



## **Report of the 7<sup>th</sup> Meeting - Non-Binary People and the Rome Statute**

On May 14, 2022, Africa Legal Aid (AFLA), held the 7<sup>th</sup> meeting of its Gender Mentoring Training Programme for Judges of International Courts and Tribunals. The topic of the discussion, *Non-Binary People and the Rome Statute*, was presented by Dr Rosemary Grey of Sydney Law School, the University of Sydney.

The meeting was attended by:

**Judge Althea Violet Alexis-Windsor**, Judge of the ICC.

**Judge Solomy Bossa**, 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 Florence Mumba** (Chair), 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 Janet Nosworthy**, Judge of the STL; Former Judge of the ICTY.

**Judge Kimberly Prost**, Judge of the ICC, Former Judge of the ICTY.

**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.

**Gabrielle Louise McIntyre**, Co-Coordinator of the Gender Mentoring Training Programme for Judges; Chairperson of the Truth, Reconciliation and National Unity Commission of the Seychelles; Former Chef de Cabinet and Principle Legal Advisor to the President of IRMCT and four successive Presidents of the ICTY.

Participants adopted the following agenda items for discussion:

### **Video Lecture by Dr Rosemary Grey: Non-Binary People and the Rome Statute**

1. Key Terms and Concepts:
2. Crime Against Humanity of Persecution
  - The Rome Statute
  - Gender Identity Under International Law
3. Crime Against Humanity of Persecution contd.
  - Intersex Status Under International Law
  - Can the ICC Prosecute Based on Non-binary and Intersex Status?
  - National Law: Gender Identity and Intersex Status

4. Other Considerations
5. Appointment of a New Chair

### **Video Lecture**

The video lecture was divided into three sections. In the first section, Dr Rosemary Grey explained the concepts of non-binary and intersex. Subsequently, she identified whether and how the Rome Statute accommodates a person who identifies as non-binary. Dr Grey interpreted these questions as particularly relevant to the crime against humanity of persecution as defined in Article 7(1)(h) of the Rome Statute. She further explained that the ICC might be asked to determine whether acts targeting people on the basis of the real or imputed status as non-binary or as intersex can amount to persecution on gender grounds. After addressing the question of persecution, Dr Grey looked at other considerations about how the International Criminal Court can interact respectfully and sensitively with people who 'are neither male nor female'.

Dr Grey briefly addressed why the discussion on non-binary people under the Rome Statute is timely: First, non-binary people have already come to the attention of the International Criminal Court in at least one situation. In its decision authorising the investigation into Myanmar and Bangladesh, Pre-Trial Chamber III noted that 'the available information suggests that in some instances 'Hijra' - individuals, who are defined as third-gender persons, transgender women, and intersex persons in South Asia who were assigned a masculine gender at birth - were reportedly targeted for rape and sexual violence'.

Beyond this specific example, Dr Grey noted more generally that the ICC is on the cusp of developing its jurisprudence on the crime of gender-based persecution and thus judicial consideration of non-binary and intersex people was timely. Dr Grey highlighted that there are three cases on trial that include a charge of gender-based persecution: the Abd-Al-Rahman case from the situation in Darfur, the Al-Hassan case from the Mali situation, and the Said case from the second situation in the Central African Republic and that ICC Prosecutor Khan was currently in the process of developing the office's first policy paper on gender-based persecution.

Dr Grey explained that the term 'non-binary' is not used in the Rome Statute nor other instruments in international law and has only just started to come into usage in some parts of the English-speaking world, including in the field of human rights law.

Dr Grey explained that the term 'non-binary' refers to a gender identity that is neither male nor female. In this sense of the term, someone's biological sexual characteristics are irrelevant. Non-binary is a question of how they perceive their own gender identity in social terms. The United Nations (UN) defines 'gender identity to mean a deeply felt and experienced sense of one's own gender'. For instance, some people might identify as having a female gender, others as having a male gender, others might identify as having both of those genders, and others might think that they have neither a male nor female identity. What matters is not the personal physical sex, but their own understanding of themselves. This is different from the concept of being transgender, which refers to someone whose gender identity is male or female and differs from their sex assigned at birth. For instance, a transgender woman is a person whose biological sex at birth was

classified as male but whose own gender identity is female. The term non-binary is different as it refers to a gender identity that is neither male nor female.

Dr Grey noted that people who regard themselves as non-binary may not necessarily disclose this fact. It could be because they might fear discrimination or stigmatisation or simply because their gender identity is a private matter. On the other hand, some non-binary people choose to express their gender identity in a more public way. For instance, they may choose to be addressed by a gender-neutral pronoun. In English, this would be referring to a person as 'they' rather than 'he' or 'she'. They may choose to dress in ways that combine what is typically thought of as male and female attire. And, if legally possible, they may select neither female nor male on an official identity document.

Dr Grey continued by explaining the term 'intersex' to refer to someone's physical, biological sex characteristics. It is not about their gender identity. There are many ways in which a person's body can be intersex. For example, the term intersex can describe people whose reproductive organs are not easily classified as male or female. Sometimes, intersex characteristics are evident at birth, other times they become apparent later in life, such as at puberty. In recent years, intersex people have been an increasing focus of the UN human rights work. In the UN glossaries, intersex people are defined as 'those born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies.' Therefore, she highlighted, being intersex relates to biological sex characteristics and it is distinct from a person's sexual orientation and gender identity. An intersex person may be heterosexual, gay, lesbian, bisexual or asexual and may identify as male, female or neither.

Dr Grey observed that there is no reliable data about the number of intersex people worldwide. However, the UN notes that, according to experts, between 0,05% and 1,7% of people worldwide are born with intersex traits. To understand better these numbers, Dr Grey took the example of a country of the size of the Netherlands, which has a population of 17.44 million. She explained that, even when considered the lowest estimate of intersex people being 0,05% of the population, that is still close to 9.000 people in the Netherlands.

Dr Grey further pointed out that people who are non-binary or intersex often face great risks as a result of the negative attitude that they encounter in their families, communities, and, sometimes, from state authorities. These risks range from social stigmatisation, exclusion, hate speech and hate crimes such as assault and even murder. In addition, segregating settings such as prisons can be especially dangerous for non-binary and intersex people. For instance, intersex people are often placed in male prisons where they face great risks of sexual assault. Concluding observations by Treaty Bodies, including the Committee Against Torture, indicate that these types of violence are often not properly investigated by prosecutors and state authorities due to prejudicial attitudes within law enforcement.

Dr Grey stated that it is well documented that intersex people often face societal or familial pressure to undergo a medical procedure to alter their body to conform to male or female sex characteristics. This can lead to surgeries that are coerced or that take place without informed consent. The consequences can be very serious. According to the Inter-American Commission on Human Rights, such surgeries have been reported to cause intersex children and adults great harm

including, but not limited to, chronic pain, life-long trauma and, often, forced, and coerced sterilisation. These are only a few examples of human rights violations and crimes against non-binary and intersex people.

The second part of Dr Grey's presentation focused on the crime against humanity of persecution. Dr Grey started her analysis by asking whether violence targeting non-binary or intersex people constitutes persecution as defined in the Rome Statute.

After noting that there was little scholarship on this topic, Dr Grey examined the definition of persecution as described in Article 7(1)(h) of the Rome Statute, namely:

*'Persecution 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 recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.'*

Dr Grey then posed this scenario: 'Let us assume that most of the elements are satisfied; that the perpetrator deprived one or more victims of fundamental rights contrary to international law; that those victims were part of a group or collectivity; and that the targeting occurred in connection with other Rome Statute crimes. Only one element is left for consideration: Was the targeting based on one or more of the grounds that are recognised in Article 7(1)(h) of the Rome Statute?' To consider this issue Dr Grey turned to the definition of gender under Article 7(3) of the Rome Statute:

*'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.'*

Dr Grey then considered how the definition relates to people that are non-binary or intersex. Dr Grey opined that the rules of treaty and interpretation as defined in the Vienna Convention on the Law of Treaties apply to the interpretation of Gender in the Rome Statute. These rules permit clarifying ambiguities in the text; however, in this case, she found the drafting history of the Statute to be of little use because in the 388 pages of official records of the plenary meetings at the 1998 Rome Conference, there is not one singular reference to people that are non-binary or intersex. Dr Grey explained that, in all likelihood, the negotiating history of the Rome Statute is silent on non-binary and intersex people because back in 1998 there was little awareness of these groups in international law-making. She expressed the view that the silence of non-binary and intersex people at the Rome Conference may have been a mere oversight rather than a deliberate omission. Dr Grey said from the negotiating history, she noticed that some States were concerned about sexual orientation. A small but vocal minority of states were concerned that the term 'gender' was a code word for sexual orientation and that they tried to swap the term gender with biological sex. However, the proposal was rejected as a larger block of states insisted on keeping the word gender in order to capture the social dimension of sexual orientation and gender identity.

She concluded that the term 'gender', as used in the Rome Statute, is not limited to biological sex but rather includes socially understood gender norms. Dr Grey highlighted that the Rome Statute definition of gender includes non-binary people as it is about how that person relates to positions of male or female in the context of society.

Subsequently, Dr Grey examined whether the Rome Statute definition of gender covers intersex people.

To answer the question, she looked at a different ground of persecution: *'other grounds that are universally recognised as impermissible under international law.'*

She noted that to determine if other grounds that are universally recognised as impermissible under international law and if the considerations of international and regional human rights law are permitted under Article 21(3) of the Rome Statute, the International Criminal Court should look at international and regional human rights law.

After assessing the relationship between the Rome Statute and non-binary and intersex people, Dr Grey reflected on what international law has to say about gender identity. She stated that there is increasing recognition in human rights law that discrimination and violence by reason of gender identity is repellent to human dignity and human rights. She then gave some examples:

In 2008, the United Nations (UN) General Assembly adopted its 'Declaration on human rights, sexual orientation and gender identity', A/63/635, 22 December 2008. In this document, the Assembly reaffirmed that the principle of non-discrimination requires that human rights apply equally to every human being regardless of gender identity.

In 2009, the Economic and Social Council confirmed in General Comment No.20 that the right against discrimination on the basis of other status as protected by Article 2(2) of ICESCR includes discrimination arising from gender identity.

In 2011, the UN Human Rights Council approved a 'Resolution regarding human rights, sexual orientation and gender identity'. In this resolution, the Council expressed its grave concern over violence and discrimination against individuals because of their sexual orientation and gender identity.

In 2012, the Inter-American Court of Human Rights held that gender identity is a protected category under any other social condition pursuant to Article 1(1) of the American Convention on Human Rights.

In 2014, the African Commission on Human and People's Rights passed 'Resolution 275 on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity'. In this Resolution, the African Commission specifically condemned the situation of systematic attacks by states and non-state actors against persons on the basis of their real or imputed sexual orientation or gender identity.

In 2017, in a case called *G. v Australia*, the Committee on Civil and Political Rights concluded that 'the prohibition against discrimination under Article 26 of the ICCPR encompasses discrimination on the basis of [...] gender identity, including transgender status.'

Dr Grey explained that all these instruments and decisions represent a trend in international and regional human rights law. A trend in which discrimination and violence on the basis of gender identity are increasingly recognised as unlawful under international law. The term non-binary is rarely used in these instruments. However, non-binary is clearly one example of gender identity and is, therefore a protected ground under these instruments.

Next, Dr Grey took a closer look at what international law has to say about intersex people, i.e. people who are biologically neither male nor female.

She noted that in international and regional human rights law there is also a trend toward condemning discrimination on the basis of intersex status. She gave some examples:

The 2009 General Comment No.20 by the Economic and Social Council affirmed that the right against discrimination in ICESCR also prohibits discrimination by reason of intersex status.

The Inter-American Commission on Human Rights has confirmed in its 2015 Report that Article 13(5) of the American Convention on Human Rights prohibits ‘hate speech that incites lawless violence against a group on the grounds of sexual orientation, gender identity and bodily diversity’.

The Commission further specified that violence on the ground of bodily diversity includes violence against intersex persons.

The Committee Against Torture has since 2015 expressed concern about ‘unnecessary and in some cases irreversible surgical procedures that have been carried out on intersex persons without informed consent’.

In 2015, various UN human rights mandate holders, intersex experts and relevant civil societies, academics, and health professionals convened for the first UN Expert Meeting on ending human rights violations against intersex persons.

In 2016, Joint Calls by the UN and regional human rights experts were published calling on governments to prohibit forced and coerced surgeries and other medical proceedings on intersex children without their informed consent.

In 2017, the African Commission on Human and People’s Rights confirmed in General Comment No.4 (which is about the right against torture) that ‘there is a wide prevalence of sexual and gender-based violence perpetrated against women and girls that acts of sexual violence against men and boys, persons with psychosocial disabilities, and lesbian, gay, bisexual, transgender and intersex persons are of equal concern, and must also be adequately and effectively addressed by State Parties.’

Dr Grey concluded that the brief survey of international and regional human rights instruments shows that:

- Targeting because of gender identity, that is non-binary, or targeted because of body diversity or sex characteristics, that are intersex, both fall within the Rome Statute definition of persecution.
- Targeting non-binary people is arguably persecution based on gender grounds because it is targeting based on socially understood gender identity.
- Targeting people who are intersex is arguably persecution on ‘other grounds that are universally recognised as impermissible under international law’.
- Also, if targeting on the basis of non-binary status wasn’t gender, then it could fall on this ground as well.

She noted that the International Criminal Court must respect the principle of legality – the principle of *nullum crime sine lege* as defined in Article 22 of the Rome Statute. This means that the International Criminal Court cannot extend crimes by analogy. Therefore, if persecution of non-binary or intersex people is to be prosecuted in the ICC, it must be because its conduct is persecution on the basis of one or more grounds in the Rome Statute and not because it is analogous or akin to persecution on those grounds.

For opposing views, Dr Grey pointed to the following:

- Laura Nacyte, ‘Intersex Outcast – The Limit of Gender at the International Criminal Court’, 1 December 2016, ‘Justice in Conflict (International law blog)’.<sup>1</sup>
- María Manuela Márquez Velásquez, ‘Intersex: A Neglected Category in the Understanding of Gender-Based Crimes at the ICC?’, 9 March 2022, ‘Opinion Juris’ (International law blog).<sup>2</sup>

Dr Grey is of the view that analysis of the opposing views are limited as they do not consider relevant development in human rights law regarding gender identity and intersex status, which are relevant to the Rome Statute by virtue of Article 21(3).

For a sense of complementarity, she turned to national laws, which are increasingly prohibiting discrimination and violence due to gender identity, including non-binary identity and intersex status. She gave some examples:

In 2005, South Africa amended its anti-discrimination law to specifically include intersex status as a ground for discrimination.

In 2013, Australia amended its anti-discrimination law to prohibit intersex and gender identity discrimination.

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<sup>1</sup> At <https://justiceinconflict.org/2016/12/01/intersex-outcast-the-limits-of-gender-at-the-international-criminal-court/> (As provided by Dr Grey).

<sup>2</sup> At <https://opiniojuris.org/2022/03/09/intersex-a-neglected-category-in-the-understanding-of-gender-based-crimes-at-the-icc/> (As provided by Dr Grey).

In 2014, Finland modified its Equality Act to prohibit discrimination based on both gender identity and gender expression, specifying that those prohibitions shall apply *mutatis mutandis* to discrimination based on the fact that the physical characteristics of a person are not unequivocally male or female - that is intersex people.

In 2014, Malta passed the Equality Act for men and women and modified it to prohibit discrimination against gender identity, gender expression, or sex characteristics.

In 2019, Indian legislation protected transgender persons, including ‘a person whose gender does not match the gender identity assigned to that person at birth, and persons with an intersex variation, gender-queers, and persons with socio-cultural identities, such as kinnar and hijra.’ Hence, the Indian legislation protects people from discrimination on the basis of changing their gender identity as well as their intersex status.

In 2019, the Netherlands passed a Decree to clarify the Equal Treatment Act that confirms that it is unlawful to discriminate on the basis of gender identity and intersex status.

Dr Grey explained that national laws are not directly binding on the International Criminal Court. However, these examples are to make the point that if the ICC were to recognise the targeting of non-binary and intersex people as persecution this would be part of a larger global trend toward respecting the rights and dignity of non-binary and intersex persons.

In the final part of her presentation, Dr Grey looked at some other considerations on how the International Criminal Court can interact respectfully with people that are non-binary or intersex. There are many different ways in which non-binary and intersex people may interact with the ICC. There could be non-binary or intersex judges, lawyers, victims’ counsels, prosecutors, defence, court staff, interpreters etc.

Non-binary and intersex people may participate in International Criminal Court proceedings in a non-professional capacity, such as victims, witnesses or defendants. Several considerations may enable the International Criminal Court to engage with non-binary and intersex people in a respectful and inclusive, and non-discriminatory manner:

1. Evidence: when a victim, witness or accused person provides testimony, it may become apparent that the person’s sex or gender identity has changed over the course of their lifetime. The Chambers are capable of accommodating this complexity in the finding of facts.
2. Terms of address: as noted in the 2019 background paper on intersex people by the UN OHCHR, it is important to always respect people’s choice of terms to refer to themselves. For the ICC, this may involve coordinating between the Chambers, the Registry and interpretation team and other units to develop a protocol to address people who are neither male nor female. It might also be significant to incorporate foreign words into their French and English Court records to better reflect conceptions of sex and gender identity in different parts of the world. There are many different categories, each with their own



history, vocabulary and connotations. For instance, In India, legally recognised standard categories include male and female as well as hijra, kinnar, aravani, and kothi. These terms can communicate something about gender identity. In the ICC's practise, it may be convenient to develop a standard term that can capture all these types of variations. However, the convenience of having standard terminology can come at a cost, i.e., it implies that all people share a common identity or belong to one group, which is untrue and tends to underplay the diversity of the global non-binary and intersex population worldwide. Moreover, using a standard term such as 'non-binary' is a way of describing these people using a Western taxonomy and way of classifying humanity rather than truly recognising people on their own terms. Given those considerations, it might be preferable to incorporate a person's own terminology into the ICC lexicon rather than using English and French words. The ICC has already incorporated foreign words on some occasions when there were no corresponding English or French words that could capture the meaning. One example was in the *Ongwen* Case. The Court judgements used the word 'Koni' to refer to some spiritual beliefs of the Acholi people. Likewise, the International Criminal Court might develop a practice of incorporating local language to describe sexual identities, intersex characteristics and gender identities that are neither male nor female. This approach of using the local lexicon in the International Criminal Court may be more culturally sensitive than just using the word non-binary or intersex.

Dr Grey ended her presentation by underlining that in most societies non-binary and intersex people are invisible if not oppressed. It is important to not replicate the reality in the International Criminal Court.

## **Discussion**

The Judges remarked on the importance of this meeting as the concepts of non-binary and intersex people are new and complex. They highlighted that there is very little literature on these concepts. They explained that it is of paramount significance to bring the topic to the attention of the other judges as well.

It was observed that this is a complex field, and it challenges judges – as judges are humans. While on the bench, judges bring with them the cultural gender and gender identity baggage from their own domestic cultures, and there is such a difference through continents and cultures in how 'we look at these issues'.

Participants agreed on the need to formally seek guidance and special training from the experts. Furthermore, Judges asked themselves how they could keep up with this literature that is constantly growing. There was agreement that the focus should be on the crimes and not on nomenclature because everyone should be protected despite their label.

In addition, Participants appreciated the strong argument of interpretation given by Dr Grey on the definition of gender in the Rome Statute, which will allow for a flexible approach. Gender, in fact, could be defined as a basis of discrimination in a broader way to include non-binary and intersex people. Nonetheless, Participants noted that the optimistic argument advanced might be much

more difficult to sustain when it comes to interpreting this in a courtroom with defence arguments presented. Therefore, Judges emphasised the importance of having background information, including guidance and special training from the experts and the Prosecutor's Policy Paper, as they will face legal challenges on whether the definition of gender was deliberately made narrow to exclude these groups from the categories of discrimination. In order to avoid having only one view, Participants suggested inviting an equal number of different experts as *Amicus Curiae* in order to provide an overview picture.

Next, Participants imagined a real-life case before the Court where the Prosecutor faces a case in which all the elements of a crime of persecution are present; however, the targeted group falls within the non-binary category.

Participants acknowledged the challenge that could be faced by the Prosecutor's office to convince the bench that this is a crime that should be looked at. In particular, the Prosecutor may need to call experts to provide evidence that non-binary and intersex people are a distinct category.

Participants agreed that this issue is rather new, and judges have to be aware of the implications. They also reiterated their desire to have someone expressing an opposing view in a subsequent meeting as it is necessary for judges to be apprised of all the avenues that one could take.

Participants noted that there is a huge division among countries on the topic as many are even against the resolutions that have been adopted. Therefore, they emphasised the need to have more academic work on non-binary and intersex people to generate more awareness. Nevertheless, participants saw how some countries have tried at the national level to include non-binary and intersex people in their legislation, highlighting how the law should protect everyone.

Participants noted that there may be a need for judicial activism on the part of the judges but this should be balanced by the principle of legality.

Participants discussed how important it would be for the Prosecutor to define crimes as accurately as possible using the nomenclature provided in the Rome Statute. For instance, Article 7 of the Rome Statute defines persecution as 'the intentional and severe deprivation of fundamental rights contrary to international law because of the identity of the group or collectivity.' However, it is not specified which group. If the Prosecutor were to label the group as gender, the judges might immediately stop the reasoning as is defined in Article 7(3). At the same time, if the Prosecutor were to define the group as 'other' rather than 'gender', it would still be possible to target that same group for protection. Participants provided some examples from their past where the Prosecutor's office presented the case in a way that included crimes that were not expressly written in the treaty provisions.

At the close of the meeting the Judges chose Judge Solomy Bossa as the new Chair by acclamation.