>

Participants acknowledged that implementing positive complementarity efforts requires a certain degree of creativity, particularly due to the political and financial limitations surrounding the concept of positive complementarity. A number of States have stated their opposition to any positive complementarity-related activities by the Court that go beyond the information sharing. For some States, the issue seems primarily budgetary, as they deem such activities to be outside the ICC’s “core mandate” and therefore not the responsibility of States Parties to fund. Other States imply that more expansive positive complementarity activities undertaken by the Court could infringe on the independence of State institutions.<sup>70</sup>

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66. The concept of positive complementarity was first mentioned by the OTP in its 2009-2012 Prosecutorial Strategy, wherein it states that “The positive approach to complementarity means that the Office will encourage genuine national proceedings where possible, including in situation countries, relying on its various networks of cooperation, but without involving the Office directly in capacity building or financial or technical assistance.” Office of the Prosecutor of the International Criminal Court, Prosecutorial Strategy 2009-2012, 1 February 2010, para 17.

67. According to Articles 17 and 53 of the Rome Statute, before an investigation can begin, the OTP’s Situation Analysis Section conducts a preliminary examination to decide whether there is a reasonable basis to believe crimes of sufficient gravity have been committed in a situation to warrant an investigation. During this examination, the OTP analyses whether or not the Court has material, temporal and personal or territorial jurisdiction over the crimes; whether an investigation would be admissible (a national court is not already genuinely investigating or prosecuting the same crimes); and whether or not an investigation would be in the interests of justice and of the victims. For more information, see: Office of the Prosecutor of the International Criminal Court, Policy Paper on Preliminary Examinations, November 2013, available at: [https://www.icc-cpi.int/iccdocs/otp/OTP-Policy\\_Paper\\_Preliminary\\_Examinations\\_2013-ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf)

68. The OTP has been extremely active in Guinea in terms of missions to push for complementarity, completing its 13th mission in 2016. In cooperation with national and international civil society organisations pushing for investigations to include SGBV, and by engaging the UN Team of Experts on the Rule of Law and Sexual Violence, significant advances have been made nationally. These advances include the indictments of 14 individuals (including a former Head of State) charged with crimes related to the 2009 stadium massacre. Investigative judges have also received testimony from more than 50 female survivors of sexual violence. Further, in 2016 the Parliament of Guinea adopted a new Criminal Code and Criminal Procedural Code, which fully implements the Rome Statute. Nonetheless, victims continue to await the opening of the 2009 stadium massacre case, as well as the advancement of other significant national cases involving SGBV. Civil society organisations have likewise signalled security risks for victims of SGBV. See, for example: FIDH, *Justice, réconciliation et réformes législatives : 3 priorités pour l’État de droit en Guinée*, 20 March 2017, available at: <https://www.fidh.org/fr/regions/afrique/guinee-conakry/guinee-trois-priorites-pour-combattre-l-impunite-et-renforcer-l-etat>

69. See: OTP, Report on Preliminary Examination Activities 2016, 14 November 2016, paras 249-251, available at: [https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-pe\\_eng.pdf](https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-pe_eng.pdf). The report indicates that in Colombia “although some steps had been adopted to prioritise SGBC cases attributed to all parties”, such as the legislation 1719 of 18 June 2014 on “access to justice for victims of sexual violence in the context of the armed conflict” enabling the prosecution of SGBV crimes, in reality “relevant national proceedings for these crimes against members of the FARC-EP, the ELN and state forces, appear limited”.

70. See, for example, language in the 2015 Report of the Bureau on Complementarity (drafted by the Complementarity Facilitation of The Hague Working Group) presented to the 14th Assembly of States Parties, including: “States Parties and the Court have expressed the view that the role of the Court itself is limited in actual capacity-building for the investigation and prosecution of Rome Statute crimes “in the field”. Rather, this is a matter for States, the United Nations and relevant specialized agencies, other international and regional organizations and civil society” (para 21). In 2016, language in the equivalent report highlighted the importance of international development organisations in performing activities related to positive complementarity (once again shifting focus away from the ICC), underscoring that “National ownership is essential and a requirement to engage in, and ensure the success of, such activities” (para. 4). Both reports do, however, shed light on positive complementarity efforts undertaken related to SGBV, within said constraints. Report of the Bureau on complementarity, ICC-ASP/14/32, Fourteenth session of the Assembly of States Parties, 10 November 2015, available at: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP14/ICC-ASP-14-32-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-32-ENG.pdf); Report of the Bureau on complementarity, ICC-ASP/15/22, Fifteenth session of the Assembly of States Parties, 10 November 2016, available at: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP15/ICC-ASP-15-22-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-22-ENG.pdf)

Greater coordination and cooperation with civil society organisations, discussed in more detail in Part II of this report, is therefore even more important in this respect. Nonetheless, several participants indicated that a greater focus on SGBV during OTP preliminary examinations would make a tangible difference in terms of complementarity, not least by strengthening calls by civil society organisations for accountability for these crimes at a national level.

#### D. Applying appropriate modes of liability

Participants stressed that the OTP should make use of the full range of modes of liability available under the Statute in order to best establish the connection between the accused and his or her victims. While the conviction in first instance in the **Bemba case** represented a milestone in successful prosecution for SGBV under Article 28 on superior liability<sup>71</sup> – dispelling certain myths and misconceptions about the foreseeability and acceptability of sexual violence during armed conflicts – the acquittal by the ICC Appeals Chamber overturned this positive development. Three of the five Appeals judges considered indeed that the Trial Chamber judges erred by affirming that Bemba had not taken the necessary measures to prevent the crimes and punish the members of his troops responsible for the abuses. Therefore, the responsibility of Jean-Pierre Bemba as commander (pursuant to Article 28 of the ICC Statute) could not be held, according to the three judges of the majority, since they were all based on this mode of liability. Two appeals judges issued dissenting opinions, defending the confirmation of the conviction and criticising strongly the decision of the majority, that indeed went against jurisprudence of international tribunals, including the ICC.<sup>72</sup>

Several participants noted, however, that although the prosecution of commanders and political leaders for SGBV through command responsibility is crucial, this is still a mode of liability based on omission. Prosecutors should avoid falling into the trap that with non-physical perpetrators of SGBV it is “command responsibility or nothing.”

Additionally, for some victims the direct perpetrator may indeed fulfil the category of “those most responsible.” As such, prosecution of direct perpetrators (such as in the **Ongwen** and **Ntaganda cases**) continues to hold relevance in bringing about accountability for SGBV.

#### E. Strategic appeals

As previous practice at the ICTY has shown, and as many participants indicated, pursuing strategic appeals in cases of SGBV, despite apparent difficulties or initial resistance, can be incredibly important in moving jurisprudence forward.<sup>73</sup> In this sense, the decision by the OTP not to appeal the **Katanga judgment** may have been a missed opportunity.

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71. The Prosecutor v. Jean-Pierre Bemba, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/05-01/08-3399, 21 June 2016, paras 693-742.

72. See for example, Leila N. Sadat, “Fiddling While Rome Burns? The Appeals Chamber’s Curious Decision in Prosecutor v. Jean-Pierre Bemba Gombo”, 12 June 2018, available at: <https://www.ejiltalk.org/fiddling-while-rome-burns-the-appeals-chambers-curious-decision-in-prosecutor-v-jean-pierre-bemba-gombo/>; Diane Marie Amann, “In Bemba and Beyond, Crimes Adjudged to Commit Themselves”, 13 June 2018, available at: <https://www.ejiltalk.org/in-bemba-and-beyond-crimes-adjudged-to-commit-themselves/>; and Alex Whiting, “Appeals Judges Turn the ICC on its Head with Bemba Decision”, 14 June 2018, available at: <https://www.justsecurity.org/57760/appeals-judges-turn-icc-head-bemba-decision/>

73. See, for example, Michelle Jarvis and Serge Brammertz (Eds), *Prosecuting Conflict-Related Sexual Violence at ICTY* (Oxford: Oxford University Press, 2016), 66-67.

## The ICTY's Đorđević Appeal and Its Contribution to SGBV Jurisprudence

In the Đorđević case at the ICTY, the Office of the Prosecutor brought a very important factual appeal to challenge the Trial Chamber's decision relating to circumstantial evidence for sexual violence. The appeal involved the Chamber's evaluation of evidence relating to an incident in which a woman had been taken to the bush and brought back half-naked, which for the Prosecution was circumstantial evidence to prove that she had suffered sexual violence. Because this witness did not testify, the judges refused to accept this interpretation and suggested that there may have been other explanations for why she had lost her clothes. The Prosecution appealed the judgment because, in the words of one interviewee: "If the same woman had been taken to the bush, and gunshots would have been heard, the judges would have had no problem finding she had been killed." The decision to appeal on that basis was contentious even within the OTP as many people did not understand the basis for the appeal. The decision to appeal and the Đorđević appeal judgement are now excellent precedent on how to deal with circumstantial evidence.<sup>74</sup>

### 1.3 The need for increased Court-wide expertise on SGBV

SGBV expertise of ICC staff and judges is instrumental in achieving accountability for these crimes. For instance, participants have expressed continuing concerns about the receptiveness of judges to SGBV issues. Notably, many participants noted their concerns about the impact of conservative interpretations of key crimes and provisions by the judges, leading to the dismissal or withdrawal of SGBV charges.

The Rome Statute contains a range of provisions requiring specific institutional capacity on SGBV. For instance, the OTP is required to 'appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence',<sup>75</sup> and the Registry's Victims and Witnesses Section (VWS) must have staff 'with expertise in trauma, including trauma related to crimes of sexual violence'.<sup>76</sup> Similarly, States must take into account the need to appoint judges with specific expertise, such as on 'violence against women'.<sup>77</sup>

Despite these provisions, however, our research suggests that not enough effort has been made to increase the Court's capacity to deal with SGBV issues across the board.<sup>78</sup> While the OTP has taken some steps to increase its staff expertise on gender issues, particularly since the adoption of the SGBC Policy (and more recently following the preliminary stages of this research project), it remains less clear to what extent efforts are made within the other Court organs.<sup>79</sup>

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74. The Prosecutor v Vlastimir Đorđević, Case No. T-05-87/1-A, Appeal Judgment, 27 January 2014, paras 853-859, available at: <http://www.icty.org/x/cases/djordjevic/acjug/en/140127.pdf>

75. Article 42(9), Rome Statute of the International Criminal Court.

76. Article 43(6), Rome Statute of the International Criminal Court.

77. Article 36(8)(b), Rome Statute of the International Criminal Court.

78. See, for example, the recommendations made to the different organs in the latest Gender Report Card: Women's Initiatives for Gender Justice, Gender Report Card on the International Criminal Court 2014, December 2014, available at: <http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2014.pdf>; also, Report of the Bureau on equitable geographical representation and gender balance in the recruitment of staff of the International Criminal Court, ICC-ASP/15/32, Fifteenth session of the Assembly of States Parties, 14 November 2016, Annex A, available at: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP15/ICC-ASP-15-32-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-32-ENG.pdf)

79. Two years ago a discussion on gender started within the Registry, but this does not appear to have progressed since. No efforts appear to have been taken at all in Chambers.

### 1.3.1 Gender equality and seniority of SGBV experts

Many of the current SGBV experts within the OTP hold more junior positions, sometimes of a temporary nature or funded externally (e.g. by UN Women), rather than from the core budget. This is reflective of concerns raised by civil society representatives in the lead up to the Assembly of States Parties and may relate to the continued failure of the Court in achieving gender equality in recruitment for positions above entry level. Indeed, the Prosecutor<sup>80</sup> and former President<sup>81</sup> are not emblematic of the remainder of the Court's staffing.<sup>82</sup> Given that SGBV experts are often (although not necessarily) female, gender equality in staffing is a legitimate and on-going concern. However, participants equally expressed caution about the assumption that women are necessarily better advocates for SGBV issues. Both women and men should be empowered to engage with vulnerable witnesses and tackle issues of SGBV, with care taken not to confine SGBV to a "women's issue." There is a need to break such gender stereotypical patterns in training and recruitment practices.

Participants repeatedly stressed the importance of ensuring that the right individuals with the right expertise and an appropriate level of authority and seniority are included within the staff of all organs of the Court in order to advance the ICC's capacity to provide accountability for SGBV. Specifically, several participants stressed the need to increase understanding and awareness of SGBV among judges and Chambers staff.

### 1.3.2 Gender advisers

Participants suggested that several *in-house* gender advisers should be appointed *at a senior level* in all organs of the Court, including the Registry and Chambers. Lower level staff may not always feel comfortable challenging decisions from a gender perspective or may not enjoy the necessary respect among colleagues and seniors to be able to address such issues. Notably, concerted efforts must be made to mainstream knowledge of and experience dealing with SGBV, and ensuring that such advisers are not alienated from other staff.

The OTP is currently the only Court organ with a specific adviser on gender issues. Several participants expressed concern, however, about the role of Special Adviser to the Prosecutor on Gender. Since the position is temporary, voluntary, and external, many participants were concerned about the capacity of the Adviser to have a genuine impact on *day-to-day* operational decisions. Due to the structure of the role, there is a risk that decisions will be taken without consulting the Adviser or waiting for their recommendations, or that the Adviser will be providing advice without being party to all the relevant internal considerations. Participants also expressed concern that one part-time unpaid position was simply not enough to effectively address the need for internal guidance on SGBV. The nature of the ICC's work means there will inevitably be spontaneous decision-making moments when there may not be sufficient time to consult with the Adviser beforehand. Internalising gender expertise by appointing several *in-house*, rather than external or voluntary, advisers is therefore necessary to ensure a consistent approach.

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80. In 2012, Fatou Bensouda (The Gambia) became the ICC's first female Chief Prosecutor.

81. Judge Silvia Fernández de Gurmendi (Argentina) was elected as the ICC's first female President in 2015, along with two other women: Judge Joyce Aluoch (Kenya) as First Vice President and Judge Kuniko Ozaki (Japan) as Second Vice President.

82. Statistics on gender balance reported to the 2016 Assembly of States Parties indicated "10. As at said date, female staff comprised 47 per cent of the Court's professional staff, a decrease of 1.1 per cent from 2015, while male staff comprised 53 per cent. The data illustrates also that while female staff constitute more than 50% at the P-1 (71%) and P-2 (61%) levels, female staff are severely under-represented at the higher levels: only one of eleven staff at the D-1 level is female, 12 of 32 at the P-5 level, 24 of 45 at the P-4 level, and 55 of 124 at the P-3 level." Report of the Bureau on equitable geographical representation and gender balance in the recruitment of staff of the International Criminal Court, ICC-ASP/15/32, Fifteenth session of the Assembly of States Parties, 14 November 2016, paras 10-11, available at: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP15/ICC-ASP-15-32-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-32-ENG.pdf)

Participants stressed that internal advisers must be present in all sections of the OTP, from preliminary examinations to appeals, should be appointed at a decision making level (at a minimum P4/P5, including some at D1 level), and must be integrated within the Executive Committee (ExCom)<sup>83</sup> and at a policy level.

However, participants equally stressed the importance for gender advisers to influence the day-to-day operations of the various organs of the OTP. In this respect, they underscored the need to consider the advisers' required background so that they may be appropriately integrated and accepted within teams. For instance, investigators may feel more comfortable working with someone with an investigations background. Appointing gender advisers with knowledge of the day-to-day experience of investigators, therefore, may assist in opening up the space within the Investigations Division for these individuals to be taken seriously and thus have a real impact on the Court's operations. The appointment of internal gender advisers should be complemented with a sustained focus on enhancing SGBV knowledge and experience of *all* OTP staff.

Regarding the Special Adviser to the Prosecutor on Gender, efforts should be made both to appoint the most qualified experts and to avoid potential conflicts of interest, particularly as Special Advisers are contractually obliged to refrain from publicly criticising the Court. Participants expressed concern that external appointments may effectively silence important critical voices and efficient expert monitoring of the Court's work. The mandate of the previous Special Adviser to the Prosecutor on Gender, Brigid Inder, expired in August 2016. The Prosecutor appointed Patricia Viseur Sellers as the new Special Adviser on Gender on 19 December 2017.<sup>84</sup> While participants stressed the need to appoint several internal gender advisers, they equally stressed the urgent need to move forward with the appointment of a new (external) Special Adviser on Gender in the interim, so as to not leave a vacuum within the office and risk a deprioritisation of gender issues.

## Special Advisers to the Prosecutor

The Prosecutor is currently advised by the following:

- **Patricia Viseur Sellers** – Special Adviser on Gender, formerly on International Criminal Law Prosecution Strategies
- **Laila Nadya Sadat** – Special Adviser on Crimes against Humanity
- **Diane Marie Amann** – Special Adviser on Children in and affected by Armed Conflict

Former Special Advisers on Gender include:

- **Brigid Inder** (2012 - 2016)
- **Catherine MacKinnon** (2008 - 2012)

83. The Executive Committee (ExCom) of the OTP is composed of the Prosecutor and Heads of the three Divisions of the Office (Jurisdiction, Complementarity and Cooperation Division - JCCD; Investigations Division - ID; and Prosecutions Division - PD). ExCom is responsible for the development and adoption of the strategies, policies and budget of the office. In addition, ExCom provides strategic guidance and final decision-making on all major activities of the OTP.

84. ICC Press release, "The Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, appoints Patricia V. Sellers as her Special Adviser on Gender", ICC-CPI-20171219-PR1352, 19 December 2017, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1352>

### 1.3.3 Training

Whilst the recruitment of experts with specific experience dealing with SGBV within the OTP is a positive development, there has been only limited training on the SGBC Policy since its release over two years ago. There was one compulsory training programme on certain aspects of the Policy, and following the first stages of this research project, additional training has been planned and implemented. Yet, the training of staff in interviewing vulnerable witnesses is not yet complete and the internal gender analysis guidelines were only adopted in August 2016. This limits the institutional capacity to deploy appropriately trained staff, although efforts are currently underway to address this within the OTP.

The lack of training for all persons working within the field, including in other organs of the Court, carries inherent risks of isolating the SGBV experts and side-lining these crimes. For instance, several participants suggested that when meetings or workshops on SGBV are organised on a voluntary basis, those in attendance are generally staff with already (some) SGBV knowledge or interest. While it is important to create a supportive environment for those individuals to minimise their possible isolation within the OTP, it is equally important to move towards wider mandatory knowledge on SGBV. As one participant stated, “gender analysis is not a luxury.”

One way of addressing this is organising training sessions or workshops on the SGBC policy, gender analysis guidelines, or SGBV investigative techniques as an obligatory part of professional development. Staff members should understand that knowledge of and ease in working with SGBV is “good for their job” – staff at the ICC should want to be well-equipped to address any type of crime he or she encounters. One suggestion is to train whole teams together, using examples and issues they come across specifically, and adapting the training to the legal frameworks that they are working in or struggling with. Another suggestion is to make a greater effort to ensure that operational staff is included in internal and external meetings and events relating to SGBV issues, not just management or public representatives.

### 1.3.4 Site visits

Participants also stressed the importance of site visits undertaken by judges and their legal officers. So far, only twice have ICC judges visited a situation country: in January 2012, ICC judges in the **Katanga** and **Ngudjolo** cases visited Ituri, Eastern DRC;<sup>85</sup> in June 2018, ICC judges in the **Ongwen** case visited Northern Uganda.<sup>86</sup> By physically engaging with the communities affected by the crimes, judges and their staff will better understand the general context of victimisation, as well as the cultural and societal gender-dynamics implicit in the commission of SGBV.

### 1.3.5 Gender-responsive budgeting

One particular suggestion that has come out of this research to increase the ICC’s gender competence, is gender-responsive budgeting (GRB): ensuring the necessary institutional capacity to deal with SGBV requires time, money, and a long-term commitment to changing practices and addressing personal and institutional biases. Without the appropriate funds, most changes suggested by our research could not be implemented.

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85. ICC Press release, “ICC judges in case against Katanga and Ngudjolo Chui visit Ituri”, ICC-CPI-20120127-PR765, 27 January 2012.

86. ICC Press release, “ICC judges in Ongwen case visit northern Uganda”, ICC-CPI-20180611-PR1391, 11 June 2018.

GRB refers to the process of conceiving, planning, approving, executing, monitoring, analysing, and auditing budgets in a gender-sensitive way. GRB could help both the ICC and States Parties to its Statute understand how they may need to adjust their priorities and reallocate resources to meet their commitments to achieving advances on gender and SGBV.

Gender-responsive budgeting requires, first and foremost, an evaluation of each budget line on women and men in respect of gender equality and accountability for SGBV. Then, the budget can be made gender-responsive, aimed at genuinely fulfilling the gender mandate set forth in the ICC's founding documents. In addition to a GRB process, several participants suggested that the Court must request specific funds from the Assembly of States Parties – which votes the budget of the ICC –, in order to implement gender competence across the board, including for the necessary training sessions and workshops and the appointment of a number of senior level internal gender advisers across the Court.

## **1.4 Approaching and supporting victims and witnesses of SGBV**

### **1.4.1 Reaching out to and interviewing victims and witnesses**

#### **A. Creating a safe space for victims and witnesses**

Victims of SGBV face major obstacles in reporting these crimes. They may face rejection from their partner, families or communities. They may be unable to (re)marry because they are seen as 'spoiled'. In addition to physical and psychological consequences of the crimes, the stigmatisation deeply impacts their social and economic life. They may also fear reprisals, negative attitudes from people receiving their complaint, and confrontation with the justice system in general. For these reasons, victims of SGBV face additional obstacles to reporting these crimes or speaking out to investigators. This partly explains why disclosure of SGBV victimisation often comes much later than other crimes because of the persisting stigma attached to these crimes in many societies.

Nonetheless, participants cautioned against the perception that victims of SGBV are necessarily more vulnerable or hesitant to tell their story. Assumptions among investigators that victims do not want to speak about SGBV or testify, often turn into a self-fulfilling prophecy. Several key elements should be taken into consideration in order to encourage the disclosure of SGBV crimes.

Firstly, participants stressed that building a relationship of trust between investigators or prosecutors, and victims and witnesses of SGBV is critical to creating an environment in which victims feel sufficiently safe and secure to tell their story. The reality is that investigators and other ICC staff interacting with victims are often only in the field for short periods. That means that it is not always easy to create this necessary relationship of trust. More attention must be paid within the ICC as to how to make it easier for both male and female victims to speak about their experiences of SGBV, which includes exploring possibilities of a longer-term field presence. The need for extended field presence has been recognised by the Prosecutor and is steadily improving in some situations.<sup>87</sup>

Secondly, consideration should be given as to how and where to approach SGBV victims. Investigators must assess whether it is preferable to approach victims in the area they live, or whether it is better

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87. According to the OTP's 2016-2018 Strategic Plan, "The longer term or permanent field presence of investigators has been systematically implemented (Mali, Côte d'Ivoire, Central African Republic, Uganda)." Office of the Prosecutor of the International Criminal Court, Strategic Plan 2016-2018, 16 November 2015, Annex 1, para. 20, available at: [https://www.icc-cpi.int/iccdocs/otp/EN-OTP\\_Strategic\\_Plan\\_2016-2018.pdf](https://www.icc-cpi.int/iccdocs/otp/EN-OTP_Strategic_Plan_2016-2018.pdf)

for them to be moved to another location to be interviewed. Participants stressed that finding the right compromise sometimes means putting an interview off for a certain period of time. SGBV victims, together with insider witnesses, require particular consideration, especially when their families or communities do not know about the crime and where there are risks of ostracisation if they do.

Thirdly, participants addressed the issue of training. The legal requirements of appropriate training regarding psychological support for those dealing with victims and witnesses of SGBV are positive developments.<sup>88</sup> However, there have been significant delays in implementing staff training on these issues.

One advance in investigative techniques has certainly been the promotion of the *Do No Harm* approach to witness and victim interviews, which aims at minimising the potential negative impact that judicial proceedings may have on victims and witnesses. This approach engages the interviewer in ethical planning and execution of all interactions with victims and witnesses in order to put the interviewee at ease, build trust by creating a safe space, and avoid re-traumatisation.<sup>89</sup>

## **B. Risk of infantilising victims of SGBV**

While it is important to recognise the impact of the stigma and trauma associated with sexual violence, there is a risk of infantilising victims of SGBV or treating them paternalistically. Participants felt strongly that victims of sexual violence are not inherently less capable of making informed decisions about speaking to investigators than equally vulnerable victims of other crimes and that well-intended efforts to avoid re-traumatisation have the potential to inadvertently exacerbate both the stigma and side-lining of these crimes.

The unintended consequence of strict adherence to protocols requiring psychological assessment for all SGBV victims prior to interview means that in practice, when it becomes clear that an individual is a victim of SGBV, the interview is postponed to allow for a psychosocial assessment, which may not even be available. This may mean that the opportunity to speak to that victim about SGBV is lost forever. Victims, particularly male victims, do not always speak about SGBV easily and participants stressed that it is important to give them the opportunity to do so once they indicate that they are ready to speak.<sup>90</sup> Ultimately, a fine balance must be struck between sensitivity to re-traumatisation and actively empowering victims of SGBV to speak.

This phenomenon is not unique to the ICC, as some participants noted a similar pattern of exceptionalism on the part of civil society or other international organisations when dealing with victims of SGBV.

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88. Article 43(6) Article 54(1), Article 68 (1), Article 87 of the Rome Statute of the International Criminal Court; Rules 16-19, 86-88, Rules of Procedure and Evidence of the International Criminal Court.

89. On the "Do No Harm" principle, see, for example, UNICEF's Humanitarian Principles (July 2003) which explains that "humanitarian organizations must strive to 'do no harm' or to minimize the harm they may be inadvertently doing." See also UNICEF, Core Commitments for Children in Humanitarian Action, May 2010, para. 1.9, available at: [https://www.unicef.org/publications/files/CCC\\_042010.pdf](https://www.unicef.org/publications/files/CCC_042010.pdf); UN Office of the High Commissioner for Human Rights, Manual on Human Rights Monitoring, Chapter 2, Basic Principles of Human Rights Monitoring, 2011, p. 4. United Nations Department of Peacekeeping Operations/Department of Field Support, Civil Affairs Handbook, Ch. 5.4 "Do No Harm" and conflict-sensitive approaches, 2012, available at: [http://www.un.org/en/peacekeeping/documents/civilhandbook/Civil\\_Affairs\\_Handbook.pdf](http://www.un.org/en/peacekeeping/documents/civilhandbook/Civil_Affairs_Handbook.pdf). The principle was made explicit as well by the Trust Fund for Victims in its submission in the reparations phase of the Lubanga case. See Chappell, Louise. *The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy* (Oxford: Oxford University Press, 2016), p. 151.

90. See for example Christian, Mervyn, Octave Safari, Paul Ramazani, Gilbert Burnham, and Nancy Glass. "Sexual and gender based violence against men in the Democratic Republic of Congo: effects on survivors, their families and the community." *Medicine, conflict and survival* 27, no. 4 (2011): 227-246; Also, United Nations High Commissioner for Refugees, Working With Men and Boy Survivors of Sexual and Gender-Based Violence in Forced Displacement, 2012, available at: <http://www.unhcr.org/news/makingdifference/2012/10/5072bfa69/unhcr-issues-guidelines-protection-male-rape-victims.html>

## **C. Gender composition of field teams**

Participants stressed that specific attention must be paid to gender issues in the composition of teams when dealing with victims and witnesses, particularly in the field. This must also include considerations of the gender of field team members, such as OTP investigators, legal representatives, and defense counsels or VPRS representatives. However, participants equally cautioned against an automatic assumption that female victims of SGBV will only want to speak to female interviewers and male victims of SGBV will only want to speak to male interviewers. This must be assessed on a case-by-case basis and participants stressed the need to simply ask victims and witnesses whom they would be most comfortable with.

Similarly, all investigators must be able to identify the 'red flags' of SGBV. Investigating teams cannot rely upon one or two investigators being SGBV experts to conduct all witness interviews on SGBV. At the risk of stating the obvious, SGBV victims are also witnesses to or victims of other crimes and when victims do not mention SGBV, this does not preclude them being SGBV victims. Being able to ask the right questions and picking up on verbal or non-verbal clues comes with experience and the right training; thus the necessity for training on SGBV to be mainstreamed throughout the Investigations Division.

Attention to the composition of a team applies also to support staff, such as interpreters. Participants recounted stories about interpreters who used euphemisms or were laughing when victims were describing SGBV because they felt embarrassed translating what the victim was saying, or because of a (cultural) sense of unease dealing with these issues.

Other times, the limited pool of certified female interpreters inhibited SGBV investigations. One participant, for example, explained that because of the nature of SGBV, their team wanted to use female interpreters. However, at the time, they did not have certified female English interpreters available, so instead they asked a French female interpreter to step in. This led to discrepancies in the witness' testimony around where and when a certain incident took place: the victim appeared to be describing a particular location and incident in her statement during the investigations, but during testimony at trial confirmed it happened somewhere entirely different. The participant explained that, had they not dealt with SGBV, they would have had a much larger pool of certified interpreters to choose from. The small pool of certified interpreters in all languages in this instance unnecessarily complicated the trial and jeopardised a witness' testimony, which could have easily been avoided. While it appears some of these issues around interpretation have been addressed over time, it remains important to invest in a large pool of available (male and female) interpreters with knowledge of or familiarity with SGBV issues.

Participants also highlighted the importance of understanding victim language and body language. Victims of SGBV will not always say very clearly that they have suffered SGBV. For instance, victims may use euphemisms such as "he laid with me," or "they made me a woman," or may include other clues to their specific victimisation such as "when they finished with me." Understanding how language is embedded in culture, and how it conditions victims' ability to speak out about SGBV is essential.

### **1.4.2 Victims' participation and legal representation**

#### **A. Victims' participation**

##### **a. Victims' participation scheme at the ICC**

Under Article 68 (3) of the ICC Statute, for the first time before an international criminal tribunal, victims have been granted access to proceedings and the possibility of presenting their views and concerns

where their personal interests are affected. ICC Pre-Trial Chamber I clarified on 17 January 2006 that: “The victims’ participation regime established by the drafters of the Statute ensued from a debate that took place in the context of the growing emphasis placed on the role of victims by the international body of human rights law and by international humanitarian law... the Statute grants victims an independent voice and role in proceedings before the Court. It should be possible to exercise this independence, in particular, vis-à-vis the Prosecutor and the International Criminal Court so that victims can present their interests”.<sup>91</sup>

The recognition of victims’ right to participate is a tribute to the centrality of victims’ experience and their potential to contribute to the justice process. Indeed, “victims bring to the Court their own narrative about the crimes they suffered, provide judges with contextual information, ensure connection with the field and a degree of local ownership of ICC proceedings thereby advancing the legitimacy of the ICC mandate”.<sup>92</sup>

Even if the scope of their rights varies in relation to the stage of the proceedings, victims can participate as early as the preliminary examination phase, before the opening of an investigation. Victims can submit:

- **“Victims’ representations”**, at the end of the preliminary examination phase: In four situations (Kenya, Côte d’Ivoire, Georgia, and Afghanistan) when the Prosecutor submitted requests after a preliminary examination to open an investigation to the Pre-Trial Chamber, she also notified victims of the situation that they could “make representations” in accordance with Article 15 (3) of the ICC Statute.<sup>93</sup> The aim is for victims to explain if and why the opening of an ICC investigation would be important, in order to help Pre-Trial Chamber judges to decide whether or not to open an investigation and to determine its scope. Victims had one to three months to submit their “representations” to the VPRS, which transmitted them to the Prosecutor and the Pre-Trial Chamber together with an analytical report.
- **“Article 15 Communications” to the OTP**. Another way for victims to participate in ICC proceedings is through communications submitted to the Office of the Prosecutor, in accordance with Article 15(1) of the ICC Statute. These communications are mainly submitted through NGOs, in order to influence the opening and the scope of a preliminary examination or of an investigation.
- **Victims’ participation after the issuance of an arrest warrant**: Victims can participate individually or collectively through their legal representative to provide contextual elements but also elements of proof, in order to contribute to the conviction and the sentencing of an accused.
- **Victims’ participation during the reparation phase**: Victims can fill a form to ask for different types of reparation measures. After the conviction of the accused, judges grant victims reparation, based on these requests.

Participants insisted on the importance of victim participation in ICC proceedings. This has the potential to have significant impact by providing a means for the voices and needs/demands of victims, including victims of SGBV, to contribute to the proceedings and have an impact on the decisions rendered by the judges.<sup>94</sup>

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91. ICC Pre-Trial Chamber I, Decision on the application for participation in the proceedings of VPRS 1-6, 17 January 2006, §50-51, available at: [https://www.icc-cpi.int/CourtRecords/CR2006\\_01689.PDF](https://www.icc-cpi.int/CourtRecords/CR2006_01689.PDF)

92. FIDH, “Enhancing Victims Rights before the ICC: A View from Situation Countries on Victims’ Rights at the International Criminal Court”, November 2013, p. 4, available at: <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/14259-fidh-report-enhancing-victims-rights-before-the-icc-a-view-from-situation>

93. According to Article 15 (3) of the Rome Statute, “Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence”.

94. FIDH, “Five Myths about Victim Participation in ICC Proceedings,” 5 December 2014, available at: <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/16592-five-myths-about-victim-participation-in-icc-proceedings>

## b. Limitations and obstacles to victims' participation

The framework for victims' participation, however, has been applied differently by various ICC Chambers. The type of information required, the length and format of the application form, modalities of participation during the proceedings etc., were different before different Chambers. Depending on the cases and Chambers, victims have been granted different levels of rights and the current tendency at the ICC has been towards greater limitation of victims' rights (e.g. restrictions on oral statements of victims' legal representatives and victims' testimonies, time allowed for written submissions, limitations on the possibility of questioning witnesses or accused, etc.). A harmonised approach to a meaningful victims' participation framework would increase both the framework's efficiency and would allow victims to better understand and anticipate the way they will be able to exercise their right to participate in order to strengthen accountability, including in relation to SGBV crimes.<sup>95</sup>

More specifically, the number of participating victims in cases with SGBV charges have been substantial. However, there are no specific statistics of the number of SGBV victims. Participants stressed that this lack of disaggregated data makes it difficult to assess if SGBV victims have been timely and duly informed of their right to participate and how many of them had effective access to justice before the ICC.

Number of Participating Victims in Trials Including SGBV Charges		
Defendant and Situation	SGBV crimes charged and confirmed	Number of participating victims (not limited to victims of SGBV)
<b>Katanga (DRC)</b>	Rape and sexual slavery (CAH); rape, sexual slavery and outrages upon personal dignity (WC)	366
<b>Ongwen (Uganda)</b>	Torture, rape, sexual slavery, forced pregnancy, other inhumane acts (forced marriage), persecution and enslavement (CAH); Torture, rape, sexual slavery, forced pregnancy, cruel treatment, outrages upon personal dignity and attacks against the civilian population (WC)	4107
<b>Ntaganda (DRC)</b>	Rape, sexual slavery and persecution (CAH); rape and sexual slavery (WC)	2148
<b>Bemba (CAR)</b>	Rape	5229
<b>Gbagbo &amp; Blé Goudé (Côte d'Ivoire)</b>	Rape and persecution (CAH)	727

## B. Victims' legal representation

Victims participate through a lawyer ("legal representative") who conveys their views and concerns, and represents their interests throughout the various stages of ICC proceedings. The main challenges for the legal representation of victims of SGBV relate to **a)** their common legal representation, and **b)** the current legal aid scheme.

95. See, for example, calls for harmonisation in: Redress, *The Participation of Victims in International Criminal Court Proceedings: A Review of the practice and consideration of options for the future*, October 2012, available at: [https://redress.org/wp-content/uploads/2017/12/121030participation\\_report.pdf](https://redress.org/wp-content/uploads/2017/12/121030participation_report.pdf); Pena, Mariana and Carayon, Gaëlle, "Is the ICC Making the Most of Victim Participation?" *Int J Transit Justice* (2013) 7 (3): 518-535, available at: <https://academic.oup.com/ijtj/article-abstract/7/3/518/643540?redirectedFrom=fulltext>; FIDH, "Recommendations to the 14th Assembly of States Parties to the Statute of the ICC", November 2015; See, for example, "Enhancing Victims Rights before the ICC: A View from Situation Countries on Victims' Rights at the International Criminal Court", November 2013.

## a. Common legal representation and specific interests and needs of SGBV victims

Victims participate mainly through a legal representative of their choice.<sup>96</sup> In all cases now, victims are represented by a common legal representative, either external or from the Office of Public Counsel for Victims (OPCV), in order to ensure the effectiveness of proceedings before the ICC, which mostly deals with mass crimes potentially affecting a large number of victims. In some cases, common legal representatives are chosen by judges, moving away from the basic principle of victims' freedom of choice.

For victims of SGBV crimes, it is particularly important to be represented by a legal representative and supported by a team with proper expertise and experience in working with SGBV victims, women and men, and on the particular context of the situation. All lawyers from the list of counsels before the ICC should be able to receive specific training on how to best interact with SGBV victims. The ICC's counsel list should also ensure a gender balance so that victims can choose to be represented by a woman or a man.

Participants highlighted the practical difficulties involved in effectively representing the views and concerns of large numbers of participating victims, expressing particular concern that insufficient attention is being paid to the particular needs and interests of SGBV victims.

For instance, when groups of victims are represented by one or two legal representatives, measures must be put in place to help SGBV victims feel their voice is preserved in these groups. Participants also stressed the importance of paying attention to the group dynamics and the ways in which this can affect the ability of victims to express their concerns or interests. For instance, one legal representative explained that they were faced with a situation where social norms demanded women to allow men to speak for them. In this case, the legal representative arranged meetings with women only, which changed the dynamics and allowed women to speak more freely about their own victimisation. Having local staff on a legal representation team is also key to assist in creating the necessary trust with victims.

Several participants expressed concern that without a consistent, supportive, and inclusive approach, the Rome Statute system of victim participation runs the risk of becoming removed from the reality of victims' lives, needs, and views.<sup>97</sup>

These concerns should be taken into account as and when the ICC reviews the legal aid scheme, guaranteeing an effective and meaningful victims' participation.<sup>98</sup>

## b. For an effective legal aid scheme

As for victims' participation, there is no harmonised practice for victims' legal representation and the allocation of legal aid, which depends on the judges' and the Registrar's discretion. In the **Ongwen case**, the case with the largest scope of SGBV crimes, the single judge of ICC Trial Chamber IX considered in a decision of 14 November 2016, that "victims who individually choose their own legal representatives

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96. Rule 90(1), RPE.

97. See FIDH reports "Enhancing Victims Rights before the ICC: A View from Situation Countries on Victims' Rights at the International Criminal Court" November 2013, available at: <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/14259-fidh-report-enhancing-victims-rights-before-the-icc-a-view-from-situation>; "Five Myths about Victim Participation in ICC Proceedings" December 2014, available at: <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/16592-five-myths-about-victim-participation-in-icc-proceedings>

98. See, for example, FIDH, IBA, NPWJ, PGA, Redress, "Open Letter to the ICC Registrar on Legal Aid for Victims in the Ongwen Case," 17 November 2016, available at: <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/open-letter-to-the-icc-registrar-on-legal-aid-for-victims-in-the>

do not qualify for financial assistance as a matter of right from the Court”.<sup>99</sup> Only Court-appointed counsel should be entitled to legal assistance paid by the Court. Therefore, the two external legal representatives chosen by the 2607 victims participating in the Ongwen case were not paid – nor their team – by the ICC legal aid during the preliminary stage, in contradiction with the ICC Rules of Procedure and Evidence (RPE). Following mobilisation of victims’ legal representatives and NGOs,<sup>100</sup> the ICC Registrar decided to review this decision and allocate legal aid to victims, as of the date of commencement of the Ongwen trial.

Several participants also expressed concerns about the limits of the current legal aid scheme. Notably, in situations where legal representatives work under the Court’s legal aid scheme, every activity and expense has to be pre-approved and authorised. According to one participant, doing so was a “complete nightmare” as they had to request permission every time they wanted to do something, especially when traveling to remote areas where represented victims live because of the funding implications.

Nonetheless, it is the right of victims to be informed and to express their demands, and ultimately, this lack of understanding on the need for frequent interaction between legal representatives and victims, including providing updates on judicial developments, can jeopardise the relationship between victims, their legal representatives, and the ICC, create unnecessary frustrations, and undermine victims’ rights and the meaningfulness of their participation. The participant explained, “People ask ‘how does it work? Do you go and talk to the victims? [...]’ Yes, of course! Victim participation is not supposed to be abstract!” Basic principles relating to field presence, adequate flexibility and independence of the legal representative<sup>101</sup> should be preserved.

Moreover, victims’ participation and legal representation are impacted by the problematic “zero growth” policy of some ICC States Parties (lobbying for several years for a limited increase of the Court’s budget), while the case load and the number of impacted victims are increasing. Indeed at the last ASPs, the budget of the Court was limited, the tendency being to “cut the weakest link” and this is reflected in the budget lines dedicated to victims’ participation and representation, that do not even represent 4% of the ICC budget.<sup>102</sup>

### 1.4.3 Protection, support and outreach

#### A. Victims and witnesses

##### a. Support throughout the justice process

Participants stressed that justice is a process – there is a ‘before, during and after’. Physical and

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99. ICC Trial Chamber IX, « Decision on decision on Registry’s Request for Clarification on the Issue of Legal Assistance Paid by the Court for the Legal Representatives of Victims », 14 November 2016, ICC-02/04-01/15-591, §2.

100. See in particular FIDH-REDRESS-IBA-NPWJ-PGA Open Letter to the ICC Registrar, 17 November 2016: <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/open-letter-to-the-icc-registrar-on-legal-aid-for-victims-in-the>

101. See, for example, FIDH, “Five Myths about Victim Participation in ICC Proceedings,” 5 December 2014, available at: <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/16592-five-myths-about-victim-participation-in-icc-proceedings>; FIDH, “FIDH Comments on the ICC Registrar’s Revision Proposals in Relation to Victims,” 18 November 2014, available at: [https://www.fidh.org/IMG/pdf/letter\\_registar\\_icc.pdf](https://www.fidh.org/IMG/pdf/letter_registar_icc.pdf)

102. A review of the 2016 approved budget, for example, indicates that the main sections dealing with victims participation and legal representation (VPRS, OPCV and legal aid provisioned by CSS) receive a minimal 3.6% of the budget. The following allocations are provisioned out of a total budget of €137,390,100: Victims Participation and Reparations Section: €1,429,100; Office of Public Counsel for Victims: €1,582,300; Counsel Support Section – Legal Aid for Victims: €1,963,200. Assembly of States Parties, “Proposed Programme Budget for 2017,” ICC-ASP/15/10, 17 August 2016, available at: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP15/ICC-ASP-15-10-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-10-ENG.pdf). See also: FIDH, “Cutting the Weakest Link: Budget Discussions and their Impact on Victims Rights to Participate in the Proceedings,” November 2012, available at: <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/Cutting-the-Weakest-Link-Budget-12398>

psychological support must be granted, if necessary, at all stages of the Court process.<sup>103</sup> Ideally, a support person would be available to accompany participating victims who need such support, throughout the entire process, not only if or when they testify. Given the ICC's increasing resource constraints, there is a risk that too much emphasis is placed on getting from witnesses what the ICC needs (i.e. their statement or testimony) without sufficient attention being paid to accommodating witnesses in this process. Several participants called for a more holistic approach in the Court's practices of engaging with victims and witnesses, and the integration of (referrals to) support services. While participants acknowledged that the Court is not in a position to offer extensive psychosocial or other support services to victims or witnesses, increased cooperation with other actors on the ground who are able to provide such services is critical.

## **b. Outreach to and communication with victims and affected communities**

Participants equally stressed the urgent need to improve the ICC's ability to maintain contact with and reach out to victims and witnesses over time and to manage their expectations.

Transparency by OTP investigators and other Court staff about what the ICC is realistically able to offer witnesses and victims is important to minimise the risks of creating unrealistic expectations and ultimately disappointment when the Court cannot live up to those expectations. Informing witnesses from the beginning that investigators may only meet with them once and clarifying how often the ICC will stay in touch with them can go a long way to prevent frustration. Without clear communication from the ICC, victims will feel forgotten, something that can be easily remedied if victims are told in advance what they can expect in terms of frequency of communication. When demands are made on victims, combined with an "in-out" approach by investigators or by outreach personnel, this leaves people at a complete loss.

This is further complicated by the high number of ICC interlocutors victims have to deal with (e.g. Office of the Prosecutor, Victim Participation and Reparations Section, Victims and Witnesses Section, Outreach, Office of Public Counsel for Victims, Legal Representatives of Victims), making it even more confusing for victims trying to understand what each wants from them and how their roles differ and interact. Participants therefore stressed the importance of greater coordination and cooperation across Court organs – fragmentation can only hurt the Court's engagement with victims and witnesses.

## **c. Protection of victims and witnesses**

The ICC has an obligation to "take appropriate measures to protect the safety of victims and witnesses".<sup>104</sup> That can involve redacting names and elements of identification, distorting voices and images, and, for the most serious cases, relocation.

Security issues and victim and witness intimidation, in addition to putting people participating in Court proceedings at risk, also continue to have a severely negative impact on the work of the Court, as evidenced by the collapse of the proceedings in the **Kenya cases**, which included, for some of them, SGBV charges.

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103. Article 68(1) of the Rome Statute includes an obligation for the Court to take appropriate measures to "protect (...) the physical and psychological well-being of victims and witnesses".

104. Article 68(1) of the ICC Statute.

## Witness Intimidation and the Kenya Cases

The Kenya cases (*Mathaura & Kenyatta* and *Ruto & Sang*) were both terminated due to insufficient evidence following alleged witness tampering. When the Court terminated the case against Ruto and Sang, multiple judges found that the incidence of witness interference was “at a disturbing scale.”<sup>105</sup> For the first time, it was even likely that one of the witnesses for the OTP had been targeted and killed for interacting with the Court.<sup>106</sup> While witness interference has been alleged in almost all the cases before the Court, the impact the allegations have had in the *Kenya cases* was unprecedented.

Fatou Bensouda also emphasised that witness tampering played a pivotal role in the outcome of the Kenya cases: “the level of witness tampering and obstructing the court has resulted in either having to withdraw the case, as I did in the Kenyatta case, or one of the judges declaring a mistrial, as in the Ruto case.”<sup>107</sup>

Warrants of arrest have been issued against three individuals afterwards for ‘offences against the administration of justice’ (Article 70 of the Rome Statute).<sup>108</sup> As of today, all the suspects remain at large.

## B. Intermediaries

Due to the lack of a dedicated field presence, the Court is heavily reliant on local civil society actors, that is to say intermediaries, to identify SGBV victims and witnesses, interact with and reach out to them, and provide practical support and assistance to victims of SGBV. For too long, the ICC did not have a framework for this cooperation with intermediaries, and operated on a case-by-case basis. Due to pressure from NGOs, the ICC adopted guidelines on intermediaries, aiming at identifying the various types of intermediaries (of the OTP, of the Registry etc.) and identifying respective rights and duties.<sup>109</sup> While the adoption of the guidelines must be acknowledged as a positive development, many participants spoke about the on-going need for increased support to intermediaries, including through protection measures and adequate training.

It is therefore important that training activities on SGBV do not only focus on ICC staff, but also ensure adequate training of intermediaries, as they conduct the majority of the work.

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105. International Criminal Court, ‘Decision on Defence Applications for Judgments of Acquittal.’ ICC-01/09-01/11-2027-Red-Corr, 5 April 2016, available at: [https://www.icc-cpi.int/CourtRecords/CR2016\\_04384.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_04384.PDF), Judge Fremr para. 147 and Judge Oeboe-Osuji para. 141.

106. International Criminal Court Office of the Prosecutor, “Strategic Plan 2016-2018”, p. 27.

107. Fatou Bensouda in ‘The International Criminal Court on Trial: A Conversation With Fatou Bensouda.’ Foreign Affairs January/February 2017 Issue, available at: <https://www.foreignaffairs.com/interviews/2016-12-12/international-criminal-court-trial> accessed on 19 December 2016.

108. Warrants of arrest against Paul Gicheru and Philip Kipkoech Bett, International Criminal Court, ‘Order unsealing the warrant of arrest and other documents.’ ICC-01/09-01/15-11, 10 September 2015, available at: [https://www.icc-cpi.int/CourtRecords/CR2015\\_16213.PDF](https://www.icc-cpi.int/CourtRecords/CR2015_16213.PDF), accessed 4 January 2017. And against Walter Barasa International Criminal Court, ‘Warrant of arrest for Walter Osapiri Barasa.’ ICC-01/09-01/13-1-Red2, 26 September 2013, available at: <https://www.icc-cpi.int/pages/record.aspx?uri=1650592>

109. ICC Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with intermediaries, March 2014: <https://www.icc-cpi.int/iccdocs/lt/GRCI-Eng.pdf>

#### 1.4.4 Assistance and reparations to victims

The ICC is the first international tribunal to include a comprehensive reparations mandate and a Trust Fund for Victims (TFV) tasked with implementing reparations orders and assistance to victims.<sup>110</sup>

##### **Trust Fund for Victims (TFV)**

Art.79 of the ICC Statute creates a TFV to benefit victims of crimes within the jurisdiction of the ICC and victims' families. Rule 98 of the RPE adopted in 2002 and the Regulations of the TFV adopted by the Assembly of States Parties in 2005 clarified its dual mandate.

As described in the TFV's 2014-2017 Strategic Plan, it is tasked with:

1. Implementing Court-ordered reparations awards against a convicted person when directed by the Court to do so.
2. Providing general assistance to victims survivors and their families in situations where the Court is active with physical rehabilitation, material support, and/or psychological rehabilitation.

"While both TFV mandates depend on the Court's jurisdiction in a particular situation, only the reparations mandate is directly linked to particular cases adjudicated before the ICC. By definition, the identification of beneficiaries of reparations awards will be based on a determination of the harm resulting from the crimes on the case. In contrast, the TFV's assistance mandate is not linked to a prosecutorial strategy, is implemented before the conclusion of a trial, and is not limited to victims and their families who suffered harm from the convicted crimes. This mandate serves as a very immediate response to the urgent needs of victims and their communities who have suffered from the worst international crimes."<sup>111</sup>

#### **A. Assistance to victims**

The Regulations of the Trust Fund for Victims allow the TFV to conduct assistance activities in ICC situations, but not related to ICC cases, in order to provide physical, psychological, and material support to victims of crimes under the jurisdiction of the Court.

Since 2007, the TFV has been financing assistance activities in the DRC and Uganda, implemented by intermediaries, assisting approximately 460,000 direct and indirect beneficiaries throughout these two countries.<sup>112</sup> While developing these programmes, the Secretariat, as well as the Board of Directors of the Trust Fund, have adopted a strong SGBV-sensitive approach. In both situations, the TFV has been supporting programmes addressing the impact of gender-based violence and other sexual violence towards women, men, and children. Addressing SGBV is one of its core programmatic principles. These programmes are also conducted as a result of donations having been specifically allocated to victims of SGBV.

110. Article 75 and 79 of the Rome Statute.

111. Trust Fund for Victims, TFV Strategic Plan 2014-2017, August 2014, p. 14, available at: <https://www.trustfundforvictims.org/sites/default/files/imce/1408%20TFV%20Strategic%20Plan%202014-2017%20Final%20ENG.pdf>

112. The Trust Fund for Victims Annual Report, 2016, p. 11.

This approach allows the TFV to have a tremendous impact on SGBV victims' access to medical, psychological and social services, and is particularly appropriate in situations where the Court has failed to properly investigate and prosecute perpetrators of SGBV crimes, leaving victims of these crimes aside.

However, this positive impact is mitigated by the fact that despite the opening of 11 ICC investigations in the last 10 years, the TFV has only been active in two of them, leaving tens of thousands of victims, including SGBV victims, without support. This failure is mostly, but not only, due to the severe lack of funding of the Fund.

In 2012, the Board of Directors of the Trust Fund allocated 600,000 euros to assistance activities in CAR focusing particularly on SGBV victims. But since the 2013 crisis, the implementation of projects has been suspended "until the situation in the country is more conducive to have the partners implement their activities". In 2015, the Board decided to undertake a new assessment of the situation before implementing assistance activities; it allocated funds for that purpose but the project remained stalled for security reasons. On 13 June 2018, right after ICC Appeals Chamber decided to acquit Jean-Pierre Bemba, the TFV announced its decision to accelerate the launch of its assistance programme in CAR and to establish a starting capital of 1 million Euros for this programme.<sup>113</sup> In 2017, following a TFV secretariat's assessment mission in Cote d'Ivoire, the Board decided to launch an assistance programme for the benefit of victims and pledged 800,000 euros for 2018. The Board approved a similar assessment mission in Kenya and Mali.<sup>114</sup>

## B. Reparations to victims

The Court may order a convicted person to provide individual and/or collective reparations to victims in various forms, such as restitution, compensation and rehabilitation, to be more precisely defined and implemented by the TFV. The convicted person has the primary responsibility of financing the reparation measures. However, the TFV – that is financed by resources collected through fines and forfeitures against the convicted person, voluntary contributions by States and other entities, or other resources<sup>115</sup> – may also complement the convicted person's financial resources or entirely fund the reparations in case of indigence.

However, as of the date of publication of this research, no victims (of SGBV or otherwise), have actually received reparations.<sup>116</sup> In reparations orders that have been issued by Chambers, victims of SGBV have been excluded (the **Lubanga** and **Katanga cases**).<sup>117</sup> Reparations in the **Al Mahdi case** were also awarded, but did not include victims of SGBV as charges against him were limited to the destruction of cultural property.

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113. ICC TFV Press Release "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>

114. Trust Fund for Victims, Report to the Assembly of States Parties on the projects and activities of the Board of Directors of the Trust Fund for Victims for the period 1 July 2016 to 30 June 2017, ICC-ASP/16/14, 21 August 2017, para. 9.

115. Article 21 of the Regulations of the TFV.

116. See, for example, Saris A., Lofts K, "Reparation Programmes: A Gendered Perspective", in Ferstman, C., Goetz M., Stephens, A. (eds.), *Reparations for victims of genocide, war crimes and crimes against humanity, systems in place and systems in the making*, Martinus Nijhoff publishers, Leiden – Boston, 2009, pp. 79-99; Correa, Cristian, "Getting to Full Restitution: Guidelines for Court-Ordered Reparations in Cases Involving Sexual Violence Committed during Armed Conflict, Political Violence, or State Repression," *ICTJ Briefing Paper*, April 2017, 6-7, available at: <https://www.ictj.org/sites/default/files/ICTJ-Briefing-Court-Reparations-2017.pdf>; UN Secretary General, "Guidance Note of the Secretary-General on Reparations for Conflict-Related Sexual Violence," June 2014, available at: <http://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune2014.pdf>

117. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-3129, 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 (hereafter Lubanga Reparations Appeals Decision); Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07-3728, Ordonnance de réparation en vertu de l'article 75 du Statut, 24 March 2017, available at: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-01/07-3728>

When deliberating on the reparations awards in the **Lubanga case**, the Trial Chamber held these should also be aimed at repairing harm from SGBV. The Chamber considered that “reparations may include measures to address the shame felt by some former child soldiers, and to prevent any future victimisation, particularly when they endured sexual violence (...) following their recruitment”.<sup>118</sup> Indeed, Trial Judges stressed that “reparations should not be limited to ‘direct’ harm or the ‘immediate effects’ of the crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in the hostilities, but instead the Court should apply the standard of ‘proximate cause’”.<sup>119</sup> This interpretation takes into account the reality of the crimes suffered and the intricate connection, when considering reparations, between the crimes of sexual violence endured by child soldiers once recruited. This recognises that the harm suffered from the crimes of sexual violence is the consequence of the enlistment, conscription and use of child soldiers.

However, this Trial Chamber decision was overruled following an appeal by the Defense. In its decision of 3 March 2015, the Appeals Chamber rejected the above holding, stating that a reparation order must define the harm suffered by the victim and, as such, has to be connected to the criminal liability of the perpetrator that has been found to be guilty. In the **Lubanga case**, since the perpetrator was not found guilty of SGBV, reparations on the basis of this harm suffered, could not be awarded to victims of SGBV.

“In the particular circumstances of the present case, the Appeals Chamber considers that the Trial Chamber’s finding that the acts of sexual violence could not be attributed to Mr Lubanga amounts to concluding that the Trial Chamber did not establish that harm from sexual and gender-based violence resulted from the crimes for which Mr Lubanga was convicted, within the meaning of rule 85 (a) of the Rules of Procedure and Evidence. The Appeals Chamber is of the view that, having made the above-mentioned finding in the Sentencing Decision, the Trial Chamber was required to explain in the Impugned Decision how it nonetheless considered that Mr Lubanga should be liable for reparations in respect of the harm of sexual and gender-based violence. It did not do so. The Appeals Chamber therefore considers that Mr Lubanga cannot be held liable for reparations in respect of such harm and accordingly amends the Impugned Decision in this respect.”<sup>120</sup>

The Appeals Chamber decided to follow a restrictive interpretation of the causal link required between the reparable harm and the crimes for which the accused was convicted. On the contrary, the TFV in its observations in the appeals proceedings, continued to stress that “to be recognised as a result of the commission of the convicted crimes, it is sufficient for the purpose of reparations, that the harm is related to the course of the recruitment or use in active participation in hostilities. There is no need to have the factual situation of sexualised violence captured by specific crimes. (...) In this regard, sexualised violence is one of the accompanying and inherently linked factual situations that are part of the reality of child soldiers. Sexual abuse, enslavement and exploitation are frequent occurrences in the course of the recruitment and use of child soldiers in hostilities. Thus, the harm caused through acts of sexualised violence is inherently connected to underlying facts of the charges, regardless of whether sexualised violence and sexual exploitation are specifically charged”.<sup>121</sup>

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118. Prosecutor v Thomas Lubanga Dyilo, ICC Trial Chamber I “Decision establishing the principles and procedures to be applied to reparations”, 7 August 2012, ICC-01/04-01/06-2904, para. 240.

119. Lubanga Reparations Decision, para. 249.

120. Lubanga Reparations Appeals Decision, para. 198.

121. Observations of the TFV on the appeals against Trial Chamber I’s “Decision establishing the principles and procedures to be applied to reparations”, ICC-01/04-01/06-3009, 8 April 2013, para. 152-153. See also Perez-Leon J. P., “The emerging reparations case law of the ICC Appeals Chamber in comparative perspective”, 12 June 2015: <https://www.ejiltalk.org/the-emerging-reparations-case-law-of-the-icc-appeals-chamber-in-comparative-perspective/>.

The absence of reparation orders for SGBC in the first final judgments handed down by the ICC illustrates the great importance of effective investigation and prosecution strategies of SGBC and the necessity of judges with strong SGBV expertise, to enable victims of these crimes to be eligible to receive reparations.

### C. Reinforcing the TFV gender strategy

In a study conducted by the TFV from 2010 to 2012, results clearly showed a gender dimension related to the impact of violence, highlighting the need for a gender analysis when deciding, designing and implementing reparation orders or assistance programmes.<sup>122</sup> The 2014-2017 Strategic Plan thus indicates comprehensive plans for gender mainstreaming across all TFV activities, applying a gender-sensitive approach to all programme areas, and specifically targeting SGBV crimes.<sup>123</sup> Nonetheless, a separate policy dedicated to gender and SGBV would help articulate and strengthen these commitments. As with the Court organs, gender advisers should be integrated within the TFV team and a comprehensive policy on SGBV should be adopted. Such policy should outline how the TFV's commitment to gender mainstreaming will be made effective through raising the institutional capacities of its implementing partners.

Additionally, more efforts should be made to increase the TFV's resources, which come mainly from voluntary State contributions. The decision to hire a staff member fully dedicated to fundraising and visibility is a step in the right direction, as long as this is not a junior-level or temporary position. Dedicated high-level leadership in fundraising would greatly increase the probability of healthy and sustainable reparations and assistance programmes. It is encouraging, however, that the TFV accepts voluntary contributions from States earmarked for victims of SGBV,<sup>124</sup> as such victims run the risk of further marginalisation in a general reparations or assistance programme.

## CONCLUDING REMARKS

The ICC Statute has created unique opportunities for the investigation and prosecution of SGBV crimes, in particular as crimes against humanity and war crimes. However, in its first years, the ICC failed to fully implement these progressive provisions and meet expectations. SGBV strategies were not systematically implemented in investigations, leading to limited SGBV charges, which were not always confirmed, as well as acquittals, leaving SGBV victims without any prospect of justice or reparation. Bemba's conviction in first instance for rape brought much hope to victims of SGBV in CAR and elsewhere. Bemba's acquittal in appeal provoked immense frustration and misunderstandings. It paves the way for a needed effective implementation and reinforcement of the OTP policy and strategy on SGBC but also for clearer ICC standards relating to command responsibility. Impacts of this policy show a new positive trend that can be seen in the *Ongwen* and *Ntaganda* cases, which – as the *Al Mahdi* case shows – still needs to be strengthened.

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122. "Interestingly, the TFV's results clearly showed a gender dimension related to the impact of violence. Violence, that is, impacts men and boys differently than it impacts women and girls; and the findings suggested that among the Trust Fund's beneficiaries, female victims had experienced more severe psychological and social consequences. This, in turn, showed that women approach the issues of justice, rehabilitation, reparation and reconciliation differently than men. This finding reiterated the importance of considering the cultural and social contexts surrounding the role of women and girls, and their access to basic services and information when designing a reparation award and implementation process." TFV Strategic Plan 2014-2017, August 2014, p. 7, available at: <https://www.trustfundforvictims.org/sites/default/files/imce/1408%20TFV%20Strategic%20Plan%202014-2017%20Final%20ENG.pdf>

123. *Ibid.*

124. As of September 2016, 5.5 million Euros had been earmarked for SGBV projects since 2008. See link above.

Our research also showed that, beyond the OTP, there is a need for a Court-wide approach of strengthened expertise, capacity, and strategy on SGBV, especially in relation to victims and witnesses' role and support, in order to better implement their rights before the ICC. FIDH's research suggests that it is essential to have appropriate individuals in the right positions at the right time (with the appropriate level of authority and seniority) promoting the changes necessary to increase the ICC's capacity around SGBV. This would be an important first step, but in order to translate the policy commitment into practice, SGBV approaches must become internalised into the day-to-day activities of all divisions, sections, and units of the Court. A top-down focus on SGBV might oblige otherwise unwilling individuals to change their practices, but several interviewees expressed concern that there is still a sense of 'ticking the box' to include attention to SGBV, which suggests that the policy commitment has not (yet) translated into normalisation of the issue or standardisation of practice.

The potential created by the legal framework of the Rome Statute, the Rules of Procedure and Evidence, and the strategic recognition of SGBV in the OTP's SGBC Policy are not sufficient, in and of themselves, to change the culture or capacity of an institution as a whole to deal with SGBV in practice. The Court has to adopt a court-wide policy on SGBV, implement its policies and build upon its first practical positive trends to adequately and effectively respond to the victims' need for access to justice and reparation. Therefore, our research identified the following recommendations:

## RECOMMENDATIONS

### To the Office of the Prosecutor of the ICC

- Ensure full implementation of the SGBV policy, take concrete steps towards a comprehensive strategy regarding all crimes of sexual violence and a progressive focus on gender-based crimes, including:
  - continuing to bring charges for sexual and gender based violence explicitly as sexual and gender based crimes *per se*;
  - charging gender-based violence outside of circumstances involving sexual violence, such as gender-based crimes, including forced marriage, forced pregnancy or based on sexual orientation and gender identity;
  - prosecuting sexual violence against women and girls as well as men and boys, and incorporating this focus in all stages (from preliminary examinations onward);
  - Improving positive complementarity on SGBV by ensuring that a systematic focus on SGBV during preliminary examinations and investigations translates into encouragement of positive complementarity supporting investigation and prosecution at a national level.
- Continue improving investigative and prosecutorial practices on SGBV:
  - Incorporating greater gender focus within preliminary examinations and investigations from the outset, including broadening checklists used as part of the gender analysis guidelines for investigations;
  - Paying attention to gender issues in the composition of teams, including gender (competence) of investigators, prosecutors and support staff (e.g. interpreters);
  - Applying the "Do No Harm" approach while investigating SGBV, but ensuring such approach does not become unworkable and prejudicial to the agency and testimony of SGBV survivors; providing staff with appropriate training and skills with sufficient flexibility;
  - Expanding opportunities for both male and female victims of SGBV to speak more easily about their experiences (e.g., by building more trust through longer field presence);
  - Applying appropriate procedural and evidentiary provisions that may influence courtroom dynamics when questioning SGBV witnesses;

- Requiring training on gender and SGBV as an obligatory part of professional development;
  - Making use of the full range of modes of liability available under the Statute, in order to best characterise the connection between the accused and the victims;
  - Making use of strategic appeals if necessary to move forward the jurisprudence;
- Consider reinforcing the structure of Special Adviser to the Prosecutor on Gender.

While the OTP has taken steps to learn from and address on-going difficulties in relation to SGBV investigations and prosecutions, it is less clear whether a similar commitment exists among the other Court organs. This research points to the necessity of a more coordinated approach among various organs, in particular those directly engaging with victims, witnesses and affected communities, thus enabling the Court to bring justice and accountability to SGBV victims. Several participants agreed that it is important for all organs of the Court to develop and adopt a specific policy on gender, in light of the requirements of the Statute and the differing mandates of the OTP, Registry, and Chambers.

### **To all organs of the ICC**

- Each organ of the Court should develop and adopt a specific policy on gender;
- Gender competence should broaden across the Court.

#### **Through recruitment and evaluation practices**

- Recruiting more individuals with knowledge and experience regarding gender and SGBV;
- Bridging the gender gap by recruiting qualified female candidates to senior positions and by supporting the career advancement of key female performers;
- Appointing several in-house gender advisors at a senior level in all organs of the Court;
- Mainstreaming SGBV knowledge and experience to ensure appointed experts are not alienated from other staff and all relevant staff are empowered to perform duties related to SGBV;
- Conducting annual evaluations on gender progress.

#### **Through training and consultations**

- Increasing training on gender and SGBV across the board for staff working within the OTP, Registry, and Chambers;
  - Paying close attention to structure and design of training content to ensure it does not unintentionally replicate gender stereotypes;
  - Providing expert consultations to address issues of SGBV with judges to ensure their increased level of gender competency.
- Develop systems to preserve institutional memory around SGBV and proactively collect relevant statistics related to SGBV and victims of SGBV (e.g., collecting statistical data as to the number of participating victims, or recipients of reparations or assistance).
  - Improve communications and outreach, while appropriately managing expectations:
    - Develop a more coordinated gender approach between the organs of the Court, in particular among those directly engaging with victims, witnesses and affected communities;
    - Improve frequency, transparency and responsiveness of communication on SGBV with stakeholders, including civil society organisations in the field, as well as victims and affected communities;
    - Increase transparency of decision-making regarding prosecutorial strategy, outreach planning, or judicial decisions as they relate to victims of SGBV.

- Integrate gender-responsive budgeting:
  - Conduct a comprehensive analysis of the Court's budget from a gender perspective and request a revision of the budget to make it gender-responsive;
  - Allocate the necessary funds for gender competence and integrate issues of gender into discussions about the Basic Size of the Court.
  
- Improve engagement with victims of SGBV:
  - Adopt a more holistic approach to interactions with victims of SGBV and explore ways in which ICC's operations can be better linked up with referrals to support services (including psycho-social support) provided by other actors;
  - Improve the communication and outreach with victims, managing their expectations and adopting a two-way interaction;
  - Proactively engage in greater coordination and cooperation across Court organs in reaching out to and interacting with victims and affected communities in order to avoid overwhelming individuals and civil society organisations with a multitude of different contacts and demands;
  - Harmonise the system of victim participation and legal representation, while ensuring the approach remains victim-responsive and allows for the full enjoyment of victims' rights under the Rome Statute;
  - Ensure an adequate legal aid scheme and budget for Legal Representatives chosen by victims
  - Ensure adequate training on gender and SGBV for relevant intermediaries;
  - Strengthen dedicated long-term field presence of sections engaging with victims and witnesses.
  
- Increase the possibility for victims of SGBV to access reparations and/or assistance:
  - The Registry should articulate a clear gender policy regarding interactions with victims, beginning with victim mapping and application, so as to ensure the necessary gender perspective is in place at the time of designing reparations programmes;
  - TFV should develop an effective and pragmatic fundraising strategy for obtaining the necessary resources to implement the full range of activities under its reparations and assistance mandate
  - TFV should implement its assistance mandate to address the needs of victims of SGBV as soon as investigations are opened;
  - Chambers must define a coherent policy of reparation for SGBC taking into account victims' views and perspectives;
  - The Registry and the TFV should explain the reasons for pursuing individual, collective, or transformative reparations in specific cases.

## **To the Assembly of States Parties**

- Continue to take into account the need to elect judges with specific expertise on violence against women, as required by Article 36(8)(b) of the Rome Statute, but also on SGBV in general;
- Incorporate a gender-responsive approach to the budget;
- Make significant financial contributions to the Trust Fund for Victims;
- Continue to organise specific high-level panels on investigation and prosecution of sexual and gender based crimes, as well as gender policies;
- Support a comprehensive legal aid review process that reflects on the substantial improvements needed.



Meeting between NGOs and the ICC Prosecutor and her team, 14th session of the Assembly of States Parties, The Hague, November 2015. © Matias Bercovich / CICC

## II. THE RELATIONSHIP BETWEEN THE ICC AND CIVIL SOCIETY

Civil society has been critical in the establishment of the ICC ever since the negotiations of the ICC Statute.<sup>125</sup> Civil society plays a leading role worldwide in the fight against impunity for SGBV and in supporting victims of such crimes and has had a significant impact on the Court's jurisdiction and activities through advocacy efforts and practical support. As explained in the previous chapter, the advocacy of the Women's Caucus for Gender Justice as well as other human rights organisations contributed to the inclusion of progressive provisions towards gender justice in ICC founding instruments.

More broadly, national and international NGOs play an important role in the ICC's activities, as they often have more direct and continuous relationships with victims and witnesses of crimes within the

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125. See, for example: Glasius, Marlies. *The International Criminal Court: A global civil society achievement*. (Routledge: London and NY, 2006); Bendetti, Fanny, Bonneau, Karine and Washburn, John, *Negotiating the International Criminal Court: New York to Rome 1994-1998*, (Martinus Nijhoff: Leiden, Boston 2014); Lee, Roy S. "Participation of Non-Governmental Organizations," *The International Criminal Court: The Making of the Rome Statute*, Chapter 13, (Kluwer Law International: The Hague, 1999), pp. 391-398.

Court's jurisdiction. It is clear that there has been strong collaboration and detailed consultation (both institutionalised and on a day-to-day basis) between the ICC and civil society on numerous issues during the different phases of proceedings, including policy developments such as the Prosecutor's policy on SGBV, which has significantly moved forward the ICC's work.<sup>126</sup> NGOs also often contribute to fill the ICC's gaps on the ground and act as an important source of information as well as intermediaries for different organs of the Court.

### **FIDH and the Jean-Pierre Bemba Case**

From the outset of its first urgent mission to the conflict area in the Central African Republic (CAR) in November 2002, FIDH and its member organisations addressed the situation of international crimes committed in 2002 and 2003 in the following ways: conducting numerous missions to document crimes, collect victims' testimonies and material evidence; publishing incriminating investigative reports; analysing judicial responses at national level; organising capacity-building for local civil society, as well as awareness raising seminars among security and military forces; meeting with national authorities, the UN, and the African Union to reduce and end impunity for crimes committed in CAR; advocating for referral to and action by the ICC through the submission of communications on crimes to open a preliminary examination and an investigation; interacting with the ICC to orient its criminal policy in order to encourage the inclusion of SGBV charges. FIDH further documented Jean-Pierre Bemba's involvement in and knowledge of the international crimes committed by his troops.<sup>127</sup> FIDH's documentation – including testimonies of victims of SGBV and other violence – and advocacy putting Mr Bemba 'on notice' were cited extensively by the ICC Trial Chamber in the decision condemning Mr Bemba for war crimes and crimes against humanity.<sup>128</sup>

If NGOs have been able to have such a positive impact on the work of the Court, it is also because the ICC has made room for this cooperation.

However, the ICC and NGOs have different mandates, objectives, approaches and constraints, which can lead to a certain degree of disconnect, creating misunderstandings and frustrations that can affect the effectiveness of the fight against impunity for international crimes, including SGBV. While there appears to be a more proactive approach from the ICC to overcome the challenges of this ICC-NGOs relationship now than in its early days, the research suggests there is still room for improvement.

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126. NGOs (including FIDH) are invited to participate in week-long annual meetings with high-level officials from all organs of the Court to discuss developments, advancements, and points of concern. Additionally, civil society is active at the yearly Assembly of States Parties, during which meetings are held with the Prosecutor, the President, the Registrar, the President of the ASP, and others. NGOs are invited to organised consultations on the development of substantive and structural policies within the different organs of the Court, including the Prosecutor's policies (e.g. on gender, children in armed conflict, case selection and prioritisation) as well as issues such as legal aid, reparations, performance indicators, and the restructuring of the Registry (ReVision project). Civil society organisations, particularly those with a permanent representation in The Hague, are engaged in bilateral meetings with relevant Court officials to share information, as appropriate, and participate in a two-way dialogue about specific situations under ICC jurisdiction.

127. FIDH, "The ICC verdict in the Jean-Pierre Bemba Case 15 years of FIDH action: from field investigations to Prosecutor's conclusions", 17 March 2016, available at: <https://www.fidh.org/en/region/Africa/central-african-republic/bemba-in-front-of-the-icc-15-years-of-fidh-action-from-the-field>

128. Prosecutor v Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute, 21 March 2016, paras 460, 578, 607-611, 714, 724 (hereafter Bemba Judgment).

## 2.1 Understanding and respecting respective confidentiality constraints

Civil society organisations are often the first point of contact for victims, mainly due to their permanent presence within affected communities. They therefore constitute an important entry point for the ICC for a range of different issues, including providing background and contextual information on social and political dynamics within countries under preliminary examination or investigation before the Court, documenting and publishing open-source information on patterns of crimes, on the state of national investigations and prosecutions for international crimes, and providing referrals to local support services.

One of the most important interactions between the ICC and civil society, however, relates to identifying individuals who have been affected by crimes within the jurisdiction of the Court. This relationship is critical not only for the Office of the Prosecutor, but also for the Registry and Chambers. Civil society plays a crucial role in providing access to potential witnesses who can provide testimony that is necessary and relevant for the OTP's investigations, as well as identifying victims who have suffered harm for the purposes of the Court's victim participation process.

NGOs can also provide vital guidance about the significance of patterns of crimes and victimisation in specific cases.<sup>129</sup> ICC Chambers also occasionally rely on NGOs to provide legal expertise on specific issues<sup>130</sup> and representatives from NGOs have also been called to testify before the Court.<sup>131</sup>

This relationship may be hampered, however, by a lack of understanding by each party of the restrictions upon the other in communicating openly about sensitive information. Participants from the Court expressed frustration at the unwillingness of civil society organisations to provide them with specific evidence relevant to their investigations, particularly evidence relating to SGBV crimes. Several participants from civil society, on the other hand, were concerned that providing the ICC access to confidential information could put them and the victims they have been in contact with at significant risk, something they feel the ICC does not always fully appreciate. Some participants highlighted risks faced by civil society considering that some information they provide to the OTP, for example, may be disclosed to the defence at a later date, and thus the confidentiality of victims' identities may not always be guaranteed. Also, NGOs might be involved in supporting victims in proceedings at a national level and therefore may refrain from transmitting information to the OTP in order to keep control over their litigation strategy in the prospect of genuine national efforts.

Equally, civil society organisations, particularly those based in the field with less frequent direct interaction with the ICC, often request detailed information on the progress of the ICC's work, such as who investigations are targeting or when arrest warrants will be issued, the publication of which could jeopardise the Office of the Prosecutor's operations.

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129. FIDH called upon the ICC to open an investigation on international crimes committed in CAR since 2002, submitting several Article 15 communications to the ICC OTP and supporting victims, victims' associations and Central African NGOs to access the Court. In several reports, FIDH indicated Bemba's involvement in international crimes committed by his troops, in support of Patassé's regime. See Box "FIDH and the Jean-Pierre Bemba Case" above, and International Federation for Human Rights, *The ICC verdict in the Jean-Pierre Bemba Case 15 years of FIDH action: from field investigations to Prosecutor's conclusions*, 17 March 2016, available at: <https://www.fidh.org/en/region/Africa/central-african-republic/bemba-in-front-of-the-icc-15-years-of-fidh-action-from-the-field>

130. For example, WIGJ was invited by ICC Judges to provide an oral presentation at the hearing on reparations in the case against Thomas Lubanga who was convicted in 2012 of the war crimes of enlistment, conscription and use of children to participate actively in hostilities – child soldiers. This was the first Hearing on reparations held by the ICC. WIGJ, "Presentation to Trial Chamber II: Observations of the Women's Initiatives for Gender Justice," 11 October 2016, available at: <http://www.4genderjustice.org/pub/Presentation-to-TC-II-Reparations-Hearing-October-2016.pdf>

131. For example, the Deputy Director of the Africa Division of Human Rights Watch (HRW) was called to testify in the Ntaganda case regarding reports she had authored and the associated documentation. *The Prosecutor v Bosco Ntaganda, Case No. ICC-01/04-02/06-T-107-Red-ENG*, Transcript, 22 June 2016, available at: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-02/06-T-107-Red-ENG>

This conflict is particularly pronounced when civil society organisations act as formal or informal intermediaries for the Office of the Prosecutor. Participants from the ICC spoke about making a deliberate choice to withhold operational information from civil society intermediaries so that they would not be compromised, and using multiple organisations as intermediaries to avoid being conspicuously reliant on just one source. These tactics are used not only to protect the OTP's sources, but also to protect the OTP itself against allegations of undue influence by a small number of intermediaries.<sup>132</sup> Civil society organisations that had worked with the Court expressed frustration about being placed in the position of having to explain developments in cases to affected communities without having sufficient information to be able to understand the strategic reasons behind the decision.

Ironically, the extent of the Court's reliance on civil society for approaching victims is partially a consequence of its own risk-averse strategy, with some participants expressing the belief that they could not meet with victims in remote communities without everyone knowing their movements and making assumptions about who they were speaking to and why. The concern about the visibility and security risks of meeting with ICC investigators in person was invoked by some participants as part of the reason for the Court's lack of dedicated field presence, arguing that they could be more effective while causing fewer risks to witnesses by conducting short focused field missions.

Other participants from civil society were more critical of what they called the 'hit and run' approach, particularly when investigating SGBV crimes, because of the more significant time commitment needed to build sufficient trust for victims and witnesses to open up to investigators. They also expressed frustration that the lack of field presence entailed that investigators and prosecutors had less understanding of the social and cultural context in which the crimes were committed, which meant that they were less able to appreciate the relevance or credibility of some evidence or the ability of suspected perpetrators to intimidate witnesses.

A lack of understanding on both sides of these legitimate concerns and confidentiality restraints fuels misunderstandings and a sense of frustration. There is a need for more transparent and open communication and feedback from both sides about the constraints they both face and the risks that pertain to sharing certain information with the other party in order to manage expectations, minimise frustrations, and maximise positive outputs. It is clear that, up until now at least, both sides have expected more from the other than they have felt able to provide without compromising their own professional responsibilities.

## 2.2 Recognising the different mandates of the ICC and civil society organisations

A significant factor in the mutual frustration mentioned above comes from a failure on both sides, ICC and civil society, to fully understand and appreciate the divergence in the respective mandates of the Court and both national and international civil society organisations.

Several participants acknowledged the lack of comprehension between the Court and civil society of each other's mandates. One participant with experience of both the ICC and civil society suggested the professional backgrounds of staff were relevant, in that not everyone working in the Court was comfortable or familiar working with civil society and that they did not necessarily understand who they were

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132. This is a lesson learned from the Lubanga case in which the OTP was strongly criticised for predominantly relying on intermediaries for evidence, some of which were accused of influencing some victims' and witnesses' testimonies. See, for example, Wegner, Patrick, "What went wrong in the Lubanga Trial," *Justice in Conflict*, 14 March 2012, available at: <https://justiceinconflict.org/2012/03/14/what-went-wrong-during-the-lubanga-trial/>; Also: Ambos, Kai, "The First Judgment of the International Criminal Court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues", *International Criminal Law Review* 12.2, 2012; Buisman, Caroline, "Delegating Investigations: Lessons to be Learned from the Lubanga Judgment," *Northwestern Journal of International Human Rights* 11.3, 2013, available at: <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1143&context=njihr>

dealing with or how they worked, which led to inconsistencies and a lack of standard practice between different Court actors working on the ground. Other participants agreed that there was an overall lack of understanding of civil society within the Court. Of course, civil society is not one homogenous group and not all organisations will take the same approach to the Court or their work in the field. Although individual civil society organisations have different priorities and mandates, some participants noted a degree of fragmentation and disorganisation between NGOs working on similar issues in the same communities.

## **A. Limitations resulting from prosecutorial strategy**

The first years of the ICC were marked by a narrow prosecutorial policy, including regarding the selection of cases and the exclusion of SGBV from investigations and prosecutions and by deficiencies in communicating about these prosecutorial choices.<sup>133</sup> Numerous NGOs and victims' organisations criticised these shortcomings and the lack of redress for victims of international crimes including SGBC.

A notable tension exists between the dual objectives of providing meaningful justice to victims and building a case that will succeed at trial and be upheld on appeal. Participants from the Court spoke about the importance of presenting the strongest possible evidence to have the best chance of achieving a conviction and the strategic considerations behind choosing whether or not to pursue specific defendants or charges. Some expressed frustration at sustained criticism from civil society, saying that no matter what charges they chose they would 'always be criticised'.

Participants from the Court noted that some civil society organisations did not fully appreciate the limitations of what the Court could achieve in terms of pursuing all potential perpetrators for all possible crimes, or providing individual reparations to victims, and that the relationship was hampered by unrealistic expectations of the Court's powers or the impact of its activities. One participant with experience of both civil society and international prosecutions recognised that when prosecutors cannot publicly explain the reasons for not including specific charges the Court ends up "looking like the bad guy." The reasons could include, for example, confidentiality constraints, security concerns for staff or witnesses, or strategic decisions to avoid jeopardising future arrests or prosecutions. Nonetheless, this leads to mistrust from civil society, as they do not have access to the totality of information possessed by the prosecutors and therefore cannot assess such decisions.

Participants recognised that while the ICC can only prosecute a few perpetrators, the cases and charges should reflect the reality of the different categories of crimes perpetrated, including SGBC. The OTP's Policy Paper on Case Selection and Prioritisation, adopted in September 2016, acknowledges the importance of choosing charges and defendants that are truly representative of the underlying conflict, as well as maintaining on-going and direct interaction with victims and victim associations at all stages of the OTP's activities.<sup>134</sup> While the OTP policy paper is a positive development, it is also clear that more effective formal and informal communication between the Court and civil society would be helpful in reducing misunderstandings and frustrations regarding the limitations of each other's mandates. One possible way of improving this communication would be to organise peer-to-peer meetings and events involving operational staff from the Court and representatives from civil society who are working on similar issues.

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133. See for example FIDH report "The Office of the Prosecutor of the ICC: nine years on", December 2011: <https://www.fidh.org/IMG/pdf/cpiproc579ang.pdf>.

134. Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation, 15 September 2016, available at: [https://www.icc-cpi.int/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf)

## **B. Support for victims and witnesses by the ICC and civil society**

NGOs have been pointing out the weaknesses of the different organs of the ICC in adequately approaching and supporting victims and witnesses interacting with the Court<sup>135</sup> and its excessive reliance on NGOs to overcome its shortcomings.

### **a. Participation and reparation**

As first point of contact for victims, NGOs have been supporting the ICC Registry in providing access to victims entitled to participate in ICC proceedings and receive reparations.

They have particularly been involved in reaching out to victims to explain their rights before the ICC and help them complete application forms to participate in ICC proceedings and request reparations. The VPRS' limitations in access to certain victims in conflict affected areas and lack of human and financial resources, led to this particular involvement of NGOs in these processes.

Even though reparations measures have not been implemented yet in any of the proceedings, the Court might also rely on civil society to provide reparations to victims.

### **b. Protection and support**

Under the ICC Statute, the Court has the obligation to adequately protect the physical and psychological wellbeing of victims and witnesses. But for now, the ICC has adopted a limited and non-holistic approach of its protection mandate, leading to additional involvement of NGOs in this field.

As far as the Office of the Prosecutor is concerned, their capacity for psycho-social support has been limited to providing a psycho-social assessment of potentially vulnerable interviewees to evaluate whether they are too traumatised to participate in the interview process, while any long-term follow-up support is dependent on external referrals (often provided by local civil society groups), which may or may not be available. Although some participants from the Office of the Prosecutor showed great sensitivity when speaking about their interactions with victims and witnesses, others viewed their job as strictly confined to building the strongest possible case while safeguarding the independence and integrity of their operations. As one participant stated, "we are not in the business of empathy." This reinforces the perception that "prosecutors view victims only as evidence".

Also, for some NGOs, the Court does not fulfil its obligation to protect the safety and physical well-being of victims and witnesses. Indeed, the ICC considers that only those victims and witnesses endangered because of their testimony before the ICC, can benefit from advanced protection measures, such as relocation. NGOs may therefore have to provide protection measures to victims and witnesses also at risk, but for other reasons than their direct testimony.

Some participants criticised the lack of basic support provided to victims and witnesses cooperating with the Court, while ICC participants were clear about their limitations and the risks of being accused of providing inappropriate inducements to witnesses or intermediaries.

Finally, a major point of concern for civil society organisations was that they felt that they were being asked to essentially commodify the trust and connection they had built with victims over months and years in order to facilitate the ICC's agenda, but with no reciprocal support for their cooperation. As one

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135. See in particular part 1.4. of this report for further details on the ICC's mandate of support to victims and witnesses.

participant put it, “we’ve spent years building these relationships and then we’re asked to serve them up on a plate without payment.” Some interviewees were also concerned about the ethical implications of asking victims and witnesses to cooperate with the Court’s activities when they did not have confidence that their participation would ultimately be healthy or beneficial.

### C. Outreach

Participants felt that the Court’s outreach efforts were insufficient and, as a result, sometimes ineffective. They again reiterated that the Court is too reliant on civil society to explain and publicise its work.

This problem is not unique to the ICC, as some domestic criminal processes also rely on civil society to disseminate information about the outcome of trials or the opportunity to participate in proceedings. However, participants felt that it was crucial for the Court to strengthen its outreach and coordinate better the communications efforts. One issue arises from the fact that outreach and public information are, in general, the responsibility of the Registry (specifically the Public Information and Outreach Section (PIOS), now housed within the new External Relations Division). However, the OTP also has a small public information office, and it is not clear how the two cooperate and coordinate activities.

Participants agreed that the Court must update and make more effective its dedicated media and outreach strategy, which was adopted in 2005 by the Registry.<sup>136</sup> Any updated PIOS strategy should be made public for transparency, so that civil society counterparts know better what to expect (and what not to expect) from the outreach team. A similar, or coordinated, public information strategy should be adopted by the OTP, which could, for example, solidify the Office’s policy on visits by the Prosecutor to situation countries as well as statements for deterrent purposes in on-going conflicts. All communications strategies should be gender-sensitive and make specific reference to strategies aimed at achieving accountability for SGBV.

In terms of the timeline of providing public information, participants agreed that the earlier communication begins in a situation under preliminary examination or investigation, the better. However, outreach activities by PIOS are not undertaken during the preliminary examination phase, which inhibits the provision of relevant information. In a July 2018 decision, the ICC Pre-Trial Chamber I interestingly asked the Office of the Prosecutor to undertake regular communication with victims having submitted information in the framework of the preliminary examination into Palestine and encouraged outreach activities even before any decision whether to open or not an investigation.<sup>137</sup> The Prosecutor, nonetheless, increasingly makes statements relevant to those situations, particularly for deterrence purposes during on-going conflicts.<sup>138</sup> Since 2011, the OTP has also published annual Preliminary

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136. The only publicly available Outreach Strategy dates to 2005, though the Court itself recognised in its “Integrated Strategy for External Relations, Public Information and Outreach” (2007) that it should be evaluated and revised based on external input and experience. International Criminal Court, Strategic Plan for Outreach of the International Criminal Court, ICC-ASP/5/12, 29 September 2006, available at: [https://www.icc-cpi.int/NR/rdonlyres/FB4C75CF-FD15-4B06-B1E3-E22618FB404C/185051/ICCASP512\\_English1.pdf](https://www.icc-cpi.int/NR/rdonlyres/FB4C75CF-FD15-4B06-B1E3-E22618FB404C/185051/ICCASP512_English1.pdf); International Criminal Court, Integrated Strategy for External Relations, Public Information and Outreach, 18 April 2007, available at: <https://www.legal-tools.org/en/doc/840afa/>

137. See footnote 17 of ICC Pre-Trial Chamber I, Decision on Information and Outreach for the Victims of the Situation, the Situation of Palestine, 13 July 2018, available at: [https://www.icc-cpi.int/CourtRecords/CR2018\\_03690.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_03690.PDF) referring to Rule 92(2) of the Rules of Procedure and Evidence which provides for the notification of victims who have communicated with the Court with respect of the situation, “envisaging communication between victims and the Court even before the Prosecutor’s decision as to whether to initiate an investigation has been taken”.

138. See, for example, regarding the Philippines “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda concerning the situation in the Republic of the Philippines,” 13 October 2016, available at: <https://www.icc-cpi.int/pages/item.aspx?name=161013-otp-stat-phi>; regarding the Democratic Republic of the Congo, “Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, regarding the situation in the Kasai provinces, Democratic Republic of the Congo,” 31 March 2017, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=170331-otp-stat>; regarding ISIS, or Daesh, “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS,” 8 April 2015, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1>

Examination Reports, which are useful for dispelling misinformation and reaching out to victims and affected communities, and were widely called for by civil society. However, a clear approach to public information about the ICC and its mandate during this initial phase is missing. Communication during preliminary examinations is particularly relevant in curtailing the spread of misinformation about the ICC.

In general, participants felt that the Prosecutor or other high-level Court officials do not publicly comment enough on on-going preliminary examinations, investigations or prosecutions, which can give rise to confusion or allow biased narratives and deliberate misinformation to spread. In addition, some participants emphasised the failure to fully appreciate or exploit the potential impact of interventions from the Court in specific situations. A strategic and timely visit to a country can, for example, generate a great deal of impact. One participant expressed hope, for instance, that Prosecutor Bensouda would herself publicly visit Colombia, what she eventually did in September 2017, at a moment considered a critical juncture for justice in the country, following the signing of the 2016 peace agreement. Another participant highlighted the “unique position of international prosecutors to contribute to advocacy on domestic issues.” This is one area where more strategic use could potentially be made of positive complementarity and where the Court could more effectively leverage its status and influence to maintain public, on-going engagement with domestic investigations and prosecutions.

Importantly, outreach activities should be fully supported with adequate resources to have the most possible impact. Ironically, civil society representatives are often left to advocate for more funding from States Parties for ICC outreach activities, which should be seen as absolutely fundamental to the core mandate of the Court.

#### **D. Cooperation requests**

The ICC is heavily reliant upon functional relationships with civil society in situation countries. Yet, the relationship sometimes appears to be one-sided, with several participants from civil society referring to feeling ‘used’ by the Court. As one participant illustrated, “when they want something from us they want it done yesterday, but when we want something from them nobody picks up the phone.”

Several participants also expressed frustration with the lack of sufficient notice in requests for cooperation from the Court, or in delegating practical tasks to them without considering their independent duties. One example given detailed how ICC officials expected victims or witnesses to be transported to a capital city to meet with representatives from the ICC within one or two days, without considering pre-existing work or family obligations on the part of the witnesses or the NGO staff accompanying them. These demands led to some participants feeling that ICC officials treat NGO staff like local subordinates. One civil society participant spoke with considerable frustration about being asked to arrange the transport of young and vulnerable witnesses to meet with ICC staff at a location several hours away, on the apparent assumption that staff from the NGO would be able to accompany them even if it involved cancelling other commitments. While that was not possible, another staff member ultimately ensured their safe arrival having encountered them by chance, without any appropriate support or assistance from the Court. Though this specific case occurred a number of years ago, and presumably best practice has evolved over time, the sentiment was echoed in the experiences of other participants.

Participants from the Court recognised that such last-minute requests were not ideal but explained that there were a variety of institutional factors behind them, such as late approval of field missions, limited availability of team members, resource constraints, or sometimes a simple lack of organisation within the team. Some participants felt there was an arrogance or sense of entitlement in the ICC’s approach to civil society, based on an underlying assumption that the Court’s priorities and preferred timeframes

were more important than those of local NGOs or that civil society organisations would be more willing to compromise or cut corners to facilitate their demands.

Participants also expressed frustration that if they refused to agree to what they considered an 'unreasonable' request from Court staff they would be viewed as obstructive or uncooperative, despite acting out of a genuine desire to safeguard the interests of the victims or communities they work with on a day-to-day basis. Several participants noted that cooperation with the ICC carries significant implications for civil society's perceived impartiality in the field, which is not always fully appreciated.

In addition, some participants from civil society were unhappy that, when the Court consulted them, their advice was not always taken on board. In one country under investigation, for example, members of civil society were contacted by Court staff to ask what particular language victims of SGBV spoke in order to arrange for appropriate interpretation facilities. However, when the field mission took place, the ICC staff members ultimately brought interpreters who spoke a *national* language but not the *local* language in which the victims were much more comfortable expressing themselves, despite having received such advice from local civil society.

One significant conclusion that came from the research was the need for civil society organisations to set conditions for their cooperation with the Court in order to protect their own independence and ethical obligations to the victims, witnesses, and communities they work with. While some civil society participants expressed concern about the political difficulties or funding implications of setting boundaries to ensure that their cooperation with the Court complies with their own standards of care, other participants (including some Court staff) recognised that, given the extent of the ICC's reliance on civil society, refusing to cooperate under the sole ICC conditions is the only leverage NGOs may have to force the Court to think more carefully about the impact of the timing and nature of their demands on local organisations.

In order to clearly establish mutual expectations, it has proven quite effective for the ICC to conclude Memoranda of Understanding (**MoUs**) with NGOs, particularly if the NGOs are working as intermediaries. The ICC as well as NGOs must build on the existing work concerning intermediaries, including by applying the existing Guidelines of the Court on intermediaries, which entered into force in March 2014.<sup>139</sup>

## E. Resources and funding

Both ICC and civil society participants expressed frustration about the absence of adequate structures and funding to be able to provide support to victims on the ground. Gaps in structural capacity cause difficulties for both the ICC and civil society in their efforts to work towards accountability.

This reliance stems in part from a lack of resources within the ICC, which is encumbered by a budgeting process reliant on approval from States. In that sense, ICC officials' claims about the limits of their reach are partially legitimate, particularly when the lack of resources is coupled with severe security concerns or the inability for ICC staff to even enter a situation country (such is the case in Sudan, for example). However, the limited reach of the Court also derives to some degree from the organisation of the Court itself. There is a need for a different policy approach from the ICC, for instance to ensure more consistency between the work of different organs of the Court in the field in relation to SGBV, in addition to the need for greater funding from States to increase the ICC's field presence.

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139. See International Criminal Court, "Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with intermediaries," March 2014, available at: <https://www.icc-cpi.int/iccdocs/LT/GRCI-Eng.pdf>

## The ICC's Budget

Unlike the budget of ad hoc tribunals, the budget for the ICC must be approved annually by States Parties. The Court first develops a budget internally, which is then discussed and revised by the Committee on Budget and Finance of the ASP. In recent years, this process has become increasingly contested, with a number of wealthy States pushing for a 'zero growth' policy, which has led to meagre budget increases, significantly lower than the Court's requests. This practice has raised significant concerns about how States may unduly influence the OTP's investigatory and prosecutorial capabilities as well as other Court services such as outreach to affected communities and legal aid.<sup>140</sup>

### Budget comparison between ICC, ICTY and STL

The ICC's approved budget for 2017 has been set at €144,587,300 to cover ten different country situations under investigation and ten more under preliminary examination. In 2016, the ICC employed 970 staff members.<sup>141</sup>

The ICTY's budget for 2014-2015, as its operations are winding to a close, was \$179,998,600 (approximately €165,830,221).<sup>142</sup> As of March 2016, the ICTY employed 425 staff members.

The Special Tribunal for Lebanon (STL), mandated to investigate the 2005 assassination of Rafic Hariri, the former Lebanese Prime Minister, managed a budget of €62,800,000 in 2016, for the investigation of one series of attacks.<sup>143</sup> In the same period, the STL employed 456 staff members.

The recent *ReVision* project undertaken by the Registry created a new Division of External Relations, and has promised to strengthen field presence, in part by appointing high-level officials to run field offices and increasing support to victims and affected communities.<sup>144</sup> These changes will hopefully lead to increased impact upon the project's full implementation. Nonetheless, such strengthened field offices currently only exist in Cote d'Ivoire (also charged with covering Mali), Uganda (also charged with covering Kenya), DRC, and CAR, with an office in Georgia opened in 2018.<sup>145</sup>

However, the continued reliance upon civil society organisations in the context of even greater resourcing restraints within civil society gives rise to some concern. The Court must be careful in not expecting civil society to do more than it is able to, as this can give rise to complacency or resentment.

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140. See, for example, Brown, Matt, "African Withdrawals Mask the Real Issue at the Assembly of States Parties 15," *Opinio Juris*, 8 December 2016, available at: <http://opiniojuris.org/2016/12/08/african-withdrawals-mask-the-real-issue-at-the-assembly-of-states-parties-15/>; Evenson, Liz and O'Donohue, Jonathan, "States shouldn't use ICC budget to interfere with its work," 22 November 2016, available at: <https://www.amnesty.org/en/latest/news/2016/11/states-shouldnt-use-icc-budget-to-interfere-with-its-work/>

141. Assembly of States Parties, "Programme Budget for 2017", Resolution ICC-ASP/15/Res.1, 24 November 2016, available at: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ASP15/ICC-ASP-15-Res1-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP15/ICC-ASP-15-Res1-ENG.pdf), p. 15.

142. Budget figure provided by the ICTY: *The Cost of Justice*, available at: <http://www.icty.org/en/about/tribunal/the-cost-of-justice>

143. Special Tribunal for Lebanon, Seventh Annual Report (2015-2016), available at: [https://www.stl-tsl.org/index.php?option=com\\_k2&id=7551\\_b06403f665a6f7b36d9572d08e2f0eb3&lang=en&task=download&view=item](https://www.stl-tsl.org/index.php?option=com_k2&id=7551_b06403f665a6f7b36d9572d08e2f0eb3&lang=en&task=download&view=item)

144. International Criminal Court, "Report of the Registry on the outcome of the Revision process," ICC-ASP/14/19, 15 July 2015, Sections N through R, available at: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP14/ICC-ASP-14-19-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-19-ENG.pdf)

145. International Criminal Court, "Proposed Programme Budget for 2017 of the International Criminal Court," ICC-ASP/15/10, 17 August 2016, para 40, available at: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP15/ICC-ASP-15-10-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-10-ENG.pdf)

## 2.3 Overcoming organisational barriers

Both the ICC and civil society participants identified bureaucracy as a barrier to communication.

Civil society found that a lack of coordination between the different divisions of the Court in carrying out work in situation countries was problematic. This hampered their ability to harness relationships with ICC staff and, in the absence of adequate ICC outreach activities, equally led to confusion among victims concerning the different roles played by different sections of the Court. Without a clear understanding of the Court's structures and different responsibilities and functions of different sections, it is not surprising that individuals or organisations think only in terms of 'the ICC' and are confused by their interactions with several sections and divisions, such as the Jurisdiction, Cooperation and Complementarity Division (JCCD), the Investigations Division, or the Prosecutions Division, the Gender and Children Unit (within the OTP), the Victim Participation and Reparations Section (VPRS), the Victim and Witness Unit (VWU), the Public Information and Outreach Section (PIOS), the Legal Representative(s) of Victims, the Office of Public Counsel for Victims (OPCV), field offices (within the Registry), or the Trust Fund for Victims (TFV).

Although different organs and sections of the Court have different mandates, there is sometimes an overlap between their activities, particularly when it comes to interacting with victims.

Not only is it confusing to have multiple contacts with different Court staff for different purposes, participants also expressed frustration that information provided to representatives of one section did not appear to be shared internally, resulting in the need to repeat the process several times to ensure that the message is communicated to the right person. Participants expressed that it is unrealistic to expect each person who interacts with the Court to understand the intricate bureaucratic differences among such a large number of contacts. Extended and more permanent field presence, strengthened outreach, and a more coordinated and streamlined approach, would all improve the quality of interaction with victims and witnesses.

Persons within the ICC have equally expressed frustration in dealing with the sometimes complex structure or internal processes of international NGOs – particularly where their most direct point of contact is with the NGO's field staff rather than the international secretariats. Lack of understanding by the ICC, of collaboration dynamics among NGOs, can also be explained by the diverse range of local, national and international civil society organisations working on similar issues (including SGBV) in locations where the Court may be investigating or operating. However, participants were not in favour of nominating one NGO as the focal point for all ICC communications with civil society. They were of the view that in the majority of cases, such an approach is neither sensible nor workable, given the diversity of views and strategies predominant within various NGOs.

## 2.4 Towards more impactful Article 15 communications

Under Article 15 of the ICC Statute, individuals or groups, States, intergovernmental or NGOs may submit information ("Article 15 communications") to the ICC Prosecutor, seeking the opening of a preliminary examination, an investigation or contribution to on-going investigations.<sup>146</sup>

Some participants specifically identified Article 15 communications as a useful advocacy tool, drawing attention to issues that may not have immediately been identified as relevant to the Court's work. Several

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146. Article 15(1) of the ICC Statute states that "the Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court". This means that any State or intergovernmental or non-governmental organisation can submit information or "communications" to feed the preliminary examination of the OTP.

participants expressed a wish for the Court to take more of a leadership role in pursuing widespread global crimes, such as trafficking in persons or the persecution of LGBTI individuals, and treating them as crimes against humanity committed outside the context of armed conflict.

Some participants emphasised the role of Article 15 communications as a means of identifying areas where sample SGBV cases could fall within the Court's jurisdiction; such as the communication on the preliminary examination in Honduras by the civil society-led truth commission (Comisión de Verdad) which communicated, among other things, facts relating to deliberate targeting of LGBTI individuals and journalists.<sup>147</sup> Article 15 communications have also been used to draw attention to sexual violence in Colombia,<sup>148</sup> including by alleging liability of non-Colombia-based corporate officials who financially supported the direct perpetrators.<sup>149</sup> An Article 15 communication filed in 2015 on the situation of Cambodia argued the gendered nature of international crimes stemming from land grabbing, especially as to how such crimes have a disproportionate impact on women, who bear the dual responsibility for childbearing and contributing to household income.<sup>150</sup>

No official format of Article 15 communications has been provided by the ICC. This leads to a certain tension between what the Situation Analysis Section (SAS) of the OTP (in charge of preliminary examinations) *wants* to receive from civil society and what civil society actors believe that section *needs* to receive and are *able* to provide. OTP staff may feel frustrated that the information received does not always meet the criteria it uses for analysis (e.g., communications describing human rights violations rather than international crimes or lacking linkage elements to the alleged perpetrators). NGOs may be frustrated by the limited impact of their communication and legal analysis on the OTP's preliminary examinations and investigations, due to in particular a sometimes narrow ICC strategy. NGOs are also often asked to provide detailed legal analysis that some of them are not in a position to provide. The OTP should be able to use the submitted information, in combination with other sources of information, and elaborate its own legal analysis.

Although the SAS has made efforts to communicate its preferences for the form or structure of Article 15 communications to some civil society organisations, this issue cannot be solved through individual instructions or discussions alone, but should be addressed in a structural manner. Equally, some participants have expressed concern that country-based organisations may not always be aware of the possibilities of this avenue of communication. Others have expressed concern that there is a discrepancy or misunderstanding between the OTP's concern about evidentiary and disclosure obligations, which can lead to a degree of hesitation about collecting all the information civil society may present and a perceived lack of interest in the issues which are most relevant to those making submissions. Civil society organisations do not wish to be perceived as service providers to the ICC, particularly when their strategy on certain issues may not align with the Court's approach. Again, transparent communication about needs, expectations, and operational constraints on both sides could alleviate many of these frustrations, although it may take some time to more effectively capitalise on the potential of Article 15 communications in practice.

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147. Comisión de Verdad, Informed de la Comisión de Verdad: La Voz Más Autorizada de las Víctimas, October 2012, available at: [http://iepala.es/IMG/pdf/Informe\\_Comision\\_de\\_Verdad.pdf](http://iepala.es/IMG/pdf/Informe_Comision_de_Verdad.pdf)

148. ECCHR, Sisma Mujer and Colectivo de Abogados Jose Alvear Restrepo, "ICC Communication on Sexual Violence in Colombia," available at: <https://www.ecchr.eu/en/international-crimes-and-accountability/sexual-violence/colombia.html>

149. FIDH, "Human Rights Coalition Calls on ICC to Investigate Role of Chiquita Executives in Contributing to Crimes against Humanity", 18 May 2017: <https://www.fidh.org/en/region/americas/colombia/human-rights-coalition-calls-on-icc-to-investigate-role-of-chiquita>

150. FIDH, "Cambodia: 60,000 new victims of government land grabbing policy since January 2014," Press Release, 22 July 2015, available at: <https://www.fidh.org/en/region/asia/cambodia/cambodia-60-000-new-victims-of-government-land-grabbing-policy-since>

## 2.5 Need to include more voices

One of the frustrations identified by many participants regarding the Court's relationship with civil society, was the need for more civil society voices to be heard at both an international and particularly at a field level.

Although there is a genuine consistent relationship between the ICC and the few civil society organisations with permanent representations in The Hague, several participants expressed concern that this is not replicated to the same extent at the country level. Civil society organisations working primarily in situation countries, including those working directly with victims of SGBV such as local victims' associations and women's rights organisations, may not have the same level of access to policy or strategic discussions in The Hague even though they may be particularly well placed to provide feedback into those developments. Similarly, because of their more limited interaction with the ICC, they may also have more unrealistic expectations of what the ICC can or cannot provide. This in turn fuels frustrations and obstructs effective working relationships.

In addition, some participants were disappointed by the limited opportunities to facilitate engagement between the Court and national-level civil society beyond a handful of regular yearly events organised by the ICC or the ASP. It is important that these engagements occur more regularly than just at the annual ASP and the annual meetings between NGOs and the ICC held in The Hague, both of which require independent funding for travel. Additionally, due to the numerous issues that have to be discussed and decided upon during these meetings, substantial engagement may be sidelined due to other discussions. Others expressed frustration at the fact that it has been extremely difficult for civil society organisations to develop meaningful relationships with ICC staff. Several participants spoke about 'the same faces' always attending public events relating to SGBV, but not bothering to establish meaningful channels of communication between the Court and external organisations working on SGBV.

Equally, some participants expressed concern that cooperation between civil society organisations, both at an international level and on the ground, is sometimes hampered by a sense of territoriality. This is fuelled by the donor community's increased attention on SGBV issues and a resulting sense of competition for funds between organisations. One example of this is the hostility sometimes expressed in response to advocacy efforts relating to male victims of sexual violence, with a perceptible sense from some organisations that "there isn't enough to go around" and that any attention for male victims will necessarily be at the direct expense of existing projects dedicated to female SGBV victims.

Outside of the field context, many participants spoke about the need to include more voices in the conversation, at the international level. They cautioned against the use of any one organisation as the *de facto* spokesperson for all NGOs on such a complex and wide-ranging issue.

The broader the range of voices that the ICC engages with, the greater the potential impact of that cooperation can be. Civil society definitely has a role to play in keeping up pressure on the Court to strive for the highest standards of accountability and to devote appropriate attention and resources to SGBV crimes.

## CONCLUDING REMARKS

The relationship between the ICC and civil society organisations is strong and quite unique in the sphere of international jurisdictions. It creates unprecedented avenues for civil society to impact the Court's activities and allows victims' voices to be heard during ICC proceedings. It builds upon close interactions between NGOs, victims and affected communities. Civil society organisations can therefore be instrumental in connecting the ICC, sometimes perceived as a remote institution, with victims and local populations.

However, the ICC relies extensively on civil society in the global fight against impunity, expecting civil society to engage in a variety of tasks normally falling under the ICC's own mandate. Some civil society organisations feel instrumentalised by the ICC, without receiving the necessary support or recognition in return, while ICC staff has expressed frustration at difficulties interacting with civil society.

The disconnect between the ICC and civil society may arise in part from a lack of transparent, open communication and understanding from both sides regarding the constraints attached to their respective independent mandates and their potential differences of strategies.

There is also a need for the ICC to engage with a broader range of civil society voices.

Despite the aforementioned difficulties, all participants in our research unanimously agreed that the relationship between the ICC and civil society is critical to the success of fighting impunity for SGBV and one that should be nurtured.

## RECOMMENDATIONS

### To the ICC

#### Communication and outreach

- Improving communications both within and outside the Court;
- The Public Information and Outreach Section should evaluate and update its communications strategy, integrating a gender-sensitive approach (including reaching out to victims of SGBV);
- The OTP should develop a complementary public information strategy that also integrates a gender-sensitive approach;
- The Court should actively advocate for a reinforced budget for public information and outreach activities;
- The Court should explore ways in which timely statements or visits may support domestic processes, including development of legislation, investigations and prosecutions of SGBV;
- The Court should increase public engagements on SGBV for the purposes of positive complementarity.

#### Reinforcing synergies between civil society and the Court

- The Court should improve coordination and streamline interaction with victims and witnesses, capitalising on the new Division of External Affairs and Field Operations;

- The Court should expand its staff presence on the ground through the early establishment of resourceful field offices;
- The Court should engage a broader range of civil society voices on SGBV;
- When organising policy and strategic discussions, the Court should increase its efforts to include the views of smaller civil society organisations working directly with victims of SGBV in situation countries;
- The Court should work with civil society to develop meaningful relationships with ICC staff beyond policy level, including through peer-to-peer meetings;
- The Court should explore possibilities, without compromising any independent mandate, to provide greater support (financial or otherwise) to civil society organisations that facilitate the ICC's access to victims and witnesses (e.g. payment of intermediaries);
- The different sections of the Court should strive for transparent dialogue with civil society organisations (without compromising confidentiality), about the constraints they face in order to manage expectations, minimise frustrations and maximise positive outputs;
- Fully implement, monitor, and evaluate the use of intermediaries' guidelines, and ensure all Court officials interacting with intermediaries have been trained in accordance with the guidelines;
- Assess and improve institutional structures and practices that hamper the ability of the Court to provide civil society organisations with sufficient notice of cooperation requests;
- Include within Court training programmes a component on the work of civil society organisations, how they are linked to the Court's work and – most importantly – on the constraints they face in cooperating with the Court.

### **Victims and Witnesses' protection and support**

- When possible, continuity of communication with victims and witnesses should be guaranteed (i.e. through extended field presence, contact from the same investigators, etc.);
- Engage in a holistic and long-term approach in respect of victim and witness support and protection.

### **Article 15 Communications**

- Clarify the process of examination of Article 15 communications and follow-up with NGOs submitting such communications;
- Clarify information needed from NGOs by the OTP, while developing capacity to conduct required legal analysis of information submitted by NGOs which would fit the OTP's legal criteria.

### **To civil society organisations**

- CSOs should set clear conditions for their cooperation with Court to ensure their own standards and priorities are not compromised (e.g. through establishing MoUs when possible, particularly if an NGO will act as an intermediary);
- CSOs should continue to submit information to the ICC under Article 15, particularly when that information can expand the Court's horizons and draw attention to issues related to SGBV;
- CSOs should maintain a clear and transparent dialogue with any victims they work with to manage expectations regarding the possibilities and limitations of the ICC;
- CSOs should develop holistic / multidisciplinary advocacy and litigation strategies for accountability that take into account the full spectrum of victims' needs.

## **To the Assembly of States Parties**

- Do not approve budget reductions likely to undermine the ICC's ability to investigate and prosecute or to restrict the implementation of victims' rights; in particular, disregard the 'zero growth' principle in budgetary discussions;
- Support a reinforced budget for public information and outreach activities, recognising the importance of such activities to the ICC's core mandate;
- Support the strengthening of field offices and their establishment as early as possible in a situation country.



*Maya Ixil women celebrating after listening to the sentence given to retired General Jose Efraim Rios Montt, former Guatemalan de facto President (1982-1983), for genocide and war crimes committed during his regime, Guatemala City, May 2013. © Johan Ordonez/AFP*

### III. OTHER AVENUES FOR ACCOUNTABILITY FOR SGBV CRIMES

Under the principle of complementarity enshrined in the Rome Statute,<sup>151</sup> national jurisdictions have the primary responsibility to investigate and prosecute crimes within the ICC's jurisdiction, including SGBV. The ICC only intervenes in case of lack of willingness and ability of national authorities to genuinely investigate and prosecute perpetrators of international crimes committed on their territory. Furthermore, the ICC was not intended to be and does not have the resources to prosecute all perpetrators of the most serious crimes falling under its jurisdiction. For these, and other reasons, the OTP made a strategic decision to focus its investigations on those bearing the greatest responsibility for the most serious crimes under the ICC's jurisdiction.

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151. See in particular paragraph 10 of the Preamble of the ICC Statute, Article 1 and Article 17(1) of the ICC Statute.

National justice systems are confronted with many challenges and obstacles in their accountability efforts for international crimes (i.e. restrictive and discriminatory legal frameworks; traditional, patriarchal stereotypes and attitudes around the commission of sexual violence; lack of specific expertise of police, investigators and legal practitioners on SGBV crimes). As a result, the ICC has been called to proactively encourage and assist States to investigate and prosecute perpetrators of international crimes committed on their territory, be it through advocacy and assistance to the drafting of implementing legislation incorporating ICC Statute crimes or through support to national judicial proceedings. This has been called “positive complementarity” or “positive approach to complementarity”.

Although some of these challenges are unique to national jurisdictions, many are reminiscent of similar difficulties faced by the ICC and other international courts. Importantly, significant headway has been made in various national and regional jurisdictions to increase accountability for SGBV. A variety of means have been used to ensure the dissemination of best practices, but further efforts should be made to build upon success stories and effectively share the lessons learned among practitioners at national and international level.

### 3.1 Positive complementarity between the ICC and national authorities

#### A. Complementarity in legislation

States Parties must incorporate ICC founding texts into their national legal framework, including by adopting implementing legislation on international crimes but also on procedural rights of victims and witnesses, for example. Equally, the ICC Presidency, Registry, and the ASP Presidency have to support (as much as possible) these efforts to legally enable national investigations and prosecutions for international crimes, including for SGBV.

Most recently, the Democratic Republic of Congo<sup>152</sup> and Côte d’Ivoire<sup>153</sup> adopted comprehensive implementing legislation in 2016 to reform restrictive penal codes and expand the capacity of national criminal law to address SGBV. Incorporating international criminal law standards in national penal codes might trigger more domestic engagement with SGBV and address gaps or legal impossibilities, such as those surrounding sexual violence against men and boys.

Several participants from civil society organisations also spoke about the possibility of positive complementarity as related to the protection of victims and witnesses. Transposition into national law of protective measures contemplated in the Rome Statute and the Rules of Procedure and Evidence can contribute to facilitating safe access to justice.

In turn, having such national legal frameworks in place may open up more opportunities for strategic litigation by civil society organisations. This can also be true in situations where the ICC is not and cannot get involved, such as in Guatemala. Even though the crimes fall outside the Rome Statute’s temporal jurisdiction, civil society organisations do look to the ICC and its practices to persuade domestic magistrates, or to change jurisprudence at national level.<sup>154</sup> Participants stressed that more

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152. The DRC adopted in 2015 and enacted in 2016 the implementing legislation to fully incorporate the Rome Statute into its domestic laws. The legislation consists of four bills, amending the Military Criminal Code, Military Criminal Procedure Code, Criminal Code and Criminal Procedure Code.

153. Cote d’Ivoire adopted two bills in March 2015, amending the Criminal Code (Loi N°2015-134 du 9 mars 2015) and the Criminal Procedural Code (Loi N°2015-133 du 9 mars 2015) to define Rome Statute crimes and modes of liability, as well as indicate the non-applicability of statutes of limitation. However, the bills do not include cooperation provisions or non-immunities for official capacities. Full section on international crimes in penal code available here: <http://www.loidici.com/codepenalcentral/codepenalinfractiondroitdesgens.php>

154. For example, a two-day workshop on “Combating Sexual and Gender-Based Mass Atrocity Crimes at National Level” was

attention should be paid to facilitating a transfer of knowledge from the international to the national level. Lessons learned at the international level have not been communicated properly or sufficiently to the national level; this negatively affects positive complementarity efforts.

Sustained advocacy from civil society may also be necessary to remove legislative and procedural obstacles to domestic accountability. In Bosnia, for example, advocacy from national and international civil society was vital not only in contributing to the amendment of the domestic criminal code to incorporate international crimes, but also to develop the law to comply with international standards, such as removing the necessity of proving an ‘imminent threat of physical violence’ to establish coercion.<sup>155</sup> The situation of male victims of sexual violence, is another example where concerted national and international advocacy is required to draw attention to the scale and severity (and in some cases, the very existence) of the issue. Civil society advocacy has also highlighted the severe obstacles facing male survivors, when the domestic criminal law in 62 countries only recognises female victims of rape and 67 countries potentially criminalise male survivors due to domestic prohibitions on what may be deemed or assumed to be “homosexual acts.”<sup>156</sup> This context increases the responsibility of all civil society organisations to assess whether male victims may inadvertently be overlooked; due consideration must be given to the particular harm these victims may have been subjected to and the unique risks they may face by coming forward and speaking out.

## B. Complementarity in investigative and prosecutorial strategies and policies

The OTP endorsed the principle of positive complementarity explaining in 2010 that the “positive approach to complementarity means that the Office (of the Prosecutor) will encourage genuine national proceedings where possible, including in situation countries”.<sup>157</sup> This approach has been included in various OTP policy and strategy papers, with more or less consistency as to the nature of the assistance that the ICC could provide to national authorities.<sup>158</sup>

The OTP specified in its SGBC Policy Paper that, “consistent with its positive complementarity policy, the Office seeks to combine its own efforts to prosecute those most responsible with national proceedings for other perpetrators. It may, for example, engage with and support national authorities in their national proceedings, including in relation to sexual and gender-based crimes, provided that this does not

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held in Antigua, Guatemala in 2015, co-organised by the ICC, the IDLO, the Embassy of Sweden and UNAMG (one of the civil society organisations who filed the criminal complaints for sexual violence in the Sepur Zarco case). The workshop brought together government representatives, high-level judicial officials, international representatives from the ICC, including the OTP, and civil society organisations for discussions on how to advance accountability for SGBV and share information and experiences. See Assembly of States Parties, “Report of the Bureau on Complementarity,” ICC-ASP/14/32, 10 November 2015: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP14/ICC-ASP-14-32-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-32-ENG.pdf)

155. See, for example, OSCE, “Combating Impunity for Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges: An analysis of criminal proceedings before the Court of Bosnia and Herzegovina between 2005 and 2013,” February 2014, p. 60-62: <http://www.osce.org/bih/117051?download=true>

156. See further the Refugee Law Project briefing paper: C. Dolan, “Into the Mainstream: Addressing Sexual Violence Against Men and Boys in Conflict,” Briefing Paper prepared for the workshop held at the Overseas Development Institute. Refugee Law Clinic, May 2014, 12 p.: <http://reliefweb.int/report/world/mainstream-addressing-sexual-violence-against-men-and-boys-conflict>

157. ICC OTP Prosecutorial Strategy 2009-2012, 1 February 2010, para. 17.

158. See in particular the ICC OTP Prosecutorial Strategy 2009-2012, 1 February 2010, para. 17: “The Office’s approach includes: a) providing information collected by the Office to national judiciaries upon their request pursuant Article 93(10) (...); b) calling upon officials, experts and lawyers from situation countries to participate in OTP investigative and prosecutorial activities (...);” the ICC OTP Strategic Plan 2016-2018, 16 November 2015, para. 57: “As regards to positive complementarity, the Office’s position is that it will not act as a development agency towards situations under preliminary examination or under investigation but that it can contribute to complementarity through the normal execution of its mandate, including through (1) the sharing of its expertise in international criminal law, investigations or witness protection upon request, (2) the inclusion, where appropriate, of national investigators or prosecutors into its teams for the duration of an investigation, or (3) the participation in the coordination of national and ICC investigations”; and ICC OTP Policy paper on case selection and prioritisation, 15 September 2016, para. 31: “If the national authorities are conducting, or have conducted, investigations or prosecutions... the Office may consult with the authorities in question to share the information or evidence it has collected, pursuant to article 93(10) of the Statute, or it may focus on other perpetrators that form part of the same or a different case theory, in line with a burden-sharing approach”.

compromise any future admissibility proceedings. This could include sharing evidence in the course of an investigation to support national proceedings, subject to the existence of a credible local system of protection for witnesses and other security-related caveats. As part of its positive complementarity approach, the Office encourages States to carry out their primary responsibility of investigating and prosecuting crimes, including sexual and gender-based crimes and supports them in this endeavour".<sup>159</sup>

Participants generally agreed that more creativity and flexibility is needed concerning the ICC's role in encouraging or facilitating national accountability processes for SGBV under the principle of positive complementarity. While the ICC's mandate to contribute to positive complementarity efforts at a national level is increasingly restrictive, in part also because of resource constraints, participants generally agreed that more could be done to ensure that complementarity on SGBV is not only rhetoric. This could, for instance, be done by exploring possibilities of establishing clearer evidence sharing processes,<sup>160</sup> or by establishing targeted (paid) visiting professional placements within all parts of the Court to enable domestic practitioners to see the ICC "in action."<sup>161</sup>

The ICC should also strengthen its dialogue with national authorities, especially to identify pro-actively requirements in terms of evidence for national investigations and prosecutions, while overcoming security and protection constraints. In the course of its own investigations, the ICC might collect useful contextual, crime-based but also linkage evidence that it should share with national judicial authorities. Indeed, if the ICC's prosecutorial strategy is to focus on prosecuting those most responsible, national authorities should continue their accountability efforts and benefit from gathered evidence. In the Central African Republic for example, a Special Criminal Court (SCC) was established to investigate and prosecute perpetrators of serious human rights violations and international crimes committed in CAR since 1 January 2003.<sup>162</sup> This marked the first occasion where the ICC and a hybrid tribunal investigated crimes in the same situation, in a potentially complementary relationship where the ICC is focusing on the prosecution of those most responsible, while the SCC may focus on lower level perpetrators.<sup>163</sup> Some expressed concern over provisions in the organic law that grant the ICC jurisdictional primacy over the SCC, depriving the SCC of priority to prosecute cases and violating the Rome Statute's principle of complementarity.<sup>164</sup> Cooperation agreements should clarify the modalities of cooperation and effectively facilitate interaction between the ICC and national jurisdictions, in particular with respect to the exchange of evidence-based information. Indeed, effective cooperation in terms of evidence-sharing between the ICC and national authorities is vital.

National actors (authorities or civil society) should also express the concrete obstacles they are facing to their ICC counterparts. Although the ICC itself may not always be able to provide direct assistance, these obstacles (be they material, technical or legal) can be conveyed to key stakeholders including development institutions who may be in a position to provide appropriate assistance. In Guinea, for example, in addition to civil society advocacy, the ICC's preliminary examination probably contributed

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159. ICC OTP Policy Paper on SGBC, June 2014, para. 109-110.

160. Participants both inside and outside the ICC noted that there is a misunderstanding about how national actors should draft appropriate Requests for Assistance for evidence-sharing between the ICC and national judicial authorities, pursuant to Article 93(10) of the ICC Statute.

161. For instance, in 2015, with financial support from the European Commission, the ICC launched a paid Legal Professionals Programme, which sought to bring to the ICC representatives and professionals from situation countries and countries under preliminary examination for a period of approximately 3 to 6 months.

162. *Loi 15/003 du 3 juin 2015 portant création, organisation et fonctionnement de la Cour pénale spéciale* [Law 15/003 of June 3, 2015, Establishing the Organization and Functioning of the Special Criminal Court], *Journal Officiel de la République démocratique du Congo* [Official Journal of the Democratic Republic of the Congo], known as the organic law.

163. For more information, see the FIDH Q&A on the CAR Special Criminal Court, 30 August 2017: <https://www.fidh.org/en/region/Africa/central-african-republic/what-is-the-special-criminal-court>

164. P. Labuda, *The American Society of International Law*. "The Special Criminal Court in the Central African Republic", (2018), available at: <https://www.asil.org/insights/volume/22/issue/2/special-criminal-court-central-african-republic>

to the increase in the resources of national judges investigating the crimes committed in or about 28 September 2009 (including in terms of equipment and security measures).

Participants noted that in some countries, the mere involvement of the ICC (preliminary examination) acted as a ‘Sword of Damocles’ triggering domestic actions to address SGBV, in order to prevent the opening of an ICC investigation. In Colombia for example, though national prosecutions for sexual violence are still lacking according to the 2016 Preliminary Examination Report of the OTP (paras 249-251), in June 2016 the Attorney General’s Office adopted a comprehensive protocol for the investigation of sexual violence with the assistance of Sisma Mujer, UN Women and others. The protocol addresses best practices for investigation of SGBV using a gender analysis and a victim-centred approach, and is explicitly complementary to the Rome Statute.<sup>165</sup> In Guinea, collaboration with the OTP of the ICC, as well as with civil society organisations such as FIDH, victims’ associations, and the UN Team of Experts on Rule of Law and Sexual Violence in Conflict, has led to progress on the national investigation of sexual violence related to the 2009 events in Conakry, including rape and sexual violence against at least 109 women.<sup>166</sup>

### 3.2 Building upon best practices and success stories

Many participants were concerned about the tendency to “reinvent the wheel” on issues of SGBV, both at national and international levels. Common legal questions arise in nearly all situations, including:

- How can we prove sexual violence without medical records?
- How can we prosecute SGBV when crimes were committed many years ago?
- Can SGBV be proven without corroboration?
- Can SGBV be proven based on witness evidence alone?
- How do we contextualise SGBV?
- What is the best way to link SGBV to perpetrators; which modes of liability should be charged?

As one participant noted, “information can be like a gold nugget.” The difficulty is ensuring that national actors have access to the appropriate information and the capacity to benefit from it and develop SGBV jurisprudence further. The following sections address successful strategies in sharing and reproducing information to enable SGBV investigations and prosecutions nationally and in hybrid tribunals.

#### A. Training programmes and peer-to-peer experience sharing

While training programmes are important at a national level, they are most successful when any assistance is provided through case-based, hands-on mentoring rather than one-off generalised training programmes.

Numerous participants highlighted the numerous opportunities for peer-to-peer mentoring or experience-sharing between judges, lawyers and other counterparts, whether it be internationally, regionally or even nationally. In the view of one participant, discussions between judges or prosecutors (for instance, about how to tackle very practical questions related to SGBV) are vital: “There is something about [it being] a colleague, a judge telling another judge about how they are doing this.”

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165. Fiscal General de la Nación, Protocolo de Investigación de Violencia Sexual: Guía de buenas prácticas y lineamientos para la investigación penal y judicialización de delitos de violencia sexual, 14 June 2016. Press release available at: <http://www.fiscalia.gov.co/colombia/noticias/destacada/fiscalia-adopta-protocolo-para-investigar-y-judicializar-la-violencia-sexual/>

166. See in particular FIDH-partner organisations in Guinea report, “Justice, reconciliation and legislative reform: three priorities for the Rule of Law in Guinea”, 20 March 2017: <https://www.fidh.org/en/region/Africa/guinea-conakry/guinea-3-priorities-for-the-the-fight-against-impunity-and-the>

There is a need for forums where practitioners can be connected on SGBV issues, to “drill down” into technical aspects and develop professional networks. One new initiative stemming from the ICTY legacy project is the “Prosecuting Sexual Violence in Conflict Network” (PSV Network) of the International Association of Prosecutors (IAP).<sup>167</sup> The goals of the network are to allow for problem-solving between jurisdictions, to collate best practices, and to ensure that expertise developed at the international level can be channelled into national prosecutions, and *vice versa*, as well as stimulate horizontal experience-sharing between jurisdictions. Though it is a new initiative, the PSV has begun peer-to-peer workshops and trainings in a number of locations.

In designing any training programmes, participants stressed that it is important to incorporate adult learning principles and to focus on practice; it is far less effective to present practitioners with theoretical presentations than it is to have them engage in practical exercises that incorporate examples from their own work. Furthermore, it is important for such training programmes to go beyond mere skill-building. The most successful training programmes to increase the capacity of domestic actors to deal with SGBV in pursuit of complementarity have been those that have taken a broader, holistic approach to capacity-building.

Several participants highlighted the success of training programmes that spent a lot of time reconstructing and addressing investigators’ attitudes and perceptions around SGBV to tackle existing myths and misconceptions. For instance, during a training session organised for police officers in Kenya, the officers were asked to rank a range of different crimes, including rape and armed robbery. The next part of the training was spent dissecting the criteria they used for ranking. While all police officers agreed that the maximum sentence should be a prioritisation factor, none of them could name the maximum sentence for armed robbery, while they knew the maximum sentence for rape (life imprisonment). Yet, they consistently ranked armed robbery as more serious than rape. Dissecting these criteria showed the police officers that rape was more serious than armed robbery, and challenged unconscious myths and misconceptions that contributed to the continued deprioritisation of SGBV. During a follow-up workshop, the police officers stressed that this exercise, while tough, was useful in making them reconsider their internal assumptions around allocation of resources. The police officers subsequently repeated the exercise with their subordinate officers outside the context of this training. The practical hands-on nature of this training contributed greatly to a certain degree of internalisation. Lessons learned should be filtered down to more junior domestic practitioners, who were not the initial target of the international training programmes.

## B. Sharing best litigation practices

### a. Expert opinions

*Amicus curiae* filings by civil society organisations and academics have been particularly successful in triggering jurisprudence on SGBV in national courts as well as at the international level. Two prime examples include *amicus* briefs filed at the Extraordinary Chambers in the Courts of Cambodia (ECCC) set up to bring to trial Khmer Rouge leaders,<sup>168</sup> and before the Extraordinary African Chambers (EAC) in the Hissène Habré case in Senegal.<sup>169</sup> The brief filed at the ECCC provided expert guidance on the crime

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167. More information is available at: <http://www.iap-association.org/PSV/Home>

168. See, for example, ECCC, *Amicus curiae* brief on forced marriage, Case No. 002/19-09-2007-ECCC/TC, 29 September 2016: [http://csiw-ectg.org/wp-content/uploads/2016/11/E418\\_4\\_EN-OCT-2016.pdf](http://csiw-ectg.org/wp-content/uploads/2016/11/E418_4_EN-OCT-2016.pdf).

169. 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>

against humanity of forced marriage, charged under Article 5 of the ECCC Statute as “other inhumane acts.” The Habré *amicus* analysed how the multiple forms of sexual violence perpetrated under the Habré regime already constituted customary international law and urged the Chambers to revise the charges to reflect testimony of SGBV survivors. While the judges did not formally accept the *amicus curiae* filing on SGBV into the case record, the judgment does reflect many of the points made in that filing, advancing greatly SGBV jurisprudence.

### The Hissène Habré Case

Extraordinary African Chambers (EAC) in the Courts of Senegal, a mixed jurisdiction with national and international components, were set up to bring to trial former Chad dictator Hissène Habré and his acolytes. His trial started on 20 July 2015. On 30 May 2016, Hissène Habré was found guilty, in his capacity as leader of the repression during his regime in Chad from 1982 to 1990 and in the context of a joint criminal enterprise, of crimes of torture, war crimes and crimes against humanity, including for rape and sexual slavery. He was sentenced to life imprisonment.<sup>170</sup> This conviction, confirmed on appeal on 27 April 2017, is broader than the original indictment, which did not include SGBV: legal representatives fought tirelessly and successfully to get SGBV charges included during the trial. Regrettably, the Appeals Chamber did not convict Habré for the direct perpetration of rape against one victim, despite her testimony, which was deemed ‘not timely’ according to Senegalese procedural law.

Using **expert testimony** is also a way of allowing international expertise and international jurisprudence to feature more prominently in national judgments, thus leading to a certain degree of harmonisation on accountability for SGBV. For instance, in the *Ríos Montt* and *Sepur Zarco trials* in Guatemala, the presentation of expert testimony on international criminal law’s treatment of SGBV assisted the judges in taking a more progressive approach towards the inclusion of SGBV crimes in connection with those cases.

### Guatemalan Cases

The Genocide Case in Guatemala was the first national prosecution and conviction of a former head of state for the crime of genocide. Former president Efraín Ríos Montt and his co-defendant José Mauricio Rodríguez Sánchez (former head of military intelligence) were charged with genocide and crimes against humanity committed against the Ixil Maya people in 1982-1983. During the trial, more than a dozen indigenous women testified to rape and sexual violence. Two “associated plaintiffs” (*querellantes adhesivos*) co-prosecuted the case – The Center for Human Rights Legal Action (CALDH) and the survivors’ association Association for Justice and Reconciliation (AJR) – after more than a decade of pushing for advancements and arrests. In the now-annulled judgment of 2013, the tribunal recognised SGBV as evidence of genocide and crimes against humanity.<sup>171</sup>

170. See FIDH press release, “Hissène Habré convicted of international crimes: a historic verdict for victims,” 3 June 2016: <https://www.fidh.org/en/region/Africa/chad/hissene-habre-convicted-of-international-crimes-a-historic-verdict>; FIDH, Questions and Answers on the Hissène Habré case, 26 April 2017: <https://www.fidh.org/en/region/Africa/chad/questions-answers-on-the-hissene-habre-case>

171. Ten days after the verdict was rendered, the Guatemalan Constitutional Court overturned the decision on a highly controversial procedural appeal and ordered a retrial. The retrial recommenced in 2016, without the presence of Mr. Ríos Montt due to health concerns. He died in April 2018.

The Sepur Zarco case, which commenced in 2016, is the first prosecution in a national court for sexual slavery committed during an armed conflict. Sepur Zarco was a small village in Guatemala that was repeatedly attacked in 1982 by military forces. After killing or forcibly disappearing many men from the village, the women were raped and/or held in sexual or domestic slavery for the following months. The trial was held after a long initiative by women's organisations to break the silence of sexual violence in Guatemala. In 2010, the First Court of Conscience on Sexual Violence Against Women during the Internal Armed Conflict was held, and nine Maya women testified to a symbolic panel of international judges. Shortly thereafter, the Public Prosecutor's office initiated an investigation into crimes committed in Sepur Zarco, ultimately leading to the arrest, prosecution and conviction of Esteelmer Francisco Reyes Girón, the colonel responsible for the Sepur Zarco military base, and Heriberto Valdez Asij, a military commissioner, for murder, sexual slavery and other crimes. Two women's organisations, Mujeres Transformando el Mundo and La Unión Nacional de Mujeres Guatemaltecas (UNAMG), as well as the survivors' association Colectiva Jalok U, co-prosecuted the case as "associated plaintiffs."

In both cases, psychosocial support and community security initiatives accompanied strategic litigation, in order to provide the necessary care and attention to witnesses and survivors despite minimal State provisions. For instance, when women were testifying before the judges about sexual violence they suffered, groups of women filled the courtroom gallery in support. Like the witnesses, they covered their heads with scarves to create an environment of support and connection with the witnesses, who wore scarves as a protective measure, rendering identification more difficult. This was hugely empowering for the women who were testifying.

A class-action constitutional case taken against the Government of Kenya for failing to provide accountability for survivors of sexual crimes during the post-election violence of 2007/2008, heard expert testimony supporting the argument that medical or physical evidence should not be required to corroborate witness testimony of SGBV.<sup>172</sup>

## b. External technical support

The involvement of external expertise has equally emerged as a way of moving forward traditionally restrictive national legal frameworks around SGBV. This has been done through the provision of international expert assistance to judges in drafting particular sections of a judgment dealing with SGBV, by providing technical advice and support to prosecutors in the development of new practices and policies around SGBV and through case-based mentoring of police officers, investigators and prosecutors. Examples include the appointment of an international gender expert to the judges working on the *Habré case* at the EAC, and the secondment of a UN Women SGBV expert to the Attorney General's Office in Colombia to assist in the drafting of a protocol on the investigation of SGBV (also with the notable assistance of the Colombian civil society organisation Sisma Mujer).<sup>173</sup> This may infuse within domestic practices, policies or judgments many of the lessons learned at an international level.

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172. See summary of expert testimony by Maxine Marcus at: International Justice Monitor, "Witness: Scientific Evidence Not Necessary to Prosecute Sexual Crimes," 21 June 2016: <https://www.ijmonitor.org/2016/06/witness-scientific-evidence-not-necessary-to-prosecute-sexual-crimes/>

173. The contributions of Sisma Mujer and international expert Daniela Kravetz, consulting for UN Women, are mentioned in paragraphs 9 and 12 of the introduction to the protocol. Fiscalía General de la Nación, "Fiscalía adopta protocolo para investigar y judicializar la violencia sexual," 20 June 2016: <http://www.fiscalia.gov.co/colombia/noticias/destacada/fiscalia-adopta-protocolo-para-investigar-y-judicializar-la-violencia-sexual/>

At the same time, several participants expressed concern that some of the SGBV success stories at a national level were primarily the result of “parachuting in an international expert,” questioning the sustainability of that approach. For instance, if a gender expert is only appointed very late in the process of a trial involving SGBV, that position may ultimately be reduced to one of judgment-writing rather than a more comprehensive advisory role. While the international expertise of the expert may be incorporated into a judgment, it is questionable to what extent any of that expertise can translate into changes in national practices or contribute to knowledge-building of domestic practitioners less sensitised to SGBV. Participants therefore stressed the need for increased emphasis on building local SGBV expertise, when missing, from the ground up and for more time and resources to be dedicated to longer-term mentoring programmes as a way of improving positive complementarity efforts beyond the Rome Statute framework.

At the same time, participants noted that this information-exchange should not be seen as a one-way street and that international practitioners should also be aware of the massive strides made in some national jurisdictions (such as Guatemala), and to learn from the techniques local organisations have used to bring about justice for SGBV crimes.

### **c. Victims' participation in criminal proceedings**

While expertise strengthening national capacity with respect to SGBV is important, involvement of victims and civil society with national jurisdictions is often decisive in strengthening of national prosecutions of these crimes or even triggering criminal proceedings on SGBV cases at the national level, including on the basis of extra-territorial jurisdiction.

Civil society has been instrumental in expanding the scope of on-going investigations or charges to include SGBV, by constituting civil parties and representing victims of SGBV directly in civil law systems or through other sustained advocacy. Such pressure has been successfully applied in numerous situations. In Côte d'Ivoire, for example, in 2015, FIDH and its two member organisations in Cote d'Ivoire (MIDH and LIDHO) introduced a legal brief with the Special Investigation and Examination Unit (Cellule spéciale d'enquête et d'instruction – CSEI) on behalf of 43 women who were victims of sexual violence during the 2011 post-election crisis, introducing them as civil parties in the case, thus pushing for the expansion of the scope of national investigations.<sup>174</sup> Before that, FIDH, LIDHO, and MIDH during an advocacy mission in April 2012 seized the Prosecutor dealing with the post-election violence crimes to request the inclusion of sexual violence in the scope of the on-going investigations, which was finally the case. As a consequence, victims of sexual violence, supported by FIDH, were able to participate as civil parties in those proceedings as of October 2012. This advocacy effort also led the Minister of Justice to issue, on 18 March 2014, an administrative order stating that the production of a medical certificate was no longer a pre-requisite to filing a complaint for rape or other form of sexual violence.

In Mali, in 2014, FIDH and its member organisations and partners in Mali filed a complaint on behalf of 80 victims of rape and other forms of sexual violence as crimes against humanity during the occupation of northern Mali. Before this complaint, charges of rape and other sexual violence had been totally omitted from the scope of the investigations, which only focused on terrorism and criminal association, thus excluding violations of human rights.<sup>175</sup>

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174. FIDH, “Ivory Coast: 43 women who suffered sexual violence during the post-election crisis finally access justice,” 20 March 2015: <https://www.fidh.org/en/region/Africa/cote-d-ivoire/ivory-coast-43-women-who-suffered-sexual-violence-during-the-post>

175. See FIDH, “Mali / Complaint filed on behalf of 80 victims of rape and sexual violence during the occupation of northern Mali: response by Malian judiciary to victims' need for justice is essential without delay,” 12 November 2014: <https://www.fidh.org/en/region/Africa/mali/16455-mali-complaint-filed-on-behalf-of-80-victims-of-rape-and-sexual-violence>

In Cambodia, Prosecutors at the ECCC (established in 2003) originally did not include SGBV charges in their introductory submissions. However, civil parties representing victims pushed for a broadening of investigations and a focus on SGBV. However, presentation of evidence on forced marriage only began in 2016<sup>176</sup> and other instances of SGBV have been thus far largely excluded.

In Guatemala, in 2011, a criminal lawsuit was presented before the Guatemalan justice system by two feminist organizations: Mujeres Transformando el Mundo and UNAMG, alleging the commission of sexual violence at the Sepur Zarco military base. In 2012, pre-trial evidentiary hearings were held to hear the testimony of 20 witnesses and victims, considering the advanced age and frailty of some of the victims. Ultimately, two defendants were found guilty in 2016 of enforced disappearance, systematic rape and sexual and domestic slavery.

### Litigation Strategies in the Hissène Habré Case

The success in the Habré case was in part due to strategic litigation by civil society supporting victims: the victims/survivors, supported in their endeavours by civil society organisations, first attempted to get justice in Chad, but when faced with a jurisdictional impossibility, moved their case to Belgium and subsequently to the International Court of Justice (ICJ). This interaction between different national and international jurisdictions, and the finding by the ICJ of an obligation to extradite or prosecute Habré for his crimes, eventually contributed to the creation of the Extraordinary African Chambers in Senegal by the African Union.<sup>177</sup>

The **use of universal or extra-territorial jurisdiction** of national authorities to pursue perpetrators of international crimes committed in another country is one crucial avenue for accountability in situations where the domestic legal system is incapable or unwilling to address such crimes, and in particular when the ICC has no jurisdiction.

Such extra-territorial jurisdiction cases involving SGBV charges may be the only option for situations like Syria or Iraq in the near future, given the impasse in the UN Security Council to refer the matter to the ICC<sup>178</sup> and the political unlikelihood of the creation of any kind of *ad hoc* international criminal tribunal to investigate the situation in the region in the near future. Several proceedings were opened, under extra-territorial jurisdiction, in Sweden, Austria, Germany, France<sup>179</sup> against Syrian suspects on the territory of European States concerning crimes committed in Syria, although none of those proceedings have thus far included rape or sexual violence charges. Yet, it should be a focus for future prosecutions, especially given the strong efforts of SGBV documentation done by Syrian civil society groups in the framework of the conflict in Syria. Those extraterritorial investigations should be strengthened by the accountability mechanism established by the UN.<sup>180</sup> In December 2016, the UN General Assembly

176. ECCC, Trial Chamber heard evidence on forced marriage and rape. 2 September 2016: <https://www.eccc.gov.kh/en/blog/2016/09/02/trial-chamber-heard-evidence-forced-marriage-and-rape>

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

178. UN News Centre, "Russia, China block Security Council referral of Syria to International Criminal Court," 22 May 2014: <http://www.un.org/apps/news/story.asp?NewsID=47860>

179. For example, after a complaint filed by FIDH-LDH and two victims, French tribunals opened an investigation into the disappearance of two Franco-Syrian nationals, arrested by members of Bashar Al Assad's forces in September 2013: <https://www.fidh.org/en/region/north-africa-middle-east/syria/the-case-of-two-disappeared-franco-syrians-in-a-bachar-el-assad-jail>

180. For a recent overview of proceedings, see TRIAL International, ECCHR, FIDH, FIBGAR, REDRESS, "Make Way For Justice #4 Universal Jurisdiction Annual Review 2018", March 2018: <https://www.fidh.org/en/issues/international-justice/universal-jurisdiction/make-way-for-justice-4-international-momentum-towards-accountability>

created an International Impartial and Independent Mechanism on International Crimes in Syria to assist national authorities in investigating and prosecuting international crimes committed in Syria, in application of extra-territorial jurisdiction.<sup>181</sup>

Additionally, participants stressed that national authorities should accord greater attention to foreign fighters in Syria and Iraq being arrested or fleeing the combat zone to their country of origin. While such individuals are consistently marked as potential security threats and charged with terrorism, very little attention has been paid to the fact that they may also be responsible for the commission of crimes under the Rome Statute. National authorities should therefore consider collecting further evidence for the purpose of incorporating, where appropriate, international crimes charges, including SGBV charges.

Likewise, participants highlighted the fact that people who have been displaced from their homes, in situations like Iraq and Syria, and have fled to European countries could be potential witnesses who may have valuable evidence about crimes committed against civilians in the region, including SGBV.

Participants stressed that extra-territorial jurisdiction cases in one country can also be used to trigger or support proceedings in the country where the crimes were perpetrated or other countries. Judges in courts in one part of the world are encouraged to hold perpetrators accountable by progressive jurisprudence from other courts. For instance, the extra-territorial jurisdiction cases brought by civil society organisations before Spanish and United Kingdom courts triggered proceedings and progressive legal developments in Guatemala in the *Rios Montt case*,<sup>182</sup> and the *Pinochet* regime cases in Chile and other countries where survivors live.<sup>183</sup>

Participants agreed that collaboration between national jurisdictions is equally important to strengthen national prosecutions of these crimes. For instance, the meetings of the EU Network of contact points for the investigation and prosecution of genocide, crimes against humanity and war crimes (EU Genocide Network), which take place twice a year and allow for the participation of a limited number of NGOs, including FIDH, provide for unique exchanges of experience and expertise, including on universal or extra-territorial jurisdiction cases. In 2016, the EU Genocide Network dedicated a specific session of its meetings to the investigation and prosecution of SGBV in order to share their challenges and proposed solutions.

#### d. Importance of individual stories and awareness-raising

Another important mechanism that has emerged through this research is the power of story-telling. When public figures – survivors or witnesses – speak out publicly about SGBV issues, this can trigger a chain reaction not only in terms of legal developments, but also in putting in motion the necessary societal changes to recognise SGBV. In Cambodia, for instance, a transgender survivor of SGBV spoke

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181. UNGA resolution, A/RES/71/248, adopted on 21 December 2016: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/71/248](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/248)

182. In 1999, the Rigoberta Menchú Foundation filed a criminal complaint before the Spanish National Court against Rios Montt and other senior officials stemming from the 1981 burning of the Spanish Embassy. In 2008, testimony from 40 indigenous victims and witnesses was heard in the Spanish courts. These proceedings later contributed to the formation of the case against Rios Montt and Rodriguez Sanchez in Guatemala. Roht-Arriaza, Naomi and Bernabeu, Almudena, "The Guatemalan Genocide Case in Spain," *Berkeley Review of Latin American Studies*, Fall 2008: [http://www.cja.org/downloads/Guatemala\\_U.C.Review\\_fall08.pdf](http://www.cja.org/downloads/Guatemala_U.C.Review_fall08.pdf)

183. See, for example, the history of the Pinochet case: Karine Bonneau, *Le droit à réparation des victimes*, Éditions universitaires européennes, 2011, 664 p.; FIDH-LDH-CODEPU, *The Trial of the Pinochet Dictatorship*, 2010: [https://www.fidh.org/IMG/pdf/CHILL\\_DosPress\\_UK-CS3-02-2-2.pdf](https://www.fidh.org/IMG/pdf/CHILL_DosPress_UK-CS3-02-2-2.pdf); FIDH-LDH-CODEPU, *Historic decision on the crimes of the Chilean*, 17 December 2010: <https://www.fidh.org/en/issues/litigation/litigation-against-individuals/Pinochet-and-others-Case/Historic-decision-on-the-crimes-of>; HRW, "The Pinochet Case – A Wake-up Call to Tyrants and Victims Alike," 1998: <https://www.hrw.org/legacy/campaigns/chile98/precedent.htm>. More recently, France sentenced in absentia thirteen officials who served under the Pinochet regime for the enforced disappearance of a number of French citizens: "Pinochet officials sentenced to jail in France," BBC, 17 December 2010: <http://www.bbc.com/news/world-europe-12021397>

out about the abuse she suffered, in a press conference organised by civil society in 2008. The ECCC issued a press release on the matter,<sup>184</sup> which in turn triggered conversations within Cambodian society on broader SGBV issues.<sup>185</sup> Similarly, one participant from Nepal recounted how a former Maoist rebel, now a member of Nepalese parliament, spoke out in parliament about having suffered a gang rape at a time when people believed that there had been no sexual violence during Nepal's ten-year civil war. This speech changed the dynamics significantly, and as a result, the government, which had denied SGBV had occurred, was forced to offer interim compensatory relief to SGBV survivors. Such stories again underline the importance of multi-level approaches when dealing with SGBV.

The increased visibility of male survivors has had an important impact in increasing awareness and understanding of sexual violence against men and boys. In Cambodia, for example, where half of the witnesses testifying about forced marriage were men, there is a greater understanding of the fact that men were also victims of the crime of forced marriage and that forced marriage is a form of SGBV. In Uganda, male survivors who spoke out and given media interviews have provided a source of comfort and identification for other men, many of whom have struggled with self-loathing, isolation, and the feeling that they were "the only one" to have suffered such a violation. The use of accurate language to describe and identify different forms of sexual violence against men for what they are<sup>186</sup> can also have a significant impact on increasing public understanding, particularly in relation to torture and the abuse of individuals in detention. In the former Yugoslavia, for example, even in prosecutions at the ICTY, men were stereotypically portrayed as victims of torture (even those who had experienced genital mutilation or forced sexual acts) while women were usually presented as victims of sexual violence. This mischaracterisation of sexualised violence as merely a form of torture or inhumane and degrading treatment has extended to abuses committed by US forces, despite widespread evidence of forced nudity, forced masturbation, and other sexual violence in Abu Ghraib,<sup>187</sup> while threats of "forcible rectal rehydration" against detainees as part of the CIA torture programme<sup>188</sup> have only recently begun to be acknowledged as the crime of rape.<sup>189</sup>

The continuing impact of such stories again underlines the importance of multi-branched advocacy and strategic approaches to address SGBV.

### C. Cross-fertilisation between various jurisdictions and mechanisms

Several participants stressed the need for increased cross-fertilisation between various jurisdictions and legal frameworks, such as between human rights reporting mechanisms and international criminal law, and a resultant diversification of approaches to accountability.

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184. ECCC, "Press Statement by Civil Parties Laywer Silke Stuzinsky: First Civil Party Application before the Extraordinary Chambers in the Courts of Cambodia (ECCC) on Gender-Based Violence under the Khmer Rouge Regime," September 2008: [https://www.eccc.gov.kh/sites/default/files/media/PressRelease\\_1st\\_civil\\_party\\_on\\_Gender\\_Based\\_Violence.pdf](https://www.eccc.gov.kh/sites/default/files/media/PressRelease_1st_civil_party_on_Gender_Based_Violence.pdf)

185. See, for example: Wright, George and Odom, Sek, "Study Details KR Abuse of Transgender People," *The Cambodia Daily*, 3 March 2015: <https://www.cambodiadaily.com/archives/study-details-kr-abuse-of-transgender-people-78941/>

186. In this respect, it is worth noting that the Bemba trial judgment for the first time in the history of international criminal law classified rape of men as rape (rather than other types of violations such as torture, inhumane treatment of outrages upon personal dignity). See Bemba judgment, *The Prosecutor v. Jean-Pierre Bemba*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/05-01/08-3399, 21 June 2016, para. 487-501

187. See, for example: Hersch, Seymour H., "Torture at Abu Ghraib," *The New Yorker*, 10 May 2004: <http://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib>; Sivakumaran, Sandesh, "Sexual Violence Against Men in Armed Conflict," *Eur J Int Law* 2007; 18 (2): 253-276: <https://academic.oup.com/ejil/article/18/2/253/361968/Sexual-Violence-Against-Men-in-Armed-Conflict#5234668>

188. United States Senate Select Committee on Intelligence, "Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, Foreword by Senate Select Committee on Intelligence Chairman Dianne Feinstein, Findings and Conclusions, Executive Summary," 9 December 2014, Conclusion #4 p. 4: <https://www.intelligence.senate.gov/sites/default/files/documents/CRPT-113srt288.pdf>

189. Ginatta, Antonio, "Prosecute CIA Interrogators for Sexual Assault," *Al Jazeera America*, 15 June 2015: <http://america.aljazeera.com/opinions/2015/6/prosecute-cia-interrogators-for-sexual-assault.html>

The perception that the most progressive developments for SGBV accountability happen at the international level because of the gender sensitive nature of the Rome Statute must be balanced. Not only does the Rome Statute codify former practice, but there have also been significant advances made at national levels that have not yet been seen at the international level. While there is a concerted effort to increase knowledge and understanding of international legal standards among practitioners at a national level, participants suggested that greater effort should be made at the international level to learn from developments at a national level.

Bosnia is an example of a jurisdiction where conflict-related sexual violence has been the subject of both national and international criminal prosecutions. Although the ICTY's record on accountability for sexual violence is the strongest of all international criminal tribunals, the work done by civil society and international organisations to improve domestic capacity and legislation on SGBV has led to convictions for sexual violence crimes at the domestic level now exceeding those achieved by the ICTY.<sup>190</sup> In addition, Bosnia has become the first criminal jurisdiction anywhere in the world to pronounce convictions for the crime against humanity of gender-based persecution,<sup>191</sup> leading to a situation where the ICC could find itself citing domestic precedent in pursuing prosecutions for that crime under the Rome Statute. The ICC can and should learn more from an increased engagement with actors involved in those processes at a national and regional level. The creation of a judicial database by the ICC's VPRS in 2012 summarising reparations jurisprudence from the Inter-American Court of Human Rights, which has handed down far-reaching and progressive reparations decisions over the past two decades,<sup>192</sup> is a welcome example, but this is rendered ineffective without the resources to keep such databases up-to-date.

Moreover, although development of national jurisprudence is strengthened through collaboration between different jurisdictions, participants stressed that this is subject to such jurisprudence being available to judges. Research for this project identified collaboration between the ICC and national jurisdictions on jurisprudence, as a huge opportunity in waiting. The ICC needs to strengthen its engagement with national jurisdictions dealing with international crimes to make better use of their jurisprudence. In turn, the ICC's own jurisprudence needs to be made more accessible, in both form and substance. A project by Case Matrix Network to compile comprehensive commentary on ICC case law and the ICC Legal Tools Database are steps in the right direction.<sup>193</sup> However, language and the dearth of translation is a first, important, inhibiting factor. Several participants expressed that international jurisprudence must be made available to domestic practitioners, in their own languages. There is concern about the inaccessibility of jurisprudence in French, Spanish, and English restricting the potential for cross-fertilisation between the ICC and national courts dealing with similar crimes. There is a distinct and concrete need to translate judgments for domestic actors to understand how certain legal issues, including the contextual elements of crimes, are dealt with internationally and nationally. These limitations are magnified outside these focal languages.

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190. See, for example, the number of rulings convicting soldiers for sexual violence and awarding compensation to victims. Eg: "Bosnian court grants wartime rape victim compensation in landmark ruling", *The Guardian*, 24 June 2015: <https://www.theguardian.com/world/2015/jun/24/bosnian-court-grants-wartime-victim-compensation-landmark-ruling>; Also, OSCE, "Combating Impunity for Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges: An analysis of criminal proceedings before the courts of the Federation of Bosnia and Herzegovina, Republika Srpska and Brčko District BiH between 2004 and 2014," June 2015: <http://www.osce.org/bih/171906>. However, note that compensation for victims has yet to be effectively enforced: TRIAL, "Effective Enforcement of Compensation for Victims of War Crimes within the Criminal Procedure in Bosnia and Herzegovina," April 2017, Executive Summary: [https://trialinternational.org/wp-content/uploads/2017/04/Publication\\_BiH\\_Compensation-enforcements\\_Executive-summary\\_201704\\_EN.pdf](https://trialinternational.org/wp-content/uploads/2017/04/Publication_BiH_Compensation-enforcements_Executive-summary_201704_EN.pdf)

191. Notably, the Samardžić case, the Kujundžić case and the Perković case before the BiH court. See: OSCE, "Combating Impunity for Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges: An analysis of criminal proceedings before the Court of Bosnia and Herzegovina between 2005 and 2013," February 2014, p. 60-62: <http://www.osce.org/bih/117051?download=true>

192. See, for example: Correa, Cristian, "Getting to Full Restitution: Guidelines for Court-Ordered Reparations in Cases Involving Sexual Violence Committed during Armed Conflict, Political Violence, or State Repression," *ICTJ Briefing Paper*, April 2017, 6-7: <https://www.ictj.org/sites/default/files/ICTJ-Briefing-Court-Reparations-2017.pdf>

193. Commentary on the Law of the International Criminal Court available at: <https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/>; ICC Legal Tools Database: <https://www.casematrixnetwork.org/icc-legal-tools-database/>

## CONCLUDING REMARKS

As the ICC is a court of last resort, national jurisdictions have the primary duty to investigate and prosecute SGBV crimes. However, national authorities have been faced with many challenges, amongst which the need to reinforce their expertise, capacities and resources. The ICC should therefore have a more pro-active role and implement the principle of “positive complementarity” by supporting national efforts to comply with the Rome Statute system and encourage exchanges on best investigative and prosecutorial strategies and policies.

Moreover, success stories of accountability for SGBV crimes all had in common sustainable and multi-faceted litigation and advocacy strategies, seeking multiple avenues for justice and often driven by committed civil society organisations working in support of victims. Other elements have also contributed to legal and social changes, such as when public figures, survivors or witnesses of SGBV crimes, take the subject out of the courtroom and into the wider public arena.

Facilitated access to progressive jurisprudence, expert opinions, training, and experience-sharing sessions are also part of the equation. Progressive developments for SGBV accountability are occurring at international, regional and national levels. Sharing of experiences and data between jurisdictions and practitioners should be strengthened in order to build upon these positive developments, to achieve justice for victims of SGBV at the ICC and beyond.

## RECOMMENDATIONS

### To the ICC

- Make ICC jurisprudence more accessible in both language and substance to national practitioners
- Actively pursue access to and incorporate progressive jurisprudence, from national jurisdictions into ICC prosecutions and decisions;
- Facilitate two-way learning to gain insight from progressive national-level jurisprudence, for example by establishing targeted (paid) visiting professional placements within all part of the Court;
- Increase positive complementarity efforts to encourage and/or facilitate national accountability processes for SGBV (e.g. by exploring possibilities of establishing clearer evidence-sharing processes);
- Expand the practice of a database collecting progressive jurisprudence on SGBV from national, regional and international jurisdictions;
- Make databases on jurisprudence easily accessible in various languages.

### To national justice practitioners and national authorities

- Incorporate and implement Rome Statute standards on SGBV in domestic criminal legislation;
- Expand training programmes on SGBV in line with international best-practices: Training programmes should go beyond mere skills-building, including by focusing on reconstructing and addressing practitioners’ attitudes and perceptions around SGBV to tackle existing myths and misconceptions;
- Hold follow-up workshops/trainings to ensure consistency and internalisation of lessons learned;
- Develop, adopt and implement protocols on the investigation and prosecution of SGBV, ensuring in particular the safety and protection of witnesses;

- Invest time and resources in empowering survivors to exercise their rights to truth, justice and reparation, building the capacity of complementary mechanisms of justice;
- Increase interaction between different legal fora, both between international and national courts as well as across national courts and with regional mechanisms. This can for example be implemented through the setting up of regional networks of national focal points on international crimes, including SGBV, like the EU Genocide network;
- Increase the use of relevant expert testimony on SGBV during prosecutions;
- Combine civil remedies with criminal proceedings and adopt more holistic approaches to accountability;
- Proactively implement a gender-sensitive approach from the outset in any accountability mechanism addressing consequences of conflict.

### **To civil society organisations**

- CSOs should expand the use of strategic litigation (i.e. filing of *amicus curiae*, facilitating expert testimonies, supporting victims' participation including using extra-territorial jurisdiction), accompanied by communication and advocacy activities, to support SGBV victims' quest for justice;
- CSOs should develop training programmes in order to strengthen their expertise on documenting SGBV crimes, as well as litigation and advocacy;
- CSOs should advocate for further efforts at the international level to learn from progressive developments on SGBV at the national level;
- CSOs should implement a gender-based approach in their internal functioning and their activities towards accountability for SGBV crimes.

### **To donor organisations**

- Donor organisations should increase their support to local, national and international CSOs to strengthen accountability for SGBV;
- Donor organisations must move away from an almost exclusive focus on prosecutions or other legal processes as concrete 'deliverables' at the expense of harder-to-measure but equally valuable psychosocial work;
- Donor organisations should support projects to develop multi-lingual databases of relevant international and national jurisprudence so that multi-way cross-fertilisation between jurisdictions can occur.





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# Keep your eyes open

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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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