

Intersectional Approaches to Investigating and Prosecuting Sexual and Gender-Based Crimes

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Greetings to all. My remarks today will address ‘Intersectional approaches to investigating and prosecuting sexual and gender-based crimes’. In doing so, I will focus on two areas: First: What is intersectionality? Second: Why does intersectionality matter when it comes to investigating and prosecuting sexual and gender-based crimes?

WHAT IS INTERSECTIONALITY?

The term intersectionality was coined in 1989 by African American legal scholar Kimberlé Crenshaw, to provide a multi-dimensional framework for discrimination law in the United States – a framework that recognises and accounts for the discrimination experienced by Black women on the basis of their race, sex, and class. In Crenshaw’s words: ‘Intersectionality is a lens through which you can see where power comes and collides, where it interlocks and intersects. It’s not simply that there’s a race problem here, a gender problem here, and a class or LGBTQ problem there.’¹

Now, when it comes to international criminal law, intersectionality serves as an analytical framework that enables the surfacing of intersecting identities, systems of privilege and oppression (for example, patriarchy or colonialism) that drive and form the backdrop to international crimes.

HOW DO WE LINK INTERSECTIONALITY TO SEXUAL AND GENDER-BASED CRIMES?

The ICC Policy Paper on sexual and gender-based crimes recognises that ‘multiple’ factors of discrimination may underlie sexual and gender-based crimes – that these crimes ‘may be motivated by underlying inequalities, as well as a “multiplicity” of

¹ Columbia Law School, ‘Kimberlé W. Crenshaw, Isidor and Seville Sulzbacher Professor of Law’, available at www.law.columbia.edu/faculty/kimberle-w-crenshaw.

other factors, *inter alia*, religious, political, ethnic, national, and economic reasons'.² The policy as such highlights underlying structural and systemic inequalities within a particular social context, which is the bedrock of an intersectional framework.

While still finding its feet in international criminal law, intersectional analysis is a well-established analytical tool in the human rights world. For example, decisions and general recommendations of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Committee regularly address the intersectional aspects of women's human rights violations.

Recent reports of the Special Rapporteur on the right to health, Tlaleng Mofokeng, and the Independent Expert on protection against violence and discrimination based on sexual orientation and gender, Victor Madrigal-Borloz, have made explicit an intersectional approach in their work.

Pivoting back to international criminal law, an intersectional approach is embedded in Article 21(3) of the Rome Statute. This article requires that the application and interpretation of the law must be consistent with human rights law and 'without any adverse distinction founded on grounds such as gender [as defined in Article 7, paragraph 3], age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status'.

Article 21(3) not only builds a bridge between international criminal law and international human rights law, in which intersectionality finds deeper roots. It also links an intersectional analysis to how the law is to be applied and interpreted.

Despite these snippets of intersectionality and some promising developments in the jurisprudence, the overriding approach in international criminal law has been to focus on one form of discrimination, such as gender-based discrimination.

Gender analysis has achieved much through surfacing the underlying unequal power structures embedded in patriarchal systems that drive violence against women.

That said, gender – while a significant aspect of a person's identity – is not the only defining aspect of an individual, and gender analysis alone is insufficient to surface the full breadth and depth of harms experienced by survivors. For this, we need to recognise and account for factors beyond gender.

Let's turn to some practical examples that demonstrate why intersectionality matters when it comes to investigating and prosecuting sexual and gender-based crimes.

A seminal case of conflict-related sexual violence was the sexual enslavement of women and girls by the Japanese military during World War II. Estimates indicate that up to 200,000 women and girls were captured, forced, or tricked into sexual slavery. These women and girls were drawn from various Japanese colonies at that time, including Korea. We know that sexual slavery is a sexual and gender-based crime; what can intersectionality add here?

² The Office of the Prosecutor, 'Policy Paper on Sexual and Gender-Based Crimes', Policy Paper, June 2014, § 19, available at www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes-June-2014.pdf.

Pyong Gap Min writes that in the case of the women and girls from Korea, Japan's colonisation of the country was a critical factor in their enslavement; a state-supported patriarchal system in Japan facilitated the establishment of military brothels, while patriarchal customs in Korea perpetuated further victimisation upon their return home. Being drawn largely from impoverished families, Korean victims were sexually enslaved due to their economic and social status.³ This meant that when they were eventually freed from slavery, their future prospects were limited, forcing some to work as sex workers for economic survival.

Here we see how an intersectional approach allows us to broaden our vision to unpack the diverse drivers of the violations experienced. For these Korean women and girls, gender along with colonialism, ageism, patriarchy, and class coalesced to produce their unique violations that, for some, continued to permeate their lives well beyond the specific acts and temporal duration of their enslavement.

Let's take another example: The systematic killing of 8,000 Bosnian Muslim men and the removal of Bosnian women, children, and elderly people from the Srebrenica enclave in July 1995.

Expert testimony in the *Krstić* case at the ICTY identified the 'Srebrenica Syndrome' as a specific impediment to female survivors' recovery. One of the primary factors giving rise to the syndrome is that, with few exceptions, the majority of the men of Srebrenica were listed as missing, their fate unknown. For a Bosnian Muslim woman, having a clear marital status was paramount. A woman whose husband was missing lacked such status. On a psychological level, the women's recovery was impeded – without knowing with certainty the fate of their men, they were unable to bury and grieve for them.

An intersectional approach reveals that this syndrome was a specific response to the lived experiences of the women – the social and cultural context that permeated these violations – such as their religion as Bosnian Muslims and their stature in a patriarchal society, where marital status mattered immensely.

The individual harms experienced by each woman were also woven into the fabric of inter-community and inter-generational harms. In the words of one former Srebrenica resident, referring to her own family: 'With the fall of Srebrenica . . . from the face of the earth were wiped off three generations of men in the cruellest way possible.'⁴ As the Trial Chamber stated, 'In little over one week, thousands of lives were extinguished, irreparably rent or simply wiped from the pages of history.'⁵

Analysing this context holistically demonstrates the full contours and complexities of harms experienced by the women as a result of the loss of their male family members.

³ P. G. Min, 'Korean "Comfort Women": The Intersection of Colonial Power, Gender, and Class' 17(6) *Gender and Society* (2003) 938–957.

⁴ Ms. Mirsada Malagić, T. 1983–84, *Prosecutor v. Radislav Krstić* (IT-98-33-T).

⁵ Judgment, *Krstić* (IT-98-3-T), Trial Chamber, 2 August 2001, § 2.

A final example concerns conflict-related sexual violence in Sri Lanka experienced by ethnic Tamil men and boys, perpetrated by Singhalese state actors. Many survivors articulated feelings of shame and emasculation associated with sexual violence as a gendered crime. Many also felt degraded by the use of abusive language (ethnic slurs) by perpetrators that underscored their sense of superiority.⁶ Here, gender intersected with nationalist narratives on the dominance of the Singhalese ruling class, the cultural and ethnic hierarchies that fed this dominance and fuelled sexual violence, juxtaposed against the minority status of being Tamil in Sri Lanka, and legacies of colonialism.

Let's wrap up: In the examples discussed, we see how factors such as gender, class, social and economic status, age, culture, ethnicity, religion, and colonial status intersected to compound and hone past violations and harms at an individual and community level, while straddling the present and the future.

This is why intersectionality matters – it seeks to uncover violations with an understanding of the past, as well as the present and future realities of survivors – as multi-dimensional complex human beings – that we all are.

Thus, intersectionality can make visible other pertinent factors and structural inequalities, alongside gender, that are often disregarded or overlooked. A single-axis analysis would not have done justice to survivors' experiences in this way.

An intersectional approach provides another tool in our armoury to deepen our contextual understandings of affected individuals, communities, and the systems of privileges and disadvantages that define them. It enables a more precise and comprehensive articulation of the nature of violations, harms, and their impacts.

This is what intersectionality can bring to the table when properly executed. Critically, it calls for intentionality in seeking to make visible what is excluded and unseen at first glance.

Intersectional analysis has the power to set us on a trajectory towards more survivor-responsive justice processes and outcomes – the very aim that has brought us all together today.

I will leave my remarks at that.

Finally, I would like to thank fellow participants in the Webinar series on 'Intersectionality and International Criminal Law' organised by the Emergent Justice Collective, for their insights that have informed my remarks today.

Thank you.

⁶ A report by the International Truth and Justice Project Sri Lanka, an NGO that documents conflict-related sexual violence and torture in Sri Lanka, focuses on sexual violence against mostly Tamil men and boys. It contains a narrative analysis of the experiences of more than 100 male victims of sexual violence by the state security forces in Sri Lanka in 2014–2018. Most were detained and abused multiple times. See H. Touquet, *Unsilenced: Male Survivors Speak of Conflict-Related Sexual Violence in Sri Lanka* (International Truth and Justice Project, 2018), available at www.itjpsl.com/assets/ITJP_unsilenced_report-final.pdf.

