

**LGBTIQ Civil Society Convening:  
Strengthening the protection of LGBTIQ persons  
in the draft crimes against humanity treaty**

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**City University of New York (CUNY)  
School of Law**

**Outcome Report**

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*Law in the Service of Human Needs*



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## I. Background

On October 26<sup>th</sup> the Human Rights and Gender Justice (HRGJ) Clinic of the City University of New York (CUNY) School of Law, OutRight Action International, MADRE, the Center for Socio-Legal Research at the Universidad de Los Andes School of Law, Bogotá, Colombia organized an experts meeting on the draft crimes against humanity (CAH) treaty. The International Law Commission completed its first reading of articles for the new treaty in 2017 and called for civil society input by December 1<sup>st</sup> 2018. While the current draft treaty embraces strong language from the Rome Statute, including gender as a protected class from persecution, it also adopts its unusual and opaque definition of gender.

Two decades of international law have since clarified the definition of gender contained in the Rome Statute has become outdated. Strong treaty language that complies with existing human rights treaties and customary international law norms would be an invaluable tool for confronting impunity and enhancing state efforts to prevent and punish gender-based crimes. By contrast, a text that does not adhere to existing human rights norms risks eroding gains of women's and gender rights movements. A failure to recognize gender rights could further sideline women and other marginalized victims and result in even greater impunity for gender-based crimes amounting to crimes against humanity. Also at risk is the further concretizing of women's rights as secondary rights, and the exclusion of rights for lesbian, gay, bisexual, transgender, intersex, and queer (LGBTIQ) persons altogether.

In the mid-1990's, substituting the word "gender" for "sex" was one of the most important safeguards for gender justice to happen at the Rome Conference, which created the Rome Statute and ultimately the International Criminal Court (ICC). A fundamental objective by the opposition was to exclude sexual orientation and gender identity as categories protected against discrimination. While these bigoted views wielded a heavy hand in the negotiations, they were not representative of the overwhelming majority of delegates who favored the more inclusive term of gender and embraced the recognition of its social construction.

The term "gender" is defined in Article 7(3) as, "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." At the formation of the Rome Statute, the phrase "in the context of society" was decidedly understood to codify the societal definition of gender, thus its social construction. As discussed during the negotiations, the accepted definition of gender recognizes discrimination based on whether or not a person behaves according to a prescribed gender role, "whether it be in the realm of housekeeping, work, or sexuality." This came in part from the Report of the U.N. Secretary General to the Beijing Platform for Action, which was distributed to delegates discussing the definition of gender. Over the last two decades, international human rights law and jurisprudence has born this out, as experts and jurists have adopted language that accounts for the social construction of gender identity. However, since the Statute's formation nearly twenty years ago, the ICC has never successfully prosecuted a charge of gender-based persecution, arguably because of its opaque definition.

Similar to the call to end impunity for persecution committed on the basis of gender, the struggle to secure the recognition of rape as a form of torture initially faced stiff resistance. Sexual

violence crimes were not taken as seriously as other crimes in the early years of international criminal tribunals. However, activists were successful in rallying drafters to abandon the “outrages to personal dignity” language, and to broaden the category for sexual violence to not only include rape but also sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other undefined forms of sexual violence.

## II. Purpose of event

Before the International Law Commission called for states, international organizations, and others to submit their final commentaries after its first reading, civil society was largely not provided the opportunity to weigh in on the progress or text of the draft crimes against humanity treaty. While this treaty is the most significant international criminal law initiative in nearly 20 years, civil society groups representing communities affected by crimes against humanity in both conflict and peacetime should have a say in the final outcome. To this end, experts and leaders from the LGBTIQ rights movements were convened in New York City on October 26, 2018 at CUNY Law School to discuss the gender provisions in the draft treaty and how they should be strengthened to support the LGBTIQ community.

## III. The treaty and its development

The session began with a discussion on real-world conflict situations, including those featuring hardline militias like ISIS, where women and men, including LGBTIQ persons and irrespective of age, are being persecuted because of their gender. Despite global media attention to such violations during armed conflict, such persecution is virtually ignored in post-conflict phases. Victims rarely, if ever, receive justice or reparations. In Iraq, prosecutions of ISIS fighters are sweeping by at unprecedented rates, with some sentencing hearings lasting a record seven minutes, while no recognition is attributed to the gender-based crimes the militia fighters committed.

A question was raised concerning why this treaty would not have a treaty body monitoring its implementation and development, and whether or not activists could advocate for the creation of such a body with the passage of the treaty. Participants discussed how the treaty would provide a framework for the codification of crimes against humanity under domestic penal codes.

Participants also discussed how crimes against humanity, as currently defined by the Rome Statute, include gender as a protected class under the crime of persecution. For a crime to be considered persecution under the treaty, the act must be one of the enumerated crimes under crimes against humanity (rape, torture, sexual slavery, enforced disappearance, etc.) and the victim, a member of a protected group. Out of the seven protected classes under the Rome Statute, gender is the only group defined.

Participants analyzed the gender definition in the Statute. Numerous legal scholars have clarified that the “context of society” portion of the definition clarifies that gender is a social construct, including gender expression, roles, norms, and attributes, etc. However, the definition is opaque

and confusing and does not reflect customary international law. Not surprisingly, there hasn't been a successful gender-based persecution case at the ICC.

Participants discussed case law that guides the interpretation of the gender definition. International criminal law is comprised namely of international criminal tribunals and the ICC rulings and focuses on individuals, while international human rights law applied to states is not binding on international criminal law, but is persuasive in legal arenas. Twenty years of international human rights law have progressed the understanding of gender as a social construct, and international criminal law must now catch up in this pivotal moment.

Under international criminal law, there is a dearth of jurisprudence relating to gender-based persecution. Importantly, the Office of the Prosecutor of the ICC released the 2014 *Policy Paper on Sexual and Gender-Based Crimes*<sup>1</sup> to clarify that gender is understood as a social construct within the understanding of the Rome Statute. This definition includes the phrase “women and men, girls and boys,” which is binary in nature but is indicative of how perpetrators assign roles and that the binary fits the perpetrators' views of victims.

Participants then turned the discussion to the additional language added to the draft treaty in article 3, paragraph 4, which states: “This draft article is without prejudice to any broader definition provided for in any international instrument or national law.” Participants discussed how treaty language is the bedrock to the codification of customary international law (CIL). Even with this additional blanket statement recognizing the natural progression of rights, such an explicit definition to the term gender in a treaty only works to ensconce gender misrecognition. Consequently, it may be perceived as both confusing and conflicting to both qualify only one persecutory category, and with a problematic definition that is not in compliance with CIL, while broadly permitting alternative definitions.

This is the most significant international criminal law treaty since the Rome Statute, and this definition cannot be overlooked. Even if the treaty is never passed and does not become law, the ILC process and its final draft version that is handed to states has significant weight on codifying international criminal law, and a lot is at stake in this effort.

#### **IV. Strengthening LGBTIQ protections in the treaty**

Participants were presented with potential options regarding the definition and how it could be changed. The goal of the discussion was not to come to a consensus, but to present ideas for change that could be utilized in various communities.

Participants agreed that the definition of gender should be removed from Article 3(3) of the CAH draft treaty. In the alternative, participants discussed how the Commission should revise the definition to reflect the definition put forth by the Office of the Prosecutor of the International Criminal Court (ICC) in its 2014 *Policy Paper on Sexual and Gender-Based Crimes*.

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<sup>1</sup> The Office of the Prosecutor of the ICC, *Policy Paper on Sexual and Gender-based Crimes*, 3 (2014), <https://www.icc-cpi.int/iccdocs/otp/otp-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>.

Additionally, participants discussed how the grounds for persecution listed in Article 3(1)(h) should be expanded to reflect evolving international law.

Participants agreed that a strong text on crimes against humanity that complies with existing human rights law would be an invaluable tool for confronting impunity, and enhancing state efforts to hold accountable those suspected of criminal responsibility for gender-based crimes. In contrast, a text that does not properly account for current understandings of gender could sideline women, LGBTIQ persons, and other marginalized and vulnerable groups. At worst, it could result in greater impunity for gender-based crimes amounting to crimes against humanity.

Participants also discussed how the CAH treaty should fully comport with the two decades of international human rights law and jurisprudence that have accounted for the social construction of gender. While international human rights precedents recognizing gender as a social construct are abundant, there is less jurisprudence that exists under international criminal law. This significantly raises the importance of properly defining gender in the new crime against humanity treaty. If the final draft produced by the International Law Commission adopts outdated and opaque language on gender, it will set a dangerous precedent and harm efforts to address impunity for gender-based crimes.

Finally, participants discussed how, other than “gender,” no other protected class under persecution is defined in the draft treaty. Such a definition may imply that persecution on the basis of gender is secondary or qualified, and not equivalent to other persecutory categories. Maintaining an opaque definition or any definition for a protected class when other classes are not defined, as reflected in the draft treaty now, may signal to states contemplating ratification that gender is a lesser category, and not equivalent in stature to other persecutory categories.

## **V. Strategies and actions going forward**

Civil Society has until December 1, 2018, to submit comments to the International Law Commission. ILC members themselves indicated that states should also submit their final commentaries, since they are the entities that will take the final decision on the treaty. Therefore, the general effort and strategy is to engage as many stakeholders and states as possible—who support a stronger gender definition—and work with them to submit comments to the International Law Commission before the December 1 deadline. Time is short, but engagement has already started with civil society and states, and will continue in earnest.

In order to develop strategies and next steps for engaging civil society and governments, the participants formed two working groups, one focusing on advocacy with states and UN entities, the other focusing on civil society engagement and messaging. After discussing various approaches and how each activist could participate, the group reconvened to deliberate on next steps and strategies. The group decided that outreach to allied states, UN experts and other key civil society organizations to make submissions to the International Law Commission was essential.

## VI. Participants

1. **Rejna Alaaldin**, Iraq Legal Advocate, MADRE
2. **Amir Ashour**, Founder and Executive Director, IraQueer
3. **Georges Azzi**, Founder and Executive Director, Arab Foundation for Freedoms and Equality (AFE)
4. **Danny Bradley**, Human Rights Advocacy Fellow, CUNY School of Law
5. **Phylesha Brown-Acton**, Co-Chairperson, Asia-Pacific Transgender Network (APTN)
6. **Charlotte Bunch**, Founding Director and Senior Scholar, Center for Women's Global Leadership, Rutgers University
7. **Nada Chaiyajit**, SOGIESC and Human Rights Advocate
8. **Lisa Davis**, Associate Professor and Co-Director, Human Rights and Gender Justice (HRGJ) Clinic, CUNY School of Law
9. **Tashwill Esterhuizen**, Programme Head, LGBTI and Sex Workers Rights Programme, Southern African Litigation Centre (SALC)
10. **Sylvan Fraser**, Staff Attorney, interACT
11. **Francoise Girard**, President, International Women's Health Coalition (IWHC)
12. **Mirna Haidar**, CUNY School of Law
13. **Ping Hou**, Global Public Service Fellow, OutRight Action International
14. **Axel Keating**, Board Member, interACT
15. **Siri May**, UN Program Coordinator, OutRight Action International
16. **Camille Massey**, Founding Executive Director, Sorensen Center on International Peace and Justice, CUNY Law School
17. **Tess McEvoy**, Programme Manager and Legal Counsel, International Service for Human Rights (ISHR)
18. **Neish McLean**, Caribbean Program Officer, OutRight Action International
19. **Sahar Moazami**, UN Program Coordinator, OutRight Action International

20. **Arvind Narrain**, Director of Research and Practice, ARC International
21. **Andrew Park**, International Program Director, Williams Institute
22. **Alecs Recher**, Legal Department Head, Transgender Network of Switzerland
23. **Graeme Reid**, Director of the LGBT Rights Program, Human Rights Watch
24. **Cianán Russell**, UN Officer, Transgender Europe (TGEU)
25. **Robinson Sanchez Tamayo, Professor of Legal Hermeneutics**, Universidad de Los Andes
26. **Jessica Stern**, Executive Director, OutRight Action International
27. **Monica Tabengwa**, Independent Consultant
28. **Leigh Ann van der Merwe**, Director, Social Health and Empowerment Feminist Collective of Transgender Women of Africa
29. **Miki Wali**, Co-Founder, Haus of Khameleon