



# HISTORY REPEATING

## THE PERSECUTION OF HOMOSEXUAL MEN IN MODERN-DAY EGYPT AND THE STRUGGLE TO RECOGNISE 'SEXUAL ORIENTATION' AS A GROUNDS OF PERSECUTION UNDER THE ROME STATUTE

---

BY MARIE ISKANDER

*"I used to think being gay was just part of my life and now I know it means dark cells and beatings. It is very, very difficult to be gay in Egypt."<sup>1</sup>*

International criminal law ('ICL') emerged in response to the unimaginable "scale of barbarism" committed by Nazi officials during the Third Reich,<sup>2</sup> whereby the Nuremberg Charter and Nuremberg trials codified crimes against humanity into positive ICL.<sup>3</sup> Despite their merits, the Nuremberg Charter and Nuremberg trials both failed to adopt a holistic approach to the crimes against humanity committed by the Nazis. This was particularly the case as the catalogue of victim groups recognised in the Nuremberg Charter was "too narrow", and although homosexuals "suffered group-based attacks by the Nazis",<sup>4</sup> they were not recognised. Unlike the Nuremberg Charter, which seemingly required a discriminatory motive

to prosecute perpetrators of crimes against humanity,<sup>5</sup> the Rome Statute has been celebrated for eliminating this requirement in relation to all crimes against humanity except for the crime of persecution.<sup>6</sup> This is a step forward for ICL, as it enables the International Criminal Court (ICC) to indict individuals responsible for perpetrating crimes against humanity, regardless of a discriminatory motive.<sup>7</sup> However, the grounds of persecution under the Rome Statute<sup>8</sup> have been construed in a manner which seeks to exclude sexual orientation, as Article 7(3) narrowly defines 'gender' in a manner which would preclude homosexuals.<sup>9</sup> This construction of gender in the Rome Statute is particularly problematic as homosexuals and transsexuals are often subjected to the worst form of persecution,<sup>10</sup> but under the current interpretations emerging from the Rome Statute they would not be afforded protection against persecution under ICL.

The purpose of this piece is to challenge this exclusion of homosexuals from ICL, and I argue that such a construction is inconsistent with the principles of transitional justice and fails to address the widespread culture of impunity attached to such crimes. Although it would be difficult to indict perpetrators from Egypt for international crimes against humanity,<sup>11</sup> as Egypt is yet to ratify the Rome Statute,<sup>12</sup> this case study is relevant to this piece's arguments, as the alleged crimes committed against homosexual men in Egypt are akin to those committed by Nazi officials over seven decades ago. This situation where history is seemingly repeating itself demonstrates the extent to which ICL since the Nuremberg Trials has failed to deter crimes of such gravity, and in particular highlights the necessity for ICL to positively protect people who are persecuted on the basis of their sexual orientation. As many homosexuals in a variety of countries are often subjected to severe state-sanctioned violence, persecution and torture,<sup>13</sup> this piece calls on the ICC to consider an expansive definition of 'gender' when interpreting the Rome Statute in order to deter further crimes of persecution against individuals on the basis of sexual orientation.

### **THE PERSECUTION OF HOMOSEXUAL MEN IN EGYPT AND MEMORIES OF THE 'PINK TRIANGLE' IN NAZI GERMANY**

The Third Reich began their persecution of homosexual men immediately following their rise to power, whereby the police were set to "destroy the homosexual subculture" in Germany by "performing raids" at "exotic events".<sup>14</sup> By a disturbingly similar token, agents of the "Vice Squad"<sup>15</sup> in Egypt have reportedly been involved in conducting "mass roundups" of "men suspected of homosexual conduct"<sup>16</sup> following raids conducted at bars and clubs renowned for being frequented by gay men.<sup>17</sup> The most significant raid took

place in May 2001, when fifty-two men were arrested during a police raid of a "Cairo discotheque" called the 'Queen Boat'.<sup>18</sup> After these men were rounded up, Human Rights Watch reported that victims were "whipped, beaten, bound and suspended in painful positions, splashed with ice-cold water, and burned with lit cigarettes", or more heinously "tortured with electroshock on the limbs, genitals, or tongue".<sup>19</sup> In addition, guards would sometimes encourage "other prisoners to rape suspected homosexuals".<sup>20</sup>

Moreover, similar to the Nazi Party, who used "invasive 'medical' procedures" designed to alter sexual orientation,<sup>21</sup> men arrested for appearing homosexual in Egypt are "forcibly subjected to anal examinations at the hands of the Forensic Medical Authority", an agency of the government's Ministry of Justice.<sup>22</sup> According to Human Rights Watch:

Doctors compel the men to strip and kneel; they massage, dilate, and in some cases penetrate the prisoners' anal cavities in search of signs that they have been "habitually used" in "sodomy."<sup>23</sup>

What is worse is that doctors have also recently employed "new methods" involving electricity to investigate prisoners' anuses.<sup>24</sup>

Furthermore, akin to the imprisonment of homosexuals in concentration camps under the Nazi regime, where the Gestapo habitually imprisoned men without any



evidence that they had actually engaged in homosexual “offences”,<sup>25</sup> the Vice Squad in Egypt regularly arrest and imprison men “suspected” of engaging in homosexual acts, charging them with contravening Egyptian laws prohibiting “debauchery”.<sup>26</sup> These men are routinely harassed, beaten and arrested based on how they look and walk, the style of their hair, and even the colour of their underwear.<sup>27</sup> Thus such persecution often merely occurs merely because individuals appear to act “at odds with social norms” in particular “norms for expressing gender”.<sup>28</sup>

Although the political regime in Egypt has changed since the Human Rights Watch report was published in 2004, frequent media reports have cited the ongoing existence of persecution against homosexuals in Egypt.<sup>29</sup> In addition, as the principles of Shar’ia law have been codified in the Egyptian constitution, it is arguable that there is a likely chance that persecutory practices will continue, as homosexuality is cited as being inconsistent with Shar’ia law.<sup>30</sup>

## **DEVELOPING A CASE AGAINST EGYPTIAN OFFICIALS FOR CRIMES AGAINST HUMANITY**

As previously noted Egypt has not ratified the Rome Statute<sup>31</sup> and therefore would not come within the ambit of the ICC’s jurisdiction, unless the United Nations Security Council referred the matter to the ICC Prosecutor to investigate.<sup>32</sup>

Notwithstanding this, in order for persecution to be proved under the Rome Statute, it must have been committed in “connection with any act” referred to in Article 7(1) or any crime within the jurisdiction of the Court.<sup>33</sup> This

could have been satisfied in this case, as the persecution of homosexuals clearly involved conduct such as torture,<sup>34</sup> rape<sup>35</sup> and arbitrary deprivation of liberty.<sup>36</sup> Nonetheless, while the persecutory conduct by the Egyptian officials was clearly pursued for discriminatory reasons, because persons were targeted for their perceived homosexual identity,<sup>37</sup> the conditions of persecution as recognised under the Rome Statute would not be proven due to the limited grounds of persecution recognised under Article 7(1)(h). This is the case as persecution may only be prosecuted under the Rome Statute if it is committed on the basis of “political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law”.<sup>38</sup> Up until this point, international criminal jurisprudence does not recognise persecution on the grounds of sexual orientation.<sup>39</sup> As will be discussed next in this piece, the narrow definition provided for ‘gender’ is problematic as it precludes prosecution of perpetrators who have persecuted homosexuals.

## **A CRITIQUE OF ARTICLE 7(3): A FUTILE DEFINITION OF ‘GENDER’**

*“The religious enclave, wrongly elevated to statehood by an unthinking international community, was responsible for including Article 7(3): the most ridiculous clause in any international treaty ever devised.”<sup>40</sup>*

Article 7(3) of the Rome Statute defines ‘gender’ as referring to the “two sexes, male and female, within the context of society”. In addition the definition of gender, Article 7(3) includes the following



sentence: “[t]he term ‘gender’ does not indicate any meaning different from the above”.<sup>41</sup> While the inclusion of ‘gender’ as a ground for persecution has been hailed as an achievement for international law,<sup>42</sup> this restrictive definition was intentionally constructed to ensure that persecution on the basis of sexual orientation was not proscribed.<sup>43</sup>

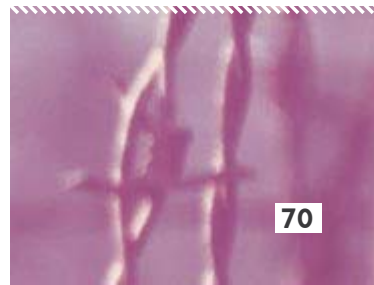
Interestingly, it may be noted that Egypt, among other Arab and Catholic delegates, played a dominant role in opposing the inclusion of the term ‘gender’,<sup>44</sup> as they feared it would be understood to include sexual orientation.<sup>45</sup> In relation to this, one commentator stated that they objected to the inclusion of the ‘term’ gender because they believed that this would “be a code of homosexuals”<sup>46</sup> and would subsequently “put them and their lifestyles on the same legal footing as married couples”.<sup>47</sup> As a result, some delegates suggested that the term “sex” be alternatively adopted, as this would confine the definition to the biological differences between men and women.<sup>48</sup> Other delegates however argued that the inclusion of the term ‘gender’ would be a more “accurate reflection of the current state of international law”, as it would capture sociological and biological definitions.<sup>49</sup> Therefore, the definition in Article 7(3) was adopted to “prohibit any interpretation of the term gender as a social construction that might encompass sexual orientation”,<sup>50</sup> particularly as this definition was the only one which the “Arab States and others” were willing to agree to.<sup>51</sup>

The definition of ‘gender’ encapsulated in Article 7(3), however, appears futile

when considering the chapeau elements of persecution in the context of the Rome Statute. To be prosecuted under the Statute, the persecutory acts must have been conducted “in connection” with other crimes against humanity referred to under the Rome Statute or within the ICC’s jurisdiction.<sup>52</sup> The high threshold therefore renders persecution type crimes to a ‘secondary status’,<sup>53</sup> requiring it to be “of the same gravity or severity” as other crimes enumerated under the Statute.<sup>54</sup> Therefore contrary to the ‘fears’ expressed during the negotiations at Rome, “not every denial of human rights may constitute a crime against humanity”.<sup>55</sup> For this reason, issues pertaining to “marriage equality”, for example, would not come within the ambit of the ICC’s jurisdiction as this form of discriminatory conduct does not amount to persecution as defined by the Rome Statute. In order to constitute a crime against humanity, acts of persecution in their “overall consequences must offend humanity in such a way that they may be termed ‘inhumane’”.<sup>56</sup> For this reason it seems rather futile that the delegations sought to preclude protecting people from being persecuted on the grounds of sexual orientation, unless their aim was to tacitly permit the persecution of homosexuals and transsexuals.

In light of Egypt’s persecution of homosexuals, it is clear that inclusion of Article 7(3) has contributed to a culture of impunity, where state actors can systematically persecute people on the basis of their sexual orientation, and be able to escape unscathed and without being reprimanded by ICL.

**CONTRARY TO THE ‘FEARS’ EXPRESSED DURING THE NEGOTIATIONS AT ROME, “NOT EVERY DENIAL OF HUMAN RIGHTS MAY CONSTITUTE A CRIME AGAINST HUMANITY”.**



## READING 'SEXUAL ORIENTATION' INTO THE ROME STATUTE AS A GROUND OF PERSECUTION

Although some delegates were convinced that the definition of 'gender' would preclude sexual orientation as becoming a ground of persecution,<sup>57</sup> the definition in Article 7(3) adopted language which could be interpreted to include sexual orientation and thereby contribute to the "progressive development of international law".<sup>58</sup>

Firstly, sexual orientation may be recognised within Article 7(1)(h) as falling within "other grounds that are universally recognised as impermissible under international law".<sup>59</sup> This ground however may not easily accommodate for sexual orientation on the basis that "universal recognition" is a significantly high threshold.<sup>60</sup>

Alternatively, the inclusion of the language "within the context of society" sought to provide sufficient flexibility to the definition which would thereby leave it open for the ICC to interpret the definition of gender based on the "circumstances before it".<sup>61</sup> The term 'gender' in the context of the language used in Article 7(3) may be read in a way that suggests that individuals who do not behave according to "a prescribed gender role"<sup>62</sup> may be afforded protection against persecution under the Rome Statute. This approach to "gender-based violence" was taken by the United Nations Human Rights Council which highlighted that persecution on the grounds of gender may be "driven by a desire to punish those seen as defying gender norms".<sup>63</sup> This reading would thereby support the finding that the crimes against

homosexual men in Egypt satisfy the grounds of persecution under the Rome Statute, as such persecutory conduct was driven by a motivation to re-establish "gender hierarchy in a context of shifting gender roles".<sup>64</sup>

In addition, while the last sentence of Article 7(3) appeared to be an attempt to exclude sexual orientation being read within the Statute's definition of gender, several scholars have argued that this sentence is "superfluous".<sup>65</sup> This is evident because the sentence merely refers the reader back to the first sentence, which as previously stated, may be read in a way that accommodates for sexual orientation.<sup>66</sup> Moreover, while some may have been concerned that the language "within the context of society" would be read to accommodate for cultural relativism, thereby precluding expansive definitions of gender, Kelly Askin highlights that this language does not refer to a "specific society" but rather "connotes a normative approach to society as a whole".<sup>67</sup> Therefore, within this framework the ICC may consider reading the definition of 'gender' in light of the context of the international society's conception of gender.

Furthermore, by adopting a plain reading of the Rome Statute's definition of gender and analysing the negotiation history, it does not appear that "sexual orientation" was explicitly excluded from the meaning of 'gender'. This therefore provides further scope for the ICC to expansively read the prohibited grounds of discrimination as including sexual orientation.<sup>68</sup>

Finally, it may be argued that when considering the general principles of ICL

as expressed in Article 21(3), it would be dubious to suggest that any ambiguities inherent in the definition of gender “would be resolved in favour of discrimination, especially in a statute establishing the highest international institution of justice”.<sup>69</sup> This is arguable on the basis that Article 21(3) states that the Statute must be consistent with international human rights and that the law must be applied without any adverse distinction of discrimination. Therefore, this holistic approach to reading gender in light of other provisions contained in the Rome Statute would favour an inclusion of sexual orientation as a prohibited ground of persecution, rather than interpreting the definition of gender as being exclusive.

Therefore, these approaches demonstrate that while the definition of ‘gender’ in Article 7(3) upon first reading appears rather restrictive, it may be expansively read to allow the ICC to interpret the definition of gender as including non-discrimination on the basis of sexual orientation, thereby avoiding a “regression in the law”.<sup>70</sup>

## CONCLUSION

*“Hatred which expresses itself in persecution must draw condemnation and punishment as a crime against humanity, otherwise hatred wins the day.”<sup>71</sup>*

Crimes against humanity, committed on the grounds of sexual orientation, have existed before the birth of ICL and date back to the atrocities committed by the Nazi Party.<sup>72</sup> Despite this, ICL has been slow to positively protect homosexuals and transsexuals,

as was evident during the negotiations at Rome, whereby delegates failed to seize the opportunity to define gender in a way which protects victims who are frequently targeted, persecuted and tortured on the basis of their sexual orientation or gender identity. Although the birth of the Rome Statute and the International Criminal Court marked an evolution in international law as it sought to end impunity for mass atrocities,<sup>73</sup> the tacit failure of the international community to protect homosexuals from persecution has contributed to an ongoing culture of impunity. This is most evidently portrayed by the case study detailing the modern-day persecution of homosexuals in Egypt, where such crimes and persecutory conduct appears disturbingly similar to the crimes committed by the Nazi regime.

While the Rome Statute deserves positive recognition for eliminating the discriminatory chapeau element from the application of crimes against humanity, the restrictive definition of ‘gender’ adopted in Article 7(3) should be read expansively, reformed or abolished for the Statute to be considered complete. The justification for this argument is based on the facts that such an exclusive definition of gender is not consistent with the principles of transitional justice, as it contributes to a culture of impunity with regards to crimes committed against individuals on the basis of their sexual orientation. Ultimately, it is not appropriate for the international community or the ICC to tacitly permit such “egregious” crimes to occur,<sup>74</sup> or to allow the horrors of history to continuously repeat itself.

**DELEGATES FAILED TO SEIZE THE OPPORTUNITY TO DEFINE GENDER IN A WAY WHICH PROTECTS VICTIMS WHO ARE FREQUENTLY TARGETED, PERSECUTED AND TORTURED ON THE BASIS OF THEIR SEXUAL ORIENTATION OR GENDER IDENTITY.**

## REFERENCES

1. Scott Long, 'In A Time of Torture: The Assault on Justice in Egypt's Crackdown on Homosexual Conduct', (Report, Human Rights Watch, 2004) 1.
2. Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (Penguin Books, 3rd ed, 2006) 207.
3. Alycia T. Feindel, 'Reconciling Sexual Orientation: Creating A definition of Genocide that includes Sexual Orientation' (2005) 13 *Michigan State Journal of International Law* 197, 198.
4. David Luban, 'A Theory of Crimes Against Humanity' (2004) 29 *Yale Journal of International Law* 85, 100.
5. Cameron Charles Russell, 'The Chapeau of Crimes Against Humanity: The Impact of the Rome Statute of the International Criminal Court' (2011-12) 8 *Eyes on the ICC* 25, 36.
6. *Ibid* 53-4.
7. *Ibid*.
8. *Statute of the International Court of Justice* art 7(1)(h) ('Rome Statute').
9. Joshua H. Joseph, 'Gender and International Law: How the International Criminal Court can bring Justice to Victims of Sexual Violence' (2009) 18 *Texas Journal of Women and the Law* 61, 67-68.
10. *Ibid* 96-7.
11. An exception to this would be if the United Nations Security Council referred the matter to the Prosecutor of the International Criminal Court under Chapter VII of the United Nations Charter. See *Rome Statute* art 13(b).
12. Coalition for the International Criminal Court, 'Global Coalition Calls on Egypt to Move Forward on ICC Commitment' (Media Release, 23 May 2013) 1  
<[http://www.iccnw.org/documents/CICC\\_EGYPT\\_PR\\_Final\\_ENG.pdf](http://www.iccnw.org/documents/CICC_EGYPT_PR_Final_ENG.pdf)>.
13. Ryan Goodman, 'The Incorporation of International Human Rights Standards into Sexual Orientation Asylum Claims: Cases of Involuntary "Medical" Intervention' (1995) 105 *Yale Law Journal* 255, 255.
14. Rudiger Lautmann, 'The Pink Triangle: Persecution of homosexual males in concentration camps in Nazi Germany' (1981) 6(1) *Journal of Homosexuality* 141, 143.
15. See Long, above n 1, 2-3. This Squad was a 'morals' police within the Ministry of Interior's national police force, with divisions in each jurisdiction
16. *Ibid* 2.
17. *Ibid* 19.
18. *Ibid* 2.
19. *Ibid*.
20. *Ibid*.
21. Goodman, above n 14, 268.
22. Long, above n 1, 2.
23. *Ibid*.
24. *Ibid*.
25. Feindel, above n 3, 203.
26. Long, above n 1, 1-2.
27. *Ibid* 3.
28. *Ibid* 124.
29. Amnesty International, 'Egypt: HIV Arrests: Policing in Ignorance and Fear: Doctors Failing in their medical responsibility' (Press Release, MDE 12/009/2008, 20 May 2008)  
<[www.amnesty.org/en/library/info/MDE12/009/2008/en](http://www.amnesty.org/en/library/info/MDE12/009/2008/en)>.
30. Duncan Golestani, 'Getting Worse': Egypt's gays fear government crackdown', *NBC News* (online), 23 January 2013 <[http://worldnews.nbcnews.com/\\_news/2013/01/23/16644770-getting-worse-egypts-gays-fear-government-crackdown?lite](http://worldnews.nbcnews.com/_news/2013/01/23/16644770-getting-worse-egypts-gays-fear-government-crackdown?lite)>.
31. Coalition for the International Criminal Court, above n 13.
32. *Rome Statute*, art 13(b).
33. International Criminal Court, *ICC Elements of Crime*, art 7(1)(h), element 4.
34. *Rome Statute*, art 7(1)(f).
35. *Rome Statute*, art 7(1)(g).
36. *Rome Statute*, art 7(1)(e).
37. International Criminal Court, *ICC Elements of Crime*, art 7(1)(h), element 2.

38. *Rome Statute*, art 7(1)(h).
39. See *Explanatory Memorandum of the (German) Code of Crimes against International Law* (BT-Drucks. 14/8524) 22.
40. Robertson, above n 2, 338.
41. *Rome Statute*, art 7(3).
42. Cate Steains, 'Gender issues' in Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute - Issues, Negotiation, Results* (Kluwer Law International, 1999) 357, 372.
43. Stephanie Farior, 'The Rights of Women in International Human Rights Law Textbooks: Segregation, Integration or Omission?' (2003) 12 *Columbia Journal of Gender and Law* 587, 598.
44. Joseph, above n 9, 67; Johan D. Van Der Vyver, 'Civil Society and the International Criminal Court' (2003) 2(3) *Journal of Human Rights* 425, 432.
45. Valerie Oosterveld, 'The Definition of 'Gender' in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?' (2005) 18 *Harvard Human Rights Journal* 55, 76.
46. Steains, above n 44, 372.
47. Roger S. Clark, 'Crimes Against Humanity and the Rome Statute of the International Criminal Court' in Mauro Politi and Giuseppe Nesi (eds.) *Rome Statute of the International Criminal Court* (Ashgate Publishing Limited, 2001) 75, 81.
48. Steains, above n 44, 373.
49. Ibid.
50. Joseph, above n 9, 67-8.
51. Steains, above n 44, 372.
52. International Criminal Court, *ICC Elements of Crime*, art 7(1)(h), element 4.
53. Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press, 2005) 260.
54. See, eg, *Kupreskic et al* (Judgment) 14.1.2000 [193]-[195]; *Kordic et al* (Judgment) 17.12.2004 [102].
55. Ibid [618].
56. Ibid [615], [622].
57. Oosterveld, above n 47, 72.
58. Steains, above n 44, 372.
59. *Rome Statute*, art 7, subpara 1(h), cited in Darryl Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference' (1999) 93(1) *American Journal of International Law* 43, 54.
60. Ibid 54.
61. Steains, above n 44, 372.
62. Ibid 237.
63. United Nations Human Rights Council, 'Report of the United Nations High Commissioner for Human Rights on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity', 19<sup>th</sup> sess, Agenda Items 2 and 8, A/HRC/19/41 (17 November 2011) [20].
64. Nicola Pratt, 'The Queen Boat Case in Egypt: sexuality, national security and state sovereignty' (2007) 33(1) *Review of International Studies* 129, 137.
65. Copelon, above n 64, 237; Steains, above n 44, 372.
66. Oosterveld, above n 47, 77.
67. Kelly D. Askin, 'Crimes within the Jurisdiction of the International Criminal Court' (1999) 10 *Criminal Law Forum* 33, 48.
68. Oosterveld, above n 47, 82.
69. Copelon, above n 64, 237.
70. Oosterveld, above n 47, 84.
71. Judge Rosalie Abella quoted in Copelon, above n 64, 237.
72. See: *Tadic (Appeal Judgment)* 15.7.1999 [285].
73. Juan E. Mendez, 'Recent Trends in Transitional Justice' (Paper presented at the Marek Nowicki Lecture, Helsinki Foundation for Human Rights, Warsaw, 10 November 2010).
74. Pam Spees, 'Women's advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power' (2003) 28(4) *Signs* 1233, 1244-5.