

December 1, 2018

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Cc:

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**Re: The Definition of Gender in the Draft Crimes Against Humanity Convention**

Dear Members of the International Law Commission,

In response to your call for comments and observations on the draft crimes against humanity (CAH) convention, we write to recommend that the definition of gender be removed from Article 3(3). In the alternative, the Commission should revise the definition to reflect the definition put forth by the Office of the Prosecutor of the International Criminal Court (ICC) in its 2014 *Policy Paper on Sexual and Gender-Based Crimes*.<sup>1</sup> Additionally, the grounds for persecution listed in Article 3(1)(h) should be updated to reflect evolving international law.

We commend the International Law Commission for its efforts drafting the crimes against humanity convention. Strong text on crimes against humanity that complies with existing human rights law would be an invaluable tool for confronting impunity, and enhancing state efforts to hold accountable those suspected of criminal responsibility for gender-based crimes. In contrast, a text that does not properly account for current understandings of gender could sideline women, lesbian, gay, bisexual, transgender and intersex (LGBTI)<sup>2</sup> persons, and other marginalized and vulnerable groups. At worst, it could result in greater impunity for gender-based crimes amounting to crimes against humanity.

**I. Removing or Revising the Outdated Definition of Gender**

The International Law Commission (“the Commission”) has made great strides in its mission to analyze and promote the progressive development of international law and its codification in

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

<sup>2</sup> The use of the categories LGBTI is used in this submission as it has been widely adopted by human rights mechanism and jurisprudence.

areas of “both settled rules and gaps requiring development of new rules.”<sup>3</sup> In this respect, the Rome Statute’s definition of “gender” is a rule requiring further clarification and reflection of the contemporary understanding of gender under international law.

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

Over the last two decades, numerous regional and U.N. human rights mechanisms, including treaty bodies, experts, and jurists have adopted language that recognizes the social construction of gender.<sup>4</sup> The ICC’s own Office of the Prosecutor (OTP) also adopted this understanding. Its 2014 publication, “Policy Paper on Sexual and Gender-Based Crimes,” clarifies the definition of “gender” under the Rome Statute: “[g]ender’, in accordance with article 7(3) of the Rome Statute ... refers to males and females, within the context of society. This definition acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys.”<sup>5</sup> Accordingly, the policy paper distinguishes “gender” from the term “sex” which refers to “the biological and physiological characteristics that define men and women.”<sup>6</sup>

Consistent with this approach, the international criminal tribunals for the former Yugoslavia (“ICTY”) and Rwanda (“ICTR”) have considered how transgressing prescribed gender roles and behaviors can be the underlying basis for crimes.

- In *Nahimana*, Tutsi women were perceived as violating prescribed gender behavior and labeled as “femmes fatales” and “seductive agents of the enemy” which the court noted had motivated sexual attacks and killings against them.<sup>7</sup>

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<sup>3</sup> Sean D. Murphy, *Codification, Progressive Development, or Scholarly Analysis? The Art of Packaging the ILC’s Work Product*, GW Law Faculty Publications & Other Works, 2 (2012).

<sup>4</sup> See for example, U.N. Sec’y-Gen., Protection against violence and discrimination based on sexual orientation and gender identity U.N. Doc. A/73/152 (July 12, 2018); the Inter-American Court of Human Advisory Opinion OC-24/17 (Nov. 24, 2017) ¶ 32; CAT Committee, Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. CAT/C/57/4 (Mar. 22, 2016); CEDAW, Gen. Rec. 33, U.N. Doc. CEDAW/GC/33 (Aug. 3, 2015); CAT Gen. Comm. 3, U.N. Doc. CAT/C/GC/3 (Nov. 19, 2012); CEDAW, Gen. Rec. 28, U.N. Doc. CEDAW/GC/28 (Dec. 16, 2010); Gen. Comm. 2, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008); ICESCR, Gen. Comm. 16, U.N. Doc. E/C.12/2005/4 (Aug. 11, 2005); U.N. Sec’y-Gen., Question of torture and other cruel, inhuman or degrading treatment or punishment, U.N. Doc. A/56/156 (July 3, 2001); ICCPR, Gen. Com. 28, U.N. Doc. CCPR/C/21/Rev.1/Add.10, (Mar. 29, 2000); Report of the U.N. Sec’y-Gen.: Implementation of the Outcome of the Fourth World Conference on Women (Beijing Platform for Action) (Sept. 3, 1996); CEDAW, Gen. Rec. 19, U.N. Doc. A/47/38 (1992).

<sup>5</sup> The Office of the Prosecutor of the ICC, *Policy Paper on Sexual and Gender-based Crimes*, 3 (2014).

<sup>6</sup> *Id.*, citing the World Health Organization (WHO), What do we mean by “sex” and “gender”? (2014).

<sup>7</sup> *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Judgment ¶ 1079 (Dec. 3, 2003).

- In *Kvočka*, the Trial Chamber held that sexual violence was a “natural or foreseeable consequence” of holding women in detention, “guarded by men with weapons who were often drunk, violent, and physically and mentally abusive and who were allowed to act with virtual impunity.”<sup>8</sup> On appeal, the Trial Chamber further clarified that discriminatory intent is not voided by personal motivations to commit sexual assault.<sup>9</sup>
- In the *Lubanga* case, the International Criminal Court identified “sexual orientation” as a protected class in accordance with Article 21(3) of the Rome Statute when discussing reparations.<sup>10</sup>

The application and interpretation of law pursuant to the definition of gender must be consistent with internationally recognized human rights and as affirmed by the OTP. By failing to acknowledge the social construction of gender, the International Law Commission’s text contradicts these developments.

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

Globally, sexual and gender-based crimes remain the least-condemned crimes in conflict. According to U.N. Women, “narrow definitions of sexual violence codify gender inequalities preventing access to justice to many survivors and making the implementation of international conventions and frameworks difficult.”<sup>11</sup> The proposed convention presents a unique opportunity to reduce obstacles to prosecuting sexual and gender-based crimes. A text that reflects the current status of human rights law would help to ensure that the convention does not reinforce the sidelining of women, LGBTI persons and other marginalized victims. It would assist States in their efforts to prevent, punish and protect against gender-based crimes, sending the message that such violence is unacceptable, that it will not occur with impunity, and that all survivors’ rights will be upheld.

We applaud the additional language added to the draft convention in article 3, paragraph 4, which states: “This draft article is without prejudice to any broader definition provided for in any

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<sup>8</sup> *Prosecutor v. Kvočka*, Case No. IT-98-30/1-T, Judgment ¶ 327 (Nov. 2, 2001).

<sup>9</sup> *Prosecutor v. Kvočka*, Case No. IT-98-30/1-A, Judgment on Appeal, ¶¶ 369-70 (Feb. 28, 2005).

<sup>10</sup> *Prosecutor v. Lubanga Dyilo*, Case No. CC-01/04-01/06, Decision establishing the principles and procedures to be applied to reparations, ¶ 191 (Aug. 7, 2012). The Trial Chamber states, “reparations shall be granted to victims without adverse distinction on the grounds of gender, age, race, . . . sexual orientation, national, ethnic or social origin, wealth, birth or other status.” *Id.* The Court refers to principle 25 of the U.N. Basic Principles on Reparations, which states that the application of those principles must be “consistent with international human rights law” and be “without any discrimination of any kind or on any ground, without exception.” G.A. Res. A/RES/60/147, ¶ 25 (Mar. 21, 2006).

<sup>11</sup> U.N. Women & U.N. Team of Experts Rule of Law/Sexual Violence in Conflict, UNDP, *Accountability for Sexual Violence in Conflict: Identifying gaps in theory and practice of national jurisdictions in the Arab region*, 4 (2018).

international instrument or national law.” However, we are cognizant that treaty language is the bedrock to the codification of Customary International Law (CIL). Even with this additional blanket statement recognizing the natural progression of rights, such an explicit definition to the term gender in a treaty only works to ensconce gender misrecognition. A memorandum submitted by the U.N. Secretary-General after the first session of the Commission, warned of the danger of “a mere registration...of existing law [as] it may crystallize the law in matters in which the existing rules are obsolete and unsatisfactory.”<sup>12</sup> Consequently, it may be perceived as both confusing and conflicting to both qualify only one persecutory category, and with a problematic definition that is not in compliance with CIL, while broadly permitting alternative definitions.

Moreover, the convention in its current draft could be misread as promoting the misconception that the term “gender” has multiple understandings codified under international human rights law and as such denies its consistently recognized definition as a social construct.

According to our research, a diverse set of rights and protections were taken into consideration during the discussions on the draft convention among members of the U.N. General Assembly’s Sixth Committee. However, over the last four years of dialogue, state comments, and debates, there appears to have been no mention of the draft’s definition of gender. In accordance with the purpose of the convention and to address this oversight, the text should reaffirm the two decades of international human rights law and jurisprudence that have accounted for its social construction.

## **II. Expanding the grounds for persecution<sup>13</sup>**

The International Law Commission has been judicious in its comments on grounds for persecution, providing a critical role in the expansion of recognized persecutory grounds to reflect both progressive developments under international law and to respond to the needs of differing vulnerable groups that fall under threat. The last such occasion was in the 1990s, when the Commission recognized the need to expand the grounds to reflect evolving international issues of concern and substantially expanded the grounds in its drafting of the Rome Statute. It has been over twenty years since persecutory categories have been fully examined to assess their congruence with international law.

Since Rome, the international community has made great strides in recognizing and expanding discriminatory, and in its worst form, persecutory grounds. This is apparent from the codification of recent treaties on the rights of persons with disabilities and migrants’ rights to the creation of both the U.N. Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity<sup>14</sup> and the Inter-American Special Rapporteur on the rights

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<sup>12</sup> Memorandum, Secretary-General, Survey of International Law in Relation to the Work of Codification of the International Law Commission, 6, para 7 (1949).

<sup>13</sup> Contains excerpts from Lisa Davis, *Reimagining Justice for Gender-Based Crimes at the Margins: New Legal Strategies for Prosecuting ISIS Crimes Against Women and LGBTI Persons*, 24 Wm. & Mary J. Women & L. 546, 547-553, (2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3184815](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3184815).

<sup>14</sup> Resolution adopted by the Human Rights Council adopted on June 30, 2016, U.N. Doc A/HRC/RES/32/2 (15 July 2016).

of LGBTI persons,<sup>15</sup> along with the reappointment of the Special Rapporteur on the rights of Indigenous peoples. We therefore urge the Commission to add sexual orientation, gender identity, and sex characteristics to the list of persecutory grounds, in addition to considering adding disability, Indigenous status, age, social origin, language, and migrant and refugee status.

While behaviors that transgress gender roles derive from normative conceptions of sexual orientation and gender identity and therefore fall under the umbrella protection of gender, the international community's priority is to also elevate and recognize sexual orientation and gender identity (SOGI), and more recently sex characteristics, as distinct protective classes under international law. By 1999, as international law began codifying SOGI rights more broadly, the European Court followed suit, expanding its scope of liability from violations of the right to privacy to the inclusion of SOGI as a protected class against discrimination.<sup>16</sup>

While they have become more nuanced over the years, many of the references to sexual orientation or gender identity throughout the U.N. human rights system stem from the landmark decision in 1994 by the U.N. Human Rights Committee monitoring compliance with the International Covenant on Civil and Political Rights ("ICCPR") in *Toonen v. Australia*.<sup>17</sup> The Committee held that sexual orientation was included in the treaty's antidiscrimination provisions as a protected status. The *Toonen* decision, like the *Dudgeon* decision<sup>18</sup> for Europe, marked a turning point in the recognition of gay and lesbian rights within the U.N. human rights system.<sup>19</sup>

In 2007, the Committee Against Torture ("CAT Committee") adopted General Comment No. 2 ("CAT Comment No. 2"),<sup>20</sup> consolidating decades of international developments on the understanding of gender-based torture as a human rights violation. CAT Comment No. 2 reaffirms that gender is indeed a social construction and highlights the often-obscured roles of gendered discrimination in facilitating the practice of torture. It clarifies that both women and men, and more specifically, persons who deviate from their culturally assigned hetero-normative gender roles, are at risk of gender discrimination. It prohibits such discrimination, finding that states have the responsibility to protect against gender-motivated crimes of torture, explicitly including when directed against LGBTI people and other gender transgressors.<sup>21</sup>

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<sup>15</sup> Press Release, Org. of Am. States, The IACHR creates Rapporteurship to address issues of Sexual Orientation, Gender Identity, Gender Expression, and Body Diversity (Nov. 25, 2013), [http://www.oas.org/en/iachr/media\\_center/PReleases/2013/094.asp](http://www.oas.org/en/iachr/media_center/PReleases/2013/094.asp).

<sup>16</sup> See *Lustig-Prean & Beckett v. United Kingdom*, App. No. 31417/96 and 32377/96 Eur. Ct. H.R. (1999); *Smith & Grady v. United Kingdom* App. No. 33985/96, Eur. Ct. H.R. (1999) (holding that such discriminatory policies "were founded solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation" and cannot justify discrimination "any more than similar negative attitudes towards those of a different race, origin or colour.").

<sup>17</sup> *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) (holding that a Tasmanian law criminalizing consensual sexual contact between men was not "essential to the protection of morals in Tasmania" and arbitrarily interfered with the petitioner's rights under article 17 of the ICCPR (right to privacy)).

<sup>18</sup> *Dudgeon v. United Kingdom*, App. No. 7525/76, Eur. Ct. H.R. (1981).

<sup>19</sup> The Human Rights Committee has continued to recognize and uphold SOGI rights, stating in 2014 that LGBTI persons are part of the "everyone" guaranteed the rights of liberty and security of person, encompassing "freedom from injury to the body and the mind." Human Rights Committee, General Comment No. 35 (2014): article 9 (Liberty and security of person), ¶ 3 U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014).

<sup>20</sup> CAT Gen. Comm. No. 2 (2007).

<sup>21</sup> *Id.* at ¶ 21.

Beyond the CAT Committee and Human Rights Committees, General Comments and Recommendations of other U.N. treaty bodies recognize SOGI rights as well.<sup>22</sup> Beginning in 2000, the U.N. Committee on Economic and Social Rights (CESCR Committee) has listed sexual orientation as protected grounds from discrimination numerous times.<sup>23</sup> By 2009, the CESCR Committee crystalized its jurisprudence through its General Comment No. 20 recognizing sexual orientation and gender identity as protected classes under “other status.”<sup>24</sup> Similarly, the U.N. Committee on the Elimination of all forms of Discrimination Against Women (CEDAW Committee) has found that states parties “must legally recognize and prohibit intersecting such forms of discrimination” including where sex and gender intersect with sexual orientation.<sup>25</sup> The Convention on the Rights of the Child,<sup>26</sup> the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)<sup>27</sup>, Convention on the Rights of Persons with Disabilities<sup>28</sup> all find sexual orientation and gender identity among the prohibited

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<sup>22</sup> See generally, *Sexual Minorities Uganda v. Scott Lively*, Expert Opinion of the Professor M. Cherif Bassouini, U.S. Dist. Ct. of Mass. ¶¶ 22-26 (filed July 13, 2012) (arguing that sexual orientation and gender identity is considered a group status under international law jurisprudence).

<sup>23</sup> See CESCR, Gen. Comm. No. 23 (2016) on the right to just and favorable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), ¶ 65(a) U.N. Doc. E/C.12/GC/23 (Apr. 27, 2016); CESCR, Gen. Comm. No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), ¶ 23 U.N. Doc. E/C.12/GC/22 (May 2, 2016); CESCR, Gen. Comm. No. 20: Non-discrimination in economic, social and cultural rights, U.N. Doc. E/C.12/GC/20 (July 2, 2009); Gen. Comm. No. 18: The Right to Work (art. 6) ¶ 12(b)(i) U.N. Doc. E/C.12/GC/18 (Feb. 6, 2006); CESCR, Gen. Comm. No. 15 (2002): The Right to Water, ¶ 13 U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003); CESCR, Gen. Comm. No. 14 (2000): The right to the highest attainable standard of health, ¶ 18 U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

<sup>24</sup> CESCR, Gen. Comm. No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), ¶ 32 U.N. Doc. E/C.12/GC/20 (July 2, 2009).

<sup>25</sup> CEDAW, Gen. Rec. No. 28 on the Core Obligations of States Parties under article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, U.N. Doc. CEDAW/C/2010/47/GC.2.

See, e.g., CEDAW, General Recommendation No. 19: Violence against women, Addendum, Draft General Recommendation No. 19 (1992): accelerating elimination of gender-based violence against women, U.N. Doc. CEDAW/C/GC/19/Add.1 (July 28, 2016); CEDAW, General recommendation No. 33 on women’s access to justice, U.N. Doc. CEDAW/C/GC/33 (Aug. 3, 2015); CEDAW, Gen. Rec. No. 27 on Older Women and Protection of Their Human Rights, U.N. Doc. CEDAW/C/2010/47/GC.1.

<sup>26</sup> See Comm. on the Rights of the Child, Gen. Comm. No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), U.N. Doc. CRC/C/GC/15 (Apr. 17, 2013); Comm. on the Rights of the Child, Gen. Comm. No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3) ¶ 55 U.N. Doc. CRC/C/GC/14 (May 29, 2013); Comm. on the Rights of the Child, Gen. Comm. No. 13 (2011): The right of the child to freedom from all forms of violence, ¶ 72 (g) U.N. Doc. CRC/C/GC/13 (Apr. 18, 2011); Comm. on the Rights of the Child, Gen. Comm. No. 4 (2003): Adolescent health and development in the context of the Convention on the Rights of the Child, ¶ 6 U.N. Doc. CRC/GC/2003/4 (July 1, 2003); Comm. on the Rights of the Child, Gen. Comm. No. 3 (2003): HIV/AIDS and the Rights of the Child, ¶ 8 U.N. Doc. CRC/GC/2003/3 (Mar. 17, 2003).

<sup>27</sup> While the Committee on the Elimination of Racial Discrimination has not enshrined sexual orientation or gender identity (SOGI) as protected classes through its general comments as of yet, it has SOGI protected classes under the Convention through its Concluding Observations to member states. E.g., Comm. on the Elimination of Racial Discrimination, Concl. Obs. on the combined nineteenth to twenty-second periodic reports of Germany, ¶ 16, U.N. Doc. CERD/C/DEU/CO/19-22 (June, 30, 2015); Comm. on the Elimination of Racial Discrimination, Concl. Obs. on the combined nineteenth to twenty-first periodic reports of the Netherlands, ¶ 26 & 34 U.N. Doc. CERD/C/NLD/CO/19-21 (Sept. 24, 2015).

<sup>28</sup> Comm. on the Rights of Persons with Disabilities, Gen. Comm. No. 3 (2016) on women and girls with disabilities, ¶ 4(c) U.N. Doc. CRPD/C/GC/3 (Nov. 25, 2016); See also Concluding Observations, e.g., Comm. on the Rights of Persons with Disabilities, Conc. Obs. on the initial report of the Islamic Republic of Iran\* ¶ 12(b)), 13(c), 19(c), 35(c)), U.N. Doc. CRPD/C/IRN/CO/1 (Apr. 12, 2017).

grounds of discrimination under their respective treaties. There are now nine core international human rights treaties, all of which “interrelate with the issue of sexual orientation and gender identity....”<sup>29</sup> Seven of the nine treaties have been widely ratified—ranging from 83% to 99% of all U.N. Member States<sup>30</sup>—evidencing states’ behavior.

In the late 1990s, while reports on violence and discrimination committed against LGBTI individuals began to gain visibility in Special Rapporteur reports, in 2003, the U.N. General Assembly officially recognized sexual orientation as a protected class against extrajudicial, summary or arbitrary executions through its resolutions.<sup>31</sup> Since then, the Special Rapporteurship has reported on killings committed on the basis of gender identity and gender expression, explicitly including LGBTI individuals.<sup>32</sup>

Since then, numerous U.N. Resolutions have supported protections for sexual orientation or gender identity rights.<sup>33</sup> U.N. General Assembly resolutions have also recognized that killing based on sexual orientation or gender identity “may under certain circumstances amount to genocide, crimes against humanity or war crimes, as defined in international law, including in the Rome Statute of the International Criminal Court.”<sup>34</sup> Consequently, the U.N. General Assembly has called on states to “to bring those responsible to justice before a competent, independent and impartial judiciary at the national or, where appropriate, international level.”<sup>35</sup>

Like the General Assembly, joint statements and resolutions on LGBTI rights have also been delivered at the former U.N. Commission on Human Rights, and at its replacement, the U.N. Human Rights Council. In what human rights defenders consider to be a landmark accomplishment for LGBTI rights, on June 17, 2011, the Human Rights Council passed the “Joint Statement on Ending Acts of Violence and Related Human Rights Violations based on Sexual Orientation and Gender Identity.”<sup>36</sup> Supported by 85 states from all regions of the world,

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<sup>29</sup> The Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, U.N. Doc. A/HRC/35/36, para. 20 (Apr. 19, 2017).

<sup>30</sup> See *Ratification of 18 International Human Rights Treaties*, U.N. Human Rights Office of the High Commissioner, <http://indicators.ohchr.org> (last visited Nov. 26, 2018).

<sup>31</sup> Resolution adopted by the General Assembly, U.N. Doc. A/Res/57/214 (Feb. 25, 2003).

<sup>32</sup> See, e.g., The Report of the Special Rapporteur on extrajudicial, summary or arbitrary killings on her mission to Iraq, U.N. Doc. A/HRC/38/44/Add.1, para. 45 (June 20, 2018).

<sup>33</sup> G.A. Res. 67/168, ¶ 6(b), (Mar. 15, 2013). The U.N. General Assembly urges states to “ensure the effective protection of the right to life of all persons under their jurisdiction, to investigate promptly and thoroughly all killings, including . . . killings of persons . . . because of their sexual orientation or gender identity.” See, e.g., G.A. Res. 69/182, ¶ 6(b) (Dec. 18, 2014), GAOR, U.N. Doc. A/Res/69/182 (Jan. 30, 2015); G.A. Res. 67/168, ¶ 6(b) (Dec. 20, 2012), GAOR, U.N. Doc. A/Res/67/168 (Mar. 15, 2013); G.A. Res. 65/208, ¶ 6(b) (Dec. 21, 2012); GAOR, U.N. Doc. A/Res/65/208 (Mar. 30, 2011); G.A. Res. 63/182, ¶ 6(b) (Dec. 20, 2012); GAOR, U.N. Doc. A/Res/63/182 (Mar. 16, 2009); G.A. Res. 61/173, ¶ 5(b) (Dec. 20, 2012), GAOR, U.N. Doc. A/Res/61/173 (Mar. 1, 2007); G.A. Res. 59/197, ¶ 8(c), GAOR, U.N. Doc. A/Res/59/197 (Mar. 10, 2005); G.A. Res. 57/214, ¶ 6, GAOR (Dec. 18, 2002).

<sup>34</sup> G.A. Res. 69/182, ¶ 2 (Jan. 30, 2015).

<sup>35</sup> *Id.* at ¶ 6(b).

<sup>36</sup> U.N. Doc. A/HRC/17/L.9/Rev.1; See Press Release, Int’l Gay & Lesbian H.R. Comm., Historic Decision at the United Nations: Human Rights Council Passes First-Ever Resolution on Sexual Orientation and Gender Identity (June 17, 2011), <http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/1417.html>.

the Resolution demonstrates the significant trend in state support for prohibiting discrimination based on sexual orientation.<sup>37</sup>

That same year, the Organization of American States (OAS) General Assembly passed a Resolution in the Americas condemning violence and discrimination committed on the basis on sexual orientation or gender identity.<sup>38</sup> The OAS also created an LGBTI Unit, later succeeded by a special rapporteurship on the rights of LGBTI persons, dedicated to monitoring the human rights situation of LGBTI individuals.<sup>39</sup> The Inter-American Commission on Human Rights (“IACHR” or “Inter-American Commission”) has issued eleven precautionary measures for LGBTI persons, related almost exclusively to violence and death threats perpetrated against LGBTI activists.<sup>40</sup> In 2012, the Inter-American Court of Human Rights followed suit when it established sexual orientation and gender identity as protected categories under the American Convention in the case of *Atala Riffo and Daughters v. Chile*.<sup>41</sup>

The European Union has also been a longstanding champion of protecting LGBTI rights. The Charter of Fundamental Rights expressly lists sexual orientation as a ground protected against discrimination.<sup>42</sup> It became binding European Union law in 2009. Following the European Union’s lead, the Council of Europe Parliamentary Assembly adopted a resolution in 2010 condemning violence and discrimination committed on the basis of sexual orientation and gender identity and echoing the European Court’s view that “negative attitudes on the part of a heterosexual majority against a homosexual minority cannot amount to sufficient justification for

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<sup>37</sup> See U.N. Human Rights Council: A Stunning Development Against Violence, INT’L GAY & LESBIAN H.R. COMM., (Mar. 23, 2011), <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/1368.html>. This was an increase from 54 states that issued a joint statement in 2006 proclaiming that existing human rights standards apply to LGBT persons and calling upon the Council to take action. *HRC 3rd session. Joint statement on Human Rights violations based on sexual orientation and gender identity, 1 December 2006*, NORWAY: THE PERMANENT DELEGATIONS IN GENEVA, <http://www.norway-geneva.org/unitednations/humanrights/hrc011206/>.

<sup>38</sup> OAS General Assembly Resolution, AG/RES. 2653 (XLI-O/11), Human Rights, Sexual Orientation and Gender Identity, HUMAN, (Adopted at the fourth plenary session, held on June 7, 2011), *available at* [www.oas.org/en/41ga/docs/AG05445E02.doc](http://www.oas.org/en/41ga/docs/AG05445E02.doc). More broadly, the Resolution condemns violence, harassment, discrimination, exclusion, stigmatization, and prejudice based on sexual orientation and gender identity.

<sup>39</sup> Press Release, Inter-American Commission on Human Rights (IACHR), The IACHR creates Rapporteurship to address issues of Sexual Orientation, Gender Identity, Gender Expression, and Body Diversity, No. 94/13 (Nov. 25, 2013).

<sup>40</sup> See, e.g., MC 457/13 (precautionary measures granted for the members of the “Asociación para una Vida Mejor de Honduras” who were at risk because of their activities in defense of LGBTI persons in Honduras), PM 155/13 (precautionary measures granted for Caleb Orozco, an LGBTI human rights defender in Belize, subjected to death threats, harassment and attacks), PM 153/11 (precautionary measures for two unnamed individuals in Jamaica victimized on account of their sexual orientation).

<sup>41</sup> *Atala Riffo v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, (Feb. 24, 2012).

<sup>42</sup> Charter of Fundamental Rights of the European Union art. 21(1) 2010 O.J. C 83/02, at 396. In addition to the protections against sexual orientation discrimination explicit in these treaties, the Court of Justice of the European Union (“Court of Justice”) has established that discrimination against transgender persons is “sex” discrimination.<sup>42</sup> Moreover, the Court of Justice has held that sexual orientation can be a particular social group for the purposes of asylum in part because “it is common ground that a person’s sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it.” Joined Cases C-199/12, C-200/12 and C-201/12 *X, Y and Z v Minister voor Immigratie en Asiel* [2013] I-0000.

discrimination, any more than similar negative attitudes towards those of a different sex, origin or colour.”<sup>43</sup>

In 2014, the African Commission on Human and Peoples’ Rights (“African Commission”) adopted a resolution urging parties to the African Charter on Human and Peoples Rights to take the necessary measures to prevent and prosecute violence committed on the basis of real or perceived sexual orientation or gender identity.<sup>44</sup> The resolution came on the heels of a 2011 decision when a coalition of local and international organizations led by OutRight Action International, (then known as IGLHRC<sup>45</sup>) successfully educated the African Commission on the widespread recognition gender and sexual orientation as prohibited grounds of discrimination in guidelines issued to assist States Parties in complying with their obligations to protect economic, social and cultural rights.<sup>46</sup>

The office of the U.N. High Commission for Refugees (“UNHCR”) has also recognized the role of socially constructed gender roles in the persecution of LGBTI refugees. In 2012, it released guidelines addressing refugee claims based on sexual orientation and gender identity, recognizing that LGBTI individuals are often persecuted because of “non-compliance with expected cultural, gender and/or social norms and values.”<sup>47</sup> The guidelines further explain that LGBTI individuals are protected as a particular social group, as well as under the religion and political opinion grounds, under the 1951 Refugee Convention.<sup>48</sup> Recently the UNHCR released a report on best practices for helping LGBTI refugees in which it attributed “social hostility toward LGBTI persons . . . to broader contextual factors, such as “patriarchy,” “conservatism,” “cultural taboos,” “religion,” and/or traditional practices.”<sup>49</sup>

This is a pivotal moment in history to recognize the evolving discourse on gender into text and affirm several decades of expansion in the understanding of discrimination, including when based on sexual orientation, gender identity, or sex characteristics. More importantly, we have real-world emergent conflict situations, including ones involving militias such as the Islamic State and Boko Haram, where women, men and youth, including LGBTI persons, have been persecuted because of their gender. Yet, while legal scholars have clarified that the definition of gender under the Rome Statute is understood to be inclusive of all gender-based crimes that meet the threshold of persecution, there has never been a successful prosecution of gender-based persecution at the ICC. Not surprisingly, no other mechanism has adopted this opaque definition.

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<sup>43</sup> Council of Europe Parliamentary Assembly, Resolution 1728 (2010), Discrimination on the basis of sexual orientation and gender identity (Apr. 29, 2010).

<sup>44</sup> *Id.*

<sup>45</sup> International Gay and Lesbian Human Rights Commission.

<sup>46</sup> The African Commission on Human and Peoples' Rights, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, ¶ 1(d), (Oct. 24, 2011).

<sup>47</sup> U.N. High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012, at ¶ 14, U.N. Doc. HCR/GIP/12/09.

<sup>48</sup> *Id.* at ¶ 40.

<sup>49</sup> U.N. High Commissioner for Refugees (UNHCR), *Protecting Persons with Diverse Sexual Orientations and Gender Identities: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees*, 15 (Dec. 2015), <http://www.refworld.org/docid/566140454.html>.

This has amounted to a missed opportunity to hold perpetrators accountable and challenge impunity.

In light of this, the persecutory categories in the draft CAH convention should be updated to reflect evolving international human rights law and include sexual orientation, gender identity and sex characteristics, in addition to providing consideration of other evolving categories such as disability, Indigenous status, age, social origin, language, and migrant and refugee status.

What the International Law Commission adopts will affect human rights and access to justice for generations to come. We therefore respectfully recommend you and all the International Law Commission members consider the definition of gender either be removed or revised in the draft crimes against humanity convention.

We thank you for your commitment to promoting the progressive development of international law and its codification, and we commend you for your important work in drafting the crimes against humanity convention. In the words of the former President of the International Law Commission, Professor Lucius Caflisch, “we must continue to strengthen and improve what was achieved in Rome.”<sup>50</sup>

We look forward to continuing to engage with the International Law Commission and the 6<sup>th</sup> Committee of the U.N. General Assembly. We stand ready to provide further inputs on the reading of the draft convention that could accomplish the goal of preventing gender-based crimes impunity.

Yours sincerely,

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3. Jessica Stern, Executive Director, OutRight Action International
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<sup>50</sup> Written Statement, Professor Lucius Caflisch, Commemoration of the 20<sup>th</sup> Anniversary of the Rome Statute, 1 (Feb. 15-16, 2018).