

JUDICIAL APPROACHES TO SEXUAL AND GENDER-BASED CRIMES AT THE INTERNATIONAL CRIMINAL COURT

Structural Shortcomings, Critical Improvements and
Future Possibilities of Intersectional Justice

A fundamental pillar of the rule of law, access to justice is effectively nullified as a right and a guarantee of proper administration of justice. It is internationally recognised in human rights law and domestically enacted under different constitutional laws. Coupled with the right to an effective remedy, the right of access to justice provides every person, without discrimination on any basis, the possibility to use legal tools and mechanisms to claim recognition and protection of any of his or her rights, including fundamental and human rights. Justice does not differentiate on the basis of sex, gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status²

It is difficult for the Chamber to ascertain the names of every victim of the several crimes of which Dominic Ongwen has been convicted. Yet, in many cases the Chamber was able to do so. These victims have a right not to be forgotten. They have the right to be mentioned explicitly.

Forced pregnancy (Article 7(1)(g) and Article 8(2)(e)(vi))
This is the first time forced pregnancy is to be considered by a trial chamber of this Court. The crime of forced pregnancy is grounded in the woman's right to personal and reproductive autonomy and the right to family.

The Women's Initiatives for Gender Justice would like to thank its supporters and partners, and in particular the Wellspring Philanthropic Fund and the Swiss Federal Department of Foreign Affairs for their generous support in producing this publication.

The views expressed in this publication are those of the Women's Initiatives for Gender Justice and do not necessarily represent the views of our donors, not any of their affiliated organisations.

Judicial Approaches to Sexual and Gender Based Crimes at the International Criminal Court
Structural Shortcomings, Critical Improvements and Future Possibilities of Intersectional Justice

© Women's Initiatives for Gender Justice, December 2023
ISBN 979-8-88940-268-8

WOMEN'S INITIATIVES
FOR GENDER JUSTICE



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ABBREVIATIONS

AfCHPR	African Court on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AC	Appeals Chamber
ASP	Assembly of States Parties to the Rome Statute
CSO	Civil Society Organisation
CoC	Confirmation of Charges
CRSV	Conflict-Related Sexual Violence
DCC	Document Containing the Charges
EoC	Elements of Crimes
ECHR.....	European Convention on Human Rights
ECTHR	European Court of Human Rights
ECCC	Extraordinary Chambers in the Courts of Cambodia
FIDH	International Federation for Human Rights
IER	Independent Expert Review
IIIM	International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011
IACHR	Inter-American Court of Human Rights
IHRL	International Human Rights Law
IHL	International Humanitarian Law
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICC	International Criminal Court
ICL	International Criminal Law
ICT	International Criminal Tribunal
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
OTP	Office of the Prosecutor
PTC	Pre-Trial Chamber
RS	Rome Statute
RPE	Rules of Procedure and Evidence
SGBC	Sexual and Gender-Based Crimes
SGBV	Sexual and Gender-Based Violence
SCSL	Special Court for Sierra Leone
TC	Trial Chamber
UDHR	Universal Declaration of Human Rights
WCGJ	Women's Caucus for Gender Justice
WIGJ	Women's Initiatives for Gender Justice

Accessibility: The practice of making resources, environments, activities etc. accessible for as many people as possible, also considering the needs of persons with disabilities and other special needs.¹

Acts of sexual nature: Acts carried out through sexual means or targeting a person's sexuality or sexual autonomy.² Some indicia that an act is of a sexual nature include exposing or having physical contact with a sexual body part, deriving or intending to derive sexual gratification from the act, impacting one's sexual autonomy, sexual integrity, sexual orientation, gender identity, or reproductive capacity or autonomy, and involving sexual innuendos. To better understand the sexual nature of an act, it is important to be knowledgeable about the societal norms and the perceptions of the community where the act took place.

Autonomy: Concept denoting freedom to make decisions; in the case of individuals, regarding own life. The autonomy of individuals is limited by law to establish balance between rights and duties towards society. When limitations of autonomy go beyond the necessary legal restrictions according to certain specific factors such as age, physical or mental

capacity, they constitute human rights violations.³

Conflict related sexual violence: Acts of sexual violence occurring within the context of armed conflict (war crimes), mass atrocities such as crimes against humanity or genocide, or sexual violence acts of similar gravity directly or indirectly linked to a conflict.⁴ Incidents of CRSV will amount to international crimes if what is referred to as the common or contextual elements for each of these categories of crimes are met.

Diversity: A range of differences among individuals or groups, such as race, ethnicity, national origin, gender, gender identity and expression, sexual orientation, age, class, education, and religion.⁵

Equality: The state of being equal, or achieving the same status, rights, and opportunities. Equality implies treating different individuals equally regardless of specific needs or circumstances.

Equity: Fairness and justice in the distribution of opportunities, resources, and benefits. Equity recognizes the different needs or circumstances of individuals and seeks to address those to achieve a more balanced and just outcome.

¹ SeeWriteHear, [What is Accessibility?](#)

² For more comprehensive guidance on understanding acts of a sexual nature, please consult [The Hague Principles on Sexual Violence](#), 2020.

³ FIDH, [Sexual and gender-based violence: A glossary from A to Z](#).

⁴ For a more comprehensive explanation of the term, please refer to the [Report of the UN Secretary General on Conflict-Related Sexual Violence](#), S/2023/413, 6 July 2023.

⁵ For more guidance on this topic, please consult the [Glossary of Diversity, Inclusion and Belonging \(DIB\) Terms](#), Harvard Human Resources.

Feminism: The belief that all genders should have equal rights and opportunities.⁶ Can also refer to the movement to challenge and change unfair treatment and discrimination faced by a certain gender.

Gender: Refers to the socially constructed roles, behaviors, expressions and identities of people.⁷ Gender has different meaning than 'sex' despite often being used interchangeably. See the definition of 'sex' below.

Gender analysis: Evaluates social and political hierarchies, power imbalances and inequalities between persons due to their actual or perceived gender identity, sex and/or sexual orientation, which are reflected and shape gender roles in a society, and give rise to assumptions and stereotypes.⁸

Gender-based crimes/violence: Acts of violence, discrimination, or persecution that are committed against individuals based on their gender; used to punish behavior perceived to transgress gender criteria defined as 'accepted' forms of gender expression.⁹

Gender bias: Difference in perception and treatment based on gender; can be

intentional or unconscious.¹⁰

Gender mainstreaming: Integrating a gender perspective into all stages of decision-making, policy development, program implementation etc. to ensure that the experiences and needs of all genders are taken into account and addressed.¹¹

Gender perspective: Implies an understanding of differences in status, power, roles, and needs between persons as a result of their actual or perceived gender identity, sex and/ or sexual orientation within the context of society, considering the impact on people's opportunities and interactions, social and political hierarchies, and inequalities. Everyone brings their own gender perspective to an analysis.¹²

Gender sensitive approach: An approach that recognizes and addresses the diverse needs, experiences, and priorities of individuals based on their gender. It involves considering the social, cultural, and economic factors that influence gender roles, identities, and inequalities in order to promote equality, fairness, and inclusivity, and acknowledges that gender is a significant factor in shaping people's opportunities, constraints, and experiences.

⁶ See International Women's Development Agency, [What Is Feminism?](#)

⁷ See Canadian Institute of Health Research, [What is gender? What is sex?](#)

⁸ Emerging Justice Collective, Comments on 2014 Policy Paper on Sexual and Gender-Based Crimes and 2016 Policy Paper on Crimes Against and Affecting Children.

⁹ ICC OTP, [Policy on the Crime of Gender Persecution](#), p 4.

¹⁰ FIDH, [Sexual and gender-based violence: A glossary from A to Z](#).

¹¹ See UN Women, [Gender Mainstreaming](#).

¹² Emerging Justice Collective, Comments on 2014 Policy Paper on Sexual and Gender-Based Crimes and 2016 Policy Paper on Crimes Against and Affecting Children.

Inclusion: The practice of creating a sense of belonging and feeling of being respected and valued by everyone. Where a person can be as they are and are not required to change to be included.

Intersectionality: Concept which emerged through the grassroots movement work of the Combahee River Collective¹³ and later coined by pioneering scholar of critical race theory and Black feminist legal theory, Professor Kimberlé Crenshaw,¹⁴ to denote the complex ways that multiple aspects of identity (e.g., race, ethnicity, gender, class, ability, sexual orientation, gender identity, national origin, and religion) intersect and mutually constitute one another, especially in the experiences of marginalized individuals or groups.

Intersectional analysis: Evaluates social and political hierarchies, power imbalances and inequalities between persons and collectivities on intersecting grounds, including race, ethnicity, socio-economic status, religion, age, gender identity and/or sex, sexual orientation, caste, indigeneity, disability; and considers

structural drives of violence on such intersecting grounds and their relationship to systems of political and social domination within the context of society.¹⁵

LGBTQI+: Lesbian, gay, bisexual, transgender, queer and intersex identified persons. The plus sign represents people who identify with the broader LGBTQI community but use other terms for self-identification. While the acronym LGBTQI+ is inclusive of a broad range of persons, it is not exhaustive, nor is it the universally standard acronym.¹⁶

Non-binary: Adjective describing persons who do not identify exclusively as man or woman. Non-binary people may identify as being both a man and a woman, somewhere in between, or as falling completely outside these categories.¹⁷

Reproductive rights: Human rights recognizing and ensuring individuals' freedom to reproduction and access to reproductive health.¹⁸

¹³ [The Combahee River Collective Statement](#).

¹⁴ Kimberlé Crenshaw, [Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies](#), 1989, University of Chicago Legal Forum, Vol 1989(1).

¹⁵ Emerging Justice Collective, Comments on 2014 Policy Paper on Sexual and Gender-Based Crimes and 2016 Policy Paper on Crimes Against and Affecting Children.

¹⁶ ICC OTP, [Policy on the Crime of Gender Persecution](#), p 3.

¹⁷ National Center for Transgender Equality, [Understanding Nonbinary People: How to Be Respectful and Supportive](#), 12 January 2023.

¹⁸ FIDH, [Sexual and gender-based violence: A glossary from A to Z](#).

Positionality: Refers to the ways in which identities (including race, gender, socio-economic status, nationality, ethnicity, age etc.) are shaped by personal experiences, privileges or disadvantages, and influence perspectives, beliefs, and understanding of the world. It emphasizes the importance of self-reflection and awareness of our own biases, privileges, and limitations when engaging in discussions, research, or social interactions. Understanding one's positionality helps recognize that different individuals may have different perspectives and experiences, which can contribute to diverse and nuanced understandings of social issues and realities. By acknowledging and critically reflecting on our positionality, we can strive for greater empathy, respect, and understanding when engaging with others and seeking to address social inequalities and injustices.¹⁹

Privilege: Refers to unearned advantages and benefits that certain individuals or groups enjoy based on their social, economic, or cultural position. It is often associated with systems of power and oppression that result in certain people having advantages and opportunities simply because of their social identities, such as race, gender, socioeconomic

status, or sexual orientation. Privilege can manifest in various ways, such as access to education, job opportunities, healthcare, safety, and representation in media and politics. It is important to note that privilege is not something individuals choose or directly control, but it is a product of societal structures and systems.²⁰

Sex: Set of biological and physical attributes typically distinguishing males from females, although this binary classification does not account for the full spectrum of human biological diversity.²¹

Sexual crimes/violence: Intentional and non-consensual acts of a sexual nature (see above) committed by force, threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, or by taking advantage of a coercive environment or a person's incapacity to give genuine consent. Include both physical and non-physical acts with a sexual element.²²

¹⁹ See Women's Legal Education and Action Fund, *Intersectionality in Law and Legal Contexts*, 2020.

²⁰ *Ibid.*

²¹ See Canadian Institute of Health Research, *What is gender? What is sex?*.

²² See *The Hague Principles on Sexual Violence*, 2020.

Sexual orientation: An inherent or immutable enduring emotional, romantic, or sexual attraction to other people, independent of gender identity.²³ SOGI (Sexual Orientation and Gender Identity) rights: Human rights recognizing respect for individuals regardless of their SOGI. Aim at enhancing the enjoyment of universal human rights by the LGBTQI+ community.²⁴

Stereotypes: Widely held and oversimplified generalizations, beliefs, or assumptions about a particular group of people or things. These beliefs are often based on limited or superficial information, that often emerge from social and cultural influences, including media portrayals, societal norms, and personal experiences, and can lead to preconceived notions, biases, and judgments. They overlook the diversity and individuality within a group and can lead to the marginalization and stigmatization of certain individuals or communities.²⁵ Challenging stereotypes involves promoting understanding, empathy, and critical thinking. It requires recognizing and questioning our own assumptions and biases, seeking out diverse perspectives, and treating individuals as individuals rather than fitting

them into preconceived notions based on stereotypes.

Survivor: Term used as alternative for 'victim' as the latter is commonly used in legal contexts, while 'survivor' often refers to those who have undergone or go through a recovery process and is used as a term of empowerment, emphasizing the agency of the individual.²⁶

Trauma: Physical or psychological harm resulting from extremely negative experiences. Can take various forms on affected persons depending on social environment, pre-existing psychological conditions and the traumatic incident itself.²⁷

Victim-centred approach: Processes considering the interests, well-being, needs and concerns of the victims a priority and in which victims play an active and participatory role.²⁸

Women rights: Comprise all human rights. The term refers to advocacy for the equal enjoyment of rights by women and girls in response to inequalities and discrimination based on gender.²⁹

²³ Washington University in St. Louis, [What do LGBTQI+ terms mean?](#)

²⁴ FIDH, [Sexual and gender-based violence: A glossary from A to Z.](#)

²⁵ Stanford University, Gendered Innovations, [Stereotypes.](#)

²⁶ See FIDH, [Sexual and gender-based violence: A glossary from A to Z.](#)

²⁷ Ibid.

²⁸ See [The Murad Code](#) (the Global Code of Conduct for Gathering and Using Information about Systematic and Conflict-Related Sexual Violence).

²⁹ See FIDH, [Sexual and gender-based violence: A glossary from A to Z.](#)

INTRODUCTION

01

This report is dedicated to the advocates who have contributed to the continually growing, and ever important gender justice field. A special tribute is paid to all members of the Women's Caucus for Gender Justice, a movement of women's human rights advocates from around the world who came together with a view to enshrine principles of gender justice in the framework and functioning of the International Criminal Court. Active between 1997 and 2003, the Women's Caucus demonstrated the need for feminist analysis of international criminal law and humanitarian law, and for dedicated consideration of women's interests in the work of the ICC to ensure it is inclusive, representative, and relevant to the lives of women, as well as men, affected by conflict.

Central to the work of the Women's Caucus were many path-finding feminists, including one of the world's foremost legal scholars for women's rights, Rhonda Copelon (15 September 1944 - 6 May 2010). In honor of her leadership, this report opens with her visionary words.¹

“ Thanks to the expertise and commitment of a small group of delegates – both women and men – and the openness, albeit sometimes reluctant, of the overwhelming majority of delegates, the Statute of the International Criminal Court is a landmark. It has codified not only crimes of sexual and gender violence as part of the jurisdiction of the Court, but also a range of structures and procedures necessary to ensure that these crimes and those victimized by them will remain on the agenda and be properly treated in the process of justice.

The ICC statute is thus revolutionary in its thoroughgoing approach to the issues of gender in international law. The Court is not only a potentially important concrete mechanism of accountability; it also establishes basic norms of gender justice that operate as an inspiration and model for political advocacy and domestic systems. The broad incorporation of the gender norms codified in the Rome Statute will not automatically change misogynist or sexist laws. Under the statute's principle of complementarity, states are encouraged, though not required, to incorporate the key provisions in their domestic laws. Moreover, even the Rome Statute's codification will not avert the danger of exclusion and impunity in the ICC or in the accountability processes – national and international – to which it should give rise. But it provides a critical new tool.

In addition to looking at historical and immediate signs of violence, it is necessary to look at basic economic and political conditions that generate or provide the ground for manipulation of insecurity, desperation, and rage into hatred and violence. These include issues of gender inequality as well as economic issues, and particularly the impact of economic and media globalization on those it colonizes. [...] We cannot prepare the ground for peace and security and exclude from consideration either globalization policies that breed economic insecurity and insecurity about identity, or the role of patriarchal and misogynist culture in everyday life.”

¹ Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law*, 2000, 46 McGill L.J. 217.

1.1 Background

The adjudication of sexual and gender-based crimes (SGBC) forms an intrinsic part of the International Criminal Court's (ICC or the Court) work concerned with the investigation and, where warranted, prosecution of 'individuals charged with the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression'.² Whether these crimes are adequately and effectively adjudicated depends, among others, on the Judges of the Court. The Judges are elected by the Assembly of States Parties (ASP or Assembly) to the Rome Statute (RS or the Statute), representing a range of diverse geographical backgrounds and legal systems with differing levels of specialised expertise, including gender-competence.

As such, the composition of the bench and dynamics of adjudication create the Court's 'judicial culture', which manifests on a spectrum between judicial activism and reticence. This is reflected, among others, in the adjudication of SGBC. While after more than two decades of the Court's existence there are promising signs of progression in the overall work of the ICC, there is significant room to strengthen judicial approaches to SGBC in pursuit of non-discriminatory justice outcomes

for all communities affected by atrocity crimes. This Women's Initiatives for Gender Justice (WIGJ) report entitled '**Judicial Approaches to Sexual and Gender-Based Crimes at the International Criminal Court: Structural Shortcomings, Critical Improvements and Future Possibilities of Intersectional Justice**' examines judicial approaches to interpreting and applying the legal provisions of the ICC concerning SGBC. The report corresponds with the 25th Anniversary of the Rome Statute and builds upon the legacy and work of gender justice advocates, particularly the Women's Caucus for Gender Justice (WCGJ or Women's Caucus) who played an instrumental role during the Statute's negotiation in ensuring that principles of gender justice were incorporated in its substantive and procedural provisions.³

The report also acknowledges and relies on contributions from academia and practice that have thoughtfully analysed and reviewed the Court's work on SGBC. While previous important contributions have focused on the work of the prosecution,⁴ examined the Court's work on SGBC as a whole,⁵ focused on specific ICC crimes⁶ or cases,⁷ or provided practical tools in the larger context of international criminal investigations

² ICC, [About the Court](#).

³ WIGJ, [History](#).

⁴ See Rosemary Grey, [Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court](#), 2019, Cambridge University Press; FIDH and WIGJ, [Accountability for Sexual and Gender-Based Crimes at the ICC: An Analysis of Prosecutor Bensouda's Legacy](#), 18 June 2021; Valerie Oosterveld, [The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law](#), March 2018, William & Mary Journal of Race, Gender and Social Justice, Vol 24(3); Dianne Luping, [Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court](#), 2009; Susana SaCouto and Katherine Cleary, [Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court](#), 2009, Journal of Gender, Social Policy & the Law, Vol 17(2).

⁵ See FIDH, [Unheard, Unaccounted: Towards Accountability for Sexual and Gender-Based Violence at the ICC and Beyond](#), November 2018; Tanja Altunjan, [The International Criminal Court and Sexual Violence](#), August 2021, German Law Journal, Vol 22(5); Indira Rosenthal, Valerie Oosterveld and Susana Sacouto, [Gender and International Criminal Law](#), 14 July 2022, Oxford University Press.

⁶ See Rosemary Grey, [The ICC's First 'Forced Pregnancy' Case in Historical Perspective](#), 2017, Journal of International Criminal Justice, Vol 17; Rosemary Grey, Jonathan O'Donohue, Indira Rosenthal, Lisa Davis and Dorine Llanta, [Gender-based Persecution as a Crime Against Humanity: The Road Ahead](#), 28 December 2019, Journal of International Criminal Justice, Vol 17(5).

⁷ See Sarah T. Deutch, [Putting the Spotlight on "The Terminator": How the ICC Prosecution of Bosco Ntaganda Could Reduce Sexual Violence During Conflict](#), May 2016, William & Mary Journal of Race, Gender and Social Justice, Vol 22(3); Marie-Alice D'Aoust, [Sexual and Gender-based Violence in International Criminal Law: A Feminist Assessment of the Bemba Case](#), 19 February 2017, International Criminal Law Review, Vol 17(1).

and prosecutions,⁸ this report represents the first comprehensive research setting out and analysing the ICC SGBC jurisprudence, i.e., decisions of pre-trial, trial and appeals chambers on issues related to charges of sexual and gender based crimes.

Furthermore, the report builds on decades of meticulous efforts and interventions to advance gender justice at international tribunals, including the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the

Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Court for Sierra Leone (SCSL), as well as increasingly critical legal interventions by civil society actors around the world who work with affected communities to advance gender justice for core international crimes at domestic or international courts. Additionally, gender justice capacities and strategies are established and strengthened at commissions of inquiries,⁹ fact-finding missions,¹⁰ and accountability mechanisms,¹¹ which may also have an impact on gender justice efforts at the ICC.

1.2 Role of Judges in advancing gender justice at the ICC

This report recognizes the critical importance of gender-competent judging. It seeks to take stock of judicial approaches contributing to notable gender justice developments. By the same token, the report underlines the shortcomings of ICC SGBC adjudication to date. These include, but are not limited to, gender stereotyping,¹² a lack of an intersectional analysis of structural drivers and the impact of SGBC, as well as an inadequate contextual understanding of evidence related to SGBC. Acting on preconceived beliefs, rather than on facts, can distort or influence Judges' views about victimhood, harm, and witness credibility, compromising in turn impartiality and, in case not mitigated, potentially leading to miscarriage of justice and revictimization.¹³

Thus, the report is simultaneously *reflective*, looking back at the Court's problematic first SGBC-related cases and its slow journey from narrow approaches to SGBC prosecution and adjudication; and *prospective*, as it examines its progressive movement to more expansive charges and gender-competent, human-rights based, intersectional judging. It recognises that the journey is still ongoing and that the Court has not yet fully realised its potential in relation to how SGBC are to be adjudicated. The report assesses the level of gender-competent judging at the ICC, defined by the skills, knowledge, and analytical capability of the Judges to adjudicate on SGBC issues in a manner which takes account of the socially constructed differences between persons.¹⁴ The report further argues that,

⁸ See WIGJ, [The Hague Principles on Sexual Violence](#), 2020; FIDH, [Sexual and gender-based violence: A glossary from A to Z](#), 18 June 2021; Global Code of Conduct for Gathering and Using Information about Systematic and Conflict-Related Sexual Violence (Murad Code), 13 April 2022; Sara Ferro Ribeiro and Danaé van der Straten Ponthoz on behalf of the UK Foreign & Commonwealth Office, [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict \(Second Edition\)](#), March 2017.

⁹ See e.g. Office of the High Commissioner for Human Rights (OHCHR), [UN Commission of Inquiry on Syria: Sexual and gender-based violence against women, girls, men, and boys a devastating and pervasive feature of the conflict and must end now](#), 15 March 2018.

¹⁰ Starting with 2010, the Human Rights Council and UN Secretary-General have mandated the deployment of an SGBC expert to UN investigations. UN Women, [Specialized investigation into sexual violence in conflict is essential for justice, experts say](#), 30 April 2019. In 2019, the OHCHR published a guidance and practice paper on [Integrating a Gender Perspective into Human Rights Investigations](#).

¹¹ See e.g. IJM, [Gender Strategy and Implementation Plan - Abridged Version](#), 30 September 2022.

¹² Simone Cusack, [Eliminating judicial stereotyping: Equal access to justice for women in gender-based violence cases](#), OHCHR, 9 June 2014.

¹³ *Ibid.*, p. ii.

¹⁴ Adapted from Gender Toolbox, [What is gender competence?](#), p.1. See also European Institute for [Gender Equality Gender Institutional Transformation, Step 9: Developing Gender Equality Competence](#).

beyond gender-competence, ICC adjudication of SGBC should be intersectional. Intersectionality is both a 'method of observation and an action-oriented form of practice that aims to uncover and redress the workings of privilege and oppression that often remain hidden from view in the classical single-axis analyses of discrimination and inequality'.¹⁵ It is paramount for Judges to conduct their work, including with respect to SGBC, through a broader anti-discrimination lens. As our research and analysis will demonstrate, Article 21(3) of the Statute constitutes a critical pillar in

ensuring a just, non-discriminatory outcome in the adjudication of international crimes, including SGBC, at the ICC and beyond. Intersectional justice is only possible if the law is interpreted and applied in a manner that grants the full scope of legal protection from mass atrocity harms to a group, community, or collectivity as envisioned by the RS and expanded through the Court's jurisprudence, taking into account relevant international law developments, particularly in the field of international human rights law (IHRL).

1.3 Methodology

The report presents the outcome of the analysis of key ICC SGBC jurisprudential developments to date, with the view to strengthen and increase the impact the Court could have on both international and national accountability efforts to address SGBC.

Desk research examined primarily how the Court's Chambers interpreted SGBC elements and further considered related rulings on modes of liability and procedures in accordance with the Court's normative framework, including the Statute, the Rules of Procedure and Evidence (RPE or the Rules), and the Elements of Crimes (EoC or the Elements). The analysis of jurisprudence was guided by an assessment as to whether the interpretation and application of the law was in accordance with IHRL and resulted in no adverse distinction on gender and other intersecting grounds, including race, ethnicity, nationality, sexual orientation, or age. The report also evaluates how the jurisprudence aligns or diverges between ICC Chambers and important precedents set by other international courts and tribunals, as well as international human rights norms and standards.

The desk research has been combined with a series of comprehensive, semi-structured consultations under Chatham House rules with some ICC Judges. The consultations focused on the identification of practical challenges to gender-competent judging at the ICC and the participants' views on addressing such challenges. Based on our research, analysis, and consultations, the final section of the report looks ahead at how judicial approaches to SGBC will need to evolve to meet the dynamic nature of cases before the Court. We anticipate that the substantive findings of this report and its recommendations will impact judicial approaches to SGBC at the ICC and other justice mechanisms.

We also invite the readers to consult the annexes of the report, which include: (1) the status of SGBC charges across ICC cases; (2) SGBC charges brought before ICC corresponding to RS provisions; (3) an overview of modes of liability for all SGBC charges; (4) summaries of relevant ICC case facts; and (5) excerpts of completed questionnaires by current Judges and judicial candidates in the 2023 election on their experience in addressing SGBC.

¹⁵ Ivona Truscan and Joanna Bourke-Martignoni, *International Human Rights Law and Intersectional Discrimination*, 2016, *The Equal Rights Review*, Vol 16, p 104.

1.4 The role of the Women's Caucus for Gender Justice

For many years, conflict-related sexual violence (CRSV) crimes were not recognized as independent international crimes constituting genocide, crimes against humanity, or war crimes, and, as such, were not, or were very rarely, prosecuted before international criminal tribunals (ICTs).¹⁶ It took until the 1990s for the statutes of ICTs to explicitly label forms of CRSV as international crimes. Understanding this milestone requires reflection on the path which led to the Rome Conference and those who played a key role in this important development, including the feminist advocates and organisations who formed the Women's Caucus for Gender Justice when it became clear that history was set to repeat itself with the invisibility of SGBC at ICTs and other accountability mechanisms.

Human rights groups and other NGOs played an active role in the drafting process to the Rome Statute under the umbrella of the Coalition for the International Criminal Court. Although NGOs did not have standing to vote at the 1998 Conference in Rome where the Statute was adopted, they lobbied extensively and provided expert advice to different delegations during the proceedings.¹⁷ The Women's Caucus came together in 1997 on the side line of the establishment of the ICC after the realisation that without an organised caucus, women's concerns would not be appropriately defended and promoted. Along with their focus on women's concerns, the Caucus consistently made their views known on issues which were generally not recognized as gendered, such as jurisdiction, independence of the prosecutor, complementarity, cooperation, and financing, among others.¹⁸

By the time the Women's Caucus was formed, the International Law Commission had already prepared two draft documents for consideration by the delegates: the 1994 Draft Statute of the International Criminal Court ('1994 Draft ICC Statute') and the 1996 Draft Code of Crimes against the Peace and Security of Mankind ('1996 Draft Code of Crimes'), but neither had been written with women's input.¹⁹ The Women's Caucus critiqued and made recommendations on critical issues in the drafts. Their advocacy was pivotal in ensuring that the RS included a range of gender-based crimes, including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other forms of sexual violence. Grey notes that the Caucus made three significant contributions to an inclusive and gender-sensitive RS drafting process: (i) although the Caucus's primary goal was to represent the interests of women, its proposals were inclusive of other marginalised groups including male victims of sexual violence and intersex persons; (ii) in addition to pushing for the specific inclusion and enumeration of sexual violence crimes, the Women's Caucus sought accountability for non-sexual gender-based crimes; and (iii) the Caucus lobbied for the inclusion of a wide range of sexual violence crimes in the Statute.²⁰ Although not all of the Caucus' submissions or proposals were adopted, its activism contributed to the 'inclusion of gender crimes into a binding international treaty, opening new spaces for victim inclusion and reparations, civil society involvement, and institutionalizing a role for gender expertise in international criminal institutions'.²¹

¹⁶ Anne-Marie De Brouwer, *The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes*, 2015, Cornell International Law Journal, p 642.

¹⁷ Helen Durham, *The Role of Civil Society in Creating the International Criminal Court Statute: Ten Years On and Looking Back*, 1 January 2012, Journal of International Humanitarian Legal Studies.

¹⁸ Women's Caucus for Gender Justice, *Recommendations and Commentary for December 1997 PrepCom on the Establishment of an International Criminal Court*, December 1997.

¹⁹ Rosemary Grey, *Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court*, 2019, Cambridge University Press, p 101.

²⁰ *Ibid*, p 103.

²¹ Anna van der Velde, *The Women's Caucus for Gender Justice: Writing Gender into International Criminal Law*, May 2023, p 10.

The Caucus faced significant challenges due to the power dynamics at play during the Rome negotiations. One Caucus member noted that ‘at the negotiation table women’s voices were not as respected as a white male speaking to these issues who would be heralded as an expert’.²² Other power dynamics concerned what Van der Velde describes as ‘the North-South’ divide.²³ Since English was the main language of

negotiation, advocacy was particularly challenging for activists from Latin America, Asia, and francophone countries, which was further hampered by the lack of resources to hire translators.²⁴ These challenges persisted beyond Rome to national and local levels, with Caucus members struggling to effectively communicate the relevance of the RS to women on the ground living in different national contexts.

1.5 Continuing impact of feminist legal advocacy

Lobbying efforts did not end after Rome. The focus shifted to negotiations concerning the EoC, the RPE, judicial elections, and national ratifications of the Statute. Since then, the contribution of the Women’s Caucus to a gender-just ICC has continued through the work of WIGJ, which continues to monitor and advocate for the inclusion of gender perspectives in the ICC’s work. The importance of sustained expert engagement and advocacy for gendered and intersectional approaches to SGBC was demonstrated in 2021 with the amici submissions of a group of feminist legal advocates in the landmark case against Dominic Ongwen, the first case arising from the Uganda situation to reach the trial stage at the ICC, and the only case in which the conviction for the highest number of counts of SGBC charges ever before the ICC were upheld by the Appeals Chamber (AC).²⁵ As will be discussed in more detail in this report, the call by the AC for amicus curiae

submissions on the SGBC charged in the case not only opened the door for historic and unprecedented submissions by leading feminist advocates in the field, it also demonstrated the importance of continuous involvement by external experts and feminist advocates with the judicial process to ensure that the ICC realises its full potential in this area.²⁶

At the same time, the challenges faced by the Women’s Caucus during the Rome Conference in relation to extant power dynamics and the difficulty in communicating the Court’s relevance to local communities remain enduring for the ICC to this day. We explore this further in chapter 6, where we call for systems and processes, such as judicial elections and internal hiring processes at the ICC, to not only be based on equitable gender and geographic representation, but to be approached in a manner which acknowledges and acts to change broader power imbalances.

²² Ibid, p 11.

²³ Ibid, p 11. WIGJ considers that the term ‘North-South divide’ as it has often been used in human rights and development discourse gives an incomplete and inaccurate picture of the different perspectives and political dynamics at play in relation to the divisions between States situated in the Global North and those in the Global South. As such, the terms ‘Global Minority’ to categorise the countries of the Global North and ‘Global Majority’ for the Global South are preferred. See International Peace Institute, *Deconstructing the North-South Label*, 5 April 2010.

²⁴ Ibid.

²⁵ Prosecutor v. Dominic Ongwen, *Trial Judgment*, ICC-02/04-01/15-1762-Red, 4 February 2021. See also *Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled “Trial Judgment”*, ICC-02/04-01/15-2022-Red, 15 December 2022.

²⁶ See *The Prosecutor v. Dominic Ongwen, Order inviting expressions of interest as amici curiae in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)*, ICC-02/04-01/15-1884, 5 October 2021; *Decision on the requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence*, ICC-02/04-01/15-1914, 24 November 2021. For a comprehensive summary of the amicus submissions, see Alexander Lily Kather and Angela Mudukuti, *Symposium in Pursuit of Intersectional Justice at the International Criminal Court: Ongwen amici curiae Submissions from a Feminist Collective of Lawyers and Scholars*, *Opinio Juris*, 2 May 2022.

LEGAL FRAMEWORK

02

Chapter 2 - Legal framework

The RS codifies the broadest range of SGBC in the history of international law by proscribing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence as crimes against humanity²⁷ and war crimes.²⁸

Article 7(1)(g) RS <i>Crimes against humanity</i>	Article 8(2)(b)(xxii) RS <i>War crimes (international armed conflicts)</i>	Article 8(2)(e)(vi) RS <i>War crimes (armed conflicts not of an international character)</i>
Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;	Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;	Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

The Statute also lists the crime against humanity of persecution committed against any identifiable group or collectivity on multiple and intersecting grounds, including political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognised as impermissible under international law.²⁹

Article 7(1)(h) RS <i>Crimes against humanity</i>	Article 7(2)(g) RS <i>Crimes against humanity</i>
Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;	'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

2.1 Applicable law

Article 21 of the Statute sets out the hierarchy of applicable law at the ICC. Article 21 has been described as 'very interesting' because of, among other things, its 'very existence, the specificity and complexity of its content, the hierarchy or the multiplicity of hierarchies it establishes.'³⁰ The sources of law in Article 21(1) are said to be derived from those contained in Article 38 of the Statute of the International Court of Justice,

²⁷ Article 7(1)(g) RS.

²⁸ Articles 8(2)(b)(xxii) and 8(2)(e)(vi) RS.

²⁹ Article 7(1)(h) RS.

³⁰ Gilbert Bitti, *Part IV The ICC and its Applicable Law, 18 Article 21 and the Hierarchy of Sources of Law before the ICC*, in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court*, May 2015, Oxford Public International Law.

which represents an authoritative source of general international law.³¹ The provision is unique to the ICC, not having been included in the statutes of the ad hoc tribunals or other similar mechanisms such as the Tokyo or Nuremberg Tribunals. Critically, Article 21 establishes a legal relationship between the Statute and other legal frameworks relevant for its interpretation and application, including, for example, IHRL.

Article 21 RS - Applicable law

1. The Court shall apply:
 - (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

There is no legally binding requirement for ICC Judges to follow previous jurisprudence of the Court. Despite the statutory discretion to depart from its previous jurisprudence, however, the practice of the Court has been that, absent 'convincing reasons', it will not depart from previous decisions 'given the need to ensure predictability of the law and the fairness of adjudication to foster public reliance on its decisions'.³² This approach is consistent with the practice of the ad hoc tribunals, which established the importance of coherence and consistency in the interpretation and application of the law. In the *Aleksovski* appeal judgment, the ICTY AC ruled that it should follow its previous decisions but should be free to depart from them for cogent reasons in the interests of justice, including where the previous decision has been based on an incorrect legal principle or given per incuriam, meaning 'wrongly decided, usually because the Judge or Judges were ill-informed about the applicable law'.³³

³¹ Margaret M. de Guzman, [Article 21 Applicable Law](#), 1 May 2008, in Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC*, 2008, Hart Publishing.

³² The Prosecutor v. Laurent Gbagbo and Charles Ble Goude, [Reasons for the "Decision on the 'Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate'.](#) ICC-02/11-01/05-172, 31 July 2015, para 14. See also The Prosecutor v. Uhuru Muigai Kenyatta, [Corrigendum of Concurring Separate Opinion of Judge Eboe-Osuji](#), ICC-01/09-02/11-728-Anx3-Corr-Red, 1 May 2013, para 91.

³³ Prosecutor v. Zlatko Aleksovski, [Judgement](#), IT-95-14/1-A, 24 March 2000, paras 107-109. See also Georges Anderson Nderubumwe Rutaganda v. The Prosecutor, ICTR-96-3-A, [Judgement](#), 26 May 2003, para 26.

2.2 Article 21(3)

Article 21(3) requires the Court to interpret applicable law consistently with internationally recognised human rights and without adverse distinction, effectively codifying the non-discrimination provision enshrined in the Universal Declaration of Human Rights (UDHR).³⁴ Following the prohibition of discrimination based on race, sex, language, and religion in the Charter of the United Nations (UN Charter), the adoption of the UDHR, together with the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, became the next important step in the legal consolidation of the principle of equality before the law and the resultant prohibition of discrimination.³⁵ Non-discrimination is also included in Article 4 of the International Covenant on Civil and Political Rights (ICCPR). In the context of the ICCPR, the Covenant prohibits discrimination on grounds such as race, colour, sex, language, religion, or social origin.³⁶

The term 'adverse distinction' referenced in Article

21(3) of the Statute originates from the IHRL principle of non-discrimination and implies a negative or unfavourable difference between two or more things.³⁷ This was confirmed by the ICC AC in *Lubanga*, which held that '[Article 21(3)] requires the exercise of the jurisdiction of the Court in accordance with internationally recognized human rights norms'.³⁸ As Sellers highlights, 'the myriad forms of gender-based violence exemplify the human rights violation of gender discrimination. Pervasive sexual violence, a manifestation of gender-based violence, occurs during wartime, in its aftermath or in any period of societal breakdown'.³⁹ As such, human rights standards underlie the framework of SGBC and have been recognised throughout numerous human rights treaties and authoritative documents, especially as they relate to the protection of the rights of women and girls.⁴⁰ Broader recognition of human rights covering persons of all gender identities is also present in a wide range of international⁴¹

³⁴ Yvonne McDermott, *Human Rights and the International Criminal Court*, in Klaus Larres and Ruth Wittlinger (eds), *Understanding Global Politics*, 7 August 2019, Routledge, p 2; Article 1 UDHR proclaims that 'All human beings are born free and equal in dignity and rights', while, according to article 2: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

³⁵ OHCHR in cooperation with the International Bar Association, *Human rights in the administration of justice: a manual on human rights for Judges, Prosecutors and lawyers*, 2003.

³⁶ Article 4 ICCPR.

³⁷ United Nations and the Rule of Law, *Equality and Non-discrimination*, accessed 15 August 2023.

³⁸ *The Prosecutor v. Thomas Lubanga Dyilo, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006*, ICC-01/04-01/06-772, 14 December 2006, p 18. See also *Separate Opinion of Judge Carmen Ibáñez Carranza*, ICC-01/04-01/06-3466-AnxII, 16 September 2019, para 50 p 28, in which the Judge notes the applicability of Article 21(3) to reparations proceedings: 'The Rome Statute imposes in article 21(3) an imperative mandate. This provision stipulates that the Court, in interpreting and applying the applicable law set out in article 21, must be consistent with internationally recognised human rights. Indeed, a comprehensive understanding of reparations for international crimes extends beyond international criminal law and international humanitarian law; it further transcends into concepts of international human rights law. The harm caused by international crimes affects the core human rights of victims. Article 21(3) of the Rome Statute is a mandatory provision that applies to all proceedings before this Court, and particularly to reparations proceedings'.

³⁹ Patricia Viseur Sellers, *The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation*.

⁴⁰ See among others, United Nations General Assembly (UNGA) Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), 18 December 1979, Article 2; CEDAW General Recommendation No. 19: Violence against Women, February 1992, paras 6-7; UNGA, World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc. A/Conf. 157/23, 12 July 1993, paras 18, 38; Beijing Declaration and Platform for Action, 15 September 1995, para. 131; United Nations Security Council Resolution (UNSC Res) 1325, 31 October 2000, paras 9-10; The Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: An African Perspective, 2002, Articles 1, 7; UNGA Res 61/143, 19 December 2006, paras 3,8; UNSC Res 1820, 19 June 2008, paras 1, 3, 4.

⁴¹ See articles 1-5, 7-8, 17(2) UDHR. See also ICCPR, ICESCR, CAT.

and regional⁴² human rights conventions.

Through its case law, the ICC has determined the contours of Article 21(3). For example, the issue of adverse distinction was examined by the Trial Chamber (TC) in *Katanga*,⁴³ where the TC noted the importance of taking an interpretative approach that is consistent with Article 21(3): '[t]he Chamber notes that Article 21(3) states most clearly that the application and interpretation of the applicable provisions must be consistent with internationally recognised human rights and be without any adverse distinction. The outcome of the interpretation undertaken by the Chamber must not therefore run counter to such rights'.⁴⁴ The TC ultimately acquitted Katanga as an accessory to rape and sexual slavery as war crimes and crimes against humanity since Judges did not believe these crimes formed part of the common purpose of the attack, unlike the crimes of directing an attack against a civilian population, pillage, murder, and destruction of property.⁴⁵ The *Katanga* acquittal for sexual crimes is discussed in more detail in chapter 5 of this report.

2.2.1 Intersectional analysis

To capture the full complexity of the harm suffered by victims of grave crimes, Article 21(3) should be interpreted through the framework of intersectionality, which 'recognizes that individuals do not experience discrimination as members of a

In the *Al Mahdi* reparations proceedings,⁴⁶ the TC made it clear that the non-discrimination provision enshrined in Article 21(3) was applicable to reparations.⁴⁷ Nonetheless, a closer examination of the reparations order suggests that the TC did not fully consider the situation of women and girls. Namely, the Chamber restricted individual reparation for consequential economic loss 'to those whose livelihoods exclusively depended upon the Protected Buildings', including the guardians of the mausoleums, the *maçons* tasked with prominent responsibilities in maintaining them and people whose businesses could not exist without the Protected Buildings'.⁴⁸ In defining who the beneficiaries of reparations would be, the Chamber could have considered that the expressly mentioned roles directly connected to the mausoleums were performed only by men as women were not allowed to enter the buildings and that business owners were also mostly men. A more gender sensitive or non-discriminatory approach would have included women and girls whose livelihoods depended upon the Protected Buildings despite not being guardians, *maçons* or business owners.

homogenous group but, rather, as individuals with multidimensional layers of identities, statuses and life circumstances'.⁴⁹ Such an approach 'acknowledges the lived realities and experiences of heightened disadvantage of individuals caused

⁴² Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5; Organization of American States (OAS), American Convention on Human Rights, 'Pact of San Jose', Costa Rica, 22 November 1969; Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ('Banjul Charter'), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982); League of Arab States, Arab Charter on Human Rights, 15 September 1994.

⁴³For the relevant case facts of the *Katanga* case, please refer to annex 4. ⁴⁴The Prosecutor v. Germain Katanga, Judgment pursuant to article 74 of the Statute, ICC-01/04-01/07, 7 March 2014, para 50.

⁴⁵Ibid, para 1664.

⁴⁶For the relevant case facts of the *Al Mahdi* case, please refer to annex 4.

⁴⁷The Prosecutor v. Ahmad Al Faqi Al Mahdi, Reparations Order, ICC-01/12-01/15-236, 17 August 2017, para 105.

⁴⁸Ibid, para 73.

⁴⁹Committee on the Rights of Persons with Disabilities (CPRD), General Comment No. 3 (2016) on women and girls with disabilities, CRPD/C/GC/3, 26 November 2016, para 16.

Combahee River Collective⁵¹ and was later coined by Crenshaw to account for the discrimination experienced by Black working-class women in the United States and the ways it was significantly different from the experience of white working-class women and Black working-class men.⁵²

UN Treaty Bodies and Special Procedure Mandate holders have long noted the importance of taking an intersectional approach and analysis to understand violations of IHRL, among them the Committee on the Elimination of Racial Discrimination (CERD),⁵³ the Committee on the Rights of Persons with Disabilities (CRPD),⁵⁴ the Committee on the Elimination of Discrimination against Women (CEDAW),⁵⁵ the Committee on the Rights of the Child (CRC),⁵⁶ as well as the Independent Expert on protection against Violence and Discrimination based on Sexual Orientation and Gender Identity,⁵⁷ and the Special Rapporteur on the Right to Health.⁵⁸ From UN Mechanisms to regional human rights courts, intersectionality has gained traction and has been 'increasingly embraced in their analysis of complex human rights violations'.⁵⁹

In the case of *Gonzales Lluy et al v. Ecuador*, the Inter-

American Court of Human Rights (IACtHR) used the concept of intersectionality to address the situation of a female minor living in poverty and with HIV.⁶⁰ The Court found that the minor experienced factors of vulnerability and discrimination associated with these various conditions and from the intersection of those factors. Importantly, the IACtHR noted that:

'The concept of intersectionality allowed the Court to develop the Inter-American Court's case law on the scope of the principle of non-discrimination, taking into account that, in this case, multiple discrimination occurred based on the composite nature of the causes of the discrimination'.⁶¹

Intersectionality was also used to assess a challenge brought against the constitutional validity of social security legislation before the South African Constitutional Court, which recognised intersectionality as 'a general theory of interpretation for the bill of rights under the Constitution'.⁶² The Court drew on intersectionality to assess the impact of the exclusion by the relevant provision on 'those who are most vulnerable or most in need', indicating the need to 'take cognisance of those who fall at

⁵¹ [The Combahee River Collective Statement](#).

⁵² Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies*, 1989, University of Chicago Legal Forum, Vol 1989(1).

⁵³ CERD, *General Recommendation N° 25. Gender Related Dimensions of Racial Discrimination*, A/55/18, annex V, 20 March 2000.

⁵⁴ CRPD, *General comment No. 6 on equality and non-discrimination*, 26 April 2018, CRPD/C/GC/6, para 19. See also CRPD, *General Comment No. 3 (2016) on women and girls with disabilities*, paras 4 (c) and 16.

⁵⁵ CEDAW, *General Recommendation N° 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/2010/47/GC.2, 19 October 2010, paras 18 and 26.

⁵⁶ CEDAW, *Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices*, CEDAW/C/GC/31-CRC/C/GC/18, 14 November 2014, para 15.

⁵⁷ *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, Victor Madrigal-Borloz, A/HRC/47/27, 3 June 2021.

⁵⁸ *Violence and its impact on the right to health - Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, A/HRC/50/28, 25 May 2022.

⁵⁹ Johanna Bond, *Intersectionality and Human Rights within Regional Human Rights Systems*, in *Global Intersectionality and Contemporary Human Rights*, July 2021, Oxford University Press; Shreya Atrey, *Intersectional Discrimination*, 2019, Oxford University Press; Monika Zalnieriute and Catherine Weiss, *Reconceptualizing Intersectionality in Judicial Interpretation: Moving Beyond Formalistic Accounts of Discrimination on Islamic Covering Prohibitions*, 21 November 2019, Berkeley Journal of Gender, Law and Justice, 2020, Vol 35(1).

⁶⁰ *Case of Gonzales Lluy et al v. Ecuador, Preliminary objections, merits, reparations, and costs, Judgement*, IACtHR, 1 September 2015, para 6.

⁶¹ *Ibid*, para 7.

⁶² *Mahlangu and Another v. Minister of Labour and Others, Judgment*, 2020, Constitutional Court of South Africa, cited in Shreya Atrey, *Beyond discrimination: Mahlangu and the use of intersectionality as a general theory of constitutional interpretation*, 12 May 2021, *International Journal of Discrimination and the Law*, Vol 21(2).

the intersection of compounded vulnerabilities due to intersecting oppression based on race, sex, gender, class and other grounds.⁶³ The Court noted that:

[U]sing the intersectionality framework as a legal tool, leads to more substantive protection of equality. Adopting intersectionality as an interpretative criterion enables courts to consider the social structures that shape the experience of marginalised people. It also reveals how individual experiences vary according to multiple combinations of privilege, power, and vulnerability as structural elements of discrimination. An intersectional approach is the kind of interpretative approach which will achieve “the progressive realisation of our transformative constitutionalism”.⁶⁴

The ICC must begin to similarly develop its jurisprudence to take account of multiple and intersecting forms of discrimination using intersectionality as a tool. As Gopalan notes, ‘Article 21(3) serves as a bridge between international criminal law (ICL) and IHRL in which intersectionality finds deeper roots, thus laying the important substantive and procedural groundwork to link an intersectional analysis to the application and interpretation of the law under the Rome Statute’.⁶⁵ An intersectional approach to assessing the compounded harms which are inherent to SGBC, rather than a single-axis approach that focuses on gender to the exclusion of other grounds, will be crucial to the effective adjudication of SGBC

cases at the Court.⁶⁶ Recognising the importance of an intersectional approach when assessing gravity in cases of gender persecution, for example, the ICC Office of the Prosecutor (OTP) pledges to take into account ‘whether there were multiple forms of persecution, the multi-faceted character of the act or acts, and the resulting suffering, harm and other impacts of such acts or crimes.’⁶⁷ The OTP notes that gender persecution ‘may, and frequently does, intersect with and constitute multiple forms of persecution based on political, racial, national, ethnic, cultural, religious or other grounds that are universally recognised as impermissible under international law’.⁶⁸

The Court has already seminally begun to utilise the term, but it has not yet been the subject of extensive judicial pronouncement. For example, in the *Al Hassan* decision on the confirmation of charges, the Pre-Trial Chamber (PTC) noted that the targeting of the citizens of Timbuktu was based on intersectional grounds of gender and colourism, noting that ‘violence against women could also have been motivated by considerations linked to skin colour, since women with dark skin were more affected by this violence than others; the same goes for dark-skinned men who, according to some witnesses, were [more] persecuted than those with light skin’.⁶⁹ The decision of the *Al Hassan* TC, expected before March 2024, will show whether intersectionality features in the analysis of the evidence.

⁶³ *Ibid*, para 65.

⁶⁴ *Ibid*, para 79.

⁶⁵ Priya Gopalan, *Intersectional Approaches to Investigating and Prosecuting International Crimes: Sexual and Gender-based Crimes*, in Carsten Stahn (ed), *The International Criminal Court in its Third Decade: Reflecting on Law and Practices*, 2024, Nijhoff Law Specials, Vol 109, Brill.

⁶⁶ Ana Martin Beringola, *Intersectionality and Sexual and Gender-Based Violence: Applicability and Benefits for International Criminal Law*, PHD Thesis, January 2022, p. 6. See also CRPD, *General Comment 6 on equality and non-discrimination*, at para 19, ‘Discrimination can be based on a single characteristic, such as disability or gender, or on multiple and/or intersecting characteristics’.

⁶⁷ ICC OTP, *Policy on the Crime of Gender Persecution*, 7 December 2022, para 67.

⁶⁸ *Ibid*, para 55.

⁶⁹ Unofficial translation from French. *Le Procureur c. Al Hassan AG Abdoul Aziz AG Mohamed AG Mahmoud*, *Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18-461-Corr-Red, 13 November 2019, para 702, ‘La Chambre note enfin que les violences faites aux femmes ont pu être également motivées par des considérations liées à la couleur de peau, les femmes à la peau foncée étant plus touchées par ces violences que les autres ; il en va de même pour les hommes à la peau foncée qui, selon certains témoins, étaient plus persécutés que ceux à la peau claire.’

2.2.2 Intersectional analysis from the admissibility phase

In accordance with Article 21(3) of the Statute, ICC Chambers should implement an intersectional analysis from the earliest stage of the proceedings and in relation to admissibility and complementarity.

The approach to admissibility challenges in the *Al-Senussi* and *Al Hassan* cases provide useful contrasting examples. In the *Al-Senussi* case, the PTC issued a warrant of arrest against the accused for the crimes against humanity of murder and persecution.⁷⁰ Libya brought a challenge to the admissibility of the case, claiming that its judicial system was already actively investigating it and that the evidence demonstrated that it was both willing and able to do so.⁷¹ Libya anticipated that the charges against Al-Senussi would include, inter alia, incitement to rape and asserted that, in preparation for the trial, a courtroom complex would be renovated to ensure 'the proper administration of justice in accordance with minimum international standards' and it had 'taken various steps to ensure the safety and security of witnesses'.⁷²

In determining whether the case was inadmissible, the Chamber applied the two-step test set out under Article 17(1)(a) of the Statute, namely, (i) whether there is an ongoing investigation or prosecution of the case at the national level; and (ii) if so, whether the State is unwilling or unable genuinely to carry out such investigation or prosecution.⁷³ The Chamber found that both limbs of the test were satisfied and

that the case was therefore inadmissible.⁷⁴ However, in assessing whether Libya was genuinely able to investigate or prosecute pursuant to Article 17(3), the Chamber expressed concern about the lack of appropriate witness protection programs in the context of Libya's precarious security situation. It nevertheless concluded that overall, in the circumstances of the case and contrary to its finding in the *Gaddafi* case,⁷⁵ this factor did not result in Libya's inability genuinely to carry out its proceedings.⁷⁶ It reasoned that Libya had already collected a considerable amount of evidence as part of its investigation against Al-Senussi, that there was no indication the collection of such evidence had or would cease, and that the proceedings had progressed to the accusation phase despite the security challenges.⁷⁷

The *Al-Senussi* case is the only case to date found to be inadmissible before the ICC. The Chamber's assessment as to whether Libya satisfied the criteria for exercising jurisdiction in the domestic proceedings did not include a gender and intersectional analysis to determine whether any barriers existed relating to genuine proceedings covering allegations of SGBC. The following could have been considered: whether Libya's criminal law framework adequately criminalized SGBC; whether sufficient steps had been taken in the investigation and prosecution of SGBC; whether its courtroom infrastructure was suitable to provide adequate protection and support

⁷⁰ Situation in the Libyan Arab Jamahiriya, *Warrant of Arrest for Abdullah Al-Senussi*, ICC-01/11-01/11-4, 30 June 2011.

⁷¹ The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, *Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute*, ICC-01/11-01/11-307-Red2, 2 April 2013.

⁷² The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, *Decision on the admissibility of the case against Abdullah Al Senussi*, ICC-01/11-01/11-466-Red, 11 October 2013, paras 12-19.

⁷³ *Ibid.*, paras 24-27.

⁷⁴ *Ibid.*, paras 293, 309-311.

⁷⁵ The Prosecutor v. Saif Al-Islam Gaddafi, *Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute'*, ICC-01/11-01/11-662, 5 April 2019.

⁷⁶ The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, *Decision on the admissibility of the case against Abdullah Al Senussi*, ICC-01/11-01/11-466-Red, 11 October 2013, para 308.

⁷⁷ *Ibid.*, paras 297-303.

for SGBC victims; whether procedural rules limited access to justice for victims of such crimes; and how the lack of appropriate witness protection may have disproportionately impacted victims of SGBC, including the ability to secure their testimony.⁷⁸

By contrast, the PTC in the *Al Hassan* case considered the discriminatory motive on the intersecting grounds of religion and gender in ruling on a defence challenge to the admissibility of the case.⁷⁹ The Chamber issued a warrant of arrest against Al Hassan on 27 March 2018. The prosecution filed an amended and corrected version of its Document Containing the Charges (DCC) against Al Hassan on 8 May 2019, charging Al Hassan with, inter alia, the war crimes of rape and sexual slavery, forced marriage as an other inhumane act, and persecution on gender grounds

as a crime against humanity.⁸⁰ The defence challenged the admissibility of the case on the ground that it was not of sufficient gravity pursuant to Article 17(1)(d) of the Statute.⁸¹ The Chamber dismissed the defence's challenge.⁸² In finding that the case was of sufficient gravity, the Chamber took into consideration the repercussions of the alleged crimes on the direct victims as well as the population of Timbuktu as a whole, especially the victims of rape, sexual slavery, and forced marriage, and took note of the discriminatory motives behind the alleged crimes 'on religious and/or gender-based grounds, and the vulnerability of certain victims'.⁸³ A consideration of the discrimination based on religious and gender grounds is also present in a redacted version of the PTC's decision on amended charges, issued on 8 May 2020, and discussed at more length in chapter 4 below.

⁷⁸ Indicators drawn from the OTP Policy Paper on SGBC, June 2014, para 41.

⁷⁹ The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (The Prosecutor v. Al Hassan), *Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18-2-tENG, 27 March 2018, reclassified as public on 31 March 2018.

⁸⁰ The Prosecutor v. Al Hassan, ICC-01/12-01/18-335-Conf, 8 May 2019; ICC-01/12-01/18-335-Conf-Corr, amended version submitted 11 May 2019; ICC-01/12-01/18-335-Corr-Red, public redacted version submitted on 2 July 2019; *Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18-461-Corr-Red, 13 November 2019.

⁸¹ The Prosecutor v. Al Hassan, Submissions for the confirmation of charges, ICC-01/12-01/18-394-Conf, 4 June 2019; *Public redacted version of "Submissions for the confirmation of charges"*, ICC-01/12-01/18-394-Red, 9 July 2019, paras 256-258. See also The Prosecutor v. Al Hassan, *Decision on the Admissibility Challenge raised by the Defence for Insufficient Gravity of the Case*, ICC-01/12-01/18-459-tENG, 27 September 2019, para 17.

⁸² *Ibid.*, para 58.

⁸³ *Ibid.*, paras 57-58.

2.2.3 A victim-sensitive approach

Article 21(3)'s grounding in IHRL, coupled with the ICC's victim rights regime set out in Articles 68 and 75 of the Statute, implies that the Court should adopt a victim-sensitive approach and consider appropriate measures for the protection of victims and witnesses and their participation in proceedings, in particular 'where the crime involves sexual or gender violence or violence against children'.⁸⁴

Victim participation in proceedings can potentially strengthen the work of the Court as victims provide important factual and contextual information regarding the crimes, the situation, and the broader societal impact. For many years, ambiguity concerning victims' procedural rights, which the Chambers decided on a case-by-case basis, and often in a very limited way, particularly in the ICC's early years, created uncertainty for the effective exercise of victim rights before the Court.⁸⁵

In the delivery of the *Ongwen* judgment on 4 February 2021, Judge Schmitt, Presiding Judge of TC IX, read out a summary of the judgment and noted that 'victims have a right not to be forgotten [and] to be mentioned explicitly'.⁸⁶ The Judge took the time to provide detailed descriptions of some of the crimes committed and read out the names of some of the victims, as far as they were known to the Court. This served as a powerful acknowledgement of

the harm suffered by the mentioned victims and the many others from the atrocities committed by Ongwen and the Lord's Resistance Army.⁸⁷

A victim-sensitive approach should, however, go beyond mere acknowledgment of harm. Rule 86 of the RPE provides that 'the needs of all victims and witnesses' shall be taken into account 'in any direction or order' of the Chambers.⁸⁸ As such, the recognition by the *Ntaganda* TC reiterating the importance of adopting a 'victim-centred' approach to reparations was both important and timely.⁸⁹ The Chamber noted that a 'victim-centred' approach 'accords due consideration to the victims, properly involving them in the criminal justice process, so that their rights to truth, justice, and reparations are respected and enforced'.⁹⁰ The Chamber stressed the importance of victim involvement in the reparations process at all stages of the proceedings, 'allowing them to gain a sense of ownership and recognising their active contribution to the process', 'giving them a voice in the design and implementation of reparations programmes and allowing them to shape the reparation measures according to their needs'.⁹¹ In several dissenting and separate opinions, Judge Ibanez has consistently stressed the centrality of victims to the ICC and RS system and the importance of recognising their rights to the truth, to access justice, and to an effective remedy.⁹² In her dissenting

⁸⁴ Article 68(1) RS.

⁸⁵ FIDH, *Victims at the center of justice. From 1998 to 2018: Reflections on the Promises and the Reality of Victim Participation at the ICC*, December 2018, p 10.

⁸⁶ ICC, *Ongwen case: summary of the verdict*, 4 February 2021.

⁸⁷ FIDH, *Whose Court is it?* Judicial handbook on victims' rights at the International Criminal Court, April 2021, p 17

⁸⁸ Rule 86 RPE.

⁸⁹ *The Prosecutor v. Bosco Ntaganda, Reparations Order*, ICC-01/04-02/06-2659, 8 March 2021, para 46.

⁹⁰ *Ibid.*, para 45.

⁹¹ *Ibid.*

⁹² *Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza to the 'Decision on the Registry's transmission of applications for victim participation in the proceedings', whereby the majority declined to consider the applications*, ICC-02/11-01/15-1319-Anx, 25 March 2020; *Situation in the Islamic Republic of Afghanistan, Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza to the Majority's decision dismissing as inadmissible the victims' appeals against the decision rejecting the authorisation of an investigation into the situation in Afghanistan*, ICC-02/17-137-Anx-Corr, 10 March 2020; *The Prosecutor v. Thomas Lubanga Dyilo, Separate Opinion of Judge Luz del Carmen Ibanez Carranza*, ICC-01/04-01/06-3466-AnxII, 16 September 2019.

opinion against the majority's decision issuing an oral ruling denying victims legal standing in the Afghanistan situation appeal, Judge Ibanez noted that 'the Statute is centred on the victims and many of the provisions under its statutory framework state

that they have a central role, in particular, at the initial article 15 stage'.⁹³ Thus, a ruling denying victims their right to be heard before the AC was, in Judge Ibanez's view, not a 'minor issue' and should have been delivered as a fully reasoned, written decision.⁹⁴

2.2.4 Assessing witness credibility

To arrive at a determination of the truth, Judges are required to assess the credibility and reliability of witness testimony and determine the weight it should be given in the complete evidentiary record. This is particularly difficult in SGBC cases due to various factors which may impact witness testimony, such as trauma, concerns of stigmatisation, fear and shame, language, and other cultural barriers. These factors may 'stand in the way of a witness's ability to appear credible and to provide reliable information or hamper the judges' capacity of accurate assessment'.⁹⁵

The ICTR *Akayesu* trial judgment made a lasting contribution to the criteria for determining witness competence and helped establish specific factors for their application in international crimes cases.⁹⁶ The *Akayesu* TC indicated that 'trauma and stress disorders, time lapse, [and the] continuous nature of events' should all be taken into account

'when assessing shortcomings in the quality of testimonies (e.g. inconsistencies or lack of detail)'.⁹⁷ In practice, this means that some deficiencies in testimony could be 'explained away' and give Judges more flexibility in this assessment.⁹⁸

ICC Chambers have generally been mindful of the particular challenges faced by witnesses which could contribute to deficiencies in their testimony. For example, in the *Ntaganda* case, the TC ruled that delayed reporting of rape was an understandable consequence of victims' alleged experience given factors such as 'cultural or communal stigmatisation, shame and fear, as well as the general lack of trust in authorities' which contributed to witnesses' difficulties in coming forward, especially in a conflict or post-conflict area like Ituri.⁹⁹ The Chamber found that late reporting 'does not, as such, affect the relevant witness's general credibility'.¹⁰⁰

⁹³ Situation in the Islamic Republic of Afghanistan, *Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza to the majority's oral ruling of 5 December 2019 denying victims' standing to appeal (Preliminary reasons)*, ICC-02/17-133, 5 December 2019, para 2.

⁹⁴ *Ibid.*

⁹⁵ Gabriele Chlevickaite, Barbora Hola and Catrien Bijleveld, *Judicial Witness Assessments at the ICTY, ICTR and ICC: Is there 'Standard Practice' in International Criminal Justice?*, 2020, *Journal of International Criminal Justice*, Vol 18, p 191.

⁹⁶ *Ibid.*, p 193.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ The Prosecutor v. Bosco Ntaganda, *Judgment*, ICC-01/04-02/06-2359, 8 July 2019, para 88.

¹⁰⁰ *Ibid.*

2.3 Procedural safeguards in SGBC cases

The normative framework of the ICC provides important procedural guidelines for the support and protection of victims and witnesses. The Court has an overarching responsibility ‘to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses’, taking into account all relevant factors including age, gender, health, and the nature of the crime, in particular sexual or gender-based crimes.¹⁰¹ This includes appropriate protective measures in the course of a trial, allowing, for instance, the presentation of evidence by electronic or other special means¹⁰² and controlling the manner of questioning of a witness or victim so as to avoid any harassment or intimidation,¹⁰³ in particular in the case of a victim of sexual violence or a child.¹⁰⁴

Special provisions concerning how evidence is to be elicited in cases involving crimes of sexual violence feature in the RPE. For example, Rules 70 (‘Principles of Evidence in Cases of Sexual Violence’), 71 (‘Evidence of Other Sexual Conduct’), and 72 (‘In Camera Procedure to Consider Relevance or Admissibility of Evidence’) of the RPE stipulate, among others, that questioning with regard to the victim’s prior or subsequent sexual conduct or the victim’s consent is restricted.¹⁰⁵ Rule 63(4) of the RPE further states that corroboration is not a legal requirement to prove any crime falling within the jurisdiction of the Court and, in particular, crimes of sexual violence.¹⁰⁶ Rules 81 and 82 on restrictions to disclosure provide

the procedural complement to Article 54(1)(b) of the Statute requiring the Prosecutor to ‘respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in Article 7(3), and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children’ when taking appropriate measures in the investigation and prosecution of crimes.¹⁰⁷ The RPE also provide for the inclusion of legal representatives on the ICC’s List of Legal Counsel with expertise on SGBC,¹⁰⁸ and that the Registrar shall take ‘gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings’.¹⁰⁹

Special measures for victims and witnesses were considered by ICC Judges in the *Katanga* case, where the PTC appropriately authorized the Prosecutor to redact identifying information of three alleged sexual violence victims even though they were not connected to the charges, citing Article 68(1) of the Statute.¹¹⁰ In the *Lubanga* case, the TC addressed the application of Rule 86, recognizing that victims of SGBC have special needs that must be taken into account, that the Chamber may order special measures to facilitate their testimony, and that anonymity may be necessary for particularly vulnerable victims.¹¹¹ The standards applicable to assessing evidence of sexual violence were considered in Ongwen,

¹⁰¹ Article 68(1) RS.

¹⁰² Article 68(2) RS.

¹⁰³ Rule 88(5) RPE.

¹⁰⁴ Article 68(2) and Rule 88(5) RPE.

¹⁰⁵ Rules 70-72 RPE.

¹⁰⁶ Rule 63(4) RPE.

¹⁰⁷ Rules 81-82 RPE and Article 54(1)(b) RS.

¹⁰⁸ Rule 90(4) RPE.

¹⁰⁹ Rule 16(1)(d) RPE.

¹¹⁰ *The Prosecutor v. Germain Katanga*, Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9, ICC-01/04-01/07-123-Conf-Exp, 21 December 2007; ICC-01/05-01/07-124-Conf, 21 December 2007, confidential redacted version; ICC-01/05-01/07-160, 23 January 2008, public redacted version.

¹¹¹ *The Prosecutor v. Thomas Lubanga Dyilo*, [Decision on victims’ participation](#), ICC-01/04-01/06-1119, 18 January 2008.

where the TC appropriately assessed evidence of enslavement, sexual violence, and other suffering.¹¹² SGBC victims taking into consideration their prolonged

2.4 Requirements for ICC Judges and representation

As a recognition of the critical role of Judges as the ultimate guardians of ensuring fair trials and upholding the principles of the Court, including on the interpretation of the crimes and their elements, the rules and practices of the Court, and procedural safeguards for victims and witnesses, the RS establishes high qualifications to be met by judicial candidates. Judges must meet the requirement of 'high moral character, impartiality and integrity',¹¹³ have 'established competence' either in criminal law and procedure or in relevant areas of international law,¹¹⁴ and have 'excellent knowledge of and be fluent in at least one of the working languages of the Court'.¹¹⁵ A further requirement of the Statute is for States Parties to take into account three types of representation in the selection of Judges: (i) of the 'principal legal systems of the world'; (ii) 'equitable geographical representation'; and (iii) a 'fair representation of female and male judges'.¹¹⁶ In addition, 'legal expertise on specific issues, including, but not limited to, violence against women or children' should also be taken into account.¹¹⁷ Part of the elections process for Judges includes

minimum voting requirements (MVRs), set to minimise the risk of negatively affecting gender and geographical representation, as well as the level of expertise across the bench. Following the MVRs, States are required to vote for at least five women candidates, one candidate from the African Group of States, one candidate from the Asia-Pacific Group of States, one candidate from the Latin American and Caribbean Group of States (GRULAC); one candidate from 'List A' (candidates with competence and experience in criminal law and one candidate from 'List A' (candidates with competence and experience in criminal law and criminal proceedings); and one candidate from 'List B' (candidates with expertise in the field of international law and extensive experience in a professional capacity).¹¹⁸

Having examined the relevant legal framework for the adjudication of SGBC, the following chapter will analyse how SGBC have been interpreted by the judiciary of the Court.

¹¹² The Prosecutor v. Dominic Ongwen, *Amici Curiae Observations on Duress and the Standards Applicable to Assessing Evidence of Sexual Violence*, ICC-02/04-01/15-1932, 22 December 2021. ¹¹³ Article 36(3)(a) RS.

¹¹⁴ Article 36(3)(b) RS.

¹¹⁵ Article 36(3)(c) RS.

¹¹⁶ Article 36(8) RS. Please note that while the Rome Statute specifically refers to 'female and male', we encourage the readers of this report to use such terms when the discussion refers solely to biological sex. When referring to humans where both biology and culture are concerned, the terms 'women' and 'men' are preferred. *Female and Male*, Gendered Innovations, Stanford University. For more guidance on gender sensitive communication, see also European Institute for Gender Equality *Toolkit on Gender-sensitive Communication: A resource for policymakers, legislators, media and anyone else with an interest in making their communication more inclusive*, 2019.

¹¹⁷ Article 36(8) RS.

¹¹⁸ ASP, Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court (ICC-ASP/3/Res.6)1 - Consolidated version.

ADJUDICATING SGBC: ANALYSIS OF SPECIFIC CRIMES

03

Chapter 3 - Adjudicating SGBC: analysis of specific crimes

At the time of writing, SGBC charges have been brought in 9 of the 11 situations under investigation by the ICC, specifically Uganda, the DRC, the Central African Republic (CAR) I, CAR II, Darfur, Kenya, Côte d'Ivoire, Mali, and Libya, and in 17 of the 27 ICC cases. To date, final convictions (affirmed on appeal) for SGBC charges have only been recorded in two cases: *Ntaganda* (DRC) and *Ongwen* (Uganda). Despite being convicted for murder and pillaging as war crimes in respect of the same incident, the TC acquitted Katanga of all sexual violence charges. Bemba was convicted of sexual crimes but his conviction was subsequently overturned by the AC, in a controversial decision which is discussed in more detail in the next chapter.

The inclusion of extensive SGBC charges and a more nuanced and gender-competent prosecutorial approach to the *Ntaganda* and *Ongwen* cases represent a major pivot in the ICC's approach to SGBC and have significantly contributed to landmark convictions for SGBC. As Thuy Seelinger notes, 'despite a conservative start, we have in recent years seen more expansive charging of SGBCs by the OTP, drawing from across Articles 7(1) and 8(2) of the Rome Statute in acknowledgment that

conflict-related sexual violence manifests in multiple ways, far beyond rape alone'.¹ Increased SGBC charges by the OTP have created opportunities for expansive jurisprudential developments as cases are prosecuted and adjudicated. For an analysis of the OTP's work towards accountability for SGBC, please consult the FIDH and WIGJ joint 2021 report.²

This chapter reviews noteworthy jurisprudential developments on specific crimes of sexual and gender-based violence (SGBV) before the Court and assesses how the judicial interpretation of these crimes has shaped the ICC's evolving jurisprudence. The crimes discussed in this chapter are rape, sexual slavery, forced pregnancy, the conduct of forced marriage as an 'other inhumane act', other forms of sexual violence, and persecution on grounds of gender. It is important to note at the outset that the crimes of enforced prostitution and enforced sterilization, though specifically mentioned in the RS, have not yet been charged at the ICC. Equally important to mention is that forced marriage is not a stand-alone crime in the RS but has been charged and adjudicated upon as a conduct under the crime against humanity of other inhumane acts.

3.1 Rape

For most of the ICC's existence, SGBC charges have focused primarily on rape and sexual slavery as both war crimes and crimes against humanity, with the occasional inclusion of charges like 'outrages upon personal dignity' as a war crime and 'other inhumane acts' as a

crime against humanity.³ Rape is codified as both a crime against humanity and war crime in the RS and can constitute genocidal conduct causing mental or bodily harm.⁴ The recognition of rape as an international crime was 'anchored by its listing in the

¹ Kim Thuy Seelinger, *Sexual and Gender-Based Crimes*, Völkerrechtsblog, 15 July 2022.

² FIDH and WIGJ, *Accountability for Sexual and Gender-Based Crimes at the ICC: An Analysis of Prosecutor Bensouda's Legacy*, June 2021.

³ Kim Thuy Seelinger, *Sexual and Gender-Based Crimes*, Völkerrechtsblog, 15 July 2022.

⁴ Articles 7(1)(g) and 8(2)(b)(xxii) RS; Article 6(b), element 1, fn 3, EoC.

Statutes of international courts and tribunals and their modern judicial interpretation'.⁵ Unlike before the ad hoc tribunals, where the definitions of the crimes set out in their statutes were developed through their jurisprudence, the ICC EoC is the first supranational criminal law instrument to provide a comprehensive definition and context for the crimes contained in its Statute, including rape and other SGBC, specifying their constituent elements 'in minute detail'.⁶

While the Court's normative framework represents an advancement over the ad hoc tribunals, in practice, the outcome has been mixed. With the

only final convictions for rape (and other SGBC) being in the *Ongwen* and *Ntaganda* cases, the ICC's track record with respect to SGBC remains poor. Nevertheless, EoC judicial interpretations, even in cases resulting in an acquittal, have helped provide clarity and contextual understanding of the legal provisions and have advanced the jurisprudence on rape at the ICC. Conversely, judicial approaches to issues such as modes of liability and cumulative charging as they relate to SGBC charges in the first 15 years of the ICC's existence have signalled that there is still much work to be done at the Court.

⁵ Patricia Viseur Sellers, *The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation*, p 11.

⁶ Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence. The ICC and the Practice of the ICTY and the ICTR*, September 2005, School of Human Rights Research Series, Vol 20, Intersentia, p 19.

3.1.1 The elements of the crime of rape

The ICC's EoC have been instrumental in shaping the jurisprudential understanding of rape as an international crime, but their formulation has been significantly influenced by the jurisprudence of the ad hoc tribunals.

Article 7(1)(g)-1 EoC <i>Crime against humanity of rape</i>	Article 8(2)(b)(xxii)-1 EoC <i>War crime of rape (international armed conflicts)</i>	Article 8(2)(e)(vi)-1 EoC <i>War crime of rape (armed conflicts not of an international character)</i>
<ol style="list-style-type: none"> 1. The perpetrator invaded* the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. 2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.** 3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. 4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population. 	<ol style="list-style-type: none"> 1. The perpetrator invaded* the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. 2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.** 3. The conduct took place in the context of and was associated with an international armed conflict. 4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict. 	<ol style="list-style-type: none"> 1. The perpetrator invaded* the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. 2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.** 3. The conduct took place in the context of and was associated with an armed conflict not of an international character. 4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

*The concept of 'invasion' is intended to be broad enough to be gender-neutral.

**It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.

The EoC definition of rape combines 'conceptual' and 'mechanical' components,⁷ closely aligning with the decisions in the ICTR's *Akayesu* case and the ICTY's *Furundžija* case.⁸ The *Akayesu* case, the first in which an accused person was convicted of rape as a crime against humanity and of genocide as a predicate crime, was also the first to address the elements of rape as an international crime. The *Akayesu* case adopted a broader 'conceptual' approach to rape

⁵ Patricia Viseur Sellers, *The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation*, p 11.

⁶ Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence. The ICC and the Practice of the ICTY and the ICTR*, September 2005, School of Human Rights Research Series, Vol 20, Intersentia, p 19.

⁷ The mechanical approach to defining rape focuses primarily on the physical act itself, without due consideration for the broader circumstances surrounding the act. This means that the act is defined by the specific physical actions that constitute rape, with a strong focus on penetration. The conceptual approach broadens the definition of rape beyond the physical act. It takes into consideration the surrounding circumstances, such as coercion, abuse of power, and the inability of a victim to give genuine consent. This view looks at rape as an act of power, domination, and violation of personal autonomy, as opposed to merely focusing on the sexual act.

⁸ Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence. The ICC and the Practice of the ICTY and the ICTR*, September 2005, School of Human Rights Research Series, Vol 20, Intersentia, p 114.

where the elements of the crime were not limited to ‘a mechanical description’ of objects or body parts.⁹ By contrast, the *Furundžija* definition focused more on the mechanical aspects of rape (what one body part of the perpetrator does to the body part of the victim), but also expanded the elements of rape to include oral and anal penetration.¹⁰

De Brouwer argues that instead of making a clear choice between *Akayesu*, *Furundžija*, or any other approach to the definition of rape at that time, the ICC adopted a definition which is ‘confusing’ at first sight, and on some issues appears to favour the more restrictive *Furundžija* approach.¹¹ Some

of the ‘confusion’, for example, in relation to the use of the term invasion or penetration, appears to have been based on a compromise among delegates in Rome and influential states who feared the impact on their national laws.¹² Despite this apparent confused merging of the two approaches, the codification of a definition in the EoC provides a clearer and more consistent standard, avoiding some of the ambiguities and varied interpretations that arose from the case-based approach of the ad hoc tribunals. Judicial interpretation of the elements will ultimately be the main determinant of whether the ICC adopts a narrow or progressive approach to the elements of rape as an international crime.

3.1.2 Interpreting ‘invasion’ and ‘penetration’

The *Akayesu* TC utilised a broad definition of rape, which it defined as ‘a physical invasion of a sexual nature, committed on a person under circumstances which are coercive’.¹³ The Chamber also affirmed that acts amounting to rape are ‘not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact’.¹⁴ Conversely, the *Furundžija* TC required an act to result in penetration for it to amount to rape by defining rape as ‘sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used

by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator’ when conducted ‘by coercion or force or threat of force’¹⁵. On this issue, the ICC EoC appears to have adopted the *Furundžija* approach by providing that the ‘invasion’ must result in penetration.¹⁶ However, the EoC goes further by not limiting vaginal or anal penetration of the victim only to penile penetration or penetration with an object, but includes penetration by any other body part (such as a finger or tongue, for example).

This requirement has been confirmed by the *Katanga*

⁹ The Prosecutor versus Jean-Paul Akayesu, *Judgement*, ICTR-96-4-T, 2 September 1998, paras 596-598.

¹⁰ Prosecutor v. Anto Furundžija, *Judgement*, IT-95-17/1-T, 10 December 1998, para 185.

¹¹ Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence. The ICC and the Practice of the ICTY and the ICTR*, September 2005, School of Human Rights Research Series, Vol 20, Intersentia, p 114.

¹² *Ibid*

¹³ The Prosecutor versus Jean-Paul Akayesu, *Judgement*, ICTR-96-4-T, 2 September 1998, paras 596-598, 686–688.

¹⁴ *Ibid*, para 688..

¹⁵ Prosecutor v. Anto Furundžija, *Judgement*, IT-95-17/1-T, 10 December 1998, para 185.

¹⁶ The elements of rape in *Furundžija* are ‘(i) the sexual penetration, however slight (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person’. Prosecutor v. Anto Furundžija, *Judgement*, IT-95-17/1-T, 10 December 1998, para 185.

TC, which noted that the first constituent element of rape is established where ‘the perpetrator invaded the body of a person by conduct *resulting in penetration*, even where the perpetrator does not engage in the act of penetration’ (emphasis added).¹⁷ The Chamber found that ‘irrespective of

the situation, [the bodily invasion] *must comprise penetration*, however slight, of any part of the body with a sexual organ, or penetration of the anal or genital opening with any object or any other part of the body’ (emphasis added).¹⁸

3.1.3 Consent, coercion or coercive circumstances

The EoC’s approach to the issues of consent, coercive circumstances, and use of force has also amalgamated the diverse positions at the ad hoc tribunals. The *Katanga* TC has made it clear that the victim’s lack of consent need not be proven in relation to a charge of rape since the EoC does not refer to this, save in the very specific situation where a person whose ‘incapacity’ was ‘tak[en] advantage of’.¹⁹ The EoC adopts the *Akayesu* approach (any act of penetration taking advantage of a coercive environment) and that of *Furundžija* (any act of invasion committed under threat of force or of coercion) in determining the conditions required for an act of penetration/invasion to be criminal. The *Katanga* Chamber found that the ‘establishment of at least one of the coercive circumstances or conditions set out in the second element is sufficient alone for penetration to amount to rape within the meaning of articles 7(1)(g) and 8(2)(e)(vi) of the Statute’.²⁰

Coercive circumstances need not be evidenced by show of physical force.²¹ Threats, intimidation, extortion, and other forms of duress which prey on fear or desperation may constitute coercion and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of hostile forces amongst the civilian population.²²

In *Ntaganda*, the Chamber highlighted that genuine consent cannot be obtained when one of the parties involved is in a position of power, invoking the broader conceptual understanding of rape beyond the mere act.²³ In *Ongwen*, the Chamber emphasized the importance of contextual circumstances like coercion, and how taking advantage of a coercive environment (e.g., abduction and detention in camps) can eliminate the possibility of genuine consent.²⁴ This further reinforced the conceptual definition of rape.

¹⁷ The Prosecutor v. Germain Katanga, *Judgment pursuant to article 74 of the Statute*, ICC-01/04-01/07, 7 March 2014, para 963.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, paras 964-965.

²⁰ *Ibid.*

²¹ *Ibid.*, para 966.

²² *Ibid.*, para 970.

²³ The Prosecutor v. Bosco Ntaganda, *Judgment*, ICC-01/04-02/06-2359, 8 July 2019, para 935. The ICTR TC in *Musema* concurred with the conceptual approach set forth in *Akayesu* recognising that ‘the essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion’ and that ‘the distinction between rape and other forms of sexual violence drawn by the *Akayesu* Judgement [...] is “a physical invasion of a sexual nature” as contrasted with “any act of a sexual nature” which is committed on a person under circumstances which are coercive is clear and establishes a framework for judicial consideration of individual incidents of sexual violence and a determination, on a case by case basis, of whether such incidents constitute rape’; The Prosecutor versus Alfred Musema, *Judgement and Sentence*, ICTR-96-13-T, 27 January 2000, paras 226-227. However, the ICTY TC in *Kunarac et al.* added the component of consent to an otherwise mechanical definition: ‘the Trial Chamber understands that the actus reus of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim’; Prosecutor v. Kunarac et al, *Judgement*, IT-96-23-T, 22 February 2001, para 460. See further Case Matrix Network, *Legal Requirements: Sexual and Gender-Based Violence Crimes*, June 2017, International Criminal Law Guidelines, ICJ Toolkits.

²⁴ The Prosecutor v. Dominic Ongwen, *Trial Judgment*, ICC-02/04-01/15-1762-Red, 4 February 2021, para 2710.

3.1.4 Rape as a gender-neutral crime

The *Bemba* case has significantly advanced the Court's jurisprudence in regards to the prosecution of SGBC involving the rape of men.²⁵ The Chamber underlined that the definition of rape under the RS is gender-neutral, and thus includes both men and women perpetrators and victims.²⁶ It also reiterated that the penetration of the anal or genital opening of the victims with any object or part of the body amounted to rape and that oral penetration is as humiliating and traumatic as vaginal or anal penetration.²⁷ Rape of men also featured in the *Ntaganda* case in which the Chamber found that the fact that soldiers penetrated the anal orifices of certain captured men with their penises or by using bits of wood fulfilled the

material element of rape as a crime against humanity and a war crime.²⁸ The rape of men also arose in the circumstances surrounding the Ongwen case, with reports of men forced to have sex with other men, including with objects, or to rape women in the presence of their husbands or family members.²⁹ However, the prosecution did not charge any acts of sexual violence against men and boys in that case. During the trial, the Legal Representatives of Victims (LRV) applied to the Chamber to include evidence of SGBC against men and boys, but this was refused on grounds that the evidence exceeded the scope of the confirmed charges.³⁰

3.1.5 Rape and sexual violence intra-party

The *Ntaganda* case has been trailblazing in multiple respects, not least of which is the AC decision confirming the conviction for rape and sexual slavery committed by Ntaganda's troops intra-party, that is, against members of their own armed group. Judges heard evidence regarding a pattern of daily sexual violence perpetrated by Claude Uzauakiliho, Ntaganda's chief escort, and also found that Ntaganda himself was

among the commanders who inflicted rape on his own female bodyguards.³¹ The defence argued that the alleged conduct did not constitute a war crime because the victims and perpetrators belonged to the same armed group, that war crimes must involve a violation of international humanitarian law (IHL), and IHL does not generally regulate the conduct of combatants toward other combatants in the same armed group.³²

²⁵ Natacha Bracq, *Sexual and Gender-Based Violence: What Legacy for the New ICC Prosecutor*, in Takeh B.K. Sendze, Adesola Adeboyejo, Howard Morrison and Sophia Ugwu (eds), *Contemporary International Criminal Law Issues: Contributions in Pursuit of Accountability for Africa and the World*, 2023, TMC Asser Press, p 340; Bridget Mannix, *A quest for justice: Investigating sexual and gender-based violence at the international criminal court*, January 2014, James Cook University Law Review, Vol 21, p 22.

²⁶ The Prosecutor v Jean-Pierre Bemba Gombo, *Judgment pursuant to Article 74 of the Statute*, ICC-01/05-01/08-3343, 21 March 2016, paras 99-100.

²⁷ *Ibid.*, paras 99-101.

²⁸ The Prosecutor v. Bosco Ntaganda, *Judgment*, ICC-01/04-02/06-2359, 8 July 2019, paras 623, 940-942.

²⁹ Kennedy Amone-P'Olak et al, *Sexual violence and general functioning among formerly abducted girls in Northern Uganda: the mediating roles of stigma and community relations — the WAYS study*, 22 January 2016, BMC Public Health, p 2.

³⁰ *Ibid.* See also The Prosecutor v. Dominic Ongwen, *Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests*, ICC-02/04-01/15-1199-Red, 6 March 2018, para 57.

³¹ The Prosecutor v. Bosco Ntaganda, *Judgment*, ICC-01/04-02/06-2359, 8 July 2019, para 407.

³² The Prosecutor v. Bosco Ntaganda, *Conclusions écrites de la Défense de Bosco Ntaganda suite à l'Audience de confirmation des charges*, ICC-01/04-02/06-292-Red2, 14 April 2014, PTC; *Consolidated submissions challenging jurisdiction of the Court in respect of Counts 6 and 9 of the Updated Document containing the charges*, ICC-01/04-02/06-1256, 7 April 2016, TC; *Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Document containing the charges*, ICC-01/04-02/06-804, 1 September 2015, AC.

The TC first concluded that such question of substantive law does not need to be addressed before the charged crimes are proven by the prosecution,³³ but upon appeal by the defence of this decision,³⁴ and finding of the AC that ‘the question of whether there are restrictions on the categories of persons who may be victims of the war crimes of rape and sexual slavery is an essential legal issue which is jurisdictional in nature’ and needs to be clarified by the TC,³⁵ the TC rejected the defence challenge, finding that ‘members of the same armed force are not per se excluded as potential victims of the war crimes of rape and sexual

slavery as listed in Article 8(2)(b)(xxii) and (e)(vi)’.³⁶ Following another appeal by the defence and a closer examination of the issue by the AC, it found that it is ‘persuaded that international humanitarian law does not contain a general rule that categorically excludes members of an armed group from protection against crimes committed by members of the same armed group’ and observed that ‘prohibitions of rape and sexual slavery in armed conflict are without a doubt well established under international humanitarian law’ thus rendering additional arguments by the defence moot and rejecting the appeal.³⁷

³³ The Prosecutor v. Bosco Ntaganda, *Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9*, 9 October 2015, ICC-01/04-02/06-892, para 28.

³⁴ The Prosecutor v. Bosco Ntaganda, *Appeal on behalf of Mr Ntaganda against Trial Chamber VI’s ‘Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9’*, ICC-01/04-02/06-892, 19 October 2015.

³⁵ The Prosecutor v. Bosco Ntaganda, *Judgment on the appeal of Mr Bosco Ntaganda against the ‘Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9’*, ICC-01/04-02/06-1225, 22 March 2016, para 40.

³⁶ The Prosecutor v. Bosco Ntaganda, *Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9*, ICC-01/04-02/06-1708, 4 January 2017, para 54.

³⁷ The Prosecutor v. Bosco Ntaganda, *Judgment on the appeal of Mr Ntaganda against the “Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9”*, ICC-01/04-02/06-1962, 15 June 2017, paras 63-64.

3.2 Sexual slavery

The concept and definition of slavery originated in the 1926 Convention to Suppress the Slave Trade and Slavery (Slavery Convention), which defines slavery under international law.³⁸ The Rome Statute enumerates sexual slavery as a crime against humanity³⁹ and as a war crime in both international and non-international armed conflicts,⁴⁰ and also proscribes the crime of enslavement as a crime against humanity.⁴¹

Article 7(1)(g)-2 EoC <i>Crime against humanity of sexual slavery*</i>	Article 8(2)(b)(xxii)-2 EoC <i>War crime of sexual slavery* (international armed conflicts)</i>	Article 8(2)(e)(vi)-2 EoC <i>War crime of sexual slavery* (non international armed conflicts)</i>
<ol style="list-style-type: none"> 1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.** 2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature. 3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. 4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population. 	<ol style="list-style-type: none"> 1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.** 2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature. 3. The conduct took place in the context of and was associated with an international armed conflict. 4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict. 	<ol style="list-style-type: none"> 1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.** 2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature. 3. The conduct took place in the context of and was associated with an armed conflict not of an international character. 4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

* Given the complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as a part of a common criminal purpose.

** It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

At the core of the crime of sexual slavery is the control or limitation of the victim's sexual autonomy, freedom of movement, and power to decide on matters relating to one's sexual activity.⁴² Legal experts note that acts of a sexual nature and sexualized violence are, and always have been, integral to slavery in all its forms under customary international law, and any interpretation of the provisions of sexual slavery under the RS require full recognition that the breadth of the crime of enslavement includes 'control over a person's sexuality, sexual integrity,

³⁸ Article 1(1) of the Convention defines slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised', *Slavery Convention*, 25 September 1926.

³⁹ Article 7(1)(g) RS.

⁴⁰ Articles 8(2)(b)(xxii) and 8(2)(e)(vi) RS.

⁴¹ Article 7(1)(c) RS.

⁴² Dianne Luping, *Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court*, 2009, American University Journal of Gender, Social Policy & the Law, Vol 17(2), p 44.

and sexual and reproductive autonomy as indicia central to this crime'.⁴³ According to the UN Special Rapporteur of the Working Group on Contemporary Forms of Slavery, practices such as detention of women in rape camps or 'comfort stations', forced marriages to soldiers, and other practices where women are treated as chattel are 'in fact and in law forms of slavery and as such, violations of the peremptory norm prohibiting slavery'.⁴⁴

Judicial pronouncements and legal arguments, including submissions by amici curiae on the crime of sexual slavery in the *Katanga*, *Chui*, *Ntaganda* and *Ongwen* cases, have served to highlight the complex historically gendered and sexualised elements of slavery as an international crime, now codified in the RS.⁴⁵

Charges of sexual slavery have been brought before the ICC in the cases of *Kony and Otti*, *Katanga*, *Ntaganda*, *Chui*, *Ongwen*, *Al Hassan*, and *Said*.⁴⁶ While not the first to be charged with sexual slavery as a crime against humanity and war crime, *Ntaganda* was the first to be convicted.⁴⁷ The *Katanga* Chamber found that the 'right of ownership' and the powers attaching to it may take many forms, and must be interpreted as 'the use, enjoyment and disposal of a person who is regarded as property, by placing him or her in a situation of dependence which entails his or her deprivation of any form of autonomy'.⁴⁸ It also found that the imposition of a deprivation of liberty may take different forms and that the Chamber will consider the person's subjective perception of his or her situation and reasonable fear.⁴⁹ The TC in *Ongwen* found that sexual slavery had been committed by members of

⁴³ Patricia Viseur Sellers and Jocelyn Getgen Kestenbaum, *The International Crimes of Slavery and the Slave Trade: A Feminist Critique*, in Indira Rosenthal, Susana SaCouto and Valerie Oosterveld (eds), *Gender and International Criminal Law*, 14 July 2022, Oxford University Press, pp 180-181. See also Jocelyn Getgen Kestenbaum and Magali Maystre, *Symposium in Pursuit of Intersectional Justice at the International Criminal Court: Group One – Sexual Slavery is Enslavement*, 2 May 2022, *Opinio Juris*.

⁴⁴ *Ibid*, referencing UN ECOSOC Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict. Final report submitted by Ms Gay J. McDougall, Special Rapporteur*, 22 June 1998, UN Doc E/CN.4/Sub.2.

⁴⁵ For a comprehensive discussion of the sexualised and gendered nature of slavery and the slave trade, see Patricia Viseur Sellers and Jocelyn Getgen Kestenbaum, *The International Crimes of Slavery and the Slave Trade: A Feminist Critique*, in Indira Rosenthal, Susana SaCouto and Valerie Oosterveld (eds), *Gender and International Criminal Law*, 14 July 2022, Oxford University Press.

⁴⁶ As discussed elsewhere in this report, the Prosecutor brought no charges of sexual violence in the case against Lubanga. During the trial however, witnesses testified about sexual violence amounting to the crimes of rape and sexual slavery, suffered mainly by girl soldiers within the armed group he led. The legal representatives of 27 victims asked the Chamber to modify the charges against Lubanga under Regulation 55 of the Regulations of the Court to include crimes of sexual slavery and inhumane or cruel treatment. In a decision issued on the same day that the Prosecution finished presenting its evidence in the case, the majority of TC I notified the parties that it would consider adding the victims' Legal Representatives' proposed charges. The victims had argued that the proposed charges fell within the facts and circumstances of the confirmed charges but the majority of the TC held that it was not bound by the facts and circumstances described in the charges confirmed by the PTC. The AC overturned the decision on the basis that the Trial Chamber's decision approach to Regulation 55 conflicted with Article 74(2) of the Rome Statute, which provides that the judgment of the TC at the end of the trial 'shall not exceed the facts and circumstances described in the charges and any amendments to the charges' and was inconsistent with Article 61(9) RS which sets out the limited circumstances under which charges may be amended post-confirmation. See *The Prosecutor v. Thomas Lubanga Dyilo, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court*, ICC-01/04-01/06-1891-tENG, 22 May 2009; *Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court"*, 17 December 2009, ICC-01/04-01/06-2205.

⁴⁷ *The Prosecutor v. Bosco Ntaganda, (Trial) Judgment*, ICC-01/04-02/06-2359, 8 July 2019.

⁴⁸ *The Prosecutor v. Germain Katanga, Judgment pursuant to article 74 of the Statute*, 7 March 2014, ICC-01/04-01/07-3436-tENG, para 975.

⁴⁹ *Ibid*, paras 973-978, 1023, citing at fn 2303 UN ECOSOC Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict. Update to the final report submitted by Ms Gay J. McDougall, Special Rapporteur*, E/CN.4/sub.2/2000/21, 6 June 2000, para 30. Katanga was unanimously acquitted of the charges of the acts of sexual violence as the Chamber did not believe these crimes formed part of the common purpose of the attack, unlike the crimes of directing an attack against a civilian population, pillage, murder and destruction of property. For commentary, see WIGJ, *Partial Conviction of Katanga by ICC. Acquittals for Sexual Violence and Use of Child Soldiers. The Prosecutor vs. Germain Katanga*, 7 March 2014.

Sinia brigade, over whom Ongwen had command, as they had 'exercised powers attaching to the right of ownership over the abducted women and girls by imposing on them a deprivation of liberty similar to those explicitly stated in Articles 7(1)(g) and 8(2)(e)(vi)⁵⁰ of the Statute'. The legal components set out in the EoC are consistent with the approach of the ICTY TC in the *Kunarac, Vukovic and Kovac (Kunarac)* case, which provides important guidance on the definition and conceptualisation of the crime of sexual slavery.⁵¹ The *Kunarac* judgment is ground breaking for its elaboration of the material elements of the crime of enslavement, including factors that may establish the existence of ownership and control

as indicative of enslavement, and the ICC TCs have drawn extensively on this definition. ICC Judges have also referenced the jurisprudence of the SCSL, where the first-ever international criminal convictions for the crime against humanity of sexual slavery were recorded in the *Sesay, Kallon and Gbao (Sesay et al.)* case, and thereafter in the trial of Charles Taylor, former President of Liberia.⁵² Both the *Sesay et al.* and *Taylor* judgments adopted the detailed list of indicia of enslavement set out in the ICTY *Kunarac* case.⁵³ Significantly, the *Taylor* case also recognised sexual slavery as a continuing crime, which was also referenced in the *Ntaganda* trial judgment.⁵⁴

3.2.1 Overlap with other crimes

A central issue in the adjudication of sexual slavery is the extent to which the elements of the crime overlap with other SGBC charges with which the accused is charged. During the RS negotiations, delegates questioned the difference between enforced prostitution and sexual slavery and between sexual slavery and enslavement. In the proposal by the Holy See to delete the references to sexual slavery, enforced prostitution, and enforced pregnancy, and replace them with a new subsection on enslavement, the question was asked: 'how is sexual slavery

different from the crime of enslavement, and if it is subsumed within that crime, why should it be listed?'⁵⁵ In the jurisprudence of the SCSL, the distinction between the crime of forced marriage and sexual slavery also became a relevant issue. These debates concerning the distinctions between sexual slavery and other enumerated forms of sexual violence involving slavery-like elements became an important issue in the jurisprudence of the Court, including in the *Ongwen* and *Katanga* cases.

⁵⁰ The Prosecutor v. Dominic Ongwen, *Trial Judgment*, ICC-02/04-01/15-1762-Red, 4 February 2021, para 3083.

⁵¹ Prosecutor v. Kunarac et al, *Judgement*, IT-96-23-T, 22 February 2001. See also Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 2003, *Berkeley Journal of International Law*, Vol 21(2), p 338.

⁵² The *Kunarac* TC found that enslavement includes 'elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent', Prosecutor v. Kunarac et al, *Judgement*, IT-96-23-T, 22 February 2001.

⁵³ Valerie Oosterveld, *Gender and the Charles Taylor Case at the Special Court for Sierra Leone*, 2012, *William & Mary Journal of Race, Gender and Social Justice*, Vol 19(7), p 12.

⁵⁴ Prosecutor v. Charles Ghankay Taylor, *Judgement*, case no. SCSL-03-01-T, 18 May 2012, para 420; Prosecutor Against Sesay, Kallon & Gbao, *Judgement*, SCSL-04-15-1234, 2 March 2009, para 160, citing Prosecutor v. Kunarac et al, *Judgement*, IT-96-23-T, 22 February 2001, para 543.

⁵⁵ The *Ntaganda* TC described 'continuing crimes' as crimes in which the 'conduct does not take place at one specific moment in time and the elements of the relevant crimes may therefore be fulfilled during a certain period, which can potentially occur over a prolonged period of time. Continuing crimes are, when the requisite elements are fulfilled, unlawful and remain unlawful over the entire period during which the elements continue to be met'. The Chamber found that the crime of enlisting, conscripting and using children to participate actively in hostilities was a continuous crime and noted that the Brima et al case before the SCSL had ruled that sexual slavery was also a continuing crime; The Prosecutor v. Bosco Ntaganda, (Trial) *Judgement*, ICC-o1/04-02/06-2359, 8 July 2019, para 42.

⁵⁶ Valerie Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 2004, *Michigan Journal of International Law*, Vol 25(3), p 615.

3.2.1.1 Sexual slavery and rape

In *Ongwen*, the defence argued that the crime of rape was ‘consumed’ by the crime of sexual slavery, because of the overlap in the protected interests of both crimes and the fact that both have a single culpable intention.⁵⁷ Alternatively, that the rape charge was ‘subsidiary’ to sexual slavery and that sexual slavery ‘was a more intensive form of rape’.⁵⁸ The *Ongwen* AC clarified that, despite some overlap between the crimes, they have materially distinct elements and do not protect the same interests.⁵⁹ In the Chamber’s view, the fundamental nature of the crime of sexual slavery is reducing a person to a servile status, and depriving

him or her of his or her liberty and sexual autonomy.⁶⁰

The *Ntaganda* TC also distinguished between the material elements of the crimes of rape and sexual slavery, noting that the act(s) of a sexual nature required for the crime of sexual slavery do not require penetration, as in the case of rape, and the latter does not require proof of exercise of powers attaching to the right of ownership.⁶¹ The Chamber found that a conviction for rape and sexual slavery, when based on the same underlying conduct, is therefore legally permissible.⁶²

3.2.1.2 Sexual slavery and the conduct of forced marriage

The *Ongwen* TC and AC also made important distinctions between the crime of sexual slavery, which ‘penalises the perpetrator’s restriction or control of the victim’s sexual autonomy while held in a state of enslavement’, and the ‘other inhumane act’ of forced marriage, which penalises the perpetrator’s imposition of ‘conjugal association’ with the victim.⁶³ Forced marriage implies the imposition of this conjugal association and does not necessarily require the exercise of ownership over a person, an essential element for the existence of the crime of sexual slavery.⁶⁴ The *Ongwen* Chambers’ decisions align with the positions taken

by the SCSL AC in the *Brima et al.* and *Taylor* cases.⁶⁵

The SCSL TC in *Brima et al* had sought to classify forced marriage as sexual slavery, rather than as a form of ‘other inhumane act’. The SCSL Chamber determined that ‘the crime of “other inhumane acts” exists as a residual category in order not to unduly restrict the Statute’s application with regard to crimes against humanity’ and that forced marriage as an ‘other inhumane act’ must involve conduct distinct from other crimes enumerated under Article 2 of the [SCSL] Statute.⁶⁶ The decision was however reversed by the SCSL AC, which found that the TC had erred in

⁵⁷ The Prosecutor v. Dominic Ongwen, *Public Redacted Version of “Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021”*, filed on 21 July 2021 as ICC-02/04-01/15-1866-Conf, 19 October 2021, ICC-02/04-01/15-1866-Red, paras 283, 288, 294.

⁵⁸ *Ibid.*, para 295.

⁵⁹ The Prosecutor v. Dominic Ongwen, *Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled “Trial Judgment”*, ICC-02/04-01/15-2022-Red, 15 December 2022, para 1679.

⁶⁰ *Ibid.*, para 1678.

⁶¹ The Prosecutor v. Bosco Ntaganda, (Trial) *Judgment*, ICC-o1/04-02/06-2359, 8 July 2019, para 1204.

⁶² *Ibid.*

⁶³ The Prosecutor v. Dominic Ongwen, *Trial Judgment*, ICC-02/04-01/15-1762-Red, 4 February 2021, para 2750; *Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled “Trial Judgment”*, ICC-02/04-01/15-2022-Red, 15 December 2022, para 1004.

⁶⁴ *Ibid.*

⁶⁵ Prosecutor Against Brima, Kamara & Kanu, (Trial) *Judgement*, case no. SCSL-2004-16-T, 20 June 2007, para 703.

⁶⁶ Prosecutor Against Brima, Kamara & Kanu, (Trial) *Judgement*, case no. SCSL-2004-16-T, 20 June 2007, para 703.

encompassing sexual slavery in forced marriages.⁶⁷ By contrast, the TC in *Taylor* distinguished sexual slavery from forced marriage rejecting the classification of the latter as ‘inhumane act’ and finding inappropriate the use of the word ‘marriage’ because it did not accurately capture the harm done

to victims and the role of the perpetrators.⁶⁸ The Chamber proposed, instead, the term ‘conjugal slavery’ in an attempt to capture the forced marriage elements and the enslavement characterised by forced labour and control over the sexuality of the victims.⁶⁹

3.2.1.3 Sexual slavery and enslavement

The *Ongwen* TC determined that enslavement as a crime against humanity is ‘in the abstract entirely encompassed within sexual slavery’.⁷⁰ The defence had argued that the elements of the crime of enslavement were not distinct from sexual slavery and the charges of enslavement should be dismissed, a view with which the TC agreed. The TC found that sexual slavery, as a crime against humanity, is a ‘specific form of enslavement’, qualified by the additional fact that the victim is also caused to engage in at least one act of a sexual nature.⁷¹

A group of feminist international law scholars and practitioners with expertise in gender-based crimes filed an amici curiae brief to assist the ICC AC in its determination of the case.⁷² Other submissions were

also made, including by the UN Special Rapporteur on Trafficking in Persons, especially women and children.⁷³ The amici disagreed with the Chamber’s finding that sexual slavery is a ‘form’ of enslavement’, arguing instead that, ‘all acts of a sexual nature - including control over sexuality, sexual integrity, and sexual and reproductive autonomy - constitute indicia of the exercise of powers of ownership of enslavement in all its forms (i.e. de jure, or legal, and de facto, or customary, slavery)’.⁷⁴ The amici contend that ‘sexual slavery is - in the abstract and in fact - entirely encompassed within the crime of enslavement, not the other way around’.⁷⁵ The amici observed that the *Ongwen* TC’s legal interpretation was incorrect based on factual and historical understandings of slavery and the exercise of powers of ownership over a person, as

⁶⁷ Prosecutor Against Brima, Kamara & Kanu, (Appeals) *Judgment*, case no. SCSL-2004-16-A, 22 February 2008, paras 187-196.

⁶⁸ Prosecutor v. Charles Ghankay Taylor, *Judgment*, case no. SCSL-03-01-T, 18 May 2012, paras 422-426.

⁶⁹ *Ibid.*, paras 427-428. Oosterveld notes several concerns with the use of the term ‘conjugal slavery’ including that ‘by moving from an understanding of forced marriage to that of conjugal slavery, it is not immediately obvious that the latter captures one part of the harm initially identified by the Prosecutor: the harm caused by the non-consensual conferral of a status of “wife” and the resulting damage, especially societal stigmatization’. See Valerie Oosterveld, *Gender and the Charles Taylor Case at the Special Court for Sierra Leone, 2012*, *William & Mary Journal of Race, Gender and Social Justice*, Vol 19(7), p 23.

⁷⁰ The Prosecutor v. Dominic Ongwen, *Trial Judgment*, ICC-02/04-01/15-1762-Red, 4 February 2021, para 3051.

⁷¹ *Ibid.*

⁷² The Prosecutor v. Dominic Ongwen, *Amici Curiae Observations on Sexual- and Gender-Based Crimes, Particularly Sexual Slavery, and on Cumulative Convictions Pursuant to Rule 103 of the Rules of Procedure and Evidence*, ICC-02/04-01/15-1934, 23 December 2021 (hereafter *Amici Observations Sexual Slavery*).

⁷³ The Prosecutor v. Dominic Ongwen, *Observations on the crimes of sexual slavery, enslavement and trafficking in persons, and on the grounds for excluding criminal responsibility: defences of duress, mental defect or disease and the non-punishment principle*, ICC-02/04-01/15-1958, 21 February 2022.

⁷⁴ *Amici Observations Sexual Slavery*, paras 2, 7-8.

⁷⁵ See Jocelyn Getgen Kestenbaum and Magali Maystre, *Symposium in Pursuit of Intersectional Justice at the International Criminal Court: Group One – Sexual Slavery is Enslavement* (hereafter *Ongwen Symposium – Sexual Slavery*), *Opinio Juris*, 2 May 2022.

encapsulated by Article 1(1) of the Slavery Convention.⁷⁶

The Special Rapporteur's amicus submission noted that the TC's characterisation of sexual slavery 'does not recognise the distinct though related crimes, and the potentially wider definition of the crime of enslavement, not entirely encompassed within sexual slavery, as such'.⁷⁷ The Special Rapporteur noted that sexual slavery may also be a component or form of enslavement, and an indication or essential element of enslavement, which is not limited to forced labour or services, or other forms of exploitation.⁷⁸

The amici submissions highlight the importance of the accurate categorisation of sexualised and non-sexualised harms as sexual slavery or enslavement under the RS, and the potentially discriminatory impact of more narrow categorisations. Referencing *Kunarac*, amici submitted that, though the *Ongwen* TC correctly identified control of sexuality as an indicator of the exercise of the powers of ownership of enslavement, it categorised enslavement by reference to the systematic abductions and forced labour of all persons (genders and ages) while recognising only some acts of a sexual nature committed against a particular category.⁷⁹ As such, 'the Chamber's restrictive

interpretation hindered a more comprehensive and accurate legal interpretation of enslavement, excluding myriad additional acts, even acts of a sexual nature - such as the enslavement of girl-child *ting tings* whose sexuality and reproduction were completely controlled through grooming by, inter alia, menstruation checks and purposeful exclusion from sexual acts - as constituting indicia of enslavement'.⁸⁰

Based on a feminist gender analysis of the Chamber's reasoning, the amici submitted that the Chamber's finding that sexual slavery fully encompasses enslavement led it to a discriminatory application of the law (and discriminatory results).⁸¹ In this way, the *Ongwen* TC has reinforced the misconception that enslavement primarily criminalizes general deprivations of liberty, forced labour and non-sexualized violence, while sexual slavery primarily criminalizes rape and rape-like acts in the enslavement of women and girls, a restrictive understanding of sexual slavery which fails to address the multi-faceted harms experienced by enslaved persons of all genders and ages.⁸²

Regrettably, the AC did not engage with these submissions, thus the lacuna in the legal interpretation of sexual slavery espoused by the *Ongwen* TC remains.

3.3 Forced pregnancy

The RS is the first ICL instrument to expressly criminalise forced pregnancy. The crime was

absent from the charters of the Nuremberg and Tokyo tribunals, the 'grave breach' provisions of

⁷⁶ Amici referred to the 1926 Slavery Convention which defines slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'. This definition is replicated in all slavery crimes enumerated under the Rome Statute (see Arts. 7(1)(c) [enslavement as a crime against humanity], 7(1)(g) [sexual slavery as a crime against humanity], 8(2)(b)(xxii) & 8(2)(e)(vi) [sexual slavery as a war crime]). As amici submitted, the 1926 Slavery Convention drafters intended for the slavery definition to include, inter alia: concubinage, *plaçage*, and grooming of 'fancy girls'; as well as acts of rape, castration, forced procreation and forced breastfeeding, whenever those systems and practices constituted the exercise of powers of ownership over a person. See [Amici Observations Sexual Slavery](#), para 4, and [Ongwen Symposium - Sexual Slavery](#).

⁷⁷ The Prosecutor v. Dominic Ongwen, *Observations on the crimes of sexual slavery, enslavement and trafficking in persons, and on the grounds for excluding criminal responsibility: defences of duress, mental defect or disease and the non-punishment principle*, ICC-02/04-01/15-1958, 21 February 2022, para 6.

⁷⁸ *Ibid.*

⁷⁹ [Amici Observations Sexual Slavery](#), para 16.

⁸⁰ [Ongwen Symposium - Sexual Slavery](#).

⁸¹ [Amici Observations Sexual Slavery](#), para 18.

⁸² *Ibid.*

the 1949 Geneva Conventions and their 1977 Additional Protocols, as well as the statutes of the ad hoc tribunals.⁸³ Discussions on this crime advanced with the work of women's rights activists who took a leading role in advocating for the recognition of violations of reproductive violence in international fora.⁸⁴

During the negotiations of the RS, the definition of forced pregnancy came about as a result of the proposal by the Women's Caucus to include attacks on reproductive integrity such as forced pregnancy and forced sterilization as war crimes.⁸⁵ The Women's Caucus referred to forced pregnancy as 'another form of gender enslavement' and illustrated the violence of this crime with the examples of Bosnian-Muslim women forced to bear children of rape and Rwandan women forced to abandon their children born of rape in light of the heavy stigma they faced when returning to their community.⁸⁶

At the Rome Conference, the advocacy of the Women's Caucus to recognize this crime was supported by the Preparatory Committee⁸⁷ but opposed by the Holy

See, who proposed to replace 'enforced pregnancy' with 'forcible impregnation',⁸⁸ as well as a group of states including Libya, the United Arab Emirates, Saudi Arabia, and the Islamic Republic of Iran, who were concerned with how this new crime would relate to national abortion regulations.⁸⁹ An informal meeting between interested states helped reach a consensus on the requisite elements of the crime and the irrelevance of national laws concerning abortion.⁹⁰

Nonetheless, the crime as defined in the final version of the RS applies only if pregnancy was forcibly initiated *and* the victim was unlawfully confined while pregnant *and* the goal of the confinement was either to affect the ethnic composition of the population or to carry out grave violations of international law, resulting in a relatively narrow scope. Victims who, for instance, have been forcibly impregnated with the intent of bearing children of the rapist's ethnicity, but are not confined as such, or victims who became pregnant through consensual sex but later forced to bear the child, will not be covered by this particular crime.⁹¹

⁸⁴ Some of the major developments included: the 1968 Tehran Declaration (non-binding statement adopted at UNGA) - parents have a basic human right to determine freely and responsibly the number and the spacing of their children; the 1974 World Population Plan of Action (World Population Conference in Bucharest) - all couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so; the 1976 International Tribunal on Crimes against Women (not an official court, a people's tribunal) - recognized violations of reproductive autonomy, including 'forced motherhood' and 'compulsory non-motherhood'; 1979 CEDAW - guaranteed women and men equal rights to decide freely and responsibly on the number and spacing of their children; the 1984 World Population Conference in Mexico - strong anti-abortion lobby; Reagan administration 'global gag rule' barring any NGO that performed/promoted abortion from receiving US government funds for any purpose; the 1993 Vienna Declaration (soft law instrument adopted by consensus by 171 states) - expressly recognized forced pregnancy as HR violation; and the 1995 Beijing Declaration (UN World Conference on Women in Beijing) - the explicit recognition and reaffirmation of the right of all women to control all aspects of their health, in particular their own fertility, is basic to their empowerment. Rosemary Grey, *Reproductive Crimes in International Criminal Law*, in Indira Rosenthal, Susana SaCouto and Valeria Oosterveld (eds), *Gender and International Criminal Law*, 14 July 2022, Oxford University Press, pp 239-241.

⁸⁵ The UN committee responsible for preparing a draft ICC Statute referred to forced pregnancy and forced sterilization as war crimes following the Women's Caucus proposal; *ibid*, p 243.

⁸⁶ Women's Caucus for Gender Justice, *Recommendations and Commentary for December 1997 PrepCom on the Establishment of an International Criminal Court*, December 1997.

⁸⁷ *Ibid*.

⁸⁸ The term 'forcible impregnation' was not accepted as it failed to capture all the elements of enforced pregnancy leaving out the broader implications involving keeping the women pregnant. Cate Steains, *Gender Issues*, in Roy S.K. Lee (ed), *The International Criminal Court. The Making of the Rome Statute: Issues, Negotiations and Results*, 1999, Kluwer Law International, pp 366-367.

⁸⁹ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June - 17 July 1998, Official Records (Volume II: Summary records of the plenary meetings and of the meetings of the Committee of the Whole), p 63.

⁹⁰ Cate Steains, *Gender Issues*, in Roy S.K. Lee (ed), *The International Criminal Court. The Making of the Rome Statute: Issues, Negotiations and Results*, 1999, Kluwer Law International, p 367.

⁹¹ Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence. The ICC and the Practice of the ICTY and the ICTR*, September 2005, School of Human Rights Research Series, Vol 20, Intersentia, p 145.

The difficult negotiations at the Rome Conference also led to the definition being prone to misinterpretation, with some commentators suggesting that there is a necessary intent to impregnate on behalf of the perpetrator, and that the victim and perpetrator must be members of different ethnic groups, despite none of these assumptions being consistent with the RS or the EoC.⁹²

Article 7(2)(f) RS

"Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

Article 7(1)(g)-4 EoC <i>Crime against humanity of forced pregnancy</i>	Article 8(2)(b)(xxii)-4 EoC <i>War crime of forced pregnancy</i>	Article 8(2)(e)(vi)-4 EoC <i>War crime of forced pregnancy</i>
<ol style="list-style-type: none"> 1. The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. 2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. 3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population. 	<ol style="list-style-type: none"> 1. The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. 2. The conduct took place in the context of and was associated with an international armed conflict. 3. The perpetrator was aware of factual circumstances that established the existence of an armed conflict. 	<ol style="list-style-type: none"> 1. The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. 2. The conduct took place in the context of and was associated with an armed conflict not of an international character. 3. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Ongwen was the first accused to be convicted of forced pregnancy as a war crime and crime against humanity before the ICC. Forced pregnancy had previously been mentioned but not charged in the *Lubanga* trial where a prosecution witness testified that female child soldiers from Lubanga's group were impregnated through rape, and some were forced to abort.⁹³ The representatives of victims asked the TC to recharacterize the facts and add a charge of cruel or inhumane treatment for forced impregnation and forced abortion, but the Chamber

⁹² Rosemary Grey, *Reproductive Crimes in International Criminal Law*, in Indira Rosenthal, Susana SaCouto and Valerie Oosterveld (eds), *Gender and International Criminal Law*, 14 July 2022, Oxford University Press, p 253. It is also important to note that for the crime to be recognized, the perpetrator does not have to be involved in the action, just aware of the women to be made forcibly pregnant; as well as there is no requirement for the pregnancy to be successful nor for the pregnancy to be resulted from rape. See Amnesty International, *Forced Pregnancy: A commentary on the Crime in International Criminal Law*, 2020, p 11.

⁹³ Rosemary Grey, *Reproductive Crimes in International Criminal Law*, in Indira Rosenthal, Susana SaCouto and Valerie Oosterveld (eds), *Gender and International Criminal Law*, 14 July 2022, Oxford University Press, p 233, citing *The Prosecutor v. Thomas Lubanga Dyilo, (Trial) Judgment pursuant to Article 74 of the Statute*, ICC-01/04-01/06-2842, 14 March 2012, paras 629-631.

rejected the request explaining that evidence of sexual and reproductive violence falls outside the scope of presented charges.⁹⁴ The Chamber recognized the evidence of sexual violence in the judgment, but this was not a case related to reproductive violence, except for one reference to 'unwanted pregnancies'.⁹⁵ In the 2008 application for an arrest warrant against Al Bashir, the prosecution alleged that 'hundreds' of women and girls from particular ethnic groups in Darfur became pregnant or died due to rapes by Sudanese armed forces and affiliated Janjaweed militia, but this evidence was not part of the 2009 and 2010 arrest warrant decisions of the PTC.⁹⁶ In the *Bemba* case, the prosecution alleged that many female victims of rape became pregnant, but brought no charges for forcible impregnation and treated it as a consequence of rape instead.⁹⁷ The TC did, however, mention the 'unwanted pregnancies' as an aggravating factor of rape in the sentencing decision.⁹⁸ Reproductive violence was also referred to in *Mbarushimana*, where

the document containing the charges mentions soldiers cutting open a pregnant woman's stomach, 'causing her moving foetus to fall out', and women miscarrying pregnancies as a result of rape.⁹⁹ Before *Ongwen*, other international tribunals also failed to charge forced pregnancy, despite ample evidence of forcible impregnation during the conflicts in Rwanda, the former Yugoslavia, and Cambodia.¹⁰⁰ In the case against Brima & Kanu at the SCSL, the trial judgment shows substantial evidence of women and girls being abducted and forced to perform conjugal duties, including, among others, enduring forced pregnancy.¹⁰¹ In the case against Chea & Samphan before the ECCC, SGBC charges were limited to rape and forcing people into marriages, and did not include forcing men to impregnate women and forcing women to endure pregnancy and childbirth, despite extensive evidence that men and women were forced to marry and 'consummate' in order to produce more workers and soldiers for the state.¹⁰²

⁹⁴ *Ibid.*

⁹⁵ Rosemary Grey, *The ICC's First 'Forced Pregnancy' Case in Historical Perspective*, 2017, *Journal of International Criminal Justice*, Vol 15, p 922.

⁹⁶ *Ibid.*, p 923.

⁹⁷ Rosemary Grey, *Reproductive Crimes in International Criminal Law*, in Indira Rosenthal, Susana SaCouto and Valerie Oosterveld (eds), *Gender and International Criminal Law*, 14 July 2022, Oxford University Press, p 233.

⁹⁸ Rosemary Grey, *The ICC's First 'Forced Pregnancy' Case in Historical Perspective*, 2017, *Journal of International Criminal Justice*, Vol 15, p 924.

⁹⁹ *Ibid.*, p 923.

¹⁰⁰ *Ibid.*, p 907.

¹⁰¹ 'The trial record contains ample evidence that the perpetrators of forced marriages intended to impose a forced conjugal association upon the victims rather than exercise an ownership interest and that forced marriage is not predominantly a sexual crime. There is substantial evidence in the Trial Judgment to establish that throughout the conflict in Sierra Leone, women and girls were systematically abducted from their homes and communities by troops belonging to the AFRC and compelled to serve as conjugal partners to AFRC soldiers. They were often abducted in circumstances of extreme violence, compelled to move along with the fighting forces from place to place and coerced to perform a variety of conjugal duties including regular sexual intercourse, forced domestic labour such as cleaning and cooking for the "husband," endure forced pregnancy, and to care for and bring up children of the "marriage".' Prosecutor Against Brima, Kamara & Kanu, (Appeals) *Judgment*, case no. SCSL-2004-16-A, 22 February 2008, para 190.

¹⁰² Rosemary Grey, *Reproductive Crimes in International Criminal Law*, in Indira Rosenthal, Susana SaCouto and Valerie Oosterveld (eds), *Gender and International Criminal Law*, 14 July 2022, Oxford University Press, pp 233-234.

3.3.1 Rectifying historical gaps

In the *Ongwen* case, the ICC TC had a chance to rectify earlier missed opportunities by taking a closer look at the origins of the crime and interpreting and applying the Statute in line with internationally recognized human rights. The Chamber set a positive precedent by referring to a broad range of relevant provisions from human rights treaties in defining the elements of the crime.¹⁰³ The TC found that ‘the crime of forced pregnancy is grounded in the woman’s right to personal and reproductive autonomy and the right to family’, citing, inter alia, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),¹⁰⁴ as well as the Women’s Caucus’s recommendations to the 1997 Preparatory Commission on the Establishment of the ICC.¹⁰⁵ It noted the RS’s narrow definition of forced pregnancy, resulting from the controversy surrounding the provision, that some states considered the crime duplicative of rape and unlawful detention, and that some were concerned that the crime could be construed as interfering with national laws on abortion.¹⁰⁶

The *Ongwen* TC underscored the importance of properly characterizing the evil committed, finding that evil should not be punished as a combination of other crimes or subsumed under the generic crime of ‘any other form of sexual violence’.¹⁰⁷ As Grey explains, categorizing acts under the broader umbrella of ‘sexual violence’ indicates the primary harm to be the victim’s sexual autonomy, but with crimes of reproductive

violence there is an additional aspect to consider, the harm of violating the victim’s reproductive autonomy.¹⁰⁸

In examining the elements of forced pregnancy as a crime against humanity or war crime, the TC found the first element to be ‘unlawful confinement’, holding that ‘the woman must have been restricted in her physical movement contrary to standards of international law’ and citing the obligation to interpret and apply the RS in conformity with internationally recognized human rights and several articles of the UDHR, ICCPR, African Charter for Human and Peoples Rights, American Convention on Human Rights, and European Convention on Human Rights.¹⁰⁹ It found the second element to be ‘that the woman has been *forcibly made pregnant*’, explaining that ‘this is understood as encompassing the same coercive circumstances described for other sexual violence crimes in the Statute’.¹¹⁰ With regard to the mens rea, in addition to the mental elements specified in Article 30 of the Statute, the Chamber found that the perpetrator must act with the specific intent of ‘affecting the ethnic composition of any population or carrying out other grave violations of international law’, meaning that the crime would apply even in circumstances that are not related to ethnic cleansing, and that other grave violations of international law include ‘confining a woman with the intent to rape, sexually enslave, enslave and/or torture her’. The Chamber further found that it is not required that the accused specifically intended to keep the woman pregnant.¹¹¹

¹⁰³ The Chamber referred to articles 161(1) CEDAW, 16 Proclamation of Teheran, 9 UDHR, 9-11 ICCPR, 6 AfCHPR, 7 ACHR, 5 ECHR but also Women’s Caucus PrepCom recommendations and other academic articles. The Prosecutor v. Dominic Ongwen, *Trial Judgment*, ICC-02/04-01/15-1762-Red, 4 February 2021, para 2717, fn 7164.

¹⁰⁴ Specifically, the Trial Chamber cited Article 16(1)(e), stating that ‘Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations’, *ibid*.

¹⁰⁵ Specifically, the Trial Chamber noted para W.C.4.4., ‘classifying forced pregnancy as an attack on reproductive integrity’, *ibid*.

¹⁰⁶ The Prosecutor v. Dominic Ongwen, *Trial Judgment*, ICC-02/04-01/15-1762-Red, 4 February 2021, paras 2718-2720.

¹⁰⁷ *Ibid*, para 2722.

¹⁰⁸ Rosemary Grey, *Reproductive Crimes in International Criminal Law*, in Indira Rosenthal, Susana SaCouto and Valerie Oosterveld (eds), *Gender and International Criminal Law*, 14 July 2022, Oxford University Press, p 235.

¹⁰⁹ The Prosecutor v. Dominic Ongwen, *Trial Judgment*, ICC-02/04-01/15-1762-Red, 4 February 2021, para 2717, fn 7164.

¹¹⁰ *Ibid*.

¹¹¹ The Prosecutor v. Dominic Ongwen, *Trial Judgment*, ICC-02/04-01/15-1762-Red, 4 February 2021, paras 2717-2729.

Ongwen was convicted of forced pregnancy as a crime against humanity and war crime for confining women who had forcibly been made pregnant with the intent of sustaining the continued commission of other crimes, including forced marriage, torture, rape, and sexual slavery.¹¹²

The TC's legal interpretation of forced pregnancy and its factual findings were challenged by the defence, submitting that the Chamber 'failed to make a reasoned enquiry about whether its interpretation of the crime [...] affects the national law of Uganda on abortion' and that it 'imported meanings from a variety of non-binding sources which were inconsistent with the intendment of the Statute'.¹¹³

On appeal, the AC invited highly qualified scholars and practitioners of criminal procedure and international law to submit observations on questions including the legal interpretation of the crime of forced pregnancy.¹¹⁴ The Chamber's call for submissions from experts on questions involving issues with gender components for consideration in its decision-making represents a good practice which can and should be replicated. In response, WIGJ, together with Dr Rosemary Grey, the Global Justice Center and Amnesty International, submitted a joint amicus brief.¹¹⁵ The submission addressed three issues: (i) the irrelevance of national laws relating to pregnancy when interpreting the RS's definition of forced pregnancy; (ii) the elements of 'forced pregnancy' as a war crime

and crime against humanity; and (iii) the grounding of the crime of forced pregnancy in human rights that protect personal, sexual, and reproductive autonomy.

Other amici curiae observations on this crime further revealed that forced pregnancy is distinct from other sexual and gender-based crimes, its materially specific elements being (i) the state of being forced to be pregnant; (ii) a coerced and forced confinement; and (iii) the risk of ostracization once released from captivity.¹¹⁶ Amici have also emphasized that forced pregnancy is a 'gender-specific' crime targeting any individual who was assigned as female at birth, including trans and gender diverse people,¹¹⁷ and that its victims endure distinct harms stemming from the pregnancy itself but also forced childbirth, forced maternity, and potential stigma when returning to their communities. Victims are affected both physically and emotionally, given the circumstances of their captivity and the fact that they are carrying the child of their captor. The harm also extends to the children and can have lifelong effects. Finally, amici submissions highlighted that, due to the distinctive nature of SGBC, it is both 'proper and permissible' to have cumulative charges and convictions for such crimes.¹¹⁸

On 15 December 2022, the AC upheld Ongwen's conviction on the crime of forced pregnancy. The Chamber recalled the drafting history of the crime and concurred with the PTC's finding that the essence of the crime is in 'unlawfully placing the

¹¹¹ The Prosecutor v. Dominic Ongwen, *Trial Judgment*, ICC-02/04-01/15-1762-Red, 4 February 2021, paras 2717-2729.

¹¹² The Prosecutor v. Dominic Ongwen, *Trial Judgment*, ICC-02/04-01/15-1762-Red, 4 February 2021, paras 3056-3062.

¹¹³ The Prosecutor v. Dominic Ongwen, *Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021*.

¹¹⁴ The Prosecutor v. Dominic Ongwen, *Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021*, paras 1042-1043.

¹¹⁵ The Prosecutor v. Dominic Ongwen, *Order inviting expressions of interest as amici curiae in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)*, ICC-02/04-01/15-1884, 25 October 2021.

¹¹⁶ The Prosecutor v. Dominic Ongwen, *Amici Curiae Observations on the Rome Statute's definition of 'forced pregnancy' by Dr Rosemary Grey, Global Justice Center, Women's Initiatives for Gender Justice and Amnesty International*, ICC-02/04-01/15-1938, 23 December 2021.

¹¹⁷ The Prosecutor v. Dominic Ongwen, *Amici curiae observations submitted by Prof. Bonita Meyersfeld and the Southern African Litigation Centre Trust pursuant to rule 103 of the Rules of Procedure and Evidence*, ICC-02/04-01/15-1941, 23 December 2021.

¹¹⁸ The Prosecutor v. Dominic Ongwen, *Amici Curiae Observations on Sexual- and Gender-Based Crimes, Particularly Forced Pregnancy, and on Standards of Proof Required for Sexual and Reproductive Violence Pursuant to Rule 103 of the Rules of Procedure and Evidence*, ICC-02/04-01/15-1933, 23 December 2021.

¹¹⁹ The Prosecutor v. Dominic Ongwen, *Amici curiae observations submitted by Prof. Bonita Meyersfeld and the Southern African Litigation Centre Trust pursuant to rule 103 of the Rules of Procedure and Evidence*, ICC-02/04-01/15-1941, 23 December 2021.

victim in a position in which she cannot choose whether to continue the pregnancy'.¹¹⁹ The appeal judgment also reinforced the TC's reliance on internationally recognized human rights standards, agreed that the legal interest behind the crime of forced pregnancy is a 'woman's reproductive health and autonomy and the right to family planning', and ruled that national abortion laws are irrelevant to the Court's analysis of the crime.¹²⁰

3.4 Forced marriage (as an other inhumane act)

Forced marriage is not listed as a stand-alone crime in the RS and is, as such, to be understood as a conduct that merits legal characterization pertaining to codified crimes. Other international tribunals, similarly, do not recognize forced marriage as a crime, resulting in the subsequent challenges in confirming the legal basis of the crime and defining the parameters of the crime when charges have been brought.¹²¹ As a violation of IHRL, forced marriage is linked to the 'fundamental right to freely consent to marriage', guaranteed by multiple international human rights instruments.¹²² At the ICC, the crime against humanity of forced marriage was first addressed as an 'other inhumane act' by the respective PTCs in Ongwen in 2016¹²³ and Al Hassan in 2019.¹²⁴ Before that, the PTC in Katanga mentioned forced marriage as an example of sexual slavery, referencing the Supplementary Convention on the Abolition of Slavery, but forced marriage was not charged under a separate count.¹²⁵ In Ntaganda, the Prosecutor 'implicitly affirmed her reluctance to charge forced marriage as a separate [conduct] in a subsequent application for an arrest warrant for Ntaganda'.¹²⁶

Article 7(1)(k) EoC

Crime against humanity of other inhumane acts

1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.
3. The perpetrator was aware of the factual circumstances that established the character of the act.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

¹¹⁹ The Prosecutor v. Dominic Ongwen, *Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021*, entitled "Trial Judgment", ICC-02/04-01/15-2022-Red, 15 December 2022, para 1061.

¹²⁰ *Ibid.*

¹²¹ Melanie O'Brien, Gender Dimensions of Forced Marriage in International Criminal Law, in Indira Rosenthal, Susana SaCouto and Valerie Oosterveld (eds), *Gender and International Criminal Law*, 14 July 2022, Oxford University Press, p 212.

¹²² Articles 16(2) UDHR, 23 ICCPR, 10(1) ICESCR, and 23 General Comment no 19. *Ibid.*, p 208.

¹²³ The Prosecutor v. Dominic Ongwen, *Decision on the confirmation of charges against Dominic Ongwen*, ICC-02/04-01/15-422-Red, 23 March 2016.

¹²⁴ The Prosecutor v. Al Hassan, ICC-01/12-01/18-335-Conf, 8 May 2019; ICC-01/12-01/18-335-Conf-Corr, amended version submitted 11 May 2019; ICC-01/12-01/18-335-Corr-Red, public redacted version submitted on 2 July 2019; Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18-461-Corr-Red, 13 November 2019.

¹²⁵ The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, *Decision on the confirmation of charges*, ICC-01/04-01/07-717, 30 September 2008, paras 430-431.

¹²⁶ Aiste Dumbyte, "Till Death Do Us Part": Forced Marriage as an International Crime, 2013, *Revista do Instituto Brasileiro de Direitos Humanos*, p 14.

3.4.1 Ground breaking jurisprudence in Ongwen

The ICC's first conviction for the conduct of forced marriage as the crime against humanity of other inhumane acts was rendered by the *Ongwen* TC on 4 February 2021. In confirming the legal basis for forced marriage as an other inhumane act constituting a crime against humanity, the *Ongwen* TC cited ECCC and SCSL jurisprudence.¹²⁷ As with the crime of forced pregnancy, the AC invited amici curiae to submit observations on the issue of forced marriage. In response to the defence's claim that forced marriage is a new crime, an amici curiae brief helped the Chamber further interpret the origins of the crime and its particularities, including on critical issues such as: (i) jurisprudential developments in ICL concerning forced marriage as an other inhumane act

by both the SCSL and ECCC; (ii) forced marriage as a violation of relational autonomy and associated harms; (iii) the nature of forced marriage as a continuing crime;¹²⁸ and (iv) forced marriage as an intersectional crime with gender and ageist implications (since the majority of victims are girls and young women) and the corresponding implications for sentencing and reparations.¹²⁹ On appeal, the Chamber found no merit in the defence's arguments and confirmed the findings of the TC with regard to forced marriage, discussed below.¹³⁰ The jurisprudence in the *Ongwen* case at both the Trial and Appellate levels significantly advanced the understanding of the crime of forced marriage in international criminal law, several aspects of which will be analysed below.

3.4.2 The constituent elements of the crime

First, the *Ongwen* TC found that the crime against humanity of 'other inhumane acts' includes forced marriage. The Chamber noted that other international jurisdictions have recognized forced marriage as an other inhumane act constituting a crime against humanity, citing ECCC and SCSL jurisprudence.¹³¹

The Chamber confirmed the constituent elements of other inhumane acts as set out in the elements of crimes, namely: (i) the perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane acts; and

(ii) such act was of a character similar to any [of the other enumerated crimes against humanity].¹³²

It then defined forced marriage as 'forcing a person, regardless of his or her will, into a conjugal union with another person by using physical or psychological force, threat of force or taking advantage of a coercive environment' and determined that the central element of this crime is the imposition of this status on the victim, as well as duties associated with marriage and the consequent social stigma.¹³³ The Chamber reasoned that the crime of forced

¹²⁷ The Prosecutor v. Dominic Ongwen, *Trial Judgment*, ICC-02/04-01/15-1762-Red, 4 February 2021, para 2744, fn 7206.

¹²⁸ This was also confirmed by SCSL because victims were obligated to remain in the forced marriage either until they escaped or the perpetrator group lost power.

¹²⁹ The Prosecutor v. Dominic Ongwen, *Amici Curiae Brief on Forced Marriage*, ICC-01/04-01/15-1935, 22 December 2021. Valerie Oosterveld, Kathleen M. Maloney and Melanie O'Brien, *Symposium in Pursuit of Intersectional Justice at the International Criminal Court: Group Two – The 'Other Inhumane Act' of Forced Marriage in Prosecutor v Ongwen*, 3 May 2022, *Opinio Juris*.

¹³⁰ The Prosecutor v. Dominic Ongwen, *Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled "Trial Judgment"*, ICC-02/04-01/15-2022-Red, 15 December 2022.

¹³¹ The Prosecutor v. Dominic Ongwen, *Trial Judgment*, ICC-02/04-01/15-1762-Red, 4 February 2021, para 2744.

¹³² *Ibid*, para 2743.

¹³³ *Ibid*, para 2748.

¹³⁴ *Ibid*, para 2747.

marriage 'inflicts great suffering, or serious injury to body or to mental or physical health, by means of a course of conduct which, despite comprising also acts falling under one or more of the enumerated crimes, is, in its entirety, not identical, but is nonetheless "similar" in character in terms of nature and gravity, to those enumerated crimes'.¹³⁴ The Chamber also held that forced marriage is a continuing crime only ending when the individual is freed from the forced relationship.¹³⁵ It noted that '[e]very person enjoys the fundamental right to enter a marriage with the free and full consent of another person', citing international human rights instruments including, inter alia, the UDHR, ICCPR, International Covenant on Economic, Social and Cultural Rights, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, and CEDAW.¹³⁶ It found that the harm suffered from forced marriage included being ostracized from the community, mental trauma, a serious attack on the victim's dignity, and the deprivation of the victim's fundamental right to choose his or her spouse.¹³⁷ The Chamber referred to the *Brima et al.* case before the SCSL. In that case, the TC found that the prosecution had not established forced marriage as a crime independent of sexual slavery.¹³⁸ However, this was overturned on appeal wherein the AC held that 'other inhumane acts' is a residual category designed to punish acts or omissions not specifically listed as crimes against humanity

so long as they meet the elements of the crime.¹³⁹ Subsequently, in the *Sesay et al.* case, the SCSL AC endorsed its previous interpretation of forced marriage in *Brima et al.* and upheld the first ever conviction for forced marriage as an 'other inhumane act'¹⁴⁰ in international law. Forced marriage also came up in the *Samphan* case at the ECCC. The ECCC TC convicted the accused of the crime against humanity of 'other inhumane acts' through conduct characterized as forced marriage and rape in the context of forced marriage.¹⁴¹ It held that the crime of other inhumane acts existed under customary international law at the relevant time and that its definition is not restricted to a list of specific underlying conduct.¹⁴² It determined that, in assessing whether the underlying conduct of forced marriage amounts to other inhumane acts, it must determine whether such conduct is of similar gravity to the enumerated crimes against humanity, whether it caused serious mental or physical suffering or injury or constituted a serious attack on human dignity, and whether it was performed intentionally.¹⁴³ Although the ECCC's jurisprudence further confirms the legal standing of forced marriage as an other inhumane act, it has been observed that the Chamber's gender analysis was lacking in that: (i) it did not specifically acknowledge the gender experience of women, and that due to the definition of rape adopted by the Court (ii) it excluded men as rape victims within the forced marriage.¹⁴⁴

¹³⁵ *Ibid*, para 2757.

¹³⁶ *Ibid*, para 2748, fn 7210.

¹³⁷ *The Prosecutor v. Dominic Ongwen, Trial Judgment*, ICC-02/04-01/15-1762-Red, 4 February 2021, paras 2741-2753.

¹³⁸ *Prosecutor Against Brima, Kamara & Kanu, (Trial) Judgment*, case no. SCSL-2004-16-T, 20 June 2007, para 711.

¹³⁹ *Prosecutor Against Brima, Kamara & Kanu, (Appeals) Judgment*, case no. SCSL-2004-16-A, 22 February 2008, paras 187-196.

¹⁴⁰ *Prosecutor v. Sesay et al., Judgment*, SCSL-04-15-A, 26 October 2009, paras 726, 735, 861-862.

¹⁴¹ *Prosecutor v. Samphan, Case 002/02, Judgment*, 16 November 2018, paras 741-749, 4170-4172, 4198, 4247-4249, 4303-4305.

¹⁴² *Ibid*, para 741.

¹⁴³ *Ibid*, para 746.

¹⁴⁴ Melanie O'Brien, *Gender Dimensions of Forced Marriage in International Criminal Law*, in Indira Rosenthal, Susana SaCouto and Valerie Oosterveld (eds), *Gender and International Criminal Law*, 14 July 2022, Oxford University Press, pp 219-220.

3.4.3 Forced marriage conduct distinguished from sexual slavery

The *Ongwen* and *Al Hassan* PTCs highlighted the distinct nature of the conduct of forced marriage. In *Ongwen*, the PTC held that forced marriage as an other inhumane act differed from the other crimes Ongwen was charged with, notably from sexual slavery, and that its central element is the imposition of ‘marriage’ and its associated duties and social status on the victim.¹⁴⁵ The PTC determined that the conduct underlying forced marriage and the impact it has on victims is not fully captured by other crimes against humanity, including sexual slavery and rape.¹⁴⁶ While forced marriage implies the ‘imposition of a conjugal association over a person’, sexual slavery implies ‘ownership over a person’; and while sexual slavery penalizes the sexual aspect of the perpetrator’s ownership over the victim, forced marriage also penalizes the ‘perpetrator’s imposition of the conjugal association’.¹⁴⁷

This view was taken in the *Brima et al.* case where the SCSL Chamber found that acts of forced marriage were of similar gravity to crimes against humanity, including enslavement, imprisonment, torture, rape, sexual slavery, and sexual violence.¹⁴⁸ The Chamber also held that, while the crime of forced marriage shared certain elements with sexual slavery, such as non-consensual sex and deprivation of liberty, there were also distinguishing factors rendering forced marriage a distinct crime.¹⁴⁹

Specifically, the Chamber noted that forced marriage involves a perpetrator compelling a person by force or threat of force into a conjugal association with another person, resulting in great suffering or serious physical or mental injury on the part of the victim.¹⁵⁰ Further, unlike sexual slavery, forced marriage implies a relationship of exclusivity between the ‘husband’ and ‘wife’, which could lead to punishment for breach.¹⁵¹ It concluded that these distinctions imply that forced marriage is not predominantly a sexual crime.¹⁵²

As explained by O’Brien, this definition shifts away from interpreting the crime with a human rights lens and, rather, focuses on the traditional link of rape with force instead of non-consent and autonomy.¹⁵³ O’Brien notes that there is an inconsistency in SCSL decisions which appear to favour an enslavement approach based on ownership powers rather than on non-consent.¹⁵⁴

The distinct nature of forced marriage in terms of conduct, interests protected, harms suffered, and objectives sought was also confirmed by the *Al Hassan* PTC, which further explained that the behaviour criminalised corresponds to the imposition of a marriage, which is a very specific aspect of the relationship between the perpetrator and the victim.¹⁵⁵ Thus, the PTC interpreted the concept of forced marriage broadly, taking into account not only the sexual aspect of the behaviour, but also

¹⁴⁵ The Prosecutor v. Dominic Ongwen, *Decision on the confirmation of charges against Dominic Ongwen*, ICC-02/04-01/15-422-Red, 23 March 2016, paras 92-93.

¹⁴⁶ *Ibid.*, para 94.

¹⁴⁷ *Ibid.*, paras 92-93.

¹⁴⁸ Prosecutor Against Brima, Kamara & Kanu, (Appeals) *Judgment*, case no. SCSL-2004-16-A, 22 February 2008, para 201.

¹⁴⁹ *Ibid.*, paras 187-196.

¹⁵⁰ *Ibid.*, para 192.

¹⁵¹ *Ibid.*, para 195.

¹⁵² *Ibid.*

¹⁵³ Melanie O’Brien, Gender Dimensions of Forced Marriage in International Criminal Law, in Indira Rosenthal, Susana SaCouto and Valerie Oosterveld (eds), *Gender and International Criminal Law*, 14 July 2022, Oxford University Press, p 215.

¹⁵⁴ *Ibid.*, p 216.

¹⁵⁵ The Prosecutor v. Al Hassan, ICC-01/12-01/18-335-Conf, 8 May 2019; ICC-01/12-01/18-335-Conf-Corr, amended version submitted 11 May 2019; ICC-01/12-01/18-335-Corr-Red, public redacted version submitted on 2 July 2019; Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18-461-Corr-Red, 13 November 2019, para 553.

all the social and domestic dimensions that forced marriage covers, in particular, the imposition of marital status on the victim who is then designated as the spouse of the perpetrator, publicly or privately.¹⁵⁶

In *Al Hassan*, the PTC noted that the exclusivity between

the victim and perpetrator is only one element which can point to forced marriage, others possibly being household chores or respect for traditions.¹⁵⁷ The particular stigma faced by victims of forced marriage, which can alienate them and their children from the community and have a long-term impact, was also mentioned by the Chamber.¹⁵⁸

3.4.4 No requirement of legally recognised marriage

The relevance of the legality of the marriage and the grounding of the crime in IHRL were also addressed in both the *Ongwen* and *Al Hassan* cases. The *Ongwen* PTC deemed it to be irrelevant whether such 'marriage' was illegal under national law,¹⁵⁹ and held that force marriage violates the right to consensually marry and establish a family, referencing Article 23 of the ICCPR, Article 16 of the UDHR, and Article 16 of CEDAW.¹⁶⁰ In the *Al Hassan* CoC decision, the PTC further grounded the crime of forced marriage in IHRL by holding that the protected interests of

the criminalization of forced marriage corresponds to the right to marry, to choose a spouse, and to consensually form a family.¹⁶¹ In *Al Hassan*, the PTC also confirmed that there is no need to prove that 'an official or formal marriage' took place and that the marriage does not need to be legally recognized by national law.¹⁶² Rather, the existence of the marriage can be derived from the subjective perspective of the victim, third parties, the perpetrator, and the intention of the perpetrator to consider the couple married.¹⁶³

3.5 Other forms of sexual violence

The RS is the first ICL instrument to include the crime of other forms of sexual violence as a war crime and a crime against humanity. This provision was meant to act as a residual category to allow the prosecution of other crimes of sexual violence which are not specifically enumerated in the RS. A

potential drawback of such a classification, however, is that the prosecution can concentrate on the explicitly listed offences in order to circumvent the additional challenge of substantiating that the non-enumerated form of sexual violence is of comparable gravity to those crimes enumerated in the RS. Consequently,

¹⁵⁶ Ibid.

¹⁵⁷ Ibid, para 558.

¹⁵⁸ Ibid, para 555.

¹⁵⁹ The Prosecutor v. Dominic Ongwen, *Decision on the confirmation of charges against Dominic Ongwen*, ICC-02/04-01/15-422-Red, 23 March 2016, para 93.

¹⁶⁰ Ibid, para 94.

¹⁶¹ Articles 16 UDHR, 23(3) ICCPR, 10(1) ICESCR, paras 23-24 Gender Comment 28, 1(1) Convention on Consent to Marriage, 16(1)(b) CEDAW, 6(2)(a) UN Declaration on the Elimination of All Forms of Discrimination against Women, 6(1) Protocol of the African Charter, 19(i) Islamic Declaration of HR, 33(1) Arab Charter on HR, 17(3) ACHR, 8(1) ECHR, 5 Protocol no. 7 ECHR. The Prosecutor v. Al Hassan, *Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18-461-Corr-Red, 13 November 2019, para 554.

¹⁶² Ibid, paras 556-557.

¹⁶³ Ibid.

this circumstance may give rise to a stratification or hierarchy of crimes, wherein the enumerated crimes are given heightened recognition and considered more established. Practice at the ICC shows this concern to be true.

An additional challenge in relation to other forms of sexual violence is the circularity of the definition of sexual violence in the RS texts. In the EoC, sexual violence is defined with reference to acts of a sexual nature, with no additional explanation of what constitutes an act of a sexual nature.¹⁶⁴ This can result, as ICC jurisprudence will show, in mischaracterizing acts of sexual violence and not accurately reflecting the harm suffered by victims.

<p>Article 7(1)(g)-6 EoC <i>Crime against humanity of sexual violence</i></p>	<p>Article 8(2)(b)(xxii)-6 EoC <i>War crime of sexual violence (international conflicts)</i></p>	<p>Article 8(2)(e)(vi)-6 EoC <i>War crime of sexual violence (non international conflicts)</i></p>
<ol style="list-style-type: none"> 1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent. 2. Such conduct was of a gravity comparable to the other offences in article 7, paragraph 1 (g), of the Statute. 3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct. 4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. 5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population. 	<ol style="list-style-type: none"> 1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent. 2. The conduct was of a gravity comparable to that of a grave breach of the Geneva Conventions. 3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct. 4. The conduct took place in the context of and was associated with an international armed conflict. 5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict. 	<ol style="list-style-type: none"> 1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent. 2. The conduct was of a gravity comparable to that of a serious violation of article 3 common to the four Geneva Conventions. 3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct. 4. The conduct took place in the context of and was associated with an armed conflict not of an international character. 5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

This section will examine the other forms of sexual violence that have either been charged by the prosecution or established in ICC jurisprudence. For a more comprehensive list of other forms of sexual violence which have either been established in other jurisdictions or which meet the criteria to be charged as an international crime, please refer to The Hague Principles on Sexual Violence.¹⁶⁵

¹⁶⁴ WIGJ, *How to break the ICC's circular definition of sexual violence – a guest post by Wayne Jordash*, 3 December 2020.

¹⁶⁵ WIGJ, *The Hague Principles on Sexual Violence*, 2020.

3.5.1 Forced nudity¹⁶⁶

Charges of forced nudity were ultimately not confirmed at the ICC but were proposed by the prosecution when applying for an arrest warrant in the *Bemba* case, which included other forms of sexual violence constituting a crime against humanity and war crime.¹⁶⁷ In deciding on the application, the PTC requested the prosecution to provide ‘additional information, as precise as possible, and supporting material’ to substantiate the sexual violence counts.¹⁶⁸ In the prosecution’s response, it explained the legal basis for the definition of other forms of sexual violence under the EoC as the perpetration of acts of a sexual nature, distinguishing it from rape, which requires invasion resulting in penetration.¹⁶⁹ It observed, thus, that the crime of sexual violence can be considered an act of a sexual nature not involving the invasion of the body, thus charging Bemba with sexual violence for the acts of forcing men and women to undress in public to humiliate them.¹⁷⁰

This observation on the crime of sexual violence is largely based on the ICTR’s *Akayesu* case where the prosecution charged Akayesu with acts of sexual violence, including sexual abuse in the form of forced nudity. The ICTR TC defined sexual violence as ‘includ[ing] acts which do not involve penetration

or even physical contact’ and found that forced public undressing constituted sexual violence.¹⁷¹ In the absence of an explicit provision governing sexual violence, the TC found that sexual violence falls within the crime of ‘other inhumane acts’ as a crime against humanity, ‘outrages upon personal dignity’ as a war crime, and ‘serious bodily or mental harm’ as an underlying act of genocide.¹⁷² In relation to the acts of forcing victims to undress and do exercises, march, and sit in the mud in public,¹⁷³ Akayesu was convicted of the crime against humanity of other inhumane acts and genocide.¹⁷⁴ It is important to note that, although the *Akayesu* TC referred to sexual violence as ‘including acts which do not involve penetration or even physical contact’,¹⁷⁵ in *Bemba*, the prosecution defined the crime of sexual violence as ‘acts of a sexual nature which do not involve an element of invasion of the body’.¹⁷⁶ This is a misinterpretation of the ICTR jurisprudence, as the broader category of sexual violence also encompasses acts which involve bodily invasion, including rape, but also other acts which are not specifically enumerated in the RS and may not involve invasion of the body.¹⁷⁷

In its decision on Bemba’s arrest warrant, the ICC PTC found that forced public undressing did not constitute

¹⁶⁶ When dealing with charges related to forced nudity, practitioners are encouraged to consider the broader category of ‘having someone undress partially or fully in public, including while performing activities such as dancing, exercising or marching whilst nude’. For more guidance on what constitutes sexual violence, please refer to [The Hague Principles on Sexual Violence](#).

¹⁶⁷ Prosecutor v. Bemba, Prosecutor’s Application for Warrant of Arrest under Article 58, ICC-01/05-01/08-26-Red, 9 May 2008, pp 9-10.

¹⁶⁸ Prosecutor v. Bemba, ICC-01/05-01/08-89, Decision Requesting Additional Information in Respect of the Prosecutor’s Application for Warrant of Arrest under Article 58, 3 September 2008, p. 4.

¹⁶⁹ Situation in the Central African Republic, Prosecutor’s Submission on Further Information and Materials, ICC-01/05-01/08-29-Red, 27 May 2008, p 8.

¹⁷⁰ Ibid.

¹⁷¹ The Prosecutor v. Akayesu, [Judgement](#), Case no. ICTR-96-4-T, 2 September 1998, para 688.

¹⁷² Ibid, para 687.

¹⁷³ ‘Order[ing] the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitut[ing] sexual violence’, *ibid*, para 688.

¹⁷⁴ Ibid, paras 685, 688, 692-695, 697, 731-732, 734 and section 8, verdict, p 293.

¹⁷⁵ Ibid, para 688.

¹⁷⁶ Prosecutor v. Bemba, ICC-01/05-01/08-89, Decision Requesting Additional Information in Respect of the Prosecutor’s Application for Warrant of Arrest under Article 58, 3 September 2008.

¹⁷⁷ Examples can include: making physical contact with a person, including by touching any sexual body part of that person’s, touching a person with a sexual body part, or by sitting or lying on a person; and penetrating someone’s body, however slightly, with a human or animal sexual organ. For more guidance on what constitutes sexual violence, please refer to [The Hague Principles on Sexual Violence](#).

a form of sexual violence of comparable gravity to the other crimes set forth in Article 7(1)(g) of the Statute, and thus excluded the charge from the arrest warrant.¹⁷⁸ The Chamber also declined to include this conduct as other forms of sexual violence as a war crime, finding that the conduct could be characterized solely as the war crime of outrages upon personal dignity.¹⁷⁹ This decision departed from the established jurisprudence of the ad hoc tribunals as reference could have been made to the ICTR's finding in *Akayesu* that forced nudity can constitute an act of sexual violence as a war crime and crime against humanity. Reference could have also been made to the drafting history of 'other forms of sexual violence' during the negotiations of the RS which also meant to capture forced nudity.¹⁸⁰ It must also be noted that, in order to assess whether an act of sexual violence is of comparable gravity to the other enumerated in crimes in Article 7(1)(g) of the Statute, important factors to take into account are the views of the victim and the affected community about the cultural significance of forced nudity as well as the significance of qualifying acts of sexual violence as other forms of sexual violence rather than as outrages upon personal dignity.¹⁸¹

Charges of forced nudity were also proposed by the OTP in the *Ngaissona and Yekatom* case, but not as the crime of any other form of sexual violence. Instead, the Prosecutor charged the accused with 'mutilation, cruel treatment and torture' as war crimes based, in part, on the act of subjecting six women 'to severe physical and mental injury, including by [...] forcing them to undress'.¹⁸² Despite well-established international jurisprudence characterizing forced undressing as an act of sexual violence, the Prosecutor decided not to charge this act as 'any other form of sexual violence'. This may stem from the *Bemba* jurisprudence, and exemplifies the negative repercussions such jurisprudence, which is not in line with international standards, can have on subsequent decisions relating to sexual violence charges. It is recommended that the prosecution continue to charge, when supported by the evidence, forced nudity as sexual violence, at least in the alternative, despite the *Bemba* jurisprudence.

This will provide ICC Chambers an opportunity to re-examine the issue and rectify its past jurisprudence in order to reflect international standards.

3.5.2 Sexual and gender-based mutilation

Charges of genital mutilation were discussed in the *Kenyatta* case at the ICC in which the Prosecutor applied for summonses for Kenyatta and his co-accused to appear for their alleged commission of, inter alia, forcible circumcision as other forms of

sexual violence as a crime against humanity.¹⁸³ The Chamber found forcible circumcision could not be considered an act of a sexual nature but, instead, found that such conduct is more properly qualified as 'other inhumane acts' in light of 'the serious

¹⁷⁸ Prosecutor v. Bemba, ICC-01/05-01/08, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, 12 June 2008, paras 39-40, 62-63.

¹⁷⁹ Ibid.

¹⁸⁰ Rosemary Grey, *Conflicting interpretations of 'sexual violence' in the International Criminal Court*, 23 October 2014, Australian Feminist Studies, Vol 29(81).

¹⁸¹ Ibid. This case defeats the stereotype that sexual violence is mostly committed by men against women as only 1 of 3 forced nudity incidents in Bemba involved a male perpetrator and female victim, while the other 2 cases involved male victims and female perpetrators.

¹⁸² Prosecutor v. Yekatom and Ngaissona, Corrected version of 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaissona', 28 June 2021, p 104.

¹⁸³ The Prosecutor v. Kenyatta et al., ICC-01/09-02/11-01, *Decision on the Prosecutor's Application for Summonses to Appear for [Kenyatta et al.]*, 8 March 2011, para 27.

injury to body that the forcible circumcision causes' as well as 'its character, similar to other underlying acts constituting crimes against humanity'.¹⁸⁴ The prosecution requested leave to appeal the decision on various grounds, including 'whether the PTC properly rejected, without explanation, the Application's characterization of forced circumcision as acts of sexual violence'.¹⁸⁵ The prosecution noted that it had concluded forcible circumcision was the most appropriate legal characterization in light of its statutory duty under Article 54(1)(b) to 'take into account the nature of the crime, in particular where it involves sexual violence [and] gender violence'.¹⁸⁶ It argued that the decision prevented the prosecution from discharging that duty and the PTC adopted a legal characterization that did not accurately reflect the nature of the acts of forcible circumcision.¹⁸⁷ It indicated that it is the prosecution's role to select and present the charges, and that 'the PTC is not entitled to choose the counts that it believes best reflect the harm suffered by the victims and the criminality' of the accused and to summarily reject others.¹⁸⁸ It further observed that, as a result of the decision, serious charges would not go to trial and any decision in the case would not reflect the full range of crimes committed or the nature and degree of victimization.¹⁸⁹ It asserted that an immediate resolution of this issue would advance the proceedings by ensuring that the respective roles of the Prosecutor and Chambers are respected, and that the case would progress based on legally and factually justifiable charges.¹⁹⁰

It also asserted that legal certainty from the outset on the definition of offenses would be preferable to revisiting the charges later under Regulation 55, which would impact the expeditiousness of the trial.¹⁹¹

The single Judge presiding over the case denied the prosecution's application. The Judge was not persuaded that the Prosecutor was prejudiced by the Chamber's decision, noting that the decision was grounded in the evidence and information submitted, that the Prosecutor was not precluded from charging the suspects with acts of forcible circumcision as other forms of sexual violence at the confirmation stage, nor was the Chamber precluded from confirming the charge if supported by the evidence.¹⁹²

At the confirmation stage, the prosecution again brought the charge of sexual violence for acts of forcible circumcision, arguing at the confirmation of charges hearing 'that these were not just attacks on men's sexual organs as such but were intended as attacks on men's identities as men within their society and were designed to destroy their masculinity'.¹⁹³ The prosecution's arguments at the summons to appear and confirmation stages demonstrated the prosecution's application of a gender analysis and its statutory duty under Article 54(1)(b) to 'take into account the nature of the crime, in particular where it involves sexual violence [and] gender violence'. Its reasoning aptly sets out the importance of charges that fully reflect the range of crimes committed and the nature and degree of victimization.

¹⁸⁴ Ibid.

¹⁸⁵ The Prosecutor v. Kenyatta et al., Prosecution's Application for Leave to Appeal the "Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muiga Kenyatta and Mohamed Hussein Ali", ICC-01/09-02/11-2-Red, 14 March 2011, paras 24-30, 35-36.

¹⁸⁶ Ibid, para 26.

¹⁸⁷ Ibid, para 27.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid, para 28.

¹⁹⁰ Ibid, para 32.

¹⁹¹ Ibid, para 36.

¹⁹² The Prosecutor v. Kenyatta et al, Decision on the "Prosecution's Application for Leave to Appeal the "Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muiga Kenyatta and Mohamed Hussein Ali", ICC-01/09-02/11-27, 1 April 2011, para 31.

¹⁹³ The Prosecutor v. Kenyatta et al, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, 23 January 2012, para 264.

The Chamber declined to confirm the charge, finding that ‘not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence’, and that the evidence did not establish the sexual nature of the acts of forcible circumcision and penile amputation. It found, instead, that ‘it appears from the evidence that the acts were motivated by ethnic prejudice and intended to demonstrate cultural superiority of one tribe over the other’ and considered the acts ‘as part of the Prosecutor’s allegation of acts causing severe physical injuries’.¹⁹⁴

The PTC’s analysis in the confirmation of charges decision is a stark example of failure to apply an intersectional approach. Its finding that the acts of forcible circumcision and penile amputation were motivated by ethnic prejudice does not preclude a finding that they were also acts of a sexual nature and thus sexual violence. Yet, the possibility that intersectional factors motivated the crimes was not considered. Besides violating one’s sexual autonomy and integrity, the act of forcible circumcision also limits one’s reproductive capacity, which adds a layer of harm and should have been considered by the Chamber. Like the *Bemba* decision, the PTC’s decision in *Kenyatta* represents a departure from the established jurisprudence of other international criminal tribunals.

It should also be noted that when Prosecutor Bensouda took office, her office sought recharacterization of

the forced circumcisions and penile amputations at issue in this case as sexual violence.¹⁹⁵ The Prosecutor’s application referred to jurisprudence and scholarly publications describing attacks on genitals as sexual violence, and argued that ‘the harm caused by the amputation or disfigurement of one’s sexual organs is not merely physical; it also attacks the victim’s sexuality [which] is particularly true in patriarchal societies, where an assault on a man’s sexual organs also constitutes an assault on his masculinity and identity within society’.¹⁹⁶ The prosecution added that it is ‘impossible to divorce the physical harm caused by forcible circumcision and penile amputation from the harm caused to the victim’s sexuality [as it is] this latter form of harm - to the victim’s sexuality - that is inherently “of a sexual nature”’.¹⁹⁷ Following this application, the TC ordered the Prosecutor to submit an updated list of charges,¹⁹⁸ but it did not include any new charges of sexual violence.¹⁹⁹ The submission did describe acts against men as sexual violence, but as the defence objected to this language, the Prosecutor agreed to remove references to sexual violence from the new list of charges.²⁰⁰

The LRV also made a submission on this subject, arguing that the PTC had ‘relied on an outdated conceptualization of sexual violence; namely, that such are purely about sex and not about the complex power dynamics at play’.²⁰¹ In contrast to that ‘outdated conceptualisation’, the LRV argued that sexual violence ‘may be motivated less by sexual gratification than

¹⁹⁴ *Ibid*, para 266.

¹⁹⁵ *The Prosecutor v. Kenyatta et al*, [Prosecution’s application for notice to be given under Regulation 55\(2\) with respect to certain crimes charged](#), ICC-01/09-02/11-445, 3 July 2012.

¹⁹⁶ *Ibid*, para 19.

¹⁹⁷ *Ibid*.

¹⁹⁸ *The Prosecutor v. Muthaura & Kenyatta*, [Order for the prosecution to file an updated document containing the charges](#), ICC-01/09-02/11-450, 5 July 2012.

¹⁹⁹ *The Prosecutor v. Muthaura & Kenyatta*, [Decision on the content of the updated document containing the charges](#), ICC-01/09-02/11-584, 28 December 2012.

²⁰⁰ Rosemary Grey, [Conflicting interpretations of ‘sexual violence’ in the International Criminal Court](#), 23 October 2014, *Australian Feminist Studies*, Vol 29(81).

²⁰¹ *The Prosecutor v. Muthaura & Kenyatta*, [Victims’ Observations on the “Prosecution’s application for notice to be given under Regulation 55\(2\) with respect to certain crimes charged”](#), ICC-01/09-02/11-458, 24 July 2012, para 12.

by an attempt to exert power and dominance over the victim and potentially the victim's community' and explained that the forced circumcisions had impacted detrimentally on the victims' 'ability to have sexual intercourse' and had a 'severe effect' on their 'masculinity and sense of manhood'.²⁰²

As explained by Grey, while the *Kenyatta* case indicated that determining whether particular acts are 'sexual' is a difficult task, the LRV put forward several ideas which can help guide the Court in this respect.²⁰³

First, that sexual violence is often an expression of power instead of, or as well as, committed for the perpetrators' sexual gratification. In some cases, power and sexual gratification may be linked in the perpetrator's mind. In other cases, the expression of power might be the only aim of sexual violence. Second, violence resulting in sexual dysfunction can be considered 'sexual violence'. Third, sexual violence and gender identity may be linked—in this case, the victims' 'masculinity and sense of manhood' was directly affected by the attacks on their sexual organs. These arguments help explain why the victims understood the attacks as 'sexual violence' and may be relevant issues to explore when there is a debate about whether acts constitute 'sexual violence' in subsequent cases.²⁰⁴

Genital mutilation also came up in the *Mbarushimana* and *Mudacumura* arrest warrant decisions, but it was not charged by the Prosecutor as sexual violence in either case. In *Mbarushimana*, the Prosecutor included charges of torture as a crime against humanity for

mutilation of civilians' genitals, and inhumane acts as a crime against humanity and inhuman treatment as a war crime for acts including cutting open the stomach of a pregnant woman and removing the foetus.²⁰⁵ These charges were confirmed by the PTC in its decision on the arrest warrant,²⁰⁶ but later, at the confirmation of charges phase, the Chamber declined to confirm all charges against Mbarushimana, finding there were not substantial grounds to believe that he was individually responsible under Article 25(3)(d) as he 'did not provide any contribution to the commission of [the] crimes, even less a "significant" one'.²⁰⁷

In *Mudacumura*, the prosecution charged mutilation, cruel treatment and torture as war crimes and inhumane acts and torture as crimes against humanity for acts including 'brutal sexual attacks, sometimes involving mutilation and disfigurement'.²⁰⁸ As the prosecution's application is heavily redacted, it is unclear how the prosecution qualified these crimes. However, it is clear that they were not qualified as 'other forms of sexual violence' given that the crime was not included in the application.²⁰⁹ The PTC found reasonable grounds to believe that mutilation and torture as war crimes were committed for, inter alia, cutting off the genitals of civilians.²¹⁰ The suspect is still at large.

Although jurisprudence stemming from international courts establishing acts of genital mutilation as sexual violence is not extensive, in *Tadić*, the ICTY found the accused guilty of sexual assault for forcing other

²⁰² Ibid, paras 12-14.

²⁰³ Rosemary Grey, *Conflicting interpretations of 'sexual violence' in the International Criminal Court*, 23 October 2014, Australian Feminist Studies, Vol 29(81).

²⁰⁴ Ibid.

²⁰⁵ The Prosecutor v. Callixte Mbarushimana, Prosecution's Application under Article 58, ICC-01/04-572-US-Exp, 20 August 2010.

²⁰⁶ Prosecutor v. Callixte Mbarushimana, ICC-01/04-01/10-1-US, *Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana*, 28 September 2010, paras 10, 27.

²⁰⁷ Prosecutor v. Callixte Mbarushimana, *Decision on the confirmation of charges*, ICC-01/04-01/10-465-Red, 16 December 2011.

²⁰⁸ Prosecutor v. Mudacumura, ICC-01/04-616-Red, *Prosecution's Application under Article 58*, 13 June 2012, para 22 and pp 16-18.

²⁰⁹ Ibid.

²¹⁰ Prosecutor v. Mudacumura, ICC-01/04-01/12-1-Red, *Decision on the Prosecutor's Application under Article 58*, 13 July 2012, paras 43, 49-50.

prisoners to ‘commit oral sexual acts’ and sexually mutilate another prisoner by biting off his testicles, acts which corresponded to the war crimes of torture, inhuman treatment, wilfully causing great suffering or serious injury to body and health, and cruel treatment, and the crime against humanity of other inhumane acts characterized as sexual mutilation and sexual assault, respectively.²¹¹ In addition, in *Todorović*, the accused pled guilty to sexual assault as the underlying criminal conduct of the

crime against humanity of persecution for acts including ‘beat[ing] [the victim] and kick[ing] him in the genital area’ and ordering the victim to bite another man’s penis.²¹² Other convictions for acts that were not characterized as sexual by the respective Chamber, but which have been characterized as such by Chambers in other cases have been entered in *Simić*,²¹³ *Sesay et al.*,²¹⁴ *Delalić et al.*,²¹⁵ *Naletilić et al.*,²¹⁶ *Furundžija*,²¹⁷ and *Niyitegeka*.²¹⁸

²¹¹ Prosecutor v. Tadić, IT-94-1-T, *Opinion and Judgement*, 7 May 1997, paras 194, 198.

²¹² Prosecutor v. Todorović, IT-95-9/1-S, *Sentencing Judgement*, 31 July 2001, paras 38, 34, 37.

²¹³ Prosecutor v. Simić, IT-95-9/2-S, *Sentencing Judgement*, 17 October 2002 (“Simić Sentencing Judgement”), para 63 (Milan Simić pled guilty to torture as a crime against humanity for acts including: “order[ing] [victims] to stand with their legs apart in order to receive forceful kicks to their genitals”).

²¹⁴ Sesay et al Trial Judgement, paras 1208, 1307- 1309, 1347, 1352, 2063 and pp 677-678, 680-682, 684-685 (each accused convicted of the war crimes of terrorism and outrages on personal dignity for acts including: “slitting the [genitalia] of several male and female civilians with a knife”); Prosecutor v Sesay et al, SCSL04-15-A, Judgment, 26 October 2009 (“Sesay et al Appeal Judgment”), pp 477-479 (affirming the convictions).

²¹⁵ Prosecutor v. Delalić et al, IT-96-21-T, Judgment, 16 November 1998 (“Delalić Trial Judgement”), paras 1019, 1035-1048 and p 442 (Zdravko Mučić convicted of the war crimes of wilfully causing great suffering or serious injury to body or health and cruel treatment for acts including: “the placing of a burning fuse cord around the genital areas”); Prosecutor v Delalić et al, IT-96-21-A, Judgment, 20 February 2001 (“Delalić et al Appeal Judgement”), paras 424, 427 and p 306 (upholding Mučić’s conviction for wilfully causing great suffering or serious injury to body or health for these acts and dismissing the conviction for cruel treatment).

²¹⁶ Prosecutor v Naletilić et al, IT-98-34-T, Judgment, 31 March 2003, paras 450, 451, 453- 454, 721 and pp 254-255 (Mladen Naletilić convicted of the war crime of wilfully causing great suffering for acts including: “beat[ing] [the victim] on the genitals”); Prosecutor v Naletilić et al, IT-98-34-A, Judgment, 3 May 2006, p 207 (upholding Naletilić’s conviction for these acts).

²¹⁷ Furundžija Trial Judgement, paras 264, 124, 267 and p. 112 (Anto Furundžija convicted of the war crime of torture for acts including: interrogating the victim while “[another soldier] rubbed his knife on the inner thighs of [the victim] and threatened to cut out her private parts if she did not tell the truth in answer to the interrogation”); Furundžija Appeal Judgement, p 79 (rejecting each ground of appeal, dismissing the appeal and affirming Furundžija’s conviction).

²¹⁸ The Prosecutor v. Niyitegeka, ICTR-96-14-T, Judgment and Sentence, 16 May 2003, paras 312, 462, 464-467, 480 (Eliézer Niyitegeka convicted of the crime against humanity of other inhumane acts for acts including: castrating a victim and hanging “[h]is genitals [...] on a spike [...] visible to the public.”); Niyitegeka v. The Prosecutor, ICTR-96-14-A, Judgment, 16 May 2003, para 270 (dismissing Niyitegeka’s appeal in its entirety).

3.6 Persecution

The RS is the first ICL instrument to recognise the crime against humanity of persecution. Gender is one of several grounds on which a charge of persecution as a crime of humanity can be based under the RS ('gender persecution'), the others include 'political, racial, national, ethnic, cultural, religious' and 'other grounds that are universally recognized as impermissible under international law'.²¹⁹

Article 7(2)(g) RS

"Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity

Article 7(1)(h) EoC

Crime against humanity of persecution

1. The perpetrator severely deprived, contrary to international law,* one or more persons of fundamental rights.
2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as

impermissible under international law.

4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.**
5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

*This requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes.

** It is understood that no additional mental element is necessary for this element other than that inherent in element 6.

Charges of persecution on gender grounds have been brought in the *Al Hassan*,²²⁰ *Abd-Al-Rahman*,²²¹ and *Said*²²² cases,²²³ and feature in the Nigeria and Afghanistan situations.²²⁴ As the first case to proceed to trial

²¹⁹ Article 7(1)(h) RS.

²²⁰ The Prosecutor v. Al Hassan, [Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud](#), ICC-01/12-01/18-461-Corr-Red, 8 November 2019; [Version publique expurgée du Rectificatif de la Décision portant modification des charges confirmées le 30 septembre 2019 à l'encontre d'Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud](#), 23 avril 2020, ICC-01/12-01/18-767-Conf; the charge of persecution is based on the intersecting grounds of gender and religion.

²²¹ Prosecutor v. Abd-Al-Rahman, [Public redacted version of "Second Corrected Version of 'Document Containing the Charges'"](#), 29 March 2021, ICC-02/05-01/20-325-Conf-Anx1", 22 April 2021, ICC-02/05-01/20-325-Conf-Anx1-Corr2, para 93; the Abd-Al-Rahman case is notable in that it charges gender persecution for alleged crimes committed against male victims.

²²² The Prosecutor v. Mahamat Said Abdel Kani, [Decision on the confirmation of charges against Mahamat Said Abdel Kani](#), ICC-01/14-01/21-218-Red, 9 December 2021.

²²³ The case of Callixte Mbarushimana was the first ICC case to include charges of persecution on gender grounds. The majority of the PTC (Judge Monageng dissenting) declined to confirm the charges finding that the evidence submitted by the Prosecution did not provide substantial grounds to believe that Mbarushimana was individually criminally responsible for the alleged crimes committed by the FDLR under Article 25(3) (d) of the Statute. See The Prosecutor v. Callixte Mbarushimana, [Decision on the Confirmation of Charges](#), ICC-01/04-01/10-465-Red, 16 December 2011.

²²⁴ The Nigeria situation featured allegations of persecution on gender and religious grounds by Boko Haram and of persecution on gender and political grounds by the Nigerian Security Forces; [Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Nigeria](#), 11 December 2020. Afghanistan is mentioned as an example of conflict where acts that may amount to gender persecution have recently occurred; ICC OTP, [Policy on the Crime of Gender Persecution](#), 7 December 2022, para 11, fn 21.

on these charges, judicial assessment of gender persecution in the *Al Hassan* case is likely to be ‘precedent setting’, with ‘potentially far-reaching implications for future international prosecutions and possibly national prosecutions of crimes against humanity.’²²⁵ Adjudicating the crime of gender persecution at the ICC will likely present challenges

3.6.1 Definitional ambiguities

How Judges interpret the meaning of ‘gender’ at the ICC will significantly impact the way gender persecution cases are prosecuted, the way the law is interpreted and applied, and even the protection and participation of victims and witnesses. It could also ‘profoundly affect the legal construction of “gender” under international law.’²²⁶ The term ‘gender’ is defined in the RS under Article 7(3) as referring to ‘the two sexes, male and female, within the context of society’. Oosterveld notes that the ‘skeletal form of this definition is the result of diplomatic recourse to “constructive ambiguity” to ensure agreement amidst polarized negotiations’.²²⁷ The grounds of persecution had previously been limited in other international criminal tribunals to political, racial, or religious.²²⁸

Thus, the inclusion of gender as a ground of

and opportunities for Judges to develop progressive jurisprudence in this area of law. Some topics around which issues are likely to arise include: definitional ambiguities, the need to undertake an intersectional analysis, and the assessment of cumulative charges. Each will be discussed, in turn, below.

persecution is a revolutionary, albeit controversial, achievement.²²⁹ The ‘constructive ambiguity’²³⁰ in the definition of gender in the RS presents an opportunity for the Court in *Al Hassan* and other cases to further clarify and reflect on the contemporary understanding of gender under international law that recognizes gender as a social construct.

The OTP’s ‘Policy on the Crime of Gender Persecution’ interprets ‘gender’ as referring to sex characteristics and social constructs and criteria used to define maleness and femaleness, including roles, behaviours, activities, and attributes. The OTP notes that ‘as a social construct, gender varies within societies and from society to society and can change over time’.²³¹ There is wide academic support for a broad interpretation of ‘gender’ as a social, non-binary construction.²³² Commentators, such as Grey, argue

²²⁵ Valerie Oosterveld, Prosecuting Gender-Based Persecution as an International Crime, in Anne-Marie de Brouwer et al (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches*, Intersentia, 2013, p 59. National prosecutions of the crime of persecution on grounds of gender are already underway. See for example, the Sarah O. case at the Higher Regional Court of Düsseldorf, which was the first successful prosecution of persecution on intersecting grounds of gender and religion. Alexandra Lily Kather and Alexander Scharz, *Intersecting Religious and Gender-Based Persecution in Yazidi Genocide Case: A Request for an Extension of Charges*, 24 February 2021, Just Security.

²²⁶ Valerie Oosterveld, *The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 Harvard Human Rights Law Journal, p 57.

²²⁷ *Ibid*, p 58.

²²⁸ See for example Article 5(h), ICTY Statute and Article 3(h), ICTR Statute.

²²⁹ Yvonne Dutton and Mileno Sterio, *The ICC’s 2022 Gender Persecution Policy in Context: An Important Next Step Forward*, 1 June 2023, Just Security.

²³⁰ Valerie Oosterveld, *The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 Harvard Human Rights Law Journal, citing Anthony Aust, *Modern Treaty Law and Practice*, 2000, Cambridge University Press, p 188.

²³¹ OTP, *Policy on the Crime of Gender Persecution*, p 3.

²³² Public International Law and Policy Group, *PILPG Comments on the International Criminal Court Office of the Prosecutor’s Policy Initiative to Advance Accountability for Gender Persecution under the Rome Statute*, March 2022.

that the interpretation of 'gender' under Article 7(3) as a social construct, rather than a biological category, is consistent with the drafting history of the RS.²³³ Oosterveld notes that the inclusion of the words 'in the context of society', suggests that the ICC definition goes beyond biological sex and is consistent with a 'socially constructed' understanding of gender, which allows the Court to consider a wide range of factors beyond the biological binary of maleness and femaleness.²³⁴

Adopting a more expansive approach to defining gender is also consistent with the growing practice and interpretative approaches of regional and international human rights bodies concerning non-discrimination and persecution on gender grounds.²³⁵

An expansive non-binary approach to the definition also serves to defeminise gender-based crimes, that is, the perception that women are the only victims of such crimes, thereby occluding gender harms or incidents with gender significance against men, children, and non-binary persons, or otherwise gender non-conforming persons outside of Western ideas of gender identity and sexual orientation.²³⁶ The gender persecution charges in the *Said* and *Abd-Al-Rahman* cases, which focus on the persecutory targeting of males and on the assumption that they are, or will become, fighters and defenders of their communities, provides an opportunity for the Court to adopt an understanding of gender which dismantles harmful stereotypes and limiting binaries.²³⁷

²³³ Rosemary Grey, Jonathan O'Donohue, Indira Rosenthal, Lisa Davis and Dorine Llanta, *Gender-based Persecution as a Crime Against Humanity: The Road Ahead*, *Journal of International Criminal Justice* 17, 2019, p 963.

²³⁴ Valerie Oosterveld, *Prosecuting Gender-Based Persecution as an International Crime*, in Anne-Marie de Brouwer et al (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches*, Intersentia, 2013.

²³⁵ See for example, UN Secretary General, *Protection against violence and discrimination based on sexual orientation and gender identity*, UN Doc A/73/152, 12 July 2018; the Inter-American Court of Human Rights *Advisory Opinion, OC24/17*, 24 November 2017, p 32; CAT Committee, *Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc CAT/C/57/4, 22 March 2016; CEDAW, *General Recommendation 33*, UN Doc CEDAW/GC/33, 3 August 2015; CAT, *General Comment 3*, UN Doc CAT/C/GC/3, 19 November 2012; CEDAW, *General Recommendation 28*, UN Doc CEDAW/GC/28, 16 December 2010; CAT, *General Comment 2*, UN Doc CAT/C/GC/2, 24 January 2008; ICESCR, *General Comment 16*, UN Doc E/C.12/2005/4, 11 August 2005; UN Secretary General, *Question of torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/56/156, 3 July 2001; ICCPR, *General Comment 28*, UN Doc CCPR/C/21/Rev.1/Add.10, 29 March 2000; Report of the UN Secretary General: *Implementation of the Outcome of the Fourth World Conference on Women (Beijing Platform for Action)*, 3 September 1996; CEDAW, *General Recommendation 19*, UN Doc A/47/38, 1992, cited in Lisa Davis et al, *The Definition of Gender in the Draft Crimes Against Humanity Convention*, *Open Letter to the UN Secretary General*, 1 December 2018, p 2. See also PILPG *Comments on the International Criminal Court Office of the Prosecutor's Policy Initiative to Advance Accountability for Gender Persecution under the Rome Statute*, March 2022, p 13; Rosemary Grey, Jonathan O'Donohue, Indira Rosenthal, Lisa Davis and Dorine Llanta, *Gender-based Persecution as a Crime Against Humanity: The Road Ahead*, *Journal of International Criminal Justice* 17, 2019, p 959.

²³⁶ Maria Lugones, *The Coloniality of Gender*, in *World & Knowledges Otherwise*, Duke University, Spring 2008.

²³⁷ Rosemary Grey, *Gender-based Persecution against Men: the ICC's Abd-al-Rahman Case*, *Opinio Juris*, May 30, 2021

3.6.2 Intersectional analysis

Given the multi-faceted nature of persecution, which affects certain individuals or groups, Judges will need to adopt an intersectional approach grounded in Article 21(3) of the RS in their analysis and reasoning in such cases.²³⁸ The OTP's approach to Article 7(3) recognises that IHRL is evolving 'to put an end to violence and discrimination on the basis of sexual orientation or gender identity'.²³⁹ Charging persecution on diverse grounds, including gender, highlights the underlying discriminatory drivers of violence and atrocity in conflict, and the vulnerability of victims who experience diverse and intersecting harms.²⁴⁰

Gender persecution might intersect with other forms of persecution, such as those based on race, religion, or political beliefs. The OTP has committed to applying an intersectional approach by investigating and charging gender persecution with, when relevant, other grounds recognised under the Statute or universally recognised as impermissible under international law. The Pre-Trial Judges in *Al Hassan* made specific reference to the intersection of the victim's race, age, and pregnancy as potential factors evincing the persecutory acts.²⁴¹ Though not specifically charged with gender-based persecution, the approach of the Judges in *Ntaganda* provides indicative guidance concerning how a Chamber could interpret intersecting harms.²⁴² At the trial phase of the *Ntaganda* case, the Court confirmed that one ground or 'a combination of more

than one [ground] may equally form the basis for the discrimination'.²⁴³ In its reparations order, the Chamber also adopted a progressive intersectional approach to its determination of eligibility, noting that '[a] gender-inclusive and sensitive perspective should integrate intersectionality as a core component'.²⁴⁴ The Chamber referenced key decisions from the IACtHR, and the work of feminist scholars such as Kimberley Crenshaw, in noting the importance of taking into account 'the existence of previous gender and power imbalances, as well as the differentiated impact of harm depending on the victim's sex or gender identity'.²⁴⁵

The OTP's gender persecution policy pays particular attention to gender persecution committed against or affecting children, noting the particular gravity of such acts or crimes, given the commitment made to children in the Statute.²⁴⁶ The prosecution commits to charging persecuting acts targeting children on the basis of age or birth on intersecting grounds, including gender, in accordance with the OTP's 'Policy on Children'.²⁴⁷

It is critical that Judges also adopt an intersectional lens in addressing gender-based persecution involving children, and definitively depart from the single-axis approach to analysing charges and evidence applied by the majority in the *Lubanga* case.

²³⁸ Valerie Oosterveld, Prosecuting Gender-Based Persecution as an International Crime, in Anne-Marie de Brouwer et al (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches*, Intersentia, 2013.

²³⁹ ICC OTP, Policy Paper on Sexual and Gender Based Crimes, June 2014, fn 23.

²⁴⁰ Michelle Jarvis, *Gender Persecution: Why Labels Matter*, Just Security, 31 May 2023.

²⁴¹ The Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18-767-Corr-Red, Version publique expurgée du Rectificatif de la Décision portant modification des charges confirmées le 30 septembre 2019 à l'encontre d'Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 23 avril 2020, ICC-01/12-01/18-767-Conf Avec une annexe publique expurgée contenant la liste complète des charges confirmées à l'encontre de l'accusé, (11.05.2020), para 166 and 168. See also PILPG Comments on the International Criminal Court Office of the Prosecutor's Policy Initiative to Advance Accountability for Gender Persecution under the Rome Statute, March 2022, p 20.

²⁴² *Ibid*, discussing the approach in *Ntaganda*.

²⁴³ *Ibid*, citing Prosecutor v. Ntaganda, ICC-01/04-02/06, Judgment with Public Annexes A, B and C, 8 July 2019, para 1009.

²⁴⁴ The Prosecutor v. Bosco Ntaganda, Reparations Order, ICC-01/04-02/06-2659, 8 March 2021, para 60.

²⁴⁵ *Ibid*.

²⁴⁶ OTP, *Policy on the Crime of Gender Persecution*, para 8.

²⁴⁷ *Ibid*.

3.6.3 Assessment of cumulative charges

The crime of persecution may be committed by a ‘single intentional act or omission or a series of intentional acts or omissions’.²⁴⁸ At the ICTY and ICTR, the underlying act or omission did not need to constitute a crime in international law, but had to reach the same level of gravity as the other crimes set out in the relevant statutes of the international tribunals.²⁴⁹ In the *Vasiljević* case, the ICTY TC considered that the act or omission constituting the crime of persecution may assume various forms, and there is no comprehensive list of what acts can amount to persecution.²⁵⁰

Gender-based violence can amount to a persecutory act. For example, in the *Todorović* case, ICTY Judges found that orders given to detained men to perform fellatio on each other amounted to persecution.²⁵¹ The TC in *Kvočka et al.* provided a non-exhaustive list of potential acts, including sexual violence, which may constitute persecution when committed with the requisite discriminatory intent.²⁵²

However, in order to capture the totality of persecutory harms perpetrated through acts of gender persecution and their multi-faceted character, the OTP may seek to bring cumulative charges for other SGBC or undertake thematic prosecutions of SGBC, as supported by the evidence in each case.²⁵³ Since

gender persecution might be charged alongside other crimes, Judges have to determine whether these cumulative charges are appropriate and if they accurately reflect the totality of the crimes committed. As discussed elsewhere in this report, the practice at the ICC has been that, where gender-based persecution is charged alongside underlying gender-based acts, such as rape, slavery, and other forms of sexual violence, some of these charges may be rejected by the PTC at the confirmation of charges stage.²⁵⁴

Guidance concerning the approach to cumulative charges and convictions has now been provided by the Chambers Practice Manual, a non-binding document prepared by the Judges,²⁵⁵ and by the AC in *Ongwen*.²⁵⁶ Thus, where the charges arise from the same conduct, the Chamber must analyse whether each charge has a materially distinct element not contained within the other.²⁵⁷ An element is considered materially distinct if it requires proof of a fact not required by the other.²⁵⁸ If the charges have no materially distinct elements, the Chamber then evaluates whether the charges protect against the same harm.²⁵⁹ If they do, then cumulative convictions would be impermissible.²⁶⁰

²⁴⁸ Prosecutor v. Dario Kordic, Mario Cerkez, *Appeal Judgment*, IT-95-14/2-A, ICTY, 17 December 2004, para 102. The Chamber noted that ‘although persecution often refers to a series of acts, a single act may be sufficient, as long as this act or omission discriminates in fact and was carried out deliberately with the intention to discriminate on one of the listed grounds.’

²⁴⁹ The Prosecutor v. Thomas Blaskic, *Appeal Judgment*, IT-95-14-A, ICTY, 29 July 2004, para 135.

²⁵⁰ Prosecutor v. Mitar Vasiljević, *Trial Judgment*, IT-98-32-T, ICTY, 29 November 2002, para 246.

²⁵¹ Prosecutor v. Todorović, IT-95-9/1-S, Sentencing Judgment, 31 Jul 2001, paras 9, 12 and 38–40.

²⁵² Prosecutor v. Miroslav Kvočka et al, *Trial Judgment*, IT-98-30/1-T, ICTY, 2 November 2001, para 186.

²⁵³ OTP, *Gender Persecution Policy Paper*, para 84

²⁵⁴ Valerie Oosterveld, Prosecuting Gender-Based Persecution as an International Crime, in Anne-Marie de Brouwer et al (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches*, Intersentia, 2013, p 73. For example, the Bemba Pre-Trial Chamber declining to confirm the torture or outrages upon personal dignity charges on the grounds that the latter charges were cumulative to the rape charges.

²⁵⁵ ICC, *Chambers Practice Manual*, 7th Edition, adopted following the judicial retreat 2023, paras 67-68.

²⁵⁶ The Prosecutor v. Dominic Ongwen, *Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled “Trial Judgment”*, ICC-02/04-01/15-2022-Red, 15 December 2022, paras 1635-1636.

²⁵⁷ ICC, *Chambers Practice Manual*, para 68.

²⁵⁸ The Prosecutor v. Dominic Ongwen, *Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled “Trial Judgment”*, ICC-02/04-01/15-2022-Red, 15 December 2022, paras 24.

²⁵⁹ *Ibid.*

Thus, while acts of sexual violence may be charged as underlying acts of gender-based persecution, separate charges of rape or other forms of sexual violence may not necessarily be cumulative because the two sets of crimes are rooted in different violations and societal harms. Gender persecution focuses on the commission of systemic and broad violations based on gender,

whereas sexual violence crimes are more act-centric, addressing specific infringements on bodily and sexual autonomy. Applying the *Ongwen* AC standard, separate charges of rape as a crime against humanity and gender-persecution as a crime against humanity based on the underlying act of rape may, (depending on the evidence), possess materially distinct elements.

ADJUDICATING SGBC: THEMATIC CONSIDERATIONS

04

Chapter 4 - Adjudicating SGBC: thematic considerations

Despite the progress that has been witnessed in the ever-evolving approach to SGBC at the ICC, cases involving SGBC charges appear to be particularly vulnerable at all stages of ICC proceedings. Charges for SGBC, when they have been brought, have been particularly susceptible to being dropped, or, in some instances, re-characterised. Undoubtedly, the OTP's investigations, evidence analysis, and charging strategy have directly impacted the adjudication of SGBC cases and their likely survival beyond the pre-trial phase. Where SGBC charges were not included at the outset, or where there was insufficient evidence to support the charges, the confirmation of the charges or convictions were unlikely. However, the manner in

which Judges approach issues such as cumulative charging, modes of liability, the Prosecutor's request to amend the charges, among others, could result in acquittals despite significant charges and cogent evidence. Judicial approaches vary depending on the stage of the proceedings, and a decision at one stage could potentially significantly impact the viability of the case at other stages of the proceedings.

This chapter will examine some key issues that are present at different stages of the proceedings, from pre-trial to the appellate stage, highlighting how judicial approaches to these issues have variously affected the outcome of SGBC charges at the ICC.

4.1 Recognising intersectional and gendered harms in charges

As the first case to be prosecuted before the ICC, the case against Thomas Lubanga held significant potential for ensuring accountability for the extensive crimes of sexual violence committed in the DRC. However, Lubanga was not charged with sexual crimes. The prosecution's error in failing to charge Lubanga with sexual crimes, or to request an amendment during the trial, had a significant impact on the Chamber's ability to find Lubanga responsible for those crimes.¹ In his opening statement, the Prosecutor acknowledged and made extensive reference to the gender dimensions of the crimes, highlighting

that child soldiers were encouraged to rape women as part of their training and were sent by their commanders to look for women to bring to the camp, and that girl soldiers, some as young as 12 years old, 'were the daily victims of rape by their commanders' and they were used as 'cooks and fighters, cleaners and spies, scouts and sexual slaves'.²

In addition to the prosecution's failure to bring SGBC charges in the Lubanga case, the majority of the Chamber similarly failed to recognise the intersectional dimensions of the crimes.

¹ Patricia Viseur Sellers, former Special Advisor to the OTP on Gender and current Special Advisor on Slavery Crimes, noted: 'The Prosecutor could have brought charges related to sexual violence and... [c]ould have amended the indictment at anytime prior to trial or even at a reasonable moment during the presentation of the prosecution case [to include charges for crimes of sexual violence]. The Prosecutor has suggested that to do so would have been detrimental to the due process rights of the accused. However, in the event of granting the Prosecutor's move to amend, the Trial Chamber could have allowed the accused whatever time he needed to prepare his case in light of additional charges. That is a fairly standard procedure at other international tribunals.' FIDH, Press Release, *Crimes of sexual violence and the Lubanga Case: Interview with Patricia Viseur Sellers*, 16 March 2012. From the early stages of the investigation, the Women's Initiatives advocated for the OTP to both investigate and include charges for gender-based crimes in the DRC Situation and in the case against Lubanga. On 16 August 2006, the Women's Initiatives submitted a letter and confidential report to the OTP, outlining concerns that gender-based crimes had not been adequately investigated in the Lubanga case, and encouraging the Prosecutor to investigate further.

² The Prosecutor v. Thomas Lubanga Dyilo, 26 January 2009 | Trial Chamber I | Transcript, ICC-01/04-01/06-T-107-ENG, p 11 line 24 - p 12 line 4. See generally, p 11 line 17 - p 13 line 8. WIGJ, *Gender Report Card 2009*, pp 69-71; and *Gender Report Card 2012*, p 160.

There was ample testimony, and thus direct evidence, from former child soldiers and members of the UPC concerning the gender and intersectional dimensions of the crimes for which Lubanga was convicted. Yet, due to the absence of specific SGBC charges against Lubanga, the majority of the Chamber adopted a narrow interpretation of ‘using children to participate actively in hostilities’, which did not encapsulate the gender dimensions of the charges or reflect the evidence presented before the Court.

The Chamber referred to the ‘relevant background evidence’ provided by the expert testimony of the UN Special Representative for Children and Armed Conflict, Radhika Coomaraswamy, that ‘children in this context frequently undertake a wide range of tasks that do not necessarily come within the traditional definition of warfare. As a result, they are exposed to various risks that include rape, sexual enslavement and other forms of sexual violence, cruel and inhumane treatment, as well as further kinds of hardship that are incompatible with their fundamental rights’.³

The majority of the Chamber noted that, while the prosecution had referred to sexual violence in its opening and closing statements, it had not requested an amendment to the charges, and had further opposed the inclusion of rape and sexual enslavement as unfair to the accused at the time of the joint request by the LRV.⁴ Thus, the Chamber concluded that it could not consider the evidence of sexual crimes in its final decision because facts relating to sexual violence were not included in the confirmation of charges.⁵

The majority indicated, however, that it would consider whether to take sexual violence into account for the purpose of sentencing and reparations.⁶

In a compelling dissent, Judge Odio Benito pointed to the fact that the majority’s failure to include the sexual violence and ill-treatment suffered by girls and boys in the definition of ‘using children to participate actively in hostilities’ rendered this aspect of the crime ‘invisible’, leading to discrimination against this category of victims.⁷ Atiba-Davies and Nwoye note that, by failing to take the gendered dimensions of the crime into account, ‘the majority decision of the TC had set up a false dichotomy between boy and girl child soldiers who are assigned to different duties on the basis of their sex and accompanying discriminatory stereotypes, [t]he Chamber recognis[ing] as criminal only those activities which were more likely to be performed by boy soldiers, leading to a discriminatory result’.⁸

The AC rejected both the TC’s majority and Judge Odio Benito’s dissent and found that ‘the crime of using children (in hostilities) depends on proof of a link between the activity for which the child is used and the combat in which the armed force or group of the perpetrator is engaged.’⁹ By failing to engage with the issues raised in Judge Odio Benito’s dissent, the AC missed an opportunity to address the gendered and intersectional elements inherent to the crime of using children to participate actively in hostilities, thereby perpetuating the discriminatory outcome of the majority’s decision.

³ The Prosecutor v. Thomas Lubanga Dyilo, Submission of the Observations of the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict pursuant to Rule 103 of the Rules of Procedure and Evidence, Annex A, ICC-01/04-01/06 – 1229-Anx 2, 18 March 2008, paras 13-14. WIGJ, *Gender Report Card* 2008, p 88.

⁴ The Prosecutor v. Thomas Lubanga Dyilo, *Judgment pursuant to Article 74 of the Statute*, ICC-01/04-01/06-2842, 14 March 2012, para 629.

⁵ *Ibid*, para 630.

⁶ *Ibid*, para 617.

⁷ The Prosecutor v. Thomas Lubanga Dyilo, *Judgment pursuant to Article 74 of the Statute (Separate and Dissenting Opinion of Judge Odio Benito)*, ICC-01/04-01/06-2842, 14 March 2012, para 16.

⁸ Gloria Atiba-Davies and Leo Nwoye, Children, Gender and International Criminal Justice, in Indira Rosenthal, Valerie Oosterveld and Susana Sacouto, *Gender and International Criminal Law*, 14 July 2022, Oxford University Press, p 147.

⁹ The Prosecutor v. Thomas Lubanga Dyilo, *Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction*, ICC-01/04-01/06-3121-Red, 1 December 2014, para 340.

4.2 Approach to cumulative charging

On 15 June 2009, PTC II in the *Bemba* case issued its confirmation of charges decision in which it declined to confirm the cumulative charge of torture as a crime against humanity committed through acts of rape or other forms of sexual violence on the basis that 'as a matter of fairness and expeditiousness of the proceedings' only distinct crimes could be cumulatively charged and confirmed.¹⁰ In so doing, PTC II endorsed the reasoning of PTC III in the arrest warrant decision¹¹ finding that 'the Prosecutorial practice of cumulative charging is detrimental to the rights of the Defence since it places an undue burden on the Defence'.¹² Relying on ICTY jurisprudence, it determined that cumulative charges based on the same underlying criminal conduct could only be confirmed if each alleged crime contained an additional material element not contained in the other.¹³ The Chamber also reasoned that before the ICC, the Prosecutor did not need to cumulatively charge because, unlike the ad hoc tribunals, the TC may recharacterize a crime to reach the most appropriate legal characterization under Regulation 55.¹⁴

Applying this test, the Chamber noted that the evidence presented in support of the torture charge reflected the same conduct underlying the charge of rape.¹⁵ It found that the material elements of torture – 'severe pain and suffering' and 'control by the perpetrator'

– were 'also the inherent specific material elements of rape', despite the fact that the elements of the crime of rape require the additional specific material element of penetration and would therefore have been the most appropriate legal characterization.¹⁶ The Chamber similarly declined to confirm the charge of outrages upon personal dignity as a war crime, based on the underlying act of rape. At the confirmation of charges hearing, the Chamber found that most of the facts presented 'reflect in essence the constitutive element of force or coercion in the crime of rape', and thus, the charge of outrages upon personal dignity was fully consumed by the charge of rape.¹⁷

WIGJ filed an amicus curiae submission before the PTC in which it argued among others that, although the Chamber had applied the correct standard to determine the cumulative nature of the charges, the test was applied incorrectly in relation to at least three categories of witnesses: (i) the child of ten years, (ii) the brother of a rape victim who was beaten while his sister was raped, and (iii) the person who was forced to watch the sexual assault of their relatives.¹⁸ WIGJ argued that the Chamber's application of the cumulative charging test was too narrow. The RS separates rape and outrages upon personal dignity into different provisions, thus the elements of rape do not require humiliation, degradation, or other violations

¹⁰ The Prosecutor v. Jean-Pierre Bemba, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, 15 June 2009, para 202.

¹¹ The Prosecutor v. Jean-Pierre Bemba, *Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-14-tENG, 10 June 2008/17 July 2008, para 25.

¹² The Prosecutor v. Jean-Pierre Bemba, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, 15 June 2009, para 202.

¹³ *Ibid.*

¹⁴ *Ibid.*, para 203.

¹⁵ *Ibid.*, para 205.

¹⁶ *Ibid.*, paras 72, 190-205.

¹⁷ *Ibid.*, paras 301-312.

¹⁸ The Prosecutor v. Jean-Pierre Bemba Gombo, *Amicus Curiae Observations of the Women's Initiatives for Gender Justice pursuant to Rule 103 of the Rules of Procedure and Evidence*, 31 July 2009, ICC-01/05-01/08-466, para 25.

of dignity to accompany the act.¹⁹ The amicus submission pointed to the broader non-discriminatory manner in which gender-based crimes, especially sexual assaults, perpetrated on women, children, or men, are to be examined in all proceedings. It was further argued that the Chamber's narrow restriction of rape and torture as crimes against humanity and rape and outrages upon personal dignity as war crimes, through cumulative charging and re-characterization, 'diminish the effective access of victims to justice even in the absence of infringement on the due process rights of the accused'.²⁰

The *Bemba* decision stands in stark contrast to decisions before other international criminal tribunals.²¹ The ICTY, ICTR,²² SCSL,²³ and ECCC²⁴ have unanimously held that cumulative charges are permitted based on the same underlying acts, even where one charge is fully subsumed within another charge.²⁵ In *Kupreškić et al*, the TC found that cumulative charges are permissible 'when the Articles of the Statute referred to are designed to protect different values and when each Article requires proof of a legal element not required by the others'.²⁶ In *Delalić et al*, the AC held that cumulative charging is permissible on the basis that, prior to the presentation of all evidence, it is not possible to determine to a

certainty which charges will be proven against an accused.²⁷ Further the TC is better able to evaluate which charges to retain, based on the sufficiency of the evidence, after the presentation of evidence.²⁸

The *Bemba* PTC departed from established ICTs jurisprudence in declining to permit cumulative charging. In applying the test for determining the permissibility of cumulative charging that it articulated, the Chamber also departed from the EoC's definition of rape, which does not include 'severe pain and suffering' or 'control by the perpetrator' as required by the elements of torture as a crime against humanity;²⁹ nor do the elements of rape require that the perpetrator humiliated, degraded or otherwise violated the dignity of the victim, constituent elements of the war crime of outrages upon personal dignity.³⁰

The Chambers Practice Manual has addressed the issue of cumulative and alternative charging. The Manual provides that the Prosecutor may plead alternative legal characterisations, both in terms of the crime(s) and the mode(s) of liability, and may also present cumulative charges, defined as 'crimes charged which, although based on the same set of facts, are not alternative to each other, but may all, concurrently, lead to a conviction'.³¹

¹⁹ *Ibid*, para 29.

²⁰ *Ibid*, para 39.

²¹ For a comprehensive discussion, see *The Practice of Cumulative Charging at the International Criminal Court*, Washington College of Law, American University, War Crimes Research Office, International Criminal Court Legal Analysis and Education Project, May 2010; *The Practice of Cumulative Charging before International Criminal Bodies*, 10 February 2011, STL-11-01/1-ACR/R176bis, Amicus Curiae brief of the War Crimes Research Office at the American University Washington College of Law.

²² *Prosecutor v. Rutaganda, Trial Judgment and Sentence*, ICTR-96-3-T, 6 December 1999, paras 108-119.

²³ *Prosecutor v. Brima et al, Appeals Chamber Judgment*, SCSL-04-16-A, 22 February 2008, para 212; *Prosecutor v. Sesay et al, Appeals Chamber Judgment*, SCSL-04-15-A, 26 October 2009, para 1191.

²⁴ See for example, *The Prosecutor v. Kaing Guek Eav alias "Duch"*, Decision on Appeal Against Closing Order Indicting Kaing Guek Eav Alias "Duch," 001/18-07-2007-ECCC/OCIJ (PTC-02), 5 December 2008, paras 85-88.

²⁵ *The Practice of Cumulative Charging at the International Criminal Court*, Washington College of Law, American University, War Crimes Research Office, International Criminal Court Legal Analysis and Education Project, May 2010.

²⁶ *Prosecutor v. Kupreskic et al, IT-95-16-PT, Decision on Defence Challenges to Form of the Indictment*, 15 May 1998.

²⁷ *Prosecutor v. Delalic et al, (Appeals) Judgment*, Case No. IT-96-21-A, 20 February 2001, para 400.

²⁸ *Ibid*.

²⁹ Article 7(1)(f), Crime against humanity of torture, Elements 1 and 2, EoC.

³⁰ Article 8(2)(c)(ii), War crime of outrages upon personal dignity, Element 1, EoC.

³¹ ICC, *Chambers Practice Manual*, paras 67-68.

Where cumulative charges are presented, the Manual provides that the PTC will confirm cumulative charges when each of them is sufficiently supported by the available evidence and each crime cumulatively charged contains a materially distinct legal element.³² In doing so, the PTC will give deference to the TC which, following a full trial, will be better placed to resolve questions of concurrence of offences.³³ In the case of alternative charges, the Manual makes it clear that the PTC will confirm alternative charges (including alternative modes of liability) when the

evidence is sufficient to sustain each alternative.³⁴ It would then be up to the TC, on the basis of a full trial, to determine which, if any, of the confirmed alternatives is applicable to each case. The Manual posits that this course of action 'should limit recourse to Regulation 55 of the Regulations, an exceptional instrument which, as such, should be used only sparingly if absolutely warranted.'³⁵ In particular, it should limit the improper use of Regulation 55 immediately after the issuance of the confirmation decision even before the opening of the evidentiary debate at trial'.³⁶

4.3 Departure from previous practice

The acquittal of Bemba by the ICC AC, overturning the conviction decision of the TC, is one of the most significant examples, to date, of unexplained departure from previous judicial practice at the ICC. The majority decision departed from settled ICC and other international jurisprudence in several ways, including on (i) the role of the AC in reviewing potential factual errors in TC judgments and the practice of judicial deference; (ii) the contested or novel interpretations of the Rome Statute; (iii) a lack of detailed interpretation of Article 28 on command responsibility; (iv) the omission to interpret the 'state or organisational policy' element; and (v) a lack of consensus given the 3-2 Chamber decision.³⁷ Prior to this decision, as acknowledged by both the majority judgment and the dissenting opinion,³⁸ previous ICC appellate jurisprudence deferred to

the factual findings of the TC, unless it found that no reasonable TC could have been satisfied beyond a reasonable doubt as to the finding in question based on the available evidence.³⁹ Consequently, only if and when it finds that the TC's factual findings are unreasonable, can the AC conclude that it would have decided differently on the facts.

The Bemba decision was not only devastating for the victims involved in the case, it also created a crisis of confidence for the Court. The experts conducting an independent expert review (IER) of the ICC noted that the decision created a 'void of uncertainty' and that 'urgent action [was] needed to provide legal certainty and restore confidence in the Rome Statute system among the public at large'.⁴⁰ The IER recommended that given the 'importance of legal certainty and

³² Ibid, para 68.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid, para 67.

³⁶ Ibid.

³⁷ The Prosecutor v. Jean-Pierre Bemba Gombo, *Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute"*, ICC-01/05-01/08-3636-Red, 8 June 2018; Leila N. Sadat, *Fiddling While Rome Burns? The Appeals Chamber's Curious Decision in Prosecutor v. Jean-Pierre Bemba Gombo*, 12 June 2018, EJIL: Talk! Blog of the European Journal of International Law.

³⁸ The Prosecutor v. Jean-Pierre Bemba Gombo, *Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański*, ICC-01/05-01/08-3636-Anx1-Red, 8 June 2018, para 3.

³⁹ The Prosecutor v. Thomas Lubanga Dyilo, *Judgment on the appeal of Mr. Thomas Lubanga Dyilo against his conviction*, ICC-01/04-01/06-3121-Red, 1 December 2014, para 21.

⁴⁰ *Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report*, 30 September 2020 (IER Report), para 611.

consistency, the Court should depart from established practice or jurisprudence only where that is justified on grounds precisely articulated in the decision/judgment’.

While welcoming the recommendations contained in the IER’s Final Report in the interest of accessibility, certainty, and predictability of its jurisprudence, the Court pointed to the absence of a statutory system of binding precedent, which provides that the ‘Court may apply principles and rules of law as interpreted in its previous decisions’ (emphasis

4.4 Modes of liability

Modes of liability, regulated primarily by Articles 25 and 28 of the RS, have been among the most debated aspects of the cases before the ICC, both between and within the TCs and PTCs.⁴⁴ As the Statute provides only a general framework for determining individual criminal responsibility, the elements of each mode of liability have been developed through the Court’s case law.⁴⁵ Divergent approaches to judicial interpretation of modes of liability have had a significant impact in relation to SGBC charges. Jurisprudence from the ad hoc tribunals and the early jurisprudence of the ICC demonstrated that Judges often treated

added).⁴² Thus, according to the Judges, Chambers are free to depart from existing jurisprudence if they consider it appropriate.⁴³ While there is indeed no system of binding precedent at the ICC, as the Court’s workload increases, there is a greater need for legal certainty and consistency in its decision-making processes. Departure from established jurisprudence should remain an exceptional option, which is clearly articulated in the Chamber’s decisions. Guidance on this issue should also be included in the Chambers Practice Manual.

SGBC crimes differently than others, including by ‘demanding more evidence than legally required when applying legal theories and modes of liability to assess the role and culpability of the accused’.⁴⁶ This reflected early international law narratives of wartime rape as ‘a private matter, an opportunistic and lust-driven crime committed by errant soldiers, or the inevitable result of the chaotic context of war, and thus of secondary importance to other crimes’.⁴⁷

The convictions of Ntaganda and Ongwen for a significant number of sexual crimes as direct

⁴¹ Ibid, R217, p 204. See also, R218-219; Audrey Fino, *Legal Consistency in the ICC Jurisprudence: A Brief Critique of the ICC’s Response to Recommendations on the Jurisprudence Made in the Independent Expert Review Report*, *Opinio Juris*, 17 November 2021.

⁴² ICC, *Overall Response of the International Criminal Court to the “Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report”*, 14 April 2021, paras 387-390.

⁴³ Ibid.

⁴⁴ WIGJ, *Modes of Liability: A Review of the International Criminal Court’s Current Jurisprudence and Practice*, Expert Paper, November 2013, p 7. The Statute provides for two main categories of liability: individual criminal responsibility (Article 25), and the responsibility of commanders and other superiors (Article 28). This articulation of individual criminal responsibility within the Statute, also referred to as the ‘mode of liability’, lies at the core of a case, providing the legal theory connecting the alleged perpetrator to the crimes charged.

⁴⁵ See for example the following cases: *Prosecutor v. Katanga and Ngudjolo*, Decision on the Confirmation of Charges, ICC-01/04-01/07-717, 14 October 2008, paras 480-486, 541; *Prosecutor v. Lubanga*, Judgment, Separate Opinion of Judge Adrian Fulford, ICC-01/04-01/06-2842, 14 March 2012; *Prosecutor v. Ngudjolo*, Judgment, Concurring Opinion of Judge Christine Van den Wyngaert, ICC-01/04-02/12-4, 18 December 2012; *Prosecutor v. Ntaganda*, Annex 5: Partly Concurring Opinion of Judge Eboe-Osuji, ICC-01/04-02/06-2666-Anx5, 30 March 2021, para 77; *Prosecutor v. Yekatom and Ngaïssona*, Corrected version of Public Redacted Version of ‘Decision on the Confirmation of Charges’ against Alfred Yekatom and Patrice-Edouard Ngaïssona, ICC-01/14-01/18-403-Red-Corr, 14 May 2020.

⁴⁶ Indira Rosenthal, Susana Sacouto and Valerie Oosterveld, What is Gender in International Criminal Law, in *Gender and International Criminal Law*, I. Rosenthal, S. Sacouto, V. Oosterveld eds., Oxford University Press, pp 34-35.

⁴⁷ Sarah Schwartz, *Wartime Sexual Violence as More than Collateral Damage: Classifying Sexual Violence as Part of a Common Criminal Plan in International Criminal Law*, 2017, *UNSW Law Journal* Vol 40 (1).

perpetrators and indirect co-perpetrators under Article 25(3)(a) of the RS represented a major turning point in the ICC's efforts to hold perpetrators individually accountable for collective crimes of sexual violence.⁴⁸ Prior to *Ntaganda* and *Ongwen*, as discussed elsewhere in this report, the Court had a troubled history in ensuring accountability for SGBC crimes. For example, in the *Katanga* case, the ICC's first case to confirm SGBC charges, Katanga was convicted under a recharacterized mode of liability of all but the charges of sexual violence because the TC found that there was no evidence that the SGBC fell within the common purpose.⁴⁹ This was followed by the acquittal of Bemba, the only accused convicted of SGBC on the basis of liability as a commander under Article 28 of the Statute.⁵⁰

The interpretation of Article 25(3) has arguably been among the most contested issues at the Court.⁵¹ Judges in the *Lubanga*, *Katanga*, *Ngudjolo Chui*, *Kenyatta*, *Gbagbo and Blé Goudé*, and *Ntaganda* cases have applied the 'control over the crime' theory to the interpretation of collective criminality, borrowing heavily from German criminal law scholarship.

4.4.1 Article 25(3)(a)

Article 25(3)(a) through which an accused can be held liable where they commit a crime, 'whether as an individual, jointly with another or through another person', has been interpreted to encompass multiple sub-modes of liability, namely direct perpetration,

Despite dissenting views as to its correctness in several cases, including *Ntaganda*, Judges in the *Ongwen* case, one of only two (at the time of writing) in which final convictions for SGBCs have been entered by the Court, were unanimous in their acceptance of indirect co-perpetration and the attendant objective elements of this mode of liability.

However, there is evidence that future cases may depart from this approach. The PTCs in the *Yekatom and Ngaïssona*, *Al Rahman* and *Said* cases have declined to engage with the existing jurisprudential approach to co-perpetration and the notion of a 'common plan', noting that 'the very compatibility of the notion of a common plan with the statutory framework and its usefulness vis-à-vis article 25 of the Statute is far from being a foregone conclusion.'⁵² It is still unclear whether the position in *Yekatom* and others will be applied by the TCs. However, the *Yekatom* approach may signal a shift in the judicial interpretation of Article 25(3)(a) and the doctrine of co-perpetration, which could have significant implications for the adjudication of SGBC.

co-perpetration, indirect perpetration, and indirect co-perpetration.⁵³ According to Sadat, Sacouto and Sellers, 'the drafters of the Rome Statute found the provisions on individual criminal responsibility in the statutes of the ad hoc tribunals [to be] too

⁴⁸ FIDH and WIGJ, *Accountability for Sexual and Gender-Based Crimes at the ICC: An Analysis of Prosecutor Bensouda's Legacy*, June 2021, p 12.

⁴⁹ The Prosecutor v. Germain Katanga, Judgment pursuant to article 74 of the Statute, ICC-01/04-01/07-3319, 7 March 2014, para 1664. See also WIGJ, *Partial Conviction of Katanga: Acquittals for Sexual Violence and Use of Child Soldiers. The Prosecutor vs. Germain Katanga*, 7 March 2014; WIGJ, *Gender Report Card on the International Criminal Court*, 2018, p 147.

⁵⁰ Prosecutor v. Bemba, ICC-01/05-01/08 A, Judgement on the Appeal of Mr Jean-Pierre Bemba Gombo Against Trial Chamber III's "Judgement Pursuant to Article 74 of the Statute", 8 June 2018, para 41.

⁵¹ Susana SáCouto, Leila Sadat, and Patricia Viseur Sellers, *Collective criminality and sexual violence: Fixing a failed approach*, 2020, Leiden Journal of International Law 33, p 212.

⁵² Prosecutor v. Yekatom and Ngaïssona, Corrected version of Public Redacted Version of 'Decision on the Confirmation of Charges' against Alfred Yekatom and Patrice-Edouard Ngaïssona, ICC-01/14-01/18-403-Red-Corr, 14 May 2020.

⁵³ Paul Bradfield, *Alternative Charges and Modes of Liability in the Latest CAR Case at the ICC – Trouble Ahead?*, EJIL:Talk! 21 January 2020.

laconic, [t]hus propos[ing] a more comprehensive provision and eventually adopt[ing] Article 25, which sets out a more detailed framework of liability than predecessor instruments'.⁵⁴

To establish liability under the rubric of indirect co-perpetration, the Court's jurisprudence has established that the following objective legal elements should be met: the existence of an agreement or common plan, between the accused and one of more other persons, to commit the crimes; the control of the members of the common plan over a person or persons who execute the material elements of the crimes by subjugating the will of the direct perpetrators; control by the accused over the crime by virtue of his or her essential contribution to it and the resulting power to frustrate its commission; and the requisite mental elements provided by Article 30'.⁵⁵

According to the Ntaganda TC (based on reference to previous jurisprudence) the crucial element of 'control over the crime' is that the perpetrator

controls the actions of another person or persons to such a degree that the will of that person or persons becomes irrelevant, and their actions must be attributed to the perpetrator as if it were their own.⁵⁶ The TC noted that the purpose of the requirement of control over the crime is to distinguish between commission and other modes of liability, such as those under Article 25(3)(c) of the Statute.⁵⁷

However, Judges Fulford and Van den Wyngaert have disagreed with this theory, opining that the plain text of Article 25(3) defeats this requirement and that it had been improperly imported from national law, this view being shared by Judges Morrison and Eboe-Osuji in their opinions in the *Ntaganda* case.⁵⁸ By contrast, Judge Ibañez, who subsequently became the Presiding Judge in the Ongwen appeal, fully endorses the Lubanga approach to indirect perpetration. In her view, 'indirect co-perpetration as an integrated mode of liability is an appropriate tool to address the large-scale and mass criminality that characterise international crimes'.⁵⁹

4.4.2 Article 25(3) and SGBC

Lingering questions remain concerning 'the control over the crime' theory and its efficacy in prosecuting SGBC crimes. Sacouto, Sadat and Sellers criticize the judicial interpretation of Article 25(3) as 'stunningly complex' and 'neither mandated by the Statute nor

grounded in customary international law'.⁶⁰ They note that 'by restricting the application of Article 25(3)(a) to principal liability and limiting it to those with control over the crime, the Court has had to rely on Article 25(3)(d) in cases of group liability where the facts do

⁵⁴ Susana SáCouto, Leila Nadya Sadat and Patricia Viseur Sellers, *Group crime and sexual violence: Fixing a failed approach*, 2020, Leiden Journal of International Law 33, p 24.

⁵⁵ Prosecutor v. Bosco Ntaganda, Judgment, ICC-01/04-02/06-2359, 8 July 2019, para 774.

⁵⁶ Ibid, para 777.

⁵⁷ Ibid, para 780.

⁵⁸ Prosecutor v. Lubanga, Judgment, Separate Opinion of Judge Adrian Fulford, ICC-01/04-01/06-2842, 14 March 2012; Prosecutor v. Ngudjolo, Judgment, Concurring Opinion of Judge Christine Van den Wyngaert, ICC-01/04-02/12-4, 18 December 2012; Prosecutor v. Ntaganda, Annex 5: Partly Concurring Opinion of Judge Eboe-Osuji, ICC-01/04-02/06-2666-Anx5, 30 March 2021, para 77; Annex 2: Separate Opinion of Judge Howard Morrison on Mr Ntaganda's appeal, ICC-01/04-02/06-2666-Anx2, 30 March 2021, paras 17, 31.

⁵⁹ Prosecutor v. Bosco Ntaganda, Annex 3: Separate opinion of Judge Luz Del Carmen Ibañez Carranza on Mr Ntaganda's appeal, ICC-01/04-02/06-2666-Anx3, 30 March 2021.

⁶⁰ Susana SáCouto, Leila Sadat, and Patricia Viseur Sellers, *Collective criminality and sexual violence: Fixing a failed approach*, 2020, Leiden Journal of International Law 33, p 29.

not support such a limited interpretation'.⁶¹ Thus, in the *Katanga* case, following a review of the evidence concerning Katanga's role, the Judges recharacterized the mode of liability from the 'more restrictive' Article 25(3)(a) to 'common purpose' liability under Article 25(3)(d), and found the accused guilty of all but the sexual violence charges, based on their ruling that the SGBC crimes were outside of the common purpose of the attack.⁶² The TC concluded that the evidence was insufficient to establish that '(1) in February 2003, the Ngiti militia was an organised apparatus of power; and (2) Germain Katanga, at that time, wielded control over the militia such as to exert control over the crimes for the purposes of article 25(3)(a) of the Statute'.⁶³

However, the reasoning of the *Katanga* Chamber in relation to its exclusion of the SGBC charges based on common purpose liability under Article 25(3)(d)

was problematic and inconsistent. It appeared that the Judges expected a different level of proof regarding Katanga's contribution to the SGBC crimes than they required to convict him on the basis of his contribution to the crimes of directing an attack against a civilian population, pillaging, murder, and destruction of property, which were committed simultaneously as the rape of women in the village.⁶⁴ Ultimately, the *Katanga* case demonstrates the challenges associated with seeking to prove that SGBCs are part of the common plan and that the accused 'unquestionably [...] conceived the crime, oversaw its preparation at different hierarchical levels, and controlled its performance and execution', as required by the Court's doctrinal construction of indirect perpetration, given that 'sexual violence – even when widespread – often occurs because it is tolerated and permitted rather than explicitly ordered or planned'.⁶⁵

4.4.3 A paradigm shift?

The Judges in the *Yekatom and Ngaissona, Said and Al Rahman* cases have moved from considering whether the evidence in the case established the existence of a 'common plan' between the suspects, to an assessment of whether the available evidence establishes a link between the accused and each of

the alleged criminal incidents.⁶⁶ Some commentators have criticised this approach, noting that the *Yekatom* PTC fails to explain what it deems to be the proper legal definition of co-perpetration.⁶⁷ Cupido and Yanev ask rhetorically, '[i]f co-perpetration is not premised on the existence of a common plan, what

⁶¹ Ibid.

⁶² The Prosecutor v. Germain Katanga, Judgment pursuant to article 74 of the Statute, ICC-01/04-01/07-3319, 7 March 2014, at para 1664: 'Hence, although the acts of rape and enslavement formed an integral part of the militia's design to attack the predominantly Hema civilian population of Bogoro, the Chamber cannot, however, find, on the basis of the evidence put before it, that the criminal purpose pursued on 24 February 2003 necessarily encompassed the commission of the specific crimes proscribed by articles 7(1)(g) and 8(2)(e)(vi) of the Statute. Accordingly, and for all of these reasons, the Chamber cannot find that rape and sexual slavery fell within the common purpose'. See also WIGJ, *Partial Conviction of Katanga. Acquittals for Sexual Violence and Use of Child Soldiers. The Prosecutor vs. Germain Katanga*, 7 March 2014 <<http://iccwomen.org/images/Katanga-Judgement-Statement-corr.pdf>>; WIGJ, *Gender Report Card on the International Criminal Court 2018*, p 147.

⁶³ Prosecutor v. Germain Katanga, Judgment pursuant to article 74 of the Statute, ICC-01/04-01/07-3319, 7 March 2014, para 1420.

⁶⁴ WIGJ, *Partial Conviction of Katanga by ICC Acquittals for Sexual Violence and Use of Child Soldiers The Prosecutor vs. Germain Katanga*, 7 March 2014.

⁶⁵ Susana SáCouto, Leila Sadat, and Patricia Viseur Sellers, *Collective criminality and sexual violence: Fixing a failed approach*, 2020, Leiden Journal of International Law 33, p 40.

⁶⁶ Prosecutor v. Yekatom and Ngaissona, Corrected version of Public Redacted Version of 'Decision on the Confirmation of Charges' against Alfred Yekatom and Patrice-Edouard Ngaissona, ICC-01/14-01/18-403-Red-Corr, 14 May 2020, para 60: 'Accordingly, the Chamber will assess the evidence in light of the elements of each of the modes of liability listed in that provision'.

⁶⁷ Marjolein Cupido and Lachezar Yanev, A "Schrödinger's Cat" Moment for Co-Perpetration Liability? The Yekatom and Ngaissona Decision on the Confirmation of Charges, EJIL:Talk!, 8 May 2020; See also Paul Bradfield, *Alternative Charges and Modes of Liability in the Latest CAR Case at the ICC – Trouble Ahead?*, EJIL:Talk! 21 January 2020.

then is the legal basis for establishing liability as co-perpetrator? More specifically, what are the legal elements of co-perpetration?'.⁶⁸ In their view, by failing to answer these fundamental questions, the PTC in *Yekatom* has created significant challenges for the prosecution in determining how to proceed at trial.⁶⁹

Nevertheless, the AC has ruled that there is no formal requirement for certain terminology to be used in a charging document aside from the language of the Statute, and that deciding whether to revisit the interpretation of the mode of liability advanced by the PTC will be for the discretion

4.4.4 Article 28

Article 28 provides for the liability of military commanders and superiors for crimes committed by persons under their effective control that they fail to prevent, repress, or submit to competent authorities for investigation and prosecution. Thus, while liability under Article 25(3) of the Statute, in general, refers to actions taken by the perpetrators, accomplices and instigators of crimes, the *actus reus* required for liability under article 28 of the Statute explicitly refers to an omission on the part of the commander or superior.⁷²

To date, Bemba is the only accused to have been convicted, and subsequently acquitted on the basis of his role as a commander. The majority of the AC,

of the TC if the issue is raised by the parties.⁷⁰

The approach in *Yekatom* and others is likely to find favour with those advocating for a simplified and less restrictive approach to interpreting Article 25(3). Thus, it has been suggested that the way forward is for the Court to move away from hierarchical distinctions between principals and accessories and the control over the crime theory. To give effect to this shift, 'the Court could adopt a plain reading of the provision, as dissenting judges Fulford and Van den Wyngaert have suggested'.⁷¹

with Judges Monageng and Hofmański dissenting, found significant errors in the TC's consideration of whether Bemba had taken all necessary and reasonable measures to prevent, repress or punish the commission of crimes by his subordinates. Based on its analysis of the evidence, the TC had found that Bemba had taken some measures to address the crimes committed by his troops, but they were limited and grossly inadequate to effectively prevent, redress and punish the troops as required under the Statute.⁷³

Bemba's acquittal has been criticised as reflecting a 'problematic lack of gender competence'.⁷⁴ In addition to not providing the TC a margin of deference with

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ Prosecutor v. *Yekatom* and Ngaissona, Judgment on the Appeal of Mr Alfred Yekatom against the decision of Trial Chamber V of 29 October 2020 entitled 'Decision on motions on the Scope of the Charges and the Scope of Evidence at Trial', ICC-01/14-01/18-874, 5 February 2021, para 60.

⁷¹ Susana SáCouto, Leila Sadat, and Patricia Viseur Sellers, *Collective criminality and sexual violence: Fixing a failed approach*, 2020, Leiden Journal of International Law 33, p 54.

⁷² Prosecutor v. Bosco Ntaganda, Annex 3: Separate opinion of Judge Luz Del Carmen Ibáñez Carranza on Mr Ntaganda's appeal, ICC-01/04-02/06-2666-Anx3, 30 March 2021, para 294.

⁷³ Prosecutor v. Bemba, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", ICC-01/05-01/08-3636-Red, 8 June 2018, para 123.

⁷⁴ Susana SáCouto and Patricia Viseur Sellers, *The Bemba Appeals Chamber Judgment: Impunity for Sexual and Gender-Based Crimes?*, 27 Wm. & Mary Bill Rts. J. 599, 2019, p 600.

respect to its review of the evidence (discussed elsewhere in this report), the majority failed to critically assess the measures Bemba took with respect to the sexual violence allegations which 'should have raised significant doubts about whether Bemba complied with his duties as a commander.'⁷⁵ According to Sacouto and Sellers, the majority's approach is 'consistent with earlier judgments in

4.4.5 Looking ahead

The ICC's approach to modes of liability, and in particular to Article 25(3)(a) is still not settled. While the *Ongwen* case, as one of the more significant cases in terms of SGBC charges, has demonstrated the successful application of indirect co-perpetration to establish liability, it is still questionable whether this restrictive and complex interpretative approach serves the ends of justice in SGBC cases. By basing the assessment of Article 25(3) solely on the link

4.5 Reparations

Article 75(2) of the RS empowers ICC Judges to make an order for reparations directly against an accused person who has been convicted of a crime before the Court. The inclusion of reparations provisions in the RS and ancillary legal texts, as well as the establishment of a Trust Fund for Victims (TFV), represent major advancements in international criminal justice and an improvement to the legal framework of the ad hoc tribunals at which the granting of reparations was excluded. While the inclusion of a reparations mandate within the Statute is undoubtedly a victory for victims' rights in international criminal justice, its implementation has been inconsistent and

which the court similarly interpreted other modes of liability in the absence of the kind of insight that a critical gender analysis would have offered'.⁷⁶ The *Bemba* decision is likely to be seen as an anomaly in relation to the prosecution of commanders under Article 28, due to the majority's clear departure from established practice.⁷⁷

between the accused and the crimes, as has been done in *Yekatom and Ngaissona, Al Rahman and Said*, it is possible for Judges to create opportunities for a simplified approach to determining liability where each individual who participated in the commission of the crime could be held responsible (without hierarchical classification) regardless of the role they may have played in its commission.

challenging. After 25 years of existence, the Court has delivered only four reparations orders, and the TFV has struggled to make the 'promise of reparations a tangible reality for victims on the ground'.⁷⁸

Reparations orders have been issued by Chambers in the *Lubanga, Katanga, Al Mahdi* and *Ntaganda* cases. Judges had also commenced reparations proceedings in the *Bemba* case, but declined to issue a reparations order following his acquittal by the AC. The reparations phase in the *Ongwen* case is ongoing and, at the time of writing, the reparations decision was pending. Despite the absence of charges

⁷⁶ Ibid, 600.

⁷⁷ Ibid, p 622.

⁷⁸ Redress, Victims' Rights Working Group, [Making Sense of Reparations at the International Criminal Court](#), Background Paper, 20 June 2018, p 1.

of SGBC in the *Lubanga* case, it was a pioneering case in relation to its jurisprudence on reparations.⁷⁹ Judges declined to issue Court-wide principles on reparations, but non-binding principles were first espoused in *Lubanga* (what have come to be known as the 'Lubanga Principles') together with the essential requirements for awarding reparations and have become entrenched in the Court's jurisprudence.⁸⁰ The *Lubanga* AC held that an order for reparations under Article 75 of the Statute must contain, at a minimum, five essential elements: (i) it must be directed against the convicted person; (ii) it must establish and inform the convicted person of his or her liability with respect to the reparations awarded in the order; (iii) it must specify, and provide reasons for, the type of reparations ordered, either collective, individual, or both, pursuant to Rules 97(1) and 98 of the RPE; (iv) it must define the harm caused to the direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the modalities of reparations that the TC considers appropriate based on the circumstances of the specific case before it; and (v) it must identify the victims eligible to benefit from the award for reparations or set out the criteria of eligibility based

on the link between the harm suffered by the victims and the crimes for which the person was convicted.⁸¹

Some aspects of the reparations 'elements' have proven to be difficult for victims, many of whom wait for years for a reparations award. For example, the fact that reparations can only be awarded against a convicted person has proven to be a major drawback at the ICC. In the *Bemba* case, following his acquittal, the *Bemba* TC issued a final order on reparations in which it indicated that it was bound by the legal limitations of the Statute to only order reparations against a convicted accused.⁸² The Chamber declined however to make concrete findings on the scope and extent of victimisation, as invited by the LRVs in their submissions, while acknowledging the suffering of communities in the CAR due to the extensive incidents of SGBC during the conflict.⁸³ Similarly, in the Kenyan Ruto and Sang case, the Judges declined to consider a request by victims to determine if the Kenyan government should provide them reparations or order the TFV to provide them with assistance following the case's collapse before the ICC, citing lack of jurisdiction.⁸⁴ In an interesting

⁷⁹ The Appeals Chamber indicated that while Lubanga could not be held liable for reparations for the SGBC charges, the victims should receive assistance under the Trust Fund's assistance mandate: 'The above finding in relation to Mr Lubanga's liability for reparations in respect of harm resulting from sexual and gender-based violence should not be viewed as precluding such victims from being able to benefit from assistance activities that the Trust Fund may undertake [...]. The Appeals Chamber is therefore of the view that it is appropriate for the Board of Directors of the Trust Fund to consider, in its discretion, the possibility of including such victims in the assistance activities undertaken according to its mandate under regulation 50 (a) of the Regulations of the Trust Fund. The Appeals Chamber also considers that it is appropriate for the draft implementation plan to include a referral process to other competent NGOs in the affected areas that offer services to victims of sexual and gender-based violence'; The Prosecutor v. Thomas Lubanga Dyilo, *Order for Reparations*, ICC-01/04-01/06-3129-AnxA, 3 March 2015, para 16. A similar position was taken by the Katanga Chamber in light of the absence of reparations in that case: 'The Chamber takes the view that the principles established by the Appeals Chamber in Lubanga find application, mutatis mutandis, in the case at bar.' The Prosecutor v. Germain Katanga, *Order for Reparations pursuant to Article 75 of the Statute*, ICC-01/04-01/07-3728-tENG, 24 March 2017, para 30.

⁸⁰ The Prosecutor v. Thomas Lubanga Dyilo, *Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2* ICC-01/04-01/06-3129, para 55; *Order for Reparations*, ICC-01/04-01/06-3129-AnxA, 3 March 2015, para 5. See also Luke Moffett and Clara Sandoval, *Tilting at windmills: Reparations at the International Criminal Court*, 21 May 2021, *Leiden Journal of International Law*, Vol 34(3), p 751. Redress, *No Time to Wait: Realising Reparations for Victims before the International Criminal Court*, 2019, p 23.

⁸¹ The Prosecutor v. Thomas Lubanga Dyilo, *Order for Reparations*, ICC-01/04-01/06-3129-AnxA, 3 March 2015, p 7, para 1. The Prosecutor v. Bosco Ntaganda, *Reparations Order*, ICC-01/04-02/06-2659, 8 March 2021, para 23; Redress, Victim Rights Working Group, *Making Sense of Reparations at the International Criminal Court*, Background Paper, 20 June 2018, p 1.

⁸² The Prosecutor v. Jean-Pierre Bemba Gombo, *Final Decision on the Reparations Proceedings*, ICC-01/05-01/08-3653, 3 August 2018, paras 3, 6-7.

⁸³ *Ibid.*

⁸⁴ The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, *Decision on the Requests regarding Reparations*, ICC-01/09-01/11-2038, 1 July 2016, para 7.

dissent, Judge Chile Eboe-Osuji noted that he saw ‘no convincing basis in law for the idea that an ICC Trial Chamber may not entertain questions of reparation merely because the accused they tried was not found guilty.’⁸⁵ Opposing what he described as ‘formalistic reasoning’, the judge noted that there is a ‘solid basis in international law to reject the no “compensation” without conviction thesis’, which has been rejected by international and transnational norms concerning criminal injuries compensation, such as the European Convention on Compensation of Victims of Violent Crimes.⁸⁶ Judge Eboe-Osuji’s views have not gained traction at the Court, yet given the disappointing and devastating outcomes from acquittals, such as in the Bemba case, separating the award of reparations from the conviction of an accused should be fully explored.⁸⁷ As the first Chamber to issue a reparations decision related to SGBC, the approach of the *Ntaganda* TC has in many ways revolutionised the reparations process by adopting a victim-centred and gender-sensitive approach to reparations. Building on the *Lubanga* Principles and the *Katanga* jurisprudence, the TC stressed the importance of applying a non-discriminatory, intersectional approach to reparations, grounded in Article 21(3) of the Statute, reiterating that a ‘gender-inclusive and sensitive approach or perspective should guide the design and

implementation of reparations at the Court and every step of the reparation process’.⁸⁸ This includes taking into account the existence of previous gender and power imbalances, as well as the differentiated impact of harm depending on the victim’s sex or gender identity.⁸⁹

The *Ntaganda* TC set several positive precedents for reparations awards for SGBC. These include findings that: victims of SGBC and children born as a result of rape or sexual slavery should be among those prioritised in the reparations process;⁹⁰ children born out of rape and sexual slavery are direct rather than indirect victims;⁹¹ and children of direct victims may have suffered transgenerational harm irrespective of the date on which they were born.⁹² In addition, the Chamber made presumptions of material, physical, and psychological harm in relation to certain categories of victims, namely, former child soldiers, direct victims of rape and sexual slavery, and indirect victims who are close family members of direct victims of the crimes of using child soldiers, rape, and sexual slavery.⁹³

The Chamber found that awarding collective reparations with individualised components was the

⁸⁵ The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, *Dissenting Opinion of Judge Eboe-Osuji*, ICC-01/09-01/11-2038-Anx, 1 July 2016, para 12; Tom Maliti, *Judges Decline to Consider Reparation Request of Victims in Ruto and Sang Case*, International Justice Monitor, 15 July 2016.

⁸⁶ *Ibid.*, para 13.

⁸⁷ See Carla Ferstman, *Reparations at the ICC: The Need for a Human Rights Based Approach to Effectiveness*, 1 August 2019.

⁸⁸ The Prosecutor v. Bosco Ntaganda, *Reparations Order*, ICC-01/04-02/06-2659, 8 March 2021, para 60.

⁸⁹ *Ibid.*, para 71.

⁹⁰ *Ibid.*, paras 93, 214. Individuals who require immediate physical and/or psychological medical care, victims with disabilities and the elderly, as well as victims who are homeless or experiencing financial hardship were also to be prioritised.

⁹¹ *Ibid.*, paras 122-123.

⁹² *Ibid.*, para 182. The issue of transgenerational harm was also raised in the *Katanga* case. The *Katanga* TC defined transgenerational harm as ‘a phenomenon, whereby social violence is passed on from ascendants to descendants with traumatic consequences for the latter’ in a way that the trauma suffered by the parents influences the behaviour of their children. The Chamber dismissed the claims of transgenerational harm because the causal nexus between psychological harm and the attack had not been established as there could have been other unrelated events contributing to the trauma of the parents. The Prosecutor v. Germain Katanga, *Order for Reparations pursuant to Article 75 of the Statute (With one public annex (Annex I) and one confidential annex ex parte Common Legal Representative of the Victims, Office of Public Counsel for Victims and Defence team for Germain Katanga (Annex II))* (hereafter *Katanga Reparations Order*), ICC-01/04-01/07-3728-t-ENG, 17 August 2017, para 132.

⁹³ The Prosecutor v. Bosco Ntaganda, *Reparations Order*, ICC-01/04-02/06-2659, 8 March 2021, para 145.

most appropriate way to remedy the harms suffered and meet the long-term needs of the victims.⁹⁴ For victims of SGBC, the form and modalities of reparations are particularly important. While collective and symbolic reparations are appropriate forms of reparation in certain contexts, some victims specifically request an award of individual reparations. The *Katanga* case was the first time that reparations on both an individual and collective basis were made before the Court.⁹⁵ Participating victims had overwhelmingly expressed their preference for obtaining financial compensation or indemnity to help them address the harm they suffered, and the Chamber undertook a detailed, albeit protracted, exercise to examine individual application forms.⁹⁶ The *Katanga* decision established a positive precedent for recognising the harm suffered by individual victims, despite criticism of the delay caused by the individual examination of application forms.⁹⁷

One of the most significant issues to be determined by the *Ntaganda* TC was the amount of Ntaganda's liability to repair the harm. The TC found Ntaganda 'liable to repair the full extent of the harm (assessed at USD 30 million) caused to the direct and indirect victims of all crimes for which he was convicted, regardless of the different modes of liability relied on in the conviction and regardless of whether others may have also contributed to the harm.'⁹⁸ Lubanga had been found responsible for USD 10 million for the totality of the harm suffered, irrespective of the existence of other perpetrators.⁹⁹

In *Katanga*, the calculated total monetary value of the extent of the harm caused was USD 3,752,620, and the Chamber apportioned Katanga's liability at USD 1 million based on his participation in the commission of the crimes.¹⁰⁰ In response to an appeal against the *Katanga* order, the AC ruled that a convicted person's liability for reparations had to be proportionate to the harm caused, but that this 'did not mean, however, that the amount of reparations for which a convicted person is held liable must reflect his or her relative responsibility for the harm in question vis-à-vis others who may also have contributed to that harm'.¹⁰¹ As Lostal notes, the *Ntaganda* TC has embraced a victim-centred approach where the objective is repairing the harm caused to the victims, not as caused by the offender.¹⁰² This is also more in line with the non-punitive nature of reparations proceedings where, as a consequence, the degree of culpability of the individual should be inconsequential to questions of monetary liability.¹⁰³ In this regard, the *Ntaganda* approach is a step forward.

However, the *Ntaganda* reparations decision was partially overturned by the AC and remitted to the TC for reconsideration. The AC found, among other issues, that the TC failed to: (i) make any appropriate determination in relation to the number of potentially eligible or actual victims of the award and/or to provide a reasoned decision in relation to its conclusion about that number; (ii) provide an appropriate calculation, or set out sufficient reasoning, for the amount of the

⁹⁴ *Ibid.*, para 194.

⁹⁵ *Katanga Reparations Order*, para 281.

⁹⁶ *Ibid.*

⁹⁷ *The Prosecutor v. Germain Katanga, Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute"*, ICC-01/04-01/07-3778-Red, 9 March 2018, para 1.

⁹⁸ *The Prosecutor v. Bosco Ntaganda, Reparations Order*, ICC-01/04-02/06-2659, 8 March 2021, para 218.

⁹⁹ TFV, *The Lubanga Case*.

¹⁰⁰ *Katanga Reparations Order*, paras 239 and 264.

¹⁰¹ *The Prosecutor v. Germain Katanga, Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute"*, ICC-01/04-01/07-3778-Red, March 9, 2018, para 175.

¹⁰² Marina Lostal, *The Ntaganda Reparations Order: a marked step towards a victim-centred reparations legal framework at the ICC*, EJIL:Talk! Blog of European Journal of International Law, 24 May 2021.

¹⁰³ *Ibid.*

monetary award against Ntaganda; and (iii) assess and rule upon victims' applications for reparations.¹⁰⁴ In relation to the TC's findings concerning transgenerational harm, the AC found that the TC's decision was unclear, lacked reasoning and should therefore be reconsidered on multiple grounds, including its scientific basis and the appropriateness of a reparations award for this type of harm.¹⁰⁵ The AC did, however, confirm the TC's finding that children born of rape and sexual slavery were direct victims of the crimes who had suffered a unique type of harm that merits recognition.¹⁰⁶ In July 2023, the TC issued an extensive addendum

to the *Ntaganda* reparations order in which it addressed and provided explanations for a number of the issues raised in the AC decision, including on transgenerational harm.¹⁰⁷ However, the law is far from settled as the defence and common legal representatives have appealed the addendum.¹⁰⁸ While some aspects of the Ntaganda TC's approach to reparations were, at the time of writing, still being adjudicated, the approach of the TC is a promising step forward in relation to gender-competent, intersectional, victim-centric judicial approaches to reparations for SGBC.

¹⁰⁴ The Prosecutor v Bosco Ntaganda, Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled "Reparations Order", ICC-01/04-02/06-2782, 12 September 2022, para 1.

¹⁰⁵ *Ibid*, paras 495-497.

¹⁰⁶ *Ibid*, para 17.

¹⁰⁷ The Prosecutor v. Bosco Ntaganda, Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659, ICC-01/04-02/06-2858-Red, 14 July 2023.

¹⁰⁸ The Prosecutor v. Bosco Ntaganda, Notice of Appeal of the Common Legal Representative of the Victims of the Attacks against the "Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659", and Request for Suspensive Effect in relation to Trial Chamber II's Decision on the eligibility of Victims a/01636/13, a/00212/13, a/00199/13 and a/00215/13, ICC-01/04-02/06-2862, 16 August 2023.

**LOOKING AHEAD:
TOWARDS STRUCTURAL
TRANSFORMATION**

05

Chapter 5 - Looking ahead: towards structural transformation

Given the critical role of the judiciary in shaping the law on SGBC, it is important that the ICC prioritises the elections of gender-competent Judges and hires support staff with gender expertise. The RS requirement for fair gender representation contributed to the election of significantly more women Judges at the ICC when compared to other tribunals.¹⁰⁹ During the ICC's first elections in February 2003, a regionally diverse bench that included 7 women was elected.¹¹⁰ During judicial elections in 2020, 4 women and 2 men judges were elected. The women Judges joined 5 previously elected women colleagues, resulting in a total of 9 out of a possible 18 Judges on the bench. In representational terms, the ICC bench reached gender parity in 2021.¹¹¹ It is essential, however, to consider the broader judicial support staff, including legal officers and other employees, as well as Court-wide representation in senior level positions. Despite the ICC bench reaching gender parity in 2021, Court-wide disproportionate representation in higher positions remains a significant concern, highlighting the need for continued efforts to achieve equitable representation across all roles. As of 31 March 2023, the gender distribution of professional and higher-level staff by grade at the Court was:

- **D-1:** 6 men; 1 woman;
- **P-5:** 26 men; 12 women;
- **P-4:** 47 men; 29 women;
- **Other grades:** 153 men; 200 women.¹¹²

The data underscores a concerning trend. While women representation is higher at lower-grade levels, it drastically declines at the higher P-4, P-5, and D-1 levels. In fact, at the D-1 grade, men hold a significant majority of positions at 86%, leaving only a minimal 14% for women, which reveals substantial gender inequity when it comes to positions of considerable decision-making power. Within the Chambers themselves, the AC is led by 3 men and 2 women, further highlighting the underrepresentation of women in senior level roles, even within the judiciary.

A similar trend is observed in terms of geographical representation, more than half of the ICC's professional staff are from the Western Europeans and Other States Group (WEOG). As of 31 March 2023, the distribution of established professional staff by regional group was the following:

- **Africa:** 71 ~ 16,2%;
- **Asia:** 35 ~ 8%;
- **East Europe:** 51 ~ 11,6%;
- **GRULAC:** 33 ~ 7,5%;
- **WEOG:** 249 ~ 56,7%.¹¹³

¹⁰⁹ The ICC has had 24 women out of total of 53 judges. For comparison, see 'Where are the women in international organisations?' GQUAL campaign. See also Pam Women's Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power, Signs, vol 28 (4), 2003, pp 1243.

¹¹⁰ Women's Caucus for Gender Justice, [Main page Women's Caucus archives](#).

¹¹¹ According to the UNICEF Gender Equality glossary of terms and concepts, 'gender parity' is a numerical concept concerning relative equality in terms of numbers and proportions of men and women, girls and boys. Gender parity addresses the ratio of female-to-male judges at the ICC. Gender equality implies that the interests, needs and priorities of both women and men and girls and boys are taken into consideration, recognizing the diversity of different groups and that all human beings are free to develop their personal abilities and make choices without the limitations set by stereotypes and prejudices about gender roles. See UNICEF, [Gender Equality Glossary of Terms and Concepts](#), p 3.

¹¹² ASP Report of the Committee on Budget and Finance on the work of its forty-first session, 2023, p 29.

¹¹³ Ibid.

The data is more concerning when it comes to the distribution of higher grade level positions, with WEOG staff having a dominant presence across all higher positions:

• Africa:	D-1: 0 ~ 0%;	P-5: 7 ~ 18,4%	P-4: 11 ~ 16,2%
• Asia:	D-1: 1 ~ 14,3%	P-5: 1 ~ 2,6%	P-4: 6 ~ 8,8%
• East Europe:	D-1: 0 ~ 0%	P-5: 3 ~ 7,9%;	P-4: 6 ~ 8,8%
• GRULAC:	D-1: 1 ~ 14,3%	P-5: 1 ~ 2,6%	P-4: 4 ~ 5,9%
• WEOG:	D-1: 5 ~ 71,4%;	P-5: 26 ~ 68,4%	P-4: 41 ~ 60,3%

The inclusion of a goal to achieve more equitable geographical representation and gender balance, particularly at higher-level posts in the ICC Strategic Plan 2023-2025¹¹⁴ is a welcome step. However, to ensure the effective implementation of this goal and to advance discussions on distributing the Court's resources in a more equitable manner, the Court is encouraged to include more disaggregated data in its upcoming reports on various intersecting aspects including, but not limited to, gender and geographical representation. Other indicators for disaggregation to consider are, among others, age, race, income, and disability. In terms of gender representation, the Court is encouraged to be more inclusive by considering not only the binary framework of men and women, but also other gender identities. Finally, in areas where available statistics already show significant under-representation, such as the lack of gender diversity in higher-level positions and the lack of geographic diversity overall, but especially for more senior positions, more drastic measures could be considered in terms of recruitment and promotion policies, flexible work arrangements, and regular reporting by using diversity metrics to correct current imbalances. Adherence to the provisions of the RS will be vital in achieving a fair representation of professionals within the ICC.

5.1 Why does representation matter?

Equitable representation on the bench has been seen as a key contributor to improved office/institutional culture, staff wellbeing, and the overall legitimacy of the institution. Significantly, gender underrepresentation could potentially negatively impact the effective investigation and prosecution of crimes of sexual violence.¹¹⁵ Mudukuti argues that 'gender imbalance has been known to affect the jurisprudence of

[...] international court [sic] as it is often women Prosecutors and Judges who ensure the inclusion of gender crimes'.¹¹⁶ Judge Pillay, who was at the time the only woman Judge on the ICTR panel adjudicating the *Akayesu* case, 'is credited with taking the initiative to question witnesses about evidence of sexual violence'.¹¹⁷ Her efforts, combined with the efforts of feminist legal officers, lawyers, and several NGOs,

¹¹⁴ ICC, *ICC Strategic Plan 2023-2025*.

¹¹⁵ Milena Sterio, *Women as Judges at International Criminal Tribunals*, 2020, Law Faculty Articles and Essays, 1172, p 240.

¹¹⁶ Angela Mudukuti, *Symposium on Gender Representation: The International Criminal Court's "Boys Club" Problem*, *Opinio Juris*, 7 October 2021.

¹¹⁷ *Ibid.*

resulted in the amendment of Akayesu's indictment to include charges of sexual violence. The ICTR ultimately convicted Akayesu of the crime against humanity of rape and genocide founded on rape, a judgment that was both far-reaching in terms of setting out the definition of rape in international law and in being the first judgment delivered by an international tribunal to recognize criminal responsibility for genocide resulting from a systematic and targeted pattern of rape.¹¹⁸

The current Special Advisor to the Prosecutor on Slavery Crimes, Patricia Viseur Sellers, has remarked

that her being a descendant of an enslaved person bears a relationship to her profound professional interest in ensuring accountability for slavery crimes, which is reflected in her significant contributions to the adjudication of slavery crimes, including those that involved SGBC at the ICTY and those that followed and will follow at the ICC.¹¹⁹ It follows that diverse and equitable representation in other sections of the Court, including among legal officers and other support staff, can impact the way in which SGBC are adjudicated because legal officers and advisers provide critical legal research and advice to the judiciary.

5.2 Court-wide developments on gender mainstreaming

Over recent years, a combination of factors has led to several initiatives to better integrate gender in the Court's work. These factors include a change of leadership, grassroots efforts by ICC staff, and, most importantly, the IER conducted in 2019-2020. Recommendations issued in light of the IER report have served as a catalyst for the debate on how to improve the ICC's functioning. The IER report also brought to light the fact that the ICC is not impervious to deeply troublesome workplace culture issues. The sharp critique by the IER of the ICC's internal culture, coupled with the persistent advocacy of civil society and the courage of a number of former and current ICC staff in speaking out, are laying the groundwork for the vetting of ICC election candidates in the future.¹²⁰ In March 2021, the ICC appointed a Focal Point on Gender Equality (Focal Point). A month into

the appointment of the Focal Point, the ICC principals – the Court's President, Judge Piotr Hofmański, then Prosecutor, Fatou Bensouda, and Registrar, Peter Lewis – adopted a high-level statement on gender equality, recognising that 'gender equality is not only right and necessary but a driver of performance and success for the organisation'.¹²¹ Later that year came the drafting, with open consultations, of the ICC's first Strategy on Gender Equality and Workplace Culture, launched in December 2022.¹²² The Focal Point also helped launch a Court-wide campaign against sexism and sought to improve recruitment and work/life balance processes.¹²³ In April 2022, the Presidency issued a new administrative instruction addressing discrimination, harassment, and abuse of authority within the Court's work sphere.¹²⁴ Besides introducing guidelines on dealing with such conduct, it also

¹¹⁸ Loveday Hodson, *Gender and the international judge: Towards a transformative equality approach*, *Leiden Journal of International Law*, 35(4), 913-930, December 2022.

¹¹⁹ London School of Economics, *The International Women's Tribunal: Gender Just Peace*, Youtube, 8 December 2020.

¹²⁰ Danya Chaikel, *Workplace Misconduct at the ICC – A Call to Action for Compassionate Leadership*, Part I and Part II, *Opinio Juris*, 21 February 2021. See also Danya Chaikel and Maria Elena Vignoli, *Vetting in ICC Elections*, *Quo Vadis?*, CICC, 13 July 2022.

¹²¹ ICC, *ICC Principals adopt high-level statement on gender equality: "Gender equality is not only right and necessary but a driver of performance and success for the organisation"*, 30 April 2021.

¹²² ICC, *The ICC launches its first strategy on Gender Equality and Workplace Culture*, 9 December 2022.

¹²³ Secretariat of the ASP, *Remarks by Focal Point on Gender Equality, Review Mechanism Third Meeting*, 11 October 2021.

¹²⁴ ICC Registry, *Administrative Instruction: ADDRESSING DISCRIMINATION, HARASSMENT, INCLUDING SEXUAL HARASSMENT, AND ABUSE OF AUTHORITY*, Ref. ICC/AI/2022/003, 6 April 2021.

introduces the position of Ombudsperson for the ICC. Additionally, at civil society's initiative, discussions are underway on the long-term integration of elements of gender-responsive budgeting in the Court's processes.

In September 2021, the Prosecutor appointed 17 Special Advisers, including on the following SGBC-related themes: Sexual Violence in Conflict, Gender Persecution, and Slavery Crimes.¹²⁵ This, in turn, led to: the issuance of a new OTP policy on gender persecution, developed in consultation with

experts, civil society, and affected communities;¹²⁶ the revision of the OTP policies on SGBC (2014) and on children (2016); and the development of a policy on slavery crimes scheduled for 2024. While the Prosecutor has appointed Special Advisers on SGBC related themes, there are no Special Advisers who play a similar role for the judiciary. Thus, knowledge and expertise pertaining to gender and intersectional perspectives must come from either the direct experience of the Judges themselves, or from the legal advisers assigned to Chambers.

5.2.1 Judicial Committee on Gender Equality

In addition to the above-mentioned developments, 2021 also witnessed the establishment of a Judicial Committee on Gender Equality. The Committee is currently in its inception phase, with member-Judges discussing options for the potential mandate and activities of the Committee.

It is not yet clear what form this Judicial Committee will take, and whether it will dedicate its attention solely to institutional matters or to substantive issues also, but the main judicial protagonists are committed to its development.

5.3 Ongoing training: anti-discrimination, intersectional analysis and gender-competence

There is limited publicly available information on ICC judicial training pertaining to anti-discrimination, intersectional and gender analysis, and no reference to gender-sensitive interpretative approaches in the Chambers' Practice Manual.¹²⁷ However, Judges were not averse to peer-to-peer judicial training and mentorship programmes aimed at increasing judicial gender-competency, such as the Gender Mentoring Training Programme for Judges of International Criminal Courts launched in 2020 by Africa Legal Aid (AFLA).¹²⁸ The Judges with whom we spoke indicated a

commitment to delivering gender justice, but admitted that the Court had not yet moved as quickly as IHRL in relation to the importance of taking an intersectional analysis, the interpretation of gender, and the rights of non-binary people. Some indicated that these issues could not be considered in the abstract, but once there was an actual case before the Chamber, more attention would need to be paid to these issues.

During a side-event at the 20th ASP organised by AFLA, Judge Mumba from the ECCC noted that gender

¹²⁵ ICC, *ICC Prosecutor Mr Karim A.A. Khan QC appoints Seventeen Special Advisers*, 17 September 2021.

¹²⁶ ICC, *Prosecutor of the International Criminal Court (ICC), Karim A.A. Khan KC Publishes Policy on the Crime of Gender Persecution*, 7 December 2022.

¹²⁷ ICC, *Chambers Practice Manual*, 13 July 2023. Notes however the existence of civil society initiatives aimed at improving judicial training.

¹²⁸ WIGJ bilateral consultations with ICC Judges. See AFLA, *Gender Mentoring Training Programme for Judges of International Criminal Courts*.

stereotypes could negatively impact the assessment of the credibility of evidence. She opined that evidence should be considered holistically and be critically examined to avoid bias.¹²⁹ At that same event, Judge María del Socorro Flores Liera, currently a member of the ICC judiciary, spoke of a fundamental need for change concerning gender awareness among all stakeholders including Prosecutors, practitioners, civil society organizations, states, and Judges.¹³⁰ Judge Flores highlighted the importance of gender-sensitivity training for Judges, noting that ‘Judges all over the world do not escape social constructions and are not immune to stereotypes’.¹³¹

Judges consulted by WIGJ were generally reluctant

to support the issuance of policy documents similar to those promulgated by the OTP given their role, but their openness to gender-sensitive training coupled with their internal plans to establish a Judicial Committee on Gender Equality are welcome developments at the ICC. While cases and trials present an important opportunity for adjudicating gender crimes, advanced training and competence in these areas will enable the judiciary to better interpret and apply RS norms in a gender-sensitive manner. Specifically, training in intersectional approaches to evidentiary analysis and the interpretation of the ICC’s laws and procedures will be key to securing gender-just outcomes in criminal trials before the Court.

5.4 Beyond representation: tackling structural root causes

While acknowledging the promising and important developments regarding representation at the ICC and among the judiciary, predominantly on gender grounds, it is equally critical to recognize that representation must be expanded beyond equitable gender representation. By focusing on one ground of discrimination (in this case gender), there is a risk of neglecting discrimination on other grounds (e.g., race, sexual orientation, ability, etc.) or to place them in a secondary frame of importance.¹³² Another risk is treating one group as monolithic, thus ignoring other layers of discrimination.¹³³ For example, the ICC needs non-binary persons, intersex persons, transwomen, Indigenous women, persons with disabilities, and more people of African descent in positions of significant leadership and so forth. Moreover, a representational standard which considers

equitable geographical representation must be aware of systems of hierarchies globally, regionally, and nationally on multiple intersecting grounds, which may lead to a certain level of privilege needed in a given context to be able to access employment at the Court.

The Court’s work is concerned with mass violence and crimes occurring in the midst of an existing matrix of ‘political and social domination’ in which ‘each individual derives varying amounts of penalty and privilege from the multiple systems of oppression which frame everyone’s life’.¹³⁴ For the ICC to advance accountability for grave crimes in a genuinely equitable manner, concrete markers and measures need to be developed to holistically anchor intersectional approaches at the structural level as well as in the substantive decision-

¹²⁹ AFLA, *Report 6th Meeting – Gender-Sensitive Judging in International Criminal Courts (ICC)*

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² Gregor Maucec, “The International Criminal Court and the Issue of Intersectionality – A Conceptual and Legal Framework for Analysis”, 1 February 2021, iCourts Working Paper Series No. 237, Forthcoming in *International Criminal Law Review*, p 13.

¹³³ *Ibid.*, p 14.

¹³⁴ Patricia Hill Collins, *Black Feminist Thought*, 2nd ed, New York: Routledge, 2000, p 18.

making processes at the Court. Thus, beyond the current activities of the Court aiming to address gender inequality, including ensuring gender parity, a more comprehensive and intersectional approach would include entrenching protective anti-harassment policies, providing consistent anti-oppression trainings, as well as implementing structures and models that uphold the wellbeing of all staff. The planned Gender Equality Committee being spearheaded by the Judges is well-positioned to support this more holistic approach to gender equality at the Court.

At the same time, it should be understood that addressing structural, discriminatory gaps will not prove as successful without tackling the root causes of intersectional discrimination. As Nash notes, 'where diversity is a project of including bodies, intersectionality is an anti-subordination project, one committed to foregrounding exclusion and its effects'.¹³⁵ Equally, Davis posits that '[d]iversity without structural transformation simply brings those who were previously excluded into a system as racist [and] misogynist as it was before. [...] There can be

no diversity and inclusion without transformation and justice'.¹³⁶ Gerges remarks that 'to continue to propose demographic solutions without attending to the structural underpinnings, is fundamentally misunderstanding what the problem is'.¹³⁷

Consequently, while an important first step in ensuring gender-competent judging at the ICC, equitable geographical and gender representation of Judges does not go far enough, since equitable gender representation does not equate to gender-competence, nor does diverse geographical representation guarantee non-discrimination. Ultimately, the interrelationship between representation and competence must be proactively approached with nuance and distinction. Rather than an exclusive focus on gender and geography, everyone working to make the ICC a beacon of gender equality and non-discrimination should simultaneously consider their positionality in relation to such work, including the ways in which it is implicated in or privileged by structures that uphold systems of global hierarchies and domination.¹³⁸

¹³⁵ Jennifer Nash, *Black Feminism Reimagined After Intersectionality*, Duke University Press, 2019, p. 24.

¹³⁶ Merray Gerges, *Against Representation Without Transformation*, *Early Magazine*, 30 March 2023, citing Angela Davis.

¹³⁷ *Ibid.*

¹³⁸ See a definition of 'positionality' as relevant for the legal profession at Women's Legal Education & Action Fund, Grace Ajele and Jena McGill, *Intersectionality in Law and Legal Contexts*, 2020, p 6.

CONCLUSION

Sexual and gender-based crimes have only recently gained the focus of international attention. Addressing these crimes can be challenging for legal practitioners, due to, among others, complex legal and definition requirements, underreporting, the absence of a victim-sensitive and trauma-informed approach, and a lack of understanding the acts of sexual violence in the broader context in which they occur. This has, at times, resulted in a disparity between how SGBC are addressed by criminal justice practitioners, and how the violence is perceived and experienced by victims. This disparity is reflected in the failure to recognize or identify acts of a sexual nature, as well as victims, witnesses, and perpetrators of SGBC, or even the scale of the crimes committed; the lack of charges brought for SGBC crimes, despite compelling evidence of their commission; and the recharacterization of crimes in a manner which does not accurately reflect the harm suffered by victims.

Significant progress has nonetheless been made since the early 1990s thanks to the criminalization of specific crimes and jurisprudential developments from the ad hoc tribunals. Building on these advancements, the RS expanded the list of codified sexual violence crimes, allowing for further progress to be made in terms of both prosecution and adjudication of SGBC. The first years of adjudicating SGBC at the ICC were rather problematic, with cases such as *Lubanga*, *Katanga*, and *Bemba*¹ being marked by a failure to recognise gendered and intersectional harm, a limited understanding of cumulative charging, and unexplained departures from previous jurisprudence.

Since then, SGBC beyond rape are increasingly being investigated, charged, prosecuted, and adjudicated. The expansive understanding of gender, both as a structural driver of violence and as a term that reveals the gender composition of protected groups and their specific harms, is represented among the adjudication of SGBC by ICC Judges. Recent progress is recognised in the *Ntaganda*, *Ongwen*, and *Al Hassan* cases with respect to the comprehensive interpretation of crimes, some of which were adjudicated for the first time. Also laudable is the recent proactive approach taken by the AC in *Ongwen* in inviting guidance from experts on a range of identified matters, including on relevant SGBC and standards of evidence assessing SGBC, duress, and cumulative charges. The wealth and quality of the received, accepted, and considered amici submissions represents a humble acknowledgment by the Judges that the adjudication of SGBC benefits from external expertise of an interdisciplinary nature and, hopefully, paved the way for similar conduct in the future, including on appeal.

Despite such successes, challenges remain, including the lack of a context-specific understanding of evidence of sexual violence as well as context-specific challenges to obtaining such evidence; the lack of consistent gender- and anti-discrimination competence across the bench; and the underutilization of IHRL in assisting Judges to obtain a progressive understanding of the different sexual harms that can be committed against persons of different intersecting identities.

Similarly, the commendable recent efforts to advance gender mainstreaming on an institutional

¹ See comparatively Annex 1: Status of SGBC charges across ICC cases.

level must be expanded beyond the single axis of 'gender' to avoid overshadowing the comprehensive internal structural transformation that is needed to ensure equity and anti-discrimination practices within the Court. This includes tackling inequity and discrimination on grounds of race, sexual orientation and gender identity, bodily and mental ability, socio-economic status, and other grounds.

As such, it is imperative that the ICC judiciary maintains its commitment to evolving and improving its approaches to interpreting SGBC, ensuring the inclusion of relevant gender, intersectional, and human rights related perspectives. This ongoing dedication will not only address current gaps but also pave the way for a more just and inclusive Rome Statute system, at the International Criminal Court and beyond.

RECOMMENDATIONS

With an increasing number of cases at the ICC addressing SGBC, both the already achieved developments as well as the remaining structural shortcomings demonstrate the importance for Judges to move from reactivity to proactivity in their approach towards the adjudication of SGBC. The review of ICC SGBC related jurisprudence to date, as well as a critical examination of the structural underpinnings of the challenges in addressing SGBC, call for the following recommendations:

1. It is paramount for Judges to conduct their work, including with respect to SGBC, through an anti-discrimination lens. In other words, to advance gender justice at the ICC, such justice must be intersectional. As the research and analysis in this report demonstrates, Article 21(3) of the RS constitutes a critical pillar in ensuring a just, non-discriminatory outcome of the adjudication of international crimes, including SGBC, at the ICC and beyond. Intersectional justice is only possible if the law is interpreted and applied in a manner that grants the full breadth of legal protection from mass atrocity harms to all groups, communities, or collectivities as envisioned by the RS and as expanded upon through the Court's jurisprudence and relevant international law developments.
2. All references to 'gender competence' must be understood expansively to mean 'anti-discrimination competence'. As this report depicts, Judges' proactive contributions towards the equitable and non-discriminatory adjudication of SGBC is prescribed by law and, thus, guaranteed to victims and affected communities. A guarantee that must apply not just in theory, but in practice.
3. Anti-discrimination competence must be proactively and continuously acquired by the judiciary, Chambers' staff, and within the institution more broadly, including by inviting the opinions of, as well as engaging in training and collaboration with, external experts.
4. The adjudication of SGBC should be informed by established jurisprudence and a progressive understanding of relevant international human rights law.
5. Acts of a sexual nature other than the listed sexual crimes in the RS² should be recognized by Judges as other forms of sexual violence, rather than as non-sexual crimes, to adequately reflect the nature and extent of the harm caused, facilitate appropriate redress, and give effect to the spirit, purpose, and potential of the RS.
6. SGBC charges should be considered in light of their aggravating circumstances³ in order to reflect the full extent of the harm suffered. For example, charges of rape with the aggravating circumstances of forced pregnancy (in cases where the victim was not unlawfully confined) or of sexual humiliation (in cases where the acts are not of a gravity comparable to the other crimes set forth in Article 7(1)(g) of the Statute).
7. Charges brought by the prosecution that do not adequately reflect the sexual nature of the crimes committed should be addressed by the Judges, including through the consideration of giving notice of potential recharacterization of the facts pursuant to Regulation 55.

² Rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization.

³ Rule 145(2)(b), RPE.

ANNEX 01

Status of SGBC charges across ICC cases

Case	Stage of proceedings	SGBC charges
The Prosecutor v. Germain Katanga	Katanga was unanimously acquitted of all charges of SGBC in March 2014.	Charges against Katanga: ¹ <ul style="list-style-type: none"> • Rape as a crime against humanity; • Sexual slavery as a crime against humanity; • Rape as a war crime; and • Sexual slavery as a war crime.
The Prosecutor v. Mathieu Ngudjolo Chui	Ngudjolo was unanimously acquitted of all charges in December 2012.	Charges against Ngudjolo: ² <ul style="list-style-type: none"> • Rape as a crime against humanity; • Sexual slavery as a crime against humanity; • Rape as a war crime; and • Sexual slavery as a war crime.
The Prosecutor v. Bosco Ntaganda	On 8 July 2019, Ntaganda was found guilty on 18 counts of war crimes and crimes against humanity, including 7 counts of SGBC. On 30 March 2021, the conviction was confirmed on all counts.	Charges against Ntaganda: ³ <ul style="list-style-type: none"> • Rape of civilians as a crime against humanity; • Sexual slavery of civilians as a crime against humanity; • Persecution (including acts of rape and sexual slavery) as a crime against humanity; • Rape of civilians as a war crime; • Sexual slavery of civilians as a war crime; • Rape of child soldiers as a war crime; and • Sexual slavery of child soldiers as a war crime.
The Prosecutor v. Callixte Mbarushimana	No charges were confirmed against Mbarushimana in December 2011.	Charges against Mbarushimana: ⁴ <ul style="list-style-type: none"> • Torture as a crime against humanity; • Rape as a crime against humanity; • Other inhumane acts (including acts of rape and mutilation of women) as a crime against humanity; • Persecution (based on gender) as a crime against humanity; • Torture as a war crime; • Rape as a war crime; • Cruel treatment (including acts of rape and mutilation of women) as a war crime; and • Mutilation as a war crime.

¹ In the DCC, the Prosecution also brought the charge of outrages upon personal dignity as a war crime against Katanga; however, PTC I declined to confirm this charge.

² In the DCC, the Prosecution also brought the charge of outrages upon personal dignity as a war crime against Ngudjolo; however, PTC I declined to confirm this charge.

³ The first five charges of SGBC were brought against Ntaganda in his second arrest warrant (13 July 2012), namely: rape of civilians, sexual slavery of civilians, and persecution (by means of rape and sexual slavery) as crimes against humanity; and rape of civilians and sexual slavery of civilians as war crimes. The DCC included important new charges of SGBC, namely: rape of child soldiers and sexual slavery of child soldiers as war crimes.

⁴ The DCC added the charge of mutilation as a war crime to the other SGBC charges already brought in the Arrest Warrant.

Case	Stage of proceedings	SGBC charges
The Prosecutor v. Sylvestre Mudacumura	An arrest warrant was issued for Mudacumura in July 2012. The execution of this arrest warrant is pending.	Charges against Mudacumura: ⁵ <ul style="list-style-type: none"> • Rape as a war crime; • Torture as a war crime; and • Mutilation as a war crime.
The Prosecutor v. Joseph Kony and Vincent Otti	An arrest warrant was issued for Kony in July 2005. The execution of this arrest warrant is pending. An arrest warrant was issued for Otti in July 2005. The execution of this arrest warrant is pending.	Charges against Kony: <ul style="list-style-type: none"> • Sexual slavery as a crime against humanity • Rape as a crime against humanity; and • Inducing rape as a war crime. Charges against Otti: <ul style="list-style-type: none"> • Sexual slavery as a crime against humanity; and • Inducing rape as a war crime.
The Prosecutor v. Dominic Ongwen	On 4 February 2021, TC IX found Dominic Ongwen guilty for a total of 61 comprising crimes against humanity and war crimes, including for all 19 SGBC counts contained in the DCC.	Charges against Ongwen: ⁶ <ul style="list-style-type: none"> • Forced marriage as a crime against humanity (2 counts); • Torture as a crime against humanity (2 counts); • Rape as a crime against humanity (2 counts); • Sexual slavery as a crime against humanity (2 counts); • Enslavement as a crime against humanity (2 counts); • Forced pregnancy as a crime against humanity (1 count); • Rape as a war crime (2 counts); • Torture as a war crime (2 counts); • Sexual slavery as a war crime (2 counts); • Forced pregnancy as a war crime (1 count); and • Outrages upon personal dignity as a war crime (1 count).
The Prosecutor v. Jean-Pierre Bemba Gombo	Bemba was unanimously convicted and sentenced for all charges of SGBC in March 2016. On 8 June 2018, the Appeals Chamber acquitted Bemba of all charges.	Charges against Bemba: <ul style="list-style-type: none"> • Rape as a crime against humanity; and • Rape as a war crime.
The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman (Kushayb)	An arrest warrant was issued for Harun in April 2007. The execution of this arrest warrant is pending. An arrest warrant was issued for Kushayb in April 2007. Victims are scheduled to present their views and concerns, and the Defence to make opening statements in October 2023.	Charges against Harun: <ul style="list-style-type: none"> • Rape as a crime against humanity (2 counts); • Persecution by means of sexual violence as a crime against humanity (2 counts); • Rape as a war crime (2 counts); • Outrages upon personal dignity as a war crime (1 count). Charges against Kushayb: <ul style="list-style-type: none"> • Rape as a crime against humanity (2 counts); • Persecution by means of sexual violence as a crime against humanity (2 counts); • Rape as a war crime (2 counts); • Outrages upon personal dignity as a war crime (2 counts).

⁴ The DCC added the charge of mutilation as a war crime to the other SGBC charges already brought in the Arrest Warrant.

⁵ Mudacumura also faces the charge of outrages upon personal dignity, which could be based on acts of sexual and gender-based violence subject to the availability of further information regarding the acts underlying the charge. The application is redacted and thus the factual basis for the charge is unclear. However, WIGJ notes that, in other cases, the Prosecution has frequently charged outrages upon personal dignity arising out of sexual violence.

⁶ Although no charges of SGBC were brought at the arrest warrant stage, the Prosecution included 19 counts in the Notice of Intended Charges, relating to 11 different SGBC.

Case	Stage of proceedings	Sexual and gender-based ` crimes charges
The Prosecutor v. Oman Hassan Ahmad Al Bashir	Arrest warrants were issued for Al Bashir in March 2009 and July 2010. The execution of these arrest warrants is pending.	Charges against Al Bashir: <ul style="list-style-type: none"> • Rape as a crime against humanity; • Causing serious bodily or mental harm (including through acts of rape) as an act of genocide.
The Prosecutor v. Abdel Raheem Muhammad Hussein	Arrest warrants were issued for Al Bashir in March 2009 and July 2010. The execution of these arrest warrants is pending.	Charges against Hussein: <ul style="list-style-type: none"> • Persecution (including acts of sexual violence) as a crime against humanity; • Rape as a crime against humanity; • Rape as a war crime; and • Outrages upon personal dignity as a war crime.
The Prosecutor v. Uhuru Muigai Kenyatta, Francis Kirimi Muthaura, and Mohammed Hussein Ali	<p>The Prosecution withdrew all charges against Kenyatta in December 2014 after the confirmation of charges. The case was subsequently terminated in March 2015.</p> <p>The Prosecution withdrew all charges against Muthaura in March 2013 after the confirmation of charges. The case was subsequently terminated the same month.</p> <p>No charges against Ali were confirmed in January 2012.</p>	<p>Charges against Kenyatta:⁷</p> <ul style="list-style-type: none"> • Rape as a crime against humanity; • Other inhumane acts as a crime against humanity; and • Persecution (by means of rape and other inhumane acts) as a crime against humanity. <p>Charges against Muthaura:⁸</p> <ul style="list-style-type: none"> • Rape as a crime against humanity; • Other inhumane acts as a crime against humanity; and • Persecution (by means of rape and other inhumane acts) as a crime against humanity. <p>Charges against Ali:</p> <ul style="list-style-type: none"> • Rape as a crime against humanity; • Other inhumane acts as a crime against humanity; and • Persecution (by means of rape and other inhumane acts) as a crime against humanity.
The Prosecutor v. Al-Tuhamy Mohamed Khaled	An arrest warrant was issued for Al-Tuhamy in April 2013. The execution of this Arrest Warrant is pending.	It is unclear from the Arrest Warrant which specific charges are inclusive of acts of sexual violence and rape. According to the decision issuing the arrest warrant, "the Chamber finds reasonable grounds to believe that between 15 February 2011 and 24 August 2011, members of the Internal Security Agency (the "ISA") and of other Security Forces arrested and detained persons perceived to be opponents of the Gaddafi regime, who were subjected to various forms of mistreatment, including severe beatings, electrocution, acts of sexual violence and rape, solitary confinement, deprivation of food and water, inhumane conditions of detention, mock executions, threats of killing and rape in various locations throughout Libya." ⁹ "The Chamber finds reasonable grounds to believe that these acts constitute the crimes against humanity of imprisonment under article 7(1)(e) of the Statute, torture under article 7(1)(f) of the Statute, other inhumane acts under article 7(1)(k) of the Statute and persecution under article 7(1)(h) of the Statute from 15 February 2011 until 24 August 2011." ¹⁰

⁷ In the CoC decision, PTC II, by majority, declined to confirm the charge of other forms of sexual violence as a crime against humanity against Kenyatta.

⁸ In the CoC decision, PTC II, by majority, declined to confirm the charge of other forms of sexual violence as a crime against humanity against Muthaura.

⁹ ICC-01/11-01-13-1, para 7.

¹⁰ ICC-01/11-01-13-1, para 8.

Case	Stage of proceedings	Sexual and gender-based ` crimes charges
The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé	<p>On 15 January 2019, TC I, by majority, acquitted Mr Laurent Gbagbo and Mr Charles Blé Goudé from all charges of crimes against humanity allegedly committed in Côte d'Ivoire in 2010 and 2011. On 31 March 2021, the acquittal decision was confirmed by the AC.</p>	<p>Charges against Laurent Gbagbo:</p> <ul style="list-style-type: none"> • Rape as a crime against humanity;¹¹ and • Persecution (including acts of rape) as a crime against humanity. <p>Charges against Blé Goudé:</p> <ul style="list-style-type: none"> • Rape as a crime against humanity;¹² and • Persecution (including acts of rape) as a crime against humanity.
The Prosecutor v. Simone Gbagbo	<p>An arrest warrant was issued for Simone Gbagbo in February 2012. The arrest warrant was vacated on 19 July 2021.</p>	<p>Charge against Simone Gbagbo:¹³</p> <ul style="list-style-type: none"> • Rape and other forms of sexual violence as a crime against humanity.
The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud	<p>The trial opened on 14-15 July 2020. The closing statements took place May 2023. Judges are now in deliberation.</p>	<p>Charges against Al Hassan:</p> <ul style="list-style-type: none"> • Other inhumane acts (forced marriage) as crime against humanity; • Sexual slavery as crime against humanity; • Sexual slavery as war crime; • Rape as crime against humanity; • Rape as war crime; and • Persecution on gender and religious grounds as crime against humanity.
The Prosecutor v. Yekatom & Ngaissona	<p>The trial opened on 16 February 2021 before Trial Chamber V. The Prosecution and LRVs presented their evidence. The Defence is scheduled to make its opening statement in November 2023.</p>	<p>Charges against Ngaissona:</p> <ul style="list-style-type: none"> • Rape as crime against humanity; and • Rape as war crime.

¹¹ While in the Arrest Warrant Laurent Gbagbo had faced charges of rape and other forms of sexual violence as crimes against humanity, the DCC, as well as the CoC decision, refer only to the charge of rape.

¹² While in the Arrest Warrant Blé Goudé had faced charges of rape and other forms of sexual violence as crimes against humanity, the DCC, as well as the CoC decision, refer only to the charge of rape.

¹³ Based on a comparison of the Arrest Warrant for Simone Gbagbo with the Arrest Warrants for Laurent Gbagbo and Blé Goudé, which are substantially similar, the charge of persecution as a crime against humanity could be based on SGBV subject to the availability of further information regarding the acts underlying the crime. Laurent Gbagbo and Blé Goudé are charged with persecution as a crime against humanity, which includes acts of rape, as clarified in the CoC decision for Laurent Gbagbo and the DCC for Blé Goudé.

ANNEX 02

ICC SGBC charges corresponding to RS provisions

SGBC under the Rome Statute	ICC cases including SGBC
Genocide (Article 6 RS):	
<i>Killing members of the group</i> Article 6(a)	X
<i>Causing serious bodily or mental harm to members of the group</i> Article 6(b)	The Prosecutor v. Oman Hassan Ahmad Al Bashir – outstanding arrest warrant. The crime was allegedly committed ‘through acts of rape, other forms of sexual violence, torture and forcible displacement of members of [the targeted ethnic] groups’.
<i>Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part</i> Article 6(c)	X
<i>Imposing measures intended to prevent births within the group</i> Article 6(d)	X
<i>Forcibly transferring children of the group to another group</i> Article 6(e)	X
Crimes against humanity (Article 7 RS):	
<i>Rape</i> Article 7(1)(g)	The Prosecutor v. Germain Katanga – acquitted. The Prosecutor v. Mathieu Ngudjolo Chui – acquitted. The Prosecutor v. Bosco Ntaganda – confirmed. The Prosecutor v. Callixte Mbarushimana – not confirmed. The Prosecutor v. Joseph Kony and Vincent Otti – outstanding arrest warrants. The Prosecutor v. Dominic Ongwen – confirmed. The Prosecutor v. Jean-Pierre Bemba Gombo – confirmed. The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman (Kushayb) – outstanding arrest warrants. The Prosecutor v. Oman Hassan Ahmad Al Bashir – outstanding arrest warrant. The Prosecutor v. Abdel Raheem Muhammad Hussein – outstanding arrest warrant. The Prosecutor v. Uhuru Muigai Kenyatta – charges withdrawn for Kenyatta and Muthaura, not confirmed for Ali. The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé – confirmed. The Prosecutor v. Simone Gbagbo – vacated arrest warrant. The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud – not confirmed.
<i>Sexual slavery</i> Article 7(1)(g)	The Prosecutor v. Germain Katanga – acquitted. The Prosecutor v. Mathieu Ngudjolo Chui – acquitted. The Prosecutor v. Bosco Ntaganda – confirmed. The Prosecutor v. Joseph Kony and Vincent Otti – outstanding arrest warrants. The Prosecutor v. Dominic Ongwen – confirmed. The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud – not confirmed.

SGBC under the Rome Statute	ICC cases including SGBC
<i>Enforced prostitution</i> Article 7(1)(g)	X
<i>Forced pregnancy</i> Article 7(1)(g)	The Prosecutor v. Dominic Ongwen – confirmed.
<i>Enforced sterilisation</i> Article 7(1)(g)	X
<i>Other forms of sexual violence</i> Article 7(1)(g)	The Prosecutor v. Jean-Pierre Bemba Gombo – declined to include in the Arrest Warrant. The Prosecutor v. Uhuru Muigai Kenyatta – charges not confirmed against Kenyatta, Muthaura and Ali. The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé – included in the Arrest Warrants but not in the Documents Containing the Charges or Confirmation of Charges decisions. The Prosecutor v. Simone Gbagbo – vacated arrest warrant.
<i>Forced marriage</i> Article 7(1)(k)	The Prosecutor v. Dominic Ongwen – confirmed. The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud – not confirmed.
<i>Persecution</i> Article 7(1)(h)	The Prosecutor v. Bosco Ntaganda – confirmed. The Prosecutor v. Callixte Mbarushimana – not confirmed. The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman (Kushayb) – not confirmed. The Prosecutor v. Abdel Raheem Muhammad Hussein – outstanding arrest warrant. The Prosecutor v. Uhuru Muigai Kenyatta – charges withdrawn for Kenyatta and Muthaura, not confirmed for Ali. The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé – confirmed. The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud – not confirmed.
<i>Other inhumane acts</i> Article 7(1)(k)	The Prosecutor v. Callixte Mbarushimana – not confirmed. The Prosecutor v. Uhuru Muigai Kenyatta – charges withdrawn for Kenyatta and Muthaura, not confirmed against Ali.
<i>Enslavement</i> Article 7(1)(c)	The Prosecutor v. Dominic Ongwen – confirmed.
<i>Torture</i> Article 7(1)(f)	The Prosecutor v. Callixte Mbarushimana – not confirmed. The Prosecutor v. Dominic Ongwen – confirmed. The Prosecutor v. Jean-Pierre Bemba Gombo – not confirmed.
<i>Deportation or forcible transfer of population</i> Article 7(1)(d)	X
<i>Murder</i> Article 7(1)(a)	X

SGBC under the Rome Statute	ICC cases including SGBC
War crimes (Article 8 RS):	
<i>Rape</i> Article 8(2)(b)(xxii) or 8(2)(e)(vi)	<p>The Prosecutor v. Germain Katanga – acquitted. The Prosecutor v. Mathieu Ngudjolo Chui – acquitted. The Prosecutor v. Bosco Ntaganda – confirmed. The Prosecutor v. Callixte Mbarushimana – not confirmed. The Prosecutor v. Sylvestre Mudacumura – outstanding arrest warrant. The Prosecutor v. Joseph Kony and Vincent Otti – outstanding arrest warrants. The Prosecutor v. Dominic Ongwen – confirmed. The Prosecutor v. Jean-Pierre Bemba Gombo – confirmed. The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman (Kushayb) – not confirmed. The Prosecutor v. Abdel Raheem Muhammad Hussein – outstanding arrest warrant. The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud – not confirmed.</p>
<i>Sexual slavery</i> Article 8(2)(b)(xxii) or 8(2)(e)(vi)	<p>The Prosecutor v. Germain Katanga – acquitted. The Prosecutor v. Mathieu Ngudjolo Chui – acquitted. The Prosecutor v. Bosco Ntaganda – confirmed. The Prosecutor v. Dominic Ongwen – confirmed. The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud – not confirmed.</p>
<i>Enforced prostitution</i> Article 8(2)(b)(xxii) or 8(2)(e)(vi)	X
<i>Forced pregnancy</i> Article 8(2)(b)(xxii) or 8(2)(e)(vi)	The Prosecutor v. Dominic Ongwen – confirmed.
<i>Enforced sterilisation</i> Article 8(2)(b)(xxii) or 8(2)(e)(vi)	X
<i>Other forms of sexual violence</i> Article 8(2)(b)(xxii) or 8(2)(e)(vi)	The Prosecutor v. Jean-Pierre Bemba Gombo – confirmed.
<i>Outrages upon personal dignity, in particular humiliating and degrading treatment</i> Article 8(2)(b)(xxi) or 8(2)(c)(ii)	<p>The Prosecutor v. Germain Katanga – not confirmed. The Prosecutor v. Mathieu Ngudjolo Chui – not confirmed. The Prosecutor v. Dominic Ongwen – confirmed. The Prosecutor v. Jean-Pierre Bemba Gombo – confirmed. The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-AlRahman (Kushayb) – not confirmed. The Prosecutor v. Abdel Raheem Muhammad Hussein – outstanding arrest warrant.</p>
<i>Torture</i> Article 8(2)(a)(ii) or 8(2)(c)(i)	<p>The Prosecutor v. Callixte Mbarushimana – not confirmed. The Prosecutor v. Sylvestre Mudacumura – outstanding arrest warrant. The Prosecutor v. Dominic Ongwen – confirmed. The Prosecutor v. Jean-Pierre Bemba Gombo – confirmed.</p>
<i>Cruel treatment</i> Article 8(2)(c)(i)	The Prosecutor v. Callixte Mbarushimana – not confirmed.
<i>Mutilation</i> Article 8(2)(c)(i) or 8(2)(e)(xi)	<p>The Prosecutor v. Callixte Mbarushimana – not confirmed. The Prosecutor v. Sylvestre Mudacumura – outstanding arrest warrant</p>
<i>Intentionally directing attacks against the civilian population</i> - Article 8(2)(b)(i) or 8(2)(e)(l)	X
<i>Recruitment of child soldiers</i> Article 8(2)(b)(xxvi) or 8(2)(e)(vii)	X

ANNEX 03

Overview of modes of liability for all SGBC charges

SGBC under RS	Article 25(3)(a)	Article 25(3)(b)	Article 25(3)(c)	Article 25(3)(d)	Article 25(3)(e)	Article 25(3)(f)	Article 28
Genocide (Article 6 RS):							
Causing serious bodily or mental harm to members of the group Article 6(b)	Al Bashir (outstanding arrest warrant)	X	X	X	X	X	X
Crimes against humanity (Article 7 RS):							
Enslavement Article 7(1)(c)	Ongwen (confirmed)	Ongwen (confirmed)	X	Ongwen (confirmed)	X	X	Ongwen (confirmed)
Torture Article 7(1)(f)	Ongwen (confirmed)	Ongwen (confirmed)	X	Mbarushimana (not confirmed) Ongwen (confirmed)	X	X	Mbarushimana (not confirmed) Ongwen (confirmed)
Rape Article 7(1)(g)	Ngudjolo Chui (acquitted) Ntaganda (confirmed) Kony (outstanding arrest warrant) Ongwen (confirmed) Abd-Al-Rahman (not confirmed) Al Bashir (outstanding arrest warrant) Hussein (outstanding arrest warrant) Kenyatta (withdrawn) Muthaura (withdrawn) L. Gbagbo (confirmed) Blé Goudé (confirmed) S. Gbagbo (vacated arrest warrant)	Ntaganda (confirmed) Ongwen (confirmed) Harun (outstanding arrest warrant) L. Gbagbo (confirmed) Blé Goudé (confirmed)	Blé Goudé (confirmed)	Katanga (acquitted) Ntaganda (confirmed) Mbarushimana (not confirmed) Ongwen (confirmed) Harun (outstanding arrest warrant) Abd-Al-Rahman (not confirmed) Hussein (not confirmed) L. Gbagbo (confirmed) Blé Goudé (confirmed)	X	X	Ntaganda (confirmed) Ongwen (confirmed) Bemba (confirmed)

SGBC under RS	Article 25(3)(a)	Article 25(3)(b)	Article 25(3)(c)	Article 25(3)(d)	Article 25(3)(e)	Article 25(3)(f)	Article 28
Sexual slavery Article 7(1)(g)	Ngudjolo Chui (acquitted) Ntaganda (confirmed) Ongwen (confirmed)	Ntaganda (confirmed) Kony (outstanding arrest warrant) Otti (outstanding arrest warrant) Ongwen (confirmed)	X	Katanga (acquitted) Ntaganda (confirmed) Ongwen (confirmed)	X	X	Ntaganda (confirmed) Ongwen (confirmed)
Forced pregnancy Article 7(1)(g)	Ongwen (confirmed)	X	X	X	X	X	X
Other forms of sexual violence Article 7(1)(g)	Bemba (declined to include in the Arrest Warrant) Kenyatta (not confirmed) Muthaura (not confirmed) L. Gbagbo (not included in DCC nor CoC decision) Blé Goudé (not included in DCC nor CoC decision) S. Gbagbo (vacated arrest warrant)	X	X	Hussein (not confirmed)	X	X	X
Persecution Article 7(1)(h)	Ntaganda (confirmed) Abd-Al-Rahman (not confirmed) Hussein (outstanding arrest warrant) Kenyatta (withdrawn) Muthaura (withdrawn) L. Gbagbo (confirmed) Blé Goudé (confirmed)	Ntaganda (confirmed) Harun (outstanding arrest warrant) L. Gbagbo (confirmed) Blé Goudé (confirmed)	Blé Goudé (confirmed)	Ntaganda (confirmed) Mbarushimana (not confirmed) Harun (outstanding arrest warrant) Abd-Al-Rahman (not confirmed) Hussein (not confirmed) L. Gbagbo (confirmed) Blé Goudé (confirmed)	X	X	Ntaganda (confirmed)
Other inhumane acts Article 7(1)(k)	Kenyatta (withdrawn) Muthaura (withdrawn)	X	X	Mbarushimana (not confirmed) Hussein (not confirmed)	X	X	X
Forced marriage Article 7(1)(k)	Ongwen (confirmed)	Ongwen (confirmed)	X	Ongwen (confirmed)	X	X	Ongwen (confirmed)

SGBC under RS	Article 25(3)(a)	Article 25(3)(b)	Article 25(3)(c)	Article 25(3)(d)	Article 25(3)(e)	Article 25(3)(f)	Article 28
War crimes (Article 8 RS):							
Torture Article 8(2)(a) (ii) or 8(2)(c)(i)	Ongwen (confirmed)	Mudacumura (outstanding arrest warrant) Ongwen (confirmed)	X	Mbarushimana (not confirmed) Ongwen (confirmed)	X	X	Ongwen (confirmed) Bemba (confirmed)
Outrages upon personal dignity Article 8(2)(b) (xxi) or 8(2)(c)(ii)	Katanga (not confirmed) Ngudjolo Chui (not confirmed) Ongwen (confirmed) Abd-Al-Rahman (not confirmed) Hussein (outstanding arrest warrant)	Katanga (not confirmed) Ngudjolo Chui (not confirmed) Harun (outstanding arrest warrant)	X	Harun (outstanding arrest warrant) Abd-Al-Rahman (not confirmed)	X	X	Bemba (confirmed)
Rape Article 8(2)(b) (xxii) or 8(2)(e)(vi)	Ngudjolo Chui (acquitted) Ntaganda (confirmed) Ongwen (confirmed) Abd-Al-Rahman 'Kushayb' (not confirmed) Hussein (outstanding arrest warrant)	Ntaganda (confirmed) Mudacumura (outstanding arrest warrant) Kony (outstanding arrest warrant) Otti (outstanding arrest warrant) Ongwen (confirmed) Harun (outstanding arrest warrant)	X	Katanga (acquitted) Ntaganda (confirmed) Mbarushimana (not confirmed) Ongwen (confirmed) Harun (outstanding arrest warrant) Abd-Al-Rahman (not confirmed)	X	X	Ntaganda (confirmed) Ongwen (confirmed) Bemba (confirmed)
Sexual slavery Article 8(2)(b) (xxii) or 8(2)(e)(vi)	Ngudjolo Chui (acquitted) Ntaganda (confirmed) Ongwen (confirmed)	Ntaganda (confirmed) Ongwen (confirmed)	X	Katanga (acquitted) Ntaganda (confirmed) Ongwen (confirmed)	X	X	Ntaganda (confirmed) Ongwen (confirmed)
Forced pregnancy Article 8(2)(b) (xxii) or 8(2)(e)(vi)	Ongwen (confirmed)	X	X	X	X	X	X
Other forms of sexual violence Article 8(2)(b) (xxii) or 8(2) (e)(vi)	Bemba (declined to include in the Arrest Warrant)	X	X	X	X	X	X
Cruel treatment Article 8(2)(c)(i)	X	X	X	Mbarushimana (not confirmed)	X	X	X
Mutilation Article 8(2)(c)(i) or 8(2)(e)(xi)	X	Mudacumura (outstanding arrest warrant)	X	Mudacumura (outstanding arrest warrant)	X	X	X

ANNEX 04

ICC Factual Summaries

The Prosecutor v. Ali Muhammad Ali Abd-Rahman¹ (ICC-02/05-01/20; Situation in Darfur, Sudan)

Between at least August 2003 and at least April 2004, Ali Muhammad Ali Abd-Al-Rahman was a senior leader of the Militia/Janjaweed in West Darfur, Sudan. He is suspected of 31 counts of war crimes and crimes against humanity allegedly committed between August 2003 and at least April 2004 in Darfur, including rape as a crime against humanity (Article 7(1)(g)) and a war crime (Article 8(2)(e)(vi)), charged under alternative forms of criminal responsibility. The evidence shows that it was known that Abd-Al-Rahman held the position of *agid al-ogada* (“colonel of colonels” or “commander of commanders”) of the Militia/Janjaweed. When witnesses do not use this specific title as such, they always describe him as the head, the highest leader, the chief or the commander of the Militia/Janjaweed, as well as the highest-ranking *agid* in these localities. The charges were confirmed on 9 July 2021 and the trial began on 5 April 2022.

This is the first case before the ICC in which crimes committed exclusively against men and boys were specifically charged as gender-based crime, and in particular, as persecution on political, ethnic and gender grounds.

The Prosecutor v. Omar Hassan Ahmad Al Bashir² (ICC-02/05-01/09; Situation in Darfur, Sudan)

Omar Hassan Ahmad Al Bashir was suspected of

being the indirect co-perpetrator (Article 25(3)(a)) of several counts, including rape as a crime against humanity (Article 7(1)(g)) and genocide by causing serious bodily or mental harm (Article 6(b)). These charges arose out of the non-international armed conflict in Darfur during which Al Bashir and other senior Sudanese political and military leaders of the Government of Sudan agreed on a common plan to conduct a counter-insurgency campaign against the Sudan Liberation Movement/Army (SLM/A), the Justice and Equality Movement (JEM) and other armed groups opposing the Government of Sudan in Darfur.

PTC I found that there were reasonable grounds to believe that Al Bashir – as *de jure* and *de facto* President of the State of Sudan and Commander-in-Chief of the Sudanese armed forces – acted with the specific intent to destroy, in part, the Fur, Masalit and Zaghawa ethnic groups. In particular, by subjecting thousands of civilian women – belonging mainly to the aforementioned groups – to rape. PTC I also found that there were reasonable grounds to believe that Al Bashir played an essential role in coordinating the design and implementation of the common plan; that he played a role that went beyond coordinating the implementation of the Government of Sudan’s so-called counter-insurgency campaign; that he had complete control over all branches of the ‘apparatus’ of the State of Sudan, including the Sudanese armed forces and their allied Janjaweed militias, the Sudanese police forces, the NISS and

¹ ICC, Case Information Sheet - The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman, 10 July 2023.

² ICC, Case Information Sheet - The Prosecutor v. Omar Hassan Ahmad Al Bashir, July 2021.

the HAC; and that he used this control to ensure the implementation of the Government's counter-insurgency campaign.

This case affirmed that sexual violence can constitute an act of genocide by causing serious physical or mental harm.

The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud³
(ICC-01/12-01/18; Situation in Mali)

Between April 2012 and January 2013, in pursuance of a policy devised by the armed groups Al-Qaida in the Islamic Maghreb (AQIM) and Ansar Eddine, a widespread and systematic attack within the meaning of Article 7(1) of the Statute was carried out against the civilian population, including the torture, rape and persecution of members of the civilian population of Timbuktu, Mali. Al Hassan, as a member of Ansar Eddine and de facto head of the Islamic police, and through his involvement in the work of the Islamic Court of Timbuktu and his participation in the execution of its decisions, was accused of playing a leading role in the commission of gender-based crimes and persecutions against the civilian population of Timbuktu. In particular, Al Hassan was alleged to have participated in the policy of forced marriages that claimed victims among the female inhabitants of Timbuktu and led to the repeated rape and sexual enslavement of women and young girls.

In its decisions issued on 30 September 2019 and 23 April 2020, PTC I found that there were substantial grounds to believe that Al Hassan was responsible for crimes against humanity (including rape and sexual slavery (Article 7(1)(g)), torture (Article 7(1)(f)), persecution (Article 7(1)(h)) and forced marriage as other inhumane acts (Article

7(1)(k))) and war crimes (including rape and sexual slavery (Article 8(2)(e)(vi)) allegedly committed in Timbuktu, between April 2012 and January 2013. The Chamber found reasonable grounds to believe that Al Hassan bears criminal responsibility for the commission of the crimes individually, jointly with another or through another person (article 25(3)(a)) or by ordering, soliciting or inducing the commission of the crimes (article 25(3)(b)).

This is the first case arising out of the situation in Mali to include SGBC. It also brings to the fore crimes that have, hitherto, not been dealt with as often by the Court, namely gender-based persecution and the conduct of forced marriage as the crime against humanity of other inhumane acts.

The Prosecutor v. Al-Tuhamy Mohamed Khaled⁴
(ICC-01/11-01/13; Situation in Libya)

Al-Tuhamy Mohamed Khaled was suspected of committing four crimes against humanity and three war crimes in Libya in 2011 for alleged criminal responsibility under articles 25(3)(a) or (d), or 28(b). Al-Tuhamy's case was closed due to the passing of the suspect. The charges against Al-Tuhamy included the war crime of outrages upon personal dignity (Article 8(2)(c)(ii)) in the context of an armed conflict not of an international character, allegedly committed in Libya between at least the beginning of March 2011 and 24 August 2011. PTC I concluded that there were reasonable grounds to believe that, between 15 February 2011 and 24 August 2011, members of the Internal Security Agency (ISA) and other security forces arrested and detained persons considered to be opponents of the Muammar Gaddafi regime, and subjected them to various forms of brutality, including sexual

³ ICC, Case Information Sheet - Al Hassan Case, August 2023.

⁴ ICC, Case information sheet - The Prosecutor v. Al-Tuhamy Mohamed Khaled, September 2022.

violence, rape and threats of death, in various locations across Libya. Al-Tuhamy was the Head of the ISA and, thus, in this capacity, Al-Tuhamy was alleged to have had the authority to implement Gaddafi's orders to arrest, detain, conduct raids, conduct surveillance, investigate, monitor and torture political prisoners, and that he was in charge of all 33 ISA sub-agencies located on the Libyan territory and that the members of ISA were his subordinates.

This was the only Libya-related case thus far to include acts of sexual violence, although the arrest warrant does not specify which specific acts of sexual violence constituted which specific crime charged.

The Prosecutor v. Jean-Pierre Bemba Gombo⁵
(ICC-01/05-01/08; Situation in CAR)

During an intervention by the Mouvement de libération du Congo (MLC) in support of President Ange-Félix Patassé in the suppression of a rebellion led by General François Bozizé, MLC soldiers allegedly committed several crimes from on or around 26 October 2002 to 15 March 2003. As a person acting as a military commander and exercising effective control over MLC troops, Bemba could not be considered a rebel. Accordingly, on 21 March 2016, TC III found Bemba criminally responsible for having effectively acted as a military commander (Article 28(a)) for crimes against humanity (including rape (Article 7(1)(g))) and war crimes (including rape (Article 8(2)(e)(vi))) from on or about 26 October 2002 to 15 March 2003. However, he was acquitted by the AC on 8 June 2018 due to errors in TC III's decision convicting Bemba.

This case is relevant to this report for several reasons. Firstly, it was the first case where an individual was convicted and sentenced by the ICC, not only for SGBC, but also for responsibility under Article 28(a) of the Statute. Secondly, this case marked the first time that the ICC AC had the opportunity to consider the responsibility of a Chief of Staff. Thirdly, by departing from the established standard of review for factual errors, the AC modified the standard of appellate review and transformed the confirmation of charges procedure, thereby creating a new standard.

The Prosecutor v. Simone Gbagbo⁶
(ICC-02/11-01/12; Situation in Côte d'Ivoire)

Simone Gbagbo, the First Lady of Côte d'Ivoire, was suspected of participating in her husband, Laurent Gbagbo's, post-election campaign of violence in Côte d'Ivoire between 16 December 2010 and 12 April 2011. She was suspected of individual criminal responsibility for having committed crimes against humanity (including rape and other forms of sexual violence (Article 7(1)(g))). However, on 15 June 2021, the OTP informed PTC II of the withdrawal of its arrest warrant application against Simone Gbagbo and requested the Chamber to cancel the warrant of arrest issued against her. On 19 July 2021, PTC II found that developments at first instance and on appeal in the case against Laurent Gbagbo indicated that the evidence on which the warrant of arrest for Simone Gbagbo was based could no longer be considered to meet the evidentiary threshold required by Article 58(1)(a). Consequently, the Chamber ordered that the warrant of arrest for Simone Gbagbo cease to have effect.

⁵ ICC, Case Information Sheet - The Prosecutor v. Jean-Pierre Bemba Gombo, March 2019.

⁶ ICC, Case Information Sheet - The Prosecutor v. Simone Gbagbo, July 2021.

⁷ ICC, Case Information Sheet - The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, July 2021.

The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé⁷ (ICC-02/11-01/15; Situation in Côte d'Ivoire)

In the context of the post-election violence that occurred in Côte d'Ivoire between 16 December 2010 and 12 April 2011, Laurent Gbagbo (former Head of State and the first Head of State to be transferred to the custody of the ICC) and Charles Blé Goudé (Minister for Youth, Vocational Training and Employment, and allegedly a member of Laurent Gbagbo's inner circle) were accused of committing crimes against humanity (including rape (Article 7(1)(g)) and persecution (Article 7(1)(h))). On 15 January 2019, Trial Chamber I, by a majority, acquitted Gbagbo and Blé Goudé of all charges against them. On 31 March 2021, the majority of the Appeals Chamber confirmed their acquittal.

This is the first case brought before the ICC in which a former Head of State was transferred to the Court and, arguably, paves the way for similar transfers in the future.

The Prosecutor v. Ahmad Muhammad Harun⁸ (ICC-02/05-01/07; Situation in Darfur, Sudan)

This case arose in the context of the non-international armed conflict between the Government of Sudan, including fighters from the Sudan People's Armed Forces (SPAF), the Popular Defence Forces (PDF) and the Janjaweed militia, and organised rebel groups, including the SLM/A and JEM in Darfur, Sudan. As Minister of State for the Interior between 2003 and 2005, and having been responsible for managing the "Darfur Security Office", Ahmad Muhammad Harun was alleged to have been aware of the crimes committed against the civilian population and of the methods used by

the Janjaweed militias. In the context of his position at the 'Darfur Security Office', Harun was accused of intentionally contributing to the commission of the crimes through his personal involvement in key activities of the security committees, namely the recruitment, arming and financing of the Janjaweed militias in Darfur. In addition, he is alleged to have demonstrated – in his public speeches – that he knew that the Janjaweed militias were attacking civilians and pillaging towns and villages, and that he also personally encouraged the commission of these illegal acts. Harun was thus charged on the basis of his individual criminal responsibility (under Articles 25(3)(b) and 25(3)(d)) with having participated in the commission of crimes against humanity (including persecution (Article 7(1)(h)) and rape (Article 7(1)(g))) and war crimes (including rape (Article 8(2)(e)(vi)) and outrages upon personal dignity (Article 8(2)(c)(ii))). The execution of the arrest warrant of 27 April 2007 is still pending.

The Prosecutor v. Abdel Raheem Muhammad Hussein⁹ (ICC-02/05-01/12; Situation in Darfur, Sudan)

This case takes place in the context of the non-international armed conflict in Darfur between the Sudanese armed forces (including the Militia/Janjaweed on the side of the Government of Sudan) and several organised armed groups, in particular the SLM/A and JEM. As part of this conflict, a joint plan was reportedly formulated at the highest levels of government to conduct a counter-insurgency campaign against the SLM/A, JEM and other armed groups opposed to the government. As part of this campaign, the portion of the civilian population that was perceived by the Sudanese Government as being close to the rebel groups – largely belonging to the Fur, Masalit and Zaghawa groups – was

⁸ ICC, Case Information Sheet - The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun"), July 2021.

⁹ ICC, Case Information Sheet - The Prosecutor v. Abdel Raheem Muhammad Hussein, July 2021.

¹⁰ ICC, Case Information Sheet - The Prosecutor v. Germain Katanga, July 2021.

attacked as part of this campaign.

As Minister of the Interior and Special Representative of the President in Darfur, Abdel Raheem Muhammad Hussein was considered to have made essential contributions to this joint plan. In particular, he was able to help coordinate all the entities responsible for security at the national, State and local levels and participated in recruiting, arming and financing the police forces and Militias/Janjaweed in Darfur.

Hussein was thus suspected of having committed, as an indirect co-perpetrator (Article 25(3)(a)), crimes against humanity (including persecution (Article 7(l)(h)) and rape (Article 7(1)(g))) and war crimes (including rape (Article 8(2)(e)(vi)) and outrages upon personal dignity (Article 8(2)(c)(ii))). The arrest warrant issued on 1 March 2012 is still in force.

The Prosecutor v. Germain Katanga¹⁰
(ICC-01/04-01/07, Situation in the DRC)

This case concerns the attack on the village of Bogoro and its predominantly Hema population on 24 February 2003 in the Ituri district of the Democratic Republic of the Congo (DRC), by elements of the Front des nationalistes et intégrationnistes (FNI) and the Force de résistance patriotique en Ituri (FRPI), Lendu and Ngiti militias.

TC II found that Katanga was the intermediary of choice between the suppliers of arms and ammunition and those who physically committed the crimes using these arms and ammunition in Bogoro. These supplies allegedly helped strengthen the strike capability of the Ngiti militiamen. Thus, it was considered that Katanga's involvement provided the Ngiti with logistical resources that

they did not possess and ensured their military superiority. The Chamber therefore concluded that Katanga had acted with knowledge of the common criminal plan devised by the militia to target the predominantly Hema population of Bogoro. However, the Chamber did not consider Katanga to be a principal perpetrator as he did not have the material capacity to give orders to the group or ensure their execution, or the power to punish the camp commanders. He was therefore found guilty on 7 March 2014 of one count of crimes against humanity and four counts of war crimes. However, Katanga was acquitted of the charges of rape and sexual slavery as crimes against humanity and of the war crimes of using children under the age of fifteen to participate actively in hostilities, subjecting them to sexual slavery and raping them. The Court found that, while the evidence presented established the commission of such crimes, it did not establish that they formed part of the common criminal plan.

Following the joinder of the cases against Katanga and Mathieu Ngudjolo Chui on 10 March 2008, the case against Katanga (and Ngudjolo Chui) became the first case to confirm charges of sexual and gender-based crimes – including rape and sexual slavery – and the first case in which a defendant was partially acquitted of the charges brought against him at the time of the judgment.

The Prosecutor v. Uhuru Muigai Kenyatta¹¹
(ICC-01/09-02/11; Situation in Kenya)

As part of the 2007 to 2008 post-election violence in Kenya, the Mungiki criminal organisation allegedly carried out a widespread and systematic attack against the non-Kikuyu population perceived as supporting the Orange Democratic Movement (ODM) (belonging mainly to the Luo, Luhya and

¹¹ ICC, Case Information Sheet - The Prosecutor v. Uhuru Muigai Kenyatta, 13 March 2015.

Kalenjin ethnic groups) in Nakuru and Naivasha between 24 and 28 January 2008. These attacks included a large number of rapes. PTC II found that, at least between November 2007 and January 2008, Kenyatta and members of the Mungiki organisation allegedly developed a common plan to commit these attacks. According to the PTC's findings, Kenyatta's contribution to the implementation of the common plan would have been essential in providing institutional support on behalf of the Party of National Unity (PNU) coalition. This would have ensured the agreement with the Mungiki to commit the crimes and the execution on the ground of the common plan by the Mungiki in Nakuru and Naivasha. Kenyatta was therefore charged with criminal responsibility as an indirect co-perpetrator (Article 25(3)(a)) for the crimes against humanity of rape (Article 7(1)(g)), persecution (Article 7(1)(h)), other inhumane acts (Article 7(1)(k)) and deportation or forcible transfer of population (Article 7(1)(d)). However, on 5 December 2014, the Prosecutor filed a notice of withdrawal of the charges against Kenyatta. On 13 March 2015, TC V(B) terminated the proceedings in this case and quashed Kenyatta's summons to appear.

The Prosecutor v. Joseph Kony and Vincent Otti ¹²
(ICC-02/04-01/05; Situation in Uganda)

From 1 July 2002 until 2004, the Lord's Resistance Army (LRA), an armed group, allegedly led an insurgency against the Government of Uganda and the Ugandan army (also known as the Uganda People's Defence Force (UPDF)) and local defence units (LDUs). The LRA is alleged to have launched attacks against the UPDF, the LDUs and the civilian population. In pursuit of its objectives, the LRA allegedly engaged in a cycle of violence and established a pattern of 'civilian brutalisation' through acts such as sexual slavery and mutilation,

and by abducting civilians, including children, and forcibly 'recruiting' them as fighters, porters and sex slaves to serve the LRA and contribute to attacks against the Ugandan army and civilian communities.

Joseph Kony is said to have founded and run the LRA as its President and Commander-in-Chief. The LRA is organised into four brigades with a military-style hierarchy and operates as an army under Kony's overall leadership. In this capacity, Kony is alleged to have committed, ordered or incited the commission of several crimes within the jurisdiction of the Court during the period from 1 July 2002 to 2004. The warrant of arrest for Kony included charges based on his individual criminal responsibility (Articles 25(3)(a) and 25(3)(b)) for crimes against humanity, including sexual enslavement (Article 7(1)(g)) and rape (Article 7(1)(g)), and for war crimes, including incitement to rape (Article 8(2)(e)(vi)).

Vincent Otti was the Vice-President and Second in Command of the LRA forces. In this capacity, and on the basis of his individual criminal responsibility (Article 25(3)(b)), he was suspected of having committed crimes against humanity, including sexual enslavement (Article 7(1)(g)), and war crimes, including incitement to rape (Article 8(2)(e)(vii)).

Kony and Otti – as well as other individuals – are said to be the principal members of 'Control Altar', which represents the core of the LRA leadership and is responsible for devising and implementing the LRA's strategy, including standing orders to attack and brutalise civilian populations. Kony and Otti remain at large, over fifteen years after the issuance of their warrants of arrest.

¹² ICC, *Case Information Sheet - The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, April 2018.

The Prosecutor v. Thomas Lubanga Dyilo¹³
(ICC-01/04-01/06; Situation in the DRC)

This case is set in the context of the non-international armed conflict that occurred in Ituri from on or about 6 August 2002 to on or about 31 December 2003 between the Union des patriotes congolais (UPC) and its military wing – the Forces patriotiques pour la libération du Congo (FPLC) – and an opposing party. Lubanga was one of the UPC’s founding members and its President. During the conflict, the UPC/FPLC was responsible for the widespread recruitment of young people, including children under the age of 15, and using them to actively participate in hostilities.

TC I delivered its verdict on 14 March 2012, convicting Lubanga of committing, as co-perpetrator, war crimes consisting of enlisting and conscription children under 15 into the FPLC and using them to actively participate in hostilities. Lubanga was sentenced to 14 years of imprisonment. On 7 August 2012, TC I issued a decision on The AC confirmed the verdict and sentence on 1 December 2014. A reparations decision was issued on 7 August 2012, and amended on 3 March 2015. Lubanga’s liability for collective reparations was set at USD 10,000,000.

The Prosecutor v. Callixte Mbarushimana¹⁴
(ICC-01/04-01/10; Situation in the DRC)

Between at least 20 January 2009 and 31 December 2009, a non-international armed conflict took place in North and South Kivu between forces of the DRC government, sometimes supported by Rwandan forces (RDF) or the forces of the United Nations Mission in the DRC, on the one hand, and at least one organised armed group, the Forces démocratiques pour la libération du Rwanda (FDLR),

on the other. During this conflict, FDLR troops allegedly committed several war crimes.

Callixte Mbarushimana was alleged to be criminally responsible under Article 25(3)(d) for crimes against humanity (including rape (Article 7(1)(g)), persecution (Article 7(1)(h)), torture (Article 7(1)(f)) and inhumane acts (Article 7(1)(k))) and war crimes (including cruel treatment (Article 8(2)(c)(i)), torture (Article 8(2)(c)(i)), rape (Article 8(2)(e)(vi)) and mutilation (Article 8(2)(c)(i))).

However, the majority of PTC I found that there were insufficient grounds to believe that crimes against humanity had been committed by FDLR troops. In addition, the majority of the Chamber, with the Presiding Judge dissenting, was unable to find that Mbarushimana contributed to the commission of the alleged war crimes, let alone that he made a “significant” contribution to the commission of such crimes. Thus, on 16 December 2011, PTC I decided not to confirm the charges and to release Mbarushimana. On 23 December 2011, Mbarushimana was released from ICC detention, in accordance with the Chamber’s decision.

The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka¹⁵ (ICC-01/14-01/22; Situation in CAR II)

As a senior official and national coordinator of the Anti-Balaka armed group in CAR since January 2014, Maxime Jeoffroy Eli Mokom Gawaka was alleged to have had authority over the operations carried out by the organisation, to have helped establish its overarching policy, to have been kept informed of the organisation’s progress in implementing this policy, and to have provided logistical support to the organisation in the form of money, weapons and ammunition. In relation to the attack on Bangui on 5 December 2013,

¹³ ICC, *The Prosecutor v. Thomas Lubanga Dyilo – Case Information Sheet*, July 2021.

¹⁴ ICC, *Case Information Sheet – The Prosecutor v. Callixte Mbarushimana*, 15 June 2012.

¹⁵ ICC, *Case Information Sheet – The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka*, August 2023.

Mokom is alleged to have supplied weapons and communicated with members of the Anti-Balaka group who were involved in the crimes committed in the Bangui sector. Following this attack, the Anti-Balaka group took control of other localities and committed crimes with a fairly recurrent *modus operandi*, which included killing Muslims, whether or not they had taken part in the hostilities, destroying or looting mosques and property belonging to Muslims, creating enclaves where Muslims lived in appalling conditions, and expelling large numbers of Muslims. Mokom purportedly communicated with the members of the Anti-Balaka armed group who were directly involved in these alleged crimes.

Mokom was thus alleged to have enabled the Anti-Balaka armed group to commit these crimes by improving the organisation of the group, providing logistical support (such as weapons), directing and controlling operations during which crimes were committed, and validating the behaviour of his subordinates involved in the commission of these crimes. Accordingly, PTC II confirmed several of the charges brought against Mokom, including rape as a war crime (Article 8(2)(e)(vi)) and a crime against humanity (Article 7(1)(g)).

Mokom was surrendered to the ICC on 14 March 2022 and made his first appearance before PTC II on 22 March 2022. On 17 October 2023, based on the prosecution's notice of withdrawal, PTC II terminated the proceedings in this case ordering Mokom's immediate release.

The Prosecutor v. Sylvestre Mudacumura¹⁶
(ICC-01/04-01/12; *Situation in the DRC*)

From 20 January 2009 to 25 February 2009, from 2 March 2009 to 31 December 2009 and from

January 2010 to the end of September 2010, a non-international armed conflict took place in the Kivu provinces of the DRC. This conflict pitted the FDLR, an armed group sometimes organised in to a coalition with other groups, against the Forces Armées de la République Démocratique du Congo (FARDC), in coalition with the RDF. It is alleged that the FDLR carried out attacks and committed several war crimes in the Kivu provinces between February and December 2009.

As the alleged supreme commander of the FDLR, Mudacumura is alleged to have incurred criminal responsibility as an indirect co-perpetrator (Article 25(3)(b)) for war crimes in the Kivu provinces of the DRC between 20 January 2009 and the end of September 2010. These war crimes included rape (Article 8(2)(e)(vi)), torture (Article 8(2)(c)(i)) and mutilation (Article 8(2)(c)(ii)). While the ICC issued an arrest warrant for Mudacumura on 13 July 2012, he remains at large.

The Prosecutor v. Mathieu Ngudjolo Chui¹⁷
(ICC-01/04-02/12; *Situation in the DRC*)

This case concerns the attack on the village of Bogoro and its predominantly Hema population on 24 February 2003, in the Ituri district of the DRC, by elements of the FNI, FRPI, Lendu and Ngiti militias. As leader of the FNI at the time the arrest warrant was issued, Mathieu Ngudjolo Chui was accused of having committed, through other persons (Article 25(3)(a)), crimes against humanity (including sexual slavery and rape (Article 7(1)(g))) and war crimes (including sexual slavery and rape (Article 8(2)(e)(vi))). However, on 18 December 2012, TC II acquitted Ngudjolo Chui of the charges of war crimes and crimes against humanity and ordered his immediate release. The acquittal was confirmed

¹⁶ ICC, *Case Information Sheet - The Prosecutor v. Sylvestre Mudacumura*, July 2021.

¹⁷ ICC, *Case Information Sheet - The Prosecutor v. Mathieu Ngudjolo Chui*, 27 February 2015.

by the Appeals Chamber on 27 February 2015. Following the joinder of the cases against Germain Katanga and Ngudjolo Chui on 10 March 2008, the decision on the confirmation of charges on 26 September 2008 was the first to confirm charges of crimes against humanity and sexual violence at the ICC. Ngudjolo Chui was also the first individual to be acquitted at the ICC.

The Prosecutor v. Bosco Ntaganda¹⁸
(ICC-01/04-02/06; Situation in the DRC)

This case is set in the context of the non-international armed conflict that occurred in Ituri from on or about 6 August 2002 to on or about 31 December 2003 between the Union des patriotes congolais (UPC) and its military wing – the Forces patriotiques pour la libération du Congo (FPLC) – and an opposing party. The crimes committed during this conflict were allegedly committed in furtherance of a UPC/FPLC policy against the civilian population and were the expected result of a preconceived strategy to target the civilian population.

Bosco Ntaganda, the former Deputy Chief of Staff in charge of operations for the FPLC, is said to have served under Thomas Lubanga between 2002 and 2005, the then Head of the UPC. Ntaganda was convicted on 8 July 2019 of committing crimes against humanity (including rape and sexual slavery (Article 7(1)(g))) and war crimes (including rape and sexual slavery (Article 8(2)(e)(vi))) and sentenced to 30 years' imprisonment. The Chamber found that Ntaganda was liable as direct perpetrator of the charges of murder as crime against humanity and war crime and persecution as crime against humanity, and as indirect perpetrator for remaining crimes. On 30 March 2021, the AC confirmed Ntaganda's conviction and sentence.

This case represents the first time that an ICC PTC has unanimously confirmed all the charges of sexual crimes and crimes against humanity against an accused. It is also the first time that a high-ranking military figure has been accused before an international criminal court of raping and sexually enslaving child soldiers within their own militia. On 30 March 2021, the ICC AC confirmed Ntaganda's conviction and sentence. TC VI delivered a reparations order on 8 March 2021, setting the total reparations at USD 30,000,000.

The Prosecutor v. Dominic Ongwen¹⁹
(ICC-02/04-01/15; Situation in Uganda)

This case took place in the context of the armed rebellion and attacks by the LRA against the Ugandan government (see also, Kony and Otti above). The LRA, including Dominic Ongwen, considered civilians living in northern Uganda to be associated with the Ugandan government, and therefore enemies. This particularly applied to those living in the Internally Displaced Persons (IDP) camps set up by the government (including four IDP camps in northern Uganda).

As a commander in the LRA who was in a position of control and direction over the armed forces during the timeframe relevant to the charges, Ongwen was charged with crimes allegedly committed during attacks on the four IDP camps. On 4 February 2021, TC IX found Ongwen guilty of a number of sexual and gender-based crimes committed against seven women who were abducted and placed in his home, namely forced marriage as a crime against humanity (Article 7(1)(k)), torture as a war crime (Article 8(2)(c)(i)) and crime against humanity (Article 7(1)(f)), rape as a war crime (Article 8(2)(e)(vi)) and crime

¹⁸ ICC, *Case Information Sheet - The Prosecutor v. Bosco Ntaganda*, July 2021.

¹⁹ ICC, *Case Information Sheet - Dominic Ongwen*, December 2022.

against humanity (Article 7(1)(g)), sexual slavery as a war crime (Article 8(2)(e)(vi)) and crime against humanity, the crime against humanity of enslavement (Article 7(1)(c)), forced pregnancy as a war crime (Article 8(2)(e)(vi)) and crime against humanity (Article 7(1)(g)) and outrages upon personal dignity as a war crime (Article 8(2)(c)(1i)). Ongwen was also convicted of a number of other sexual and gender-based crimes committed against girls and women committed by Sinia Brigade soldiers, over whom Ongwen was commander, including forced marriage, torture, rape, sexual slavery and enslavement.

On 15 December 2022, the AC confirmed the decisions of TC IX on Ongwen's guilt and sentence. The case's reparations phase is ongoing. This is the first case in which the conduct of forced marriage was charged as the crime against humanity of other inhumane acts and prosecuted before the ICC. It was also the first time that the crime of forced pregnancy was prosecuted before an international court.

The Prosecutor v. Mahamat Said Abdel Kani
(ICC-01/14-01/21; Situation in CAR II)

This case concerns alleged crimes committed in Bangui, CAR, between 12 April 2013 and 30 August 2013. Said, also known as 'Mahamat Said Abdel Kain' and 'Mahamat Saïd Abdelkani' is alleged to have been a member of the Seleka coalition and suspected of imprisonment or other severe deprivation of physical liberty, torture, other inhumane acts and persecution as crimes against humanity, and cruel treatment and outrages upon personal dignity as war crimes. On 9 December 2021, PTC II partially confirmed the charges

brought by the prosecution and found there is sufficient evidence to establish substantial grounds to believe that, as a senior member of the Seleka coalition, Said would be criminally responsible under articles 25(3)(a) (direct co-perpetration) and 25(3)(b) (ordering or inducing).

The trial opened before TC VI on 26 September 2022 and is ongoing.

The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona²⁰
(ICC-01/14-01/18; Situation in CAR II)

During the non-international armed conflict in the CAR between the Seleka and the Anti-Balaka armed groups between September 2013 and December 2014, the Anti-Balaka group carried out an attack on the Muslim civilian population, which was then considered to be supportive of the Seleka group and therefore collectively responsible for the crimes Seleka group allegedly committed. The Prosecutor did not bring rape charges against Alfred Yekatom and, consequently, PTC II did not charge him with this crime. However, the Chamber did conclude that there were substantial grounds to conclude that Patrice-Edouard Ngaïssona was responsible for, among others, rape as a war crime (Article 8(2)(e)(vi)) and crime against humanity (Article 7(1)(g)) by having aided, abetted or otherwise assisted in the commission of these crimes. On 11 December 2019, PTC II issued a unanimous decision partially confirming the charges of war crimes and crimes against humanity brought by the Prosecutor against Yekatom and Ngaïssona and committed them for trial. The trial opened in February 2021 and is ongoing.

²⁰ ICC, Case Information Sheet - Yekatom and Ngaïssona Case, September 2023.

ANNEX 05

Judicial Candidates SGBC Experience (Civil Society Questionnaire Excerpts)

Questionnaire for ICC Judicial Candidates, 2017 Elections

Historically, many of the grave abuses suffered by women in situations of armed conflict have been marginalized or overlooked. Please describe any experience you may have in dealing with sexual and/or gender-based crimes and where you have applied a gender perspective, i.e. inquired into the ways in which men and women were differently impacted.

Rosario Salvatore AITALA (Italy)

I have had several experiences with cases of sexual violence and other crimes against women and children, both as an investigator, a prosecutor and a judge. I believe that a larger category that deserves specific attention is that of crimes against vulnerable persons, which include violent offences against persons who suffer sensitive personal situations: women, children, elderly, physically and mentally impaired. These offences are particularly repugnant because of the exploitation of victims' vulnerability. In my experience, investigators, prosecutor and judges should consider, depending on the circumstances of the case, seeking appropriate assistance of psychological experts when victims are heard during preliminary investigations or trial. On the one hand this avoids damaging psychologically the victim, on the other hand it helps preserving the spontaneity of victims' testimonies that are vital in these kinds of proceedings. I believe that testimonies of children

or other vulnerable victims should be taken in protected environment in special hearings, with the involvement of psychologists. In the Italian system, the protection of children requires that the parties, defence and prosecution, are not allowed asking questions directly, but they must go through the judge.

Tomoko AKANE (Japan)

I have plenty of experience in dealing with crimes of sexual and/or gender violence, including gang rape cases, abductions, and murders.

In dealing with such crimes, I was able to develop mutual trust with the female victims, and that enabled me to conduct smooth proceedings, while protecting the fundamental rights of the accused. I as a public prosecutor never applied a gender-biased perspective during the proceedings, but female victims might have had better feelings when female prosecutors took care of them.

¹ Unofficial translation from French.

Reine ALAPINI-GANSOU (Benin)¹

Indirectly, I can mention the case of MINOVA in the DRC as an emblematic case.

During my fact-finding and investigative missions, I came across cases of sexual crimes. I will also cite the case of Uganda where women and little girls were victims of rape and atrocities by elements of the Lord's Resistance Army; collected by the RACHEL Center in LIRA in northern Uganda.

Gender-based violence is mainly found in individual cases linked to personal relationships, for example in professional environments. The African Commission on Human and Peoples' Rights has also adopted certain relevant resolutions in this regard, including: resolution 284 on the repression of sexual violence against women in the Democratic Republic of Congo; Resolution 103 on the situation of women in the DRC; resolution 283 on the situation of women and children in armed conflicts.

Solomy Balungi BOSSA (Uganda)

The experience I have in dealing with sexual and/or gender-based crimes has been on rape and defilement in domestic and conflict situations, domestic violence and disputes on matrimonial property.

I was part of the Trial Chamber that applied a gender perspective in the case of Nyiramasuhuko et al. The Trial Chamber realized that rape and sexual violence were used as a weapon against women to eliminate the Tutsi population and to dehumanize them. It would have convicted Nyiramasuhuko for rape as genocide if the prosecution had charged it in the indictment and stated so.

At the domestic level, gender-based violence in inheritance matters, where relatives of the deceased seek to dispossess wives and children of property, is rampant. In a patriarchal society, the majority of men and women consider that women

should not inherit land or any possession and that they constitute part of the possessions of men. The same situation obtains in divorce proceedings. Men and society do not consider women as equal partners in setting up a home, despite constitutional provisions that provide for equal rights during marriage and its dissolution.

In the judgments I have rendered, I have made it clear that women are equal partners who are entitled to inherit property and to have a share of the property to which they contributed during the subsistence of the marriage and that contribution does not have to be monetary. They are also equally entitled to participate in the upbringing of their children.

Another example of gender based violence that I have handled concerns men who murder women for alleged adultery or use of money they have genuinely worked for like selling produce or a goat. Again, this stems from the cultural belief that all property and resources belong to the husband for whom, a wife should work without pay forever. This is not a defense to criminal charges and many have ended up being convicted.

Luz del Carmen IBÁÑEZ CARRANZA (Peru)

As I mentioned above, most of the cases I have prosecuted in the last 14 years were committed in the armed conflict that Peru went through, and in order to hold the accused persons accountable for sexual crimes, I had to apply a gender perspective.

For instance, in the case "Los Cabitos", that I explained in question number 10, some female victims that testified in Court, attended first as witnesses of crimes occurred against other people or against themselves, but that did not include sexual crimes, while they were kidnapped in the military headquarters. However, they ended up as victims of sexual crimes, because as hostages of the headquarters they suffered sexual violence of all sorts, that at the beginning

the victims themselves did not recognize as such. Thus, the prosecution had to, first make the victims acknowledge the abuses, and then make them visible for the Chambers as sexual crimes committed in a context of crimes against humanity, otherwise they would have prescribed and the proof would have been impossible.

Another case where I had to apply gender perspective was one of forced sterilizations occurred from 1996- 2000. Thousands of women were sterilized without consentment in various regions of the highlands and the pacific coast of Peru. However, after all these years the case remains in the investigation phase, as the investigation prosecutor alleges the prescription of the crimes as they were framed as the crime of grievous bodily harm.

When the case was submitted to my office, in order to provide a legal opinion on the prescription, I considered the consequences the victims suffered a cause of the sterilizations, that went beyond not being able to have children. They suffered the stigma and shame of their communities. Additionally, I took into account the widespread and systematic practice of the State, and I framed the

forced sterilizations as crimes against humanity, and considered that the crimes had not prescribed and the investigations were ready to move to the trial phase.

Additionally, in all the cases that I prosecute, I put effort on making the sexual crimes visible, because usually the judiciary does not pay attention to these types of crimes occurred in the non-international armed conflict, and perpetrated either by the members of the terrorist groups or the members of state armed or police forces.

Besides, in my capacity as a National Coordinator I promote among the 17 Prosecution agencies, the application of gender perspective in the investigation and trials that they conduct.

Kimberly PROST (Canada)

As a Canadian prosecutor I dealt with cases related to sexual violence albeit to a limited extent. I also worked on model legislation at the Commonwealth Secretariat to deal with the protection of vulnerable witnesses including in cases of sexual violence. I have followed the development of the ad hoc Tribunal and ICC case law on this particular issue.

Questionnaire for ICC Judicial Candidates, 2020 Elections

Please describe any experience you may have in dealing with SGBCs, including in addressing misconceptions relating to SGBCs.²

Joanna KORNER (UK)

Whilst at the Bar for many years I specialised in prosecuting and defending cases of crimes of sexual violence against women, men and children. The trials at ICTY contained many such allegations and the tribunal also greatly contributed to the jurisprudence of sexual and gender-related crimes by enabling the prosecution of sexual violence as a war crime.

I personally interviewed victims of such crimes. I have also conducted numerous training courses for both lawyers and judges in the UK and overseas on the treatment of witnesses who have alleged that these crimes were committed.

Gocha LORDKIPANIDZE (Georgia)

As a co-chair of the Inter-agency Gender Commission, I contribute and coordinate interagency efforts to draft and meet commitments under the action plans on gender equality, violence against women, and domestic violence, and UN Security Council resolution 1325 on women, peace and security.

My track-record also includes drafting the Human Rights Strategy of Georgia (2014-2020), with a strong element of women's rights, gender equality and the fight against violence against women in the capacity of a co-chair of the Inter-agency Council; coordinating inter-agency efforts in the preparation of guidelines for law enforcement

agencies on human trafficking issues, with a focus on the identification of THB victims, the treatment of women and child victims, and providing/offering needs-based assistance to victims in the framework of the Inter-agency Council against Human Trafficking; leading efforts in the Inter-agency Humanitarian Commission (IHL) of Georgia to further develop the legal framework on missing persons in times of armed conflict, putting in place relevant instruments to combat and prevent sexual and gender-based violence during and after armed conflict, protecting IDP women from sexual, domestic and gender-based violence, and ensuring their access to medical, psychological and legal assistance services.

As a Deputy Minister of Justice of Georgia, I supervise the Department in charge of litigation before the European Court of Human Rights (ECtHR) and UN Treaty-Based Bodies. In this capacity, I have developed an extensive experience in leading and handling litigations and friendly settlements since 2012. During this period I have worked on numerous cases related to violence, discrimination, sexual assault and alleged violation of the rights of women and sexual minorities before the ECtHR and the UN committees. It is also my mandate to coordinate execution of ECtHR judgments/decisions and decisions of UN committees. This includes systemic efforts to address individual cases as well as prevent future violations.

² The candidates of the 2020 election were also asked to share examples of applying a gender perspective in their professional career. For this and other relevant answers, please refer to the full questionnaire (accessible through the link embedded in the candidates' names or through the website of the Coalition for the ICC).

Here are some other noteworthy developments I have been a part of in that regard:

1. Led the drafting of the first Human Rights Strategy of Georgia for 2014-2020 to cover key challenges and addressing discrimination and violence-related, as well as gender sensitive issues;
2. Led Ministry of Justice of Georgia team which drafted the first comprehensive antidiscrimination law adopted in 2014;
3. Contributed to drafting the package of laws on protecting women from violence to harmonise the Georgian legislation with the Istanbul Convention on preventing and combating violence against women and domestic violence in 2017;
4. Coordinated efforts in the preparation of guidelines for law enforcement agencies on human trafficking issues, with a focus on the identification of THB victims, the treatment of women and child victims;
5. Under the auspices of Inter-agency Humanitarian Commission of Georgia, led efforts to further develop the legal framework on missing persons in times of armed conflict, putting in place relevant instruments to combat and prevent sexual and gender-based violence during and after armed conflict;
6. As an adjunct-professor at Columbia University School of International and Public Affairs (SIPA) has focused on women's rights and gender mainstreaming.

Last but not least, during my tenure, at its 74th session of 2019 the Committee on the Elimination of Discrimination against Women (CEDAW) adopted a decision to close the execution proceedings in the case "X and Y v. Georgia". Hence, the Committee welcomed the complex measures conducted by the Government of Georgia led, among others, by the Ministry of Justice in the course of fighting against domestic violence/gender based crimes (inter alia,

the payment of compensation to the applicants, the implementation of the recommendations of the mentioned Committee, etc.). All the aforementioned unequivocally confirms the recognition of the success of the measures taken by Georgia by the UN Committee.

Further I am actively involved in the interagency efforts in combating misconceptions relating to SGBCs including via media platforms, public events and campaigns, participating in parliamentary sessions, delivering public lectures, etc.

Miatta Maria SAMBA (Sierra Leone)

Article 7(3) of the Rome Statute defines 'gender' as male and female. It must be, therefore, understood that gender-based violence could be committed against both males and females. However, statistics in our region do not show a high percentage of gender-based violence committed against males because many times, though these offences are committed, the stigma associated with it does not allow complaints, investigation, and/or prosecutions of gender-based violence against men/boys. The fact, however, is that these offences are committed against both males and females.

Most of the female victims I took statements from as an Investigator for the OTP of the SCSL were victims of sexual and gender-based violence. These female victims were abducted by warring factions in Sierra Leone, especially by the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC), forcefully married and impregnated sexually exploited. At the early stages of investigations into the crimes within the jurisdiction of the SCSL, some of these victims of sexual violence still lived with their perpetrators in the same communities for fear of being targeted; in other instances, they were not accepted by their relations and so instead continued living with their 'bush husbands' and children of their forceful marriage.

Dealing with these victims required the necessary expertise to get their statements and facilitate their testimonies before the Court. It was essential to build a trust relationship with each victim of gender-based violence and get them to understand that it was not their fault that they had such a horrible experience. We offered necessary medical facilities for victims of SGBCs, as most of them, unfortunately, suffered from sexually transmitted diseases. All such contacts and management remained documented for purposes of disclosure to the defence.

Once a relationship of trust had been established and maintained, in consultation with the Witness and Victims Unit of the Court, victims of SGBCs who were to serve as witnesses for the OTP at the SCSL were given familiarization tours of the Court because most of them had never been to Court and knew nothing about what goes on in Court. They then got to realise that they will get to see their perpetrators or persons who are charged with offences against them; at this realization, there were changes in risk assessments and the necessity for making certain protective applications for protective measures including testifying behind curtains, video link or with psychosocial staff or family relation(s) in the room where the victim makes her testimony.

As a legal practitioner, under the leading gender equality advocacy organisation, Legal Access Through Women Yearning for Equality and Social Justice (LAWYERS), I helped prosecute sexual violence, especially sexual violence against children.

As a Judge assigned to the General Criminal Division of the Trial Court, I get to hear and determine sexual offences against children. With experienced gained at the Special Court of Sierra Leone in respect of handling and dealing with

witnesses, I can facilitate testimonies of child victims of sexual violence who appear before me. Some of my judgments relating to SGBCs can be found at www.sierralii.org.

Maria del Socorro FLORES LIERA (Mexico)

My experience is more related to discussions on normative frameworks at international organizations where SGBCs are considered, particularly the United Nations.

In my opinion, among misconception are the believe that violence against women is an issue that only concerns women or that it may be permissible during conflicts. Sexual and gender based violence affects the physical and mental health of women, children and men, and in the long run leads to poverty and marginalization. It's an issue that concerns all genders and that must concern us all. Misconceptions about SGBC are usually based in gender biases and patriarchal stereotypes that are entrenched in social and cultural norms, and in the judicial systems.

Sergio UGALDE GODINEZ (Costa Rica)

While I have not dealt directly with cases concerning SGBC's, I have a strong position on sexual and gender based crimes, specially concerning the need to address social structural gender related issues. My position is that there must be zero tolerance por the perpetration of these hideous acts of physical and psychological harm, directed, in particular, at women. I have been an outspoken advocate for the eradication of gender based crimes, as a recent op-ed of my authorship recently published in my country's most recognized newspaper demonstrates.

Althea Violet ALEXIS-WINDSOR (Trinidad & Tobago)

Throughout my professional life, I have had exposure to sexual and gender based crimes. As a prosecutor in Trinidad and Tobago, I prosecuted

many cases involving sexual and gender based crimes such as sexual assaults and rape. As a prosecutor at the ICTR, I was part of the prosecution of Pauline Nyiramasuhuko who was found to have ordered the rape of Tutsi women who had taken refuge at the prefecture office.

In Trinidad and Tobago, I have had often sat as a judge in cases related to sexual and gender based cases. In the course of summing up the case to the jurors before their contemplation of the verdict, I describe in detail commonly held misconceptions about sexual and gender based crimes. In this regard, I explain to the jury that the experience of

the courts has shown that sexual offences can be committed against men, women and children of both sexes and that no one “looks for” a sexual or gender based crime to be committed against them because of what they were wearing or perceptions about their physical attributes. I also explain to the jury that some victims react to the offence being committed by screaming, some by remaining silent; some speak freely afterwards but some do not. Therefore, that there are myriad reactions to sexual and gender based crimes, both by the offenders and victims. Further, that each offence is to be viewed objectively and fairly having cast aside behavioural assumptions and biases.

Questionnaire for ICC Judicial Candidates, 2023 Elections

What do you consider are the main advancements in the Rome Statute regarding sexual and gender-based crimes and crimes against children, as well as the relevant jurisprudence and charges brought so far at the Court? Please describe challenges and opportunities for improvement in adjudicating these crimes, and any experience you may have in this area, including addressing misconceptions relating to SGBCs.³

Haykel BEN-MAHFOUDH (Tunisia)

The Rome Statute represents a significant step forward in the fight against sexual and gender-based crimes, as well as crimes against children. Here are some of its main advancements:

1. Sexual and gender-based crimes: The Rome Statute explicitly recognizes sexual crimes, such as rape, sexual slavery, forced prostitution, forced pregnancies, forced

sterilizations and gender-based persecution, as serious crimes that fall within the jurisdiction of the ICC. This recognition is crucial to ending impunity for the perpetrators of such atrocities.

2. Protection of children: The Rome Statute pays specific attention to the protection of children by recognizing the recruitment of child soldiers, sexual violence inflicted on children and other acts of violence against them as crimes falling within the jurisdiction of the

³ The candidates of the 2023 election were also asked to share examples of applying a gender perspective in their professional career. For this and other relevant answers, please refer to the full questionnaire (accessible through the link embedded in the candidates' names or through the website of the Coalition for the ICC). Additionally, during the public roundtables on 6 and 7 November 2023, judicial candidates were asked to share about their experience in applying a gender or intersectional analysis in adjudication. The streaming of the roundtables can be accessed on UN Web TV.

Court. This reinforces the accountability of the perpetrators of such crimes and offers greater protection to child victims.

3. Mode of liability: The Rome Statute establishes that those in higher positions of responsibility are responsible for crimes committed by their subordinates. Thus, military and political leaders can be prosecuted and held responsible for crimes, including sexual and gender-based crimes, perpetrated by individuals placed under their authority. This provision aims to discourage atrocities and prevent future crimes.
4. Recognition of victims' rights: The Rome Statute recognizes the rights of victims, including victims of sexual and gender-based crimes, to participate in judicial proceedings and to obtain reparations. This enables victims' voices to be heard and contributes to their recovery, while promoting a fairer justice system.

In terms of jurisprudence and charges brought before the Court, the Court has prosecuted individuals for acts of rape, sexual slavery, recruitment of child soldiers and other forms of sexual violence and crimes against children. Undeniably, the ICC's decision in the Ongwen case constitutes a major success in the fight against impunity for sexual and gender-based crimes. This decision marks a significant step forward, as for the first time, it allowed to recognize reproductive violence and to defend women's right to personal and reproductive autonomy, as well as their right to family.

However, despite such progress, it will be essential to pay particular attention to defining the crime of forced pregnancy in any new convention pertaining to crimes against humanity, so as to avoid repeating the same shortcomings and to guarantee adequate protection for the victims of such crimes. In addition, some challenges remain and improvements can be made when adjudicating

these crimes:

1. Gathering of evidence: Sexual and gender-based crimes are often under-reported, complexifying the gathering of evidence. The ICC must continue to strengthen its evidence gathering mechanisms to ensure thorough investigations and a solid prosecution.
2. Raising awareness and combating stereotypes: Preconceived ideas and stereotypes linked to sexual and gender-based crimes can influence the perception of victims and alleged perpetrators. It is essential to raise awareness among the public, judges and lawyers to eliminate these stereotypes and ensure an impartial approach in dealing with these crimes.
3. Victim and witness protection: Victims of such crimes are often at risk of reprisals and threats to their safety. In order to encourage their participation in judicial proceedings, the ICC must continue to strengthen its victim and witness protection mechanisms.
4. International cooperation: The ICC depends on the cooperation of States to carry out its investigations and prosecutions. Closer and more effective international cooperation is needed to meet the transnational challenges posed by these crimes, and to ensure that perpetrators cannot escape justice by hiding in other countries.
5. Finally, it is essential to tackle preconceived ideas about sexual and gender-based crimes. Stereotypes and stigmatization can dissuade victims to report crimes, compromise investigations and weaken the prosecution of perpetrators. By disseminating accurate information, raising awareness and promoting equal rights for all, we can contribute to changing mentalities and to enhancing the effectiveness of the fight against these heinous crimes.

Erdenebalsuren DAMDIN (Mongolia)

Indeed, the Rome Statute's recognition of a broad

range of SGBCs and crimes against children stands as a significant advance in international criminal law. The Statute not only defines crimes such as rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other forms of sexual violence as crimes against humanity and war crimes, but it also provides a framework for recognizing forms of SGBV as methods of perpetrating international crimes, such as genocide. This framework has been instrumental in prosecuting and convicting Mr. Dominic Ongwen, where the accused was convicted on numerous counts of sexual and gender-based violence. It was also the first instance where the Office of the Prosecutor (OTP) brought charges for the crimes against humanity of forced marriage as an inhumane act.

The jurisprudence of the ICC has further reinforced the commitment to prosecuting these grave crimes. The case of Mr. Thomas Lubanga Dyilo marked a milestone, as the Court issued its first conviction for the war crime of conscripting and enlisting children under the age of 15 and using them to actively participate in hostilities. Subsequently, the case of Mr. Bosco Ntaganda represented another significant development, as it resulted in the first conviction confirmed by an appeal for SGBCs. More recently, Mr. Al Hassan and Mr. Ali Muhammad Ali Abd-AlRahman have expanded the ICC's jurisprudence on SGBCs and gender persecution.

However, numerous challenges persist. Gathering sufficient evidence and collecting witness testimonies remain formidable tasks, particularly in contexts where stigma, fear, and potential retaliation may deter victims from coming forward. Misconceptions about the nature of SGBCs and crimes against children can further complicate these challenges. As mentioned above, one of these misconceptions is the erroneous belief that only females can be victims of SGBCs. There are significant opportunities for improvement. The ICC can refine the legal definitions and

parameters of SGBCs and crimes against children to develop consistent, coherent jurisprudence. In addition, the Court could potentially foster a more comprehensive understanding of these crimes, including recognizing that men and boys can also be victims of SGBCs. Such efforts will not only contribute to improving the ICC's ability to prosecute these grave crimes but will also enhance the support and justice provided to victims.

Adélaïde DEMBÉLÉ (Central African Republic)
With regards to sexual and gender-based crimes in the statutes of the ad hoc international tribunals, rape is included as a crime against humanity in the ICTY Statute (article 5), while rape (article 3) and coercion into prostitution and any form of indecent assault (article 4 (e)) are included as war crimes in the ICTR Statute. The Statute of the International Criminal Court has broadened the scope of sexual violence. Thus, amongst the criminal acts constituting a crime against humanity, such acts go beyond rape, to include sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity (article 7 (g) of the Rome Statute).

Article 8 of the Rome Statute on war crimes includes the same forms of sexual violence. Such violence is considered to constitute "a grave breach of the Geneva Conventions" (article 8 § 2 b) and "a grave breach of article 3 common to the four Geneva Conventions" (article 8 § 2 e) vi).

In the Ntaganda and Ongwen cases, the judges established that the sexual crimes resulted directly or indirectly from the implementation of a common plan agreed upon by the co-perpetrators. The judges unanimously concluded that the sexual crimes were an explicit or implicit element of their common plan, based on the following aspects: the suspects were military leaders of armed groups; they led military operations in the field; they were undisputedly present at the scene where the sexual

crimes were committed by their subordinates; they committed the said crimes themselves; they gave orders to their subordinates regarding the commission of sexual violence; a system of abduction and sexual enslavement of girls existed within their armed groups.

Regarding crimes against children, the Rome Statute first prohibited the conscription or enlistment of children as well as their use in hostilities, which is one of its major advances.

Article 8-2-b-xxvi stipulates that conscripting or enlisting children under the age of fifteen into armed forces or groups, or using them to participate actively in hostilities in the context of an international armed conflict, constitutes a war crime. Article 8-2-e-vii prohibits the conscription or enlistment of children or their use in armed conflicts not of an international character.

In his very first case (Lubanga), the ICC Prosecutor decided to focus solely on the crime of enlisting, conscripting and using children under the age of fifteen to participate actively in hostilities. This choice was made to the detriment of sexual crimes which had also been committed, and in connection with the only crime held against the suspect, in order to send the message to the international community that violations to the humanitarian rights of children cannot go unpunished.

As for opportunities for improvement regarding the prosecution of these crimes, as well as any experience I may have in this field, including combating preconceived ideas about sexual and gender-based crimes, it should be stressed that sexual crimes are no longer exclusively directed against women. We should embrace the developments and decisions that have been made in this direction to date, and better consider the gender diversity of victims going forward.

Nicolas GUILLOU (France)

Jurisdictional experience in SGBV and crimes

against children: As a pre-trial judge, I have dealt with numerous cases of rape, sexual assault and violence against women and children. I have interviewed many victims, worked with many psychiatrists and psychologists on these issues, and have always allowed women's and children's protection associations to make their voices heard and participate in proceedings where appropriate

Implementation of legislation on violence against

women: As part of my duties as criminal advisor to the French Minister of Justice in 2009/2010, I coordinated the parliamentary follow-up to the law on violence against women, violence within couples and the impact of such violence on their children. This law created the incrimination of psychological violence in French law and victim protection orders. It also enabled the use of electronic bracelets to ensure the removal of perpetrators of violence

Advancements in the Rome Statute concerning gender-based violence and crimes against children:

Firstly, the Rome Statute provides for a number of sexual crimes, in line with the Akayesu case before the ICTR and Furundzija case before the ICTY: the underlying crimes of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity, are integrated in the definition of crimes against humanity (art. 7(1)(g) of the Statute) and in the definition of war crimes, both in international and non-international armed conflicts (art. 8 (2)(b)(xxii) and art. 8 (2)(e)(vi)). The Rules of Procedure and Evidence also make major advances in terms of the provision of evidence of sexual violence. Rule 70 stipulates that consent can never be inferred from the words or behavior of a victim where their ability to freely give genuine consent has been impaired, or where they are incapable of giving genuine consent. Consent cannot either be inferred from the silence or lack of resistance of

the victim of alleged sexual violence. Lastly, the credibility, respectability or sexual availability of a victim or witness can in no way be inferred from their previous or subsequent sexual behavior. It should also be noted that the ICC Prosecutor's Office adopted a Policy Paper on Sexual and Gender-Based Crimes in 2014, and a Policy Paper on Crimes Against or Affecting Children in 2016. Both documents are currently the subject of consultations aimed at improving the effectiveness of investigations.

Potential improvements: I believe that article 56 of the Statute could be used to allow victims of sexual violence to be heard in closed session as early as the pre-trial phase and to avoid their revictimization during the trial. Used in the Ongwen case, this procedure could ensure better protection for vulnerable victims, while safeguarding the rights of the accused, since statements would be made before judges and in adversarial proceedings. This practice could also be used for witnesses and victims who are minor children close to reaching majority. I also feel that the question of recognizing intergenerational damage could be raised in the context of certain conflicts.

Beti HOHLER (Slovenia)

Main advancements and key jurisprudence

The Rome Statute includes an extensive catalogue of sexual and gender-based crimes (SGBC) and crimes against children as crimes against humanity, war crimes and genocide. Many States Parties have also amended their national criminal codes to include the complete catalogue of crimes included in the Statute. The elements of each of these crimes are explicitly defined in the ICC's Elements of Crimes. These are all important advancements.

In addition to including an extensive list of prohibited behaviour, the ICC legal framework also contains other relevant provisions to ensure that SGBC are prosecuted in an effective and gender-sensitive manner. For example, it includes

important evidentiary principles specifically for cases of sexual violence, set out in Rules 70 – 72 of the Rules of Procedure and Evidence. Amongst them is one of the very few explicit exclusionary rules of evidence in the ICC legal framework: Rule 71, prohibiting admission of evidence of the prior or subsequent sexual conduct of a victim or a witness (in light of the definition and nature of crimes within the jurisdiction of the Court and subject to article 69(4)). The Rules also include other provisions, safeguarding the specific interests of victims and witnesses of SGBC. For example, article 68(2) of the Statute on conducting part of proceedings in camera or allowing presentation of evidence by electronic or other special means as an exception to the principle of public hearings, specifically refers to victims of sexual violence (as well as victims and witnesses who are children).

The Court's handling of SGBC and the OTP's practice in investigations and charging decisions have been faithfully monitored by the civil society since the Court's inception. After the OTP in 2014 promulgated its Policy Paper on SGBC, the first such policy for an international court or tribunal, SGBC started to feature more prominently in cases before the Court. In 2022, the OTP also published a Policy on the crime of gender persecution.

Various chambers of the Court have issued important decisions regarding SGBC. They include:

- Ntaganda Appeals Judgment on Jurisdiction (15 June 2017, ICC-01/04-02/06-1962): finding that rape and sexual violence, committed against child soldiers in the accused's own armed group, constitute war crimes, thereby reinforcing the prohibition of sexual violence and importantly contributing to the development of international criminal law and international humanitarian law;
- Ntaganda Trial Judgment (8 July 2019, ICC-01/04-02/06-2359) and Sentencing Judgment (7 November 2019, ICC-01/04-02/06-2442),

confirmed on appeal on 30 March 2021: first ever (confirmed on appeal) conviction for SGBC, and elaboration of sentencing principles regarding SGBC;

- Ongwen Trial Judgment (4 February 2021, ICC-02/04-01/15-1762) and Sentence (6 May 2021, ICC-02/04-01/15-1819) and Ongwen Appeal Judgments (15 December 2022, ICC02/04-01/15-2022 and ICC-02/04-01/15-2023): first ever conviction for the crime of forced pregnancy and corresponding clarification of the elements of the crime; first conviction for forced marriage as other inhumane act before the ICC and articulation of why it is a distinct crime from sexual slavery and enslavement, as well as recognition that forced marriage is a gendered crime; various other relevant findings related to SGBC and crimes against children; use of article 56 to preserve evidence of vulnerable witnesses - direct victims of SGBC and introduction of this evidence at trial.
- Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud Confirmation of Charges Decision (ICC-01/12-01/18-461, 30 September 2019/13 November 2019): first ever confirmation of a charge for the crime of gender-based persecution. The crime of gender persecution was also subsequently charged (and the charge confirmed) in other cases.

The ICC Judges have also issued important decisions regarding crimes against and affecting children, namely the Lubanga, Ntaganda, Ongwen Trial Judgments (all confirmed on appeal). In all three cases the respective Trial Chamber convicted the accused persons for the war crimes of conscripting and/or enlisting, and using child soldiers.

Challenges and opportunities regarding SGBC and crimes against and affecting children

The challenges include understandable reluctance of SGBC victims to come forward and share their experiences due to the stigma that still surrounds

SGBC. Furthermore, the charging thus far has predominantly focused on women and girls as victims. Investigating and consequently charging sexual violence committed against male victims continues to pose a challenge, as it is often even more hidden and severely underreported. Another area is the consideration of crimes targeting individuals based on sexual orientation and gender identity.

It is important that prosecutors and judges addressing SGBC use an intersectional, trauma-informed, and survivor-centred approach to fully understand and take steps to address the trauma of the victims of SGBC. Judges should use all tools available in the Statute and the Rules of Procedure and Evidence to ensure that victims and witnesses of SGBC and children can present their evidence in court effectively. The Court should learn from best practices at the national level in this regard and exchanges between international and national courts on this topic would be welcome.

My own experience dealing with SGBC and crimes against and affecting children

I have extensive experience in relation to SGBC and crimes against and affecting children, specifically in ICC proceedings, and most notably in the Ongwen case, where crimes against children and SGBC were at the heart of the case. In addition to dealing with substantive issues relating to these crimes, I also dealt with procedural aspects, including the first-time use of article 56 of the Statute to preserve the evidence of direct victims of SGBC perpetrated by the accused. During the investigation, I participated in investigative interviews of victims and witnesses. During the trial stage of the proceedings, I examined victims of SGBC and former child soldiers. I also examined experts in this field. Further, I have relevant experience working on SGBC and crimes against and affecting children in another case in the same situation and directing the investigation regarding SGBC. I serve as one of the SGBC/crimes against children focal points in the ICC OTP and

was a member of the ICC OTP working group on the implementation of its Policy on Children.

In addition to my ICC experience, I have also dealt with criminal cases involving sexual violence (rape, sexual assault, sexual attack against a minor) and domestic violence during my time with the Court of Appeals in Ljubljana, Slovenia. Whilst serving with the EU Rule of Law Mission in Kosovo as a judicial advisor, I worked on cases involving conflict-related sexual violence, including the first case of rape as a war crime dealt with by the EU Rule of Law Mission. Finally, I have lectured and published on SGBC in international criminal law, as elaborated in my Curriculum Vitae. Most recently in this regard, I co-authored a book chapter titled "Achieving Justice: Accountability for sexual and gender-based violence in the practice of UN human rights treaty-bodies and international criminal courts and tribunals".

Ute HOHOFF (Germany)

Due to the recognition that sexual violence widely occurs in armed conflicts and other macro-criminal contexts, the Rome Statute includes a wide range of sexual crimes and demonstrates a high sensitivity to gender in international criminal law. With these provisions, the Rome Statute includes a progressive legal framework on sexual and gender-based crimes and allows for an effective prosecution of these crimes.

From my perspective, the current legal framework of seven sexual and gender-based crimes against humanity and war crimes enumerated in the ICC statute (rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, any other form of sexual violence of comparable gravity, and gender-based persecution) is sufficient to legally cover all forms of conflict-related sexual violence and gender-based crimes. This is in particular so due to the catch-all crime of "any other form of sexual violence of comparable gravity" in article 7 (1) (g) and - slightly different - article 8 of the Rome-

Statute.

In contrast, in the early years the ICC's practice in the prosecution of sexual and gender-based crimes was not satisfactory. The first final conviction for sexual crimes (rape and sexual slavery) was only in March 2021 in the Ntaganda case. In the case against Lubanga the judges of the Trial Chamber themselves criticized in July 2012 the prosecutorial approach in relation to the issue of sexual violence. In comparison, the recent decisions of the ICC (cases against Ongwen and Al Hasan) demonstrate a change in attitude and demonstrate that the ICC is able to address sexual violence in an adequate manner.

From my perspective, the court's success in prosecuting and trying conflict-related sexual violence and gender-based crimes depends on the sensitivity of its officials towards sexual-related violence and gender issues. It also depends on the prioritization of conflict-related sexual violence in the policy of the prosecutor. Against this background, the policy paper on sexual and gender-based crimes of the Office of the Prosecutor of 2014 was an important step forward to raise the awareness of conflict-related sexual violence. Furthermore, the policy paper of the Office of the Prosecutor on the crime of gender persecution of 2022 will also contribute to this aim.

Additionally, it is crucial that court officials not only receive proper resources, but also training on gender sensitivity. Correspondingly, rules 17 (2) (a) (iv), 18 (d) of the Rules of Procedure and Evidence require organs of the Court to provide training on issues of sexual violence and gender sensitivity. From my perspective, it is necessary to raise the awareness of gender-based causes for conflict-related crimes in international criminal law in particular for sexual and gender-based crimes, so that the experience of women and other marginalized groups becomes visible.

Regarding the crimes against children, I would

like to emphasize the necessity to prioritize the prosecution of these crimes because children are particularly vulnerable in conflict situations and need protection of the international community. This approach encompasses not only the specific crimes to the detriment of children (article 6 (e), 8 (2) (b) (xxvi) of the Rome Statute) but also sexual violence crimes and other crimes which often affect children in conflict situations. Against this background, and since the interpretation complies with the wording of the Rome Statute, I value the decision of the Appeals Chamber of 15 June 2017 in the Ntaganda case pertaining the offences of rape and sexual slavery of child soldiers as war crimes. The Appeals Chamber stated that the ICC Statute does not exclude members of an armed group from protection against acts committed by the members of the same armed group. However, I am also aware that this decision has been widely criticized with regard to its non-compliance with international humanitarian law. For the prioritization of the prosecution of crimes to the detriment of children in armed conflicts and other macro-criminal contexts, the policy paper on children of the Office of the Prosecutor of 2016 is also relevant.

Mirjana LAZAROVA TRAJKOVSKA (North Macedonia)

The Rome Statute is the key international instrument that clearly includes various forms of sexual and gender-based crimes (rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, and other forms) as acts of crimes against humanity and war crimes committed in international and non-international armed conflicts. The Statute also criminalises persecution based on gender as a crime against humanity. Sexual and gender-based crimes may

also fall under the Court's jurisdiction if they constitute acts of genocide or other acts of crimes against humanity or war crimes. Similarly, the Rules of Procedure and Evidence are a strong base for key procedural and evidentiary advancements in ensuring the protection of victims' interests and ending impunity for sexual and gender-based crimes.

Iulia Antoanella MOTOC (Romania)

The ICC constitutes a major advancement in its substantive and procedural approach to sexual and gender-based crimes and its victims.

Substantively, the Rome Statute is the first international legal instrument which prescribes many SGBCs as separate and distinct crimes. Beyond that, the Statute also recognizes SGBCs as part of other crimes, such as preventing births within a group as an element of genocide.

The Rules of Procedure and Evidence state, for example, that consent cannot be inferred by certain circumstances such as the victim's words or conduct under coercive circumstances, or the victim's silence or lack of resistance. Evidence of the prior or subsequent sexual conduct of a victim or witness shall generally not be admitted. Article 68(1) of the ICC Statute also provides for the protection of victims and witnesses with specific regard to gender and gender violence.⁴

The Statute further obligates the Prosecutor to appoint advisers with expertise on sexual and gender violence pursuant to Article 42(9) and to consider the gender of victims and witnesses as well as the nature of sexual and gender crimes in investigations pursuant to Article 54(1)

⁴ Tanja Altujan, *The International Criminal Court and Sexual Violence: Between Aspirations and Reality*, *German Law Journal* (2021), 22, pp. 878–893.

(b). Concerning the judiciary, Article 36(8) calls upon the States Parties to appoint judges with expertise on violence against women and children. Furthermore, the Rules of Procedure and Evidence require organs of the Court to take gender-sensitive measures with respect to victims and witnesses. Apart from the explicit criminalization of sexual violence, the ICC Statute and the accompanying documents, the Elements of Crimes and the Rules of Procedure and Evidence contain several important provisions aimed at ensuring that sexual crimes are prosecuted in an effective and gender-sensitive manner. Pertaining to substantive law, the Elements of Crimes define rape in a gender-neutral manner, clarifying that the crime does not exclusively apply to women and girls. With regard to genocide, they also clarify that the genocidal act of “causing serious bodily or mental harm” under Article 6(b) of the ICC Statute may include rape and sexual violence.

The Statute further obligates the Prosecutor to appoint advisers with expertise on sexual and gender violence pursuant to Article 42(9) and to consider the gender of victims and witnesses as well as the nature of sexual and gender crimes in investigations pursuant to Article 54(1) (b). Concerning the judiciary, Article 36(8) calls upon the States Parties to appoint judges with expertise on violence against women and children. Furthermore, the Rules of Procedure and Evidence require organs of the Court to take gender-sensitive measures with respect to victims and witnesses.

On the procedural level, under Article 54(1)(b) the Prosecutor must take into account whether a crime includes sexual violence, gender-violence, or violence against children in pursuing the

effective investigation and prosecution of a crime. Likewise, the ICC’s reparations regime represents a significant advancement because it allows for easier access to reparations in one procedure without parallel litigation. This is especially important for victims of sexual and gender-based crimes because of their particular vulnerability. Because of this, I also consider the Trust Fund for Victims as a major improvement.

Within the Court’s jurisprudence, I would like to highlight some examples of the Rome Statute’s application to sexual and gender-based crimes and crimes against children. Within the context of crimes against children, I consider the Lubanga case of particular relevance because it clarified the elements of conscripting, enlisting and using child soldiers, especially active participation in hostilities.⁵ However, it regrettably did not include victims of sexual and gender-based crimes in its reparations decision which fails to recognize the gendered aspects of most crimes within the Court’s jurisdiction and risks to discriminate women in the reparations process. On the other hand, the Ongwen case represents a laudable example of jurisprudence, because it recognized forced marriage, forced pregnancy, and sexual slavery as separate crimes allowing for cumulative convictions. This constitutes an important acknowledgement of reproductive autonomy on the part of the Court. Moreover, this case stands for the Court’s careful consideration of the context of long-term armed conflicts and the forced recruitment of child soldiers in sentencing decisions. However, while the prosecution included children born out of forced pregnancies as a distinct group of victims,⁶ the Court did not recognize their victimhood, which risked their further stigmatization as children of

⁵ Prosecutor v Thomas Lubanga Dyilo, Judgment on the Appeals of The Prosecutor and The Defence Against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, ICC-01/04-01/06-1432, AC, 11 July 2008.

⁶ Statement Of The Prosecutor Of The International Criminal Court, Fatou Bensouda, At The Opening Of Trial In The Case Against Dominic Ongwen (6 December 2016).

perpetrators. The Trial Chamber explicitly clarified in the Ongwen judgment that the crime of forced pregnancy protects the value of reproductive autonomy. This indicates a clear understanding of the conceptual differences between sexual and reproductive violence.

Another positive example is presented by the Bosco Ntaganda case. While in this case, the judges of the Appeals chamber were regrettably divided on the question of liability of indirect co-perpetration and did not consolidate this legal question, the judgment provided a carefully reasoned treatment of sexual violence, including sexual slavery, as part of war crimes and crimes against humanity.

In 2022 the Prosecutor has published the policy-crime-gender-persecution. The paper recognizes the complex nature of victimization. Only then can we successfully advance accountability for the crime against humanity of persecution on the grounds of gender under the Rome Statute.

“This new Policy takes a comprehensive approach to sexual and gender-based crimes that may amount to the crime against humanity of persecution on the grounds of gender (gender persecution). It recognizes all of its victims, namely women, girls, men, boys, including/and LGBTQI+ persons. It also recognizes that acts or crimes of gender persecution may include, but are not always manifested as, forms of sexual violence or any physical violence or physical contact. They may include psychological abuse. They may also take forms other than physical injury to persons, including acts such as cultural destruction or confiscation and prohibition of education for girls.”⁷

Much attention has been devoted to sexual and gender-based crimes at the ICC in recent years.

While some innovative approaches have been advanced, an analysis of the ICC’s jurisprudence reveals that a clear understanding of what constitutes an act of sexual violence or gender-based violence and the relation between these concepts has not been established. I think there are ways to improve this approach, from the way investigators and judges can be educated in this regard. There is a difficulty to work with evidence in this field.

Moreover, as someone who has investigated such crimes on the ground, I believe that cultural understanding and discussion with the communities to which these victims belong is fundamental.

Clarence Joseph NELSON (Samoa)

One of the most critical decisions in the work of the Court came about in 2012 in the Thomas Lubanga Case when it recognized that the use of children as child soldiers was a war crime and a crime against humanity. As for SGBCs, the release of the OTP policy on Gender Persecution which is also applicable to child victims, and cases like that of Prosecutor v Al Hassan represent modern milestones in clarifying certain key aspects of article 7 and the jurisdiction of the Court.

It is also essential that the prosecution of SGBCs be handled sensitively, being mindful of the needs of vulnerable witnesses and victims. The trial process must be carefully managed to ensure that misconceptions such as that SGBCs against women and children are somehow deserved or acceptable, do not proliferate.

The issue of differing viewpoints and interpretation of the Rome Statute needs to be recognized and confronted. Mechanisms to address these need

⁷ Karim A.A Policy on the Crime of Gender Persecution (7 December 2022).

to be developed in order to promote certainty and consistency.

For the future, there remain challenges such as whether the scope of article 7(1)(k) would benefit from greater scrutiny and interpretation, in particular what “inhumane acts” are capable of causing “serious injury.....to mental or physical health”, a concept also referred to in article 8(2)(a) (iii); and whether these should extend to the indirect effects of such acts.

Keebong PAEK (Republic of Korea)

It is very significant that the Rome Statute has included various forms of sexual and gender-based crimes such as rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other form of sexual violence as crimes against humanity and war crimes. It is also notable that persecution on the ground of gender is included as a crime against humanity in the Statute. Furthermore, SGBCs may be considered to constitute genocide under Article 6(b), as “causing serious bodily or mental harm to members of the group”.

Accordingly, for the first time at the ICC, in the Bemba case, the accused was found guilty of war crimes and crimes against humanity of rape and others by the Trial Chamber, though this was later reversed by the Appeals Chamber. In addition, in the Ntaganda case, war crimes and crimes against humanity of rape and sexual slavery were recognized, and the same recognition occurred in the subsequent cases, including the Ongwen case, where the accused was found guilty of forced marriage and pregnancy as well. Separately, in the Al Hassan case, the first indictment for the crime of gender persecution was confirmed by the Pre-Trial Chamber; this is currently pending in the Trial Chamber.

On the other hand, the Rome Statute recognized children as persons with individual rights pursuant

to the 1989 Convention on the Rights of the Child and included provisions of criminalization such as (a) conscription, enlistment or use of children under the age of fifteen years to participate actively in hostilities, (b) forcible transfer of children and prevention of birth, and (c) trafficking of children as a form of enslavement.

In the Lubanga case, the accused was found guilty of the war crimes of conscripting and enlisting children under the age of fifteen years and using them to participate actively in hostilities. Moreover, in the Ntaganda case, the accused was found guilty of war crimes and crimes against humanity of rape and sexual slavery against child soldiers who were on the same side of the armed forces as the accused.

In such cases, victims of sexual violence or gender-based crimes were often reluctant to testify because they were afraid of the social stigma. In the case of child victims, they often lacked the ability to make statements or, over time, did not remember the details of the harm they suffered. In this sense, special care is needed in dealing with those victims, and it is notable that Article 42(9) stipulates that the “Prosecutor shall appoint advisers with legal expertise on issues ... including ... sexual and gender violence and violence against children”.

Therefore, when investigating those crimes and asking victims to testify in court, appropriate assistance and protection measures should be pursued depending on each victim’s circumstances. To this end, Article 68(1) stipulates that the “Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses [with] ... regard to all relevant factors, including age, gender ... and health, and the nature of the crime, in particular, ... where the crime involves sexual or gender violence or violence against children”.

Furthermore, in order to ease the difficulty of testifying in court, conducting proceedings in camera or by video-link can be considered, as stipulated in Article 68(2), particularly “in the case of a victim of sexual violence or a child who is a victim or witness”.

An even more flexible approach regarding the hearsay rule can be considered. The Prosecutor should think of a video recording investigation at the early stage of the investigation and use the results as evidence in court. In this regard, Rules 88(1) and 112(4) stipulate that... a Chamber may, ..., “order special measures ...to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence ...” and that, when questioning, the Prosecutor may choose to use procedures such as recording, in particular when this “could assist in reducing any subsequent traumatization of a victim of sexual or gender violence, a child or a person with disabilities in providing their evidence ...”.

Overall, the Rome Statute was adopted with thoughtful attention to the punishment of sexual and gender-based crimes and crimes against children, as well as to protect victims’ rights and prevent the risk of re-traumatization. In addition to the specific measures stipulated for the investigation and the trial stages, it is highly recommended that the Prosecutor and the Chamber ensure the charges fully reflect the nature of the SGBCs and crimes against children, including by way of cumulative charges, and the appropriate sentence is rendered, especially when the vulnerability and defencelessness of victims was abused.

While special consideration should be given to the cruelty and gravity of the crime and protective measures for victims in case of sexual crimes, it is crucial to pay attention to the motive and driving factors behind gender-based crimes, which are often related to gender discrimination and prejudice

prevalent in the community. In dealing with gender-based crimes, a gender-based perspective and analysis should be taken during the investigation and trial stages, and gender inclusive reparations should be sought, in order to transform the mindset and culture of the people in the community.

On the other hand, with regard to child victims, special attention should be given to individual profile of the victim as well as to the victim’s social and cultural context. Not only the victims’ views, but also those of their parents, caregivers and experts should be fully considered. Under the ‘do no harm’ principle, a child-sensitive approach should be taken.

However, occasionally, some victims are not active in providing statements and evidence and may not seem to strongly want the perpetrators to be punished. This may not actually be the case, but rather the intention may be to avoid additional investigations and testimony, or it may be due to social pressure or fear of social stigma. Therefore, it is important to understand the particular background without falling into misconceptions, and to take the appropriate supportive measures.

Similar consideration should be given when investigating sexual crimes and reviewing the consent of the victim. Though lack of the victim’s consent is not an element of the sexual crime, which the Prosecutor must prove, it can be used by the defence as a ground for excluding or reducing the responsibility of the perpetrator. No active resistance from a victim can be misconstrued as voluntary consent. In this sense, in cases of sexual violence, note should be taken of Rule 70(a),(b) and (c), which states that consent cannot be inferred by “any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victims’ ability to give voluntary and genuine consent” or “where the victim is incapable of giving genuine consent” or by “the silence of, or lack of resistance

by, a victim ...”.

In the first half of the response to the question 14 above, I described my personal experience to overcome challenges and my experiences in this area.

Andres PARMAS (Estonia)

The ICC is paying more and more attention to SGBCs in its policy and practice. In 2019, Bosco Ntaganda was convicted of 18 counts of war crimes and crimes against humanity, including rape and sexual slavery committed against male and female civilians as well as his own child soldiers in the Democratic Republic of the Congo. The conviction was upheld on in 2021.

In 2020, in Ongwen case, the ICC came to an important conclusion that a former victim could transform into a perpetrator and explained in detail the elements of a defence of mental disease. The case is also a milestone in the prosecution of sexual and gender-based crimes as international crimes. In the judgment, the distinctive elements of the crime of forced marriage and forced pregnancy are analysed.

The Policy on the Crime of Gender Persecution of 2014 and renewed in 2022 strive towards addressing sexual and gender-based crimes in the ICC in a more systematic and effective way and this work should be continued. Victims should better know their rights before the ICC, their privacy be respected in the proceedings and all steps be taken to avoid re-victimization of victims of SGBCs in their communities.

Andriamanakiandrianana RAJAONA
(Republic of Madagascar)

Under the Rome Statute, rape is punished in two distinct situations: rape as a crime against humanity, and rape as a war crime.

It can be punished as a crime against humanity if the rape was committed during a systematic attack against the civilian population, and as a war crime if the rape was perpetrated during a war covered by the Geneva Conventions.

The crime of rape is thus punishable under any circumstances.

The jurisprudence has clearly defined the difference between common law rape and rape as a crime against humanity or as a war crime, by requiring a causal link between rape and war or attacks on the civilian population as defined by the Rome Statute. Jurisprudence has also ruled out, in the case of war, that rape can be excused if it has been perpetrated against potential victims of that war. Thus, raping one's opponent falls into the category of a war crime, since rape does not fall into the category of risks run by a soldier participating in combat. Rape is rape and not a fact of war.

Rape perpetrators also sometimes highlight the characteristics of the victim, especially in terms of morals. Proposals are currently being put forward to make it inadmissible to plead the victim's lack of morals or provocative attitudes. Perpetrators can also mobilize the excuse of the victim's consent, which they deem confusing. Legislation on the determination of consent could also help analyze consent in relation to the circumstances of the case. For example, a victim cannot give consent during an attack, a situation of widespread looting, etc. Such potential improvements could help tackle preconceived ideas about rape.

Pavel ZEMAN (Czech Republic)

As to the SGBCs, the Rome Statute explicitly recognizes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other forms of sexual violence as distinct types of war crimes. The Rome Statute also specifically addresses crimes against children, in addition to the fact that children might be victims

For instance, the Rules of Procedure and Evidence consider commission of a crime where the victim is particularly defenseless etc. as an aggravating circumstance for the determination of sentence.

There is a clear understanding that victims of such crimes are vulnerable. This fact has to be reflected at all stages of the proceedings (victim-sensitive and child-sensitive approaches), in particular when hearing a victim or witness. I do have experience in handling vulnerable victims when I served as a prosecutor in both the district and regional level, as well when I held the position of Prosecutor General.

The relevant case law continues to develop. For instance, the case against Germain Katanga dealt with sexual crimes resulting into acquittal of those crimes. The acquittal indicated the difficulties related to the concept of common purpose liability under Article 25 (3) (d) of the Rome Statute. The acquittal of Jean-Pierre Bemba illustrated how uneasy is to prove command responsibility in the absence of clear orders to commit sexual violence. More recently, the convictions of and Bosco Ntaganda (first final conviction for sexual crimes) and Dominic Ongwen (prosecution of forced pregnancy) showed further development.

This report was written by Lorraine Smith van Lin, Valeria Babără and Alexandra Lily Kather. Initial research for the report was conducted by Diane Brown. The report's development and execution were guided by Alix Vuillemin. A final review was carried out by Morgan Grant. We are also thankful to Melinda Reed for the initial concept and fundraising and to our interns, Fayha Najeeb, Lucas Medinger, Chiara Frittitta and Silvia Caravaggio, for their contributions. Graphic design by: Anisa Shaikh and Alina Kliuchnikoff.

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