

# **Information Sheet**

## **Prosecuting Sexual Violence Legacy Project**

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Office of the Prosecutor  
International Criminal Tribunal for the Former Yugoslavia

## Summary

The Office of the Prosecutor (OTP) of the International Criminal Tribunal for the Former Yugoslavia (ICTY) is working towards documenting its legacy concerning the investigation and prosecution of sexual violence crimes (Legacy Project). As the ICTY completes its work and transitions to the Mechanism for International Criminal Tribunals (MICT), a unique opportunity exists to record information about our experiences and insights concerning sexual violence cases, before the institutional knowledge disperses too far and wide to be easily reconstructed. Our goal is to develop guidance for the future prosecution of sexual violence crimes at the international level as well as at the national level, particularly in the former Yugoslavia. We have now developed the first draft of a comprehensive Manuscript setting out our experience and lessons learned. We aim to finalise a first edition of the Manuscript by around June 2015, with a view to publishing it and launching it in The Hague in the first half of 2016.

## **Background: the significance of the ICTY's legacy regarding sexual violence prosecutions**

Before the ICTY was established in 1993, sexual violence charges were inadequately dealt with in post-conflict international prosecutions, resulting in poor accountability and a paucity of case-law. The ICTY has made great strides in prosecuting sexual violence crimes and in developing the law. Almost 50% of persons convicted by the ICTY were found responsible for sexual violence crimes. ICTY case-law clearly established that sexual violence can satisfy the elements of a variety of serious international crimes that, historically, had not been interpreted to include them, such as torture and enslavement. The ICTY's case-law has also clarified the elements of rape under international criminal law.

At the same time, the ICTY's work has exposed ongoing obstacles in prosecuting sexual violence crimes, such as inconsistent approaches during investigations and prosecutions, the tendency to mischaracterize gender crimes as "incidental" and the challenges of linking sexual violence crimes to senior officials.

Further, as the ICTY nears the completion of its mandate, building capacity for sexual violence prosecutions in the former Yugoslavia remains a priority to close the impunity gap for large numbers of remaining perpetrators. This priority will continue as the OTP gradually transfers its work to the Office of the Prosecutor of the MICT. More generally, the OTP's legacy on sexual violence crimes will also be of considerable interest to national capacity building initiatives around the world.

## **The Prosecuting Sexual Violence Legacy Project**

In 2009, under the direction of ICTY Prosecutor Serge Brammertz and Principal Legal Counsel Michelle Jarvis, the OTP formed the Prosecuting Sexual Violence Working Group (PSV Working Group) comprised of OTP prosecutors, investigators and other staff members committed to documenting its legacy on sexual violence crimes. The Group's progress has been constrained by the fact that members can only dedicate time to the Legacy Project when it does not interfere with their core OTP functions and by the absence of regular budget funds to support its work. However, in more recent years, aided by funding from UNWomen, we have made substantial progress and have developed a detailed plan to deliver the first edition of a comprehensive Manuscript setting out the OTP's lessons learned in prosecuting sexual violence crimes (first phase of the project) as well as a final edition of the Manuscript once all ICTY cases have been completed along with associated training materials (second phase of the project). The work carried out so far is described below.

## **Collection of internal and external materials relevant to the OTP's work on sexual violence crimes**

We have collected relevant materials covering the OTP's investigation and prosecution of sexual violence crimes. In particular we have compiled an extensive dossier of internal OTP documentation, filings, trial exhibits, testimony and other documents, which have informed our understanding of a broad range of issues, including: charging practices for sexual violence crimes; legal analyses of sexual violence crimes prepared for trial teams; protective measures granted to victims in ICTY cases; and the assessment by Trial Chambers of the testimonies of sexual violence victims. These documents will feature prominently in the Manuscript, providing concrete examples of practice and precedent, such as:

- how protective measures have been applied in practice;
- the manner in which examination-in-chief and cross-examination have been conducted;
- the manner in which victims have been treated in the courtroom;
- the support provided to traumatised victims in the courtroom; and
- strengths and weaknesses in the OTP's case development for sexual violence crimes.

The PSV Working Group has also collected contemporaneous media reports and books describing incidents of sexual violence in various war-time campaigns, primarily throughout Bosnia and Herzegovina, in detention camps and other detention settings. We have also collected and analysed NGO reports and other materials critiquing aspects of the OTP's work on sexual violence crimes, such as the failure to pursue these crimes in some cases and the treatment of witnesses. These materials provide an important reference point against which to assess the ICTY's work on sexual violence prosecutions and will assist in pinpointing lessons learned and recommendations for the Manuscript.

We have assembled an archive composed of this unique collection of materials which, of itself, is an important aspect of recording the OTP's legacy concerning sexual violence crimes.

### Interviewing ICTY staff members who, over the years, worked on sexual violence cases

The PSV Working Group has interviewed (on condition that their comments will not be attributed) over 40 current and former ICTY staff members who have worked on sexual violence cases over the course of the OTP's 21 years of work, including senior management, prosecuting attorneys, investigators, researchers and interpreters, as well as representatives from the ICTY's Victim and Witnesses Unit.

The information collected in the interviews has provided focus on critical lessons learned and insight into the challenges faced by trial and appeals teams pursuing charges of sexual violence in their respective cases. This information has guided the structure and content of the outline for the Manuscript, particularly the sections on investigation and prosecution strategies, and the treatment of victims by OTP investigators and prosecutors. It has also provided valuable leads for other relevant documents and interviewees.

In addition, we have conducted missions to Bosnia and Herzegovina, Croatia and Serbia and met with representatives of the local judiciary, prosecutors, NGOs, international organizations and other stakeholders to assess how the OTP's legacy can be best applied to assist with national capacity building. During these interviews and meetings, we learned about the key difficulties in pursuing conflict-related sexual violence cases at the national level, so that the second phase of the Project –the finalisation of the second edition of the Manuscript and the development of training materials – can be designed in a way that will best assist with building national capacity for the prosecution of sexual violence crimes.

In the course of these missions, we interviewed 12 national court staff including prosecutors, judges, and victim-witness support personnel, and 16 NGO, UN and rule of law program representatives engaged in monitoring national proceedings and training practitioners. We also spoke with two human rights researchers based in the UK about their assessment of war crimes prosecutions of sexual violence in Croatia and Bosnia and Herzegovina.

The information provided revealed that national prosecutors are facing many of the same challenges experienced by the OTP and would benefit from guidance regarding best practices and lessons learned in several areas, such as:

- witness protection and reasons victims are discouraged from testifying;
- improper questioning of victims in court;
- the court's assessment of and reliance on victims' testimony;
- strategies for overcoming difficulties in identifying perpetrators (for example, those who the victim did not know before the sexual assault, and those who were known only by nickname);
- risk of retraumatisation for witnesses who are called to testify in multiple cases; and
- the elements of crimes of sexual violence established in customary international law as analysed in ICTY jurisprudence and strategies for charging wartime sexual violence, particularly using more complex charging formulations, such as crimes against humanity and joint criminal enterprise theories.

Based on this input, the PSV Working Group is incorporating into the Manuscript and associated training materials examples from the OTP's experience in addressing these difficult issues and possible practical solutions.

### **Work towards finalising the first edition of the Manuscript (first phase of the project)**

Drawing on the materials collected and information provided in the interviews, the PSV Working Group has completed a first comprehensive draft of the Manuscript documenting the OTP's experience, insights and recommendations for the future prosecution of conflict-related sexual violence. We aim to finalise the first edition of the Manuscript by the end of June 2015, with a view to launching it in The Hague in the first half of 2016.

The Manuscript includes:

- I. An overview of key insights and recommendations;
- II. Background on sexual violence in the conflicts in the former Yugoslavia and the establishment of the ICTY;
- III. Challenges to successful outcomes in sexual violence cases;
- IV. Strategies for overcoming obstacles to successful sexual violence prosecutions;
- V. Evidentiary and witness issues in sexual violence cases;
- VI. Legal strategies for contextualizing conflict-related sexual violence and linking it to senior officials;
- VII. Sentencing and enforcement of sentences for sexual violence crimes;
- VIII. The characteristics of sexual violence as reflected in ICTY proceedings;
- IX. National capacity building for sexual violence crimes;
- X. Conclusions

In drafting the Manuscript, concrete examples from the ICTY staff member interviews (unattributed), transcript reviews, court filings and other case-related materials are being integrated to provide practical examples and guidance. Feedback received in the interviews during the missions to Croatia, Bosnia and Herzegovina and Serbia is also being used to ensure that the best practices and lessons learned incorporate a strong regional capacity building element.

### **Producing the final edition of the Manuscript and associated training materials (second phase of the project)**

Once the first edition of the Manuscript has been drafted, soliciting feedback from relevant stakeholders, such as national and international practitioners, rule of law personnel, academics and other partners in the former Yugoslavia will ensure that the second edition of the Manuscript and associated training materials are as useful and relevant as possible for the target audiences. Most immediately, this will require translating the Manuscript into BCS and other languages and ensuring a wide distribution. In parallel, we will also continue to work on incorporating additional insights and lessons learned from the sexual violence prosecutions in the last remaining ICTY cases, in which some key issues are pending for adjudication. Based on feedback from stakeholders in the former Yugoslavia and internationally (academics, practitioners, NGOs), the content of the Manuscript will be revised into a final second edition and will also be used to create practical materials for training purposes, tailored to the most pressing needs.

#### **Further information**

For additional information regarding the Legacy Project, please contact Michelle Jarvis, Principal Legal Counsel, Office of the Prosecutor, International Criminal Tribunal for the Former Yugoslavia

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