Report of the 8th Meeting – Protection of Non-Binary and Intersex People under the Rome Statute: Opposing View to Dr Rosemary Grey's Presentation on Non-Binary People and the Rome Statute

On 22 October 2022, Africa Legal Aid (AFLA), held the 8th meeting of its Gender Mentoring Training Programme for Judges of International Courts and Tribunals. The topic of the discussion, *Protection of Non-Binary and Intersex People under the Rome Statute: Opposing View to Dr Rosemary Grey's Presentation on Non-Binary People and the Rome Statute,* was presented by María Manuela Márquez Velásquez, PhD Candidate, Grotius Centre, Leiden University.

The meeting was attended by:

Judge Reine Alapini-Gansou, Judge of the ICC; Former Member of the African Commission on Human and Peoples' Rights.
Judge Althea Violet Alexis-Windsor, Judge of the ICC.
Judge Solomy Bossa (Chair), Judge of the ICC; Former Judge of UN IRMCT; Former Judge of the ICTR; Former Judge of the African Court on Human and People's Rights.
Judge María del Socorro Flores Liera, Judge of the ICC.
Judge Luz Ibáñez Carranza, Judge of the ICC; Former Superior National Prosecutor of Peru.
Judge Florence Mumba, Judge of the Supreme Court Chamber of the ECCC; Former Judge and Vice President of the ICTY; Former Judge of the Appeals Chamber of the ICTY and ICTR; Former Judge of the Supreme Court of Zambia.
Judge Miatta Maria Samba, Judge of the ICC.
Judge Julia Sebutinde, Judge of the ICJ; Former Judge of the SCSL.
Evelyn A. Ankumah, Coordinator of the Gender Mentoring Training Programme for Judges; Executive Director of AFLA.

Participants[1] adopted the following agenda items for discussion:

Video Statement by María Manuela Márquez Velásquez: Protection of Non-Binary and Intersex People under the Rome Statute: Opposing View to Dr Rosemary Grey's Presentation on Non-Binary People and the Rome Statute

1. Overview and differentiation among the terms and concepts. Concepts of gender, sexual orientation, gender identity, non-binary individuals and intersex people
- Discussion

[1] This Report uses participants and Judges interchangeably.

2. Text of Article 7.1 H and 7.3 of the Rome Statute and its possible interpretations
- Discussion

3. Implications of amplifying the interpretation of the term ‘gender’ and its possible consequences
- Discussion

4. Shortcomings and limitations of prosecuting persecution of intersex individuals, or based on gender identity and sexual orientation under any of the grounds recognised as impermissible by international law
- Discussion

5. Any Other Matters

Video Statement

The video lecture was divided into four sections. In the first section, María Manuela Márquez provided an overview and differentiation among the terms and concepts, distinguishing between the concepts of gender, sexual orientation, gender identity, non-binary individuals and intersex people. She observed that the Rome Statute of the ICC was the first international instrument to list persecution on the grounds of gender as a crime against humanity. This, she said, was a product of a long-lasting battle with NGOs, the Holy See and some states who associated the term ‘gender’ with ‘transgressive’ ideas. She then stated that the ICC Statute’s criminalisation of persecution on grounds of gender was the result of serious legal compromises, and its inclusion marks a new chapter in international law, and its fundamental milestone in protecting marginalised communities. She noted however that the word ‘gender’ is non-passive, and wide, and might be interpreted in different ways.

In this sense, Márquez explained that several UN institutions like the UN Women and the UN High Commission for Refugees have defined the term ‘gender’ as a complex socially constructed concept influenced by culture. ‘A mutable idea among societies and times, a learned category rather than any human attribute’, Márquez cited and explained that these institutions have contrasted the concept of gender with that of sex. In this sense, she noted that it is generally accepted in the UN system that ‘gender’ refers to social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as relations between women and those between men. Márquez noted that these attributes, opportunities and relationships are socially constructed and are learned through socialisation processes.

She pointed out that another important feature of many UN definitions is the recognition that ‘gender’ is a category that changes over time and that it is not innate or immutable. Márquez explained that according to the WHO, the Secretary-General’s Report, Yogyakarta Principles, and the UNHCR Sexual Orientation and Gender Identity (SOGI) Guidelines, while ‘sex’ refers to the biologically determined differences between men and women, that are universal, ‘gender’ refers to the changeable and learned differences between men and women.

Focusing on other relevant terms used by the UN institutions and human rights bodies, Marquez addressed the concept of sexual orientation and gender identity. She explained that according to the SOGI Guidelines, 'sexual orientation' is a broad continuum including exclusive and non-exclusive attraction to the same or opposite sex. Márquez also noted that the UN institutions have understood it as 'each person's capacity for profound, emotional, affectional and sexual attraction to intimate and sexual relations with individuals of a different gender or the same gender, or more than one gender.

On the other hand, Marquez observed that 'gender identity' has been understood as referring to the internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including a personal sense of the body and other gender expressions like dress, speech and mannerisms. In this regard, the term gender identity seems to encompass non-binary individuals i.e. people who do not identify or perceive themselves as male or female exclusively. She noted that in this sense, the sex characteristics of the individual are irrelevant because what matters is how the individual identifies or perceives their gender; for example, when a person assigned a female sex at birth does not identify as female nor as male and prefers to be referred to with the pronoun 'they', as they do not identify exclusively as one or the other.

She then focused on the term 'sex' and explained that according to the Council of Europe's definition, it has to do with different biological and physical characteristics of males and females, such as reproductive organs, chromosomes and hormones. On this basis, she rhetorically asked: 'but what does the term 'intersex' mean? 'Intersex alludes to natural bodily variations, sometimes visible at birth and sometimes only apparent in puberty', Márquez opined. She explained that intersex refers to individuals born with sex characteristics like genitals, gonads and chromosome patterns that do not fit the traditional binary notions of female or male bodies. It relates to biologically determined sex characteristics and differs from gender identity, gender as a constructed concept and sexual orientation. As such, she clarified that the term intersex differs from the term non-binary, as intersectionality denotes the sexual characteristics of the individual genetically present and does not relate to how the individual perceives, or the society understands or perceives gender. She concluded this section of her presentation by highlighting that an intersex person - a person who has sex characteristics which do not fit in the traditional dichotomy of male or female - may identify as a woman, a man, or as a non-binary individual and might be attracted to women, men or both.

The second part of Márquez' presentation focused on the text of Articles 7.1 H and 7.3 of the Rome Statute and its possible interpretations. She cited the text of both articles and explained that from the textual interpretation of the article and considering the UN's definitions of 'sex' and 'gender', the term 'gender' in the referenced provisions of the Rome Statute might be given at least three different interpretations. Firstly, it might be understood as alluding to 'sex': biologically determined characteristics of male and female. Secondly, it might be interpreted as 'gender', hence, referring to socially constructed ideas of what it means to be a woman or a man, and consequently, attributed characteristics, roles, behaviours, and expectations, among others. Thirdly, it might be understood as a mix of both or as encompassing 'sex' and 'gender'.

In this regard, Márquez explained that the determination of Article 7.1 H and 7.3's interpretation has significant effects. The term, as previously mentioned, which differs and even contrasts with

each other, might also have different implications. The question of collapsing the word gender into different categories ‘sex’, ‘gender’, ‘sexual orientation’ implies that the scope of protection might change.

She then analysed each scenario of interpretation. Firstly, she explained that if the term is understood as equivalent to ‘sex’, the Court would be incapable of prosecuting conduct related to the roles of women and men in a specific society. For example, if gender is no more than sex, then the Court would not be able to carry out the kind of analysis of men's and women's roles that proved to be critical in the disposition of the *Krstić* case before the International Criminal Tribunal for the Former Yugoslavia (ICTY). She pointed out that acts such as those committed against the Yazidi community would not be prosecutable as gender-based crimes against humanity. Márquez explained that this is because the targeting and discrimination would need to be based on the actual sex characteristic of the individuals targeted and not how they are perceived by the perpetrator or the idea the perpetrator has on how they should behave, what roles they should have or what should be their specific behaviour in society. She contended that this interpretation seems to be insufficient considering the Article’s reference to society with the words ‘within the context of society’. This is because although the language used is not as clear as other definitions of gender, including ‘socially constructed’, the words clearly indicate a reference to the societies’ perception and appreciation of what it means to be a woman or a man and how they are constructed in each of the cases.

She remarked that it might seem appealing to interpret the term ‘gender’ as a ‘social construct concept’, referring to the behaviours, roles, activities, attributes, characteristics and others assigned to girls and boys and men and women, as it was done by the previous Office of the Prosecutor’s (OTP) Policy on Gender and Sexual-Based Crimes. By interpreting the term ‘gender’ as a ‘social construct concept’, gender-based persecution refers to conducts targeting a group, or person, grounded on the societally constructed idea of what the men and women should look like, behave, or do, rather than because of their membership in one of the biologically defined categories. This interpretation would cover, for example, attacks seeking to impede or limit the participation of women in government, politics, religion and the so-called honour killings, or femicides in the case of Latin America. It would also encompass the persecution of female students, driven by the socially constructed beliefs that only men should be educated.

Marquez opined that this interpretation of the term ‘gender’ would also protect and covert non-binary individuals when targeted because of not identifying or conforming with the classic notions and roles assigned to women and men. However, the understanding of the concept as a learned category might also fall short of protecting at least two situations: first, persecution targeting intersex and androgen individuals, which is sex-based; and second, persecution based on the individual's sexual preferences or sexual orientation.

She then revisited ‘intersex persons’ recalling that intersexuality relates to biological sex characteristics and differs from gender identity, gender as a constructed concept, and sexual orientation, but rather refers to naturally occurring bodily variations. Therefore, an intersex person may identify as female, or male, while their sexual orientation might be lesbian, gay, bisexual, heterosexual, or none of the above. She contended that understanding the term as a socially constructed concept would mean that persecution of intersex or androgen individuals based on

their anatomy or biological characteristics would be excluded from the scope of protection of Article 7.3 of the Rome Statute, as the scope of protection would be then limited to socially constructed concepts of what the society at a specific time considers to be man or woman and how they should behave rather than specific references to the female or male sex characteristics. Furthermore, Marquez pointed out that under any of the options, persecution based on sexual orientation seems to be also excluded from the scope of Article 7.3. The term gender will only cover those situations of nonconformity with the perceived role assigned to males and females, and not those relating to the sexual preferences of the individual.

Márquez then presented another rhetorical question: 'So, are all these groups protected under the Rome Statute'? To address this issue, she submitted that first, a distinction between the ground of persecution and the identity of the targeted group, as suggested in the confirmation decision in *Ongwen* should be considered. This is to interpret the crime of gender-based persecution as persecution on gender grounds rather than against gender groups. Therefore, the term gender persecution would be understood as persecution based on the beliefs of the perpetrator of the roles, behaviours, attitudes of what it means to be a woman or man, and the perception of the perpetrator of the individuals belonging to those categories.

Secondly, a decision must be taken as both terms, sex and gender, are different. Márquez explained that the first option would be to interpret 'gender' as incorporating 'sex', 'gender as a social construct', and 'sexual orientation' ergo, covering all possible scenarios. She expressed the view that this is highly complex, and controversial and might create a degree of uncertainty inside and outside the scope of the protection of the Rome Statute. Moreover, this option seems to be inconsistent with current developments and trends at the United Nations and the letter and spirit of UN instruments which define the concept of gender strictly; and might even be contrary to the legality principle. The second option is to understand the concept or the term 'gender' as a 'socially constructed idea', hence prosecuting persecution based on sex and sexual orientation under other grounds that are universally recognised as impermissible under international law. The third option would be to interpret the term as referring to 'sex', thus prosecuting persecution based on 'sexual orientation', 'gender' and 'gender identity' through the residual clause of 'any other grounds' universally recognised as impermissible under international law. She argued, however, that there are implications and limitations of prosecuting persecution on sex, sexual orientation or gender under any other grounds universally recognised under international law.

The third section of the video statement considered the implications of amplifying the interpretation of the term 'gender' and its possible consequences. Márquez recalled that the Rome Statute of the International Criminal Court was the first international instrument that explicitly included in Article 7.1. H persecution based on 'other grounds that are universally recognised as impermissible under international law'. By including persecution on other grounds that are universally recognised as impermissible, Article 7.1 H, calls for an ongoing interpretation by the Court. Consequently, it allows the International Criminal Court to consider developments in international law at the international criminal law level without requiring amendment of the Statute.

The question then is how to define other grounds that are universally recognised as impermissible under international law? And how and which groups to consider as covered under the scope?

Márquez argued that although there is still no consensus on this question, it has generally been accepted that the standard to be met is high. The ordinary meaning of the term 'universally recognised' already indicates a very high threshold. The Oxford Dictionary defines 'universally' as 'in every case or instance i.e. always'. Requiring a high standard is also supported by combining the grammatical argument and the systemic interpretation of the Rome Statute. In this regard, she pointed out that only the crime of persecution uses the universally recognised standard. Furthermore, the principle of effectiveness requires the standard of 'universally recognised' to be different from that of 'internationally recognised'. Moreover, she explained that the drafting history denotes that the words 'universally recognised' were the product of compromises between states in favour of an open list of prohibited persecution grounds, and those who feared that this would violate the principle of legality. Thus, the consequence was the inclusion of an open list, but with a high threshold of universal recognition.

Márquez expressed the view that in interpreting the term universally recognised as analysed by Valérie Suhr, three levels of acceptance can be distinguished: first, *jus cogens* norms; second customary international law; and third, treaty law. She briefly addressed each one of them separately.

She started by making a reference to Article 53 of the Vienna Convention on the Law of Treaties, which states that a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a norm from which no derogation is permitted, and which can only be modified by a subsequent norm of the same character. She remarked that 'other grounds that are universally recognised as impermissible under international law' include at least such grounds that amount to *jus cogens* norms. Although there is no consensus on the specific content of *jus cogens,* in terms of the principle of non-discrimination, it seems that only the prohibition of systemic racial discrimination would be included. Consequently, both the prohibition of discrimination based on sexual orientation and gender identity would not constitute *jus cogens* norms. Similarly, the protection of intersex individuals with male and female characteristics not fitting the traditional dichotomy would probably be excluded.

She then referred to the second option, which would be to resort to customary international law. When interpreting the term universally recognised literally, it is likely that the grounding question would be recognised as impermissible in all countries and societies. However, there is consensus among scholars that such a standard is too high and that universally recognised could instead be read as merely widely recognised, which denotes, but does not require the acceptance of all states or every single state. The term thus might be interpreted as an analogue to customary international law. However, she argued that to establish the existence of a custom, the Court will have to show the presence of a general and homogeneous practice among states and the presence of an *opinio juris* accompanying said practice. Viewing the prohibition of discrimination based on sexual orientation and gender identity as part of customary international law may lead to objections due to the diverse state practice and explicitly voiced opposition against some of the rights of sexual and gender minorities by specific states. The lack of state practice and *opinio juris* regarding intersex, individual and sexual orientation is essential when determining the existence of a prohibition against intersex persecution or persecution based on sexual orientation in customary international law.

Márquez submitted that a considerable number of Western States and medical associations have long advocated for corrective surgeries, sex reassignment and other medical practices violating the rights of intersex individuals. These practices have been and are still accepted as well as endorsed by some states and governments. She noted that unfortunately, this shows at least the lack of clarity and the lack of existence of general practice and *opinio juris* prohibiting intersex persecution. She also explained that the situation is analogous to criminalisation of same-sex sexuality, and she would object to a reading of the rights of sexual and gender minorities as universally recognised. She pointed out that because they are seen to reflect customary international law, the grounds listed in universally recognised human rights documents, such as the Universal Declaration of Human Rights, are often seen as universally recognised within the meaning of the Rome Statute. Consequently, in addition to the grounds explicitly listed, the Rome Statute covers persecution based on colour, language, social origin, property, and sex. However, gender identity and sexual orientation are not included in said universal conventions, and sexual characteristics that do not fall within one of the traditional binary categories of male and female, will also very likely be excluded from the traditional scope of protection.

Finally, she highlighted the importance of mentioning that until now there is no legally binding instrument at the UN that affirms the rights of sexual and gender minorities.

The last section of María Manuela Márquez' presentation focused on the shortcomings and limitations of prosecuting persecution of intersex individuals or based on gender identity and sexual orientation under any of the grounds recognised as impermissible by international law. She summed up as follows:

- To conclude, and excluding the less viable option, which is interpreting the term as referring to 'sex', 'gender' and 'gender identity' and 'sexual orientation', the remaining two options (interpreting the term gender as a 'socially constructed concept' or as referring to 'sex') present risks and might imply different understandings and confusion.

- Interpreting the term 'gender' as a 'socially constructed concept' would require a lot of creativity and effort to prove that intersex individuals are protected from discrimination under international law and would require showing a high standard for what constitutes 'universally recognised'. This, due to the medical tradition and classic binary division of sex between male and female categories and the lack of specific binding instruments, seems very unlikely at the present stage.

- Similarly, as previously mentioned, the lack of a general binding instrument and the presence of contradictory state practice, as well as the absence of the terms 'gender' and 'gender identity' in universally ratified instruments and conventions, might imply a huge risk for the protection of sexual and gender minorities. It would also require a high degree of argumentation to the practice of UN institutions, to demonstrate the existence of the prohibition of discrimination on the grounds of sex and gender, and that this provision is universally recognised as impermissible by international law.

Discussion

The Judges highlighted the importance of this meeting and thanked María Manuela Márquez Velásquez for the definitions and the analysis she provided. Participants expressed the need for all judges to understand that the classification of people is always evolving, as it is a fact that the term 'gender' is in continuous evolution. The point was made that it is important for judges to remember that everyone needs to be treated in the same way and that international law is there to save people. Therefore, the principle of non-discrimination recognised in Article 21.3 of the Rome Statute must always be kept in mind and interpreted in an inclusive way, so no one is left without protection.

At the same time, the Judges recognised that some of the articles of the Rome Statue might present some challenges and problems. But they also expressed the need to remember how difficult the negotiations of the Rome Statute were, as some states were opposed to a broader sense of the term 'gender'. The Judges highlighted the need of advancing the law and considered that there is enough room and mechanisms in the Rome Statute to do it.

How gender diversity is regulated in India, where a 'third gender' has been recognised for many years with equal rights, was introduced. Indeed, the Supreme Court of India explicitly held that third-gender persons should have specific quotas in education and employment, as everyone else.

The Judges expressed appreciation for Velásquez' argument for the urgency of broadening the interpretation of Article 7.3 of the Rome Statute and explored how this could be done given that the Article explicitly refers to 'male' and 'female' only. The Judges were of the opinion that despite the concept of 'gender' not being a universally recognised principle, this does not limit its protection. This is because the ICC Statute provides for a holistic interpretation of this Article, through the principle of non-discrimination.

Additionally, it was pointed out that Article 21.3 states that the application and interpretation of law pursuant to this article must be consistent with internationally recognised human rights and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3. The Judges were of the view that 'such as' should be understood as an example, not as a limitation.

The Judges then discussed the limitation of the principle of legality deducing that while judges must work within the text of the Statute, they also need to recognise that law evolves. Thus, a possible solution presented by the Judges could be to use the concept of 'other grounds that are universally impermissible under international law'. Judges agreed that it is difficult to make analogies in terms of criminal law, but that this could be a solution.

Participants agreed with Velásquez that there is no general binding law protecting sexual and gender minorities, despite being now in development. But they also noted that there are international human rights norms that protect gender minorities, such as the Jakarta Declaration and the Universal Declaration of Human Rights, as well as treaties that do not allow human rights violations. The Judges agreed that human rights covenants are living instruments and it is the duty of judges to make room for their interpretation.

In this sense, the Judges acknowledged that although the inclusion of the term 'gender' seems problematic, it is an element of prosecution, and all elements must be taken into account when prosecuting a crime. This means that when someone has been harmed or caused great suffering as a result of their sexual orientation or gender identity, judges could find a way to apply Article 7.1 (k) of the Rome Statute's reference to "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health".

The importance of looking at state practices was emphasised as in many countries LGTBIQ+ rights are still forbidden.

The cultural challenges faced in Africa were also mentioned, as was the fact that national judges in African countries are addressing these issues. It was observed that the first African judgement on the protection of gender diversity came from Uganda. Participants noted that there is a common duty for judges to go further when examining human rights violations.

The option of proposing an amendment to the Rome Statute was raised, but the Judges realised that an amendment would be unduly prolonged. They were of the view that in the meantime there is room in the Rome Statute for interpretation.

In conclusion, the Judges were in agreement that extending boundaries is their duty.

The Chair, and indeed all the Judges conveyed their sincere thanks to María Manuela Márquez Velásquez. They thanked AFLA and their fellow Judges for a fruitful meeting. The Judges further called upon AFLA to propose a theme for the next meeting, which AFLA proposed would be held in early December to coincide with the 21st Session of the Assembly of States Parties (ASP) to the International Criminal Court.[2]

[2] Accordingly, on 6 December 2022 AFLA convened an ASP Side Event on ***Gender Diversity and the Rome Statute System.***