



In conversation: the crime of gender persecution at the International Criminal Court

Adrienne Ringin

To cite this article: Adrienne Ringin (2023): In conversation: the crime of gender persecution at the International Criminal Court, Australian Journal of Human Rights, DOI: [10.1080/1323238X.2023.2238384](https://doi.org/10.1080/1323238X.2023.2238384)

To link to this article: <https://doi.org/10.1080/1323238X.2023.2238384>



© 2023 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group



Published online: 07 Aug 2023.



Submit your article to this journal [↗](#)



Article views: 192



View related articles [↗](#)



View Crossmark data [↗](#)

In conversation: the crime of gender persecution at the International Criminal Court

Adrienne Ringin 

Sydney University Law School, The University of Sydney, Sydney, Australia

ABSTRACT

On 1 March 2023, International Criminal Court (ICC) Special Advisor on Gender Persecution, Professor Lisa Davis, joined Dr. Rosemary Grey at the University of Sydney to discuss the recently released *Policy on the Crime of Gender Persecution*. The conversation explored the creation of the Policy, including the historical deficit that led to its need. Touching on the current cases before the ICC, Davis and Grey also contemplated the charge of the crime of gender persecution in potential future cases before the ICC or other jurisdictions. Reflecting upon the conversation, this article considers the practical, ideological and legal implications of the Policy as well as offers commentary on the potential challenges and future prospects as the crime of gender persecution is utilised.

ARTICLE HISTORY

Received 29 April 2023
Accepted 3 July 2023

KEYWORDS

Gender Persecution Policy; International Criminal Court; ICC; gender; international criminal law; Al Hassan; Abd-Al-Rahman; Said; in conversation

Introduction

After over two decades of operation, the International Criminal Court (ICC) is finally tackling the unique crime of gender persecution. This crime occurs when another crime under the ICC statute, such as murder or torture, is committed against a subset of persons because of their gender.¹ While gender persecution has featured in the Rome Statute since the treaty's conception, it has only recently become a focus of the courtroom. There are currently three separate cases before the ICC with a charge of gender persecution: *The Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (Al Hassan)* from the Situation in Mali,² *The Prosecutor v Abd-Al-Rahman (Abd-Al-Rahman)* from the Situation in Sudan,³ and *The Prosecutor v Mahamat Said Abdel Kani (Said)* from the Situation in the Central African Republic II.⁴ The Office of the Prosecutor is alleging gender persecution in the *Abd-Al-Rahman* and *Said* cases in connection with the treatment of males, while in the *Al Hassan* case, gender persecution is linked to the treatment of females during the occupation of Timbuktu, Mali, by the Islamic militant groups Ansar Dine and Al Qaeda in the Lands of the Islamic Maghreb (AQIM).

CONTACT Adrienne Ringin  adrienne.ringin@sydney.edu.au, adrienneringin@gmail.com

¹Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute) art 7(1)(h), art 7(2)(g).

²*The Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Judgment) ICC-01/12-01/18.

³*The Prosecutor v Abd-Al-Rahman ("Ali Kushayb")* (Judgment) ICC-02/05-01/20.

⁴*The Prosecutor v Mahamat Said Abdel Kani* (Judgment) ICC-01/12-01/21.

© 2023 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group

This is an Open Access article distributed under the terms of the Creative Commons Attribution-NonCommercial-NoDerivatives License (<http://creativecommons.org/licenses/by-nc-nd/4.0/>), which permits non-commercial re-use, distribution, and reproduction in any medium, provided the original work is properly cited, and is not altered, transformed, or built upon in any way. The terms on which this article has been published allow the posting of the Accepted Manuscript in a repository by the author(s) or with their consent.

On 1 March 2023, Professor Lisa Davis, the ICC Special Advisor on Gender Persecution, joined Dr. Rosemary Grey at the University of Sydney to discuss this crime and the recently released ICC Office of the Prosecutor *Policy on the Crime of Gender Persecution* (the Policy).⁵ An Associate Professor of Law and Co-Director of the Human Rights and Gender Justice Clinic at the City University of New York School of Law, Davis is a prolific academic and advocate in the area of human rights law, specifically women's rights, gender rights and LGBTQIA+ rights. Professor Davis offers ICC Prosecutor Karim Khan KC, and the Office of the Prosecutor, an unparalleled understanding of the intersection of gender and conflict, providing a scaffold and pathway for the ICC to appropriately unearth previously invisible crimes and victims. Dr. Grey is a Senior Lecturer at Sydney Law School, and Co-Director of the Sydney Centre for International Law. She is also an active member of the Sydney Southeast Asia Centre in the University of Sydney. Her research focuses on gender and international criminal law, particularly in the ICC and Extraordinary Chambers in the Courts of Cambodia and she has been invited to present at international forums including the ICC Assembly of States Parties and the ICC Office of the Prosecutor. Her book, *Prosecuting Sexual and Gender-Based Crimes in the International Criminal Court*, was published by Cambridge University Press in 2019.

Gender persecution as a misunderstood crime

When questioned as to why gender persecution has taken so long to be charged, Professor Davis' answer was firm. Davis proposed that the reluctance stemmed from a fundamental uncertainty about what the crime entails and the basic lack of language to articulate it. So, while the provision was included in the Rome Statute, the progression achieved by its insertion plateaued and stagnated as the international community failed to understand what gender-based violence encapsulated *beyond and disassociated* from sexual violence, which *was* understood. It is evident, however, that this stagnation is now being reversed.

While the previous Prosecutor, Fatou Bensouda, approved the charge of gender persecution in the three current cases, the succession of Prosecutor Khan to the position on 16 June 2021 increased focus on this crime. The appointment of Professor Davis to Special Advisor, together with the immediate request to formulate a policy on gender persecution, demonstrated Khan's undertaking that:

[G]ender persecution as a crime against humanity takes many forms, and is indeed linked to other crimes under the Rome Statute. I am firmly committed to ensuring that my Office systematically address sexual and gender-based crimes, and take a deeper and focused approach to investigating and prosecuting gender persecution. This latest policy paper initiative is another commitment to this necessary objective.⁶

The resultant Policy,⁷ launched at the 21st session of the Assembly of States Parties on 5 December 2022, exposed and sought to fill the jurisprudential gap which exists due

⁵The Office of the Prosecutor, 'Policy on the Crime of Gender Persecution' (7 December 2022) <www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf> accessed 25 March 2023 (Gender Persecution Policy).

⁶International Criminal Court, 'Press Release: The Office of the Prosecutor Launches Public Consultation on a New Policy Initiative to Advance Accountability for Gender Persecution under the Rome Statute' (20 December 2023) <<https://www.icc-cpi.int/news/office-prosecutor-launches-public-consultation-new-policy-initiative-advance-accountability>> accessed 25 March 2023.

⁷Gender Persecution Policy (n 5).

to the crime being disregarded until now. Professor Davis and Dr. Grey commented on the ability to trace the existence of gender persecution through historical conflicts, with Davis pointing to the example of the plight of homosexuals under the Nazi regime in Germany during World War II as a situation which fits the metrics of gender persecution. Persecution in these historical instances, however, was governed by the legal instruments at the time which limited the definition of persecution to the categories of race, religion and politics.⁸ This failure to identify gender as a category and validate the crimes committed against persons is a contribution to and continuation of the language deficit concerning this crime.

Many feminist scholars and activists of the 1990s recognised the obscured crimes committed against women and other marginalised peoples, particularly enlivened during realities of the conflicts of the former Yugoslavia and Rwanda. They began a movement of law reform to include sexual and gender-based crimes in the then draft of the Rome Statute.⁹ Part of their goals was to expand the crime against humanity of persecution to also cover persecution on gender grounds.¹⁰ First, however, a definition of gender was required. What eventuated was a definition that appeased States with social and cultural concerns, but has been described as ‘constructive ambiguity’¹¹ and has never been duplicated in subsequent international work. The language deficit is at play again. Gender is defined in Article 7(3) of the Rome Statute as ‘the two sexes, male and female, within the context of society’. An attempt to make sense of this definition was first proffered in the ICC Office of the Prosecutor’s 2014 *Policy Paper on Sexual and Gender-Based Crimes*,¹² and Professor Davis was able to build upon that work to interpret ‘gender’ in the Policy to mean:

... [S]ex characteristics and social constructs and criteria used to define maleness and femaleness, including roles, behaviours, activities and attributes. As a social construct, gender varies within societies and from society to society and can change over time. This understanding of gender is in accordance with article 21 of the Statute. [footnotes omitted]¹³

The Policy further explained that ‘gender persecution is committed against persons because of their sex characteristics and/or because of the social constructs and criteria used to define gender’.¹⁴

The central tenet of the offence of gender persecution, Professor Davis argues however, lies in the essential question to be asked at the investigation stage: *why* did the crime occur? For Davis, the ‘who’, ‘what’, ‘when’, ‘where’ and ‘how’ is usually self-evident in the initial crime, while the ‘why’ reveals the discriminatory intent which gender persecution is predicated upon. By way of explanation, Davis offered the example of a bombing of a co-education school. Investigators may see the crime of murder, but due to the victims being of various ages, races, religions, and consisting of

⁸Rhonda Copelon, ‘Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law’ (2000) 46 *McGill Law Journal* 217, 235.

⁹See Louise Chappell, *The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy* (Oxford University Press 2015) 35–40.

¹⁰Copelon (n 8) 233–36.

¹¹Valerie 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, 57.

¹²The Office of the Prosecutor, ‘Policy Paper on Sexual and Gender-Based Crimes’ (June 2014) <www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf> accessed 26 March 2023.

¹³Gender Persecution Policy (n 5) 3.

¹⁴*ibid.*

both male and female victims, may not identify the bombing as a crime of gender persecution. By asking *why* the bombing occurred, the intent is revealed as one pursuing a policy preventing girls from accessing education. This intent is gendered, and therefore all persons who were murdered, whether they be female or not, are classed as victims of gender persecution. In this way, both prominent and obscured instances of gender persecution are identifiable.

Gender persecution before the ICC

The cases currently before the ICC demonstrate how gender persecution can transpire. In *Al Hassan*, gender persecution is alleged to have occurred through the treatment of women during the occupation of Mali, Timbuktu, by Ansar Dine and AQIM. The imposition of adherence to an interpretation of Sharia law which authorised, for example, the use of corporal punishment for infractions in dress codes or the forcible marriage of women to occupying forces, disproportionately affected the freedom of women in the city.¹⁵ The intertwining of gender with religion, religious law, and race¹⁶ demonstrates the complexity and multilayered elements of gender persecution, which may therefore provide a rich jurisprudence for other cases to build upon. The cases of *Said* and *Abd-Al-Rahman*, by contrast, offer another example of this crime whereby males were targeted due to their perceived role in society; that of protectors, agitators and potential combatants. Said was allegedly in charge of a detention facility in the Central African Republic in which predominantly male supporters of an overthrown government were detained and suffered abuse. Aside from being male, these supporters were systematically targeted on the basis of their characteristics such as religion, ethnicity and specific residential zones. In the case of *Abd al Rahman*, the conflict in Darfur, Sudan, between April 2003 and April 2004 featured Fur males in the villages of Mukjar and Deleig being arrested, detained and subsequently tortured and murdered. The Prosecution alleged that Abd al Rahman was a central figure in directing and authorising the attacks. Again the men were targeted based on their perceived social roles connected to their gender. The treatment of men in the *Said* and *Abd-al-Rahman* cases demonstrates how gender persecution is not a euphemism to mean ‘women’, and how gender persecution can be experienced by all genders.

Professor Davis was unable to comment on the cases currently before the ICC but was able to cite other processes also utilising a gender persecution charge, such as the *La Jurisdicción Especial para la Paz* (Special Jurisdiction for Peace) (JEP) in Colombia. This is the transitional justice mechanism which currently has 10 cases before it concerning the conflict between the government and the militant group FARC-EP.¹⁷ Macro case 005 currently includes five LGBTI persons and instances of ‘threats, sexual violence, physical injuries, harassment, torture, arbitrary detentions, kidnapping and forced displacement

¹⁵For full description of charges alleged, see The Office of the Prosecutor, ‘Annex A Public Redacted Version of ICC-01/12-01/18-819-Conf-AnxA Prosecution Trial Brief, ICC-01/12-01/18’ (18 May 2020) <www.legal-tools.org/doc/qfxy77/pdf/> accessed 23 March 2023.

¹⁶Davis commented that evidence has been brought to suggest women of darker skin tones suffered harsher punishments.

¹⁷Jurisdicción Especial Para La Paz, ‘Estructura orgánica de la JEP’ <<https://www.jep.gov.co/Paginas/organigrama.aspx>> accessed 4 April 2023.

because of their sexual orientations, gender identities and expressions'.¹⁸ Davis commented that the ICC and the JEP were working closely particularly in this case to share knowledge and skills regarding the prosecution of gender persecution.

Considerations for the path ahead

The conversation between Professor Davis and Dr. Grey proposed several points to consider concerning prosecution of the crime of gender persecution. The practical barriers faced by investigators when attempting to identify victims of gender persecution remain an obstacle. As Davis explained, the identification of male victims of gender persecution may be easier due to the visibility and mobility men tend to have in society in general. Others who experience gender persecution, such as lesbians or trans persons, are victims of existing oppression which is exacerbated during conflict, with gender persecution experienced during conflict becoming the second, third or even fourth layer of discrimination thrust upon such persons. In this way, the multiplicity of discrimination makes it harder to disentangle and identify individual strands, which works to leave women, lesbians and trans persons as invisible victims. The need for an intersectional approach is imperative, ideally utilising the work already created concerning racial and ethnic oppression and persecution.¹⁹

It is this challenge of identifying victims that poses a potential threat to the forward motion achieved by the creation of the new Policy. Without necessary changes to the enquiries of investigators and interrogators, victims may remain invisible. Further resources and training must be offered to all ICC actors, particularly the judicial bench, to ensure this policy is utilised to its full potential. The result of these changes may result in an increase of charges and prosecutions before the ICC, especially as in asking the 'why' question may capture crimes such as rape and sexual slavery, while also unearthing those who have not traditionally been thought of as victims, notably the LBGTQIA+ community. Professor Davis did state that such an undertaking was being considered, which is heartening. What comes next is an interim period of adjustment and education, which will require time, patience, and accommodation. It is hoped that this Policy is given that time.

A further challenge is an ideological one. International law is clear that religion and culture cannot be used to excuse the committal of crimes. The definition of gender persecution is also clear that the crime occurs where there is a severe breach of fundamental rights on the basis of gender. However, gender is a social construct. What it represents, and how it is defined, has evolved and continues to do so. This evolution has not been linear; depending on intersecting factors, such as religion, culture, history and politics, gender and socialised acceptance of it, is as varied as the many societies that exist today. Even in the most progressive societies, levels of entrenched gender discrimination operate as an inherent aspect of that society. The reality is, therefore, that charges of

¹⁸Susann Aboueldahab, 'Gender-based Persecution as a Crime against Humanity: A Milestone for LGBTI Rights before the Colombian Special Jurisdiction for Peace' (EJIL: Talk!, 4 May 2021) <<https://www.ejiltalk.org/gender-based-persecution-as-a-crime-against-humanity-a-milestone-for-lgbti-rights-before-the-colombian-special-jurisdiction-for-peace/>> accessed 15 April 2023.

¹⁹See Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 *Stanford Law Review* 1241; Barbara Giovanna Bello and Letizia Mancini, 'Talking about Intersectionality. Interview with Kimberlé W. Crenshaw' (2016) 2 *Sociologia del Diritto* 11.

gender persecution take place in environments whereby various levels of gender discrimination are already permissible and normalised.

The question becomes, is the ICC prepared to delineate what is and is not acceptable? The threshold of 'severe' in the definition of gender persecution is an opportunity for debate as is the ongoing contest between 'universalism' and 'cultural relativism' in relation to the notion of fundamental human rights.²⁰ As emphasised in the Policy, gender is a social construct, and the Court will be confronted with these debates in future cases. The international community is already experiencing a lethargy in confronting gender discrimination generally, as explored in the work of Louise Chappell.²¹ As an institution itself, the ICC has grappled with understanding gender within its own operations. The requirement for gender expertise as a consideration in the election of judges found in Article 36(8)(b) of the Rome Statute has not been applied,²² and while a 2021 report states that as of 30 September 2020, 48.1 per cent of all staff were female, 81 per cent of these women held roles in the lower grade levels of the Court (P-1, P-2 and P-3).²³

While this is a concern, as demonstrated by Feminist Judgments projects, such as Cambridge University Press's upcoming publication, *Feminist Judgments: Re-imagining the International Criminal Court*,²⁴ the Court has the ability now, and arguably has always had the ability, to make determinations using a gender-sensitive approach. Asking the gender question, asking the *why*, is not new and novel: the Court can do so and in doing so, will be accurately articulating the crimes before it. It is not as if the international community has not confronted such a social fissure before. The experiences from the International Criminal Tribunals of the former Yugoslavia and Rwanda respectively, and the examination and scrutiny of racial and ethnic tensions, resulted in significant change of tolerance of such motivations. The current cases at the ICC, the JEP, and cases under universal jurisdiction may be the pivotal moments that subsequently transform gender persecution to a similar level of global detestation.

Finally, legal considerations are also raised regarding the potential fracturing of the legal jurisprudence of gender persecution. Gender persecution is a crime at the JEP but is also appearing in other jurisdictions under the doctrine of universal jurisdiction. Germany, for example, convicted defendant Sarah O. for gender persecution on 16 June 2021 regarding instances in Syria where she and her husband enslaved, bought and sold Yazidi women, including a 14-year-old girl who died.²⁵ There was also evidence of physical beatings, sexual abuse of the women by Sarah's husband with her consent,

²⁰See, for example, Frederick Cowell, *Defensive Relativism: The Use of Cultural Relativism in International Legal Practice* (University of Pennsylvania Press 2022). Part II references case studies which highlight the tension between individual and State rights. See also Ulf Johansson Dahre, 'Searching for a Middle Ground: Anthropologists and the Debate on the Universalism and the Cultural Relativism of Human Rights' [2017] 31(5) *The International Journal of Human Rights*.

²¹Chappell (n 9) 190–206.

²²Rosemary Grey, Kcasey McLoughlin and Louise Chappell, 'Gender and Judging at the International Criminal Court: Lessons from "feminist judgment projects"' (2021) 34 *Leiden Journal of International Law*, 253.

²³Assembly of States Parties, 'Report of the Bureau on Equitable Geographical Representation and Gender Balance in the Recruitment of Staff at the International Criminal Court' (29 November 2021) ICC-ASP/20/29 29 November 2021.

²⁴Kcasey McLoughlin, Rosemary Grey, Louise Chappell and Suzanne Varrall, *Feminist Judgments: Re-imagining the International Criminal Court* (Cambridge University Press, forthcoming).

²⁵Doughty Street Chambers, 'German Court Convicts a Third ISIS Member of Crimes against Humanity Committed against Yazidis' (18 June 2021) <<https://www.doughtystreet.co.uk/news/german-court-convicts-third-isis-member-crimes-against-humanity-committed-against-yazidis>> accessed 27 March 2023.

and slave labour.²⁶ Other States may soon follow as universal jurisdiction is used to prosecute returned ISIS fighter in domestic courts.²⁷ It is possible that as individual States and other bodies attempt to charge this crime, the foundational base of gender persecution may birth various avenues or interpretations. Deviations may not be an automatically negative evolution, however with gender emerging from decades of confusion, and existing debates concerning its breadth and depth, the impact on future cases and understanding will be interesting. While noting that the precedential value of decisions may not be binding across jurisdictions, development is an area that requires close observance in the coming years.²⁸

Conclusion

The conversation between Professor Davis and Dr. Grey provided valuable insight into the construction and intended implementation of the *Policy Paper on Gender Persecution*. In centring gender and asking the 'why' question, the ICC can only become a more competent and proficient institution. While there are practical, ideological and legal aspects to scrutinise, this approach is adhering to international law fair trial norms, through which fair labelling notifies defendants, the prosecution and survivors of the true crimes committed during conflict.

Acknowledgements

The author extends their appreciation to Dr. Rosemary Grey regarding support for this article.

Disclosure statement

No potential conflict of interest was reported by the author(s).

Notes on contributor

Adrienne Ringin is a research assistant to Dr. Rosemary Grey at the University of Sydney, with a focus on sexual and gender-based crimes before the International Criminal Court.

ORCID

Adrienne Ringin  <http://orcid.org/0009-0003-1286-9686>

²⁶*ibid.*

²⁷Sofia Koller, Carlotta Sallach, Alexander Schiele, 'CEP Policy Paper: Recent Legal and Political Developments in the Repatriation of European Nationals from Northeastern Syria' (Counter Extremism Project, December 2022) <https://www.counterextremism.com/sites/default/files/2022-12/CEP%20Policy%20Paper_Recent%20Repatriation%20of%20Europeans%20from%20Syria_Dec%202022.pdf> accessed 15 April 2023.

²⁸Further reading, see Larissa van den Herik and Carsten Stahn, *The Diversification and Fragmentation of International Criminal Law* (Brill Nijhoff 2012); Ole Kristian Fauchald and André Nollkaemper, *The Practice of International and National Court and the (de-)Fragmentation of International Law* (Bloomsbury Publishing 2014); Sivan Shlomo Agon, 'Farewell to the F-Word? Fragmentation of International Law in time of the Covid-19 pandemic' (2022) 72(2) *University of Toronto Law Journal* 1–49.