

HUMANITY WORTH DEFENDING? ACCOUNTABILITY FOR QUEER AND TRANS PERSONS UNDER INTERNATIONAL CRIMINAL LAW

BY VINOD BAL*

I. INTRODUCTION

In February 2017, an “anti-gay purge” was unleashed by Chechnya.¹ At least 150 persons, targeted due to their homosexuality were arrested and subjected to sexual violence, torture and extrajudicial killing.² Victims’ were taken by police who noted “[y]ou were brought here because you are faggots. You bring shame ... you shouldn’t exist.”³ The latter part of this quote demonstrates the purpose of this campaign; the regional erasure of homosexuals. The victims were held for weeks without access to their families and legal counsel.⁴ Left without food and water, they were electrocuted and beaten.⁵ Some survived, others succumbed to the fatal effects of torture or once released, honour killings by families.⁶ The persecution of queer and trans persons is a trend of history. From Roman codes prescribing execution, to Nazi Germany’s extermination of homosexuals, queer and trans persons have been persecuted since the beginning of ancient civilisation through to present.⁷ It is incontestable that persecutory harm has been done to the queer and trans community. However, what is subject to debate is if international criminal law provides accountability for this harm. This paper will consider this *problematique* and answer the question: can queer and trans persons be considered a “protected group” under art 7(1)(h) of the *Rome Statute*?

* LLB (First Class Honours) / BSocSci, University of Waikato; Co-Founder, Adhikaar Aotearoa. The author would like to thank Senior Lecturer Dr Anna Marie Brennan for her indefatigable support, supervision and encouragement.

1 Katy Steinmetz “A Victim of the Anti-Gay Purge in Chechnya Speaks Out: ‘The Truth Exists’” (26 July 2019) Time Magazine <<https://time.com/5633588/anti-gay-purge-chechnya-victim/>>.

2 Philip Oltermann “German NGO files legal case against Chechen officials over anti-gay purges” (19 April 2021) The Guardian <www.theguardian.com/world/2021/apr/18/german-ngo-files-legal-case-against-chechen-officials-over-anti-gay-purges>.

3 Wolfgang Benedek *OSCE Rapporteur’s Report under the Moscow Mechanism on alleged Human Rights Violations and Impunity in the Chechen Republic of the Russian Federation* (OSCE, ODIHR.GAL/76/18/Corr.1, December 2018) at 8.

4 At 13.

5 At 8.

6 At 12.

7 Theodosian Code 9.8.3; Rüdiger Lautmann, Erhard Vismar and Jack Nusan Porter *Sexual Politics in the Third Reich: The Persecution of the Homosexuals During the Holocaust* (Spencer Press, Newton MA, 1991).

Persecution is defined by the *Rome Statute* as the intentional deprivation of human rights due to membership in a collectivity.⁸ The substantive nature of this crime is beyond the purview of this paper; this paper will consider the definitional characteristics of art 7(1)(h). This article posits that persecution must occur “against any identifiable group or collectivity on [...] gender [...] or other grounds that are universally recognised as impermissible under international law.”⁹ This paper works from the thesis that accountability can be afforded to queer and trans persons under the grounds of “gender” and “universally recognised as impermissible under international law.”¹⁰ As such, a conception of international criminal law that promulgates equality can be realised. This is in the collective interest that humanity has in expanding the reach of international criminal law, under the enduring and universal threat that “politics will turn cancerous and the indispensable institutions of organised political life will destroy us.”¹¹

This matter is topical and as such, many are exploring the ambit of art 7(1)(h).¹² This paper offers a contribution. The gender and international law grounds provides the option of accountability to queer and trans persons. Such an argument is not new. However, the gender ground has been strengthened by recent jurisprudence that synergises sexuality and gender expression.¹³ Furthermore, recent developments in international affairs operationalise to necessitate a contemporary assessment of the protection international law provides to queer and trans persons.¹⁴ This paper intends to draw upon this new knowledge to propel this argument.

II. STORIES OF HARM – PERSECUTION OF QUEER AND TRANS FOLX

A. Introduction

International criminal law is concerned with punishing those who perpetrate the most heinous of crimes. It aims to protect the “peace, security and the well-being the world ...” and historically, has provided redress to those victims who have endured the worst of humanity.¹⁵ In spite of these principles, international criminal law has allowed persecution against queer and trans persons to go unaddressed. This state of affairs materialises notwithstanding the numerous calls for redress from victims. This chapter notes that an expansive interpretation of art 7(1)(h) of the *Rome Statute* is necessary in light of the regulatory gap that allows impunity for perpetrators of persecution against queer and trans persons. This chapter will provide the contextual framework of queer and trans

8 *Rome Statute of the International Criminal Court* 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002), art 7(2)(g). Also see Leila Nadya Sadat “Crimes Against Humanity in the Modern Age” (2013) 107 *American Journal of International Law* 334 at 352.

9 *Rome Statute of the International Criminal Court*, above n 8, art 7(1)(h).

10 Now referred to as the “gender” and “international law” grounds.

11 David Luban “A Theory of Crimes Against Humanity” (2004) 29 *Yale J Int Law* 85 at 91.

12 Valerie Oosterveld “Constructive Ambiguity and the Meaning of “Gender” for the International Criminal Court” (2014) 16 *International Feminist Journal of Politics* 563.

13 *Bostock v Clayton County* 590 US ___ (2020).

14 Samar Habib “Arab regimes’ sympathy over the Orlando massacre may seem hypocritical. But it’s a start.” (17 June 2016) *The Washington Post* <www.washingtonpost.com/news/monkey-cage/wp/2016/06/17/arab-regimes-sympathy-over-the-orlando-massacre-may-seem-hypocritical-but-its-a-start/>.

15 *Rome Statute of the International Criminal Court*, above n 8, preamble. Also see Gerhard Werle and Florian Jeßberger *Principles of International Criminal Law* (4th ed, Oxford University Press, Oxford, 2020) at 45.

persecution and a theoretical anchor on persecution; it contains purely contextual analysis that will support later legal analysis. As Desmond Tutu notes, “[e]xamining the painful past, acknowledging it and understanding it, and above all transcending it together, is the best way to guarantee that it does not-and cannot-happen again.”¹⁶ One cannot transcend the harm of persecution until redress is achieved; international criminal law can provide this.

B. *Persecution: A Brief Legal Framework*

Persecution was first identified as an international crime after the Armenian Genocide of 1915.¹⁷ It belongs to the “crimes against humanity” subset of international crimes in that it damages the innate humanity of individuals. Crimes against humanity inarguably form part of customary international law.¹⁸ As the International Criminal Tribunal for the Former Yugoslavia noted, it is 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 [...] humaneness ...”¹⁹ Persecution was only codified in the wake of World War II.²⁰ The International Military Tribunal noted persecution was “a record of consistent and systematic inhumanity on the greatest scale ...”²¹ However, it was not until the crimes of the former Yugoslavia that the substantive elements of persecution were enumerated.²² The actus reus of the crime “consists of an underlying act which discriminates in fact and must deny a fundamental human right ...”²³ The mens rea of persecution is discrimination on the basis of prohibited grounds.²⁴ An act is discriminatory “when a victim is targeted because of the victim’s membership in a group defined by the perpetrator on specific grounds ...”²⁵ It is important to note that an act is also discriminatory if it discriminates against those that the perpetrator *perceives* as carrying the identity it wants to target.²⁶

The *Rome Statute* notes that persecution is “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity...”²⁷ However, the Statute is reductive in applicability as it notes the particular groups within its ambit.²⁸ As scholar Andrew Hagopian provides, persecution within the *Rome Statute* intends to redress “the

16 David Bloomfield, Teresa Barnes and Luc Huyse *Reconciliation After Violent Conflict: A Handbook* (International Institute for Democracy and Electoral Assistance, Stockholm, 2003) at foreword.

17 Fausto Pocar “Persecution as a Crime Under International Criminal Law” (2008) 2 Natl Secur Law J 355 at 356.

18 Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal [1950] vol 2 YILC 190 at [40].

19 *Prosecutor v Erdemović (Judgement)* ICTY Appeals Chamber IT-96-22-A (7 October 1997) at [21].

20 Caroline Fournet and Clotilde Pegorier “Only One Step Away from Genocide: The Crime of Persecution in International Criminal Law” (2010) 10 Int Crim Law Rev 713 at 713.

21 Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part XXII (22 August 1946 to 31 August 1946, 30 September 1946 and 1 October 1946) at [436].

22 Ken Roberts “Striving for Definition: The Law of Persecution from its Origins to the ICTY” in Hiram Abtahi and Gideon Boas (eds) *The Dynamics of International Criminal Justice* (BRILL Publishers, Leiden, 2005).

23 Pocar “Persecution as a Crime Under International Criminal Law,” above n 17, at 358.

24 *Prosecutor v Krnojelac (Judgement)* ICTY Appeals Chamber ICTY-95-25-A, 17 September 2003 at [185].

25 *Prosecutor v Kaing Guek Eav alias Duch (Judgement)* ECCC Trial Chamber 001/18-07-2007/ECCC/TC (26 July 2010) at [377].

26 *Prosecutor v Naletilic and Martinovic (Judgement)* ICTY Trial Chamber IT-98-34 (31 March 2003) at [636].

27 *Rome Statute of the International Criminal Court*, above n 8.

28 See Introduction.

specific harm that is caused when individuals are targeted for the simple fact of their membership within a group.”²⁹

1. Historical persecution and impunity: queer and trans persons under the Nazi Regime

The Nazi regime represented a modern iteration of persecution against queer and trans persons.³⁰ In 1935, the regime decreed the “compulsory sterilisation [...] of homosexuals along with [...] other ‘degenerates.’”³¹ Utilising Paragraph 175 of the German Criminal Code, which criminalised consensual male same-sex relations, the Nazi’s ramped up their persecution and sentencing of gay men.³² In 1942, the Nazi’s instituted the death penalty.³³ Between 1933 and 1945, at least 100,000 gay men were arrested. Many of these men spent time in regular prisons, however, an estimated 5,000-15,000 men were incarcerated in concentration camps.³⁴ The death rate for gay men in such camps was as high as 60 per cent.³⁵ The persecution that gay men faced was particularly brutal. In one case, five homosexual prisoners at Sachsenhausen Concentration Camp were rounded up and immobilised by guards. The guards proceeded to put water hoses down the victims’ throats and turned the tap on full; the victims drowned.³⁶ They were then turned upside down and had their throats slit to drain the water.

Instead of redress for the victims, there was an effacement of their suffering. The Nuremberg Tribunal did not charge Nazi generals for their crimes against homosexuals; “[t]his omission, in effect, silently legitimized these crimes.”³⁷ The lack of justice “served to continue victims’ silence and humiliation”.³⁸ The harm committed against and queer and trans community was left unaddressed; justice can never be achieved when victims are window-picked for redress. It was only in 2006, 61 years after the end of the Nazi regime, that the European Parliament acknowledged the atrocities committed towards the homosexual community.³⁹ When impunity reigns, deterrence is not realised and persecution is more likely to be repeated. The Nuremberg omission tacitly sent a message: queer and trans persons did not possess humanity worth providing accountability for. In

29 Andrew Sumner Hagopian “Persecution and Protection of Sexual and Gender Minorities under Article 7(1)(h) of the Rome Statute” (2016) 3 SOAS LJ 55 at 56.

30 The author notes that although the main reference of Nazi persecution is to “gay men,” lesbians, transgender persons and gender-nonconforming folx were also subject to persecution. This paper recognises that gay men were the predominant victims, however it does not intend to reproduce the erasure that the gay community was initially inflicted with; see Clayton Whisnant *Queer Identities and Politics in Germany: A History, 1880–1945* (Harrington Park Press, New York, 2016).

31 Heinz Heger *The Men with the Pink Triangle: The True Life-and-Death Story of Homosexuals in the Nazi Death Camps* (Alyson Books, New York City, 1994) at 12.

32 German Criminal Code §175 StGB.

33 Alycia T Feindel “Reconciling Sexual Orientation: Creating a Definition of Genocide that Includes Sexual Orientation” (2005) 13 Mich State J Int Law 197.

34 Erwin J Haeberle “Swastika, Pink Triangle and Yellow Star – The Destruction of Sexology and the Persecution of Homosexuals in Nazi Germany” (1981) 17 J Sex Res 270.

35 Lautmann, Vismar and Porter *Sexual Politics in the Third Reich: The Persecution of the Homosexuals During the Holocaust*, above n 7.

36 Geoffrey J Giles *Why Bother About Homosexuals? Homophobia and Sexual Politics in Nazi Germany* (United States Holocaust Memorial Museum, Washington D.C., 2001) at 3.

37 At 198.

38 At 198.

39 *European Parliament resolution on homophobia in Europe* P6 TA(2006)0018 at [14].

a world hostile towards the will of queer and trans persons to live authentically, letting perpetrators of persecution have impunity adds the last touch to their work. Therein lies the necessity of an expansive interpretation of art 7(1)(h); ensuring those most vulnerable have recourse to justice.

2. *Contemporary persecution and a missed opportunity: queer and trans persons under the ISIS Regime*

Armed with digital savviness and influenced by an anachronistic interpretation of religion, ISIS, a terrorist group based in Syria, had a special hatred of queer and trans persons. The group situates itself in opposition to “America and Western Europe,” which they characterise by “bestiality, transgenderism, sodomy, pornography, feminism, and other evils.”⁴⁰ According to the group, “sodomites” represent sexual perversion and are consequently worthy of death.⁴¹

ISIS’ persecution of queer and trans persons is founded in their conflation of gender expression with sexuality; “LGBT persons or those perceived as such [...] those [...] perceived as stepping outside of traditional gender roles were targeted ...”⁴² For example, wearing skinny jeans or tight clothing, attires attributed with homosexuality was criminalised.⁴³ Furthermore, the group forbid men shaving their beards because “no one does this except men who are effeminate.”⁴⁴ In any case, real or perceived homosexuality for females and males was punished via execution.⁴⁵ On 19 April 2016, the group threw a blindfolded victim off a building due to alleged homosexuality.⁴⁶ One month later, ISIS arrested, raped and executed three under-16-year-olds by immolation, on “charges” of homosexuality.⁴⁷ Later, the group put four men into a “rectangular hole [...] and tied [them] to each other with metal chains. They then put benzene on them and burned them.”⁴⁸

There is no lacuna of evidence to disprove ISIS’ persecution of queer and trans persons. In spite of this, there has been no redress. Furthermore, while the Prosecutor of the ICC, Fatou Bensouda noted that “[t]he atrocities allegedly committed by ISIS undoubtedly constitute serious crimes of concern to the international community ...” the Court has been inert, reproducing the same erasure

40 “The Fitrah of Mankind and the Near-Extinction of the Western Woman” *Dabiq* 15 (ISIS-occupied Syria) at 20.

41 At 20.

42 *Violence and Discrimination based on Sexual Orientation and Gender Identity in Iraq: A submission to the United Nations Human Rights Council for the Universal Periodic Review of IRAQ, Thirty-fourth Session of the UPR Working Group of the Human Rights Council* (IraQueer, MADRE and OutRight Action International, March 2019) at [17].

43 Morgan Winsor “ISIS Bans Skinny Jeans: Islamic State Arrests Men Caught Wearing Tight Pants in Raqqa” (4 March 2015) *International Business Times* <www.ibtimes.com/isis-bans-skinny-jeans-islamic-state-arrests-men-caught-wearing-tight-pants-raqqa-1869358>.

44 Johnlee Varghese “Isis Bans Men from Shaving, Says Those Without Beard are Effeminate” (30 April 2015) *International Business Times* <www.ibtimes.co.in/iraq-isis-bans-men-shaving-beard-mosul-says-those-who-do-so-are-effeminate-630922>.

45 Michael Lavers “Report: Islamic State Executes Teenager for ‘Homosexuality’” (3 January 2016) *Washington Blade* <www.washingtonblade.com/2016/01/03/report-islamic-state-executes-teenager-for-homosexuality/>.

46 “Timeline of Publicized Executions for Alleged Sodomy by the Islamic State Militias” (June 30 2016) OutRight International <<https://outrightinternational.org/content/timeline-publicized-executions-alleged-sodomy-islamic-state-militias>>.

47 *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* (CUNY School of Law, MADRE and OWFI, 2017) at 29.

48 At 30.

of suffering that Nuremberg did.⁴⁹ This paper appreciates the challenges to prosecuting ISIS, namely issues of collective responsibility, however, “[t]he complete lack of criminal accountability sends a clear message to ISIS forces that there will be no repercussions for the widespread, directed, and documented commission of barbarous acts...”⁵⁰ The non-prosecution of ISIS members is a missed opportunity to expand the ambit of the *Rome Statute*. The inaction of the ICC calls into question the effectiveness of the institution as an enterprise of international justice.

3. *Ongoing persecution and a chance for redress: queer and trans persons under the Chechnyan regime*

Chechnya has been highlighted for their vicious persecution of queer and trans persons. Since the 15th century, the region has been irredentist. Masculinity exhibited through brute force has been instrumental in securing the region; to not be masculine is to not be Chechen. As such, hypermasculinity is the prescribed form of patriotism.⁵¹ As the Chechen head of police notes, “[a]s a people, we don’t like softness [...] it is a really terrible disgrace.”⁵² The official posits that to be gay is to be “soft” and this is opposition to the hypermasculinity that is prescribed.

The persecution of queer and trans persons in Chechnya has been state practice since 2017. In February of that year, reports came out of the region noting “persecution, unlawful arrests, torture, sexual violence and incitement to murder ...” had been perpetrated against at least 150 queer and trans folk.⁵³ The police tortured victims via electric shocks and beatings. Some survived while other succumbed to their injuries. Those who did survive were taken to their families, some of whom, committed “honour killings” at the behest of the state; a 17-year-old gay teenager was fatally thrown by his uncle from a ninth-story window to “salvage the family’s honour.”⁵⁴ In the words of one witness, the message of the police was clear: “[e]ither you kill your kid or we will do it for you.”⁵⁵ The centrality of media focus on gay men is due to the fact that “they had the ability and freedom to leave the country that the women are not afforded”.⁵⁶ There are many reports that state forces raped and killed lesbians in the country, however, “the main punishment seems to have been” male family members raping the victims in the hope that they would become heterosexual.⁵⁷ Such persecution is ongoing and extraterritorial. In April of 2021, Chechnyan agents kidnapped two gay men who escaped to a safehouse in central Russia. In a concerning twist, Chechnya has

49 Office of the Prosecutor of the International Criminal Court *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS* (Statement, 8 April 2015).

50 *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*, above n 47, at 3.

51 Dominic Scicchitano “The “Real” Chechen Man: Conceptions of Religion, Nature, and Gender and the Persecution of Sexual Minorities in Postwar Chechnya” (2019) 68 *J Homosex* 1545.

52 James Longman “Nightline: Am I Next? Gay and Targeted in Chechnya” ABC News (24 October 2019).

53 Oltermann “German NGO files legal case against Chechen officials over anti-gay purges,” above n 2.

54 “Chechnya accused of ‘gay genocide’ in ICC complaint” (16 May 2017) BBC <www.bbc.com/news/world-europe-39937107>.

55 Benedek *OSCE Rapporteur’s Report under the Moscow Mechanism on alleged Human Rights Violations and Impunity in the Chechen Republic of the Russian Federation*, above n 3, at 14.

56 Masha Gessen “The Year Russian L.G.B.T Persecution Defied Belief” (29 December 2017) *The New Yorker* <www.newyorker.com/culture/2017-in-review/the-year-russian-lgbt-persecution-defied-belief>.

57 Benedek *OSCE Rapporteur’s Report under the Moscow Mechanism on alleged Human Rights Violations and Impunity in the Chechen Republic of the Russian Federation*, above n 3, at 14.

granted the two men “state protection,” rather ironically considering the threat comes from the state.⁵⁸

In 2017, the ICC received communications from NGOs asking the Court try state leaders for their role in the persecution.⁵⁹ There has been no action, however the opportunity for redress still exists; negating impunity is imperative. Considering the ongoing nature of such persecution, only more evidence will be yielded. All that is required for action to be taken, is for the prosecutor to uptake a case based upon the legal assessments that will be provided in subsequent chapters.

C. Conclusion

Judge Posner of the US District Court for the District of Massachusetts held “persecution of LGBTI people constitutes a crime against humanity...”⁶⁰ The temerity of the Court in pronouncing this is not reflected in the international arena. The failure to allow accountability for queer and trans persons under art 7(1)(h) provides “disparate protection to victims of massive human rights violations on arbitrary grounds.”⁶¹ If international criminal law wants to provide a “free pass merely because the group [persecuted] consists of gays [...] rather than Jews or Tutsis...” then that calls into question whether or not the world should be looking to the ICC as an avenue of international justice.⁶²

III. ACCOUNTABILITY FOR QUEER AND TRANS FOLX UNDER “GENDER”

A. Introduction

Article 7(1)(h) of the *Rome Statute* provides that “gender” is an “identifiable group or collectivity” that international criminal law enables accountability for.⁶³ This chapter proposes gender, as defined by art 7(3) of the *Rome Statute*, can encompass gender and sexual minorities.⁶⁴ In doing so, it argues that queer and trans persons, currently afflicted by a lack of accountability mechanisms, will be afforded one. The chapter relies upon the notion that art 7(3) is a result of “constructive ambiguity” and as such, alternative meanings can be posited and accepted by the ICC. Furthermore, the chapter uses knowledge from gender studies to make the argument that to persecute on the basis of queerness or being transgender, one must first persecute on the basis of gender. The result of such an argument is gender and sexual minorities being subsumed under art 7(1)(h) and afforded accountability.

58 “Chechnya Grants State Protection to ‘Kidnapped’ Gay Men – Reports” (29 April 2021) The Moscow Times <www.themoscowtimes.com/2021/04/29/chechnya-grants-state-protection-to-kidnapped-gay-men-reports-a73779>.

59 “Chechnya accused of ‘gay genocide’ in ICC complaint,” above n 54.

60 *Sexual Minorities Uganda (SMUG) v Lively* 960 F 2d 304 (D Mass 2013).

61 Beth Van Schaack “The Crime of Political Genocide: Repairing the Genocide Convention’s Blind Spot” (1997) 106 Yale LJ 2259 at 2268.

62 Luban “A Theory of Crimes Against Humanity,” above n 11, at 106.

63 *Rome Statute of the International Criminal Court*, above n 8, art 7(1)(h).

64 *Rome Statute of the International Criminal Court*, above n 8, art 7(3): “[f]or 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.”

B. Accountability for Queer and Trans Folx Under “Gender:” The Argument

The argument that “gender” includes sexual and gender minorities is not without debate. One scholar notes that “[d]ebates in Rome resulted in [the adoption of] a limit[ed] definition.”⁶⁵ Another scholar notes this definition means “homosexual provisions are excluded.”⁶⁶ In the opposite, another notes that the definition does not “implicitly preclude “gender” from encompassing sexual orientation” a nod to the *ejusdem generis* nature of art 7(1)(h).⁶⁷ The scholarly disagreement regarding the meaning of “gender” is in line with the negotiating strategy adopted by states during the drafting of the *Rome Statute* that scholar Valerie Oosterveld terms “constructive ambiguity.”⁶⁸ Such a tactic refers to the use of “compromise[d] language [which is] crafted to appease two irreconcilable points of view, both sides may assert that the definition as adopted reflects their understanding of the term.”⁶⁹ As is the case with any international agreement, drafting is a process of appeasing both liberal and conservative states. The drafting of the *Rome Statute* was no different with “indefinite language used to resolve disparate points of view.”⁷⁰ The Vatican, several Arab states and conservative NGOs attempted to remove “gender” totally during drafting.⁷¹ The concern here was that the term “gender” would be used to encompass sexual orientation and that the term “evoked thoughts of gender roles and each genders’ place in society.”⁷² These were considerations that conservatives wished to exclude from the *Rome Statute*.⁷³ In the end, art 7(3)’s reference to “the two sexes, male and female” was a compromise intended to placate conservative states while the reference to gender “within the context of society” was a concession to feminist groups who wanted “gender” to include sociological considerations.⁷⁴ The result of this ambiguity is that “the issue remains under the purview of the Court” and as such, the Court has the power to subscribe to the reasoning proposed below.⁷⁵

65 Stephanie Farior “The Rights of Women in International Human Rights Law Textbooks: Segregation, Integration, or Omission?” (2003) 12 CJGL 587 at 589.

66 Rana Lehr-Lehnardt “One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court” (2002) 16 BYU J Pub L 317 at 340 and 351.

67 Valerie Oosterveld “The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?” (2005) 18 Harv Hum Rights J 55 at 77.

68 Oosterveld “Constructive Ambiguity and the Meaning of “Gender” for the International Criminal Court,” above n 12.

69 Leila Nayda Sadat *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (Martinus Nijhoff Publishers, Leiden, 2002) at 160.

70 Oosterveld “Constructive Ambiguity and the Meaning of “Gender” for the International Criminal Court,” above n 12, at 563.

71 Joydeep Sengupta “How the UN Can Advance Gay Rights” (2002) Nov–Dec Gay & Lesbian Rev at 32.

72 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” (2017) 101 Minn L Rev 1987 at 1290-1291.

73 Rhonda Copelon “Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law” (2000) 46 McGill Law J 217 at 236.

74 Brian Kritz “The Global Transgender Population and the International Criminal Court” (2014) 17 Yale HR & Dev LJ 1 at 36.

75 Hagopian “Persecution and Protection of Sexual and Gender Minorities under Article 7(1)(h) of the Rome Statute,” above n 29, at fn 26.

Gender as defined by art 7(3) of the *Rome Statute* is described as “stunningly narrow,”⁷⁶ while others have argued that it erroneously “elides the notions of ‘gender’ and ‘sex.’”⁷⁷ There is no agreed-upon meaning. This presents an opportunity to provide an alternative explanation. The proposition of this chapter is simple: that gender, as per art 7(3) can be conflated with being queer and/or trans. In essence, being persecuted against based upon being queer and/or transgender, is to be persecuted against based upon transgressing normative gender expectations. Therefore, a persecutor inadvertently persecutes on the basis of gender and thus, the ambit of the *Rome Statute* is extended.

It is contended that the alternative meaning opined above is given credence by its elucidation in the case of *Bostock v Clayton County* decided by the United States Supreme Court.⁷⁸ Justice Neil Gorsuch, regarding whether federal anti-discrimination laws apply to transgender and homosexual persons, utilises such reasoning; “[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex.”⁷⁹ Such a rationale speaks to the link that homosexuality or being transgender has with ascribed gender roles and modalities of gender expression. To persecute against someone based upon them being homosexual and/or transgender, first, one must make an assessment of their victim’s gender expression and role. If they are transgressing such expression and their gender role, by for example, wearing tight clothes or speaking effeminately, characteristics commonly stereotyped to queerness or being transgender, they would be considered homosexual and/or transgender (even if they are not) and subjected to persecution. To elucidate further, one must interrogate gender roles. For example, “in most if not all societies, the role of women is primarily based on their ascribed functions as wives and mothers.”⁸⁰ Women who diverge from this ascribed role often face prejudice; this is gender-based discrimination. The same rationale is applied to queer and trans folk. The key consideration around whether one is queer and/or transgender comes from if the person commits a “gender role violation,” in essence, acting beyond what is expected of their gender identity. The result of this is categorisation, either correct or not, as a homosexual or transgender individual; “[w]hen people violate certain social role norms, they risk [...] categorization into a stigmatized group.”⁸¹ For clarity, it is submitted by this paper that when one commits a “gender role violation,” they then are identified as queer and/or transgender and subjected to persecution. Anthropologist Geoffrey Gorer notes “[a]ny interest or pursuit which is identified as [...] feminine [...] becomes deeply suspect for a man.”⁸² In Nazi Germany, in ISIS-occupied territory and in Chechnya, such a pursuit, was and is not just suspect, but causative of persecution. Gender must be considered when one persecutes queer and/or transgender persons. As this argument was promulgated by the United States Supreme Court it needs to be considered by the ICC with the highest deference. This is especially so considering the “infant nature of the

76 Brenda Cossman “Gender Performance, Sexual Subjects and International Law” (2002) 15 Can JL & Jur 281 at 283.

77 Hilary Charlesworth “Feminist Methods in International Law” (1999) 93 Am J Int Law 379 at 394.

78 *Bostock v Clayton County*, above n 13.

79 At 2.

80 Barbara Bedont “Gender-Specific Provisions in the Statute of the International Criminal Court” in Favlia Lattanzi and William Schabas (eds) *Essays on the Rome Statute* (il Sirente, Ripa di Fagnano Alto, 1999) 183 at 187–188.

81 Jennifer K Bosson, Jenel N Taylor and Jennifer L Prewitt-Freilino “Gender Role Violations and Identity Misclassification: The Roles of Audience and Actor Variables” (2006) 55 Sex Roles 13 at 13.

82 Geoffrey Gorer *The American People: A Study in National Character* (Norton, New York, 1948) at 129.

ICC” necessitating it to “look to human rights courts that have encountered cases involving ... the LGBT community.”⁸³

The applicability of such reasoning lies in its application to circumstances of persecution against queer and trans persons. As noted in chapter one, ISIS’s persecution of queer and trans folx was based upon their eddying of gender expression with sexuality and gender identity. For example, those who wore skinny jeans, adorned western haircuts and who did not or could not grow their beards, were considered to be homosexual and persecuted. Cardinal in ISIS’s persecution of queer and trans persons were rigid standards of prescribed gender expression and expectations. It is the transgression of such standards that triggered the group’s persecution of a queer or transgender individual.⁸⁴ This reasoning is also applicable to Chechnya’s ongoing persecution of homosexuals. As one victim of persecution in the region notes, “[t]hey have to be warriors, straight, sportsmen. Being gay is just not acceptable for them.”⁸⁵ Implicit in Chechnya’s persecution of homosexuals is the transgression of masculinity as defined by warriorship and heterosexuality. Derogation from this masculinity speaks to possible homosexual tendencies in the mind of persecutors; persecution of queer and trans persons, is persecution on the basis of gender.

C. Realising the Argument: Ameliorating Challenges and Recognising Strengths

While “gender” can provide accountability for queer and trans persons, such an assessment would be incomplete without ameliorating the challenges to this assertion and recognising its strengths. First, the drafting history of the *Rome Statute* will be assessed. Article 32 of the *Vienna Convention on the Law of Treaties* notes that if interpretation renders the meaning of a passage ambiguous then the drafting history can be used as a supplementary means of interpretation.⁸⁶ The drafting history of art 7(3) is indicative of the strategy of “constructive ambiguity” noted above. Some states argued that the *Rome Statute* should have adopted the United Nations (UN) definition of gender.⁸⁷ This definition has three characteristics: 1) gender is socially constructed; 2) it is influenced by culture and gender roles; and 3) gender varies temporally and geographically.⁸⁸ However, conservative states opposed such a move as “they feared it could be interpreted to mean that laws outlawing homosexuality would be criminal.”⁸⁹ Beyond this consternation, conservative states had reservations regarding the definition that was agreed upon. The Azerbaijan delegate was concerned about “the use of the word “gender”” and asked if it “impl[ied] that a conviction

83 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,” above n 72, at 1290–1291.

84 *Violence and Discrimination based on Sexual Orientation and Gender Identity in Iraq: A submission to the United Nations Human Rights Council for the Universal Periodic Review of IRAQ, Thirty-fourth Session of the UPR Working Group of the Human Rights Council*, above n 42, at [17].

85 “Chechnya gay rights: Putin backs inquiry into hate crimes” (5 May 2017) BBC <www.bbc.com/news/world-europe-39823237>.

86 *Vienna Convention on the Law of Treaties* 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 32.

87 Sadat *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*, above n 69.

88 Oosterveld, “The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?,” above n 67, at 67–70.

89 Sadat *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*, above n 69, at 160.

by a national court for homosexual acts might be regarded as persecution and thus fall within the jurisdiction of the Court as a crime against humanity?”⁹⁰ In the view of Qatar’s delegate, “gender” referred to “both males and females” and excluded any abstraction of queer and trans persons.⁹¹ These conservative states were apprehensive towards the use of “gender,” however, the reference to the “two sexes” placated them. The drafting history of the *Rome Statute* offers no challenge to the assertion that “gender” can encompass sexual and gender minorities. In fact, it supports the notion that “constructive ambiguity” was the result. As such, alternative meanings can be founded and ICC judges can determine the quagmire at a later stage; “the drafting history does not offer any findings”.⁹²

International legal positivists assert that as the *Rome Statute* does not explicitly note queer and trans persons within art 7(1)(h), that they are to be excluded from its reach.⁹³ Such an assertion is incorrect. There is precedent for non-enumerated categories to be brought into the purview of criminal tribunals. The Trial Chamber of the International Criminal Tribunal for Rwanda noted that rape and sexual violence constituted genocide, despite these two concepts not being enumerated in the relevant instrument.⁹⁴ What the Chamber noted was necessary, was a nexus between the harm and the specific intent, a key characteristic of the crime of genocide. This rationale can be applied here. Take the circumstance of persecution of homosexuals in Chechnya. The harm against them, inclusive of torture and summary execution, has a direct nexus with the key characteristic of the crime of persecution, the denial of fundamental human rights due to membership within a group. The nexus between the two is evident and as such, the same rationale applied in *Akayesu* can be applied here.

To provide credence to the “gender” argument, one must look to how the Office of the Prosecutor considers sexual orientation in the Office’s *Paper on Sexual and Gender-Based Crimes*. First of all, it is important to note that the Office views gender in the same way that the argument proposes; inclusive of sociological considerations. They note gender as per art 7(3) “acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men”.⁹⁵ This holistic view of gender enables the transgression of gender roles, in lieu of sexuality, to be considered. The Office provides further deference to this argument when noting that “gender-based crimes are those committed against persons, whether male or female, because of their sex and/or socially constructed gender roles.”⁹⁶ Evident in this statement is that gender-based crimes, which are included in the ambit of art 7(3), can be used as guise

90 *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court: Summary records of the plenary meetings and of the meetings of the Committee of the Whole* A/CONF.183/13 (15 June –17 July 1998) at [61].

91 At [84].

92 Valérie V Suhr “Rainbow Jurisdiction of the International Criminal Court? Gender-based Persecution of Gays, Bisexuals and Lesbians as a Crime Against Humanity” (12 March 2018) *Völkerrechtsblog* <<https://voelkerrechtsblog.org/de/rainbow-jurisdiction-of-the-international-criminal-court/>>.

93 *Sexual Orientation, Gender Identity and International Human Rights Law* (International Commission of Jurists, Practitioners Guide No. 4, 2009) at 29.

94 *Prosecutor v Jean-Paul Akayesu (Judgement)* ICTR Trial Chamber I ICTR-96-4-T (2 September 1998) at [731].

95 The Office of the Prosecutor of the International Criminal Court *Paper on Sexual and Gender-Based Crimes* (International Criminal Court, June 2014) at 3.

96 At 3.

when prosecuting those who persecute on the basis of “socially constructed gender roles.”⁹⁷ By considering gender beyond the binary of male and female, the Office of the Prosecutor opens up the possibility to prosecute the likes of Chechnya where the main impediment is considered to be a lack of jurisdiction. The Office also posits that the Prosecutor must understand “the intersection of factors such as gender ... sexual orientation, and other status or identities which may give rise to multiple forms of discrimination and social inequalities”.⁹⁸ The Office’s support of gender as including sociological considerations gives credence to the argument. While the *Paper on Sexual and Gender-Based Crimes* only guides the Prosecutor, it does show the understanding of the Office regarding gender and this is of scholarly use.⁹⁹

A substantial barrier to the gender argument is the *nullum crimen sine lege* principle as prescribed by art 22. Saliently for the purposes of this paper, it prohibits unwritten criminal provisions by extension by analogy. It may be considered that gender encompassing queerness and being transgender is extension by analogy and therefore, would be prohibited. This paper does not argue for persecution to be prosecuted on the basis of queerness or being transgender; these are groups not within the ambit of the *Rome Statute* and the Prosecutor would be acting *ultra vires* if these were the grounds of prosecution. Article 22 would prevent this also. What this paper argues is that persecution against sexual and gender minorities involves the transgressing of normative gender roles. As such, prosecution would occur on the basis of gender and therefore, analogy is not required; “[t]he prohibition of analogy poses no problem where crimes committed based on sexual orientation will be prosecuted as gender-based persecution.”¹⁰⁰

It is important to tease out the significance of this argument to those who are of lesser-known sexual and gender minorities such as non-binary, agender or intersex persons. Scholars note that as art 7(3) explicitly refers to “the two sexes” that only those sexual and gender minorities that identify within the binary are afforded a mechanism of accountability. Under such a conception, homosexuals, lesbians and transgender persons are afforded such a mechanism, however who “do not have a gender identity or refuse to be classified as male or female” are not.¹⁰¹ This paper disagrees with this assertion. First and foremost, if a strategy for queer and trans persons is to be conceptualised, scholars must endeavour to be as inclusive as possible. The same academic exercise of attempting to expand accountability for queer and trans persons from art 7(1)(h) should not have to occur again for lesser-known identities. It is contended that considering the lack of understanding that such lesser-known identities possess in society, “[t]o be transgender or gender non-binary is to be ‘gay’.”¹⁰² Obviously, counsel must ascertain from the persecutor, the target group of persecution, however, the eddying of non-binary identities with queerness presents an opportunity to such groups to fall within the ambit of the *Rome Statute*. For the purposes of

97 At 3.

98 At [27].

99 Valerie Oosterveld “The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law” (2018) 24 *Wm & Mary J Women & L* 443 at 446.

100 Suhr “Rainbow Jurisdiction of the International Criminal Court? Gender-based Persecution of Gays, Bisexuals and Lesbians as a Crime Against Humanity,” above n 92.

101 Kritz “The Global Transgender Population and the International Criminal Court,” above n 72, at 36.

102 Chloe Schwenke “A Transgender Perspective on Human Rights: The Case of the World Bank and the United States Agency for International Development” in J Michael Ryan (Ed) *Trans Lives in a Globalizing World: Rights, Identities, and Politics* (Routledge, Abingdon-on-Thames, 2020) 128 at 133.

international criminal law, it is the perpetrator who defines their victim's status as a member of a certain collectivity. As the ICC noted in the *Kenya Situation*, attacks on ethnic groups based on their "assumed political allegiance ... does not diminish the fact that the identification of the targeted population was essentially on political grounds."¹⁰³ As such, it is contended that, based upon the proviso that a persecutor has defined a non-binary person as gay, lesbian or transgender, that an accountability mechanism can be afforded to them. Such an argument is qualified; however, it works to fill the lacuna that currently exists.

D. Conclusion

As one scholar notes, "[w]ithout action from the Office of the Prosecutor... it is unlikely that any case will be brought in front of the ICC seeking to prosecute persecutors of the LGBT community ..."¹⁰⁴ This represents an affront to the suffering of queer and trans persons. However, action from the Office of the Prosecutor will enable victims to achieve a sense of justice. As outlined above, it is well within the powers of the Prosecutor to conflate gender with queerness and being transgender, and expand the ambit of art 7(1)(h). It is important to note that this is only a stepping stone; a remedial measure to ameliorate impunity. Using gender as a guise to provide justice to queer and trans folx is an insult to their true identities and reproduces the erasure they have already been subjected to. Furthermore, conflating gender expression and sexual identity does nothing to assist those who wish to express their gender in non-normative ways but who still identify as heterosexual. This solution is a band-aid; longer lasting reform that appreciates the true identities of victims is needed.

IV. ACCOUNTABILITY FOR QUEER AND TRANS FOLX UNDER "INTERNATIONAL LAW"

A. Introduction

Article 7(1)(h) of the *Rome Statute* notes that an "identifiable group or collectivity" is "other grounds that are universally recognized as impermissible under international law."¹⁰⁵ Essentially, this enables other non-listed collectivities to fall within the ambit of the *Rome Statute* – if the collectivity falls within the protectory ambit of international law. This chapter proposes that queer and trans persons are a collectivity that international law, has afforded protection. As such, this collectivity will be covered by art 7(1)(h) of the *Rome Statute* and validate the central thesis of this paper; queer and trans persons can be afforded accountability by international criminal law.

103 *Prosecutor v Uhuru Muigai Kenyatta (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute)* ICC Pre-Trial Chamber II ICC-01/09-02/11-382-Red (29 January 2012) at [144].

104 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," above n 72, at 1289.

105 *Rome Statute of the International Criminal Court*, above n 8, art 7(1)(h).

B. Accountability for Queer and Trans Folx under “International Law:” The Argument

As the International Commission of Jurists notes “[t]here is a radical positivist assertion that no protection of “sexual orientation” or “gender identity” exists in international human rights law”.¹⁰⁶ Such an argument would have had credence in the nascent stages of international law. However, international law has developed and protection has been afforded to queer and trans persons. It is a domestic court that provides the clear and explicit noting of this. Referring to an evangelical’s “actions in aiding and abetting efforts to demonize, intimidate, and injure LGBTI people,” Judge Posner in *Sexual Minorities Uganda (SMUG) v Lively*, poses a rhetorical statement of whether such actions “constitute violations of international law.” He answers, “[t]hey do.”¹⁰⁷ It is in the esprit of Judge Posner’s assertion that international law provides protection to queer and trans persons that this paper argues upon.

It must be noted that in conjunction with art 7(1)(h), the *Rome Statute* itself, is “friendly” towards international law. Essentially what this means is that interpretation of articles in the Statute *should* concur with the general principles of international law. Provisions of the Statute note this. For example, art 21(1)(b) provides that after the *Rome Statute* and its corresponding documents, “applicable treaties and the principles and rules of international law” are to be applicable to the Court.¹⁰⁸ Furthermore, art 21(3) provides that interpretation of the Statute in congruence with “internationally recognised human rights” and without “adverse distinction” to a variety of categories, saliently “gender . . . or other status,” must occur.¹⁰⁹ As has been shown, the *Rome Statute* relies heavily upon international law and non-discrimination; this reliance provides credence to the argument. The explicit mention of arts 21(1)(b) and 21(3) synergise to instruct judges of the ICC to ensure international law, human rights and the principle of non-discrimination are instruments of statutory interpretation and construction. This starting point affirms art 7(1)(h) and provides that if international law, human rights and the principle of non-discrimination protect queer and trans persons, so does the *Rome Statute*.

Numerous scholars have argued that international refugee law is a body of law that is most applicable to questions relating to art 7(1)(h).¹¹⁰ This is in light of the fact that persecution is often a key cause of refugee movements. As such, international refugee law has considered whether persecution on the basis of being queer and/or trans, comes within its protectory ambit. International refugee law is clear; it does. The United Nations High Commissioner for Refugees (UNCHR) Gender Guidelines notes that persecution on the basis of sexual orientation necessarily is persecution on the basis of gender.¹¹¹ As such, the UNCHR noted that those persons persecuted due to their sexual orientation can be afforded protection under international refugee law. In 2012, the UNCHR expanded this protection to trans persons, noting that persecution against them can

106 *Sexual Orientation, Gender Identity and International Human Rights Law*, above n 93, at 29.

107 *Sexual Minorities Uganda (SMUG) v Lively* 254 F 2d 262 (D Mass 2017).

108 *Rome Statute of the International Criminal Court*, above n 8, art 21(1)(b).

109 *Rome Statute of the International Criminal Court*, above n 8, art 21(3).

110 Valerie Oosterveld “Gender, Persecution, and the International Criminal Court: Refugee Law’s Relevance to the Crime Against Humanity of Gender-Based Persecution” (2006) 17 DJCIL 49.

111 *UNHCR Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Statutes of Refugees* HCR/GIP/02/01 (7 May 2002) at [16].

occur because they challenge normative expectations of their sex.¹¹³ Hence, international refugee law has enabled queer and trans persons to be protected. If the ICC does not take the same interpretation, it would be in violation of the *Rome Statute*'s explicit reliance on principles of international law and providing disparate accountability. Those who are fleeing their countries due to persecution on the basis of being queer and/or trans are afforded redress in the form of being accepted refugees. However, those same people would not be able to claim against the persecutors on the very same ground that enabled them freedom in the first place. Such a conception is nonsensical. It is contended that this interpretation is accepted by the Office of the Prosecutor who, in their *Paper on Sexual and Gender-Based Crimes* made explicit reference to the UNHCR and its interpretation of "persecutions on the basis of gender in refugee law."¹¹³

Reference to international human rights law also amplifies the argument. Firstly, the International Covenant on Civil and Political Rights (ICCPR) provides that the laws of countries must be applied in line with the principle of non-discrimination.¹¹⁴ While there is no explicit mention of queer and trans persons, the Human Rights Committee decided in *Toonen v Australia* that "other status" in arts 2(1) and 26 of the treaty includes sexual orientation.¹¹⁵ Furthermore, the principle of non-discrimination affords protection to queer and trans persons. This principle is one that is non-derogable.¹¹⁶ As the Committee on Civil and Political Rights notes "[n]on-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights."¹¹⁷ To decide that queer and trans persons cannot be afforded accountability but others can, violates not only substantive provisions of international law (namely international human rights law and the principle of non-discrimination), but also the *Rome Statute* reliance on international law. This would make a mockery of the will of states as expressed via arts 21(1)(b) and 21(3).

Many instruments have been promulgated that provide credence to the assertion that international law provides protection to queer and trans persons. The Committee on Economic, Social and Cultural Rights (CESCR) has noted sexual orientation and gender identity as a prohibited ground of discrimination.¹¹⁸ This interpretation is shared by other bodies such as the Committee on the Elimination of Discrimination against Women that found that states "must legally recognize and prohibit such intersecting forms of discrimination," referring to gender's intersection with sexual

112 UNHCR *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* HCR/GIP/12/09 (23 October 2012).

113 The Office of the Prosecutor of the International Criminal Court *Paper on Sexual and Gender-Based Crimes*, above n 95, at [33].

114 *International Covenant on Civil and Political Rights* 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 2(1) and art 26.

115 *Toonen v Australia (Judgement)* (1994) UN Doc CCPR/C/50/D/488/1992.

116 CCPR *General Comment No 29: Article 4: Derogations during a State of Emergency* CCPR/C/21/Rev.1/Add.11 (31 August 2001) at [8].

117 CCPR *General Comment No 18: Non-discrimination* (10 November 1989) at [1].

118 CESCR *General Comment No 22 on the right to sexual and reproductive health* (Article 12) E/C.12/GC/22 (2 May 2016) at [9], [19] and [23] and CESCR *General Comment No 20: Non-discrimination in economic, social and cultural rights* (art 2, para 2) E/C.12/GC/20 (2 July 2009) at [32].

orientation.¹¹⁹ Furthermore, the Committees on the Rights of the Child and the Rights of Persons with Disabilities also situate gender identity and sexual orientation within prohibited grounds of discrimination.¹²⁰ The fact that majority of the UN committees protect sexual and gender minorities speaks to the growing apprehension of non-discrimination within international human rights law. This understanding expands the ambit of art 7(1)(h). The cited treaties have been ratified by 83 per cent to 99 per cent of all UN Member States thus evidencing state practice and behaviour.¹²¹ State practice contributes towards an understanding of customary international law. The ICC must have reference to such law as expressed via art 21(1)(b).

The Human Rights Council, in 2011 passed Resolution 17/19 that noted the UN has an obligation to “promote universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner.”¹²² The UN General Assembly has also noted that sexual orientation is a protected class against summary executions.¹²³ Furthermore, the Special Rapporteur for Sexual Orientation and Gender Identity has noted that killings on the basis of being queer and/or trans are violations of international human rights law.¹²⁴ While the aforementioned is highly descriptive, it serves to prove the central test of art 7(1)(h), whether international law protects queer and trans persons. It does. Of saliency to this paper, the UN General Assembly has asserted that killings on the basis of queerness or being transgender “may under certain circumstances amount to genocide, crimes against humanity or war crimes, as defined in international law, including in the Rome Statute of the International Criminal Court.”¹²⁵ The killings noted in chapter one, in the opinion of the UN, have the character of being able to be tried by the ICC. This is a significant assertion that further supports the argument.

Measures such as the Yogyakarta Principles also support the assertion that sexual orientation and gender identity are encompassed by international human rights law.¹²⁶ Principle two of the Yogyakarta Principles notes that the rights of equality and non-discrimination apply universally to queer and trans folk.¹²⁷ While by themselves, the Principles may seem like an academic folly, they

119 CEDAW *General recommendation No 28 on the core obligations of States parties under article 2 CEDAW/C/GC/28* (16 December 2010) at [18].

120 CRC *General Comment No 15 on the right of the child to the enjoyment of the highest attainable standard of health* (art 24) CRC/C/GC/15 (17 April 2013) at [8] and CRPD *General comment No 3 (2016) on women and girls with disabilities* CRPD/C/GC/3 (25 November 2016) at [4].

121 *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*, above n 47, at 40.

122 *Human rights, sexual orientation and gender identity* UN Doc A/HRC/RES/17/19 (14 July 2011).

123 *Extrajudicial, summary or arbitrary executions* GA Res 57/214 (25 February 2003) at [6].

124 *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender sensitive approach to arbitrary killings* UN Doc A/HRC/35/23 (6 June 2017) at [20] and [110].

125 *Extrajudicial, summary or arbitrary executions* GA Res 69/182 (18 December 2014), preamble.

126 Kelly Kollman and Matthew Waites “The global politics of lesbian, gay, bisexual and transgender human rights: an introduction” (2009) 15 *Contemporary Politics* 1 at 5.

127 Yogyakarta Principles - principles on the application of international human rights law in relation to sexual orientation and gender identity (International Commission of Jurists, March 2007), principle two <www.icj.org/yogyakarta-principles/>.

have been successfully invoked in courts in countries such as Nepal.¹²⁸ Furthermore, they have been cited by the Supreme Court of India, the supreme legal body of the world's largest democracy.¹²⁹ The invocation by such countries speaks to the growing movement towards what international law has already noted, human rights frameworks apply to sexual and gender minorities.

Domestic jurisdictions also recognise the human rights of queer and trans persons. The Lobatse High Court in Botswana have allowed updates of gender markers for trans people while the Colombian Constitutional Court has enabled trans persons to self-identify on documents.¹³⁰ The Guiyang Intermediate People's Court in China held that workers must not face discrimination due to their gender identity while the Mombasa Court of Appeal in Kenya noted that anal examinations (a form of homosexual "confirmation") were unconstitutional.¹³¹ Judiciaries are making strides for queer and trans folk; this indicates state practice and as such, contributes to the argument. Furthermore, this movement has occurred across both time and geographic region which also contributes to the notion that queer and trans persons are "universally recognisable" as being deserving of protection from international law.

International case law also affirms the human rights of queer and trans persons. In conjunction with *Toonen*, the Human Rights Committee has noted that differential treatment for the awarding of pensions on the basis of sexual orientation was discrimination for the purposes of the ICCPR.¹³² The European Court of Human Rights has found in favour of applicants who have been discriminated against on the basis of their sexual orientation.¹³³ The European Court of Justice have found in favour of a transexual employee; the Court noted that to tolerate discrimination would be "a failure to respect the dignity and freedom to which he or she is entitled and which the Court has a duty to safeguard."¹³⁴ It is contended the ICC has the same duty for queer and trans folk. Furthermore, the African Commission protects sexual and gender minorities through its Resolution 275 which urges states to "prevent and prosecute violence committed on the basis of real or perceived sexual orientation or gender identity."¹³⁵

While all of the aforementioned domestic and international case law is convincing enough, the Inter-American Court of Human Rights provides the most avid assertion of the argument:¹³⁶

This principle (equality and non-discrimination) forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of jus cogens.

128 Anirban Roy "SC directs Govt to safeguard gay rights" (23 December 2007) Hindustan Times <<https://widgets.hindustantimes.com/world/sc-directs-govt-to-safeguard-gay-rights/story-SUN7GTfzqzWwoydelSnE2J.html>>

129 *National Legal Services Authority v Union of India* [2014] WP (Civil) No 400 of 2012 (India) at 18-28.

130 *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity* UN Doc A/HRC/38/43 (11 May 2018) at [82].

131 At [83].

132 *Young v Australia (Judgement)* (2000) UN Doc CCPR/C/78/D/941/2000 at [10].

133 *X v Turkey* ECHR 24626/09, 9 October 2012 and *Kozak v Poland* ECHR 13102/02, 11 March 2010.

134 *Case C-12/64 P v S and Cornwall County Council* [1996] ECR I-02143 at [21]-[22].

135 *Resolution on the Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation of Gender Identity* ACHPR/Res.275(LV)2014 (28 April to 12 May 2014).

136 Inter-American Court of Human Rights, Advisory Opinion OC-18/03 "Juridical Condition and Rights of Undocumented Migrants" (17 September 2003) at [101].

This judgement builds upon international legal and diplomatic developments that note international human rights includes queer and trans persons. Non-discrimination being considered *jus cogens*, makes it universally applicable, non-derogable and creates obligations *erga omnes* meaning that *all* states have the right to enforce them in the event of non-compliance. It would be an awfully circumscribed position for the Court to be in to act against the principle. It would be a violation of *jus cogens* for the Court not to expand art 7(1)(h) to include sexual and gender minorities and such a circumstance is one that an international court could not in good conscience, be in. If the Court acts against this *jus cogens*, it calls into question its competence when dealing with such matters.

C. Realising the Argument: Ameliorating Challenges and Recognising Strengths

The argument that international law provides protection to queer and trans folk is not without challenges. However, it would be “difficult for a court to hold that such an egregious crime [persecution] is permissible under international law”¹³⁷ especially when considering the “object and purpose” of the *Rome Statute*.¹³⁸ The first challenge to this argument presents itself in the wording of art 7(1)(h) in that the group deserving accountability must be “universally recognized... under international law.”¹³⁹ This is a narrow category and places a significantly higher burden compared to the alternative “internationally recognized” category.¹⁴⁰ The phrase “internationally recognized” is utilised elsewhere in the *Rome Statute* and therefore, the language used in art 7(1)(h) suggests a higher threshold.¹⁴¹ Scholars have contended that this universal standard was used to avoid an interpretation that could violate the principle of legality.¹⁴² If this “universally recognized” standard is the proper reading of art 7(1)(h) it is likely that queer and trans persons *would not* fall within the protectory ambit of international law. This is especially the case considering that 67 UN member states criminalise consensual same-sex conduct and 10 institute the death penalty for this “crime;” hardly universal recognition.¹⁴³

It is submitted that the “universal” standard is not to be read in a literal sense; “the standard itself is probably influenced by a combination of positive law, customary law and international norms.”¹⁴⁴ A reading in this light would more accurately represent political realities. It is contended that for matters of sexual orientation and gender identity, there will always be opposition because “political homophobia is [...] used as a means for constructing national identity against a permissive Western other.”¹⁴⁵ Queer and trans persons should not pay the price because of such malevolent national identity-building strategies; this is the exact harm that international law was

137 Pam Spees “Women’s Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power” (2003) 28 *Signs* 1233 at 245.

138 *Vienna Convention on the Law of Treaties*, above n 86, art 31(1).

139 *Rome Statute of the International Criminal Court*, above n 8, art (7)(1)(h).

140 George E Edwards “International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy” (2001) 26 *Yale J Int. Law* 323 at 337.

141 *Rome Statute of the International Criminal Court*, above n 8, arts 21(1)(c), 21(3) and 69(7).

142 Darryl Robinson “Defining “Crimes Against Humanity” at the Rome Conference” (1999) *Am J Int Law* 43 at 54.

143 *State-Sponsored Homophobia: Global Legislation Overview Update* (ILGA, 2020) at 25.

144 Hagopian “Persecution and Protection of Sexual and Gender Minorities under Article 7(1)(h) of the Rome Statute,” above n 29, at 65–66.

145 Dennis Altman and Jonathan Symons “International Norm Polarization: Sexuality as a Subject of Human Rights Protection” (2015) 7 *International Theory* 61 at 85.

conceptualised to protect against. Furthermore, considering the jus cogens nature and therefore, universal applicability of non-discrimination, the “universal” standard is of lesser concern.

Scholars also note that the lack of enforcement of antigay laws evidences that persecution of queer and trans persons is impermissible.¹⁴⁶ While the author of this paper understands the impetus behind such an assertion, it cannot be used as a defence. In *Norris v Ireland*, the European Court of Human Rights noted that antigay laws rendered the applicant, a homosexual, a victim, despite the law not being enforced; a law “even though [...] not enforced in a particular class of cases for a considerable time, may be applied again in such cases at any time”.¹⁴⁷ The implication of this judgement means that the lack of enforcement of anti-gay laws, unfortunately, do not speak to the assertion that persecution of queer and trans persons is impermissible. Another defence must be found.

A key defence against the charge of queer and trans persons not being “universally recognized” under international law comes from the tragic events of the 2016 Orlando terror attacks. In response to the attacks, diplomatic and international legal efforts were galvanised and the United States led the UN Security Council to offer a statement that condemned the attack for “targeting persons as a result of their sexual orientation.”¹⁴⁸ This statement was joined by Russia and Egypt, countries not known for their friendliness to queer and trans persons.¹⁴⁹ Furthermore, diplomatic statements were released by the main bloc of countries who typically promote opposition to queer and trans rights. Saudi Arabia noted that they “pray for the recovery and the healing of all those injured in the attack [and] condemn in the strongest terms the attack on innocent people in Orlando.”¹⁵⁰ The United Arab Emirates promulgated that “such criminal acts that target innocent civilians contradict all moral principles and human values.”¹⁵¹ Qatar and Egypt offered up similar statements.¹⁵² It is the words of Saad Hariri, the Prime Minister of Lebanon that, for the purposes of this paper, speak the most volume. He described the attack as “a significant crime against humanity.”¹⁵³ This paper agrees. These promulgations demonstrate sexual and gender minorities as people with the right to life and the right not to be targeted due to their membership within a collectivity. They also recognise that acts of harm against sexual and gender minorities are, at a minimum, wrong. This is all that is required for the “universally recognised” standard to be met. While such countries still have antigay laws on their statute books, these statements and diplomatic actions “define the victims of the Orlando massacre as people deserving of life” and the injured victims as “innocent civilians.”¹⁵⁴

146 Josh Scheinert “Is Criminalization Criminal?: Antisodomy Laws and the Crime Against Humanity of Persecution” (2005) 24 *Law & Sexuality: A Review of Lesbian, Gay, Bisexual & Transgender Legal Issues* 99 at 130.

147 *Norris v Ireland* ECHR 10581/83, 26 October 1988.

148 Somini Sengupta “After Orlando, Gay Rights Moves off Diplomatic Back Burner” (14 June 2016) *New York Times* <www.nytimes.com/2016/06/15/world/united-nations-gay-rights-diplomacy.html>.

149 Sengupta, n 148.

150 David Pollock and Mahamed Abdelaziz “Arab Government and Media Reactions to the Orlando Attack” (15 June 2016) *The Washington Institute for Near East Policy* <www.washingtoninstitute.org/policy-analysis/arab-government-and-media-reactions-orlando-attack>.

151 Pollock, above n 150.

152 Pollock, above n 150.

153 Pollock, above n 150.

154 Pollock, above n 150.

Considering these states constitute the main bloc of opposition to queer and trans persons, these statements speak to the growing universality of the protection of queer and trans persons. This diplomatic and international legal U-turn cannot be explained away; it is contended that it can be used to support the argument.

A further challenge to this argument lies in the opinion that “[t]he LGBT community itself has not received recognition to the level that their protection can be considered a *jus cogens* norm,” and therefore not afforded protection in light of the “universally recognized” standard.¹⁵⁵ It is submitted that such an opinion is an erring of international law. It is generally accepted that there is a *jus cogens* prohibition on torture.¹⁵⁶ This assertion is supported by international case law.¹⁵⁷ Furthermore, there is a *jus cogens* prohibition on crimes against humanity; “the perpetration of that act on a widespread or systematic basis amounting to crimes against humanity would also have the character of *jus cogens*.”¹⁵⁸ Hence, it is indisputable that crimes against humanity (including persecution) and torture, both of which queer and trans persons have been subjected to as noted in chapter one, are of a *jus cogens* character. *Jus cogens* apply to everyone; there is no circumventing their universality just because some states do not accept queer and trans persons. As the Inter-American Court of Human Rights notes *jus cogens* “have a universal vocation in being applicable in all and any circumstances, conforming an imperative law... and bringing about obligations *erga omnes* of protection.”¹⁵⁹ Hence, the assertion that “the LGBT community itself has not received recognition to the level that their protection can be considered a *jus cogens* norm” is incorrect. *Jus cogens* apply to an act; they do not exclude anyone from their protectory ambit.

The ICC has also cited sexual orientation as a prohibited ground of adverse distinction. It noted that “[u]nder Article 21(3) of the Statute, reparations shall be granted to victims without adverse distinction on the grounds of gender [and...] sexual orientation...”¹⁶⁰ The Court did not explain why sexual orientation was included in their reasoning, however, they cited principle 25 of the UN Basic Principles of Reparations which notes that reparations must be “consistent with international human rights law” and be “without any discrimination of any kind or on any ground, without exception.”¹⁶¹ It is important to note that principle 25 does not explicitly note sexual orientation as a grounds of adverse distinction. Therefore, it is the Court’s interpretation that sexual orientation

155 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,” above n 72, at 1306.

156 Mahmoud Cherif Bassiouni “International Crimes: ‘Jus Cogens’ and ‘Obligatio Erga Omnes’” (1996) 59 *Law and Contemporary Problems* 63 at 68.

157 *Prosecutor v Furundžija (Judgement)* ICTY Trial Chamber IT-95-17/1-T (10 December 1998) at [114].

158 *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Judgement)* [2012] ICJ Rep 2012 at [99].

159 *Pueblo Bello Massacre v Colombia (Judgement – Merits, Reparations and Costs)* IACHR Series C no 159 [2006] Inter-American Court of Human Rights at [64].

160 *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v Thomas Lubanga Dylio (Decision establishing the principles and procedures to be applied to reparations)* ICC Trial Chamber I ICC-01/04-01/06 (7 August 2012) at [191].

161 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* GA Res 60/147 (2005), principle 25.

is encompassed by art 21(3).¹⁶² The judges of the ICC posit that international law protects queer and trans persons. All that is needed is action from the Prosecutor to initiate a case based upon this assessment.

D. Conclusion

William Schabas, a leading scholar of international criminal law has previously suggested that noting the “relatively primitive stage of international law in the area” it is likely that queer and trans persons are not a “universally recognized” group.¹⁶³ He elaborates further; “the situation will undoubtedly change with the progressive development of international human rights law.”¹⁶⁴ There are numerous international instruments that both explicitly and tacitly provide protection to queer and trans persons, even more so after the Orlando terror attacks. Domestic and international case law also support this assertion. Even the judges of the ICC have cited sexual orientation as a prohibited ground of adverse distinction. As such, this strategy is the best chance to enable full and fair justice to be achieved and redress for the queer and trans victims to be gained. As Schabas notes above, the progressive development of international human rights law will lead to a time where queer and trans persons are protected by international law. That time is now.

V. CONCLUSION: MOVING FORWARD AND ENDING IMPUNITY

In the same year his country began their vicious persecution of queer and trans persons, Ramzan Kadyrov stated “[t]hey are devils. They are not people.”¹⁶⁵ These views create and proliferate actions of persecution and they are not going away anytime soon. Right-wing populist leaders use queer and trans persons as an easy scapegoat, a diversionary tactic to orientate public opinion away from their shortcomings. In light of this growing threat and the impunity that has marked the persecution of queer and trans persons, a mechanism of accountability needs to be provided. As one scholar notes, “international criminal law need[s] to provide an answer to the failure of traditional mechanism for protecting human rights.”¹⁶⁶ Part II affirms this notion by providing examples of impunity and demonstrating the necessity of an expansive interpretation of art 7(1)(h).

Part III argued the first thesis of this paper, that “gender” as defined in art 7(3) can be conflated with sexual orientation and gender identity. As such, sexual and gender minorities will be brought into the ambit of the *Rome Statute* and an accountability mechanism afforded to them. This chapter relied upon the notion of “constructive ambiguity” that enabled alternative meanings to be drawn. Furthermore, the challenges to the “gender” ground were overcome to allow this ground more credence in its push for application.

162 Rosemary Grey “Hate Crime Against Humanity? Persecution on the Grounds of Sexual Orientation under the Rome Statute” (21 February 2014) Beyond the Hague <<https://beyondthehague.com/2014/02/21/hate-crime-against-humanity-persecution-on-the-grounds-of-sexual-orientation-under-the-rome-statute/>>.

163 William Schabas *The International Criminal Court: A Commentary on the Rome Statute* (1st ed, Oxford University Press, Oxford, 2010) at 177.

164 At 171, fn 309.

165 Neal Broverman “Chechen President on Gays: ‘They Are Devils. They Are Not People’” (14 July 2017) Advocate <www.advocate.com/world/2017/7/14/chechen-president-gays-they-are-devils-they-are-not-people>.

166 Nevenka Đurić and others “Legal Protection of Sexual Minorities in International Criminal Law” (2018) 6 Russian Law Journal 28 at 31.

Part IV argued the second thesis of this paper, that international law “universally recognises” and affords protection to queer and trans persons. As such, they will be brought into the meaning of art 7(1)(h). This chapter relied upon numerous instruments and case law to support the proposition that international law protects queer and trans persons. Furthermore, the challenges to this ground were overcome, namely the notion that queer and trans persons need to be and are not “universally recognised.” It was contended that developments after the Orlando terror attacks made this the case.

This paper appreciates that the arguments above do nothing to validate the true identities of those who are subjected to persecution. By using gender and international law as a guise for sexual and gender minorities, this paper is merely buying into the notion of providing “tolerance” rather than “justice.”¹⁶⁷ However, the law has to start somewhere. It is better to have legal propositions that enable accountability for queer and trans persons, than not. With that being said, this paper is not concerned with mere tolerance. Legal reform that enables affirmation of the true identities of victims is what is needed. The arguments provided above are just band-aids; temporary solutions to impunity. The fact that scholars need to look for loopholes in an instrument intended to end impunity just to gain accountability for queer and trans persons, is inane. Reliance on art 7(1)(h) speaks to the innate weakness of the *Rome Statute* when it comes to providing accountability for queer and trans persons. Reliance on this article is not enough. Queer and trans individuals could be targets of genocide but because they are not mentioned within the prohibited groups, redress for them is left to the imagination.¹⁶⁸ It is expected that the international community should work together to explicitly mention queer and trans identities within art 7(1)(h) and all other relevant substantive articles of the *Rome Statute*. In the meantime, the Office of the Prosecutor needs to bring a case or numerous cases on the basis of the legal arguments above. It is within their power to do so; they can end impunity.¹⁶⁹ Furthermore, it is contended that art 7(1)(k) should be given further scholarly attention to fill the regulatory gap.

Queer and trans persons are brought up in a world that tells them from the very outset, that they are abnormal and to some degree, deserving of the harm society afflicts upon them. They internalise it. They believe it. When the world lets crimes of the greatest magnitudes against queer and trans persons go unaddressed, they believe it a little more. For the queer and trans persons subjected to persecution, it is not just the thought of abnormality that afflicts them. It is torture, it is rape, it is extra-judicial killing and it is state-sponsored criminalisation of their very being. As such, the promises of equality and accountability are a fallacy. It does not have to be this way. With action from the International Criminal Court, the impunity that has been perennial in such circumstances can begin to disappear. Queer and trans persons can start to believe they are deserving of a world that values them and importantly for those subjected to persecution, a world that provides justice. This is what international criminal law was conceptualised for.

167 Jasbir Puar *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press, Durham, 2007).

168 *Rome Statute of the International Criminal Court*, above n 8, art 6.

169 Allison Marston Danner “Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court” (2013) 97 *Am J Int Law* 510.