Global Justice Center
Human Rights Through Rule of Law

Submission to the International Law Commission: The Need to Integrate a Gender-Perspective into the Draft Convention on Crimes against Humanity

November 2018

About the Global Justice Center

The Global Justice Center (GJC) is an international human rights organization dedicated to advancing gender equality through the rule of law. We combine advocacy with legal analysis, working to ensure equal protection of the law for women and girls.

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I. Intro

The Global Justice Center, international human rights organization, welcomes the International Law Commission's ("ILC") decision to codify crimes against humanity to form the basis of a potential Convention. Unlike war crimes and genocide, crimes against humanity are not codified in a treaty outside the Rome Statute of the International Criminal Court ("Rome Statute"). The development of a treaty on the basis of the ILC's draft articles presents the opportunity to monitor and enforce the provisions outside of the limited jurisdiction of the International Criminal Court ("ICC" or "the Court") and to encourage states to enact national legislation.

Given the unique and powerful opportunity the ILC has to combat impunity and codify progressive standards of international law, the Global Justice Center ("GJC") believes it is essential to do more than merely replicate the language of the Rome Statute. We call on the ILC to take the opportunity to reflect the progress made and lessons learned in the 20 years since the Rome Statute was adopted, particularly with regard to gender. Specifically, we ask the ILC to reconsider for the purposes of the draft Convention, two specific instances where the Rome Statute has differential treatment of gender-related provisions relative to their non-gendered counterparts: (1) the formulation of the crime of forced pregnancy; and (2) the definition of gender.

II. Formulation of Forced Pregnancy

The ILC's Special Rapporteur on crimes against humanity spearheaded the drafting of articles, which form the potential Draft Convention on crimes against humanity, in his first report. The report acknowledged that, while several formulations of crimes against humanity exist, the "most widely accepted" is Article 7 of the Rome Statute.[1] Thus, he proposed the definition in the Rome Statute "be used verbatim except for three non-substantive changes, which are necessary given the different context in which the definition is being used."[2]

Draft article 3(1)(g) of the draft Convention recognizes "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" as crimes against humanity "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[3] It further defines "forced pregnancy" as:

> "the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. **This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.**"[4]

GJC believes that the formulation of forced pregnancy needs to be changed for the following reasons. First, forced pregnancy is the only act which includes a caveat on national laws, which arbitrarily differentiates between forced pregnancy and other acts constituting crimes against humanity. Second, it fails to reflect the significant developments on the crime of forced pregnancy and the fundamental human right to an abortion. Third, it reproduces an inadequate gender perspective that has been shown to yield ineffective remedies for victims of gender-based crimes. In its present formulation the draft articles perpetuate discrimination against women and girls by limiting accountability for crimes that are exclusively committed against them.

1. Lack of legal basis for differentiation

The Rome Statute defined several of the Article 7 acts constituting crimes against humanity; however, forced pregnancy is the only one for which there is a caveat carved out for conflicting national legislation. Scholars have noted that the deference to the state on forced pregnancy is in "stark contrast to how other crimes are prosecuted by the ICC," which generally applies domestic law only as a last resort.[5]

The crime of forced pregnancy as defined by the Rome Statute envisions a very particular and grave set of circumstances. The act has two components: the woman must be forcibly made pregnant, through an act of sexual violence and the perpetrator must then confine the pregnant

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[1] ILC, First report on crimes against humanity, by Sean D. Murphy, Special Rapporteur, UN Doc. A/CN/4/680, 17 Feb. 2015, para. 121.

[2] Replacing "For the purpose of this Statute" with "For the purpose of the present draft articles" in Art. 3(1) and Art. 3(3). Inclusion of Art. 3(4), stating that "This draft article is without prejudice to any broader definition provided for in any international instrument or national law." ILC, Report on the work of the sixty-ninth session (2017), UN Doc. A/72/10, *Text of the draft articles on crimes against humanity adopted by the Commission on first reading*, art. 3(1)

[3] ILC, Report on the work of the sixty-ninth session *supra* note 2. art. 3(1)(g)

[4] *Id.* art. 3(2)(f). [emphasis added]

[5] Milan Markovic, *Vessels of Reproduction: Forced Pregnancy and the ICC,* 16 MICH. ST. J. INT'L L. 439, 448 (2007).

woman. In addition, there is a specific intent requiring a nexus with "affecting the ethnic composition" or "carrying out other grave violations of international law."[6] In its first case alleging forced pregnancy, The Prosecutor v. Dominic Ongwen ("the Ongwen case"), ICC Trial Chamber IX stated that the perpetrator must have knowledge that the woman is pregnant and intent to prohibit her from making free and independent choices.[7] It has been argued that the limiting language on forced pregnancy, requiring force, confinement, and, particularly, the specific intent to alter ethnic composition or to further other grave violations of international law, remove it from the purview of legitimate state legislation on abortion.[8] Even in absence of the law on forced pregnancy, state action that pursues unlawful ends, i.e. change in ethnic composition or grave violations of international law, is illegal.[9] Thus the caveat is unnecessary.[10]

A review of the drafting history of the Rome Statute shows that there was no functional or legal reason for the differential treatment, but rather it was a bare political compromise.[11] Several states expressed concern that criminalizing forced pregnancy would run afoul of their national laws on abortion.[12] The states also expressed the belief that forced pregnancy was adequately addressed under other crimes, namely rape and unlawful detention.[13] The Holy See was vocal in its opposition to recognizing it as a crime because of the fear that it would allow for "abortion on demand." It raised the concern that domestic legislation denying women abortions, Catholic hospitals and clinics with policies denying abortions, and husbands who persuade their wives to keep a pregnancy could fall within the definition of forced pregnancy in the context of international criminal law.[14] This compromise gives undue authority to religious and ideological concerns about control over women's bodies rather than addressing the grave violation that it seeks to remedy.[15]

Furthermore, the provision that the crime of forced pregnancy "shall not in any way be interpreted as affecting national laws relating to pregnancy" is inconsistent with the criminalization of forced pregnancy insofar as there is an expectation that if an act is illegal, legal systems should make equitable remedies available to victims.[16] Scholars have noted that the only reasonable interpretation of the intent of the inclusion of forced pregnancy was to prevent a woman from being forced to carry a pregnancy against her will, and that inherent in that is at

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[6] Rome Statute of the International Criminal Court art. 7(2)(f), Jul. 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

[7] Decision on the confirmation of charges against Dominic Ongwen, The Prosecutor v. Dominic Ongwen, ICC-02/04-01/15, paras. 97-101.

[8] Soh Sie Eng Jessie, *Forced Pregnancy: Cofidiction in the Rome Statute and its Prospect as Implicit Genocide,* 4 NZJPIL 311 (2006).

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court: Rome, 15 June - 17 July 1998, Official Records Vol. II *available at* http://legal.un.org/icc/rome/proceedings/contents.htm [hereinafter Rome Conference Official Record, Vol. II].

[13] Rome Conference Official Record, Vol. II, *supra* note 12; s*ee also* Jessie, *supra* note 8.

[14] Jessie, *supra* note 8.**Error! Bookmark not defined.**

[15] *Id.*

[16] *See, e.g.*, Markovic, *supra* note 5.

least a limited right to abortion. Language that permits states or private actors sanctioned by the state to establish an outright ban on abortion that fails to provide remedies for victims who are forcibly made pregnant cannot reasonably coexist with the inclusion of forced pregnancy as a crime.[17]

2. Legal Developments in Perspectives on Abortion and Forced Pregnancy

Despite the ILC's assertion that the Rome Statute is the most widely accepted formulation of crimes against humanity, it is hardly a settled matter of law. Subsequent codifications in national legislation and statutes for international and hybrid criminal tribunals, as well as commentary from international bodies show that perspectives on forced pregnancy and the understanding of abortion as a fundamental human right have shifted since the Rome Statute was adopted.

In the aftermath of the conflicts in the former Yugoslavia and Rwanda, the Rome Statute was the first international criminal law statute that recognized forced pregnancy as an act constituting a crime against humanity.[18] The Rome Statute represented the first step in a progressive recognition of gender-based crimes. However, since its adoption, subsequent statutes and laws have not stayed fully faithful to its provisions, including with respect to the national law caveat on forced pregnancy.

The 2002 Statute of the Special Court for Sierra Leone included forced pregnancy but forewent an explanatory provision on forced pregnancy including the deference to national laws on pregnancy.[19]States such as France[20] and the Republic of Congo[21] have reproduced the Rome Statute's definition of the acts constituting crimes against humanity in nearly identical language in their national penal codes; however, opt not to define the acts further. Similarly, several countries have codified the prohibition on forced pregnancy in the context of crimes against humanity without providing further detail or noting its preemption by national laws on pregnancy and abortion, including the Czech Republic[22]; Finland[23]; Georgia[24]; Lithuania[25]; Montenegro[26]; and Serbia[27]. Even countries with restrictions on abortion, which are those for which the caveat is most relevant, have also opted to forego an explanatory provision.[28]

Additionally, since the adoption of the Rome Statute, the protection of abortion, in particular for reasons of rape, life and health endangerment and incest, as a fundamental human right has grown. Leading international experts and treaty bodies have found that restrictions on access to abortion, including those imposed through national legislation, constitute violations of a range of

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[17] *Id*. at p. 447.

[18] Jessie, *supra* note 8.

[19] Statute of the Special Court for Sierra Leone art. 2(g), Aug. 11, 2010.

[20] France, Code pénal, Article 212-1(7).

[21] Republic of Congo, Loi N°8-98 du 31 octobre 1998, Article 6(g).

[22] Czech Republic, Criminal Code, Sec 401(1)(d).

[23] Finland, Criminal Code, Chapter 11 (War Crimes and Crimes against Humanity), Section 3(4).

[24] Georgia, Criminal Code, Article 408.

[25] Lithuania, Criminal Code, Article 100.

[26] Montenegro, Criminal Code, Article 427.

[27] Serbia, Criminal Code, Article 371.

[28] *See, e.g.*, Burkina Faso, Code pénal (2018), Article 422-1

human rights, including to be free from torture, to health[29], to life[30], and to non-discrimination. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment stated that "[h]ighly restrictive abortion laws that prohibit abortions even in cases of incest, rape or fetal impairment or to safeguard the life or health of the woman violate women's right to be free from torture and ill-treatment."[31] The Committee on the Elimination of All Forms of Discrimination against Women ("CEDAW Committee") similarly found that violations of sexual and reproductive health, including forced pregnancy, criminalization of abortion, and denial or delay of safe abortion may constitute torture or other cruel, inhuman, or degrading treatment.[32] Both the CEDAW Committee and the Human Rights Committee have applied this view in specific situations where states have restricted access to abortion.[33] In addition, the Special Rapporteur on extrajudicial, summary or arbitrary executions has noted that deaths from being forced to resort to unsafe abortions have repeatedly been linked to violations of the right to life.[34] She went further to state that where a death can be "medically linked to a deliberate denial of access to life-saving medical care because of an absolute legal ban on abortion," it would amount to a gender-based arbitrary killing by a state[35]

3. Importance of a gender lens

The events that led advocates to demand forced pregnancy be included in the Rome Statute demonstrate the importance of an effective definition of forced pregnancy and other gender-based crimes and what is at stake. Advocates, led by several non-governmental organizations, particularly women's rights groups, were spurred by the sexual and reproductive violence that had recently occurred in Bosnia and Herzegovina, Rwanda, and Sierra Leone.[36] Feminists and women's rights groups were active in pushing for a permanent international court to protect women and push towards equality. These groups, primarily led by the Women's Caucus for Gender Justice in the ICC, were successful in having sexual and gender-based crimes included in the Rome Statute as separate and defined crimes.[37] However, despite this success, the women's groups feared that these would be the crimes for which accountability could be easily avoided by

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[29] Rep. of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Aug. 3, 2011, UN Doc. A/66/254; HRC 66th Sess. (2011).

[30] Rep. of the Special Rapporteur on extrajudicial, summary or arbitrary executions, June 6, 2017, UN Doc. A/HRC/35/23; HRC 35th Sess. (2017).

[31] Rep. of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Jan. 5, 2016, UN Doc. A/HRC/31/57; HRC, 31st Sess. (2016), para. 43.

[32] CEDAW Comm., General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, para. 18, UN Doc. CEDAW/C/GC/35, July 14, 2017.

[33] CEDAW Comm., Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc. CEDAW/C/OP.8/GBR/1, Mar. 6, 2018; Human Rights Committee, Views under article 5, paragraph 4, of the Optional Protocol to the ICCPR, Communication No. 1153/2003, Un Doc. CCPR/C/85/D/1153/2003, Nov. 22, 2005.

[34] Rep. of the Special Rapporteur on extrajudicial, summary or arbitrary executions, June 6, 2017, UN Doc. A/HRC/35/23; HRC 35th Sess. (2017), para. 93.

[35] *Id*. at para. 94.

[36] Rome Conference Official Records Vol. II, *supra* note 12 at 7th Plenary Meeting, para. 95 and 8th Plenary Meeting, paras. 81-83.

[37] Brook Sari Moshan, *Women, War, and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes Against Humanity*, 22 Fordham Int'l L. J. 154 (1998).

utilizing loopholes.[38] For example, they worried that the burden of specific intent that was required in several gender-based crimes would prove too difficult to prove and qualifications on gender-based crimes would create confusion and complications within the court when victims sought redress.[39]

The ICC's difficulties in securing convictions for gender-based crimes is a case in point.[40] Among the criticisms of the ICC, several raised the failure to investigate and charge Thomas Lubanga Dyilo with any sexual and gender-based crimes at the outset of the case, despite accusations of such acts.[41] It was not until March 2016, nearly 14 years after the Court's establishment, that Jean-Pierre Bemba Gombo became the first defendant convicted of any sexual or gender-based crime.[42] Unfortunately, this conviction was overturned[43]; thus, to date there have been no successful standing prosecutions on the basis of sexual and gender-based crimes at the ICC.[44]

The dearth of case law on forced pregnancy is enigmatic of these shortcomings. In 2016, The Prosecutor v. Dominic Ongwen ("the Ongwen case") became the first time that forced pregnancy has been charged in the ICC;[45] to date it remains the only forced pregnancy charge. As a commander in the Lord's Resistance Army in Uganda, Ongwen is accused of abducting women and girls as "wives." He is accused of raping and forcing women and girls to carry the resultant pregnancies to term with the intent of retaining the women as sexual slaves. While the details of the Ongwen case are undoubtedly horrific, they are not exceptional in the context of situations giving rise to investigation by the ICC or other criminal tribunals.

In Bosnia and Herzegovina, there were reports of women being detained after conception and held as prisoners until they reached term with the intent of forcing them to bear "Serb babies" and shift the ethnic composition.[46] Widespread forced impregnation was a major factor in Rwanda, where an estimated 2,000-5,000 women and girls became pregnant due to rape.[47] The High Commissioner for Human Rights identified widespread sexual and reproductive rights violations against the Nigerian girls forced into "so-called marriages" and forcibly impregnated by Boko Haram, noting that many wished to seek abortions.[48] Currently Daesh is manipulating Yazidi

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[38] *Id.* at p. 178.

[39] *Id.*

[40] Louise Chappell, *The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy*, 27 EUR. J. INT'L L. 1176 (2017).

[41] *See, e.g.*, Women's Initiatives for Gender Justice, *Overturn of the first ICC conviction for crimes of sexual violence,* Jun. 12, 2018, *available at* http://4genderjustice.org/pub/Statement-Bemba-Appeal-Judgment-June-2018.pdf; Francois Lenoir, *A chance for the International Criminal Court to fix sex crimes injustice,* THE CONVERSATION, Dec. 17, 2017, *available at* https://theconversation.com/a-chance-for-the-international-criminal-court-to-fix-sex-crimes-injustice-88966.

[42] Francois Lenoir, *supra* note 41.

[43] Women's Initiatives for Gender Justice, *supra* note 41.

[44] Lisa Davis, *Reimagining Justice for Gender-Based Crimes at the Margins: New Legal Strategies for Prosecuting ISIS Crimes Against Women and LGBTIQ Persons*, 24 WM. & MARY J. WOMEN & L. 513, 519-521 (2018).

[45] Stefan Simanowitz, *A historic moment for international justice*, AMNESTY INTERNATIONAL, March 31, 2016, *available at* https://www.amnesty.org/en/latest/news/2016/03/a-historic-moment-for-international-justice/; Rosemary Grey, *The ICC's First 'Forced Pregnancy' Case in Historical Perspective*, 15(5) J. INT'L OF CRIM. JUST. 905 (2017).

[46] Siobhan K. Fisher, *Occupation of the Womb: Forced Impregnation as Genocide*, 46 DUKE L.J. 91, 112.

[47] Grey, *supra* note **Error! Bookmark not defined.**

[48] Office of the High Commissioner for Human Rights, *Boko Haram* (July 2015),

women's reproductive autonomy both through forced abortions and sexual slavery.[49] It is not for lack of situations warranting such a charge, but rather reticence to pursue charges of this nature. There is a need for greater protections of women and girls in such situations and legislation that ensures effective implementation of accountability measures.

The ICC's Office of the Prosecutor also recognized the challenges victims face when seeking justice for sexual and gender-based crimes. In its Strategic Plan 2012-2015 and Policy Paper on Sexual and Gender-based Crimes, the Office of the Prosecutor committed itself to integrate a gender perspective in its work. It outlined strategic goals to take account of gender in statutory interpretation, best practices in investigation and prosecution, and its institutional practices.[50]

The historic and ongoing violations of gender-based crimes define the impetus behind effective inclusion of sexual and gender-based crimes that existed both in the Rome Conference and today. It is clear from the shortcomings of the ICC to realize effective accountability that further integration of gender perspectives is necessary. International commitments to furthering gender integration and mainstreaming, including the Office of the Prosecutor of the ICC, demonstrate that reproducing formulations of gender-based crimes from 20 years ago does not sufficiently meet this burden.

4. Conclusion

The inclusion of a caveat on forced pregnancy limiting it based on national legislation has no legitimate basis and is the result of political compromise rather than legal obligation. The existing formulation does not conform with modern conceptualizations of forced pregnancy and abortion and is out of step with national codifications of international law and human rights bodies' recognition of the right to safe abortion. History and international scholars show that the current formulation has not yielded effective implementation. The Office of the Prosecutor has indicated the need for greater gender mainstreaming in all aspects of international criminal law. Hence, there is a need and opportunity for the ILC to modernize its formulation of forced pregnancy and ensure that the Convention on Crimes against Humanity promotes, not limits. gender justice.

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https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=16176&LangID=R

[49] *See* Rep. of the Office of the United Nations High Commissioner for Human Rights, *The Human Rights Situation in Iraq in Light of Abuses Committed by the So-Called Islamic State in Iraq and the Levant and associated groups*, Mar. 27, 2015, UN Doc. A/HRC/28/18; HRC 28th Sess. (2015).

[50] The Office of the Prosecutor of the ICC, *Policy Paper on Sexual and Gender-based Crimes* (2014), https://www.icc-cpi.int/iccdocs/otp/otp-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf.

III. Formulation of "Gender" in the Context of Persecution

Similar to the formulation of forced pregnancy, the formulation of gender with respect to the crime of persecution arose in the context of the ILC's Special Rapporteur on crimes against humanity's first report. He relied on the widely accepted nature of the Rome Statute to justify the verbatim use of its language. The draft articles provisionally adopted by the Drafting Committee recognize persecution as an act constituting crimes against humanity when carried out "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."[51]

Unlike the other protected identifiable groups referred to in the definition of persecution, gender is subject to further definition; the term 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."[52]

The inclusion of the term "gender" in the definition of persecution as a protected group represented a significant success on the part of women's rights organizations, particularly the Women's Caucus for Gender Justice.[53] Prior statutes on international criminal tribunals only recognized political, racial, and religious groups in its formulations of persecution.[54] The original 1994 draft of the Rome Statute did not contain a single explicit reference to gender.[55] The use of the term "gender," rather than "sex" also indicated a measured change from earlier international texts, such as the International Covenant on Civil and Political Rights ("ICCPR") and the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW").[56] Whereas "sex" refers solely to biological differences, "gender" incorporates a social element. However, the progressive meaning of the word was lost in the narrow and complicated definition used in the Rome Statute.[57]

There is no legitimate reason for gender to be treated different than other identifying criteria for protected groups under the provisions on persecution. It wrongfully excludes individuals of different sexual orientations and gender identities from the protection of the articles. The opaque and stagnant formulation fails to recognize the significant changes in the definition of gender over the past 20 years and fails to provide adequate accountability for gender-based crimes.

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[51] Statute of the International Law Commission art. 1(1), Nov. 20, 1947.

[52] Rome Statute art. 7(3); Rep. of the Int'l Law Comm'n, 69th Sess., May 1-June 2, July 3-Aug. 4, 2017, UN Doc. A/72/10 (2017) art. 3(3).

[53] Rana Lehr-Lehnardt, *One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court,* 16 B.Y.U. J. OF PUB. L. 317 (2002).

[54] Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States art. 3(h), Nov. 8, 1994; Statute of the International Criminal Tribunal for the Former Yugoslavia art. 5(h), May 25, 1993.

[55] While it included sexual and gender-based crimes, such as rape, it did so in a gender-neutral way. Valerie Oosterveld, *The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?* (2005). Law Publications. 93

[56] ICCPR arts. 2(1) and 26; CEDAW art. 1.

[57] Oosterveld, *supra* note 55.

1. *Lack of legitimate basis for differentiation*

The Rome Statute's legislative history reveals that the decision to include a definition of gender, but none of the other identifying criteria, was influenced primarily by states seeking to limit it to men and women to the exclusion of other genders, including transgender and intersex persons.[58] Qualifying language applied only to gender may imply that it is secondary to the other criteria.

Delegates at the Rome Conference directly espoused the impetus behind the definition: to ensure that the definition of persecution would not include state-sanctioned discrimination against LGBTQ individuals, namely the criminalization of homosexual acts.[59] Bare animus against a group, particularly in light of the advances in legal recognition, is not a legitimate reason for treating gender differently than "political, racial, national, ethnic, cultural, [or] religious" groups.[60]

Some states that advocated for the inclusion of a definition of gender framed it as a need for clarity. Instead the resultant definition is one of "constructive ambiguity," that placates both sides of the debate but offers no precision or guidance for practical implementation.[61] Critics state that the definition could complicate prosecution and "appears unworkable and impractical."[62]

2. *Changes in the world*

Both prior to and since the adoption of the Rome Statute's language defining gender, international and regional frameworks have significantly broadened to include people of different sexual orientations and gender identities within existing legislation.[63] In 1994, the Human Rights Committee adopted the view that "sex" as used in articles 2(1) and 26 of the ICCPR "is to be taken as including sexual orientation."[64] The CEDAW Committee expressed the connection between sex, sexual orientation, and gender identity in its General Recommendation 28.[65] Regional human rights bodies have similarly recognized sexual orientation and gender identity as protected under existing non-discrimination provisions, despite no explicit references in the foundational texts.[66]

The vast majority of international and regional bodies, including the ICC's Office of the Prosecutor have adopted broad definitions of "gender" that encompasses the understanding of gender as a

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[58] Rome Conference, Official Record Vol. II; *See also* Lisa Davis *supra* note

[59] Rome Conference, Official Record Vol. II.

[60] Rome Statute art. 7(1)(h)

[61] Oosterveld, *supra* note 55, at 57.

[62] Moshan, *supra* note 37.

[63] *See, e.g.,* UN Secretary-General, *Protection against violence and discrimination based on sexual orientation and gender identity*, UN Doc. A/73/152 (12 July 2018); the Inter-American Court of Human Advisory Opinion OC-24/17 (November 24, 2017) par. 32; CAT Committee, 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); CEDAW, General Recommendation 33, UN Doc. CEDAW/GC/33 (3 August 2015); CAT General Comment 3, UN Doc. CAT/C/GC/3 (19 November 2012).

[64] Toonen v. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), para. 8.7.

[65] UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28, para. 18.

[66] ECtHR, Salgueiro da Silva Mouta v Portugal, no. 33290/96, ECHR 1999-IX, Judgment of 21 December 1999; Inter-American Court of Human Rights, Case of Atala Riffo and Daughters v. Chile. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, para. 95.

social construct.[67] The Office of the Prosecutor of the ICC states that its definition is "in accordance with article 7(3) of the Rome Statute," but it notably differs in its precise wording.[68] It defines gender as referring to "males and females, within the context of society. This 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."[69] Scholars note that this and similar definitions are inclusive of sexual orientation and gender identity because they can be understood as deviations from prescribed gender roles.[70]

3. Importance of gender lens

Despite international and regional human rights bodies' understanding that the meaning of gender broadly encompasses the social construction, legal scholars warn that some states may take advantage of the opacity of the term to ignore gender-based crimes.[71] Other commentators caution that the policy stated by the Office of the Prosecutor of the ICC focuses on the social construction as it applies to women and is far from definitive in its protection of LGBTQ individuals.[72] Hence, more is required to ensure adequate protection.

As discussed above, the international criminal system has a poor record of successful investigations and convictions on gender-based crimes. There have been no convictions for the crime of persecution on the basis of gender in the ICC, despite its frequent occurrence.[73] Daesh is an ongoing example that uses notions of masculinity and femininity to persecute women and those they perceive to be LGBTQ.[74] Women are targeted for physical punishment, including stoning to death and lashing, for failing to adhere to dress codes, working professions outside the home, and engaging in pre-marital sex.[75] Men who appear effeminate based on the inability or the choice not to grow a beard, wearing western hairstyles, or wearing skinny jeans may be accused of homosexuality.[76] Those believed to be homosexual have been targeted for death by throwing victims from buildings, beheading, gunfire, and bludgeoning.[77]

The ineffectiveness of the existing legal framework to address persecution on the basis of gender along with the ongoing violations demonstrates that more needs to be done to incorporate a gender lens. Where the existing legislation allows for this type of conduct to continue, there is a

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[67] The Office of the Prosecutor of the ICC, *supra* note 50.

[68] *Id.*

[69] *Id.*

[70] *See* Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law,* 46 McGill L.J. 217, 237 (2000); Lisa Davis, *Reimagining Justice for Gender-Based Crimes at the Margins: New Legal Strategies for Prosecuting ISIS Crimes Against Women and LGBTIQ Persons*, 24 Wm. & Mary J. Women & L. 513 (2018).

[71] Lisa Davis, *Will the New Crimes Against Humanity Treaty Protect Women and LGBTI Persons?,* Open Democracy 50.50 (Sept. 21, 2018).

[72] Rosemary Grey, *Hate Crime Against Humanity? Persecution on the Grounds of Sexual Orientation under the Rome Statute,* Beyond the Hague (Feb. 21, 2014) *available at* https://beyondthehague.com/2014/02/21/hate-crime-against-humanity-persecution-on-the-grounds-of-sexual-orientation-under-the-rome-statute/.

[73] Davis, *supra* note 44.

[74] *Id.*

[75] *Id.* at p. 524-528.

[76] *Id.* at p. 528-530.

[77] *Id.*

moral and legal obligation to strive for more inclusive language.

4. Conclusion

There is no legally valid reason for the inclusion of a definition on gender where no equivalent exists for other identifying criteria for protected groups and the current formulation neither reflects general nor best practice. The legislative history points to animus against LGBTQ persons and a constructively ambiguous, thus legally impractical, definition. The concept of gender has shifted drastically in the past 20 years with international and regional bodies recognizing the inclusion of varying social constructions that evolve over time and change by culture. The current status of gender in the ICC is inadequate to protect or secure justice for women, sexual and gender minorities. GJC calls on the ILC to reconsider the formulation of gender to better codify non-political legal standards, reflect the current state of the law, and ensure accountability for gender-based crimes.

IV. Recommendations

The Global Justice Center recommends that the ILC:

- Remove the phrase "This definition shall not in any way be interpreted as affecting national laws relating to pregnancy" from Draft Article 3(2)(f).

- Either remove the definition of gender in the draft Convention or revise the definition to mirror the definition put forth by the ICC's Office of the Prosecutor.

- Conduct a gender audit of the draft articles on crimes against humanity to ensure that gender is effectively mainstreamed and that the articles reflect the progressive legal developments on gender since the adoption of the Rome Statute.