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Human Rights, Sex, and Gender: Limits in Theory and Practice

Lara Stemple*

At the *Pace Law Review* Symposium entitled *After Gender: Examining International Justice Enterprises*, I was delighted to participate on one of the four panel "conversations" along with Bridget Crawford (Pace), Suzanne Goldberg (Columbia), Scott Long (Harvard), and Carole Vance (Columbia). Refreshingly, rather than the typical fifteen-minute panel presentations, panelists were invited to converse around a theme; some of us spoke beforehand, together with organizers Darren Rosenblum (Pace) and Janet Halley (Harvard), to map out the directions our conversation might take. Our panel's theme was christened *Human Rights Beyond Sex and Gender*.

As I reflect on the unfolding of that conversation, it occurs to me that a more accurate though surely less snappy title would have been "Human Rights Beyond Sex and Gender as Currently Rendered in International Lawmaking." In my view, a project no less ambitious than the development of a body of international human rights law applicable to all people demands thoughtful consideration of gender. The problem is that when lawmaking pen has finally met paper, the outcome has been distressingly limited.

I focus my comments here on the role of sexual violence in international law, both because it is a topic on which my advocacy practice has focused, and because sexual violence represents the central issue around which women-focused international law-making has coalesced in recent decades.[1]

My theoretical interest in issues concerning gender and sexual violence originates from my practical experience as a

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1. *See* Alice M. Miller, *Sexuality, Violence Against Women, and Human Rights: Women Make Demands and Ladies Get Protection*, 7 HEALTH & HUM. RTS., no. 2, 2004 at 16.

human rights lawyer. Working for different women's rights non-governmental organizations (NGOs), I routinely employed a range of international human rights instruments as tools to advocate against the sexual and reproductive subordination of women and girls. Later, I served as the director of the human rights organization Just Detention International (JDI), which works to end sexual violence in prisons, jails, and immigration detention. Because approximately 91 percent of prisoners are men,[2] I moved from advocacy concerning issues affecting mostly women to advocacy concerning an issue affecting mostly men. In so doing, I was struck by how few tools were at my disposal when the victims of sexual abuse were male.

Indeed, the instruments that address sexual violence the most comprehensively exclude men. Beyond the limited utility of the instruments, I found that this sex-based framing reinforced an us-versus-them dualism that was generally useless and frequently counterproductive. Men's rights advocates latched on to messages about prisoner rape as proof that feminists were wrong about rape. Likewise, some feminists at rape crisis centers were at first openly resistant to serving male prisoner rape victims. Gender nonconforming people, who are frequently victimized in prisons, did not fit comfortably within the essentialist two-sex binary presented in the instruments.

Instead of belonging to any one constituency, the phenomenon of rape is instead part of a larger whole, related, of course, to the exercise of domination, the violation of bodily integrity, and the subjugation of its victims. And, yes, rape is almost always about gender, which is not to say it is always about women.

Feminist approaches that value equality and inclusion, that interrogate structural hierarchies, and that examine intersecting forms of oppression have proved useful. Other "feminist" approaches resting upon a women-versus-men

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2. *World Prison Brief*, INT'L CTR. FOR PRISON STUDIES, http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=190 (last visited Aug. 3, 2011). Just Detention International now works in multiple countries, but when I worked there it was focused only on the United States. This is therefore U.S. data.

perspective have been untenable; ideology too often trumps evidence, and alternative perspectives seem unwelcome.

Neither I nor most scholars who seek to challenge the sex-based certainties embedded in international law advocate for an erasure of gender considerations. Undoing rape requires thorough attention to gender it all its forms. But despite assurances like these, advocate friends and law students I teach who are exposed to the academic literature critical of current approaches often fret that the critiques threaten to undo hard-won progress by women's rights movements.

Others ask, quite rightly, how movements for transformative gender change can ever describe inequality ("women are victims") without re-inscribing sex-based stereotypes ("women are victims"). It simply cannot be that all advocacy for gender equality actually reinforces women's inequality. The problem lies not with the advocacy per se, but with the approach as currently articulated in international law.

International law's approach to violence against women has been problematized by many at the Symposium, including but not limited to these participants: Karen Engle has questioned "the assumption that women who have been raped in wartime have been destroyed."[3] Ratna Kapur has argued that "victimization rhetoric has reinforced an imperialist response toward women in the developing world" by representing them "as thoroughly disempowered, brutalized, and victimized: a representation that is far from liberating for women."[4] Carole Vance and Alice Miller have argued that the preference for "innocent" victims stems from the desire to create appealing advocacy messages, but risks leaving other victims out, serving to reinforce hierarchical norms of sexual privilege.[5]

I hope to contribute to this ongoing dialogue my own concerns about the problematic practical and theoretical

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3. Karen Engle, *Judging Sex in War*, 106 MICH. L. REV. 941, 942 (2008).

4. Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 18 (2002).

5. Alice M. Miller & Carole S. Vance, *Sexuality, Human Rights, and Health*, 7 HEALTH & HUM. RTS., no. 2, 2004 at 5, 11.

implications of the body of international law which assumes that sexual violence is something that befalls only women and girls. Below, I discuss four limitations inherent in the current approach.

I. Conflating the Terms "Gender" and "Women"

To the extent that we wish to acknowledge the limitations of identity categories while nevertheless deploying them strategically to advance equality-oriented rights claiming, as Suzanne Goldberg described on our panel, we need, at the very least, working definitions that are not nonsensical. We cannot move "beyond sex and gender" before arriving at the difference *between* sex and gender.[6]

In the Committee on the Elimination of All Forms of Discrimination against Women's General Recommendation 19, for example, "gender based violence" is "violence that is directed against a woman, because she is a woman, or that affects women disproportionately."[7] No room is left for gendered violence that harms men, a glaring omission considering that male victims of sexual violence are routinely feminized, while their perpetrators maintain a dominant, masculinized role. As I have explored in detail elsewhere, the human rights cannon repeatedly conflates sex and gender, thereby limiting state accountability to acts of gender-based violence against one sex.[8]

Meanwhile, international criminal law, specifically in the

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6. In the *Oxford English Dictionary*, "sex" is defined as "[e]ither of the two divisions of organic beings distinguished as male and female respectively; the males or the females (of a species, etc., esp. of the human race) viewed collectively." 15 OXFORD ENGLISH DICTIONARY 107 (2d ed. 1989). The Oxford English Dictionary states that "gender" in modern, especially feminist use is "often intended to emphasize the social and cultural, as opposed to the biological, distinctions between the sexes." 6 OXFORD ENGLISH DICTIONARY 428 (2d ed. 1989).

7. Comm. on the Elimination of Discrimination against Women, General Recommendation 19: Violence against Women, U.N. Doc. A/47/38 (Jan. 29, 1992).

8. *See* Lara Stemple, *Male Rape and Human Rights*, 60 HASTINGS L.J. 605 (2009).

form of the Rome Treaty establishing the International Criminal Court, set out to define gender for the first time in an international treaty. The bland and still confusing result—"two sexes, male and female, within the context of society"[9] at least includes both sexes as well as social context, if only as a secondary modifier. Notably, it was women's rights NGOs that attempted to advance a more sophisticated and still quite workable definition of gender: "socially constructed differences between men and women and the unequal power relationships that result."[10]

But human rights law fares worse than international criminal law, with gender typically assumed to be something relevant only to women and girls. This not only erases opportunities to understand gender as relative, but it prohibits the application of law to situations that do not follow traditional gender scripts.

The most comprehensive and conscientious United Nations' (UN) definition of gender I have seen is as follows:

> Gender: refers to the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context/time-specific and changeable. Gender determines what is expected, allowed and valued in a woman or a man in a given context. In most societies there are differences and inequalities between women and men in responsibilities assigned, activities undertaken, access to and control over resources, as well as decision-

9. Rome Statute of the International Criminal Court art. 7(3), opened for signature July 17, 1998, 2187 U.N.T.S. 90.

10. Pam Spees, *Women's Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power*, 28 SIGNS: J. WOMEN CULTURE & SOC'Y 1243, 1244 n.22 (2003).

> making opportunities. Gender is part of the broader socio-cultural context. Other important criteria for socio-cultural analysis include class, race, poverty level, ethnic group and age.[11]

Unfortunately, this definition is currently located on the UN Women website, not in a formal instrument.

II. Explicit Exclusion of Male Victims

So-called women's issues were virtually ignored in the early decades of the post-World War II human rights movement. In the 1980s and 1990s, when significant attention was finally paid to women's vulnerability to human rights violations—not infrequently in the form of anti-rape language—men were consequently overlooked. This exclusion of men and boys can therefore be understood in its historical context, but the continuation of the exclusion runs counter to important findings about male victimhood.

As has been well documented by researchers, men and boys have been sexually abused in large numbers in prison cells, on battlefields, in church rectories, and elsewhere. Of course, varied definitions and methodologies limit ease of comparison, but one analysis of 120 prevalence studies concluded that 3 percent of men worldwide have been raped in their lifetime, as compared to 13 percent of women.[12]

One can locate over one hundred uses of the term "violence against women"—a definition that of course includes sexual violence—in UN treaties, general comments, resolutions, and consensus documents.[13] Most of these instruments exclude men, especially those that insist upon the most comprehensive remedies to address sexual abuse. Instruments such as the

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11. *OSAGI Gender Mainstreaming*, UN WOMEN, http://www.un.org/womenwatch/osagi/conceptsandefinitions (last visited Aug. 3, 2011).

12. *See* Brian H. Spitzberg, *An Analysis of Empirical Estimates of Sexual Aggression Victimization and Perpetration*, 14 VIOLENCE & VICTIMS 241, 245 (1999).

13. Stemple, *supra* note 8, at 618 (internal citation omitted).

2000 Security Council Resolution 1325,[14] and the related resolutions adopted in the decade that followed, imagine wartime sexual violence as a danger irrelevant to men. Resolution 1325 was the first of its kind, and it focuses on the sexual abuse of "women and girls." The resolutions that followed (1694(2006), 1820(2008), 1888(2009), 1889(2009), 1960(2010)) were broadened to include "women and children"—indicating some attention was paid to moving beyond 1325's limitations—but each continued to exclude men. This exclusion cannot be squared with evidence, for example, from Liberia, which found that 32 percent of male combatants had experienced conflict-related sexual violence.[15]

A comprehensive *gendered analysis* of sexual violence has much to contribute to our understanding about, for instance, why men in prison who are slight, young, and effeminate are disproportionately targeted for rape. Such an analysis is similarly essential to critiquing the humiliating aims of forced fellatio and performative incest during wartime. It is also seemingly critical to our understanding of the way in which male survivors of sexual abuse often feel emasculated and ashamed—with a resulting silence that enables the ongoing failure of advocacy groups, the media, and governments to take this problem seriously.

Discomfort with male vulnerability in international lawmaking is not limited to sexual violence. When, on behalf of a women's rights NGO, I advocated for attention to women's concerns at the General Assembly Special Session on HIV/AIDS in 2001, I was struck by the ease with which governments agreed to include our suggested language about women.[16] Women's vulnerability, and the validity of addressing

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14. S.C. Res. 1325, U.N. SCOR, 4213th mtg., U.N. Doc S/RES/1325 (2000), *available at* http://www.unfpa.org/women/docs/res_1325e.pdf.

15. Forty-two percent of female combatants also reported conflict-related sexual violence. Kirsten Johnson et al., *Association of Combatant Status and Sexual Violence With Health and Mental Health Outcomes in Postconflict Liberia*, J. AM. MED. ASS'N, http://jama.ama-assn.org/content/300/6/676.full (last visited Aug. 3, 2011).

16. The language pertained to women in general. Groups such as sex workers, in contrast, provoked discomfort and were among the vulnerable groups state delegates refuse to include in the final instrument by name.

it in international lawmaking processes, was by that time no longer contested by policymakers. But as I note below, men, and in particular those belonging to groups whose vulnerability to HIV is well documented, receive no such attention.

III. Males Viewed Only in Their Instrumentalist Capacity

Women's rights NGOs can be credited with advancing groundbreaking language in international human rights instruments that includes men and boys in the context of family, reproductive health, and violence, beginning with the outcome document developed at the International Conference on Population and Development in 1994. As important as this language has been, a close reading of this document reveals what I have called an "instrumentalist approach": one that includes men and boys only in the context of their responsibility to improve women's and girls' health and rights. While not doubting the importance of addressing the role men have to play in the realization of women's equality, I find the approach, when used exclusively, to be problematically narrow.

For example, the Political Declaration on HIV/AIDS (2006) mentions men and boys only once (I safely assume that, unfortunately, here as elsewhere, "gender" is used to refer to women and girls):

> States pledge to eliminate gender inequalities, gender based abuse and violence; increase the capacity of women and adolescent girls to protect themselves from the risk of HIV infection and take all necessary measures to create an enabling environment for the empowerment of women and strengthen their economic independence; and in this context, reiterate the importance of the role of men and boys in achieving gender equality.[17]

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17. Political Declaration on HIV/AIDS, G.A. Res. 60/62, ¶ 30, U.N. Doc. A/RES/60/262 (June 15, 2006), *available at* http://data.unaids.org/pub/Report/2006/20060615_hlm_politicaldeclaration_ar

I recognize the benefit of this framing for drawing attention to women's vulnerabilities to HIV, but I find that the instrumentalist approach, when used exclusively, fails to account for the ways in which gendered norms operate to make men susceptible to the disease.[18] When healthcare-seeking behavior is viewed as a sign of weakness, for example, men avoid clinics, and no one wins.

Moreover, the General Assembly's refusal to explicitly articulate the rights of men who have sex with men in the context of HIV/AIDS, despite pressure from NGOs and health experts to do so, is discriminatory and dangerous. Silence in HIV/AIDS instruments about the real vulnerabilities that some men face risks reinforcing notions of men's invincibility.

The finger-wagging "should" tone found in instrumentalist language also risks turning off men and boys who might be open to other, more inclusive messages about the ways in which regressive masculinity norms put them in danger. In contrast, programs like "One Man Can," run by Sonke Gender Justice in South Africa, frame the engagement of men in gender equality efforts as something that empowers and benefits them, too. The program asserts that "One Man Can: love passionately, stop AIDS, end domestic violence,"[19] and so on, encouraging men to "to build a movement, to demand justice, to claim our rights and to change the world."[20]

In the spirit of Scott Long's description on our panel of human rights law as "creatively norm producing," can we imagine international texts that aim to liberate men and boys from the pressure to live up to a masculine ideal? If not, we risk remaining stuck with an outdated and unduly limited model.

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es60262_en.pdf.

18. *See* Jenny A. Higgins et al., *Rethinking Gender, Heterosexual Men, and Women's Vulnerability to HIV/AIDS*, 100 AM. J. PUB. HEALTH 435 (2010).

19. *One Man Can Home*, SONKE GENDER JUSTICE, http://www.genderjustice.org.za/onemancan/ (last visited Aug. 3, 2011).

20. *Id.*

IV. Female Perpetrators are Overlooked

Female perpetration of sexual violence is a particularly thorny issue for women's rights advocates to confront, as it runs counter to the well-established and politically-potent feminist narrative about men's use of violence to subordinate women. This, together with run-of-the-mill gender stereotyping to which anti-rape activists are also susceptible, might account for its under-exploration in the human rights literature and the lack of attention paid to it by human rights NGOs.

Two data points illustrate the phenomenon of female perpetration. The Prison Rape Elimination Act of 2003,[21] for which I lobbied together with allies from Human Rights Watch, Amnesty International, and others, calls for an annual survey of those held in prison, jail, immigration detention, and juvenile detention centers. Among other significant findings, of youth reporting forced sexual conduct by an adult staff member, 86.1 percent were boys abused by female staff.[22]

Elsewhere, a 2010 population-based assessment of sexual violence in the Eastern Democratic Republic of Congo (DRC) found that, of women who experienced sexual violence as part of the long-running DRC conflict, 41 percent reported a female perpetrator, most typically a female combatant. 15 percent of male victims also reported a female perpetrator. (The study was also notable for finding that 22 percent of all men had experienced conflict-related sexual violence.) Tellingly, in the Journal of the American Medical Association (JAMA) article reporting these findings, the authors note, "the term *interpersonal violence* is used in place of *gender-based violence* to include all types of violence between men and women."[23]

Why so? Senior author Lynn Lawry tells me that the

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21. 42 U.S.C. §§ 15601-15609 (2006).

22. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF JUSTICE, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH 2008-2009, at 13 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/svjfry09.pdf.

23. Kirsten Johnson et al., *Association of Sexual Violence and Human Rights Violations with Physical and Mental Health in Territories of the Eastern Democratic Republic of Congo*, 304 J. AM. MED. ASS'N. 553, 554 (2010).

change was at the behest of JAMA who removed the term "sexual gender based violence" during its edits, due to confusion between the terms sex and gender. The authors then objected in writing, explaining that gender-based violence, an internationally accepted phenomenon, "occurs to either men or women"; indeed the findings are significant for demonstrating exactly this. Nevertheless, the neutered term "interpersonal violence" was ultimately used. Lawry concludes that the term "gender-based violence" has been "overtaken by advocacy groups to push agendas" focused only on male violence against women.[24] The result of this ongoing narrowness perpetuated by advocates, at least in this case, was gender's partial erasure from a study wholly revelatory about gendered violence.

Interrogating the gender implications of the above findings would seem an important feminist project. Do prison and military institutions encourage displays of traditional forms of masculinity? Do women working as corrections officers or acting as combatants face pressure to perform dominance? How do males abused by females interpret their own victimization and what are the implications, if any, for their propensity for future violence or victimization? Erasure of female perpetration precludes these explorations. Instead feminism would do better to "absorb more holistically the experiences of women who would wield strength, aggression, and violence in all its forms."[25]

The infamous Abu Ghraib photo of Lynndie England, the Army reservist who gave the swaggering "thumbs up" while next to a naked, hooded, male detainee forced to masturbate before her, certainly has much to say about institutionalized gender dominance. Contrary to the dismissive "bad apple" story used to explain the behavior of England and her colleagues, forced nudity was in fact developed by the U.S. military as an interrogation technique and used in Afghanistan, Iraq, and at the Guantanamo Naval Base in Cuba.[26] The use of nudity has

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24. E-mail from Lynn Lawry to Lara Stemple (Mar. 14, 2011) (on file with author).

25. Jamie R. Abrams, *The Collateral Consequences of Masculinizing Violence*, 16 WM. & MARY J. WOMEN & L. 703, 704 (2010).

26. *See* Anthony R. Jones & George R. Fay, *AR 15-6 Investigation of the*

been credited with the dehumanization of detainees that set the stage for an escalation of degradation.[27] And to unpack what was really going on, we need tools much more sophisticated than international instruments concerned only with the sexual violation of women. The torture frame that was frequently used also felt limited, missing as it does a gendered lens.

V. Conclusion

I am sympathetic to concerns about compromising decades of work to tell a story about rape as a tool of male dominance and female subordination. As Carole Vance observed on our panel, the anti-violence against women "establishment," has done important work on an issue of serious concern, creating a vested interest in the male perpetrator/female victim narrative. It is a narrative that continues to reflect reality for far too many people around the world. At the same time, this narrative risks obscuring other vectors of gendered oppression that are also operating, such as violence against people who fail to conform to gender norms. These are competing concerns that are difficult, though essential, to keep in balance.

How to do so? Bridget Crawford asked our panel if we would like international human rights instruments to be sex-neutral. For the reasons laid out above, I oppose sex-specific language that is descriptively inaccurate and normatively problematic. I am also concerned about the comfort with which governments address women's peril while remaining circumspect about the vulnerability of others. I fear that the solutions as currently represented in international texts are at best only partial and at worst at risk of reinforcing the gendered norms they should instead upend.

But, I do not favor an erasure of gender considerations. I favor approaches that focus on empowerment, and that move

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Abu Ghraib Detention Facility and 205th Military Intelligence Brigade 10 (2005), *available at* www.globalsecurity.org/intell/library/reports/2004/intell-abu-ghraib_ar15-6.pdf.

27. *Id.*

beyond the female victim/male perpetrator focus. I favor frameworks that make rights to sexual autonomy, to bodily integrity, to dignity, and to *inclusive* equality paramount.

Rosalind Petchesky calls sexuality "the matrix of universality and a viable exit point"[28] to move us beyond the exclusive focus on women's victimization that was politically necessary at the moment of Cairo and Beijing. Advocates aiming to advance LGBT rights, protect exploited migrant workers, end female genital mutilation/cutting, combat HIV/AIDS, expand reproductive rights, eradicate prisoner rape, and advance the rights of sex workers have much more in common in this regard than their organizational silos might suggest.

Collaboration across these movements is do-able and has begun to take place in interesting ways in practice.[29] International legal instruments ought not get in the way.

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28. Rosalind P. Petchesky, *Rights of the Body and Perversions of War: Sexual Rights and Wrongs Ten Years Past Beijing*, 57 INT'L SOC. SCI. J. 301, 306 (2005).

29. For instance, a coalition of organizations formed the Raising the Bar for Justice and Safety Coalition to advocate for the adoption of federal standards developed by the Prison Rape Elimination Commission. Among others, coalition members include Gay Men's Health Crisis, National Congress of Black Women, Drug Policy Alliance, RAINN (Rape, Abuse and Incest National Network), National Minority AIDS Council, Just Detention International, Transgender Law Center, and Women's Refugee Commission. The full list can be found at http://raisingthebarcoalition.org/members.aspx.