

Project Brief

Improving cooperation in the prosecution of conflict-related sexual violence *Understanding the merits of cooperation between civil society organizations and judicial mechanisms*

Introduction

While the prosecution of sexual violence as an international crime has gained steady ground, the path to justice experienced by victims is nevertheless complicated and difficult. This brief opens up discussions relating to the specific challenges of cooperation between civil society organizations (CSOs) and judicial mechanisms in the prosecution of conflict-related sexual violence. It explores a number of cross-cutting issues which may serve as obstacles to cooperation, together with the merits of cooperation, but also its limitations.

The importance of cooperation between these stakeholders emanates from the substantial activity of CSOs during, and in the aftermath of conflict, both at a local, national and international level. Sexual and gender-based crimes can be particularly difficult to prosecute as international crimes given the lack of evidence. In this respect, therefore, judicial mechanisms look to further cooperation with CSOs. Such organizations are often seen as bridging the gap between courts and local communities; however, this role has expanded over the years to encompass a wide range of functions. For instance, CSOs can play a central role before, during and even after an investigation, working closely with victims in the affected region. Importantly, they may be in a better position to educate communities on the work of the court, about the nature of the sexual violence crimes and the prosecution's role in investigating these crimes. Others may address local and cultural practices, as well as the stigma associated with being a victim of sexual violence, which often prevent recourse to legal justice mechanisms.

In the same vein, however, it must also be recognized that some activities of CSOs could in fact harm a court's investigation. For example, by gathering multiple statements from a victim or witness, these organizations may create difficulties when it actually comes to testifying in court proceedings (Human Rights First, p. 1). With such challenges in mind, the issue of cooperation has been continually identified as an area in which improvement can and must be made.¹ Improvement, in this regard, does not have to lead to increased cooperation in all given cases, rather, the circumstances under which cooperation would be most beneficial must be defined. Accordingly, and benefitting from years of prosecutorial experience, a number of organizations have published best practices of investigation and prosecution of conflict-related sexual violence. Yet, aligning the work of those involved and the manners in which

¹ See for example, the current ICC topic on its online forum "How can the Office of the Prosecutor of the International Criminal Court secure better cooperation from those individuals and organisations on the ground responding to Sexual and Gender-based Violence, in order to facilitate its independent investigations and gain access to reliable evidence necessary to effectively investigate and prosecute such crimes?" - available at < <http://iccforum.com/sgbv>>.

they could cooperate during prosecution of sexual crimes signifies a need for further discussion.

Existing best practices for the prosecution of sexual violence

Judicial mechanisms and CSOs must come together to shape the modalities of cooperation in collaborative manner. One particular issue in this regard is the recognition that CSOs have varying and broad mandates which may or may not include cooperation with judicial mechanisms, and consequently both actors must decide the terms of their engagement (OSJI, 2015, 10). Moreover, while best practices are intended to be used by all parties, exactly *what kind* of cooperation and *when*, is still a matter to be discussed and progressed.

The *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*,² for instance, has been intended for the use by justice actors and organizations faced with the challenge of documenting sexual violence as a crime under international law. Accordingly, at any given time, there may be multiple efforts underway to collect, record and analyze information on sexual violence. This may be particularly true in areas where sexual violence is believed to be highly prevalent or where official national or international investigations have been launched. In such instances, the need for cooperation assumes evermore importance in light of concerns such as ‘assessment fatigue’, whereby the local communities become saturated with multiple inquiries and intrusions (International Protocol, p. 36). The Protocol provides guidelines for practitioners to coordinate their investigative efforts with one and other, yet evaluations must be made to ascertain whether, in practice, coordination is in fact possible in the defined circumstances.

Best practices have also emerged through international criminal courts and tribunals. For instance, the International Criminal Tribunal for Rwanda has produced a *Lessons Learned* manual for the investigation and prosecution of sexual violence crimes in post-conflict regions. It proposes the implementation of a global strategy and establishment of a unit or working group responsible for coordinating sexual violence cases (ICTR Manual, pp 8-17). The working group would be drawn from investigation, prosecution and witness support teams, which may hail from different offices and agencies. This working group would play a leading role in establishing or maintaining partnerships with other organizations to develop and implement systems for the welfare and protection of victims and witnesses.

With such recommendations in mind, the ICTR recognizes the indispensable role CSOs can play in coordinating support efforts, as well as educating communities on the nature of the crimes committed and the prosecution's role in bringing perpetrators to justice. The importance of this potential input has also been acknowledged by the ICC, as stipulated in its *Policy Paper on Sexual and Gender-based Crimes*. It also seeks to support and strengthen cooperation with CSOs, particularly those which have experience in documenting sexual and gender-based crimes and working with victims of these crimes (ICC Policy Paper, paras. 104-

² Issued by the UK Foreign & Commonwealth Office and was part of the Global Summit to End Sexual Violence in Conflict.

111). More recently, Serge Brammertz and Michelle Jarvis of the ICTY, have published a book *Prosecuting Conflict-Related Sexual Violence*, documenting the experiences, achievements, challenges and fundamental insights of the OTP in prosecuting such crimes. It provides an essential resource for investigators and criminal lawyers, human rights fact-finders and policy makers, and exposes the need for determined and increasingly sophisticated strategies in order to overcome the ongoing obstacles in prosecuting sexual and gender-based violence.

The Institute for International Criminal Investigations has released *Guidelines for Investigating Conflict-related Sexual and Gender-based Violence against Men and Boys*. These aspire to assist criminal justice and human rights investigators, reporters and monitors across the globe to fully and properly monitor, document and investigate sexual and gender-based violence against men and boys. The guidelines are designed to complement existing relevant investigation frameworks and practices, but accommodate for the growing awareness and sensitivity towards sexual violence against men and boys. With this in mind, it focuses on capacity-building and awareness in organizations such as human-rights NGOs. However, while the guidelines are intended for the use of those who would require little explanation and commentary within this field (ICII Guidelines, para. 1.10), this might in fact impede its use in light of the particular controversy surrounding the prosecution of sexual violence against men.

While the abovementioned best practices are not exhaustive, they all support a more integrative approach towards sexual violence prosecution in the form of enhanced coordination and understanding between the stakeholders involved. Importantly, though several of these recommendations emerge from the experiences of the court, they appear weighted towards the needs of the prosecutors and do not incorporate the perspectives of the CSOs themselves. Consequently, aligning the use of such practices by the relevant actors is a difficult task and requires further discussions.

Cross-cutting issues affecting cooperation between CSOs and judicial mechanisms

Underlying assumptions of sexual violence prosecution

The manner in which sexual violence is prosecuted ultimately shapes the narrative for both the crimes and context in question. Within the justice sector, the legal narrative created through prosecution arises from legal as well as factual findings, based on evidence that prosecutors, witnesses and others submit before the courts (Mibenge, pp. 3-4). Such narratives, however, are prone to bias and are shaped significantly by the overwhelming emphasis on particular forms of sexual violence against a specific group of victims. For instance, narratives such as the ‘perfect victim’ are solely based upon binary assumptions of a male perpetrator and a female victim of rape (Mibenge, p. 8). With this in mind, the influence and participation of NGOs in the operational work of international courts may also take the form of criticism that challenges the strict prosecutorial definitions of sexual violence in armed conflict.

In a similar vein, sexual violence against men and boys has been largely ignored in the international arena, and while the UN continues to stress the importance of gender sensitivity, its policy prescriptions appear to treat wartime sexual violence as a phenomenon that affects mainly women or girls (Human Security Report, p. 44). Additionally, if the abuse is recognized, it may not always be seen as *sexual* violence, for the issue is often buried under the rubric of 'abuse' or 'torture'. For instance, castration is often seen as 'mutilation' and rape as 'torture', yet importantly, reports of organizations such as Amnesty International and Human Rights Watch highlight the sexual nature of such crimes and address the reluctance to acknowledge them as such (Sivakumaran, pp. 256-260).

Underlying assumptions also exist in relation to the specific crime of sexual violence. For example, sexual slavery is often indicted as multiple incidents of rape which subsequently dismisses the analysis of the very crime itself and avoids a broader gender analysis which would reveal the complexity of the crime (Mibenge, p. 20).³ This also triggers the question as to whether prosecutors privilege some narratives over others and remove what they deem 'inconsequential' details. Mibenge draws on the possibility of whether prosecutors might arbitrarily deem victims with particular traits as implausible witnesses of rape or sexual violence (p. 9).

Overcoming such assumptions requires a parallel understanding and willingness on both sides to broaden the scope of sexual violence prosecution. While CSOs may offer alternative narratives for prosecutions, they must also ensure that they meet the basic minimum standards for fact-finding and investigations in order to complement the work of the ICC (OSJI, p. 9).

The diversity of the roles and mandates of CSOs

CSOs have a vital role to play in prosecutions. They have the power to voice concerns or reservations on unpopular subjects; they may be in a good position to provide a broad picture of the context in which violations take place; they may offer alternative narratives which encourage the analysis of the complexity of sexual violence crimes; and they may provide the court with valuable information but also explain the role of the court to affected communities. Additionally, they often have direct knowledge of violations and contacts with victims and communities, and may be able to document violations shortly after they occur in order to compile information regarding patterns of violence (Human Rights First, p. 1). Yet despite this, not all CSOs could be either useful or willing to cooperate in particular proceedings for a number of reasons.

In this regard, it is important for prosecutors to define the local actors' assistance they seek to enhance and harness during trial. They ought to think expansively about the potential network of local actors who may have access to information about sexual and gender-based violence committed in the context of a specific conflict. This can encompass a variety of actors, such as medical care service providers, leaders of displaced communities, religious groups, local human rights defenders who document the crimes, CSOs providing psychosocial and legal

³ See Mibenge, Chapter 4, for a more detailed analysis of this.

counseling for survivors and members of local human rights commissions, to name but a few (Seelinger, ICC Forum 2016).

A further limitation can be witnessed in the fact that judicial mechanisms and CSOs are both in possession of their own independence and mandate which they seek to preserve. For instance, international courts tend to have very specific mandates, namely, the investigation and prosecution of individuals for violations of crimes within their jurisdiction. CSOs, on the other hand, often have much broader goals, including advocating for systematic change, as well as fighting for assistance to and reparations for victims. Accordingly, CSOs also have to review their mandates prior to accepting or rejecting cooperation with courts. While there may be some overlap here, both parties must make choices from the very beginning in order to align their work. If CSOs wish to pursue objectives that are broader than a criminal investigation,⁴ they may very well collect information that is useful to those goals, but not sufficiently reliable for a subsequent criminal case (Alex Whiting, ICC Forum 2016). Simultaneously, NGOs and courts often need to preserve alliances and, at times, political support, making them less independent in matters of criminal justice.

Reluctance to cooperation

As mentioned previously, cooperation with international courts is not always understood to be an appropriate working method for CSOs. Though the involvement of these organizations may be critical to prosecution, many are reticent to cooperate for a number of reasons. For instance, owing to the sensitive nature of the crimes under question, several CSOs have confirmed confidentiality as a key starting point for all security interactions. For example, in the *Lubanga* case, NGOs were only willing to share their work product with the OTP on the condition that it was not disclosed to anyone else at any stage of the proceedings. Consequently, the prosecutor entered into confidentiality agreements with these organizations, which in turn prevented the Chamber from exercising its ultimate duty to assess whether the trial could still be fair if this material was not disclosed to the defense, and whether alternative measures were available to compensate for this unfairness (Buisman, p. 36).

Victims are often concerned about their physical safety when coming forward to testify against such crimes, or to even seek rehabilitative help. Moreover, the stigma associated with sexual and gender based crimes can often be severe, with an individual's status as victim being subject to shame, guilt and blame by the community. Thus, victims may be willing to approach local CSOs under the assurance that their status not be known, which in turn bears serious implications on the possibility of bringing perpetrators to justice. Without considering such factors, prosecutors could be unable to conduct useful investigations in the absence of openness and full disclosure during interviews, for example. Moreover, the willingness of CSOs to cooperate may also be dependent upon the nature of the crimes committed. Arguably, CSOs which hold successful prosecution as one of their constitutive aims may prioritise those crimes which are more recognised and which would not necessarily interfere with such key goals.

⁴ For example, this could entail prioritizing reconciliation or peacebuilding, as opposed to accountability.

Reluctance may also stem from the ethical dilemma of submitting information to prosecutors by healthcare providers hailing from both national and international relief organizations. Cooperation could potentially compromise their neutrality in providing healthcare and discourage survivors to come forward in fear of their counseling or medical files being turned over to prosecutors (Seelinger, ICC Forum 2016). With such concerns in mind, cooperation in the form of outreach tailored to target specific individuals, such as healthcare providers, could improve their willingness to engage with judicial mechanisms.

At this stage, it becomes important to iterate that reluctance does not stem solely from the side of CSOs. While one may see the appeal in harnessing the resources and efforts of CSOs, prosecutors are also aware of the potential hurdles involved when relying upon these organizations. For example, many international courts encompass the duty to protect the rights of suspects, which subsequently dictates an investigatory approach dealing with both incriminating and exonerating circumstances. Such realities complicate cooperation as prosecutors will seek to preserve the integrity of the investigation and thus cannot share detail of its inquiry or the potential targets until it presents its case to the court (Whiting, ICC Forum 2016).

Understanding capacity and awareness challenges of both courts and CSOs

Though some CSOs choose not to partner with prosecutors for a number of reasons (an issue explored in further detail above), others are simply unable to do so. Their potential contribution can be strained by internal capacity challenges and a lack of clarity with respect to *how* to engage with international courts (Seelinger, ICC Forum 2016).

For instance, most NGOs are not trained in evidence-gathering techniques and therefore may not capture information about crimes in ways that are admissible in court. Thus, there is a need to develop trainings and disseminate guidelines on how to collect evidence of crimes in ways that will maximize its potential probative value in court (First Responders, p. 4). Consequently, a flow of information between these actors is required to determine the extent to which cooperation could be possible and to discuss the various aspects of this need.

A further capacity-related need is to ensure that CSOs which cooperate with courts are educated on the potential ramifications of submitting information and of cooperation in general. There appears to be a lack of guidance regarding the roles and responsibilities of such organizations in relation to international investigations and trials. In order to strengthen cooperation, it may be important for such organizations to at least have a basic understanding of the legal framework and jurisprudence of relevant judicial mechanisms. Furthermore, providing examples of the type of evidence used to prove both elements of the crime and modes of liability, as well as admissibility of evidence requirements, would give CSOs a clearer idea of the specific types of information investigators would be looking for when investigating sexual and gender-based crimes (SaCouto, ICC Forum 2016).

Furthermore, it is also important for these organizations to be aware of, and responsive to, the sensitive nature of sexual and gender-based violence. In this respect, capacity challenges also relate to the appropriateness of questions posed to victims and witnesses, mindfulness of the risk of re-traumatization and an understanding of the purposes behind particular interviews (SaCouto, ICC Forum 2016). Finally, awareness challenges do not only emanate from CSOs but also from judicial mechanisms. Effective collaboration requires that the latter is able to identify the different capacities of CSOs and can pursue only those opportunities which can foster mutual respect, understanding and goals (SaCouto, ICC Forum 2016).

Discussions and ways forward

Should courts educate those who might support their work about the functioning of the court to further cooperation? Here, it may be beneficial to discuss the purpose of complete cooperation, as well as its limitations, in order to better manage this relationship. In relation to issues of disclosure, should a more ambitious solution be sought? For instance, would the planning and design of new institutions, that can coordinate and support CSOs and facilitate interactions with courts, bridge this gap?

Could the dissemination of guidelines be improved in order to aid cooperation? For example, a concise description of the courts' processes could help courts disseminate information about their changing internal culture and their move toward greater openness in working with CSOs. This could benefit organizations that may be familiar with courts and their legislation, yet want details of how exactly the court interacts with intermediaries (regarding security and compensation, for example) as well as those that are completely unfamiliar with the role of the court. A concise set of materials which clearly set out the legal, ethical and security ramifications about how and when to submit information could be helpful to build both capacity and awareness within CSOs.

In light of these issues, ongoing dialogue between CSOs and judicial mechanisms is paramount in fostering cooperation during prosecution of sexual violence. While cooperation may not always be the best option available, ascertaining the circumstances under which this may be the case will only be possible when both build a relationship to enhance understanding of respective roles and responsibilities.

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