

Can Opposition to Homosexual/Transgender Issues and Abortion be Considered a Crime Against Humanity?

By Stefano Gennarini, J.D.

INTRODUCTION

The concept of “gender-based persecution” in the draft articles of a new treaty on crimes against humanity presents a unique and unprecedented threat to the ability of traditional people and persons of faith to communicate freely what they believe about the nature of the human person, men, women, marriage, and family, and to adopt laws consistent with such beliefs.

The draft treaty discards the definition of gender as “male and female” which was part of the definition of the crime of “gender-based persecution” in the 1998 Rome Statute of the International Criminal Court. Without that definition, the draft articles open the door to the criminal prosecution of anyone who objects to homosexual and transgender ideas, behavior, or practices.

The gravity of labelling anyone *hostis humani generis* (enemy of humanity) for merely advocating for traditional marriage, traditional norms of sexual morality, and the understanding of sex as a binary should give pause to UN member states and lead to further reflection on the new treaty on crimes against humanity.

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A New Treaty on Crimes Against Humanity

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The topic of crimes against humanity and international crimes more broadly is among the most controversial and technically difficult in international law. It raises issues related to universal jurisdiction, the extraterritorial application of laws, guarantees of due process, and, perhaps most controversially, an extranational court with permanent universal prosecutorial powers.

The topic is so controversial that the possibility of a treaty on crimes against humanity was discussed for several decades after the Nuremberg Trials before the Rome Statute of the International Criminal Court was ever adopted in 1998.¹ Even after it was finally adopted, the Rome Statute remains a controversial and divisive treaty. It allows differing levels of participation and buy-in from signatories, and several countries are not parties to the treaty at all, most notably the United States.

Advocates for transnational justice in Western countries now want to establish a new treaty on crimes against humanity that would achieve the aims of the International Criminal Court even more effectively. Rather than create an international court with universal jurisdiction, the treaty would require individual countries to adopt domestic legislation to prosecute crimes against humanity, which would be defined within the new treaty, using both new and existing judicial and prosecutorial mechanisms. The treaty is being presented as complementary to the Rome Statute's legal framework.

The new treaty design, modelled on the 1951 Convention Against Genocide,² which was ratified by the U.S., bypasses the U.S.'s principal objection to the Rome Statute's framework: namely, that universal jurisdiction by a foreign court would violate the due process guarantees for U.S. citizens under the U.S. Constitution. Rather than establish an international court with universal jurisdiction, the new framework is entirely based on enforcement through domestic laws and the administration of justice at the national level, avoiding the U.S. objection to the Rome Statute based on due process entirely inasmuch as national courts operate within their constitutional mandates.

Both the European Union³ and the United States government⁴ have already expressed their support for the new treaty and for a rapid adoption process. What makes the framework additionally attractive to Western powers is that they would likely be able to use financing mechanisms for technical and capacity-building within foreign countries' legal frameworks

for crimes against humanity to obtain influence in how such domestic courts function and are staffed in every country in the world.

During its most recent sessions, the sixth committee of the General Assembly, which deals with legal matters, debated the new treaty on crimes against humanity after it was initially proposed by the International Law Commission in 2019.⁵ Disagreements arose when the European Union and the United States wanted to begin negotiations on the final version of the treaty, while developing countries argued that this would be premature. To resolve the dispute, the committee scheduled two special sessions for the committee to discuss the draft articles in more detail, to be held from April 10-14 of 2023 and April 1-5 of 2024.⁶

During the first resumed session, several member states who promote progressive social values, including the United States, the European Union, and Nordic countries, called for the new treaty to redefine two crimes against humanity included in the Rome Statute: the crime of “gender-based persecution”, or “gender persecution,” and the crime of “forced pregnancy.” Because of the relationship between these terms and issues of abortion and sexuality, both are controversial proposals.

Gender-based Persecution

The Rome Statute of the International Criminal Court famously defined “gender” exclusively as a biological and binary concept in Article, 7, paragraph 3:

For the purpose of this Statute, it 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.

This definition of gender is contained in the section of the Rome Statute that defines each of the crimes against humanity and their constituent elements. It was hard-fought over many months of difficult and tense negotiations. States expressly excluded “any meaning different from the above” before the treaty could be adopted, because theories of gender as a social construct were already circulating at high levels of academia and policy-making.

At the resumed session of the sixth committee in April 2023, the European Union, the United States, Nordic countries and other progressive Western countries supported the decision of the

International Law Commission’s decision to delete the definition of gender in the Rome Statute from the new treaty.⁷ This is the principal concern of this paper, and the implications of this omission are discussed in detail in the sections below.

Forced Pregnancy

The Rome Statute, Article 7, paragraph 2(f), narrowly defined “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.”

That definition was the result of a protracted negotiation to exclude the possibility that adopting such a concept as a crime against humanity could imply that abortion restrictions could constitute a crime against humanity.

At the 2023 resumed session, the United Kingdom asked to re-define “forced pregnancy” in the new treaty to reflect “the repugnance of forcible interference with reproductive rights,” with the clear implication that “forced pregnancy” should be redefined to include any restriction on access to abortion or contraception. Cuba and Canada supported this position, arguing that the concept of forced pregnancy had evolved over time.⁸ Despite the fact that abortion has never been accepted as an international human right, if this attempted redefinition were to be adopted in a hard-law treaty, it would result in the consideration of any restriction on abortion a form of “forced pregnancy” punishable as a crime against humanity. While this is not the focus of this paper, it is worth noting because it is a similar controversy being debated by nearly-identical opponents and using similar arguments.

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The Open Definition of “Gender” as Social Construct in the New Treaty

The section on definitions in Article 2 of the draft new treaty on crimes against humanity⁹ preserves the same definitions section from the Rome Statute verbatim with only one exception: the International Law Commission removed the definition of gender altogether. (Note the different numeration: the definitions section in the Rome Statute is contained in Article 7. In the new treaty, the definitions are in Article 2).

The express reason given by the commission for removing the definition of gender in international practice is “evolving” to a different concept of “gender as a socially constructed (rather than biological) concept.”

The express reason given by the commission for removing the definition was that the understanding of gender in international practice is “evolving” to a different concept of “gender as a socially constructed (rather than biological) concept” based on “several developments in international human rights law and international criminal law.”¹⁰ The sources cited for such practice were chiefly the Council of Europe’s Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) and the non-binding pronouncements of the Office of the Prosecutor of the International Criminal Court, UN human rights treaty bodies, and UN special procedures operating under the Office of the High Commissioner for Human Rights.

Because of the elaborate rationale in the report of the International Law Commission, discarding the definition of gender from the Rome Statute in a new treaty on crimes against humanity will not merely leave the definition of gender open to each country to define in national legislation, as some might believe. The legal effect of dropping the Rome Statute’s definition of gender in the new treaty will be to enshrine gender as a social construct in international law, as advocates for homosexual and transgender issues openly argue.¹¹

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Article 31 of the Vienna Convention on the Law of Treaties provides that the negotiations and documents prepared in the process of adoption of a treaty provide the context to understand the meaning of the provisions of a treaty.¹² Having dropped the biological binary definition of gender from the Rome Statute, for the express reason that the meaning of gender has evolved and now refers to a social construct that encompasses “sexual orientation” and “gender identity” and not just sex, the new treaty would ratify this new definition, and it would ratify this new definition not just for the new treaty but also for the Rome Statute.

Article 31 of the Vienna Convention states that subsequent applications and interpretations of treaty can also affect the way the obligations in treaties are defined. The rationale developed by the International Law Commission presumes that the definition of gender has already evolved in the practice of the ICC prosecutor and in the work of UN human rights system. Adopting the new treaty without the definition of gender would therefore define gender also for the Rome Statute.

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law on par with sex, and authorize UN agencies and the International Criminal Court prosecutor to recognize as many genders as individuals may subjectively assert.

It should also be noted that the process the International Law Commission used to make this change gives the impression of impropriety and of being the result of undue influence. The commission only revisited the definition of gender after homosexual and transgender activists lobbied the commission to drop the definition of gender, after it had been retained in the early drafts of the new treaty.¹³ This was done even though the terms of reference for the project were to retain the definitions on crimes against humanity from the Rome Statute integrally.

The International Crime of “Gender-Based Persecution”

The narrow definition of gender in the Rome Statute, Article 7, paragraph 3, was added to the treaty precisely to avoid its misuse to prosecute beliefs and opinions. It was thought to be necessary because the crime of “gender-based persecution” applies to a very broad range of actions in the Rome Statute, and can include speech.

Persecution is defined in the Rome Statute, Article 7, paragraph 1(g) as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.” Persecution can become a crime against humanity under the Rome Statute, Article 7, paragraph 1(h) when it is carried out “against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, *gender as defined in paragraph 3*, or other grounds that are universally recognized as impermissible under international law, *in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court*” (emphases added).

The last clause in the paragraph is referring to the crimes of rape, murder, torture, and imprisonment, contained in Article 7, paragraphs 1(a-k). Notably, sub-paragraph (k) provides a broad catchall provision that defines crimes against humanity to include any and all “inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

While this language is based on the language of the Nuremberg Tribunal,¹⁴ the current application of this language by the International Criminal Court prosecutor departs sharply from any conceivable application at the time of the Nuremberg Trials

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or the adoption of the Rome Statute. The prosecutor of the International Criminal Court has already made the mere political or religious opposition of homosexual and transgender policies a crime against humanity. He ordered his staff to adopt a broad new reading of "gender-based persecution" in a 2022 policy paper on "gender persecution"¹⁵ that frames homosexuality and transgender rights as fundamental rights, and any interference with such "rights" as capable of being considered a crime against humanity under the Rome Statute.

According to the paper, such gender-based persecution can include "any deprivation" of fundamental rights as defined by UN human rights bodies and experts. Such a deprivation may take place through all manner of "regulations that can impact persons in every aspect of life." This includes "their reproductive and family options, who they can marry, whether they can attend school, where they can work, how they can dress and whether they are simply allowed to exist."¹⁶

The ICC prosecutor's policy paper notably does not acknowledge the freedom of religion and expression of those who hold traditional family values. On the contrary, the paper instructs ICC staff to investigate local cultures and religions to find if they violate the Rome Statute throughout the policy paper. In a chilling paragraph, designed to intimidate anyone who does not carry water for the entire homosexual/transgender agenda, the ICC prosecutor declares that all manner of protected speech and even religious activity will be investigated and used as evidence of the crime of persecution:

The Office will seek to present evidence to establish the discriminatory intent and knowledge of the accused through diverse sources. Policies, plans, rules, regulations and other means for expressing gender criteria may come in various forms of oral statements or written materials such as teachings, arts and literature, visual and audio media, education and religious materials, manifestos, orders, decrees, brochures, magazines, leaflets, posters, radio or television broadcasts, artwork, graffiti, internet postings such as social media or blog posts, orders, speeches, everyday language and utterances. This may also include elements of an individual suspect's background and prior conduct that are indicative of relevant intent and adverse gender biases in the response of suspected groups or authorities to the crimes. The Office may also review documentary evidence contained in the reports of civil society organizations, universities, UN experts or bodies, Commissions of Inquires and media coverage.¹⁷

Under such an approach any political and religious rhetoric designed to oppose homosexual and transgender policies will be treated as a form of gender persecution.

The ICC prosecutor's policy paper is not a mere theoretical exercise. It is a manual for ICC staff to investigate crimes against humanity.

It is easy to see how under such an approach any political and religious rhetoric designed to oppose homosexual and transgender policies will be treated as a form of gender persecution punishable as a crime against humanity.

Any legal measures that limit demands for complete social approval of homosexual and transgender conduct and subjective preferences in schools, family law, religious spaces, and society more broadly could rise to the level of a crime against humanity, including restrictions on homosexual marriage, adoption, transgender identity change and sports policies, and even restrictions on access to "gender-affirming" hormone therapy and surgeries, including for minors. Laws that do not extend marriage to homosexual unions, legally recognized gender changes, and the protection of children from harmful propagandistic and sexual content could all qualify as deprivations of fundamental rights and be considered "gender-based persecution" for purposes of crimes against humanity.

The ICC prosecutor's policy paper is not a mere theoretical exercise. It is a manual for ICC staff to investigate crimes against humanity. Moreover, there are already countries that are carrying out prosecutions based on this understanding with the endorsement of the U.S. government.

U.S. Ambassador to the United Nations Linda Thomas-Greenfield praised Colombia's Special Jurisdiction for Peace for initiating the first-ever "charges of gender persecution as a crime against humanity when committed against five LGBTQI+ persons in the armed conflict" during a briefing of the Security Council. She called it a "model" and said she hoped it would be "replicated" across the world.¹⁸

These are completely new understandings of "persecution" and "inhumane acts" that go far beyond what has previously been understood to constitute crimes against humanity at the Nuremberg trials or when the Rome Statute was adopted. The ICC prosecutor, UN human rights mechanisms, and other sources cited by the International Law Commission for changing the definition of gender, do not have any authority to change a definition of gender that was negotiated by sovereign states. Unless sovereign states act to correct these abuses, the abuses will become the new norm. The authority for these officials to do all this is questionable. What is relevant is that they did it and they have the power to enforce it. Absent a course correction by UN member states, their actions will become law.

Conclusion

Most countries do not consider gender a merely social construct, but a societal understanding based in biological reality, and with legal implications.

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DEFINITIONS is published monthly by the Center for Family & Human Rights (C-Fam).

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If the General Assembly were to adopt a new treaty on crimes against humanity that omits the definition of gender from the Rome Statute, based on the rationale provided by the International Law Commission in the draft articles of the new treaty, it would have the effect of ratifying the commission's completely novel interpretations of gender-based persecution under the Rome Statute. Moreover, it would propel the adoption of laws and protocols to target and prosecute any political and religious opponents of the homosexual/transgender agenda as international criminals.

Most countries do not consider gender a merely social construct, but a societal understanding based in biological reality, and with legal implications. Only seven countries allow gender change based on self-identification alone, according to Amnesty International, which supports this controversial position.¹⁹ Only a minority of countries recognize "sexual orientation and gender identity" as protected categories and even less give any social protection to homosexual unions.²⁰

Because of the seriousness of this treaty, and the gravity of labelling anyone *hostis humani generis* (enemy of humanity), UN Member States should insist that any eventual negotiation of a new treaty on crimes against humanity must start with the definition of gender from the Rome Statute, as was understood by the sixth committee at the outset of the project of the International Law Commission.

Endnotes

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- 13 Letter to the International Law Commission from activist groups: Re: “Gender” in the Draft Crimes Against Humanity Convention, December 3, 2018. Available at https://www.law.cuny.edu/wp-content/uploads/page-assets/academics/clinics/hrgj/CAH_English.pdf
- 14 United Nations, Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, Article 6(c).
- 15 ICC Policy Paper on Gender Persecution (2022). Available at <https://www.icc-cpi.int/news/prosecutor-international-criminal-court-icc-karim-aa-khan-kc-publishes-policy-crime-gender>
- 16 Ibid. p. 10-11 (“24. Gender persecution severely deprives a person or persons of the fundamental right to be free from discrimination in connection with other fundamental rights deprivations, contrary to international law. For example, it may deprive a person of the right: to life; to be free from torture or other inhumane or degrading treatment or punishment; to be free from slavery or the slave trade, servitude and retroactive application of penal law; to freedom of assembly, opinion, expression, movement and religion, including the right to be free from religion; rights to equality, dignity, bodily integrity, family,

privacy, security, education, employment, property, political or cultural participation, to access to justice or health care. Human rights violations can constitute a severe deprivation of fundamental rights on their own or when considered cumulatively. The deprivation of fundamental rights may be enforced by means of violence or destruction, or occur via the imposition of regulations that can impact persons in every aspect of life. This may include, for example, their reproductive and family options, who they can marry, whether they can attend school, where they can work, how they can dress and whether they are simply allowed to exist”)

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