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Public international law: armed opposition groups and customary international law

This essay will evaluate the approaches taken by the International Committee of the Red Cross (ICRC) and the Special Court for Sierra Leone (SCSL) regarding the relationship between armed opposition groups (AOG) and customary international law (CIL). The analysis will be from the perspective of the theory of sources and the theory of subjects of international law (IL). It will then critically conclude whether the ICRC and SCSL's views are compatible with IL.

Sources of IL

International conventions and international custom are accepted as sources of IL under Article 38 of the ICJ Statute.

International treaties

Such agreements are binding on the states who are party to it – usually two or more states.

Customary international law

The 'classical' two-element theory of CIL comprises of an established practice by the state (*usus*) and the belief that such a practice is necessary by the existence of a rule of law (*opinio juris sive necessitatis*).

SCSL's position and its applicability to the Lomé Agreement

Was the Agreement international? Kooijman argues that as the Agreement was co-signed by international actors such as the UNSG's Special Representative that it not only formed an obligation to obey it on the two domestic parties but also on its signatories. Cassese goes further with stipulating that as the AOG possessed control over a territory, with the conflict being a large-scale one, this gives the AOG temporary legal personality to enter into an international agreement.

The above minority view of the two academics is in steep dissent with other more widely acceptable opinions. The most indicative reason for the Agreement to be domestic is in the name: *Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front (RUF) of Sierra Leone*. The Agreement's terminology consistently refers to 'both parties' which equates to the Agreement resting on both parties and not the internationalised co-signatories. Shaw continues this view by stating that a 'method of acquiring international legal personality is by subjecting an agreement between a recognised international person and a private party directly to the rules of international law'. There is no indication in the Agreement that would give a temporary or permanent international legal personality to the RUF. Thus, the Court's ruling that the Agreement is not a treaty, as the rights and duties that it established are regulated by domestic law, proves to be the most agreeable decision.

Subjects of IL

Traditionally, only states were subjects of IL, however with the development of the field, there are now certain entities which possess a degree of 'personality'. According to Crawford and Shaw, insurgents and belligerents are granted certain rights and duties under IL where they have the capacity to enter into agreements on the international level with states. These AOG are regarded by the authoritative academics as limited yet legitimate subjects.

Criticism

There are no criteria for recognising 'personality' in IL, which constitutes a variety of problems. It is generally presumed that AOG are fighting for self-determination. The right to fight for self-determination depends on the third parties' recognition of possessing the right. In the case of Libya, the



international community recognised the AOG as legitimate, therefore giving them a limited degree of personality. However, there is a thin line between acquisition of territory through self-determination and the unlawful scenarios of acquisition that lead to the use of force, which is strictly unlawful.

UNSC often addresses non-state actors in its resolutions. Does this give rise to legal personality? Under the UN Charter only states are obliged to follow the Organisation's decisions. It seems that at most, the addressees are not granted a legal personality but rather merely some powers in international relations.

In the *Bernadotte* case it was emphasised that there are various categories of subjects that vary in terms of their legal personality, and international rights and obligations. Higgins presents an alternative view by removing the distinction between 'subjects' and 'objects' of IL, and volunteers instead that all international actors are relevant in international decision-making. However, to what extent they are relevant remains unknown.

ICRC's study

Prior to reading the 'criticism' section below, it is important to note that the ICRC is more interested in securing humane treatment of victims of war rather than playing politics.

CIL and AOG

Firstly, state practice has two aspects: the practices amounting to creating CIL and whether these practices create rules of CIL. According to the ICRC, the practices of AOG, such as codes of conduct, do not constitute state practices. While their practice might illustrate the acceptance of some rules of non-international armed conflicts (NIAC), the legal significance, if any, is unclear. Ergo the ICRC listed AOG's practice under 'other practice'.

Secondly, the writers of the study found it difficult to separate the *opinio juris* from the *usus*. However, they did manage to agree as to the implementation of the international humanitarian law's (IHL) rules in CIL. They believed that parties to the conflict have a truce concerning them respecting IHL. Consequently, in theory, this would result in AOG giving instructions to their forces on IHL.

Criticism

The study is undecided whether any other obligation apart from the aforementioned one, would be binding on AOG. The authors of the study expect AOG to instruct their forces in IHL, but stay quiet on adhering to IHL rules. While states are obligated to make reparations for violating IHL, it is unknown whether the ICRC expects the AOG to take responsibility for their members' behaviour to such a degree. At best, the victims can look to international criminal law to set up ad hoc tribunals post-act.

The 161 rules in the study are expressed in absolute terms, such as the most relevant rule - Rule 139:

'Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control.'

Such formation aims to strengthen the study as according to the ICRC, vagueness would create unnecessary ambiguity. However, by doing so, this leaves little room to present dissenting views to the rules, which is contrary to the foreword by Dr Sandoz, which encourages discussion. This combination of absolute wording versus discussion will make it more difficult for states to follow suit.

Conclusion

In the ICRC study, Judge Koroma notes that CIL is 'notorious for its imprecision'. However, he sees that as a double edged sword since on the one hand, while CIL is not written down as a treaty is, it is accepted that CIL binds the states that have not consistently objected to a rule while the rule was being established.

Prior to the ruling on the status of the Lomé Agreement, there was very few sources on AOG and IHL, although that is not to say that there are a lot now. The main aspect this essay was aiming to answer was whether AOG are obligated to uphold the Geneva Convention's Common Article 3, which reads:

'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound [...]'

While it has been adopted that they are bound, it is not clear 'why' and 'how'. I agree that AOG are bound by the virtue of the Geneva Convention to not violate IL. Furthermore, AOG are also bound by

Additional Protocol II. Even though in the past, states have sporadically agreed to give rights to AOG, they are wary of these groups having any rights in the international system. This might be due to IL establishing public order, which AOG aims to distort. Therefore by giving the AOG – the unwanted entities – an official status, it would make them more legitimate than they deserve. An analogy could be drawn to further simplify it: it could be said that AOG are the instruments of chaos, while IL is the tool of order. These opposites need to exist together but are not required to work together in harmony. Therefore, it would be idealistic to convey rights and responsibilities from the sphere of order onto AOG, which have little to no genuine interest in them.

Regarding the Lomé Agreement, the Judges concluded that an agreement that resolves an internal conflict cannot have the same status as an agreement that settles an international one. I agree with the view taken in Lomé, as the Agreement was not an international treaty that could be governed by IL due to laying down obligations only between the two domestic parties. This is supported in the essay through an analysis of the provisions and the terminology used in the Agreement. Furthermore, it is not possible for AOG to ratify treaties, however they are nonetheless bound (to an unknown extent) by the treaties which have been ratified by the states on which the AOG operates. This middle view of AOG being bound indirectly through the state is understandable in theory, but far from satisfactory in practice. This possesses a problematic situation as how can AOG, who aims to overthrow the government, adhere

to the treaty which is, in effect, due to said government? This is the expectation laid out in NIAC, which is contrary to what is expected in international armed conflicts, since in those no party is expected to comply with a treaty it has not ratified.

Regarding, the authority of the ICRC's report, in my opinion, if the ICRC's objective was to provide an instrument which the international system can use to advance the progression and cohesion of IHL, then it has mostly succeeded. This is perhaps due to the special status of the ICRC in IL as a somewhat authoritative source of CIL. The report did well on not being biased or politicised, therefore making it more reliable when complying with.

In my opinion, AOG have no current legal personality, as supported by the ICRC's Study and the SCSL. This is mostly due to them not having the capacity to enter into international treaties as they cannot create sources of CIL, nor are they subjects of IL as that is reserved for a small pool of actors. Furthermore, the international community is not yet ready to grant that status to AOG as by avoiding to take a stance on this issue, makes or rather allows the law to stay flexible until a more suitable date. While I would be intrigued to witness how bestowing AOG directly with duties and obligations would influence IL, I would be cautious to do so. Perhaps the IHL would benefit from another actor and another source, but the current approach is not close to allowing that. Although in the end, the best hope we have is for all actors and alike to adhere to the law of war to be able to achieve peace or at least an illusion of it.



What is sexual and gender-based violence? Exploring the preliminary shortcomings faced by the ICC in prosecuting SGBV crimes

It is undisputed that the International Criminal Court (ICC) has faced numerous challenges to-date in seeking to effectively prosecute sexual and gender-based violence (SGBV). In 2016, The Office of the Prosecutor (OTP) published a *Policy Paper on Sexual and Gender-Based Crimes*.¹ The paper, inter alia, stressed the need for the OTP to adopt a newfound strategy towards SGBV, wherein it must ‘systematically’ account and prioritise the prosecution and investigation of SGBV within its mandate. On 8 July last year, Bosco Ntaganda was found guilty of 18 counts of war crimes and crimes against humanity, including the rape and sexual slavery of child soldiers.² Yet, with his case currently being subjected to appeal, and the recent acquittal of Bemba marking a long unsuccessful history in seeking international criminal justice for sexual and gender-based crime, the ability for the ICC to fulfill its newfound strategy is increasingly doubtful.³

The reason behind the challenges faced by the ICC requires us to consider a plethora of shortcomings, stemming from the OTP’s investigation strategy, to the prioritisation of cases and attribution of criminal liability to indicted offenders. However, in seeking to understand the practical underpinnings of the ICC’s continued lack of success, perhaps the most indicative issue is one of a more primary nature. What is sexual and gender-based violence?

Defining sexual and gender-based violence in the Rome Statute

SGBV has featured heavily as a political tool and strategic weapon in war and conflict worldwide. Yet, despite its widespread occurrence, SGBV has historically been diminished to a mere ‘spoil’ and inevitable consequence of war, existing only within

a heterosexual and female-oriented context. The work of tribunals such as the International Criminal Tribunal for Rwanda (ICTR) and the International Tribunal for the Former Yugoslavia (ICTY) sought to dispute this historical reality, by setting the standard for the acknowledgement and definition of SGBV offences within the international criminal framework.⁴ Following on from the ICTY and the ICTR, the ICC officially acknowledged SGBV crimes within the Rome Statute, in turn envisaging an era of accountability within an all-inclusive criminal framework. Yet, although the broad definition of SGBV crimes adopted within the Rome Statute represents a progressive step in the acknowledgement of SGBV victims, ambiguities in the practical application of such crimes have undermined the ICC’s potential to provide the greater access to justice that it envisaged.

Defining gender-based violence

In theory, gender-based crimes are afforded wide recognition within the Rome Statute. As per Article 7(1)(h) of the Rome Statute, ‘persecution based on gender’ is considered a ‘crime against humanity’. Article 7(3) of the Rome Statute defines gender fluidly, as ‘the two sexes, male and female, *within the context of society*’.⁵ Further, as stated within its Policy Paper, the OTP considers gender more generally as a ‘socially constructed norm’, requiring the consideration of ‘socially constructed norms of maleness and femaleness’.

Although progressive, the theoretical classification of gender-based violence in the Rome Statute presents a double-edged sword. While the widespread definition afforded to gender-based crimes provides an all-encompassing avenue for SGBV victims,

the same breadth gives room for practical pitfalls in SGBV justice. For example, with full discretion being afforded to the OTP in including or excluding gender-based charges, such charges may be overlooked in favour of more mainstream offences. In the case of *Lubanga* for example, despite strong evidence of sexual slavery and rape against female child soldiers, the OTP sought to exclude an explicit charge of gender-based sexual violence, instead indicting Lubanga more generally for war crimes.⁶

Further, the broad definition of gender-based violence in the Rome Statute leaves room for the exclusion of historically dismissed victims of gender-based crime. In the case of *Bemba*, the defendant was charged with sexual violence as a war crime and a crime against humanity. Yet, the sexual violence perpetrated against male victims in the DRC was largely omitted from the OTP's prosecutorial strategy, with rape charges only considering two male victims compared with 27 female victims.

The solution to the current shortfalls in the prosecution of gender-based crimes, ultimately requires the OTP to classify gender-based violence as crime of its own, rather than seeking to classify it as a subset of broader crime or excluding it altogether. Indeed, within its Policy Paper, the OTP acknowledged that 'gender-based crimes are amongst the gravest under the Statute'. Some legal scholars have argued for the amendment of the Rome Statute, to more clearly define 'persecution based on gender', as stated in Article 7(1)(h). Amendments aside, improving the prioritization of gender-based crime within the ICC ultimately rests on making the OTP accountable to the affirmations guaranteed in its policy guidelines.

Defining sexual violence

Like gender-based crimes, sexual violence is also widely acknowledged within the Rome Statute. Although 'sexual violence' itself is not defined, Article 7(1)(g) lists specific acts including 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity' as a crime against humanity. Further, Article 8 lists the same crimes as constituting war crimes, while Article 8(b)(xxi) provides for their characterisation as 'outrages upon personal dignity'.

Despite adopting a broad definition of sexual violence however, it is no coincidence that only 18 out of 31 accused persons within the ICC have been charged with sex-related crimes.⁷ As with gender-based crimes, sexual violence is often de-prioritised by the OTP, in its investigation and indictment of charges. However, more pertinently, issues faced when applying the formal definitions of sexual violence, provided for within the ICC Statute, arguably present the greatest barrier to achieving SGBV justice. Although the list of acts constituting sexual violence in the Rome Statute is broad, the definitions provided for such acts are conversely limited in practical scope and application.

For example, within the ICC's Elements of Crime, rape is defined as the invasion of 'the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator...'.⁸ Although gender-neutral in its definition, sexual penetration is limited to person-to-person conduct. In the Rwanda conflict, records demonstrated the use of forced bestiality as a common tool to humiliate male victims.⁹ Thus, by limiting the definition of rape as involving person-to-person penetration, the current legal framework excludes potential victims of sexual violence.

On this point it is worth noting that, where the definition of crime listed in Article 7(1)(g) proves restrictive, the OTP may seek justice under the inclusion of crimes relating to 'any other form of sexual violence of comparable gravity'. In turn, the 'residual clause' effectively provided by Article 7 can be used to categorise charges, where mainstream definitions of sexual violence are not accounted for. Yet, the lacking definition of 'sexual violence' in the Rome Statute makes applying this provision difficult in practice. Indeed, a recent debate has ensued on whether cases of 'extreme rape' may be categorised as sexual violence, in light of their additional emotional and physical implications.¹⁰ In turn, great confusion now exists in making a distinction between 'rape' and other forms of 'sexual violence'.

Like with gender-based violence, amendments to the Rome Statute have been proposed to both broaden the definition of rape and include a clear definition of 'sexual violence'. Such amendments would in turn aid the OTP in identifying criminal indictments for sexual violence, by redressing legislative ambiguities in the classification of sex-related crimes. However, should the



ICC's constituent documents be amended to clearly define sexual violence, the scope of the residual clause afforded to the OTP would likely be limited. Thus, perhaps the best solution to better prosecuting crimes of sexual violence again rest on the encouragement of the OTP to implement the objectives of its Policy Paper.

Conclusion

Overall, it is clear that the ICC continues to face significant hurdles when seeking judicial redress for victims of SGBV. While the broad and elusive definition of SGBV provided for in the ICC's constituent documents leaves significant room for error, victims of SGBV remain at the mercy of the wide discretionary powers afforded to the OTP. Although amendments to the Rome Statute may help the OTP to better categorise SGBV offences, the OTP must ultimately learn from past errors, in order to embrace the intentions of its founding fathers and pioneer justice for SGBV victims in the future.

Notes

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2. *Prosecutor v Bosco Ntaganda*, (Trial Chamber Judgement) (International Criminal Court), Trial Chamber VI, Case No. ICC-01/04-02/06 (8 July 2019)
3. *Prosecutor v Jean-Pierre Bemba Gombo*, (Appeals Chamber Judgement) (International Criminal Court), Appeals Chamber III, Case No. ICC-01/05-01/08-3636-Red (8 June 2018)
4. See *Prosecutor v Akayesu* (Judgement) (International Criminal Tribunal for Rwanda), Case No. ICTR-96-4, 1 June 2001; *Prosecutor v Dusko Tadic* (Appeal Judgement) (International Tribunal for the former Yugoslavia) Appeal Chamber I, Case No. IT-94-1-A, 15 July 1999; *Prosecutor v Mucic et al.* (Appeals Judgement) (International Tribunal for the Former Yugoslavia) Appeal Chamber I, Case No. IT-96-21, 8 April 2003; *Prosecutor v Kunarac et al.* (Appeal Judgement) (International Tribunal for the former Yugoslavia) Appeal Chamber I, Case No. IT-96-23 & 23/1, 8 November 1999.
5. Rome Statute of the International Criminal Court, opened for signatures 17 July 1998, 2187 UNTS 90
6. *Prosecutor v Thomas Lubanga Dyilo*, (Appeals Chamber Judgement), (International Criminal Court), Appeals Chamber, Case No. ICC-01/04-01/06, 1 December 2014.
7. Supra note 1, *Anne-Marie de Brouwert* 661.
8. International Criminal Court (ICC) Elements of Crimes, 2011, ISBN NO. 92-9227-232-2.
9. Anne-Marie de Brouwert, 'The Importance of Understand Sexual Violence in Conflict for Investigation and Prosecution Purposes' (2015) 48 *Cornell International Law Journal* 639.
10. Nicole Brigitte Maier, 'The Crime of Rape Under The Rome Statute of the ICC: with a special emphasis on the jurisprudence of the Ad Hoc Criminal Tribunals' (2011) 3(2) *Legal Perspectives on Gender and Sexual Equality*, 146, 147.

Violence in pursuit of silence: SGBV as a weapon against political participation

Introduction

In June 2020, LGBTQ+ activist, Sarah Hegazi died by suicide after succumbing to the depression, anxiety and PTSD from which she suffered as a result of three months of torture at the hands of Egyptian authorities. Subsequent to an arrest in 2017 for waving the rainbow Pride flag at a music concert, she was charged with 'promoting debauchery' and joining an illegal organisation which 'threatens public and societal peace'. Hegazi was subjected to electroshocks, sexual assault and sexual harassment during her

detention; an ordeal from which she never recovered fully. She died in Canada, where she had sought asylum upon her release on bail. In the same month, Cecilia Chimhiri, Netsai Maroma, and Member of Parliament (MP) Joana Mamombe, all youth leaders in Zimbabwe's main opposition party, the Movement for Democratic Change (MDC), were criminally charged with making false statements of abduction and torture following international furore over their treatment by State security agents. The three women were abducted in May on their way to a political

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protest, and detained extra-judicially for two days, during which they were beaten, forced to drink each other's urine and sexually assaulted. These events on opposite ends of the world brought to the fore the challenges and consequences of an underexplored phenomenon: sexual and gender-based violence (SGBV) as a weapon against political participation.

SGBV is a political phenomenon notorious for its global pervasiveness. It is caused and sustained by the patriarchy, but also contributes to sustaining the patriarchy itself. Elements pulled from definitions provided by UN Women, the UN High Commissioner for Refugees, the UN Office for the Coordination of Humanitarian Affairs, the European Institute for Gender Equality, and the European Commission identify SGBV as consisting of acts perpetrated against a person's will which are based on socially and culturally constructed gender norms. SGBV takes multiple forms, ranging from murder to online harassment, all of which are designed to entrench unequal power dynamics. SGBV is likely to cause long-term physical, sexual, psychological or economic harm or suffering, not only to the people directly targeted by the violence, but also their families or communities, especially where the bodies of individuals are turned into battlegrounds in ideological conflicts.¹

Sexual violence (and the threat of it) in particular, is a political expression of dominance through intimidation, degradation and the violation of personal autonomy and dignity. In the context of political participation, sexual and other forms of gender-based violence are weaponised to quash the exercise of the freedoms of expression, assembly and association, participation in the conduct of public affairs, candidacy and professional engagement in public office, as well as involvement in activist bodies or networks.² SGBV may be brought to bear against its targets in periods of peace or of public disturbance; in supposedly progressive democracies or in countries ruled by repressive regimes. It allows perpetrators, be they state actors, armed groups or civilians, to secure or preserve their models of political power.

As a necessary caveat, it cannot be overlooked that the general prevalence of SGBV does complicate explorations into SGBV as a weapon against political participation. Attacks intended to deter such participation may be difficult to distinguish

from opportunistic attacks facilitated by infrastructural breakdowns, especially during periods of political turmoil. Indeed, although there were marked increases in sexual assaults perpetrated by persons unknown to survivors and of gang rapes during the 2007-2008 and 2017 periods of election violence in Kenya, and notwithstanding reports by survivors and witnesses that militias and 'men in uniform' were amongst the perpetrators, some of whom scorned survivors for 'voting incorrectly', it could not be established definitively how many attacks were politically motivated and how many were opportunistic.³ In all probability, mass incidents of SGBV in politically turbulent environments consist of both politically motivated and non-politically motivated acts, but demarcating one type of attack from the other requires levels of investigation that are often lacking in such contexts.

The primary victims

The most documented victims of SGBV as a weapon against political participation are women and girls. While participation in public life and access to social and legal protections may reduce vulnerability to violence, increased prominence in political and decision-making functions leaves some women and girls susceptible to it where their conduct is considered a threat to traditional gender norms. This applies whether or not they are professionally involved in politics. Even in a general sense, violence against women deters their participation in politics because of structural inequalities and their interaction with institutional shortcomings in protection and support.⁴ These intersecting facets of patriarchal culture consistently crystalize into incidents of violence which have included 15 year-old Malala Yousafzai being shot by the Taliban for championing the right of Pakistani girls to education, 18 pro-democracy demonstrators being subjected to highly invasive forced virginity tests by the army during the 2011 Egyptian revolution, and 89 year-old Holocaust survivor and senator for life, Liliana Segre, receiving hundreds of death threats for demanding the establishment of an anti-hate commission in Italy.

A 2016 survey by the Inter-Parliamentary Union (IPU) of 55 women MPs in 39 countries revealed that, while serving terms of office, 44% of them had received threats of death, abduction, or physical or sexual



assault (including threats of abduction or death against their children), 20% had experienced physical attacks, and 20% had experienced sexual harassment.⁵ A 2018 study of 123 women parliamentarians and parliamentary staff members in 45 European countries further disclosed the extent of SGBV against women professionally involved in politics. 46.9% of women MPs reportedly received threats of death, or physical or sexual violence, 58.2% reported experiencing humiliating or sexual online attacks, 24.7% reported experiencing sexual harassment (mostly from male colleagues) and 11.1% reported experiencing acts of physical violence.⁶

Victimisation goes beyond womanhood

As the patriarchy consists of interconnected power structures, victims of SGBV may be targeted not only because of their gender, *per se*, but also on the basis of other factors like race, ethnicity, sexual orientation, gender identity, religion, age and disability, where such factors are perceived to interact with these power structures. Intersectional or multiple discrimination is an incontrovertible facet of SGBV. Indeed, the level of vitriol directed towards Liliane Segre was attributable to her being both a woman and Jewish, and the violence to which Sarah Hegazi was subjected in detention was attributable to her being a gay woman.

Perpetrators of SGBV, politically-motivated or otherwise, act to strong-arm victims into subordination or silence. SGBV can therefore be perpetrated against anyone. 2019 saw a spate of murders and assaults on gay and trans people in Uganda, including the murder of LGBTQ+ activist Brian Wasswa, during a time when homophobia and transphobia were at a high level and (ultimately false) rumours were circulating of a legislative amendment to impose the death penalty for consensual same-sex relations. If patriarchal perceptions of ideal gender expressions, which traditionally uphold hyper-masculine cisgender men and hyper-feminine cisgender women as the standard, form the basis of SGBV, then homophobic and transphobic violence are intrinsic to SGBV as the very existence of LGBTQ+ people is often construed as inimical to long-established gender norms. The threat invariably increases when LGBTQ+ people become involved in public affairs or engage in human rights activism.⁷

In Zimbabwe, teenage boys and adult men were reportedly interrogated, beaten and sexually assaulted by militias affiliated with the ruling Zanu-PF party as part of a terror campaign against the MDC during the 2003 election cycle. Sexual violence against men is intended to emasculate them by destroying their self-concept of masculinity which, due to social and cultural conditioning, is inextricable from perceptions of psychological and physical strength and the ability to 'resist' sexual attacks. Where perpetrators are men, the taboo surrounding victimisation is compounded by the taboo surrounding same-sex relations, especially in jurisdictions where such relations are criminalised regardless of consent. Survivors are discouraged from approaching the police, who may even be perpetrators of SGBV themselves, out of fear that they will be arrested and publicly prosecuted for violating 'sodomy', 'gross indecency' or 'unnatural offence' laws.⁸

Addressing the issue

Tackling politically-motivated SGBV requires promoting and facilitating the increased visibility of women, LGBTQ+ people, and all other groups occupying the lower echelons of the patriarchal power structure. However, it is not enough simply to uplift these groups. Significant shifts in gender norms will always incur violent reactions from those who see their dominance as imperilled by the social and political advancement of others. It is therefore necessary for governments to confront the causes, forms and impacts of politically-motivated SGBV. Sufficient legal protections for potential victims must be established, policies regulating the provision of medical and psychological support to survivors by trained healthcare personnel must be drafted and implemented, and punishments reflecting the gravity of their crimes must be imposed on perpetrators. It is also necessary that criminal justice processes are sufficiently independent to permit proper, timely investigation, as well as impartial prosecution and adjudication, where accused perpetrators are police officers, military personnel, State agents, or militias affiliated with high-ranking politicians. Such an endeavour requires long-term collaboration with multiple stakeholders, including research bodies, advocacy groups, and other human rights or civil society organisations.

Notes

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2. For different forms of public participation, see United Nations “Women & Elections: Guide to promoting the participation of women in elections” (March 2005), p. 33.
3. Human Rights Watch “‘I Just Sit and Wait to Die’: Reparations for Survivors of Kenya’s 2007-2008 Post-Election Sexual Violence”, 15 February 2016 (<https://www.hrw.org/report/2016/02/15/i-just-sit-and-wait-die-reparations-survivors-kenyas-2007-2008-post-election>); UN Office of the High Commissioner for Human Rights (OHCHR), Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008, 28 February 2008, p. 13-14; Human Rights Watch “‘They Were Men in Uniform’: Sexual Violence Against Women and Girls in Kenya’s 2017 Elections”, 14 December 2017 (<https://www.hrw.org/report/2017/12/14/they-were-men-uniform/sexual-violence-against-women-and-girls-kenyas-2017>).
4. UN Human Rights Special Procedures, UN Women and UNOHCHR “Expert Group Meeting Report & Recommendations”, 8-9 March 2018, p. 6.
5. Inter-Parliamentary Union “IPU study reveals widespread sexism, harassment and violence against women MPS”, 26 October 2014 (<https://www.ipu.org/news/press-releases/2016-10/ipu-study-reveals-widespread-sexism-harassment-and-violence-against-women-mps>).
6. Inter-Parliamentary Union “Sexism, harassment and violence against women in parliaments in Europe”, 2018 (<https://www.ipu.org/resources/publications/issue-briefs/2018-10/sexism-harassment-and-violence-against-women-in-parliaments-in-europe>).
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8. Sivi Sivakumaran “Sexual Violence Against Men in Armed Conflict” (2007) *The European Journal of International Law* 18(2), 253-276, pp. 270-273.

Lindsay Johnson



The law and independent living: how the United States has failed Americans with disabilities

Introduction

Covid-19 has had a disproportionate impact on people with disabilities, specifically those who live in institutions and other congregate settings. The pandemic has illustrated more than ever that people with disabilities are put at great physical, mental and social risk when they do not have access to supportive, affordable and independent housing. This essay will analyse domestic and international law to demonstrate how the United States has consistently failed to support the housing needs of Americans with disabilities.

Olmstead v. L.C.

For the majority of the history of the United States, Americans with disabilities were placed into institutions or isolated in family homes since affordable, accessible and supportive housing options simply did not exist. As large scale social justice movements took place in the 1960s and 1970s and deinstitutionalisation

and disability rights came to the forefront of American policy thanks to the hard work of disability advocates across the country, significant social and political advancements facilitated the development of independent and community-based living opportunities. Most notably, advocates celebrated the passing of the Americans with Disabilities Act (ADA) in 1990. The ADA is a civil rights law that enumerates the right of people with disabilities to be free of discrimination in employment, housing, and other key areas. It requires businesses and other organisations to make reasonable accommodations to allow all people including those with disabilities to access and use their settings and services.¹

The ADA laid the foundation for a United States Supreme Court decision nine years later that affirmed the right for people with disabilities to live in the community. In 1999, the Court held in *Olmstead v. L.C.* that unjustified segregation of persons with disabilities constitutes discrimination in violation of Title II of the ADA. Title



II secures the right of persons with disabilities to receive public services without ‘discrimination’, whether or not those services receive federal funds; the law thus applies to all state and local service providers. Furthermore, Title II mandates that ‘a public entity shall administer services, programmes, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities’.²

Broadly, the ruling disallowed inappropriate segregation of individuals with disabilities, requiring that services for individuals be delivered in community-based settings when:

- (1) such services are appropriate;
- (2) the affected persons do not oppose community-based treatment; and
- (3) community-based services can be reasonably accommodated, taking into account the resources available to the public entity and the needs of others who are receiving disability services from the entity.³

The Court explained that its holding reflected the judgement that automatically placing people with disabilities in institutions perpetuates ‘unwanted assumptions’ that people with disabilities are ‘incapable or unworthy’ of participating in community life and that institutional confinement ‘severely diminishes’ the social, educational, economic and cultural experiences of people with disabilities.⁴

An unfunded mandate

It has now been 20 years since the *Olmstead* decision, yet independent community-based settings for individuals with disabilities remain in short supply. Studies show that the majority of Americans with disabilities would prefer to live independently in their own homes, but less than 12 per cent of all people with developmental disabilities own or rent their own home.

Almost 58 per cent of adults with developmental disabilities live at home with their parents.⁵ The primary barrier to housing is affordability. There is not a single housing market in the United States where an individual with disabilities relying solely on Supplemental Security Income (SSI) could afford to rent a studio apartment without rental assistance.⁶ *Olmstead* mandated that people with disabilities not be forced into institutions and should have access to independent living options in the community,

but did not create a funding stream to facilitate independent living options. As a result, funding discretion for independent living options is left to individual states. With the exception of a few state initiatives and drips of funding through federal housing programs, this means disability housing funding is nearly nonexistent for the 61 million Americans with disabilities. It is remarkable that there is a Supreme Court case that speaks specifically to the type of housing that should be available to people with disabilities, yet the United States has never meaningfully invested in independent community-based housing.

Housing and the UN Convention on the Rights of Persons with Disabilities

The failure of the United States to implement *Olmstead* should come as no surprise as the Senate has also failed for over ten years now to ratify the UN Convention on the Rights of Persons with Disabilities. This requires signatories to promote, protect and ensure the full enjoyment of human rights by people with disabilities and to ensure that they enjoy full equality under the law. Article 19 of the Convention addresses independent living and requires member states to ensure that people with disabilities are able to choose where and with whom they live, that they are ‘not obliged to live in a particular living arrangement’, and that they have access to a range of support services to live independently in the community and to prevent isolation and segregation.⁷

Alarming, even nations that have ratified the Convention fail to support the housing needs of citizens with disabilities. France ratified the Convention in 2010. In 2018, a national housing law designed to promote new construction throughout the country lowered accessibility standards for new dwellings from 100 per cent to a paltry 20 per cent.⁸ Mexico ratified the Convention in 2007. Just last month, *Human Rights Watch* published an extensive report documenting the abuse and neglect many people with disabilities in Mexico face at the hands of their own families, exacerbated by the lack of government support and funding for independent living.⁹ The lack of government policies supporting independent living means people have few options but to remain with abusers, some for their entire lives.

Conclusion

Thus far, domestic and international law has failed to support the housing needs of Americans with disabilities. The failure to fund *Olmstead's* promise of independent community based living and the decade-long failure to ratify the Convention on the Rights of Persons with Disabilities illustrates a systematic devaluation of the lives and rights of Americans with disabilities. As governments worldwide look to long term recovery and infrastructure investments in housing in the wake of Covid-19, people with disabilities and their housing needs must be a part of the conversation.

Notes

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Tatenda Zvogbo




The digital divide and its prominence during the Covid-19 crisis

It has been over four months since the 11 March 2020, when the World Health Organization (WHO), declared the coronavirus outbreak a pandemic, and countries began closing their borders and requiring their citizens to stay indoors. As of 29 June 2020, the world has seen 9, 962, 192 cases of Covid-19, and among those, there have been 498, 723 deaths across 216 countries. This pandemic caught the world unaware and has greatly affected everyday lives. The numerous measures put in place, like the closing of borders and limiting travel, as well as the closure of schools, offices and other places of work, has left the world reeling. The poorest in society have been greatly affected as their livelihoods have been destroyed. Throughout this pandemic, the world has sought to find ways to reduce the rapid spread of the fatal virus. One of those ways is contact tracing.

The WHO defines contact tracing as 'the identification and follow-up of persons who may have come into contact with a person infected with a contagious disease, to help the contact to get relevant care and treatment'.¹ 'The objective of contact tracing is to rapidly

identify potential secondary cases infected by known primary cases and to promptly institute containment measures to prevent the onward spread of infection'.² The ultimate aim of this is to avoid continuous community spread. It is not a new concept; it was used most recently during the Ebola virus epidemic and has been used to contain the spread of many other viruses. When dealing with contagious diseases, scientists have proven that, in the absence of a specific vaccine and anti-viral agents, non-pharmaceutical measures are the only way to stop the spread of the disease.³ Measures like restricting movement, interaction and autonomy by way of contact tracing, surveillance, social distancing, isolation, quarantine and lockdowns are regarded as the most effective tools.⁴

During this pandemic, the world has seen the development and usage of new technologies, such as geolocation apps, facial recognition and AI-based software in order to assist in enforcing the quarantine orders.⁵ These new technologies have been scientifically proven to work. Research conducted by Oxford University has shown



that between one third and half of the transmissions occur before the symptoms are manifested.⁶ With the coronavirus, manual contact tracing is too slow and limited to contain the contagion.⁷ The use of mobile phone apps, on the other hand, could reduce the epidemic growth rate.⁸ It has been said that due to the 'infectiousness of Covid-19 and the high proportion of transmission from pre-symptomatic individuals, controlling the virus through manual contact tracing is infeasible'.⁹ The use of contact tracing applications would be sufficient if used by enough people. Marcel Salathé⁹, an epidemiologist at the Swiss Federal Institute of Technology Lausanne has pointed out that mobile phone apps do not necessarily need 60 percent of the population to use them for there to be some benefit to society; even at much lower levels of uptake, these applications can still prevent infection and save lives.

There are currently, two types of applications being used. The Application design can either be based on GPS or Bluetooth. When the application is based on Bluetooth, your smartphone generates a complex string of characters and exchanges them with other smartphones. When your Bluetooth is turned on, your phone uses radio waves to figure out which phones are nearby. With the Application, your phone will blast out an opaque string of characters called an identifier beacon, and other phones nearby would make a time-stamped log of that identifier. This method is discreet as your beacon identifier will change every few minutes to prevent location tracking. This method also does not involve much personal information being shared; however, it is deemed to be inaccurate. The actual distance range one would need to be for the phone's identifier beacon to be stamped is currently not known, and other blockages like walls and fences can cause the deterioration of the application. Even humidity in the air can affect the effectiveness of the app. These interferences can even stop detection of a phone that is two metres away from you.¹⁰

The second type of application is based on GPS. This is where cell phone towers or location is used. This method raises serious threats to the user's privacy rights as it enables the user's information about their location and who they were in contact with to be stored (depending on whether the system is centralised or decentralised). There have been many debates around digital contact

tracing and the application design. Both types have positives and negatives and ultimately, it depends on the country's preference. Many of these debates around contact tracing have been centered on the conflict between stopping the spread of the contagion and the respect for people's human rights. Very valid points on the legality of these measures and their breaching of human rights have been raised.

In addition to these valid concerns, those in less developed countries have another problem to worry about. It has been stated that not everyone with a smartphone will be able to use these applications. The Bluetooth-based applications require a standard of Bluetooth low energy that not all mobile phones have. It is estimated that about 25 per cent of the 3.4 million smartphones in active use in the world¹¹, are incapable of the required standard. In the UK, the percentage of mobile phones that are incapable of the standard of Bluetooth required is 12 per cent. A recent study shows that in Sub-Saharan Africa, which encompasses 37 countries, only one third of the population has a smartphone. One can only imagine how many of those will have the required standard of Bluetooth required for the contact tracing application. Consequently, the majority of Africans in poor and developing countries will suffer from the digital divide, with potentially profound consequences for their health.

Although the number of cases in Africa are relatively low now with only 383, 216 confirmed cases and 9,675 deaths in the whole continent, this region is in dire need of measures that will stop the contagion. Since the inception of the category of Less Developed Countries (LDC) in 1971, Sub-Saharan countries have dominated the list. Currently, 33 of the world's 47 LDCs are located in the region. These countries have infamously under-funded health care systems that are already dealing with endemic diseases like HIV and malaria. The medical staff are predominantly underpaid and over-worked, and there is little to no medical equipment available. According to a recent (not yet confirmed) WHO survey, which covered 41 African countries, the average number of ICU beds per one million Africans is five, compared to the OECD countries' average of 3,500 ICU beds per one million people.¹² It is clear from these statistics, that when the virus hits this continent, it will leave a higher death toll than can be imagined.

In this Sub-Saharan Africa, there is a high

dependency on the informal sector. With little to no government financial assistance, lockdown measures might not be effective. In the absence of furlough schemes seen in many OECD countries, people are being forced to leave home to make some sort of income and survive. It is a cruel irony, therefore, that this region, which could benefit most from the fast and effective use of digital contact tracing, is also the one region that will not be able to make much use of it. The benefits of technology once again remain 'geographically concentrated'.¹³

The conversation about reducing the gap between LDCs and other countries in science, technology and innovation existed before the virus. It is not new. However, its importance has increased as the technology itself has become a lifeline. With the creation of these digital tracing applications, for many, it could very well be the difference between life and death. More attention must be paid to this subject. The governments in these regions must attempt to close the gap, and all those providing assistance must attempt to do the same. Lives depend on it.

This virus has shown more prominently the divide in how health-care must be approached. On one side, there is the 'communal health advocates'¹⁴, who believe in collective action for the benefit of the whole community. On the other side lies the 'tech fixers'¹⁵, like Bill Gates, who believe that science and technology are the answer to the world's healthcare problems. James Meek succinctly points out that the two approaches represent a 'deeper choice'.¹⁶ The choice between actions that help the individual, to benefit the whole community, or actions that help the community, which will indirectly help the individual. The current lockdown measures are based on the communal health approach as they force an individual to restrain themselves for the benefit of the community, even when they themselves are not sick. The tech-fixers and their contact tracing applications ensure protection for the individual first, which will then benefit society at large. The tech-fix has great benefits, however, because it involves obtaining gadgets and technology and with it comes problems of 'priority, price, privilege and exclusivity'.¹⁷

Notes

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