

## **Sexual and Gender-Based Crimes against LGBT and Intersex people**

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The human rights of lesbian, gay, bisexual, transgender (LGBT)<sup>1</sup> and intersex people remains a matter of grave concern worldwide, with continuing, serious and widespread violations perpetrated against individuals based on their sexual orientation, gender equality and sex characteristics.<sup>2</sup> These violations, which are too often met with impunity, include killings, violent attacks, torture, arbitrary detention, denial of rights to assembly and expression, and discrimination in accessing health care, education, employment and housing.<sup>3</sup> LGBT and intersex people frequently face multiple and intersecting forms of discrimination: poverty, migration, religion of belief, ethnicity, disabilities, sex work, refugee status and age. Moreover, the most basic rights and fundamental freedoms of LGBT and intersex people are regularly violated anywhere. Indeed, victims reported episodes of violence, but the numbers are only the tip of iceberg. The main cause is the culture of silence and without evidence, impunity prevails.

In some places, the mere perception of being LGBT is extremely dangerous and having same-sex relationships could be a serious problem because they will be prosecuted only for this reason. Consensual same-sex relationships is considered a crime in 73 countries, which exposes individuals to the risk of arrest, blackmail and extortion, and feeds stigma, discrimination and violence.<sup>4</sup> Being LGBT is punished with a death sentence in nine countries, including Iran, Qatar, United Arab Emirates, Saudi Arabia, Sudan and Yemen.<sup>5</sup> In fact, Saudi Arabia operates an uncodified criminal code based on the Sharia law.<sup>6</sup> Under this framework, sex outside marriage is illegal. As same-sex marriage is not permitted, same-sex intimacy is criminalized. The punishment varies depending on the circumstances: married men and interfaith sex are punished with the death penalty, while non-married men are punished with flogging.<sup>7</sup> They can also be condemned to life imprisonment or public executions.<sup>8</sup> To glorify and promote its systemic persecution of gay people, Islamic State of Iraq and Syria (ISIS) has released numerous videos, photos, and propaganda showcasing public executions.<sup>9</sup> International Reports (UN, International Organizations and NGOs) declare that some gay Syrians

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<sup>1</sup> LGBT does not capture all of the gender, sexual, and/or political identities. The acronym is an umbrella term, meant to encompass any and all individuals who identify themselves in ways that are within and outside of the narrow "LGBTI" acronym and categorizations.

<sup>2</sup> United Nations, *Living Equal and Free. What states are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people*, (2016), 13.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*, 11.

<sup>5</sup> Hristina Byrnes, *13 countries where being gay is legally punishable by death*, (jun. 2019), Available at <https://eu.usatoday.com/story/money/2019/06/14/countries-where-being-gay-is-legally-punishable-by-death/39574685/>

<sup>6</sup> *Id.*

<sup>7</sup> Human Dignity Trust, *Saudi Arabia – Sharia Law*. Available at <https://www.humandignitytrust.org/country-profile/saudi-arabia/>

<sup>8</sup> *Id.*

<sup>9</sup> Counter Extremism Project, *ISIS's Persecution of Gay People*, May 2017, 2.

and Iraqis have fled their home countries fearing persecution by ISIS as well as by their own families.<sup>10</sup> For this reason, human rights groups have referred to gay Syrians and Iraqis as “double refugees”.<sup>11</sup>

In particular, this research is focused on gender-based crimes (GBC). Those crimes are committed against persons, whether male or female, because of their biological sex or social gender roles. It can include targeting men and women in different ways, reinforcing gender roles or pushing non-conformists.<sup>12</sup> GBC does not need to include a sexual component.<sup>13</sup> They may include non-sexual attacks on women and girls, men and boys, LGBT and intersex people because of their gender, such as persecution on the grounds of gender.<sup>14</sup> Historically, sexual and GBV (SGBV) was considered an inevitable by-product of war, not a crime to be prosecuted. The Charters of the post-World-War-II International Military Tribunals at Nuremberg and Tokyo, which were established to prosecute wartime atrocities, did not explicitly recognize sexual and GBC, although Control Council Law No. 10<sup>15</sup> recognized rape as a Crimes Against Humanity (CAH).<sup>16</sup> However, persecution as CAH was first codified in international law in the Charter of the International Military Tribunals for the Far East also included the CAH of persecution, but limited grounds to political or racial.<sup>17</sup> The Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) partly followed these precedents by including the CAH of “persecutions on political, racial and religious grounds.”<sup>18</sup> The Statute of the International Criminal Tribunal for Rwanda (ICTR) contains the same act, but adds a persecutory element, requiring that the CAH be committed not only “as part of a widespread or systematic attack against any civilian population,” but also as an attack be based on “national, political, ethnic, racial or religious grounds.”<sup>19</sup>

Today, SGBC are considered especially grave violations of international law. SGBC is different from domestic violence because the public is different. SGBC is designed to have an audience, because it maximizes the harm that caused to the direct victims but also sends a message to everybody else.<sup>20</sup> The CAH of gender-based persecution was first codified in the 1998 Rome Statute of the International Criminal Court.<sup>21</sup> In this way, the Rome Statute is the only binding international instrument that explicitly recognizes gender-based persecution. However, for several reasons, the international community has not yet reached a precise definition of persecution. Persecutory grounds were

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> N. Hayes, *Gender Crimes in International Criminal Law*, Association of Defence Counsel, 2018.

<sup>13</sup> *Id.*, Srebrenica.

<sup>14</sup> Article 7(1)(h) of the Rome Statute.

<sup>15</sup> Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, 20 December 1945, 3 Official Gazette Control Council for Germany 50-55, 1946.

<sup>16</sup> UN WOMEN and Justice Rapid Response. *Justice Now: Ending Impunity for Sexual and Gender-Based Violence as International Crimes* (2018).

<sup>17</sup> Charter of the International Military Tribunal for the Far East art. 5, Apr. 26, 1946, 4 Bevans 27 (replacing the original Charter, Jan. 19, 1946, 4 Bevans 20).

<sup>18</sup> Statute of the International Criminal Tribunal art. 5(h), May 25, 1993, 32 I.L.M. 1192 (1993).

<sup>19</sup> Statute of the International Criminal Tribunal for Rwanda art. 3, Nov. 8, 1994, 33 I.L.M. 1602 (1994). Commentators have noted that this formulation does not reflect customary international law. See also, e.g., Darryl Robinson, *Defining “Crimes Against Humanity” at the Rome Conference*, 93 AM. J. INT’L L. 43, 46 (1993).

<sup>20</sup> N. Hayes, *Gender Crimes in International Criminal Law*, Association of Defence Counsel, 2018.

<sup>21</sup> Rome Statute of the International Criminal Court art. 7(1)(h), July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 999, 1004 (1998).

reproduced from political, racial, national, ethnic, and religious perspectives and three new grounds were added: gender, cultural, and “other grounds that are universally recognized as impermissible under international law.”<sup>22</sup> These acts can be categorized as genocide (Article 6), CAH (Article 7), or war crimes (Article 8) depending on how the crimes are committed and in what context. The same behavior can also fall into multiple categories of crime.

The recognition in international law that gender-based discrimination is a violation of the fundamental principle of non-discrimination would allow any court or tribunal with jurisdiction to try international crimes to prosecute for the crime of persecution without violating the principle of legality.<sup>23</sup>

### **What can we do to diminish or end gender crimes?**

SGBC is rooted in entrenched patriarchal norms and cultural stereotypes about the responsibilities and roles of men and women in the society prevalent throughout the country, including within the judiciary and among other law enforcement officials.<sup>24</sup> Moreover, legal frameworks and ineffective procedures for the investigation, prosecution and adjudication of SGBC fail to adequately protect human rights.<sup>25</sup> Every country is different in the law applied to violent behavior. While almost all countries have laws that criminalize most forms of homicide, only some countries have laws in place to protect LGBT and intersex people from SGBC.<sup>26</sup> Indeed, while many countries have taken encouraging steps, in most cases, these efforts have fallen short of the concerted strategy required to tackle violence and discrimination against LGBT and intersex people.<sup>27</sup> Even in countries that have arguably recorded the most progress in respect of the rights of gay men and lesbians, there has been far less attention given to protecting the rights of trans people and only incipient attention to the rights of intersex people.<sup>28</sup> One of the gaps identified is the failure to evaluate the impact of legal and policy measures on the human rights situation of LGBT and intersex people. For several reasons, the strategies for combating GBC and serious “human rights violation” need to be addressed through multi-levelled and multi-pronged strategies.<sup>29</sup> It includes prevention, collaboration and coordination between States at national, regional and international levels.

For example, in Iraq, for LGBT and intersex people, the fact that police officers, prosecutors, lawyers, judges and other government authorities are complicit in GBC against them further discourages reporting violence and crimes.<sup>30</sup> The government’s

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<sup>22</sup> V. Oosterveld, *Gender, Persecution, and the international Criminal Court: Refugee Law’s Relevance to the Crime Against Humanity of Gender-Based Persecution*, Duke Journal of Comparative & International Law, Vol. 17:49, 57.

<sup>23</sup> Widney Brown and Laura Grenfell, *The International Crimes of Gender-Based Persecution and the Taliban*, Melbourne Journal of International Law, Vol. 4 (2003).

<sup>24</sup> International Commission of Jurists, Lebanon: ensure accountability for gender-based violence. Report (2019).

<sup>25</sup> *Id.*

<sup>26</sup> UNDOC, *Global Study on Homicide. Gender-related killing of women and girls* (2018), 55.

<sup>27</sup> *Id.*

<sup>28</sup> United Nations, *Living Equal and Free. What states are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people*, (2016), 7.

<sup>29</sup> *Id.*

<sup>30</sup> IraQueer, *OutRight Action International, Dying to Be Free: LGBT Human Rights Violations in Iraq, in Response to the Fifth Periodic Report of the Republic of Iraq*, p. 8 (2015). See also, *Violence and Discrimination based on Sexual Orientation and Gender Identity in Iraq*. A submission to the United Nations Human Rights Council

denial of access to justice (A2J) for victims of these serious violations of human rights and crimes encourages further discrimination and acts of violence, including those committed by health professionals and others who capitalize on LGBT and intersex people's vulnerable status.<sup>31</sup>

Laws alone cannot end these crimes and serious violations of human rights. They need to be applied alongside education on the rights from part of the community engagement around changing cultural and social norms.

To combat SGBC, it will be necessary a coordination between the countries, through a combination of partnership building, capacity-building, research, publication and advocacy, at international, regional and national levels:

- Addressing all discriminatory practices and eliminating all types of stereotypes and bias against LGBT and intersex people that undermine criminal investigations and prosecutions in SGBC cases;
- It will be important to take steps to investigate and end violence and killings against LGBT and intersex people, including people who have non-conforming appearances and/or gender expression;
- Raising awareness among all justice actors and people, including by conducting official campaigns to reject violence, discrimination, and stereotypes against LGBT and intersex people;
- Implementing measures to address the social and practical factors that impede all LGBT and intersex people A2J, including by providing adequate training to all law enforcement officials, including judges, prosecutors, police officers, lawyers, social workers, and forensic doctors on gender equality and non-discrimination law and practice
- Take measures to ensure the safety of witnesses and victims participating in trials or filing for assistance from any retaliation;

Silence is often violence. Being silent means being complicitous to the violence of the situation. "Silence is a symbol of oppression, while liberation is speaking out, making contact".<sup>32</sup>

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for the Universal Periodic Review of IRAQ. Thirty-fourth session of the UPR Working Group of the Human Rights Council, March 2019, 2.

<sup>31</sup> *Id.*

<sup>32</sup> Deborah Cameron, *Feminism and Linguistic Theory*, Paperback Second Edition (1992).