

Sexual and Gender Based Crimes and the International Criminal Court

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I. Introduction

June 19th marked the International Day for the Elimination of Sexual Violence in Conflict. Sexual and gender based violence (SGBV) refers to any act that is perpetrated against a person's will and is based on gender norms and unequal power relationships. It encompasses rape, sexual violence, sexual slavery, forced prostitution, forced pregnancy, forced sterilization, gender based persecution and trafficking¹. It is a violation of human rights and denies the human dignity of the individual and hurts human development.

This violence affects mostly women and girls but also men and boys. It can be physical, emotional, psychological, or sexual in nature, and can take the form of a denial of resources or access to services. Therefore, it is not always, as commonly believed, in the form of sexual violence – it encompasses any crime committed against an individual because of that individual's gender.

Sexual and gender based crimes (SGBC) are a conflict strategy: they are widespread weapons of war seen in conflicts around the world such as Central African Republic, Mali, Syria and Sudan. They are used to terrorize, degrade, punish communities and ethnically “cleanse.” Additionally, survivors are often marginalized and stigmatized, with little hope of seeing their attackers brought to justice.

The International Criminal Court works hard to fight against impunity for these crimes.

II. The International Criminal Court's fight against SGBV

A. Gender justice in the Rome statute

The Rome Statute is the first international treaty to establish conflict-related SGBV as crimes against humanity, war crimes and genocide. Articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi) list the SGBC that are under the court's jurisdiction.

¹ <http://www.coalitionfortheicc.org/sexual-and-gender-based-crimes>

The Rome Statute includes victim participation in the judicial proceedings; this allows them to tell their stories in the courtroom and have their voices be heard, which has never been done before in international tribunals.

The Statute ensures protection of victims and witnesses who suffered from SGBV and the Court procedures are designed to address the specific needs of female victims and witnesses. The Victims and Witnesses Unit (VWU) provides protection security, counselling and other forms of assistance. The Court controls the questioning of witnesses to avoid harassment or intimidation. The Rules of Procedure and Evidence makes it clear that a victim's consent cannot be inferred where the perpetrator took advantage of a coercive environment (like a detention center).

The Statute also guarantees special SGBC expertise within the court; it requires that the prosecutor appoint advisers with legal expertise on such crimes. Consequently, the Court's VWU includes staff with experience in trauma related to sexual crimes.

The Statute also requires, in electing judges, taking into account the need for "fair representation" of female and male judges. The prosecutor and the registrar must do the same with their own staff, and the Assembly of State Parties should always elect officials that have gender justice expertise.

Finally, the ICC promotes inclusive gender justice. SGBV against men and boys are often misunderstood and vastly underreported, making it a difficult issue to talk about. The Rome Statute is gender neutral in defining sexual violence; Therefore, the conversation is made easier at national levels.

B. The court's actions against SGBV so far

The Court's prosecutor, Fatou Bensouda, actively and in detail, addresses the gender-justice gap. She has made it clear that investigating and prosecuting SGBC to end impunity for these crimes is one of her key objectives. This is reflected by the Policy Paper on Sexual and Gender Based Crimes² published in June 2014, which affirms the commitment of the Office of The Prosecutor (OTP) to pay special attention to SGBC.

1. The Policy Paper

The Policy-Paper was created following internal consultations within the ICC, with state parties, international, national and regional organizations, as well as with civil societies, academic, victims and survivors advocacy groups.

² <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>

It provides procedural guidelines for investigating and prosecuting SGBC and calls for transparency and predictability in the prosecution of such crimes. Through its implementations, this Policy Paper contributes to the on-going development of international jurisprudence regarding SGBC.

In this Paper, the Office of the Prosecutor (OTP) declared its commitment to integrating a gender perspective and analysis into all areas of its work. It provides adequate training for staff, adopting a victim-responsive approach in its work, and it pays particular attention to staff interaction with victims, witnesses, their families and communities.

The Policy Paper emphasizes that SGBC are crimes in themselves (separate from other crimes like murder or torture), so they need to be analyzed, investigated, persecuted and charged as such. It is important to note that the Court recognizes a distinctive character to gender based violence as much more than “mere” human rights violations.

In its 2016-2018 Strategic Plan³, the OTP reaffirmed it will continue to place a special focus on SGBC to address specific challenges posed to the investigation and prosecution of these crimes, from the very beginning of preliminary examinations. The office also announced it will concentrate on crimes against children: a Comprehensive Policy on Children will be completed and implemented. This policy will address issues about children who are in and affected by armed conflict. This includes interaction at different phases of the Office’s work, the best interest of the child, consent, protection and support.

2. The Court’s prosecutions

In its first cases, the court either did not include SGBC, as seen in the *Lubanga* trial in 2012, or was forced to drop specific charges for rape and sexual violence, like in *Katanga* in 2014.

Nonetheless, the Court’s more recent cases prove its determination to prosecute these crimes. In 2015, the *Bosco Ntaganda* case marked the first militia leader facing SGBV charges. In 2016, militia leader Jean Pierre Bemba was the first to be convicted for rape as a weapon of war⁴. This case constituted a real milestone for the Court. It became clear that the ICC recognizes SGBC as a weapon of war, not only in policy but also in practice, since Bemba was charged with crimes against humanity and war crimes of murder and rape. The Court clearly showed that sexual

³ https://iccforum.com/media/background/general/2015-07-06_ICC_OTP-Strategic_Plan_2016-2018.pdf

⁴ <https://ilg2.org/2016/03/21/icc-issues-landmark-judgment-bemba-convicted-as-commander-in-chief-for-sexual-violence-crimes-part-12/>

violence could no longer be treated as a collateral crime. This judgement represents the first time in the history of international criminal law that sexual violence against men has been charged as the crime of rape (and not torture for instance), and that a defendant has been convicted of rape based on the testimony of male victims⁵. Later that year, the Court addressed SGBC against women when Ugandan warlord Dominic Ongwen was charged such crimes – his trial was the first to feature sexual slavery, forced pregnancy and forced marriage⁶.

There is also a focus on SGBC in situations under preliminary examinations like Columbia, Iraq, Ukraine, Afghanistan and Nigeria⁷. These investigations include the crime against humanity of gender-based persecution, which has never been charged by an international criminal tribunal.

If the Afghanistan investigation is opened, it will be the first investigation to specifically contemplate this crime⁸. It is unique because it is the only one in the ICC statute that requires to prove the victim was targeted because of their gender. Gender based persecution is set apart from other crimes like SGBC by discriminatory intent. An example of this crime would be instances where men were rounded up and shot because as males of a certain age, they were seen by the enemy as potential combatants⁹.

Bemba's controversial acquittal in August 2018 should not be viewed as a step back from effectively ensuring SGBC are being punished. The appeal chamber's decision was based on its determination to uphold fair trial standards. The majority's reasoning behind the acquittal was about whether the lower chamber arrived at the conviction in a just and fair manner. In no way does this acquittal mean the Court is standing down from its fight against impunity for SGBC.

III. Conclusion

The work of the Court on SGBC so far is extremely positive, both in policy and in practice. The Court must continue its work against impunity for prosecution of sexual and gender based crimes.

It still faces important challenges today in collecting the evidence necessary for the prosecution. These include security issues in situations of ongoing conflict, lack of full cooperation in some cases, the under - or non - reporting of crimes, lack of forensic

⁵ <https://www.justicetribune.com/blog/sexual-and-gender-based-crime-few-talk-about>

⁶ <https://ilg2.org/2016/12/05/a-day-to-remember-ongwens-trial-starts-on-6-december/>

⁷ https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf

⁸ <https://ilg2.org/2017/01/06/gender-based-persecution-on-the-international-criminal-courts-radar/>

⁹ *Ibid.*

evidence partly due to the passage of time, and inadequate support services at the national level¹⁰. Among other solutions, a greater ICC budget would allow some of these challenges to be resolved.

It is important to remember the Court's jurisdiction is based on the principle of complementarity – it only has jurisdiction over individuals that national courts are unwilling or unable to prosecute fairly themselves.

Also, the Rome Statute contributes to accountability for SGBV at the national level: if the state parties incorporate far-reaching domestic laws, then they can investigate and prosecute these crimes themselves. Supporting the universal application of the Rome Statute and the inclusion of its provisions on SGBC in national legislation, helps to ensure that the perpetrators of SGBC are held accountable. Without the support of adequate, gender sensitive domestic laws and procedures, the achievement of gender justice will be only a partial reality.

¹⁰ <https://iccforum.com/background/sgbv>