

Reimagining Justice: Ending Impunity for Gender-Based Crimes at the Margins

Experts Convening on the Draft Crimes Against Humanity Treaty Outcomes and Observations

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Law in the Service of Human Needs



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I. Introduction

Last summer, the International Law Commission (ILC) completed its first reading of the draft articles for a new treaty on crimes against humanity, which members of the UN General Assembly's Sixth Committee reviewed in the fall. While the current treaty draft embraces strong language from the Rome Statute, including gender as a protected class from persecution, it also adopts its definition gender. Two decades of international law have since clarified the broad definition of gender under customary international law, and the "footnote" to the term gender contained in the Rome Statute has become redundant and outdated. Strong treaty language that complies with existing human rights treaties and customary international law norms would be an invaluable tool for confronting impunity and enhancing state efforts to prevent and punish gender-based crimes.

A text that does not adhere to existing human rights norms risks eroding gains of women's and gender rights movements. A failure to recognize gender rights could sideline women and other marginalized victims and result in even greater impunity for gender crimes amounting to crimes against humanity. Also at risk is the further concretizing of women's rights as secondary rights, and the exclusion of rights for Lesbian, Gay, Bisexual, Transgender, Intersex, and Queer (LGBTIQ) persons altogether.

Through a coordinated advocacy strategy and movement-building initiative, the Human Rights and Gender Justice (HRGJ) Clinic of the City University of New York (CUNY) School of Law, MADRE, the Organization for Women's Freedom in Iraq (OWFI), Outright Action International, the Women's International League for Peace and Freedom (WILPF), the NGO Working Group on Women, Peace and Security, and other institutions and organizations seek to seize this pivotal moment in history to broaden the discourse on gender discrimination, including where gender intersects with sexual orientation and gender identity.

Last year with the support of UN WOMEN, this same coalition convened an experts' meeting on gender rights under the Rome Statute and more broadly international criminal law. Participants examined the legal theories and current debates regarding persecution on the grounds of gender discrimination. They discussed provisions and legal precedents which support prosecution of crimes against humanity committed against women and other marginalized persons based on their gender non-conforming behavior.

Building on last year's convening, and with the continued support of UN WOMEN, the HRGJ Clinic of CUNY Law School convened a second experts' meeting, bringing together 25 international experts and scholars in the fields of international criminal law, women's rights and LGBTIQ rights. Participants examined the legal theories and current debates regarding criminalization of persecution on the grounds of gender discrimination contained within the new crimes against humanity draft treaty provisions. Moreover, participants built on their legal analysis from the first experts' meeting to develop recommendations on effective strategies for infusing a gender analysis during these final stages of the treaty drafting process, and for engaging with international human rights and

transitional justice mechanisms to support the protection of gender rights in conflict situations. This convening was organized under the Chatham House Rule.

II. Background

In the mid-1990's, substituting the word "gender" for "sex" was one of the most important safeguards for gender justice to happen at the Rome Conference, which created the Rome Statute and ultimately the International Criminal Court (ICC). A fundamental objective by the opposition was to exclude sexual orientation and gender identity as categories protected against discrimination. While these bigoted views wielded a heavy hand in the negotiations, they were not representative of the overwhelming majority of delegates who favored the more inclusive term of gender and embraced the recognition of its social construction.

The footnote to the term "gender" in Article 7(3) states that, "it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society." At the formation of the Rome Statute, the phrase "in the context of society" was decidedly understood to codify the societal definition of gender, thus its social construction. As discussed during the negotiations, the accepted definition of gender recognizes discrimination based on whether or not a person behaves according to a prescribed gender role, "whether it be in the realm of housekeeping, work, or sexuality." This came in part from the Report of the UN Secretary General to the Beijing Platform for Action, which was distributed to delegates discussing the definition of gender. Over the last two decades, international human rights law and jurisprudence has born this out, as experts and jurists have adopted language that accounts for the social construction of gender identity. Since the Statute's formation nearly twenty years ago, the understanding of gender under Article 7(3) has not been clarified; there has likely never been a call for the ICC to investigate atrocities committed on the basis of gender at the margins.

Similar to the call to end impunity for atrocities committed on the basis of gender, the struggle to secure the recognition of rape as a form of torture initially faced stiff resistance. Sexual violence crimes were not taken as seriously as other crimes in the early years of international criminal tribunals. However, activists were successful in rallying drafters to abandon the "outrages to personal dignity" language, and to broaden the category for sexual violence to not only include rape but also sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other undefined forms of sexual violence.

A key component to their success was combining advocacy with legal strategy. One participant noted that "the participation of women's rights activists on issues of international criminal and humanitarian law (as opposed to human rights law) [has been a] phenomenal step in 'genderizing' the structural content of international law as it pertains to the 'masculine' arenas of war, genocide and crimes against humanity." Gender strategies in the tribunals grew from the notion that "women's rights are human rights." Today, advocates are calling for a "gender equal world."

III. Understanding the Genesis of the Crimes Against Humanity Treaty

The experts meeting began with a review of the history of the drafting process for the crimes against humanity (CAH) treaty and an overview of stakeholders involved in the process. It was noted that the Rome Statute was the first time the international community set a definition for crimes against humanity under international law, making it easier to prosecute individuals for atrocities they have committed. However, the need for a convention on crimes against humanity became evident after cases such as *Bosnia v. Serbia* and *Belgium v. Senegal* made clear the need to hold states accountable for atrocities committed by state authorities. This provided an opening for the negotiation of a new treaty that could complement the Rome Statute and codify and broaden the scope of crimes against humanity prosecutions. Leila Sadat, the Special Adviser on Crimes Against Humanity to the Prosecutor of the International Criminal Court, organized a coalition and steering committee to draft the crimes against humanity treaty and advocate for its adoption by the international community.

The Prosecutor's Office have been supportive of the draft treaty and view it as complementary to the work of the Court. In addition, there has been a strong coalition of states supporting the treaty and the work of the International Law Commission, including Chile, Germany, Jordan, Sierra Leone, and South Korea, that hosted a side event for the treaty during the Assembly of State Parties of the ICC in December 2017. The ILC finalized a draft version of the treaty in May 2017 and it is open for comments from civil society and governments until December 2018. A revised treaty will be issued in summer 2019 to the UN General Assembly's Sixth Committee.

IV. Historical and Current Intervention Strategies

Participants next engaged in a discussion on historical feminist intervention in international criminal law and lessons learned from the negotiation of the Rome Statute and other international treaties. Beginning in 1994 when the ILC first released a draft of the Rome Statute for review, civil society pushed for the inclusion of gender provisions in the Statute, particularly given the atrocities committed against women in Rwanda at the time. They formed a women's caucus to organize their demands and outlined three requirements that must be included in the Rome Statute for it to be considered a gender-sensitive document: 1) the crimes listed in the Rome Statute should reflect the experiences of women, girls, men and boys; 2) victim's rights should be reflected and protected in the Rome Statute, and; 3) there should be equal gender representation in the court among judges, officials, and staff.

A coalition of conservative Arab states and the Vatican led the opposition to the inclusion of gender-sensitive provisions in the Rome Statute, arguing that references to gender-based crimes would increase women's human rights protections, and create rights for LGBTIQ communities. The women's caucus overcame this opposition and through intense

negotiation was able to include a definition of gender in the Rome Statute.

V. Feminist Intervention in the Treaty Drafting Process

In this session, participants discussed what feminist intervention should look like for the crimes against humanity treaty. Participants spoke about drafting the treaty to respond to the needs of “us”: the civilian population that the treaty is meant to protect. To craft such a treaty, it is important to expand the groups that will be protected from persecution to incorporate groups that have been historically persecuted, but have yet to receive formal protection under international criminal law. In addition, redefining specific terms in the treaty such as gender, enslavement, and torture can expand protections for gender-based crimes.

As many experts noted, the stronger negotiating position would be to present all concerns in the treaty and call for progressive language at the outset, rather than negotiating from a stance that does not reflect the evolution of international gender and human rights law in the twenty years since the Rome Statute’s formation. In the intervening years several prominent cases have highlighted the weaknesses with the Rome Statute language when prosecuting gender-based crimes; thus, the importance of pushing for more progressive language in the crimes against humanity treaty. For instance, the ICC Bemba case represented a loss for the feminist community because the crime of rape was determined to be lesser than torture and rape charges were subsumed by the torture charges. The crimes against humanity treaty presents an opportunity for the international community to broaden the scope of protections for civilians. Affirming the understanding of the definition of gender will allow more crimes to be captured under the treaty, including those committed not only against women and girls, but also LGBTIQ persons, men and boys.

VI. Critical Concerns and Strategies for Change

In the afternoon, participants analyzed the strengths, weaknesses, opportunities, and threats at play in moving forward the inclusion of progressive gender language in the crimes against humanity draft convention. Participants listed as a strength the fact that they can build upon a recent increase in progressive movements and activism, particularly involving gender, to push for better language on gender in the treaty. They noted that the ILC Special Rapporteur on crimes against humanity Sean Murphy, who is leading the process, has been receptive to civil society input and may be open to including an analysis of gender in the commentaries for the treaty. However, potential weaknesses include insufficient time before the December 2018 deadline to submit comments on the draft treaty, combined with the reality that many civil society groups are not aware of the treaty. Participants were also concerned that they may face opposition from conservative member states.

Participants noted potential opportunities to take advantage of in order to push forward a more progressive interpretation of gender in the treaty. For example, assessing whether states that were more conservative at the time of the Rome Statute negotiations have

pivoted towards a progressive stance on the issues, as may be the case with Ireland. In addition, speaking to states that are not on the record about the treaty and influence them to adopt progressive gender language, stressing its importance to the women, peace and security agenda that emerged after the Rome Statute was adopted. There is also the potential for movement building with other groups that will be affected by the treaty, such as the current immigrant and migrant rights and Indigenous movements that are already organizing for major events at the United Nations in the coming year. Finally, there is an opportunity to involve academics who can produce scholarly works demonstrating the importance of adopting progressive language, and clarifying that international law has already been interpreted to allow for such a definition.

Nonetheless, advocates will be operating in a potentially hostile environment with the rise of conservatism and populism in the international community that has led to less engagement with multilateral organizations on the part of many member states and less commitment to a human rights agenda overall. One significant threat identified by participants is the rise in fundamentalist and religious groups that have co-opted the term gender for their movements, turning it into a red flag for governments and making it politically difficult for civil society groups to bring up gender in discussions with states. Another threat is the closing of civil society space through attacks on and intimidation of human rights defenders, making this kind of advocacy more difficult for civil society partners in certain countries.

VII. Next Steps

After breakout strategy sessions, participants agreed to take advantage of the opportunity to provide comments to the treaty by raising awareness of the issue among other civil society groups, drafting progressive language for inclusion in the treaty, and reaching out to relevant stakeholders in the international realm and a cross-regional group of states to advocate for the adoption of progressive gender language in the treaty.

To achieve these goals MADRE, OutRight Action International and the NGO Working Group on Women, Peace and Security put together a call to action that was circulated during the Commission on the Status of Women describing the status of the treaty and the importance of getting involved to help engage additional civil society groups. After building civil society support, participants will also circulate an open letter to relevant stakeholders outlining our recommendations for changes to the draft treaty text. The HRGJ Clinic at CUNY Law School will put together a legal memo explaining the recommended revisions to the draft treaty discussed by participants to enhance gender protections and better reflect current international human rights and humanitarian law.

VIII. List of Participants

1. **Louise Allen**, Executive Director, NGO Working Group on Women, Peace and Security
2. **Amir Ashour**, Founder and Executive Director, IraQueer
3. **Kelly Askin**, Former Legal Advisor to the judges of the International Criminal Tribunal for the former Yugoslavia and for Rwanda (in absentia)
4. **Anne-Marie de Brouwer**, Researcher, Tilberg University, Amsterdam, Co-Founder and Team Member at IMPACT: Center against Human Trafficking and Sexual Violence in Conflict
5. **Charlotte Bunch**, Founding Director and Senior Scholar at the Center for Women's Global Leadership, Rutgers University
6. **Agnès Callamard**, UN Special Rapporteur on extrajudicial, summary or arbitrary executions
7. **Lisa Davis**, Associate Professor of Law and Co-Director of the Human Rights and Gender Justice (HRGJ) Clinic, CUNY Law school
8. **Sarah Douglas**, Deputy Chief, UN Women Peace and Security Team
9. **Yasmine Ergas**, Director of the Specialization on Gender and Public Policy and Lecturer in the Discipline of International and Public Affairs, Columbia University
10. **Katherine Gallagher**, Senior Staff Attorney, Center for Constitutional Rights
11. **Jocelyn Getgen Kestenbaum**, Assistant Clinical Professor of Law at Cardozo School of Law, Director of the Benjamin N. Ferencz Holocaust and Atrocity Prevention Clinic, and Director of the Cardozo Law Institute on Holocaust and Human Rights
12. **Julie Goldsheid**, Professor of Law at CUNY School of Law
13. **Niamh Hayes**, Expert on justice for conflict-related sexual violence crimes
14. **Maya El Helou**, Arab Foundation for Freedom and Equality
15. **Cynthia El Khourg**, Arab Foundation for Freedom and Equality
16. **JM Kirby**, Human Rights Advocacy Director, MADRE

17. **Camille Massey**, Founding Executive Director, Sorensen Center for International Peace and Justice, CUNY Law School
18. **Siri May**, UN Program Coordinator, OutRight Action International
19. **Charo Mina-Rojas**, National Coordinator of Advocacy and Outreach for Black Communities' Process, Cali, Colombia (PCN)
20. **Norul Mohamed Rashid**, UN Secretary General's Office
21. **Kaoru Okuizumi**, UN Team of Experts on Rule of Law / Sexual Violence in Conflict
22. **Valerie Oosterveld**, Associate Dean, Western Law School, and former member of the Canadian delegation to the 1998 U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court
23. **Madeleine Rees**, Secretary-General, Women's International League for Peace and Freedom (WILPF)
24. **Leila Sadat**, James Carr Professor of International Criminal Law, Director of the Whitney R. Harris World Law Institute, and Special Adviser on Crimes Against Humanity to the Prosecutor of the International Criminal Court
25. **Jessica Stern**, Executive Director, OutRight Action International
26. **Yifat Susskind**, Executive Director, MADRE
27. **Barbro Svedberg**, Policy Specialist Women, Peace and Security, Swedish International Development Cooperation Agency (SIDA)
28. **Rene Ureña**, Director of Research & Associate Professor of Law, Universidad de Los Andes Law School,
29. **Patricia Viseur-Sellers**, Special Advisor on Gender to the Prosecutor of the International Criminal Court
30. **Anna Von Gall**, Project Manager on Women, Peace and Security, Zentrum für Internationale Friedenseinsätze (ZIF)