

GENDER REPORT ON THE INTERNATIONAL CRIMINAL COURT

CARD

2018

Women's Initiatives for Gender Justice



Women's Initiatives for Gender Justice



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Gender Report Card on the International Criminal Court

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GENDER REPORT CARD

ON THE INTERNATIONAL CRIMINAL COURT 2018

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Introduction

This *Gender Report Card on the International Criminal Court* corresponds with the 20th Anniversary of the Rome Statute of the International Criminal Court (Rome Statute). On this occasion, this *Gender Report Card* is dedicated to all the Gender Justice Advocates who have contributed to the continually growing, and ever important field. A special tribute is made to all members of the Women's Caucus for Gender Justice, a movement of women's human rights advocates from around the world who came together with a view to enshrine principles of gender justice and gender equality in the framework and functioning of the International Criminal Court (ICC). Active between 1997 and 2003, the Women's Caucus demonstrated the need for feminist analysis of international criminal law and humanitarian law, and for dedicated consideration of women's interests in the work of the ICC to ensure it is inclusive, representative, and relevant to the lives of women, as well as men, affected by conflict. The Women's

Initiatives for Gender Justice, established in 2004, continues to advocate for gender inclusive justice through the ICC and the Rome Statute.

As a result of the tireless work of many, the legal framework of the ICC integrates gender in its structures, substantive jurisdiction, and procedures. The **structures** of the Court foresee the fair gender and regional representation of judges and staff as well as gender specific legal expertise. Regarding the ICC's **substantive jurisdiction**, the Rome Statute is the first instrument of international criminal law to expressly include crimes of sexual violence and acknowledges sexual and gender-based violence as the constitutive acts for genocide, crimes against humanity, and war crimes. It further includes the principle of non-discrimination in the application and interpretation of the law, including on the basis of gender. The **procedures** foresee the rights of victims to participate and apply for reparations,

and special measures, especially for victims and/or witnesses of crimes of sexual violence.

The *Gender Report Cards* produced by the Women's Initiatives for Gender Justice from 2005 to 2014 have grown with the Court. As the Structures, Procedures and Substantive Work of the Court have been implemented and grown, the focus of the first decade of *Gender Report Cards* evolved. In tribute to the Women's Caucus, this edition of the *Gender Report Card* is focused on the extent to which gender has been integrated in a meaningful way in all organs of the ICC, and the extent to which it has provided gender inclusive justice.

This *Gender Report Card* highlights the most significant developments which have occurred over the past year, from 1 July 2017 to 30 June 2018. Where relevant, information from prior to this time period has been included to complement analysis of developments identified during

the time period of this Report. As with previous *Gender Report Cards*, the 2018 edition focuses on States Parties, and the Substantive Work of the ICC. The Substantive Work is explored through the Preliminary Examinations, Situations under investigation, and cases active during this year, and through the development of jurisprudence particularly relevant to gender justice. In a departure from previous *Gender Report Cards*, these developments are explored through a thematic approach, providing an overview of procedural developments, and comprehensive analysis of the gender specific jurisprudential developments, challenges and opportunities before the Court to ensure it is a mechanism capable of delivering gender inclusive justice. As in every *Gender Report Card*, detailed recommendations addressing the Assembly of States Parties and the Court are provided.



STATES PARTIES

States Parties

States Parties are integral to the operation, functioning and effectiveness of the ICC. Widespread support from States Parties grants legitimacy to the Court, and funding and cooperation from States Parties ensures its functionality. There are currently 123 States Parties to the Rome Statute of the ICC. Each State Party is represented in the Assembly of States Parties (ASP), the Court's management oversight and legislative body.

This section provides an overview of recent important developments related to the involvement of States Parties with the Court, individually or through the ASP. Selected items are presented due to their significance towards achieving a gender inclusive Court and/or for the functioning of the Court and the Rome Statute as a whole. Special focus is placed on State withdrawal from the Rome Statute, the historic recent amendments to the Statute, the operability of the Independent Oversight Mechanism (IOM), the proposed budget for 2019, and the current under-representation of female judges and heads of organ at the ICC.

Withdrawals from the Rome Statute

States Parties are able to withdraw from the Rome Statute pursuant to procedures set out in Article 127 of the Statute. A withdrawal takes effect one year after written notification is received by the UN Secretary-General.¹ The first withdrawal notification was received from South Africa in October 2016, and three further notifications have been received from Burundi, The Gambia and the Philippines since then. South Africa and The Gambia revoked their notifications of withdrawal prior to their taking effect due to internal parliamentary procedural obstacles, and a change in policy after presidential elections, respectively.² Burundi has effectively withdrawn, and the withdrawal of the Philippines is due to take effect in March 2019.

State withdrawal does not affect the ability of the Prosecutor to investigate crimes allegedly committed while the State in question was still party to the Rome Statute.

Decisions to withdraw from the Rome Statute have mainly been influenced by questioned legitimacy of ICC action, particularly if the action was perceived as likely to target the government. This includes primarily ICC proceedings against Heads of State and the opening of Preliminary Examinations. For instance, the withdrawal notifications from both Burundi and the Philippines were issued shortly after the opening of an ICC Preliminary Examination of the respective countries.³

The perceived lack of legitimacy is further fueled by allegations that the Court is targeting Africa. Notably, three of the four States that have initiated withdrawal processes are African nations. However, it is important to note that, of the 11 ongoing ICC investigations into Situations in African States, five were self-referred by the Government of the respective countries, two

1 Article 127(1), Rome Statute.

2 'Withdrawals from the Rome Statute: Continuing the saga of institutional (il)legitimacy', *MJIL Online*, April 2017.

3 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a Preliminary Examination into the situation in Burundi', 25 April 2016; 'Statement of the President of the Assembly of States Parties on the process of withdrawal from the Rome Statute by Burundi', ICC-CPI-20161014-PR1244, 18 October 2016; 'ICC Statement on The Philippines' notice of withdrawal: State participation in Rome Statute system essential to international rule of law', ICC-CPI-20180320-PR1371, 20 March 2018.

State	Date of Withdrawal Notification	Other Key Dates	Situation Under Preliminary Examination or Investigation?
South Africa	19 October 2016	Withdrawal revoked on 7 March 2017	No
Burundi	27 October 2016	Effective withdrawal on 27 October 2017	Preliminary Examination since 25 April 2016; Situation under investigation since 25 October 2017
The Gambia	10 November 2016	Withdrawal revoked on 10 February 2017	No
Philippines	17 March 2018	Will effectively withdraw on 17 March 2019	Preliminary Examination since 8 February 2018

The data used for this graph is from the UN Treaties website on the Rome Statute and the ICC website.

were referred by the UN Security Council, and four were opened by the ICC Prosecutor *proprio motu* with Pre-Trial Chamber approval.

African States, such as Zambia and Kenya, have publicly considered withdrawing but have not taken any action in this regard or ultimately decided against it. In Zambia, the idea of withdrawing from the Rome Statute was discarded after a national consultative process in which over 91% of the population reportedly voted against it.⁴ Since then, Zambia has expressed its intention to strengthen the national judicial system in order to effectively fulfill its Rome Statute obligations.⁵ Kenya had indicated its intentions to withdraw from the Statute. According to the Attorney-General however, there are

no current plans to withdraw, but a more constructive relationship between the Court and the African continent is needed.⁶ Dissatisfaction with the Court has been voiced by further countries, including Uganda, Rwanda, and the Democratic Republic of the Congo (DRC).⁷

The African Union (AU) played a critical role in the recent withdrawal movement. In February 2017, the AU adopted a collective strategy document providing its members with an analysis of potential implications of a collective withdrawal from the Rome Statute by African States, as well as a list of possible reforms to the Rome Statute and the Court. The resolution is non-binding and mainly political in nature,⁸ and, importantly, not all African States supported the motion. States

4 AllAfrica, 'Zambia: "We Stay in ICC"', 1 July 2017; Daily Nation, 'Kenya has no plans to pull out of ICC, says AG Githu Muigai', 27 February 2018.

5 AllAfrica, 'Zambia: "We Stay in ICC"', 1 July 2017.

6 Daily Nation, 'Kenya has no plans to pull out of ICC, says AG Githu Muigai', 27 February 2018.

7 Africa Renewal Online, 'ICC: Beyond the threats of withdrawal', April-May 2017; VOA Afrique, 'Kinshasa menace de quitter la CPI a deux jours d'une décision concernant Bemba', 15 September 2018.

8 African Union (AU), Withdrawal Strategy Document, 12 January 2017, para 9.

such as Nigeria, Senegal, Malawi, and Cape Verde issued reservations to the resolution.⁹ The recent initiation of withdrawal procedures and the AU strategy document highlight the need for the ICC to strengthen its relationship with many States on the continent.

State withdrawal does not affect the ability of the Prosecutor to investigate crimes allegedly committed while the State in question was still party to the Rome Statute.¹⁰ In this regard, the Prosecutor has emphasised that the Office of the Prosecutor (OTP) retains authority to examine, and potentially investigate, the Situations in Burundi and the Philippines.¹¹ However, the fact that jurisdiction is maintained over a specific Situation after the State in question has withdrawn may not be sufficient deterrence for further States from leaving the Rome Statute system.

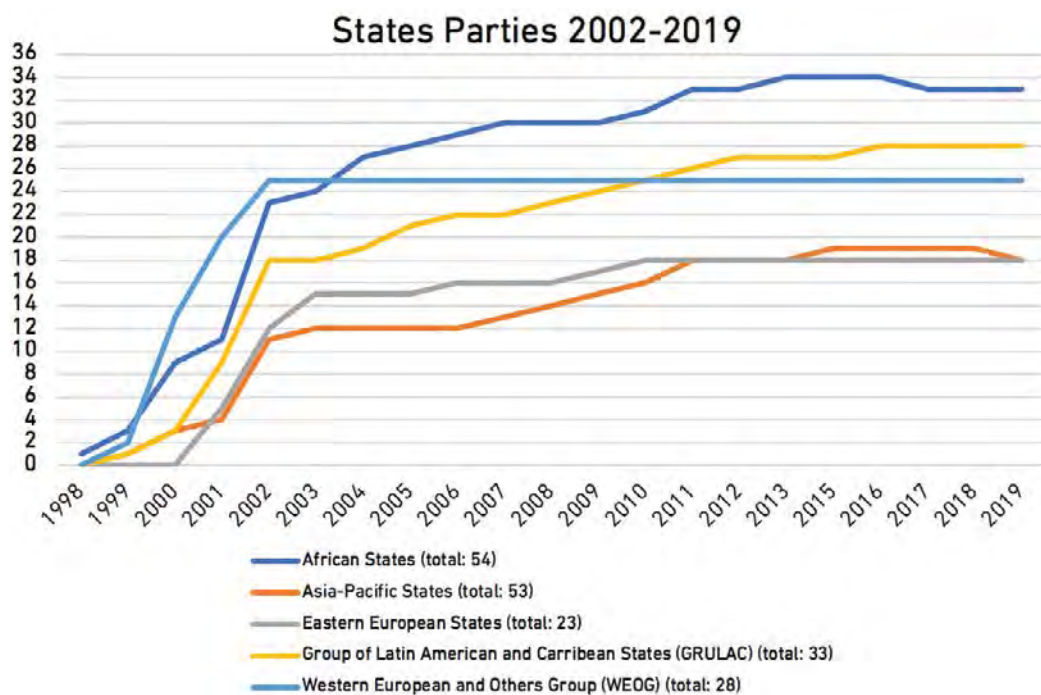
The recent withdrawal movement underlines the importance of a strategy by the ICC and the ASP to reinforce the commitment of States to the Court. While individual cooperation efforts are important, a strong overarching strategy to combat potential withdrawals and remind States of the significance of the Court is needed. Unless the ICC undertakes a robust communications strategy against potential future withdrawals,

States may feel empowered to leave the Rome Statute system when faced with decisions by the Court that may be against the interests of governments but desired by their people.

9 Mark Kersten, 'Not All It's Cracked Up to Be—The African Union's "ICC Withdrawal Strategy"', *Justice in Conflict*, 6 February 2017. See also Africa Renewal Online, 'ICC: Beyond the threats of withdrawal', May–July 2017.

10 Withdrawals also do not impact the status of any Court staff from the withdrawing State already working at the Court nor any existing financial obligations towards the Court. Article 127(2), Rome Statute.

11 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following judicial authorisation to commence an investigation into the Situation in Burundi', 9 November 2017; 'ICC Statement on The Philippines' notice of withdrawal: State participation in Rome Statute system essential to international rule of law', ICC-CPI-20180320-PR1371, 20 March 2018.



The data used for this graph is from the UN Treaties website on the Rome Statute.

Amendments to the Rome Statute

ICC Jurisdiction Over the Crime of Aggression

In December 2017, the ASP unanimously passed a historic resolution activating the ICC's jurisdiction beyond war crimes, crimes against humanity and genocide to include the crime of aggression as of 17 July 2018, the 20th anniversary of the Rome Statute.¹² The crime of aggression is defined in Article 8 *bis* of the Statute as the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the UN Charter. An act of aggression refers to the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the UN Charter. This historic criminalisation of the crime of aggression is important as it expands international criminal justice and constitutes a significant step towards creating a more peaceful, secure and accountable environment for all.

This historic criminalisation of the crime of aggression is important as it expands international criminal justice and constitutes a significant step towards creating a more peaceful, secure and accountable environment for all.

While the Court now has the ability to exercise jurisdiction over all core international crimes listed in Article 5 of the Statute, its reach over this particular crime is not without limitations. In case of a State referral or a *proprio motu* investigation by the Prosecutor, States Parties are able to opt out of the Court's jurisdiction over this crime by previously lodging a declaration to this effect with the Registrar.¹³ A UN Security Council referral, however, imposes no jurisdictional limitations on the Court.¹⁴

¹² ICC-ASP/16/Res.5, para 1.

¹³ Article 15 *bis* (4)-(5), Rome Statute.

¹⁴ Article 15 *ter*, Rome Statute.

Criminalisation of Three New War Crimes

In addition to activating the ICC's jurisdiction over the crime of aggression, the ASP adopted three important amendments to Article 8 of the Statute. Specifically, the use of the following weapons was criminalised:

- Weapons which use microbial or other biological agents, or toxins;
- Weapons the primary effect of which is to injure by fragments undetectable by x-rays in the human body; and
- Blinding laser weapons.¹⁵

The criminalisation of these weapons applies to both international and non-international armed conflicts.¹⁶ However, these amendments apply only to States Parties a year after they have accepted the relevant amendment.¹⁷ These amendments reflect the changing nature of weapons and warfare over time and acceptance or ratification of these amendments by all States Parties is strongly encouraged as it would result in the broader criminalisation of means of warfare causing excessive suffering through unnecessary injuries.

Proposed Amendment on the Use of Anti-personnel Mines

Along with the three new war crimes, Belgium proposed an additional amendment to Article 8 of the Statute relating to antipersonnel mines.¹⁸ The proposal arose from the use of these weapons in contemporary conflicts, with a view to complementing the wide ratification of international treaties on the matter, notably the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Convention).¹⁹ Despite the Ottawa Convention being one of the most ratified international treaties,²⁰ the proposal was not adopted, as several States Parties to the Convention voted against its adoption within the ICC legal framework.²¹ Reasons against adoption included the view that the proposed amendment would further fragment the international community and deter non-States Parties from ratifying the Rome Statute, and that the amendment would increase the challenges already facing the Court, including non-cooperation, withdrawals, and threats of withdrawals.²²

15 ICC-ASP/16/Res.4; ICC-ASP/16/Res.4, Annexes I-III.

16 See ICC-ASP/16/Res.4, Annexes I-III.

17 Article 121(5), Rome Statute.

18 'Belgium: Proposal of Amendments', C.N.480.2017.TREATIES-XVIII.10 (Depository Notification).

19 See *ibid*; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, C.N.163.2003 TREATIES-2, 3 March 2003.

20 See International Campaign to Ban Landmines, 'Treaty Status'.

21 See Amnesty International, 'ASP16: States Parties miss a key opportunity to criminalise Anti-Personnel Landmines in the Rome Statute', 16 December 2017.

22 ICC-ASP/16/22, p 3-4.

The Independent Oversight Mechanism

The IOM, established on 26 November 2009, became operational in 2017.²³ The IOM's mandate is to “ensure [...] the effective and comprehensive oversight of the Court in order to enhance its efficiency and economy”, by conducting inspections, evaluations, and investigations.²⁴ In pursuit of these aims, the IOM:

- Conducts unscheduled and confidential inspections of any premises or processes at the request of the Bureau or a head of organ;²⁵
- Provides confidential evaluations of any programme, project or policy as requested by the ASP or the Bureau;²⁶
- Receives and investigates reports of misconduct or serious misconduct, including possible unlawful acts by key leadership positions, other staff, and contractors.²⁷

“Misconduct” and “serious misconduct” are defined as acts harming the standing of the Court to a varying degree.²⁸ While sexual misconduct is not explicitly mentioned, there is nothing in the resolutions governing the IOM that precludes it from falling within the investigative powers of the IOM.

According to its 2017 annual report, the IOM received 15 complaints of misconduct.²⁹ The report is silent on the nature of the conduct that triggered investigation activities, and thus no information is available regarding potential issues of sexual misconduct within the Court. The report further states that 12 out of 15 reports of alleged misconduct were not pursued to full investigation.

²³ ‘Independent Oversight Mechanism (IOM)’, ICC website.

²⁴ ICC-ASP/12/Res.6, Annex, paras 3, 5. See also ICC-ASP/8/Res.1, Annex, para 6(a); ICC-ASP/9/Res.5, Annex, para 1.

²⁵ ICC-ASP/12/Res.6, Annex, paras 6-7, 12-15.

²⁶ *Ibid*, paras 17, 23-26.

²⁷ *Ibid*, para 28. The investigative unit may exercise its powers *proprio motu*. ICCASP/8/Res.1, Annex, para 6(b).

²⁸ Resolution ICC-ASP/8/Res.1, referring to Rules 25.1.b and 24.1.b of the Rules of Procedure and Evidence (RPE).

²⁹ ICC-ASP/16/8, p. 3.

The IOM is an important mechanism to provide meaningful oversight of the Court and its independence from each organ of the Court is crucial for its effectiveness. In this respect, confidentiality is of utmost importance to create a safe environment for potential victims of misconduct to come forward. Nonetheless, it can make it difficult at times for third parties to evaluate the work and effectiveness of the IOM. The IOM is required to balance confidentiality with transparency and has expressed interest in having a communications policy setting out when information must be kept confidential.³⁰ Such an initiative would facilitate a more detailed analysis by third parties of the IOM's activities while complying with important confidentiality requirements. A welcome full review of the work and mandate of the IOM is scheduled to take place during the 2018 ASP.³¹

30 *Ibid*, para 17.

31 ICC-ASP/16/Res.6, para 15; ICC-ASP/15/Res.5, Annex, para 16(b).

ICC Budget for 2019

The annual budget for the ICC is proposed by the Court and approved by the ASP in the lead-up to the relevant year. The proposed programme budget for 2019 is €147,548,900, representing a 2.6% increase (€3.7 million) from the approved programme budget of 2018.³² The proposed budget for the OTP increased 4.6% (2.1 million); the proposed budget for the Judiciary decreased 2.6% (€334,200); and the proposed budget for the Registry nominally decreased 0.0% (€16,200).³³

The 2019 proposed budget reflects anticipated judicial and prosecutorial activities for the following year, agreed upon by the organs of the Court as of July 2018.³⁴ These activities include nine anticipated Preliminary Examinations, eight active investigations,³⁵ and three cases in the trial phase.³⁶ It also includes reparations proceedings in three cases.³⁷

The proposed budget of the Court does not appear to explicitly take gender mainstreaming or gender responsiveness into account. The goal of gender responsive budgeting is to review the impact of budget allocations from a gendered perspective, ensure a gender equitable distribution of resources, and contribute to equal opportunity for all. Despite the apparent absence of gender responsive budgeting at this stage, it does not prevent the possibility of spending the 2019 budget in a gender responsive manner.

The Committee on Budget and Finance (CBF) is encouraged to request future budgets with gender specific allocations for outreach, victim participation, witness engagement, investigations, recruitment, and training. Additionally, the CBF could consider whether allocations for each organ have taken gender mainstreaming priorities into account, and review budget development

Over a third of all States Parties are allocating their national budgets in a gender responsive manner or have taken first steps towards this goal.

³² ICC-ASP/17/10, para 5.

³³ *Ibid.*, Table 1.

³⁴ *Ibid.*

³⁵ *Ibid.*, para 19.

³⁶ These include the *Laurent Gbagbo and Blé Goudé*, *Ongwen*, and *Al Hassan* cases.

³⁷ ICC-ASP/17/10, para 10. The cases at the reparations stage are those against Lubanga, Katanga, and Al Mahdi.

practices to ensure that gender considerations are taken when determining resource allocation.

Office of the Prosecutor

The proposed budget for the OTP for 2019 (€48.1 million) represents a 4.6% increase (€2.1) from the 2018 approved budget.³⁸ The OTP indicated that this increase is due to the need to adequately support active investigations and Preliminary Examinations, including increased operational support such as travel and new language requirements.³⁹ The requested resources are said to correct a historical imbalance in the travel budget and to meet the needs of an additional two new active investigations.⁴⁰

The resources requested for the OTP's Investigation Division amount to €19.92 million, an increase of €27.2 thousand (0.1%) from the 2018 approved budget, with staff costs comprising 86% of the total costs.⁴¹ In line with its Strategic Plan,⁴² and its Case Selection and Prioritisation Policy, the OTP will focus on 11 Situations, including eight active investigations.⁴³ The OTP noted in the budget proposal that such prioritisation is needed given the "limited resources available to the OTP and the Registry and the need to avoid spreading these resources too thin."⁴⁴

In its proposed budget, the OTP requested seven additional positions in the Investigation Division, including two new Situation-specific investigation assistants.⁴⁵ According to the OTP, these positions have proven very effective in the Uganda, Georgia and Darfur Situations, however, additional positions were not requested beyond the two in order to limit budgetary growth.⁴⁶ With respect to Prosecution teams, it is noted that this is a conservative budget proposal focused on positions "absolutely crucial to achieving the budget assumptions".⁴⁷ This position by the OTP, while understandable with view to avoid antagonising States Parties by requesting a budget that may be perceived as too large, limits the OTP's upcoming and necessary activities. The Court needs to be able to request funds in accordance with real needs in order to conduct effective investigations.

Encouragingly, the OTP budget request includes a notable increase with view to strengthening the Office's field presence. This is visible in the travel budgets for the Support Services Division and the Investigation Division, noting the increased need for interpreters on field missions and the investigative need to place teams in the field.⁴⁸

The budget requested by the OTP addresses some historically underfunded divisions, includ-

38 ICC-ASP/17/10, Table 1.

39 *Ibid.*, para 22.

40 *Ibid.*

41 *Ibid.*, para 286.

42 'OTP Strategic Plan', June 2012, para 4(a).

43 ICC-ASP/17/10, para 19.

44 *Ibid.*, para 22.

45 *Ibid.*, para 289.

46 *Ibid.*, para 289.

47 *Ibid.*, para 335.

48 *Ibid.*, paras 224, 309.

ing the Investigations Division, which could support effective investigations of sexual and gender-based crimes. However, repeated references to conservative requests for other staff and resources given the budget parameters suggests that the OTP will be constrained by resources, with potential consequences in conductive gender sensitive investigations and building effective cases for sexual and gender-based crimes, depending on how the approved 2019 budget will be allocated and prioritised.

As indicated above, the 2019 proposed budget, despite some increases, does not explicitly allocate funds in a gender responsive manner. While efforts to efficiently manage resources and to shift resources within the various organs are commendable, it must not result in OTP investigations, particularly of sexual and gender-based crimes, being approached from a resource-driven approach, rather than from a needs-based approach. Without specific allocation of funds for investigating sexual and gender-based crimes, which is likely to cost more as it may take longer to identify victims, build rapport, and conduct psychosocial assessments of witnesses of these crimes, it is doubtful that these investigations will be prioritised or consistently included within investigation plans as they should be. In general, strict adherence to a policy of zero nominal

growth across the Court may hamper important efforts to achieve gender mainstreaming and gender responsiveness throughout the Court.

Registry

The proposed budget for the Registry for 2019 (€77.13 million) represents a decrease of €16.2 thousand from the 2018 approved budget (€77.14 million).⁴⁹ The Registry reported that it was able to identify savings of €424 thousand and used efficiencies to avoid cost increases in the amount of €75.4 thousand.⁵⁰ Overall, the Registry stated having applied a “stringent budgetary process” and proposed additional resources only when “strictly necessary for the purposes of its mandated activities in the context of 2019 budgetary assumptions”.⁵¹

In the 2019 proposed budget, the Registry reported that the Court will maintain or fully operationalise field offices in six Situation countries—the Central African Republic (CAR), Côte d'Ivoire, the DRC, Georgia, Mali, and Uganda—to support Situation-related ICC activities such as investigations, outreach, victim participation, and reparations.⁵²

The proposed budget for counsel for victims decreased by €63.7 thousand (5.5%),⁵³ while the amount requested for Defence counsel increased by €150 thousand (4.4%).⁵⁴

⁴⁹ *Ibid*, Table 29.

⁵⁰ *Ibid*, paras 373, 377.

⁵¹ *Ibid*, para 352.

⁵² *Ibid*, paras 362, 540, 544, 546, 548, 550, 552.

⁵³ *Ibid*, para 523 and Table 29.

⁵⁴ The Office of Public Counsel of the Defence (OPCD)'s proposed budget would fund Defence teams in nine cases involving 14 accused, namely the *Lubanga*, *Katanga*, *Ntaganda*, *Ongwen*, *Banda*, *Al Mahdi*, *Al Hassan*, *Bemba et al*, and *Laurent Gbagbo and Blé Goudé* cases. ICC-ASP/17/10, para 521 and Table 29.

The Registry emphasised the efficiency of its proposed budget, and highlighted zero growth from the proposed 2018 budget. Given the increase in investigations and other operations throughout the Court, it is noted that additional resources are not being requested to support the Victims Participation and Reparations Section (VPRS) and other services that support victims. There is no indication whether the Registry budget was developed in a gender responsive manner.

Trust Fund for Victims' Secretariat

While the reparation awards and assistance programmes are funded through voluntary contributions, the Trust Fund for Victims (TFV) Secretariat is included in the ICC's annual budget. The proposed 2019 budget for the Secretariat of the TFV is €4 million, constituting a 58.5% increase from 2018.⁵⁵ This substantial increase is based on the TFV's draft Strategic Plan for 2019–2022 and the increased cost associated with "expanding and intensifying responsibilities during the implementation phase of reparations proceedings".⁵⁶ The proposed budget for 2019 describes the strategic goals of the TFV as: (1) reparative justice for victims; (2) financial growth and sustainability; (3) advocacy for victims; and (4) creating an effective organisational structure.⁵⁷

The proposed 2019 budget for the TFV represents the only significant increase (58.5%) within the proposed budget. The proposed budget includes

significant increases in staff positions and training, highlighting the increased work due to the Court entering the reparations phase in several cases and the need to strengthen the organisation. However, there are no explicit allocations within the budget to meet gender mainstreaming goals, and no references to an analysis of the resources from a gender perspective. Particularly for the assistance mandate, an analysis of activities from a gender responsive budgeting perspective will be critical to ensuring the appropriate equitable allocation of resources.

⁵⁵ *Ibid.*, para 704 and Table 50.

⁵⁶ *Ibid.*, para 705.

⁵⁷ *Ibid.*, para 674.

Under-representation of Female Judges and Heads of Organs

In 2018, the representation of women in leadership positions remained at an all-time low. Currently, only six of 18 judges are women, and only one of the five key leadership positions at the Court — President, First Vice-President, Second Vice-President, Prosecutor, and Registrar — is held by a woman, the Prosecutor.

Gender Representation Across the Bench

Pursuant to Article 36(1) of the Rome Statute, the ICC has 18 judges, six of whom are replaced every three years.⁵⁸ Amongst the criteria listed in the Statute for the election of ICC judges is the principle of fair representation of women and men, as well as specific legal expertise on violence against women.⁵⁹ Nonetheless, 2018 marks the fourth consecutive year in which female judges are under-represented at the ICC, with twice as many male judges as female judges.

2017 judicial elections: a missed opportunity?

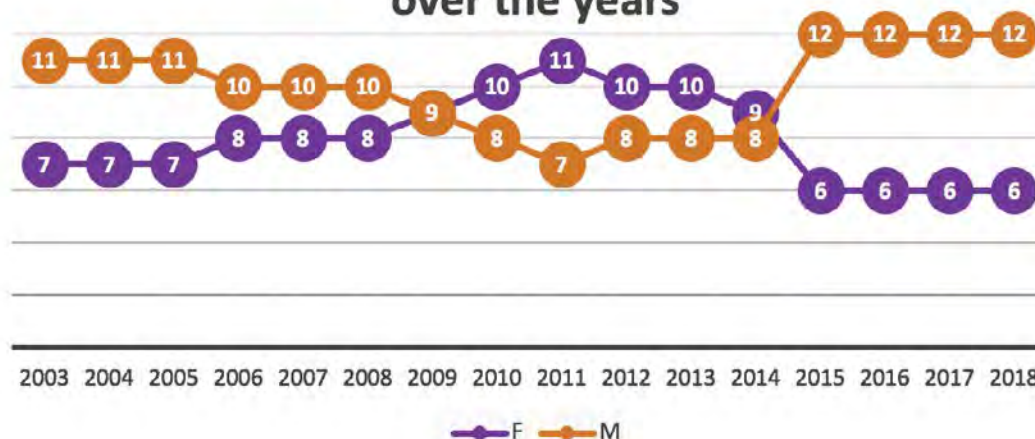
In December 2017, at its 16th session, the ASP elected six new judges (five female and one male) to the ICC bench. Of the 12 judges remaining on the ICC bench, only one is female. This raised the significance of the December 2017 judicial elections as they represented an important opportunity to increase the fair representation of women on the bench, as well as ensuring geographical diversity. Unfortunately, even if all six judicial vacancies had been filled by female candidates, an imbalance of seven female to 11 male judges would have remained at the ICC.

Only six of 18 judges are women, and only one of the five key leadership positions at the Court — President, First Vice-President, Second Vice-President, Prosecutor, and Registrar — is held by a woman, the Prosecutor.

⁵⁸ Article 36(2) of the Statute specifies that the Presidency may propose an increase of judges, subject to certain conditions and the approval of the Assembly of States Parties (ASP).

⁵⁹ Article 36(8)(a)-(b), Rome Statute.

Gender representation on the ICC bench over the years



The data used for this graph is from the ICC website.

Ahead of the elections, the Women's Initiatives for Gender Justice strongly encouraged States Parties to nominate and fill all six judicial vacancies with highly qualified female candidates from under-represented regions, namely Africa, the Latin America and Caribbean Group (GRULAC), Asia-Pacific, and Eastern Europe.⁶⁰

Minimum Voting Requirements (MVRs) were set to minimise the risk of negatively affecting gender and geographical representation, as well as the level of expertise, across the bench. According to the MVRs, States were required to vote for at least:

- 5 female candidates;

- 1 candidate from the African Group of States;
- 1 candidate from the Asia-Pacific Group of States;
- 1 candidate from the Latin American and Caribbean Group of States;
- 1 candidate from 'List A' (candidates with competence and experience in criminal law and criminal proceedings); and
- 1 candidate from 'List B' (candidates with expertise in the field of international law and extensive experience in a professional legal capacity).⁶¹

⁶⁰ See Women's Initiatives for Gender Justice, 'Election of Six New ICC Judges', 31 October 2017.

⁶¹ To ensure the ICC bench remains fully representative, each judicial election has minimum voting requirements. For more information on these requirements, see Coalition for the International Criminal Court, 'The Nomination And Election Of Six New ICC Judges December 2017', 5 March 2017, p 3-6.

Candidates for judicial elections are nominated by States Parties,⁶² and at least twice the number of candidates fulfilling specific MVRs must be put forward: at least ten female candidates in this case.⁶³ However, the required number of female nominees was unfortunately not met.⁶⁴ Ultimately, 12 candidates were nominated, including three men and only nine women. Of the nine female candidates, only five were elected, the minimum required to meet the MRVs..

Importantly, several of the newly elected Judges have specific experience in the field of gender equality. Judge Solomy Balungi Bossa from Uganda is a women's rights advocate and a member of the International Association of Women Judges.⁶⁵ Judge Luz del Carmen Ibáñez Carranza has acted as the Peruvian delegate to the CEDAW committee, amongst other international bodies.⁶⁶ Judge Reine Alapini-Gansou is a member of several women's associations and has worked and published on tackling gender-based discrimination.⁶⁷ This additional range of experience is anticipated to encourage a robust understanding and adjudication of sexual and gender-based crimes.

While the elections were successful in the sense that all MVRs were met, the December 2017 elections represented an important opportunity to increase gender representation across the ICC

bench from six to seven female judges on a bench of 18. As displayed in the table on the following page, this — albeit small — increase would have been possible based on the nominations at hand. It is essential for the next judicial elections that more candidates are elected by States Parties with view to increasing gender representation of ICC judges.

Composition of Chambers

The appointment to the different Pre-Trial, Trial and Appeals Chambers are to be made “based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law”.⁶⁸ The table below shows the assignation of judges to the different Chambers, as well as the Presidency. Regrettably, female judges are a minority within all Chambers except one, and female representation is entirely absent from one Chamber and the Presidency of the Court.

62 Article 36(4)(a)-(b), Rome Statute.

63 ICC-ASP/3/Res.6, para 12.

64 *Ibid*, paras 3, 11; ICC-ASP/16/SP/39; ICC-ASP/16/SP/46; ICC-ASP/16/SP/47.

65 ‘Judge Solomy Balungi Bossa’, ICC website.

66 Judge Luz del Carmen Ibáñez Carranza, ICC website.

67 ICC-ASP-EJ2017-BEN-ST-ENG.

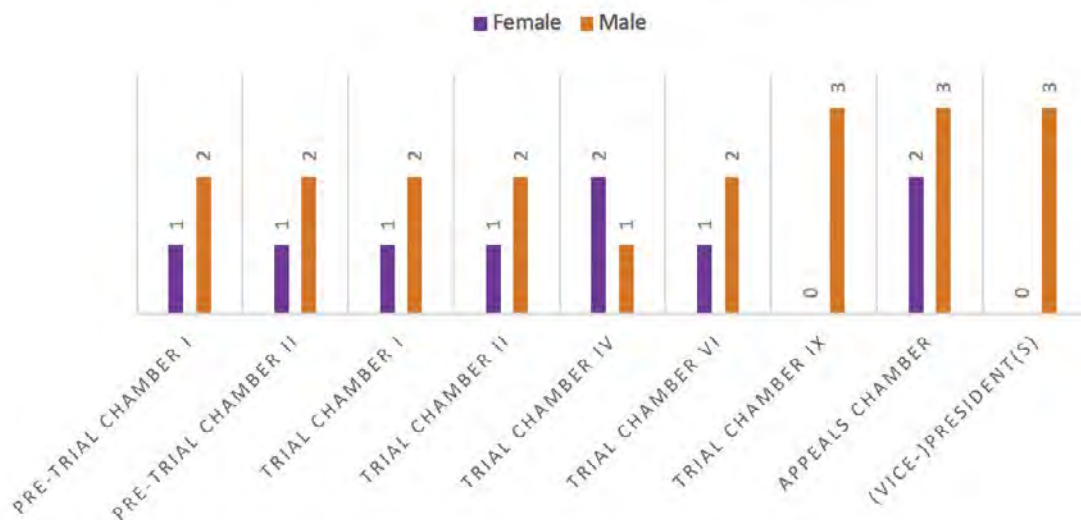
68 Article 39(1), Rome Statute.

Overview of Geographical and Gender Representation Amongst Judicial Candidates

	African States	Asia-Pacific States	Latin American and Caribbean States (GRULAC)	Eastern European States	Western European and Other States (WEOG)
Female	ALAPINI-GANSOU, Reine Adelaide Sophie Nationality: Benin List B	AKANE, Tomoko Nationality: Japan List A	IBÁÑEZ CARRANZA, Luz del Carmen Nationality: Peru List A	ĐURDEVIĆ, Zlata Nationality: Croatia List B	PROST, Kimberly Nationality: Canada List A
	BOSSA, Solomy Balungi Nationality: Uganda List A		PERALTA DISTÉFANO, Ariela Nationality: Uruguay/ Italy List B		
	MAJARA, Nthomeng Justina Nationality: Lesotho List A				
	MENSA-BONSU, Henrietta Joy Abena Nyarko Nationality: Ghana List A				
Male		CHAGDAA, Khosbayar Nationality: Mongolia List A		VUKOJE, Dragomir Nationality: Bosnia and Herzegovina List A	AITALA, Rosario Salvatore Nationality: Italy List A

The blue colour reflects the six successful candidates of the December 2017 judicial elections at the ASP. The data used for this graph is from the ICC website.

GENDER REPRESENTATION ACROSS ICC CHAMBERS AND PRESIDENCY



The data used for this graph is from the ICC website.

All-male Presidency

According to the Rome Statute, the ICC President and the First and Second Vice-Presidents are elected by an absolute majority of fellow judges.⁶⁹ On 11 March 2018, an all-male ICC Presidency was elected: Judge Chile Eboe-Osuji as President, Judge Robert Fremr as First Vice-President, and Judge Marc Perrin de Brichambaut as Second Vice-President.⁷⁰ These positions rotate every three years or until the end of the judges' respective terms of office, with the possibility of re-election once.⁷¹ However, as Judge Eboe-Osuji

and Judge Fremr's judicial terms end in 2021 their re-election is not possible.

Registrar

Pursuant to Article 43 of the Statute, the Registrar is elected by an absolute majority of the Judges, considering any recommendations from the ASP. On 28 March 2018, Peter Lewis was elected as Registrar for a term of five years, with the possibility of re-election.⁷² With the election of an all male Presidency only two and a half weeks earlier, this appointment results in four out of five

⁶⁹ Article 38(1), Rome Statute.

⁷⁰ 'New ICC Presidency elected for 2018-2021', ICC-CPI-20180311-PR1367, 11 March 2018.

⁷¹ Article 38(1), Rome Statute.

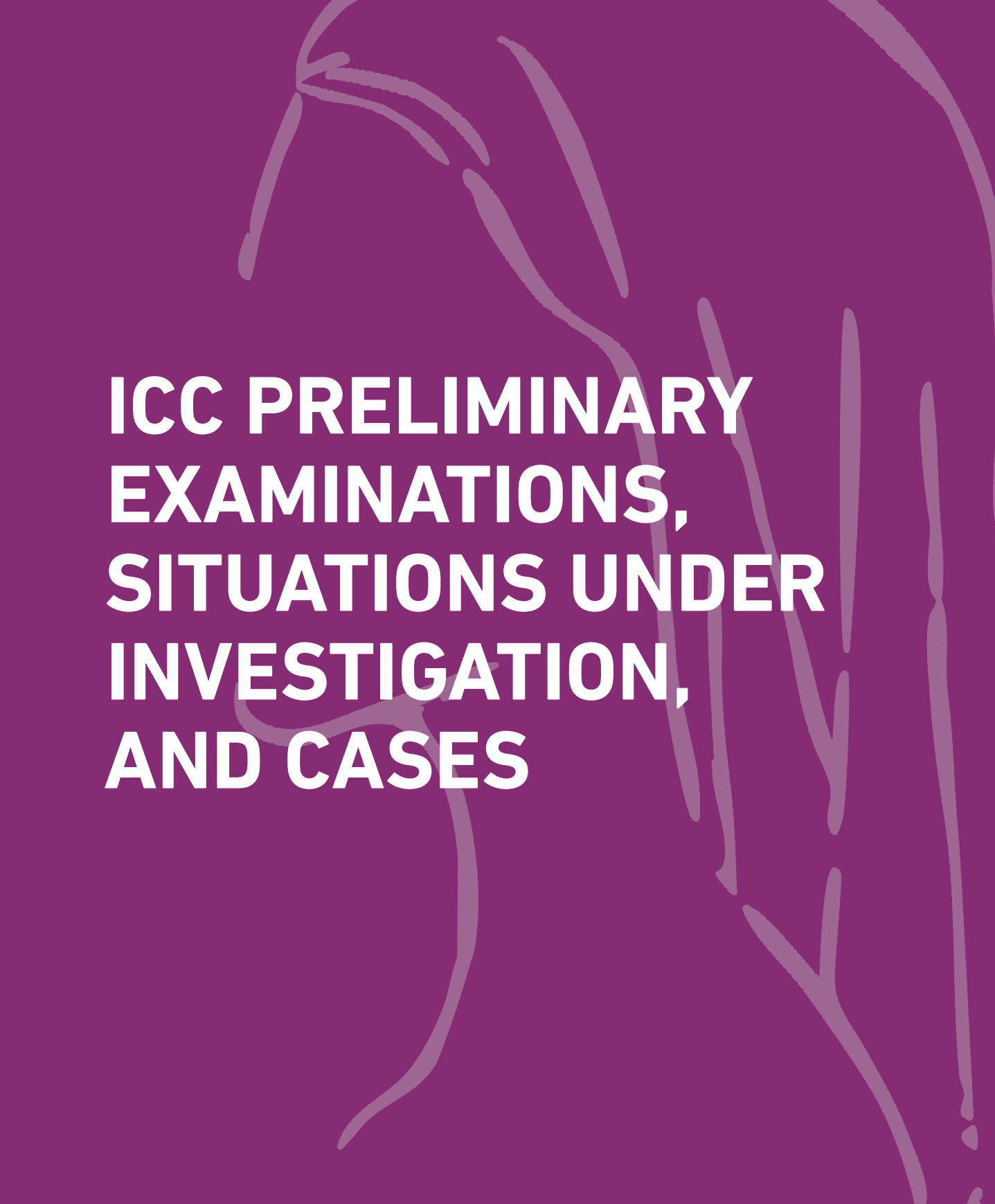
⁷² 'Peter Lewis elected as ICC Registrar', ICC-CPI-20180328-PR1374, 28 March 2018.

key leadership positions of the Court being held by men and raises expectations for the election of the next Prosecutor in 2020.

Prosecutor

The Prosecutor of the ICC is elected by an absolute majority of the ASP for a term of nine years and is not eligible for re-election, pursuant to Article 42(4) of the Statute. Prosecutor Fatou Bensouda took office in June 2012, and her successor is to be elected at the ASP of 2020.⁷³ In light of the recent election of the Court's Presidency and Registrar, there will be even more of an emphasis on the election of a female Prosecutor to maintain at a minimum the gender representation at the highest level of the Court, ensuring that not all five key leadership positions are held by men.

73 Fatou Bensouda, ICC website.



ICC PRELIMINARY EXAMINATIONS, SITUATIONS UNDER INVESTIGATION, AND CASES

ICC Preliminary Examinations, Situations under Investigation, and Cases

Pursuant to Article 13 of the Rome Statute, the ICC may exercise jurisdiction over a Situation when: (a) the Situation has been referred to the ICC Prosecutor by a State Party; (b) the UN Security Council refers a Situation to the Prosecutor; or (c) the Prosecutor initiates an investigation into a Situation *proprio motu* (on his/her own initiative).

The opening of a *proprio motu* investigation is subject to authorisation by the ICC Pre-Trial Chamber. To support the opening of this type of investigation, any person or organisation may submit information to the Office of the Prosecutor (OTP) on alleged crimes under the jurisdiction of the Court, known as a “communication” under Article 15 of the Statute. Non-States Parties may also lodge a declaration accepting the Court’s jurisdiction under Article 12(3) of the Statute. The initiation of an investigation subsequent to such a declaration is also considered a *proprio motu* investigation by the Prosecutor.

This section provides an overview of all Situations at the preliminary examination or investigation stage. It focuses on Situation and case developments between 1 July 2017 and 30 June 2018. However, particularly important developments outside of this timeframe are included due to their significance and temporal proximity.

Situations under Preliminary Examination

The OTP conducts Preliminary Examinations prior to opening an investigation into a Situation. Such examinations serve the purpose of determining whether a Situation meets the legal criteria established by the Rome Statute to warrant investigation by the ICC. To that end, Preliminary Examinations comprise four phases:

- Phase 1 consists of an initial assessment of all information on alleged crimes received;
- Phase 2 focuses on whether the preconditions to the exercise of jurisdiction are satisfied;
- Phase 3 focuses on the admissibility of potential cases in terms of complementarity and gravity; and
- Phase 4 examines whether an investigation would be in the interests of justice.

Should the Prosecutor determine that the Court has jurisdiction over the Situation, potential cases are admissible, and an investigation is not against the interests of justice, the Prosecutor will seek authorisation from a Pre-Trial Chamber to launch an investigation; otherwise, the investigation will not be opened.

Overview of Preliminary Examinations

	Opening of Preliminary Examination	Status	Scope	SGBV ⁷⁴
Colombia	June 2004	Phase 3	Crimes against humanity and war crimes ⁷⁵ allegedly committed by different actors in the context of the armed conflict between Government forces, paramilitary armed groups and rebel armed groups, as well as amongst those groups	✓
Guinea	October 2009	Phase 3	Crimes against humanity allegedly committed in the context of the violent suppression by Government forces of protests on 28 September 2009 ⁷⁶	✓
Nigeria	November 2010	Phase 3	Crimes against humanity and war crimes allegedly committed in the Niger Delta, the Middle-Belt States and in the context of armed conflict between Boko Haram and Nigerian security forces in Nigeria, including sexual and gender-based crimes against children	✓
Iraq/UK	May 2014 ⁷⁷	Phase 3	War crimes allegedly committed by UK nationals in the context of the Iraq conflicts between 2003 and 2009	✓
Ukraine	April 2014	Phase 2	Crimes allegedly committed in the context of the "Maidan" protests since 21 November 2013 and crimes reportedly committed in Crimea and Eastern Ukraine since 20 February 2014, including sexual and gender-based violence in the context of detention against men and women in Eastern Ukraine	✓
Palestine	January 2015	Phase 2	Crimes allegedly committed since 13 June 2014 ⁷⁸ in the occupied Palestinian territory, including East Jerusalem	✗
Philippines	February 2018	Opened	Crimes allegedly committed since at least 1 July 2016, in the context of the "war on drugs" launched by the President of the Philippines	✗
Venezuela	February 2018	Opened	Crimes allegedly committed since at least April 2017 in the context of demonstrations and related political unrest	✗
Afghanistan	2006	Completed, Decision on request for authorisation of an investigation pending	Crimes against humanity and war crimes allegedly committed by the Taliban and their affiliates; war crimes allegedly committed by the Afghan National Security Forces; and war crimes allegedly committed by members of the US armed forces in Afghanistan, and by members of the CIA in secret detention facilities in Afghanistan and on the territory of other States Parties	✓
Registered Vessels of Comoros, Greece and Cambodia	May 2013	Completed, PE closed; decision by Pre-Trial Chamber pending.	Crimes allegedly committed by the Israeli Defense Forces on and after 31 May 2010 aboard vessels registered in the Comoros, Greece and Cambodia	✗
Rohingya/ Myanmar	September 2018	Phase 2	Crimes allegedly committed against the Rohingya population in Myanmar and their deportation to Bangladesh and other alleged crimes against humanity, including sexual violence	✓

The data used for this table is from the ICC website.

⁷⁴ This column indicates whether sexual and gender violence is being considered in the OTP's Preliminary Examination (as known to the public).

⁷⁵ OTP (Office of the Prosecutor), 'Report on Preliminary Examination Activities 2017', 4 December 2017, para 123: "Colombia deposited its instrument of ratification to the Statute on 5 August 2002. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Colombia or by its nationals from 1 November 2002 onwards. However, the Court may exercise jurisdiction over war crimes committed since 1 November 2009 only, in accordance with Colombia's declaration pursuant to article 124 of the Statute."

⁷⁶ OTP, 'Report on Preliminary Examination Activities 2017', 4 December 2017, para 158.

⁷⁷ The Preliminary Examination in Iraq had previously been closed in 2006. It was re-opened following further information received on the alleged crimes. OTP, 'Report on Preliminary Examination Activities 2017', 4 December 2017, paras 173-174.

⁷⁸ Palestine lodged a document accepting the ICC's jurisdiction since 13 June 2014. 'Palestine declares acceptance of ICC jurisdiction since 13 June 2014', ICC-CPI-20150105-PR1080, 5 January 2015.

Currently, ten Preliminary Examinations are ongoing, and sexual and gender-based violence features in seven of them, namely in the Examinations pertaining to Ukraine, Colombia, Guinea, Iraq/UK, Afghanistan, Myanmar/Bangladesh, and Nigeria. During the reporting period, the Prosecutor opened two new Preliminary Examinations, which relate to the Situations in Venezuela and the Philippines, and completed three, namely those concerning alleged crimes committed in Burundi,⁷⁹ in the context of the conflict in Afghanistan, and in the incidents involving the Registered Vessels of Comoros, Greece and Cambodia. While the Preliminary Examinations pertaining to Burundi and Afghanistan have been taken to the next level, the Examination of the Registered Vessels incident led the Prosecutor to conclude that any potential cases would be inadmissible, and hence closed the Examination and dropped the Situation. In addition, the Prosecutor opened a Preliminary Examination regarding the Situation in Myanmar following the Pre-Trial Chamber I decision of 6 September 2018 on the question of jurisdiction over the matter.⁸⁰ The Preliminary Examination of the Situation in Gabon was closed and an investigation will not be opened, as the OTP announced on 21 September 2018, citing that the relevant legal requirements were not met.⁸¹

Preliminary Examinations opened

Venezuela

A country heavily dependent on oil revenues, Venezuela plunged into an economic crisis when the oil price fell sharply in 2014. The drop in oil prices coupled with price controls and a lack of foreign currency added to the economic instability. As a result, food and other basic supplies, including products needed for menstrual hygiene and contraception,⁸² have become scarce, inflation skyrocketed, and the black market has been booming. With the labour market failing, Venezuelans can barely afford basic foodstuffs, or other indispensable services, such as medical care. The ensuing economic desperation has led to a surge in violence against women, rendering them increasingly vulnerable to femicides and sex trafficking.⁸³

It is against this backdrop that Venezuelans started to protest against the Government in April 2017. To repress the protests and deter oppositionists, national security forces allegedly met the demonstrators with force, in the course of which they reportedly committed human rights violations to suppress dissent,⁸⁴ including the use of excessive force, arbitrary detention, enforced disappearances, destruction of property, and

⁷⁹ The Prosecutor was authorised to initiate an investigation into the Situation in Burundi: ICC-01/17-9-Red. See also the sub-section on **Burundi** of this Report.

⁸⁰ 'Statement of ICC Prosecutor, Fatou Bensouda, on opening a Preliminary Examination concerning the alleged deportation of the Rohingya people from Myanmar to Bangladesh', 18 September 2018.

⁸¹ 'International Criminal Court Prosecutor on Gabon: "The legal criteria for this Court to investigate have not been met"', 21 September 2018.

⁸² See eg Inter-American Commission on Human Rights, OEA/Ser.L/V/II, 31 December 2017, para 436.

⁸³ See *ibid*, paras 340-342, 347-348.

⁸⁴ UN Office of the High Commissioner for Human Rights (OHCHR), 'Human rights violations and abuses in the context of protests in the Bolivarian Republic of Venezuela from 1 April to 31 July 2017', August 2017, p ii.

violent house raids, which “particularly affected women, as many were at home during [the] search operations” and in some cases involved sexual assault.⁸⁵

According to the Inter-American Commission on Human Rights and the UN, sexual violence has been particularly prevalent in the context of arrests and detention and is committed against both men and women.⁸⁶ Further to this, sexual violence has been employed to repress demonstrators.⁸⁷ In particular, rape, groping, and other forms of sexual violence have commonly been reported.⁸⁸

On 8 February 2018, the Prosecutor announced the opening of a Preliminary Examination of the Situation in Venezuela. The Examination focuses on crimes allegedly committed since at least April 2017 in the context of demonstrations and related political unrest by both the State forces and the protestors. In this regard, the Prosecutor highlighted allegations of excessive use of force by State security forces to disperse and hinder demonstrations; arrests and detentions of thousands of actual or perceived members of the opposition; and abuses and ill-treatment in detention. The Prosecutor also referred to reports alleging that some groups of protestors resorted

to violent means, resulting in some members of security forces being injured or killed.⁸⁹ Notably, the Prosecutor has not specifically commented on allegations of sexual violence in public, though given details of such violence in reports of the UN and Inter-American Commission on Human Rights, including sexual violence in the examination appears necessary.⁹⁰

The Philippines

Since taking office on 30 June 2016, the President of the Philippines, Rodrigo Duterte, has engaged in a “war on drugs”, an anti-drug campaign targeting suspected drug dealers and users, and subjecting them to extrajudicial killings.

By the end of February 2018, it was reported that over 20,000 civilians, predominantly men suspected of drug-dealing, had been killed since the “war on drugs” began.⁹¹ The loss of husbands and other male family members has dramatically affected many women in the Philippines, who, by virtue of their gender-based roles, “are left to confront the associated stigma, fear, insecurity and economic deprivation, in addition to the burdens of identifying and burying their dead loved ones and seeking justice”.⁹²

85 *Ibid.*, p 8-29.

86 *Ibid.*, p ii, 17, 19; Inter-American Commission on Human Rights, OEA/Ser.L/V/II, 31 December 2017, paras 38, 47, 91, 193, 221, 252-256.

87 Inter-American Commission on Human Rights, OEA/Ser.L/V/II, 31 December 2017, para 219.

88 See *ibid.*, paras 252-256.

89 ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela’, 8 February 2018.

90 Inter-American Commission on Human Rights, OEA/Ser.L/V/II, 31 December 2017, paras 38, 47, 91, 193, 221, 252-256; OHCHR ‘Human rights violations and abuses in the context of protests in the Bolivarian Republic of Venezuela from 1 April to 31 July 2017’, August 2017, p ii, 17, 19.

91 Al Jazeera, ‘Senator: Rodrigo Duterte’s drug war has killed 20,000’, 21 February 2018.

92 A/HRC/35/23, 6 June 2017, para 49.

On 8 February 2018, the Prosecutor announced the opening of a Preliminary Examination of the Situation in the Philippines. This Examination focuses on crimes allegedly committed in the Philippines since at least 1 July 2016 in the context of the “war on drugs” campaign launched by the Government of the Philippines. In this regard, the Prosecutor noted allegations whereby, since 1 July 2016, thousands of persons have been killed in the course of police anti-drug operations for reasons related to their alleged involvement in illegal drug use or dealing.⁹³

On 17 March 2018, the Government of the Philippines deposited its notice of withdrawal from the Rome Statute, which will become effective on 17 March 2019.⁹⁴ This withdrawal cannot, however, frustrate ongoing proceedings or any matter which was already under consideration by the Court prior to the date on which the withdrawal becomes effective.⁹⁵

Rohingya/Myanmar

On 9 April 2018, the OTP filed a request seeking the Pre-Trial Division to determine whether the Court may exercise jurisdiction over the alleged deportation of the Rohingya people from Myan-

mar to Bangladesh.⁹⁶ The OTP in essence argued that the Court had jurisdiction over the alleged deportation of Rohingya for two reasons: First, and in contrast to the crime of forcible transfer, the crime of deportation is only completed when the victim has been forced across an international border.⁹⁷ Second, “Article 12(2)(a) [of the Rome Statute] requires at least one legal element of an article 5 crime to have occurred on the territory of a state party”.⁹⁸ In brief, the Prosecutor’s case hinges on the point that, while the crime “began” in a non-State Party to the Rome Statute (Myanmar), it was completed in a State Party to the Rome Statute (Bangladesh). Consequently, the Prosecutor’s request does not capture crimes only committed in Myanmar.⁹⁹

Documentation efforts in refugee camps across the border in Bangladesh have been exposing the grave nature and vast scale of sexual violence perpetrated against Rohingya in Myanmar, which forced many to flee. Human Rights Watch (HRW), for example, stated that it “found that Burmese security forces raped and sexually assaulted women and girls [...]”.¹⁰⁰ The Special Representative on Sexual Violence in Conflict, Pramila Patten, told the Security Council that every woman or girl she had spoken with during

93 ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela’, 8 February 2018.

94 UN Depository Notification C.N.138.2018.TREATIES-XVIII.10, 17 March 2018.

95 ‘ICC Statement on The Philippines’ notice of withdrawal: State participation in Rome Statute system essential to international rule of law’, ICC-CPI-20180320-PR1371, 20 March 2018.

96 ICC-RoC46(3)-01/18-1, paras 1, 63.

97 *Ibid*, paras 15-27.

98 *Ibid*, paras 28-50.

99 See also Andrea Raab and Siobhan Hobbs, ‘The Prosecutor’s Request for a Ruling on the ICC’s Jurisdiction over the Deportation of Rohingya from Myanmar to Bangladesh: A Gender Perspective’, *EJIL talk!*, 18 April 2018.

100 Human Rights Watch (HRW), “All of My Body Was Pain” Sexual Violence against Rohingya Women and Girls in Burma, 16 November 2017.

her visit to Rohingya encampments in Bangladesh “ha[d] either endured or witnessed sexual violence”, including seeing women literally being raped to death.¹⁰¹ Approximately 80% of those forced into Bangladesh since 25 August 2017 are women and children,¹⁰² and while sexual violence has not been limited to women and girls, it is understood they appear to comprise the majority of victims of sexual violence in this context.¹⁰³

On 18 June 2018, the Women’s Initiatives for Gender Justice, together with Naripokkho, a Bangladeshi NGO, Sara Hossain, advocate before the Bangladeshi Supreme Court, and the European Center for Constitutional and Human Rights, submitted an *amicus curiae* brief, arguing, *inter alia*, that sexual violence may permissibly underlie the crime of deportation.¹⁰⁴ The *amicus curiae* brief sought to ensure that Judges and the OTP are alive to the large-scale sexual violence committed against the Rohingya, and how it may be accommodated within the crime of deportation.

On 6 September 2018, Pre-Trial Chamber I ruled in favour of the Prosecutor’s request of 9 April 2018, confirming that the Court has jurisdiction over deportation and other crimes committed against the Rohingya people of which a legal ele-

ment or a part of the crime in question occurred on the territory of a State Party.¹⁰⁵ In the decision, the Chamber advised the opening of an investigation instead of instituting a Preliminary Examination first. The Chamber provided three reasons for this recommendation: First, the Chamber referred to the formal absence of a preliminary examination stage from the statutory framework of the Court; second, it noted that the Prosecutor has already conducted fairly detailed analysis; and third, it recalled the gravity of human rights situation of the victims.¹⁰⁶ Following the Chamber’s decision, the Prosecutor announced on 18 September 2018 that the OTP will “proceed to the next stage of the preliminary examination phase and [...] carry out a full-fledged preliminary examination”.¹⁰⁷

In its decision on jurisdiction, the Chamber explicitly discussed sexual violence. It did so in relation to the crime of deportation, determining that acts of sexual violence can constitute underlying acts of the crime, along with other violations such as killing and torture.¹⁰⁸ In making this finding, the Chamber referred to the observations of the Women’s Initiatives for Gender Justice’s joint *amicus curiae* brief. In a statement following the Chamber’s decision, the Prosecutor

101 ‘Security Council Must Demand Swift End to Atrocities in Rakhine State, Says Special Representative, Stressing “Inaction Is Not an Option”’, SC/13117, 12 December 2017.

102 Inter Sector Coordination Group, Gender in Humanitarian Action Working Group, ‘Gender Profile No. 1 for Rohingya Refugee Crisis Response’, 3 December 2017.

103 See also Andrea Raab and Siobhan Hobbs, ‘The Prosecutor’s Request for a Ruling on the ICC’s Jurisdiction over the Deportation of Rohingya from Myanmar to Bangladesh: A Gender Perspective’, *EJIL talk!*, 18 April 2018.

104 ICC-RoC46(3)-01/18-22, paras 12-19.

105 *Ibid.*

106 ICC-RoC46(3)-01/18, para 82-3, 87-8

107 ‘Statement of ICC Prosecutor, Fatou Bensouda, on opening a Preliminary Examination concerning the alleged deportation of the Rohingya people from Myanmar to Bangladesh’ 18 September 2018.

108 *Ibid.*, para 61.

also explicitly mentioned sexual violence, stating that the Preliminary Examination may take into account sexual violence as acts underlying the crime of deportation.¹⁰⁹ Additionally, the Prosecutor stated that OTP will further consider other crimes against humanity, “such as the crimes of persecution and other inhumane acts”.¹¹⁰

Completed Preliminary Examinations

During the reporting period, the OTP completed three Preliminary Examinations, namely those relating to Burundi,¹¹¹ Afghanistan, and the incidents aboard the Registered vessels of the Comoros, Greece and Cambodia.

Afghanistan

In response to the attack on the World Trade Center on 11 September 2001, the US Government launched Operation Enduring Freedom in Afghanistan. The purpose of the operation was to fight Al Qaeda and the Taliban government which harboured Al Qaeda. Within this context, allegations of international crimes have emerged, implicating all major actors involved: Members of the Taliban and affiliated Haqqani Network are alleged to have committed crimes against humanity and war crimes largely asso-

ciated with their policy of attacking civilians, and targeted attacks against protected objects, such as schools, hospitals, places of worship, civilian government offices, and humanitarian organisations.¹¹² In particular, the Taliban and their affiliates have targeted violence at women and girls to prevent them from accessing their fundamental rights to education, work, and public affairs, and as such are believed to have committed persecution on the grounds of gender.¹¹³ Afghan National Security Forces are said to have tortured predominantly male detainees, and to have committed acts of sexual violence against them.¹¹⁴ US forces and CIA agents allegedly committed, *inter alia*, torture, rape, and other forms of sexual violence.¹¹⁵ Notably, torture, rape, and other acts of sexual violence against (mostly male) detained terror suspects are said to have taken place also as part of the Extraordinary Rendition Programme within the context of the conflict in Afghanistan. In the course of said programme, the US transferred detained terror suspects to secret detention sites in different states to elicit information through enhanced interrogation techniques, which included, for example, forced nudity.¹¹⁶ Finally, and more recently, the Islamic

109 ‘Statement of ICC Prosecutor, Fatou Bensouda, on opening a Preliminary Examination concerning the alleged deportation of the Rohingya people from Myanmar to Bangladesh’ 18 September 2018.

110 *Ibid.*

111 For more information, see the sub-section on **Burundi** of this Report.

112 OTP, ‘Report on Preliminary Examination Activities 2017’, 4 December 2017, paras 246, 249.

113 *Ibid.*, paras 248-249.

114 *Ibid.*, paras 250-252; ICC-02/17-7-Red, paras 181-183.

115 *Ibid.*, paras 253-255.

116 OTP, ‘Report on Preliminary Examination Activities 2017’, 4 December 2017, para 254. The International Criminal Tribunal for Rwanda (ICTR) considered forced nudity a form of sexual violence: *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para 697. For more information on the Extraordinary Rendition Programme and the enhanced interrogation techniques, see eg *Al Nashiri v Poland*, 28761/11, 24 July 2014, paras 45-81.

State¹¹⁷ is also reported to have committed international crimes in Afghanistan.

Sexual violence has also reportedly been committed against boys. The tradition of *bacha bazi*, also known as dancing boys, has long been engrained in Afghan society. However, this tradition has been co-opted by some, resulting in abuse of boys and intersex children “kept usually by wealthy or powerful men, including military and political leaders, for entertainment, particularly dancing and sexual activities”.¹¹⁸

The impact on women of all of this is ambivalent. While there is a marked absence of analyses examining how the conflict itself and the alleged crimes have affected women, much has been reported on the effects of the ousting of the Taliban on women’s lives. For example, girls are now allowed, in law, to attend schools, and rape is criminalised for the first time. However, it is suggested that these *per se* welcomed changes to the status of women in Afghanistan have, for now, little impact on the realities Afghan women and girls find themselves in.¹¹⁹ In particular, reports suggest that girls still do not have equal access to education,¹²⁰ women continue to be stoned to death if deemed to have committed adultery in

Taliban-controlled areas,¹²¹ and women’s rights activists are still heavily targeted by Taliban.¹²²

After a Preliminary Examination stretching over 11 years, on 20 November 2017, the Prosecutor requested Pre-Trial Chamber III to authorise an investigation into crimes committed on the territory of Afghanistan from 1 May 2003 onwards, as well as crimes committed within the context of the Situation in other States Parties from 1 July 2002 onwards.¹²³ The Prosecutor determined that there was reasonable basis to believe that, *inter alia*, by targeting schools teaching girls and women in leading positions in governance and politics, the Taliban and affiliated groups committed gender-based persecution.¹²⁴ The Prosecutor further considered that the war crimes of torture, outrages upon personal dignity, rape and other forms of sexual violence were committed by members of the US armed forces on the territory of Afghanistan and members of the CIA in secret detention facilities both in Afghanistan and on the territory of other States Parties.¹²⁵ This appears to include the Extraordinary Rendition Programme, and the acts of sexual violence committed in this context. In this regard, the request thus stands out for its inclusion of sexual vio-

117 Also referred to as “IS”, “ISIL”, and “Daesh”.

118 See eg UN Assistance Mission in Afghanistan (UNAMA) and OHCHR, ‘Afghanistan, Protection of Civilians in Armed Conflict, Annual Report 2017’, February 2018, p 13.

119 See eg *ibid*, p 19.

120 HRW, “‘I Won’t Be a Doctor and One Day You’ll Be Sick’ Girls’ Access to Education in Afghanistan”, 17 October 2017; International Crisis Group, ‘Women and Conflict in Afghanistan’, 14 October 2013.

121 See eg Al Jazeera, ‘Afghan woman stoned to death for ‘adultery’’, 4 November 2015.

122 See eg The Guardian, ‘The female journalists defying taboos and braving death threats in Afghanistan’, 31 May 2017.

123 ICC-02/17-7-Red, para 1.

124 *Ibid*, paras 115-121.

125 OTP, ‘Report on Preliminary Examination Activities 2017’, 4 December 2017, para 241.

lence against men, which has so far not featured prominently in cases before the ICC,¹²⁶ as well as its consideration of acts of sexual violence committed by US officials in States Parties other than Afghanistan.

However, the Prosecutor does not appear to request leave to investigate the individual criminal responsibility of officials of those States Parties for facilitating the torture of and sexual violence against detainees.¹²⁷ Another issue not publicly appraised by the Prosecutor is that of the *bacha bazi*: While the request includes the crimes of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities reportedly committed by the Taliban,¹²⁸ an appraisal of *bacha bazi* is not readily apparent. However, in light of reports by the UN Assistance Mission in Afghanistan (UNAMA) and the UN Office of the High Commissioner for Human Rights (OHCHR), and the judgments rendered by the European Court of Human Rights concerning the responsibility of European states for the torture by CIA agents of detainees,¹²⁹ inclusion of these issues in an investigation (if authorised) appears warranted.

As of the end of the reporting period, Pre-Trial Chamber III has not adjudicated the Prosecutor's request, but ordered the Prosecutor on two occasions to furnish information additional to that contained in the request.¹³⁰

Registered vessels of Comoros, Greece and Cambodia

In February 2006, following the victory of Hamas in the legislative elections, Israel imposed economic restrictions on the Gaza Strip.¹³¹ These restrictions grew increasingly severe over the following years, with limitations being set on the movement of goods in and out of Gaza, and electricity and fuel supplies being reduced. Additionally, Israel established a naval blockade in January 2009.¹³²

To alleviate this situation, a flotilla carrying humanitarian supplies headed to the Gaza strip in 2010. On 31 May 2010, the Israeli Defense Forces (IDF) boarded and took over one of the vessels, namely the Comoros-registered vessel *Mavi Marmara*. In the course of this operation, nine passengers were killed and many others were wounded.¹³³ Other passengers were detained and reportedly mistreated.¹³⁴

126 See further the **Gender Justice at the ICC** section of this Report.

127 The Prosecution expressly refers to the States of Lithuania, Romania and Poland. The European Court of Human Rights considered all of these States responsible for assisting the US in torturing detainees: *Al Nashiri v. Poland*, 28761, 24 July 2014; *El Masri v. Macedonia*, 39630/09, 13 December 2012; *Abu Zubaydah v. Lithuania*, 46454/11, 31 May 2018.

128 ICC-02/17-7-Red, paras 151-153.

129 *Al Nashiri v. Poland*, 28761, 24 July 2014; *El Masri v. Macedonia*, 39630/09, 13 December 2012; *Abu Zubaydah v. Lithuania*, 46454/11, 31 May 2018.

130 ICC-02/17-8; ICC-02/17-23.

131 For further information, see Women's Initiatives for Gender Justice, 'The Compendium: An overview of Situations and cases before the International Criminal Court', p 22-24.

132 A/HRC/15/21, para 34.

133 Ibid, paras 117-128; 'Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident', September 2011, p 3.

134 Ibid, paras 133-135, 184-223.

On 14 May 2013, the Prosecutor opened a Preliminary Examination revolving primarily around this incident. Two years later, in November 2015, the Prosecutor decided to close this Preliminary Examination and drop the Situation, considering that, although there was a reasonable basis to believe that war crimes had been committed on board of the intercepted *Mavi Marmara*, “the potential case(s) that would likely arise from an investigation of the flotilla incident would not be of sufficient gravity to justify further action by the Court”.¹³⁵ The Prosecutor thus determined that potential cases would not be admissible before the Court.

The Union of the Comoros (Comoros) requested that Pre-Trial Chamber I review the Prosecutor’s decision.¹³⁶ On 16 July 2015, the Chamber rendered its decision on this request, finding that a number of errors had materially affected the Prosecutor’s conclusion and thus asking the Prosecutor to reconsider the decision.¹³⁷

On 29 November 2017, the Prosecutor affirmed the decision not to proceed with an investigation into the incidents. Yet again, the Prosecutor considered, *inter alia*, that the incidents were of insufficient gravity to warrant an investigation by the ICC.¹³⁸

On 23 February 2018, the Government of the Comoros filed another application for review.¹³⁹ In response, the Prosecutor submitted that the “Pre-Trial Chamber should dismiss the Government of the Union of the Comoros’ application *in limine* for lack of jurisdiction”.¹⁴⁰ The Office of Public Counsel for Victims (OPCV) expressed support for the Comoros’ application and asked the Chamber to take into account the interest of the victims “to obtain justice and to know the truth”.¹⁴¹

To date, no decision on this latest request for review has been made public. It thus remains to be seen whether the Pre-Trial Chamber will consider itself competent to adjudicate this request, and, if so, whether it will maintain the stance it took in its 2015 decision.

135 OTP, ‘Article 53(1) Report on the Situation on Registered Vessels of Comoros, Greece and Cambodia’, 6 November 2014, paras 149-152.

136 ICC-01/13-3-Red.

137 ICC-01/13-34, paras 49-51, p 26.

138 ICC-01/13-57-Anx1, paras 332-334.

139 ICC-01/13-58-Red.

140 ICC-01/13-61, para 1.

141 ICC-01/13-65, para 102.

Situations under Investigation and Cases

The OTP lists 11 Situations as under investigation before the Court, namely Burundi, the Central African Republic (CAR), CAR II, Côte d'Ivoire, the Democratic Republic of the Congo (DRC), Georgia, Kenya, Libya, Mali, Darfur (Sudan), and Uganda. In the reporting period, one Preliminary Examination became a Situation under investigation: Burundi.¹⁴²

To date, within the 11 ICC Situations under investigation, 26 cases have been brought before the ICC, including 23 cases relating to core international crimes under Article 5, and three cases relating to offenses against the administration of justice under Article 70 of the Statute. Overall, 16 cases (61.5%) have included charges of crimes for or based upon the commission of sexual and gender-based violence.

¹⁴² 'ICC judges authorise opening of an investigation regarding Burundi situation', ICC-CPI-20171109-PR1342, 9 November 2017; 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following judicial authorisation to commence an investigation into the Situation in Burundi', 9 November 2017.

Population: 11.3 million

♀ 51% | ♂ 49%

Agriculture, accounting for 90% of Burundi's food production and exports, is dominated by women who account for 62% of all hours worked in the sector.¹⁴³ Passing legislation on inheritance of property to overcome current barriers women and girls face remains challenged by debates around scarcity of land and negative views on women's rights to inherit or own land.¹⁴⁴ Lack of access to land is a major cause of poverty and leads to a heightened risk of different types of violence. Widows, divorced women, women who never married, and families with only daughters are at particular risk.¹⁴⁵

143 USAID, 'Burundi Gender Analysis Final Report 2017', 29 April 2017, p 14.

144 Foundation for International Relations and Foreign Dialogue (FRIDE) and Ligue Burundaise des Droits de l'Homme (ITEKA), 'The issue of inheritance for women in Burundi', March 2011, p 4-6.

145 *Ibid*, p 1-7.

Burundi

President Pierre Nkurunziza's political power struggle following the announcement of his candidacy for a third term in office, and the Government's use of brutal force in support of the President plunged Burundi into a spiral of violence in the spring of 2015.¹⁴⁶ This most recent of many cycles of violence that tarnished Burundi's history is characterised by blatant human rights abuses perpetrated against military and civilian oppositionists, or persons believed to be oppositionists.¹⁴⁷

These human rights violations have taken many forms, and sexual and gender-based violence features amongst them.¹⁴⁸ Indeed, the current crisis has exacerbated Burundi's already high rates of sexual and gender-based crimes.¹⁴⁹ The Report of the UN Independent Investigation on Burundi (UNIIB) relays accounts of women raped, gang-raped and mutilated by members of security forces.¹⁵⁰ Children were often nearby as their mothers were raped,¹⁵¹ or fell victim to rape themselves.¹⁵² The UNIIB Report further shows that men were also subjected to rape and mutilation and at risk of sexual violence while in detention.¹⁵³

Situating these accounts within the broader context of the crisis in Burundi paints a picture where sexual and gender-based violence has been instrumentalised to repress political dissent.¹⁵⁴ Fueled by misogynist propaganda that has been inundating Burundian media, depicting women related to the opposition as prostitutes,¹⁵⁵ women and girls have been targeted on the

146 See A/HRC/33/37, paras 21-26; A/HRC/36/54, para 12.

147 See A/HRC/33/37, paras 18, 26; A/HRC/36/54, para 14.

148 See A/HRC/33/37, para 56; S/PRST/2018/7, p 2; S/RES/2303, p 1; S/RES/2279, p 1.

149 A/HRC/33/37, para 56. See also HRW, 'Gang-rapes by Ruling Party Youth', 27 July 2017.

150 A/HRC/33/37, paras 56, 58-60; A/HRC/36/54, para 49. See also 'Report of the Delegation of the African Commission on Human and Peoples' Rights on its Fact-Finding Mission to Burundi', para 144.

151 A/HRC/33/37, para 54; HRW, 'Gang-rapes by Ruling Party Youth', 27 July 2017.

152 See A/HRC/36/54, para 48; ICC-01/17-5-Red, para 125; HRW, 'Gang-rapes by Ruling Party Youth', 27 July 2017; S/2017/249, para 86.

153 A/HRC/33/37, para 61. ICC-01/17-5-Red, paras 123, 124, 129.

154 International Federation for Human Rights (FIDH), 'Repression and Genocidal Dynamics in Burundi', November 2016, p 88.

155 S/2016/361, para 13.

basis that their male relatives were presumed political dissidents.¹⁵⁶ Men were subjected to sexual violence for reasons such as their reluctance to join the youth wing of the ruling party.¹⁵⁷ Notably, many women and girls were also raped during their flight from Burundi, in the attempt to deter people from fleeing the country.¹⁵⁸

As a result of this violence, nearly 180,000 persons have been internally displaced and more than 429,000 Burundians sought refuge in neighbouring countries by April 2018.¹⁵⁹ However, people who have fled seem far from safe, in addition to rapes perpetrated against Rohingya during their flight, sexual violence is reportedly prevalent in refugee camps, where the numbers of rapes are alarmingly high, including of children.¹⁶⁰ Further to this, it appears that survivors of sexual violence are not provided with appropriate care after attacks. The administration of emergency contraceptives and HIV/Aids prophylaxis is reported to be delayed in some cases as a result of untimely identification of rape survivors.¹⁶¹ Some survivors are said to therefore develop the disease or become pregnant, in addition to other

long-term consequences of sexual violence, such as physical and psychological trauma.¹⁶²

At the ICC

On 25 April 2016, the ICC Prosecutor announced the decision to open a Preliminary Examination of the Situation in Burundi.¹⁶³ In response, Burundi lodged its notification of withdrawal from the Rome Statute in October of that same year, which came into effect one year later.¹⁶⁴ The international community's response to the violence in Burundi has been marked by a quest for accountability.¹⁶⁵ Noting the Burundian authorities' inactivity in this regard,¹⁶⁶ Pre-Trial Chamber III authorised the Prosecutor on 25 October 2017 to investigate the Situation in Burundi, only two days before Burundi's withdrawal from the Rome Statute came into effect.¹⁶⁷

Notably, the investigation relates to, *inter alia*, sexual violence in the form of rape and torture.¹⁶⁸ To consider potential sexual and gender-based crimes at the earliest of stages of an investigation is crucial to ensure that such crimes will not fall outside the scope of the particular pro-

156 A/HRC/33/37, para 58; ICC-01/17-9-Red, para 111; ICC-01/17-5-Red, paras 123, 124, 126, 127; A/HRC/33/37, para 58; HRW, 'Gang-rapes by Ruling Party Youth', 27 July 2017.

157 A/HRC/33/37, para 61. See also A/HRC/36/54, para 50.

158 ICC-01/17-5-Red, para 124, 126; A/HRC/33/37, paras 56-57; S/2017/249, para 87.

159 S/PRST/2018/7, p 2.

160 HRW, 'Gang-rapes by Ruling Party Youth', 27 July 2017.

161 *Ibid.*

162 *Ibid.*

163 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a Preliminary Examination into the situation in Burundi', 25 April 2016.

164 See UN Depository Notification C.N.805.2016.TREATIES-XVIII.10.

165 S/RES/2303, p 2; S/RES/2279, p 2; S/RES/2248, p 2.

166 ICC-01/17-9-Red, paras 181-182.

167 ICC-01/17-5-Red. A public redacted version of this request was issued on 15 November 2017.

168 ICC-01/17-9-Red, para 109, 116.

ceedings at a later stage. In light of the delayed appraisal of sexual violence in other cases, the resulting absence of sexual violence charges, and the long-term consequences thereof, it is encouraging to see the Prosecution investigate rape and torture in the context of the Situation in Burundi at these early stages.

The Pre-Trial Chamber's authorisation of the investigation is not confined to the crimes of rape and torture. Carefully noting that the Prosecutor was "not restricted to the incidents and crimes set out in the present decision but may, on the basis of the evidence, extend her investigation to other crimes", the Pre-Trial Chamber left the door open for other crimes to be included in the investigation.¹⁶⁹ This is important, as the Pre-Trial Chamber's decision omits incidents of mutilations as "other forms of sexual violence" within the meaning of Article 7(g) of the Statute,¹⁷⁰ and sexual violence against men within the paradigm of sexual and gender-based crimes.

At the time of writing, no cases have been made public in this Situation.

Sexual violence is reportedly prevalent in refugee camps, where the numbers of rapes are alarmingly high, including of children.

¹⁶⁹ ICC-01/17-9-Red, para 193.

¹⁷⁰ See eg ICC-01/17-9-Red, para 112.

Central African Republic

Population: 4.8 million

♀ 51% | ♂ 49%

The CAR has been plagued by a history marked by poverty, ethnic tension, political instability, and armed conflict.¹⁷⁴ Regional instability and internal conflicts in neighbouring countries have severely impacted the country.¹⁷⁵ For most of the years since its independence from France, the country has been ruled by dictators.¹⁷⁶ In 2002, François Bozizé, a former Army Chief, attempted to take power through a coup against then-President Ange-Félix Patassé, eventually overthrowing the government in 2003. Between October 2002 and March 2003, fighting between government forces and troops loyal to General Bozizé led to widespread and systematic human rights abuses.

Intense fighting took place between October–November 2002 and February–March 2003, with serious allegations relating to killing, rape and looting. Attacks against civilians were widespread and sexual violence was a central element of the conflict, with rapes and other acts of sexual violence being perpetrated on a large scale by armed individuals.¹⁷⁷ Patassé commissioned outside forces to help him fight off the *coup*, including the *Mouvement de Libération du Congo (MLC)*, led by Jean-Pierre Bemba Gombo (Bemba) as its President and Commander-in-Chief. MLC combatants engaged in a widespread attack against the civilian population, committing acts of murder, rape and pillaging.¹⁷⁸ Since Bozizé came into power in 2003, government forces committed serious crimes against the civilian population in the north-eastern and north-western parts of the CAR.

In 2012, Séléka, an armed rebel group, emerged as “a coalition of militant political and armed groups representing Muslims in the north-east

During recent conflict in the CAR, sexual violence against men and boys has been used by armed groups as a political strategy to attack civilians, as well as being a consequence of impunity due to the fragile governance and rule of law.¹⁷¹ Attacks against men and boys most commonly take place during armed attacks or during captivity by armed groups.¹⁷² Sexual violence against men and boys includes rape, genital mutilation or beatings, and forced nudity. Male survivors feel forced to stay silent due to fear of stigma and rejection.¹⁷³

174 S/2006/1019, para 17.

175 *Ibid.*

176 S/2014/928, para 25.

177 ICC-OTP-BN-20070522-220-A_EN.

178 OHCHR, 'Report of the Mapping Project documenting serious violations of international human rights law and international humanitarian law committed within the territory of the Central African Republic between January 2003 and December 2015', May 2017, p 41.

171 Institute for Security Studies, 'Sexual violence against men and boys in CAR', 23 July 2018.

172 All Survivors Project, "I don't know who can help" Men and boys facing sexual violence in the Central African Republic', 23 February 2018, p 5.

173 *Ibid.*, p 6.

and other groups dissatisfied with President Bozizé".¹⁷⁹ The group launched a major offensive in December 2012, with little resistance from the Central African Armed Forces (FACA), and seized power on 24 March 2013, forcing President Bozizé into exile and appointing Séléka leader Michel Djotodia as President.¹⁸⁰ While continually expanding their control over the CAR, Séléka combatants frequently attacked civilians, particularly in regions associated with Bozizé and his ethnic group, committing, *inter alia*, mass killings and sexual violence.¹⁸¹ In response to the mass atrocities committed by the Séléka, the Christian anti-Balaka group emerged, engaging in fighting with the Séléka and attacking Muslim civilians, with Séléka combatants attacking non-Muslims in retaliation.¹⁸² French military forces intervened in the country, just as anti-Balaka groups started their violent reprisal campaign. Members of the French forces have been accused of (sexual) abuse. In April 2014, the UN Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) was created to help restore peace in the CAR.

Rape and sexual violence were a central part of the conflicts that have taken place in the CAR. Rape was committed against civilians, including elderly women, girls and men. Often there

were cruel aggravating aspects, such as rapes committed by multiple perpetrators, in front of families or others, with relatives sometimes forced to participate.¹⁸³ A 2017 UN mapping report documented serious violations of international humanitarian law (IHL) and international human rights law committed in the CAR between 2003 and 2015.¹⁸⁴ The Report documents in detail hundreds of horrific incidents, including multiple accounts of gang rapes of women and girls.

The victims were mainly women and girls, but men and boys were also subjected to sexual violence, albeit to a lesser extent. The age of the victims ranged from as young as five years to 60 years and over. A high percentage of the rapes were gang rapes, committed by up to 20 perpetrators against a single victim, and often in public and/or in front of their family members. [...] Armed groups also used women and girls captured from their known or perceived opponents as sex slaves. [...] Some of the sexually enslaved women and girls bore children from rape.¹⁸⁵

According to the Mapping Report, nearly all parties to the armed conflicts which took place in the timeframe covered by the report, committed various forms of sexual violence. Perpetrators

179 Situation in the Central African Republic II: Article 53(1) Report', 24 September 2014, para 9.

180 *Ibid*, para 10.

181 *Ibid*, para 11.

182 *Ibid*, paras 12-13.

183 ICC-OTP-BN-20070522-220-A_EN, p 2.

184 OHCHR, 'Report of the Mapping Project documenting serious violations of international human rights law and international humanitarian law committed within the territory of the Central African Republic between January 2003 and December 2015', May 2017.

185 *Ibid*, p 206.

were members of the security forces, rebel and armed groups, forces of foreign governments, and civilians.¹⁸⁶

At the ICC

Following the outbreak of violence between 2002 and 2003, the Government of the CAR referred the Situation on its territory to the ICC on 21 December 2004.¹⁸⁷ According to the statement by the OTP at the opening of the investigation on 22 May 2007, this was the first time the Prosecutor opened an investigation in which allegations of sexual crimes significantly outnumbered alleged killings.¹⁸⁸ It marked the first time that the Prosecutor announced the intention to explicitly investigate gender-based crimes as a priority at the outset of a formal investigation. A distinctive feature of the Situation was the high reported number of rape victims — at least 600 victims in a period of five months.¹⁸⁹

On 24 September 2014, the Prosecutor announced the opening of a second Situation in the country (CAR II), separate from the Situation referred to the ICC in 2004, regarding war crimes and crimes against humanity allegedly committed by both the Séléka and anti-Balaka groups since 2012, including murder, rape, forced dis-

placement, persecution, pillaging, attacks against humanitarian missions and the use of children under 15 years in combat.¹⁹⁰ There are currently no cases arising from this second Situation.

So far, there have been two cases before the ICC arising from the first CAR Situation. The main case relates to the OTP's investigations of the 2002–2003 violence, which led to an arrest warrant issued against Jean-Pierre Bemba Gombo (Bemba). As his trial progressed, a new set of allegations was brought against Bemba, along with four individuals associated with his defence, pursuant to Article 70 of the Statute. These allegations relate to the commission of offences against the administration of justice, including corruptly influencing witnesses before the ICC and knowingly presenting false or forged evidence.¹⁹¹

On 3 June 2015, the Special Criminal Court (SCC), a hybrid tribunal located in the CAR, was established. The SCC is tasked with adjudicating serious human rights violations and violations of IHL committed in the country since 1 January 2003. The Court is currently still in the process of being set up and has not yet started taking cases. The situation in the CAR remains volatile. Self-proclaimed self-defence groups, connected to anti-Balaka, have continued to operate in

186 *Ibid.*

187 'Prosecutor receives referral concerning Central African Republic', ICC-OTP-20050107-86, 7 January 2005. See also ICC-01/05-1, p 2.

188 'Prosecutor opens investigation in the Central African Republic', 22 May 2007.

189 ICC-OTP-BN-20070522-220-A_EN, p 2.

190 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a second investigation in the Central African Republic', ICC-OTP-20140924-PR1043, 24 September 2014.

191 'Bemba case: Four suspects arrested for corruptly influencing witnesses; same charges served on Jean-Pierre Bemba Gombo', ICC-CPI-20131124-PR962, 24 November 2013.

the country's south-east, attacking Muslims. Ex-Séléka factions continue to prey on the population in the areas under their control. Over half a million people have fled to neighbouring countries and close to 700,000 remain internally displaced.

Charges in cases of the CAR Situation

Charge	Bemba ¹⁹²	
Rape	WC	• ⊙ ● C A
	CAH	• ⊙ ● C A
Other Forms of Sexual Violence	WC	
	CAH	
Torture	WC	•
	CAH	•
Outrages Upon Personal Dignity	WC	•
	CAH	
Murder	WC	• ⊙ ● C A
	CAH	• ⊙ ● C A
Pillaging	WC	• ⊙ ● C A
	CAH	

• Arrest warrant/Summons to appear

A Acquitted

⊙ Confirmation of charges

C Convicted

● Trial

■ SGBC charges

192 The Prosecution originally brought charges of other forms of sexual violence as a war crime and a crime against humanity, however, Pre-Trial Chamber III declined to include these charges in the first Arrest Warrant for Bemba.

The Prosecutor v. Jean-Pierre Bemba Gombo

Bemba, a Congolese national, is the founder and former President of the political group MLC and Commander-in-Chief of the MLC's military branch, the *Armée de libération du Congo* (ALC).¹⁹³ He was prosecuted by the ICC for crimes allegedly committed by MLC soldiers in the CAR from on or about 26 October 2002 to 15 March 2003.¹⁹⁴ The events took place during an intervention by the MLC to support then president of the CAR, Ange-Félix Patassé, in suppressing a rebellion by General François Bozizé. The Prosecution originally sought a broad range of sexual and gender-based crimes charges, namely rape, other forms of sexual violence, torture as crimes against humanity; and rape, other forms of sexual violence, torture and outrages upon personal dignity as war crimes.¹⁹⁵ However, the Pre-Trial Chamber narrowed these charges at both the arrest warrant and confirmation of charges stages.

On 21 March 2016, Bemba became the first—and so far only—individual to be convicted and sen-

tenced by the ICC for crimes of sexual violence, as well as under the doctrine of command responsibility pursuant to Article 28(a) of the Rome Statute.¹⁹⁶ He was unanimously convicted of murder, rape and pillaging as war crimes, and murder and rape as crimes against humanity.¹⁹⁷ He was sentenced to 18 years' imprisonment, the highest sentence imposed by the ICC to date.¹⁹⁸

Bemba's conviction was short-lived. The Defence appealed the Conviction decision,¹⁹⁹ which was granted by a narrow majority of the Appeals Chamber, reversing the conviction.²⁰⁰ Both the Defence and the Prosecution had appealed the Sentencing decision,²⁰¹ which were consequently and unanimously dismissed as moot.²⁰²

While a decision on the appeals against the conviction and the sentence was pending, the case was at the reparations stage and preparatory steps were well underway, awaiting the issuance of a reparations order. These proceedings were suspended following Bemba's acquittal.

193 ICC-01/05-01/08-3343, para 1.

194 ICC-01/05-01/08-424, para 490 and p 184-185.

195 ICC-01/05-01/08-26-Red, p 8-11.

196 ICC-01/05-01/08-3343, para 752; ICC-01/05-01/08-3399, paras 95, 97. See also Women's Initiatives for Gender Justice, 'ICC first conviction for acts of sexual violence', 21 March 2016. For a detailed description of the Court's approach to Article 28 in this case, see Women's Initiatives for Gender Justice, 'Modes of Liability: a review of the International Criminal Court's jurisprudence and practice', Expert Paper, November 2013, p 88-96.

197 ICC-01/05-01/08-3343, para 752; ICC-01/05-01/08-3343-AnxI; ICC-01/05-01/08-3343-AnxII. See also 'ICC Trial Chamber III declares Jean-Pierre Bemba Gombo guilty of war crimes and crimes against humanity', ICC-CPI-20160321-PR1200, 21 March 2016.

198 ICC-01/05-01/08-3399, paras 95, 97. See also Women's Initiatives for Gender Justice, 'Bemba Sentenced to 18 Years by the ICC', 21 June 2016. For more information, see Women's Initiatives for Gender Justice, 'The Compendium: An overview of Situations and cases before the International Criminal Court', December 2017, p 83-90.

199 ICC-01/05-01/08-3348; ICC-01/05-01/08-3434-Red.

200 ICC-01/05-01/08-3636-Red, paras 197-198 and p 4.

201 ICC-01/05-01/08-3412; ICC-01/05-01/08-3450-Red; ICC-01/05-01/08-3411; ICC-01/05-01/08-3451.

202 ICC-01/05-01/08-3637, para 8 and p 3.

Acquittal

The Appeals Chamber rendered its Judgment on the appeals on 8 June 2018. In its Judgment on the Defence appeal against the conviction, a 3-2 majority of the Chamber²⁰³ reversed Bemba's conviction.²⁰⁴ The majority addressed only two of the six grounds of appeal presented by the Defence against the conviction, to come to an acquittal.²⁰⁵ More concretely, the majority (1) discontinued the proceedings with respect to multiple criminal acts which it found fell outside of the scope of this case,²⁰⁶ and (2) acquitted Bemba of all remaining charges.²⁰⁷ The dissenting Judges would have upheld Bemba's conviction.²⁰⁸

Standard of appellate review

Before addressing the two grounds of appeal which were granted by the majority of the Appeals Chamber, it is important to note that the Appeal Judgment appears to depart from settled ICC and other international jurisprudence regarding the role of the Appeals Chamber in reviewing potential factual errors in Trial Chamber judgments. Until now, as acknowledged by both the majority Judgment and the dissenting opinion, previous ICC

appellate jurisprudence deferred to the factual findings of the Trial Chamber unless it found that no reasonable Trial Chamber could have been satisfied *beyond reasonable doubt* as to the finding in question based on the available evidence.²⁰⁹ Consequently, only if and when it finds that the Trial Chamber's factual findings are unreasonable, can the Appeals Chamber conclude that it would have decided differently on the facts.

The new approach used by the majority in this case discards deference and allows the Appeals Chamber to "interfere with the factual findings of the first-instance chamber whenever the failure to interfere may occasion a miscarriage of justice".²¹⁰ The Appeals Chamber argued that "when a reasonable and objective person can articulate serious doubts about the accuracy of a given finding" and can support this with specific arguments, this is a strong indication that the Trial Chamber may not have respected the standards of proof, and an error of fact could have been made.²¹¹ Furthermore, the Appeals Chamber stated that when it identifies findings which can reasonably be called into doubt, it must overturn them.

203 ICC-01/05-01/08-3636-Anx1-Red, ICC-01/05-01/08-3636-Anx2, ICC-01/05-01/08-3636-Anx3.

204 ICC-01/05-01/08-3636-Red, paras 197-198 and p 4. See also 'ICC Appeals Chamber acquits Mr Bemba from charges of war crimes and crimes against humanity', ICC-CPI-20180608-PR1390, 8 June 2018; Women's Initiatives for Gender Justice, 'Bemba Conviction Overturned by the ICC Appeals Chamber: Overturn of the first ICC conviction for crimes of sexual violence', 12 June 2018.

205 ICC-01/05-01/08-3636-Red, paras 29-32. The six grounds of appeal raised by the Defence were: (1) that the trial against Bemba was a mistrial; (2) that the conviction exceeded the charges; (3) that Bemba is not liable as a superior; (4) that the contextual elements were not established; (5) that the Trial Chamber erred in its approach to identify evidence; and (6) that there were other procedural errors which also invalidated the conviction.

206 ICC-01/05-01/08-3636-Red, paras 116, 197 and p 4. These criminal acts included five instances of rape, two of murder, and 11 of pillaging. ICC-01/05-01/08-3636-Red, para 116.

207 ICC-01/05-01/08-3636-Red, paras 118, 198 and p 4. Aspects of the remaining grounds of appeal are addressed in the majority's separate opinions. ICC-01/05-01/08-3636-Red, para 33.

208 ICC-01/05-01/08-3636-Anx1-Red, para 1.

209 ICC-01/05-01/08-3636-Red, paras 38-39; ICC-01/05-01/08-3636-Anx1-Red, paras 2-3, 9.

210 ICC-01/05-01/08-3636-Red, para 40.

211 *Ibid*, para 45.

The dissenting Judges raised concerns about this new approach, noting that the Appeals Chamber does not change its jurisprudence lightly. They stated that the modifications proposed by the majority are “unwarranted and contrary to the corrective model of appellate review” and argued that in some aspects it is potentially even inconsistent with the Statute.²¹² They further noted that, although the Appeals Chamber is not obligated to follow its previous jurisprudence, it should not depart therefrom without convincing reasons, in order to ensure “predictability of the law and the fairness of adjudication to foster public reliance on its decisions”—especially at the ICC with its complex legal framework and limited number of cases.²¹³ The dissenting Judges found that the majority did not give reasons for this departure nor refer to any authority in support of its propositions.²¹⁴ As highlighted by the dissenting Judges, the Appeals Chamber has access to the trial record, however, the Trial Chamber is better positioned to assess the reliability and credibility of evidence.²¹⁵ In their view, a *de novo* review, according no deference to the Trial Chamber’s findings,

would turn appellate proceedings into a second trial, risking inaccuracy.²¹⁶ The dissenting Judges found the majority’s review of evidence to have been limited given its consideration of individual items of evidence, and stated that it appeared that “the Majority did not apply even its own standard fully”.²¹⁷ For this reason, they held that any conclusion that the majority reached can only be impressionistic and provides insufficient basis to overturn findings of the Trial Chamber.²¹⁸

A *de novo* review by a Chamber that has not heard and considered the entirety of the evidence requires extreme caution. This is particularly true for a case which has been marred by significant corruption during the trial, leading to a separate trial and conviction against Bemba and four other individuals connected to his defence for offenses against the administration of justice, particularly bribing and coaching witnesses to testify falsely in court.²¹⁹ From a trial that lasted four and a half years, heard the testimony of 77 witnesses and considered 773 items of evidence, it is perilous to select pieces of contentious evidence and rely on these to arrive at a different conclusion than a unanimous Trial Chamber.²²⁰

212 ICC-01/05-01/08-3636-Anx1-Red, paras 4-5.

213 *Ibid*, para 5.

214 *Ibid*, para 5.

215 *Ibid*, paras 6-7.

216 *Ibid*, para 7.

217 *Ibid*, paras 8, 18.

218 *Ibid*, para 18.

219 For more information regarding the *Bemba et al* case, see below. See also Women’s Initiatives for Gender Justice, ‘[Gender Report Card 2014](#)’, p 196-200; Women’s Initiatives for Gender Justice, ‘[The Compendium: An overview of Situations and cases before the International Criminal Court](#)’, December 2017, p 91-93.

220 See further Alex Whiting, ‘Appeals Judges Turn the ICC on its Head with Bemba Decision’, *Just Security*, 14 June 2018.

Second ground of appeal: the conviction exceeded the charges

The Appeals Chamber majority granted the Defence's second ground of appeal, arguing that the conviction exceeded the charges. The majority found that the Trial Chamber erred by convicting Bemba of 18 criminal acts which, in its view, did not fall within the facts and circumstances of this case, as they were added after the Confirmation of Charges decision.²²¹ According to the majority:

[A]dding any additional criminal acts of murder, rape and pillage would have required an amendment to the charges, which, however, did not occur in the case at hand [...] [T]his is not to say that adding specific criminal acts after confirmation would in all circumstances require an amendment of the charges [...] nevertheless, given the way in which the Prosecutor has pleaded the charges in the case at hand, this was the only course of action that would have allowed additional criminal acts to enter the scope of the trial.²²²

With regard to criminal acts which were mentioned in the Amended Document Containing the Charges but on which the Pre-Trial Chamber decided not to rely to confirm the charges, the Appeals Chamber majority found that they formed part of the facts and circumstances described

in the charges. According to the majority, it was clear that the Pre-Trial Chamber did not intend to exclude these criminal acts from the case but decided not to rely on them for the purpose of confirmation due to evidential shortcomings.²²³

The majority Judgment departed from previous jurisprudence with respect to the role of the Pre-Trial Chamber, requiring it now to confirm every single underlying criminal act before it can fall within the scope of the case. In cases in which new evidence emerges after the confirmation of charges, a cumbersome amendment of the charges would now be necessary, rather than simply providing the accused with adequate notice. According to the dissenting Judges, the Pre-Trial Chamber's consideration of the detailed underlying factual allegations should be limited to what is necessary to allow determination on whether the charges should be confirmed. A different finding would create "a laborious fact-finding process prior to trial that is not required by the provisions of the Statute and would be incompatible with judicial efficiency."²²⁴

Recalling the Prosecutor's discretion as to the formulation of the charges, and that allegations of criminal acts serve to prove broader allegations, the dissenting Judges highlighted that, depending on the case, the level of specificity is variable and that the charges may be based on specific criminal acts or broader parameters. For instance, by specifying a time period and a geo-

221 ICC-01/05-01/08-3636-Red, para 116.

222 *Ibid*, para 115.

223 *Ibid*, para 113.

224 ICC-01/05-01/08-3636-Anx1-Red, para 34.

graphical area “over which criminal acts were allegedly committed by an identifiable group of perpetrators against an identifiable group of victims”.²²⁵ In this view, the charges can be formulated based on the specific circumstances of the case. In cases of command responsibility for mass crimes, the case will generally focus on the accused’s ability or failure to properly exercise control, and the “detail of individual criminal acts alleged will generally be less material to the description of the charges”.²²⁶ The dissenting Judges maintained that the scope of the case, which is broadly defined, is not necessarily limited to the criminal acts presented by the Prosecutor.²²⁷

Third ground of appeal: Bemba is not liable as a superior

The majority of the Appeals Chamber focused on, and granted, only one aspect of the Defence’s third ground of appeal related to Bemba’s criminal liability as a superior under Article 28(a) of the Rome Statute.²²⁸ The majority stated that, while it also had concerns as to the Trial Chamber’s findings relevant to Bemba’s effective control and actual knowledge of crimes committed by the MLC troops in the CAR, it limited its assessment to the Trial Chamber’s finding

that Bemba had failed to take all necessary and reasonable measures to prevent or repress the commission of crimes by his subordinates or to submit the matter to the competent authorities for investigation and prosecution, “given the clear error therein”.²²⁹

The majority found that the Trial Chamber had committed seven serious errors which materially impacted its conclusion: (1) failing to properly appreciate the limitations Bemba faced as a remote commander in investigating and prosecuting crimes; (2) not taking into account Bemba’s argument that he sent a letter to the CAR authorities while concluding that Bemba had failed to refer allegations of crimes to the CAR authorities; (3) considering that Bemba’s motivations were indicative of a lack of genuineness in adopting the relevant measures; (4) attributing to Bemba any shortcomings it found in the mandate, execution and/or results of the measures taken; (5) finding that Bemba failed to empower other MLC officials to properly investigate and prosecute crimes; (6) failing to indicate the approximate number of crimes committed and to assess its impact in the determination whether Bemba took all necessary and reasonable measures; and (7) taking into account the redeployment of MLC troops—for example to

225 *Ibid*, paras 27, 34. The dissenting Judges clarified that it is “important that the charges are described in a way that enables the chamber, as well as the parties and participants, to determine with certainty which sets of historical events, in the course of which crimes within the jurisdiction of the Court are alleged to have been committed, form part of the charges, and which do not”. ICC-01/05-01/08-3636-Anx1-Red, para 27.

226 *Ibid*, para 27.

227 *Ibid*, paras 28, 32, 34.

228 ICC-01/05-01/08-3636-Red, paras 30, 32, 194, 198.

229 *Ibid*, paras 32, 189, 194.

avoid contact with the civilian population—as an available measure.²³⁰

High importance was attributed to Bemba's status as a so-called remote commander, in particular the limitations that he faced in investigating and prosecuting crimes as a remote commander sending troops to a foreign country.²³¹ The majority held:

[A]lthough the limitations alluded to by Mr Bemba did not completely curtail his ability to investigate crimes committed by MLC troops in the CAR, the Trial Chamber did not conduct a proper assessment as to whether, in the particular circumstances that existed at the time, the range of measures taken by Mr Bemba could be regarded as the extent of the necessary and reasonable measures that he could have taken, given the limitations upon his material abilities.²³²

The Appeals Chamber disagreed with the Trial Chamber about the meaning of “all necessary and reasonable measures” that a commander is required to take under Article 28 of the Statute. The majority argued that an assessment of which measures were at his disposal in the circumstances at the time was necessary, and that “[s]imply juxtaposing the fact that certain

crimes were committed by the subordinates of a commander with a list of measures which the commander could hypothetically have taken does not, in and of itself, show that the commander acted unreasonably at the time”.²³³

The dissenting Judges argued that it is not “immediately apparent to [them] that an assessment of what a commander should have done is any less hypothetical than what a commander could have done in response to the crimes committed”.²³⁴ They further stated that such an approach represented a selective and unwarranted *de novo* review, but that, if this approach was to be taken, the Appeals Chamber is required to review and analyse all the evidence presented to the Trial Chamber, and not merely selected elements thereof.²³⁵ They added that “[i]n the absence of such a full review and a positive determination of the issues, it is unclear to [them] how the majority could proceed to overturn the findings of the Trial Chamber and enter an acquittal.”²³⁶

According to the Appeals Chamber majority, Bemba, as a remote commander, “was not part of the investigations and was not responsible for the results generated”.²³⁷ The majority argued that measures taken by a commander cannot be faulted simply because of shortfalls in their

230 *Ibid*, paras 189, 191.

231 *Ibid*, para 191.

232 *Ibid*, para 173.

233 *Ibid*, paras 168, 170.

234 ICC-01/05-01/08-3636-Anx1-Red, para 51.

235 *Ibid*, paras 46-47, 53.

236 *Ibid*, para 46.

237 ICC-01/05-01/08-3636-Red, para 192.

execution,²³⁸ and that it is not the responsibility of the accused to show that the measures taken were sufficient.²³⁹ This determination—which was made without providing reference to any previous jurisprudence or other sources—arguably not only protects Bemba, but also serves the interests of governments or rebel groups if and when their forces cross into the territory of a different State.²⁴⁰ It further does not take into account modern communication methods that enable commanders to have almost immediate access to their forces and to have a better overview of the situation on the ground.²⁴¹

The majority also drew attention to the Trial Chamber's approach towards Bemba's motives when determining whether the measures he took were necessary and reasonable.²⁴² It found that measures taken by a commander with the motivation to preserve the reputation of his or her troops do not intrinsically render them any less necessary or reasonable in preventing or repressing the commission of crimes, and in ensuring their prosecution after a proper investigation.²⁴³ The dissenting Judges found no error in the Trial Chamber's examination of Bemba's motives in its assessment of whether he took all necessary and reasonable measures.²⁴⁴

Analysis and impact of the Judgment

This was the first real opportunity for the ICC Appeals Court to elaborate on command responsibility, making it a—not just in this respect—highly anticipated judgment. Unfortunately, the Appeals Chamber is divided to such a degree that no reliable, consistent and uncontested jurisprudence can be derived from it, particularly with regard to command responsibility. Four judicial opinions were rendered by Appeal Judges on Bemba's conviction,²⁴⁵ and eight out of 11 ICC Judges who heard this case concluded that the ICC's threshold of proof was met at the different stages of proceedings for the crimes that Bemba is now acquitted of. The ICC Prosecutor issued a rare public statement expressing concerns with regard to the majority's Appeal Judgment.²⁴⁶ This lack of cohesion and level of discord between organs and actors of the Court is problematic as it has implications for generating accepted and meaningful ICC jurisprudence.

The Appeals Chamber majority decision has been heavily criticised not just for acquitting Bemba, but for having modified the standard of appellate review, and for turning the confirmation of charges procedure, which was initially meant as a way to ensure early on that there is sufficient

²³⁸ *Ibid.*, para 180.

²³⁹ *Ibid.*, para 170.

²⁴⁰ See further Leila N. Sadat, 'Fiddling While Rome Burns? The Appeals Chamber's Curious Decision in Prosecutor v. Jean-Pierre Bemba Gombo', *EJIL: Talk!*, 12 June 2018.

²⁴¹ *Ibid.*

²⁴² ICC-01/05-01/08-3636-Red, para 176.

²⁴³ *Ibid.*, para 177.

²⁴⁴ ICC-01/05-01/08-3636-Anx1-Red, para 72.

²⁴⁵ These include the majority Judgment with two separate opinions by three Judges, and one dissenting opinion by two Judges.

²⁴⁶ 'Statement of ICC Prosecutor, Fatou Bensouda, on the recent Judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba Gombo', 13 June 2018.

evidence to warrant a lengthy trial, into a “mini trial”.²⁴⁷ It is unfortunate that the majority decision does not go into great detail in explaining its reasoning regarding these contentious findings nor does it often substantiate its arguments by referring to relevant international jurisprudence. Subsequently, it has casted doubt and uncertainty regarding the threshold and standard of review that must be applied to current and future ICC pre-trial and trial proceedings.

Regardless, it is important to be careful not to equate an acquittal with a failure of the ICC as a whole. An effective and independent international judicial institution needs to be able to acquit an accused if the evidence presented was not sufficient for a reasonable trial chamber to convict.

The fact that the ICC tries so few cases at such a slow pace and with limited resources means that the impact of an acquittal in one case can be detrimental to the external optics of the Court. This is also another reason why clear and consistent ICC jurisprudence is of such importance.

Furthermore, the fact that, at the 20th anniversary of the Rome Statute, there is no final ICC conviction for sexual and gender-based crimes is a devastating result, not only for the more than 5,200 registered victims in the *Bemba* case, but also for victims across other Situations under investigation. Given that the commission

of murder, rape and pillaging as crimes against humanity and war crimes by MLC troops is now confirmed at the appeals stage, and no other accused is publicly indicted for these crimes before the ICC, the *Bemba* acquittal generated the impression of “crimes with no perpetrator”.

Judgment on the appeal against the sentencing decision

Due to the reversal of the Conviction decision, the Appeals Chamber unanimously dismissed the Prosecution and Defence appeals against the Sentencing decision as moot.²⁴⁸

Launch of the TFV's assistance mandate

Following Bemba's acquittal and the subsequent suspension of the reparations proceedings in this case, on 12 June 2018, the Trust Fund for Victims' (TFV) Board of Directors unanimously decided to accelerate the launch of a programme under its assistance mandate to provide physical, psychological or material support to victims and their families in the CAR I Situation.²⁴⁹ The TFV Secretariat is instructed to consider first the harms suffered by victims in the *Bemba* case, and, second, the harms suffered from additional sexual and gender-based violence arising out of the CAR I Situation.²⁵⁰

The Board decided to reallocate resources from available funds to establish a starting capital of

247 See further Alex Whiting, 'Appeals Judges Turn the ICC on its Head with Bemba Decision', *Just Security*, 14 June 2018.

248 ICC-01/05-01/08-3637, para 8 and p 3.

249 Trust Fund for Victims (TFV) Board of Directors, 'Communication from the Chair of the Board of Directors of the Trust Fund for Victims to the President of the Assembly of States Parties', 13 June 2018, p 1.

250 *Ibid*, p 2.

€1 million for assistance programme.²⁵¹ Since the activities under its assistance mandate are funded by voluntary contributions from States Parties, as well as institutional and individual private donors, the TFCV Board issued a call for voluntary contributions “in order to ensure that sufficient financial resources are available to meaningfully respond to the overwhelming and devastating harms suffered by victims and their families in the CAR I situation”.²⁵²

In a press release, the TFCV stated that it is “mindful of the profound suffering of victims of the conflict in the situation of the Central African Republic, particularly with regards to victims of sexual and gender-based violence, and is taking careful note of the extensive evidence of victim suffering established in the context of the Bemba case”.²⁵³ A positive development is the utilisation of the Assistance Mandate in the DRC and Uganda and the high number of victims of sexual and gender-based crimes as beneficiaries. This is a welcoming approach and diversion from previous Situations.

The Prosecutor v. Jean-Pierre Bemba Gombo et al

Separate to the *Bemba* main case, Bemba was involved in another trial which concerned several

charges of offences against the administration of justice committed in connection with the main case. This Article 70 case involves Bemba and four individuals who connected with his defence in the main case: Defence Team Lead Attorney Aimé Kilolo Musamba (Kilolo), Defence Team Case Manager Jean-Jacques Mangenda Kabongo (Mangenda), Congolese Member of Parliament Fidèle Babala Wandu (Babala), and Defence Team Witness Narcisse Arido (Arido).²⁵⁴ Charges included soliciting Defence witnesses to give false testimony under Article 70(1)(a); presenting false or forged testimonial evidence of such witnesses under Article 70(1)(b); and corruptly influencing them under Article 70(1)(c).²⁵⁵

Conviction appeals

The Trial Judgment was delivered by a unanimous Trial Chamber VII on 19 October 2016, and the five accused were found guilty.²⁵⁶ Bemba, Kilolo and Mangenda were part of a common plan that involved illicitly interfering with, at least, 14 Defence witnesses. The interference was to ensure that they would provide evidence that would be favourable to Bemba in the main case against him.

Notably, six out of the 14 Defence witnesses relevant in this case provided false testimony

²⁵¹ *Ibid*, p 2.

²⁵² *Ibid*, p 1.

²⁵³ ‘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.

²⁵⁴ ICC-01/05-01/13-1989-Red, paras 8-12.

²⁵⁵ ICC-01/05-01/13-526-AnxB1-Red2, p 53-78. Bemba, Kilolo, Mangenda and Arido were also charged with an additional count concerning 14 documents, also related to the *Bemba* case, which present false or forged documentary evidence under Article 70(1)(b) of the Statute. For more information, see Women’s Initiatives for Gender Justice, ‘*The Compendium: An overview of Situations and cases before the International Criminal Court*’, December 2017, p 91-93.

²⁵⁶ ICC-01/05-01/13-1989-Red, p 455-457.

regarding the charges of rape against Bemba; specifically, their testimonies indicated that although rape occurred, it was not committed by MLC soldiers but by other rebel factions within the CAR.²⁵⁷ However, the Defence did not rely on any of the testimony of these 14 witnesses in its Closing Brief in the main *Bemba* case.²⁵⁸

Bemba, Kilolo, and Mangenda were found guilty, as co-perpetrators under Article 25(3)(a), for having jointly committed the offences of intentionally corruptly influencing 14 Defence witnesses, and presenting their false evidence in Court.²⁵⁹

Bemba and Kilolo were further found guilty of, respectively, soliciting and inducing, under Article 25(3)(b), the giving of false testimony by the 14 Defence witnesses;²⁶⁰ and Mangenda of aiding under Article 25(3)(c) the giving of false testimony by two Defence witnesses and abetting or otherwise assisting in the giving of false testimony by seven witnesses.²⁶¹ Babala was found guilty of aiding the corrupt influencing of two Defence witnesses under Article 25(3)(c);²⁶² and Arido was found guilty of corruptly influenc-

ing four Defence witnesses under Article 25(3)(a) of the Statute.²⁶³

All five accused appealed the Conviction decision.²⁶⁴ The Prosecutor filed a consolidated response to the appeal briefs that were filed.²⁶⁵

On 8 March 2018, the Appeals Chamber issued its unanimous decision on the convictions appeals, acquitting Bemba, Kilolo, and Mangenda of the charge of presenting false evidence under Article 70(1)(b) of the Statute, while confirming all the other convictions.²⁶⁶

Sentencing appeals

On 22 March 2017, the Trial Chamber unanimously delivered its Sentencing Judgment against the five accused.²⁶⁷ Bemba was sentenced to one year of imprisonment, to be served consecutively to his existing sentence from the main case and without deduction of the time previously spent in detention.²⁶⁸ Additionally, Bemba was fined €300,000 to be paid to the Court and ultimately transferred to the

257 For a more detailed analysis of the testimonies of witnesses D-2, D-3, D-4, D-6, D-23, D-29, see Women's Initiatives for Gender Justice, 'Gender Report Card 2014', p 197-199; Women's Initiatives for Gender Justice, 'Gender Report Card 2013', p 114-115.

258 ICC-01/05-01/08-3343, para 262.

259 ICC-01/05-01/13-1989-Red, p 455-456.

260 *Ibid*, p 455.

261 *Ibid*, p 456.

262 *Ibid*, p 456.

263 *Ibid*, p 457.

264 Between 31 October and 7 November 2016, the accused filed their Notices of Appeal and between 24 and 25 April 2017, their respective Documents in Support of the Appeal. ICC-01/05-01/13-1995; ICC-01/05-01/13-2145-Corr-Red; ICC-01/05-01/13-1999-tENG; ICC-01/05-01/13-2147-Corr-Red; ICC-01/05-01/13-2006; ICC-01/05-01/13-2143-Red; ICC-01/05-01/13-2012; ICC-01/05-01/13-2144-Red; ICC-01/05-01/13-2015; ICC-01/05-01/13-2148-Corr2-Red2.

265 ICC-01/05-01/13-2170-Corr-Red.

266 ICC-01/05-01/13-2275-Red, p 16. ICC-01/05-01/13-2275-Anx.

267 ICC-01/05-01/13-2123-Corr. ICC-01/05-01/13-2123-Anx.

268 Due to his acquittal in the main case, Bemba was granted interim release on 15 June 2018. He was provisionally released with specific conditions on the territory of the Kingdom of Belgium.

TFV.²⁶⁹ Kilolo was sentenced to two years and six months of imprisonment and a fine of €30,000 to also be paid to the Court and ultimately transferred to the TFV. 11 months were deducted from his sentence, reflecting the time already spent in detention; moreover, the execution of the sentence was conditionally suspended for three years.²⁷⁰ Mangenda was sentenced to two years of imprisonment, with a deduction of the time he had already spent in detention of 11 months and eight days. The Chamber conditionally suspended the execution of the prison sentence also for Mangenda for three years.²⁷¹ Arido was sentenced to 11 months and Babala to six months of imprisonment; however, by deducting previous time spent in custody, the Chamber considered their sentences as served.²⁷² On 21 June 2017, the Prosecution, Babala, Bemba and Arido appealed the Sentencing Judgment.²⁷³

The Appeals Chamber issued its unanimous decision on the appeals against the sentences on 8 March 2018. The Appeals Chamber rejected all grounds of appeal advanced by Arido, Babala, Bemba against their respective sentences and confirmed the sentences imposed on Arido and Babala.²⁷⁴ However, addressing the Prosecution's grounds, the Appeals Chamber found several

errors by the Trial Chamber in the assessment of the gravity of the offences committed by Bemba, Kilolo and Mangenda and in the suspension of the sentences for Kilolo and Mangenda.²⁷⁵

Among its findings, the Appeals Chamber noted that there is no explicit provision on conditional suspension of sentences and on whether a trial chamber can take such a decision and found that the Trial Chamber had erred in finding that it had the inherent power to suspend the sentences imposed on Kilolo and Mangenda.²⁷⁶

On 12 June 2018, Trial Chamber VII held a status conference regarding the matter of the continued detention of Bemba on account of his conviction in this case. This followed the acquittal of Bemba by the Appeals Chamber in the main case. On 15 June 2018, Bemba was provisionally released, under specific conditions, awaiting the final decision regarding his sentencing in the administration of justice case under Article 70. This final decision was rendered on 17 September 2018.²⁷⁷

Notably, the Prosecution submitted that the main case appeals proceedings against Bemba were affected by the corrupted and tainted evidence introduced by Bemba and the four others. It argued that the acquittal evidences the dam-

269 ICC-01/05-01/13-2123-Corr, paras 249-263 and p 99.

270 *Ibid*, paras 194-199 and p 99.

271 *Ibid*, paras 146-149 and p 98.

272 *Ibid*, paras 67-68, 97-98 and p 98.

273 ICC-01/05-01/13-2146; ICC-01/05-01/13-2168-Red; ICC-01/05-01/13-2139; ICC-01/05-01/13-2166-Red; ICC-01/05-01/13-2142; ICC-01/05-01/13-2167-Red; ICC-01/05-01/13-2141; ICC-01/05-01/13-2169-Red.

274 ICC-01/05-01/13-2276-Red, paras 357, 358.

275 *Ibid*, paras 359, 362.

276 *Ibid*, para 359.

277 ICC-01/05-01/13-2312.

age caused by the conduct of the five convicted persons and constitutes an aggravating circumstance in the decision on sentencing in the *Bemba et al* case. The Chamber disagreed, recalling that the two cases had been separated from the start. This meant, according to the Judges, that none of the Chamber's evidentiary findings in the *Bemba et al* case were affected by the Appeal Judgment in the main case. However, to evaluate to what extent the corrupted witnesses affected the merits of the main case, the Chamber would have had to access the main case record, which would go against the Chamber's consistent directions of separating the two cases. Nonetheless, the Chamber was of the view that there is no indication that the Appeals Chamber majority in the main case relied upon corrupted witnesses. Finding that the Prosecution did not establish any causal link between what the convicted persons in *Bemba et al* were convicted of and the main case acquittal, it could not consider this as an aggravating circumstance.²⁷⁸

The Prosecution submitted that the main case appeals proceedings against Bemba were affected by the corrupted and tainted evidence introduced by Bemba and the four others.

278 ICC-01/05-01/13-T-60-ENG, p 5 lines 2 to 21.

Côte d'Ivoire

Population: 25.1 million

♀ 49% | ♂ 51%

Violence broke out in Côte d'Ivoire after former President Laurent Gbagbo refused to accept the result of the 28 November 2010 elections and to transfer power to Alassane Ouattara (Ouattara), the internationally recognised President-elect.²⁸² What began as an allegedly targeted campaign of violence by Gbagbo forces against civilians perceived as Ouattara supporters, evolved by March 2011 into an armed conflict with armed forces from both sides committing crimes mostly along political, ethnic and/or religious lines.²⁸³ According to the report of the independent international commission of inquiry on Côte d'Ivoire of July 2011, among the main underlying causes of the post-election violence was the use of ethnicity as a political tool, the manipulation of the Ivorian youth by political groups, and unresolved rural land issues.²⁸⁴

In March 2011, pro-Ouattara forces launched an offensive to take over Côte d'Ivoire, while at the same time collectively punishing perceived Gbagbo supporters.²⁸⁵ During the six months of post-election violence, both sides reportedly committed serious crimes amounting to crimes against humanity and/or war crimes, including murder, rape and other forms of sexual violence, torture, persecution based on political, ethnic and national grounds, pillaging, destruction of property, attacks against the civilian population and peacekeepers, and attacks intentionally directed against buildings dedicated to religion, education and hospitals.²⁸⁶ Crimes were allegedly committed primarily in Abidjan and in the west of the country. By April 2011, it was estimated that at least 3,000 people had been killed and more than 700,000 displaced.²⁸⁷

Pursuant to the Ivorian Civil Code, married men have the right to choose the family residence or to administer and dispose of marital property.²⁷⁹ Succession law provides for the property of the deceased to be distributed in a certain line of priority in which a widow is last.²⁸⁰ Further, criminal law provides that the same crime of adultery is punishable for women on every occurrence, but for men only if committed in the marital home or if it constitutes "habitual adultery".²⁸¹ Such inequality in law perpetuates gender inequality in the home and in society.

282 See HRW, 'They Killed Them Like It Was Nothing', 5 October 2011, p 4.

283 *Ibid.*

284 A/HRC/17/48, p 2.

285 See HRW, 'They Killed Them Like It Was Nothing', 5 October 2011, p 4, 6.

286 A/HRC/17/48, paras 91-93; HRW, 'They Killed Them Like It Was Nothing', 5 October 2011, p 6-7.

287 A/HRC/17/48, paras 69, 105.

279 Ivorian civil code, Droit civil I des personnes et de la famille Loi (n° 2013-33), 25 janvier 2013.

280 Ivorian law on succession, Droit des successions en Côte d'Ivoire 1964 (n° 64-379).

281 Ivorian criminal code, Code Pénal de la Côte d'Ivoire 31 juillet 198.

According to the 2012 report on conflict-related sexual violence of the UN Secretary-General, sexual crimes against civilians, particularly rape and gang rape, were committed during the post-election violence by all sides to the conflict.²⁸⁸ The acts of sexual violence were reportedly politically and ethnically motivated and inflicted publicly or in front of relatives by members of armed groups or militias with the aim of humiliating male and female civilians perceived to be supporters of the opposing side.²⁸⁹ The report further outlined that, between January and September 2011, a total of 478 cases of rape were documented across Côte d'Ivoire.²⁹⁰

The report of the independent international commission of inquiry on Côte d'Ivoire described four stages in which the crisis can be said to have developed, reflecting the sequence of events. In late-2010, youth demonstrations protested against the imposed curfew and were met with violent response from the *Forces de défense et de sécurité* (FDS) under Laurent Gbagbo's command at the time.²⁹¹ From 16 December 2010 until the end of January 2011, security forces, assisted by the military, cracked down on pro-Ouattara marches. The mounting tension and use of weapons of war marked a turning point

in the conflict and gave rise to the forming of self-defence groups to protect the population. During the march on 16 December in Abobo, at least 18 demonstrators and 14 FDS members were reportedly killed.²⁹² Subsequently, from 23 February 2011, the FDS attacked the *Forces armées de Côte d'Ivoire* (FAFN – Ouattara's army) in the west of the country inciting a large counteroffensive and armed conflict which lasted until Laurent Gbagbo's arrest on 11 April. Ouattara merged the FDS and the FAFN into the *Forces Républicaines de Côte d'Ivoire* (FRCI). They started to gain control of towns and finally Abidjan,²⁹³ and security and calm was gradually established in Abidjan followed by the rest of Côte d'Ivoire, with the exception of isolated fighting.²⁹⁴

On 30 March 2011, the UN Security Council passed Resolution 1975, calling on the UN Operation in Côte d'Ivoire (UNOCI) to "use all necessary means to carry out its mandate to protect civilians under imminent threat of physical violence [...] including to prevent the use of heavy weapons against the civilian population".²⁹⁵ Subsequently, during the week of 4 April 2011, UNOCI and the French *Force Licorne* launched a series of airstrikes targeting Laurent Gbagbo's military sites in Abidjan and heavy weaponry at

288 A/66/657-S/2012/33, para 23.

289 *Ibid*, para 24.

290 *Ibid*, para 26.

291 A/HRC/17/48, paras 40, 45.

292 *Ibid*, paras 41, 46.

293 *Ibid*, paras 11, 20-21, 42, 58, 63.

294 *Ibid*, para 43. The Commission of inquiry remained in Côte d'Ivoire until 28 May 2011.

295 SC/10215, para 6.

Laurent Gbagbo's residence.²⁹⁶ On 11 April 2011, Ouattara forces stormed Laurent Gbagbo's residence and arrested him, his wife Simone Gbagbo, and other allies.²⁹⁷ Despite continued activity by certain pro-Gbagbo armed groups, by mid-May, the post-election violence had ceased.²⁹⁸

At the ICC

Côte d'Ivoire, which was not a State Party to the Rome Statute at the time, had been under preliminary examination by the ICC since the receipt of a declaration from the Ivorian Government under then President Gbagbo on 1 October 2003, accepting the Court's jurisdiction in accordance with Article 12(3) of the Statute.²⁹⁹ The declaration allowed the Court to exercise its jurisdiction over crimes allegedly committed since 19 September 2002.³⁰⁰ On 14 December 2010, Ouattara, acting as the newly elected President of Côte d'Ivoire, confirmed the continued validity of the previous declaration and expressed his commitment to fully cooperate with the Court, particularly regarding crimes committed since March 2004.³⁰¹ On 15 February 2013, Côte d'Ivoire ratified the Rome Statute,

becoming the 122nd State Party to the ICC and the 34th State Party from the Africa region.

On 23 June 2011, the ICC Prosecutor requested authorisation to initiate investigations *proprio motu* into the Situation in Côte d'Ivoire,³⁰² which was granted by Pre-Trial Chamber III on 3 October 2011.³⁰³ The Situation in Côte d'Ivoire marked the first investigation opened by the ICC following an Article 12(3) declaration by a non-State Party to the Rome Statute accepting the Court's jurisdiction.

The investigation focused on: crimes against humanity including murder, rape, other forms of sexual violence, imprisonment and other severe deprivation of physical liberty, and enforced disappearance of persons;³⁰⁴ and war crimes including murder, rape, attacking civilians, attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission, and attacks against buildings dedicated to religion.³⁰⁵

To date, the Pre-Trial Chamber has issued arrest warrants for three individuals in the Côte d'Ivoire Situation.³⁰⁶ Two of these Warrants have been executed, resulting in the arrest of Laurent Gbagbo and Charles Blé Goudé (Blé Goudé), allegedly involved in the commission of crimes during the

296 Security Council Report, 'Update Report Côte d'Ivoire', 20 April 2011, No. 3, p 1; See HRW, 'They Killed Them Like It Was Nothing', 5 October 2011, p 6-7, 25.

297 Security Council Report, 'Update Report Côte d'Ivoire', 20 April 2011, No. 3, p 1.

298 See HRW, 'They Killed Them Like It Was Nothing', 5 October 2011, p 7.

299 The declaration was signed 18 April 2003. Republic of Côte d'Ivoire, 'Declaration Accepting the Jurisdiction of the International Criminal Court', 18 April 2003.

300 ICC-02/11-3, para 15; Republic of Côte d'Ivoire, 'Declaration Accepting the Jurisdiction of the International Criminal Court', 18 April 2003. The declaration specified that it would remain valid for an unspecified period of time.

301 President Alassane Ouattara, 'Confirmation de la Déclaration de reconnaissance', 14 December 2010.

302 ICC-02/11-3, paras 1, 181.

303 ICC-02/11-3, para 212.

304 ICC-02/11-3, para 117.

305 *Ibid*, paras 134, 162-164.

306 ICC-02/11-01/11-1; ICC-02/11-02/11-1; ICC-02/11-01/12-1.

post-election violence.³⁰⁷ Laurent Gbagbo and Blé Goudé are currently on trial before the ICC. The third Arrest Warrant, for the former First Lady of Côte d'Ivoire, Simone Gbagbo, remains outstanding.³⁰⁸ In 2015, she was sentenced to 20 years of imprisonment by an Ivorian court for her involvement in the 2010-uprising, however, she was recently granted amnesty by President Ouattara.³⁰⁹

At the time of writing, no charges have been brought against President Ouattara, his allies or supporters. The Court has confirmed in formal

conversations with NGOs the existence of a Côte d'Ivoire II investigation, which potentially looks into crimes committed by Ouattara forces. This investigation has not been made public on the ICC website.

307 ICC-02/11-02/11-186, paras 58-60.
308 For more information, see Women's Initiatives for Gender Justice, 'The Compendium: An overview of Situations and cases before the International Criminal Court', December 2017, p 124-125.
309 BBC News, 'Ivory Coast ex-first lady Simone Gbagbo granted amnesty', 7 August 2018.

Charges in Cases of the Côte d'Ivoire Situation

Charge		Laurent Gbagbo	Blé Goudé	Simone Gbagbo
Rape	WC			
	CAH	• ⊕ ●	• ⊕ ●	•
Other Forms of Sexual Violence	WC			
	CAH	•	•	•
Persecution	WC			
	CAH	• ⊕ ●	• ⊕ ●	•
Other Inhumane Acts	WC			
	CAH	• ⊕ ●	• ⊕ ●	•
Murder	WC			
	CAH	• ⊕ ●	• ⊕ ●	•

- Arrest warrant/Summons to appear

A Acquitted
- ⊕ Confirmation of charges

C Convicted
- Trial

■ SGBC charges

The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé

The joint trial against Laurent Gbagbo and Blé Goudé, the first ICC trial in relation to the Côte d'Ivoire Situation, is currently ongoing. This is a high-profile case against Laurent Gbagbo, the first former Head of State to be transferred into the Court's custody, and Blé Goudé, a prominent leader of the pro-Gbagbo youth, appointed Minister for Youth, Vocational Training and Employment, and alleged member of Laurent Gbagbo's inner circle.³¹⁰ According to the Prosecution, Laurent Gbagbo, refusing to accept the electoral result of November 2010 and to transfer power to Ouattara, allegedly conceived a plan with his inner circle to keep him in power "by all means", including lethal force.³¹¹

Laurent Gbagbo and Blé Goudé are charged with the crimes against humanity of murder, rape, other inhumane acts and persecution allegedly committed during the course of four incidents: a pro-Ouattara march on the *Radiodiffusion Télévision ivoirienne* (RTI) headquarters from 16 to 19 December 2010; a women's demonstration in Abobo on 3 March 2011; the shelling of Abobo market on 17 March 2011; and the attack in Yopougon on 12 April 2011.³¹² Blé Goudé is also charged with murder, other inhumane acts, and

persecution as crimes against humanity allegedly committed during a fifth incident: an attack by the pro-Gbagbo youth on Yopougon from 25 to 28 February 2011.³¹³ Sexual and gender-based crimes are charged in the context of the first and fourth events.

According to the Prosecution, the two accused contributed to the commission of the crimes by conceiving and implementing the common plan, setting up a structure to execute the plan, and inciting forces loyal to Laurent Gbagbo to commit the crimes. Laurent Gbagbo allegedly also armed pro-Gbagbo forces and coordinated the execution of the plan.³¹⁴

The trial commenced before Trial Chamber I on 28 January 2016. The Prosecution cross-examined its last witness on 19 January 2018, almost two years since the start of the Prosecution's presentation of evidence.³¹⁵ At the time of writing, it is unclear if and when the Defence will start presenting its case, and it seems likely that the Chamber will rule on "no case to answer" motions by the Defence teams contending the Prosecution's evidence as being unspecific, potentially leading to charges being either vacated or withdrawn by the Prosecution.

310 ICC-02/11-02/11-186, paras 58-60.

311 ICC-02/11-01/11-592-Anx1, para 39.

312 ICC-02/11-01/11-656-Red, paras 271-274, 278 and p 131; ICC-02/11-02/11-186, paras 187-189, 194 and p 90; ICC-02/11-01/15-1, para 53.

313 ICC-02/11-02/11-186, paras 187(b), 189(b), 194; ICC-02/11-01/15-1, para 54.

314 ICC-02/11-01/11-656-Red, para 276; ICC-02/11-02/11-186, para 192. For more information, see Women's Initiatives for Gender Justice, 'The Compendium: An overview of Situations and cases before the International Criminal Court', December 2017, p 121-124.

315 The Prosecution's presentation of evidence started on 3 February 2016.

Conclusion of the Prosecution's presentation of evidence

Overall, 82 Prosecution witnesses have testified in this case, most of whom were officials of the Gbagbo Government, police or military at the time of the crimes.³¹⁶ In-court protective measures were used, mainly due to security and potential self-incrimination concerns, including the use of pseudonyms, closed sessions, voice distortion, and the appointment of legal advisers for witnesses. Nonetheless, there have been several issues regarding witness protection in this case as well as the unintended disclosure in open court of the identities of other witnesses.³¹⁷

Of the 82 witnesses, approximately ten testified on sexual violence.³¹⁸ All witnesses testifying on their own account of sexual violence, or that of others, were heard in private session.³¹⁹ The Chamber found that hearing testimonies in private session was appropriate as, “due to the traumatic events they suffered, they are vulnerable and may indeed be exposed to retraumatisation if they were to testify publicly”.³²⁰

After the Prosecution completed presenting its case, the Chamber issued an order on 9 February 2018 on the further conduct of proceedings, in which it, as suggested by the Laurent Gbagbo Defence team,³²¹ invited the Prosecutor to file a trial brief “illustrating her case and detailing the evidence in support of the charges”, and, in particular, indicating how the evidence “supports each of the elements of the different crimes and forms of responsibility charged”.³²²

The Prosecution complied with this request by submitting a “mid-trial brief”.³²³ It emphasised that this brief was not a closing brief submitted at the end of the case and cannot be considered as such. Instead, it is meant to be an “auxiliary tool” for the benefit of the Chamber, parties and participants.³²⁴ Seemingly in contradiction with the Chamber’s instructions, the Prosecution further stated that “[i]n a case of this magnitude, and consistent with the present stage of the trial, it is not possible to recite in this Mid-Trial Brief all the relevant evidence before the Chamber. The Prosecution has therefore assessed those matters it considers of

316 See ICC-02/11-01/15-1157-Red, para 138.

317 See eg ICC-02/11-01/15-T-18-Red2-ENG, p 7 lines 3-25 to p 8 lines 1-15. See further ICC-02/11-01/15-T-149-Red-ENG, p 24 lines 16-22.

318 There is no clear public information as of yet as to the exact number of witnesses testifying on sexual violence, due to the lack of a publicly available consolidated document, testimony held in private session, and not available transcripts. The approximate number ten was reached by going through available transcripts, decisions and submissions with regards to testimonies on witnesses’ own account of sexual violence, related accounts, or researchers confirming the commission thereof in a more general manner.

319 See eg ICC-02/11-01/15-1060, paras 11, 14, 19; ICC-02/11-01/15-T-103-Red-ENG, p 80 lines 12-14.

320 ICC-02/11-01/15-1060, para 11; ICC-02/11-01/15-T-103-Red-ENG, p 80 lines 12-14. According to the Chamber, decisions as to possible reclassification of parts of the testimony as public were to “be deferred to a later stage in order to prevent that the purpose of the measures be defeated”. ICC-02/11-01/15-1060, paras 13, 21.

321 ICC-02/11-01/15-1041-Red, para 46.

322 ICC-02/11-01/15-1124, para 10 and p 8.

323 The mid-trial brief is confidential, however, the filing outlining its structure and purpose is publicly available. ICC-02/11-01/15-1136, paras 2, 4-5.

324 ICC-02/11-01/15-1136, para 10. Additionally, the Prosecution submitted that the mid-trial brief cannot itself be considered a response to a future, hypothetical “no case to answer” motion that may be filed by either or both Defence teams. Should such (a) motion(s) be made, the Prosecution stressed that it must be afforded a proper response to the specific challenges raised to the sufficiency of the evidence. ICC-02/11-01/15-1136, para 11.

importance and endeavoured to support them with sources deemed to be of pertinence.”³²⁵

Upon review of the brief, the Chamber found that the overall narrative was essentially the same as that in the Pre-Trial Brief, containing several “sweeping allegations” based on large collections of evidence and included repetitions, cross-references and circularity.³²⁶ This view was shared by the Defence teams,³²⁷ who also found the mid-trial brief to selectively, partially and sometimes not reference any evidence submitted to the Chamber.³²⁸ As a consequence, the Defence argued that it is deprived of obtaining a complete and detailed overview of the evidence submitted by the Prosecution and how it connects to its narrative.³²⁹ At the request of the Gbagbo Defence team,³³⁰ and noting two incorrect citations in the brief,³³¹ on 7 June 2018, the Single Judge ordered the Prosecution to submit a final corrected version of the brief by 15 June 2018.³³²

The Prosecution’s presentation of evidence officially ended on 1 June 2018, when the Chamber, by majority, recognised as submitted 2,740 items of evidence which the Prosecution had

not included in its List of Evidence of 30 June 2015.³³³ This decision was in line with the Chamber’s decision of 28 January 2016 in which it had decided to postpone ruling on the admissibility or relevance of evidence submitted by the parties “until the end of the trial”.³³⁴ However, the Chamber noted that it did not consider that a ruling on relevance or admissibility was warranted for these materials, as they would be considered by the Chamber as part of its eventual determination on the facts of the case.³³⁵

In his dissenting opinion to this decision, Judge Henderson found that, despite this approach having been endorsed by the Appeals Chamber, merely recognising these items as submitted “represents an extravagant failure on the Chamber’s part, to make any meaningful decision and is, in the circumstances, lacking both efficiency and fairness”.³³⁶ The dissenting Judge focused on practical implications of the Chamber’s “permissive and essentially unfiltered approach”, highlighting two “very real challenges that arise from allowing the prosecutor to submit in this undisciplined manner lacking in rigour, whatever

325 ICC-02/11-01/15-1136, para 7.

326 ICC-02/11-01/15-1174, para 6 and fn 11.

327 ICC-02/11-01/15-1157-Red, paras 110, 117; ICC-02/11-01/15-1158-Corr-Red, para 11.

328 ICC-02/11-01/15-1157-Red, para 106; ICC-02/11-01/15-1158-Corr-Red, paras 13-14.

329 ICC-02/11-01/15-1157-Red, paras 107, 109, 122; ICC-02/11-01/15-1158-Corr-Red, paras 15-16. The Blé Goudé Defence team was further concerned that “it would be unfair for the Defence to respond to the present evidence while being later potentially confronted with alleged evidence that has not been raised in the Trial Brief”. ICC-02/11-01/15-1158-Corr-Red, para 16.

330 ICC-02/11-01/15-1166.

331 ICC-02/11-01/15-1177, para 7.

332 *Ibid*, para 8 and p 7.

333 ICC-02/11-01/15-1172, p 19; ICC-02/11-01/15-1172-AnxA.

334 ICC-02/11-01/15-405, paras 11-15 and p 10. ICC-02/11-01/15-405-Anx, para 1.

335 ICC-02/11-01/15-1172, paras 61-63.

336 ICC-02/11-01/15-1172-Anx, para 1.

the items of evidence that they wish, without applying any filter in terms of quality and/or relevance”.³³⁷ First, he argued that the uncertainty created by not ruling on the admissibility of the large amount of evidence places “an unfair and impermissible burden on the defence requiring them to justify that the evidence is not relevant”, especially as the Prosecutor “has not demonstrated a serious effort to explain the relevance of all the submitted items”.³³⁸ Second, he noted that, while “wav[ing] the evidence through with the promise of later considering [it]” is appealing as it gives the “impression of expeditiousness”, it is not fair and “effectively leaves the parties entirely in the dark until the end of the trial”.³³⁹

Uncertainty about the next steps

In its order on the further conduct of proceedings of 9 February 2018, the Chamber noted that “[i]f the Prosecutor intends to withdraw any or all of the charges [...], she shall petition the Chamber as soon as possible.”³⁴⁰ It further stated that, upon receipts of the mid-trial brief, the two Defence teams shall indicate whether or not they wish to make any submission of a no case to answer motion or, whether they intend to present any evidence”.³⁴¹

The Chamber raised concern regarding a submission made by the Laurent Gbagbo Defence team on 2 February 2018,³⁴² indicating that (1) it was not yet in a position to properly assess the Prosecution’s case or to examine the Prosecution’s evidence, and (2) it would need at least six months after the completion of this assessment/examination to investigate before being able to provide a list of witnesses.³⁴³ The Chamber noted that the Laurent Gbagbo Defence team “seems to rely on the assumption not only that all the Defence work on the case is yet to be done, notwithstanding the fact that these proceedings have been ongoing for several years (and that Lead Counsel for Mr Gbagbo has been in place since the very beginning), but also that the clock for this work has yet to start running”.³⁴⁴ The Chamber found this perspective to be “grounded on a distorted conception of the relevant procedural framework” referencing to the irreconcilability with the “principle of the expeditiousness of the proceedings [and] the overall notion of fairness of the trial”.³⁴⁵

On 23 April 2018, the two Defence teams submitted their observations on the continuation of the trial proceedings, both indicating that the Prosecution had not presented enough evi-

337 *Ibid*, para 3.

338 *Ibid*, para 4.

339 *Ibid*, para 5.

340 ICC-02/11-01/15-1124, para 13.

341 *Ibid*, para 14.

342 See ICC-02/11-01/15-1121-Red.

343 ICC-02/11-01/15-1124, para 9.

344 *Ibid*.

345 *Ibid*.

dence to warrant a conviction.³⁴⁶ The teams also expressed their intention of bringing motions challenging the adequacy of the Prosecution's evidence and seeking a full or partial acquittal of the accused.³⁴⁷

On 4 June 2018, the Chamber issued a second order on the further conduct of the proceedings.³⁴⁸ In this order, the Chamber highlighted that the parties cannot compel it to entertain "no case to answer" motions and that the Chamber may decide to conduct or decline to conduct such a procedure in the exercise of its discretion.³⁴⁹ The Chamber ordered the two Defence teams to submit by 20 July 2018 concise and focused submissions on the specific factual issues for which, in their view, the evidence presented is insufficient to sustain a conviction and in respect of which, accordingly, a full or partial judgment of acquittal would be warranted.³⁵⁰ The Prosecution and the Legal Representative of the Victims were to file their responses a month later.³⁵¹ The Chamber scheduled a public hearing on 1 October 2018 to hear any further submissions and seek answers to specific questions in order to determine whether the evidence presented "suffices to warrant the continuation of the trial

proceedings" or whether the Chamber should immediately make a final assessment regarding all or parts of the charges".³⁵²

The Chamber noted that "[i]f the Prosecutor intends to withdraw any or all of the charges [...], she shall petition the Chamber as soon as possible."

346 ICC-02/11-01/15-1157-Red; ICC-02/11-01/15-1158-Corr-Red.

347 ICC-02/11-01/15-1157-Red, paras 24-25, 27-28; ICC-02/11-01/15-1158-Corr-Red, paras 2-3.

348 ICC-02/11-01/15-1174.

349 *Ibid*, para 8. The Chamber referred to the Appeals Chamber's decision in the *Ntaganda* case in relation to such motions. ICC-01/04-02/06-2026, para 45.

350 ICC-02/11-01/15-1174, paras 9-10 and p 7.

351 *Ibid*, p 7.

352 ICC-02/11-01/15-1174, paras 12-13 and p 7. The public hearing was originally scheduled for 10 September 2018, but was postponed to 1 October 2018. ICC-02/11-01/15-1189.

Population: 84.7 million

♀ 50% | ♂ 50%

*Culturally ingrained gender norms consider masculinity a synonym for “dominance” or “control” and men often are seen as the breadwinners and heads of their families. The perilous situation of the conflict in the DRC left many men without paid employment, as a consequence of which many women were forced into transactional sex, in order to secure food or temporary shelter. In addition to the unequal gender relations prior to the conflict, this survival mode challenges men’s sense of masculinity, which has often been reasserted through violence in the home, leading to significantly increased rates of domestic violence post-conflict.*³⁵³

353 Partnership Africa Canada, ‘Why Gender Still Matters: Sexual Violence and the Need to Confront Militarized Masculinity – A Case Study of The Conflict In The Democratic Republic Of The Congo’, 16 December 2004.

Democratic Republic of the Congo

Protracted armed violence has tarnished the short history of the DRC. Over the last two decades alone, the DRC has seen two civil wars, the 1996–1997 First Congo War and the 1998–2003 Second Congo War, and continued violence from 2003 to this day.

Political and ethnic tensions propelled the widespread commission of grave international crimes particularly during the Second Congo War in the ethnically diverse provinces of Ituri, North Kivu and South Kivu. In a region rich with mineral resources, government forces and militia groups, often supported by other regional powers,³⁵⁴ violently clashed in the attempt to seize control over the region, with the civilians bearing the brunt thereof.³⁵⁵ Economic and political inequalities on the basis of ethnicity further fuelled the violence.³⁵⁶ Military alliances formed along ethnic lines, and villages home to a different ethnicity frequently became targets of attacks, as is epitomised by the 2003 attack on Bogoro, a Hema village, by armed groups of Ngiti and Lendu ethnicity.

It is estimated that 3.9 million people died or were killed from the effects of the Second Congo War between 1998 and 2004.³⁵⁷ Around 2.7 million were internally displaced, including around 400,000 children.³⁵⁸ Indeed, “almost every single individual has an experience to narrate of suffering and loss”.³⁵⁹

354 See International Crisis Group, ‘Congo at War’, 17 November 1998; International Crisis Group, ‘How Kabila Lost His Way’, 21 May 1999; International Crisis Group, ‘Africa’s Seven Nation War’, 21 May 1999.

355 See HRW, ‘Ituri: “Covered in Blood” – Ethnically Targeted Violence in Northeastern DRC’, July 2003, p 1–2; International Crisis Group, ‘The Kivus: The Forgotten Crucible of the Congo Conflict’, 24 January 2003. See further African Centre for the Constructive Resolution of Disputes, ‘The peace process in the DRC: A Transformation quagmire’, 6 December 2012; OHCHR, ‘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.

356 See eg UN Economic Commission for Africa, ‘Conflicts in the Democratic Republic of Congo: Causes, impact and implications for the Great lakes region’, September 2015, p 22, 87.

357 International Rescue Committee, ‘Mortality in the Democratic Republic of the Congo: An Ongoing Crisis’, 2007, p 1.

358 Watch List on Children in Armed Conflict, ‘The Impact of Armed Conflict on Children in the Democratic Republic of the Congo’, June 2003, p 11.

359 OHCHR, ‘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, p 1.

Sexual violence featured prominently before, during and after the two Congo Wars. Countless acts of torture, rape, as well as the widespread recruitment of children were documented. Sexual violence was reportedly committed “during the fighting, during the withdrawal of combatants, after the fighting, in areas where troops were stationed, in occupied areas, during patrols, during reprisals against the civilian population and during raids conducted by isolated and sometimes unidentified armed groups.”³⁶⁰ This predominance of sexual violence is reportedly explained by the high prevalence of impunity in the country, the lack of discipline within troops, ethnic hatred between communities, the “normalisation of violence”, mystical beliefs, psychological coercion exercised over child soldiers, and the active or implicit encouragement of institutional and rebel military hierarchies, as well as the unequal place of women in Congolese society.³⁶¹

While sexual violence remains chronically unreported for fear of stigmatisation, and representative figures are difficult to obtain, a study published in the *American Journal of Public Health* estimated in 2011 that between 1.69 and 1.80 million women in the DRC have been

raped during their lifetimes, and that an average of 1,150 Congolese women were raped every day in 2010, amounting to 48 women raped every hour and four every five minutes.³⁶² The UN Joint Human Rights Office in the DRC alone documented over 3,600 cases of conflict-related sexual violence committed by both armed groups and State forces between 2010 and 2013.³⁶³ And the situation remains troublesome: In 2017, the UN Population Fund (UNFPA) reported twice as many cases of sexual violence in conflict-affected regions as in 2016.³⁶⁴ In addition, the progress that had been achieved in addressing sexual violence as a tactic of war has recently been “jeopardised by an unstable political environment, unprecedented levels of displacement, continued armed clashes and weak state structures.”³⁶⁵

At the ICC

On 3 March 2004, the DRC Government referred the Situation related to crimes allegedly committed on its territory since 1 July 2002, the date of the entry into force of the Rome Statute, to the ICC.³⁶⁶ The decision to open an investigation was made public by the ICC Prosecutor on 23 June 2004, who made reference to reports by States,

360 OHCHR, ‘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, paras 529-530, 532. With a view to the recruitment of child soldiers, see generally Amnesty International, ‘Children at War’, 2003, p 4-5.

361 OHCHR, ‘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, paras 532-533.

362 Amber Peterman, Tia Palermo, and Caryn Bredenkamp, ‘Estimates and Determinants of Sexual Violence Against Women in the Democratic Republic of Congo’, *American Journal of Public Health*, Vol. 101, No. 6, June 2011, p 1064-1065.

363 UN Joint Human Rights Office, ‘Progress and Obstacles in the Fight Against Impunity for Sexual Violence in the Democratic Republic of the Congo’, April 2014, para 19.

364 S/2018/250, para 37.

365 *Ibid*, para 36.

366 ICC-01/04-01/06-39-AnxB1-tENG; ‘Prosecutor receives referral of the situation in the Democratic Republic of Congo’, ICC-OTP-20040419-50, 19 April 2004.

international organisations, and NGOs alleging “a pattern of rape, torture, forced displacement and the illegal use of child soldiers”.³⁶⁷ The investigation into this Situation focused initially on the Ituri province and later on the North Kivu and South Kivu provinces.

To date, six arrest warrants have been publicly issued in the DRC Situation.³⁶⁸ Five of these Warrants have been executed, resulting in the arrest or surrender of Thomas Lubanga Dyilo (Lubanga), Germain Katanga (Katanga), Mathieu Ngudjolo Chui (Ngudjolo),³⁶⁹ Bosco Ntaganda (Ntaganda) and Callixte Mbarushimana (Mbarushimana).³⁷⁰ The Arrest Warrant for Sylvestre Mudacumura (Mudacumura) remains outstanding.³⁷¹ At the time of the alleged crimes, all indictees were high ranking members of armed groups active in eastern DRC. No ICC arrest warrants have been issued against DRC State military forces.

Despite the widely acknowledged and reported large-scale commission of conflict-related sexual violence in the DRC at the time,³⁷² and although such charges have been brought against four of the five indictees, there have not been any successful convictions of sexual and gender-based crimes related to the DRC Situation to date. A

wide panoply of reports and documentation of sexual violence in areas relevant to the *Lubanga* case notwithstanding, no sexual and gender-based crimes charges were brought in that case. Although the subsequent cases against Katanga and Ngudjolo included sexual and gender-based crimes charges, both accused were ultimately acquitted of these charges. Charges of sexual and gender-based crimes were included in the Arrest Warrant for Mbarushimana, but none were confirmed. With Mudacumura remaining at large, Ntaganda is currently the only accused on trial to potentially be convicted of sexual and gender-based crimes in this Situation.³⁷³

The Kasai provinces seem to have become the current focus of ICC investigations in the DRC. On 31 March 2017, the Prosecutor voiced concern about numerous reports of serious acts of violence in these provinces, and reminded all parties involved that the OTP continues to carefully monitor the situation throughout the DRC.³⁷⁴

367 ‘The Office of the Prosecutor of the International Criminal Court opens its first investigation’, ICC-OTP-20040623-59, 23 June 2004.

368 ICC-01/04-01/06-2-tEN; ICC-01/04-01/07-1-tENG; ICC-01/04-01/07-260-tENG; ICC-01/04-01/12-1-Red; ICC01/0402/06-2-Anx-tENG; ICC01/04-01/10-2-tENG.

369 For further information, see Women’s Initiatives for Gender Justice, ‘[The Compendium: An overview of Situations and cases before the International Criminal Court](#)’, p 65-69.

370 *Ibid*, p 74-76.

371 *Ibid*, p 76-77.

372 See eg S/2004/573, 16 July 2004, para 80; Amnesty International, ‘Democratic Republic of Congo – Mass Rape: Time for Remedies’, 25 October 2004. See further Women’s Initiatives for Gender Justice, ‘[Letter to the Prosecutor](#)’, August 2006.

373 For detailed information on these cases, see Women’s Initiatives for Gender Justice, ‘[The Compendium: An overview of Situations and cases before the International Criminal Court](#)’, December 2017, p 47-77.

374 ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the situation in the Kasai provinces, Democratic Republic of the Congo’, 31 March 2017.

Charges in Cases of the DRC Situation

Charge		Lubanga	Katanga ³⁷⁵	Ngudjolo ³⁷⁶	Ntaganda ³⁷⁷	Mbarushimana ³⁷⁸	Mudacumura
Rape	WC		• ⊙ ● A	• ⊙ ● A	• ⊙ ●	•	•
	CAH		• ⊙ ● A	• ⊙ ● A	• ⊙ ●	•	
Sexual slavery	WC		• ⊙ ● A	• ⊙ ● A	• ⊙ ●		
	CAH		• ⊙ ● A	• ⊙ ● A	• ⊙ ●		
Persecution	WC						
	CAH				• ⊙ ●	•	
Other Inhumane Acts	WC						
	CAH		•	•		•	
Torture	WC					•	•
	CAH					•	
Outrages Upon Personal Dignity	WC						•
	CAH						
Mutilation	WC						•
	CAH						
Inhumane Treatment	WC		•	•		•	
	CAH						
Cruel Treatment	WC						•
	CAH						
Wilful Killing	WC		• ⊙	• ⊙ ● A			
	CAH						
Murder	WC		C		• ⊙ ●	•	•
	CAH		• ⊙ ● C	• ⊙ ● A	• ⊙ ●	•	
Intentionally Directing an Attack Against the Civilian Population	WC		• ⊙ ● C	• ⊙ ● A	• ⊙ ●	•	•
	CAH						

Charge		Lubanga	Katanga ³⁷⁵	Ngudjolo ³⁷⁶	Ntaganda ³⁷⁷	Mbarushimana ³⁷⁸	Mudacumura
Destruction of Property	WC		• ⊙ ● C	• ⊙ ● A	• ⊙ ●	•	•
	CAH						
Pillaging	WC		• ⊙ ● C	• ⊙ ● A	• ⊙ ●		•
	CAH						
Conscripting Children Under the Age of 15 Years Into Armed Forces or Groups	WC	• ⊙ ● C			• ⊙ ●		
	CAH						
Enlisting Children under the Age of 15 Years Into Armed Forces or Groups	WC	• ⊙ ● C			• ⊙ ●		
	CAH						
Using Children Under the Age of 15 Years to Participate Actively in Hostilities	WC	• ⊙ ● C	• ⊙ ● A	• ⊙ ● A	• ⊙ ●		
	CAH						

• Arrest warrant/Summons to appear
 A Acquitted
 ⊙ Confirmation of charges
 C Convicted
 ● Trial
 ■ SGBC charges

375 The charge of outrages upon personal dignity as a war crime was brought in the Document Containing the Charges, but not confirmed. ICC-01/04-01/07-649-Anx1A, p 33. The charge of wilful killing was changed to murder at the Trial Judgment stage after the nature of the conflict was recharacterised to non-international. ICC-01/04-01/07-3436-tENG, para 229 and p 658.

376 The charge of outrages upon personal dignity as a war crime was brought in the Document Containing the Charges, but not confirmed. ICC-01/04-01/07-649-Anx1A, p 33.

377 The Document Containing the Charges included important new charges of sexual and gender-based crimes: rape of child soldiers and sexual slavery of child soldiers as war crimes.

378 The charges of mutilation and pillaging as war crimes were brought in the Document Containing the Charges, rather than at the Arrest Warrant stage. See ICC-01/04-01/10-2-tENG, p 6-7; ICC-01/04-01/10-311-AnxA-Red, p 42-47.

The Prosecutor v. Thomas Lubanga Dyilo

On 14 March 2012, Trial Chamber I unanimously convicted Lubanga of the war crimes of enlisting and conscripting children and using them to actively participate in hostilities.³⁷⁹ Despite numerous and credible accounts thereof, the Prosecution did not bring charges regarding sexual and gender-based violence, and sexual violence was not appraised within any other crimes.³⁸⁰

On 7 August 2012, Trial Chamber I issued the ICC's first order for reparations. Notably, although Lubanga was not convicted of any sexual and gender-based crimes, the Chamber considered that "[t]he Court should formulate and implement reparations awards that are appropriate for the victims of sexual and gender-based violence".³⁸¹ Indeed, it noted that "[t]he Court must reflect the fact that the consequences of these crimes are complicated and they operate on a number of levels; their impact can extend over a long period of time; they affect women and girls, men and boys, together with their families and communities; and they require a specialist, integrated and multidisciplinary approach."³⁸²

On 3 March 2015, the Appeals Chamber overturned this and other holdings and issued an

amended order for reparations. Fundamentally, the Appeals Chamber considered that only persons who suffered harm from the crimes of which Lubanga was convicted are victims and thus have a right to reparations.³⁸³ Therefore, the Appeals Chamber found that Lubanga was not liable for reparations to survivors of sexual and gender-based crimes.³⁸⁴ The issue, according to the Appeals Chamber, was whether sexual and gender-based violence can be defined as harm resulting from the crimes for which Lubanga was convicted, and considered that in the circumstances of the case it could not.³⁸⁵ In the Sentencing decision of 2012 the Trial Chamber had decided that the link between Lubanga and sexual violence, in the context of the charges, had not been established beyond a reasonable doubt.³⁸⁶ In the Reparations Order, the Trial Chamber was therefore required to explain how it nonetheless considered that Lubanga was liable for reparations in respect of the harm of sexual and gender-based violence. However, it failed to do so and therefore the Appeals Chamber considered that Lubanga was not liable for reparations in respect of this harm.³⁸⁷ In this regard, it may be noted that sexual harm associated with the conviction for the conscription, enlistment, and

379 For more information, see Women's Initiatives for Gender Justice, *'The Compendium: An overview of Situations and cases before the International Criminal Court'*, December 2017, p 47-57.

380 Women's Initiatives for Gender Justice, *'Letter to the Prosecutor'*, August 2006, p 2, 4-6; Women's Initiatives for Gender Justice, *'ICC Judges uphold conviction of Lubanga'*, 1 December 2014; Women's Initiatives for Gender Justice, *'ICC issues first appeal judgment on reparations'*, 3 March 2015.

381 ICC-01/04-01/06-2904, para 207.

382 *Ibid.*

383 ICC-01/04-01/06-3129, para 186.

384 *Ibid.*, para 198.

385 ICC-01/04-01/06-3129, para 196.

386 ICC-01/04-01/06-2901, para 75.

387 ICC-01/04-01/06-3129, paras 197-198.

use of children under 15 years in hostilities, was encapsulated by the Trial Chamber in its assumption of harm for victims who qualify for “child soldier” status.

The Appeals Chamber emphasised that this does not preclude such victims from benefitting from assistance activities the TFV might undertake. Moreover, it considered it to be appropriate for the draft implementation plan to include a referral process to relevant NGOs that offer services to sexual and gender-based violence survivors.³⁸⁸ The Appeals Chamber tasked the Trial Chamber with, *inter alia*, determining the scope of Lubanga’s liability for reparations—that is, the amount of reparations Lubanga is responsible for.³⁸⁹

Trial Chamber II issued the requisite order on 15 December 2017, considering Lubanga responsible for reparations in the amount of USD 10,000,000.³⁹⁰ In order to qualify for reparations as a victim, the “child-soldier status” of the direct victim had to be proved, and indirect victims had to establish the child soldier status of the direct victim and their close personal relationship.³⁹¹ In its Amended Order for Reparations, the Appeals Chamber had defined the harm suffered by direct and indirect victims as material, physical and psychological harm, including, with respect to direct victims, physical injury and trauma, and

psychological trauma and the development of psychological disorders.³⁹² Trial Chamber II applied a presumption of harm for both direct and indirect victims, not seeing a need to scrutinise the specific harm alleged by each eligible victim.³⁹³ Harm suffered by direct victims, as a result of their enlistment, conscription or active participation can encompass a wide range of harm, including harm resulting from sexual violence they suffered during their time as a child soldier. The Trial Chamber’s decision allows the reparations to encompass sexual harm causally linked to the crimes Lubanga has been convicted of.

Lubanga appealed the decision setting his liability at USD 10,000,000, arguing it to be excessive. Further, the eligibility of several victims to receive reparations was contested.³⁹⁴ The Legal Representatives of Victims also appealed the decision, arguing that it is not up to the Trial Chamber to assess each victim’s eligibility for reparations, but it is the TFV that should determine this.³⁹⁵ They further argue that a significant number of victims, whom the TFV already decided to qualify as victims, were excluded from the collective reparations.

388 *Ibid*, para 199.

389 *Ibid*, paras 237-243.

390 ICC-01/04-01/06-3379-Red-Corr, p 123.

391 ICC-01/04-01/06-3379-Red-Corr-tENG, paras 66, 179.

392 *Ibid*, paras 177-178; ICC-01/04-01/06-3129-AnxA, para 58.

393 ICC-01/04-01/06-3379-Red-Corr-tENG, para 185.

394 ICC-01/04-01/06-3394-Red-tENG.

395 ICC-01/04-01/06-3396-Corr-Red-tENG.

The Prosecutor v. Germain Katanga

The case against Katanga revolves around the events that took place during the attack of Bogoro, a Hema village, by elements of the *Front des nationalistes et intégrationnistes* (FNI) and the *Force de résistance patriotique en Ituri* (FRPI), Lendu and Ngiti militias under the command of Katanga and Ngudjolo in the early hours of 24 February 2003.³⁹⁶ Combatants from the FNI and FRPI killed between 200 and 350 people, including a majority of the Hema civilians in the town and committed rape, pillaging and destruction of homes.³⁹⁷ The attack took place in the context of an armed conflict between the FNI/FRPI and the *Union des Patriotes Congolais* (UPC), as well as between other groups.

Criminal proceedings

On 7 March 2014, the majority of Trial Chamber II convicted Katanga as an accessory for the war crimes of directing an attack against a civilian population, pillaging, and destruction of property, as well as murder as a war crime and a crime against humanity. The Chamber was unanimous in acquitting Katanga for rape and sexual slavery as war crimes and crimes against humanity, as

well as for the war crime of using child soldiers to participate actively in hostilities.³⁹⁸

At the confirmation of charges stage, the charges of rape and sexual slavery were the only charges confirmed by a majority of the Pre-Trial Chamber, not the full bench.³⁹⁹ This was an early indicator that some of the Judges considered the evidence regarding the charges of rape and sexual slavery to be insufficient and that the evidence underpinning Katanga's role in the commission of these crimes needed to be strengthened at the trial stage.

The Judges emphasised that the evidence established that the crimes of rape and sexual slavery had been committed during the attack.⁴⁰⁰ Regardless, the Chamber found that, unlike other crimes such as murder and destroying property, rape and sexual slavery did not form part of the common purpose of the attack to "reconquer Bogoro through the elimination of its civilian population".⁴⁰¹ It held that "no evidence is laid before the Chamber to allow it to find that the acts of rape and enslavement were committed on a wide scale and repeatedly on 24 February 2003, or furthermore that the obliteration of the village of Bogoro perforce entailed the commission of such acts".⁴⁰²

396 S/2004/573, para 65.

397 OHCHR, '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, para 420.

398 ICC-01/04-01/07-3436-tENG, p 658-660. For more information, see Women's Initiatives for Gender Justice, 'The Compendium: An overview of Situations and cases before the International Criminal Court', December 2017, p 57-64; Women's Initiatives for Gender Justice, 'Gender Report Card 2014', p 158-193.

399 ICC-01/04-01/07-717, p 209-212. ICC-01/04-01/07-717, p 214-226.

400 ICC-01/04-01/07-3436-tENG, paras 833, 848 and 876.

401 ICC-01/04-01/07-3436-tENG, para 1655.

402 *Ibid*, para 1663. The issues arising from this holding are further discussed in the **Gender Justice at the ICC** section of this Report.

Katanga was sentenced to 12 years' imprisonment by the majority of Trial Chamber II on 23 May 2014.⁴⁰³ Both the Defence and the Prosecution discontinued their appeals against the Trial Judgment.⁴⁰⁴ This was the first case in which charges of sexual and gender-based crimes, specifically rape and sexual slavery, were confirmed. This was also the first case in which an accused was partially acquitted of charges at the time of the Judgment, specifically relating to the allegations of sexual violence.

Reparations

On 24 March 2017, Trial Chamber II issued its Reparations Order awarding 297 out of 341 victims of the crimes for which Katanga was convicted individual and collective reparations. All 297 victims were awarded a symbolic amount of USD 250 per person, as well as collective reparations in the form of support for housing, support for income-generating activities, education aid and psychological support.⁴⁰⁵ The extent of harm that was suffered by the victims was estimated to have a monetary value of approximately USD 3,752,620, and Katanga's liability was set at USD 1,000,000.⁴⁰⁶ Due to Katanga's indigence, the Board of Directors of the TFV was invited to

consider using its resources to fund and implement the reparations.⁴⁰⁷

The Chamber stated that it is crucial that reparations are granted "without adverse distinction on the grounds of gender, age, race, colour, language, religion or belief, political or other opinion, sexual orientation, national, ethnic or social origin, wealth, birth or other status".⁴⁰⁸ The Chamber highlighted the importance of reparations being meaningful to the victims, and for them to be implemented ensuring victims' safety, physical and psychological well-being and privacy.⁴⁰⁹

Some of the applicants submitted that they suffered harm, physical and psychological, resulting from rape and sexual slavery committed during the Bogoro attack.⁴¹⁰ While emphasising the gravity of the crimes of rape and sexual slavery, the Chamber considered itself bound by the scope of Katanga's conviction. The Chamber concluded that victims must show that they suffered harm resulting from the crimes for which Katanga was convicted. The Chamber stated that it could not determine that the harm caused by rape and sexual slavery or gender-based violence during the Bogoro attack ensued from one of the crimes for which he was convicted.⁴¹¹ Furthermore, the Chamber concluded that it was not in a position

403 ICC-01/04-01/07-3484-tENG.

404 ICC-01/04-01/07-3497; ICC-01/04-01/07-3498. See Women's Initiatives for Gender Justice, '*Gender Report Card 2014*', p 229-232; Women's Initiatives for Gender Justice, '*Appeals Withdrawn by Prosecution and Defence*', 26 June 2014.

405 ICC-01/04-01/07-3728-tENG, paras 300, 304 and p 118.

406 *Ibid*, paras 239, 264 and p 118.

407 *Ibid*, paras 330, 342 and p 119.

408 *Ibid*, para 30.

409 *Ibid*, para 15.

410 *Ibid*, para 140.

411 ICC-01/04-01/07-3728, para 152.

to consider child soldiers as victims for the purpose of reparations.⁴¹²

Pointing to the TFV's assistance mandate, the Chamber urged the TFV to take into consideration, whenever possible, the harm suffered by victims during the attack on Bogoro, in particular sexual violence, though excluded this from the scope of the case against Katanga.

The Appeals Chamber, on 8 March 2018, unanimously rejected the appeals by both Katanga and the OPCV, but upheld the appeal filed by the Legal Representative of Victims concerning transgenerational harm, considering, *inter alia*, that the Trial Chamber failed to reason its decision.⁴¹³ Consequently, the Appeals Chamber reversed the matter to the Trial Chamber for this issue to be assessed anew.⁴¹⁴ Overall, the Appeals Chamber emphasised concern with the approach taken by the Trial Chamber in the reparations proceedings and the efficiency. The Appeals Chamber expressed that a focus on the cost of repair, instead of the monetary value of the harm caused, is appropriate in light of the purpose of reparations.⁴¹⁵

The TFV, on 25 July 2017, submitted a Draft Implementation Plan for individual and collective reparations in accordance with the Reparations Order. In the draft plan, the TFV emphasised

the importance of sensitivity to gender specific issues during the intake process and identifying channels for women and girls' access to registration and services they prefer that ensure confidentiality and avoids stigmatisation. Additionally, the TFV stressed that it will ensure that female victims will have the same access, and that they retain control over the benefits that are preferable to them.⁴¹⁶

The Prosecutor v. Bosco Ntaganda

Bosco Ntaganda is alleged to be the former Deputy Chief of Staff in charge of operations of the *Forces Patriotiques pour la Libération du Congo* (FPLC), the military wing of the UPC, an armed group in Ituri promoting the interests of the ethnic Hema.⁴¹⁷ Between 2002 and 2005, he served under UPC's leader Thomas Lubanga. Ntaganda, known as "The Terminator",⁴¹⁸ was active in several armed groups in eastern DRC. FPLC soldiers under Ntaganda's control committed numerous serious human rights abuses, including ethnic killings, rapes, torture and the recruitment and use of children under the age of 15 to actively participate in hostilities.

Proceedings against Ntaganda

On 9 June 2014, Pre-Trial Chamber II unanimously confirmed the charges against Ntaganda,

⁴¹² *Ibid*, para 180.

⁴¹³ ICC-01/04-01/07-3778-Red, paras 235-239.

⁴¹⁴ *Ibid*, para 260.

⁴¹⁵ *Ibid*, para 72.

⁴¹⁶ ICC-01/04-01/07-3751-Red, paras 114-115.

⁴¹⁷ ICC-01/04-02/06-309, paras 12, 15.

⁴¹⁸ ICC-01/04-02/06-2-Anx-tENG, p 5.

consisting of 13 counts of war crimes (murder and attempted murder; attacking civilians; rape of civilians; sexual slavery of civilians; pillaging; displacement of civilians; attacking protected objects; destroying the enemy's property; and rape, sexual slavery and enlistment and conscription of child soldiers under the age of fifteen and using them to participate actively in hostilities) and five counts of crimes against humanity (murder and attempted murder; rape; sexual slavery; persecution; and forcible transfer of population).⁴¹⁹ This is the first case in which all sexual and gender-based crimes charges brought against an accused were unanimously confirmed by an ICC Pre-Trial Chamber. Notably, Ntaganda is also the first senior military figure charged before an international criminal tribunal with the rape and sexual slavery of child soldiers within his own militia group.

However, only charges relating to war crimes and crimes against humanity that took place in the Ituri region between 2002 and 2003 have been brought. Consequently, the atrocities committed by troops under Ntaganda's command in the North and South Kivu provinces fall outside the scope of the case.

The trial against Ntaganda commenced on 2 September 2015. During its opening statement, the

Prosecution described the conduct which took place in the UPC military camps:

Bosco Ntaganda and his troops also recruited young girls. These girls underwent the same harsh treatment during military training as the boys. And, in addition, these young girls were routinely raped and sexually enslaved. Girl soldiers in the UPC were called PMFs, which stood for personnel féminin. Rape of these girls was so common that the soldiers sang about it. The words to one of these songs are as follows: "Why should I marry a PMF, for what use, where am I to go with her? Food of the leader, like a guduria, cooking pot for the party." These songs, comparing the girl soldiers to food for the leaders and communal cooking pots for the party, were not only degrading, they encouraged rape and sexual slavery within the UPC.⁴²⁰

The presentation of evidence was concluded on 16 March 2018.⁴²¹ After the Prosecution called its final witness on 16 February 2017, nine victims of the alleged crimes were given an opportunity to present their views and concerns to the Chamber. One victim recounted how she was raped by two UPC soldiers in the presence of her three children.⁴²² Another victim described that she was raped by three UPC soldiers when she was 13

419 ICC-01/04-02/06-309, paras 36, 74 and p 63.

420 ICC-01/04-02/06-T-23-ENG, p 60 lines 23-25 to p 61 lines 1-8.

421 ICC-01/04-02/06-2259.

422 ICC-01/04-02/06-T-199-Red-ENG, p 8 lines 3-23.

years old.⁴²³ On 23 February 2018, the Defence for Ntaganda notified Trial Chamber VI of the end of its presentation of evidence.⁴²⁴

In order to bring the Court closer to the affected communities, the Trial Chamber considered hearing the closing statements in the DRC.⁴²⁵ However, this was considered not possible due to security concerns. Closing statements were held in August 2018, at the seat of the Court in The Hague.

Historic decision regarding rape and sexual slavery within own militia group

On 15 June 2017, the Appeals Chamber unanimously confirmed the jurisdiction of the Court over the war crimes of rape and sexual slavery committed by members of an armed group against members of that same armed group.⁴²⁶ The Chamber found that it has jurisdiction over alleged war crimes of rape and sexual slavery of child soldiers within Ntaganda's militia group, thereby rejecting Ntaganda's appeal⁴²⁷ against Trial Chamber VI's 4 January 2017 decision.⁴²⁸ The Chamber stated that the prohibitions on rape and sexual slavery are well established under IHL and there is no reason to conclude that there are any limitations of who may be a victim of such conduct.⁴²⁹ The Chamber highlighted that, to

establish war crimes, it must be demonstrated that the conduct in question took place in the context of an armed conflict and was associated with the armed conflict.⁴³⁰ This decision has landmark character and is an important precedent, as will be discussed further in the **Gender Justice at the ICC** section of this Report.

The prohibitions on rape and sexual slavery are well established under IHL and there is no reason to conclude that there are any limitations of who may be a victim of such conduct.

423 ICC-01/04-02/06-T-198-Red-ENG, p 58 line 22 to p 59 line 25.

424 ICC-01/04-02/06-2243.

425 ICC-01/04-02/06-2259, para 10.

426 ICC-01/04-02/06-1962.

427 ICC-01/04-02/06-1710; ICC-01/04-02/06-1754.

428 ICC-01/04-02/06-1707.

429 ICC-01/04-02/06-1962, para 64.

430 *Ibid*, para 68.

Population: 3.9 million

♀ 52% | ♂ 48%

Georgia

Women and children have been disproportionately affected by the conflict due to shifting socio-economic roles which have exposed them to increased violence, lack of adequate protection measures and rehabilitation centres, and trauma from the conflict.⁴³¹ As a result of the conflict, over 260,000 persons are internally displaced in Georgia. Around 70% of them receive IDP allowance, excluding the conflict-affected population that live close to the occupied areas of South Ossetia and Abkhazia. Consequently, many IDP and conflict-affected women excluded from receiving the financial support live below the poverty line and face poor living conditions.⁴³²

The conflict in South Ossetia, a disputed partially recognised territory in the South Caucasus, broke out in August 2008 between Georgia and Russia, after tensions between the Georgian and South Ossetian residents in the region escalated to armed clashes in early to mid-2008.⁴³³ After several incidents of bombings, the European Union and Russia negotiated and signed a ceasefire accord on 16 August 2008 and, in September, a six-point peace plan, which included the withdrawal of Russian forces by 10 October 2008.⁴³⁴

The short conflict with Russia over South Ossetia seriously affected Georgia and resulted in homes and communities devastated, 850 deaths and displacement of over 100,000 civilians.⁴³⁵ Victims of the conflict also suffered from other war crimes and crimes against humanity by all parties, such as the destruction of property, pillage, and persecution on ethnic grounds.⁴³⁶ A report by HRW listed: widescale pillaging, arbitrary killings, beatings, rapes, threats to civilians, unlawful detention of ethnic Georgians, burning of Georgian homes, and deliberate destruction of ethnic Georgian villages committed by South Ossetian forces; lootings, destructions, indiscriminate killings, wounding civilians, and use of indiscriminate and disproportionate force during the conflict by Russian forces; and beatings, illtreatment of detained Ossetians, and use of indiscriminate and disproportionate force during the conflict by Georgian forces.⁴³⁷ Notably, the attacks against ethnic Georgian civilians and villages by South Ossetian forces were committed “on the basis of the ethnicity and imputed political affiliations of the residents of these villages with the express purpose of forcing those who remained

433 FIDH and the Human Rights Centre (HRIDC), ‘Living on the edge: victims’ quest for accountability. The ongoing impact of the 2008 Russia-Georgia war’, February 2018, p 8-10.

434 *Ibid*, p 10.

435 See *ibid*, p 5. See also HRW, ‘Up In Flames. Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia’, January 2009, p 2.

436 FIDH and HRIDC, ‘Living on the edge: victims’ quest for accountability. The ongoing impact of the 2008 Russia-Georgia war’, February 2018, p 5. See also ICC-01/15-4, para 8.

437 HRW, ‘Up In Flames. Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia’, January 2009, p 3-4.

431 UN Development Programme (UNDP), ‘Gender Equality in Georgia: Barriers and Recommendations’ Vol 1, January 2018, p 87.

432 *Ibid*.

to leave and ensuring that no former residents would return".⁴³⁸ According to the report, numerous accounts of rape of ethnic Georgian women during the August 2008 conflict were received.⁴³⁹

At the ICC

After conducting a Preliminary Examination of the Situation in Georgia since August 2008, the ICC Prosecutor requested authorisation from Pre-Trial Chamber I on 13 October 2015 to open an investigation into this Situation.⁴⁴⁰ The request was based on information the OTP had gathered on alleged war crimes and crimes against humanity attributed to the three parties involved in the armed conflict. Namely, killings, forcible displacements and persecution of ethnic Georgian civilians, and destruction and pillaging of their property, by South Ossetian forces (with possible participation by Russian forces); intentionally directing attacks against Georgian peacekeepers by South Ossetian forces; and intentionally directing attacks against Russian peacekeepers by Georgian forces.⁴⁴¹

On 27 January 2016, the Chamber authorised the Prosecutor to proceed with an investigation into crimes within the ICC's jurisdiction committed in and around South Ossetia in the context of an

international armed conflict between Georgia and the Russian Federation between 1 July and 10 October 2008.⁴⁴² It found that there was a reasonable basis to believe that the following crimes had been committed: murder, attack against the civilian population, deportation or forcible transfer of population, and persecution as crimes against humanity; and wilful killing, intentionally directing attacks against peacekeepers, destruction of property, and pillaging as war crimes.⁴⁴³ The Chamber in this decision relied on the findings that the crimes committed against ethnic Georgians by South Ossetian forces "resulted in 51-113 killings, the destruction of over 5,000 dwellings and the forced displacement of 13,400-18,500 persons constituting, in the estimation of the Prosecutor, a 75% decrease in the ethnically Georgian population in South Ossetia".⁴⁴⁴

In the request for authorisation to open an investigation, the Prosecutor had stated that the OTP had also gathered information on a limited number of reports of sexual and gender-based violence, including rape, but that no clear information had yet emerged at the time on the alleged perpetrators or the link between these crimes and the armed conflict or wider context.⁴⁴⁵

438 HRW, 'Up In Flames. Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia', January 2009, p 3.

439 *Ibid.*

440 ICC-01/15-4, paras 1-2, 349.

441 *Ibid.*, paras 2, 9.

442 ICC-01/15-12, para 27 and p 26. ICC-01/15-12-Anx1. See also 'ICC Pre-Trial Chamber I authorises the Prosecutor to open an investigation into the situation in Georgia', ICC-CPI-20160127-PR1183, 27 January 2016.

443 ICC-01/15-12, paras 7, 29-31, 61. See also 'ICC Pre-Trial Chamber I authorises the Prosecutor to open an investigation into the situation in Georgia', ICC-CPI-20160127-PR1183, 27 January 2016.

444 ICC-01/15-12, para 54.

445 ICC-01/15-4, paras 4, 231.

Other organisations, such as HRW, have reported about rapes committed by what seemed to be members of South Ossetian armed forces.⁴⁴⁶ The Chamber noted that these allegations of sexual and gender-based violence could be included in the investigation.⁴⁴⁷

According to a 2018 report from the International Federation for Human Rights (FIDH), many victims are hopeful that there will be justice for the crimes committed and that the ICC will play a role in ensuring this. Many victims are reportedly in favour of the ICC investigation, with 6,335 victims participating in the proceedings,⁴⁴⁸ while other sources suggest that many South Ossetians are still unaware of the Court's activities.⁴⁴⁹ Survivors and victims of the 2008 conflict continue to suffer from kidnappings, detention, and extortion on a daily basis due to the shifting demarcation line, which is not recognised by the international community, and continue to live in extremely precarious conditions. Many victims are impoverished: homes and means of income have been destroyed; economic opportunities are hampered in Ossetian territories; and no substantial compensation for their losses was received.⁴⁵⁰ During the gradual build-up of ten-

sions eventually escalating into armed violence in the region, many members of the younger generation chose to leave South Ossetia. As a result, many victims of the conflict are elderly people who were unable to leave or chose to stay to protect their livestock, homes and possessions.⁴⁵¹ They were not spared in the violence and suffered crimes such as killing and pillaging.⁴⁵² In addition, many elderly victims still suffer from the consequences of losing their source of income and their family members, including psychological trauma and economic hardship.⁴⁵³ Living in precarious conditions, battling hunger and unable to access basic infrastructure are among the consequences suffered by many of the remaining, mostly elderly, South Ossetian population in the aftermath of the conflict.⁴⁵⁴ Due to the age of many victims, providing justice is a pressing need.⁴⁵⁵

At the time of writing, no cases have been made public in this Situation.

446 HRW, 'Up In Flames. Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia', January 2009, p 159-161.

447 ICC-01/15-12, para 35.

448 *Ibid.*

449 FIDH and HRIDC, 'Living on the edge: victims' quest for accountability. The ongoing impact of the 2008 Russia-Georgia war', February 2018, p 29, 16; Justice Hub, 'Waiting On the ICC in South Ossetia', 24 April 2018.

450 FIDH, 'The Russia-Georgia War: The Forgotten Victims 10 Years On', 5 February 2018; FIDH and HRIDC, 'Living on the edge: victims' quest for accountability. The ongoing impact of the 2008 Russia-Georgia war', February 2018, p 15-26.

451 FIDH and HRIDC, 'Living on the edge: victims' quest for accountability. The ongoing impact of the 2008 Russia-Georgia war', February 2018, p 17.

452 *Ibid.*, p 17-19.

453 *Ibid.*, p 17-19.

454 *Ibid.*, p 17-19.

455 *Ibid.*, p 19.

Kenya

Population: 51.3 million

♀ 50% | ♂ 50%

The results of the presidential elections in Kenya of 27 December 2007 were highly contested and sparked a violent political crisis as President Mwai Kibaki of the Party of National Unity (PNU) was re-elected over Raila Odinga of the opposing Orange Democratic Movement (ODM). The ensuing violence was sudden and widespread. Although the immediate trigger may have been political, ethnic tensions flared up during the election, making the post-election violence go beyond mere political disagreement over the presidential elections.⁴⁵⁷

The PNU drew most of its support from the Kikuyu, Embu and Meru communities mainly in the central and eastern provinces, as well as the Nairobi area and Rift Valley provinces. Support for the ODM, however, came mostly from the Luo, Luhya and Kalenjin communities living mainly in Nyanza, Rift Valley and Western provinces, as well as in major urban areas, and among Muslims in the coast and the youth.⁴⁵⁸ Inflammatory or threatening statements from elements of both sides, as well as hate messages against particular candidates and other communities, prevailed during the presidential campaigns.⁴⁵⁹ As State authority collapsed at the ODM political strongholds following the announcement of the results, its supporters engaged in violent protests and reportedly took revenge on the communities perceived to be loyal to Kibaki.⁴⁶⁰

Within the two months of post-election violence, 1,200 persons were reportedly killed, over 350,000 individuals displaced,⁴⁶¹ over 41,000 houses were destroyed, and many shops, commercial outlets and crops were looted, according to a report by the OHCHR fact-finding mission deployed in Kenya in February 2008.⁴⁶² The report identified three main patterns of violence:

In 2010, Kenya promulgated a new constitution with the aim to enhance civil and equal rights for the population. One measure to achieve gender equality is the requirement of no more than two thirds of members of an elective or appointive body to be of the same gender. Nonetheless, gender inequality persists in several bodies. For example, of the 349 seats in Parliament 78% are held by men despite a directive of the High Court to ensure the stipulated quota is observed.⁴⁵⁶

457 OHCHR, 'Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008', 28 February 2008, p 10.

458 *Ibid.*, p 7.

459 *Ibid.*

460 See International Crisis Group, 'Kenya in Crisis', 21 February 2008.

461 The number of individuals who were displaced varies, with some reports estimating as high as 600,000.

462 OHCHR, 'Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008', 28 February 2008, p 8.

456 The Conversation, 'Kenya's parliament continues to stall on the two-thirds gender rule', 2017.

1. Spontaneous violence: including violent protests, burning and looting of commercial businesses, Government installations or PNU supporters' property out of anger of ODM supporters following the announced results;
2. Organised attacks: including raids and attacks allegedly targeting non-Kalenjin communities and those perceived as ODM opponents such as the Kikuyu, Kisii and Luyha communities mainly in rural areas of the Rift Valley; and
3. Organised retaliatory attacks: including counter-attacks and reprisals by Kikuyu youths mainly in the Mathare area of Nairobi and the Naivasha and Nakuru localities of the Rift Valley.⁴⁶³

Sexual violence was prevalent during the crisis, including rape, gang rape, sodomy, genital mutilation, forced circumcision, and sexual exploitation, according to a report by the Commission of Inquiry into the post-election violence.⁴⁶⁴ The report further outlines instances of families, including children, being forced to witness the sexual violence committed against their close relatives, as well as husbands leaving

their wives on account of them being victims of sexual violence.⁴⁶⁵ According to the Commission, these crimes were allegedly committed by State security agents, members of organised gangs, neighbours, supposed friends, relatives and individuals working in internally displaced person (IDP) camps.⁴⁶⁶ According to the OHCHR fact-finding mission's report, 322 cases of sexual assault and rape of women and girls were reported to Nairobi Women's Hospital, and information collected during interviews with victims of sexual violence suggest that most instances of rape in urban areas had been opportunistic in nature.⁴⁶⁷ Sexual violence perpetrated against men, in relation with the ethnic tensions stirred up due to the election, included forced nudity, forced circumcision, genital mutilation, and penile amputation.⁴⁶⁸ At least one victim did not survive the attack.⁴⁶⁹ These acts were committed against Luo men and boys, who are traditionally uncircumcised.⁴⁷⁰ Overall, "at least hundreds of victims" suffered from sexual violence.⁴⁷¹

At the ICC

In the aftermath of the violence, the ICC Prosecutor requested authorisation to open an investigation into the Kenya Situation. The request for authorisation was submitted to

⁴⁶³ *Ibid*, p 8-10.

⁴⁶⁴ Commission of Inquiry into Post-Election Violence, 'Final Report', 16 October 2008, p 237, 239, 244.

⁴⁶⁵ *Ibid*, p 237.

⁴⁶⁶ *Ibid*, p 252.

⁴⁶⁷ OHCHR, 'Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008', 28 February 2008, p 3.

⁴⁶⁸ ICC-01/09-02/11-382-Red, paras 260-263.

⁴⁶⁹ ICC-01/09-02/11-T-5-Red-ENG, p 63 lines 6-12.

⁴⁷⁰ ICC-01/09-02/11-382-Red, paras 260-263.

⁴⁷¹ ICC-01/09-31-Red2, para 9.

Pre-Trial Chamber II on 26 November 2009 and marked the first time that the Prosecutor utilised *proprio motu* powers to initiate an investigation, pursuant to Article 15 of the Rome Statute.⁴⁷² On 31 March 2010, the Chamber, by majority,⁴⁷³ granted authorisation to proceed,⁴⁷⁴ and the investigation was subsequently opened.⁴⁷⁵

The investigation focused on crimes against humanity allegedly committed between the entry into force of the Rome Statute for Kenya on 1 June 2005 and the opening of the investigation on 26 November 2009, including murder, rape and other forms of sexual violence, forcible transfer of population, and other inhumane acts causing serious injury committed mainly in Nairobi, the Rift Valley, Western and Nyanza provinces, and Kisumu and its surroundings.⁴⁷⁶

On 8 March 2011, Pre-Trial Chamber II, by majority,⁴⁷⁷ issued summonses to appear for a total of six Kenyan suspects in two cases: William Samoei Ruto (Ruto), Joshua Arap Sang (Sang), Henri Kiprono Kosgey (Kosgey), Uhuru Muigai Kenyatta (Kenyatta), Francis Kirimi Muth-

aura (Muthaura), and Mohammed Hussein Ali (Ali).⁴⁷⁸ All suspects voluntarily appeared before the Court.

At the time of the post-election violence, Ruto, Sang and Kosgey were allegedly aligned with the ODM. Ruto was a Member of Parliament and one of the founders and prominent leaders of the ODM.⁴⁷⁹ Since 2013, Ruto has served as the Deputy President of Kenya. Sang was a radio broadcaster on Kass FM, and a vocal supporter of the ODM.⁴⁸⁰ Kosgey was the former Minister of Industrialisation of the Republic of Kenya and Chairman of the ODM.⁴⁸¹

Kenyatta, Muthaura and Ali were allegedly aligned with the PNU. At the time of the post-election violence, Kenyatta was serving as Minister for Local Government.⁴⁸² Following his success in the presidential election of March 2013, he became the first ICC suspect facing trial to be subsequently elected to the position of Head of State. Muthaura held the post of Chairman of the National Security and Advisory Committee, and Ali was Commissioner of the Kenyan Police.⁴⁸³

472 ICC-01/09-3, para 114.

473 ICC-01/09-19-Corr.

474 *Ibid*, p 83.

475 See 'OTP Press Conference on Kenya, Prosecutor Moreno-Ocampo's Statement, 1 April 2010', 1 April 2010.

476 ICC-01/09-19-Corr, paras 139, 141-171, 173-174, 176-178.

477 ICC-01/09-01/11-2; ICC-01/09-02/11-3.

478 ICC-01/09-01/11-1; ICC-01/09-02/11-1. For more information on these Summonses to Appear, see Women's Initiatives for Gender Justice, 'Kenya: Pre-Trial Chamber II issues Summonses to Appear for six individuals', *Legal Eye on the ICC eLetter*, July 2011. For more information on these cases, see Women's Initiatives for Gender Justice, 'The Compendium: An overview of Situations and cases before the International Criminal Court', December 2017, p 104-113.

479 ICC-01/09-01/11-448-AnxA, paras 6, 9-10.

480 *Ibid*, paras 13, 19.

481 ICC-01/09-01/11-1, p 23.

482 ICC-01/09-02/11-257-AnxA, para 9.

483 *Ibid*, paras 4, 13.

Despite significant reports of sexual violence taking place in the context of the post-election violence, including materials presented by the Prosecution in the request to open an investigation in Kenya, the Prosecution only sought charges of sexual and gender-based crimes in the case against Kenyatta, Muthaura, and Ali. The Prosecutor brought charges of rape and other forms of sexual violence. In support of the sexual violence charge, the Prosecution presented evidence of forcible circumcision and penile amputation. However, in the decision issuing the Summons to Appear as well as in the Confirmation of Charges decision, the Pre-Trial Chamber rejected the charge of sexual violence and recharacterised this evidence as “other inhumane acts”.⁴⁸⁴ This recharacterisation denying the classification of the mutilation of sexual organs as sexual violence raises serious concerns as to the Court’s definition of sexual violence.⁴⁸⁵

At the time of writing, the two cases involving charges arising out of the post-election violence have been terminated and all six accused have been discharged. The charges were not confirmed against two (Kosgey and Ali), the charges were withdrawn against another two (Muthaura and Kenyatta), and the charges were vacated against the remaining two (Ruto and Sang). The *Kenyatta* case was the only case in the Kenya Situation in which charges of sexual and gender-

based crimes were brought. By 23 January 2012, all cases were closed.

On 2 October 2013, an arrest warrant was unsealed for Kenyan journalist Walter Barasa (Barasa) for offences against the administration of justice under Article 70 of the Statute, relating to his alleged role in corruptly influencing witnesses in the *Ruto and Sang* case. Two further arrest warrants were unsealed on 10 September 2015 for lawyer Paul Gicheru (Gicheru) and Philip Kipkoech Bett (Bett), also for offences against the administration of justice consisting in corruptly influencing witnesses in the context of cases in the Kenya Situation.⁴⁸⁶ To date, Barasa, Gicheru, and Bett have not been arrested and remain at large.

This recharacterisation denying the classification of the mutilation of sexual organs as sexual violence raises serious concerns as to the Court’s definition of sexual violence.

⁴⁸⁴ ICC-01/09-02/11-382-Red, para 265.

⁴⁸⁵ Rosemary Grey, ‘Conflicting Interpretations of ‘Sexual Violence’ in the International Criminal Court’, *Austr. Fem. St.*, 2014, p 284; See also Women’s Initiatives for Gender Justice, ‘*Gender Report Card 2013*’, p 117; Women’s Initiatives for Gender Justice, ‘*Gender Report Card 2010*’, p 122-124 and Women’s Initiatives for Gender Justice, ‘*Kenya: Pre-Trial Chamber II issues Summonses to Appear for six individuals*’, *Legal Eye on the ICC eLetter*, July 2011.

⁴⁸⁶ ICC-01/09-01/15-1-Red; ICC-01/09-01/15-11.

Charges in Cases of the Kenya Situation

Charge		Ruto ⁴⁸⁷	Sang	Kosgey ⁴⁸⁸	Kenyatta ⁴⁸⁹	Muthaura ⁴⁹⁰	Ali ⁴⁹¹
Rape	WC						
	CAH				• ⊙	• ⊙	•
Other Forms of Sexual Violence	WC						
	CAH				•	•	•
Persecution	WC						
	CAH	• ⊙ ●	• ⊙ ●	•	• ⊙	• ⊙	•
Other Inhumane Acts	WC						
	CAH				• ⊙	• ⊙	•
Deportation or Forcible Transfer of Population	WC						
	CAH	• ⊙ ●	• ⊙ ●	•	• ⊙	• ⊙	•
Torture ⁴⁹²	WC						
	CAH	•	•	•			
Murder	WC						
	CAH	• ⊙ ●	• ⊙ ●	•	• ⊙	• ⊙	•

• Arrest warrant/Summons to appear ⊙ Confirmation of charges ● Trial
 A Acquitted C Convicted ■ SGBC charges

487 The charges against Ruto and Sang were vacated in April 2016. ICC-01/09-01/11-2027-Red-Corr.

488 The charge of torture was brought in the Summons to Appear, but was not in the Document Containing the Charges. All other charges were not confirmed.

489 The charges against Kenyatta were withdrawn in December 2014. ICC-01/09-02/11-983. The charge of other forms of sexual violence was not confirmed.

490 The charges against Muthaura were withdrawn in March 2013. ICC-01/09-02/11-687, para 12; ICC-01/09-02/11-696, p 8. The charge of other forms of sexual violence was not confirmed.

491 All charges brought against Ali were not confirmed.

492 Although the charge of torture was brought in the Summons to Appear, it was no longer mentioned in the Document Containing the Charges. ICC-01/09-01/11-1, p 7; ICC-01/09-01/11-448-AnxA, p 39-41.

Population: 6.5 million

♀ 50% | ♂ 50%

Libya

The political situation in Libya remains fragile and the security situation remains unstable.

Women in particular continue to feel insecure in public spaces. One third of Libyan women feel restricted in their freedom of movement, and abductions of women and girls receive little attention or investigation.⁴⁹³ Women are also under-represented in the security sector, which is also in part due to female bodyguards during the Gaddafi-era being sexually violated and abused.⁴⁹⁴

Major demonstrations against the regime of Muammar Mohamed Abu Minyar Gaddafi (Muammar Gaddafi), the then Libyan Head of State and Commander of the Libyan Armed Forces,⁴⁹⁵ were held in February 2011 in Benghazi and Al-Zawiya, rapidly spreading to other parts of the country, including Tripoli and Misrata, Libya.⁴⁹⁶ The demonstrations were met with excessive and lethal force by State forces, but opposition to Muammar Gaddafi only grew stronger. By late February 2011, most of eastern Libya and other parts of the country were under the control of the opposition.⁴⁹⁷ Offensives were launched by Government forces against the opposition, which were met with armed resistance, escalating into armed conflict what had initially started as demonstrations.⁴⁹⁸ By the end of August 2011, most of the country, including Tripoli, was controlled by armed groups opposing Muammar Gaddafi's rule.⁴⁹⁹ On 20 October 2011, Muammar Gaddafi was captured and killed in Sirte. Three days later, the National Transitional Council declared that Libya had been liberated.⁵⁰⁰

The report by the UN International Commission of Inquiry on Libya highlighted international crimes allegedly committed during the 2011 Libyan conflict.⁵⁰¹ It found that a wide range of international crimes had been committed, including murder, arbitrary detention or other severe deprivation of physical liberty, torture, persecution, enforced disappearance within the context of a widespread or systematic attack against civilian population, violence to life and person, outrages upon personal dignity including

493 International Foundation for Electoral Systems, 'Survey on the Status of Women in Libya', 2014; see also Swedish Institute of International Affairs 'Gender and Transition in Libya—Mapping Women's Participation in Post-Conflict Reconstruction', 2014.

494 The Washington Post, 'Gaddafi's female bodyguards say they were raped, abused by the Libyan leader', 29 August 2011.

495 See ICC-01/11-01/11-2, p 7.

496 UN Support Mission in Libya (UNSMIL) and UN Office of the High Commissioner for Human Rights, 'Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)', 21 February 2017, p 6.

497 *Ibid*, p 6-7.

498 *Ibid*, p 7.

499 *Ibid*, p 7.

500 *Ibid*, p 7.

501 A/HRC/17/44, para 246.

humiliating and degrading treatment, and attacks against protected buildings, materials, medical units and transport.⁵⁰² The Commission noted that the consistency of patterns of the crimes created an inference that they were committed as a result of policy decisions by Muammar Gaddafi and senior leadership.⁵⁰³ The commission of international crimes is also allegedly attributable to opposition forces, including acts of torture, cruel treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, especially against persons in detention and migrant workers including refugees.⁵⁰⁴

The Commission received several reports of rape, gang rape and other forms of sexual violence or abuse, as well as reports of threats of rape perpetrated by Government forces.⁵⁰⁵ The reported cases of rape targeted women and girls at checkpoints or in their own houses and included several days of abduction or detention. Moreover, it was suggested that armed forces were instructed to engage in rape and were supplied with Viagra pills and condoms.⁵⁰⁶ Some interviewees reported “collective rape” of residents by Government forces, at least one

witness described Government forces patrolling the streets threatening residents with rape if they “did not ally themselves with the regime”, and other interviewees stated that the main reason for fleeing was “to safeguard family members from rape”.⁵⁰⁷ These findings suggest that such acts were widespread in several areas and that sexual violence was used as a deterrent or reprisal against the dissidents (or persons perceived as such) of the regime. Media sources mentioned video recordings of rapes committed by Government soldiers being circulated in Misrata.⁵⁰⁸ The Commission further collected reports of rape, including gang rape, committed by opposition forces and armed civilians during house raids.⁵⁰⁹

The Commission clarified that most rape allegations were made by persons other than the victims, including family members, and that it faced difficulties in collecting evidence of sexual violence, considering victims’ reluctance to disclose information not only due to the trauma, shame and stigma but also due to the fact that sexual relations outside a lawful marriage are punishable under Libyan criminal law.⁵¹⁰ Although the Commission was unable to verify

502 *Ibid*, paras 247–248.

503 *Ibid*, para 250.

504 *Ibid*, para 251. The report refers as “migrant workers” for those who fled Libya due to insecurity, conflict and economic hardship. *Ibid*, para 192.

505 *Ibid*, paras 204–206, 249.

506 *Ibid*, para 205.

507 *Ibid*, paras 204–206.

508 *Ibid*, para 206. HRW and Physicians for Human Rights (PHR) also documented cases of rape of women and girls by Government forces. The latter reported that rape destroys the whole community, alleging its use as a weapon, and that some survivors of rape have also been subjected to honour killings. Moreover, it reiterated the risks for a woman to report rapes due to the possible stoning or flogging. HRW, ‘Libya: Transitional Government Should Support Victims’, 19 September 2011; PHR, ‘Witness to War Crimes: Evidence from Misrata, Libya’, August 2011, p 16. See further BBC News, ‘Libya rape victims “face honour killings”’, 14 June 2011.

509 A/HRC/17/44, paras 207–208, 251.

510 *Ibid*, para 202.

the reports of sexual violence, it stated that there was “sufficient information received to justify further investigation to ascertain the extent of sexual violence”, and that it is evident “that the reports of the rapes have had a major psychological and social impact and have spread fear among the population”.⁵¹¹

At the ICC

On 26 February 2011, the UN Security Council issued Resolution 1970, granting the ICC jurisdiction over the Situation in Libya, a non-State Party to the Rome Statute, since 15 February 2011.⁵¹² The OTP subsequently announced the opening of an investigation into the Situation in Libya on 3 March 2011.⁵¹³ In June 2011, the Court issued three simultaneous arrest warrants for the following individuals: Muammar Gaddafi,⁵¹⁴ his son and former *de facto* Libyan Prime Minister Saif Al-Islam Gaddafi (Gaddafi),⁵¹⁵ and Abdullah Al-Senussi (Al-Senussi), a Colonel in the Libyan Armed Forces and Head of the Libyan Military Intelligence at the time of the commission of the crimes.⁵¹⁶ The proceedings against Muammar Gaddafi were terminated in November 2011,

following the confirmation of his death.⁵¹⁷ The proceedings against Al-Senussi were terminated in October 2013, following a successful admissibility challenge by the Libyan Government⁵¹⁸ — the first and so far only case found to be inadmissible before the ICC. The ICC Arrest Warrant for Gaddafi remains outstanding.⁵¹⁹

Two further arrest warrants were issued in April 2013 and August 2017 for Al-Tuhamy Mohamed Khaled (Al-Tuhamy) and Mahmoud Mustafa Busayf Al-Werfalli (Al-Werfalli), respectively,⁵²⁰ for charges outlined below in each respective part. A second arrest warrant was issued against Al-Werfalli in July 2018, complementing the first Arrest Warrant for him.⁵²¹ These Arrest Warrants remain outstanding.

Explicit charges of sexual and gender-based crimes were not brought in any of the ICC cases in the Libya Situation. To date, sexual and gender-based violence has only been included in the charges against Al-Tuhamy as underlining acts, and the Arrest Warrant does not specify to which of the crimes charged these acts refer.⁵²² The lack of explicit sexual and gender-based crimes

511 *Ibid*, paras 209, 242.

512 S/Res/1970, para 4.

513 ‘ICC Prosecutor to open an investigation in Libya’, 2 March 2011.

514 ICC-01/11-01/11-2, p 7.

515 ICC-01/11-01/11-3, p 5, 7.

516 ICC-01/11-01/11-4, p 7. See also ‘Pre-Trial Chamber I issues three warrants of arrest for Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdulla Al-Senussi’, ICC-CPI-20110627-PR689, 27 June 2011.

517 ICC-01/11-01/11-28, p 5.

518 ICC-01/11-01/11-466-Red; ICC-01/11-01/11-565; ICC-01/11-01/11-567.

519 For further information, see Women’s Initiatives for Gender Justice, ‘The Compendium: An overview of Situations and cases before the International Criminal Court’, December 2017, p 115-118.

520 ICC-01/11-01/13-1, p 6-7; ICC-01/11-01/17-2, p 16.

521 ICC-01/11-01/17-13, para 7 and p 18.

522 ICC-01/11-01-13-1, paras 7-10.

charges in this Situation is notable given that the Prosecutor stated that the Office had received “information concerning the alleged commission of rape” and promised “no impunity for gender crimes committed in Libya”.⁵²³ Even more clearly, in November 2011, the Prosecutor specifically addressed the crime of rape and its use during the Libyan conflict in 2011 and stated:

[T]he Office has been in contact with sources reporting multiple victims of sexual violence, allegedly committed by Gaddafi security forces. While it is premature to draw conclusions on specific numbers, the information and evidence indicates at this stage that hundreds of rapes occurred during the conflict. [...] The Prosecution has collected some evidence showing that commanders gave orders to commit rape in the Western Mountains area and is screening possible witnesses that indicated that Muammar Gaddafi, Al-Senussi and other high officials were discussing the use of rape to persecute those considered dissidents or rebels.⁵²⁴

The Prosecutor has repeatedly called for the required support from the UN Security Council, UN member States, and States Parties to the Rome Statute to ensure that ICC indictees are brought to

justice. In the Prosecutor’s latest report to the UN Security Council, it was highlighted that “[i]nvestigations in relation to both existing and potential cases continue to progress and preparations are moving ahead for possible new applications for warrants of arrest”.⁵²⁵ However, the OTP remains concerned regarding the precarious security situation in the country and the continued armed conflict between various factions.⁵²⁶ The Prosecutor noted that, between January and February 2018, the UN Support Mission in Libya (UNSMIL) documented 248 civilian casualties, a sharp increase from previous months, and that the IOM estimated that 165,478 persons remain internally displaced across Libya.⁵²⁷

Particular attention was drawn to migrants reportedly subjected to arbitrary detention, torture, rape and other forms of sexual violence, abduction for ransom, extortion, forced labour, unlawful killings and slave auctions.⁵²⁸ In a statement to the UN Security Council in November 2016, the Prosecutor stated that the Office would “continue to study the feasibility of opening an investigation into alleged criminal acts against refugees and migrants in Libya, including any alleged acts of sexual violence or crimes against children, that fall under the Court’s jurisdiction”.⁵²⁹

523 ‘Statement to the United Nations Security Council on the situation in the Libyan Arab Jamahiriya, pursuant to UNSCR 1970 (2011)’, 4 May 2011, para 12; ‘Statement of the Prosecutor of the International Criminal Court, Luis Moreno-Ocampo in relation to Libya’, 16 May 2011.

524 ‘Statement of the Prosecutor of International Criminal Court, Luis Moreno-Ocampo, to the United Nations Security Council on the situation in Libya, pursuant to UNSCR 1970 (2011)’, 2 November 2011, paras 14, 17.

525 OTP, ‘Fifteenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011)’, 9 May 2018, para 20.

526 *Ibid*, para 21.

527 *Ibid*, paras 21, 24. See also UNSMIL, ‘Human Rights Report on Civilian Casualties—January 2018’, 1 February 2018; UNSMIL, ‘Human Rights Report on Civilian Casualties—February 2018’, 1 March 2018.

528 OTP, ‘Fifteenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011)’, 9 May 2018, para 28.

529 ‘Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011)’, 9 November 2016, para 29.

Charges in Cases of the Libya Situation

Charge		Muammar Gaddafi	Gaddafi	Al-Senussi	Al Tuhamy ⁵³⁰	Al-Werfalli
Murder	WC					•
	CAH	•	•	•		
Persecution	WC					
	CAH	•	•	•	•	
Torture	WC				•	
	CAH				•	
Imprisonment	WC					
	CAH				•	
Other Inhumane Acts	WC					
	CAH				•	
Cruel Treatment	WC				•	
	CAH					
Outrages Upon Personal Dignity	WC				•	
	CAH					

• Arrest warrant/Summons to appear
A Acquitted

○ Confirmation of charges
C Convicted

● Trial
 ■ SGBC charges

⁵³⁰ Sexual violence and rape were included in the charges against Al Tuhamy as underlining acts. However, the Arrest Warrant does not specify to which of the crimes charged these acts refer. ICC-01/11-01-13-1, paras 7-8, 10.

The Prosecutor v. Al-Tuhamy Mohamed Khaled

On 24 April 2017, Pre-Trial Chamber I reclassified as public an arrest warrant issued on 18 April 2013 under seal against Al-Tuhamy.⁵³¹ The execution of this Arrest Warrant is pending and he remains at large.⁵³²

Al-Tuhamy is the alleged former Lieutenant General of the Libyan Army and former Head of the Libyan Internal Security Agency (ISA) and allegedly had the “authority to implement Gaddafi’s orders to arrest, detain, conduct raids, conduct surveillance, investigate, monitor and torture political prisoners”.⁵³³ In this capacity, Al-Tuhamy faces charges as a direct perpetrator, an indirect perpetrator or indirect co-perpetrator under Article 25(3)(a), as an accessory to the crimes under Article 25(3)(d), or as a superior under Article 28(b) of the Statute.⁵³⁴

Members of the ISA, as Al-Tuhamy’s subordinates, are alleged to have arrested and detained perceived opponents of the Gaddafi regime and subjected them to “various forms of mistreatment, including severe beatings, electrocution, acts of sexual violence and rape, solitary confinement, deprivation of food and water, inhumane

conditions of detention, mock executions, threats of killing and rape in various locations throughout Libya including Zawiya, Tripoli, Tajoura, Misratah, Sirte, Benghazi and Tawergha”.⁵³⁵

According to Pre-Trial Chamber I, there are reasonable grounds to believe that these acts constitute four crimes against humanity (imprisonment, torture, persecution, and other inhumane acts) committed between 15 February 2011 and 24 August 2011; and three war crimes (torture, cruel treatment, and outrages upon personal dignity) committed between early March 2011 and 24 August 2011.⁵³⁶ This is the first and so far only case in the Libya Situation to include acts of sexual violence; however, the Arrest Warrant does not clarify which specific act constitutes which specific crime.

The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli

On 15 August 2017, Pre-Trial Chamber I issued an arrest warrant for Al-Werfalli,⁵³⁷ which was later complemented on 4 July 2018 by a second warrant.⁵³⁸ This is the first Libyan case relating to crimes committed after the Libyan uprising in 2011, and Al-Werfalli is the first ICC accused in the Libya Situation who was not affiliated with

531 ICC-01/11-01/13-18, para 4 and p 4; ICC-01/11-01/13-1, p 6-7.

532 For more information, see Women’s Initiatives for Gender Justice, ‘The Compendium: An overview of Situations and cases before the International Criminal Court’, December 2017, p 119.

533 ICC-01/11-01/13-1, para 11 and p 6.

534 *Ibid*, para 12 and p 6.

535 *Ibid*, para 7.

536 *Ibid*, paras 8-10.

537 ICC-01/11-01/17-2, p 16.

538 ICC-01/11-01/17-13, para 7 and p 18.

the Gaddafi regime or Gaddafi's armed forces at the time of the crimes.⁵³⁹

In May 2014, the Libyan National Army (LNA)—a coalition of army units, ex-revolutionary groups and tribal militias acting under the command of General Khalifa Haftar—reportedly launched Operation Dignity to fight terrorist groups in Benghazi.⁵⁴⁰ The Al-Saiqa Brigade, of which Al-Werfalli is alleged to be a commander since December 2015, was one of the revolutionary armed groups part of Operation Dignity.⁵⁴¹ Al-Werfalli is alleged to have authority over at least one detention centre.⁵⁴²

In this capacity, Al-Werfalli is alleged to be criminally responsible for the war crime of murdering 33 persons who were either detainees, civilians, or persons *hors de combat*, as a direct perpetrator or for ordering the executions.⁵⁴³ These executions were allegedly committed in Benghazi or surrounding areas in Libya, from around 3 June 2016 until on or around 17 July 2017 during the course of seven separate rounds of executions described as “exceptionally cruel, dehumanising and degrading”.⁵⁴⁴ The

evidence brought before the Chamber included, among other items, recordings and summaries of witness interviews, video material, social media posts by the Media Centre of the Al-Saiqa Brigade, and reports by international organisations, NGOs and research centres.⁵⁴⁵

Following the emergence of credible evidence showing that Al-Werfalli has allegedly been committing additional murders since the Arrest Warrant for him was issued,⁵⁴⁶ on 4 July 2018, the second Arrest Warrant for him was issued. This new Arrest Warrant added an eighth incident to the charge of murder as a war crime, namely the killing of ten persons in front of a mosque in Benghazi on 24 January 2018.⁵⁴⁷ There have also been conflicting reports indicating a possible arrest of, and internal investigation by the LNA into, Al-Werfalli, or indicating that he is at large.⁵⁴⁸ However, at the time of writing, his custodial status remains uncertain.⁵⁴⁹ The execution of the two ICC Arrest Warrants for Al-Werfalli remain outstanding.

539 For more information, see Women's Initiatives for Gender Justice, 'The Compendium: An overview of Situations and cases before the International Criminal Court', December 2017, p 119-120.

540 ICC-01/11-01/17-2, para 6.

541 *Ibid*, paras 7-9 and p 16.

542 *Ibid*, para 9.

543 *Ibid*, paras 10, 28 and p 16. See also 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following the issuance of a warrant of arrest for Mr Mahmoud Mustafa Busayf al-Werfalli', 15 August 2017.

544 ICC-01/11-01/17-2, paras 10-22.

545 *Ibid*, para 3.

546 'ICC Prosecutor, Fatou Bensouda, condemns recent violence in Benghazi, Libya', 26 January 2018. See also 'Fifteenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011)', 9 May 2018, paras 3-11.

547 ICC-01/11-01/17-13, paras 7, 16-17 and p 18.

548 'Prosecutor Fatou Bensouda renews call for the immediate arrest and surrender of ICC suspect, Mahmoud Mustafa Busayf al-Werfalli', 13 September 2017.

549 See 'Fifteenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011)', 9 May 2018, para 7.

Population: 19.3 million
♀ 50% | ♂ 50%

In Mali, an estimated 75% of girls up to the age of 14 and 89% of women and girls between the age of 15 and 49 have undergone female genital mutilation (FGM).⁵⁵⁰ FGM refers to procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for cultural or other non-medical reasons. FGM has devastating implications for the sexual and reproductive health of women and girls. The UN General Assembly adopted a milestone resolution in 2012, calling on the international community to increase efforts to end the practice.⁵⁵¹ FGM is an issue of human rights which affects women and girls globally.

Mali

Mali has been troubled by instability since January 2012, when a non-international armed conflict broke out between Government forces and a myriad of organised armed groups, in particular the *Mouvement national de libération de l'Azawad* (MNLA), Ansar Dine, Al Qaeda in the Islamic Maghreb (AQIM), the *Mouvement pour l'unicité et le jihad en Afrique de l'Ouest* (MUJAO) and "Arab militias", as well as fighting amongst these armed groups themselves.⁵⁵² The north of Mali has been marginalised since the country's independence from France in 1960, and different groups, mainly Tuareg, have been fighting for decades to achieve independence or autonomy for the northern territory. The ensuing violence has been a longstanding source of conflict in the region, fuelled by the downfall of Libyan leader Muammar Gaddafi in 2011 which flooded Mali with heavy weapons and strengthened the rebels in the north of the country.⁵⁵³

On 17 January 2012, a rebellion was launched in northern Mali by the MNLA, a Tuareg rebel movement, soon joined by the Ansar Dine group and other armed groups, advancing and taking the main cities and military bases in northern Mali.⁵⁵⁴ The military's disappointment with the Government's handling of the rebellion in the north led to a *coup d'état* on 22 March 2012, overthrowing then-President Amadou Toumani Touré.⁵⁵⁵

On 6 April 2012, the MNLA declared independence of the territory under the name "Azawad",⁵⁵⁶ but soon lost political and military control of the territory to radical Islamist groups, including AQIM, Ansar Dine and the MUJAO.⁵⁵⁷ The Islamist armed groups forcefully imposed a strict version of Sharia law

550 World Health Organization (WHO), 'Female genital mutilation (FGM)', 2018.

551 UN Children's Fund, 'Female Genital Mutilation/Cutting: A global concern', 2016.

552 OTP, 'Situation in Mali: Article 53(1) Report', 16 January 2013, para 3.

553 See Grégory Chauzal and Thibault van Damme, 'The roots of Mali's conflict: Moving beyond the 2012 crisis', *Clingendael Netherlands Institute of International Relations*, March 2015, p 8, 17, 45.

554 OTP, 'Situation in Mali: Article 53(1) Report', 16 January 2013, paras 25-28.

555 *Ibid*, para 35.

556 See BBC News, 'Mali Tuareg rebels declare independence in the north', 6 April 2012.

557 See OTP, 'Situation in Mali: Article 53(1) Report', 16 January 2013, para 29.

on the territory under their control⁵⁵⁸ and serious human rights abuses were reported during this period. Those who did not obey the new law were subjected to public beatings, whipping, stoning, amputation of limbs, amongst other punishments. Women were forced to wear black face-covering veils and loose-fitting clothing.⁵⁵⁹

Since the crisis began in January 2012, the Situation in Mali has remained unstable. Within the first year, the UN Secretary-General, in his report on sexual violence in conflict, noted a dramatic increase of reported cases of sexual violence.⁵⁶⁰ The report highlighted the systematic use of sexual violence, including rape and gang rape, as a tactic of war by rebels in northern Mali.⁵⁶¹ Sexual violence was reportedly used with the aim to punish, intimidate and enslave women and girls.⁵⁶² Reported cases of sexual violence include incidents of rape, sexual slavery, forced marriage, torture and sexual violence in places of detention, as well as gang rape, abduction and sexual violence during house-to-house operations and at checkpoints.⁵⁶³ A majority of women and girls have not reported sexual violence out of fear of punishment and exclusion by their partners and their communities.⁵⁶⁴ The violence was allegedly

perpetrated by different parties to the conflict, including Government forces, the MNLA, Ansar Dine, AQIM and MUJAO.⁵⁶⁵

In rebel-controlled areas, reports of survivors also indicate a practice of “requisition”, consisting of the abduction of women and girls and forcing them to spend the night in rebel camps, where they were subjected to sexual violence. The report of the UN Secretary-General highlighted this practice, adding that “[e]ach night, a different district [was] required to provide a certain number of women and girls to the rebels.”⁵⁶⁶

Multiple cases were reported of women and girls forced into relationships with Islamist rebels, particularly from the Ansar Dine, AQIM and MUJAO groups.⁵⁶⁷ Parents were “threatened into handing over their daughters for marriage to members of these groups, marriages that resulted in rape, sexual slavery and, in some instances, death. These women and girls are often married and then raped repeatedly by several men in rebel camps.”⁵⁶⁸

In June 2015, a peace agreement was signed between the Malian Government and two coalitions of armed groups—the *Coordination des mouvements de l’Azawad* (CMA) and the Plat-

558 See The New York Times, ‘In Timbuktu, Harsh Change Under Islamists’, 2 June 2012.

559 See France 24, ‘Out with colour: Islamists force Timbuktu women to wear black veils’, 24 September 2012.

560 A/67/792–S/2013/149, para 50.

561 *Ibid.*, para 52.

562 UN Team of Experts on the Rule of Law/Sexual Violence in Conflict, ‘Annual Report 2015’, p 29.

563 A/67/792–S/2013/149, para 51.

564 *Ibid.*

565 *Ibid.*, para 50; UN Team of Experts on the Rule of Law/Sexual Violence in Conflict, ‘Annual Report 2015’ p 29.

566 A/67/792–S/2013/149, para 52.

567 *Ibid.*, para 54.

568 *Ibid.*

form coalition of armed groups.⁵⁶⁹ Only five of approximately 100 delegates participating in the peace negotiations were women.⁵⁷⁰ Women were further not able to equally participate in implementation of the agreement which has made little progress and remains ongoing.⁵⁷¹ This raises serious doubts with regard to the inclusion of women's concerns and priorities at the negotiating table and during the implementing phase. Any serious attempt at increasing gender sensitivity and inclusiveness within the peace process in the country will inevitably need to find ways to address obstacles impeding women from participating, such as the insecurity which continues to grow and spread, exposing them to violence when leaving their homes or communities and preventing them from organising themselves across communities.⁵⁷² Despite being often excluded from formal decision-making processes, Malian women are highly active in local associations and networks, as well as in NGOs at the national level.⁵⁷³

The security situation in northern and central Mali remains precarious with continued threats and attacks against humanitarian workers, peacekeepers and national security forces hindering

efforts to investigate conflict-related sexual violence.⁵⁷⁴ Underreporting of sexual violence is likely to have been perpetuated due to fear of stigmatisation and retaliation, cultural taboos, lacking services, and distrust of national institutions.⁵⁷⁵ The conflict has severely impacted Mali's justice system and citizens' confidence therein. The protection of victims and witnesses remains challenging due to the continued insecurity in the country, preventing them from participating in judicial proceedings.⁵⁷⁶ In a recent letter dated 19 January 2018, the UN Secretary-General informed the Security Council of his decision to establish an International Commission of Inquiry with the purpose of investigating allegations of abuses and serious violations of international human rights law and IHL, including conflict-related sexual violence, committed in Mali from 1 January 2012 to the date of the establishment of the Commission.⁵⁷⁷

At the ICC

In July 2012, the ICC Prosecutor received a letter from the Government of Mali, referring the Situation in the country since January 2012 to the Court,⁵⁷⁸ which ultimately led to the opening

⁵⁶⁹ S/2018/58, p. 3.

⁵⁷⁰ Peace Research Institute Oslo (PRIO) Centre on Gender, Peace and Security, 'Women and the Peace Process in Mali', February 2017, p. 2-3.

⁵⁷¹ *Ibid.*, p. 3.

⁵⁷² *Ibid.*, p. 4.

⁵⁷³ *Ibid.*, p. 2.

⁵⁷⁴ S/2018/250, para 51.

⁵⁷⁵ *Ibid.*

⁵⁷⁶ UN Team of Experts on the Rule of Law/Sexual Violence in Conflict, 'Annual Report 2015', p. 29.

⁵⁷⁷ S/2018/57, p. 1.

⁵⁷⁸ Government of Mali, 'Referral Letter', 13 July 2012.

of a formal investigation on 16 January 2013.⁵⁷⁹ Based on the initial assessment of evidence, the Prosecutor announced there were reasonable grounds to believe that crimes had been committed in northern Mali since January 2012, including murder, the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, mutilation, cruel treatment and torture, intentionally directing attacks against protected objects, pillaging, and rape.⁵⁸⁰ Furthermore, the OTP since then indicated that it would continue to investigate allegations relating to the use, conscription, and enlistment of children.⁵⁸¹

There are currently two ICC cases related to the Mali Situation, namely the case against Ahmad Al Faqi Al Mahdi (Al Mahdi), a former member of the Ansar Dine armed group and leader of the “morality brigade” *Hesbah*,⁵⁸² and the case against Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (Al Hassan), allegedly a member of Ansar Dine and *de facto* chief of the Islamic Police.⁵⁸³ Notably, the charges brought against Al Hassan include forced marriage as an other inhumane act, and persecution on the grounds of gender.

Continued threats and attacks against humanitarian workers, peacekeepers and national security forces are hindering efforts to investigate conflict-related sexual violence.

579 ‘ICC Prosecutor opens investigation into war crimes in Mali: “The legal requirements have been met. We will investigate”’, ICC-OTP-20130116-PR869, 16 January 2013. See further Women’s Initiatives for Gender Justice, ‘Mali: Office of the Prosecutor announces opening of investigations in ICC’s eighth Situation’, *Legal Eye on the ICC eLetter*, February 2013.

580 ‘ICC Prosecutor opens investigation into war crimes in Mali: “The legal requirements have been met. We will investigate”’, ICC-OTP-20130116-PR869, 16 January 2013.

581 OTP, ‘Article 53(1) Report on the Situation in Mali’, 16 January 2013, paras 120–124.

582 ICC-01/12-01/15-171, paras 9, 31, 33.

583 ICC-01/12-01/18-2-tENG, para 7; ICC-01/12-01/18-1-Red, paras 2, 6.

Charges in cases of the Mali Situation

Charge		Al Mahdi	Al Hassan
Rape	WC		•
	CAH		•
Sexual Slavery	WC		•
	CAH		•
Torture	WC		
	CAH		•
Persecution	WC		
	CAH		•
Forced Marriage as an Other Inhumane Act	WC		
	CAH		•
Violence to Life and Person	WC		•
	CAH		
Outrages Upon Personal Dignity	WC		•
	CAH		
The passing of sentences and carrying out of executions without previous judgment by a regularly constituted court	WC		•
	CAH		
Intentionally directing attacks against buildings dedicated to religion and historic monuments	WC	• ⊙ ● C	•
	CAH		

• Arrest warrant/Summons to appear ⊙ Confirmation of charges ● Trial
 A Acquitted C Convicted ■ SGBC charges

The Prosecutor v. Ahmad Al Faqi Al Mahdi

Al Mahdi was convicted in September 2016 of the war crime of intentionally directing attacks against religious and historical buildings in Timbuktu between June and July 2012, he was sentenced to nine years' imprisonment.⁵⁸⁴ This is the first, and so far only, ICC case in which the accused pleaded guilty before the Court, and the shortest ICC trial to date. This is also the first ICC trial focusing solely on the destruction of historical and religious monuments.⁵⁸⁵

Following Al Mahdi's conviction and sentence, reparations proceedings commenced. This is the first case in which individual, collective and symbolic reparations were ordered by the ICC.

Reparations Order

On 17 August 2017, Trial Chamber VIII unanimously issued a Reparations Order awarding individual, collective and symbolic reparations to the community of Timbuktu.⁵⁸⁶ The Chamber identified three categories of harm in this case, namely damage to protected buildings,⁵⁸⁷ consequential economic loss,⁵⁸⁸ and moral harm.⁵⁸⁹ In

total, 139 reparations applications, including 137 individuals and two organisations, were considered by the Chamber at this stage.

Al Mahdi was found to be liable for €2.7 million in expenses for reparations.⁵⁹⁰ Noting his indigence, the Chamber encouraged the TFV to complement the individual and collective awards.⁵⁹¹ It was further encouraged to complement the reparations award with general assistance beyond the narrow scope of this case to a wider range of human rights violations alleged to have occurred in Timbuktu and elsewhere throughout Mali.⁵⁹²

A gender sensitive approach to reparations

Gender sensitivity with regard to reparations is crucial for ensuring effective, inclusive and meaningful reparations. The Chamber in this case highlighted the need for a gender sensitive approach to preventing and fighting the destruction of cultural heritage, as well as to repairing the related harm suffered. More specifically, with regard to the protection and defence of cultural heritage, the Chamber noted that a gender sensitive approach is particularly essential given that women and girls may face gender specific risks, discrimination and challenges in accessing and

584 ICC-01/12-01/15-171, paras 7, 11, 30, 42-43, 62, 98-100. See also 'Al Mahdi case: accused makes an admission of guilt at trial opening', ICC-CPI-20160822-PR1236, 22 August 2016.

585 For more information, see Women's Initiatives for Gender Justice, 'The Compendium: An overview of Situations and cases before the International Criminal Court', December 2017, p 127-130.

586 ICC-01/12-01/15-236, p 60. See also 'Al Mahdi case: ICC Trial Chamber VIII issues reparations order', ICC-CPI-20170817-PR1329, 17 August 2017.

587 ICC-01/12-01/15-236, paras 60-67, 104.

588 *Ibid*, paras 72-83, 104.

589 *Ibid*, paras 84-92, 104.

590 ICC-01/12-01/15-236, paras 134-135 and p 60.

591 *Ibid*, paras 114-115, 134-135, 138 and p 60.

592 *Ibid*, para 108 and p 60.

defending cultural heritage.⁵⁹³ As for the implementation of reparations, the Chamber referred to the need for transformative reparations by emphasising that “[t]o every extent possible, these reparations must be implemented in a gender and culturally sensitive manner which does not exacerbate—and in fact addresses—any preexisting situation of discrimination preventing equal opportunities to victims.”⁵⁹⁴

Individual reparations

The Chamber ordered individual reparations in the form of compensation for the victims whose livelihoods exclusively depended upon the protected buildings and whose ancestral burial sites were damaged in the attack.⁵⁹⁵ The Chamber ordered the TFV to prioritise the individual reparation awards due to the particular extent to which victims were harmed by Al Mahdi’s crimes.⁵⁹⁶ The Court emphasised that this prioritisation shall only take place if it does not hinder broader reconciliation or generate stigma towards individual victims *vis-à-vis* the community of Timbuktu.⁵⁹⁷ This is an important point to consider as compensating certain individuals but not others can cause division. From a gender perspective, compensation can be further problematic as the necessary calculations to award

compensation depend on an accurate understanding of gender components of short-term and long-term harms. The Chamber’s expressed commitment to gender sensitive reparations—in light of the concrete compensation amounts not yet being publicly determined—is encouraging as it is important to consider societal and other inequalities that may affect male and female victims differently, in particular when assessing the loss of livelihood.

With regard to the eligibility of victims, the Chamber noted that the number of applications received pales in comparison to the number of persons who were in fact harmed, and that, due to the security situation in Mali, the names of all victims who would be eligible for individual reparations are unknown.⁵⁹⁸ In light of this, the Chamber considered that “the impracticability of identifying all those meeting its individual reparations parameters” justifies an administrative screening by the TFV during the implementation phase.⁵⁹⁹ Of concern is the indication by the Chamber that “[a]nyone who wishes to be considered for individual reparations must make their identity known to both the TFV and the Defence.”⁶⁰⁰ Despite the Chamber highlighting that “no identity of a reparations applicant may be transmitted to the TFV or Defence without

593 *Ibid*, para 34.

594 *Ibid*, para 105.

595 *Ibid*, paras 83, 90 and p 60. The Chamber defined compensation as ‘something, typically money, awarded to one or more victims in recognition of the harm they suffered’. *Ibid*, para 47.

596 *Ibid*, para 140.

597 *Ibid*, para 140.

598 *Ibid*, para 141.

599 *Ibid*, para 144.

600 *Ibid*, para 146(v).

the victim's consent",⁶⁰¹ this requirement may nonetheless risk the security and well-being of potential beneficiaries, and strongly discourage the submission of applications for reparations.

Collective reparations

Collective reparations were ordered for the rehabilitation of the protected sites and for the community of Timbuktu as a whole.⁶⁰² Collective reparations in this case were ordered to address the financial loss, economic harm and emotional distress suffered as a result of the attack.⁶⁰³

Gender sensitivity is crucial for the effectiveness of such reparation awards and it is promising that the Chamber has indicated for these awards to be designed based on a consultation process. This process must be inclusive, leading to proposed activities that are transformative in nature and avoid perpetuating discriminatory structures. In order to ensure equal access for both men and women to the consultation process as well as to the proposed activities within the specific context of this case, consideration of potential gender specific obstacles is essential.

Symbolic reparations

Collective reparations further included symbolic measures, such as a memorial, commemoration or forgiveness ceremony.⁶⁰⁴ Al Mahdi's apology was considered "genuine, categorical and empathetic" and a video excerpt of it was posted on the ICC website as a symbolic measure and to increase victims' access to the apology.⁶⁰⁵

The Chamber also awarded nominal damages, in the form of €1, as a symbolic gesture for the damages suffered, to the State of Mali and the international community, represented by the UN Educational, Scientific and Cultural Organization (UNESCO), given the specific nature of the case.⁶⁰⁶

Victims appeal the Reparations Order

The Legal Representative appealed the Reparations Order and requested the Chamber to revise or define disputed wording concerning individual reparations for consequential economic loss, as well as the role of the TFV.⁶⁰⁷

Specifically, the Legal Representative of Victims disagreed with solely awarding "individual reparations for those whose livelihoods *exclusively* depended upon the Protected Buildings".⁶⁰⁸ According to the Legal Representative, with this

601 *Ibid*, para 146(iv).

602 *Ibid*, paras 67, 83, 90 and p 60. According to the Chamber, rehabilitation is 'aimed at restoring the victims and their communities to their former condition'.
Ibid, para 48.

603 *Ibid*, paras 83, 90.

604 *Ibid*, para 90.

605 *Ibid*, paras 70-71 and p 60.

606 *Ibid*, paras 106-107 and p 60.

607 ICC-01/12-01/15-244-tENG, p 18. ICC-01/12-01/15-238-Corr-tENG, paras VII, XIII. A *corrigendum* of the Notice of Appeal was filed on 21 September 2017. The Legal Representative of Victims filed an amended Notice of Appeal on 6 October 2017, pursuant to the order of the Appeals Chamber of 26 September 2017. ICC-01/12-01/15-242-Corr-Red-tENG; ICC-01/12-01/15-240, p 3.

608 ICC-01/12-01/15-244-tENG, p 4 (para 1) (emphasis in original).

wording, the Trial Chamber effectively restricted reparations to no more than 10% of victims.⁶⁰⁹

Furthermore, the Legal Representative of Victims challenged the administrative role given to the TFV in relation to the screening of victims for individual reparations,⁶¹⁰ arguing that this is in fact “adjudicative” in nature, and that such powers should lie with the Chamber.⁶¹¹ In his view, this does not provide available recourse for victims, as applicants cannot call for a judicial review if the TFV turns down their applications for reparations.⁶¹² The Legal Representative further stated that nowhere is it provided that the Chamber can delegate its powers to another organ of the Court, especially a non-judicial organ which exists to support the Court.⁶¹³

Ruling by the Appeals Chamber

On 8 March 2018, the Appeals Chamber unanimously decided to amend the Reparations Order with regard to the second ground of appeal, while confirming the remainder of the Order.⁶¹⁴ Regarding the first ground of appeal the Chamber found that the Legal Representative failed to demonstrate that the Trial Chamber had erred in determining the category of victims entitled to individual reparations for economic loss.⁶¹⁵ In

reaching this conclusion, the Appeals Chamber highlighted that the number of eligible victims remained to be determined, and that the Legal Representative’s argument that 90% of the victims would be deprived of reparations if their eligibility was contingent upon their livelihoods depending exclusively on the protected buildings was speculative.⁶¹⁶ The Appeals Chamber further noted that the Trial Chamber ordered primarily collective reparations due to the mainly collective character of the harm suffered, while individual reparations would concern a limited number of victims.⁶¹⁷

Addressing the second ground of appeal regarding the delegation of “power of adjudication” to the TFV and the confidentiality of identifying information of applicants, the Appeals Chamber found errors in the Trial Chamber’s determinations. Firstly, the Appeals Chamber found that a Trial Chamber may indeed request, on a case-by-case basis, the assistance of the TFV to undertake the administrative screening of beneficiaries of individual reparations who meet the eligibility criteria set out by the Chamber, but amended this to the extent that the Trial Chamber needs to fully endorse the results of the screening and make final determinations in the applications where the TFV’s administrative decisions are contested

609 *Ibid*, p 5 (para 2), p 9 (paras 11–12), p 10 (paras 5–6).

610 *Ibid*, p 4 (para 1).

611 *Ibid*, p 5 (para 4) and p 14–16 (paras 40, 45, 49).

612 *Ibid*, p 15 (para 44).

613 *Ibid*, p 16 (para 47).

614 ICC-01/12-01/15-259-Red2, paras 1–2. See also ‘Al Mahdi case: Reparations Order becomes final’, ICC-CPI-20180308-PR1363, 8 March 2018.

615 ICC-01/12-01/15-259-Red2, paras 33, 43, 39.

616 *Ibid*, para 39.

617 *Ibid*, paras 26, 33, 39.

or *proprio motu*, thus maintaining control over the entire reparations proceedings.⁶¹⁸

Secondly, the Appeals Chamber reversed and amended the Reparations Order with respect to having ordered victims to reveal their identity to Al Mahdi as a pre-condition to having their applications for reparations assessed by the TFV, “thereby creating an unnecessary obstacle to certain victims to receive reparations”.⁶¹⁹ According to the Appeals Chamber, the TFV may consider applications for individual reparations in cases where the applicants do not wish to have their identifying information disclosed to Al Mahdi.⁶²⁰

Draft Implementation Plan

The TFV filed its Draft Implementation Plan on 18 May 2018.⁶²¹ The Plan is heavily redacted, apparently due to “complexities arising from the security situation in Mali and related sensitivities, especially in regard of victims”.⁶²² Based on the publicly available content, the Plan outlines the proposed scope, measures and procedures for the implementation of the reparation awards, taking into account the scope of Al Mahdi’s liability, the substantive modalities of the awards, and the likely operational circumstances in Timbuktu

and in Mali.⁶²³ The estimated overall implementation period is three years.

Individual reparation awards

The TFV stated that the implementation of individual reparations will precede collective reparation awards to the extent possible.⁶²⁴ As for the contentious issue of the TFV’s screening for individual reparations, the TFV provided an overview of the process, outlining an identification phase—in which a potential victim comes forward to have their eligibility for individual reparations awards determined by the TFV—followed by a verification phase—in which the determination of individual eligibility is finalised by the TFV Board.⁶²⁵

Noting the Appeals Chamber’s decision that a rejected applicant may seek judicial review of the TFV Board’s negative eligibility determination, the TFV stated that it will also establish an Independent Review Panel.⁶²⁶ This panel is to have the authority to emit policy recommendations to the TFV Board and overturn a negative verification decision by the TFV Secretariat which will then be binding on the TFV Board.⁶²⁷

⁶¹⁸ *Ibid*, paras 1-2, 72, 98. The Appeals Chamber confirmed that victim applicants, who according to the TFV are ineligible for individual reparations, may request that the Chamber review the assessment by the TFV. *Ibid*, para 72 and p 4.

⁶¹⁹ *Ibid*, paras 87, 99.

⁶²⁰ *Ibid*, para 99.

⁶²¹ ICC-01/12-01/15-265-Corr-Red.

⁶²² *Ibid*, para 42.

⁶²³ *Ibid*, para 281.

⁶²⁴ *Ibid*, para 74.

⁶²⁵ *Ibid*, para 169.

⁶²⁶ *Ibid*, paras 216, 220-221.

⁶²⁷ *Ibid*, paras 225, 227, 231.

Collective reparation awards

As a form of economic rehabilitation of the community of Timbuktu, the TFV proposed a range of consultations-based collective awards to help victims overcome the economic harm through training, financial empowerment through access to (micro-)finance, and improved revenue through access to local markets.⁶²⁸ The TFV noted that some victims and their relatives face precarious economic circumstances and that the collective awards programme aims at recognising that “women and the elderly merit priority targeting, as they are found to be in dire financial circumstances as a result of the loss of livelihoods and tools of the trade”.⁶²⁹

As for redress for the moral harm suffered by the community of Timbuktu, the TFV proposed community dialogue, cultural and religious ceremonies and events to promote the importance and restoration of cultural heritage as well as to spread the message of reconciliation and non-repetition.⁶³⁰

The TFV’s indication that its proposed activities are consultations-based, as well as the particular focus on female victims, is encouraging and in line with the Reparations Order. It would be helpful, however, to have more publicly available information as to the way in which consultations

with victims are held, in particular with view to consulted victims’ diversity, individual interests, and different experiences and recollections, bearing in mind the degree of marginalisation or discrimination they may face in accessing the consultation process and reparation awards.

Symbolic reparation awards

Symbolic measures are included in the collective reparations awards.⁶³¹ In addition to the symbolic reparations already mentioned under collective reparations above, additional measures were already determined by the Trial Chamber in its Reparations Order, namely: (1) the symbolic gesture of €1 to the State of Mali and UNESCO, the latter representing the international community;⁶³² and (2) the production and posting of a video excerpt of Al Mahdi’s apology on the ICC website.⁶³³

Cost and funding of the reparations programme

The TFV reserved the right to reallocate the amounts between the different types of reparation awards, as well as within or between either or both categories of harm.⁶³⁴ It further clarified that it would bear the internal administration costs it incurs during the implementation phase, and that the Registry will bear the costs of the

⁶²⁸ *Ibid*, p 57.

⁶²⁹ *Ibid*, para 245.

⁶³⁰ *Ibid*, para 256.

⁶³¹ ICC-01/12-01/15-236, para 90; ICC-01/12-01/15-265-Corr-Red, para 258.

⁶³² ICC-01/12-01/15-236, paras 106-107 and p 60.

⁶³³ *Ibid*, paras 70-71 and p 60.

⁶³⁴ ICC-01/12-01/15-265-Corr-Red, para 85.

specific symbolic reparations ordered by the Trial Chamber.⁶³⁵

Approximately two years since Al Mahdi's conviction, and about one year since the Reparations Order was issued, the TFCV stated that "[g]iven the present state of fundraising and of the TFCV's reparations reserve, the Board may not yet be in a position to provide the Chamber with a definitive determination on its ability to complement the individual awards."⁶³⁶ This raises questions regarding the TFCV's fundraising efforts concerning this case, especially at the early stages of the reparations proceedings. The TFCV's website indicates that no earmarked contributions have been received in this case.

Additionally, with regard to the development of an assistance programme in Mali, the TFCV indicated that, despite its intent to develop such a programme in Mali, it is not in place as of yet given its contingency upon the availability of resources and the prevailing security environment.⁶³⁷

On 12 July 2018, the Trial Chamber approved the TFCV's Draft Implementation Plan, subject to amendments.⁶³⁸

The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud

On 27 March 2018, Pre-Trial Chamber I issued an Arrest Warrant for Al Hassan.⁶³⁹ Four days later, he was surrendered to the ICC by Malian authorities.⁶⁴⁰ Al Hassan's initial appearance before the Court took place on 4 April 2018 and the start of the confirmation of charges hearing, initially scheduled for 24 September 2018, was set on 6 May 2019.⁶⁴¹ In the meantime, Al Hassan remains in ICC custody.

Al Hassan is alleged to have been a member of Ansar Dine, a movement associated with AQIM, and the *de facto* chief of the Islamic Police.⁶⁴² In this capacity, Al Hassan is believed to have been a chief protagonist in the commission of crimes in Timbuktu, Mali, between April 2012 and January 2013.⁶⁴³

As *de facto* chief of the Islamic Police, Al Hassan is said to have had command over some 40 Islamic Police officers and to have therefore played a prominent part in the commission of crimes by that group.⁶⁴⁴ The Islamic Police's mission was to enforce and punish violations of the new rules and prohibitions that Ansar Dine

⁶³⁵ *Ibid*, para 89.

⁶³⁶ *Ibid*, para 37.

⁶³⁷ ICC-01/12-01/15-265-Corr-Red, paras 277-280.

⁶³⁸ ICC-01/12-01/15-273-Red, p 36-37.

⁶³⁹ ICC-01/12-01/18-2-tENG, p 9.

⁶⁴⁰ 'Situation in Mali: Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud surrendered to the ICC on charges of crimes against humanity and war crimes in Timbuktu', ICC-CPI-20180331-PR1376, 31 March 2018.

⁶⁴¹ 'Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud makes first appearance before the ICC', ICC-CPI-20180404-PR1377, 4 April 2018; 'Al Hassan case: Confirmation of charges hearing postponed to 6 May 2019', ICC-CPI-20180720-MA230, 20 July 2018.

⁶⁴² ICC-01/12-01/18-2-tENG, para 7; ICC-01/12-01/18-1-Red, paras 2, 6.

⁶⁴³ ICC-01/12-01/18-2-tENG, para 3 and p 9; ICC-01/12-01/18-1-Red, para 1.

⁶⁴⁴ ICC-01/12-01/18-2-tENG, para 7.

and AQIM instituted while they had control over Timbuktu.⁶⁴⁵ Many of these rules and prohibitions targeted women and girls, such as strict dress codes,⁶⁴⁶ and any violation of these rules ensued severe punishment, including beatings, other types of physical violence, and detention.⁶⁴⁷ While in detention, many women and girls were subjected to rape and other acts of sexual violence.⁶⁴⁸ Aside from commanding Islamic Police officers, Al Hassan is also alleged to have himself patrolled the streets to enforce the new rules and prohibitions, and detain persons violating them.⁶⁴⁹ Further to this, Al Hassan is believed to have taken part in what the Prosecution and Pre-Trial Chamber described as a “policy of forced marriage”, giving rise to rape and sexual enslavement of women and girls.⁶⁵⁰

Against this backdrop, the Pre-Trial Chamber considered that there exist reasonable grounds to believe that Al Hassan is responsible⁶⁵¹ for the following sexual and gender-based crimes:

1. Rape as a crime against humanity and war crime;
2. Sexual slavery as a crime against humanity and war crime;

3. Gender-based persecution as a crime against humanity, on the basis of the underlying acts of forced marriages, rapes, fundamentalist rules and prohibitions targeting women and girls, and severe punishment for violations of these;⁶⁵²
4. Forced marriage as an other inhumane act as a crime against humanity;⁶⁵³ and
5. Torture as a crime against humanity.⁶⁵⁴

The case against Al Hassan is the first case in the Situation in Mali to include sexual and gender-based crimes and further includes two such crimes which have received fairly limited attention by the Court thus far, namely gender-based persecution and forced marriage as an other inhumane act. These issues are discussed further in the **Gender Justice at the ICC** section of this Report.

645 ICC-01/12-01/18-2-tENG, para 7.

646 See ICC-01/12-01/18-1-Red, paras 163-165; ICC-01/12-01/18-2, para 6.

647 ICC-01/12-01/18-1-Red, paras 164-165.

648 *Ibid*, paras 123, 167.

649 ICC-01/12-01/18-2-tENG, para 7; ICC-01/12-01/18-1-Red, paras 47, 193.

650 ICC-01/12-01/18-2-tENG, para 9, ICC-01/12-01/18-1-Red, paras 48, 206.

651 Specifically, Al Hassan is alleged to have committed, or ordered, solicited or encouraged the commission of crimes in Timbuktu, within the meaning of Articles 25(3)(a) or 25(3)(b), respectively. ICC-01/12-01/18-2, para 15.

652 ICC-01/12-01/18-2, para 12; ICC-01/12-01/18-1-Red, paras 162-174.

653 ICC-01/12-01/18-2-tENG, para 12.

654 ICC-01/12-01/18-2, p 9-10. The Prosecution submitted that women who did not respect the dress code were subjected to torture or cruel treatment. ICC-01/12-01/18-1-Red, para 164.

Population: 9.3 million

♀ 50% | ♂ 50%

Gender-based violence against men and boys can take many forms, including physical and psychological violence and is perpetrated with a variety of motives. In Darfur, the Janjaweed and groups of soldiers have used rape against Darfuri men and boys as a way to emasculate them. Rape of Darfuri men and boys often preceded and was followed by their killing. The rape typically involved penile penetration or objects, such as sticks and guns.⁶⁵⁵

Darfur, Sudan

Against a long history of conflict interspersed with periods of relative peace, a mixture of democratic and military rule regimes following *coup d'états*, violent conflict broke out in Darfur, Sudan in 2002 between government and armed opposition groups. The conflict has been characterised by indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur.

By the end of 2004, it was estimated that 1.65 million persons were internally displaced in Darfur, and that more than 200,000 refugees from Darfur were in neighbouring Chad. Today, an estimated 1.76 million persons are internally displaced.⁶⁵⁶ The extensive destruction and displacement resulted in a loss of livelihood and means of survival for countless women, men and children. In addition to the large-scale attacks, many people have been arrested and detained, and many were held incommunicado for prolonged periods and tortured. Sexual violence against women and girls in particular has been widespread throughout the conflict. Incidents documented by the African Union (AU)–UN Hybrid Operation in Darfur (UNAMID) in 2016 include rape, gang-rape, attempted rape, abduction for the purpose of sexual assault, and sexual harassment. Most sexual violence attacks have taken place when women and girls have gone to farm or collect firewood.

At the ICC

The Situation was referred to the ICC in 2005 by the UN Security Council at the recommendation of the Commission of Inquiry on Darfur.⁶⁵⁷ The Commission established that the Government of Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law. The referral

⁶⁵⁵ Gabrielle Ferrales, Hollie Nysbeth Brehm, and Suzy McElrath, 'Gender-Based Violence Against Men and Boys in Darfur: The Gender-Genocide Nexus', *Gender & Society*, 2016, p 573-574.

⁶⁵⁶ UN Office for the Coordination of Humanitarian Affairs (UNOCHA), 'Darfur Humanitarian Overview', 1 February 2018.

⁶⁵⁷ 'Report of the International Commission of inquiry on Darfur to the United States Secretary General', 25 January 2005; The Prosecutor of the ICC opens investigation in Darfur', ICC-OTP-0606-104, 6 June 2005.

to the ICC was the first of its kind, and the first formal investigation into a Situation on the territory of a non-State party.

There are currently five cases before the ICC arising from the Darfur Situation, involving seven individuals. There are five outstanding arrest warrants related to the cases: Ahmad Muhammed Harun (Harun); Ali Muhammad Ali AbdAl-Rahman (Kushayb); President Omar Hassan Ahmad Al Bashir (Al Bashir); Abdel Raheem Muhammad Hussein (Hussein), and Abdallah Banda Abakaer Nourain (Banda).⁶⁵⁸ In addition to President Al Bashir, at the time of the issuance of the Arrest Warrants, all of these suspects were senior government Ministers, members of the government-aligned Janjaweed militia group or in the case against *Banda*, the Commander-in-Chief of the Justice and Equality Movement (JEM).

On 12 December 2014, the Prosecutor informed the Security Council of the decision to hibernate investigative activities in Darfur due to limited resources of the Court, lack of oversight of the Security Council, and difficulties in bringing the accused individuals to justice.⁶⁵⁹ During a Statement to the Council, the Prosecutor emphasised ongoing atrocities in Darfur, the disproportionate impact on women and girls, and the implication of some of the accused:

To date, none of these individuals have been brought to justice, and some of them continue to be implicated in atrocities committed against innocent civilians. It is becoming increasingly difficult for me to appear before you to update you when all I am doing is repeating the same things I have said over and over again, most of which are well known to this Council. Not only does the situation in Darfur continue to deteriorate, the brutality with which crimes are being committed has become more pronounced. Women and girls continue to bear the brunt of sustained attacks on innocent civilians. But this Council is yet to be spurred into action. Victims of rapes are asking themselves how many more women should be brutally attacked for this Council to appreciate the magnitude of their plight.⁶⁶⁰

Concerns over the Situation in Darfur continued to be discussed at the UN Security Council, and repeated calls were made to armed actors to refrain from all acts of violence against civilians, in particular members of vulnerable groups such as women and children.⁶⁶¹ Risk of sexual violence against women and girls reportedly remains very high, “cast[ing] a shadow over everyday life, restricting women’s freedom of

658 ICC-02/05-01/07-2; ICC-02/05-01/07-3-Corr; ICC-02/05-01/09-1; ICC-02/05-01/09-95; ICC-02/05-01/12-2; ICC-02/05-03/09-606, para 26(iii); ICC-PIDS-CIS-SUD-04-006/15_Eng. For more information, see Women’s Initiatives for Gender Justice, ‘*Gender Report Card 2011*’, p 156-159; Women’s Initiatives for Gender Justice, ‘*Gender Report Card 2012*’, p 179-187. For more information, see Women’s Initiatives for Gender Justice, ‘*The Compendium: An overview of Situations and cases before the International Criminal Court*’, December 2017, p 96-102.

659 ‘Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)’, 12 December 2014, para 4.

660 *Ibid*, para 2.

661 See eg S/RES/2200; OTP, ‘Twenty First Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005)’, 29 June 2015.

movement”.⁶⁶² Yet, in the absence of any arrests, perpetrators continue to operate in a climate of impunity. Moreover, authorities in Sudan are actively preventing service providers connecting with sexual violence survivors, and limiting the scope of prevention activities thereby exacerbating the precarious situation of women and girls in Darfur.

The Prosecutor informed the Security Council of the decision to hibernate investigative activities in Darfur due to limited resources of the Court, lack of oversight of the Security Council, and difficulties in bringing the accused individuals to justice.

⁶⁶² S/2017/249, para 64.

Charges in Cases of the Darfur, Sudan Situation

Charge		Abu Garda ⁶⁴³	Banda	Jerbo	Harun	Kushayb	Al Bashir	Hussein
Persecution	WC							
	CAH				•	•		•
Murder	WC	•	• ⊕	• ⊕	•	•		•
	CAH				•	•	•	•
Attacks Against the Civilian Population	WC				•	•	•	•
	CAH							
Destruction of Property	WC				•	•		•
	CAH							
Forcible Transfer	WC							
	CAH				•	•	•	•
Rape	WC				•	•		•
	CAH				•	•	•	•
Pillaging	WC	•	• ⊕	• ⊕	•	•	•	•
	CAH							
Inhumane acts	WC							
	CAH				•	•		•
Imprisonment or Severe Deprivation of Liberty	WC							
	CAH				•	•		•
Torture	WC							
	CAH				•	•	•	•
Outrages Upon Personal Dignity	WC				•	•		•
	CAH							
Extermination	WC							
	CAH						•	

Charge		Abu Garda ⁶⁶³	Banda	Jerbo	Harun	Kushayb	Al Bashir	Hussein
Killing	WC							
	CAH							
	GEN						•	
Causing Serious Bodily or Mental Harm	WC							
	CAH							
	GEN						•	
Deliberately inflicting conditions of life calculated to bring about the group's physical destruction	WC							
	CAH							
	GEN						•	
Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a peacekeeping mission	WC	•	• ⊙	• ⊙				
	CAH							
Attempted Murder	WC	•	• ⊙	• ⊙				
	CAH							

• Arrest warrant/Summons to appear
A Acquitted

⊙ Confirmation of charges
C Convicted

• Trial
■ SGBC charges

⁶⁶³ All charges brought against Abu Garda were not confirmed.

Population: 44.6 million
♀ 50% | ♂ 50%

In Uganda, 10% of girls are married before the age of 15, and 40% of girls before the age of 18. The minimum age for marriage for girls and boys is 18 years, but with parental consent girls can get married at the age of 16.⁶⁶⁴ According to the Uganda Demographic Health Survey, 25% of girls aged 15 to 19 have at least one child or are pregnant.⁶⁶⁵ Pregnancy and childbirth complications are the leading cause of death among 15 to 19-year-old girls globally.⁶⁶⁶

Uganda

Since its independence from the British Empire in 1962, Uganda has endured unrest and conflict, resulting in hundreds of thousands of deaths. Military coups and violent regimes are part of the country's recent history. In 1986, President Yoweri Museveni took power through a military coup and has since been the president of Uganda.

President Museveni's Government has been confronted by opposition from different armed groups, one of the most prominent being the Lord's Resistance Army (LRA), led by Joseph Kony.⁶⁶⁷ The conflict between the LRA and the Government began shortly after Museveni became president,⁶⁶⁸ which gave rise to a rebellion, particularly in northern Uganda, against the Government by several armed groups, including the Holy Spirit Movement, a predecessor of the LRA.⁶⁶⁹

In the 1990s, the LRA became increasingly violent against civilians in northern Uganda, attacking villages and towns. Civilians were killed and brutally mutilated. A common practice for the LRA was to cut off hands, lips, ears, noses and feet.⁶⁷⁰ Another characteristic feature of the group was the abduction of civilians, especially children, to increase the size of LRA troops. While both boys and girls were abducted, most boys were forced to become fighters and most girls were sexually violated in forced relationships with the combatants.⁶⁷¹ The Uganda Peoples' Defence Forces (UPDF), the Ugandan army, have also committed serious crimes against civilians, with almost full impunity to date. In March 2002, in an attempt to end the conflict

⁶⁶⁴ Girls not Brides, 'Uganda'.

⁶⁶⁵ Uganda Bureau of Statistics, 'Demographic and Health Survey 2016', March 2016, p 14.

⁶⁶⁶ WHO, 'Global health estimates 2015: deaths by cause, age, sex, by country and by region, 2000–2015', 2016.

⁶⁶⁷ Open Society Justice Initiative (OSJI), 'Briefing Paper—The Trial of Dominic Ongwen at the International Criminal Court', December 2016, p 3; HRW, 'Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda', September 2005, p 8.

⁶⁶⁸ HRW, 'Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda', September 2005, p 8; OSJI, 'Briefing Paper—The Trial of Dominic Ongwen at the International Criminal Court', December 2016, p 3.

⁶⁶⁹ OSJI, 'Briefing Paper—The Trial of Dominic Ongwen at the International Criminal Court', December 2016, p 3.

⁶⁷⁰ HRW, 'Who will stand for us?', August 2017, p II.

⁶⁷¹ OSJI, 'Briefing Paper—The Trial of Dominic Ongwen at the International Criminal Court', December 2016, p 3; HRW, 'Who will stand for us?', August 2017, p II; Andrea Raab and Siobhan Hobbs, 'Forced Relationships: Prosecutorial Discretion as a Pathway to Survivor-Centric Justice', *Opinio Juris*, 13 September 2018.

in northern Uganda, the Government launched “Operation Iron Fist”, a military campaign aimed at crushing the LRA by taking the war into its neighbouring country, and LRA military and logistical stronghold, Sudan. In response to the Government’s operation, the LRA intensified the scale of its abductions, killings, and looting. The escalation of violence caused a great number of people to flee their homes, with a total of 800,000 civilians internally displaced in northern Uganda by the end of the year.⁶⁷² By 2005, the conflict had displaced an estimated two million people, of whom more than 1.7 million were living in poor conditions in the 188 camps in the districts of Gulu, Kitgum, Pader, Lira, Apac, and Adjumani.⁶⁷³ Furthermore, according to a report from UNICEF Uganda, at least 66,000 young people between the ages of 14 and 30 were abducted during the conflict by 2006.⁶⁷⁴

In 2006, the Ugandan Government and the LRA began peace talks to try to end the conflict and a formal cessation of hostilities was signed.⁶⁷⁵ However, the peace process failed and the LRA dispersed into other countries, including to the southern part of Sudan (now the territory South Sudan), the DRC and the CAR.

Despite some regional variations, the patterns of abuse that occurred throughout northern and northeastern Uganda included high levels of sexual violence, rape, forced pregnancies, and the widespread abduction of girls and boys.⁶⁷⁶

During the protracted conflict with the Ugandan army, the LRA abducted thousands of women and girls. Girls, if considered “very young”, were assigned to a commander’s household as so called “ting tings”, forced to do domestic chores and take care of the children. After their first menstrual cycle or development of breasts, perceived markers of girls’ readiness for sex, they were forced into relationships with an LRA commander in which they were raped and threatened or beaten if they resisted.⁶⁷⁷ In addition to experiencing sexual violence, torture, enslavement, and gender-based persecution, women and girls were forced to bear and nurse children while in captivity.⁶⁷⁸ Any perceived wrongdoing was punished, including by beatings, and failing to conceive or losing a child was punished with death.⁶⁷⁹

Girls and young women able to escape from the LRA and return to their communities often face severe consequences of the abduction and sexual violence they were subjected to. In

672 HRW, ‘Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda’, September 2005, p 9-10.

673 UNOCHA, ‘Annual Report 2005’, 2005, p 120.

674 UN International Children’s Emergency Fund (UNICEF) Uganda, ‘The State of Youth and Youth Protection in Northern Uganda – Findings from the Survey for War Affected Youth’, September 2006, p 55.

675 International Center for Transitional Justice (ICTJ), Human Rights Center, Payson Center for International Development, ‘When the War Ends: Peace, Justice, and Social Reconstruction in Northern Uganda’, December 2007, p 18.

676 ICTJ, ‘Confronting Impunity and Engendering Transitional Justice Processes in Northern Uganda’, June 2014, p 2.

677 Conjugal Slavery in War (CSIW), ‘Uganda Country Report on Forced Marriage inside the LRA, Northern Uganda’, 2017, p 7-10.

678 HRW, ‘Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda’, September 2005, p 22; Justice and Reconciliation Project (JRP), ‘Engaging Men and Boys in Redress for Conflict SGBV in Northern Uganda’, 25 March 2017, p 18.

679 CSIW, ‘Uganda Country Report on Forced Marriage inside the LRA, Northern Uganda’, 2017, p 18-19.

Uganda, women who have children outside a recognised marriage are often discriminated against and this is even more severe if the father is a suspected combatant.⁶⁸⁰ In some communities, women who return from captivity with children are perceived as perpetrators instead of victims.

Mostly women and girls of school age were abducted, resulting in years of missed schooling, limited opportunities and increased burdens hindering their ability to resume education upon return to their communities. The lack of proper care during child birth and sexual violence resulted in “lifelong impacts” on their health,⁶⁸¹ and access to adequate healthcare remains a challenge. Furthermore, women returning from LRA captivity or IDP camps face the loss of access to land.⁶⁸² These women face burdens such as limited employment opportunities, raising children alone that are unable to be registered for lack of documentation of their fathers, and enduring stigma that affects every aspect of their lives, including their children.

Men and boys were also subjected to sexual and gender-based violence by the LRA as well as state actors such as the National Resistance Army and the UPDF.⁶⁸³ Sexual violence against them is highly underreported and there is a com-

mon misconception that sexual violence entails only rape.⁶⁸⁴ Those who were sexually assaulted or abused face additional stigma due to social attitudes and stereotypes about men, masculinity, and misconceptions that, as a result, victims are homosexuals. The Anti-Homosexuality Act in Uganda, which permits life sentences for some sexual acts between consenting adults, may be another deterrent for the reporting of sexual violence against men and boys. Further, the LRA inflicted physical acts of torture against men, including sexual torture, which may have been overlooked during investigations into the crimes committed by the LRA.⁶⁸⁵ Men and boys were subjected to different types of sexual violence during the conflict, both as forced perpetrators, being forced to abuse and rape women, and as victims, being sexually assaulted by both rebels and government soldiers.⁶⁸⁶

At the ICC

The Situation in Uganda was referred to the ICC by the Ugandan Government in December 2003. It was the first referral by a State Party to the Rome Statute to be received by the Court.⁶⁸⁷ A formal investigation into the conflict between the LRA and the Government of Uganda was sub-

680 ICTJ, ‘From Rejection to Redress. Overcoming Legacies of Conflict-Related Sexual Violence in Northern Uganda’, October 2015, p 14.

681 CSiW, ‘Uganda Country Report on Forced Marriage inside the LRA, Northern Uganda’, 2017, p 11, 26.

682 Women’s access to land is usually in the form of limited use-rights which depend on the woman’s relationship with male family members. Women, especially those returning from captivity, have been subjected to land grabbing. CSiW, ‘Uganda Country Report on Forced Marriage inside the LRA, Northern Uganda’, 2017, p 24-25.

683 JRP, ‘Engaging Men and Boys in Redress for Conflict-SGBV in Northern Uganda’, 25 March 2017, p 8-9.

684 International Justice Monitor, ‘Sexual Violence against Men and Boys and its Relevance to the Trial of Dominic Ongwen’, 24 April 2018.

685 *Ibid.*

686 JRP, ‘Engaging Men and Boys in Redress for Conflict-SGBV in Northern Uganda’, 25 March 2017, p 25.

687 ‘President of Uganda refers situation concerning the Lord’s Resistance Army (LRA) to the ICC’, ICC-20040129-44, 29 January 2004.

sequently opened on 29 July 2004, focusing on the alleged crimes committed by the LRA since 1 July 2002.⁶⁸⁸

There are currently two cases before the ICC within the Uganda Situation. The first case involves Joseph Kony (Kony), the alleged Commander-in-Chief of the LRA, and Vincent Otti (Otti), the alleged Vice-Chairman and Second-in-Command of the LRA. Both Kony and Otti are considered at large by the ICC, despite witness evidence attesting to Otti's death.⁶⁸⁹ The second case is against Dominic Ongwen (Ongwen) and is currently at trial. Thus far, the *Ongwen* case is the first and only ICC case of the Uganda Situation to move beyond the arrest warrant stage. Overall, five arrest warrants were issued in this Situation, however, the proceedings against Raska Lukwiya and Okot Odhiambo were terminated following confirmation of their deaths.⁶⁹⁰

Sexual and gender-based crimes charges were included in the Arrest Warrants for Kony and Otti but were not included in the Arrest Warrant for Ongwen. Nonetheless, 19 counts underlining 11 charges of sexual and gender-based crimes were later brought by the Prosecution against Ongwen, which were all confirmed for trial by ICC Pre-Trial Chamber II.

Men and boys were subjected to different types of sexual violence during the conflict, both as forced perpetrators, being forced to abuse and rape women, and as victims, being sexually assaulted by both rebels and government soldiers.

688 Prosecutor of the International Criminal Court opens an investigation into Northern Uganda', ICC-OTP-20040729-65, 29 July 2004. See also 'Uganda', ICC website.

689 ICC-02/04-01/15-T-49-Red2-ENG, p 29 lines 3-4; ICC-02/04-01/15-T-112-Red-ENG, p 13 line 21. For more information, see Women's Initiatives for Gender Justice, 'The Compendium: An overview of Situations and cases before the International Criminal Court', December 2017, p 78-80.

690 ICC-02/04-01/05-248; ICC-02/04-01/05-431.

Charges in Cases of the Uganda Situation

Charge		Kony	Otti	Lukwiya	Odhiambo	Ongwen ⁶⁹¹
Rape	WC					⊙ ●
	CAH	●				⊙ ●
Inducing Rape	WC	●	●			
	CAH					
Sexual Slavery	WC					⊙ ●
	CAH	●	●			⊙ ●
Forced Marriage as an Other Inhumane Act	WC					
	CAH					⊙ ●
Torture ⁶⁹²	WC					⊙ ●
	CAH					⊙ ●
Enslavement ⁶⁹³	WC					
	CAH	●	●	●	●	● ⊙ ●
Forced Pregnancy	WC					⊙ ●
	CAH					⊙ ●
Outrages Upon Personal Dignity ⁶⁹⁴	WC					⊙ ●
	CAH					
Murder	WC	●	●		●	● ⊙ ●
	CAH	●	●		●	● ⊙ ●
Attempted Murder	WC					⊙ ●
	CAH					⊙ ●
Inhumane Acts	WC					
	CAH	●	●			● ⊙ ●
Cruel Treatment	WC	●	●	●		● ⊙ ●
	CAH					

Charge		Kony	Otti	Lukwiya	Odiambo	Ongwen ⁶⁹¹
Attacks Against the Civilian Population	WC	•	•	•	•	• ⊙ ●
	CAH					
Pillaging	WC	•	•	•	•	• ⊙ ●
	CAH					
Persecution	WC					
	CAH					⊙ ●
Destruction of Property	WC					⊙ ●
	CAH					
Conscription of children under the age of 15	WC					⊙ ●
	CAH					
Forcibly enlisting children under the age of 15	WC	•	•		•	
	CAH					
Use of children under the age of 15 years to actively participate in the hostilities	WC					⊙ ●
	CAH					

• Arrest warrant/Summons to appear
A Acquitted

⊙ Confirmation of charges
C Convicted

● Trial
■ SGBC charges

⁶⁹¹ Most charges against Ongwen were brought after the arrest warrant stage.

⁶⁹² Only some of the counts include sexual violence acts.

⁶⁹³ Only some of the counts include sexual violence acts.

⁶⁹⁴ Only some of the counts include sexual violence acts.

The Prosecutor v. Dominic Ongwen

The case against Ongwen is the first case arising from the Uganda Situation to reach the trial stage.⁶⁹⁵ Ongwen, also known as “Odomi”, is alleged to be a former LRA commander. Abducted at a young age, Ongwen was trained in military tactics and eventually rose through the ranks to become an LRA commander. The ICC Arrest Warrant was initially issued in 2005⁶⁹⁶ and Ongwen voluntarily surrendered to the Court in January 2015.⁶⁹⁷

Originally, the Arrest Warrant contained only seven counts and did not include any sexual and gender-based crimes charges.⁶⁹⁸ However, following the Prosecution’s Notice of Intended Charges of September 2015, the number of counts increased significantly to 67, including 19 counts underlining 11 charges of sexual and gender-based crimes. It was further amended to 70 counts relating to 23 charges in December 2015 in the Document Containing the Charges.⁶⁹⁹ On 23 March 2016, ICC Pre-Trial Chamber II unan-

imously confirmed all charges against Ongwen, and committed the case to trial.⁷⁰⁰

Attacks on four IDP camps

The conflict between the LRA and the Government of Uganda, in particular the LRA’s attacks on civilians, caused the displacement of approximately 1.8 million civilians at the height of the conflict, forcing them to live in IDP camps.⁷⁰¹

Some of the crimes Ongwen is charged with allegedly took place during attacks on four IDP camps in northern Uganda. The LRA allegedly attacked the camps as a form of retribution against their inhabitants who were seen by the LRA as supporting the Government, as well as to loot food and abduct civilians. Ongwen is charged with crimes allegedly committed during the attack on Pajule in October 2003,⁷⁰² Odek in April 2004,⁷⁰³ Lukodi in May 2004,⁷⁰⁴ and Abok in June 2004.⁷⁰⁵

According to the Pre-Trial Chamber, the evidence presented shows that Ongwen was a commander in a position to control and direct his operation

695 Women’s Initiatives for Gender Justice, ‘[The Compendium: An Overview of Situations and cases before the International Criminal Court](#)’, December 2017, p 80-82.

696 ICC-02/04-01/05-57. On 28 January 2015, the Arrest Warrant for Ongwen was reclassified as public pursuant to an instruction by Pre-Trial Chamber II. ICC-02/04-01/05-10.

697 ICC-02/04-01/05-419, para 6.

698 ICC-02/04-01/05-10, p 9-10. The seven counts included three counts of crimes against humanity (murder, enslavement, and inhumane acts of inflicting bodily injury and suffering) and four counts of war crimes (murder, cruel treatment, attack against the civilian population, and pillaging).

699 ICC-02/04-01/15-305-Red3, p 10-11, 13-16, 18-19, 21, 24-25, 30-32, 35-36. The redacted version was filed on 27 May 2016. ICC-02/04-01/15-375-AnxA-Red2, p 12-14, 18-21, 25-28, 32-34, 47-51, 54-56, 58-59. The less redacted version was filed on 25 May 2016. For an overview of the charges, see the table above.

700 ICC-02/04-01/15-422-Red. ICC-02/04-01/15-422-Anx-tENG.

701 Office of the UN High Commissioner for Refugees (UNHCR), ‘UNHCR closes chapter on Uganda’s internally displaced people’, 6 January 2012.

702 ICC-02/04-01/15-422-Red, paras 65-70.

703 *Ibid*, paras 71-75.

704 *Ibid*, paras 76-80.

705 *Ibid*, paras 81-85.

force throughout the timeframe relevant to the charges.⁷⁰⁶ Acts to assert his position included upholding a “ruthless disciplinary system”, abducting children to replenish his forces, and distributing female abductees to his subordinates and forcing them into sexual relationships with their captors.⁷⁰⁷

Charges of sexual and gender-based crimes

The *Ongwen* case currently has the highest number of counts of sexual and gender-based crimes charges before the ICC. Notably, this is the first time that the crime against humanity of forced marriage charged as an other inhumane act is being prosecuted before the ICC,⁷⁰⁸ as well as the first time that the crime of forced pregnancy is being prosecuted before an international court.

The table on the following page illustrates the sexual and gender-based crimes charges brought against Ongwen, highlighting the alternative modes of liability charged in relation to these charges. In confirming the charges of sexual and gender-based crimes *directly* perpetrated by Ongwen, the Chamber relied on the testimonies of seven female witnesses who were forced into sexual relationships with Ongwen as so-called

wives.⁷⁰⁹ The testimonies of these Witnesses⁷¹⁰ were considered clear, consistent and providing evidence of other witnesses’ victimisation.⁷¹¹

Regarding the charges of sexual and gender-based crimes committed *indirectly* by Ongwen, the Chamber found that the evidence showed the existence of a common plan between Kony and other senior LRA leaders such as Ongwen to systematically abduct women and girls to force them into sexual relationships with, and turn them into domestic servants and sex slaves of, male LRA fighters.⁷¹² This practice was found by the Chamber to be an inherent feature of the LRA, and Ongwen himself issued orders, undertook action, and contributed to the crimes pursuant to the abovementioned common plan.⁷¹³

⁷⁰⁶ *Ibid*, para 58.

⁷⁰⁷ *Ibid*, para 59.

⁷⁰⁸ See the **Accommodating survivors’ perspectives of conflict-related forced relationships** sub-section of this Report.

⁷⁰⁹ ICC-02/04-01/15-277-Red, para 1; ICC-02/04-01/15-316-Red, para 2; ICC-02/04-01/15-422-Red, paras 102-103.

⁷¹⁰ These seven Witnesses were P-99, P-101, P214, P-226, P-227, P-235, and P-236. See ICC-02/04-01/15-422-Red, paras 127-130, 132, 135.

⁷¹¹ ICC-02/04-01/15-422-Red, para 103. The witnesses, during different time frames, shared similar experiences, establishing that: (i) all seven women were abducted by the LRA; (ii) they were all distributed to Ongwen’s household; (iii) they were made ‘wives’ to Ongwen; (iv) they were all forced to have regular sexual intercourse with Ongwen, whether by brutal force, threat of force, other forms of coercion; (v) they were all deprived of their personal liberty throughout the abduction; and (vi) six of them became pregnant as result of the rapes by Ongwen. ICC-02/04-01/15-422-Red, paras 104-105.

⁷¹² ICC-02/04-01/15-422-Red, para 137.

⁷¹³ ICC-02/04-01/15-422-Red, paras 123, 138, 140.

Modes of Liability	SGBC Counts	Crimes Against Humanity	War Crimes
Direct Perpetrator Article 25(3)(a) of the Statute	50 to 60	<ul style="list-style-type: none"> • Forced Marriage • Torture • Rape • Sexual slavery • Enslavement • Forced Pregnancy 	<ul style="list-style-type: none"> • Torture • Rape • Sexual slavery • Forced Pregnancy • Outrages upon personal dignity
Indirect Co-perpetrator Article 25(3)(a)	61 to 68	<ul style="list-style-type: none"> • Forced Marriage • Torture • Rape • Sexual slavery • Enslavement 	<ul style="list-style-type: none"> • Torture • Rape • Sexual slavery
Ordering Article 25(3)(b)	61 to 68	<ul style="list-style-type: none"> • Forced Marriage • Torture • Rape • Sexual slavery • Enslavement 	<ul style="list-style-type: none"> • Torture • Rape • Sexual slavery
Contributing in Any Other Way Article 25(3)(d)(i) and (ii)	61 to 68	<ul style="list-style-type: none"> • Forced Marriage • Torture • Rape • Sexual slavery • Enslavement 	<ul style="list-style-type: none"> • Torture • Rape • Sexual slavery
Command Responsibility Article 28(a)	61 to 68	<ul style="list-style-type: none"> • Forced Marriage • Torture • Rape • Sexual slavery • Enslavement 	<ul style="list-style-type: none"> • Torture • Rape • Sexual slavery

Some of the experiences that these seven Witnesses testified to occurred outside of the timeframe of the charges brought by the Prosecution, regrettably preventing the evidence from being used. The Prosecution had set the cut-off date of 31 December 2005 and justified this decision by reasoning that “the evidence d[id] not support the existence of a non-international armed conflict between the UPDF and the LRA or a widespread and systematic attack against a civilian population after that date”.⁷¹⁴ Pre-Trial Chamber II highlighted that as a result of this cut-off date, some victims may be denied, at least partially, reparations for their harm suffered.⁷¹⁵ The Chamber made a point of noting that “[i]t is not required that the crimes against humanity are committed during the attack, or war crimes in the midst of the armed conflict, as the required nexus can be established otherwise”.⁷¹⁶

Arguments by the Defence

At the confirmation of charges stage, the Defence raised two main arguments to support Ongwen’s claim that he lacks individual criminal responsibility. Firstly, the Defence emphasised Ongwen’s

status as a former child soldier, reiterating that he is a victim and not a perpetrator.⁷¹⁷ Secondly, the Defence raised that Ongwen acted under duress at the time of the crimes charged, alleging that the LRA’s threat of imminent death and bodily harm to himself, his family and his village induced the crimes in question.⁷¹⁸ The Pre-Trial Chamber, however, rejected these arguments and committed the case to trial.⁷¹⁹

Subsequently, the Defence raised additional arguments claiming Ongwen’s lack of criminal responsibility to be discussed at trial.⁷²⁰ The Defence submitted that Ongwen suffered from a mental illness or defect at the time of the crimes, arguably amounting to an inability to appreciate the unlawfulness of his conduct.⁷²¹ The Defence further submitted that he has an alibi for 10 October 2003, the day of the LRA attack on the Pajule IDP camp, without providing further information at this time.⁷²²

The trial against Ongwen Prosecution case

The trial started in December 2016 and Ongwen pleaded not guilty to all charges. The Prosecution began its presentation of evidence on 16

714 ICC-02/04-01/15-422-Red, para 105.

715 *Ibid*, paras 105-106.

716 *Ibid*, paras 106-107.

717 ICC-02/04-01/15-404-Red2, paras 42, 46-49.

718 *Ibid*, para 53-57; ICC-02/04-01/15-517.

719 ICC-02/04-01/15-422-Red, para 156.

720 International Justice Monitor, ‘Defence Phase of Ongwen’s Trial begins this week’, 17 September 2018.

721 ICC-02/04-01/15-620-Red.

722 ICC-02/04-01/15-519-Red.

January 2017,⁷²³ which concluded on 13 April 2018.⁷²⁴ 69 Prosecution witnesses testified over the course of 15 months. Nine female witnesses testified about the relationships they were forced into with LRA fighters and their captivity by the LRA. At least 16 other witnesses, mostly former LRA fighters and abductees, testified about the abduction of women and girls and their forced distribution amongst LRA commanders and the forced relationships that ensued from this distribution.

Female witnesses, who testified on the relationships they were forced into with LRA fighters presented common features in their testimonies. They spoke about their abduction; their lack of choice regarding their forced allocation to LRA fighters, which was decided by commanders; the rapes they suffered; the physical and psychological pain they experienced; the restriction of movement imposed on them during captivity; and their enslavement. Their testimonies also highlighted the stigma they faced upon returning to their communities as women formerly abducted and forced into sexual relationships with LRA fighters, the impossibility of continuing their studies, and the severe impact of their experiences in the LRA on their daily lives.

The Witnesses further testified about the abduction of women and girls, the LRA's practice of forcibly distributing them to LRA fighters to do household chores until they were perceived as ready for sex and could be forced into sexual relationships with them.⁷²⁵ According to witness testimony, the age of the women and girls in captivity by the LRA ranged between 12 and 40 years.⁷²⁶ Girls were allegedly abducted during attacks, mostly but not exclusively from IDP camps.⁷²⁷ One witness described witnessing Ongwen deciding to abduct girls they came across while on the move and who were "too beautiful to be left behind" and that "when they grow up, they will grow into beautiful girls who can become his wives in the future".⁷²⁸

According to witness testimony, the practice of forcing women and girls into so-called marriage did not include a ceremony, but rather consisted of arbitrarily and forcefully assigning a girl or woman to an LRA combatant, followed by forced intercourse. The punishment for refusing sexual intercourse was being publicly beaten or killed.⁷²⁹

723 'Case Information Sheet – The Prosecutor v. Dominic Ongwen', ICC-PIDS-CIS-UGA-02-012/16_Eng, June 2018.

724 ICC-02/04-01/15-1225.

725 ICC-02/04-01/15-T-127-Red-ENG, p 51 lines 1-10; ICC-02/04-01/15-T-85-Red2-ENG, p 20 lines 18-19, p 21 lines 18-21; ICC-02/04-01/15-T-98-Red-ENG, p 18 lines 5-11, p 54 lines 13-18.

726 ICC-02/04-01/15-T-106-Red-ENG, p 35 lines 7-8.

727 ICC-02/04-01/15-T-125-Red-ENG, p 8.

728 ICC-02/04-01/15-T-98-Red-ENG, p 15 lines 8-25, p 16 lines 1-25, p 17 lines 1-25, p 18 lines 17-19, p 22 lines 7-19.

729 ICC-02/04-01/15-T-145-Red-ENG, p 27 line 25, p 26 lines 1-6; ICC-02/04-01/15-T-120-Red-ENG, p 28 lines 1225.

Legal Representatives of Victims' submission on sexual violence against male victims

The Legal Representatives of Victims called four witnesses to testify before the Court between 1 and 4 May 2018, and the Common Legal Representative of Victims called three witnesses between 14 to 24 May 2018.

On 2 February 2018, as part of their justifications as to why they should be granted leave to present evidence, the Legal Representatives of Victims made submissions to the Chamber on the infliction of sexual violence on men and boys, the forced desecration of bodies, the stigma experienced by people formerly abducted upon their return to their communities, the impact of the crimes on victims' right to education, and the interrelated and cumulative nature of harms.⁷³⁰

Notably, with regards to sexual violence, the Legal Representatives stated that a "significant number of male participating victims were either victims of rape, forced to carry out rapes, or forced to abuse the corpses of killed abductees in sexualised ways", and that, therefore, sexual violence within the LRA was not limited to women and girls.⁷³¹

The Legal Representatives gave two reasons as to why outlining sexual violence against men and boys to the Chamber and to the public is impor-

tant. Firstly, they submitted that the evidence can help the Chamber in understanding more comprehensively the forms of violence used by the LRA and the nature of the crimes: sexual violence against men is meant to humiliate, emasculate, "feminisate" the victim while exerting power and dominance over them.⁷³² According to the Legal Representatives, the forcible commission of violence, such as the desecration of dead bodies or forcing them to commit sexual violence against others, is a feature of the "initiation into the group", terrorising the youth and desensitising them to violence.⁷³³ The testimonies on the impact of sexual violence on male victims and the harm it generates was deemed significant in helping the Chamber understand that the "construction of terror by the LRA was used as a mechanism for maintaining control over the local population".⁷³⁴

Secondly, testimonies on this matter in a public hearing recognise sexual violence committed against men and boys which is underreported and characterised with particular forms of stigma and shame.⁷³⁵ The Legal Representatives acknowledged that, while the charges of sexual and gender-based crimes against Ongwen brought in this case exclusively concern women and girls, acts of sexual violence against men

⁷³⁰ ICC-02/04-01/15-1166, paras 15-36.

⁷³¹ *Ibid*, para 16.

⁷³² *Ibid*, para 17.

⁷³³ *Ibid*, para 18.

⁷³⁴ *Ibid*, para 19.

⁷³⁵ *Ibid*, para 20.

and boys could also fall under other crimes confirmed, such as those related to the attacks to the IDP camps. The Legal Representatives added that “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 charges 62 to 68 (torture and rape through sexual violence)”,⁷³⁶ and that, therefore, these victims’ testimonies could be linked to those crimes. However, the Legal Representatives recalled that their purpose was not to “establish the elements of those crimes”, but rather to demonstrate that such crimes were committed and to highlight the particular harm suffered by those victims.⁷³⁷

On 6 March 2018, the Trial Chamber rejected the three witnesses that the Legal Representatives of Victims proposed to testify on sexual violence against men and boys and the desecration of bodies, stating that the topics were not included in the facts and circumstances of the charges confirmed and therefore fell outside of the scope of the charges.⁷³⁸ The Legal Representatives of Victims requested the Chamber to reconsider its decision based on: (1) an error in the reasoning of the Chamber; and (2) the need to prevent injustice.⁷³⁹

Notably, the Legal Representatives underlined the difficulties that victims of such crimes face in bringing forward their experiences, especially in light of the fact that even the Legal Representatives themselves only came to know about them in later stages.⁷⁴⁰ Their concerns therefore were that the Chamber’s decision preventing these victims from testifying could have a negative impact on them, reinforcing the harmful social messages that male sexual violence victims are likely to have internalised and discourage them from disclosing their experiences in the future.⁷⁴¹ The Legal Representatives warned that disregarding rape and other forms of sexual violence against men and boys risks contributing to the continued invisibility of such crimes and the further stigmatisation of the victims.⁷⁴²

On 26 March 2018, the Legal Representatives’ request for reconsideration was declined by the Trial Chamber.⁷⁴³ The Chamber reiterated that this evidence falls beyond the facts and circumstances of the sexual and gender-based crimes charged in the *Ongwen* case and that it needs to balance the rights of the victims with the rights of the accused.

⁷³⁶ *Ibid*, para 21.

⁷³⁷ *Ibid*, para 22.

⁷³⁸ ICC-02/04-01/15-1199-Red, paras 57, 59.

⁷³⁹ ICC-02/04-01/15-1203, paras 8-9.

⁷⁴⁰ *Ibid*, para 31.

⁷⁴¹ *Ibid*, paras 32, 34.

⁷⁴² *Ibid*, para 15.

⁷⁴³ ICC-02/04-01/15-1210, p 7.

It is regrettable that the Prosecution did not bring charges of sexual violence against men and boys in this case. This important filing by the Legal Representatives of Victims and the subsequent decision may promote the inclusion of these crimes within OTP investigations.

The trial resumed in September 2018 with the Defence's presentation of evidence.

**The Legal
Representatives
of Victims made
submissions to
the Chamber on
the infliction of
sexual violence
on men and boys.**

The background is a solid orange color. Overlaid on this is a white line-art illustration of a person's head and shoulders, facing right. The lines are thick and expressive, capturing the basic shape of the face, hair, and neck. The text is positioned in the upper left quadrant of the image.

GENDER JUSTICE AT THE ICC

Gender Justice at the ICC

The Women's
Caucus for
Gender Justice
demonstrated
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feminist analysis
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and for dedicated
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The Women's Caucus for Gender Justice demonstrated the need for feminist analysis of international criminal law and humanitarian law, and for dedicated consideration of women's interests in the work of the Court to ensure it is inclusive, representative, and relevant to the lives of women, as well as men, affected by conflict. Among the many contributions to the legal framework and administration of the Court are the gender specific recommendations for the Elements of Crimes and Rules of Procedure and Evidence, and Composition and Administration of the Court that remain relevant today.⁷⁴⁴

This section provides analysis of developments, opportunities, and challenges for the promotion of gender justice through the Court from July 2017 to June 2018. Where relevant, developments prior to this time period have been included to complement analysis of developments identified during the time period of this Report. The section is comprised of two parts, the first is focused on procedural developments, and the second on the jurisprudence of the Court.

⁷⁴⁴ Women's Caucus for Gender Justice, 'Recommendations and Commentary for the Elements of Crimes and Rules of Procedure and Evidence', 12 June 2000; Women's Caucus for Gender Justice, 'Summary of Recommendations Composition and Administration of the Court'.

Gender Responsive Procedures

Mainstreaming gender at the Court

The ICC, as a key institution in international criminal justice and the promotion of accountability, is encouraged to set high standards for the integration of gender in all areas of its work. In order to achieve this, it must actively seek to mainstream gender within each of its units, functions and procedures, and ensure that staff, from field officers to legal officers, administrators to judicial officers, have gender specific competencies that are continually refreshed and strengthened.

The UN Economic and Social Council (ECOSOC) defines gender mainstreaming as:

[...] the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.⁷⁴⁵

Gender mainstreaming means integrating a gender perspective in all elements; it does not remove the need for policies and processes targeted specifically to women, nor does it replace the need for positive legislation or gender units and focal points. A gender analysis needs to form an inherent part of any action as early as possible to ensure meaningful inclusion in

Gender mainstreaming means integrating a gender perspective in all elements; it does not remove the need for policies and processes targeted specifically to women, nor does it replace the need for positive legislation or gender units and focal points.

⁷⁴⁵ A/52/3, p 28.

goals, strategies and resource allocations that can promote gender equality.⁷⁴⁶

Within the ICC, a gender mainstreaming strategy could serve to inform budget and resource allocations, outreach and victim participation, as well as the overall gender responsive capacity of the various units.

Office of the Prosecutor

The Office of the Prosecutor (OTP) has taken steps mainstreaming gender within its core functions and institutional development. In the OTP Strategic Plan for 2012–2015, one of the six strategic goals is to “[e]nhance the integration of a gender perspective in all areas of [the OTP’s] work and continue to pay particular attention to sexual and gender-based crimes and crimes against children”.⁷⁴⁷ In June 2014, the OTP launched its Policy Paper on Sexual and Gender-Based Crimes (Policy Paper), in which it commits itself to “integrating a gender perspective and analysis into all of its work, being innovative in the investigation and prosecution of these crimes, providing adequate training for staff, adopting a victim-responsive approach in its work, and paying special attention to staff interaction with victims and witnesses, and their families and communities.”⁷⁴⁸ Furthermore, the OTP undertakes to “increasingly seek opportunities for effective and appropriate consultation

with victims’ groups and their representatives to take into account the interests of victims.”⁷⁴⁹ In order to reflect on the lessons learnt from its implementation, the OTP could undertake a five-year review of the Policy Paper.

The OTP is tasked with, among other things, the investigation and prosecution of sexual and gender-based crimes. Sexual crimes in particular can take longer to uncover and investigate, as fear of reprisals, shame, and stigma can act as deterrents for victims and survivors to disclose such acts. Pursuant to the Policy Paper, each potential victim-witness of sexual and gender-based crimes must be screened by a psychosocial expert before being interviewed by an investigator.⁷⁵⁰ It is therefore foreseeable that investigations of sexual violence may take longer to identify as having occurred, longer to identify victim-witnesses, and potentially longer and more expensive to investigate. Sufficient allocation of resources to enable early, and thorough investigation of sexual violence is necessary, including staff time in investigations teams and in preliminary examinations teams which may be able to provide a gender analysis and mapping of relevant actors to fast-track initial stages of investigations.

In addition to gender specific training for staff and the appointment of legal staff with specific gender expertise, three Special Gender Advisers

⁷⁴⁶ UN Office of the Special Adviser on Gender Issues and the Advancement of Women, ‘The Development of the Gender Mainstreaming Strategy’, August 2001.

⁷⁴⁷ OTP, ‘OTP Strategic Plan June 2012–2015’, 11 October 2013, p 7.

⁷⁴⁸ OTP, ‘Policy Paper on Sexual and Gender-Based Crimes’, June 2014, para 2.

⁷⁴⁹ *Ibid.*

⁷⁵⁰ *Ibid.*, para 61.

have been appointed (consecutively). The Special Adviser positions are *pro bono*, part-time and to date held by experts based outside of the Court. In view of the extensive case load and pending examinations, it is essential that the OTP is further supported by (and staffed by) persons with gender specific legal expertise, and management level staff are able to ensure their team's work is gender responsive and sexual violence investigation and prosecution is prioritised.

Gender mainstreaming beyond the OTP

Policies and practices to enable meaningful gender mainstreaming could be of great utility to all organs of the Court. Policy papers similar to the OTP's Policy Paper on Sexual and Gender-Based Crimes could be useful to guide each specific organ to reach specific gender-related goals, and promote uniformity within each organ or unit. Gender mainstreaming requires all staff, especially at management levels, to promote gender equality. It is most effective when adequate resources are allocated, there are clear mandates for gender advisers, and there is a commitment at all levels. In order for gender advisers to do their work to the best of their ability, it is important they have access to all levels, especially senior management levels, and have the support of senior management in their work.

There is a need for consistent approaches to be undertaken across all areas of the Court to demonstrate its commitment to gender equality. This can be enhanced through measures such as consistent reporting on gender specific tasks and responsibilities in all management meetings,

strengthening gender specific capacities of all staff, and evaluating gender responsive capacities at staff performance evaluations.

Regular, ongoing, internal gender seminars at which knowledge can be shared and strengthened should be encouraged within all organs of the Court. Additionally, prioritisation of gender awareness and sensitivity in recruitment is recommended. Particular emphasis on the recruitment of expertise for sexual and gender-based violence, gender analysis, women's rights, transformative justice processes, and prior experience engaging with or representing victims of gender-based violence could enhance the implementation of gender mainstreaming strategies and the work of each unit and organ. This could lead to a more successful sexual and gender-based crimes investigation.

Resource allocation

It is important for the Court to develop a gender responsive budget to ensure the distribution of resources pursuant to a gender analysis of each of the Court's functions and units to provide the basis for gender sensitive processes. A gender responsive budget allocates financial resources in a way to ensure that women and men benefit equally from all resources. It should also aim to reduce existing patterns of the systematic inequality affecting women. Through gender responsive budgets, staff time, financial and other resources can be allocated to address the gaps identified in the gender analysis in furtherance of a unit's goals and objectives.

For example, if ensuring outreach processes are inclusive is identified as a goal of the outreach unit for 2019, and a gender analysis of outreach activities in a specific country identifies that as there were many abductions of children in communities A, B and C during the conflict, and those returned are considered to be traitors, separate outreach activities to reach this specific group may be necessary. The gender analysis may also indicate that women and girls formerly abducted are reticent to attend community screenings of the trial for reasons of stigma associated with sexual violence they are presumed to have suffered. Through a gender responsive budget process, specific resources can be allocated to both physically enable these separate outreach activities, and account for the allocation of specific staff time for these purposes.

Outreach and Victim Participation

Victim participation in ICC proceedings has been hailed as one of the key and most innovative features and fundamental pillars of the Rome Statute. Article 68(1) of the Rome Statute indicates that the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims, and that, in so doing, it is to consider all relevant factors including age, gender, health and the nature of the crime, particularly if it involves sexual or gender-based violence or violence against children.⁷⁵¹

A victim-centred approach places victims at the forefront of all proceedings and allows them to

meaningfully participate by minimising the risk of retraumatisation and proving support through legal representatives and service providers. It stands in contrast to a punitive, perpetrator-centred approach in which judicial outcomes are solely directed against the accused, and reframes judicial proceedings as such in which victims are properly included and considered. Importantly, a true victim-centred approach by nature implies the need for gender sensitivity with regard to the allocation of resources, equal access to information about the relevant application procedure and the proceedings, and adequate representation across all stages of the proceedings.

The Women's Initiatives for Gender Justice consulted in 2018 with the ICC Registry's Victims Participation and Reparations Section (VPRS) to obtain further information on specific procedures. It also reached out to Legal Representatives of Victims and partner grassroots organisations in northern Uganda and eastern Democratic Republic of the Congo (DRC) to obtain their views, as well as the views of the communities they engage with, on these procedures. Their views and concerns expressed are reflected below.

Outreach activities

Effective outreach activities have an important role to play in ensuring that victims obtain the necessary information to meaningfully participate in judicial proceedings if they wish to do so. This includes disseminating relevant information through easily accessible means in local

⁷⁵¹ Article 68(1), Rome Statute.

languages, using simple terminology, and using different and far-reaching platforms to reach victims, especially those living in remote locations, who may wish to participate in ICC proceedings.

In June 2018, a partner of the Women's Initiatives in eastern DRC expressed the need for more mindful outreach activities by the Court:

ICC outreach is good on paper but not in practice. Court representatives go into the field and meet with victims speaking French, or even English, instead of local languages. Many victims feel excluded due to too narrow investigations. The Court needs to improve its relationships with civil society and listen in order to reach more victims and be more effective.

Sufficient outreach to victims of sexual and gender-based crimes specifically is essential, especially as victims of sexual and gender-based crimes may require stronger rapport with someone before coming forward due to potential stigmatisation and the lack of appropriate support. To encourage increased participation of these victims in ICC proceedings, targeted outreach may be necessary. For example, sexual violence victims in northern Uganda felt uncomfortable sitting with other members of the community during screenings of trial proceedings and were therefore unable to attend. Following encouraging discussions between the Women's Initiatives for Gender Justice, local partners, and the Registry, in July 2018, screenings of the ongoing Ongwen trial were held specifically

for victims of sexual and gender-based violence in northern Uganda, in an environment in which they felt safe to share their views.

Failure to reach victims from the outset, especially sexual and gender-based crimes victims, and meaningfully include them in the proceedings can have far-reaching impacts for the legitimacy of the Court, and how victims view its work. From 2007 to 2010, the ICC published outreach reports on its website. The Court is encouraged to resume reporting on its outreach activities across all Situation-specific countries, including the gender analysis utilised to guide its priorities and activities.

Application procedures

One of the key services of the Registry is to support victims to participate in proceedings and apply for reparations.⁷⁵² In each Situation country, the Registry considers the most appropriate methods for making the relevant application forms available, providing the necessary structure, guidelines and support. Information on the application procedure, including the application form itself, is primarily disseminated through local and international media outlets, radio stations, and social media. While distribution and explanations in person through field officers or interlocutors in some cases are also possible, in others the Court has not been able to open a field office mainly due to security constraints and relies heavily on online applications.

⁷⁵² 'Registry', ICC website. Available at <<https://www.icc-cpi.int/about/registry>>.

A gender analysis of the relevant country and region is critical to ensure the selection of avenues for application dissemination, support, and collection is inclusive. For example, in Situations such as Afghanistan, where information about the ICC is scarce, many people are illiterate,⁷⁵³ the vast mountain ranges limit the transmission of radio frequencies, and/or people are very cautious about the information they share, an internet-based application procedure has merits. However, a gender analysis would reveal, that approximately just 14% of internet users are women,⁷⁵⁴ and internet usage is largely synonymous with social media usage which has a "homogenous user base of educated, relatively wealthy, predominately male users".⁷⁵⁵ Low female literacy (12%)⁷⁵⁶ and cultural norms limiting women's ability to access internet cafés, coupled with concerns over women and girls connecting with males unrelated to the family via the internet are likely to contribute to the low level of internet usage. These factors need to be considered in designing a strategy to reach women in Afghanistan, and additional or alternative means such as working with women's rights groups to disseminate application forms and assist with their completion is necessary.

In addition to being mindful of such possible obstacles and limitations to female participation, it would be helpful for the Registry, specifically

the VPRS, to publish performance indicators that not only include disaggregation of data pertaining to the gender balance amongst victims, but also to the gender of the victims reporting specific crimes. For example, female victims who report the crime of pillaging; sexual and gender-based crimes are underreported and often hidden behind other reported crimes, such as pillaging. It is therefore important to identify such instances and create safe environments in which both female and male victims feel encouraged to report sexual and gender-based crimes, and not only focus on crimes they may be more willing to communicate.

Representation of victims

To date, the various Trial Chambers have adopted differing approaches to legal representation for victims. Some Chambers appoint external counsel as Legal Representatives of Victims, others the ICC's Office of Public Counsel for Victims (OPCV), and at times a combination of Legal Representatives of Victims and OPCV, representing different victim groups in the one trial. Cultural affinity, gender sensitivity, reliability, and familiarity with victims are relevant to how the appointed counsel may build and maintain a relationship of trust and avoid potential retraumatisation. This is especially important for victims of sexual and gender-

753 The adult literacy rate was 32% in 2011. Internews, Masae Analytics, and Altai Consulting, 'Social media in Afghanistan, Users and Engagement', October 2017, p 1.

754 In 2016, 3G internet service subscribers were 86% being male and 14% female: Heinrich Böll Stiftung, 'How social media is changing Afghan society', 14 February 2018.

755 Internews, 'In Study of Social media in Afghanistan, Women Report Mixed Feelings', 8 January 2018.

756 See eg UN Women, 'In Afghanistan, women and girls strive to get an education', 9 July 2013; UN Women, 'UN Women in Afghanistan'; Internet World Stats, 'Internet Usage in Asia'.

based crimes, as they may require a stronger relationship of trust to be established between them and their counsel.

Collective representation by its nature can limit attention to each victim. This can lead to anguish for those who may need stronger rapport with their representatives, and raises the question whether the quality of representation suffers if the number of victims being represented becomes too large.

“The legal representatives are interested in collective issues and not individual issues and interests. The war affected us as individuals, so I do not think they are representing us well.” –A sexual violence survivor from northern Uganda.

Managing expectations

Due to the geographical distance between the ICC and the victims, it is possible for those involved to feel misinformed, confused or neglected. A strong field presence is necessary as it is crucial that victims feel comfortable and included in the process, and that no expectations are raised that cannot be met, particularly regarding the length of proceedings and contentious issues and outcomes. For example, many victims of sexual and gender-based crimes seem to still not understand the Prosecution’s decision to not bring any charges for these crimes in the *Lubanga* case, or fully comprehend why Katanga, Ngudjolo, and Bemba were acquitted of these

crimes.⁷⁵⁷ Timely information, disseminated as far and wide as possible is key to avoid disappointment or distrust in the system.

“It is hard to know if our interests are being properly represented because we do not know what the legal representative is doing. Since we do not have the chance to watch what is going on, we just hear of it and do not get any feedback from them on what is happening at the Court.” –A sexual violence survivor from northern Uganda.

While the interests of victims may at times seem to conflict with the priorities of accountability processes, it is important victims remain prioritised in outreach and participation processes, and they receive adequate, clear, sufficient, and timely information so that they can fulfil their right to participate in proceedings.

“The legal representatives are interested in collective issues and not individual issues and interests. The war affected us as individuals, so I do not think they are representing us well.”

⁷⁵⁷ As reported to the Women’s Initiatives for Gender Justice by multiple partners.

Gender Justice Jurisprudential Developments

Justice for child soldiers in the Ntaganda case

“There is never a justification to engage in sexual violence against any person; irrespective of whether or not this person may be liable to be targeted and killed under international humanitarian law.”

Conflicts expose children to manifold types of harms, many of which have long-term consequences and can leave the children traumatised for the rest of their lives. These harms are further compounded in cases where children are recruited by armed groups (child soldiers). This practice is so widespread, in the past year children have participated in at least 18 conflicts,⁷⁵⁸ oftentimes witnessing their relatives being killed, and homes and communities destroyed before their conscription into an armed force or group. What ensues once a child is recruited is a cycle of being subjected to violence, being traumatised and, often, inflicting violence on others. For many children — especially girls — recruitment also leads to sexual violence and early parenthood.

The latter issue has been a focus of the case against *Ntaganda*, the first ICC accused to be charged with sexual violence crimes allegedly committed *within* an armed group. Central to the case has been the question of whether the ICC has jurisdiction over the war crimes of rape and sexual slavery allegedly perpetrated against children in Ntaganda’s armed group, the *Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo* (UPC/FPLC), by other members of that group. In a seminal decision rendered on 15 June 2017, the Appeals Chamber unanimously confirmed that the ICC does indeed have jurisdiction over those crimes. Though slightly outside the reporting period for this *Gender Report Card*, this landmark ruling is included for its importance and contribution to gender justice.

⁷⁵⁸ Child Soldiers International, ‘Annual Report 2017–2018’, p 5.

Appeals Chamber decision

The Rome Statute criminalises rape and sexual violence in Articles 8(2)(b)(xxii) and (e)(vi), the former applying to international armed conflicts, and the latter applying to non-international armed conflicts. In deciding whether these crimes could be charged in relation to the UPC child soldiers, the Appeals Chamber had to resolve two key questions.

The first question was whether victims of the aforementioned war crimes must be “protected persons” under the 1949 Geneva Conventions (in relation to an international armed conflict), or “persons taking no active part in hostilities” (in relation to a non-international armed conflict). The Appeals Chamber held that although those tests were relevant for war crimes under Articles 8(2)(a) and 8(2)(c) of the Rome Statute (which are based directly on the Geneva Conventions), they are inapplicable for war crimes under Articles 8(2)(b) and (e).⁷⁵⁹ Hence, the question of whether the UPC child soldiers were taking an “active part in hostilities” at the time of the alleged acts of sexual violence—a point of dispute between the Prosecution and Defence—was irrelevant.⁷⁶⁰

The second key question was whether the war crimes of rape and sexual slavery under Articles 8(2)(b)(xxii) and (e)(vi) require that the victim and perpetrator are not members of the same armed

force (the “adverse affiliation” requirement). No such requirement is made explicit in Articles 8(2)(b)(xxii) and (e)(vi); however, both provisions are made subject to the “established framework of international law”. It is this reference to the “established framework of international law”, which the Chamber defined as “permit[ting], in principle, the introduction of additional elements to the crimes listed in article 8(2)(b) and (e)”,⁷⁶¹ that led it to analyse whether international humanitarian law (IHL) imposes any “adverse affiliation” requirement for war crimes generally.

In answer to that question, the Appeals Chamber held that IHL “does not contain a general rule that categorically excludes members of an armed group from protection against crimes committed by members of the same armed group.”⁷⁶² In coming to this conclusion, the Chamber took into account, *inter alia*, the fact that under Geneva Conventions I and II, the protection afforded to wounded, sick and/or shipwrecked soldiers “is not limited to persons belonging to enemy armed forces, but includes wounded, sick or shipwrecked members of a party’s own armed forces”,⁷⁶³ and the fact the protections against inhumane treatment in Common Article 3 of the Geneva Conventions applies “*irrespective of a person’s affiliation*, requiring only that the persons were taking no active part in hostilities at the material time”.⁷⁶⁴

⁷⁵⁹ ICC-01/04-02/06-1962, paras 51–52.

⁷⁶⁰ *Ibid*, para 69.

⁷⁶¹ *Ibid*, para 55.

⁷⁶² *Ibid*, para 63.

⁷⁶³ *Ibid*, para 59.

⁷⁶⁴ *Ibid*, para 60 (emphasis added).

The Appeals Chamber also agreed with the Trial Chamber that in the absence of any blanket “adverse affiliation” requirement for war crimes under IHL, there is no reason to assume that such a requirement exists for the war crimes of rape and sexual slavery specifically, given that “there is never a justification to engage in sexual violence against any person; irrespective of whether or not this person may be liable to be targeted and killed under international humanitarian law”.⁷⁶⁵

Rather than any blanket “adverse affiliation” requirement, the Appeals Chamber held that the key distinction between war crimes and other crimes is the “nexus requirement”, meaning “it must be established that the conduct in question ‘took place in the context of and was associated with an armed conflict’ of either international or non-international character”.⁷⁶⁶ Citing the ICTY’s *Kunarac* Judgment, the Chamber remarked that, to establish the nexus, it is relevant to consider “the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator’s official duties.”⁷⁶⁷

Having confirmed that the war crimes of rape and sexual slavery under Articles 8(2)(b)(xxii) and (e)(vi) could theoretically apply in relation to the UPC child soldiers, Appeals Chamber left it to the *Ntaganda* Trial Chamber to determine whether the charges of rape and sexual slavery—including the “nexus requirement” were proven beyond a reasonable doubt in this case.

The Appeals Chamber’s interpretation of IHL reflects both the Geneva Conventions as well as customary international law.⁷⁶⁸ It affirms the absolute prohibition of sexual violence in IHL, and mirrors settled jurisprudence whereby the nexus is the pertinent criterion to distinguish a war crime from another crime under domestic or international law.⁷⁶⁹ Most importantly, it is consistent with the ICTY/ICTR Appeals Chamber’s finding that a victims’ status as a non-combatant or part of an opposing force to the perpetrator is just a *factor* in the assessment of a nexus, and not a *conditio sine qua non*.⁷⁷⁰

The Appeals Chamber’s decision provides definitive jurisprudence under the Rome Statute that sexual violence against child soldiers belonging to the same party of the conflict is prohibited under IHL and may be prosecuted before the ICC. This conclusion avoided an unprincipled outcome of sexual vio-

⁷⁶⁵ *Ibid*, para 65.

⁷⁶⁶ *Ibid*, para 68.

⁷⁶⁷ *Ibid*, para 68; *The Prosecutor v. Dragoljub Kunarac et al*, IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002, para 59.

⁷⁶⁸ Although the Pre-Trial Chamber and Trial Chamber seized of this question prior to the Appeals Chamber also held that the ICC had jurisdiction over the rape and sexual slavery of child soldiers belonging to the same party to the conflict, their reasoning differed from that of the Appeals Chamber. As the Appeals Chamber’s holding is the final decision, and for reasons of space and comprehensibility, the present analysis is limited to the Appeals Chamber’s holding.

⁷⁶⁹ See *The Prosecutor v. Dragoljub Kunarac et al*, IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002, para 58.

⁷⁷⁰ *Ibid*, para 59.

lence perpetrators enjoying impunity through circumventing protections IHL provides for children by virtue of conscripting or enlisting a child.⁷⁷¹ Importantly, it also affirms that child soldiers can be victims of war crimes, which may assist in their reintegration into society. The Appeals Chamber's decision showcases a rigorous analysis of IHL and the Rome Statute, resulting in a decision that reflect the realities of modern conflict, and its changing patterns of victimisation.

Sexual and Gender-Based Violence, Modes of Liability, and the Principle of Culpability

Defendants before the ICC are usually former high-ranking officials of armed groups or forces. They are seldom the physical perpetrators of the alleged crimes. Rather, they usually play a more removed role in the commission of the crime, such as ordering or otherwise inciting it, or failing to prevent or punish the crime despite having the knowledge, and the material power, to do so. Accordingly, the Rome Statute includes modes of liability which are capable of describing the myriad different ways in which high-ranking offi-

cials participate in or contribute to the physical commission of crimes, including by committing a crime as an individual, jointly with another or through another person;⁷⁷² by ordering, soliciting or inducing the commission of crimes;⁷⁷³ aiding and abetting;⁷⁷⁴ or otherwise contributing to crimes.⁷⁷⁵ Under the doctrine of command responsibility as enshrined in Article 28 of the Rome Statute, superiors may be held responsible for failing to prevent or punish crimes committed by subordinates if certain conditions are met.⁷⁷⁶

Underlying modes of liability is the principle of culpability, a general principle of criminal law, which prescribes that an individual should only be punished if they are guilty, that is if a crime can be imputed to the offender by virtue of their blameworthy conduct.⁷⁷⁷ Conduct is considered blameworthy if the person could have acted otherwise and can thus be said to have chosen their conduct.⁷⁷⁸ In general terms, this is the case if a person acts either with intent, or negligently.⁷⁷⁹ All of this also entails that an individual may only be punished for their own wrongs.

Twenty years after the establishment of the ICC through the Rome Statute, there have not been

⁷⁷¹ The ICC Appeals Chamber held that "enlistment" involves volunteering, and "conscripting" involves compulsion, but both are crimes. See ICC-01/04-01/06-2842, para 608; ICC-01/04-01/06-3121-Red, para 278.

⁷⁷² Article 25(3)(a), Rome Statute.

⁷⁷³ Article 25(3)(b), Rome Statute.

⁷⁷⁴ Article 25(3)(c), Rome Statute.

⁷⁷⁵ Article 25(3)(d), Rome Statute.

⁷⁷⁶ In brief, it must be shown that the superior knew or should have known that his or her subordinates were committing or about to commit such crimes, and that the superior had effective control over the subordinates, and that the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

⁷⁷⁷ Werle and Burghardt, 'Establishing Degrees of Liability', in van Sliedregt and Vasiliev, *Pluralism in International Criminal Law* (2014), p 304.

⁷⁷⁸ See eg Hart, *Punishment and Responsibility, Essays in the Philosophy of Law*, 2nd ed (2005), p 39; Herring, *Criminal Law, Text, Cases, and Materials*, 3rd ed (2008), p 31. See also Fuchs, *Strafrecht Allgemeiner Teil I*, 8th ed (2012), p 200-201.

⁷⁷⁹ Werle and Burghardt, 'Establishing Degrees of Liability', in van Sliedregt and Vasiliev, *Pluralism in International Criminal Law* (2014), p 304.

any final convictions for sexual and gender-based crimes. While the reasons for this are manifold and permeate various stages of the proceedings, the Chambers' appraisal of modes of liability was decisive in the acquittals for sexual and gender-based crimes in the *Bemba* and *Katanga* cases. Both cases and Judgments warrant critical analysis, as do the apparent concern of Chambers of over-inculpation.

Katanga trial judgment

After finding that Katanga was not responsible for any crime as an indirect co-perpetrator as alleged by the Prosecutor, the majority of the Trial Chamber elected to consider Katanga's responsibility for contributing, under Article 25(3)(d) of the Statute, to crimes committed by Ngiti combatants, including murder, attacking the civilian population, pillaging, destruction of property, sexual slavery, and rape.⁷⁸⁰ The majority noted that in order to incur responsibility under this provision, it was necessary to demonstrate, *inter alia*, that the persons who committed the crime belonged to a group acting with a common purpose.⁷⁸¹

The Prosecution had submitted that the common purpose consisted in "an army of Ngiti commanders and combatants descend[ing] on Bogoro, in a coordinated manner and with the plan to wipe

out the village by targeting the predominantly Hema civilian population, killing indiscriminately women, children and elderly, raping and sexually enslaving women, destroying and looting the property of civilians."⁷⁸²

By contrast, the Trial Chamber held that rape and enslavement did not form part of the common purpose, which it considered was "to attack the village of Bogoro so as to wipe out from that place not only the UPC troops but also, and, first and foremost, the Hema civilians present".⁷⁸³ In this regard, it explained that, "[t]o be satisfied that the perpetrator's acts were encompassed by the common purpose, it will also be necessary to show that the crime at hand formed part of the common purpose. Crimes ensuing solely from opportunistic acts by members of the group and which fall outwith the common purpose cannot be attributed to the group's concerted action".⁷⁸⁴

In holding that sexual violence did not form part of the common purpose, the Chamber reasoned that "no evidence is laid before the Chamber to allow it to find that the acts of rape and enslavement were committed on a wide scale and repeatedly on 24 February 2003, or furthermore that the obliteration of the village of Bogoro perforce entailed the commission of such acts [...]".⁷⁸⁵ The Chamber further pointed out that "it was not established that the Ngiti combatants [...] had,

⁷⁸⁰ For more information on this, see the sub-section on *The Prosecutor v. Germain Katanga* of this Report.

⁷⁸¹ ICC-01/04-01/07-3436-tENG, para 1620.

⁷⁸² ICC-01/04-01/07-3367, para 45.

⁷⁸³ ICC-01/04-01/07-3436-tENG, para 1654.

⁷⁸⁴ *Ibid*, para 1630.

⁷⁸⁵ *Ibid*, para 1663.

prior to the battle of Bogoro, committed crimes of rape or sexual slavery”,⁷⁸⁶ and noted that the lives of some violated women were spared on the basis of their claims that they were non-Hema.⁷⁸⁷ By contrast, the Chamber held that destruction of property and pillage fell within the common purpose because there was evidence that in prior battles, Ngiti combatants had destroyed houses, set them ablaze, and seized enemy property.⁷⁸⁸

In relation to the Trial Chamber’s view that sexual violence was not sufficiently widespread to fall within the common purpose,⁷⁸⁹ bearing in mind that the Chamber heard the testimony of three survivors and at least one testifying to gang rape,⁷⁹⁰ it is unclear whether the Chamber refers to the number of victims or the number of perpetrators engaging in rape. Similarly, elaborations on why the Chamber found the fact that women’s lives were spared on the basis of their claims that they were non-Hema instructive for establishing the reasons why they were raped would have been helpful. Related to this, and in applying the same standards to sexual violence as the Chamber applied to the crime of pillaging, consideration of whether predominantly Hema women were targeted for rapes and enslavement, and if so, whether such targeted rapes occurred

exclusively on the day of the attack, would have appeared necessary.

Beyond the common purpose of the group, and in assessing Katanga’s individual contribution to the crimes committed within that criminal purpose, the Chamber relied significantly on the importance of the delivery of weapons solicited by Katanga for the attack on Bogoro. The Chamber emphasised that “[i]t is beyond doubt that many crimes were perpetrated directly by machete and bladed weapon, but it was the firearms which not only allowed the population to be taken by surprise and Bogoro to be captured, but also to wound and kill its inhabitants.”⁷⁹¹ The firepower of those weapons, however, not only allowed the Ngiti combatants to wound and kill Bogoro’s inhabitants, but also to rape and enslave them. The Prosecution alluded to this in its submission when it inferred Katanga’s knowledge that the weapons he solicited would be used in sexual violence crimes from the fact that “rape and sexual slavery constituted a common practice in the region [...] and this was widely acknowledged by the combatants”.⁷⁹² That the mere presence of a firearm as a show of force amounts to coercion was settled case law of the *ad hoc* tribunals and has already been recognised in the seminal

⁷⁸⁶ *Ibid*, para 1663.

⁷⁸⁷ *Ibid*, paras 1663, 989.

⁷⁸⁸ *Ibid*, para 1661.

⁷⁸⁹ Mindful of the length and comprehensibility of this sub-section, issues relating to the applicability of Joint Criminal Enterprise (JCE) type III will not be addressed. Under this concept, an individual member of a JCE may be held liable for crimes committed falling outside the common purpose of the JCE, provided that it was foreseeable that such a crime might be perpetrated and the accused willingly took that risk. *The Prosecutor v. Duško Tadić*, IT-94-1-A, Judgment, 15 July 1999, para 228.

⁷⁹⁰ ICC-01/04-01/07-3436-tENG, para 989.

⁷⁹¹ *Ibid*, para 1677.

⁷⁹² ICC-01/04-01/07-3367, para 64.

Akayesu case.⁷⁹³ As such, the Chamber should have taken into consideration the role of weapons coercing and committing sexual violence, rather than dismissing the utility of them for anything further than injuring or killing persons.

On 9 April 2014, the Prosecutor notified the Appeals Chamber of the Prosecution's intent to appeal the acquittals of Katanga for rape and sexual slavery as crimes against humanity and war crimes.⁷⁹⁴ However, on 25 June 2014, in reaction to Katanga's discontinuance of his appeal against the Judgment and Sentence,⁷⁹⁵ the Prosecutor filed a Notice of Discontinuance of the Prosecutions' Appeal.⁷⁹⁶ In the Prosecutor's Notice of Discontinuance, Katanga's expression of "sincere regret to all those who have suffered as a result of his conduct, including the victims of Bogoro" was noted.⁷⁹⁷ At the Sentencing hearing on 5 and 6 May 2014, the Trial Chamber agreed with the view of the Prosecutor and the Legal Representatives of Victims that Katanga had not expressed remorse for his actions. Though noteworthy regret was expressed by Katanga after Sentence, in view of a vague statement of remorse, it is regrettable that the Prosecution discontinued the Appeal on the charges of rape and sexual violence.⁷⁹⁸ The impact of this decision has been profound for victims, limiting their

eligibility for reparations for harm flowing from the sexual violence, as well as having implications for the ICC and jurisprudence on crimes of sexual violence.

Bemba appeals Judgment

The case against Bemba ultimately hinged on whether, as commander of the MLC, he discharged his responsibility to prevent and repress crimes committed by those under his command and authority, as embedded in Article 28 of the Statute.⁷⁹⁹

In a split 3-2 decision, the Appeals Chamber quashed Bemba's conviction for failure to prevent or repress the crimes of rape, pillaging and murder allegedly committed by the MLC, having identified a number of errors in the Trial Judgment with a view to the Trial Chamber's assessment of command responsibility. While much could be discussed in this regard, the present analysis will be limited to two aspects of the Judgment: (i) the Appeals Chamber's holding that the Trial Chamber erred by failing to properly appreciate the limitations that Bemba would have faced in investigating and prosecuting crimes as a remote commander sending troops to a foreign country;⁸⁰⁰ and (ii) the balance to be struck

793 See *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para 688.

794 ICC-01/04-01/07-3462, para 3.

795 ICC-01/04-01/07-3497.

796 ICC-01/04-01/07-3498.

797 A short statement dated 23 June 2018 signed by Katanga was annexed to the Defence Notice of Discontinuance of Appeal. ICC-01/04-01/07-3497.

798 See Women's Initiatives for Gender Justice, 'Statement on Appeals Withdrawn by Prosecution and Defence *The Prosecutor vs. Germain Katanga*', 26 June 2014.

799 For more information, see the sub-section on *The Prosecutor v. Jean-Pierre Bemba Gombo* of this Report.

800 ICC-01/05-01/08-3636-Red, para 189.

between military exigencies and the scope of the measures to be taken by a commander.⁸⁰¹

With a view to the discussion of limitations facing Bemba, the Chamber considered that the Trial Chamber paid insufficient attention to “the fact that the MLC troops were operating in a foreign country with the attendant difficulties on Mr Bemba’s ability, as a remote commander, to take measures”, including his limited ability to discipline his troops while they were in the CAR.⁸⁰² While the realities of a conflict may be complex and military exigencies may impact on a commander’s ability to act, “reasonable and necessary” should not be equated with “practicable or practically possible”.⁸⁰³ In this regard, the Chamber’s analysis of Bemba’s geographical remoteness as a factor reducing his ability to act would have benefitted from exploring further the extent to which, in modern warfare, technological advance renders geographical distance irrelevant, as well as the definition and delimitation of the notion of remoteness.⁸⁰⁴ In this respect, it is noteworthy that in 2017 the ASP recognised the changing nature of warfare

by criminalising the use of three additional types of modern weapons.⁸⁰⁵

Further to this, it appears that a more detailed discussion of the balance to be struck between military exigencies and the scope of the measures to be taken by a commander would have been warranted: Despite indications by the Trial Chamber in this regard,⁸⁰⁶ the Appeal Judgment does not acknowledge that the prevention or repression of sexual violence did not feature prominently in any of the measures taken by Bemba. Rather, they were centred on allegations of pillaging.⁸⁰⁷ To be sure, the Chamber’s holding that “commanders are allowed to make a cost/benefit analysis when deciding which measures to take”, cautioning that “[t]here is a very real risk, to be avoided in adjudication, of evaluating what a commander should have done with the benefit of hindsight”, is important and sensitive to the realities of a conflict.⁸⁰⁸ That being said, it appears necessary to further explore whether military exigencies can ever justify the exclusion of a certain category of crimes, namely sexual and gender-based crimes, from the scope of a commander’s measures almost in their entirety.

801 ICC-01/05-01/08-3636-Red, para 170-173.

802 *Ibid*, paras 171, 173.

803 Jamie Allan Williamson, ‘Some considerations on command responsibility and criminal liability’, *IRRC*, June 2008, p 311.

804 See eg Ventura, ‘Farewell “specific direction”: aiding and abetting war crimes and crimes against humanity in Perišić, Taylor, Šainović et al, and US Alien Tort Statute jurisprudence’, in Casey-Maslen (ed.), *War Report: Armed Conflict in 2013* (2014), p 511-553. The issue of remoteness and its impact on culpability has previously arisen in the highly contentious *Perišić* Appeal Judgment, wherein the International Criminal Tribunal for the former Yugoslavia (ICTY)’s Appeals Chamber considered that remoteness of an arms supplier from the conflict for which the arms are destined necessitates the presentation of evidence demonstrating that the assistance was specifically directed at assisting in the commission of crimes. *The Prosecutor v. Momčilo Perišić*, IT-04-81-A, Judgment, 28 February 2013, paras 38-40.

805 See para 17 of this report.

806 ICC-01/05-01/08-3343, paras 720, 722, 726.

807 ICC-01/05-01/08-3636-Red, paras 122-136.

808 *Ibid*, para 170.

Addressing concerns of over-inculpation

The *Katanga* and *Bemba* cases indicate that ICC Chambers are cautious not to over-inculpate individuals. While this concern is important in international criminal law generally, the two cases suggest the principle of culpability is being applied overly strictly, and in particular adversely affecting jurisprudence related to sexual violence crimes.

The *Bemba* Judgment, for example, invites the conclusion that a commander's geographical remoteness reduces that commander's responsibility to take reasonable and necessary measures to prevent or repress crimes committed by subordinates, and thus reduces the blameworthiness of the commander's failure to act. In the 21st Century, it is entirely feasible that a commander can have *more* knowledge of what has and is happening on the ground, than those in the "fog of war". With technology such as telephone, the internet, and drones for example, it is possible that a clearer view, from multiple angles, and of multiple locations is possible from a distant location, in addition to remote controlled weaponry. Above all, any geographical remoteness does not inhibit a commander's ability to take measures appropriately addressing allegations of sexual violence as opposed to other crimes, an aspect the Appeals Chamber majority has largely omitted in their analysis.

In *Katanga*, the exclusion of sexual violence from the common purpose, and the absence of any consideration of the use of firearms in relation to these crimes, suggest that the Chamber measured culpability for sexual violence against a higher standard than that applied to other crimes.

Yet, the Rome Statute makes no distinction as to the evidentiary standard for establishing culpability for sexual violence crimes versus other crimes. Moreover, the widespread and systematic nature of sexual violence, and its instrumentalisation to achieve military goals, indicate that it is not possible to generalise that sexual and gender-based violence are committed opportunistically more often than other crimes.

While the realities of a conflict may be complex and military exigencies may impact on a commander's ability to act, "reasonable and necessary" should not be equated with "practicable or practically possible".

Ongoing Challenges and Opportunities

Addressing sexual violence against men and boys

Sexual violence against men has been perpetrated in ancient wars and modern conflicts and crises alike.⁸⁰⁹ It has been utilised as an exertion of power and attempt to emasculate, humiliate and inflict extreme pain, and as a means of dominating and controlling men and boys, among other things. The issue is extremely pertinent to the work of the ICC, given credible reports of sexual violence against men and boys in numerous Situations before the Court including Afghanistan,⁸¹⁰ Uganda,⁸¹¹ the Central African Republic (CAR),⁸¹² Kenya,⁸¹³ Burundi,⁸¹⁴ Venezuela,⁸¹⁵ and Myanmar/Bangladesh.⁸¹⁶

An intersectional understanding of sexual violence, which recognises that multiple factors (such as gender, sexuality, race and class) interact to shape an individual's life.

809 Sexual violence against men has been chronicled as being committed in conflicts in Ancient Persia, the Crusades, by Ancient Greek, Chinese, Amalekite, Egyptian and Norse armies, and in numerous modern conflicts. Sivakumaran, 'Sexual Violence Against Men in Armed Conflict', *EJIL*, 2007, p 257-258.

810 Allegations of sexual violence against men committed by US officials and Afghan forces feature in the Prosecution's Request for authorisation to initiate an investigation into the Situation in Afghanistan. Afghan forces are said to have committed acts of sexual violence "against predominantly male conflict-related detainees under coercive circumstances". According to the Request, the acts comprised the infliction of severe pain on detainees' genitalia as well as intimidation and threats of sexual assault, in many cases as part of interrogations and for purposes of humiliating and punishing the detainees. ICC-02/17-7-Red, paras 181, 183.

811 See Amone-P'Olak *et al*, 'Sexual violence and general functioning among formerly abducted girls in Northern Uganda: the mediating roles of stigma and community relations – the WAYS study', *BMC Public Health*, 2016, p 2.

812 Sexual violence against men and boys in the Central African Republic (CAR) conflict was prevalent in detention, as well as in situations where they refused to join armed groups. It appears to have been used to terrorise and humiliate enemy groups, as revenge for attacks by opposing armed groups, and boys in armed groups may also have been vulnerable to sexual violence while in the ranks. All Survivors Project, "I don't know who can help" Men and boys facing sexual violence in Central African Republic, 23 February 2018, p 18; S/2016/133, paras 28-31.

813 The Kenyan Truth, Justice and Reconciliation Commission found that sexual violence was committed in relation to the 2007–2008 post-election crisis in Kenya, including, *inter alia*, forced circumcision and other mutilation of sexual organs. Report of the Truth, Justice and Reconciliation Commission, Volume IV, 2013, para 147. During the *Kenyatta et al* proceedings at the ICC, which were ultimately discontinued, the Prosecution had submitted evidence pertaining to the amputation and forced circumcision of penises of men and boys belonging to the Luo, an ethnicity associated with a certain political party: ICC-01/09-02/11-T-5-Red-ENG, p 91.

814 Sexual violence against men and women alike was widespread during the crisis in Burundi, and it appears that sexual violence has been instrumentalised and used as means to repress political dissent: FIDH, 'Repression and Genocidal Dynamics in Burundi', November 2016, p 88; A/HRC/33/37, para 58; ICC-01/17-9-Red, para 111; ICC-01/17-5-Red, paras 123, 124, 126, 127; A/HRC/33/37, para 58; HRW, 'Gang-rapes by Ruling Party Youth', 27 July 2017.

815 Inter-American Commission on Human Rights, OEA/Ser.L/V/II, para 38, 47, 91, 193, 221, 252-256; OHCHR, 'Human rights violations and abuses in the context of protests in the Bolivarian Republic of Venezuela from 1 April to 31 July 2017', August 2017, p ii, 17, 19.

816 One of the many atrocities allegedly committed against the Rohingya in Myanmar leading to their forced displacement is sexual violence, reportedly perpetrated against men as a means of torture, including to obtain information or confessions from detainees. A/HRC/39/64, para 62.

Attempts to have sexual violence against men and boys prosecuted in the case against *Kenyatta et al* and the case against *Bemba*, and to have it recognised in the case against *Ongwen*, were unsuccessful for different reasons. Stigma, humiliation and the law have been some of the many stumbling blocks that have inhibited the judicial appraisal of sexual violence against men, which, however, may have played a crucial role in bringing closure, a sense of justice, reconciliation and reparation to survivors. This part looks at these challenges to have sexual violence against men and boys prosecuted/recognised as seen through the *Kenyatta et al* and *Ongwen* cases.

Kenyatta et al Pre-Trial Chamber decision

During the *Kenyatta et al* ICC proceedings which were discontinued after the confirmation of charges, the Prosecution submitted evidence pertaining to the amputation and forced circumcision of penises of men belonging to the Luo group, an ethnicity associated with a certain political party.⁸¹⁷ The acts occurred in the context of men being forced to remove their underwear and expose their penis as a means of confirming their ethnicity, as traditionally Luo men are not circumcised. The Prosecutor charged the acts as “other forms of sexual violence”, arguing that the acts “weren’t just an attack on men’s sexual organs as such but were intended as attacks on

men’s identities as men within their society and were designed to destroy their masculinity”.⁸¹⁸ However, Pre-Trial Chamber II declined to confirm the acts as “sexual violence” under Article 7(1)(g), and instead described them as “other inhumane acts” under Article 7(1)(h). The Chamber held that “the evidence placed before it does not establish the sexual nature of the acts of forcible circumcision and penile amputation. Instead, it appears from the evidence that the acts were motivated by ethnic prejudice”.⁸¹⁹ It further considered that “not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence”.⁸²⁰

Under the Elements of Crimes, part of the ICC legal framework, sexual violence is defined as:

- “1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature 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, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.
2. Such conduct was of a gravity comparable to the other offences in article 7, paragraph 1 (g), of the⁸²¹

817 See further Women’s Initiatives for Gender Justice, ‘*Gender Report Card 2011*’, p 179–181.

818 ICC-01/09-02/11-382-Red, para 266.

819 *Ibid.*

820 *Ibid.*, para 265.

821 Article 7 (1) (g)-6, Elements of Crimes.

There has been limited guidance regarding both of these elements. First, the definition provided is circular, and ultimately only elucidates that sexual violence involves forcing a person to engage in sexual acts. It does not define the term “sexual”, or engage with the concept and notion of sexual violence. Jurisprudence has so far equally refrained from defining sexual violence, but circumscribed it by virtue of acts that fall or do not fall within the scope of the notion. For example, a Trial Chamber of the ICTY observed in *Kvočka et al* that “sexual violence is broader than rape and includes such crimes as sexual slavery or molestation, and also covers sexual acts that do not involve physical contact, such as forced public nudity.”⁸²²

Possible approaches toward defining “sexual violence” have been pointed out aptly in submissions to the Court as well as in academia. The Legal Representative of Victims in the *Kenyatta et al* case, for example, submitted that sexual violence “may be motivated less by sexual gratification than by an attempt to exert power and dominance over the victim and potentially the victim’s community” and proposed that the forced circumcisions had affected the victims’ “ability to have sexual intercourse” and had a “severe effect” on their “masculinity and sense of manhood.”⁸²³ Dr Rosemary Grey suggests that we must look beyond body parts and embrace an

intersectional understanding of sexual violence, which recognises that “multiple factors (such as gender, sexuality, race and class) interact to shape an individual’s life.”⁸²⁴ In *Kenyatta et al*, the Pre-Trial Chamber did not engage with these arguments. It did not explain why the amputation of a sexual organ, causing severe pain and a life-long impairment to sexual function, is not sexual violence. Nor did it recognise that even if the acts were motivated by ethnic prejudice, that in no way excludes the “sexual” character of the crimes. Indeed, there are numerous cases before the ICC, ICTY, and ICTR in which sexual violence is said to have been used as a tool of ethnic persecution, genocide against an ethnic group, and/or “ethnic cleansing”. These points were not acknowledged by the Pre-Trial Chamber, resulting in an unsatisfactory justification for its refusal to characterise the alleged acts as “sexual violence”.

As the first element was considered unmet in the case against *Kenyatta et al*, the Pre-Trial Chamber did not address the second element relating to gravity. Further interpretation of this element would have been useful. Thus far, the only consideration of this element has been in the *Bemba* case, in which Pre-Trial Chamber III held that forcing women and men to undress in public in order to humiliate them was not a sufficiently grave form of sexual violence to be prosecuted

822 *The Prosecutor v. Kvočka et al*, IT-98-30-T, Judgment, 2 November 2001, para 180. See also *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para 668.

823 ICC-01/09-02/11-458, paras 12-14.

824 Rosemary Grey, ‘Conflicting interpretations of ‘sexual violence’ in the International Criminal Court’, *Austr. Fem. St.*, 2014, p 283.

under Article 7(1)(g).⁸²⁵ In so holding, the Chamber did not explain whether the standard for measuring gravity is objective or subjective in nature, and it did not take into consideration, and the Prosecutor did not submit information on, cultural implications⁸²⁶ and perceptions of victims and communities on forced nudity. Failing to identify the parameters for measuring gravity not only poses issues pertaining to the rule of law, but also circumvents the question of survivors' roles in the process, including in terms of engaging with their personal experiences.

It is regrettable that these two elements were not further elaborated on in the *Kenyatta et al* case so as to provide clearer guidelines to the prosecution on what may make violence against men and boys sexual.

The trial against Dominic Ongwen

During the conflict in Uganda, reports of men forced to have sex with other men, with objects, or to rape women in the presence of their husbands or family members emerged.⁸²⁷ The underlying dynamics of this violence have been explained by virtue of "militarized masculinity" theory, whereby sexual violence is used to "show power by feminizing the perceived enemy".⁸²⁸ The Prosecution did not charge any acts of sexual violence against men and boys in

the case against *Ongwen*. However, charges of acts of sexual violence against women and girls were confirmed and went to trial. During the trial, the Legal Representatives of Victims sought to introduce disclosures of sexual violence against men and boys that came to light in the course of proceedings. Notably, the Legal Representatives stated that a "significant number of male participating victims were either victims of rape, forced to carry out rapes, or forced to abuse the corpses of killed abductees in sexualised ways".⁸²⁹ The request to introduce such evidence was declined by the Trial Chamber due to its perceived irrelevance to the charges confirmed.⁸³⁰ From this unfortunate episode, three important lessons can be learned.

The first is that stigma and shame attaching to sexual violence invariably pose difficulties for victims and survivors to come forward, and such violence to be identified by investigators. As such, while it is incumbent on the Prosecution to ensure adequate time and resources are allocated to investigate sexual violence against all groups and genders, it is also foreseeable, that allegations of sexual violence may arise after an arrest warrant is issued or charges confirmed. In the interests of justice, an accused person has the right to know the charges against him/her, and the factual basis for them. Yet, it is also

825 ICC-01/05-01/08-14-tENG, para 40.

826 Rosemary Grey, 'Conflicting interpretations of 'sexual violence' in the International Criminal Court', *Austr. Fem. St.*, 2014, p 273-288 (287).

827 Amone-P'Olak *et al*, 'Sexual violence and general functioning among formerly abducted girls in Northern Uganda: the mediating roles of stigma and community relations—the WAYS study', *BMC Public Health*, 2016, p 2.

828 *Ibid*.

829 ICC-02/04-01/15-1166, para 16.

830 ICC-02/04-01/15-1199-Red, para 57.

in the interests of justice to understand, and to the extent possible, accommodate the fact that stigma and shame deter victims/survivors from reporting or disclosing sexual violence perpetrated against them. Thoughtful consideration of how to weigh these issues in order to both respect an accused person's rights, and create an environment in which delayed disclosure of sexual violence may be introduced in support of specific charges (that may need to be added), or the context of the attack or conflict is necessary. Possibilities may include utilising Article 61(9) of the Statute to add charges after a confirmation of charges decision, or Regulation 56 of the Regulations of the Court, which provides that evidence may be adduced for the purposes of a decision for reparations, at the same time as for the purposes of trial.⁸³¹ In light of this request being made after the *Lubanga* Trial Chamber decision on reparations in December 2017 which clarified that sexual harm causally linked to crimes an accused is convicted of should be considered in the scope of reparations, requesting to introduce the evidence by way of regulation 56 could have served to safe guard the victims' potential rights to reparations if Ongwen is convicted of crimes to which it can be linked.⁸³²

Second, a more careful consideration of the relevance of sexual violence against men and boys is needed. In the case against *Ongwen*, the Pre-Trial Chamber assumed that the evidence of men

being forced to rape women was irrelevant, or in its words "beyond the scope of the charges."⁸³³ And yet, the act of forcing a person to witness rape may fall within the scope of torture. As in the *Ongwen* case, if the evidence of these crimes emerges too late to be charged, the evidence in and of itself may still be relevant to the charges confirmed related to acts of sexual violence against women and girls.

Third, should similar evidence of forced perpetratorship of sexual violence arise in future ICC investigations, it can and should be charged as "other forms of sexual violence".⁸³⁴ Such violence is clearly included in the Elements of Crime definition of sexual violence: "caused such person or persons to engage in an act of a sexual nature by force". Unlike the elements underlying rape, this definition is not limited to the roles of perpetrator and victim. Such enforced sexual violence may also amount to the crime of outrages upon personal dignity (should grave humiliation be caused), and persecution, both as gender-based crimes. Furthermore, the act of forcing a person to witness rape may fall within the scope of torture. As in the *Ongwen* case, if the evidence of these crimes emerges too late to be charged, the evidence in and of itself may still have been relevant to the charges confirmed related to acts of sexual violence against women and girls.

Survivors' accounts emerging from recent conflicts and crises detail horrific injustices

831 ICC-BD/01-01-04.

832 ICC-01/04-01/06-3129.

833 ICC-02/04-01/15-1199-Red, para 57.

834 Articles 7(1)(g), 8(2)(c)(xxii), or 8(2)(e)(vi), Rome Statute.

and unimaginable pain—but at the same time, they invite judicial discourse, adjudication and, ultimately, the rendering of justice. A discussion on how obstacles that have been impairing the investigation, prosecution and adjudication of sexual violence against men and boys may be overcome is ever more important and timely given the further Preliminary Examinations, Situations under investigation, and cases likely ahead for the Court. It is essential to end impunity for this age-old phenomena, and ensure male survivors of sexual violence, too, ultimately have access to justice.

Accommodating Survivors' Perspectives of Conflict-related Forced Relationships

The case against Al Hassan is the latest of three cases to date before the ICC to involve forced relationships of the kind described by the OTP as “forced marriages”.⁸³⁵ In international criminal law, such forced relationships have been characterised as both the crimes against humanity of “sexual slavery” and “other inhumane acts”. Any judicial qualification inevitably puts a label on survivors, which may have profound impacts on them and all stakeholders including the Court and communities, especially if the crime label superimposed does not match survivors’

perceptions. Going forward, flexible case law opens up an avenue for survivors’ perceptions, and ultimately agency, to be factored into the legal qualification of forced relationships, most notably through the survivor-centred exercise of prosecutorial discretion.⁸³⁶

Prominent instances of forced relationships in recent conflicts

The case against Al Hassan revolves around the events that took place in Timbuktu, Mali, between January 2012 and April 2013, while the city was under the control of two militant Islamist groups, Ansar Dine and AQIM.⁸³⁷ According to the Prosecution, those groups pursued a policy of forced relationships, referred to as “marriages”,⁸³⁸ which served the purposes of implanting the groups within Timbuktu’s society, and legitimising intimate relations with Timbuktu women, including girls.⁸³⁹

Prior to the Situation in Mali, forced relationships during the conflicts in Northern Uganda and the DRC have brought the issue before the ICC.⁸⁴⁰ The first international tribunal to discuss forced relationships was the Special Court for Sierra Leone (SCSL). The SCSL received accounts of women and girls abducted from their communities into the bush, where they “were expected to carry out

835 While Ongwen and Al Hassan face the explicit charge of forced marriage as an other inhumane act; forced marriage was included under sexual slavery in the Katanga and Ngudjolo case. ICC-02/04-01/15-422-Red, p 101; ICC-01/12-01/18-2-tENG, para 12; ICC-01/04-01/07-717, paras 431, 434.

836 See further Andrea Raab and Siobhan Hobbs, ‘Forced Relationships: Prosecutorial Discretion as a Pathway to Survivor-Centric Justice’, *Opinio Juris*, 13 September 2018.

837 See also the sub-section on *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* of this Report.

838 ICC-01/12-01/18-1-Red, para 168

839 *Ibid*, para 48.

840 For more information, see the *Ongwen* and *Katanga* Confirmation of Charges decisions. ICC-02/04-01/15-422-Red; ICC-01/04-01/07-717.

all the functions of a wife and more [...], show undying loyalty to her husband for his protection and reward him with 'love and affection'". The women were constantly sexually abused, physically battered during and after pregnancies, and psychologically terrorised by their husbands, who thereby demonstrated their control over their wives."⁸⁴¹ Though not prosecuted before the ICTR, forced relationships were reportedly also prominent in the 1994 Rwandan genocide.⁸⁴²

Forced relationships were also prominent amidst the many crimes the so-called Islamic State of Iraq and Syria (ISIS) has been committing in Syria and Iraq. Indeed, numerous reports suggest that ISIS members forced Sunni women into so-called "marriages" with its members.⁸⁴³ By contrast, and as Nadia Murad vividly describes in her book, most captured Yazidi women were treated as *sabiyah*—sex slaves considered property either of an ISIS individual, or ISIS itself.⁸⁴⁴

The utility of survivor-centric legal qualification of forced relationships

Whether the imposition of these relationships is characterised in law as sexual slavery or forced marriage as other inhumane act can compound the full spectrum of physical, mental and emotional harm and consequences facing survivors. It is important to understand that differences in impacts can also emerge years after the victimisation, and be most profound for survivors when trying to reintegrate or return to a normal life in society. For example, in Uganda women formerly abducted by the LRA that have since returned to their communities are considered to have "liaised with the enemy". As a result of the domestic nature of the tasks the survivors were required to perform, the exclusivity of the forced relationship with the perpetrator, as well as the perpetrators' perception of the women as "wives",⁸⁴⁵ some survivors and their children from the forced relationship have been ostracised and stigmatised by their communities. Consequently, they have been left to recover on their own, considered ineligible for marriage or face divorce from their pre-conflict marriage, and have to provide for children born during the conflict by themselves. The categorisation and realities of forced relationships also profoundly affects the lives of the children from forced relationships:

841 *The Prosecutor v. Alex Tamba Brima et al*, SCSL-04-16-A, Judgment, 22 February 2008, para 192.

842 See HRW, 'Shattered Lives, Sexual Violence during the Rwandan Genocide and its Aftermath', September 1996.

843 See eg HRW, 'Iraq: Sunni Women Tell of ISIS Detention, Torture', 20 February 2017; Mahmood, 'Challenges of Children Born by ISIS Rape in Iraq', Mahmood, *CERAH Working Paper 49*, 2016–2017, p 6, 7, 13; Lafta, Cetorelli and Burnham, 'Living in Mosul during the time of ISIS and the military liberation: results from a 40-cluster household survey', *Conflict and Health*, 2018; Foreign Policy, 'Women Survive. They Do Not Live.', 11 October 2016.

844 Murad, 'The Last Girl', *Tim Duggan Books*, 2017.

845 See eg ICC-02/04-01/15-422-Red, para 111.

In Uganda, these children cannot be registered due to lack documentation of the “father”, which aggravates inaccessibility and ineligibility to services and rights such as higher education and land rights. These direct and indirect impacts on children can lead to transgenerational harm and exacerbated inequality. In situations like these, conflict-related forced relationships thus perpetuate structural gender inequalities, compounding patriarchal societal norms and a conservative construction of a woman’s roles in society and the home.

By contrast, and based on a perception of victimisation by sexual slavery, the Baba Sheik, a senior religious leader of the Yazidis, has welcomed survivors back into the community with honour. On the one hand, this notion seems to stem from the characterisation by ISIS of the captured Yazidi women as slaves, projected onto the women throughout their ordeals, being referred to as “slaves” by their captors, and, in many cases, repeatedly sold to other fighters as slaves.⁸⁴⁶ On the other hand, as Nadia Murad indicates, many survivors struggle to reconcile their experiences with Yazidi religion, which strictly prohibits intercourse before marriage, and requires that Yazidis only enter into relationships with other Yazidis. As a result, departing from the characterisation of the forced relationships as slavery, and the connotations of involuntariness and coercion attaching thereto, could prove detrimental to individual and the community’s recovery processes.

Any label superimposed on the survivor that is not reflective of their perception of what happened to them may, in addition to compounding the harms ensuing forced relationships and adverse effects on reintegration, lead survivors to consider that justice was not rendered and that they cannot identify with the Judgment. Abandoning the survivors’ views may also negatively affect reconciliation, in that frictions between communities affiliated with different fighting groups may worsen. All of this may jeopardise the Court’s own legitimacy in leaving its wider audience to ask who justice is administered for, and whether the Court renders justice in a manner contributing to reconciliation.

The flexibility engrained in case law

International jurisprudence, recent and dated alike, affords the flexibility necessary to transpose and incorporate survivors’ perceptions into the legal characterisation of forced relationships, holding that forced relationships may come within the ambit of both the crimes of slavery and other inhumane acts, depending on the circumstances.

A Trial Chamber of the SCSL in the *Brima et al* case by majority held that forced relationships did not come within the ambit of the crime of other inhumane acts, but fell within the scope of the crime of sexual slavery. In coming to this conclusion, the Chamber reasoned, *inter alia*, that “[...] the use of the term ‘wife’ by the perpetrator in reference to the victim is indicative of the intent of the perpetrator to exercise ownership

⁸⁴⁶ The Guardian, ‘Slaves of Isis: the long walk of the Yazidi women’, 25 July 2017.

over the victim, and not an intent to assume a marital or quasi-marital status with the victim in the sense of establishing mutual obligations inherent in a husband-wife relationship.”⁸⁴⁷ The Appeals Chamber overturned the Trial Judgment in this respect, holding that forced relationships in Sierra Leone came within the ambit of the crime of other inhumane acts, because victims were forced into a conjugal association not of a predominantly sexual nature.⁸⁴⁸ Notably, however, the Appeals Chamber did not exclude that in different circumstances, forced relationships may give rise to sexual slavery.

The ICC has adopted this flexible approach. In *Katanga and Ngudjolo*, for example, the Pre-Trial Chamber held that “sexual slavery also encompasses situations where women and girls are forced into ‘marriage’, domestic servitude or other forced labour involving compulsory sexual activity, including rape, by their captors.”⁸⁴⁹

The Pre-Trial Chamber in *Ongwen* considered that forced marriage may per se come within the ambit of the crime of other inhumane acts, and is hence distinct from sexual slavery.⁸⁵⁰ The Judges did not, however exclude that forced marriage may also give rise to sexual slavery, depending on the circumstances. In the case at hand, the Pre-Trial Chamber found that forced relationships

in Uganda gave rise to both crimes.⁸⁵¹ Similarly, the Pre-Trial Chamber in *Al Hassan* issued an arrest warrant for forced relationships, holding that they gave rise to both forced marriage as an other inhumane act and sexual slavery.⁸⁵²

Prosecutorial discretion as pathway to survivor-centric justice

A perpetrator-centric approach has thus far characterised the assessment of the circumstances giving rise to either the crime of other inhumane acts or sexual slavery as the analyses in *Brima et al* illustrate. In that case, the Trial Chamber analysed the use of the term “forced wife” by the perpetrator, without expressly considering the survivors’ stance. In establishing the elements of the crime of other inhumane acts, the Appeals Chamber noted that being labelled a “forced wife” by perpetrators subjected survivors to mental trauma,⁸⁵³ but did not contemplate any long-term consequences of their judicial determination to the same effect. Along similar lines, in the case against *Ongwen*, the ICC found 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’” determinative,⁸⁵⁴ rather than the survivors’ perceptions. That, as outlined above, survivors’

847 *The Prosecutor v. Alex Tamba Brima et al*, SCSL-04-16-T, Judgment, 20 June 2007, para 711.

848 *Ibid*, paras 187-196.

849 ICC-01/04-01/07-717, para 431.

850 ICC-02/04-01/15-422-Red, paras 91-95.

851 See ICC-02/04-01/15-422-Red, paras 116-119.

852 ICC-01/12-01/18-2-tENG, para 9.

853 *The Prosecutor v. Alex Tamba Brima et al*, SCSL-2004-16-A, Judgment, 22 February 2008, para 193.

854 ICC-02/04-01/15-422-Red, para 93.

perceptions often appear to be informed by the perpetrators' views does not render circumventing survivors' agency defensible. Not only may their perceptions, and reasons propelling those, change over time, but it would also appear unprincipled to disregard survivors' views on that basis.

As the confines of the document containing charges, however, constrain the judges' scope of consideration, the Prosecution is ascribed a key role in engendering a survivor-centric approach to justice, and instilling survivors' perceptions into the legal process — and prosecutorial discretion provides it with the necessary tool to do so. In the first place, the Prosecution should adduce evidence for and initially charge all relevant crimes. While multiple charging can be observed both in *Ongwen* and thus far in *Al Hassan*, it is paramount that the Prosecution go even further and allow its prosecutorial strategy to be guided by survivors' perceptions and agency during the trial. It ought to accommodate survivors' perspectives as necessary by dropping charges not, or no longer, reflecting their perceptions.

This approach not only aligns with prosecutorial practice before other international tribunals, but also recognises the realities facing many survivors. More often than not, individuals are victimised by more than one crime within the span of a single conflict. In addition to being raped, a woman may also see her whole family murdered, her house destroyed and pillaged, and her friends or relatives raped. The same woman may have

been caught in a forced relationship, may consider herself as victimised by sexual slavery, forced marriage, or both, and is entitled to justice sensitive to her perceptions and experience.

Appraising Sexual Violence in Composite Crimes

Documentation efforts suggest that sexual violence against Rohingya people has been prominent amongst the factors causing, and forcing, them to leave Myanmar. The Independent Fact-Finding Mission on Myanmar reported:⁸⁵⁵

Rape and sexual violence have been a particularly egregious and recurrent feature of the targeting of the civilian population in Rakhine, Kachin and Shan States since 2011. Similar patterns of rape and sexual violence have been reported for at least three decades. Rape, gang-rape, sexual slavery, forced nudity, sexual humiliation, mutilation and sexual assault are frequently followed by the killing of victims. The scale, brutality and systematic nature of these violations indicate that rape and sexual violence are part of a deliberate strategy to intimidate, terrorise or punish a civilian population, and are used as a tactic of war. This level of normalisation is only possible in a climate of long-standing impunity.

On 9 April 2018, the Office of the Prosecutor requested a ruling on the ICC's jurisdiction over the alleged deportation of the Rohingya peo-

855 Human Rights Council, A/HRC/39/64, para 79.

ple from Myanmar to Bangladesh, arguing that the Court has jurisdiction over the deportation of Rohingya people from Myanmar to Bangladesh for two reasons. First, and in contrast to the crime of forcible transfer, the crime of deportation is only completed when the victim has been forced across an international border.⁸⁵⁶ Second, “Article 12(2)(a) [Rome Statute] requires at least one legal element of an article 5 crime to have occurred on the territory of a state party”.⁸⁵⁷ In short, the Prosecution’s case hinges on the point that, while the crime “began” in a non-State Party to the Rome Statute (Myanmar), it was completed in a State Party to the Rome Statute (Bangladesh). Women’s Initiatives for Gender Justice argued in an *amicus curiae* brief to the ICC, that sexual violence may underlie the crime of deportation.⁸⁵⁸ The OTP has indicated that it agrees.⁸⁵⁹ In defining the crimes of deportation and forcible transfer, the ICC Elements of Crimes specify that “[t]he term ‘forcibly’ is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment”.⁸⁶⁰ Sexual violence, by its very

denomination, is a type of violence. Sexual violence is also a form of coercion, which is defined as “the action or practice of persuading someone to do something by using force or threats”.⁸⁶¹ Moreover, the Elements of Crimes require, *inter alia*, the presence of coercive circumstances for establishing both rape and sexual violence.⁸⁶² It follows that sexual violence, including rape, constitutes a forcible act within the meaning of the Elements of Crimes.

Moreover, case law shows that sexual violence may be a factor in establishing the coercive element of the crime of deportation. Pre-Trial Chamber II held in its Confirmation of Charges decision in the case against Ruto and Sang that “deportation or forcible transfer of population is an open-conduct crime”, meaning that “the perpetrator may commit several different conducts which can amount to ‘expulsion or other coercive acts’, so as to force the victim to leave the area where he or she is lawfully present”.⁸⁶³ Likewise, Pre-Trial Chamber II considered in its Confirmation of Charges decision in the *Kenyatta et al* case that rape, together with the destruction of homes and brutal killings and injuries, as well as specific public announcements, amounted to coercion within the meaning of the Elements

856 ICC-RoC46(3)-01/18-1, paras 15-27.

857 *Ibid*, paras 28-50.

858 ICC-RoC46(3)-01/18-22, paras 13-19.

859 ICC-RoC46(3)-01/18-33, para 7.

860 Footnote 12, p 6, Elements of Crimes.

861 Oxford Dictionary, “coercion”.

862 P 8, 10, 28, 30, 36, 38, Elements of Crimes.

863 ICC-01/09-01/11-373, para 244.

of Crimes.⁸⁶⁴ These holdings also align with the jurisprudence of the *ad hoc* tribunals. The ICTY's Trial Chamber in *Stanišić and Simatović* found that acts of sexual violence in combination with other acts may cause duress and fear of violence such that they create a coercive environment where persons have no choice but to leave, thereby establishing forcible displacement.⁸⁶⁵ This holding was not challenged on appeal.

On 6 September 2018, Pre-trial Chamber I ruled in favour of the Prosecutor's request of 9 April 2018, confirming that the Court has jurisdiction over deportation and other crimes committed against the Rohingya people of which a legal element or a part of the crime in question occurred on the territory of a State Party.⁸⁶⁶ The Chamber explicitly discussed sexual violence in its decision in relation to the crime of deportation, determining that acts of sexual violence can constitute underlying acts of the crime, along with other violations such as killing and torture.⁸⁶⁷ In making this finding, the Chamber referred to the observations of the Women's Initiatives' joint *amicus curiae* brief. In its statement following the Chamber's decision, the Prosecutor also explicitly mentioned sexual violence, stating that the

Preliminary Examination may take into account sexual violence as acts underlying the crime of deportation.⁸⁶⁸ Additionally, the Prosecutor stated that it will further consider other crimes against humanity, "such as the crimes of persecution and other inhumane acts".⁸⁶⁹

Intersectionality as a Pathway to Gender Justice

The concept of intersectionality refers to the way in which multiple factors (such as gender, sexuality, race and class) interact to shape an individual's life.⁸⁷⁰ An intersectional understanding of sexual violence helps conceptualise how individuals are targeted for sexual violence by virtue of their ethnic identity, their political affiliation, their sexual orientation, as well as their sex or gender.⁸⁷¹

Recognising this facilitates a more nuanced view on the Rome Statute. The crime of persecution, for example, can be committed on political, racial, national, ethnic, cultural, religious, and gender grounds.⁸⁷² That persecution is committed on, for example, grounds of religion, however, does not exclude that it may also be gender-based, and/or that sexual violence may be an act underlying per-

864 See ICC-01/09-02/11-382-Red, para 244.

865 *The Prosecutor v. Jovica Stanišić and Franko Simatović*, IT-03-69-T, Judgment, 30 May 2013, paras 1094-1095.

866 ICC-RoC46(3)-01/18-37.

867 *Ibid.*, para 61.

868 OTP, 'Statement of ICC Prosecutor, Mrs Fatou Bensouda, on opening a Preliminary Examination concerning the alleged deportation of the Rohingya people from Myanmar to Bangladesh', 18 September 2018.

869 *Ibid.*

870 Rosemary Grey, 'Conflicting interpretations of 'sexual violence' in the International Criminal Court', *Austr. Fem. St.*, 2014, p 283, and authorities cited.

871 *Ibid.*

872 Article 7(1)(h), Rome Statute.

secution.⁸⁷³ The case against *Al Hassan* is the most recent example of the recognition of intersectionality before the ICC. Violence against women was rife while the Malian town of Timbuktu was under the control of AQIM and Ansar Dine.⁸⁷⁴ According to the Prosecution, those groups sought to impose their fundamentalist Islamic views on Timbuktu's population, especially by way of fundamentalist prohibitions and rules, many of which affected women, including strict dress codes, disregard of which ensued corporal punishment in many cases.⁸⁷⁵ The Prosecution considered that this conduct amounted to both persecution on gender and religious grounds.⁸⁷⁶

Similarly, the crime of genocide can be committed against protected groups through sexual or gender-based violence, and propelled by sexual or gender-based motives. The seminal *Akayesu* case made clear that rape may constitute severe mental harm and measures preventing birth for purposes of establishing genocide. At the ICC, in the Second Decision on the Prosecution's Application for a Warrant of Arrest for Omar Hassan Ahmad Al Bashir, the Prosecutor argued, and the Pre-Trial Chamber agreed, that sexual violence was an act of genocide through causing serious bodily or mental harm.⁸⁷⁷

Beyond recognising gendered aspects of the Rome Statute, intersectionality is an important tool for ensuring the closure of impunity gaps. In cases where rape as such would not come within the ICC's jurisdiction, as is the case with the Rohingya, intersectional considerations may function as a basis to include the crime within the scope of another crime, such as deportation.

This is particularly relevant where domestic laws are ill-equipped to ensure accountability for sexual violence, and the example of the Rohingya illustrates this aptly. The Myanmar Government's acts and the domestic legal framework paint a picture where no justice for Rohingya women—and Rohingya generally—can be expected. Although the Myanmar government has recently acknowledged the existence of a mass grave,⁸⁷⁸ it failed to issue visas for members of an Independent Fact-finding Mission,⁸⁷⁹ and its own investigation results were inconsistent with numerous credible and independent reports.⁸⁸⁰ Another obstacle in achieving justice is the expansive immunity afforded to State agents under the 2008 Myanmar Constitution: Pursuant to Section 445, "[n]o proceeding shall be instituted against the [State Law and Order Restoration Council and the State

873 The International Criminal Tribunal for the former Yugoslavia (ICTY) considered that all crimes against humanity may underlie the crime of persecution, including rape. *The Prosecutor v. Zoran Kupreškić et al*, IT-95-16-T, Judgment, 14 January 2000, para 617; *The Prosecutor v. Tihomir Blaškić*, IT-95-14-A, Judgment, 29 July 2004, para 143. In discussing the crime of persecution, a Trial Chamber in the *Stakić* case held that "under international criminal law, not only rape but also any other sexual assault falling short of actual penetration is punishable". *The Prosecutor v. Milomir Stakić*, IT-97-24-T, Judgment, 31 July 2003, para 757.

874 For more information on this case, see the sub-section on *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* of this Report.

875 ICC-01/12-01/18-1-Red, paras 162-174.

876 *Ibid*, paras 137-138.

877 ICC-02/05-01/09-94, paras 25-31.

878 The Washington Post, 'In a first, Burmese military admits that soldiers killed Rohingya found in mass grave', 10 January 2018.

879 The Guardian, 'Myanmar refuses visas to UN team investigating abuse of Rohingya Muslims', 30 June 2017.

880 See for example: A/HRC/39/64; The Guardian, 'Myanmar military exonerate itself in report on atrocities against Rohingya', 14 November 2017.

Peace and Development Council] or any member thereof or any member of the Government, in respect of any act done in the execution of their respective duties". Moreover, the Myanmar Penal Code addresses sexual and gender-based crimes only to a very limited extent. The definition of rape is confined to vaginal penetration.⁸⁸¹ Finally, other forms of sexual violence are barely, if at all, addressed.

"It is important that an intersectional approach is adopted in all cases before the Court, particularly in those involving sexual and gender-based violence. In doing so, the Court can lead in the promotion of justice informed by experiences and voices of victims."

881 See Section 375 of the Myanmar Penal Code.

The background of the slide is a solid blue color. Overlaid on this are several abstract, wavy white lines of varying thickness. These lines are scattered across the slide, with some appearing as simple curves and others as more complex, branching shapes. The overall effect is a modern, artistic design.

RECOMMENDATIONS

Recommendations

To the Assembly of States Parties

Ensure that the requisite number of female nominations are received before holding elections for leadership positions at the Court.

Strengthen efforts to achieve a desirable balance of women and men in Court management positions across each organ of the Court.

Committee on Budget and Finance

Monitor the gender representation of ICC staff and request the Court provide a plan to address the imbalances at each level.

Request future budgets have gender specific allocations for outreach, victim participation, witness engagement, investigations, recruitment, and training. Additionally, the Committee on Budget and Finance could consider whether allocations for each organ have taken gender mainstreaming priorities into account, and review budget development practices to ensure that gender considerations are included when determining resource allocation.

Encourage the Court to request funds in accordance with real needs in order to conduct effective investigations.

To the Court

Adopt a Court wide gender mainstreaming strategy to inform budget and resource allocations, outreach and victim participation, as well as the overall gender responsive capacity of the various units. There is a need for consistent approaches to be undertaken across all areas of the Court to demonstrate its commitment to gender equality. This can be enhanced through measures such as consistent reporting on gender specific tasks and responsibilities in all management meetings, strengthening gender specific capacities of all staff, and evaluating gender responsive capacities at staff performance evaluations.

Ensure that staff, from field officers to legal officers, administrators to judicial officers, have gender specific competencies that are continually refreshed and strengthened.

Request urgent additional funds for a fulltime gender adviser position within all organs of the Court to ensure that a strong focus on gender issues, and gender analysis of each unit's work underlies the basis for the next ICC Strategic Plan.

Prioritise gender awareness and sensitivity in recruitment. In particular, ensure the recruitment of expertise for sexual and gender-based violence, gender analysis, women's rights, and prior experience engaging with or representing victims of sexual and gender-based violence in order to enhance the implementation of gender mainstreaming strategies and the work of each unit and organ.

Undertake a gender responsive budgeting process ahead of preparing the 2020 budget, and reflect on how the 2019 proposed budget can be implemented in a gender responsive way. The goal of gender responsive budgeting is to review the impact of budget allocations from a gendered perspective, ensure a gender equitable distribution of resources, and contribute to equal opportunity for all. Despite the apparent absence of gender responsive budgeting at this stage, it does not prevent the possibility of spending the 2019 budget in a gender responsive manner.

Strengthen relationships with States Parties, particularly those of the African continent to combat the recent initiation of withdrawal procedures and reinforce the importance of the Rome Statute and ICC for the promotion of peace and security.

Consider holding part of the Court processes where possible in the affected community/region/country, for example opening or closing statements. In the *Ntaganda* case, the Court considered holding the closing statements in the Democratic Republic of the Congo, but did not for reasons of security. By bringing the justice process to the affected people, the Court can reinforce their importance within the international criminal justice process, and enable affected community members to have the opportunity to observe the Court directly.

Judiciary

Create a P5 gender legal adviser position within the Trial Division to augment sources of legal advice and support the cohesion of legal reasoning

and consistency of interpretations across Chambers and between divisions. In light of the number of cases with charges of sexual and gender-based crimes now under consideration, as well as the complexity of these crimes, and the theories of liability, dedicated posts serving as expert resources for the Judges could provide valuable assistance.

Undertake ongoing internal reflection on critical issues including: interpretation of the modes of liability and conceptualisation of common purpose in relation to: sexual and gender-based crimes; analysis of sexual violence regarding prior commission, repetition and numerosity; and what makes violence sexual.

Provide clear elaborations, to the extent possible, on reasonings for findings, especially those relating to elements of crimes of sexual violence. Further elaboration will serve to provide clearer guidelines to the parties on what may make violence sexual.

Office of the Prosecutor

Initiate regular, ongoing internal gender seminars at which knowledge can be shared and strengthened within all OTP units.

Ensure preliminary examinations teams undertake a gender analysis of each Situation. The analysis should include a mapping of relevant actors and explanation of the Situation from a gendered perspective, including possible markers for sexual and gender-based crimes. Ensure the gender analysis is provided to the investigation team once appointed to facilitate the early consideration of possible sexual and gender-based crimes and linkage to relevant actors.

Recruit a P4 gender and legal adviser to support the expanded work of the preliminary examinations team and ensure a gender analysis of each context is undertaken.

Ensure sufficient allocation of resources to enable early, and thorough investigation of sexual violence, including staff time, in preliminary examinations teams and investigations teams, which may be able to provide a

gender analysis and mapping of relevant actors to fast-track initial stages of investigations.

Undertake a five-year review of the OTP's Policy Paper on Sexual and Gender-Based Crimes to reflect on the lessons learned from its implementation. A discussion on how obstacles that have been impairing the investigation, prosecution and adjudication of sexual violence, especially against men and boys, may be overcome is ever more important and timely given the further Preliminary Examinations, Situations under investigation, and cases likely ahead for the Court.

Adopt an intersectional approach in all cases before the Court, particularly in those involving sexual and gender-based violence. In so doing, the OTP can lead in the promotion of justice informed by experiences and voices of victims.

Registry

Ensure the work of each unit within the Registry is premised on a gender analysis of the unit's work and goals. A gender analysis needs to form an inherent part of any action as early as possible to ensure meaningful inclusion in goals, strategies and resource allocations that can promote gender equality. Policy papers similar to the OTP's Policy Paper on Sexual and Gender-Based Crimes could be useful to guide each specific unit to reach specific gender-related goals, and promote uniformity across the work of the Registry as a whole.

Additionally, field work and methods of outreach and communication need to be based on a gender analysis of the relevant country and region to ensure the selection of avenues for application dissemination, support, and collection is inclusive.

Assess the need for targeted outreach to encourage increased participation of these victims in ICC proceedings. For example, sexual violence victims in a particular locality may be unable or uncomfortable to join with other com-

munity members for screenings of trial proceedings, and as such private screenings for such a group of victims ensures the Court's process are accessible to them.

Strengthen capacities of each field presence to ensure the teams can interact with affected communities regularly to ensure they feel comfortable and included in the process, receive information in a timely manner and their questions and concerns can be addressed.

Resume reporting on outreach activities across all Situation-specific countries, including the gender analysis utilised to guide its priorities and activities.

Publish performance indicators that not only include disaggregation of data pertaining to the gender balance amongst victims, but also to the gender of the victims reporting specific crimes. For example, female victims who report the crime of pillaging; sexual and gender-based crimes are under-reported and often hidden behind other reported crimes, such as pillaging.

Acronyms used in this Report

ALC	<i>Armée de libération du Congo</i>	FRPI	<i>Force de résistance patriotique en Ituri</i>
AQIM	Al Qaeda in the Islamic Maghreb	GEN	Genocide
AU	African Union	HRIDC	Human Rights Centre
ASP	Assembly of States Parties	HRW	Human Rights Watch
CAH	Crime against humanity	ICC	International Criminal Court
CAR	Central African Republic	ICTJ	International Center for Transitional Justice
CBF	Committee on Budget and Finance	ICTR	International Criminal Tribunal for Rwanda
CIA	Central Intelligence Agency	ICTY	International Criminal Tribunal for the former Yugoslavia
CMA	<i>Coordination des mouvements de l'Azawad</i>	IDF	Israeli Defense Forces
CSiW	Conjugal Slavery in War	IDP	Internally Displaced Person
DRC	Democratic Republic of the Congo	IHL	International humanitarian law
FACA	Central African Armed Forces	IOM	Independent Oversight Mechanism
FAFN	<i>Forces Armées des Forces Nouvelles</i>	ISA	Libyan Internal Security Agency
FDS	<i>Forces de défense et de sécurité</i>	ISIS	Islamic State of Iraq and Syria
FGM	Female genital mutilation	JCE	Joint Criminal Enterprise
FIDH	International Federation for Human Rights	JEM	Justice and Equality Movement
FNI	<i>Front des nationalistes et intégrationnistes</i>	JRP	Justice and Reconciliation Project
FPLC	<i>Forces patriotiques pour la libération du Congo</i>	LRA	Lord's Resistance Army
FRCI	<i>Forces Républicaines de Côte d'Ivoire</i>	LNA	Libyan National Army

MINUSCA	United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic	SCSL	Special Court for Sierra Leone
		SGBC	Sexual and gender-based crimes
MLC	<i>Mouvement de libération du Congo</i>	SGBV	Sexual and gender-based violence
MNLA	<i>Mouvement national de libération de l'Anzawad</i>	TFV	Trust Fund for Victims
MUJAO	<i>Mouvement pour l'unicité et le jihad en Afrique de l'Ouest</i>	UK	United Kingdom
		UN	United Nations
NGO	Non-Governmental Organisation	UNICEF	United Nations International Children's Emergency Fund
ODM	Orange Democratic Movement	UNIIB	United Nations Independent Investigation on Burundi
OHCHR	United Nations Office of the High Commissioner for Human Rights	UNOCI	United Nations Operation in Côte d'Ivoire
OPCV	Office of Public Counsel for Victims	UNSCR	United Nations Security Council Resolution
OSJI	Open Society Justice Initiative	UNSMIL	United Nations Support Mission in Libya
OTP	Office of the Prosecutor	UPC	<i>Union des patriotes congolais</i>
PE	Preliminary Examination	UPDF	Uganda Peoples' Defence Forces
PHR	Physicians for Human Rights	US	United States
PNU	Party of National Unity	VPRS	Victims Participation and Reparations Section
RPE	Rules of Procedure and Evidence	WC	War crime
RTI	<i>Radiodiffusion Télévision Ivoirienne</i>	WHO	World Health Organization
SCC	Special Criminal Court		

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Previous publications include:

- Prior editions of the Gender Report Card on the International Criminal Court
- Expert papers and reports
- Amicus curiae briefs
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Our most recent publication:

The Compendium: An overview of Situations and cases before the International Criminal Court
December 2017

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Women's Initiatives for Gender Justice



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