

## *LGBT AND THE INTERNATIONAL CRIMINAL COURT*

The Rome Statute of the International Criminal Court (ICC) does not specifically mention “sexual orientation.” The concept is neither included nor excluded. So it can be asked: Does the ICC have jurisdiction over crimes on the “sexual orientation” of the victims and how could the crimes against lesbians, gays, bisexuals and transsexuals (LGBT) be addressed through the ICC?

In the Rome Statute there are only two provisions that include the attack against a specific group as a defining element of the crime. These two provisions are the crime of genocide in the Article 6 and crimes against humanity when it concerns the persecution of certain groups in Article 7(1)(h). To respond to the question of how crimes against LGBT might be addressed through the ICC, it is necessary to analyze these two articles.

### Crimes Against LGBT: Crime of Genocide?

In a 1946 resolution, the UN General Assembly stated that genocide was a denial of a group’s right to exist.<sup>1</sup> Two years later, on December 9, 1948, the General Assembly approved the Convention on the Prevention and Punishment of the Crime of Genocide. This convention defined the crime of genocide as the commission of acts such as killing and causing serious bodily or mental harm, among others, with the intent to destroy, in whole or in a part, any one of the specifically enumerated groups (national, ethnical, racial or religious).

In 1998, the Rome Statute included the same definition of genocide for the purpose of individual criminal responsibility. During the negotiations for the Statute, the question of whether other groups beyond the traditional four should be included in the definition was raised. However, no country wanted to expand the definition. The list of groups in the Rome Statute thus does not include LGBT and so crimes against them as a group cannot be tried as genocide by the ICC.

### Crimes Against LGBT: Crimes Against Humanity?

While there is a consensus that the Rome Statute does not include acts against LGBT as a crime of genocide, there is a distinct possibility that such acts could be crimes against humanity. The Rome Statute provides that the persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, constitutes a crime against humanity when committed as part of a widespread or systematic attack directed against a civilian population and with knowledge of the attack.

The debate on whether crimes against LGBT could be considered crimes against humanity depends on the definition of gender. The Statute provides its own definition in Article 7(3): “For the purpose of this Statute, it

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<sup>1</sup> G.A. Res. 96, U.N. GAOR, 1st Sess., at 188, U.N. Doc. A/204 and Add. 1 (1947), available at <http://www.un.org/depts/dhl/resguide/r1.htm>.





is understood that the 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.”<sup>2</sup>

During the negotiations for the Rome Statute, the language of the Annex to the Beijing Platform for Action (the Statement by the President of the Conference on the Commonly Understood meaning of the Term “Gender”) arose. This text reaffirmed that the word “gender” was intended to be interpreted and understood as it was in ordinary, generally accepted usage. However, it became clear that that approach was too imprecise for judges to use and delegates agreed to attempt to define the term for the purpose of the Rome Statute.

There was an obvious division between those countries who wanted a narrow definition of the term “gender,” so that no additional considerations such as sexual orientation could be included, and those countries who wanted a broader definition. The first group of countries suggested replacing the word “gender” by the word “sex” because while the word “gender” had no definite meaning, the word “sex” could be defined in terms of the biological difference between men and women. The second group of countries, who wanted a broader definition of “gender,” pointed out that for the preceding decade the United Nations system had consistently used the term “gender” rather than “sex,” in recognition of that “gender” includes biological and sociological aspects. Eventually, the need for the definition to incorporate a reference to the sociological dimension of the term “gender” was accepted.

Article 7(3) was the only definition of “gender” to which both sides were willing to agree. The reference to “two sexes, male and female” and the language “within the context of society” satisfied the delegations of both sides. They thought there were sufficient flexibility as well as precision inherent in the sentence. A close look at Article 7(3) shows that it effectively leaves the term open for the Court to interpret and apply to the circumstances before it. Yet, it is not clear if the judges of the ICC might include or not “sexual orientation” in the definition of “gender.”

On one hand, there are arguments for excluding “sexual orientation” from the definition of gender. The first is that as the Rome Statute does not explicitly include “sexual orientation” it therefore excludes it. A second argument would consider the actual text of the article which provides that gender refers to the two sexes, male and female, which would draw the conclusion that gender collapses back into biology and no other interpretation is possible. These arguments are extremely restrictive with their interpretation of the term “gender.” They stress the first part of the definition of the term “gender” – “two sexes, male and female” – and they omit the possible implications of the second part – “within the context of society.”

On the other hand, there are arguments for including “sexual orientation” within the definition of gender. First, there is no consensus, either generally or in the Rome Statute, on whether the definition of gender should include sexual orientation. This lack of consensus leaves it open to the Court to interpret and apply the term. Moreover, Article 21(3) of the Rome Statute provides that the application and interpretation of law must be consistent with internationally recognized human rights and be without any adverse distinction founded on

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<sup>2</sup> The article governing the crimes against humanity provided the obvious opening for a definition of gender because it was the only article to include a definitional section. Moreover, the term “gender” appears for the first time in the Statute under crimes against humanity.





grounds such as gender (as defined in Article 7(3)), age, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status. Second, it is problematic to argue that any ambiguity in a treaty with the purposes of the Statute should be resolved in favor of discrimination. The right to nondiscrimination on the basis of sexual orientation has been recognized by various United Nations treaty committees such as the Human Rights Committee. Third, conceptions of gender and sexual orientation are linked. Violence against women or men based on cultural definitions of appropriate maleness or femaleness is intimately related to violence against individuals based on sexual orientation. The term gender must be broad enough to capture any group challenging traditional defined gender roles.<sup>3</sup>

As stated above, there is no consensus on whether to include or exclude sexual orientation from the definition of gender. Only if it were included the ICC would be able to prosecute the persecution of LGBT as crimes against humanity.

However, sexual orientation can be addressed through other avenues. In considering crimes against humanity, “sexual orientation” could possibly be considered as a protected category through the phrase “or any other grounds that are universally recognized as impermissible under international law” contained in the definition of crimes against humanity. However, it would be difficult to overcome the threshold of universal recognition because even though international law is beginning to consider sexual orientation,<sup>4</sup> it has not yet universally recognized it as a prohibited ground of discrimination.<sup>5</sup>

## Conclusion

There is a consensus on the fact that LGBT do not constitute a protected group in the definition of genocide so crimes against these groups cannot be punished as genocide by the ICC. However, there is a lack of consensus on considering crimes against LGBT as crimes against humanity, whether through the definition of “gender” or through the phrase “any other grounds that are universally recognized as impermissible under international law.” There are valid arguments for including and excluding crimes against LGBT from the definition of crimes against humanity. The ambiguity of the Rome Statute is a “constructive” ambiguity and the role of interpretation is crucial. No matter what the current interpretation of the Rome Statute is in respect to this issue, no provision of the Statute should preclude the progressive development of the international law.

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<sup>3</sup> Some might argue that the ICC, in its Code of Professional Conduct for Counsel before the ICC, has demonstrated that it understands “femaleness” and “maleness” as only including heterosexuality as it chose to list separate “sexual orientation” and “gender” as grounds of upon which counsel cannot discriminate against others. The opposite argument might also be made that the ICC views “sexual orientation” as linked to and part of the term “gender,” but felt the need to ensure clear guidance in the Code and so named them separately. Given that the ICC’s Registry drafted the Code at a time when the ICC was still in its establishment phase, it is doubtful that the Code represents a specific policy on whether “sexual orientation” forms part of the definition of “gender.”

<sup>4</sup> In the Convention Relating to the Status of Refugees (1950), refugees are defined as individuals who have a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. The United Nations High Commissioner for Refugees has interpreted the phrase “social group” to include lesbians and gay men.

<sup>5</sup> See Douglas Sanders, Human Rights and Sexual Orientation in International Law, 25 Int’l J. Pub. Admin. 13, (2002), available at <http://www.xs4all.nl/~heinv/hearingintergroup/documents/dougsanders.PDF>.

