

A Commentary on the Conference Room Paper of the Independent
International Commission of Inquiry on the Syrian Arab Republic

“I lost my dignity”: Sexual and gender-based violence in the Syrian Arab Republic

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Independent International Commission of Inquiry on the Syrian Arab Republic: “I lost my dignity”: Sexual and gender-based violence in the Syrian Arab Republic’¹

1. Introduction

The report on sexual and gender-based violence by the Commission of Inquiry for Syria (the Col) is ground-breaking. Few will be surprised by the content, given the previous reports and the existing knowledge of the brutality of the conflict, but this might well be the first report by a UN mandated body, albeit an independent one, which makes a significant departure from existing approaches to the subject. If their vector is followed, it has the potential to go some way to changing the discourse on Sexual Violence (SV) and Gender-based Violence, (GBV), which will, in turn, affect the way that it is addressed under international criminal law and help guide post-conflict transformation and redress.

Whilst a great deal was achieved by the *ad hoc* tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY) in establishing – when the other elements are present - rape as a war crime, a crime against humanity, torture and constitutive of genocide, less well understood is how the approach to those crimes was set in a very patriarchal system of law, borrowing and relying as it did on the practices of nation states, largely reflecting their criminal law in which the issues of consent² conduct, and detailed analysis of penetration, were considered to be relevant. This is reflective of a heteronormative approach to the experience of sexual violence. The revelations of the extent of sexual violence in Bosnia and Herzegovina set a precedent for taking conflict-related SV seriously, as a result of which in subsequent conflicts there has been a tendency to seek out women as victims of rape, with the negative consequence of creating a narrative of their victimhood and subsequently a collective identity (‘rape victims’) by which survivors are categorized by the crime that was committed against them, rather than an approach that looks at the entirety of their experiences.

In post-conflict Bosnia and Herzegovina this has had untold consequences relating to stigmatization, an inability to regain agency and to be an effective part of post-conflict governance structures.³

There can be no doubting the courage of the Bosnian women in coming forward to testify. What is disturbing is that it was pretty much all that women were called upon to witness! Analysis of the ICTY cases shows that:

"The overall number of women who testified before the ICTY is relatively small (approximately 13 percent), with disproportionate numbers represented in sexual violence cases."⁴

Effectively the history of the wars in the former Yugoslavia, as documented and evidenced by the ICTY, is written predominantly from the male gaze. Prosecutions for SV against men were also part of that male gaze. Objectively, the numbers before the tribunals were fewer, were predominantly prosecuted as torture or cruel treatment, and frequently the witness gave evidence as to the torture and abuse of a third party not of his own experience. Again this is reflective of a highly gendered narrative. Subsequent analysis has shown that Investigators did not go into the details of the penetration in the same way as was done regarding women survivors. The technical approach to proving the crime was as a result of the national criminal laws of states and the developing case law of the *ad hoc* tribunals. This was epitomized in the case of *Furundzija*, which defined the elements of the crime of rape as requiring:

"the sexual penetration, however slight, either of the vagina or anus of the victim by the penis of the perpetrator, or any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator, where such penetration is effected by coercion or force or threat of force against the victim or a third person."⁵

Neither consent nor conduct were considered as factors in investigating sexualised violence, including rape against men. Sexual assault was rather accepted as an act of torture and/or cruel treatment.

This is why the report of the Col is so important. For those who experience conflict the revelation that men experience rape and SV is not a surprise. The fact that it has not been surfaced as such has led some to drive for greater emphasis on the crimes of SV perpetrated against men, almost to the extent of seeming to suggest discrimination and exclusion. The Col takes us in a logical truly gendered analysis of the crimes and fundamentally alters that precept, ending the binary narrative in the context of its report and opening a way for how issues of SV and GBV should be addressed by legal and policy decision-makers.

2. Summary of the Report: "I lost my dignity"

The report gives an overview of the incidence, manifestations and impact of SV and GBV in the war in Syria. It brings to the forefront the complexities of such violence in conflict-affected areas and over a drawn out period of time and in so doing shows that all who are made vulnerable by the conflict and the power dynamics within it, are affected, by such violence - men, women, boys and girls. The report makes apparent the need for a precise contextual analysis of such crimes to be made in conjunction with a deeper inquiry into the structural international and local factors in which they occur as such violence mirrors the fault lines of the conflict. It shows how SV and GBV work in different scenarios within the framework of conflict.

It is also a welcome rebuttal of both the more simplistic assertion of 'rape as a tactic of war' of Security Council Resolutions such as 1820 (2008), 1888 (2009), 1960 (2010) and 2106 (2013) and the gender binary, male/female, with the associated stereotypes (for instance protector/protected; perpetrator/victim). It shows how GBV and SV are used to weaken political opposition (assumed to be largely male), to further sectarianism, religious extremism and ideology. GBV and SV play out against pre-existing gender inequalities and are implicated in the political economy of the conflict and of international relations. Such deeper understanding is needed to inform measures taken for the

prevention of such crimes and to underscore the obligations of all members of the international community.

The report makes clear that multiple persons have been responsible for the gender-based and sexual violence in Syria. The forms of such violence committed by the various perpetrators have shifted along with course of the conflict, as have the purposes for its commission. Gender-based and sexual violence have been committed against women and girls, men and boys. Homosexuals (or suspected homosexuals) have also been targeted. There is commonality in the exercise of power by perpetrators over those made vulnerable by the collapse (or abuse) of state institutions, in extreme brutality and in the intention to terrorise and humiliate.

The following is a brief summary of some of the report's findings. In all cases the report provides examples from survivors, victims and witnesses.

2.1 Perpetrators of Gender-based and Sexual Violence

Government Forces

Acts of rape and SV by government forces were most prevalent during military operations on the ground when opportunities were greatest. Accordingly they proliferated where government forces had effective spatial control and asserted control over people, for instance through arrests at checkpoints, in house searches, and during admission to and in detention.

The reasons for such violence were to quell political opposition, to obtain information about the opposition, to intimidate, to punish, to humiliate. Rape and SV were committed by the Syrian army personnel, security and intelligence forces (officers and lower ranking personnel) and other pro-government armed militia.

Rape and SV were committed in conjunction with other crimes, killings, looting, pillage.

Rape and SV were committed against women when men were arrested, to instil terror and to punish further men for their (actual or supposed) opposition to the government.

Homes ceased to be places of privacy and non-intervention but places of invasion, violence and humiliation; the association of women with the private space of home makes this an especially gendered form of violence.

SV in detention was gendered: women were subjected to invasive searches, touching of breasts and genitalia as well as rape, interrogated about their sexual life; men were raped with objects, subjected to genital mutilation, forced to have intercourse with other detainees. For both men and women rape and SV were committed in conjunction with and as integral to other forms of torture, in order to induce confessions and obtain information, among other reasons.

Women and girls of all ages (from as young as nine) were subjected to rape and SV, as were young boys.

Repeated incidents of similar behaviour across government controlled areas and detention centres provide evidence that GBV and SV were not individualized private acts but rather formed part of a pattern of deliberate and targeted crimes that were sanctioned at the highest levels.

As the course of the conflict shifted and government military action comprised greater use of airstrikes the opportunities for SV by government forces apparently decreased. However, earlier patterns of such violence provide clear warnings of likely similar behaviour in areas where the government regains control.

Armed Militia

The report states that armed militia did not use rape and SV systematically “to instil fear, extract information, or enforce loyalty.” Nor did they use checkpoints to control movement thereby reducing the incidence of rape and sexual violence in this context.

Rape and SV by armed militia were committed, largely in the context of:

- Exploitation for instance to pressurize families to marry their daughters to militia members.
- Revenge.
- Sectarianism.

Jabbat Fatah al-Sham

Forms of SV committed by Jabbat Fatah al-Sham are in the context of their imposition of their interpretation of Islam on those living in areas under their control and punishment for those who did not comply.

Manifestations of GBV and SV thus include:

- Forced dress codes and restrictions on women’s movements and physical punishments for violation of both.
- Forced marriage as a ‘reward’ for fighters.
- Forced closure of organisations that might contribute to women’s empowerment or allow for mixed participation.
- Stoning for suspected extra-marital sex.
- ‘Mediaeval’ punishment of men suspected of homosexuality.

ISIS

In areas that ISIS established under its control it forcibly imposed its version of social order in accordance with its ideology and interpretation of Islam. This entailed strict requirements on conduct in all spheres of life, especially upon women and girls and sexual minorities, enforced by harsh punishments, and entailing severe violations of human rights related to:

- Freedom of movement and association; activities that involved people having unapproved contact with the opposite sex, including charges of adultery, routinely resulted in execution, for women usually by public stoning.
- Rigid imposition of a dress code, enforced by fines, and more commonly, lashings
- Forced marriage to ISIL fighters, especially of girls aged 12-16 years; if the fighter died the girl was typically passed on to another fighter.

Other violations of human rights inflicted on women that demonstrate the intention to have lasting impact on women's ability to live in the public sphere:

- Freedom to choose an occupation.
- Access to education.

Syrian Democratic Forces

Incidents of torture of male detainees, including sexual torture (but not rape).

Family Members

The report does not have a separate heading of family members but nevertheless shows how they become complicit in sexual or gender-based violence, or inflict it themselves. For instance:

- Families being forced to marry their girls to ISIS fighters, marrying their daughters in child marriage to other men to avoid this eventuality; child marriage more broadly as a by-product of war in the belief that this will protect the child from further violations.
- Women and girls who have been raped subjected to killings in the name of honour.

2.2 The Changing Face of Conflict

In 2017 as the net closed on ISIS the situation gave rise to further violations:

- The situation of the Yazidis has been the subject of earlier documentation by the Commission of Inquiry. As ISIS fighters have retreated or fled thousands of Yazidis have disappeared.
- In 2016 ISIS allowed fighters to sell Yazidi children separately from their mothers resulting in separation, sale of children as slaves and house servants. Their loss of identity through changed names is a further violation.
- Further displacement has meant thousands of women and girls trapped in situations of extreme vulnerability in internment camps.
- In refugee camps outside Syria women and girls are vulnerable to being trafficked, forced marriage and other violations.

3. Economy of Women's Bodies and of War

Conflict-related GBV and SV occurs within the domestic framework of the structural inequalities of the political economy, international law and relations, exacerbated by the predatory economy of the violence and conflict.

Basically the pre-conditions for SV exist in global patriarchal structures replicated at all levels of society; they are by no means singular to the Syrian conflict. Patriarchy provides the cultural and hence political context in which SV and GBV are possible, and indeed normalized as a means to express power and control. The report clearly shows that anyone who is not part of the institutions of masculine governance, including formal and informal military structures which hold and exercise power, are at risk.

How that works in practice is documented by the way in which SV becomes part of GBV and vice versa within the different contexts in which the violence occurs. For example, the initial crimes committed against women and men are designated by the Col as SV, that crime then leads to gender specific forms and outcomes as a result of ostensible religious and cultural norms which require, variously: for women, honour killing by her family, stoning to death, the forced marriage to fighters; for men the outcome for perceived homosexuality is death. The consequences for male survivors of SV who were not perceived as homosexual are not in the report and as yet, have to be documented.

It would appear, therefore, that the assertion of power through sexualized violence is used against all. Differences in forms of such violence – in effect torture - are determined by reason of biology, but the consequences for women are gendered and hence reflective of culturally specific responses. Gender oppressive narratives imposed by society or culture reinforce gender discrimination in laws against women and others who would defy their culturally ascribed gender role.

This is important. It should help guide the International, Impartial and Independent Mechanism (IIIM) in its investigations (and any ICC or other subsequent judicial body, as well as policy makers), and help to frame jurisprudence, which will accurately describe the sequencing of violations: when, where and why

they occur, and by whom. This should negate the ‘need’ for invasive questioning, such as to the extent of penetration and with what, the relevance of which is absolutely questionable in the ‘coercive circumstances’ of conflict. Accountabilities must flow from that analysis.

This has logical consequences: in relation to prevention it takes us inexorably into the need for states to take all necessary measures to end gender inequalities. A political economy analysis is vital, showing as it does who holds and exerts power – from within the household through to the state institutions – and hence shows the inequalities in gender relations that play a major role in conflict and in its prosecution.

In addition it should inform the post-conflict design of transition and justice programmes so that the legal obligations relating to reparations, restitution, guarantees of non-repetition, reconstruction and justice are done in such a way that they respond to the different harms suffered. In particular they must not ‘restitute’ so as to recreate the situation that played a role in creating the conditions for conflict and violence in the first place. In so doing it is vital not to embrace the binary narrative that has been damaging to both women and men in past transitions. Instead focus must be on redressing the systems of power that subordinated the population and made it vulnerable to their exercise and abuse.

4. International Accountability

4.1 International Criminal Law

Securing accountability for the crimes and human rights violations committed and ending the impunity of all perpetrators – state and non-state actors – is a paramount obligation. International law provides a number of applicable legal regimes that are discussed in the report.

International criminal law imposes criminal liability upon individual perpetrators and on those exercising command responsibility with respect to the commission of crimes of which they knew, or should have known (*Bemba*), or through participation in a joint enterprise. The report highlights that after 2012 incidents of SV in Syria constitute war crimes within the terms of the Rome Statute. Syria is not a party to the Rome Statute but where an accused person is a national of a state party to the Rome Statute there is jurisdiction before the ICC, or, of course, in the national courts under the domestication of the Rome Statute. Further, there is universal jurisdiction under the grave breaches provision of the Geneva Convention IV.

The widespread or systematic nature of the many crimes of GBV and SV, including those committed before the outbreak of war, constitutes crimes against humanity.

4.2 International Human Rights Law

UN Treaty Bodies

In addition to individual criminal responsibility, there is also state responsibility for the widespread violations of human rights and international humanitarian law. Human rights violations include arbitrary deprivation of life, torture and disappearance, as well as GBV and SV in armed conflict that have been recognized as violations of human rights law, as well as of IHL, by numerous international instruments and bodies, including the CEDAW Committee, the Committee against Torture, the Human Rights Council. This also applies to acts of GBV and SV committed prior to the outbreak of conflict (and before the establishment of the Col). Other human rights violations are denial of freedom of movement, of association, of the highest attainable standard of healthcare, of access to education, to justice and to a remedy. All of these must be analysed through a gender lens. The Col report makes very clear the commission of multiple internationally wrongful acts attributable to the Syrian state through their commission by state agents and those acting on behalf of the Syrian government.

The UN human rights treaty bodies should require Syria to report on its measures with respect to its obligations to respect, protect and fulfil human rights and its actions with respect to violations committed during the conflict. This is especially applicable to the CEDAW Committee which in its General Recommendation No 30 (2013) has referenced the UN Security Council resolutions on Women, Peace and Security (WPS) and recommended that states report on “the legal framework, policies and programmes they have implemented to ensure the human rights of women in conflict prevention, conflict and post-conflict” and to provide information on their implementation of the WPS resolutions. The CEDAW Committee’s review of Syria’s third periodic report, which is due in July 2018, will be a key opportunity to do that. Other especially relevant treaty bodies are the Committee on the Rights of the Child (CRC), Committee Against Torture (CAT) and Committee on Economic, Social and Cultural Rights (CESCR). The CRC will review Syria in January 2019 (pre-session in June 2018); the CRC should take this opportunity to address violations and recommendations in the Col report within the framework of the Convention. The Human Rights Council should call on Syria to submit its overdue reports to human rights treaty bodies, in particular to the CAT (overdue since 2014) and the CESCR (overdue since 2006).

Obligations of Human Rights Council members

States do not only have the obligation to respect human rights but also to protect and fulfil human rights. The obligation to protect requires states to protect against violations committed by third parties. The Committee on the Elimination of Discrimination against Women (CEDAW Committee) has reiterated the continued applicability of the Convention in armed conflict and its extraterritorial application (CEDAW, General recommendation No 30). Accordingly, Human Rights Council members and observer states should engage its mechanisms to assert the responsibility of the Syrian state for its violations of human rights. They should ensure that Col report findings and recommendations are addressed fully in the Human Rights Council’s resolutions and meaningful follow-up is given to them. States should also use the UPR process to follow up on the Col report, including by engaging Syria bilaterally on UPR recommendations and by taking into account meaningfully the Col report findings and recommendations in the next UPR of Syria. These processes are not subject to the veto as in Security

Council, and a targeted approach across all the available mechanisms would emphasize the continuation of state obligations and responsibility for violations.

Another possibility is targeted sanctions against all perpetrators listed in the report – the Syrian government, other militia, and extremist and terrorist groups. The Security Council WPS Resolutions envisage the possibility of Security Council imposed sanctions under UN Charter, article 41 and in response to the listing of “parties credibly suspected of committing or being responsible for patterns of rape or other forms of sexual violence in situations of armed conflict on the agenda of the Security Council in the annex to the reports to the Security Council of the Secretary-General on Conflict-Related Sexual Violence”⁶ The Special Representative of the Secretary-General (SRSG) on sexual violence in armed conflict has noted that while ISIS has collected millions of dollars in ransoms for hostages, “the global discourse on and response to the issue of curbing financial flows to violent extremists are focused almost exclusively on such considerations as the sale of oil and antiquities.”⁷

As well as accountability the report demonstrates the need for relief and recovery and reparations in accordance with Security Council WPS resolutions and human rights law. In particular the delivery of and access to economic and social rights is essential for victims and survivors including:

- Immediate delivery of and secure access to healthcare appropriate to the physical and psychological needs of women and girls, including abortion services, post-abortion healthcare, HIV/AIDS prevention treatment and support; similarly delivery of appropriate healthcare.
- Appropriate, affordable, accessible and gender-sensitive healthcare services for men and boys, including survivors of SV;
- Planning for delivery of long term appropriate and accessible gender-sensitive healthcare.
- An adequately resourced programme for determining and delivering the economic and social rights of children born of rape and their mothers, ensuring that these are determined through full discussion with the survivors and that their security is assured at all times.
- A reparations programme in which survivors are fully involved in their design, implementation, monitoring and evaluation.

While human rights obligations are incurred by the state, the ICESCR, article 2 states: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation.”

5. Conclusion: Implementation of the Report's Recommendations

In order to facilitate an effective response to the report, member states of the Human Rights Council could form a working group with the express purpose of bringing states which have geographical proximity, political, economic, military or other influence over the belligerent parties to find ways in which the recommendations and human rights obligations can be implemented.

Knowledge of the situation on the ground is fundamental to this. For many years Syrian women have been insisting that they must be part of the peace process, not least because of the knowledge and experience within their communities. They must be brought into these discussions in a meaningful way.

It would be appropriate for relevant Special Procedures of the Human Rights Council to provide expertise on how States should respond by producing a joint response to the report.

For there to be a breakthrough on the appalling human rights violations and violations of IHL in the Syrian conflict, the multilateral system, through all its manifestations needs to work as it is supposed to do. The report of the Col says clearly what needs to be done, it is incumbent on the system to make that happen.

¹ UN Index: A/HRC/37/CRP.3, 8 March 2018.

² Rule 96 ICTY rules of procedure. Limiting but not preventing absolutely, consent to be argued as a defence

³ See WILPF (2017) "A Feminist Perspective on post-conflict - Restructuring and Recovery. The Case of Bosnia and Herzegovina."

⁴ From the report, "Echoes of testimonies - A Pilot Study into the long-term impact of bearing witness before the ICTY", p. 123 http://www.icty.org/x/file/About/Registry/Witnesses/Echoes-Full-Report_EN.pdf

⁵ Other definitions including that in Akayesu emphasizing coercive circumstances, but element of penetration preserved in the Rome Statute.

⁶ See especially Security Council Resolution 1960, 2010.

⁷ Report of the Secretary-General on conflict-related sexual violence, 20 April 2016, UN index: S/2016/361, paragraph 20.