

Analysing the work of the Commission of Inquiry on Syria from a SOGIESC lens

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Introduction

The conflict in Syria in March of 2021 passed a grim milestone and entered its eleventh year. The ten plus years of the conflict has caused untold suffering with at least half a million dead and more than 11 million people being displaced. As of March, 2021 as per the statement by Karen Koning AbuZayd, though President Assad now controls ‘70% of the territory and 40% of the pre-war population’, its difficult to think of the conflict as having ended. As she put it, ‘Recent months have seen increased fighting and violence in the northwest, northeast and south of the country’ in the period from 1 July last year to 30 June of 2021.¹ Most importantly as the Commissioner rightly observed, ‘there seems to be no moves to unite the country or seek meaningful reconciliation.’²

This conflict which began as an uprising against the regime transmuted into a complex civil war. Thus the trajectory of the Syrian conflict is from a peaceful uprising in 2011 to a brutal armed conflict between multiple forces representing diverse tendencies.

The conflict has been accompanied by massive human rights violations committed by all parties. Ever since the beginning of the conflict in 2011, the Commission of Inquiry on Syria(COI) has been documenting the rights violations which have been committed. The

¹ <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=27542&LangID=E>

² <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=27542&LangID=E>

Commission of Inquiry was constituted by a resolution of the Human Rights Council with a mandate to 'investigate all alleged violations of international human rights law', to 'establish the facts and circumstances that may amount to such violations' and 'to identify those responsible' for such violations in Syria since 'March 2011'.³

By 2013 the Commission was documenting not only violations by state actors but also by armed groups such as the ISIS and Jabhat Al Nusra. ISIS during its brief but brutal rule from 2015 to 2017 perpetrated massive atrocities including a specific targeting of persons on grounds of SOGIE. The human rights violations documented by the Commission includes mass disappearances, mass detention, sexual violence on women and men, attacks on medical facilities and long term sieges of entire residential areas of cities which are deemed to host enemy populations. The Reports painstakingly document how civilians have not been spared by all combatants and how women and children have been specifically targeted. All sides to the conflict are guilty of crimes that have risen to the level of some of the most serious violations of international law including war crimes, crimes against humanity and genocide.

While initially the Syrian regime seemed to be on the backfoot, with the decisive entry of Russian forces on the side of the regime beginning from 2015, they have slowly regained the initiative. As we approach the tenth year of the conflict, it seems that the regime of Bashar Al Assad is consolidating its hold over all the territories it has lost. With the exception of Idlib in the north west of Syria which is still controlled by Islamist rebels and the Kurds in the north east of Syria, the regime after waging savage and uncontrolled war in which civilians are being viciously targeted seems on the verge of a pyrrhic victory.

The political context is important to outline as it will determine the space that there is for accountability for human rights violations. It will determine the immediate relevance of the work of the Commission of Inquiry on Syria (COI) as inevitably, accountability in almost all parts of the world has only ever been possible when there is a new dispensation in place. The Nuremberg trials as we know, were the trials of the violations of international criminal law as committed not by the victors of the Second World War, be they Americans or the Russians but rather by the losers, Japan and Germany. Thus in the context of the continuance in power of the regime of Bashar Al Assad, one can be sure that there will be no accountability for the crimes committed by the state. Especially as Syria has never recognized the legitimacy of the Commission of Inquiry on Syria and has steadfastly refused to cooperate with it, it's unlikely that there will even be accountability for the crimes committed by the opposition. The possibility of accountability for the far more serious (in quantitative terms as they controlled the skies and rained destruction down upon people indiscriminately) crimes committed by the regime seems even more distant. Thus the immediate future seems to indicate that there

³ The members of the Commission of Inquiry are Karen Koning Abuzayd, Paulo Sérgio Pinheiro, Hanny Megally. Abu Zayd, Carla del Ponte, Vitit Muntarbhorn and Yakin Ertürk were former members of the COI.

will be no fixing of responsibility for the crimes committed during the civil war as and when the civil war does wind down.

However it's important to hold on to the possibility of justice in some future time.⁴The hope of justice, even when it seems distant, needs an accounting with the past. For doing that accounting, the work of the COI on Syria is indispensable. The forms of violation which have been documented include arbitrary detentions, enforced disappearances, torture and violation of socio-economic rights including the right to health and the right to education. Over the last eight plus years of conflict, the UN has documented the way conflict has affected sub-groups among the Syrian population differentially. Thus the Commission of Inquiry on Syria has published specialized reports on the impact of the conflict on children⁵, siege as a weapon of war⁶, detention⁷, the genocide of the Yazidis⁸ as well as sexual violence against both men and women⁹.

Since its inception, the Commission on Syria has made over 39 public interventions including regular reports, oral updates, press releases and thematic reports. The output of the Commission of Inquiry on Syria which has sustained fact finding over ten plus years are models of credible international fact finding reports. These reports can both mould public opinion and become invaluable resources when the question of justice and accountability for the crimes committed in Syria finally arises. The reports set in place, credible base line data as well as analysis from which further conclusions can be drawn. The reports thus have the potential to generate new perspectives and frameworks within which human rights can be understood.

This paper will explore what the output of the COI can mean with respect to violations on grounds of sexual orientation, gender identity and gender expression (SOGIE). The particular violations faced by persons on grounds of SOGIE find a mention in at least three ways

- 1) The Commission of Inquiry documents the targeting of persons because of their SOGIE. This has taken the form of judicially sanctioned persecution and murder

⁴ Karim Atassi, *Syria: The Strength of an Idea*, Cambridge University Press, New Delhi, 2018.

⁵“They have erased the dreams of my children”: children’s rights in the Syrian Arab Republic, <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=25465&LangID=E>

⁶Sieges as a weapon of war: Encircle, starve, surrender, evacuate, https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/PolicyPaperSieges_29May2018.pdf

⁷ The report released in March of 2021 tries to understand the decade of conflict through the lens of detentions. A decade of arbitrary detention and imprisonment - Report of the Commission of Inquiry of the Syrian Arab Republic, <https://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/Detention-report.aspx> ;Also see, Detention in the Syrian Arab Republic: A Way Forward, <https://www.ohchr.org/en/hrbodies/hrc/iicisyr/pages/independentinternationalcommission.aspx>

⁸ They came to Destroy, https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A_HRC_32_CRP.2_en.pdf

⁹“I lost my dignity”: Sexual and gender-based violence in the Syrian Arab Republic, <https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-37-CRP-3.pdf>

especially by the Islamist groups such as Jabhat Al Nusra and ISIS, both of whom have executed persons on grounds of their SOGIE.

- 2) The second way in which the issues affecting persons on grounds of SOGIE are conceptualized is in the understanding of sexual violence. The COI has sought to understand sexual violence and rape as a continuum of assault perpetrated on all human beings. By being inclusive both in terms of the understanding of both rape and sexual violence and in broadening the category of the victim to include men, the COI implicitly includes some dimensions of the sexual violence and torture faced by LGBTI persons during the course of the conflict.
- 3) The COI has also understood the targeting on grounds of SOGIE factors as not only a case of torture, rape and murder but as possible indications of crimes against the collectivity such as genocide and crimes against humanity. Thus the work of the COI could lay the ground work for future conceptualisations of collective crimes.

Sexual orientation, gender identity, gender expression and sex characteristics as coequal markers of discrimination

When it comes to the domain of gender and sexuality, there is an evolution of the way discrimination has been understood and this has manifested in a wider conceptualisation of the markers of discrimination. The current understanding based upon both developments in international law as well as the grassroots perspectives is captured in the Yogyakarta Principles plus 10.¹⁰ The Yogyakarta Principles plus 10 has popularized the acronym SOGIESC which is taken to mean sexual orientation, gender identity, gender expression and sex characteristics as markers of discrimination.

While the concept of sexual orientation was first articulated in international law in *Toonen v Australia*,¹¹ it took longer for the concept of gender identity to be recognized. In fact, as late as 2003 when Brazil proposed a resolution at the then Commission on Human Rights on 'Human rights and sexual orientation', the resolution 'expressed deep concern at the occurrence of violations of human rights in the world against persons on the grounds of their *sexual orientation*' (Italics added). Gender identity was wholly absent from the framework of international human rights law.

¹⁰ As the Preambular paragraph in both the Yogyakarta Principles and the Yogyakarta Principles Plus 10 note: **ACKNOWLEDGING** that this articulation must rely on the current state of international human rights law and will require revision on a regular basis in order to take account of developments in that law and its application to the particular lives and experiences of persons of diverse sexual orientations and gender identities over time and in diverse regions and countries

¹¹ Comm. No. 488/1992, UNGAOR Hum. Rts. Comm., 49 Sess., Supp. No 40, Vol. 2 at 226, UN Doc. A/49/40 (1994); 1 Int. Hum. Rts. Reports 97 (No. 3, 1994).

The breakthrough in terms of introducing the notion of gender identity had to wait until the release of the '*Yogyakarta Principles on the application of international human rights law to sexual orientation and gender identity*' in 2007. The Yogyakarta Principles sought to distil the current state of international law as it now applied to persons discriminated on grounds of sexual orientation and gender identity in the form of twenty-nine principles traversing a range of rights including civil, political, social, cultural and economic rights. The principles for the first time in international law defined both the terms 'sexual orientation' and 'gender identity' thereby enunciating how one's rights could be violated on the above-mentioned grounds.

The next important development was in 2017 which saw the addition of sex characteristics and gender expression as distinct grounds of discrimination through the newly adopted Yogyakarta Principles plus 10 document.

One of the most vital contributions of the Yogyakarta Principles and the Yogyakarta plus 10 are the definitions it provides for the terms sexual orientation and gender identity, gender expression and sex characteristics. The Yogyakarta Principles define the terms 'sexual orientation' and 'gender identity', while the Yogyakarta plus 10 defines gender expression and sex characteristics.

'sexual orientation' refers 'to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.

'gender identity' to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

The Yogyakarta Principles filled a crucial gap as even though international law used these concepts, it never defined them. For example, *Toonen* used the term 'sexual orientation' without quite clarifying what it meant. The fact that the Yogyakarta Principles defined these terms was eagerly seized upon by lawyers, judges and LGBTI activists from around the world.

How does one evaluate the concepts of sexual orientation and gender identity in this light? What is the range of identities, acts, behaviours which should be protected by law from violence and discrimination and where do these concepts fall short?

With respect to sexual orientation the debate has centered around whether the protection of identities ends up excluding those who do not identify as gay or lesbian, but may engage

in sexual acts with those of the same sex.¹² What activists have rightly identified is that an exclusive focus on identities will negate the fact that in large parts of the world people may not identify as gay or lesbian, but are subjected to violence and discrimination on grounds of the sexual acts which they perform. The question is whether the concept of sexual orientation as defined by the Yogyakarta Principles is broad enough to encompass both acts and identities?

A close reading of the definition of sexual orientation indicates that it encompasses two notions:

- each person's capacity for profound emotional, affectional and sexual attraction between people of the same gender, different gender or more than one gender.

- forming of sexual and intimate relations between people of the same gender, different gender or more than one gender.

The first notion hints at a realm which is not in that of actions but of feelings, emotions and attractions. This aspect of the definition by pointing to the 'profound capacity for emotional, affectional and sexual attraction' hints at the psychological aspect of sexual orientation. While the word profound is read with 'sexual, emotional and affectional' it communicates a dimension which is linked to the sexual but also belongs to another domain in which sexual acts have deep meanings for those engaging in them. Thus, sexual acts are not sexual acts alone but expressive of something more fundamental such as notions of identity and personhood.

The second notion brings sexual orientation back into the body as it were, by clearly pointing to 'the forming of sexual and intimate relations between people' as an aspect of sexual orientation. Within this notion, one is not necessarily talking of the aspect of identity and personhood but rather the formation of sexual and intimate relations between people as integral to sexual orientation. Thus, crucially one need not be gay or lesbian to come within the rubric of sexual orientation, one only needs to form sexual relations with those of the same sex, thereby opening out protection to those who fall outside the framework of identity.

Thus, these two aspects of the definition point towards the diversity of the grouping which is affected by state and societal prejudice. It encompasses those for whom sexual attraction is part of their personhood and very identity and those who may not identify as gay or lesbian, but whose sexual relations and sexual acts exposes them to societal ridicule and state

¹² See Akshay Khanna, *Sexualness*, New Text, Delhi, 2016. Khanna argues that identity might not be the frame through which one can think of sexuality in the global south and that 'the erotic and the sexual need not speak to the sense of self'. Thus, there are expressions of sexualness which are criminalized and expose a person to criminal sanction, but have nothing to do with any form of sexual identity like gay or lesbian.

discrimination. By phrasing the notion broadly, the concept provides protection to the diversity of acts and identities within the LGBT community.

Coming to the term 'gender identity', one of the contested notions is regarding the question of who is encompassed within the definition of transgender? One of the principle issues is whether protection is only for those who alter their bodies to bring it in line with their deeply felt gender or is it also for those who do not wish to alter their bodies but choose to express their gender through dress, comportment and mannerisms?

The definition of gender identity in the Yogyakarta principles is phrased broadly to encompass this diversity within the LGBT community. It can be read as including two groupings:

- Those who choose to go in for a 'modification of bodily function or appearance by medical, surgical or other means to bring their body in alignment with their 'deeply felt internal and individual sense of gender';

- Those who choose to express their 'deeply felt internal experience of gender' not through bodily modification but through 'dress, speech and mannerisms'.

The definitions of sexual orientation and gender identity in the Yogyakarta Principles carefully avoid the trap of protecting only established identities like gay, lesbian, bisexual or transgender and expressly broaden the protection to a wide range of people all of whom could be targeted for either their sexual behaviour, sexual acts, sexual identities, gender expression or gender identity.

The broad phrasing of the Yogyakarta definition does justice to this plurality of identities, bodies and expressions which are grouped under the terms 'gender identity' and 'sexual orientation'. These two concepts are a broad tent under which diversity can shelter.

The Yogyakarta Principles plus 10 has added gender expression and sex characteristics to the markers of discrimination. With respect to gender expression, it is defined as:

- 'gender expression' as each person's presentation of the person's gender through physical appearance – including dress, hairstyles, accessories, cosmetics– and mannerisms, speech, behavioural patterns, names and personal references, and noting further that gender expression may or may not conform to a person's gender identity;

The definition of gender expression seeks to make the case that gender expression and gender identity are not always the same thing as well as provide a deeper understanding of the ways in which gender expression manifests itself. Gender expression goes beyond 'dress, speech and mannerisms' as referenced in the Yogyakarta Principles to include 'hairstyles,

accessories, cosmetics, behavioural patterns, names and personal references’, thereby making the concept clearer.

With respect to sex characteristics, it is defined as:

‘sex characteristics’ as each person’s physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty;

It’s interesting to note that instead of the term intersex, the Principles preferred the more neutral term ‘sex characteristics’.¹³ In line with the original Yogyakarta Principles definition of sexual orientation and gender identity, sex characteristics also is a universal characteristic. By using sex characteristics, the Yogyakarta Principles plus 10 has (like the Yogyakarta Principles) eschewed culturally specific identity categories and instead sought to build a normative framework around discrimination on a more universal ground.

The application of Sexual orientation, gender identity, gender expression and sex characteristics to the conflict in Syria

During a period of conflict, conventional categories are thrown into question and some identities become invisible while others become hyper visible. A conflict zone always raises very challenging ethical questions about whose suffering is being prioritized and whose suffering remains unacknowledged. In a conflict situation it is important to address the way victims are made legible by both international law and policy. In particular how are LGBTI persons in the Syrian conflict perceived and made subjects of intervention?

This important question has been raised most pertinently by Syrian scholar, Fadi Saleh who has argued that the western humanitarian gaze has visibilised the figure of the ‘suffering gay Syrian refugee’. The ‘suffering gay Syrian refugee’ is an abject figure, who is the product of relentless violence based upon his sexual orientation. In particular Saleh persuasively argues that the UN Security Council meeting on LGBT rights and Daesh in 2015, which was the first time that the Security Council was seized of LGBT rights, ended up reinforcing the notion that the Syrian homosexual man was an abject victim. What remained invisibilized was the history of the Syrian LGBT community, its modes of life, survival and resilience and the pre-war Syrian LGBT community was reduced to the status of bare victims, trapped in a pornographic gaze.

¹³ The term sex characteristics was first defined legally in The Malta law called, Gender Identity, Gender Expression and Sex Characteristics Law, 2015. ‘Sex characteristics refers to the chromosomal, gonadal and anatomical features of a person, which include primary characteristics such as reproductive organs and genitalia and, or in chromosomal structures and hormones; and secondary characteristics such as muscle mass, hair distribution, breasts and, or structure.’

If we take the category of SOGIESC, what has been made most visible are the kinds of violations inflicted upon homosexual men, particularly by ISIS. The violence inflicted on lesbians as well as transgender persons has not yet been articulated strongly in the reports. The issue of sex characteristics has not become a part of the narrative of the COI reports. Part of the reason of this uneven light shed upon violations even within the broad rubric of SOGIESC is the specific targeting of homosexual men by Daesh as well the invisibility of lesbians and trans persons as victims of conflict.

How does one move beyond the stereotypical perceptions of the Syrian LGBT community, especially as reinforced by a period of conflict? Saleh argues that it is important not to isolate the strand of queerness from the larger rubric of Syrianness and make it the sole category of suffering.

As Saleh notes:

But one might ask, when does this kind of paranoid visibility—with its exclusive focus on Syrian queers' death through execution— “turn into a voyeuristic quasi-pornography?” What happens to the humanitarian allocation of care and Western media attention when deaths of queer and trans Syrians are no longer caught on camera by the perpetrators, but happen in the prisons of the Assad regime or other warring factions, or are related to the queer or trans* persons political opinions and religious sect rather than their sexuality or gender identity?¹⁴

The difficult question any representation of the concerns of LGBTI persons in Syria will have to navigate is how does one represent the specificity of the violations they have suffered without at the same time reducing LGBTI persons to nothing more than their sexuality? As Saleh argues there could be a range of reasons why LGBTI people suffer in a conflict region. Part of the reason may be due to sexuality, it could also be due to their religious status or their political opinion.

Hence any analysis of the role of SOGIESC in a conflict region will have to be sensitive to these nuances. As the Yogyakarta Principles plus 10 appositely notes:

that sexual orientation, gender identity, gender expression and sex characteristics are each distinct and intersectional grounds of discrimination, and that they may be, and commonly are, compounded by discrimination on other grounds including race, ethnicity, indigeneity, sex, gender, language, religion, belief, political or other opinion, nationality, national or social origin, economic and social situation, birth, age,

¹⁴ Fadi Saleh, *Queer/Humanitarian Visibility: The Emergence of the Figure of the Suffering Syrian Gay Refugee*, *Middle East Critique*, DOI:10.1080/19436149.2020.1704501

disability, health (including HIV status), migration, marital or family status, being a human rights defender or other status¹⁵

The work of the Commission of Inquiry on Syria, negotiates this delicate balance of drawing attention to the specificity of the violation suffered by persons on grounds of SOGIE while at the same time placing the issues faced by Syrian LGBTI persons within the larger frame of the violations engendered by the conflict.

Perhaps as an illustration of the way one can negotiate this delicate balance is the statement delivered by Fadi Saleh himself at the 32nd Session of the Human Rights Council in which Saleh responded to the Report of the Independent International Commission of Inquiry on the Syrian Arab Republic: “They came to destroy”: ISIS Crimes Against the Yazidis.

As Saleh put it:

The Report details the horrific crimes committed by ISIS against Yazidi women and girls. The Report in its recommendations emphasizes the different nature of the crimes committed against the children according to their sex. It powerfully shows how sexual slavery and violence are systematically committed against women and girls. However, we would like to highlight that there are also reports of how captured boys have also been subjected to sexual violence. Sexual violence perpetrated against boys and men, whether by ISIS, the Syrian regime, or other factions, remains an issue that is shrouded in shame and secrecy and is rendered invisible. Targeting the sexuality of women and girls as well as men and boys is an integral part of ISIS’ genocidal project.

In that sense, ISIS’ genocidal project also targets non normative sexualities. As previous reports have shown, ISIS in both its ideology and its practice has demonstrated that its aim is not merely persecution but elimination of the entire grouping comprising those who engage in homosexual conduct.

We call upon the Commission to take forward its pioneering analysis of genocide in the context of the Yazidi community and analyze its applicability to other groups similarly targeted by ISIS including homosexuals, Kurds, Arameans and other ethnic minorities.

¹⁵ Yogyakarta Principles plus 10 , http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf

We also call upon the Commission in future reports to analyze the ways in which sexual violence and rape perpetrated against men and boys can constitute both genocide and a crime against humanity.¹⁶

A close reading of the statement indicates that it is based upon an intersectional approach as embodied in the Yogyakarta Principles. Even while commending the report of the COI on the genocide of the Yazidis, the intervention makes a plea for specificity. A specificity which is grounded in SOGIE but which also appreciates that the targeting based on SOGIE is itself a part of a broader targeting of non-normative sexualities. This reference to non-normative sexualities seeks to open up the category of victim beyond the homosexual man.

Thus, while analyzing the work of the COI on Syria and its relevance to LGBTI persons the following points can be made. The COI itself uses the language of sexual minority as well as homosexual in its understanding of the specificity of the LGBTI experience. However, it may do injustice to an understanding of intersectionality if one were to reduce the output of the COI which is relevant to LGBTI persons solely to the areas where it specifically references SOGIE. This is especially important as in a conflict situation, one ought not to see the violations which LGBTI persons are subjected to purely from an identity lens. Keeping this in mind this study will focus on three dimensions

- The specific targeting homosexual men by Daesh based upon a religious interpretation
- Seeing sexual violence as a continuum affecting all persons
- Broadening the understanding of genocide and crimes against humanity to include the specific persecution on grounds of SOGIESC.

Direct targeting because of Sexual Orientation

There is no documentation of any direct targeting of persons on grounds of SOGIESC factors by the Syrian regime. However, the Islamist groups, especially when they had control over territory and population functioned as a quasi-state and directly targeted homosexual persons. The groups which have persecuted and killed homosexual persons include Hay'at Tahrir al-Sham(HTS), Islamic State in Iraq and Syria (ISIS), Jabhat al-Nusra, Jabhat Fatah al-Sham. The names and identities of the groups change and mutate, but what is clear is that in their interpretation of the Quran, there is no place for homosexuals. The documentation of the Commission of Inquiry indicates:

Throughout the Syrian conflict, the Commission has regularly received allegations of members of extremist and terrorist groups imposing medieval punishments on men accused of homosexuality. In early 2016, two men, accused of being homosexuals

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<https://extranet.ohchr.org/sites/hrc/HRCSessions/RegularSessions/32ndSession/Pages/OralStatement.aspx?MeetingNumber=21&MeetingDate=Tuesday,%2021%20June%202016>

were thrown from the third floor of a building in Khan Sheikhoun (Idlib). Their hands were tied behind their backs and Jabhat al-Nusra militants announced the accusations of homosexuality over loudspeakers. In September 2016, militants of the newly self-styled Jabhat Fatah al-Sham⁷ in concert with armed group fighters executed seven men in Rastan city (Homs) via fusillade whom they accused of being homosexual. An unauthorised court, functioning on behalf of all armed groups in the area, had ordered the executions.¹⁷

ISIL also targeted for execution sexual minorities and those accused of engaging in homosexual conduct. Males, including boys raped by older men, have been executed on charges of sodomy, and videos of the executions widely circulated to terrorise populations under their control. In July 2016, a teenage boy was arrested by al-Hisbah in ar-Raqqah city, and thrown off a building on charges of sodomy. Similar incidents have been documented in Aleppo, Dayr az-Zawr, and Palmyra (Homs) throughout the period that ISIL controlled territory in these governorates.¹⁸

During the height of its power, the Islamic State in Iraq and the Levant (ISIL) discriminated against women, girls, and sexual minorities as a matter of policy. Stoning of women and girls on charges of adultery and executions of homosexuals were recurrent in areas under ISIL control, as were forced marriages of Sunni women and girls to ISIL fighters. ISIL's rule placed women and girls under the control of male relatives, effectively restricting their freedom of movement and removing them from public life. Those found to violate ISIL's strict dress code, most commonly women but also girls as young as 10, were punished with lashings. These acts constituted the war crime of torture, cruel or inhuman treatment, and outrages upon personal dignity against women.¹⁹

The use of parallel justice systems including unauthorised courts by HTS and various armed groups to execute sexual minorities constitute the war crime of murder, and seriously contravene international human rights norms, including the right to life, liberty and security of person, the right to freedom from torture and other forms of cruel, inhuman, or degrading treatment, and the right to the highest attainable standard of physical and mental health.²⁰

Between 2013 and 2016, the Islamic State in Iraq and the Levant (ISIL) executed women, men, and children on charges of adultery, and also targeted sexual minorities, including homosexuals. These acts constitute the war crime of murder. The executions

¹⁷ <https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-37-CRP-3.pdf>

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

and other punishments also contravene international human rights norms, including denial of the right to life, and the right to be free from discrimination, among other violations. Further, the well-documented crimes of ISIL and their terrorising of the civilian population in ar-Raqqah and Dayr az-Zawr governorates formed part of a widespread or systematic attack directed against a civilian population, carried out with knowledge of the perpetrator. By targeting sexual minorities on grounds universally recognised as impermissible under international law, and severely depriving sexual minorities of their fundamental rights, ISIS's treatment of sexual minorities constitutes the crime against humanity of persecution.²¹

The key point which emerges in the documentation of the COI is that there is a specific targeting of homosexual men. The targeting is not by state actors, but non-state actors which have control of territory and population and hence have the powers of the state and have the responsibilities of a state and are bound by customary international law, which clearly prohibits murder, rape and torture – all crimes committed by the non-state actors as documented by the COI.

The intention behind the targeting emerges from an interpretation of the religious texts as prohibiting homosexual conduct and prescribing the death penalty for such conduct. Thus the armed groups seen themselves as conforming to their own version of non-state law. As Islamic State's Information Office in Hama Province (Syria) made clear in their video and photo report about the execution of three men on sodomy accusations and for spreading homosexuality. The record of one trial transcript makes clear that it is for the 'crime of homosexual intercourse and for carrying out "the imposition of religious punishment against those who spread corruption on earth," specifically in this case "promoting the acts of the people of Lot amongst Muslims," thereby trying to change the "innate character of the Muslims."²²

Sexual violence as a continuum affecting all persons

While the issue of sexual and gender based violence was a part of the documentation of the COI ever since its inception the Report presented at the 37th Session of the Human Rights Council titled, *"I lost my dignity": Sexual and gender-based violence in the Syrian Arab Republic*, brought together information from previous reports and focussed specific attention on this issue. As the COI rightly observed:

Sexual and gender-based violence during conflict, as in times of peace, is consistently underreported....Challenges to documenting sexual and gender-based violations include the social and cultural stigma attached to such incidents.²³

²¹ Ibid.

²² <https://outrightinternational.org/content/timeline-publicized-executions-alleged-sodomy-islamic-state-militias>

²³ <https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-37-CRP-3.pdf>

The Report recognizes the pervasiveness of sexual and gender based violence as a strategy of war used by all parties. It analyses sexual violence as a continuum which includes rape, sexual torture and sexual humiliation. Apart from documenting forms of sexual violence which are a broader category than rape, the COI also documents sexual violence committed on men.

The Syrian Commission of Inquiry documents sexual violence as a continuum which is used as an instrument of war, both against the bodies of women as well as men.²⁴ Traditionally sexual violence has been seen as an issue which affects only women. While women suffer disproportionately from sexual violence, emerging documentation and analysis shows that men too are victims of sexual violence. The use of sexual violence against men is often a hidden crime because of the additional shame and stigma attached to sexual violence suffered by men. The documentation of the Commission of Inquiry has visibilized this aspect of sexual violence against men, used during armed conflict in its first, third, fifth, seventh, tenth and other reports.

The COI does not separate out sexual violence against men from sexual violence against women but rather sees the violence as a part of a continuum, inflicted to exercise power and destroy the autonomy of those the regime considers rebels and subversives be they men or women.

As the first report of the COI noted

Several testimonies reported the practice of sexual torture used on male detainees. Men were routinely made to undress and remain naked. Several former detainees testified to reported beatings of genitals, forced oral sex, electroshocks and cigarette burns to the anus in detention facilities... Several of the detainees were repeatedly threatened that they would be raped in front of their family and that their wives and daughters would also be raped".²⁵

The fifth Report of the Commission notes

In the case of pro-government forces, sexual violence was committed during house searches, at checkpoints and in detention centres, often as part of interrogations by intelligence services. One woman detained in Latakia described how she was threatened with gang rape during her interrogation. She also described other detainees being stripped naked while subjected to electric shocks. In Branch 285, the

²⁴ It should also be noted that the focus on 'men' and 'women' has the unfortunate effect of invisibilising forms of gender expression that may not fit the rigid categories of male and female. This is a direct result of the definition in Article 7(3) of the Rome Statute which clearly states that 'For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above.'

²⁵ <https://daccess-ods.un.org/TMP/4906749.12929535.html>

rape and sexual abuse of male detainees by their interrogators was reported. There were no indications of action taken by senior commanders to investigate, prevent or punish acts of sexual violence.²⁶

The Seventh report of the Commission notes

Sexual torture, including the tying of genitals, has been systematically perpetrated against men and boys in custody in Damascus, Homs and Aleppo. In November 2012, a man was raped in Al Khatib security branch, Damascus. In January 2013, at the Homs Security Branch, security agents beat and electrocuted the genitals of a 17-year-old boy and raped him while others watched... Men were tortured and raped on the grounds of their sexual orientation at government checkpoints in Damascus. In 2011, six homosexual men were beaten viciously with electric cables by security agents and threatened with rape. In October 2012, a man was stopped by security because his partner's brother was a member of the FSA. The man was taken to a rural area, where cigarettes were stubbed on his body and he was gang raped.²⁷

The report of the Commission in September 2016 again reiterates the reality of sexual violence against men

Male detainees are frequently subjected to sexual violence. Many stated that cellmates had been raped with objects and received electric shocks to their genitals. A man, held in an Air Force Intelligence branch in Hama in 2013, stated that cellmates had been raped with knives and other implements, which caused physical injuries. Another detainee, held in Dayr az-Zawr from mid-2011 to the spring of 2012, was stripped naked and hung by his wrists from the ceiling in a room with a female detainee, who was similarly naked and hung from her wrists. "We stood naked and humiliated in front of each other," he said.²⁸

The 2018 Report further highlights the following instances of sexual humiliation, sexual torture and sexual assault:

Detainees were also forced to have intercourse with other detainees. In one incident in 2014 in Branch 251, a detainee was made to perform oral sex on a second detainee who had previously been sexually assaulted by the officer issuing the orders. The second detainee was then electrocuted on his genitals and became permanently impotent. In more extreme cases, perpetrators exploited blood relations by forcing male relatives to have intercourse with one another, with devastating psychological consequences for the victims. This was the case of an uncle and nephew detained in

²⁶ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/156/20/PDF/G1315620.pdf?OpenElement>

²⁷ <https://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/Documentation.aspx>

²⁸ <http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommission.aspx>

2011 at the Halab prison (Aleppo), and of a father and son at the Damascus Political Intelligence branch in 2012. The rape of an adolescent boy in front of his father was used in 2011 at the Latakia Political Security Directorate Branch to force the father to confess.

Rape of male detainees in various forms occurred frequently in Sednaya military prison (Rif Damascus). Prison guards raped detainees with rods and pipes, in some cases seemingly for amusement. A detainee described how, in 2013, one guard would enter the cell and make detainees face the wall. Then, the guard would pick two detainees and tell one to “do him in front of me.” In another incident during the winter of 2014, a detainee explained how prison guards raped one of the prisoners while the other prisoners looked away. Male rape in Sednaya was reported to be most frequent during the night, between midnight and 5:00 a.m.

Electrocution and beating of male genitals was a consistent part of the torture administered to male detainees during the conflict. Some such beatings have resulted in permanent injuries to the genitals of the victims that remain untreated due to a lack of available medical support. Other forms of male sexual torture include forcing a detainee to drink large quantities of water and tying a plastic wrap around his penis causing retention of fluid in the bladder and other complications. This took place on multiple occasions at Military Intelligence branch 235 (Palestine) and at least once at branch

One of the most disturbing forms of torture was the genital mutilation of boys and men. In one unofficial detention facility, described as “a slaughterhouse” in the base of a water tower in Sahnaya, adjacent to Darayya, one witness described how the worst treatment was reserved for suspected FSA members. One man had his penis mutilated, where after it became infected and it was not until he reached Adra prison that he was taken to hospital. A detainee from the same facility stated he thought this punishment was reserved for some men from Douma and Darayya to humiliate the populations there. Another victim was a young boy who was tortured following the Saida massacre in Dara’a in 2011. He died and, while his body was prepared for burial, it was discovered his penis had been cut off.²⁹

The combined documentation of the COI is an acknowledgement that right from the very beginning of the Syrian conflict sexual violence was perpetrated on a continuum. It ranged from sexual humiliation to sexual torture and rape. Further the targets of sexual violence were predominantly women but also men.

²⁹ <https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-37-CRP-3.pdf>

This targeting of men as objects of sexual violence points to the intentionality of sexual violence. In the context of war, the reason for sexual violence is linked strongly to the need to dehumanize, humiliate and strip the one perceived as the 'enemy' of his or her humanity.

Sexual crimes committed in the context of a war are not just ordinary crimes but can become the *actus reus* in international crimes, be it genocide, crimes against humanity or war crimes. International law has only belatedly begun to recognise the fact that sexual violence is an integral aspect of the three international crimes: crimes against humanity, war crimes and genocide. The jurisprudential breakthroughs were achieved in the decisions of the International Criminal Tribunals in Rwanda and Yugoslavia.

Key to this belated acknowledgement of sexual violence, has been the seminal *Akayasu* judgment, which came to the conclusion that the rape of Tutsi women by Hutu militia was perpetrated with the specific intent to destroy the Tutsi community and hence came within the definition of genocide.

These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole... Sexual violence was a step in the process of destruction of the Tutsi group – destruction of the spirit, of the will to live, and of life itself.³⁰

The jurisprudence of the International Criminal Tribunal for Yugoslavia (ICTY) has shed light on the sexual violence committed against men. In *Prosecutor v. Cesic*³¹, the defendant, a member of the Bosnian Serb police was convicted of rape as a crime against humanity for forcing two brothers to perform sexual acts on each other in the Luka detention camp. In *Prosecutor v Simic*³², the court found Simic and Todorovic guilty of committing sexual assaults on male detainees in the same detention center. In *Prosecutor v Tadic*³³, Dusko Tadic was found guilty of sexual mutilation of a male detainee.

The reason sexual violence inflicted on men and women has to be viewed as a continuum is because the rationale for the infliction of this almost unthinkable is to 'exert power and dominance over the victim and potentially the victims community'.³⁴ It is also exercised for purposes of 'domination, degradation or destruction of a person's autonomy'.³⁵

³⁰ Prosecutor v. Jean Paul Akayesu, International Criminal Tribunal for Rwanda, (para 732), <http://unictr.unmict.org/en/cases/ict-96-4>

³¹ Case No.: IT-95-10/1-S, <http://www.icty.org/case/cesic/4>

³² Case no.: IT-95-9, <http://www.icty.org/case/simic>

³³ Case no.: IT-94-1, https://www.icty.org/x/cases/tadic/tjug/en/970507_Tadic_summar_en.pdf

³⁴ Dustin Lewis, Unrecognised victims: Sexual violence against men in conflict settings under international law, 27 Wisc. L. J (2009) 1-49.

³⁵ Solange Mouthan, Sexual Violence Against Men and international law: Criminalising the unmentionable, Int.

If one sees sexual violence through this lens, then the act itself is 'not limited to physical invasion of the human body and includes actions directed at a person's sexual and reproductive health or identity such as sexual harassment, forced incest, castration, enforced sterilization, sexual mutilation, enforced nudity, enforced masturbation, genital violence including beating of the genitals and electric shocks to the genital area and other forms of sexual humiliation.'³⁶

What the developing international jurisprudence is gesturing towards is understanding rape as a crime of violence and not a crime of passion and hence having a conceptual linkage to the other serious crimes which are perpetrated during armed conflict. If the reason for sexual violence is to exercise domination even though the impact of sexual violence on men and women may be different, the purposes for which it is employed are the same.

As such, what the facts presented by the COI urge us to do is to take sexual violence committed on both men and women with the same seriousness. In a sense, the Rome statute understands this impulse as rape, which is one of the acts under crimes against humanity, is gender neutral. Some of the acts of sexual violence perpetrated may come under the heading of torture, which is also a gender neutral crime. Hence there is a legal basis to recognise the sexual crimes committed against both women and men.

However, the obstacles to prosecuting sexual crimes committed against men are likely to be quite large due to a lack of social recognition of the nature of these crimes. It is in this context that one hopes that the documentation of the Commission of Inquiry will pave the way for a more 'general recognition that men can also be victims of gender based crimes that will lead the way for prosecutors to investigate allegations of such occurrences and judges to develop definitions and constitutive elements of gender based crimes that leave room for male victims.'³⁷

In the time going forward, as the Syrian civil war inches towards a conclusion, the question of accountability will become increasingly important. When accountability is sought to be fixed for grave crimes, thanks to the documentation of the Commission of Inquiry, the sexual violence can be seen as a continuum affecting both women and girls as well as men and boys.

Moving beyond the Rome Statute's binary notions of male and female

While the documentation of the COI has broadened the understanding of those affected to include men and boys, the documentation still hews to a binary understanding of gender. This

Cr. L. Rev 13(2013) 665-697.

³⁶ Ibid.

³⁷ Solange Mouthan , op. cit.

understanding again flows from one of the limitations of international criminal law as seen in the Rome Statute which establishes the International Criminal Court.

The Rome Statute encodes a narrow definition of gender.

Art 7 (3) of the Rome Statute which notes:

For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above.

This definition of gender is deeply problematic as it restricts the understanding of gender to the two sexes alone. There have been many developments both in international law and in a societal understanding of gender which must be taken into account. The Yogyakarta Principles enjoin that when it comes to questions of sexual orientation and gender identity, the legal standard must be revised to pay attention both to changes in our understanding of these concepts as well as changes in the legal regime.

This is made clear in the preambular paragraph to the Yogyakarta Principles which states that, 'this articulation must rely on the current state of international human rights law and will require revision on a regular basis in order to take account of developments in that law and its application to the particular lives and experiences of persons of diverse sexual orientations and gender identities over time and in diverse regions and countries.' The Yogyakarta Principles plus 10 which was adopted ten years after in 2017 expressly broadened the understanding of sexual orientation and gender identity to also include the terms gender expression and sex characteristics and read the protection of international human rights law to include all four markers of discrimination.³⁸

This interpretative strategy of reading into international law new understandings is being adopted when it comes to questions of gender and sexuality. This is most apparent in the discussion around the proposed draft of a treaty on Crimes Against Humanity currently under discussion in the International Law Commission.

The first draft of the proposed treaty had in place the definition of gender as put forward in the Rome Treaty as discussed above.³⁹ When comments were invited to the draft treaty, very strong opposition to the Rome statute definition of gender was voiced by both states and civil society.

The objections were summarized in the Report of the Rapporteur on Crimes Against Humanity:

³⁸http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf

³⁹<https://legal.un.org/docs/?symbol=A/CN.4/L.892>

With respect to **paragraph 3**, many States criticized the repetition from the Rome Statute of the International Criminal Court of this paragraph defining “gender”. Canada referred to the definition as “under-inclusive and inaccurate”, noting that the “proposed definition tethers the concept of gender to that of sex”, even though “the term ‘sex’ has been used to refer to biological attributes whereas the term ‘gender’ refers to socially constructed roles”. Belgium asserted that this “definition does not take into consideration the developments of the last 20 years in the areas of international human rights law and international criminal law, particularly with regard to sexual and gender-based crimes”. Likewise, Bosnia and Herzegovina referred to the definition in paragraph 3 as “opaque, outdated and not in line with the recent, more inclusive and gender sensitive definitions of ‘gender’”. Chile found that “the definition would seem to indirectly tolerate persecution by reason of gender identity, an outcome which could be hardly desirable, and one for which scarce reasons would be available”. Estonia asserted that “the Statute was composed 20 years ago” that “this definition does not reflect the current international human rights law”. And that a future convention should protect “transgender and intersex persons” since they are “more vulnerable to persecution”. Costa Rica viewed paragraph 3 as containing “an obsolete definition of the term ‘gender’ that ignores developments over the last two decades in the areas of human rights and international criminal law, including within the International Criminal Court, in relation to “sexual and gender based crimes”. Sweden stated that the “Nordic countries are of the view that the definition of ‘gender’ contained in draft article 3 paragraph 3, does not reflect current realities and content of international law.

Moreover, particular attention was drawn to the “Policy Paper on Sexual and Gender-based Crimes” of the Office of the Prosecutor of the International Criminal Court, which maintained that:

Article 7(3) of the Statute defines “gender” as referring to “the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.” This definition acknowledges the social construction of gender and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and girls and boys. The Office will apply and interpret this in accordance with internationally recognised human rights pursuant to article 21(3) [of the Rome Statute of the International Criminal Court].

While Chile, Costa Rica and Liechtenstein proposed replacing paragraph 3 with an alternative definition, most States simply recommended the deletion of paragraph 3. Chile, Costa Rica and Liechtenstein also viewed deletion as an acceptable alternative.⁴⁰

⁴⁰ Sean D. Murphy, Fourth report on crimes against humanity, A/CN.4/725, <https://legal.un.org/docs/?symbol=A/CN.4/725>

One of the representations by civil society:

was signed by 583 NGOs from 103 States worldwide, which “urge[d] the Commission to remove the definition of gender from article 3(3) . . . or in the alternative, replace it with the definition of gender put forth by the Office of the Prosecutor”. In support, the submission cited a number of international authorities in addition to those cited above.⁴¹

Post the strong objections expressed by both states as well as civil society to the outdated definition of gender in the draft of the Crime Against Humanity Treaty, the International Law Commission expressly dropped the outdated definition of gender.⁴² This means that gender in the new draft of the Crimes Against Humanity treaty, will not be limited by the Rome Statute definition but can be understood in the light of the developments in international law including the Yogyakarta Principles and Yogyakarta Principles Plus 10.

The importance of this larger shift in the understanding of gender is vital for the future work of the COI on Syria. As a fact finding body, the COI’s mandate is to establish with credible evidence the kinds of violations of international human rights law. What is apparent is that the work of the COI has mapped the kinds of violence inflicted on grounds of gender and also specifically looking at sexual orientation. If the COI were to examine violations on the basis of an understanding of gender as updated by the Yogyakarta Principles plus 10, it would have to examine the specific violations which persons have suffered due to not only sexual orientation but also gender identity, gender expression and sex characteristics.

Genocide of the Yazidis: The limitation of genocide law in protecting LGBTI persons

While the Syrian regime headed by Bashar Al Assad has committed horrific crimes against its own people amounting to both crimes against humanity and war crimes, the only group to yet commit what has been characterized as the ‘crime of crimes’, namely genocide, is ISIS. The 2016 Report of the Commission of Inquiry on Syria, for the first time, makes an argument that ISIS, in addition to committing war crimes and crimes against humanity, has also committed and, is committing an ongoing genocide against the Yazidi people.

In its Report titled, *‘They came to destroy’*, the Commission powerfully documents how ISIS is intentionally destroying a religious group, namely the Yazidis. The elements of the intent to destroy are derived from the way ISIS implemented its policy vis a vis those it captured, for example the entire Yazidi population in the Sinjar region of Northern Iraq. Those captured were divided into three groups: men and boys aged approximately 12 and above; women and

⁴¹ Ibid.

⁴² <https://legal.un.org/docs/?symbol=A/CN.4/L.935>

children; and boys aged seven and above. As the Commission notes, 'each group suffered distinct and systematic violations, sanctioned under ISIS's ideological framework.' What this translated into was summary execution of men and older boys who refused to convert to Islam, the sale of women and girls to ISIS fighters as slaves, and the forcible conscription of young Yazidi boys as cadre for ISIS's armed forces.

ISIS engaged in acts of killing Yazidi men and boys and selling into slavery and raping Yazidi women, all with the specific intent of destroying the Yazidi community. In all the crimes committed by ISIS in the Sinjar region, according to the Commission, the only group who was targeted for systematic extermination was the Yazidis. The Christians for example were allowed to continue to live in the Sinjar region as long as they paid a religious tax (jizya) as they were, according to ISIS, 'people of the book'.⁴³ However the Yazidis not being 'people of the book' were targeted for elimination from the territory of the Caliphate.

Thus the COI concludes that ISIS had the 'intent to destroy, in whole or in part a national, ethnic, racial or religious group' which is the essence of the crime of genocide. 'ISIS commits the crime of genocide against individual Yazidis, as an incremental step in their overall objective of destroying this religious community.'

Through its analysis the COI demonstrates that all the acts contemplated under the Genocide Convention as part of the crime of genocide have been committed by ISIS.⁴⁴ Thus the focus is not only on killing members of the group but also sexual violence, sexual mutilation, torture, enslavement, prevention of pregnancy, transferring of children from their parents to ISIS custody etc. In the Commission's analysis all these acts are intentionally inflicted to destroy the group, namely the Yazidis.

While there is no argument that the Yazidis are a protected group under the international legal framework defining genocide, the question is can the protection be extended to other groups targeted by ISIS?

One other group who is similarly targeted for extermination by ISIS are what the 10th Report as well as subsequent reports characterize as sexual minorities. 'Sexual minorities have been executed by ISIS and Jabhat Al-Nusra. The Commission continues to investigate reports of ISIS

⁴³ The Christian minority while not the targets of genocide were definitely the targets of persecution which means the 'intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'. If persecution is systematic and widespread, then it's possible to make the case that a crime against humanity was committed with respect to the Christian community.

⁴⁴ Article II of the Convention on Prevention and Punishment of Genocide defines genocide: In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

fighters throwing gay men off high buildings, and their being beheaded by Jabhat Al-Nusra.⁴⁵ This finding is buttressed by the Report of the COI which specifically documents sexual violence.⁴⁶

Documentation by Outright International indicates that since the birth of ISIS across Syria and Iraq, 41 people till now have been executed because they were suspected to be homosexual.⁴⁷ Clearly the numbers are nowhere in the range of the destruction visited on the Yazidi community, however what is to be remembered is that for understanding the crime of genocide, the key element accompanying the *actus reus* (killing, enslavement, etc.) is the *mens rea* (intent to destroy the group in whole or in part).

As scholar Payam Akhwan notes, 'Genocide is unique because of its element of *dolus specialis* (special intent). It is this *mens rea* that gives genocide its speciality and distinguishes it from ordinary crimes and other international crimes and makes it the crime of crimes.'⁴⁸

When ISIS's crimes are characterized as genocide, the understanding which one brings to the rationale of these crimes is that they are the product of an ideological thinking which believes that the world would be better without a particular group of people in it and that by destroying those they consider impure, the perpetrators are creating a more perfect society. It is precisely this mode of thinking about the world when it is accompanied by the acts prescribed under the legal definition of genocide that the crime of genocide seeks to punish. As Payan Akhawan put it succinctly, 'the crime of genocide is intent rather than result oriented in terms of its relationship to harm'⁴⁹

Seen from this perspective, the crimes of ISIS against sexual minorities should also be investigated as to whether they as a group were similarly targeted for destruction. Initially there was very little documentation of the bureaucracy within which the sexual minority population was targeted for extermination. One of the few documentations of the way the death sentence is carried out is the one by Outright International who document 41 cases of homosexual men who were executed after a trial in which the accused were found to have violated the commandments of the Shariat.

To give two illustrative examples⁵⁰

On August 2, 2015, the Islamic State's Information Office in Hama Province (Syria) issued a video and photo report about the execution of three men on sodomy accusations and for

⁴⁵ <https://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/Documentation.aspx>

⁴⁶ <https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-37-CRP-3.pdf>

⁴⁷ <https://www.outrightinternational.org/content/timeline-publicized-executions-alleged-sodomy-islamic-statemilitias>

⁴⁸ Payan Akhawan, Reducing genocide to law, Cambridge University Press, Cambridge, 2014. p.46.

⁴⁹ *ibid.* p.45.

⁵⁰ <https://www.outrightinternational.org/content/timeline-publicized-executions-alleged-sodomy-islamic-statemilitias>

spreading homosexuality. The Islamic State in its video stated that it is carrying out “the imposition of religious punishment against those who spread corruption on earth,” specifically in this case “promoting the acts of the people of Lot amongst Muslims,” thereby trying to change the “innate character of the Muslims.”

A translation of the only judgment by an ISIS court which sentences two persons to death is worth citing in full.

The Islamic State

Neinava Province

Islamic Court

Serial number : 1111

Date: 17-5-1436

3-8

Praised be the Lord of the Universe and prayers and peace be upon our Mater Mohammad and upon all his household and his disciples.
And now:

The Almighty God has sent prophets and messengers and sent down books and legislated punishment to protect the five fundamental necessities which included religion, lives, belongings, honor, and wisdom. One of these five necessities is honor. The Almighty God, in order to protect honor, has imposed punishments for adultery and the acts committed by Prophet Lot. [The Prophet peace and prayers be upon him] had said “if you find a person who has committed the act of the people of Lot, you should kill him, whether they are the top or the bottom.”

In front of the Islamic court of the Neinava province, it was proved that:

1- [name blurred]

And

2- [name blurred]

Have repeatedly committed the act of the people of Lot, based on their own confessions. Therefore the Islamic Court will carry out the God’s punishment on them, to punish them for their deeds and to teach a lesson to those who witness it. The God is able of managing his affairs but most people are unaware.

The seal of the Islamic State, department of justice and judgment.
March 8

The judgment itself indicates that the death sentence, within ISIS' logic is not arbitrary and irrational but rather a punishment for the violation of the prohibition in the Shariat on engaging in the 'act of Lot'. Repeatedly engaging in the 'act of Lot' as proved by the confessions of the accused is a violation of 'honour', which is one of the 'five fundamental necessities' which God aims to protect by imposing the punishment of death for those who violated this commandment. Hence the death penalty is the result of violating what according to ISIS is a violation of the God ordained fundamental necessity of defending honour.

What the judgment shows in clinical detail is that there is a legal and religious sanction for eliminating those found to be engaging in homosexual acts. As with the Yazidis, the killing of homosexuals is not an arbitrary vengeful act but the outcome of a 'religious' logic clothed in a specifically 'legal' form which prescribes the elimination of homosexuals.

This judgment indicates the chilling extent to which ISIS was prepared to go. While killing is the extreme punishment, that extreme punishment must logically follow from a more quotidian persecution of homosexuals under ISIS rule. Post the collapse of ISIS as a territorial state, New York times journalist Rukmini Callimachi who was embedded in the Iraqi army, collected over 15,000 pages of documents left behind by the Islamic State. These documents referred to as the 'ISIS files', reveal 'the inner workings of a complex system of government.'⁵¹ These documents were deposited with George Washington University where they were scanned and are now in the process of being translated and being released into the public domain in tranches. After much pressure, the originals were finally returned to the Iraqi state who is the rightful trustee of these documents.

The documents which have been released into the public domain supplement our understanding of the treatment of homosexuals by the Islamic state. The Islamic State had a sophisticated bureaucracy to deal with the question of moral offences. There were three wings which dealt with moral offences namely the Hisbah, the Islamic Police and the Islamic Courts. The documentation released by the George Washington University helps us to make sense of the role of the Hisbah. The Hisba, as a religious obligation to 'commanding right and forbidding wrong', originates from Quranic verses that implore Muslims to enforce such a duty. The Islamic State used hisba to police and surveil those who lived under its control.⁵²

As per the ISIS files, 'hisba enforcers patrol the streets and can proactively investigate cases and transgressions.' Judges by contrast, 'authorize the enforcement of hudud. The process

⁵¹ <https://isisfiles.gwu.edu/about>

⁵² Asaad Almohammad et.al., Moral Dominance: Policing Minds, Spirits, Bodies, and Markets, <https://isisfiles.gwu.edu/concern/reports/f1881k934?locale=en>

leading to carrying out punishment involves a procedure that requires the oversight of Islamic courts. Hudud are enforced for ‘offenses’ like adultery, homosexual intercourse, consuming alcohol, slander, theft, and banditry.’⁵³

Coming to the Hisbah, the Hisbba enforcers, ‘gave ‘advice’ to men and distributed leaflets on restrictions pertaining to look and dress code. These restrictions dealt with haircuts, beard grooming, plucking eyebrows, and the length of men’s clothing. Based on the group’s publications, the impetus for regulating men’s look and dress code is derived from a perceived connectivity to Salafi identity.’

Hisbah also tried to ‘deter trimming and shaving beard, declaring whoever defames the beard, mocks it, and ridicules it, then he has disbelieved (apostatized) and has left the folds of Islam. Those who violated such codes were harassed and punished. The punishment for shaving beard was up to 30 lashes. Plucking eyebrows was another ‘violation’ that resulted in up to 20 lashes. Hisba enforcers inspected barbershops to capture and punish ‘violators,’ advise those running such businesses on the regulations associated with haircuts and beard shaving, and confiscate banned items such as razors.’⁵⁴

The effort to control personal grooming is an intrusion into the sphere of intimate decision making and an assault on a person’s dignity. These efforts by the Hisbah directly seek to control a person’s gender expression and implicitly seek to control a person’s gender identity and sexual orientation. The fact that ‘homosexuality’ and its control was never far from the imagination of the Hisbah emerges through another narrative of the ISIS files.

For example, an internal Islamic State file tells the story of a teenage boy who has a tattoo of a football teammate. This case was handled by the hisba department. The document in question refers to tattooing as an offence, for which the teenage boy was detained. The author of that document also insinuated accusations of homosexuality among members of the football team and the arrested teenager was interrogated to provide more details about his team’s conduct. The punishment for homosexuality in the Islamic State’s former controlled territories is death. The hisba department is among the chief perpetrators of abuses committed against homosexuals, particularly, against gay men.⁵⁵

Clearly as more information emerges from the ISIS files especially with respect to the work of the Islamic Police as well as Islamic Courts a fuller picture of how homosexuals were persecuted under ISIS will emerge.

The importance of analysing the bureaucratic legality within which extermination is ordered and executed cannot be underestimated. It bears recalling that the first work to coin the term genocide, Raphael Lemkin’s *Axis Rule in Occupied Europe* was a detailed analysis of the laws,

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

decrees and proclamations targeting the occupied population living under Nazi rule. Central to Lemkin's argument is that genocide was a product of Nazi legality.⁵⁶

The legalized murder of homosexuals by ISIS is reminiscent of another forgotten holocaust, namely the Nazi persecution and destruction of the first homosexual sub-culture in the modern world i.e. in Weimar, Germany. Apart from the genocide perpetrated against the Jews, the Nazis also systematically aimed to eliminate Communists, the disabled and the homosexual community. Referring to the systematic manner in which the homosexual community was eliminated, Grau says that "the declared aim of the Nazi regime was to eradicate homosexuality. To this end homosexual were watched, arrested, registered, prosecuted and segregated; they were to be re-educated, castrated and [-] if this was unsuccessful – exterminated."⁵⁷

Again it bears repeating that the point is not to compare the numbers who were eliminated but rather the intentionality behind the elimination. The intentionality flowing from ISIS's actions be it the desire to control the expression of sexual orientation, gender identity and gender expression as well as the killing of homosexuals, bespeaks a political frame in which the objective was genocidal.

'Crimes Against Humanity': A better fit for protecting persons persecuted on grounds of SOGIESC

What the Reports of the Commission of Inquiry on Syria reminds us is of the inadequacy of genocide law as according to the legal definition, the 'crime of crimes' can only be perpetrated against 'racial, ethnical, religious and national groups'. The fact that other collectivities cannot be victims of genocide, even when the intent to destroy that collectivity is clearly present, is a serious limitation of the definition of genocide both in the *Convention on Prevention and Punishment of the Crime of Genocide* as well as the *Rome statute*. If genocide is to retain its status as the 'crime of crimes' its essential that it also protect other collectivities who have been historically targeted for destruction as well as collectivities who may be so targeted in the future.

However even assuming that genocide law in a future incarnation covers an open list of groups who may be targeted for extermination, the question as to why should a crime committed against a collectivity necessarily be seen as more serious than crimes committed against numerous individuals who are not a collectivity, remains.⁵⁸

If one refers back to the situation in Syria, clearly the crimes committed by the regime including disappearances, sieges, attacks on medical facilities and indiscriminate aerial

⁵⁶ Raphael Lemkin, *Axis Rule In Occupied Europe*, Law Book Exchange Limited, Clark, 2005.

⁵⁷ Gunter Grau, (Ed.), *Hidden Holocaust?*, Cassell, London, 1995.

⁵⁸ See Payan Akhawan, *op. cit.*

bombardment dwarf in sheer quantitative impact the crimes of ISIS. However these crimes would fall within the legal definition of a 'crime against humanity' and 'war crimes' and may not come within the legal definition of genocide. If we consider that the regime is responsible for the vast majority of deaths and displacement in Syria, the moral *cul de sac* into which a focus on genocide as the 'crime of crimes' can lead us becomes apparent.

Philippe Sands in his book part legal history part personal history incisively traces the history of the two terms genocide with its focus on the group and crime against humanity with its focus on the individual to two eminent legal scholars- Raphael Lemkin and Hersch Lauterpacht respectively. Both men had a personal stake in the development of these terms as they both lost members of their close family in the holocaust. The difference between the two viewpoints was that for Lauterpacht, the membership in a collectivity was not essential as long as one can show that the atrocity was perpetrated on a 'civilian population' and that it was 'widespread and systematic'. It would come within the understanding of a crime against humanity. However for Lemkin, the intentional destruction of the collectivity was the essence of the offence.⁵⁹

While 'genocide' is a powerful way of capturing a crime like no other, namely the intentional destruction of an entire human group there are clearly limitations to the concept. Firstly the groups who are protected are too narrowly defined and secondly atrocities regardless of scale if they are committed without genocidal intent will always be seen as a lesser crime to genocide. This has ethical moral and socio-legal implications.

Thus while genocide may be the appropriate way of analyzing the harm visited on the Yazidi community, the term itself as currently defined lacks the suppleness to respond to different realities. As the Syrian civil war teaches us there is a gap between the 'material seriousness' of the crimes committed by the regime and the 'juridical seriousness' with which those crimes are likely to be treated as long as genocide continues to be seen as the 'crime of crimes'.⁶⁰

Thus the concept of 'crimes against humanity' may be the concept in international criminal law of greatest relevance to the LGBTI community. In many of the offences under this concept, the idea of a collectivity which is targeted is eschewed and the focus is instead upon 'widespread and systematic attacks' upon a 'civilian population. Thus the actus reus of 'murder', 'torture', enslavement etc can be perpetrated on individuals who do not have to belong to a group. Within these actus reus, the specific violence suffered on grounds of SOGIESC will be seen as a part of a wider attack on a civilian population thereby invisibilising the suffering on grounds of SOGIESC.

However the Rome Statute in Article 7(1)(h) defines the actus reus of a 'crime against humanity as 'persecution against any identifiable group or collectivity on political, racial,

⁵⁹ See Philippe Sands, *East West Street*, Widenfield and Nicolson, London, 2016.

⁶⁰ Payam Akhawan, op. cit.

national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law' Under 7(2)(g) it defines 'persecution' to mean, 'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group.'

The space for conceptualizing the idea that a group is deprived of rights by virtue of being a group is there in the concept of persecution. Persecution is really about how a group is intentionally deprived of fundamental rights. The groups who could be deprived of rights unlike under genocide are not defined in exclusive terms. As Article 7(1)(h) makes clear the groups are open ended and include national, ethnic, cultural, religious, gender or *other* groups. The only specific limitation imposed on the nature of groups is with respect to gender. As noted above it is restricted to 'male and female, within the context of society'. However, the fact that 'other group' is mentioned in the list of groups means that groups targeted on grounds of SOGIESC could find a place within the understanding of 'other groups' if not under 'gender'.

Thus, it seems to be the case that 'crimes against humanity' as compared to 'genocide' is a far more malleable and flexible concept within which persons targeted on grounds of SOGIESC can be protected. It is the germinal importance of the notion of 'crimes against humanity' to LGBTI persons which prompted the initiation of the campaign by Outright International and others which was eventually successful in ensuring that the proposed 'crimes against humanity' treaty does not limit the understanding of gender to 'male and female, within the context of society'.⁶¹

Conclusion

The importance of the work of the COI, lies in the fact that by documenting the specific violations committed on what it calls 'sexual minorities' it brings attention to an otherwise invisible phenomenon during times of conflict. By drawing attention to the specific targeting of homosexual men and to the range of sexual torture, rape and sexual humiliation inflicted upon both men and women it broadens the understanding of the violations perpetrated in times of conflict. This will be of great importance as and when the question of accountability for such grave and serious crimes is on the table.

Keeping in mind this future oriented perspective, its also important to critique the work of the COI. As important as the work of the COI it still works with the notion of male and female as the two categories within which violation happens. However, if current development in international law with respect to gender are taken seriously then the work of the COI should

⁶¹ <https://www.madre.org/international-crimes-against-humanity-treaty>

expand to shed more light on the specificity of violation on grounds of not only of sexual orientation but also gender identity, gender expression and sex characteristics.

Even while the frame within which documentation by the COI is being done can be widened it's also important to think through both the limitations as well as the potential of international criminal law. The limitation of genocide law is that end of the day the 'crime of crimes' is only applicable to persons who are targeted because they belong to a 'national, ethnical, racial or religious group'. This expressly leaves out SOGIESC as possible bases on which genocide could be carried out. The definition of 'crimes against humanity' offers more hope to LGBTI persons as one of the actus reus, persecution can be carried out against any 'identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law'. The specific inclusion of *gender* as well as *other groups* indicates that perhaps, the hope for bringing attention to the crimes against LGBTI persons lies in using the concept of 'crimes against humanity' both in the Rome Statute as well as in the proposed treaty on Crimes Against Humanity.