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Valérie V. Suhr, *Rainbow Jurisdiction at the International Criminal Court. Protection of Sexual and Gender Minorities Under the Rome Statute*, T.M.C. Asser Press, Springer: 2022, pp. 405

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Under the eye-catching title of “Rainbow Jurisdiction”, the author of the monograph presents a comprehensive study on the issue of penalizing the persecution of sexual and gender minorities (SGM) as crimes against humanity under Art. 7(1) (h) of the Rome Statute (RS). This provision penalizes, as acts that can amount to a crime against humanity, “Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.” Additionally, in paragraph 2(g) “Persecution” is defined as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”, and in paragraph 3 the term “gender” is defined as referring “to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above”. These provisions are not easy to interpret and create a complicated legal norm. Thus the author takes up the task of defining the real scope of these provisions as regards anti-SGM crimes. The author analyses this issue on two levels: both legal and sociological; basing this research on two foundations: personal (who is protected as “an identifiable group or collectivity on gender grounds”) and material (the scope of the terms “persecution on grounds that are universally recognized as impermissible under international law” and “in connection with any act referred to in this paragraph or any crime within

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the jurisdiction of the Court”). These issues are no longer purely academic, as a communication reached the ICC-OTP in November 2017 asking the International Criminal Court (ICC or Court) to open a preliminary examination with regard to the gender-based crimes committed by the Islamic State of Iraq and Syria (ISIS) in Iraq. This shows that the ICC may be poised to answer the question whether SGM are protected as a specified group. The reader of the book, however, should not mistake “Jurisdiction” with “Jurisprudence” of the ICC – as the text relates to the possible scope of the ICC’s material jurisdiction, proposing covering within its scope the persecution of a specific group – and not its case law, as the Court has so far not dealt with this question.

The author begins with a historical overview – invoking the Nazi persecution of SGM (the Nazis were never held accountable for the crimes they committed against homosexuals, or their homophobic laws and policies; the only time the Nuremberg Trials referred to homosexuals at all was with reference to medical experiments) – and also to more recent crimes as well (observing that when the UN *ad hoc* Tribunals dealt with sexualized violence the ICTY made clear that sexualized violence against men is punishable under international criminal law; however it did not categorize it as rape or other sexualized crimes but instead prosecuted under the more general norms of “torture”, “inhuman and degrading treatment”); observing that these examples illustrate how anti-SGM crimes form part of the violence over which the ICC should have jurisdiction, as it is primarily the ICC that will ultimately decide whether international criminal law protects this group.

In the Introduction the author explains that the rights of sexual and gender minorities are human rights, but the book deals with that topic from another angle: from the point of view of goods (qualities) protected by international criminal law. Therefore, the author adopts the criminal law perspective, successfully driving the analysis in the light of human rights and international criminal law. According to this basic assumption, the crime under Art. 7(1)(h) RS covers persecution on the basis of sexual orientation and gender identity, even though these grounds are not explicitly listed. The book establishes that crimes against gender minorities may constitute crimes against humanity in two ways: by treating the SGM as a targeted protected group (qualifying them as gender-based persecution, being targeted merely because of a real or perceived group affiliation); or as victims of crimes against humanity, such as e.g. murder and torture based on “other grounds that are universally recognized as impermissible under international law.” The author presents the thesis that in this latter case the term “crime against humanity” should focus on the identity of the victim group, as this identity is the reason why the harm has been inflicted. According to the author it is important not to merely prosecute, e.g. rape under “torture” (rather than explicitly prosecuting it as rape), since it fails to adequately address its sexualized

aspects and particular harm. One has to agree with the author that the principle of fair labelling is relevant not only for the perpetrator's individual prosecution and punishment, but also for general deterrence.

The book is composed of ten chapters, divided into three parts. Chapter One of Part I, entitled "Factual and legal background", precisely describes the two foundations of the researched problem: the facts and law applicable to the chosen topic. The topic is then examined in two following chapters: Chapter 2 "Reality" explains the meaning of the terms "SGM" and "anti-SGM persecution", describing various forms of the persecutory acts, adding that the main reason for all human rights violations directed against SGM can be traced back to the same roots, namely to "assumptions about 'appropriate' gender roles for women and men." The factual background shows that much discrimination against SGM is still prescribed by law, even criminal law. Chapter 3, entitled "Interpretation of the Rome Statute" prepares the groundwork for the method of application of the provisions of the Rome Statute, and demonstrates according to what rules a legal norm in Art. 7(1) RS is created from a legal provision. The theoretical part of the analysis relates to the issue: In what way and scope does international human rights law shape the content of international criminal law. In this Chapter the author presents the tension between a human rights' interpretation and the *nullum crimen* principle, arguing that it is crucial for the research question to determine how to reconcile the evolutive, dynamic, teleological human rights interpretation with international criminal law's need for a strict construction. This is – from the dogmatic point of view – the most interesting part of the legal analysis. The chapter demonstrates what the consequences are of the thesis that Art. 21(3) RS requires the ICC to interpret and apply its law consistent with internationally recognized human rights and the principle of non-discrimination. Human rights can both help to interpret the relevant persecutory grounds ("gender" and "other grounds that are universally recognized as impermissible under international law") and identify the persecutory acts. In fact, since international criminal law aims to protect human rights through criminalization and prosecution, it is often considered a tool of human rights protection. However as the author observes, the convergence between international criminal law and international human rights law is not absolute. Not every human rights violation also constitutes a crime "against humanity" "under international law." Unlike international criminal law, international human rights law usually does not depend on the *mens rea* of an individual perpetrator. Accordingly, international human rights law allows for broader definitions of human rights violations than international criminal law's definitions of crimes. As an example, the author mentions the ICTY case *Prosecutor v Zoran Kupreskic*,¹ where it was observed that it "would be contrary

¹ ICTY (TC), *Prosecutor v Zoran Kupreskic et al.*, Judgment, 14 January 2000, IT-95-16-T, para. 589.

to the principle of legality to convict someone of persecution based on a definition found in international ... human rights law.” According to the author, the tension between these two principles cannot be resolved on the basis of a hierarchy between them, by describing the human rights interpretation as a “superlegality” which might also prevail over *nullum crimen* principle. The next argument in the line of analysis is to explore the universal and the regional human rights systems in order to determine whether persecution on grounds of sexual orientation and gender identity are grounds that are “universally recognized as impermissible under international law” within the meaning of Art. 7(1)(h) RS. The author misses nothing in her chain of legal reasoning: she explores the distinction between “international human rights”, “internationally *recognized* human rights”, and “internationally *protected* human rights”; and answers the question: When are the rights “international” enough? – by stating that the recognition of an “internationally recognized human right” does not need to be universal, but “merely” widespread.

In Part II – “Persecution of Sexual and Gender Minorities as a Crime Against Humanity” – beginning with Chapter 4 the author firstly presents the contextual element of crimes against humanity, that is the *chapeau* of Art. 7 RS. In this chapter she explores every element of crimes against humanity, analysing whether it may be fulfilled by attacks against the SGM population – or any other crime executed on the basis of a state policy. The author proves that attacks and policies against SGM can be both widespread and systematic. “Widespread” is a quantitative element characterized by a massive large-scale nature, including a multiplicity of victims, and the thesis of the author is that: “It is usually estimated that SGM constitute ten percent of a population. This leads to a potentially high number of individuals fearing persecution because of their sexual orientation or gender identity.” According to the author, an attack may also be systematic, when there are domestic laws which punish sexual relations between persons of the same sex with imprisonment, corporal punishment, or the death penalty. This element may be linked to state conduct, or the conduct of highly organized terrorist organizations (as in the communication directed to the ICC-OTP concerning the gender-based crimes committed by ISIS). The author also describes the connection between the individual act and mental elements, explaining that if the individual act was committed merely accidentally within the context of a general attack, without the perpetrators’ knowledge of such a connection, they did not commit a crime against humanity. The author even presents here a far-reaching thesis – that even the inaction of a State towards crimes committed extra-legally or by non-state actors against sexual and gender minorities can, in exceptional circumstances, fulfil the contextual element.

Taking into consideration the elements of a crime in Art. 7(1)(h) RS, in Chapter 5, entitled “The Crime Against Humanity of Persecution”, the author ac-

knowledges that since neither sexual orientation nor gender identity are explicitly listed as persecutory grounds, the material scope of the punishable act depends on the interpretation of the notion “persecution”. The author explains that since persecution is the only crime against humanity that focuses on the real or perceived identity of the victim group, it most adequately deals with the specific harm of being targeted merely because of one’s actual or perceived membership in or belonging to a specific group. This chapter analyses for the most part the most common persecutory acts which lead to severe deprivation of fundamental rights contrary to international law. The author carefully constructs her legal hypotheses; she does not put every element of discrimination into one group and therefore she concludes that only some of the persecutory acts can constitute a crime under Art. 7(1)(h) RS. Certainly, forcing SGM to live and work in concentration camps qualifies as a persecutory act under the RS; one that is committed in connection with another crime. However, even when contrary to international human rights law a failure to recognize couples and families does not alone amount to an individual act listed in Art. 7(1) RS. Moreover, a refusal to allow same-sex marriages alone is unlikely to be seen as a “severe deprivation of fundamental rights contrary to international law” comparable to other crimes against humanity and thus a persecutory act.

Chapter 6 – “Gender-Based Persecution of Sexual and Gender Minorities” – is more of a sociological than legal character, showing that persecution based on sexual orientation and gender identity may be persecution based on “other grounds that are universally recognized as impermissible under international law”, which requires analysis of the substantial development of SGM rights under international human rights law. The Rome Statute is the first international treaty ever which defines the term “gender”. However, as Art. 7(1) stipulates, in addition to the general requirements of the crime against humanity, a persecutory ground must be fulfilled. The legally interesting problem is the analysis of the interpretation of the *nullum crimen* principle in the light of possible differences between the notions “gender” and “sex” – analyzing the meaning of the binary part of the definition (“the two sexes”) and showing how the definition also includes socially-constructed aspects of being male and female, thus arguing that the persecution of SGM could even be seen as sex-based persecution, as the Rome Statute’s gender definition in Art. 7(3) does not refer only to the two “traditional” sexes.

The above-analysed issues lead to several questions of practical importance to these findings, and these questions are answered in the last chapters of the monograph. In Chapter 7 – “Persecution on ‘Other Grounds that Are Universally Recognized as Impermissible Under International Law’” – the author explains that persecution based on sexual orientation and gender identity is universally recognized as impermissible under international law. Finally, the argumentation arrives

at the question that appeared to be of importance from the beginning: that issues of sexual orientation and gender identity are often seen as particularly culturally sensitive, and perceived as a “Western” conception. For example, several Asian governments, while reaffirming the general universality of human rights, regularly claim that these are currently too much influenced by the “West” and ask for respect for diversity; and several Islamic States have made specific reservations to human rights provisions (or treaties), in particular the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), to ensure its consistency with *shari’a law*. In section 7.2 of this Chapter “Universalism Versus Cultural Relativism, Colonialism, and Anti-SGM Laws”, the author argues that persecution on grounds of sexual orientation and gender identity is “universally recognized as impermissible under international law”, because the UN’s position is most relevant as it is the only universal organization concerned with human rights. While matters of SGM are often seen as culturally sensitive, the analysis demonstrates that the common conception of SGM rights as “Western” is not justified; universal recognition does not mean absolute universality, and clear recognition at the international level only, particularly in international human rights law, suffices.

Part III begins with Chapter 10 “Anti-SGM Legislating as a Crime Against Humanity”. This chapter analyses the question of whether legislators can be held individually criminally responsible for a crime against humanity under the Rome Statute for passing laws which persecute sexual and gender minorities. The author assumes that the members of parliament also intend the commission of the crime if a law provides for the death penalty, corporal punishment, or imprisonment of SGM, and thus can be held criminally responsible as, e.g., (joint) indirect perpetrators. As the author recalls, one of the main challenges is establishing causation between the passing of the law by each member of a parliament who voted in its favor and the attacks themselves. In this Chapter the author analyzes existing cases dealing with legislative injustice to show that the idea of holding legislators criminally responsible is not new (the Nuremberg Military Tribunal famously concluded that the “dagger of the assassin was concealed beneath the robe of the jurist”; another famous case was the US case *Sexual Minorities Uganda v Scott Lively*²).

Chapter 11 – “Summary, Factual Consequences, and Recommendations” – discusses the most likely factual consequences of a decision by the International Criminal Court on this topic. The author observes that “while a judgment on this issue will be heavily criticized either way, the more harmful choice is excluding sexual and gender minorities from the Rome Statute’s protection”. This will be seen as

² US District Court for the District of Massachusetts, Memorandum and Order Regarding Defendant’s Motions to Dismiss, 14 August 2013, available at: https://ccrjustice.org/files/SMUG_OrderDenyingDefMTD_08_13.pdf (accessed 30 June 2022).

a decision that will have political consequences. In conclusion there are two possible legal qualifications: persecution of SGM as a crime against humanity based on sexual orientation and gender identity as persecution based on “*other grounds* that are universally recognized as impermissible under international law”. SGM would be recognized as a distinct minority worthy of protection under international criminal law. However, prosecuting these crimes as *gender*-based persecution, together with a variety of other gender-based forms of persecution, would adequately reflect that SGM are subject to the same patterns of persecutions based on social or legal gender norms as other members of society. Consequently, when prosecuting the persecution of SGM, both grounds should be considered. Also in this Chapter – as the final conclusion – recommendations are presented to amend the Rome Statute in a way that makes it clearer that all sexual and gender minorities are included within the scope of protected groups, as well as an assessment on how likely it is that such amendments will be implemented. Even other authors, who have come to the conclusion that the ICC currently cannot prosecute persecution against SGM, also criticize this (apparent) lack of protection.

This is a very interesting and valuable monograph for a person who wants to get to know the subject, which is so widely discussed in the English-language literature. The monograph gathers both factual and legal argumentation and reasonably and convincingly proves the main thesis of the book: that persecution of sexual and gender minorities (SGM) should be penalized as a crime against humanity under Art. 7(1)(h) RS. Even for a reader who is not an expert in this area the book still can be read with real interest, as it contains solid argumentation and is consistent and convincing. It is also a reliable work from the point of view of criminal law. By properly interpreting elements of crimes and criminal law principles, the author undoubtedly demonstrates her great erudition in the chosen research area. *Prima facie* it is visible that the author has made a great effort to gather together the vast literature on the topic of sexual minorities under international law and the meaning of this notion for the prosecution of crimes by the ICC.³ The book is very care-

³ The author invokes numerous publications on that topic in both English and German by, *inter alia*, just showing some of the literature that has been published so far on that topic: R. Axelson, *State-Sponsored Hatred and Persecution on the Grounds of Sexual Orientation: The Role of International Criminal Law*, in: J. Schweppe, M.A. Walters (eds.), *The Globalisation of Hate*, Oxford University Press, Oxford: 2016, pp. 277-293; B. Bedont, *Gender-Specific Provisions in the Statute of the International Criminal Court*, in: F. Lattanzi, W.A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, il Sirente, Ripa Fagnano Alto: 1999, pp. 183-210; F. Bensouda, *Gender and Sexual Violence under the Rome Statute*, in: E. Decaux (ed.), *From Human Rights to International Criminal Law: Studies in Honour of an African Jurist, the Late Judge Laïty Kama*, Brill, Leiden: 2007, pp. 401-417; M. Bohlander, *Criminalising LGBT Persons Under National Criminal Law and Article 7(1)(b) and (3) of the ICC Statute*, 5 *Global Policy* 401 (2014); P.F. Byrne, *Sexual Minorities under International Law and the Rome Statute's Gender Provisions: A Step Forward for Recognition, or a Rubber Stamp for Outlaw Status?* University of Toronto. Toronto: 2006;

fully researched – the references reflect the wide reading of the author, relating to numerous fields: social, cultural, philosophic, and criminal law and international law as well as human rights law – and combines the conclusions resulting from the research into one comprehensive analysis. It constitutes a thorough academic workshop, even if it is a bit too long in places and some parts could have been omitted, as sometimes the arguments are repeated and the line of argumentation goes into “loops”.

The book also raises several questions about the possibility for the ICC to accept jurisdiction in such a case: one has to keep in mind that the ICC can prosecute only the most serious crimes of international interest and must have jurisdiction in a specific case, based on territoriality, personality, or a referral from the Security Council. By finding that the worst crimes committed against SGM simply because they are sexual and gender minorities can amount to crimes against humanity, the ICC would recognize that these crimes belong to the “most serious crimes of concern to the international community as a whole”, which would have both a symbolic and deterrent effect. Is this plausible or is this discussion purely academic? In the “Policy Paper on Sexual and Gender-Based Crimes” (June 2014⁴), published by the OTP, the Prosecutor Fatou Bensouda stated that: “The Office recognises that sexual and gender-based crimes are amongst the gravest under the Statute” and promised that “In appropriate cases, the Office will charge acts of sexual and gender-based crimes as different categories of crimes within the Court’s jurisdiction (war crimes, crimes against humanity, and genocide), in order to properly describe, *inter alia*, their nature, manner of commission, intent, impact, and context. The Office will also seek to highlight the gender-related aspects of other crimes within its jurisdiction”.⁵ The author of the reviewed book assumes that it is primarily the ICC that will ultimately decide whether international criminal law protects SGM, but to commence such a case it would have to choose from the multitude of other “most serious crimes”, such as genocide, war crimes, and the crime of aggression. This task however should not be placed only on the Court.

R.C. Carpenter, *Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations*, 37 Security Dialogue 83 (2006); N. Duric, S.R. Vidlicka, G. Bogush, *Legal Protection of Sexual Minorities in International Criminal Law*, 6 Russian Law Journal 28 (2018); A.T. Feindel, *Reconciling Sexual Orientation: Creating a Definition of Genocide that Includes Sexual Orientation*, 13 Michigan State Journal of International Law 197 (2005); H. Heger, *The Men with the Pink Triangle: The True, Life-and-death Story of Homosexuals in the Nazi Death Camps*, Alyson Books, Los Angeles: 1994; E. Heinze, *Sexual Orientation: A Human Right: An Essay on International Human Rights Law*, Nijhoff, Dordrecht et al.: 1994.

⁴ Available at: https://www.icc-cpi.int/sites/default/files/iccdocs/otp/Policy_Paper_on_Sexual_and_Gender-Based_Crimes-20_June_2014-ENG.pdf (accessed 30 June 2022), para. 3.

⁵ *Ibidem*, para. 8.