Gender-based Persecution as a Crime against Humanity: The Road Ahead

Abstract

In 2019, in the case of *Prosecutor v. Al Hassan* the ICC Prosecutor sought confirmation of the first charge of gender-based persecution in the ICC. Given that no previous international tribunal had jurisdiction to prosecute persecution on ‘gender’ grounds, this was an important first step towards developing the jurisprudence on this crime. Meanwhile, the Rome Statute’s definition of ‘gender’ has been discussed and debated in the International Law Commission, in the context of the ongoing development of draft articles on crimes against humanity. In the context of these recent developments in the ICC and International Law Commission, this article closely examines the Rome Statute’s definition of ‘gender’, and explores what ‘gender’ means as a ground of persecution. We conclude that as a result of the definition agreed to at the 1998 Rome Diplomatic Conference, the Rome Statute’s definition of ‘gender’ captures the social aspects of gender, consistent with widely accepted practice at the time (and in the intervening two decades). These are important facts to hold on to as the focus on the definition of ‘gender’ intensifies, the ICC’s jurisprudence on gender-based persecution evolves, and efforts advance to develop a new convention on crimes against humanity.

1. Introduction

In 1998, the Rome Statute of the International Criminal Court became the first international instrument to list persecution on ‘gender’ grounds as a crime against humanity, and the first to define the term ‘gender’. According to this definition, ‘gender’ refers to ‘the two sexes, male and female, within the context of society.’¹ Incorporating the term ‘gender’ into the Rome Statute was a hard-won victory for its proponents. They had to contend with sustained opposition from some States, the Holy See and a number of non-government organisations who associated the term ‘gender’ with ideas they viewed as transgressive, such as women’s empowerment, equality between the sexes, and the end of discrimination against people who

¹ ICCSt, Art. 7(3).

are lesbian, gay, bisexual, transgender, intersex, or queer (LGBTIQ).² These were some of the same opponents, with the same arguments, who have been fighting for decades against what they perceive to be the promotion of transgressive ideas about gender throughout the United Nations (UN) system.³ Despite their efforts, the term ‘gender’ is used in the Rome Statute, including as a ground of the crime against humanity of persecution. Indeed, currently, the ICC is the only international court with jurisdiction to prosecute the crime of persecution on ‘gender’ grounds.⁴

Twenty years after winning this battle and the Statute’s adoption, the ICC Office of the Prosecutor (OTP) is yet to bring allegations of persecution on the ground of gender beyond the pre-trial process in any case. However, since adopting its 2014 *Policy Paper on Sexual and Gender Based Crimes* (‘Gender Policy’), the OTP has begun to consider gender-based persecution in some of its preliminary examinations, alleging that it occurred in Afghanistan⁵ and analysing possible acts of gender-based persecution in Nigeria.⁶ Most recently, it has sought the confirmation of charges of gender-based persecution in the *Al Hassan* case, the

² See V. Oosterveld, ‘The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?’ 18 *Harvard Human Rights Journal* (2005) 55-84; C. Steains, ‘Gender Issues’ in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International, 1999) 357 at 372-375; L. Chappell, ‘Women’s Rights and Religious Opposition: The Politics of Gender at the International Criminal Court’ in Y. Abu-Laban (ed.), *Gendering the Nation State: Canadian Comparative Perspectives* (University of British Columbia Press, 2008) 139 at 151-152.

³ See, e.g.: D. Otto, ‘Holding up Half the Sky, but for Whose Benefit?: A Critical Analysis of the Fourth World Conference on Women’ 6(1) *Australian Feminist Law Journal* (1996) 7-28; J. Borger, ‘Trump administration wants to remove ‘gender’ from UN human rights documents’, *The Guardian*, 25 October 2018, available online at: <https://www.theguardian.com/world/2018/oct/24/trump-administration-gender-transgender-united-nations> (last visited 11 Jul 2019).

⁴ The special panels established by the United Nations Transitional Administration in East Timor (UNTAET) also had jurisdiction over the crime against humanity of persecution on ‘gender’ grounds. See *Regulation No. 2000/15 On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, UN Doc. UNTAET/REG/2000/15, 6 June 2000, s 5(h).

⁵ *Situation in Afghanistan*, Public redacted version of “Request for authorisation of an investigation pursuant to article 15” (ICC-02/17-7-Red), 20 November 2017 (‘Prosecutor’s Afghanistan Request’), [115]-[121].

⁶ ICC Office of the Prosecutor, *Report on Preliminary Examination Activities 2018*, 5 December 2018 (‘2018 Preliminary Examination Report’), [225].

second case from the situation in Mali.⁷ This is the first case in which the OTP has sought to charge a suspect with this crime.⁸

Meanwhile, in a parallel development, the UN International Law Commission has been preparing draft articles on crimes against humanity, with a view to the possible development of a new convention addressing these crimes. In 2015, the ILC Special Rapporteur leading this process, Sean Murphy, proposed that the definition of crimes against humanity in these draft articles mirror Article 7 of the Rome Statute,⁹ incorporating the crime of persecution on ‘gender’ grounds, as well as the Rome Statute’s definition of ‘gender’.

Considering that the development of a possible convention on crimes against humanity might be an opportunity to review the definition of ‘gender’, 583 non-government organisations from over 103 countries made a submission to the ILC in 2018. They proposed that the term ‘gender’ should be left undefined in a future convention on crimes against humanity, emphasising that no other ground of persecution is defined in the Rome Statute or draft articles.¹⁰ In the alternative, they proposed that the definition of ‘gender’ in a future convention on crimes against humanity be revised to reflect the ICC OTP’s *Gender Policy* which does not advance an *alternative* to the Rome Statute’s definition of ‘gender’, but rather unpacks that definition, explaining that it:

...acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys.¹¹

⁷ Version publique expurgée de la ‘Version amendée et corrigée du Document contenant les charges contre M. Al HASSAN Ag ABDOUL AZIZ Ag Mohamed Ag Mahmoud’(ICC-01/12-01/18-335-Corr-Red), 2 July 2019 (*‘Al Hassan DCC’*), [945]-[974].

⁸ In 2010, at the (then) Prosecutor’s request, Pre-Trial Chamber I included a charge of persecution on ‘gender’ grounds on the arrest warrant for Callixte Mbarushimana. However, that charge was not included in the DCC, and thus was not discussed in the confirmation of charged decision. See *Mbarushimana*, Prosecution’s Application under Article 58 (ICC-01/04-01/10-11-Red2), 20 August 2010, Count 11; *Mbarushimana*, Arrest Warrant (ICC-01/04-01/10-2-tENG), 28 September 2010, [10].

⁹ *First report on crimes against humanity by Sean D. Murphy, Special Rapporteur*, UN Doc. A/CN.4/68017 February 2015, [177].

¹⁰ L. Davis et al., Submission Re: The Definition of Gender in the Draft Crimes Against Humanity Convention, 1 December 2018, 1, 3, available online at: <https://www.madre.org/international-crimes-against-humanity-treaty> (last visited 11 July 2019).

¹¹ ICC Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes* (June 2014), 3

The submission further argued that a new crimes against humanity convention should expressly recognise other grounds of persecution including ‘sexual orientation, gender identity and sex characteristics.’¹² At no point did the submission accept that persecution on the aforementioned grounds is *excluded* by the Rome Statute’s definition of ‘gender’. Nor did it argue that the Statute’s definition is incapable of being construed as meaning that gender is socially constructed as contended in the OTP’s *Gender Policy*. Rather, the concern expressed in the submission was that the Rome Statute’s definition used ‘outdated and opaque language’ which, if replicated, could be misinterpreted as conflating gender with biological sex.¹³

The positions advanced in this submission appear to have had an impact. They were reflected in subsequent comments by some States on the draft articles on crimes against humanity, which acknowledged that the Rome Statute’s definition could be clearer,¹⁴ a position that has previously been taken by some scholars.¹⁵ Likewise, the twenty-four UN experts who provided comments on the draft articles echoed the submission’s language to express their ‘concern’ that the draft articles ‘adopt the outdated and opaque definition of gender from the Rome Statute’.¹⁶ These twenty-four UN experts observed that ‘[i]nternational human rights law recognizes gender as the social attributes associated with being male and female’, and that twenty-five years of practice has demonstrated ‘wide recognition of gender as a social construct that permeates the context in which human rights abuses take place’.¹⁷ They acknowledged that

¹² Davies et al, *supra* note x, 10. The other proposed grounds were ‘disability, Indigenous status, age, social origin, language, and migrant and refugee status.’

¹³ *Ibid*, 2.

¹⁴ For example, New Zealand stated that ‘New Zealand domestic law recognises biological sex and gender identity as distinct concepts. For the purposes of a convention [on crimes against humanity], New Zealand would prefer a definition which *better reflected* that distinction and the ways in which gender is experienced and expressed in contemporary society, if a definition is considered necessary at all’ (emphasis added). International Law Commission, *Crimes against humanity: Comments and observations received from Governments, international organizations and others*, A/CN.4/726, 21 January 2019, 43.

¹⁵ E.g. Cossman states: ‘The conception of gender here is explicitly limited to the two biological sexes. It is not entirely clear that it is even intended to include the more typical understanding of gender as socially constructed roles and values, although that may be the intention of the words “within the context of society”.’ B. Cossman, Gender Performance, Sexual Subjects and International Law’ 15(2) *Canadian Journal of Law & Jurisprudence* (2002) 281-296 at 284. To give another example, Ruth Philips states: ‘[t]he Statute defines gender in a way that renders practically indistinguishable the difference between gender and sex, although it leaves slight room for an interpretation of gender that acknowledges the cultural construction of sex roles.’ R. Philips, ‘Too Close to Home? International Criminal Law, War Crimes and Family Violence’ 24 *Thomas Jefferson Law Review* (2002) 229-238 at footnote 14.

¹⁶ Joint Comments to the Draft Crimes Against Humanity Convention to the International Law Commission by 24 Special Rapporteurs, Working Groups and Independent Experts (30 November 2018), 2, available online at <https://www.ohchr.org/Documents/Issues/Executions/LetterGender.pdf> (last visited 11 July 2019).

¹⁷ *Ibid*, 2, 6.

‘gender *is* understood as a social construction’ under the Rome Statute’s definition (emphasis added), but noted that this definition has ‘never been adopted in any subsequent human rights instrument nor cited in tribunal jurisprudence.’¹⁸ They concluded, somewhat inconsistently:

We therefore urge the International Law Commission to either remove the definition of gender in article 3(3) of the draft crimes against humanity convention (since no other persecutory category comes within a definition) or to insist on the social construction of gender as it is widely recognized to be.¹⁹

Regrettably, some States appeared to directly misinterpret the definition of gender in the Rome Statute as relating to solely biological sex (male or female), without recognising the socially constructed nature of gender.²⁰ As a result of these consultations, in May 2019 the International Law Commission adopted a draft article defining crimes against humanity which lists persecution on ‘gender’ grounds as a prohibited act, without defining the term ‘gender’.²¹

In the context of these recent developments in the ICC and International Law Commission, this article closely examines the Rome Statute’s definition of ‘gender’. It also explores what ‘gender’ means as a ground of persecution: a question that has been addressed to some extent in previous scholarship,²² but not in as much depth as we go into here, nor necessarily with the same conclusions. We acknowledge that there may be benefits to elaborating on the definition of ‘gender’ in a new convention on crimes against humanity, consistent with the OTP’s interpretation and the more detailed definitions of ‘gender’ in international human rights law and practice. The ICC can also elaborate on the Rome Statute’s definition in Article 7(3) along these lines in its caselaw. However, it is critical to address and head off any misinterpretation

¹⁸ Ibid, 2.

¹⁹ Ibid, 6.

²⁰ For example, Argentina commented that the definition of ‘gender’ found in the Rome Statute ‘sets forth a binary gender system based on biological factors; it does not take into account the broad concept of gender identity.’ International Law Commission, *supra* note x (currently note 15), 30.

²¹ *Crimes against humanity Texts and titles of the draft preamble, the draft articles and the draft annex provisionally adopted by the Drafting Committee on second reading*, UN Doc. A/CN.4/L.935, 15 May 2019.

²² E.g. V. Oosterveld, ‘The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?’ 18 *Harvard Human Rights Journal* (2005) 55-84; V. Oosterveld, ‘Gender, Persecution, and the International Criminal Court: Refugee Law’s Relevance to the Crime Against Humanity of Gender-Based Persecution’ 17(1) *Duke Journal of Comparative and International Law* (2006) 49-89; L. Davis, ‘Reimagining Justice for Gender-Based Crimes at the Margins: New Legal Strategies for Prosecuting ISIS Crimes Against Women and LGBTIQ Persons’ 24(3) *William & Mary Journal of Race, Gender, and Social Justice* (2018) 513-558; R. Grey, *Prosecuting Sexual and Gender-Based Crimes in the International Criminal Court* (Cambridge University Press, 2019), 310-314.

of that this definition, as seems to have arisen in some comments on the draft articles on crimes against humanity. The fact that the Rome Statute's definition is 'skeletal'²³ is not a basis for interpreting it as equating gender with biological sex (male or female), ignoring the hard fought recognition of gender as a social construct achieved by the majority of states and the Women's Caucus for Gender Justice at the 1998 Rome Diplomatic Conference. To the contrary, because of the agreement reached at that conference, the Rome Statute's definition not only enables but *requires* recognition of the socially constructed nature of gender. It could therefore be applied to prosecute any act of persecution that is based on beliefs about what it means to be 'male' and 'female', including acts aimed at enforcing a persecutor's beliefs about the ideal behaviour for males and females, respectively.

Cognisant that the extent to which people enjoy gender equality differs throughout the world, and that discrimination against women and LGBTIQ people is the norm in many, if not all, countries, the article also briefly considers what this means for gender-based persecution. We argue that the answer in the Rome Statute is clear: discrimination on gender grounds can constitute persecution if it involves the severe deprivation of fundamental rights contrary to *international* law, even if those rights are not recognised, or respected, in the relevant State.

This article is divided into four parts. After this introduction, Part 2 hones in on the Rome Statute's definition of 'gender'. It demonstrates that under this definition, 'gender' is a social construct. In Part 3, we turn our focus to the crime against humanity of persecution and the application of the Rome Statute's definition of 'gender' to that crime. We show that the crime of gender-based persecution involves persecution *on gender grounds* (as opposed to *against a gender group*). We also argue that this crime could be used, *inter alia*, to prosecute violations that seek to enforce a perpetrator's ideas about what it means to be 'male or 'female', including sexual orientation or gender identity for each sex. Part 4 considers the interplay between local conceptions of gender relations and the crime of persecution on gender grounds. It argues that gender-based persecution need not be rare or atypical in order to qualify as a crime under the Rome Statute. As such, even if the relevant conduct is permissible according to local law or customs, this has no bearing on the ICC's jurisdiction to prosecute that conduct as persecution on 'gender' grounds. Part 5 considered the ICC's emerging approach to allegations of persecution on gender grounds, taking into account the *Al Hassan* case. We conclude with some

²³ Oosterveld, *supra* note x, 67.

thoughts on how the ICC's jurisprudence on gender-based persecution might develop in the decades ahead.

1. Interpreting the Definition of 'Gender' in Article 7(3)

Under Article 21(1)(a) of the Rome Statute, the first source of law applicable in the ICC is the Statute itself. The Statute, therefore, is the starting point for interpreting the term 'gender'. Article 7(3) of the Statute defines 'gender' as follows:

[T]he term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above.

According to the ICC OTP, '[t]his definition acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys.'²⁴ The OTP's understanding of the Article 7(3) definition of 'gender' as a social construct is also widely supported by academics²⁵ and other experts, including twenty-four United Nations (UN) experts who recently provided comments on this definition in the context of the draft articles on crimes against humanity.²⁶ As detailed below, this interpretation is confirmed by the text of Article 7(3) itself, as well as its drafting history.

A. Ordinary meaning of the terms

In interpreting the Rome Statute, it is the Court's practice to apply the Vienna Convention on the Law Treaties (VCLT).²⁷ Article 31(1) of the VCLT states that:

²⁴ ICC Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes* (June 2014), 3.

²⁵ E.g.: B. Bedont and K. Hall-Martinez, 'Ending Impunity for Gender Crimes under the International Criminal Court' 6(1) *Brown Journal of World Affairs* (1999) 65-85 at 68; R. Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law' 46 *McGill Law Journal* (2000) 217-240 at 237; Oosterveld 2005, *supra* n x, 74-75; Grey, *supra* note x, 50, 311.

²⁶ E.g.: *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict, Update to the Final Report Submitted by Ms. Gay J. McDougall, Special Rapporteur*, U.N. Doc E/CN.4/sub.2/2000/21, 6 June 2000, [26]; Joint Comments to the Draft Crimes Against Humanity Convention to the International Law Commission by 24 Special Rapporteurs, Working Groups and Independent Experts (30 November 2018), available at <<https://www.ohchr.org/Documents/Issues/Executions/LetterGender.pdf>>: 'we recognize that gender is understood as a social construction under this definition'.

²⁷ E.g. *Lubanga*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction (ICC-01/04-01/06-3121-Red), 1 December 2014, [227]; *Al Bashir*, Final Submissions of the Prosecution following the Appeal Hearing (ICC-02/05-01/09-392), 28 September 2018, [6].

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The ordinary meaning of the terms used in Article 7(3) demonstrates that ‘gender’ is a socially constructed ground. This is evident from the terms ‘the two sexes, male and female, *within the context of society*’, which recognise that perceptions and experiences of what it means to be ‘male’ and ‘female’ depend on social factors. As the Office of the Prosecutor’s interpretation correctly acknowledges, such factors include beliefs about the appropriate ‘roles, behaviours, activities, and attributes’ for people depending on their status as ‘male’ or ‘female’: beliefs which vary across time and place, and which affect the opportunities available to each person.

The second sentence of the definition states: ‘The term “gender” does not indicate any meaning different from the above.’ This sentence neither restricts nor expands the statutory definition of ‘gender’. It simply affirms that the definition in the first sentence of Article 7(3) applies in the ICC, an interpretation that is confirmed by the drafting history.

To interpret the Rome Statute’s definition of ‘gender’ solely as a biological category comprising males and females, as some commentators have suggested is possible, would be nonsensical or not ‘in good faith’ as required by Article 31(1) of the VCLT, because it would effectively ignore the phrase ‘within the context of society’.

B. The Drafting History

The drafting history of the Rome Statute confirms that gender, as defined in Article 7(3), is a socially constructed ground rather than a biological category. The drafting history is relevant under Article 32 of the VCLT, which states:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31 ...

Prior to the 1998 Rome Conference, the term ‘gender’ appeared in several of the draft statutes prepared by the Preparatory Committee on the Establishment of an International Criminal Court. The first documented example was in 1996, when several States proposed that the

composition of the Court's judiciary 'should ensure gender balance'.²⁸ The next was in February 1997, when 'gender' was first listed as a ground of persecution in the draft Statute (this ground of persecution was bracketed, indicating it was not accepted by consensus at that point in the negotiations).²⁹ The December 1997 draft Statute included a provision requiring the ICC to interpret and apply the law without 'adverse discrimination of any kind, including discrimination based on gender'.³⁰ The April 1998 draft Statute incorporated the latter proposal without brackets,³¹ retained the bracketed reference to persecution on 'gender' grounds,³² and included provisions recognising the need for 'gender balance' and 'expertise on issues related to sexual and gender violence' in the judiciary,³³ and requiring the Prosecutor to appoint advisors with expertise on 'sexual and gender violence'.³⁴

At the Rome Diplomatic Conference, the provision regarding the Prosecutor's advisors was agreed on within the first two weeks.³⁵ A small bloc of States then lobbied against the remaining references to 'gender' because they were concerned that including the term in those provisions could criminalize discrimination on the basis of sexual orientation or gender identity.³⁶ However, the majority of other States insisted that the term 'gender' be retained. According to Valerie Oosterveld, who was a member of the Canadian delegation during the negotiations:

²⁸ Report of the Preparatory Committee on the Establishment of the International Criminal Court, Vol. I (Proceedings of the Preparatory Committee During March-April and August 1996), UN Doc. A/51/22 (1996), [36].

²⁹ Decisions Taken by the Preparatory Committee at Its Session held from 11 to 21 February 1997, UN Doc. A/AC.249/1997/L.5 (12 March 1997), Annex I; Oosterveld 2005, *supra* note x, 59.

³⁰ Decisions Taken by the Preparatory Committee at Its Session held from 1 to 12 December 1997, UN Doc. A/AC.249/1997/L.9/Rev.1 (18 December 1997), note 11.

³¹ Report of the Preparatory Committee on the Establishment of the International Criminal Court (Part I: Draft Statute of the International Criminal Court), UN Doc. A/CONF.183/2/Add.1 (14 April 1998), 47.

³² *Ibid*, 26.

³³ *Ibid*, 64.

³⁴ *Ibid*.

³⁵ Oosterveld 2005, *supra* note x, 60-61.

³⁶ Oosterveld 2005, *supra* note x, 63; C. Steains, 'Gender Issues' in R. S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International, 1999) 357 at 371. See, for example, the statement of the delegate for Azerbaijan, documented in *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June - 17 July 1998 Official Records*, Vol II, 272, [61].

Countries supporting use of the term were committed to ensuring that any definition adopted would reflect that ‘gender’ refers to socially constructed understandings of what it means to be male or female.³⁷

Oosterveld’s account is corroborated by Cate Steains, a member of the Australian delegation. As Steains recalls, several States insisted that:

[T]he inclusion of the term ‘gender’ in the Statute must represent an accurate reflection of the current state of international law, and therefore needed to capture sociological aspects rather than mere biological differences (emphasis added). They pointed out that for the preceding decade the United Nations system had consistently used the term ‘gender’ rather than ‘sex’, in recognition of the fact that ‘gender’ encompassed biological and sociological aspects whereas ‘sex’ referred only to the biological distinction between men and women. This group of countries, accordingly, argued in favor of a broad definition of gender capable of being interpreted to include the socially constructed roles of men and women.³⁸

Those states advocating a definition reflecting that gender is a social construct particularly referenced the UN Secretary General’s 1996 report on the Fourth World Conference on Women (‘the Beijing Conference’),³⁹ which states that:

In United Nations usage, gender refers to the socially constructed roles played by women and men that are ascribed to them on the basis of their sex.⁴⁰

Faced with this support for including the term ‘gender’ in the Statute, the smaller bloc dialled back their demands. They indicated that the term ‘gender’ could remain in the relevant provisions, so long as it was defined as ‘men, women and children’ or ‘the two sexes, male and female’, that is, equating the term ‘gender’ with biological sex.⁴¹ Again, that effort was rejected and, in the final round of negotiations, the parties settled on a definition that expressly refers

³⁷ Oosterveld 2005, *supra* note x, 64.

³⁸ Steains, *supra* note x, 373 (emphasis added).

³⁹ Bedont and Hall-Martinez, *supra* note x, at 68.

⁴⁰ Bedont and Hall-Martinez, *supra* note x, 68; Implementation of the outcome of the Fourth World Conference on Women: Report of the Secretary-General, UN Doc. A/51/322, 3 September 1996, [9].

⁴¹ Oosterveld 2005, *supra* note x, 64.

to ‘the two sexes, male and female, *within the context of society*.’⁴² While open to elaboration by the judges,⁴³ the first sentence of the definition in Article 7(3) agreed on at Rome clearly defines gender as a social construction, and goes beyond equating ‘gender’ with ‘biological sex’.

The second sentence of the definition states: ‘The term “gender” does not indicate any meaning different from the above.’ Steains noted that this sentence ‘was included upon the insistence of the “anti-gender” delegations, despite arguments by the ‘pro-gender’ delegations that it was superfluous.’⁴⁴ Indeed, this sentence is self-evidently superfluous: it merely confirms that the previous sentence defines ‘gender’ for the purposes of the ICC.

Thus, the drafting history of Article 7(3) shows that definitions that sought to conflate the terms ‘sex’ and ‘gender’ were proposed at Rome, but were ultimately rejected in order to capture the social aspect of gender, in line with the 1995 Beijing Platform for Action⁴⁵ and with previous UN definitions of ‘gender’.⁴⁶

C. Gender’ in International Human Rights Law

Article 21(3) of the Rome Statute requires the ICC to interpret and apply all sources of law applicable in the Court – including the Statute and the Elements of Crimes⁴⁷ – ‘consistent with internationally recognized human rights’. It is therefore relevant to observe that in international human rights law and practice, the term ‘gender’ has consistently been interpreted as a socially constructed ground rather than a biological category.

For example, in the one treaty besides the Rome Statute that expressly defines ‘gender’, namely the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, ‘gender’ is defined to mean ‘the socially constructed roles, behaviours,

⁴² ICCSt, Art. 7(3) (emphasis added).

⁴³ Oosterveld, *supra* note x, 67.

⁴⁴ This sentence comes from Steains’ original version of her chapter. The published version of this chapter contains an error: it claims that this second sentence was ‘included to forestall any implication that the issue of sexual orientation could be raised in connection with article 7(3).’ Steains, *supra* note x, 374. However, that claim is incorrect: it was added by the editor without Steains’ permission. See Oosterveld 2005, *supra* note x, 77 (footnote 132).

⁴⁵ Beijing Declaration and Platform for Action, Report of the Fourth World Conference on Women Beijing, 4-15 September 1995 (A/CONF.177/20/Rev.1), [27], [48], [180(b)], [245(a)], [262].

⁴⁶ See Oosterveld 2005, *supra* note x, 2/Rev.1), [27], [48], [180(b)], [245(a)], [262].

⁴⁶ See Oosterveld 2005, *supra* note x, 67.

⁴⁷ The Elements of Crimes is supplementary instrument which assists the Court in the interpretation and application of the crimes enumerated in the Rome Statute. See ICCSt, Art. 9.

activities and attributes that a given society considers appropriate for women and men.’⁴⁸ The term ‘gender’ is not used or defined in other international or regional human rights treaties. However, the human rights treaty bodies, UN Human Rights Council special procedures and UN agencies involved in the promotion and protection of human rights all recognise the term ‘gender’ and define it as a social construct. For example, in its General Recommendation 28, the Committee on the Elimination of Discrimination against Women stated that the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) covers ‘gender-based discrimination against women’ in addition to ‘sex-based discrimination’.⁴⁹ The Committee explained that whereas ‘sex’ means ‘biological differences between men and women’,

The term ‘gender’ refers to socially constructed identities, attributes and roles for women and men and society’s social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women.⁵⁰

Definitions of gender as a social construct have also been adopted by the UN Committees against Torture⁵¹ and Economic, Social and Cultural Rights;⁵² numerous UN Special Rapporteurs, Working Groups and independent experts⁵³ and the Office of the Special Adviser to the UN Secretary General on Gender issues and Advancement of Women.⁵⁴ Gender is also defined as a social construct by UN Agencies, including the Office of the High Commissioner

⁴⁸ *Council of Europe Convention on preventing and combating violence against women and domestic violence* (‘Istanbul Convention’), CETS 210, 11 May 2011 (entered into force 1 August 2014), Art. 3(c).

⁴⁹ CEDAW, General Recommendation 28, CEDAW/C/GC/28, 16 December 2010, [5].

⁵⁰ Ibid. See also: CEDAW, General Recommendation 33, UN Doc. CEDAW/C/GC/33, 23 July 2015, [7]; CEDAW, General Recommendation 25, UN Doc. A/59/38, 2004, footnote 2.

⁵¹ Committee against Torture, Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. CAT/C/57/4 (22 March 2016), [53]; General Comment 2, CAT/C/GC/2, 24 January 2008, [22].

⁵² Committee on Economic, Social and Cultural Rights (CESCR), General Comment 16, UN Doc. E/C.12/2005/4, 11 August 2005, [14].

⁵³ See, e.g.: *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings*, Agnès Callamard, UN Doc. A/HRC/35/23, 6 June 2017, [16]-[17]. See also Joint Comments to the Draft Crimes Against Humanity Convention to the International Law Commission by 24 Special Rapporteurs, Working Groups and Independent Experts, [supra note x](#).

⁵⁴ Office of the Special Advisor on Gender Issues and Advancement of Women, *Gender Mainstreaming: Strategy for Promoting Gender Equality* (2001), available at: <https://www.un.org/womenwatch/osagi/pdf/factsheet1.pdf> (accessed 25 June 2019).

for Human Rights,⁵⁵ the UN High Commissioner for Refugees,⁵⁶ UN Women,⁵⁷ UNICEF,⁵⁸ UNESCO⁵⁹ the UN Food and Agriculture Organization,⁶⁰ and the World Health Organization.⁶¹

At the regional level, the Inter-American Court of Human Rights in a 2017 Advisory Opinion held that gender ‘[r]efers to the socially constructed identities, functions and attributes of women and men and the social and cultural significance attributed to these biological differences’.⁶² A study by the Inter-American Commission on Human Rights in 2012 states: ‘[t]he difference between sex and gender lies in the fact that the former is conceived as a biological fact and the latter as a social construction.’⁶³ The European Commission has similarly defined gender as ‘[a] concept that refers to the social differences, as opposed to the biological ones, between women and men that have been learned, are changeable over time and have wide variations both within and between cultures.’⁶⁴ Although the term ‘gender’ is yet to be defined by the African Commission on Human and Peoples’ Rights, the Commission

⁵⁵ E.g.: Office of the High Commissioner for Human Rights, Integrating a gender perspective into human rights investigations: Guidance and Practice (2018), p.7. See also: Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya: detailed findings* A/HRC/31/CRP.3 23 February 2016, [174].

⁵⁶ UNHCHR Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/01, 7 May 2002, [3].

⁵⁷ UN Women, Concepts and Definitions, available at:

<https://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm> (accessed 25 June 2019).

⁵⁸ UNICEF, Glossary of Terms and Concepts, November 2017 available at:

<https://www.unicef.org/rosa/media/1761/file/Gender%20glossary%20of%20terms%20and%20concepts%20.pdf> (accessed 25 June 2019).

⁵⁹ UNESCO’s Gender Mainstreaming Implementation Framework Baseline definitions of key concepts and terms, available online at:

<http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/BSP/GENDER/PDF/1.%20Baseline%20Definitions%20of%20key%20gender-related%20concepts.pdf> (accessed 25 June 2019).

⁶⁰ Food and Agriculture Organization of the United Nations, ‘What is gender?’ available online at:

<http://www.fao.org/3/y5608e/y5608e01.htm> (accessed 25 June 2019).

⁶¹ World Health Organization, ‘Gender, Women and Health’, available online at: <https://www.legal-tools.org/doc/a33dc3/pdf/> (accessed 25 June 2019).

⁶² I/A Court H.R., Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights), Advisory Opinion OC-24/17 of November 24, 2017, Series A No. 24, [32].

⁶³ OEA, Consejo Permanente de la Organización de los Estados Americanos, Comisión de asuntos jurídicos y Políticos. Orientación sexual, identidad de género y expresión de género: algunos términos y estándares relevantes. Estudio realizado por la Comisión Interamericana de Derechos Humanos, OEA/Ser.G. CP/CAJP/INF. 166/12, 23 April 2012, [14].

⁶⁴ European Commission – One hundred words for equality: A glossary of terms on equality between men and women (1998), available online at: <https://publications.europa.eu/en/publication-detail/-/publication/7342d801-86cc-4f59-a71a-2ff7c0e04123> (last visited 25 June 2019).

has used this term in a 2014 resolution condemning violence directed at people because of their real or imputed sexual orientation or gender identity.⁶⁵ The resolution impliedly acknowledges that gender does not mean biological sex, given that ‘gender identity’ refers to one’s chosen gender expression as opposed to one’s sex at birth.

Interpreting Article 7(3) of the Rome Statute as meaning that gender is a *social* rather than *biological* category ensures consistency with international human rights law and practice.

2. Persecution ‘on Gender Grounds’

Having examined the meaning of ‘gender’, the next question is how gender operates as a ground for persecution. The question is significant because the crime against humanity of persecution is the only crime in the Rome Statute to use the word ‘gender’. To inform future jurisprudence on this crime, we first explain how the above interpretation relates to the crime of gender-based persecution. We then explain the difference between persecution *on gender grounds* as opposed to persecution *of a gender group*. Finally, we discuss persecution on gender and other intersecting grounds.

A. Persecution based on socially constructed ideas of gender

Applying the above interpretation of Article 7(3), it follows that persecution on the grounds of ‘gender’ does not mean targeting a group because its members are either biologically ‘male’ or ‘female’. Rather, it means persecution by reason of socially constructed ideas about what it means to be ‘male’ and ‘female’.

For example, in relation to attacks on female teachers and students,⁶⁶ it would be inaccurate to conclude that such victims are targeted merely due to their biological sex, if the evidence shows that the attacks were in fact motivated by a socially-constructed belief that only men and boys should be educated. Another example would be the killing of men on the basis that their appearance is too ‘feminine’, or because they were perceived as homosexual.⁶⁷ Again, it would

⁶⁵ Resolution 275: Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity, Adopted at the 55th Ordinary Session of the African Commission on Human and Peoples’ Rights in Luanda, Angola, 28 April to 12 May 2014.

⁶⁶ The Court has heard allegations of this nature in relation to Afghanistan, for example. See Prosecutor’s Afghanistan request, *supra* note x, [119].

⁶⁷ See examples documented in: CUNY Human Rights and Gender Justice (HRGJ), MADRE and Organization of Women’s Freedom in Iraq, Communication to the ICC Prosecutor Pursuant to Article 15 of the Rome Statute Requesting a Preliminary Examination into the Situation of: Gender-Based Persecution and Torture as Crimes Against Humanity and War Crimes Committed by the Islamic State of Iraq and the Levant (ISIL) in Iraq, 8 November 2017, [48].

be inaccurate to say that these men were targeted based on their biological sex if the evidence shows that they were targeted because they defied the perpetrators' beliefs about how men should look and behave and with whom they should have sexual relations.

Identifying these social constructs as the basis of gender persecution exposes the discriminatory attitudes that underlie the crime. Moreover, it requires the Court to recognise forms of persecution that might go unrecognised if 'gender grounds' was equated to 'sex grounds'.

B. 'Gender grounds' versus 'gender groups'

Under the ICC's legal framework, persecution can be directed 'against any identifiable group or collectivity' on various grounds, including gender grounds. This is clear from Article 7(1)(h) of the Rome Statute and is confirmed by the ICC Elements of Crimes which addresses each of these elements separately:

2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.⁶⁸

Commentary on the Rome Statute confirms that these elements are distinct. For example, Hall, Powderly and Hayes state that the 'grounds' listed in Article 7(1)(h) 'are intended to enumerate the prohibited reasons for targeting a specific group or collectivity, not to provide a means of characterizing protected groups.'⁶⁹ An example of this distinction can be seen in the *Ongwen* confirmation decision,⁷⁰ in which the Pre-Trial Chamber distinguished between the ground of persecution and the identity of the targeted group. Specifically, it found that there were substantial grounds to believe that the Lord's Resistance Army targeted certain identifiable groups (namely, civilian residents of certain internally displaced persons camps) and that such

⁶⁸ Article 7(2)(g) states that 'persecution means the severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'. It does not reference the grounds enumerated in Article 7(1)(h). However, when Article 7(2)(g) is read together with Article 7(1)(h) and with the Elements of Crimes, it is clear that the identity of the 'group or collectivity' is a separate element from the grounds for targeting.

⁶⁹ C.K. Hall, J. Powderly and N. Hayes, 'Persecution' in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Bloomsbury T&T Clark, 2016) at 221.

⁷⁰ *Ongwen*, Decision on the confirmation of charges against Dominic Ongwen (ICC-02/04-01/15-422-Red), 23 March 2016.

targeting was based on ‘political’ grounds (namely, these civilians were perceived to be affiliated with the Ugandan government).⁷¹ Unfortunately, this interpretation may not have been applied in all ICC cases, including the recent *Ntaganda* judgment.⁷²

Applying this interpretation, it is apparent that the crime of gender-based persecution means persecution *on gender grounds*, as distinct from *against gender groups*. Thus, it is not necessary to establish that the targeted group was a ‘gender group’, in the sense that its members were all of one gender, or that gender distinguished them from the persecutors. Rather, the Prosecutor must establish that the perpetrator persecuted ‘any identifiable group or collectivity’ based on social constructs relating to gender.

For example, the identifiable group could be proponents of girls’ education, including men, as well as women. If this group was targeted due to a belief that only boys should be educated, such targeting could conceivably constitute persecution on gender grounds. To give another example, the identifiable group could be transgender people (i.e. people whose chosen gender identity does not correlate with their assigned sex at birth). If this group was targeted by perpetrators who believe that people who are designated ‘male’ at birth must adopt a particular masculine gender identity, and people who are designated ‘female’ at birth must adopt a particular feminine gender identity, the crime of gender-based persecution might apply. As these examples illustrate, the victimised group need not itself share a common gender identity in order for the crime of gender-based persecution to apply. This is because the term ‘gender’ describes the grounds on which the group is victimised, rather than the identifying feature of the group.

⁷¹ *Ongwen*, Decision on the confirmation of charges against Dominic Ongwen (ICC-02/04-01/15-422-Red), 23 March 2016, [25], [39], [52] and [65].

⁷² In relation to the charge of ethnic-based persecution, the *Ntaganda* trial judgment refers to the persecution of an ‘ethnic group’, namely, the Lendu, rather than persecution on ‘ethnic grounds’. The Chamber also referred to ‘the requirement that the persons, group, or collectivity targeted shared a political, racial, national, ethnic, cultural, religious, or gender identity’. However, no such ‘requirement’ is imposed by the Rome Statute nor Elements of Crimes. It will suffice to show that the relevant acts were targeted at ‘any identifiable group or collectivity’, and that such targeting was based on one of the enumerated grounds. See *Ntaganda*, Judgment (ICC-01/04-02/06-2359), 8 July 2019, [1009]. See also [1012] and [1022].

C. Persecution on intersecting gender and other grounds

International human rights law has long recognised the widespread phenomenon of discrimination on intersecting grounds.⁷³ This phenomenon can and should also be recognized in prosecuting the crime against humanity of persecution. Indeed, the Rome Statute imposes no bar to prosecuting persecution on multiple, intersecting grounds. Such an approach, would enable the ICC to capture the reality that victims are often targeted on multiple grounds.⁷⁴ For example, in the 1995 Srebrenica attack, Bosnian Serb forces killed close to 7,000 Bosnian Muslim males of roughly ‘fighting age’ (excluding elderly men and young boys).⁷⁵ Such targeting could be considered persecution on intersecting religious, ethnic, gender and age grounds.

That the Rome Statute permits recognition of persecution on intersecting grounds was affirmed in the recent *Ntaganda* trial judgment⁷⁶ and accords with the OTP’s commitment in its *Policy Paper on Sexual and Gender-Based Crimes* to:

Understand the intersection of factors such as gender, age, race, disability, religion or belief, political or other opinion, national, ethnic, or social origin, birth, sex, sexual orientation, and other status or identities which may give rise to multiple forms of discrimination and social inequalities.⁷⁷

3. ‘Severe Deprivations of Fundamental Rights Contrary to International Law’

Gender inequality and discrimination against women and LGBTIQ people is widely practised and accepted in most countries to varying degrees. In some it is even legally enshrined. Some commentators have therefore questioned whether the ICC could prosecute persecution on gender grounds in societies where the idea of gender equality is contentious, or where gender-

⁷³ E.g. Convention on the Rights of People with Disabilities, Art. 6(1); CEDAW, General Recommendation 28, *supra* note x, [18]; CESCR, General Comment 20, UN Doc. E/C.12/GC/20, 2 July 2009, [17], Committee on the Elimination of all forms of Racial Discrimination, General Recommendation 25, UN Doc. CERD/C/GC/25, 20 March 2000, [12].

⁷⁴ E.g. Oosterveld 2006, *supra* note x, 86; ‘Prosecuting Gender-Based Persecution as an International Crime’ in A. de Brouwer et al. (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia, 2013) 57 at 70-71; Grey, *supra* note x, 314.

⁷⁵ See M. Jarvis, ‘Overview: The Challenge of Accountability for Conflict-related Sexual Violence Crimes’ in S. Brummertz and M. Jarvis (eds), *Prosecuting Conflict-related Sexual Violence at the ICTY* (Oxford University Press 2016) 1, 11.

⁷⁶ *Ntaganda*, Judgment (ICC-01/04-02/06-2359), 8 July 2019, [1009]. In relation to the grounds of persecution enumerated in the Rome Statute, the Trial Chamber observed: ‘one such ground will suffice, although a combination of more than one may equally form the basis for the discrimination.’

⁷⁷ Office of the Prosecutor, *supra* note x, [27].

based discrimination is the norm.⁷⁸ As shown below, the ICC's legal framework requires a negative answer to this question. Severe violations of fundamental rights contrary to international law can amount to persecution on gender grounds, regardless of whether such violations are permitted according to domestic law, religious doctrine, or local custom.

Under Article 7(2)(g) of the Rome Statute and the Elements of Crimes, for charges of persecution on all grounds, the Prosecutor must establish that:

1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.

This element is unambiguous. Nonetheless, in the absence of any jurisprudence on persecution on 'gender' grounds, it is worthwhile examining what this element requires of the prosecutor. Given the contexts in which the ICC is currently examining allegations of gender-based persecution, it is also timely to draw attention to several matters relevant to ensuring that this element is applied effectively

A. Fundamental rights

The first question is 'what is a fundamental right'? This term is broad, covering a wide range of human rights in the Universal Declaration of Human Rights and elaborated in the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and other UN treaties, such as CEDAW, as well as in regional human rights treaties.⁷⁹

The Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Kupreškić* case recognised that creating an exhaustive list of fundamental rights would not serve the interests of justice,⁸⁰ and indeed, the drafters of the Rome Statute did not provide an exhaustive list. Thus, in the context of persecution on 'gender' grounds, it is open to the ICC to consider a broad range of rights violations against any person or persons. For example, the Court is not limited to addressing violations *perceived* as being targeted disproportionately against women, including sexual violence, or violations of CEDAW. Such violations will be relevant in many cases, however, *all* human rights violations can theoretically be based on

⁷⁸ See commentaries cited in Oosterveld 2006, *supra* note x, 75 (footnote 131); Davis *supra* note x, 554.

⁷⁹ *Kupreškić*, Judgment (IT-95-16-T), 14 January 2000, [621]. See also G. Werle and F. Jessberger, *Principles of International Criminal Law* (OUP, Third Edition (2014)), at 373-4.

⁸⁰ *Kupreškić*, Judgment (IT-95-16-T), 14 January 2000, [623].

gender grounds so long as the targeting is based on ‘gender’ as defined in the Rome Statute. A sophisticated gender analysis is required to ensure that all violations of fundamental rights that contribute or amount to gender persecution are acknowledged.

Notably, article 7(2)(g) of the Rome Statute expressly states that ‘persecution means the intentional and severe deprivation of fundamental rights *contrary to international law*’. International law, in particular international human rights law, is therefore the applicable framework for determining whether fundamental rights have been violated. It is irrelevant if the alleged violations are permitted or even required under national law in the relevant country, or are widely accepted in the relevant society. This point warrants emphasis in relation to gender persecution due to the widespread acceptance of gender discrimination in practice and in national laws.

B. Severe violations of fundamental rights

Next, it is relevant to ask *which* violations of fundamental rights under international law can constitute persecution. Again, the Statute is clear on this point. The degree to which fundamental rights must be deprived in order to constitute persecution is standard across all grounds: the deprivation must be ‘severe’.⁸¹ This test must be applied on a case-by-case basis, bearing in mind that persecution does not require a physical element (such as a violent physical attack)⁸² and that it can include a wide range of acts or omissions, including for example, restrictions on the types of professions open to the targeted group and restrictions on family life.⁸³

In order to satisfy this ‘severity’ test, the violations may be assessed collectively, because ‘it is the *cumulative effect* of all the underlying acts of the crime of persecution’ that determines the gravity of the crime.⁸⁴ When considering the severity of deprivations of fundamental rights on gender grounds, it is necessary to conduct a detailed analysis of the gendered impact of all human rights violations and the gendered harms caused to those targeted. In *Ntaganda*, the Trial Chamber clarified that the commission of any act considered to be a crime against

⁸¹ ICCSt, Art. 7(2)(g). Note: the term ‘severe’ in this provision ‘refers to the character of the deprivation of fundamental rights’: M. Boot, ‘Persecution’, in O. Triffterer and K. Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Nomos, 1999) at 166.

⁸² *Tadić* (IT-94-1), Judgment, 7 May 1997, [707].

⁸³ *Ibid*, [704].

⁸⁴ *Nahimana et al.* (ICTR-99-52-A), Appeal Judgment, 28 November 2007, [987]. See also *Ntaganda*, Judgment (ICC-01/04-02/06-2359), 8 July 2019, [992].

humanity will, in principle, result in a sufficiently severe deprivation of fundamental rights to meet the threshold for persecution. For example, acts of murder, rape and sexual slavery may all constitute underlying acts of persecution.⁸⁵ Having said that, it is clear that other acts which are not enumerated in Article 7 of the Rome Statute can *also* amount to persecution, so long as they involved the severe deprivations of fundamental rights under international law.

The fact that a violation may be commonplace or even ubiquitous does not make it any less ‘severe’. The ordinary meaning of the term ‘severe’ refers to *gravity* rather than *rarity*. This is the same approach taken in international refugee law, which has long recognised that ‘discrimination that is omnipresent within a country (or globally) should not be viewed as “lower-level” or “mere” discrimination even though its widespread nature makes it “ordinary”’.⁸⁶ This point is important in relation to persecution on ‘gender’ grounds precisely because such discrimination, which may amount to persecution, is so widespread. Hence, the United Kingdom Government’s 2018 guidelines for refugee claims on the basis of gender-based persecution state that:

The fact that violence against women is common, widespread and culturally accepted in a particular society does not mean that international protection on an individual basis is inappropriate. FGM [female genital mutilation], for example, is widely practiced in some societies but it is a form of gender-based violence that inflicts severe harm, both mental and physical, and amounts to persecution. Each case must be considered on its own merits in the light of country policy information.⁸⁷

⁸⁵ *Ntaganda*, Judgment (ICC-01/04-02/06-2359), 8 July 2019, [994].

⁸⁶ Oosterveld 2006, *supra* note x, 74.

⁸⁷ United Kingdom Home Office, *Gender Issues in the Asylum Claim: Version 3.0*, 10 April 2018, 2.

Similar cautions about the prevalence of gender-based persecution are found in guidelines issued by the Canadian,⁸⁸ Australian⁸⁹ and Swedish⁹⁰ governments. While not binding on the ICC, these insights from refugee law underscore the point that gender-based persecution can be ‘severe’ even if the violations are widespread, widely accepted or endemic in the relevant State.

Finally, it can be observed that gender-based persecution is often most visible when persons who transgress social constructs of gender are subjected to adverse consequences such as violence, imprisonment, loss of employment or stigma as punishment for that perceived transgression.⁹¹ However, in most cases, such reprisals or punishments are preceded or accompanied by other oppressive measures that seek to impose roles, behaviours, activities and attributes based on a person’s status as male or female. Such measures (for example, restrictions on freedom of expression, association or movement) can have a devastating impact on those targeted, including those who *comply* with the restrictions in order to avoid punishment or reprisals. The ICC can consider on a case-by-case basis whether such measures amount to severe deprivations of fundamental rights under international law, to ensure that all forms of persecution are addressed and all victims can access justice and reparation before the Court. This includes taking into account punishments or reprisals for non-compliance with beliefs about gender, and considering how such restrictions relate to other severe deprivations of fundamental rights.

⁸⁸ Immigration and Refugee Board of Canada, *Guidelines Issued by the Chairperson Pursuant to Section 65(4) of the Immigration Act: Guideline 4 - Women Refugee Claimants Fearing Gender-Related Persecution*, 13 November 1996, No. 4, 16 (‘The fact that violence, including sexual and domestic violence, against women is universal is irrelevant when determining whether rape, and other gender-specific crimes constitute forms of persecution.’).

⁸⁹ Department of Immigration and Multicultural Affairs, *Refugee and Humanitarian Visa Applicants Guidelines on Gender Issues for Decision Makers*, July 1996, [4.9], [4.12]. (‘The status of women in some societies may be restricted and dictated by legal, social or religious mores. The restrictions will vary from mere inconvenience to oppression. In addition a broad range of penalties may be imposed for disobeying restrictions placed on women ... In some societies, particular types of violence against women may be officially condemned or even illegal but in fact be so endemic that local authorities turn a blind eye to its occurrence.’)

⁹⁰ Migrationsverket (Migration Board), *Gender-based persecution: Guidelines for investigation and evaluation of the needs of women for protection*, 28 March 2001, 3. (‘Gender-related persecution often has a strong connection to legal, social, cultural and traditional disparities between the relative power of men and women, with women most often the clearly weaker party. In many cultures, men and boys automatically are accorded a higher social and economic status.’)

⁹¹ For examples, see: *Discriminatory Laws and Practices and Acts of Violence against Individuals Based on Their Sexual Orientation and Gender Identity: Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/29/23 (4 May 2015), [21].

5. The ICC's emerging practice on gender-based persecution

The OTP first advanced detailed examples of alleged gender-based persecutions in its preliminary examination on Afghanistan. According to the OTP's request to open an investigation into this situation, gender-based persecution was committed by the Taliban and affiliated armed groups against female politicians, public servants and students in Afghanistan.⁹² Specifically, the OTP alleged that:

Pursuant to the ideology and rules of the Taliban, women and girls have been deliberately attacked by the Taliban and affiliated armed groups to prevent them from studying, teaching, working or participating in public affairs, through intimidation, death threats, abductions and killings. As a result of such attacks, countless other women and girls have reportedly stopped going to school or working due to the attendant climate of fear.⁹³

However, the Pre-Trial Chamber's refusal to authorize an investigation in that situation means that the possibility of justice for these crimes is uncertain, pending determination of the OTP's application for leave to appeal.⁹⁴ The OTP has also stated that it is analysing possible acts of gender-based persecution in the Nigeria preliminary examination. This analysis covers crimes allegedly committed against male and female victims by Islamist group Boko Haram⁹⁵ However, the Office has not requested authorization to open an investigation into that situation, nor given any strong indication that such a request is imminent. Much therefore depends on the OTP's first attempt to charge a suspect with the crime of gender-based persecution in the *Al Hassan* case.

The *Al Hassan* case concerns the activities of two alleged Islamist groups, namely Ansar Dine and Al-Qaeda in the Islamic Maghreb (AQIM) in Timbuktu in 2012-2013. According to the Document Containing the Charges (DCC), this charge relates to measures taken against Timbuktu's female population, who were allegedly barred from being alone with men to whom

⁹² Prosecutor's Afghanistan Request, *supra* note x, [115].

⁹³ *Ibid*, [116].

⁹⁴ *Situation in Afghanistan*, Request for Leave to Appeal the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan" (ICC-02/17-34), 7 June 2019. An appeal against the decision has also been filed by the legal representatives of victims, however there is yet to be a decision on whether they have standing to do so. See: *Situation in Afghanistan*, Victims' Appeal Brief (ICC-02/17-53), 24 June 2019.

⁹⁵ 2018 Preliminary Examination Report, *supra* note x, [225].

they were not married and interacting with men other than their husbands and brothers, forbidden to meet freely with other women or interact with male students at school, and forced to comply with a strict dress code. Breaches of these rules allegedly led to beatings, whippings, or incarceration in a crowded and overheated prison in which several women were allegedly raped.⁹⁶ In addition, women and girls in other spaces were allegedly subjected to rape, sexual slavery, and inhumane acts such as forced marriage.⁹⁷

As detailed in the DCC, these alleged acts violated a range of rights protected under international law including the rights to privacy, physical integrity, personal dignity, freedom of expression, liberty, health, and a fair trial, and the rights against torture, inhuman and degrading treatment or punishment, and discrimination on the basis of sex.⁹⁸

Consistent with the ICC's legal framework, the DCC refers to persecution on religious and gender *grounds* (as opposed to religious and gender *groups*). That is, the terms 'religious' and 'gender' describe the reasons for the targeting, rather than the identity of the targeted group.⁹⁹ For example, for the charge of religious persecution, the DCC described the targeted group as the population of Timbuktu and its region whom Ansar Dine and AQIM perceived as not sharing its ideology and religious vision,¹⁰⁰ and argued that such targeting was based on religious beliefs espoused by Ansar Dine's leader and propagated by its members.¹⁰¹ As to the charge of gender-based persecution, the DCC alleged described the targeted group as the women and girls from Timbuktu and its region,¹⁰² and argued that such targeting was based on gender grounds within the meaning of Article 7(3) because it was motivated by discriminatory views about the appropriate roles and behaviours of this female population.¹⁰³ Such views were evident, for example, in the sermon delivered in Timbuktu by an AQIM preacher who declared that women must cover their entire bodies, wear headscarves, and stay at home.¹⁰⁴

⁹⁶ 'Al Hassan DCC', *supra* note x, [960]-[968].

⁹⁷ Ibid, [969]-[970].

⁹⁸ Ibid, [971]-[972].

⁹⁹ See Part 3(B) of this article.

¹⁰⁰ Al Hassan DCC, [888]; [899]-[908].

¹⁰¹ Ibid, [889]-[892].

¹⁰² Ibid, [945]-[946].

¹⁰³ Ibid, [948]. In the words of the DCC: 'Un tel ciblage était fondé sur des motifs sexistes au sens du paragraphe 3 de l'article 7 du Statut, car il a été motivé par les opinions discriminatoires des membres des groupes et personnes associées sur le rôle et comportement des femmes et jeunes filles.'

¹⁰⁴ Ibid, [952].

In addition to illustrating the elements of gender-based persecution, this case could potentially touch on several issues raised in this article. In particular, it might address the relationship between international human rights law and standards and local beliefs, customs, and law. For example, according to the Defence, a ‘live’ issue in this case is ‘whether certain Islamic practices are compatible with international criminal law or would amount to crimes under the ICC Statute.’¹⁰⁵ If the Pre-Trial Chamber agrees that this question is pertinent to the case, it may take the opportunity to clarify that gender-based persecution is the same as persecution on any other ground: it involves one or more violations of fundamental rights under *international* law. Thus, it is legally irrelevant whether such rights were respected under alternative frameworks, including the laws and customs of Islam, or any other belief system for that matter.

6. Conclusion

The recognition of gender-based persecution in the Rome Statute has been described as an ‘exciting, and potentially revolutionary, development’.¹⁰⁶ The description is fitting, considering that international criminal law had never before recognised gender as a basis of victimisation.¹⁰⁷ This stands in contrast with victimisation on the basis of race, religion, nationality and ethnicity, which has been acknowledged – through various crimes – since the 1940s.¹⁰⁸ The jurisprudence on this ‘exciting’ new crime may well begin to develop soon, given the Prosecutor’s decision to include a charge of gender-based persecution in the ICC’s *Al Hassan* case.

As the jurisprudence continues to develop, the Court may also be asked to consider violence directed at people who are, or are perceived to be LGBTIQ. Such violence is potentially

¹⁰⁵ *Al Hassan*, Public redacted version of the Request for the disqualification of Judge Marc Perrin de Brichambaut (ICC-01/12-01/18-376-Red), 18 June 2019, [29(c)].

¹⁰⁶ V. Oosterveld, ‘Prosecuting Gender-Based Persecution as an International Crime’ in A. de Brouwer et al. (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia, 2013) 57 at 77.

¹⁰⁷ Grey, *supra* note __, 95-98.

¹⁰⁸ The *Charter of the International Military Tribunal* (adopted 1945) referred to the crime against humanity of ‘persecutions on political, racial or religious grounds’, and the *Charter of the International Military Tribunal for the Far East* (adopted 1946) referred to ‘persecutions on political and racial grounds’. The 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* criminalises certain acts when committed with intent to destroy, in whole or in part, a ‘national, ethnical, racial or religious group, as such.’ In 1973, the United Nations (UN) General Assembly adopted the *Convention on the Suppression and Punishment of the Crime of Apartheid*, which recognised apartheid (defined exclusively to mean the oppression of a racial group) as a crime against humanity. The ICTY and ICTR Statute referred to the crime of genocide (as defined in the 1948 Convention) and the crime against humanity of persecution on ‘political, racial and religious grounds’. In addition, for *all* crimes against humanity, the ICTR Statute required proof that the relevant acts were committed as part of an attack ‘on national, political, ethnic, racial or religious grounds.’

prosecutable using a range of crimes, including persecution on ‘other grounds that are universally recognized as impermissible under international law.’¹⁰⁹ In addition, the analysis presented in this article suggests that persecution on the basis of sexual orientation or gender identity can be charged as persecution on ‘gender’ grounds, where it is targeted against an identifiable group or collectivity (e.g. men perceived as homosexual) due to a socially constructed belief about what it means to be ‘male’ or ‘female’ (e.g. the belief that men should only have sexual relations with women). Such an interpretation has long enjoyed support in academic literature,¹¹⁰ and was also supported in the recent submission on the definition of ‘gender’, referred to in this article’s introduction that was sent by 583 organizations to the International Law Commission. As the authors of the submission observed:¹¹¹

While behaviors that transgress gender roles derive from normative conceptions of sexual orientation and gender identity and therefore fall under the umbrella protection of gender, the international community’s priority is to also elevate and recognize sexual orientation and gender identity (SOGI), and more recently sex characteristics, as distinct protective classes under international law.

The road to the recognition of ‘gender’ in the Rome Statute was notoriously rough. In the intervening decades, there has been much discussion about that pathway and the resultant definition of ‘gender’. However, the ICC is only now starting to interpret this term, following the Prosecutor’s decision to include a charge of gender-based persecution in the *Al Hassan* case. Recent comments made by non-government organizations and some States to the International Law Commission may indicate that despite clear terminology to the contrary in Article 7(3), there is a risk that the Rome Statute gender definition will be misinterpreted as equating ‘gender’ with biological sex. In this context, it is critical to affirm that as a result of the definition agreed to at the 1998 Rome Diplomatic Conference, the Statute’s definition of ‘gender’ captures the social aspects of gender, consistent with widely accepted practice at the time (and in the intervening two decades). These are important facts to hold on to as the focus on the definition of ‘gender’ intensifies, the ICC’s jurisprudence on gender-based persecution evolves, and efforts advance to develop a new convention on crimes against humanity.

¹⁰⁹ Oosterveld 2005, *supra* note x, 79; Grey, *supra* note x, 313.

¹¹⁰ E.g. Oosterveld 2005, *supra* note x, 76-79; Grey, *supra* note x, 312.

¹¹¹ L. Davis et al., *supra* note x, 5.