

Solving the Puzzle of Gender in the International Criminal Court: Does the Rome Statute Protect the LGBTQ+ Community from Persecution?

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ABSTRACT

Despite the oppression that the LGBTQ+ community endures, persecution on the grounds of sexual orientation or gender identity has not yet come to the attention of the International Criminal Court. This study analyzes one of the main difficulties that a crime like persecution on the grounds of sexual orientation might face: whether sexual orientation and gender identity could be contemplated within the specific discriminatory grounds that art. 7(1)(h) of the Rome Statute provides for the crime of persecution. I argue that they are indeed included and that this ground is contained within the crime of gender-based persecution.

To reach this conclusion, I examine the definition of gender within international law. First, I look into the elements of the crimes against humanity of persecution, to then examine the travaux préparatoires of the Rome Statute and the drafting process of its definition of gender. Second, given the relative lack of jurisprudential references on gender-based persecution in international criminal law, I delve into how other fields of international law have interpreted it. Particularly, I analyze the developments regarding the definition of gender in international human rights law and international refugee law. For this, I investigate international practice in cases of gender-based persecution, observing, in a somewhat consistent manner, that persecution against LGBTQ+ individuals has been regarded as gender-based persecution.

This investigation suggests the existence of a tendency within international law, which could apply to eventual gender-based persecution cases before the International Criminal Court, that this crime is applicable when it is committed because of the sexual orientation or gender identity of the victim. I observe a proclivity towards an extended interpretation of gender, understanding the term as a social construction, a cumulus of social roles and norms. This would mean, I contend, that persecution against the LGBTQ+ community must be included within gender-based persecution since this persecution occurs because

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of the manifestation of one's gender and how this manifestation differs from what society expects from, in the case of the Rome Statute, a "female" or a "male."

RESUMEN

A pesar de la opresión que sufre la comunidad LGBTQ+, la persecución por razón de orientación sexual o identidad de género no ha recibido demasiada atención por parte de la Corte Penal Internacional. Este trabajo analiza una de las principales dificultades que este crimen podría enfrentar de llegar a un caso en la Corte Penal Internacional: si orientación sexual e identidad de género podrían entrar en los motivos de discriminación del art. 7(1)(h) del Estatuto de Roma. Defendemos que la orientación sexual e identidad de género están incluidos entre estos motivos, y, específicamente, en el tipo de persecución por razones de género.

Para llegar a esta conclusión examinamos la definición de género en derecho internacional. En primer lugar, analizamos los elementos del tipo del crimen de lesa humanidad de persecución, así como los travaux préparatoires del Estatuto de Roma y la redacción de su definición de género. Tras ello, y dada la escasez de referencias jurisprudenciales en derecho penal internacional, examinamos cómo otras ramas del derecho internacional han interpretado el concepto de género. Particularmente, analizamos su desarrollo en derecho internacional de los derechos humanos y en derecho internacional de los refugiados, estudiando doctrina y práctica en diferentes casos de persecución por motivos de género. En este estudio, observamos una tendencia que incluye la persecución contra la comunidad LGBTQ+ como persecución por motivos de género.

Esta investigación sugiere que existe una tendencia en derecho internacional que podría hacer aplicable el tipo del art. 7(1)(h) del Estatuto de Roma a actos de persecución por motivos de orientación sexual o identidad de género. Observamos que se emplea una interpretación extensiva del concepto de género, entendiendo el término como un constructo social, un cúmulo de normas y roles sociales asociadas a cada género. Argumentamos que esto implicaría la inclusión de la persecución contra la comunidad LGBTQ+ dentro del tipo de persecución por motivos de género, ya que la primera ocurre, precisamente, por la expresión de género de cada cual, y de cómo esta difiere de las expectativas de la sociedad de, en el caso del Estatuto de Roma, los sexos "femenino" y "masculino."

I. INTRODUCTION

I.1 OBJECTIVES AND MOTIVATION

Already codified in the context of the International Military Tribunal (IMT), the crime of persecution was among the first to be recognized as a crime against humanity.¹ Persecution has long been recognized as a crime by International Criminal Law,² and continues to be part of the Statute of the International Criminal Court (ICCSt).³ In this research, I will delve into the crime against humanity of persecution, particularly when it is committed on the grounds of gender and specifically directed against the Lesbian, Gay, Bisexual, Trans, Queer (LGBTQ+) community, as well as other persons within the wider LGBTQ+ community who rely on other terms for self-identification. I will analyze the ICCSt's concept of gender⁴ and examine whether persecution against the LGBTQ+ community can be included within the International Criminal Court's (ICC) concept of gender-based persecution. I will further touch on the persecution of transgender persons in the context of the scarcity of legal protection and lack of doctrinal and jurisprudential analysis of these persons relative to the rest of the LGBTQ+ community.⁵

In furtherance of this objective, I will describe and examine the doctrine and practice on gender-based persecution and the definition of gender in the Statute of the International Criminal Court. Then, given the relative lack of jurisprudential sources, aside from the relevant International Criminal Court Office of the Prosecutor (OTP) Policy Papers,⁶ regarding gender-based persecution in International Criminal Law (ICL), this research will examine other fields of law that have considered this issue, such as International Human Rights Law (IHRL) and International Refugee Law (IRL).⁷

I will also examine relevant instances of LGBTQ+ persecution around the world in order to establish the current relevance of this research and to analyze possible grounds of application. I will thus draw from facts of ongoing persecutions against the LGBTQ+ community, as reported by Non-governmental

¹ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6(c), Aug. 8, 1945, 82 U.N.T.S. 280 [hereinafter IMT Charter].

² David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85, 102, (2004).

³ Rome Statute of the International Criminal Court, art. 7(1)(g), July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

⁴ *Id.* at art. 7(3).

⁵ Brian Kritz, *The Global Transgender Population and the International Criminal Court*, 17 YALE HUM. RTS. DEV. L. J. 1, 3–4 (2014).

⁶ Int'l Crim. Ct. Office of the Prosecutor, Policy Paper on Sexual and Gender- Based Crimes (ICC Office of the Prosecutor 2014) [hereinafter ICC Office of the Prosecutor 2014]; Int'l Crim. Ct Office of the Prosecutor, Policy on the Crime of Gender Persecution (ICC Office of the Prosecutor 2022) [hereinafter ICC Office of the Prosecutor 2022]. I will delve into these in Chapters V and VII below.

⁷ Valerie Oosterveld, *Gender, Persecution, and the International Criminal Court: Refugee Law's Relevance to the Crime against Humanity of Gender-Based Persecution*, 17 DUKE J. COMPAR. & INT'L L. 49, 51–52 (2006); Charles Barrera Moore, *Embracing Ambiguity and Adopting Propriety: Using Comparative Law to Explore Avenues for Protecting the LGBT Population under Article 7 of the Rome Statute of the International Criminal Court*, 157 MINN. L. REV. 1287, 1307, 1321–25 (2017).

Organizations (NGOs), International Organizations and Tribunals, and trustworthy news reports.

Lastly, I will critique the concept of gender at the ICCSt, with a normative conclusion on whether the LGBTQ+ community is adequately protected by the ICC. I will conclude by providing prescriptive recommendations on how the ICC should interpret the concept of gender in cases of LGBTQ+ persecution.

I.2 STRUCTURE

This research will be divided into eight chapters. Aside from this introduction, the second chapter will compile several situations of LGBTQ+ persecution taking place around the world, which provide the basis for my analysis. In the third and the fourth chapters, I will delve into the crime of persecution, its history, and elements within the ICC system. In the fifth chapter, I will turn to the definition of gender to examine how LGBTQ+ persecution can be defined as gender-based persecution and thereby examine the *travaux préparatoires* of the ICCSt and subsequent practice of the ICC. In the sixth, I will turn to analyze developments on the concept of gender in IHRL, and IRL. In the seventh chapter, I will analyze whether Sexual Orientation and Gender Identity (SOGI) can be considered within gender-based persecution as defined by the ICCSt. In the last chapter, I will present my conclusions.

I.3 SOME CONSIDERATIONS ABOUT THE LGBTQ+ COMMUNITY

To contextualize this research, I begin with some brief definitions relating to SOGI and the LGBTQ+ community.

Sexual orientation defines the gender or genders towards which a person feels sexually and/or romantically or affectionately attracted, usually conflated into categories such as heterosexual (attraction to the opposite gender), homosexual (attraction to the same gender), or bisexual (attraction to more than one gender), among others.⁸ Gender identity is defined as the internal and individual conception of one's gender, whether female, male, or non-binary, which may coincide with the Assigned Gender At Birth (AGAB).⁹ It follows that lesbian and gay (LG) persons are those attracted to the same gender, female or male, respectively; and bisexual (B) persons are those attracted to two or more genders. A trans (T) person's gender identity does not coincide with their AGAB, whereas a cisgender person's does coincide with their AGAB.

⁸ INTERNATIONAL COMMISSION OF JURISTS, YOGYAKARTA PRINCIPLES - PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY, 6 (2007).

⁹ *Id.*

Finally, queer (Q) is an umbrella term that includes other SOGI minorities,¹⁰ while the plus (+) sign represents persons who, within the wider LGBTQ+ community, use other terms for self-identification.¹¹

II. THE PERSECUTION OF THE LGBTQ+ COMMUNITY: DRAWING FROM REALITY

SOGI persecution still occurs all over the globe and widely varies from the gravest forms of assaults on human life and physical integrity, such as killings, corrective rapes, or torture, to subtler forms of discrimination, like the refusal to recognize someone's identity or denial of access to healthcare. Some of this conduct has already been denounced before the ICC. For example, the City University of New York, MADRE, and the Organization of Women's Freedom in Iraq submitted a communication to the Office of the Prosecutor reporting gender based persecution, including acts of torture, killing, and sexual violence against persons based on their real or perceived sexual orientation or gender identity.¹² These were allegedly committed by members of the Islamic State of Iraq and al-Sham/Greater Syria (also known as ISIS, ISIL, Daesh, or IS) against civilians in Iraq between 2014 and 2017.¹³ One notable instance described was when two female university students were seen kissing each other and were issued death warrants for committing "homosexual acts," which they could only avoid by going into hiding and seeking help from humanitarian organizations.¹⁴ The communication also contains reports of summary executions of women for suspected and/or actual homosexuality,¹⁵ and it shows how ISIS equated homosexuality with the transgression of their imposed gender norms.¹⁶ In a similar fashion, ISIS persecuted and sentenced to death homosexual men and their families, based on their actual homosexual behavior or perceived gender non-conformity (which could include having "trendy hairstyles" and wearing "fashionable clothes").¹⁷

¹⁰ Merriam-Webster, <https://www.merriam-webster.com/dictionary/queer> (last visited May. 13, 2023).

¹¹ ICC Office of the Prosecutor 2022, *supra* note 6, at 3.

¹² CUNY, MADRE AND OWFI, COMMUNICATION TO THE ICC PROSECUTOR PURSUANT TO ARTICLE 15 OF THE ROME STATUTE REQUESTING A PRELIMINARY EXAMINATION INTO THE SITUATION OF: GENDER BASED PERSECUTION AND TORTURE AS CRIMES AGAINST HUMANITY AND WAR CRIMES COMMITTED BY THE ISLAMIC STATE OF IRAQ AND THE LEVANT (ISIL) IN IRAQ (2017). This communication was publicly shared by the submitters and is available at <https://www.madre.org/sites/default/files/PDFs/CUNY%20MADRE%20OWFI%20Article%2015%20Communication%20Submission%20Gender%20Crimes%20in%20Iraq.pdf> (last visited May 13, 2023).

¹³ *Id.* ¶ 61.

¹⁴ *Id.* ¶ 63.

¹⁵ *Id.* The Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD) also confirmed this aspect over the course of its investigative activities. See UNITAD, Letter dated 7 November 2022 from the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant addressed to the President of the Security Council, ¶ 43, U.N. Doc. S/2022/836 (Nov. 8, 2022).

¹⁶ *Id.*

¹⁷ *Id.* ¶¶ 67–73.

Another notable case of violence against the LGBTQ+ community is the "gay purge" conducted by the regional authorities of Chechnya. There have been numerous reports of gay men being detained, tortured, and even killed in the Russian region from 2017–2019.¹⁸ Men suspected of homosexuality were irregularly detained and tortured.¹⁹ Their status was also disclosed to their families, who were encouraged by the local authorities to carry out honor killings,²⁰ accompanied by threats of executions if the families did not do it.²¹ This violence affected over one hundred persons in 2017,²² and authorities have not carried out any effective investigations.²³

More recently, in 2021, there have been reports of a surge of State violence against LGBTQ+ persons in Cameroon. According to Human Rights Watch, between February and April 2021, twenty-four persons were arrested, beaten, or threatened for SOGI reasons or gender nonconformity.²⁴ The authorities have also raided LGBTQ+ civil society organizations, sometimes arresting their staff and members.²⁵ Specifically, authorities targeted transgender women for arrest, subjected them to forced HIV tests and anal examinations, and charged them with homosexual conduct, lack of identity cards, and public indecency.²⁶

In addition to physical violence, the LGBTQ+ community continues to face many legal impediments and discrimination. According to the regular reports of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), sixty-seven United Nations (UN) member States continue to officially criminalize same-sex consensual sexual conduct, and two others do so *de facto*.²⁷ In six of those States, the death penalty is the required legal sanction for

¹⁸ Andrew E. Kramer, *Chechen Authorities Arresting and Killing Gay Men, Russian Paper Says*, N.Y. TIMES, Apr. 1, 2017; HUMAN RIGHTS WATCH, "THEY HAVE LONG ARMS AND THEY CAN FIND ME": ANTI-GAY PURGE BY LOCAL AUTHORITIES IN RUSSIA'S CHECHEN REPUBLIC (Human Rights Watch 2017).

¹⁹ Kramer, *supra* note 18; HUMAN RIGHTS WATCH, *supra* note 18, at 17–19.

²⁰ HUMAN RIGHTS WATCH, *supra* note 18, at 19–20.

²¹ Matt Moore, *Council of Europe to tackle Chechnya over gay 'purge' reports*, GAYTIMES, <https://www.gaytimes.co.uk/life/council-of-europe-to-tackle-chechnya-over-gay-purge-reports/> (last visited May 13, 2023).

²² HUMAN RIGHTS WATCH, *supra* note 18 at 2.

²³ Matt Moore, *Russia: Two years after Chechnya's gay purge victims still seek justice as LGBTI defender receives death threats*, AMNESTY INTERNATIONAL (Apr. 1, 2019), <https://www.amnesty.org/en/latest/news/2019/04/russia-two-years-after-chechnyas-gay-purge-victims-still-seek-justice-as-lgbti-defender-receives-death-threats/>; Human Rights Watch, *Russia: New Anti-Gay Crackdown in Chechnya*, HUMAN RIGHTS WATCH (May 8, 2019), <https://www.hrw.org/news/2019/05/08/russia-new-anti-gay-crackdown-chechnya>.

²⁴ Human Rights Watch, *Cameroon: Wave of Arrests, Abuse Against LGBT People*, HUMAN RIGHTS WATCH (Apr. 14, 2021), <https://www.hrw.org/news/2021/04/14/cameroon-wave-arrests-abuse-against-lgbt-people>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ KELLYN BOTHA, RAFAEL CARRANO LELIS, ENRIQUE LÓPEZ DE LA PEÑA, ILIA SAVELEV & DARON TAN, INT'L LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASSOC., STATE-SPONSORED HOMOPHOBIA: GLOB. LEGIS. OVERVIEW UPDATE (December 2020).

homosexual acts, and in five others, the death penalty is a punishment option.²⁸ The ILGA also reports other kinds of restrictions, such as legal restrictions on the freedom of expression, present in forty-two UN States,²⁹ and the freedom of association, in fifty-one UN member States.³⁰ Moreover, a majority of States still do not protect LGBTQ+ individuals against discrimination.³¹

Transgender persons face a slightly different situation. Express criminalization of transgender persons is uncommon; discrimination is usually disguised in the form of "cross-dressing" laws. As of 2020, these laws exist in thirteen States.³² Nevertheless, this lack of express criminalization does not mean that transgender persons are not persecuted.³³ In fact, other laws that do not expressly mention transgender individuals are used against them, such as those said to protect morality, public decency, or legal identification of persons.³⁴

This legal and de facto discrimination could constitute severe violations of fundamental human rights and is reflected in the different types of crimes against humanity enumerated in the ICCSt, such as murder (protecting the right to life),³⁵ torture (protecting the right to physical integrity and freedom from torture),³⁶ or imprisonment in violation of fundamental rules of international law (protecting the right to liberty and security).³⁷ Thereby, the instances presented in this chapter could amount to acts of persecution under the ICCSt, including the mere enforcement of anti-LGBTQ+ laws,³⁸ so long as they meet the elements of the crime against humanity of persecution, as will be laid out in the following chapters.

III. A BRIEF HISTORY OF THE CRIME OF PERSECUTION AS AN INTERNATIONAL CRIME

The crime of persecution, as a crime against humanity, has had a long history and was already present in the charters of the IMT³⁹ and the International Military Tribunal for the Far East (IMTFE).⁴⁰ These crimes, as continued to be

²⁸ *Id.* at 25.

²⁹ *Id.*

³⁰ *Id.* at 25–26.

³¹ *Id.* at 26–28.

³² ZHAN CHIAM ET AL., INT'L LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASSOC., TRANS LEGAL MAPPING REPORT: RECOGNITION BEFORE THE LAW (2020).

³³ *Id.* at 11.

³⁴ *Id.*

³⁵ International Covenant on Civil and Political Rights art. 6(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Rome Statute, *supra* note 3, art. 7(1)(a).

³⁶ ICCPR, *supra* note 35, art. 7(1); Rome Statute, *supra* note 3, art. 7(1)(f).

³⁷ ICCPR, *supra* note 35, art. 9(1); Rome Statute, *supra* note 3, art. 7(1)(e).

³⁸ Josh Scheinert, *Is Criminalization Criminal?: Antisodomy Laws and the Crime Against Humanity of Persecution*, 24 TUL. J. L. & SEXUALITY 99, 143 (2015).

³⁹ IMT Charter, *supra* note 1, art. 6(3).

⁴⁰ Charter of the International Military Tribunal for the Far East art. 5(c), Jan. 19, 1946, 1589 T.I.A.S. 20 [hereinafter IMTFE Charter]. For a more nuanced discussion of the history of the crime of persecution, see Helen Brady & Ryan Liss, *The Evolution of Persecution as a Crime Against Humanity*, in *Historical Origins of International Criminal Law: Volume 3* 429 (Morten Bergsmo et al. eds, 2015).

the case in contemporary ICL, were restricted to certain grounds on which the persecution could take place: namely, political, racial, or religious, in the IMT Charter;⁴¹ and political or racial grounds, in the IMTFE Charter.⁴² Additionally, other sources of law criminalized persecution outside the context of these military tribunals. This fact is illustrated, for example, in the Control Council Law number ten, which prohibits persecution for political, racial, or religious reasons.⁴³ In this context, the IMT had the opportunity to give specific examples of what could be considered persecution. Acts that were considered persecution were citizenship stripping, prohibition from holding public office, holding a group to public ridicule, and restricting family life, among others.⁴⁴

The contours of the crime of persecution have been consistent in modern international criminal tribunals, including within the UN. The Statute of the International Criminal Tribunal for Rwanda (SICTR) includes a crime against humanity of persecution based on national, political, ethnic, racial, and religious grounds.⁴⁵ The Statute of the International Criminal Tribunal for the former Yugoslavia (SICTY) also contemplates a crime of persecution, in this case on political, racial, and religious grounds.⁴⁶ Specifically, it was in the context of the *Tadić* case before the International Criminal Tribunal for the former Yugoslavia (ICTY) where the criteria of the crime of persecution were developed. In that case, the prosecution, with no objection by the defense counsel, stated that the elements of persecution are:

- (1) the accused committed a specified act or omission against the victim; and (2) the specified act or omission was intended by the accused to harass, cause suffering, or otherwise discriminate against the victim based on political, racial or religious grounds.⁴⁷

The ICTY gave examples of acts of persecution that the defendant committed, such as "the seizure, collection, segregation and forced transfer of civilians to camps, calling-out of civilians, beatings and killings,"⁴⁸ and classified them as violating the victims' fundamental rights.⁴⁹

⁴¹ IMT Charter, *supra* note 1, art. 6(3).

⁴² IMTFE Charter, *supra* note 40, art. 5(c).

⁴³ Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, Dec. 20, 1945, OFFICIAL GAZETTE CONTROL COUNCIL FOR GERMANY at 3, § II(1)(c) (Ger.).

⁴⁴ France et al. v. Göring (Hermann) et al., 22 IMT, Judgement, ¶¶ 75–77 (Oct. 10, 1946).

⁴⁵ S.C. Res. 955, art. 3 (Nov. 8, 1994).

⁴⁶ U.N., UPDATED STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA art. 5(h) (U.N. 2009).

⁴⁷ Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgement, ¶ 698 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997). <https://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf>.

⁴⁸ *Id.* ¶ 717.

⁴⁹ *Id.*

It is with these antecedents that the crime of persecution arrived to the ICCSt⁵⁰ as a crime against humanity.

IV. THE CRIME OF PERSECUTION IN THE ICCST

IV.1 ELEMENTS OF CRIMES AGAINST HUMANITY

The crime of persecution is situated in the larger category of "crimes against humanity." Crimes in this category have certain common elements (also known as "contextual"), as defined in the ICCSt.⁵¹ A detailed explanation of each of these elements is outside the scope of this Note, in which I focus on the specific crime of persecution.

The first common element referred to in art. 7(1) ICCSt refers to the "widespread or systematic" character of the crime. This test is considered to be disjunctive, and so only one of the thresholds must be satisfied.⁵² The application of the first test focuses on the "large-scale nature of the attack and the number of victims,"⁵³ as can be derived from the factual background of the case.⁵⁴ It can refer either to multiple criminal acts assessed cumulatively, as the joint result of a large number of separate criminal acts part of a course of attack, or to a single act of great magnitude.⁵⁵ On the other hand, the second test has been interpreted in different ways.⁵⁶ Specifically, as illustrated by Cryer and colleagues, the most recent jurisprudence has tended towards defining systematicity as a high degree of organization, taking into account the planning of the criminal acts, its political objectives, and the probability or improbability of random occurrence, among others.⁵⁷ This is different from definitions of systematicity in *Akayesu* and *Blaškić*, which emphasized a thorough organization and the establishment of a regular pattern of facts occurring on the basis of a common policy involving significant public or private resources and/or high-level authorities.⁵⁸

The second common element is the existence of an "attack," as defined in the ICCSt.⁵⁹ This refers to the commission of multiple criminal acts against a civilian population, following a State or organizational policy. However, there is more controversy surrounding the policy element. This policy element was included to ensure that isolated or random attacks would not be considered crimes against humanity and, as such, is a threshold meant to exclude the international

⁵⁰ Rome Statute, *supra* note 3, art. 7(1)(h).

⁵¹ *Id.* at art. 7(1).

⁵² ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 232 (Cambridge University Press 4th ed. 2019).

⁵³ Prosecutor v. Tadić, *supra* note 47, ¶ 652.

⁵⁴ CRYER ET AL., *supra* note 52, at 232.

⁵⁵ *Id.*

⁵⁶ *Id.* at 232–33.

⁵⁷ *Id.* at 233.

⁵⁸ *Id.* at 232–33.

⁵⁹ Rome Statute, *supra* note 3, art. 7(2)(a). Here, an "attack" is defined as "a course of conduct involving the multiple commission of acts . . . against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack."

criminality of random or unorganized action.⁶⁰ According to Cryer and colleagues, the policy element has three major features:

1. The policy does not need to be formalized or clearly adopted.⁶¹ Rather, it must be seen as a course of action adopted as advantageous or expedient.⁶²
2. The policy can be inferred from the circumstances of the act, sufficing a certain lack of probability of random occurrence.⁶³
3. The policy can be either active or passive.⁶⁴

Finally, an attack must be directed "against any civilian population."⁶⁵ The jurisprudence of the Special Court for Sierra Leona (SCSL) indicates that an attack is directed against a civilian population when that population is the *primary* target of the attack, rather than an incidental/collateral target.⁶⁶ However, this issue is not settled; some authors argue this element should be construed as one of intention, meaning the attack must be *intentionally* directed against the civilian population, rather than *primarily* directed against it.⁶⁷ The ICTY has pointed to several factors that should be taken into account when evaluating this element, including the status and number of victims, the discriminatory nature of the attack, and the nature of the crimes committed.⁶⁸

Lastly, the mental state of the perpetrator is also considered. Namely, they must have knowledge of the attack.⁶⁹ This means the perpetrator must be aware of the attack against the civilian population, and this knowledge suffices even when the perpetrator does not agree with the aim of the attack and acts out of personal or opportunistic reasons.⁷⁰ This knowledge may be inferred from the facts.⁷¹ Additionally, actual knowledge is not an absolute requirement. Instead, willful blindness suffices.⁷²

⁶⁰ CRYER ET AL., *supra* note 52, at 235–36.

⁶¹ *Id.* at 236–37.

⁶² *Id.* at 237.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Rome Statute, *supra* note 3, art. 7(1).

⁶⁶ Prosecutor v. Kunarac et al., Case No. IT-96-23, Appeals Judgement, ¶ 92 (Int'l Crim. Trib. for the former Yugoslavia June 12, 2002), <https://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf>; Prosecutor v. Fofana and Kondewa, SCSL-04-14-A, Appeals Judgement, ¶ 299 (May 28, 2008), <http://www.rscsl.org/Documents/Decisions/CDF/Appeal/829/SCSL-04-14-A-829.pdf>.

⁶⁷ Chile Eboe-Osuji, *Crimes Against Humanity: Directing Attacks against a Civilian Population*, 2 AFRICAN J. LEGAL STUD. 118, 122 (2008).

⁶⁸ Prosecutor v. Kunarac et al., Case No. IT-96-23, Appeals Judgement, ¶ 91 (Int'l Crim. Trib. for the former Yugoslavia June 12, 2002), <https://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf>.

⁶⁹ Rome Statute, *supra* note 3, art. 7(1).

⁷⁰ CRYER ET AL., *supra* note 52, at 241–42.

⁷¹ INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES 1 (2011).

⁷² Prosecutor v. Tadić, *supra* note 47, ¶¶ 656–59.

IV.2 ELEMENTS OF THE CRIME OF PERSECUTION

The crime of persecution is an offense committed in connection with another crime within the jurisdiction of the ICC, purposely directed against a certain group with discriminatory intent that results in severe deprivation of that group's human rights.⁷³ These different elements of the crime of persecution can be misleadingly straightforward; below, I discuss the complexity and dimension of each.

For "severe deprivation of fundamental rights," we can turn to *Kupreškić*. Under the definition established in *Kupreškić* and adopted by the ICTY, this element is met when there has been a gross or blatant denial of a fundamental right, as defined by customary international law, on discriminatory grounds, that reaches the same level of gravity as other crimes against humanity.⁷⁴ Defining the exact fundamental rights protected by the crime of persecution is unnecessary if doing so would vex the interests of justice, as expressed by the ICTY in *Kupreškić*.⁷⁵ Indeed, according to the ICTY, including certain human rights would implicitly exclude others (*expressio unius est exclusio alterius*).⁷⁶

The element of gravity is subsequently subsumed in the previous element of severe deprivation of fundamental rights.⁷⁷ Criminal acts must be of a gravity comparable to that of other crimes against humanity.⁷⁸ This requirement is supplemented by the ICCSt with the condition that the crime of persecution must be committed "in connection with any act referred to in this paragraph [crimes against humanity] or any crime within the jurisdiction of the Court."⁷⁹ This supplementary requirement used within the ICC system was rejected by the *Kupreškić* court; this reflects broader skepticism within ICL.⁸⁰ Cryer and colleagues point out the potential irrelevance of this supplementary requirement, given the likelihood that any situation warranting prosecution for persecution in the international sphere will be linked to at least one of the crimes under the jurisdiction of the ICC.⁸¹

Additionally, a certain mental state is required. According to jurisprudence, knowledge of acting on discriminatory grounds is not sufficient. There must be a particular intent to act in a discriminatory fashion, as repeatedly

⁷³ Rome Statute, *supra* note 3, arts. 7(1)(h), 7(2)(g).

⁷⁴ Prosecutor v. Kupreškić et al., Case No. IT-95-16-T, Trial Judgement, ¶ 621 (Int'l Crim. Trib. for the former Yugoslavia Jan. 14, 2000), <https://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>.

⁷⁵ *Id.* ¶ 623.

⁷⁶ *Id.*

⁷⁷ CRYER ET AL., *supra* note 52, at 253.

⁷⁸ Prosecutor v. Kupreškić et al., *supra* note 74, ¶ 619–21

⁷⁹ Rome Statute, *supra* note 3, art. 7(1)(h).

⁸⁰ "[T]his requirement [in reference to the required connection of persecution with other crimes under the ICCSt] is especially striking in the light of the fact that the ICC Statute reflects customary international law In short, the Trial Chamber finds that although the Statute of the ICC may be indicative of the *opinio iuris* of many States, Article 7(1)(h) is not consonant with customary international law. . . . Accordingly, the Trial Chamber rejects the notion that persecution must be linked to crimes found elsewhere in the Statute of the International Tribunal." See Prosecutor v. Kupreškić et al., *supra* note 74, ¶ 580–81

⁸¹ CRYER ET AL., *supra* note 52, at 253–54.

affirmed in case law including judgments of the Tadić, Kupreškić, Kordić, and Ongwen courts, *inter alia*.⁸²

Finally, the ICCSt states that the discriminatory grounds on which the targeting for the crime of persecution is based are limited to political, racial, national, ethnic, cultural, religious, and gender-related acts of persecution, as well as other grounds universally recognized as prohibited under international law.⁸³

IV.3 PREVIOUS APPLICATION OF THE CRIME AGAINST HUMANITY OF PERSECUTION IN THE ICC

The crime of persecution does not often appear in the jurisprudence of the ICC. The few rulings issued by the ICC, however, do outline the margins and details of the crime of persecution within the meaning of the ICCSt.

First, the ICC has referred to the element of severe deprivation of fundamental rights in several of its rulings and has given examples of rights that can be considered as such. In *Ntaganda*, the ICC referred to rights recognized in the Universal Declaration of Human Rights (UDHR),⁸⁴ the different UN human rights covenants and other related international instruments, and rights recognized in international humanitarian law.⁸⁵ Specific examples given by the ICC are the rights to life, to liberty, to security of the person, to not be subjected to cruel, inhuman, or degrading treatment or punishment, to freedom of association, and to education, among many others.⁸⁶ Moreover, the ICC has established that these deprivations of fundamental rights, when perpetrated by a State or a non-State armed agent,⁸⁷ and with consideration of their cumulative effect (if there are multiple instances of persecution),⁸⁸ must be contrary to international law in general, and international human rights law in particular,⁸⁹ to fall within the scope

⁸² INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES 7 (2011). See also Prosecutor v. Tadić, Case No. IT-94-1-T, Appeals Judgement, ¶ 305 (Int'l Crim. Trib. for the Former Yugoslavia July 7 15, 1999), <https://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf>; Prosecutor v. Kupreškić et al., Case No. IT-95-16-T, Trial Judgment, ¶ 634-36 (Int'l Crim. Trib. for the former Yugoslavia Jan. 14, 2000), <https://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>; Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2, Trial Judgement, ¶ 212 (Int'l Crim. Trib. for the former Yugoslavia Feb. 26, 2001), <https://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>; Prosecutor v. Ongwen, ICC-02/04-01/15, Trial Judgement, ¶ 2739 (Feb. 4, 2021), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01026.PDF.

⁸³ Rome Statute, *supra* note 3, art. 7(1)(h).

⁸⁴ G.A. Res. 217 (III), (Dec. 10, 1948).

⁸⁵ Prosecutor v. Ntaganda, ICC-01/04-02/06, Trial Judgement, ¶ 991 (July 8, 2019), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_03568.PDF.

⁸⁶ *Id.*; Le Procureur c. Al Hassan AG Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18, Rectificatif à la Décision Relative à la Confirmation des Charges, ¶ 664 (Nov. 13, 2019), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_06927.PDF; Prosecutor v. Ongwen, *supra* note 82, ¶ 2733.

⁸⁷ Prosecutor v. Ntaganda, *supra* note 85, ¶ 993.

⁸⁸ *Id.*; Le Procureur c. Al Hassan AG Abdoul Aziz Ag Mohamed Ag Mahmoud, *supra* note 86, ¶ 664; Prosecutor v. Ongwen, Case No. ICC-02/04-01/15, Trial Judgement, ¶ 2733 (Feb. 4, 2021), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01026.PDF.

⁸⁹ Prosecutor v. Ntaganda, *supra* note 85, ¶ 999.

of persecution as a crime against humanity. Furthermore, the ICC has affirmed that any crime against humanity can be tantamount to persecution when committed on discriminatory grounds.⁹⁰

Second, the ICC has repeatedly taken into account the subjective views of the perpetrator and the victim when considering how membership in a protected group is to be identified.⁹¹ Actual membership within the group might not be needed.⁹² The fact that the perpetrator perceived the victim as part of the group can be sufficient to establish this element. This view recognizing persecution on the basis of *perceived* political affiliation has been widely applied.⁹³ Additionally, the protected group can be defined positively, meaning that the perpetrator aims to target persons belonging to a specific group,⁹⁴ as well as negatively, when the perpetrator targets persons who do not belong to a particular group (*see e.g.*, *Ntaganda*, where the Trial Chamber found he targeted all ethnic groups save for one).⁹⁵

Finally, regarding the mental element, the ICC, in *Al-Hassan* and *Ongwen*, affirmed that discriminatory intent can be inferred from the general behavior of the perpetrator and the circumstances surrounding the crime.⁹⁶ Additionally, the existence of other personal motives does not exclude the discriminatory intent,⁹⁷ and the perpetrator does not need to have completed a "value judgment" regarding the severity of the deprivation that they have inflicted.⁹⁸ This means the perpetrator needs not have assessed the intensity of the human rights violation inflicted as "severe" at the time of its commission.

V. THE CONCEPT OF GENDER WITHIN THE ICCST: CONSIDERING THE TRAVAUX PRÉPARATOIRES AND SUBSEQUENT PRACTICE OF THE ICC

Article 7(3): 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 the above.⁹⁹

⁹⁰ *Id.* ¶ 994.

⁹¹ Prosecutor v. Ongwen, ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges, ¶¶ 1009, 2736 (Mar. 23, 2016), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_02331.PDF.

⁹² *Id.* ¶ 2736; Prosecutor v. Ntaganda, *supra* note 85, ¶ 1011.

⁹³ Prosecutor v. Ruto, Kosgey and Sang, ICC-01/09-01/11, Decision on the Confirmation of Charges, ¶¶ 172, 273 (Jan. 23, 2012), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_01004.PDF; Prosecutor v. Gbagbo, ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges, ¶ 204 (June 13, 2014), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2014_04863.PDF; Prosecutor v. Ongwen, *supra* note 91, at ¶¶ 25, 39, 52, 65.

⁹⁴ Prosecutor v. Ntaganda, *supra* note 85, ¶ 1009. Later reaffirmed in Prosecutor v. Ongwen, *supra* note 82, ¶ 2735.

⁹⁵ *Id.*

⁹⁶ Le Procureur c. Al Hassan AG Abdoul Aziz Ag Mohamed Ag Mahmoud, *supra* note 86, ¶ 671; Prosecutor v. Ongwen, *supra* note 82, ¶ 2739.

⁹⁷ Le Procureur c. Al Hassan AG Abdoul Aziz Ag Mohamed Ag Mahmoud, *supra* note 86, ¶ 671.

⁹⁸ Prosecutor v. Ongwen, *supra* note 82, ¶ 2740.

⁹⁹ Rome Statute, *supra* note 3, at art. 7(3).

The above definition of gender used in art. 7(3) ICCSt has sparked controversy among progressive thinkers, who advocate for a social definition of gender, and a more conservative group, who prefer using the word "sex" as defined by the biological differences between persons of the male and female sex. The apparent and bizarre combination of the definitions of sex and gender uniquely applied by the ICC has been controversial since the moment of its drafting and during the *travaux préparatoires* of the ICCSt.

As Oosterveld illustrates, opinions on the matter vary widely. One side qualified these definitions as "stunningly narrow," "a failure," and "puzzling and bizarre."¹⁰⁰ While the other side critiques them as "creating a third sex," "permitting sexual orientation and deviation," and undermining "traditional values."¹⁰¹ Nevertheless, the ambiguous result was an expected outcome of the negotiations of the ICCSt, given the polemics around the term and how the views between more conservative and more progressive States varied.¹⁰²

Gender as a ground for persecution was included in the draft text of the ICCSt in 1997. The draft included other references to the term in the context of the election of judges and the role of the OTP and victims.¹⁰³ Disagreements became more apparent with the start of the Rome Diplomatic Conference, where the inclusion of gender considerations in judicial provisions was removed¹⁰⁴ and the crime of gender-based persecution was disputed.¹⁰⁵

Indeed, States opposing the inclusion of gender as a ground for persecution feared this recognition would exceed the States' domestic recognition of women's or SOGI human rights. They also feared that the inclusions would "impose[] other cultures which permit 'sexual orientation and deviation,'"¹⁰⁶ supporting a concept of gender associated as closely as possible with their understanding of biological sex and cis-heteronormativity.¹⁰⁷ They also argued the term could not be adequately translated into all the official languages of the UN and the term gender did not possess the clarity needed to fulfill the requirement of certainty under ICL.¹⁰⁸ Other States argued for the significance of different sexual identities in different societies, including different sexual orientations.¹⁰⁹ Supporters deemed that the inclusion of "gender" without qualifications was important to represent "an accurate reflection of international

¹⁰⁰ Valerie Oosterveld, *The Definition of Gender in the Rome Statute of the International Criminal Court: Step Forward or Back for International Criminal Justice*, 18 HARV. HUM. RTS. J. 55, 55–56 (2005).

¹⁰¹ Valerie Oosterveld, *Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court*, 16 INT'L FEMINIST J. POL. 563, 566–68 (2014).

¹⁰² Oosterveld, *supra* note 100, at 57.

¹⁰³ *Id.* at 59.

¹⁰⁴ *Id.* at 61–62.

¹⁰⁵ *Id.* at 63.

¹⁰⁶ Oosterveld, *supra* note 101, at 566.

¹⁰⁷ Oosterveld, *supra* note 100, at 63.

¹⁰⁸ *Id.* at 63–64.

¹⁰⁹ Oosterveld, *supra* note 101, at 567.

law', in which the usage of "gender" instead of "sex" was already settled.¹¹⁰ An effort was made to reach a compromise, trying to capture both contending definitions of sex as a biological determination and of gender as a social construct.

The two sides considered different approaches in this compromise, including both positive (defining what gender is) and negative (defining what gender is not) definitions of the concept, favoring the former.¹¹¹ Finally, the sides approached an agreement—a precept referring to the traditional view of gender as sex *and* gender in the context of society.¹¹² This agreement led to the current definition of gender in art. 7(3) ICCSt, which mentions both "the sexes, male and female."¹¹³ That verbiage was enough for those supporting a more traditional view but still satisfied the less traditional camp by making a sociological reference by framing the definition in the "context of society."¹¹⁴

Regarding more current interpretations of the concept of gender within the ICC system, I must turn to the views manifested by the OTP in its diverse policy papers. Relevantly, the OTP has admitted that the ICCSt's concept of gender "acknowledges the social construction of gender, and the accompanying roles, behaviors, activities, and attributes assigned to women and men, and to girls and boys."¹¹⁵ The OTP adopts a wide view of gender-based crimes as any crime within the ICCSt committed against persons because of their socially constructed gender roles, including, but not limited to, sexual violence and gender-based persecution.¹¹⁶ More importantly, this point of view was later confirmed in the OTP Policy on the Crime of Gender Persecution.¹¹⁷ In this groundbreaking policy, the OTP expressly defines the ICCSt's concept of gender as referring to "sex characteristics and social constructs and criteria used to define maleness and femaleness, including roles, behaviors, activities, and attributes."¹¹⁸ The OTP Policy Paper on Gender Persecution further recognizes the difficult history of gender-based persecution and the rarity of its investigation and prosecution,¹¹⁹ and explicitly acknowledges that the targeting of LGBTQ+ persons by virtue of their SOGI may be prosecutable under art. 7(1)(h) ICCSt.¹²⁰

Similarly, the International Law Commission (ILC) has also examined the concept of gender within ICL in its drafting of the Draft Articles on Prevention and Punishment of Crimes Against Humanity.¹²¹ While the ILC did not adopt a

¹¹⁰ Moore, *supra* note 7, at 1301.

¹¹¹ Oosterveld, *supra* note 100, at 64–65.

¹¹² *Id.*

¹¹³ Rome Statute, *supra* note 3, art. 7(3).

¹¹⁴ *Id.*; Oosterveld, *supra* note 100, at 64–65.

¹¹⁵ ICC Office of the Prosecutor 2014, *supra* note 6, ¶ 15.

¹¹⁶ *Id.* ¶ 16.

¹¹⁷ ICC Office of the Prosecutor 2022, *supra* note 6, at 3 and ¶ 4–5. The author submitted a draft version of this manuscript to the OTP's public consultation in relation to this Policy, in order to aid and advocate for a LGBTQ+-inclusive interpretation of "gender."

¹¹⁸ *Id.* at 3. This definition is nearly identical to the one used by the International, Impartial and Independent Mechanism for Syria (IIIM). See IIIM, Gender Strategy and Implementation Plan 8 (IIIM 2022).

¹¹⁹ *Id.* at 4–5.

¹²⁰ *Id.* ¶¶ 4–5, 9, 45.

¹²¹ ILC, Report of the International Law Commission Seventy-first session 46, U.N. Doc. A/74/10 (2019).

definition of the concept of gender to account for the continued evolution of its meaning, the Commentary for the abovementioned Draft Articles showed the evolution of the concept of gender within international law and how it has evolved to be understood as a social construct.¹²²

In conclusion, it can be seen how these disagreements among prospective State parties on the meaning of gender could only be solved by applying what scholars have called "constructive ambiguity."¹²³ Indeterminate language was used to include the different points of view and solve the dispute. This meant that the interpretation of the term was left to the ICC Chambers, which, despite the OTP's later progressive interpretation of gender, so far has not had the opportunity to delve into the matter.¹²⁴

VI. LATEST DEVELOPMENTS ON THE CONCEPT OF GENDER OUTSIDE ICL

In this chapter, given the relative lack of jurisprudential and doctrinal sources in the meaning of gender in the ICCSt,¹²⁵ I will delve into the meaning into which this concept has developed in other instances that have had to face similar problems of defining gender. Here, I will concentrate on examining the term's meaning in two related fields of international law: IHRL and IRL. The possible definitions derived from these fields might become relevant in the work of the ICC as alternative sources of law pursuant to art. 21(1) and (3) ICCSt, and given the obscurity of art. 7(3) ICCSt.

VI.1 INTERNATIONAL HUMAN RIGHTS LAW

The definition of gender within IHRL is particularly relevant for the work of the ICC.¹²⁶ In fact, art. 21(3) of the ICCSt directly points to IHRL when applying the bodies of law mentioned in the same article and interpreting different personal and social characteristics, namely, gender.

Within IHRL, the term gender has been generally understood as a social construct, encompassing the gender roles that each person takes on in society, rather than as a determinative biological category.¹²⁷ The Convention on Preventing and Combating Violence Against Women and Domestic Violence (CPCVWDV) defines gender as "the socially constructed roles, behaviors,

¹²² Nicholas Leddy, *Investigative and Charging Considerations for International Crimes Targeting Individuals on the Basis of Sexual Orientation and Gender Identity*, 20 J. Int'l. Crim. Just. 911, 918 (2022).

¹²³ Oosterveld, *supra* note 101, at 563–64.

¹²⁴ *Id.*

¹²⁵ Rome Statute, *supra* note 3, art. 7(3).

¹²⁶ *Id.*

¹²⁷ Rosemary Grey et al., *Gender-based Persecution as a Crime Against Humanity*, 17 J. INT'L CRIM. JUST. 957, 966 (2019).

activities, and attributes that a given society considers appropriate for women and men," and is the only treaty to do so apart from the ICCSt.¹²⁸

However, different international institutions, including UN organs and other IHRL tribunals and bodies, have developed their own definition, after which the ICC could model the details and scope of the ICCSt's definition of gender.¹²⁹ For example, the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) Committee defined both gender and sex in its General Recommendation No. 28.¹³⁰ The committee asserted that, while sex is used to refer to the biological differences between female and male persons, the term gender must reflect the socially constructed identities, attributes, and roles for women and men. The latter also includes the sociocultural meaning ascribed to these biological differences arising from sex and which result in hierarchical relationships and an asymmetric distribution of power and rights among women and men.¹³¹ The Committee further affirmed that the social positioning of women and men is not static. Rather, it is affected by political, economic, and cultural factors, and acknowledges the inextricable intersection of gender with SOGI.¹³²

As illustrated by Grey and colleagues, most UN agencies also regard gender as a social construct.¹³³ The most prominent human rights tribunals and organizations also hold this view or have otherwise protected SOGI-based discrimination. For example, the Human Rights Committee (HRC) has recognized that discrimination based on sexual orientation, though not explicitly mentioned, is included within the meaning of the more restrictive concept of sex in the nondiscrimination clauses of the International Convention on Civil and Political Rights (ICCPR).¹³⁴ Since this landmark decision, this position has been affirmed by the HRC in subsequent decisions,¹³⁵ as well as by other UN institutions which have openly assumed the concept of gender as a social construct.¹³⁶ The same can be said about gender identity, which has been included as a protected category within nondiscrimination clauses in the UN system.¹³⁷

¹²⁸ Convention on Preventing and Combating Violence against Women and Domestic Violence, May 11, 2011, C.E.T.S. No. 210.

¹²⁹ Rome Statute, *supra* note 3, art. 7(3).

¹³⁰ CEDAW, *General Recommendation No. 28 on the Core Obligations of States Parties Under Article 2 of the CEDAW*, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010) [hereinafter CEDAW General Recommendation No. 28].

¹³¹ *Id.* ¶ 5.

¹³² *Id.* ¶¶ 5, 18.

¹³³ Grey et al., *supra* note 127, at 967.

¹³⁴ Toonen v. Australia, HRC, ¶ 8.7, U.N. Doc. CCPR/C/50/D/488/1992 (1994). For the concerned discrimination clauses see ICCPR, *supra* note 35, arts. 2(1) and 26.

¹³⁵ Young v. Australia, HRC, ¶ 10.4, U.N. Doc. CCPR/C/78/D/941/2000 (2000); X v. Colombia, HRC, ¶ 9, U.N. Doc. CCPR/C/89/D/1361/2005 (2005).

¹³⁶ See e.g. CAT, *General Comment No. 2 on the Implementation of Article 2 by States Parties*, ¶ 21, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) [hereinafter CAT General Comment No. 2]; CESCR, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 32, U.N. Doc. E/C.12/GC/20 (July 2, 2009) [hereinafter CESCR General Comment No. 20]; CRC, *General Comment No. 13 (2011): The Right of the Child to Freedom from All Forms of Violence*, ¶ 60, U.N. Doc. CRC/C/GC/13 (Apr. 18, 2011) [hereinafter CRC General Comment No. 13].

¹³⁷ OHCHR, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*, ¶ 17, U.N. Doc. A/HRC/19/41 (Nov. 17, 2011).

This tendency is also followed by the Inter-American Court of Human Rights (IACtHR). In its advisory opinion on gender identity, equality, and nondiscrimination of same-sex couples, it construed gender as "socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences."¹³⁸ Previously, the Inter-American Commission of Human Rights (IACHR) found that SOGI categories are included within the non-discrimination safeguards of the American Convention on Human Rights (ACHR).¹³⁹ In *Álvarez Giraldo v. Colombia*, where the applicant, an inmate, was denied an intimate visit by her same-sex partner, the IACHR confirmed that sexual orientation is included as a protected class under art. 1(1) ACHR, analyzing it in conjunction with the category of sex.¹⁴⁰ This same conclusion was reached by the IACtHR in *Atala Riffo y niñas v. Chile*, where a mother was deprived custody of her children due to her homosexuality, not only based on sexual orientation, but also gender identity.¹⁴¹ The IACtHR has repeatedly affirmed this holding, most recently in *Rojas Marín y otra v. Perú*, where the court reaffirmed that "the sexual orientation, gender identity or gender expression of a person are categories protected by the Convention," and determined that a State Party to the ACHR is forbidden to act against a person based on these parameters, real or apparent.¹⁴²

The same can be said of the European Court of Human Rights (ECtHR), which has protected the LGBTQ+ community on the basis of arts. 8 and 14 of the European Convention of Human Rights (ECHR), the latter of which is the nondiscrimination clause.¹⁴³ This coverage is even stronger than the aforementioned approaches, because the ECtHR has declared that SOGI discrimination falls within the scope of sex under the ECHR (this normative text does not contemplate gender. Instead, it only refers to sex).¹⁴⁴ The ECtHR expanded this definition in a case where the surviving partner of a same-sex partnership was denied succession in the late partner's lease due to his sexual

¹³⁸ Gender Identity, and Equality and Non-Discrimination with Regard to Same-Sex Couples State Obligations in Relation to Change of Name, Gender Identity, and Rights Deriving from a Relationship Between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 And 24, in Relation to Article 1, of the American Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24, ¶ 32 (Nov. 24, 2017).

¹³⁹ See American Convention on Human Rights art. 1(1), Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR].

¹⁴⁰ See *Marta Lucía Álvarez Giraldo v. Colombia*, Merits, Report, Inter-Am. Ct. H.R. (ser. L) No. 122, ¶¶ 162–66 (Oct. 5, 2018).

¹⁴¹ *Atala Riffo y niñas v. Chile*, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 91 (Feb. 24, 2012).

¹⁴² *Azul Rojas Marín y otra v. Perú*, Preliminary Exceptions, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 402, ¶¶ 86–95 (Mar. 12, 2020).

¹⁴³ Convention for the Protection of Human Rights and Fundamental Freedoms arts. 8, 14, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

¹⁴⁴ *Id.* at art. 14.

orientation, although different-sex couples had that right.¹⁴⁵ This was affirmed in *X v. Turkey*, where X was put in solitary confinement due to his homosexuality.¹⁴⁶

The African Commission on Human and Peoples' Rights (ACHPR) has made a limited use of the term gender, alongside sex, when referring to human rights violations against persons on the basis of real or imputed SOGI.¹⁴⁷ In fact the ACHPR has not given much treatment to SOGI discrimination and existing jurisprudence is contradictory. On one side, in *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, there is a reference in dicta to sexual orientation as grounds for discrimination under the African Charter on Human and Peoples' Rights (AChHPR).¹⁴⁸ On the other, and over the course of the 73rd Ordinary Session of the ACHPR, the regional human rights mechanism rejected the application of three NGOs defending LGBTQ+ persons for observer status and claimed that "sexual orientation is not an expressly recognised right or freedom under the African Charter, and contrary [sic] to the virtues of African values."¹⁴⁹ Consequently, and even when at first there were arguments for the illegality of SOGI discrimination under the AChHPR.¹⁵⁰ The position of the ACHPR seems now reluctant towards the inclusion of SOGI under the AChHPR protections.

There is, despite very limited ACHPR doctrine, a clear tendency within IHRL towards the inclusion of SOGI within the protected classes of nondiscrimination clauses. This is sometimes accomplished by including SOGI within the residual clause of nondiscrimination provisions and as intrinsic to other categories, such as gender or sex.

VI.2 INTERNATIONAL REFUGEE LAW

Both ICL and IRL have the common objective of tackling gender-based persecution, albeit with different approaches. While the former has an aim of accomplishing this through the punishment of perpetrators and prevention of impunity, the latter focuses on the victims of gender-based persecution and helping them reach safety in the territory of other States. However, as Oosterveld highlights, IRL has more experience with the treatment of gender-based

¹⁴⁵ *Kozak v. Poland*, App. No. 13102/02, ¶ 92 (Mar. 2, 2010), <https://hudoc.echr.coe.int/fre?i=001-97597>.

¹⁴⁶ *X v. Turkey*, App. No. 24626/09, ¶ 50 (Oct. 9, 2012), <https://hudoc.echr.coe.int/fre?i=001-113876>.

¹⁴⁷ African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], *275 Resolution on Protection against Violence and other Human Rights Violations Against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity*, Afr. Comm'n H.P.R. Doc. ACHPR/Res.275(LV)2014 (2014).

¹⁴⁸ See African Charter on Human and Peoples' Rights art. 2, June 27, 1981, 1520 U.N.T.S. 217 [hereinafter ACHPR]; *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 169 (May 15, 2006), https://achpr.org/public/Document/file/English/achpr39_245_02_eng.pdf.

¹⁴⁹ African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], Final Communiqué of the 73rd Ordinary Session Of the African Commission on Human and People's Rights, ¶ 58 (2022).

¹⁵⁰ ACHPR, IACHR, UN and University of Pretoria Centre for Human Rights, *Ending Violence and Other Human Zimbabwe Human Rights NGO Forum v. Zimbabwe*, No. 245/02, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 169 (May 15, 2006), https://achpr.org/public/Document/file/English/achpr39_245_02_eng.pdf.

persecution, having first acknowledged it in 1985.¹⁵¹ On the other hand, ICL still lacks sufficient examination of gender-based persecution, and, specifically, SOGI persecution.

I will first refer to the UN High Commissioner for Refugees (UNHCR), which created guidelines relating to gender-based persecution in 2002.¹⁵² The UNHCR affirms the intrinsic connection between SOGI and sex and gender.¹⁵³ Particularly, the organization argued that SOGI refugee claims contain a gendered element, and that this persecution is motivated by the claimant refusing to "adhere to socially or culturally defined roles or expectations of behavior attributed to his or her sex."¹⁵⁴ SOGI persecution must be included as a form of gender-based persecution because it is intrinsically linked to the claimant's (or victim's, in ICL) perceived sex/gender. Further, SOGI persecution is only made possible by the refusal to adapt to society's dictates of the roles and behaviors assigned to individuals, as a woman or a man. Additionally, these guidelines also recognize the dynamic character of gender, as opposed to sex, and highlight how gender is socially and culturally defined.¹⁵⁵

The UNHCR later confirmed these views in its Guidelines on International Protection No. 9.¹⁵⁶ In fact, the UNHCR recognizes that the 1951 Convention is to be interpreted and applied with due regard to the IHRL prohibition on discrimination for reasons of SOGI.¹⁵⁷ The Guidelines also find that SOGI-based persecution occurs not only to actual LGBTQ+ persons but also to others that might be perceived as members of the group.¹⁵⁸ Furthermore, the guidance note supplementing the UNHCR guidelines on gender-related persecution clearly affirms that LGBTQ+ persons enjoy the protection of the 1951 Convention,¹⁵⁹ when persecuted.¹⁶⁰ These guidelines also identify how SOGI persecution might find its way within the grounds specified in the 1951

¹⁵¹ Oosterveld, *supra* note 7, at 50.

¹⁵² U.N. High Comm'r for Refugees, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HRC/GIP/02/01 (May 7, 2002) [hereinafter UNHCR *Guidelines on International Protection No. 1*].

¹⁵³ *Id.* ¶ 16. Though the text does not explicitly discuss gender identity, it includes 'transsexuals or transvestites' in its discussion of persecution on the basis of sexual orientation.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* ¶ 3.

¹⁵⁶ U.N. High Comm'r for Refugees, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HRC/GIP/12/01 (Oct. 23, 2012) [hereinafter UNHCR *Guidelines on International Protection No. 9*].

¹⁵⁷ Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Convention]; *Id.* ¶ 6.

¹⁵⁸ UNHCR *Guidelines on International Protection No. 9*, *supra* note 156, ¶ 41.

¹⁵⁹ 1951 Convention, *supra* note 156.

¹⁶⁰ UNHRC, GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO SEXUAL ORIENTATION AND GENDER IDENTITY 3 (UNHRC 2008).

Convention.¹⁶¹ This would include religious¹⁶² and political grounds,¹⁶³ for instance, when the life experiences of LGBTQ+ persons run contrary to the predominant religious or political beliefs of their geographical area. More importantly, SOGI persecution could fall under the category of "membership of a particular social group."¹⁶⁴

According to the UNHCR, a particular social group exists when their members are "a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society[,]"¹⁶⁵ and whose common characteristic is usually "one which is innate, unchangeable, or which is otherwise fundamental to identity . . ."¹⁶⁶ Consequently, the LGBTQ+ community may be protected on these grounds, considering that SOGI are innate and immutable characteristics that are fundamental to one's identity.¹⁶⁷ The guidelines also recognize that it is not necessary that LGBTQ+ persons are socially visible or associated with each other.¹⁶⁸ These views were equally supported in the 2002 UNHCR gender guidelines, which include "homosexuals, transsexuals, or transvestites" within the concept of gender-based persecution as well as the recognition of gender identity as a particular social group.¹⁶⁹ As put by La Violette, "gender is relevant to LGBT asylum and refugee claims made by both men and women."¹⁷⁰

Practice gives support to UNHCR's view. Crawley and Lester, in their report for the UNHCR, give several examples of asylum being granted, exclusively or in conjunction with other reasons, to persons being persecuted for the transgression of gender-based social or religious roles.¹⁷¹ This report also includes examples of the persecution of homosexual and transgender persons, defining them as a particular social group,¹⁷² and, more generally, examples of persecution on the basis of sex.¹⁷³

Moreover, Oosterveld argues in favor of the claim maintained by the UNHCR and mentions how different domestic refugee determinations have recognized SOGI persecution as "intimately related to the socially-constructed

¹⁶¹ 1951 Convention, *supra* note 156.

¹⁶² UNHCR *Guidelines on International Protection No. 9*, *supra* note 155, ¶ 42.

¹⁶³ *Id.* ¶ 50.

¹⁶⁴ *Id.* ¶ 40.

¹⁶⁵ U.N. High Comm'r for Refugees, *Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, ¶ 11, U.N. Doc. HRC/GIP/02/02 (May 7, 2002) [hereinafter UNHCR *Guidelines on International Protection No. 2*].

¹⁶⁶ *Id.*

¹⁶⁷ UNHCR *Guidelines on International Protection No. 9*, *supra* note 156, ¶ 47.

¹⁶⁸ *Id.* ¶¶ 48–49.

¹⁶⁹ UNHCR *Guidelines on International Protection No. 1*, *supra* note 152, ¶ 30.

¹⁷⁰ Nicole LaViolette, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: a Critical Commentary*, 22 INT'L J. REFUGEE L. 173, 181 (2010).

¹⁷¹ HEAVEN CRAWLEY & TRINE LESTER, AMRE CONSULTING, *COMPARATIVE ANALYSIS OF GENDER-RELATED PERSECUTION IN NATIONAL ASYLUM LEGISLATION AND PRACTICE IN EUROPE* ¶¶ 324, 331–33 (UNHCR 2004).

¹⁷² *Id.* ¶ 374, 378, 380, 383 and 390ff.

¹⁷³ *Id.* ¶¶ 376–78.

understanding of ‘maleness’ and ‘femaleness.’”¹⁷⁴ Wilets also affirms this and considers persecution against sexual minorities an intrinsic form of gendered violence.¹⁷⁵ It is conceptually similar to other criminalized behaviors for women, such as being in a public space without a veil in certain States.¹⁷⁶ He then concludes, and I agree, that the cases of violence against sexual minorities are not so different from those more generally covered by gender-based persecution, for instance, against cisgender women showing gender non-conforming behavior.¹⁷⁷ As La Violette expresses, LGBTQ+ persons are non-conforming with respect to gender roles that are unequivocally based on a cis-heterosexual norm dictated by their perceived AGAB.¹⁷⁸ Violence and persecution against SOGI minorities is, inherently, of a gendered character, and is directly attached to the victim’s real or perceived sex or gender and the expression of their sexuality and gender identity. In summary, there has been a tendency to include LGBTQ+ persons who are persecuted on the grounds of their SOGI within the protection of the 1951 Convention,¹⁷⁹ either by considering them victims of gender-based persecution or as members of their particular social group. In the chapter immediately below, I analyze the implications of this inclusion as well as how the views of gender-based persecution within IRL might help us solve the puzzle of gender and SOGI persecution in the ICCSt.

VII. SOLVING THE PUZZLE: FITTING GENDER IDENTITY AND SEXUAL ORIENTATION WITHIN THE ICCST CONCEPT OF GENDER-BASED PERSECUTION

Recall one of the apparent common points between IHRL and IRL, that SOGI persecution targets those who exhibit behaviors defiant towards societies’ canons for gender and thereby exists beyond the cis-heterosexual norm. In this sense, a homosexual woman disrupts societal views of gender by being attracted to, or disclosing her affection towards, another woman in a way that is typically reserved to men. Similarly, a transgender person presents and behaves in society in a gendered way not compliant with society’s behavioral expectations of their AGAB. With this in mind and as outlined below, I must conclude that those who are persecuted on the basis of their SOGI are persecuted because of the manifestation of their gender and how this manifestation differs from what society expects of, in the case of the ICCSt, a “male” or a “female.”

This conception of gender as a social construct has gained overwhelming traction in IHRL and IRL, as well as within the UN system.¹⁸⁰ Within this framework, it follows that LGBTQ+ persons are discriminated against due to their

¹⁷⁴ Oosterveld, *supra* note 7, at 80.

¹⁷⁵ See James D. Wilets, *Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective*, 60 ALB. L. REV. 1, 996–97 (1997).

¹⁷⁶ *See id.*

¹⁷⁷ *See id.*

¹⁷⁸ LaViolette, *supra* note 170, at 182.

¹⁷⁹ 1951 Convention, *supra* note 157.

¹⁸⁰ *See* Chapter VI, *supra*.

performance of their own gendered experience. The field of gender studies is not indifferent to this discussion and has discussed the essence and formation of gender within human societies. One of the most authoritative voices on the topic, philosopher and gender theorist Butler, defines gender in a manner I believe is compatible with the views of IHRL and IRL examined above. Indeed, Butler considers gender "a performance with clearly punitive consequences,"¹⁸¹ and conceives gender as possibly constituting "a strategy of survival within compulsory systems."¹⁸² Gender is thus an exterior manifestation (a "*performance*") of the attributes and identity of the person, constructed from a "stylized repetition of acts," that is, of socially pre-established meanings that society considers gendered. This is a combination of "bodily gestures, movements, and styles"¹⁸³ as Butler suggests, as well as the external expression of one's SOGI. Viewing gender as performance, SOGI persecution is nothing less than gender-based persecution.

Moreover, there are legal arguments that favor the construction of gender-based persecution as including SOGI persecution and the idea of gender as a social construct. As I presented above in Chapter V, the OTP has taken the position that the ICCSt's concept of "gender" must be interpreted progressively. According to its policy papers, "gender" at the ICCSt is defined as a social construct and encompasses the roles, behaviors, activities, and attributes that are typically assigned to women and men.¹⁸⁴ These elements define the societal concepts of maleness and femaleness,¹⁸⁵ and include SOGI.¹⁸⁶ These views expressed by the OTP, while not rising to the level of law, give an important and authoritative indication of the interpretation of the ICCSt by the OTP and the legal position it may argue, should a case of gender-based persecution for SOGI reasons be pleaded before the ICC Chambers.

As Oosterveld accounts, gender-based crimes and gender-based persecution criminalize the lack of compliance with the socially constructed canons of "femaleness" or "maleness,"¹⁸⁷ thereby including SOGI persecution within the scope of gender-based crimes. Moreover, the OTP, as mentioned, recently assumed a similar definition and acknowledged the intersection of different dimensions of gender discrimination, at its intersections with race, ethnicity and culture, *inter alia*.¹⁸⁸

Another important argument favoring the concept of gender as including the social constructions that surround it, can be found in art. 21(3) of the ICCSt. IHRL seems to favor the social meaning of gender, consistently admitting SOGI

¹⁸¹ JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 139 (Routledge, Chapman & Hall 1990).

¹⁸² *Id.*

¹⁸³ *Id.* at 140.

¹⁸⁴ ICC Office of the Prosecutor 2014, *supra* note 6, ¶ 15.

¹⁸⁵ ICC Office of the Prosecutor 2022, *supra* note 6, at 3.

¹⁸⁶ *Id.* ¶ 4–5, 9,45.

¹⁸⁷ *Id.*; Valerie Oosterveld, *The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law*, 24 *Wm. & Mary J. Women & L.* 443, 448–49 (2018).

¹⁸⁸ ICC Office of the Prosecutor 2022, *supra* note 6, at 3, ¶ 27.

persecution as a form of gender-based discrimination.¹⁸⁹ The OTP also highlights this.¹⁹⁰ A proper application of art. 21(3) would lead us towards including SOGI persecution as a form of gender-based persecution. Moreover, this article has been used by the ICC Chambers in a similar fashion. For instance, the ICC had recourse to art. 21(3) in *Lubanga* to argue that victims must obtain reparations without distinction, regardless of their gender or sexual orientation or other factors.¹⁹¹

The extent to which IHRL lends support to the notion of gender as a social construct and *performance*, rather than as a biologically determined fact, is clear. This is visible in the CPCVWDV definition of gender, as well as within numerous UN human rights agencies,¹⁹² which overwhelmingly support the social definition of gender.¹⁹³ It is also visible in numerous rulings and resolutions of global and regional human rights mechanisms, as developed throughout Chapter VI. I argue these views are made relevant for the work of the ICC by the mandate of arts. 21(1)(b) and 21(3) ICCSt. Furthermore, gender as a social construction has also been welcomed in IRL, as discussed above. The ICC's application of the law and principles derived from this field of international law is similarly justified by art. 21(1)(b) ICCSt, which makes other relevant "treaties and the principles and rules of international law"¹⁹⁴ applicable when the ICCSt, the Elements of Crimes, and the Rules of Procedure and Evidence do not hold the answer for a question of law raised in the ICC.

However, I must be cautious in the application of fields of law distinct from ICL in an eventual case of gender-based persecution (and, specifically, of SOGI persecution). As the ICTY warned in *Kupreškić*, the direct application of IHRL or IRL in a criminal procedure could compromise the principle of legality.¹⁹⁵ This is why, in this case, I do not argue for a direct application of the several definitions that I have found in my study. Rather, I find that art. 7(3) ICCSt presents an interpretative dilemma that can be solved through ruling with a more or less extensive definition of gender. And it is in solving this dilemma where the ICC—when presented with the opportunity—might find the definitions developed in other fields of international law as relevant interpretative aids in crafting a final interpretation of gender under the ICCSt.

This expansive interpretation of gender in other fields of law must also be followed in aiding the ICC's interpretative task regarding the concept of gender. Not only has this expansive interpretation become the ordinary meaning of the word in international law,¹⁹⁶ but it also appears to be the best interpretation

¹⁸⁹ See Chapter VI.1, *supra*.

¹⁹⁰ *Id.* ¶ 26.

¹⁹¹ Prosecutor v. Lubanga, Case. No. ICC-95-16-T-, Decision Establishing the Principles and Procedures to Be Applied to Reparations, ¶ 191 (Jan. 14, 2000), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_07872.PDF.

¹⁹² See Chapter VI.1, *supra*.

¹⁹³ Grey et al., *supra* note 127, at 967.

¹⁹⁴ Rome Statute, *supra* note 3, at art. 21(1)(b).

¹⁹⁵ Prosecutor v. Kupreškić et al., *supra* note 74, ¶ 589

¹⁹⁶ The ordinary meaning constitutes the preferential canon of interpretation of the law of treaties. See Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

in the light of the aim and purpose of the ICC to prevent impunity for the most atrocious crimes committed by mankind.¹⁹⁷ I find it difficult to see how the ICC, by not including SOGI persecution under gender-based persecution, would rule in favor of the exclusion of sexual and gender minorities. Given that art. 7(3) of the ICCSt is deliberately ambiguous, and seeing that related fields of international law have evolved to better protect the LGBTQ+ community from gender-based persecution,¹⁹⁸ it would be even more bizarre to see the ICC rule in favor of discrimination.

In *Ntaganda*, the ICCSt, when concerned with the material elements of the crime against humanity of persecution, referred to "gender identity" as a discriminatory ground for this criminal offense, rather than solely "gender" (as in art. 7(1)(h) ICCSt) or "the two sexes" (as in art. 7(3) ICCSt).¹⁹⁹ In my opinion, the express mention of "gender identity," despite its analysis focusing on ethnic-based persecution, shows a tendency towards the view of gender as a social construct. More recently, ICC judges also participated in discussions regarding the interpretation of the concept of gender in the ICCSt, suggesting a potential openness to advance the law established under the ICCSt towards the protection of LGBTQ+ persons and, particularly, non-binary and intersex individuals.²⁰⁰ These jurisprudential mentions to the elements of persecution and the definition of "gender" under the ICCSt, coupled with the OTP policy papers on Sexual and Gender-Based Crimes and on the Crime of Gender Persecution,²⁰¹ might signal the position of the ICC Chambers, although they still have not had the opportunity to face the art. 7(3) ICCSt directly.

The expansive interpretation of gender as a ground for the crime against humanity of persecution is also in accordance with the defining characteristics of crimes against humanity. According to Luban, crimes against humanity are examples of politics gone cancerous,²⁰² simultaneously attacking individuals and groups with the structure of the state.²⁰³ Living in groups, he contends, is one of the most important, unavoidable characteristics of human beings, and attacking part of the population based on their membership in a group (in this case, the LGBTQ+ community) results in an attack on humanity itself.²⁰⁴ Using the same terms as Luban, persecution against the LGBTQ+ community, when committed by the state or in an organized manner, become political crimes, crimes resulting from politics gone cancerous.

Furthermore, following such an interpretation is also in line with the authoritative definition of crimes against humanity from post-World War II

¹⁹⁷ Rome Statute, *supra* note 3, at Preamble.

¹⁹⁸ See Chapter VI, *supra*.

¹⁹⁹ Prosecutor v. Ntaganda, *supra* note 85, ¶ 1009.

²⁰⁰ Options discussed included "broadening the interpretation of Article 7.3 of the Rome Statute." See Africa Legal Aid, Report of the 8th Meeting - Protection of Non-Binary and Intersex People under the Rome Statute: Opposing View to Dr Rosemary Grey's Presentation on Non-Binary People and the Rome Statute 8–9 (January 2023).

²⁰¹ ICC Office of the Prosecutor 2014, *supra* note 6; ICC Office of the Prosecutor 2022, *supra* note 6.

²⁰² Luban, *supra* note 2, at 116.

²⁰³ *Id.* at 117.

²⁰⁴ *Id.*

jurisprudence in the *Barbie* case. In this case, the French *Cour de Cassation* defined the crime against humanity as one committed by the ideological hegemony against those who are considered its opponents, because of their mere deviation from the norm.²⁰⁵ This is similar to the situation here with regard to the LGBTQ+ community, which suffers persecution by virtue of their non-compliance with the gender canons that are hegemonically accepted.

There is also doctrinal support for the use of an extensive definition of gender and the subsequent inclusion of LGBTQ+ persecution within gender-based persecution. According to Oosterveld, the incise "within the context of society"²⁰⁶ necessarily includes the idea of gender as a social construct and mandates the ICC to consider gender as such.²⁰⁷ Accordingly, gender-based persecution must include persecution against the LGBTQ+ community,²⁰⁸ since the violence that this community suffers is intrinsically linked with societal perceptions of femininity and masculinity. Copelon argues for the inclusion of SOGI within gender-based persecution in a similar manner.²⁰⁹ Additionally, she brings up her conviction that, in the face of two possible interpretations of the ICCSt, this ambiguity in the legal text must be resolved against discrimination and in favor of the inclusion of the LGBTQ+ community within the protection of art. 7(1)(h), in view of the aims with which the ICC was established.²¹⁰ Commentators Moore,²¹¹ Scheinert,²¹² and Kritz have reached similar conclusions.²¹³

Moreover, this extensive interpretation has recently gained some jurisprudential support. The Colombian Special Jurisdiction for Peace accredited, in April 2021, five LGBTQ+ persons as possible victims of gender-based persecution as an international crime in the context of the Colombian armed conflict.²¹⁴ The Colombian transitional jurisdiction followed an extensive interpretation of gender, including SOGI grounds for persecution within the discussed crime against humanity of gender-based persecution.²¹⁵

Finally, transgender individuals are persecuted because they do not follow the social canons that correspond to their AGAB. As a consequence, the

²⁰⁵ *Le Procureur v. Klaus Barbie*, 95166 Cour de cassation de la République française 15–16 (Ct. de Cassation de la République française, 1985) (Fr.).

²⁰⁶ Rome Statute, *supra* note 3, at art. 7(3).

²⁰⁷ Oosterveld, *supra* note 100, at 75–78.

²⁰⁸ *Id.*

²⁰⁹ Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law*, 46 MCGILL L. J. 217, 236–37 (2000).

²¹⁰ *Id.* at 237.

²¹¹ Moore, *supra* note 7, at 1329–30.

²¹² Scheinert, *supra* note 38, at 129–35.

²¹³ Kritz, *supra* note 5, at 36.

²¹⁴ Susann Aboueldahab, *Gender-Based Persecution as a Crime Against Humanity: A Milestone for LGBTI Rights Before the Colombian Special Jurisdiction for Peace*, EJIL:TALK!, (May 4, 2021), <https://www.ejiltalk.org/gender-based-persecution-as-a-crime-against-humanity-a-milestone-for-lgbti-rights-before-the-colombian-special-jurisdiction-for-peace/>.

²¹⁵ Acreditación de las Víctimas CA-01, CA-02, CA-03, CA-04 y CA-05, 202103005403 SJP ¶ 18.3 (Special Jurisdiction for Peace, 2021); *Id.*

root cause of discrimination against transgender women is the rupture they cause of canons assigned to men when they assume the role of women in society. Similarly, transgender men transgress the roles assigned to what society perceives as a woman by assuming those of men.²¹⁶

However, this interpretation leaves open the question of non-binary transgender persons, who place themselves outside the gender binary of women versus men. Kritz argues that non-binary persons might remain outside of the protection granted by art. 7 ICCSt, due to the explicit mention of males and females in subsection 3.²¹⁷ On the contrary, I argue non-binary transgender persons must be included within art. 7(3) ICCSt. Non-binary transgender people transgress societal constructs for gender by abandoning them altogether and might be persecuted equally for their lack of compliance with society's rules regarding gender. This definition is arguably compatible with the *Ntaganda* judgment, which held that, to constitute persecution, the persecuted group may be defined positively or negatively.²¹⁸ Thereby, persecution could potentially apply, not only when the perpetrator intends to explicitly persecute the LGBTQ+ community, but also when they intend to do so against non-cisgender persons, as would be the case for both binary and non-binary transgender persons.

In any case, the definition of gender under the ICCSt was deliberately construed ambiguously, based on political comity rather than legal expertise or principled reasoning.²¹⁹ A tendency favoring the view of gender as socially constructed seems to exist in international law and possibly in ICL.²²⁰ Because of these antecedents and the reasons explained throughout this Chapter, I consider the ICC should favor the definition of expansive interpretation of gender that predominates in IRL and, particularly, in IHRL. As seen above, gender does not merely refer to the biological differences between women and men. Rather it refers to the socially constructed roles and meanings assigned to women and men, a "stylized repetition of acts," of socially pre-established meanings that society considers as gendered, of which SOGI are an integral part.²²¹

²¹⁶ See, e.g., Kritz, *supra* note 5, at 36.

²¹⁷ Rome Statute, *supra* note 3, at art. 7(3); Kritz, *supra* note 5, at 36.

²¹⁸ Prosecutor v. Ntaganda, *supra* note 85, ¶ 1009. See Chapter IV, *supra*.

²¹⁹ Michael Bohlander, *Criminalising LGBT Persons Under National Criminal Law and Article 7(1)(h) and (3) of the ICC Statute*, 5 GLOB. POL'Y 401, 408 (2014).

²²⁰ See Chapters V and VI, *supra*.

²²¹ JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 140 (1990).

VIII. CONCLUSION

This paper deals with the question of whether acts of persecution committed because of the victims' SOGI could qualify as a crime against humanity of gender-based persecution, as defined by art. 7(1)(h) ICCSt. This has been a topic of great debate. Some have advocated for a limited understanding of gender-based persecution, constricting it to persecution based on the biological differences between females and males; others followed the UN and wider IHRL jurisprudence and IRL practice, which embraced the concept of gender as a social construction. This debate rendered the ICCSt ambiguous, with an uncomplicated answer nearly impossible. The issue was left for the judicial interpreter to solve.

To this day, the judicial interpreter has not given a definite answer. But the scarcity of jurisprudential references treating the persecution of the LGBTQ+ community (and, in general, gender-based persecution), at least within ICL, can be augmented by other related fields of international law, namely, IHRL and IRL. The examination, above, of these fields revealed a tendency to understand gender as a social construct.

This tendency, established in other fields of law and, arguably, within the OTP, should be put into prosecutorial practice and adopted by the ICC Chambers. I argue that art. 7(3) of the ICCSt allows for this interpretation, since even though it explicitly encapsulates the sexes, "female" and "male," it does so within "the context of society." This context is solely the mentioned social norms and canons are associated with the sexes and one's gender expression, of which SOGI forms an undeniable part. Consequently, a widespread or systematic attack on the LGBTQ+ community due to their SOGI can constitute a crime against humanity of gender-based persecution when the other elements of the crime are met. It would also represent enough protection of the LGBTQ+ community, at least within ICL. At the end of the day, persecution based on the victims' SOGI is nothing other than persecution on the basis of gender, whose root cause is the gender non-conformity manifested by the LGBTQ+ community, the breaking of the expectations that society places on each individual depending on their gender.