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The Long Unfinished Struggle to Ensure Accountability for Sexual and Gender-Based Violence Under International Law*

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1. Importance of Gains in Sexual Violence Jurisprudence

Throughout history, wars have been accompanied by massive human rights violations, bringing an enormous amount of suffering to civilians of all ages, gender, religion, and ethnicity. However, the brunt of this suffering has disproportionately been born by women. Historically, women were considered as a "spoil of war" for the victorious army. Rape and other forms of sexual violence were thus commonly perceived as an unavoidable consequence of conflict, as rather than a criminal act, and even when these violations were not dismissed as mere collateral damage of war, they were not understood as rising to the level of prosecution.

One of the most striking examples of how women's bodies were used in conflict while silence has pervaded history is from the Second World War (WWII). Between 1932 and the end of WWII, the Japanese Government was involved in establishing and maintaining a system of sexual slavery throughout Asia[1]. The derogatory term of "comfort stations" were used to describe the centers that made up this system, while its victims were referred to as "comfort women"[2]. After its invasion of Nanking, during which an estimated 20,000 women were raped, the Japanese government, fearful that such violence posed a risk to the peaceful cooperation of populations in its occupied territories, as well as to the sexual health of its soldiers, responded with a policy aimed

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1 G.J. McDougall, *Addressing State Responsibility for the Crime of Military Sexual Slavery during the Second World War: Further Attempts for Justice for the Comfort Women*, in *Korean Journal of International and Comparative Law*, 1, 2013, p. 137 ff.

2 *Ivi*, p. 139 ff.

at creating a controlled sexual environment through the establishment of "comfort stations".

The Government of Japan has repeatedly minimized the seriousness of the violations stemming from this system[3]. For example, the Government has argued that victims were paid for their labor. Yet detailed testimony by former sex slaves indicates that women and girls were abducted, sold by impoverished families, or promised jobs as nurses or factory workers. The victims were captive and forced to provide sexual services for soldiers. Estimates indicate that the Japanese military forced between 100,000 and 200,000 women and girls into sexual slavery, with each victim being raped at least five times a day. To minimize its legal liability, the Government has argued that the rape centers only lasted five years, but this number is believed not to be accurate. While there is debate over the figures, relying on even the lowest estimates[4] reveals that this system resulted in approximately 125 million rapes took place across Korea, the Philippines, Burma, China, Taiwan, and Indonesia[5].

Following World War II, the victorious Allied governments established the first international criminal tribunals to pursue accountability for massive human rights violations. Without a doubt, the International Military Tribunal (IMT or Nuremberg Tribunal) and the International Military Tribunal for the Far East (IMTFE or Batavia Tribunal) contributed significantly to the development of international criminal law. For the first time in history, references to "crimes against peace", "war crimes", and "crimes against humanity" were used. While these tribunals contributed significantly to the advent of the modern international justice movement, they failed to achieve accountability for victims of sexual violence.

The Batavia Tribunal ignored the hundreds of thousands of Asian victims of the Japanese system, limiting the proceedings to the 35 Dutch women held at a "comfort station" in Indonesia. The trial resulted in the conviction of seven officers and four civilian "comfort station" operators for acts including rape, coercion to prostitution, abduction of women and girls for forced prostitution, and ill-treatment of prisoners. While this ruling is important in and of itself, it is also significant as it indicates that

[3] *Ivi*, p. 145 ss. After denial of involvement, the Japanese Government recognized its role in establishing the rape centers in an official study: «On the issue of wartime 'comfort women' of 4 August 1993 by the Japanese Cabinet Councilors' Office on External Affairs and in a statement by the Chief Cabinet Secretary on the same date».

[4] Scholars and activists do not adhere to any of these low estimates be it number of women held, number of rapes a day, or duration of program. The number reported would nevertheless be the result of calculations made on the basis of estimates given by the few who argue the system was not as large as it was. See S. Sato, *The Japanese Army and Comfort Women in World War II*, in G. Campbell - E. Elbourne (eds.), *Sex, Power, and Slavery*, Ohio, 2014, p. 258 ff.

[5] S.J. Vanderweert, *Seeking Justice for Comfort Women: Without an International Criminal Court, Suits Brought by World War II Sex Slaves of the Japenese Army May Find Their Best Hope of Success in U.S. Federal Courts*, in *North Carolina Journal of International Law*, 27, 1, 2001, p. 141 ff.

there was sufficient evidence to hold that the comfort centers were not a civilian operation, as Japan had claimed[6]. Perhaps more striking is the fact that the trials utilized testimonies from Indonesian women as evidence to pursue justice for the Dutch victims, and yet no charges were brought for the enslavement of the Indonesian victims. This demonstrates how factors such as race, class, and ethnicity, among others, may impact victims' access to justice. While groundbreaking jurisprudence on sexual violence has been set over the last several decades, issues of intersectionality still often apply in determining whose rights are protected and which victims remain invisible.

As mentioned, the comfort women case is characterized by Japan's denial of legal liability on several substantive grounds and by its related unwillingness to engage with victims fully[7]. Despite the foundational international efforts to establish justice and accountability for the massive human rights violations committed during the Second World War, these stories remained buried until 1991, when the first comfort women admitted publicly that they had been sex slaves of the Japanese military[8]. While their stories are now better known, the few remaining survivors still wait to receive an adequate apology and reparations.

When discussing the international advancements in prosecuting sexual violence, it is critical to remember the "comfort women". The lack of legal accountability for the sexual slavery they endured, as well as their decades of silence, epitomizes the historical invisibility of crimes against women. Despite being an integral part of the war arsenal, sexual violence was largely unacknowledged before the 1990s[9]. In the rare cases in which sexual violence was raised, it was justified as an inevitable consequence of war, a form of collateral damage[10]. It is important to remind ourselves of the relatively short time in which the advancements in jurisprudence that we will discuss over the next few days have taken place.

After decades of struggle by activists, international and regional legal bodies began to prosecute sexual and gender-based violence (SGBV) as a serious violation of human rights. Several key developments in the 1990s led to this shift, namely the establishment of the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The prosecution of sexual violence by the Tribunals was fraught with traditional resistance, as demonstrated by their first set of indictments which failed to recognize sexual violence[11]. These crimes

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[6] *Ibidem*.

[7] G J., McDougall, *op cit.*, p. 145.

[8] C. Sung Chung, *Korean Women Drafted for Military Sexual Slavery by Japan*, in K. Howard (ed.), *True Stories of the Korean Comfort Women*, London, 1995, p. 11 ff.

[9] R. Copelon, *Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law*, in *Law McGill Law Journal*, 46, 1, 2000, p. 220.

[10] N. Buchowska, *Violated or Protected. Women's Rights in Armed Conflicts after the Second World War*, in *International Comparative Jurisprudence*, 2016, p. 75.

[11] R. Copelon, *op cit.*, p. 224.

were only investigated and indicted after the concerted pressure of women's rights organizations.

The role of women's activists and NGOs is exemplified in the *Prosecutor* v. *Jean Paul Akayesu* case before the ICTR[12]. Initially, there were no charges for gender-related crimes, even though women's and human rights organizations had documented extensive evidence of rape and other forms of sexual violence throughout Rwanda[13]. Several NGOs[14] prepared and submitted an amicus curiae brief that eventually led the Prosecutor to indicate his intention to amend the indictment and include charges of rape and general allegations of sexual violence[15]. Also crucial to its inclusion was the presence of Judge Navanethem Pillay of South Africa on the bench, the only woman judge on the Trial Chamber hearing the case with extensive expertise in gender-related crimes[16].

The *Akayesu* Trial Chamber Judgement carried monumental legal significance[17]. The ICTR concluded that rape and other forms of sexual violence were used as an instrument of genocide. It also recognized that the crimes formed part of a widespread and systematic attack directed against civilians, constituting crimes against humanity. This was the first landmark conviction of either genocide or crimes against humanity for sexual violence. The judgment also recognized forced nudity as a form of sexual violence constituting inhumane acts as crimes against humanity. Specifically, forced nudity was cited as an example of sexual violence not involving touching[18]. The Trial Chamber also articulated a seminal definition of sexual violence and rape under international law[19]. Sexual violence was defined as «any act of a sexual nature…under circumstances which are coercive»[20]. The Tribunal also noted that sexual violence is not limited to physical invasion of the body and need not involve penetration or even physical contact.

[12] ICTR, *Prosecutor v. Jean Paul Akayesu* (Trial Judgment), Case No. ICTR-96-4-T, 2 September 1998.

[13] R. Copelon, *op cit.*, p. 225.

[14] IWHR, the Working Group on Engendering the Rwanda Tribunal, organized by a dedicated group of recent grads from the University of Toronto Faculty of Law, and the Center for Constitutional Rights in New York City.

[15] R. Copelon, *op cit.*, p. 226.

[16] *Ibidem.*

[17] ICTR, *Prosecutor v. Jean Paul Akayesu*, cit., para. 26.

[18] *Ivi,* para. 688.

[19] *Ibidem*; see also ICTR, *Prosecutor v. Jean Paul Akayesu* (Appeal Judgment), Case No. ICTR-96-4-T, 1 June 2001.

[20] ICTR, *Prosecutor v. Jean Paul Akayesu* (Trial Judgment), cit., para. 598.

Although the ICTY appeared to adopt the broad definition of the ICTR initially, the *Furundžija* case shifted towards a more precise definition of rape[21]. The most significant aspects of gender in this judgment are found in the development of the understanding of torture utilizing sexual violence. Significantly, the Trial Chamber acknowledged the efforts undertaken by international bodies in redressing the use of rape as a means of torture and, as such, a violation of international law[22]. The defendant was found guilty on two counts of war crimes, namely torture and abetting in outrages upon personal dignity, including rape. Furundůija did not commit the physical act of sexual violence, his conduct being limited to the interrogation of a woman prisoner during the sexual assault committed by another soldier. Nevertheless, the ICTY found him criminally responsible for his presence and his acts or omissions during the assault, making him liable for aiding and abetting in the rape of the prisoner.

Another major achievement was made in the ICTR case of *Prosecutor v. Gacumbitsi*. Its appeals decision established that under coercive circumstances, non-consent can be inferred from background circumstances rather than being a separate element to be proven[23]. Hence, if the conduct occurred within a detention facility or during a genocide campaign, non-consent can be inferred. In other words, the ICTR, while affirming that consent is part of the definition of rape, also held that it does not have to be proven when there are coercive circumstances.

The recognition of sexual violence as a prosecutorial priority in these cases, and others to be discussed over the coming days, is due to the essential role played by women's organizations in fighting the resistance to making gender inclusiveness a priority. As stated by Rhonda Copelon, a leading academic and activists who was at the forefront of the global movement that fought for these advancements: «The interrelationship between mobilization at every level and international legal change exemplifies the basic principle that human rights, like law itself, are not autonomous, but rise and fall based on the course and strength of peoples' movements and the popular and political pressure and cultural change they generate»[24].

Similarly persistent efforts to influence the negotiations to draft the Rome Statute of the International Criminal Court (ICC) were key to it recognizing a spectrum of gender crimes that had never been formally articulated in any international instrument.[25]. In addition to rape, it includes enforced prostitution, sexual slavery, forced pregnancy, sex trafficking, and other crimes of sexual violence within the crimes against humanity and war crimes provisions. Furthermore, through its identification

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[21] ICTY, *Prosecutor v. Anto Furundžija* (Trial Judgment), Case No. IT-95-17-1, 10 December 1998, para. 185.

[22] *Ivi*, para. 163.

[23] ICTR, *Sylvestre Gacumbitsi v. The Prosecutor* (Appeal Judgement), Case No. 2001-64-A, 7 July 2006, paras. 155-157.

[24] R. Copelon, *op cit.*, p. 220.

[25] Rome Statute of the International Criminal Court, 1998, arts. 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi).

of separate sexual and gender crimes, including gender-based persecution, the Statute acknowledges the peculiar and aggravating harms caused by different violations[26].

Lessons from the various cases to be discussed over the next few days have taught us that there must be a concentrated effort both in prosecutorial policies, as well as those guiding other organs of the court, to effectively address SGBV. Procedures ensuring that victims are provided with a safe space to testify, their information is kept confidential and they receive necessary services to ensure their psychological wellbeing is not jeopardized are of the utmost appointment. These must be guided by clear policy, but also overseen by trained personnel at every level of the court.

2. Safeguarding the Gains Made

The groundbreaking cases that will be analyzed during this conference reflect a mainstreaming of women's rights into the normative structures of international humanitarian law. While these advances must be celebrated, we must not lose sight of how far we still must go in addressing SGBV in conflict and non-conflict settings. I would like to highlight several issues that urgently require our attention if the gains we have made are to be safeguarded and the voices of the victims who continue to remain invisible are surfaced.

Despite the extraordinary progress that had been made in accountability efforts for sexual violence, gender justice remains a very contested issue in international criminal law[27]. The Rome Statute created a solid foundation for the International Criminal Court both in terms of defining sexual and gender-based crimes and establishing necessary procedures to deal with victims of SGBV; however, it has struggled to meet what has been expected of it.

The ICC suffered a slow start to its handling of sexual and gender-based violence, marked by a limited prosecutorial response by its first Prosecutor, Luis Moreno Ocampo. For example, in the 2012 *Lubanga* case[28], despite evidence pointing to widespread sexual violence against child soldiers and rape being routinely committed against young girls, charges related to sexual violence were not brought. After receiving widespread scrutiny, the Prosecutor included them in the 2014 *Katanga* case[29]. This was the first-time sexual violence charges had appeared in an ICC indictment. Unfortunately, there was no conviction for these crimes, as the ICC held

[26] Women's Caucus for Gender Justice for the ICC, *Recommendations and Commentary for December 1997 Prep Com on the Establishment of an International Criminal Court*, WC.6.1, WC.6.1-4.

[27] R. Copelon, *op cit.*, p. 233.

[28] ICC, *Prosecutor v. Thomas Lubanga Dyilo* (Decision on establishing the principles and procedures to be applied to reparations), Case No. ICC-01/04-01/06-2904, 7 August 2012, para. 191.

[29] ICC, *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, 7 March 2014.

that the evidence was insufficient to determine whether the defendant knew about the rape and sexual slavery being committed by his subordinates. Victims of sexual violence suffered yet another setback.

In 2014, the Rome Statute provisions were combined with the Policy Paper on Sexual and Gender-Based Crimes, the first policy issued by the ICC's Office of the Prosecutor. The Policy was the culmination of the efforts of the ICC's second Prosecutor, Fatou Bensouda, to reinforce the Office's expertise and commitment to the prosecution of SGBV[30]. This detailed policy also highlighted the significant gaps existing between the crimes identified in the Statute and the effectiveness of the Court's investigations, prosecutions, and convictions on SGBV.

While the OTP policy has led to improvements in the court's functioning, the Court has still faced challenges. In the 2016 *Bemba* case[31], the accused was found guilty on two counts of crimes against humanity and three counts of war crimes, all of them including rape committed by fighters under Bemba's command. Unfortunately, on 8 June 2018, a divided Appeals Chamber reversed the conviction acquitting Bemba for these crimes[32]. The Appeals Chamber's failure to recognize Bemba's liability reflected a persisting absence of critical gender-competent analysis in the ICC[33]. Fortunately, the ICC has shown some improving in the last few years. On 8 July 2019, the ICC Trial Chamber convicted *Bosco Ntaganda* on 18 charges of war crime and crimes against humanity, including rape and sexual slavery[34]. While the original indictment did not include those charges, following the verdict in the *Lubanga* case, the indictment was amended and expanded to rape and sexual slavery[35]. On 30 March 2021, the Appeals Chamber[36] delivered its judgments confirming the decision of the Trial Chamber, thus setting an important precedent as the first final conviction for crimes of conflict-related sexual violence.

The ICC recently convicted Dominic Ongwen, a former commander in the Lord's Resistance Army, in a landmark judgment. The Prosecutor's charges against

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[30] ICC, *Office of The Prosecutor, Policy Paper on Sexual and Gender-Based Crimes*, 2014, in: *https://www.icc-cpi.int/iccdocs/otp/OTP-Policy- Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf.*

[31] ICC, *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, 21 March 2016.

[32] ICC, *Prosecutor v. Bemba* (Judgement on the Appeal of Mr Jean-Pierre Bemba Gombo Against Trial Chamber III's "Judgement Pursuant to Article 74 of the Statute"), Case No. ICC-01/05-01/08 A, 8 June 2018.

[33] *Ivi*, para 621.

[34] ICC, *Prosecutor v. Bosco Ntaganda*, Judgment (Trial Chamber), Case No. ICC-01/04-02/06, 8 July 2019.

[35] ICC, *Prosecutor v. Bosco Ntaganda* (Decision on the Prosecutor's Application under Article 58), Case No. ICC-01/04-02/06, 13 July 2012.

[36] ICC, *Prosecutor v. Bosco Ntaganda* (Judgment on the appeals of Mr. Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment'), Case No. ICC-01/04-02/06-2666, 30 March 2021.

Ongwen reflect the influence offered by the 2014 Sexual and Gender-Based Crimes Policy. The Policy and its guidance empowered the Office of the Prosecutor to engage directly on gender. As in *Ntaganda*, the initial arrest warrant against Ongwen did not include any charges for sexual and gender-based crimes. However, after Ongwen was arrested and transferred to the ICC, the Prosecutor raised the number of charges from seven to seventy[37]. Nineteen of these charges were related to sexual and gender-based crimes. The Pre-Trial Chamber II unanimously confirmed all counts against Ongwen, representing the highest number of sexual and gender-based crimes confirmed by an ICC Pre-Trial Chamber to date[38].

In February 2021, the Trial Chamber found Ongwen guilty of 61 counts of war crimes and crimes against humanity, including all of the nineteen counts relating to charges of sexual and gender-based crimes[39]. The judgment is considered a turning point in the advancement of gender justice. It is not only the first conviction for forced pregnancy[40] as a standalone crime, as a war crime, and a crime against humanity; it is also the first to expressly consider the reproductive autonomy of women.

The judgment also contributed to the evolution of the conceptualization of the crime of forced marriage, charged as «another inhumane act» constituting a crime against humanity. As the crime of forced marriage is not included in the Rome Statute, the Court's interpretation of the act was critical. In its judgment, the Court rejected the notion that forced marriage is subsumed by the crime of enslavement or by the crimes of rape or sexual slavery. Instead, the Court interpreted forced marriage as an independent crime that satisfied the legal elements of «other inhumane acts» as a crime against humanity under Article 7(1)(k).

As this section illustrates, despite the ICC being a well-resourced court whose statute, policies, and procedures are considered to form best practice on handling SGBV, it still faces significant challenges in its investigations, prosecutions, and convictions on SGBV. Legal accountability for sexual violence under international law is not a foregone conclusion. The successful experiences before the ICC have been due to the ongoing perseverance of women's groups to document violations and make submissions to the Court, as well as the enhanced policy and expertise within the OTP. The *Al Hassan* case, whose trial opened in July 2020, takes the ICC into promising new territory as it is the first-time gender-based persecution as a crime against humanity

[37] ICC, *Prosecutor v. Dominic Ongwen* (Decision on the confirmation of charges against Dominic Ongwen, Pre-Trial Chamber II), Case No. ICC-02/04-01/15-422-Red, 23 March 2016, paras. 96-101.

[38] *Ibidem.*

[39] ICC, *Prosecutor v. Dominic Ongwen* Judgment (Trial Chamber), Case No. ICC-02/04-01/15, 4 February 2021.

[40] ICC Statute, art. 7(2)(f). The Rome Statute describes forced pregnancy as the «unlawful confinement of a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law».

will be adjudicated[41]. This case offers the ICC the possibility to develop groundbreaking jurisprudence, taking gender justice within the international legal framework to a new level.

3. Pushing the Boundaries

Before we begin to speak about the serious gaps in the advancements made so far and how the field must grow if it is to reflect the reality of who is targeted by gender crimes and what can contribute to the prevention of such crimes, I want to reiterate that pushing these boundaries does not imply that ongoing vigilance is not needed to protect the gains achieved to date. Being critical of where we are does not undermine the struggle it took to get here. To acknowledge that injustice still exists for certain victims and that those victims are often not represented by those who have fought and continue to fight for female sexual violence victims does not mean that their fight is not valid or should be over. The evolution of jurisprudence that we will discuss over the next few days required continuous questioning of who international justice efforts were failing and why. As feminists and gender justice advocates, we cannot become complacent with the answers we already know, even if we are still fighting for others to recognize those answers.

One of the most significant gaps in how sexual and gender-based violence is conceptualized and pursued under international law is around *who is considered* a victim. An unintended consequence of the intense struggle by women's groups to shift the international legal community's perception from sexual violence as an unfortunate consequence of conflict to it being a weapon of war was that such violence became synonymous with the experience of women. Following from this rationale, the creation of gender-sensitive accountability processes focused only on the challenges faced by women, who were often treated as a monolithic group, in accessing justice. The way individuals experience human rights violation is much more complicated and shaped by the gender roles and expectations placed on them by society.

While it may take place in lower numbers, men have often been targeted for sexual violence during times of repression or conflict. For example, male victims of rape, gang rape, electric shock and beating of genitals, genital mutilation, and forced nudity have been documented in contexts as diverse as Chile, Cambodia, Iraq (under United States' occupation), Sierra Leone, Sri Lanka, and South Africa. At one

[41] ICC, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, (Pre-Trial Chamber), Case No. ICC-01/12-01/18, 13 november 2019.

concentration camp in Sarajevo, 80% of the 5,000 male prisoners were reported to have been raped[42].

As the issue has been discussed more in the media over the last fifteen years, it is becoming increasingly understood that sexual violence against men is integral to the tactics used by many warring parties and repressive regimes. During the conflict in Syria, human rights groups documented that male political detainees have been subjected to forced nudity, electric shocks and beatings to the genitals, and rape[43]. The recent awareness has also shed light on historic SGBV against men. In 2009 reparation litigation was pursued against the Government of the United Kingdom (U.K.) for colonial era abuses during the Mau Mau uprising of the 1950-60s in Kenya. Men who had suffered abuses, such as castration, in colonial detention centers were part of the claimants. In a rare moment of justice, the U.K. Government awarded reparations in 2013[44].

Despite increased visibility, sexual violence against men is still largely unreported. Stigma against male victims is incredibly high in most contexts, and the majority of those who would document such cases – human rights workers, humanitarian aid providers and medical professionals – do not consistently look for the signs of such abuse as they do for women. Unfortunately, even when SGBV against men is identified, there tend to be two responses that inhibit the violations from being adequately addressed. In its work ICTJ has identified a fear among those working on accountability for SGBV that speaking about sexual violence against men and boys will jeopardize the hard-won fight to get policymakers, legal practitioners, and even human rights actors to focus on the rampant sexual violence that is still taking place against women. Primarily, there is a concern that resources to provide accountability and rehabilitation for sexual violence, at the international and local level, will have to accommodate another universe of victims in a world where the needs of female victims are still not being addressed.

Another way that the blind spot regarding men as victims of SGBV manifests itself is in how they are characterized in legal proceedings. Very few cases in international courts have had evidence of such crimes presented, and most cases where relevant charges are raised do not reflect the sexual nature of the crimes. For example, in *Prosecutor vs. Duško Tadić* the ICTY found the defendant guilty of inhumane acts as a crime against humanity and cruel treatment as a war crime for forcing a male detainee to perform oral sex on another prisoner and bite off one of his testicles. However, neither the indictment nor the judgment acknowledged the sexual nature of the offences[45]. Other cases before the ICTY, ICTR, and Special Court for Sierra Leone

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[42] A. Kapur - K. Muddell, *When No One Calls It Rape: Addressing Sexual Violence Against Men and Boys in Transitional Contexts*, New York, 2016, p. 6 ss. In: *https://www.ictj.org/sites/default/files/ICTJ_Report_SexualViolenceMen_2016.pdf*.

[43] *Ivi*, p. 8.

[44] *Ivi*, p. 24 ff.

[45] *Ivi*, p. 17.

also failed to recognize sexual violence against men and boys in indictments and judgements despite evidence being present and admitted.

Even with the progressive gender-neutral language of the Rome Statute, the ICC has struggled to appropriately address such violence. In its examination into the Kenyan 2007-08 post-election violence, the Prosecutor documented cases of the forcible circumcision of men from the Luo ethnic community by those from the Kikuyu ethnic group. In this case the prosecutor moved to charge these acts as «other forms of sexual violence»; however, the Pretrial Chamber fell short. Despite hearing evidence that the perpetrators conveyed their intent to emasculate the victims as the acts were being committed, the Chamber ruled that these violations should be categorized as «other inhumane acts»[46]. The evidence clearly indicated that the specific targeting of Luo males was an ethnically motivated display of masculine dominance[47].

The risk in not correctly identifying this violence is that the sexual nature of the crimes and the harms and consequences that they cause are obscured. By not applying the same standard of legal analysis to sexual crimes against men as we do for women, courts fail to recognize the societal dynamics that fuel sexual violence regardless of who the victim is. For justice processes to contribute to preventing this type of violence from recurring, they must understand the motivations behind it. Sexual violence is considered an effective tool against both men and women because it uses their prescribed gender roles against them. Much has been written about how sexual violence is a weapon of war used against women because of their roles as wives and mothers. It is a means by which perpetrators can bring shame on families and communities and impact the future of each through reproductive harm. However, the same motivation exists behind sexual violence against men. In many societies, the definition of being a man is connected to their ability to exert power over others and being a victim of sexual violence is inconsistent with this role. Through sexual violence, perpetrators erode the capacity of men to provide for their families and be leaders in the community[48].

Recognizing the complex influence gender roles have over why and how victims are targeted for SGBV goes beyond recognizing male victims of sexual violence. Little acknowledgement has been made within both the international legal community and broader transitional justice field of how individuals are often targeted for human rights violations because they deivate from gender norms. For example, in ISIS-controlled Iraq men and women were forced to adhere to a strict code of how they were to behave and dress according to their gender. Those whose conduct was seeing as not following these rules were considered "gender transgressors" and subjected to torture and often

[46] ICC, *Prosecutor v. Kenyatta* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute), Case No. ICC-01/09-02/11, 23 January 2012, para. 265.

[47] W. Kamau-Rutenberg - W. Wazima, *A gender analysis of forced male circumcisions during Kenya's post-election violence*, 2009. In: *http://africanarguments.org/2009/07/17/watu-wazima-a-gender-analysis-of-forced-male-circumcisions-duringkenya%E2%80%99s-post-election-violence/*.

[48] A. Kapur - K. Muddell, *op cit.*, p. 4 ff.

death. In 2017, gender justice advocates made a submission to the ICC arguing that ISIS had committed systematic gender-based persecution constituting crimes against humanity as well as the war crime of torture based on gender discrimination[49].

The targeting of individuals during periods of conflict or repression because of their sexual orientation or gender identity is not a new phenomenon[50]; however, these already marginalized victims have been almost entirely ignored by past accountability efforts for human rights violations. Through its arguments the submission sought to broaden the discourse on gender crimes and «expand the understanding of discrimination, including where gender, sexual orientation, and gender identity intersect»[51]. While this submission was not acted upon, it has expanded the discussion on gender crimes, and in and of itself is a victory for gender justice advocates who fought a very contentious battle to ensure that the crime of gender-based persecution was included in the Rome Statute.

The ICC could take advantage of the effort to broaden the legal landscape through the *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, which is the first case of gender-based persecution be adjudicated at the international level. Similar to ISIS in Iraq, the Malian jihadist imposed restrictions on individuals based upon their gender and severely punished those who violated them; however, such gender restrictions have been considered in the case in question only for women. The Prosecutor has argued that Al Hassan and other members of Ansar Addine severely deprived these women and girls of their fundamental rights, including the right to physical integrity, right to not be held in slavery, and right to freedom of association[52].

Fortunately, innovative legal thinking on how to pursue violations against those who deviate from gender norms is not confined to the sphere of international justice. In the last few years, ICTJ helped a local Colombian LGBTQI rights organization, Colombia Diversa, on a project analyzing how gender ideologies of the warring parties combined with existing social prejudices to give rise to human rights violations targeting LGBTQI individuals. The research demonstrates how this conflict-related violence exacerbated already existing discrimination and violence against those perceived as deviating from gender norms. Colombia Diversa argued that mechanisms existed throughout society to control the behaviors of those with diverse sexual orientations or gender identities, and that this discrimination and violence permeated

[49] Human Rights and Gender Justice Clinic of the City University of New York School of Law, MADRE, and the Organization of Women's Freedom in Iraq, communication to ICC Prosecutor Pursuant to 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 Iraq and the Levant (ISIL), 2017.

[50] K. Muddell, *Sexual Minorities Study: LGBT Issues and Transitional Justice*, New York, 2007.

[51] L. Davis, *Reimagining Justice for Gender-Based Crimes at the Margins: New Legal Strategies for Prosecuting ISIS Crimes Against Women and LGBTIQ Persons*, in *William & Mary Journal of Race, Gender, and Social Justice*, 24, 3, 2018, p. 518 ff.

[52] ICC, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, cit.

every aspect of a combatant's socialization. Based upon these findings Colombia Diversa created a legal argument that reconceptualized the idea of systematicity, asserting that conflict-related violence against LGBTQI individuals could not be characterized as random but was part of the system of warfare conducted by both the Colombian military and armed groups. In addition to publishing a book, the group made submissions to both the country's Truth and Reconciliation Commission and Special Jurisdiction for Peace.

The final gap in the contribution of international jurisprudence on SGBV that I believe is vital to keep in mind is how, or if, it is applied in local jurisdictions. As very few cases can be heard before regional and international courts, prosecutions at the national level are vital and can offer a greater chance of impact. In ICTJ's experience these proceedings can provide greater access to witnesses, evidence, and victims as well as judges, staff, lawyers, and material in local languages. Though national trials still require a proactive approach to outreach and public relations, it is more likely that the public will receive information about national trials than about trials happening on the international stage, well outside the country. This increased visibility contributes to the possibility that bringing perpetrators to account will signal a kind of normative shift from a culture of impunity to one of accountability. This is vitally important given the levels of stigma and silence that can exist around sexual and gender-based crimes.

Unfortunately, there are several major challenges to ensuring that domestic jurisdictions are capable of meaningfully prosecuting these types of violations. First, very often domestic laws often contain very restrictive definitions of SGBV. For instance, some definitions may only recognize female victims or may limit the definition of sexual violence to rape[53]. Even if adequately defined laws are in place and applicable, many countries face other challenges to prosecuting SGBV. First, there is often a significant gap between a law and its implementation. A law is only as good as the attitudes of those who are tasked with upholding it and protecting the population. Changing attitudes can take much longer than crafting new laws. For example, after Apartheid ended, South Africa passed progressive laws on gender-based violence, but in practice there is still significant impunity for these crimes[54].

In many domestic settings, ordinary courts do not have the expertise or capacity to try massive human rights violations. Certain countries, such as Colombia, Tunisia, and Uganda, have established specific mechanisms within their national judicial system for this purpose. In Uganda, the International Crimes Division (ICD) was created within the country's High Court and mandated to prosecute genocide, war crimes and crimes against humanity. The Rome Statute was domesticated into Ugandan law with the passage of the 2010 International Criminal Court Act, which criminalized a broad range of sexual offenses not previously captured under domestic law. Unfortunately,

[53] K. Muddell - S. Hawkins, *Gender, and Transitional Justice: A Training Module Series, Module 4. International Center for Transitional Justice,* New York, 2018, p. 23 ff.

[54] *Ibidem.*

as the Act cannot be applied retrospectively, most forms of conflict-related sexual violence that took place during the conflict cannot be prosecuted by the ICD[55].

The Ugandan example also demonstrates how progressive steps within domestic systems can be undermined by a lack of political will. Both the ICD and Directorate of Public Prosecutions have adopted guidelines for protecting witnesses and victims of sexual crimes, as well as to ensure that specialized training for the handling of SGBV cases takes place with their staff. However, inadequate budgetary allocations have hindered the development of appropriate protection measures, and there still exists an insufficient number of competent personnel (medical, police and prosecutors) with the relevant skills and attitudes to conduct effective investigation and prosecutions of sexual crimes[56].

There is one final comment that I would like to make. The gaps in applying international jurisprudence in national courts speaks to the importance of adequate law reform, but also the reform of institutions that have allowed such violence to thrive. When a country emerges from a period of conflict or repression, various transitional justice tools are often employed to address a legacy of human rights violations. Quite often governments will adopt different types of measures, such as criminal justice, truth-seeking and reparations. These efforts are meant to address the past, but also provide guarantees that this type of violence will never happen again.

Unfortunately, while institutional reform is one of the agreed upon elements of transitional justice, often it is overlooked. However, even if the most responsible are prosecuted, laws are changed, and victims are acknowledged, the culture of institutions that were either directly involved in committing acts of violence or did not question it will perdure.

For example, after Kenya's 2007 post-election violence, a new constitution established numerous government entities dedicated to gender equality and legal protections for women. However, ICTJ found during a series of trainings for mid-level police officers a multitude of problems hindering the so much needed progress on investigating sexual violence. First, officers reported being unaware of how sexual violence was criminalized. They had never been exposed to what the laws consisted of. Second, many reported preferring to resolve a reported incident of sexual violence by bringing together the family of the victim and the perpetrator. This was indicative of their own biases that such violence belonged in the private sphere and did not warrant the seriousness of a crime meant to be investigated by police. Finally, those who knew the law and wanted to pursue investigations reported that their efforts were often shut down by their supervisors. This latter observation reflects the challenge with the use of trainings to reform police or other parts of the security sector. Given the

[55] International Center for Transitional Justice, *Interview with Sarah Kasande*, Head of Uganda Office, 2020.

[56] *Ibidem*.

reliance of these institutions on hierarchy, for reform to take place, those high up in the chain of command must be the ones who are demanding it.

More importantly than anything discussed so far, accountability for gender and sexual crimes requires a shift in the culture of institutions and societal perceptions of this type of violence. International jurisprudence has evolved tremendously since the establishment of the international tribunals, but it still fails to deliver justice to many victims and, specifically, certain categories of victims. The international legal community must continue to evolve, transforming the narrow way in which it views sexual violence and interprets gender. Any advances in these areas have been pushed forward by select gender justice advocates. The broader gender justice movement must push past its preconceived notions and challenge itself to evolve just as it challenged international law to do so decades ago.

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Abstract: As a result of decades of struggle by gender justice activists, international and regional bodies began in the 1990s to prosecute conflict related sexual and gender-based violence (SGBV). This paper recognizes the critical evolution of international jurisprudence since then. However, it argues that academics, practitioners, and actors cannot become complacent with these advances. There is a necessity to question which international justice efforts are failing and why, and work to expand current thinking on gender justice issues to fill the gaps that contribute to the invisibility of certain groups of victims.

Toward this end, the paper examines the various gaps in how sexual and gender-based violence is conceptualized and pursued under international law.

Abstract: Come risultato di decenni di lotta da parte di attivisti per la giustizia di genere, gli organismi internazionali e regionali hanno iniziato a partire dagli anni Novanta a perseguire la violenza sessuale e di genere correlata ai conflitti (SGBV). Il presente testo riconosce l'evoluzione critica della giurisprudenza internazionale, tuttavia, sostiene che gli accademici, i professionisti e i diversi attori che interagiscono non possono diventare compiacenti con questi progressi. È necessario chiedersi quali sforzi di giustizia internazionale stiano fallendo e perché, e lavorare per espandere il pensiero attuale sulle questioni della giustizia di genere per colmare le lacune che contribuiscono all'invisibilità di alcuni gruppi di vittime. A tal fine, il presente testo esamina le varie lacune nel modo in cui la violenza sessuale e di genere viene concettualizzata e sanzionata nel diritto internazionale.

Keywords: international law – gender justice – victims – international jurisprudence – sexual and gender-based violence.

Parole Chiave: diritto internazionale – giustizia di genere – vittime – giurisprudenza internazionale – violenza sessuale e di genere.

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