

CHAPTER IX

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WOMEN, HUMAN SECURITY AND INTERNATIONAL CRIMINAL LAW: OBJECTS AND AGENTS IN STABILISATION AND RECONSTRUCTION

Abstract

Sexual and gender-based violence (SGBV) is a serious threat to international peace and security and must be addressed for there to be reconstruction and stabilization in conflict and post-conflict situations. SGBV is committed systematically, whether by state or non-state armed groups, as a form of terrorism, a war crime, a crime against humanity or genocide. The International Criminal Court (ICC) has adopted a comprehensive approach to investigating and prosecuting SGBV, further structuring the case law of its predecessors, the *ad hoc* International Criminal Tribunals (ICTs) prosecuting atrocities committed systematically in the Balkans and Rwanda.

The ICC is an improvement compared with previous ICTs but there is still much to do to provide victims of SGBV with effective remedies. In the 21st century, the UN provides a normative framework recognising SGBV as a threat to international peace and security against which states must act. It also offers mechanisms for investigating SGBV, enhancing domestic and international prosecutorial accountability mechanisms and striving to end impunity for international crimes of a sexual nature. Examples include the focus given to SGBV⁴⁷⁸ by mechanisms such as the UN Counter-Terrorism Executive Directorate (UN-CTED), the establishment of specialising entities such as the UN Special Representative (UNSR) on SGBV and the UN Team of Experts on Gender-Based Crimes (GBCs).

⁴⁷⁸ UN Counter-Terrorism Executive Directorate (UN CTED), *Towards Meaningful Accountability: Sexual and Gender Base Violence linked to Terrorism*, November 2023, p.6.

International crimes of a sexual nature are referred to as sexual and gender-based violence, sexual and gender-based crimes, gender-based violence or gender-based crimes, often interchangeably. Not all violence constitutes an international crime but taken as a whole, it creates an environment conducive to the commission of crimes of a sexual nature. Gender-based violence or crimes can also be of a non-sexual nature.

Case studies offer best practices of victim-led or victim-inclusive justice initiatives for reconstruction. These include justice for Islamic State of Iraq and al-Sham (ISIS) crimes in Syria and Iraq against Yazidi women and girls, the Mukwege Foundation initiatives against widespread SGBV committed in the Democratic Republic of Congo (DRC); the Colombian Special Jurisdiction for Peace (JEP) special unit for SGBV; and the systematic and widespread SGBV committed as part of the attack launched by Hamas and other Palestinian militia on 7 October 2023.

Three case studies will be the focus of this chapter. The framework for accountability, reconstruction and strategic partnership presented in this chapter constitutes the result of past lessons and offers a forward-looking framework for future SGBV committed in conflict. The general framework for accountability must be implemented intelligently in close partnership with the affected communities to bring trust and greater impact to sustain reconstruction and stabilisation.

Keywords: SGBV, SGBC, victim-centred, ISIS, accountability.

1. Introduction

While the development of modern international criminal law can be traced back over two centuries based on the common understanding that international

crimes ‘*threaten the peace, security, and well-being of the world*’,⁴⁷⁹ crimes systematically targeting women and girls in armed conflict or in peacetime received official recognition as an international crime only much more recently. The role of women as both systematic targets of international crimes (objects) and agents for stabilization and reconstruction (agents) has only recently been recognised⁴⁸⁰ and still deserves significant attention from scholars, decision-makers and policymakers. Rape in armed conflict or peacetime was not always considered a crime. Indeed, the first known recorded international prosecution of war crimes – the trial of Sir Peter van Hagenbach in 1474⁴⁸¹ – convicted him of rape committed by his soldiers only because ‘he had instituted terror without first having declared war’.⁴⁸²

This shows that in certain circumstances of war, rape was even considered legal.⁴⁸³ Historically, women were often considered the property of men, and ‘to the victor goes the spoils’.⁴⁸⁴ Some voices were raised against rape, notably the jurist Alberico Gentili (1555-1608)⁴⁸⁵ and the forefather of international law, Hugo Grotius (1584-1645),⁴⁸⁶ stating rape ‘should not go unpunished in war any more than in

⁴⁷⁹ International Criminal Court (ICC) Rome Statute, Preamble, (1998). <https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf>. The first serious proposal for an International Criminal Court was made by Gustave Moynier on 3 January 1872 to enforce the obligations of Contracting Parties to armed conflict under the 1864 First Geneva Convention on Wounded Soldiers, see Gustave Moynier, ‘*Note sur la création d’une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève*’, Bulletin international des Sociétés de secours aux militaires blessés, Comité international, No. 11, (avril 1872), p. 122. See further in Christopher Keith Hall, ‘The first proposal for a permanent international criminal court’, *International Review of the Red Cross*, No. 322, (31 March 1998). <https://www.icrc.org/en/doc/resources/documents/article/other/57jp4m.htm>.

⁴⁸⁰ See for example UN Security Council Resolution 1325 on Women, Peace and Security, 2000.

⁴⁸¹ M Cherif Bassiouni, *International Criminal Law, A Draft International Criminal Code*, 1980 p. 8; and Bassiouni, *The Time has Come for an International Criminal Court*, *International and Comparative Law Review*, 1, 1 (1991).

⁴⁸² Donald A Wells, *War Crimes and Laws of War*, 2nd Edition 1991, pp 93-94.

⁴⁸³ Kelly D. Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals*, Leiden, Netherlands: Martinus Nijhoff Publishers, 1997, p. 29.

⁴⁸⁴ *Ibid.*, p. 21. Referencing to Peter Karsten, *Law, Soldiers and Combat*, 5, 1978.

⁴⁸⁵ *Ibid.* pp 23-26; quoting Alberico Gentili, *De Iure Belli Libri Tres*, 1612; see also Theodore Meron, *Henry’s Wars and Shakespeare’s Laws*, 111-113, 1993.

peace'.⁴⁸⁷ The 1945 International Military Tribunal (IMT) of Nuremberg largely ignored SGBV although sexual crimes were committed and reported to the IMT.⁴⁸⁸

The two *ad hoc* ICTs for former Yugoslavia (ICTY) and for Rwanda (ICTR) punish sexual crimes as war crimes and crimes against humanity. However, the Statute lists only 'rape' and 'enforced prostitution', taking a very narrow perspective on the issue. Nevertheless, ICTY's case law implemented the crimes and solidified future steps to prosecute SGBVs. ICTY raised the bar by recognising rape as a form of genocide, as will be discussed below. In 1998, the Rome Statute of the ICC offered new hope. Human rights organisations hailed the Rome Statute as offering a '*dramatic and long-awaited improvement in how international crimes against women are treated and greatly increases the possibility for redress*'.⁴⁸⁹ To date, the ICC has yet to implement sanctions and convictions for such acts, as opposed to the crimes of torture or degrading treatment as war crimes and crimes against humanity.

This chapter provides theoretical and practical guidance for any entity considering a productive response to SGBV in armed conflict or peacetime. Part I describes the essential development of recognising SGBV against anyone – male or female – as an international crime (Part I).

It then focuses on why there is a need to recognise it as a factor destabilizing communities and reducing chances for sustainable peace and reconstruction. In Part II, the chapter examines recent normative developments. This includes the most recent policies and guidelines and the specialised mechanisms mandated to

⁴⁸⁶ Grotius, *De Jure Belli Ac Pacis Libri Tres*, 1646, pp 656-657.

⁴⁸⁷ *Ibid*, quoted in Askin, *supra note 6*, p. 30.

⁴⁸⁸ Kelly D. Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals*, Leiden, Netherlands: Martinus Nijhoff Publishers, 1997, pp. 14 and 97.

⁴⁸⁹ Human Rights Watch, 'International Justice for Women: The ICC Marks a New Era Human Rights', *Watch Backgrounder*, (July 1, 2002). <https://www.hrw.org/legacy/campaigns/icc/icc-women.htm>.

fight, sanction and prevent SGBV. Part III focuses on recent case studies of systematic SGBV, examples of good practice and means of redress. Special focus is given to building a victims-based approach, engaging civil society as complementary to state authorities, the importance of first responders, using strategic litigation for human rights to ensure accountability, building bridges for coordinated, interstate and international judicial cooperation, increasing expertise, and the need for specialised units to investigate, prosecute and prevent SGBV in every jurisdiction.

2. Solidifying Recognition of SGBV as an International Crime Threatening International Peace and Security

*History shows us that sexual violence is something that can destroy towns, nations, communities, and can be used as a means of genocide to destroy groups.*⁴⁹⁰

Patricia Sellers, Special Adviser on
Gender to the ICC Prosecutor, 2018

Every practitioner should master the main legal developments in the process of recognising SGBV as an international crime at the earliest stages of investigating atrocities in conflict-ridden areas. The fundamental understanding of the need to address past wrongs to build a stable future is a cornerstone of building stability in conflict situations.⁴⁹¹

For centuries, and despite some recognition,⁴⁹² the prohibition of SGBV was

⁴⁹⁰ As reported in, Women's Initiative for Gender Justice, 'Blogpost: Calling it what it is: It is time to define sexual violence', (13 December 2018).

⁴⁹¹ See in general on the need to address past wrongs in a forward looking perspective, Ruti Teitel, *Transitional Justice*, Oxford University Press, 2000.

⁴⁹² See in Ancient Times the writings of Cicero, Gentili, Grotius as mentioned in the *Introduction* above; or more recently, cf eg Article 44 of the 1863 Lieber Code which provides that all rape of persons in the invaded country is prohibited, *Instructions for the Government of Armies of the United States in the Field*, prepared by Francis Lieber, promulgated as General Order No. 100 by President Abraham Lincoln, Washington D.C., 24 April 1863.

not codified and sanctioned despite the widespread, systematic reality of armed conflicts that led to atrocities.⁴⁹³ From Nuremberg⁴⁹⁴ to The Hague,⁴⁹⁵ international accountability for SGBV saw its codification and implementation, despite the challenges. The most significant development is that international accountability evolved from a state-centred to a victim-centred justice where victims are allowed a more active role as participants in the procedure who can bring to the opening of an investigation, provide evidence, communicate their concerns directly to judges independently from the prosecution, and can express their views at key moments of the criminal procedure.

2.1 International Recognition of Sexual and Gender-Based Crimes

At Nuremberg, sexual and gender-based evidence was brought before the IMT but rape was not included in the indictment nor the judgement of the major Nazi war criminals.⁴⁹⁶ Nevertheless, Article II(1)(c) of the 1945 Allied Control Council Law No. 10, which was the main legal foundational act for the twelve Nuremberg trials that followed the judgement of the major Nazi war criminals, provided that ‘*rape, or other inhumane acts committed against any civilian population*’ was a crime against humanity. While the three Geneva Conventions do not mention rape or any other form of SGBV, Article 27(2) of the 1949 Fourth Geneva Convention provides: ‘*Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault*’. Common Article 3(1)(c) of the

⁴⁹³ Kelly D. Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals*, Leiden, Netherlands: Martinus Nijhoff Publishers, 1997, pp.12-13.

⁴⁹⁴ The *ad hoc* International Military Tribunal was established in Nuremberg in 1945 to try the Major Nazi War Criminals, for more information see Holocaust Museum website at <https://encyclopedia.ushmm.org/content/en/article/international-military-tribunal-at-nuremberg>.

⁴⁹⁵ The Hague refers to the establishment of the permanent International Criminal Court (ICC) by the 1998 Rome Statute.

⁴⁹⁶ Nuremberg Trial Proceedings Vol. 1 Indictment, The Avalon Project, Yale Law School; INTERNATIONAL MILITARY TRIBUNAL (NUREMBERG) Judgment of 1 October 1946, *ICC Legal Tools*.

four 1949 Geneva Conventions (GCs) provides that ‘*outrages upon personal dignity*’ are prohibited at any time and in any place whatsoever with respect to persons *hors de combat*.⁴⁹⁷ The ICTR Statute recognised the *ad hoc* tribunal’s jurisdiction to prosecute violations of common Article 3 of the 1949 GCs, *including rape, enforced prostitution, and any form of indecent assault*.⁴⁹⁸

2.1.1 ICTY and ICTR landmark cases on SGBV

ICTY issued several landmark cases relating to sexual and GBCs⁴⁹⁹ in the application of Article 5(g) of the 1993 ICTY Statute, providing that: ‘*rape, when committed in armed conflict, whether international or internal in character, and directed against any civilian population, constitutes a crime against humanity*’.⁵⁰⁰

It should be recalled that the widespread and systematic rapes and sexual violence committed during the Balkans War alongside ‘ethnic cleansing’ were the crimes the International Inquiry Commission led by Prof Mahmoud Cherif Bassiouni highlighted and what led to the establishment of the first international criminal tribunal since Nuremberg and Tokyo.

⁴⁹⁷ Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, Article 3(1)(c); Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, Article 3(1)(c); Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, Article 3(1)(c); Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, Article 3(1)(c).

⁴⁹⁸ Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States between 1 January 1994 and 31 December 1994, adopted by the UN Security Council, Res. 955, 8 November 1994, as amended by Res. 1165, 30 April 1998, and by Res. 1329, 30 November 2000, Articles 3(g) and 4(e).

⁴⁹⁹ For further reading see, Valerie Oosterveld, *The Legacy of ICTY and ICTR on Sexual and Gender-Based Violence*, in Sterio M, Scharf M, eds. *The Legacy of Ad Hoc Tribunals in International Criminal Law: Assessing ICTY’s and the ICTR’s Most Significant Legal Accomplishments*, Cambridge University Press; 2019, pp.197-220.

⁵⁰⁰ Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, adopted by the UN Security Council, Res. 827, 25 May 1993, as amended by Res. 1166, 13 May 1998 and by Res. 1329, 30 November 2000, (herein ICTY Statute) Article 5(g).

The ICTR was established soon thereafter, in 1994. As one author emphasises [footnote added]:⁵⁰¹

Rape was explicitly listed in the ICTR Statute, and implicitly listed in ICTY Statute, as a violation of the laws and customs of war, including as an outrage upon personal dignity.⁵⁰² [...] Prior to its consideration by ICTY and ICTR, rape had never before been defined in international criminal law.

Rape was widespread during the 1994 genocide in Rwanda:

Women were raped in every prefecture of Rwanda, throughout the genocide, most often in the open in plain view, including at roadblocks, in official and governmental buildings such as military camps, churches, schools and university premises, hospitals, health clinics, stadiums and marketplaces.⁵⁰³

The ICTR became the first international tribunal to grapple with the definition of rape. There was no precedent in international law and national laws varied and did not offer a single definition. Existing definitions in domestic laws did not address the complexities of rape in armed or mass atrocity. While rape was not initially charged in the ICTR's first case, *Prosecutor v. Akayesu*,⁵⁰⁴ evidence of rape emerged during the trial and charges were added.⁵⁰⁵ In the *Akayesu Case*, the ICTR prosecuted rape as genocide and convicted the former mayor

⁵⁰¹ Valerie Oosterveld, *The Legacy of ICTY and ICTR on Sexual and Gender-Based Violence*, in Sterio M, Scharf M, eds. *The Legacy of Ad Hoc Tribunals in International Criminal Law: Assessing ICTY's and the ICTR's Most Significant Legal Accomplishments*, Cambridge University Press; 2019, p199.

⁵⁰² ICTY Statute, Article 3; Statute of the International Criminal Tribunal for Rwanda, 8th November 1994, UN Doc S/RES/955(1994), Annex, 1994, 33 ILM 1598 (herein ICTR Statute), Article 4(e).

⁵⁰³ Linda Bianchi, *The Prosecution of Rape and Sexual Violence: Lessons from the Prosecutions of the ICTR*, in *Sexual Violence As And International Crimes: Interdisciplinary Approaches* 123, 135, Anne-Marie de Brouwer, Charlotte Ku, René Ro 'mkens & Larissa van den Herik, eds., 2013.

⁵⁰⁴ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, para. 688 (Sept. 2, 1998).

⁵⁰⁵ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, para. 688 (Sept. 2, 1998), paras 416-417.

Akayesu, for rape and other acts of sexual violence constituting genocide.⁵⁰⁶

ICTY confirmed this jurisprudence finding that given the correct contextual and mental elements, rape could constitute genocide.⁵⁰⁷ ICTY carried out extensive investigations and prosecution of wartime sexual violence, raising several indictments for sexual violence committed in Bosnia and Herzegovina as early as 1995. Since then, more than 70 individuals have been charged with crimes of sexual violence including sexual assault and rape. As of early 2011, almost 30 had been convicted.⁵⁰⁸ ICTY advanced the development of international justice in the realm of gender crimes by enabling the prosecution of sexual violence as a war crime, a crime against humanity and genocide. The *Duško Tadić* case,⁵⁰⁹ the first international war crimes trial since Nuremberg and Tokyo, was the first international war crimes trial on sexual violence. The Trial Chamber convicted Tadić of cruel treatment and inhumane acts for the part he played in incidents of sexual violence.⁵¹⁰ Two years later, the Appeal Chamber additionally classified the acts as inhumane treatment and wilfully causing great suffering or serious injury to the body or health.⁵¹¹ ICTY examined other incidents of sexual violence against men in several other cases including those against *Češić*, *Mucić et al.*, *Todorović* and *Simić*.

In *Mucić et al.*,⁵¹² ICTY convicted three of the four accused of rape and the use of

⁵⁰⁶ The ICTR record on prosecuting rape was mixed, for example, criticism see Binaifer Nowrojee, 'Your Justice Is Too Slow': Will the ICTR Fail Rwanda's Rape Victims? (UN Research Institute for Social Development Occasional Paper 10, November 2005), www.unrisd.org/80256B3C005BCCF9.

⁵⁰⁷ See below in the *Furundzija* case.

⁵⁰⁸ UN ICTY, Official Website on Landmark Cases. <https://www.icty.org/en/features/crimes-sexual-violence/landmark-cases>.

⁵⁰⁹ ICTY Case Number: IT-94-1, Judgement convicting in May 1997.

⁵¹⁰ ICTY Prosecutor v. Duško Tadić, IT-94-1-T, *Opinion and Judgment*, (7 May 1997). <https://www.refworld.org/jurisprudence/caselaw/icty/1997/en/40193>.

⁵¹¹ ICTY Prosecutor v. Duško Tadić, IT-94-1-A, *Appeal Judgment*, (15 July 1999). <https://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>.

⁵¹² ICTY Prosecutor v. Zdravko Mucić, Hazim Delić and Esad Landžo ICTY Case No.: IT-96-21-T, Judgement, (16 November 1998). https://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf.

sexual violence as torture. One was convicted of command responsibility over acts committed by his subordinates. The crimes consisted of acts against male inmates of extreme cruelty relating to male genital organs and acts against two women detained in the camp during interrogations. The judges ruled that the purpose of the rapes was to obtain information, punish the women for their inability to provide information and intimidate and coerce them.

The Trial Chamber also found that the violence suffered by the two women had a discriminatory purpose – it was inflicted on them because they were women. When passing this judgement in 1998, the Trial Chamber considered ‘*the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity*’.⁵¹³ The judges held that acts of rape constitute torture under customary international law and therefore it is a crime in international and non-international armed conflict and a prohibition applicable to all parties taking part in hostilities, whether state or non-state armed groups. The *Furundžija* case⁵¹⁴ made a significant step forward by recognising rape as genocide, following *Prosecutor v. Akayesu*. Additional notable cases are *Kunarac et al.*⁵¹⁵ which broadened the acts that constitute enslavement as a crime against humanity to include sexual enslavement and determined the relationship of gender crimes to customary law. The judgement recognised a ‘campaign’ of sexual abuse as a means for expulsion through terror and to ensure ethnic superiority or victory.⁵¹⁶ Finally, the *Krstić* case⁵¹⁷ established a link between rape and ethnic cleansing, which, in the Srebrenica crimes in July 1995, was closely associated with genocide.⁵¹⁸

⁵¹³ ICTY Case No.: IT-96-21-T, para. 495, Judgement, (16 November 1998). https://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf.

⁵¹⁴ ICTY Prosecutor v Anto Furundžija IT-95-17/1-A, *Appeal Judgement*, (21 July 2000). <https://www.refworld.org/jurisprudence/caselaw/icty/1998/en/20418>.

⁵¹⁵ IT-96-23 & 23/1.

⁵¹⁶ See for the Trial Chamber Judgement of 2001, upheld by Appeal Chamber in 2002 and other key decisions in the case at <https://www.icty.org/en/case/kunarac>.

⁵¹⁷ IT-98-33

⁵¹⁸ *Ibid*, See case information sheet300 available at chrome-extension://efaidnbmnnnibpajpcgplefindmkaaj/https://www.icty.org/x/cases/krstic/cis/en/cis_krstic_en.pdf.

2.1.2 The 1998 Rome Statute established the ICC and a comprehensive framework for investigating and prosecuting SGBV

In promoting the investigation and prosecution of SGBV, the ICC offers a comprehensive framework, whereas previous international courts or tribunals lacked the required expertise and structure to properly deal with these crimes. For instance, in previous tribunals, victims did not take an active role in the proceedings. At most, they could be witnesses and in certain instances were further humiliated and even mocked during the trial.⁵¹⁹

Giving a more central role to victims of atrocity crimes, especially SGBV, empowers victims in their journey for reconstruction. The ICC framework marks an improvement in investigating and prosecuting SGBV in mass atrocity or armed conflict, although there are still improvements to be made in implementing the ICC mandate. First, the codification of crimes. The ICC criminalises SGBV as war crimes⁵²⁰ and crimes against humanity⁵²¹ and expands the definition using the term ‘other forms of grave sexual violence’.⁵²²

The ICC Rome Statute does not require to prove the absence of consent and recognises an act of sexual nature ‘*by force or by threat of force or coercion, ... or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent*’⁵²³ such as would generally exist during an attack against a civilian population. ICC codification of SGBV in mass atrocity better matches the

⁵¹⁹ See B. Nowroojee, ‘Your Justice is Too Slow’ Will the ICTR Fail Rwanda’s Rape Victims?, United Nations Research Institute for Social Development, November 2005.

⁵²⁰ 8(2)(b)(xxii), and 8(2)(e)(vi) of the Rome Statute.

⁵²¹ Articles 7(1)g, 7(2) c and 7(2)e of the Rome Statute.

⁵²² ICC Elements of Crime, which serve judges and participants in the procedure, defines other forms of grave sexual violence to include ‘acts of a sexual nature’, Article 7(1)g-6, para.1 Elements of Crime, Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May -11 June 2010 (International Criminal Court publication, RC/11). However, what acts are considered of a ‘sexual nature’ is not defined and is left to the interpretation of ICC case law, see for example Women’s Initiative for Gender Justice, ‘*Blogpost: Calling it what it is: It is time to define ‘sexual violence’*’, 13 December 2018.

⁵²³ Ibid.

reality of the commission of crimes of this nature. Despite the milestone marked by the ICC's broad codification of sexual violence constituting war crimes or crimes against humanity, ICC case law is still shy of implementing this recognition in practice.⁵²⁴ The conviction of Dominic Ongwen⁵²⁵ on 61 counts, including as an indirect and direct perpetrator of sexual and GBCs and of Bosco Ntaganda⁵²⁶ for indirect perpetration of rape, sexual slavery and persecution as war crimes and crimes against humanity, mark a new turning point for victims of SGBV in mass atrocity.

Second, the ICC offers procedural protections for victims and witnesses. Rule 17 of the Rules of Procedure and Evidence (RPE) entrusts the Victims and Witness Unit (VWU) with specific functions tailored to victims and witnesses of sexual violence. The Court is required to protect the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses, with special regard to factors such as their gender and whether the crime involved sexual or gender violence.⁵²⁷

The Registry is specifically responsible for '*taking gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings*'.⁵²⁸ Other gender-sensitive measures are also in place that did not exist in previous international courts.⁵²⁹

⁵²⁴ In the *Bemba Case*, ICC-01/05-01/08, the prosecutor alleged sexual violence was committed as Bemba's soldiers subjected men and women to forced nudity to humiliate them. However, the Pre-Trial Chamber did not consider the acts constituted 'sexual violence' as it did not regard them to be of 'comparable gravity'. See, 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, June 15, 2009. In the *Kenyatta Case*, the Pre-Trial Chamber rejected the qualification of 'sexual violence' for acts of forcible circumcision or amputation of men's genitals and rather qualified the acts as 'other inhumane acts' under Article 7 (1) (k) of the Statute.

⁵²⁵ *Prosecutor v Dominic Ongwen*, ICC-02/04-01/15-1762-Red, 4 February 2021.

⁵²⁶ *Prosecutor v. Bosco Ntaganda* ICC-01/04-02/06, convicted on 8 July 2019, as confirmed by the Appeal Chamber on 31 May 2021.

⁵²⁷ Rule 86, RPE.

⁵²⁸ Rule 16(1)d, RPE.

⁵²⁹ For example, Rule 112(4) RPE encouraging the Prosecution to use video or audio recording to avoid re-traumatisation of the victim and Rule 69(4), ICC Rules of Procedure and Evidence shields victims from damaging or intrusive attacks on their sexuality or credibility.

Third, the Statute requires the ICC Prosecutor and Registry to include staff with trauma-informed and legal expertise in crimes of a sexual nature. Fourth, and finally, the ICC provides a more adequate framework for victims of all international crimes, including of SGBV, since the role and rights of victims as participants are enshrined in the Statute, whereby victims can file communications to the Prosecutor, at the origin of investigations. They can communicate with the Court, provide evidence, question witnesses, provide legal and factual information throughout the trial and participate in the reparations stage following a conviction. This empowers victims allowing them to actively participate in accountability mechanisms carried out in their name, notwithstanding remaining challenges for an effective and meaningful victim role at the ICC.⁵³⁰

3. A Systemised Approach against Sexual and GBCs for Strategic Partnerships and Stabilization

If sexual violence is not addressed squarely in ceasefires and peace processes, there will be no peace for women.

(Former Under-Secretary-General for Humanitarian Affairs Jan Egeland, at a New York meeting on peace talks and sexual violence organised by UN Action Against Sexual Violence in Conflict, June 2009)

In the aftermath of the groundbreaking UN Security Council Resolution 1325 (2000) – also known as the UNSC Resolution on Women Peace and Security – recognising the particular impact of war on women and the importance of women’s full and equal participation in conflict resolution, peacebuilding, peacekeeping, humanitarian response and post-conflict reconstruction, several devel-

⁵³⁰ For further reading see, Kinga Tibori-Szabó and Megan Hirst, (Editors), *Victim Participation in International Criminal Justice Practitioners’ Guide*, Springer 2017.

opments followed focusing specifically on SGBV in conflict or mass atrocity, the need for strategic partnerships and taking SGBV in peace processes, stabilization and reconstruction.

3.1 UN Security Council Resolutions dedicated to SGBV in armed conflict and mass atrocity

The UN Security Council adopted two resolutions addressing sexual violence as a tactic of war and the need to address it in peace processes. UNSC Resolution 1820, adopted in 2008, recognises sexual violence as a weapon and tactic of war. It notes that rape and other forms of sexual violence can constitute a war crime, a crime against humanity or a constitutive act concerning genocide and it stresses the need for the exclusion of sexual violence crimes from amnesty provisions in the post-conflict resolution processes. It also calls on member states to comply with their obligations to prosecute those responsible for such acts, to ensure that all victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice and stresses the importance of ending impunity for such acts as part of a comprehensive approach to seeking sustainable peace, justice, truth and national reconciliation. UNSC Resolution 1888, adopted in 2009, on Women, Peace, and Security⁵³¹ stresses the UN's commitment to addressing the issue of SGBV in armed conflict, peace processes and mediation efforts. It calls on parties to armed conflict, including non-state actors, to protect civilians from sexual violence, enforce military discipline, uphold command responsibility and prosecute perpetrators. It also establishes effective support mechanisms such as the establishment of a rapid response team of judicial experts and improved monitoring and reporting mechanisms on trends, early warning indicators and patterns of attack.⁵³²

⁵³¹ S/RES/1888 (2009), adopted by the Security Council at its 6195th meeting, on 30 September 2009, available at [https://www.un.org/shestandsforpeace/content/united-nations-security-council-resolution-1888-2009-sres18882009#:~:text=%2F1888\(2009\)-,United%20Nations%20Security%20Council%20Resolution%201888%20\(2009\)%2C%20S%2F,situations%20of%20particular%20concern%20with.](https://www.un.org/shestandsforpeace/content/united-nations-security-council-resolution-1888-2009-sres18882009#:~:text=%2F1888(2009)-,United%20Nations%20Security%20Council%20Resolution%201888%20(2009)%2C%20S%2F,situations%20of%20particular%20concern%20with.)

⁵³² See especially Articles 4 and 8 for operative article, UN SC Res 1888(2009).

3.2 Dedicated UN mechanisms to address SGBV in armed conflict and mass atrocity

Following these UN Security Council Resolutions and others, several mechanisms were established, some directly under the UN Secretary-General. In 2007 the UN Action Against Sexual Violence in Conflict was established.⁵³³ This is a network of 24 UN entities engaged, in line with their respective mandates, to prevent conflict-related sexual violence, enhance accountability and meet the needs of survivors. In 2010, under Article 4 of UN Security Council Resolution 1888, calling for the appointment of a:

*Special Representative to provide coherent and strategic leadership, to work effectively to strengthen existing United Nations coordination mechanisms and to engage in advocacy efforts, inter alia with governments, including military and judicial representatives, as well as with all parties to armed conflict and civil society, in order to address, at both headquarters and country level, sexual violence in armed conflict, while promoting cooperation and coordination of efforts among all relevant stakeholders, primarily through the inter-agency initiative 'United Nations Action Against Sexual Violence in Conflict.'*⁵³⁴

Since April 2017, the Special Representative of the Secretary-General (UN-SRSG) for Sexual Violence in Conflict, has been Ms. Pramila Patten of Mauritius. In the latest episode of conflict-related sexual violence that caught international attention related to sexual violence committed in the Hamas attack against civilians in Southern Israel on 7 October 2023, Ms. Patten issued the first UN report focusing on SGBV which recognised on reasonable grounds that SGBV was systematically committed during the attack and is most likely still

⁵³³ See official website at <https://www.un.org/sexualviolenceinconflict/about-us/un-action/>.

⁵³⁴ Accordingly, in April 2010, the first Special Representative, Ms. Margot Wallström of Sweden, established the Office. In September 2012, Ms. Zainab Hawa Bangura of Sierra Leone took over the role.

being committed against hostages in captivity in Gaza at the time of writing this chapter.⁵³⁵

One of the main tools of action of the UNSRSG on conflict-related sexual violence is the monitoring, analysis and reporting arrangements (MARA) on conflict-related sexual violence in armed conflict, post-conflict and other situations of concern.⁵³⁶

A major aspect of MARA is the strategic partnerships it harnesses to gather accurate and timely information:

MARA draws on information gathered from a variety of sources, including local government authorities and institutions, health and psychosocial service providers, UN Civilian, Police and Military Peacekeeping presences, UN Country Team actors, local and international non-governmental organisations (NGOs), civil society organisations, religious institutions and faith-based networks.

Additionally, under Article 8 of UN Security Council Resolution 1888 (2009), a UN Team of Experts on the Rule of Law and Sexual Violence in Conflict was established. It is composed of a Team Leader reporting to the UN SRSG on SVC and experts from the Department of Peace Operations (DPO), the Office of the United Nations High Commissioner for Human Rights (OHCHR), the Office of the SRSG-SVC and the United Nations Development Programme (UNDP), each of whom report to both the Team Leader and their respective entities. The team's main focus and areas of work include: (i) criminal investigations and prosecu-

⁵³⁵ Office of the Special Representative of the Secretary General, Sexual Violence in Conflict, Mission report Official visit of the Office of the SRSG-SVC to Israel and the occupied West Bank 29 January – 14 February 2024, issued March 2024, accessible at <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2024/03/report/mission-report-official-visit-of-the-office-of-the-srsg-svc-to-israel-and-the-occupied-west-bank-29-january-14-february-2024/20240304-Israel-oWB-CRSV-report.pdf>.

⁵³⁶ The MARA was established based on UN Security Council Resolution 1960 (2010).

tions; (ii) military justice; (iii) legislative reform; (iv) protection of victims and witnesses; (v) reparations for survivors; and (vi) security sector oversight.⁵³⁷ Since its inception, the Team of Experts has actively engaged in the Central African Republic (CAR), Colombia, the DRC, Guinea (Conakry), Iraq, South Sudan and other areas. The team's work is especially noteworthy in building strategic partnerships between international, domestic and civil actors.⁵³⁸

3.3 Multilateral Conventions for Strategic Partnerships and Cooperation against SGBV

Two central and recent international law instruments present a milestone in preventing and punishing SGBV domestically, in armed conflict and mass atrocity. First, the 2011 Istanbul Convention Against Violence Against Women⁵³⁹ is an additional impetus for effectively combatting SGBV against women, girls, men and boys in armed conflict.

This regional convention, open only to member states of the European Council and associated states, aims to prevent, protect, prosecute and coordinate policies of fighting impunity for SGBV in member states. Second, in May 2023 in Ljubljana, states issued the Hague Convention on International Cooperation in the Investigation and Prosecution of The Crime of Genocide, Crimes Against Humanity, War Crimes and Other International Crimes, (Mutual Legal Assistance and Extradition or MLA Convention) listing rape and sexual violence as war crimes and crimes against humanity. The Convention seeks to reinforce state cooperation to better fight impunity against international crimes, including SGBV.

⁵³⁷ See UN Team of Experts on Rule of Law and Sexual Violence in Conflict official website, available at <https://www.un.org/sexualviolenceinconflict/our-work/team-of-experts/>.

⁵³⁸ For further reading on UN SRSG and UN Team of Experts tools of action, including an annual report by the UN SRSG, please go to the UN SRSG on SVC website.

⁵³⁹ Council of Europe Convention on preventing and combating violence against women and domestic violence Istanbul, 11.V.2011 [henceforth 'Istanbul Convention'].

3.4 Best Practice Guides against Conflict-Related Sexual Violence

For the past two decades, organisations specialising in organised crime, human rights, human trafficking, counter-terrorism and investigating and prosecuting international crimes have devoted substantial efforts to developing policies and lessons learned for good practice.⁵⁴⁰ In November 2023 the UN Counter-Terrorism Executive Directorate (UN-CTED) released an updated study titled ‘Towards Meaningful Accountability: Sexual and Gender Base Violence Linked to Terrorism’.⁵⁴¹ The report reiterates a broad definition of what constitutes sexual-based violence to include ‘*rape, sexual abuse, forced pregnancy, forced sterilisation, forced abortion, forced prostitution, sexual enslavement, forced circumcision, castration and forced nudity*’. The report recalls that “*the Security Council has recognized that SGBV is known to be part of the strategic objectives and ideology of certain terrorist groups*”.⁵⁴² Seeing the specific nature of terrorism, SGBV committed as part of a terrorist attack require a specific framework when addressing these crimes. Notably, The report underlines six dimensions of ‘SGBV linked to terrorism’, in such a comprehensive manner, that it is worth quoting in its entirety:

*The **first** dimension of SGBV linked to terrorism is where violent extremists and terrorist groups systematically commit SGBV in a manner that is integral to their operation. Examples include Al-Shabaab’s use of abduction, rape, and forced marriage to subjugate those in areas under its con-*

⁵⁴⁰ For further study, see for example UNDOC, dozens of guidelines and handbooks issued in the past decade available here <https://www.unodc.org/unodc/en/justice-and-prison-reform/cpcj-tools-gender.html>; alongside domestic and EU legislation and best practices, see the European Parliament Study on ‘*The legislative frameworks for victims of gender-based violence (including children) in the 27 Member States*’, 2022; OSCE, *Preventing and Addressing Sexual and Gender-Based Violence in Places of Deprivation of Liberty Standards, Approaches and Examples from the OSCE Region*, 2019; IOM, *PROTECT – Preventing Sexual and Gender-Based Violence against Migrants and Strengthening Support to Victims*, 2019; International Commission of Jurists, *Women’s Access to Justice for Gender-Based Violence A Practitioners’ Guide*, 2016; ICC Policy on Gender Prosecution, 2022, ICC Policy Paper on Sexual and Gender-Based Crimes, 2014.

⁵⁴¹ UN Counter-Terrorism Executive Directorate (UN CTED), *Towards Meaningful Accountability: Sexual and Gender Base Violence linked to Terrorism*, November 2023 (‘UN CTED Nov 2023 Report’).

⁵⁴² UN CTED Nov 2023 Report, , p. 8 recalling Security Council resolutions 2242 (2015), 2331 (2016), 2388 (2017) and 2467 (2019).

*trol. The deliberate use of SGBV to spread terror is the **second** dimension. The **third** dimension is where SGBV is used to finance and sustain terrorist activity. This dimension may include using SGBV as a form of compensation and reward to fighters as well as ransoming trafficked and abducted women and girls back to their families. With the **fourth** dimension, terrorist groups deliberately use SGBV as a means of persecuting a group based on its political, ethnic, or religious identity. This dimension is now understood also to include persecution on the basis of gender, and which can be illustrated by targeted attacks by ISIL on members of the LGBTQ+ community.*

*Terrorist groups have also adopted SGBV as part of a strategy for radicalization, recruitment, and retention of its members, and this constitutes the **fifth** dimension of SGBV linked to terrorism. According to one of the interlocutors, an illustration of this fifth dimension that may easily be overlooked is the use of gendered narratives to indoctrinate and radicalize female students into Boko Haram for use as suicide bombers. Information collected for this study also suggests that human trafficking for the purpose of terrorist activities is another example of the fifth dimension. The **sixth** dimension of SGBV linked to terrorism is where these crimes are committed pursuant to and/or in furtherance of an ideology. Ideologies held by terrorist groups that entail SGBV include the subjugation of women in society and the control of their bodies and reproductive health to breed a generation of future group members or promote the survival of one ethnic or racial group over another.”⁵⁴³*

The report takes into account linkages between relevant international and national legal frameworks, identifies the main challenges detected in different contexts of

⁵⁴³ UN CTED Report November 2023, p.9. emphasis in the original text, footnotes omitted.

SGBV committed in linkage to terrorism and identifies best practice through case studies. The report identifies challenges in the criminal justice system, international cooperation, victims' access to justice and gender. According to the report, challenges to effective redress and accountability within the criminal justice system include a lack of coordination between practitioners as where counter-terrorism units are embedded in national or international investigation systems, they often lack expertise in SGBV. A better inter-agency approach is thus needed. Second, the report addresses the challenge of narrow investigative and prosecutorial strategies. There is the urge to act quickly in addressing crimes and a lack of in-depth study on the *modus operandi* of terrorist groups such as ISIL that is sufficiently connected to investigations. There is also little if any support and strategy for investigations focusing on SGBV and terrorist groups:

*Failure to prioritise SGBV linked to terrorism could result in investigators overlooking essential evidence that could support such cases. Experts in investigating SGBV linked to terrorism recommend identifying and investigating all perpetrators, including high-level individuals. This approach ensures a thorough and effective investigation of SGBV, holding all those responsible accountable for their actions.*⁵⁴⁴

Evidentiary challenges are perhaps the most crucial. These include prosecuting SGBV outside their place of commission, domestic impediments and requirements such as proving specific use of force or lack of consent, whereas the general context is an attack and that of violence. There is also a seeming bias among investigators that perhaps there is a higher evidentiary requisite to prove systematic SGBV in any attack as opposed to systematic murder, torture or other crimes. The response should be of equal evidentiary requirements for SGBV as for any other crime. Challenges relating to engaging with victims of SGBV must be addressed. This is

⁵⁴⁴ UNCTED Nov 2023 Report, page 35.

due to the profound trauma, social stigma and the victim's wish to protect themselves and their family and community which could all lead to a lack of engagement by that victim. Creating a safe environment for the victim is crucial. International co-operation is essential in addressing SGBV especially when linked to terrorism by non-state armed groups operating and hiding across jurisdictions. Fighting and changing the social stigma associated with SGBV is also essential and victim reparation mechanisms outside the criminal justice system are ever more significant. These can include transitional justice mechanisms and processes where perpetrators and victims participate in a healing process based on truth and recognition of the wrongdoing, reparations for victims of SGBV linked to terrorism and international, regional or domestic sanctions to ensure there is no haven for members of organisations that employ SGBV as part of their attacks against civilian populations. In December 2023, the ICC issued its Policy on GBCs⁵⁴⁵ aiming to provide stronger guidelines for investigating and prosecuting SGBV compared with the previous 2014 ICC Policy. It takes a survivor-centred trauma-informed approach. The guideline pursues five main objectives following Article 54 of the Rome Statute that imposes a duty upon the ICC Prosecutor when investigating and prosecuting crimes to *'take into account the nature of the crime, in particular where it involves sexual violence, gender violence, or violence against children'*.

4. Victim-led or victim-inclusive case studies to enhance post-conflict

In the challenge to investigate mass crimes and particularly SGBV committed in armed conflict, best practices do stand out. Clear good practices from specific situations of SGBV can be a lighthouse. To briefly name a few notable examples, we can learn from experience addressing: the most widespread and systematic commission of SGBV in armed conflict in the 20th and 21st centuries: the Democratic Republic of

⁵⁴⁵ International Criminal Court, 'Policy on Gender-Based Crimes', December 2023, <https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-gender-en-web.pdf>.

Congo⁵⁴⁶ (DRC) or in Darfur-Sudan, ISIL SGBV committed against Yazidi women and girls in Syria and Iraq,⁵⁴⁷ SGBV committed in Ukraine by Russian occupying forces in Bucha,⁵⁴⁸ or the Colombian example of SGBV-focused justice and the Special Jurisdiction for Peace established as an integral part of the Colombian Peace Agreement.⁵⁴⁹ There is an ever-growing understanding of the need to address SGBV, including in: (1) ensuring a victims-based, trauma-based approach in treatment, evidence collecting and reparations and in ensuring access to justice; (2) enhancing first responder capacity in the immediate response at a location of commission of the crimes (crime scene) which is often also a battlefield and where the number of casualties surpasses the response capacity; (3) training and building expertise through international and domestic cooperation; (4) structural investigations and inter-agency cooperation; (5) strategic litigation for human rights and victims of atrocities including SGBV; and (6) a role for civil society organisations, especially those with existing expertise in international crimes but also civil society specialising in victims of SGBV regardless of a mass context, where SGBV is systematic and the number of victims overwhelming.

Providing an in-depth examination of each of the needs and lessons listed above would require an entirely new chapter devoted entirely to this question, followed by training to implement these insights. Three case studies will highlight the current challenges and the way ahead based on best practice and the general framework developed to address SGBV, for stabilisation and the importance of a strategic, holistic, comprehensive and victim-centred response, including through strategic partnerships.

⁵⁴⁶ See for example Global Survivors Fund, ‘Denis Mukwege’, n.d., <https://www.globalsurvivorsfund.org/who-we-are/our-board/denis-mukwege/>.

⁵⁴⁷ See for a victim led initiative Nadia’s Initiative, ‘About Nadia’s Initiative’, n.d., <https://www.nadiasinitiative.org/nadias-initiative>; followed by criminal trials in Sweden and Germany.

⁵⁴⁸ See for more information Europol’s official website: <https://www.europol.europa.eu/media-press/newsroom/news/europol-participates-in-joint-investigation-team-alleged-core-international-crimes-in-ukraine>.

⁵⁴⁹ See the full text (English Translation) available at <chrome-extension://efaidnbmninnibpcjpcjgclcfndmkaj/https://peaceaccords.nd.edu/wp-content/uploads/2023/02/Colombia-Final-Accord-Text-in-English.pdf>. Chapter 5 of the Agreement establishes the Special Jurisdiction for Peace and the role and rights of victims.

4.1 Colombia's special jurisdiction for peace: A progressive approach to addressing SGBV in armed conflict

Colombia's Special Jurisdiction for Peace (JEP) stands out as a pioneering and progressive mechanism for addressing the complex issue of conflict-related sexual violence. Established as part of the peace agreement between the Colombian government and the Revolutionary Armed Forces of Colombia (FARC) in 2016, the JEP serves as an exemplary model for dealing with SGBV crimes within the framework of transitional justice. By examining the features of Colombia's JEP and drawing parallels with other conflict zones, it is evident that this approach holds significant promise for promoting accountability, reconciliation and justice in the aftermath of conflict-related sexual violence. One of the key strengths of Colombia's JEP lies in its comprehensive framework for accountability specifically tailored to address SGBV crimes. It acknowledges the unique nature of these crimes and ensures that they are not overlooked during the transitional justice process. According to the UN Team of Experts (mentioned above), the special unit for SGBV was one of the positive results of the strategic partnership between the UN Team of Experts and Colombian national authorities.⁵⁵⁰ The team worked with the Office of the SRSG-SVC and UN Women to advocate for the inclusion of sexual violence as a key aspect of the peace and ceasefire agreements between the Government and the FARC in 2016 and the National Liberation Army (ELN) in 2017. The team also provided technical advice on Law 1719 on Access to Justice for Victims of Sexual Violence in Colombia (2014). Within the JEP, there is a specialised chamber known as the 'Special Jurisdiction for Peace Chamber for Recognition of Truth, Responsibility and Determination of Facts and Conduct' (Sala de Reconocimiento de Verdad, Responsabilidad y Determinación de los Hechos y Conductas) dedicated to investigating and prosecuting cases related to SGBV crimes that occurred during the armed conflict.

⁵⁵⁰ See the official website of UN Team of Experts on Rule of Law and Sexual Violence in Conflict available at <https://www.un.org/sexualviolenceinconflict/our-work/team-of-experts/>.

The specialised chamber is tasked with recognising the truth about the committed crimes, determining responsibility and establishing the facts and conduct surrounding these crimes. It focuses on the unique dynamics of SGBV, ensuring that these cases are treated with the specificity and sensitivity they require. Finally, Colombia's JEP is victim-oriented and takes steps to prevent stigmatisation and re-traumatisation. Consequently, it prioritises the inclusion of victims in the justice process, giving them a platform to share their experiences and seek redress. The use of closed-door hearings, protective measures for witnesses and the careful handling of testimonies contribute to creating a safe environment for survivors to come forward. Therefore the JEP is victim-inclusive and trauma-sensitive by design. Time will tell whether its results live up to its objectives.

4.2 ISIS crimes in Syria and Iraq against civilians and the Yazidi minority: a multifaceted response

SGBV and other crimes committed by ISIS are international crimes committed systematically in the pursuit of terrorism. The judicial response to the terror regime implemented by ISIS has been multifaceted. First, in the absence of international jurisdiction over these crimes due to the absence of membership or UN Security Council referral of these crimes to the ICC, the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL UNITAD was created. This is an international investigation and fact-finding mission for ISIS crimes committed in Iraq. In parallel, the International, Impartial and Independent Mechanism (IIIM) for Syria was established fulfilling a crucial mandate for accountability for victims and collecting and preserving evidence that will serve prosecutions internationally and domestically. The IIIM operates independently to investigate and document SGBV crimes perpetrated in Syria since March 2011, including those committed by ISIS. The mechanism employs a hy-

brid model involving international and national collaboration to ensure a comprehensive approach to addressing SGBV and other serious crimes. By focusing on the experiences of survivors, it seeks to provide a platform for their voices and for justice to be pursued. Both UNITAD and IIIM recognise the challenges and needs of victims of SGBV-related crimes and apply specialised procedures. Both institutions have been instrumental in empowering domestic courts of third parties, under the principle of universal jurisdiction. In 2021, a German Court found an ISIL member guilty of genocide in connection with the treatment of Yazidis held hostage, which resulted in the death of a five-year-old girl.⁵⁵¹

Although the charges did not expressly reference the gendered nature of the crime, in dismissing the defendant's appeal in January 2023, the Federal Court of Justice confirmed that

*[i]t was precisely the organised enslavement of women and girls, especially in connection with religious reeducation, that served to destroy the Yazidi religious minority in order to establish an Islamic caliphate. All in all, the approach was capable of bringing about [...] the (partial) destruction of this group as such.*⁵⁵²

The UN Team of Experts also played a significant role in assisting domestic authorities in Iraq to promote accountability for ISIS crimes.⁵⁵³ Finally, *Nadia's Initiative*, helping victims and survivors of SGBV includes judicial action or strategic litigation for victims and implements restorative and reconstructive

⁵⁵¹ Doughty Street Chambers, 'German Federal Court of Justice Confirms the First-Ever Conviction of an ISIS Member for Genocide', 26 January 2023, available at www.doughtystreet.co.uk/news/germanfederal-court-justice-confirms-first-ever-conviction-isis-member-genocide.

⁵⁵² Ibid.

⁵⁵³ United Nations, 'UN Team of Experts on Rule of Law and Sexual Violence in Conflict – United Nations Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict', Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, n.d., <https://www.un.org/sexualviolenceinconflict/our-work/team-of-experts/>.

programmes empowering victims, helping women and girls to rise from their victimhood to mass atrocity.

Nadia Murad, a Yazidi woman who survived captivity under ISIS, has become a prominent voice for her community. In 2018, she was awarded the Nobel Peace Prize for her efforts to end the use of sexual violence as a weapon of war and armed conflict. Her organisation, in cooperation with others, brought attention to the Yazidi genocide, advocated for justice and supported survivors. Murad's advocacy extends beyond raising awareness; she actively engages with world leaders, international organisations and legal institutions to promote accountability for ISIS crimes.

4.3 Systematic SGBV as part of Hamas October 7th attack: strategic partnerships for fact-finding and justice within an ostensibly politicised context

The 7 October attack orchestrated by Hamas and other armed groups included systematic rape and crimes of a sexual nature as part of the attack⁵⁵⁴ This case study focuses on the main challenges, the response and the need to focus on victims' rights in reaching accountability (not revenge), in a politicised and polarised situation and the need to ensure strategic partnerships between stakeholders. First, it is important to address inherent and particular challenges. As in other SGBV situations, challenges in capturing the full nature and scale of crimes remain.⁵⁵⁵ These relate to collecting and preserving evidence where the initial priorities was to secure the area during combat, rescue the survivors, iden-

⁵⁵⁴ See the statement of the ICC Prosecutor on the request for three arrest warrants against M. Mohamed Def, Sinwar and Hanya, 20 May, 2024 at <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>; March 2024 Mission Report of the UN Special Representative of the Secretary General on Sexual Violence in Conflict, Mission report Official visit of the Office of the SRSG-SVC to Israel and the occupied West Bank 29 January – 14 February 2024, ('Patten Report March 2024') for example para. 44 available at: <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2024/03/report/mission-report-official-visit-of-the-office-of-the-srsg-svc-to-israel-and-the-occupied-west-bank-29-january-14-february-2024/20240304-Israel-oWB-CRSV-report.pdf>.

⁵⁵⁵ Patten Report March 2024, para. 56.

tify 3,200 missing people and gather and identify the bodies of 1,200 murder victims.⁵⁵⁶

The initial focus was not on preserving evidence. An additional double-challenge related to the broad dissemination of images of the atrocities over social media alongside extreme polarisation and fake news. This shaped international public opinion and stirred social unrest and violence, including in democracies far from where crimes were committed. Images of the crimes were captured on the body cameras the perpetrators were wearing during the attack and footage of summary executions and torture was posted on social media. This dissemination of the atrocities, including of SGBV, through Telegram and other social media was an element of the attack. The challenge of the widespread use of social media consists of establishing the truth amidst many counter-narratives while protecting victims and survivors from exposure. Additional challenges relate to truth-seeking and the difficulty of holding fair trials while armed conflict is going on and while Hamas is still holding hostages.

In terms of investigations and prosecutions, several jurisdictions are relevant. The primary authority to investigate and prosecute is the State of Israel but trials are at a standstill until a ceasefire is reached. Other jurisdictions, both international and domestic, are relevant to investigating and prosecuting international crimes.⁵⁵⁷

The ICC has jurisdiction and victims have been invited to express their views and concerns relating to the Prosecutor's request to issue arrest warrants.⁵⁵⁸ German, French, US, Israel, UK and other jurisdictions are also seized. Faced with

⁵⁵⁶ See Human Rights Watch (HRW): official summary of its July 2024 report "Human Rights Watch found evidence of acts of sexual and gender-based violence by fighters including forced nudity, and the posting without consent of sexualized images on social media..." available at <https://www.hrw.org/report/2024/07/17/i-cant-erase-all-blood-my-mind/palestinian-armed-groups-october-7-assault-israel>.

⁵⁵⁷ The author is leading a pro bono strategic litigation front for the victims and established a Non-Profit to ensure sustainable judicial action named October 7 Justice Without Borders (for more information see october7justice.org/en).

⁵⁵⁸ Both Palestinian and Israeli victims expressed their views. For an example of victims' views submitted by Victims Representative of the Hamas attacks see, ICC-01/18-333, Views, Concerns and General Interests of Victims of the October 7 Attack under Article 68(3), 12 August 2024.

on-going challenges, the response needed to address SGBV relates to strategic partnerships between domestic, grassroots civil society organisations and international or third-state entities. The response must be victim-centred, as only a response relying on universal, established principles can provide a road map for independent and impartial justice. Given the politicised situation, victims' rights can be easily instrumentalised, presented as competitive between the suffering of innocent Palestinian civilians and innocent Israeli civilians: 'In a competition for pain, no one wins', Jon Goldberg-Polin, the father of since-murdered hostage, Hersh Golberg-Polin stated at a US election event. Faced with this reality, victims from all sides must be treated equally, regardless of the identity of the victim or the perpetrator.

All belligerents are bound by international humanitarian law and prohibited from committing acts amounting to war crimes or crimes against humanity. International and domestic investigators must be guided by universal humanitarian principles to alleviate all human suffering to investigate and prosecute international crimes. Most of all, investigative and prosecutorial authorities must exercise jurisdiction independently, impartially and based on tangible evidence. To begin any judicial action, there is dire need to collect and preserve evidence. Despite early outcries that all victims of SGBV were murdered and all evidence was lost or burned, forensic evidence remains.

The office of the UN Special Representative of the Secretary-General on Sexual Violence in Conflict concluded that there were 'reasonable grounds to believe that conflict-related sexual violence occurred during the October 7 attacks in multiple locations across Gaza periphery, including rape and gang rape, in at least three locations'.⁵⁵⁹ The UN Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem and Israel (UN Commission of Inquiry) conducted an investigation into crimes including those committed dur-

⁵⁵⁹ See Patten Report, para 12.

ing the 7 October assault. In the Commission's June 2024 report, it wrote that it had 'documented cases indicative of sexual violence perpetrated against women and men in and around the Nova festival site, as well as the Nahal Oz military outpost and several kibbutzim, including Kfar Aza, Re'im and Nir Oz'.⁵⁶⁰

Strategic partnerships between international and domestic official and civil society organisations are needed to establish the truth, implement victims' rights and ensure accountability for SGBV under the highest judicial standards.

5. Conclusion: the state of the art and prospects ahead for stabilisation and reconstruction in SGBV mass atrocity

This chapter has provided a historical overview of the recognition of the threat posed by SGBV in armed conflict and mass atrocity to international peace and security and covered key international case law that contributed to this understanding.

Addressing the reality of widespread or systematic commission of SGBV is important in creating stability and preventing future mass atrocity. The chapter also highlighted the importance of recognising that when mass atrocity crimes are committed all are targeted but women and girls are targeted in additional ways for different reasons, including for the role they hold in traditional and modern societies. This is not to say that men and boys are not also subjected to gender-related crimes. The chapter reviewed the main tools in the hands of practitioners such as UN Security Council Resolutions, designated UN mechanisms and their tools as well as multilateral treaties providing a framework and guidelines which promotes state cooperation and strategic partnerships with international, domestic and civil society actors. Any action for redress must be led by the fundamental principle of 'do no harm'. Practitioners interacting with victims need to acquire the tools

⁵⁶⁰ Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel (COI) – Advance unedited version (A/HRC/56/26), para 25.

to help their actions be constructive, avoid re-traumatizing victims, avoid corruption or duplication of evidence and provide victims with the necessary psychological support needed to ensure their resilience. Three case studies were highlighted and others mentioned as were victim-led initiatives for accountability. The courage of victims and those supporting victims stands out. The need to ensure norms and institutions fit the realistic needs of accountability, including avoiding barriers to justice such as requiring a higher threshold to prove the systematic nature of SGBVs, erasing the burden on victims to prove they did not consent and adopting a broad enough definition of SGBV to ensure accountability are all needed steps.

Experience has shown that accountability efforts must be strategic and multifaceted. Multiple actors can play a constructive role in partnership in support of victims, in fact-finding missions and in prosecuting crimes. Most recent events in Syria, Ukraine and Israel show that SGBV is not part of the past. Systematic and widespread SGBV committed in those regions are still to be accounted for. Efforts to collect and preserve evidence, including direct evidence, digital evidence and with the specific expertise in collecting evidence of SGBV, avoiding re-traumatization, contamination and duplication of evidence is key in any mass atrocity, and even more so in relation with SGBV, where victims suffer additional stigmatisation and are often reluctant to step forward and expose their painful experience. Strategic partnerships are key and international, interstate and inter-agency cooperation will be important to address the crimes committed and ensure stabilisation and reconstruction.

Punitive efforts are not enough. Prevention must be the focus of considerable resources in schools, youth movements, the public sphere, social media and politics. There must be zero tolerance for SGBV in daily life, the workspace, armed conflict and in any movement for national liberation. Governments participating

in hostilities must speak and act clearly against gender-based discrimination in their jurisdictions and must stand against inhumane acts committed in or outside their territory, regardless of the politics. Corporate entities also have a role to play in implementing a risk-based approach to avoid or end potentially funding state or non-state armed groups involved in any such crimes. If the free world based on democracy, basic freedoms and the rule of law holds a chance of surviving the shift of paradigms this generation is facing, universal values must be implemented fearlessly, demonstrating unconditional humanity in front of atrocity crimes, including those of a sexual nature. The response must be of equal standard, victim-centred and trauma-informed and placing women as agents of stabilisation, applying an inclusive approach.

Suggested further reading

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