

Investigations and Prosecutions of Sexual and Gender-based Violence by the International Criminal Court

Dr Yassin Brunger

Summary

At the 1998 diplomatic conference to establish a permanent International Criminal Court (ICC), the following statement was made:

The effective investigation, prosecution, and trial by the Court of sexual and gender violence crimes would not necessarily flow automatically from the inclusion of crimes of sexual and gender violence in the Statute.¹

Sexual and gender-based violence (SGBV) at the international level has been incorporated in the categories labelled as crimes against humanity, war crimes and genocide.² The Rome Statute of the ICC explicitly recognises various manifestations of SGBV such as rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilisation, and other forms of sexual violence as war crimes. It expanded the definition of crimes against humanity to include various types of SGBV crimes and explicitly includes gender as a basis for persecution against an identifiable group or collective.³ The ICC Office of the Prosecutor (OTP) has made some significant strides in devising a strategy that reflects a gender-sensitive response to SGBV crimes, which steps include: the OTP Policy Paper on Sexual and Gender-Based Crimes (June 2014); the Policy Paper on Case Selection and Prioritisation (September 2016); and the Policy on

Children (November 2016).⁴ These measures, in conjunction with the conviction of Jean-Pierre Bemba Gombo, former vice-president of the Democratic Republic of the Congo in March 2016, for rape as a crime against humanity and as a war crime, are key developments in the fight against impunity for SGBV. This policy brief highlights how a gender-sensitive response strategy can further address some of the complex and evolving realities of investigating and prosecuting SGBV crimes within the context of the ICC.⁵ Barriers to achieving justice exist at every level for victims of SGBV crimes and the ICC must therefore continually evaluate the delivery of its operations. To that end, this policy brief advocates for a court-wide approach to the application of a gender-sensitive and gender-inclusive response strategy.

Introduction

This policy brief advocates for a gender-sensitive and gender-inclusive response strategy that is integrated into the fabric of ICC operations dealing with SGBV crimes. It recognises that the OTP Policy Paper on Sexual and Gender-Based Crimes (OTP 2014 Policy Paper) is a positive example of a gender-sensitive policy. While the trial of Jean-Pierre Bemba Gombo predated the implementation of the OTP Policy Paper on

Sexual and Gender-Based Crimes, the ongoing trial against Dominic Ongwen, a former commander of the Sinia Brigade in the Lord's Resistance Army (LRA), will be a significant test case regarding the extent to which the ICC can solidify itself as a site of progressive gender justice. The amendment of the charges against Dominic Ongwen in December 2015 pointed to the implementation of the OTP 2014 Policy Paper and was a positive expansion of such charges so as to include the crimes of forced marriage, rape, sexual slavery, enslavement, torture, outrages against personal dignity, and forced pregnancy.⁶

While acknowledging the significant strides made by the ICC in its efforts to close the accountability gap in relation to SGBV crimes, this policy brief provides a holistic analysis of a broader institutional response that goes beyond a narrow focus on the OTP. The policy brief strongly favours the adoption of a gender-sensitive response strategy across the different organs of the ICC. The brief is divided into four interrelated issues critical to achieving this strategic goal. The policy brief begins with a consideration of the general policy implications of a gender-sensitive response strategy. Thereafter, it proceeds to examine the importance of gender-sensitivity in respect of victims/witnesses of SGBV crimes and demonstrates how this needs to be acknowledged and addressed. The analysis in the policy brief recognises the magnitude of the challenges facing the ICC. However, it explains that the applicability of a gender-sensitive response strategy, if properly implemented, requires both increased gender competence across the ICC and strategic partnerships with civil society and states parties.

General policy implications of a gender-sensitive response strategy

A gender-sensitive response strategy is an integral part of a programme of action which seeks accountability for SGBV crimes. Put simply, a gender-sensitive response enables recognition of the *gendered nature* of the harms in terms of the *crimes* themselves, the *context* in which they occur, and the *experiences* of victims. This should be a mandatory requirement across the activities of the ICC, because it will enable the institution to reveal and appreciate the pre-existing gendered differences in ICC countries that will undoubtedly have an impact on its operations. When a matter comes before the ICC as to whether or not alleged SGBV crimes have in fact been committed, a gender-sensitive response strategy would foster adaptability of ICC action with regard to the four key elements.

Understanding the crime

A gender-sensitive response strategy ensures an inclusive understanding of SGBV crimes. This enables the ICC to investigate a range of harms faced by all victims, regardless of gender, that would qualify in terms of the definitions of SGBV in the Rome Statute. In the first conviction for sexual violence of Jean-Pierre Bemba Gombo, the judgment of the Trial Chamber emphasised that rape under the Rome Statute is 'broad enough to be gender-neutral' and 'includes same-sex penetration, and encompasses both men and/or women perpetrators and victims'.⁷ While the words of the Trial Chamber are a step in the right direction, a gender-sensitive response strategy demands a more progressive and inclusive understanding of 'gender'. Victims with identities that fall outside the binary conceptions of gender either as men or women consequently fall outside the parameters of international justice.⁸ Such a position fails to provide universal justice for all victims of 'unimaginable atrocities that deeply shock the conscience of humanity'.⁹ To be a site of gender justice, the ICC needs to develop its institutional understanding of gender so as to include marginalised minorities.¹⁰

By expanding the agenda to include the range of crimes, a gender-sensitive and gender-inclusive response strategy would cover manifestations of the crimes of: (a) sexual violence; (b) gender-based violence; and (c) crimes that are both sexual and gender-based violence committed against victims of all gender identities. What this means is that the broad umbrella of SGBV is deconstructed and that different variations of SGBV can be given due recognition, and that action can be identified and evidence can be sought.¹¹ Scholars have argued that gender-based harms, such as reproductive violations and socio-economic deprivations, are given far less attention in comparison with sexually based harms against women.¹² The ICC is in a prime position to make a seismic shift in the global attitudes and responses to SGBV.

This policy brief advocates that a *gender-sensitive vocabulary* be used by the ICC. The gendered language surrounding how SGBV crimes are described/referred to has both explicit and implicit meaning. The predominant global narrative concerning SGBV atrocity crimes is to describe sexual violence as a 'weapon of war', something which is evidenced in media reports as well as in national, international and intergovernmental policy documents. Given the legal and symbolic capital attached to the actions of the ICC, a gender-sensitive response strategy would ensure a more inclusive vocabulary that expands this narrow conceptualisation of SGBV in the global conscience.

Appreciation of the context

A response strategy that is both gender-sensitive and gender-inclusive paves the way for an analysis of the engrained patriarchal structures and non-binary gender roles which inform/influence and define the status and position of those of various gender identities in ICC countries. As De Brouwer states:

Sexual violence in conflict can be committed in many different ways, for many different reasons, by anyone (women, girls, men, boys) and against anyone (women, girls, men, boys).¹³

It is critical to reveal the stigmatisation attached to victims by their families, communities and wider society; the familial harms suffered that are the consequences of direct victimisation; and the sociocultural factors that would have an impact on the willingness and ability of victims to come forward. Integrating a contextual approach to the core case theory is particularly valuable in order to situate how SGBV was deliberately used rather than simply being a consequential or isolated act. A gender-sensitive response strategy further equips ICC officials (particularly investigators and prosecutors) with the ability to better assess, and adapt to, the specific environment within each situation country.

Unveiling the perpetrator

A gender-sensitive and gender-inclusive response strategy facilitates an understanding of the reasons/motives for SGBV committed against men/boys and how these differ from those in respect of women/girls. It also reveals some commonalities (e.g. the humiliation, degrading and disempowering of victims; attacking communities through particular groups of victims) in terms of which SGBV is strategically deployed as a crime-base pattern. Furthermore, a gender-sensitive response also looks beyond a classic binary construction of SGBV as involving perpetrators who are men committing violence against victims who are women, in the process broadening the discourse in order to reflect the multiple expressions of perpetration across the spectrum of gender identities and forced sexual violence among victims/witnesses.¹⁴

Sensitivity to victims

A gender-sensitive response strategy would more readily capture the experiences of victims on the basis that gender is an integral element that shapes their victimisation. While women and girls have been the primary targets of SGBV crimes, men and boys have also been victimised in this manner, and this must continue to be recognised in the policy and practice of

institutions such as the ICC.¹⁵ The adoption of a gender-sensitive and gender-inclusive response strategy would ensure recognition of the victimisation for those who are seldom visible in international justice, such as LGBTQ (lesbian, gay, bisexual, transgender and queer) or gender non-conforming people. This level of institutional sensitivity would allow the ICC to have a 'significant and positive impact on the content of "gender" within international law'.¹⁶ Therefore, where SGBV crimes amount to crimes against humanity, to war crimes or to genocide, the ICC must avoid constraining itself to a binary and limited understanding of 'gender' when engaging with victims.

There are many challenges affecting the willingness and ability of victims of SGBV crimes to tell their stories. Both the reluctance of victims to talk about their victimisation, and the under-reporting of SGBV crimes, are underlined by structural and sociocultural factors and result in victims lacking the necessary motivation and confidence to engage with a accountability mechanisms. Victims are influenced and affected by societal views of femininity and masculinity, womanhood and manhood, and what it means to be a husband/provider/protector or wife/caregiver/child-bearer. One profound example from the Bemba trial was the testimony given by a man who was a victim of sexual violence who stated:

I considered myself to be dead because a man cannot sleep with another man. With what they did to me, I knew that I was dead. I could no longer feel like a human being. And after that, my second wife refused me because she considered that I was a woman like her.¹⁷

To ignore the underlying importance of gender roles that are pervasive in the lives of victims – prior to, during and after conflict – is to deny a richer understanding of the victims' experiences and blind the ICC to the patriarchal structures that define the social interactions/relationships among individuals. In addition, a gender-sensitive approach would recognise the physical, psychosocial and socio-economic impacts that are experienced by victims and how these adverse effects can manifest themselves in gendered ways. Overall, a gender-sensitive and gender-inclusive response strategy would foster an informed and careful design of ICC interventions that situates and understands the lives of victims.

Gender-sensitive response to victims/witnesses of SGBV crimes

International criminal trials rely extensively on the testimonial evidence of witnesses. As research by Cody, Koenig and Stover indicates:

*Witnesses are the lifeblood of trials involving serious international crimes, such as genocide, crimes against humanity, and war crimes. Effective prosecutions depend on witness testimonies both for the facts they provide and for their moral authority.*¹⁸

A gender-sensitive response strategy would aid robust criminal investigations and effective prosecutorial strategies, and would further enable witnesses to confront 'past ghosts and present demons'.¹⁹

Witnesses who have experienced SGBV crimes will often find it extremely difficult to talk about their experiences and it is therefore incumbent on ICC staff to address their needs and adequately prepare SGBV witnesses who will testify.²⁰ The Rome Statute and the Rules of Procedure and Evidence provide the appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.²¹ Article 68 of the Rome Statute addresses the protection of victims and their participation in proceedings, and it is for this reason that the Victims and Witnesses Unit (VWU) was set up to provide protective measures and security arrangements, counselling services, and other appropriate assistance to victims and witnesses. As the VWU works in coordination with the different sections of the OTP, specifically the Gender and Children Unit, victims and witnesses of SGBV can have their specific needs attended to. Such a tailored response is consistent with a gender-sensitive response strategy and must be continued across the work of the Court.

As Chappell notes, the Trust Fund for Victims has 'elaborated a gender-sensitive approach to assistance, informed by the Nairobi Declaration'.²² The principal areas of development (and limitations) which require a gender-sensitive response if the needs of victims/witnesses of SGBV are to be met are:

- The recognition and subsequent reporting of SGBV crimes;
- The identification of the *physical harm* (such as gynaecologic fistulas, HIV/Aids, or sexually transmitted diseases, and other long-lasting health problems) and *psychosocial harm* suffered by victims/witnesses (such as post-traumatic stress, depression, anxiety, suicidal tendencies, and low self-esteem when having to talk and relive such traumatic experiences); and
- The development of effective measures to address the range of harms that victims/witnesses suffer during the investigations and pre-trial preparation, as well as during the criminal trial and post-criminal proceedings.²³

Early identification of the above will further improve the service and support provided for victims and witnesses of SGBV in order to achieve the overall desired outcomes of a gender-sensitive response strategy, which outcomes are:

- To prepare and familiarise a witness with proceedings of the ICC, in particular the courtroom environment, the participants in court proceedings, and their role in the proceedings;
- To give victims a voice and space to tell their story – which includes assessing the extent to which witnesses wish to avail themselves of special measures;²⁴
- To increase empowerment of victims and assure them of gender-sensitive procedural justice;
- The sensitive management of the complex challenges faced by victims and witnesses of SGBV and by the ICC staff working with them; and
- The best deployment of ICC resources in order to meet the expectations of victims/witnesses of SGBV.

Victims of SGBV are often silent (and silenced) about the violence perpetrated against them for fear of being isolated or stigmatised as a rape victim. The stigmatisation, isolation and rejection felt by many victims can be linked to patriarchal understandings of sexual-violence survivors as being 'spoiled'/'unmarriageable', as having lost their honour/purity, as having borne children of rape, as being homosexuals/adulterers, and so on. While international prosecutions alone cannot alleviate these consequences in the realities of victims' lives, they can make a significant contribution to lessening the shame and guilt that victims may feel and redirecting it towards the perpetrators. A gender-sensitive response recognises and acknowledges the realities of *bearing witness* for victims. Trials can potentially be sites of emotional distress and secondary trauma for victims having to relive their stories. A gender-sensitive strategy can provide the ICC with a holistic level of responsiveness needed by SGBV victims/witnesses.²⁵

Institutional gender competency

Integrate gender competence development into policy documents

Gender competency can make a difference. Such competency may be defined as follows:

Gender competence ... reflects the capacity to identify where difference on the basis of gender is significant, and act in ways that produce more equitable outcomes for men and women ... In

the present context it refers to the capacity of court members to understand the gender implications of the court's procedure, rules and regulations so that they can function [by] recognizing gender inequalities and [eliminating] them from court proceedings.²⁶

If implemented systematically across the institution, it can facilitate a more sensitive, as well as an efficient and positive response, to SGBV crimes. The ICC is an institution made up of individuals with various national/international experiences. As with many other international tribunals, the legal culture that develops is influenced and impacted by the national systems in which the experiences of the majority of staff are rooted.²⁷ Sharratt's study of judges, prosecutors, investigators, victims, and witnesses who were members of the International Criminal Tribunal for the former Yugoslavia and the Bosnia War Crimes Court revealed that many of them accepted rape myths, held misogynistic views about women, and were ambivalent and uncomfortable when dealing with cases of rape and sexual violence.²⁸ In the light of the rigours of the international legal process for the victim – which includes talking to foreign investigators or intermediaries, and being questioned in order to acquire details about the harms they have suffered and the perpetrator's identity – this policy brief unequivocally suggests that gender competence is a prerequisite requirement in respect of all institutional staff who are in contact with victims/witnesses of SGBV.

Developing gender competence (e.g. through training) should be integrated beyond the strategies of the OTP and across all the different organs of the Court (the presidency, the registry and the judicial divisions). This would represent a collective acknowledgement of the importance of gender-sensitive knowledge and competency and indicate the readiness of the institution to embed these in the operations of the ICC. While the OTP has made significant strides through its operational policies relating to SGBV, most notably the OTP 2014 Policy Paper, it is incumbent on all organs of the Court to take responsibility for supporting, sharing and promoting a gender-sensitive understanding of SGBV crimes. This policy brief suggests that the OTP 2014 Policy Paper can be used as an example to further 'integrate a "gendered" perspective' more widely throughout the ICC.²⁹ It provides a blueprint for developing specific policies and practices that collectively represent the efforts of the ICC to respond to the needs of victims of SGBV.

Judicial decision-making

Members of the judiciary play an essential role in addressing SGBV. Through their decisions, judges can

help to identify, clarify and modify practices that reinforce gender stereotypes and can challenge and unveil the complexities of SGBV. The causes and consequences of SGBV are multilayered and reflect the lives of individual victim-survivors, conflicted communities, and the wider international audience. Judicial decisions of the ICC provide interpretative tools that can be used in local, national and international strategies to address SGBV.³⁰ Moreover, the judicial decisions can establish and reaffirm the norms and rules applicable to SGBV within the framework of crimes against humanity, genocide and war crimes. This can be an influential factor which can filter down to the national systems and the formal codes of conduct/behaviour of the potential perpetrators instructed by the military and political leadership. Judges need to be trained in issues that might arise during the course of testimony given by witnesses who are victim-survivors of SGBV. The benefits of a gender-sensitive response within judicial decision-making are as follows:

- Judges will be conscious of the gender norms that shape expectations, responsibilities and opportunities as they pertain to victims of SGBV, particularly those related to the position/role of women and girls as well as ideas of masculinity;³¹
- The identification of the sources of differentiated treatment based on gender within the pattern of crime and the practice of perpetrators;
- The identification and exposure of the gendered consequences of victimisation; and
- The identification of the legal principles and procedures, in accordance with Article 21 of the Rome Statute, from domestic and international law that judges can apply both in the conduct of court proceedings and in the evaluation of facts and evidence relating to SGBV crimes.

The example of Rwanda illustrates the intrinsic challenges for judges in dealing with SGBV. As a result of the recognition of the difficulties faced by judges in Rwanda in trying cases of sexual violence in the local Gacaca courts, judges received training, comprising legal and psychological components, in how to deal with the cases of rape and sexual torture that they would be hearing.³² This policy brief acknowledges the multifaceted obstacles that judges may encounter when adjudicating cases of SGBV and thus considers a programme of gender competency to be a significant tool for producing gender-sensitive and gender-inclusive jurisprudence.

Allocate adequate resources to training

The resources dedicated to gender-competency training must be adequate. Both human and financial

resources are necessary to ensure that initial training and follow-up activities take place. Staff should be encouraged to participate in these sessions, and there must be a consistent allocation of time and an adequate budget in place to allow them to attend. Aligning financial resources with gender policy commitments can serve as a powerful tool for closing the gap between policy and practice in terms of SGBV crimes. The focus of gender-competency training should be on how to improve staff awareness of, and sensitivity to, gender issues. Such training has been used by other tribunals such as the Extraordinary Chambers in the Courts of Cambodia.³³ Reiger points out that 'gender-sensitivity is not only about awareness raising but it is also about the use of positive steps to reduce the negative impacts of gendered assumptions and beliefs'.³⁴ This will ensure that staff have the opportunity to reflect on whether SGBV crimes against men/women/children are used in different gender-specific ways. Gender issues are often relegated to the bottom of the list when it comes to prioritising programmes and funding. This policy brief recommends to the Assembly of States Parties, as the plenary body of the ICC with budgetary responsibility, that a portion of the institutional budget be ring-fenced for the purposes of developing and integrating gender competency across the institution and for furthering a gender-sensitive response strategy.³⁵

Strategic civil society partnerships

The ICC is at the epicentre of the global network for accountability for SGBV crimes. Yet the institution requires partnerships and civil society networks that can assist in closing the policy/practice gap and strengthening a gender-sensitive response to SGBV. It is critical that discussions on gender-sensitive strategies and the development of the institutional gender competence of the ICC incorporate dialogue with, and input from, civil society. In particular, inputs should be sought from civil society partners, advocacy organisations and research institutions that deal directly with gender issues, from bodies that work directly with victims of SGBV, from organisations that research and advocate for training and awareness of SGBV crimes, and from those that have experience of ICC countries. To be consistent with the aims of the *gender-sensitive* and *gender-inclusive* response, the ICC should ensure that it also partners with civil society organisations that represent and support victims with marginalised gender identities (such as LGBTIQ [lesbian, gay, bisexual, transgender, intersex, queer/questioning and allies] organisations). Public consultations should be embarked on in order to afford civil society organisations the opportunity to provide dynamic feedback and responses. These types of strategic

partnerships can assist the development of best practice when it comes to gender-sensitive policy within the ICC. Through strategic civil society partnerships, the ICC can benefit from broader expertise which can be deployed in the design, monitoring and evaluation of its gender-sensitive response strategies. Partnerships should contribute to the strategic goals of addressing SGBV. By creating a more inclusive forum where stakeholders' voices are heard, the ICC will be able to achieve greater participation, transparency, inclusion and plurality in policy discussions.

States parties

This policy brief adopts a holistic view of the ICC system, which system includes states parties to the Rome Statute. The relationship between the ICC and states parties could be used to facilitate a gender-sensitive response strategy to the investigation and prosecution of SGBV crimes. Gender-sensitive programmes and practices within the broader national system – such as national action plans to tackle different manifestations of SGBV, gender-awareness training, outreach activities inclusive of all gender identities, and institutional reforms – can be used to inform the work of the ICC. This brief recommends that states parties identify such efforts, in collaboration with civil society organisations, in order to show the practical benefits of integrating gender issues within accountability mechanisms.

In line with the principle of complementarity at the heart of the Rome Statute system, this policy brief advises states parties to mirror the processes at the ICC as part of a global effort to 'engender' international law.³⁶ There remains a gap between international and regional human rights standards and national legislation in relation to SGBV crimes. For many countries, sexual violence and gender-based violence are still structurally reinforced within national laws. Where appropriate legislation is in place, it is not translated into gender-sensitive and gender-inclusive practices and procedures. This policy brief therefore recommends that states parties view developments at the ICC as a catalyst for assessing national responses to SGBV crimes and increase sensitivity and inclusiveness with regard to all victims, regardless of gender identity.

Conclusion

As the dockets of the ICC increase, the expectations of, and pressure from, victim communities will undoubtedly increase as well. A gender-sensitive response strategy is a valuable means of addressing the complex and evolving realities of investigating and

prosecuting SGBV crimes. The present policy brief examined the general policy implications of a gender-sensitive and gender-inclusive response strategy. Thereafter, it analysed the significance of a gender-sensitivity approach to ICC engagement with victims/witnesses of SGBV crimes. In doing so, the policy brief recognises the vital need to develop and integrate gender-competency across the different organs of the ICC as adequately resourced by the Assembly of States Parties. In addition, the policy brief advocated the involvement of strategic civil society partners with the aim of integrating gender sensitivities and gender inclusiveness across the activities of the ICC. Finally, the policy brief called on states parties to participate in a process of gender reform within the ICC and to reflect on the adequacy of national measures to meet the needs of victims of SGBV. This policy brief concludes with the following recommendations:

Policy recommendations

- It is advisable that a gender office, unit or work group be established that fosters a cooperative approach among the different organs of the ICC in order to effectively promote the inclusion and institutionalisation of a gender perspective in the administration of justice and to monitor compliance therewith.
- The Judicial Division should make a firm commitment to the embedding of gender sensitivity and inclusion, to developing gender competence, and to recognising the need for, and encouraging, individual judges to develop gender competency.
- The Judicial Division should endeavour to actively engage with the other organs of the Court as well as external stakeholders in order to ensure the

implementation of the above-mentioned general guidance.

- The ICC should ensure that training goes beyond ‘awareness-raising’ so as to enable staff to apply gender analysis to their area of work when it comes to SGBV crimes.
- The Assembly of States Parties must ensure that adequate resources are allocated to gender-sensitivity and gender-inclusive training.
- The Assembly of States Parties should ring-fence funding in the ICC budget, that is, set aside a specified amount for developing and integrating gender competency within the institution and for furthering a gender-sensitive response.
- The ICC should encourage dialogue, partnerships and networking with civil society partners, organisations and research institutions as key activities for a gender-sensitive response strategy.
- Civil society organisations should lobby for budgetary resources that are specifically intended to support a gender-sensitive response strategy.
- Civil society should develop practical capacity-building strategies that can boost the gender competency of the different organs of the ICC.
- Civil society should raise awareness, and promote the taking on board in the ICC, of a gender-sensitive response strategy.
- States parties should gather data and detailed examples that demonstrate the necessity for, and benefits of, incorporating gender issues into national accountability and support mechanisms.
- States Parties should view developments at the ICC as a catalyst for assessing national responses to SGBV crimes and increase sensitivity and inclusiveness with regard to all victims, regardless of gender identity.

Endnotes

1. C. Steains, 'Gender Issues', in R. S. Lee (ed.), *The International Criminal Court: The Making of The Rome Statute* (Martinus Nijhoff Publishers, 1999), p.357, 375.
2. See K. Askin, 'Treatment of Sexual Violence in Armed Conflicts: A Historical Perspective and the Way Forward', in Anne-Marie de Brouwer et al. (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia, 2013), pp.19-57.
3. Rome Statute of the International Criminal Court, Art. 6 (definition of genocide), Art. 7 (definition of crimes against humanity), Art. 8 (definition of war crimes), 17 July 1998, U.N. Doc. A/CONF.183/9.
4. Policy Paper on Sexual and Gender-Based Crimes, Office of the Prosecutor, ICC-OTP, June 2014, available at: https://www.icc-cpi.int/iccdocs/otp/Policy_Paper_on_Sexual_and_Gender-Based_Crimes-20_June_2014-ENG.pdf; Policy Paper on Case Selection and Prioritisation, ICC-OTP, September 2016, available at: https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf; Policy on Children, ICC-OTP, November 2016, available at: https://www.icc-cpi.int/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF.
5. Reparations are outside the scope of this policy brief. However, see R. Rubio-Marín, 'The Gender of Reparations in Transitional Societies', in R. Rubio-Marín (ed.), *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations* (Cambridge University Press, 2009), pp. 63-120; F. Ni Aolain, A. Swaine and C. O'Rourke, 'Transforming Reparations for Conflict-related Sexual Violence', *Harvard Human Rights Journal* (2015), pp. 97-146.
6. *Situation in Uganda in the Case of Prosecutor v. Dominic Ongwen*, ICC-OTP Pre-trial Brief, Trial Chamber IX, 6 September 2016, ICC Doc. No. ICC-02/04-01/15-533, paras 500-700.
7. *Situation in the Central African Republic in the Case of Jean-Pierre Bemba Gombo, Judgment Pursuant to Article 74 of the Statute*, Trial Chamber III, 21 March 2016, ICC Doc. No. ICC-01/05-01/08-3343, para 100.
8. Lesbian, gay, bisexual, transgender and queer (LGBTQ) individuals have not generally been integrated into international justice.
9. Preamble, Rome Statute of the International Criminal Court, 17 July 1998, U.N. Doc. A/CONF.183/9.
10. See L. R. Helfer and E. Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe', 68(1) *International Organization* (2014), pp. 77-110.
11. N. Henry, 'Theorizing Wartime Rape: Deconstructing Gender, Sexuality, and Violence', 30(1) *Gender & Society* (2016), pp. 44-56; S. SáCouto and K. Cleary, 'Importance of Effective Investigation of Sexual Violence and Gender-based Crimes at the International Criminal Court', 17 *American University Journal of Gender, Social Policy and the Law* (2009), pp.337-359.
12. See F. D. Ni Aoláin, 'Political Violence and Gender during Times of Transition', 15 *Columbia Journal of Gender and Law* (2006), pp.829-849; D. de Vos, 'ICC Trial against Dominic Ongwen Commences – Some Thoughts on Narratives' (*IntLawGrrls*, 8 December 2016), available at: <https://ilg2.org/2016/12/08/icc-trial-against-dominic-ongwen-commences-some-thoughts-on-narratives/>.
13. A. M. de Brouwer, 'Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes', 48 *Cornell International Law Journal* (2015), pp.639-666, p.648.
14. See ICTY, *Prosecutor v. Duško Tadić*, ICTY Case No. IT-94-1, Judgment (Trial Chamber), 7 May 1997, para 198, where the Trial Chamber concluded that an incident in the Omarska Camp, where one of the detainees was forced by uniformed men, including Duško Tadić, to bite off the testicles of another detainee, amounted to cruel treatment (violation of the laws and customs of war) and an inhumane act (crime against humanity).
15. See V. Oosterveld, 'Sexual Violence Directed against Men and Boys in Armed Conflict or Mass Atrocity: Addressing a Gendered Harm in International Criminal Tribunals', 10 *Journal of International Law and International Relations* (2014), pp. 107-128; S. Sivakumaran, 'Sexual Violence against Men in Armed Conflict', 18(2) *European Journal of International Law* (2007), pp. 253-276.
16. See V. 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 Journal* (2005), pp. 55-84, 84.
17. *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Transcript (20 January 2011) ICC-01/05-01/08-T-51-Red2-ENG CT2 WT 21-01-2011 1-53 SZ, p. 323, lines 8 to 11.
18. S. S. Cody, A. Koenig, and E. Stover, 'Witness Testimony, Support, and Protection at the ICC', in K. M. Clarke, A. S. Knottnerus and E. de Volder (eds), *Africa and the ICC: Perceptions of Justice* (Cambridge University Press, 2016), pp. 301-322, 301.
19. Ibid.
20. J. Mertus, 'Shouting from the Bottom of the Well: The Impact of International Trials for Wartime Rape on Women's Agency', 6(1) *International Feminist Journal of Politics* (2004), pp. 110-128.
21. Rome Statute, Article 68; Rules of Procedure and Evidence (adopted on 9 September 2002 and entered into force on 9 September 2002), ICC-ASP/1/3 and Corr. 1, Part III.
22. L. Chappell, *The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy* (Oxford University Press, 2016), p.141. See, also, Trust Fund for Victims, Strategic Plan 2014-2017 (August 2014); Nairobi Declaration on Women's and Girls' Right to Remedy and Reparation (2007).
23. For instance the ICC Gender and Children's Unit.
24. See ICTY, 'Reliving the Past', available at: <http://www.icty.org/en/in-focus/crimes-sexual-violence/reliving-past> on the experiences of victims and witnesses of sexual violence.
25. See *Prosecution of Sexual Violence, Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda* (2014), para 32.
26. S. Sharratt, *Gender, Shame and Sexual Violence: The Voices of Witnesses and Court Members at War Crimes Tribunals*, (Ashgate Publishing, 2013), p. 80.
27. See J. D. Jackson and Y. M. Brunger, 'The Effect of Legal Culture on the Development of International Evidentiary Practice: From the "Robing Room" to the "Melting Pot"', Volume 26(4) *Leiden Journal of International Law* (2013), pp. 947-970.

- 28 See S. Sharratt, *Gender, Shame and Sexual Violence: The Voices of Witnesses and Court Members at War Crimes Tribunals* (Ashgate Publishing, 2013), pp.73-97.
- 29 See F. Bensouda, 'Gender Justice and the ICC: Progress and Reflections', 16(4) *International Feminist Journal of Politics* (2014), pp. 538-542; V. Oosterveld, 'Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court', 16(4) *International Feminist Journal of Politics* (2014), pp. 563-580.
- 30 A. Kapur, 'The Value of International–National Interactions and Norm Interpretations in Catalysing National Prosecutions of Sexual Violence', 6(1) *Oñati Socio-Legal Series* (2016), pp.62-90.
- 31 This links up with the existing ICC Code of Judicial Ethics: Article 8(2) – 'Judges shall exercise vigilance in controlling the manner of questioning of witnesses or victims in accordance with the Rules and give special attention to the right of participants to the proceedings to equal protection and benefit of the law', ICC-BD/02-01-05 (9 March 2005).
- 32 U. Kaitesi and R. Haveman, 'Prosecution of Genocidal Rape and Sexual Torture before the Gacaca Tribunals in Rwanda', in Rianne Letschert et al. (eds), *Victimological Approaches to International Crimes: Africa* (Intersentia, Cambridge, 2011), p. 385, 394; See, also, A. M. de Brouwer and E. Ruvebana, 'The Legacy of the Gacaca Courts in Rwanda: Survivors' Views', 13 *International Criminal Law Review* (2013), pp. 937-976.
- 33 Report on the ECCC, Gender-Sensitivity Training Workshop (22 June 2012), available at: http://gbvkr.org/wp-content/uploads/2013/01/Report-on-the-ECCC-Gender-Sensitivity-Training-Workshop-22_June_-2012.pdf.
- 34 Ibid. at p. 5.
- 35 See the Approved Budget for 2017 €144,587,300, *Assembly of States Parties to the Rome Statute of the International Criminal Court, 15th Session* (16-24 November 2016), The Hague , Official Records Vol. I, ICC Doc. No. ICC-ASP/15/20, p. 15.
- 36 L. Chappell and A. Durbach, 'The International Criminal Court', 16(4) *International Feminist Journal of Politics* (2014), pp. 533-537.

ABOUT THE INSTITUTE FOR JUSTICE AND RECONCILIATION

The Institute for Justice and Reconciliation (IJR) was launched in 2000 by officials who worked in the South African Truth and Reconciliation Commission, with the aim of ensuring that lessons learnt from South Africa's transition from apartheid to democracy are taken into account and utilised in advancing the interests of national reconciliation across Africa. IJR works with partner organisations across Africa to promote reconciliation and socio-economic justice in countries emerging from conflict or undergoing democratic transition. IJR is based in Cape Town, South Africa. For more information, visit <http://www.ijr.org.za>, and for comments or enquiries contact info@ijr.org.za.

IJR acknowledges the support of Kingdom of the Netherlands for this policy brief.

This policy brief is part of a larger project on accountability for conflict-related sexual violence. For more information on the project, please contact Kelly-Jo Bluen at kbluen@ijr.org.za or kellyjobluen@gmail.com



Kingdom of the Netherlands

ABOUT THE AUTHOR

Dr Yassin Brunger is Lecturer of Human Rights Law at Queen's University Belfast. Dr Brunger's research concerns international criminal law, human rights and feminist perspectives on international law. She explores these themes, primarily, in the study of the UN Security Council, the International Criminal Court and accountability mechanisms for sexual and gender-based violence crimes. Her work strives to consider legal issues in context, and much of her work combines a strong socio-legal approach with an empirical element. She has presented her work at a number of international forums, including most recently at the ICC Assembly of States Parties Meeting in The Hague.

CONTACT US

Tel: +27 21 202 4071
Email: info@ijr.org.za

Physical and Postal Address

105 Hatfield Street
Gardens
8001
Cape Town
South Africa



www.ijr.org.za

The opinions expressed in this paper do not necessarily reflect those of the Institute for Justice and Reconciliation (IJR). Authors contribute to the IJR Policy Briefs series in their personal capacity.

© IJR 2017

Designed and typeset by COMPRESS.dsl