

KELLI MUDELL AND SIBLEY HAWKINS

GENDER AND TRANSITIONAL JUSTICE

A TRAINING MODULE SERIES

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Module 4 Criminal Justice

Acknowledgments

These training modules were prepared by Kelli Muddell, Senior Expert and head of ICTJ's gender justice initiatives, and Sibley Hawkins, program expert at ICTJ, with support from program expert Elena Naughton. The modules also benefitted from content and design support from intern Madeline Wood and consultant Anjali Manivannan. The "Women's Voices and Participation" film and several slide presentations were prepared by Marta Martínez, consultant for ICTJ. Emily Kenney and Megan Manion from UN Women provided valuable technical input.

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About ICTJ

The International Center for Transitional Justice works across society and borders to challenge the causes and address the consequences of massive human rights violations. We affirm victims' dignity, fight impunity, and promote responsive institutions in societies emerging from repressive rule or armed conflict as well as in established democracies where historical injustices or systemic abuse remain unresolved. ICTJ envisions a world where societies break the cycle of massive human rights violations and lay the foundations for peace, justice, and inclusion. For more information, visit www.ictj.org.

Cover image: In West Papua, Indonesia, indigenous women documented violence and human rights violations occurring between 1963 and 2009, during the period of integration of their region in Indonesia. (ICTJ/Anne Cecile Esteve).

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CONTENT WARNING: This training seminar contains descriptions of crimes against humanity and other grave violations, including sexual violence, that some readers and trainees will find difficult.

How to Use the Modules

a. Objectives and Goals

With the support of UN Women, ICTJ developed a set of multimedia training materials with in-depth information on different phases and dimensions of a gender-sensitive transitional justice process. The intended audience for this project is broad, and thus the materials are designed to be accessible for diverse state and civil society actors. This includes those seeking to increase their knowledge so that they can better train or work with others, such as staff of intergovernmental institutions or national human rights groups. It also includes those who plan to apply the materials more directly, such as people working with or within transitional justice measures.

There are six modules in total, covering the following topics: (1) a conceptual overview of gender and transitional justice, (2) truth seeking, (3) reparative justice, (4) criminal justice, (5) memorialization, and (6) women’s voices and participation in justice processes. While ICTJ recognizes that all transitional justice processes are intertwined and best served by a holistic approach, we also understand that in practice, often only one or two processes have strong momentum at any given time. ICTJ also notes that the universe of what can be considered a transitional justice process extends well beyond the topics included here. Thus, rather than serving as a comprehensive and exhaustive tool kit—which could not possibly be created—these modules and the proposed categorizations are intended to allow users to personalize their own training programs in a way that is as relevant as possible to their context.

The first five modules each consist of an interactive PowerPoint presentation and accompanying speaker notes to assist users in preparing their own training or presentation.

The final module, “Women’s Voices and Participation in Transitional Justice,” takes the form of a short video that tells the story of how women have participated in the transitional justice process and explores how they can participate now. This module is intended to broaden the reach of the training materials, as it is accessible to any audience. It can be used directly with women victims in sensitization workshops or other, similar contexts.

b. Using the Modules

The modules are designed to allow users to personalize and adjust their own trajectory through the materials based on their needs, experiences, and expertise. The concepts mentioned in each slide correspond to a section in the accompanying speaker notes. At the beginning of each section, the main points are summarized in bullet form and then explained in detail. The speaker notes also contain user-friendly additions such as links to key supplementary information and primary resources, as well as country-specific examples. Throughout each module, discussion questions and suggested exercises are contained in blue bordered boxes, to be explored at the user’s discretion.

Users can design the training to fit the needs of the intended audience by skipping certain information, focusing more on supplementary materials, or engaging in dialogue via questions and activities.

It is recommended that the presenter familiarize him- or herself with the slides and the speaker notes in advance to anticipate where the slide breaks occur. Within a section of the speaker notes, there may be multiple corresponding slides.

Accompanying these modules is a document entitled “Additional Resources.” This document can be consulted should the user wish to learn more about a particular topic.



Photo: Women march together during the first ever celebration of Colombia's National Day of the Memory and Solidarity with the Victims on April 9, 2012. (Astrid Elena Villegas/ICTJ)

Module 4: Criminal Justice

Gender and Transitional Justice: A Training Module Series

1. Introduction

- Historically unprosecutable acts of sexual and gender-based violence can be prosecuted as international crimes, such as war crimes, crimes against humanity, or genocide.
- International criminal law tends to target those who bear the greatest responsibility.
- Both international and domestic prosecutions of sexual and gender-based violence are necessary to close the “impunity gap” created by international criminal law’s focus on those bearing the greatest responsibility.

One universally prevalent type of violence, regardless of time, geography, culture, or other factors, is sexual and gender-based violence (SGBV).

Sexual violence refers to the *type* of violence. It is defined as “any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or act to traffic, or otherwise directed at a person’s sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work.”¹ Sexual violence is about power and control—not sex.

Gender-based violence refers to the victim and the motivation for or intended impact of the violation. If someone is targeted *because of his or her gender*, this is a form of gender-based violence. Sexual violence is always a form of gender-based violence, but not all gender-based violations are sexual violence. Anyone of any gender can be a victim or a perpetrator of SGBV; for example, men can be victims and women can be perpetrators.

Conflict-related sexual violence refers to “incidents or patterns of sexual violence against women, men, girls or boys occurring in a conflict or post-conflict setting that have direct or indirect links with the conflict itself or that occur in other situations of concern such as in the context of political repression.”² It is often part of widespread acts of violence by armed actors who use sexual violence to terrorize, collectively punish, demoralize, and humiliate opposing groups. Examples of sexual violence include rape, forced abortion, sexual slavery, forced marriage, forced nudity, enforced prostitution, forced pregnancy, enforced sterilization, and genital torture. Women and children face a high risk of being subjected to conflict-related sexual violence.

Today, SGBV is generally recognized as a weapon of war and can be prosecuted as an international crime, such as war crimes, crimes against humanity, and genocide. This progress has come only after decades of struggle by activists; historically, rape and sexual violence were considered inevitable—and unprosecutable—consequences of armed conflict, and sometimes even “spoils of war” for victorious soldiers.

While much has changed in terms of prosecuting SGBV, ensuring that courts continue to prioritize prosecution of these violations will require sustained attention from civil society activists, prosecutors, judges, and other judicial stakeholders. This is especially true given that international prosecutions

¹ Etienne G. Krug et al., “World Report on Violence and Health,” World Health Organization (2002), 154.

² United Nations, “Guidance Note of the Secretary-general: Reparations for Conflict-related Sexual Violence” (June 2014), 2.

have an inherently narrow focus and are often pursued only for serious violations of international humanitarian law or gross violations of international human rights law that constitute international crimes. International criminal prosecutions tend to target those who bear the greatest responsibility, such as commanders or political leaders, who are not necessarily direct perpetrators. This can create an “impunity gap” unless domestic courts prosecute both sexual crimes that are not international crimes as ordinary crimes under their penal laws and perpetrators who do not bear the greatest responsibility, including lower-level rapists.

Discussion Questions

- Ask participants if they have questions about the differences between sexual violence and gender-based violence. What are acts of gender-based violence that are not also acts of sexual violence?
- What role has criminal justice for SGBV played in your work?
- What challenges have you experienced or do you foresee with respect to using criminal prosecutions to promote gender justice?

2. Why Prosecutions?

- In general, prosecutions can contribute to reestablishing the rule of law, ending impunity, and deterring perpetrators from committing crimes.
- A proactive approach on gender is necessary to ensure that investigations and prosecutions adequately prioritize SGBV, particularly against women.
- Prosecutions can contribute to advancing gender justice by providing redress for SGBV, improving women’s status as rights holders and their access to justice, and deterring perpetrators from committing SGBV.

In their simplest form, prosecutions offer victims a mechanism of redress by holding perpetrators accountable for human rights violations. By prosecuting certain acts of harm, a state recognizes the criminality of such conduct and confirms that impunity is unacceptable. This recognition lends psychological support to victims by confirming that their experience was an injustice. Prosecutions also send a strong warning to perpetrators and potential perpetrators that they will be punished, which is often called the deterrence effect.

a. Why the Need for a Proactive Approach on Gender?

In many contexts, violence against women is not prioritized alongside other violent crimes, even in peacetime. Often, violence against women is committed in the home and is therefore considered to be a private matter. Biases within police forces and the judicial system result in a de-prioritization of these “domestic forms” of SGBV. Relatedly, little attention has been paid to the continuum of “ordinary” violence (e.g., during peacetime) and “extraordinary violence” (e.g., during war)—that is, the everyday practices and prejudices that are normalized, domesticated, and privatized on the one hand and the extreme violations that hit the headlines and make news on the other.

Thus, it is important to recognize that biases may exist and carry over into the investigation and prosecution of SGBV in contexts of large-scale human rights abuses. It is necessary to focus both on the individual acts of violence and the systemic conditions that enable such abuses. To be fully gender-sensitive, prosecutions must consider structural factors that make women particularly vulnerable to certain human rights violations, such as SGBV. This requires a proactive focus on gender in terms of how investigations are carried out and charges are formulated. It also demands equal access to justice for all victims, including women and other victims of SGBV.

b. How Prosecutions Can Contribute to Advancing Gender Justice

Post-conflict and post-authoritarian communities are typically characterized by a breakdown of the rule of law or the manipulation and perversion of the legal system to achieve oppressive ends. Prosecutions may be the first step toward reversing some of the damage done to the legal system by contributing to respect for rule of law and the institutions that uphold it and by transmitting a message that certain behavior is unacceptable.

When it comes to gender, including specific considerations for women and others affected because of their gender throughout the criminal justice process not only provides redress for those victims—which is of critical significance—but also initiates long-term impacts such as:

- establishing women as more powerful players with effective rights in the new society;
- officially recognizing the need to enhance women’s access to justice;
- recognizing that acts of SGBV are criminal acts and not unfortunate side effects of war;
- contributing to breaking cycles of impunity for SGBV;
- sending a warning to perpetrators that they will be punished for committing SGBV.

By incorporating gender into prosecutions, legal precedent is established for reforming domestic penal codes and criminalizing peacetime gender-based violence.

3. Prosecuting SGBV under International Law

- SGBV acts committed in the context of an armed conflict can be prosecuted as war crimes.
- SGBV acts committed as part of a systematic or widespread attack against a civilian population can be prosecuted as crimes against humanity.
- SGBV acts committed with the intent to destroy a national, ethnic, racial, or religious group can be prosecuted as genocide.
- Commanders or superiors may be liable for their subordinates' international crimes, including acts of SGBV, via command or superior responsibility.

a. SGBV as an International Crime

The “core” international crimes are war crimes, crimes against humanity, and genocide. Customary international law binds states to investigate and prosecute these core crimes. In relation to periods of massive human rights violations, SGBV crimes can be prosecuted as war crimes (acts committed in the context of an armed conflict), crimes against humanity (acts committed as part of a systematic or widespread attack against a civilian population), or genocide (acts committed with the intent to destroy a national, ethnic, racial, or religious group). A central part of prosecuting acts of SGBV as an international crime is proving that they were committed in one of these three contexts.

b. Modes of Liability for International Crimes

Under international criminal law, there are two modes of responsibility for international crimes: *direct responsibility* and *command or superior responsibility*.

Individuals may be liable via *direct responsibility* if they committed, ordered, solicited, induced, aided and abetted, or otherwise assisted in an international crime or if they contributed to a group's efforts to commit an international crime.³

Commanders or superiors may be liable for their subordinates' crimes via *command or superior responsibility* if:

- they had effective command and control over their subordinates;
- they knew or should have known their subordinates were committing or about to commit crimes;
- they failed to take all necessary measures to prevent or repress the commission of crimes *or* to investigate and prosecute the directly responsible subordinates; and
- their failure to properly exercise control over their subordinates resulted in the commission of the crimes.⁴

The two modes of liability allow for the prosecution of both direct perpetrators (via direct responsibility) and their superiors (via command or superior responsibility). This is important given

³ Rome Statute of the International Criminal Court, July 17, 1998, Vol. 2187 U.N.T.S. 3, Art. 25.

⁴ *Ibid.* at Art. 28.

the necessity of prosecutorial discretion with respect to the selection of cases, which currently focuses on those considered most responsible. Although the most responsible are often at the leadership level and do not have a direct hand in acts of SGBV, they may be held liable under command or superior responsibility for their subordinates' SGBV crimes.

Activity

Present the following scenario to participants: The government and military of Country recently began committing violence against the Minority Ethnic Group that lives there. One evening, 10 soldiers (of Majority Ethnic Group) belonging to a military unit of Country entered Village and started shooting only at the houses belonging to Minority Ethnic Group, killing many Minority Ethnic Group civilians who were living there. The soldiers raped the surviving women and told them they would be the mothers of Majority children now. The soldiers severely beat the surviving men all over their bodies, including their genitals, while telling them they would lose their manhood. Some of the men were taken away. This is the 10th known attack by the military against Minority Ethnic Group civilians this month.

The next morning, Commander of the military unit found out about the killings, rapes, and beatings from a soldier who was present at the incident but did not actively participate in the offenses. Commander was visibly upset, and he warned the soldiers that they should never do anything like that again and should only act under his command. He also told them to never speak about the incident again.

Provide participants with copies of Articles 6, 7, 25, and 28 of the Rome Statute for reference. Divide participants into small groups and ask them to answer the following questions before reconvening everyone to discuss the answers (included below).

What acts of what international crimes likely occurred? What additional information would you need to prove their occurrence? Explain.

- *Genocide*, based on the ethnic targeting and what the soldiers said. We would need information to prove “intent to destroy, in whole or in part.” The acts of genocide could include killing, causing serious bodily or mental harm to members of the group through the rapes and beatings, imposing measures intended to prevent births within the group, and forcibly transferring children of the group to another group.
- *Crimes against humanity*, based on the fact that this is the 10th such attack against civilians (i.e., the violence is widespread). We would need information to prove the soldiers intended to further the broader campaign of violence by attacking Village. The acts of crimes against humanity could include murder, torture (in the physical beatings), rape (of women), forced pregnancy (if pregnancy occurred), enforced sterilization (of men due to genital beatings), persecution, and enforced disappearance (we would need to know if the soldiers refused to acknowledge information about the taken men, etc.).

Under what mode of responsibility could a soldier participating in the offenses be held liable? Explain.

- Via direct responsibility for committing crimes, similar to Article 25(3)(a) of the Rome Statute.

Under what mode of responsibility could Commander be held liable? Explain.

- Via command responsibility, similar to Article 28(a). Commander had effective control over the soldiers, received at least after-the-fact knowledge that the soldiers had committed crimes, and did not punish the soldiers.

(Adapted from International Bar Association, [International Criminal Law: A Facilitator’s Guide on International Criminal Law for Judges, Prosecutors and Lawyers](#), pp. 78, 103–104.)

4. Mechanisms for Pursuing Accountability for SGBV in Transitional Contexts

- Prosecutions of large-scale human rights violations are commonly held at the regional or international level, purely domestic or national level, or a mix of these levels.
- The principle of complementarity is a foundational tenet of regional and international courts, meaning they will only prosecute if the national authorities are unable or unwilling to prosecute domestically.
- National-level prosecutions are ideal because they provide increased visibility and access to victims and witnesses, but they can be hindered by restrictive definitions of crimes, especially SGBV, and inadequate legal and judicial infrastructure, among other things.
- Hybrid courts, or mixed tribunals, combine national and international elements to best suit the context in which they operate.

Criminal accountability for systematic human rights violations has taken place in courts at both the national and international levels. Whether prosecutions take place and in what form are affected by factors such as political will, judicial independence, and the existence of a functioning legal framework and infrastructure. Generally, large-scale human rights violations have been addressed in prosecutions via regional or international institutions (permanent or ad hoc), purely domestic or national-level prosecutions, and hybrid prosecutions.

a. International and Regional Mechanisms

One option for prosecuting systemic human rights violations, including SGBV, is to do so at the regional or international level. Many of the first, most prominent attempts at pursuing criminal accountability for widespread violations of international law took this form.

For example, after World War II, the Nuremberg tribunals were set up. Collectively, they have come to be recognized as one of the first major attempts at pursuing justice for widespread violations of human rights on an international stage. Though they were not without major flaws (the tribunals represented a form of “victor’s” justice), these early trials nevertheless left a valuable legacy. In what was certainly the next biggest step forward for international justice, two well-known ad hoc tribunals—the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)—were formed in the mid-1990s following massive violence and conflict in each place. The ad hoc tribunals had a very specific, and temporally limited, mandate.

In turn, the ad hoc international criminal tribunals “paved the way for the creation of the International Criminal Court (ICC),”⁵ a permanent court formally established by the [Rome Statute of the International Criminal Court](#) (known as the Rome Statute). The Rome Statute gave birth to a new,

⁵ United Nations, “[International and Hybrid Criminal Courts and Tribunals](#),” United Nations and the Rule of Law.

permanent system for dealing with war crimes, crimes against humanity, genocide, and crimes of aggression.⁶

There are three ways in which individuals can find themselves before the ICC. According to the [website of the ICC](#):

The Court may exercise jurisdiction in a situation where genocide, crimes against humanity or war crimes were committed on or after 1 July 2002 and:

- The crimes were committed by a State Party national, or in the territory of a State Party, or in a State that has accepted the jurisdiction of the Court; or
- The crimes were referred to the ICC Prosecutor by the United Nations Security Council (UNSC) pursuant to a resolution adopted under chapter VII of the UN charter.⁷

An important element to consider in the relationship between national and international courts is the *principle of complementarity*. A foundational tenet of the ICC and other multistate courts is the idea that courts at the national level have both the right and the first responsibility to prosecute international crimes. In fact, the ICC is generally called a “court of last resort”; it can only prosecute if national authorities cannot or have failed to do so.

According to an [expert paper prepared for the ICC](#), “the principle of complementarity is based both on respect for the primary jurisdiction of States and on considerations of efficiency and effectiveness, since States will generally have the best access to evidence and witnesses and the resources to carry out proceedings. Moreover, there are limits on the number of prosecutions the ICC, a single institution, can feasibly conduct.”⁸

On account of this notion of complementarity, the Office of the Prosecutor (OTP) of the ICC holds a great deal of sway when it comes to encouraging national authorities to take meaningful steps to prosecute international crimes. Because governments typically want to avoid intervention by the court, it can be in their interest to implement OTP recommendations and to demonstrate positive steps toward domestic prosecutions. This function of the ICC is sometimes referred to as “[positive complementarity](#).”

Example: Colombia illustrates how pressure from the ICC can prompt incremental changes. Colombia has been under “preliminary examination” by the ICC’s OTP since 2004. In its [2012 report on the situation in the country](#), the OTP noted the low number of national SGBV proceedings despite the large-scale occurrence of such acts.⁹ The report recommended that Colombian authorities prioritize the investigation and prosecution of these crimes. The OTP’s subsequent reports have shown a moderate increase in the number of steps Colombia is taking

⁶ Paul Seils, “Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes,” International Center for Transitional Justice (2016).

⁷ The International Criminal Court, “[About: How the Court Works](#).”

⁸ The International Criminal Court, “Informal Expert Paper: The Principle of Complementarity in Practice” (2003), 3.

⁹ The International Criminal Court Office of the Prosecutor, “Situation in Colombia: Interim Report” (2012).

to address SGBV crimes. For example, the prioritization of 16 “macro-investigations” against the paramilitary and leaders of the Revolutionary Armed Forces of Colombia (FARC) participating in the Justice and Peace Law process led to charges against 15 individuals for sexual violence and other crimes in 2013;¹⁰ adoption of new legislation on access to justice for sexual violence;¹¹ and the establishment by the attorney general of a working group to analyze 442 sexual violence cases submitted by Colombia’s Constitutional Court.¹²

Prominent Ad Hoc and Permanent International Criminal Institutions

International Criminal Tribunal for the Former Yugoslavia (ICTY): According to its [website](#), the ICTY was a “United Nations court of law dealing with war crimes that took place during the conflicts in the Balkans in the 1990’s.” During its mandate, which lasted from 1993 to 2017, it “irreversibly changed the landscape of international humanitarian law and provided victims an opportunity to voice the horrors they witnessed and experienced,” proving that those suspected of bearing the greatest responsibility for atrocities committed during armed conflicts can be called to account. Its reports, “depicting horrendous crimes, in which thousands of civilians were being killed and wounded, tortured and sexually abused in detention camps and hundreds of thousands expelled from their homes, caused outrage across the world and spurred the UN Security Council to act.”¹³

International Criminal Tribunal for Rwanda (ICTR): The UN Security Council established the [ICTR](#) to “prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighboring States, between 1 January 1994 and 31 December 1994.”¹⁴ These crimes included rape and other SGBV crimes committed in a widespread and systematic manner against the Tutsi ethnic group and moderate Hutus. Thousands of women and girls were individually raped; gang-raped; raped with objects, such as sharpened sticks or gun barrels; held in sexual slavery either collectively or through forced marriage; and sexually mutilated.¹⁵ According to the website of the International Residual Mechanism for Criminal Tribunals, the ICTR was the “first ever international tribunal to deliver verdicts in relation to genocide, and the first to interpret the definition of genocide set forth in the 1948 Geneva Conventions. It also is the first international tribunal to define rape in international criminal law and to recognize rape as a means of perpetrating genocide.”¹⁶

International Residual Mechanism for Criminal Tribunals (Mechanism): According to [its website](#), the Mechanism “is mandated to perform a number of essential functions previously carried out by the International Criminal Tribunal for Rwanda (‘ICTR’) and the International Criminal Tribunal for the former Yugoslavia (‘ICTY’). In carrying out its multiple functions...the Mechanism maintains the legacies of these two pioneering ad hoc international criminal courts and strives to reflect best practices in the field of international criminal justice....During the initial years of the Mechanism’s existence, it operated in parallel with the ICTR and the ICTY, and it will continue to operate after the Tribunals’ closure. The ICTR closed on 31 December 2015 with the ICTY following on 31 December 2017.”¹⁷

¹⁰ The International Criminal Court Office of the Prosecutor, “Report on Preliminary Examination Activities 2013” (2013).

¹¹ The International Criminal Court Office of the Prosecutor, “Report on Preliminary Examination Activities 2014” (2014).

¹² The International Criminal Court Office of the Prosecutor, “Report on Preliminary Examination Activities (2015)” (2015).

¹³ International Tribunal for the Former Yugoslavia, “About the ICTY,” www.icty.org/en/about

¹⁴ United Nations Security Council, 3453rd Mtg. *Resolution 955*, Nov. 8, 1994. (New York: Official Record S/RES/955), Art. 1.

¹⁵ International Criminal Tribunal for Rwanda, “Prosecution of Sexual Violence: Best Practices” (2014).

¹⁶ United Nations International Residual Mechanism for Criminal Tribunals, “The ICTR in Brief,” <http://unictr.unmict.org/en/tribunal>

¹⁷ United Nations International Residual Mechanism for Criminal Tribunals, “About,” www.unmict.org/en/about

International Criminal Court (ICC): The ICC commenced its operations in 2002 as a permanent and independent court that “tries persons accused of the most serious crimes of international concern, namely genocide, crimes against humanity and war crimes.”¹⁸ The [ICC](#) was officially established by the Rome Statute of the ICC and has been adopted by 121 UN member states. The ICC is made up of its presidency, the judicial divisions, the OTP, and the Registry. According to the United Nations Development Programme (UNDP), “the ICC is referred to as the court of ‘last resort’ based on the complementarity principle: it will neither act nor consider a case admissible if the crimes are genuinely investigated and prosecuted by domestic authorities.”¹⁹

Similar in many ways to these international institutions, a set of permanent *regional human rights bodies* “monitor, promote, and protect human rights in several geographic regions around the world.”²⁰ Regional human rights systems have been established in Africa, the Americas, Southeast Asia, Europe, and the Middle East, with mandates of varying scope.

Important to note is the fact that, as with international mechanisms, these regional systems are not meant to take the place of national courts. Similar to the institutions listed above, national jurisdictions must have first right and responsibility to prosecute human rights violations. However, if the accused state fails to provide a remedy in a “suitable and timely manner,” it may then be considered by the appropriate regional entity.²¹

Example: According to its founding statute, “the Inter-American Court of Human Rights is an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights. The Court exercises its functions in accordance with the provisions of the aforementioned Convention and the present Statute.”²² The court was formed by the American Convention on Human Rights, which entered into force on July 18, 1978, and has been ratified by 25 states.

Other examples of regional mechanisms include the African Commission on Human and Peoples’ Rights, the African Court on Human and Peoples’ Rights, the Arab Human Rights Committee, the Association of Southeast Asian Nations (ASEAN) Intergovernmental Commission on Human Rights, the European Court of Human Rights, the European Committee of Social Rights, and the Inter-American Commission on Human Rights.

Example: As an example of how regional courts have dealt with gender, in the case of *Aydin v. Turkey* the European Court considered the issue of rape as torture as prohibited by Article 3 of the European Convention. In this case, a majority of the court referred to the previous finding of the European Commission for Human Rights and held that “rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened

¹⁸ United Nations Development Programme, “Complementarity and Transitional Justice: Discussion Paper” (2012).

¹⁹ Ibid.

²⁰ International Justice Resource Center, “[Regional Systems](#).”

²¹ Ibid.

²² Inter-American Court of Human Rights, Statute of the I/A Court, adopted by the General Assembly of the Organization of American States at its Ninth Regular Session, held in La Paz, Bolivia, Oct. 1979 (Resolution No. 448).

resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence.”²³ The court noted that the applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally.

b. National Prosecutions

Following a period of conflict or dictatorial rule, a society can—and should—undertake its own prosecutions independent of the international community. This would mean that cases are pursued purely within the judiciary of the national context in which the crimes occurred. Human rights violations may be prosecuted in national courts as either domestic crimes or international crimes, depending on the relevant laws and judicial structures in a particular context.

Example: Several Pinochet-era officials have been convicted within domestic courts in Chile. One such individual is former Chilean general Manuel Contreras, who headed the infamous National Intelligence Service (DINA) during the reign of dictator Augusto Pinochet. Contreras was convicted in numerous domestic trials and abroad in both the United States and Italy. At the time of his death in 2015, Contreras had accumulated a prison sentence of over 500 years, with several other sentences still pending.²⁴ Between 2004 and 2015, Contreras was convicted by Chilean courts of murder, enforced disappearance, torture, and kidnapping, among other crimes, amounting to crimes against humanity.

Prosecutions at the national level are ideal for several reasons, but perhaps one of their most significant strengths is the increased visibility and accessibility they inherently provide to victims and witnesses. If trials are happening inside the country where violations occurred, there is likely to be greater access to witnesses, evidence, and victims as well as judges, staff, lawyers, and material in local languages, among other things. Though national trials still require a proactive approach to outreach and public relations, it is more likely that the general public will receive information about national trials than about trials happening on the international stage, well outside the country.

Example: Tunisia has adopted a purely domestic special court. On December 29, 2014, the government of Tunisia officially established the *Criminal Chambers specialized in Transitional Justice within the Tribunal of First Instance of Tunis and other Tunisian cities* via executive decree. Otherwise known as the Specialized Criminal Chambers (SCC), this court has exclusive jurisdiction over gross violations of human rights, including deliberate killing, rape and any other form of sexual violence, torture, enforced disappearance, and execution without fair trial guarantees. The SCC is technically purely domestic in nature, existing as a new structure established within Tunisia’s courts of first instance.²⁵

²³ *Aydin v. Turkey*, Case No. 57/1996/676/866, Council of Europe: European Court of Human Rights, Judgment Strasbourg, ¶ 83 (Sept. 25, 1997).

²⁴ Centro de Derechos Humanos, “Informe Anual Sobre Derechos Humanos en Chile 2015: Silencio e Irrupciones: Verdad, Justicia, y Reparaciones en la Postdictadura Chilena,” Universidad Diego Portales, Capítulo 1, 64.

²⁵ Howard Varney and Katarzyna Zdunczyk, “Legal Frameworks for Specialized Chambers: Comparative Studies for the Tunisian Specialized Criminal Chambers,” International Center for Transitional Justice (Dec. 2018).

Another reason to prioritize national prosecutions where there is capacity and will is that bringing perpetrators to account signals a kind of normative shift from a culture of impunity to one of accountability. In nearly every post-conflict or post-authoritarian context, there is great mistrust of the state and its institutions. If a state demonstrates its willingness to pursue prosecutions in a fair, unbiased way, it can send an important message to the public.

Of course, from the perspective of a government, national-level prosecutions are politically ideal as well—few governments desire the intervention of international actors in domestic affairs.

More positively, the threat of intervention by regional or international bodies can act as a form of pressure, pushing along progress at the national level (following the notion of positive complementarity mentioned above).

However, states may stave off international intervention with promises of national prosecutions but not deliver or deliver in a biased or illegitimate way. If the new government comprises members of only one group from the conflict or only the victims of an oppressive regime, there is the potential for prosecutions to be, or appear to be, biased and vindictive.

Example: In Côte d’Ivoire, a postelection crisis in 2010 and 2011 resulted in thousands of victims of human rights violations, including at least 3,000 deaths. The incoming government of Allasane Ouattara established several mechanisms to address the postelection violence, which included acts that constituted war crimes and crimes against humanity. The Special Inquiry and Investigation Unit (Cellule spéciale d’enquête et d’instruction, or CSEI) has been criticized, however, for prioritizing cases involving suspects who were supporters of former president Laurent Gbagbo. Another sign of the Ouattara government’s low political will to pursue criminal accountability in a meaningful way is the insufficient amount of resources given to the CSEI to handle its investigative load.²⁶

Another argument in favor of prioritizing domestic prosecutions is a simple economic one. Lessons learned from the ICTY and ICTR have shown that this kind of international intervention, particularly when it is ad hoc by nature, is extraordinarily resource intensive and generally inefficient from an operational standpoint. The ICTJ’s Handbook on Complementarity notes some of those difficulties in international trials, including different operating languages, challenges to witness protection, long distances from victims and crime scenes, and lengthy trials.²⁷ These are issues that presumably would be easier to deal with in a national context, especially if subsumed into existing judicial infrastructure.

Despite the benefits of national-level prosecutions, there are several major challenges to ensuring that meaningful domestic prosecutions occur. For one, national-level prosecutions require that domestic law defines these acts as crimes. This has been a problem for pursuing SGBV because many domestic laws contain very restrictive definitions of such crimes.

²⁶ International Center for Transitional Justice, “Disappointed Hope: Judicial Handling of Post-election Violence in Côte d’Ivoire,” (April 2016), 29.

²⁷ Seils, “Handbook on Complementarity.”

For instance, some definitions may only recognize female victims or may limit the definition of sexual violence to rape. Another problem is the absence of witness protection and victim support measures. These include medical care, psychosocial support, and other measures that shield victims from stigma and reprisals.

Example: In 2014 in Colombia, after years of pressure by national women’s rights activists and international actors, the Senate passed a major bill that addressed several gaps related to accountability for acts of SGBV, including acts committed in the context of the long-standing internal armed conflict. The bill expanded the definition of sexual violence to bring it in line with the Rome Statute, for example by including sterilization and forced nudity. It put further pressure on judicial authorities to investigate sexual violence crimes, mandated certain forms of support for victims of sexual violence, and ruled that sexual violence can constitute a crime against humanity.²⁸

Perhaps the greatest challenge to a national-level prosecution is that after emerging from a period of violence and unrest, few countries have a fully functioning judiciary capable of undertaking criminal proceedings involving massive human rights violations. Conflict may have destroyed necessary infrastructure, such as prisons and courthouses, as well as hindered the development of an adequate legal sector. There may also simply be a dearth of experience when it comes to prosecuting crimes of the scale and scope often seen in transitional contexts.

One final consideration regards the poor translation of good laws on paper into real-world practice. A law is only as good as the attitudes of those who are tasked with upholding the law and protecting the population. It is much easier to change the law than to shape these attitudes.

Example: In South Africa, laws are progressive on gender-based violence, but there is significant impunity for these crimes in practice. A failure to shift norms often results in a lack of implementation.

c. Hybrid Institutions

In response to the limitations of pursuing criminal prosecutions within purely domestic systems or through regional and international institutions, an alternative approach was developed in the form of hybrid courts, or mixed tribunals. These institutions combine national and international elements in different ways and have varied greatly in their design and implementation globally. [Examples of hybrid tribunals](#) include the Bosnian War Crimes Chamber, the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Court for Sierra Leone (SCSL), the Special Tribunal for Lebanon, the Serious Crimes Process in Timor-Leste, the Special Criminal Court in Central African Republic, and the Kosovo Specialist Chambers.

²⁸ El Congreso de Colombia, Ley 1719 de Colombia Por La Cual Se Modifican Algunos Artículos De Las Leyes 599 De 2000, 906 De 2004 Y Se Adoptan Medidas Para Garantizar El Acceso A La Justicia De Las Víctimas De Violencia Sexual, En Especial La Violencia Sexual Con Ocasión Del Conflicto Armado, Y Se Dictan Otras Disposiciones, June 18, 2014.

Implemented well, hybrid courts can provide solutions to the major obstacles of the other approaches described. For example, they can support the capacity building of local judicial systems in places where they have been destroyed or are no longer functioning, or where there may simply be no experience prosecuting international crimes, such as war crimes, crimes against humanity, or genocide. But, the state is intricately involved in the process, and trials remain physically closer, more visible, and more readily accessible to the affected public.

Hybrid courts are uniquely tailored to the needs of the context in which they operate. One of the strengths of this approach is the flexibility to pursue accountability for international crimes at the domestic level. These systems can vary in terms of their balance between domestic and international staff, use of substantive and procedural law, jurisdiction over crimes, and funding. This mix is usually the result of a compromise negotiated between national and international stakeholders.

Though hybrid courts may be inherently better placed to communicate a message of justice and intolerance for impunity to the public, outreach remains a critical element in the success of their operations. According to the Office of the United Nations High Commissioner for Human Rights (OHCHR) [“Rule-of-Law Tools for Post-conflict States,”](#) “With successful outreach, hybrid courts may serve a function far beyond their lifespan in setting certain standards through their so-called demonstration effect. Hybrid courts may contribute to a culture shift and demands for change or increased accountability through increased rights awareness. Demonstrating the supremacy of law and its independence from political considerations will play an essential role in this contribution.”²⁹

Of course, these positive effects will only come if the court meets high standards of independence, impartiality, and application of norms of due process and international human rights.³⁰

Despite the positive contributions hybrid courts are capable of, they are by no means immune from flaws. Some of the challenges associated with hybrid courts include:

- ensuring national and international political will by decision makers;
- carrying out a proper recruitment of experienced international staff;
- promoting an adequate relationship between national and international staff;
- guaranteeing coherent planning and resourcing, especially considering expectations that may exceed practical outcomes;
- a lack of enforcement powers.

Emblematic Hybrid Courts

Bosnia War Crimes Chamber (BWCC): *from hybrid to domestic court*

The BWCC is an interesting case of a hybrid tribunal that eventually phased out the international staff to become a purely nationally run court. The BWCC began its work on March 9, 2005, and represents “the most significant national effort in Bosnia and Herzegovina to investigate and prosecute persons allegedly

²⁹ Office of the United Nations High Commissioner for Human Rights, “Rule-of-Law Tools for Post-conflict States: Maximizing the Legacy of Hybrid Courts” (2008), 17.

³⁰ *Ibid.*

involved in serious violations of international law.”³¹ In addition to pursuing criminal accountability for the harms perpetrated during the 1992–95 conflict, the BWCC began building the capacity of the national judiciary on international law so the tribunal could eventually continue this work without the presence of international staff.³²

Extraordinary Chambers in the Courts of Cambodia (ECCC): *a mixed tribunal, under a national law specially promulgated in accordance with a treaty*

In the aftermath of the murderous Khmer Rouge regime, the Cambodian government sought international assistance in creating a court to try those most responsible for crimes committed during that period. In 2001, a law was passed that created the [ECCC for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea](#). The government insisted on a hybrid nature for the court, including local staff and judges as well as foreign judges, and ensured that the trials would take place inside Cambodia. According to its website, the ECCC is an independent Cambodian court “with international participation that applies international standards.”³³

Special Court for Sierra Leone (SCSL): *the world’s first hybrid international criminal tribunal*

According to its [website](#), the “Special Court for Sierra Leone was set up in 2002 as the result of a request to the UN in 2000 by the Government of Sierra Leone for ‘a special court’ to address serious crimes against civilians and UN peacekeepers committed during the country’s decade-long (1991–2002) civil war.”³⁴ Ultimately, negotiations between the UN and the government of Sierra Leone resulted in the creation of a hybrid international criminal tribunal.³⁵ The SCSL sat within Sierra Leone and became the first international court to be funded through voluntary contributions. The SCSL took many laudable steps toward ensuring a gender-sensitive process, many of which are highlighted in examples throughout the remainder of this module.

Extraordinary African Chambers: *a hybrid court using universal jurisdiction*

In 2012, the African Union and Senegal entered into an agreement that led to the creation of the Extraordinary African Chambers, a hybrid court inside the Senegalese justice system, to prosecute those most responsible for international crimes committed in Chad between 1982 and 1990. The court is significant for holding the first universal jurisdiction trial in Africa and the first trial of a former head of state of one country to take place in another country. In 2016, former president [Hissène Habré was ultimately convicted](#) of torture, war crimes, and crimes against humanity, including sexual violence. The conviction for sexual violence encompassed the crimes committed by his security forces as well as a rape he directly perpetrated. Unfortunately, the Appeals Chamber [overturned the conviction of the direct rape](#) on procedural grounds because the victim disclosed her rape too late in the proceedings. This highlights a need for greater sensitivity to providing rape victims more time to come forward to testify.³⁶

³¹ Bogdan Ivanišević, “The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court,” International Center for Transitional Justice (Jan. 2007).

³² Ibid.

³³ Extraordinary Chambers in the Courts of Cambodia, “[Introduction to the ECCC](#).”

³⁴ Special Court for Sierra Leone, “The Special Court for Sierra Leone: Its History and Jurisprudence,” www.rscsl.org/

³⁵ Ibid.

³⁶ Kim Thuy Seelinger, “Rape and the President: The Remarkable Trial and (Partial) Acquittal of Hissène Habré,” *World Policy Journal* 34.2 (Summer 2017): 16–22.

5. Evolution of Prosecuting SGBV

- Post–World War II trials were one of the first major, modern attempts to achieve justice and accountability for massive human rights violations, but they largely neglected SGBV crimes.
- Ad hoc international tribunals slowly but surely made strides toward achieving gender justice, including by broadening the definition of sexual violence beyond rape and allowing the inference of nonconsent from background circumstances.
- Sexual violence does not require penetration or even physical contact, as in instances of forced nudity.

International criminal law has been developed from national laws as well as jurisprudence by both national and international bodies. Compared with many domestic bodies of law, international law has become more progressive on recognizing and defining SGBV; however, this has been a hard-fought battle that has evolved over time. These advances must be actively protected and existing boundaries must continue to be pushed.

a. Permissibility or Invisibility of Wartime Gender Crimes Immediately after World War II

Historically, when acts of harm have been committed against women during periods of conflict or oppressive regimes, such harms have not been regarded as violations. Up until the mid-1990s, SGBV in conflict was often considered an unavoidable consequence of war. This idea was tolerated in large part due to bias and an entrenched cultural perception of women’s bodies as fodder for warring parties.

One of the first prominent modern attempts to achieve justice and accountability for massive human rights violations came in the aftermath of World War II. Within these efforts, a few charges were levied for acts of SGBV, but they did not come close to covering the vast amounts of SGBV that were committed.

The Nuremberg Charter established the rules and procedures governing the International Military Tribunal (IMT, or Nuremberg Tribunal), which was responsible for trying prominent Nazis following World War II. The charter did not specifically mention rape, and the IMT did not prosecute any instances of SGBV.

However, Control Council Law No. 10, which was used by the Allied powers to prosecute German military and civilian personnel, established “(1) that rape on a wide scale could be prosecuted as a war crime; (2) that crimes of sexual violence committed during peacetime could constitute crimes against humanity; and (3) that responsibility for such crimes could not be limited to military personnel and...liability could attach to persons occupying other key positions.”³⁷

³⁷ Catherine N. Niarchos, “Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia,” *Human Rights Quarterly* 17.140 (Nov. 1995): 672.

One of the most egregious omissions from prosecutions following World War II was the lack of accountability for the systematic sexual slavery of an estimated 200,000 Korean, Indonesian, Chinese, Filipino, Malaysian, and Taiwanese women. These women were held in “comfort stations” established by the Japanese military throughout the occupied parts of Asia. During peace negotiations at the end of the war, all governments involved effectively abandoned these so-called comfort women.

The Allied powers created an International Military Tribunal for the Far East (IMTFE, or Tokyo Tribunal) after World War II that found Japanese military and political leaders guilty of war crimes and crimes against humanity. However, rape and sexual slavery were not among the violations addressed.

The only trial that addressed acts of SGBV committed against “comfort women” concerned the forcible seizure by the Japanese military of 35 Dutch women for rape and prostitution. The Batavia Military Tribunal held in Indonesia charged and ultimately convicted Japanese military officers with the war crime of enforced prostitution.

The juxtaposition of these two facts—that 200,00 Asian women did not see justice while 35 Dutch women did—highlights the importance of intersectionality and the way factors such as race, class, and ethnicity, among others, may impact victims’ access to justice.

After World War II, the 1949 Geneva Conventions were created to regulate armed conflict between countries and provide minimum guarantees related to the treatment of combatants, prisoners of war, and civilians. Article 27 of Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War grants special protection to women, prohibiting “any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”³⁸ However, Article 147 of Geneva Convention (IV) does not include rape or other forms of SGBV as prosecutable offenses.

b. Key Jurisprudence from Ad Hoc International and Hybrid Courts

In the 1990s, the landscape of how international criminal justice dealt with SGBV during conflict began to change, albeit in the face of resistance to including SGBV crimes. This shift occurred largely because of the two ad hoc international tribunals established around this time: the ICTY and the ICTR.

Neither tribunal included acts of SGBV in their statutes. However, through prosecutorial and judicial interpretation, different acts of SGBV were prosecuted and several key precedents were set.

In both tribunals, women played a major role in ensuring the consideration of acts of SGBV and pushing forth charges of SGBV. This certainly speaks to the importance of gender representation within the OTP and judges’ chambers—in terms of hiring women as well as hiring men or women with expertise in gender issues. Additionally, the active pressure by women’s groups on both tribunals

³⁸ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Convention), August 12, 1949, vol. 75 U.N.T.S. 287, Art. 27.

was invaluable in ensuring gender issues were not forgotten. The major strides in terms of women’s rights that the various rulings contributed to would not have been possible without both gender representation in the courts and activism by women’s groups.

Key Rulings on Gender

***Prosecutor v. Akayesu* (ICTR—September 2, 1998):** *Akayesu* is famous today for its holdings on rape and sexual violence, but the prosecutor did not charge rape in the initial indictment. It was largely thanks to the intervention of Judge Navi Pillay, civil society pressure, and an amicus curiae brief that the prosecutor amended the indictment to include rape and sexual violence charges. The court held that rape is distinct from sexual violence, which meant that acts of violence that involved no penetration or even physical contact—in this case, forced nudity—could still constitute sexual violence. The court concluded and ruled:

- Rape is “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.” (para. 598)
- Sexual violence is “any act of a sexual nature which is committed on a person under circumstances which are coercive.” (para. 598)
- “Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person....[R]ape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” (para. 687)
- “Rape and sexual violence...constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such.” (para. 731)³⁹

***Prosecutor v. Delalic et al.* (ICTY—November 16, 1998):** This infamous case, also known as the *Celebici* case, was the ICTY’s first conviction for rape as torture. The court ruled:

- “Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting.”
- “It is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation.”

***Prosecutor v. Furundzija* (ICTY—December 10, 1998):** This case represents the first ever prosecuted exclusively based on crimes of a sexual nature before an international tribunal. The ICTY held that Furundzija, the commander of a special military police unit, had violated the laws and customs of war by interrogating a woman while she was being raped and sexually assaulted by another. Therefore, Furundzija aided and abetted the commission of “outrages upon personal dignity.” Significantly, the court did not stop at regarding rape as a war crime pursuant to the “outrages upon personal dignity” category. Instead, the court used the fact that rape is listed as a stand-alone crime in the Rome Statute to indicate its understanding of rape as such.

***Prosecutor v. Gacumbitsi* (ICTR—June 17, 2004):** The judgment ruled that nonconsent may be inferred from examining relevant and admissible evidence about background circumstances, such as an “ongoing genocide campaign” or the detention of the victim.

³⁹ *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, International Criminal Tribunal for Rwanda, Judgement (Sept. 2, 1998).

The ICTR and ICTY are not the only ad hoc tribunals that made meaningful rulings on SGBV. *Prosecutor v. Brima* (SCSL—July 19, 2007) held that forced marriage exists as an international crime distinct from sexual slavery, features unique elements, and can constitute a crime against humanity.

The ECCC was one of the first courts to recognize acts of gender-based violence against men *as such* when it chose to describe forced marriage in gender-neutral language and stated in its indictment for *Case 002* that “both men and women were forcibly married” under the Khmer Rouge.⁴⁰

⁴⁰ Amrita Kapur and Kelli Muddell, “When No One Calls It Rape,” International Center for Transitional Justice (Dec. 2016).

6. The Rome Statute and the ICC

- The ICC is the first and only permanent international criminal tribunal that can prosecute war crimes, crimes against humanity, and genocide.
- The Rome Statute of the ICC is more gender-progressive than the statutes of the ad hoc tribunals and recognizes that rape and sexual violence can constitute war crimes, crimes against humanity, and genocide.
- Despite the progressive Rome Statute and operational policies of the ICC, the court's jurisprudence has fallen short with respect to advancing gender justice. For example, the ICC has yet to convict (and uphold a conviction) for SGBV to date.

a. Rome Statute: The Most Progressive International Instrument

On July 17, 1998, the Rome Statute was officially adopted, thus establishing the ICC. The statute took effect in 2002, when the ICC officially opened. The ICC remains the first and only permanent international criminal tribunal with the jurisdiction to prosecute war crimes, crimes against humanity, genocide, and more recently, crimes of aggression.

The statute has been hailed as the most progressive to date in terms of gender justice. It recognizes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence as war crimes and crimes against humanity in both international and noninternational armed conflicts. The inclusion of forced pregnancy marks the first time this act has been listed as a war crime. The statute's inclusion of gender as a basis for the crime of humanity of persecution is also a first. The statute also recognizes that rape and sexual violence can constitute acts of genocide.

The statute called for the creation of a victims and witnesses unit within the Registry of the court and requires the inclusion of staff with expertise in sexual violence–related trauma. It also mandates that the [court provide special protection measures for victims during its proceedings](#). Moreover, Article 68(3) recognizes the right of victims to have “their views and concerns...presented and considered at stages of the proceedings determined to be appropriate by the Court....Such views and concerns may be presented by the legal representatives of victims.”⁴¹

The ICC's commitment to gender extends beyond the statute. The Rules of Procedure and Evidence of the ICC include provisions to protect victims and witnesses and reduce the impact of their participation on their physical and mental well-being. The OTP of the ICC has specific obligations to apply and interpret the law in a manner consistent with international human rights, to investigate SGBV crimes, and to appoint specialist advisers.

Consistent with this mandate, the OTP made the investigation and prosecution of SGBV one of its key strategic goals. It created an official policy that very specifically outlines how gender should be integrated into preliminary examinations, investigations, prosecutions, cooperation with relevant

⁴¹ Rome Statute of the International Criminal Court, July 17, 1998, Vol. 2187 U.N.T.S. 3, Art. 68(3).

stakeholders, and institutional development. The policy notes: “Within the scope of its mandate, the Office will apply a gender analysis to all crimes within its jurisdiction examining how those crimes are related to inequalities between women and men, and girls and boys, and the power relationship and other dynamics which shape gender roles in a specific context.”⁴²

b. Jurisprudence: Mixed Results

Even though the Rome Statute and various operational guidelines of the ICC are notably progressive on gender issues, the implementation of these principles has thus far been lacking. The selection of cases below highlights not only the gains but also the shortcomings and missed opportunities to advance gender justice.

A Mixed Legacy at the ICC

Prosecutor v. Germain Katanga (March 7, 2014): Congolese militia leader Germain Katanga was convicted in March 2014 for war crimes and crimes against humanity. The ICC charged Katanga with seven counts of war crimes and crimes against humanity. The allegations included rape and sexual slavery, marking the first time that SGBV crimes were confirmed by the ICC Pre-Trial Chamber.

In a major blow, Katanga was ultimately convicted of all crimes *except* rape and sexual slavery. Despite the fact that the court found the relevant witnesses to be credible and believed that sexual violence crimes had been committed, it did not find that these crimes formed part of the “common purpose” of the attack in question when compared with other charges, such as murder, attacking a civilian population, destruction of property, and pillaging.

The prosecution initially appealed the acquittal of the SGBV charges. However, following Katanga’s statement that he accepted the judgment and sentence and his expression of his “sincere regrets,” the prosecution dropped its appeal.

Beyond the immediate concerns this case raised in terms of inconsistent expectations of standards of proof for SGBV and other crimes, it also sent a message that SGBV crimes are more acceptable than other, nongendered crimes. It seriously damaged the ICC’s, particularly the judiciary’s, credibility with victims of sexual violence in conflict zones.

⁴² The International Criminal Court Office of the Prosecutor, “Policy Paper on Sexual and Gender-based Crimes” (June 2014).

Prosecutor v. Thomas Lubanga Dyilo (March 14, 2012): The trial of Thomas Lubanga Dyilo for crimes in the Democratic Republic of the Congo was the first chance for the ICC to apply its reparations regime. The ICC charged Lubanga with the war crimes of enlisting, conscripting, and using child soldiers. In 2012, he was convicted and sentenced to 14 years of imprisonment.

The indictment was heavily critiqued for excluding SGBV charges, despite publicly available information about such crimes occurring. Since evidence about these crimes came up during the trial, there was hope that the reparations order upon conviction would include reparations for sexual violence against girl child soldiers.

However, the Appeals Chamber decided in March 2015 that no reparations would be given for SGBV since these crimes were not charged, despite efforts by the Trial Chamber to do so.⁴³ This represents a massive failure when the court could have taken the lead in meting out a truly gender-sensitive reparations program. Gender activists have argued that the failure is twofold, lying both with the OTP, for not including SGBV charges in the indictment, and with the Appeals Chamber, for its decision on reparations.

Prosecutor v. Jean-Pierre Bemba Gombo (judgment—March 21, 2016; acquittal—June 8, 2018): The trial of Jean-Pierre Bemba Gombo, accused of crimes in the Central African Republic, represented several historic firsts at its outset. *Bemba* was the first case in which a majority of the charges on the arrest warrant were for SGBV crimes, and it was the first indictment charging sexual violence against men as rape. The conviction by the Trial Chamber in March 2016 was the first before the ICC for crimes of sexual violence and command responsibility. It was also the first time sexual violence was considered as an aggravating factor during sentencing. The case would have represented an opportunity for reparations to finally be given out to victims of SGBV.

However, in yet another blow, the convictions for two counts of crimes against humanity and three counts of war crimes, including for rape, were unanimously overturned two years later, in June 2018. The only conviction that stands is for offenses against the administration of justice. This means that the ICC has yet to convict for SGBV to date.⁴⁴

Prosecutor v. Al-Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (ongoing): This developing ICC case marks one of the [first times](#) that the court has attempted to charge and prosecute an individual on the basis of [allegations](#) of gender-based persecution. This is not the first time the court has recognized gender-based charges, but this case could be the first instance of conviction and will be important in establishing jurisprudence in the realm of gender-based violations. The [potential charges](#) as they currently stand include “crimes against humanity (torture, rape and sexual slavery; persecution of the inhabitants on religious and gender grounds....) and...war crimes (rape and sexual slavery...)”⁴⁵

Even though the court had not yet officially charged Al-Hassan at the time these modules were being produced, his case gives the ICC a chance to execute its first conviction of the basis of gender grounds after its previous failures. While the grounds for Al-Hassan’s prosecution are promising, only time will tell if his case creates supportive, gender-inclusive jurisprudence. As one of the early cases in respect to gender justice,

⁴³ Women’s Initiative for Gender Justice, “The Compendium: An Overview of Situations and Cases before the International Criminal Court” (Dec. 2017).

⁴⁴ *Ibid.*

⁴⁵ The International Criminal Court, “Press Release: Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud Makes First Appearance before the ICC,” April 4, 2018.

Prosecutor v. Al-Hassan is important for establishing jurisprudence for gendered criminal violations in the future.⁴⁶

⁴⁶ For updates on this ongoing case, check the ICC website: www.icc-cpi.int/mali/al-hassan

7. Establishing Priorities

- A mapping exercise—which can help determine what kinds of crimes occurred, when and where they occurred, who the victims were, and the likely identity of perpetrators and their chain of command—should be used to identify patterns of violations.
- In order to thoroughly capture the gender dimension of international crimes, courts should hold local consultations with key stakeholders, such as victims’ groups, women’s groups, and groups representing other marginalized populations.

a. Identifying Acts of Harm and Patterns of Violations

In the past, prosecutions tended to lack a bird’s-eye view of how social and political systems exacerbate violence against women. It is therefore particularly important for prosecutors to ensure SGBV is included when producing what is known as a *systems crime map*.

A mapping exercise can assist in the preparation of prosecutions by providing a sense of what kinds of crimes occurred, when and where they occurred, who the victims were, and the likely identity of the perpetrators, including direct perpetrators and those with command responsibility. The objective of this exercise is to provide a basis for the formulation of initial hypotheses of the investigation by getting a sense of the scale of violations, detecting patterns, and identifying potential sources of evidence.

The prosecution can use the information provided in statement taking and investigations to demonstrate how individual cases are part of a pattern. A *pattern* refers to a set of events that, by their frequency, location, and nature, imply some degree of planning and centralized control. Evidence of patterns can help prove that a particular crime was part of a planned process.

To ensure that acts of SGBV are captured in a systems crime map, any database created for analysis should include gender-specific categories so that individual incidents can be captured and patterns can be identified.

Example: In Rwanda, the ICTR indicted three media moguls for helping to create a climate of hate, making it easier to target members of the Tutsi ethnic group. In this case, the tribunal found Ferdinand Nahimana, Hassan Ngeze, and Jean Bosco Barayagwiza guilty of genocide, direct and public incitement to commit genocide, and crimes against humanity for the dissemination of extremist anti-Tutsi propaganda through print and radio. The ICTR also found: “The [media’s] portrayal of the Tutsi woman as a femme fatale and the message that Tutsi women were seductive agents of the enemy...articulated a framework that made the sexual attack of Tutsi women a foreseeable consequence of the role attributed to them.”⁴⁷ This judgment was a critical step in linking crimes to their enabling conditions.

⁴⁷ *The Prosecutor v. Ferdinand Nahimana Jean-Bosco Barayagwiza Hassan Ngeze*, Case No. ICTR-99-51-T, International Criminal Tribunal for Rwanda, Judgment and Sentence ¶ 1079 (Dec. 3, 2003).

b. Consulting Women’s Groups and Communities

In order to thoroughly capture the experiences and needs of women and girl victims as well as victims of SGBV, and thus to ensure a responsible prosecutorial mandate, ample consultations must be held with key stakeholders, such as victims’ groups, women’s groups, and groups representing other marginalized populations.

This process of consultations can ensure that victims have a direct say in confirming which violations occurred and in shaping how those violations should be defined. Otherwise, prosecutorial authorities may omit certain groups of victims.

Local consultations with actors who know the communities well can assist in other ways as well. They can help judicial entities understand the needs of victims and witnesses—both financial and emotional—and can alert authorities to other potential challenges that should be bridged before pursuing cases and selecting victims and witnesses.

Example: During Sierra Leone’s civil war, combatants abducted and forced thousands of women and girls to become “bush wives.” The SCSL’s OTP recognized that perpetrators subjected their “bush wives” to sexual and nonsexual violence within a proprietary relationship with one perpetrator—harms distinct from the SGBV crimes enumerated in the SCSL’s statute (i.e., rape, sexual slavery, enforced prostitution, forced pregnancy, and other forms of sexual violence). Before deciding whether to charge “bush wife” crimes as “sexual slavery” or as a new crime of “forced marriage,” the OTP brought together 50 to 60 women for a full day of consultations. The women unanimously requested indictments of such crimes as “forced marriage” because that more accurately reflected their experiences than “sexual slavery” did. As a result of these consultations, the OTP introduced the charge of “forced marriage.” Unfortunately, at first, the OTP miscategorized “forced marriage” simply as “sexual violence,” ignoring the nonsexual element of the crime. But in 2009, the SCSL delivered the first conviction by an international tribunal for forced marriage as a crime against humanity in the *Revolutionary United Front (RUF) Trial* case.⁴⁸

Discussion Questions

- In order to help ensure women’s inputs inform investigations and prosecutions, how would you go about connecting women’s groups and the criminal justice sector?
- What problems or challenges might you encounter in trying to build relationships with women’s organizations in communities dominated by male local leaders?
- How can you preempt and anticipate increasing intra-community tensions in the way you approach communities?

⁴⁸ Valerie Oosterveld, “The Special Court for Sierra Leone: Initial Structural and Procedural Decisions on Sexual and Gender-based Violence,” *Cambrian Law Review* 46 (2017): 131–150.

8. Bias as a Challenge to Prosecuting SGBV

- Victims of SGBV experience bias, discrimination, and blame from their families, communities, police, and judicial actors.
- Prosecutors are reluctant to try, or even charge, SGBV crimes because of evidentiary problems and subjective misconceptions about the violence and its victims.

Negative and discriminatory attitudes about women's roles and status in society, as well as the massive stigma and blame often attached to victims of SGBV, lead to real, concrete challenges in accurately and adequately dealing with violations as well as in treating victims humanely and with dignity throughout the process.

Due to these attitudes, different actors in the justice chain may act in a way that de-prioritizes the adjudication of SGBV cases. Often, women are subjected to harsh treatment and harassment by authorities, especially when reporting acts of SGBV. Victims of SGBV may be blamed, told they must have done something to warrant the violation, or not believed at all.

For example, during investigations and trials, victims of SGBV may be asked about what they were wearing at the time of the violation, about their prior sexual history, or other unwarranted, inappropriate, and unrelated questions. This treatment can also come from medical professionals or others who come into contact with victims during the course of an investigation.

All of these factors have great potential to retraumatize victims and even lead to their withdrawal from criminal justice processes. In turn, this discourages other victims of similar violations from coming forward.

Another form of bias appears in the reluctance of prosecutors to pursue SGBV charges at all. Part of this problem is one of evidence: it is easier to prove cases that have physical evidence of harm, and prosecutors are more inclined to pursue cases that have a higher likelihood of success. But another part is attributable to more subjective factors, such as myths about when and in what circumstances rape is possible or the misconception that many women lie about being raped.

Example: To give a sense of the low success rate of indicting and prosecuting SGBV crimes, as of September 2016 at the ICTY, 78 of 161 accused individuals (48 percent) had been charged with SGBV crimes. Only 32 individuals had been convicted (a 38.5 percent conviction rate) for those crimes. Of those 32, only 4 were convicted via superior responsibility.⁴⁹

Fear of stigma and rejection by family members and communities may also deter victims from coming forward to report a violation to the authorities or to cooperate with a prosecutorial entity if approached.

⁴⁹International Tribunal for the Former Yugoslavia, "[In Numbers](#)."

Discussion Questions

- Ask participants to identify their own biases and prejudices toward victims of SGBV. Toward women victims? Toward men victims?
- How are gender biases exacerbated by intersectionality?
- How have you tried to combat your internal biases? The biases of others?
- How can your work address and change attitudes toward victims of SGBV at the community and family levels? The judicial level?

9. Importance of Staffing

- Gender representation and expertise should be factors in the recruitment of staff, prosecutors, and judges.
- All staff members should receive relevant training on gender issues on a regular, ongoing basis.

As with all transitional justice measures, gender representation and expertise are of the utmost importance to ensuring a gender-sensitive approach.

Gender expertise should be a factor in the recruitment of staff and judges. Traditionally, prosecutors and their staff have had limited expertise in gender and the nuanced, complex ways that conflict affects women. Lessons learned from the international tribunals and other judicial mechanisms have demonstrated that having dedicated gender experts on staff makes a significant difference in the successful adjudication of SGBV crimes.

For example, the ICTY had a legal advisor on gender who was responsible for all components of a trial relating to gender. This position has been recognized as having contributed to the success—albeit limited—of the ICTY in its judgments on sexual violence.

The Rome Statute provides for a gender legal advisor, and one has been a part of the OTP since 2008. Moreover, a woman, Fatou Bensouda, was elected by consensus as prosecutor of the ICC by the Assembly of States Parties in December 2011 after serving as deputy prosecutor since the court's inception. Under her authority, the OTP has made the effective investigation and prosecution of SGBV crimes a key priority.

Gender representation and expertise on the judicial bench have also played critical roles in highlighting the need to take SGBV crimes seriously.

Example: The victory in the *Akayesu* case was hard-won. When Akayesu was first charged in 1996, the 12 counts in his indictment did not include SGBV, despite documentation of widespread rape during the genocide in general and in his commune in particular. The charges of rape were only added to the indictment mid-trial, following concerted pressure by civil society organizations, an amicus curiae brief, and the initiative of Judge Navi Pillay (the only woman judge in the Trial Chamber) in questioning two witnesses regarding rapes under Akayesu's watch. This illustrates the importance of staffing courts with both men and women judges, especially with respect to improving the court's rulings on SGBV.

While the presence of experts is paramount, a court should also not rely exclusively on those with gender expertise to handle SGBV cases. All staff members should receive relevant training on gender issues. For example, those who interact with victims should be trained on how to engage victims of SGBV with appropriate sensitivity and respect. Trainings should not be one-off sessions; instead, they should be provided on an ongoing basis.

10. Procedural Considerations

- The most important guiding principle in investigations is “do no harm”; this includes assessing risks and taking steps to mitigate them, and even excluding certain victims and witnesses whose level of risk cannot be reduced.
- Victims and witnesses may need logistical support and medical care to enable their travel to testify, witness protection, and psychosocial support throughout the criminal justice process.
- Acts of sexual violence often leave no visible scars, are difficult to prove with forensic evidence, and thus rely on individual testimony, which is difficult to corroborate since there are often no witnesses or medical records.
- Good evidentiary practices include not requiring corroboration of testimony about SGBV, limiting the use of consent as a defense, and prohibiting evidence about the prior sexual conduct of the victim.

International and hybrid legal entities have made great strides in terms of gender sensitivity within rules of procedures. Numerous best practices have been established, which are discussed later.

Unfortunately, many national jurisdictions lag far behind. Procedural matters are difficult to change within national structures. Each national jurisdiction has its own process for changing rules of procedure, but for the most part, such changes require significant legislative reforms. While the advances in international law provide a strong framework, it is easier to leverage international law to influence substantive matters than procedural ones, although there are challenges to substantive reform as well.

Example: In Uganda, domestic law is particularly problematic when it comes to SGBV crimes, and reform has been slow, with minimal results to date. One major issue is the way the penal code deals with rape. It is included in the chapter entitled “Offences against Morality” and defined as “unlawful carnal knowledge of a woman or girl.” This excludes forced oral sex, rape with an object, anal rape, and other common forms of penetrative sexual violence, which are instead characterized merely as “indecent assault.” It also precludes male victims from receiving any accountability for sexual violence crimes. This has created an impunity gap.

In 2010, Uganda passed what is known as the ICC Act, which criminalizes all crimes under the jurisdiction of the ICC under Ugandan law as well. So, in the context of treating SGBV as international crimes, the far more inclusive Rome Statute definition applies. This discrepancy between the ICC Act and the penal code prompted women’s rights organizations to advocate for the review and reform of the outdated penal code definition. In 2016, the Ugandan Law Reform Commission recommended the enactment of the Sexual Offences Bill, which proposes a progressive and broad definition of sexual crimes and seeks to address inconsistencies within the domestic penal code. The Sexual Offences Bill has yet to be enacted.

a. Investigations and Statement Taking

Unlike with other transitional justice processes such as truth commissions, the main objective of taking statements with the aim of prosecution is not to provide a platform for victims to tell their stories, but rather to extract information for the specific purpose of gathering evidence. As a result, these processes may not be victim-centered, which can lead to victims and witnesses being treated as mere instruments of proof.

The sensitivity of statement takers and investigators is paramount. Investigators who interact with victims and witnesses, especially of SGBV, need to understand the nuances and extraordinary emotional complexities involved. A failure to understand this, irrespective of one's gender, can alienate victims or witnesses from the criminal justice process.

What will make it harder for victims to tell their stories?

- asking for just the facts
- certain questions or statements

How to express compassion

- acknowledge gravity
- allow victim to vent
- demonstrate empathy
- allow victim to regain control
- make eye contact
- avoid physical touch

Techniques for sensitive communication

- ask open-ended questions and explain the rationale behind them
- recognize and use context-specific terminology for sensitive issues
- solicit a narrative first, then more substantive clarifying questions

As a rule, the most important guiding principle should be to do no harm. Staff should conduct a risk analysis of the possible negative impacts for victims and witnesses who provide evidence, including social, psychological, and security threats. The court should take every possible step to reduce or mitigate these risks; if this is not possible, then the victim or witness should not be involved in the process. At all times, confidentiality of information is of the utmost importance, and the court should always obtain informed consent to use the information provided.⁵⁰

⁵⁰ Sara Ferro Ribeiro and Danaé van der Straten Ponthoz, "International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law (2nd ed.)," UK Foreign & Commonwealth Office (March 2017).

Some other important considerations are:

Choice of same-sex interviewer with proper training and experience

Representation of various ethnic groups, languages, age groups, and other relevant groups in investigation team

Interview site that is private and comfortable

Interviews conducted one-on-one unless the victim desires the presence of a support person

This range of protection mechanisms should always be offered and the steps outlined above followed. Nevertheless, it should not be assumed that all women and victims of SGBV will be fearful to provide evidence. Victims and witnesses may find the process to be empowering.

Example: Many of the victims of sexual violence and other crimes who testified in front of the ICTY have spoken about the great difficulties they faced when giving their testimony in front of a court, knowing that everyone would know about their experiences. They have also expressed their disappointment in the relatively lenient sentences for many of the perpetrators. However, they have simultaneously noted the great value of witness testimony and the feeling of satisfaction that came from testifying about what had happened to them and who had done it and being able to look their perpetrators in the face while doing so.

b. Support for Victims and Witnesses

When victims and witnesses do become involved in the prosecutorial process, the prosecution remains responsible for their safety. Special measures should be put into place to protect the well-being of victims and witnesses. The best practice is to create a separate unit somewhere within the court, such as the Victims and Witnesses Unit within the Registry of the ICC.

Logistical Support to Testify

Among the first issues the court may need to contend with are the various logistical barriers that may pose challenges to the participation of women and victims of SGBV. This often includes practical difficulties in accessing the court; for example, women may not have access to safe and affordable transportation. They may also face difficulties in taking time away from work or domestic responsibilities.

Example: The fact that the ICTR was situated in Tanzania, rather than Rwanda, meant that many individuals could not access the court. The tribunal did not allocate the necessary funds to enable victims and witnesses to travel. Victims and witnesses were able to attend the trials only because NGOs or local organizations contributed to their travel expenses.

Another potential obstacle to participation is the dire health conditions many victims, particularly victims of SGBV, face as a result of their violation. The reproductive and other long-term health implications that result from SGBV are severe and may make it difficult for witnesses to travel and testify. When a court deems that these harms may negatively impact a victim’s testimony, it should consider taking steps to provide medical care.

Example: The SCSL provided health services such as fistula repair to enable women to testify in court. While some criticized this move for going well beyond the scope of a court’s typical responsibilities, the SCSL held that the provision of health services was necessary to ensure the full range of testimonies could be heard.

Victim and Witness Protection

Victims may be reluctant to testify for fear of stigmatization or retaliation. The court is responsible for the protection of victims and witnesses before, during, and after testifying if they are deemed to be at risk. A balancing act is necessary to ensure that while the safety of the witness or victim is secured, the procedural right of the accused to examine all accusers and witnesses is compromised as little as possible.

Building on the advances of the international tribunals, the ICC established several clear protection mechanisms for victims and witnesses (as [summarized](#) by the Women’s Initiative for Gender Justice):

<p>Confidentiality</p> <ul style="list-style-type: none"> • For example, the ICC may expunge the identity of victims and witnesses from the record, electronically alter pictures and voices, or use pseudonyms for victims and witnesses. <p>Alternative means of giving evidence</p> <ul style="list-style-type: none"> • For example, the ICC may conduct <i>in camera</i> proceedings and allow the introduction of audio or video testimony and written transcripts as evidence. <p>Relocation⁵¹</p> <ul style="list-style-type: none"> • For example, the ICC has entered into relocation agreements with states regarding temporary or permanent relocation. Relocation is a last-resort measure, considered only if no other protection measure is sufficient.

⁵¹ Rome Statute of the International Criminal Court, July 17, 1998, Vol. 2187 U.N.T.S. 3, Art. 68; International Criminal Court, “Cooperation Agreements” (2017), 6–11.

Prosecutions taking place in national jurisdictions may present additional challenges because existing witness protection infrastructure may be deficient, or even nonexistent, and such structures must be established. Under these circumstances, national prosecutors and judges use their discretion in providing witness protection in collaboration with other actors such as organizations that supply psychosocial support and physical rehabilitation services. However, since this model puts a resource strain on the external actors, it is not a sustainable form of witness protection.

Psychosocial Support Before and After

Trials may create emotional turmoil, as victims have to relive the harm they experienced while they are under examination. Moreover, victims may already be dealing with retraumatization, stigmas, ostracism, pressure to reconcile with perpetrators, and economic hardship as a result of the violation, all of which may be compounded by participating in the trial. Consequently, prosecutorial authorities must provide emotional and psychological support before and after victims testify.

Example: Uganda has guidelines that set forth the duties of police, investigators, prosecutors, defense counsel, and judicial officers regarding the protection of witnesses and victims of SGBV. For example, the guidelines call for psychosocial specialists to assess victims' or witnesses' emotional vulnerability and refer them to psychosocial services providers. As part of the investigation phase, the guidelines direct the police to assess the psychological needs of victims who report SGBV, make referrals, and offer the presence of a psychosocial services provider during the intake interview. The guidelines even broadly advise the provision of psychosocial services to family members of victims who are struggling to accept that their family member was sexually violated. During the trial, victims and witnesses should be allowed to bring a trusted person, such as a health professional, to sit with them during their testimony. In order to reduce post-trial retraumatization, an appropriate official should assess the victim's or witness's emotional well-being and need for short- and long-term counseling, and then make referrals.

c. Evidentiary Considerations

Challenges in Obtaining Proof

Traditionally, criminal justice has narrowly focused on bodily harm perpetrated by an individual. The prosecution of crimes usually relies on forensic evidence that is tangible or can be corroborated.

However, acts of sexual violence, such as rape, enforced impregnation, and forced sterilization, often leave no visible scars and are difficult to prove with forensic evidence. Thus, their prosecution relies on individual testimony, which is difficult to corroborate since there are often no witnesses to SGBV crimes. Due to stigma, many victims of SGBV do not seek medical assistance, so there are no records of when the crime took place.

Even if there were evidence, such as a witness or medical records, it may be difficult, if not impossible, to find them after conflicts and other periods of social disruption. Evidence may have been lost, destroyed, or weakened as a result of the passage of long periods of time.

Finally, gendered abuse can be so ingrained within the culture of an institution or society that it can be difficult to find direct evidence, such as written policies or clear directives. For example, it is unlikely that there will be a military memorandum mandating a culture of misogyny that could be used to convict those responsible for creating a climate conducive to SGBV.

Overcoming Challenges

These challenges to prosecuting SGBV should be mitigated in the rules of evidence established by the criminal justice institution responsible for addressing violations during conflict or under authoritarian regimes.

Since the establishment of the international tribunals and the ICC, a number of rules have developed that address many of the difficulties outlined above. The following should be considered good practices:

- No corroboration of a testimony about sexual violence is required.
- Consent is not allowed as a defense if:
 - The victim was subjected to or threatened by violence or if she or he had reason to fear violence, duress, detention, or psychological oppression. As seen in *Prosecutor v. Gacumbitsi*, this threat can include contextual threats, such as an ongoing campaign of genocide.
 - The victim reasonably feared that if she or he did not submit to the assault, another individual would be subjected to or threatened by violence, duress, detention, or psychological oppression.
- Consent cannot be inferred.
- Evidence of the prior sexual conduct of the victim is prohibited.

Example: The Women’s Caucus for Gender Justice has long called for dropping the requirement of demonstrated nonconsent for a successful rape charge, which is still prevalent in most national jurisdictions. They have urged courts to recognize that coercive circumstances are inconsistent with the possibility of consent—that is, when there is duress, acquiescence does not constitute consent. Further, a women’s prior sexual history is never relevant.

Discussion Questions

- In your work, how have you supported victims of SGBV in criminal justice or other transitional justice processes?
- What are the differences between the kinds of support needed by victims of SGBV participating in criminal trials and the kinds of support needed by victims of SGBV participating in other transitional justice processes, such as truth commissions?
- Can you think of other good practices to overcome challenges in prosecuting SGBV crimes?

11. Outreach to Communities

- It is essential to manage the expectations of victims and communities regarding the nature of their engagement with criminal trials, realistic time frames, and realistic outcomes, such as disappointing verdicts or sentences.
- Judgments must be disseminated in various accessible ways to victims and affected communities.

a. Managing Expectations

As with every transitional justice process, it is vital for victims to understand exactly how they will be expected to engage with the respective entity and what can and cannot result from their participation. Local populations should receive a comprehensive explanation of prosecutions' approaches, objectives, and rationale for choosing to prosecute one individual, such as a commander, and not others, such as foot soldiers. This can be achieved by engaging with victims, witnesses, and broader communities about their expectations of justice.

This is particularly relevant when it comes to prosecuting system crimes, which involve the prosecution of high-profile individuals who may not be guilty of individual acts of harm. This may frustrate victims whose direct perpetrators are not held accountable.

It is extremely important that victims understand prosecutorial strategies. They need to be informed about the possible use of their statements and the reasons why they have been selected to produce the evidence in question. Victims must understand the risks they are taking when deciding to participate in the trial, including the potential for retraumatization, in addition to understanding the support available to them.

It is also necessary to inform victims and witnesses about realistic time periods and outcomes that could be expected from the prosecutions. Victims must be prepared to wait years between their first encounter with a court and the rendering of a judgment. They also need to understand that this timeline will be extended if the verdict is appealed.

Example: The Bosnian War Crimes Chamber has requested statements from victims, only to delay taking their cases for years, if they ever do. This exacerbates victims' frustration. If such delays are inevitable, this should be clearly communicated from the start so that victims can make informed decisions about whether they want to cooperate with a court and can manage their expectations about the results.

If a trial does occur, it is vital to remind victims and communities that prosecutions may not yield a guilty verdict. What must be communicated is that there are many technical reasons why such a judgment could be rendered that have nothing to do with the actual guilt or innocence of the accused. Issues such as the procedural rights related to fair trials, standards of proof, and due process need to be explained.

Example: Unfortunately, there are ample examples of trials at all levels that have failed to bring justice to women, girls, and other victims of SGBV. One such example is the *Minova Rape Case* out of the Democratic Republic of the Congo. In November 2012, at least 76 women and girls were raped by Congolese soldiers in the town of Minova during 10 days of unspeakable violence, which resulted in over a thousand victims of other forms of violence as well. Thirty-nine individuals were eventually brought to trial; only two were convicted of one account of rape each. This was a devastating loss for the victims and a serious blow to accountability efforts. A Human Rights Watch report captures the devastation women experienced. One of the rape victims who participated in the proceedings is quoted after the judgment: “When the court arrived in Minova, I felt a bit happy. I thought, ‘Finally, here is someone to listen to us and the horrible things that happened to us.’...But the judgment [the court handed down], it is a lie. We were hurt. Where are they, then, those who hurt us? I am ready to continue and go anywhere for justice to be done.”⁵²

Another reality that victims and affected communities must be prepared for is a disappointing sentence. Often trial chambers have given lesser sentences to perpetrators convicted of sexual violence relative to other grave human rights abuses.

Even if a perpetrator is sentenced to spend significant time in prison, victims may feel disappointed with this outcome, depending upon their own circumstances. Initial elation over the judgment may give way to frustration over time.

Example: Victims of SGBV who had provided evidence against Chad’s former president Hissène Habré were reported to have broken into song when the guilty verdict was announced.⁵³ However, months after the trial, they expressed feeling extreme disillusionment because after the risks they took to testify, Habré’s prison conditions were better than their lived realities.

b. Disseminating Findings

Just as extensive outreach must be conducted with victims and affected communities before and during the course of a trial, judicial decisions must be made fully accessible to them. This means physically disseminating the full judgment, including any appellate decisions. It also means ensuring translation into the languages of the victims and affected communities. Further, it requires identifying accessible ways to communicate the important parts of the judgment, including the sentence, for example through radio, media, or other widely used mediums.

Failing to share the judgment widely and fully deprives victims and affected communities of their ownership of the truth and misses an opportunity to acknowledge their suffering and any risks they have taken in the pursuit of justice.

⁵² Human Rights Watch, “Justice on Trial: Lessons from the Minova Rape Case in the Democratic Republic of Congo” (Oct. 2015).

⁵³ Kim Thuy Seelinger, “The Landmark Trial against Dictator Hissène Habré: Serving Justice in Chad, Making History in Senegal,” *Foreign Affairs*, June 16, 2016.

12. Reconceptualizing Gender within and beyond Criminal Justice

- Prosecutions are a necessary element of transitional justice, but they are not sufficient alone.
- Criminal justice efforts still render invisible many of the gendered patterns and structures of human rights abuses beyond specific incidents of SGBV.
- Prosecutions should strive to address gendered patterns of human rights abuses and to encourage institutional reforms, including those related to enhancing women's access to justice.

Prosecutions can provide several benefits: reestablishing the rule of law, challenging cultures of impunity, and providing a more systemic analysis of why and how crimes were committed. But there are major limitations in the power of prosecutions to provide meaningful justice for victims.

One point that must be reiterated is that prosecutions are a necessary, but insufficient, element of transitional justice. Particularly because criminal accountability can take decades to achieve, other, more immediate steps must be taken to acknowledge victims' suffering, provide redress and other forms of justice for harms, and ensure that the full truth about the causes, consequences, and experiences of human rights violations is uncovered and told widely.

Prosecutions in transitional situations have the potential to be both an instrument of change and a conspirator of silence. Since the advent of the ICTY and ICTR in the mid-1990s, the shift in legal jurisprudence has been remarkable and unprecedented.

Unfortunately, other recent developments in both national and international courts showcase the difficulty in securing criminal accountability for SGBV crimes in particular. Failure to hold perpetrators of SGBV criminally accountable not only devastates the victims, who have often risked much to participate in trials, but also entrenches problematic precedents about which acts are deserving of justice.

Moreover, criminal justice efforts still render invisible many of the gendered patterns and structures of human rights abuses *beyond* specific incidents of SGBV. Moving forward, prosecutions should work to bring to light the gendered patterns of human rights abuses, comprehend the diverse ways in which women have figured into the state's human rights history, open a national conversation about the enabling conditions of abuse against women and others based on gender, and mobilize institutional reform and broader political support for enhancing women's access to justice in preventing and redressing human rights abuses.

Discussion Questions

- How have you seen, or how do you envision, criminal justice efforts feeding into other elements of transitional justice?
- How can prosecutions of SGBV contribute to improving women's socioeconomic situation?
- How do you envision gender justice beyond criminal justice for SGBV crimes?

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and the Empowerment of Women



ICTJ New York
50 Broadway, 23rd Floor
New York, NY 10004
Tel +1 917 637 3800
Fax +1 917 637 3900
www.ictj.org