

Submission to the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity:

Thematic report on gender, sexual orientation and gender identity

25 February 2021

1. Introduction and focus of submission

All Survivors Project (ASP) supports global efforts to eradicate conflict-related sexual violence (CRSV) and strengthen national and international responses through research and action on CRSV against men and boys, including those with diverse sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC), as well as other people with diverse SOGIESC.

This submission focuses on sexual violence against people with diverse SOGIESC in situations of armed conflict and, in particular, on the way in which pre-existing structural inequalities and discrimination are exacerbated in this context. While the primary focus of the submission is on CRSV targeting individuals based on their SOGIESC, it also addresses the way in which the same discriminatory structures and negative narratives can also form part of the “logic” of CRSV against men and boys.¹

ASP urges that in his analysis and recommendations for the thematic report, the Independent Expert considers armed conflict as among the factors that can contribute to the reinforcement of existing or the emergence of new norms that impacts negatively on the enjoyment of rights by people with diverse SOGIESC. We urge that the Independent Expert takes into consideration the way in which these norms can exacerbate vulnerabilities to CRSV of these populations, but also how they undergird CRSV more broadly including against heterosexual and cisgender males.

2. Overview of CRSV against people with diverse SOGIESC

Rape and other forms of sexual violence are prevalent in most contemporary armed conflicts. In the case of lesbian, gay, bisexual, transgender, and intersex (LGBTI+) communities, pre-existing vulnerabilities resulting from inequalities rooted in patriarchal power structures, lack of legal protection, deeply embedded prejudices against individuals who do not, or who are perceived as not conforming to prevailing gender norms, and other factors are often exacerbated by armed conflict. New threats can also arise such as the emergence of armed actors with extremist religious ideologies that do not tolerate sexual and gender diversity. CRSV is therefore both an extension of and a facilitator of the heteropatriarchal system, norms and values that are present in times of peace but which may be intensified and take new forms during armed conflict.

¹ ASP seeks to complement and reinforce existing work on CRSV against women and girls, recognising the disproportionate impact of CRSV on them and the way in which gendered inequalities, institutions and identities drive this form of violence. ASP's work with men, boys and people with diverse SOGIESC is aimed at enlarging the scope of research, policy, prevention and response to include those survivors who are not always easily identified or supported within existing responses to CRSV.

It is recognised that the way in which a specific society or context is gendered impacts on which groups are targeted/discriminated against, as well as how and why they are targeted. CRSV against persons with diverse SOGIESC uses injury and humiliation to enact power and dominance and to aggressively communicate which sexualities, femininities and masculinities are deemed acceptable within the society envisioned by the perpetrators. Conversely, in heteronormative contexts where CRSV is perpetrated against cisgender heterosexual males, the victim/survivor may also carry, and be intended to carry, the stigma and shame of assumed homosexuality.²

Available information shows that individuals have been targeted in situations of armed conflict by state security forces and non-state armed groups on the basis of their actual or perceived sexual orientation or gender identity. They have been unlawfully killed, arbitrarily detained, subjected to torture and ill-treatment, including of a sexual nature, and forced to flee their countries of origin. In Syria for example, UN investigators have reported incidents in which men have been beaten, tortured and raped or threatened with rape by state security forces, on the grounds of their sexual orientation at government checkpoints.³ In Iraq, police officers are reported to have turned a blind eye to and colluded with deadly campaigns against LGBTI+ populations by militia groups, and have themselves committed acts of rape and other human rights violations against individuals perceived as being gay.⁴ In Myanmar, Rohingya with diverse SOGIESC are also reported to be vulnerable to sexual violence including by the Myanmar Armed Forces in the context of armed operations there.⁵

Already at heightened risk of detention relative to many other populations, including not only in the 67 plus countries where consensual same-sex relations are still criminalised, LGBTI+ people can face increased risks of incarceration during armed conflict. When deprived of liberty, people with diverse SOGIESC are particularly vulnerable to sexual violence and other forms of torture or ill-treatment, both by their captors and by other detainees.⁶

Rape and other forms of sexual violence is also known to have been carried out to terrorise and persecute LGBTI+ individuals and violently enforce societal gender norms. In countries including in the Democratic Republic of Congo, Colombia, Iraq and Syria, information indicates that sexual violence has been used by certain armed groups as a form of social control, or “moral cleansing”.⁷

² For detailed discussion see, Louise du Toit and Elisabet le Roux, ‘A feminist reflection on male victims of conflict-related sexual violence’, *European Journal of Women’s Studies*, 1–14, 2020, and Sandesh Sivakumaran, ‘Male/Male Rape and the ‘Taint’ of Homosexuality’, *Human Rights Quarterly*, Vol. 27, 4, 2005.

³ Report of the Commission of Inquiry on the situation in the Syrian Arab Republic, UN Doc. A/HRC/25/65 (2014).

⁴ Human Rights Watch (HRW), *They Want Us Exterminated” Murder, Torture, Sexual Orientation and Gender in Iraq*, August 2009, www.hrw.org/sites/default/files/reports/iraq0809web.pdf

⁵ Women’s Refugee Commission (WRC), ‘It’s Happening to Our Men as Well.’ *Sexual Violence Against Rohingya Men and Boys*, November 2018, <https://reliefweb.int/sites/reliefweb.int/files/resources/Rohingya-Report-Final-Screen-.pdf>

⁶ See, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/31/57 (2016). For information on the status of national laws criminalising same-sex relations, see International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), *State-sponsored homophobia. Global Legislation Overview Update*, December 2020,

https://ilga.org/downloads/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2020.pdf

⁷ See, UN Secretary-General annual reports on sexual violence in conflict 2020 and 2015; Unidad para la Atención y Reparación Integral a las Víctimas (UARIV), *Violaciones a los derechos humanos en el conflicto armado colombiano desde la perspectiva de las orientaciones*

Asylum seekers and refugees with diverse SOGIESC, including those forcibly displaced by armed conflict, are frequently subject to severe social exclusion and violence in countries of displacement or asylum by national and local authorities, host communities and the broader migrant, asylum-seeker and refugee communities.⁸ LGBTI+ people held in immigration detention settings are also particularly vulnerable to abuse, including sexual violence, both because of their migration status and their diverse SOGIESC.⁹ In Libya, for example, gay male refugees are reported to have been arbitrarily detained by militia groups and there are indications that if an individual's diverse SOGIESC status becomes known, they may be at increased risk of victimisation, including sexual exploitation and sexual slavery.¹⁰

3. Afghanistan case study

ASP is engaged in a multi-year project in Afghanistan working with its national partner, Youth Health and Development Organization (YHDO).¹¹ The project includes research on healthcare responses for male victims/survivors of sexual violence including men and boys with diverse SOGIESC, and CRSV within the context of *bacha bazi* (meaning 'boy for play', involves dressing male children in female clothing and keeping them for sexual pleasure and/or dancing or singing in public or private parties, and often involves rape, sexual touching, pornography or other forms of sexual violence).^{12,13}

CRSV against people of all genders, sexual orientations, gender expressions and sex characteristics is vastly under-reported in Afghanistan. Nevertheless, ASP's research indicates that CRSV involving male victims/survivors, including men and boys with diverse SOGIESC, occurs widely including in the context of *bacha bazi*. Armed conflict is widely believed to have increased the levels of sexual violence in this context: both directly, when the alleged perpetrators are members of the state armed forces or non-state armed groups; and indirectly, as a result of conditions that contribute to abuse, such as poverty, displacement, family separation, having been exacerbated by years of fighting. Decades of insecurity have also contributed to fragile rule of law and widespread impunity for human rights violations, in which *bacha bazi* and sexual violence against children in other contexts has flourished.

sexuales y las identidades de género, 2014,

<https://www.unidadvictimas.gov.co/sites/default/files/documentosbiblioteca/caracterizacionsituacionallgbti.pdf>

⁸ See, UN High Commissioner for Refugees (UNHCR), *Protecting Persons with Diverse Sexual Orientations and Gender Identities. A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees*, December 2015, <https://www.refworld.org/pdfid/566140454.pdf>

⁹ See, Association for the Prevention of Torture (APT), *Towards the Effective Protection of LGBTI Persons Deprived of Liberty: A Monitoring Guide*, 2018, www.apr.ch/en/resources/publications/towards-effective-protection-lgbti-persons-deprived-liberty-monitoring-guide

¹⁰ WRC, "More Than One Million Pains": *Sexual Violence Against Men and Boys on the Central Mediterranean Route to Italy*, March 2019, <https://s33660.pcdn.co/wp-content/uploads/2020/04/Libya-Italy-Report-03-2019.pdf>

¹¹ YHDO is a national NGO which carries out research and capacity-building activities, as well as delivering health, protection and other services to children, youth and marginalised populations in 20 provinces across Afghanistan.

¹² Islamic Republic of Afghanistan Ministry of Justice, *Law on Protection of Child Rights*, March 2019; See also Afghanistan Independent Human Rights Commission, *Causes and Consequences of Bacha bazi in Afghanistan. National Inquiry Report*, 2014.

¹³ The information in this section is drawn from unpublished research by ASP on *bacha bazi* in 2019/2020 and a forthcoming report by ASP and YHDO on enhancing responses for male survivors of sexual violence in Afghanistan. The latter report is based on over 100 interviews, including with 27 male survivors of sexual violence and 70 healthcare professionals.

Discriminatory laws and lack of legal protection, combined with rigid gender-norms also contributes to an environment in which people with diverse SOGIESC face daily harassment and discrimination including in education, workplace and public settings. It can also force them into unsafe practices, such as *bacha bazi*, as a means of earning an income. Boys and young men may also be targeted for such practices on account of their real or perceived diverse SOGIESC. Once a boy or man has been subjected to sexual violence by another male, including as a *bacha*, he is likely to be labelled as gay whether he identifies as such or not. This has extremely serious consequences in Afghanistan where consensual same-sex relations are criminalised and are widely considered to be unacceptable.

Afghanistan is party to core human treaties prohibiting discrimination including on grounds of sexual orientation and gender identity and/or which prohibit rape and other forms of sexual violence. These include, the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Covenant on Economic, Social and Cultural Rights (ICESCR) the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); and the Convention on the Rights of the Child (CRC).

ASP is not aware of working definitions of gender and related concepts having been adopted in public policy, legislation or jurisprudence aimed at addressing violence and discrimination based on sexual orientation and gender identity. On the contrary, **gender is narrowly defined and laws discriminate against people with diverse SOGIESC.**

Under the 2004 Constitution “any kind of discrimination and distinction between citizens of Afghanistan shall be forbidden,” but citizens are defined as “man and woman” (article 22). Same-sex relations are criminalised via various provisions of the revised Penal Code.¹⁴ These include provisions that prohibit “sodomy” (articles 646-648) which is punishable by up to two year’s imprisonment, or “more than two years” where there are aggravating circumstances. It also includes the act of “*tafkhez*” (when the male offender commits same-sex sexual acts not involving any penetration) (articles 645 and 649), and the act of “*mosabiqal*” (feminine same-sex sexual act without penetration) (article 645), both of which carry prison sentences of up to one year. These provisions can be used to prosecute same-sex relations, including if the conduct is consensual.

Gender is among forms of “general aggravating circumstances of criminal responsibility” listed under Article 218(8) of the Penal Code, but no definition of gender is provided.¹⁵ However, the notion that an individual can have a gender identity or gender expression that differs from the sex that they were assigned at birth is recognised in new provisions in the revised Penal Code relating to *bacha bazi*, in which the keeping or training of a “male or transgendered child” for the purposes of sexual gratification or dancing is prohibited (articles 653-646). *Bacha bazi* is also prohibited in the 2019 Law on the Protection of Child Rights (article 99), in which the practice is described as “keeping a male or she-male child for sexual pleasure, dancing in public or private parties, singing, clothing with female clothes, pederasty, rape, intercourse, touching, pornography, and sleeping with.”¹⁶

¹⁴ The revised Penal Code entered into force in February 2018.

¹⁵ “Commission of a crime as a result of race, tribe, religion, sect, gender, region, social status or political ideology based on discrimination.”

¹⁶ Decree of the President of Islamic Republic of Afghanistan on Endorsement of the Law on Protection of Child Rights Number 362, 5 March 2019.

Despite these important legal developments, there are concerns that these provisions have yet to be effectively implemented and that practice of *bacha bazi* remains widespread.¹⁷ There is also concern that the prohibitions only relate to children under the age of 18 years old, even though adult males, in particular men with diverse SOGIESC, are vulnerable to becoming *bachas* and to the sexual and other forms of violence that are perpetrated in this context. Moreover, there are no laws prohibiting discrimination on the basis of sexual orientation and no legal protection against hate crimes. There is also no legal recognition of same-sex civil unions or marriages, and same-sex couples cannot adopt children.¹⁸

This legal environment contributes to a **lack of reporting on CRSV against men and boys, including those with diverse SOGIESC**. To ASP's knowledge there are no official processes to systematically gather data about CRSV or other forms of gender-based violence (GBV) involving these categories of persons. Our research also indicates that male victims/survivors rarely report their experiences to the authorities. Reasons for this include fear of being prosecuted, secondary victimisation including rape or other forms of sexual violence by police officers, and shame and blame by their families and their communities.

Similar concerns have emerged in relation to accessing healthcare for injuries and other harm resulting from sexual violence. Although, there is no legal requirement to mandatorily report cases of sexual violence or other types of GBV in Afghanistan, male survivors interviewed by ASP have reported fears that healthcare providers might disclose information about their experiences to the police or other rule of law officials without their consent, based on their own assessment of whether the act was consensual or not. ASP's research indicates that this fear deters many male survivors from seeking emergency medical and other health care. Male survivors also fear stigma and negative attitudes from healthcare providers. Fears of being blamed or judged by health workers appeared to be particularly pronounced among male victims/survivors with diverse SOGIESC.

The lack of reference to or guidance on the treatment of victims/survivors with diverse SOGIESC in the GBV Treatment Protocol for Healthcare Providers in Afghanistan may be illustrative of broader **gaps in policy relating to people with SOGIESC**. The Protocol, although comprehensive in many ways, does not differentiate between female and male victims/survivors. Nor does it address whether attitudes towards victims/survivors, including stigmatising attitudes, might be different based on gender, and there is no specific guidance on the particular vulnerabilities or victims/survivors with diverse SOGIESC. It is recognised that this is likely due to the sensitivity of the topic and the fact that homosexuality is criminalised. However, there is a clear gap in guidance to healthcare providers on providing non-stigmatising treatment to all male victims/survivors, including those with diverse SOGIESC.¹⁹

ASP's research also highlights **negative attitudes towards people with diverse SOGIESC among religious and community leaders** which, by extension, also applies to other victims/survivors of sexual violence. More than half of the male survivors interviewed for research by ASP on healthcare responses feared negative responses by traditional and community leaders. Some survivors reported fearing that

¹⁷ See UN Secretary-General Report on children and armed conflict in Afghanistan, UN Doc. S/2019/727 (2019), para. 39.

¹⁸ ILGA, *State-sponsored Homophobia 2019*, (sections 4.2 and 4.3).

¹⁹ Ministry of Public Health of the Islamic Republic of Afghanistan (MoPH), World Health Organization Afghanistan Country Office with the United Nations Entity for Gender Equality and the Empowerment of Women, *MoPH (2014), Gender-based Violence Treatment Protocol for Healthcare Providers in Afghanistan*.

community leaders would verbally abuse them and eject them from the community. Others reported fearing that they would be killed if their experience of sexual violence became known, due to same-sex sexual activity being perceived as “un-Islamic”. According to one male survivor interviewed for the research, “*from the perspective of Sharia law, they [religious and community leaders] consider this incident illegal and prohibited, so they may threaten him to death by stoning*”.

Another common theme to emerge in ASP/YHDOs research is the negative attitudes towards male **victims/survivors from community members**, who were reported to tease, taunt and humiliate survivors. Victims/survivors noted that stigmatising attitudes and behaviours from community members, including peers, has resulted in them dropping out of school or leaving their communities to escape mistreatment. Victims/survivors also described the negative impact that stigma associated with sexual violence has on the reputation of their families. In many cases “preserving the dignity of their family” was given as the reason for not disclosing their experience of seeking support. Victim-blaming was a repeated theme and often linked to perceptions that survivors were responsible for or had consented to the act which, in turn, was linked to perceptions (true or false) of their SOGIESC.

ASP interviews with male victims/survivors of sexual violence in the context of *bacha bazi* also revealed that **family members often share these negative attitudes** that, in some cases translate into rejection of or violence against victims/survivors by family members. Fear of such reactions, as well as concern about shame and dishonour that their experience will bring on their family, were among the reasons that interviewed victims/survivors gave for not revealing what had happened to them to parents and other family members.

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