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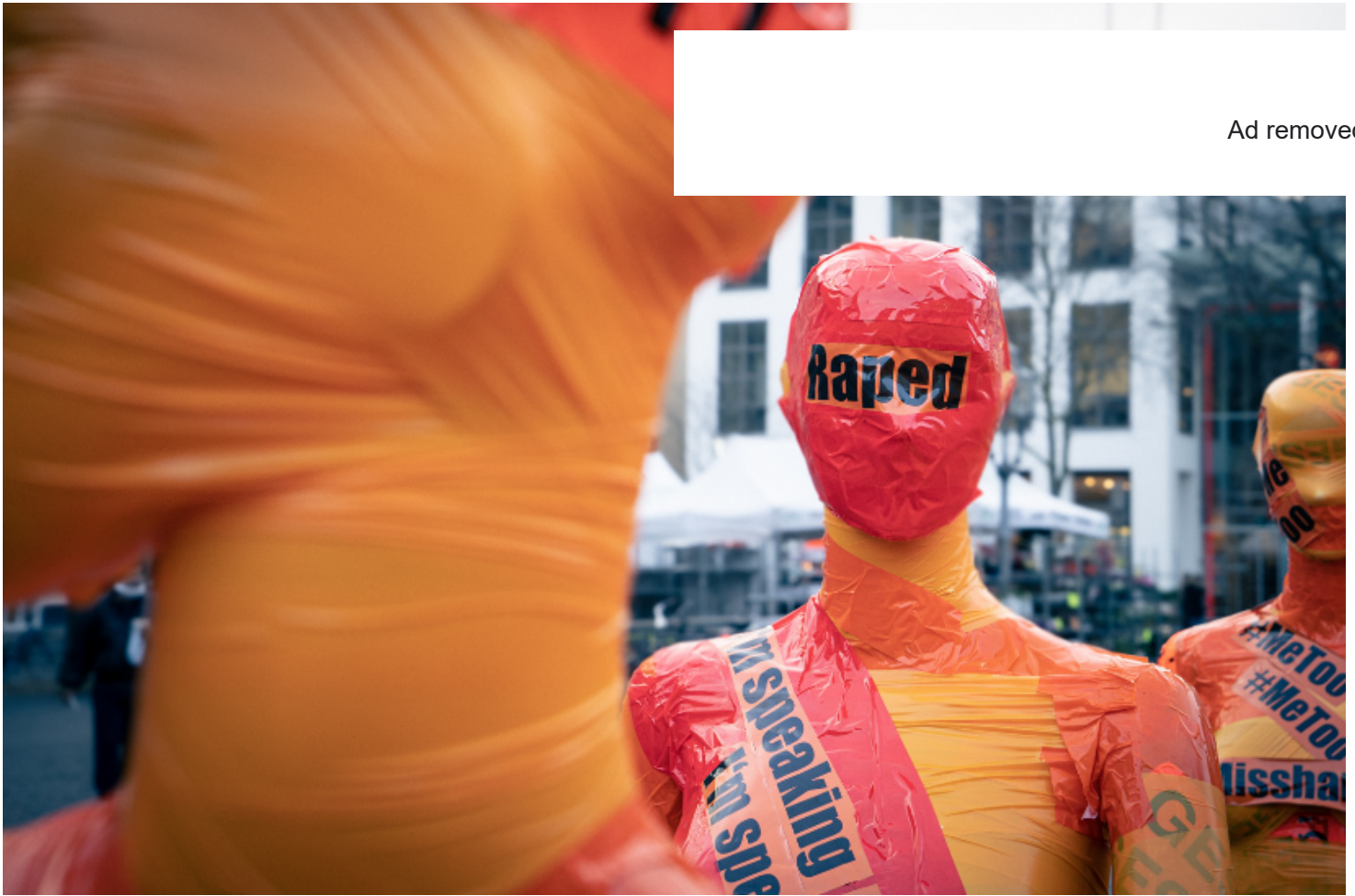
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ANALYSIS RIGHTS

Where Does International Criminal Law Stand When It Comes to Sexual and Gender-Based Violence?

Despite confirmation of charges of sexual and gender-based violence against women and men, the ICC has thus far had a poor track record in convicting suspects for these crimes.

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This photo was taken in Bonn, displaying the work of an artist against sexual violence. Photo: Mika Baumeister/Unsplash



Saumya Uma



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GENDER LAW RIGHTS WOMEN 06/SEP/2021

This is the fifth in a series of articles on the International Criminal Court (ICC). The Rome Statute creating the ICC entered into force on July 1, 2002 and the court is now in its 20th year. To mark the occasion, The Wire is publishing a series of articles evaluating its performance over the past two decades. See also: [Part 1 \(Afghanistan\)](#) | [Part 2 \(Powerful states staying above the law\)](#) | [Part 3 \(Rohingya crisis\)](#) | [Part 4 \(Palestine\)](#)

Recent reports of Taliban's atrocities against Afghan women and girls – **including forced marriages and sexual slavery** – have shone the spotlight once again on sexual and gender-based violence in contexts of armed conflict. The challenges to justice for victims in situations of mass crimes, such as stigma, victim blaming, insecurity, fear of reprisals and lack of support services are further compounded by the restriction of mobility due to the COVID-19 pandemic.

While the global community works towards creating an enabling environment for seeking redress, justice through national legal mechanisms is not always possible, particularly in contexts of mass crimes. This is because the alleged perpetrators wield political power and clout, or are backed/shielded by the power holders, often through state or institutional machinery. In such contexts, the possibilities for justice through international mechanisms become significant.

From abject neglect to historical recognition in law

Robert Jackson, the chief prosecutor of the Nuremberg trials, chose not to prosecute the Nazi officials for sexual and gender-based violence, despite possessing evidence for the same. Japanese leaders who were prosecuted by the Tokyo Tribunal were never made accountable for the 'comfort women' phenomenon by which over 80,000-100,000 women from China, Korea, the Philippines and other Asian countries that they colonised, were forced systematically into sexual slavery to "serve" the Japanese army officials.

Decades later, in the 1993 and 1994 respectively, the **Statute of the International Criminal Tribunal for former Yugoslavia (ICTY)** and the **Statute of the International Criminal Tribunal for Rwanda (ICTR)**, explicitly included ‘rape’ as a crime against humanity. The statutes also recognised “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault” as war crimes. Various forms of sexual and gender-based violence, such as mass and systematic rape, forced prostitution, forced pregnancy and sexual slavery formed the backbone of the genocide and ethnic cleansing in Bosnia on Bosnian Muslims and Croats in 1995. The Rwandan genocide consisted of Hutus’ targeted and brutal sexual attacks, primarily on Tutsi women, due to their intersectional identities of gender and ethnicity. For this reason, the provisions in the two statutes were of immense importance.

Yet, prosecuting offenders for sexual and gender-based violence was not easy. In the ICTR, Judge Navaneetham Pillay **directed** the prosecutor to include charges of sexual and gender-based violence against Jean Paul Akayesu as crimes against humanity. She questioned the prosecutor’s failure to do so in the face of overwhelming evidence of rape and sexual violence during the targeted attacks against Tutsis in Rwanda.

Subsequent judgments of the ICTR developed the jurisprudence further. In *Nahimana et al*, the tribunal said that the act of spreading propaganda that incites sexual crimes of a targeted group amounted to persecution of the group.

In the case of *Laurent Semanza*, the tribunal held that sexual violence constituted torture, and convicted him for instigating rape and torture, and for personally committing torture. One may wonder why it took the international law so many decades to acknowledge rape as torture, when it is something that common sense tells us. However, under international law, torture as a crime has acquired a special status as *jus cogens* (a universally recognised norm of international law), giving rise to an obligation upon all states to take action against the perpetrators.

The slow recognition of sexual violence as torture is an outcome of entrenched patriarchy in international law, that treated sexual violence (that predominantly targeted women) as lesser crimes and as a necessary byproduct of conflicts.

Broader Recognition in the Rome Statute of the ICC

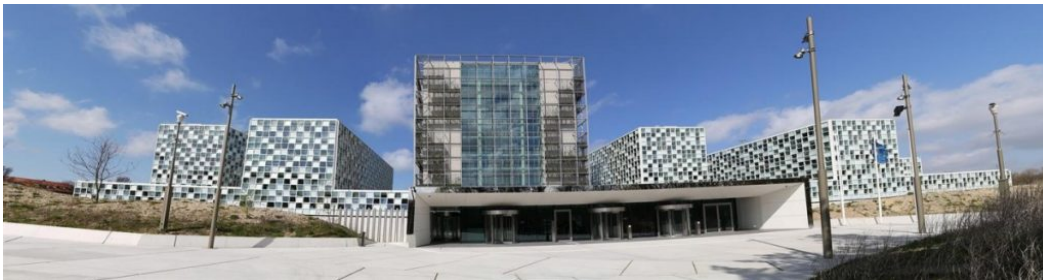
In 1998, *the Rome Statute* establishing the International Criminal Court (ICC) was adopted by the global community. ICC is the first international judicial institution of a permanent nature that is capable of prosecuting individuals for war crimes, crimes against humanity, genocide and the crime of aggression.

When the ICC Statute was being formulated, a large number of women's rights activists from various parts of the world participated in the process under the aegis of Women's Caucus for Gender Justice, and brought the lived experiences of attacks faced by women to inform the creation of the legal framework for the ICC. It had the added legacy of decisions from the ICTY and ICTR that provided directions for

addressing sexual and gender-based violence through international law.

This resulted in a recognition of a broader set of crimes under the umbrella term ‘sexual and gender-based violence’ as crimes against humanity. These include rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and any other form of sexual violence of comparable gravity, as well as persecution on grounds including of gender.

Significantly, these provisions apply to all genders. Rules of procedure and evidence were also formulated, taking into consideration the challenges faced by victims and survivors of such forms of violence. Expertise on sexual and gender-based violence among the key personnel of the court was included as criteria to integrate a gender perspective into its institutional functioning.



The International Criminal Court. Photo: www.icc-cpi.int

A closer look at ICC’s decisions

In subsequent years, experience has shown us that recognising acts of sexual and gender-based violence as ICC crimes is the first important step, but does not, in itself, guarantee that perpetrators will be held accountable.

For example, in 2016 the **trial chamber of the ICC** had convicted *Jean Pierre-Bemba Gombo* (Bemba) – a senior military commander in the Central African Republic (CAR). It held him guilty of crimes against humanity (murder and rape) and war crimes (murder, rape and pillaging) committed in

2002-03. He was held criminally responsible for sexual violence committed by officials under his control through the application of the principle of **command responsibility** and sentenced to 18 years in prison.

The conviction was hailed by many as a huge doctrinal advancement for the recognition of sexual violence as a staple of war, by international criminal law. After all, it was the first conviction by the ICC for sexual and gender-based violence.

However, in 2018, **the appeals chamber reversed the conviction**. It decided that although rampant sexual violence was present in the situation, there was inadequate evidence to link Bemba with the same, and so, his conviction for such violence through the principle of command responsibility was overturned. By a majority of 3:2, Bemba was acquitted of all charges including those related to sexual and gender-based violence. This was a major setback to prosecutions for such crimes in the ICC.

In another case, **Thomas Lubanga** was convicted by the ICC for conscription, enlistment and active use of child soldiers in Ituri, Democratic Republic of Congo (DRC). Approximately 30,000 child soldiers had been abducted or enlisted in Ituri by Lubanga's faction, in order to keep the conflict alive.



A former child soldier holds a gun as they participate in a child soldiers' release ceremony, outside Yambio, South Sudan, August 7, 2018. Photo: Reuters/Andreea Campeanu

Among them, the girl child soldiers were considered as “trophies” for good behaviour by male soldiers (leading to their “marriage” to them), and girl soldiers were often recruited in order to provide sexual services to them. The judgment is a landmark one on child soldiers.

However, when the appeals chamber of the ICC had to determine which acts would amount to an “active use of persons under 15 in hostilities” – a war crime under international law – the prosecutor failed to bring sexual and gender-based violence against girl child soldiers within its ambit.

The intersections between the crime of using child soldiers and crimes of sexual and gender-based violence were not brought by the prosecutor before the judges. The judges felt constrained by this, and declined to make a determination of whether or not systematic sexual abuse of girl child soldiers would amount to an “active participation”.

Needless to say, an opportunity for breaking new ground in addressing the intersectional identities of girl child soldiers and the consequent marginalisation and vulnerability of girl child soldiers in international law was lost.

In the case of *Germain Katanga*, he was charged with orchestrating an attack on the village of Bogoro in the region of Ituri in DRC, in February 2003. ICC's trial chamber convicted him as an accessory to murder, pillaging and destruction of property as war crimes and crimes against humanity. However, it unanimously acquitted him of being an accessory to rape, sexual slavery and the use of child soldiers.

Three women testified of having been raped and sexually enslaved during the attack on Bogoro. The trial chamber found their testimony credible, and concluded that rape and sexual slavery had indeed taken place. However, it declined to hold Katanga responsible for the crimes as it did not find convincing evidence to conclude that such crimes formed part of the common purpose of the attack. While he was convicted of other crimes (such as murder, attacking a civilian population, destruction of property and pillaging), it appeared that the trial chamber required a higher standard of evidence to prove the deliberate intention of Katanga to commit sexual and gender-based crimes as compared to such other ICC crimes.

The Lord's Resistance Army (LRA) is an armed group that rebelled against the Ugandan government. Former commander *Dominic Ongwen* was convicted by the trial chamber in February 2021 and sentenced to 25 years of imprisonment thereafter.

Ongwen was convicted of crimes including sexual and gender-based crimes such as forced marriage, torture, rape, sexual slavery, enslavement, forced pregnancy and outrages upon personal dignity he committed against seven women

who were abducted and placed into his household. He was also found guilty of several other crimes that he committed against girls and women within the Sinai brigade, namely forced marriage, torture, rape, sexual slavery and enslavement; and the crime of conscripting child soldiers into the Sinai brigade and using them to participate actively in hostilities.

Significantly, over 4,000 victims and survivors were allowed to participate in the trial, represented by three teams of legal representatives.



Dominic Ongwen, a former senior commander in the rebel Lord's Resistance Army, enters the hearing room at the International Court in The Hague, Netherlands, December 6, 2016. Photo: Reuters/Peter Dejong/Pool/File Photo

While the *Ongwen* conviction gives renewed hope for the possibility of justice for victims of sexual violence, it is too premature to conclude that this is a new positive trend in

ICC's convictions for sexual and gender-based violence, and not a one-off exception from the otherwise poor track record of the ICC. The significant aspect that perhaps facilitated his conviction was that he was a direct perpetrator of those crimes.

Assigning criminal responsibility to military commanders and civilian leaders

Since the ICC prosecutes those most responsible for the commission of serious crimes, these are usually military commanders and civilian leaders of the government and non-state groups. In most instances, they would not be the direct perpetrators of sexual and gender-based crimes, but would incite, goad, facilitate, aid, abet, direct and/or provide support to their subordinates to perpetrate such crimes, or tolerate/turn a blind eye when the subordinates actually commit these crimes.

Both *Bemba* and *Katanga* illustrate the difficulty in securing convictions and pinning criminal culpability of leaders for such violence, as an indirect co-perpetrator or as a commander/superior.

In *Bemba*, the application of the principle of command responsibility to a context of sexual and gender-based violence came to the fore. The principle imposes three distinct responsibilities on commanders (in a military structure) and superiors (in a non-military structure) once the effective control of the leader over the subordinates is established: preventing the commission of crimes; repressing the commission of crimes; and submitting the matter to competent authorities for investigation and prosecution.

A failure of the leader to discharge any of these responsibilities may entail criminal responsibility on the

commander/superior for crimes committed by the subordinates.

In *Bemba*, the trial chamber heard the testimony of 77 witnesses, including seven expert witnesses, and reviewed 733 items of documentary evidence over a period of four years before concluding that Bemba had effective control over his forces in CAR and had failed in discharging the three responsibilities. However, little of the appeals chamber judgment engages with the issue of whether or not Bemba took adequate measures to address allegations of sexual crimes by his subordinates. This fatal failure resulted in his acquittal for crimes of sexual and gender-based violence by the appeals chamber.

Pending trials at the ICC

A trial that is pending at the ICC and important to watch out for prosecution of sexual and gender-based crimes is the *Al-Hassan* case.

Al-Hassan was the *de facto* chief of the Islamic police, responsible for the brutal and strict implementation of religious rules in Timbuktu, Mali in 2012-2013. He is charged with perpetrating various ICC crimes in furtherance of a

policy designed by the armed group Al-Qaeda in the Islamic Maghreb (AQIM).

The crimes that he has allegedly committed include crimes against humanity (torture, rape, sexual slavery, other inhumane acts, including inter alia, forced marriages and religious and gender-based persecution) and war crimes (torture, cruel treatment, outrages upon personal dignity, passing of sentences without previous judgment pronounced by a regularly constituted court affording all judicial guarantees which are generally recognised as indispensable, intentionally directing attacks against buildings dedicated to religion and historic monuments, rape and sexual slavery).

The trial commenced in July 2020 and is ongoing, with the presentation of evidence of the prosecution.

Situations under investigation

In a number of situations related to ICC's ongoing investigation, forms of sexual and gender-based violence constitute some of the core crimes perpetrated by the accused persons. These include countries such as Afghanistan, Colombia, Democratic Republic of Congo, Mali, Myanmar, Nigeria and Uganda.

In particular, investigation of all actors – Taliban, Afghan government officials and international armed forces – in the Afghan situation will be of utmost importance. If the ICC prosecutor investigates the acts of Central Intelligence Agency (CIA) on Afghan nationals, as announced, many skeletons such as details of torture, including sexual violence against the detainees, may tumble from the closet.

A 528-page **US Senate Intelligence Committee report on the CIA's detention and interrogation programme**, released in December 2014, contains details of torture including anal

insertion of feeding tubes into detainees leading to rectal prolapse. It is important that the officials responsible are made accountable for such heinous crimes.

In 2019, a **UN Independent International Fact Finding Mission** found that Myanmar's military used sexual and gender-based violence to terrorise and punish ethnic minorities – the Rohingyas. They inflicted such violence on women, girls, men, boys and transgender people. Hopefully, the ICC prosecutor will draw upon such reports during the ongoing investigation into Myanmar.



Rohingya refugee women wait to collect relief vouchers at Kutupalang Unregistered Refugee Camp in Cox's Bazar, Bangladesh, February 27, 2017. Credit: Stringer/Reuters

Sexual and gender-based violence against men

Sexual violence against men and boys has been rampant in some situations but has not gained much traction at the ICC. "Rape" in the ICC Statute is defined in a gender neutral manner, and includes rape of persons belonging to all genders.

ICC's **Elements of Crimes** document defines rape and sexual violence in a manner that includes rape of men.

Acts of sexual and gender-based violence are perpetrated on persons belonging to all genders in contexts of conflicts and mass crimes. Reported acts of sexual violence against men and boys in cases before the ICC include rape, forced nudity, forced circumcision, forced castration, mutilation of genitals and being forced to watch sexual violence against loved ones.

In *Bemba*, the decision of the pre-trial chamber on confirmation of charges included gang-rape of a man by three soldiers at his house in the presence of his wives and children. Additionally, his daughters were raped in his presence. The ICC prosecutor included both these incidents as rape. However, the appeals chamber acquitted him of all charges of rape and sexual violence.

In *Lubanga*, a male child soldier testified in the ICC that he was forced to rape. However, no charge in this regard was brought against the accused. In the same case, reports of sexual violence against child soldiers – both male and female – were rampant; however, no prosecutions were brought in the intersecting crimes of sexual violence against male child soldiers.

It is a matter of regret that the trial chamber of the ICC **denied the request** of the victim's legal representatives to allow the testimony of three victims on sexual violence perpetrated by *Ongwen* on men and boys. The rejection was on the ground that it did not fall within the scope of the charges that Ongwen faced (sexual and gender-based violence against women and girls). The chamber of judges said that they did not consider hearing the evidence from male victims of sexual violence to be "appropriate and necessary for the determination of truth".

During post-election in Kenya, Uhuru Muigai Kenyatta – the former deputy Prime Minister of Kenya – was charged with rape and sexual violence against men as crimes against humanity, among many other charges, by the ICC.

The ICC prosecutor charged Kenyatta with forced circumcision of men and forced amputation of the penis as “other sexual violence”, but the pre-trial chamber **rejected** that such crimes were sexual in nature, and said they ought to be prosecuted as “other inhumane acts”. It said “not every act of violence which targets part of the body commonly associated with sexuality should be considered an act of sexual violence”. Charges against Kenyatta were subsequently withdrawn due to insufficient evidence, after key witnesses dropped their charges against him due to a widespread threat to witnesses.

These cases indicate that having gender neutral provisions on rape and other forms of sexual violence do not necessarily guarantee the prosecution of suspects for sexual and gender based violence committed on men and boys. Gender stereotypes about who can be a victim of such forms of violence, and what acts constitute these crimes seem to prevail among the ICC’s chamber of judges. At the same time, recent reports document the frequent occurrence of targeted sexual



Representative image. Photo: Unsplash/Salman Hossain Saif

violence against men and boys, as well as transwomen, in conflict and post-conflict situations, including in **Syria**.

While sexual and gender-based violence against women is often underreported, it is believed that those against men and boys is even more so, due to the social construction of masculinity and the consequent stigma around male vulnerability.

This poses an added challenge for investigation and prosecution of sexual and gender-based violence against men and boys.

Gender-based persecution

In the close to two decades of its functioning, the ICC has no decisions on gender-based persecution whatsoever. *Al Hassan* (discussed above) is the first instance of a suspect being charged by the ICC with gender-based persecution as a crime against humanity.

The crime of persecution, as defined by the ICC statute, involves the intentional and severe deprivation of fundamental rights contrary to international law, by reason of the identity

of the group or collectivity. The identifiable group or collectivity includes a gender-based one. The ongoing ICC investigations in Myanmar and other situations may lead to charges of gender-based persecution against suspects.

The definition of ‘gender’ in the Rome Statute is a contentious one. An active resistance by some countries to include crimes against persons from LGBTQI+ communities within the ICC Statute led to the following provision: “For the purpose of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society [Article 7(3)].” The inclusion of the societal context holds promise that sexual and gender-based violence targeted at transgender, gender non-conforming and non-binary persons, would also be addressed by the ICC at a future point in time. The ICC prosecutor’s 2014 [policy paper on sexual and gender-based crimes](#) aligns with this approach.

The [atrocities committed by members of the Islamic State on Yazidi women](#) in Syria could also constitute gender-based persecution, as it involves systematic rape, sexual slavery and other targeted sexual attacks based on intersectional identities of gender, race, ethnicity and religion.

Iraq and Syria are both non-state parties to the ICC Statute, and a referral to the ICC through the UN Security Council is unlikely due to past records of China and Russia in [vetoing](#) a referral of the Syrian issue to the ICC. Yet, if jurisdictional hurdles can be overcome, there is a glimmer of hope that members of the Islamic State may be held accountable for their horrific crimes.

Prosecution and conviction of such members would not only render justice to thousands of victims and survivors, but also establish important legal precedent and standards on gender-based persecution.

Miles to go for international justice

Throughout the years when the Rome Statute was formulated, advocacy groups on women's rights worked tirelessly and in a concerted manner, in an effort to undo the historic injustice in recognising sexual and gender-based crimes in international law. The resultant provisions that formed a part of the Rome Statute of the ICC, adopted in 1998, were considered a triumph for the groups. After nearly two decades of the ICC's treatment of such crimes, it is disappointing that the legal provisions have not translated into successful prosecutions. A chasm exists between the written law and its application to ground realities, by a court which is expected to have expertise on sexual and gender-based violence.

The ICC has considerable work ahead in inspiring the confidence of victims and survivors, that it is a credible institution that will end impunity for sexual and gender-based violence. Combined with a failure to effectively implement [UN Security Council's Resolution 1325](#) on women, peace and security, [the Beijing Declaration and Platform for Action](#) and the [Sustainable Development Goals](#) (particularly Goal 5 on gender equality and Goal 16 on peace and justice), it appears that international standards and mechanisms have cumulatively failed to protect and promote women's rights globally.

Dr. Saumya Uma was a co-founder of ICC-India: an anti-impunity campaign on the International Criminal Court and served as its national coordinator in the years 2000-2010. She is currently a professor of law at Jindal Global Law School, O.P. Jindal Global University, India and a Board member of Women's Regional Network. The views expressed are her own.

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