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Gender crimes in International Law

Abstract

The first part will focus on the meaning of gender and the development of what are now called “gender crimes”, it means sexual or gender-based crimes (SGBV). I will also use a different lens and focus on the men's, boys' and lesbian, gay, bisexual or transgender (LGBT)'s victims of SGBV crimes. Then, I will analyze the Article 7(1)(h) of the Rome Statute and its possible legal basis for defining persecution on the grounds of sexual orientation or gender identity as a crime against humanity (CAH) impermissible under international law. The last part is related to access to justice.

Keywords: Gender, gender crimes, LGBT, access to justice

The meaning of gender and the role of culture

Sex and gender are different, but there is a common misconception that the words “gender” and “sex” are words used to describe the same thing. Sex tends to relate to the biological and physiological characteristics that define men and women such as the genitalia and genetic differences.¹ Gender is more difficult to define. There are number of languages where the concept of gender does not exist, for most languages is related to nouns. It is a grammatical term. Gender is not a part of natural order, it is not a natural given, but it is a social construct because it is a human invention, not a biological fact. What it means to be a men or women can change and is changing every day. Many of the gender stereotypes were not always present in the past; they are new trends in human society. The reason is because social expectations of each gender change over time, and culture plays an important role.

Gender is more about how women and men, girls and boys, see themselves in the society. Depending on where you from are, what religion, ethnicity, age, social class you are, in what period of history you were born. Gender roles in some societies are more rigid than those in others and are not set in stone.²

For the society, women and men should behave in ways that fall into specific categories determined solely on their gender.

On the one hand, men are logical, strong, reasonable, therefore, they can be a leader, soldiers or anything they want. On the other hand, women are irrationals and physically weak. There are certain roles that need to be covered by men, in the common criminal scenario men are the perpetrators and women are the victims.³

Regarding the international framework, the Rome Statute is the first instrument of international criminal law to use the term “gender”, and the first to recognize the CAH of persecution on the “gender” grounds.⁴

Cultures are not fixed or immutable. Contests to “fix” the meanings of social entities take place all the time, leading to changes in social practices.⁵

¹ The Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, 1.

² Maitrayee Mukhopadhyay, *Gender relations, development practice and “culture”*, Gender and Development Vol. 3, No. 1, February 1995, 17

³ Nira Yuval-Davis, *Intersectionality and Feminist Politics*, European Journal of Women’s Studies, 2006, 200.

⁴ Article 7(3) of the Rome Statute.

⁵ See *supra*, note 2.

Women often suffer of “double or triple oppression”, because they can be victim of discrimination for different reasons. In 1989 was coined the term intersectionality asserts that people are often disadvantaged by multiple sources of oppression: their race, class, gender, identity, sexual orientation, religion, and other identity markers.⁶ Intersectionality recognizes that identity markers do not exist independently of each other, and that each informs the others, often creating a complex convergence of oppression.⁷

Gender inequality as a global issue, from western to developing countries. Gender inequality is an obstacle for economic progress and the human development because it creates crimes against women and also against men.⁸

Gender is conceptualized exclusively as a woman’s issue,⁹ but this view is partial. Gender is too often theorized based on a rigid binary dichotomy of man-woman and the target of sexual violence are overwhelmingly female and perpetrators are overwhelmingly male.¹⁰

Sexual Violence and Gender-Based Violence in International Law

Sexual violence (SV) in domestic jurisdictions is labelled under a variety of definitions: sexual assault, indecent assault or sodomy. Common elements can be: coercion, force or lack of consent but the *actus reus per se* is different in some legal system and related to the culture.

There are also many different reasons and ways why SV can be use: military tactic, punishment of an individual, destroy or attack to an entire group. SV has different motivations.

A perpetrator group has a military plan (allegedly a criminal plan), they try to figure out how achieve the purpose: through the use of physical violence (torture, assault, murder, mutilation); political violence (attacking demonstrations; arresting people; detaining people; form of treason or terrorism); violence against property (property crimes against home or possessions) or there is SV not only completely destroys the person you directly inflicted against, it has impact on their family, on the wider community. SV in a domestic criminal context is usually private, in

⁶ Nira Yuval-Davis, *Intersectionality and Feminist Politics*, European Journal of Women’s Studies, 2006, 197. The term was coined by Kimberle Crenshaw in her 1989 paper “Demarginalizing The Intersection of Race and Sex: A Black Feminist critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics”.

⁷ *Id.*

⁸ World Economic Forum, The Global Gender Gap Report 2017.

⁹ Susan Clark Muntean, Banu Ozkazanc -Pan, *A Gender Integrative conceptualization of entrepreneurship*, New England Journal of Entrepreneurship, Vol. 18 Issue 1, pp. 27-40, 32.

¹⁰ Paul J. Fleming, Sofia Gruskin, Florencia Rojo and Shari L. Dworkin, *Men’s violence against women and men are inter-related: Recommendations for simultaneous intervention*, 2015.

between two people, but SV in an international criminal law (ICL) context is usually public, it is designed to have an audience, because it maximizes the harm that caused to the direct victim but also send a message to everybody else.

Special Court for Sierra Leon convicted Charles Taylor for the use of rape as a tactic to terrorize a civilian population. If you rape a woman on the street corner or at the checkpoint is a clear message to everybody else, that they have no protection whatsoever. In this way, family, community (social and religious) are under attack and damaged. There are multiple direct and indirect victims and from the perpetrator point of view it is cheaper and more effective and destructive than a bullet or any other weapon you have.

Looking at specific conflicts, the plan was part of a widespread or systematic attack against the civilian population, it was a systemic part of mistreatment in detention situation, it was a means of terrorize a group or forcing to leave their homes.

Nobody thinks that victims of torture will react in the same way but about victims of SV or rape they are always victim with capital V, there is never any qualified. This is something unique only for the crime of SV. First of all, they may prefer to be called survivors and second there were individual people before the violence, some of them were confident, bitter, resilient, vulnerable, optimistic but still different and they did not disappear after the violence. The assumption that they all fall into the same category with the same view is wrong. It is also wrong think that they all want justice, or they are traumatized to testify in public.

At international level, SV could be divided in three different categories: penetration or sexual contact committed by force, coercion or without consent; acts committed for the sexual gratification of the perpetrator, may not involve physical contact¹¹ or violence direct at sexual organs or acts targeting a person's sexual autonomy/integrity.

SV was recognized as an international crime from the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and in 2001 the ICTY became the first International Court to find an accused person guilty of rape as a crime against humanity (CAH). Then the Court expanded the definition of slavery as a CAH to include slavery.

¹¹ Forced nudity.

ICL has been vital in fostering the understanding of SV against women in armed conflict as a weapon of war that targets a woman's role in society. The jurisprudence of the ICTY has been crucial in establishing that the rape of women can constitute a war crime, a violation of the laws and customs of war, and a CAH. More than a third of those convicted by the ICTY have been found guilty of crimes involving SV.

SV against men and boys is a significant problem. Rape and other forms of sexual coercion direct against men and boys take place in variety of settings, including in the home, the workplace, schools, on the streets, in the military and during war, as well as in prisons and police custody.¹²

While numerous women were in fact sexually abused during the Yugoslavia Wars, men also become victims of sexual violence in detention camps and police stations. Their victimization has gone largely unacknowledged.¹³

The ICTY definition of rape is formulated in a gender-neutral manner. In the context of SV against men, it is usually not the element of sexual penetration that impedes the categorization of the experiences of male victims of sexual violence as rape. It is the lack of the physical involvement of the perpetrator in the act that is in conflict with the ICTY definition of the offence.¹⁴

In ten cases featuring SV against men that were prosecuted at the ICTY, the perpetrators did not themselves physically assault other men but rather forced male detainees to perform sexual acts on each other.¹⁵

There is a multitude of evidence publicly available that proves that Bosnian Serb and other forces executed 7,000 to 8,000 Bosnian Muslim men and boys (the victims were either civilians or prisoners of war) from Srebrenica in one week in July 1995. Before it, men and women were separated, it was a gender segregation. The massacre that occurred in Srebrenica in July 1995 was the single worst atrocity committed in the former Yugoslavia during the wars of the 1990s and the worst massacre that occurred in Europe since the months after World War II.

¹² World Report on Violence and Health, *Sexual Violence*, 2010, 154.

¹³ Maïke Isaac, *The Prosecution of Sexual Violence against Men in International Criminal Law*, INTLAWGRRRLS, Feb. 11, 2016.

¹⁴ Maïke Isaac, *Enhancing the visibility of sexual violence against men: a critique of the ICTY*, International Justice in the News, 2016, 2.

¹⁵ Tadić, Mucić et al., Todorović, Sikirica et al. and Mejković et al., Stakić, Simić et al., Česić, Brđanin, Krajišnik, and Martić.

SV against men changes a man's position in the society. Male victims feel feminized, either by themselves or others, because they have lost their masculinity. Depending on the societal and cultural context, the male victim is often perceived as no longer being a real man, because he was not able to protect himself and was put into the stereotypically submissive role of a woman.¹⁶

WHO notes that, in regard to male victims of rape, official statistics “vastly under-represented” the true number of survivors.¹⁷ Although research is scarce, studies from the US and the UK suggest that gay and bisexual men and boys in these countries experience higher rates of sexual victimization than their heterosexual counterparts.¹⁸

There are some common points of SV: sexual exploitation of boys and men in countries of asylum; against LGBT person in the countries of asylum; and in detention.¹⁹

GBV and SV are related because SV is GBV but not all GBV is SV. GBV means acts targeting men, women, boys or girls, because of their biological sex or social gender roles; can include targeting men and women in different ways, reinforcing gender roles or pushing non-conformists.

The Rome Statute of the International Criminal Court listed some crimes under Articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi) of the Statute. These crimes include rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity.

Articles 7(1)(h) and 7(3)

¹⁶ Maike Isaac, *Enhancing the visibility of sexual violence against men: a critique of the ICTY*, International Justice in the News, 2016, 2.

¹⁷ World Health Organization, *World Report on Violence and Health* (Geneva, 2002), p. 154.

¹⁸ In the United States, for example, the lifetime prevalence of sexual violence other than rape is 40.2 per cent for gay males and 74.9 per cent for bisexual males, compared to 20.8 per cent for heterosexual males. Mikel Walters and others, *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Findings on Victimization by Sexual Orientation*, (Atlanta, Georgia, Centers for Disease Control and Prevention, 2013). *See also* Emily Rothman, Deinera Exner, and Allyson L. Baughman, *The prevalence of sexual assault against people who identify as gay, lesbian, or bisexual in the United States: a systematic review*, Trauma, Violence, & Abuse (2011); Ford Hickson and others, *Gay men as victims of nonconsensual sex*, Archives of Sexual Behavior, vol. 23, No. 3 (1994), pp. 281-294.

¹⁹ 94 per cent of detainees and 97 per cent of the disappeared in Syria are male. Refugee women in Jordan estimate that 30 to 40 per cent of all adult men experienced sexual violence in detention in Syria. 117,000 people remain imprisoned in detention centres and another 65,000 have forcibly disappeared.

The provision of Article 7(1)(h) of the Rome Statute identified the “gender-based persecution”. The gender-based persecution has been charged only once, in a case that failed to move forward for evidentiary reason.²⁰

After long negotiation process, the final definition of “gender” is a study in a constructive ambiguity²¹ and the result is equivocal because the direct linkage of the term “gender” with the term “sex” seems to conflate the two.²² Constructive ambiguity can create uncertainty and discordance but can also create normative flexibility by preserving multiple possible meanings of the term.

The definition equates “gender” with biologically determined “sex” and eliminating the understanding that “gender” is not a natural given but is a social construction.²³ The term “gender” does not indicate any meaning different from above man and woman so the definition is restricted to a binary system: male and female and does not stand in the way of including sexual orientation. LGBT are often victimized because they do not conform to stereotypes of gender identity, but homosexual and bisexual can be included in the binary system described by Article 7(3). The problem regards intersex and transgender person because they are outside the gender dichotomy.

In accordance with Article 21(3) of the Rome Statute, it interprets and applies the definition of gender “in accordance with internationally recognized human rights” as they evolve over time, and “without any adverse distinction founded, inter alia, on gender or ‘other status’”.²⁴

In some countries, the inherent stereotyping that takes place within legislative text also creates invisible categories of individuals who do not conform to gender expectations or heterosexual norms, overlooking types of violence that are inflicted upon them for their perceived deviance from such stereotypes.²⁵ The current Chinese legal framework ignores violence against male victims and violence against LGBT individuals.

²⁰ *Prosecutor v. Mbarushimana*, Case No. ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges (Dec. 16, 2011), http://www.icc-cpi.int/CourtRecords/CR2011_22538.pdf [<http://perma.cc/P9FX-BCLS>].

²¹ Valerie Oosterveld, *Constructive Ambiguity and the Meaning of “Gender” for the International Criminal Court*, Western University, Law Publication, 2014. Constructive ambiguity is a tactic used by diplomats and other negotiators, especially in consensus negotiations, to adopt indefinite language to seemingly resolve disparate points of view.

²² Valerie Oosterveld, *The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice*, 18 *Harvard Human Rights Journal* (2005) 54-84, p. 57.

²³ Rome Statute, Article 7(3).

²⁴ ICC OTP POLICY PAPER, *supra* note 1, ¶ 15.

²⁵ Amy Barrows and Joy L. Chia, *Gender, Violence and The State of Asia*, Routledge, 2016, 189.

The Islamic State of Iraq and Syria (ISIS) has an extremely gender-conservative ideology²⁶ and it has established a system of strict gender roles for women and men. Assigned roles of female members of ISIS were mostly associated with marriage and raising children. Even though ISIS actively addresses women in its propaganda and recruitment strategies, their role was largely to be of domestic nature. Violations of these gender rules are subject to hard punishment, in particular homosexuality is often punished with execution. ISIS militants torture suspected LGBT individuals and reserve them one of the most brutal methods of killing.²⁷

These gender-based persecution does not only affect women but all persons that do not respect the restrictive gender rules.

In 2014 the “gender-based crimes” were defined as “those committed against persons, whether male or female, because of their sex and/or socially constructed gender roles”.²⁸

The landmark step was on 8 November 2017 when one communication was submitted to the Office of the Prosecutor (OPT) of the International Criminal Court (ICC) that includes crimes committed based on the victims’ real or perceived sexual orientation.²⁹

Impact and barriers to Accessing Justice

Women’s access to justice (A2J) is a human right³⁰ essential to realization of all rights protected under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).³¹ As stated by United Nations Development Programme (UNDP), A2J is “a key

²⁶ Jennifer Philippa Eggert, *Women in the Islamic State: Tactical Advantage Trumps Ideology*, Aug. 21, 2017, (last visit Sept. 30, 2018) <https://theglobalobservatory.org/2017/08/isis-women-ideology-mosul/>

²⁷ According to ISIS’ radical interpretation of Islam, gays should be thrown from a high building then stoned if they are not dead when they hit the ground.

²⁸ The Office of the Prosecutor of the International Criminal Court, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014.

²⁹ The Human Rights and Gender Justice, Clinic of the City University of New York School of Law, MADRE, *The Organization of Women’s Freedom in Iraq, Communication to the ICC Prosecutor Pursuant to the Article 15 of the Rome Statute Requesting a Preliminary Examination into the Situation of: Gender-Based Persecution and Torture as Crimes Against Humanity and War Crimes Committed by the Islamic State of the Iraq and the Levant (ISIL) in Iraq*, November 8, 2017.

³⁰ Francesco Francioni, *Access to Justice as a human right*, Oxford University Press, (2007), p. 21.

³¹ Thailand ratified CEDAW on 9 August 1985. Art. 2(c) of CEDAW, which speaks of the obligations of States parties “[t]o establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination. See also General Recommendation n. 33, para. 1.

means to defend other rights” and “an enabling right” that allows individuals to enforce their substantive rights and obtain a remedy when these rights are violated.

A2J is also a fundamental element of the rule of law,³² which is the bedrock for both justice and security and also a cornerstone of good governance and democracy.³³ It has different meanings and it may be defined narrowly, to signify an individual’s right to bring a claim to a court or tribunal and to have that court or tribunal decide the claim.³⁴ It could also refer to the right to be given legal aid³⁵ when the individual does not have the resources required to avail of legal remedies.³⁶ And, in a broad sense, A2J also includes, as a critical element, the individual’s right to have her claim decided according to substantive standards of fairness and justice.³⁷

In international human rights instruments - such as the 1948 Universal Declaration of Human Rights (UDHR),³⁸ the International Covenant on Civil and Political Rights (ICCPR)³⁹ and the European Convention on Human Rights (ECHR)⁴⁰ - A2J as a term of art is not used but the right of access to justice *per se* is clearly guaranteed.⁴¹

International law and standards require countries to respect, protect and fulfil the civil, cultural, economic, political and social rights of all those within its territory and jurisdiction without distinction of any kind.⁴²

In fact, effective protection of human rights depends largely on domestic legal systems.

³² *Id.*

³³ UN Women, Women’s Access to Justice (last visited on Aug. 13, 2018) <http://asiapacific.unwomen.org/en/focus-areas/governance/womens-access-to-justice>

³⁴ United Nations Entity for Gender Equality and the Empowerment of Women, *Access to Justice for Women in Plural Legal System of Southeast Asia*, (2014), p. 5.

³⁵ United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, adopted by the General Assembly under its resolution 67/187 (2012), para. 8.

³⁶ *See supra*, note 33.

³⁷ *See supra*, note 30.

³⁸ Art. 8 guarantees the right to an effective remedy before competent national tribunals for violations of human rights. Art. 10 declared further that “everyone is entitled in full equality to a fair and public hearings by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. Artt. 7, 11 and 3 guarantee for the right to equal protection of the law, the right to be presumed innocent in the criminal investigations, and the right to non-discrimination are also related to the right to access to justice.

³⁹ ICCPR, Artt.2(3), 2(3)(b)-(c), 14(1).

⁴⁰ ECHR, Artt. 6 and 13 on the right to a fair trial, provides that “[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

⁴¹ United Nations Entity for Gender Equality and the Empowerment of Women, *Access to Justice for Women in Plural Legal System of Southeast Asia*, 2014, p. 5.

⁴² Antonio Cassese, *International Law*, Second Edition, Oxford 2005, p. 141.

There are many barriers and restrictions that impede women from realizing their right of A2J on a basis of equality. Lack of domestic expertise between practitioners and specialists.⁴³ The problems faced by female lawyers are also unique to the region ranging from traditional-minded clients, who may prefer male partner on their accounts, to conservative societal pressure where ambition may be frowned upon.⁴⁴

The percentage of women in justice system is quite low comparing to other governmental offices.⁴⁵ As shown by statistics, four types of services for public servants with the huge gap of gender employment between male and female officers are police officers, public prosecutors, judges and autonomous organization's officers.

One solution is to adopt a strong gender perspective in investigation and adjudication.⁴⁶ This does not mean taking the side of the woman in every case and throwing out standards of fairness in investigations or reneging on the duty to make sound evidence-based adjudication,⁴⁷ but recognizing that men and women are treated differently due their gender and therefore have a unique personal perspective.

Conclusion

Women and men, girls and boys, can be victims or perpetrators or sometimes can be both at the same time. There is no fix dichotomy for their roles.

The binary structure of power – women/men, victim/perpetrator – obscures all groups and models of gender-power relations that do not conform with the known violence stereotypes or certain constructs of masculinity or victimhood.⁴⁸ SGBV female perpetrators, female GBV victims of same-sex violence, male victims in heterosexual and same-sex relations, other gender-non conforming groups, and hides the specific experiences of particular groups suffering from multiple combined oppressions.⁴⁹

⁴³ See *supra*, note 5, para. 3.

⁴⁴ Seher Hussain, *Women in Law*, July. 23, 2012, <https://www.legalbusinessonline.com/features/women-law/57703> (last visited on Aug. 12, 2018).

⁴⁵ See *supra*, note 32.

⁴⁶ UN Women, *Gender Stereotypes in laws and court decisions in Southeast Asia. A reference for justice actors*, (2016), p. 104.

⁴⁷ *Id.*

⁴⁸ Clare Cannon, Katie Lauve-Moon and Fred Buttell, *Re-Theorizing Intimate Partner Violence through Post-Structural Feminism, Queer Theory, and the Sociology of Gender*, 2015, 671.

⁴⁹ Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, Stanford Law Review, Vol. 43, No. 6 (July 1991), pp. 1241-1299, 1250.

There is no crime of GBV in ICL, it does not exist in this particular formulation, the only crime is persecution on the ground of gender, Article 7(1)(h) of the Rome Statute.⁵⁰

SGBV against women and girls, men and boys or LGBT is both a denial of women's human rights themselves and inhibits their enjoyment of other rights.⁵¹ SGBV can happen to anyone, such as women, men, elderly, youth, infants, persons with disabilities.

Foster a culture of silence and impunity, deterring many male and other survivors from reporting their victimization out of fear of being publicly identified as a victim of sexual violence.

The culture of impunity, or the culture of silence, is a factor in the normalization of societal violence, which as it continues becomes even harder to reduce. Denial of A2J is only one aspect of this normalization and must be seen alongside other ways in which women are marginalized and subordinated.⁵²

The right to A2J for women is essential to the realization of all the rights protected under CEDAW. Addressing SGBV, especially in post-conflict situation is vital to promoting accountability and achieving sustainable peace.

SGBV is an unforgivable attack to personal dignity as human beings, persecutors destroyed the victims.

It will be important to adopt an intersectional lens when analyzing SGBV, vulnerabilities and responses and deconstruct the gender binary. Inclusive gender approach while also tackling hierarchies. It will be important to create a class of specialist in area of gender, in particular more women's specialists.

⁵⁰ *Id.*

⁵¹ Amy Barrows and Joy L. Chia, *Gender, Violence and The State of Asia*, Routledge, 2016, 25.

⁵² *Id.*