

# **Decision on the Confirmation of Charges in the Al Hassan case : Expert Commentary - Part III**

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Langue Anglais

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## **4. Charges of Crimes Against Humanity that Reflect the Systematic Nature of the Attacks Perpetrated**

The Pre-Trial Chamber adopted an important conclusion by confirming that acts of torture, rape, sexual slavery, forced marriage, persecution and other inhuman acts committed against the civilian population of the Timbuktu region by members of the Ansar Dine/AQIM coalition constituted crimes against humanity. This decision reflects the nature and scope of the crimes committed against the civilian population of this region, pursuant to the policy imposed by the members of these armed groups (OTP, [Situation in Mali: Article 53\(1\) Report](#), para. 132; Al Mahdi, [Judgement](#), paras. 10, 63 and 109; [DCC](#), para. 171).

The Chamber concluded to the existence of a widespread and systematic attack directed against the civilian population of Timbuktu by the Ansar Dine/AQIM coalition. The members of these armed groups thus aimed to control the population through violence, through the unilateral enactment of new rules previously unknown to the population and accompanied with severe sanctions ([DCC](#), paras. 182-183). The acts of violence perpetrated by Ansar Dine/AQIM, far from being a mere aggregate of isolated or random acts, constituted a real campaign of violence, characteristic of an attack in the context of crimes against humanity ([DCC](#), para. 175; Bemba, [Judgement pursuant to Article 74 of the Statute](#), para. 149). This campaign of violence was widespread in its scope, and systematic in its regular and repetitive modus operandi ([DCC](#), para. 190; Katanga, [Judgement](#), para. 1162; Ntaganda, [Judgement](#), para. 693).

The Chamber has considered in particular the targeting of women and girls, as is confirmed a wide range of sexual and gender-based charges. The Al Hassan case thus provides a new opportunity for the ICC to address sexual and gender-based violence, distinguishing itself from the Al Mahdi case, where no sexual or gender-based crime charges had been raised.

However, with respect to the crime against humanity of persecution on religious grounds, it is unfortunate that the Chamber missed the opportunity to explicitly recognise the destruction of the mausoleums of Timbuktu as an act underlying this international crime (see notably Blaskić, [Judgement](#), paras. 227-233; Kordić, [Judgement](#), paras. 206-207).

## **5. An Open Door to a Historical Development of the Concept of Gender in International Criminal Law**

The confirmation of the charge of crime against humanity of gender-based persecution should be welcomed as

it provides an unprecedented opportunity for the ICC to clarify the concept of gender as defined in the [Rome Statute](#).<sup>[1]</sup> Indeed, this crime is the only one that explicitly refers to the concept of gender. Moreover, this is the first time that such a charge has been brought before the ICC<sup>[2]</sup>, which is also the first international criminal tribunal to be able to hear about this crime, the reason of persecution being absent from the statutes of the *ad hoc* tribunals.

Throughout the drafting Article 7(3) of the Rome Statute, which defines gender, the debate was generally polarized between two groups, one seeking to limit the definition of gender to two biological sexes, and the other seeking a broader definition that takes into account the context of society ([Oosterveld, 2005](#), pp. 58-66). As proponents on both sides agreeing on the need to include a definition in the Statute, the definition retained reflects a 'constructive ambiguity', which means that the language used is deliberately imprecise in order to accommodate diverging opinions ([Oosterveld, 2014](#), p. 567). Thus, pursuant to Article 7(3) of the [Rome Statute](#), 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.' In the absence of any judicial clarification, the debate persists as to the meaning of this definition, and the ideological polarisation present in Rome continues to this day.

In the Al Hassan case, the Pre-Trial Chamber did not explicitly take a position in this debate, but its analysis seems to suggest that it also takes into account the social context and not only the physical and biological characteristics of individuals. Indeed, its analysis of acts of persecution based on gender appears intimately linked to the social roles and perception of women in the society targeted by the actions of Ansar Dine/AQIM members. The Chamber noted that the 'persecution suffered by women has resulted in the loss of their social status among the civilian population of Timbuktu' ([DCC](#), para. 701, [our translation]). It claimed that violence against women constituted 'persecution on sexist grounds, **in that these women were treated as objects**' ([DCC](#), para. 700; emphasis added [our translation]). In other terms, the Chamber considered that women were attacked not only because of their biological sex, but rather because of what they were perceived as objects in the context of the society of which they were a part (for a similar point of view, see [Grey et al, 2019](#), p. 977).

In short, the confirmation of the charge of persecution based on gender against Al Hassan is likely to allow the ICC to offer a first interpretation of the definition of gender in international criminal law, which will likely have repercussions far beyond this case. An interpretation of the concept of gender that takes into account the social component of this concept could in fact imply that the crime of gender-based persecution encompasses certain acts of persecution committed on the basis of sexual orientation ([Oosterveld, 2005](#), p. 77-78), which would be a major advance for the rights of those affected by such acts.

Version en français [ici](#).

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<sup>[1]</sup> Although the French version of Article 7(3) of the Statute uses the term 'sexe', other official versions of the text use terms that translate like 'gender.' For example, the terms *gender* and *género* are used in English and Spanish, rather than *sex* and *sexo*, which would rather translate as 'sex'. In order to fill this gap in the French version, the OTP has made a distinction in its [Policy Paper on Sexual and Gender-Based Crime](#) between the concepts of sex 'in the generic sense' (i.e., gender) and 'in the biological sense' (i.e., sex). For clarity and brevity, in this document, the term 'gender' has been preferred to 'sex in the generic sense' or 'sex as defined in Article 7(3) of the Rome Statute'. Similarly, the concept of 'gender-based persecution' is used as a synonym for 'persecution on sexist grounds'.

<sup>[2]</sup> This crime had been included in the [arrest warrant](#) issued in 2010 against Callixte Mbarushimana, but was ultimately not included in the [document containing the charges](#).

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