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**Are Sexual Orientation And Gender Identity Persecution  
Protected Under The Rome Statute? Challenges To The Legal  
Interpretation of “Gender”**

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# **Are Sexual Orientation And Gender Identity Persecution Protected Under The Rome Statute? Challenges To The Legal Interpretation of Gender**

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**Abstract:** Sexual orientation and gender identity remain a ground for discrimination worldwide. Gender-based persecution, as foreseen in the Rome Statute of the International Criminal Court (ICC), poses several legal inquiries on whether sexual orientation and gender identity-driven persecution could be adjudicated under the jurisdiction of the ICC. This paper discusses the legal void left by international criminal law on the protection of sexual and gender minorities and the role of the Rome Statute. It delves into the definition and criteria of persecution as a crime against humanity, emphasizing the role of discrimination in this crime. The paper analyzes the term “gender” and the challenges of its definition and interpretation *vis-à-vis* sexual orientation and gender identity. The author discusses the potential inclusion of sexual orientation as a ground of discrimination in gender-based persecution in relation to societal gender expectations and heteronormativity. The paper further explores the gender minorities protection status under the body of international criminal law. The binary gender construction set by the ICC Statute stands as odds with transgender, non-binary, and intersex individuals. Finally, this study recognizes the historical shortcomings in gender-based prosecution in front of the Court and highlights recent trends, developments and potential future progress of expanding the ICC mastery of the term “gender” within its Statute.

Discrimination on the basis of sexual orientation and gender identity remains widespread worldwide. Violence and abuse against the LGBTQIA+ community are not new, on the contrary, these have become matters of international criminal law since World War II.<sup>1</sup> Nowadays, the criminalization of same-sex behaviors or non-conforming gender expressions is still present, and conflicts across the globe feature gender-based crimes against humanity. This includes persecution based on sexual orientation and gender identity discrimination, as in Iraq and Colombia.

The history of gender-based persecution is often denied or left unheard due to the heteronormativity of international law, and difficulty interpreting the current body of international criminal law *vis-à-vis* sexual orientation and gender identity minorities.<sup>2</sup> Currently, the situation around the world is alarming. Seventy-six countries have legislation against LGBTQIA+ people in their jurisdiction, with seven of them including capital punishment for certain offenses. This means that LGBTQIA+ populations worldwide could become victims of state-sanctioned crimes against humanity.<sup>3</sup>

The legal void in protection against gender-based crimes as crimes against humanity has been filled by the International Criminal Court (ICC) Statute,<sup>4</sup> which is so far the biggest step in its codification in international criminal law. The ICC serves the purpose of guaranteeing international protection to those most vulnerable to the violent purge of crimes worldwide. Indeed, the idea of a permanent international tribunal with jurisdiction over atrocities was envisioned by the United Nations General Assembly in the 1948 Convention on the Prevention and Punishment of the Crime

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<sup>1</sup> This acronym is not exhaustive and not universally standardized.

<sup>2</sup> Ruby Axelson, "State-Sponsored Hatred And Persecution On The Grounds Of Sexual Orientation: The Role Of International Criminal Law" in *The Globalization of Hate: Internationalizing Hate Crime?*, ed. Jennifer Schweppe and Mark Austin Walters (Oxford: Oxford University Press, 2016), 277.

<sup>3</sup> Josh Scheinert, "Is Criminalization Criminal?: Antisodomy Laws and the Crime Against Humanity of Persecution," *Tulane Journal of Law and Sexuality* 24 (2015): 101, <https://doi.org/https://journals.tulane.edu/tjls/article/view/2877>.

<sup>4</sup> International Criminal Court, *Rome Statute of the International Criminal Court* (The Hague: International Criminal Court, 2011), <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

of Genocide. The world could not bear accepting again that heinous crimes - as those that occurred in the conflicts of the twentieth century - could be left unpunished.

After the end of the Cold War, the need for international criminal justice surfaced once again. The ICC Statute negotiations were ongoing when the international community was assisting abhorrent and despicable crimes in former Yugoslavia and Rwanda. The objective in creating the Court was making sure that crimes of the greatest severity could be prosecuted without recurring to special, military, or *ad hoc* tribunals as it had occurred in the past.<sup>5</sup>

Article 7(1)(h) sanctions the crime of persecution against “any identifiable group or collectivity.”<sup>6</sup> This presents an opening to explore the protection guarantees of sexual and gender minorities under the ICC Statute and international criminal law.

This paper aims to understand whether sexual orientation and gender identity could fall under the categories protected by the jurisdiction of the ICC and under the body of international criminal law, by analyzing the crime of persecution and the controversies attached to its reference to “gender” in the definition attached in the Statute.

Then, this paper will proceed to briefly analyze the current developments of the Court’s jurisprudence on gender-based persecution in the cases of *Al Hassan* and *Ahd-Al-Rahman*, in which the Court could set important precedents for gender-based crimes and develop its definition and application of the notion of “gender.”

### **Gender based-crimes against humanity: where do sexual minorities stand?**

Persecution has been delineated as the gravest crime at the core of crimes against humanity. Persecution is defined as “the intentional and severe deprivation of fundamental rights contrary to

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<sup>5</sup> International Criminal Court, *Helping Build a More Just World - Understanding the International Criminal Court* (The Hague: International Criminal Court, 2020) 9, <https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf>.

<sup>6</sup> International Criminal Court, *Rome Statute*, art. 7 (1)(h), 3.

international law by reason of the identity of the group or collectivity.”<sup>7</sup> Discrimination is at the core of this crime. Hence, persecution necessitates the destitution of fundamental rights (so the *actus reus*) executed with the intent of discriminating (i.e., the *mens rea*).<sup>8</sup>

Obviously, not every type of persecution amounts to a crime against humanity, and the ICC Statute goes on to define that persecution as a crime against humanity occurs “against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in Paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.”<sup>9</sup>

Persecution has to comply with the *chapeau* element of the crime. This means that the persecutory act must be “part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>10</sup> This was important for the Court in order to rule out of its jurisdiction single, isolated, and sporadic persecutory acts that do not amount to crimes against humanity. Furthermore, to constitute persecution, the act must occur “in connection with” any act of Article 7(1) or any act under the jurisdiction of the ICC.<sup>11</sup>

Relevant for the sake of this paper is the term “gender” which appeared in an international law treaty for the first time in the 1998 Rome Statute. Gender-based crimes are defined in the Policy Paper of the Office of the Prosecutor (OTP) of the ICC as those crimes targeting women, men, children, LGBTQIA+ individuals, non-binary and gender non-conforming persons who are

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<sup>7</sup> Preparatory Commission for the International Criminal Court, *Finalized Draft Text of the Elements of Crimes* (New York: United Nations, 2000), art. 7(1)(h), 15, <https://digitallibrary.un.org/record/418867#record-files-collapse-header>.

<sup>8</sup> Lisa Davis, “Dusting Off The Law Books: Recognizing Gender Persecution In Conflicts And Atrocities,” *Northwestern Journal of Human Rights* 20, no. 1 (2021): 5, <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1234&context=njihr>.

<sup>9</sup> International Criminal Court, *Rome Statute*, art. 7(1)(h), 3.

<sup>10</sup> See note above, art. 7(1), 3.

<sup>11</sup> Nevenka Đurić, Sunčana Roksandić Vidlička and Gleb Bogush, “Legal Protection Of Sexual Minorities In International Criminal Law,” *Russian Law Journal* 6, no. 1 (2018): 36, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3122271](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3122271).

punished for deviating the preconceived gender narratives imposed through roles, behaviors, activities, or attributes.<sup>12</sup> Various types of gender-based crimes such as rape, enslavement, torture, or murder are inflicted on those who do not conform to gender roles, which ultimately can add up to the threshold and requirements to be classed as persecution.<sup>13</sup>

The problem of Article 7(1)(h) when referring to persecution against an identifiable group or collectivity based on gender is its definition. Gender is the only persecution category defined in the Rome Statute in Article 7(3). Gender is spelled out as “the two sexes, male and female, within the context of society.”<sup>14</sup> This definition was the result of a harsh negotiation with a small coalition of conservative Islamic and Catholic countries led by the Vatican's diplomatic leverage. Their opposition regarded the inclusion of gender because of the possible understanding of the term. Indeed, including a socially constructed component of gender in the definition would have threatened the power balance of gender roles and gender rules at the basis of these patriarchal countries. The narrow vision of gender as biological sex is the foundational matrix of gender-based violence and discrimination, which erases any deviation from the societal norm and the domination of the masculine repressor. The coalition advocated for a strict interpretation of gender related to “sex” and the biological dichotomy of man/woman, thus driving home women’s rights as secondary, and excluding LGBTQIA+ rights.<sup>15</sup>

The ICC has a poor history in terms of adjudicating gender-based persecution, which adds a layer of difficulty when understanding whether sexual orientation and gender identity persecution could fall under the jurisdiction of the Court. The ICC has never found itself faced with cases of

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<sup>12</sup> The Office of the Prosecutor of the International Criminal Court, rep., *Policy Paper on Sexual and Gender-Based Crimes* (The Hague: International Criminal Court, 2014), 3  
<https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>.

<sup>13</sup> Lisa Davis, “Dusting Off The Law Books,” 5-6.

<sup>14</sup> International Criminal Court, *Rome Statute*, art. 7(3), 4.

<sup>15</sup> Lisa Davis, “Dusting Off The Law Books,” 8-9.

sexual or gender minority-based persecution to adjudicate.<sup>16</sup> The ICC was asked, for example, to investigate the Islamic Republic of Syria and Iraq (ISIS) for gender-based crimes carried out also against gender non-conforming persons and perceived homosexuals. This attempt at investigation failed, which underscores why this discussion is relevant to international criminal law.<sup>17</sup>

An initial clarification of gender applied by the Court is to be found in the *Mbarushimana* case.<sup>18</sup> The Court stated that gender persecution may arise from discriminatory acts against a female or a male, members of the same collectivity, that are targeted in diverging ways and by different types of violence depending on how their gender roles are perceived in the context of society.<sup>19</sup>

The issue of understanding whether sexual orientation persecution falls into gender-based persecution is highly debated. The perpetrator of the persecutory acts commits crimes because the victim diverts from the gender rules of choosing the “socially appropriate” partner. This means that gender expectations and heteronormativity of society, states, regimes, or non-state armed groups are to be considered, recalling the formula “within the context of society” of Art. 7(3).<sup>20</sup> The expectations of compliance with gender stereotypes – such as a man being attracted to a woman and vice versa – shape every society worldwide, albeit to different degrees.<sup>21</sup> Persecution based on sexual orientation lies in the transgression of imposed gender rules. Under UN rationale, gender means the socially constructed duties assigned to men and women because of their sex. This could be further clarified by raising the notions of male/female and masculine/feminine. These dichotomies are relevant since they could serve the purpose of legally comprehending sexual orientation as a discriminatory base for crimes against humanity.<sup>22</sup>

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<sup>16</sup> Valérie V. Suhr, *Rainbow Jurisdiction at the International Criminal Court: Protection of Sexual and Gender Minorities under the Rome Statute* (The Hague: T.M.C. Asser Press, 2022), 213-214.

<sup>17</sup> Lisa Davis, “Reimagining Justice For Gender-Based Crimes At The Margins: New Legal Strategies For Prosecuting ISIS Crimes Against Women And LGBTIQ Persons,” *William & Mary Journal of Race, Gender, and Social Justice* 24, no. 3 (2018): 515, <https://scholarship.law.wm.edu/wmjowl/vol24/iss3/4/>.

<sup>18</sup> *The Prosecutor v Callixte Mbarushimana* ICC, ICC-01/04-01/10 (International Criminal Court, 2011).

<sup>19</sup> Lisa Davis, “Dusting Off The Law Books,” 14.

<sup>20</sup> ICC, *Rome Statute*, art. 7(3), 4.

<sup>21</sup> Suhr, *Rainbow Jurisdiction at the International Criminal Court*, 243-244.

<sup>22</sup> Đurić, Roksandić, and Bogush, “Legal Protection of Sexual Minorities,” 38-39.

Assuming it is agreed that the Rome Statute comprises a socially constructed notion of gender, some have argued against the inclusion of sexual orientation. In this case, they would be relying on the first part of Art. 7(3) that refers to biological sexes (male and female). Still, the dichotomy prescribed in the ICC Statute does not exclude discrimination based on sexual orientation, but instead reinforces it. Creating a binary definition permits discrimination of anything that falls beyond the binary nature of the definition itself, i.e., homosexuality, bisexuality, transgenderism, etc.

Most homosexual or bisexual persons belong to the biological binary part of the definition of gender, and discrimination against them originates from their non-compliance with gender roles. Those who support this understanding believe that sexual orientation could fall under gender-based persecution because of the second part of the definition, i.e., “within the context of society.” For example, this vision has been supported by the former Gender Advisor to the ICC Catharine MacKinnon, who denounced the failure of the Statute to protect sexual minorities, arguing that crimes of discrimination against gay, bisexual, and lesbian individuals are always gendered.<sup>23</sup>

Henceforth, based on this view, the wording of gender persecution encompassed in the ICC Statute can be interpreted to include sexual orientation-based discrimination because of the social construction intrinsic in the understanding of the term gender and the roots of the persecutory discrimination based on the victims' perceived non-compliance with gender roles by the perpetrators.<sup>24</sup>

### **Persecution of gender minorities: are they entitled to protection under ICL?**

The persecution of gender minorities and their protection under international criminal law is legally more challenging. As to the wording of the Rome Statute, two criteria should be met to

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<sup>23</sup> Catharine Alice MacKinnon, “Creating International Law: Gender As Leading Edge,” *Harvard Journal of Law and Gender* 36, no. 1 (2013): 105, <https://harvardjlg.com/wp-content/uploads/sites/19/2012/01/2013.3.pdf>.

<sup>24</sup> Suhr, *Rainbow Jurisdiction at the International Criminal Court*, 243-245.

adjudicate whether gender-based persecution encompasses persecution of gender minorities. Indeed, the perpetrator of the alleged persecution must identify the targeted individual as either a man or a woman, and then as infringing on the accompanying gender norms.<sup>25</sup>

The binary male/female phrasing of Art. 7(3) entails that the perpetrator must foresee in the targeted group either one of the two biological sexes. This seems to preclude the protection of non-binary transgender or intersex individuals, based on the *nullum crimen*<sup>26</sup> principle sanctioned by Article 22 of the Rome Statute.<sup>27</sup> Certain gender minorities may still recognize themselves in the gender dichotomy of male and female, but other gender minorities do not fall within the binary system. However, the perpetrator of the crime typically still recognizes victims as either male or female.

When discrimination against gender minorities occurs, perpetrators tend to hold the viewpoint that only two natural sexes exist in line with the sex-assigned-at-birth mentality. Explaining this notion is the fact that crimes committed against transgender individuals frequently include forced exposure of the victims' genitals to ascertain the biological sex of the person. Such actions are clearly engrained in and fueled by a binary vision of the gender system.<sup>28</sup> On a theoretical note, Bettcher explained this type of crime with the obsession of society for the dichotomy of appearance and reality, and the interconnection it had with the deceiver and pretender linked to gender identity and the sexed body. Individuals whose gender presentation and genitalia are perceived to be mismatched are then subject to accusation of being liars or impostors, which in turn can lead to heinous violations by forcibly verifying the misalignment of how they present themselves and

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<sup>25</sup> See note above, 246.

<sup>26</sup> Short for *nullum crimen sine lege*. This principle means that conduct can only constitute a crime if it was considered to be a crime under applicable law at the time the act was committed. It is inscribed in Art. 22 of the Rome Statute.

<sup>27</sup> International Criminal Court, *Rome Statute*, art. 22, 14.

<sup>28</sup> Suhr, *Rainbow Jurisdiction at the International Criminal Court*, 246-247.

their sex features. This has been testified in the famous public cases of Gwen Araujo and Brandon Teena assassination that involved forced genital exposure to verify biological sex.<sup>29</sup>

Many transgender individuals still fall within the binary gender system *ex-post* their sex transition; however, they are still discriminated against because they do not respect the expectations of their biological sex assigned at birth. For instance, a transgender woman is discriminated against because she is not perceived as a “real woman”, and/or because she is seen as a man who violated his gender role by transitioning to the other sex. Therefore, it could be stated that transgender individuals fall under the ICC Statute definition of gender because they respect the binary nature of its phrasing. Indeed, the perpetrator of the persecutory acts defines their targeted group by recognizing transgender persons either as male or female. In light of what has been stated, it seems that persecution of transgender persons could fall under the term “gender” as defined in the Rome Statute.<sup>30</sup>

The matter becomes legally challenging when we consider non-binary, agender, or gender fluid individuals. They transcend the dichotomy of male/female and refuse to comply with the gender roles attached to the binary system of gender. According to their self-perception, these individuals fall beyond the definition of gender-based persecution found in the Rome Statute. Nonetheless, it is the role of the Court to investigate the intention of the perpetrator of the acts. Gender-based persecution as set in the ICC Statute could still include transgender people who do not conform to either male or female roles, provided that the perpetrator had discriminated against that individual on the basis they had infringed upon their “correct” gender role.

Intersex persons are born with primary and/or secondary sexual characteristics that do not fall under the binary gender system of male and female. Intersex is considered by some as a third gender. Still, physicians and states prefer to assign the closest sex to the physical appearances of

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<sup>29</sup> Talia Mae Bettcher, “Evil Deceivers and Make-Believers: On Transphobic Violence and the Politics of Illusion,” *Hypatia* 22, no. 3 (2007): 52-53, <https://www.jstor.org/stable/4640081>.

<sup>30</sup> Suhr, *Rainbow Jurisdiction at the International Criminal Court*, 248.

these individuals, and medically intervene (if necessary) to “correct” their features to their assigned sex.<sup>31</sup> Genital surgeries on intersex individuals usually happen in infantile age without the informed consent of the concerned person or that of the parents as testified by several reports of the UN Human Rights Council and independent inquiries of Amnesty International.<sup>32</sup> The main aim of physicians is including these individuals in the gender dichotomy of male/female.

As reported by the Special Rapporteur Méndez,<sup>33</sup> intersex individuals undergo deliberate permanent gender surgeries which will assign them to one of the two sexes after having analyzed the appearance of their genitalia. However, these surgeries are accompanied by lifelong hormonal therapies, and involuntary sterilization. These intentional decisions to align an intersex children with the binary gender system through the use of the above mentioned means, has been shown to cause unintended grave harm to the physical integrity and psychological well being of these individuals. Therefore, intersex individuals could potentially be also discriminated against on the grounds of further aggravating factors such as being perceived as physically or mentally disabled, or because their physical appearances do not match the expectations of masculine and feminine bodies.<sup>34</sup>

As a result, to legally deal with intersex persecution we shall intrinsically consider a socially constructed notion of gender. This would mean that intersex individuals are not guaranteed protection under gender-based persecution by following Article 7(3) of the Rome Statute. The ICC

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<sup>31</sup> María Manuela Márquez Velásquez, “Intersex: A Neglected Category in the Understanding of Gender-Based Crimes at the ICC?,” *Opinio Juris*, March 9, 2022, <https://opiniojuris.org/2022/03/09/intersex-a-neglected-category-in-the-understanding-of-gender-based-crimes-at-the-icc/>.

<sup>32</sup> UN Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez* (Geneva: UN Human Rights Council, 2013), para. 77, [https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53\\_English.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf); Amnesty International, *First, Do No Harm: Ensuring the Rights of Children with Variations of Sex Characteristics in Denmark and Germany* (Amnesty International, 2015), para. 31-36, <https://www.amnesty.org/en/documents/eur01/6086/2017/en/>

<sup>33</sup> UN Human Rights Council, *Report of the Special Rapporteur on Torture*, para. 77.

<sup>34</sup> Suhr, *Rainbow Jurisdiction at the International Criminal Court*, 47.

Statute must not be interpreted by outpacing the wording of a provision based on the *nullum crimen* principle.<sup>35</sup>

More broadly, some scholars have stated that the “within the context of society” was meant to give room for maneuver in the interpretation of the notion of gender directly to the Court on a case-by-case basis. This appears exceedingly doubtful because it would contradict legal interpretation principles to indicate that the drafters would quarrel over the restriction of a significant term – as in the case of “gender” – and then plan to leave it up to the judges to read the phrase in a way that would contradict their compromise.<sup>36</sup>

As a result, if the requirements described above are not met in an alleged ICC investigation for gender minorities' persecution, it is extremely hard to find protection as such under the Statute's wording. In light of the Statute itself, even if we advocate for the application and interpretation of Article 7(3) in compliance with “internationally recognized human rights” as stated in Article 21(3),<sup>37</sup> it will still mean that international criminal law fails to protect transgender individuals from persecution. Indeed, international human rights regarding the protection of gender minorities are not widely accepted and are severely underdeveloped.<sup>38</sup> The substantial missing protection under the Statute to gender minorities, and the impossibility of having a rather undoubtful interpretation of the crime of gender-based persecution against these groups stands in stark contrast to the social reality in which transgender persons are highly discriminated against.

### **Conclusion and developments of the ICC: towards inclusivity?**

The *Elements of Crimes* of the Rome Statute specifies that persecution is the deprivation of fundamental rights contrary to international law on the grounds of the identity of a group or collectivity. History is filled and continues to be permeated with instances of severe deprivation of

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<sup>35</sup> Velásquez, “Intersex: A Neglected Category in the Understanding of Gender-Based Crimes at the ICC?”.

<sup>36</sup> Đurić, Roksandić, and Bogush, “Legal Protection of Sexual Minorities,” 42.

<sup>37</sup> International Criminal Court, *Rome Statute*, art. 21(3) on Applicable Law under ICC jurisdiction.

<sup>38</sup> Đurić, Roksandić, and Bogush, “Legal Protection of Sexual Minorities,” 43.

fundamental rights on the basis of sexual orientation and gender identity discrimination. The Nazis' persecution of homosexuals during World War II was not a detour in history. Examples of persecution against the LGBTQIA+ community were recorded in ISIS crimes, in the Chechen Republic's "Anti-Gay Purge" and in a state-sponsored mission to erase the community in Uganda or in Poland's "LGBT-free" zones. Simply put, these crimes are left unaddressed or forgotten due to heteronormativity and the under-examination of gender-related intersectional issues in international law.<sup>39</sup>

As extensively demonstrated, the ICC has a poor record in prosecuting cases of gender-based persecution, which adds substantial challenges to interpreting and developing the notion of "gender" by jurisprudence. However, recent developments by the ICC could offer a glimmer of hope. The Appeals Chamber has confirmed jurisdiction in the case *Abd-Al-Rahman*<sup>40</sup> referred by the UN Security Council. The Pre-Trial Chamber has corroborated the charges of gender persecution linked to ethnic and political motives, which will require a compounded examination based on intersectional discriminatory grounds. The decision of the Court is also relevant because the charges upon the perpetrator include gender-based violence against the "Fur males" subjected to cruel, inhuman, or degrading treatment.<sup>41</sup> Again, this will constitute an occasion for the Court to clarify its understanding of the ICC Statute notion of "gender".

Another recent and relevant case is *Al Hassan*,<sup>42</sup> a pending case in front of the Court representing the first defendant to be charged with crimes against humanity of gender-based persecution in front of the ICC. This trial has promising significance *vis-à-vis* the status of

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<sup>39</sup> For examples of LGBTQIA+ prosecution refer to note 7. Specifically for the Chechen case refer to note 14.

<sup>40</sup> The Prosecutor v Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb") ICC, ICC-02/05-01/20 OA8 ICC-02/05-01/20-503 (International Criminal Court, 2021).

<sup>41</sup> Ana Martín, "The Potential Of Gender Persecution In ICC Case Abd-Al-Rahman: A Twofold Opportunity To Interpret Its Customary Status And Intersectional Discrimination," *Opinio Juris*, March 24, 2022, <http://opiniojuris.org/2022/03/24/the-potential-of-gender-persecution-in-icc-case-abd-al-rahman-a-twofold-opportunity-to-interpret-its-customary-status-and-intersectional-discrimination/>.

<sup>42</sup> The Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud ICC, ICC-01/12-01/18 (International Criminal Court, 2020).

gender-based persecution in international criminal law. Again, intersectionality comes to the forefront in the case since the charges encompass both gender and religion.<sup>43</sup>

These cases could create a positive precedent for the inclusion of sexual and gender minorities under the protection of the Statute. First of all, these cases' outcomes will influence future adjudications and eventually clarify legal loopholes in the definition of gender persecution. The possible positive advancement of these precedents could also have an impact on expanding the pursuit of charges against perpetrators of such crimes that the OTP will commence.

Ideally, the UN system would also be affected by the repercussions of these proceedings. This could help advance the reach of the ICC jurisdiction due to the possibility of the UN Security Council to refer crimes committed by non-state parties to the Rome Statute. Positive evidence of the possible result arising from these cases is to be found in the new Policy Initiative announced in December 2021 by the ICC Prosecutor K.A. Khan.<sup>44</sup> The Initiative will delve into advancing accountability for crimes against humanity of prosecution on the grounds of gender. The hope is that the Prosecutor could clarify on the current challenges and legal voids in matters regarding sexual orientation and gender identities.

Many commentators such as Rosemary Grey, Indira Rosenthal, and Valerie Oosteverld have advocated to capitalize on the momentum timidly set by the former OTP 2014 Policy Paper and its socially constructed notion of gender.<sup>45</sup> Their appeals will probably be brought on throughout the consultation for the new OTP Policy Initiative. The aim shall be foreseeing gender-based

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<sup>43</sup> Alexandrah Bakker, "Gender-Based Persecution At The International Criminal Court: Questions And Implications," *Public International Law & Policy Group*, November 25, 2020, <https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2020/11/25/gender-based-persecution-at-the-international-criminal-court-questions-and-implications>.

<sup>44</sup> "The Office of the Prosecutor Launches Public Consultation on a New Policy Initiative to Advance Accountability for Gender Persecution under the Rome Statute," International Criminal Court, December 21, 2021, <https://www.icc-cpi.int/news/office-prosecutor-launches-public-consultation-new-policy-initiative-advance-accountability>.

<sup>45</sup> Paul Williams, "Gender-Based Persecution at the International Criminal Court: Questions and Implications — Public International Law & Policy Group," *Public International Law & Policy Group*, December 1, 2020, <https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2020/11/25/gender-based-persecution-at-the-international-criminal-court-questions-and-implications>.

persecution as a crime including discrimination against persons perceived in contrast to their gender roles, rules, and expectations.

The path is still tumultuous for international criminal law to be inclusive, but the first signs of change may be on the way.

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