

LEGAL PROTECTION OF SEXUAL MINORITIES IN INTERNATIONAL CRIMINAL LAW

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For a long time, the issues of sexual orientation and gender identity have been restrained from entering the legal arena as being regarded as too radical. In today's society, these issues warrant consideration in the context of international criminal law. Critically reflecting on the way of placing these grounds within the international criminal law framework, this paper tries to unpack the sheer possibility of addressing them within the core international crimes. Correctly defining terms such as "sexual orientation" and "gender" is not only germane, but also necessary for international criminal law to tackle them accordingly. By doing so, the power of legal argumentation in international criminal law for protecting sexual minorities is strengthened, but its boundaries and vulnerabilities are also exposed. This paper proposes that the described massive violation of the most fundamental human rights should be legally qualified as persecution. For protecting sexual minorities on an international criminal law scale, it is argued that we are not really "there" yet, but we might just be on the right track.

Keywords: sexual orientation; LGBT; gender; international criminal law; Rome Statute; human rights; crimes against humanity.

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Introduction: How Did We Get Here?

International criminal law aims to protect “peace, security and the well-being of the world”¹ and is foremost an instrument to protect fundamental human rights.² The highest point of the crystallization of international criminal law so far is the Rome Statute of the International Criminal Court (hereinafter Statute, ICC Statute), which established the permanent International Criminal Court (hereinafter ICC).³ One of

¹ Rome Statute of the International Criminal Court, opened for signature 17 July 1998 and entered into force on 1 July 2002, 2187 U.N.T.S. 3, Preamble (3).

² Gerhard Werle, *Principles of International Criminal Law* 45 (2nd ed., The Hague: T.M.C. Asser Press, 2009).

³ *Id.* at 3.

the main reasons for creating the ICC was the fact that different groups of people suffered from atrocities and that the most vulnerable groups warranted international protection.⁴

One of the many atrocities, which went unacknowledged,⁵ was the extermination of homosexuals by the Nazi regime during World War II.⁶ The targeting of homosexuals by the Nazis was however neither a historical anomaly nor a sparse or sporadic practice in the world,⁷ since people have historically been persecuted on the basis of their sexual orientation or gender identity.

The stellar rise of today's international human rights framework for the protection of homosexuals is certainly laudable, but it is far from reaching a point in which lesbians, gays, bisexuals and transgender (hereinafter LGBT)⁸ people are legally protected throughout the world.⁹ Today, 72 countries still criminalize private, consensual same-sex relationships and in at least 5 countries, prescribe the death

⁴ ICC Statute, Preamble (2).

⁵ It was not until 2002 that the German authorities apologized to the homosexual community and in 2006 the European Parliament acknowledged the atrocities committed towards the homosexual community during the Nazi regime in its Resolution against homophobia. See European Parliament Resolution on Homophobia in Europe, adopted on 18 January 2006, para. 14 (Jan. 15, 2018), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0018+0+DOC+XML+V0//EN>.

⁶ Valerie Oosterveld, *The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 Harvard Human Rights Journal 55, 77 (nt. 135) (2005). Between 1933 and 1945, an estimated 100,000 men were arrested for violating Nazi Germany's law against homosexuality, and of these, approximately 50,000 were sentenced to prison and the rest were sent to concentration camps, where an unknown number of them perished. Second Reich Penal Code, para. 175 read: "An unnatural sex act committed between persons of male sex or by humans with animals is punishable by imprisonment; the loss of civil rights might also be imposed." Persecution of Homosexuals in the Third Reich, Holocaust Encyclopedia – United States Holocaust Memorial Museum (Jan. 15, 2018), available at <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005261>.

⁷ E.g., Fidel Castro's persecution of homosexuals after the Cuban Revolution of 1959. ISIS persecution of homosexuals & Ancient Rome, see *Codex Theodosianus* 9.8.3: "When a man marries and is about to offer himself to men in womanly fashion (quum vir nubit in feminam viris porrecturam), what does he wish, when sex has lost all its significance; when the crime is one which it is not profitable to know; when Venus is changed to another form; when love is sought and not found? We order the statutes to arise, the laws to be armed with an avenging sword, that those infamous persons who are now, or who hereafter may be, guilty may be subjected to exquisite punishment."

⁸ The acronym stands for lesbian, gay, bisexual and transgender people. Nowadays, some use the acronym LGBTQI+. However, for the purpose of this work, the acronym LGBT is sufficient and will be used. For the purpose of clarity, the term LGBT and sexual minorities will be used interchangeably in this paper.

⁹ General Assembly Resolution 66/290, Follow-Up to Paragraph 143 on Human Security of the 2005 World Summit Outcome, A/RES/66/290, 10 September 2012, para. 3(a): "The right of people to live in freedom and dignity, free from poverty and despair. All individuals, in particular vulnerable people, are entitled to freedom from fear and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential."

penalty.¹⁰ In 2011, the United Nations (hereinafter UN) released the first-ever report on human rights of LGBT people around the world, which details and serves as proof to the often grim and on-going realities of violence and discrimination they face in their own countries.¹¹ Under international law, states are obligated to protect individuals under their jurisdiction from violence and ensure their right to equality under law.¹² In the event of failure, international criminal law would need to provide an answer to the failure of traditional mechanisms for protecting human rights.¹³ Yet, there remain many serious and widespread human rights violations perpetrated, too often with impunity, against individuals based on their sexual orientation and gender identity.¹⁴ On an international scale, it is definitely plausible to consider a situation where scattered incidents of homophobia¹⁵ and/or transphobia¹⁶ reach to such a high level that in the end lead to widespread or systematic attacks worthy of the legal qualification as crimes against humanity.

Essentially, what seems distinct about this particular time in our history is the lack of legal consensus regarding the recognition of LGBT rights as international human rights. Thus, international law should provide an “engine for justice” for those previously victimized, with each successive case reaching farther than its predecessors to protect more persons and more groups from international mass atrocity crimes.¹⁷

And despite the excessive length of the crimes against humanity, the list of prohibited discriminatory grounds for persecution is incomplete; among others

¹⁰ Fact Sheet – Criminalization, Free & Equal, United Nations (Jan. 15, 2018), available at [https://www.unfe.org/system/unfe-43-UN_Fact_Sheets_-_FINAL_-_Criminalization_\(1\).pdf](https://www.unfe.org/system/unfe-43-UN_Fact_Sheets_-_FINAL_-_Criminalization_(1).pdf) (source taken from Aengus Carroll, *State-Sponsored Homophobia: A World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition* (11th ed., Geneva: ILGA, 2016) (Jan. 15, 2018), also available at http://ilga.org/downloads/02_ILGA_State_Sponsored_Homophobia_2016_ENG_WEB_150516.pdf).

¹¹ Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity, Report of the United Nations High Commissioner for Human Rights, U.N. Doc. A/HRC/19/41, 17 November 2011.

¹² General Assembly Resolution 60/1, 2005 World Summit Outcome, A/RES/60/1, 16 September 2005, paras. 138, 139.

¹³ Werle 2009.

¹⁴ Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity, Report of the United Nations High Commissioner for Human Rights, A/HRC/29/23, 4 May 2015, para. 5.

¹⁵ *Homophobia*, noun, intense and unreasoning hatred of homosexuality and homosexuals. *Penguin English Dictionary* 668 (R. Allen (ed.), 2nd ed., London: Penguin Books, 2005).

¹⁶ *Transphobia*, noun, irrational fear of, aversion to, or discrimination against transgender or transsexual people. Dictionary by Merriam-Webster (Jan. 15, 2018), available at <https://www.merriam-webster.com/dictionary/transphobia>.

¹⁷ Brian Kritz, *The Global Transgender Population and the International Criminal Court*, 17 *Yale Human Rights & Development Law Journal* 1, 3 (2014).

it lacks that based on sexual preference.¹⁸ Keeping that in mind, the possible legal constraints and challenges of protecting sexual minorities on the grounds of sexual orientation and gender identity shall be examined in the context of international criminal law.¹⁹

1. Sexual Orientation and Gender Identity in International Criminal Law

1.1. Overview

In this narrative, before addressing the current international legal framework for sexual minorities, the terms “sex,” “sexual orientation” and “gender” need to be appropriately dissected. The term “sex” denotes a physical attribute of humans: external genital anatomy.²⁰ The “common sense” of biological sex tells us that in each individual all of these components are unambiguously male or female, congruent, and aligned in a predictable and permanent relation to each other.²¹ *Gender* signifies the social or cultural dimensions derived from and determined by sex, which include attire, grooming and other aspects of physical appearance as well as behavioral mannerisms.²² While the definitions of sex and gender used on the UN level differ in focus and wording, they all tend to emphasize three similar points: *first*, gender is a socially constructed concept; *second*, the construction of gender is complex and is influenced by culture, the roles women and men are expected to play, the relationships among these roles, and the value society places on these roles; and *third*, the content of gender can vary within and among cultures, and over time.²³ Lastly, *sexual orientation* means the predisposition, inclination, or proclivity of humans towards affectional intimacy with members of one particular sex or of both sexes.²⁴

The international legal framework of LGBT rights consists of different international instruments and can be traced all the way back to the UN Universal Declaration of Human

¹⁸ Antonio Cassese et al., *The Rome Statute of the International Criminal Court: A Commentary* 1081 (Oxford: Oxford University Press, 2002).

¹⁹ In contracts to the human rights approach, the human security approach introduces a practical framework for identifying the specific rights that are at stake in a particular situation of insecurity and for considering the institutional and governance arrangements that are needed to exercise and sustain them.

²⁰ Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83(1) *California Law Review* 3, 6 (1995).

²¹ Paisley Currah, *Compulsory Monogamy and Polyamorous Existence in Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* 247 (M.A. Fineman et al. (eds.), Farnham and Burlington: Ashgate, 2009).

²² Valdes 1995, at 6, nt. 20.

²³ Oosterveld 2005, at 67.

²⁴ Valdes 1995, at 6, nt. 20.

Rights (1948) (hereinafter UDHR), when it proclaimed that “all human beings are born free and equal in dignity and rights” (Art. 1). The International Covenant on Economic, Social and Cultural Rights (1966) (hereinafter ICESCR) as well as the International Covenant on Civil and Political Rights (1966) (hereinafter ICCPR) provide that economic, social and cultural rights, as well as civil and political rights, shall be enjoyed without any discrimination, including on the grounds of “sex... and other status.”²⁵ On a regional level, the European Convention on Human Rights (1950) (hereinafter ECHR) sets out in Art. 8 the right to respect for private and family life as well as the fundamental prohibition of discrimination in Art. 14. Article 2 of the African Charter on Human and Peoples’ Rights (1981) sets out the right to freedom from discrimination with a non-exhaustive clause as well as Art. 3, entailing the right to equality before the law and equal protection of the law. The same can be said for the newest regional acceptance of the Inter-American Convention Against All Forms of Discrimination and Intolerance (2013), where sexual orientation and gender identity are explicitly named as prohibited grounds for discrimination in obtaining fundamental human rights.

Another important step has been made with the Yogyakarta Principles of 2007, which list twenty-nine human rights standards that urge the application of international human rights law to the lives and experiences of persons of diverse sexual orientation and gender identity. Perhaps the most prominent ones for legal international protection are Principles 2 and 3. They state that every person has a right to recognition before the law regardless of sexual orientation and gender identity, is equal to enjoy all human rights and shall not be discriminated against in the enjoyment of these rights on the basis of sexual orientation and gender identity. Although these principles have not been adopted by States in a treaty and are not by themselves a legally binding part of international human rights law, the Yogyakarta Principles are intended to serve as an interpretive aid to human rights treaties. For the purpose of the ICC, it will be argued that they should be given special consideration, in line with Art. 21(3) of the Statute and ICC jurisprudence.²⁶

Moreover, the UN Declaration on Sexual Orientation and Gender Identity (2008) reaffirmed the principle of non-discrimination, stipulating that human rights must apply equally to every human being regardless of sexual orientation or gender identity.²⁷ More recently, two landmark UN Resolutions on human rights, sexual

²⁵ ICESCR, Art. 2(2); ICCPR, Art. 2(1).

²⁶ See Part I of this paper. ICC Statute, Art. 21(3): “The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.”

²⁷ Letter dated 18 December 2008 from the Permanent Representatives of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands and Norway to the United Nations addressed to the President of the General Assembly, A/63/635, 22 December 2008.

orientation and gender identity came in June of 2011 and 2016. The most important consequence of the latter one was the appointment of an Independent Expert on Sexual Orientation and Gender Identity, whose job is among others, “to assess the implementation of existing international human rights instruments.”²⁸ Under the auspices of the UN, this move buttresses the fact that human rights legislation for the protection of LGBT community is steadily growing.

Nevertheless, the question is, whether in the context of international criminal law as an *ultima ratio* measure for the protection of gross violations of human rights, these legal instruments carry any weight. In the event of a widespread or systematic persecution of a civilian population on the grounds of sexual orientation, could international criminal law afford efficient protection based on the international legal framework as it stands today?

In the context of the ICC, the wording of the Statute is precise as Art. 21 of the Statute establishes a clear hierarchy of applicable law for the judges of the ICC when adjudicating cases.²⁹ None of the previous statutes of international criminal tribunals have contained a provision dealing with “applicable law,” much least a hierarchical one, and therefore, Art. 21 of the Statute is an important innovation.³⁰ It is also clear that *stricto sensu*, the ICC is not a human rights court, although it carries great significance for the global protection of the most fundamental human rights and values. As an international treaty, the Statute needs to be interpreted in accordance with Arts. 31 and 32 of the Vienna Convention on the Law of the Treaties (1969) (hereinafter VCLT). The Elements of Crimes (hereinafter EoC) and Rules of Procedure and Evidence supplement the Statute’s provisions.³¹

Article 5 of the Statute limits the Court’s subject matter jurisdiction to four crimes: genocide, crimes against humanity, war crimes and the crime of aggression. Unlike other “core crimes,” the crime of genocide and crimes against humanity carry the discriminatory treatment towards members of a certain group. Whereas the prohibition of genocide aims at protecting certain groups from extermination or

²⁸ General Assembly Resolution 32/2, Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, A/HRC/RES/32/2, 30 June 2016.

²⁹ Margaret M. deGuzman, *Article 21 in The Rome Statute of the International Criminal Court: A Commentary* 932, 933 (O. Triffterer & K. Ambos (eds.), 3rd ed., Munich: C.H. Beck; Oxford: Hart, 2016). Art. 21(1): “The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.”

³⁰ William A. Schabas, *Genocide in International Law: The Crime of Crimes* 381–382 (2nd ed., New York: Cambridge University Press, 2009).

³¹ ICC Statute, Arts. 9(1), 54(4),(5).

attempted extermination, the concept of crimes against humanity exists to protect civilian populations from persecution,³² as the intentional deprivation of persons' fundamental rights due to its affiliation within a group or community.

According to Art. II of the Convention on the Prevention and Punishment of the Crime of Genocide (1948), as well as Art. 6 of the ICC Statute, the prohibition of genocide aims at the protection of four groups – *national, ethnical, racial or religious groups*. The exclusivity of this exhaustive list of four groups has not gone unchallenged. Therefore, if a certain group of people is intended for destruction by any means enumerated from (a) to (e) in Art. 6 of the Statute and does not fall within any of the enumerated groups, it is not genocide, but may meet the definition of crimes against humanity.

Though it could be argued, that the definition should be developed and interpreted in a way to afford a sexual minority protection against genocide, the current state of international law does not allow such a qualification. It does not require considerable imagination to envision that a number of the *actus rei* enumerated in Art. 6 could be committed against a sexual minority, with the intent to destroy, in whole or in part, that sexual minority, as such. However, it seems that if LGBT people are targeted to bring about their complete or partial annihilation, they are possibly left out of Art. 6 and might not even be able to pertain to Art. 7 of the Statute.³³ Only in the event of a LGBT group of people who are at the same time targeted as a racial, religious, national or ethnical group would trigger the protection of Art. 6 of the Statute.

1.2. Crimes Against Humanity

1.2.1. Persecution

The notion of crimes against humanity is part of human legacy and indisputably forms part of customary international law.³⁴ As the International Criminal Tribunal for the Former Yugoslavia (ICTY) explained in the *Erdemovic* case,

it is therefore the concept of humanity as victim, which essentially characterizes crimes against humanity... because of their heinousness and magnitude they constitute an egregious attack on human dignity, on the very notion of humaneness.³⁵

³² Agnieszka Szpak, *National, Ethnic, Racial, and Religious Groups Protected Against Genocide in the Jurisprudence of the ad hoc International Criminal Tribunals*, 23(1) *The European Journal of International Law* 155, 158 (2012) (Jan. 15, 2018), also available at <https://academic.oup.com/ejil/article-lookup/doi/10.1093/ejil/chs002>.

³³ See sec. 1.2.

³⁴ Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (Jan. 15, 2018), available at http://legal.un.org/ilc/texts/instruments/english/draft_articles/7_1_1950.pdf; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968), Art. I.

³⁵ *Prosecutor v. Drazen Erdemovic* (Appeal Judgment), IT-96-22-A, ICTY, 7 October 1997, para. 21.

Crimes against humanity affect not only individual victims, but also the international community as a whole.

The crime of persecution sits very much at the core of crimes against humanity,³⁶ since it has often been emphasized as the gravest form.³⁷ All the relevant international criminal law instruments have included it since Nuremberg.³⁸

Persecution is an intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.³⁹ The specificity of persecution is that it contemplates racist or other discriminatory acts and policies of a State or an organization that may in fact be authorized by a legal regime.⁴⁰ Discrimination is therefore intrinsic to this crime. According to the ICC Statute, not every act of persecution amounts to a crime against humanity, but

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,

constitutes a crime against humanity. Many definitions of crimes against humanity in national law have adopted a similar approach.⁴¹

1.2.2. Persecution on the Grounds of Sexual Orientation and/or Gender Identity

Like all crimes against humanity, the persecutory acts must first satisfy the *chapeau* of this crime (contextual elements), meaning they must be committed as part of a *widespread or systematic attack against a civilian population, with the intent or knowledge of the attack*. The *chapeau* requirement is of significance to omit certain single, isolated and random acts that do not rise to the ambit of crimes against humanity. The “*widespread or systematic*” requirement is especially significant in the context of discrimination based on sexual orientation and/or gender identity. The alternative

³⁶ Schabas 2009, at 175.

³⁷ *Prosecutor v. Dusko Sikirica, Damir Dosen, Dragan Kolundzija* (Sentencing Judgment), IT-95-8-S, ICTY, 13 November 2001, para. 232.

³⁸ Nuremberg Charter, Art. 6(c); Control Council Law No. 10, Art. II(1)(c); Tokyo Charter, Art. 5(c); ICTY Statute, Art. 5(h); ICTR Statute, Art. 3(h); ICC Statute, Art. 7(1)(h); SCSL Statute, Art. 2(h).

³⁹ ICC Statute, Art. 7(2)(g).

⁴⁰ Schabas 2009, nt. 40.

⁴¹ Crimes Against Humanity Statutes and Criminal Code Provisions in Selected Countries, Law Library of Congress, Multinational Report (April 2010) (Jan. 15, 2018), available at <https://www.loc.gov/law/help/crimes-against-humanity/crimes-against-humanity.pdf>.

approach *either-or* is supported by the case law of international tribunals.⁴² This approach opens up the possibility of protection to transgender people. If it were a cumulative approach, the question whether an attack on transgender people could be considered widespread for the purpose of ICC would be uncertain.⁴³ The next requirement is that the acts must be committed “*in connection with*” another crime in the ICC’s jurisdiction, in order to constitute persecution. This caveat was included in the Statute “to avoid sweeping interpretation criminalizing all discriminatory practices.”⁴⁴ For example, discriminatory marriage laws may not, by themselves, constitute persecution.

To correctly tackle the issue of persecution of the LGBT community, the drafting history of the provision of gender in Art. 7(3) needs to be firstly addressed. From there, it will be explained how can sexual orientation or gender identity fit within the ambit of gender as proscribed in Art. 7(3) in order to prosecute persecution against such a community. The final possibility that will be addressed is the right against discrimination on the ground of sexual orientation, universally recognized as impermissible for the purpose of Art. 7(1)(h).

1.2.3. Gender in Article 7(3)

In 1998, in the ICC Statute, “*gender*” was first used in an international criminal law treaty. During the negotiations around the ICC Statute there was a fierce debate about the use and definition of the term “*gender*,” with a sizeable number of states opposing the use of the term as a synonym for sexual orientation, which could have included lesbian, gay, bisexual and transgender persons.⁴⁵ Due to the contentious debate surrounding its definition, the definition consequently reflects the use of “*constructive ambiguity*”⁴⁶ by the negotiators as follows:

⁴² *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, ICC, 15 June 2009, para. 82; *Prosecutor v. Mrksic et al.* (Trial Judgment), IT-95-13/1-T, ICTY, 27 September 2007, para. 3; Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries (1996) (Jan. 15, 2018), available at http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf.

⁴³ Although the ICC dismisses a *stare decisis* policy (Art. 21(2) of the Statute), the Chamber held that the adjective widespread connotes the large-scale nature of the attack and the number of targeted persons. See *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07 OA 8, ICC, 25 September 2009, para. 394. Differently, ICC PTC II stressed that the widespread element is neither to be assessed strictly quantitatively nor geographically but on the basis of the individual facts. Situation in Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, Pre-Trial Chamber II, 31 March 2010, para. 95. See also *Prosecutor v. Tihomir Blaskic* (Appeal Judgment), IT-95-14-A, ICTY, 29 July 2004, para. 202.

⁴⁴ Herman von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court in The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* 90, 101 (R.S. Lee (ed.), The Hague and Boston: Kluwer Law International, 1999).

⁴⁵ Michael Bohlander, *Criminalizing LGBT Persons under National Criminal Law and Article 7(1)(h) and (3) of the ICC Statute*, 5(4) Global Policy 401 (2014).

⁴⁶ Constructive ambiguity is a term used in diplomacy to refer to the use of ambiguous words that give comfort to those on different sides of a debate, thereby promoting agreement.

For the purpose of this Statute, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from above.

The term gender occurs nine times in the Statute.⁴⁷ Thus, how the ICC interprets “gender” will have a direct impact on the kinds of cases of persecution that the Court may be able to prosecute, as well as on the law applied, how the Prosecutor undertakes her duties, and on the protection and participation of victims and witnesses.⁴⁸ Accordingly, it is important to mention that the ICC Statute is the first international instrument to expressly include various forms of sexual and gender-based crimes. Further work has been done on this matter, such as the Office of the Prosecutor’s Draft Policy Paper on Sexual and Gender Based Crimes.⁴⁹ It commits to integrating a gender perspective and analysis in all its work, to being innovative in the investigation and prosecution of these crimes,⁵⁰ affirms that Art. 7(3) shall be interpreted in accordance with Art. 21(3) of the Statute⁵¹ and points out the recent efforts of the UN to put an end to violence and discrimination on the basis of sexual orientation and gender identity.⁵²

In light of this, legal challenges will be discussed in two parts. *First*, the protection of a civilian population from persecution on the grounds of sexual orientation under Art. 7(1)(h) in conjunction with Art. 7(3) will be analyzed as well as under Art. 7(1)(h) independently as “*other universally impermissible grounds*.” *Secondly*, the persecution of a civilian population based on their gender identity will be addressed under Art. 7(1)(h) in conjunction with Arts. 7(3) and 21(3) of the Statute.

1.2.4. Sexual Orientation

1.2.4.1. Sexual Orientation Can (Not) Be Subsumed under the Term “Gender” in Article 7(3) for the Purpose of Persecution in Article 7(1)(h)

The ICC has never been faced with a case where it needed to adjudicate whether persecution on the ground of gender could include persecution on the ground of sexual orientation. On the one occasion where persecution on the grounds of

⁴⁷ ICC Statute, Arts. 7(1)(h), 7(3), 21(3), 42(9), 54(1)(b), 68(1).

⁴⁸ Oosterveld 2005, at 57.

⁴⁹ Draft Policy Paper on Sexual and Gender Based Crimes (June 2014), at 5 (Jan. 15, 2018), available at <https://www.icc-cpi.int/iccdocs/otp/OTP-draft-policy-paper-February2014-Eng.pdf>. The OTP considers “*gender based crimes*” as those committed against a person on the basis of gender, whether male or female, as a result of existing gender norms and underlying inequalities, which it proclaims to effectively put an end to impunity as crimes of concern to the international community as a whole.

⁵⁰ *Id.* at 3.

⁵¹ *Id.* para. 13.

⁵² *Id.* para. 20, nt. 16.

gender was briefly mentioned in the context of the *Mbarushimana* case, where the Prosecutor emphasized that not only did it amount to sexual violence against the individuals, but that this also formed persecution on the basis of gender against the collective.⁵³ It is clear that gender discrimination under Art. 7(1)(h) could logically be extended to situations where male or female members of a group are targeted on the basis of gender roles as understood in the context of society.⁵⁴

In UN usage, gender refers to the socially constructed roles played by women and men that are ascribed to them based on their sex.⁵⁵ The distinction could be best described as the difference between the concepts of “male” and “female” and the adjectival descriptions of “masculine” and “feminine.”⁵⁶ This differentiation and understanding of terms is important because it opens the door to legally qualify persecution on the basis of sexual orientation as crimes against humanity. If members are targeted due to their ascribed gender roles in the context of society, they can just as much be targeted due to their failure to comply with such roles. The concept of gender and sexual orientation are very closely linked, particularly in the context of persecution, where homosexuals are often targeted as punishment for defying traditionally defined concepts of masculinity and femininity.⁵⁷ Precisely this prejudice that could be found in the discriminatory intent of a perpetrator and State or organizational policy might give rise to legal protection of sexual orientation under the term “gender.” As Bedont argues:

Contrary to the wishes of some delegations that opposed the term “gender,” the term may include sexual orientation... for example, in most if not all societies, the role of women is primarily based on their ascribed functions as wives and mothers. Women that diverge from this stereotype often suffer discrimination. This would constitute persecution on the grounds of gender.⁵⁸

In order to successfully prosecute persecution on the grounds of sexual orientation as gender persecution, Art. 22(2) of the Statute must be respected. It would thus be the task of the Prosecutor to establish reasonable grounds that sexual

⁵³ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, ICC, 28 September 2010, para. 97.

⁵⁴ Bohlander 2014, at 401: “Violent targeting of sexual minorities as a group or collectivity... on the basis of the victim’s perceived departure from their assigned gender role, could satisfy the elements of the crime of persecution as defined in the Statute and the EoC.”

⁵⁵ See Part I. Christopher K. Hall et al., *Article 7 in The Rome Statute of the International Criminal Court: A Commentary* 2016, at 293.

⁵⁶ *Id.*

⁵⁷ Oosterveld 2005, at 77–78.

⁵⁸ Barbara Bedont, *Gender-Specific Provisions in the Statute of the International Criminal Court in Essays on the Rome Statute of the International Criminal Court. Vol. 1* 183, 187–188 (F. Lattanzi & W.A. Schabas (eds.), Sirente: Ripa Fagnano Alto, 1999).

orientation is *not analogous* to gender persecution, but rather that it is in fact in itself gender persecution, in the sense of being based on the ideas about what it means to be “male or female, within the context of society.”⁵⁹ Although the essence of the crime of persecution is that it is a crime of discrimination,⁶⁰ it is hard to envisage that gender persecution could be subsumed as persecution on the grounds of sexual orientation, since the final sentence of Art. 7(3) clearly reads that “the term ‘gender’ does not indicate any meaning different from the above.”

1.2.4.2. The Right Against Discrimination on the Grounds of Sexual Orientation Can Be Considered a Universally Recognized Impermissible Ground under International Law in Accordance with Article 21(3) of the Statute

If gender persecution did not already include persecution on the ground of sexual orientation, it can be argued that in time that has changed. Article 7(1)(h) states that persecution may also be committed against any identifiable group or collectivity on “other grounds that are universally recognized as impermissible under international law.”

The ICC Statute is the first international instrument to include other discriminatory grounds, going beyond the scope of customary international law. This open clause leaves the door ajar for further development of customary international law in a direction favorable to human rights.⁶¹ Contrary to some opinions,⁶² this paper argues that sexual orientation may be regarded as “*other grounds*” for protection under Art. 7(1)(h).

⁵⁹ “The rule of strict construction requires that the language of a particular provision shall be construed such that no cases shall be held to fall within it which do not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment” (*Prosecutor v. Zdravko Mucic aka “Pavo,” Hazim Delic, Esad Landzo aka “Zenga,” Zejnir Delalic* (Trial Judgment), IT-96-21-T, ICTY, 16 November 1998, paras. 408–413).

⁶⁰ *Prosecutor v. Kupreskic et al.* (Trial Judgment), IT-95-16-T, ICTY, 14 January 2000, para. 621; *Prosecutor v. Radislav Krstic* (Appeal Judgment), IT-98-33-A, ICTY, 19 April 2004, para 534; *Prosecutor v. Tihomir Blaskic*, *supra* note 43, para. 131.

⁶¹ In accordance with Art. 21(3) of the ICC Statute, “the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.”

⁶² See, e.g., Rebekka Wiemann, *Sexuelle Orientierung im Völker- und Europarecht: Zwischen kulturellem Relativismus und Universalismus* 147 (Berlin: Berliner Wissenschafts-Verlag, 2013). See also Werle 2009, at 335, footnote 280. The reference is made to the Explanatory Memorandum of the (German) Code of Crimes Against International Law [Begründung zum Völkerstrafgesetzbuch (VStGB)], at 22. Das Völkerstrafgesetzbuch (VStGB) provision on crimes against humanity as persecution reads: “eine identifizierbare Gruppe oder Gemeinschaft verfolgt, indem er ihr aus politischen, rassischen, nationalen, ethnischen, kulturellen oder religiösen Gründen, aus Gründen des Geschlechts oder aus anderen nach den allgemeinen Regeln des Völkerrechts als unzulässig anerkannten Gründen grundlegende Menschenrechte entzieht oder diese wesentlich einschränkt” (§ 7(1) Verbrechen gegen die Menschlichkeit).

From this perspective, it can be argued that discrimination on the ground of sexual orientation constitutes a norm under international human rights law that reached the necessary threshold of universality in the meaning of Art. 7(1)(h). The words “*universally recognized*” should be understood as “*widely recognized*” and not within the meaning that all States have to recognize a particular ground as impermissible.⁶³ Although the ICC does not accept a *stare decisis* principle, it is beneficial to mention that in the *Lubanga* case, a right has been defined as universally recognized human rights if it “finds expression in international and regional treaties and conventions.”⁶⁴ Hence, if sexual orientation finds expression in international and regional treaties and conventions, it can be subsumed under Art. 7(1)(h) as *other grounds*. What is necessary is some form of discrimination that is intended to be and results in an infringement of an individual’s fundamental right.⁶⁵ It would not be the first time that an open clause covers sexual orientation in international and regional human rights law.

Several treaties cover discrimination on the basis of sexual orientation, such as Art. 26 of the ICCPR and Art. 2(2) of ICESCR. But more importantly, in its 1996 Draft Code,⁶⁶ the International Law Commission confirmed that the rights found in the UN Charter⁶⁷ as well as in the ICCPR⁶⁸ are rights and freedoms to which individuals are entitled without distinction. This has been confirmed by case law, with the most prominent case of *Toonen v. Australia* brought before the UN Human Rights Committee (hereinafter HRC). It held that the term “sex” in Arts. 2(1) and 26 of the ICCPR included sexual orientation and that the criminalization on this basis was a violation of the right to privacy under Art. 17(1) of the ICCPR⁶⁹ and of non-discrimination under Art. 2(1) of the ICCPR. The HRC supported its reasoning based on the European Court of Human Rights (hereinafter ECtHR) jurisprudence.⁷⁰ In this respect, the ICCPR and many of the rights recognized in the UDHR⁷¹ can be considered reflective of customary international law.⁷² Thus, contrary to some

⁶³ Hall et al. 2016, at 226.

⁶⁴ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, ICC, 14 March 2012, para. 12.

⁶⁵ *Prosecutor v. Dusko Tadić aka “Dule”* (Opinion and Judgment), IT-94-1-T, ICTY, 7 May 1997, para. 697.

⁶⁶ Draft Code of Crimes, *supra* note 42, Art. 18, para. 11.

⁶⁷ UN Charter, Arts. 1(3), 55(c).

⁶⁸ ICCPR, Arts. 2(1), 26.

⁶⁹ *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), para. 8.7 (Jan. 15, 2018), also available at <http://hrlibrary.umn.edu/undocs/html/vws488.htm>.

⁷⁰ *Dudgeon v. the United Kingdom*, No. 7525/76, 22 October 1981, Series A No. 45, paras. 64–70; *Norris v. Ireland*, No. 10581/83, 26 October 1988, Series A No. 142, paras. 39–47; *Modinos v. Cyprus*, No. 15070/89, 22 April 1993, Series A No. 259, paras. 20–25.

⁷¹ UDHR, Arts. 2, 29.

⁷² Hall et al. 2016, footnote 127.

author's opinions, sexual orientation can be argued as widely recognized⁷³ and by this, the protection of persecution on the basis of sexual orientation becomes a legal possibility under Art. 7(1)(h) of the Statute.

1.3. Gender Identity

In the context of persecution on the ground of gender identity and the protection of transgender or intersex people against crimes against humanity, the legal reasoning appears more difficult. What is clear is that the definition of gender in Art. 7(3) removes biologically intersex individuals at the outset. Even though Art. 7(3) of the Statute defines gender referring to two sexes, namely male and female only, it also *expressis verbis* specifies that the term gender should be viewed within the context of society and as argued by some, leaves room for a broader interpretation in line with internationally recognized human rights in accordance with Art. 21(3) of the Statute.⁷⁴

It is possible to argue that gender in today's context of society cannot be viewed as only male and female due to the fact that this dichotomous view is specific to certain cultures and is not universal.⁷⁵ However, that would not extend protection to transgender people since the term "*within the context of society*" refers to only two sexes – male or female. It uses the terms male or female as a starting point for any kind of interpretation. Surely, it can be argued that transgender persons have become sufficiently mainstreamed in some parts of the world to become at least somewhat woven into the fabric of those societies, as male or female.⁷⁶ However, we really cannot claim that transgender life has become mainstreamed in all countries throughout the globe. If the notion of transgender does not fit gender notions in these individual societies, it is hard to argue that transgender life fits within our combined global societal notions of "*male and female*," thereby not fitting "*within the context of society*,"⁷⁷ as required by Art. 7(3) of the Statute.

Contrary to this reasoning, some authors argue that the phrase "*within the context of society*" was chosen to give the ICC judges the flexibility to determine the meaning of the phrase on a case-by-case analysis.⁷⁸ This seems highly unlikely, since it would

⁷³ There are currently 195 States in the world and 76 States still criminalize same-sex conduct, which is 38% of the world.

⁷⁴ Sunčana Roksandić Vidlička, *Prosecuting Serious Economic Crimes as International Crimes: A New Mandate for the ICC?* (Berlin: Max Planck Institute for Foreign and International Criminal Law, Pravni fakultet Sveučilišta u Zagrebu, 2017); Sunčana Roksandić Vidlička, *Criminal Responsibility for Severe Economic Crimes Committed in Transitional Periods* 365 ff. (International Dual Doctorate, Zagreb, 2014).

⁷⁵ *The Difference Between Sex and Gender*, OpenStax, at 2 (Jan. 15, 2018), available at <https://cnx.org/exports/8144da41-917e-41ac-9b56-117e73186d46@5.pdf/the-difference-between-sex-and-gender-5.pdf>.

⁷⁶ Kritz 2014, at 36.

⁷⁷ *Id.* at 37.

⁷⁸ Cate Steains, *Gender Issues in The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* 357, 374 (R.S. Lee (ed.), The Hague and Boston: Kluwer Law International, 1999).

defy the accepted principles of legal interpretation to suggest that the drafters would struggle over the restriction of a term relevant to the issue and then intend to leave it open to the judges to interpret the clause in a way that would countermand their compromise.⁷⁹ Even more, reference to national penal codes confirms this. For example, for persecution as a crime against humanity, the German and French Penal Codes translate “gender” as “*Gründen des Geschlechts*”⁸⁰ and “*sexiste*.” The Croatian Penal Code also confirms this by translating it to “*spolna osnova*.”⁸¹ This further confirms that gender in Art. 7(3) is intended to serve as nothing more than female and male.

Even if we argue that Art. 7(3) needs to be applied and interpreted in accordance with internationally recognized human rights as required by Art. 21(3), it still however fails to provide protection to transgender people. It is not because their human rights are not internationally recognized, but rather that even if they are, the second sentence in para. 3 of Art. 7 clearly reads that “the term ‘gender’ does not indicate any meaning different from the above.” It seems as though a transgender population who does not view themselves as male or female, would not be protected against the crime against humanity. This may represent substantial lack of protection for a group of people, who in many countries, are subject to discriminatory practices. Unlike the argument made for sexual orientation to be subsumed as “other grounds” in Art. 7(1)(h), it is uncertain if gender identity has reached the “wide recognition” threshold necessary for protection under the Statute. What can be concluded with certainty is that the criticisms of the Statute’s definition of gender highlight the fact that the term “*gender*” is under-theorized in international law.⁸²

1.3.1. Domestic Criminalization of Same-Sex Conduct as Crimes Against Humanity under Article 7(1)(h)

This part has so far dealt with a substantive matter in the event of an attack against a civilian population, i.e., a homosexual or transgender one, pursuant to or in furtherance of a State or organizational policy to commit such an attack. However, the EoC clarify that

⁷⁹ Bohlander 2014, at 401–414.

⁸⁰ “...eine identifizierbare Gruppe oder Gemeinschaft verfolgt, indem er ihr aus politischen, rassistischen, nationalen, ethnischen, kulturellen oder religiösen Gründen, aus Gründen des Geschlechts oder aus anderen nach den allgemeinen Regeln des Völkerrechts als unzulässig anerkannten Gründen grundlegende Menschenrechte entzieht oder diese wesentlich einschränkt” (§ 7(1) Verbrechen gegen die Menschlichkeit, Völkerstrafgesetzbuch (VStGB)); “La persécution de tout groupe ou de toute collectivité identifiable pour des motifs d’ordre politique, racial, national, ethnique, culturel, religieux ou sexiste ou en fonction d’autres critères universellement reconnus comme inadmissibles en droit international” (Art. 212-1, Chapitre II: Des autres crimes contre l’humanité, Code pénal) (Jan. 15, 2018), available at <https://loc.gov/law/help/crimes-against-humanity/index.php#france>.

⁸¹ Kazneni zakon Republike Hrvatske od 21. listopada 2011, Nar. nov. 125/11 [Penal Code of the Republic of Croatia of 21 October 2011, Official Gazette No. 125/11], Art. 90(1), para. 8.

⁸² Oosterveld 2005, at 82.

such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack.⁸³

In that case, if a State allows domestic criminalization of same-sex conduct and sexual minorities are being arbitrarily arrested and even sentenced to death, it can be argued that the State agents have committed a crime against humanity pursuant to Arts. 27 and 7(1)(h) of the Statute in conjunction with the aforementioned interpretation of Art. 7(3). It is important to reiterate that

“persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.⁸⁴

A historical parallel may be made to a non-violent attack in nature⁸⁵ on a civilian population – the system of apartheid. The crime of apartheid is uncontestedly a crime against humanity,⁸⁶ which is

committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.⁸⁷

In this regard, there is no difference between an institutionalized regime of systematic oppression and domination in which people are deprived of their fundamental rights on the grounds of race⁸⁸ and one in which they are dominated and deprived of the same rights on the basis of sexual orientation and gender identity.

Furthermore, the right to life, as well as the right to be protected from torture, inhuman and degrading treatment and punishment, establishes a positive legal

⁸³ Elements of Crimes, ICC (2011), at 5 (Jan. 15, 2018), available at <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, *supra* note 43, para. 396.

⁸⁴ ICC Statute, Art. 7(2)(g).

⁸⁵ *Prosecutor v. Jean-Paul Akayesu* (Trial Judgment), ICTR-96-4-T, ICTR, 2 September 1998, para. 581.

⁸⁶ ICC Statute, Art. 7(1)(j).

⁸⁷ *Id.* Art. 7(2)(h).

⁸⁸ Genetically and biologically, there is only one race and that is the human race. See Four Statements on the Race Question, UNESCO (1969), at 30 (Jan. 15, 2018), available at <http://unesdoc.unesco.org/images/0012/001229/122962eo.pdf>; Sally Haslanger, *Gender and Race: (What) Are They? (What) Do We Want Them to Be?*, 34(1) *Noûs* 31, 43 (2000); Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Geneva, 25 January 2005, para. 494 (Jan. 15, 2018), available at http://www.un.org/news/dh/sudan/com_inq_darfur.pdf. However, this issue is beyond the scope of this work.

obligation on the State to take all appropriate measure to prevent violations and punish perpetrators as well as address any conditions in society which encourage or facilitate crimes based on victims' sexual orientation or gender identity from either agents of the State or third parties. This would include putting in place effective criminal law provisions to deter the commission of offences against the person, backed up by law/enforcement mechanism for the prevention, suppression and punishment of breach of such provisions.⁸⁹ This positive obligation should not be neglected as a large part of the violations of human rights in relation to sexual orientation and gender identity, which occurs not just in the action of agents of the State, but also in their *inaction* or *failure* to take positive steps to secure the aforementioned rights.

Of the total number (83) of States, which criminalize same-sex relationships, 37 are States Parties of the ICC (44.6%) and 46 are not (55.4%).⁹⁰ The concentration of countries criminalizing LGBT *per* region is the highest in Africa, with almost 47% of the entire sample and 59.5% of the States Parties.⁹¹ The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has explicitly stated that imposition of the death sentence for a private sexual practice, such as sodomy, is a violation of international law.⁹² It is argued that the sheer existence of a state sponsored law, which allows for the imprisonment of people based on their sexual orientation is a systematic attack on a civilian population on discriminatory grounds pursuant to a policy, which in turn results in one of the acts in Art. 7 – for example, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law.⁹³ After all, crimes against humanity need to be at least tolerated by a State or entity.⁹⁴

However, what stands in the way of legally qualifying domestic criminalization of same-sex conduct as crimes against humanity is precisely the aforementioned interpretation of Art. 7(3) of the Statute. The weakness of the argument that the drafters of the Statute intended to "*leave the door ajar*" when interpreting Art. 7(3) is exposed. The same can also be said with regard to the term of "*other grounds as universally impermissible*" under Art. 7(1)(h). It certainly cannot have been in the interest of the opposing states to allow for such a broad interpretative legal maneuver because the consequences under the complementarity principle would have been

⁸⁹ *Angelova and Iliev v. Bulgaria*, No. 55523/00, 26 July 2007, ECHR 2007-IX, para. 93; *Osman v. the United Kingdom*, No. 23452/94, 28 October 1998, [1998] ECHR 101, para. 115.

⁹⁰ Human Dignity Trust (Jan. 15, 2018), available at <http://www.humandignitytrust.org/>.

⁹¹ The main religion in the majority of the states criminalizing LGBT persons is not Islam but Christianity, if only by a small margin. As far as the death penalty is concerned, all jurisdictions that employ it are Islamic states. See Bohlander 2014.

⁹² Civil and Political Rights, Including the Question of Disappearances and Summary Executions: Extrajudicial, Summary or Arbitrary Executions, Report of the Special Rapporteur, Mr. Philip Alston, U.N. Doc. E/CN.4/2006/53/Add.4, 7 January 2006, para. 37.

⁹³ ICC Statute, Art. 7(1)(e).

⁹⁴ *Prosecutor v. Kupreskic*, *supra* note 60, para. 552; *Prosecutor v. Tihomir Blaskic*, *supra* note 43, para. 119.

obvious.⁹⁵ If a future ICC interpretation of Art. 7(3) would invoke sexual orientation or transgender identity, the State signatories that criminalize LGBT persons would be declared *unable* to carry out the investigation or prosecution, thus satisfying one of the “*folds*” of the *conditio sine qua non* – the principle of complementarity under Art. 17 of the Statute.⁹⁶

2. *Sexual Minorities Uganda v. Scott Lively*

Sexual Minorities Uganda (hereinafter SMUG) is an umbrella organization comprised of several organizations that advocate for lesbian, gay, bisexual, transgender and intersex rights in Uganda. In 2012, under the Alien Tort Statute (hereinafter ATS),⁹⁷ it filed a claim against Scott Lively,⁹⁸ an American citizen based in Springfield, Massachusetts, for persecution that amounts to a crime against humanity, based on a systematic and widespread campaign of persecution against LGBT people in Uganda.⁹⁹ The claim brought alleges Lively’s active involvement in initiatives with legislative and executive branch officials and private parties, including holding lectures at universities and high schools, to intimidate LGBT people, undermine their rights in Uganda and deprive them of their fundamental human rights, such as the right to life, liberty and freedom of expression.¹⁰⁰

⁹⁵ Bohlander 2014.

⁹⁶ The principle of complementarity “still presents a great challenge for the Court, and due to sensitive political implications will most likely continue to do so in the future.” Marijana Konforta & Maja Munivrana Vajda, *The Principle of Complementarity in the Jurisprudence of the ICC* (2013), at 25 (Jan. 15, 2018), available at <https://hrcak.srce.hr/file/191352>.

⁹⁷ The Alien Tort Statute (28 U.S.C. § 1350): “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” The Supreme Court of the United States has for the first time comprehensively studied and interpreted the ATS in the case of *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The ATS furnishes jurisdiction only where the international law norm is sufficiently definite and historically rooted to support the asserted cause of action, and “the Supreme Court has held that a federal court can only recognize a claim under the ATS if the claim seeks to enforce an underlying norm of international law that is as clearly defined and accepted as the international law norms familiar to Congress in 1789 when the ATS was enacted.” Cited from *Sexual Minorities Uganda v. Scott Lively*, 254 F.Supp.3d 262 (D. Mass. 2017), at 18–20 (hereinafter *SMUG v. Lively*, 2017).

⁹⁸ Scott Lively is an attorney, author and evangelical minister, known as the expert on what he terms the “gay movement.” He believes that America has “brought down low” due to homosexuality, blames homosexuals for historical atrocities, such as the Rwandan genocide and connects pornography with homosexuality. In one of his numerous statements he makes a link with Nazism and homosexuality: “Nazism was in large part an outgrowth of the German homosexual movement.” *SMUG v. Lively*, 2017, at 2.

⁹⁹ *Sexual Minorities Uganda v. Scott Lively*, 960 F.Supp.2d 304, 316 (D. Mass. 2013) (hereinafter *SMUG v. Lively*, 2013).

¹⁰⁰ According to SMUG, Scott Lively’s anti-gay propaganda throughout Uganda and his help to officials, led to a proposal of the Anti-Homosexuality Bill. The bill firstly proposed the death penalty for “aggravated homosexuality” and criminalizing any advocacy for LGBTI rights.

In 2013, Lively's motion to dismiss the federal claims case was denied, but in 2015, Lively's motion for summary judgment based on jurisdiction was allowed and thus, the case ultimately dismissed. The analysis whether this order was correctly or incorrectly dismissed, goes beyond the scope of this work. However, it will be briefly addressed for future substantive reasons only. The main issue is that not only did SMUG claim that systematic persecution of individuals based on their sexual orientation and gender identity constitutes a crime against humanity that violates international norms,¹⁰¹ but the US Court accepted this argument and confirmed it in its second decision in 2015.¹⁰²

Thoroughly explained in *Sosa*, the violations of "law of nations" under the ATS do not have to be identical to the ones, which were recognized in 1789, but they have to be of a comparable universality and specificity to those, which were recognized in that time.¹⁰³ The "law of nations" is taken by American courts to mean customary international law and courts are to invigilate this process of trans-historical analysis by detecting sufficiently definite, obligatory, mutual norms of a universal character.¹⁰⁴

In essence, the US Court relied on three main arguments. At the outset, it is important to stress that the court heavily relied on the ICC Statute to support its claim that persecution on the basis of sexual orientation and gender identity constitutes a crime against humanity. This is not surprising since it is claimed that the ICC Statute can be viewed as a codification of customary norms.¹⁰⁵ First, the US Court acknowledged that although persecution may not always rise to a crime against humanity, it did so in the present case because it was a part of a widespread or systematic attack directed against a civilian population.¹⁰⁶ It relied on Art. 7(1)(h) in conjunction with Art. 7(2)(g) of the ICC Statute in which 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." In the second step, it confirmed that persecution, as a crime against humanity has been "repeatedly held

¹⁰¹ *SMUG v. Lively*, 2013, at 3–4.

¹⁰² *SMUG v. Lively*, 2017, at 3.

¹⁰³ Piracy, abduction of ambassadors and safe conduct.

¹⁰⁴ Mark A. Drumbl, *Extracurricular International Criminal Law*, 16 *International Criminal Law Review* 412 (2016).

¹⁰⁵ Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* 340 (Cambridge: Cambridge University Press, 2014).

¹⁰⁶ It is still controversial whether there is a requirement in international customary law that a crime against humanity be committed pursuant to or in furtherance of a plan or policy (Hall et al. 2016, at 244). See, e.g., M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* 243 ff. (Dordrecht; Boston; London: Martinus Nijhoff, 1999). See also *Prosecutor v. Dusko Tadic aka "Dule"*, supra note 65, para. 644. However, in this line of reasoning, the Court views the ICC Statute as a codification of international customary law and relies on its articles. It is evident from the facts of the case that the state policy was furthered by legislation pursuant to Lively's anti-homosexual policy.

actionable under the ATS.¹⁰⁷ And in the final step, whilst acknowledging that many international treaties and instruments that provide jurisdiction over crimes against humanity list particular protected groups without specifying LGBTI people,¹⁰⁸ it states that all of these instruments provide savings clauses and even when they do not, the jurisprudence of the *ad hoc* tribunals show that the list of persecution grounds must be interpreted broadly.¹⁰⁹ The most interesting part of the argument is that the court has completely disregarded the most contentious argument of gender as defined in Art. 7(3) and decided for a more clear-cut option in order to grant protection – an open, savings clause of “*other grounds*” under Art. 7(1)(h).

3. Case Study: The Chechen Republic

3.1. Factual Background

Chechnya is a semi-autonomous republic within the Russian Federation. Regardless of its certain legislative autonomy, the Russian Constitution and federal legislation bind it. However, in many respects, Chechnya is still somewhat a state of exception. It is a society of high traditionalism and strict hierarchy accompanied by a heteronormative culture.¹¹⁰

According to the report of the Russian LGBT Network in cooperation with “*Novaya Gazeta*,” there have been three waves of persecution of LGBT people since December 2016 and the third wave is still on going.¹¹¹ The report contains 33 testimonies

¹⁰⁷ “...customary international law rules proscribing crimes against humanity... have been enforceable against individuals since World War II,” *Kadic v. Karadzic*, 70 F.3d 232 (2^d Cir. 1995); “...holding that persecution that constitutes a crime against humanity is actionable under the ATS,” *Mehinovic v. Vuckovic*, 198 F.Supp.2d 1322 (ND Ga. 2002); “Crimes against humanity have been recognized as a violation of customary international law since the Nuremberg trials and therefore are actionable under the ATCA,” abrogated in part *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1246-47 (11th Cir. 2005), cited from *SMUG v. Lively*, 2013.

¹⁰⁸ See, e.g., Art. 6(c) of the Nuremberg Charter encompassing “persecutions on political, racial or religious grounds”; Art. 7(1)(h) of the ICC Statute defining an actionable crime against humanity as “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”; updated Art. 5(h) of the ICTY Statute providing jurisdiction over “persecutions on political, racial and religious grounds”; Art. 3(h) of the ICTR Statute providing jurisdiction over “persecutions on political, racial and religious grounds.”

¹⁰⁹ “There are no definitive grounds in customary international law on which persecution must be based and a variety of different grounds have been listed in international instruments,” *Prosecutor v. Dusko Tadic aka “Dule,” supra* note 65, para. 711; “It is enough that Plaintiff alleges that the denial of fundamental rights it suffered was based on an ‘unjustifiable discriminatory criterion,’” *Id.* para. 697.

¹¹⁰ Relating to or based on the attitude that heterosexuality is the only normal and natural expression of sexuality. Dictionary by Merriam-Webster (Jan. 15, 2018), available at <https://www.merriam-webster.com/dictionary/heteronormative>.

¹¹¹ They Said That I’m Not a Human, That I Am Nothing, That I Should Rather Be a Terrorist, Then a Fagot LGBT, Persecution in the North Caucasus: A Report, Prepared by the Russian LGBT Network

of victims falling under the hands of the authorities of Chechnya for their real or perceived homosexuality. The global community became aware of this situation in March 2017, when various sources, such as the Human Rights Watch reported that there have been an unknown number of men abducted, beaten, held prisoner, tortured and murdered for being homosexual or being perceived as homosexual.¹¹² And, although there have been similar individual cases of unlawful arrests and detentions on the grounds of sexual orientation in the 2000s, the later events in 2017 took form of state-orchestrated crime.¹¹³

The EU has not remained silent on this matter. During this year's May plenary session, the European Parliament voted a joint motion for a resolution¹¹⁴ on the implementation of the Council's LGBTI Guidelines,¹¹⁵ particularly in relation to the persecution of (perceived) homosexual men in Chechnya, Russia. In this resolution, the Parliament called the EU to offer material and advisory support to the Russian authorities in the investigation regarding the events in Chechnya.

According to the evidence, LGBT persons in Chechnya are not only being killed by the authorities, but they also fall victim to *honor killings*¹¹⁶ by their own relatives for tarnishing family honor. More and more real and perceived homosexuals are being sent to clandestine camps by the authorities or simply released to their families knowing that they would be killed.

One might also wonder why there have been extensive reports of arrests and murders of homosexuals, yet somehow homosexual women remain underreported. The fact of the matter is that Chechen women are the most vulnerable part of this traditional society.¹¹⁷ Despite the fact that the female survivors were not massively taken to prisons, they also suffered detention and torture mostly coming from their

in Cooperation with Elena Milashina (senior reporter, Novaya Gazeta) (St. Petersburg, 2017), at 3–4 (Jan. 15, 2018), available at https://www.ilga-europe.org/sites/default/files/chechnya_report_by_rus_lgbt_n_31_july_2017.pdf.

¹¹² Tanya Lokshina, *Anti-LGBT Violence in Chechnya: When Filing "Official Complaints" Isn't an Option*, Human Rights Watch, 4 April 2017 (Jan. 15, 2018), available at <https://www.hrw.org/news/2017/04/04/anti-lgbt-violence-chechnya>.

¹¹³ They Said That I'm Not a Human, *supra* note 111, at 9.

¹¹⁴ Joint Motion for a Resolution, European Parliament, 15 May 2017 (Jan. 15, 2018), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+MOTION+P8-RC-2017-0349+0+DOC+PDF+V0//EN>.

¹¹⁵ Guidelines to Promote and Protect the Enjoyment of All Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons, Council of the European Union, 24 June 2013 (Jan. 15, 2018), available at <https://eeas.europa.eu/sites/eeas/files/137584.pdf>.

¹¹⁶ Traditions in the North Caucasus suggest that the family should renounce problematic relatives or undergo a series of severe punishments and by such severe execution, the family demonstrates that it not only renounces its relative in accordance with the Chechen tradition, but also that it values these traditions higher than kinship ties.

¹¹⁷ They Said That I'm Not a Human, *supra* note 111, at 23.

brothers.¹¹⁸ Their invisibility in the Chechen society does not and must not diminish their pain and suffering.¹¹⁹

Arguably, the described situation in Chechnya may be subsumed under various crimes under the current Russian federal legislation, i.e., the Criminal Code of the Russian Federation.

3.2. Legal Framework in the Russian Federation

In accordance with Art. 15(1) of the Federal Constitution (hereinafter Constitution), the Constitution has supreme legal force in the entire territory of Russia. The Constitution provides for direct applicability of prohibits discrimination.¹²⁰ Although homosexuality is decriminalized in Russia, a recent federal ban, the so-called “propaganda of homosexuality,”¹²¹ can be seen as the effective stigmatization of same-sex relationships.¹²²

It is questionable whether the most recent ECtHR judgment *Bayev and others v. Russia* will be of any help for the advancement of LGBT rights in Russia.¹²³ The Court highlighted the general impact of the LGBT ban¹²⁴ on the applicants’ lives, as it not only prevented them from campaigning for their rights, but also required them in effect to conceal their sexual orientation whenever a minor was present.¹²⁵ This not only directly violated Art. 10 of the ECHR, but it also contravenes the contemporary

¹¹⁸ They Said That I’m Not a Human, *supra* note 111, at 24.

¹¹⁹ “My brother entered my room, sat in front of me with a pistol, and asked me to kill myself. He said that he promised my father that he wouldn’t do it, and that it would be easier to explain to others that it was an accident if I shot myself. I replied that I was not going to commit suicide, and if he was ready to kill me, it’s time.” *Id.*

¹²⁰ Конституция Российской Федерации, принята всенародным голосованием 12 декабря 1993 г., Собрание законодательства РФ, 2014, № 31, ст. 4398 [Constitution of the Russian Federation enacted by the national referendum on December 12, 1993, Legislation Bulletin of the Russian Federation, 2014, No. 31, Art. 4398], Art. 2.

¹²¹ Федеральный закон от 29 июня 2013 г. № 135-ФЗ “О внесении изменений в статью 5 Федерального закона “О защите детей от информации, причиняющей вред их здоровью и развитию” и отдельные законодательные акты Российской Федерации в целях защиты детей от информации, пропагандирующей отрицание традиционных семейных ценностей,” Собрание законодательства РФ, 2013, № 26, ст. 3208 [Federal law No. 135-FZ of 29 June 2013. For the Purpose of Protecting Children from Information Advocating for a Denial of Traditional Family Values, Legislation Bulletin of the Russian Federation, 2013, No. 26, Art. 3208].

¹²² Justice or Complicity? LGBT Rights and the Russian Courts, Equal Rights Trust (September 2016), at 13 (Jan. 15, 2018), available at http://www.equalrightstrust.org/ertdocumentbank/Justice%20or%20Complicity%20LGBT%20Rights%20and%20the%20Russian%20Courts_0.pdf.

¹²³ *Bayev and others v. Russia*, No. 67667, 20 June 2017, [2017] ECHR 572.

¹²⁴ The Russian Federal law “For the Purpose of Protecting Children from Information Advocating for a Denial of Traditional Family Values.” It made promoting “non-traditional sexual relationships” among minors an administrative offence and categorized homosexual relationships as “second class.”

¹²⁵ *Bayev and others v. Russia*, *supra* note 123, para. 61.

human security approach, as the essence for future prevention of mass atrocities. The ECtHR concluded that Russian law embodied a predisposed bias on the part of the heterosexual majority against the homosexual minority since there is a clear European consensus about the recognition of individuals' right to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their own rights and freedoms.¹²⁶ The Government had not therefore provided convincing and weighty reasons to justify treating the applicants differently, in violation of Art. 14 taken in conjunction with Art. 10.¹²⁷

Nevertheless, Russia is a State Party to many international human rights treaties: the ICCPR, the ICESCR, the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the Convention on the Elimination of All Forms of Discriminations against Women (1979), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (hereinafter CAT), the Convention on the Rights of the Child (1989) and the Convention on the Rights of Persons with Disabilities (2006). International human rights law requires states to take legislative and other measure to protect LGBT persons from hate-motivated violence.¹²⁸ This includes prohibiting, investigating and prosecuting such violence, and also providing remedies for such violence when it occurs.¹²⁹ States must also exercise due diligence in preventing LGBT persons from facing torture and other ill-treatment, including prohibiting, investigating, prosecuting and punishing acts of torture and other ill-treatment carried out by private individuals.¹³⁰

In fact, the Constitution provides for supremacy of international treaties over domestic law:

If an international treaty of the Russian Federation stipulates other rules than those stipulated by the law, the rules of the international treaty shall apply.¹³¹

This Article does not provide for supremacy of commonly recognized principles of international law, but is strictly reserved for treaties. However, the first prong of the same Article should be pointed out:

¹²⁶ *Bayev and others v. Russia*, *supra* note 123, para. 66.

¹²⁷ *Id.* para. 91.

¹²⁸ *Justice or Complicity?*, *supra* note 122, at 41.

¹²⁹ ICCPR, Arts. 6, 9; General Comment No. 35, Article 9 (Liberty and Security of Person), HRC, CCPR/C/GC/35, 16 December 2014, para. 9; *Discrimination and Violence Against Individuals*, *supra* note 14, paras. 11, 12.

¹³⁰ ICCPR, Art. 7; CAT, Arts. 3, 16; *Discrimination and Violence Against Individuals*, *supra* note 14, paras. 13, 14.

¹³¹ Constitution of the Russian Federation, Art. 15(4).

The commonly recognized principles and norms of international law and the international treaties of the Russian Federation shall be a component part of its legal system.

This is significant due to the fact that one might argue that the prohibition of crimes against humanity, as a peremptory norm of international law, definitely forms part of commonly recognized principles of international law. However, in the Russian context it is superfluous to argue that crimes against humanity form part of commonly recognized principles of international law since Russia does not contain a provision on the prohibition of crimes against humanity in its domestic Criminal Code. In accordance with the cardinal legal principle *nulla poena sine lege scripta*, embodied in the Arts. 1 and 3 of the Russian Criminal Code, customary law is excluded as a basis for criminal punishment despite the fact that commonly recognized principles of international law should form part of Russia's legal system.

On the other hand, Art. 17 of the Constitution states that the "rights and freedoms of man and citizen" shall be recognized in accordance with the "commonly recognized principles and norms of international law." Arguably, this may be read as requiring that customary international law in relation to human rights also takes precedence over domestic law.¹³² Although this may be of help to the victims of Chechnya in a national lawsuit, it is of no assistance for qualifying and prosecuting these crimes as a crime against humanity.

For national legislation, it also important to mention that a sexual minority, i.e., the LGBT group in Russia has been confirmed as a social group by the Russian Constitutional Court in 2014 for the purposes of both the Criminal Code and the Code of Administrative Offences.¹³³ According to the Russian Criminal Code, discriminatory acts on the grounds of a person's affiliation to any social group may be considered a criminal offence (Art. 136). More importantly, a crime committed "by reason of hatred or enmity with respect to some social group" is an aggravating circumstance for crimes such as murder (Art. 105), torture (Art. 117) and deliberate infliction of bodily harm (Arts. 111, 112, 115). However, Russian courts persistently denied the status of LGBT as a social group.¹³⁴

On a European level, as a signatory to the ECHR, Russia is obliged not only to follow case law of the ECtHR, but also uphold the right to freedom from torture and inhuman and degrading treatment as required by Art. 3 of the ECHR. Hand

¹³² Justice or Complicity?, *supra* note 122, at 24–25.

¹³³ Постановление Конституционного Суда Российской Федерации от 23 сентября 2014 г. № 24-П, Российская газета, 3 октября 2014 г., № 6498(226) [Judgment of the Constitutional Court of the Russian Federation No. 24-P of 23 September 2014, Rossiyskaya Gazeta, 3 October 2014, No. 6498(226)], para. 2.1, regarding the "propaganda of non-traditional sexual relations."

¹³⁴ See Justice or Complicity?, *supra* note 122; "He Wasn't Worthy of Being a Man": How Gay People are Murdered in Russia, While the Justice System Remains Silent about Homophobia, Meduza, 2 November 2017 (Jan. 15, 2018), available at <https://meduza.io/en/feature/2017/11/02/he-wasnt-worthy-of-being-a-man>.

in hand goes the respect for private and family life under Art. 8 which always closely intertwines with the prohibition of non-discrimination enshrined in Art. 14. Specifically, in cases involving homophobia, the European consensus is clear:

When investigating violent incidents, such as ill-treatment, State authorities have the duty to take all reasonable steps to unmask possible discriminatory motives... The authorities must do whatever is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of violence induced by, for instance, racial or religious intolerance, or violence motivated by gender-based discrimination.¹³⁵

These fundamental European rights are buttressed by the aforementioned Yogyakarta Principles, specifically Principles 6 and 24 related to private and family life in which “everyone has the right to choice to disclose or not do disclose information relating to one’s sexual orientation or gender identity...”

3.3. The Anti-Gay Purge as a Crime Against Humanity

The argument that the alleged Chechnya’s campaign against homosexual men by murder, unlawful imprisonment, extermination, torture, enforced disappearances and other inhumane acts constitute crimes against humanity is quite straightforward. If the alleged facts turn out to be true, they would constitute the first recorded persecution aimed solely towards a sexual minority in the 21st century. It would confirm that they were not isolated or random acts, but in fact represented a systematic attack¹³⁶ against a civilian population and as such, can be qualified as crimes against humanity.¹³⁷ The direct involvement of state authorities may give rise to the legal argument of policy element presence.¹³⁸

¹³⁵ *Identoba and others v. Georgia*, No. 73235/12, 12 May 2015, Para. 67; *M.C. and A.C. v. Romania*, No. 12060/12, 12 April 2016, Para. 113. See also *Nachova and others v. Bulgaria*, Nos. 43577/98 and 43579/98, 6 July 2005, Para. 160.

¹³⁶ Widespread refers to the large-scale nature of the attack. But, the numerical threshold should be assessed on a case-by-case basis, including the social context. *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Trial Judgment), IT-96-23-T & IT-96-23/1-T, ICTY, 22 February 2001, para. 95.

¹³⁷ It should be noted that “a policy element” for such an attack is not needed under customary law, but rather under the ICC Statute under Art. 7(2)(a). In Chechnya, the unlawful detentions, arbitrary searches and clandestine camps where homosexuals are tortured, constitute a part of a systematic attack. In determining whether actions are part of a systematic attack, the former President of the ICTY, Antonio Cassese set out the following test: “One ought to look at these atrocities or acts in their context and verify whether they may be regarded as part of an overall policy or a consistent pattern of inhumanity, or whether they instead constitute isolated or sporadic acts of cruelty or wickedness” (*Doe v. Rafael Saravia*, 348 F.Supp.2d 1112 (2004), at 1156).

¹³⁸ *They Said That I’m Not a Human*, *supra* note 111, at 9.

3.4. Solution: A Legal Catch-22

Despite the aforementioned extensive legal framework, the Russian Federation has signed, but never ratified the ICC Statute and therefore, the situation in the Republic of Chechnya is not within the purview of the ICC. Had Russia have ratified the Statute, the gross violations of human rights on the grounds of sexual orientation in Chechnya would have been one of the first opportunities for the ICC to adjudicate on as persecution on the basis of sexual orientation. The ICC could have paved the road for a more certain interpretation of Arts. 7(3) and 7(1)(h), thereby giving a more certain judicial outcome for the future protection of sexual minorities on an international criminal law scale. Unfortunately, not only did Russia not ratify the Statute, but it also announced the withdrawal of its signature last November.¹³⁹

Nevertheless, it must be reminded that very few might argue that crimes against humanity do not constitute a *jus cogens* norm from which no derogation is allowed. Although not yet codified in a distinct convention, “a comparable international indignation at such act is not to be doubted.”¹⁴⁰ This has been further affirmed by the International Law Commission in Art. 9 of its proposed Draft Articles on Crimes Against Humanity.¹⁴¹ Accordingly, a proper recognition of these acts as crimes against humanity provides possible accountability options under universal jurisdiction in other states. Thus, qualifying sexual orientation as other universally impermissible grounds under international law as explained in the previous part of this paper is of utmost importance in the case of universal jurisdiction.

The adequate legal solution for the homosexual minority in Chechnya is denied by the circumstances of the problem and existing national legal framework. Such a “Catch 22”¹⁴² illustrates the need for developing a clear and certain international law response to state-orchestrated discrimination and violence against LGBT minorities.

¹³⁹ This withdrawal was done in light of the Declaration submitted by the Ukrainian government in September 2015 pursuant to Art. 12(3) of the Statute, in which it accepted the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the perpetrators and accomplices of acts committed in the territory of Ukraine since February 2014. On the basis of this Declaration, the ICC has jurisdiction to investigate and prosecute crimes set out in its Statute that have taken place on the Crimean Peninsula during the period of Russian occupation, i.e., war crimes and crimes against humanity. Report on Preliminary Examination Activities (2016) (Jan. 15, 2018), available at <https://www.documentcloud.org/documents/3220719-ICC-Crimea-Nov2016.html>.

¹⁴⁰ *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, [2002] I.C.J. 1, Joint Separate Opinion of Judge Higgins, Buergenthal and Kooijmans, para. 51.

¹⁴¹ Report on the work of the sixty-eighth session (2016), Art. 9, *Aut dedere aut judicare*: “The State in the territory under whose jurisdiction the alleged offender is present shall submit the case to its competent authorities for the purpose of prosecution, unless it extradites or surrenders the person to another State or competent international criminal tribunal. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State” (Jan. 15, 2018), available at <http://legal.un.org/ilc/reports/2016/>.

¹⁴² “Catch-22” (a satirical novel by American author Joseph Heller) is “a problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule.”

Conclusion: Are We There Yet?

The persecution of homosexuals by the Nazis in World War II was not a historical anomaly since people have been historically persecuted on the grounds of sexual orientation and gender. Not only did most of these crimes go unacknowledged, but they have never been given a legal attribute worthy of the atrocities committed. There should be no doubt as to whether persecution on the grounds of sexual orientation constitutes “an intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”

The aim of this paper is to show that a historically vulnerable group of people can in fact be legally subsumed under the notion of crimes against humanity for the purpose of their protection in international criminal law. In a world that is changing faster than ever before, the law can be used as a tool to stand at the frontier of change in order to prevent mass atrocities, rather than confronting them *ex-post*. If these suggestions are seen as too radical, it is important to stress that the legal qualification of persecution on grounds of sexual orientation and gender would be in line with today’s international framework for human rights, in which human security sits at the apex. It

means protecting fundamental freedoms – freedoms that are the essence of life. It means protecting people from critical (severe) and pervasive (widespread) threats and situations... by creating... systems that together give people the building blocks of survival, livelihood and dignity.¹⁴³

By correctly defining the terms of sexual orientation and gender, by recognizing the potential of open clauses under the ICC Statute, qualifying domestic criminalization of same-sex conduct as a crime against humanity and tackling legal circumvention appropriately, a human security approach¹⁴⁴ with regards to sexual orientation and

¹⁴³ Human Security Now, Report of the Commission on Human Security (2003), at 4 (Jan. 15, 2018), available at http://www.un.org/humansecurity/sites/www.un.org.humansecurity/files/chs_final_report_-_english.pdf. Too often gross violations of human rights result in conflicts, displacement, and human suffering on a massive scale. In this regard, human security underscores the universality and primacy of a set of rights and freedoms that are fundamental for human life. Human security makes no distinction between different kinds of human rights – civil, political, economic, social and cultural rights thereby addressing violations and threats in a multidimensional and comprehensive way. It introduces a practical framework for identifying the specific rights that are at stake in a particular situation of insecurity and for considering the institutional and governance arrangements that are needed to exercise and sustain them.

¹⁴⁴ All people, including lesbian, gay, bisexual and transgender (LGBT) persons, are entitled to enjoy the protection provided for by international human rights law, including in respect of rights to life, security of person and privacy, the right to be free from torture, arbitrary arrest and detention, the right to be free from discrimination and the right to freedom of expression, association and peaceful assembly. Discriminatory Laws and Practices and Acts of Violence Against Individuals, *supra* note 11.

gender identity would be ensured in international criminal law. In that case, the international community would truly *be resolved to guarantee the lasting respect for and the enforcement of international justice*¹⁴⁵ for all people.

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¹⁴⁵ ICC Statute, Preamble.

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