



Report 5th Meeting - Gender-Sensitive Judging in International Criminal Law

On November 13, 2021, Africa Legal Aid (AFLA), held the 5th meeting in its Gender Mentoring Training Programme for Judges of International Courts and Tribunals. The topic of the discussion, *Gender-Sensitive Judging in International Criminal Law*, was presented by Dr Rosemary Grey of Sydney Law School, the University of Sydney.

The meeting was attended by:

Judge Reine Alapini-Gansou, Judge of the ICC, Former Member of the African Commission on Human and Peoples' Rights.

Judge Solomy Bossa, Judge of the ICC; Former Judge of UN IRMCT; Former Judge of the ICTR; Former Judge of the African Court on Human and People's Rights.

Judge Luz Ibáñez Carranza, Judge of the ICC; Former Superior National Prosecutor of Peru.

Judge Fatoumata Dembélé Diarra, Former Judge and First Vice President of the ICC; Former Judge of the ICTY.

Judge María del Socorro Flores Liera, Judge of the ICC.

Judge Joanna Korner, Judge of the ICC; Former Judge of the ICTY.

Judge Florence Mumba (Chair), Judge of the Supreme Court Chamber of the ECCC; Former Judge and Vice President of the ICTY; Former Judge of the Appeals Chamber of the ICTY and ICTR; Former Judge of the Supreme Court of Zambia.

Judge Kimberly Prost, Judge of the ICC, Former Judge of the ICTY.

Judge Miatta Maria Samba, Judge of the ICC.

Judge Julia Sebutinde, Judge of the ICJ; Former Judge of the SCSL.

Evelyn A. Ankumah, Coordinator of the Gender Mentoring Training Programme for Judges; Executive Director of AFLA.

Gabrielle Louise McIntyre, Co-Coordinator of the Gender Mentoring Training Programme for Judges; Chairperson of the Truth, Reconciliation and National Unity Commission of the Seychelles; Former Chef de Cabinet and Principle Legal Advisor to the President of IRMCT and four successive Presidents of the ICTY.

Participants adopted the following agenda items for discussion:

Video Lecture: Gender Sensitive Judging in International Criminal Law

Dr Rosemary Grey

1. Why Gender-Sensitive Judging is Important for International Criminal Tribunals.
2. Concrete Examples and Concrete Missed Opportunities for Gender-Sensitive Judging in the ICC and Other International Criminal Courts.

3. Common Myths and Misperceptions About Sexual Violence Which Judges Should be Aware Of.

Video Lecture

The video lecture was divided into three parts. Firstly, Dr Grey explained why gender-sensitive judging is important for international criminal tribunals. Then, she examined some concrete examples and missed opportunities for gender-sensitive judging in the ICC and other international criminal courts, as well as the common myths and misperceptions about sexual violence, which judges should be aware of and should try not to reproduce in their judgements.

Dr Grey started the discussion by highlighting the importance of adopting gender-sensitive judging in international criminal courts. She stressed that whether at the national level, at the international level or a hybrid court, judges must bring a gender lens to their work. She pointed out that it is not enough to have equal representation on the bench. Judges of any sex or gender must also bring gender expertise to their work, which means being attentive to gender power relationships and the different experiences of males, females, and non-binary people in all exercises of judicial power. She argued that this gender analysis is relevant when interpreting the law (such as the scope of a crime), making findings of facts, calculating sentencing or reparations orders, as well as when applying procedural rules, and in day-to-day interaction with victims and witnesses in a courtroom. Next, Dr Grey highlighted the reasons why judges should take a gender-sensitive approach. First, she explained that it leads to a more sophisticated analysis of the facts and the law. It allows the court to see all the dimensions of the crime and the evidence that might otherwise go unnoticed. In fact, the same crime might have a different impact on male and female victims. It is, therefore, essential that the court considers the gender impact of a crime to provide justice to all the affected victims.

Secondly, Dr Grey contended that gender-sensitive judging is a corrective to the default masculine bias in international criminal law. She stressed that like most legal systems, international criminal law has historically been defined and enforced by men - treaty makers, judges, advocates and the scholars in this field have been men until recently. She underlined that, as a result of this masculine bias, what we consider to be the traditional approaches in international criminal law is unlikely to be gender-neutral. On the contrary, the more traditional and more conservative approaches reflect a male perspective and a male-lived experience. Yet, gender-sensitive judging is about fairness and inclusivity. It involves acknowledging that the law has been historically skewed toward a male perspective and finding ways to mitigate the male bias within the existing legal framework. She clarified that judges of any sex or gender could take this approach as it is not a burden or a prerogative for the female judges alone.

Dr Grey turned to the Rome Statute, which recognises a vaster range of sexual and gender-based crimes than any previous instrument of international criminal law, as well as identifying gender persecution as a crime against humanity. In addition, the Rome Statute requires that the judges and the prosecutor take measures to protect the dignity of victims of sexual and gender-based violence. In fact, Article 21(3) of the Rome Statute requires that all ICC law must be interpreted and applied without any adverse distinction founded on grounds of gender among other factors. In addition,

the Rome Statute includes articles that are aimed at securing gender expertise in the Chambers, the Office of the Prosecutor (OTP), and the Registry. Regarding the Chambers, the relevant provision is Article 36(8)(b), which directs states parties to take into account the need to include judges with legal expertise on specific issues, including violence against women and children.

At the end of the first part of her presentation, Dr Grey noted that states were already working towards more than the equal representation of male and female judges and that there is awareness that gender expertise is also required. In that regard, Dr. Grey emphasised that parity on the bench, although important, is not enough.

In the second part of her address, Dr Grey identified some **concrete examples and missed opportunities for gender-sensitive judging at the ICC and other international criminal courts.**

She started by introducing **gender sensitivity in interpreting the definition of a crime.** She reiterated that international criminal law has been historically interpreted and applied from a male perspective, with little consideration for how genocide and armed conflict affect people differently based on their gender. She asserted that judges may help overcome this historical gender blindness by re-interpreting existing crimes in a way that better reflects the distinctive experiences of victims of all sexes and genders and not just the male victims. She then brought the example of the 1998 Akayesu Judgment at the International Criminal Tribunal for Rwanda (ICTR). This judgment confirmed for the first time that sexual violence can be an act of genocide when committed with the intention of destroying an ethnic, racial, or religious group. More specifically, in *Akayesu*, the Trial Chamber found that sexual violence against Tutsi women, including rape and forced nudity, constituted acts of genocide under Article 2(2)(b) of the ICTR Statute. As the Trial Chamber reasoned: ‘sexual violence was a step in the process of the destruction of the Tutsi group; destruction of the spirit, of the will to live, and of life itself’. This finding that sexual violence can constitute an act of genocide, was then embedded into the ICC elements of crimes. Dr Grey pointed out that this precedent remains one of the most influential judicial decisions on gender-based violence in international criminal law. In fact, numerous references were made in subsequent cases. For instance, in the 2010 *Al Bashir* case, the Pre-Trial Chamber of the ICC included a charge of genocide based on rape, following the *Akayesu* case at the ICTR. More recently, in 2016, in the *Karadžić* case, the ICTY Trial Chamber held that examples of serious bodily or mental harm as an act of genocide include torture, inhumane or degrading treatment, and sexual violence, including rape.

Dr Grey stated that these examples demonstrate the importance of gender analyses when interpreting gender-neutral crimes such as genocide or war crimes. She stressed that, although judges must uphold the principle of legality when interpreting crimes, within that constraint, they can nonetheless minimise gender discrimination by giving due regard to the experiences of men and women and ensuring that gender blindness does not exclude those experiences when defining the elements of crimes.

Dr Grey then spoke about **gender sensitivity in acknowledging gender-based targeting.** She explained that since the Nuremberg Tribunal until today, international criminal tribunals have been quite attentive to the prejudices and the ideologies that contribute to mass crimes. For instance,

international courts and tribunals have recognised that antisemitism contributed to the persecution of Jewish people in Germany, that ethnic animosity has contributed to acts of genocide, ethnic cleansing, and persecution in numerous conflicts, and the role nationalism and religious ideology has also played in motivating the commission of these crimes.

While these factors have been well considered, Dr Grey was of the view that judgements rarely acknowledge that gender is also a basis for targeting people. Dr Grey asserted that the gender dimension is often overlooked even when it is clear in the facts. For example, when explaining the mass rape of women in Rwanda, the Rwanda Tribunal gave more attention to the ethnicity of the victims compared to their gender. She underlined that judges can make gender-based targeting more visible (when relevant to the facts of the case). She pointed out that targeting women and girls for sexual assault and detaining and executing men is not entirely random and often reflects gender beliefs such as, in regards to sexual violence against women, that men are entitled to use women's bodies for their sexual purposes. Or, in the case of the detention and execution of male civilians, a belief that men represent potential threats that need to be neutralised. In other words social ideas about what it means to be male or female in a particular society could help explain the commission of mass crimes, and these factors often intersect with ideas concerning ethnicity, nationalism and religion.

Dr Grey further observed that judges can explicitly recognise the gender basis of the crimes. In international criminal courts, judges can legally recharacterize the facts as persecution on gender grounds when appropriate. They can do so both at the Pre-Trial stage using Article 61(7)(c) of the Rome Statute and at the Trial level using Regulation 55 of the Court.

Dr Grey addressed the **gendered impact of the crimes**. She explained that crimes have a different impact on victims and survivors, depending on whether they are male, female, non-binary or other. Unfortunately, in most submissions at the International Criminal Court, the gendered impact of crimes is often related to sexual crimes, particularly when it comes to reparations. For other crimes, the gender analysis of the impact of the crime tends to be lacking. Dr Grey underlined that as international criminal tribunals continue to evolve, attention must be given to the gendered consequences of all crimes and not only to sexual crimes. This, she said is relevant to a judge when determining whether a gravity threshold has been met and, after a conviction, what sentence is appropriate and what reparation needs to be made.

Dr Grey discussed **the principle of complementarity**. This principle entails that the ICC needs to determine whether a state with jurisdiction over the crimes is able and willing to investigate and prosecute the case genuinely in accordance with Article 17 of the Rome Statute. When applying that test, ICC Judges should consider whether the national justice system is excessively biased, thereby not meeting the genuinely prosecution test. She noted that the ICC Prosecutor identified the gendered components of the complementarity test in its 2014 Gender Policy.

Dr Grey explained that a gender analysis could be relevant in **assessing the credibility and reliability of witness testimony**, which is particularly important when dealing with allegations of traumatic experiences such as sexual violence. She opined that judges can help to overturn prejudices in several ways. For example, by making sure that they do not discount as unreliable testimony that includes inconsistencies; or assume that a victim is unreliable if s/he has suffered

from post-traumatic stress disorder or similar conditions that affect her/his ability to recall specific facts. In addition, the witness' reliability should be tested on a case-by-case basis with sensitivity to the impact of sexual and gender-based violence on the victim's memory. Dr Grey used the example of *Ongwen* where the prosecution witnesses included a woman who was allegedly abducted and forced to become a wife to the accused, Dominic Ongwen. The defence team challenged her testimony, stating that when she was questioned by NGO workers after escaping the LRA, she had denied being a victim of rape and only claimed to have been a victim of rape when interviewed by ICC investigators. The defence team further argued that there was a substantial inconsistency in the witness' statement regarding her alleged rape and so for that reason she was not a credible witness. Nevertheless, the woman stood by her testimony, explaining that she had initially concealed this information when speaking to NGO workers in Uganda as they were male, and she did not feel comfortable disclosing her experience of sexual violence. By contrast, when interviewed by ICC investigators, she felt more comfortable telling her story as they were female. The Pre-Trial Chamber considered this explanation and accepted it taking into account the impact of trauma. Dr Grey observed that, in reaching that conclusion, the Judges showed awareness of the socio-gender context that makes it difficult for some women to disclose their experiences of sexual violence, especially when talking to men.

In the final part of her presentation, Dr Rosemary Grey spoke about **common myths and misperceptions about sexual violence**, which judges should keep in mind so that they do not reproduce them in their judgements.

The first common misconception is that **sexual violence must include rape and forced penetration**. Dr Grey stressed that judges must understand that sexual violence is not only about forced penetration. It includes forcing nudity, sexualised torture, forcing victims to engage with a third party, taking pictures and disseminating them without their consent. She referred to Women's Initiatives for Gender Justice's comprehensive list of such sexual violence acts, 'The Hague Principles'.

Another common misconception is that **sexual violence against men and boys is less grave than sexual violence against women and girls**. Dr Grey explained that this prejudice has been replicated, either implicitly or explicitly, in many judgments. Case 002/2 at the Extraordinary Court Chamber of Cambodia (ECCC) is a clear example of this misconception. In the 2013 Trial Judgement, the ECCC held that there was evidence of forced marriages and that couples were coerced into having sex with one another to produce the next generation. Furthermore, the ECCC stated that this coercion was sufficiently grave to be considered an inhumane act in the case of the women but not in the case of the men. The Prosecution appealed this conclusion arguing that the Trial Chamber unwittingly reproduced a misperception that sexual violence must include forcible penetration, and that sexual violence against men and boys is less grave than sexual violence against women and girls.

Another common misconception Dr Grey explained is **that sexual violence is about sexual gratification**. She argued that sexual violence is often about intimidating, dominating and controlling the victims and not about sexual lust and satisfaction from the perpetrator. To explain it better, Dr Grey referred to the *Muthaura* case of the ICC involving crimes against humanity allegedly committed during the post-election violence in Kenya in 2007-2008. In that case, there

was evidence that men had been subjected to forced circumcision and amputation of their genitals with crude weapons. The Prosecutor charged this conduct as sexual violence under Article 7(g) of the Rome Statute, which refers to rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of similar gravity. However, the Pre-Trial Chamber did not accept that charge, holding that there was insufficient evidence that the acts were sexual in their nature. The Pre-Trial Chamber was of the view that it was more appropriate to characterise those acts as ‘another inhumane act’ other than ‘sexual violence’. Although the issue was not resolved as the case was terminated for a lack of evidence against the accused, the Judges struggled to understand that those acts were sexual because there was no evidence of sexual gratification, whereas the Prosecutor and the victims’ counsels argued that the conduct was sexual because it impacted the victim’s sexual identity, their ability to engage in sexual relations, and because it was meant to emasculate and humiliate them.

Dr Grey spoke about the assumption that **delayed testimony of sexual violence is probably false**. In particular, she examined the belief that if a victim comes forward long after being sexually abused then she may have fabricated the testimony due to the delayed disclosure. Dr Grey explained that there are multiple reasons why victims would not immediately disclose an experience of sexual violence. For example, the victim had not processed the act, did not trust their interlocutors, and were still in a threatened position.

Discussion

The Judges remarked that equal representation of women and men on the bench is not enough to ensure gender-sensitive judging. They also noted that besides the masculine bias present in the laws, other forms of biases must also be considered.

The Judges stressed that victims and witnesses must be treated with dignity at all stages of prosecution. They highlighted the need for gender-sensitive training for all judges, not only female judges. They reiterated that male judges must be included in the discussion to enhance gender sensitivity. The Judges further noted that training on gender issues is often optional, and, for that reason, the attendance rate is low. The Judges said there’s a level of reluctance from judges to engage in training. Therefore, they concluded that one of the main challenges that training organisers will face will be to ensure attendance of all judges. The Judges emphasised that training on gender-sensitive judging training must involve all key stakeholders including the Office of the Prosecutor, Defence Counsels, and investigating officials.

The Judges were of the view that the five areas that Dr Grey addressed: Gender sensitivity in interpreting crimes; Acknowledging gender-based targeting; Impact of the crimes from a gender perspective; The principle of complementarity; and, Gender in the Context of Assessing the credibility and reliability of witness testimony – form a comprehensive basis of gender-sensitive training for judges, prosecutors, lawyers, among others.

Participants considered how judges treat witnesses and women in the courtroom and determined that there is a need to review how judges approach witnesses and women. They observed that there is a difference among ICC Judges on how they assess evidence of sexual and gender-based crimes.

In fact, judges need to take into account the context in which crimes happen - for instance, when women are used as a tool to humiliate enemies. Participants noted that the bench may be extremely gender-sensitive, however, there are other parties in the Court (Defence Counsel, Prosecutor) that need to be sensitised, especially in their cross-examination techniques.

Participants observed that misconceptions and misperceptions are very common. They emphasised that sexual and gender-based crimes are not about gratification but power and discrimination and that stereotypes and assumptions about rape, sexual behaviours and reactions to non-consensual conduct should play no part in the judge's mind or in their judgment. Participants highlighted that judges need to be aware that there is no typical rape or typical rapist, there are no typical victims of rape, no 'rapeable' women or standard behaviour after a rape has occurred. Such misconceptions can lead to impunity.

Lastly, Participants noted that judges and investigators often look for stereotypical behaviour and, if a set of circumstances do not fit the stereotype, then they have doubts raised in their minds as it happens with delayed testimony and reporting of sexual violence crimes. Especially in the context of mass crimes, victims are so afraid that they do not want to disclose their experience. Trauma and stigmatisation are some of the reasons why victims do not come forward. Participants explained that, in many cases, because victims were so afraid to come forward, the rape charges were completely excluded.