

## A HOPEFUL CONVERSATION: OVERCOMING IMPUNITY FOR SEXUAL AND GENDER-BASED VIOLENCE

This panel was convened on March 30, 2023 at 2:00 pm by its moderator Susana SáCouto, director of the War Crimes Research Office at American University, who introduced the panelists: Zubaida Akbar, Afghanistan Program Officer at Freedom Now; Karima Bennouna, Lewis M. Simes Professor of Law at the University of Michigan and former UN Special Rapporteur in the field of Cultural Rights; Lisa Davis, Associate Professor of Law at CUNY Law School and Special Adviser on Gender Persecution to the International Criminal Court; David Eichert, PhD candidate at the London School of Economics; and discussant Beth Van Schaack, U.S. Ambassador-at-Large for Global Criminal Justice. This panel was organized by Alejandra Vicente, Head of Law at REDRESS.

### INTRODUCTORY REMARKS BY SUSANA SÁCOUTO\*

As most of you know, despite centuries of being overlooked, mischaracterized, ignored, or treated as secondary to other crimes, an extensive list of sexual and gender-based violence (SGBV) crimes occurring in situations of conflict or mass violence are now explicitly enumerated in the Rome Statute establishing the International Criminal Court (ICC), as well as in the statutes of other tribunals. Along with this, we have seen the production and dissemination of numerous protocols, guidelines, and policy papers on the investigation and prosecution of these crimes, including (most recently) a policy on the crime against humanity of persecution on the grounds of gender launched by the ICC's Office of the Prosecutor of the at the end of last year.

Moreover, we have seen some considerable and noteworthy successes in recent years in the investigation and prosecution of these crimes, not only at the international level but also before domestic courts. In addition to the ICC judgments in *Ntaganda*—which convicted the accused for, among other things, rape and sexual slavery committed against victims belonging to the same armed group as the perpetrators—and *Ongwen*—which saw the first conviction of forced pregnancy as both a crime against humanity and a war crime—we have also seen a number of landmark decisions at the national level holding perpetrators liable for SGBV crimes.

Yet despite the international legal framework in place, and some notable successes, impunity for international SGBV crimes remains the norm in many parts of the world. Many survivors are often left with few legal avenues to seek justice or must embark on long and painful legal processes. Convictions are still rare, reparations remain largely elusive (and even when issued, a challenge to implement), and the impact of violence on women and girls, children, minorities, and members of the LGBTIQ+ community is often still underreported and not properly documented.

So what is missing? What more can be done? How can international law address the ongoing violence and prevailing impunity for SGBV crimes? Fortunately, we have with us today a distinguished panel of speakers to help us address these questions.

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I want to start with Zubaida Akbar, a leading women's rights and civil society activist from Afghanistan, currently Afghanistan Program Officer at Freedom Now. Zubaida, you recently briefed the UN Security Council (UNSC) on the situation of women and girls in Afghanistan. Can you talk a bit about the extent to which life for Afghan women and girls has been affected since the Taliban took over in 2021? And how can international institutions like the UNSC and the UN special representative of the secretary-general for Afghanistan (or an extension of the United Nations Assistance Mission in Afghanistan (UNAMA)) assist in efforts to combat impunity for crimes committed against women and girls in Afghanistan?

#### REMARKS BY ZUBAIDA AKBAR\*

Another academic year in Afghanistan started last week, and women and girls continue to be excluded from most forms of formal education. Girls above secondary school cannot go to school, and university-level education is banned for women. Women cannot travel more than seventy-five kilometers without a male guardian. Women are banned from public baths, restaurants, and parks. The total collapse of the legal system and dismantling of national human rights mechanism means that women facing domestic abuse have no access to legal services. Taliban fighters recently prevented the sale of contraceptives for women in some provinces; in a country where maternal mortality rates are already very high, this means women are facing catastrophic situations. There have been many restrictions on women's employment. When the Taliban came to power, they shut down the Ministry of Women's Affairs. They announced that women's civil servants could not return to work until further notice. And most recently, the Taliban banned women's employment in international and national NGOs. Now women are only able to work in very limited sectors, like health and education, which are becoming even more restricted. Most recently, the Taliban issued a circular to the divorce law that would require women who were divorced during the Republic to go back to their former husbands. Overall, the Taliban has issued around forty decrees targeting the rights and freedoms of women directly.

The Afghan human rights community and many international stakeholders have labeled this systematic erasure of women from public spaces as "gender apartheid."<sup>1</sup>

As far as what the UNSC, UNAMA, and the broader international community can do, I want to reiterate that there are two stories about Afghanistan right now. There is the story that the Taliban came to power, and they are running the country; at the same time, there is the story that the people of Afghanistan are resisting, and this resistance is led by women. The first thing that the international community and the UN can do is to acknowledge this resistance and support the civil society actors inside Afghanistan when they are being detained, tortured, and killed for demanding their rights. There needs to be advocacy by the broader international community for those who risk their lives, who continue to protect the civic space in Afghanistan, and who try to make sure that human rights demands continue to be made from inside Afghanistan. Their work needs to be funded and it needs to be elevated. These are not the formal civil society structures that the UN and the Global North community are familiar with and have worked with before. But this is what remains of the civic space in Afghanistan: these small pockets of civic resistance.

The UNSC, UNAMA, and the broader international community must make sure that there is no unconditional engagement with the Taliban; this includes no recognition for the Taliban and no high-level visits to Afghanistan. High-level visits or any kind of unconditional engagement

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<sup>1</sup> End Gender Apartheid (2023), at [www.endgenderapartheid.today](https://www.endgenderapartheid.today).

with the Taliban would only give the Taliban a sense of recognition, emboldening them and impacting the rights of the people of Afghanistan even more.

UNAMA is already required to address the current human rights crisis in Afghanistan, but we have seen that UNAMA is not able to fully carry out its human rights mandate in Afghanistan. This is something that the human rights community of Afghanistan has constantly talked about. We see serious gaps in documentation and reporting. For example, in the recent briefing of the UNAMA SRSG at the Security Council, she failed to mention the targeted attacks on marginalized ethnic groups in Afghanistan.<sup>2</sup>

There needs to be assurance from the international community that they will continue to push for full, equal, and meaningful participation of diverse group of people from Afghanistan. In the conversations about the future of their country, we constantly see that the international community does talk to the Taliban. But we do not see those same conversations, with the same level of transparency, happening with the people of Afghanistan.

Women are sidelined from meaningful conversations about their future, their faith, and their country. We hope that the UNSC, UNAMA, and the broader international community continue to issue strong statements and resolutions about what is happening in Afghanistan. But that is not enough. The international community must be more confrontational with the Taliban on their grave human rights violations. For over two years, the Taliban have continued to violate the rights of the people of Afghanistan, and specifically the rights of women and marginalized ethnic groups, and yet the Taliban has seen no consequences for what they do, which emboldens them to do more.

You might have heard that just earlier this week, they arrested an education activist, Matiullah Wesa, a grassroots community-level activist who was traveling around the country to advocate for the rights of girls to education.<sup>3</sup> The Taliban felt threatened by that because they are threatened by educated women. They have continued to make excuses about reopening schools. They say it is the curriculum that needs to be changed, they say it is the school uniform; however, we know that the last time they were in power, they said these exact same things for six years and never reopened schools for girls.

The last thing that I want to say is that for all international-level engagement with the Taliban, there needs to be transparency. We need to know the intention of the international community in engaging with the Taliban: what do they want to get out of those conversations? And we need to hear what they have been able to achieve so far in engagement with the Taliban, because we do not see the impacts of that in our own daily lives.

## SUSANA SÁCOUTO

Let me now turn it over to Karima Bennouna, Lewis M. Simes Professor Law at the University of Michigan Law School. You recently published a piece in the *Columbia Human Rights Law Review* entitled “The International Obligation to Counter Gender Apartheid in Afghanistan.”<sup>4</sup> You and others have talked about the need for a new crime, gender apartheid, to accurately capture the

<sup>2</sup> United Nations Assistance Mission in Afghanistan (UNAMA), *Briefing to the United Nations Security Council by the Secretary-General's Special Representative for Afghanistan*, Roza Otunbayeva (Mar. 8, 2023), at [unama.unmissions.org/sites/default/files/briefing\\_to\\_the\\_un\\_security\\_council\\_by\\_the\\_secretary-generals\\_special\\_representative\\_for\\_afghanistan\\_-\\_8\\_march\\_2023.pdf](https://unama.unmissions.org/sites/default/files/briefing_to_the_un_security_council_by_the_secretary-generals_special_representative_for_afghanistan_-_8_march_2023.pdf).

<sup>3</sup> Amnesty International, *Afghanistan: Education Activist Arbitrarily Arrested: Matiullah Wesa* (Apr. 6, 2023), at [www.amnesty.org/en/documents/asa11/6656/2023/en/](https://www.amnesty.org/en/documents/asa11/6656/2023/en/).

<sup>4</sup> Karima Bennouna, *The International Obligation to Counter Gender Apartheid in Afghanistan*, 54 COLUM. HUM. RTS. L. REV. 1 (2022).

systemic repression of Afghan women and girls by the Taliban. Can you speak a bit about why you think this crime is needed?

Additionally, how is this different than using the crime against humanity of gender persecution to address these crimes? What is the added value of the crime of gender apartheid? And what do you think the strategy should be for advancing the gender apartheid approach? Could the success of the international legal response to racial apartheid in Southern Africa be helpful in designing an effective approach?

#### **REMARKS BY KARIMA BENNOUNE\***

I should say I have the full article that you mentioned on gender apartheid with me. It is eighty-eight pages long, so I cannot speak to all of it, but I want to say a few things quickly. The first thing to note is that the concept of gender apartheid is not just intended to be grounded in international criminal law (ICL). ICL and human rights law are certainly closely related, but they are not contiguous. There is the new global campaign for recognizing gender apartheid that is being led by very prominent Iranian and Afghan women, like Shirin Ebadi and Fawzia Koofi, who have called for the recognition of gender apartheid as a crime, and that is a call that I support. But I think that gender apartheid should be recognized as a much broader concept with legal, political, popular campaigning, and rhetorical significance that could be applied across and beyond the field of human rights. In fact, to use the title of this panel, it is precisely a way to have a new, hopeful conversation about situations like the one that Zubaida so eloquently described in Afghanistan.

In my paper, I define gender apartheid as the systematic segregation of women and men imposed through law and/or policy as a governing ideology. It involves the systemic oppression of women, defining women, as an Afghan woman human rights defender I interviewed said, as being “not as human as men.” This mirrors the experience of Black South Africans under the apartheid regime in many ways. Segregation may be accompanied by, as we see in Afghanistan, the near total exclusion of women. In fact, the situation that Zubaida described is the paradigmatic example of gender apartheid, a concept adapted from international laws about racial apartheid. Gender apartheid emphasizes that discrimination has been made the system of governance itself, such that the very aim of the authorities and their public policy, such as it is, is to discriminate. This is an illegal situation to be ended, not to be addressed with piecemeal or “constructive” engagement like the engagement offered by the Reagan administration in regard to apartheid South Africa. Zubaida is raising very important questions about apartheid here today.

The apartheid framework is important because it underscores the legal obligations of other states to take concerted and effective action to end this illegal situation and not be complicit with it, rather than to simply make statements denouncing it, which is what we have heard again and again. It can be important to have those denunciations, but they often are not worth much more than the paper they are printed on. The apartheid framework is thus trying to hold states accountable to the commitments they are making in these statements. According to international laws about apartheid, there are both (1) heightened obligations to implement relevant UN resolutions and (2) obligations to refrain from any action that implies recognition of, or lends support or assistance to, the commission of apartheid.

Now, let me say regarding the relationship between the gender apartheid approach and the gender persecution approach: I fully support the efforts to prosecute gender persecution at the

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International Criminal Court. I see the work of Lisa Davis as incredibly important, and we have had some good conversations about how these approaches fit together. I see them as complements, not as alternatives; there is much that persecution adds to this discussion, in particular because there is explicit text criminalizing it in the Rome Statute.<sup>5</sup> But I would submit that the definition of apartheid in the Rome Statute more fully characterizes the ideology and governance model that is structuring systematic discrimination in Afghanistan today if one simply substitutes gender groups for racial groups in that definition.<sup>6</sup>

We should think about using these frameworks in a complementary way, and not seeing any one of them as the sole solution to the problem. If we use these frameworks together in a variety of arenas, we can better reflect the totality of the assault on human dignity and the need for a holistic approach.

The gender apartheid approach is receiving increasing recognition, including by the UN secretary-general, the UN special rapporteur on the situation of human rights in Afghanistan, and the UN Working Group on Discrimination against Women and Girls.<sup>7</sup> I call on my fellow international lawyers here to avoid using a technocratic approach here which would make them an obstacle to this. There is a major international campaign now to recognize the crime of gender apartheid, led by frontline women human rights defenders from countries like Afghanistan and Iran, which sometimes faces pushback from some legal and policy people in certain international and civil society organizations. In response, I want to cite a thought from Judge Espinosa, the commentator on the Grotius lecture yesterday, who spoke about “the power of innovative arguments that may in future become the law.” I hope we will think about international law not as a barrier to these ways of accessing justice, but as a horizon of possibility for more inclusive and contemporary forms of justice and accountability for SGBV, including gender apartheid.

## SUSANA SÁCOUTO

Let us now move to Lisa Davis, Associate Professor of Law at CUNY Law School and Special Adviser on Gender Persecution to the ICC Prosecutor. Can you talk a bit about the process you led to design a policy about gender persecution and how it fits with the prosecutor’s policy on SGBV? Also, there have been a few investigations in cases where gender persecution has been investigated or charged at the ICC. Could you give us a sense of whether and how the gender persecution policy has been applied in those cases or situations?

## REMARKS BY LISA DAVIS\*

Let me just start a little bit by telling you why the prosecutor wanted the Policy Paper on the Crime of Gender Persecution<sup>8</sup> to be written. I think he wanted it to be written because gender

<sup>5</sup> Rome Statute of the Int’l Criminal Court, Art. 7, para. 1(h), July 17, 1998, 2187 UNTS 90 (entered into force on July 1, 2002).

<sup>6</sup> *Id.* Art. 7, para. 2(h).

<sup>7</sup> See, e.g., UN OHCHR, A/HRC/53/21: Situation of Women and Girls in Afghanistan - Report of the Special Rapporteur on the Situation of Human Rights in Afghanistan and the Working Group on Discrimination Against Women and Girls, paras. 95–97 (June 15, 2023), at [www.ohchr.org/en/documents/country-reports/ahrc5321-situation-women-and-girls-afghanistan-report-special-rapporteur](https://www.ohchr.org/en/documents/country-reports/ahrc5321-situation-women-and-girls-afghanistan-report-special-rapporteur).

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<sup>8</sup> International Criminal Court Office of the Prosecutor, *Policy on the Crime of Gender Persecution* (Dec. 7, 2022), at [www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf](https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf).

persecution has been a crime for decades, but there has never been a single successful prosecution in some twenty odd years, and that is unacceptable.

We must ask ourselves why. Part of the reason is because gender-based violence is not a crime. It is a term of art. The formal charge for bringing accountability is “gender persecution,” and the lack of prosecutions for gender persecution means that we do not recognize and hold accountable gender-based violence in conflict (at least, not outside of sexual violence, which still has challenges). It begs the question: what does gender-based violence look like in conflict outside of sexual violence?

I want to begin by asking you to think of the most famous conflict in modern international history where gender persecution was a central feature of the conflict. You will know it as soon as I say it. It is World War II and the persecution of homosexuals. While gender persecution was not an available charge at the time, we can look back at the historical records and see acts that may amount to gender persecution. But let me ask you this: where are the lesbians? Where are the trans people in those stories of what happened in World War II? What about women who were also persecuted by the Nazis having their offices raided and burned down, saying they could not work jobs that were more appropriate for men anymore, saying they had to stay at home? What happened to these stories? We do not hear them partly because they were not persecuted to the numbers that gay men were. But we also do not hear about these stories because we do not see persecuted people who experience double or triple forms of discrimination. We do not see people who are persecuted at vulnerable intersections, especially because they were already oppressed when the Nazis rolled in. So they were not a threat: they could not hold office, they could not pass on their name to their children, they could not vote. They had already lost so many rights or did not have them to begin with, that they were not considered a threat to the Nazi Party. And that is why we do not see that oppression, because that oppression was already there. But that does not mean that acts of gender persecution against women and LBTQI+ persons did not take place and that the oppression they already faced was not compounded.

Now let us move over to looking at Colombia. There we see the transitional justice process taking gender persecution as well as racial and ethnic persecution into consideration. There we see intersectional issues. We see the rape of Black and Indigenous women because they are Black or Indigenous and because they are women. This type of misogynist, racist belief that fuels sexual and gender-based violence in the conflict needs to be addressed. Their transitional justice process is starting to turn its attention to these types of crimes now, but in the beginning of their process, they were not looking at it. Now, that is not to say that there is a hierarchy of harms. To quote Andrea Smith, we do not want to play the Oppression Olympics.<sup>9</sup> But the point is we have to recognize discrimination that fuels egregious crimes against all of us, not just some of us. So, when we are looking at gender-based crimes in conflict, it requires an intersectional approach.

This is why accountability for the crime of persecution is an excellent tool. We need to look at all dimensions of oppression because we can use that intersectional approach to see and expose the racism, misogyny, and homophobia that drives conflict. And if we can unearth that, we can start to build a sustainable peace.

Now let us move over to Afghanistan. Because gender persecution is defined as the severe deprivation of fundamental rights, it brings together human rights law and international criminal law. How should we talk about girls’ education being banned? That is a severe deprivation of a

<sup>9</sup> Andrea Smith, *Heteropatriarchy and the Three Pillars of White Supremacy: Rethinking Women of Color Organizing*, in *FEMINIST THEORY READER: LOCAL AND GLOBAL PERSPECTIVES* 141 (Carole R. McCann, Seung-Kyung Kim & Emek Ergun eds., 5th ed. 2021)



fundamental right. Can we prosecute that under criminal law, to get accountability? The answer is yes, when it is gender persecution. And yes, the ICC is looking at this issue in Afghanistan.

But we must look closer at conflict or other crisis situations because we can miss gender persecution. Take, for example, a school bombing. The Islamic State in Khorasan (ISK) does not want girls going to school, so they allegedly bomb a school. Maybe the father walking his daughter to school dies. Men and women who are teachers die. The principal dies. The custodian who is a man dies. An investigator might say that there are both men and women killed, so there is no gender persecution—there are men and women, girls and boys who are victims. A different approach, however, would say that all of those victims are victims of gender persecution, because for gender persecution the focus is the targeting of a group, and that entire group was targeted because of their affiliation with girls' schools and girls access to education. As such, we can go after all of those murders or killings as a form of gender persecution. That is why gender persecution is an incredible tool to see the gender discrimination that fuels crimes; if we fail to do that analysis, we might see murder or torture, but we will miss the reason why that crime happened. And without the why, how are we going to build sustainable peace? We must understand why crimes happen or we will not root out the discrimination that existed before the conflict, the crimes that are exacerbated in conflict, and the post-conflict solutions that must address that discrimination.

We need a gender persecution lens and we need to take an intersectional approach to this work. The good news is there are cases starting to move forward on gender persecution. For example, we have a case in Mali where the ICC Office of the Prosecutor (OTP) does an excellent job looking at gender persecution, for example around dress codes: namely, women being tortured or humiliated for not wearing proper head scarves as decided by the perpetrator.<sup>10</sup> While there was not enough evidence to charge racial persecution, the OTP also makes note of that the enforcement of these discriminatory policies was harsher on women with darker skin.

There are also a lot of complexities in how these crimes played out against men: we must look at crimes against men because that is also gender persecution. We know that sometimes men are subjected to crimes based on that underlining discrimination against women. What do I mean by that? Well, sometimes men are raped in conflict to make them feel like they are a woman or a homosexual. We have to unearth the discriminatory intents behind these crimes because that tells the story of discrimination that happens in conflict.

We are seeing efforts for accountability for gender persecution moving forward. For example, I was talking about Colombia, the Special Jurisdiction for Peace, where they are looking at gender persecution.<sup>11</sup> The same processes are moving forward in other accountability mechanisms—on Syria, on Myanmar, they are developing their own papers or using the one from the ICC. Word is catching on and prosecutions are starting to move forward. We already have three cases at the ICC that are moving forward, with Mali being the first to have closing arguments in May. We will probably get our first decision shortly thereafter, and hopefully it will be our first successful prosecution on gender persecution so that all of us, not just some of us, have our rights recognized in conflict.

I want to turn to how we developed the Policy Paper on the Crime of Gender Persecution: the process was a little different than how the Court has done it before. We decided that we wanted to solicit civil society intervention from the beginning. We wanted to make sure that civil society was not shut out of the negotiation process, which meant getting comments before we started drafting. I

<sup>10</sup> Prosecutor v. Al Hassan, Case No. ICC-01/12-01/18, Version Publique Expurgée de la “Version Amendée et Corrigée du Document Contenant les Charges Contre M. Al HASSAN Ag ABDOUL AZIZ Ag Mohamed Ag Mahmoud,” paras. 949–60 (July 2, 2019), at [www.icc-cpi.int/sites/default/files/CourtRecords/CR2019\\_03499.pdf](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_03499.pdf).

<sup>11</sup> Lisa Davis, *Dusting Off the Law Books: Recognizing Gender Persecution in Conflicts and Atrocities*, 20 NW. J. HUM. RTS. 1, 42–51 (2021).

am happy to say that over five hundred organizations, academics, other institutions, and governments from over one hundred different countries and territories weighed in. And importantly, the vast majority of comments are reflected in the policy paper.

Regarding gender apartheid, this is an excellent tool for us to understand how gender crimes happen in conflict. While gender apartheid not a recognized crime—it would need to be included in a legal instrument for that to happen—it offers us a political analysis through a gender framework. Gender apartheid gives us a macro picture of what is happening in terms of discrimination. We can use apartheid to understand the framing; we can use gender persecution to charge the accountability. And we should be doing that because crimes should be charged cumulatively. We need to understand how discrimination fuels egregious crimes if we are going to build sustainable peace. That is one of the greatest tools we have as women and LGBTQI+ rights activists, and we know this because we have learned from charging rape as a form of torture in a way that highlights both the sexual violence and the torture within the crime of rape for example. The obstacles to dismantling misogyny, homophobia, and racism are big and they are challenging, so we need all the tools we can get if we are truly going to make a difference in ending discrimination for women and LGBTQI+ persons in conflict, including those at vulnerable intersections.

### SUSANA SÁCOUTO

Thank you Lisa for an extraordinarily compelling case for the implementation of gender persecution and its complementarity with gender apartheid. I am going to turn the floor over to our next panelist, David Eichert. David is a PhD candidate at the London School of Economics and a visiting lecturer at Sciences Po in France. You note in a recent article published in the *UCLA Journal of International Law and Foreign Affairs* that men, transgender women, and people outside the binary also experience sexual violence during periods of genocide, yet these crimes are rarely labeled as genocidal.<sup>12</sup> Can you briefly take us through your analysis of how sexual violence against these groups can qualify as an act of genocide under the Genocide Convention? My second question focuses on your particular research about the Rohingya. The ICC has opened an investigation into crimes against the Rohingya, but these seem to be limited to the crimes against humanity of deportation and persecution because Myanmar is not a state party to the Rome Statute, so the ICC's jurisdiction is limited to crimes where part of the criminal conduct took place on the territory of a state party (in this case, Bangladesh). How might sexual violence against men, transgender women, and people outside the binary also qualify, for instance, as the crime against humanity of persecution, using Lisa's and Karima's approach?

### REMARKS BY DAVID EICHERT\*

Thank you for including me here. My research focuses on a double phenomenon that happens in international law. On one hand, in armed conflicts around the world, people of all genders experience sexual violence. But at the same time, the stories international lawyers tell about sexual violence often focus entirely or predominantly on the sexual violence committed against cisgender women. For example, sexual violence against cisgender men has been prosecuted before international tribunals as a crime against humanity and a war crime, but sometimes it is categorized as something that is not sexual: it will be categorized as “torture,” or as “inhumane acts,” where

<sup>12</sup> David Eichert, *Expanding the Gender of Genocidal Sexual Violence: Towards the Inclusion of Men, Transgender Women, and People Outside the Binary*, 25 *UCLA J. INT'L L. FOR. AFF.* 157 (2021).

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the same acts against cisgender women are usually always categorized as “sexual” in nature. Moreover, in addition to cisgender men, you also have this entire phenomenon of sexual violence against queer people, including transgender women, transgender men, non-binary people, intersex people, third gender people, and more, who are almost entirely excluded from the practice of international law.

However, when you look at genocide, the so-called “crime of crimes,” all of a sudden you lose any sexual violence victim who is not a cisgender woman. Every single case that has been prosecuted in an international court about genocide and sexual violence has focused solely on sexual violence committed against cisgender women. And this is interesting because there is no such restriction on this in the Genocide Convention.<sup>13</sup> In fact, the Genocide Convention, which is the treaty that formally established the crime of genocide, does not include sexual violence at all. Instead, sexual violence was read into the Genocide Convention by feminists in the 1990s who were lobbying the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) to really focus on crimes against cisgender women.

The first case to come out of this lobbying was *Akayesu* at the ICTR, which affirms this idea that sexual violence can be an act of genocide.<sup>14</sup> But in *Akayesu* and all of the other cases that follow, sexual violence against men or other people is never articulated as a form of genocide, despite the fact that victims of all genders have reported experiencing horrific sexual violence during genocide.

The Genocide Convention lists five acts of genocide, and four of them are generally read as including sexual violence. The first is killing: in genocides, sexual violence can result in death due to very violent rape or genital mutilation. In other instances, people who are deliberately infected with HIV can die, or people who survive the genocide can commit suicide afterward.

The second act of genocide is causing serious bodily or mental harm; in other words, no one needs to die from the sexual violence for it to be genocidal. Rather, it just has to result in serious harm. Sexual violence, obviously and without question, is very harmful, causing both tremendous physical and psychological pain. This can be especially true for some men who may feel like they have lost something about their masculinity, or for queer people for whom being sexually victimized can worsen feelings of gender dysphoria or fears about physical violence from other members in their community. Being forced to be naked in public, if you live as a marginalized gender, can be tremendously harmful.

The third act of genocide is deliberately inflicting conditions of life calculated to bring about destruction. This could be physical, such as restricting medical care after rape (which can happen to someone of any gender), or more symbolic, such as destroying the community fabric through sexual violence. Sexual violence, especially when it is public, can destroy ties between people, between family members and neighbors and friends, so that even if survivors return to their land, they may have lost their community; in other words, their community does not exist anymore on an almost-metaphysical level because of what has happened.

Finally, the fourth act of genocide is imposing measures to prevent birth. This can affect anybody because it is focused on restricting the person’s ability to reproduce biologically. For example, crimes like forced sterilization, genital mutilation, castration, and amputation can all be genocidal. Similarly, in the twenty-first century, many people (including queer people) will set aside sperm samples or eggs for later use; if that genetic material is destroyed, or if a person is unable to access

<sup>13</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Art. II, Dec. 9, 1948, 102 Stat. 3045 (1988), 78 UNTS 277.

<sup>14</sup> *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment (Sept. 2, 1998).

fertility services that they want, that could be a prevention of pregnancy that violates the Genocide Convention.

I am obviously not trying to dismiss sexual violence against cisgender women, which is absolutely horrific during genocide and other armed conflicts. But my argument here is that genocidal sexual violence could and should be articulated to include everybody; the fact that it is currently narrowly focused on cisgender female victims is due to the narratives we tell about what counts as genocidal sexual violence.

My main focus is the Rohingya genocide, and if you look at the ongoing cases, we see a similar pattern emerging. For example, at the International Court of Justice in *The Gambia v. Myanmar*, The Gambia has asserted that only women and girls experienced sexual violence during the genocide.<sup>15</sup> Similarly, the UN Fact-Finding Mission for Myanmar reported on thousands and thousands of cases of sexual violence against the Rohingya population, but differentiated among victims. In their words, gang rape and genital mutilation against cisgender women was categorized as “genocidal,” while the same acts against cisgender men or queer people were not categorized as genocidal—those were crimes against humanity or violations of human rights.<sup>16</sup> I see this as an unnecessary drawing of a line wherein lawyers interpret harms differently depending on the gender of the victims.

The question now is whether the ICC OTP will reproduce this narrative about who is experiencing sexual violence in the Rohingya genocide. As my co-panelists have pointed out, the name(s) we assign to particular crimes matter, both for survivors but also for how we campaign against violence at the international level. This is why the limited case law about genocide is really problematic: because we only have prosecutions of sexual violence against cisgender women, that can become an arbitrary limit to how we discuss mass violence.

For me, the solution is to have a broad understanding of gendered violence and to reject a comparative understanding of harm, to really understand that when one person is harmed, when one person experiences sexual violence, that affects their entire community, that affects their loved ones and their friends and their spouses. These are the ties that are targeted by genocidal sexual violence, both in the situation of the Rohingya and elsewhere. These are the things that genocidaires are trying to destroy, and so if international law can reaffirm the ties between individuals and communities by understanding the similarities between different acts of violence, that can be an ultimately positive thing.

## SUSANA SÁCOUTO

I am going to turn the floor over to our last, but not certainly not least, panelist, Dr. Beth Van Schaack, a longtime friend who is currently serving as sixth Ambassador at Large for Global Criminal Justice. Beth, much of what we have been talking about are developments at the international level, but my question to you is how some of these developments can be used to assist accountability efforts at the national level to combat impunity for sexual violence and other forms of gender violence? Relatedly, there has been increasing documentation of SGBV in the context of the conflict in Ukraine, with Ukrainian and international investigators identifying and documenting potential cases. But as in many other situations, these crimes remain under-reported and under-documented for a lot of reasons: stigma, trauma, security issues, and many other challenges.

<sup>15</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Gam. v. Myan.*), Application Instituting Proceedings and Request for Provisional Measures, para. 116 (Nov. 11, 2019).

<sup>16</sup> Indep. Int’l Fact-Finding Mission on Myanmar, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, paras. 1–7, UN Doc. A/HRC/42/CRP.4 (Aug. 22, 2019).

How do you think your office can support efforts to overcome impunity for these crimes in Ukraine as well as in other situations?

**REMARKS BY BETH VAN SCHAACK\***

There is no question that international criminal tribunals capture our imagination. However, we know that they can only take, at most, a handful of cases unless it is a dedicated tribunal with significant resources and then maybe it can handle upward of one hundred cases, as we saw with the ICTY and ICTR. As a result, the real work of accountability in most situations, if the system is working properly, will have to be pursued at the national level, mostly in the situation country itself, although we may also have a handful of cases that can proceed elsewhere under theories of extraterritorial jurisdiction. In other words, there is a dialectic among what is happening at the international level and what is happening at the domestic level, which is implicit in some of what David and Lisa have both said today: the inspiration goes both ways. But we often do see developments at the international level inspiring activists, other judicial actors, lawyers, and prosecutors to change the way they have been doing business for many years, most notably when it comes to accountability for gender-based violence.

I also think there is potentially a third dynamic on the horizontal level we should highlight where criminal prosecutions are not the only thing we are concerned about. We may also be concerned with integrating a gendered approach into broader transitional justice responses, which could include mechanisms for truth telling, reparations, guarantees of non-repetition, the lustration of public officials, or institutional reform. What is happening at the international level can affect prosecutions at the national level but also affect these broader transitional justice processes. Lisa's new policy is a great example of standard-setting that can then be adopted and adapted to local contexts. We have also seen this with respect to some handbooks that the Residual Mechanism has created: they are handy, people can look to them, they are practical, they can be adapted. These resources have a signaling effect of what is expected at the international level, what are the best practices, which can be used by activists and others to affect how these processes are dealt with on the national level.

We also have the ability to think about inspiring the domestic incorporation of norms and standards in a formal matter. In other words, as states join the ICC system, they might incorporate international crimes into their domestic legal codes, thus creating a vector for international jurisprudence, for international standards, and for international guidelines. These are not considered binding necessarily, but at best they may be authoritative or at least available for judges to consult. Similarly, we have seen how some key pieces of jurisprudence—like *Akayesu* or *Ntaganda*—may influence how domestic jurists, academics, or prosecutors think about these issues. This is related to Lisa's point about creating tools and a set of arguments that can empower individuals and inspire change, so it does not look like they are building a new approach alone but are instead grounded in an existing institutional framework and jurisprudence.

We have seen now, particularly in regards to third state cases in the Syrian context, that new favorable conditions between civil society actors and formal judicial, prosecutorial, and investigative actors allow for very fruitful arrangements and relationships. For example, the Special Court for Sierra Leone's jurisprudence on forced marriage was very much the result of prosecutors talking to survivors, who brought up sexual violence but also the fact that their marital status was imposed on them. For survivors, these were two very different kinds of harms, which inspired

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the prosecutors to figure out a way to charge “forced marriage” as a distinct international crime that we have since seen invoked elsewhere.

My office is particularly engaged in implementing this principle of complementarity and in looking for ways to inspire and empower national courts. We obviously have relationships with international courts, even ones that we are not officially members of, but we see these courts as part of a larger ecosystem. We want to do what we can to support international courts and to ensure that they have the evidence and diplomatic assistance that they need. At the same time, we also invest heavily in strengthening the ability of national systems to prosecute international crimes.

This brings me to your second question about Ukraine. Our work is being carried out under the rubric of the Atrocity Crimes Advisory Group. This is a project with the EU and the UK to fund experts, many of whom are veterans of the international criminal tribunals, to work as peer mentors in side-by-side relationships with their counterparts in Ukraine. Importantly, we want to ensure that Ukrainian authorities are undertaking trauma-informed and survivor-centric investigations, are able to frame their charges to capture the lived experience of survivors, and know how to preserve testimonial evidence so that people are not being interviewed multiple times. These approaches are very much informed by the Murad Code and other best practices.<sup>17</sup> Now, when we work with organizations that are applying for funding, we will ask them to explain their trauma-informed and survivor-centric approach, and then we have metrics and benchmarks to ensure these standards are being met. This is one way that governments can help capacitate this work and ensure that these issues are not continually rendered invisible in the way that we know they have in the past. Thank you.

<sup>17</sup> Global Code of Conduct for Gathering and Using Information about Systematic and Conflict-Related Sexual Violence (Murad Code) (2022), at [www.muradcode.com/murad-code](https://www.muradcode.com/murad-code).